ORIGINAL

In the

Supreme Court of the United States

DAYTON BOARD OF EDUCATION, ET AL.,	)	
Petitioners,	)	
v.	)	No. 78-627
MARK BRINKMAN, ET AL.,	)	
Respondents.	)	

Washington, D. C.
April 24, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

DAYTON BOARD OF EDUCATION, ET AL., Petitioners, v. MARK BRINKMAN, ET AL., Respondents.	No. 78-627

Washington, D. C.

Tuesday, April 24, 1979

The above-entitled matter came on for argument at 11:12 o'clock a.m.

BEFORE:

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

APPEARANCES:

DAVID C. GREER, ESQ., Bieser, Greer & Landis, 600 First National Bank Building, Dayton, Ohio 45402; on behalf of the Petitioners

WILLIAM E. CALDWELL, ESQ., Ratner, Sugarmon & Lucas, 525 Commerce Title Building, Memphir, Tennessee 38103; on behalf of the Respondents

DREW S. DAYS, III, ESQ., Assistant Attorney General, Civil Rights Division, Department of Justice Washington, D. C.; on behalf of the United States as amicus curiae

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-627, Dayton Board of Education v. Brinkman.

You may proceed whenever you are ready now, Mr. Greer.

ORAL ARGUMENT OF DAVID C. GREER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GREER: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

I at least was pleased by having the respondents in the Columbus case open by asking that this Court affirm the findings of the trier of the facts, the trial court, and I would hope that they would open their argument in this case with the same request.

Let me open my argument by attempting to answer in the context of Dayton a legal question and then a factual question that has been posed in the context of Columbus.

At the time this lawsuit was filed in April of 1972, seven years ago, there were 57 elementary schools in the Dayton School System, including the middle schools. There were no all-white elementary schools. There were three all-black. There wer eleven high schools in the Dayton School District, none of them were all-white; two of them were all-black. And as far as teaching staffs were concerned, the teachers in the Dayton School System

were integrated throughout the system on the basis of the same ratio between black and white teachers in each school as there was in the system as a whole.

To turn from the questions posed by Mr. Justice Stewart and Mr. Justice Marshall to the question posed by Mr. Justice Stevens, which is a legal question, was the remedy in Swann correct, let me answer that at least in part by saying that I would stand here and say that every principle enunciated in Swann was correct. Whether the remedy was correct depends upon what the facts were when that case went back to the trial court and how those facts were presented to the court and what the findings were.

I think I stand here in a culmination of a series of decisions. There has been some implication or direct indication in some of the briefs filed that we are asking the Court to overrule Swann or to overrule Keyes or to overrule some prior decision. We are not. We are here in a case of equity that turns on particular facts, and I think that is important. And I think the principles enunciated in Dayton I grow directly from Swann and the prior decisions of this Court.

It was in Swann that this Court said that the remedial task is to correct a constitutional violation, a condition that offends the Constitution. It was in Swann that there was reference to the equitable powers of

this Court being remedial powers, corrective powers, and that the nature of the violation is what determines the scope of a remedy in a school desegregation case and any other equitable case.

In Milliken, this Court held that the remedy is necessarily designed as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. That it seems to me is clearly what the incremental segregative effect standard of Dayton I is.

I would submit to the Court that as the trial court found in this case, there was no system-wide violation. I would also submit to the Court, however, that in a case where there is a system-wide violation, the equitable principles applicable to cases of this nature require a finding with respect to incremental segregative effect, because the remedial purpose is a restorative purpose. It is not to compare what is to what ought to be in some ideal world in which none of us can ever live. It is an effort to compare what is to what would have been in the absence of violations.

And under the sharply defined standard of this Court as expressed in Dayton, the remedy turns on a comparison between what is and what would have been.

In justifying a system-wide remedy in this case,

the Sixth Circuit completely abandoned that comparative test and it redefined the whole concept of incremental segregative effect in terms of a snowballing process of cumulative violations.

QUESTION: The District Court on remand in this case, Judge Reuben found that there wasn't a system-wide violation, didn't he?

MR. GREER: That is correct, Your Honor.

QUESTION: And he ultimately dismissed the case, didn't he?

MR. GREER: He dismissed the case flat, that's correct.

QUESTION: Did he find any specific isolated constitutional violations?

MR. GREER: In three areas, he did. Pre-1951, in faculty assignment, there was a policy of assigning black faculty to teach in black schools. There was in 1933 established a school, Dunbar High School, which had a system-wide attendance zone, and that school was attended by black students.

QUESTION: Only?

MR. GREER: Only. That school went out of existence in 1962.

QUESTION: What is it called now?

MR. GREER: There is a Dunbar High School. The

school that was Dunbar from 1933 to 1952, the physical plant was turned into an elementary school named McFarland.

QUESTION: They are still predominantly Negro, I assume, because Dunbar was a Negro.

MR. GREER: Well, the fact that Paul Lawrence Dunbar was a great Negro poet has no relationship to the fact that Dunbar High School, new Dunbar or the old McFarland, are attended primarily by black students today. That fact is established by the residential complexion of the neighborhoods they serve.

QUESTION: There were 24 new schools constructed between '50 and '72, and 22 of them were Negro or white.

MR. GREER: Correct.

QUESTION: Deliberately so.

MR. GREER: Well, it depends upon the --

QUESTION: It was accidentally or deliberately, either one, it ends up that way.

MR. GREER: Building the schools was deliberate, sure.

QUESTION: In 1971, 75 percent of the Negroes were assigned to Negro schools?

MR. GREER: By virtue of their neighborhood proximity.

QUESTION: Answer my question and then add to it. Yes?

MR. GREER: Yes is the answer, Your Honor.

QUESTION: Now you can add to it whatever you want to.

QUESTION: In answering my question, what was the third --

MR. GREER: If I may come back to that after I have added my yes, comma, but, to Mr. Justice Marshall's question. I think the complete answer to that is that while that is all entirely true, it overlooks the fact that there was no feasible alternative for the board other than the location of those schools as they were. As the plaintiffs' own witnesses have testified, the only alternative to the program that you have just described was, one, build a single campus in the City of Dayton and bring all students bused to that, or, two, to adopt some system-wide busing plan to --

QUESTION: Mr. Greer, that is as old as 1955.

MR. GREER: Well, whether it is new or --

QUESTION: The town case, that theory was made.

MR. GREER: Whether it is new or old --

QUESTION: Well, why don't you add onto it that it is not new?

MR. GREER: All right, if it is not new, it is a fact in this case, that because of the residential patterns in Dayton, those were the only available

alternatives.

To get back to your question, Mr. Justice Stewart, the third finding was essentially a group of isolated practices all of which the court had found were long gone years before this suit was filed and on which the court found there was no incremental segregative effect of those practices at the time of suit. Separate use of swimming pools at Roosevelt High School for black students and white students back in the thirties or separate athletic competitions for Dunbar students up to the forties, or back in early 1920 a situation at Garfield Elementary School where the black students were taught in a separate classroom.

QUESTION: This lawsuit was brought when?

MR. GREER: 1972, April.

QUESTION: And did the District Court find any except for considering the continuing effect of these historic acts of unconstitutional segregation by race, did he find any then on-going conduct that violated the Constitution?

MR. GREER: Absolutely none, Your Honor, and he specifically found that there was no continuing effect of these prior practices in the three areas which I have described.

To get back to what has happened with the legal

doctrines involved in the remedy side of this case between Dayton I and what I guess will now be Dayton II, the Sixth Circuit it seems to me has clearly completely distorted and abandoned the concept of incremental segregative effect. That is in essence admitted in the briefs filed in opposition to us. The National Education Association brief points out that the Sixth Circuit described that as a description of the manner in which segregation occurs in a northern school system, rather than as a legal standard for determining how much school segregation must be remedied. That I would submit is a clear departure.

In their 144-page brief, the respondents never discuss the Sixth Circuit's handling of the concept of incremental segregative effect. They touch it in a footnote in a kind of confession and avoidance manner at page 128 of their brief, where they indicate that our approach would be correct, relevant at least if this were a case of isolated segregative practices, which I submit to you it is, but that the incremental segregative effect concept has no application whatsoever to a situation of a system-wide violation. I don't think that there is a double standard expressed with regard to incremental segregative effect in your opinion in Dayton I, nor do I think a double standard is justified. If the equitable purpose is restoration, the goal, whether it is a system-wide

violation or isolated violations, is the same.

QUESTION: Of course, there is no remedy at all until or unless there is a finding of a constitutional violation, isn't that correct?

MR. GREER: That is correct.

QUESTION: The case we heard first this morning, the Columbus case, involved basically, as I understood it at least, the concessions made by counsel particularly, a question of remedy. This case at least initially involves a question of whether or not there was a violation. Isn't that correct?

MR. GREER: Although because of what happened to me in the Sixth Circuit, this case is both a violation and --

QUESTION: I know it is both, but at least is initially a question of whether or not there was a violation, isn't it, because the District Court found there wasn't any.

MR. GREER: That is absolutely correct. And if I may turn to that aspect of the case to discuss it, it seems to me that it is clear that the doctrinal problem, to get to the legal issue here, and where I believe the Sixth Circuit has gone astray from the moorings provided by your decision, the doctrinal problem at the violation stage of this case lies in the substitution of what I

would refer to as a bed of procrustean presumptions for the judicial analysis that is contemplated by Arlington Heights, Washington Davis and Davis I decisions of this Court.

If I can turn the phrase "loaded game board" to a new use, it seems to me that the series of presumptions that has been invented by the Sixth Circuit is a means for requiring system-wide racial balance is indeed that.

The way that the analysis seems to work is that whenever there is a condition of current racial imbalance in the schools, which there certainly was in Dayton at the time suit was filed, then it is fair game to go back in the past as far as may be necessary to find some constitutional violation and then to juxtapose the current condition of racial imbalance with a historical situation of a constitutional violation by the welding material or glue of a concept of an affirmative duty to diffuse the races throughout the system. Now, that it seems to me is a far cry from the concept of the goal in the case of determining violation is to focus on the conditions that existed at the time suit was filed, and then how you can look to historical background to see if those conditions were created by some constitutional midconduct on the part of the school board, but you beg the question and

you get into circular reasoning if you say that there is an affirmative duty to diffuse races throughout a school system and therefore if that constitutional duty had been followed, why, the races would have been diffused at the time suit was filed, and if they aren't diffused there must be a constitutional violation. That I submit to you is what the Sixth Circuit has done on the violation side of this case, and I think that is error, and I think that is departure from the precedents and rulings of this Court and it is also a situation that if that kind of reasoning were adopted, any school system in which there is existing racial balance must be subjected to a judicial remedy that provides racial balance.

QUESTION: You mean racial imbalance?

MR. GREER: Racial imbalance, I'm sorry. Where racial imbalance is found, the courts must provide racial balance. It is essentially what the Sixth Circuit is saying. That is not simply an application of the Keyes burden shifting principle. That principle is, of course, triggered by a finding of a current condition of intentional segregation in a substantial or meaningful portion of the system. This is triggered simply by a finding of racial imbalance, and where racial imbalance is found, racial balance must follow. It is not a real presumption, it is an outcome determinative approach to finding violations.

Because of time constraints on oral argument, I want to focus on these legal issues and I have to refer you to my brief for the factual analysis that I think fits hand and glove them with them.

QUESTION: Mr. Greer, I don't think you are really stating the theory of the Court of Appeals though, are you? They didn't start from the fact there is presently imbalance and then infer violation from that. Didn't they start from the notion that there was proof of intentional violation as of 1954, and a failure affirmatively to correct the situation? The relied entirely on the duty to take affirmative action in effect.

MR. GREER: They are talking about 1954 --

QUESTION: Right.

MR. GREER: -- and they are putting the focus there, rather than in 1972 when the suit was filed.

QUESTION: Right.

MR. GREER: It is our contention that there was no dual system in 1954 or in 1972 or any of the years in between.

QUESTION: Right.

MR. GREER: But what they are doing is instead of focusing on the existence of a violation at the time suit was filed, it is using a double focus. One is a condition of racial imbalance at the time of suit, and the

other is a finding of an unconstitutional act at some time in the past. They picked the year 1954 which I would submit has the logic only of being the date of the Brown v. Board of Education decision.

QUESTION: Well, they say as of that date there was a clear duty on the part of the board to change a situation they found to exist. Now, I know you don't accept the finding as of that time, and it is a failure to have corrected in the interval amounts to a present violation today.

MR. GREER: And that is where you get what I call the glue or the weld, and that is this affirmative duty -- and the words of the Sixth Circuit are an affirmative duty to diffuse black and white students throughout the system.

QUESTION: Well, there would be such a duty, would there not, if they are right about the dual system in 1954?

MR. GREER: I don't think there would, Your Honor. I think that the constitutional duty as it has been defined in this Court is to provide a unitary system, and what is a unitary system, a unitary school system as this Court has defined that term, it is -- in the Alexander case, for example, a unitary system is one within which no person is to be effectively excluded from

any school because of race or color. The ACLU, and this is --

QUESTION: Let me just test that, because this goes really to the heart of the case.

MR. GREER: It does, indeed.

QUESTION: Supposing you had a de facto situation with all black and all white schools, totally the same, and then all they did was change rules and say anybody can go to any school within three-quarters of a mile of his home or whatever the boundary was, but there was no change in boundaries. You would have to change the boundaries to correct the situation, and you say there is no duty to change boundaries?

MR. GREER: That's correct.

QUESTION: Say they were gerrymandered and all the rest of it, just to make sure there are no blacks going to white schools and vice versa. Could they leave the situation exactly as it was?

MR. GREER: I think they could, Your Honor, under my understanding of the Constitution.

QUESTION: Let's take a school system in that region of the country which up until 1954 had legislation on the books requiring the segregation of school children based upon the color of their skin, and in 1954, in Brown v. Board of Education, that legislation was held to be

unconstitutional. Certainly it then became incumbent upon the school boards of some school districts in that part of the country in a state which had had such legislation to do something about it, didn't it?

MR. GREER: It absoultely did and --

QUESTION: To desegregate, wasn't it, an affirmative duty?

MR. GREER: But the duty is to provide a system in which no one is denied access to a school because of race or color. That I would submit to you is different from an affirmative duty to create some balance of races throughout the school system.

QUESTION: What has happened to that good old phrase "root and branch"?

MR. GREER: The good old phrase "root and branch" is still in the law. But in the Green case --

QUESTION: I hope so.

MR. GREER: In the Green case, the words "root and branch" refer to the noun "discrimination." It is discrimination that is to be taken out of these school, root and branch.

QUESTION: But wouldn't you admit that there was discrimination in '72? Didn't you admit that?

MR. GREER: No, I have not admitted that.

QUESTION: I thought you admitted that in '72,

75 percent of the Negroes were assigned to all-Negro schools.

MR. GREER: I do not call that discrimination, Your Honor.

QUESTION: Well, you do admit that fact though?

MR. GREER: That fact I admit, yes. What I am saying is that in an equity case -- and maybe I can highlight this best by addressing your attention to the amicus brief filed by the ACLU on behalf of the respondents, where they urge the Court to in essence overrule Dayton I and hold that the Fourteenth Amendment provides an affirmative duty to create as much dispersion of the races as possible. I don't think the Fourteenth Amendment as you have defined it means that. And in order to get where the respondents want to get in the case, they have to have you rewrite the Fourteenth Amendment.

QUESTION: That would mean overruling in part the Swann case, would it not?

MR. GREER: Indeed it would, Your Honor.

QUESTION: You keep saying -- the respondents don't say that. You are talking about the ACLU. Are you putting that burden on the respondents?

MR. GREER: Well, I think, to be blunt about it, if the respondents want to get where they want to end up in this case, they have got to adopt the reasoning of

the ACLU, because the only way you can get there is to rewrite the Fourteenth Amendment in that manner and to hold specifically that the imposition of a neighborhood school system on a situation where you have racially imbalanced population, without any segregative intent or purpose on the part of the board at all, violates the Constitution, and I don't think you should reach that conclusion because I think that is an incorrect constitutional conclusion.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Caldwell.

ORAL ARGUMENT OF WILLIAM E. CALDWELL, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

My case, as apparent, is quite different from the case that has been presented by the petitioners. Their case is that racial discrimination has been the rare exception in the operation of the Dayton public schools. My case is that it has been the rule.

Their case in effect contends that deliberate segregation has affected the schools on only a few occasions at random and with very limited and precisely definable impact. But our case and the undeniable facts show that school segregation in Dayton not only was predictable,

it was predicted by purposeful design and operation for a period of at least sixty years, from 1912 to 1972, the board operated a systematic program of racial segregation that was circumscribed by neither geography nor administrative function. Throughout this time, the board operated a cover dual school system.

QUESTION: What were the District Court's findings on the 1972 situation again? What did the District Court find about the condition in 1972?

MR. CALDWELL: The District Court found no extant condition requiring a constitutional remedy.

QUESTION: They found no violation.

MR. CALDWELL: They found no -- well, it found violations.

QUESTION: No violation as of the time of the lawsuit, didn't it?

MR. CALDWELL: Well, I am not exactly sure -- I assume that is correct, since it dismissed the complaint. But it seemed to acknowledge that there were constitutional violations that had existed in the past --

QUESTION: Had been.

MR. CALDWELL: -- but none had any continuing effect at the time of the lawsuit.

QUESTION: At the time of the lawsuit --

MR. CALDWELL: That is the finding of the District

Court.

QUESTION: It would seem to me it would have to have found that to have dismissed the complaint.

MR. CALDWELL: I think that is at least implicit if not explicit in the District Court's opinion. The facts, however, are that between 1912 and the time of Brown -- and by talking about the pre-Brown period, I don't want to exclude the post-Brown period which I will turn to momentarily. This program of systematic segregation consisted of the conversion of three elementary schools into black only schools, and by that I mean schools to which only black people were assigned and to which only black teachers were assigned.

QUESTION: And that had taken place when?

MR. CALDWELL: Between 1912 and 1954 and during that period --

QUESTION: During that whole period?

MR. CALDWELL: I'm sorry?

QUESTION: Sometime between that some 42 years?

MR. CALDWELL: These schools were converted as the need arose to segregate and confine the black population, as the black population grew. So it began in 1912 with the segregated class at the backdoor of an otherwise white school. That moved eventually into a larger outbuilding in back of this white school, the black population

continued to grow, the school was converted into an all-black school over the summer. The white students and teachers were transferred out to other schools.

QUESTION: And this process --

MR. CALDWELL: And this process was repeated --

QUESTION: -- went on over a 42-year period?

MR. CALDWELL: That's correct, and these schools were full-blown state imposed segregated schools at the time of Brown.

QUESTION: Not the State of Ohio technically, because the State of Ohio since the 1880's had prohibited precisely what you tell us Dayton was doing.

MR. CALDWELL: I cannot agree with that, Your Honor.

QUESTION: They did not --

MR. CALDWELL: The State of Ohio acting through its agency with jurisdiction over this problem, imposed --

QUESTION: Acting through its legislature.

MR. CALDWELL: Not acting through its legislature, but it --

QUESTION: Hadn't it been the law of Ohio that these things were illegal that you have told us about?

MR. CALDWELL: That's correct.

QUESTION: That is what I thought.

MR. CALDWELL: That's correct. They also prior

to Brown built another all-black school which made four all-black elementary schools. In 1933, they constructed Paul Lawrence Dunbar High School, opened it as a blacks only high school operating on a city-wide basis to which blacks from all over the system were assigned. It was assigned an all-black faculty. This school continued in raw form as it was created in 1933 until 1962. The board from 1912 to 1951 operated pursuant to a system-wide policy of never allowing black teachers to have any contact with white pupils.

QUESTION: Well, all of these things that you have told us happened in spades in that region of the country where the legislatures required them to happen. Does that mean that school districts in those areas of the country are always going to be tainted by their historic illegal unconstitutional action?

MR. CALDWELL: Your Honor, it will be until they have done something to undo this horrendous wrong that they have committed. And what I am trying to convince you is that by the time of Brown, the Dayton school authorities had essentially accomplished the same results that North Carolina accomplished in Charlotte-Mecklenburg and that thereafter they should have been under the same constitutional duty.

QUESTION: Mr. Caldwell, you say what you are

trying to convince us of, but ordinarily we don't sit as finders of fact.

MR. CALDWELL: I should have said what the Court of Appeals found was that they had committed that same wrong and were therefore under the same constitutional duty.

QUESTION: Of course, there we come back to what has been mentioned before, it is not normally the function of a reviewing court to make findings of fact, is it?

MR. CALDWELL: I was curious about that question in the Columbus case. In our case, any time a Court of Appeals finds a finding of fact of the District Court clearly erroneous, it is necessarily asserting another fact and it is finding another fact.

QUESTION: Or it is sending the case back with some instructions, is that not more often the fact?

MR. CALDWELL: As I read the clearly erroneous decisions, they almost always -- if the appellate court arrives at a judgment unless there is some other issue aside from the clearly erroneous findings of fact at issue, but if an appellate court decides --

QUESTION: The cases that you are talking about are usually cases where you have a single issue or two issues, not a whole maze of issues, isn't that so?

MR. CALDWELL: Oh, I don't think so. I think

the leading clearly erroneous case, United States v. U.S. Gypsum Company, is a case in which the facts were enormously complex and the court dealt with those at some length. I may be mistaken about my recollection of the facts in that case, but quite a few of the cases in this Court have involved antitrust litigation --

QUESTION: You are not speaking of the more recent --

MR. CALDWELL: Not the more recent U.S. v. U.S. Gypson, no, the 1948 decision.

QUESTION: Mr. Caldwell, in your submission I believe -- and I am confident that it is the case in your colleague's submission in the Columbus case -- the school board after a finding of a violation is entitled to shoulder the burden of proof that the violation did not cause an incremental segregative effect so as to be system-wide, is that correct?

MR. CALDWELL: That's correct, they have the option of carrying that burden.

QUESTION: Since Judge Reuben found there was no violation here, presumably there was never any hearing at all on remedy, so shouldn't the Court of Appeals at the very least, even under its own hypothesis, have sent the case back to the District Court so that the school board could have been heard on the issue of remedy?

MR. CALDWELL: Ordinarily that would be the case in the situation where a school board was making the assertion that it wanted to meet its burden of showing that the system-wide violation had less impact than intended. But in this instance the board of education has not contended ever that if we are right about the nature of the violation that there is anything wrong with this remedy that we have and so --

QUESTION: I understood your opponent to argue at some length that the violations, whatever violations existed were not system-wide.

MR. CALDWELL: That is his contention, Your Honor, but he has not made the next argument by conceding that if he is wrong about that, he nevertheless thinks that the remedy is too broad.

QUESTION: You regard those as two separate stages of the proceeding?

MR. CALDWELL: Well, I think it depends on the circumstances of each case perhaps, whether you have a separate inquiry. Ordinarily you have a separate -- in school segregation litigation where the question of violation is at issue, you have a bifurcated approach, one dealing with the violation and one dealing with the remedy.

QUESTION: Well, wouldn't you as school board

counsel in this case, after succeeding getting the complaint dismissed in the District Court on the violation issue, have been somewhat surprised by a Court of Appeals decision which not only said there was a violation and we now impose this remedy?

MR. CALDWELL: Not in this case, Your Honor, because in the Court of Appeals we challenged the board to point out any part of the remedy which it thought was excessive if we were right about the violation. There is nothing that has prohibited the board from assuming arguendo that there has been system-wide violation and saying nevertheless we think the remedy goes too far even as they contend the violation --

QUESTION: But isn't that something for the District Court in the first instance?

MR. CALDWELL: Not if the school board is not making a contention, and if the school board were to make that contention or had made it in the Court of Appeals, I would agree that the ordinary course would be to send it back for a hearing on that issue. But they have not to this day to my knowledge, Mr. Justice, made a contention about the need to have a remedy hearing on this particular issue.

Our assertion is, and we have asserted in our brief and I do not understand them to disagree, that if

we were right about the violation and its impact, they are satisfied with the remedy.

By 1954 -- I should mention a couple of other important policies which were followed throughout the system. By 1954, 54 percent of all black students and all black teachers were confined to these deliberately created black only schools. Throughout this same period of time between 1912 and 1954, whenever black students attended school in predominantly white schools, they were subjected to all forms of within school discrimination, segregated swimming pools, segregated locker rooms, the athletic programs were segregated until 1948, black children were required to sit in the back of the class, denied the opportunity to participate in white activities such as being an angel in the school play, and black orphanage children from across town were bused in to these black only schools, past nearby white schools to which they could have attended. And the board operated one-race classrooms in explicitly designated one-race public housing projects.

As I say, 54 percent of the black children at the time of Brown were in these black only schools and three-fourths of all children were in schools that were virtually one race. Except for the absence of the written state law permitting this result, the Dayton system was

basically the same system or the same as the systems that were before the court in Brown, and it was basically the same system that existed in Charlotte. The minor slight factual distinction is that there was a minimal level of tolerance of racial mixing.

QUESTION: Wasn't that true of almost every big city in the United States -- New York or Chicago or --

MR. CALDWELL: I'm sorry?

QUESTION: That there is a great deal of de facto concentration of one race or another in various schools?

MR. CALDWELL: In my case, I am talking about de jure concentration. I am not talking about de facto concentration. It may well be that the pattern exists --

QUESTION: In New York City, every time they build a new school in Harlem, I suppose it could be reasonably anticipated that that would be population 100 percent by Negro children, couldn't it?

MR. CALDWELL: It is certainly possible. The question is how did it get that way, and I don't know that there has been litigation on that issue.

QUESTION: No, I don't either.

MR. CALDWELL: Although there have been some school boards --

QUESTION: It has just occurred to me that what

you were telling us was probably characteristic of every sizable city in the United States.

MR. CALDWELL: Well, if it is, Your Honor, it is a sad state of affairs because these people did the same thing that the Charlotte-Mecklenberg Board of Education did.

QUESTION: Perhaps so. The issue in this case is whether or not there was a constitutional violation at the time the lawsuit was brought and, if so, what the appropriate remedy should be?

MR. CALDWELL: What was the first part of your question?

QUESTION: Whether or not there was a constitutional violation and, if so and only if so, what the appropriate remedy should be.

MR. CALDWELL: This system that existed at the time of Brown was expanded --

QUESTION: At the time of this lawsuit.

MR. CALDWELL: -- and maintained throughout that period. The board never met its affirmative duty to undo that deliberate segregation. Instead, it deliberately advantaged itself of the very substantial root system and trunk of segregation that were firmly in place in 1954, so that as of the time of trial the schools in the Dayton System were racially segregated because of system-

wide policies and practices of deliberate racial segregation. These policies and practices included the continued racial assignment of faculty to existing schools as well as to new classroom space according to the racial composition of the students, pursuant to a policy adopted in 1951 which was explicitly racist. It said that we will introduce Negro teachers into white schools when the white communities are willing to accept them, and we will not introduce white teachers into Negro schools against their will.

QUESTION: And when did this happen?

MR. CALDWELL: This policy was in effect from 1951 until 1969 when H.E.W. intervened pursuant to Title VI of the 1964 Civil Rights Act.

QUESTION: So that situation didn't itself exist apart from the vestages of its effects, but it didn't itself exist at the time the lawsuit was brought?

MR. CALDWELL: But its vestages were rampant. The board engaged in a massive pattern of school construction on a racially segregated basis, and the Court of Appeals concluded that two things during the period between 1954 and the time of trial --

QUESTION: Mr. Caldwell, you say the board engaged in a massive program of school construction on a segregated basis. Supposing the board has to build a

school out in a newly developed area the population of which is 99 percent white and it picks a site out there and it knows that 99 percent of the people going to school are white, would you describe that as part of that kind of a program?

MR. CALDWELL: If it does that in a vacuum, Your Honor, it is one thing, but in this case they did it in the context of a system-wide program of segregation which had funneled black people to part of the system and preserved the rest of the system for whites and they cannot be forgiven for that, any more than Charlotte-Mecklenberg can be forgiven for that for the period between 1954 --

QUESTION: Well, where is that finding? Judge Reuben obviously did not so find.

MR. CALDWELL: No, the Court of Appeals made that finding with respect to a number of the board's practices and they found that the entire board was operating a system-wide program of segregation.

QUESTION: Well, where is the finding as to funneling by school construction?

MR. CALDWELL: Well, I will give you one example of such a finding, the Dunbar High School, which was operated from 1933 to 1962, the Court of Appeals found that through discriminatory practices in other parts of

the system that the board by counseling, by discriminating against black students that went to predominantly white schools and in effect forced blacks to go to this system-wide black only high school. Any person who would observe that situation would make a residential choice on the basis of the board's policy or would likely make a residential choice on the basis of the board's segregation policy. A white family seeking a residence in Dayton certainly would not move to the Dunbar High School area where their children couldn't even be educated because they couldn't have any contact with black teachers, at the same time black families were not inclined to move or could not have been inclined to move into the white parts of town where they would have been subjected to humiliating discrimination and never had contact with black adults.

I want to make one other point. By 1969, considerable pressures were being brought to bear on the operation of the -- on the segregated operation of the Dayton public schools and on the school authorities to do something about that condition. H.E.W., as I said, intervened in 1969 and found that the board had a racially motivated faculty assignment policy and worked out a two-year remedy for that. The state board of Ohio investigated the school system, the State Board of Education, and found

that the board was under a moral and a constitutional duty to take remedial action. The board appointed a citizens committee which made similar findings. The board presdient admitted before the citizens committee that the board itself had been guilty of past de jure acts of segregation, intentional acts of segregation, I should say. Then the board itself considered that question in December of 1971 and adopted resolutions admitting that its past practiced had caused the current condition of segregation and directing the superintendent to develop a remedy.

All of these findings would be entitled to probative weight in any circumstance, given the normal reluctance of school officials to admit past wrong-doing. In this case they are compelling because the facts cannot be read to the contrary. That remedial action, of course, was rescinded the following month when a new board of education took over.

We think, if I may sum up by comparing Swann to this case, that the -- in Swann, the court recognized that the delay between 1954 and 1971 had compounded the problem, that dilatory tactics of school authorities had compounded the problem, that the court's failure to refine guidelines had compounded the problem, that the massive urban growth that had occurred through this period

compounded the problem. Yet the court recognized that the school officials persisted in discriminatory conduct, had played a substantial role in this pattern of development, and those findings are fully applicable to Dayton and that remedy should be fully applicable. The judgment below should be affirmed.

Thank you.

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

Mr. Days.

ORAL ARGUMENT OF DREW S. DAYS, III, ESQ.,

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. DAYS: Mr. Chief Justice, and ma it please the Court:

I would like to respond to a question that Mr. Justice Stewart put to my colleague. Essentially, does a school board ever get out from under the responsibility for certain segregatory practices? I think the key response to that question, talking about essentially the attenuation theory, and there is indeed a possibility for a school board to show that past segregative acts have not created or contributed to current segregated conditions, and I think that is a burden that is open to every school board to try to discharge.

QUESTION: Well, it would be a very difficult

burden, it seems to me, to carry. We all know, even amateur historians, that the present is a product of the past and I am sure nobody could argue the proposition that all sorts of conditions in the present have their roots back in the 19th if not the 18th Century. Isn't that an almost impossible burden that you have described?

MR. DAYS: I don't believe it is impossible. It has to be evaluated on a case by case basis, but I think it is open to the school board to make that showing. That is what this Court said. And I think it also said it in Swann, that there was a possibility available to a board to make this type of showing.

There is one other point that I wanted to make and that is to make clear that there is no suggestion on the part of the government that Dayton be overruled. We think that Dayton I can be read consistently with the earlier decisions of this Court, even where there is a showing of a system-wide violation. The inquiry nevertheless must be made as to what are the cumulative or the incremental -- strike cumulative -- incremental segregative effects of that violation.

But the Columbus and Dayton School Boards challenge here the validity of principles and procedures that are not the product of some theoretical exercise. They come instead from our judicial experience and hundreds

of cases with this Court's opinion in Swann, the flinty and tractable realities of how to make desegregation work in the face of deliberate resistance and changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families and other changes.

QUESTION: You speak of hundreds of cases, I would like to ask you about one that you set forth at some length in your brief on page 64 in which the Court of Appeals relied on a case called Oliver v. Michigan State Board of Education, and your quote at that page of your brief is from Oliver. It says, "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of the public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish their action or inaction was a consistent and resolute application of racially neutral policies." Do you think that is consistent with Dayton, with Arlington Heights or with Washington v. Davis?

MR. DAYS: I do, Mr. Justice Rehnquist, because I read that language in context, in the context of showing not just one such act creating a segregative effect but a pattern of that kind of in the context of other showings

of segregative intent. In other words, it is some evidence, this pattern is some evidence that there is a consitutional violation, but it necessary, as Arlington Heights points out, to look at the totality of the circumstances, to look at the history, to look at contemporaneous practices, to look at alternatives that were available to the board.

QUESTION: But Oliver says it -- it just doesn't say it permits an inference, it says it is a presumption that becomes proof unless it is rebutted.

MR. DAYS: Well, I am not here to defend the Sixth Circuit, Mr. Justice Rehnquist. It is my understanding of the law that the principle is one of looking at the totality of the circumstances and where there is this pattern, consistent pattern of decisions that will produce segregation as opposed to avoiding segregation and achieving integration, that pattern absent some showing by the school board that there are justified explanations for it, becomes sufficient basis for a determination of a violation. This is not unusual. This Court said in Washington v. Davis that certain patterns, if they are shown to be very consistent, can ultimately serve as the basis for a determination of a violation, not simply an inference of that violation.

The principles that have been articulated by

this Court in its opinions are grounded on considerations of fairness and policy and designed to provide practical and effective means of eliminating long-standing and pervasive segregation of the public schools in violation of the Fourteenth Amendment.

We know, moreover, that these principles have worked well in practice, based upon a review of the reported decisions and Department of Justic files, we have determined that approximately 200 school districts with a combined enrollment of more than five million students are presently operating under court-ordered desegregation plans that are premised in whole or in part on the remedial principles of Swann and Keyes. In addition, the department--

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Days.

(Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Days, you may continue. You have about four minutes left.

MR. DAYS: Thank you, Mr. Chief Justice.

At the noon hour, I was addressing my comments to the practical and effective nature of the principles and procedures that have grown out of these decisions of the Supreme Court, of this Court with respect to school desegregation. Not only are they practical and effective in theory, they are in fact practical and working in actuality.

We looked at reported decisions in the files of the Justice Department and, as I indicated, we found that there are 200 school districts, involving over five million children who are going to desegregated schools based in whole or in part on the remedial principles of Swann and Keyes.

In addition, we have consulted with the Department of Health, Education, and Welfare and have learned from that department that it has 200 additional school districts that are desegregated as a result of the guidance provided by Swann and Keyes. In fact, one reason why the Dayton Board of Education may not be contesting the remedy in the case is because the plan there is working well. It is in its third year, not of course meaning to say that

the board gives up its right to make the arguments before this Court as to whether the correct principles were applied.

But what the records here reflect is that the familiar pattern of intentional segregative acts by school officials affecting substantial portions of those school districts by techniques such as segregated faculty assignments, constructions, additions, sitings, and closings of schools, with segregative consequences where there were integrative alternatives available.

QUESTION: What you say there, I take it, Mr. Days, is that the segregated faculty which terminated, when, back in '69?

MR. DAYS: Well, in Columbus not until '74, and in Dayton in the 1971-72 school year.

QUESTION: I suppose there are still possibly some students in the schools who went to school under a segregated faculty system?

MR. DAYS: I think that is correct, Your Honor.

QUESTION: But not very many.

MR. DAYS: Well, it has been eight or nine years since that was decided, so one would assume that there are students who started in elementary school who are still in the system.

QUESTION: The kindergarteners would still be

in the upper echelon of high school now somewhere.

MR. DAYS: That's correct. But we have seen also in these records departures from so-called neighborhood school concepts when it served to keep blacks in majority black schools or would allow whites to avoid going to schools that were substantially black. We see in these records overnight conversions of schools from white to black, that is one day the faculty was white and the student body was partially black, the next day, speaking figuratively, the faculty was all black because there was some indication that that school had a substantial black student body.

We think that these records make unavoidable the conclusion that the principles enunciated in Brown, Green, Swann and Keyes are as applicable to Columbus and Dayton today as they were to Topeka, Kansas in 1954, New Kent County, Virginia in 1968, Charlotte, North Carolina in 1971, and Denver, Colorado in 1973.

QUESTION: When was the Montgomery case decided on the faculty segregation, about '67?

MR. DAYS: It was prior to Swann.

QUESTION: A couple of years prior.

MR. DAYS: That's correct.

QUESTION: Then if they remedied that between '69 and '71, the schools were not called upon until the

Montgomery holding to do that as a constitutional matter, were they?

MR. DAYS: Well, I think they were. Montgomery really got to the --

QUESTION: They were in the abstract but the Court didn't declare that it was a constitutional requirement until the Montgomery case, did they?

MR. DAYS: No, I believe it was a requirement long before Montgomery. Montgomery was really concerned with what type of remedy one could enter with respect to faculty segregation, but I think it was clear far before that that school boards had the responsibility not to assign faculty members based upon their race.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Days.

Mr. Greer, you have about eight minutes left.

ORAL ARGUMENT OF DAVID C. GREER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. GREER: Both of my opponents have suggested that the Dayton School Board is not contesting a remedy in this case and I think it behooves me to correct that statement before you. As we have indicated in the opening argument, Dayton is both a violation and a remedy case.

The query is, is the plan that has been imposed in Dayton working well with the student population that

has shrunk from 52,000 to 36,000 since this suit was filed. I would --

QUESTION: Tell me if you happen to agree with the findings of a system-wide violation in the case, which I know you don't. Do you separately attack the remedy?

MR. GREER: Indeed I do, Your Honor, and that is what --

QUESTION: Well, was that among the questions in the petition?

MR. GREER: It is, Your Honor, at pages 45 to 50 of our brief, I have expressed the factual side of the case that relates to that remedy finding. Either I have expressed it so well that nobody has deemed it possible to answer it or I have expressed it so poorly that nobody has deemed it necessary to answer it, but I would like to think that the former is true.

It seems to me that if the remedial goal is th restoration of plaintiffs to substantially the position they would have occupied in the absence of alleged violations, it is appropriate to examine how that position is defined by the evidence. And it is very sharply defined by the evidence in this case, and I go through that evidence in quite a bit of detail on pages 45 to 50 of the brief, and it is essentially taking block census data and taking maps and going year by year through it, and

here is what you find.

There is factual evidence in the record in this case that the center of the black population in Dayton was established not by the school board but by the 1913 Dayton Flood, that the black population following that flood located in an area on the west side of Dayton and that the population expanded from that central location with the passage of time. Indeed, in the period from '51, '52, up to the time of this suit, the black student population of the Dayton school system increased from 19 percent to almost 45 percent of the students in the school system.

The evidence in this case is that the attendance boundaries in the Dayton school system have been unchanged for some twenty-five years. There hasn't been any manipulation, any gerrymandering, any changes of any of these school boundaries. And the evidence demonstrates graphically through maps and through census data that as the black population expanded from the center that it established after the 1913 flood, the schools in the Dayton system changed from white to racially mixed to black, reflecting the residential population change. And it can be demonstrated year by year in a ring of schools that follows that census population, that there was no change wrought in these attendance boundaries or any other manner

by the board to contain or to change that natural movement of population.

Indeed, the case is a textbook because it shows the exception that proves the rule. After that flood, in addition to the center of the black Dayton population being on the west side, there was a small residential area on the east side of Dayton which is a primarily white residential area, along Springfield Street, in my home town. And that small area of black families attended the schools that were geographically close to them, Washington Elementary School, and that situation has not changed over the years. And you can look at the figures for a period of twenty years and you will find that the elementary school that serves that black neighborhood has consistently remained between 14 and 23 percent black simply because it, like every other school in this system, has done nothing but reflect the residential racial populations served. You could talk about --

QUESTION: Mr. Greer, to what extent -- one of our problems in the case, as you know, is the Court of Appeals making findings. Now are you asking us to make findings or the District Court to make findings covering this area of the case?

MR. GREER: I hate to get into the posture of making a factual argument to the Supreme Court of the

United States and I don't think I need to make that argument. All I am trying to do is to answer to the factual arguments that have been made here today, is to express what the evidence really was and that there was a strong basis for the District Court's findings that should have been upheld. There is no clear --

QUESTION: Did the District Court make findings on this very point, that the effect would have been the same regardless of the violation, if any?

MR. GREER: Right, it is phrased in the findings of fact in terms of taking practice by practice in these isolated unconstitutional practices that may have existed historically and expressly finding that there was no incremental segregative effect from those practices at the time this suit was filed. So this is part of the findings in the case, and I would simply submit to you that upon both the remedy and on the violation side of this case, the Dayton School Board was justified in securing a dismissal of the complaint.

QUESTION: Your position is, really, regardless of which party has the burden of proof on this issue, you have met it?

MR. GREER: You can put the burden of proof on me, that is fine, although I don't think legally that is correct. But if you should choose to do so, I have met

it. The facts are there. The incremental segregative effect here is zero and the appropriate remedy is a dismissal of the complaint.

Again, I could answer every factual argument that has been presented with regard to black orphans being transported across town. In fact, from 1950 on, they were all placed in white schools, but I don't think I need to go into each of those detail factual arguments before this Court. It is all in the brief. It is in the judge's findings of fact, and there is evidence to support it all.

At its most fundamental level, this litigation it seems to me poses a choice, a choice between case by case application of equitable principles and judicial legislation of racial balance through the use of a loaded game board of artificial presumptions. The case also presents a focus on the proper role of intermediate appellate courts in this federal system.

I would submit that in an attempt to justify a predetermined result, the Sixth Circuit has rewritten the legal standards that have been espoused and presented by this Court and it has rewritten the factual evidence that was presented to the trial court. That is not the proper role of an intermediate appellate court.

If the standards established by this Court and the facts presented by the trial court are put together,

they compel the following answers to the particular questions that are posed by this case: Was the Dayton School System at the time suit was filed segregated by reasons of acts of the Dayton School Board? No. Would the distribution of the student population in the Dayton system have been different at the time of suit if the school board had not taken the actions which the plaintiffs have challenged? No.

That ends the case. We are addressing a court of equity and I think equitable principles and the facts here compels those answers to those questions.

Thank you.

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

(Whereupon, at 1:15 o'clock p.m., the case in the above-entitled matter was submitted.)

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