ORIGINAL

In the

Supreme Court of the United States

WILLIAM G. MILLIKEN, GOVERNOR OF THE STATE OF MICHIGAN, ET AL.,

PETITIONERS,

V.

RONALD BRADLEY, ET AL.,

RESPONDENTS.

No. 76-447

Washington, D. C.
March 22, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM G. MILLIKEN, GOVERNOR OF THE STATE OF MICHIGAN, ET AL., Petitioners,	:	
v.	:	No. 76-447
RONALD BRADLEY, ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, March 22, 1977.

The above-entitled matter came on for argument at 1:40 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANK J. KELLEY, ESQ., Attorney General of Michigan, Lansing, Michigan; on behalf of the Petitioners.

GEORGE T. ROUMELL, JR., ESQ., 720 Ford Building, Detroit, Michigan 48226; on behalf of Respondent Detroit Board of Education, City of Detroit.

NATHANIEL R. JONES, ESQ., 1790 Broadway, New York, New York 10019; on behalf of Bradley Respondents.

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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 76-447, Milliken v. Bradley.

Mr. Attorney General.

ORAL ARGUMENT OF FRANK J. KELLEY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

We are here appearing on behalf of the petitioners in this cause. The Court might recall that I was here some three years ago on this school desegregation case regarding the question then of whether the lower court had exceeded their authority in ordering an inter-district remedy in the absence of an inter-district violation.

In reversing, this Court at that time held that the constitutional right of the plaintiffs was to attend a unitary school system within the City of Detroit and remanded the case for formalation of a decree to eliminate the segregation that existed within that city.

Following the remand and pursuant to the order of the District Court, the plaintiffs and the Detroit Board of Education each filed a desegregation plan. The plaintiffs' plan dealt solely with pupil reassignment. It contained no educational components.

As a matter of fact, during the plaintiffs' expert

testimony in the remedy stage, their expert testified that the plaintiffs' plan would in fact eliminate the segregation found to exist in Detroit.

On the other hand, the Detroit Board of Education's plan, in addition to recommending proposing pupil reassignment for the first time, included thirteen so-called educational components at a projected cost of $30 million annually to its plan. And the Detroit Board in addition demanded that the cost of these expanded educational programs be paid by the petitioners who are state officials in the State of Michigan in the executive branch of government and the money come from unappropriated state funds.

QUESTION: The Board of Education, the Detroit Board of Education was at that time a defendant in the case, wasn't it?

MR. KELLEY: That's correct.

QUESTION: Do you think you would have any standing, that the state officials would have any standing here if the Detroit Board had agreed with the District Court's order and the District Court's order had sought to impose no financial burden on the state officials?

MR. KELLEY: Probably not, Mr. Justice. The plaintiffs at the time that the Detroit Board of Education made this recommendation and their plan responded to the court by pointing out, the plaintiffs themselves pointing out that in the findings there were no violations with respect to educational components.

Yet, in November of 1975 the court, the lower court then entered its order concerning pupil reassignment, a desegregation plan involving some 27,000 students in 105 schools out of 300 zoned schools in Detroit. This desegregation plan was peacefully implemented in the second semester of January 1976. We submit that, for the purposes of the remedy in this cause, based on the last time we were here, that the implementation had taken place.

Yet, on May 11 of that year, 1976, the District Court entered another order and its judgment directed that there be ten educational components to be put into effect system-wide in September of 1976 and each year thereafter for the expanded educational components of reading, guidance counseling, testing and in-service training. And the trial court ordered the state, the petitioners to pay half of the excess cost of implementing the system-wide expansion of existing educational components from unappropriated funds of the state treasury.

Now, pursuant to the court's order, the Detroit Board disclosed that for the previous year, '75-76, it had spent $75 million on these four components. It also pointed out that the expanded order of the court as to these four components would cost in excess of $11.6 million for the '76-77 school year.

Then on August 4, 1976, the Court of Appeals in Cincinnati affirmed the lower court, compelling the system-wide expansion of existing educational programs to be financed with

additional unappropriated funds from the state treasury.

After unsuccessfully seeking a stay, on October 18, 1976, the state treasurer of Michigan issued a warrant in the amount of $5.8 million of unappropriated state funds from the state treasury and paid the same to the Detroit Board of Education.

Now, in affirming the District Court, the Court of Appeals did so, and I quote, "without prejudice to the right of the District Court to require a larger proportion of payment by the State of Michigan if found to be required by future developments." And it is this judicially decreed blank check to be filled in each year and presented for payment of unauthorized funds upon the treasury of the State of Michigan that we are asking this Court to reverse.

QUESTION: Is it your view that you must challenge all of it now, the open end, the blank check, as you call it, or if you did not prevail now do you consider that you should be free to challenge the next order allocating funds?

MR. KELLEY: Mr. Chief Justice, I believe that because of the factor that there was no adjudication in this case of any violation, any constitutional violation with regard to educational programs in the Detroit school system, that as soon as the lower court in its remedy got into educational components, it was beyond its jurisdiction and in violation of the principles of this Court as laid down in Swann and every

succeeding case thereafter, including the last time I was here when the Court had there exceeded its remedy.

The Detroit Board doesn't need a federal court order to expand education. The only reason for this Court --

QUESTION: Is it your position that if the absence of that finding is critical, that the findings that were made would justify a transportation remedy and no other? Is busing the only permissible remedy, in your view?

MR. KELLEY: We found that any reasonable type of pupil reassignment would be available because the violation found in the lower court, Mr. Justice, had to do with pupil reassignment, and that is all that was found. There is no violation of guidance education components or financing --

QUESTION: Is it your response to my question that that is the only permissible remedy?

MR. KELLEY: Any reasonable remedy having to do with pupil reassignment would not necessarily be confined to busing, in my judgment.

QUESTION: But it would have to be pupil reassignment?

MR. KELLEY: That's correct.

QUESTION: Mr. Attorney General, in that connection -- and I want to be sure -- I take it you are arguing basic lack of power in the court or are you arguing the existence of power but an abuse of it here?

MR. KELLEY: I believe that, following Swann, when

there was no finding by the Court of a violation having anything to do with educational components, that in these desegregation cases it would be beyond the power of the Court in this case.

I also feel that the act of the Court here is also doing violence to the principle of federalism as laid down in the Rizzo case. I also feel that it is doing -- it is violative of the decisions with regard to the Tenth and Eleventh Amendments also in this matter.

QUESTION: Suppose, Mr. Attorney General, that the District Court made the finding, the explicit finding that "X" number of children in the schools, all of this based on expert testimony and surveys, the usual way, that "X" percentage of students were suffering under a handicap, a language or speech handicap, that is problems of ghetto life and ghetto speech, and that to bring them into the mainstream with their peers in the school after the reassignment, special speech, remedial speech programs were necessary. Now, there is no such finding here.

MR. KELLEY: That's correct.

QUESTION: This is really somewhat like Justice Blackmun's question. Are you now challenging the power of the Court to do that, or are you challenging here that no such -- no findings were made to support these specific educational components as they are described?

MR. KELLEY: Well, I think, first of all, in answer to your question, the first part is that, yes, there was no finding and therefore it is beyond the remedy power of the Court.

The second part, I don't believe that this is an exception under the Fourteenth Amendment, where the Court could come in and compel payment of money from a state treasury for some inequity found. I have never known of any statute or any congressional act that lets us do this in a school desegregation case.

I haven't thought ahead to the principal part of your question, however, because I have been concentrating on the fact that there was no violation here, and the thrust of my argument --

QUESTION: Do you think that a similar remedy would have been forbidden in Brown v. Board of Education?

MR. KELLEY: I believe on the findings, the Brown case was strictly pupil reassignment, I think that --

QUESTION: Even though the Court observed that segregated education was unequal?

MR. KELLEY: If the Court observed, then I think that there is a possibility that something could have been done. But it is not true in this case.

QUESTION: Otherwise how do you go about finding a constitutional violation in this case, any?

MR. KELLEY: Proofs were taken in this matter, in the Detroit case, Your Honor, with regard to this matter of educational components and finance. The court did not become convinced by that evidence and there were no findings.

QUESTION: What is the basis for any remedy at all?

MR. KELLEY: The basis for remedy --

QUESTION: Or any constitutional --

MR. KELLEY: The basis for remedy in this case was --

QUESTION: -- or any constitutional violation at all?

MR. KELLEY: The violation in this case was that the Detroit Board was found guilty of unconstitutional pupil assignment.

QUESTION: Segregated.

MR. KELLEY: Segregated assignment.

QUESTION: Well, what is wrong with that under the Constitution?

MR. KELLEY: It violates Brown and --

QUESTION: Well, what does Brown say that the violation is?

MR. KELLEY: Brown said, in repudiating Plessey v. Ferguson and that line of cases, that it shall --

QUESTION: Well, does it include a ruling that segregated education is unequal or not?

MR. KELLEY: It is inherently unequal under the Fourteenth Amendment.

QUESTION: And that goes for this case, too?

MR. KELLEY: I believe so.

QUESTION: Well, then what about a remedy?

MR. KELLEY: The remedy --

QUESTION: The remedy to inherently unequal education?

MR. KELLEY: I believe that if you follow the rule as laid down in Brown, one and two, and then in Swann and then in this case, that the scope of the remedy is determined by the nature of the violation and --

QUESTION: Which includes violation is furnishing inherently unequal education?

QUESTION: By segregating this group of school children on the basis of the color of their skin, and the remedy is to desegregate?

MR. KELLEY: That's correct, and I believe that that is what this Court said the last time in finding a violation in Detroit only and ordering a remand that the plaintiffs' rights in this case were to a unitary school system within the confines of the City of Detroit, that there having been no showing on the record of any finding of an inter-district violation or violation of any district outside of Detroit, and now we are back here again on a remedy where there has been no showing that there was a violation of the financing of the Detroit school system or any violation with regard to educational components or the quality of education within the school system.

QUESTION: Mr. Attorney General, Judge Roth in 1972 did find uncontroverted evidence of the need for remedial measures, didn't he?

MR. KELLEY: It is not in the order --

QUESTION: "Uncontroverted evidence in the plans filed by every party that certain educational components, including in-service training, testing evluation, would be essential to any plan."

MR. KELLEY: Well, I can only say to Your Honor at this point that Detroit has in fact a unitary school system, that in the last year, '75-76, we spent $75 million on those four components that Judge DeMascio now wants expanded in a remedy phase, so that we are committed to this program and it is part of a unitary school system. But if in fact the record as we see it did not show that there had been any constitutional violation of plaintiffs' rights with regard to accusation and finding of inequity in the educational components or in the quality of education or in the financing of the school system, then I believe it is beyond the power of the Court now from the remedy stage to order educational components.

QUESTION: Well, isn't your case in behalf of state officials somewhat different than would be a case that could be made on behalf of the Detroit Board of Education if they objected to this order -- which I take it they don't -- but if they did object, they could make the same arguments that you

have just been reciting, that it goes beyond the scope of the violation, it intrudes too deeply into the authority of the local officials, that type of argument?

But I had thought one of your additional arguments on behalf of your state officials was that, conceding that all of those things would be ruled in favor of the Court of Appeals, nonetheless the Eleventh Amendment prevented the Court from requiring the state officials, as opposed to the Detroit officials, to pay for it?

MR. KELLEY: Well, we feel that Edelman v. Jordan, a case in this Court, would apply, where the Court reiterated the rule that a suit by private parties to impose a liability be paid from a state treasury is barred by the Eleventh Amendment.

Now, our constitution in Michigan provides that no money shall be paid out of the state treasury except pursuant to appropriations made by law. The people of Michigan have imposed the appropriations power in the elected representatives. They have not waived the Eleventh Amendment in any way and, as a result, I believe we do have the protection.

I think we also have the protection of the language of Rizzo, where the Court reaffirmed the principle of federalism that limits the injunctive power of federal courts over officials in the executive branch of state and local governments.

QUESTION: But there --

MR. KELLEY: It is just a matter of administering the educational system without finding.

QUESTION: But in Rizzo you were talking about a city police official --

MR. KELLEY: That's right.

QUESTION: -- the chief of police of the City of Philadelphia, who doesn't have Eleventh Amendment protection.

MR. KELLEY: That's correct. That is absolutely true, but --

QUESTION: Mr. Attorney General, if you are correct, as I remember the findings, there was a finding of violation by the state, the state was guilty of some constitutional violation.

MR. KELLEY: That's correct.

QUESTION: Is there any remedy at all that could be ordered against the state?

MR. KELLEY: Well, the state has already paid --

QUESTION: Any remedy that could be ordered by a federal court?

MR. KELLEY: Only having to do with a correction of the remedy of pupil reassignment and any part that the state could play. Now, the state --

QUESTION: The state was ordered to --

MR. KELLEY: -- the state was not asked to submit a plan. The state --

QUESTION: Could the state be made to pay a portion of the cost of buying the new buses and the transportation?

MR. KELLEY: The state board did pay the cost of 250 --

QUESTION: Could it be ordered to do so?

MR. KELLEY: It did so, but it did so within state law.

QUESTION: But could it be ordered to do so was my question.

MR. KELLEY: Yes, it was ordered to do so, Your Honor.

QUESTION: Could it be ordered to do so, consistently with your theory of the case?

MR. KELLEY: Well, as it turned out, the payment of the buses in this case was done within the state constitution and --

QUESTION: What I am trying to find out is, under your view of the law, there any remedy that the federal court could order against the state? I don't seem to find any in your answer. You say you have done some things voluntarily, but you seem to dispute the power of the federal court to grant any effective remedy against the state, is that correct?

MR. KELLEY: No, I believe that in pupil reassignment that they could issue any order that was reasonable to correct the federal violation.

QUESTION: Including compelling the state to contribute

to the cost of purchasing new buses?

MR. KELLEY: That's correct.

QUESTION: You would agree to that?

MR. KELLEY: I would agree to that. But I would also point out that, as far as the Tenth Amendment is concerned, it would also apply here.

QUESTION: Mr. Attorney General, you do concede that the state could have been ordered to pay for buses?

MR. KELLEY: It can be ordered because in this particular situation there is a law that provides for the state to participate in the payment of buses. It would not be in violation of the state constitution or the state law.

QUESTION: Do you mean the state waives the Eleventh Amendment --

MR. KELLEY: It did not waive it but in practical effect we paid for 25 percent of these buses, Mr. Justice.

QUESTION: What about the Eleventh Amendment? What happens to your Eleventh Amendment argument if you are going to concede that the state could have been ordered to pay for the buses?

MR. KELLEY: I don't concede that the state has waived the Eleventh Amendment in the abstract in the hypothetical questions posed to me by Justice Stevens.

QUESTION: No, no, in answer to my question.

MR. KELLEY: Right.

QUESTION: How do you reconcile your Eleventh Amendment argument with your concession that you could be ordered to pay for busing?

MR. KELLEY: We could pay for busing only to the extent --

QUESTION: Now, how could you be ordered in face of your Eleventh Amendment argument?

MR. KELLEY: I don't -- I believe that the Eleventh Amendment would have to be argued in that case and that the state would have to be defended on the Eleventh Amendment because in anything we have done in this case, the state has not waived its Eleventh Amendment. So what is misleading about this case is that we were able to buy the buses within state law and under the state constitution by future appropriation methods, and so the issue has never been drawn.

QUESTION: Whose plan is it that includes these educational components?

MR. KELLEY: It was the Detroit Board of Education, Mr. Chief Justice. It was not in the plaintiffs' plan.

QUESTION: And accepted by the District Court?

MR. KELLEY: It accepted ten, I believe, of the -- it accepted nine and put one plan of his own into the situation, and in effect in a remedy we are asking for -- it is a situation where there is a remedy being directed against us without a violation, and I believe that it follows the dictate of this

Court in Swann. I believe the federalism argument will apply, and I also believe that the Tenth and Eleventh Amendment would also apply because of our state constitution and the fact that we have not waived, nor is there any exception under section 5 of the Fourteenth Amendment involved here, where you could order the compulsion of payment of state monies, as you did in the case of -- I believe it was not Griffin but --

QUESTION: Section 5 applied to Congress.

MR. KELLEY: Congress' law, and then, of course, the --

QUESTION: It didn't apply to us.

MR. KELLEY: Well, the Court reaffirmed the principle in Rizzo with regard to courts, even though that was local officials.

QUESTION: The Congress shall have power to enforce by appropriate legislation.

MR. KELLEY: Fitzpatrick, the Fitzpatrick case, I'm sorry, Your Honor.

QUESTION: It says Congress, it doesn't say anything about us.

MR. KELLEY: Well, there is no statute here that would have enabled the lower court to use that power.

QUESTION: I thought you said that we could use section 5.

MR. KELLEY: No, I'm sorry, there was no congressional

act that would have enabled the lower judge to make an exception.

QUESTION: All right.

MR. KELLEY: And the case I have referred to earlier was where there was a section 5 exception, in Fitzpatrick v. Bitzer, having to do with employment discrimination, and there was authority for the payment of state funds and ordered by the federal courts, but we don't have that present in this case. And I just believe that, despite the noble purpose, the lower court has once again gone into a remedy situation without a violation having been found in the record, and it beyond the power of the court to do so, and I think it not only fails to follow the principle of a remedy being within the scope of the violation, but it also violates the Eleventh Amendment and the Tenth Amendment.

QUESTION: When the court approved substantially the greater part of the proposed plan, 9 of the 13 parts, as to those 9 parts, isn't that a finding of the District Court of the need of those components in the total educational process?

MR. KELLEY: I felt that we would be bound by the record. There was no opportunity at that point to properly put forth -- I don't believe at that stage that the court was authorized to make a finding because I don't believe that the record supported it, and I think that the last time we were here we included this matter, the judgment had been entered and

in that judgment there was no showing in the record of a violation.

QUESTION: Well, the state -- did you have an opportunity to challenge the court's approval of the plan to the extent it approved it?

MR. KELLEY: Yes, but only to the extent in an advisory capacity at that point in the proceedings, Your Honor. I don't think that we had the same standing at that point as we had during the trial of the matter.

QUESTION: You were a party?

MR. KELLEY: Pardon?

QUESTION: You were a party to the litigation?

MR. KELLEY: That's correct.

QUESTION: You weren't just an amicus or an intervenor?

MR. KELLEY: No, no. That's correct, we are a party.

QUESTION: So you got notice, I assume, of a hearing and --

MR. KELLEY: Oh, yes.

QUESTION: -- had an opportunity to say what you wanted to say, didn't you?

MR. KELLEY: But I honestly believe that at that point in the proceedings, after the trial -- and we must remember that the late Judge Roth was the original trial judge in this matter, and we are faced with a situation where a succeeding

judge came into the matter after the case was tried and the record was developed.

QUESTION: Did it go to Judge DeMascio as soon as it came back on the remand, after Judge Roth's death?

MR. KELLEY: That is correct.

QUESTION: He has had it ever since?

MR. KELLEY: He has had the case ever since, Mr. Chief Justice, that is true. We feel that this case, as far as the Eleventh Amendment is concerned, does follow the doctrines laid down in Edelman, where the Court reiterated the rule that a suit by private parties to impose liability is barred. And even though the state is not named a party in this case, Edelman held that where the effect is the compelling of money from the state treasury, which is what happened here, that the state by that act does become a party. And what we have here is a direct compulsion of money from the state treasury, it is not some ancillary effect or some prospective injunctive relief.

In addition to that, I think the language of the Court of Appeals is important when it said that this could be done annually, that we could come back here annually and take unappropriated funds from the state, and I believe that we would have a repetition of Eleventh Amendment violations.

QUESTION: Mr. Attorney General, on the remedy question, would the case be different if the decree, instead of saying you pay 50 percent of the costs, it said you provide the

books and you provide the teachers and you provide the testing materials and one thing -- asked you to provide a lot of services and facilities, rather than just plain dollars, would that present a different issue?

MR. KELLEY: I don't think so. I should also point out that, you know, this is not -- this school district is among the highest 20 percent in the state in per capita expenditures. This year, the state of Michigan will appropriate under proper appropriations from its state treasury to the City of Detroit $192.5 million, in addition to any local taxation or federal help that they get. They are among the higher per capita school districts in the state. We have not been parsimonious with them.

What the petitioners and the state object to is the ordering of unappropriated funds, in violation of our constitution, from the state treasury in the absence of any constitutional violation. That is what we are here for.

QUESTION: Well, there was a finding by Judge Roth that the state had participated in the situation that existed, the violations. That was not challenged in the original Milliken v. Bradley, and I think the opinion said that that finding was left undisturbed, if I recall correctly.

MR. KELLEY: Well, I don't believe there has ever been a finding that the state of Michigan or any of the defendants, for that matter, have been involved in a constitutional

violation with regard to educational quality or with regard to financing.

QUESTION: But there was a finding by lower courts, and I gather not challenged here --

MR. KELLEY: With regard to pupil reassignment.

QUESTION: -- well, that the state had participated in racial discrimination in the operation of the schools. That is what the finding was.

MR. KELLEY: That's correct.

QUESTION: And that is what is not challenged.

MR. KELLEY: That's correct.

QUESTION: And you do not challenge that? You cannot challenge that, can you?

MR. KELLEY: We cannot challenge that, Your Honor. We are only challenging the remedy that is being used here beyond the nature of the violation and in violation of the Eleventh Amendment.

We now have a unitary system in Detroit, that I don't believe anybody can question. And the desegregation and the implementation for the elimination of that desegregation has been accomplished and was accomplished in January of 1976 and there is no complaint from anybody on that score.

If it please the Court, we will reserve any time we have remaining.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney

General.

Mr. Roumell.

ORAL ARGUMENT OF GEORGE T. ROUMELL, JR., ESQ.,
ON BEHALF OF THE RESPONDENT, DETROIT BOARD OF
EDUCATION

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

This case is about a remedy for a state imposed condition of segregation in the Detroit School District that was caused by two separate and distinct defendants, the Detroit Board and the State of Michigan. Footnote 16, Milliken I, verifies this, and again in the Gautreaux case, at Footnote 13, this Court reaffirmed that finding -- two separate and distinct defendants.

The state defendants here are attempting to twist this Court's statements in Swann and Milliken that the nature of the violation determines the scope of the remedy. The violation here is segregation. This is more than unlawful pupil assignment. The scope of the remedy has more than just to do with pupil reassignment.

In Brown --

QUESTION: Wasn't that the violation, segregation of pupils based upon their race or ethnic background? There was no claim, was there, of inequality other than that, of inequality among the various schools, was there?

MR. ROUMELL: Yes, Your Honor, in this respect --

QUESTION: This was a separate but equal system and that was the violation, wasn't it?

MR. ROUMELL: Your Honor, the record evidence in this case shows that as the schools in Detroit evolved, one black school, two black schools, three black schools, and so forth, and the black children came into the Detroit system with the same capabilities and with the same potentiality to learn that by the time they reached the eighth grade in the Detroit schools, on an average, the record reveals that the black children were reading at a sixth grade level --

QUESTION: Well, was that ever alleged as a constitutional violation?

MR. ROUMELL: That is the effect of segregation in Detroit.

QUESTION: Well, why does it have that effect on black children and not on white children, if it is the effect of segregation?

MR. ROUMELL: Because, Your Honor, one of the major reasons for this reading disability is unfortunately teacher perceptions toward the ability of their students to learn, and the record evidence in this case shows that there was low teacher expectations in the developing black schools in Detroit. It was an unfortunate result, proven in the record, and we refer the Court to our supplemental record, at pages 1 to 23,

where we laid that out in the violation stage.

Furthermore, the record also shows, Your Honor, that in testing, our testing proved in many cases to be culturally biased, and in many cases unfortunately resulted in the tracking of black students. Again, I refer to the record, 1 to 23 of our supplemental record.

QUESTION: Well, to get back to my original question, am I mistaken in my understanding that the only constitutional violation found in this litigation was segregation of students based upon their color?

MR. ROUMELL: That is correct, but the effect of --

QUESTION: Or the assignment of students because of color?

MR. ROUMELL: It was an evolving process and the effect of --

QUESTION: Evolving or not, that was the constitutional violation?

MR. ROUMELL: That was the constitutional violation.

QUESTION: And the only constitutional violation?

MR. ROUMELL: And the state constitutional violation.

QUESTION: Well, we are concerned here with only the federal Constitution violation.

MR. ROUMELL: I mean the state defendants --

QUESTION: They were also found to be violators?

MR. ROUMELL: Yes, Your Honor. And what we are saying

is that this was an effect of that violation, and it also had an effect, as the violation record established, in the counseling, it institutionalized the concept of bias. For example, in a majority black school, for some reason in our aero mechanics school, where we were training children to go into the aircraft industry, we had an 80 percent white enrollment. Black children were not being counselled into that educational opportunity.

And so one of the purposes of equity is to restore, restore the children to where they would have been but for this vidious segregation in Detroit.

Now, in addition, when we get to the remedial stage of the hearing, not only does the record, without exception, confirm what I have just said, but in addition the state defendants, through their own witnesses -- and I must call the Court's attention to the fact that after the Detroit Board presented their plan, the state was asked to present a critique and the state in their critique said, yes, we agree, to overcome the obstacles to desegregation in Detroit you must have a counselling program designed to eliminate the effects of segregation, you must have an unbiased testing program, and, by all means, you must have an in-service training program.

QUESTION: Where do you find that in here?

MR. ROUMELL: Pages 18 to 24 of the brief of the Detroit Board of Education, where we cite the references to the

to the appendix and actually quote from the testimony of the state's defendants' own witness, plus our witnesses, plus the witnesses of the plaintiffs.

QUESTION: May I ask you some questions?

MR. ROUMELL: Yes, Your Honor.

QUESTION: I understand that there were four --

MR. ROUMELL: Yes.

QUESTION: -- in-service teacher training, counselling, testing, and remedial reading. How long has Detroit had all four of those components in its school system?

MR. ROUMELL: Your Honor, we have had those components in our school system for some time, but we have not had --

QUESTION: Wait just a minute. Do you know any major school system in the United States that doesn't have them or any school system that hasn't had them for a quarter of a century?

MR. ROUMELL: I do not, but the components we are speaking of --

QUESTION: Let me ask you another question. Is there any finding in this record that any one of those systems was enforced in a discriminatory way?

MR. ROUMELL: Your Honor, two things, if I may answer the question in two parts: The components we are speaking about here are not the routine educational programs in any school system. These are restoration, overcoming obstacle programs. They are designed to teach counsellors, for example, to be

prepared in prevention crisis. They are designed to open up career opportunities to the black children that have been deprived of them in Detroit. The reading program is designed -- for the first time we have not had remedial reading at the high school level -- we are finding children who went through our system, a desegregated school system, and not be able to read at the high school level.

QUESTION: I understand that and I am in favor of all of those, but my question is what constitutional violation was found with respect to any one of these components?

MR. ROUMELL: The constitutional violation was a violation of segregation and --

QUESTION: And you could give me that answer if I ask you whether the teaching of mathematics or history or civics or any other subject in the schools, you could say it is being taught inadequately, that segregation was the cause, could you not?

MR. ROUMELL: No, I could not, Your Honor, for this reason --

QUESTION: Then tell me why.

MR. ROUMELL: Because the second prong, not only the question of restoring but overcoming the obstacles. When you bring the children into the Detroit system, into a desegregated system -- Dr. Foster pointed out, and we pointed out in our brief, in the testimony, you bring children into a classroom

that have all different levels of reading, you incur difficult teaching problems and eventually the children who have been discriminated against, who have been the victims of low teacher expectations begin to daydream and eventually we have the horrible, horrible situation in Detroit of black dropouts. Now --

QUESTION: My understanding is that 75 percent of the pupils are black, is that correct?

MR. ROUMELL: 79 percent, Your Honor.

QUESTION: 79 percent. Has discrimination occurred with respect to all 79 percent of the pupils of the Detroit school system?

MR. ROUMELL: It was system-wide.

QUESTION: System-wide.

MR. ROUMELL: That was a finding of Judge Roth.

QUESTION: What is the composition of the Detroit School Board? You have five members system-wide, don't you?

MR. ROUMELL: No, sir, we have 13 members, sir.

QUESTION: Well, what is the composition of that board?

MR. ROUMELL: At the present time?

QUESTION: Yes.

MR. ROUMELL: In terms of race?

QUESTION: Yes.

MR. ROUMELL: Nine black and four white.

QUESTION: You have regional boards, don't you, eight of them?

MR. ROUMELL: Yes, Your Honor.

QUESTION: What is the composition of the eight regional boards?

MR. ROUMELL: They vary from region to region. Some regions are virtually all black, others have --

QUESTION: How many are virtually all white?

MR. ROUMELL: There is a mixture, Your Honor.

QUESTION: Well, how many have a majority of white members?

MR. ROUMELL: Two, I believe, Your Honor.

QUESTION: Two out of the eight?

MR. ROUMELL: Two or three.

QUESTION: And they are discriminating against themselves, are they?

MR. ROUMELL: Your Honor, they are not discriminating at the present time. They are trying to correct the remedy.

QUESTION: When was this discrimination in these four component programs?

MR. ROUMELL: In these four components, Your Honor --

QUESTION: Does the record show when there was any discrimination?

MR. ROUMELL: The record shows that at the time this lawsuit was begun, and during the course of the lawsuit there

was desegregation, this evolving process, and the effect of this was the reading, the counselling, the problems that I have outlined above, produced by the evidence on this record, the hard evidence. And then when we get to the remedial stages, the educators, without exception, including the state's own witness, says that in order to make desegregation work in Detroit, in order to make it work in Detroit, we have to have these programs, and these programs are not spending $75 million for additional programs, these are new programs --

QUESTION: May I ask you this: What is the ratio between your counsellors and pupils? How many pupils per counsellor in the Detroit school system?

MR. ROUMELL: Approximately 400.

QUESTION: How does that compare with national averages?

MR. ROUMELL: The North Central Association proposes 300 to 350.

QUESTION: 300 to 350 is considered the best relationship, but Detroit is better than average?

MR. ROUMELL: Your Honor, we have problems in Detroit. We are a large system. We have large dropouts of students. We have tension problems caused by the desegregation that we are trying to work out. We can't explain why many of our students -- we have to counsel them into the systemwide schools so they can participate in desegregated education. Part of our tools

in the educational component are just one tool, a part of the whole tool is a whole system of drawing children of both races into the various schools, and we have to counsel them so their parents know about the availability of these opportunities.

QUESTION: May I say this: I am very sympathetic to the problem, that many school systems in the United States are inadequately staffed. I know people in this business who think there ought to be a counsellor for every 200 students. Suppose the District judge had decided that that ought to have been the ratio, and instead of ordering $11 million, he ordered $22 million, you would be here supporting that, wouldn't you?

MR. ROUMELL: Your Honor, two questions, if I may: Number one, he didn't decide that; and, number two, the state of Michigan at every opportunity said he was incorrect in what he was ordering. As a matter of fact, one of these programs was a joint submission to the court, the testing program. They had every opportunity and nowhere in the record, nowhere in this record have they challenged that these programs are needed to restore, to overcome the obstacles. We are putting counsellors in other areas in the Detroit system so that, particularly in our middle schools, so that our children can gravitate toward the city-wide schools and the magnet schools in order to make this desegregation plan work.

It is a Detroit situation, it is a way segregation evolved in Detroit, it is the way the -- the only way we can

remedy the situation, because if we do not, if we do not utilize these tools, the children in Detroit will continue to have the lingering badges of segregation on them.

QUESTION: Mr. Roumell, are you saying in effect that in the school system which, as Detroit is, is 79 percent Negro, or Washington, D. C., which is somewhat similar, that the need for counsellors is higher than in a school system in some city where you have a much more traditional situation, either all white -- is there a greater need for these programs when you have a 79 percent Negro population?

MR. ROUMELL: Your Honor, Mr. Chief Justice, I may say this: I am only familiar with the record in the Detroit situation, and I believe that segregation is a case by case litigation, and I believe this is the way it developed in Detroit.

I would say, Your Honor, that if we had 10 percent black and if the record showed that because of desegregation of those children, that it was necessary to give them remedial programs, restoration programs, so that they can participate in the desegregated aspects of the program, then we would have to have it in that system.

QUESTION: May I interrupt just a second. We have taken a lot of your time so we will extend your time by five minutes and the same on the other side and give Justice Powell a chance to pursue his question.

QUESTION: Well, I will just ask you one more. I am afraid I have interrupted you more than my share. Does it concern you at all that a federal district judge, elected for life and not responsible to the people, is engaging here in undertaking to run a school system which, under the constitution of Michigan and every other state, is vested in the school board and the state board of education?

MR. ROUMELL: Your Honor, that is not what happened here. Here is what happened here: This federal judge, like any other judge in any other type of case, heard the evidence, and you had the Board of Education coming in and saying, we as trained educators are telling you that we cannot desegregate Detroit in this situation unless we have these components. We have the state defendants coming in and saying, we agree on three of them; we have the state defendants coming in and saying, we are submitting a joint report on testing. We agreed. Everybody says to the poor little judge, here it is, and then we have the expert from the plaintiffs, two men who have spent their lives, their professional life, desegregating, said, yes, Your Honor, in order to overcome the obstacles of desegregation you must have these educational components.

Now, Mr. Justice Powell, this is what happened: This did not come from the mind of Judge DeMascio, he had not thought of it. It came from the minds of every person that was in that court room, every report. He has no contrary evidence. It is

no different than a psychiatrist in an accident case saying, yes, that person has a trauma as a result of this accident and there must be a remedy. It is the same principle that happened here in the Detroit case.

QUESTION: May I go back on my own word and ask you one more question. If these same witnesses present the same testimony before the Board of Education in the City of Detroit, and if so what was the board's response, what did it say in its role as the elected representatives of the people to provide a quality education for the City of Detroit?

MR. ROUMELL: Your Honor, I take issue with the question of quality education. I call this restoration. Your Honor, we are not teaching French cooking and home economics or literature, we are restoring children, and we are trying to overcome the obstacles to segregation.

Here is what happened: When the case was remanded, the Detroit Board utilizing a number of people, including an expert from the University of Michigan, an expert from Michigan State, an expert from Wayne State University, developed a plan and it was the unanimous view of the Detroit Board that they should present to the District Court as part of the plan of desegregation as another tool, just as much as zoning and busing, as another tool to desegregate Detroit, to make it work now. And that is what we are talking about here, Your Honor, and that is what the Detroit Board did, and it was voted on and the

vote was unanimous.

QUESTION: Let me go back to a question I put to the Attorney General. I put to him the question, if there were a finding by the District Court that the language difficulties of these Negro students was way below par, that is both in speech and in reading, and a finding was made to that effect specifically, and the further finding that it was necessary to engage in these remedial components in order to balance that out, I thought he said, yes, if there had been such a finding, that would be a different case from the one here. And then I put to him the question, is not the approval by the District Court of the plan submitted by the Board of Education, not conceived by the district judge but by the Board of Education, is not his approval the equivalent of a finding on that score, and I think he took issue there and said, no, he did not think that was specific enough. What would you have to say about that?

MR. ROUMELL: Five words, Your Honor, it was the finding. And may I respectfully say to the Chief Justice and the Court, pages 18 through 34 of our brief set forth those specific findings. And may I point out to the Court that after we made our presentation, the judge said go back, work with the state and whittle it down. And this thing had been refined, it had gone through a very refined position, with the state participating, and if they didn't like it they could have filed motions, they could have brought it to the attention of the

court.

QUESTION: Well, Mr. Roumell, isn't the real dispute here not between the School Board and the District Court, you are really aligned with the District Court, it is between the School Board and the District Court on the one hand and the state on the other, not over the nature of the remedy so much as the fact that the District Court has ordered the state to pay unappropriated funds that it might not have chosen to pay Detroit for it.

MR. ROUMELL: Well, the District Court didn't order the state to pay unappropriated funds. What they ordered the state, as one of the joint two wrongdoers, they were a wrongdoer, to put these programs into effect, n d they didn't give a blank check. The only order that is before this Court is the order to do that, and the representation by the Detroit board, undisputed by the state defendants, that it would cost $11.6 million, and the state was asked to pay less than $25 per child. Now, frankly, if the state wanted to do the evaluation of the tests, if they wanted to send in the remedial teachers, if they wanted to send in the counselling help that we needed and put on the in-service training, they would have been welcome to do it, but they didn't choose to do that. They were only ordered, just like this Court has ordered states to prepare transcripts for indigents in criminal matters, that is all they were ordered to do. This is not a money judgment. And they are

wrongdoers.

QUESTION: You say it is not the equivalent of a money order, an order to pay money?

MR. ROUMELL: Absolutely not, nobody was ordered to pay every child $200 because of these violations.

QUESTION: How about an order to pay the Detroit School Board a certain amount of money in order to assist it in implementing this program?

MR. ROUMELL: Well, he had another choice, they could have just put the program in, if they wanted to, but I don't call that a money judgment. It is no different than ordering a state to provide an indigent defendant a transcript or legal counsel. There is no difference. You have to meet the constitutional remedy. Nobody has usurped the authority of the state or the Detroit board in running an educational system. All the District Court said, if you are going to run an educational system, run it constitutionally. And the $75 million, the alleged expansion of the program, that is not true, we are not expanding existing programs. We are establishing new programs to restore, to overcome the obstacle to desegregation in Detroit. This is a Detroit case. What may happen in other cities, unfortunately I do not know the record in those cities.

Thank you very much.

MR. CHIEF JUSTICE BURGER: We will hear from your colleague now. Mr. Jones.

ORAL ARGUMENT OF NATHANIEL R. JONES, ESQ.,

ON BEHALF OF RESPONDENT BRADLEY

MR. JONES: Thank you, Mr. Chief Justice, and may it please the Court:

The respondents, Ronald Bradley, urge that the judgment of the Court of Appeals be affirmed. Before setting forth the reasons for urging that affirmance, I should like to dispose of two assertions that have been repeated in the briefs and in argument here by the state petitioners.

First, that the Detroit school system is now unitary; and, second, that the respondents have been and are opposed to educational adjuncts as part of an education plan.

Let me first observe that the Detroit school system is not unitary. The Sixth Circuit reversed in part and remanded the pupil reassignment portion of the opinion insofar as it left untouched three regions in the Detroit school system that contained over 100 schools that were all black. The Sixth Circuit said this situation is intolerable, they recognized the difficulty of the problem, but the District Court would have to deal with this problem and could not leave those schools with these 100 black schools with their students located in the heart of the section of Detroit which represented the very essence of the violation to go untouched.

Secondly, it totally misrepresents the respondents' position to assert that respondents have been opposed to these

educational adjuncts. It is necessary to I think understand the dynamics of the remand proceedings to have a correct understanding as to what took place.

The District Court had a preoccupation with the cart rather than the horse. There was undue attention we felt at that time being placed upon the educational adjuncts and an ignoring of the primary element of a remedy which was desegregation. These are adjuncts, not the primary elements of relief, and we had to continue to refocus the court's attention and the attention of all the parties on the fact that this was a Brown violation, and the essential remedy had to be pupil reassignment, elimination of the discrimination, the segregation; and secondly, as an ancillary matter, we had to deal with curing the effects, the lingering effects of that primary discrimination, the primary segregation, and the state petitioners take one line out of a cross-examination response of one of our experts, Dr. Foster, and escallate that to our primary position, and I think it is necessary for us to set that record straight.

It would be preposterous, it would be ludicrous, it would be absurd, hypocritical and a reflection of the continued concern we have had for the evils of segregation that was addressed in Brown for the respondents to be challenging the inclusion of educational components in a desegregation plan.

Our concern was in seeing that the cart followed the horse.

QUESTION: Mr. Jones, have other courts, in devising a remedy for an unconstitutionally segregated public school system, have other courts included in the remedy these educational adjuncts?

MR. JONES: Yes.

QUESTION: Or is this case unique?

MR. JONES: This is not unique, Mr. Justice Stewart. This is not unique. This is done all the time. In fact, HEW, as a part of its desegregation thrust, authorizes and puts in place educational components. Congress, through its legislative enactments, has recognized as national policy the importance of including educational adjuncts as a part of a desegregation plan for the purpose of overcoming the intangible and the enormous effects of the evils of segregation. So there is nothing unique about this.

QUESTION: Has HEW not furnished some expert assistance and equipment in the remedial speech area and remedial reading, both, in some of these cases? Not necessarily in this one, but in some cases?

MR. JONES: Not in this one, but when called upon they have done it, when applications are made, HEW has responded. There are a number of instances --

QUESTION: And as a remedy for unconstitutional segregation?

MR. JONES: Not as a primary remedy.

QUESTION: That is what I am talking about.

MR. JONES: No, no. No, merely as --

QUESTION: Of course, I know about all of these programs of remedial reading and all the rest --

MR. JONES: -- merely as ancillary assistance to --

QUESTION: Well, how about as a remedy for unconstitutional segregation?

MR. JONES: No, not as a basic remedy.

QUESTION: How about court decrees as a remedy for unconstitutional segregation?

MR. JONES: NO.

QUESTION: Have there been many in which have required educational components?

MR. JONES: Well, educational components are generally found to be necessary.

QUESTION: Well, can you cite me some cases, because I haven't been familiar with this until this case?

MR. JONES: Yes, I think in the State of Michigan, in the Kalamazoo case, educational components were made a part. Swann included educational components as a part of the remedy, and this Court expressly approved it.

QUESTION: We affirmed it?

MR. JONES: That is correct.

QUESTION: And the order had these very components that are involved here?

MR. JONES: That is correct.

QUESTION: And we affirmed it?

MR. JONES: That is correct. And I think, Your Honor, I would like to call your attention to the brief filed by the Justice Department, by the Solicitor General, at page -- both at page 18 and the bottom paragraph, in which the government recognizes that racial discrimination in the operation of schools often has a pervasive effect on the educational process and on the hearts and minds of students. And it goes on to note that the remedial decree should seek to alleviate these intangible effects, no less than to alleviate the assignment of students to racially identifiable schools.

Now, on page 20 of the government's brief, the first paragraph, the Solicitor General puts his finger on the nub of the problem here, the problem the State of Michigan has, and that is the confusion which it has between goals and tools, and certainly as the government contends, that an approach, the approach they suggest would unduly constrict the flexibility of a court, charged with creating a decree that would eliminate all of the effects of racial discrimination, and it goes on to note that Congress has provided in 20 U.S.C. 1703, that no state may deny equal educational opportunity by failing to take affirmative steps to remove the vestages of discrimination. And petitioners would deny district courts the tools needed to achieve that goal.

QUESTION: What if the District Court here had ordered the precise educational components that it did, but declined to require the state to pay any money towards them, would the school board and the individual plaintiffs have still supported the decree?

MR. JONES: I can't speak for the school board and the state, Your Honor.

QUESTION: How about the plaintiffs?

MR. JONES: The plaintiffs would have, as we did, insist upon, in the first instance, the desegregation of the schools.

QUESTION: So that the adjuncts were not enough, in effect? The plaintiffs would have continued to insist, as you earlier mentioned, that the adjunct programs weren't the essential of the decree if the pupil reassignment itself wasn't carried out?

MR. JONES: Well, the plaintiffs would have continued to insist that somebody, some agency of the state address these secondary problems that are a part of bringing about the creation of the unitary system. In fact, we learn as we grow, and one of the lessons that has been learned through 23 years of litigation and efforts to desegregate school systems is that there are certain problems in connection with creating a unitary system that have to be faced, and --

QUESTION: Mr. Jones, may I interrupt you for just a

minute.

MR. JONES: Yes, sir.

QUESTION: In line with the question Mr. Justice Rehnquist was asking, I am looking at the appendix as filed to the opinion of the Court of Appeals, page 189a. This appendix states that the financial impact of these orders, the orders of the District Court, could easily destroy the educational program of the Detroit school system. The financing of these components of the Detroit school system would only mean a concomitant elimination of existing programs.

Now, as I understand it, that came from a brief eild by the Board of Education in Detroit. That suggests to me that the city board had to have state assistance. If you hadn't had state assistance, this suggests that your program would have been destroyed. What is your comment about that?

MR. JONES: Well, Your Honor, the concern of the plaintiffs --

QUESTION: Is the plaintiffs the school board or --

MR. JONES: No, the school board is the defendant.

QUESTION: Yes, but this is a quotation, as I understand it, from the school board brief before the Court of Appeals.

MR. JONES: Well, I am hardly the one to comment on the brief of my adversary.

QUESTION: Oh, yes. Well, I will ask you this: If

your adversary was correct in saying that the court order added all of these ingredients in the educational program in Detroit would destroy the school system unless the state came to the relief, do you think the District Court has that power?

MR. JONES: Well, I cannot accept the premise --

QUESTION: So you don't think the system would have been destroyed?

MR. JONES: No, I do not. Wolf is cried often, and I would not accept that premise. But I think the court clearly has the power under --

QUESTION: The power to destroy the school system?

MR. JONES: No, not the power to destroy the school system. The court clearly had the power under Ex Parte Young to issue an injunction, to require agents, an agency of the state and state officials, to conform their future behavior, their future conduct to conform and comply with the commands of the Fourteenth Amendment.

QUESTION: Even if that requires funds totally beyond the means of either the city or state to provide?

MR. JONES: Well, I can't accept that assumption. I think Griffin v. Prince George's County speaks to that question.

QUESTION: I am not talking about desegregation. I am talking about determining the content of the educational program of a school system that is supported by money raised from taxpayers.

MR. JONES: Your Honor, the court was not determining the program of the Detroit school system. The court was faced with the problem of how do I bring about a conversion of an unconstitutional school system into one that is constitutional. He invited the parties to submit plans. Plans were submitted by both the state, by the Detroit board and the plaintiffs. The state participated in that process and they reached the conclusion, and the court adopted and included into an overall plan prepared by the court what in his judgment, based upon record evidence, was necessary to accomplish the legitimizing of that unconstitutional school system, and that is what we are concerned with, what the power of the court was. And I submit that the court had that power.

QUESTION: Referring to that appendix that Justice Powell has just read from, that is attached to the opinion of the Sixth Circuit. The authorship of the appendix at least doesn't appear -- is that something written by the court, by the Sixth Circuit or --

MR. JONES: The Detroit Board, I am informed, Mr. Chief Justice, wrote that.

QUESTION: That was submitted by the Detroit Board to the Sixth Circuit?

MR. JONES: That is correct.

QUESTION: The Sixth Circuit at least adopted it to the extent of attaching it as an appendix to the opinion -- is

it attached as an appendix to the opinion or is it --

MR. JONES: I can't explain the Sixth Circuit, Your Honor. I don't know.

QUESTION: Was it there when the opinion came down, since you were in the case?

MR. JONES: Yes, it was.

QUESTION: At the top of page 180a, Mr. Chief Justice, that will perhaps answer your question.

QUESTION: Oh, yes, they do make reference to it. I just wanted to be sure of the authorship of it, because it seemed to be hanging somewhat in midair in this form. That does explain it at the top of 180a.

MR. JONES: Very well. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF FRANK J. KELLEY, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. KELLEY: Mr. Chief Justice, I believe we will waive any rebuttal and thank the Justices.

MR. CHIEF JUSTICE BURGER: Any more questions?

QUESTION: The only thing I would like to ask you, Mr. Attorney General, I notice that the government, at page 21 of its brief, takes issue with a statement of yours. They suggest in there, footnote 8, that you err in asserting that the Charlotte-Mecklenburg decree was limited to student assignments, and they cite 318 F Supp. 802 for the sentence, "In Swann

itself the district court's order included a requirement of in-service training of teachers and the creation of a bi-racial advisory committee to help the school system begin the process of desegregation."

You are with the government, right?

MR. KELLEY: Right.

QUESTION: I've got the Federal Supp of 802 before me.

MR. KELLEY: Well, you have me at a slight disadvantage. We believe that for the purpose of this case we will rely on our brief.

QUESTION: Let me ask you a question related to my Brother Brennan's, and that is, in the Swann-Charlotte cases, was the state of North Carolina ordered to pay any money to pay for those facilities, so far as you know?

MR. KELLEY: I know as a matter of fact that they were not ordered to pay any money.

QUESTION: And was the propriety of the remedy beyond student assignment, an issue here, in Swann-Mecklenburg?

MR. KELLEY: There was no mention of anything, as I recall reading and memorizing that matter, beyond pupil reassignment.

QUESTION: This sort of thing is not novel, is it?

MR. KELLEY: Well --

QUESTION: The tools that we are talking about, there are four things and they are not novel in desegregation?

MR. KELLEY: Certainly not. Michigan has pioneered many of them and we do them and we like to do them but we would like to do them within our constitution and within the framework of the legislature and not have the lower court sit in a position of a school board when it is beyond the violation.

QUESTION: It is too late to help you with the answer to that question that was put to you, but once I was asked by Justice Black a similar question when I said sometimes assistant attorney generals argue cases but they don't always prepare all of the papers themselves.

MR. KELLEY: Well, you can always learn, and I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:46 o'clock p.m., the above-entitled case was submitted.]

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