Nos. 1, 2, 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1954

No 1
OLIVER BROWN, ET AL., APPELLANTS
v.
BOARD OF EDUCATION OF TOPEKA, ET AL

No 2
HARRY BRIGGS, JR., ET AL, APPELLANTS
v
R W ELLIOTT, ET AL

No 3
DOROTHY E DAVIS, ET AL, APPELLANTS
v
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL

No 4
SPOTTSWOOD THOMAS BOLLING, ET AL, PETITIONERS
v
C. MELVIN SHARPE, ET AL

No 5
FRANCIS B GEBHART, ET AL., PETITIONERS
v.
ETHEL LOUISE BELTON, ET AL

BRIEF FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

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CITATIONS

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No 1[1]

OLIVER BROWN ET AL, APPELLANTS

v

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL

BRIEF FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

This brief is filed in response to the Court's invitation to the Attorney General of the United States to participate in the further argument of these cases on the questions of relief It is now the settled law of the land that segregation of white and colored children in the public schools of a State or of the District of Columbia is unconstitutional There remain for consideration and decision only the questions as to the decrees that should be entered in these cases in order to achieve compliance with the Court's ruling

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[1] Together with No 2, *Harry Briggs, Jr, et al* v *R W Elliott, et al;* No 3, *Dorothy E Davis, et al* v *County School Board of Prince Edward County, et al;* No 4, *Spottswood Thomas Bolling, et al* v *C Melvin Sharpe, et al;* and No 5, *Francis B Gebhart, et al* v *Ethel Louise Belton, et al*

The views of the Government on these questions are set forth in this brief At the outset it may be helpful to state, in summary fashion, our answers to the questions formulated by the Court (347 U S 483, 495–96):

> 4 Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice? *No*
>
> (b) or may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? *Yes*
>
> 5 On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
>
> (a) should this Court formulate detailed decrees in these cases? *No*
>
> (b) if so, what specific issues should the decrees reach? ---
>
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees? *No*
>
> (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so, what

general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees? *Yes The provisions suggested for inclusion in the decrees are outlined at pp 27–29, infra*

I

THIS COURT HAS FULL POWER TO DIRECT SUCH RELIEF AS WILL BE MOST EFFECTIVE AND JUST

Question 4 need not detain the Court long The Government, in its brief submitted on the previous reargument, reviewed the authorities bearing on the scope of the Court's remedial powers (Br 152–167), and concluded that the Court has "undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision" (Br 167) We noted that Congress has expressly empowered the Court, in fashioning effective relief in cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances" (28 U S C 2106) This provision reflects the breadth and flexibility of judicial remedies which are available to the Court The shaping of appropriate relief in the present cases, as all will agree, involves considerations of a most sensitive and

difficult nature. But, as was stated in our earlier brief (p 154), "we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice"

II

THE VINDICATION OF THE CONSTITUTIONAL RIGHTS INVOLVED SHOULD BE AS PROMPT AS FEASIBLE

The fashioning of relief in these cases does not call for the formulation or application of new or unusual legal principles On the contrary, the task confronting the Court is one which presents itself whenever it has been judicially found that legal rights have been, and are continuing to be, violated The question is always one of determining how, in the light of the facts presented and within the limits of the power possessed by it, the Court can best insure the removal of the condition of illegality in a manner comporting not only with the interests of the parties but also, to the extent it may be involved, with the public interest

In many instances the solution to this problem is quite simple The balancing of the relevant considerations may lead inescapably to the conclusion that the legitimate interests of all concerned require only immediate termination of the unlawful conduct In such circumstances a court of equity normally does no more than to enter a decree enjoining that conduct It is where the

scales are not so clearly tipped in that direction that the shaping of the appropriate remedy involves difficulties

The Court recognized, in restoring these cases to the docket for further argument (347 U. S. at 495), that "the formulation of decrees in these cases presents problems of considerable complexity" These problems must be viewed in proper perspective The starting point must be a recognition that we are dealing here with basic constitutional rights, and not merely those of a few children but of millions These are class actions. Under the Court's decision the maintenance of segregated schools is in violation of the constitutional rights not only of the individual plaintiffs but of all other "similarly situated" colored children upon whose behalf the suits were brought. Relief short of immediate admission to nonsegregated schools necessarily implies the continuing deprivation of these rights The "personal and present" right (cf *Sweatt* v *Painter,* 339 U S 629, 635) of a colored child not to be segregated while attending public school is one which, if not enforced while the child is of school age, loses its value Hence any delay in granting relief is *pro tanto* an irretrievable loss of the right

The unconstitutionality of racial segregation in public schools is no longer in issue However, in considering whether any delay in granting full relief is justifiable, it must be borne in mind that continuation of school segregation has harmful

express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights In similar fashion, psychological and emotional factors are involved—and must be met with understanding and good will—in the alterations that must now take place in order to bring about compliance with the Court's decision The practical difficulties which may be met in effecting transition to nonsegregated public school systems should therefore be taken into account in determining the most effective means for ending school segregation in particular areas The Court itself has recognized, in restoring these cases to the docket for further argument on the questions of relief, that these difficulties cannot be resolved by a single stroke of the judicial pen

Broadly speaking, therefore, the decrees in these cases should be framed to require a transition which achieves the most expeditious compliance with the constitutional mandate and at the same time permits the intelligent, orderly, and effective solution of the problems that may be encountered in desegregating school systems in particular areas.

IV

THE NATURE AND EXTENT OF THE PROBLEMS THAT THE DESEGREGATION OF PUBLIC SCHOOL SYSTEMS MAY ENTAIL WILL VARY FROM AREA TO AREA

As the Court has noted (347 U S at 495), there is a "great variety of local conditions,"

which will undoubtedly affect the nature and extent of the changes in public school systems and practices required to bring about compliance with its decision Without elaborating in detail the structure and organization of the educational systems of the States and the District of Columbia, it is not difficult to outline some of the kinds of problems which may arise in making a transition to nonsegregated systems.

1 The implementation of any program for the desegregation of public school facilities will be, of course, the responsibility of no single individual or administrative body Indeed, of all governmental activities, education is undoubtedly the most decentralized, its administrative and financial base being shared between the states and their political subdivisions And the extent of local participation is brought into perhaps sharper focus by the fact that of the approximately 120,000 governmental units tabulated by the Census Bureau in 1951, more than 70,000 were school districts [2]

The division of authority between state and local school officials customarily is delineated by the state legislature In most jurisdictions, the state board of education and school superintendent have the statutory duty of making the broad policy decisions affecting the state school system as a whole, enforcing state laws relating to the

[2] U S Department of Commerce, *Statistical Abstract of the United States* (1952), p 355

operation of schools and, in general, insuring that all school units meet certain minimal standards Local authorities, within the framework of state educational policy as embodied in statutes, regulations and directives, exercise control over the intimate details of school management within their district or other operating unit

The problems that will confront authorities on the state level thus will be principally ones of revising state laws and regulations which were tailored to fit the needs of a segregated school system In South Carolina, for example, the statutory formula now employed in the distribution of state funds for teachers' salaries requires that minimum enrollment and average daily attendance in each district be determined separately for each race [3] In several jurisdictions, the law provides for school officials whose duties are limited to the supervision of Negro schools; [4] in others, the legislature has provided for entirely separate Negro and white school districts encompassing the same area [5]

[3] South Carolina Code (1952), §§ 21–251, 290 Cf D C Code (1951 ed), §§ 31–1110, 31–1112

[4] See e g , D C Code (1951 ed), §§ 31–670, 31–671; Anno Code of Maryland (Flack ed , 1951), Art 77, §§ 42 (4), 208

[5] See e g , Mississippi Code (1942 ed) 6276 In some states separate Negro school districts are maintained even in the absence of a legislative requirement In Delaware, for example, there are at least 42 such districts It has been reported that at the next session of the Delaware General Assembly, legislation will be introduced to merge them with white school districts See *Southern School News*, September 3, 1954, page 3

2. Because local school authorities have considerable discretion respecting many facets of school administration, and because there is a wide variety in local conditions, it can be expected that, even within the same state, no two school districts will be faced with precisely the same problems in accomplishing an effective transition to nonsegregated school systems

(a) In districts where there is more than one school, adjustments in the method employed for allocating students to particular schools may have to be made In the majority of such districts, children are given little, if any, choice as to the school they are to attend Instead, each school in the district is assigned a particular attendance area and the pupil must enroll in the facility within whose attendance boundaries he resides

Many factors are taken into consideration in drawing these boundaries, foremost among them being the size and character of the school, the geographical distribution of the school population in the district, and the ease and safety of public travel to and from school In the case of segregated school systems, boundaries are formulated separately for white and colored facilities, with the result that the overall objective of making the maximum use of total school facilities and minimizing travel difficulties is seldom achieved Changes in the racial character of a neighborhood frequently cause overcrowding in some schools while others operate at far below capacity

Similarly, children of both races are often compelled to travel long distances to reach the segregated schools to which they are assigned

The extent of the boundary alterations required, in the reformulation of school attendance areas on a non-racial basis, will vary This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis In the neighborhoods where there is little or no mixture of the races, and where school facilities have been fully utilized, it was found that the elimination of the racial factor did not work any material change in the territory served by each school In biracial neighborhoods, however, the objective of securing maximum utilization of facilities, on a non-racial basis, could be achieved only by making radical revisions in the area covered by the formerly Negro and white schools

In connection with the formulation of new attendance boundaries, school districts may be called upon to review or alter prevailing practices regarding pupil transfers Because it is almost impossible to fix boundaries which do not work a hardship on any pupils, many communities now permit enrollment outside the attendance area of residence in exceptional circumstances Pupils on the secondary school level occasionally are allowed to attend a school at a distance from their homes because it offers courses of instruction not otherwise available Specialized needs of

mentally or physically handicapped children may cause them to be grouped together for instructional purposes And pupils not possessing an adequate knowledge of the English language sometimes are placed in separate schools until that knowledge is acquired While the allowance of transfers and special assignments for reasons of this character is fully warranted and undoubtedly will be continued, some districts may be confronted with efforts by students to attend schools in other areas for the sole and unjustifiable purpose of avoiding enrollment in a biracial facility

(b) At the same time that procedures are devised for the assignment of pupils to schools on a basis not involving distinctions of color, some districts may have to readjust the use of their facilities In low population rural areas now maintaining two schools solely by reason of the dual system, educational and economic considerations may dictate consolidation There are several ways in which this consolidation might be accomplished Where existing structures are small or otherwise inadequate, a new school might be constructed to accommodate all children Another solution might be to close one of the schools and transfer its pupils to the other

In areas where there is a considerable disparity in the quality and curricula of the former white and Negro schools, the problem of readjustment may be more troublesome Parents will

be understandably reluctant to send their children to schools markedly inferior to those previously attended, or which do not provide courses of instruction that would have been begun or continued if no transfer had been required While the long-range answer to a substantial part of this problem may be the improvement of substandard schools, or the construction of new ones, school administrators may have to devise stopgap methods—not involving continuation of racial segregation—to protect the interests of children now in school

(c) Teachers may have to be reassigned and changes made in the method of their selection, with due regard to the safeguarding of seniority and tenure rights In areas which now have separate eligibility lists for white and colored teachers, new lists combining applicants of both races may be established [6] Salary differentials

[6] This step was taken in both the District of Columbia and in Baltimore In the former, under the segregated system, Negro and white applicants for teaching positions took separate examinations conducted by separate boards of examiners Performance on these qualifying examinations determined position on the eligibility lists maintained for applicants of each race and the lists in turn provided the sole basis of appointment In June 1954, the boards of examiners were merged into a single board under the direct chairmanship of the superintendent of schools, teacher examinations were held on an integrated basis for the first time, and eligibility lists were consolidated For each level of

may have to be eliminated [7] And, on the supervisory level, in communities maintaining separate supervisors for Negro schools a general realignment of duties may be necessary [8]

(d) Most rural and some urban areas provide transportation to and from schools Communities which have maintained separate transportation facilities for the two races may have to reorganize schedules and routes And some localities may discover that there will be a need

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instruction, there is now but a single list on which no reference is made to the race of any of the named individuals

In Baltimore, the compilation of separate lists involved not only the grade received on a written examination, administered to white and colored alike, but in addition the results of an oral interview and the evaluation of the applicant's previous experience In combining the lists, Baltimore did not disturb these criteria; nor was a change made in the established practice of selecting any one of the five highest ranking qualified individuals to fill a vacancy

[7] In 1952, the average annual salaries of white and Negro classroom teachers in 12 Southern states were $2,740 and $2,389, respectively A part of this differential may be explained by the fact that the average amount of college training possessed by the white teachers was slightly higher And between 1940 and 1952, the gaps in both salary and training averages were substantially diminished See Ashmore, *The Negro and The Schools* (1954), pp 158–159

[8] Baltimore's dual system, for example, had five assistant school superintendents serving on a systemwide basis and one assistant superintendent for Negro schools

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for additional vehicles or, conversely, that less equipment will be necessary [9]

(e) A few school districts may have to compensate for differences in the educational backgrounds of newly integrated pupils In localities where the segregated Negro facilities were inferior, colored students may find it difficult to pursue satisfactorily the same studies as white students in the same grades School authorities faced with that problem may desire to give tests to determine the grade to which each student should be assigned Or such tests might be employed for the purpose of selecting students for additional and intensified instruction in subjects in which they are deficient

3 Because, as has been noted, the responsibility for the financial support of public education is distributed between the state and its subdivisions, the economic burdens incident to the implementation of integration also will fall upon several levels of government These burdens, however, will flow largely from the present inequality, in a physical sense, of separate Negro schools As a consequence, even if the dual system were to continue, many areas would be faced

[9] The requirement of additional equipment will be generally restricted, of course, to places where present facilities have not been sufficient to provide adequate transportation for all pupils It cannot therefore be regarded as, in any real sense, a problem arising from the elimination of segregation

with the necessity of making substantial outlays for capital improvements

Indeed, the financial cost of an "equalization" program for separate schools unquestionably would be far greater No matter how small the Negro population in the particular area, it would have to be provided with facilities and equipment equivalent in all respects to those provided in white schools In similar circumstances, a non-segregated school system may find that the educational needs of all children will be satisfied by merely closing down the former Negro school and transferring its pupils to other facilities

While, placed in perspective, economic considerations would seem to furnish less of an obstacle to the maintenance of integrated schools than to "separate but equal" schools, it should be noted that if expenditures per classroom unit are to be continued at current levels for white children, an additional annual expenditure of over 160 million dollars will be required in the states involved and the District of Columbia In respect to pupil transportation services, the estimated capital outlay is 40 million dollars And the estimated cost of "equalizing" Negro schools is in excess of two billion dollars [10]

4 In addition to problems of a purely administrative or fiscal character, school authorities

[10] These estimates have been furnished by the Office of Education, U S Department of Health, Education and Welfare

may have to cope with a certain amount of popular hostility towards the elimination of segregation in public schools This results from the fact that in each of the areas involved the dual system has existed for generations and is accepted by many as being a part of the "way of life" of the area And the fear has been expressed in some quarters that the opposition to any departure from the existing pattern will manifest itself in the withdrawal of state aid to education and in other action on state and local levels designed to prevent or impair the effective operation of public schools on a nonsegregated basis

We do not believe that there is warrant for presuming that responsible officials and citizens will tolerate violations of the Constitution [11] The solutions to these problems, like all others in a democracy, will emerge from the "sober second

[11] The well-publicized student disturbances which occurred recently in some localities certainly provide no basis for such a presumption For one thing, these disturbances were isolated; in the overwhelming majority of the areas which have begun or completed compliance with this Court's decision, the adjustment has been remarkably free of untoward incident Moreover, it appears to be the fact that the misconduct was in substantial measure incited by a small number of reckless and irresponsible individuals and groups, many from without the community, who took full advantage of some students' immaturity And, as is so often true in such circumstances, where school and law enforcement authorities made clear their determination neither to countenance nor to capitulate to lawlessness, the disturbances ended as abruptly as they had started

thought of the community, which is the firm base on which all law must ultimately rest" (Stone, *The Common Law in the United States,* 50 Harv L Rev 4, 25) Popular hostility, where found to exist, is a problem that needs to be recognized and faced with understanding, but it can afford no legal justification for a failure to end school segregation Racial segregation in public schools is unconstitutional and will have to be terminated as quickly as feasible, regardless of how much it may be favored by some people in the community There can be no "local option" on that question, which has now been finally settled by the tribunal empowered under the Constitution to decide it [12]

While general community hostility cannot serve as justification for avoiding or postponing compliance with the constitutional mandate, it is relevant in determining the most effective method for ending segregation in the particular

[12] "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges" *Buchanan* v *Warley*, 245 U S 60, 80–81

In any event, this would not be the proper occasion or time to adjudicate possible attempts to evade or circumvent this Court's decision Such questions, like all other questions of constitutional law, must be resolved when they arise concretely, in a factual setting, and when this Court can have the benefit of findings of fact and the judgment of the lower courts

locality School administrators will have an obvious concern in obtaining public support and acceptance of the transition The extent of the difficulties which may be encountered will depend, of course, upon the state of local opinion, which in turn is influenced by such varied factors as the economic structure, geographical location, and relative numbers of whites and Negroes in the community There is, however, a general recognition of the need for thoughtful advance preparations to resolve the problems of desegregation with as few disruptions as possible If any lesson can be derived from past experiences in ending segregated school systems, it is the importance of public confidence in the ability of school administrators to accomplish the adjustment without, in the process, losing sight of or sacrificing the basic and continuing educational needs of all the children affected [13]

[13] In presenting his program for integration for the approval of the Board of Education, the Superintendent of Schools of the District of Columbia laid emphasis on the consideration of the educational growth and welfare of the school child Thus, in justification of the proposal that each presently enrolled pupil be granted a limited option to remain in the school he now attends even though he does not reside within its new attendance boundaries, the Superintendent enumerated the ways in which this would provide "stability, continuity and security in the educational experiences of pupils during the transition period" (See brief for respondents in No 4, p 13)

While we do not describe the District of Columbia pro-

In some areas it may be found advisable to preface the desegregation process with programs, not extending for more than a few months, designed to promote interracial understanding among students, teachers, and parents Such preparatory measures were taken in many of the localities which have abolished segregated school systems in recent years In one New Jersey community, for example, funds were appropriated to allow several selected teachers to attend a special workshop on human relations conducted at a state university In addition, an extension course on the same subject was offered by school authorities during the year preceding desegregation and was well attended by teachers In other areas civic, P-TA, religious, and fraternal groups took the initiative in establishing a favorable climate for making the transition It was found that the efforts of these groups were instrumental in reducing many of the pre-existing racial tensions in the community, with the result that

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gram in detail here, since this is undertaken in the brief for respondents in No 4, we think it reflects credit upon those responsible for its formulation and execution In every significant respect, the plan evidences painstaking care on the part of school officials to realize the expressed objective of an expeditious transition calculated "to make the best use of the total resources of the school system in plant and personnel, to serve the best interest of all the pupils, and to promote the general welfare of the community" (See brief for respondents in No 4, p 11)

integration was accomplished speedily and with little or no serious friction or incident [14]

V

THE FORMULATION AND EXECUTION OF PROGRAMS FOR TRANSITION TO NONSEGREGATED SCHOOL SYSTEMS SHOULD BE UNDERTAKEN BY THE RESPONSIBLE SCHOOL AUTHORITIES UNDER THE SUPERVISION OF THE COURTS OF FIRST INSTANCE

For the reasons which have been summarized, it is clear that no single formula or blueprint is readily susceptible of application to all localities which must end segregation in their school systems The measures essential to bringing about an expeditious, orderly, and effective transition in any given area will depend on the special conditions and problems in that area And since there is wide variance in local conditions, what may be practicable in one community may be wholly inappropriate in another.

A prerequisite to the formulation, initiation, and supervision of any practicable program for ending segregation is a knowledge of the special problems and needs of the particular community. It is the responsible school authorities and the courts of first instance in each area who will have the greatest familiarity with local conditions and

[14] The transitional experiences of twenty-four communities in six states which within the past ten years desegregated their public school systems are the subject of a study conducted under the auspices of the Fund for the Advancement of Education of the Ford Foundation Williams and Ryan, *Schools in Transition* (1954)

who will be in the best position to evaluate their significance and effect in accomplishing desegregation in as short a period as feasible For this reason, this Court should not, either itself or with the assistance of a special master appointed by it,[15] delineate the precise steps that each of the defendants should take in ending segregation in the public school systems Instead, the primary responsibility for both devising and carrying out programs for the expeditious accomplishment of the required transition should be placed upon the defendants, to be exercised under the continuing direct supervision of the district courts or appropriate state courts

This Court, we believe, should lay down standards for the guidance of the lower courts in carrying out its decision A remand for further proceedings, without more, would add to the uncertainty and doubt which already exist and would only serve to make the process of adjustment more difficult

Specifically, the lower courts should be instructed to require the defendants either to admit

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[15] While we do not believe that the Court should appoint a special master to hear evidence, there can be no question of its power to do so In the 1948 revision of the Judicial Code, Congress expressly repealed R S 698 [28 U S C (1946 ed) 863] which had provided that "[u]pon the appeal of any cause in equity, * * * no new evidence shall be received in the Supreme Court" Act of June 25, 1948, c 646, § 39, 62 Stat 992 We find nothing to suggest that the legislative purpose was other than to remove the restriction entirely.

the plaintiffs, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as practicable In passing upon the acceptability of proposed programs, the criterion should be whether the defendants have sustained the burden of showing that their particular program will bring about the total elimination of racial considerations in the admission of pupils to public schools as rapidly as local conditions allow And in determining whether the projected plan represents the most expeditious means of accomplishing an effective transition, the courts should be permitted to take into account the scope of the administrative adjustments that are called for and the particular conditions existing in the community Where there are no solid obstacles to desegregation, delay is not justified and should not be permitted It is only where the lower court finds, upon clear and convincing evidence, that the defendants have met the burden of showing that immediate (i e, at the beginning of the next school term) completion of the desegregation program is impracticable, that any delay is justifiable And, in such a situation, the district court should fix the shortest practicable period for completing desegregation

Although it would be helpful if this Court could

specify outside limits for the period of desegregation, we do not think it would be feasible to do so at this time Apart from the fact that there is no way of judging at this point what integration will involve in the particular area, maximum periods tend to become minimum periods This Court should not enter any order which might have the practical effect of slowing down desegregation where it could be swiftly accomplished The Court, however, should make it clear that any proposal for desegregation over an indefinite period will be unacceptable, and that there can be no justification anywhere for failure to make an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible

Further, the lower courts should be instructed to be insistent that any interval permitted for the accomplishment of desegregation is being fully utilized Any period during which little or nothing is being done to further the transition would serve no useful purpose and, indeed, would only intensify the difficulties Whether time will be useful will depend on how it is used; delay solely for the sake of delay is intolerable Where a period of time is allowed for transition, it should be for the sole purpose of enabling necessary constructive measures to be taken, and not for the purpose of permitting postponement *per se.*

If the program for desegregation formulated by the defendants will remove, as expeditiously as possible, state-imposed or state-supported racial classifications of pupils in public schools, the lower courts should not substitute their judgment respecting the administrative features of the program for that of the school authorities The Constitution prohibits the maintenance of segregaged school systems It does not compel the adoption of any specific type of nonsegregated system The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools The essence of the Court's decision in these cases is that there be no governmental action which enforces or supports school segregation

This Court, we believe, should not in its present decrees give blanket approval to any particular programs for desegregation The determination of the necessity for, and constitutionality of, any specific plan should not be made *in vacuo* Flexibility in responding to developing circumstances may become important The experience in carrying out a plan, once it is begun, may alter the assumptions on which it was based. For example, it may develop, after a plan is in operation, that it can be carried out more quickly than was anticipated at the outset, as has been demon-

strated by the experience in the District of Columbia

VI

THE CASES SHOULD BE REMANDED TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS RAPIDLY AS THE PARTICULAR CIRCUMSTANCES PERMIT

For the reasons outlined above, the Government suggests that the Court should enter decrees (a) declaring that racial segregation in public schools is unconstitutional and that all provisions of law requiring or permitting such segregation are invalid, and (b) remanding the cases to the appropriate courts of first instance for such further proceedings and orders as are necessary and proper to carry out this Court's decision [16] The decrees should contain specific provisions substantially as follows:

(1) That the lower court shall forthwith enter orders directing the defendants to submit within 90 days a plan for ending, as soon as feasible, racial segregation of pupils in public schools subject to their authority or control

[16] In the Delaware case, No 5, *Gebhart* v *Belton*, the Attorney General of Delaware, in his brief for petitioners (pp 17–18), now agrees that the judgment of the state Supreme Court should be affirmed Accordingly, since the respondents did not file a cross-petition for certiorari, it would appear that in the Delaware case this Court should simply enter an order of affirmance

(2) That, unless a satisfactory plan is submitted to and approved by the lower court, it shall forthwith enter appropriate orders, by way of injunction or otherwise, directing admission of the plaintiffs and other children similarly situated to nonsegregated public schools at the beginning of the next school term.

(3) That, upon submission of a plan by the defendants, the lower court shall promptly hold a hearing to determine whether it provides for transition to a nonsegregated school system as expeditiously as the circumstances permit The defendants shall have the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required In approving any proposed program, the court shall make such modifications as may be required, and shall fix the earliest practicable date for completion of the program And no program shall be sanctioned which does not call for the immediate commencement of the procedures necessary to the accomplishment of the transition

(4) That during the period, if any, allowed for completion of the program for transition to a nonsegregated system, the lower court shall require the defendants to submit detailed periodic reports showing the progress made in ending segregation The court shall enter such fur-

ther orders as may be required from time to time in order to insure against unnecessary delay in the execution of the program

(5) That this Court shall retain jurisdiction for the purpose of making such further orders, if any, as may become necessary for carrying out its mandate To this end the lower courts should be required to submit information reports to this Court at specified intervals showing in detail the actions taken in bringing about compliance with the requirements of the Constitution (The Court may wish to appoint a special master to review such reports and to make appropriate recommendations thereon to this Court and to the lower courts)

CONCLUSION

The responsibility for achieving compliance with the Court's decision in these cases does not rest on the judiciary alone Every officer and agency of government, federal, state, and local, is likewise charged with the duty of enforcing the Constitution and the rights guaranteed under it. And, ultimately, it is the obligation of every citizen to respect and abide by the law, once it is authoritatively declared We have no doubt that the American people and the officials through whom they act will meet these responsibilities

in the spirit, to quote the words of the President, of "patience without compromise of principle" [17]

Respectfully submitted

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[17] New York Times, June 30, 1954, p 19

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