LIMITATIONS ON COURT-ORDERED BUSING—NEIGHBORHOOD SCHOOL ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 951

LIMITATIONS ON COURT-ORDERED BUSING—NEIGHBORHOOD SCHOOL ACT

JUNE 17, JULY 15, 22, AND AUGUST 5, 1982

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LIMITATIONS ON COURT-ORDERED BUSING—NEIGHBORHOOD SCHOOL ACT

THURSDAY, JUNE 17, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Schroeder, Frank, Railsback, Butler, and Sawyer.

Staff present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

Without objection, pursuant to rule 5 of the committee rules, this hearing may be covered in whole or in part by television or still photography.

Hearing no objection, it is so ordered.

This morning, the subcommittee is convened to begin a series of hearings on an amendment recently passed by the U.S. Senate which seeks to limit the authority of the Federal courts and the Department of Justice to seek or order transportation of students as a remedy to unconstitutional racial segregation in public schools.

The Senate passed this provision as an amendment offered by Senators Johnston and Helms during the full Senate consideration of the fiscal year 1982 Department of Justice Authorization Act, S. 951.

Although the amendment was the subject of a lengthy filibuster, and passed only after weeks of delay, it was not the subject of extensive hearings in the Senate nor was it reported by the Senate Committee on the Judiciary. So no official committee report on the amendment exists.

Consequently, now that the bill is pending in the House, I believe it is our duty to thoroughly review the provisions of this amendment, and I am pleased to announce that today's hearing is the first of what is likely to be 6 or 7 days of hearings on the subject.

As I know that some supporters of this legislation may be concerned that it is the intention of the committee to simply oppose the passage of this legislation, I want to assure all that I intend to

give proponents of the legislation every opportunity to persuade the committee of the efficacy of the proposal.

Also, I have invited national legal leaders, including the president of the American Bar Association and several former attorneys general, to advise us on the bill. Further, the Reagan administration has never had an opportunity to testify on this issue, and I have invited Attorney General Smith to appear as well.

I know that the subcommittee will want to hear from these distinguished witnesses and others, including those suggested by the proponents, before making any recommendation on this bill to the full committee or to the House.

The focus of these hearings will be on the constitutional and policy considerations of Congress, by statute, attempting to limit the authority of the Federal courts to order a particular remedy to correct the violation of a constitutional right.

It is not my intention to determine the efficacy of schoolbusing itself. Rather, we will focus on the role of the courts and the Congress, and the issues associated with this effort to constrain the Federal judiciary by the statutory restriction of its powers.

Candidly, the Chair views this legislation as part and parcel of various bills pending before us which seek to eliminate the jurisdiction of the Federal judiciary to consider constitutional claims. The constitutional issues are very similar, and the policy issues are nearly identical.

I certainly made no secret of my reservations in the course of attempting to restrain the Federal courts in considering or remedying violations of particular constitutional rights.

As stated in a recent New York Times column,

> I warn against any legislative attempt to constrain the Federal judiciary. To emasculate the vital functions of an institution so essential to our liberty can only have disastrous consequences.

I have noted publicly many times that I am concerned that the result of the legislation would be a weakened Federal judicial branch, rather than the independent, fearless one that has served us so well.

I know there are many of us who do not share this view, and who sincerely feel that the judiciary has assumed too many powers, and who are frustrated with our historical reliance on the courts to interpret constitutional rights and the remedies for violation of those rights. This legislation is in part a product of that genuine frustration, and I am certain that we will have an opportunity for articulate debate by distinguished witnesses on the question.

Before greeting our witnesses this morning, I will yield to the gentleman from Illinois, if he has any opening statement.

Mr. RAILSBACK. Thank you very much, Mr. Chairman.

I simply want to welcome Senator Johnston, and express my belief that what we are considering is extremely important. I welcome the idea of having hearings, and I think it is significant that so many of our colleagues have expressed an interest in holding hearings on this very important matter.

Thank you, Mr. Chairman, and I look forward to hearing the evidence.

Mr. KASTENMEIER. We are very pleased this morning that the gentlewoman from Colorado could be here. She has been interested in the subject for some time.

Mrs. SCHROEDER. Mr. Chairman, again, I welcome the Senator and I will let him get on with it.

Mr. KASTENMEIER. It is the Chair's privilege this morning to greet the original sponsor of the bill before us. The Chair doesn't need to extol the splendid career of Senator Bennett Johnston of Louisiana. He is one of the finest public servants on the Hill, and we are very pleased to greet Senator Johnston this morning to address himself to this issue. We will inset in the record the text of S. 951.

[The text of S. 951 follows:]

97TH CONGRESS
1ST SESSION

S. 951

To authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1982, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 8 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself and Mr. BIDEN) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1982, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Department of Justice Appropriation Authorization Act, Fiscal Year 1982".

SEC. 2. There are authorized to be appropriated for the fiscal year ending September 30, 1982, to carry out the activities of the Department of Justice (including any bureau,

office, board, division, commission, or subdivision thereof) the following sums:

(1) For General Administration, including—

(A) the hire of passenger motor vehicles;

(B) miscellaneous and emergency expenses authorized or approved by the Attorney General, or the Deputy Attorney General, or the Associate Attorney General, or the Assistant Attorney General for Administration: $37,653,000.

(2) For the United States Parole Commission for its activities including the hire of passenger motor vehicles: $6,461,000.

(3) For General Legal Activities, including—

(A) the hire of passenger motor vehicles;

(B) miscellaneous and emergency expenses authorized or approved by the Attorney General, or the Deputy Attorney General, or the Associate Attorney General, or the Assistant Attorney General for Administration;

(C) not to exceed $20,000 for expenses of collecting evidence, to be expended under the direction of the Attorney General and accounted for solely on the certificate of the Attorney General;

(D) advance of public moneys under section 3648 of the Revised Statutes (31 U.S.C. 529);

(E) pay for necessary accommodations in the District of Columbia for conferences and training activities;

(F) the investigation and prosecution of denaturalization and deportation cases involving alleged Nazi war criminals: $176,702,000.

(4) For the Foreign Claims Settlement Commission for its activities, including—

(A) services as authorized by section 3109 of title 5, United States Code;

(B) expenses of packing, shipping, and storing personal effects of personnel assigned abroad;

(C) rental or lease, for such periods as may be necessary, of office space and living quarters for personnel assigned abroad;

(D) maintenance, improvement, and repair of properties rented or leased abroad, and furnishing fuel, water, and utilities for such properties;

(E) advances of funds abroad;

(F) advances or reimbursements to other Government agencies for use of their facilities and services in carrying out the functions of the Commission;

(G) the hire of motor vehicles for field use only; and

(H) the employment of aliens: $705,000.

(5) For United States Attorneys, Marshals, and Trustees, including—

(A) purchase of firearms and ammunition;

(B) lease and acquisition of law enforcement and passenger motor vehicles without regard to the general purchase price limitation for the current fiscal year;

(C) supervision of United States prisoners in non-Federal institutions;

(D) bringing to the United States from foreign countries persons charged with crime; and

(E) acquisition, lease, maintenance, and operation of aircraft: $291,206,000.

(6) For Support of United States Prisoners in non-Federal institutions, including—

(A) necessary clothing and medical aid, payment of rewards, and reimbursements to Saint Elizabeths Hospital for the care and treatment of United States prisoners, at per diem rates as authorized by section 2 of the Act entitled "An Act to authorize certain expenditures from the appropriations of Saint Elizabeths Hospital, and for other purposes", approved August 4, 1947 (24 U.S.C. 168a);

(B) entering into contracts or cooperative agreements for only the reasonable and actual cost to assist the government of any State, territory, or political subdivision thereof, for the necessary physical renovation, and the acquisition of equipment, supplies, or materials required to improve conditions of confinement and services of any facility which confines Federal detainees, in accordance with regulations to be issued by the Attorney General and which are comparable to the regulations issued under section 4006 of title 18, United States Code: $25,600,000.

(7) For Fees and Expenses of Witnesses, including expenses, mileage, compensation, and per diem of witnesses in lieu of subsistence, as authorized by law, including advances of public moneys: $29,421,000. No sums authorized to be appropriated by this Act shall be used to pay any witness more than one attendance fee for any one calendar day.

(8) For the Community Relations Service for its activities including the hire of passenger motor vehicles: $5,313,000.

(9) For the Federal Bureau of Investigation for its activities, including—

(A) expenses necessary for the detection and prosecution of crimes against the United States;

(B) protection of the person of the President of the United States and the person of the Attorney General;

(C) acquisition, collection, classification and preservation of identification and other records and their exchange with, and for the official use of, the duly authorized officials of the Federal Government, of States, cities, and other institutions, such exchange to be subject to cancellation if dissemination is made outside the receiving departments or related agencies;

(D) such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General;

(E) purchase for police-type use without regard to the general purchase price limitation for the current fiscal year and hire of passenger motor vehicles;

(F) acquisition, lease, maintenance, and operation of aircraft;

(G) purchase of firearms and ammunition;

(H) payment of rewards;

(I) not to exceed $70,000 to meet unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General and to be accounted for solely on the certificate of the Attorney General;

(J) classification of arson as a part I crime in its Uniform Crime Reports;

$739,013,000 of which $5,000,000 for automated data processing and telecommunications and $600,000 for undercover operations shall remain available until September 30, 1983. None of the sums authorized to be appropriated by this Act for the Federal Bureau of Investigation shall be used to pay the compensation of any employee in the competitive service.

(10) For the Immigration and Naturalization Service, for expenses necessary for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration, including—

(A) advance of cash to aliens for meals and lodging while en route;

(B) payment of allowances to aliens, while held in custody under the immigration laws, for work performed;

(C) payment of expenses and allowances incurred in tracking lost persons as required by

public exigencies in aid of State or local law enforcement agencies;

(D) payment of rewards;

(E) not to exceed $50,000 to meet unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General and accounted for solely on the certificate of the Attorney General;

(F) purchase for police-type use without regard to the general purchase price limitation for the current fiscal year and hire of passenger motor vehicles;

(G) acquisition, lease, maintenance, and operation of aircraft;

(H) payment for firearms and ammunition and attendance at firearms matches;

(I) operation, maintenance, remodeling, and repair of buildings and the purchase of equipment incident thereto;

(J) refunds of maintenance bills, immigration fines, and other items properly returnable except deposits of aliens who become public charges and deposits to secure payment of fines and passage money;

(K) payment of interpreters and translators who are not citizens of the United States and distribution of citizenship textbooks to aliens without cost to such aliens;

(L) acquisition of land as sites for enforcement fences, and construction incident to such fences;

(M) research related to immigration enforcement which shall remain available until expended: $363,376,000 of which not to exceed $100,000 may be used for the emergency replacement of aircraft upon the certificate of the Attorney General.

(11) For the Drug Enforcement Administration for its activities, including—

(A) hire and acquisition of law enforcement and passenger motor vehicles without regard to the general purchase price limitation for the current fiscal year;

(B) payment in advance for special tests and studies by contract;

(C) payment in advance for expenses arising out of contractual and reimbursable agreements with State and local law enforcement and regulatory agencies while engaged in cooperative enforcement and regulatory activities in accordance

with section 503a(2) of the Controlled Substances Act (21 U.S.C. 873(a)(2));

(D) payment of expenses not to exceed $70,000 to meet unforeseen emergencies of a confidential character to be expended under the direction of the Attorney General, and to be accounted for solely on the certificate of the Attorney General;

(E) payment of rewards;

(F) payment for publication of technical and informational material in professional and trade journals and purchase of chemicals, apparatus, and scientific equipment;

(G) payment for necessary accommodations in the District of Columbia for conferences and training activities;

(H) acquisition, lease, maintenance, and operation of aircraft;

(I) research related to enforcement and drug control to remain available until expended;

(J) contracting with individuals for personal services abroad, and such individuals shall not be regarded as employees of the United States Government for the purpose of any law administered by the Office of Personnel Management;

(K) payment for firearms and ammunition and attendance at firearms matches;

(L) payment for tort claims against the United States when such claims arise in foreign countries in connection with Drug Enforcement Administration operations abroad;

(M) not to exceed $1,700,000 for purchase of evidence and payments for information (PE/PI) to remain available until the end of the fiscal year following the year in which authorized:

$228,524,000. For the purpose of section 709(b) of the Controlled Substances Act (21 U.S.C. 904(b)), such sums shall be deemed to be authorized by section 709(a) of such Act, for the fiscal year ending September 30, 1982.

(12) For the Federal Prison System for its activities including—

(A) for the administration, operation, and maintenance of Federal penal and correctional institutions, including supervision and support of United States prisoners in non-Federal institutions, and not to exceed $100,000 for inmate legal services within the system;

(B) purchase and hire of law enforcement and passenger motor vehicles;

(C) compilation of statistics relating to prisoners in Federal penal and correctional institutions;

(D) assistance to State and local governments to improve their correctional systems;

(E) purchase of firearms and ammunition and medals and other awards;

(F) payment of rewards;

(G) purchase and exchange of farm products and livestock;

(H) construction of buildings at prison camps and acquisition of land as authorized by section 4010 of title 18 of the United States Code;

(I) transfer to the Health Services Administration of such amounts as may be necessary, in the discretion of the Attorney General, for the direct expenditures by that Administration for medical relief for inmates of Federal penal and correctional institutions;

(J) for Federal Prison Industries, Incorporated, to make such expenditures, within the limits of funds and borrowing authority, and in accord with the law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Gov-

ernment Corporation Control Act, as may be necessary in carrying out the program set forth in the budget for the current fiscal year for such corporation, including purchase and hire of passenger motor vehicles;

(K) for planning, acquisition of sites and construction of new facilities, and constructing, remodeling, and equipping necessary buildings and facilities at existing penal and correctional institutions, including all necessary expenses incident thereto, by contract or force account, to remain available until expended, and the labor of United States prisoners may be used for work performed with sums authorized to be appropriated by this clause; and

(L) for carrying out the provisions of sections 4351 through 4353 of title 18 of the United States Code, relating to a National Institute of Corrections, to remain available until expended: $383,784,000.

SEC. 3. Sums authorized to be appropriated by this Act may be used for—

(a) the travel expenses of members of the family accompanying, preceding, or following an officer or employee if, while he is en route to or from a post of

assignment, he is ordered temporarily for orientation and training or is given other temporary duty;

(b) benefits authorized under section 901 (5), (6)(A), (8), and (9) and section 904 of the Foreign Service Act of 1980 (22 U.S.C. 4081 (5), (6)(A), (8), and (9) and 22 U.S.C. 4084), and under the regulations issued by the Secretary of State.

SEC. 4. (a) Sums authorized to be appropriated by this Act which are available for expenses of attendance at meetings shall be expended for such purposes in accordance with regulations issued by the Attorney General.

(b) Sums authorized to be appropriated by this Act may be used for the purchase of insurance for motor vehicles and aircraft operated in official Government business in foreign countries.

(c) Sums authorized to be appropriated by this Act for salaries and expenses shall be available for services as authorized by section 3109 of title 5 of the United States Code.

(d) Sums authorized to be appropriated by this Act to the Department of Justice may be used, in an amount not to exceed $35,000 for official reception and representation expenses in accordance with distributions, procedures, and regulations issued by the Attorney General.

(e) There are authorized to be appropriated for the fiscal year ending September 30, 1982, such sums as may be nec-

essary for increases in salary, pay, retirement, and other employee benefits authorized by law, and for other nondiscretionary costs.

(f) Sums authorized to be appropriated for "Salaries and expenses, General Administration", "Salaries and expenses, United States Attorneys and Marshals", "Salaries and expenses, Federal Bureau of Investigation", "Salaries and expenses, Immigration and Naturalization Service", and "Salaries and expenses, Bureau of Prisons" may be used for uniforms and allowances as authorized by sections 5901 and 5902 of title 5 of the United States Code.

SEC. 5. Notwithstanding the second of the paragraphs relating to salaries and expenses of the Federal Bureau of Investigation in the Department of Justice Appropriation Act, 1973 (86 Stat. 1115), sums authorized to be appropriated by this Act for such salaries and expenses may be used for the purposes described in such paragraph until, but not later than the end of the fiscal year ending September 30, 1982.

SEC. 6. (a) With respect to any undercover investigative operation of the Federal Bureau of Investigation which is necessary for the detection and prosecution of crimes against the United States or for the collection of foreign intelligence or counterintelligence—

(1) sums authorized to be appropriated for the Federal Bureau of Investigation by this Act may be used for leasing space within the United States, the District of Columbia, and the territories and possessions of the United States without regard to section 3679(a) of the Revised Statutes (31 U.S.C. 665(a)), section 3732(a) of the Revised Statutes (41 U.S.C. 11(a)), section 305 of the Act of June 30, 1949 (63 Stat. 396; 41 U.S.C. 255), the third undesignated paragraph under the heading "Miscellaneous" of the Act of March 3, 1877 (19 Stat. 370; 40 U.S.C. 34), section 3648 of the Revised Statutes (31 U.S.C. 529), section 3741 of the Revised Statutes (41 U.S.C. 22), and subsections (a) and (c) of section 304 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 395; 41 U.S.C. 254 (a) and (c));

(2) sums authorized to be appropriated for the Federal Bureau of Investigation by this Act may be used to establish or to acquire proprietary corporations or business entities as part of an undercover operation, and to operate such corporations or business entities on a commercial basis, without regard to the provisions of section 304 of the Government Corporation Control Act (31 U.S.C. 869);

(3) sums authorized to be appropriated for the Federal Bureau of Investigation by this Act, and the proceeds from such undercover operation, may be deposited in banks or other financial institutions without regard to the provisions of section 648 of title 18 of the United States Code, and section 3639 of the Revised Statutes (31 U.S.C. 521); and

(4) the proceeds from such undercover operation may be used to offset necessary and reasonable expenses incurred in such operation without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484);

only upon the written certification of the Director of the Federal Bureau of Investigation (or, if designated by the Director, an Executive Assistant Director) and the Attorney General (or, if designated by the Attorney General, the Deputy Attorney General) that any action authorized by paragraph (1), (2), (3), or (4) of this subsection is necessary for the conduct of such undercover operation.

(b) As soon as the proceeds from an undercover investigative operation with respect to which an action is authorized and carried out under paragraphs (3) and (4) of subsection (a) are no longer necessary for the conduct of such operation, such proceeds or the balance of such proceeds remaining at

the time shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) If a corporation or business entity established or acquired as part of an undercover operation under paragraph (2) of subsection (a) with a net value of over $50,000 is to be liquidated, sold, or otherwise disposed of, the Federal Bureau of Investigation, as much in advance as the Director or his designee determines is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as miscellaneous receipts.

(d)(1) The Federal Bureau of Investigation shall conduct detailed financial audits of undercover operations closed on or after October 1, 1981, and—

(A) report the results of each audit in writing to the Attorney General, and

(B) report annually to the Congress concerning these audits.

(2) For the purposes of paragraph (1), "undercover operation" means any undercover operation of the Federal Bureau of Investigation, other than a foreign counterintelligence undercover operation—

(A) in which the gross receipts exceed $50,000, and

(B) which is exempted from section 3617 of the Revised Statutes (31 U.S.C. 484) or section 304(a) of the Government Corporation Control Act (31 U.S.C. 869(a)).

SEC. 7. Section 709(a) of the Controlled Substances Act (21 U.S.C. 904(a)) is amended—

(1) by striking out "and" after "1980", and

(2) by inserting after "1981", the following: "and $228,524,000 for the fiscal year ending September 30, 1982,".

SEC. 8. Section 511(d) of the Controlled Substances Act (21 U.S.C. 881(d)) is amended by inserting "and the award of compensation to informers in respect to such forfeitures" immediately after "compromise of claims".

SEC. 9. Without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484), the Drug Enforcement Administration is authorized to—

(a) set aside 25 per centum of the net amount realized from the forfeiture of seized assets and credit such amounts to the current appropriation account for the purpose, only, of an award of compensation to informers in respect to such forfeitures and such awards shall not exceed the level of compensation prescribed by section 1619 of title 19, United States Code;

(b) the amounts credited under this section shall be made available for obligation until September 30, 1983;

(c) such awards shall be based on the value of the seized property or the net proceeds from the sale of such property except that no award may be paid from or based on the value of the seized contraband; and

(d) the remaining 75 per centum of the net amount realized from the forfeiture of the seized assets referred to in subsection (a) shall be paid to the miscellaneous receipts of the Treasury;

Provided, That the authority furnished by this section shall remain available until September 30, 1983, at which time any amount of the unobligated balances remaining in this account, accumulated before September 30, 1982, shall be paid to the miscellaneous receipts of the Treasury: *And provided further,* That the Drug Enforcement Administration shall conduct detailed financial audits, semiannually, of the expenditure of funds from this account and—

(1) report the results of each audit, in writing, to the Attorney General, and

(2) report annually to the Congress concerning these audits.

SEC. 10. (a) Section 569(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) Except as provided in paragraph (2), the United States Marshals shall execute all lawful writs, process, and orders issued under authority of the United States, and command all necessary assistance to execute their duties.

"(2) Service of civil process, including complaints, summonses, subpoenas, and similar process, shall not be performed by the United States Marshals on behalf of any party other than the United States, unless performed pursuant to—

"(A) section 1915 of this title or any other express statutory provision, or

"(B) order issued by the court in extraordinary and exigent circumstances".

(b) The amendment made to title 28, United States Code, by subsection (a) of this section shall take effect on the date of enactment of this Act or October 1, 1981 whichever date is earlier.

SEC. 11. (a) The Attorney General shall perform periodic evaluations of the overall efficiency and effectiveness of the Department of Justice programs and any supporting activities funded by appropriations authorized by this Act and annual specific program evaluations of selected subordinate organizations' programs, as determined by the priorities set either by the Congress or the Attorney General;

(b) Subordinate Department of Justice organizations and their officials shall provide all the necessary assistance and

cooperation in the conduct of evaluations, including full access to all information, documentation, and cognizant personnel, as required.

SEC. 12. (a) Chapter 15 of title 11, United States Code (92 Stat. 2651 et seq.) and chapter 39 of title 28, United States Code (92 Stat. 2662 et seq.) are repealed.

(b) Section 408 of the Act entitled "An Act To Establish a Uniform Act on the Subject of Bankruptcy", approved November 6, 1978 (92 Stat. 2686), is repealed.

(c) Section 330 of title 11, United States Code (92 Stat. 2564) is amended by striking out "and to the United States Trustees.".

SEC. 13. The Act of March 2, 1931 (8 U.S.C. 1353a and 8 U.S.C. 1353b) is hereby repealed.

SEC. 14. The Immigration and Nationality Act is amended by adding after section 283 the following new section:

"§ 283a. Reimbursement by vessels and other conveyances for extra compensation paid to employees for inspectional duties

"(a) The extra compensation for overtime services of immigration officers and employees of INS for duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles arriving in the United States by water, land, or air, from a foreign

port shall be paid by the master, owner, agent, or consignee of such vessel or conveyance, at the rate fixed under the applicable provisions of sections 5542 and 5545 of title 5, United States Code.

"(b) The extra compensation shall be paid if the employee has been ordered to report for duty and has reported, whether or not the actual inspection or examination takes place: *Provided,* That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.".

SEC. 15. (a) Section 1353c of title 8, United States Code (the Act of March 4, 1921 (41 Stat. 1224), as amended), is redesignated as section 1353b of title 8, United States Code.

(b)(1) The Act of August 22, 1940, as amended (8 U.S.C. 1353d), is amended by striking the words "the Act of March 2, 1931" and inserting instead the words "section 283a of the Immigration and Nationality Act.".

(2) Section 1353d of title 8, United States Code is redesignated as section 1353c of title 8, United States Code.

(c) Section 5549 of title 5, United States Code is amended by—

(1) striking subsection (2), and

(2) redesignating subsections (3) through (5) as (2) through (4), respectively.

TESTIMONY OF HON. J. BENNETT JOHNSTON, U.S. SENATOR FROM LOUISIANA

Senator JOHNSTON. Thank you very much, Mr. Chairman, and distinguished members of the committee.

I am very honored to be here on this historic day. In case you have forgotten, this is the 10th anniversary of the Watergate break-in in which this committee played such a great and courageous role.

Mr. Chairman, throughout history great calamities have been set in motion by the best of men in the pursuit of the most noble causes. In the name of God, the Christian conducted the bloody crusades. More recently, America lost its first war and along with it 50,000-plus lives in Vietnam, in the pursuit of freedom and self-determination. I am sure that the British and the Argentines can give us wonderful reasons for the carnage in the Falkland Islands.

So, it is that the best of men in pursuit of a very noble cause have invented a remedy called schoolbusing, which was supposed to, at least initially, give us quality education, to pursue equal rights, and in the process to vindicate the Constitution.

Mr. Chairman, this noble experiment by these fine men has not worked and it is time now for the Congress to step in and play a role which is created for it under the Constitution.

Lest there be those who say that we are hasty in taking this congressional action, let me say that for 10 years since I have been in the Senate I have watched for some evidence of restraint on behalf of the courts, for some evidence that this remedy was working, was indeed vindicating the Constitution, giving better education, or indeed working to integrate the schools.

But, Mr. Chairman, like Evangeline under the Oak, we have waited and waited and waited, without any results, other than a tightening of the screw, more unreasonable orders, more counterproductive effects of this remedy so overused by the courts.

Specifically, Mr. Chairman, this very year in the city of Baton Rouge, in East Baton Rouge Parish, La., 6-year-old children are being bused 1 hour and 15 minutes in one direction in the morning. In the process, over 4,000 students left the school system virtually overnight after the order was issued.

In Rapides Parish, a brandnew school, Forest Hill, bought and paid for by the taxpayers of that area, was ordered closed. The students were ordered to be bused 25 miles plus, and over 60 percent of them left the school system.

One particular bus route involved a bus trip of 46.8 miles in one direction, with a bus trip of 1 hour and 45 minutes, this according to the school board—46.8 miles, an order of a U.S. Federal district court in the name of quality education.

Mr. Chairman, and members of this committee, after 10 years of seeing this kind of remedies come down from the courts, remedies that have turned in my home parish, a formerly majority-white system into a now black system, and we see that occurring all over my State as the orders get more and more unreasonable, Mr. Chairman, I thought it was time to find a remedy, a reasonable remedy allowing the Congress to play its role of factfinding and of putting limits on the orders of courts.

It is time for us to recognize, Mr. Chairman, as Mr. Justice Powell said in the 1979 case of *Estes* v. *Metropolitan Branches,* that we must put an end to this practice which "like a loose cannon inflicts indiscriminate damage on the school system."

As David J. Armor, the distinguished social scientist, says:

> There is overwhelming social science evidence that mandatory busing doesn't work to integrate the schools, and it doesn't work to improve the education of the children in the schools.

A Justice of the Supreme Court describes this remedy as a "loose cannon," and a distinguished social scientist says that there is overwhelming social science evidence that it neither works to improve education, nor works to integrate the schools.

Mr. Chairman, it seems to me that we in the Congress cannot stand by and wring our hands and say that there is absolutely nothing we can do. Indeed, there is something we can do, a role traditional under the 14th amendment and under our Constitution.

I am aware, Mr. Chairman, that from round one on, it has been the command of the Supreme Court that we eliminate discrimination, root and branch; to quote the Supreme Court, that "we dismantle the dual school system." No one disagrees with that, and least of all the author of this amendment. We should dismantle the dual school system; we should eliminate discrimination root and branch from our school system, but how do we do it?

In the *Swann* case, Mr. Chairman, which was one of the first, a 1970 case, the Supreme Court talked about "balancing individual and collective interests," to quote them in that case, "in coming up with orders." As you go through the many cases involving busing, you find these words describing the scope of the order: That it ought to be "reasonable," "feasible," "workable," "effective," "realistic," or to use the words of the *Green* case, which is one of the most famous, a 1968 case, that "we should have a plan that promises realistically to work." That in a nutshell, Mr. Chairman, is what we ought to be pursuing.

What we ought to be pursuing today is a plan that promises realistically to work. It must do two things. It must eliminate all vestiges of State-imposed segregation, and it must eliminate the effects of past discrimination.

Again, not only do we have no argument with all of these tests, we fully endorse these tests. But it is against these very tests, Mr. Chairman, that busing, at least long distance busing, fails as a remedy.

Mr. Chairman, I know these judges. I will even say that I have passed on some of them: they are men of good will, but they feel constrained by the Supreme Court to follow what they see as the orders of the Supreme Court in ordering 6-year-old kids to be bused 1 hour and 15 minutes.

Does anybody think that that works? Does anybody feel that this is going to make a better school system? They don't.

In the months and months of arguing this case on the floor of the U.S. Senate, do you know that nobody was willing to defend long-distance busing, no one. You know, I didn't get all the votes over there. We got obviously over 60 percent. We got 60 votes and invoked cloture on three different occasions. But in all that time,

the opponents who felt strongly about this issue were never willing to defend busing. They were never willing to defend it.

How did we get into this? Because, as I said, men of good will looked at the evidence in existence at that time.

Do you remember James S. Coleman, the distinguished social scientist who did a study on the effects of segregation, what it means in terms of a dual school system and the psychological damage it does to children. Based upon his evidence, the Supreme Court issued the initial order in the *Green* case. I guess the *Green* case in 1968 was the first real case that talked about the need for busing.

But what does Mr. Coleman say now? He says, in effect, that what he assumed in the sixties is wrong. Writing in the fall 1978 issue of Human Rights, if I may just quote very quickly, he said:

> It was assumed that the elimination of school segregation would eliminate all racial segregation in education. Any knowledge of urban areas and urban residential segregation along income, ethnic and racial lines leads immediately to the recognition that most segregation in urban areas is due to residential patterns.

Second, he says:

> It was assumed that integration would immediately improve the achievement of lower class black children. I hasten to add that it was research of my own doing that in part laid the basis for this assumption. It turns out, that school desegregation, as it has been carried out in American schools, does not generally bring achievement benefits to disadvantaged children.

Third, it was once assumed that policies of radical school desegregation could be instituted, such as a busing order, to create instant racial balance, and the resulting school populations would correspond to the assignment of children to the schools—no matter how much busing, no matter how many objections by parents to the school assignment.

It is now evident, despite the unwillingness of some to accept the fact, that there are extensive losses of white students from large central cities when desegregation occurs. As a result, harmful school desegregation policies are being implemented in American cities.

This is James S. Coleman, the very social scientist whose evidence was used by the Courts.

I have quoted David J. Armor, who undertook the massive Rand study on the effects of busing. He says, "The evidence is overwhelming."

I have these in the record, Mr. Chairman, and if I may I would like to have my full written statement put into the record.

Mr. KASTENMEIER. Without objection, your full written statement will be received as part of the record, and the addenda that you are also offering will be made part of the record.

Senator JOHNSTON. I would especially invite this committee, Mr. Chairman, to read the results of the Armor study, and of the Coleman study, because with those results, I think it is very difficult to argue and, indeed, no one in the U.S. Senate has argued with them. There is an absolute paucity of evidence to the contrary.

Mr. Chairman, as one anecdotal matter, I might point out that the April 21 issue of Newsweek shows the results of busing in the extreme. It describes what is going on in Boston.

I think this committee may be familiar with it, but to quote what Newsweek said:

In 1972, Judge Garrity ordered an extensive school busing order to be implemented. Boycotts resulted, demonstrations, even bloodshed. Since that time, white enrollment in Boston schools has dropped from 70 percent to 34 percent, less than half.

It has resulted in what Newsweek describes as "Resegregation in some schools," "there is little to improve education."

To cap it all, in a Boston Globe poll, 79 percent of blacks indicated that they now favor freedom of choice.

Mr. Chairman, surely there is something that this Congress can do about that. Surely, we can't sit by year after year and see our systems destroyed. It is destroying Louisiana school systems, some of them. It has certainly destroyed Boston. Surely there is something we can do.

The polls nationwide—I understand that constitutional rights are not and should not be subject to a plebiscite, but over a period of 10 years, consistently the American public by margins of 2 and 3 to 1 have disapproved busing.

In the last nationwide poll taken in 1981, blacks nationwide disapprove of busing by a margin of 47 to 44 percent, and of those who have a strong feeling, 38 percent disapprove of busing and 26 percent support it. That is an NBC/AP poll, and that is also in the record.

So, Mr. Chairman, while the failures continue to multiply, and justifications continue to evaporate, courts continue on their merry way. But, Mr. Chairman, as the Supreme Court said in the *Swann* case, "It must be recognized that there are limits." That is the Supreme Court itself.

Those limits, first of all, affect the nature of the remedy, that is to say, the nature of the remedy, says the Court, must be calculated to fit the scope of the violation. The Court has, for example, on a number of occasions, refused to issue orders for intercounty or interdistrict busing because they say that would violate the right of school boards to make their own determinations.

They also said, in the *Swann* case, as follows:

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.

That is in the *Swann* case, Mr. Chairman, and *Swann* and *Green* are the landmark cases on this subject.

Objection to transportation may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.

The problem is that these cases are all heavily involved with factual determinations. You have schools, with differing geographic patterns, different ethnic distributions. So it has been impossible, or at least the Supreme Court has not found it proper, to give life to what they said as to limitations spelled out in the *Swann* case.

They have never given us any guidance as to what they mean by "health of the students," or what they mean by "impinging on the educational process." That is where the Congress comes in, Mr. Chairman, because under section 5 of the 14th amendment, the Congress is specifically given the power to implement this amendment by appropriate legislation, "implement" and "appropriate" being the operative words.

What do they mean? The two leading cases on section 5 of the 14th amendment are *Oregon* v. *Mitchell,* and *Katzenbach* v. *Morgan. Oregon* v. *Mitchell* is a 1970 case, and here is what they say, it is a very short quote but it is a very important one:

The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind of so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as arbitrary, irrational, or unreasonable.

Limitations stemming from the nature of the judicial process have no application to Congress. Section 5 of the 14th amendment provides that the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a State legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter.

This is very broad language, Mr. Chairman.

To quote the language of *Katzenbach* v. *Morgan:*

By including Section 5, the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the necessary and proper clause, Article I, Section 8, Clause 18. The classic formulation of the reach of each of these powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland* as follows:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution are constitutional."

You could hardly have, Mr. Chairman, a broader statement of the authority of Congress. We have the power to set priority. We have the power to find facts. We have the power, which is coterminous only with the necessary and proper clause in its scope and in its breadth, to make these determinations.

The Supreme Court has invited us to do so in the *Swann* case by saying that there are limits to busing, they have to do with the health of the children, and impingement on the educational process. The Supreme Court says so itself.

The 14th amendment gives us the power to enforce the amendment by appropriate legislation. We can find facts, and the facts that we have found in this amendment, Mr. Chairman, and they are set forth in that amendment, comport totally with what David J. Armor, the distinguished social scientist, says is the "overwhelming social science evidence."

The evidence is overwhelming. The Congress comes along and finds that evidence to be true, and exercises the power which the Supreme Court says we have in a whole line of cases.

Mr. Chairman, in opposition to all of this the only real opposition that I see to our argument under the 14th amendment is a footnote to the *Katzenbach* case. That footnote says that the Congress cannot restrict, abrogate, or dilute the constitutional guarantees in the name of section 5 of the 14th amendment.

I have checked all the cases that I can find on section 5 of the 14th amendment, and indeed section 2 of the 15th amendment, which is identical to section 5 of the 14th amendment, and the legal principle is exactly alike. The only thing you can find to sug-

gest that there is any limitation on the power of Congress is this footnote in the *Katzenbach* case.

So, I think it behooves us all to examine this case. Indeed, in the Attorney General's opinion, he says, "It seems to be settled law," if I recall his statement correctly, "that Congress cannot abrogate, restrict or dilute." It is not settled at all.

It is a footnote, which constitutes dictum within dictum, because what the footnote was doing was replying to a dissent, the dissent of Justice Harlan in that case. He said that Congress did not have the power to vindicate or restrict a right unless that right was protected by the Constitution.

In the *Katzenbach* case, the Congress had gone farther than the Constitution by protecting a right which was not protected by the courts. In any event, it is clearly only dictum.

But I choose not to rely upon the fact that it is dictum and that it is a footnote, and merely say, Mr. Chairman, it doesn't answer the question: it merely begs the question of what constitutes restricting, abrogating or diluting a constitutional right.

What is the constitutional right here involved? Is it the right to be bused? Clearly not. Clearly not.

Indeed, all of the statements of all of those cases, not only those that deal with busing, talk of the constitutional right of being free of discrimination, of dismantling the dual system root and branch, and of eliminating all vestiges of the former dual school system. That is what they say. That is not only what they say, but it is the spirit of what they say.

Nowhere do they say that a child ought to be entitled to have a long bus trip. Of course, they don't. Indeed, in the *Swann* case, what they say is that there are limits to what the court can order, and they have to do with health, and they have to do with the educational process.

So, Mr. Chairman, if that is so, then it seems to me that it is up to us, or it ought to be up to us, or it ought to be up to this distinguished committee, to find out how best can we vindicate those rights.

Is David J. Armor really right? Was James S. Coleman right the first time, or is he right now? That ought to be our inquiry. If they are right, then let's fashion a remedy that will vindicate those rights.

It is indeed within our power to find those facts, to balance the interests, and to protect the rights. Congress can determine, it seems to me, Mr. Chairman, that the interest of those being bused also is entitled to protection.

In a whole host of cases, *Rome* v. *Georgia, Oregon* v. *Mitchell,* and others, the courts have said that the Congress can protect a right which the Supreme Court has not recognized as entitled to protection under the 14th or 15th amendment.

The Supreme Court has not yet said that children are entitled to protection under the 14th amendment from unreasonable orders of busing. The Supreme Court has not said in so many words that it is unconstitutional to use a racial classification to decide that a child is to be bused 46.8 miles in Rapides Parish. That right has never been recognized.

Under *Oregon* v. *Mitchell,* under *Rome* v. *Georgia,* the Congress has the clear power, it seems to me, to protect that right because it does comport with due process and equal protection arguments.

Second, Mr. Chairman, the Congress has the right and the power to determine what is best for most of the children. How do you best integrate schools? How do you best promote education in schools? It seems to me that you do so by putting reasonable limits. What we have done under this act, Mr. Chairman, is to put what we regard as reasonable limits on busing—5 miles or 15 minutes from the school.

I want to emphasize, Mr. Chairman, that the reach of this act applies only to court orders of U.S. Federal courts, districts courts, courts of appeal, and the Supreme Court. It does not apply to State courts. It does not apply to the orders of school boards. So, indeed, as the Attorney General says the act is ambiguous in that respect, it is not.

We never intended to reach school board orders. So, if a school board, with duly elected or duly appointed members, undertakes to employ its own schoolbusing plan that exceeds the limits of this act, this act does not purport and does not intend to affect those kinds of orders. We think that those are protected under the political system, that duly elected people or duly appointed people on the ground, in their local communities, can determine what is a proper balance of the interests.

All we are doing here is to expunge the court orders which have been entered against the will of schoolchildren and against the will of school boards. It does not affect the duty of school boards, and of the Federal district courts to properly, in a nondiscriminatory manner, to draw school board attendance districts. There can be no gerrymandering under this bill.

The majority to minority rule, which was recognized, I know, as long ago as 1971 and is still the law of the land, to the effect that a child has a right, if he is in the majority to be transferred to a school where his race is in the minority, and to be transported, that right is not affected, it is still protected.

The panoply of other remedies which courts have undertaken which do not involve long-distance schoolbusing—magnet schools, properly drawn attendance zones, assignment of teachers all of those things are not affected.

Indeed, it remains and it ought to remain the duty of school boards to employ all of those things. All we say is that Federal courts cannot, under this act, make and continue to make these unreasonable orders which don't work, which do impinge, as the court says, on the educational process.

Very quickly, Mr. Chairman, I want to mention article 3. This act, under article 3, does purport to invoke the full power of the Congress to restrict the jurisdiction of courts. Frankly, it is a supplementary argument. It is an additional argument.

It is not the primary argument, because I think the primary argument is and ought to be under section 5 of the 14th amendment. I think that is our proper role, to balance the interests, to decide what is appropriate to enforce the amendment. That is the spirit in which the legislation was submitted, that is to enforce the amendment.

But let there be no mistake, Mr. Chairman, the act does apply, not just to Federal district courts as the Attorney General suggested, but to all Federal courts, indeed the language of the act, he says, "no Court of the United States may"—no court of the United States. Courts of the United States have a clearly defined meaning, and apply to all courts. So, let there be no mistake about that. We intend to invoke the full power under article 3 of the Constitution.

Finally, Mr. Chairman, let me simply say this. This is a distinguished committee. It has a long and great history. It has taken courageous stands. It takes courage on both sides of this issue to stand up and do what is right. I hope that this committee will allow the Congress to express itself.

This committee and the House of Representatives have thus far done everything that I have asked. I have asked that the bill not be held at the desk, that it be referred to committee, that was done. I have asked that the hearings be held in committee, and that has been done.

Mr. Chairman, the problem is that for that which should have taken a day, that is referral of the bill to the committee, it has taken 18 days. For the setting of hearings in a matter of this importance where three times cloture was invoked in the U.S. Senate, it has taken 3½ months.

I hope, Mr. Chairman, that that is not an indication that the committee will fail to let the process work, give this bill a full and fair hearing to determine whether or not you think the Congress has any power under the Constitution to put reasonable limits, and at least let the Congress work its will.

If the Congress works its will, if this committee really determines whether or not busing works and decides how far busing ought to go, I am totally confident, Mr. Chairman, that this bill will be reported out favorably and will be passed by the House of Representatives.

Thank you very much.

[The written statement of Senator Johnston follows with addenda:]

STATEMENT OF SENATOR JOHNSTON

Mr. Chairman, the constant theme and thrust of the Supreme Court since the 1954 case of *Brown* v. *Board of Education* has been that state enforced separation of races in public schools is a discriminatory violation of the Equal Protection Clause of the Constitution. The remedy commanded has been to dismantle dual school systems. The best method for effectuating this remedy has been the subject of countless discussions, thousands of court cases, and is the purpose of this hearing today.

The emotionalism which surrounds this issue is testimony to its complexity. The competing considerations are many, and as the Supreme Court noted in *Swann* v. *Board of Education*, the task involves "a balancing of the individual and collective interests." 402 U.S. 1, 16 (1970).

The court in *Brown* noted that "In fashioning and effectuating the decrees, the courts will be guided by equitable principles." 349 U.S. 294, 229 (1955). In searching for a term to define the equitable remedial powers of the district courts, opinions have employed words such as "reasonable," "feasible," "workable," "effective," and "realistic," in the mandate to develop "a plan that promises realistically to work." *Green* v. *County School Board*, 391 U.S. 430 (1968). Regardless of the descriptive term used, two general criteria have emerged for any school segregation remedy. First, it must "eliminate from the public schools all vestiges of state imposed segregation." 402 U.S. 15. Second, it must eliminate the effects of past discrimination, "striving, to the extent possible, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v.

Bradley, 418 U.S. 746 (1973). This second requirement has been variously interpreted to include the goals of increased positive racial contact, reduced prejudice and improved racial relations in general. (D. J. Armor, "Unwillingly to School," 18 Policy Review 99, 104-106, Fall 1981). As Justice Powell noted in *Estes* v. *Metropolitan Branches, NAACP*, "A desegregation remedy that does not take account of . . . social and educational consequences . . . can be neither fair nor effective." 444 U.S. 437, 452 (1979). It is against the backdrop of these requirements that we must measure the appropriateness of mandatory long distance busing. I would submit that it meets neither criteria.

In the original cases ordering busing, the Court, relying on such distinguished social scientists as James S. Coleman, determined that on balance, the interest of black students in receiving a nondiscriminatory school assignment took priority over the interest of students going to the school closest to their residences. Thus was created the paradoxical situation where the evil of racially conscious school assignments was cured by racially conscious school assignments. As the Court noted in *North Carolina Board of Education* v. *Swann*, "[J]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy," 402 U.S. 43, 46 (1971).

It was originally assumed that policies of racial desegregation could be instituted through busing orders, and the resulting school populations would correspond to the assignments of children to schools, regardless of the scale or duration of the busing. The remedy would not only guarantee the right of maximized integration, but would improve education as well. More than a decade of experience has shown that this is clearly not the case. Increasing incidences of white flight continue to prevent achievement of a fully unitary school system.

An example in point, noted in the April 21, 1982 edition of Newsweek, is the city of Boston. In 1972 U.S. Judge Arthur W. Garrity, Jr. ordered a busing plan for Boston which shipped about half of the city's students out of their neighborhood. School boycotts, demonstrations and even bloodshed followed. While public resistance has softened somewhat, white enrollment has dropped from 70 percent to 34 percent since 1972. Noting that mandatory busing "has even resulted in resegregation of some schools," and has done little to improve the quality of education, more than 200 blacks have formed a Black Parent Committee to try and persuade Garrity to revise the system. Indeed, a poll taken by the Boston Globe indicated that 79 percent of the blacks surveyed favored freedom of choice as the best method for school assignments. Clearly, massive mandatory busing orders such as that of Boston fail to meet either the requirement of dismantling dual school systems or of improving race relations and the quality of education.

As the failings of court ordered busing continue to multiply, the justification for racially conscious school assignments of those remaining within the school system continues to evaporate. Yet, the response of the courts to these failings has not been to abandon busing as a tool for desegregation, but to expand the scope and duration of busing plans. Clearly, as the Supreme Court noted in *Swann*, at some point "it must be recognized that there are limits." 402 U.S. 28.

Certain of these limits have been recognized by the Court itself. As articulated in *Swann* "the nature of the violation determines the scope of the remedy." 402 U.S. 16. Subsequent cases have further clarified this limitation. In *Milliken* v. *Bradley* the Supreme Court dealt with the question of whether a Federal court may impose a multi-district, areawide remedy to a single district de jure segregation problem absent any finding of discrimination within the other included school districts and absent a finding that the boundary lines of the affected district were drawn with the purpose of fostering racial segregation in public schools. In holding that it could not, the Court stated: "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." 418 U.S. 745 (1973). To hold otherwise could "disrupt and alter the structure of public education in Michigan," giving rise to "an array of other problems in financing and operating" the school system, and elevating the court to a *"de facto* 'legislative authority' to resolve these complex questions." The court correctly noted that "This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." 418 U.S. 716.

Three years later in *Dayton Board of Education* v. *Brinkman*, the Court specified that the limitations of *Swann* applied even within a single district. In that case, the District Court, after an evidentiary hearing, found that the Dayton School Board had engaged in racial discrimination in the operation of the city's school system. Based on the "cumulative violation" of the Equal Protection Clause, which consisted of three specifically articulated elements, the Court imposed a systemwide remedy. The Supreme Court found this remedy "entirely out of proportion of the Constitu-

tional violations found by the District Court" and held that "only if there has been a systemwide impact may there be a systemwide remedy." 433 U.S. 406, at 418 and 420 (1976).

These cases, based on the reasoning in *Swann*, clearly stand for the proposition that there are limits to the remedy which can be applied to a certain violation. But *Swann* further stands for the proposition that there must be certain unspecified limits on the *means* used to effectuate a given remedy. These limits are peculiarly factual in nature and thus defy judicial definition: "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." 402 U.S. 29 (emphasis added). Nevertheless, the Court went on to detail certain exemplary limitations: "An objection to transportation of students may have validity when the time or distance or travel is so great as to either risk the health of the children or significantly impringe on the educational process." 402 U.S. 30-31. Thus, the Court itself admits that while there are certainly limits on the means used to achieve a desired remedy, the factual nature of those limits preclude the Court from articulating them.

SCOPE OF CONGRESS POWERS UNDER SECTION 5

I would submit that Congress is in a uniquely appropriate position to determine what those limits are and when the objections become valid. That is indeed what we seek to do, pursuant to section 5 of the Fourteenth Amendment, in the Neighborhood School Act. That such an undertaking is within the authority of Congress is supported by Justices Brennan, White and Marshall, members of the so-called liberal wing of the Court, in their opinion in *Oregon* v. *Mitchell*. Stressing Congress' superior fact finding competence, they urged judicial deference to Congressional judgments regarding the "appropriate means" for remedying equal protection violations:

"The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable,' (citations omitted).

"Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that '[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. 400 U.S. 247-8 (1970).

That the Conservative members of the Court are also acutely aware of Congress' power under Section 5 of the Fourteenth Amendment is evidenced in Chief Justice Burger's opinion in *Fullilove* v. *Klutznick:*

"Here we deal, as we noted earlier, not with the limited remedial powers of a Federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or Federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S. 483 (1979).

The powers of Congress under section 5 of the 14th Amendment are exceedingly broad and are entitled to great judicial deference. As stated by the Court in *Katzenbach* v. *Morgan:*

"By including section 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the 14th Amendment, the same broad powers expressed in the necessary and proper clause, Article 1, Section 8, Clause 18. The classic formulation of the reach of these powers was established by Chief Justice Marshall and *McCulloch* v. *Maryland,* 4 Wheat. 316, 421:

" 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the Constitution, are constitutional.' " 384 U.S. 641, 650 (1965).

In attacking the constitutionality of the Neighborhood School Act, opponents have stated that it restricts equal protection and due process rights under the 14th Amendment and therefore must fall. This argument contends that while Congress may expand protection under the 14th Amendment, it may not restrict rights under that amendment. The only judicial justification for this argument which we have

been able to locate is found in a footnote, which is itself dictum, in the opinion in *Katzenbach* v. *Morgan*. In that footnote the Court states:

"Contrary to the suggestion of the dissent . . . § 5 grants Congress no power to restrict, abrogate or dilute these guarantees. Thus, for example, an enactment authorizing the states to establish racially segregated systems of education would not be—as required by section 5—a measure 'to enforce' the Equal Protection Clause since the clause of its own force prohibits any such state laws." 384 U.S. 651, note 10 (1965).

This statement, which merely states a conclusion without any legal reasoning or justification, is a response to a hypothetical argument proffered by Justice Harlan in his dissent, and is tenuous authority at best. But even assuming for the purpose of argument that this footnote accurately depicts the law in this area, it merely begs the question rather than answers it. The court has never elevated the concept of busing to the level of an equal protection right. Rather, the equal protection rights have been variously described as the right to "admission to public schools on a nondiscriminatory basis," *Brown II*, 349 U.S. at 299; the right to attend "a unitary system in which racial discrimination [has been] eliminated root and branch," *Green*, 391 U.S. at 437-8; and to be assured that "school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23.

Rather than constituting a right, busing is no more than "an implement of a remedial decree." 402 U.S. 29. To argue that by limiting the extent to which courts may impose long distance busing Congress is seeking to "restrict abrogate or dilute" equal protection rights ignores the distinction between a right and a remedy. Both the Courts and Congress have recognized that busing is only one of several remedies for the elimination of segregation in public schools. As noted by Professor Hart in a 1953 *Harvard Law Review* article:

"The denial of *any remedy* is one thing . . . but the denial of one remedy while another is left open, or the substitution of one for another, is very different. It must be plain that Congress had a wide choice in the selection of remedies, and that a complaint about an action of this kind can rarely be of constitutional dimension. (H. M. Hart, 'The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic;' " 66 *Harvard Law Review* 1362; 1953).

Finally, the racially conscious assignment of students, against their will, to schools distant from their homes is an extraordinary remedy which is justified only so long as it works to cure a greater evil. Absent a remedial attempt to dismantle a dual school system, the racially conscious application of busing to some students and not others would surely be perceived as a violation of the equal protection rights of those subject to the busing order. In the Neighborhood School Act Congress is merely saying that in light of the failures and inequities inherent in long distance busing, and in light of the numerous other remedies available to achieve school desegregation, the merits of court ordered long distance busing to the populace as a whole no longer outweigh the imposition on the rights of those being bussed. This is not to say that racially conscious school assignments achieved through busing orders violate 14th Amendment Equal Protection guarantees. It does say, however, that Congress has balanced "the individual and collective interests" and has chosen to extend protections to those previously subjected to long distance busing.

That this is within the power of Congress to undertake has been clearly established by the Supreme Court in *City of Rome*. In that case the Court upheld the preclearance procedures of the Voting Rights Act which declared illegal the election practices of Rome, Georgia, even though those practices were not illegal per se under the 15th Amendment:

"It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate' as that term is defined in *McCulloch* v. *Maryland*, 446 U.S. 177."

The powers of Congress under Section 5 of the 14th Amendment are identical to its powers under section 2 of the 15th Amendment, a fact frequently recognized by the Court. see e.g. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *City of Rome* v. *United States*, 446 U.S. 156, (1980). Thus, Congress clearly has the authority under Section 5 of the 14th Amendment to extend Equal Protection guarantees to a practice not determined to be discriminatory by the Courts. That is precisely what we seek to do in the Neighborhood School Act.

That this vindication of rights addresses only court ordered busing and not busing plans per se does not lessen its legitimacy. For it is indeed well settled that a "statute is not invalid under the Constitution because it might have gone farther than it did." *Roschen* v. *Ward*, 279 U.S. 337, 339. Clearly, "reform may take place one step

at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489. In this instance, the most acute problem is the ineffective and burdensome imposition of long distance court ordered busing—a measure which, by definition "deprive[s] the people of control of schools through their elected officials." 418 U.S. 716.

SCOPE OF CONGRESS POWER UNDER ARTICLE III

Article III provides a separate source of power to restrict busing. Under Article III Congress has virtually plenary control over the jurisdiction of the lower Federal courts and over the appellate jurisdiction of the Supreme Court. The Supreme Court has frequently stated that "the judicial power of the United States—is—dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress." *Cary* v. *Curtis,* 1845, 3 How 236, 245, 11 L. ED. 576.

In his opinion submitted to the House Judiciary Committee, the Attorney General acknowledges the power of Congress over the jurisdiction of the lower Federal courts and concludes that Act's application to the lower Federal courts is constitutional. However, the Attorney General erroneously assumes that by failing to reference Article III, Section 2, the Act was never intended to apply to the Supreme Court.

Contrary to the Attorney General's conclusion that the reference to Article III, Section 1, "supports the proposition that the bill limits the remedial power only of the inferior Federal courts, not the Supreme Court," is the statement by the author of the Neighborhood School Act:

"So what we have done on this amendment, this compromise amendment, which is broadly supported in this Senate, would be *to establish reasonable limits to tell the Supreme Court* that what they have done has not worked but that the remedies still left and provided for in this amendment are likely to work. And we believe, Mr. President, that that would be appropriate under the Constitution to do so." (emphasis added).

"As I mentioned, there are other legal scholars, Mr. President, who believe that Congress, under section 5 of the Fourteenth Amendment, has the power completely to prohibit busing and further that Congress under Article III of the Constitution has the power to withdraw jurisdiction from the lower Federal courts and from the Supreme Court itself in ordering that busing. At S 6647 of the *Congressional Record* 1st Session, 97th Congress." (emphasis added).

The plain language of the Neighborhood School Act serves as the most dispositive statement concerning the scope of the Act's remedial limitations. The Act explicitly states that "*no court of the United States* may order or issue any writ ordering . . ." The Act's addition of a new subsection (c) to section 1651 of Title 28, the "all writs" provision of the United States Code, cannot legitimately be construed to apply only to the inferior Federal courts. The "all writs" section of the United States Code empowers both the Supreme Court and the inferior Federal courts to issue writs. The Neighborhood School Act amends this "all writs" provision to restrict both the inferior Federal courts *and* the Supreme Court.

Furthermore, the First Judiciary Act establishes that the term "courts of the United States" includes the Supreme Court and the inferior Federal courts. This statute which organized both the Supreme Court and the inferior Federal courts was entitled: "An Act to establish the Judicial Courts of the United States." No distinction was made between the Supreme Court and the inferior Federal courts in the Act's title. Section 14 of this Act, amended and codified as section 1651 of title 28, authorized courts to issue writs as follows:

"SEC. 14. *And be it further enacted,* That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Section 14 of the First Judiciary Act authorized both the Supreme Court and the inferior Federal courts to issue the aforementioned writs. There was no doubt in 1789, and there should be none today, that "courts of the United States" meant both the Supreme Court and the inferior Federal courts.

The Neighborhood School Act's limitation of transportation remedies in school desegregation cases does, in effect, remove from courts of the United States jurisdiction to order a remedy in violation of the Act. Unlike the separation of powers infraction found by the Court in *United States* v. *Kline,* 13 Wall, (80 U.S.) 128 (1872), this jurisdictional removal does not require the application of a particular rule of

decision. Instead, the Neighborhood School Act comports with *Morgan's* deference to Congress in determining "the adequacy or availability of alternative remedies."

SOCIAL SCIENCE EVIDENCE

It has taken over ten years for the experts to spot what the public knew intuitively: that busing doesn't work. As now concluded by David Armor, one of the leading experts in the desegregation process, "There is overwhelming social science evidence that mandatory busing has failed as a feasible remedy for school desegregation." Mandatory busing doesn't work to integrate the schools and it doesn't work to improve the education of the children in the schools.

The man who dreamed up the idea of busing to improve education of school children, Dr. James S. Coleman of Harvard and the University of Chicago, never thought of such busing as any more than a theory. Dr. Coleman had done a massive study of American education in the 1960's and his findings suggested that children learned more and schools were stronger when children of all races attended the same schools. If housing patterns prevented this from happening naturally, it could be made to happen by busing children away from their neighborhood schools.

Like the good scientist he is, Dr. Coleman continued to test his throry. By 1975, he had come with so much evidence against it that he had changed his mind. Forced busing, he had come to believe, actually hurt the cause of integrated schools. Writing in the 1978 Issue of Human Rights Review, he said: ". . . It was once assumed that integration—at least in majority middle-class white schools—would automatically improve the achievement of lower-class black children. I hasten to say that it was research of my own doing that in part laid the basis for this assumption. It turns out that school desegregation, as it has been carried out in American schools, does not generally bring achievement benefits to disadvantaged children . . . it was once assumed that policies of radical school desegregation could be instituted, such as a busing order to create instant racial balance and the resulting school population would correspond to the assignment of children to the schools, no matter how much busing, no matter how many objections by parents to the school assignments. It is not evident, despite the unwillingness of some to accept that fact, that there are extensive losses of white students from large central cities when desegregation occurs."

Further extensive studies by David Armor of the Rand Corporation confirmed Coleman's findings that mandatory busing causes "White Flight." Parents opposed to busing orders and able to afford it could evade those orders by moving to another area, or placing their children in private schools. Families with school-age children could avoid moving to localities under court order to bus students. The result, as Armor said, was increasing ethnic and racial isolation in many larger school districts.

Busing, Armor said in a recent article in Policy Review (Fall 1981), is "Perhaps the most unpopular, least successful and most harmful national policy since prohibition . . . just as prohibition was not a feasible and equitable remedy for alcohol abuse, so mandatory busing is not a feasible and equitable remedy for school segregation. Like prohibition, the policy is not merely ineffective, it is counterproductive."

POLL RESULTS

It is not without significance that poll after poll for over a decade since it has become the principal remedy of school segregation reflects public opposition to court-ordered busing by margins of no less than three to one. In most polls that opposition is over four to one. These opinion polls cannot be discounted because of the belief that they reflect only the views of the white majority. Interestingly enough, the most recent national opinion poll in which the views of the black community on this issue were measured demonstrated that blacks disapproved of busing by a margin of 49 percent to 46 percent. Those who strongly disapprove busing policies in the black community outweigh those who favor it by 37 percent to 24 percent. This result was from the NBC/AP News Poll, released June 4, 1981, which also demonstrated that overall only 18 percent approve of forced busing while 76 percent oppose. (See Appendix I for other listing of national polls.)

In the same polls that are reflecting margins of four to one against forced busing, Americans have been asked questions such as "Do you agree with integration of schools?" By an overwhelming margin of about four or five to one, Americans say, "Yes, we do." Consistently, they say, as I do, that this country is and ought to be committed to civil rights.

CONCLUSION

Congress constitutionally vested powers to enforce the Fourteenth Amendment and to regulate the jurisdiction and forms of remedies of the courts of the United States provide ample support for the restrictions on the use of busing remedies prescribed by the Neighborhood School Act. Such legislative action, instead of constituting an intrusion on the judicial domain, is rather a health exercise of Congressional powers in the political scheme envisioned by the Constitution. If the protective system of checks and balances is to retain its vitality in our constitutional system, congressionally legislated remedies for denials of equal protection must be accorded substantial deference by the courts. This is particularly true where, as in the case of the Neighborhood School Act, the enactment is strongly supported by provisions of the Constitution independent of the equal protection clause. Congress is uniquely competent to determine the factors relevant to the right to a desegregated education and in resolving the conflicting considerations concerning the scope of remedies. The judgment of Congress as to necessary restrictions on the use of busing as a remedy should thus be upheld.

APPENDIX I—POLLS

NATIONAL POLLS

The Gallup Poll (October 8-11, 1971)

In general, do you favor or oppose the busing of Negro and white school children from one school district to another?

Favor: 17 percent; oppose: 77 percent.

The Gallup Poll (November 1974)

I favor busing school children to achieve better racial balance in schools.

Favor: 35 percent; oppose: 65 percent.

The Gallup Poll (May 31, 1975)

Do you favor busing of school children for the purpose of racial integration or should busing for this purpose be prohibited through a constitutional amendment?

Favor: 18 percent; oppose: 72 percent.

The Gallup Poll (February 5, 1981)

Do you favor or oppose busing to achieve a better racial balance in the schools?

[In percent]

	Favor	Oppose	No opinion
National	22	72	6
White	17	78	5
Black	60	30	10

The Harris Survey (July 8, 1976)

Do you favor or oppose busing children to schools outside your neighborhood to achieve racial integration?

[In percent]

	Favor	Oppose
All	14	81
Whites	9	85
Blacks	38	51

The Harris Survey (March, May, August 1972)

Would you favor or oppose busing school children to achieve racial balance?

[In percent]

	Favor	Oppose
March	20	77
May	14	81
August	18	76

The CBS News Poll (August 22, 1978)

What about busing? Has that had a good effect, a bad effect or no effect at all on the education of the children involved?

[In percent]

	All	Parents	White	Black
Good	12	12	9	35
Bad	50	48	54	27
No effect	18	20	18	19
Depends	5	4	4	7
No opinion	15	10	15	12

The NBC/AP Poll (June 4, 1981)

Do you favor or oppose busing of public school children to achieve racial integration?

[In percent]

	All	White	Black
Strongly favor	8	6	24
Mildly favor	10	8	22
Strongly oppose	61	65	37
Mildly oppose	15	15	12
Not sure	6	6	5

LOCAL POLLS

The California Poll (conducted statewide throughout California, September 21, 1979)

Do you favor or oppose school busing to achieve racial balance?

[In percent]

	Favor strongly	Favor moderately	Oppose moderately	Oppose strongly
State	8	10	18	60
Whites	5	8	19	64
Blacks	31	19	16	32
Hispanics	12	12	16	57

The Boston Globe Poll (June 2, 3, 1980)

Has court-ordered busing in Boston's public schools generally resulted in better or worse education for black children?

[In percent]

	Better	Worse	Not much, effect	Don't know
Greater Boston	17	28	36	19
Whites	16	29	36	19
Blacks (Boston)	18	10	56	16

Would you prefer to spend tax money to improve public schools in largely black neighborhoods, or have black children transported to schools in largely white neighborhoods?

[In percent]

	Improve	Transport	Don't know
Greater Boston	80	10	10
Whites	80	9	11
Blacks	81	9	10

The Los Angeles Times poll of November 9-13, 1980

Do you approve or disapprove of forced busing to achieve racial integration?
Approve: 18 percent; disapprove: 75 percent; not sure/refused: 7 percent.

Appendix II—White Flight

Armor, David J. "The Dangers of Forced Intergration," Society, 14 (May-June 1977).

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Appendix III—Alternatives to Busing

Bell, Derrick A., Jr. "A Ressessment of Racial Balance Remedies—I," Phi Delta Kappan (November 1980).

Campbell, Connie and Brandstetter, John. "The Magnet School Plan in Houston" in Daniel Levine and Robert Havighurst, Eds. The Future of Big City Schools Desegregation Policies and Magnet Alternatives (1977).
Irvine, Jacqueline Jordan and Irvine, Russell W., "A Reassessment of Racial Balance Remedies—II," Phi Delta Kappan (November 1980).
Mayesky, Mary E. "Extended Day Program in a Public Elementary School," Children Today, 8 (May-June 1979).
Meadows, George R. "Open Enrollment and Fiscal Incentives," School Review, 84 (May 1976).
Rossell, Christine H. "Magnet Schools as a Desegregation Tool," Urban Education, 14, No. 3 (October 1979).
Scott, Marvin B. "Pairings in Boston: Boston University and the District One Program," in Daniel Levine and Robert Havighurst, Eds. The Future of Big City Schools Desegregation Policies and Magnet Alternatives (1977).
Scagall, Grant "The Magnetic Appeal of Grimes," American Education, 16 (July 1980).

[Human Rights, Vol. 7, fall 1978, 10-15, 48-49, 54]

New Incentives for Desegregation

The man whose research led to busing reverses himself

(By James S. Coleman)

First, it was assumed that elimination of school segregation, whether that segregation had been created by dual systems in the South or by gerrymandering in the North would eliminate all racial segregation in education.

Any knowledge of urban areas and of urban residential segregation along ethnic, income and racial lines leads immediately to the recognition that most segregation in urban areas is due to residential patterns.

Second, it was once assumed that integration—at least in majority middle class white schools—would automatically improve the achievement of lower class black children. I hasten to say that it was research of my own doing that in part laid the basis for this assumption.

It turns out that school desegregation, as it has been carried out in American schools, does not generally bring achievement benefits to disadvantaged children.

Third, it was once assumed that policies of radical school desegegation could be instituted, such as a busing order to create instant racial balance, and the resulting school populations would correspond to the assignments of children to the schools—no matter how much busing, no matter how many objections by parents to the school assignments.

It is now evident, despite the unwillingness of some to accept the fact, that there are extensive losses of white students from large central cities when desegregation occurs. To be sure, these losses are only extensive when the proportion of blacks in the city is high, or when there are predominantly white suburbs to flee to, or both. But again, this is not the point, for in all large American cities, one of these two conditions holds, and in most, both conditions hold. Any desegregation that is to remain stable must involve the metropolitan area as a whole, and it must be a plan in which the coercive qualities are outweighed by the attractive ones. There are many school policymakers and many courts (still operating under the fiction that constitutionality requires racial balance) that have not recognized this. As a result, harmful school desegregation policies are being implemented in American cities.

Mr. Kastenmeier. Senator Johnston, I compliment you on your able presentation, and your able advocacy of your amendment.

We have a vote on. Let me inquire whether you are free to remain?

Senator Johnston. Yes, I am, Mr. Chairman.

Mr. Kastenmeier. That is fine; I think in that event, we will take a 10-minute recess to vote on the House floor. I encourage members to return as promptly as possible to hear Senator Johnston.

We thank you.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

I would like to conclude certainly with Senator Johnston and possibly other witnesses before there might yet be another vote.

The Chair would only like to say that the last comment of Senator Johnston may seem to be well taken.

Although it has been pointed out that the Department of Justice authorization passed by the House Judiciary Committee has been pending in the Senate for 1 year, indeed held at the Senate desk, this bill was in fact referred to the subcommittee in April, 2 months ago. But the Chair has announced the Chair's intentions with respect to hearings in the matter, and I am sure that this matter can be, one way or another, reconciled by members of this subcommittee, by members of the Judiciary Committee, and by Members of the House.

I was impressed, Senator Johnston, that you have clarified the situation with respect to whether the proposed bill or amendment reaches the Supreme Court of the United States.

Clearly I think a reading of it that all Federal courts would include the Supreme Court of the United States. How is it that the administration went so far wrong as to conclude that it did not apply to the Supreme Court of the United States?

Senator JOHNSTON. Mr. Chairman, I cannot speak for the administration. I was pleased with their result. I almost totally disagreed with all of their reasoning along the way. I thought they were just, frankly, flailing and clutching for little bits and pieces of evidence on which to reach a judgment that they wanted to reach.

It is quite clear, I think, that it does reach all courts. Court of the United States has a clear and distinct meaning under the statutes, and under the Supreme Court history, it means all courts of the United States, including the court of appeals and the Supreme Court.

Mr. KASTENMEIER. You don't feel that this should be clarified by further amendment?

If it might lead the Justice Department astray, might it not lead others astray on the question?

Senator JOHNSTON. I think the history is quite clear, Mr. Chairman, and I think the words of the amendment are. There was an oversight in failure to cite section 2 of article 3, and I think that is what the Justice Department refers to.

The bill, as originally drafted, when I put in the Neighborhood School Act before the Judiciary Committee, referred only to section 5 of the 14th amendment. It was by, in effect, a floor compromise, a compromise on the floor, that we added article 3.

I didn't draft that and, frankly, I was even unaware that they had failed to reference section 2, but it is very clear that it affects all courts, and I said so in my opening statement, and I said so throughout the legislative history of the act. I have referred to some of those statements in my written statement.

Mr. KASTENMEIER. One provision that may strike some as mischievous is the one that enables the Attorney General to reopen settled cases. I admit that a settlement may be very painful for many school districts, but, years past litigants have reached some accommodation with the law, and finality occurs. Under this bill, one could find the whole matter reopened and heaven knows what

disposition made. Wouldn't the aftermath of all these attorney general suits be even greater chaotic situations?

Senator JOHNSTON. Mr. Chairman, there would be no chaos at all. Indeed, in California, the whole school system was done and undone in successive years, and without that great chaos.

That which the courts have done, they can undo. If it is working. If it is, as I read one letter to the editor, I believe it was in Alexandria, Va., where one letter said, "Our system is working well," they need not change it. We are not ordering the school board to change. All this bill does is to expunge the mischievous court order.

In the absence of the court order, if the school board wants to but beyond these limits, they may do so, and we do not reach that. That is where those decisions ought to be made. It seems to me that those decisions can be much better made now in light of the evidence as to whether they have worked or not worked.

Mr. KASTENMEIER. But is that an adequate legal test, whether or not a system is working or not?

Subjectively, of course, some parents in almost any system will complain and, if they can get the ear of the Attorney General, perhaps challenge the existing system?

Senator JOHNSTON. That is exactly what the Supreme Court said ought to be the test, that it promises to work. That was the phrase used, I think it was in *Green* case, the landmark case.

Mr. KASTENMEIER. But you have also said that the Supreme Court will not have jurisdiction to order a remedy, which goes beyond a certain point in terms of limitations. Also, you have indicated that the Supreme Court presumably is not following its own *Swann* case guidelines to knock down egregious schoolbusing plans ordered at the local district level.

Senator JOHNSTON. That is correct, Mr. Chairman. After saying that this was the test, that there are limits and stating in broad, general terms what those limits are, they failed then to go back into individual cases and spell out what those limits should be. That is why the Congress has in such a peculiarly and particularly proper role, not only constitutionally but factually and practically, to draw those limits.

I want to reemphasize, Mr. Chairman, that we do not reach all of those other powers—zoning, magnet schools, majority to minority transfer, other quality education programs, teacher assignments, the power to require that new schools be built in an area that will maximize integration rather than minimize it, prohibit the closing of schools for racial purposes. All of those powers we do not affect. We affect only that one limited power, and then not completely the power to bus. We simply put limits on one remedy, leaving all the other remedies in place.

Mr. KASTENMEIER. But presumably the courts are finding these other remedies in some circumstances to be inadequate constitutionally?

Senator JOHNSTON. Mr. Chairman, there is no doubt that courts do find that they are adequate. The problem is that they don't focus on whether busing is adequate, or whether busing is proper, or whether it achieves its role.

I might say to the distinguished Member from Massachusetts, from Boston, Mr. Frank, that I quoted earlier the results, or at

least what Newsweek referred to in Boston. Perhaps you know that situation better, but it seems to me that it does not work when half the white students leave the school system, when polls show that 77 percent of the black children, according to the Boston Globe poll, want freedom of choice, they no longer want forced busing. Now, that ought to be an adequate test of whether it has worked.

Sometimes, the Supreme Court can make an order but they can't enforce it. Unless they are willing to get the bus police out to grab people up and physically put them on the buses, they just won't go.

In Forest Hills, in Rapides Parish, where they ordered the school closed, a brand new school, and ordered those kids to be bused over 25 miles, that a poor section of my State, yet over 60 percent—blacks and whites by the way—refused to go. You cannot order people to do that which they refuse to do in a free society.

Mr. KASTENMEIER. At this point, I would like to yield to my colleague. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I want to thank the Senator for his very helpful statement.

I would like to get back to the question of the chairman relative to the application of the Supreme Court. Notice that in the Department of Justice letter to Chairman Rodino, on page 6 they refer to a colloquy engaged in by Senator Hatch, and I am wondering if you are familiar with that, where Senator Hatch specifically says that it does not apply to the power of the Supreme Court.

Senator JOHNSTON. Mr. Railsback, there was a great deal said during those many months. To my knowledge, the question was never asked: Does that apply only to the Federal district courts, or does it apply to the Supreme Court as well?

I made clear in a number of statements that this applied to all Federal courts, and the plain words of the amendment itself apply to all courts. The focus has, of course, been on the Federal district courts because it is at that level that the orders are actually made. The Supreme Court declares the broad principles, and the actual writs are almost always, in fact are always, to my knowledge, issued by the Federal district courts.

It was only in that sense that there was a special focus on the Federal district courts. But I think it is clear what the act does and intends to do, and what the words of it say.

Mr. RAILSBACK. Is it your view that this power of the courts has generally been used in respect to remedying cases of, say, invidious discrimination, or violations of the Constitution?

In other words, have their actions generally been simply remedial?

Senator JOHNSTON. Mr. Railsback, as you know, they have this distinction, which may have made sense at one time, between de jure and de facto segregation.

De facto segregation was that which occurred innocently, traditionally, historically, by neighborhood patterns and that sort of thing. De jure was that which had its origin in a policy of the State. That might have made sense in 1954, or even in the 1960's. It doesn't make sense any more.

Busing should not be a punishment, and it has been, in effect, used as a punishment, for children who were not even born, whose parents were not even adults or certainly not policymakers at the

time that the invidious discrimination may have been done in the first place.

Mr. RAILSBACK. Yes.

Senator JOHNSTON. So, when we talk about invidious discrimination and de jure segregation, it just doesn't make any sense in the context of America in 1982. There should not be a distinction between the two.

Mr. RAILSBACK. I guess what really troubles me a little bit is in a unique case, where there really has been or where there is evidence of invidious discrimination, and there are no other remedies, in that case do we really want to deprive the Federal court, including the court of last resort, the Supreme Court of the United States, of a right to use that which should be, I agree with you, seldom used if there are any alternatives which might work or likely would work better.

You know, I am really troubled that we may be setting a precedent by inhibiting or restricting the Federal courts' jurisdiction in this area, which could lead to us restricting it as well in other areas.

This leads me to ask you, inasmuch as apparently Mr. Coleman and others have changed their mind about the desirability of busing, I wonder if we might not be better advised, if we feel strongly that busing has not worked as well as many people had hoped, to simply have a sense-of-Congress resolution expressing the sense of Congress that at one point, we agreed with the courts that this might be a very desirable remedy. It has not proven to be as valuable as we had once hoped. Therefore, it is the sense of this Congress that busing should be used only as a last resort, and very seldom used.

That gets back to your opening statement, where you pointed out, just as I pointed out, that it was well intended, it was well motivated, but that now some courts feel constrained to use it. Maybe it would help if we had a sense-of-Congress resolution, but without setting that precedent, that we might be setting, of restricting the Courts' jurisdiction?

Senator JOHNSTON. I think you have asked some very key and important questions. Let me answer each one.

You say, what happens when you really have invidious discrimination, and busing is the only way to remedy that? First of all, what do you mean by invidious?

If you mean simply that you don't have racial balance, I assume that the lack of racial balance would not by you be considered to be in itself invidious discrimination. If all you are talking about is the lack of racial balance, then I think it is clear, with or without busing, you are not going to be able to get a proper racial balance unless you are going to put troops out and require people to go to school, and nobody has suggested that.

If you are talking about a policy of racial segregation, there are adequate remedies for that. That was prohibited before the act was passed, and will be prohibited after the act is passed, if it is passed. There are plenty, plenty of remedies to deal with invidious discrimination, as I think you mean it.

The point is, though, it is impossible to get an adequate racial balance if you have an imbedded black school deep in the black

community, or an imbedded white school deep in the rural sections of Rapides Parish, La. Yes, you can order a kid to be bused 46.8 miles, but he is not going. There is just some imbalance that naturally is going to occur, that if undertaken today would be considered to be de facto segregation.

Second, is this a precedent for other constitutional rights being prohibited, no more than Congress set a precedent with article 3, and a whole host of other things. I think that the power I would like to see invoked here is article 5 of the 14th amendment.

Would we succeed by just passing a resolution? The Supreme Court should have gotten the message already. I have attached to my statement a number of polls that stretch back over a period of 10 years, and by margins of 3 to 1, and usually by margins of 77 percent to 17, 72 to 18, et cetera, the American public has been on record, and I think the Congress has been on record, and the Supreme Court has not gotten the message. It is time for us, it seems to me, to exercise our power under section 5.

Mr. RAILSBACK. I know we have a vote, Mr. Chairman, but if I could have one more moment.

Is your language meant to apply in the case of de jure segregation as well as de facto?

Senator JOHNSTON. In limiting the busing order, yes. Again, invidious discrimination, as you describe it, can be totally extirpated by all these other remedies involved. There can be no official policy of segregation, or anything that permits segregation.

Mr. RAILSBACK. I still think that what you are asking us to do is to take away the right of some injunctive relief for constitutional violations, even if it were a de jure violation.

Senator JOHNSTON. Most of the school boards have been under court order for 20 years, so what difference does it make whether it is de jure or de facto? They have been following these orders for 20 years.

Mr. RAILSBACK. We are talking about prospective violations as well as historical violations.

Senator JOHNSTON. We have the remedies to deal with those.

Mr. RAILSBACK. But you are taking away what I think—what I think has been the most important remedy, and that is injunctive relief.

Senator JOHNSTON. We do not take away injunctive relief.

Mr. RAILSBACK. You are limiting the injunctive relief. I am concerned about busing, but I am very much concerned about taking this step which limits the role of even the Supreme Court to determine constitutional questions and remedies that should be available. I am concerned about that.

Thank you very much.

Mr. KASTENMEIER. If the gentleman has completed, the other members have questions of Senator Johnston. Can we prevail on you to stay a little longer?

Senator JOHNSTON. Yes.

Mr. KASTENMEIER. In which case the subcommittee will recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The subcommittee will come to order.

The Chair will recognize the gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

Senator Johnston, first of all, I would like to have your opinion of the Attorney General's opinion, which I find somewhat shaky. The Attorney General has told us that the bill is constitutional, and it does not appear to be, and we may have to do something to correct that.

We have talked about one specific difference, which is limiting the ability of the Supreme Court. There is another point of difference on page 2 of the letter to Chairman Rodino, which says that neither the text of the bill nor the legislative history appear to support the conclusion that it requires an automatic reversal of any outstanding court order. Do you have that letter?

Senator JOHNSTON. I don't have that letter, but I remember what he said. There is nothing automatic about these court orders. Under this bill, the reversal of a court order would have to follow a hearing, it would have to follow the filing of either an original complaint or an intervention, which could be done either by those who are bused or by the Attorney General.

Mr. FRANK. I understand, but I don't think that is exactly what he means. The Attorney General is assuming that the bill requires a court order straight away. As I understand it, it would be the case that if the proper aggrieved parties or the Attorney General took the case to the appropriate court, that court would be compelled by the oath of the judge to reverse any order that did not comply with the bill; is that correct?

Senator JOHNSTON. To modify the order.

Mr. FRANK. To modify the order if it didn't comply with the bill?

Senator JOHNSTON. That is correct.

Mr. FRANK. That is how I would raise an automatic reversal. I think that is what he means.

The bill would compel a judge, acting in good faith, to cancel any part of the order which is not in compliance with the bill. That appears to me to be the provision that the Attorney General describes as attempt to exercise direct control over a court order, and that would raise constitutional problems.

Senator JOHNSTON. I don't know what constitutional problems he is talking about, other than he refers to the footnote in the *Katzenbach* case that I have talked about and treated that as subtle law, when it is simply dictum within dictum in a footnote. It doesn't answer the question at all.

If that is what he is talking about as a constitutional problem, then it is not a constitutional problem in my judgment.

Mr. FRANK. Let me say again, with respect to this letter, in his first statement, in the second paragraph, the first substantive matter is stated to the chairman, "It is important to note at the outset that this does not discharge jurisdiction from the Supreme Court." You say that he is wrong about that.

Senator JOHNSTON. He is wrong.

Mr. FRANK. Have you discussed the bill with him, and has that changed his opinion of the constitutionality?

Senator JOHNSTON. I have not discussed the bill with him at all. The Attorney General did not want to rule on it, and I think he found a way——

Mr. FRANK. I think he reads quicker than he writes. He seems to me to rule out pretty heavily on his interpretation.

Senator JOHNSTON. I think if you assume that he has the power to assess the jurisdiction of the district courts, he has similar or identical power to affect the Supreme Court's jurisdiction.

Mr. FRANK. You don't think that it would be a constitutional problem for the Attorney General?

Senator JOHNSTON. I can't conceive of how he can say he has the power to affect the district courts——

Mr. FRANK. Why would he have gone to such tortuous lengths to arrive at that conclusion?

Senator JOHNSTON. That is a good question.

Mr. FRANK. I appreciate your candor, and perhaps it is catchy. Perhaps the Attorney General was instructed to come out with an opinion that the bill was constitutional, and apparently the only way he could do that was to mention this. It makes me a little bit nervous about what they would do if they had to confront the bill as is.

Senator JOHNSTON. Candidly, let me say that under article 3 you cannot affect the jurisdiction of the Supreme Court if to do so would take away constitutional rights. Numerous parties, including the American bar association, feel that the power under article 3 is complete, but I have never heard anybody say that there is a difference between the reach of Congress under article 3 as it applies to districts courts and as it applies to the Supreme Court. Those powers, I think, are coterminous and there is no reason to distinguish between the two.

Mr. FRANK. My recollection is that the American Bar Association certainly opposes this bill, they submitted a letter to us from Professor Sager that raised constitutional objections. At least, the most recent American Bar Association statements I have didn't seem to support that full reach of power ascribed to article 3.

Senator JOHNSTON. I think what they say is that we have the power to do it, but it would be improper to do it.

Mr. FRANK. I think that the opinion that Mr. Brink sent along is in fact the first thing you said, that there is no power, if the power would lead to the abrogation of a constitutional right.

Let me ask another question, and it is about the *Kline* case, it seems to me to be the most serious precedential problem that you raise. While your statement seems to me in general well argued, frankly on page 13 the reference to *Kline* seems to be a little ipse dixit, saying that this jurisdiction does not require the application of a particular rule or decision.

My reading of the *Kline* case, and it is cited by Professor Sager in the letter that Professor Brink of the bar association sent us, they read the *Kline* case to be a problem for you, saying that you may be able to take away the whole class of cases, but once the courts have got the whole class of cases, you cannot tell them how they are going to decide, and you can't say that a particular remedy is not available to them.

Senator JOHNSTON. We don't tell them how to decide at all.

Mr. FRANK. You tell them that a particular remedy is not available.

Senator JOHNSTON. That is correct, and that has been done a number of times, you know, in the labor cases in the Norris-LaGuardia Act. To quote Professor Hart, I think from Harvard Law School, he says that to take away one remedy and leave the others is permissible, it is the taking away of all remedies that is constitutionally proscribed.

Mr. FRANK. I am going to finish up in a couple of minutes.

This goes back to the question that Mr. Railsback asked before. If there was a case of de jure segregation, and a court felt that busing was essentially to eradicate that, you don't see that as a problem?

Senator JOHNSTON. You see, you frame a question that there is de jure segregation. If by de jure segregation, you mean a school system whose racial assignments initially, prior to 1954, were State enforced——

Mr. FRANK. And were subsequently gerrymandered, et cetera, as the courts have found—I should say, by the way, I tried very hard in the last redistricting to get a piece of the city, and I didn't get it. If I didn't get, I am not going to take responsibility for it either, the good comes with the bad. So, I don't represent any part of the city.

However, there was a finding in that case, I think a fairly clearly documented one, that the school committee had, in fact, by official action segregated the schools of the city.

Senator JOHNSTON. If there continues to be an official act, if there continues to be de jure segregation, then you don't need busing to get rid of that. You do away with that official act, that official act which would generally be the assignment of children on a racial basis in order to segregate the schools.

Mr. FRANK. What happens if the physical construction of schools sets the pattern?

Senator JOHNSTON. You can still get to that. That remedy is not disturbed by this act, and is well established.

Mr. FRANK. If the construction of schools is deliberately placed to make it very hard to integrate without busing, you would still would say, no busing, under your bill?

Senator JOHNSTON. What do you mean?

Mr. FRANK. If the school board built the schools in a way to make it very difficult, in a way that if you complied with your bill the nearest school for everybody would mean a lot of——

Senator JOHNSTON. The courts presently have the power, which we do not affect, we do not take away the power, to prohibit a school from being bused so as to perpetuate segregation.

Mr. FRANK. I am talking about a situation where they built the schools, knowing the population, in a way that would make it very difficult to integrate them without some busing. Would you raze the school in order for a new one to be built?

Senator JOHNSTON. If you are talking about the situation where you cannot get racial balance, other than by busing because——

Mr. FRANK. Because the school was deliberately built to make integration difficult. The finding in Boston was that they built the schools, and did some other things, to try and make it difficult. For the last 15 years the schools were built in racially isolated pockets

of the city, so that you could not integrate them unless you razed some schools and built new ones, or had busing.

Senator JOHNSTON. The bill frankly recognizes that there are areas of racial patterns of housing, where you cannot achieve a racial balance with this bill because we restrict the busing.

Mr. FRANK. I appreciate that, but I am talking about the hard-cases that we have to deal with and perhaps it is going to happen very rarely, but I think we have to know the reach of the bill.

If the school board, knowing the racial pattern of the city, built schools so as to foster racial segregation, that would be a de jure situation.

Senator JOHNSTON. I can't understand how that could happen because it has been the law of the land for a long time that that was prohibited, and there are remedies to prohibit that.

Mr. FRANK. I understand, Senator, but the law is not always enforced everywhere automatically all the time, and you have had such situations. Let's talk about some of the existing cases. Your bill would cancel those parts of existing orders which bus excessively.

Senator JOHNSTON. It would cancel the court order, but it wouldn't cancel the plan if the school board wanted to undertake the plan.

Mr. FRANK. But we are talking in some cases of the school board that segregated in the first place. I think that is a problem we have to deal with. There are cases where, by a combination of racial segregation in the way they built public housing through official action, which is part of the problem of official actions, and certainly in building the schools, where you could have had a de jure situation that would be very hard to correct without transportation. That, I think, would be the constitutional problem as to whether a right could ever be vindicated if this particular remedy was taken away.

Senator JOHNSTON. There will be some situations where if you define the right as to be a right of racial balance, you can't get perfect racial balance with or without this bill.

Mr. FRANK. But I am saying where de jure action took place, where schools built, as was the case in many parts of the country, in racially isolated areas.

Senator JOHNSTON. As I said, you will not have a perfectly balanced school system with this bill, there is no doubt about that.

Mr. FRANK. There would be some elements of de jure segregation, the deliberate building of schools in racially segregated areas, that would be put, I think, somewhat beyond reach by this particular piece of legislation.

Senator JOHNSTON. There have been adequate remedies.

Mr. FRANK. What is the adequate remedy where the school board has built a pattern of segregated schools physically, other than razing the school.

Senator JOHNSTON. It depends on when it was done. I mean, the original sin starts somewhere. Are you talking about that which was done in the 1930's or the 1940's, or are you talking that which was done in the 1960's.

Mr. FRANK. In the 1970's.

Senator JOHNSTON. If it was done in the 1970's, it was done illegally, when it was already prohibited, and there were adequate remedies at that time.

Mr. FRANK. But somebody may not have invoked the remedy at the right time, and I don't think that ought to be a perpetual estoppel against somebody then saying we are going to remedy it.

Senator JOHNSTON. I just can't answer your question as to building a school with the specific intent to foster segregation that has been done in the last 10 years. I just can't conceive of that. All of my school boards have been under orders since the mid-1960's, so I can't conceive that they would do that. In Boston, maybe you have not been under order until 1972, when that order was achieved, and maybe we ought to have a different rule for that, I don't know. But that is really not a problem, at least not throughout the South. In the South we have been under orders for 15 years on the average.

Mr. FRANK. Thank you, Senator.

Mr. KASTENMEIER. The Chair would like to yield to the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I, too, want to thank you Senator for your comprehensive testimony and your dedication to this issue. I don't want you to think that my questions are hostile. I think I am sympathetic with what we are trying to do here, but I do have real reservations in one area, which you touched on briefly a moment ago, about whether you can in fact limit this legislation so as not to affect school board ordered busing, even though that is clearly what you want to do.

If I am right, as a practical matter, you can't exempt school board ordered busing from this legislation. This legislation would effectively require many jurisdictions to alter present school transportation systems, having nothing to do with integration, and I am not sure that is what we want or need to do.

For example, assume a child wishes to contest, or his parents, or whoever the appropriate contestant is, the action of a school board ordering busing on the ground that it is unreasonable to him or her—too far, too long, or any other thing. Under your amendment, could the Federal court enter an order supporting the school board order, even though it is contrary to the limitations set forth in your bill?

Senator JOHNSTON. The court could not exceed the limitations in my bill, the school board could.

Mr. BUTLER. But if the school board's order were challenged in the Federal court, then the Federal court would have to decide whether the school board's order would be enforced or not. Is it your answer that under those circumstances the school board order would have a superior standing than the court order?

Senator JOHNSTON. The school board is not a court order. It is a plan undertaken pursuant to State law, and we do not disturb that power. That is the very essence of the bill, Mr. Butler, that the politically elected members of the school board ought to have full reach and full power, subject only to the limitations of this bill, and subject also to the limitations of the 14th amendment as enforced by remedies other than this bill, and there are plenty of other remedies.

I might invite the attention of the committee, by the way, to the bibliography I put in the back on alternatives to busing. We have an appendix there of some 10 articles on showing the different alternatives, such as magnet schools, and so forth. So, there are plenty of alternatives.

Mr. BUTLER. I am satisfied with the alternatives, and I am satisfied that local school boards ought to have the jurisdiction and the authority to do whatever they think is appropriate, including busing 20 miles if that is what they want to do. But I still have doubts about what happens when that school board order is challenged in the Federal court.

Senator JOHNSTON. How would they challenge the order?

Mr. BUTLER. They would challenge it on the ground that it is unreasonable.

Senator JOHNSTON. Let's say that they are challenging it under the *Swann* decision, then that is the law, and this bill doesn't change that law. But if they are challenging it under this amendment, there is no such challenge to be made because this amendment, this act applies only to orders of Federal courts, and does not reach a plan of a school board.

Mr. BUTLER. So, your answer is that the school board issue would not get to the Federal court.

Senator JOHNSTON. That is correct, not under this act.

Mr. BUTLER. I thank you for your answer, but I have some reservations about it.

What is your view as to the authority of Congress by statute to authorize States to establish racially segregated systems of education? I am referring to the footnote, which you have elevated to the status of a dictum on a dictum, in which the court said, for example, an enactment authorizing the States to establish racially segregated systems of education would not be a measure to enforce the equal protection clause, and so forth.

What is your view as to the authority of Congress by statute to authorize States to establish racially segregated systems of education?

Senator JOHNSTON. Congress clearly could not do that because Congress there would be getting to a right and not simply to a remedy. In other words, what we are doing under this act, we are not taking away from the right at all. Remember the right is to be free of discrimination, to have a plan that works and works now to dismantle the dual school system root and branch, to use various phrases the Supreme Court has used. That is the constitutional right.

Mr. BUTLER. So, you are not questioning what the footnote has to say about Congress has no power to restrict, abrogate, or dilute these guarantees.

Senator JOHNSTON. That is correct. All I am saying is that it begs the question. It doesn't answer the question, it simply begs it.

Mr. BUTLER. It begs an answer, too. Could you provide us with a footnote as to just where do you draw the line as to when Congress restricts, abrogates, or dilutes the constitutional guarantees?

What I am wondering about, aren't there situations where court ordered busing could be construed as a restriction, abrogation, or dilution of a constitutional guarantee, or the granting of one?

Senator JOHNSTON. As the courts have many times said, there is a balancing of the interests here. As long as Congress is reasonable, the power of Congress extends, as the court said in *Oregon* v. *Mitchell,* to the full reach of the necessary and proper clause, which is to say that we can find facts just as long as the facts are not arbitrary or unreasonable.

But we don't have to depend on the broad reach of that power. It seems to me that the facts that I have found in this bill are not only not arbitrary, but they are almost irresistible. I have not heard, as I said, in months of debate on the floor of the Senate anyone who would defend long distance busing.

No one said, "You say that James J. Coleman and David J. Armor, and this long list of expert witnesses, say that it doesn't work." They don't say, "Our experts say it does." They don't produce any experts, because those experts that existed have either been discredited or have changed their mind. It just doesn't work.

Mr. BUTLER. Is it your perception of it that the record really doesn't have any defense of busing as a constitutional guarantee?

Senator JOHNSTON. That is correct. Busing was never a constitutional guarantee. It is the being free of discrimination that is the constitutional guarantee. All we are saying is, when you overuse this busing remedy, that not only doesn't it work, but it is counterproductive. It hurts education. It is turning my school systems, as it already has, from a majority white to majority black. Mr. Frank can tell you what has happened in Boston. Others can tell you what has happened elsewhere in the country.

It is not because the American public is a bunch of racists and bigots that for 10 years they have been against busing by margins of 2½ and 3½ to 1. The American public is not like that. They have seen it work in the field. They know it doesn't work in Baton Rouge, La., in Rapides Parish, La., and elsewhere across this country. It is a great idea, conceived with the noblest of ideas, conceived by the best meaning people, but it just doesn't work.

The limits that I have put of 5 miles and 15 minutes may not be the best limits. They may not be exactly right in every situation, but I can tell you that they are a whole lot better than what they are doing right now. Those courts out there are going without any limits at all.

Can you imagine a 6-year-old child for 1 hour and 15 minutes. Well, they are ordering a lot of those being bused. That is a one-way trip in Baton Rouge right now, and who can defend that.

Mr. BUTLER. Mighty pretty country around there.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. The Chair yields to the gentlewoman from Colorado.

Mrs. SCHROEDER. I thank the chairman, and I thank the Senator. I am sorry that the morning has been so crazy.

I guess my problem is that I come from an area where they found de jure segregation, where the school board just kept changing the lines, and under the busing order there ended up by being less busing, according to the statistics, than there was before.

I don't quite understand what your position is on that. If they find de jure segregation, and they find that a school board has intentionally been changing the lines to keep the schools of one

racial mix or another, did I understand you to say that it would be all right to use busing in that case?

Senator JOHNSTON. What I have said, it is not only perfectly all right, it is constitutionally required that you draw your lines in an indiscriminatory manner. So, if the school board has gerrymandered its lines. Those lines today have to be drawn in an indiscriminatory way. After this act passes, if it does, they would have to be drawn in an indiscriminatory way.

Mrs. SCHROEDER. So, you are only going after de facto.

Senator JOHNSTON. You see de jure means different things in different parts of the country, I guess. It means original sin in the South. It means that which school boards did prior to 1954, or certainly prior to the early 1960's, because since that time we have all been under court orders. So, that which has happened since that time has happened with the concurrence and at the order of the courts.

Mrs. SCHROEDER. I guess my problem is that my understanding of the *Brown* case was that it was the original antibusing case, because in the *Brown* case the young woman suing wanted to go to the school across the street and couldn't because she was black and the school was white, and she was being bused to a black school, if I recall the facts correctly.

So, where you start in 1954 was with a case which was to lessen busing, because you were using busing to keep the schools separate but equal, which the Supreme Court said no.

My confusion, No. 1, is, what remedy does the court have if a school system is doing that? I think it is wonderful to say that busing is not the proper tool, and busing should not be used, but I am not real sure that the court can order the school board to build new schools, or that they can go and do rezoning. I think that busing ended up being their only tool in these kinds of cases, and I think that this is how we got there.

When I first came to Congress, a group of us sat down and said, "What can we do to be constructive?" Udall, and Andy Young, and many of others sat down and came up with a bill, John Anderson, I think, joined us, where the whole thing was to try to have an incentive for the local districts to do it, rather than fold their arms and say, "Make us," because at that point you either have a right or you don't.

I am not quite sure what you are saying. I was a little distressed by your testimony, in all honesty, because I kind of had the feeling that you were saying that this was not really a right worth pushing very far, because you were citing Coleman and all the rest, saying that it really doesn't make any difference if we desegregate the schools, and that bothered me.

Senator JOHNSTON. No; you are referring to a quotation from Coleman where he talked about busing raising educational standards. I simply say that he changed his mind on that.

Mrs. SCHROEDER. In your testimony, you agree with him. You don't think that it raises the education standards anywhere?

Senator JOHNSTON. I think discrimination lowered educational standards. I don't think a system of racial balance as found by Mr. Coleman raises educational standards.

Mrs. SCHROEDER. So, you are saying, then, since the Supreme Court thought it would, because of the Coleman testimony—you cited that this is part of what they used—and since he has now changed his mind, we shouldn't enforce that right? It is no longer an important right.

Senator JOHNSTON. Which right?

Mrs. SCHROEDER. The right to desegregated schools.

Senator JOHNSTON. No; I am very strong for the right of desegregation schools.

Let me give you a little historic perspective on this. In 1954 in Brown I, and 1955 in Brown II, they decided that you must be free of racial discrimination, that school assignments must be color-blind. I believe the *Green* case in 1968 and the *Swann* case in 1970, and between those times you have had a whole series of cases where the Supreme Court was evolving and molding the law, but that was a permissive thing where they would order a school board to open up, usually it was the first grade, to permissive transfers. Then it went to two grades a year, and then junior high, and all that.

After almost a decade and a half of litigation, they finally decided that the only way to eliminate the dual system root and branch, to give you a remedy that promises to work and promises to work now, is to do it by busing and mandatory assignments, where they would take a geographic school system, and you would have an all-black school here and an all-white school there, and they would order them either to be paired or to have new attendance zones.

Mrs. SCHROEDER. If the gentleman would yield, I understand all that. But part of that was because no matter what they said in Brown, none of the local boards did anything. Most local boards that ended up going into court, ended up going into court because they Brown, folded their arms, and said, "We are not going to change," and people felt that they had to go to court.

Senator JOHNSTON. I don't defend what these school boards did for one moment. All I am saying is that they have all been under court orders for a long time.

What we are dealing with in my State, and what we are dealing with in other areas of the South particularly, are a second generation or maybe even a third generation of court orders.

They came in initially and ordered that the school systems be set up a certain way. Those orders were tested right up to the Supreme Court, and they found that those orders were proper, comported with the Constitution, and were entirely proper. But what has happened in the meantime is that white flight has altered the racial composition of some of those schools, so this second generation is to come in and chase even farther.

Mrs. SCHROEDER. I understand that, but my position here is that here we have an authorization bill for the Justice Department, and you want to put this stripping legislation on it. I think it is terribly comprehensive.

I think the reason we are here is because the local school boards have just refused to deal with this. If we take away a remedy, in essence, we are really taking away a right, and that to me is very, very serious. I think we ought to go ahead and authorize the Jus-

tice Department without tacking on these kinds of broad, sweeping things, without much more comprehensive hearings.

Senator JOHNSTON. Mrs. Schroeder, let me say that I share your view about the seriousness of the bill. There is no doubt about it, it is one of the most important social issues in the country. It is the issue that, in my judgment, at least in my State, will determine the future of public education, because right now it is undermining public education. It is really seriously hurting it. That is why I am here.

I am not here as a bigot. I have enjoyed, up until now at least, a strong black support. Indeed, the national polls show that even blacks across the country are not for this.

What I am saying is that there are many, many remedies that can be used to extirpate segregation and discrimination, and that can do away with the dual school system. There is no way that you can have racial balance, it won't work.

Mrs. SCHROEDER. My understanding of those remedies is that they are not real because the courts do not have the authority to go out and float bonds to buy new schools, to do those kinds of things. That is a real problem.

As I said, I think there have been many other approaches that have been floated that are positive, rather than hitting them with a stick, it is a positive thing. I think that is the way we should go in trying to encourage local districts to honor the right, rather than strip the remedy.

Senator JOHNSTON. I agree with you. As you suggest, we ought to do the affirmative things, which take money, and which most of all take public support. You know what is happening to public support of public education all across this country. You can't pass a bond issue for a school system. It is very difficult anywhere in my State, and it used to never be questioned. Much of that is because they think the Federal courts are running the schools and running the schools unreasonably.

Mrs. SCHROEDER. My time has run out, but I think part of the reason they said originally they couldn't desegregate the schools was that they couldn't then pass the bond issues. They were being so rigid about desegregation because they felt that it would cause trouble, that the courts came in and ordered busing. Now, you are telling me that they have ruined the system, and they can't get it back. I think we just have to be more creative, and I think this is a very dangerous precedent.

I thank the gentleman.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer, is recognized.

Mr. SAWYER. Thank you very much, Mr. Chairman.

Senator, I have been interested in this topic for a long time. As a matter of fact, a number of years ago I defended the only successfully defended antibusing or desegregation case in the United States that held up to the Supreme Court and held all the way. At one time, I knew a fair amount about the topic, but since then I have become interested in other things.

First, just a passing comment on this de jure and de facto. There practically isn't any such thing as de facto. In the decisions, they always find that it is de jure. They constantly say that de facto is

not subject, but they always find that something somebody did or didn't do constituted de jure contribution.

Senator JOHNSTON. I think in California they found de facto, and that is the basis on which the Federal courts did not interfere in California, because they said it was de facto. But it is a distinction without a substantial difference, I think.

Mr. SAWYER. You know, they had kind of a dog and pony show that traveled all over for the NAACP defense fund. They visited our jurisdiction, too.

If you build a new school in a black neighborhood, you are then perpetuating segregation. If you build only in the white area, you are discriminating by providing the good facilities in the suburban white areas, and not in the black areas. Either way you move in either direction, they always convert it into a de jure contribution.

Senator JOHNSTON. Let me say that the courts would still have that power. Whether it is right or wrong, they would still have that power under this bill.

Mr. SAWYER. Interestingly, the courts, at least up till the last time I was conversant with it, have not allowed busing across school district lines. I think the *Mecklenburg* v. *Charlotteville* case, I know Detroit, and several others that I am familiar with, Benton Harbor in Michigan most recently, those areas are so heavily black that it is substantially impossible to desegregate them as long as you are saying that you can't cross into suburban school districts. That also, of course, brings about white flight, so you get to about a 40 percent, and then you tilt and you have the white flight into the suburbs and then it goes quickly to 80 or 90 percent.

Senator JOHNSTON. Precisely.

Mr. SAWYER. I just saw in the newspaper yesterday or the day before that there were some 4,600 high school students that graduated from Washington, D.C., school year, and 4,300-plus were black, and 120 were white, and about 200 foreign students from different embassies, and so on, I presume.

What can you do with that kind of situation, if they say that you cannot bus into northern Virginia or suburban Maryland?

I think you are seriously damaging core-city or center-city schools, you are destroying them with this busing so long as you do not bus into the suburbs. You are just giving the kiss of death to the inner cities.

Senator JOHNSTON. You would have to include suburbs and you would have to prohibit private schools, because people will go to extraordinary lengths, even poor people, to go to private school. If they can do it in Forest Hills in Rapides Parish, La., they can do it anywhere.

Mr. SAWYER. Now, having said that, I have to say that I am not really inclined to support the Helms-Johnston bill. I would support, and I did as a matter of fact, Ron Mottl's discharge petition for a constitutional amendment. It just offends me professionally to go this route of, in effect, an amendment to the Constitution by a simple vote of both Houses.

We have a whole plethora of these things. We have prayer in school. We have busing. We have abortion. Now everybody is either limiting jurisdiction or limiting remedies under this provision of the Constitution.

My own judgment is, had the courts never decided one of these issues, you might be able, under the jurisdiction limitation, to get away with that approach. I think that it is so flagrantly and patently an attempt to amend the Constitution by a simple vote of both Houses that you will never survive in the Supreme Court. It is almost obvious on its face. It also offends me, and I am not a judge, and I am basically in favor of getting rid of busing.

Senator JOHNSTON. Let me say, Mr. Sawyer, I would really invite you to look into section 5 of the 14th amendment. I don't think you were here earlier when I spoke about it. I have the cases research in my statement.

The power of Congress is very broad under section 5 of the 14th amendment. I might say that under article 3, it is also very broad. Section 5 of the 14th amendment, which authorizes the Congress to enforce this article by appropriate legislation, is very broad in its reach. It is the same kind of power that we have under the necessary and proper clause, subject only to being thrown out if what we do is unreasonable and arbitrary.

I know people say that it is an amendment to the Constitution under a legislative act. Most who say that have not studied section 5 of the 14th amendment.

Mr. SAWYER. I read in the most recent American Bar Journal, which I just got a day or two ago, a rather extensive article on jurisdiction limitation written by somebody formerly on Jesse Helms' staff, and quite a persuasive article. In effect, it relied heavily on *Ex parte McArdle,* and various of its progenies, stating that it had been reaffirmed, and so on.

I did a little cross-checking on that and there has been a lot eliminated from that, too. It was a very partisan article, and I can't blame him for that, we all get partisan. But it was not really an objective analysis, in my opinion, of the case law.

The most recent case, *Taglia* v. *General Motors,* which you are probably familiar with, which the second circuit denied, expressly states and holds that the Congress cannot use its power and jurisdiction to deprive persons of rights protected under the Constitution.

I find it hard to differentiate between jurisdiction over a remedy, and those have been rights that the courts have determined to be protected under the Constitution.

Senator JOHNSTON. That begs the question, though, what is the right to be protected?

Is it a right of Washington, D.C., and those other areas to so structure their school systems with busing orders, so that they don't work, so that you have a segregated system?

Mr. SAWYER. Bear in mind, back to the basic issue, I don't disagree with you. I think the courts have created a mess in this thing. I think even they were going to be consistent, they should have gone across even State lines, if necessary, such as would be the case in the District. Otherwise, it is farcical. They haven't done this, and so they are accomplishing nothing but white flight to these areas that cannot be reached.

Detroit is about the same makeup as Washington, D.C., but surrounded by suburbs with their own school districts.

Senator JOHNSTON. If I may interrupt. If that is a fact, and I think that it is indisputably a fact, and I think you state it very well, that this thing hasn't worked. Then what the cases say under section 5 of the 14th amendment is that we have a right to find that fact. Then we have a right to select a remedy which will enforce the 14th amendment rights.

The 14th amendment has never said, and the Supreme Court has never said that busing is a right. It says, to be free of discrimination, to have a remedy that promises to work and to work practically. That is what they have defined as the right. If that is so, the cases give to the Congress that power, the power to fashion a bundle of remedies that will work in the best way possible.

Mr. SAWYER. The Court says that this particular group's constitutional rights are being impinged because they are de jure, and they always find that no matter what, being deprived of going to desegregated schools, or in effect imposing segregation. The only way to protect those constitutional rights is with a busing order, which is what they are finding.

It strikes me, then, if we, in effect, impose limitation of jurisdiction and/or remedy in this case, we are under their decisions depriving people of constitutionally protected rights.

I agree with where you want to go, but my feeling is that this subject ought to be taken on right over the bow as an amendment to the Constitution. I think that it is going to be so patently an evasion of that that the Court is going to strike it down as a clear attempt to avoid the requirements of the amending clause.

Senator JOHNSTON. Mr. Sawyer, all I can tell you, if you read the cases. I know you said that some years ago you were involved in this, but maybe you were not involved in section 5 of the 14th amendment.

Read what the role of Congress is under *Oregon* v. *Mitchell,* under a whole host of cases, read what the power of Congress is. Then, go reread all those other cases, the *Green* case, the *Swann* case, all of those, never once do they mention busing as being a right. Rather, they mention it as a remedy, and a remedy with limits.

Mr. SAWYER. But the remedy is essential to protect the right, that is what they say. They all pay lip service to the fact that everything else is preferable to busing, but if that is the only thing that will protect the right, then they will order it. It is hard for me to distinguish between protecting a right or recognizing a right, but foregoing any right to protect it.

Senator JOHNSTON. Again, it depends on how you defend that right. If the right is to go to a nondiscriminatory integrated system like Washington, D.C., if that is the right, then you are entirely correct.

I think the right is to have a remedy to get rid of discrimination that promises to work in the best practical way, and that doesn't hurt education. That is what I have tried to do here, I have tried to fashion a remedy that gives you the most desegregation, the least discrimination, with the best education. That is a proper role for Congress. In fact, I think if we don't perform that duty, we are neglecting our duty.

Mr. SAWYER. Thank you.

I yield back.

Mr. KASTENMEIER. The gentleman yields back the balance of his time.

The committee thanks you, Senator Johnston, for your splendid, advocacy of your amendment.

I have just one last question, and it can be answered very briefly. There is a subsection (i) that says; "It is the sense of the Senate that the Senate Committee on the Judiciary report out before the August recess legislation to establish permanent limitations, etc." Is that likely to happen within the next 60 days?

Senator JOHNSTON. That was last year, Mr. Chairman. It was an amendment that was put in last year, prior to the August recess.

Mr. KASTENMEIER. Of last year?

Senator JOHNSTON. Yes, and this is how long this has been pending.

Mr. KASTENMEIER. Therefore, the Senate committee has not reported out that legislation yet?

Senator JOHNSTON. No; because we went ahead and passed this legislation. There was some hope of some people that the Judiciary Committee would find some new magic formula and that it would please everyone. I didn't think it would, but I accepted the amendment.

Mr. KASTENMEIER. We thank you for your appearance here today. The extensive questioning was a testimonial to the importance with which your testimony is regarded. We appreciate your patience.

Senator JOHNSTON. Thank you very much, Mr. Chairman, and members of the committee.

Mr. KASTENMEIER. Next the Chair would like to call both of our House colleagues, if we may. The gentleman from Ohio, Hon. Ronald M. Mottl, who engaged in two contests recently: One for renomination to the seat he lost, and one that only last night he won on behalf of the Democratic Party on the baseball field.

Also we would like to greet, if he would come forward, our distinguished colleague from Louisiana, W. Henson Moore, who has been a leader, along with Mr. Mottl, on the subject in the House of desegregation, both as far as constitutional amendments are concerned, and in this case support of the statutory amendment before us.

Mr. Moore, I know that you have an obligation to leave in the next few minutes. Did you wish to proceed first?

Mr. MOORE. Mr. Chairman, I do appreciate that offer. I will certainly see that the more senior gentleman, in terms of seniority and work in this area proceed first, and I will just stick around. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio is recognized, and we will be pleased to receive your testimony.

TESTIMONY OF THE HON. RONALD M. MOTTL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. MOTTL. Thank you very much, Mr. Chairman.

I wish it could have been two, rather than one to one.

Thank you for the opportunity to testify here today on S. 951 and specifically the provisions of that bill which relate to court ordered busing.

The old saying about the emperor having no clothes applies perfectly to the Federal judiciary today.

Here is what we are seeing in public schools systems which are subject to court ordered busing plans:

White flight to the suburbs, resulting in resegregation of the school system. No perceptible improvement in the education given to minority students. Waste of countless millions of taxpayers' dollars.

An overall decline in the public school educational experience, as busing drains dollars from instructional and extracurricular programs and as children and parents find it harder to participate in after-class activities.

Declining public support for public schools, which translate into refusal to vote for necessary taxes.

It is simply incredible to me that in the face of a decade of failure of court ordered busing, the Federal judiciary plods along as if the crisis in public education is none of its doing and none of its concern so long as the buses roll.

Even the experts, such as Dr. James Coleman, an architect of busing, have gotten off the busing bandwagon. Even they have abandoned a judiciary which, to save face and avoid admitting error, has become blind to the suffering it is causing to blacks and whites alike.

Here is a headline from the Sunday, June 13, Cleveland Plain Dealer: "Scrap Boston busing plan, Black parents urge."

The newspaper story could be written most anywhere that has experienced court-ordered busing.

Here is the first paragraph: "After 8 years of mandatory school integration marked by violence and white flight, a growing number of critics, including black parents, say Boston's busing plan should be scrapped."

The school superintendent is quoted as saying that the Boston system is more segregated today than when busing was imposed in 1974.

Some of the original black plaintiffs in the Boston lawsuit now want busing abandoned.

The story also quotes a Boston University sociologist as saying that busing bankrupted the Boston schools, created an all-minority system in a white majority city and created two school systems—one for the wealthy who can afford private schools, and a second-class public system for poor whites and poor blacks.

Since coming to Congress in 1975, I have advocated a neighborhood school constitutional amendment, to insure once and for all that public education is colorblind. We now have 209 signatures on our discharge petition to force our amendment to a House vote.

Still, I wholeheartedly endorse the busing provisions of S. 951. This legislation offers a creative approach toward getting the Federal courts out of busing. The Attorney General of the United States has given an opinion that S. 951 is constitutional.

Any legislative initiative which promises to get us out of the busing quagmire deserves our support. Our public school system

must have relief, while there remains something to save. The clock is running, and there is not much left.

Thank you.

Mr. KASTENMEIER. Indeed, your last phrase also applies here, as it is running late, it used to be this morning.

We appreciate your very brief statement.

I think we will call on our colleague, Mr. Moore, to make his statement and then open the questioning of either of you.

TESTIMONY OF HON. W. HENSON MOORE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. MOORE. Thank you, Mr. Chairman.

First, I want to thank you and the subcommittee for having this hearing and for allowing me to come and testify. I very much appreciate that, and I appreciate your interest and your action in looking into this matter.

I spent some time, much to the consternation of the staff, even up as late as 10 o'clock this morning, trying to decide what I could possibly say to you that might be of any value to you. I don't believe in taking up your time and mine in coming in here with nothing to say.

I don't pretend to be a constitutional scholar. I spent some time studying it years ago. I think you are going to find an awful lot of people coming to your hearings who are far more versed in constitutional law to be able to give you an opinion about whether this is constitutional or not.

I think it is, or I would not be here this morning testifying in favor of the provisions of S. 951, which are the subject of this hearing. I also spent some time studying this, as Senator Johnston has suggested that we all might do, and I come down agreeing with the Attorney General. Although I agree with Mr. Frank that his opinion is somewhat confusing, at least he does say that he thinks it is constitutional.

I will not spend my time, unless you ask me questions, getting into the constitutionality of it, because it is something that is well beyond me, and may well be beyond anybody other than a tribunal or a judicial branch of government.

Second, I am not going to spend a lot of time going over the facts and figures to prove to you that this busing doesn't work. Likewise, I think you are going to find far more experienced and true expert witnesses come before you to talk about that sort of thing. I know what I see in my congressional district, and I know what I read, but it doesn't make me an expert. It does make me again come down in favor of this legislation.

What I would like to do is to appear before you simply as a colleague and address to you the one area where I may have some limited knowledge and expertise, and that is basically the workings of this institution and what our responsibilities are.

To sum it up quite briefly, this is a social issue and a very troublesome one. It can be lumped in that category of social issues including voluntary prayer in schools, abortion, the equal rights amendment, any number of these things which are very troublesome.

Quite frankly, when I first came here and for many years, I appreciated the work of this committee. Whatever the reasons may have been, many of these issues have either been the subject of lengthy deliberations to make sure the committee was correct in its decision or have simply been bottled up because of one viewpoint or another.

Most Members of the House really appreciate the fact that we don't have to vote on a lot of legislation in these areas, because these votes are difficult and they are tough. For every social issue, you are going to find real divisions back in our congressional districts, and let me assure you right now.

For those who don't know my district, it is one-third minority by a registration of the vote, and for everything I am saying here this morning, while I may be making one voter happy, who happens to be of one color, I may be equally making one just as blazing mad on the other side. And, this doesn't include the group in the middle who doesn't care either way. So, there aren't any political pluses to be gained out of taking this action. As a matter of fact, it is very difficult, as any social issue is.

However, it's when you look at why we are elected and why we're here, and I have had to look at that because the court ordered busing has struck my district in the last year. Suddenly, something that was taking place in Boston, or in Denver, or in Shreveport, La., which wasn't affecting my people and wasn't an issue other than something abstract that, perhaps, someday, if you brought a bill to the floor and forced me to face, I would face then.

But, suddenly the issue strikes my district. The people of my district have a different viewpoint, and I find thrust upon me the obligation to which I think I was elected, and that is to discharge the duty and to face the issue. We are obligated to bring the issue to the House floor, face it and resolve it.

If you don't like S. 951, agreeably it is not perfect, then bring us something else. But let's face the issue so that we decide for the people in my congressional district and nationwide once and for all how this Congress feels about the issue of busing: whether in fact it is an indispensible remedy, as some questions this morning have led us to believe that some members feel this way, or whether busing ought not to be used as a remedy or whether it should be banned or limited as we are proposing.

That is the sort of thing, I think, we have to face. Every social issue reaches a certain point of combustion, as we used to learn in chemistry. It reaches a certain point to where the House must face it. It was true with the equal rights amendment. It was true with civil rights issues. It has been true in a number of issues that have faced this committee and this House.

We sometimes wish that it wouldn't happen. We sometimes have one House pass something and the other one bottles it up. We have the House pass something, and the Senate bottles it up.

In the issues of civil rights and in the issue of the equal rights amendment, discharge petitions had to be used ultimately to discharge legislation to get it to the floor from the Rules Committee and from this committee, to get votes and to face that issue. I am suggesting that we have to do the same thing.

We are working, Mr. Mottl and I, along with a number of others, to get a discharge petition signed, not because we relish overstepping the boundaries of this committee, not because we are impatient, but because we feel we must face the issue. It is our duty and our obligation. It is not a new issue. It has been around a long time. It is not an issue that is insignificant. It is an issue which national polls have indicated for a decade an overwhelming feeling of the American people on one side.

It is also not irrelevant. There is the negative impact that it is having on education and school systems. It is something that is very serious. It is very pressing. The longer we sit on it, the more it festers and the more the problem begins to cause and begat other problems.

I really think I know what would happen if this legislation passed the House floor, but I am not confident of that. I thought 2 years ago, when the constitutional amendment that my friend to my left brought to the House floor, it would have gotten a two-thirds vote, but it did not. One can be surprised by what the House can do.

The gentleman from Michigan's comments this morning are indicative of someone who would favor a constitutional amendment, but would not favor this legislation. I simply think that we ought to bring something to the floor because this issue has reached the point of volatility where it ought to be decided and it ought to be faced.

It is not going to go away, just like the equal rights amendment didn't go away, and civil rights didn't go away and many of the other social issues. I suspect that the issue of abortion and others are in that category. Ultimately, we are going to have to face them, because otherwise we spend our time putting limiting amendments on appropriations bill; we go through all kinds of contortions getting an issue that, due to the rules of germaneness under the House, we really can't get to. We never really have a vehicle before us to air and to debate and to work on.

So, I would plead with the committee to not only have these hearings, which are a noble beginning, but progress toward, as the gentlelady from Colorado says, a more creative solution. Let's come forward with that solution, if S. 951 isn't it.

The issue has been sitting for a long time. In the 97th Congress, there have been approximately 20 pieces of legislation dealing with busing that have been introduced. This is the first hearing, and no legislation has yet been brought to the floor.

I introduced H.R. 2047 on February 24, 1981, which has essentially the same language as S. 951. I think that the only information I can bring to you is my opinion as a colleague that it is the duty of this House to face an issue, especially when it has been this long in the making, when there is this kind of consensus expressed consistently in the polls, when we do have the real questions about what we are accomplishing with all of this.

Last, when the other body, the Senate, with essentially an overwhelming vote, after days of testimony before its Separation of Powers and Constitution Subcommittee, where I testified, and after very lengthy weeks of debate on the Senate floor, they have discharged their duty, and they have passed a piece of legislation.

I think it is incumbent upon us, especially under those circumstances, to now discharge ours. It is very hard for me to go back home to the people of Louisiana and say, "I am awfully sorry, but we can't get a vote on this issue." They don't understand that. Democracy and a representative form of government to them means that we bring all the issues to the floor and we decide them, especially those that they think are very important.

This is a very important issue; I agree with them. I can't see why we can't come forward with some kind of decision. If you have hesitancy about S. 951, bring us something else. If you think that it is a bad idea and that the people need to vote on it, bring us that. Let the House work its will. But let us not thwart the democratic process of this House, or the republican process of a republic form of government. Let's at least face the issue. Let the House work its will, and let us put the matter behind us.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The committee can decide in due course what it wants to do. Obviously we will have more hearings on this. I note that you have a large number of members on a discharge petition for a constitutional amendment, which the gentleman from Michigan would more ideally prefer than the bill before us, and we may likely have a vote on the floor on that issue.

Mr. MOTTL. I hope you are predicting correctly that we will have a vote in the very near future on a constitutional amendment.

Mr. KASTENMEIER. As I understand, you have 209 signatures or 211, a very substantial number.

Mr. MOORE. Mr. Chairman, may I add at that point, and I don't mean in any way to impede on the Chair asking questions. I am also a cosponsor or a cosignatoree on that petition to discharge.

We find an awful lot of people who, with all deference to the gentleman from Michigan, feel that we should not go about amending the Constitution of the United States to take away busing completely as a remedy. That is why I would ask this committee to take a long, hard look at S. 951.

While I fully agree with that constitutional amendment, and I voted for it 2 years ago and will again, I think there is some merit in leaving this as at least a partial remedy of busing, which this bill does, to bring about desegregation. It doesn't leave you without any busing remedy whatsoever. So, there is that point that ought to be brought up, and I think it ought to be brought up at this point.

Mr. KASTENMEIER. The reason I asked the question is to determine whether you prefer passage of a constitutional amendment, or whether you prefer the approach represented by S. 951.

Mr. MOTTL. Naturally, I would prefer the constitutional amendment because I think that is more complete. There wouldn't be any court challenges. I think the Congress should determine the public policy, and we are the people elected to determine public policy in this country, that the court ordered busing remedy will not be used any more. There are other adequate remedies to desegregate a school system.

I am in complete accord with most of my colleagues in the House of Representatives that we have to desegregate the school systems, and that they should be desegregated. But there are other remedies

that are viable and should be used. So, I would actually prefer the constitutional amendment. However, if we cannot get that through, I would be in complete accord and endorse this proposal as a sound means in which to severely hamper the remedy of court ordered busing. We can use other remedies in which to desegregate a school system.

Let me just give as an illustration, Mr. Chairman, if I may, the court ordered busing in my hometown of Cleveland, Ohio. In 4 years, we went from an enrollment of 115,000 to 68,000. Of those 68,000 students in the Cleveland school system now, which was one of the finest school systems in the country and now it is one of the worst school systems in the country, we have 17,000 truants each schoolday because the Federal district court is still involved in the remedy of court ordered busing.

We spent millions upon millions of dollars in the purchase of schoolbuses, the hiring of drivers, the legal fees, the special masters, that could have been better spent for quality education for every schoolchild. And the energy that has been wasted. We only get 5 miles per gallon of gasoline with those schoolbuses. The minority students have not gotten a better education because of the remedy of court ordered busing.

I think that it has been a total disaster for the Cleveland school system. Not one levy or bond issue that has been put on the ballot since court-ordered busing has been in effect has passed. The tragedy of this whole concept of using this remedy is that only the poor blacks and the poor whites are bused. The other schoolchildren have adequate options such as moving to the suburbs or they can go to private schools or parochial schools. The poor whites and the poor blacks, those are the only children who are riding those schoolbuses across town.

Mr. KASTENMEIER. I think the gentleman from Louisiana prefers the flexibility of S. 951 to the constitutional amendment.

Mr. MOORE. Mr. Chairman, if I had my druthers, as we say back home, I would rather have the constitutional amendment, which settles the issue completely once and for all. As a practical matter, I don't think that this is going to happen any time soon. I can't see, with the limited time left in this Congress, even if we pass a constitutional amendment on the House floor, the Senate being able to get to it and get it done.

Second, the next Congress would go through this drill all over again, and then we have to go through the process of three-fourths of the States approving it.

I don't for one minute want to change the constitutional amendment process. It should be difficult to amend the Constitution, and I am not sure we are ever going to amend the Constitution when it comes to busing. If we are going to bring about some kind of remedy to partially limit what I think is excessive use of busing, I think legislation like this is the quickest way, especially since the other body has already passed it; it is conceivable that something could be passed and on the President's desk before the end of this Congress.

Then, we would let it go through the courts. If they rule, no, we can't attack remedies, then we know that the only thing you can do is a busing amendment.

To answer your question, technically I prefer the busing amendment, but I think that as a practical matter I think this is the way to go about it.

Mr. KASTENMEIER. I yield to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

I may say to the gentleman from Cleveland, I am aware of the problem that they had in Cleveland, and that was about at the same time that we had the problem. It was kind of interesting. There were two cases, one in the district court at that point, the *Grand Rapids* case and the *Omaha* case.

Cleveland sent their attorneys and their school board up to interview us in Grand Rapids as to what method we had followed, and they did the same thing with Omaha, which had proceeded in a different way. We had our own very affirmative programs to desegregate without busing, and they were showing success. We had been doing it for a period of time. Omaha took the completely colorblind position that they didn't do anything either way, and they stayed totally apart from it. Cleveland opted to follow the Omaha approach. We were sustained in the sixth circuit, and Omaha was reversed in their circuit.

Mr. MOTTL. That is right. Grand Rapids was very fortunate to have such an outstanding lawyer as yourself who knew the proper way to go.

Mr. SAWYER. Thank you.

I have one question of the gentleman from Louisiana.

Really, the Senate did not consider this or process this out of any committee. This was hung on, as I understand it, merely as an amendment to the judiciary authority bill.

Mr. KASTENMEIER. That is right, Senator Thurmond's committee did not report that out.

Mr. SAWYER. There was no committee report so far as I know. They hung it on after Senator Weicker had tied everybody up in a filibuster.

Mr. MOORE. The Senate committee never reported it, you are quite right. The subcommittee held hearings on it, and I testified at those hearings. There were several days of hearings on this kind of remedy, and there were three or four different witnesses who appeared with variations of this same kind of remedy.

Mr. SAWYER. What did they do with it?

Mr. MOORE. Before they had a chance to discharge it, the amendment was passed in the Senate. So, all operations ceased in the committee, and the members of the committee supported this amendment on the floor of the Senate. They had lengthy debates on the floor of the Senate for weeks on end.

Mr. SAWYER. Isn't this the one that Weicker filibustered on?

Mr. MOORE. As the Senator indicated, they had three different cloture motions and the Senate voted not to close the debate.

Mr. SAWYER. I just wanted to defend our Judiciary Committee. We are not any less sanguine than the Senate about reporting these things. They didn't report it out either.

Mr. MOORE. But there is a difference. They stopped because of their support for what was done and supported it on the floor. What we are asking you do now is to support us on the floor.

Mr. KASTENMEIER. Would the gentleman yield on that point.

Mr. SAWYER. I will be happy to.

Mr. KASTENMEIER. As the gentleman from Michigan well knows, there have been extensive hearings in the subcommittee on constitutional and civil rights on the substantive busing and desegregation issue, which are not essentially issues for this subcommittee.

This subcommittee ended up with the jurisdictional issues because of the involvement of the Federal courts alone in terms of the remedy. This is not to say, however, that the Judiciary Committee, through its subcommittee system, has not been active at least in hearing the issue even as a Senate Judiciary Committee heard you.

Mr. SAWYER. We had hearings, as I recall it, on this limitation of jurisdiction in dealing with school prayer and similar or related questions.

Mr. MOORE. I don't class this, and I don't want the record to indicate this, as limitation of jurisdiction.

Mr. SAWYER. It is hard for me to distinguish this from the limitation of jurisdiction approach. It would seem to me, if you accept the premise that the courts have decided that reluctantly the only way they can enforce a right over which they have jurisdiction is with busing, if you accept that, then it seems to me that it would either stand or fall along with the limitation of jurisdiction.

Mr. MOORE. But that is the point where it becomes our duty as a legislative body to address the presumption. I think very clearly we have the right to do that, to say that this isn't the only remedy. There are others, and we passed legislation limiting one of them, and then we will let the Supreme Court see if they agree with us.

I think that the Attorney General has addressed that matter in his letter. To give an example, in my own jurisdiction of Baton Rouge, La., we offered the Federal court a system of magnet schools to desegregate, precisely patterned upon one accepted in Minneapolis, Minn. We were told by the Federal judge that it wasn't acceptable, that we had to go through a busing situation.

A Federal judge in one area says that one remedy is fine, and a Federal judge in another area says that another remedy is not right. I don't think that there is a decision constitutionally by the Supreme Court of the United States saying that busing is the only remedy for desegregation. Therefore, any sort of limitation on busing is not taking away the jurisdiction of the court or its only remedy for busing. If I believed that, I would agree with you that it is patently unconstitutional on its face, but that is not the case. That is why this body ought to address that issue as the Senate did.

Mr. SAWYER. That is why we invite people like you to testify, to kind of educate us a little better. I am open minded.

Mr. MOORE. Don't look to me to educate you. As I indicated at the beginning, what I am trying to do is to tweak your conscience a bit as a public servant to let the House work its will. I will leave your education to somebody else.

Mr. SAWYER. I yield back.

Mr. KASTENMEIER. The gentleman from Virginia is recognized.

Mr. BUTLER. Mr. Chairman, I appreciate the contribution of the witnesses today. I really have no additional questions. They have

given us great food for thought here, and I think we will just have to think about that.

I would like to reserve the right to submit some questions in writing later to the witnesses, if that is indicated.

Mr. KASTENMEIER. If the witnesses would be agreeable, it may well be that individual members of the subcommittee may wish to address further questions to you. For example, the gentleman from Illinois, Mr. Railsback, proposed whether or not there ought to be a sense of Congress resolution on schoolbusing, which may or may not appeal to people. But he is thinking of alternatives in addition to some of the other options that confront us presently.

Mr. MOORE. Mr. Chairman, I agree that it would be a fine thing to do, except that I don't think it has any power and effect at all. I think we have expressed the feeling of the House with all these crazy amendments we keep offering on the House floor to appropriations bills. I think any judge in the country knows how the House feels. The point is that there is nothing legally limiting his ability to use busing.

To go home and tell people in Louisiana that we voted for a sense of Congress resolution saying that we are opposed to it. They say, "Fine, does it stop?" When you reply to the citizen, "No, it doesn't." He will ask, "Have you discharged your responsibility?" My answer is, "No."

Mr. KASTENMEIER. I am not suggesting that this is the action we will take.

Mr. MOORE. This is something that we will have to do in writing.

Mr. KASTENMEIER. In any event, the subcommittee is grateful to both of you for your appearance here today. We appreciate your patience. We know that you both regard this issue as very, very serious indeed, and we do appreciate your testimony.

Mr. MOORE. Thank you, Mr. Chairman.

Mr. MOTTL. Thank you.

Mr. KASTENMEIER. Accordingly, the subcommittee stands adjourned, pending our hearing next week.

[Whereupon, at 1:25 p.m., the subcommittee adjourned.]

LIMITATIONS ON COURT-ORDERED BUSING—NEIGHBORHOOD SCHOOL ACT

THURSDAY, JULY 15, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:25 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Railsback, Sawyer, and Butler.

Staff present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Thelma Donde, clerk.

Mr. KASTENMEIER. The hearing will come to order.

I am pleased to convene the second in a series of hearings on legislation which severely limits the authority of the Department of Justice and of the Federal courts to seek or order the transportation of students as a remedy to unconstitutional racial segregation in public schools.

This morning we are joined by a group of very highly qualified and distinguished witnesses who have given generously of their time to speak out on the important questions raised by this legislation.

Whatever our individual views on this bill might be, I know that we all appreciate the willingness of this group of national legal leaders to assist us in trying to resolve the controversy before us, and I would like to call upon this distinguished panel of three former attorneys general: Benjamin R. Civiletti, Elliot Richardson and Nicholas DeB. Katzenbach. Following this panel, we will be honored to hear from the distinguished president of the American Bar Association, David R. Brink.

I might add I have the highest personal admiration and regard for the three gentlemen who served as attorneys general who are before us. Both the gentleman from Illinois and I have served during times when all three have served in the office of Attorney General.

Having been in office most recently, Mr. Civiletti brings the subcommittee extensive legal experience in both the private and public sectors. He served as Attorney General under the Carter administration. He now practices law in Washington and Baltimore. He began his career as an assistant U.S. attorney, went into pri-

vate practice for many years, joining the Justice Department in 1977 as Assistant Attorney General, in charge of the Criminal Division.

He is a Fellow in the American College of Trial Lawyers, and received his degrees from Johns Hopkins, Columbia, and Maryland Universities.

Mr. Richardson has held an unusual number of distinguished posts in Government; written numerous articles on Government law and foreign policy; most recently, during the Carter administration, he represented the United States in the Law of the Sea Conference. He served also previously as Secretary of Commerce. From 1970 to 1973 he served as Attorney General, Secretary of Defense, Secretary of HEW; he currently is a partner in the law firm of Milbank, Tweed, Hadley, & McCloy in Washington. Last, Mr. Richardson is a graduate of Harvard University.

Mr. Katzenbach, currently a director and general attorney for IBM, served under President Johnson as Attorney General, then as Under Secretary of State; before that, he was a professor at the University of Chicago Law School. Mr. Katzenbach also practiced law privately, received his law degree from Yale, and was a Rhodes scholar.

Obviously, we have a very distinguished panel before us.

Mr. RAILSBACK. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. May I just join with you in welcoming our three distinguished witnesses, and it is good to have them back.

Mr. KASTENMEIER. I would like to call on any of you who would like to proceed first.

Mr. Richardson.

TESTIMONY OF HON. BENJAMIN R. CIVILETTI, HON. NICHOLAS deB. KATZENBACH, AND HON. ELLIOT L. RICHARDSON, FORMER ATTORNEYS GENERAL OF THE UNITED STATES

Mr. RICHARDSON. Thank you very much, Mr. Chairman and members of the subcommittee. I very much appreciate this opportunity to comment on the proposed Neighborhood School Act contained in S. 951.

With the permission of the committee I would like to summarize the highlights of my prepared statement, and request that the statement be printed in full at the close of the transcript.

Mr. KASTENMEIER. Without objection your statement will be received and be made a part of the record at the end of your oral presentation.

Mr. RICHARDSON. Thank you very much, Mr. Chairman.

My statement deals first with constitutional problems raised by the bill. The first of these concerns the basis of Congress power to enact such legislation. While it is clear that article III of the Constitution provides Congress with the power to limit the Federal courts' jurisdiction, that provision should not be read in a vacuum. The parameters of congressional power are found in a reading of the Constitution as a whole. Moreover, S. 951, if passed, would disturb the balance of power between State and Federal Governments. And third, an examination of the bill in light of the 14th amend-

ment's due process and equal protection clauses reveals that it would curtail individual rights in accordance with congressionally prescribed limitations.

Finally, it distorts the separation of powers required by the Constitution, because it encroaches on the independence of the judiciary. The sponsors of S. 951 purport to rely on article III, section 1, as well as section 5 of the 14th amendment, as the source of congressional authority to limit the function of the Federal courts.

Although it is not clear on the face of the bill that its provisions apply equally to the Supreme Court as the lower Federal courts, Senator Johnston, one of its sponsors, has told this committee that it was in fact intended to apply to both. Neither section 1 of article III nor section 5 of the 14th amendment contains language that would support its being used to limit the powers of the Supreme Court. To my knowledge either has ever been so used.

Section 5 of the 14th amendment is, of course, the enforcement provision of that amendment. But the Congress power to enact legislation under that section, while broad, is directed toward the affirmative implementation of the purposes of the amendment, not its subversion. As Justice Black said in *Oregon* v. *Mitchell,* Congress has no power under section 5 to undercut the amendment's guarantees of personal equality and freedom from discrimination.

Although the exceptions clause of article III, section 2, affords a more plausible basis for Congress power to limit the Supreme Court's ability to order certain remedies, neither that clause nor any other provision of the Constitution can be used in a manner that destroys an essential function of the Supreme Court. Such a reading would conflict directly with the framer's intentions as evidenced by the Constitutional Convention's rejection of a proposal expressly requiring the legislature to direct the judicial power.

Contemporary scholars follow this reasoning and posit that although Congress power over the Supreme Court's appellate jurisdiction has been deemed plenary, that power may not be exercised in a way that would permit the legislature to undermine the judiciary's constitutionally established role.

S. 951 would in certain specified circumstances prohibit the Federal judiciary from implementing student assignment, even when State law or action permits the perpetuation of illegal segregation. Hence, the bill would pro tanto prevent the Federal judiciary from exercising its essential function of insuring that State courts give adequate recognition to constitutional rights recognized by the Federal judiciary.

This duty was vested in the Supreme Court by the Constitution and developed in the lower Federal courts in response to the practical demands of coping with a tremendous volume of cases. A purpose of article III was to insure the supremacy of Federal law. To the extent that S. 951 would permit the States to avoid compliance with constitutional requirements, its implementation would be incompatible with that purpose. As Justice Holmes states in the often quoted *Western Maid* case, "[l]egal [rights] that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."

The provisions contained in S. 951 limiting the assignment of students in terms of specific traveltime and round trip distance

embody congressional efforts to tailor judicial remedies. Such efforts would seem to me clearly to exceed Congress power under article III, section 1. That section empowers Congress to establish inferior courts, not to frame remedies.

Indeed, a district court has the duty and power to frame an appropriate remedy for illegal segregation when school authorities fail to establish an acceptable remedy. In the *Charlotte-Mecklenburg* case, Chief Justice Burger envisioned this power to be broad and flexible. He stated: "No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented by thousands of situations."

I point out here that this legislation would set an unfortunate precedent for other congressional attempts to substitute legislative prescription for judicial discretion. Restrictions mandated by S. 951 also contravene other provisions of the Constitution. They would erode the protections afforded by the 14th amendment's due process and equal protection clauses to the extent that individual rights pursuant to Supreme Court decisions would instead be subordinated to a congressional majority. S. 951 would enact into law a legislative judgment as to the reasonable limits of court-ordered busing, but Congress cannot strike its own balance between the benefits derived from desegregated schooling and the social costs of attaining those benefits without preempting an essential function of the judiciary.

It would be anomalous for the judiciary to have jurisdiction over desegregation cases, to have the power, moreover to prescribe remedies up to a specified distance, or a specified interval of time, but arbitrarily to be deprived of the power to exercise discretion as to whether in a given specific situation those are indeed necessary limits.

Here I might add, Mr. Chairman, that as I have thought about this, it seems to me increasingly clear that what we have here is not, as it might at first be thought, an attempt to oust the jurisdiction of Federal courts. It is not an attempt to withdraw the power to prescribe a remedy. The legislation concedes that the case or controversy at issue is one in which an individual has been deprived of constitutional rights. That is a given. The legislation concedes that in order to fashion a remedy for that deprivation, the courts should be able to order assignment of the child to another school. And where that school is beyond walking distance, to permit the child to be bused. At that point the legislation introduces congressional determinations of what the maximum reasonable limits are.

Now, I could well imagine making an argument to a court that these are in fact sensible limits in a given case, but the question really here derives from the attempt to substitute a congressional judgment as to those limits in a situation in which the court has otherwise full discretion to determine what remedy the Constitution requires. So, the issue, therefore, is a different one than you would have if the Congress were purporting to say that there shall be no remedy at all. I think that would present, of course, another set of reasons why the legislation was invalid.

But it seems to me quite clear in any event that it is utterly anomalous to attempt to tell a court in the exercise of its discre-

tion, "You should go thus far but no farther." It is a contradiction in terms essentially to concede the existence of discretion, but partially to withdraw it.

I think I might stop there, Mr. Chairman. The statement goes on to deal with some of the considerations of judgment that are presented here, and points out that you would have a situation generating enormous pressure on the State courts if they remained bound by the declarations of the Supreme Court of the United States as to what the constitutional rights of children are to receive the benefits of a desegregated education, but are not subject to the same limitations on their discretion that this legislation would impose.

What are the State courts then to do? Are they to continue to follow the general precepts of *Charlotte-Mecklenburg* and subsequent cases, or are they to assume that the applicable constitutional standards have been somehow modified by a congressional judgment as to the limits of reasonableness.

Finally, I might just add a word. Sensitive though I may otherwise feel to the use of either slippery slope arguments, or arguments about opening the floodgates, I do, as noted on page 13, believe that here indeed the proverbial floodgates would be opened by an attempt to tailor, limit, or otherwise substitute congressional for judicial discretion in the prescription of appropriate remedies for the deprivation of individual constitutional rights.

Thank you, Mr. Chairman and members of the subcommittee. I would be happy, following the statements of my distinguished colleagues, to respond to any questions.

Mr. KASTENMEIER. Thank you, Mr. Richardson, for a splendid statement.

[The statement of Mr. Richardson follows:]

STATEMENT BY ELLIOT L. RICHARDSON

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to comment on the proposed Neighborhood School Act in S. 951, which would limit the authority of the federal courts to seek or order remedies in desegregation cases. The significant aspects of the bill, as I understand it, are the prohibition of the federal courts from ordering the assignment or transportation of students in desegregation cases, and the bill's retroactive application to existing court orders. My experience as a United States Attorney, a State Attorney General, and an Attorney General of the United States, as well as a private practitioner, has given me an insight into the far-reaching constitutional and social implications of this legislation that I hope will be of assistance to the committee.

Congressional attempts to limit the jurisdiction and remedies of the federal courts, as exemplified by this bill, are not unprecedented. What would be unprecedented, however is the passage of such legislation. I believe that enacting S. 951 may be unconstitutional for several reasons and would be unwise as a matter of policy. The first constitutional problem raised by this bill is the basis of Congress' power to enact such legislation. While it is clear that Article III of the Constitution provides Congress with the power to limit the federal courts' jurisdiction, that provision should not be read in a vacuum: the parameters of Congress' power are found in a reading of the Constitution as a whole. Second, if passed, S. 951 would disturb the balance of power between state and federal governments. This would occur because the federal courts would be denied the capacity in certain circumstances to correct unconstitutional interpretations of federal law by state courts. Third, an examination of the bill in light of the Fourteenth Amendment's due process and equal protection clauses reveals that S. 951 would curtail individual rights in accordance with congressional proscribed limitations. Fourth, this legislation distorts the separation of powers required by the Constitution because it encroaches on the judiciary's independence.

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Apart from the constitutional problems created by this legislation, sound policy requires it to be evaluated under the strictest scrutiny. For example, S. 951 would (1) expose state judges to intense political pressure; (2) result in varying standards governing constitutional rights; and (3) open the door to the passage of further legislation redefining the judiciary's role. Clearly, Congress cannot overturn the Supreme Court's constitutional precepts by legislative fiat. It should not be able to accomplish that same end through the manipulation of judicial powers.

The sponsors of S. 951 purport to rely on Article III, Section 1, as well as Section 5 of the Fourteenth Amendment, as the source of congressional authority to limit the function of the federal courts. Although it is not clear on the face of the bill that its provisions apply equally to the Supreme Court and to the lower federal courts, Senator Johnston, one of its sponsors, has told this Committee that it was intended to apply to both. Neither Section 1 of Article III nor Section 5 of the Fourteenth Amendment, however, contain language that would support its being used to limit the powers of the Supreme Court; to my knowledge, neither has ever been so used.

Section 5 of the Fourteenth Amendment is the enforcement provision of that amendment. Congress' power to enact legislation under that section is indeed broad, but it is directed toward the affirmative implementation of the amendment, not its subversion. As Justice Black said in *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970), "Congress has no power under [Section 5] to undercut the amendment['s] guarantees of personal equality and freedom from discrimination. . . ." Expressing the same view in *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966), Justice Brennan pointed out that Section 5 does not confer upon Congress any power to "dilute" or "restrict" the Fourteenth Amendment's guarantees. In that same decision Justice Douglas dissented but stated that while Congress may enact legislation under Section 5 to ensure equal protection and due process, the judiciary must decide "whether the [issue] with which Congress has . . . sought to deal is in truth an infringement [on] the Constitution. . . ." *Id.* at 666. The judiciary has already addressed the issue of student assignment to desegregate and held that such measures are not only permissible, but at times *required* by the Fourteenth Amendment. As recently as two weeks ago, the Supreme Court, in *Washington* v. *Seattle School District No. 1*, 50 U.S.L.W. 4998 (U.S. June 29, 1982) (No. 81-9), struck down a statewide initiative designed to stop the assignment of students to achieve desegregation.

Although the exceptions clause of Article III, Section 2 affords a more plausible basis for Congress' power to limit the Supreme Court's ability to order certain remedies, neither that clause nor any other provision of the Constitution can be used in a manner that destroys an "essential function" of the Supreme Court. Such a reading would conflict directly with the Framer's intentions as evidenced by the Constitutional Convention's rejection of a proposal expressly requiring the legislature to "direct" the "[j]udicial power." Contemporary scholars follow this reasoning and posit that although Congress' power over the Supreme Court's appellate jurisdiction has been deemed "plenary," that power may not be exercised in a way that would permit the legislature to undermine the judiciary's constitutionally established role.[1]

S. 951 would in certain specified circumstances prohibit the federal judiciary from implementing student assignment, even when state law or action permits the perpetuation of illegal segregation. Hence, the bill would pro tanto prevent the federal judiciary from exercising its "essential function" of ensuring that state courts give adequate recognition to constitutional rights recognized by the federal judiciary. This duty was vested in the Supreme Court by the Constitution and developed in the lower federal courts in response to the practical demands of coping with a tremendous volume of cases. A purpose of Article III was to ensure the supremacy of federal law. To the extent that S. 951 would permit the states to avoid compliance with constitutional requirements, its implementation would be incompatible with that purpose. As Justice Holmes stated, in the often quoted *Western Maid* case, "[l]egal [rights] that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."

The provisions contained in S. 951 limiting the assignment of students in terms of specific travel time and round trip distance embody congressional efforts to tailor judicial remedies. Such efforts would seem to me clearly to exceed Congress' power under Article III, Section 1. That section empowers Congress to establish inferior courts, not to frame remedies. Indeed, a district court has the duty and power to

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[1] The late Professor Henry M. Hart, Jr., Professor Herbert Wechsler, Columbia University, and Professor Lawrence Sager, New York University are among the many adopting this view. For a general discussion on this topic, see P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's "The Federal Courts and the Federal System" 330-35, 362-65 (2d ed. 1973).

frame an appropriate remedy for illegal segregation when school authorities fail to establish an acceptable remedy. In the case Chief Justice Burger envisioned this power to be broad and flexible. He stated: "The scope of permissible transportation of students . . . has never been defined by this Court, and by the very nature of [desegregation] cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented by thousands of situations." [2]

Moreover, fashioning remedies in equal protection cases has been viewed by the Supreme Court as a function entrusted to the Court by the Constitution. *Nebraska* v. *Wyoming,* 325 U.S. 589, 616 (1945). The exercise of this function on a case-by-case basis, as suggested by Chief Justic Burger, has been accepted and even advocated by the Supreme Court under similar circumstances. Former Chief Justice Warren stated that developing a doctrine on a case-by-case basis provided the most satisfactory method for arriving at detailed constitutional requirements to redress unconstitutional legislative apportionment. *Reynolds* v. *Sims,* 377 U.S. 533, 578 (1964). Enactment of this legislation would set an unfortunate precedent for other congressional attempts to substitute legislative prescription for judicial discretion.

The restrictions mandated by S. 951 also contravene other provisions of the Constitution. The bill would erode the protections offered by the Fourteenth Amendment's due process and equal protection clauses to the extent that individual rights entitled to vindication pursuant to Supreme Court decisions would instead be subordinated to a Congressional majority. S. 951 would enact into law a legislative judgment as to the reasonable limits of court ordered busing. But Congress cannot strike its own balance between the benefits derived from desegregated schooling and the social costs of attaining those benefits without preempting an essential function of the judiciary, for it would be anomalous for the judiciary to have jurisdiction over desegregation cases and at the same time to lack the corollary power to shape remedies suited to specific circumstances.

Judicial review of state action affecting Constitutional rights has been consistently recognized as an essential element of due process. Although congressional decisions regarding the choice of remedies do not generally afford reason for complaint, the situation is otherwise where Congress effectively forbids the federal judiciary to grant constitutionally adequate remedies for an entire class of claims. Judicial review has in that case and to that extent been effectively eliminated and due process has been denied. A constitutional claimant has the right to be heard in a court capable both of adjudicating his claim and of granting effective relief. Crippling the federal judiciary by denying it the full scope of its discretion to order such remedies as it deems to be necessary is clearly as fatal to a litigant's effort to vindicate constitutional rights as is flatly denying jurisdiction. Such measures obstruct the judicial protection of constitutional rights by preventing specific violations from being redressed, and also eliminate the protection afforded by past decisions in this area.

S. 951 also violates the equal protection clause without compelling justification. Generally, a plain reading of a statute determines its constitutionality. While S. 951 does not expressly mandate unequal treatment, its effect in certain circumstances is to curtail the full extent of the constitutional rights made available by *Brown* v. *Board of Education* and subsequent decisions. That is, those rights would be accessible only to individuals residing in a community that desegregates voluntarily or in a state where courts would order student assignment.

This is not the only equal protection problem raised by S. 951. Its application clearly results in two distinct classes of plaintiffs being subjected to unequal treatment: plaintiffs suing in federal courts and those suing in state courts. Those bringing suit in state courts are allowed to seek the full range of judicial remedies while those suing in the federal courts cannot obtain them.

This denial of authority to grant effective relief in specific cases not only discriminates, but would in practice invite the federal judiciary to render advisory opinions in desegregation cases. At the same time, S. 951 opens the door for Congress to decide what fractional part of a constitutional right is entitled to its blessing.

By asserting the power to determine the scope of protected rights, Congress would be intruding upon a judicial function and thus, disrupting the constitutionally separated powers. If the courts were to accept as final the restrictions imposed by S. 951, the result would be to immunize such legislation from judicial review, thus nullifying the role of the judiciary as a check on the legislature.

The retroactive provision of S. 951 infringes further on the judiciary's role. That provision stipulates that the bill's restrictions on available remedies apply to desegregation orders implemented prior or subsequent to its enactment. Such qualifica-

[2] Id. at 29.

tion would result in the relitigation of decided desegregation cases where the court ordered remedies do not fit within the bill's specific requirements.

For over a century it has been clear that Congress may not prescribe a rule of decision in cases before the judiciary. This was the precise holding in the landmark decision of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). In *Klein*, Congress had passed legislation purporting to deprive the Supreme Court of jurisdiction to hear cases initiated under circumstances specific to that petitioner's case and required further the dismissal of such cases. The Supreme Court held that this was an attempt to dictate a rule of decision and, therefore, an impermissible use of Congress' Article III powers.

In addition to the apparent unconstitutionality of S. 951, important policy considerations require it to be evaluated under the strictest scrutiny. First, if S. 951 is enacted, state courts would face intense political pressure not to grant appropriate remedies that are either disfavored by Congress or by their constituents. Such pressure would be acute because the withdrawal of jurisdiction to assign students freezes the Supreme Court's desegregation decisions as permanent law of the land. Because these constitutional decisions are the last word from the Supreme Court, they are binding precedent on state courts. Although state judiciaries are to some extent insulated from political pressure, the enactment of S. 951 would nevertheless place state court judges in an awkward, position; they could not disregard the Supreme Court's constitutional mandate regarding desegregation, yet if student assignment is ordered, they would subject themselves to majoritarian political pressures.

Second, the limitations imposed by S. 951 would result in multiple standards governing constitutional rights in the different states. The First Amendment should offer the same protection and guarantees in New York as in California, and the impact of *Brown* v. *Board of Education* should be felt equally in Mississippi and Illinois. The emergence of varying standards for the protection of constitutional rights would inevitably contribute to disillusionment with the courts. Moreover, the withdrawal of a constitutionally required remedy from federal courts, while permitting such a remedy to be administered in state courts, presents an anomaly. No reason exists as to why those suing in a state court should be afforded more protection than those suing in a federal court in the same state. It has been argued that this potential difference is desirable because the state court's power to order remedies is undiminished. This power, however, is illusory since section 1441, title 28 of the United States Code permits a defendant to remove a case to federal court without cause.

Finally, I fear that the passage of S. 951 could truly open the proverbial floodgates to further legislation that would redefine the judiciary's constitutionally prescribed role. It cannot be asserted that S. 951 is an isolated instance of Congress revealing its displeasure with controversial decisions rendered by the judiciary. In the first session of the 97th Congress, at least 22 bills were introduced to strip the federal courts of jurisdiction to hear cases involving abortion and school prayer. One bill was introduced that would have effectively denied federal courts the power to review any state court decision. I would like to draw to your attention that Congress previously faced the decision of whether to enter the sphere of constitutional decision-making by restricting jurisdiction, yet did not yield to this temptation. Between 1953 and 1968 over 60 bills were introduced to restrict federal jurisdiction primarily in response to controversial Supreme Court holdings. None were passed.

To this point in time, the legislature has consistently exhibited self restraint in this area. Congress has realized that, in the long run, the passage of legislation such as S. 951, would not ensure the prevalence of a particular viewpoint, but rather, would damage the delicate balance among the legislative, executive, and judicial branches.

Thank you Mr. Chairman. I would be happy to answer any questions that the Committee may have.

Mr. KASTENMEIER. We will proceed with the panel in its entirety before questions. I will now recognize Benjamin R. Civiletti.

Mr. CIVILETTI. Mr. Chairman, members of the committee, thank you for the opportunity to appear before you and to comment on the constitutionality, and perhaps the wisdom or ill wisdom of S. 951, known as the Neighborhood School Act. The bill, as we all can readily see, is an extraordinarily sensitive piece of legislation because of its potential impact, not only on its particular subject, but on our entire constitutional system.

We are familiar with the bedrock of the Constitution three equal branches of the Federal Government and the relationship of checks and balances. That relationship, the balance of powers, is both complex and delicate, but it is crucial to the effective functioning of the Constitution. And the balance is safeguarded.

One, the constitutional amendment process is a careful and difficult one that requires great scrutiny and time. But as important as the amendment process is to safeguarding the balance of powers and the constitutional scheme, so is the history of the relationship between the three branches and the way they have exercised their powers over the years to give deference to the appropriate spheres of authority of the other branches and to, by and large, avoid tampering with or upsetting the fragile balance.

There may be forays from time to time into or to the extent or limit of the power of one branch of Government or the other, the executive or the legislative branches. But by and large, there has developed a substantial respect and a buffer zone between those branches and the exercise of whatever their ultimate powers may be. This legislation I see as not a foray, but the first of a series of direct attacks on the independence and separateness and authority of the Federal judicial power.

I know that the proposed legislation reflects deep feelings of many people. Whether a majority, I can't say. But even with deference to those beliefs, I nevertheless think that if the bill is enacted, Congress would step outside its appropriate role in dealing with these concerns, and would endanger the fundamental relationship of our constitutional system designed to protect the rights of all people; particularly the minority, as well as the majority.

Let me speak first to the provisions of the bill which concern the executive branch of the Government. Article II, section 3 of the Constitution directs that the President "shall take care that the Laws be faithfully executed." In addition, the President, like Senators, Congressmen, and Federal judges, takes an oath to uphold the Constitution. The Constitution nowhere grants the legislature the power to direct the executive branch in carrying out its independent and separate constitutional duties.

The proposed bill authorizes the Attorney General on citizen complaints to institute suits to end, in effect, mandatory busing. The provision authorizing the Attorney General to so act will appear in the United States Code immediately following the very provision authorizing him to institute a remedial suit when he receives a complaint that a person is being subjected to unconstitutional segregation. The bill thus presents the possibility of the Attorney General being called on to institute a suit to challenge an order just obtained in another suit he had a duty to file. This irony reflects a fundamental unresolved conflict raised by this legislation between the executive duty delegated to the Attorney General to seek judicial relief from constitutional violations and restrictive legislative direction to challenge appropriate remedies designed to provide precisely that kind of relief.

Additionally, the bill purports to prohibit the Department of Justice from spending any appropriations to bring or maintain any action requiring transportation of a student to a school other than the one which is nearest his home. Under the definitions set out in

the bill, that provision would in many instances frustrate the ability of the Department of Justice to seek any effective relief for children who are victims of a segregated school system.

Title 42 of the United States Code, sections 2000c through 6a, specifically authorizes the Attorney General to maintain suits to remedy school segregation. Having done so, Congress cannot logically mandate that they may not seek effective relief. In this section as well, the bill seems to me to create a blatant inconsistency in the law and to impinge directly on the executive's constitutional function. As such, I think it may very well be unconstitutional.

It certainly is unwise. Inconsistent or illogical laws undermine public respect for the law and for the body which enacts the law. In addition, the law inserts the legislature into the domain of the executive and invites confrontation between the branches in a way which can only upset the balance of the constitutional system.

Perhaps the most important frailty of the bill is with regard to its purported limitations on the power of the Federal courts to issue any order directly or indirectly which would require the transportation of a student to some school other than the one closest to his residence. I am not convinced that the bill entirely accomplishes that purpose, which I think it intends. But to the extent that it does accomplish that purpose, I think it is plainly unconstitutional.

The relationship between Congress and the courts differs from the relationship between Congress and the executive. Under the Constitution, Congress does have wide power over the jurisdiction of the Federal courts. The article III powers, and particularly the exceptions clause, those clauses taken together, it seems to me, give Congress power to designate the jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court—over both State action and decisions and Federal action and decisions. Short of a constitutional question or the ability to order an essential remedy to effect a constitutional right, Congress power over the courts is plenary. Thus, if Congress decided to remove from the Federal courts jurisdiction to hear diversity cases, or insurance claims, or suits involving governmental torts, and many other article III jurisdictional heads, it could do so.

Whether such action would be wise is, of course, a separate question; it would lead to confusion, would deprive citizens of uniform interpretation of some laws, and could be perceived as an interference with justice based on special interests.

But Congress power over the courts is subject to limitations. If Congress gives the courts power over a specific type of cases, it cannot dictate to the courts how those cases must be decided—that would insert the legislature directly into the judiciary's domain. Nor can Congress impinge on the Supreme Court's power to decide constitutional issues or dictate limitations on the Court's power to prevent, cure or remedy constitutional failings. To do so would destroy the Supreme Court and reduce it to rendering advisory opinions.

Any legislation which Congress enacts in this area, as in all others, whether it is under article III or in other regards, must be consistent with all constitutional guarantees including those of the 14th amendment. The proposed bill, as it purports to limit the

courts, suffers from several constitutional infirmities. In essence, it would deprive the courts of the ability to order the only effective remedy in many school desegregation cases.

It is my view, shared by a number of other former attorneys general and solicitors general, and expressed in a letter from all of us to Chairman Thurmond, that Congress is not empowered by the Constitution selectively to restrict the jurisdiction of the Federal courts to prevent them from enforcing *Brown* v. *Board of Education.*

The bill also directs the result which courts must reach in any cases brought pursuant to it and, in fact, could require courts to issue orders returning school districts to the status quo ante. By definition, the law's only practical application would be to void court orders which were issued for the sole purpose of remedying unconstitutional segregation.

The law, therefore, not only directs the courts to reach a specific result, but dictates that they reach an unconstitutional result. Congress clearly has no such power.

Although it may seem, at any given moment, that one branch of the Federal Government is exceeding its appropriate role, over the history of the country, the branches have maintained a sensitive and functional balance. We should, therefore, be wary of hasty overreactions to perceived imbalances. The Constitution establishes a process for its amendment designed to avoid emotional responses to momentary passions and to promote carefully considered changes. To attempt to circumvent that process is to endanger the very fabric of the Constitution. The Congress could not directly by legislation deny our citizens the opportunity for equal education and the Congress cannot indirectly, through manipulation of spending authority or jurisdiction, achieve that unconstitutional end.

Thank you.

Mr. KASTENMEIER. Thank you very much for that fine statement, Mr. Civiletti.

[The statement of Mr. Civiletti follows:]

TESTIMONY OF BENJAMIN R. CIVILETTI

The bill before this committee is an extraordinarily sensitive piece of legislation because of its potential impact on our entire constitutional system. The Constitution establishes three equal branches of the federal government and a relationship of checks and balances, cooperation and autonomy, designed to "secure the Blessings of Liberty" to the people of the United States. That relationship—the balance of powers—is both complex and delicate, but it is crucial for the effective functioning of our constitution.

There are safeguards of that balance. The Constitution provides a method of amendment which mandates that thorough scrutiny be given any proposed change. But just as important has been the care which, for the most part, all three branches have exercised over the years to give difference to the appropriate spheres of authority of the other branches and to avoid tampering with and upsetting the fragile balance.

I know that the proposed legislation reflects deep feelings of many people—whether a majority, I cannot say. With deference to those beliefs, I nevertheless think that if this bill is enacted, Congress would step outside its appropriate role in dealing with these concerns and would endanger those fundamental relationships of our Constitutional system designed to protect the rights of all people—the minority as well as the majority.

Let me speak first to the provisions of the bill which concern the executive branch of the government. Article II, Section 3 of the Constitution directs that the President "shall take care that the Laws be faithfully executed." In addition, the

President, like Senators, Congressmen and Federal Judges, takes an oath to uphold the Constitution. The Constitution nowhere grants the Legislature the power to direct the Executive branch in carrying out its constitutional duties.

The proposed bill authorizes the Attorney General on citizen complaints to institute suits to end in effect mandatory busing. The provision authorizing the Attorney General to so act will appear in the United States Code immediately following the very provision authorizing him to institute a remedial suit when he receives a complaint that a person is being subjected to unconstitutional segregation. The bill thus presents the possibility of the Attorney General being called on to institute a suit to challenge an order just obtained in another suit he had a duty to file. This irony reflects a fundamental unresolved conflict raised by this legislation between the executive duty of the Attorney General to seek judicial relief from constitutional violations and restrictive legislative direction to challenge appropriate remedies designed to provide precisely that kind of relief.

Additionally, the bill purports to prohibit the Department of Justice from spending any appropriations to bring or maintain any action requiring transportation of a student to a school other than the one which is nearest his home. Under the definitions set out in the bill, that provision would in many instances frustrate the ability of the Department of Justice to seek any effective relief for children who are victims of a segregated school system. 42 U.S.C. § 2000c-6(a) specifically authorizes the Attorney General to maintain suits to remedy school segregation. Having done so, Congress cannot logically mandate that he may not seek effective relief. In this section as well, the bill seems to me to create a blatant inconsistency in the law and to impinge directly on the Executive's constitutional function. As such, I think it may very well be unconstitutional.

It certainly is unwise. Inconsistent or illogical laws undermine public respect for the law and for the body which enacts the law. In addition, the law inserts the Legislature into the domain of the Executive and invites confrontation between the branches in a way which can only upset the balance of the constitutional system.

The bill also purports to limit the power of the federal courts to issue any order, directly or indirectly, which would require the transportation of a student to some school other than the one closest to his residence. I am not convinced that the bill accomplishes that purpose, but to the extent it does, I think it is unconstitutional.

The relationship between Congress and the courts differs from the relationship between Congress and the Executive. Under the Constitution, Congress does have wide power over the jurisdiction of the federal courts. Article III of the Constitution provides that:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."

"In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Those clauses taken together, it seems to me, give Congress power to designate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court—over both state action and decisions and federal action and decisions. Short of a constitutional question or the ability to order an essential remedy to effect a constitutional right, Congress' power over the courts is plenary. Thus, if Congress decided to remove from the federal courts jurisdiction to hear diversity cases, or insurance claims, or suits involving governmental torts, it could do so. Whether such action would be wise is, of course a separate question; it would lead to confusion, would deprive citizens of uniform interpretation of some laws, and could be perceived as an interference with justice based on special interests.

But Congress' power over the courts is subject to limitations. If Congress gives the courts power over a specific type of cases, it cannot dictate to the courts how those cases must be decided—that would insert the Legislature directly into the Judiciary's domain. Nor can Congress impinge on the Supreme Court's power to decide constitutional issues or dictate limitations on the Court's power to prevent, cure or remedy constitutional failings. To do so would destroy the Supreme Court and reduce it to rendering advisory opinions.

Any legislation which Congress enacts in this jurisdiction area, as in all others, must be consistent with all constitutional guarantees including those of the 14th Amendment. The proposed bill, as it purports to limit the courts, suffers from several constitutional infirmities. In essence, it would deprive the courts of the ability to order the only effective remedy in many school desegregation cases. It is my view, shared by a number of other former Attorneys General and Solicitors General, and expressed in a letter from all of us to Chairman Thurmond, that Congress is not

empowered by the Constitution selectively to restrict the jurisdiction of the federal courts to prevent them from enforcing *Brown* v. *Board of Education*.

The bill also directs the result which courts must reach in any cases brought pursuant to it and, in fact, could require courts to issue orders returning school districts to the status quo ante. By definition, the law's only practical application would be to void court orders which were issued for the sole purpose of remedying unconstitutional segregation. The law, therefore, not only directs the courts to reach a specific result, but dictates that they reach an unconstitutional result. Congress clearly has no such power.

Although it may seem, at any given moment, that one branch of the federal government is exceeding its appropriate role, over the history of the country, the branches have maintained a functional balance. We should, therefore, be wary of hasty overreactions to perceived imbalances. The Constitution establishes a process for its amendment designed to avoid emotional responses to momentary passions and to promote carefully considered changes. To attempt to circumvent that process is to endanger the very fabric of the Constitution. The Congress could not directly by legislation deny our citizens the opportunity for equal education and the Congress cannot indirectly, through manipulation of spending authority or jurisdiction, achieve that unconstitutional end.

Mr. KASTENMEIER. Now, we would like to hear from Mr. Katzenbach.

Mr. KATZENBACH. Mr. Chairman, members of the subcommittee, it is for me also a great pleasure to be here today. I appreciate the opportunity to say a few words on the subject, about which I feel quite strongly.

I agree with what my colleagues here have said. I think this bill is unconstitutional, as I think are numerous other attempts in proposed legislation to accomplish different results in a similar manner, referring to other subjects. What I want to focus very briefly the attention of the committee on is the larger issue with which it seems to me it is faced here initially, and will be faced in other matters.

I think that our political system has worked very well. I think when the Supreme Court assumed that it is for the courts to give the final determination as to the constitutionality of a law, or to interpret the rights and provisions of the Constitution in an ultimate sense, that was a wise assertion of power that has served our constitutional system very well.

When I say that, I think we all have to recognize that decisions of courts are not always popular. I don't think decisions of courts are always right, in the sense that I don't always agree with them. The Supreme Court has not always agreed with itself, in the sense that it has from time to time overruled prior interpretations of constitutional rights and provisions. But I think the system has served us well.

This legislation, this proposal, tampers with that system. I think it is an effort, by legislative gimmicks, to overrule what courts have done. It does so more subtly than some of the other proposals in this House or the other body. But I think that it is an effort to do that. Schoolbusing is unpopular with a large segment of the community. I think this is an effort to get rid of schoolbusing whether or not schoolbusing is essential to the realization of a constitutional right.

Yet, I find very few people who would wish to say that whenever we disagree strongly with a constitutional interpretation of the judicial system, that the Congress should have the power to overrule that, or to tailor that to its own predisposition. And yet this is an

effort to do that by indirection. I wanted to focus attention on that, because I have too much respect for this Congress, this committee, to believe that you would wish to do by indirection what you constitutionally cannot do directly. I have too much respect to believe that there would be a desire to really change such a fundamental constitutional principle as that which we have had since 1801, that the Supreme Court is the ultimate determiner of rights.

So, I think that it is clear, as Mr. Civiletti has said, that there is wide power, yes, under article III. But that power has to be exercised consistently with other provisions of the Constitution. I think the wide power under article III is a desirable power, desirable in order to effectuate the rights of people in the most efficient judicial system that you can find.

I don't think jurisdictional matters and jurisdictions of courts should be used to tamper directly or indirectly with substantive rights, nor do I think that that can be accomplished under the Constitution.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Katzenbach. You have provided us with wise counsel. I have just a couple of questions, then I would like to yield to my colleagues.

Mr. Richardson, can you conceive of any situation wherein Congress would have power to set down by statute some limitation on the courts with respect to its exercise of power of a remedy in any constitutional matter? The Congress could set forth a limit beyond which any remedy would be unreasonable or outweighed by other factors. Can you conceive of any case in which the Congress might have authority to write such a statutory limitation?

Mr. RICHARDSON. I can conceive of the possibility that the Congress might, in effect, exercise a legislative judgment as to what in its view would be reasonable, subject to this being taken into account by the courts as a relevant datum, indicative of the views of a body whose judgments are entitled to significant weight.

Mr. KASTENMEIER. Notwithstanding, whether it is wise or unwise to do so, are you saying that Congress could pass a joint resolution either admonishing the courts or finding that the imposition of busing as a remedy has been, in some cases, excessive? The resolution, of course, would have no controlling effect on the courts. Is that what you are saying? We could do that but nothing really more?

Mr. RICHARDSON. Yes; I think this is in substance all that the War Powers Act does. It can't by its own force restrict whatever may be the constitutional power of the President as Commander in Chief. But it can, through the device of requiring reports and information to be submitted, exercise a kind of restraining influence.

It seems to me—but to go back to your original question, I think the answer is no. I think that if the right in question is a constitutional right, we would have to overturn the whole history since 1801, as former Attorney General Katzenbach has just said, to deny, then, to the courts the power to assure that such rights are given effect.

Mr. KASTENMEIER. You were correct, in stating and observing that the bill applies not only to lower Federal courts, but also to the Supreme Court as well. If the chief sponsor had provided other-

wise—that it did not apply to the Supreme Court of the United States, but applied to other Federal courts—would that have made any difference from a constitutional perspective?

Mr. RICHARDSON. No; not to the result, Mr. Chairman.

Mr. KASTENMEIER. In that respect you would differ with the opinion of the present Attorney General William French Smith?

Mr. RICHARDSON. Yes; as I said, to me the decisive consideration is that the Congress, while conceding a judicial function and a measure of judicial discretion is beyond that point substituting its own. And insofar as the legislation is invalid on that ground, of course it would be invalid as applied to the lower Federal courts as well as the Supreme Court.

Mr. KASTENMEIER. Thank you. I have one last question.

Mr. Civiletti, obviously this arises out of a general frustration at large in the land. And on this issue, because many people who are affected by it feel it very deeply in their personal lives, what counsel would you give adversely affected parents: those whose children are being bused a great distance. And if busing were upheld as a proper remedy, even though we know it exceeds their own guidelines, but let's assume that it is upheld, what recourse do they have? Is it a constitutional amendment only? Is a constitutional amendment the only recourse for parents who feel that they are adversely affected with respect to the implementation of such remedies?

Mr. CIVILETTI. Time, of course, is the factor. In order to make substantial changes under the Constitution or within the community, it takes time.

So, if you are asking the question on a theoretical basis rather than a practical basis, I think there are other avenues that the community can take to alleviate the idiotic circumstance of small children being bused 10 miles and 15 miles daily, twice a day, which is just crazy. By enormously increased activity within the school community or within the political community, participation in the board of education, the tax basis, efforts with regard to additional new housing, making sure of open developments and equal opportunitites for employment, may alleviate at least the circumstances—which are the underpinning for long distance busing. And that is enclaves of black citizens or Hispanic citizens in one part of the community, and satellite white communities in other parts of the community.

But even with that, there are a whole variety of auxiliary or preliminary efforts to design a system short of long distance mandatory busing which the Department of Justice and the courts must use.

Busing in my view is and should be a last resort. And the longer you, or the greater distance you have to bus people, then the more burdensome and difficult it is. But short of a constitutional amendment, it seems to me that the people in the community, particularly the younger people with the school-age children, where they see a segregated school circumstance develop, and they see the likelihood, or one that exits, it seems to me it behooves them to take a very positive, very active role in the local political process of that community to alleviate through political means and financial and

economic means some of the very causes for the terrible consequences of long-distance busing.

Mr. KASTENMEIER. In other words, if we are to advise the advocates of this approach, we can only say with respect to extracommunity legal strategy that their only recourse is to a constitutional amendment, but at the same time that there are many in-community solutions that could be carried out and aided by both the Federal Government, the executive branch, the Federal Government as well as the State and the community?

Mr. CIVILETTI. Including in short-term participation in the very processes through a representative committee or through a friend of the court position, efforts to have a role in, at least recommendations and a role in the scheme or plans which the particular court is considering to alleviate the segregated problem.

Mr. KASTENMEIER. Thank you.

The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

And I want to thank all of the witnesses. I would like to ask if it is—I take it we all agree we are not denying the courts jurisdiction to even determine, say, constitutional depreciation. What we are doing is limiting the remedy that the Federal courts have available. Do we all agree on that? Then I wonder——

Mr. KATZENBACH. I wonder, though, Congressman, if in these circumstances you can make a distinction between the right and the remedy, and say you have a right to this, but we are going to take away the only remedy. I think that is taking away the right.

Mr. RAILSBACK. Yes; trying to pursue it in my own mind, say a suit is filed in the Federal courts, and there is a finding of discrimination. What other options does the court have, would the court have other injunctive relief? I am trying to think, I take it they could not out gerrymander school district boundary lines, could they not? They still could, even if this bill is enacted into law. But the bill does not distinguish between cases of de facto discrimination and de jure discrimination, is that your feeling about that?

Then I am wondering, too, what do the rules of stare decisis play. I think one of you in your statements mentioned this. Say someone seeks to bring an action in a State court. Would not that State court be bound under the rules of stare decisis by Supreme Court decisions?

Mr. RICHARDSON. I made that point, Congressman Railsback, and I think what you say is true. The supreme court of the State would certainly be placed in an anomalous position. But insofar as it obeyed the normally accepted precept that it is bound by the authority and determinations of the Supreme Court of the United States as to what the Constitution requires, then you would have a situation in which the State courts were constantly evolving a line of decisions obeying the Supreme Court of the United States while the Federal courts, including the Supreme Court itself, were inhibited from doing so.

Mr. RAILSBACK. Mr. Civiletti.

Mr. CIVILETTI. Certainly, the State courts would have to follow the Supreme Court precedents in this area. A much harder case, a difficult case, is the proper position where the Supreme Court's jurisdiction in this area is retained by a bill. But the lower courts'

jurisdiction is removed entirely. So they have no jurisdiction. And instead the Congress judgment is that State courts shall be the tribunals to determine these cases. I think that is still constitutionally frail.

But it is a different set of arguments than the bill before us. Some of the same arguments, but some different, because you have Congress then acting strongly within and reaching the limits of its powers under article III, by providing for the supervisory power, continuing supervisory power and constitutional power of the Supreme Court, and providing for a due process remedy in the State court.

The question that you would ask is why? Why would that legislation be passed if the State courts are going to be following the Supreme Court precedent, if the State courts are more subject to pressure, because they are not appointed for life and independent in their salaries perhaps. Why would the Congress determine to shift exclusively jurisdiction from the Federal lower court to the State court unless it was to send a message or a signal that somehow the State courts were going to be deciding matters more in tune with what the Congress perceived to be the majority view and be more reluctant to order busing than what they perceive the Federal courts to be. And that is a troublesome proposition.

Mr. RAILSBACK. Let me ask all three of you if during your experiences, were there instances where you say busing was used as a tool that you thought were essential to be used? In other words, where busing was an important remedy, and did work. In other words, I think we are being asked to belive that busing has been inappropriate in about every case. I am just wondering if, in your views, busing had been an appropriate remedy and has worked for the betterment of the schoolchildren?

Mr. RICHARDSON. May I respond to that, Mr. Railsback, from the background of my difficult role as Secretary of Health, Education, and Welfare in dealing with these problems in the stage of final desegregation of the previously mandated segregation of southern schools.

This was in the period of 1970-73. There was indeed a time then, Mr. Chairman, members of the subcommittee, when I spent days on the Hill testifying on nothing but busing. And I could never get the press to listen to anything I said in any press conference or otherwise unless it involved busing. I put out important statements on social security and health insurance and other aspects of education but the press wasn't interested.

At any rate, this helps me to expand a little on what I was saying about discrimination earlier. The Supreme Court in *Brown* v. *The Board of Education* said that segregated education is inherently bad and unconstitutional.

The easy case, of course, is the one in which you have a small rural community with two schools, in each case reached by children getting there on foot. One school is all black, the other is all white. And the remedy in that case is simply to order that half the children go to one school and half to the other. You may need to go beyond that to make sure that the school system hasn't put all the black children in one classroom and all the white children in another. And you may get into further problems as to whether or not

they have kept segregated washrooms or bands or cheerleaders. And, of course, a lot of the problems of implementation of segregation involve the question of where you drew that line.

You can also deal fairly easily with the problems of desegregation if you are not required to transport children by bus a significantly greater distance than they were already going by bus to a previously all white school. So, you then reach cases where you cannot achieve any rational balance within the school system except by transporting children greater distances. This problem really first arose outside the South, or in a few of the larger cities, Texas, Nashville, Memphis, after the smaller systems had already been desegregated. But it becomes more acute the larger the city and the more concentrated the inner city ghetto.

So, you come to the question eventually whether there is any interest from the standpoint of the well-being and education of the child that justifies transportation beyond a given distance or time. You are balancing the presumed values intrinsic to the opportunity for a desegregated education against the detriments intrinsic to prolonged busing, educational detriments that affect the ability of the child to benefit from the classroom and to do homework and so on.

Chief Justice Burger in Charlotte, Mecklenberg, and everybody who has dealt with the problem ever since, has recognized that you were dealing with this kind of balance, and that there were limits. The question is who prescribes the limits. And that is to say, who determines which set of considerations should prevail, the considerations deemed to underlie, to justify the constitutional mandate to desegregate, or the considerations affecting the education that the child gets at the end of the bus trip?

The problem, of course, here is not that congressional judgments as to what the limits should be is necessarily wrong. The problem is that the courts are necessarily, under our system, vested with the requirement of making a determination in cases like this.

And, therefore, then to say, notwithstanding your constitutional function and responsibility, we are not going to let you decide how to strike this balance; that is not your job, that is the Congress job, and you are bound by it—it is there that the difficulty arises. And so in time, going back to what Mr. Civiletti said, this is the kind of problem that can only be dealt with to the extent that society works its way toward judgments about what are the relative values of the competing interests at stake.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from Massachussets, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

I would like to state, Mr. Richardson, with your reference to the *Klein* case, because I think we have had invoked the *McArdle* case, obviously, very frequently by people who would be for this and other bills taking away the whole area of jurisdictions and I share your objections to that.

I know on page 11 you refer to the *Klein* case. Is it correct then that in this instance the proponents of this particular way of going about it don't even have the advantage of *McArdle*, that is, they would appear to be specifically contravening the decision in kind

that, once the matter is before the courts, it is particularly obnoxious for the legislative branch to say you may decide it in this manner, but not that manner?

Mr. RICHARDSON. I think that is right. This is essentially what I have been trying to say. You can call it as *Klein* does, the substitution of a rule of decision, or call it the amputation of the freedom or discretion, or otherwise. There are various ways of characterizing what has been done. But in any case, it is a curtailment of an otherwise conceded power.

Mr. FRANK. Mr. Civiletti.

Mr. CIVILETTI. I agree. In this particular instance, I think *Klein* is controlling.

Mr. FRANK. We have the implication on the *McArdle* case. I think it is important to say that here even the precedent goes directly against the bill.

The chairman referred to an important question, the interpretation the current Attorney General put on this bill. He ruled, he advised he thought it was constitutional, because, I know you weren't here for the statutory interpretation, but on page 2 of the bill, lines 23 and 24, it says no court of the United States may order or issue any writ, et cetera. Does the bill seem to support the interpretation that it does not apply to the Supreme Court?

Mr. CIVILETTI. No.

Mr. RICHARDSON. No.

Mr. KATZENBACH. Yes; I think it does.

Mr. FRANK. It does apply to the Supreme Court.

Mr. KATZENBACH. Obviously that is a point that could be clarified by people here.

Mr. FRANK. I suggest if the Attorney General wanted very much——

Mr. CIVILETTI. It makes the arguments much better.

Mr. KATZENBACH. He depended on that.

Mr. FRANK. Right. He wanted to find a bill constitutional. Since he couldn't find Johnson's bill constitutional, he found his own bill, his own version of the bill constitutional.

Mr. CIVILETTI. Also, the Department of Justice has a duty in any act of Congress to look to find, as the Court does, to find it constitutional.

Mr. FRANK. Is that after the fact or before the fact?

Mr. CIVILETTI. Certainly after the fact.

Mr. FRANK. Before the fact in its advisory capacity, it wouldn't seem that would necessarily apply.

Mr. CIVILETTI. I think you try to give your good faith opinion, but you follow the principles in which the Supreme Court would follow in looking at this legislation if it was passed.

Now, if you are asked as a wisdom matter, that is something different. But you can't, I don't think you can absolutely fault the present Attorney General for taking a construction of the bill which in his view would deem it to be constitutional.

Mr. FRANK. I think it is fair to say anyone who was not presently the Attorney General would be unlikely to make such a construction.

Mr. Richardson, you referred to your generic objections, I share, I think they are often overdone. But we have both a horizontal and

vertical component to the slippery slope. I think what we have to be concerned here is the horizontal effect, that is, if Congress allows in this case for this exception, how many other subject matters will be subject to a similar degree. Even if they were to only go this far and no further. I think that may be why, that is certainly where I find the slippery slope argument more compelling in this case than you do.

Mr. RICHARDSON. I am indebted to you for that distinction.

Mr. FRANK. Constituent service.

Mr. RICHARDSON. I think that is a very useful point. That is certainly the worry. If it is a device—this is really a gimmick, as Mr. Katzenbach said. If the gimmick is good for this, it is good for a lot of other things, or bad for a lot of other things, as well. And in that sense, your use of the word horizontal, I think, is quite appropriate.

Mr. FRANK. I will yield back, Mr. Chairman.

Mr. KASTENMEIER. Does the gentleman from Michigan have any questions he wants to ask?

Mr. SAWYER. Well, recognizing we have a vote coming up, just one. I am not aware of any case where busing has cured anything. Is there any case where anyone has now decided we have been doing this for 8 years. Now, it is all fixed and we can stop it?

Mr. CIVILETTI. I don't know, Congressman Sawyer, specifically. But it is a little bit like Congressman Railsback's question about whether, which Mr. Richardson addressed, whether or not busing has worked. Has it worked anywhere? And I am of the firm belief that it has worked, and it has worked reasonably well without fanfare where there had been an enormous community participation and effort, and where there was not a ready acceptance, but a working within the social problems and other problems that busing can create by the community.

Mr. SAWYER. More to the point, where they can stop it. That is what I am curious about.

Mr. CIVILETTI. I think the Department of Justice can provide you with indentity of innumerable cities, particularly in the Middle Eastern part of the country where busing has been extraordinarily effective in desegration and there may be cases, I am not aware of any specific one, where, after a period of time and because of changes in the community development and demographics, busing was stopped or certainly there are cases where it was more limited than the orginal plan. And, of course, there are many, many circumstances where there has been satisfactory desegration without any busing at all. And that is much to be desired. And, of course, there are the hotter spots of Boston, Detroit, Cleveland.

Mr. RICHARDSON. Could I add a word, Mr. Chairman, in response to Mr. Sawyer, because I really didn't get to the essence of Mr. Railsback's question. And I can't very well. I can't cite an example of a school system where you can say that one can be fully confident that, on balance, the interest of the children in the process of education and in the course of their future lives had been benfited.

I recall from earlier periods attempts to reach such judgments. But they are intrinsically difficult to make for the very reason that the values at stake are intrinsically so difficult to measure.

Whether you think it works, quote unquote, depends by definition on the value to a child of having the experience of being educated in a racially balanced school.

As to the question of when after 8 years, Mr. Sawyer, you could end it, you could only end it if during the 8 years or the 16 years or whatever the interval was there was occurring a process of the kind that Mr. Civiletti referred to of the movement of people, people's residential patterns within the community, so that you had racially mixed communities, and thus could have desegregated schools without transportation. But only if that kind of process were going on would you be able to abandon busing so long as you asserted the social value or constitutional requirement, as the case may be, of desegregated education.

Mr. RAILSBACK. Mr. Chairman, may I ask kind of a followup? I guess we are going to have to run. I guess I would be interested if there is any empirical evidence relating, say, to test scores in areas before and after the busing. And I don't know if you would have access to any of that information. I would think there should be ways to really test the effects of busing. I am sure there have been some studies.

Mr. KASTENMEIER. There has been evidence, testimony to that effect, before other subcommittees on this question. We can avail ourselves without, I think, imposing on these witnesses.

We have a vote on and must leave. This subcommittee is very, very indebted to our three witnesses, Mr. Civiletti, Mr. Richardson, Mr. Katzenbach, for their counsel and for their testimony this morning.

I would only say in conclusion we will not burden you with it, but another aspect of this bill concerns me. And that is the section which tells the Attorney General when he receives a complaint from an individual or parent to the effect that he is required to directly or indirectly transport to a public school in violation of this so-called Neighborhood School Act, the Attorney General is authorized to institute a civil action. It makes the Attorney General almost at war with himself in terms of both pursuing the ends of school desegregation, at the same time undoing sometimes painfully achieved results by having to institute these civil suits. The net result seems to me to be mischievous at best, and certainly questionable insofar as its wisdom is concerned.

Mr. RICHARDSON. I thought Mr. Civiletti made that point very well, Mr. Chairman. I agree with you.

Mr. KASTENMEIER. In any event, our subcommittee is indebted to the three of you, and always respectful of your service and the contributions you have made to the country.

The committee will stand in recess for 10 minutes at which time we will hear from Mr. Brink.

[Recess.]

Mr. KASTENMEIER. The meeting will come to order. It is a pleasure for the Chair to greet David R. Brink, president of the American Bar Association, who is quoted often and has testified widely on subjects of great interest, not only to the legal community of the country but to citizens at large.

So, I am very pleased to have you come forward, Mr. Brink, whether Mr. Frank is still here or not. In any event, we will have others. You may proceed as you wish.

STATEMENT OF DAVID R. BRINK, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. BRINK. Mr. Chairman, my name is David R. Brink, as you have said. I am president of the American Bar Association, which is as you know a voluntary organization of lawyers representing more than half of the practicing lawyers of America. As you know, the ABA, through its house of delegates, its policymaking body, has taken a very strong stand in opposition to S. 951 and all other bills that would curtail the jurisdiction of the Federal courts for the purpose of changing constitutional law.

We thank you today for permitting us to testify following such a distinguished and scholarly panel as you heard from earlier. We also thank you for your careful and deliberate study of this serious question, apart from other measures.

I have filed a written statement in which I have gone to a great deal of depth as to some of the legal questions involved in our positions against these bills. You will be relieved to learn, I am sure, that I will not cover that in as much detail in my comments this morning.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be received as part of the record.

Mr. BRINK. Thank you very much, Mr. Chairman.

Of course, I will be happy to try to respond to any questions.

The ABA's stand and my statements are referred to it, what we call court stripping bills, have gotten considerable attention, mainly favorable in the media. We have also found some new found notoriety recently somewhat to our surprise by being listed among left-leaning organizations by the Conservative Digest. Interestingly enough, though, we were classifed some 45 years ago as reactionary when we opposed the Supreme Court packing plan.

We took both of those stands for exactly the same reason, the preservation of our Constitution and our tripartite system of government. Now I ask the committee who has changed, the ABA or its critics?

Let me emphasize another point. We do not oppose these bills because of their subject matter of prayer in schools or desegregation remedies. Our diverse members and all Americans are entitled to their own views on these controversial social issues, just as in 1937 they were entitled to be for or against the social measurements of the new deal.

But now as then, our position is solely against the process used. We cannot approve a process that will make a mockery of the justice system established by the Framers to interpret and enforce an inspired document that is the source of our American rights and freedoms, the Constitution.

I have been quoted by the media as saying that S. 951 and the 30 other court stripping bills "threaten the greatest constitutional crisis since the Civil War." That is an accurate quote, and I believe it even more strongly today than when I first said it.

Let me try to tell you briefly why. We often hear it said today that the Federal courts are overstepping their constitutional role. That proposition as a lawyer I find at best debatable. But the intrusion by the Congress on the judicial role that would be made by S. 951 and the other court stripping bills is, I think, purely beyond debate.

Some of the bills have been dubbed jurisdiction bills, and some remedies bills. But when the verbiage is stripped away, legally they all depend in the final analysis on the broad but defined article III, powers of Congress to withdraw jurisdiction from the Federal courts.

Proponents of S. 951 and the other bills read article III as though it were the sole provision of the Constitution. But in fact, withdrawal powers of article III clearly are subject to the plan of government created by the original Constitution as a whole, and particularly to the external limitations imposed on the powers of Congress by the Bill of Rights and the other amendments to the Constitution.

And whenever constitutional rights or essential constitutional remedies are limited by Congress selectively without consulting the States that adopted the Constitution and its amendments, citizens are deprived of their rights to life, liberty, and property without due process of law, or are denied the equal protection of the laws.

A secondary basis asserted for busing bills like S. 951 is that it is an exercise of the enforcement power of Congress under section 5 of the 14th amendment.

Senator Johnston, I believe, testified on that score before this subcommittee. But we disagree, as did the current Attorney General in his letter of May 6 to the committee. The Attorney General concluded in that letter that case law rather firmly establishes that, and I quote:

> Congress is without power under section 5 to revise the courts constitutionl judgments in the effect of such revision is to restrict, abrogate or dilute 14th amendment guarantees and recognized by the Supreme Court.

In his testimony before this subcommittee, Senator Johnston dismissed the Attorney General's reliance on the *Katzenbach* case, saying it was dictum within dictum. However, on July 1, Justice O'Connor, writing for the Supreme Court in *Mississippi University for Women* v. *Hogan,* left no doubt as to the limits of Congress power under section 5 when she said, again I quote:

> Congressional power under section 5 is limited to adopting measures to enforce the guarantees of the amendment. Section 5 grants Congress no power to restrict, abrogate or dilute these guarantees. Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denied the rights guaranteed by the 14th Amendment.

We conclude that section 5 simply is not a viable basis for S. 951. Some say that these constitutional defects, violation of due process and equal protection, are remedied because the State courts are a possible forum for hearing cases or granting remedies that are denied Federal courts under these bills. Rights to a hearing or remedies in State courts are not the equivalent of those in the Federal courts, and particularly so if the clear intent of the bills, as this bill finds in its findings, is to invite State courts to reach different results to change the outcome of actual cases.

I have stated some points of agreement with the Attorney General's letter to the committee on S. 951, and I should add that we do not agree with its general conclusions, nor with several of its premises.

Specifically, we do not agree with his assumption that the bill applies only to the lower Federal courts, in light of two things. First, the plain opening words of the bill, and particularly Senator Johnston's testimony before this subcommittee that it does apply to the U.S. Supreme Court.

We also disagree with the Attorney General in that we do not find *Lauf* v. *Shinner,* which was the case sustaining the Norris-LaGuardia Act to be binding and valid precedent, but instead we find the applicable precedent in *U.S.* v. *Klein,* that case disposes of S. 951 no matter which courts the bill covers.

That case you will recall held that the Congress could not tell a lower Federal court, in that case, the court of claims, or the Supreme Court, what evidence should be considered, what remedies could be granted and what the outcome of the case should be.

That seems to be precisely what S. 951 and the other court stripping bills attempt to do. If the process attempted in S. 951 and the other bills were valid as Representative Frank pointed out, there would be no way of stopping it. It could be used by a different Congress, we don't now know, to deny our citizens freedom of speech, press, assembly, exercise of religion, or any or in fact all of the many other rights protected by the Federal courts under the Constitution; rights that we all exercise daily and perhaps too often take for granted.

Both the amendment process and the role of the Federal courts in constitutional cases could become a nullity, leaving us at best with 50 different Federal constitutions, one for each State. If State legislatures, there is some movement in the States, taking their cue from Congress, should also limit the jurisdiction of State courts, we would have no enforceable constitution, and no enforceable rights at all. Or if Congress, exercising its Federal supremacy under, say, the commerce clause, then attempted to legislate for the States, we would lose State law and State's rights.

What we would have would be a purely central parliamentary form of government instead of the tripartite Federal constitutional government our forefathers forged out of their experience, wisdom, and deep labors. Our forefathers I think would not have created three branches of government, a doctrine of Federal judicial supremacy, or provide an intentionally complicated means of constitutional amendment had they at the same time intended to nullify those provisions by authorizing an unrestricted power, withdrawal of jurisdiction, under article III.

They and their descendants would not have amended the Constitution by the Bill of Rights or the post-Civil War amendments had they intended to make those great guarantees revocable by simple acts of Congress without consulting the States that adopted those amendments in the first place.

But the forefathers did provide an amendment process, and that is the principal process by which the Congress or the States, in fact the only way in which instantly we can change the Constitution in

a way that will preserve our form of government, our Constitution and our freedoms.

That was recognized at the beginning of our Republic by George Washington, who warned us in his moving farewell address to the Nation. And I would like to read that again because it does sound as though he were sitting here testifying on S. 951.

He said,

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good—

As parenthetically I would add, proponents of these measures would tell us, George Washington adds,

> It is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.

Take that as good advice. In the past, Mr. Chairman, Congress itself has repeatedly resisted calls from either the right or the left to usurp the power of the judicial branch by attempting to change the Constitution by simple majority vote. ABA urges that, once again, Congress as a matter of both law and policy, should consider thoughtfully the process being started by these bills.

We urge the Congress to heed George Washington and refuse to risk our most fundamental values in exchange for what some believe to be popular and expedient assurances to current and transient problems when the method of solution, changing the Constitution without consulting the States or the people, threatens the rights of all of us does literally in my judgment threaten the greatest constitutional crisis since the Civil War, and we of the American Bar Association respectfully but strongly urge this committee and the Congress to defeat S. 951 and all other measures that would strip the Federal courts of their customary role in our Nation's system of government.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Brink, for a most thoughtful, comprehensive discussion of the issues involved not only in the legislation before us, but parenthetically, all other legislation to limit the jurisdiction of the Federal courts.

Mr. BRINK. Mr. Chairman, with your permission I would like in addition to my written statement, to put four other items into the record of this committee. I will identify what they are.

One is a message to Congress covering essentially the message delivered today by the former Attorney General, and it happens that they are signatories to this. The sense of it I think is very clear, very plain, and very applicable. It is signed by former attorneys general, former solicitors general, former jurists, by myself representing the American Bar Association, by Arnette Hubbard, representing the National Bar Association, by various other presidents of organizations, including the American College of Trial Lawyers. I would like to submit that brief letter with those names and signatures for the record, if I may.

I would also like, and I know the committee and others have seen it, to submit a report issued to the house of delegates of our association, report and the recommendation that were acted upon

almost unanimously in our adopting this position, that is a paper that says 103 up in the corner, that being the number in our recommendations agenda book.

I would also like to submit another item that I have furnished to Members of Congress, which is a condensation done by Lawrence Sager, professor of law, New York University, and in his lengthy study in the Harvard Law Review, this is a condensation that he himself has prepared, making it much more readable and getting it down to 11 pages. It has been supplied directly to Members of Congress but I would like to have it be also in the record of this committee, if I may.

And the final paper is a resolution and report adopted by the Conference of Chief Justices being the chief justices of all of our States on January 30, 1982, in which, contrary perhaps to one expectation, that the chief justices of the States might welcome the opportunity to receive cases that otherwise would have gone to Federal court, in fact; it takes exactly the opposition and insists for a number of strongly stated reasons that the jurisdiction over these constitutional matters should have been left in the Federal courts. I would like also to have that in the record, if I may.

Mr. KASTENMEIER. Without objection, the four papers to which you refer—the message to the Congress, report issued to the house of delegates, condensation of the professor's commentary and statement from the chief justices of the State courts—will be received and made part of the record.

Mr. BRINK. Thank you very much.

[The statement of Mr. Brink follows:]

STATEMENT OF DAVID R. BRINK, PRESIDENT, AMERICAN BAR ASSOCIATION

My name is David R. Brink. I am President of the American Bar Association, a voluntary organization of approximately 290,000 lawyers—or more than half the legal profession of this country.

I am grateful for this opportunity to share with you the position of the American Bar Association ("ABA") on the grave constitutional and policy questions involved in S. 951 and other so-called "court-stripping" bills. We commend your committee for giving the serious questions involved individual and extended separate consideration, rather than permitting them to be considered on the spur of the moment as floor amendments or in the context of bills to which they are non-germane appurtenances.

I. THE ABA'S POSITION ON S. 951 AND OTHER "COURT-STRIPPING" BILLS

A. History

The ABA has taken a consistent position opposing ordinary legislation like the amendments to S. 951, that would attempt to change constitutional law without a constitutional amendment. On August 11, 1981, the ABA's policy-making body, the House of Delegates, by an overwhelming majority adopted the following resolution:

"Be It Resolved, That the American Bar Association opposes the legislative curtailment of the jurisdiction of the Supreme Court of the United States or the inferior federal courts for the purpose of effecting changes in constitutional law." This resolution only made more clear and definite earlier policies adopted by the ABA in 1950 and 1958. Prior to 1950, the ABA's position had been expressed in opposition to specific proposals, including its opposition to the Supreme Court-packing plan in 1936.

B. Nature of our position

The ABA of late has been characterized by some as "liberal" because of its stance on the more than 30 court-stripping bills now in Congress. In 1936 and at later times, it was characterized as "conservative" for opposing the court-packing plan

and other like proposals. But truth, like beauty, lies "in the eye of the beholder"; it is the proposals and the proponents that, more than the ABA, have changed.

For the truth is that the ABA is apolitical; its members represent all geographical areas, all political points of view and all types and sides of normal legal controversy. What the ABA has done consistently is to pursue goals stated in the ABA Constitution: "to uphold and defend the Constitution of the United States . . . [and] to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions . . ."

Our strong opposition to S. 951 and the other measures that would strip the federal courts of either jurisdiction to hear selected types of constitutional cases or jurisdiction to grant remedies that are often the only remedies that will vindicate constitutional rights is our consistent response to those goals.

S. 951 and the remaining court-stripping bills happen to deal with controversial social issues of our time—abortion, prayer in public schools or means of achieving school desegregation—primarily busing. The ABA believes that our members and all Americans are entitled to their own views on these social issues and even on the court decisions that declare them. The ABA therefore takes no position on the underlying subject matters of the bills. But we object strongly to the process they utilize. For they propose to change the constitutional law by simple legislation, instead of by the means provided in the Constitution—the amendment of the Constitution—in which the states and the people may play a part. Our objections are rooted in considerations both of the constitutional law and of policy best suited to preserving the interest of the American public.

C. Summary of legal and policy position

The proposition, widely asserted by some today, that the federal courts are overstepping their constitutional role is, at best, debatable, but the intrusion by the Congress on the judicial role that would be made by S. 951 and the other bills is beyond debate. Whether the bills are labelled "jurisdiction" bills or "remedies" bills, legally they must depend, in the final analysis, on undefined powers of the Congress to withdraw jurisdiction from the federal courts contained in Article III of the Constitution. But those powers do not stand alone; they are subject to the plan of government created by the Constitution as a whole and to the external limitations imposed on the Congress by the Bill of Rights and other Amendments. In our view, whenever constitutional rights or essential constitutional remedies are limited by Congress selectively, without consulting the states that adopted those Amendments, citizens are deprived of their rights to life, liberty or property without due process of law or denied the equal protection of the laws. The possible availability of state courts as a forum for hearing cases or granting remedies, as provided under some of the bills, does not grant citizens the same protection, particularly when an intent to change the outcome of actual cases is inherent in the purposes of the bills.

If the process attempted in S. 951 and the other bills were valid, it could be used by this or a future, differently minded Congress, to deny our citizens freedom of speech, press, assembly, exercise of religion or any, or all, of the many other rights protected by the federal courts under the Constitution. Both the amendment process and the role of the federal courts in constitutional cases could become a nullity, leaving us with either 50 different federal constitutions—one for each state—or a purely parliamentary form of government, instead of the tripartite national constitutional government our forefathers forged from their experience, wisdom and untiring labors. Our forefathers would not have created three branches of government or provided an intentionally complex means of constitutional amendment had they at the same time intended to cancel those clauses by authorizing an unrestricted reading and use of Article III. Their descendants would not have amended the Constitution by the Bill of Rights or the post-Civil War amendments, had they intended to make those great guarantees revocable by simple act of Congress, without consulting the states that adopted those Amendments.

The ABA, most of our state bar associations, the Conference of Chief Justices of all our states, a number of our past Attorneys General and Solicitors General, and many of the leading constitutional scholars agree that these bills are unconstitutional or create policy that sets a disastrous precedent, or both. In the past, the Congress itself has repeatedly resisted calls from either the right or the left to attempt to change the Constitution by simple majority vote. The ABA urges that, once again, Congress, as a matter of law and policy, should forego the temptation to exchange our fundamental constitutional heritage for dubious legislative solutions to the social problems of today.

II. LEGAL ANALYSIS OF COURT-STRIPPING BILLS

Proponents of the numerous varieties of court-stripping bills, depending on their individual readings of the Constitution, have attempted to shore up the constitutionality of their proposals by classifying the proposals as either "jurisdiction" bills or "remedies" bills. The bill under primary consideration at this hearing, S. 951, straddles this classification by purporting, first, to limit drastically the busing remedies a federal court can grant and, second, to remove the jurisdiction of any federal court to hear facts or legal arguments now available under the Constitution.

Another attempt in these bills is to differentiate them based on whether they apply to all courts, all federal courts, the lower federal courts or the Supreme Court only. In the case of S. 951, the chief sponsor has declared that it applies, as it states, to "any court of the United States" including, specifically, the Supreme Court, although others have found evidence to support a belief that it applies only to the lower federal courts.

These distinctions, though claimed by some to save the constitutionality of a particular measure, in our view, are distinctions almost without a difference. Common principles apply to render all the bills constitutionally objectionable. Since it relies on constitutional sources making it both a "jurisdiction" bill and a "remedies" bill, S. 951 is an apt subject for analysis of these commond principles.

The "jurisdiction" bills rely on the "Exceptions" Clause of Article III, Section 2, for the proposition that appellate jurisdiction of any kind can be withdrawn from the Supreme Court in any degree or in any selected class of cases. In the case of the lower federal courts, they depend on the power of withdrawal inherent in the "Ordain and Establish" clause of Article III, Section 1. Those clauses, standing alone, do create very substantial powers in the Congress. But those who rely on them in these bills read them as though they were the sole provisions of the Constitution. They ignore the total plan of government under the original Constitution, the "Supremacy" clause of Article VI, and the amendment process of Article V, and forget the later Bill of Rights and other Amendments with their express limitations on governmental power.

For example, Carl A. Anderson, a former legislative assistant to Senator Helms, writing in the *ABA Journal* for June, 1982, points out that there *is* an Exceptions clause and thoroughly documents that that undoubted fact has been recognized many times by the courts. But he fails to tell us what happens when a legislative effort at the exercise of the withdrawal power is clearly intended to circumvent a prohibition on action by state of federal government contained in the Bill of Rights or a subsequent Amendment to the Constitution. And this is precisely what occurs under each of the court-stripping bills. In the case of S. 951, the intent to limit busing for racially oriented reasons is indicated by Section 2(b)(1) which finds that court orders mandating busing beyond the student's closest school "for the purpose of achieving racial balance or racial desegregation have proven to be ineffective remedies to achieve unitary school systems." Section 2(d) contains conclusive presumptions of unreasonableness that would limit the existing power of all federal courts in constitutional cases. In S. 951, extrinsic evidence of intent of the kind found in *Washington* v. *Seattle School District No. 1*, ——— U.S. ——— (June 30, 1982) also shows an impermissible motive for limiting a constitutionally mandated potential remedy.

Under the *Seattle* case and under *Rogers* v. *Lodge*, ——— U.S. ——— (July 1, 1982); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Lee* v. *Nyquist*, 318 F. Supp. 710 (1970), aff'd 402 U.S. 935 (1971); *Wright* v. *City of Emporia*, 407 U.S. 451 (1972); and *Reitman* v. *Mulkey*, 387 U.S. 369 (1976), S. 951 would seem to be a clear violation of the equal protection clause unless it is some how saved by its claimed sources of power, Article III of the Constitution or Section 5 of the Fourteenth amendment.

Section 5 of the Fourteenth Amendment gives Congress the power of enforcement of that amendment. But it clearly does not give the Congress the power to bar a remedy the court finds necessary to correct a constitutional violation. Congress cannot place its Section 5 power beyond judicial review and cannot exceed limitations placed on the states and the Congress by the Fourteenth Amendment itself, the Bill of Rights or other portions of the Constitution. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970; *City of Rome* v. *U.S.*, 446 U.S. 156 (1980); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). Justice O'Connor, writing for the Court in *Mississippi University for Women* v. *Hogan*, ——— U.S. ——— (July 1, 1982), left no doubt as to the limits of Congress' power under Section 5, when she said: "Congress' power under § 5 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees; *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 p. 10 (1966). Although we give deference to congressional

decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." One of the legs on which S. 951 purports to stand has been shot away.

The remaining leg of S. 951 is the Article III power of withdrawal of jurisdiction. In his May 6, 1982 letter to Senator Thurmond relating to S. 1742, Attorney General Smith stated the view that Congress may not make "exceptions to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers." In discussing that point, he made the further point that the exceptions clause must be read in light of other external limitations on congressional power contained in the Bill of Rights or elsewhere in the Constitution. We agree with that further point and believe, in fact, that, fully applied, it demonstrates that legislation like S. 951, which limits jurisdiction to grant essential constitutional remedies, cannot be valid as applied to either the Supreme Court or the lower federal courts.

For S. 951 does not withdraw power to consider a whole subject matter; it selectively withdraws power to grant specified constitutional remedies. If it simply purported directly to change the constitutional law relative to busing as a means of achieving school desegregation, it would clearly be unconstitutional, as cases previously cited demonstrate. But the attempt of S. 951 to achieve that same result by the device of reciting that the statute is an exercise of the withdrawal power under Article III must be controlled by the same constitutional prohibitions.

Only two cases deal explicitly with this point. In *U.S.* v. *Klein*, 80 U.S. 128, 145 (1971), the Supreme Court recognized the purported withdrawal of jurisdiction only "as a means to an end." The facts of the *Klein* case are well known. Suffice it to say that it establishes that if a lower federal court has jurisdiction of the subject matter, Congress cannot, under the guise of limiting jurisdiction, dictate to the court in a constitutional case what facts shall be determinative, what legal processes shall be used and how the cases shall be decided. But this is precisely what S. 951 purports to do in its conclusive presumptions as to what busing shall be deemed unreasonable.

In *Battaglia* v. *General Motors Corp.*, 169 F.2nd 254, 257 (2d Cir.), cert. den. 335 U.S. 887 (1948), the Court stated the rule even more broadly. It said "that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law, or to take private property without just compensation." See also *Yakus* v. *U.S.*, 321 U.S. 414 (1944). Obviously, the Article III right to withdraw jurisdiction from the federal courts is subject, not only to the Fifth Amendment, as stated in the Battaglia case, but to all other express external limits on Congress, such as the First Amendment and all other Amendments.

As interpreted by its sponsor and as its plain words seem to say, S. 951 depends on withdrawing from all federal courts the power to order busing, an essential constitutional remedy, in situations the bill conclusively defines as unreasonable. Even if S. 951 is interpreted as applying only to the lower federal courts, as Attorney General Smith interprets it in his May 6 letter to Chairman Rodino, the bill still violates these principles. For it decrees the outcome of cases and makes new constitutional law under the guise of withdrawing jurisdiction. *U.S.* v. *Klein, supra.* The selective withdrawal of rights violates the Due Process and Equal Protection clauses either way. *Seattle School District, Hunter* v. *Erickson, Lee* v. *Nyquist* and other cases previously cited.

The question remains only whether, because S. 951 presumably leaves the state courts open as a forum for asserting constitutional rights the due process and equal protection defects are cured. Under the *Seattle, Hunter, Lee* and other cases, it is clear that intent to create an impermissible racial classification can be inferred freely from a variety of circumstances both intrinsic and extrinsic to the legislation or other governmental action. The findings contained in S. 951 deny a facial neutrality and extrinsic facts show an intent to change the law of desegregation. Certainly the bill would create a disproportionate impact related to racial classification. And the obvious intent of S. 951 and all other court-stripping bills is to invite state courts to render decisions at variance with current constitutional law. If that were not true, the bills would have no point at all. The bills also deny the enforcement power of the Supreme Court inherent in the Cases or Controversies clause, the power to remove cases to federal court or to secure the supervisory and uniformity functions of the Supreme Court. If the bills do in fact exempt the Supreme Court, they effectively deny plaintiffs justice by overburdening the already strained capac-

ity of that court to be the sole federal forum for enforcement of established constitutional remedies. They deny plaintiffs a free choice of an original forum having the independence required of Article III Courts. c.f. *Northern Pipeline* v. *Marathon Pipeline*, ——— U.S. ——— (June 28, 1982). It is inconceivable that a court that found a denial of equal protection in cases like those cited would not find the same in a bill like S. 951 that, for the admitted purpose of changing the constitutional law, selectively closed the federal courts.

The Attorney General, in his letters of May 6 responding to requests for opinions from the Judiciary Committees of the House and Senate, reached some conclusions with which we agree and some with which we do not agree. While we believe that his letter relative to S. 1742 could have found stronger arguments and reached a more emphatic conclusion of unconstitutionality, it generally argued for that result. Hence our general disagreement with his letter on S. 951 is much sharper.

First, we do not necessarily agree with the Attorney General's assumption that S. 951 covers only the lower courts, in light of some of its express language and the declarations of Senator Johnston. Further, we disagree emphatically with his reliance on *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), sustaining the Norris-LaGuardia Act. That Act did not limit jurisdiction to grant necessary remedies under the United States Constitution and did not direct a change of law or a specified result by defining the terms of remedies conclusively. S. 951 does so direct, and hence falls afoul of the rule of *Klein* that removal of jurisdiction of lower courts may not be used as a guise for changing constitutional law or dictating the outcome of cases. We disagree with the Attorney General's view that S. 951 does not create a racial classification in the same senses as were found in *Seattle, Hunter, Lee, Emporia* and other cases previously cited. While we commend his view that Section 5 of the Fourteenth Amendment "does not . . . authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation," we would point out that under existing law those are precisely the cases in which busing is now ordered by the courts. We share many of the Attorney General's concerns expressed in his "General Comments" and would add others of a more basic nature. Finally, we believe that had S. 1742 and S. 951 been considered together, in light of *Klein* and other precedents, a unified and unqualified disapproval of both might have evolved.

III. POLICY CONSIDERATIONS

The constitutional questions involved in S. 951 and the other court-stripping bills are difficult and there is scant definite and binding authority. The reason for that is simple. The Congress, although presented with numerous opportunities to pass court-stripping bills in the past, has declined to pass the bills, primarily because of wise policy considerations. Members of Congress are sworn to uphold the Constitution and they have refrained in the past from testing its outer limits in ways that could strain or impair the unique system of government created by that great document.

And those who most strongly believe our Constitution needs change are not without remedy. Many of the proponents of the court-stripping bills believe that most Americans disagree with our Constitution, as interpreted by the branch of federal government to which our forefathers entrusted interpretation of the Constitution and protection of our rights. If, indeed, our nation does disagree with rights, under the Constitution, in the areas of abortion, prayer in schools or desegregation, there is a perfectly valid way to change the Constitution. That is the amendment process involving the states and the people and requiring more than simple majorities. And our forefathers never intended that Congress, alone, by a simple majority vote, could obtain the same result.

For if the Congress, by a simple majority vote, could rewrite the Constitution, a future Congress could wipe out federal jurisdiction and remedies in all constitutional cases. Then, at best, we would have 50 federal constitutions—one for each state. And if state legislatures followed the example of Congress and deprived state courts of constitutional jurisdiction, we would have no judicial review at all in constitutional cases. We would have a purely parliamentary system of government, without either an enforceable written national Constitution or a court having the power to declare the process unconstitutional. The founders of our country clearly did not intend to create a tripartite system of federal government that so easily could be rendered a nullity. So these bills all should be opposed on both legal and policy grounds.

The admitted purpose of many of these bills is to change the constitutional law as interpreted by the judicial branch of the federal government. That purpose betrays a great cynicism about our state judicial systems, for it is based on the belief that variations that are pleasing to current local majorities will be read into our national organic document by local courts. If that belief is unfounded, as we believe it is, the bills are pointless. If it is well founded, it risks our converting America into a kind of league of independent states instead of one nation.

Many of the bills, like S. 951, would thrust the constitutional responsibility on the state courts. But the state courts do not want that responsibility. The Conference of Chief Justices, representing all our state court systems, passed a resolution on January 30, 1982, without dissent, that viewed these bills with the gravest concern, citing many strong arguments for leaving constitutional review of these and all other cases in the federal courts.

Some apologists for the theory that the Congress can eliminate or control the federal courts say that enactment of these bills will teach the courts a needed lesson. But if the process is begun, where will it stop? We can perhaps answer for this Congress, but can we answer for future Congresses of unknown composition?

The ABA strongly urges that Congress, as it has repeatedly in the past, once again decline the ultimate confrontation. For if we pass to the Supreme Court the task of being the sole defender of the role of the federal courts, we face the certainty of grievous damage to our system. If, in accordance with the law as we think it to be, the Supreme Court declares these bills unconstitutional, we will hear a clamor of unjustified attacks on our courts and legal system and possible constitutional amendments to eliminate or limit the judicial branch. But if, contrary to our views, the Court sustains the bills, each Congress, according to its mood, may remove more and more of the jurisdiction of the federal judiciary until it is gone. Either way we face a diminished institutional perception of all branches of our government and a needless division of our country. We put at risk the very existence of our free system of government.

George Washington, in his moving Farewell Address to the Nation, issued a clear warning: "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield."

We believe in the sincerity of those who propose the court-stripping bills. But every member of Congress must consider thoughtfully what we are starting. We should heed the Father of Our Country and not risk our most fundamental values in exchange for what some believe are popular and expedient solutions to current and transient problems. For the method of solution threatens the rights of all of us. Once the door is opened, another Congress, another day, next could abolish or curtail the rights of free speech, free press, free assembly or free exercise of religion or the other great protections each of us enjoys under our Constitution.

We of the American Bar Association respectfully, but strongly, urge this Committee and the Congress to defeat S. 951 and all other measures that would strip the federal courts of their customary role in our nation.

MESSAGE TO CONGRESS: JUDICIAL INDEPENDENCE AND COURT STRIPPING LEGISLATION

We are opposed to the pending legislative restrictions on the jurisdiction of federal courts to hear or grant remedies in constitutional cases involving such controversial issues as school desegregation and busing, prayers in public schools and abortion. We urge that Congress, in resolving these issues, not respond to dissatisfaction with particular court decisions by attempting statutorily to rewrite constitutional law. Although the pending bills deal with different subject matters, and present varying constitutional and policy questions, they share a common impermissible purpose. All are attempts by Congress to do legislatively what should be done by constitutional amendment. We believe that such efforts pose a dangerous threat to the integrity and independence of the federal judiciary in our constitutional system of government.

As individuals, we hold varying views on the substantive policy issues which are the subjects of these proposals, and as a group we take no position on them. But we are united in the belief that these proposals threaten our fundamental constitutional principles: the independence and supremacy in constitutional questions of the fed-

eral judiciary, the separation of powers, and the system of checks and balances. The enactment of any one of these proposals curbing the authority of the courts to hear cases or grant remedies for constitutional violations would establish an unworthy precedent.

Because the policy considerations are so substantial, and because the constitutional propriety of these bills is open to serious reservations, we urge the Congress to reject all efforts to remove federal court jurisdiction over constitutional rights and remedies, in whatever form they are presented.

BENJAMIN R. CIVILETTI,
Attorney General, 1979-81
ELLIOT L. RICHARDSON,
Attorney General, 1973
RAMSEY CLARK,
Attorney General, 1967-69
NICHOLAS DEB. KATZENBACH,
Attorney General, 1965-66
WADE MCCREE,
Solicitor General, 1977-81
ERWIN N. GRISWOLD,
Solicitor General, 1967-73
ARCHIBALD COX,
Solicitor General, 1961-64
J. LEE RANKIN,
Solicitor General, 1956-61
DAVID R. BRINK, *President,*
American Bar Association
ARNETTE R. HUBBARD, *President,*
National Bar Association
W. EDWIN YOUNGBLOOD, *President,*
Federal Bar Association
E. N. CARPENTER, *President,*
American Judicature Society
ALSTON JENNINGS, *President,*
American College of Trial Lawyers
JUSTICE ARTHUR J. GOLDBERG
JUDGE SHIRLEY HUFSTEDLER

REPORT WITH RECOMMENDATION

RECOMMENDATION

Be it *Resolved,* that the American Bar Association opposes the legislative curtailment of the jurisdiction of the Supreme Court of the United States or the inferior federal courts for the purpose of effecting changes in constitutional law.

REPORT

Before the 97th Congress are more than a score of bills which would strip from the original jurisdiction of the lower federal courts certain subject areas involving controversial decisions of the Supreme Court of the United States, notably abortion, school prayers, and busing. Enactment of such legislation would require persons claiming rights under one or another of these decisions to bring suit in state courts. Moreover, several of these bills would deny the Supreme Court appellate jurisdiction to review the decisions of the state courts with respect to those issues that could be brought only in the state courts.

Sponsors of these bills clearly avow that their purpose is to bring about an altering of the constitutional interpretations that now prevail. The belief is apparently that state courts, if given exclusive power to decide such suits without fear of Supreme Court review, will not follow the precedents established in these areas by the Nation's highest Court.

The Committee recommends to the Association the adoption of this resolution because of one overriding conviction: the necessity to protect the integrity of the courts of this Nation, federal and state, from misdirected legislative efforts to achieve something that can be done only through constitutional amendment. The issue is not abortion; it is not busing; it is not prayer in the public schools; it is not any of a number of things that may occasion dissatisfaction with particular deci-

sions. We are sure that the Members of the Association have many various positions on these substantive questions, as we do. But the real issue, the only issue, is whether, as a matter of policy and of constitutional permissibility, this Nation is going to adopt a device whereby each time a decision of the Supreme Court or a lower federal court offends a majority of both Houses of Congress the jurisdiction of the federal courts to hear that issue will be stripped away. We do not believe that is a system the Framers intended nor one that we should strive to institute.

Supreme Court decisions interpreting the Constitution establish binding precedents which are subject to alteration by the people through the process of constitutional amendment. The Framers provided in Article V a means of changing the Constitution and deliberately made it difficult to achieve. The "Leaden-footed process of constitutional amendment," as Justice Frankfurter called it, with the requirement of extraordinary majorities in Congress and among the States, was designed to make sure that transient majorities could not easily change our fundamental law. Are we to believe that after constructing this formidable barrier to easy change, the Framers intentionally or inadvertently also put in place a system in which simple majorities could bring about a rewriting of constitutional law?

The American Bar Association has long opposed efforts, from whatever spectrum of the political scene, to alter constitutional interpretation through means other than constitutional amendment. We stood in opposition to the "Court-packing" plan of the late 1930's, which would have altered prevailing law by stacking the Court's membership. More than thirty years ago we called for the adoption of assurance that jurisdictional manipulation would not and could not be used to work substantive changes in the Constitution. In 1958, the Association opposed bills pending in Congress that would have denied the Supreme Court review of decisions involving alleged subversives in various fields. That policy is Association policy today and the Committee calls on the House to reaffirm it and extend it.

Central to this position is recognition of the great power which Congress possesses under the Constitution to structure and to allocate the jurisdiction of the Supreme Court to hear appeals and the jurisdiction of the lower federal courts—and of the limits on that power. Article III stipulates that the High Court has appellate jurisdiction over practically the entire range of federal judicial matters, subject to such "exceptions and regulations" as Congress provides. Clearly, then, Congress may regulate how cases come to the Court and could deny the Court appellate jurisdiction over some classes of cases altogether, as in fact it has historically done. It could, for example, make a lower federal court's decisions with respect to interpretation of the tax laws or admiralty issues final.

Even greater is Congress' power with respect to the lower federal courts. The compromise at the Constitutional Convention was to create "one Supreme Court" and to leave in legislative discretion whether and when to create and to do away with any "inferior" federal courts. Some of the Framers wanted constitutional assurance of lower courts, but the prevailing number thought that congress should be able to leave to state court adjudication matters of national interest, subject to Supreme Court review. And to safeguard the national interest and the integrity of constitutional rights, the Framers wrote in Article VI, the "Supremacy Clause," the guarantee that the Constitution, federal laws, and treaties would be the "supreme law of the land" and that "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Moreover, the same Article requires state judges, as well as all other state officers, to be bound by oath or affirmation to support the Constitution of the United States.

Necessarily, it follows that if the Constitution empowers Congress to provide or not to provide for lower federal courts, it empowers Congress to vest in such lower federal courts that it creates all or only some of the jurisdiction it could give and thus to allocate between state and federal courts the judicial power of the Nation in such ways as it deems to serve the best interests of the States and the Nation. That has been the understanding from the beginning on which Congress has acted and the decisions of the United States Supreme Court are consistent in affirming the correctness of that understanding.

It is thus not with any reservations with respect to congressional power generally that the Committee recommends this resolutions. Rather, we are actuated by specific constitutional reservations, more substantial as to Supreme Court appellate jurisdiction than as to lower federal court jurisdiction, and by what we believe to be compelling policy considerations against the propriety and desirability of the bills now pending before Congress.

Even were the constitutional considerations compellingly clear in favor of the validity of these bills, as they are not, we would urge opposition.

First, if it is likely, as we by no means concede it is, that the meaning ascribed to a constitutional provision can be changed by the simple device of divesting jurisdiction from the one set of courts and giving it to another, then indeed we have a Constitution writ on sand and the integrity of our amending process is eroded. It is central to our fundamental Charter that ordinary legislation can be changed through ordinary legislation and the Constitution only through amendment. We should resoundingly reject the counsel of those who tell us there is another way. Down that route lie barely-hidden hazards to constitutional governance.

Second, to accept the explicit judgment of the sponsors of these bills that shifting jurisdiction will result in substantive change requires us to dishonor the thousands of state judges who by oath and conscience are bound to adhere to established precedent enunciated by the Supreme Court. We do not doubt that the great majority of state judges will do their duty. Nonetheless, this legislation is pernicious in concept even if it does not achieve its purpose.

It is bad because it suggests state judges will depart from their oaths. It is bad because it constitutes a congressional invitation to them to depart from their oaths; it says to state judges that Congress believes some decisions are so wrong they ought to be changed and those judges should do it. It is wrong because hundreds or thousands of state judges who are subject to periodic elections will be put in peril. The same interest groups that extract from an elected Congress jurisdictional alterations will demand from elected state judiciaries that they accept the congressional invitation to change. Federal judges are insulated from this and other pressures; the Framers deliberately provided for independence to prevent just these pressures. Congress should not subject state judges to often hard choices between oath and career.

Finally, if most state judges honor their oaths, the status of the objected-to constitutional decisions will be frozen in place. The Supreme Court cannot hear such cases and perhaps overrule them or alter them in any way. And as new fact situations arise, state court interpretations will begin to create somewhat different rules which will vary from State to State.

Third, either because of disagreement with the substance of these decisions or because of electoral pressures, some state judges may indeed accept the invitation of Congress and refuse to follow Supreme Court precedent. Because there would be no Supreme Court review, in those States federal constitutional law would change and the Constitution would mean something different from State to State. This result would be pernicious because fundamental liberties—whether the ones which are the subjects of these bills or others in the future if these succeed—will have been altered in some States and depreciated in all because of the demonstration that, contrary to what we have always believed, constitutional rights are subject to evanescent majority opinion. While the constitutional rights at peril today may not be valued by some, those at peril tomorrow may be freedom of speech, or just compensation for property taken for public use, or the guarantee against impairment of the obligation of contracts.

Even were Congress to adopt an approach, which is found in a few of the pending bills, or depriving the lower federal courts of jurisdiction and continuing Supreme Court review of state court decisions in those areas, we believe that should be opposed as well. Basic to that effect would be a conclusion that alteration of substantive law could still be achieved which contains the same insult to state judges and the same possible injury to them. Supreme Court review could always alleviate some of the problem should some state judges depart from precedent, but the High Court's caseload is such that it could insure adherence to precedent only by taking an inordinate number of state cases in these areas to the neglect of its many other functions in interpreting national law.

Certainly, in the absence of Supreme Court review, the command of the Supremacy Clause that the Constitution be the "supreme law of the land" could become a nullity. Since the adoption of the Judiciary Act of 1789, a constant feature of the history of federal court jurisdiction in this country, upon which the Nation continues to depend, has been the review by the United States Supreme Court of state court interpretations on questions of federal constitutional law. If, as Justice Holmes reminded us, a page of history is worth a volume of logic, that singular fact stands as a practically unanswerable argument against jurisdictional legislation that would remove Supreme Court review of state court interpretation of the Constitution.

With regard to the constitutional validity of these bills, the Committee doubts that, with respect to the Supreme Court's appellate jurisdiction, they can be sustained as proper "exceptions and regulations" and we have reservations about the bill's divestitures of lower federal court jurisdiction as well. Numerous arguments

have been addressed to the question, some based on theories of the "essential functions" of the federal courts, some on equal protection concepts governing the decision to restrict jurisdiction over certain disfavored issues, but we believe the correct analysis to be grounded upon what limits the Constitution itself places upon congressional exercise of any of its granted powers. The Constitution explicitly authorizes Congress to make exceptions to the Supreme Court's appellate jurisdiction and implicitly to determine what, if any, jurisdiction the lower federal courts are to have. Proponents of these bills read these authorizations not only as if they are plenary powers but as if they are completely unrestrained. But this cannot be so. The Constitution authorizes Congress to regulate interstate commerce, to tax, to spend money, to create a postal system. None of these powers is conferred in language that then says, "but you cannot regulate commerce to deny the right to transport political literature across state lines," or "but you cannot bar from the mails newspapers that oppose the position of the majority in Congress." Rather, these powers are conferred in the manner in which Chief Justice Marshall described the commerce power in *Gibbons* v. *Ogden*. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

Just so is the power to structure jurisdiction. It is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. And what is prescribed in the Constitution? The First Amendment, the Fourth Amendment, and the Fifth Amendment, and all the other limitations upon the powers conferred on Congress in other parts of the Constitution obviously are those limitations. They restrain the power of Congress to legislate with respect to other constitutional provisions under granting clauses which would appear on their face to be unlimited. To construe the congressional power to structure jurisdiction the way the proponents would construe it would be to make it the only power conferred on Congress that is beyond the constraints of other provisions of the Constitution.

Important to this issue is the fact that while the authorization to Congress to structure the jurisdiction of the courts is contained in the body of the Constitution adopted in 1789, the relevant limitations are in the Bill of Rights, proposed and adopted in 1791, which are operative as to all of Congress' powers conferred in the Constitution itself. Thus, even if the Framers in the Convention did not conceive of the jurisdictional powers being limited, although it is likely they did, adoption of the Bill of Rights did so limit them. Madison, we must remember, stated in the House of Representatives on June 8, 1789, that the amendments he proposed would not be "parchment barriers" to federal action, because "independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights."

No Supreme Court precedent stands in the way of this reading. The *McCardle* case (1869) is of limited value, not only because it arose in the context of post-Civil War radicalism, but because, as the Court plainly stated, it did not bar all access to the Supreme Court but only one avenue of appellate review. Within three years of *McCardle*, the Court in the *Klein* case (1872) held unconstitutional an attempted exercise of congressional power over its jurisdiction for the purpose of nullifying the President's pardoning power. Certainly, *McCardle* lends support to the proponents of these bills but far less support than they pretend.

The only complexity that enters into the argument is that when Congress removes from the jurisdiction of the federal courts an issue it does not by that act alone violate one of the constitutional constraints. That is to say, when it denies to the lower federal courts and to the Supreme Court authority to hear a suit arising out of the institution of a prayer in the public schools, it does not establish a religion. The establishment clause is violated when some state or local authority imposes a prayer requirement and a state court refuses to follow Supreme Court precedent and to strike down the imposition. But just as Congress could not itself violate the establishment clause it cannot authorize the States to violate the establishment clause. The authorization when acted on in the jurisdictional context would violate the establishment clause and could not validly prevent exercise of the Supreme Court's appellate jurisdiction to give a remedy for the violation. The congressional jurisdiction provision would be void.

We think it plain that the Constitution thus bars a manipulation of the Supreme Court's appellate jurisdiction for the purpose of effecting substantive changes in constitutional law. More difficult is resolution of the issue when what Congress enacts takes from the federal and gives to the state courts jurisdiction to entertain such suits subject to Supreme Court review. Theoretically, High Court review should prevent effectuation of the forbidden constitutional change and save the statute. But it may be that the practical difficulties of Supreme Court review do not

allow for adequate protection of constitutional rights under the circumstances. It may be that state legislatures would restrict state court jurisdiction and powers to afford adequate relief or to process cases that can be taken to the Supreme Court with sufficient promptness to protect rights. It may be that other unforeseen situations arise. In that eventuality, can it be doubted that serious constitutional questions would arise?

Because the policy considerations are so substantial and because the constitutional propriety of these bills is open to such serious reservations, we urge the House to adopt as the position of the Association a simple, forthright policy: to oppose the curtailment of the jurisdiction of the federal courts for the purpose of effecting constitutional change that is properly the province only of the amending process. Irrespective of the subject invoived and regardless of our individual beliefs with respect to any of them, the overriding consideration is that we support the integrity and independence of federal courts, whether we agree with particular decisions or not, and that we support the integrity and inviolability of the amending process.

We ask reaffirmation of the principle that Elihu Root, leader of the American bar, enunciated in 1912. "If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but shall be exhibiting . . . the lack of that self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they have struck the impulse of the moment."

In Number 78 of *The Federalist,* Alexander Hamilton explained that federal judges had been given the maximum degree of independence and protection possible because they have a critical function to perform. They must assure, he said, that the limitations on legislative authority are enforced. "Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

We do not believe the great rights set out in the First, Fourth, Fifth, and other provisions of the Constitution "amount to nothing." We deem it critical to their continued meaningfulness that these bills under consideration and others like them be defeated.

Respectfully submitted,

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W. GIBSON HARRIS,
ELAINE R. JONES,
JOHNNY H. KILLIAN,
HON. HARRY PHILLIPS,
HON. H. BAREFOOT SANDERS,
IRVING R. SEGAL,
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EDWARD I. CUTLER,
Chairman.

CONSTITUTIONAL LIMITATIONS OF CONGRESS AUTHORITY TO REGULATE THE JURISDICTION OF THE FEDERAL COURTS

(Lawrence Gene Sager*)

INTRODUCTION

Pending in Congress are a number of bills that seek to limit the jurisdiction of the federal courts to hear claims or grant remedies in various types of constitutional cases. These bills threaten a gross breach of the institutional premises by which our nation, for 200 years, has chosen to govern itself, and the adoption of any one of them would set a dangerous and unworthy precedent. At risk is our tradition of gov-

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This paper is a condensation of my views as expressed in a more comprehensive article on the subject published in the Supreme Court Review volume of the Harvard Law Review, Vol. 95 (1961). The research and preparation of the law review article were supported by a grant from the New York University Law Center Foundation.

ernance that has made the judicial branch of the federal government the ultimate arbiter of the Constitution. Tampering with that tradition in the manner proposed by these bills would be both unconstitutional and unwise.

The language, structure and history of Article III of the Constitution, taken alone, indicate that Congress has a broad, but imprecisely defined, power to regulate the jurisdiction of the federal courts. The lower federal courts take their jurisdiction from statutory grants by Congress, and Congress clearly can withhold from their jurisdiction substantial portions of the reservoir of jurisdiction provided in Section 2 of Article III. Indeed, the framers of the Constitution contemplated the possibility that Congress might choose to create no lower federal courts at all—a possibility that seems academic today. In contrast, the existence of the Supreme Court is stipulated by Article III, and the whole of the jurisdiction itemized in Section 2 is constitutionally conferred on the Court. The appellate jurisdiction of the Supreme Court, however, is provided in Article III "with such Exceptions and under such Regulations as the Congress shall make," and Congress can remove from the jurisdiction of the Court some of the cases that fall within Section 2.

But from Article III itself, and from the logic of the constitutional scheme of which it is a pivotal part, there flow significant limitations on the power of Congress to regulate the jurisdiction of the federal courts. Moreover, the Bill of Rights and reconstruction amendments to the Constitution provide important additional limitations on the exercise of whatever powers Congress might otherwise possess under Article III. While the precise scope of congressional authority in this area may remain unclear, the power of Congress to shape the jurisdiction of the federal courts is clearly limited by three important constitutional principles:

(1) The Supreme Court must be available to superintend state and local compliance with the Constitution, unless Congress has provided equally effective and independent review elsewhere within the federal judiciary;

(2) Congress cannot strip from the jurisdiction of the federal courts a narrow group of cases which involve constitutional claims to which Congress is hostile; and

(3) Congress cannot cripple the federal courts by denying them the authority to issue all reasonably effective remedies in particular groups of cases.

The bills presently pending in Congress that propose jurisdictional or remedial responses to Supreme Court precedent in the areas of abortion rights, school prayer, and mandatory busing to desegregate public schools, share the vice of violating one or more of these constitutional limitations. They also violate Congress' own tradition of prudence, restraint and respect in dealing with the federal judiciary, and do so at a time when a like restraint is being urged on the courts by both the executive and legislative branches. The ill-wisdom of the course these bills chart is as striking as their illegality.

I. FEDERAL JUDICIAL SUPERINTENDENCE OF STATE AND LOCAL COMPLIANCE WITH THE CONSTITUTION

Supreme Court review of state conduct is the cornerstone of our constitutional scheme. Without it or an equally effective and independent alternative source of federal judicial review, the legal structure upon which our identity as a nation depends would be fatally undermined. Congress has never doubted this: from the first Judiciary Act of 1789 to this day, it has adopted legislation that assured the Supreme Court of jurisdiction to superintend state compliance with the Constitution. Throughout our history, Congress has removed various portions of the Court's Article III jurisdiction, but this head of jurisdiction has always been made available to the Court, despite crises and concerns that would have tempted an unscrupled Congress to curb the Court's authority. As a result of Congress' fidelity to this basic premise of our constitutional order, there has never been a judicial test of Congress' power to reverse this unvarying pattern of respect of the logic of the Constitution. But there is no dearth of clear judicial sentiment on the essentiality of federal review of state conduct. There are a number of powerful Supreme Court statements on the matter, of which this language from *Dodge* v. *Woolsey* is a good example:

"[O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and legislation of Congress; with powers also to declare judicially what acts of the legislatures of the States might be in conflict with either."[1]

[1] 59 U.S. (18 How.) 331, 350 (1855).

A closer look at the history and structure or Constitution's provisions for a federal judiciary strongly supports these sentiments and the tradition of two centuries to which they pend.

A. The history and logic of our federal scheme

The issue around which all else in the Constitutional Convention revolved was the status of the attending states. Would they remain sovereign members of an interstate compact, or would they be folded into a genuinely national structure—to which they as states would be subordinate and to whose authority their citizens would be answerable directly? In the end there emerged from the Convention a rather clear commitment to a government structure that was distinctly more centralized than that of the Articles of Confederation. As part of this move toward nationhood, the framers put critical restraints on state autonomy into the Constitution itself and gave Congress legislative authority to direct a strong national government.

The commitment to nationhood raised the question of how the legal subordination of the states would be effectuated. Initially, attention and debate focused on a congressional "negative," or veto, of state laws. But the Convention rejected this means of control, opting in its stead for judicial supervision of state conduct. The supremacy clause was the product of this clear and conscious decision to rely on judicial control; the unanimous adoption of its prototype followed immediately upon the heels of the Convention's rejection of the congressional negative.

With judicial supervision as the Convention's chosen means of controlling the states, the structure of the American judiciary became a matter of great importance. On the day following the repudiation of the congressional negative and adoption of the supremacy clause, the Convention approved the compromise which James Madison had engineered earlier in committee. Controversy in this area has centered on the question of the lower federal courts, with opponents of an extensive federal judiciary arguing that the Supreme Court could adequately guarantee federal interests. Under the Madisonian compromise, the Constitution neither created nor forbade the creation of the lower federal courts. Their existence was left to the discretion of Congress.

Thus, as the delegates to the Constitutional Convention made their peace on issue after issue, the Supreme Court's superintendence of state compliance with national law emerged as the fulcrum of the national government. Direct legislative supervision of state conduct was abandoned, and the possibility was embraced that no subordinate federal judiciary necessarily had to be established. What remained was the Supreme Court, whose jurisdiction was consciously tailored to the role of supervising the enforcement of the supremacy clause. There was serious debate on the question whether the appellate oversight of the Court was sufficient as a restaint on the states, but none about its necessity. Unless the state courts were answerable to the Supreme Court, the scheme of the Constitution would have had little to recommend it over the Articles of Confederation.

B. The judicial independence requirements of article III

Article III stipulates that federal judges are to be continued in office during good behavior and without diminution in salary. These provisions were placed in Article III in order to secure judicial independence, which is a core value in our constitutional tradition, and must be understood as limiting the power of Congress to channel Article III cases to the state courts without providing for federal judicial review. If Congress can place any group of cases it chooses in the exclusive province of the state courts, it can subvert the judicial independence requirements of Article III at will. The obvious relationship between federal review and the commitment of Article III to judicial independence was recognized early by Justice Marshall, writing for the Court in *Cohens* v. *Virginia:*

"It would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute prefectly impartial tribunals. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist. . . .[2]"

[2] 19 U.S. (6 Wheat.) 264, 386-87 (1821).

Thus, while Article III embodies the understanding that Congress might choose to create no lower federal courts or to endow them with limited jurisdiction, and apparently gives Congress power to effectuate some restrictions on Supreme Court jurisdiction, these powers cannot be used in combination utterly to defeat the judicial independence requirements which are also stipulated in Article III. State judges do not enjoy Article III security, and unrestricted use of the state courts as exclusive forums for Article III business is wholly inconsistent with our constitutional commitment to an independent judiciary. The Article III compromise entitles Congress to use state courts in lieu of inferior federal courts to hear Article III cases in their initial stages. But there plainly must be limits on Congress' ability to make the state courts exclusive arbiters of Article III matters; and those limits are crossed when Congress attempts to divest the Supreme Court and all other federal courts of jurisdiction at least to review state court decisions on matters arising under the federal Constitution.

The question is not an entirely novel one. Congress has created various entities—ranging from courts martial to administrative agencies—which do Article III business but whose members do not enjoy Article III security. Just as with delegations of Article III business to the state courts, unlimited exercises of this sort by Congress would nullify the judicial independence provisions of Article III. The Court has consistently referred to such limits, and has had the occasion to invalidate adjudicatory schemes that overstep them. When the Court has evaluated congressional delegations of Article III business to non-Article III tribunals, it has held of critical importance: (a) the significance and sensitivity of the pertinent Article III business, and (b) the ultimate availability of Article III review.

Constitutional challenges to governmental conduct raise issues of great national importance. No other area of adjudication is as likely to excite public controversy and to invite political manipulation of the judiciary. Article III's commitment to judicial independence is nowhere more important than here. And no practical necessity could justify Congress in denying federal review of constitutional claims that have been directed to the federal courts. Under some circumstances, Congress can relegate the adjudication of Article III cases to the state courts, but it must provide persons who advance claims of federal constitutional right an opportunity to secure effective and independent review of the state court's disposition in an Article III court. Any other reading of Article III would permit Congress to circumvent the article's tenure and salary requirement.

The Constitution, as with any legal document, cannot be read to permit one set of its provisions to eviscerate another, and the judicial independence provisions of Article III were not included casually. The English Crown's power to remove colonial judges at will had been one of the colonists' bitter grievances, and the decision to secure independence for the federal judiciary met with a rare degree of consensus among the framers. Each of the major proposals for the federal judiciary contained provisions similar to those ultimately adopted in Article III. The gravity with which the framers viewed these requirements was reflected by Alexander Hamilton, writing in The Federalist No. 78; for Hamilton, the Constitution would have been "inexcusably defective" if it had omitted guarantees of judicial tenure and salary. The contemporary importance of those provisions is vividly reflected in the pending legislation assaulting the jurisdiction of the federal court, which frankly rests on the expectation that some state courts will yield to political pressure and dishonor their obligation to federal judicial precedent.

II. THE SELECTIVE DEPRIVATION OF JURISDICTION AS AN UNCONSTITUTIONAL MEANS TO AN UNCONSTITUTIONAL END

Another important constitutional restraint on Congress' authority to shape federal jurisdiction is violated by a quality that is inherent in current proposals to strip the federal court of jurisdiction. These bills deprive the federal courts of jurisdiction in a highly selective way, and they are plainly efforts to undermine the enforcement of prevailing constitution doctrine in order to facilitate other substantive outcomes currently favored by some groups. The objection to such legislation is simple: Congress cannot circumvent the Supreme Court's constitutional rulings by direct legislative action and it cannot accomplish the same ends indirectly by manipulating federal jurisdiction. Congress cannot use its power over jurisdiction as a "bootstrap," permitting it to accomplish what the Constitution otherwise forbids it to do.

Were Congress to enact legislation of this sort, it would be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional. Officials not otherwise inclined to accept the invitation would find themselves the object of intense pressure from the same

political groups that induced Congress to act. Many such officials doubtless would succumb to such pressure and leave to the state courts the responsibility for sorting out the niceties of conformity to the Constitution. In effect, Congress would be painting a target on constitutionally protected rights. If, for example, Congress were to enact legislation insulating "voluntary" school prayers from federal judicial scrutiny, there would inevitably be an epidemic of school prayer programs.

State judges, in turn, would be placed in an untenable position. The proposed legislation can only be understood as encouraging state courts to ignore their legal obligations and to dishonor extant federal precedent. State judges, many of whom suffer insecure tenure, cannot be expected to enforce constitutional rights rigorously against their own state's conduct—in the face of some popular hostility to the rights in question, their normal desire to be reelected, an absence of support from the federal courts, and the obvious desire of Congress that the disfavored claims be repudiated.

These objections to the selective deprivation of federal jurisdiction apply in full to legislation that limits the jurisdiction of only the lower federal courts. There is no mechanical link between the Supreme Court and the state judiciaries which it superintends. Under such legislation, state trial courts would control the factfinding process, state judiciaries as a whole would control the timing of litigation, and for all practical purposes the availability of interim injunctive relief would rest in state court hands. If Congress acts to drive a wedge between rights defined by the Supreme Court and their enforcement, it encourages abuse of these prerogatives by state courts. Those of the present proposals that leave the Supreme Court's jurisdiction intact yet deprive the lower federal courts of the power to grant anticipatory relief to abortion rights claimants, for example, clearly invite dragging of feet, shading of precedent, and withholding of effective relief by state courts in disregard of the Constitution and their obligations as subordinate tribunals in the national legal system. If that were not the expectation of the proponents of these bills, the bills would be pointless. Proposals of this sort thus rely upon and promote a tawdry view of the rule of law.

The constitutional case against such behavior is supported by cases addressing similar jurisdictional issues. In *United States* v. *Klein*,[3] the Supreme Court considered legislation which denied it and the Court of Claims jurisdiction to return property seized during the Civil War to supporters of the Confederacy who had subsequently received presidential pardons. The Court struck down the limitation, on the ground that it withheld jurisdiction only "as a means to an end. Its great and controlling purpose is to deny the pardons . . . the effect which this court had adjudged them to have." And in *Battaglia* v. *General Motors*,[4] a distinguished Second Circuit panel took pains to emphasize that the jurisdictional limitations of the Portal-to-Portal Act of 1947 could not serve to protect the substantive provisions of the Act if they were unconstitutional: "[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation." *Klein* and *Battaglia* involved attempts to deprive all available courts of jurisdiction, to be sure. But where selective deprivations of federal jurisdiction both provoke assaults on constitutional rights and badly prejudice the possibility that the resulting injury will be redressed in court, the distinction between such legislation and the complete absence of a forum can be, at most, one of modest degree.

Legislation that has the purpose or effect of placing constitutional rights at great risk is inconsistent with those rights themselves. And to deny constitutional claimants access to the federal courts because the constitutional rights upon which they rely are in temporary disfavor, and may be less well received in politically beseiged state courts, would be to violate the due process clause and the principles of equal protection incorporated within the Fifth Amendment. However far Congress' Article III powers may extend, they do not constitute a license to disregard or override the Bill of Rights. *Klein* and *Battaglia* make that much clear.

III. CONSTITUTIONALLY INADEQUATE REMEDIES

Several bills now before Congress would not strip the federal courts totally of jurisdiction to hear controversial cases, but instead, would forbid them to order particular remedies in those cases. The targets of these bills are orders by federal courts that school children be bused to achieve desegregation, and federal coercive or de-

[3] 80 U.S. (13 Wall.) 128, 145 (1872).
[4] 169 F. 2d 254, 257 (2d Cir., per Chase, Swan, & A. Hand 1948).

claratory relief to secure abortion rights. The constitutional difficulty with such legislation is obvious. As concluded above, Congress is obliged to provide for effective federal judicial superintendence of the states, and is barred from selectively exposing disfavored claims of constitutional right to state and local hostility. It necessarily follows that Congress cannot leave the federal courts intact yet deprive them of the power to issue the only remedies which can adequate prevent or redress particular constitutional violations. Depriving the federal courts of the power to issue any adequate remedy in particular cases is the functional and constitutional equivalent of denying them jurisdiction to hear those cases at all.

Indeed, the bills which merely strip the federal courts of remedial authority pose even more obvious constitutional hazards than legislation totally denying these courts jurisdiction. Under present federal statutes, any defendant in a state court action arising under the Constitution can remove the case to federal court.

If the federal courts lack the authority to grant meaningful relief, defendants so armed with the power to remove doubtless would do so. The practical effect would be to deny the entire American judiciary—both state and federal—the capacity to redress the implicated constitutional harm. That is clearly unconstitutional. There is a further constitutional problem with legislation that deprives the federal courts of power to issue adequate remedies for constitutional wrongs—such legislation does violence to settled separation of powers doctrine by giving the federal courts jurisdiction yet directing them to reach an unconstitutional result. The proposition that Congress cannot constitutionally give the federal courts jurisdiction to adjudicate cases and at the same time direct them to reach an untenable result in those cases was at the heart of *United States* v. *Klein:*

"Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."[8]

To be sure, measuring the effectiveness of remedies for constitutional wrongs is not an easy or uncontroversial business. And our legal tradition cedes to Congress considerable discretion in selecting among remedial mechanisms. But where fundamental constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it has set itself against the Constitution. For example, those bills that would deprive a pregnant woman of declaratory and injunctive relief do not leave her any reasonably effective form of relief. They are plainly intended to render the federal courts unattractive and ineffective forums in abortion cases, and they would surely succeed in so doing. In like fashion, the busing bills, by barring or severely restricting court orders that direct public schools to fashion attendance zones on racial grounds, would be virtually fatal to judicial efforts to remedy school segregation. Just as with legislation selectively depriving the federal courts of jurisdiction to hear particular cases at all, these bills deny constitutional claimants due process and equal protection of the laws, and are at war with the underlying substantive provisions of the Constitution. And just as with legislation delegating constitutional cases to the exclusive authority of the state courts, these bills do violence to the text and logic of Article III itself.

IV. THE IMPROPRIETY AND ILL-WISDOM OF THE PROPOSED LEGISLATION

While exploring the constitutional infirmities of the pending legislation, one should not lose sight of the policy considerations. These bills would disturb policy by subverting our settled institutional arrangements and undermining public respect for the rule of law itself. These bills inevitably involve a gross breach of the premises by which we have chosen to govern ourselves. They are not merely illegal but deeply unwise.

Our constitutional order proceeds from a central premise of an independent judiciary whose interpretations of the Constitution prevail over inconsistent views or actions of the policymaking branches of government. The courts are not omnipotent and their constitutional decisions are not necessarily final. But the only legitimate means by which Congress can attempt to change constitutional decisions of the Supreme Court is by proposing a constitutional amendment, a process that requires a two-thirds majority in Congress. If Congress now undertakes, by simple legislative majority, to overturn established constitutional rights by using the language of jurisdiction, it will be attempting by indirect means to do that which it plainly cannot

[8] 80 U.S. (13 Wall.) at 147.

do directly. It will have challenged the authority of the federal judiciary, departed from its own almost unvarying tradition of restraint and respect for that judicial independence, and, for the first time in our history, upset the balance of authority provided by federal review of state conduct. Worse still, it will have enacted legislation that brazenly invites state judges to ignore existing federal doctrine. It is difficult to imagine a legislative strategy more erosive of respect for the rule of law at both federal and state levels.

It is not surprising that state judges, far from embracing the opportunity to reverse federal precedent, have condemned these bills and noted the insult to both the federal and state judiciaries that they embody. The Conferene of Chief Justices, representing all the states, on January 30, 1982, adopted without dissent a strong resolution, setting out many difficulties with the pending jurisdictional legislation, and expressing "serious concern" about that legislation.[6]

Attacks on the authority of the federal courts, from both conservatives and liberals, have been heard often in Congress, but Congress has resisted these calls to overstep the boundaries of the Constitution, often with stirring reminders of the vital place of separation of powers principles in our legal system. For example, in 1937, the Senate Committee on the Judiciary explained its rejection of the Roosevelt Court-packing plan in ringing and pertinent terms:

Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen against the Government itself, create the vicious precedent which must necessarily undermine our system?

Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent court, a fearless court, a court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, that a Court that, out of fear or sense of obligation to the appointing power or fractional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

Exhibiting this restraint, thus demonstrating faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands.[7]

No member of this Congress should lend his or her support to any of the bills that are part of the present assault on the independence of the federal judiciary.

CONFERENCE OF CHIEF JUSTICES, RESOLUTION I

RESOLUTION RELATING TO PROPOSED LEGISLATION TO RESTRICT THE JURISDICTION OF THE FEDERAL COURTS

Whereas, there are presently pending in the United States Congress approximately twenty bills that would strip the federal courts, including the United States Supreme Court, of substantive jurisdiction in certain areas involving prayer in public schools and buildings, abortion, school desegregation and busing, and sex discrimination in the armed services; and

Whereas, the Conference of Chief Justices, without regard to the merits of constitutional issues involved, expresses its concern about the impact of these bills on state courts and views them as a hazardous experiment with the vulnerable fabric of the nation's judicial systems, arriving at this position for the following reasons, among others:

A. These proposed statutes give the appearance of proceeding from the premise that state court judges will not honor their oath to obey the United State Constitution, nor their obligations to give full force to controlling Supreme Court precedents;

B. If those proposed statutes are enacted, the current holdings of those Supreme Court decisions targeted by this legislation will remain the unchangeable law of the land, absent constitutional amendments, beyond the reach of the United States Supreme Court or state supreme courts to alter or overrule;

C. State court litigation constantly presents new situations testing the boundaries of federal constitutional rights. Without the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and

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[6] Resolution Relating to the Proposed Legislation to Restrict the Jurisdiction of the Federal Courts, Conference of Chief Justices, Fifth Midyear Meeting, Williamsburg, Virginia, January 30, 1982.

[7] S. Rep. No. 711, 75th Cong., 1st Sess. 13-14 (1937).

thus the United States Constitution could mean something different in each of the fifty states;

D. Confusion will exist as to whether and how federal acts will be enforced in state courts and, if enforced, how states may properly act against federal officers;

E. The proposed statutes would render uncertain how the state courts could declare a federal law violative of the federal Constitution and whether Congress would need to wait for a majority of the state courts to so rule before conceding an act was unconstitutional;

F. The added burden of litigation engendered by the proposed acts would seriously add to the already heavy caseload in state courts;

Now, Therefore, be it *Resolved* that the Conference of Chief Justices expresses its serious concerns relating to the above legislation, approves the report of the Conference's Subcommittee of the Committee on State-Federal Relations, and directs its officers to transmit that report, together with this resolution, to appropriate members of Congress.

Adopted at the Midyear Meeting in Williamsburg, Virginia on January 30, 1982.

REPORT TO THE CONFERENCE OF CHIEF JUSTICES ON PENDING FEDERAL LEGISLATION TO DEPRIVE FEDERAL COURTS OF JURISDICTION IN CERTAIN CONTROVERSIAL AREAS INVOLVING QUESTIONS OF CONSTITUTIONAL LAW

Pending in the United States Congress are approximately twenty bills that would strip the federal courts, including the Supreme Court, of substantive jurisdiction in certain areas involving prayer in public schools and buildings, abortion, school desegregation and busing, and sex discrimination in the armed services.[1] Several of these proposals would prohibit Supreme Court review of state court decisions within the defined areas,[2] as well as withdraw all jurisdiction from the federal district courts.

Provisions of the United States Constitution that are implicated directly in these proposed measures are found in article III:

"Section 1. *The judicial Power of the United States, shall be vested in one Supreme Court,* and in such inferior Courts as the Congress may from time to time ordain and establish.

"Section 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. *In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."* (Emphasis added.)

Those supporting these bills reason that the withdrawal of jurisdiction is authorized by the article III, section 2, "exception" provision, a congressional power that they assert has been recognized in several Supreme Court decisions commencing with Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1868).[3] Supporters point out that until 1889 no criminal cases were appealable to the Supreme Court, because Congress had not authorized the right.[4] They further rely on prior partial jurisdictional restraints imposed on federal courts in the Norris-LaGuardia Act of 1932 [5] and the Tax Injunction Act.[6]

Opponents of the proposed legislation assert the exception cannot swallow up the rule:[7] That the article III, section 1, delegation of "the judicial Power" to the Supreme Court cannot be diminished, for example, to a limited right in the court to pass only on patent claims.[8] They rely on the language of several Supreme Court decisions starting with *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872).

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[1] Proposed legislation to limit review of sex discrimination in the armed services may be mooted by the decision in *Rostker* v. *Goldberg,* ——— U.S. ———, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981).

[2] See, e.g., H.R. 326, 95th Cong., 1st Sess. (1981). ("[T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation or any part thereof, or arising out of any Act interpreting, applying, or enforcing a state statute, ordinance, rule or regulation, which relates to voluntary prayers in public schools and public buildings.").

[3] Rice, "Limiting Federal Court Jurisdiction:" The constitutional basis for the proposals in Congress today, 65 JuD. 190 192-93 (No. 4 Oct. 1981).

[4] See *United States* v. *Sanges,* 144 U.S. 310, 319, 12 S. Ct. 609, 612-13, 36 L. Ed. 445, 449 (1892).

[5] 29 U.S.C. §§ 101, 107 (1976).

[6] 26 U.S.C. § 7421(a) (1976).

[7] Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," 109 U. Pa. L. Rev. 157, 172 (1960).

[8] Hart, "The Power of Congress to Limit the Jurisdiction of the Federal Courts:" An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364 (1953).

These opponents argue the exceptions "must not be such as will destroy the essential role of the Supreme Court in the Constitutional Plan,"[9] that depriving the Supreme Court of jurisdiction to review the constitutionality of state enactments would nullify the supremacy clause,[10] and that the "exceptions clause" cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights.[11]

It is not the intent of this subcommittee nor the purpose of this report to explore the constitutionality of these congressional efforts to nullify or contain the effect of Supreme Court constitutional interpretations involving the above issues. The published efforts of qualified scholars and commentators have illuminated the opposing views.[12] Further, several state constitutions contain language analogous to that in article III of the United States Constitution, quoted above, and members of this Conference may be confronted with issues involving the constitutionality of similar legislative measures in their own courts.[13]

Nonetheless, this subcommittee would reject its assignment if it failed to express its concerns relating to these bills, and mark the potential fall-out that might accompany their enactment.

First, these proposed statutes give the appearance of proceeding from the premise that state court judges will not honor their oaths to obey the United States Constitution,[14] nor their obligation to follow Supreme Court decisions interpreting and applying that constitution, thus breaking with a 200 year practice and tradition. So viewed, these efforts to transfer jurisdiction to the state courts for these purposes neither enhance the image of those institutions nor demonstrate confidence that state court judges will do their duty.[15] Changes in substantive constitutional law amounting to amendments should not be attempted by excluding federal jurisdiction in the hope that state courts will give less than full force to controlling Supreme Court precedents. The procedure that should be used for such amendments is provided in the constitution itself.

Second, when state court judges honor their oaths, the holdings of those Supreme Court decisions targeted by this legislation will be cast in stone, beyond the reach of the Supreme Court to alter or overrule.

Finally, it must be recognized that state court litigation constantly presents new situations testing the boundaries of federal constitutional rights and requiring judgment calls on applicability of federal constitutional principles. Without the unifying function of Supreme Court review, the United States Constitution could well mean something different in each of the fifty states. Aside from the obvious effect of this anomaly on the nation's citizens, the resulting inconsistencies in legal precedent and the more frequent jurisdictional disputes would further overload state courts.

We believe these considerations, without regard to constitutional issues, should red-flag the above legislation in Congress. We question the wisdom of these bills and view them as a hazardous experiment on the vulnerable fabric of the nation's judicial systems.

LAW REVIEW ARTICLES

Brant, "Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause," 53 Or. L. Rev. 3 (1973).

Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction," 83 Yale L. J. 498 (1974).

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[9] I.d. at 1365.

[10] U.S. Const. art. VI.

[11] Taylor, "The unconstitutionality of current legislative proposals," 65 Jud. 199, 203-04 (No. 4 Oct. 1981).

[12] See the attached bibliography.

[13] See, e.g., Ala. Const. art. 6, § 140(c); Alas. Const. art. 4, § 1; Ark. Const. art. 7, § 4; Conn. Const. art. 5, § 1; Hawaii Const. art. 6, § 1; Iowa Const. art. 5, § 4; Kan. Const. art. 3, § 3; Neb. Const. art. 5, § 2; Ohio Const. art. 4; §§ 2 3; Pa. Const. art. 5, § 2; S.D. Const. art. 5, § 5; Tenn. Const. art. 6, § 2; Tex. Const. art. 5, §§ 3, 5, 6; Vt. Const. ch. 2, § 3; Va. Const. art. 5, § 1; W. Va. Const. art. 8, § 3.

[14] These oaths are required by the supremacy clause, U.S. Const. art. VI.

[15] Typical of observations made by commentators is this from remarks prepared by Professor Paul Gewirtz, Yale Law School, dated March 27, 1981, and entitled "Why Proposed Legislation to Restrict Federal Court Jurisdiction is Unwise and Unconstitutional"—"The sponsors of the bills have obviously made the judgment themselves that many state courts will enforce existing rights with far less vigor and effectiveness than their federal court counterparts; that is the point of the proposed legislation."

Forkosch, "The Exceptions & Regulations Clause of Article III & a Person's Constitutional Rights: Can the Latter Be Limited by Congressional Power Under the Former?," 72 W. Va. L. Rev. 238 (1970).
Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362 (1953), reprinted in P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, "Hart and Wechsler's The Federal Courts and the Federal System" 330 (2d ed. 1973).
Lenoir, "Congressional Control Over the Appellate Jurisdiction of the Supreme Court," 5 Kan. L. Rev. 15 (1956).
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Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis," 47 Minn. L. Rev. 53 (1962).
Nagel, "Court-Curbing Periods in American History," 18 Vand. L. Rev. 925 (1965).
Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," 109 U. Pa. L. Rev. 157 (1960).
Redich & Woods, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis," 124 U. Pa. L. Rev. 45 (1975).
Rotunda, "Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing," 64 Geo. L. J. 839 (1976).
Sager, "The Supreme Court, 1980 Term-Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," 95 Harv. L. Rev. 17 (1981).
Strong, "Rx for a Nagging Constitutional Headache," 8 San Diego L. Rev. 246 (1971).
Thompson & Pollitt, "Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders," 50 N.C. L. Rev. 809 (1972).
Tribe, "Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts," 16 Harv. C.R.-C.L. L. Rev. 129 (1981).
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Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001 (1965).

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P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, "Hart and Wechsler's The Federal Courts and the Federal System," 309-65 (2d ed. 1973).
"Members Move to Rein in Supreme Court," Cong. Q. 947-51 (May 30, 1981).
"Symposium—Limiting Federal Court Jurisdiction: Can Congress do it? Should Congress do it?," 65 Jud. (No. 4 Oct. 1981).

Mr. KASTENMEIER. The Chair would like to yield to the gentleman from Massachusetts.

Mr. FRANK. I want to add to the chairman's comments to thank you, Mr. Brink, and the bar association.

I have spent my first year and a half in the House here in this committee and I have been consistently impressed with the willingness of the American Bar Association to put time and effort into a lot of difficult questions.

I say that because this is the committee that gets the questions everybody else wants to duck, including the White House, a lot of our members and a lot of other associations. The consistent willingness of the American Bar Association has really been estimable. They go far beyond what might be seen as the professional interest. Obviously there are legitimate interests in protecting the profession, but it has gone beyond that and I appreciate it.

Let me ask you one thing you said that I have been meaning to ask people. If you are not, if you haven't worked on it, no need. But you referred to the decision upholding *LaGuardia*. Could you distinguish the *Norris-LaGuardia* precedent for us for these purposes?

Mr. BRINK. Well, my recalled answer to that which I have expanded on a little in the written testimony, is that first it did not really limit or cut off a constitutional remedy under the Constitution of the United States. Primarily, it limited remedies under the

State laws and State constitutions insofar as limiting the injunction power of the Federal courts.

I think at the time it was decided it was rather clear that there was not a Federal constitutional issue involved anymore. Further, I might add to that that it is rather interesting in some of the subsequent litigation over that that one of the interesting developments is that the approach used in S. 951 I believe proved to be ineffective even though the case was not an identical one in that I think it was held later in the *Hoyes Market* case which I don't have the citation to hear because the injunctive remedy was available in the State courts, it would also be able in the lower Federal courts and upper Federal courts.

I simply think this is not a case of involving the limitation of constitutional problems arising under the U.S. Constitution; therefore, I think that the *U.S.* v. *Klein* is a much more applicable precedent.

Mr. FRANK. Thank you. Let me go on to one other point I felt was important. A lot of individuals come in and out of these various fights in different points in history. The bar association, as you said, has had some continuity in this regard. And I sense I guess what you are saying is it has been the experience of the bar association as an entity that bills to somehow impinge on the freedom of the courts to interpret the Constitution inevitably are going to go against one side or another.

In fact, ideologically there have been a series of attacks from the right and from the left, and that the first time any such proposal is enacted, new law I would assume that would call back up a whole range of others that are waiting around.

That is that experience would suggest that once Congress sets the precedent saying, here is how we are going to deal with the courts, there would be a whole range of other areas where that would be inevitable that that would happen.

Mr. BRINK. I think that that is true. I assume that if the first case were held unconstitutional in a sufficiently broad opinion, it might discourage further attacks on some of the other measures. That is, it might be regarded as settling them.

However, it would I think produce a great deal of legislation that would have to be corrected and would produce a great deal of litigation in the lower Federal courts following such an opinion.

Obviously, the other point that you made is also true, however, that if there is a perception that this will work, it will be applied to any number of subjects.

Mr. FRANK. People sometimes aren't happy when an organization takes a position and we are often told well, that is the leadership. That is the Washington lead, or whatever, talking to each other.

Would you just briefly describe the process and your estimate of the degree of support within the bar association for the position the association has taken on all these court stripping bills?

Mr. BRINK. Yes; I would be very glad to do that. I might say that first our policy is made by a house of delegates consisting of 387 members, I believe is the current count. These people include representatives of every State. They include representatives of all of our 24 sections and divisions.

They include members of affiliated organizations, and there are a number of at-large members who are there by virtue of some other office. For example, the Attorney General of the United States is one of our members of our house of delegates. I do not believe that he was present and voting at the time we voted on this particular measure. However, that is a very broad constituency, and I think it is fairly representative of our association as a whole.

Obviously we have Republicans, we have Democrats, we have independents, we have all types of persons. And frankly were we to address the subject matter of these bills, I don't know what the response would be because I think we fairly represent a cross-section of, you might say, the United States with regard to those social and moral issues.

With regard to the legal issue there was substantial unanimity. I might add that this is not an unprecedented position for our association to take. In 1958 we had a resolution that we believed covered this point.

The action taken in 1981 was really for the purpose of verifying it and pinpointing it to these particular bills. Before the 1958 resolution there had been action in 1950 of a similar nature. Prior to that many things have been considered ad hoc as they arose issue by issue, rather than in the generality with which they have been considered lately.

For example, the opposition to the court packing plan in 3637. Toward the beginning of the century there were also resolutions on individual items that were in accordance. So I think this is a relatively consistent position and certainly taken by a broad cross-section of the bar.

Mr. FRANK. Thank you.

Mr. BRINK. May I add one comment, Mr. Chairman?

Mr. KASTENMEIER. Sure.

Mr. BRINK. I have been reminded of something I should have said before. Not only does our organization support this, and not only do the organizations listed on the letter from the attorneys general and others that I have submitted for the record, but the State bars of this Nation of which there are I assume at least 50, there may be 52; if we count Puerto Rico and so forth, at any rate, of those we have already heard from 32 of them who have taken positions essentially congruent with our own.

They strongly feel the same way. In fairness, I will say I think there are about three that declined to take such a position, not so much disagreeing with it, perhaps, as because they felt they did not want to be injecting themselves into such controversial an item.

But at any rate the State bars strongly bother us in this. There are numerous of the large metropolitan bars and that do so and also local bars.

Mr. FRANK. Are there any that have taken the other side?

Mr. BRINK. I do not believe anyone——

Mr. FRANK. We are getting a no from your staff behind you.

Mr. BRINK. I don't believe anyone has voted to the contrary. It has either been a question of not taking action, or deciding it is too controversial. But I don't know anybody that has voted that our position is wrong. Am I correct? No one has voted that our position is wrong.

Mr. KASTENMEIER. That is to say, you are referring to the some perhaps 20 State bar associations that have not taken a position as yet, you state that none of them has taken a position which advocates stripping the courts of jurisdiction?

Mr. BRINK. That's correct, absolutely none.

Mr. KASTENMEIER. If the Neighborhood School Act passes the House as it so readily passed the Senate, and should the President sign such a bill, I would assume that it would be litigated. Would it be your view that the present Supreme Court is likely to find the act unconstitutional? I know you have quoted a couple of fairly current decisions pointing in that direction.

Mr. BRINK. I think I would be imprudent to try to forecast what the outcome would be. I will say that I was very encouraged not only by what I knew already, but by the several decisions issued June 30 and July 1 which, it seemed to me, found a number of things.

The pipeline case, we found the strong insistence that article III courts decide this. Now that is not a relevant precedent directly, but I think it tells us something. *Washington* v. *Seattle School District* case I think tells us that intent is very readily to be inferred to achieve racial classifications, even though race was not mentioned.

Point out that in S. 951, it is stated right up front that one of the inducements to the bill is that busing to achieve racial desegregation has not worked. That was absent in the *Washington* v. *Seattle* case. Yet they found sufficient intent to overcome the injury, or show the injury segregative intent.

I was pleased by the decision of Justice O'Connor that I quoted from, indicating that, as I think we all believe, section 5 of article 14 does not support bills of this kind. So on the whole I would say that I feel encouraged, rather than otherwise, by the most recent decisions of the U.S. Supreme Court. But I would hate to say what the Court would do in a given case.

Mr. KASTENMEIER. Whether or not one is clairvoyant enough to forecast what the Court might do, is it certainly not the case that it would be highly regrettable for the Supreme Court to be confronted in terms of a constitutional crisis, whereby it would be forced literally to justify its own jurisdictional values under the Constitution.

Mr. BRINK. I think it would indeed, Mr. Chairman. Both the Congress and the Court have shown in the past extreme deference to the provinces of each other. I think that leaving the Court to be sole defender of its role, so to speak, would be unfortunate, however the case would be decided.

My feeling is that it seems that public confidence in all our institutions, including unfortunately the legal profession, is not terribly high these days. And I fear that the institutional perception of our Government, all of its branches, would be diminished if this confrontation occurs, irrespective of the outcome.

If as I expect that it should be the bills of this kind were held unconstitutional, I think we would hear a clamor from people who look only at the subject matter and not at the process, that they might even introduce amendments to abolish the court system, or something else.

I think that would be unfortunate. If by any chance the Court sustained any of these measures, I think that, as has been suggested, the door would be opened so that, bit by bit, we would strip away the powers of the Federal courts to protect our constitutional right.

And I think that would also be disastrous. So I would hope a restraint that has characterized I think both this Congress and the courts would be continued and that we would not put this to the ultimate confrontation.

Mr. KASTENMEIER. That analysis certainly confirms your sense of urgency about this issue. Indeed, this committee appreciates and is grateful to you for not only your contribution but also that of the organization which you so ably represent.

Mr. BRINK. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. That concludes hearings today on S. 951, the Neighborhood School Act. The letter referred to from the Attorney General to Chairman Rodino will be included as part of the record. There will be further hearings next week. A week hence, we will hear from the Justice Department. In that regard, I am not sure the Attorney General will be present but the Justice Department will be represented. Until then, the subcommittee stands adjourned.

[Whereupon, at 12:45 p.m., the subcommittee was adjourned.]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 6, 1982.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request concerning those portions of S. 951, the Senate-passed version of the Department of Justice appropriation authorization bill for Fiscal Year 1982, which relate to the mandatory transportation of school children to schools other than those closest to their homes ("busing"). One of these provisions relates to the remedial powers of the inferior courts and the other to the authority of the Department of Justice. This letter discusses the effect of these provisions as well as the policy and constitutional implications of the provisions as construed. The funding provisions of S. 951 will be addressed in a separate letter by the Assistant Attorney General of the Office of Legislative Affairs.

It is important to note at the outset that S. 951 does not withdraw jurisdiction from the Supreme Court to limit the jurisdiction of the federal courts to decide a class of cases. The provisions of the bill and its legislative history make clear that the effect of these provisions relate only to one aspect of the remedial power of the inferior federal courts—not unlike the Norris-LaGuardia Act, enacted in 1932. Nor do the provisions limit the power of state courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. Careful examination of these provisions indicates that they are constitutional.

I. BUSING PROVISIONS OF S. 951

The first provision, § 2 of the bill, entitled the "Neighborhood School Act of 1982," recites five congressional findings to the effect that busing is an inadequate, expensive, energy-inefficient and undesirable remedy. It then states that, pursuant to Congress' power under Article III, § 1 and § 5 of the Fourteenth Amendment, "no court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closet to the student's residence unless" such assignment or transportation is voluntary or "reasonable". The bill declares that such assignment or transportation is not reasonable if—

"(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

"(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

"(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

"(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or

"(v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the student's residence with a grade level identical to that of the student."

Section 2(f) of the bill adds a new subparagraph to § 407(a) of Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a), authorizing suits by the Attorney General to enforce rights guaranteed by the bill if he determines that a student has been required to attend or be transported to a school in violation of the bill and is otherwise unable to maintain appropriate legal proceedings to obtain relief. The bill is made "retroactive" in that its terms would apply to busing ordered by federal courts even if such order were entered prior to its effective date. Section 16 of the bill supplements these provisions by providing that "[n]otwithstanding any provision of this Act, the Department of Justice shall not be prevented from participating in any proceedings to remove or reduce the requirements of busing in existing court decrees or judgments."

The second provision, § 3(1)(D), limits the power of the Department of Justice to bring actions in which the Department would advocate busing as a remedy:

"No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped."

II. GENERAL COMMENTS

There appear to be ambiguities in the Neighborhood School Act's provisions for suits to be brought by the Attorney General challenging existing decrees. For example, it is unclear what, if any, obligations are placed on the Attorney General with regard to court decrees that offend § 2. Since the bill does not purport to prevent any governmental entities other than federal courts from requiring the transportation of students, the Attorney General's review of a complaint must include the inquiry whether the transportation is the result of federal court action. It is difficult to determine the party against whom the action is to be brought. The assignment violates the Neighborhood School Act only if it is required by court order. Does the Attorney General sue the court? If so, then what relief is appropriate? Does the bill permit an action against a school board even though its actions are not the subject of the bill's prohibition? If a school board is the defendant, then what relief is appropriate? Does the Attorney General ask that the school board be enjoined from complying with the court order? Does he ask for a declaratory judgment of the board's obligations under the order? If the latter is the case and the board wishes to continue its present assignment patterns, what will have been accomplished by the lawsuit? These questions illustrate the problems incident to the provisions that allow for collateral attack on existing decrees.

Serious concern arises also because of the limitation on the Attorney General's discretion contained in § 3(1)(D). This Administration has repeatedly stated its objection to the use of busing to remedy unlawful segregation in public schools. See Testimony of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, Concerning Desegregation of Public Schools, October 16, 1981. The express limitation on the Department's authority is unnecessary and may inhibit the ability to present and advocate remedies which may be less intrusive and burdensome than those being urged on a court by other litigants. Moreover, because the limitation is imposed only in the Department's one-year authorization, there is no force to the argument that a statutory provision is necessary to ensure that successive Administrations will also carry out congressional intent. Finally, to the extent that Congress does intend to effect a long-term substantive change in the law, the proper vehicle would seem to be permanent substantive legislation, not an authorization bill which must be reviewed annually by Congess and which becomes more difficult to enact

and thus less efficient for its necessary purposes when it is encumbered by extraneous matters.

III. CONSTITUTIONALITY

A. Textual interpretation of the Neighborhood School Act

The Neighborhood School Act restricts the power of inferior federal courts to issue remedial busing decrees where the transportation requirement would exceed specified limits of reasonableness. That it does not purport to limit the power of state courts or school boards is amply demonstrated by its text and by statements of its supporters. Senator Hatch, in a colloquy with Senator Johnston, stated that "this bill does not restrict in any way the authority of State courts to enforce the Constitution as they wish. . . ." 127 Cong. Rec. S 6648 (daily ed. June 22, 1981). On the day that the bill passed the Senate, Senator Johnston echoed these remarks:

"If a school board wants to bus children all over its parish or all over its county, it is not prohibited from doing so by this amendment. Nor indeed would a state court if it undertook to order that busing. The legislation deals only with the power of the Federal courts. . . ." 128 Con. Rec. S 1324 (daily ed. March 2, 1982).

The impact of the Neighborhood School Act on the federal courts is also limited. It withdraws, in specified circumstances, a single remedy from the inferior federal courts. The substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power only of the inferior federal courts, not the Supreme Court. There is strong textual support for this conclusion, because the bill recites that it is enacted pursuant to congressional power under Article III, § 1. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. The source of congressional authority relative to the jurisdiction of the Supreme Court is the "Exceptions Clause," Article III, § 2, cl. 2. The conspicuous and apparently intentional omission of that clause as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

Moreover, there do not appear to be any direct statements in the legislative history to the effect that any restriction on the Supreme Court's jurisdiction was intended. To the contrary, there is an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

"There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle inferior federal courts has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court. . . .

"This amendment would be only a slight modification of lower federal court jurisdiction. These inferior federal courts would no longer have the authority to use one remedy among many for a finding of a constitutional violation.

* * * * * * *

"I would hasten to add that this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.

"In short, this is a very, very narrow amendment, it only withdraws a single remedy which Congress finds inappropriate from the lower Federal courts.

* * * * * * *

"Mr. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction."127 Cong. Rec. S 6648-49 (daily ed. June 22, 1981).

B. Legal status of transportation remedies

In *Brown* v. *Board of Education* [II], 349 U.S. 294, 300 (1955), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "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." *Milliken* v. *Bradley* [I], 418 U.S. 717, justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," *Swann* v. *Charlotte-Mecklenburg Board,* 402 U.S. 1, 16

(1974), and "a federal court is required to tailor 'the scope of the remedy' which included the transportation of students to schools other than the ones which they had formerly attended, to fit 'the nature and the extent of the constitutional violation,'" "*Dayton Board of Education* v. *Brinkman* [I], 433 U.S. 406, 420 (1977), quoting *Milliken* v. *Bradley* [I], *supra* at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed . . . *remedial,*" *Milliken* v. *Bradley* [II], 433 U.S. 267, 280 (1977), that is when it is aimed at making available to the victims of unlawful segregation a school system that is, free of the taint of such segregation.

The Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended would be unavoidable in order to vindicate constitutional rights. If school authorities have segregated public school students by race, they shoulder a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed discrimination," *Swann, supra,* 402 U.S. at 15. The Court has said that if this duty cannot be fulfilled without the mandatory reassignment of students to different schools, with the concomitant requirement of student transportation, this remedy cannot be statutorily eliminated. In *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43 (1971), the Court overturned a North Carolina statute that proscribed the assignment of students to any school on the basis of race, "or for the purpose of creating a balance or ratio of race," and prohibited "involuntary" busing in violation of the statutory proscription. The Chief Justice, writing for a unanimous Court, concluded:

> [I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of constitutional rights.
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> * * * * * * *

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio" will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As we noted in *Swann, supra,* at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." 402 U.S. at 45-46.

Although the Court has indicated that some student transportation might be a necessary incident to a desegregation decree, it has never stated with particularity what those cases might be, nor has it identified the limitations on busing orders in cases where transportation is constitutionally required. In *Swann* v. *Charlotte-Mecklenburg Board, supra,* for example, the Court declined to provide "rigid guidelines" governing the appropriateness of busing remedies. It stated only that busing was to be limited by factors of time and distance which would "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Limits on time and distance would vary with many factors, "but probably with none more that the age of the students." id at 31.

C. Congressional power under section 5 of the 14th amendment

In light of the Supreme Court's conclusion that student transportation might in some circumstances be a necessary feature of a remedial desegregation decree, it is necessary to consider whether the limitation on the power of the inferior federal courts under the Neighborhood School Act would be justified as an exercise of congressional authority under § 5 of the Fourteenth Amendment. Section D, infra, focuses on Congress' power under Article III, § 1, which is broader in this context that § 5.

Section 5 provides that Congress "shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the Equal Protection clause, which has been held to guarantee all students a right to be free of intentional racial discrimination or segregation in schooling. *Brown* v. *Board of Education* [I], 347 U.S. 483 (1954). The question is whether congressional power to enforce that right by appropriate legislation includes authority to limit the power of the lower federal courts to award transportation remedies generally and specifically in those cases in which some transportation is necessary fully to vindicate constitutional rights.

The cases of *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), *Oregon* v. *Mitchell,* 400 U.S. 112 (1970; *City of Rome* v. *United States,* 446 U.S. 156 (1980); and *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) (plurality opinion), firmly establish that the § 5 power is a broad one. Congress may enact statutes to prevent or to remedy situations

which, on the basis of legislative facts, Congress determines to be violative of the Constitution. At the same time, these cases rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court.

The limitation on busing remedies contained in the Neighborhood School Act would be authorized under § 5 to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. The grant of power under § 5 to "enforce" the Fourteenth Amendment carries with it subordinate authority to determine specific methods by which that amendment is to be enforced. As an incident of its enforcement authority, therefore, Congress may instruct the lower federal courts not to order mandatory busing in excess of the § 2(d) limits, so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.

Moreover, federal and state courts would probably pay considerable deference to the congressional factfinding upon which the bill is ultimately based in determining the scope of constitutional requirements in this area. The Court has stated that, so long as it can "perceive a basis" for the congressional findings, *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, it will uphold a legislative determination that a situation exists which either directly violates the Constitution or which, unless corrected, will lead to a constitutional violation. Similar deference would be appropriate for findings under this bill, notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which have supported or undermined the specific limitations on federal court decrees contained in § 2(d) of the bill. It is likely, however, that the time and distance limitations contained in § 2(d) of the bill would serve as legitimate benchmarks for federal and state courts in the future in devising appropriate decrees. To this extent, the exercise of congressional power under § 5 would be fully proper and effective.

Nor does it appear that the Neighborhood School Act would be interpreted to "dilute" Fourteenth Amendment rights merely because it denies a certain form of relief in the inferior federal courts or includes certain retroactivity provisions in §§ 2(f) and (g). Congress cannot, under § 5, prohibit a federal district court from granting a litigant all the relief that the Fourteenth Amendment requires. Moreover, the state courts would remain open to persons claiming unconstitutional segregation in education after this bill becomes law, and would be empowered—indeed, required—to provide constitutionally adequate relief.

Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation. Congressional power to enforce the Fourteenth Amendment is not a power to determine the limits of constitutional rights. Although it includes the power to limit the equitable discretion of the lower federal courts to impose remedial measures which are not necessary to correct the constitutional violation, the courts must retain remedial authority sufficient to correct the violation. And although Congress can express its view through factfinding, but subject to the limitations set forth in § 2(d) of the bill, that busing is an ineffective remedial tool and that extensive busing is not necessary to remedy a constitutional violation, it is ultimately the responsibility of the courts to determine, after giving due consideration to the congressional findings contained in this bill, whether in a given case an effective remedy requires the use of mandatory busing in excess of the limitations set forth in § 2(d) of the bill.

In sum, Congress, pursuant to § 5, can: (1) limit the authority of federal district courts to require student transportation where it is not required by the Constitution; and (2) adopt guidelines, based on legislative factfinding, as to when busing is effective to remedy the violation, which guidelines will tend to receive substantial deference from the courts. Section 5 does not, however, authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation. This authority must be found, if at all, in the power of Congress under Article III, § 1 to restrict the jurisdiction of the lower federal courts.

D. Congressional power under article III, § 1

Congress authority to limit the equitable powers of the inferior federal courts has been repeatedly recognized by the Supreme Court. Article III, § 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See also U.S. Const., Art. 1, § 8, cl. 9 (giving Congress power

to "constitute Tribunals inferior to the supreme Court"). It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of the court's jurisdiction was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction was accepted by the Supreme Court in *Cary* v. *Curtis,* 44 U.S. (3 How.) 236 (1845), and *Sheldon* v. *Sill,* 49 U.S. (8 How.) 441 (1850). That view remains firmly established today.

Congress power over jurisdiction has been further recognized, most notably in cases under the Norris-LaGuardia Act, to include substantial power to limit the remedies available in the inferior federal courts. In *Lauf* v. *E.G. Shinner & Co.,* 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris-LaGuardia Act which imposed restrictions on federal court jurisdiction to issue restraining orders or injunctions in cases growing out of labor disputes. In two cases under the Emergency Price Control Act, the Supreme Court recognized the power of Congress to withdraw certain cases from the jurisdiction of the inferior federal courts and to prohibit any court from issuing temporary stays or injunctions. See *Lockerty* v. *Phillips,* 319 U.S. 182 (1943); *Yakus* v. *United States,* 321 U.S. 414 (1944).

The provisions of the Neighborhood School Act appear to be firmly grounded in Congress' Article III, § 1 power, as interpreted in *Lauf, Lockerty,* and *Yakus,* to control the inferior federal court jurisdiction. The bill does not represent an attempt by Congress to use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power. The bill does not instruct the inferior federal courts how to decide issues of fact in pending cases. *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872).

Nor does the bill usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. The bill does not withdraw the authority of inferior federal courts to hear desegregation cases or to issue busing decrees, so long as they comport with the limitations in § 2(d) of the bill. This limited effect on the court's remedial power does not convert the judicial power—to hear and decide particular cases and to grant relief—into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases. Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Neither the text of the bill nor the legislative history appears to support the conclusion that the bill requires an automatic reversal of any outstanding court order that imposed a busing remedy beyond the limits specified in the bill. Such an attempt to exert direct control over a court order would raise constitutional problems associated with legislative revision of judgments. *E.g., Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) (on petition for mandamus). The "retroactive" effect is felt instead through a change in the substantive law, in this case the law of remedies, to be applied by courts in determining whether to impose or to revise a busing remedy, coupled with the grant of authority to the Attorney General to seek relief on behalf of a student transported in violation of the Act. Upon the Attorney General's application, the court would itself determine whether the busing remedy was consistent with the Act. The bill, therefore, does no more than require the court to apply the law as it would then exist at the time of its decision in a "pending" case. *See* "The Schooner Peggy," 5 U.S. (1 Cranch) 103 (1801).

The busing remedy is "pending" and not final to the extent that the court has retained jurisdiction over the case or the order is otherwise subject to modification by the court in the exercise of its equity jurisdiction. See *United States* v. *Swift & Co.,* 286 U.S. 106, 114-15 (1932). Prior to or in the absence of relief by the court from a previously imposed busing order, the parties before the court would be required to continue to perform pursuant to the court's order. Cf. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855).

E. Constitutionality of section 3(1)(D)

Section 3(1)(D) of the bill prohibits the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The effect of § 3(1)(D) is only to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it

would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

The limitation would restrict the litigating authority presently conferred upon the Department by Title IV to seek all necessary relief to vindicate the constitutional rights at stake. At least in cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be restricted to this limited extent. Because the restriction does not entirely preclude enforcement actions by the United States, § 3(1)(D) does not impermissibly limit the Executive's "inherent" authority to remedy constitutional violations, to the extent recognized in *United States* v. *Philadelphia,* 644 F.2d 187 (3d Cir. 1980), or *New York Times* v. *United States,* 403 U.S. 713, 741-47 (1971) (Marshall, J., concurring). And because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, § 3(1)(D) does not exceed the congressional power over the enforcement authority that is granted.

Where federal funds are provided, § 3(1)(D) would be constitutional if read to preserve the Government's ability to fulfill its Fifth Amendment obligations by initiating antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits. The Department would be authorized to seek alternative remedies and to comment on the sufficiency of these alternatives. If the alternative remedies to busing are inadequate in a particular case to vindicate the rights at stake, the court would retain authority, subject, of course, to the Neighborhood School Act provisions, to order a transportation remedy. The Department could be asked to comment on the sufficiency of this remedy if ordered by the court.

Moreover, § 3(1)(D) would not appear to disable the Department of Justice from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the administrative agency was precluded from terminating federal funds. See *Brown* v. *Califano,* 627 F.2d 1221 (D.C. Cir. 1980).

F. Due process clause

Finally, both the limitation on the courts under the Neighborhood School Act and on the Department of Justice under § 3(1)(D) should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, see *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), as a deprivation of a judicial remedy from a racially identifiable group. These provisions neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. See *Harris* v. *McRae,* 488 U.S. 297 (1980).

As the law has developed, the courts will review statutory classifications according to a "strict scrutiny" standard either if they create a racial or other "suspect" classification, *e.g., Hunter* v. *Erickson,* 393 U.S. 385 (1969), or if they reflect an invidious discriminatory purpose. E.g. *Village of Arlington Heights* v. *Washington Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington* v. *Davis,* 426 U.S. 229 (1976); cf. *Mobile* v. *Bolden,* 446 U.S. 55 (1980) (plurality opinion). Satisfaction of the strict scrutiny standard requires a classification that is narrowly tailored to achieve a compelling governmental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

First, these provisions, unlike the provision found unconstitutional in *Hunter* v. *Erickson,* supra, do not contain a racial classification. Mandatory busing for the purpose of achieving racial balance is only one of the circumstances in which student transportation is placed off limits to Justice Department suits or district court orders. The proposals prohibit Justice Department suits or court orders for the transportation of students specified distances or away from the schools nearest their homes for any reason. Moreover, a racial classification would not result even if these provisions limited advocacy or ordering of mandatory busing only to achieve racial integration. The issue of what sorts of remedies the Justice Department should advocate or the federal district courts should order simply does not split the citizenry into discrete racial subgroups. Cf. *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979).

Second, there appears to be no evidence of purposeful discrimination. Whatever might be the arguable impact on racial minorities, the legislative history to date contains no suggestion of an invidious discriminatory purpose. To the contrary, the sponsors and supporters of these measures endorsed the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and repeatedly stated their abhorrence of de jure

segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of the bill did not suggest that any invidious purpose was present.

Accordingly, the bill will not be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purposes. This test is a highly deferential one. It is reasonably clear that the defects in busing noted by the proponents of the bill and discussed above would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advance other rationales to support the measure, including that mandatory busing is a excessive burden on the taxpayer; that it wastes scarce source petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons appear to be legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

It should be noted in closing that these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

LIMITATIONS ON COURT-ORDERED BUSING—THE NEIGHBORHOOD SCHOOL ACT

THURSDAY, JULY 22, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Schroeder, Railsback, and Sawyer.

Also present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The meeting will come to order.

The subcommittee is convened today for the third hearing in a series on the Helms-Johnston amendment to S. 951. This amendment, known as the Neighborhood School Act, would greatly limit the authority of the Department of Justice in its ability to order remedies to unconstitutional racial segregation in the public schools.

We have heard from Senator Johnston and several of our colleagues in the House in support of the amendment. Last week we heard from several national legal leaders, including three former Attorneys General, the president of the American Bar Association—all in opposition to the provision.

Today we are pleased to greet and hear from a representative of the administration, Hon. Theodore B. Olson, the Assistant Attorney General, Office of Legal Counsel. You are most welcome, Mr. Olson.

I note that you have a prepared statement of some 45 pages. You may proceed as you wish.

TESTIMONY OF THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. OLSON. Thank you, Mr. Chairman, Mr. Sawyer.

I am pleased to appear here today on behalf of the Attorney General to present the views of the administration regarding the provisions of S. 951 that relate to the authority of the Justice Department to seek, and the inferior Federal courts to order, compulsory transportation of schoolchildren in school desegregation cases. The

Attorney General has expressed his views regarding the constitutionality of these provisions in a letter of May 6, 1982, to Chairman Rodino of the Judiciary Committee.

Although I would not presume to improve upon his comments, I do hope today to elaborate on those views and to address the questions that you, Mr. Chairman, raised in your invitation to the administration to testify before your subcommittee. I have a prepared statement that I will summarize and will ask that the full statement be included in the record.

Mr. KASTENMEIER. Without objection, your statement will be included in the record.

Mr. OLSON. Thank you, Mr. Chairman.

As you noted, two provisions of S. 951 are involved. The first is entitled "The Neighborhood School Act of 1982." It comprises section 2 of the bill; and it provides limits on the extent to which Federal courts may order transportation of schoolchildren to schools other than those nearest their homes. The second provision is section 3(1)(D), which provides in general that the Department of Justice shall not bring or maintain an action to require transportation of students other than to the school nearest to the student's home.

Because of the concern which has been expressed regarding the constitutionality of these provisions, I will generally confine my remarks to the constitutional questions. Before addressing the substance of the proposals, however, I would like to make a few preliminary observations.

First, the Attorney General's May 6 letter to Chairman Rodino stated his opinion that the express limitation on the Department's authority contained in section 3(1)(D) relative to the use of funds appropriated under this authorization act was unnecessary, given this administration's clear position on the use of mandatory busing in school segregation cases.

That limitation in fact may have the incidental effect of impairing the Department's ability to present and advocate a remedy which might in a particular situation be less burdensome on students and local school systems than those being urged on the Court by other litigants.

Second, with respect to the retroactive aspect of the bill, the Neighborhood School Act, and the possibility of reopening previously resolved cases, William Bradford Reynolds, Assistant Attorney General of the Civil Rights Division of the Department of Justice, has presented the administration's view that the Department does not favor blanket retroactive application.

Many of the decrees which might be made subject to attack by these provisions have been in existence for years, and to require school systems and communities that have long since accepted busing decrees to begin anew the agonizing process of redrafting school assignments through the litigation process would, in many cases, be highly disruptive.

The final preliminary comment is that our conclusions regarding these provisions and their constitutionality are predicated on our reading of the proposed legislation and the legislative history compiled to date. To the extent that subsequent history changes the apparent intent or content of the bill, our conclusions regarding its advisability or constitutionality could be affected.

This legislation represents a reaction to a particular means adopted by some courts to eliminate unconstitutionally segregated public school systems. In *Brown* v. *Board of Education*, in 1954, the Supreme Court found that State-imposed segregation of schoolchildren by race violated the 14th amendment's guarantee of equal protection of the laws.

In the second *Brown* case in 1955, the Court first considered the manner in which unconstitutional segregation was to be relieved. The Court recognized that individual cases required solutions of "varied local school problems" and that in evaluating the solutions developed by school authorities, "the courts will be guided by equitable principles"—that is, "a practical flexibility in shaping . . . remedies and by a facility for adjusting and reconciling public and private needs."

Under these principles, as the Supreme Court has more recently explained, "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." Thus, school authorities administering racially segregated public school systems have a constitutional obligation "to eliminate from the public schools all vestiges of State-imposed discrimination" and to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

But the judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," and "a Federal court is required to tailor 'the scope of the remedy' to 'fit the nature and the extent of the constitutional violation'." Thus, "an objection to the transportation of students may have validity", in the words of the Supreme Court, "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge upon the educational process."

As recently as 3 weeks ago, the Supreme Court noted that busing is not a constitutional end in itself. It is simply one potential tool available for use to satisfy a school district's constitutional obligation. The Court has recognized that in some circumstances the costs of busing in both financial and education terms may render its use inadvisable.

Morever, the affirmative values and educational benefits of neighborhood schooling, in the words of the Supreme Court, are legitimate and "racially neutral." It is similarly legitimate to consider that mandatory busing may aggravate rather than ameliorate the segregation problem.

There is a growing body of evidence, much of which was before the Senate in the debate on the Neighborhood School Act, that mandatory busing, particularly over long distances, may be counterproductive to the educational experience of the children involved and that it is costly, disruptive and not conducive to the desegregation of schools.

The Senate, therefore, voted to place limits of 10 miles and 30 minutes on the round trip to which students could be exposed against their will in the implementation of a desegregation remedy and also prohibited mandatory transportation if reasonable alternatives exist which involve less time in travel, distance, danger, or

inconvenience, or if a busing plan would lead to greater racial imbalance.

The Congressional Record of the Senate debate on busing reflects the recognition that opposition to busing was not limited to whites, but was shared in large measure by substantial segments of the black community. Various Senators also urged that mandatory busing has not worked to eliminate segregation in education; has not improved the education provided to financially disadvantaged children; and has aggravated rather than alleviated racial tensions. It was also asserted that the emotional reactions of students and parents to long-distance mandatory busing undermine support for civil rights legislation.

For their part, opponents of these measures have not been able to refute these conclusions. Diminishing numbers of experts contend that busing has been effective in eliminating segregation in public schools, that it has furthered the goal of quality education for all students, or that it has produced a positive attitude of equality of the races or harmonious race relations.

We must not forget that the children who are forced to ride buses for long periods to schools far from their homes have not contributed to the unconstitutional conditions which require a solution. We must not impose intolerable burdens on them in order to correct a situation that was not of their making.

In summary, with respect to the constitutional questions, before I elaborate on these conclusions in detail, we conclude that careful examination and construction of both section 2 of the Neighborhood School Act and section 3(1)(D) lead to the conclusion that they are constitutional.

We do not believe that S. 951 withdraws appellate jurisdiction from the Supreme Court to consider a class of cases or to decide constitutional questions.

Neither does S. 951 limit the jurisdiction of the inferior Federal courts to hear and adjudicate allegations of unconstitutional racial segregation of schools. The effect of section 2 relates to and limits but one aspect of the remedial power of the inferior Federal courts.

Finally, S. 951 does not affect the power of State courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. As thus construed, section 2 is a constitutional exercise of Congress' authority under article III, section 1 of the Constitution to create the inferior Federal courts and to place restrictions on their remedial authority.

We believe that section 3(1)(D) is also constitutional. That section does not affect the authority of the Department of Justice to institute litigation against segregated school systems under title IV of the Civil Rights Act of 1964. The effect of section 3(1)(D) is to restrict only the advocacy by the Department of a busing remedy. The Department may continue to seek alternative remedies and it may comment on the sufficiency of these alternatives. The Court may order busing within the limitations prescribed by the Neighborhood School Act.

I would like to turn briefly, Mr. Chairman, to the text of the Neighborhood School Act, because that has generated a controversy, and I would like, in discussing this, to attempt to answer a question that you raised.

The Neighborhood School Act recites congressional findings that busing is ineffective, inadequate, expensive, energy inefficient, undesirable, and an often counterproductive remedy for unconstitutional segregation. It then states that Congress is hereby exercising its power under article III, section 1 of the Constitution and under section 5 of the 14th amendment of the Constitution to provide that no court of the United States may order or issue any writ directly or indirectly ordering any student to be transported to a public school other than that which is closest to the student's residence unless such assignment or transportation is voluntary or "reasonable."

A transportation requirement is not reasonable under the act if the round-trip time or distances limitations, as I noted above, are exceeded, if school district lines would be crossed or if less burdensome alternatives are available. In these circumstances, the busing solution is not reasonable under the act.

Notwithstanding some statements that have been made to the contrary, we do not believe that the prohibition in section 2(d) operates to limit the appellate jurisdiction of the Supreme Court. We recognize, of course, that the prohibition is stated in terms of any "court of the United States," and we have observed in the legislative history certain ambiguous statements upon which an argument might be based that some restriction on the powers of the Supreme Court may have been intended.

Finally, as you pointed out, Mr. Chairman, in your letter to the Attorney General, Senator Johnston has stated subsequent to the passage by the Senate of S. 951 that he fully intended its provisions to apply to the inferior Federal courts and the Supreme Court.

Notwithstanding this, we believe that the better construction of section 2(d) as presently drafted is that it limits the remedial power, not jurisdiction, of the courts and only of the inferior Federal courts, not the Supreme Court. We reach this conclusion based on the text of the bill, the substantial weight of the legislative history and well-established principles of statutory construction.

There is strong textual support in the act for this conclusion because the bill itself states that it is enacted pursuant to congressional power under article III, section 1 of the Constitution. Section 1 provides authority for limiting the jurisdiction and the powers of the inferior Federal courts, not the Supreme Court. Congressional authority to limit Supreme Court jurisdiction is found in the exceptions clause of article III, section 2, clause 2 of the Constitution.

The conspicuous omission from this bill of article III, section 2 as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended. We must presume that the legislators voting for the measure were aware of its contents.

Moreover, Mr. Chairman, we have found no direct statements in the relatively voluminous legislative history to the effect that a restriction on the Supreme Court's jurisdiction was intended. The few statements relative to this subject are mostly disclaimers of any intention to create broad exceptions to the Supreme Court's jurisdiction, carrying at most a negative implication that some minor restriction was intended.

There is, in addition, as the Attorney General noted in his letter to Chairman Rodino, an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended by the Senate. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

> This amendment would be only a slight modification of lower federal court jurisdiction. These inferior federal courts would no longer have the authority to use one remedy among many for a finding of a constitutional violation.

Senator Hatch continued:

> I would hasten to add that this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.
>
> In short, this is a very, very narrow amendment. It only withdraws a single remedy which Congress finds inappropriate from the lower Federal courts.

Senator Johnston responded.

> Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction. I think it is abundantly clear as his more full and definitive statement of cases has indicated.

While it may be asserted that Senator Johnston did not express agreement in so many words with Senator Hatch's remarks, his comments certainly carry that inference, and he quite obviously did not disassociate himself from Senator Hatch's interpretation of the language and intent of the proposal. Senator Hatch and others may well have relied on the interpretation expressed during this colloquy in connection with their voting on the measure.

Finally, the conclusion that no restriction on Supreme Court jurisdiction was intended is consistent with the principle that courts will read a statute to avoid reaching a constitutional question if such a reading can be fairly made. Congress has broad authority to restrict the power of the inferior Federal courts.

As the Attorney General explained in a letter to Senator Thurmond of the same date as his letter to Chairman Rodino regarding S. 951, congressional authority to restrict the Supreme Court's jurisdiction under the exceptions clause contained in article III, section 2 is far more debatable; and whether that power extends so far as to justify eliminating jurisdiction over classes of constitutional cases is open to some doubt.

We do not intend to imply that the Neighborhood School Act should be read to affect jurisdiction rather than simply place limits on remedial powers, or that the act would necessarily be unconstitutional if it were construed to limit Supreme Court remedial power as well as the authority of the lower Federal courts.

We do believe, however, that to avoid the serious constitutional questions associated with attempts to restrict Supreme Court jurisdiction, a court interpreting the bill would interpret its provisions as narrowly as possible.

I would like to move now, Mr. Chairman, to a discussion of the congressional authority under section 5 of the 14th amendment. That commences on page 20 of my statement.

Mr. KASTENMEIER. Well, I think that may be a good point at which to recess, since we have a vote on, rather than go into that particular question—while we would be required to vote. I would

suggest that we recess for 10 minutes and then return at more or less 10:45.

Accordingly, the committee stands in recess.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will resume the hearing. When we recessed a few minutes ago, our distinguished witness, Mr. Olson, had reached, I think, page 20 in his statement and the issue of congressional authority under section 5 of the 14th amendment.

Mr. Olson.

Mr. OLSON. Thank you, Mr. Chairman and members of the subcommittee.

The right to be free of purposeful discrimination or segregation in public schools is derived from the equal protection clause of the 14th amendment, which guarantees that no State shall deprive any person of equal protection of the laws. Section 5 of that amendment grants Congress the power to enforce by appropriate legislation the provisions of the 14th amendment.

The authority granted in section 5 has been analogized to the authority vested in Congress under the necessary and proper clause of article I of the Constitution to make all laws which shall be necessary and proper for carrying into execution its enumerated powers under the Constitution.

We do not believe that either section 5 of the 14th amendment or the necessary and proper clause of the Constitution provides Congress with the authority to "restrict, abrogate, or dilute" the guarantees of the Constitution, in the words of the Supreme Court. Thus, the Supreme Court has stated:

> An enactment authorizing the States to establish racially segregated systems of education would not be—as required by Section 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

Although section 5 does not authorize Congress to contract or withdraw constitutional rights, its grant of power is a broad one to legislate to secure the implementation and protection of constitutional rights. The Constitution recognizes that Congress, in our scheme of separated powers, is uniquely capable of determining how the broad guarantees of the Constitution shall be given meaning and life.

The Supreme Court has expressly observed that Congress brings a specially informed legislative competence to weigh competing considerations, particularly with respect to the effectiveness of any particular remedy and the adequacy or availability of alternative remedies. Those are the words of the Supreme Court. The establishment of reasonable limits on how far children can be transported against their will and when doing so may begin to be counterproductive to the goals of desegregation, quality education, healthy children, and good race relations seems to be within this area of legislative competence.

The Supreme Court has held unconstitutional a State legislative enactment which entirely foreclosed—"flatly forbids," in the words of the Supreme Court—local authorities from utilizing the transportation of students as the means to implement school assign-

ments made on the basis of race as a remedy for de jure segregation.

Under those circumstances, the Court characterized the State legislature's action as hampering "the ability of local authorities to effectively remedy constitutional violations." Because of the need to use transportation to implement reassignments, the Court held that "an absolute prohibition against transportation of students assigned on the basis of race, or for the purpose of creating a balance or ratio, contravenes the impicit command * * * that all reasonable methods be available to formulate an effective remedy."

Questions continue to arise, and Chairman Kastenmeier has also raised them in his June 8, 1982 letter to the Attorney General, regarding the hypothetical situation in which the Court has found that no other remedy would serve to correct the condition of unconstitutional segregation other than mandatory busing in excess of the limits expressed in the Neighborhood School Act.

Speculation about the constitutionality of the time and distance limitations in that situation is traced in large part to the Supreme Court's holding in the *Swann II* case that the prohibition against transportation of students was unconstitutional. The speculation, however, extends the holding of *Swann II* to the proposition that any limits on busing would be unconstitutional if one might be able to envision a situation in which the limits would have to be exceeded in order to formulate an effective remedy.

Carefully read, however, *Swann II* states only that all reasonable methods must continue to be available and only that a flat prohibition of an essential method was unconstitutional. In the first *Swann* case, the Supreme Court specifically acknowledged that there is a limit to how much time children can be forced to spend on buses and to the number of miles from home which they may be forcibly transported.

Two separate factors must therefore be considered in resolving the speculation about the limitations of the Neighborhood School Act. First, of course, the act does not impose a flat prohibition on the use of transportation. Second, the act does not prohibit busing within the limits that Congress has identified as reasonable.

The Neighborhood School Act represents a legislative attempt to draw a reasonable line beyond which the damage which mandatory busing may cause outweighs the utility of that particular remedy.

We believe that the Court would accord substantial deference to a measure such as the Neighborhood School Act which carefully considers and balances the effectiveness, utility, and productiveness of this particular remedy and places reasonable limits on its availability in light of congressional factfinding concerning the cost, ineffectiveness, damage to educational values, harm to the positive benefits of neighborhood schooling, and counterproductivity of unlimited, mandatory, cross-town busing. We believe that the limits on the transportation of students established by the Neighborhood School Act are reasonable and will be upheld by the courts.

The Neighborhood School Act, therefore, is not inconsistent with anything in *Swann II*. Busing is not the constitutional end. Moreover, to be utilized as a means to the end of segregation, it must be reasonable. Courts should and will defer to the Congress with respect to the reasonableness of the limitations contained in the

Neighborhood School Act. And, in our judgment, restrictions which are reasonable and which seek to protect the mental and physical health of the children and to protect the integrity of the educational process, will be upheld.

It remains theoretically possible that some court at some time might encounter a situation in which a willfully segregated school system simply could not be disestablished without the transportation of some students in excess of the limits imposed by the Neighborhood School Act.

In such a case, if all other remedies have been considered and have been found not to be effective to remedy the constitutional violation, and if the damage caused by the remedy was found not to exceed the limits of reasonableness—and we are not aware of any situation that would fall within these criteria—a court might issue an order that would exceed the limits specified in the Neighborhood School Act.

In such a case, we do not believe that the statute would be held unconstitutional on its face, and even if the limits of the act were found in such circumstances to be an inappropriate exercise of congressional power under section 5 of the 14th amendment, the congressional authority to limit the remedial power might still be found to exist under article III of the Constitution, which must be considered as well.

Article III, section 1 of the Constitution provides "[t]hat the judicial power of the United States shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." This language in the Constitution reflects a compromise arrived at during the Constitutional Convention.

While the Framers of the Constitution were unanimous as to the need for a Supreme Court, they disagreed strongly with respect to inferior Federal courts. The Committee of the Whole approved a provision for mandatory inferior Federal courts, but on reconsideration the Committee struck this provision by a divided vote. The Committee later approved the substance of the present language empowering Congress to establish inferior judicial tribunals within Congress discretion.

It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress, that the scope of the jurisdiction of the courts, once created, was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior Federal court jurisdiction has been repeatedly recognized by the U.S. Supreme Court.

Congress power over jurisdiction includes substantial power to limit the remedies available in the inferior Federal courts. For example, the Supreme Court has expressly upheld legislation sharply limiting the power of Federal courts to issue injunctions in labor disputes.

We believe that the limitation contained in the Neighborhood School Act is simply a restriction on the availability of a remedy and is not a restriction on jurisdiction of the courts as that term is generally understood. Moreover, even if construed as a jurisdiction-

al limit on the inferior Federal courts, we believe that it would be upheld as firmly grounded in article III power.

Chairman Kastenmeier, I am skipping over to page 30 of the prepared testimony. You emphasized in your letter to the Attorney General the notion of effective remedial power and asked whether withdrawal of the authority of lower Federal courts to order busing of more than 10 miles or 30-minute round trips would be withdrawal of all effective remedial power in the case where the court has found that no other remedy would serve to correct the condition of unconstitutional segregation.

That question, of course, assumes on the one hand the conclusion that there would be no other satisfactory remedy to correct the constitutional violation and on the other that long-distance busing is an effective remedy. We simply cannot accept such premises without a much better understanding of the facts of the particular hypothetical case and exactly what other remedies had been tried and had failed.

For example, although busing can be ordered only to remedy a constitutional violation, it has not always been the remedy of last resort in constitutional cases. If the courts focus more on alternative remedies to long-distance busing, we believe that the task of disestablishing unconstitutionally segregated school systems can be attained, notwithstanding the proposed limitations on the use of mandatory transportation.

Furthermore, as we noted earlier, the Supreme Court has said no more than that all reasonable methods be available to the court. The Supreme Court has never said that the busing of small children unreasonable distances for unreasonable lengths of time is required by the Constitution. Surely there are limits.

Los Angeles, according to the Supreme Court 3 weeks ago, was apparently busing children up to 4 hours per day. We do not believe that the Constitution requires our children to spend their childhood on buses, riding the freeways and highways of our cities in the early hours of the morning and the late afternoons. We believe that the 10-mile and 30-minute limitations in the Neighborhood School Act are reasonable and that they will be upheld.

The other provision of S. 951 that we have been asked to address is section 3(1)(D), which would prohibit the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of schoolchildren.

Although this section significantly affects the Department's authority to seek busing decrees, that is its only effect. The Department's authority to institute litigation under the Civil Rights Act of 1964 against segregated school systems would not be diminished, nor would the Federal courts under this section be limited in their power to remedy constitutional violations.

The narrow effect of section 3(1)(D) is to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. We believe that section 3(1)(D) would be upheld, despite the limitation that it would impose on the discretion currently possessed by the executive branch.

Some have argued that section 3(1)(D) is an unconstitutional intrusion on the Executive's power under article II to "take care that

the laws be faithfully executed" because it prohibits the Executive from advocating remedies that could be, in the particular hypothetical case, necessary to vindicate constitutional rights. Such arguments were made by opponents of the bill during the Senate debates.

I would like to respond to this in two parts, first by referring to schools which do not receive Federal funds and, second, by referring to schools that do receive Federal funds.

In cases that do not involve the use of Federal funds by segregated school systems, the Executive's authority may be constitutionally restricted to the limited extent of merely not advocating a busing remedy. Congress created by statute in the first place the litigating authority presently exercised by the Department of Justice in school desegregation cases. Whatever may be the extent of the Executive's inherent authority to institute litigation to remedy constitutional violations, we believe that that power can be regulated by Congress in this limited context.

Where Federal funds are provided, an additional factor is involved. In the case of *Norwood* v. *Harrison,* the Supreme Court held that the equal protection clause of the Constitution prohibits a State from becoming involved in racial segregation through tangible financial assistance to purposefully segregated schools. The Court has held that the equal protection component of the due process clause of the fifth amendment imposes no lesser obligations on the Federal Government.

On the basis partly of these authorities, the Court of Appeals for the District of Columbia Circuit has stated repeatedly that the United States has an affirmative obligation under the fifth amendment not to permit its funds to become involved in illegal discrimination.

We believe that section 3(1)(D) would not be unconstitutional if it preserves, as we believe it does, the Government's ability to initiate antidiscrimination suits restricting only, and in a very limited fashion, the Department's participation in the remedial phase of such suits. Congress has not manifested any intent to deprive the Department of its power to bring suits against segregated school systems.

The Department would not, therefore, be required to stand by and allow school systems to use Federal funds in an unconstitutional manner, nor would the Department be prohibited from participation during the remedial phase of desegregation suits. The Department would be permitted to seek such remedies as voluntary magnet schools, faculty desegregation, school construction, or any other appropriate relief not directly or indirectly involving transportation remedies prohibited by section 3(1)(D).

I would like to turn now to the remaining constitutional question which has been raised with respect to these provisions. That is the due process clause of the fifth amendment. Both the Neighborhood School Act and section 3(1)(D) must also be considered in the context of the equal protection component of the due process clause under the fifth amendment.

Is this legislation a deprivation of a judicial remedy from a racially identifiable group? We do not believe that it is. The provisions at issue neither create a racial classification nor evidence a

discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate governmental purpose.

As the law has developed, the courts will review statutory classifications according to a strict scrutiny standard either if they create a racial or other suspect classification or if they reflect an invidious discriminatory purpose. Satisfaction of the scrutiny standard requires a classification that is narrowly tailored to achieve a compelling governmental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

First, these provisions do not contain a racial classification. As the Supreme Court observed less than a month in the *Los Angeles* case, the benefits of neighborhood schooling are "racially neutral" and a restriction on court-imposed busing is not a "racial classification". A neighborhood school policy does not offend the equal protection clause.

Like proposition I in California, which the Supreme Court upheld in an 8-to-1 decision on June 30 of this year, the benefit a neighborhood school policy seeks to confer—neighborhood schooling—is made available, at the discretion of the school boards, regardless of race. The transportation which is prohibited protects children of all races from long hours on buses.

The second basis for invoking strict scrutiny, an invidious discriminatory purpose, is not, we believe, involved here. We have found no evidence in the legislative history to date of purposeful discrimination. Whatever might be the arguable impact on racial minorities with these provisions, the legislative history to date does not support a finding of an invidious discriminatory purpose.

To the contrary, the sponsors and supporters of these measures endorsed the decision in *Brown* v. *Board of Education* and repeatedly stated their abhorrence to purposeful segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of this bill did not suggest that any invidious purpose was present.

Accordingly, we do not believe that the bill will be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed and upheld under the principles of equal protection, if it is rationally related to legitimate governmental purpose. That test is a highly deferential one.

It is reasonably clear that the findings contained in the legislation and the litany of problems noted by proponents of the bill which have followed from mandatory long-distance busing would suffice to satisfy the minimum rationality standard. These reasons are legitimate governmental purposes and the busing restrictions appear to be rationally related to these purposes.

In closing, I would like to emphasize that this administration is unalterably opposed to racial segregation and discrimination in public schools. We take seriously our responsibility to help eliminate all vestiges of it, root and branch. The promise of equality contained in our Constitution must be fulfilled.

We are saddened, however, by ill-conceived and excessive remedies which have caused vast numbers of our citizens to flee from

public schools, weakening the political and financial support for this essential system and resulting in greater division of races. The solution to segregation does not lie in long, expensive, and damaging daily bus rides for our children. Reasonable limits must be placed on such attempted solutions if our public school systems are to survive and if they are to provide quality education to all of our children.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Olson follows:]

STATEMENT OF THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. Chairman and Members of the Subcommittee: I am pleased to appear today on behalf of the Attorney General to present the views of the Administration regarding the provisions of S. 951 that relate to the authority of the Justice Department to seek, and the inferior federal courts to order, compulsory transportation of school children in school desegregation cases. The Attorney General has expressed his views regarding the constitutionality of these provisions in a letter of May 6, 1982, to Chairman Rodino of the Judiciary Committee. Although I would not presume to improve on his comments, I do hope today to elaborate on those views and to address the questions that Chairman Kastenmeier has raised in his invitation to the Administration to testify before your Subcommittee. I have a prepared statement that I will summarize, and I will ask that the full statement be included in the record.

I. INTRODUCTION

Two provisions of S. 951 are involved. The first is entitled "The Neighborhood School Act of 1982." It comprises § 2 of the bill; and it provides limits on the extent to which federal courts may order transportation of school children to schools other than those nearest their homes.

The second provision is § 3(1)(D), which provides, in general, that the Department of Justice shall not bring or maintain an action to require transportation of students other than to the school nearest to the student's home.

Because of the concern which has been expressed regarding the constitutionality of these provisions, I will generally confine my remarks to the constitutional questions. Before addressing the substance of the proposals, however, I would like to make a few preliminary observations.[1] First, the Attorney General's May 6 letter to Chairman Rodino stated his opinion that the express limitation on the Department's authority contained in § 3(1)(D) relative to the use of funds appropriated under this authorization act was unnecessary, given this Administration's clear position on the use of mandatory busing in school desegregation cases. That limitation may, in fact, have the incidental effect of impairing the Department's ability to present and advocate a remedy which might, in a particular situation, be less burdensome on students and local school systems that those being urged on the court by other litigants. This proposal may unnecessarily and unintentionally prevent the Attorney General from effectuating policies designed to reduce and minimize disruptive transportation decrees.

Second, with regard to the retroactive aspect of the bill and the possibility of reopening previously resolved cases, Wm. Bradford Reynolds, Assistant Attorney General of the Civil Rights Division, has presented the Administration's view that the Department does not favor blanket retroactive application.[2] Many of the decrees

[1] I would also like to call the Subcommittee's attention to the ambiguities in the Neighborhood School Act noted by the Attorney General in his letter to Chairman Rodino. In addition, Senator Johnston noted a drafting error in § 2(b)(4), which contains an unnecessary double negative. See 128 Cong. Rec. § 394 (daily ed. Feb. 4, 1982). The text of § 2(d)(ii) is similarly ambiguous in its prohibition of crossing a school district, although the legislative history probably sufficiently establishes the intended meaning. *See* 128 Cong. Rec. S. 6646 (daily ed. June 22, 1981) (remarks of Senator Johnston).

[2] We . . . do not contemplate reopening decrees that have proved effective in practice. The law generally recognizes a special interest in the finality of judgments, and that interest is particularly strong in the area of school desegregation. Nothing we have learned in the ten years, since Swann [*Swann I*, 402 U.S. 1 (1971); *Swann II*, 402 U.S. 43 (1971)] leads to the conclusion

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which might be made subject to attack by these provisions have been in existence for years; and to require school systems and communities that have long since accepted busing decrees to begin anew the agonizing process of redrafting school assignments through the litigation process would, in many cases, be highly disruptive. In view of this position, the spectre that Chairman Kastenmeier raised in his letter, regarding increased litigation and increased animosity, is overstated. We believe that this legislation will reduce litigation and racial ill will.

The final preliminary comment is that our conclusions regarding these provisions and their constitutionality are predicated on our reading of the proposed legislation and the legislative history compiled to date. Our reliance on the current legislative record is important in two respects. First, of course, to the extent that subsequent history changes the apparent intent or content of the bill, our conclusions regarding its advisability or constitutionality might be changed as well. And second, to the extent that we have identified areas in which the legislative intent could profitably be clarified to avoid a possible constitutional challenge, we would hope that the subsequent history would focus on these points and help clarify the record.

II. BACKGROUND

This legislation represents a reaction to a particular means adopted by some courts to eliminate unconstitutionally segregated public school systems. A brief review of the legal history which provides the backdrop for this proposal provides a useful perspective.

In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the Supreme Court found that state-imposed segregation of school children by race violated the Fourteenth Amendment's guarantee of equal protection of the laws. In *Brown II, Brown* v. *Board of Education,* 349 U.S. 294 (1955), the Court first considered the manner in which unconstitutional segregation was to be relieved. The Court recognized that individual cases required solutions of "varied local school problems," id. at 299, and that in evaluating the solutions developed by local school authorities, "the courts will be guided by equitable principles," that is, "a practical flexibility in shaping . . . remedies and by a facility for adjusting and reconciling public and private needs." Id. at 300. Under these principles, as the Court has more recently explained, "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." *Milliken* v. *Bradley* [I], 418 U.S. 717, 746 (1974). Thus, school authorities administering racially segregated public school systems have a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed discrimination," *Swann* v. *Charlotte-Mecklenberg Board of Education* [I], 402 U.S. 1, 15 (1971), and to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968). But the judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation, *Swann I,* supra, 402 U.S. at 16; and "a federal court is required to tailor 'to scope of the remedy' to fit 'the nature and the extent of the constitutional violation,' " *Dayton Board of Education* v. *Brinkman* [I], 433 U.S. 406, 420 (1977), quoting *Milliken I,* supra, 418 U.S. at 744. This, "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann I,* supra, 402 U.S. at 30-31.

As recently as three weeks ago, the Supreme Court noted that "busing" "is not a constitutional end in itself." *Crawford* v. *Los Angeles Board of Education,* No. 81-38 (Sup. Ct. June 30, 1982), slip op. at 2 n.3, (quoting California Supreme Court, 17 Cal. 3d 280, 309, 551 P.2d 28, 47 (1976)). It is simply one potential tool available for use to satisfy a school district's constitutional obligation. The Court has recognized that in some circumstances the "costs" of busing in both financial and educational terms may render its use inadvisable. *Crawford,* supra, slip op. at 14. Moreover, the affirmative values and the "educational benefits of neighborhood schooling," id. at p. 15, are legitimate and "racially neutral." Id. at 16. It is similarly legitimate to consider that mandatory busing may aggrevate rather than ameliorate the segregation problem. Id. at 15.

There is a growing body of evidence, much of which was before the Senate during the debates on the Neighborhood School Act, that mandatory busing, particularly

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that the public would be well served by reopening wounds that have long since healed. Testimony before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary (printed at 128 Cong. Rec. S 1046) (daily ed. Feb. 24, 1982).

over long distances, may be counterproductive to the educational experience of the children involved and that it is costly, disruptive, and not conducive to the desegregation of schools. The Senate therefore voted to place limits of ten miles and thirty minutes on the round trip to which students could be exposed against their will in the implementation of a desegregation remedy and also prohibited mandatory transportation if reasonable alternatives exist which involve less time in travel, distance, danger, or inconvenience, or if a busing plan would lead to greater racial imbalance.

The Congressional Record of the Senate debate on busing reflects the recognition that opposition to busing was not limited to whites, but was shared in large measure by substantial segments of the black community.[3] Various Senators also urged that mandatory busing has not worked to eliminate segregation in education[4]; has not improved the education provided to financially disadvantaged children[5]; and has aggravated, rather than alleviated, racial tensions.[6] It was also asserted that the emotional reactions of students and parents to long distance mandatory busing undermine support for civil rights legislation.[7]

For their part, opponents of these measures have not been able to refute these conclusions. Diminishing numbers of experts contend that busing has been effective in eliminating segregation in public schools; that it has furthered the goal of quality education for all students; or that it produced a positive attitude of equality of the races or harmonious race relations.

We must not forget that the young children who are forced to ride buses for long periods to schools far from their homes have not contributed to the unconstitutional conditions which require a solution. We must not impose intolerable burdens on them in order to correct a situation that was not of their making.

The Administration is in accord with the general sentiments behind the opposition to the use of mandatory busing. As Assistant Attorney General Reynolds of the Civil Rights Division told another of the House Judiciary's subcommittees last November, we have concluded that busing has largely failed in two major respects: (1) it has failed to elicit public support; and (2) it has failed to advance the goal of equal educational opportunity. Testimony before the Subcomm. on Civil and Constitutional Rights of the Judiciary Comm. Concerning School Desegregation, Nov. 19, 1981. Numerous studies bear out these conclusions, and we support the general legislative purpose of restricting the use of mandatory busing, as we understand the purpose of the proponents of these measures.

III. CONSTITUTIONALITY

I will reiterate the Attorney General's basic conclusions regarding the constitutionality of these provisions; I will expand somewhat on these conclusions later.

Careful examination and construction of both § 2 and § 3(1)(D)—at this time and on the basis of the current legislative record—lead to the conclusion that they are constitutional. As I will discuss in more detail in a few moments, we do not believe that S. 951 withdraws appellate jurisdiction from the Supreme Court to consider a class of cases or to decide constitutional questions. Neither does S. 951 limit the jurisdiction of the inferior federal courts to hear and adjudicate allegations of unconstitutional racial segregation of schools. The effect of § 2 relates to and limits but one aspect of the remedial power of the inferior federal courts. Finally, S. 951 does not affect the power of state courts or school officials to reassign students or require

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[3] 127 Congressional Record S 6274 (daily edition, June 16, 1981) (remarks of Senator Helms); id. at S 6589 (daily edition, June 18, 1981) (remarks of Senator Helms); id. at S 6592 (daily edition, June 18, 1981) (remarks of Senator Helms); id. at S 6599 (daily edition, June 18, 1981) (remarks of Senator Thurmond); id. at S 7520 (daily edition, July 13, 1981) (remarks of Senator Johnston); 128 Congressional Record S 413 (daily edition, Feb. 24, 1982) (remarks of Senator Johnston); id. at S 1336 (daily edition, Mar. 2, 1982) (remarks of Senator Dixon); id. at S 970 (daily edition, Feb. 23, 1982) (remarks of Senator Specter).

[4] 127 Congressional Record S 6646 (daily edition, June 22, 1981) (remarks of Senator Johnston); id. at S 6655 (daily edition, June 22, 1981) (remarks of Senator Stennis); id. at S 7267 (daily edition, July 8, 1981) (remarks of Senator Johnston); id. at S 7523 (daily edition, July 13, 1981) (remarks of Senator Riegle); 128 Congressional Record S 970 (daily edition, Feb. 23, 1982) (remarks of Senator Specter). The bill itself contains explicit findings that busing has been an ineffective remedy. S. 951 §§ 2(b)(1), (2).

[5] 127 Congressional Record S 6348 (daily edition, June 17, 1981) (remarks of Senator Biden); id. at S 6585 (daily edition, June 19, 1981) (remarks of Senator Grassley); id. at S 6646 (daily edition, June 22, 1981) (remarks of Senator Johnston).

[6] 127 Congressional Record S 6274 (daily edition, June 16, 1981) (remarks of Senator Helms); id. at S 6646 (daily edition, June 22, 1981) (remarks of Senator Johnston); id. at S 6653 (daily edition, June 22, 1981) (remarks of Senator Hatch).

[7] 127 Congressional Record S 6358 (daily edition, June 17, 1981) (remarks of Senator Biden).

transportation to remedy unconstitutional segregation. As thus construed, § 2 is a constitutional exercise of Congress' authority under Article III, § 1 of the Constitution to create the inferior federal courts and to place restrictions on their remedial authority.

We believe that § 3(1)(D) is also constitutional. That section does not affect the authority of the Department of Justice to institute litigation against segregated school systems under Title IV of the Civil Rights Act of 1964. The Department would continue to be authorized to bring such suits. The effect of § 3(1)(D) is to restrict only the advocacy by the Department of a busing remedy. The Department may continue to seek alternative remedies, and it may comment on the sufficiency of these alternatives. The court may order busing within the limitations prescribed by the Neighborhood School Act. And finally, the Department retains the litigating authority to bring actions against systems with unconstitutionally segregated schools.

We have also considered questions of due process and equal protection. We conclude that both busing provisions would be upheld by a court if challenged on these grounds.

Now to elaborate on these conclusions.

A. The Neighborhood School Act

1. Textual interpretation.—Section 2 of the bill (the Neighborhood School Act) recites these congressional findings: that busing is an ineffective, inadequate, expensive, energy-inefficient, undesirable, and often counter-productive remedy for unconstitutional segregation. It then states that "the Congress is hereby exercising its power under Article III, section 1 and under section 5 of the Fourteenth Amendment," to provide that "no court of the United States may order or issue any writ directly or indirectly ordering any student to be transported to a public school other than that which is closest to the student's residence unless" such assignment or transportation is voluntary or "reasonable." A transportation requirement is not reasonable if the round trip time or distances noted above are exceeded; if school district lines would be crossed; or if less burdensome alternatives are available.

Notwithstanding some statements that have been made to the contrary, we do not believe that the prohibition in § 2(d) operates to limit the appellate jurisdiction of the Supreme Court. We recognize, of course, that the prohibition is stated in terms of any "court of the United States." We are also aware that the bill would amend the All Writs Act, 28 U.S.C. § 1651, which authorizes the "Supreme Court and all courts established by an Act of Congress" to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." We have observed in the legislative history certain ambiguous statements upon which an argument might be based that a restriction on the powers of the Supreme Court may have been intended.[8] Finally, Senator Johnston has stated subsequent to the passage by the Senate of S. 951 that he fully intended its provisions to apply equally to the inferior federal courts and the Supreme Court.

Nevertheless, we believe that the better construction of § 2(d) as presently drafted is that it limits the remedial power, not jurisdiction, and only of the inferior federal courts, not the Supreme Court. We reach this conclusion on the basis of the text of the bill, the substantial weight of the legislative history, and well-established principles of statutory construction.

There is strong textual support for this conclusion because the bill itself states that it is enacted pursuant to congressional power under Article III, § 1 of the Constitution. Section 1 provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. Congressional authority to limit Supreme Court jurisdiction, to the extent that it exists, is found in "Exceptions Clause" of Article III, § 2, cl. 2. The conspicuous omission from this bill of Article III, § 2 as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

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[8] For example, Senator Johnston stated that he "never regarded this amendment as being grounded principally upon a jurisdictional attack on the Supreme Court." 128 Congressional Record S 1323 (daily edition, Mar. 2, 1982). Senator Johnston also stated that the amendment "does not deal with the jurisdiction of the Supreme Court or of the lower federal courts, notwithstanding a statement in my amendment relative to Article III." Id. at S 974 (daily edition, Feb. 23, 1982). From this latter statement, it might be inferred that whatever limitations the bill does impose on the lower federal courts—limits on their remedial power—were intended to be applicable also to the Supreme Court. At another point in that same discussion, Senator Helms noted a statement by former Senator Ervin that "there are 57 instances in which Congress has limited the jurisdiction of the Supreme Court." Id. at S 972 (daily edition, Feb. 23, 1982). Presumably, Senator Helms mentioned the issue of congressional limitation of Supreme Court jurisdiction because he thought that it was relevant to this bill.

We must presume that the legislators voting for the measure were aware of its contents and that the provision did not refer to Congress' power over the Supreme Court under the Exceptions Clause. The Supreme Court continues to remind us that there is no substitute in statutory interpretation for the statutory language itself. E.g. *North Haven Board of Education* v. *Bell,* No. 80-986 (Sup. Ct. May 17, 1982), slip op. at 7.

Senator Johnston, in fact, manifested awareness of the contents of Article III and the distribution of Congress' power over courts between § 1 and § 2 of that Article during the debates on S. 951. In discussing the theoretical power of Congress "to take away the jurisdiction or modify the jurisdiction of the Supreme Court," Senator Johnston cited only Article III, § 2. See 127 Cong. Rec. S 7244 (daily ed. July 8, 1981). Senator Johnston also stated: "I think that what the court has said under article 3 is that the Congress can establish courts and take away courts. It can abolish courts and it has, in some respects, approved the Congress taking away remedies." See id. Because Congress has discretion to establish or abolish only the lower federal courts, not the Supreme Court, it seems likely that the restrictions imposed must also apply only to the lower courts.

Moreover, we have found no direct statements in the relatively voluminous legislative history to the effect that a restriction on the Supeme Court's jurisdiction was intended. The few statements relative to this subject are mostly disclaimers of any intention to create broad exceptions to the Supreme Court's jurisdiction, carrying at most a negative implication that some minor restriction was intended. The assumption that the bill would place some limitations on the Supreme Court can be explained as based on a reading of the bill that the Supreme Court, in reviewing judgments of federal distict courts governed by this bill would, under the terms of the bill, arguably not have the authority to command the district courts to order mandatory busing in excess of the § 2(d) limits. This is not a jurisdictional limitation, however; it is rather a consequence of the fact that such a Supreme Court order would require the district court to exercise a power not authorized by a statute—something which the Supreme Court has repeatedly recognized that it cannot do. E.g., *Aldinger* v. *Howard, 427 U.S. 1, 15 (1976); Sheldon* v. *Sill,* 49 U.S. (8 How.) 441 (1850).

There is, in addition, as the Attorney General noted, an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

"There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle *inferior federal courts* has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court. . . .

"This amendment would be only a slight modification of *lower federal court* jurisdiction. These *inferior federal courts* would no longer have the authority to use one remedy among many for a finding of a constitutional violation.

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"I would hasten to add that *this bill does not however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.*

"In short, this is a very, very narrow amendment, it only withdraws a single remedy which Congress finds inappropriate *from the lower Federal courts.*

"Mr. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction. I think it is abundantly clear as his more full and definitive statement of cases has indicated." 127 Cong. Rec. S 6648-49 (daily ed. June 22, 1981) (emphasis added).

While it may be asserted that Senator Johnston did not express agreement in so many words with Senator Hatch's remarks, his comments certainly carry that inference; and he quite obviously did not disassociate himself from Senator Hatch's interpretation of the language and intent of the proposal. Senator Hatch and others may well have relied on the interpretation expressed by Senator Hatch in voting on the bill. The remarks during debates by the sponsor of language ultimately enacted are an authoritative guide to the statute's construction. E.g., *North Haven Board of Education,* supra, slip op. at 14.[9]

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[9] By contrast, Senator Johnston's statement, by letter of June 25, 1982, to the Attorney General, that "it was always [his] intent to include the Supreme Court as well as the inferior courts

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Finally, the conclusion that no restriction on Supreme Court jurisdiction was intended is consistent with the principle that courts will read a statute to avoid reaching a constitutional question if such a reading can be fairly made. *International Association of Machinists* v. *Street,* 367 U.S. 740, 749 (1961); *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932). Congress has broad authority to restrict the power of inferior federal courts. As the Attorney General explained in a letter to Senator Thurmond of the same date as his letter to Chairman Rodino regarding S. 951, congressional authority to restrict the Supreme Court's jurisdiction under the Exceptions Clause contained in Article III, § 2 is far more debatable; and whether that power extends so far as to justify eliminating jurisdiction over classes of constitutional cases is open to some doubt. See, e.g., Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362 (1953); Ratner, "Congressional Power Over the Appellate Jurisdiction of the Supreme Court," 109 U. Pa. L. Rev. 151 (1960). We do not intend to imply that the Neighborhood School Act should be read to affect "jurisdiction" rather than simply place limits on remedial powers, or that the Act would necessarily be unconstitutional if it were construed to limit Supreme Court remedial power as well as the authority of the lower federal courts. We do believe, however, that to avoid the serious constitutional questions associated with attempts to restrict Supreme Court jurisdiction, a court interpreting the bill would interpret its provisions as narrowly as possible.

Chairman Kastenmeier's letter of June 8, 1982, to the Attorney General raised several questions relating to the application of the bill to the Supreme Court. I would like to comment directly on some of these points. The Chairman's letter questions our reading of the bill that it does not limit the remedial power of the Supreme Court because of the prohibition in the proposed legislation that "no court of the United States" may order busing in excess of the specified limitations. A question is also raised regarding our reliance on the significance of the bill's citation of § 1 of Article III, and not § 2, because the bill also recites that it is based on § 5 of the Fourteenth Amendment, which does not distinguish between the Supreme Court and the inferior federal courts. The argument is made that the colloquy which I quoted between Senators Hatch and Johnston in no way indicates Senator Johnston's agreement with Senator Hatch's narrow construction. Senator Johnston is said to have stated that his intention was to restrict the Supreme Court as well as the lower federal courts. Finally, in light of what Chairman Kastenmeier characterizes as "the unrestricted language of S. 951 and the legislative history supporting this 'plain meaning,' " the question is asked whether there is "a substantial likelihood that the bill would be construed as restricting the appellate jurisdiction of the Supreme Court." I will address these points in turn.

First, we do not assume that the United States Senate relied exclusively upon § 5 of the Fourteenth Amendment as a source of congressional power to limit the remedial powers of the federal courts to order busing as a remedy because congressional power under Article III is broader in this context than the § 5 power. I will develop this point more fully later in my testimony, but it is appropriate to mention now our conclusion that the limitation on busing remedies contained in the bill would be authorized under § 5 to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. I am not sanguine, however, that the courts would hold that § 5 alone would allow Congress to preclude the inferior federal courts from ordering mandatory busing in a situation in which that court concluded that some student transportation in excess of the proposed limits was necessary to remedy a constitutional violation. We believe that the reference to Article III as well as § 5 of the Fourteenth Amendment was intentional in order to invoke Congress' broad power over the inferior federal courts and that the Senate would have at least mentioned Article III, § 2 if it had intended to invoke its power to make an exception to Supreme Court jurisdiction.

Second, we are, of course, aware as I noted above, that Senator Johnston's response to Senator Hatch's analysis may be short of an unequivocal endorsement of that analysis and that Senator Johnston did make certain ambiguous statements

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within the proscriptions of the Neighborhood School Act" would not be regarded with great weight by a revewing court. To recognize the authoritativeness of such a statement would raise the problem of the apparent discrepancy between what the Senator says he intended and what he, and more important, the Senate, legislated. For similar reasons, "postenactment developments cannot be accorded 'the weight of contemporary legislative history. . . .'" *North Haven Board of Education,* supra, slip op. at 23. "[T]he views of a subsequent *Congress* form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 119 (1980). Here, we have only the views of one Senator. "The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment." Id. at 118 n.13.

during the debates relative to the effect of the bill on the jurisdiction of the Supreme Court. However, Senator Johnston did not dispute Senator Hatch's views and certainly implied that he agreed with them. And, more important, in statutory construction the most that one can do is to look at the legislative history as a whole and not be diverted by isolated comments. We adhere to our interpretation of the legislative history taken as a whole.

We have acknowledged that Senator Johnston now asserts that he did intend to include the Supreme Court's powers and that, as he puts it, "we inadvertently omitted reference to section 2 of Article III." As we have noted, however, the courts place considerably greater reliance on the positions of legislators taken during debates rather than subsequently. And the entire Senate voted on and passed the provision as it is written.

Finally, in answer to what seems to be the question regarding the ultimate result, whether there is a substantial likelihood that the bill would be construed as restricting the appellate jurisdiction of the Supreme Court, and if so construed, whether the Department would view the bill as unconstitutional, I will repeat our conclusion that we do not believe that the bill would be construed as applying to the Supreme Court. Where any fair reading of the bill would possibly avoid the constitutional issue that would arise from construing the bill as applying to the Supreme Court, that reading should be endorsed. Here, we believe that such a construction is more than fair. It is fairly compelled.

2. Congressional authority under section 5 of the 14th amendment.— The right to be free of purposeful discrimination or segregation in public schools in derived from the Equal Protection Clause of the Fourteenth Amendment, which guarantees that no state shall deprive any person of equal protection of the laws. Section 5 of that Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. The authority granted by § 5 has been analogized to the authority vested in Congress under the Necessary and Proper Clause of Article I of the Constitution to "make all laws which shall be necessary and proper for carrying into Execution" its enumerated powers under the Constitution. *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

We do not believe that either § 5 of the Fourteenth Amendment or the Necessary and Proper Clause of the Constitution provides Congress with the authority to "restrict, abrogate, or dilute the guarantees" of the Constitution. *Katzenbach,* supra, 384 U.S. at 651-52 n.10; *accord, Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969); *Brown* v. *Califano,* 627 F.2d 1221, 1233 n.76 (D.C. Cir. 1980); *Westberry* v. *Gilman Paper Co.,* 507 F.2d 206, 215 (5th Cir. 1975). [10] Thus, the Supreme Court has stated, "an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." *Katzenbach,* supra, 384 U.S. at 651-52 n.10. On the contrary, under § 5 "[w]hatever legislation is appropriate, that is, adopted to carry out the objects the amendments have in view . . . if not prohibited, is brought within the domain of congressional power." Ex Parte Virginia, 100 U.S. 339, 345-46 (1879).

However, although § 5 does not authorize Congress to contract or withdraw constitutional rights, its grant of power is a broad one to legislate to secure the implementation and protection of constitutional rights. The Constitution recognizes that Congress, in our scheme of separated powers, is uniquely capable of determining how the broad guarantees of the Constitution shall be given meaning and life. The Supreme Court has expressly observed that Congress brings a "specially informed legislative competence . . . to weigh . . . competing considerations," *Katzenbach,* supra, 384 U.S. at 656, particularly with respect to the "effectiveness" of any particular remedy and the "adequacy or availability of alternative remedies." Id. at 653. The establishment of reasonable limits on how far children can be transported against their will and when doing so may begin to be counterproductive to the goals of desegregation, quality education, healthy children, and good race relations seems within this area of legislative competence.

The Supreme Court has held unconstitutional a state legislative enactment which entirely foreclosed ("flatly forbids") local authorities from utilizing the transportation of students as the means to implement school assignments made on the basis of race as a remedy for de jure segregation. Under those circumstances, the Court characterized the state legislature's action as hampering "the ability of local au-

[10] Senator Johnston apparently agrees with this limitation on Congress' § 5 power. He stated that "[t]he Neighborhood School Act in no way attempts to 'restrict, abrogate, or dilute' the guarantees of the Equal Protection Clause in a fashion inconsistent with the Morgan and Oregon rationale." See 127 Congressional Record S. 6650 (daily ed. June 22, 1981).

thorities to effectively remedy constitutional violations." *North Carolina Board of Education* v. *Swann* [II], 402 U.S. 43, 46 (1971). Because of the need to use transportation to implement reassignments, the Court held that "an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio.' "contravenes the implicit command . . . that all reasonable methods be available to formulate an effective remedy." Id. (emphasis added).

Questions continue to arise, and Chairman Kastenmeier has also raised them in his June 8, 1982, letter to the Attorney General, regarding the hypothetical situation in which "the court has found that no other remedy would serve to correct the condition of unconstitutional segregation" other than mandatory busing in excess of the limits expressed in the Neighborhood School Act. Speculation about the constitutionality of the time and distance limitations in that situation is traced in large part to the Supreme Court's holding in *Swann II* that the prohibition against transportation of students was unconstitutional. The speculation, however, extends the holding of *Swann II* to the proposition that any limits on busing would be unconstitutional if one might be able to envision a situation in which the limits would have to be exceed in order "to formulate an effective remedy." *Swann II,* supra, 402 U.S. at 46. Carefully read, however, *Swann II* states only that "all reasonable methods" must continue to be available and only that a "flat prohibition" of an essential method was unconstitutional. In *Swann I,* the Court specifically acknowledged that there is a limit to how much time children can be forced to spend on buses and to the number of miles from home which they may be forcibly transported. See *Swann I,* supra, 402 U.S. at 30-31.

Two separate factors must therefore be considered in resolving the speculation about the limitations of the Neighborhood School Act. First, of course, the Act does not impose a "flat prohibition" on the use of transportation. Second, the Act does not prohibit busing within the limits that Congress has identified as "reasonable." The Neighborhood School Act represents a legislative attempt to draw a reasonable line beyond which the damage which mandatory busing may cause outweighs the utility of that particular remedy. We believe that the Court would accord substantial deference to a measure such as the Neighborhood School Act which carefully considers and balances the effectiveness, utility, and productiveness of this particular remedy and places reasonable limits on its availability in light of congressional factfinding concerning the cost, ineffectiveness, damage to educational values, the harm to the positive benefits of neighborhood schooling, and counterproductivity of unlimited, mandatory, cross-town busing. We believe that the limits on the transportation of students established by the Neighborhood School Act are reasonable and will be upheld by the courts. As Chief Justice Marshall declared in his classic formulation of congressional power under the Necessary and Proper Clause in *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819), analogized in *Katzenbach* to the § 5 power:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The Neighborhood School Act, therefore, is not inconsistent with anything in *Swann II.* Busing is not the constitutional end. Moreover, to be utilized as the means to the end of desegregation, it must be "reasonable." Courts should and will defer to the Congress with respect to the reasonableness of the limitations contained in the Neighborhood School Act. And, in our judgment, restrictions which are reasonable and which seek to protect the mental and physical health of the children and to protect the integrity of the educational process, will be upheld.

It remains theoretically possible that some court at some time might encounter a situation in which a willfully segregated school system simply could not be disestablished without the transportation of some students in excess of the limits imposed by the Neighborhood School Act. In such a case, if all other remedies have been considered and have been found not to be effective to remedy the constitutional violation, and if the damage caused by the remedy was found not to exceed the limits of reasonableness—and we are not aware of any situation that would fall within these criteria—a court might issue an order that would exceed the limits specified in the Neighborhood School Act. In such a case, we do not believe that the statute would be held unconstitutional on its face; and even if the limits in the Act were found in such circumstances to be an inappropriate exercise of congressional power under § 5, the congressional authority to limit the remedial power might still be found to exist under Article III of the Constitution, which must be considered as well.

3. Congressional authority under article III.—Article III, § 1 of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." [11] This language reflects a compromise arrived at during the Constitutional Convention. While the Framers were unanimous as to the need for a Supreme Court, they disagreed strongly with respect to inferior federal courts. The Committee of the Whole approved a provision for mandatory inferior federal courts, but on reconsideration the Committee struck this provision by a divided vote. See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's "The Federal Courts and The Federal System" 11 (1973). The Committee later approved the substance of the present language empowering Congress to establish inferior judicial tribunals within its discretion.

It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that the scope of the jurisdiction of the courts, once created, was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction, has been repeatedly recognized by the Supreme Court. *E.g., Cary* v. *Curtis,* 44 U.S. (3 How.) 236 (1845); *Sheldon* v. *Sill,* 49 U.S. (8 How.) 441 (1850). Congress' power over jurisdiction includes substantial power to limit the remedies available in the inferior federal courts. *Lauf* v. *E. G. Shinner & Co.,* 303 U.S. 323, 330 (1938); *Lockerty* v. *Phillips,* 319 U.S. 182 (1943); *Yakus* v. *United States,* 321 U.S. 414 (1944). In *Lauf,* supra, for example, the Supreme Court upheld legislation sharply limiting the power of federal courts to issue injunctions in labor disputes.

We believe that the limitation contained in the Neighborhood School Act is simply a restriction on the availability of a remedy and is not a restriction on "jurisdiction" of the courts as that term is generally understood. Moreover, even if construed as a jurisdictional limit on the inferior federal courts, we believe that it would be upheld as firmly grounded in Article III, § 1 power. We do not see the bill as exceeding the implicit limitation on congressional control over jurisdiction contained in the principle of separation of powers. Such a conflict might arise in three situations: first, if the jurisdictional limitation usurped the exercise of judicial power by instructing the federal courts how to decide issues of fact in pending cases, see *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872); second, if the legislation required an automatic reversal of an outstanding court order that imposed a remedy beyond the limits specified in the bill. Cf. *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) (on petition for mandamus) (legislative revision of judgments); and third, if the limitation deprived the court of its power to issue any remedy at all, cf. *Correspondence of the Justices* (1793) (advisory opinions); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38-39 (1976) (Article III minimum requirement for standing is "actual injury redressable by the Court"). There could be no serious contention that the Neighborhood School Act is defective either as an instruction to the courts on an issue of fact or a legislative revision of preexisting judgments, so I will not further discuss the first or second point. Chairman Kastenmeier, however, has raised specific questions relating to the third point; so after some additional elaboration, I will turn to his questions.

Congress cannot impose on the courts the duty to exercise an essentially legislative function without any power to issue relief affecting individual legal rights or obligations in specific cases. We do not believe that the limited constraints imposed by the Neighborhood School Act on the court's remedial power convert the judicial power to hear and decide cases into a legislative function. Of the entire range of remedial powers of the federal district courts, only one remedy—mandatory transportation of students beyond their neighborhood schools—is affected, and that only

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[11] Section 2 of Article III provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the Same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.* (emphasis added). As noted previously, the Exceptions Clause (underscored) is not mentioned as a source of congressional power with respect to S. 951 and need not, therefore, be examined in connection with the constitutionality of these provisions.

to a limited extent. Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Chairman Kastenmeier emphasized this notion of effective remedial power in his letter to the Attorney General and whether withdrawal of the authority of lower federal courts to order busing of more than ten-mile or thirty-minute roundtrips would be a withdrawl of all effective remedial power in a case where the court has found that "no other remedy would serve to correct the condition of unconstitutional segregation." That question, of course, is tautological in that it assumes on the one hand the conclusion that there would be no other satisfactory remedy to correct the constitutional violation and on the other than long-distance busing is an effective remedy. We simply cannot accept such premises without a much better understanding of all the facts of the particular hypothetical case and exactly what other remedies had been tried and had failed. For example, although busing can be ordered only to remedy a constitutional violation, it has not always been the remedy of last resort in constitutional cases. There may be instances where the federal court has not tried every other possible remedy first. Furthermore, the search for alternatives to mandatory transportation is impeded by the reflex resort to busing. If the courts focus more on alternative remedies to long-distance busing, we believe that the task of disestablishing unconstitutionally segregated school systems can be attained notwithstanding the proposed limitations on the use of mandatory transportation.

Furthermore, as we noted earlier, the Supreme Court has said no more than that all "reasonable" methods be available to the courts. The Supreme Court has never said that the busing of small children unreasonable distances or for unreasonable lengths of time is required by the Constitution. Surely there are limits. Los Angeles was apparently busing children up to four hours per day. See *Crawford* v. *Los Angeles Board of Education,* supra, slip op. at 3 n.4. We do not believe that the Constitution requires our children to spend their childhood on buses riding the highways and freeways of our cities in the early hours of the morning and the late afternoons. We believe that ten miles and thirty minutes are reasonable limits and that they will be upheld.

Finally, the Attorney General repeatedly stressed that the limitation on the inferior federal courts would not have the effect of allowing a constitutional violation to go unremedied. The bill does not limit the power of school boards or state courts, which would remain open to persons claiming unconstitutional segregation in education and which would be empowered—indeed, required—to provide constitutionally adequate relief.

B. Section 3(1)(D)

The other provision of S. 951 that we have been asked to address is § 3(1)(D), which would prohibit the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The only exception is on behalf of students requiring specific education as a result of being mentally or physically handicapped.

Although this section significantly affects the Department's authority to seek busing decrees, that is its only effect. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The narrow effect of § 3(1)(D) is to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

Some have argued that § 3(1)(D) is an unconstitutional intrusion on the Executive's power under Article II to "take Care that the Laws be faithfully executed" because it prohibits the Executive from advocating remedies that could be, in particular cases, necessary to vindicate constitutional rights. Such arguments were made by opponents of the bill during the Senate debates. See, e.g., 127 Cong. Rec. S. 6274 (daily ed. June 16, 1981) (remarks of Sen. Weicker) (reading into Congressional Record President Carter's veto message of similar bill during 96th Congress); *id.* at S 6602 (daily ed. June 19, 1981) (remarks of Sen. Hart). In fact, the restraints imposed by § 3(1)(D) would prevent the Department from seeking remedies even within the limitations of time and distance contained in the Neighborhood School Act. For ease of analysis, and because of another specific question raised by Chairman Kas-

tenmeier, my response will discuss separately suits involving schools that do not receive federal funds and those that do.

1. Schools that do not receive federal funds.—In cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be constitutionally restricted to the limited extent of merely not advocating a busing remedy. Congress created by statute in the first place the litigating authority presently exercised by the Department of Justice in school desegregation cases. Whatever may be the extent of the Executive's "inherent" authority to institute litigation to remedy constitutional violations, see *generally United States* v. *Philadelphia,* 644 F.2d 187 (3d Cir. 1980), and *New York Times* v. *United States,* 403 U.S. 713, 741, 47 (1971) (Marshall, J., concurring), we believe that even that power can be regulated by Congress in this limited context. We do not believe that the full extent of the litigating and remedial authority granted by Title IV, which was not enacted until 1964, is in all cases implicit in the "take Care" Clause. Moreover, because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, it does not exceed the congressional power over the enforcement authority that is granted.

2. Schools that do receive federal funds.—Where federal funds are provided, an additional factor is involved. In the case of *Norwood* v. *Harrison,* 413 U.S. 455 (1973), the Supreme Court held that the Equal Protection Clause of the Constitution prohibits a State from becoming involved in racial segregation through tangible financial assistance to purposefully segregated schools. The Court has held that the equal protection component of the Due Process Clause of the Fifth Amendment imposes no lesser obligations on the Federal Government than the Equal Protection Clause of the Fourteenth Amendment imposes on the States. See *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). On the basis partly of these authorities, the Court of Appeals for the District of Columbia Circuit has stated repeatedly that the United States has an affirmative obligation under Fifth Amendment not to permit its funds to become involved in illegal discrimination. *Brown* v. *Califano,* 627 F.2d 1221 (D.C. Cir. 1980); *Kelsey* v. *Weinberger,* 498 F.2d 701 (D.C. Cir. 1974); *Adams* v. *Richardson,* 480 F.2d 1159 (D.C. Cir. 1973). Under this interpretation of the Fifth Amendment by the District of Columbia Circuit, there must be open to the Government at least one of three avenues for preventing the involvement of federal funds in racial discrimination or segregated public schools: administrative authority to withhold funds until the discrimination ends; presidential power to impound funds; or authority for the Attorney General to seek judicial relief that would end the unlawful discrimination, thus allowing federal funding to continue. See *Brown* v. *Califano, supra,* 627 F.2d at 1236.

In *Brown* v. *Califano, supra,* the court of appeals found that, because the Justice Department's authority was not affected, the foreseeable effect of a statute prohibiting the Department of Health, Education, and Welfare from terminating federal funding of segregated schools would not be "unremedied segregation." The court therefore upheld the prohibition notwithstanding "statements by individual Congressmen that reveal opposition to busing. . . ." *Id.* at 1235. The court concluded that the continued authority, and what it characterized as the duty, of the Department of Justice to seek busing remedies in cases in which those remedies are necessary saved the constitutionality of the amendment, which simply removed one route by which the Government's obligation could be fulfilled.

Against this background, the constitutional issue that § 3(1)(D) presents with respect to federally funded school systems is whether the Government can fulfill its constitutional obligations by initiating antidiscrimination suits, notwithstanding the obstacle imposed by § 3(1)(D) to its full participation at the remedial stage of such suits.

We believe that § 3(1)(D) would not be unconstitutional under *Brown* v. *Califano* if it preserves, as we believe that it does, the Government's ability to initiate antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation in the remedial phase of such suits. Congress has not manifested any intent to deprive the Department of its power to bring suit against segregated school systems. The Department would not therefore be required to stand by and allow school systems to use federal funds in an unconstitutional manner. Nor would the Department be prohibited from participation during the remedial phase of desegration suits. The Department would be permitted to seek such remedies as voluntary "magnet" schools, faculty desegregation, school construction, or any other appropriate relief not directly or indirectly involving transportation remedies prohibited by § 3(1)(D). *See Brown* v. *Califano, supra,* 627 F.2d at 1231. The Department would thus be encouraged to advance alternatives, but not to advocate a particular

remedy disfavored by Congress. A prohibition of active encouragement of transportation remedies does not amount to an unconstitutional intrusion on the Executive's responsibility under the Constitution.

3. "Indirect" actions by the Department of Justice.—Chairman Kastenmeier has raised questions specifically about § 3(1)(D). The letter to the Attorney General of June 8, 1982, stresses the language of § 3(1)(D) prohibiting "any sort of action to require . . . . indirectly the transportation of any student." It states that "[a] suit by the Justice Department to terminate funding to a school district which refused to initiate busing to remedy unconstitutional school segregation would seem to be a 'sort of action' to require indirectly the transportation of students." Two arguments are made in support of this construction. We agree with neither. First, it is suggested that the common result in the past of administrative or judicial action to terminate funds has been a decision by the recipient to accept the remedies required by the Constitution and civil rights law rather than forgo federal assistance.

Second, it is assumed that a principal purpose of the sponsor of § 3(1)(D) was to close a "loophole" left by the Byrd-Esch Amendment which is characterized as preventing the Department of Education from terminating funds to districts which refuse to engage in busing to remedy illegal segregation while leaving the Justice Department free to seek fund termination. We believe that the questions contain unstated premises which we cannot accept.

First, labeling suits to require a termination of funds as "indirect" actions to require busing is not a fair characterization. The legislative history of the Neighborhood School Act, which similarly prohibits a lower federal court from "indirectly" ordering busing, discloses that the reference to "indirectly" was intended to disable the courts from issuing any decree which would require, as a necessary incident, that students be transported in a manner which the courts could not order directly under § 2(d). An order terminating funding was simply not contemplated as embraced within the concept of an "indirect" busing requirement. A similar construction of the prohibition of "indirect" action seems appropriate with respect to litigating authority under § 3(1)(D).

Moreover, whatever action the school system might choose to take in response to a suit to terminate funding would not amount to a requirement, even indirect, of busing. State authorities, do, after all, retain the choice between remedying unconstitutional segregation or losing federal funds. As the Attorney General repeatedly noted in his letter to Chairman Rodino, the bill does not affect any voluntary action by state officials. Voluntary decisions are not within the range of federal action prohibited under the bill. A suit to compel the termination of funding may result in relinquishment of funding or a wide range of solutions to the unconstitutional situation which provoked the suit. We simply do not agree that such a suit is an action "to require directly or indirectly" any busing.

Second, we are not aware of any specific reference in the legislative history to suggest that the "purpose" behind § 3(1)(D) was to prevent suits to cut off funds. Certainly Congress knows how to say that if that is what is intended. *Cf. North Haven Board of Education, Supra,* slip op at 8. We do not believe that § 3(1)(D) was intended or would have the effect of applying to suits to prevent federal funds from going to segregated schools. Nor do we believe that it is at all likely that the courts would construe it in such a fashion.

C. Due process

Both § 2 and § 3(1)(D) must also be considered in the context of the equal protection component of the Due Process Clause under the Fifth Amendment, see *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Is this legislation a deprivation of a judicial remedy from a racially identifiable group? We do not believe that it is. The provisions at issue neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. See *Harris* v. *McRae,* 448 U.S. 297 (1980).

As the law has developed, the courts will review statutory classifications according to a "strict scrutiny" standard either if they create a racial or other "suspect" classification, e.g., *Hunter* v. *Erickson,* 393 U.S. 385 (1969), or if they reflect an invidious discriminatory purpose. E.g., *Village of Arlington Heights* v. *Washington Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington* v. *Davis,* 426 U.S. 229 (1976); cf. *Mobile* v. *Bolden,* 446 U.S. 55 (1980) (plurality opinion). Satisfaction of the strict scrutiny standard requires a classification that is narrowly tailored to achieve a compelling governmental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

1. Racial classifications.—First, these provisions, unlike the provision found unconstitutional in *Hunter* v. *Erickson, supra,* do not contain a racial classification. As the Supreme Court observed less than a month ago, the benefits of neighborhood schooling are "racially neutral," and a restriction on court-imposed busing is not a "racial classification." *Crawford* v. *Los Angeles Board of Education, supra,* slip op. at 8-9. A neighborhood school policy does not offend the Equal Protection Clause. *Id.* at 9 n.15. Like Proposition I in California which the Supreme Court upheld in an 8-to-1 decision three weeks ago, "[t]he benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of the school boards." *Id.* at 9. The transportation which is prohibited protects children of all races from long hours on buses. The issue of what sorts of remedies the Justice Department should advocate or the federal district courts should order simply does not split the citizenry into discrete racial subgroups. *Cf. Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979).

As the reference to *Crawford* reveals, the Supreme Court decisions in the most recent busing cases, which were decided on June 30 of this year, support our conclusions. Furthermore, in *Washington* v. *Seattle School District No. 1,* No. 81-9, (Sup.Ct. June 30, 1982), the Court considered a Washington State initiative that prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest his home for racial purposes. The Court held the Initiative unconstitutional, but not on the basis that it created an unconstitutional racial classification. The Court did recognize "the racial focus" of the measure, id. at 16; but still found "facial neutrality." Id. at 13. More important, given that the Court specifically noted that no compelling state interest had been suggested, id. at 27 n.28, if the Court had viewed the Initiative as an explicit racial classification, the Court would have struck it down on that basis alone and not on the basis of the more complex and esoteric rationale of *Hunter* v. *Erickson, supra.* In fact, the basis for holding Initiative 350 unconstitutional was that it was found to create "special burdens on the ability of minority groups to achieve beneficial legislation." *Washington* v. *Seattle School District No. 1, supra,* slip op. at 9. In short, it was unconstitutional because the "political mechanisms [were] modified to place effective decisionmaking authority [regarding certain racial decisions] at a different level of government." Id. at 17. S. 951 does nothing of the sort.

2. Discriminatory Purpose.—The second basis for invoking strict scrutiny, an invidious discriminatory purpose, is not, we believe, involved here. We have found no evidence in the legislative history to date of purposeful discrimination. Whatever might be the arguable impact on racial minorities, the legislative history to date does not support a finding of an invidious discriminatory purpose. To the contrary, the sponsors and supporters of these measures endorsed the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and repeatedly stated their abhorrence of purposeful segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of the bill did not suggest that any invidious purpose was present.

Even if there were evidence that an individual legislator may have been improperly motivated, the Supreme Court has stated that "[i]t is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process." *Washington* v. *Davis,* 426 U.S. 229, 253 (1976) (Stevens, J., concurring), quoted in *Crawford* v. *Los Angeles Board of Education,* supra, slip op. at 17 n.32. In the Court's words, "[a] law conscripting clerics should not be invalidated because an atheist voted for it." *Id.* Neither should the reasonable limitations of S. 951 be invalidated on the basis of possible isolated comments of personal motivation by individual legislators.

3. Rational basis.—Accordingly, we do not believe that the bill will be subject to review under the strict scrutiny standards. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purpose. This test is a highly deferential one. It is reasonably clear that the findings contained in the legislation and the litany of problems, noted by the proponents of the bill, which have followed from mandatory long-distance busing noted by the proponents of the bill would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advanced other rationales to support the measure, including that mandatory busing is a excessive burden on the taxpayer; that it wastes scarce petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons are legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

IV. CONCLUSION

In closing, I would like to emphasize that this Administration is unalterably opposed to racial segregation and discrimination in public schools. We take seriously our responsibility to help eliminate all vestiges of it—"root and branch." The promise of equality contained in our Constitution must be fulfilled.

We are saddened, however, by ill-conceived and excessive remedies which have caused vast numbers of our citizens to flee our public schools, weakening the political and financial support for this essential system and resulting in greater division of races. The solution to segregation does not lie in long, expensive, and damaging daily bus rides for our children. Reasonable limits must be placed on such attempted solutions if our public school systems are to survive and if they are to provide quality education to all of our children.

Mr. KASTENMEIER. Thank you, Mr. Olson. I think you covered the essentials of your statement quite thoroughly. Actually you have raised a couple of points that were not part, really, of the hearing.

Among them is section 3(1)(D). That is not actually part of the Neighborhood School Act but relates to it. As I understand your testimony on that point, it is that it may be restrictive of the Justice Department's necessary obligation to bring about constitutional compliance and therefore I take it you feel that it ought to be deleted. Correct?

Mr. OLSON. Let me answer that this way, Mr. Chairman. We do not believe that it impairs the ability of the Department to exercise its obligations under either the statute or the Constitution, but we feel that section 3(1)(D), in light of the position of this administration as not in support of or advocating mandatory busing and not having found that necessary to remedy constitutional violations we believe that it is not necessary.

Mr. KASTENMEIER. You believe that 3(1)(D) is not necessary?

Mr. OLSON. That is correct.

Mr. KASTENMEIER. You could put it that way. What is your recommendation to us—that we delete it?

Mr. OLSON. We have no objection to its presence in S. 951, Mr. Chairman. We think that it is not necessary and it may under some circumstances be unduly restrictive. However, section 16—unduly restrictive on the Department in the sense that it seems to restrict the Department's participation in the remedial phase with respect to transportation remedies.

However, section 16 of the act seems to suggest that the Department, notwithstanding section 3(1)(D), section 16 of the act may provide the Department that necessary flexibility. Therefore, while we feel it is not necessary and if we were given our druthers we would just as soon not have it in there, we are not opposed to it if it does appear in the final form of this legislation.

Mr. KASTENMEIER. Well, that is not a very clear recommendation to us in terms of what we ought to do legislatively and I think you will have to concede that.

Mr. OLSON. Well, I think I have given you as much help as I can.

Mr. KASTENMEIER. I understand. I think I understand your position, which is for that tactical reasons you are not asking for the deletion of 3(1)(D), but to be consistent with your statement, which is that it is not necessary and may be unduly restrictive, having said that, I cannot see how you can say, however, just leave it there.

Mr. OLSON. Well, I should clarify, then. That provision tells the Department of Justice that it should not use appropriated funds to do that which the Department of Justice has already announced that it has no intention of doing anyway, and while we were concerned—and the Attorney General expressed this concern—that it may impair our ability or arguably impair the Department's ability to urge a less restrictive or less burdensome transportation remedy, I think that section 16 of S. 951 would cure that problem.

So, while it is a provision that asks us to do that which we do not intend to do and might arguably restrict us in some way and we might prefer not to have it in there, it is not unduly restrictive on us and we do not have any strong opposition to its presence there.

Mr. KASTENMEIER. On a different point, the point of retroactivity, I think I am in basic agreement with your position, to wit, that it might begin anew the agonizing process of redrafting through assignment, through litigation, which would in many cases be highly disruptive. The Department does not favor blanket retroactive application, yet you say we believe this legislation will reduce litigation and racial ill-will.

What does that contemplate with reference to the blanket retroactive feature of the bill?

Mr. OLSON. As we suggested, and I think the Attorney General also mentioned this in his letter to Chairman Rodino on May 6, that we would prefer not to intervene and reopen existing decrees where they have been, if they have been, successful and accepted by the community. The idea of scraping away the scab, so to speak, and getting into litigation in those areas we agree with you, I think, that that would not be productive.

Our conclusion that the act as a whole may reduce ill-will and litigation is based upon the premise that a great deal of litigation and ill-will and animosity and some damage to the public schools has resulted from mandatory busing over long distances, and we would hope that the cumulative and total effect of this legislation would be to reduce litigation and to reduce racial hostility.

Mr. KASTENMEIER. Then your position is to oppose the retroactivity provisions of the bill?

Mr. OLSON. It is possible. That provision gives discretion to the Attorney General. It may be that there are situations where a busing decree is already in existence which has not worked, has not been accepted and could be remedied in ways which would be consistent with the Neighborhood School Act. This may give us an opportunity to correct that situation.

That is why the word "blanket" is in that statement.

There may be situations where the sound exercise of the discretion of the Attorney General to achieve those very objectives that you are concerned about, it might be useful to have that power.

Mr. KASTENMEIER. Well, as I understand it—and I think I am correct—if the blanket retroactivity feature is permitted to remain in the bill and the bill becomes law, then there would be, I think, an unfortunate expectation on the part of the Department to pursue all of these remedies—ones that you and I agree would be very unwise to pursue. It is that expectation which ought to be cured, I would think.

Would you not recommend at least an amendment to the retroactivity feature—either its removal or an amendment to it to achieve what you and I would like to achieve?

Mr. OLSON. Well, we would be perfectly willing to look at any suggestion that this subcommittee might have in this regard. The fact of expectations or unreasonable expectations on the Department of Justice and the Civil Rights Division is a fact of its life and existence.

Various provisions in the civil rights statute says, you know, provide citizens with the opportunity, as this provision would, to petition the Attorney General and ask him to take action in certain cases. I think that the Attorney General could probably resist that and exercise that discretion with discretion and with good judgment in the areas that you are talking about.

However, we would certainly be willing to look at and discuss with you any suggestion that you might have or your subcommittee might have that would address that problem but would not take away necessarily the power to correct that situation in a case where an unsatisfactory decree is causing more trouble than it is solving.

Mr. KASTENMEIER. Another point—and then I will yield to my colleagues. There are several other issues that I wanted to raise with you. It is an obvious one and you have addressed yourself in large measure to it. But I think there is a simple question that remains, and that is the author's clear intention that his bill refer to the U.S. Supreme Court and that the plain language of his amendment states that no court of the United States may order and issue a writ and so forth and so on.

He says "the courts of the United States" are not merely inferior courts of the United States. They are all courts, including the Supreme Court. I might also add that the witnesses last week, the three former Attorneys General of this country and the president of the American Bar Association agree with the author that the courts of the United States, as used in this bill, would, of necessity, apply to the Supreme Court.

My colleague who is not here today, Mr. Frank, has insisted that the Justice Department's version of that is to try to create another reality, to rewrite the bill in its own mind and approve of it in "wish" form rather than its present form.

The author also says that he is relying on the 14th amendment, section 5, rather than article III, section 1 principally and, as a consequence, the limitation, however read in article III, section 1, that might apply to inferior courts and not the Supreme Court, that that would not obtain because principal reliance is on the 14th amendment in which the courts of the United States would surely include the Supreme Court of the United States.

So, if that is the case, as far as the legislative history is concerned there surely is a lack of clarity. Even the Attorney General himself in his last sentence to Mr. Rodino on May 6 said:

> It should be noted in closing these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

I assume he refers to that point as well.

Mr. OLSON. Well, I think that you included several questions and several observations and if I fail to respond to parts of them perhaps you will remind me.

It is always true when we try to address the constitutionality of a statute, when that statute has not been passed yet and when it has passed only one House of Congress, we must rely for our conclusions with respect to the wording of the statute or the proposed statute on the legislative history developed up to that point and the subsequent legislative history which you are creating here and I presume will continue to create may affect the conclusions with respect to what the statute means, what it intends to accomplish and whether it would be constitutional.

That would always be the case. The Attorney General, when he used those words, was not simply referring to the question of jurisdiction over the inferior courts or the Supreme Court but other aspects of the bill as well.

Mr. KASTENMEIER. I appreciate that, but it has to do with the willingness to stand corrected in terms of the legislative history or intention, and I think this is a case where it is very clear what the author intends and what others may read into it.

Mr. OLSON. Well, we carefully examined the legislative history of the U.S. Senate. The author has now said much more clearly than he ever said during the debates in the Senate what he now says he intended then.

He also drafted and sponsored a statute that included no reference to section 2 of article III of the Constitution. He now says that that was an inadvertence, so I have to respond to the suggestion that there has been some rewriting of this statute to analyze its constitutionality. We read the statute as it was passed by the U.S. Senate.

If there should have been or the author intended to include something else in it, we were not able to discern that from the legislative history. We had to examine the text of the statute as actually passed by the Senate and as debated by other members of the Senate, including the author and principal sponsor, and you will note that I did quote from a relatively clear, we felt, colloquy between Senator Hatch and Senator Johnston with respect to whether or not the Supreme Court was intended.

I think your witnesses last week also suggested that they may have been a little bit—or at least one of them did, I believe—confused with respect to what was intended or what the statute actually was intended to accomplish concerning the Supreme Court. We believe that, as enacted, a fair reading of the statute and the legislative history is consistent with our interpretation of it.

Mr. KASTENMEIER. Do I not also understand your position that if there is a question as to the interpretation that you care to place on it you would seek that construction which would be a constitutional construction? That is to say you would be inclined to interpret or construe the statute as would be constitutional rather than as would cause any particular problem.

Mr. OLSON. I noticed that colloquy in the hearing last week in the transcript of the hearing last week, and it was suggested then that while the Attorney General may have bent over backward to construe it in a way in which he could come to the conclusion that

it is constitutional—and I think Congressman Frank responded that that was not exactly the Attorney General's function at this point in the process—when we respond to Congress with respect to the constitutionality of a statute at this phase of it or in the process of the development of the statute, we try to call it as clearly and as cleanly and as objectively as we possibly can.

The role of the Department and the executive branch changes once the enactment is passed. As you know, we have a constitutional responsibility to defend the acts of Congress. Once an enactment such as this is passed, that suggestion might be more correct or appropriate because we would then present to the courts the best argument that we possibly could for the constitutionality of the statute. But that was not a factor in the development of the Attorney General's opinion as articulated in his May 6 letter or in my testimony today.

Mr. KASTENMEIER. Following up on that point, would you recommend that we clarify that point? At least you must concede it is arguable. Principals are arguing about it. Should we clarify it?

Mr. OLSON. I certainly would have to agree that reasonable minds could differ, after the parade of reasonable minds that you have there that have differed, and I certainly could not quarrel with the concept of clarifying.

Mr. KASTENMEIER. That only inferior courts are intended?

Mr. OLSON. If that is your intention, that should be clarified.

Mr. KASTENMEIER. Is that not your recommendation to us?

Mr. OLSON. I would recommend that; yes.

Mr. KASTENMEIER. On the contrary, if the author and others would insist that it be clarified that the Supreme Court be included, would that change your opinion with respect to the constitutionality of the bill?

Mr. OLSON. It would change the analysis, obviously. It would change the things that we would consider in rendering our judgment considering the constitutionality of the statute. It is difficult, of course, to speculate when you change the statute or change the words of the statute what our opinion would be because we have generated different types of testimony or argument in the Senate and we still do not have a complete legislative record here.

However, I think there is a reasonable chance that even if the statute did embrace the remedial power of all of the Federal courts, including the Supreme Court, I think there is a reasonable possibility that it would be upheld as constitutional for the reasons that I gave in the testimony that you heard this morining, that it is not a restriction on jurisdiction.

It is a development of reasonable limitations on the remedial power of the courts and, therefore, it is completely different than those other measures which have been considered, and particularly those measures which the president of the American Bar Association addressed last week before your subcommittee, which would strip jurisdiction of a class of cases from the courts.

This is not that kind of a measure. It attempts to develop reasonable limitations on an aspect of the remedial power of the courts, and that is not a jurisdiction-stripping bill, at least as we see it. I think on that basis there is a reasonable chance that even as so construed it would be upheld.

Mr. KASTENMEIER. I would like to pursue that further, but I would like to yield to my colleagues. The point I would like to pursue with you later is what the effect would be and whether there is any precedent for stripping remedies from the courts in constitutional issue cases, whether we might be opening a Pandora's box on this as we would be in the jurisdiction question if we start on this path.

But I am going to postpone that question and think about it. I want to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I have not had a chance to read your entire statement and I apologize. I am about two-thirds through and I got here late.

Mr. OLSON. I think we owe you an apology. It was very difficult to get it to you as rapidly as we would have liked. I would have liked to have had it in your possession sooner and it arrived late yesterday, so I can understand completely.

Mr. RAILSBACK. What are the remedies that the Department has found most useful in combating segregation?

Mr. OLSON. I think that that question is probably more properly addressed to the Assistant Attorney General in charge of the Civil Rights Division because obviously that is a substantial segment of his work. I think that he would answer your question by saying that it is not any one approach, that it is a combination of possibly changes in student assignments within certain areas, the magnet school concept and the like.

Mr. RAILSBACK. Actually I see in your statement I think there is a reference to that. I really was not aware of what actions the Justice Department was taking to remedy discrimination, but I guess you named some of them.

Mr. OLSON. And some of them that are still available and would not be affected by this proposed legislation. I would prefer—and I think you can understand—to defer to Mr. Reynolds with respect to how they have gone about it in the year and a half that he has been doing so.

Mr. RAILSBACK. I wonder if you know the answer to that, and that is has the Department, since the Republicans, our administration, have taken over, have we used busing in any cases as a remedy or have we been prohibited from doing so by statute?

Mr. OLSON. The Department is not prohibited from doing so by statute. The answer to that question, again, is within his special competence. However, part of the answer depends upon the definition of the term "busing." I have found that the term is used relatively loosely and while a student may go to a different school after a particular remedy or school board decision is implemented than he did before, and while that student may have been riding a bus before and riding a bus afterwards, it is not clear whether that situation would be embraced within the term "busing," as embraced by your question or the various people that discussed the subject.

Mr. Reynolds has said that mandatory busing is not a tool which he feels is necessary to accomplish the desegregation of schools and to remedy unconstitutional conduct.

Mr. RAILSBACK. Well, I am a little bit concerned about that part of the administration's testimony, your testimony. It seems to indicate that even in a case of, say, blatant de jure segregation that

Congress, even in that hypothetical case, would have a right to prevent the use of the remedy of busing. Did I understand that? I read it very hurriedly.

Mr. OLSON. I did not say that and I did not intend to say that. That is, I think, a very, very different question than we are faced with today because this S. 951 permits the courts to order busing up to the limits specified in the statute. So, I do not think that that is before us.

Mr. RAILSBACK. Let me read the hypothetical. I think it begins on page 25—maybe I misunderstood it—where it says this:

> It remains theoretically possible that some court at some time might encounter a situation in which a willfully segregated school system simply could not be disestablished without the transportation of some students in excess of the limits imposed by the Neighborhood School Act. In such a case, if all other remedies have been considered and have been found not to be effective to remedy the constitutional violation, and if the damage caused by the remedy was found not to exceed the limits of reasonableness—and we are not aware of any situation that would fall within these criteria—a court might issue an order that would exceed the limits specified in the Neighborhood School Act.
>
> In such a case, we do not believe that the statute would be held unconstitutional on its face, and even if the limits in the Act were found in such circumstances to be an inappropriate exercise of congressional power under Section 5, the congressional authority to limit the remedial power might still be found to exist under Article III of the Constitution, which must be considered as well.

Now maybe I am misreading that, but it sounds like you are taking a look at that question and saying even in that case, even in that case Congress does have the power to prohibit the use of busing, or am I misreading it.

Mr. OLSON. In the first place, that is a very complicated sentence for which I apologize.

Mr. RAILSBACK. It is not mine. I am reading it.

Mr. OLSON. I know. I am apologizing for the complexity of it. We have been constantly asked about a hypothetical, theoretically possible case. It is very difficult to deal with that theoretically possible case when we cannot and have not been presented with the facts that create that case.

In fact, while that question continually gets asked and was debated over and over again on the Senate floor, no one, to my understanding, developed the facts that would create such a case. We believe that the remedy may be found in a satisfactory fashion without that busing.

However, since the question continues to get asked and Chairman Kastenmeier asked it in his question to the Attorney General and in connection with section 5 of the 14th amendment, we believe that while a court could conceivably in the abstract or hypothetically or theoretically come to that conclusion, that nonetheless the power to restrict, the congressional power to restrict the remedial power of the Federal courts does exist.

The State courts are still an available source for a remedy in that hypothetical situation.

Mr. RAILSBACK. But then let me get back to my first question rather than my reference to page 26. My understanding is that you answer that in a way that would seem to indicate that you believe that Congress could not do anything to prohibit the use of a necessary—assume hypothetically that it is a necessary remedy to pre-

vent the case of de jure discrimination—not de facto, but de jure discrimination.

I thought that you indicated to me that no, you did not intend that to mean that we would be able to use or prohibit the use of a remedy in that kind of a serious case of de jure discrimination.

Mr. OLSON. I will try to answer that, not to reinterpret what I have said, but to answer it this way: The Supreme Court simply said in the *Swann* case, the second *Swann* case, that all reasonable methods must be available beyond the points articulated in the Neighborhood School Act.

The experience has been, time after time, that putting children on buses for long distances or for long periods of time is not an effective remedy or a reasonable remedy. The consequence usually is—and has proven itself over and over again—that people leave the public school system and you wind up with greater racial isolation than you had before. So, it is not beyond those limits an effective remedy.

Mr. RAILSBACK. I am not disagreeing with what you are saying now. What I am asking you, however, is to assume the worst case. I am assuming and asking you to assume a hypothetical where there is a blatant case of de jure discrimination where busing is the only essential remedy. I take it from what you have said earlier that despite your statement on page 26 I take it as a policy matter that if you were sitting in our shoes as a policy matter you would certainly not want to prohibit the use of busing in that kind of an extreme de jure discrimination case.

Mr. OLSON. All we are addressing here is the busing under the limitations in the Neighborhood School Act, which do not prohibit the transportation of students.

Mr. RAILSBACK. It does. You know what I think? I think I asked Senator Johnston this. I think that the language in his bill actually prohibits the use of busing even in the most blatant case of de jure discrimination, not just de facto, but de jure.

Mr. OLSON. The act?

Mr. RAILSBACK. I think he answered that it does. I think he said it prohibits it in either case.

Mr. OLSON. Well, the act itself is not written in that way. It imposes limits on how far the child can ride the bus or how far away from home he can be transported. But it does not prohibit the remedy altogether. It simply does not do that and I do not recall any Member of the U.S. Senate saying so or interpreting it that way, including Senator Johnston.

Mr. RAILSBACK. You do not think that it amounts to a prohibition on busing—a prohibition of busing as a remedy in a case where those guidelines are not met? I think it amounts to a prohibition.

Let me ask you this—in other words, you and I respectfully disagree because, you know, I agree with generally, I think, your perception and the Department's perception that busing has not always been the best remedy. I am inclined to agree with that.

But what about—wouldn't we be better rather than trying to take away a remedy from the Federal courts, including the Supreme Court, I might add, according to the sponsor of the bill, that differs with our Department of Justice—wouldn't we be better, if we believed that busing has not been a very satisfactory, to simply

come out and have Congress go on record with a sense of the Congress resolution telling the courts and everybody else that we think busing has not been a very good remedy and asking them not to use it except in, say, extreme cases?

Mr. OLSON. I do not think that that is going to do the job, Congressman. I think almost everybody or the vast majority of people in this country and in this Congress in both Houses would agree with your statement and what your sense of the Congress resolution would say. I think you would have a not difficult time getting that passed because I think there are not very many people out there that disagree with it.

That has not done the job. We are not talking about the elimination of a remedy. We are talking about placing limits on the remedy. This abstract, theoretical question about when it might be necessary to use that remedy, I am sure you would agree, in the situation where it required the transportation of a student for 4 hours in the morning and 4 hours in the afternoon, or 2 on either side of the day, as the Los Angeles people found, was not reasonable and was not a remedy for anything and was not effective for anything and in fact was leading to the destruction of the system.

What we are saying is that there are reasonable limits here and this is a reasonable effort to try and find those limits.

Mr. RAILSBACK. Yes, I am inclined to, like I mentioned earlier—I do not disagree with what you are saying now except we have had testimony by others, including other Attorneys General under past administrations, one of whom answered a similar question about the value of busing by saying that in his judgment there had been cases where busing—I cannot exactly quote him, but I think he thought it had been a very valuable remedy.

So, I take it you are taking issue with those? We had Elliot Richardson and then Ben Civiletti and Nicholas Katzenbach and at least Elliot Richardson and Civiletti, particularly, said that busing had indeed been a very useful remedy.

Mr. OLSON. Well, I read that testimony, including the questions and the answers, and I think that all three of them expressed some serious reservations about busing under certain circumstances.

Mr. RAILSBACK. As do I.

Mr. OLSON. To the extent that any of those witnesses suggested that there may have been some ameliorative effect of transportation in some circumstances, they did not say that their judgment was predicated on busing in excess of the 10-mile, 30-minute limitation proposed by this statute.

They did not say that busing over long distances has been effective in any case. They did not go into the details of specific cases, but at least as I read the testimony they did not say that.

Mr. RAILSBACK. I think they were against the legislation. You would agree with that. They testified against it.

Mr. OLSON. Yes; they did.

Mr. RAILSBACK. OK. Thank you.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. Thank you. I hope we are not now going to revert to the 5-minute rule.

I, personally, am very disillusioned with the whole busing program. I think if the busing situation had any possibility of success

it was killed by the decisions in Charlotte, Mecklenberg and in Detroit which prevented the inclusion of suburbs in the mandatory busing.

Do you have any view on that?

Mr. OLSON. Yes; I do. I do not quarrel with those decisions. The Supreme Court has said, I think, repeatedly that the remedy for unconstitutional conduct cannot be applied to schools or school systems that were not involved in the unconstitutional conduct in the first place.

Mr. SAWYER. That might be very satisfying from a purely theoretical point of view, but you then bring about a total resegregation because it is very simple for people to move suburban and be in an all-white district and you tend to make the center city district, which happens to be the one in which the busing occurs, virtually an all-black district surrounded by all-white suburban districts. It is inescapable.

I lived 48 trial days with one of these cases. I defended a school district as chief counsel.

Mr. OLSON. And you won.

Mr. SAWYER. The only one in the United States that held up through the Supreme Court. But preliminarily we made an effort to include all the suburban districts. We were surrounded by 11 suburban districts and we were not so concerned with busing, if you included all of the suburbs. Otherwise, you would ruin the center city district because the history of these cases shows that when a school district gets 40 percent black and then goes to 70 percent almost immediately or in a very, very short time, they call it a tilt factor and you get a white flight into suburban areas.

It makes your center city district virtually an all-black district which it was not before. It may have been, you know, a percent, but not all, and your white districts surrounding it all-white, which just defeats, you know, what would be the purpose of it.

I think once they imposed that limitation they in effect made busing a destructive remedy as opposed to a constructive one, if it had the potential to be.

Mr. OLSON. Well, the latter part I agree with and I cannot quarrel with your conclusions with respect to what actually happened. It, certainly, has proven itself to be true over and over again, that what you have just described actually does occur and you have a school district that is more racially isolated than it was before.

Whether the solution is to expand the radius into other districts, where neither the parents nor the children nor the school districts have been involved in any unconstitutional conduct, I do not know whether I agree with you. Somewhere I would think that we would have to draw the lines.

Mr. SAWYER. Well, it just seems to me you have to do one or the other. I mean, after all, we are not just engaging in, you know, a theoretical exercise. If we do not accomplish anything with it, it is not a useful remedy.

Mr. OLSON. I agree completely.

Mr. SAWYER. So, it seems to me you are faced, whichever way you opt to go, that you really have two choices—one, to broaden it to include all of the commuter or suburban areas where people really move beyond that would have to give up their jobs and do a

lot of things that would make white flight not very practical, or else you have to eliminate it as being instead of a remedy a destructive situation.

In light of the court's refusal to expand, I personally think it is destructive on the whole question of integration. I do not think that you can point to an area where it has operated other than that.

I remember New Orleans was a prime example back at the time we had our case up, and look at Washington, D.C., and many other areas. There is no way, if you are limited to a city school district, how in the name of heaven can you integrate when you have not got anybody to integrate with. In the suburban areas you cannot do anything about it because there are no blacks in the suburban areas that amount to anything to integrate either.

So, you tend to form, you know, a black center city and all-white suburbs and if it was not that way to begin with, a busing order brings it about.

In history I know of no busing order that has not done that. Do you know that? Are you familiar with that?

Mr. OLSON. No; I am not, but I am not Assistant Attorney General for the Civil Rights Division, so I do not have the information. It is true that that is exactly what motivated in part Senator Johnston. He talked about busing in Louisiana where some children—and this was the extreme end of it, perhaps, but it was nonetheless true—46.8 miles, I believe, he talked about.

Now, the result of that was not the integration of those school systems or the desegregation of the school system but the parents taking their children out of the school. So, they were not really—as soon they happened maybe a few people were going that distance, but the vast majority of them were leaving the school system and the system was more racially isolated than it was before.

Certainly, the statistics that I have examined, Mr. Sawyer, do support exactly what you have said.

Mr. SAWYER. Well, we in Michigan right now, last I heard the case was still floundering around the Federal courts, but we have a community called Benton Harbor—the city of Benton Harbor—in southwest Michigan, not in my district but maybe 90 miles away.

And there is the St. Joseph River that runs between Benton Harbor and the city of St. Joseph, Mich. They are both small cities, you know—I would guess not over 25,000 population apiece and they are only separated by a river with bridges across it. So, the distances are very small and they are surrounded then by some rural school districts and they each have their own separate school district.

Benton Harbor is 96 percent black. St. Joe is about as close to 100 percent white as it can be. And they are fooling around with a Federal court, NAACP defense fund suit trying to figure out how they are going to integrate Benton Harbor. Well, there is not any way you can integrate Benton Harbor if you cannot include St. Joe, and they cannot include St. Joe under the Supreme Court rules, or the surrounding suburban districts.

So, it is just a useless thing and I think as near as I know they have just put it on the back burner, not being able to do anything with it. It just strikes me that, you know, the situation is one that

somebody ought to, one way or the other—if your remedy is a workable remedy—I am not sure at all if it is—but if it is it has to include suburban areas, the whole metropolitan area or else it is just destructive.

The city of Benton Harbor is virtually a blighted desolation right now and it used to be a very prosperous, mixed population city. It is just in a destruct situation, you know.

I have a very strong feeling about going one way or the other on the problem. Another thing about busing that plagues me is that it never cures anything. You never get to a point that now you can stop it. You know, the minute you stop it, the whole situation that was there to begin with reoccurs. You have not destroyed it. It is nothing that cures anything. It merely is an artifical thing imposed on it without ever addressing the underlying problem.

Mr. OLSON. I think one of the things you are saying is that we have got to learn—and I think most people who have looked at the situation appreciate that there are things to learn from the experiences that have developed under the court decrees that have existed—if a particular remedy is not improving the situation and is not eliminating racial segregation, unconstitutional conduct, then something else has to be done.

Mr. SAWYER. Just one other observation. That is these limitations on the Department's use of its funding. I would dare guess just from my own limited knowledge of the situation that the Department has probably had a hand in not to exceed 4 or 5 percent of all of the busing orders that are operating now.

Maybe I am terribly wrong on that, but it is my impression that the great bulk of them have resulted from NAACP defense fund litigations privately as opposed to the Department of Justice.

Mr. OLSON. The vast segment of the school desegregation cases involve on the one side a school district as a litigant and the other side private citizens represented by one group or another as a litigant. Often the Department of Justice is a friend of the court and will participate, but not as a party.

Mr. SAWYER. Well, they may come in as amicus or file a brief, but at least I think there are very, very few cases that they ever put initially.

Mr. OLSON. I could not give you the exact figures, but I think you are correct.

Mr. SAWYER. Thank you. I yield back, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan's 5 minutes have expired. [Laughter.]

Mr. SAWYER. Wait until I start on my second, third, or fourth.

Mr. KASTENMEIER. Just two other questions briefly. Aren't you concerned somewhat that by limiting remedies we may be opening a Pandora's box by starting now with the precedent of limiting the Federal courts' ability to apply remedies in constitutional rights cases?

Mr. OLSON. I do not feel that you would be in connection with this approach. This is, as I say, an effort after a great deal of study by a lot of people to articulate reasonable limits on one part of one remedy and the evidence is mounting to the point of becoming overwhelming that beyond limits such as these the remedy is not effective and, therefore, it is not a remedy.

Mr. KASTENMEIER. Well, that is a conclusion by some people but not by all.

Let us assume that the limitation on remedies in constitutional rights cases may or may not be reasonable. We will certainly now invite—if this becomes law, we will be inviting the Congress to second-guess constitutional rights cases, what are, what are not, appropriate remedies in many situations.

Mr. OLSON. Those situations have to be looked at when you encounter them. I do not agree with the argument that I think several of your witnesses last week adopted, that if you take this step it is going to bring you all of the other way and take classes of cases out of the jurisdiction of the Federal courts, because I do not think this proposal is that kind of a measure.

That so-called parade of horribles that gets presented to you or was presented to you, and which you are justifiably concerned about, I do not think is brought into play in this case and I respect the judgment of the Congress and the Members of the Congress of the United States to legislate in this area whenever it comes to the jurisdiction of the courts or remedial powers of the courts to uphold their oath, as the courts must do.

Mr. KASTENMEIER. We have a parade of horribles with respect to limitations of jurisdiction of the Federal courts in terms of legislation before the Congress. There is a long list of measures involving several—three or more—types of situations, any one of which, if enacted, could precipitate the others. There is no reason to expect that it would not.

Mr. OLSON. Well, I am not sure that one piece of legislation would precipitate the others. We do feel that those types of legislation to which I think you are referring fall into another category.

The Attorney General, on the same day that he responded to Congressman Rodino, sent a letter to Chairman Thurmond addressing those issues and stating not only his views with respect to concerns relative to the constitutional implications but stating that he felt that those pieces of legislation were not things that he would advise.

He recommended against that kind of legislation, that quality of tampering with the courts, for the very same reasons that concern you, Mr. Chairman.

Mr. KASTENMEIER. Well, I would argue that this is certainly court tampering.

I have one last question, and that is a reading of your testimony and the Attorney General's letter suggests at the very best his reservations about certain aspects of the bill and certain questions about interpretation.

Would it be possible for the Justice Department to rewrite the bill so that it comes to us in a more ideal form?

Mr. OLSON. You mean start the process all over? I do not think that that is a reasonably practical alternative that you have. I think that certainly you here, with the hearings that you have had—which have been most extensive—can possibly clarify things and possibly improve things.

I do not think it is necessary or appropriate to start the whole process over because we will be here, then, 2 years from now and

still will have gotten no where in dealing with a problem that needs to be addressed.

Mr. KASTENMEIER. No; I do not think that shows an understanding of the legislative process. We are not obligated to pass this bill in its present form.

Mr. OLSON. I understand.

Mr. KASTENMEIER. And we can amend it and take something of the same import and substitute for it. It is all part of the legislative process.

My question is, if the Justice Department has better language in whole or in part, could it not make such language available to us?

Mr. OLSON. We have not drafted any language and we do not customarily do that with respect to a bill that is already here. We have pointed out the areas where we found some ambiguities and some concerns, and we have expressed those in that letter. If there is anything else that we can possibly look at, Mr. Chairman, we will be happy to do that.

But I think that the Attorney General's letter had several paragraphs that were addressed to aspects.

Mr. KASTENMEIER. I yield to the gentleman from Illinois.

Mr. RAILSBACK. I think one of the questions that is certainly going to arise is—it is a very serious one—whether we should amend the language to include article III, section 2, clause 2 as one of the bases for the legislative action which would then give substance to the argument that yes, the Supreme Court is meant to be included.

I wonder what your feeling is about that. I am sure that is what Senator Johnston is going to want to do.

Mr. OLSON. He may want to do that. I think the legislation as presently drafted and as we interpreted it would apply to the inferior Federal courts. Therefore, we are not recommending that you add that provision to the legislation.

Mr. RAILSBACK. Let me ask you this: If we did not do that and if it is held—let us say there is a challenge. Does the Supreme Court, in the absence of being included in the language of the bill—would the Supreme Court have the power to enforce by ordering busing if the lower courts did not?

Mr. OLSON. Again we are assuming the hypothetical situation that I have said over and over again we do not think exists. I think the Supreme Court would have that power, yes, under the act as written and as we interpret it. We do not think that the situation would occur.

Mr. RAILSBACK. Yes.

Mr. SAWYER. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. Suppose we were to go a little bit in the other direction. What would be your view of the ability, constitutionally, without regard to what you may feel is the advisability, of providing that if the court were to use busing as a remedy they must include or consider the inclusion of the entire metropolitan area?

Mr. OLSON. I am very reluctant to speculate about difficult constitutional questions—and that is definitely in the zone of difficult constitutional questions—in a spontaneous way.

Mr. SAWYER. Why does it pose a constitutional problem if we expressly put that requirement on the use of the remedy?

Mr. OLSON. Because the Supreme Court, when it decided those cases, said that the remedy for unconstitutional conduct should not be applied to institutions that were not engaged in the unconstitutional conduct in the first place, that the school district that had not engaged in unconstitutional segregation should not be made subject to a remedy for some other school district's unconstitutional conduct.

Mr. SAWYER. But that was sua sponte or on their own motion. Suppose the statute required the remedy to be that way. What would be the constitutional objection?

Mr. OLSON. With the reservation, Mr. Sawyer, that it is risky to speculate in a spontaneous way about a difficult constitutional question, I still feel that the Supreme Court's analysis is still correct, that you should not be applying—constitutionally cannot be applying—a remedy for this individual's unconstitutional conduct against this individual.

The individual or school district or people involved in the remedy should not be involved in the remedy if they have not engaged in the conduct which the remedy is designed to cure. They have rights too.

Mr. SAWYER. Well, if we have the ability to in effect eliminate or severely delimit the remedy to so many miles and so many minutes, why can't we, dealing only with the remedy again and not with the underlying result, why can't we expand the remedy? Why couldn't we say, you know, if you are going to bus you cannot bus for distances less than 10 miles or you must bus 40 miles—in other words, within the metropolitan area?

It would strike me if we can do one we can do the other.

Mr. OLSON. Except to the extent that you are applying your remedy to an institution than has not engaged in the conduct that brings about the remedy to begin with.

Mr. SAWYER. You would be applying it to less than the whole institution than did the other way. If you limit it to 5 miles each way you are leaving a big hunk of the outfit that apparently did violate outside the reach of it. Why can't we for the purpose of the remedy go bigger?

Mr. OLSON. You are punishing Peter for the sins of Paul.

Mr. SAWYER. We are not really punishing anybody. We are fashioning a remedy. We are theoretically benefiting everybody. We are merely remedying an unconstitutional situation and why do you say "punishment?" The fact that people are integrated living in a suburb is not punishing them, it would not strike me.

Mr. OLSON. The word "punishment" is not the appropriate word. I probably should have used a better word. You are applying a remedy to one institution's conduct when that institution was not involved in the conduct that gave rise to the need for the remedy.

Mr. SAWYER. You know, the remedy is not doing a bad thing to anybody. It is merely saying to remedy the situation that we find here we are busing over a bigger area. And theoretically that would be benefiting that bigger area.

While people like Dr. Coleman now disagree or dissent that it is being a big educational benefit, they mostly all say it is a benefit in

effective education, which goes toward racial attitudes and a lot of other things as opposed to reading, writing, and arithmetic. They use the term "affective," I believe, as I remember being exposed to these people.

So, it would seem to me when you go out beyond the municipality or school district that they decide needs the remedy, you are really spreading the benefit over a bigger area and not just limiting it to that area, by going bigger, if that is necessary, to accomplish what you are doing rather than just—you know, you kind of agreed with me, as I recall.

The way it works now, it may be theoretically all right, but you are being destructive if you limit it just to the core city for all practical purposes, and if it has got any chance of being a remedy it has to include the whole economic unit or whole metropolitan area. I do not see where you are punishing anybody.

It strikes me if you make it a remedy to work as opposed to having one that is being counterproductive, why would that make it unconstitutional?

Mr. OLSON. You may be right and I respectfully disagree with you. I think that you cannot because school district A engaged in unconstitutional conduct, in remedying the conduct of school district A you cannot apply that remedy to school district B or C and tell that school district what schools their children should go to or tell their parents what schools they should go to when they have not engaged in the unconstitutional conduct.

Mr. SAWYER. But, you see, it is up there. You are getting into the foibles that the courts have fallen into on this. They really are going on the basis of de facto now. They do not say that in almost all the cases. They stretch to find a de jure basis for what they are doing.

But they started out very simply in *Brown* v. *Board of Education.* There you had legally mandated separate systems and that was easy while they were going around the South. But then we started tackling the North. What they were really hitting were de facto segregations really caused by housing—residential problems.

Now you can argue them any way you want, but that is the real basis—the residential problems. They would then find things such as they built a new school in a black area and that by building a new school in a black residential community they thereby perpetuated the segregation. If they did not build a new school there, they discriminated against that area by providing secondary schools.

They engage in—and if you read those decisions, they always when there is de facto they find de jure—almost always—and then they address the de jure.

So, why can't you say virtually the same thing about any white suburban area surrounding? Why is it all white? You know, it is not all white today because black people cannot afford to live there—or some of them cannot. It is that, you know, they are discouraged from living there when I am sure that with a little imagination that they exercise in finding de jure out of de facto black situations, by using kind of a modicum of the same imagination they can find de jure just as well on the white suburbs and thereby include them all in a remedy.

It just seems to me we could help them with the statute by instead of saying the limitation the way Johnston has it in his statute we broaden it to include white suburban areas surrounding heavily black core cities.

Mr. OLSON. You are suggesting that the court should find de jure segregation in the cases where de jure segregation has not and does not exist and apply that to de facto segregated areas.

Mr. SAWYER. De jure segregation in most of the cities really does not exist as such. It is really the housing patterns. If there is anything de jure, it is really in the great bulk there, but they find it. They will find it and they are finding it because they feel they have to find it and they are unwilling to tackle the housing problem because they do not know how to tackle it.

Now I cannot throw any great light on how you tackle it, but if you read those decisions, you know, they are an exercise in great imagination on why this de facto thing has been caused de jure by the schools and by the school system. Now it strikes me they could use that same imagination and would not have to reach a single bit harder to find why the suburbs are involved in this too and then get a remedy that might work. If the thing will work at all, that is the way it is going to work.

Otherwise it is just counterproductive and that is why it is getting a bad name—because if it had any chance to work, it will not work with the limitations they have put on it that makes it destructive and not constructive.

Mr. OLSON. I understand what you are saying. I do not agree with changing the school districts because of problems with housing and where I would differ with you is that I would believe that those cases should not—unconstitutional conduct should not be found if that is the predicate.

Mr. SAWYER. I know, but the same thing is true with the inner city. They do not find that it is the housing pattern. They find something about where they built a school or something like that. But the real underlying causes are the same in both places.

I agree the courts have not addressed it on that basis. They have used a lot of imagination to find de jure out of de facto. It just strikes me they could extend that imaginative thinking to make the whole thing constructive or else forget it.

I will yield back.

Mr. KASTENMEIER. That concludes this morning's hearing. We thank you for your appearance this morning, Mr. Olson.

Mr. OLSON. Thank you, Mr. Chairman, Mr. Sawyer.

Mr. KASTENMEIER. The subcommittee stands in recess.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene upon the call of the Chair.]

LIMITATIONS ON COURT-ORDERED BUSING—NEIGHBORHOOD SCHOOL ACT

THURSDAY, AUGUST 5, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, and Sawyer.

Staff present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order. I expect to be joined momentarily by a couple of my colleagues.

This subcommittee is convening today, the fourth day of hearings in our series on the Helms-Johnston amendment to S. 951. This amendment, known as the Neighborhood School Act, would severely limit the authority of the Department of Justice and the Federal courts to seek and order remedies to unconstitutional racial segregation in public schools.

This committee has heard from Senator Johnston of Louisiana and two House colleagues in support of the amendment. We heard last month from several national legal leaders, including three former Attorneys General and the president of the American Bar Association, in opposition to the provision. Most recently we heard from a representative of the administration, Mr. Theodore Olson, Assistant Attorney General, Office of Legal Counsel, in general support of the Helms-Johnston amendment.

Today we will hear from three of our House colleagues, each with a unique experience on this topic: Don Edwards, chairman of the Subcommittee on Civil and Constitutional Rights; James M. Collins of Texas, the leading opponent of the use of busing; and Richard Gephardt, who represents a district which has been heavily impacted by busing orders.

First, I would call on my colleague on the Judiciary Committee. I have served with him and on his subcommittee from time to time. He is the chairman of the Subcommittee on Civil and Constitutional Rights, and has wrestled with the problems and initiatives relating to desegregation and school busing for some years past in his own subcommittee. From that perspective, as one who has presided

over extensive hearings relating to the subject, we are most anxious to greet him and to hear from him.

TESTIMONY OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. EDWARDS. Thank you very much, Mr. Chairman.

I would like my statement to be made a part of the record.

Mr. KASTENMEIER. Without objection, your statement will be made part of the record.

Mr. EDWARDS. Mr. Chairman, about a year ago, Chairman Rodino came to our subcommittee and asked that we have a series of hearings on school desegregation, including court-ordered busing. He pointed out that an indepth study had been made of this subject for more than a decade. The last study that had been made had been made by the then Senator Mondale. So, we went right ahead. We had 10 days of hearings that began in September 1981, we had 33 witnesses, and we studied the issues in great depth. We issued a report. The three Republican members of the subcommittee had supplemental views in the report. I have asked that the report be distributed to all members of your subcommittee.

The basis for our study, of course, was the decision in *Brown* v. *Board of Education,* which says that officially imposed segregation in education discriminates against minority children and denies them the right to the equal education opportunity which is guaranteed by the U.S. Constitution.

I think we should make it very clear, Mr. Chairman, that courts have ordered busing only when other desegregation methods had been inadequate to remedy the intentional segregation. Contrary to most of the rhetoric in this country, and there is a lot of rhetoric, busing for purposes of desegregation of schools is not widespread. Fifty-five percent of the public school students in the United States are bused, less than 7 percent are bused for desegregation, and that is less than 3 percent of all the public school students that there are in the United States.

The median time for travel is less than 15 minutes, and only 15 percent of those children that are bused travel more than 30 minutes. The law is very clear that a desegregation plan may not mandate busing that involves so much time that the health of the student would be hurt or that the student's schoolwork might be hurt. If that happens, you can go right into court and have it changed. Of the total public school budget, less than 0.2 percent—that is not even 1 percent—0.2 percent is spent on busing.

The desegregation programs that involve busing are successful in the United States when there is local support. Sometimes they are not very successful, and always that is when you don't have local support, the support of school officials, local leaders and newspapers, the politicians, the parents, and so forth.

What do I mean by successful? I mean that a desegregation program is successful when both black and white students involved seem to be getting a better education. In almost all the cases, black students do better in desegregated schools; that is very clear. White students often score higher, but, in any event, they do not have lower scores following desegregation efforts. Those figures were tes-

tified to by our witnesses and the results of standard scholastic achievement tests. We had at least one skeptic who said that this testing was not accurate, and had some problems with the methodology used.

Also, what do I mean by successful where there are efforts at desegregating the schools? The schools themselves usually improve when desegregation occurs as a result either of voluntary desegregation or a court order. Schools tend to look at themselves and say, "How can we do better?" Parents get involved. Teachers try new programs. They set up magnet schools, and they set up special programs. They set up centers for science study. One witness said that desegregation brings out the warps in the school system.

After graduation, minority students do better if they have been in a desegregated school. They tend to go to nontraditional careers. Black kids will go into sales. They will go into professions. They will go into the crafts that have been normally reserved for white graduates. They get better jobs because of the informal network of contact that they have worked out in desegregated schools. They have had contact with white kids. These contacts continue after graduation, and they do get better jobs. They also tend to live in desegregated neighborhoods. If they go to segregated schools, they tend to live in segregated neighborhoods after graduation.

An astonishing conclusion that witnesses testified to was that segregation in school contributes to segregation in housing. If you have a segregated school area, then you will have segregated housing. However, where there is school desegregation, voluntary or court ordered, including busing or not, neighborhoods tend to become desegregated. In other words, if the real estate agent can say all the schools are good, he can't point to one area and say there are white schools out here and there are black schools out here. So, where these schools are desegregated, the real estate brokers can tell their prospective buyers all the schools are good; not that there is a black school or there is a white school.

To sum it up, Mr. Chairman—and the report is documented and in much detail—our hearings found that, where men and women of good will made the effort to make desegregation work, whether voluntarily or by court-ordered busing, the children, black or white, benefit. As one witness said, and I quote this witness, "What study after study shows is that when the old folks get out of the way, the young folks make it work."

Thank you, Mr. Chairman.

[The statement of Mr. Edwards follows:]

STATEMENT BY CONGRESSMAN DON EDWARDS

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to present to you the results of my subcommittee's extensive review last year of the issues surrounding school desegregation as set forth throughout 10 days of hearings before the Subcommittee on Civil and Constitutional Rights. A copy of the report of those hearings is appended to my statement.

In announcing those hearings, Chairman Rodino noted that lawyers, social scientists, educators, school board members, teachers, and parents from communities which experienced court ordered and voluntary desegregation plans would discuss a wide range of issues including the impact of school desegregation on academic and career achievement of white and minority students, on housing patterns and race relations, the circumstances which compel voluntarily or court ordered plans and the extent and cost of busing for desegregation and other purposes.

Mr. Chairman, your review of proposed legislation which seeks to limit indirectly the remedies available to federal courts to assure desegregation, fully complement this earlier review. Together these two subcommittees have compiled a truly comprehensive record on school desegregation.

All of us, including judges, know how difficult and emotional the debate on school desegregation has been and is. Advocates on either side cannot conveniently be characterized as racist or non-racist. Indeed, the debate itself is euphemistically directed at busing rather than school desegregation. Yet, very often it is a debate guided by misperceptions rather than fact.

Hundreds of communities have successfully accomplished what is so difficult for most of us, change. Before I summarize the record made before my subcommittee by the experts, i.e., those persons who have been compelled voluntary or by court order to desegregate their public schools, let me make the following observations.

We have learned that public school desegregation is a national not regional issue, indeed, much of the South is effectively desegregated. Mandatory court orders occur only where there is a finding that such segregation was deliberately established or aggravated by State action. It must be noted that the Constitution does not require that the desegregation plan improve educational opportunities, although the public demands such in return for the uncertainty and change flowing from desegregation. The adequacy of the plan is measured by whether it works and that is why mandatory provisions, including busing, are elements of remedial relief in many desegregation plans. Busing is a remedy of last resort used because other remedies fail to achieve the desegregation required by the Constitution. Finally, perhaps the most important ingredient to the success or failure of a voluntary or mandatory desegregation plan is whether people of influence—local leaders, school officials and the media—are publicly supportive of the desegregation plan. Even when the support is belated, the leadership has made an important difference; it helps to create a community perception that the plan can work.

Test scores and post high school and career patterns are objective measurements of a "good school." Community perceptions of quality are frequently not supported by these objective criteria and predominantly minority schools are generally perceived as inferior. Desegregation acts as a catalyst which enables educators and parents to redefine the system guided by improving the quality of education for all students. The evidence is compelling that blacks' test scores improve significantly, especially when the desegregation starts in the first grade and involves middle class students. Whites often score higher but in any event do not score lower. The reasons are many: educational changes, infusion of resources and greater parental demands and teacher responses. Post high school and career patterns show improvements for minorities as well which may be due to increased access to a network of information and contacts or the effect of changing expectations.

Studies also show a direct correlation between segregated housing patterns and school segregation. The pattern is exacerbated when real estate agents, aware of racially identifiable schools, steer buyers to those neighborhoods where the schools are predominantly or exclusively white. Where the desegregation plan is metropolitan-wide and the schools are no longer racially identifiable—the brokers often describe all schools as "good schools".

Like busing, white flight has become an integral focus of the school desegregation debate. In the past, it was used as a term to describe the exodus to the suburbs due to long term pull factors such as space, greenery, lower housing costs and tax rates. This population shift was supported by federal housing loan policies and changes in production and transportation patterns. Today, school desegregation is pointed to as the cause of white flight, but the statistics do not isolate the pull factors previously discussed or the declining birth rate, especially among whites. There is a degree of white flight immediately following school desegregation orders, but the magnitude is determined by a number of factors, one of the most important is whether the plan is limited to inner-city schools. In such limited plans, surrounding schools become havens of white flight.

Contrary to the rhetoric, busing for purposes of desegregation is not widespread, time consuming or costly. Busing is the norm for many students; 7 percent of all public school students were bused in 1969, in 1976 that number was 55 percent. Less than 4 percent of all students are bused for purposes of school desegregation. The median time traveled is 15 minutes; less than 15 percent travel for more than 30 minutes. Busing costs represent less than two-tenths of 1 percent of a school's annual operating budget.

Voluntary desegregation efforts, i.e. where there is no mandatory student reassignments, have generally been tried and been unsuccessful. Most court ordered

plans were preceded by failed voluntary efforts. Experts agree that such plans may work where the minority student population is less than 25 percent.

In closing, our report cautions that federal support may be at its lowest point. The primary federal financial support for school desegregation was the Emergency School Aid Act. This program was consolidated in the Education Block Grant Program and as recent news reports show some school systems may have to discontinue the components designed to improve the quality of education for all students such as magnet schools because the funds have been significantly absent under the block grant.

I urge the subcommittee to continue its important review of the court stripping legislation pending before you. The complementary work of our two subcommittees represents a comprehensive review of the current school desegregation debate.

97th Congress
2d Session

COMMITTEE PRINT

No. 12

SCHOOL DESEGREGATION

REPORT OF THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

Together With Supplemental Views

NINETY-SEVENTH CONGRESS

SECOND SESSION

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History

In the 1st session of the 97th Congress, the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary undertook a series of hearings on the status of desegregation and methods of implementation in primary and secondary public schools.[1] In announcing these hearings, Chairman Peter W. Rodino, Jr. noted:

> It has been nearly a decade since the Committee on the Judiciary fully reviewed the issues associated with school desegregation.[2] Much has happened since then, and I believe it is incumbent upon us to now reassess the progress as well as the problems. Accordingly, the Subcommittee on Civil and Constitutional Rights, chaired by Don Edwards, will begin a series of comprehensive hearings on July 29, 1981 . . . The topics will include the following: the impact of school desegregation plans on academic and post-educational achievement of minority and majority students; the impact of such plans on housing patterns and race relations; the extent of community acceptance after such plans have been put into effect; the circumstances under which courts and school boards have ordered busing and other remedies; the extent and cost of school busing to achieve desegregation and for other purposes.
>
> Chairman Edwards and I believe the hearings will provide an appropriate forum to consider and debate these issues. A full record will be compiled by hearing from social scientists, educators and lawyers who have done extensive research on school desegregation, and Members of Congress, school administrators, school board members, teachers and parents from communities that have come through the process of desegregation. These people can testify from practical experience about the effectiveness of court-ordered and voluntary plans.
>
> To this end, we invite your assistance, by providing your own comments, and those of knowledgeable spokespersons from your districts, for it is our intention that the hearings provide a fair and responsible expression of all points of view.[3]

Witnesses

The Subcommittee did hear from witnesses representing all of the categories described in Chairman Rodino's letter.[4] Social scientists, drawing upon a wealth of information and research that has accumulated in the last decade, provided the Subcommittee with a much needed objective appraisal of the impact of school desegregation on educational programs, achievement scores, housing patterns, private school enrollment, and the college and career patterns of minority students. Based upon this data, those experts were able to offer their views as to desegregation strategies that appear to maximize educational benefits while minimizing negative effects, including public resistance.

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[1] By excluding the issues relating to desegregation in post-secondary public education, the Subcommittee does not intend to imply any lack of concern regarding this equally important area. Rather, the scope of the Subcommittee's inquiry was limited solely for purposes of manageability..

[2] See "School Busing," Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 92d Congress, 2d session, Serial No. 32, 1972.

[3] Dear Colleague from Peter W. Rodino, Jr. to Members of the House of Representatives, June 17, 1981.

[4] The witnesses appearing before the Subcommittee were:
September 17, 1981: Congressman Ron Mottl; Tom Atkins, General Counsel, NAACP; Dr. Jay Robinson, Superintendent, Charlotte-Mecklenburg Schools; Nathan Glazer, Professor of Education and Sociology, Harvard University Graduate School of Education; Julius Chambers, President, NAACP Legal Defense and Education Fund Inc.

(Continued)

The Subcommittee heard from school board members and school superintendents from large urban areas where "minorities" are the majority, from southern and border state cities that once operated state-mandated segregated school systems, and from a large western city which voluntarily instituted a desegregation plan with an element of mandatory busing. Several Members of Congress, representing areas across the country, testified; most focused on their constituents' dissatisfaction with busing as a means of achieving desegregation.

The Subcommittee also heard from counsel for the civil rights organizations that brought many of the leading cases on school desegregation; from others who questioned the wisdom of the current judicial interpretation of equal protection under the Constitution; from an organization of parents and other citizens opposed to busing and the role the courts have played in the process of desegregating our schools; from the Chairman of the U.S. Commission on Civil Rights, and from the Assistant Attorney General for the Civil Rights Division of the Department of Justice.

The Subcommittee is well aware that no Congressional hearings can provide all the information and opinion available on this divisive subject. However, the Subcommittee is confident that a full spectrum of opinions was expressed; that the review of academic research was sufficiently comprehensive to permit the drawing of informed conclusions; and that the focus on selected communities provided an accurate cross-sectional view of the practical problems and successes found in the real world of school desegregation.

Purpose

The report that follows is based upon this record. In the view of the Subcommittee, this information will add significantly to Congressional consideratiin of issues relating to public school desegregation: misinformation and misunderstandings can be replaced with realistic assessment; problems can be identified and dealt with without foresaking the larger goal.

The Subcommittee also believes that with greater knowledge will come greater acceptance of a national policy in favor of effective rem-

(Continued)

September 21, 1981: Congresswoman Bobbi Fiedler; Congressman Parren Mitchell; Professor Gary Orfield, University of Illinois and Brookings Institution.

September 23, 1981: Congressman James Collins; Congressman Norman Shumway; Dr. Diana Pearce, Center for National Policy Review, Catholic University; Dr. David Armor, Rand Corporation; Christine Rossell, Professor, Department of Political Science, Boston University.

October 7, 1981: Dr. Arthur Flemming, Chairman, U.S.. Commisssion on Civil Rights.

October 14, 1981: Congressman Robin Beard; James Blackburn, Member, Board of Education, Memphis; Maxine Smith, President, Board of Education, Memphis, NAACP-Memphis, Executive Secretary; Suzanne Hittman, President, Seattle School Board.

October 19, 1981: Dr. Robert L. Crain, Principal Research Scientist, Center for Social Organization of Schools, John Hopkins University; Dr. Norman Miller, Professor of Psychology, University of Southern California; Dr. Meyer Weinberg, Director, Horace Mann Bond Center for Equal Education, University of Massachusetts.

October 21, 1981: Willis D. Hawley, Dean, George Peabody College for Teachers, Vanderbilt University, Nashville, Tennessee; Dr. James McPartland, Center for Social Organization of Schools, The Johns Hopkins University.

October 29, 1981: Dr. Joseph Johnson, Superintendent, Red Clay Consolidated School District, Wilmington, Delaware; William D'Onofrio, National Association for Neighborhood Schools, Wilmington, Delaware; Professor Jeffrey Raffel, College of Urban Affairs, University of Delaware.

November 4, 1981: Dr. Robert Wentz, Superintendent, St. Louis; Majorie Weir, Chairman, Board of Education, St. Louis Schools; Congressman Bill Emerson.

November 19, 1981: Congresswoman Mary Rose Oakar; William Bradford Reynolds, Assistant Attorney General for Civil Rights Division.

The Subcommittee intends to continue these oversight hearings into the 2d Session, at which time additional witnesses will be heard.

edies for school desegregation. The experience thus far supports this conclusion. One federal judge, James B. McMillan of North Carolina, who handed down one of the first decisions involving busing [5] told a Senate Subcommittee of his study of the facts:

> We tend to deal on an emotional level with a problem which constitutionally is essentially a question of fact . . . [A]bout 20 years ago, . . . I made some remarks to the effect that I hoped that we would be forever saved from the folly of transporting children from one school to another for the purpose of maintaining racial balance of students in each school.
>
> Well, that expressed my feelings. Five years later I got in the position where I had to act on something that was based on fact and law rather than feelings.
>
> Senator Ervin, for whom I have tremendous admiration and respect and who in effect appointed me to my present job, had essentially the same views then that I did then. I have had to spend some thousands of hours studying the subject since then and have been brought by pressure of information to a different conclusion.[6]

Facts can also change the way the public feels about desegregation and busing. For example, polls indicate that parents whose children are being bused for desegregation have far more positive views about the experience than do citizens whose opinions are based on more remote involvement with the issue.[7] Likewise, researchers in Wilmington, Delaware found that as the desegregation experience came closer to home, parents evaluated those experiences higher; i.e. although parents tended to rate the school system poorly, at the same time, they viewed their own child's school as good or excellent.[8]

Finally, these hearings and the synthesis of findings they contain can provide guidance to others—school board members, judges, and members of the Executive Branch—who are struggling with the problem of fashioning effective, publicly acceptable, and educationally sound desegregation plans.

Context

Since 1972, the focus of school desegregation has altered significantly in this country. Much of the South is now effectively desegregated; where once busing was used to achieve segregation, it is now used to sustain a desegregated system. In the North, the continuing exodus of whites from the inner city has left large concentrations of minority students in financially bankrupt school systems. Meaningful system-wide desegregation within those cities has become statistically impossible unless remedies extending to districts beyond city borders are imposed.

The ability and willingness of the federal government to seek desegregation has altered. The alternative of administrative enforcement (through withholding of federal financial assistance by the Department of Education) has all but been eliminated.[9] Within the past year, the Justice Department has abandoned advocacy of many effective remedies, has rejected or diluted prosecution of several major cases, and appears to have initiated no new investigation.[10]

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[5] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[6] Testimony before the Senate Committee on the Judiciary, Subcommittee on the Separation of Powers, October 16, 1981.

[7] School Desegregation, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives, 97th Congress, First Session (hereinafter referred to as "Hearings") at p. 4.

[8] Ibid. at pp. 456, 464–467; 510.

[9] The Esch Amendment, 20 U.S.C. § 1714(a) (1973); the Byrd Amendment, 42 U.S.C. 2000d (1976) and the Eagleton-Biden Amendment, 42 U.S.C. 2000d (1976) taken together have prevented the Department of Education from requiring school desegregation.

[10] See discussion infra, at pp. 21–25.

All of these indications of retreat have come during a decade when numerous communities have peacefully and successfully desegregated their school systems; the fruits of that effort are now being realized by millions of students. The irony of this juxtaposition can be explained by the paucity of knowledge about what really has been happening. The information has been available, but most have chosen to ignore it. It was the hope of this Subcommittee that these hearings will help to reverse this trend.

Legal Framework

Misunderstandings as to what the constitution requires, what the courts have ordered and why, have contributed significantly to public confusion and opposition to certain methods for achieving desegregation. For example, the rhetoric often implies that federal courts have ordered desegregation simply upon a showing of unintentional racial imbalance within a school, and that mandatory methods (particularly busing) have been ordered even though voluntary methods would achieve the same or better results.

In fact, the law requires far more—it is only segregation that has been deliberately established or aggravated by state action that falls within constitutionl proscriptions,[11] and courts have ordered mandatory remedies only after finding that voluntary methods have failed and will continue to fail to achieve desegregation.

The Chairman of the U.S. Commission on Civil Rights well summarized this point:

> The courts found the mere presence of segregation, de facto segregation, to be inadequate evidence of a violation in instances where there was an absence of State laws requiring school segregation. In 1972, the Supreme Court in *Keyes* examined the concept of de jure segregation and held that in addition to laws requiring segregation it includes deliberate actions taken by school officials, local officials, or State officials that create or support dual systems of education. The Court recognized that school board policies and practices regarding "school site location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff," could be employed to create or maintain school segregation. Since this decision was rendered, any school district that has been found to be segregated as a result of actions taken by public officials has been under the same obligation to desegregate as are those that were segregated by State law.
>
> It is important to underscore that courts have imposed orders requiring the reassignment and where necessary, the transportation of students only where a violation of the 14th amendment by government officials has been judicially determined and where other school desegregation methods have proven inadequate to remedy the violation. Litigation in individual school desegregation cases generally involves numerous evidentiary hearings and multiple judicial decisions which cover a number of years. Before ordering any remedy, Federal cases generally involves numerous evidentiary hearings and multiple judicial district courts have uniformly required local school authorities to develop their own plans for school desegregation. Judges have ordered implementation of specific remedies only when school districts have failed or refused to propose plans that will effectively eliminate the vestiges of segregation in their schools.
>
> The meaning of *Brown* must be clearly understood by those examining the process of school desegregation. It does not require quality education for all children nor does it mandate racial balance. Although school districts should

[11] For a description of the kinds of deliberate, segregative activities that have justified remedial orders from federal courts, see the memorandum prepared by the Center for National Policy Review, Hearings at p. 261, et seq., and the testimony of Tom Atkins, Hearings at p. 34 et seq.

seek, as a part of a desegregation plan, to improve the quality of education, they are not required constitutionally to do so. All they are required to do is to break up the segregated system. Also, contrary to allegations made by some opponents of desegregation no Federal judge has required a single school district to achieve racial balance in all of the schools in the district. Again, all that is required is to break up the segregated system.

The crux of *Brown* is simply this: officially imposed segregation in education discriminates against minority children and denies them the right to equal educational opportunity which is guaranteed by the United States Constitution. Desegregation is the constitutional remedy mandated by the Supreme Court. In interpreting this mandate, Judge John Minor Wisdom noted "The only school desegregation plan that meets constitutional standards is one that works." Stated another way, a right without an effective remedy is meaningless.[12]

Local Leadership

The importance of local leadership in the desegregation process was emphasized by many of the witnesses, particularly those testifying as to the experience in their own communities. Where local officials-members of the school board, the superintendent of schools, the mayor, the media, and others in a position to influence public opinion—expressed their support for the rule of law and the need to make a desegregation plan "work," public acceptance was greatly enhanced and the quality of education was improved.[13]

Even where the support was belated, and followed years of open resistance, this leadership made an important difference.[14] In cities where those officials denounced the court, called upon parents to abandon the public schools, and otherwise fed the fears of an anxious community, the public reacted accordingly—open resistance continued and the movement out of the public school system was exacerbated.[15] This weakening effect on the community's belief in its school system has proved to be so profound that it appears to continue even after the purported cause of the white flight—busing—has been withdrawn.[16]

The failure and refusal of school officials to avoid segregative actions, to take the initiative once the problem has been identified, or to devise adequate plans once a constitutional violation has been judicially established, created the void that the courts reluctantly have filled. In those unusual instances where the local community did assume its responsibility, the benefits to the community were significant. In St. Louis, for example, the Board of Education, when

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[12] Testimony of Dr. Arthur Flemming, Hearings at pp. 246–247. See also testimony of Tom Atkins, Hearings at p. 32 et seq.

[13] This conclusion accords with the principal finding of the 1976 report of the U.S. Commission on Civil Rights, *Fulfilling the Letter and Spirit of the law*. That report, based on studies, hearings and surveys of school desegregation in hundreds of school districts, found that "school desegregation does work and one of the principal ingredients for its success is positive local leadership." Testimony of Dr. Arthur Flemming, Hearings at p. 247.

[14] See testimony of Dr. Jay Robinson, Superintendent of Schools, Charlotte-Mecklenburg County, Hearings at p. 17 et seq.

[15] See, for example, testimony of Tom Atkins, Hearings at pp. 41–42.

[16] Predictions were made by school officials, and former Board member Congresswoman Bobbi Fiedler, that the enrollment of white children in Los Angeles would increase substantially following the abandonment of that city's school desegregation plan. One witness was so confident that this would occur that he testified:

"For those who do not believe in white flight. I think it is important to recognize that in the first major city to stop mandatory busing, there has been a significant increase in white enrollment in the schools that were being bused before."

Testimony of David Armor. Hearings at pp. 216–217. However, statistics released by the Los Angeles school board and submitted to the Subcommittee indicate otherwise. See Hearings, pp. 176–177.

confronted with a choice as to whether to further appeal a court order to desegregate:

> * * * came to a decision aimed at serving the best interests of the St. Louis community. That decision was not to appeal and to put our full and sincere effort toward an educationally sound and effective desegregation plan. And with the cooperation of many civic, religious, and cultural leaders the St. Louis community accepted, and, in some cases, rallied behind the effort to comply with the orders of the court in a responsible and law abiding way.
>
> None of this was easy. All of it required some change or sacrifice from someone, but leadership had decided to build rather than to destroy. The citizens, especially our students, made that decision work. In fact, on the first day of school at Soldan High School, the local students greeted those arriving on the buses with ribbons carrying the slogan, "Let's make it work."
>
> No more apt slogan could have been found for the attitude with which responsible people approached the challenge. As a result, the name of our city is not a smear on America's face.[17]

Describing the even greater latitude available to a community that creates its own desegregation plan, without the intervention of the courts, the President of the School Board in Seattle testified:

> We were able to develop the processes by which a citizen would be involved without having to ask an external body. We developed the definition of what constituted a racially-imbalanced school. We were able to get the citizen input to put it together with what would be educationally-sound strategies.
>
> We do have, for example, the ability for education with sound reasons to maintain some schools which are and continue to be racially imbalanced.
>
> One good example is our bilingual orientation center. We have so many Asian immigrants who are moving into the area that we maintain a school for them to be in no longer than about ten weeks. But we have to maintain this for the orientation because they are new to the country. They need some opportunity to bridge the cultures initially and learn some things . . .
>
> My concern would be that if we were under court order we would not have the opportunity to make educationally-sound strategies our uppermost goal. Education is what we are about and not busing.[18]

An absence of community involvement and consultation, even when self-imposed, breeds public resentment to a court order, even where the methods of desegregation are not in themselves onerous. In New Castle County, Delaware (metropolitan Wilmington), for example, the busing plan ordered by the court involves suburban children for only three out of their twelve years in public school; aside from school closings caused by declining enrollments, during the remaining nine years, the concept of neighborhood schools is generally adhered to. Nevertheless, many suburban parents oppose the desegregation plan. Voicing these concerns, the President of the National Association for Neighborhood Schools not only indicated his opposition to busing as a desegregation remedy, but took the position that the intervention of the courts into the school system has damaged education in New Castle County:

> [T]he issue is not just transportation; it never is. In that respect busing is a misnomer. The issue is a perception of what has happened to the quality of education. The issue among many of the people that I associate with, my colleagues, is a feeling of constitutional perversion, a feeling that the law has been distorted, a feeling that Government is doing something it has no business doing and has no business forcing upon people. It is all tied in together.[18a]

However, it is the belief of this Subcommittee that the resentment borne of losing control over one's educational system accounts for

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[17] Testimony of Robert Wentz, Hearings, at p. 577.
[18] Testimony of Suzanne Hittman, Hearings at pp. 377–378.
[18a] Testimony of William D'Onofrio, Hearings at p. 517.

much of this negative perception. As evidence described in the section that follows indicates, in many cases, including New Castle County,[19] educational quality has in fact improved under the impetus of desegregation. It is not the courts that are to be blamed for this absence of involvement, but rather, the local officials who fail to assume their legal responsibilities.

The contrast between the experience of communities with public officials that have tried to make desegregation work and those that have not, is striking. One witness had the advantage of being involved in two such differing cities:

> I had the experience of serving as a court expert in Los Angeles in 1978, as one of the 8 people appointed, I was serving as the court's sole expert in St. Louis for 15 months before I came to Washington. I saw the implementation of desegregation plans in two cities, each about ¾ minority. It was like night and day * * *[20]
>
> In Los Angeles there was an extraordinary situation where the school board was taken over by a movement, Bus Stop, which campaigned on a program which is virtually nothing but resistance to the courts. When they became the leaders of the school board—and they contributed the president of the school board and other members—they dedicated themselves to disrupting and destroying successful desegregation processes.
>
> I think I would just like to quote a few things that they said at the time that the court handed down its order last year.
>
> The School Board President, Roberta Weintraub, said "No white parent in their right mind is going into an area which is all black," not something that a school board president would say who wanted to make it work. Associate Superintendent Jerry Halvorsen said that "Only God knows what will happen in September," following Judge Egly's order.
>
> Board Member Bobbi Fiedler said maybe Congress would pass a law that would outlay busing. She demonstrated in front of the Office of the Court Monitors during her congressional campaign. She said the order could well bring the destruction of public education in the City of Los Angeles. That was a member of the Los Angeles School Board.
>
> Other board members made similar comments. They fought to virtually the last day. As a matter of fact, even after school was open, people didn't know where their children were going to go to school. It was the most chaotic situation I have ever seen in many years of looking at school desegregation plans * * *
>
> I have traveled around the Deep South many times when orders were being implemented. I have never seen anything quite at this level of instability and chaos. Thousands of children didn't know where they were supposed to go to school. They were told by their own school board president and leaders that the public education was at an end, they were advised to transfer to private schools * * *[21]
>
> There were no statements by any board members predicting anything bad for the school district in St. Louis, there were no politicians elected to the school board on that issue. The school superintendent, once he realized he was going to have to do it, decided he was going to make the best of this process. He created a new level of school administration and magnet schools, all of which were successfully integrated, approximately 50–50.
>
> They created a system attractive enough so that now some hundreds of suburban white children are beginning to transfer in. On the first day of school, instead of one board member calling another a racial epithet, the school superintendent said that they had had a super day. The police all stayed in their headquarters, nothing happened across the city.
>
> It was a very tough situation to deal with. That school district has had many problems in the past, but extremely positive and strong leadership by the school board and school administration meant that parents could know where their

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[19] See testimony of one of metropolitan Wilmington's superintendents of schools, Dr. Joseph Johnson, who testified that both white and black students are scoring significantly higher achievement test scores since the start of the desegregation order, Hearings at p. 447.

[20] Testimony of Gary Orfield, Hearings at p. 170.

[21] Ibid., at 145–146.

children were going to go to school, what their choices were. They weren't put in a totally chaotic situation.

The schools opened integrated, without any significant incident. Even in the first year they showed a significant educational gain.

I am sure that as political leaders yourselves, you realize how important responsible elected officials can be in setting the tone. I believe appointed administrators are equally as important within school districts. The extremely important message that superintendents and other top leaders send shows whether or not this is a serious issue, whether or not there is a real educational and professional responsibility.

When Minneapolis desegregated, the superintendent let everybody know he was going to be at the training sessions to learn about the racial background of his students, he expected his cabinet and everybody else who wanted a future in the schools to be there. That conveys a message. Somebody going on TV and saying this is the end of education conveys a very different message.

The people who are down at the end of a transmission belt in a large bureaucracy react to those messages, and react with optimism or hopelessness, with the sense that they are going into an important reform, that they are going to come out with a new accomplishment, or the sense that they are engaged in totally chaotic unproductive activity.[22]

Educational Impact

1. ROLE OF THE COURTS

The problem described above—public dissatisfaction with the educational impact of court-imposed desegregation orders—can also be attributed to unrealistic expectations about what the court can and should do. The mandate of a court called upon by the dictates of constitutional law to desegregate a school system is simply to desegregate that system—that is, undo the effects of purposeful racial segregation by imposing changes that achieve some semblance of racial balance within the affected schools. This duty flows from the Supreme Court's finding in *Brown* v. *Board of Education*[23] that separate education is inherently unequal. It is not the duty of the court to institute educational reforms that will improve the scholastic performance of minority students. Nor is it the court's responsibility to ensure that white students fare no worse under a desegregated than a segregated system.

Nevertheless, without such a result, no desegregation order will be accepted by the public. Whether constitutionally mandated or not, the public demands—not unfairly—that in return for the uncertainty and change flowing from desegregation, their children get a better education.

Increasingly, courts and school officials are responding to that demand. Conscious efforts are being made to use the impetus of desegregation as a catalyst for educational changes designed to improve scholastic achievement.

2. EDUCATIONAL IMPROVEMENTS

For the school system, the court order or voluntary decision to desegregate can force a constructive reexamination. As one witness described it:

[W]hen school desegregation occurs, school systems have to stop and say, "What have we been doing?" And whether it is because citizens are watching over

[22] Ibid., at 170–171.
[23] 347 U.S. 483 (1954).

their shoulders, because parents are making greater demands or because the court is sitting on them because of pressures and assistance from a State agency or Federal agency or whatever, there is a reexamination. And it is very clear when we look at these school systems that new things happen.

This is not a magical process in which kids are mixed together and all of a sudden something good happens. There are new programs adopted. There are changes in teacher behavior. There is some in-service training that did not happen before.

As I say, there is a kind of introspection that is not common in organizations that do not experience some kind of crisis. So, school desegregation in some instances has that kind of effect.[24]

School superintendents agreed that desegregation had been a crucial catalyst for improvement:

I don't think the kinds of changes within that period of time and the shifts that were made and the concentrated efforts would have happened as a total community without the impetus of that court order.[25]

Ideally, courts compelled to order desegregation can rely on school officials to devise and implement educational changes. The Subcommittee found that some school officials responded enthusiastically to this challenge. In St. Louis, Missouri, for example, the Superintendent described the educational components of the desegregation plan devised by the board, with the active assistance of private citizens and school officials, as follows:

The desegregation plan changed the organizational structure to grades Kindergarten through five for elementary schools, grades six through eight for middle schools and grades nine through twelve for high schools. This allows for specific programming for the respective ages of students and opens a number of new learning opportunities.

For example, by concentrating larger numbers of students in grades six through eight in a middle school, we could provide industrial arts, home economics, laboratory science, fully-equipped and staffed libraries and full-time counselors, thus producing a much stronger curricular and co-curricular program.

To provide some exciting new programs, we developed several new and expanded magnet schools, such as a Montessori school, an Athletic and Academic Academy, a Center for Expressive and Receptive Arts, and expanded gifted program, a Classical Junior Academy, and additional Individually Guided Education School, a Business, Management and Finance Center, a Health Careers Center, and a Naval Junior ROTC Academy. In addition, we expanded the Honors Art and Honors Music programs, started a secondary level gifted program, the Senior Classical Academy, and incorporated a Mass Media Program into one of our regular high schools.

The system developed and implemented a variety of new and improved services. Expanded career education, expanded school partnerships with business, cultural and higher education enterprises, a new English as a Second Language Program, pairing and sharing programs involving city and county schools, a revitalized thrust of parent involvement and a special student leadership program are some of the excellent programmatic emphases that resulted from a strong, education-based desegregation plan.[26]

Even when the educational changes are initiated by the court, desegregation can be a vehicle for significant improvement. In Boston, for example:

Occupational or career education . . . has profited greatly from desegregation. In this last academic year, 1979–80, they opened the Humphrey Occupational Resource Center, a $40 million structure which is now an all-city facility where high school students go to their home high school in the morning or afternoon

[24] Testimony of Willis Hawley, October 21, 1981, Hearings at p. 424.
[25] Testimony of Superintendent Robert Wentz, Hearings at p. 592.
[26] Testimony of Robert Wentz, Hearings at p. 578.

and come to the ORC, the occupational resource center, in the afternoon. No single school could do it if it were simply a neighborhood vocational high school. Again, it has to be attributed to the clout that the court has because the judge found specifically that vocational educational facilities of the Boston school system were very deeply flawed by deliberate segregation, and therefore this is one way of remedying it.

3. EDUCATIONAL RESULTS

The Subcommittee was particularly heartened to discover that both minority and majority students involved in desegregation plans do seem to be getting an improved education. As measured by standardized scholastic achievement tests, the evidence is compelling that in almost all cases, black students have done significantly better in desegregated schools, and white students often score higher, but in any event, have not scored lower following desegregation.[34] In other words, the evidence suggests there is no reason to believe that whites learn more in a segregated school system, and there is strong evidence that blacks fare worse.

The precise reason for this phenomena is not well understood. Whether it is the institution of the educational changes described above, the infusion of greater human and financial resources into the desegregated schools, the increased commitment of teachers, or some other explanation, the trend is clear. One witness tried to explain it this way:

> I think there is increasing evidence that the most popular explanation for why achievement increases is probably not right. That explanation is what sociologists call "the lateral transmission of values." The idea is that if low-ability students sit next to high-ability students they will acquire their values or emulate them or whatever, just because they sit there.
>
> Rather, it is that those students are, in effect, resources that a teacher who knows how to work with students can use to create learning situations that did not exist in that class before. Students learn from each other in a direct way, but that only happens when teachers make it happen. It does not happen accidently.
>
> It may also be that teachers who deal with heterogenous classrooms learn that you have to deal with students as individuals and they therefore begin to be more sensitive to stereotyping and low expectations they have held for minority students. This benefits not only minorities and low achievers, but high achievers . . .
>
> A fourth thing I would say is that when you are changing the socioeconomic characteristics of students you are also changing the socioeconomic characteristics of parents obviously enough. Parents who are middle class are in a better position because of experience, time and status to make demands on a school system and to feel comfortable in going in and working with fellow professionals and, in a sense, not being so easily turned off. There is a concept that we talked about in parent-teacher relationships that teachers learn how to "cool the mark." They learn how to work with the parents in a way that parents assume that things are alright and thus do not make demands on the system.

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[33] Testimony of Meyer Weinberg. Hearings at p. 409.

[34] In 1964, while writing an early summary of research on desegregation, I noticed something unexpected: White children did no worse, academically, in a desegregated than in a white-segregated school.

Widespread impressions to the contrary at that time were based on an expectation that the presence of minority children somehow diluted the academic quality of learning in a school.

Three years later, a more thorough review of research showed once again that white achievement was unaffected by desegregation. Both in 1970 and 1977, and now again in 1981, later reviews of research by me have not disturbed that finding. It can be found in virtually every review of research, regardless of the author. Indeed, this finding has become the single most widely accepted finding in the field.

Testimony of Meyer Weinberg, Hearings at p. 398.

All professionals do this to their clients, but middle class folks who do this to other people are less tolerant of it and see through it and make demands. So there are both political and educational explanations, I think, for why this happens.[29]

The evidence on scholastic improvement in desegregated schools has come not from the federal government, which has failed conduct or support systematic national research since before the Supreme Court's first busing order.[30] Rather, it is based on the lessons drawn from scattered local studies and the more systematic research efforts by academics at universities and research institutes. Several of the most prominent scholars involved in this endeavor testified before the Subcommittee.[31] Dr. Robert Crain focused his analysis on black achievement, and described his findings as follows:

I located 93 studies, each done in a single community undergoing desegregation. Slightly over half of these studies conclude that black test scores are enhanced by desegregation; most of the rest conclude test scores are unaffected, and occasionally a study argues that black test scores are harmed by desegregation.

I spent over a year reading all of these studies, and found that the reason why there was a disagreement among them boiled down to some questions about the way the research was done.

The most important fact is that desegregation is not necessarily beneficial in the first couple of years, because black students who start out in segregated schools and then suddenly switch over to desegregated schools apparently do not benefit academically.

It is only after the first few years, when the students who started desegregation at first grade are tested, that you begin to see the achievement results . . .

I am, at this point, quite convinced that desegregation raises the test scores of black students without harming the test scores of white students. I also found 13 studies which looked not at achievement tests but at IQ test scores, and I again found a consistent increase in IQ, apparently as a result of desegregation.

The studies that I have reviewed all deal with single communities, but the national assessment of educational progress has been studying the educational performance of American young people for some time now, and they have found across the Nation that black test scores have been rising markedly and faster than white scores in the past few years, and they found that again especially true in the Southeast, where there has been the most desegregation.[32]

Explaining the significance of the magnitude of the improvement found in one typical community (Louisville, Kentucky) where black test scores improved, Crain said;

One way to state it is as follows: Suppose I were the Dean of Admissions of a rather selective technical university, and I said that my students were such that I would only take students in the top third of the high school graduating class of the United States.

Suppose I had 600 black students applying, and their scores looked like the black student 3rd grade scores in 1976. Out of that 600 I would take 100. The remaining 500 would fall below my admission standards.

If I had a group of graduating black high school seniors whose scores looked like the 3rd grade scores for 1978, two years later, I would have taken 150 instead of 100, a 50 percent increase in the number of students I would take. That is quite a large difference . . .[33]

The evidence on scholastic improvement is not without its critics and skeptics, however. Dr. Norman Miller, for example, testified as to the methodological weaknesses of the studies:

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[29] Testimony of Willis Hawley, Hearings at p. 425.
[30] Statement of Orfield, Hearings at p. 146.
[31] Drs. Crain, Weinberg, Miller, and Hawley.
[31] Testimony of Robert Crain, Hearings at pp. 382 and 385.
[32] Testimony of Robert Crain, Hearings at p. 384.

When the conclusions of individual studies are taken at their face value, the majority do report academic benefit for minority children. Virtually all the studies, however, are very weak in their research design, and very few, if any, are published in journals that require rigorous peer review.

Indeed, most are unpublished. This has led some reviewers to try to categorize studies in terms of the relative strength or weakness of their research design and to try to exclude very weak ones from consideration. Perhaps because the individual studies are often flawed in at least several respects, reviewers often differ in their assessment of which studies possess the stronger research designs.[34]

He also questioned whether benefits had been achieved in view of the fact that:

[i]f desegregated blacks make educational gains but desegregated whites make even larger gains, then the competitive position of blacks has worsened rather than improved.[35]

Finally, he noted that:

It comes as no particular surprise when a reviewer's conclusions matches his or her own ideological stand or the position he or she has taken in courtroom testimony.[36]

However, the overwhelming consensus among researchers is that test scores of minority students in desegregated schools usually increase, particularly when certain factors are present—desegregation beginning in the first grade and involving a significant percentage of middle class students.

In the face of this evdience, then, why do parents and public officials (including many Members of Congress) believe desegregation to have been an educational failure?

When asked why there is a gap between the public perception of what is going on in desegregated schools and what the social scientists are telling them, one witness responded:

Almost certainly, when desegregation occurs people begin to be more interested in schools. By and large, parents send their children to a school and hope for the best. They assume things are going well and that is the responsible thing to do as a parent. You really do not want to know all the weaknesses, because if you did, you would have to invest a lot of energy and time and so forth in the enterprise. So what school desegregation has done is to bring people in closer contact with the schools and some of the fantasies they had about the way it was in the "good old days" or the way it is even recently are not sustained.

So part of what has happened is that people are finding out that schools are not quite as good as they thought they were independent of desegregation itself. The irony is that even though desegregation may lead to achievement gains, those gains can never reach the levels of people's expectations they had to start with.

The second thing is expectations themselves change. I think many parents who are supportive of school desegregation use language like this. "Well, I think that it is just a really good thing for my kid to go to a school where they get to know other children and people from other backgrounds." But there is an assumption in that statement that somehow they are going to lose something in the process.

The parents who are not sympathetic to school desegregation bring that same logic to work in saying, "We want more for our children than we had before." There is some kind of sacrifice they are going to make and therefore that school is going to have to do better than they did before. What was once satisfactory is no longer satisfactory.

[34] Testimony of Norman Miller, Hearings at p. 394.
[35] Ibil., at p. 395.
[36] Ibid.

Third, there is simply an assumption that minority schools cannot be good schools. If you are sending your child to a school that was formerly a minority school, it just does not logically fit that it could be a good school. All of the evidence is that minority children achieve at lower levels than white children, so how could a racially mixed school be as good as a predominately white school? It does not fit.

Fourth, a common way of presenting the story in the newspaper is to present the positive point of view and a negative point of view. This is a "balanced perspective". If you are a parent and you say, "Well, there is a 50/50 chance that things are going to go well in that school," the responsible position is that you are not going to take that risk. I am not very happy about those odds. We certainly want our children to be secure and every incident that occurs in the school is generalized. If there is a violence level of two percent in that school, my concern as a parent is that my kid is going to be one of those two percent. When those issues become more and more visible our sense of anxiety and concern is heightened."[37]

Another witness succinctly put it this way: desegregation "brings out the warts" in a school system.

Long-Term Impact

1. EDUCATION AND CAREER PATTERNS

Notwithstanding the positive test score results described above, the Subcommittee believes that it may be at least as important to assess the educational benefits of school desegregation by the standard of how well students do after leaving school. This accords with the tendency of parents to rate schools based on their record as to whether their graduates go on to higher education and satisfying occupations.[38]

Parents also assume that their own children will benefit from attending school with such a record. Does this hold true for minority students? In other words, will desegregation of our schools equalize opportunity beyond the classroom? Will it lead to a reduction in income inequalities and adult segregation? The Subcommittee heard convincing evidence that it has. This outcome may be the most profound and beneficial change wrought by school desegregation.

Describing the impact of attending desegregated schools on employment opportunities, Dr. James McPartland summarized the research findings as follows:

School desegregation appears to be an effective way to encourage a more rapid movement of minorities into the nontraditional fields that have frequently been closed to them in the past. The school years are especially important for developing career goals. Research shows that racial differences in occupational choices first occur during the junior and senior high school ages. Other studies indicate that black males who had attended desegregated high schools were more likely to wind up in nontraditional mainstream careers in sales, crafts and the professions than those who had attended segregated schools.

Second, good jobs are often found through the use of informal networks of information, contacts and sponsorship, which appear to be less accessible to minorities in segregated environments. Recruitment, hiring, and promotion practices of firms often use informal social networks to locate and evaluate candidates. Unless minorities are tied into these networks, they may rarely be "in the right place at the right time" to become applicants for promising positions . . .

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[37] Testimony of Willis Hawley, Hearings at p. 426.

[38] Dr. Christine Rossell testified that parents often rate suburban, all-white schools as superior because they assume they have financing and facilities superior to inner-city schools. In reality, this is often not the case, and what parents are really looking at is the fact that "upper middle class white kids go on to college and people think that if you send them to those schools, your kids will get the 'good education.'" Hearings at p. 283.

Third, the perception of opportunities creates the psychological conditions through which an individual approaches the labor market. When an individual expects to face discrimination in a career line or in a firm—even if this expectation is incorrect, out-of-date, or overstated—it is unlikely that the individual will bother to explore many possibilities in that area. On the other hand, an individual who begins with a strong sense of opportunity can draw upon this strength to build a career in a wide range of areas. Repeated studies have shown that blacks and other minorities have a much lower sense of opportunity than whites, and feel less personal control over their own destinies. While this often reflects the realities of differences in employment opportunities, research also indicates that school desegregation serves to reduce the racial gaps in perception of opportunities. Specifically, minority students who graduate from desegregated schools have been found to feel a greater sense of control over their own fate and a more positive sense of opportunity. Research also suggests that students' desegregation experiences directly improve these perceptions, and that upgrading the quality of schooling in a segregated setting would not have the same impact.[39]

Dr. McPartland also noted that:

* * * students from segregated schools are more likely to be found later in life in segregated colleges, neighborhoods and places of work, while students who had attended desegregated elementary and secondary schools are more likely to choose to live in desegregated neighborhoods, to enroll in desegregated colleges, to enter desegregated occupations and firms, and to send their own children to desegregated schools.[40]

2. IMPACT ON HOUSING PATTERNS

It has long been suggested that the most effective and stable alternative to busing as a means of achieving school desegregation is residential integration. The effort by this Committee in the last Congress to strengthen the federal fair housing law [41] was, in part, promoted by this desire to create naturally integrated schools that would obviate the need for busing for purposes of desegregation.

However, the Subcommittee has learned that while segregation in schools clearly results from residential segregation, it also works the other way—segregation in schools contributes to segregation in housing. Indeed, this tendency may be more potent, and in any event, must be considered in devising strategies for school desegregation.

The basis for this impact is readily apparent. In making housing choices, parents (or parents-to-be) consider the reputation of the neighborhood school. For many parents, this factor is paramount, as Congressman Shumway explained:

. . . In many cases, [families] have arduously saved money in order to purchase a home in a neighborhood which would feed to a school more to their liking, only to find once they got there that the school district has reassigned their children, or perhaps many of the other children in that school back to the inferior schools from whence they came.[42]

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[39] Testimony of James McPartland, Hearings at p. 434.
[40] Ibid., at p. 435.
[41] See, Fair Housing Amendments Act of 1979, Hearings before the Subcommittee on Civil and Constitutional Rights, 96th Congress. That bill (HR 5200) was passed by the House of Representatives on June 12, 1980, but failed in the Senate after a vote to end debate was defeated.
[42] Testimony of Congressman Norman Shumway, Hearings at p. 188.

Chosing a neighborhood on the basis of the school tends to have a segregating effect because, as one expert explained:

> Schools tend to stamp their identity on the neighborhood, and school boundaries often actually define neighborhood boundaries. When schools are segregated and racially identifiable, they tend to influence housing choices along racial lines. Whites are not likely to buy in a neighborhood with a black or minority school, while minorities may find it difficult to buy into a community with a white school.[43]

Similarly, school choices are influenced by the fact that parents tend to perceive identifiably "white" schools as "good" schools, or at least more highly valued within the society,[44] whether or not that quality is objectively present in the form of superior student performance, faculty, resources, or curriculum.[45]

These assumptions are shared by real estate brokers, as evidenced by their practice of steering whites toward white schools and advertising the name or location of schools only when those schools are known to be white.

> A survey of real estate brokers' practices in the studied cities revealed that where the schools are segregated, whites are steered away from minority or mixed schools. Likewise, an HUD study of housing discrimination in 40 cities documented the use of schools to steer homeseekers, as in the following remark recorded by one of the white homeseekers in Monroe, Louisiana. The agent said "that no blacks attended the school where the number two inspected house was located."
>
> Real estate advertising practices in the study cities showed similar patterns. If school names were neutral geographic information, they would be mentioned about as often in one city as another. But that was not the case.
>
> The median percentage was 98 percent white, meaning half of the named schools were 98 to 100 percent white. In short, racially identifiable schools facilitate housing choices along racial lines, locking these communities into a vicious circle with school segregation reinforced with housing segregation.[46]

When schools are no longer racially identifiable, as is the case when schools are desegregated on a metropolitan-wide basis, they become "just schools," and this cycle breaks down. As Dr. Pearce explained:

> Other, less segregative choice factors become more important [such as proximity to work], and the surveyed real estate agents were much more willing to show homes throughout the community.[47]

Furthermore, school desegregation may lead to a change in perceptions as to which schools are "good" schools. Dr. Pearce reported, for example, that real estate brokers in such communities tended much more often to tell home seekers that "all the schools are good."[48]

The desegregating effect on housing has been recorded in major metropolitan areas across the country. In Dr. Pearce's words:

> In each pair of cities, it was found that the community that had had metropolitan-wide school desegregation has experienced substantially greater reductions in housing segregation than the otherwise similar community that had not had broad-based school desegregation.

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[43] Testimony of Diana Pearce, Hearings at p. 193. Dr. Pearce conducted a study of comparable cities, pairing those that had had metropolitanwide school desegregation and those that had not. See Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan Desegregation on Housing Patterns*, Center for National Policy Review, 1980.

[44] Testimony of Diana Pearce, Hearings at p. 235.

[45] Testimony of Christine Rossell, Hearings at p. 226 and 234.

[46] Testimony of Diana Pearce, Hearings at p. 193.

[47] Ibid. at p. 202.

[48] *Breaking Down Barriers, op. cit.*, at p. 19.

Moreover, the trend seems to be cumulative. That is, housing integration continues to rise year after year. Riverside, California was the earliest of the cities in this study, [school desegregation] having begun in 1965. By 1978, they had eliminated busing in all but four of the 21 elementary attendance areas. The other 17 schools attendance areas had become sufficiently racially integrated so that busing was no longer necessary in order to maintain racial balance in the schools.[49]

Careful planning can avoid resegregation and, as Dr. Pearce stated:

The choice can be made in ways that are very positive or very negative, with no cost involved in terms of the choice that the school officials have. With a little attention to this, I think a great deal of positive things can be done.[50]

It should be emphasized that the desegregating effect of school desegregation on housing is likely to occur only when the community has a relatively small minority population or when the plan is metropolitan-wide. If nearby suburbs or enclaves within the city are exempted from the plan, some parents can and do choose this escape from busing instead of moving to an integrated neighborhood. Indeed, it is when the desegregation plan is limited to the inner city that the phenomenon of "white flight" attributable to school desegregation is most pronounced.

3. WHITE FLIGHT

"White flight" was a term originally used to characterize the post-World War II movement of white middle class Americans to the suburbs. This exodus was prompted primarily by "pull" factors—greater suburban space, greenery, and (until recently) lower cost family housing, lower tax rates, federal housing loan policies, and changes in production and transportation patterns. More recently, the term white flight has been used to describe simply the decline in central city white public school enrollment.

It has been argued that the use of busing for school desegregation has so exacerbated this movement that schools, as well as housing, are being resegregated. Indeed, there is a concensus among researchers that under some circumstances, white public school enrollment has declined as a result of a desegregation plan. However, the magnitude of this decline often has been grossly overestimated. Furthermore, it is clear that white flight does not always increase in a desegregating community.

How much white flight has been caused by school desegregation? Many commentators critical of school busing have cited statistics on white flight that fail to isolate the impact of school desegregation from the long-term "pull" factors described above, and from the declining birth rate which has affected all races, but particularly that of whites. But as one expert explained:

Because of these factors, we can expect most northern central city school districts to have a "normal" percentage public school white enrollment decline of at least 4 to 8 percent annually, and that means even if they don't desegregate, and most northern suburban school districts to have an annual public school white enrollment decline of about 2 to 4 percent, again, even if they don't desegregate.[51]

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[49] Testimony of Diana Pearce, Hearings at p. 193.
[50] Ibid. at p. 229.
[51] Testimony of Christine Rossell, Hearings at p. 219.

The city of Chicago, for example, is sometimes cited as an example of the enormity of "white flight" caused by desegregation. However, that city has undergone virtually no desegregation, so that whatever the magniture of the move from public schools, none of it can be attributed to that factor.

When school desegregation is ordered, research indicates that it has its greatest impact on white flight soon after it is started:

> The implementation year white flight is the single greatest annual loss of whites a school district will experience. After that, the annual loss rate declines rapidly. Suburban and countywide school districts may actually make up their implementation year loss by the fourth or fifth year. Central city school districts, however, are unlikely to make up the implementation year loss. They will either return to the "normal" decline, or a continuing, although smaller in magnitude, annual white flight.[52]

The magnitude of this flight from desegregation depends on a number of factors. The research suggests that white flight is increased by the following:

> The reassignment of whites to formerly black schools; the extent of protest and negative media coverage; the reassignment of whites to older, larger formerly black schools; a greater than 35 percent black population; phasing-in a plan over a period of several years; having a small, geographic boundary encompassing only the central city; elementary school desegregation, although it is the most successful educationally and in terms of race relations in the classroom; long busing distances in city, not metropolitan, school districts.[53]

One important factor that does *not* appear to be linked to the magnitude of white flight is the quality of the public school being abandoned. Dr. Rossell testified:

> I did an analysis of white flight in Los Angeles for the first and second year of desegregation, and I found absolutely no relationship between the median achievement scores of the minority schools and white flight. Whether I looked at math, verbal, or combined them together, there was no relationship whatsoever. The dominant characteristic was that it was a minority school and the length of busing distance. In fact, four minority schools had higher achievement levels than the white schools that they were paired with, and had no difference in white flight compared to the other minority schools.[54]

Again, assumptions about the correlation between race and quality, rather than objective evidence, influenced attitudes and behavior.

It is clear, then, that white flight occurs, but in most cases it can be controlled. For example, even researchers identified with opposition to busing as a remedy for school segregation acknowledge that the metropolitan-wide desegregation busing plans tend to reduce the degree of white flight.

> The losses tend to be smaller . . . and they do not last as long. Therefore, resegregation is less likely in metropolitan plans.[55]

Whether or not this is a realistic policy option remains to be seen.[56] In any case, desegregation plans can minimize flight by considering the factors described above.

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[52] Ibid, at pp. 220–21.
[53] Ibid, at p. 220.
[54] Ibid, at pp. 235–236.
[55] Testimony of David Armor at p. 216.
[56] Dr. Armor believes that it is not. Other witnesses such as Dr. Pearce, believe it is not only the nation's last best chance, but politically feasible. See hearings at p. 216 and 231–233.

REMEDIES

BUSING

The methods available to undo the effects of segregation are as varied as the mechanisms used to create that racial separation. It is, however, the mandatory reassignment of pupils—with busing, where necessary—that has been the primary focus of debate.

Busing has been used to facilitate race-conscious pupil assignments since the last century. Dr. Joseph Johnson, now a superintendent with the metropolitan Wilmington public school system, described his experience in Delaware's segregated school system:

> Our high school was for many years the only secondary school in the State of Delaware that black students could attend. Members of my graduating class rode the school bus from each of the school districts that are sending or receiving communities in the current desegregation area. My classmates were transported across district lines daily throughout their secondary life. At least eleven members of the graduating class elected to move to the Wilmington, Delaware area from other parts of the States to live with friends and/or relatives just to get an opportunity to obtain a high school diploma.[56a]

Similarly, and more frequently, buses transported white students beyond the closest or "neighborhood" schools to segregated schools, or from schools in which they would have been in the minority.[57]

Today, for most school children, busing is a convenience provided by the school system. Because of the greater economy and educational benefits achieved through consolidation, the number of schools and districts has declined enormously since the last century, so that today, for over half of the nation's children, the "neighborhood" school is no longer a reality; the distances to school are such that they ride a bus to school.[58] Less than 7 percent of those children, or 3.6 percent of the total number of school children, are bused for the purpose of desegregation.[59]

The amount of time spent on school buses and their costs have figured prominently in criticism directed at busing for school desegregation. But statistical studies indicate that the median travel time for elementary school students was less than 15 minutes; only 15 percent of those students traveled more than 30 minutes.[60]

Critics should also be mindful of the fact that present constitutional law recognizes that a desegregation plan may not mandate busing involving time that would adversely affect the health of the students or the achievement of educational objectives.[61] To the extent unreasonable transportation times are being imposed, then, modifications can and should be sought under existing law.

The costs of busing have also been grossly misperceived by the public. One witness did a national survey of public attitudes about busing for desegregation, and learned that most people believe that more than

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[56a] Prepared statement of Joseph Johnson, Hearings at Appendix 9.

[57] This device was not limited to the South. See, for example, testimony of the U.S. Commission on Civil Rights, Hearings at p. 258 and 293, regarding use of this practice in Detroit and Pasadena.

[58] See, *Travel to School: October 1978*, prepared by the Bureau of the Census, reprinted in Hearings at p. 757. According to that study, the number of elementary schools declined from 238,000 in 1929 to only 63,000 in 1975, and the proportion of public school students transported to school at public expense increased from 7 percent in 1929 to 55 percent in 1976.

[59] U.S. Commission on Civil Rights, "Fulfilling the Letter and Spirit of the Law," (1976), at p. 202.

[60] *Travel to School*, op. cit. Statistics do not appear to be available establishing either the median time for bus rides to public schools, nor the time differential—if any—between busing for desegregation and other school busing.

[61] *Swann v. Charlotte-Mechlenburg Board of Education*,

a quarter of the school budget is spent on this function.[62] In fact, the percentage spent is closer to 0.2 percent.[63] Thus, the suggestion that "the money that is being spent on busing could be directed toward improving that quality of education perhaps through improved teacher salaries or better schools or better books . . . "[64] must be recognized as inviting only minor improvements.

In sum, criticism of busing for desegregation must be considered in light of the following: most American children are bused for nonracial reasons without apparent educational or health harm, or parental disapproval; relative to the total costs of public schools, the costs of busing for desegregation are not great; dissatisfaction with this method is voiced more often by those fearing future orders or otherwise not presently involved, than those participating in such a plan.[65]

Most important, however, is the question as to whether busing achieves a degree of desegregation that is unattainable through other means. The Subcommittee believes that it does.

Despite the tendency of desegregation plans (including those with mandatory busing) to accelerate white flight under certain circumstances,[66] the evidence shows that even in the worst case situations—such as Boston—there is more interracial contact than if there had been no desegregation.[67] Furthermore, busing plans—particularly those that exclude integrated neighborhoods—tend to foster residential integration, thereby stabilizing school desegregation and eventually reducing the need for mandatory pupil reassignments.[68]

2. PUPIL REASSIGNMENT WITHOUT BUSING

In many communities, the racial residential and school patterns are such that some desegregation may be obtained through pupil reassignments that need not necessitate busing. Occasionally, simply redrawing the attendance zones for schools alleviates racial imbalance, as when predominantly white and predominantly minority school attendance zones are adjacent. Likewise, since most communities are experiencing a dramatic decline in school populations, selective closings of schools can achieve the same result, with students formerly assigned to a racially imbalanced school now assigned to the remaining schools.[69]

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[62] Testimony of Gary Orfield, Hearings at p. 144.

[63] In its 1976 report, "Fulfilling the Letter and Spirit of the Law," the U.S. Commission on Civil Rights, relying on information provided by the Department of Health, Education, and Welfare, stated at p. 202:

"During the 1973–74 school year, $57 billion was spent for public education, and $1.858 billion of that total was spent for student transportation. Only $129 million of these transportation funds were used to achieve desegregation."

In other words, busing for desegregation accounted for less than 7 percent of the total public school transportation costs, and 0.2 percent of the total cost of public education.

Even when viewed from the perspective of particular communites that have instituted major busing for desegregation programs, the cost of busing compared to the total operating budget is often less than 1 percent. In Los Angeles, for example, busing in 1980–81 cost less than 1 percent of a total school operating budget of about $1.8 billion. (See Los Angeles Times, Nov. 17, 1980, p. 1.)

[64] Testimony of Congressman Bill Emerson, Hearings at p. 534.

[65] See *infra*, at p. 3. It should also be noted that the percentage of elementary and secondary students in private schools has not risen significantly in the last decade (from 10% to 11%). See CRS, "Private and Secondary Enrollment, 1970 to Present," Hearings at p. 755.

[66] See *infra*, at p. 17.

[67] "Mandatory desegregation plans, particularly in school districts above 35-percent black, yield a greater proportion of white in the average black child's school than voluntary plans, although these plans and these districts have greater white flight. Even school districts such as Boston which have experienced massive white flight have a proportion of white in the average black child's school which is almost twice as great as it would have been if the school district had not desegregated." Testimony of Christine Rossell, Hearings at p. 222.

[68] *Infra*, at p. 15–16.

[69] As noted supra, however, care must be taken to avoid resegregating the remaining schools and neighborhoods.

"Pairing" and "clustering" of schools have also been utilized as a remedy for eliminating school segregation. Under this scheme, students from two or more predominantly one-race schools are grouped, so that the total school population is relatively balanced. Those students will then attend a selected number of grades together in one school, and the remaining grades in the other paired school.

Often, all of these mechanisms have been used in the same community, sometimes with mandatory busing to rectify the problems at the remaining schools.

Because these methods appear to be less disfavored by the public, school officials and courts attempt to rely on them whenever possible. However, it should be noted that they involve pupil assignment on the basis of race,[70] and therefore would be eliminated as possible federal court-ordered remedies, if certain proposed amendments to the Constitution were adopted.[71]

Magnet schools (schools established with special programs and curricula designed to attract students of all races) have become a popular method for combining desegregation with educational improvements. However, unless a mandatory element is attached—such as racial admission limits or mandatory reassignment to another, non-magnet school in lieu of attendance at the magnet school—desegregation is rarely obtained.[72] Dr. Gary Orfield explained this phenomenon as found in Los Angeles:

> [Y]ou find a good many of the children who were in the magnet schools were not actually in integrated schools, they were in magnet schools that were segregated. Twenty-eight percent of the blacks, for example, were attending magnet programs that had an enrollment of 90 to 100 percent blacks, another 15 percent were in schools that had at least three-fourths minority children.
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> Of the Latino students in the magnet schools, which is a very small number—only 1 percent—more than a third were in schools where more than three-quarters of the children were from minority groups. In other words, even in this small magnet program, many of the children were in highly segregated magnet schools. They did not produce the remedy of integration that was desired and, at any rate, they reached a very small number of children.[73]

Thus, in communities with a sizeable minority population, magnet schools are a valuable tool for achieving desegregation only when a mandatory element is present. To that extent, magnet schools cannot be considered a "voluntary" remedy.

The Subcommittee does not mean to suggest that magnet schools are not valuable educational improvements that should be fostered even when racial balance is only marginally improved. Among other things, the institution of magnet schools as part of a mandatory plan "reduce[s] the perceived cost of school desegregation."[74] That is, parent and students believe they are gaining educationally under the desegregation plan, and, when the alternative is assignment to a non-magnet school, they form a "safety-valve" in the system.[75]

3. VOLUNTARY PLANS

It has been suggested that, in the long-run, voluntary plans can achieve a greater degree of desegregation than mandatory reassign-

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[70] See Memorandum prepared by CRS, "Legal Analysis of H.J. Res. 56," Hearings at p. 722 et. seq., and "Sundry Questions Regarding the Legal Effects of H.J. Res. 56," Hearings at p. 729 et seq.

[71] E.g. H.J. Res. 56. See discussion *infra*, p. 25–26.

[72] Testimony of Christine Rossell, Hearings at p. 221.

[73] Testimony of Gary Orfield, Hearings at p. 144–145.

[74] Testimony of Christine Rossell, Hearings at p. 221.

[75] Testimony of Suzanne Hittman, Hearings at p. 375.

ment of pupils and that the failure of proof thus far is attributable to a refusal to give these methods a fair chance.[76]

However, it should be noted that in those communites where busing was ordered, voluntary methods initially had been tried for considerable lengths of time, with little or no desegregation resulting.[77] Freedom-of-choice plans—appealing in their simplicity and seeming color-blindness—simply perpetuated segregated patterns. Those voluntary plans that have been hailed as a success have, in fact, achieved only minor reduction in racial isolation.[78]

These voluntary systems fail because of the prevailing perception that formerly black and Hispanic schools are inferior, and the refusal of many whites to transfer there even when "magnet" programs are developed in those schools.[79] On the other hand, when the percentage of minorities is low in a community and minority schools can be closed, voluntary plans are viable:

> . . . [M]agnet schools . . . may bring about desegregation in some communities where there are relatively small numbers of minority students, and that is simply because the relatively small number of white parents volunteering for desegregation along with the relatively large number of black parents volunteering for desegregation can bring about desegregation. But in school systems that have minority populations of 20 percent, 25 percent, or more, there are very few examples where substantial desegregation has been brought about. That, of course, is a pattern not just seen by social scientists but evidenced by a whole range of cases.[80]

Needless to say, voluntary plans are more popular, and, contrary to popular belief, such plans are normally tried first. As Dr. Hawley observed:

> Every system seeks to bring about desegregation voluntarily, but people go back into court saying that not enough racial balance has occurred and they go from there.[81]

Federal Support

As noted at the start of this report, despite the impressive gains of the last decade, federal support for desegregation may be at its lowest ebb since the *Brown* decision.

In testimony before the Subcommittee, the Assistant Attorney General for the Civil Rights Division, William Bradford Reynolds, made it clear that this Administration is not simply refusing to seek busing as a remedy for desegregation. While acknowledging a responsibility to develop "meaningful alternative approaches to accomplish to the fullest extent practicable the desegregation of unconstitutionally segregated public schools," [82] the strategies and actions of this Administration instead suggest a wholesale legal, financial and moral abandonment of that goal.

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[76] Testimony of David Armor, Hearings at p. 214.
[77] See testimony, *inter alia*, of Dr. Jay Robinson (Charlotte-Mecklenburg), Suzanna Hittman (Seattle), and Maxine Smith (Memphis).
[78] In San Diego, cited by David Armor, Hearings at p. 214, as an example of "impressive" progress, "the level of interracial contact is essentially unchanged from what it was before." Testimony of Diana Pearce, Hearings at p. 231–232. See also the testimony of Willis Hawley, Hearings, at p. 431.
[79] See, for example, testimony of Tom Atkins, Hearings at p. 73.
[80] Testimony of Willis Hawley, Hearings at p. 431.
[81] Ibid.
[82] Testimony of William Bradford Reynolds, Hearings at p. 614.

1. LEGAL POSITION

Legally, the Department appears to have taken the position that the effectiveness of a desegregation plan no longer should be assessed in terms of whether or not the deliberately-created racial isolation is reduced. Under this view, if legal barriers to free choice are eliminated, the fact that the school system remains segregated becomes virtually irrelevant. The position shows a fundamental misperception or misstatement of the central goal of desegregation. Segregation is the condition which offends the 14th Amendment's prohibition of racially discriminatory state action. While the Supreme Court uses the term inequality to describe the result of state-supported segregation, Mr. Reynolds takes this literally to mean differences in sums expended on schools. Even if resources were allocated absolutely equally, however a state which segregated on the basis of race would be violating the Fourteenth Amendment.

This position also ignores the nature of intentional segregation today; i.e. segregationist laws and other explicit legal barriers no longer create this racial division. Rather, it is the decisions of school officials as to where to place a new school, how to assign faculty, whether to expand a minority or majority school, and the like, that account for intentionally created segregation today. Decades of such racially tainted decisions have created a pattern of racially identifiable schools that cannot be undone with the stroke of a pen. Even when the segregating action leaves no physical presence—as with gerrymandered attendance zones—ensuing resegregation of neighborhood creates segreated housing and school patterns that cannot be cured by simply redrawing those attendance zones.

The remedies the Justice Department now indicates it will pursue in these situations are those that are unlikely to produce desegregation; rather, they promise at best an open enrollment policy that in the past has only perpetuated segregation, and an equalization of resources between majority and minority schools.[83] This is, in effect, a return to a doctrine of "separate but equal" augmented by a freedom of choice rule. Such a program not only cannot be expected to undo the effects of purposeful racial isolation, it also provides no disincentive for future acts of intentional segregation.

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[83] The following colloquy with the Assistant Attorney General demonstrates this philosophy:

[COUNSEL]. Assume that in a case before a court there is a finding both of intentional acts which created a segregated school system, and allocation of resources between these segregated schools that was unequal, so the black schools would get fewer resources than the white schools. Would you say that it would be a constitutionally adequate remedy for the courts to order a reallocation of resources so that those black and white schools receive equal resources?

Mr. REYNOLDS. Well, I think that would be one element of the remedy. But I think you also would have to remove the barriers that had been placed by the State in the way of an open student enrollment, so you would have to have as elements of your remedy the desegregation package, if you will that I have outlined in my testimony. That would have to be in addition to addressing the educational component.

[COUNSEL]. Suppose the barriers are such that they are already in place in a very physical way, such as the location that the school board chose to put new schools, the expansion of black schools to accommodate a growing black population, rather than having those additional black students go to neighborhood white schools, and so forth. What would be the appropriate remedy in these circumstances?

Mr. REYNOLDS. Well, in the abstract I would have to say that certainly some combination of those remedies that I have addressed on pages 13 and 14 of my testimony.

[COUNSEL]. They are what, again?

Mr. REYNOLDS. The voluntary student assignment program, magnet schools, and enhanced curriculum requirements, faculty incentives, in-service training programs for teachers and administrators, school closings, if you have excess capacity, or new construction where that may be called for. I'm not suggesting to you that's an exhaustive list, but certainly the relief fashioned should include some or all of those elements and maybe more.

(Continued)

The Department's legal position, then, is at odds with the established law that the measure of the adequacy of a desegregation order is whether it "works." The articulation of the Administration's policy is not simply theoretical, however. In several recent cases, the Department has abruptly reversed positions, and accepted desegregation plans previously denounced as totally inadequate.[84]

A change in legal analysis has also been proffered as the reason for the Department's changing sides in the Seattle case.[85] As a result, the Administration is now in a position of supporting the dismantling of what seems to be a successfully implemented school desegregation plan.[86]

The Seattle case also points to a central irony: while favoring local control in many instances, here the Administration disfavors the maintenance of traditional decision-making at the local school board level, where it long has reposed in every state. The shift in position also strikes a blow to the factors considered most important to the success of desegregation plans—local initiative, support, and involvement.

Consistent with and supportive of the Administration's repudiation of effective remedies is its refusal to uphold the principles of several crucial Supreme Court cases. Particularly destructive to the effort to eliminate officially sanctioned and fostered segregation is

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(Continued)

[COUNSEL]. Are you suggesting that if a community intentionally chooses sites for its schools that create a segregated system, and those schools are built, there should be no remedy that actually desegregates those facilities other than on a voluntary basis?

Mr. REYNOLDS. I think, using those components that I mentioned to you, I would say that would be the proper way to address the problem. I think that every kid in America has a right to an integrated education where he wants it, especially if you have a *de jure* situation. I don't think that means that the Government can compel an integrated education. I don't think there's anything in the Constitution that suggests it can, or in any other cases by the Supreme Court or the lower courts. Our remedies will be designed in order to help those kids that want to have an integrated education to have it. We are going to remove whatever the artificial barriers are that the State has imposed to permit the children to have that education.

With respect to forced busing, what we are saying is, though, that we are not going to compel children who do not want to choose to have integrated education to have one. I think what we have done in our remedial package is to add the component for those children who do not choose to have the integrated education, those to be insured that the education that they get is going to be in parity with and on a par with the education that everybody else is getting. And that's why we think we ought to go back and look at what *Brown* v. *Board of Education* said and focus on what its concern was, and say the educational component is something that ought to be dealt with. And if there are children in the system who don't choose to have an integrated education, they should have the same education in the predominately one-race school. And if there are children in the system that do choose to have the integrated education, they ought to be allowed to have it. They ought to be allowed to choose it wherever they want to, and the remedy that we have put in place is going to insure that they get that.

Hearings, at p. 631–632.

[84] Most striking is the case involving the city of Chicago. The Department has now agreed to a plan which (1) defines a 70 percent white school as permissibly desegregated, in a city with a white school population of 20 percent; (2) delays any mandatory busing until September 1983; (3) embraces a set of voluntary desegregation techniques which had already failed in Chicago and has shown very minimial success in other areas of the country. Thus, the plan promises only minimal desegregation.

[85] In *State of Washington* v. *Seattle School District No. 1*, the Department has now reversed the position it is taking in the Supreme Court.

Originally, the Civil Rights Division joined the City of Seattle in challenging the constitutionality of a state-wide initiative which prohibited local school boards from voluntarily adopting mandatory school desegregation plans.

In the district court and the Ninth Circuit, the Justice Department successfully argued that the initiative was unconstitutional since it created a racial classification by allowing school busing for every purpose except desegregation. Moreover, the local school board showed that the initiative was unconstitutionally tainted by the racially discriminatory intent of many of its sponsors, motivated by invidious bias against minority persons and undesirous of associating with them.

Now claiming that education is a subject for state, as opposed to local, control and expressly rejecting prior Department arguments, the new administration has asked the Supreme Court to reverse the Ninth Circuit and to uphold the constitutionality of the initiative.

[86] See testimony of Suzanne Hittman, Hearings at p. 370 et seq.

the Department's announced refusal to rely upon the "*Keyes* presumption." In *Keyes* v. *School District No. 1, Denver, Colorado*,[87] the Supreme Court held that once a court has found that substantial segregation has been caused by school authorities, it may impute (though not irrebuttably) the remaining segregation to school authorities. Following this presumption, previous Administrations had favored system-wide remedies in both the North and South, and had supported transportation remedies necessary to effectuate system-wide relief.

The significance of this new position is not only that the Department is failing to uphold the law; by seeking only partial relief (in only part of the school system), residential instability will be fostered, as white parents seek to enroll their children in schools not touched by desegregation. Furthermore, with only a fraction of a district involved, meaningful desegregation may not be possible.

In one respect, the Department has stated an interest in expanding enforcement activities: where schools are *de facto* racially imbalanced, (i.e. not as a result of intentional state action) and resources are significantly and intentionally allocated discriminatorily, the Department will challenge this allocation as a constitutional violation.

Another witness confirmed the existence of the problem of intradistrict inequities:

> A new and emerging area of research is called the study of intradistrict inequalities. I am speaking now of the per student support that varies within the same school district from one school to another, not between school districts but within the same school district.
>
> I would say in the last 2 or 3 years at the most there have been more scholarly analyses of this question than have been published in all our history, and it will I think expand. It tries to face up to a very specific question, namely are schools attended by poor and minority children being shortchanged by local school districts in the way that Federal, State, and local finances and funds are distributed from school to school?
>
> In 1966, the Coleman report, reported that there were no significant differences as between schools that were attended by minority students and those by whites. But in the last 2 or 3 years enough evidence has accumulated to put that misconception aside. So what we are finding out more and more is that urban schools, especially, are typified by a very significant inequality in the amount of resources.[88]

Theoretically, the Subcommittee welcomes this approach; however, the remedies appropriate to this kind of violation cannot suffice for those appropriate to *de jure* violations. If a community has not only intentionally segregated its schools, but also intentionally shortchanged minority schools, a settlement assuring the upgrading of minority schools is inadequate. Nevertheless, there are indications that the Department is considering such solutions in several cities.

2. OMISSIONS AND FAILURES TO PROCEED

The Attorney General has cautioned that this change in direction should not be taken "as a signal that the Department of Justice will not vigorously prosecute any governmental attempt to foster segregation. We will not countenance any retrenchment here . . .[89]

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[87] 413 U.S. 189 (1973).
[88] Testimony of Meyer Weinberg. Hearings at p. 404.
[89] Speech before the American Law Institute, May 22, 1981.

Nevertheless, the record thus far indicates that the federal government has done very little to fulfill this warning not to discriminate. No investigative initiatives have been announced, (for either *de jure* or *de facto* cases), no enforcement priorities have been set and prior cases poised for prosecution have lain dormant.[90]

The policies of the Department, combined with these omissions, reverse the historic role of the Department. Previously eager to at least present the image of a strong enforcer of the civil rights statutes and the rights of minorities, the Department has given up all illusion of such a role. Its actions and omissions signal that the Civil Rights Division now has become a negative force, providing solace to those who have violated and will continue to violate among the most important laws of this nation.

3. FINANCIAL SUPPORT

The primary instrument for federal financial support for school desegregation had been through the Emergency School Aid Act (ESAA).[91] That law authorized financial assistance for two purposes:

> To meet needs occasioned by the elimination of minority group segregation and discrimination among elementary and secondary school students and faculty; and
>
> To encourage voluntary reduction or prevention of minority group isolation in schools with substantial proportions of minority group students.

Many of the voluntary desegregation options favored by this Administration had been funded by grants under this program, such as magnet schools, pairing of schools with colleges and businesses and construction of neutral site schools.[92] Nevertheless, changes in the law and funding levels have ensured that these activities will diminish if not disappear in many communities. For exampe, the funding for fiscal year 1982 for the entire State of Delaware is 50 percent less than the 1981 ESAA funding just for the New Castle County school district. Even these funds may not be available to that district, since the law no longer targets funds specifically to the purposes of the program.[93]

Proposed Constitutional Amendments

Several measures have been referred to this Subcommittee which would affect the ability of courts or agencies to order school desegregation remedies. Prominent among these is H.J. Res. 56, a proposed amendment to the Constitution introduced by Congressman Ron Mottl. It provides:

> No court of the United States shall require that any person be assigned to, or excluded from, any school on the basis of race, religion, or national origin.

The meaning and effect of this measure are in dispute. Its sponsor testified that his purpose is simply to remove the remedy of court-ordered busing:

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[90] Prosecution involving St. Louis, among others, reportedly has long been ready for enforcement action. See, for example, Testimony of Tom Atkins, Hearings at p. 31.

[91] The Emergency School Aid Act is an official destination for Title VI of the Elementary and Secondary Education Act of 1965. ESAA was originally passed as Title VII of the Education Amendments of 1972, but the Education Amendments of 1978(Public Law 95-561) made it part of ESAA beginning in fiscal year 1980.

[92] Funding for the ESAA between 1973 and 1980 was never less than $215 million nor more than $300.5 million.

[93] See CRS memorandum, "The Possible Impact of the Education Consolidation and Improvement Act of 1981 on Activities That Have Been Funded Under the Emergency School Aid Act," Hearings at p. 733 et seq.

I, like you, believe that we have to desegregate the school systems that are segregated. But we have to use the proper remedy. The remedy I want to get rid of is a remedy that has been a total failure in my opinion. That remedy is court-ordered busing.[94]

Congressman Mottl disclaims any interest in barring other race-conscious remedies.[95] However, as the analysis submitted to the Subcommittee by the American Law Division of the Congressional Research Service suggests, the resolution would bar federal courts from ordering a wide range of race-conscious remedies traditionally used in desegregation cases. These include not only busing, but also the redrawing of school attendance zones, neutral site selection for new school construction, school consolidations, teacher assignments and so forth.[96]

The Department's support for these race-conscious remedies puts it at odds with the apparent broad reach of this proposal.

The Subcommittee concurs with the views expressed by many of our witnesses, to the effect that proposals such as H.J. Res. 56 would nullify judicial protection of the constitutional rights recognized in *Brown* v. *Board of Education*, thereby inhibiting virtually all efforts to desegregate the nation's public schools.[97]

Strategies for Effective Desegregation

Perhaps the greatest value of the Subcommittee's hearings will be its contribution to a better understanding of how to make a desegregation plan "work" for the students and the community. Effectiveness, however, must be measured by different and sometimes competing goals: the reduction of racial isolation; the avoidance of resegregation, and white flight within schools and among school systems; improved race relations; academic achievement; and community support for public education.

The pupil assignment plan is usually the key factor in shaping the chances for a plan's success. The Subcommittee concurs with the findings of the Vanderbilt University study that pupil reassignment plans are most likely to be effective across a range of goals when they:

Begin the desegregation of students at the earliest age possible;

Are mandatory but provide parents with educational options both within and among schools. Magnet program can be effective when there are a substantial number of minority students in a school system. They are most effective in reducing racial isolation in the context of a mandatory plan;

Enrich the curriculum in all schools, not only in "magnet" schools;

Affect the entire community and all ages of children simultaneously; phasing in plans results in greater resistance and exits from public schools. Plans such as this by themselves trouble and encourage white flight and generally destroy confidences in their own systems;

Take into account the special needs of different racial and ethnic groups;

Encourage stability in teacher-student and student-student relationships and otherwise reduce the uncertainties parents have about where their children will attend and who will be responsible for their education;

Retain a "critical mass" of students of any given race or ethnic group; that is, 15–20 percent, in each school, if possible; and

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[94] Testimony of Congressman Ron Mottl, Hearings at p. 14.
[95] Ibid p. 15.
[96] See CRS, "Legal Analysis of H.J. Res. 56 . . .", Hearings at p. 729 et seq. "Sundry Questions Regarding the Legal Effects of H.J. Res. 56 . . .", Hearings at p. 729 eq. seq.
[97] For a fuller discussion of the implications of H.J. Res. 56, see Testimony of Tom Atkins, Hearings at p. 38–40, Testimony of Julius Chambers, Hearings at p. 65–69.

That percentage may vary by the character of minority population in the school, the nature of residential patterns in the community and other factors.[98]

But as the Director of that program emphasized, "Mixing students by race and ethnicity establishes the basic conditions for desegregated schooling, but it is what happens in schools and classrooms that determines student outcomes." [99]

Among the things school systems can do to improve achievement and race relations, and avoid resegregation are:

Create schools and instructional groupings within schools of limited size that provide supportive environments in which teachers can know most students and can provide continuity in learning experiences. . . .

Develop multiethnic curriculums . . . [W]e often approach the problem of human relations as a kind of separate activity, a brotherhood day or a once-a-week session where there is an announcement that says that we will now talk about human relations. These kinds of programs are not likely to be effective.

Make human relations the fundamental component of everything that is done in that school.

Maximize direct parental involvement in the education of their children. [S]chools are not used to doing such things. School desegregation places a special demand on schools to take the initiative in seeking parents out. One of the problems that, of course, is created by school desegregation is that parents sometimes are at greater distances from the schools than they would otherwise be.

There is a rather simple answer to that in many communities and that is to bring the school to the parents in the form of holding teacher-parent meetings, PTA meetings, and the like in the school nearest the student's homes, in community centers and other places in the community such as, for example, a housing project, if there is one involved, or in churches and the like.

Discourage interstudent competition while holding high and attainable expectations for individual students.

Maintain discipline through clear rules of student behavior that are consistently and fairly enforced.

Maximize participation in extracurricular programs that provide opportunities for interracial interaction. That is somewhat more difficult than it sounds and it means that school systems should plan early to have effective interracial integration outside the classroom. If you want to have an interracial orchestra, for example, you may have a strings program in primary schools.[100]

As the discussion above indicates, increased flight of the middle class from public schools can occur following desegregation. The Subcommittee agrees with the Vanderbilt study that:

School systems can reduce the overall effects of middle class flight by providing accurate and thorough information to parents, involving the community in the development of the assignment plan, acting promptly, minimizing disruption, actively recruiting private school parents, taking the offensive in providing news to the media, creating incentives for integrated housing, and pursuing metropolitan-wide desegregation programs and plans—including cross district voluntary programs—and providing diverse and advanced curriculums.[101]

Clearly, all of these variables and strategies must be considered in light of local conditions. No single plan is ideal. The degree of white flight, for example differs dramatically from community to community, and can and should influence the structure of the desegregation plan. As one witness stated:

[I]n situations where a school district is three-quarters white and one-quarter black, the problems of white flight are relatively small and containable, and that

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[98] Testimony of Willis Hawley, Hearings at p. 420–421.
[99] Ibid, at p. 421.
[100] Ibid.
[101] Ibid at p. 422.

makes things rather cheery since the public schools in the United States are 80-some-odd percent majority, I guess. Most of the places that we are talking about having problems with white flight is not because it will cripple a desegregation plan.

When you get to a school district like Detroit—I guess Detroit was probably 60 percent black at the time of *Milliken*—in that situation the judge said we cannot desegregate every school. So we will write off half of the ghetto and desegregate the other half, creating schools that are about 50-50 black and white. That is done. There was considerable white flight, but also considerable desegregation, but not as much as you might wish.

When you get to a situation like contemporary Philadelphia where the public schools I guess are close to 80 percent black, in that situation the kind of traditional desegregation plan is not going to work, and as far as I know no one is going to ask for it.[102]

Conclusion

It has been said that the opposition to school desegration is premised on a belief that even though public officials might well have violated the law, the children should not be made to pay the price of the transgressions. But, as the General Counsel for the NAACP stated:

The problem with that line of reasoning, . . . is that it ignores that the real beneficiaries of school desegregation are the children. The black children who will be prevented from attending classrooms and in school buildings made separate and kept inferior by deliberate public policy of which they are fully aware; white children who will be spared the crippling racial prejudice and hatred their parents in all too many instances grow old with and die with—the children benefit. And what study after study . . . shows is that where the old folks get out of the way, the young folks can make it work.[103]

Where men and women of good will make the effort to make desegregation work, racial barriers can be dismantled beyond the classroom, too, thereby richly rewarding the community. As the Superintendent Jay Robinson stated of his community:

In my opinion school integration has significantly contributed to the good race relations and quality of life in Charlotte and Mecklenburg County . . .

I believe our community is a better place to live and the overall quality of our schools is better today than it would have been if the *Swann* decision had never been made . . .

There is an air of optimism in the Charlotte-Mecklenburg schools. Morale and expectations are high. I would prefer being superintendent in Charlotte-Mecklenburg to any large school system in this country. The major reason I feel this way is that I sincerely believe we have successfully handled the problems of school integration. In large measure we have put racial strife and bigotry behind us and are concentrating on improving the quality of education for all our students.[104]

Finally, these words of yet another witness put the issue into the appropriate perspective:

Debates over school desegregation are often dominated by myth, anecdotal war stories, and promises of easy solutions. Desegregation has increased demands on school systems and on communities. In some cases, this has resulted in unhappy outcomes. In others, it has resulted in needed improvements in educational programs. While many of the shortcomings of public schools and many of the nationwide demographic trends are blamed on school desegregation, the available evidence indicates the costs of desegregation have been overstated and the benefits have been underrecognized. In any case, it seems time to focus our attention away from the past to what can be done to improve public schools.[105]

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[102] Testimony of Robert Crain, Hearings at p. 412–413.
[103] Testimony of Tom Atkins, Hearings at p. 44.
[104] Testimony of Jay Robinson, Hearings at p. 18–19.
[105] Testimony of Willis Hawley, Hearings at p. 423.

SUPPLEMENTAL VIEWS OF MESSRS. HYDE, SENSENBRENNER, AND LUNGREN

Few civil rights issues have been more divisive than forced busing to achieve an arbitrary racial balance in our public schools. Dislike for this practice exists in black and white communities alike, and is growing. Columnist William Raspberry, an outspoken critic of forced busing, has complained that the principal question which each of us should ask is not whether this remedy has resulted in the desired racial mix, but whether "anyone—including the NAACP—has done as much as possible to improve the education of black children." "Color," he goes on to say, "isn't the problem; education is."[1] We agree.

Tragically, "separate but equal" was once the law in the United States, condoned by the Supreme Court in one of its least sublime moments.[2] In 1954, it reevaluated the standard and correctly found it wanting. Presented with cases from Virginia, Kansas, South Carolina, and Delaware, in which public schools were segregated along racial lines, the Court held in *Brown* v. *Board of Education* (*Brown I*) that such facilities "are inherently unequal" [3] and therefore violative of the equal protection clause of the Fourteenth Amendment. In a subsequent decision based on a re-argument of the same case, the Court granted wide, equitable discretion in the remedies from which district courts might choose. The seed was thus planted for the unintended busing difficulties which plague us today.[4]

In our judgment, *Brown I:*

> [did] not decide that the federal courts are to take over or regulate the public schools of the states. It [did] not decide that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of their right of choosing the school they attend. What it has decided, and all it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains.[5]

Forced busing, then, began as a remedy to eliminate *de jure* seggregation in limited parts of the country and, as it spread, soon became part of a nationwide problem. In *Swann* v. *Charlotte-Mecklenburg Board of Education*,[6] the Court upheld the decision of the district court to utilize busing as an enforcement tool in implementing the Fourteenth Amendment. Bus transportation, said the Court, "cannot be defined with precision." [7] It is, however, "within [the district court's] discretionary powers, as an equitable remedy for * * * particular circumstances." [8] On the other hand, the Court embraced the

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[1] William Raspberry, "Why is Busing the Only Route?" Washington Post. Hearings at 8 pp. 12-13.
[2] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).
[3] 347 U.S. 483, 495 (1954).
[4] *Brown* v. *Board of Education* (*Brown* II), 349 U.S..294-300 (1955).
[5] *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (1955).
[6] 402 U.S. 1 (1971).
[7] Id., at 29.
[8] Id., at 25.

district court's finding in its August 3, 1970 memorandum decision that:

> this court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.* (Emphasis in original) [9]

While sustaining the decision to bus students in *Swann*, the Court took pains to note as well that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." [10]

We believe this point of overkill has been reached far too often in recent years. The zeal of some federal judges, encouraged by groups purporting to represent the educational interests of minority children, has, in far too many cases, substituted litigation for education, and helped produce near fatal funding deficiencies in local school systems. This tactic instead has raised the counterproductive specter of resegregation due to "white flight", a phenomenon which cannot be ascribed solely to racial prejudice. On the contrary, the controlling factors are not so much racism as the natural inclination of parents to have their children attending schools close to the home setting, combined with the perception, if not the reality, that crime and harassment are more prevalent, and academic standards less stringent, in schools located in the inner-city. These are very real fears which mere rhetoric cannot dispel.

In hearings before this Subcommittee, witnesses expressed their concern about the disruptive effect of forced busing. Dr. Nathan Glazer, a social scientist from Harvard University, testified that:

> [i]n Boston, to take one particularly hard case, after seven years of court-ordered and administered forced racial assignment of students, the school system has lost many thousands of white—and black—students, costs have risen greatly, and the reputation of the school system is as bad as it has ever been.[11]

Reinforcing Dr. Glazer's assertion that middle-class blacks have begun to join whites in fleeing urban schools victimized by poor educational opportunities, the Washington Post, in one of a series of articles on the growing black middle-class in suburban Washington, D.C., commented:

> Education is in fact the reason many of the families, like the white families who came to the suburbs before them, are here. They were concerned that the District's public schools were no good and hoped that the [suburban] Prince George's system would be better.[12]

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[9] Id., at fn. 9.
[10] Id., at 30-31.
[11] Hearings (September 17, 1981), at p. 47. In fact, in a recent survey of parental preferences in Chicago, Illinois, released in December, 1981, by the National Opinion Research Center of the University of Chicago, 51 percent of all blacks sampled opposed forced busing to achieve school desegregation as did 56 percent of all Hispanics. (See Subcommittee Report.)
[12] Washington *Post*, Oct. 5, 1981, page A-1.

Unfortunately, when asked about the possibility that many blacks, like their white contemporaries, might have more concern for a better education than they do for arbitrary statistical balances, Dr. Christine Rossell, of Boston University, replied that such a view reflects "racist" attitudes which some blacks hold for other blacks.[13] In other words, to leave a school system because of concern for a quality education, according to Dr. Rossell, is racist if it means that the majority of those left behind are black. In our view, subscribing racially prejudiced motives to parents who want acceptable academic challenges for their children is overly simplistic and hardly professional. It is further our view that, as we have said, most parents who oppose busing do so not because their child may sit next to a black child in school, but because they are distressed about the time which they believe is wasted traveling to and from school, about the lack of parental input possible in a school distantly located from the home, about the safety factors which they see as inevitable in inner-city environments, and about the resultant academic deterioration which can only be heightened by high teacher turnover and diminished financial resolve.

Moreover, it is ironic that so many advocates of forced busing send their own children to exclusive private schools, often without the benefit of exposure to many blacks.[14]

Dr. David Armor, senior social scientist at the Rand Corporation in Santa Monica, California, testified that scores of cities with court-ordered busing have experienced white flight and resegregation. Among them is Los Angeles, where a study has revealed that opposition to busing, once again, is spurred by educational rather than social concerns. Among the other nontraditional venues he named were Denver, San Francisco, Omaha, Seattle, Oklahoma City, and Dallas.[15]

One of the best examples of the disaster busing can cause is presented by Memphis, Tennessee. The Subcommittee invited Mrs. Maxine A. Smith, President of the Memphis Board of Education, to appear before us on October 14, 1981. She claimed that the school system in Memphis was no different in 1972 than it was before *Brown I* in 1954.[16] What she did not say was that many highly placed blacks in Memphis have begun to question forced busing as a means to higher socio-economic achievement. In 1970, the white enrollment in Memphis amounted to 48.4 percent of the total, with blacks making up the balance. In 1980, after a decade of court-ordered busing the white percentage had shrunk to 24.7 percent;[17] in short, "there [are] simply not enough white kids left to achieve any kind of meaningful integration."[18]

Why? Partly because 30,000 Memphis students were involved in busing plans which took them out of their neighborhoods and deposited them in one of 26 inner-city schools.[19] As we have seen, those with economic alternatives, regardless of race, often opt out of the social "experiment" and into what they know to be a quality academic environment. As a consequence, the blacks left behind frequently find themselves bused from predominantly black schools near their homes to predominantly black schools across town, a

[13] Hearings, Sept. 23, 1981, at p. 233.
[14] One former congressman, long a staunch supporter of busing to achieve racial balance (and now a judge on a federal circuit court), was heard to justify his decision to send his daughter to an exclusive private school rather than rely on the District of Columbia's mostly black system with the comment: "She wasn't getting the kind of educational challenge I thought she needed . . . ."
[15] Hearings, Sept. 23, 1981, at p. 214 *See also* fn. 7.
[16] Hearings, Oct. 14, 1981, at p. 324.
[17] Id., at 5.
[18] David Dawson, "Charade on Wheels", Memphis Magazine, October, 1981, at 40.
[19] Id., at 41.

result which benefits no one. Dr. Willie Herenton, who appeared before the Subcommittee on another matter unrelated to is both black and superintendent of the Memphis public schools. He has been quoted elsewhere as saying that:

> There are many segments of the black community [in Memphis] who are unhappy with busing. Initially, I supported busing. I don't ever want to lead anyone to believe that I am not in favor of desegregated educational settings in the schools; I am. However, I am a pragmatist. What we are doing today, busing, simply has not worked.[20]

Even an aplologist for liberal causes such as the Washington Post has begun to waiver in its across-the-board support for forced busing. In an editorial published just last May, it concluded:

> The issue of school segregation has moved well beyond the original context: to ensure that all children, regardless of race, have the right to go to any public school they are eligible to attend. The real threat to children today is not so much official segregation as plain bad schools, especially in big cities where black students commonly make up more than three quarters of the public school population.[21]

We deplore and positively reject any suggestion that a return to the kind of educational environment which existed before *Brown I* is appropriate under any circumstances. We are painfully aware, though, how easy it is to focus on racism as the principal motivating factor behind dissatisfaction with forced busing. We are equally aware that such charges, while unfair and clearly designed to be intellectually intimidating, also tend to ignore the crippling effect that busing can have, and has had, on many of our nation's secondary school systems.

We would urge courts and schools authorities to place more emphasis on incentive systems designed to encourage the best teachers to locate in majority-black environments, "magnet schools" to lure academically oriented students into schools with racially mixed student populations, and voluntary systems which permit students, at public expense and regardless of race, to attend the school of their choice.[22]

We agree with Dr. Armor's complaint that voluntary plans, in particular, have not been given sufficient opportunity to succeed; it is therefore misleading to assail them as ineffective.[23] Failure on the part of the Executive and the courts to heed this clear public preference will inevitably lead to a change in the law—probably by constitutional amendment. It is important to stress that it is not busing which we oppose. It is "forced" busing—there is a significant difference. The former is merely transportation, the latter a form of conscription which creates many more problems than it purports to solve.

HENRY J. HYDE.
F. JAMES SENSENBRENNER, Jr.
DANIEL E. LUNGREN.

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[20] Id., at 41–42.
[21] Washington Post, May 7, 1981 (editorial).
[22] The Supreme Court's holding in *Green* v. *County School Board*, 391 U.S. 430 (1968), has often been cited in support of the proposition that voluntary plans are unacceptable. That is not our reading, nor is it the opinion of the Court itself. In *Green*, the voluntary plan under attack failed because students in just two grades, the first and eighth, were required to choose between one of the two schools in rural New Kent County, Virginia. Though all others had the option to choose, they predictably did not, and were assigned to the school they were already attending, each of which was racially segregated. The Court struck down this "voluntary plan" because it offered no "real promise of aiding a desegregation program" designed to achieve a unitary, rather than a dual, school system (*Green*, at 440–441).
The Court, although it had been urged to discard voluntary plans, altogether, held that voluntary plans were not unconstitutional (*Id.*, at 439). Indeed, the Court in *Swann* admitted that such plans "could be . . . valid remedial measure[s] in some circumstances." (*Swann*, *supra*, at 13).
[23] *See* fn. 13, *supra*. The Department of Justice's present efforts in Chicago, Illinois, with a 17 percent white student population, are designed to give voluntarism a chance to work.

Mr. KASTENMEIER. Thank you very much for that perspective on school busing.

Are you satisfied from cases the committee surveyed that mandatory schoolbusing only occurs when all other avenues have been exhausted?

Mr. EDWARDS. Yes; generally speaking, you will find—and all of the testimony was to this effect—that efforts will be made in a community to voluntarily desegregate under threat, perhaps, of a court order. Even magnet schools will be set up. I am sorry to say—and I think magnet schools and all of these voluntary efforts are really very good—but in practically no cases have they been very effective. But the courts do not order busing unless they make a finding that not only is the school board and the local government at fault and intentionally, or just by terrible neglect, not making effort as far as desegregation. In other words, the segregation has to be official before the court will make a finding and order busing.

Mr. KASTENMEIER. Certain of the witnesses, I think the original advocates, argued that—as you have persuasively argued to the contrary—the experience in schoolbusing has been bad. They argue that distinguished school administrators and students of school administration, such as Dr. Coleman and Dr. Armor, who had once supported the notion of busing, have now changed their minds and oppose it.

I just wonder whether you think there is any basis for their doing so, or whether they are just looking at a different part of the problem?

Mr. EDWARDS. I go back to the original findings in the committee, Mr. Chairman. In those areas, especially where busing involves children in the first grade or kindergarten and starts early in their academic career, that where there is community support and where there is a resolve to comply with the law, to be law abiding—remember, this is a court order, the Federal district court enforcing the 14th amendment of the Constitution—where the local people say they are going to try, they are going to explain it to the people—in St. Louis, for example, the children wore little badges the first day that said, "Let's make it work." St. Louis, Minneapolis, Seattle, Charlotte-Mecklenburg in North Carolina, in all of those cases where you had this kind of community support, it really worked very well.

Where you don't have community support, like in Los Angeles, where it was operating under a State law which was later declared unconstitutional, where the school board members themselves demonstrate and ask the students not to obey the court order, then you are in real trouble and busing doesn't work at all. Nothing works. The whole system breaks down.

I am sorry to say that in many, many cases, you had very little support from people who are supposed to be leaders in the community to ask the local people to obey the law.

Mr. KASTENMEIER. You mentioned St. Louis. As far as you know, is court-ordered busing working in greater St. Louis?

Mr. EDWARDS. The testimony we had was that it worked out very well.

Mr. KASTENMEIER. I yield to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I would like to know of some instances where the integration of the schools by busing then was followed by an integration of housing and, therefore, they were able to stop the busing. I am not aware of any, and I followed what you said very closely.

Mr. EDWARDS. I refer you to the report and to the hearings. The testimony was from Christine Rossell. We had quite a lot of testimony on that. I don't have the specific city, but that had been pretty well documented.

Mr. SAWYER. I defended one of these cases, one of the major ones in the country. It went to the U.S. Supreme Court, and I was chief counsel. I am not aware of a single case in the United States where they have ever been able to say that busing has accomplished its aim and we can, therefore, stop it, which would be true if the housing became integrated.

Mr. KASTENMEIER. On page 16, you refer to the Riverside, Calif. case.

Mr. SAWYER. The testimony was from Diana Pearce from Catholic University. She has written a book, "Breaking Down Barriers: New Evidence on the Impact of Metropolitan Desegregation on Housing Patterns," Center for National Policy Review. In the cities studied, it was found that the community that had metropolitanwide school desegregation has experienced substantially greater reductions in housing segregation than the otherwise similar community that had not broad-based school desegregation. That is also in Riverside, Calif. It was studied, and Riverside, Calif., was found to have that pattern.

Mr. SAWYER. You weren't here at the last hearing we had. This is a point that has concerned me. You see, they said metropolitanwide. The courts do not order metropolitanwide, and they have been prohibited from ordering metropolitanwide. Mechlenburg and Detroit were two of the first cases to try to go areawide, in other words, to include all of the suburban school districts. The courts knocked that out and said they can't do it, that the surrounding suburbs don't have any significant number of black students and, therefore, they really can't be found guilty of discrimination because they couldn't if they wanted to. Therefore, they have held they can't include them in the relief; they can only limit it to the guilty party, as they put it.

The net result is that they have bused to core cities, and you have forced a white flight to the suburban surrounding districts where they are pure white. You end up with a solid black core city, or close to it, surrounded by white suburbs and accomplish a resegregation. This is what has bugged me about this.

I think the remedy might be a feasible one if you could bus metropolitanwide and include all the suburbs so there isn't anywhere to go. But once you leave somewhere to go, forget it. And the courts have left somewhere to go. They took New Orleans, which was a 30-odd percent black school district, and once they hit 40 percent, a tilt occurs and they go to 70 percent almost overnight because of white flight. White flight is very easy if they don't include the suburbs.

Just take a little city in my district, the one that I was involved in, the city of Grand Rapids. The corporate city of Grand Rapids has its own school board, its own school district. It is about a 200,000 population, incorporated city. But the physical city is about 375,000 or 400,000, being surrounded by separately incorporated suburbs. You wouldn't know when you went from one to the other except by a sign. Each one has its own school district with its own superintendent, and so forth. There are 11 of them surrounding the city of Grand Rapids.

Some of them aren't high-priced suburbs. The suburbs aren't of any higher economic status than the city itself—some are, some aren't. There is no strain. You move a couple of miles and you are in a different school district. That was the big concern, that you would just take and turn about a 20- to 30-percent black or minority Grand Rapids school district into virtually 70 percent, virtually overnight. That has been the history.

When you say metropolitan, you are saying one thing; but when you are saying a core city which is, to my knowledge, the only place the courts have ever permitted the busing, the history shows you are resegregating and not integrating, except until you run out of people to integrate.

Mr. EDWARDS. I understand that. We had some people who told us that. Most of the testimony was to the effect that, of course, when you have a very small area that is under a court order, there can be white flight, and that there is, but the extent of white flight has been grossly exaggerated because an awful lot of people leave the cities for a lot of different reasons, for reasons that the Federal Government has made it easier to move to the suburbs——

Mr. SAWYER. Except this 40-percent tilt point is documented. I mean, they all can see that. When it gets to 40 percent minority, it gets to 70 percent almost overnight, even though it may have taken 20 or 30 years to get to the 40 percent.

I am totally concerned about this problem. I totally agree with you. Personally, my inclination is that we ought to correct the courts and mandate areawide integration busing if they are going to do it. What they are doing, I think, is absolutely destructive and counterproductive. Until somebody forces a change on the courts, I just think it is an absolutely counterproductive measure, and I am not aware of a single case where anybody or any court has been able to say, "Now busing has accomplished its purpose after 15 years, and now we can stop it." It doesn't. It makes it worse.

Maybe if we would go the other step—and I support that other step—to include, anywhere within reasonable commuting range, all the districts. Then you might get some integration housing pattern resulting. But, as it is, you are getting a resegregation.

Mr. EDWARDS. I would point out to the gentleman from Michigan that courts do order metropolitanwide desegregation where the outlying areas also can be shown to have discriminated.

Mr. SAWYER. Those are virtually known. The reason is they don't have any minority population.

Mr. EDWARDS. There are metropolitan plans in Seattle and Denver, for example.

Mr. SAWYER. I can't say there aren't any, but in almost all of them. We have one right now in Michigan that is really a total co-

nundrum. Nobody knows what to do about it. We have two relatively small cities, Benton Harbor and St. Joseph. They are separated only by the St. Joseph River. I don't know their exact population, but they may be 20,000 in population apiece, if they are that much. St. Joseph is an all white city; and now Benton Harbor has become virtually all black, a 90-plus percent black city. They are two separate school districts.

Now the Federal court is being asked to do something about the Benton Harbor district. How in the name of heaven can you do anything? It is 96 percent black. Under the rules, they can't throw in St. Joseph that doesn't have any minority people in their school district and, therefore, it can't be discriminating, even if they wanted to. It is hopeless, really. They can't really do anything constructive.

Mr. EDWARDS. I am sure there are some areas where the courts can't do anything.

Mr. SAWYER. There may be some areas. If St. Joseph had a 15-percent black population and discriminated against them, maybe you could do it. But the facts are you can't. In most of the surburbs surrounding core cities, that is substantially true that they don't have enough minority students that, even if they wanted to, they could not really discriminate against them. They have to provide them schooling, and there are not enough of them to have a segregated school. I am not suggesting they do want to. Therefore, the hands of the courts' are tied.

Thank you.

Mr. EDWARDS. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. FRANK. Thank you. I appreciate the gentleman from California coming.

The focus shifts a little bit, obviously, from your own subcommittee to this one. Your subcommittee deals with the substance of a constitutional amendment change; the approach here is more of a procedural one. I would like to shift a little bit from this substance of busing and whether or not it is a good idea to what the constitutional implications are of methods chosen in this case.

There has been some dispute as to what the bill means. Senator Johnston tells us that he meant to include the U.S. Supreme Court; Attorney General Smith tells us that the bill does not include the U.S. Supreme Court. I am wondering what your interpretation would be if we were to pass it, whether it would mandate that the U.S. Supreme Court had to follow it. I think that was implicit in the discussion we have been having, but I think we ought to make it explicit.

Mr. EDWARDS. I haven't actually looked at that aspect of it. I was not asked by the Chair to address that particular issue. However, I would like to point out that I feel very strongly that this bill—this is a statute, is it not?

Mr. FRANK. It is a statute.

Mr. EDWARDS. I feel very strongly that this bill tries to do by a majority vote statute is strip the courts of their authority to enforce a right guaranteed by the 14th amendment of the United States. I feel it is totally unconstitutional.

Mr. FRANK. It is not simply a statute. It is an effort within the authorization of the Department of Justice to deal with that. Assuming that it covers the Supreme Court, which everyone in America except the Attorney General seems to think it does, what would be the implications? If we would do this in this case, if it were constitutional to do this by statute to simply say as part of the Justice Department authorization, "the Supreme Court shall not tell anybody to engage in busing," is that a remedy that you think might be limited, or would it then be constitutional to do it in other cases.

Mr. EDWARDS. You could move it into other areas of civil rights and criminal law.

Mr. FRANK. We could, for instance, tell the courts no OSHA cases could be appealed to the Federal courts.

Mr. EDWARDS. That is exactly it.

Mr. FRANK. Or the National Labor Relations Board would only be able to go to State courts and not Federal courts to deal with that.

Mr. EDWARDS. You could refer most cases back to the State courts and say the Federal courts just can't be involved in these cases.

Mr. FRANK. Which would mean then no uniformity whatsoever, obviously.

Mr. EDWARDS. That is correct.

Mr. FRANK. I think if you were to make a prediction right now of what the courts, in the public opinion right now in the country, which the courts are obviously cognizant of looking at some of the successes and failures, I think the implications of this bill, if we pass it, will be much less upon schoolbusing and much more on the Constitution. That is, I don't think you are likely to see in the foreseeable future many new cases of busing ordered. For one thing, the ones that presented themselves according to those guidelines that have been dealt with, it has clearly been a move away on the part of the court personnel, and the court personnel has changed.

I think what we are really talking about here is a matter that will have best to do with what happens in education in the future, specifically with integration, and more to do with what happens with the Constitution. I suspect, actually, the gentleman from California might have institutional interest here in approaching this bill because he is the Chair of the subcommittee that deals with constitutional amendments. If this method of telling the courts what to do by language in the authorization is acceptable, we won't need a subcommittee on constitutional amendments anymore, because no one will need to amend the Constitution. People who aren't happy with the Constitution will simply amend some of these authorizations statutorily and accomplish by the majority of Congress and Presidential signature what you are supposed to require two-thirds of both Houses and three-quarters of the States to accomplish.

Mr. EDWARDS. I certainly agree with the gentleman from Massachusetts. But the Helms-Johnston proposition goes even one step further. What they are trying to do in this statute can only be done by constitutional amendment.

Mr. FRANK. They are trying to do something by statute.

Mr. EDWARDS. Yes.

Mr. FRANK. If, in fact, it were to be done and upheld and validated, then the distinction between the Constitution and statutory law, it seems to me, would have simply gone away.

I yield back.

Mr. KASTENMEIER. The committee is indebted to our colleague for appearing this morning and sharing his views on this legislation with us.

Next, the Chair would like to call our colleague, Hon. James M. Collins of Texas, who has been a leading spokesman on the subject for some time. We are very pleased to greet our friend, Mr. Collins.

TESTIMONY OF HON. JAMES M. COLLINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. COLLINS. Thank you, Mr. Chairman. I always appreciate the opportunity to appear before you because you are openminded, you are fair, and you give a balanced hearing. I am glad to see on our side of the aisle Mr. Sawyer, who probably has more experience on this subject than anyone because he has been a private attorney involved in it. He carried a case to the Supreme Court.

This issue has been before us now for 17 years. What we are interested in now is to work on S. 951, and specifically the provisions of that bill that relate to forced schoolbusing. I come before the committee because of my very keen interest in it. The Collins amendment which was attached to the bill dates back to June 9, 1981. The wheels of Congress move very slowly sometimes.

We spoke loud and clear on this subject. Our vote was 265 to 122. After that, Mr. Helms, Mr. Thurmond of South Carolina, Mr. Johnston of Louisiana, several of them, improved the amendment on the Senate side and made it more comprehensive.

At this time, I have filed petition No. 15 to discharge S. 951, but, as we all know, it takes a while for discharge petitions to proceed.

Basically, we in Congress are responsive to the wishes of the American people. An NBC poll reveals that 73 percent of the American people are opposed to forced schoolbusing. That is blacks, whites, browns, anywhere you look, the American people are opposed to forced schoolbusing.

Let me go back to the 1954 *Brown* decision. The court ruled wisely. It certainly made an excellent decision. Here was a small black youngster in Topeka, Kans., that lived seven blocks from a school. Yet, they put her on a bus and they made her go 27 blocks to another school. At that time, they said that everyone should be treated equally, and that every child shall go to the neighborhood school nearest their home. That is fair. Here was a child that lived 7 blocks from the school and they made her go 27 blocks, even though she was entitled to go to the school nearest her home.

The district courts have proceeded to distribute children in every direction and not let them go to their neighborhood schools. They are doing the two things we started out to avoid. They will not let them go to their neighborhood school.

Another thing that should be made clear is that the 1964 Civil Rights Act very clearly brought out that it did not mean the assignment of students in order to achieve racial balance. It was very

clearly brought out that this was never an objective of the Civil Rights Act. They, too, believed in the neighborhood school concept.

The greatest scholar on this subject, and certainly a learned man that has been very fair in his evaluation, is Dr. Coleman, who was idealistic in his original approach in thinking that busing would work. But when he studied it, and saw the results, he came back and said, "School desegregation in the form of mandatory busing for racial balance has been destructive to its own goals."

The results were also supported by David Armour. If you remember, he is the distinguished scholar who has done so much in California. He has been through this field over and over again. What he brought out is what the gentleman from Michigan pointed out so clearly, that what happens with forced schoolbusing is white flight, and simply resegregating the communities. We had 15 out of 23 cities that were predominantly minority, and we have just turned them upside down. In my own city, we have an open-minded city and we want to have a racial balance. When they started this busing, we had 38 percent minority; today, we have 72 percent minority. In other words, it is now 3-to-1 minority. We have lost the balanced school concept, which is what we needed so badly.

Let's look at the 17 years since we have had this busing system in America. The scholastic aptitude tests have dropped 10 percent. During that period, teachers, in terms of real salaries, are paid more; the school buildings are better—they even have air-conditioning in most of them today—they have better facilities; they have better books; they have better teaching aids. They have everything better except one thing: They have forced schoolbusing in America. There have been other contributing factors, but that is the only one factor you can measure. The scholastic aptitude tests—and that is across the board, across all America—are down 10 percent. What we want is quality education.

You know the disadvantages of forced schoolbusing. It means that a youngster who wants to participate in dramatics or wants to be on the school's athletic team, has to get on that bus and go home instead. It means a youngster who gets sick during the day has a hard time going clear across town. It means that the families that want to go to the PTA meeting at night find it almost impossible to go across town to the PTA. Mainly, the children who are in school together want to play together after school, and that is impossible because they don't live together.

I have worked actively on this subject. I am glad to say that Attorney General William French Smith has endorsed the busing provisions of S. 951 as constitutional.

I might just add this: I am not a lawyer, but never did I see anyplace in the Constitution that said that the court could specify exactly how children went to school. They said things that are not specified in the Constitution on the rights of the State. I don't think they have any more right to specify that than to say that children shall eat spinach every day at high noon in the homes throughout America. They can't determine everything. As we know, they not only have determined busing, but they tell them how to do the busing.

In this forced schoolbusing case, we have both Houses, the House and Senate, and the administration saying loud and clear and so plainly, the time has come to end forced schoolbusing and let's get on with quality education in America.

I ask unanimous consent to include my statement in the record, Mr. Chairman.

Mr. KASTENMEIER. Without objection, your statement will be received and appear in the record in its entirety.

[The statement of Mr. Collins follows:]

STATEMENT BY HON. JAMES M. COLLINS

Mr. Chairman, I welcome the opportunity to testify before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice on S. 951, and specifically, the provisions of that bill relating to Forced School Busing. I commend the Judiciary Committee for proceeding with these important hearings.

I come before the Subcommittee with a special interest in the Anti-Busing Amendment which has been included by both Houses in their versions of the Department of Justice Authorization bill (S. 951). Having introduced the Amendment on the House side (which passed by an overwhelming vote of 265-122 on June 9, 1981), I was pleased to see the Senate include the House Amendment, along with language added by the distinguished Senator from North Carolina, Mr. Helms, and the distinguished Senator from Louisiana, Mr. Johnston.

On May 25, 1982, I filed Petition Number 15 to discharge S. 951 and bring it to the House floor for consideration. The House has clearly stated its opposition to Forced School Busing. I would like to highlight some of the reasons why we need to end Forced School Busing and return to the Neighborhood School.

A 1982 NBC poll shows that 73 percent of Americans oppose busing. Polls are consistently showing that by margins of 3-1 and greater, Americans want to stop Forced Busing. Majorities of both blacks and whites are now opposed to busing.

Since the 1954 *Brown* decision, court decrees have mistakenly promoted Forced Busing. The intent of this landmark decision was to allow children to be treated equally and to attend their neighborhood schools. In that case, a little black girl in Topeka, Kansas wanted to go to a school seven blocks from her home. Yet, she was forced to go on a bus to a school 27 blocks away because of her race. The courts were wise and just in ruling that a child shall be entitled to attend the school nearest home.

This is exactly what Americans want today—the Neighborhood School.

The 1964 Civil Rights Act clearly stated that desegregation does not mean the assignment of students from one school to another to achieve racial balance. Yet, this is exactly what proponents of Forced School Busing are doing.

The experts agree that busing is a failure. Dr. James Coleman, the "father of busing," has reversed his busing theory after a decade of research, stating: "School desegregation in the form of mandatory busing for racial balance has been destructive to its own goals." He said that Forced School Busing does not generally bring achievement benefits to disadvantaged children and that policies to institute "instant racial balance" simply would not work.

Coleman's findings were supported by extensive studies by David Armour, another leading expert in the desegregation process. Armour's report showed massive white flight occurring because of busing. This left 15 out of 23 cities predominantly minority, clearly defeating the purpose of desegregation. This is true in my Dallas School District where minority enrollment has increased from 38.8 percent in 1968 to 72 percent today. And what we're seeing now is increasingly segregated schools. We wanted racial balance, and Forced School Busing has developed a minority School System.

While judges have forced school districts to become preoccupied with busing, not enough attention has been paid to assuring quality education for all students. In the last 17 years Scholastic Aptitude Test scores of high school seniors have dropped over 10 percent—from 973 in 1964 to 890 in 1981. We should be concentrating on improving the quality of education.

It is completely senseless to force young children to sit on school buses for up to one hour or more riding to and from their neighborhood. Busing makes it difficult, and often impossible, for parents and children to participate in extracurricular activities such as athletics and School Dramatics. If you bus a child an hour away

from home, it also causes problems if a child gets sick in the middle of the day. Parents find it difficult to go across town to an evening PTA meeting.

Since coming to Congress in 1968, I have actively worked for passage of legislation to end forced School Busing. This year I believe we have the momentum. Attorney General William French Smith has endorsed the busing provisions of S. 951 as Constitutional.

I am now gathering signatures on my discharge Petition. Once we reach 218, the bill will be brought to the House floor for consideration. The House deserves the opportunity to vote on S. 951.

The American people want an end to Forced School Busing. We have the Administration behind us and both Houses on record in favor of the anti-busing provisions. I hope the full Committee will expeditiously report S. 951 out of Committee so it can come to the House floor for a vote.

Thank you.

Mr. KASTENMEIER. Thank you for your presentation.

You indicate that, in the last 17 years, scholastic aptitude has dropped over 10 percent. That is nationwide, is it not?

Mr. COLLINS. It is.

Mr. KASTENMEIER. It is not just due to school busing, it is for other reasons as well.

Mr. COLLINS. I would ask the chairman what else has contributed to it? I am sure it is one of the big contributing factors, because we do have higher paid teachers, we have better buildings, and we have more teaching aids than we ever had.

Mr. KASTENMEIER. But when scholastic aptitude drops in areas in which there is no school busing, there must be another cause.

Mr. COLLINS. There could be. I know that in our city, we are down tremendously right across the board.

Let me give you one figure of my own. I appreciate the chairman bringing that up. In my own city of Dallas, we made a study in 1979—we took 1,115 students who were not bused away from their neighborhood schools. They were one quarter of a year ahead of their 810 counterparts, both in mathematics and language. The nonbused students showed higher achievements than the bused students in the same schools. Those are the same schools and everything.

You are right that there may be other contributing factors where they didn't have forced busing, but in ours, it seems to be a definite factor in bringing the achievement level down.

Mr. KASTENMEIER. Quoting this committee report, a Dr. Crain offers this analysis. It says:

> I located 93 studies, each done in a single community undergoing desegregation. Slightly over half of the studies conclude that black test scores are enhanced by desegregation. Most of the rest conclude test scores are unaffected and, occasionally, a study argues that black test scores are harmed by desegregation.

The burden of his testimony is that they are enhanced or improved by desegregation. I thought Mr. Edwards said that, too. So there seems to be at least a debate as to whether or not students are——

Mr. EDWARDS. He indicated the blacks' grades are going up and the white are going down?

Mr. KASTENMEIER. I thought that Mr. Edwards said that, largely, white students' grades are unaffected, but are not diminished by virtue of desegregation.

I am glad you raised the point that your amendment is included in the bill, because most of the emphasis has been on the Johnston-Helms amendment.

Mr. COLLINS. They added to our bill and they improved it.

Mr. KASTENMEIER. But my recollection is that the Justice Department did not really support the inclusion of your amendment.

Mr. COLLINS. They said it was constitutional.

Mr. KASTENMEIER. They said they didn't need it, however.

Mr. COLLINS. They said what?

Mr. KASTENMEIER. The administration, the Justice Department, said they did not need the Collins amendment.

Mr. COLLINS. They did not need it?

Mr. KASTENMEIER. Yes; I think that is a fair restatement of what they said. I am not sure you knew that.

Mr. COLLINS. President Reagan has always expressed himself as being opposed to the principle of forced schoolbusing.

Mr. KASTENMEIER. This is what they said. This is the Justice Department. The Attorney General's letter—they restated this—in his May 6, letter, stated his opinions that the express limitation on the Department's authority, to wit, the amendment, relative to the use of funds appropriated under this authorization act, was unnecessary.

I say that because this is a point where the administration does not really support the inclusion. I don't think they made a big point out of excluding it, but they feel it is unnecessary. I didn't know whether you knew that or not.

Mr. COLLINS. When you say they feel it was unnecessary, that would seem to me it would be a way of us working toward balancing the balance, a constructive way, to do away with these unnecessary expenses.

Mr. KASTENMEIER. They go on to say that that limitation may, in fact, have the incidental effect of impairing the Department's ability to present and advocate a remedy which might, in a particularly situation, be less burdensome on students and local systems than those being urged on the court by other litigants. That is the Reagan Justice Department's view. I don't know whether you have any comment or not on that.

Mr. COLLINS. There are many other remedies, as the gentleman knows. As a remedy, the courts have used the school that is in a little area and they bring in everybody to it. It is what they call the magnet school. Another one is to have an incentive school program, which has been probably the most successful. The one I prefer above all is freedom of choice, to let any youngster in any school to go where they want to go. So, there are other alternatives. The court has always chosen this one because the court can, by its own function, specify control. It was never intended that the courts legislate or control, it was that they merely give judicial interpretation. That is why we object so strenuously to forced schoolbusing.

Mr. KASTENMEIER. Another point, which is a small point, indeed, but you mention the movement to the opposition to schoolbusing for 17 years. That would date back to 1965. What happened in 1965 that precipitated that?

Mr. COLLINS. That is when they started actively in the district courts implementing this. They passed it in 1954, but they didn't get into this actual implementation. That is when the courts determined that we were going to have forced busing as the alternative.

There have been many other alternatives. We had one at home with Judge Justice. He took forced schoolbusing and said that we must use this instead of freedom of choice. We started having this come up all over the country. They had used freedom of choice but said they were not moving fast enough. So, at that time, they began to use this alternative all over the country.

Mr. KASTENMEIER. I yield to the gentleman from Michigan.

Mr. SAWYER. You mentioned the test scores. There is a very misleading thing about that, I think, that gets out in the general public. The experts that deal in this, at least back when I was dealing with it, had a quite different view, and that is that the test scores are not really based on black or white, high or low. What they are based on are socioeconomic levels.

Again, I don't like to come back to our little city as being some kind of a national thing, but we are kind of a microcosm. We have a black area, and we have probably, criminally, everything Chicago has, just smaller in numbers, and so forth. But we have 16 impacted schools that qualify for Federal aid because they fall below certain test levels and have remedial education. That is one of the areas that the Feds do finance, and have historically, at least in my time.

There are eight of those schools that lie on the west of the Grand River, which runs through the center of the city, and eight on the east. The total center city is the old, more or less rundown part of the city, about half of which lies west of the river and about half of which lies east. The river isn't all that wide, maybe 100 yards wide through town, if it is that wide.

Strangely enough, on the west side of the city it is solid white. There are no black residents on the west side of the city. While it is probably not a nice thing to say, that would be a hostility over there. You have a blue-collar ethnic population over there that would not be very amiable to black intrusion, for some reason—or whatever. Anyway, it is a fact. On the east side of the inner city, it is very solidly black. It is a little bit Hispanic, but very solidly black.

The eight schools on each side of the river score about the same—they are terrible. They all qualify for economic Federal remedial education. It has obviously nothing to do with the racial mix in those schools because they are exactly the opposite. But the socioeconomic condition is very similar. That has been pretty much proved, at least to the satisfaction of the experts around the country.

There happens to be a high school in the suburbs of Los Angeles—again, I am talking about data that may be 7, 8, or 9 years out of date, but I have no reason to think that it has changed—that scores among the highest test scores in the United States, way up like the 99 percentile nationally, and it is substantially an all-black school. But it happens to be a very affluent black suburb. Almost all of the parents there are professionals or executives connected with movie industries or other industries, right up at the top socio-

economic areas. It matches any all-white school in the United States in its scores.

To a degree, I have the feeling that when we are busing purely because of black or white, we are a little bit missing the boat. If we were going to address the learning problem with the idea that a mix of high achievers with low achievers will be helpful, it really ought to be on a socioeconomic basis, which perhaps would make for a much bigger percentage of blacks because, obviously, in a socioeconomic structure, you have a higher percent of minority in the lower socioeconomic structure. But if you are going to do some good, that is really the target, not really so much black or white.

Again, I come back and say that I think this segregation thing is a drastically serious problem nationally, maybe our most serious. I think it has got to be addressed and it has got to be cured. I think busing, as the courts have done it, limiting it to core cities, has been counterproductive and it has made the situation worse and not better.

As I say, I would support a broader approach to it, but also we urge that the socioeconomic aspect be weighted into this regardless of minority or majority, because that is where the educational problem lies—the achievements, not the racial. It is the socioeconomic. That, I think, all the experts agree on.

As to the magnet schools and the clusters and the various others, these just haven't worked. If they work, great. That would be everybody's first choice.

Let me just throw out one other problem again. I lived though this problem and I have maybe a little different perspective because of that. That is, you get as much resistance on the part of the black power structure as you do on the white to, let's say, a metropolitan busing situation. Take the city of Washington, D.C. We live right here. It is 90-plus percent black.

As a matter of fact, I saw an article on the high school graduation classes. It showed, as I recall—the figures I didn't try to memorize, so I am approximately right—I think there were 4,200 or 4,300 high school graduates in the District of Columbia this year, of which something like 110 were nonminority. It is that heavily concentrated. If you were to say let's include all suburban Maryland and all of suburban Virginia, anywhere within reasonable commuting range, all the school districts be included, and let's bus back and forth, one of the first fights you would have would be—and one of the strongest—would be with the school board of the District. Why? Because they control their own school district. They can run it like they think they ought to run it without the interference of what would be a majority anywhere else. They are running the show. They are not about to say that they want to be bled out and made minorities where they don't get to run anything or any schools.

So, you are running into a really double-barrel political problem when you try to get out beyond a core city. As much resistance comes from the black power structure that want their own school districts and like being able to run them. They don't want to be perpetually minority everywhere. I guess nobody wants to be a minority. Your biggest resistance from white parents is when you bus their kids into a school where they would be a minority. They don't

mind if they are a heavy majority. There is opposition if they are a minority. The minority feels the same way. You get into an insoluble political problem.

I wish I could say that this Johnston bill answered what I think it a critical problem on us so I could get right on the bandwagon and support it. I think the problem is a real desperate, critical problem. But, like most of them, it is so complex, and with so many sides to it, just busing is no simple answer, and neither is just the prohibition of busing any simple answer. I think it takes a much broader, more complicated answer to what I think is maybe, in the long term, our most serious problem.

Mr. COLLINS. Let me say this to the gentleman from Michigan. As he was talking, I thought of my father, who grew up in what we would call today poverty. I once asked him about it. He said he never had any poverty, and he said we had everything. But when his mother died, he and his brother went over and lived with his uncle and aunt out in the country. I asked him if they had a bedroom. Of course, they slept on the floor. He worked out there on the farm with everybody else.

When I looked at what my dad grew up on—and you talk about socioeconomic—he was so far below what we call the poverty level today. He was way, way down there. He didn't have shoes. He had one pair of coveralls. But he made it through high school. He didn't have anything going for him but one thing. I think that survey in Harvard was right. They made a survey trying to prove what busing did—I think it was Harvard that did it. They said, "You know what improves education for anyone? It is parents' interest." Dad wasn't blessed because he was living with his uncle and aunt, but what is interesting is that every one of his cousins that lived out there on that farm with the Barnes, every one of them made good. One became a lawyer, one a CPA, one was the head of schools. The parents—and in this case, his aunt and uncle—gave them encouragement. The big mistake in America is that we have too many indifferent parents.

Mr. SAWYER. I agree with you. I am sure that you can find very depressed socioeconomic homes where the kid does fantastic, or the whole family does. They are going to get out of it and go free because they have very dedicated parents.

But you have to speak in averages, and that is not the average. That is not the way it is shaking down in the inner cities of our cities.

Mr. COLLINS. Let me tell you what is interesting. We have one other alternative that has worked in Dallas. As you were talking about the metropolitan schools, I thought about what we have. You are right about that. We turned our city of Dallas into a minority school district. It causes problems as far as community support and all of that.

Mr. SAWYER. We have it right here with the District of Columbia and surrounding Maryland.

Mr. COLLINS. Out in the city of Richardson, a city of about 70,000, the court came in and said, "You have got to bus?" The city said, "What do you mean we have to bus?" They had one school. The black citizens all lived in one little community there. They said, "Accept our alternative," and it was a tremendous success. Their

alternative was to take the Hamilton Park Elementary School, and to bring whites into that school. They have had this magnet school for approximately 6 years and they have only had one black student that has asked to be transferred out. They told any black that if they wanted to, they could leave. They have a waiting list of 3 years of white students that want to be transferred in. They keep it half and half.

What did they do? The first thing is they open the doors at 7:30 in the morning and they stay open until 6. That is a tremendous factor. People like that factor in the schools. They have offered computer training to grade school students. What happens is the smartest parents in the area are bringing their kids in to take computer training.

They offer Spanish and French as languages. They really have a high-class faculty. I could go on and on. But I will tell you that it is a tremendous success. What has happened is that people want to go there.

So, I think the real alternative is to offer some enrichment schools where we make it desirable to have the parents transfer their students in.

Mr. KASTENMEIER. I have one last question. The Justice Department feels that the language of the bill, S. 951, does not reach the Supreme Court, but rather other Federal courts. Do you agree with the Justice Department?

Mr. COLLINS. It really is going to the other courts the way they are implementing it.

Mr. KASTENMEIER. I beg your pardon?

Mr. COLLINS. Are you saying that we are talking about moving——

Mr. KASTENMEIER. I am asking whether you feel the bill reaches the Supreme Court of the United States or whether, on the other hand, you agree with the Justice Department?

Mr. COLLINS. What they are trying to do here is to implement and explain so that the district courts can understand the will of Congress. We are not trying to override any Supreme Court ruling.

Mr. KASTENMEIER. Do I take that to be in agreement with the Justice Department that it does not reach the Supreme Court of the United States?

Mr. COLLINS. That was never our intention. I don't know what the intention was of the gentleman in the Senate, but I never had any intention to try to overrule. I think the way you overrule the Supreme Court is through a constitutional amendment. That is one alternative we are discussing. But I also believe it is the responsibility of Congress to enlighten some of the judges who, in the past few years, have decided they are legislators instead of judges. This does help clarify, and does help them in their deliberations.

Mr. KASTENMEIER. I would only make the comment that I think my colleague, Mr. Sawyer, what he sees as a possible preferred solution goes in the face of this. That is to say that he would take in a larger metropolitan area so you wouldn't have resegregation, so that the core city alone is resegregated. But to do that, if you had busing, this bill limits busing not to exceed 30 minutes and not to exceed 10 miles. It would tend to mitigate against taking the larger area.

Mr. COLLINS. I don't agree with Mr. Sawyer's alternative plan. He wouldn't find any plans for it in Texas. I don't know whether they would like it in Michigan or not.

Mr. SAWYER. Nowhere in the Deep South would I expect to.

Mr. COLLINS. No; and I don't think you would find many cities eager about it either. They would still rather have neighborhood schools everywhere in America.

Mr. SAWYER. Yes; but I may just call your attention to the fact that the core city in Charlotte-Mechlenburg, the core city in Detroit, and the core city in Grand Rapids filed a petition, when confronted with NAACP busing suit, to include the surrounding suburban districts, at least for purposes of relief. Those were granted. So, the core city wasn't nearly as concerned if they brought in the whole surrounding area as it was if it was left in a situation where you were going to have resegregation. So, I think if you were going to give the city of Dallas a choice, if it were going to have a busing order, would it prefer to include all of the surrounding suburban districts, I doubt you would have any answer but the same answer Detroit, Grand Rapids, Charlotte-Mechlenburg and the others have all given. Sure, they prefer to include the whole area so they don't get a white flight.

Mr. COLLINS. But you wouldn't have that answer from all the suburban towns around the city.

Mr. SAWYER. Of course not.

Mr. KASTENMEIER. We may be able to test that proposition with our next witness from St. Louis. In any event, I want to thank you, Mr. Collins, for appearing today and giving your views to the committee.

Mr. COLLINS. Thank you. I appreciate the opportunity.

Mr. KASTENMEIER. Next, I would like to greet our colleague from Missouri, Richard A. Gephardt.

I notice you have a brief statement, Congressman Gephardt. You may proceed from it. We will be very pleased to listen.

TESTIMONY OF HON. RICHARD A. GEPHARDT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. GEPHARDT. Thank you, Mr. Chairman and members of the committee. I really appreciate this opportunity to appear before you to testify in favor of the Johnston amendment to S. 951 which, as you well know, would limit court-ordered busing to achieve school desegregation.

I have been encouraged by the subcommittee's willingness to hold these hearings. S. 951 offers, in my view, the best opportunity to enact, after many years of controversy, restrictions on a practice I view as ineffective and counterproductive to desegregation efforts in our country. I truly hope that these hearings will pave the way for final action on S. 951 before the Congress adjourns this year.

This legislation, as the subcommittee members are well aware, has been highly controversial. Clearly, valid questions have been raised about the implications of the Johnston amendment, not only for school desegregation efforts, but for our whole constitutional system of checks and balances and separation of powers. I am sure you have been and will be hearing from witnesses with far greater

expertise in these areas than I have. I will not try to compete today with legal scholars and constitutional scholars and social scientists in discussing the civil rights and constitutional aspects of this issue.

But as a representative of an area engaged in implementation of a busing plan, I think I can give the subcommittee some firsthand information that will help give additional insight on busing and its effectiveness as a tool in achieving school desegregation. The St. Louis situation, I think, provides a convincing case against business and in favor of early action on this bill so we can stop its expansion throughout the whole region.

To give you some background, very briefly, desegregation efforts began in 1972 when a suit was filed against the St. Louis School Board claiming the schools in the city were segregated. In 1975 a consent decree was issued requiring affirmative action to achieve desegregation, and in response, a magnet school system was created in St. Louis.

Although the district court ruled in 1979 that the plaintiffs had failed to prove segregation was intentional on the part of the school board, the decision was overturned by the Eighth Circuit Court of Appeals which required a desegregation plan to be developed by the school board. Such a plan was submitted and approved by the court, leading to the institution of busing within the city of St. Louis in 1980. A year ago, the court ordered a voluntary interdistrict desegregation plan to be implemented between the city and the surrounding suburban communities.

I might add that there is also a mandatory plan in the offering for those school districts that do not participate in the voluntary plan. Further than that, the NAACP and other parties have now filed suits to throw out the whole voluntary plans that are starting to be implemented on the ground that the voluntary plans, even if in good faith, are not sufficient, and that there ought to be a total interdistrict mandatory busing plan in the entire metropolitan area.

While a number of issues await final rulings by the courts, the situation in St. Louis is as follows: First, mandatory busing is in effect in the city of St. Louis, which now has about 450,000 residents and a total metropolitan area that has about 2 million people; 10 or 24 school districts in St. Louis County are participating in a voluntary busing program with the city, and those voluntary programs are just beginning; third, the remaining districts in St. Louis County and other counties in the region await decisions requiring areawide busing or some combination of voluntary or mandatory busing.

As St. Louisans await final disposition of this case, statistics are becoming available on the effect of the citywide busing that has not been in effect for 2 school years, 1980 and 1981. A review of these numbers, I think, raise doubts in the minds of even the staunchest supporters of busing.

Under the plan as developed in 1980, the black enrollment of the elementary schools was to be evened out to range roughly from 35 to 40 percent. No school was to be over 50 percent minority. However, according to the report filed with the courts in March of this year, as required by the 1980 ruling, black enrollment is more

heavily concentrated in city schools than before busing began. Of the 26 elementary school clusters established as part of the plan, 11 are over 99 percent black, and 1 of these has 100 black enrollment. Three more clusters have black enrollment between 95 and 99 percent. Thus, a majority of the clusters is over 95 percent black.

On the secondary level, each high school was projected to have 43 minority enrollment. In actuality, as of March 1980, high school enrollment ranged from 49 to 67 percent black. Each high school shows a heavier concentration of black students since 1980.

While minority concentrations have increased on all levels, not surprisingly, overall enrollment is down. The total number of students in city schools this year was 3,000 less than projected in 1980.

These numbers make it quite evident that St. Louis is beginning to suffer from white flight from the city schools, if not from the city altogether. In short, we are not achieving desegregation; we are, in fact, seeing resegregation.

At the same time, $22 million is being poured each year into the cost of busing alone. This is over 10 percent of the total city school budget. This is $22 million a year that might otherwise be invested in maintaining or improving the quality of education provided in the city of St. Louis schools. I can't help thinking that providing excellent schools throughout the city would be a greater encouragement for desegregation than diverting this much money to busing can ever be.

Mr. Chairman, when my constituents look at these facts and figures, they come to me and ask what I am doing to put an end to this seemingly illogical practice. It does not make sense to them, nor to me, for so much to be invested in a practice that fails so miserably to accomplish its goal.

I firmly believe S. 951 offers an answer. It provides us with the fastest, most effective route toward bringing busing to a halt.

Mr. Chairman, I recognize the Johnston amendment may not be perfect. It may have weaknesses. It certainly has its critics. But it does have a major advantage. It will move the courts away from their heavy reliance upon busing as a remedy for segregated schools and encourage them to see, more created alternatives that would also be more effective in achieving desegregation.

I believe it is necessary we take this step to end an effective practice. I think, for St. Louis, it is essential that we move quickly so that busing can be stopped in our area before it is expanded further and the bad effects are expanded further. If we fail to complete action on this bill this year, St. Louis area schools will only suffer a further drain—of money, of students, of public support. They will not make any gains in the form of desegregation. I urge the subcommittee to report out this legislation as soon as possible so we can assure final passage before the conclusion of the 97th Congress.

Again, I appreciate very much the opportunity to be here, and I would be happy to submit to any questions that the committee may ask.

Mr. KASTENMEIER. We thank our colleague for his statement.

You have indicated you are not going to testify as to the constitutional aspects or the procedural aspects necessarily of the legisla-

tion, but just in terms of policy impact legislation of this sort might have, for example, in the greater St. Louis area.

Mr. GEPHARDT. That is my intent. I am aware of the constitutional arguments and the legal arguments about the process envisioned in the Johnston amendment. I am not a constitutional expert, and don't pretend to be. I have my own opinion as to whether or not it is constitutional. Obviously, I think it is. Further than that, I don't think we can resolve that debate in the Congress. I think, ultimately, whatever you put forth in this area would have to be resolved by the courts as to whether or not it is a constitutional amendment.

I understand the prior question you asked about whether it applies to the district courts or whether it applies to the Supreme Court. My own opinion is it probably is designed to only be applicable to the district courts. As the previous witness said, if you want to amend the Constitution, that is the route to take. I do support a constitutional amendment, but I realize that the chance of having action on that in the Senate or the House is minimal, if not impossible, at this point. I certainly feel that the Congress should take some action and state its purpose with regard to the busing situation, especially in light of the new evidence that is coming in, and St. Louis is one of those cases that I think provides that evidence.

Mr. KASTENMEIER. Do you also support a parallel piece of legislation or a forerunner of legislation which was more embracing insofar as it presumed to strip the courts from dealing with school busing as a subject at all, not merely the remedy limitations obtained in S. 951? As you know, there are several bills which would say that no district court nor the Supreme Court could handle appeals on several subjects: one, school prayer; another is abortion, I believe; and a third is school busing. Those are the general court-stripping bills. They do not affect, as this does, the remedy of the courts; they are a general withdrawal of jurisdiction from the courts. Do you also support that approach?

Mr. GEPHARDT. I would put the order of preference this way: I think a constitutional amendment is the cleanest and surest way to express one's view with regard to what the court is doing. It would be the preferable way, but I don't think it is a possible way in this Congress, or perhaps in future Congresses, certainly this year. I think the bill before the committee is the second best way. I realize it has some constitutional problems. I realize those would have to be resolved, so that would be the second preference.

I think the stripping kind of legislation has the most severe problems in terms of legality. My own opinion—and it is not worth very much because, again, I am not a constitutional scholar—but in the reading that I had done, I think those kinds of pieces of legislation would have problems in the Supreme Court and would be found to be unconstitutional. I think it probably goes to the question very directly of usurping the courts' power to interpret the Constitution.

I support all three and would vote for all three, I guess out of the frustration that we are not getting any kind of expression out of the Congress to the courts to try to change what I think is a very destructive situation in terms of desegregation and in terms of educational outcome.

Mr. KASTENMEIER. Going to the question of St. Louis, it would appear just superficially—and I do not know the St. Louis case situation—that originally the core city was directly affected and then, in line with some of the colloquy here with Mr. Sawyer, it would appear that because of the resegregation that was taking place in the core city to enlarge the scheme to include neighboring counties, that is still in litigation with respect to what plans affecting these other school districts, other than those in the city of St. Louis, and still pending.

Mr. GEPHARDT. That is correct. The case is an unusual one. I really have some problems understanding what theory is that the court is using. I can tell you what the theory is, but I still have trouble understanding it.

The case was originally, as you know, brought against the city board of education. Later, the State was brought into the suit without asking to be brought in. They were brought in voluntarily. After the city order was made, after the appeal to the eighth circuit and they turned the decision of the district court over and ordered mandatory busing in the city, the court immediately went on, without any hearing on the guilts or the nonguilts of the surrounding districts, through the use of the State, having a State board of education over all of the local boards of education, made a finding that there was guilt on the part of the State and, therefore, implied guilt on the part of every other district. It is now in the process, without really looking at evidence of resegregation or not resegregation, is going ahead to now implement both a voluntary and a mandatory plan with regard to the outlying areas.

One question that immediately comes to mind is, why are we doing it voluntarily in the suburban districts if we made it mandatory in the city? The second question I have is, why under due process don't the suburban districts at least have the right to have a trial on whether or not they are guilty of intentional segregation?

I think we have arrived in this case at a point where there is no difference between de facto and de jure segregation, where the court is saying if we find segregation and we find a State board of education that should have been doing something about this, we find everybody guilty under the State board's responsibility and we are going to go in and take care of the problem, and we are going take care of it in different ways in different places.

I think, as I read the whole set of opinions in the St. Louis case, I come to the conclusion that the court is over its head in what it is trying to accomplish. If I look at the facts in relation to what they are trying to do, I come to the conclusion that they are never going to accomplish what they are attempting to accomplish. Their goals are worthy. I think the cause is one that every American shares. But I think the tools for going about it are defective and are failing and will continue to fail and further compound the problem. There are other and better solutions to the problem than either city, core city; or metropolitan area cross-city or cross-county busing remedies.

If, in the St. Louis case, we go to a metropolitan crosstown busing remedy, which is the ultimate logical result of where they are going, we will wind up with a monumental cost to achieve that.

I submit to you that the white flight will just continue to other areas until the whole ability to affect the problem is lost.

Mr. KASTENMEIER. In the event that they adopt a plan in which busing does not exceed 30 minutes per student and the distance does not exceed 10 miles in St. Louis, that would still be approved by S. 951, would it not?

Mr. GEPHARDT. I understand that. I am not here today to say that I think, as I have said before, this is the perfect answer to the problem. I do think that it offers the only opportunity that exists in this Congress to make a statement. It would have an effect on the St. Louis case, obviously, because as it stands now, the court is likely to order a mandatory busing plan for counties even outside St. Louis County. They are carrying it to its logical conclusion. I think, to stop it at any point would make sense. Hopefully, if Congress would make this statement, perhaps the court would truly reconsider, not only at the district and circuit court level, but at the Supreme Court, the whole range of things that they are trying to do at different places and perhaps take a different and more creative approach to try to solve the problem.

I will just give you one example that I have talked about. I have introduced legislation since I have been here that would offer additional educational aid to States who comply with a certain set of criteria trying to equalize the funding for public schools among all the districts within that State, to try to follow the line of cases that had begun in California some years ago where the Supreme Court of California, I believe, said that in order to follow the constitution of California, the funding behind each child in the public school system in that State had to be equal.

I think that, I think voluntary plans, I think magnet schools—we have had a good experience with magnet schools in St. Louis. They haven't been altogether positive, but they have been good. I think there are lots of things that can be done to try to solve the problem in a realistic way. I just think we should try to get the court moving in that direction.

Mr. KASTENMEIER. What went wrong when, in 1975, a consent decree was issued and a magnet school system was created in St. Louis? That didn't seem to work?

Mr. GEPHARDT. The court was overturned. After that—and I don't remember exactly procedurally how we got to the point—the plaintiffs continued to pursue the case, and some of the plaintiffs appealed the consent decree, as I remember, and the eighth circuit overturned it. Then they ordered a trial on the merits and the court found no guilt, and then the eighth circuit overturned that. The consent decree was found to be short of what the eighth circuit wanted to have happen.

Mr. KASTENMEIER. The point I was trying to make before is even if one concedes that busing is troublesome in some communities, what assurances are there that limitations of travel and in miles of travel is the cure? Can it not be just as burdensome even though the distance is not great, in terms of what result you have?

Mr. GEPHARDT. I think what it does is it tries to put some reasonable limitation on the extent to which these orders can reach.

To give you an example, in St. Louis, if we go to the logical conclusion of this line of thinking in cases that have been presented

there, we are going to wind up with busing that could keep students on a bus for over an hour a day. If we include Jefferson, Franklin, and Charles Counties, which are counties around St. Louis, we could have some very, very difficult transportation problems, but they are necessitated by the ultimate logical conclusion of the case. If you have got to have and you want to have a remedy which achieves 30 percent in all the schools, or 20 percent or whatever it is, minority participation in all of the schools in the metropolitan area, you have got to get a massive busing mechanism up and going, and you are going to be moving children for very long periods for very long distances.

All I submit is that this at least brings some reason to how far you are willing to use this remedy. I don't at all pretend that this is my favorite solution. I just think it provides some reason and perhaps will indicate Congress concern about all of this and encourage the courts to begin looking for other solutions.

Mr. KASTENMEIER. I will yield to the gentleman from Michigan.

Mr. SAWYER. Thank you.

I enjoyed listening to the testimony. I really think it has more value than the constitutional scholars, as some people label themselves. I have been an admirer of the gentleman from Missouri for quite a while for his work on Ways and Means. I am sure he is aware of that.

I just totally agree with your thinking. We lived through the same practical experience. I am not an advocate of metropolitanwide busing; I am just saying that if you are going to bus and you think it is going to accomplish a desegregation, it certainly won't unless metropolitanwide. Otherwise, it accomplishes a resegregation and hits a tilt with the core city forcing white flight to the suburbs. Whether there is a practicality of going out further, statewide or nationwide or however far you have to go with that remedy, certainly you can demonstrate that it does not work when you limit it to the core city, leaving easy commuting and easy residential areas to reach with separate school districts that aren't affected. I think it is demonstrated all over the country.

I would guess that if the city of St. Louis, No. 1, already knew it was going to get defeated on its own and subjected to busing, it would certainly feel that the lesser of the two evils would be to include all reachable suburban school districts because, historically, you have just ruined the core city school districts with white flight. You can show that 40 percent is the magic figure, and then you get a very rapid escalation up to 70 percent and above, almost within a couple of years. Apparently that is happening in St. Louis, too.

Mr. GEPHARDT. That is correct. The figures are, I think, substantial when you look at them as to what has happened. If you look down the list of each school that was a target to get to 30 or 35 or 40 percent, and then you follow their enrollment over the 2 years after that, you see marked change in minority concentration in those schools. That leads, I think, to the inescapable conclusion that we will achieve almost total resegregation in the St. Louis public school system in the city.

The logical next step is to move to a cross-town metropolitan remedy. But I submit that it would achieve nothing but the same results eventually. It may take a little longer, but it won't take

much longer. If you don't include the outlying counties outside St. Louis County, then you will have the white flight.

Mr. SAWYER. I can't agree more. You don't have to hypothesize on it. You can look at every city to which it has happened. New Orleans was the big one. It had gone from a marginal 30 percent to over 70 percent in the course of just several years of mandatory busing. In fact, there are no exceptions that I know of. All of the cities that have been subjected had a resegregation. You get a white flight causing a resegregation.

I think you have to agree that the problem is a tremendous problem, a national problem.

Mr. GEPHARDT. I agree.

Mr. SAWYER. The courts are well-intentioned. They are not trying to be destructive; they are trying to be helpful. But the net effect is, in their good intention, they have been destructive and counterproductive. I don't think continuing on with it is indicated and, yet, they are continuing.

Mr. GEPHARDT. I just think there are better solutions if we face up to the core problem. I think that the fair housing laws, the way we deal with school moneys in the public school system, I think the whole range of magnet school and voluntary plans that have been used in many places all provide some answers. Nothing is magic. Nothing is going to solve this problem overnight. I think everybody shares the same goal.

The question is how to get there. What is the tool that you use. I just submit that our experience there, and I think the experience in other places—I am not saying in every place, but in many other places—has been a bad one. I think we need to encourage the courts to look to these other methods of doing it.

Mr. SAWYER. A couple of other things that you mentioned are true, too. That is the situation of St. Louis that occurred in the eighth circuit is not unusual. There is only one case that has survived through all the appellate processes. Many trial courts have decided that there was not segregative attempt or action.

But the problem is there has been virtually no decisions—or almost none—that hold that de facto is not de jure. They keep making a big point about that, but they always find that it is de jure in the end.

They started out very easily when they were dealing with the Deep South. Of course, they were dealing with a clear de jure segregated system. When they get to the North, particularly in the real Northern States that never had any kind of a segregated system—and really, the school boards were confronted on the most part with a problem that they didn't control, it was a housing pattern, and where people were really good willed and just had limited ability of what they can do about it—unfortunately, every time they tried to respond, it has been held by the courts who are looking for anything to a de jure desegregation.

For example, in one of the cases, there had been considerable pressure for black schoolteachers being assigned to predominantly black schools in areas. Back in that time—and this was back in the 1950's—there were not that many black teachers available in the North that met qualifications, and so on, of some of the Northern States for certification. They were kind of hard to come by. Those

that did, the black community wanted them assigned to the predominantly black schools as kind of role models to show that not just white people can be teachers, black people can, too, and are good teachers.

So, one or two of the school boards knuckled under those pressures and tried to assign, on the request of the black communities, black teachers predominantly to the black schools as they could get them, and they bused the whole district based on that being a de jure segregation, a deliberate assignment of black teachers to black schools, regardless of its purpose.

Another case is where the black community was in a largely older area of the city, and some of the schools were run down and relatively unsafe because of their age. The pressure from that community was that they wanted some new schools, too, so they built one or two new schools matching the other outlying new schools. That was held to be de jure segregation because it was perpetuating a black predominance in a school by building a new school and, thereby, not phasing out but, in effect, blocking it in and casting it in concrete.

So, when they say these things are de jure determinations of segregative intent, or so on, by the school boards, really nothing could be further from the truth. I am sure there is an isolated case here and there. But the great bulk of them are that the courts have just determined that anything that is de facto, by gosh, they are going to make de jure so that they can do something about it, and they do. Then they fall back on busing.

I just think that, whatever the end of it is, there has to be some end to it because it is unquestionably counterproductive, although well intentioned.

Mr. GEPHARDT. I agree. I think the de jure/de facto situation is best clearly understood by looking at the St. Louis case where we now have 30 or 40 or 50 school districts in St. Louis County that are being required to comply with a voluntary and then a mandatory plan without there being 1 minute of hearing in the court on the merits of whether any of them are guilty of intentional segregation. They are all brought in under the State school board, which the court says is guilty of intentional segregation.

Mr. SAWYER. You see, if you are going to go metropolitanwide—I am not that familiar with the St. Louis area, but I don't guess it is significantly different than the areas I am familiar with—most of the surburban school districts couldn't discriminate if they wanted to. They don't have a big enough amount of minority students to create a predominantly minority school, even if they wanted to. I am not suggesting that they do. So it is a virtually impossibility to prove that most any suburban district has been discriminatory. If you don't and you stay with the busing remedy, you lock it into that center city and kill the core city.

Mr. GEPHARDT. As I said before, I think what has been discriminatory is that, in effect, we have built up a private/public school system in this country. People move to suburbs. We have over 100 individual suburbs surrounding the city of St. Louis. We have a multitude of school districts. They all have their own tax base which, in many cases, is small. When you look at the disparity be-

tween the amount of money behind the child in some of those districts and in the inner city of St. Louis, it is a marked difference.

I think that is the real quarrel that inner-city parents, both black and white, have with the public school system. I think it is a rational quarrel. I think that is the kind of problem that we should pay some attention to, rather than trying to go to an exotic remedy that simply hasn't worked.

Mr. SAWYER. Thank you.

Mr. KASTENMEIER. I have just a technical question or two. I take it the State of Illinois, at least St. Louis, is not involved in this litigation at all?

Mr. GEPHARDT. That is correct.

Mr. KASTENMEIER. Those engaged in the so-called white flight from St. Louis, to what extent are they in other public schools in the area, or are they in nonpublic schools?

Mr. GEPHARDT. I can't give you a breakdown. But those who guess at it believe that it breaks down to about half and half, half moving to the suburban or ex-urban or rural areas to escape, and about the other half going to parochial or private schools. The Catholic school system, which is very large and has many students—St. Louis having a large Catholic population—has issued an order that they will not take any student from the public school system. They will only take students who start at the kindergarten level in order to try to stop white flight. They have made that order with regard to their suburban schools as well.

So, a lot of it has been stopped from going to the private school system, the Catholic school system being the largest alternative. But there are other smaller private systems, but not many of them.

Mr. KASTENMEIER. We thank you for your presentation.

Mr. GEPHARDT. Thank you very much.

Mr. KASTENMEIER. That concludes testimony on the question of S. 951, which is actually a bill authorizing appropriations for the Department of Justice, but includes what is known as the Neighborhood School Act of 1982.

We stand adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

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