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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BOARD OF EDUCATION OF OKLAHOMA CITY  
PUBLIC SCHOOLS, INDEPENDENT SCHOOL  
DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,  
Petitioner V. ROBERT L. DOWELL, ET AL.

CASE NO: 89-1080

PLACE: Washington, D.C.

DATE: October 2, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF EDUCATION OF OKLAHOMA :  
CITY PUBLIC SCHOOLS, INDEPEND- :  
ENT SCHOOL DISTRICT NO. 89, :  
OKLAHOMA COUNTY, OKLAHOMA, :  
Petitioner :  
v. : No. 89-1080  
ROBERT L. DOWELL, ET AL. :

-----X  
Washington, D.C.  
Tuesday, October 2, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

RONALD L. DAY, ESQ., Oklahoma City, Oklahoma; on behalf of the Petitioner.  
KENNETH W. STARR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae in support of the Petitioner.  
MR. JULIUS L. CHAMBERS, New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

(10:06 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 89-1080, the Board of  
5 Education of Oklahoma City Public Schools v. Robert L.  
6 Dowell.

7 Mr. Day.

8 ORAL ARGUMENT OF RONALD L. DAY

9 ON BEHALF OF THE PETITIONER

10 MR. DAY: Mr. Chief Justice, and may it please  
11 the Court:

12 This case involves a formerly de jure school  
13 system which eliminated unlawful discrimination through  
14 sustained good faith compliance with the compulsory  
15 desegregation decree and then 8 years subsequent to the  
16 achievement of unitary status was persuaded by intervening  
17 demographic forces and legitimate educational  
18 considerations to curtail compulsory busing in grades 1  
19 through 4 only and reassign those pupils to their  
20 neighborhood schools.

21 Because there are neighborhoods in Oklahoma City  
22 which are not integrated, 11 of 64 elementary schools at  
23 that time became predominantly black. The respondents  
24 challenged the racial disproportionate impact of the plan,  
25 and this chapter of the litigation was opened.

1           This case presents what is perhaps the most  
2 important unresolved question in the area of  
3 desegregation; that is, what is the effect of a binding  
4 declaration that a formerly de jure school system has  
5 achieved unitary status.

6           QUESTION: Mr. Day, how do you define unitary  
7 status?

8           MR. DAY: I define unitary status, Justice  
9 Blackmun, as the Court did, the unanimous Court in Swann  
10 and Spangler; that is, it's a school district that has  
11 dismantled the dual school system and eliminated unlawful  
12 discrimination, including the vestiges of unlawful  
13 discrimination, to the extent practical.

14          QUESTION: Do you think that's what the Court  
15 meant when it used that term?

16          MR. DAY: Yes, sir, I do.

17          QUESTION: No question about it?

18          MR. DAY: No question about it, because the '77  
19 record demonstrates, Justice Blackmun, that respondents'  
20 attorney or plaintiffs' attorney took the position at that  
21 time that jurisdiction could not be relinquished until all  
22 the vestiges of discrimination had been eliminated, and of  
23 course, the district court did relinquish jurisdiction.

24          QUESTION: Mr. Day, did the district court in  
25 1977 assume that the plan would remain in effect in making

1 its unitariness binding?

2 MR. DAY: I believe in 1977 Judge Bohanon did  
3 comment that he did not foresee that his order would  
4 result in the dismantlement of the plan. However, I do  
5 not believe that that was an order which had the effect of  
6 compelling the board to continue to follow the plan.

7 For example --

8 QUESTION: Well, do you think that a school  
9 district reaches that unitary status as soon as the  
10 desegregation plan is in effect?

11 MR. DAY: No. No, Justice O'Connor. Although  
12 a -- the implementation of a plan will create a  
13 race-neutral method of student assignment, Green clearly  
14 indicates that there must be a period of good faith and  
15 sustained compliance, and I do believe that's necessary.

16 In Oklahoma City we had 13 years of that.

17 QUESTION: Well, do you think that in 1978, for  
18 example, in this case that the school district would have  
19 been free to reintroduce neighborhood schools?

20 MR. DAY: Yes. It is our position that the  
21 finding of unitarian --

22 QUESTION: As of that time?

23 MR. DAY: Yes.

24 QUESTION: And the result apparently would be  
25 to, in many of the schools, return it to the conditions

1 that existed when the lawsuit began so many years ago; is  
2 that right?

3 MR. DAY: No, I believe that's incorrect,  
4 Justice O'Connor.

5 First of all, the unitary finding represents  
6 that the dual school system has been dismantled and that  
7 the vestiges of elimination have been eliminated.

8 I would point out that in 1985 Judge Bohanon  
9 expressed no surprise when the board did change the plan,  
10 and that his intent is reflected through that order.

11 I would also point out that when this case was  
12 filed in 1961 we had a true dual system, and all six of  
13 the Green factors were discriminatory in Oklahoma City.  
14 Presently, the only similarity is the composition of the  
15 student body, and this Court has repeatedly stated that  
16 the Constitution does not guarantee any particular degree  
17 of racial balance or mixing.

18 QUESTION: I take it that part of the definition  
19 of a unitary system is a plan that's operated over some  
20 period of time in the unitary status, is it not? It's not  
21 something that's either achieved or not achieved at one  
22 particular moment that we can --

23 MR. DAY: That is correct, Justice.

24 QUESTION: And does that mean that perceptions  
25 are important, perceptions of the community, perception of

1 the students?

2 MR. DAY: Yes, it does. In --

3 QUESTION: So this case is in part about  
4 perceptions?

5 MR. DAY: Yes, it is. In Keys\* the Court stated  
6 that the attitudes of administrators and members of the  
7 community are relevant in determining if segregation has  
8 been eliminated, so that's precisely correct.

9 QUESTION: Mr. Day, may I ask you -- I'm sorry,  
10 did I -- may I ask you a question about -- that always  
11 puzzled me about this case?

12 As I understand it, at the time the district  
13 judge made the finding of unitariness, he did not vacate  
14 the outstanding decree?

15 MR. DAY: That is correct.

16 QUESTION: Was the school board, therefore,  
17 still bound by the decree?

18 MR. DAY: It is our position that they were not.

19 QUESTION: That he in effect vacated the decree?

20 MR. DAY: That that was his intent, yes, Justice  
21 Stevens. We --

22 QUESTION: Well, but if the decree had remained  
23 in effect, it is clear, is it not, that the return to  
24 neighborhood schools for the younger children was a  
25 violation of the decree?



1 MR. DAY: Yes, that would be correct. However,  
2 I would hasten to point out that on an evidentiary  
3 hearing, there could be circumstances where that decree  
4 could be modified --

5 QUESTION: I understand, and it had a provision  
6 in it to go in and ask for a modification. But it also  
7 said in so many words, as I understand it, that you will  
8 not deviate from whatever the name of the plan was without  
9 the prior approval of the court?

10 MR. DAY: Yes.

11 QUESTION: So that one of the questions, I  
12 guess, is whether the decree was still in effect?

13 MR. DAY: Well, we do not believe it was.

14 First, I believe that language was intended to  
15 apply to the board during the remedial phase of the case  
16 when unitary status was being achieved.

17 QUESTION: Well, it doesn't say that, though.  
18 It just says it does not have a termination point within  
19 the terms of the decree itself.

20 MR. DAY: That's correct. May I also state that  
21 our position is based on the rationale adopted by the  
22 Fourth Circuit in Riddick and the Fifth Circuit in  
23 Overton.

24 In each of those cases, unitary status, coupled  
25 with court disengagement, was found sufficient to return

1 total control to the board, and in neither of those cases  
2 did the district court dissolve the decree.

3 Those jurisdictions believed that the  
4 achievement of unitary status coupled with court  
5 disengagement has the effect of rendering the decree  
6 inoperable, and that is the -- that is the understanding  
7 of the Oklahoma City Board when they implemented this  
8 plan. It was also the understanding of Judge Bohanon at  
9 that time.

10 QUESTION: Do you know why he didn't go ahead  
11 and vacate the decree when he made the finding?

12 MR. DAY: I don't believe he thought it was  
13 necessary. In a subsequent opinion, he did state that in  
14 both 1985 and 1987 that when he found the district unitary  
15 in 1977 he certainly intended to return full control to  
16 the board of education at that time. There was no  
17 question about that, and he certainly intended to say that  
18 this district was, indeed, a true unitary district which  
19 had dismantled the dual system and eliminated the vestiges  
20 of discrimination.

21 QUESTION: But does the fact that the schools  
22 became identifiably -- or would become identifiably black  
23 in some neighborhoods under the student reassignment  
24 plan -- does that mean that the Finger Plan didn't work?

25 MR. DAY: No. Your question, Justice Kennedy,

1 is the fact that there are certain neighborhoods that are  
2 not integrated, does that mean the Finger Plan didn't  
3 work?

4 QUESTION: Yes.

5 MR. DAY: No, I don't think so. The fact that  
6 certain neighborhoods in Oklahoma City are not integrated  
7 is as a result of a phenomenon over which this board of  
8 education, and no board of education, has control. We're  
9 speaking of a condition of residential segregation.

10 QUESTION: Well, there was a finding in an  
11 earlier decree, wasn't there, that residential segregation  
12 was in part caused by the de jure violation?

13 MR. DAY: I don't believe that is correct,  
14 Justice Kennedy. What Judge Bohanon did find was that  
15 when the neighborhood school policy was superimposed over  
16 nonintegrated neighborhoods, coupled with the illegal  
17 minority-to-majority transfer policy, that this had the  
18 effect in some cases of creating schools which were  
19 segregated, not neighborhoods.

20 In fact, Judge Bohanon, in 1970, in an opinion,  
21 clearly stated that the Oklahoma City Board of Education  
22 had done nothing to cause or contribute to residential  
23 segregation in Oklahoma City.

24 The issue presented by this case is perhaps the  
25 most important unresolved question in the area of

1       desegregation law. That is, what is the effect of a  
2       binding declaration that a formerly de jure school system  
3       has achieved unitary status?

4               According to respondents, it means very little,  
5       if anything, for in their view a unitary school district  
6       is obligated to continue to labor under the governance of  
7       a desegregation decree and maintain racial balance until  
8       all the neighborhoods in a community are unitary.

9               Based on fundamental principles previously  
10       announced by this Court in the desegregation context, we  
11       believe that unitarianism must mean that the  
12       constitutional violation has been eliminated, and  
13       therefore control over the schools should be returned to  
14       the board of education.

15               We believe that it means the desegregation  
16       decree should be lifted, and at that time the school board  
17       should be returned to the same status as any other school  
18       board, thereby being governed by traditional equal  
19       protection principles.

20               Now, the unitarianist finding in Oklahoma City  
21       came 16 years after this suit was filed. Although the  
22       case was filed in 1961, and the school board first used  
23       busing as an aid to integration in 1965, it was not until  
24       1 year after Swann that a comprehensive plan was  
25       implemented.

1 In 1972, Judge Bohanon ordered the school board  
2 to implement the Finger Plan, which employed the  
3 techniques of pairing, clustering, and massive cross-town  
4 busing to integrate all the schools in Oklahoma City.

5 The board of education appealed that order, and  
6 the circuit affirmed. Thus, under the rationale of  
7 Spangler, it became the law of this case that the Finger  
8 Plan constituted a race-neutral and constitutional method  
9 of pupil assignment.

10 In 1977, Judge Bohanon, pursuant to a motion by  
11 the board, entered his order terminating the case. That  
12 order did find that the school district had achieved  
13 unitariness after 16 years and terminated all further  
14 jurisdiction in the case.

15 QUESTION: May I question the -- I'm sorry.

16 You mentioned the timing going back to '61, but  
17 is it not true that in '72, when he imposed the plan, he  
18 found that up until that date the board had been  
19 recalcitrant and deliberately refused to carry out the  
20 mandate of desegregation, so isn't the relevant period  
21 from 1972 to 1977? Maybe that's enough. But isn't  
22 that --

23 MR. DAY: Justice Stevens, you're exactly  
24 correct. He did find that during the 1960's he was  
25 dealing with a recalcitrant board. That's not to say,

1       however, that the board did not make some accomplishments  
2       towards dismantling the dual system.

3               QUESTION: But they were totally unpersuasive to  
4       him, as of 1972?

5               MR. DAY: That's right, but the prior opinions  
6       in the case demonstrate that, for example, there was  
7       integration in sporting activities, extracurricular  
8       activities.

9               QUESTION: Right.

10              MR. DAY: In other words, that some of the Green  
11       factors were being impacted prior to '72. But I would  
12       agree with you that it wasn't until 1972 that a  
13       comprehensive plan was implemented to dismantle the dual  
14       system.

15              After the school board was found unitary in  
16       1977, it elected to voluntarily continue to follow the  
17       plan, and it did that for 8 more years until a committee  
18       study revealed that demographic changes had rendered the  
19       plan inequitable at the elementary level. It was at that  
20       time that the board decided to implement the neighborhood  
21       school plan for grades 1 through 4 only. It does, to this  
22       day, continue to bus students in grades 5 through 12.

23              Judge Bohanon, who by the way has lived with  
24       this case since its inception, found that this plan was  
25       adopted by the board for legitimate, nondiscriminatory

1 purposes.

2 First, to reduce the busing burdens on young  
3 black children on Oklahoma City. Second, to stop the  
4 threat of school closures in the black community. Third,  
5 to increase the level of parental and community  
6 involvement in the public schools, which had been lacking.  
7 And finally, to give these youngsters more time to  
8 participate in extracurricular activities.

9 Now, Judge Bohanon acknowledged that in the  
10 1960's, as you pointed out, Justice Stevens, this board  
11 was recalcitrant, and he butted heads with the board. But  
12 in his recent decisions he has clearly pointed out that  
13 the present board of education, and the board that was in  
14 power when his plan was implemented, was a totally  
15 different board with totally different attitudes.

16 His findings must be given due deference. He's  
17 lived with this case since 1961. He is most familiar with  
18 the on-the-spot conditions in this case, and his findings,  
19 on this record, must be given due consideration.

20 I would also point out that Judge Bohanon noted  
21 that in Oklahoma City the manner in which pupils are  
22 assigned to schools is no longer determined by race.  
23 Rather, it's determined on the race-neutral method of  
24 where the children live, and Judge Bohanon felt that it  
25 was very important that this school board had implemented

1 a transfer policy -- it's called a majority-to-minority  
2 transfer policy -- which allowed any student in a school  
3 which was racially identifiable to transfer to a school  
4 which was more integrated, and the School District picks  
5 up the cost of transportation in those circumstances.

6 So today, in Oklahoma City, no child is  
7 compelled to attend school by virtue of race, and the  
8 important thing today is that parents of all races have a  
9 choice.

10 Judge Bohanon also found that the school board  
11 had maintained its unitary status from 1977 to date. In  
12 this case, we had three findings of unitariness: one in  
13 1977, one in 1985, and another in 1987, all made by  
14 Judge Bohanon based on the circumstances in Oklahoma City.

15 QUESTION: Mr. Day, do you understand that  
16 unitarianist means both that there no continuing  
17 discrimination and that the vestiges of past  
18 discrimination have been eliminated?

19 MR. DAY: Yes. To the --

20 QUESTION: Or is it rather that unitarianist  
21 means you are now running a system in which there is no  
22 discrimination, but there may or may not be the vestiges  
23 of past discrimination?

24 MR. DAY: It is our position, Justice Scalia,  
25 that once unitary status is achieved, it signifies that



1 unlawful discrimination has been eliminated and the  
2 vestiges have been eliminated to the extent practical.  
3 That was the standard set forth in the Alexander case.

4 We also believe that, since the remedy must be  
5 related to the constitutional violation, that a district  
6 court is obligated in the first instance, when it  
7 formulates the decree, to identify the vestiges so they  
8 may be eradicated.

9 QUESTION: How is the school board injured by  
10 being required to continue to operate the schools in  
11 conformity to the United States Constitution?

12 MR. DAY: The question was how was the board  
13 injured?

14 Justice Marshall, we don't -- we believe that if  
15 this plan remained in effect --

16 QUESTION: (Inaudible) the Constitution, do you?

17 MR. DAY: With all due respect, Justice  
18 Marshall, they do intend and do comply with the  
19 Constitution. They made this change, and I think this is  
20 a very --

21 QUESTION: Well, how are they harmed by it?

22 MR. DAY: Well, they weren't harmed so much, but  
23 the young black students were. You see --

24 QUESTION: Well, are they a party to this suit?

25 MR. DAY: Yes. They made this --

1 QUESTION: Are they are party to this suit?

2 MR. DAY: The young black children?

3 QUESTION: Yes.

4 MR. DAY: Yes, sir, they are. They are the  
5 plaintiffs and respondents.

6 QUESTION: Yes. Well, I'm talking about the  
7 school board. The school board is required to follow the  
8 Constitution --

9 MR. DAY: Yes, sir.

10 QUESTION: And that's all they're required to  
11 do.

12 MR. DAY: Yes, sir.

13 QUESTION: And they object to that?

14 MR. DAY: No, sir.

15 QUESTION: Well, what is --

16 MR. DAY: They believe that because in 1977  
17 there were increased busing burdens on young minority  
18 children, that a change was necessary. They would still  
19 be busing in grades 1 through 4 today if that plan had not  
20 become oppressive at that level. All parties in this --

21 QUESTION: What assurance do I have that the  
22 school board will continue to operate pursuant to this  
23 order?

24 MR. DAY: You have the assurance of the Equal  
25 Protection Clause of the Fourteenth Amendment and

1 traditional --

2 QUESTION: Well, that's what --

3 MR. DAY: Traditional --

4 QUESTION: That's what the order says, but if  
5 you take the order away, what assurance do I have that the  
6 school board will continue to follow the Constitution?

7 MR. DAY: Well, when they achieve unitary  
8 status, they are governed by traditional equal protection  
9 principles. In other words, they may not take any action  
10 which is taken with intent to discriminate on the basis of  
11 race, and if they do, the Fourteenth Amendment authorizes  
12 Federal courts to again receive jurisdiction and remedy  
13 that violation.

14 QUESTION: You'll have to file a new lawsuit.

15 MR. DAY: Yes, sir.

16 Thank you.

17 QUESTION: General Starr.

18 ORAL ARGUMENT OF KENNETH W. STARR

19 ON BEHALF OF THE UNITED STATES, AS

20 AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

21 MR. STARR: Mr. Chief Justice, and may it please  
22 the Court:

23 Over a generation ago this Court handed down its  
24 landmark decisions in Brown v. Board of Education. In its  
25 second decision in that case, the Court made clear that

1 the Federal courts are duty bound to employ their broad,  
2 remedial powers to vindicate the rights of school children  
3 guaranteed by the equal protection clause.

4 Now 35 years after Brown II, literally hundreds  
5 of school districts across the country continue to operate  
6 under Federal court decrees, many of which were entered in  
7 the late 1960's and the early 1970's. Indeed, the United  
8 States is a party to almost 500 such cases across the  
9 Nation.

10 Throughout this long process of desegregation,  
11 this Court and the lower Federal courts have proceeded on  
12 the basis of an assumption. The assumption is that  
13 Federal judicial power terminates when it has achieved its  
14 purpose, and that purpose is when a previously  
15 unconstitutional dual system has been dismantled. That  
16 assumption, we believe, is sound. It was an assumption  
17 expressly contemplated in Brown II itself, where the Court  
18 spoke of the process of federal court supervision being a  
19 transitional one.

20 And this much seems to us clear, notwithstanding  
21 the court of appeals' view to the contrary. But the court  
22 of appeals' error, with all respect, which seems clear  
23 enough, should not obscure the real difficulty that is  
24 confronting the lower courts in these cases; and that is,  
25 as the questions this morning have suggested, when has a

1 unitary system been achieved? That threshold question is  
2 one that we believe deserves to be answered for the  
3 benefit of those hundreds of school districts and for the  
4 guidance of the courts of appeals and United States  
5 district courts.

6 In our view, this Court's decision over 20 years  
7 ago in Green v. County School Board points the way most  
8 clearly. There, the Court, speaking through Justice  
9 Brennan, looked to the six components of a school system  
10 ranging from student assignment and faculty hiring and  
11 staff hiring to physical facilities, extracurricular  
12 activities, and transportation to see whether racial  
13 discrimination has been eradicated root and branch from  
14 the system.

15 How does a system come into compliance with the  
16 Green factors? In our view, the principal way is by the  
17 good-faith compliance with a desegregation plan that has  
18 after all been put in place for the very purpose of  
19 achieving unitariness, of effecting a dismantling of the  
20 dual system.

21 QUESTION: Well, General Starr, how does a  
22 school district eliminate the last vestiges of  
23 discrimination when residential segregation remains a  
24 reality and when at some point in the past the segregated  
25 schools may have contributed to that residential

1 segregation? How do you deal with that?

2 It seems to me that may be the crux of the  
3 problem.

4 MR. STARR: Justice O'Connor, I think Green  
5 itself suggests that factors such as residential  
6 segregation cannot in any meaningful sense be considered a  
7 vestige once -- once there has been good-faith compliance  
8 with a desegregation plan.

9 We look to the components of the school system  
10 over which a school board and school authorities have  
11 control. For obvious reasons, as this Court has noted in  
12 Swann, as it noted more emphatically in Spangler, the  
13 school board has no realistic control over where people  
14 determine to live.

15 QUESTION: Does that mean the vestige can never  
16 be eliminated or that it's not a vestige?

17 MR. STARR: I believe the latter. I believe  
18 that once there has been a desegregation plan that has  
19 been operating on the short side for 3 years -- the Fifth  
20 Circuit's decision in the Youngblood case suggests that as  
21 a minimum -- once that has been in effect for a  
22 substantial period of time, then, yes, I think that the  
23 board has done all that it realistically can as long as it  
24 does not violate the Constitution by any action outside  
25 the plan that might in fact contribute.

1 QUESTION: Mr. Starr, what did the busing in the  
2 period 1972-1988 accomplish?

3 MR. STARR: It certainly accomplished the  
4 dismantling of a school assignment or student assignment  
5 plan that was infected with invidious racial  
6 discrimination. It took down, in effect, the signs over  
7 school doors that labeled schools on racial grounds. It  
8 also, by virtue of other factors as well, contributed to  
9 what the district judge found to be very substantial  
10 residential integration. But there are --

11 QUESTION: And yet, we have 11 schools that will  
12 become black again, and they're the same schools that were  
13 black before. So it would seem to me either that busing  
14 didn't work at all or that it has to continue.

15 MR. STARR: Well, I think it worked in the sense  
16 of dismantlement. That is to say, it took the official  
17 sanction of the State's imprimatur away from that school,  
18 and there are now assignments on the basis of residence  
19 and not race, and coupled -- and I think this is  
20 important, this Court emphasized its importance in  
21 Swann -- with a majority-to-minority transfer program  
22 which assures that any school child in Oklahoma City can  
23 attend another school. No one is assigned on grounds of  
24 race.

25 And I think ultimately the difficulty with, if I

1. may say so, undue emphasis upon the numbers is that, first  
2 of all, it goes beyond, quite beyond, what Swann itself  
3 contemplated. It contemplated numbers as a starting point  
4 in fashioning a desegregation plan, not at the end of the  
5 process. That starting point in Oklahoma City was 18  
6 years ago.

7           Counting by race is something that is a very  
8 serious act for this State to do, and it should not, in  
9 fact, do that once a desegregation plan has been in effect  
10 and has, in fact, been efficacious.

11           QUESTION: Of course, it's still doing that  
12 here, isn't it? One of the -- one of the remedies that  
13 the school board has continued to apply is the majority  
14 transfer program. That is to say, if you happen to be of  
15 the race that is in the majority in a particular school,  
16 you can transfer to a school in which your race is not in  
17 the majority.

18           MR. STARR: That is true.

19           QUESTION: Is that -- is that unlawful, in your  
20 view?

21           MR. STARR: It is not.

22           QUESTION: Well, then what you just said is  
23 wrong.

24           MR. STARR: No, I don't think so, with all due  
25 respect.



1 I think what this Court was emphasizing in Swann  
2 is the importance of, in fact, dismantling schools that  
3 have been racially identifiable not by virtue of  
4 demographics but by virtue of State action, State action  
5 assigning school children by virtue of their race.

6 With respect to majority-to-minority transfer  
7 provisions, that is a decision that parents make on  
8 their --

9 QUESTION: General -- General Starr, do I  
10 understand you correctly that in Oklahoma City the  
11 dismantling was done by putting it on residence rather  
12 than race but the poor Afro-American kids were still in  
13 the same school?

14 MR. STARR: Justice Marshall --

15 QUESTION: The dismantling was in changing the  
16 reason? Is that your position?

17 MR. STARR: It's not, and if I failed to be  
18 clear I do want to be clear on this point. It's  
19 fundamental.

20 The dismantling occurred by virtue of the  
21 substantial good-faith compliance with a desegregation  
22 plan that was fashioned in response to this Court's  
23 mandate in Green to fashion a plan that will work and will  
24 work now, and that --

25 QUESTION: Does school stay the same? Does it

1 still stay a Negro school?

2 MR. STARR: Not by virtue of State action.

3 QUESTION: But does it still remain a segregated  
4 school?

5 MR. STARR: By virtue of residential  
6 segregation, it does.

7 QUESTION: Then it's a still a segregated  
8 school, and you don't think segregation is  
9 unconstitutional?

10 MR. STARR: With all respect, Justice Marshall,  
11 that is emphatically not our position.

12 Our position is that any form of State-imposed  
13 segregation runs plainly afoul of the equal protection  
14 clause, that --

15 QUESTION: Thank you, General Starr.

16 Mr. Chambers, we'll hear now from you.

17 ORAL ARGUMENT OF JULIUS L. CHAMBERS

18 ON BEHALF OF THE RESPONDENTS

19 MR. CHAMBERS: Mr. Chief Justice, and may it  
20 please the Court:

21 The principal issue involved in this case is  
22 whether the Oklahoma City School District can now  
23 re-segregate 10 black elementary schools that are located  
24 in a black residential area the district court found was  
25 created by State action, including the practices of this

1 school district.

2 QUESTION: In saying that that's the issue,  
3 you're using the word segregate in an unusual sense. It  
4 is the fact, isn't it, that any of the black children who  
5 are in those neighborhood schools can choose to go to  
6 different schools if they wish?

7 MR. CHAMBERS: No. Your Honor, if you look at  
8 the plan itself, the majority-to-minority transfer  
9 provision provides that one can go to only a designated  
10 school, and if the student selects that school and is  
11 selected the board will provide transportation. One can  
12 request transfer to another school and provide his or her  
13 own transportation.

14 That is not the type of free, open  
15 transportation that the Court is -- that we are talking  
16 about.

17 Additionally, Your Honor, we have some major  
18 problems with the majority-minority transfer provision as  
19 a means for correcting past and present discrimination.  
20 This Court (inaudible) transfer provisions that were  
21 designed -- free transfer provisions that were designed as  
22 a means for desegregating schools. It simply doesn't  
23 work. And we have testimony in the record here that  
24 nobody expects this majority-majority -- majority-minority  
25 transfer provision to correct the segregated schools we

1 have in this residential area.

2 QUESTION: Was that testimony accredited,  
3 believed by the district court? Is there some way to  
4 tell?

5 MR. CHAMBERS: Well, I'm not sure, Your Honor,  
6 but there's no way -- there's nothing else that would  
7 support a court finding that the majority-minority  
8 transfer provision will correct the segregation of the  
9 schools in -- in this residential district.

10 QUESTION: But you don't know whether the  
11 district court believed or disbelieved, though, the  
12 witness you referred to?

13 MR. CHAMBERS: Oh, Your Honor, I think that in  
14 the record there's no finding by the court one way or the  
15 other in terms of -- of whether this provision would  
16 correct the past discrimination. Of course, that one  
17 could transfer out. But the Court, looking at the record,  
18 will see that there are limits to which one can request  
19 transfer and also can see that no one expects -- the board  
20 will contend that it would desegregate the schools.

21 The practical effects here, Your Honor, are that  
22 you don't have the accommodation at these schools to  
23 accept all the students who would be able to transfer if  
24 you were desegregating those schools.

25 QUESTION: Of course, the main reason it might

1 not solve the problem is that the parents would rather  
2 have their children go to the neighborhood school --

3 MR. CHAMBERS: Your Honor --

4 QUESTION: -- which they participate in, and  
5 which they can watch and which they can have some voice in  
6 running.

7 MR. CHAMBERS: We think Swann demands where we  
8 have a segregated school system like we have in Oklahoma  
9 City, that the board take steps affirmatively to  
10 desegregate those schools. We think that comes from  
11 Green, and we think the Court made that clear in Swann.  
12 And we do not think it's appropriate to leave it here  
13 where we have returned by this school district to the same  
14 segregated schools that were involved when we were  
15 litigating this case in 1961 --

16 QUESTION: Once again, you're using segregated  
17 to mean the schools that -- that happen to have a majority  
18 or almost a totality of one race but in which anyone who  
19 is in the neighborhood of any race can go, and you call  
20 that a segregated school.

21 MR. CHAMBERS: Yes, Your Honor, because we have  
22 the segregated community that the State helped to create.

23 QUESTION: Well, is it a segregated community?  
24 Can anybody move into that community or move out of that  
25 community?

1 MR. CHAMBERS: Your Honor, we have testimony on  
2 record that no one expects whites to move into this  
3 district.

4 QUESTION: Well, that does not mean that  
5 it's -- I thought segregated meant that -- you know,  
6 segregated means you couldn't move there unless you were -  
7 - unless you were white.

8 MR. CHAMBERS: Segregated meant that --

9 QUESTION: You couldn't use that room unless you  
10 were white. That's segregation.

11 MR. CHAMBERS: Your Honor, segregated means that  
12 the board is pursuing practices which perpetuate racially  
13 segregated schools, and that's what we have here in  
14 Oklahoma City, and that's what -- you cannot find these  
15 schools not segregated if you apply Swann, if you apply  
16 Green.

17 QUESTION: Well, what definition do you use of  
18 segregated, Mr. Chambers?

19 MR. CHAMBERS: Schools that have been created  
20 with a racial identity through practices of a State.

21 QUESTION: And so you -- you say that a school  
22 today in Oklahoma City if it has majority black students  
23 at it, what else does it need to be segregated under your  
24 definition?

25 MR. CHAMBERS: Well, if the past practices of

1 the board created, perpetuated that racial identity, that  
2 is, in my definition, a segregated school.

3 QUESTION: Well, sir, assume there's no doubt  
4 that the schools were segregated by law at one time.

5 MR. CHAMBERS: That's correct, and there's no  
6 doubt that they -- that segregation was perpetuated by  
7 practices of the board.

8 QUESTION: Well, so even though there are no  
9 racial restrictions on the attendance at schools in  
10 Oklahoma City, you say it's segregated because, what,  
11 because there are a majority of black students attending  
12 now?

13 MR. CHAMBERS: I'm saying it's segregated  
14 because the vestiges of the past practices of the board  
15 continue to be active today so that the board's practices  
16 in drafting a student assignment plan on that residential  
17 area perpetuates the racial identity of the schools.

18 QUESTION: Are you free to argue that? I  
19 thought the finding of unitariness was a finding that  
20 there are no vestiges.

21 MR. CHAMBERS: Your Honor, I would like to  
22 address that.

23 QUESTION: And that's -- and that's res  
24 judicata. You didn't appeal that.

25 MR. CHAMBERS: Well, I'd like to address both of

1 those issues.

2 First with respect to -- thank you.

3 First with respect to whether the 1977 order  
4 found a unitary system and directed that the (inaudible)  
5 be dismissed, I asked the Court to look at the -- that  
6 order itself. The court said simply it found that through  
7 the use of the Finger Plan the board had desegregated  
8 students and teachers and had eliminated other  
9 discriminatory practices in the system.

10 The board did not ask the court to dismiss the  
11 injunction. The board came in and promised that it would  
12 continue to use the Finger Plan because everybody knew  
13 that because of these practices of the past to permit the  
14 board to go back to a neighborhood zone would simply  
15 resegregate the elementary schools. So when the court  
16 overruling it said it had no reason to believe that the  
17 board would now abandon the Finger Plan.

18 So we don't have a court in 1977 finding a  
19 unitary system in the sense that we would define and think  
20 a unitary system should be defined. We certainly do not  
21 have the court dismissing the injunction in 1977, so that  
22 injunction remains in effect: continue to use the Finger  
23 Plan.

24 And in 1987 when the court was looking at the  
25 system and said that the system was unitary, it again, in



1 our view, used a patently insufficient definition for  
2 unitary. It said that because the board had followed the  
3 Finger Plan, which it had found in 1977 had produced the  
4 unitary system, it found that in its view some of the  
5 vestiges had -- had -- had been attenuated. But yet it  
6 looked at this black residential area, and it could not  
7 find that the vestiges there had been attenuated.

8 We had, then, clearly, vestiges of the past that  
9 continue to permit, perpetuate a segregated system in --

10 QUESTION: Didn't the district court make a  
11 finding, though, on whether the school district was  
12 responsible for the residential segregation?

13 MR. CHAMBERS: Yes, it did, Your Honor.  
14 Contrary to its earlier findings in 1963 and 1965, it said  
15 in over 25 years it found the board hadn't done anything  
16 to perpetuate this residential segregation. Yet, in 1965  
17 it found specifically that because of State law and board  
18 practices this residential segregation -- segregated  
19 system -- segregated area was created.

20 So certainly --

21 QUESTION: What was its later finding?

22 MR. CHAMBERS: It said it found that the board  
23 had not contributed to that residential segregation.

24 QUESTION: But it's your position that by  
25 adopting the neighborhood assignment plan this really

1 reinstates matters to where it was, say, in 1966 before?

2 MR. CHAMBERS: That's correct in this district,  
3 Your Honor.

4 QUESTION: And then it follows that busing over  
5 all these years has done almost nothing to eliminate the  
6 causes and the effects of segregation?

7 MR. CHAMBERS: I think it has. It certainly  
8 first has countered --

9 QUESTION: Well, if the neighborhood pattern is  
10 just the same and if your goal is to affect the  
11 neighborhood pattern, then what's busing accomplished?

12 MR. CHAMBERS: Your Honor, the injunction was  
13 designed to -- to require the board to address those  
14 practices that cause and perpetuated a residential --  
15 racially segregated system.

16 QUESTION: I understand.

17 MR. CHAMBERS: And that's all the order at that  
18 stage can do. It can direct the board to not create and  
19 to not perpetuate a segregated system. The order may or  
20 may not eventually eradicate all vestiges of past  
21 discrimination. But until those vestiges are removed it's  
22 our position that Swift and Swann require that that  
23 injunction remain in force.

24 QUESTION: Well, if 100 years from now in  
25 Oklahoma City there are still some residential patterns

1 that have -- show predominantly black neighborhoods and  
2 predominantly white neighborhoods, does this order have to  
3 remain in effect all that time and on into the next  
4 centuries?

5 MR. CHAMBERS: Your Honor, we think the order  
6 should remain and must remain in force until all vestiges  
7 have been eliminated, which would cause resegregation even  
8 through use of a racially neutral attendance plan.

9 If there are --

10 QUESTION: (Inaudible).

11 MR. CHAMBERS: Well, yes, but it depends on the  
12 extent to which segregation would be reinstated by that  
13 residential segregation. Here we have 40 percent of the  
14 black students in the elementary grades now in segregated  
15 schools, and it's because of that that we think that the  
16 injunction should remain in force.

17 QUESTION: What do you -- I don't understand  
18 your answer to Justice Kennedy's point that if -- if a  
19 quarter century of busing hasn't -- hasn't made a dent in  
20 that, what reason is there to believe that the next  
21 quarter century is -- is -- is going to make a dent in it?

22 MR. CHAMBERS: Well, Your Honor --

23 QUESTION: And if there's no reason to believe,  
24 why is it justifiable as a -- as a -- as an injunction  
25 from the Court?

1 MR. CHAMBERS: Why is the injunction justified?

2 QUESTION: Yeah. I mean, you know, you don't  
3 direct them to do things that are useless, and if, as you  
4 tell us, 25 years has produced nothing --

5 MR. CHAMBERS: I didn't say it had produced  
6 nothing. I said it had certainly countered the  
7 residential segregation that the court was trying to  
8 address.

9 QUESTION: While it's in effect, but as soon as  
10 it's gone you say the vestige returns. It hasn't been  
11 eliminated.

12 MR. CHAMBERS: That is correct, Your Honor.

13 QUESTION: Well, then it is not useful in  
14 eliminating the vestige.

15 MR. CHAMBERS: It's certainly useful in  
16 integrating the schools, and that's what we're about in  
17 Brown and the cases that follow Brown. The Court is  
18 talking about how do we ensure that black children are not  
19 now going to be relegated to a black segregated school,  
20 and what the Court did in 1972 was to direct a plan that  
21 would remove barriers that prohibited busing --

22 QUESTION: You do not regard this, then, as a  
23 transitional remedy, which is what it was originally  
24 described at when it was adopted. You -- you envision it  
25 as a permanent remedy, that it -- it eliminates the

1 vestige as long as it is in effect; and once it's taken  
2 away, the vestige comes back. Therefore, you say it's a  
3 permanent -- a permanent remedy.

4 MR. CHAMBERS: Your Honor, I think the plan is  
5 designed to correct a constitutional violation. We have  
6 no way of deciding how long that plan has to be in effect,  
7 and as long as those vestiges are there which permit  
8 resegregation, if you decide that we can't continue to  
9 correct that, you tell us that we can go back to the  
10 period before Brown. That is not what we think is here.

11 QUESTION: Or adopt other remedies that -- that  
12 won't require perpetual supervision of democratic  
13 processes by courts. That's not how busing was originally  
14 envisioned.

15 MR. CHAMBERS: Your Honor, if -- well, I think  
16 busing was envisaged because the court felt it was  
17 necessary to use that remedy to correct this intransigent  
18 segregation of schools.

19 And so here, if there is some other  
20 alternatives -- and there may be. We're not suggesting  
21 that the Finger Plan is the only one that would correct  
22 this past -- for this past discrimination.

23 QUESTION: Mr. Chambers, you referred to the  
24 Swift case, and, of course, the court of appeals relied  
25 heavily on that. You think that principle is applicable

1 here, that the injunction against -- what was it, meat  
2 packers there -- should be treated in the same way as the  
3 injunction against the school board here? You have to  
4 show a grievous wrong, unforeseen conditions in order to  
5 set aside the decree?

6 MR. CHAMBERS: Yes, Your Honor. I think that  
7 the Swift standard is applicable in school desegregation  
8 matters just like it's applicable generally in inequitable  
9 cases.

10 QUESTION: You don't think there should be any  
11 difference in -- because of the fact that there is  
12 presumably a preference for local regulation of education,  
13 other things being equal, whereas I don't know there's any  
14 preference for meat packers.

15 MR. CHAMBERS: Your Honor, I think that when the  
16 court, as this Court has directed, the district court  
17 begins to design a remedy, it takes into consideration  
18 that it's ordering a local public school district to do  
19 something. Those factors are taken into consideration at  
20 that time, and, yet, the court knows that what it is  
21 directing is necessary to correct a constitutional  
22 violation.

23 Now we know of no reason why we should apply a  
24 lesser standard than in Swift.

25 QUESTION: Well, do you -- do you think Swift is

1 consistent with the idea that when the violation has been  
2 cured it goes back to local control?

3 MR. CHAMBERS: Yes, sir. I'm saying that, as I  
4 think the Tenth Circuit pointed out, once you achieve the  
5 objectives of Green and Swann, then the court -- there's  
6 no need for the injunction.

7 QUESTION: What did you mean -- I -- what did  
8 you mean by your statement in your brief that -- it says,  
9 "Here, it was petitioner's school board that unilaterally  
10 without notice or permission abandoned part of a school  
11 plan that had effectively and permanently achieved full  
12 integration"?

13 And there's another statement, "Here, the school  
14 board itself acted unilaterally to reverse the pupil  
15 assignment plan that had made the system unitary."

16 Now, what did you mean by those statements?

17 MR. CHAMBERS: Okay. First, Your Honor, we  
18 meant that the Finger Plan was necessary in order to  
19 achieve integration of the schools.

20 QUESTION: Well, you say that it had achieved.

21 MR. CHAMBERS: Well, it had achieved as long as  
22 they were operating with the Finger Plan.

23 QUESTION: Well, obviously it had effectively  
24 and permanently achieved full integration and that it had  
25 made the system unitary.

1 MR. CHAMBERS: We were --

2 QUESTION: What did you mean by unitary?

3 MR. CHAMBERS: There, we were talking about  
4 unitary in the sense that with that plan in effect, it  
5 integrated the schools and removed the vestiges of the  
6 past which would, though --

7 QUESTION: So you say --

8 MR. CHAMBERS: Except for housing, Your Honor.

9 QUESTION: You do -- you do agree, then, that  
10 the plan had made the system unitary but that you just  
11 can't abandon it if it means going back to black schools?

12 MR. CHAMBERS: Your Honor, it doesn't mean that  
13 it was unitary in a sense that all vestiges of past  
14 discrimination have been eliminated.

15 QUESTION: Well, you said it was unitary.

16 MR. CHAMBERS: I was using that in the sense  
17 that the plan was countering the -- the continuing effects  
18 of the past. Not that all vestiges of discrimination --

19 QUESTION: By the way, what -- what had happened  
20 during the life of the Finger Plan residentially? Had  
21 there been a lot of demographic movement in the city?

22 MR. CHAMBERS: There had, Your Honor. There had  
23 been a number of black families who had moved out of the  
24 residential area we are complaining about to other parts  
25 of the city.



1 QUESTION: And --

2 MR. CHAMBERS: But --

3 QUESTION: And had whites been moving, also?

4 MR. CHAMBERS: Whites had been moving, had been  
5 moving to areas in the city and to the suburban areas --

6 QUESTION: Well, did you feel at the time that  
7 in 1988, 1987-1988, do you think that the Finger Plan was  
8 still an effective instrument to achieve your end? I  
9 thought you wanted it changed yourself?

10 MR. CHAMBERS: We did. We wanted to modify the  
11 Finger Plan.

12 QUESTION: Why did -- why did you want it  
13 modified?

14 MR. CHAMBERS: There are two reasons.

15 QUESTION: What had happened?

16 MR. CHAMBERS: Okay. First, under the Finger  
17 Plan there was -- the black students were required to be  
18 bused for the first 4 years and then white children were  
19 bused for 1 year. That created an inequity in terms of  
20 the burdensharing of students for desegregation in  
21 elementary schools.

22 Second, the Finger Plan provided for a stand-  
23 alone school once a neighborhood became sort of racially  
24 mixed, and if that was implemented it would mean that the  
25 schools that were becoming racially mixed, which were very

1 near the black residential area, would then become stand-  
2 alone schools so that black children would be bused  
3 further from the central core area to the outlying areas  
4 where the schools were not so mixed.

5 All that was required to accommodate this change  
6 was a change in the grade structure and the elimination of  
7 the stand-alone provision. There was no need to abandon  
8 the plan, and that's why we feel that the board and the  
9 court, district court, went too far in modifying --

10 QUESTION: So basically, you think that the  
11 district court in a situation like that should modify its  
12 desegregation plan in order to keep up with demographic  
13 movements that might result in blacker schools or whiter  
14 schools?

15 MR. CHAMBERS: No. We're talking about  
16 demographic movements that might result in inequities. In  
17 a plan that is directed, Your Honor, nobody expects people  
18 to remain static. We all know that there will be changes,  
19 and we are not asking this Court or any court to follow  
20 behind demographic changes in order to try to maintain a  
21 racial balance. You've decided that that is not what  
22 should be done.

23 What we are suggesting, though, is that this  
24 board not revert to a plan that will reinstitute the  
25 discriminatory practices of the past.

1 QUESTION: Mr. Chambers, would it make any  
2 difference in your view if the transfer provisions were  
3 fully adequate so that any pupil wanting to get out of a  
4 school could do so? Does that make a difference?

5 MR. CHAMBERS: Your Honor, it would not solve  
6 the problem.

7 First of all --

8 QUESTION: In other words, you think there must  
9 be forced busing for students who do not want to be bused?

10 MR. CHAMBERS: I think there must be some  
11 pairing and clustering with the schools, with  
12 transportation provided if that is necessary, in order to  
13 accommodate desegregation or the maintenance of  
14 desegregation of these elementary schools.

15 I think as the district court pointed out, look,  
16 we're talking not just about the 40 percent of the black  
17 students, we're talking about 14 to 21 white schools. So  
18 we have a substantial number of students in the system now  
19 attending racially identifiable or racially segregated  
20 schools.

21 We transported students under the Finger Plan.  
22 It did create a problem. We were able to do it. So it  
23 makes no -- it creates no problem now to accommodate  
24 maintenance of integration in these schools.

25 And going -- I'd like to address briefly the

1 justification the board offered for moving to this plan.  
2 It said that there were educational objectives. It said  
3 it was going to increase parental involvement. It said it  
4 was going to increase community involvement. It said that  
5 it was going to institute an equity program to improve the  
6 educational program, and it had the majority-minority  
7 transfer.

8 Your Honor, neither of these or all of them  
9 collectively do not justify this board resegregating 40  
10 percent of its black elementary students. Additionally,  
11 as the circuit court pointed out, there are questions  
12 about the effectiveness of these programs, and all of them  
13 can be implemented in a desegregated setting. We could  
14 have the quality education program in a desegregated  
15 setting. We could have parental involvement. We could  
16 have community involvement, and we could accommodate all  
17 of these objectives in maintaining the schools, the  
18 desegregated schools. All of them, we submit, do not  
19 justify resegregating 40 percent of the black children in  
20 the system.

21 QUESTION: Was the board's determination of  
22 parental involvement based on the fact that the parental  
23 involvement would be much more likely if there were  
24 neighborhood schools?

25 MR. CHAMBERS: The board said that, and, Your

1 Honor, in fact there was a finding of the district court  
2 that that had helped to promote parental involvement.  
3 But --

4 QUESTION: So then your last summary was not  
5 quite consistent with the finding of facts by the district  
6 court in that one respect, it seems to me, counsel.

7 MR. CHAMBERS: Well, Justice Kennedy, the  
8 problem is I'm saying that these things could have been  
9 done; that is, you could have promoted parental  
10 involvement with desegregated schools. The court didn't  
11 find that you couldn't. The court found that it helped to  
12 promote, according to the court, parental involvement by  
13 having neighborhood schools.

14 QUESTION: Can I ask you to help me out? Do you  
15 suppose there's a city or town in the country where there  
16 are -- are predominantly black schools and predominantly  
17 white schools who wouldn't be vulnerable to a  
18 desegregations case?

19 MR. CHAMBERS: Yes. What --

20 QUESTION: Well, are there cities in the country  
21 where there are predominantly black schools and white  
22 schools where you could not successfully claim that  
23 it's -- that it's the result of State action?

24 MR. CHAMBERS: Well, I -- you know, Your Honor,  
25 there may be. I think this Court has decided that de

1 facto segregation will not warrant judicial intervention,  
2 and there are some districts, the Court -- some lower  
3 courts, I don't recall this Court -- have held were not  
4 segregated by State action.

5 So I -- I --

6 QUESTION: But you say -- you say Oklahoma City  
7 should not be treated like one of those cities?

8 MR. CHAMBERS: Your Honor, it's clear -- no, it  
9 should not. Oklahoma City clearly had State law requiring  
10 segregation of students.

11 QUESTION: Well, the argument is, of course,  
12 that -- is that official segregation is a thing of the  
13 past and this has achieved unitary status, and Oklahoma  
14 City ought to be -- ought to be treated with a city with  
15 de facto segregation.

16 MR. CHAMBERS: Your Honor, I submit that there  
17 are vestiges of segregation still remaining in Oklahoma  
18 City which bars the Court from considering Oklahoma like  
19 this de facto situation we're talking about.

20 Second, Your Honor, in this instance I submit  
21 that however you define unitary you should not permit  
22 Oklahoma City or any other school district like Oklahoma  
23 City with this history of de jure segregation to  
24 reinstitute the same assignment practices that caused  
25 segregation in the past.

1           What we have here is not just a system that was  
2 segregated by State law implementing a plan that  
3 eliminated some vestiges and then go on to some other  
4 assignment system that permits some racial identifiability  
5 of schools.

6           We have a school district that is incorporating  
7 its plan on the same practices that it used before 1972  
8 that caused segregation, and so --

9           QUESTION: Well, not really. They -- it's not  
10 against the law for blacks and whites to go to school  
11 together anymore in Oklahoma City.

12          MR. CHAMBERS: That's correct.

13          QUESTION: Well, that was the practice before,  
14 and that isn't there anymore.

15          MR. CHAMBERS: That is not there, and there's  
16 also --

17          QUESTION: Well, there a lot of other --

18          MR. CHAMBERS: I'm sorry, Your Honor.

19          QUESTION: You say that they're still back to  
20 their -- up to their same old tricks. Well, that isn't  
21 really so, is it?

22          MR. CHAMBERS: Well, Your Honor, there have been  
23 changes in teachers' assignments. There have been changes  
24 in some racial mix of students in other schools in the  
25 system, but we have gone back to the same geographic zones

1 that we had before 1972. We are using the same black  
2 residential area to confine students in these nine schools  
3 or 10 schools. That's what I'm talking about.

4 QUESTION: But you're operating in an  
5 environment in which any family, assuming the economic  
6 ability, can move to any district in the city and go to  
7 any neighborhood school that it wants, and that is  
8 different.

9 MR. CHAMBERS: Your Honor, that is a change --

10 QUESTION: And that assumes the ability to  
11 change, which is a difficult problem.

12 MR. CHAMBERS: Yeah. That -- that -- that is a  
13 change in what the law was in 1972.

14 QUESTION: And also the transfer policy, so that  
15 any student in a racially segregated residential area can  
16 transfer out on request. That also would be some  
17 difference.

18 MR. CHAMBERS: It would be some difference.

19 But again, what we have is a plan that, as the  
20 record now shows, perpetuates black -- black segregated  
21 schools in the same schools we had before 1972. Even with  
22 all the changes that the Court has alluded to, we still  
23 have nine black segregated schools in this black  
24 residential area.

25 QUESTION: Just continue to note my objection to



1 the use of the word segregated in that context. There --  
2 there are schools that do not have integrated student  
3 populations in the sense of being the mixed races, but  
4 they are not segregated as I understand the word  
5 segregated. You acknowledge that anybody of any race can  
6 go to those schools if he's in the neighborhood.

7 MR. CHAMBERS: If the person lives in the  
8 neighborhood, then one can go to that school. It's just  
9 that I'm using a different definition from the Court in  
10 terms of segregation, and I think that my definition is  
11 really appropriate because it points out what is really  
12 happening with the practice.

13 QUESTION: Mr. Chambers, can I ask you one  
14 question? I want to be sure on your position on this.

15 Your opponents take the position that the decree  
16 was, in effect, vacated and no longer binding on the  
17 school board after the '77 finding. Do you agree with  
18 that?

19 MR. CHAMBERS: No, Your Honor.

20 QUESTION: What do you -- what do you say in  
21 response to your opponent's argument that the judge's  
22 understanding, the parties' understanding was that the  
23 decree would no longer be in effect?

24 MR. CHAMBERS: Your Honor, we -- we'd point out  
25 that -- that first the board didn't ask for a dissolution

1 of the injunction. Everybody knew in 1977 that that order  
2 had to remain in effect in order to maintain desegregated  
3 schools. And so when the court entered the order and  
4 dismissed the case no one expected the board was going to  
5 abandon that plan. We all expected that this plan would  
6 continue, and we knew it had to. So we didn't have a  
7 court really dismissing. It was only later when the court  
8 told us it meant to dismiss the order when it also said it  
9 found a unitary system.

10 But then we -- we have challenged that, and that  
11 goes to the second question you raise. We were not bound  
12 by any determination in '77 if that was supposed to be a  
13 unitary finding which was supposed to dissolve that order.  
14 We -- if we had -- if we were to be bound, we would have  
15 had an opportunity to litigate that issue. We didn't have  
16 an opportunity to litigate that issue.

17 And so if that is to be the determination by the  
18 Court, we ought to have a chance to go demonstrate it.  
19 And so we contend that the order was not designed to  
20 eliminate the injunction and --

21 QUESTION: What about in '85 and '87?

22 MR. CHAMBERS: We have appealed that, Your  
23 Honor. There was a decision, a finding by the court, and  
24 we contend that finding was clearly erroneous in 1985 and  
25 1987.

1 QUESTION: What finding? You mean --

2 MR. CHAMBERS: The unitariness findings.

3 Your Honor, if the Court please, I was in high  
4 school when this Court --

5 QUESTION: What do you think? Do you think the  
6 court of appeals addressed the unitary issue?

7 MR. CHAMBERS: Did it address the unitary -- it  
8 did, Your Honor.

9 QUESTION: What did it hold?

10 MR. CHAMBERS: It held that the court, the  
11 district court was clearly erroneous --

12 QUESTION: On the unitary -- on the unitariness?

13 MR. CHAMBERS: Yes.

14 QUESTION: Well, I find it very fuzzy in that  
15 respect.

16 MR. CHAMBERS: I'm sorry?

17 QUESTION: I -- I find it very fuzzy in that  
18 respect because I thought they really said it doesn't make  
19 any difference whether it's unitary or not; the injunction  
20 remains.

21 MR. CHAMBERS: The court --

22 QUESTION: That's what it held.

23 MR. CHAMBERS: The court said --

24 QUESTION: They applied Swift and said that  
25 unitariness just was irrelevant to their decision.

1 MR. CHAMBERS: The court said basically two  
2 things, Your Honor.

3 QUESTION: Do you have a page citation for what  
4 you're about to say? Or maybe you could furnish it later.

5 MR. CHAMBERS: I could furnish it later. I just  
6 wanted to respond to Justice White.

7 The court said basically two things. One, that  
8 the basis the district court used for making its finding  
9 were clearly erroneous. The court had found that the  
10 discrimination had attenuated and that it was no longer a  
11 basis for this -- the imposition of the injunctive order.

12 The court also found that the court -- the  
13 district court had relied on intent, and the district  
14 court said that was not a determining factor. So --

15 QUESTION: I think you've answered the question,  
16 Mr. Chambers.

17 MR. CHAMBERS: Thank you, Your Honor.

18 QUESTION: Thank you.

19 Mr. Day, do you have rebuttal? You have 2  
20 minutes remaining.

21 QUESTION: Mr. Day, do you have rebuttal? You  
22 have two minutes remaining?

23 REBUTTAL ARGUMENT OF RONALD L. DAY

24 ON BEHALF OF THE PETITIONER

25 MR. DAY: Mr. Chief Justice, unless there are

1 questions from the Court, we're prepared to yield the  
2 remainder of our time back to the Court.

3 QUESTION: I was going to ask Mr. Chambers. I  
4 guess I'll have to ask you.

5 The respondent does not, as I understand it,  
6 propose a definition of unitary. The SG, the Solicitor  
7 General, proposes one. The Great Schools amicus brief  
8 proposes one.

9 Am I correct that you, the respondents, think  
10 there is no particular definition of unitary?

11 MR. DAY: Justice Kennedy, the respondents had  
12 alternative arguments, and I believe in their first  
13 argument there was no definition, but in one of their  
14 alternative arguments they took the position that before a  
15 unitary status can be achieved that all the vestiges had  
16 to be eliminated, and in Oklahoma City that meant that all  
17 the neighborhoods had to be integrated.

18 QUESTION: That was part of their unitary -- the  
19 unitary definition?

20 MR. DAY: Yes.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Day.

22 The case is submitted.

23 (Whereupon, at 11:06 a.m., the case in the  
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-1080 - BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, Petitioner

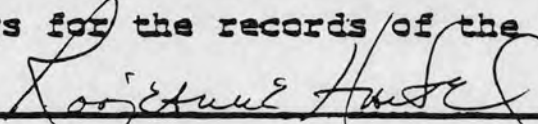
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ROBERT L. DOWELL, ET AL.

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