ORIGINAL

In the

Supreme Court of the United States

DAYTON BOARD OF EDUCATION, et al.,	)	
Petitioners,	)	
v.	)	No. 76-539
MARK BRINKMAN, et al.,	)	
Respondents.	)	

Washington, D.C.
April 26, 1977

Pages 1 thru 46

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

inks

IN THE SUPREME COURT OF THE UNITED STATES

DAYTON BOARD OF EDUCATION, et al., Petitioners, v. MARK BRINKMAN, et al., Respondents.	No. 76-539

Washington, D. C.,

Tuesday, April 26, 1977.

The above-entitled matter came on for argument at 2:35 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID C. GREER, ESQ., Bieser, Greer & Landis, 8 North Main Street, Dayton, Ohio 45402; on behalf of the Petitioners.

LOUIS R. LUCAS, ESQ., Ratner, Sugermon, Lucas, Salky & Henderson, 525 Commerce Title Building, Memphis, Tennessee 38103; on behalf of the Respondents.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 76-539, Dayton Board of Education against Brinkman.

Mr. Greer, I think you may proceed when you're ready.

ORAL ARGUMENT OF DAVID C. GREER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I am David Greer, and I am here representing the Dayton, Ohio, Board of Education.

The paramount issue which we present involves the proper fashioning of an equitable remedy in a school desegregation case. The basic principle is clear. The nature of the violation determines the scope of the remedy.

Our concern is with the application of that principle to a case where the finder of the facts determined that only limited segregatory practices exist as opposed to a dual system either mandated or under the Keyes standard.

Our contention is that a system-wide racial balance remedy, as was mandated here by the Sixth Circuit, cannot be justified equitably or constitutionally by such factual findings.

Most of the factual contentions that were raised by the plaintiffs in this action were resolved after an extended trial some five years ago in favor of the Board of Education.

Three findings were determined by the finder of the facts to constitute what it termed a cumulative violation of the Constitution. Those three findings were a condition of racial imbalance in the schools of the Dayton system, rescision of resolutions that had been enacted by a lame duck school board, and the existence of optional zones between certain schools in the system.

The trial court specifically found, and in its opinion after the first remand, in reviewing the Keyes decision which came up while this case was in process, specifically found that at no time did the defendant maintain a dual system of education, and specifically found that this case does not involve actions taken on a school-by-school basis, but, rather, segregatory practices.

The first finding that was made in this case, a condition of racial imbalance, does not amount to a violation of the Constitution of this country.

The finding with respect to rescision of resolutions, I think it is clear under the ruling of the Sixth Circuit and the law in this area, can only be considered a violation of a constitutional duty to the extent that a constitutional duty to act existed at the time the original resolutions were adopted.

QUESTION: Do I understand that you're saying the finding that there was a lack of racial balance, that is, that

the schools did not each reflect the total composition of the community is an erroneous finding. You're attacking that finding, are you?

MR. GREER: No, Your Honor, I don't mean to be misunderstood. There is no question, it was conceded at the outset that there is racial imbalance in the schools in the Dayton system. The issue is that the racial --

QUESTION: Well, you're attacking the conclusion that flows from that finding, namely that that's a constitutional violation?

MR. GREER: And it's clear under the case law that it is not a constitutional violation unless that condition exists, because of intentional segregatory acts of the school board. And the finding in this case was simply that there was a condition of racial imbalance and that it was consistent with the dispersement of the population in the Dayton area.

In other words, the evidence referred to actual census tracts, as to where the populations were located, and the trial court specifically found that the racial balance or imbalance that exizted in the Dayton schools reflected exactly what the residential racial imbalance in the community was.

I would also point out in this regard the court's findings, and there were facts that were as indisputable as the racial imbalance in the schools, that the boundaries of

the various schools in this area had seen no modifications to amount to anything for a period of some twenty years before this suit was filed, and that, as the population in the Dayton area moved, so changed the percentages of black to white students in the various schools serving the residential areas.

The point that I want to make with regard to the three findings in this case is that there is only one of those findings that, standing alone, could be considered a violation of the equal protection clause of the Constitution.

The crux or the keystone of the findings of fact in this case was the finding with respect to optional zones, small areas between two schools where a student living in the area would have an option of going to either of those two schools.

The findings of fact here were that those optional areas, and there were some 150 of them at one point in the history of the school were generally placed there because of the choice of walking one more block to school as opposed to going over railroad tracks or Wolf Creek or what-have-you.

The court did find and mentioned four, out of all of these optional zones, that may have had -- I think was the court's phrase -- some racial significance at the time of their creation. The court found as a fact that the majority of these zones had no racial significance at the time of their creation, and it further found that none of the elementary

school optional zones had any racial significance of any kind at the time this lawsuit was filed.

That left three of the four optional zones mentioned by the court as having any racial significance at the time of the filing of this lawsuit, and is set forth in our brief, and I won't try to go through all the factual arguments here or the factual findings. It's clear that the effect of these three zones, which were high school optional zones, was limited and minimal.

The reason we are here before you this afternoon is that these factual findings have triggered off a systemwide remedy in the Dayton School District by which each and every school in the system is required to reflect the systemwide racial balance plus or minus 15 percent.

In the brief which we filed, we were confident enough of our position to state not only that the remedy here must be rewritten, but also that the only way that the plaintiffs could hope to avoid a rewriting of the remedy would be to rewrite the factual findings.

And I submit that's exactly what this Court has been requested to do in the various briefs that have been filed in opposition to our position.

The plaintiff's brief tacitly concedes our position. It does not attempt to justify the systemwide remedy on the basis of the facts that were found. First, it attempts to

stretch the factual findings beyond their evidentiary content; and, second, it challenges the failure of the trial court to adopt the plaintiff's position on the other factual issues presented.

The Justice Department's brief, in a more straightforward manner, explicitly and expressly concedes our position. The brief says, and I have it to quote to you because, if I have to quote somebody, I like to quote my adversary when I can.

QUESTION: The brief agrees with you on the facts, is that it?

MR. GREER: The brief agrees with us that the three-part cumulative violation that the Court found would not support the remedy that has been imposed.

QUESTION: And the agreement ends there, I think.

MR. GREER: Then we get down to the point of rewriting the facts, Mr. Justice White, and I would propose to the Court four separate reasons why you shouldn't succumb to temptation, if it is a temptation, to adopt that kind of an argument, establish a whole new brand of law in this area, and, in essence, what I think these four reasons should satisfy you, I hope, is that you should accept the facts as found by the trier of the facts and adjust the remedy, rather than accepting the remedy and adjusting the findings of fact.

First, I would submit that the facts in this case, including the fact of a non-dual system in either the statutory or the Keyes sense of the term, have been determined as the law provides they should be determined, and no appeal was taken by the plaintiffs from the trial court's findings as to a non-dual system.

Secondly, I would point out that there was no finding of intentionally segregative school board actions in a significant or meaningful portion of the school system, and that there was therefore no basis for shifting to school authorities the burden of proving that racially imbalanced schools within the system were not the result of intentionally segregative actions.

QUESTION: What if we disagree with you on that?

MR. GREER: If you disagree with me, I think you --

QUESTION: On that particular point.

MR. GREER: On that particular point?

QUESTION: Then what?

MR. GREER: That's the question of was it in a meaningful or significant section of the school, then there would be a shift of burden, and I think my response to that would be clear. And that's really my third point here. And that is that even if the burden were shifted -- the school board didn't sit silent through these three or four weeks of hearings, we did present evidence on each of these issues

that was presented, and the facts in the record support a finding that even if the Keyes presumption had been called into effect, the presumption is, after all, a rebuttable presumption, and the trial court found that the arguments that were made should be rejected, and that the racial imbalance in the schools in the system was not the result of intentional segregatory actions by the school board.

QUESTION: Well, do you think the United States challenges the rules of law applied by the district court or the Court of Appeals?

MR. GREER: As I understand the Justice Department's position, which I must confess I received in the fifth day of a trial that I am presently engaged in in Cincinnati, after completely agreeing with all my position in this case, they would ask this Court to look to the record, make an all-new finding of fact, which is contrary to the findings of fact that have been made, take historical practices that exist or historical situations that happened in 1926 or in 1933, and then, by some leap of logic, presume by that that there was in fact a dual system in Dayton as of 1954.

This gets into a whole lot of factual arguments which have been made, and I might point out that today we did file with the clerk, to supplement the record, the brief that we had filed in the Sixth Circuit on our initial appeal in this case, where it went through those facts.

QUESTION: You mentioned three of your reasons for -- did you get to your fourth?

MR. GREER: I haven't gotten to it, --

QUESTION: All right.

MR. GREER: -- but I'll do that right now, Your Honor.

The fourth reason -- and I think this is as good a reason as the other three -- is that if the remedial goal in a suit of this nature is, as this Court stated in Milliken, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct, a systemwide remedy is inappropriate. Where, as here in Dayton, the evidence establishes that the racial composition of the schools reflected the changing racial composition of the neighborhoods that were served by those schools and the attendance zones and boundaries of these schools met with no significant change over the twenty years that elapsed before this suit was filed.

I submit to this Court, and to anybody else that wants to ask me, that there would have been no difference in the composition of the schools in the Dayton school system at the time this lawsuit was filed, regardless of how any act in 1926 or practice in 1933 or finding of fact in this case with regard to optional zones is characterized.

Just to be specific on that point: The schools in

the Dayton system as of 1954, when the Brown case was decided, consisted of four schools that were composed of an entirely black student population; 24 schools that had a mixed population of black and white students; and 21 all-white schools.

During the twenty years that elapsed before the filing of this suit, there were no significant boundary changes, and the schools in these various mixtures were affected only by population changes. There is a little pocket in the east side of Dayton, the Washington Elementary School serves that area, and the composition of the student body in that school has been somewhere around 23 or so percent consistently through this entire twenty-year period.

Other schools during this twenty years were entirely white in their student bodies at one point, or mixed at one point, and as population shifted the composition of the schools shifted, so that by the end of the period certain schools were predominantly black, and you can list them.

So that this is my fourth point that I would present to the Court; that if the purpose of a remedy in this kind of a case is to restore a condition that would have existed but for constitutional violations, there is no basis here for a systemwide remedy.

Now, I'm sure the Court's going to have a lot of questions for me as well as for my opponents, those are our four main answers to what has been an effort, as I see it,

to try to persuade this Court to rewrite the facts, I don't think that that is a request that should be accepted by this Court. We are not here, it seems to me, to determine the correctness of the trial court's findings.

What we are here to determine is to whether the findings of fact that have been made in this case support the remedy that has been imposed.

It seems to me what the Department of Justice and what the plaintiffs in this case are asking is that this Court designate itself and the Circuit Courts of Appeals as fact-finding commissions in every school desegregation case that is filed.

That, I submit, is not a proper appellate function, and that is, I submit, the job of the trier of the facts, the trial court, who has the opportunity to develop those facts on a witness-by-witness basis through the pressure of cross-examination and through examination of the witnesses.

Now, as far as the historical facts that are attempted to be put together out of a cold record in the brief that was filed by the Department of Justice, I would submit that those facts simply leave great logical gaps that were filled in at the trial of this case.

There has not been any instance cited to this Court, because there is none available for citation, where a student in the Dayton school system was ever excluded from any school

because of his race. There was an instance back in 1926 when a group of students at an elementary school, Garfield, were taught in a separate building behind the main school that was the subject of a suit in 1926, and that practice was eliminated, and that practice existed and was eliminated some four generations of students before this case was filed.

QUESTION: Mr. Greer, you told us at the outset the three facts on which the district court found a cumulative constitutional violation. First, the fact that the schools were racially imbalanced, the individual schools; --

MR. GREER: Correct.

QUESTION: -- two, the rescision of the resolution; and three, the optional zone.

And you admitted to us that the first and the second were not in themselves constitutional violations. What did the Court of Appeals for the Sixth Circuit say about the first and the second?

MR. GREER: They said essentially the same thing. They affirmed the finding that there was a cumulative violation, they didn't pass --

QUESTION: How could it be cumulative if there's only one?

MR. GREER: Your Honor, I am lost in that semantic problem myself, but I gather that the sense in which they used the term "cumulative" is that the innocuous fact of racial

imbalance, coupled with an optional zone that could aggravate that racial imbalance between two schools, when looked at together or cumulatively, could be considered a constitutional violation. I think that is the sense in which the court meant to use that term. I think that makes some sense.

QUESTION: And you concede -- you tell me if I'm mistaken in my understanding -- I understood you to concede that the optional zones, at least some of them, with respect to some of the schools, the high schools, some of the high schools, could validly be found to have been violative of the equal protection clause of the Fourteenth Amendment.

MR. GREER: We are not challenging the findings of the trier of the fact, which were the law --

QUESTION: Well, you told us that this --

MR. GREER: -- were the law, that's true. Our position is, and we've set it forth in the brief, there was only one of these that amounted to anything at all, if you take the tables that are attached in the Appendix as to the populations of these various schools, you'll find even that optional zone, which was between Roosevelt and Colonel White High Schools, and existed essentially unchanged during this period except for the addition of two city blocks at one point, affected something like one-half of one percent or one percent of the black students in the entire system.

QUESTION: So you do not concede that the optional

zones,which concededly violated the equal protection clause, resulted in this racial imbalance?

MR. GREER: We certainly do not concede that, and I think I'd fly in the face of the record to suggest it, Your Honor.

I have reserved some time for my rebuttal, if I may, and I would like to take that time now. I'd just like to say one more thing with respect to the optional zones.

The finding of intent here, which we concede and then don't argue with, was that while most of these optional zones were placed there out of perfectly honest and neutral considerations, that, for example, if you even take the one that's a problem, the one between Roosevelt and Colonel White, we've got the Dayton Tire and Rubber Company, we've got Wolf Creek, we've got Railroad Tracks, we had at one time this Dayton Stockyards, that presented some problem for children going to the closer of those two schools.

But the court found that in determining the optional zones, the school board did take into account feelings of the community, whether they wanted it or not, and in that respect some insidious intent may have crept into the decision in these few zones.

But certainly what we don't concede is that there was any meaningful or substantial portion of this district affected.

QUESTION: Well, that would affect, at the most, in your submission, the racial make-up of the student body in no more than two high schools, is that it?

MR. GREER: Three high schools.

QUESTION: Three high schools.

MR. GREER: Because there is also the high school Kiser involved in another one of the optional zones, where there was a finding.

QUESTION: There's a Dunbar in there somewhere, isn't there?

MR. GREER: Dunbar was an optional school which wasn't involved in this finding. Dunbar, at the time this suit was filed, had its own district attendance boundaries just like any other school.

There was a time when Dunbar was an optional school, in the sense that any black student living anywhere in the city could have his choice of attending either the school in his area or Dunbar High School.

QUESTION: When did that practice cease?

MR. GREER: 1962, I believe it was.

QUESTION: How many high schools are there in the Dayton School District?

MR. GREER: There are ten at present.

QUESTION: What's the population of the Greater Dayton Area?

Does the record show?

MR. GREER: I will probably be assassinated by the Chamber of Commerce if I concede that the population of Dayton changes by whatever means that they use to assess it, whether it be the 90-minute market or the exact boundaries of the city. The school population is, at these relevant times, set forth in the Appendix, and I'd have to check it or use my brains that are seated at the table here to give it to you precisely.

QUESTION: Were you served with a copy of the motion for leave to file the brief of amicus?

MR. GREER: I received it in the middle of an opening statement last Friday, Your Honor, yes. And I have no objection to their filing an amicus brief.

QUESTION: It is late, you know.

MR. GREER: I realize it's late, and I have not had a chance to respond to it.

QUESTION: But you do not oppose it?

MR. GREER: No, I do not oppose it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lucas.

ORAL ARGUMENT OF LOUIS R. LUCAS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In answer, first, to the question Mr. Justice Rehnquist asked, I believe the population, at least the figures we had in our brief, is 250,000.

QUESTION: Does that go outside of Montgomery County at all, or is it well within Montgomery County?

MR. LUCAS: I believe the city is entirely within Montgomery County, Your Honor.

QUESTION: How about the school district?

MR. LUCAS: The school district does go beyond the limits of the city, but not beyond the limits of the county.

QUESTION: And this 250,000 population figure you gave us was for what, the school population or the total population of the school district, --

MR. LUCAS: No, that's the city of Dayton.

QUESTION: -- or the population of the city?

MR. LUCAS: That's the city of Dayton, Your Honor.

QUESTION: Of all ages and sexes?

MR. LUCAS: That's correct. The pupil population is 45,000, slightly less than 50 percent of whom are black.

Our argument to this Court is really in two basic parts.

There was in Dayton, Ohio, in 1954 a de jure segregated system, a dual system, and that pre-Brown dual system was never dismantled until the district court finally ordered a systemwide plan of desegregation.

QUESTION: Well, didn't the court find to the contrary?

MR. LUCAS: I think that finding --

QUESTION: They found that there was not a dual system, I thought. As a fact.

MR. LUCAS: Well, I think that the district court's definition of "dual" is probably relevant and it's a definition that was suggested by the defendants. We've referred to it in our brief.

What they suggested was, in order to have a dual system, it had to be required by State law.

QUESTION: Well, didn't the district court find that there was not a dual system?

MR. LUCAS: I think in that context, yes, he did, Your Honor. And I refer to --

QUESTION: Well, isn't it broader than that?

MR. LUCAS: No, sir, I think that the --

QUESTION: Didn't they really find that the dual system had been dismantled?

MR. LUCAS: Your Honor, I think you have to distinguish here between the facts that were in dispute and called for the district court to resolve them, and the facts which were not disputed and which, during this lengthy trial that's been referred to, were not contested in any way. There was no evidence offered to the contrary.

And if I may just quickly summarize --

QUESTION: May I just ask quickly, Mr. Lucas: Dayton doesn't object to the filing of this brief amicus by the United States; do you?

MR. LUCAS: No, Your Honor, we do not.

In Dayton in 1954 you had five schools, which were 100 percent black. There was the Garfield school, which we detailed its establishment, and which was not controverted at the trial, Garfield started off with the black students in a back room and then in an annex in back. When the black population grew, the Garfield school was converted, whites were assigned out, and the faculty was flip-flopped in classic style, so that it was all black.

During that period of time, while there were black students in separate rooms in the Garfield school, or in the annex in back, black teachers were not permitted to teach white children. That was the express stated policy which was a change from the previous policy of the Dayton Board, which was not to hire blacks. That, too, is not in dispute.

QUESTION: What year was this?

MR. LUCAS: That school was established in 1912, I believe, and it continued forward, Your Honor.

QUESTION: But you're speaking as of 1954.

MR. LUCAS: As of 1954, that's correct.

QUESTION: So your response to Mr. Justice Powell is '54, isn't it?

MR. LUCAS: In '54 it was 100 percent black. But its origins obviously go forward.

The Willard school is again another school where the black population increased, where black teachers were not permitted to teach white children, and when a sufficient number of black students was in that school, so that it became crowded in terms of black enrollment, the white students were assigned out.

QUESTION: Can you give us some focus as to time, counsel? As to when these particular events took place?

MR. LUCAS: Garfield and Willard, they are in the brief, Your Honor, and I'm sorry I don't have the handle on that, as I should.

QUESTION: Are you speaking of 1954 or 1975?

MR. LUCAS: I am saying these schools existed in 1954, but how they got to be black schools is detailed in the record and not controverted.

There was no testimony that the flip-flop of faculty did not take place. There was no testimony that the black annex out in back did not exist, and the testimony by live witnesses who were in those schools when, as Mrs. Louise Troy testified, she had been in the system as a teacher for forty years and never permitted to teach a white child. There's no

contradiction of that.

QUESTION: How many opinions of how many courts have intervened since then? That is, in this case. You've had three district court opinions? Have there been?

MR. LUCAS: Well, if you include all the orders, I suppose there are four or five orders that are in the record. There are two, really, opinions, and the third ruling on remedy after the second remand from the Court of Appeals.

What I'm saying to the Court is that these matters were not in dispute. As counsel states, at the time of Brown, there were the black schools.

Now, in Wogaman, this school in 1945 was built in conjunction with the DeSoto Bass housing project, which was a black housing project.

The Dunbar school, which has been discussed, was in existence as a high school through 1962. Now, it served more than the traditional high school grades. At various times it served grades 7 through 12. That school had a black faculty assigned to it, and under Dayton's rules, black teachers could not teach white children; so it was a city wide dual overlapping zone. And again that's not contested, and it's set forth in the opinion of the district court.

QUESTION: And was that true at the time this lawsuit was brought?

MR. LUCAS: That was true at the time the lawsuit

was brought with respect to a new school named Dunbar, that the old Dunbar school was closed in 1962, changed its name and became McFarlane. And at that time two of the previous black elementary schools in that area were closed. When those two schools were closed, they were assigned to the McFarlane, which was the old Dunbar high school, a new Dunbar --

QUESTION: This suit was brought when? 1971?

MR. LUCAS: Yes, that's correct.

QUESTION: And at that time -- I just want to be sure -- are you telling us that at the time this suit was initiated Dayton was operating a dual school system in terms of racial segregation?

MR. LUCAS: That is clearly our position, Your Honor.

QUESTION: And the district court found that it was not, didn't it?

MR. LUCAS: I think as the district court used the term "dual" in terms of mandated segregation, you have to consider the position taken by the defendants, and I think the understanding of the district court of that word "dualism".

The defendants argued in the Court of Appeals in the first appeal that the Brown I duty applied only to those school districts where a dual system was compelled or authorized by statute, and has no applicability where a statutory dual system has never existed. That was the context

that the district court was talking about dualism.

QUESTION: Well, was it -- are you telling us that in 1971, at the time this litigation was commenced, that black teachers were not allowed to teach white children?

MR. LUCAS: No, Your Honor, that was changed as a result of action taken by HEW, where it advised the district that they had racially motivated assignment of teachers and staff, and an agreement was ultimately worked out that resulted in the reassignment of the faculty. In nineteen --

QUESTION: But here, as we've been told, and as I understood it in reading the briefs, that there were three facts found as cumulative constitutional violations.

One, racial imbalance in the schools as de facto; two, the rescision of a resolution by the school board; and three, certain optional attendance zones in some of the high schools. Period. That those were the three.

You're telling us, or do I misunderstand you, that there were really in fact many, many more?

MR. LUCAS: I think there were many more facts found, and I think some of those facts go to make up the pattern of racially identifiable schools that the district court noted and the Court of Appeals noted.

QUESTION: Well, there were racially identifiable schools in terms of some of them being maybe all-black or predominantly black, and others all-white or predominantly

white. That's not argued about, I understand.

MR. LUCAS: Well, it's our position, I think the record is undisputed, that those schools, as of 1954 --

QUESTION: No, we're talking about the commencement of this litigation.

MR. LUCAS: -- as of the time of trial.

Your Honor, I think both in 1954 and at the time of trial.

QUESTION: Well, let's just confine ourselves to this lawsuit. Lots of things went on in the past.

MR. LUCAS: I think this lawsuit -- at the time of trial we had unremedied pre-1954 violations, and a dual system which imposed a duty on the school board from that point forward to disestablish the segregation that was extant at that time. We have continuing --

QUESTION: But the district court did find, and Justice Stewart has asked you this twice and I still don't have your answer to it -- the district court did find that Dayton did not have a dual system, did it not?

MR. LUCAS: The district court --

QUESTION: You are perfectly free to qualify your answer, or respond in any way, but surely you can give a yes or no answer.

MR. LUCAS: Yes, Your Honor, the district court did use those words, and I think that that's what it meant, as I

have already explained to Mr. Justice Stewart. And I didn't mean to avoid your question.

QUESTION: Well, what I understood you to say before, what was meant was a statutorily required dual system.

MR. LUCAS: I think that --

QUESTION: That when they said there was no dual system, that's what they were talking about.

MR. LUCAS: That's correct, Your Honor.

QUESTION: Is that what you -- is that your answer?

MR. LUCAS: That's exactly what I mean, and I think that's exactly what the district court was talking about, because that was the dispute --

QUESTION: That it was in fact a dual, you're saying --

MR. LUCAS: That is correct.

QUESTION: -- a segregated dual school system, but it was not required by any statute or any law of Ohio. Is that it?

MR. LUCAS: That is precisely our position.

QUESTION: There was no law in Ohio, if ever, and certainly not since before the Civil War.

MR. LUCAS: That has been our position, and that is why we did not understand the argument that was constantly presented by the defendants that Brown standards did not apply

and could not refer to any of the Brown cases in analyzing the facts in Dayton and applying the legal standard to those facts, because there was no statutory dual system. We do not see that that is the law or correct application of it.

If I may, the 1954 -- in addition to Dunbar as a citywide school, you had the Miami Chapel school, which was established in 1953. It is undisputed in this record that in 1953 the Miami Chapel school was an all-black school.

So that you had a discreet uncontradicted policy of racial assignment of faculty that applied to every school in the system. That was systemwide segregation. We had a systemwide high school,dual overlapping high school zone in the classic tradition, or blacks at Dunbar.

We had also in 1952 a reorganization, which is characterized in this record as the West Side Reorganization. There you had an expanding black population. In order to provide school space for that population, the defendants contracted the boundaries of the original black schools. They made them tighter boxes, locked them into those boxes and expanded the boundaries of the periphery schools, which already had substantial black enrollments, inward to give them a larger share of that black population.

At the same time they cancelled their open transfer policy, which had permitted whites to get out of any situation where they did not want to stay, but instead

substituted for it a series of optional attendance zones around the West Side schools on the white side of the periphery, allowing whites to get out of those schools.

Simultaneously with that, and in the context of their policy on faculty, they began assigning black teachers to those schools, so that those schools eventually became identified as the new black schools.

QUESTION: When was this?

MR. LUCAS: This happened in 1952, Your Honor.

QUESTION: Aren't we really concerned with what the facts were in 1971 when this lawsuit was brought?

MR. LUCAS: Your Honor, the facts in 1971 are a product of what happened in the establishment of the central black board --

QUESTION: Well, each of us a product of his heritage and of his enrivonment, whether he be a human being or a societal entity. But we're concerned here with what the facts were in 1971 when this litigation was initiated, are we not?

MR. LUCAS: That's correct, and at the time of trial, Your Honor, the Dayton Board had just ended as of '71, the racial assignment, the racially motivated assignment of faculty to schools.

However, the effects of that racially motivated assignment still persisted, because schools were still

identified as white or black.

At the time of trial we had 69 schools, 49 of those schools were 90 percent or more black or white; they had 21 black schools and 28 white schools.

QUESTION: Well, doesn't your black and white school argument depend on an underlying finding that there was a dual school system?

MR. LUCAS: I think what is required is a finding that there was a pattern of de jure segregation at the time of Brown or thereafter, or that the segregation that existed pre-Brown, at the time of Brown, and throughout this period, as detailed in far more detail than I can in this argument -- whether or not that --

QUESTION: Is there any --

MR. LUCAS: -- affected substantially the district so as to shift the burden to it to go forward and demonstrate that the segregation is not its responsibility, and I don't think it met that burden in --

QUESTION: Was there anything unconstitutional, as such, say, in 1926, about a school board segregating on the basis of race?

MR. LUCAS: Yes, Your Honor, there is. Because if it were not, then in 1954 no school district in the South, which had segregated its schools pursuant to State law or, in the North, pursuant to its own will, it would not be

faulted if that same school remained an all-black school in 1971, as it did when this case was brought.

QUESTION: Well, but the laws requiring attendance of only one race at a school would certainly be struck down by Brown?

MR. LUCAS: That's correct. But the fact that it was done in 1929, whether it was done by the action of the school board in segregating that school, in assigning students in a manner which created foreseeably the segregation in that school, would not be excused by the fact it was done in 1929, if the effects of the original assignment persisted today.

QUESTION: But you say then the Act in 1929 was illegal and that the school board, in effect, should have foreseen that 25 years later Brown would have overruled Plessy?

MR. LUCAS: I think that the actions of a school board in segregating students is illegal, whether it was done in 1929 or 1971 or 1977. I think that is the teaching of Brown. I think that is the application of the Fourteenth Amendment. Otherwise, everybody who acted before Brown is excused.

I'd like to detail, if I can,because I think it's particularly important and affects the district in a system-wide way, the facts with respect to faculty in the changing policy.

In 1952 the board changed its policy only slightly,

but did so in such a way, I think, to further maximize the racial insult of that policy.

What it said was that some whites be assigned to Negro schools, where there previously were only Negro teachers, but there would be no assignments of whites to those schools against their will. And said that Negro teachers would be mixed in white schools only where the whites evidence that they are "ready to accept Negro teachers".

That policy persisted in Dayton effectively until the 1969 agreement with HEW, which went into effect in 1971. That sort of systemwide historic policy, that is not disputed was intentional, affects the racial identifiability of every school in the system, it affects the kinds of decisions that were made and is the exact environment for segregation that this Court has talked about in Swann.

The government argues, and I think it tracks the argument in our brief, that there are a number of undisputed facts in the record. In addition to the three specifics, whether they be stated in summary form or be limited to just the words as they appear. And I think you can, I think the district judge was talking cumulatively, and I think the Court of Appeals was speaking in general terms. Not as precise as this Court might like or we might like, but, nevertheless, plainly.

QUESTION: Do you agree with the government's brief?

MR. LUCAS: Yes, we do.

QUESTION: So you disagree with the Court of Appeals?

MR. LUCAS: We think that the Court of Appeals was not as precise as it might have been, and all we think the Court of Appeals --

QUESTION: Well now, what do you mean by that? Do you agree with it or don't you?

MR. LUCAS: Well, I think that the Court of Appeals' decision is not --

QUESTION: Well, I'll put it this way: do you disagree with the Court of Appeals as much as the government does?

MR. LUCAS: Not as much, Your Honor, because we don't read that as --

QUESTION: Well, then, you don't agree with the government.

MR. LUCAS: I think it's a matter of emphasis, Your Honor. We agree basically with the government's position. What we don't agree with is that the Sixth Circuit misunderstood the facts in the record that was before them, the arguments it was presented, and thought that they were only ruling on racial imbalance.

QUESTION: Well, for you to win here, do you have to convince us that the Court of Appeals misunderstood the facts?

MR. LUCAS: No, I don't think I have to convince

this Court that the Court of Appeals misunderstood the facts. I think for us to prevail, we have to show that the judgments and not all of the language or all of the reasoning of the Court of Appeals, but that the judgment they made are supported by the record, the undisputed evidence, and the facts that were found by all of the courts below.

I think the Court of Appeals has reversed the district court in so far as the district court thought that "dual" meant State-imposed, or that there was not de jure segregation; because the Court of Appeals spelled it out. They thought clearly enough when it said, "Look, when we were talking about segregation, we meant de jure segregation." They said that on the second appeal.

QUESTION: Well, what are your -- you disagree with the Court of Appeals to some extent; you think they applied a wrong legal standard?

MR. LUCAS: I think they did not articulate the legal standard or the full basis for their opinion, as clearly as they might, and I think that's what the government is saying.

QUESTION: Well, let's assume for the moment that the Court of Appeals did not articulate the right legal standard, or view the facts in the light of the right legal standard. Wouldn't normally we -- if we agreed with you, wouldn't normally we say what the right legal standard is and remand?

MR. LUCAS: I think that if the district -- if the Court of --

QUESTION: Well, wouldn't we normally do that?

MR. LUCAS: I think that normally this Court, if the Court of Appeals has applied the wrong legal standard, does vacate and remand it for application to the correct legal standard. I don't think that's what happened. I think what the Court of Appeals did was fail to spell out in detail all of the bases for its conclusions.

QUESTION: You say they did apply the right legal standard, but they didn't spell out how they did it?

MR. LUCAS: They didn't articulate it as clearly as it might or --

QUESTION: And they didn't understand the facts very well, I take it?

MR. LUCAS: I think they understood the facts very well. I think they felt that it was not necessary to spell out everything that was admitted in the request for admissions, or everything that the parties were not in dispute about, and therefore required no adversary findings by any court.

I think that the record overwhelmingly supports it, and, as the government points out, you're not going to get a stronger set of facts in a non-de jure state, if you will, upon which a district court can base a judgment. I think that the Court of Appeals has rendered the right decision, and I think

that any arguments t . this sort of plan is a racial balance plans falls on the face of the facts. Whatever terminology problems the district court or the Court of Appeals may have had, they do not support a finding that there was a racial balance argued.

It seems to be a problem if a district judge puts in his opinion a number today, other than the page numbers at the bottom of the page, then he's accused of ordering racial balance; and I don't know what they can do because a balance is between 1 and 100 percent. And if they don't give some guidance to the school boards, the school boards come back and ask for them. They ask for some outlines, some perimeters.

And this, the figures used here, are not pulled out of the air. They are not some professor's theory, they are based on the facts in the system. And, incidentally, the plan actually ultimately ordered by the district court is quite similar to the plan adopted by the original board before the new board came in and cancelled it.

It just took five years of litigation to get the plan that the Dayton Board, after studying itself, -- and the Board members admitted the violations; and their admissions are not out of whole cloth, there's a basis in fact for those admissions. And for us to say that has no effect and no probative value is to say that because a new board comes in, then whatever the old board admitted, whatever statements they

made, whatever policies they declare, have no effect; and I think this Court's opinions teach us otherwise.

QUESTION: And, Mr. Lucas, this decree of the district court -- who was it, Judge Rubin?

MR. LUCAS: Judge Rubin; yes, sir.

QUESTION: -- provided that there not be more than, what, a 15 percent deviation in any school?

MR. LUCAS: Plus or minus. It's really one-third/two-thirds range, and the actual operation of the plan ended up with a broader range; and we specify the statistics, I think it's 44 percent either way.

But, as I say, 1 to 100 is a range, too.

QUESTION: Yes, certainly it is. But basically it was a 15 percent plus or minus in any school?

MR. LUCAS: Thatwas the target, the guidelines to start with, to work from.

QUESTION: And as of a particular precise date or time, there was no continuing --

MR. LUCAS: That is correct. As a matter of fact, --

QUESTION: -- jurisdiction, was there? You make that point, I think, in your brief.

MR. LUCAS: -- the Court of Appeals cautioned against any such interpretation, even though they found no basis for the defendant's suggestion that the court had ordered some sort of annual adjustments or constant super-

vision by a federal court.

And Judge Rubin was very careful to tell the board: "If you've got any changes you want to make, if you've got any problems, if you've got any schools you think should not be included in this plan, if you have any practical problems, you come in and show me."

There was no such motion since the motions that are recited in the record, most of which the court went along with. The only thing he didn't go along with was allowing the board to delay desegregation another three years, to phase it in, and I think that's entirely proper, consistent with the record.

QUESTION: The decree did not provide or envision periodic review to maintain this sort of school population in issue, did it?

MR. LUCAS: I would say that the district court in this case was extraordinarily careful to say he didn't want to be the Superintendent. He went out of his way to tell the defendants that they were going to run the schools, and that he specifically said that he did not require them to maintain something now and forever, or for his lifetime.

There's no such problem in this case, and I think any suggestion based on this record is just out of order, it just doesn't fit the facts.

QUESTION: Do you think the racial balance, 15 per-

cent plus or minus, is compatible with the standards laid down in Swann and reasserted in the first Milliken v. Bradley case?

MR. LUCAS: I think the starting point, which is all it is, is appropriate, it's no different, as we compare it, to the starting point in Swann. And actually it permits and resulted in a broader ranger of the assignments.

What I would --

QUESTION: Well, when you say "racial balance", 15 percent plus or minus, that doesn't sound like the starting point that was dealt with in Swann; that sounds like the target, does it not?

MR. LUCAS: Well, I think we have basically a question of semantics. The district court did not say, "if it ever gets beyond this point you have to come back to 15 percent"; he just said, "Look, this is a guideline, this is a starting point"; and, as a matter of fact, in his last two opinion, he specifically refers to the Swann language. It's not a case where he simply wasn't aware of it. He specifically referred to the Swann language, and cites it in a lengthy footnote, I believe, in his second opinion.

So he knew this Court's rule, and I think he faithfully adhered to it, and the working out of the plan is really the best proof, and I think that's what this Court says in Swann.

I think this Court said, "if we thought that the court had ordered an exact ratio, then we would strike it down." And I think that that's proper. "But we'll look and see what happened, and what the district judge has done, and let's look at reality." It's a desegregated school system, it's by no means racially balanced, the facts are before the court; and I think that the district judge has not in any way suggested some sort of annual reviews or fixed adherence to a rigid racial ratio.

QUESTION: Well, let's go back to Swann a minute. In Swann, as I recall the figures, it was 71/29, and at the early stages of the litigation this was identified as the problem. In the Swann opinion, the Court said that if we thought that he had set as a target to achieve 71/29, that being the ratio of the population of the entire school system, we would reverse if there's no constitutional requirement to do that.

Now, is that relieved when you say, with 71/29, that you can deviate 15 percent, or --

MR. LUCAS: I think all the district judge was really saying, Your Honor, and in as candid a way as possible, and I think the parties understood it this way, is: Look, if you get in that range, you're going to be presumptively okay. If you get outside of that, you've got a problem, what-have-you; what he was trying to do was eliminate a pattern of

substantially disproportionate schools, and if you're talking about disproportionate schools arising out of a constitutional violation, then you have to have some measuring stick. And every school board, I might add, Your Honor, wants one. So they can have a target for their planning.

And when you talk about working it out with buildings, with different capacities, with different enrollments at different grade levels, it never comes out that way.

As we say in our brief, what we have here is not racial balance, we have typical desegregation, and it's working in Dayton, there are no headlines about Dayton. I think the school board has done a good job in trying to make it work, and there are an awful lot of people in that community with a commitment to making it work. And that's why you didn't read about it in the headlines, you didn't have a lot of political posturing imposing it.

And I think there's enough criticism of school boards, and when they do it wrong it ought to be said, and it ought to be said by plaintiffs when they do it right. They finally did here.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have something further? You have a few minutes, six minutes left.

REBUTTAL ARGUMENT OF DAVID C. GREER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GREER: Thank you.

QUESTION: May I ask a question before you commence?

MR. GREER: Certainly, Mr. Justice Powell.

QUESTION: The optional zones have sometimes been referred to as a freedom of choice policy. In the early years after Brown, as I recall, that policy was thought to be compatible with the Constitution.

Do you recall when a Court of Appeals held for the first time that the policy was not valid; and if you do, can you relate that to the creation of the optional zones involved in this case?

MR. GREER: I wish that I could, and specifically I can't. It has been a factor that's been involved in a number of cases, the Detroit case comes to mind, although it was merely one, there were much more serious situations found there.

QUESTION: While you're speaking -- I thought we made the first announcement there.

MR. GREER: I think you're correct.

QUESTION: That wasn't in any Court of Appeals, was it?

MR. GREER: Right. I think you're correct.

QUESTION: I think Green was the first case in this

Court, but my question was directed to the Court of Appeals level.

MR. GREER: I can't take you back past Green, I'm sorry.

QUESTION: Do you know whether any of these optional zones were created after Green was handed down in 1968?

MR. GREER: No, these were all prior to that time.

A few points that I would like to touch upon, that I think are responsive to points that were raised in Mr. Lucas's argument.

First of all, so it will be precise, the date this suit was filed was in April of 1972, rather than in 1971.

In fairness to the finder of the facts in this case, I would like to have it clear on the record as to what his finding was with regard to a dual system. I think there was some question raised as to whether he had some mental confusion and was thinking of dual systems solely in the context of a statutory mandated dual system. I think you will find that that's clearly not the case, and I would refer you to pages 75 and 77 of the Appendix, where he specifically talks in one paragraph about a mandated dual system in the statutory sense, and then goes on in another paragraph to talk about what we're talking about is activities that were segregative, and that at no time was there a dual system of education maintained.

Then again on page 77 he again distinguishes: we

don't deal with a mandated dual system and we don't deal with actions taken on a school-by-school basis, i.e., a Keyes type dual system.

QUESTION: Where are we now? 77 and 78?

MR. GREER: Page 77 of the First Volume of the Appendix, in the third paragraph.

QUESTION: Yes. Third paragraph.

MR. GREER: Now, as to the situations that were cited as to Garfield and Willard, you'll find that the dates there are 1926 and 1933, I believe it is.

As far as assignment of black staffs, those events did occur at these schools after the schools had become black in their composition, as far as the student composition was concerned; those events were 1936 for Garfield, 1936 for Willard, and 1945 to Wogaman. Long, long before this. And, as far as the assignment of faculty is concerned, that had nothing at all to do, as the plaintiffs' own expert, Dr. Green testified, with the community perception of these schools; and of course all occurred several generations prior to the filing of this suit.

The policy as to teachers changed in 1950, and black teachers began -- or white teachers began to be assigned to black or mixed schools. There was a whole change in this policy until a year before this suit was filed. The faculty in the entire Dayton school system was balanced in a system-

wide ratio basis in all of the schools, a year before this suit was filed.

I don't have time, I realize, to go step-by-step through the intent. I would encapsulate it with Voltaire's axiom that "history can be defined as a bag of tricks played by the dead upon the living."

There was no trace of any of these practices at the time this suit was filed, nor, if we go back and inquire into intent, as far as these various practices were concerned, was there any insidious intent at the time the practices occurred. Nor did any of them result in the exclusion of any children from any school because of their race.

QUESTION: Mr. Greer, the district court's decree has been effectuated and is now operative, is it?

MR. GREER: It is in effect, yes.

QUESTION: In other words, there was no stay in this case?

MR. GREER: No stay was granted.

QUESTION: And what was the date of the decree?

MR. GREER: The decree was dated last March, I believe is the date, and then affirmed by the Sixth Circuit in June.

QUESTION: So this is the first school year which is --

MR. GREER: The first school year.

QUESTION: -- in which it's been effectuated.

MR. GREER: And I think Mr. Lucas is correct, that the community here has done a commendable job. I don't think that is necessarily any reason to say that this plan is justified by the Constitution.

QUESTION: Well, it's certainly not a reason for you to lose your case, I suppose.

QUESTION: Mr. Greer, precisely what relief do you ask?

MR. GREER: The relief that I ask in this case, as I think I've stated on the last page of my brief, is that, at this point, this case should be dismissed. That the violations that were found to have been occurred have been corrected, there are no optional zones in this system; the schools that were affected by those zones have either been eliminated or they have been structured so that they reflect the system-wide racial balance.

I think the school board should be free at this point to decide what additional programs they should retain, reject, or modify in their attempt to make this a fine school system.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:36 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -