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REPORT
No. 95-443

TRANSPORTATION AS A REMEDY IN SCHOOL DESEGREGATION

SEPTEMBER 21, 1977.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY and ADDITIONAL VIEWS

[To accompany S. 1651]

The Committee on the Judiciary, to which was referred the bill (S. 1651) to insure equal protection of the laws as guaranteed by the fifth or fourteenth amendments to the Constitution of the United States, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

PURPOSE

1. The primary purpose of S. 1651 is to establish guidelines that are consistent with the Constitution regarding the circumstances under which courts may order the transportation of students on the basis of race, color or national origin.

GENERAL STATEMENT

Public education has become a battleground of social change in America, and that is not surprising when we understand how much education is the key to what we think our nation is all about.

It is part of the American dream that education is a stepping stone to success, and each generation has sought the best possible education for its children. In neighborhoods everywhere, the school can be the tie that binds an area into a community.

Public schools exist in a world in which confidence in government is seriously eroded. Schools are a nerve close to the surface of an anxious

public, and the erosion of confidence rubs that nerve raw. The parents of minority families are concerned about the quality of education provided their children. There is a crushing burden of evidence that the segregated schools of years ago were inferior schools, and that this was a wrong that must be remedied.

Brown v. *Board of Education* recognized equality of educational opportunity as a principle to which our government must adhere, and it offered proof that courts were an avenue that could restore confidence in public institutions in general and public schools in particular.

The *Brown* case also opened a new field of law, and it is only now—more than 20 years later—that we can see what equal educational opportunity means in a legal sense. This is a diverse nation, and the facts which underlie each court case are different. This makes the process of clarifying the law a time-consuming one.

The status of public education in our nation today dictates that Congress take note of the Constitutional meaning which has emerged from these decisions.

The principles involved are simple ones, with a long history in the law:

> The court must find that officials intended to cause racial segregation of students before there has been a violation of the Constitution; and
>
> The court must order a remedy for the segregation that is limited to the extent of the violation.

Adherence to these principles will restore public confidence in schools and government.

This is the essence of the emerging consensus on our schools—that the adjudication of wrongs and the application of remedies should follow these principles of justice, and it is urgent that we recognize these limitations before the fabric of our fragile society is further destroyed.

The hearing record of the committee on this legislation, S. 1651, reveals the broad outline of this consensus. The committee found support for legislation which provides the following:

First, it would require a court to find "a discriminatory purpose in education" behind any violation for which student transportation is proposed as a remedy. Second, courts would be required to determine the extent to which acts of unlawful segregation have caused a greater degree of racial segregation in a school or schools than would have otherwise existed, and student busing would be limited to eliminating the degree of racial segregation attributable to those proven unlawful acts. All Federal interdistrict busing orders would be stayed pending appeal however, the stay could be vacated by a majority of the Supreme Court or a Court of Appeals panel of not less than three members. Finally these requirements would apply both to orders issued after the date of enactment and to those which have not been put in effect by that date.

The bill would establish for the Federal courts clear guidelines concerning the use of busing. In practice, it would require the court to determine the extent to which specific acts of unlawful discrimination by governmental officials have caused a greater degree of racial concentration in a school or school system than would have existed absent

those acts. It would further require the court to limit remedial busing to that necessary to eliminate racial imbalance caused by those deliberate acts. In other words, courts would no longer be able, where only limited or isolated acts are proven, to order busing throughout the entire district or between districts simply for the purpose of achieving racial balance.

There are those who instantly call any bill that would limit school busing "unconstitutional." Undoubtedly, the desire to secure quality education for all young people regardless of race motivates this concern about what is constitutional. The truth is that the Supreme Court, when it endorsed the broadest busing program which it has reached, expressed grave doubts about the need for busing and about its value to students.

In order to understand the basis of the bill it is necessary to understand the origin and nature of the busing requirement in constitutional law. As we all know, in the *Brown* decision in 1954 the Supreme Court held that the Constitution prohibits school racial segregation; that is, racial discrimination in the assignment of children to schools in order to separate the races. Indeed, as other decisions of the Supreme Court quickly showed, the *Brown* principle was simply that all racial discrimination by government is constitutionally prohibited. The segregation that was prohibited by *Brown* has ended; children are no longer assigned to schools on the basis of race in order to keep the races apart.

In 1968, however, 14 years after *Brown*, the Supreme Court held in the *Green* case that it was not enough merely to end the practice of assigning students on the basis of race. The court held that it was also constitutionally necessary that the schools be "desegregated." This term has a very distinct meaning in constitutional law. Segregation is not all racial separation, but only separation that is caused by official discrimination. Racial desegregation is not supply integration, or the undoing of all racial separation, but only the undoing of unconstitutional racial segregation. The court in *Green* did not hold that the Constitution requires school racial integration for its own sake. The court held instead only that the Constitution requires desegregation—the undoing of that racial separation that is the present and continuing result of past unconstitutional segregation.

Some have argued that any decision, such as the location of a new school building, could have racial impact. However, in 1976 in *Washington* v. *Davis*, the Supreme Court clearly rejected this view and held that an act is not unconstitutional solely because it has a racially disproportionate impact. Unconstitutional racial discrimination cannot be found without a finding that the action was purposefully discriminatory.

The key court decisions outline the national constitutional policy on desegregation in the public schools. S. 1651 closely follows these guidelines. In its hearings, the committee has looked into the impact of broad orders for school busing on communities and their citizens, and recommends timely passage of this legislation. Prompt enactment of S. 1651 will bring reason and order into the sometimes controversial arena of school desegregation.

SECTION-BY-SECTION ANALYSIS

SECTION 1: No court of the United States shall order directly or indirectly the transportation of any student on the basis of race, color, or national origin unless the court determines that a discriminatory purpose in education was a principal motivating factor in the constitutional violation for which such transportation is proposed as a remedy.

Section 1 of S. 1651 incorporates the constitutional standards for finding a violation of the 14th amendment. The Supreme Court has long held that discriminatory intent is an essential component of an alleged Constitutional violation. In *Keyes* v. *School District No. 1* 413, U.S. 189 (1973), the Court stated that:

> The differentiating factor between *de jure* and *de facto* segregation * * * is purpose or intent to segregate at 208

Further the plaintiffs:

> must prove not only that segregated schooling exists but also that it was brought about by intentional state action. at 198.

While this requirement of discriminatory purpose is a longstanding one, it has not always been clear what sort of proof was needed to show the necessary discriminatory intent. Some courts of appeals adopted the view that the requitise "intent" could be inferred on the basis of discriminatory impact alone. In recent cases however, the Supreme Court explicitly rejected this approach and clarified the Constitutional standards.

As Professor Charles Abernathy, a constitutional scholar who testified at the hearings held on S. 1651 said:

> Last year, however, the Supreme Court rejected the consensus that had been building in the courts of appeals. In *Washington* v. *Davis* 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corporation* 45 U.S.L.W. 4073 (Jan., 1977), the Court made clear that "* * * proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause.

In *Washington* v. *Davis* supra, an employment case, the Supreme Court stated;

> our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose is unconstitutional solely because it has a racially disproportionate impact at 239.

Arlington Heights, a housing case, again held that discriminatory intent is required to show a violation of the Equal Protections clause. The Court affirmed that;

> official action will not be held unconstitutional solely because it results in a racially disproportionate impact * * * *Arlington Heights* supra at 4077.

The Court required a finding that discriminatory intent was a "motivating factor" in the constitutional violation from which relief is sought.

Most frequently on June 27, 1977 the Supreme Court decided *Dayton Board of Education* v. *Brinkman* No. 76–539 a school desegregation case in which this same principle was reiterated. The Court said:

> The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the fourteenth amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board" at 6.

Other school desegregation cases to which this principle has been applied are *Austin Independent School District* v. *United States*, *School Town of Speedway* v. *Buckley*, *School District of Omaha* v. *United States*.

Section 1 of S. 1651 likewise requires a showing of discriminatory intent before the remedy of busing can be imposed to rectify a constitutional violation. In so doing, it merely tracks what the Supreme Court has done. As Professor Ralph Winter, a witness at the hearings said,

> S. 1651 can, therefore, hardly be said to be unconstitutional on the grounds that it requires proof of purposeful discrimination. That is no more than the Supreme Court requires.

There are provisions in Section 1 which clarify the Supreme Court standards in school desegregation cases. Section 1 requires that a discriminatory purpose in education be shown to be "a principal motivating factor" in the constitutional violation. While this precise phrase is not used in the cases cited, it draws both clarification and implicit support from the Supreme Court decisions. What is meant by the phrase "principal motivating factor" is that discriminatory intent is substantially more significant than some of the other factors that courts examine when they review actions taken by school or state officials. This is substantially what the Supreme Court said in *Arlington Heights* when it was discussing the various factors which state officials must consider in reaching decisions. The court said:

> But racial discrimination is not just another competing consideration at 4077.

In addition to this clarification and definition, the phrase "principal motivating factor" draws further support from the *Arlington Heights* decision. As Professor Charles Abernathy testified:

> The other requirement of section 1, that the discriminatory intent has been the "principal motivating factor" in an official's decision is not explicitly sanctioned by *Davis* and *Arlington Heights*, although it draws implicit support from the latter decision.

Professor Abernathy goes on to say:

> In a final footnote * * * and in a succeeding case the Court has left the defendant official free to prove that he would have reached the same decision even apart from his discriminatory motive. In effect, the principal motivating factor test as it is used in S. 1651 is also employed in *Arlington Heights*, although the burden of proof is on the defendant official.

In other words if the defendant school official can prove that the same decision would have been made on non-discriminatory grounds, then under *Arlington Heights* the discriminatory intent requisite to finding a constitutional violation has not been shown. Stated in reverse, a discriminatory purpose must have been an indispensible component of the decision-making process and therefore *ipso facto* a principal motivating factor. Thus the principal motivating factor test as used in S. 1651 is the same as that used by the Court in *Arlington Heights.*

Section 1 of the bill also mandates that the Courts find a discriminatory purpose "in education". By this phrase, the Committee intends that the action in question must have been taken with a discriminatory educational purpose. This encompasses purposefully discriminatory acitons by non-school officials wihch are intended to affect education. This requirement is a logical outgrowth of the concept announced by the Supreme Court in *Swann* v. *Board of Education*, 402 U.S. 1 (1971), namely that the schools should not be the vehicle for desegregating society as a whole. As the Court in Swann said:

> One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope . . . at 22.

In conclusion then, section 1 of S. 1651 closely tracks Supreme Court decisions in this area and as Professor Abernathy said:

> I conclude that Section 1 is not only constitutional but indeed adopts an incorporates into statutory law the Constitution's standards.
>
> SEC. 2(a). In ordering the transportation of students, the court shall order no more extensive relief than reasonably necessary to adjust the student composition by race, color, nor national origin of the particular schools affected by the constitutional violation to reflect what the student composition would otherwise have been had no such constitutional violation occurred.

Section 2(a) of the bill incorporates another well-established principle, namely that equitable remedies should not exceed the wrong they are designed to redress. This is a time honored principle that found expression in the early school desegregation cases. In *Swann* supra the court said:

> The nature of the violation determines the scope of the remedy at 16.

However, as was the case with the discriminatory purpose rule, the Court has greatly clarified the meaning of the doctrine in more recent desegregation cases. In *Milliken* v. *Bradley*, 418 U.S. 717 (1974) the court disallowed an interdistrict busing plan since there had been no showing of an interdistrict violation. The court said that desegregation remedies are:

> necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct at 746.

The Court reiterated the basic *Swann* supra principle that

> the scope of the remedies should fit the scope of the violation.

Pasadena Board of Education v. *Spangler* 427 U.S. 424 (1976) again affirmed this.

It is of course, only logical that this should be the rule of law. The Court has held that the Constitution does not require

> any particular degree of racial balance * * * in educational facilities *Swann* supra at 24.

As Professor Ralph Winter testified:

> The proposition that busing can be utilized only to redress a proven constitutional violation is merely the converse of the rule that no particular racial balance is required by the fourteenth amendment. If a court cannot command a particular racial balance in the absence of a constitutional violation, it follows that it may not command it simply because a constitutional violation unrelated to racial imbalance is present * * * The only court orders affected, therefore, are busing orders which seek to do something other than remedy proven constitutional violations.

Section 2(a) codifies the constitutional and common law principle that the remedy should place the complaining party in the position he would have occupied had there been no wrong.

Section 2(b) before entering such an order, the court shall conduct a hearing and, on the basis of such hearing, shall make specific written findings of (1) the discriminatory purpose for each constitutional violation for which transportation is ordered, and (2) the degree to which the concentration by race, color, or national origin in the student composition of particular schools affected by such constitutional violation presently varies from what it would have been in normal course had no such constitutional violation occurred.

Section 2(b) requires specific written findings of discriminatory purpose and the degree to which the concentration in particular schools is effected by a constitutional violation. Such findings are required by the Federal Rules of Civil Procedure in some situations. This section would require them in every case involving a transportation order. While such determinations are complex to be sure, they are not beyond the capabilities of modern sociologists and courts. Professor Nathan Glazer of Harvard, testified that this type of data is available and section 2(b) of S. 1651 will encourage courts to make greater use of this evidence. Furthermore, such detailed findings will facilitate appellate review of transportation orders. The necessity of Section 2(b) is best summarized by the Court in the *Dayton* supra case, where it said;

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff.

Washington v. *Davis* supra. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a systemwide remedy. *Keyes* supra at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations int he first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case. *Dayton* supra at 13.

SEC. 3. (a) Any order by a district court requiring directly or indirectly the interdistrict transportation of any students on the basis of race, color, or national origin, shall be stayed until all appeals in connection with such order have been exhausted provided that any such stay may be vacated by a majority of Court of Appeals panel of not less than three members, or a majority of the Supreme Court.

The automatic stay provision of section 3(a) is designed to protect local school districts, parents and children from the uncertainty and often irreparable damage that results from the implementation of an inter-district busing order which is later reversed on appeal. While such disruption can occur with the implementation or any busing order it is dramatically pronounced where interdistrict orders are concerned. Interdistrict orders involve the merging of separate school districts, major alterations to tax rates and teachers' salaries, wholesale reorganizations of teacher and pupil assignments and vast changes in the internal administrative structures of the school districts involved.

Clearly unacceptable disruptions of the educational process would occur if such plans were first implemented and then reversed. The arguments for automatically staying such orders, pending appeal, are overwhelming and that is what section 3(a) does.

Of course, it is often true that intradistrict busing orders should be stayed for many of the same reasons.

However, in the case of intradistrict orders the necessity of a stay can be adequately determined on a case by case basis.

Even when interdistrict orders are involved there may be instances in which a stay is not proper. Section 3(a) makes provision for these unusual circumstances by granting a majority of a Court of Appeals panel of not less than three members or a majority of the Supreme Court the authority to vacate such a stay. While a majority of either court is clearly required, and in the case of a Court of Appeals panel, the number of justices may not be less than three, allowances will be made for vacancies and unavoidable disqualifications.

SEC. 3. (b) In any case where such order is stayed pursuant to subparagraph (a) of this section, any appeals that are to be taken from such order must be commenced by filing a notice of appeal with the clerk of the district court within 10 days of the date of the entry of such order. The record on appeal shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal and filed by the clerk of the court immediately upon receipt of the record. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but except for good cause shown, a reply brief must be filed at least 3 days before argument.

The appeal shall be heard within 15 days thereafter and a decision shall be rendered within 45 days after argument. No extensions of these time periods shall be allowed, except for extraordinary circumstances.

Section 3(b) sets forth the period of time during which appeals must be noticed, records transmitted, briefs filed, appeals heard and decisions rendered. The ordinary time periods for taking an appeal have been shortened under section 3(b), in deference to the children whose educational rights under the 14th Amendment must be finally determined on appeal.

SEC. 4. (a) This Act shall take effect with respect to any judgment or order of a court of the United States which is made after the date of enactment or which is made prior to such date but is not final or has not been effected by such date.

Section 4(a) applies the provisions of S. 1651 to all pending cases. It is applicable by its terms to orders which are "not yet final" or "have not yet been effected" by the date of the bill's passage. The phrase "not yet final" means simply that there are appeals still pending or, the time for appeals is not yet exhausted. The phrase "not yet effected" means that even though the appeals may have been exhausted, the order has not yet been put into effect. This section avoids the complex problems created by a reopener clause while at the same time encompassing pending orders which should come within the bill's provisions. In view of the expedited appeals provided for in section 3(b), section 4(a) is both reasonable and equitable.

(b) No judgment or order of a court of the United States which is not yet final or which has not yet been effected on the day before the date of enactment of this Act shall remain in force or effect, unless the court has complied with the requirements of this Act.

Section 4(b) is the logical companion to section 4(a). It provides that no order which is not yet final or has not yet been effected will remain in force or effect unless the requirements of S. 1651 have been complied with. To the extent that the courts have properly followed the law, as enunciated by the Supreme Court and codified by S. 1651, this section places no additional burdens on them except perhaps addi-

tional findings required by section 2(b). However, if the record before the appellate court is sufficiently complete then the findings required by section 2(b) can be made by the Court of Appeals and the case need not be remanded to the lower court for such findings.

S. 1651 is constitutional

As a legislative body of enumerated powers, Congress must rely on grants of constitutional authority for the legislation it enacts. S. 1651 rests on the authority granted to Congress in Section 5 of the 14th Amendment as well as Congress' general power to provide remedies for violations of the Constitution.

Section 5 of the 14th amendment to the Constitution provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Clearly, this section gives Congress some authority over the enforcement of the 14th amendment guarantees. The question is how much.

Under the view espoused in the Supreme Court case *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) this power is extremely broad. This approach claims that Section 5 is a positive grant of legislative authority that gives Congress the authority not only to implement but also to determine what legislation is needed to effect the provisions of the 14th amendment. It should be noted that the *Katzenbach* approach only allows Congress to increase and not diminish 14th amendment rights. Of course, S. 1651 is consistent with recent Court decisions and does not diminish 14th amendment rights. This highly expansive view of Congress Section 5 power is not needed to support the legislation.

Under a narrower interpretation of Section 5, it simply reinforces Congress power to deal with remedies for violations of the Constitution generally and the 14th amendment specifically. This general power of Congress over remedies for constitutional violations is long-standing and well accepted *U.S.* v. *Union Pacific Railroad Co.* 98 U.S. 569 (1878), *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics* 403 U.S. 388, 397 (1971). Section 5 enhances this power as far as 14th amendment violations are concerned.

In exercising its power over remedies it would seem that Congress may even deny the use of a particular remedy so long as its denial does not preclude the courts from enforcing the constitutional rights itself. Thus to a certain extent the constitutionality of a particular remedy restriction depends on its reasonableness in relation to the right.

Having established that Congress has the power to enact legislation such as this, the next question is to do the substantive provisions of S. 1651 pass constitutional muster?

Section one limits transportation remedies to situations where a discriminatory purpose in education has been proven. The Supreme Court has clearly and repeatedly asserted that challenged state actions must be accompanied by a discriminatory purpose before there can be any constitutional violation of the 14th amendment to be remedied. (*Keyes* v. *School District No. 1* 413 U.S. 189 (1973), *Washington* v. *Davis* 426 U.S. 229 (1976), *Arlington* v. *Metropolitan Housing Development Corp.* No. 75-b16 (Jan. 11, 1977).)

Section one basically codifies this requirement as a prerequisite to ordering transportation. It leaves all remedies for 14th amendment violations including busing, intact and merely reasserts the elements of a constitutional violation which must be proven before a remedy

can be imposed. The elements of a constitutional violation set forth in the bill closely parallel those enunciated by the Supreme Court. The Court has required a finding that discriminatory intent is "a motivating factor" in the alleged constitutional violation (*Arlington Heights* v. *Metropolitan Housing Development Corp.* No. 75–616 (Jan. 11, 1977)). The language of the bill requires a finding that a "discriminatory purpose in education was a principle motivating factor" in the constitutional violation for which the busing remedy is proposed. It is clear that S. 1651 closely tracks the Supreme Court decisions in this area and therefore there can be little doubt about its constitutionality. It is in effect a restatement and clarification of the law.

The same is true with respect to section 2 dealing with the permissible scope of transportation remedies. This section provides that when discrimination is found, no more transportation shall be ordered than is reasonably necessary to return the situation to that which would have resulted if no constitutional violation had occurred. This basically echoes the Supreme Court pronouncement that "the scope of the remedy should fit the scope of the wrong" *Miliken* v. *Bradley* 418 U.S. 717 (1974).

In the *Milliken* case, the Court elaborated on the remedial requirement saying:

> the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

Professor Graglia elucidated this point saying:

> It should, therefore, now be beyond dispute that federal courts have no constitutional warrant or other authority to require racial mixing or the undoing of racial separation except insofar as such separation is the result of prior unconstitutional segregation. In short, it is now settled that the proper function of a desegregation order, once unconstitutional segregation is found, is not to produce as much school racial integration, mixing or balance as is possible or practicable, but only to make the schools of the relevant area as racially integrated as they would be if the constitutional violation found had not taken place.

This is what section 2 seeks to accomplish. Because this section does no more than legislate what the Supreme Court has done, it cannot be said to diminish remedies under the 14th amendment. As with section 1, it is more in the nature of a restatement, than a reform, of the law.

The remaining provisions of the bill are procedural in nature and do not raise constitutional issues. However, a brief discussion of Section 5 is in order. This section provides that the bill applies to all orders "not yet final" or "not yet . . . effected" by the date of the bill's enactment. This section does not mean that the bill applies to any case over which a court has continuing jurisdiction. Rather, it applies the provisions of the bill to any case in which an appeal is pending or still possible. If all appeals have been exhausted but the order has not yet been put into effect, then S. 1651's provisions would likewise apply.

In view of the above analysis of the bill's substantive provisions the question arises; why is it necessary?

Former Solicitor General Bork in a written statement submitted to the Judiciary Committee has said:

> Neither this principle nor the ones discussed above should require legislation but the fact is that some district courts have seriously misconstrued their powers and have undertaken to cure social conditions not arising from any discriminatory purpose of public officials while others have ordered student transportation to produce student mixtures according to arithmetic guidelines that bear no relation to conditions that would have obtained in the absence of a constitutional violation. The bill under consideration would prevent such misuses of judicial power and would, which is most important, preserve all constitutional rights of persons discriminated against."

In conclusion, then this legislation simply takes clearly established constitutional principles of 14th amendment law and creates a mechanism for the orderly implementation of those principles. If enacted S. 1651 would develop once and for all a comprehensive understandable nationwide federal policy for the use of busing in school desegregation. It would eliminate the uncertainty associated with the evolution of this most controversial area of the law without doing violence to the equal protection clause of the 14th amendment.

S. 1651—The sociological merits

The testimony of Dr. Nathan Glazer and Dr. David Armor focused on the social and educational impact of busing. They pointed out that quite apart from the legal controversy that often surrounds busing orders, the evidence increasingly shows that busing can be socially counterproductive and educationally irrelevant. Furthermore, there was testimony that when transportation orders are appropriate and necessary the orders actually implemented have gone far beyond what is required to correct any unlawfully caused concentrations of minority students. Dr. Glazer made the point that a significant proportion of the racial concentration in our society is not attributable to unlawful government action. He stated:

> The general reality in racial residential segregation reflects the economic circumstances of blacks and whites, and on the average, blacks are still less economically affluent than whites. It reflects secondly, the general tendency of ethnic groups to concentrate for convenience; for access to family and friends; and for reasons of access to specific cultural, religious and commercial facilities which serve specific groups.

Dr. Armor directed his discussion to the increased racial residential concentration that frequently results as a consequence of court ordered busing. This phenomenon known as "white flight" is characterized by economically affluent white families fleeing the cities to escape the impact of busing orders. According to recent research, this flight is due not so much to latent racism as it is to a strong belief in neighborhood schools as a concept worth supporting. These feelings of territorial

identification with neighborhood schools appear to run very deep. Parents are obviously willing to change their residence so their children will be able to attend local community schools.

Thus what begins as an attempt to increase social integration ultimately result in increased residential and cultural separation of the races.

As Dr. Armor said:

> The attempt to compel desegregation may lead to more racially balanced schools in the short run, but it may be a very short run. In the long run the accelerated loss of white students may lead to more segregation, not just between schools in the district but between school districts.

Dr. Armor also testified that:

> there is no solid rigorous evidence that minority students will achieve more or get more educational benefits from going to a majority white school or a school that has a balanced racial and ethnic composition.

This of course undermines the basic premise underlying forced busing—namely that it is necessary to provide an equal educational opportunity.

In short, much of the testimony on this issue was that, contrary to hopes and expectations, manadtory busing neither improves minority educational achievement nor increases harmony and contract between the races.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic).

Sec. 1. No court of the United States shall order directly or indirectly the transportation of any student on the basis of race, color, or national origin unless the court determines that a discriminatory purpose in education was a principal motivating factor in the constitutional violation for which such transportation is proposed as a remedy.

Sec. 2. (a) In ordering the transportation of students, the court shall order no more extensive relief than reasonably necessary to adjust the student composition by race, color, or national origin of the particular schools affected by the constitutional violation to reflect what the student composition would otherwise have been had no such constitutional violation occurred.

(b) Before entering such an order, the court shall conduct a hearing and, on the basis of such hearing, shall make specific written findings of (1) the discriminatory purpose for each constitutional violation for which transportation is ordered, and (2) the degree to which the concentration by race, color, or national origin in the student composition of particular schools affected by such constitutional violation presently varies from what it would have been in normal course had no such constitutional violation occurred.

SEC. 3. (a) Any order by a district court requiring directly or indirectly the interdistrict transportation of any students on the basis of race, color, or national origin, shall be stayed until all appeals in connection with such order have been exhausted provided that any such stay may be vacated by a majority of a Court of Appeals panel of not less than three members, or a majority of the Supreme Court.

(b) In any case where such order is stayed pursuant to subparagraph (a) of this section, any appeals that are to be taken from such order must be commenced by filing a notice of appeal with the clerk of the district court within 10 days of the date of the entry of such order. The record on appeal shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal and filed by the clerk of the court immediately upon receipt of the record. The appelant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but except for good cause shown, a reply brief must be filed at least 3 days before argument.

The appeal shall be heard within 15 days thereafter and a decision shall be rendered within 45 days after argument. No extensions of these time periods shall be allowed, except for extraordinary circumstances.

SEC. 4. (a) This Act shall take effect with respect to any judgment or order of a court of the United States which is made after the date of enactment on which is made prior to such date but is not final or has not been effected by such date.

(b) No judgment or order of a court of the United States which is not yet final or which has not yet been effected on the day before the date of enactment of this Act shall remain in force or effect, unless the court has complied with the requirements of this Act.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., July 22, 1977.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1651, a bill to insure equal protection of the laws as guaranteed by the fifth or fourteenth amendments to the Constitution of the United States, as referred to the Senate Committee on the Judiciary.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN, *Director.*

MINORITY VIEWS OF MESSRS. ABOUREZK, BAYH, CULVER, AND KENNEDY

TABLE OF CONTENTS

INTRODUCTION

In the 23 years since *Brown* v. *Board of Education*, 374 U.S. 483 (1954), a series of unsuccessful legislative proposals have been put forward in the Congress and the states to prevent, obstruct or delay enforcement of the constitutional prohibition against segregation of the public schools.[1] S. 1651 is the most recent in this series of legislative proposals, and should, like its predecessors, be disapproved.

The salient features of the bill are: (1) A requirement of greater proof of intent to discriminate than required by Supreme Court decisions, thus making it more difficult to prove a violation of the Fourteenth Amendment; (2) procedural obstacles, particularly a stay provision and an unworkable requirement of particularized findings that will impede the use of busing even where needed to remedy a constitutional violation; and (3) application of the bill to all nonfinal busing orders, which will open up many cases where desegregation by peaceful busing has been achieved, thereby disrupting education, creating disorder and possibly giving encouragement to integration opponents.

Moreover, each section of S. 1651 is tainted by a serious ambiguity of significant import for the outcome of school desegregation litigation. In every busing case, the bill would be a fertile source of confusion and litigation, as the meaning of its vague provisions is explored by the courts on a case-by-case basis. The final resolution of the more important issues will easily require 5 to 10 years of motions and appeals.

Any bill so drafted should warrant rejection by the Senate; there are several additional reasons why that is particularly so in this case. First, the avowed purpose of this legislation is to establish "clear guidelines concerning the use of busing," and to "bring reason and order into the sometimes controversial arena of school desegregation."[2] In fact the bill will have precisely the opposite impact.

[1] See 122 Cong. Rec. 8904 (Daily ed., June 10, 1976).
[2] Committee report, p. 3.

Second, while the delay of clarifying litigation would be regrettable in any area of the law, it is constitutionally intolerable in school desegregation. For many years implementation of *Brown* was delayed while obstinate school boards advanced, and the Supreme Court resolved, a host of issues elaborating the meaning of that 1954 decision. Having finally arrived, after more than two decades of litigation, at a point where the constitutional responsibilities of courts and public officials are reasonably clear, it would be irresponsible to thrust both back into uncertainty and invite another round of mischievous litigation.

Third, however long the clarifying litigation may take, the ultimate outcome will have to be the same: the constitutional rules will remain controlling. Whether the specific provisions are construed to have the same meaning as the Constitution, or declared invalid because they do not, the enactment of the bill can have no impact apart from the delay occasioned by the need to resolve these issues.

The vagueness of the language creates serious doubt as to the purpose of the bill. Indeed the ambiguity is so great that committee members who voted for the bill could not agree among themselves about its meaning.[3]

S. 1651 is entitled a bill "[t]o insure equal protection of the laws as guaranteed by the fifth or fourteenth amendments to the Constitution of the United States." Curiously, no violation of the Equal Protection Clause is made actionable by this bill. No court is provided with jurisdiction over such violations. No new remedy is created. There is literally no discriminatory act, no matter how blatant, which could be inflicted on any man, woman or child by a Federal, State, or local official which this bill prevents, deters, punishes, or redresses. The purpose of S. 1651, therefore, surely cannot be to insure equal protection of the laws.

The committee report advances another more limited intention:

> The primary purpose of S. 1651 is to establish guidelines that are consistent with the Constitution regarding the circumstances under which courts may order the transportation of students on the basis of race, color, or national origin.

Unfortunately, read in their most benign light, these guidelines add nothing significant to already existing legal standards enunciated by the Supreme Court. Far worse, they can be interpreted as undermining the constitutional right of children to attend integrated schools.

Since the actual purpose of S. 1651 cannot be gleaned from either the plain language of the bill or the committee report, it becomes overshadowed by the obvious effect of the bill to reduce or present constitutionally required busing to integrate schools.

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[3] Senator Biden, author of the bill, argued in committee that S. 1651 simply codifies existing Supreme Court decisions. However another supporter, Senator Scott, stated, "I certainly hope it is not the intention of those who offered this bill to codify judge-made decisions. I would agree completely [with Senator Abourezk who criticized S. 1651 for differing from existing Supreme Court decisions] that this is not to codify existing bench made law. If I thought it was, I would be voting the other way and changing my vote every time we had a vote today." Transcript of Aug. 1, 1977, p. 88.

History of Legislation

This bill is the outgrowth of a series of proposals made by its sponsors earlier in this session. Senator Roth introduced anti-busing bills on March 24, 1977[4] and April 21, 1977.[5] Senator Biden introduced another version on March 25, 1977.[6] S. 1651 was introduced on June 9, 1977 by Senator Roth, for himself and Senator Biden.[7]

In introducing the bill on June 9, 1977, Senator Roth announced that the Judiciary Committee hearings on S. 1651 would begin 6 days later on June 15, 1977.[8] This short notice was in direct violation of section 133A(a) of the Legislative Reorganization Act of 1946, which requires "public announcement of the date, place and subject matter of any hearing to be conducted by the committee on any measure or matter at least one week before the commencement of that hearing."[9] The hearings lasted for 2 days and included 11 witnesses.

At the June hearings, the Authors did not obtain the differing experience of communities in which busing has, in whatever sense, "succeeded" and "failed." In particular there was no inquiry into how the impact of busing varied with the distances and times involved, the degree of busing before integration, the ages of the students, the racial compositions of the schools before and after busing, the relative number of black and white students involved, the role of community leaders and officials, the preparation and training of teachers and staff, the degree of faculty desegregation, and the racial attitudes among parents and students prior to the advent of busing.

At noon on July 20, 1977, the committee agreed, on the request of several members, to hold additional hearings. Those hearings commenced 21 hours later on July 21, 1977, lasted 2 days and heard seven additional witnesses. Business meetings were held by the committee on July 27, 28, and 29 and August 1, 1977, during which the meaning of various provisions of the bill were discussed and a number of amendments were agreed to. The committee voted to report the bill on August 1, 1977, by a vote of 11 to 6.

The Administration Opposition

The executive branch opposition to S. 1651 reaches the very highest office of the administration. On July 20, 1977, the White House issued the following statement on S. 1651:

> The President, upon the advice of the Attorney General, concurs with the Attorney General. He does not support the bill. He believes the bill is: (1) Unnecessary and undesirable because recent Supreme Court decisions, particularly *Dayton*, achieve substantially the goals the bill seeks to achieve. (2)

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[4] S. 1126, 95th Cong., 1st Sess. (1977). See 123 Cong. Rec. S. 4828 (Daily ed., Mar. 24, 1977).
[5] S. 1342, 95th Cong., 1st Sess. (1977). See 123 Cong. Rec. S. 6120–21 (Daily ed., Apr. 21, 1977).
[6] S. 1132, 95th Cong., 1st Sess. (1977). See 123 Cong. Rec. S. 4889 (Daily ed., Mar. 25, 1977).
[7] See 123 Cong. Rec. S. 9227–29 (Daily ed., June 9, 1977).
[8] Id., p. S 9227.
[9] F. Riddick, Senate Procedure, p. 242 (1974).

> Also, the bill's attempt to codify the decisions has ambiguities which will create unnecessary delays in the desegregation process. This is based on an opinion from the Attorney General with which the President concurs.

Attorney General Bell restated his opinion on the undesirability and the unconstitutionality of the bill in a detailed letter submitted to the Committee on July 26, 1977.

> In general it is the position of the Department of Justice that enactment of S. 1651 would be undesirable, for several reasons. As detailed below, we question the need for this legislation; some provisions would be unwise; and others would raise serious constitutional issues.
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> The subject of school desegregation, and the construction of remedies necessary to secure the constitutional rights of school children, is a subject which is of national significance. The Court's recent action in the *Dayton* case provides an important guide for lower courts to follow, and attempts to clarify several issues in this area. In the view of this Department, the enactment of this legislation would, without adding significant substance to already existing legal standards, unnecessarily and detrimentally complicate the area of school desegregation, generate unnecessary litigation, and unconstitutionally delay, in some instances, the vindication of constitutional rights. Accordingly, we oppose the enactment of the bill.[10]

While the position of any Attorney General would be of importance in assessing legislation of this sort, Attorney General Bell brings to this particular bill a unique expertise. While a Federal judge, he had unusually extensive experience with school desegregation litigation.[11]

CONSTITUTIONAL REQUIREMENTS

The central legal issue underlying both the meaning and validity of S. 1651 is the nature of the constitutional limits on the power of Congress to adopt legislation affecting litigation under the fourteenth amendment. The particular constitutional rules applicable to busing and school desegregation cases are discussed below and are there compared with each of the provisions of the bill itself. It is necessary at the outset, however, to understand the constitutional limitations on the power of Congress to affect judicial enforcement of constitutional rights.

Section 5 of the fourteenth amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The Supreme Court has made clear that section 5 per-

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[10] The entire text of the Attorney General's letter is appended.

[11] In introducing Judge Bell to the Senate Judiciary Committee on the occasion of hearings on the prospective nomination of Griffin B. Bell, Senator Nunn noted: "To my knowledge, Mr. Chairman and members of the committee, no Federal judge in the United States has been involved in as many school cases as Griffin Bell. He handled over 140 in the most difficult, the most trying, and the most emotionally charged circumstances our section of the country has faced in many, many years." (95th Cong., 1st Sess., p. 6 (1977))

mits Congress to augment the rights established and remedies entailed by the fourteenth amendment, but not to diminish them, directly or indirectly. The Court explained in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966):

> § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws. 384 U.S. at 651, n. 10.

The Framers of the Constitution rejected from the outset any suggestion that Congress could impose on the courts its own interpretations of the Constitution. Alexander Hamilton urged in The Federalist, No. 78,

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other department it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to supopse, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning.

Since *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803) the Supreme Court has recognized that if both the law and the Constitution apply to a particular case the court must decide the case conforming to the Constitution, disregarding the law. 1 Cranch at 178.

Congress could not and would not direct the Supreme Court or the lower Federal courts not to enforce the fourteenth amendment. What we must not do in such an open and sweeping manner we are also forbidden to seek in more subtle and indirect ways. Thus, by way of example, Congress cannot limit the constitutional powers of the courts by imposing a "definition" of what constitutes, or what evidence is sufficient to establish a violation. Such a statute would be the equivalent of a law which delineated the class of constitutional rights falling outside the definition and purported to forbid the courts to enforce them.

Nor can Congress nullify a constitutional right by restricting or eliminating any necessary remedy. Such a statute would, under the circumstances when only the forbidden remedy was sufficient to redress the violation, simply prohibit enforcement of the underlying right. *North Carolina Board of Education* v. *Swann*, 402 U.S. 43 (1971). Finally, Congress cannot delay the granting of a necessary remedy where the prompt implementation of that remedy is a right of constitutional magnitude. School desegregation is the pre-eminent area in which delay itself is a constitutional violation. It is 13 years since the Supreme Court announced that "(t)he time for mere 'deliberate speed' has run out",[12] 9 years since the Supreme Court ruled that school officials must adopt plans that promise "realistically to work now.",[13] and 7 years since the Supreme Court directed desegregation "at once." [14]

The majority report appears, at least in certain portions, to accept this delineation of authority between the Congress and the Judiciary. It notes that "the *Katzenbach* approach only allows Congress to increase and not diminish 14th Amendment rights", and argues the bill is valid because it "does not preclude the courts from enforcing the constitutional right itself" and "leaves all remedies for 14th amendment violations, including busing, intact. . ." [15] The report's analysis of particular provisions of the bill indicates, however, that the requirements of the bill and of the Constitution are not identical. The standards which the bill purports to establish for the courts are denoted variously as "clarifying", drawing support from" "closely tracking" "restating" and "basically echoing" the Constitution. Insofar as these standards require proof of discrimination greater than required by the Supreme Court and impose additional substantive and procedural burdens on plaintiffs, the legislation probably exceeds congressional power. For neither the Constitution nor the decisions of the Supreme Court afford a plausible basis for congressional power to interpret the Constitution by imposing statutory restrictions on constitutional rights. The final authority and responsibility for interpreting the Fourteenth Amendment lies exclusively with the Supreme Court.

During deliberations of the Eagleton-Biden amendment to the HEW appropriations bill, H.R. 7555, the issue of whether the judicial branch has final authority to determine where and when busing is constitutionally required was raised and resolved. In arguing for the amendment which strips HEW of power to require busing under title XI, proponents of the measure repeatedly assured the Senate that their purpose was to keep busing decisions in the courts. Senator Eagleton stated:

> I would not support a law which attempted to restrict the authority of Federal courts to fashion appropriate and targeted remedies to redress such constitutional violations.[16]

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[12] *Griffin* v. *School Bd. of Prince Edward County*, 377 U.S. 218, 234 (1964).
[13] *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439 (1968) (italics in the original).
[14] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).
[15] Committee report, page 10.
[16] 123 Cong. Rec. S. 10898, 10902 (Daily ed., June 28, 1977).

Senator Biden, a co-author of S. 1651, argued:

> Those of you who are going to vote with the Senator from Mass. (Senator Brooke) are making one decision: That you think, absent a court order, a bureaucrat down-town or out in the district can make a judgment that there is a constitutional violation that exists. I say to you that the only person who should be able to make that decision is a duly constituted Federal court . . . (I am) not standing here and saying we should not have busing under any circumstances. If a court finds a violation, and decides the only remedy under the Constitution is busing, so be it.[17]

Having removed from the executive branch authority to direct busing where it may be legally required, and having done so on the ground that such decisions should be made instead by the judicial branch, we cannot in good conscience attempt to interfere with the judiciary as well.

DETAILED ANALYSIS

S. 1651 specifies in detail when the federal courts may direct the use of busing to remedy discrimination in the public schools. Although the bill purports to do so by defining what will constitute a constitutional violation for which busing can be a remedy, and how a busing remedy must relate to the violation, it does not attempt to deal generally with violations and remedies under the Equal Protection Clause. As a practical matter the federal courts in school desegregation litigation do not resort to busing except to the extent that other remedies are constitutionally insufficient, a practice concurred in by Congress. See 20 U.S.C. §§ 1713, 1755. Accordingly S. 1651 would only come into play in a case in which busing was constitutionally required. What portion of school cases in fact require busing is a matter of dispute, though it is certainly greater in urban and northern areas than rural and southern districts. However that dispute may ultimately be resolved, our analysis of the bill necessarily is concerned with its application in such a case.

Section 1: The "Primary" Motivation Requirement

Section 1 limits the use of busing to remedying a constitutional violation in which "a principal motivating factor" was purposeful discrimination. The legislative requirement of purposeful discrimination is neither necessary nor significant; the Supreme Court has already established such a purpose rule [18] and Congress has already adopted legislation to this effect.[19] The additional requirement that the pur-

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[17] Id., pp. S. 10907, S. 10902.

[18] *Washington* v. *Davis*, 426 U.S. 229 (1976). Where a school board has established a dual system a mere failure to act affirmatively to dismantle it, or a practice or law obstructing such dismantlement, would be unconstitutional. The Attorney General has expressed concern that section 2(b)(1) might be read to legalize such conduct, at least so far as busing is involved, and a similar concern seems theoretically possible as to section 1. Letter of Attorney General Griffin Bell to the Hon. James O. Eastland, p. 4. In such a case it seems clear, however, that the original act of creating a dual system would be a violation on which busing under S. 1651 could be predicated.

[19] 20 U.S.C. § 1708(a), 1704, 1705, 1715, 1751, 1754, 1756; 42 U.S.C. § 2000c.

poseful discrimination to be the "principal" motivation behind the disputed conduct has no such judicial sanction. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073 (1977) the Court expressly rejected any such "principal" test. It determined that a school board decision where race was a "motivating" factor—that is, where race played any part in the decisionmaking process—is constitutionally invalid.

In *Washington* v. *Davis*, it explained,

> does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. * * * "The search for legislative purpose is often elusive enough, *Palmer* v. *Thompson*, 403 U.S. 217 (1971), without a requirement that primary be ascertained. 45 U.S.L.W. at 4077. See also *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 461–62 (1972).

Thus, under *Arlington Heights* a plaintiff's only burden is to establish that race was "a motivating factor". Then, the Court explained, the defendants would have "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 45 U.S.L.W. at 4078, n. 21.

The committee report obviously rejects the standard enunciated by the Supreme Court, when it states that "principal motivating factor" means "that discriminatory intent is substantially more significant than some of the other factors that courts examine when they review actions taken by school or state officials." [20]

Under this test, a district court, in determining whether a factor in a decision was "substantially more significant" than the other factors involved, would have to identify all of the factors and compare their weight. But this inquiry is precisely the one the court rejects in *Arlington Heights*, in part because of a recognition that even a subordinate factor can be decisive. Nor is the *Arlington Heights* language that racial discrimination not be "just another competing consideration", cited in the committee report as support for the "principal" test, to the contrary. As the next sentence shows,[21] that language was meant to underscore that once a racial motivation is shown, there is a greater burden of justification for the challenged conduct, not a lesser one as the majority report seems to argue.

The Attorney General objected strongly to the "principal motivating factor" language because of its ambiguity and constitutional problems.

> By adding the "principal motivating factor" language, S. 1651 would unnecessarily complicate the process of proof in school desegregation cases. If that language were interpreted to preclude relief unless the plaintiff were able to prove the weight accorded race by state or local officials, the bill could generate serious constitutional challanges as well

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[20] Committee report, p. 5.

[21] "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."

> as placing an unfair burden on the plaintiff. The provision could possibly be interpreted so as to secure its constitutionality, leaving on the state or local officials the burden of proving that racial factors were not the basis for their action. The litigative process to reach such an interpretation would, however, be time consuming and, in light of the fact that the result would be to leave the law in precisely the state it is now, most unnecessary.[22]

The Attorney General's objections accord with those raised by Professor Ralph Winter of Yale University in testimony before the Committee. Professor Winter, a strong supporter of the purposes of the bill, nevertheless recommended deletion of the word "principal". He queried, "How many principal factors can you have?" [23]

The requirement of "principal motivating factor" is, at best, an inartful attempt to incorporate the constitutional standard and certain to generate confusion and pointless litigation; at worst, it is an unconstitutional effort to forbid busing under circumstances where it would be required by *Arlington Heights*.

Section 1: The "In Education" Requirement

Section 1 precludes the use of busing to remedy purposeful racial discrimination unless that discriminatory purpose was "in education". The committee report explains that the phase "in education" includes "discriminatory actions by nonschool officials which are intended to affect education".[24] Absent such special intent a city with a long established official policy of forbidding blacks to live in certain all-white neighborhoods could use S. 1651 to obstruct integration of the all-white schools which resulted.

This proposed requirement is an attempt to overturn a series of decisions under the fourteenth amendment requiring school desegregation where a pattern of racial isolation in the schools was the result of official discrimination in housing.

These decisions have concluded that the Equal Protection Clause requires busing or other desegregation remedies where state or local officials have engaged in racial discrimination in the location of public housing,[25] the restriction of public housing to particular racial groups,[26] the use of urban renewal and relocation to establish or reinforce segregated neighborhoods,[27] the promulgation of official real estate codes of ethics forbidding the sale to blacks of houses in white areas,[28] the enforcement of racially restrictive convenants,[29] and joint activity with the Federal Housing Administration which for decades

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[22] Letter of Atorney General Griffin Bell to Hon. James O. Eastland, p. 4.
[23] Hearings, June 16, p. 57.
[24] An earlier version of this bill, S. 1132, was limited to discrimination by school officials, 123 Cong. Rec. S. 4889–90. (Daily ed., Mar. 25, 1977.)
[25] *Evans* v. *Buchanan*, 393 F. Supp. 428, 435 (D. Del. 1975), aff'd 423 U.S. 963 (1975); *Arthur* v. *Nyquist*, 415 F. Supp. 904, 963 (N.D.N.Y. 1976); *Morgan* v. *Hennigan*, 379 F. Supp. 410, 472 (D. Mass. 1974); *Hart* v. *Community School Bd. of Brooklyn*, 383 F. Supp. 699, 721–26, 747–52 (E.D.N.Y. 1974).
[26] *Arthur* v. *Nyquist*, 415 F. Supp. at 966–67; see also *Morgan* v. *Hennigan*, 379 F. Supp. at 471.
[27] *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143, 183 (W.D.Mich. 1973); *Swann* v. *Board of Education of Charlotte-Mecklenburg*, 306 F. Supp. 1299, — (E.D.N.C. 1969).
[28] *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. at 483.
[29] *Id.*, p. 181–82; *Swann* v. *Board of Education of Charlotte-Mecklenburg*, 431 F. 2d 138, 141 (4th Cir. 1970).

refused to approve housing loans in integrated areas.[30] The underlying rationale of these decisions is that a state "cannot parcel out its jurisdiction and deliberately achieve by bits and pieces what it could not do directly by statute. To allow each agency to plead constitutional violations of other agencies in exculpation of its own, would be to mock the Constitution of the United States". *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143, 185 (W.D. Mich. 1973).[31]

None of these decisions suggest that such proof of racial discrimination could be overcome by attempting to show that, while the officials involved were determined to keep black families from living in white neighborhoods, the officials were indifferent to where the black children involved would attend school.

The Committee report suggests that this unprecedented distinction is "a logical outgrowth of the concept announced by the Supreme Court in *Swann* v. *Board of Education*, 402 U.S. 1 (1971), namely that the schools should not be the vehicle for desegregating society as a whole." But the Court in Swann expressly insisted it was not deciding under what circumstances official discrimination in housing would warrant school desegregation.[32] In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), Justice Stewart, who cast the deciding vote, accepted the rule followed by the lower courts. "Were it to be shown, for example, that state officials had contributed to the separation of the races by * * * purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." [33]

In *Evans* v. *Buchanan*, 423 U.S. 963 (1975), the Supreme Court summarily affirmed a finding of unconstitutional discrimination in the Wilmington schools based on a district court opinion relying heavily on evidence of official discrimination in housing. In the present state of the law the "in education" limitation would thus be unconstitutional; and we see no legal ground for speculating that the Supreme Court intends to overturn the existing rule.

Even if it were constitutional, the limitation sought by section 1 would be entirely inconsistent with our national commitment against discrimination. In a community determined to maintain one race schools, section 1 could provide an incentive to engage in various forms of housing discrimination in the hope that the responsible officials

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[30] *Id.*, pp. 182–83; *Arthur* v. *Nyquist*, 415 F. Supp. at 961; *Morgan* v. *Hennigan*, 379 F. Supp. at 471; *Bradley* v. *Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971), rev'd on other grounds 418 U.S. 717, 728, n. 7 (1974).

[31] In *United States* v. *Texas Education Agency*, 467 F. 2d 848 (5th Cir. 1972) the Fifth Circuit branded the use of "neighborhood schools" in officially segregated neighborhoods "double discrimination". 467 F. 2d at 864, n. 22. In *United States* v. *School District of Omaha*, 521 F. 2d 530 (8th Cir. 1975), the Eighth Circuit indicated it believed Justice Stewart's opinion in *Milliken* to be the law, 521 F. 2d at 537, n. 11. See also *United States* v. *Board of School Commissioners, Indianapolis*, 474 F. 2d 85–86, 88 (6th Cir. 1973). In *Swann* the Fourth Circuit upheld a finding of liability based, *inter alia*, on the fact "that residential patterns leading to segregation in the schools resulted in part from Federal, State and local government action." 431 F. 2d at 141.

[32] "We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." 402 U.S. at 23.

[33] 418 U.S. at 755. The four other members of the Court opposing inter-district busing concluded that, because housing discrimination had not been relied on by the court of appeals, "the case does not present any question concerning possible state housing violations." 418 U.S. at 428, n. 7. The remaining four Justices concluded an inter-district remedy was appropriate even without such a housing violation.

could ultimately persuade a judge they were indifferent to the educational consequences of their policies. Such a rule would also tend to "reward" with all-white schools communities that engaged in such practices in the past. Six months ago the U.S. Commission on Civil Rights reported:

> The concentration of blacks and other minorities in the inner city is not in any significant measure the result of individual choice or even of income differences among the races. Rather, government at all levels has played a major role in creating racial ghettos and in excluding minorities from access to the suburban housing opportunities that government aid made possible. Although national policy has now changed to favor equal housing opportunity government has yet to undo the damage that its policies have inflicted over the past century; indeed in some areas government agencies continue to be partners to racially discriminatory activity.[34]

The Senate Select Committee on Educational Opportunity reached the same conclusion. "As in the case of school segregation housing segregation is seldom a matter of individual choice. It is clear that Federal, State, and local governmental practices, at every level, have contributed to the housing segregation which exists today."[35] We should not undertake to legitimize these past, and in some cases, continuing policies of racial discrimination by drawing technical distinctions among types of bigotry. There has been very little progress in recent years in altering the pattern of housing segregation often fostered by official discrimination, but even our best efforts will require decades to substantially reduce it. The disestablishment of the resulting segregated schools need not and should not be delayed that long.

The Attorney General has suggested that the bill's language is sufficiently vague as to permit a saving construction, but urges that that very vagueness warrants deletion of the limitation.

> Section one would allow a remedy involving transportation only where there is a "discriminatory purpose in education." Presumably this is an attempt to exclude from the court's consideration the actions of housing officials. The Court has recognized that actions of school officials may have an effect on the racial development of neighborhoods, which in turn affects school attendance patterns. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 202 (1973). If the legislation could be interpreted to permit the court to consider the interrelation of those factors, constitutional challenges could be defeated. Again, however, much confusion and time-consuming litigation will unnecessarily have been generated.

Even if the language were clear, the standard it purports to establish is entirely unworkable. While we find it unlikely in the extreme that any act of housing segregation was not motivated in part by a concern with the resulting segregation of school children, it is hard to imagine how such a concern could ever be proved or disproved. The Supreme Court has expressly noted that the search for an official

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[34] Statement on Metropolitan School Desegregation, p. 113 (1977).
[35] Committee print, Senate Select Committee on Equal Educational Opportunities, 92d Cong., 2d Sess., p. 121 (1970).

purpose is "often elusive", and that it is "rare" that a determination as to the presence or absence of discrimination is "easy". *Arlington Heights*, 45 U.S.L.W. at 4077. Given the difficulties of making such a determination, it would be virtually impossible to establish, not merely whether a housing official sought to exclude blacks, but why. Section 1 does not indicate which party would have to meet that burden, but it seems unlikely that either party could ever do so. If, as a literal reading of section 1 suggests, the court were required to go even further and decide which discriminatory motives were the "principal" ones, the mandated inquiry would manifestly exceed the abilities of judges or psychologists.

Section 2(a)

This section of the bill limits the use of busing to that "reasonably necessary to adjust the student composition by race, color or national origin of the particular schools [36] affected by the constitutional violation to reflect what the student composition would otherwise have been had no such constitutional violation occurred." This restriction, though consistent with the constitutional requirements in certain narrow circumstances, would in most cases interfere with the constitutionally mandated remedy.

The Supreme Court's most recent decision regarding northern school cases, [37] *Dayton Board of Education* v. *Brinkman*, 45 U.S.L.W. 4910 (1977), lays down a rather different rule regarding remedies for violations of the Fourteenth Amendment.

> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to *redress* that difference, and only if there has been a systemwide impact may there be a systemwide remedy.[38]

Dayton, like the bill, permits school officials to seek to prove that some racial imbalance would have existed in the absence of any constitutional violation, although that burden will of course be a very heavy one where the violations are substantial or of long duration. But *Dayton's* requirement that the remedy "redress" the violation goes considerably beyond the bill's limitation that busing be used only to recreate the racial distribution which might have existed.

The bill proceeds on the assumption that the only violation to be remedied is the assignment of students among schools whose location or facilities are not in dispute. In northern school litigation, however, one of the most common constitutional violations is the construction, expansion or closing of schools in such a way as to control the student

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[36] This phrase may contemplate a school-by-school analysis, a constitutionally impermissible requirement which we discuss with reference to section 2(b).

[37] The discussion which follows concerns the application of section 2(a) to northern school litigation. The sponsors apparently recognize that such a rule could not be applied to a southern school system which had failed to eliminate the effects of legally mandated segregation of the races. See pp. 6 and 7 *infra*.

[38] 45 U.S.L.W. at 4914 (italics added).

body or residential patterns.[39] One can only speculae what the racial composition would have been had the discriminatory building construction or demolition not occurred. Even if this were possible to determine with any accuracy, the bill's requirement that this pattern be reproduced is simply unintelligible when there are no schools at the locations to which section 2(a) permits using. Section 2(a) also makes no provision for a case in which the constitutional violation consisted of overcrowding or inadequate facilities at the predominantly black schools; in such a situation busing might be the only feasible remedy, but it would be outside the scope of the bill since the violation was not one concerning student composition.

Even in a simple case of discriminatory pupil assignment, such as through gerrymandering attendance zones, merely attempting to alter racial compositions of particular schools to what they would have been but for the violation will often not be sufficient "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). For example, the reversal of past unlawful pupil assignments "alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." *Milliken* v. *Bradley*, 45 U.S.L.W. 4873, 4877 (1977). For students who have spent most of their lives in segregated schools eradication of the psychological and educational effects of that discrimination will often require the infusion, for their remaining years in school, of a greater number of non-minority and non-disadvantaged students, than would have been present in the absence of segregation. In this instance, the Constitution would require busing to a greater extent than permitted by section 2(a).

Section 2(b) : Student Compositions of "Particular Schools"

Section 2(b) requires, inter alia, that a court make a "specific written finding of "the degree to which discrimination altered the student composition "of particular schools affected by such constitutional violation." This language seems to require, not merely the extremely difficult assessment of the effect of discrimination on the system as a whole, but separate speculation as to the racial composition of each school in the system. During the committee meeting of August 1, 1977, it was stated that this section was intended primarily "to force the lower courts to articulate their rationale for the extent of the order." [40] The committee report adopts this view of section 2(b), explaining that it is intended to require the specific findings of fact normally contemplated by Rule 52(a), Federal Rules of Civil Procedure, and to facilitate appellate review.

To the extent, however, that section 2(b) requires school-by-school adjudication, it seeks to impose on the federal courts a rule which the Supreme Court and lower courts have expressly rejected. In *Keyes* v.

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[39] See Senate Committee on Human Resources, Committee Print, 95th Cong., 1st Sess., Desegregation and the Cities, the Trends and Policy Choices, pp. 17–18 (1977).
[40] Transcript, p. 81.

School District No. 1, 413 U.S. 189 (1973), the Supreme Court emphasized:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student in the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district * * * the State automatically assumes an affirmative duly "to effectuate a transition to a racially nondiscriminatory school system". 413 U.S. at 200.

In *Dayton* the Supreme Court required an analysis of the effect of discrimination on the overall "racial distribution of the Dayton school population," 45 U.S.L.W. at 4914, but did not require special findings as to each of the 66 schools in the system. In *Morgan* v. *Kerrigan*, 530 F.2d 401 (1st Cir. 1976), the Boston Home and School Association unsuccessfully urged that it was entitled to try to prove that factors other than discrimination had caused the racial imbalance at particular schools. The First Circuit rejected that approach, noting that it would preclude the fashioning of a systemwide remedy, prevent granting relief to all victims of discrimination, and impose on the trial court a "task of unscrambling cause and effect [which] would be, to understate it, awesome." 530 F.2d. at 418. The Supreme Court denied certiorari on this issue. 44 U.S.L.W. 3708-09 (1970).

Attorney General Bell also objected to section 2 on this ground:

> The *Dayton* decision does not require the school-by-school determination required by S. 1651. Such a determination would be most difficult, if not impossible, for school districts where discrimination has occurred over decades, and many schools to which discriminatory practices were applied in the past have since been closed.
>
> If section [2] precludes a remedy where a determination cannot be made on a school-by-school basis but the record shows the overall segregative effect of the violation, the section could cause serious constitutional and practical problems.

Former Solicitor General Robert Bork, who generally supported the bill, nonetheless objected to this portion of it.

> Section [2] should not attempt to restore student compositions in "particular schools." It will often prove impossible to determine the exact effects of a violation upon a particular school and it will often be impossible or unwise to fashion a remedy with such specificity. The school may no longer exist or demographic shifts may have made its past history irrelevant for the degree of integration that would have existed in a school system in the absence of discrimination. The Constitution is concerned not with particular buildings but with the elimination of state discrimination in the educational process.

Section 2 and Southern desegregation

Whatever the nature of the remedial rules established by *Dayton*, they are expressly limited to school systems "where mandatory segregation by law of the races in the schools has long since ceased." 45 U.S.L.W. 4910, 4914 (1977). A case where a legally mandated dual system, or vestiges thereof, still exists, is controlled by *Swann*. That decision requires "[t]he district judge or school authorities [to] make every effort to achieve the greatest possible degree of actual desegregation" and to impose "a presumption against schools that are substantially disproportionate in their racial composition." 402 U.S. 1, 26 (1970). In such a school system it would be utterly impossible to reconstruct the degree of racial imbalance which might have existed but for 75 years of separate schools for black and white children. [41]

The sponsors and proponents of S. 1651 do not appear to claim that its restrictions should or could be applied to a school system that had failed to eliminate the remnants of a pre-*Brown* dual system. It was repeatedly urged that the new standards of S. 1651 were needed to regulate busing in northern urban areas, which presented factual and legal circumstances very different from those in *Swann* and other southern cases. [42] Professor Winter, while supporting the bill, distinguished the rules established by S. 1651 from those applicable under *Swann* to "a classic dual school system which had existed for generations", emphasizing that the use of racial balance formulas, which are not permitted under the bill, were appropriate in such cases "since the long history of an explicit dual system made it impossible even to speculate about what racial balance would have existed but for that history." [43]

While the standards established by S. 1651 could not constitutionally apply to the desegregation of such a dual system, and although there appears to have been no intent to do so, the language of the bill is not restricted to states in which separate schools were not required before *Brown*. Whether this was an oversight is not clear. The Department of Justice, however, has furnished the Committee with a list of 60 active cases to which S. 1651, as drafted, would apply, and 45 of these arise in southern school systems which were operated on a segregated basis prior to *Brown* and in which the vestiges of that de jure discrimination have not yet been eliminated. [44] It appears that in a majority of the cases within the literal scope of S. 1651 its application would clearly be unconstitutional and would probably be unintended.

Section 3 (a)

This section of the bill establishes the stay procedure applicable to inter-district busing orders. It alters the traditional procedure in two

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[41] The Boston Home and School Association conceded, and indeed insisted for this reason, that its school-by-school approach would be inappropriate for such a dual system. *Morgan* v. *Kerrigan*, 530 F. 2d 401, 416–17, n. 20 (1st Cir. 1976).

[42] Transcript of hearing of June 15, 1977, pp. 6–7; Transcript of Hearing of July 22, 1977, pp. 10–12.

[43] Transcript of Hearing of June 16, 1977, pp. 39–40.

[44] Letter of Assistant Attorney General Drew S. Days, III, to Hon. James O. Eastland, Aug. 5, 1977, appended hereto. Of the cases listed 14 are in Alabama, 9 in Texas, 7 in Louisiana, 4 in Mississippi, 3 in Missouri, 2 in Florida and Tennessee, and 1 each in Arkansas, Georgia, Kansas, and Delaware.

ways: (1) The district court is removed from any role in deciding whether an inter-district busing order should be implemented pending apeal, that decision being made in the first instance by the court of apeals or Supreme Court; (2) until that decision has been made by the appellate court, the order is automatically stayed. Two explanations were advanced in committee and in the report for this special procedure. First, it is argued that implementation of inter-district busing orders entail a greater risk of irreparable injury to the defendants due to "merger of separate school districts, major alterations of tax rates and teachers' salaries, wholesale reorganization of teacher and pupil assignments and vast changes in the internal administrtive structures of the school districts involved." [45] Second, it was urged that a district court would be very unlikely to grant a stay of its own order, and a court of appeals would be equally unlikely to grant a stay which had been denied below.[46]

In light of the Supreme Court's decisions in *Griffin*, *Green*, and *Alexander*, any legislation mandating further delay in school desegregation is unconstitutional. The original stay provision of S. 1651, requiring a stay pending any appeal of every busing order, regardless of the facts or the frivolous nature of the appeal, would have been invalid for this reason.[47] Once a federal court has concluded that a school board is in violation of the Fourteenth Amendment, implementation of relief must ordinarily begin immediately, and only an article III court, acting in light of problems of irreparable injury and likely result on appeal presented by each particular case, can permit any delay.

Section 3 (a) imposes a substantial and unwarranted burden on the appellate courts. An analysis of the dangers of irreparable injury to the various parties, and of the nature of the issues which will arise on appeal, requires an intimate familiarity with the facts of each case. The factual records in school desegregation cases are often extremely voluminous. The federal courts have traditionally required that stay applications be made in the first instance to the trial court because it has a unique familiarity with the circumstances involved. While a district court decision granting or denying a stay is subject to appellate review, that decision itself is often of great assistance to the appellate court in delineating the legal and factual issues and pointing to the important portions of the record. We see no reason to impose on the appellate courts the additional burden of resolving stay applications without the benefit of the views of the district judge most familiar with the case.

Nothing inherent in the nature of inter-district busing orders warrants such interference with the normal allocation of judicial responsibility. While some inter-district busing orders may impose unusual burdens on the parties involved, certainly some orders, such as routine modifications under a court's continuing jurisdiction, do not, and there is no reason to believe that the Federal trial and appellate courts are incapable of distinguishing cases which involve unusual irreparable injury from those which do not. Similarly, whatever may be the

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[45] Committee report, p. 8. See also transcript of meeting of July 28, 1977, pp. 20, 21, and 38.

[46] Transcript of meeting of Aug. 1, 1977, pp. 18–21.

[47] Op. cit.

dangers that a trial court would not stay its own order, no ground is suggested for concluding that that danger is greater in school or inter-district busing cases. In fact, in the Wilmington, Delaware school integration case, *Evans* v. *Buchanan*, the District Court stayed its own inter-district busing order, affirmed by the Court of Appeals, until all final appeals were taken.[48]

Both of the issues raised by the majority are important and entirely relevant to the granting or denial of a particular stay, but they are issues which ought to be resolved by a case-by-case approach, analyzing the particular circumstances of each stay application, which the courts traditionally apply. They cannot be dealt with properly by the sort of across-the-board rule embodied in section 3(a).

Section 3(a) provides also that any inter-district busing order must be stayed until "all appeals in connection with such orders have been exhausted." Jack Greenberg, Director of the NAACP Legal Defense and Education Fund, testified that "[t]his is a requirement for a stay * * * no matter what the actual issue being appealed, no matter how remotely the particular order involves transportation."[49] For example, if the school board was appealing only a small provision of an inter-district busing order unrelated to busing, the entire order would be stayed. A stay would also be mandatory where there was an appeal of an omnibus desegregation order of which inter-district busing was a small part. This provision is even so broad as to impose a stay if the appealing party were the plaintiff complaining that a busing order did not go far enough. It would clearly be unfair and unreasonable to provide that a plaintiff who had won limited relief would have even that stayed if he appealed for more. While such a stay could be vacated under section 3(a), there seems no plausible basis for imposing such a burden on a plaintiff.

Section 4: Retroactivity

Section 4 of the bill annuls every order that is "not yet final or which has not yet been effected" unless and until the requirements of §§ 1 and 2 are satisfied. The majority report makes it clear that this provision is to be applied to all of the many cases in which appeals on various issues are still pending. The provision may also apply even to the numerous cases in which a plan is being implemented because as the Department of Justice pointed out:

> Unlike other civil proceedings which are closed by entry of a final judgment, school desegregation proceedings normally remain under the active jurisdiction of the district court even after the entry of the order directing the implementation of a desegregation plan. * * * The plan, therefore, is always subject to modification: the entry of the initial desegregation plan may not be the "final" order in the case.[49]

Litigation will obviously be necesary to resolve that ambiguity as well.

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[48] Prior to the August stay, Wilmington, Del., was the only known pending case to which this section would apply.

[49] Transcript of hearing of July 22, 1977, p. 91.

[49] Letter from Drew S. Days, III, Assistant Attorney General, Civil Rights Division, to Honorable James O. Eastland, August 5, 1977.

Of section 4, Attorney General Bell wrote:

> This section could well cause substantial delay, and relitigation, of final orders which have found unconstitutional segregation and have ordered the implementation of a remedy. Such relitigation, and the uncertainty that would cause to communities which have already gone through desegregation proceedings but whose remedial plans have not yet become finally "effected," would be costly, unnecessary, and damaging.

In many ways, this section is the most troublesome in the entire bill, for it could create legal chaos and community disruption in all of the many cities in which desegregation is proceeding peacefully and with acceptance by the community.[50] In almost all communities in which a court has ordered transportation for the purpose of desegregation, the community has accepted it calmly, either initially or after a period of time. Pupil assignments have been made, attendance zones have been established, teachers have been assigned, routes have been set up—in short all aspects of the school system have been structured in accordance with the order.

Section 4 would upset all of this. It would require the immediate setting aside of the judgment or order pursuant to which the school system was structured and with it, perhaps the entire newly adopted structure. Immediately upon "the date of enactment", the pupil and teachers assignments, bus routes, and attendance zones set up to comply with the order or judgment would all be subject to being set aside, for the order would automatically be vacated pending a new hearing and findings.

Equally important, new and lengthy hearings will have to be held to comply with the substantive and procedural requirements of §§ 1 and 2, the rulings in which would all be subject to appeals. If these provisions are ultimately construed to merely restate current law—and a definitive construction could not come for several years—then the result will be simply a waste of precious and scarce school board and other litigants' money and time, an additional burden on an already staggering judicial system, and another lengthy delay in the already long-delayed process of desegregation. On the other hand, if §§ 1 and 2 create new standards, there may well be even further delay to determine the scope and constitutionality of these new standards.

Perhaps worst of all, passions and animosities which may have been reduced and assuaged, will be stirred up again. Instead of "reason and order", irrationality and disorder will be fomented.

Additionally, § 4 will reward the dilatory and penalize the law-abiding. Cities which have refused to put any plans into effect will suffer no disruption or upset, whereas cities that either initially or finally decided to comply, will. And since experience indicates that in almost all cases the original findings and order will probably be reaffirmed, all of this will be unnecessary.

In this aspect also, the Committee has acted in a manner inconsistent with the Supreme Court's approach. In the *Dayton* case, which the Committee majority purports to be following, the Court remanded because the lower court findings did not sufficiently support the reme-

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[50] A partial list of the cities likely to be affected by this provision appears in the letter to Chairman Eastland by Assistant Attorney General Drew S. Days, III, dated Aug. 5, 1977, and reprinted as part of the appendix hereto.

dial order, which required a substantial amount of busing. Nevertheless, the Court explicitly left the transportation order in effect because "it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems." 45 U.S.L.W at 4914. Obviously, the Court did not want its action to produce the kind of disruption and disorder that results from setting aside arrangements already in operation will surely produce, and which this bill will inevitably produce.

CONCLUSION

S. 1651, though bearing but a single number, is in reality two very different bills. The first is an Anti-Busing Act, designed to overturn in whole or part virtually every Supreme Court desegregation decision from *Green* v. *New Kent County*, 391 U.S. 430 (1968) to *Dayton Board of Education* v. *Brinkman*, 45 U.S.L.W. 4910 (1977). The second proposal is a School Desegregation Codification Act. The first measure is unconstitutional and the second is unnecessary. The Senate should not pass either bill; it certainly ought not pass both.

While any effort to slow or reverse progress toward an integrated society would be contrary to our moral and constitutional commitments, the bill's effort to single out busing for special treatment involves a number of particular inequities. Any restraint on a court's option to use busing necessarily "rewards" communities which have imposed racial segregation in housing and public officials who have failed to enforce open housing laws, and encourages other communities and officials to do so. In an area experiencing a shifting white enrollment, a delay in busing will mean that busing, when finally implemented, will have to be even more widespread. Perhaps most important, any unconditional limitation on the possible use of busing substantially reduces the existing incentive to find, aid and encourage other methods of integrating urban school systems.

We are not insensitive to the problems that school desegregation will bring in the years ahead, and we do not think that they can be dismissed by merely calling into question the motives of those opposed to busing. But neither are we unaware that these concerns have been successfully overcome in years past. During the more than two decades since *Brown*, the dismantling of dual school systems wrought great changes in over a dozen Southern States, States whose history and traditions made integration particularly controversial. The conviction on which *Brown* was founded, that racial harmony and educational equality can be expanded by educating our children together, has been vindicated by the experience of a generation of southern students, parents and teachers. Although that period was not without serious incidents, the process was less traumatic and disruptive than had feared. On September 12, 1963, President Kennedy praised the men and women involved.

> I would like to say something about what has happened in the schools in the last few days. In the past two weeks, schools in 150 Southern cities have been desegregated. There may have been some difficulties, but to the great credit of the vast majority of the citizens and public officials of these communities, this transition has been made with understanding and respect for the law. The task was not easy. The

> emotions underlying segregation have persisted for generations, and in many instances leaders in these communities have had to overcome their own personal attitudes as well as the ingrained social attitudes of the communities. In some instances the obstacles were greater, even to the point of physical interference. Nevertheless, as we have seen, what prevailed in these cities through the South finally was not emotion but respect for law. The courage and responsibility of those community leaders in those places provide a meaningful lesson not only for the children in those cities but for the children all over the country.[51]

We believe that the parents, students and teachers of the north are as capable today as were those of the South a decade ago of overcoming anxieties about the unknown, adapting to changed circumstances, and turning integration into an opportunity to unite their communities in improving education for all. This is not the time to burden the federal courts with unconstitutional and unnecessary legislation, but to finish the task, set for us by *Brown* 23 years ago, of confronting the unfounded fears of integration, the unsatisfied aspirations of the educationally deprived, and the unacceptable gap between social realities and the principles to which we are commited by the fourteenth amendment.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Thank you for your letter of July 10, 1977 conveying the committee's request that I present to the committee the views of the Department of Justice on S. 1651. This bill would directly affect the way in which the Department of Justice implements its responsibilities under prior congressional legislation relating to school desegregation, especially 42 U.S.C. § 2000c–6, 42 U.S.C. § 2000h, and 20 U.S.C. § 1706. I think it important that the committee fully air the important questions raised by S. 1651. Therefore, I appreciate the committee's interest in our views. Because of the short time available we were unable to send a representative to testify orally at the hearings held on July 21 and 22 and are therefore presenting our views to the committee by means of this letter.

In general, it is the position of the Department of Justice that enactment of S. 1651 would be undesirable, for several reasons. As detailed below, we question the need for this legislation; some provisions would be unwise; and others would raise serious constitutional issues.

The Department of Justice has attempted to formulate and urge on the courts legal rules which would insure that in remedying unlawful racial discrimination by school authorities the courts would pay due regard to practical and legal limitations on their remedial discretion. Most recently we urged that view in our *amicus* brief in the *Dayton* school desegregation case. A copy of that brief is attached for the

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[51] Public Papers of the Presidents, John F. Kennedy, 1963, pp. 672 and 673.

committee's information. The Supreme Court's opinion in that case described the role of the lower courts as follows:

> The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation' [*Milliken* v. *Bradley*], 418 U.S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16. See *Rizzo* v. *Goode*, 423 U.S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' 418 U.S., at 744; *Swann*, *supra*, at 16." *Hills*, *supra*, at 294. See also *Austin Independent School Dist.* v. *United States*, —— U.S. —— (1976) (Mr. JUSTICE POWELL, concurring).
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> The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis*, *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, *supra*, at 213.
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> We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

Dayton Board of Education v. *Brinkman*, 45 U.S.L.W. 4910, 4913–4914, decided June 27, 1977. In our view the Supreme Court decisions attempt to accommodate the competing interests at stake, in fashioning rules for remedying racial discrimination in the public schools, and it has asserted its control over the lower courts—reversing or remanding decisions in Detroit, Pasadena, Austin, Indianapolis, Dayton, Omaha, and Milwaukee to insure that the lower courts apply the correct legal doctrines in fashioning school desegregation remedies.

The first section of S. 1651 states that a remedy involving transportation may not be ordered by a court unless the court finds discriminatory "purpose." The requirement that discriminatory purpose be proven is already required by case law, and has been an accepted principle of constitutional litigation in the area of school desegregation since *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The bill, however, states that discriminatory purpose must be the "principal motivating factor." Under existing case law if racial discrimination

is proven to have been a factor in an official action, the burden shifts to the defendant to prove that the results of official action would have been the same had race not entered the decision-making process. See *Village of Arlington Heights* v. *MDHC*, 45 U.S.L.W. 4073, 4078, n. 21 (decided January 11, 1977). The Court has, on several occasions, said that attempting to characterize one factor in a decision-making process as "principal" or "dominant" is not usually possible. See *e.g.*, *Village of Arlington Heights* v. *MDHC*, *supra*, 45 U.S.L.W. at 4077, *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 462 (1972).

By adding the "principal motivating factor" language, S. 1651 would unnecessarily complicate the process of proof in school desegregation cases. If that language were interpreted to preclude relief unless the plaintiff were able to prove the weight accorded race by state or local officials, the bill could generate serious constitutional challenges as well as placing an unfair burden on the plaintiff. The provision could possibly be interpreted so as to secure its constitutionality, leaving on the state or local officials the burden of proving that racial factors were not the basis for their action. The litigative process to reach such an interpretation would, however, be time-consuming and, in light of the fact that the result would be to leave the law in precisely the state it is now, most unnecessary.

Section one would allow a remedy involving transportation only where there is a "discriminatory purpose in education." Presumably this is an attempt to exclude from the court's consideration the actions of housing officials. The Court has recognized that actions of school officials may have an effect on the racial development of neighborhoods, which in turn affects school attendance patterns. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 202 (1973). If the legislation could be interpreted to permit the court to consider the interrelation of those factors, constitutional challenges could be defeated. Again, however, much confusion and time-consuming litigation will unnecessarily have been generated.

Section two of the bill would require the convening of a three-judge court to order a transportation remedy. Only last year Congress took the salutory step of eliminating most three-judge district courts, in response to widespread recognition of the waste of judicial time, the inappropriateness of by-passing the courts of appeals, the peripheral procedural issues engendered and the undesirability of allowing direct appeal to the Supreme Court in most cases. The Department of Justice opposes the extension of three-judge court requirements under S. 1651.

Section 3(a), regarding fashioning of a remedy, states that the transportation remedy should be "no more extensive" than is necessary to "reflect what the student composition would have been had no such constitutional violation occurred." Congress previously enacted legislation stating that remedies ordered to repair denials of equal protection should be only what is "essential" to correct the particular denial of equal protection. Sec. 213 of Pub. L. 93–380, 20 U.S.C. 1712. The Court has consistently held that the remedy in school desegregation cases should be to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). See *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971). *Dayton*, *supra*, 45 U.S.L.W. at 4913. Accordingly, this portion of section 3(a) has no effect on existing law.

The latter portion of section 3(a) of the bill requires the remedy to achieve, for *particular* schools, the racial composition which would have occurred absent the constitutional violation. Section 3(b)(2) of the bill requires a court, before a remedy is ordered, to determine the racial composition each school would have achieved in the absence of constitutional violation.

In the *Dayton case*, *see* 45 U.S.L.W. at 4914, the Court stated that district courts must determine the "incremental segregative effect these [constitutional] violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference. . . ."

The *Dayton* decision does not require the school-by-school determination required by S. 1651. Such a determination would be most difficult, if not impossible, for school districts where discrimination has occurred over decades, and many schools to which discriminatory practices were applied in the past have since been closed.

If section 3 precludes a remedy where a determination cannot be made on a school-by-school basis but the record shows the overall segregative effect of the violation, the section could cause serious constitutional and practical problems. If interpreted in a manner consistent with *Dayton*, however, the section would be constitutional. However, as stated before, the *Dayton* decision, we believe, adequately incorporates the intent of section 3 and enactment of this legislation would serve only to unnecessarily complicate an already difficult area of school desegregation law on which the Court has just acted.

Section 3(b)(1) requires a court to make specific findings of the discriminatory purpose "for each constitutional violation for which transportation is ordered." This appears to require a finding of a specific violation separately directed at each school. Such specifically directed violations may not exist; segregation in particular schools may be the result of actions directed toward other schools, or even general, system-wide, policies. As long as the bill did not operate to preclude remedies based on such generalized discriminatory conduct, it would not be unconstitutional. However, it would, if enacted, more than likely generate substantial litigation in order to clarify its effects.

In addition, this provision appears to require that each action for which a transportation remedy is ordered must be an independent constitutional violation. School boards which previously discriminated are under an obligation "affirmatively" to eradicate the effects of their past discrimination, *Green* v. *County School Board*, 391 U.S. 430 (1968); actions which "neutrally" perpetuate or exacerbate existing state-imposed segregation are unacceptable. If S. 1651 would operate to preclude a remedy for such "neutral" actions unless those actions could be proven to be constitutional violations in themselves, the bill would alter existing legal standards. In *Washington* v. *Davis*, 426 U.S. 229, 243 (1976), the Court said that it did not require new proof of discriminatory purpose when a court seeks to remedy actions taken to frustrate a prior order to desegregate. This section of the bill may relieve school boards of their duty to affirmatively eliminate the effects of past discrimination. We would not support such a proposition.

Section 4 of the bill automatically would stay the implementation of all orders requiring transportation until the appeal process, or

the time for filing of an appeal, is exhausted. For example, in a case where a district court finding of extensive systemwide constitutional violations has been upheld by the higher courts, the district court would nonetheless be powerless to order immediate desegregation, since the defendants would be entitled to invoke the appellate process again and thereby obtain a stay. This section is contrary to past decisions holding that the process of school desegregation should no longer unnecessarily be delayed, *Alexander* v. *Holmes County*, 396 U.S. 19 (1969), *Green* v. *County School Board*, *supra;* it also would suspend the ordinary rules applying to stays in all other kinds of cases. This section could result in the denial of constitutional rights through delay of orders remedying constitutional violations. Congress has, in the past, been careful to limit such an automatic stay provision to cases of *de facto* segregation or cases where the district court misused its remedial power. See 20 U.S.C. 1752, *Drummond* v. *Acree*, 409 U.S. 1230 (Powell, Circuit Justice). By contrast, section 4 would probably be held unconstitutional.

Section 5 would apply the provisions of the bill to all orders not yet "final" or not yet "effected." In light of section 4, we can presume that "final" means that all appeals have not yet been exhausted. This section could well cause substantial delay, and relitigation, of final orders which have found unconstitutional segregation and have ordered the implementation of a remedy. Such relitigation, and the uncertainty that would cause to communities which have already gone through desegregation proceedings but whose remedial plans have not yet become finally "effected," would be costly, unnecessary, and damaging.

The subject of school desegregation, and the construction of remedies necessary to secure the constitutional rights of school children, is a subject which is of national significance. The Court's recent action in the *Dayton* case provides an important guide for lower courts to follow, and attempts to clarify several issues in this area. In the view of this Department, the enactment of this legislation would, without adding significant substance to already existing legal standards, unnecessarily and detrimentally complicate the area of school desegregation, generate unnecessary litigation, and unconstitutionally delay, in some instances, the vindication of constitutional rights. Accordingly, we oppose the enactment of the bill.

In fairness to the authors of the proposed legislation I should say that it was drafted without benefit of the Supreme Court's Dayton decision, which was not handed down until after the bill was introduced.

All good wishes,

GRIFFIN B. BELL, *Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., August 5, 1977.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: The Attorney General has asked me to respond to your letter of August 1, 1977, requesting a list of school desegregation cases in which final orders have not yet been entered or in which a desegregation plan has not yet been implemented.

While we have attempted in the attached list of desegregation proceedings, to list all cases we know of in the specified categories, it is probably not comprehensive and we cannot say for sure whether those cases would be affected by the provisions of S. 1651, in light of the ambiguities of the bill and the fact that we have not yet seen the amendments to S. 1651 referred to in your letter. The list we provide includes, for the most part, cases in which the United States has participated, either as a party or as *amicus curiae*. We have also included some cases filed by private individuals. These cases are ones of which lawyers in the Civil Rights Division happen to be aware, through contact with private lawyers or by discussion of the cases in the media. It does not approach a complete list, and I am sure there are many other private suits which could be placed on this sort of list.

One particular ambiguity with respect to coverage occurs in Section 5, which states that all provisions of the bill would apply to a judgment or order "not yet final . . . on the day before the date of enactment." Unlike other civil proceedings which are closed by entry of a final judgment, school desegregation proceedings normally remain under the active jurisdiction of the district court even after the entry of the order directing the implementation of a desegregation plan.

During the implementation of the plan, and while the school district is operating the plan, the case remains active, and no final judgment closing the case is entered. During this period the court, and the parties, will monitor the implementation of the plan; based on experience under the plan one of the parties may seek orders approving or requiring changes in the plan.

The plan, therefore, is always subject to modification; the entry of the initial desegregation plan may not be the "final" order in the case. The case will remain on the active docket until (a) the court is satisfied that the district is completely desegregated and (b) the desegregation plan has been properly implemented for a number of years. It is unclear whether section 5 would apply to motions to modify. If it does the provisions of the bill might be read to permit the reopening of any school desegregation case not yet removed from the active jurisdiction of a federal court.

We are continually reviewing our school cases to see if the implementation of desegregation plans complies with the guidelines developed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Where the implementation of a plan fails to meet these standards we attempt to secure compliance. There are several cases in which we are considering taking such action. Most of the cases listed in part I.A. of the list followed this pattern; if pleadings are filed in other cases presently under review, action taken in those cases would also be subject to the provisions of this bill, were it enacted.

Sincerely,

DREW S. DAYS, III,
Assistant Attorney General,
Civil Rights Division.

SCHOOL DISTRICTS IN WHICH ONGOING STUDENT DESEGREGATION LITIGATION WOULD BE POTENTIALLY AFFECTED BY THE PROVISIONS OF S. 1651

I. Suits in which some desegregation has been accomplished under court order but additional student reassignment issues have yet to be litigated or decided or final plans have not been implemented.

A. United States is a party or amicus curiae

Anniston, Ala.
Auburn, Ala.
Decatur, Ala.
Demopolis, Ala.
Linden, Ala.
Opelika, Ala.
Selma, Ala.
Tuscaloosa, Ala.
Conecuh Co., Ala.
Dallas, Co., Ala.
Hale Co., Ala.
Lee Co., Ala.
Marengo Co., Ala.
Mobile Co., Ala.
Conway Co., Ark.
Pasadena, Calif.
Waterbury, Conn.
Polk Co., Fla.
Seminole Co., Fla.
Valdosta, Ga.
Indianapolis, Ind.
Bossier Par., La.
DeSoto Par., La.
Lafayette Par., La.
Lincoln Par., La.
Pointe Coupee Par., La.
Rapides Par., La.
Omaha, Neb.
Clinton, Miss.
Columbus, Miss.
Laurel, Miss.
Natchez, Miss.
Ferguson-Florissant (St. Louis Co.), Mo.
Madison, Co., Tenn.
Shelby Co., Tenn.
Austin, Tex.
Beaumont, Tex.
Corpus Christi, Tex.
Houston, Tex.
Lubbock, Tex.
South Park (Beaumont), Tex.

B. Private suits (United States is not a party) [1]

E. Baton Rouge Par., La.
Lansing, Mich.
Buffalo, N.Y.
Dayton, Ohio
Dallas, Tex.
Milwaukee, Wis.

II. Suits in which no student desegregation remedy has yet been ordered (or if ordered, not implemented).

A. United States is a party or amicus curiae

Tucson, Ariz.
Kansas City, Kans.
Ferndale, Mich.
Kansas City, Mo.
St. Louis, Mo.
Cleveland, Ohio
Aldine, Tex.

B. Private suits (United States is not a party) [1]

Wilmington, Del.
Akron, Ohio
Cincinnati, Ohio
Columbus, Ohio
Youngstown, Ohio
El Paso, Tex.

Respectfully submitted by,

JAMES ABOUREZK.
JOHN C. CULVER.
BIRCH BAYH.
EDWARD M. KENNEDY.

[1] The lists of private suits includes only those Department attorneys are aware of through the public media and contact with counsel for parties to the suits.

ADDITIONAL VIEWS OF SENATOR MATHIAS

I personally have never believed that busing was the solution in itself. I think, at best, it is an educational tool to tide us over a period of transition, and as such I have supported it. But, in the same light, I look forward to its termination at a time when it is no longer necessary.

The true tragedy here is that so much energy and emotion are being expended on the debate over busing that virtually no collective creativity is being applied to finding a solution to the problem of providing quality education in a desegregated school system. I think that is the area in which we must apply ourselves.

Simply terminating busing prior to the time we have a solution to the problem of segregated education is leaving the problem where it is. That, in my mind, is no solution at all.

As indicated in the Minority Views of Senators Abourezk, Kennedy, Bayh and Culver, S. 1651 has serious constitutional defects, and protracted and time-consuming litigation will be required to resolve the bill's ambiguities. These facts, as well as the bill's failure to set forth an alternative to busing which would achieve the paramount goal of a quality desegregated educational system nationwide, lead me to oppose S. 1651.

Respectfully submitted,

CHARLES MCC. MATHIAS, JR.

ADDITIONAL VIEWS OF SENATOR HOWARD M. METZENBAUM ON S. 1651

I agree in substance with the legal analysis of this legislation set forth in the minority report, but I think it important to set forth my own views separately.

I have consistently opposed busing as the way to deal with school segregation because as a practical solution, it has not worked. But S. 1651 is no solution either. It is probably unconstitutional and would create many more problems than it would solve.

This is not only my view but that of the President of the United States and of the Attorney General of the United States. A statement issued by the White House on July 20, 1977, declared that:

> The President, upon the advice of the Attorney General, concurs with the Attorney General. He does not support the bill. He believes the bill is (1) unnecessary and undesirable because recent Supreme Court decisions, particularly *Dayton*, achieve substantially the goals the bill seeks to achieve. (2) Also, the bill's attempt to codify the decisions has ambiguities which will create unnecessary delays in the desegregation process.

Attorney General Griffin Bell is a life-long resident of Atlanta, Ga. As both a Southern lawyer and as a Federal judge he has had as much experience with school desegregation as any person in Government today. On July 26, he wrote the committee on behalf of the Department of Justice that almost every section of the bill would create serious constitutional, legal and practical difficulties. He summarized his objections as follows:

> In general, it is the position of the Department of Justice, that enactment of S. 1651 would be undesirable for several reasons. We question the need for this legislation; some provisions would be unwise; and others would raise serious constitutional questions.
>
> In view of the Justice Department, the enactment of this legislation would, without adding significant substance to already existing legal standards, unnecessarily and detrimentally complicate the area of school desegregation, generate unnecessary litigation, and unconstitutionally delay, in some instances, the vindication of constitutional rights. Accordingly, we oppose the enactment of this bill.

I share the views of the President and the Attorney General, that S. 1651 is undesirable, unnecessary, and probably unconstitutional.

I am particularly concerned with §§ 1 and 4 of the bill. The requirement of § 1 that a court find that discrimination "in education" was "a principal motivating factor" goes far beyond what the Supreme

Court decided in *Village of Arlington Heights* v. *Metropolitan Development Corp.*, 429 U.S. 252, 266 (1977), which required only a finding that discrimination be merely "a motivating factor." And no court decisions require that the discriminatory purpose be "in education". Many lower courts have found a constitutional warrant for a desegregation order in a finding of housing discrimination, and there are more than a few indications that this is consistent with the Supreme Court's view. See *Milliken* v. *Bradley*, 418 U.S. 717, 755 (1974) (Stewart, J., concurring); *Evans* v. *Buchanan*, 423 U.S. 963 (1975), aff'g 393 F. Supp. 428 (D. Del. 1975)

Section 4, which would undo all transportation orders already entered unless and until the substantive and procedural requirements of S. 1651 are met, will inevitably cause legal chaos and educational disruption and could produce community disorder in scores of cities.[1] As the minority report points out, desegregation is generally proceeding peacefully and with community acceptance. Setting aside all desegregation orders that are not yet final in order to comply with §§ 1 and 2 of the bill, may well require school boards to reassign pupils and teachers, redesign attendance zones, change construction plans, and in general, to undo months and years of planning. And all of this may have to be done again many years later, when the many motions and appeals on whether the orders at issue comply with the complex and ambiguous provisions of S. 1651 are completed.

Whatever my views on busing, I took an oath to support the Constitution. I cannot in good conscience support a bill that is full of constitutional, procedural, and practical infirmities.

HOWARD M. METZENBAUM.

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[1] See letters of Attorney General Griffin Bell and Assistant Attorney General Drew S. Days, III, in appendix.