August Special Term, 1958

Washington, D. C.

August 28, 1958

JOHN AARON, ET AL.,

Petitioners,

vs.

No. 1 Misc.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS INDEPENDENT SCHOOL DISTRICT, and VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS,

Respondents.

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September 5, 1958

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

AUGUST SPECIAL TERM, 1958

JOHN AARON, ET AL., Petitioners, vs. WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS INDEPENDENT SCHOOL DISTRICT, and VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS, Respondents.	NO. 1 MISC.

Washington, D. C.

August 28, 1958

The above-entitled matter came on for oral argument at 12 noon.

PRESENT:

The Chief Justice, Earl Warren, and Associate Justices Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, and Whittaker.

APPEARANCES:

On behalf of Petitioners:

Thurgood Marshall, Esq.

On behalf of Respondents:

Richard C. Butler, Esq.

APPEARANCES (continued):

On behalf of the United States:

J. Lee Rankin, Esq., Solicitor General.

P R O C E E D I N G S

The Chief Justice: The Court is now convened in special term to consider an application by the petitioners for the vacation of the order of the United States Court of Appeals for the Eighth Circuit, staying the issue of its mandate, and for a stay of the order of the United States District Court for the Eastern District of Arkansas of June 21, 1958 in John Aaron, et al, vs. William G. Cooper, et al.

The order of the argument will be, first, the petitioner; second, the respondent, and then the Solicitor General and, thereafter, either of the parties in rebuttal of the Solicitor General, if they are so advised, the respondent to speak last.

Mr. Butler, we will now entertain a motion to admit for the purposes of this case any associate that you may have.

Mr. Butler: Your Honor, in connection with this case I have Mr. John Haley of Little Rock, Arkansas, who is not yet a member of this Court. He is substituting for Mr. A.F. House.

I also have as co-counsel the president of the Little Rock School Board, who is an attorney, Mr. Wayne Upton.

We do not know at this point, Your Honor, whether they will participate in argument or not; we do not anticipate that they will.

We did not know the order until Your Honor just announced it, and if we have the rebuttal, then I shall probably carry the burden of all the argument.

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The Chief Justice: Should you wish later, Mr. Butler, to have either of these gentlemen admitted for the purposes of this case, we will be glad to hear you.

Mr. Butler: Thank you, sir.

Your Honor, one other thing: I don't know that it has been made a matter of record yet, and I do not believe the Court has announced that the Honorable J. William Fulbright, United States Senator from Arkansas, has filed motion for leave to file a brief, together with the brief.

The Chief Justice: Yes, we have the two.

Mr. Butler: Senator Fulbright is present. He does not expect to participate in the argument.

The Chief Justice: Yes.

We have two, two motions of that kind, which will be taken care of in due course.

Mr. Butler: Thank you.

The Chief Justice: Number one, miscellaneous, John Aaron, Et. Al, Petitioners, versus William J. Cooper, Et. Al, members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and Virgil T. Blossom, Superintendent of Schools. Mr. Marshall?

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF PETITIONERS

By Mr. Marshall:

Mr. Marshall: May it please the Court, this

afternoon's extraordinary session was necessitated because of the fact of the constitutional rights of the petitioners here, the Negro plaintiffs in the cases below, their right to remain in attendance at a desegregated school in Central High School, Little Rock.

And this was pursuant to court order; and I would like to emphasize that at the outset the rights we are seeking protection for are not rights that are in the abstract, but rights that have been determined, not necessarily by the Brown Decision, but the Court will remember that in this case, the District Court approved a plan of desegregation.

The plaintiffs below appealed to the Court of Appeals of the Eight Circuit, and it was affirmed, and the court record also shows that in September of last year there were two applications for stay to Judge Davies, sitting specially in the District Court for the Eastern District of Arkansas, and they were both denied.

So the rights we seek are rights that have been recognized by the Federal Courts and, as such, we believe they are in a different category from a normal litigant in an injunction proceeding prior to judgement.

However, the normal procedure in this case would admit that the stay of Judge Lemley's order would have been issued by Judge Lemley, but he did not.

He refused and declined to stay the judgment.

The Court will remember at the end of this past session of this Court, we filed a petition for certiorari, seeking to have this Court review Judge Lemley's decision, without first going to the Court of Appeals under the special section that provides that that shall happen if there is some extraordinary situation which we thought existed, and this Court denied the petition for certiorari, and the case went back, or rather we went back to the Court of Appeals.

The Court of Appeals had an extraordinary session, and set en banc, the entire court, and in a short time decided the case in unequivocal language, that Judge Lemley's order was wrong.

I emphasize the language because I will need that in my argument later.

However, two days thereafter we, having filed a motion for the mandate to be issued forthwith, the respondent School Board, having filed a motion to stay the mandate, we arrived in this very extraordinary situation -- I would like to call it an anomaly in the law, of an order appealed from, reversed in so far as an opinion and, of course, I recognize that judgments and not opinions reverse orders, and then

to have the stay issued.

And the truth of the matter is these entire proceedings, starting with the filing of the petition of the School Board way back in February, asking for time, the whole purpose of these proceedings is to get time.

The objective of the proceedings is that the Little Rock schools be returned from desegregated to segregated status as of the September school term, and the order having been declared in the opinion as being wrongfully issued, the procedural device which is normal to stay the mandate of a Court of Appeals only for the purpose of preserving the record in the Court of Appeals so it can get up here, that is the only purpose for it; but in this case the stay of the issuance of the mandate decided the merits of the case directly contrary to the opinion of the case.

The opinion said that the School Board was not entitled to a suspension of the integration plan. The stay of the mandate said, "You don't have to act on this until after the school term begins."

At that time the school term was to begin on September 2nd.

This Court can take judicial notice that that has been postponed to September 8. But, at any rate, the staying of the mandate would effectively mean that if this Court would wait until October, the school term would be in session, and

I believe anybody would agree it is not educational policy to transfer children in the middle of a school term.

So we have this extreme situation in the law of a procedural device of staying a mandate actually ruling on the merits in the case.

That point, plus this additional point, and that is that the Court certainly can take judicial notice of what is going on in the Legislature in Arkansas today.

It is quite obvious that any time spent in delay in this matter would bring about not less litigation but more litigation, and that is why -- and I think we are entitled to it -- we believe that this Court must not only vacate the stay of the Court of Appeals for the Eighth Circuit, but I think that in the present posture of this litigation, in the very peculiar status that it is in, and the atmosphere that now exists in the State of Arkansas with the Governor, the Legislature and everybody determined to set themselves up against the whole United States, that the only effective relief that this Court can give that will protect the rights of the petitioners here would be to stay the -- I mean vacate the stay of issuance of the mandate; too, to stay Judge Lemley's order suspending the previous orders of the District Court and, as was done in the Lucy case, for entirely different reasoning, to order that the existing orders of Judge Miller, who originally heard the case, and Judge Davies,

who heard it sitting specially assigned, last September, be reinstated and in full force and effect.

The question immediately arises as to whether this Court has authority to do it. Well, as was pointed out in many cases, the all writ statute, for one, gives authority and, indeed, the procedural statute on the staying of the mandate gives credence to our position; and if there is any exact authority that is needed, we take the flat position that the Lucy case says specifically that this Court has authority, and needs go no further.

I do not believe, as might be argued, that this Court cannot and should not go into the merits of this.

It tends to raise the question in my mind as to what do we mean by the merits.

The merits in this case have already been decided by the stay, and the stay is now being refused by this Court.

Justice Harlan: Could I ask you a question?

Mr. Marshall: Yes, sir.

Justice Harlan: You said September 8th was the postponed opening date?

Mr. Marshall: Yes, sir.

Justice Harlan: Was it the 8th or the 15th?

Mr. Marshall: September 8th is the date fixed by the Superintendent of Schools.

There is a bill pending in the Legislature postponing it until September 15th, for the express reason of seeing what happens in Virginia, so they will know what to do in Arkansas.

02 It has no relation to this case at all.

But the September date was done by the School Board a day or so ago.

Justice Frankfurter: But if that bill passes, I take it the Board's order will be subordinated to the legislative direction; is that right?

Mr. Marshall: I should think that under the normal stay procedure, the Legislature could supersede the School Board and, indeed, the difficulty out there is that it is all going along much -- I mean both are working the same way, it seems to me, insofar as the stay is concerned.

The merits of this case, the one issue in this case, is whether or not this order or these orders, of the District Court, approved by the Court of Appeals, can be suspended for a time.

Justice Whittaker: Approved by the Court of Appeals?

Mr. Marshall: Yes, sir.

Justice Whittaker: The first plan?

Mr. Marshall: The first plan, no, sir; the original plan.

Justice Whittaker: Oh.

Mr. Marshall: The original plan that was approved by the Court.

Justice Frankfurter: May I ask you this on something you said just a few minutes ago: Which order of Judge Davies,

the original order approving the plan proposed by the School Board, was it, you stated, by Judge Miller?

Mr. Marshall. Judge Miller.

Justice Frankfurter: What the judgment of Judge Davies later repeated, in effect, that, other than the order relating to the intervention of troops, that didn't deal with that problem?

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Mr. Marshall: No, sir; Mr. Justice Frankfurter.

What happened was as soon as the Governor threatened to bring out the troops, the School Board went to Judge Davies, and asked for instructions, and he told them to move ahead with the plan.

Subsequent to that time, a day or so later, I do not remember the exact date, I can get it for you though, sir, the Board formally appeared before Judge Davies and asked for the right to postpone the operation of the plan, and Judge Davies ordered them "to proceed forthwith with the plan," and the petition filed by the respondents here requested the Court to stay the whole business, saying that they considered the first order of Judge Miller to be in effect an injunction, and if not, then the order of Judge Davies, but it was aimed at all three, the petition, as set forth.

Justice Frankfurter: I was looking for it in the record in the Court of Appeals. Never mind.

Mr. Marshall: It is in the full record, sir.

What actually happened was that the original was, as I understand it, rather informally requested of Judge Davies.

The second one was a formal one, a hearing and a ruling, a prompt ruling then and there, so that they were under orders, to use the words of the District Court, to proceed with the plan, and they sought relief from it.

Justice Frankfurter: But am I right in understanding

that after the original order of the District Court, presided over by Judge Miller, in which he cancelled the order of the School Board at length --

Mr. Marshall: Yes, sir.

Justice Frankfurter: (Continuing) -- and issued an order for its carrying out --

Mr. Marshall: Yes, sir.

Justice Frankfurter: (Continuing) That Judge Davies appears on the judicial scene on the basis of a petition or whatever it was called, by the School Board itself asking for instructions?

Mr. Marshall: Yes, sir.

And then they petition asking a postponement of relief.

Justice Frankfurter: Those are separate things. They first asked for instructions, and in view of the imminent or actually executed order of the Governor for the troops there; is that right?

Mr. Marshall: Yes, sir -- no, sir; to keep from carrying the plan out. It is just that they did not because of this atmosphere or situation, they wanted to be relieved from putting the children in school as of that September.

Justice Frankfurter: September, that is what I wanted to know.

Were these two separate legal pieces of paper filed by the School Board, one for instructions, and another and separate

petition by them to be allowed to postpone the direction theretofore given by the Court?

Mr. Marshall: That is as I understand it.

Justice Frankfurter: They were two separate orders?

Mr. Marshall: Yes, sir; as I read it.

Justice Frankfurter: All right.

Mr. Marshall: With the permission of the Court, we can get those from the record. We do not have those with us.

Justice Frankfurter: But that is your understanding?

Mr. Marshall: Yes, sir.

Justice Frankfurter: All right.

Mr. Marshall: I think that along that line, Mr. Justice Frankfurter, I should also point out that while Judge Miller's opinion was appealed to the Court of Appeals, and the Court of Appeals affirmed it, we took the position we would carry it no further, and went back to work along with whatever could be done, and I think that --

Justice Frankfurter: That order was not sought to be brought here?

Mr. Marshall: No, sir. We let it stay right there, and let it go back, as such, and considered ourselves bound by it.

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Justice Frankfurter: You could not very well bring it here?

Mr. Marshall: Oh, no, sir; no, we lost.

Justice Frankfurter: What was that?

Mr. Marshall: Judge Miller's opinion approving this plan, we opposed that.

Justice Frankfurter: Yes.

Mr. Marshall: And we urged The Court of Appeals to reverse it.

Justice Frankfurter: I see.

Mr. Marshall: Because it required too much time.

Justice Frankfurter: The board was satisfied or they would not bring it here, and you rested on the plan as affirmed by the District Court, confirmed by the District Court, and the District Court, including an affirmance by the Court of Appeals.

Mr. Marshall: Yes, sir; on the theory that it would work out.

Justice Frankfurter: Yes.

Mr. Marshall: With the permission of the Court, I would like to, just in a measure, go into some of the background of this case, because, as we see it, the facts in this case are so clearly set out in the opinion of the Court of Appeals that in our brief, and now we do not think it is necessary to go in too great detail, but there are one

or two points that I think need emphasizing.

That is that the record will show that with the exception of the one time that the School Board asked for affirmative relief when a white parent obtained judgement in a chancery court, to which Governor Faubus and other people had testified, and the Chancery Judge ruled that the School Board should be enjoined from carrying out the plan which the District Court had approved, the School Board did on that occasion go in to Judge Davies and promptly Judge Davies enjoined the enforcement of that status judgement, and that was affirmed by the Court of Appeals for the Eighth Circuit.

With the exception of that, the only relief that the School Board has asked from the District Court is postponement.

They have asked for no relief in an affirmative way to help this thing along.

That goes back from the two requests in September of last year and, bear in mind, that the petition in this case which is before you today, was asked for way back in February. It was around February that they gave up.

That is when they asked for this relief, and it sat there for awhile until Chief Judge Gardner assigned Judge Lemley to hear it, and the hearing took place in the early part of June.

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So on that basis it seems to us, that the Government points out in its brief and, as we point out in our brief, that there was an affirmative duty on the School Board to get help in this situation, and the only objection at all was that the community was opposed to it.

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The other point that they rely on in their memorandum and in their brief is that a stay of this will help, and in the District Court, in the Court of Appeals, and in the response that they filed to our petition, and up to the present day, with the exception of two points, one that Governor Faubus might not be in office two and a half years from now, and that certain statutes of Arkansas now being litigated might be decided within two and a half years, with the exception of those two points, as of this minute the School Board has not given anybody any information of what they propose to do in the two and a half years while these rights are being suspended.

In the question of a stay or the vacation of a stay, and in cases cited in our brief, we point out that the law is quite similar between the two, especially the Virginia case and the Kasper-Brittain case, and a few others we cite in our brief, that there has got to be a showing of, one, the irreparable harm on one side as against that on the other side.

The record shows that these children will graduate so, so far as matters now stand, if they are in segregated schools next year their rights are just gone. I mean, that is the end of that.

On the other hand, the statute which affirmatively gives the right of the Court, 2101(f) of any court to stay

issuance of mandates, provides that the court may, if necessary, require supersedeas of some form, and again this case, solely because of the peculiar situation, the states never required to give bond, and so they are not even required to give, and we have a complete change of status.

When this case was heard those children in the Central High School, now seven, there were nine -- one graduated, Ernest Green graduated, one Minniejean Brown was expelled, leaving seven -- those seven were in an integrated school system. They had been there for a year.

Under Judge Lemley's order, they are taken out, and that is not only a change of status, it is a physical change of status, and they are taken out as of -- it will only be effective, so far as they are concerned, come opening of the school, because school has been in recess.

But that complete change of status must have some extraordinary reason to be sustained.

The normal procedure is to maintain the status quo, and I submit that Judge Lemley was the one that should have stayed an order, not the Court of Appeals to stay its order reversing him; and we finally take the flat position that on the merits of this case we are entitled to relief, not that we need to establish that point in order to get relief, but we take the position that the opinion of the Court of Appeals was so clear that the respondents here have nothing

that they could successfully bring to this Court.

In many of the rulings of this Court, in chambers, there have been taken into consideration the possibility of whether or not you actually have a justiciable issue, recognizable by this Court; and the petitioners have no such case.

And yet they can toy around with the situation, and effectively deny these rights by using procedural devices, such as a motion to stay.

Justice Frankfurter: There is a difference between a justiciable issue and eventually succeeding on it.

Mr. Marshall: In this Court you need more than a justiciable issue. You need an issue that, one, is cognizable by this Court, and is sufficient to get a sufficient number of justices to agree with it.

Justice Frankfurter: Yes.

Mr. Marshall: I mean, it is more than just a justiciable issue.

Justice Frankfurter: When you say they have no justiciable issue, they have a justiciable issue.

Mr. Marshall: Oh, yes. I think there is no question about that, but we take the position that under the Lucy case it has no weight at this time before this Court.

Justice Clark: What is the basis of your belief that they would not transfer the students in the event the

case took its regular course?

Mr. Marshall: I would say, Mr. Justice Clark, that there is considerable authority among educators that it is not well -- it is not good educational practice to transfer students in the middle of a year.

As to one or two days, I imagine that would be all right, but in the middle --

Justice Clark: Have they advised you to that effect, the School Board?

Mr. Marshall: No, sir; no, sir. Not at all. But I was basing that solely on good educational practices.

Justice Whittaker: Mr. Marshall --

Mr. Marshall: Yes, sir.

Justice Whittaker: Are you urging both a vacation of the Eighth Circuit's order withholding mandate and a stay of Judge Lemley's judgment or an alternative?

Mr. Marshall: I am urging them both.

Justice Whittaker: Conjunctively?

Mr. Marshall: Conjunctively and, Mr. Justice, I would also say that because of the developments now going on in Arkansas, that this case should be decided on its merits, and it could be done. There are precedents in this Court where that has been done.

Justice Frankfurter: That is what you have asked for in your petition?

Mr. Marshall: That is true, Mr. Justice Frankfurter. But, to be perfectly frank, I am thinking about the Lustig Case where, as I remember, the petition for certiorari was filed during argument, and in this case, I think, that, as we said in our original petition for certiorari, which this Court can reconsider on its own motion, our original petition for certiorari, when that was filed, this Court said, you will remember that, "We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay of the appeal in ample time to permit arrangements to be made for the next school year."

On the basis of that language, which was the basis for denying our petition for certiorari, I think present developments in the Court of Appeals for the Eighth Circuit and conditions as they exist in Arkansas, would, at least, impel this Court to order that it be heard on its merits.

Now, we have no authority, as such. We could file a petition for certiorari, but we considered it, and, to be perfectly frank with the Court, we took the position that it had been done before, and that this Court could do it, reconsider our petition filed in June, and order argument on it or could consider it right here and now.

The only thing, I believe, that the way this case stands, there must be a definitive decision -- I hate to use the two together -- I mean it is bad English, but it is the best way I can do, that there be no doubt in Arkansas that the orders of that District Court down there must be respected, and cannot be suspended, and cannot be interferred with by the legislature or anybody else.

And less than that, I do not think will give these young children the protection that they need, and they most certainly deserve, and so, in answer to your question, I would say that we requested it both, and not in the alternative; and at this time we respectfully suggest that it would be even better for this Court to decide the case on the merits because the stay which is being reviewed, decided it on the merits, and so this Court, in deciding the stay, do not see much chance of doing it, but I do know that technically it could be done without hitting the merits.

You consider the merits. But the ruling would either be the stay of the mandate -- I mean the vacation of the stay of the mandate, or the reversal of Judge Lemley's order.

But I do not believe that would give us what we thought would be enough, and it is because of the present developments out there that I think this Court must consider the whole story.

Justice Clark: You have not briefed the merits?

Mr. Marshall: Sir?

Justice Clark: You have not briefed the merits in your petition?

Mr. Marshall: In the brief? We did not; no, sir.

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Justice Clark: You would file another brief; is that your idea?

Mr. Marshall: No, sir; we would be prepared to argue; and,with permission, to submit a brief, and we could do a brief on this case in less than half a day.

We are prepared to argue it now, with the right to submit a brief at a later time; because Judge Matthes' Opinion of the Court of Appeals is so clear.

The Chief Justice: Have you discussed with counsel on the other side the possibility or the propriety of arguing the merits here today?

Mr. Marshall: I have not, sir.

The Chief Justice: May I ask this, Mr. Marshall?

I can see where you would be interested in having both points raised by you decided, both the stay in the Court of Appeals and, also, a stay of the Opinion below in the District Court.

But if this Court should see fit to stay the District Court's Opinion, would it then be necessary to also overrule the Court of Appeals on its stay of mandate?

Mr. Marshall: No, sir, Mr. Chief Justice; and I think, further, that if the Court did it that way, it would still be preserving the traditional function of the stay of the mandate of a Court of Appeals pending a petition to the Supreme Court.

Justice Whittaker: On certiorari?

Mr. Marshall: On certiorari; yes, sir.

But I think that as long as this case is undecided on its merits, our plaintiffs, our petitioners in this case will still be under terrific pressure, because of the uncertainty of it, which was recognized by this Court in its denial of our original Petition for Certiorari; and if it were not for the fact that it has been done, I would have hesitated to suggest it. But I think that on several occasions this Court has ordered cases brought up.

I mean, for example, under some precedents, as I understand it -- it was kind of late in the morning when we read them -- but we understand that this Court could order the School Board to file its petition within one or two days, and be heard promptly before school is opened; or you could consider, as I said, the petition that we have filed.

May it please the Court, finally I would like to wind this up because I don't think that there is too much law that is necessary, because it is certainly not in conflict. We rely on the Virginia case and on down to the present time. We also have some British cases in there which are all on the same theory about the power and duty of the Court to stay or to vacate and what can properly be considered by the Court.

The Government in its brief cites the same cases and additional cases. And so I would say, as I said back here, that when you weigh it, I for one can hardly talk about weighing anything against constitutional rights. I have never been able to find out how to do it.

But here we have Negro children, and the record will show they have done nothing bad except the record will show that one did -- the record will show; there is a dispute about it, but it will show, and she was expelled so that is no problem, but that these children must be forced to surrender their constitutional rights is unimportant in this Court today.

The point as set forth in the Court of Appeals decision, and quoting from the Strutwear Knitting case, in the Government's brief which was filed this morning, it points out that it is really a surrender to obstructionist and mob action, and that it is much more destructive of democratic government than it is of some few Negro's rights.

Justice Whittaker: Well, now what is destructive, so destructive? Not the 8th Circuit's opinion.

Mr. Marshall: Not the 8th Circuit's opinion.

Justice Whittaker: And that is what you are asking us now in one horn of your motion to vacate their order staying their mandate for a long enough period, a thirty day period, to lodge the petition for certiorari. That is correct, isn't it?

Mr. Marshall: Yes sir.

Justice Whittaker: Yes. It is the other horn of the motion that goes to Judge Lemley's order, isn't it?

Mr. Marshall: Yes sir.

Justice Whittaker: Which you ask that we stay.

Mr. Marshall: Yes sir.

Justice Whittaker: And that is the judgment of which you really complain about. You are not complaining about the 8th Circuit's judgment.

Mr. Marshall: I am complaining about Judge Lemley's order being in effect.

Justice Whittaker: Yes, which is reversed by the 8th Circuit.

Mr. Marshall: Which is reversed by opinion.

Justice Whittaker: Of the 8th Circuit.

Mr. Marshall: Yes sir.

Justice Whittaker: And would be inoperative during

m 3 the period that we might consider a petition of certiorari if that judgment were now stayed or, in other words, if that horn of your motion that so asked was sustained; isn't that right?

Mr. Marshall: Yes sir. The point -- I think I get it, I thought I cleared it up with the Chief Justice's question --

Justice Whittaker: Yes.

Mr. Marshall: Which as I understood the question, and my answer, was that if this Court stayed Judge Lemley's order, there would not be need for touching the Court of Appeals, and I tried to make it clear that what we wanted was to get the original court orders in there, and Judge Lemley's order was standing in the way and certainly that would be correct.

I mean I am making this statement on my feet, but we have given it some thought. And the reason we put both in was because originally you were right, sir, it was thought among our lawyers working on this that was the proposition.

Justice Whittaker: That is why I asked you specifically. I am aware that you stated your motion in the conjunctive, but I wondered why an alternative wouldn't do the job.

Mr. Marshall: I think it would, but as I said in addition to that as things now stand I don't think either of them will be enough.

Justice Whittaker: And if that alternative should be adopted by the Court, then would it not be normal for the Court of Appeals to grant at least a thirty day period in which the losing party might petition for certiorari.

Mr. Marshall: It is absolutely normal.

Justice Whittaker: That would be normal procedure, wouldn't it?

Mr. Marshall: As I understand it, it is done every day, and indeed the books so say.

Justice Frankfurter: Will you be good enough to tell me what consideration relevant to determining whether the stay of the Court of Appeals should be vacated, what matters of equitable jurisdiction or this Court's power over the lower court, what matters that are relevant to determining whether that stay should be vacated would not be relevant in determining whether Judge Lemley's original order should be vacated?

What legal consideration is there for vacating Judge Lemley's stay and disregarding the fact that he has been reviewed by the Court of Appeals and it has taken action on it and has reversed him and has then decided to grant a stay of its reversal?

Mr. Marshall: It is our position, Mr. Justice Frankfurter, that normally that is what is done to stay the mandate, but when in effect the decision issued in the case is

a stay, a suspension, the merit of the case is a suspension, then when the Court of Appeals decides that the other side is not entitled to a suspension in its opinion, and then suspends in its order, as I said in the beginning, it is an absolute anomaly.

Justice Frankfurter: That may be a very good reason why you should argue that the stay should be vacated, but I do not understand the argument that says we don't have to bother about that. We just deal with Judge Lemley's order and vacate that.

Mr. Marshall: Oh, I understand you now, Mr. Justice Frankfurter. I think the real problem in this case is as to whether or not the Court wants to go into the merits. I think that is it.

Justice Frankfurter: Well, the merits -- you use the term "the merits" -- it seems to me to be the same merits for determining the propriety of the stay as in asking us to vacate the order which we originally refused to vacate.

Mr. Marshall: We would make the same argument, and indeed in our brief we said the same argument applied to both situations.

Justice Frankfurter: I don't understand why you offer us the suggestion that we don't have to bother about the stay. We can deal with Judge Lemley. To me that is the most unreal kind of talk.

6 Mr. Marshall: I think, sir, Mr. Justice Frankfurter, I cannot get away from the fact that it is Judge

fls Lemley's order that does the damage.

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Justice Frankfurter: Yes, but that has been dealt with. This Court refused to deal with Judge Lemley's order last June. It remitted the appealability of that to the Eighth Circuit.

Mr. Marshall: Certainly.

Justice Frankfurter: The Eighth Circuit has dealt with it. The Eighth Circuit said it was wrong. It then vacated -- it then granted a stay order to give opportunity under the Act of Congress to have this Court applied to for certiorari.

What you are here for, I respectfully submit, is to argue that that stay should never have been granted.

Mr. Marshall: I have argued it. I am prepared to argue it, Mr. Justice Frankfurter, but I did not want to get into the point of upsetting what normally is a procedural device for appealing to this Court.

Justice Frankfurter: But if this Court, as you urge, has the power to vacate that stay --

Mr. Marshall: It does have that power.

Justice Frankfurter: (Continuing) -- then no procedural entanglements of the Court of Appeals are relevant to that power.

Mr. Marshall: I think that is -- I am sure that is correct, sir; but, Mr. Justice Frankfurter, I still go back to my other question.

Justice Frankfurter: All right.

Mr. Marshall: That whether you consider the vacation of

the stay of the Eighth Circuit or whether you consider a stay of Judge Lemley's order, the merits are so entwined that this is one of the types of cases where it points to the need for it.

Justice Frankfurter: What you are saying is that if, as a matter of authorized congressional action, a petition of certiorari can be brought by the School Board, that such a petition would raise claims so frivolous that there is no justification for staying the reversal by the Court of Appeals.

Mr. Marshall: We take that position, and we have tried to develop it.

Justice Frankfurter: All right.

Mr. Marshall: That it is just without merit, but in the posture of this case, it seems to me the easiest way would be to do them both.

The Chief Justice: Was the propriety of this stay argued in the Court of Appeals fully?

Mr. Marshall: No, sir. As a matter of fact, the application for stay and the ruling on the application were both the same day, and we got our copies the next day.

Justice Clark: Was this an argument or just papers?

Mr. Marshall: They just filed a motion for stay, and when it was received it was granted.

Justice Clark: You filed a motion in advance, did you not?

Mr. Marshall: Yes, we filed the motion that it be

issued forthwith. We filed ours ahead of theirs. We filed it the very next day after the opinion came down.

Justice Clark: And they filed theirs?

Mr. Marshall: Then they filed their motion to stay, and on the day it arrived in the Court of Appeals, it was decided. And it is also along that line, which was pointed out in the Virginian case which is cited in our brief, where the Court took notice of the fact that the stay was given without reason. The stay in this case was merely given under the procedural statute which says that a stay can be granted for purposes of petitioning to the Supreme Court, but nothing at all on the merits, and I presume the merits weren't considered.

And so that, at this stage of the litigation, is the first time that the merits -- I use "merits" merely as to the merits as to whether or not an order is entitled to be stayed -- that for the first time the merits of that are being considered.

And we take the position that when you balance these rights of these kids involved, plus what this Court said in the Brown case, the public interest, meaning the public interest of the United States over against the School Board's position that there are some people that don't want to let this thing go through, then, certainly, the equities involved lean toward the protection of those constitutional rights,

rather than the postponement of them.

And I believe that I have to recognize that that is an issue in this case, and, as expressed by the Court of Appeals, they said there is no problem about it; they just cannot be surrendered, and they mentioned the case I mentioned before, the case that I said before, the Strutwear Knitting case, which is famous for the expression about handling bank robbers. You don't close the banks; you put the bank robbers in jail.

And, therefore, it seems to me, -- and I don't want to prolong the argument -- that we are entitled to both.

At the same time, it seems to me that the real justice of the case would not be required by going into either, but that either on our petition originally filed or by some other procedural device, that this Court be given an opportunity to pass on the merits.

And, as I said before, petitioners are perfectly willing to argue the case on the merits, even though we were successful insofar as the opinion of the lower court was concerned.

I think a reading of the three briefs, our brief, the School Board's brief, and the Government's brief, demonstrates that there is really no serious conflict of the law as to the authority of this Court to act. There is a conflict between the School Board as to whether this Court should act; and, on that, we think that the equities on the side of the schoolchildren are such that the only relief that can be granted that will be effective will be for the decision on the merits.

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Justice Brennan: Mr. Marshall.

Mr. Marshall: Yes sir.

Justice Brennan: I don't think I am clear on this statute which I understand postpones the school opening until September 15.

Mr. Marshall: That is in the State Legislature of Arkansas. I don't know whether it is passed or not.

Justice Brennan: Oh.

Mr. Marshall: But it is there pending I understand.

Justice Brennan: Presently?

Mr. Marshall: September 8.

Justice Brennan: September 8.

Mr. Marshall: September 8 is the deadline, and I think, if I can think ahead of you, sir, the 20 days of the mandate of the Court of Appeals would be up on the 7th, but the stay gave them 30 days from the date of judgment.

Justice Clark: Have you filed a petition for rehearing?

Mr. Marshall: No sir, at least I have received no copy of it, no sir.

The Chief Justice: Has the time expired for filing a petition for rehearing?

Justice Whittaker: It is a ten day rule, is it not.

Mr. Marshall: A ten day rule, I think it is.

Justice Whittaker: And that would expire tomorrow. Excluding the first and including the half, wasn't the

decision on the 18th?

Mr. Marshall: The 19th.

Justice Whittaker: The 18th.

Mr. Marshall: Yes sir.

Justice Whittaker: It would expire tomorrow.

Mr. Marshall: Yes sir. If there are no further questions, if Your Honors please, we will reserve the time not necessarily that we will use it, but if we may reserve it in case we need it.

Justice Black: Is the Court of Appeals record before us?

Mr. Marshall: No sir.

Justice Black: The entire record?

Mr. Marshall: No sir. I can do this, Mr. Justice Black. We have a copy of the transcript of testimony and the pleadings filed. We don't have that with us.

Justice Frankfurter: Was the decision by Judge Lemley entirely on all testimony or were there affidavits?

Mr. Marshall: No affidavits. It was all testimony and exhibits, a whole basket full of newspaper clippings.

Justice Frankfurter: How many days were the proceedings?

Mr. Marshall: Practically three days, not quite.

Justice Frankfurter: Three days.

Mr. Marshall: And the testimony was mostly from the school board people showing what a difficult problem they had, from the Chief of Police, the chairman of the School Board,

and the only testimony produced by the plaintiffs in this case, petitioners here, were the two expert witnesses as to how the school system could be run.

Justice Frankfurter: Do I understand in your reply to Justice Black to indicate that you have a copy of the proceedings?

Mr. Marshall: We each have a copy of the transcript, and I would be very glad to deposit the transcript copy with the clerk. I will be glad to and will so do.

Justice Black: Was it printed or typewritten?

Mr. Marshall: It was typewritten. We will permit it to go up on the original record from the Court of Appeals including the typed transcript and the arguments based on the typed transcript of the testimony.

Justice Frankfurter: That was to accelerate the submission?

Mr. Marshall: Yes sir, they were holding a special term.

Justice Black: How many copies?

Mr. Marshall: How many copies do we have?

Justice Black: How many copies were before the Court of Appeals.

Mr. Marshall: Two so far as I know. I think that is correct. And that is all that I know of.

Justice Black: What in addition to that transcript would be necessary to have the entire record that is capable of being used on a petition for certiorari?

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Mr. Marshall: Mr. Justice Black, I don't think the pleadings would be necessary. They are very brief, and without any trouble they could be run off. The exhibits consisted of a large batch of newspapers, which, instead of being printed, could be deposited with the Court.

As I say, I don't think it would be necessary to put those in the record and, so far as I can see, you wouldn't need anything but the transcript and the pleadings, both of which we have; and we are going to file the transcript and, if necessary, we can file the pleadings, too -- a copy of it.

The Chief Justice: Mr. Butler, you may proceed.

By Mr. Butler

Mr. Butler: May it please the Court, I would like to straighten out a few things that Counsel for the NAACP may not have been aware of. Your Clerk called me several days ago. After talking with the Clerk of the Eighth Circuit Court of Appeals, and finding that the record of that court had been returned to Little Rock, I located it, and mailed it here immediately, and it is my information that the entire record from the Eighth Circuit Court of Appeals is here in your Clerk's office.

The Chief Justice: All right.

Mr. Butler: That has attached to it three such typewritten volumes, each of about this size (indicating), which shows all of the testimony that was given before Judge Lemley in approximately a three-day hearing in his court in June.

In addition to that, there was a large packet, as Counsel has referred to, of various exhibits. They were not identified each separately, but were introduced as a packet. They were largely newspaper items which Judge Lemley took into consideration to show the confusion and turmoil and the position that this School Board was put in. I thought it might be helpful for the Court to know that.

One other thing that I would like to mention in passing, at the beginning, which I think Counsel was somewhat confused on, or uninformed on. At the time this School Board

requested a temporary study, purely temporary, before Judge Davies in September of 1957, the troops, the National Guard, had either been ordered out or it was known that they were to be ordered out, and at that time there was an injunction that had been ordered by the local Chancery Court directing this School Board to do exactly opposite from what had been planned and what Judge Miller had ordered in August of 1956.

Now that was the purpose behind the School Board going into court at that time and asking merely for a temporary delay. They did that for several reasons.

In the first place, they were caught in an untenable position. As a matter of fact, they have been there continuously since then, up to this very day.

They also felt that under the circumstances, with troops moving in and out of the city, and perhaps strife and turmoil to follow, that the wise thing to do was for the court to have an opportunity to tell it, the School Board, what it should do under those circumstances.

The School Board felt that a temporary, not the kind of delay that Judge Lemley had given over a long period of time, two and a half years, but for that immediate situation, that it was necessary to get it clarified.

A third reason for the School Board to go in at that particular time before Judge Davies was that they were ordered by two different courts to do exactly opposite things, or at

least partially opposite, and they felt, on advice of counsel, that it was advisable for them to show that there was no motive on their part of contempt of the Federal Court order.

Now I think those are the reasons behind what has been referred to as the petition for delay of September, 1957.

Justice Frankfurter: Mr. Butler, may I ask you whether Mr. Marshall is correct, as I understand the inference that I drew from Judge Davies, one of his judgments, that there were two separate legal steps taken on behalf of the School Board; one, a request for instructions, and two, this motion for temporary injunction; is that correct?

Mr. Butler: Mr. Justice Frankfurter, as I understand it, and as I recall at present, those were combined, yes.

Justice Frankfurter: This is two --

Mr. Butler: Things were happening --

Justice Frankfurter: They were combined, as I read his judgment. He dealt with them in a combined disposition.

Mr. Butler: I think that is --

Justice Frankfurter: I just wanted to be sure whether those were two separate steps taken before him which he then combined into a single disposition, because he speaks separately of the motion.

In his Order of September 3rd, and the court having considered the Petition for Instructions filed by such defendant, it is not a matter of moment to this Court, certainly not,

but just as a matter of interest I wanted to know what the Board did after instructions; and, also, at the same time, asked Judge Davies to suspend or stay this thing for a period of time.

Mr. Butler: Your Honor, so many things have happened since then --

Justice Frankfurter: (Interposing) That is correct.

Mr. Butler: (Continuing) -- I would prefer to refer to the record itself, rather than rely on my memory, even though I was present.

Justice Frankfurter: The reason for my asking is that the record does not set forth these two documents, and Judge Davies' own statement leaves me in doubt.

The Chief Justice: Mr. Butler, may I ask you this question?

In view of the opinion of the Court of Appeals overruling Judge Lemley, is the School Board acting under any compulsion to desegregate the schools?

Mr. Butler: No, sir, not at the moment; if I understand Your Honor's question. They are not acting under any compulsion.

And that is one other thing that I wanted to mention: and that is there has been some statement of the delay of the School Board in opening the high schools in Little Rock or all of the schools, as a matter of fact. The School Board, on its

own motion, let us say, postponed it until September the 8th.

The Chief Justice: Yes.

Mr. Butler: There is a statute which will be passed, I think it has already been passed --if not, it will be passed today -- postponing the opening of school until September the 15th. That is my information.

Now, of course, the School Board would have to obey the statute in regard to opening or closing school.

Justice Douglas: What is the time for registration?

Mr. Butler: Sir?

Justice Douglas: What is the time for registration?

Mr. Butler: The time for registration originally is about now. I have the president of the School Board here with me. Let me ask him.

(Pause)

Mr. Butler: They have already had registration, I am informed, Mr. Justice.

Justice Douglas: And this bill for delaying the opening of the schools until the 15th has nothing to do with registration?

Mr. Butler: I don't think it affects registration; no, sir.

Justice Douglas: These petitioners are registered?

Mr. Butler: These petitioners are registered under the Order of Judge Lemley's delay, under his Order; yes, sir.

Justice Burton: Are they registered in some other school?

Mr. Butler: Yes, sir; that is my information, that they are already registered in the school that they originally were in.

Justice Harlan: They are also registered in the other school, aren't they? Central High? Under the original Order of Judge Davies?

Mr. Butler: Perhaps, yes.

Justice Harlan: Is there any doubt about that?

Mr. Butler: Yes, sir; there is some doubt about it.

Justice Harlan: Well, only by virtue of the postponement of Judge Lemley's second order, Judge Lemley's order. That is the only intervening circumstance?

Mr. Butler: Yes, that was the intervening circumstance, and the stay ordered by the Eighth Circuit; yes, sir.

Justice Frankfurter: Their names are physically on the appropriate register of the class to which they were assigned. I am not talking about legal consequence, but to carry out Justice Harlan's question. They were in that school for a year. They must have been registered when they were admitted in -- what was it? -- in '57?

Mr. Butler: Oh, yes, sir.

Justice Frankfurter: They are physically on the books of the school?

Mr. Butler: Oh yes, sir; yes.

In September of '57 -- perhaps I misunderstood your question -- in September of '57, they were registered in Central High School and remained there all during the school year, both on registration and physically being there.

Justice Frankfurter: And what with Judge Lemley's Order, they would have gone back whenever the school opened to their appropriate class.

Mr. Butler: Legally, that is correct; yes, sir.

Justice Frankfurter: That is what I am talking about.

Mr. Butler: Yes.

The Chief Justice: Mr. Butler, may I ask one other question?

Has the School Board determined what it will do towards desegregation or towards leaving the matter as it was last year, in the event this Court declines to grant this stay?

Mr. Butler: No, sir; it has not decided; because it is almost compelled to see what statutes are passed by the General Assembly now in session, and various other things which it has no way of determining. And this School Board no doubt will have to meet those situations as they arise, as they have had to do all the past year.

Justice Frankfurter: But the plan which was put before Judge Miller, and which he approved, and which the Court

of Appeals confirmed, has never been revoked by the School Board.

Mr. Butler: No, sir; it has not. It has not been revoked; no, sir.

The Chief Justice: Well, as to these specific children, have they been assigned to any school?

Mr. Butler: It is my information, Mr. Chief Justice --

The Chief Justice: (Interposing) By the School Board.

Mr. Butler: (Continuing) -- that they have not.

The Chief Justice: They have not been?

Mr. Butler: Yes, sir; they have now been assigned.

The Chief Justice: Now?

Mr. Butler: To the all-Negro school, the new high school there of Horace Mann.

The Chief Justice: Isn't that action towards segregating them again?

Mr. Butler: Oh, yes, sir. It is, it is, and that was done under the Order of Judge Lemley's decision.

The Chief Justice: Yes.

Well, then, my point is this: If this Court does not stay the Order of the Court of Appeals withholding its mandate, then the School Board will proceed to segregate these pupils who are plaintiffs in this case.

Mr. Butler: Yes, sir.

The Chief Justice: That is what I wanted to know.

Justice Frankfurter: Did they transfer them?

Mr. Butler: Now, the School Board President informs me -- and, of course, he is correct -- that we don't know that they have actually been registered.

As a matter of fact, the point I was making a moment ago is that registration generally of most of the students in Little Rock has been accomplished within the last few days.

Now, actually, these students that are in question have been up here, they have been traveling around. I doubt that, since even the School Superintendent has been gone for the last couple of days, whether he knows that all of these particular students have actually registered, because --

Justice Brennan: (Interposing) What does the registration involve, Mr. Butler?

Mr. Butler: Registration simply involves the request by the student himself under the General Rules of the School Board to indicate that he is planning to attend that particular school.

Justice Brennan: Where does he register?

Mr. Butler: That day.

Justice Brennan: Does he go to the school itself?

Mr. Butler: At the school.

Justice Brennan: Where he has been assigned?

Mr. Butler: Each school; yes, sir.

Justice Frankfurter: That applies both to segregated and Central High School?

Mr. Butler: Oh, yes, sir. All students must register, and that has been the customary practice for years.

Justice Douglas: At the beginning of each --

Mr. Butler: Yes, sir; they all register so that school authorities will know who is going to be where.

Justice Brennan: What I don't quite understand is this:

They must register -- that is, register at the very school to which the pupil has been assigned.

Mr. Butler: Yes, that is my understanding.

Justice Brennan: None of these children have ever appeared at the all-Negro high schools?

Mr. Butler: I do not know whether they have appeared there or anywhere else, as a matter of fact.

The point I was making a moment ago in answer to one of the other Justices' questions was that registration, generally, in Little Rock has already been accomplished, and just within the past few days.

The Chief Justice: Well, my only point was this, Mr. Butler:

If this Court does not grant the stay of that Order of the Court of Appeals, is it the purpose of the School Board to assign these youngsters involved in this case to an all-

Negro school?

Mr. Butler: Yes, sir.

The Chief Justice: That is all I wanted to know.

Justice Clark: Do you have a system of transfers in Little Rock?

Mr. Butler: Yes, sir; we do. There are many transfers made from time to time. Each transfer is taken up on its own merits; and, ordinarily, if a family moves from one geographical location to another, or for various other reasons, they are transferred during the school year. That is not an uncustomary proceeding.

The Chief Justice: But whites to white schools and Negroes to Negro schools.

Mr. Butler: Well, no --

The Chief Justice: Do they ever transfer any Negroes in Little Rock to a white school, or whites to a Negro school by reason of their moving their residence?

Mr. Butler: Mr. Chief Justice, in Little Rock, until this past year --

The Chief Justice: Yes.

Mr. Butler: (Continuning) -- and for the past seventy years, ever since there has been a public school system in Little Rock, it has been segregated, --

The Chief Justice: Yes.

Mr. Butler: (Continuing) -- in the public school

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systems there; so there has theretofore never been any transfer from Negro schools to white schools --

The Chief Justice: Yes.

Mr. Butler: (Continuing) -- or vice versa. The transfer of pupils from one school to another, whether it is white or Negro, is a process that goes on every school year, not just at the beginning of the year. That is when they all register.

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The Chief Justice: Yes.

Mr. Butler: And ordinarily those students stay in that particular school the balance of that year, but there are many exceptions to that, and there are transfers during the course of the year.

Justice Frankfurter: And am I right in understanding that under the plan approved, submitted by the Board and approved by Judge Miller, the stage by stage carrying out of the desegregation scheme, that Central High School was the only school in Little Rock in which the plan became operative.

Mr. Butler: As a practical matter that was the only one, yes sir.

Justice Frankfurter: I don't know what that means.

Mr. Butler: There were three high schools, Central High School, Horace Mann High School and Hall High School. Horace Mann High School is a new school. So is Hall High School. Central High School has been in its present physical plant for some 20 to 30 years. The only applicants that were made for any racial mixing or integration to the best of my knowledge --

Justice Frankfurter: Was at Central High.

Mr. Butler: Was at Central High School, and some 17 first started out becoming eligible for it. There were 70-some odd applied. For various reasons they withdrew, either voluntarily or otherwise, and it finally came down to nine and

ended up the school year with seven.

Justice Clark: Mr. Butler, if you were to assume that the Court did not issue a stay, but let the case come here in its regular course, and then further assume that after argument an order came down approving the plan and requiring integration, would it be feasible or practical or within the practice of the School Board, in keeping with the order of the Court, if such an order was entered, to then transfer these students that were so ordered, from whatever school they were in to an integrated school. Or would you have to wait a year, as Mr. Marshall stated?

Mr. Butler: Oh no, no sir, you wouldn't have to wait a year.

The point that I am making, and I think, Mr. Clark, what you are asking is the registration at the beginning of school is not necessarily held inviolate during the entire school year. Now they try to, just for the sake of continuity, to keep as many children as possible in a particular school, but there are various circumstances as I understand it that come up throughout the year whereby pupils are permitted to transfer from one school to another. I trust I have answered your question.

Justice Clark: Say we heard the case on the merits rather than passing on the stay -- say the Court did not pass on the stay at all but heard the case on the merits at a later date,

and the judgment was against you, then there would be no reason that you know of why the School Board could not at that time transfer the students from whatever school they were in to an integrated school.

Mr. Butler: No sir, I know of no reason why that couldn't be done.

Justice Clark: If it is a fair question, when did you contemplate filing a petition here? You have until the 20th I believe.

Mr. Butler: Your Honor, we were working on it when we had to drop that and file a response to the motion for vacating the stay, and we have simply not had time to pursue that. It was our intention to proceed with that as promptly as we could. We announced that we wanted to do it within a ten day period, if that were possible.

Justice Clark: I take it you are not going to file a petition for rehearing in the Court of Appeals.

Mr. Butler: No sir. That is one other point I wanted to emphasize and clear up. After the decision of the 8th Circuit Court of Appeals, the petitioners then filed for immediate sending down of the mandate. Either in the next mail or certainly by the next day we were preparing at the same time the other side was to present, our motion for a stay.

I think it is correct that the petitioner's motion arrived

there one day, ours arrived the next, so the issue there was traversed. In other words, each position was opposed to the other, they asking for immediate sending down of the mandate and our asking for the stay for a customary period of time.

And it is my information that the entire court of the 8th Circuit Court of Appeals granted that stay. It was not done just by the chief judge or any justice thereof. It is my information that every Justice agreed to the stay after the respective motions had been filed, and the answer, the decision of the court was announced the day after the later of the two motions were filed.

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Justice Brennan: Mr. Butler, I think you told us the record is here. Do I understand that all that is now required to perfect your application for certiorari is the filing of your petition?

Mr. Butler: Yes, sir, and filing a brief with it, depending largely, of course, upon whether this Court waived rules of printing records. There has been no printed record in this. Actually it has moved so fast and courts have ordered us to do things, both sides, so quickly that there has been no time to print much of the things that it is customary to print.

The Chief Justice: If we permit it to be typewritten instead of printed, could you and would you accelerate your petition for certiorari?

Mr. Butler: We would do it as quickly as we could, which we had planned to do anyway, Mr. Chief Justice. We have no disposition to delay the legal proceedings, but we hope that we will be given time in that event as we should to do it in an orderly fashion and get all of the things, all of the points before the Court that should be presented.

The Chief Justice: Yes.

Mr. Butler: It has been my limited experience that it is not an easy matter to present a petition for a writ of certiorari. There are certain things that must be done, and we are not as familiar with that as lawyers who

02 practice here in Washington. We would deplore being rushed into it to the extent of not having time adequately to prepare it.

Now, it seems that all the lawyers in this case are pretty well agreed, and we won't dwell on that part of it, that this Court probably has the power to grant petitioner's motion. Many instances can be cited both ways, not only of this Court but all appellate courts, of setting aside or upholding.

The customary thing, of course, is for the court that heard the case to exercise its judicial discretion in granting the stay or not. Now, it would be, in our opinion, an unusual procedure, although not unprecedented, for this Court to vacate the stay of the Circuit Court of Appeals. I don't think it would serve any useful purpose to dwell on the various cases in the various circuits as well as in this Court. I think we are all in accord that there is power in this Court to do either one.

Now, unquestionably, though, the burden is on the petitioners, that is at least my studied judgment. I think the very nature of the legal proceedings dictate that when a stay is granted by a court, the burden is on the side seeking to set that aside, and we feel that they have not met any such burden up to this point.

As we see it, each such case presents itself to every

court, whether it is this Court or any other appellate court, with this rather simple but profound question, and that is:

"Should we as a Court on motion pending on appeal or certiorari summarily substitute our opinion for that of the lower court which heard the case and granted the stay?"

With this Court sitting en banc, it may prove difficult for all parties to eliminate arguing Judge Lemley's decision as against the point that is before this Court right now, the particular issue of setting aside the stay of the 8th Circuit.

And I agree with counsel that has just spoken that such argument necessarily overlaps one into the other. It is difficult to distinguish between the two.

However, we feel that even though such arguments become intertwined, that really the case, the issue before this Court as of now, in so far as these pleadings are concerned is whether or not this Court is going to set aside the stay of the 8th Circuit.

Now, as set forth in our response, the trial court, after hearing evidence for three days, found that under the conditions now existing in Little Rock -- and these findings, not a single finding of Judge Lemley was disturbed or questioned by the Circuit Court of Appeals. As a matter of fact, the Circuit Court of Appeals found every one of those itself, and so set them out in the opinion.

04 But Judge Lemley found, and also the 8th Circuit Court of Appeals found that it is impossible for the School Board at Little Rock to operate a school program for the 2,000 students at Central High School on an integrated basis at this time, and that unless the plan of desegregation is postponed for a reasonable length of time, that irreparable harm will be inflicted upon the students of both the Negro and white races.

Now, the broad issue, of course, in this case is simply this: Can a court of equity postpone the enforcement of the plaintiff's constitutional rights if the immediate enforcement thereof will deprive others, many others, as a matter of fact, of their constitutional rights to an education in a free public school?

The Little Rock Public School Board is composed of outstanding citizens of our community. There are two medical doctors on the Board. There is a civil engineer, a graduate civil engineer of one of the large manufacturing concerns in our state. There is a certified public accountant. There is a leading businessman of one of the large baking companies there, an official of that company.

And the present president of the Little Rock School Board is a wise and experienced lawyer, who has practiced there many years.

Those men are unpaid. They are public servants. They

05 have tried to do the best they could under as trying circumstances as any public servant has ever been faced with.

Now, when other boards of education were refusing to recognize the basic change that the Supreme Court had made in the law in the Brown decision, this Board was studying and formulating ways and means of complying. They knew it was not an easy task, but they were willing to do their best.

These are men of high standing, as I have said, in their community. From bitter experience, however, they have discovered that they could not operate a public school system under the existing climate in Little Rock as of this time.

Now, they did not anticipate all of the difficulty that has arisen, and I daresay that many courts did not anticipate all of that difficulty. But from bitter experience, they discovered after some five or six months of operation, after troops had been in and out, and still there under a different commander, that they could operate the school only with troops, and yet they could not give an education with troops.

They came to that studied and serious conclusion on or about the latter part, or about the 20th of February, after they had been operating a full complete semester with troops in the halls and around the school building.

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Justice Frankfurter: Am I right in my understanding that it wasn't the School Board that asked for troops?

Mr. Butler: The School Board did not ask for troops, no, sir. This was not an impulsive search for relief from the courts that these men made, but after they had tried it for a long time.

Now, many people in Little Rock and throughout the land, no doubt, are sympathetic and try to be understanding of the School Board's problem. But no one can put themselves in the place of this School Board unless they have been there.

We find that even the press in many places, not just in the Southland, has been understanding, and as an example of that, I would like to read a very brief editorial from a New York paper as late as August 20.

It says: "Among many trials of the people of Little Rock, certainly not the least of them has been the way in which the course of events has been suddenly reversed and reversed again by the various agencies of government, and now they are to suffer more of it.

"First, there was the ruling of the Supreme Court that upset the old order in the schools. To this change, the local authorities in Little Rock, and most of its people, tried to adjust.

"But then all of a sudden, they were confronted with troops sent by their Governor to block integration and troops

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sent by their President to enforce integration.

"Next there was a ruling by a Federal district judge denying a stay and ordering integration. This was followed by an order from another Federal judge in the same district granting the people a time's respite by postponing integration.

"This week the Federal circuit judges once more reversed direction. There is talk of another appeal to the Supreme Court, of a special session of the legislature."

All of which, of course, has come about in the last few days. "This surely is a terrible buffeting of one people by the laws and the powers of officeholders.

"Each of these officeholders may have had the right to act as he did, but just the same, the result has been that the people of Little Rock did not know from one day unto the next under what order of society they must live, but found all changed by which holder of what office wielded the moment's power.

"We cannot know what will happen next month in the schools of Little Rock. It may be too late now for the hope that somehow time and forbearance will be allowed to heal passions. And yet, it must be hoped, for any man can see what will happen if the issue of integration comes to devour the issue of education.

"What kind of education can we give any children,

W3 white or Negro, in classrooms inflamed by animosities, if once more it comes to that, echoing the tramp of soldiers."

That ends the editorial.

Justice Clark: What paper was it?

Mr. Butler: Sir?

Justice Clark: What paper was it?

Mr. Butler: That is the Wall Street Journal of August 20, 1958.

Now the Supreme Court said that local courts should be the ones to decide the various questions which would arise. It may seem unnecessary and perhaps unduly academic to read to this Court, it may even seem presumptuous to read to this Court what it has said, but I have gotten something out of the opinion every time I have read it and reread it, and reread it, and apparently experienced judges get different ideas about what this Court meant.

And perhaps even at the expense of reptition, it is advisable to read portions of that opinion in the light of events which have taken place in Little Rock.

This Court said in the Brown case: "That because these cases arose under different local conditions, and their disposition will involve a variety of local problems, we requested further argument on the question of relief.

"These presentations were informative and helpful, and in its consideration of the complexities arising from the

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transition to a system of public education free of racial discrimination, full implementation of these constitutional principles may require a solution of very local school problems.

"Because of their proximity to local conditions, and the need for further hearings, the courts which originally heard these cases can best perform this judicious appraisal.

"Accordingly, we believe it appropriate to remand those cases to those courts. In fashioning and effectuating the decree, the courts will be guided by equitable principles.

"Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

"These cases call for the exercise of these traditional attributes of equity power.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner."

When we look at this entire problem, we recognize that two and a half years historically, is a very short time, or perhaps any other period of time, and I know of no better way, at least it was most impressive on Judge Lemley, it was

impressive on other people, when Mr. Blossom, the School Board Superintendent, who has studied this thing and it has been on his heart as well as the hearts of the School Board members more than anyone else, and it has been his major responsibility, in asking him in the lower court what he found, and this is in the record that is now before your Honors, he was asked the question whether he had read the Supreme Court decision.

These men were earnestly trying to carry out the order of the Federal court as they saw it, but their function was also to maintain a public education system in Little Rock, and I will say I think in all fairness to those men that that probably was their primary object and consideration and duty.

But Mr. Blossom testified in studying this problem just what did it mean, what did deliberate speed mean, in one locality as against another?

What did it mean in this particular serious problem that has confronted not just Little Rock but the entire nation? And here in substance was his testimony, that portion of it verbatim: We asked him whether he had given consideration to this time element when they finally filed a petition before Judge Lemley for a two and a half year delay, and he said: "Very definitely we have given great consideration to it in this plan. We are dealing with something that is very important and very dear to the hearts of many people on both sides

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of it. We took into account the effect as far as time and other cultural pattern changes in our society were concerned.

"We tried to look into history to see what it would teach us. We tried to analyze the situation of the Negro and his march to civil rights in this community."

Then he was asked the question whether he considered the term "deliberate speed." His answer was: "Yes, very materially. The Negro race as a race, came to this country in 1619. They came in chains as slaves. They stayed in that and as far as I could study it, you would class that as the first period in the history of the United States, and they stayed from 1619 until 1865, nearly two and three quarter centuries, and that is one period in their march for civil rights, of their development.

" The second period came in 1865 and they stayed in this second period until 1896, the decision of Plessy versus Ferguson.

" That is 31 years. Now, in this period they had their freedom. They did not have economic or political or any other type of position to any extent.

"Then coming out of that period into what I would call the third one from 1896 to 1954, and I would just label that separate, but equal.

"Now they stayed in that 58 years and then you look at the problem and the complexities in this thing, and

recognize that many separate, but equal, is in no way a reality in many places in the Southland, but in Little Rock, Arkansas, they were.

"I am not arguing the 'separate, but equal' philosophy," Mr. Blossom continued. "I am trying to state that history tells us in terms of two and a half years for a delay that this is the third period and we account for the fact that there are three periods, one taking nearly three centuries, another 31 years, and another 58 years, and reccgnizing that there is one group that says we are going to have it all now, and another that says we are never going to have it, you put the horns of the dilemma in the proper perspective with the School Board right in the middle, and it is a difficult thing.

"And then you come to May 17, 1954, and we look at it today."

That was June 4, 1958.

"And you compare that period of time as compared to either of the three previous periods I have outlined and you wonder how fast in terms of history can anyone expect a change in cultural pattern."

Following that, Mr. Blossom went into some detail, as did the president of the School Board, as to what could be done in two and a half years, and that is in the record, and I respectfully disagree with the implication left by opposing

counsel that nothing was to be done.

Justice Frankfurter: Would you mind either reading it if it is not too long, if it is well expressed, or would you summarize what Mr. Blossom testified as to why two and a half, not one and a half, and not three and a half, was selected.

Mr. Butler: I would like to start --

Justice Frankfurter: I don't know lines will be drawn, but I just wondered what his testimony was.

Mr. Butler: Yes, sir. His testimony in effect is this, and I would be glad to read it to your Honor, but it was rather interspersed as well as Mr. Upton's among a whole lot of other testimony.

It was basically simply this, your Honor. In the first place, they felt that starting in mid-semester after organization was completed, during first semester, was wise. That would put it at the middle of a term.

Their reasoning was simply this: That your PTA organization, perhaps other organizations, and the school, itself, was then in a better organized position than it was after a summer recess of three months.

The other thing was simply this, and we are firmly convinced of this situation. In Little Rock as well as throughout the South and in other places where this problem has arisen, the great mass of people are not law violators as

such. They are not people who form mobs. They are not people who defy the law.

But we submit, and this School Board determined that they were entitled to know what the law was. And so long as editorialists, popular editorialists in our community were saying that this was not the law of the land, and that there were ways to get around it, and one court was saying one thing and another court was saying another, and there were laws on the statute books of Arkansas as well as other states throughout the South diametrically opposed as some people argue -- some of them could be reconciled, some of them could not, with the decision in the Brown case -- but it left the people of our community as well as the people of many communities in actual doubt as to what the law was, and unquestionably the people in our part of the country wanted to believe that this thing could take a long time or be circumvented entirely.

They wanted to believe that, but it is our firm opinion and it is the opinion of this School Board, and that was the main consideration given when they finally decided on the two and a half year request, that in that period of time, perhaps, as we pointed out in our response, a national policy could definitely be established, that laws could be tested so that the people would know, the people who want to obey the final word.

Now that was the reason. And very candidly, Mr. Blossom ended up by testifying, and I am sure this was the thinking of every member of the School Board as well, that we don't know that two and a half years will do it.

You may be able to do it in one year, you might do it in a year and a half, maybe two and a half is not enough. He doesn't know. But the courts have said that the first consideration of this problem shall be dealt with by the School Boards.

It is their primary function. As a matter of fact, this Court, I believe, has said it just that way, if not, certainly all the appellate courts.

Justice Frankfurter: Mr. Butler, why aren't the two decisions of this Court, the first one which laid down as a constitutional requirement that this Court unanimously felt compelled to agree upon, and the second opinion recognizing that this was a change of what had been supposed to be the provisions of the Constitution, and recognizing that and the kind of life that had been built under the contrary conception said, as equity has also said, you must make appropriate accommodation to the specific circumstances of the situation instead of having a Procrustean bed where everybody's legs are cut off or stretched to fit the length of the bed, and who is better to decide that than the local United States judges; why isn't that a national policy?

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Why hasn't that national policy, why wasn't that enforced in Little Rock, in the Little Rock district when the School Board submitted a plan after mature consideration, after enlisting public support in its behalf, submitted it to the court where it was contested and the court said, "Yes, this satisfies the policies laid down in the second Brown decision."

Why there, that deference to the local situation in the enforcement of what was laid down as a national policy? National policy doesn't mean the same thing must take place in Little Rock, Arkansas, as in Pittsfield, Massachusetts.

Mr. Butler: No, sir.

Justice Frankfurter: For some things, yes, but not for this kind of thing. There was a national policy and the Federal courts recognized it. It was sustained by the District Court over the opposition of the parents or whoever acted in behalf of these children, went before the Court of Appeals and the Court of Appeals said, "Yes, this is a fair carrying out of that which the Supreme Court laid down."

I do not understand what is meant by saying, "Let's wait until we get a national policy," if that isn't a national policy.

Mr. Butler. Your Honor, in answer to that, I simply say this: That it was certainly not anticipated at the time that plan was formulated that the Governor of the State of Arkansas would call out troops to keep integration in the

schools from taking place.

Justice Frankfurter: The Governor's calling out troops isn't the same thing as the uncertainty of what the law is.

That has nothing to do with the uncertainty of the law. That was the action of the Governor on what he thought was his refusal to abide by the law.

Mr. Butler: This School Board is simply faced with realities, and that is the position that it is in. It did not anticipate the extreme difficulties that it went into.

It knew that it did not have an easy task in this thing. All School Boards, I think, realized that. They did not anticipate the events which actually did take place.

Neither did they anticipate the things which are right today destroying the public school system there.

Justice Frankfurter: Mr. Butler, I did not mean to imply -- I hope I did not carry any such meaning by what I said -- I did not remotely mean to imply criticism of the School Board.

Mr. Butler: Thank you.

The Chief Justice: Mr. Butler, as you were relating the reasons why the School Board continued this for two and a half years, the question crossed my mind, suppose every other school district in the South would do the same thing, say "We will carry on segregation for a number of years until the law is clarified," how would it ever be clarified?

Mr. Butler: Well, your Honor, I think the only answer to that is that many districts do not have that problem. Even in some parts of the South, in our State University Negro students have been there for some years, and there has been no great problem about it. There are other districts where the problems are greater, as this Court pointed out, that you have a variety of local problems.

Now in Arkansas there are some Districts, as well as in Texas and other states where the people of that community have done it largely for economic reasons and various other reasons, but in any event it has worked successfully. And I simply say again that this School Board in Little Rock, Arkansas, was not faced with theories. It was faced with actualities which are undermining and which are going to destroy the public school system in Little Rock, and that when it is destroyed, it will be destroyed not just for white students. It will be destroyed all the way up and down the line unless they are given an opportunity to work this thing out in a climate of calm, rather than in a climate of hysteria.

Now we urgently feel that way and the School Board feels that way about it.

The Chief Justice: My recollection is that in one of those opinions, either the Brown or the Allen Case, we did say that mere public opposition to the policy and to the program would not be a cause either for denying integration or for extending it.

Mr. Butler: We understand that, and of course your Honor is correct, the word I think, "non-acceptance" or some such opposition.

The Chief Justice: Yes.

Mr. Butler: Now the courts have certainly held, and we find no fault with the basic statement, the broad statement of just mental reservations about this or mental opposition to it, but when a School Board is confronted with facts which of themselves will force the destruction of the public school system, then this Board feels and Judge Lemley felt that time should be given for cooler heads, a calmer atmosphere to come to the front in order to work out these problems or at least to give an atmosphere that is conducive to working those out.

The Chief Justice: Well, Mr. Butler, I think there is no member of this Court who fails to recognize the very great problem which your School Board has. But can we defer a program of this kind merely because there are

those elements in the community that would commit violence to prevent it from going into effect?

Mr. Butler: Mr. Chief Justice, I think so, but not directed to the people who form mobs, not directed to the people who are law defiers. We are not standing up here trying to argue for their side of it.

The Chief Justice: I know you are not.

Mr. Butler: We are arguing for the great mass of people throughout the South who I say again and will say again and again are not law defiers. They want to follow the law, but they as of this moment, without certain state statutes having been tested in court, do not know just exactly what the law is in a particular given circumstance.

The Chief Justice: Is it the State law that concerns you or is it the threatened violence that concerns you?

Mr. Butler: Both, both.

The Chief Justice: So long as the State laws conflict with the Federal laws, you would think that there should not be any integration?

Mr. Butler: No, sir, no, sir, I do not feel that way.

The Chief Justice: How much time would you --

Mr. Butler: But there are certain laws such as pupil assignment laws of that kind, and incidentally, pupil assignment law has just been recently upheld by a three-judge Federal

court in Alabama.

I believe it was in May of this year. It is reported in the June Race Relations Report, and they upheld the constitutionality of that.

The Chief Justice: But that is not the question here, is it?

Mr. Butler: Yes, sir, I think -- well, not specifically here. I think it is intertwined in this entire problem.

The Chief Justice: It is in the same area, but it is in no sense controlling in this case, is it?

Mr. Butler: The pupil assignment -- sir?

The Chief Justice: The pupil assignment.

Mr. Butler: It is not. That statute, as such, is not before this Court at this time, no, sir.

The point I am making is, Mr. Chief Justice, that laws such as that -- I use that as an illustration -- laws such as that are being advanced. Some of them have been on the books for many years.

Some of them, many of them, have not been determined whether they are constitutional or not, and the great mass of people are in our opinion entitled to know and have those laws tested in court.

Justice Black: Suppose the pupil assignment law contains one provision that the pupils can be assigned,

must be assigned on account of their race or color. Would you say that has not been determined?

Mr. Butler: No, sir, I would say that has been decided, Mr. Justice Black, and the Arkansas statute does not contain any such provision. As a matter of fact, it contains directly the contrary. But it does set out some other things which school boards generally have taken into consideration throughout the years, such as psychological adjustment, various other things, health, and many other things.

Now some of the school assignment laws, pupil assignment laws, I understand, have been held by Federal courts to be unconstitutional on their face. The most recent one with which I am familiar with and to which I referred is the three-judge Federal court in Alabama which held that that state law was not unconstitutional on its face.

Justice Frankfurter: Did you say --

Mr. Butler: And they upheld it. I do not know just where it is now, but it was upheld by a three-judge Federal court. Excuse me, sir.

Justice Frankfurter: Did you say to Justice Black a minute ago that the Arkansas law is just the opposite of the hypothesis?

Mr. Butler: Yes, sir.

Justice Frankfurter: That was passed after Brown & Allen?

Mr. Butler: Yes, sir, it was passed in 1957; yes, sir.

Justice Frankfurter: And you said that that had --

Mr. Butler: '55 or '57.

Justice Frankfurter: -- that has explicitly a prohibition against pupil assignment on the basis of race.

Mr. Butler: On the basis of race, yes, sir, but it sets out some 12 or 15 other things that the school boards may consider.

Now immediately, of course, courts cannot make decisions based upon popularity polls, but the fact is, and I think it is interesting to note in passing, that a respective poll taken very recently across this entire nation, and it was not taken just in the South, it was throughout the entire United States, that 54 percent of the people favored Judge Lemley's decision and felt that it was the only way to solve this particular problem.

Justice Frankfurter: I sometimes wonder why we have elections and do not turn it all over to polls.

Mr. Butler: Now to show the seriousness of this problem, your Honor, your Chief Judge, Judge Gardner, wrote this short dissent, and to me it is so appropriate, so realistic, so proper under the decision, the words themselves of the Brown decision, that I would like to read at least parts of it. The entire dissent is limited to one page.

But he says: "It is conceded that the school authorities have acted in good faith, both in formulating a plan for integrating and in attempting to implement the plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance, as set out and enumerated in the majority opinion.

'This opposition included acts of violence to such an unprecedented extent that the Armed Forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integration are set forth in the majority opinion. The normal conduct of the school was continuously disrupted, and the state of mind both within and without the school was to a greater or lesser extent in a state of hysteria.

"Under such circumstances and conditions set out in Judge Lemley's opinion, the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration.

Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of this Court," and he quotes,

"'to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principle.'"

And he cites the Brynel Case, of course.

"In this situation the action of Judge Lemley in extending the time as requested by the school official was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social relations between white and colored races in the section referred to as the South.

"There had been no integration in the schools, and that practice had the sanction and a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, forbearance, are important elements in effecting all radical changes.

"The action of Judge Lemley was based on realities and on conditions rather than theories.

"The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under all the conditions. We should not substitute our judgment for

that of the trial court."

That ends Judge Gardner's decision. All we are asking at this moment is for this Court to continue in effect the stay of the Circuit Court until our petition for a writ of certiorari can be filed and considered and the matter heard in an orderly fashion.

Justice Brennan: I was just wondering, Mr. Butler, whether your argument in that event would be any different from the one just given us.

Mr. Butler: It would probably be somewhat longer, your Honor, but that would be the basis of it.

Justice Brennan. The same vein?

Mr. Butler: I think in the short space that Judge Gardner took, I think he said it about as concisely as it could be said.

I think there are other things to be said in connection with it. He prefaced his dissent that under the time element he could not go into it in great detail, but that it was a hurried opinion but his firm opinion.

But we are here now for that purpose, and as I understand it, for that purpose alone, to ask that the normal procedure be followed, in this important case, and that this Court not disturb the stay of the Eighth Circuit under the present circumstances.

Justice Whittaker: Mr. Butler.

Mr. Butler: Yes, sir.

Justice Whittaker: What would be your view as to that aspect of the motion asking a stay of Judge Lemley's opinion pending a review here of your petition for certiorari?

Mr. Butler: Well, your Honor, of course our position is simply this: That Judge Lemley's decision, although found to be in disagreement by the Eighth Circuit Court of Appeals, nevertheless both, obviously, he and then the Eighth Circuit Court of Appeals felt that it should be stayed, which is an indication to us, your Honor, and to many other judges and lawyers throughout the land, that the Eighth Circuit Court of Appeals had some question in its mind.

If it was absolutely certain that it had been correct, the chances are it would not have issued the stay. It was within its power to deny a stay. They were traversed and they had it before them, and they had heard the whole case.

Justice Whittaker: But is it not the general policy of that court if not of most courts of appeal to withhold mandate for a reasonable time to allow a petition for review by this Court if there is any substantial question at all about it?

Mr. Butler: Yes, sir, it is, and it is the customary procedure, if your Honor please, for this Court to recognize the judicial discretion of that court in granting stays,

and ordinarily I would say does not upset them.

Justice Whittaker: And let the order stand.

Mr. Butler: Yes, sir.

Justice Whittaker: Yes. Now that is why I was prompted to ask you what your position would be with respect to the second phase of the petitioner's motion, namely, to stay the effect of Judge Lemley's order meanwhile so that the normal processes of the law would be litigated against the status quo ante, you see.

Mr. Butler: Yes, sir.

Justice Whittaker: Now what is your position on that?

Mr. Butler: Well, I think your Honor, that is so wrapped up legally and practically that the practical effect of that, if I understand your Honor's question, would be that it would serve no useful purpose for what we are ultimately seeking, and that is to give the people of that section an opportunity to think in a period of calm rather than in a period of hysteria.

Now if the Court puts it back in the status quo that it was before Judge Lemley, it would serve this School Board as we see it no useful purpose.

There would be troops back in Little Rock to maintain law and order.

Justice Whittaker: Why do you say that?

Mr. Butler: Well, I perhaps should not because that is my personal opinion.

I am expressing the opinion of the School Board in its considered judgment.

The School Board feels that that is what would happen and they have been in this untenable position. They cannot operate the school without troops apparently and they cannot have an educational system and program with them.

I see my time is up.

The Chief Justice: Your time is not up. That is the call for luncheon, so if you have more to say you may take it up after lunch.

Mr. Butler: We ask for our rebuttal time. We have completed this part of our argument.

The Chief Justice: Your rebuttal time of the Solicitor General. You must make your entire argument in response to Mr. Rankin at this time.

Mr. Butler: Oh, at this time to Mr. Rankin.

The Chief Justice: Yes. You may proceed after lunch.

(Whereupon, at 2:00 o'clock p.m., the Court was recessed to reconvene at 2:30 o'clock p.m., the same day.)

AFTER RECESS 2:30 p.m.

The Chief Justice: Mr. Butler.

ARGUMENT ON BEHALF OF RESPONDENT (Resumed)

By Mr. Butler.

Mr. Butler: Thank you, your Honor.

Counsel for NAACP has made this statement: That we have to weigh, the Court has to weigh, as he said in the Brown decision, the previous decision, the irreparable harm on the one side as against on the other side.

Now here are the facts, the record points it out and I do not think anyone will dispute it. Here we have 2,000 students in one of the high schools and we have hundreds of others in the other high schools. These petitioners, although it is a class action, of course, designated as such by the original plaintiffs, but there are only seven who would not be deprived of anything tangible or any benefit that you can really point to of anything in a tangible measure.

Now as against that if the public school system is at stake in Little Rock and this School Board earnestly believes that it is, then you are affecting from an equitable standpoint maybe, not just the remaining 2,000 students in Central High School, but perhaps throughout the school system in Little Rock.

Now those are the balancing of the equities that it seems to us weigh heavily in favor of denying the vacating of

this stay of the Eighth Circuit Court of Appeals.

Now I have tried as I said at the very beginning --

The Chief Justice: Mr. Butler, really, aren't the rights of all the Negro children of Little Rock wrapped up in this case?

Mr. Butler: Yes, sir, and their actual abillty to get any kind of an education there in a public school system is wrapped up in it, Mr. Chief Justice, in our opinion, yes, sir.

The Chief Justice: I mean they are wrapped up in the principle that we are litigating here.

Mr. Butler: I think that is correct, your Honor, and we feel that unless we are granted this stay, that the whole thing might be in a flood and be washed downstream where no one benefits.

The Chief Justice: I understand your opinion.

Mr. Butler: And then of course it would be an empty victory indeed for the Negro students.

Now on that one point, though, I think theoretically at least opposing Counsel and I can agree, and that is that the balancing of these equities must be done, the irreparable harm that would be done to the students just in Central High School at least if they have to go to school with troops marching up and down the halls

Now as I started out at the beginning, we are not

in a position to argue the case in chief. I have attempted to refrain from arguing it. We believe that there are many decisions which we should study and submit to this Court on the merits of the case, and we have attempted to limit our argument on the pleadings that are now before this Court, but it is difficult, of course, to stay on that one limited issue when of course everyone is concerned about the entire issue as it is shown in the entire case.

Now one other point, and perhaps I did not emphasize this enough. Regardless of whether or not the people of Arkansas should recognize the United States Supreme Court decisions as the law of the land, the plain fact is that they have not, and it is most difficult for them to do so if not impossible, when the Governor of the State says that that is not the law of the land, that only Congress can really say what the law of the land is.

Now as lawyers, we may take the position well, they are not informed, but that is a fact, and as long as the United States Senator from a neighboring state of ours says it is not the law of the land, and as long as our Governor says that it is not the law of the land, not the settled law of the land, Mr. Chief Justice, you have been the Governor of a great state --

The Chief Justice: But I never tried to resolve any legal problem of this kind as Governor of my state. I thought that that was a matter for the courts and I abided by the

decision of the courts, whether they were the courts of my state or in the proper jurisdiction, the Federal courts.

Mr. Butler: We all realize that. The point I am making is this: That if the Governor of any state says that a United States Supreme Court decision is not the law of the land, the people of that state, until it is really resolved, have a doubt in their mind and a right to have a doubt.

The Chief Justice: But I have never heard such an argument made in a Court of Justice before, and I have tried many a case through many a year. I never heard a lawyer say that the statement of a Governor as to what was legal or illegal should control the action of any court.

Mr. Butler: I am not advocating that, Mr. Chief Justice, and I trust that these words will be weighed carefully. What I am saying is that the mass of people in a state, wanting to believe a certain thing, if they are told by their chief executive that such and such is the law or is not the law, then if he is a popular and respected public official, they are inclined to believe him and what they want to hear.

The Chief Justice: The short answer to that is if they want to believe it they'll believe it, no matter who says it.

Mr. Butler: Well, nevertheless, that is a fact and not a theory in Little Rock.

The Chief Justice: I have no doubt of that.

Mr. Butler: And that is a fact and not a theory in many other localities other than in Arkansas.

The Chief Justice: I am sure of that.

Mr. Butler: Many.

Justice Burton: Does that mean the Court should appropriate that argument?

Mr. Butler: Well, your Honor, we have gotten into a whole lot of things that maybe are not strictly directed toward the pleadings that are here before us, but we feel so earnestly about this, we feel that many people, judges, lawyers, various others have taken exactly opposite stands throughout this land, and it is my personal opinion and it is the opini . of many others, not just Southerners, that the people by and large, and even judges and lawyers are not certain as to what deliberate speed means under certain circumstances.

They are not certain about what equitable principles should be applied and when. They are not certain about laws that have not yet been tested for their constitutionality.

Justice Burton: You are asking, then, that the law be clarified, not that we follow their dictation?

Mr. Butler: We are asking for a period for orderly manner of process, your Honor, and we think that the orderly processes should dictate the stay of the Circuit Court being in effect until we have gotten our petition for a writ of certiorari

filed, and if it is granted, that we be allowed to present briefs and arguments on it. That is as simply as I can state our position.

Justice Black: Is your argument based on the premise in the sentence in the opposition brief that it is reasonable to provide at the end of the requested two and one-half year period national policy would have been established, by then state laws purporting to override the Brown decision could have been tested in the courts?

Mr. Butler: Yes, sir, I think that is in our pleadings.

Justice Black: That is the premise of your argument?

Mr. Butler: Yes, sir, yes, sir.

The Chief Justice: Thank you.

Do you have any rebuttal, Mr. Marshall?

REBUTTAL ARGUMENT ON BEHALF OF PETITIONERS

By Mr. Marshall

Mr. Marshall: Just one or two points, if it please the Court.

The Chief Justice: Go right ahead and take your time.

Mr. Marshall: There are two points. One was this question of this empty victory. We have had this argument in this case from beginning to end, and I think the Court will remember that the eminent attorney, the late John Davis,

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in arguing the Brown cases, stood here and argued the story of the dog carrying the bone across the bridge and looking in and dropping the bone, and I submit that that argument has been made to this Court. It has been disposed of in the Brown case. It has no bearing here.

On the question, Mr. Justice Black's question about time to resolve these laws, I hope the Court realizes that as the School Board is making that argument, that they must have time to get the courts to pass on the laws that were passed two years ago. The Legislature is now passing a dozen laws or so a day, and I will assume that in a short time they will be back asking for time to have those laws construed, and that, it would seem to me, would result in perpetual delay so far as this is concerned.

The other question that Mr. Butler could not answer and I cannot answer, but I can only answer from the newspapers, is that the three Negro children that did apply to the white schools were declined admission -- that was in the newspapers -- by Superintendent Blossom, and that he intended to maintain the policy of segregated schools come opening of this school term.

I do not know how to get it in the record. It is a mere newspaper statement, but the last thing I would like to call the Court's attention to, as I construe Mr. Butler's argument, except for the fact that he wants time to prepare

briefs, he seemed to be in complete agreement that the merits of this case have to be gone into. And I wish to restate our position on that particular point.

The balancing of these equities, it is not as easy as stated. I realize the School Board has a difficult job, but there is no solution. There are just three things that were mentioned in the Court of Appeals' decision. One was that they broke locks off of the lockers, and instead of punishing the people that did it, they replaced the locks, and I hate to mention it in a court of law, but the record shows, and the Court of Appeals opinion shows that the white children, the 20 or 25, a very small group, started the practice of urinating on the radiators, and instead of putting the children out they put the radiators out, and it seems to me that there is no solution to this problem that is recognized as a difficult problem, with the only possible solution, to put the Negro kids out of school.

I do not submit that that is the only solution. The record in this case will bear that out. And so it seems to me that whether or not this Court goes into the merits, certainly these Negro kids and the others that are involved in the class action are entitled to the most affirmative relief possible out of this Court before school opens, even if it is a consideration of the petition of certiorari.

The Chief Justice: Thank you.

Mr. Solicitor General.

ARGUMENT ON BEHALF OF THE UNITED STATES

By Mr. Rankin.

Mr. Rankin: Mr. Chief Justice, may it please the Court, the Government of the United States has a great interest in the maintenance and the preservation of the public school system of this country, and the Government, that is the Executive Branch, feels that this Court had that heavily on its mind when it passed on the Brown cases. And the time that was given for the consideration over a period of four days, asking for briefs especially from the Attorney General of the United States and any attorney general of any state, where segregation was either authorized or permitted, and the care that this Court used in assigning the task of determining a plan and implementation of this opinion of the Court by the local courts that would know and understand the situation, and then assigning to those courts the duty and responsibility of recognizing in each case equitable principles of law in determining upon the method, procedure, and timeliness of the action shows the consideration that this Court gave to the preservation of the public school system of this country. And if you go back to the Brown decision and study its terms, you will see that this Court, with due regard for the almost inestimable value of the public schools to the American people used every care that it could conceive to try to protect that system, provided the people who

were trying to work in the public school system and as state officials had a duty also to preserve it in accordance with the Constitution of the United States, set about the task to try to carry out the Brown decision in good faith at every step of the way.

We all know as lawyers, and the public knows it from its experience, that the courts have had equitable principles that they have worked with over the centuries, and the court in the Brown case in a note refers to that fact, the decision of this Court in which that is set out.

And a court of equity does not ask people anytime or anyplace to do things that are beyond their power, things that they cannot do. But they have to try. They cannot say, "We are going to stop obeying the laws today. It is difficult." I do not mean to infer in any way a criticism of this School Board, because they have had a terrible time. They have had imposed upon them action by state officials who had duties exactly contrary to their actions that no school board should have had to deal with, with this difficult problem. And I am sure that this Court in the decision in the Brown case, in its implementation, did not want in any way to lose the public school system in obtaining and enforcing this principle of constitutional law. Nor do I believe for one moment that the two are inconsistent, that it is impossible for all Americans to have their rights under the Constitution and be treated

equally under the law by the Government in all its various aspects and have to destroy the institution in order to grant those rights.

There is ample provision in the Brown case implementing the declaration about constitutional law for time if it is actually needed in good faith to try to carry out this constitutional principle. It is all there, and no court of equity in this country would fail to recognize those needs if they are properly brought to its attention and if the action is in good faith and everybody according to basic principles of equitable law has done everything within his power up to that point to accomplish the Court's decree.

That is when an equity court comes in and acts to help out someone who has tried and done his level best in accordance with all the means at his command and then asks for some help or relief. At that point when additional time is asked for, we think this Court has made it plain that there cannot be any more of this talk about what the law is.

Is it what the Governor says today or a Senator says tomorrow or a Governor in a neighboring state says the following day? The law is established. This country cannot exist without a recognition of the Supreme Court of the United States when it speaks on a legal matter is the law. But there must be a start. There must be a recognition that it has got to be. Then there must be some kind of a start, and I believe

in due regard, in careful consideration of the manifold difficult problems that the South has in this whole area, that there isn't a place in the country, if they have the will, cannot make some kind of a start, even if it is the smallest kind, towards solving this problem, granting these rights and working them out.

In some places it will take time, longer time than in others, and this Court recognized that, and it had the wisdom to choose the method of the common law, which does not say everyone has to follow one pattern, everybody has to do it this way, but it takes it case by case. They examine every fact, every factor in the community, every problem that the Board has to deal with that is real, and then works out the plans accordingly. But you must have a start. You cannot say, "We are going to find out what the law is," and then say, "When we really find out what the law is, we will start some day, maybe." There has got to be a good faith continuance and all reasonable means used as the Government contends to try to carry out the plan once you start it.

And above all, no court of law in this land, state or Federal, can recognize that you can ever bow to force and violence in setting aside, vacating or modifying a decree of a court. The moment you do that, you give up law and order. This country cannot afford any such price. No one can, neither the Southerner, the Westerner, from my country, the

far West or the East.

We have paid too great a price not only as Americans, but the human race, to come this far along the road of lawful action and a rule of law to give it up when someone, even a small group as in this case, only 25 in the school, used force and violence to scare out the enforcement of a court order.

And then any change must provide active steps and progress during that modification. You cannot just hold it all in abeyance and say, "Maybe the climate will change. Maybe more people will agree so we can see where the wave of opinion is, whether it is with the courts or against them, when we start to enforce the law."

It is agreed in this case that this Court has the power to take the action that is proposed, and we think that you have to start back at the Lemley decision.

We think that is where the error occurred, that there was a duty on the part of Judge Lemley to stay his order because he was changing the status quo. The Negroes were in this school. They were under the plan at the time of his decision, and so at that point when he was taking them out of the school, he was changing the status quo, and that is where the error occurred. Now we think there is no reflection on the Eighth Circuit in setting aside the stay of the Eighth Circuit because we believe that that court had in mind that in the ordinary procedure this matter would reach this Court

and that probably this issue should be decided at least by denial of certiorari by this Court in the final analysis, and with that in mind, but with this Court sitting as a complete Court, we think that there could be no purpose in leaving that order in effect, because the Court could determine this matter properly whether there was a basis for certiorari, and then proceed accordingly.

Justice Whittaker: But wouldn't it be unusual for us to do so in the absence of actually having a petition for certiorari?

Mr. Rankin: Yes, it would be a very unusual action, and I hope I can argue to justify such an unusual action. It is not unprecedented, as Counsel has conceded, but it is very unusual for this Court.

Justice Frankfurter: Have we ever passed on a petition for certiorari when it was not before us?

Mr. Rankin: No, Mr. Justice Frankfurter. You have asked that it be filed but --

Justice Frankfurter: That is a very different thing.

Mr. Rankin: During argument.

Justice Frankfurter: That is a very different thing.

Mr. Rankin: You have passed upon the question of stay by passing upon the merits in the Lucy Case.

Justice Frankfurter: That is another, different situation.

Mr. Rankin: That is right. We have gone into the merits of this case with the belief that we felt that that was our duty to the Court, because one of the great elements, one of the important elements of the question of the stay is the probability of success on appeal, and the courts have said that, this Court and others, many times, that if there is no reasonable probability of success on appeal, then the stay should not be granted.

So we felt that we had to face up before the Court to the question of whether or not there was a reasonable basis for this Court to grant any relief on a petition of certiorari on the merits, or we had to say to the Court a stay is reasonable even though in balancing the equities we might lean toward going back to preserve the status quo that existed when Judge Lemley started it.

We would still have to say to the Court that if there was something in the merits of this case that deserved it, that a stay might be reasonable and it would be an entirely different argument. So we have addressed ourselves to the proposition that there is nothing to this case that would justify this Court ever granting certiorari or acting upon the merits of it, and there is no probable success that could be obtained by the petitioners in this action, because under the law they are not entitled to relief at the hands of this Court.

Re. Argument before the Supreme Court of the United States
August 28, 1958

Enclosed is a corrected copy of page 104 to be inserted in your transcript in lieu of page with like number.

The correction appears on line 2 of this page --
"certiorari" changed to "cert-worthy"

From Ward & Paul, Reporters
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Washington 6, D. C.

September 8, 1958

Justice Whittaker In other words, on the record a cert-worthy petition could not be filed.

Mr. Rankin: That is our position.

Now the whole matter boils down as we see it to exactly what the Court of Appeals of the Eighth Circuit Court said The Negroes did nothing to cause this situation. All the difficulty that you have is force and violence that was developed by a relatively small group of people who were opposed to the implementation of this decree of the Court. It appeared inside the school and outside the school, but that is all it was, and the Court of Appeals, while finding the facts as they were found by the lower court said that they could not accept the conclusions of that court.

They found, the Court of Appeals found, that the cause, the causative factor of that petition throughout was opposition to this Court decision and the implementation of it and the use of force and violence. This Court has said in the cases referred to by Counsel that you cannot accept force and violence as a justification for modification of a decree, that there is no basis in this whole situation to accept that.

Now there is a further fact, a further claim that there was a deterioration of educational standards in the school because of the implementation of this decree, and the

the implementation of the decree or any act of these colored children, but was due to these people using these unlawful acts of violence and force to try to defeat the decree, the decision of this Court and its implementation, and that that could never be a ground for any kind of relief.

Of course, this Court already anticipated that in Brown, saying the vitality of the decision could not be impeded by any opposition on the part of the populace, as has been argued before this Court.

The Court went into, in some detail, examples of various types of problems that it anticipated the school districts might have that could be considered not merely in the implementation of the original order or plan, but for changes. As time developed, it showed that those changes became necessary in the operation of the plan. But of course, nothing like force and violence or opposition to the decision itself was recognized.

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In fact, the Court expressly would not recognize that. I don't mean to, in these remarks, to criticize the School Board. I do not want it to be construed in that manner. But, I do think--and the government takes the position -- that the School Board did not exhaust all of the things that they could have done to try to solve this situation, and they probably could not be blamed for the cause of the harassment that they suffered.

But when you consider the matter in a court of equity, you have to recognize that as a prime first consideration, have they exhausted the various steps that they might take to carry out the Court order before they ask for remedial relief against it?

There are two respects that the school district did not do what it might have. They are referred to by the Court of Appeals. One was to seek a Hoxie or Clinton-type of injunction against the acts of people who were making all the trouble for them.

It is clear in the record that they knew the names of the various people and the organizations that were engaged in the opposition and the leaders participating in it.

That is clear. So they had the ability and it can't be gainsaid that they were officers of the State of Arkansas.

It was their official duty to do what they could and they should have resorted to the courts and gotten such an

injunction and we believe that would have made a material difference. If after such an injunction, there was violation to such an extent that the lawful forces in the area, who, bear in mind, had the primary responsibility in this country to maintain law and order, could not maintain law and order, and the other forces that might be called upon, the assistants of the Federal Government were unable, then you would have a different situation for an equity court to consider.

They didn't do that, and that is an important aid that they could have obtained for themselves before they appealed to the court.

There is no question but what there could have been firmer discipline within the school, itself, and that it would have aided materially in maintaining the educational processes on the level that these children, both white and colored, were entitled to.

But when you talk about a deterioration of the educational process in this school, it seems to me that one of the things that all educators, certainly teachers, would recognize, is that part of the educational process is the attitude and conduct of the teachers, the personnel of the school and the children themselves, and part of their responsibility is to get across to these teachers and for the teachers to get across to the children and those that are in the educational process, the responsibility to enforce the

laws; that we do live in a country where we seek to maintain law and order for the benefit of all the people, that the Constitution and each of the rights that every citizen has under it, is precious to every one of us, not just the rights that I like and want for me, or that you like and want for you, but all of them for every man and woman.

And that if you teach these children in Little Rock or any other place in the country that as soon as you get some force and violence, the courts of law in this country are going to bow to it, they have no power to deal with it, they will give way to it, will change everything to accommodate that, I think that you destroy the whole educational process then and there.

If, out of this difficulty and undesired situation, the people of Little Rock and these children, who shouldn't be hurt by these problems, learn that Constitutional rights in this country are precious, that they have a duty to these Negro boys and girls in this community to help them get their constitutional rights, and this constitutional right happens to be the right to enter a school that isn't segregated, but some day they will want other constitutional rights and be able to exercise them, freedom of speech, and the press, and everything else that we consider so wonderful in our form of government, and you can't tear down a part of those rights without losing others in the process, and there isn't any

part of this country that doesn't have a tremendous stake in maintaining each and all of those rights for all of its people.

And I am confident that as the years go by, the people of the South, as a people, will realize that they have a stake in each American citizen being a full citizen with full and complete rights like every other, and they will be anxious to support and fight for that at every opportunity.

It seems to me that we are now at the crossroads in this important question. The people of the country are entitled to a definitive statement from this Court as to whether or not force and violence, opposition to the Court's decision, are grounds for not merely getting a modification to try to adapt to real problems after they have exhausted their remedies, but to just hold everything up and go backward a step, taking everybody out that you have tried to put in.

And the basic question, all there really is in the case, is whether or not we stand as a government of the United States in all of its power and strength as well as its consideration of the difficulties and problems that are real that the people have in trying to carry out court orders, we insist that there must be a rule of law that we will not abandon for a moment the heritage that has been delivered up to us by the efforts of man over centuries. Thank you.

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The Chief Justice: Mr. Marshall, do you have anything to say in response to the Solicitor General?

Mr. Marshall: No, sir, your Honor.

The Chief Justice: Mr. Butler, do you?

REBUTTAL ARGUMENT ON BEHALF OF RESPONDENTS

By Mr. Butler.

Mr. Butler: Yes, sir. If the Court please, we likewise do not want to be critical of the Attorney General's office, but we have some ideas about where it may fail in a few instances.

In the Honorable Mr. Rankin's summation, he says in one part of the argument that this Court should give a definitive statement, and then he argues strongly that unquestionably the writ of certiorari would be denied.

It seems to me that that is a rather inconsistent position to take because if the writ is denied, I think customarily, at least, there are two words, "writ denied."

I don't see how a definitive action on the part of this Court or a definitive decision, opinion, could be rendered under those circumstances which Mr. Rankin advocates.

Now, I have some difficulty in following just exactly the position that the Government is taking in this thing. I don't get the same impression from a very hurried reading, it is true. We only received the Government's brief this morning. We have only had time to scan it. But I don't quite

get the consistency of the statements in the brief as against his admission that everyone has conceded that the Little Rock School Board has acted in good faith.

Now, he made the statement that there should be good faith. The courts have found that the Little Rock School Board in all instances has acted in good faith.

It has found many other things which the Circuit Court of Appeals finds no fault with Judge Lemley's findings, among which is that this School Board cannot operate under the conditions which it faces as of this time, unless troops are stationed in the building and outside the grounds.

Now, he states that it is time to come in and ask for equitable relief when all has been done within the power of the School Board. We submit that this record through and everything that this School Board has done has not only been in good faith, but they have gone to the point to try to carry out the United States Supreme Court orders and the orders of the lower Federal courts to the extent of being harassed and humiliated among their own people.

They have done that day by day. They were faced with the situation in September of 1957, as we pointed out earlier, of troops being ordered in by one commander and then troops being ordered in by somebody else, and those troops remain, and in spite of that, the Little Rock School Board, after it got into really the school year of operating, hoping all

along that maybe the situation would resolve itself where troops would be unnecessary, they went clear from the first part of September, clear to the latter part of February, before going into the Court of Equity and asking for relief.

We submit that that is good faith. We submit that they were entitled to equitable relief under those circumstances.

Justice Frankfurter: Mr. Butler, isn't there a difference between good faith in the sense of sincere, honestly entertained conviction, and good faith in throwing up your hands and saying, "We can't do anything against force?"

Mr. Butler: Yes, sir, I think a distinction could be made there, your Honor, I do indeed.

Justice Black: May I ask, do you conceive of this as being a charge merely that the School Board of Arkansas has denied equal protection or a charge that the State of Arkansas has denied equal protection?

Mr. Butler: Well, of course, it is the School Board that takes the brunt of it, and the charge is that the School Board, some people have made the charges and I understand that from the Solicitor General, that the School Board hasn't done everything that it should.

Now, the fact is, the realities of the situation are that NAACP, which has rather vast resources and certainly able legal counsel, had a perfect right to come in and ask for

injunctive relief and it did not do so. The Justice Department had every right to put forth any criminal actions that were in order, and it did not do so, and now we have the President of the United States saying that the process should go slower, if we are to read the newspapers accurately and if the newspapers reported it accurately.

Now, that is exactly the position that the Little Rock School Board is taking. We are not arguing, and I hope the Court does not misunderstand this -- the School Board has recognized from the beginning, and still does, first that the ultimate decision of any question of this kind is a question of law and that the final decision of the United States Supreme Court must stand.

We have never argued otherwise.

Furthermore, we say, though, that until such time and under the words of the decision itself, we should be given ample time within which to try to resolve these problems in an atmosphere of calm, rather than of hysteria.

Justice Frankfurter: Will you correct me if I am wrong, Mr. Butler?

In concluding that the position of the School Board from the time of its original incubation of its plan, its submission to the court, et cetera, et cetera, has never taken the position that there is any reason for not carrying out the plan except the interposition of force, not of its own

choosing, but obstructing the orderly process of what it had planned in its original program was the obstruction of force. Is that a fair summary of the situation?

Mr. Butler: No, sir, I don't think it is, your Honor.

Justice Frankfurter: Correct me.

Mr. Butler: For this reason: The plan itself was to have been somewhat flexible. The School Board recognized that they could not set down hard and fast rules. They felt, and they earnestly felt, that they could be of help in showing the way, you might say, to the people there that the decision of the United States Supreme Court had to be carried out, and their purpose was two-fold.

First, to maintain a public school system, and, second, to carry out the orders of the Federal court or any other court in the jurisdiction.

Justice Frankfurter: And so they began with the high school?

Mr. Butler: Yes, sir.

Justice Frankfurter: And they were going to stagger it?

Mr. Butler: Yes, sir.

Justice Frankfurter: They were going to gain experience through the introduction of non-discrimination in the high schools.

But what I want to know is was that plan frustrated or obstructed not by any educational experience or to the extent that there was educational experience, tension, et cetera, the causative factor, the real reason was not anything due to the plan of the Board of the experience gained thereunder, but what happened through outsiders, isn't that correct?

Mr. Butler: I don't know what was in the thinking of each School Board member.

Justice Frankfurter: I am not talking about the thinking, but at no point is there any document in which they said, "We have now had experience, educational experience, and the plan which we matured and which began to be operative in the school year of '57, experience now shows us that educationally speaking, that is not a sound plan."

Is there anything to suggest that the thinking of the School Board as originally contrived and devised and formulated was changed because of educational experiences rather than because beginning with the Governor's intervention through troops, outside forces began to frustrate and block the carrying out of what the School Board had agreed upon?

Mr. Butler. I would say educational forces, processes, if you are going to use a broad term, because the School Board was faced with certain realities --

Justice Frankfurter: Yes, but those realities are attributable, if you are going to trace them to their causes,

it wasn't any educational experience, it wasn't the feeling that you couldn't have colored children with white children, educationally speaking, but because of the intervention of outside force, forces were brought into play which obstructed that which they had so carefully planned.

Mr. Butler: Well, that is a difficult thing to answer because I say again it is so intertwined. They don't know why they failed. They don't know, they can't point to any one thing. They know this, though.

The School Board knows that they were faced not with theories, but with realities, such as armed troops parading in the halls and on the grounds of one of their schools.

Justice Frankfurter: I accept that.

Mr. Butler: Now that to me then, to answer your question, that is an educational factor in the broad sense.

Justice Frankfurter: I should say, as a consequence of those conditions, educational results follow. You can't teach if you are going to have troops in the classroom.

Mr. Butler: That was exactly the feeling of Judge Lemley, and Judge Lemley found, and there has been nothing to the contrary, that that is likely what will happen again.

Justice Frankfurter: But it wasn't the School Board that interjected the armed forces, was it?

Mr. Butler: No, sir. The School Board didn't ask for them, but there were times there when I think I am correct

in saying that they were glad that some force was there to protect order and keep people from being injured.

Now the Solicitor General tries to compare Hoxie, Arkansas, and Clinton, Tennessee.

There is absolutely no comparison, and if anyone has been in those places, you can readily recognize that there is not.

In the first place, you have an entirely different number of people involved.

You have a much smaller school.

You have a school board in that place, in both of those places dealing directly with the people that they and everyone else could put their finger on as interfering with them. That was not the case in Little Rock.

The School Board does not know who all was interfering with it. And for Counsel to say that the record shows that there were only 25 students involved, that is not an accurate statement, for this reason: There was some testimony that said that they felt there might have been as many as 25 ring leaders, but if you replaced those 25, there would be 25 more like them. And the fact is, and this of course is undisputed, that there were 200 students that this School Board suspended because they walked out in opposition to this.

Now we submit that the record shows that this school board did use as firm measures as school boards ordinarily can and should.

It had no police powers. It had no troops. It had no plainclothesmen. It had no one like that. It has absolutely no duty in our concept of the law to go out and preserve the public peace. That is not its function. It is not equipped to do that, and I think there can be no successful argument that it ever should be, that the school board should be equipped to maintain peace and order within a community.

Now in effect the School Board did do more in

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Little Rock to try to work this thing out than either the Justice Department or the petitioners themselves. We say again, and we emphasize, that we do not criticize them any more than they criticize us for failing to do some of the things that other people might have agreed should be done or people would argue now should be done from the standpoint of hindsight rather than foresight. But the fact is that no one in the Government brought any criminal actions.

There was constant consultation between the two trying to work out problems, but nothing was done. The School Board did not advocate that they do anything. They did not advocate because they are not law enforcement officers. They were trying as best they could to operate the school system.

Now we point out again that the School Board was left on the horns of a dilemma, and the fact is, and it has never been disputed, that this School Board is in an untenable position, and all we are asking, all we are asking at this time, is for time to try to do those things and work out these problems that may bring peace and harmony, and do it in a period of calm when it can be done and not in a period of turmoil and strife. Even in cases -- and I do not want to argue the merits of this thing again, but it is a fact that even in cases -- where defendants are found to have violated anti-trust laws, and in those cases someone's constitutional rights

were always involved, or their legal rights, as much as five years or more, in many cases people are given time within which to dispose of holdings and do it in an orderly fashion. That is the whole purpose.

Now shall the courts deny citizens in a community a reasonable opportunity to reach these solutions in a period of calm and quiet rather than with troops present and in an atmosphere of strife and turmoil? Shall the courts close the door on those who earnestly and conscientiously plead for an opportunity to seek answers in a climate of calm? Shall the courts force private citizens and officials and general assemblies to make decisions when the air is charged with emotions? Any such impatient attitude by courts would certainly not be in keeping with the decision in this case where it was stated that flexible principles of equity in adjusting and reconciling public needs should come into being.

Can it be logically argued that the ruling of this Court can be carried out as this Court said it should in an effective manner when schools are closed, or if operated at all, with armed troops parading not only the ground, but the halls and classrooms themselves? Patience and forbearance for a short while might save our public school system in Little Rock, which was once the pride of our community. To vacate the stay order might as effectively destroy our public school system under the present atmosphere, and if not given

time, as if you planted a bomb under each integrated school building in the District and lighted the fuses one by one.

Only this Court has the answer. One answer leads to the immediate destruction in our best judgment of our public school program in Little Rock, depriving white and Negro students alike of their search for an education. The other answer without depriving these petitioners of any tangible rights or benefits gives a recess from turmoil and the hope of acceptable solutions.

This is the answer we prayerfully seek

The Chief Justice: Gentlemen, we all came together on rather short notice and I know the Court would have me thank both Mr. Marshall and Mr. Butler for your able and helpful arguments made on such short notice.

Mr. Solicitor General, the Court is indeed indebted to you for your cooperative and able arguments in this case

Gentlemen, we are going to take a recess until 4:30 in this matter and we will ask you to return at that time, please.

(Whereupon, at 3:35 o'clock p.m., the Court was recessed until 5:00 o'clock p.m., the same day.)

AFTER RECESS 5:10 p.m.

The Chief Justice: The Court in conference has determined upon the following order:

Having considered the oral arguments, the Court is in agreement with the view expressed by Counsel for the respective parties and by the Solicitor General that Petitioners present application respecting the stay of the mandate of the Court of Appeals and of the order of the District Court of June 21, 1958, necessarily involves consideration of the merits of the Court of Appeals' decision reversing the order of Judge Lemley.

The Court is advised that the opening date of the High School will be September 15th. In light of this and representations made by Counsel for the School Board as to the Board's plan for filing its petition for certiorari, the Court makes the following order:

(1) The School Board's petition for certiorari may be filed not later than September 8th, 1958.

(2) The briefs of both parties on the merits may be filed not later than September 10th, 1958.

(3) The Solicitor General is invited to file a brief by September 10th, 1958, and to present oral arguments at the hearing if he is so advised.

(4) The Rules of the Court requiring printing of the petition, briefs and record are dispensed with.

(5) Oral argument upon the petition for certiorari is set for September 11th, 1958, at 12:00 o'clock noon.

(6) Action on the Petitioner's application addressed to the stay of the mandate of the Court of Appeals and to the stay of the order of the District Court of June 21, 1958, is deferred pending the disposition of the petition for certiorari duly filed in accordance with the foregoing schedule. Copies of the order will be available at the Clerk's office in a few moments.

(Whereupon, at 5:14 o'clock p.m., the Court was adjourned.)