In the

Supreme Court of the United States

PASADENA CITY BOARD OF EDUCATION, et al.,
Petitioners,
v.
NANCY ANNE SPANGLER, et al.,
Respondents.

No. 75-164

Washington, D.C.
April 27, 1976
and
April 28, 1976

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PASADENA CITY BOARD OF EDUCATION, et al.,

Petitioners,

v. No. 75-164

NANCY ANNE SPANGLER, et al.,

Respondents.

Washington, D. C.,

Tuesday, April 27, 1976.

The above-entitled matter came on for argument at 2:29 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PHIL C. NEAL, ESQ., Friedman & Koven, 208 South LaSalle Street, Chicago, Illinois 60604; on behalf of the Petitioners.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of Respondent United States.

FRED OKRAND, ESQ., ACLU Foundation of Southern California, 633 South Shatto Place, Los Angeles, California 90005; on behalf of Respondents Spangler, et al.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-164, Pasadena City Board of Education against Spangler.

Mr. Neal, you may proceed whenever you're ready.

ORAL ARGUMENT OF PHIL C. NEAL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NEAL: Mr. Chief Justice, and may it please the Court:

This is a school desegregation case. The central issue it presents is whether a school district that has been in compliance with a desegregation decree for an extended period of time is entitled to release or at least to an opportunity to attempt new and different solutions to the problems of integration and educational quality.

And that issue, in turn, I would suggest, may require some further consideration of the -- what are the ultimate objectives of judicial remedies in desegregation cases?

I might say what the case does not involve. The case does not involve the question of the extent to which compulsory busing may be used as part of a desegregation order, and it does not involve issues of de jure versus de facto segregation.

The case arises on a petition that was made in the district court by the School Board for modification of the

court's original desegregation order. That order had been issued in 1970. The petition for modification was made in 1974, the fourth year of compliance with the decree.

The School Board is now completing its sixth year of compliance with the decree.

The Court of Appeals for the Ninth Circuit affirmed the district court's denial of relief by a divided vote, and with three quite divergent opinions.

To review the facts, as briefly as possible, the case began on the complaint of individual parents, alleging unlawful segregation in the high schools of Pasadena. The United States intervened, and broadened the case to include all the schools in the district.

After hearing, the district court found that the School Board, over a number of years, had engaged in a variety of acts and omissions that tended to accentuate and perpetuate the segregated character of the district schools, which fundamentally was based, as you might expect, on the racial residential patterns in the city.

The sufficiency of those findings to establish a predicate for de jure as distinguished from de facto segregation is not under challenge here.

On the basis of those findings, the district court ordered the Board to come forward with a plan that would meet the requirement that no school in the district have a majority

of any minority students. The racial composition of the district at that time was 58 percent white, 30 percent black, and 12 percent other minorities.

At the time the petition for relief was filed, the figures were 44 percent white, 40 percent black, and 16 percent other minorities.

The Plan that was adopted, which is referred in the record as the Pasadena Plan, divided the district into four somewhat irregular elongated zones, each having a racial balance that matched that of the district as a whole.

And within each of these four zones, school attendance areas were established, some of them noncontiguous, to produce in each school approximately the same racial balance. That required busing for about 50 percent of the elementary pupils, 52 percent of the junior high pupils, and 27 percent of the high school pupils.

That Plan was put into operation for the school year beginning in the fall of 1970.

The adoption of the Plan, and particularly the failure of the School Board to appeal the district court's order, generated a great deal of opposition and controversy in Pasadena.

First there was a recall election, which failed to achieve the required two-thirds majority; but then there were successive elections of new Board members, that resulted, over

time, in creating a Board that had pledged itself to seek modification of the Plan.

And I might say that the issues in the election campaign centered on opposition to forced busing, support for neighborhood schools, and also emphasized concern about the quality of education in the Pasadena schools, and the problem of the declining white population in the city.

And the theme that was constantly reiterated in the election campaigns was that there must be better ways, or that there were better ways, or that better ways would be found to achieve integration than the Plan the court had ordered.

I think it should be said here that there was never at any time any violence of resistance on the part of the parents, the children or the School Board to carrying out the order. This was a city where, so far as the operation of the Plan was concerned, everything went smoothly.

QUESTION: What is it, a five-member School Board?

MR. NEAL: A five-member School Board.

QUESTION: And they are elected for terms of how long?

MR. NEAL: Three years, I think it is.

QUESTION: And not all five at --

MR. NEAL: Not all -- it's a --

QUESTION: A staggered term?

MR. NEAL: It's a staggered term, yes. Yes.

I'm advised it's a two-year term, Mr. Justice Stewart.

Well, in 1971 the newly elected -- the first of the newly elected Board members proposed a modified plan to the Board, and this was the beginning of a series of plans that were considered by the School Board over time, for changing the Plan that had been ordered by the court.

I think it is also important to stress here that it was explicitly contemplated from the beginning that if and when the Board agreed on a new plan, that plan was going to be submitted to the district court for permission to proceed. And it was never suggested, in any way, that the Board's action in the meantime should be anything other than full compliance and cooperation with the existing Plan.

Well, the first two versions of the modified plan were not adopted, but ultimately, in December of '73, the Board agreed on a third version, and it was that plan that was submitted to the district court in early 1974.

The Board's petition to the court sought two different kinds of relief.

The first was that the school district be relieved of judicial supervision, on the ground that it had become a unitary school system in the constitutional sense.

And second, if that relief were not granted, that the decree be modified.

I will address myself first to the request for relief from active supervision. All of this relief was denied.

The Board's position in the district court, as well as here, is that it has, by its compliance for the then period of four years and now six years, met the appropriate standard for relief from detailed judicial supervision of the school desegregation.

This Court has not yet spoken on what that standard is. However, the school district has met what appears to be the standard that has been followed in other courts, notably in the Fifth Circuit, where the problem has been faced repeatedly.

And it has met the standard that respondent, the United States, urged in those cases.

The Board's proof on this point consisted essentially of stipulation at the beginning of trial, in which the respondents -- in which the government stipulated without qualification that there had been no violations of the decree, of which it was aware, during the period of the Plan's operation.

The individual respondents qualified that stipulation in minor respects, that I will mention in a moment.

The district court rely on only one circumstances, as indicating lack of compliance with its judgment, with its order. That was the fact that over the four-year period in

which the Plan had been in operation, five elementary schools had developed minor deviations from the "no majority of a minority" requirement.

Those were deviations that were due to demographic changes in those districts, and the government, indeed both respondents agree that until the hearing itself -- until the course of the hearing before the district judge, no one had supposed that the court order required annual redistricting to correct for minor changes in the racial balance that resulted from shifts in population.

The district court expressed a contrary view during the course of the hearing itself.

That was the only circumstance relied on by the district court as indicating a departure from the court order.

Now, there was another fact that was adverted to in the hearing, and it's been referred to in the brief here, namely, that in the case of five administrative appointments of an acting and temporary character the School Board had not gone through the detailed personnel procedures that were spelled out in the Plan, and which indeed were part of the Pasadena School System's existing procedures.

The Board was under the understanding that it wasn't compelled, in acting in temporary appointments, to go through these procedures. Once again, during the course of the hearing before the district court, the judge said it was his

opinion that they had to. The Board promptly proceeded to initiate procedures for permanent appointment to replace these acting appointees, following the detailed procedures.

After the opinion and order that are our concern here were handed down, contempt proceedings were initiated, although the court made no reference to this matter in its decision denying relief, contempt proceedings were initiated, centered on the point that the Board, although it had begun the process of reappointment, had not immediately vacated these five administrative positions.

And, once again, it was in the course of these proceedings that the district court made clear that that's what he had wanted, and he held the Board in contempt for not having vacated; and that order is pending in the Ninth Circuit Court of Appeals on appeal.

Now, that second incident did not figure, as I say, in the district court's action.

We believe that no substantial reason has been offered for not according the Pasadena School Board the same relief from judicial supervision that has been found appropriate in numerous other cases. And we submit that the government, although it appears to advocate that general standard, has not offered here any substantial reason for not applying it to the Pasadena School Board.

There seems to be a suggestion among others in the

government's brief that the very fact that the School Board was applying for a modification of the decree of the Plan somehow was a reason for finding that it was not entitled to be released from active supervision, because that would suggest that the Plan would change after the release.

We suggest that that's a very paradoxical kind of a reason; that the whole purpose for contemplating termination of active regulation and substituting a general injunction in the form that other courts have done is to permit the School Board to have flexibility in arranging its affairs, and that if it were expected to go on indefinitely with the court-ordered plan, there wouldn't be any point in ever bringing these proceedings to a termination.

Now, in the case of the Pasadena School Board, some subsequent events have underscored the importance at some point in time of bringing this detailed judicial supervision to a conclusion, and that concerns the so-called Audobon matter, which has subsequently come to the Court in a different form, Mr. Justice Rehnquist granted a stay in December in this other matter, because of the pendency of this case.

That matter arose out of the Pasadena School District's Fundamental Schools Program, one of the things that the School Board had done since the beginning of this whole proceeding, was to establish a number of so-called

fundamental schools, emphasizing traditional teaching, and including such fundamentals as this Court helps keep alive; that is to say, they require the school teachers to wear coats and ties in the classroom, and the emphasis is upon rigorous teaching of basic educational subjects.

The evidence so far is that the School Board has had considerable success in this program, in elevating the achievement of students in the program, both white and black, but particularly with the minority students.

At the time the district court denied relief in this proceeding, it expressed the view that the Board could accomplish whatever it wanted to in the way of its special program, including the fundamental program, under the existing decree.

A year later the Board proposed to establish a new fundamental school, this one in a predominantly black section of Pasadena, for the purpose both of making it easier on the black students who were presently attending the fundamental schools voluntarily and being bused long distances, and secondly in order to attract more black students in that neighborhood into a fundamental school.

The fundamental school program is entirely voluntary, and it maintains strict racial balance, both in the voluntary school and in the sending school; so that there is absolutely no question here about racial balance or departing from the

decree in that respect.

QUESTION: When you use the term "racial balance", Mr. Neal, in this context, precisely what do you embrace?

MR. NEAL: The district court's order required no school to have a majority of any minority. And it is that requirement that I refer to.

Given the very close racial balance in the district, that requirement in the case of Pasadena comes very close to a requirement that each school mirror the racial composition of the district.

QUESTION: Of the entire district?

MR. NEAL: Of the entire district. Yes.

QUESTION: And was that part of his original order?

MR. NEAL: That was his original order. That was a part of his original order.

QUESTION: Yes. And do you regard that as having been modified by the majority-minority standard that you referred to?

MR. NEAL: No, that is the standard. That has been the standard from the beginning.

QUESTION: I see.

MR. NEAL: And that has not been modified.

And the School Board, in this proceeding, requested modification -- really requested dissolution of that requirement, because, given the close racial balance in the district,

that was increasingly hard to comply with.

So that the district, as it now stands, is really under an order to maintain in every school a racial balance that is very close to the racial balance in the district. You can't depart very much from 40 percent without going over the 50 percent that the injunction forbids.

QUESTION: Do you regard that as being incompatible with the standard laid down by this Court in the Swann case?

MR. NEAL: Yes, sir.

QUESTION: That racial balance is not a constitutional requirement.

MR. NEAL: Yes, sir. That is our fundamental contention on that part of the petition for modification that seeks to eliminate the "no majority of a minority" requirement.

QUESTION: Mr. Neal, the Solicitor General's brief, as I read it, states that the racial balance portion of the order in the 1970 decree was modified by the opinion of the Court of Appeals for the Ninth Circuit. In the Solicitor General's brief, on page 28.

MR. NEAL: I know they say that, Mr. Justice Powell.

But if one reads the opinions of the Court of Appeals, it is very difficult to get that out of them, clearly.

QUESTION: Was any modification ever made of the

1970 decree?

MR. NEAL: No, sir.

And the Court of Appeals merely affirmed the district court's order, which denied everything that had been asked for; the Court of Appeals did not modify the order. It is perfectly clear from the Audobon School matter, which came on after the Court of Appeals' opinions were handed down, that the district court regards the "no majority of a minority" requirement as still in force, and indeed as still requiring constant readjustment to maintain the required balance in the several schools.

QUESTION: Well, Mr. Neal, --

QUESTION: And the School Board hs never been cited for contempt, for violation of the 1970 decree?

MR. NEAL: No. The only contempt matter related to these administrative appointments that I referred to earlier.

QUESTION: Yes.

QUESTION: Shouldn't the annual adjustment argument -- can't you at least make an argument that it was settled by the language of Judge Ely's opinion with Judge Chambers' concurrence in it?

MR. NEAL: I think you could argue that the annual readjustment part was settled, Mr. Justice Rehnquist. But I think Judge Ely's opinion, as Judge Wallace said -- Judge

Ely's opinion clearly contemplated that the general requirement of "no majority of a minority" would go on indefinitely. So there is no majority of the Court of Appeals on that point, and I think the -- I think, with deference, that the government is stretching things when it suggests that there's no need for relief in this case, because the Court of Appeals has already taken care of the problem.

QUESTION: Well, at the point that black became a majority in the School District, that the majority of the students in the public schools were black, --

MR. NEAL: They are not yet a majority --

QUESTION: But at the point they are, I suppose the condition would be impossible to handle.

MR. NEAL: Well, that's right. Impossible then, very difficult now.

QUESTION: But even so, even if it were very, very difficult, or impossible now, it might be that the most relief you could ask would be for that particular part of the decree to be modified.

MR. NEAL: Well, that is one of our requests for modification.

QUESTION: But you go much further than that. You think the decree should be lifted entirely.

MR. NEAL: Well, I think there must come a time, I think that's a fundamental question this Court needs to face,

it certainly has happened in other districts, but it cannot well be, I suggest, that a school distrist is to operate indefinitely under the detailed supervision of a judge.

And if I can just finish on the fundamental school thing, the ironic outcome of that was that the district judge enjoined the formation not only of this fundamental school but of any others, until the Board was able to satisfy him that they had gone through all kinds of calculations that would make this the least disruptive choice possible.

QUESTION: Well, if we were to agree with you and say that the decree had outworn its usefulness, even though -- even though the result was that there are a lot of all-black schools and a lot of all-white schools, I suppose that would involve saying that de facto segregation is acceptable.

MR. NEAL: Well, Your Honor, our position is that there is no basis for supposing that the lifting of this decree would result in a lot of all-black and all-white schools. The School District has proposed an alternative plan, and I'd like to spend several minutes discussing what the alternative plan was.

The district court rejected that on the ground that it involved freedom of choice.

What the Board wanted to do was something that could be regarded as very creative and enterprising and forward-looking; they wanted to take each one of these zones that had

been established by the decree and make them fluid zones without attendance areas, and by trying to provide incentives and differentiated schools, every school differentiated to draw students voluntarily away from their neighborhood schools and into an integrated situation.

Now, that's experimental, it's bold, perhaps; they had some solid basis for believing it might work, because of the great success they had had with these fundamental schools in drawing blacks and whites into an integrated school.

And the School Board said, let's try it, and give it a chance to work.

And I would suggest that if we knew that the Board could succeed, if we could look back and see the Pasadena School Board have had success with this plan, it would have been much more progress toward the ultimate goal of Brown vs. Board of Education and everything since, than if the Board simply went along indefinitely under this compulsory racial balancing decree.

That really is the ultimate underneath the case, I think, because if this School Board had gone along passively and merely carried out the court's decree and made no effort to develop the innovative programs that it did in the fundamental school program, and no effort to come back and seek relief from the decree, there would have come a time when it was released from the court's order, and at that point, I

suppose, it would have gone back to some perfectly neutral attendance zone system done by computer perhaps, that would have resulted in a lot of segregation because of the residential pattern, and only help things along the fringes.

Whereas the actual plan the Board has pressed for here is one that might ultimately produce much more integration than that kind of an acceptable plan would do.

And I would suggest that that kind of an objective comes closer to the long-stated goal of having not black schools and not white schools, but just schools; than the mere carrying forward indefinitely of the "no majority of the minority" requirement.

So our submission is that the result reached by the district court in refusing to relinquish jurisdiction, in refusing to modify the no-majority requirement, which seems to be squarely in the face of the Swann decision, and in dismissing out of hand the Board's request for an alternative plan is a perversion of the function of equity in school desegregation cases.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF RESPONDENT UNITED STATES

MR. BORK: Mr. Chief Justice, and may it please the Court:

My brother Neal says that the central issue here is whether a school system that has been in compliance with the decree for some considerable period of time may be released from that decree eventually and allowed to try other plans.

Were that, I think, the only issue here, there would be no disagreement between us.

Petitioners' argument actually derives such power as it has from the argument of questions that are not before the Court. They do it in two ways.

One is by arguing about what the district court said and did, rather than where the Court of Appeals decision placed the case.

And secondly, by arguing about events that have occurred since the district court's opinion and judgment; and those are not before the Court, either.

What is before the Court, we suggest, is a rather narrow case.

The question presented is whether the Court of Appeals was required, as a matter of law, and upon the facts as they stood in 1974 -- not upon the facts as they stand today -- to order the district court to relieve Petitioners

from judicial supervision altogether; or, in the alternative, to let them put in a plan for voluntary desegregation.

The short answer, I believe, is that the Court of Appeals might perhaps have done so, but it certainly was not required as a matter of law to do so.

What it did do is clearly permissible, we think, under the law as it now stands.

There were, in the Pasadena system, acts of de jure segregation by the school system. In response, the district court entered the order under discussion here. That decree was not appealed when it was entered in 1970, but the argument is now made that it was subsequently shown to be illegal by the decision of this Court in the Swann case, and should have, therefore, been terminated in 1974.

We think we can show that the Swann decision does not make the decree illegal. The Swann case says that no particular degree of racial mix or balance is a matter of substantive constitutional right; and we agree with that. Nobody in this case claims that it is.

Swann did not say, however, that an equitable decree designed to produce a unitary school system could never, under any circumstances, start, as a matter of remedy, from a particular degree of racial mixing as a starting point. Such a decree is unexceptionable under existing law.

Though the --

QUESTION: I thought the Swann case merely said that an inquiry into what was the existing balance was the stopping point of the inquiry. I draw no inference that that could be the end.

MR. BORK: That, Mr. Chief Justice, --

QUESTION: You'd have to take a census first to know whether there was any problem at all. That once having taken that census, that was it.

Perhaps we can address that the first thing in the morning.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, April 28, 1976.]

IN THE SUPREME COURT OF THE UNITED STATES

PASADENA CITY BOARD OF EDUCATION, et al., Petitioners, v. NANCY ANNE SPANGLER, et al., Respondents.	No. 75-164

Washington, D. C.,

Wednesday, April 28, 1976.

The above-entitled matter was resumed for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in Pasadena City Board against Spangler.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF RESPONDENT UNITED STATES - Resumed

MR. BORK: Mr. Chief Justice, may it please the Court:

Yesterday when I quoted from the Swann opinion, I was saying what that opinion says on pages 24 and 25. The district court therein imposed an historical equitable remedy on a percentage of the races. This Court said that a numerical mixing of the races was not a substantive constitutional right, but in an equitable decree it was a satisfactory starting point.

QUESTION: General Bork, perhaps you're about to reach it now -- if you're not, just sometime during your argument, would you address yourself to the question of whether the "no majority or any minority" provision of the 1970 decree entered by the district court in this case contemplated annual changes in pupil assignment, solely by reason of demographic changes. And, if it did, is it consistent with Swann?

MR. BORK: I think it did, Mr. Justice Rehnquist. I think it is inconsistent with Swann. I think it was an

invalid order to that extent, but I think it was an order that the Petitioners here were required to obey unless they got it modified.

And let me straighten one thing out, if I may.

QUESTION: Mr. Solicitor General, when you're addressing that same question, would you bear in mind my question, and that is: what order is in effect today with respect to racial balance?

MR. BORK: All right.

QUESTION: I've been asking myself what I would do if I were a member of the School Board in Pasadena.

MR. BORK: Well, what I would do, Mr. Justice Powell, were I a member of the School Board, is go into the district court now and say: We have done one more reassignment. Just as Chief Judge Chambers' opinion said; which I think is the opinion that represents the consensus or the only majority that could have been formed on that court.

We have done one more reassignment; we now ought to be released from the decree.

And it is our position, the position of the United States, that that is probably true. If there are no more serious violations, if there's no lingering effect of the de jure segregation proven to exist, they should be released from the decree.

But in this case we're discussing the 1974 situation.

And in 1974, these Petitioners, when they came in, made no effort to deal with any lingering effects, to even discuss them, school site incapacity decisions. And, moreover, I should say this --

QUESTION: Well, why weren't they at least entitled, under your view, to have the "no majority of any minority" provision stricken, if it were invalid?

MR. BORK: Oh, I think they were. I think the --

QUESTION: Then the Court of Appeals was wrong in simply affirming the district court here, wasn't it?

MR. BORK: I think not. I think the opinions of the Court of Appeals clearly modified that district court order considerably, and I think have done everything the Petitioners have a right to complain about.

Let me make this point, Mr. Justice Rehnquist, these Petitioners were in violation of that decree. Dean Neal said yesterday that nobody supposed that this decree required annual redistricting.

The United States did not suppose that. But it is clear that besides the judge, the one other party to this case that understood that was this School Board. Because if you look at their notice of motion to modify the decree, on page 233 of the Appendix, they come in and seek modification on the grounds that they are having problems by annual redistricting.

That's under (1), parents. And if you look at the affidavit on 234 of Ramon Cortines, who was the Superintendent of the Schools, at 235 and 236, he says: demographic changes are making it difficult for them to keep up, to keep complying.

If you look at the affidavit of Henry Marcheschi on 237, who was then the President of the Pasadena City Board of Education, he says that it had become a practical impossibility to continue to comply with the order and judgment of this court, which required that there be no school in the district having a "majority of any minority".

The School Board understood that they were under annual obligation. That obligation, I believe, is valid today. It hasn't been changed. They were violating it and they knew theywere violating it.

QUESTION: Mr. Solicitor General, --

QUESTION: What does that prove? Doesn't -- why weren't they entitled to have it modified if it were invalid?

MR. BORK: I think they were. I think the Court of Appeals so modified it, Mr. Justice White.

QUESTION: Oh, you think then -- except they said you have to do one more reassignment?

MR. BORK: They said one more time. You've been -- I think that, Mr. Justice White, --

QUESTION: Well, I know, but you have to -- because of demographic change you have to make one more? It's invalid,

but we'll let it be invalid for one more year?

MR. BORK: No, no, it's not because of demographic changes, Mr. Justice White. I think the problem here is that they were out of compliance, which indicated an attitude, I think, towards this, which the Court of Appeals was allowed to take into effect.

QUESTION: Do you think they -- were they ever in compliance?

MR. BORK: The first year. The first --

QUESTION: Well, if they were, why did they need to make changes after that?

MR. BORK: Because, Mr. Justice White, they were under an order, which they could have gotten rid of by appealing, but they did not appeal.

QUESTION: I see. It was an invalid order --

MR. BORK: It's like the United Mine Workers case, or like any of those cases --

QUESTION: -- but it's an invalid order that they didn't get modified until now?

MR. BORK: Well, they got it modified now; that is quite correct. But they were under an obligation to obey it as long as it stood in effect.

QUESTION: I see. I see.

MR. BORK: And, furthermore, the other thing about this case is that the kind of de jure violation shown in 1970

by the kinds that have lingering effects, school siting, school capacity decisions, the racial identifiability of schools; they didn't even address those problems in their motion for modification. And I think the Court of Appeals was quite right in saying: We want to see those things addressed, before we say drop the order altogether.

I think now that they -- we're told here that they have complied since 1974, and have done it again. That's all the Court of Appeals requires of them. I think if they go back at this time, they will probably be entitled to removal of that order.

But in 1974, the Court of Appeals was not required, as a matter of law, to tell them that the district court order has to be lifted in its entirety. That's our entire position, a very narrow position.

Now, a good deal of what's happening here, I think, is really an objection to a heavy busing order. And that's not really the issue before this Court.

The United States thinks that in an appropriate case the proper scope of initial remedies in cases such as this ought to be re-examined.

It is our position that proper function of a remedy in this area is like it is in any other area: it's an attempt to put matters where they would have been if the violation had never occurred.

Now, if that is true, if we rethink the problem and it comes out that way, then it is probably true that large-scale busing orders indefinitely continued, designed to produce a racial mix such as this one, are probably beyond the proper scope of an equitable remedy.

But I don't think this is the case to re-examine that, although that's part of the underlying pressure in this case.

QUESTION: Didn't we say as much in the Swann case? Didn't we say that if we read the order of the district judge as requiring any particular racial balance, we would disapprove and reverse; but then we went on to read his orders otherwise?

MR. BORK: That is quite correct, Mr. Chief Justice, and I think I'm saying something additional. I'm suggesting that the scope of an order, the size of the Swann scope, perhaps ought to be re-thought, on the theory that it did much more than put matters where they would have been had there been no de jure violation.

I'm just saying that was not litigated in the district court or the Court of Appeals, and that we should remove that element of this case from our minds for that reason. This is not the appropriate case to address that problem.

Now, as I say, we've been arguing about what the

district court said. If what the district court said was still in this case, we would concede that Petitioners have a lot of room for well-founded complaint. It is not in this case.

Where the Court of Appeals left the case is what we are discussing.

And I won't claim that there's sparkling clarity there, either; but the upshot of those opinions is that the only position which can gain a majority is Judge Chambers' position. And we ask this Court to interpret that Court of Appeals position as we do and sustain the decision of the Court of Appeals on those grounds.

QUESTION: Mr. Solicitor General, has there been this one additional reassignment?

MR. BORK: Yes, there has been, as I understand it, Mr. Justice Stewart, and I think that means that they have complied with the way the Court of Appeals reads the order, and I think they are entitled under Judge Chambers' reading of the order to go back now --

QUESTION: They're entitled to have the case against them dismissed, aren't they?

MR. BORK: That's right. I think they now have the case -- they are now in position to go in and say the court should stop active supervision of this school system.

But we are discussing 1974.

QUESTION: Right. First 1970 and then 1974.

MR. BORK: That's correct.

Well, 1970 isn't even up here, Mr. Justice Stewart.

QUESTION: Well, that's so we can understand the background.

MR. BORK: That's true.

QUESTION: Mr. Solicitor, what do you suppose would happen if the other side won this case, if the reassignment has already been -- taken place? Would it come out any different than if you won it?

MR. BORK: Only in the matter of the way the law was read in the future, Mr. Justice White.

QUESTION: In this case it wouldn't make any difference, because the assignments have already been -- they wouldn't unassign them, would they, the students?

MR. BORK: Oh, they might. I think if judicial supervision is lifted --

QUESTION: Well, I know if it's lifted, but assume the other side wins this case, and then would they reassign them, do you suppose?

MR. BORK: I think if --

QUESTION: Unassign them?

MR. BORK: -- if they win this case, in the sense that they are told they are out from under judicial super-

vision, or if they go back to the district court, as we think they should, and get judicial supervision lifted, they are free to --

QUESTION: But in either way they might unassign or reassign?

MR. BORK: Pardon me?

QUESTION: Either way they might unassign or reassign.

MR. BORK: That is quite correct. That is true.

QUESTION: So is there any difference in this case as to what might happen, as to who might win this case?

MR. BORK: I think not, Mr. Justice White.

The problem is -- that's why we opposed certiorari in this case; that's why we have been saying this is a very narrow case. And, indeed, that's why we're standing here saying that the real importance of this case is a question of law.

QUESTION: But you do insist the case is not moot?

MR. BORK: The case is not moot.

QUESTION: And so you say. I mean --

MR. BORK: That's quite correct.

QUESTION: -- there is a mootness issue?

MR. BORK: That is quite correct.

But the question is whether -- what the Court of Appeals did on the facts existing as of 1974 was within

its power.

QUESTION: It isn't moot because if you win, if you win they have to do something to get out from under the supervision?

MR. BORK: I assume, if it turns out they have been in violation of a valid part of the decree again, they might not get out from under.

QUESTION: Yes.

MR. BORK: But I'm assuming that they are acting responsibly under the decree as they say they are.

QUESTION: But that would involve facts not in any record before us now.

MR. BORK: That is quite correct, Mr. Chief Justice. That's the difficulty. We keep discussing what the district court said, which is no longer in the case, and we keep discussing what they've done since 1974, which is not in this case. That's why I say this is a narrow case, and, as a matter of law, the Court of Appeals was not required completely to remove these Petitioners from judicial supervision.

And that, indeed, is our entire case. And it is for those reasons, that we ask the judgment of the Court of Appeals be affirmed.

QUESTION: Mr. Solicitor General, may I ask you a somewhat more general question: Is it the position of the

United States Government now that a school system cannot be desegregated until every school in the entire district meets a certain mathematical racial balance?

MR. BORK: Oh, not a bit, Mr. Justice Powell. We merely said that under existing law, which we have suggested -- we are prepared to ask be re-examined in an appropriate case; but under existing law, under Swann, it is appropriate if other factors do not make it too costly, too time-consuming, too disruptive, to take a school district of this size and start with a percentage figure as a starting place; but you can't keep it up.

Now, in this case, I should stress that the "no majority of any minority" is a much more flexible rule, because there are two minorities here, and it gives the School Board much more room to maneuver than a decree like Swann did.

So if the Swann decree was all right as a starting place, this one clearly is.

QUESTION: There are now three minorities, aren't there? And no majority.

MR. BORK: Well, I'm not sure that "minority" isn't a term of art, Mr. Justice Stewart.

QUESTION: I thought it meant more than half -- I mean "majority" means more than half; "minority" means less than half.

MR. BORK: If the judge -- there are people who use "minority" as a term of art, meaning particular identified groups.

QUESTION: Even if they are a majority.

QUESTION: Even like women.

MR. BORK: That's correct.

QUESTION: Yes.

MR. BORK: That's correct.

MR. CHIEF JUSTICE BURGER: Mr. Okrand.

ORAL ARGUMENT OF FRED OKRAND, ESQ.,

ON BEHALF OF RESPONDENTS SPANGLER ET AL.

MR. OKRAND: Mr. Chief Justice, and may it please the Court:

I regret that I have to take issue with my colleague respondent.

The plaintiffs-respondent do not view the 1970 decree as being void. The portion of the decree that says the School Board at that time and until further relieved shall have no majority of a minority in any school of the district.

I read Swann quite differently. I read Swann to allow just that, and that until the School Board has shown that it is a unitary school, a unitary district, it cannot be allowed to be relieved from that requirement.

Now, just one aside. The judgment of the court did

not require that any particular -- that there be any particular ratio in any particular school. It even allowed, Your Honor, that there be all-white schools. It was the School Board which decided that they would not have any all-white schools.

With Mr. Neal eliminating from the case any question, I thought, I thought he did, as to the validity of the 1970 decree, with him eliminating from the case the question of any possible busing problem in the case, I viewed the case when I left here last night as involving only one question, and that is as to whether the trial court abused its discretion in not relieving the School Board completely from judicial control. And, alternatively, from not allowing it to go forward with its alternative plan.

I think that that's what this case is all about. And the district court not only did not abuse its discretion in not relieving the Board from judicial control, but, with due respect, had it relieved the Board from judicial control, that would have been an abuse of discretion.

Let me, in a few minutes, if I may, point out to the Court some of the things that were before the trial court at the time it was asked to relieve the Board of the judicial control.

Incidentally, I also -- before I do that, I want to make clear that the Board did not ever -- ever -- ask the court

/sic/ to relieve it of the "no majority of the no minority" requirement -- ever did they do that. They came into court and they asked to be relieved entirely of judicial control or, if not, then to be allowed to put in that alternative plan. And neither one would be proper, as I view the cases that this Court has decided.

Let me review for a moment what the Court had to consider -- oh, also, although nominally the School Board is here as a Petitioner, this really is a case involving human beings who are charged with the duty of running that school system, and it's human beings that that judge had to look at and decide whether he would permit them to go free at that time in 1974.

Before the court at that time were these facts: the ink was not even dry on the 1970 judgment of the court when certain persons, including the architect of the -- the so-called architect of the alternative plan, started a movement to recall the three members of the Board who had the temerity of not appealing the court's judgment and who decided to go forward with their efforts to desegregate the school district. These are three members who had just been found guilty of segregating the school system, and their slogan in that recall campaign was "return to neighborhood schools".

Now, "return to neighborhood schools" is --

QUESTION: Well, Mr. Okrand, is there anything illegal about making the School Board campaign turn on a decision that members of the community may have thought important as to whether a decision should be appealed or not?

MR. OKRAND: Nothing illegal at all, Your Honor. It's the genius of our American system that they do that. But they have to be held responsible for what they say and the reason that they say it.

When the recallers said "return to neighborhood schools", this was five months -- five months -- before the Pasadena Plan was even to go into effect. What were they to return to?

What they were saying was: Remain where you were; and what they were doing at that time was operating segregated schools. "Return to neighborhood schools" meant remain in segregated schools.

Next, when the architect of the Plan was elected to the Board the following year, the recall having failed, very soon thereafter he presented a so-called alternative plan to the Board, and what was the cardinal principle of that alternative plan? Ghetto black schools. The black children were being encouraged to stay in the black ghetto.

Oh, yes, there would be some encouragement for them to go out of the black ghetto, if they so wanted, if they asked to go out. But the thrust was to keep them in the black

community, even to have their own separate school, sub-school district.

QUESTION: What's the population of Pasadena? About 200,000?

MR. OKRAND: I don't know that. The school population is about 25 to 28 thousand. It's a small school district. The whole area is less than half -- about half of the District of Columbia. The whole district, from one side to the other, is about six miles.

QUESTION: And is there truly an area that could be fairly described as a black ghetto?

MR. OKRAND: Yes. Yes. There is, indeed, the northwest portion of it.

Let me go on, if I may.

The next year there was an effort, talking about white flight, which the Petitioners have talked about; there was an effort for a whole segment of the Pasadena School System to flee from the school district. They asked to be relieved to join another school district adjacent to it, which was all-white.

And while the Petitioners talk about being concerned with white flight, the architect of the alternative plan voted to allow them to get out, to further white flight.

That was before the Board below.

Another plan was presented by the architect the

following year. This time he omitted the ghetto black school.

After the three -- and in that same year the three new members, who subsequently were elected and became the majority of the Board, ran on the same platform that had been the recallers platform. This time, "return to neighborhood schools". I leave out the pejorative "stop forced busing".

During that campaign, one of the members who was running for election publicly announced that two of his school children had been taken out of this Pasadena school district, out of the public school, because of the school to which they had been assigned; thus demonstrating his feeling about it.

And I agree with the Court for the First Circuit in the Morgan vs. Kerrigan case, in which the Court said: white flight is an expression of opposition by individuals in the community to desegregation of the school system.

That was before the trial court.

Virtually the very first act that was done by this new School Board when they took control was to violate the Pasadena Plan.

This Court has said that the assignment of administrators and faculty is one of the most important parts of whether or not a school system is segregated or desegregated, and what did these School Board members do? They immediately,

in violation of the Pasadena Plan, which was very carefully designed by the former School Board members, to make sure that there wouldn't be any discrimination in administrative appointment, they appointed five top administrators in complete violation of the Plan, which is not the main thing, they appointed them without even trying to get the minority candidates that the Pasadena Plan, and what this Court's decision, envisaged, I think.

And, predictably, those five top appointees were Caucasians, not minority.

The further conduct of these Board members: Whereas, formerly there had been a black task force and a Mexican-American task force designed to try to look into the needs of the blacks and the Mexican-American communities, as soon as this new School Board took control, there was no longer any black or Mexican-American task force.

In their conduct among themselves, the School Board members allotted spheres of influence to the four white members of the School Board, none to the black member of the School Board; none.

And all the time they were in violation of the "no majority-no minority" clause.

And finally they presented to the court the alternative plan.

Now, I submit, Your Honors, that when the trial court

was faced with that kind of recalcitrance, it had no alternative but first to deny the thought of allowing these School Board members to go free and go their own way and go back to segregated schools, back to black schools and white schools, and also to deny the alternative plan.

Let me, for a moment, if I may -- if I have time -- go over a few of the things that Mr. Neal said yesterday. I've already mentioned, I think, that in our judgment the court, the Board had not been in compliance at all.

Mr. Neal suggested that the Pasadena -- that the judgment of the court simply had to do with school assignment. It did not. It had to do with desegregating the public school system in Pasadena, which had been a segregated system for years. And it ordered desegregation of all features of the Pasadena system, including the administrators and the faculty..

Mr. Neal suggests there was no resistance to the Pasadena Plan. I don't know what resistance is. You don't have to break windows, you don't have to turn over buses to show resistance. There was resistance with a vengence. And perhaps that's the tragedy of Pasadena. Had they not done that, we wouldn't be here at all. And they would very well, perhaps, be entitled to be relieved of court supervision.

By no means have they met the standard of the Fifth

Circuit. They haven't been in compliance. Not even once. This School Board still needs supervision of the court to make sure that they don't run amuck.

QUESTION: What do you think the effect of the Court of Appeals opinion is?

MR. OKRAND: I think it's a guideline of some type to the trial court and --

QUESTION: Well, what if the School Board now goes into court and says, "We have made one assignment, reassignment, and we ask that the order be terminated"?

MR. OKRAND: I think the court should not do that. I think the court should properly --

QUESTION: Well, I know you think -- I know that's what you think; but do you think the -- you don't think that's the effect of the Court of Appeals?

MR. OKRAND: I don't think the Court of Appeals -- I think Judge Chambers said that, but I don't think that's the --

QUESTION: Well, he wants that -- who else -- who said something to the contrary? The dissent certainly would agree with him.

MR. OKRAND: I don't know. The dissent would not agree. The dissent said: send it back to find out if there is still remnants of de jure segregation.

That's what the dissent said.

And I think there are remnants of de jure segregation.

QUESTION: So you're going to have an argument in the district court, I take it?

MR. OKRAND: Well, we always have arguments in the district court, Your Honor.

[Laughter.]

MR. OKRAND: You should see.

[Laughter.]

MR. OKRAND: Mr. Neal suggested that the contempt citation, which is still pending on appeal, was solely because the School Board didn't vacate the appointments. That's not it at all. The decision of the court is at 384 Fed Supp, we mention it in our brief. They were found in contempt because they violated their own Pasadena Plan by appointing five Caucasian administrators without trying to find any minority administrators -- and there were plenty of qualified ones, as the court's 1970 opinion shows.

Mr. Neal suggested that there was no substantial reason offered for not allowing the relief, the alternative plan. They had the burden of showing that the alternative plan was better than the Pasadena Plan, and there isn't a shred of proof in it at all. Indeed, the record is very clear, and the trial court just couldn't have decided it any other way, that had that alternative plan go into effect, say, next September, those schools would immediately be black and

white schools. Quite in violation of this Court's Green decision, that says there should only be schools and not black schools or white schools.

Going outside the record -- I know we're in the Supreme Court and that's perhaps permissible sometimes -- Mr. Neal talked about the Audobon School. But one of the difficulties in going outside the record is that you aren't able to give the complete picture.

Mr. Neal didn't mention that the trial court denied -- or -- denied the motion of the moving parties at the McKinley School, another school not to be allowed as a fundamental school. He allowed that school to be established as a fundamental school, because it didn't interfere with the segregation or desegregation of the Pasadena Schools.

The reason he didn't allow the fundamental school at Audobon was because it was a segregating act on the part of the Board. What it did was it put the burden on the blacks, who, under the Pasadena Plan, were supposed to, ideally, be able to walk to their elementary school for half the time and ride, if they so chose, the other half the time.

But not this fundamental school. What that required was that these blacks who were going to that school ride the bus the whole seven years of their schooling. And that's why the trial court said: No, I'm not going to allow this. You've got to make that burden equal. Then you can have your

fundamental school. And he said to go ahead and do it in McKinley.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Okrand, unless you have just a few sentences.

MR. OKRAND: Well, I think I'm just about at the bottom of this. I think I really am.

The red light is very disconcerting, I must say.

[Laughter.]

QUESTION: That's why it's there.

MR. CHIEF JUSTICE BURGER: That's the general idea.

[Laughter.]

MR. OKRAND: Yes. Oh, I want -- I'm going to say just one more thing.

Talking again about Audobon, the Court asked the Superintendent whether or not he had ever recommended to the Board that they come in and ask for relief from the "no majority of no minority"; the Superintendent answered, Yes, he had -- I think it was three times to the former President of the Board, orally, and once to the present Board in writing; and the Board still hadn't gone in to ask for that relief.

Having all those things in mind, may it please the Court, there is nothing left for this Court to do, it seems to me, but to affirm the judgment below.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Neal.

REBUTTAL ARGUMENT OF PHIL C. NEAL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NEAL: I have just two minutes, I think, Your Honor; that obviously does not allow me time to try to reply to Mr. Okrand's somewhat a cappella treatment of the record.

MR. CHIEF JUSTICE BURGER: I think you've got four minutes, Mr. Neal.

You have four minutes, yes.

MR. NEAL: Thank you. Thank you, Your Honor.

But as to the record I will have to rely, I think, upon our brief and upon this Court's own examination of the record.

Let me correct one thing that I think is of some importance. It is not true that the Board never asked for modification of the "no majority of minority" requirement. That appears explicitly in the motion at page 233 of the record, the first paragraph of the motion.

I think I'd like to take the few instants that I have to speak to Mr. Bork's position, which I find somewhat perplexing, because, as I understand it, he thinks we are really entitled to the relief that we're asking; but is confident that it has already been granted by the Court of Appeals.

I think an examination of the opinions of the Court

of Appeals will make clear that it was only Judge Chambers who said if we redistricted once more we would be entitled to be free of that requirement. Neither he nor Judge Ely addressed himself to the question at what point we would be entitled to be released from active judicial supervision.

Mr. Bork -- if Mr. Bork thinks that all we need to do now is go back before Judge Real and say everything is over, the Court of Appeals said that; Mr. Bork is simply unfamiliar with the course of this School Board's relationship with Judge Real and this entire proceeding.

And I think any such notion is totally dispelled, if the Court will take a look at any part of the record in the Audobon proceeding, which is before this Court, and I would like to point out one thing in that connection. There was testimony from that Audobon proceeding that was relied upon in the government brief, which is cited at page 13 or 15 of the government brief, and it was on the basis of that inclusion in the government's brief that I asked the Solicitor General if he would lodge the entire record, and the record is lodged, and we have discussed it in our reply brief.

And I think that should completely dispel any notion that this problem can be eradicated by merely sending the case back without this Court saying anything.

So, in conclusion, I would simply like to re-

emphasize two points: the courts below have clearly misconceived the Swann decision, and what that case said might be taken as an appropriate starting point has been made in this case; the end point, the total objective of the remedial process, then apparently for an indefinite period.

Aside from that fatal flaw, the judgment should, at the very least, be remanded with some guidance from this Court as to when and how the School Board will satisfy the requirement that it be a unitary district, so that it can be released from the straitjacket that it has been in for, now, six years.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:35 o'clock, a.m., the case in the above-entitled matter was submitted.]

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