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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. Memo	Mike Horowitz to Branden Blum, re: Proposed Department of Justice Report on S. 139, the Public Shcool Civil Rights Act of 1983, 3 p.	3/16/84	PS CS 2/14/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
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- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Busing

March 16, 1984

MEMORANDUM FOR: Branden Blum
FROM: Mike Horowitz *MH*
SUBJECT: Proposed Department of Justice Report on S.
139, the Public School Civil Rights Act of
1983

Justice's proposed report correctly notes that this legislation raises serious legal questions. However, portions of the proposed report addressing Congress' authority to limit the imposition of busing by the courts go further than previous comments by the Attorney General addressing this issue (his letter of May 6, 1982 to Representative Peter Rodino regarding S. 951). Moreover, some language in the proposed report would appear to provide unnecessary support for "remedies" (e.g., assignment of teachers by race and busing) that are opposed by this Administration. The following are the minimum changes necessary to conform the proposed report to the positions already taken by the Attorney General:

1. Page 7. The following two paragraphs (taken directly from page 7 of the Rodino letter) should be inserted immediately following "II. Legal Status of School Assignments Based on Race":

In Brown v. Board of Education [II], 349 U.S. 294, 300 (1955), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley [I], 418 U.S. 717, 746 (1974). The Court has indicated that the principle that justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," Swann v. Charlotte-Mecklenburg Board, 402 U.S. 1, 16 (1974), and "a federal court is required to tailor 'the scope of the remedy' which included the transportation of students to schools other than the ones which they had formerly attended to fit 'the nature and the extent of the constitutional

violation," Dayton Board of Education v. Brinkman [I], 433 U.S. 406, 420 (1977), quoting Milliken v. Bradley [I], *supra* at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed ... remedial," Milliken v. Bradley [II], 433 U.S. 267, 280 (1977), that is, when it is aimed at making available to the victims of unlawful segregation a school system that is free of the taint of such segregation.

The following sentence should be deleted from the paragraph beginning "In Swann v. Charlotte-Mecklenburg Board of Education ..." (which, with the addition of the above two paragraphs, would become the third paragraph following "II. Legal Status of School Assignments Based on Race":

The court declared, for example, that school authorities have "broad discretionary powers" to establish an educational policy that each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." Id. at 16.

2. Page 8. The second sentence in the first paragraph of this page should be revised to read as follows:

In Swann, the Court rejected the view that, in the context of remedies for individual victims of unlawful discrimination, the Constitution required assignments on a "color-blind" basis or that it prohibited assignments designed to achieve a particular degree of desegregation.

The reference following that sentence (402 U.S. at 19) should be deleted.

3. Page 18. The second paragraph should be deleted in its entirety.

4. Page 19. The final paragraph should be revised to read as follows:

The limitation recognized by the Attorney General on the congressional power to control the jurisdiction and remedial authority of the inferior federal courts is fully applicable to S. 139: Congress cannot, consistent with Article III, impose on the courts the duty to exercise an essentially legislative function without any power in specific cases to remedy violations of individual legal rights. If without power to order "any remedy at all", the court would not retain the jurisdictional minimum of a "case or controversy" within the meaning of Article III.

See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-39 (1976) (Article III minimum requirement for standing is "actual injury redressable by the Court"); cf. Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington (August 8, 1793), printed in 3 Johnston, Correspondence and Public Papers of John Jay 488-89 (1981) (advisory opinions). The limitation on remedial authority contained in S. 139 could not, therefore, be supported under Article III if the limitation deprived the courts of "all effective remedial power". See Attorney General's letter at page 12. As noted above, S. 139 is more restrictive than S. 951 of the jurisdiction of the inferior federal courts. The elimination of assignment and transportation remedies, plus the specification of what remedies are available, combine to create a situation in which the remedial authority retained by the inferior federal courts is less than that which would have been retained under S. 951. Nonetheless, as with S. 951, "[t]his limited effect on the court's remedial power does not convert the judicial power -- to hear and decide particular cases and to grant relief -- into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases". Id. at page 12. Accordingly, the restrictions of S. 139 "appear to be firmly grounded in Congress' Article III § 1 power ... to control the inferior federal court jurisdiction". Id.

5. Page 26. The following should be deleted from the first, second, and third lines of this page:

the restrictions on the remedial authority imposed by §§ 3 and 5 on the power of federal courts to remedy constitutional violations;



LR. F. L.

Office of the Attorney General
Washington, D. C. 20530

6 MAY 1982

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This responds to your request concerning those portions of S. 951, the Senate-passed version of the Department of Justice appropriation authorization bill for Fiscal Year 1982, which relate to the mandatory transportation of school children to schools other than those closest to their homes ("busing"). One of these provisions relates to the remedial powers of the inferior courts and the other to the authority of the Department of Justice. This letter discusses the effect of these provisions as well as the policy and constitutional implications of the provisions as construed. The funding provisions of S. 951 will be addressed in a separate letter by the Assistant Attorney General of the Office of Legislative Affairs.

It is important to note at the outset that S. 951 does not withdraw jurisdiction from the Supreme Court or limit the jurisdiction of the federal courts to decide a class of cases. The provisions of the bill and its legislative history make clear that the effect of these provisions relate only to one aspect of the remedial power of the inferior federal courts -- not unlike the Norris-LaGuardia Act, enacted in 1932. Nor do the provisions limit the power of state courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. Careful examination of these provisions indicates that they are constitutional.

I. Busing Provisions of S. 951

The first provision, § 2 of the bill, entitled the "Neighborhood School Act of 1982," recites five congressional findings to the effect that busing is an inadequate, expensive, energy-inefficient and undesirable remedy. It then states that, pursuant to Congress' power under Article III, § 1 and § 5 of the Fourteenth Amendment, "no court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless" such assignment or transportation is voluntary or "reasonable". The bill declares that such assignment or transportation is not reasonable if

"(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or

(v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the student's residence with a grade level identical to that of the student."

Section 2(f) of the bill adds a new subparagraph to § 407(a) of Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a), authorizing suits by the Attorney General to enforce rights guaranteed by the bill if he determines that a student has been required to attend or be transported to a school in violation of the bill and is otherwise unable to maintain appropriate legal proceedings to obtain relief. The bill is made "retroactive" in that its terms would apply to busing ordered by federal courts even if such order were entered prior to its effective date. Section 16 of the bill supplements these provisions by providing that "[n]otwithstanding any provision of this Act, the Department of Justice shall not be prevented from participating in any proceedings to remove or reduce the requirement of busing in existing court decrees or judgments."

The second provision, § 3(1)(D), limits the power of the Department of Justice to bring actions in which the Department would advocate busing as a remedy:

"No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped."

II. General Comments

There appear to be ambiguities in the Neighborhood School Act's provisions for suits to be brought by the Attorney General challenging existing decrees. For example, it is unclear what, if any, obligations are placed on the Attorney General with regard to court decrees that offend § 2. Since the bill does not purport to prevent any governmental entities other than federal courts from requiring the transportation of students, the Attorney General's review of a complaint must include the inquiry whether the transportation is the result of federal court action. It is difficult to determine the party against whom the action is to be brought. The assignment violates the Neighborhood School Act only if it is required by court order. Does the Attorney General sue the court? If so, then what relief is appropriate? Does the bill permit an action against a school board even though its actions are not the subject of the bill's prohibition? If a school board is the defendant, then what relief is appropriate? Does the Attorney General ask that the school board be enjoined from complying with the court order? Does he ask for a declaratory judgment of the board's obligations under the order? If the latter is the case and the board wishes to continue its present assignment patterns, what will have been accomplished by the lawsuit? These questions illustrate the problems incident to the provisions that allow for collateral attack on existing decrees.

Serious concern arises also because of the limitation on the Attorney General's discretion contained in § 3(1)(D). This Administration has repeatedly stated its objection to the use of busing to remedy unlawful segregation in public schools. See Testimony of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, Concerning Desegregation of Public Schools, October 16, 1981. The express limitation on the Department's authority is unnecessary and may inhibit the ability to present and advocate remedies which may be less intrusive and burdensome than those being urged on a court by other litigants. Moreover, because the limitation is imposed only in the Department's one-year authorization, there is no force to the argument that a statutory provision is necessary to ensure that successive Administrations will also carry out congressional intent. Finally, to the extent that Congress does intend to effect a long-term substantive change in the law, the proper vehicle would seem to be permanent substantive legislation, not an authorization bill which must be reviewed annually by Congress and which becomes more difficult to

enact and thus less efficient for its necessary purposes when it is encumbered by extraneous matters.

III. Constitutionality

A. Textual Interpretation of the Neighborhood School Act

The Neighborhood School Act restricts the power of inferior federal courts to issue remedial busing decrees where the transportation requirement would exceed specified limits of reasonableness. That it does not purport to limit the power of state courts or school boards is amply demonstrated by its text and by statements of its supporters. Senator Hatch, in a colloquy with Senator Johnston, stated that "this bill does not restrict in any way the authority of State courts to enforce the Constitution as they wish" 127 Cong. Rec. S 6648 (daily ed. June 22, 1981). On the day that the bill passed the Senate, Senator Johnston echoed these remarks:

If a school board wants to bus children all over its parish or all over its county, it is not prohibited from doing so by this amendment. Nor indeed would a state court if it undertook to order that busing. The legislation deals only with the power of the Federal courts

128 Cong. Rec. S 1324 (daily ed. March 2, 1982).

The impact of the Neighborhood School Act on the federal courts is also limited. It withdraws, in specified circumstances, a single remedy from the inferior federal courts. The substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power only of the inferior federal courts, not the Supreme Court. There is strong textual support for this conclusion, because the bill recites that it is enacted pursuant to congressional power under Article III, § 1. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. The source of congressional authority relative to the jurisdiction of the Supreme Court is the "Exceptions Clause," Article III, § 2, cl. 2. The conspicuous

and apparently intentional omission of that clause as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

Moreover, there do not appear to be any direct statements in the legislative history to the effect that any restriction on the Supreme Court's jurisdiction was intended. To the contrary, there is an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle inferior federal courts has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court

This amendment would be only a slight modification of lower federal court jurisdiction. These inferior federal courts would no longer have the authority to use one remedy among many for a finding of a constitutional violation.

* * *

I would hasten to add that this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.

In short, this is a very, very narrow amendment, it only withdraws a single remedy which Congress finds inappropriate from the lower Federal courts.

* * *

Mr. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction.

127 Cong. Rec. S 6648-49 (daily ed. June 22, 1981)(emphasis added).

B. Legal Status of Transportation Remedies

In Brown v. Board of Education [II], 349 U.S. 294, 300 (1955), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley [I], 418 U.S. 717, 746 (1974). The Court has indicated that the principle that justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," Swann v. Charlotte-Mecklenburg Board, 402 U.S. 1, 16 (1974), and "a federal court is required to tailor 'the scope of the remedy' which included the transportation of students to schools other than the ones which they had formerly attended. to fit 'the nature and the extent of the constitutional violation,'" Dayton Board of Education v. Brinkman [I], 433 U.S. 406, 420 (1977), quoting Milliken v. Bradley [I], *supra* at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed . . . remedial," Milliken v. Bradley [II], 433 U.S. 267, 280 (1977), that is, when it is aimed at making available to the victims of unlawful segregation a school system that is free of the taint of such segregation.

The Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended would be unavoidable in order to vindicate constitutional rights. If school authorities have segregated public school students by race, they shoulder a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed discrimination," Swann, supra, 402 U.S. at 15. The Court has said that if this duty cannot be fulfilled without the mandatory reassignment of students to different schools, with the concomitant requirement of student transportation, this remedy cannot be statutorily eliminated. In North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Court overturned a North Carolina statute that proscribed the assignment of students to any school on the basis of race, "or for the purpose of creating a balance or ratio of race," and prohibited "involuntary" busing in violation of the statutory proscription. The Chief Justice, writing for a unanimous Court, concluded:

[I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of constitutional rights.

* * *

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio" will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As we noted in Swann, supra, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

402 U.S. at 45-46.

Although the Court has indicated that some student transportation might be a necessary incident to a desegregation decree, it has never stated with particularity what those cases might be, nor has it identified the limitations on busing orders in cases where transportation is constitutionally required. In Swann v. Charlotte-Mecklenburg Board, supra, for example, the Court declined to provide "rigid guidelines" governing the appropriateness of busing remedies. It stated only that busing was to be limited by factors of time and distance which would "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Limits on time and distance would vary with many factors, "but probably with none more than the age of the students." Id. at 31.

C. Congressional Power Under Section 5 of the Fourteenth Amendment

In light of the Supreme Court's conclusion that student transportation might in some circumstances be a necessary feature of a remedial desegregation decree, it is necessary to consider whether the limitation on the power of the inferior federal courts under the Neighborhood School Act would be justified as an exercise of congressional authority under § 5 of the Fourteenth Amendment. Section D, infra, focuses on Congress' power under Article III, § 1, which is broader in this context than § 5.

Section 5 provides that Congress "shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the Equal Protection Clause, which has been held to guarantee all students a right to be free of intentional racial discrimination or segregation in schooling. Brown v. Board of Education [I], 347 U.S. 483 (1954). The question is whether congressional power to enforce that right by appropriate legislation includes authority to limit the power of the lower federal courts to award transportation remedies generally and specifically in those cases in which some transportation is necessary fully to vindicate constitutional rights.

The cases of Katzenbach v. Morgan, 384 U.S. 641 (1966), Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); and Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion), firmly establish that the § 5 power is a broad one. Congress may enact statutes to prevent or to remedy situations which, on the basis of legislative facts, Congress determines to be violative of the Constitution. At the same time, these cases rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court.

The limitation on busing remedies contained in the Neighborhood School Act would be authorized under § 5 to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. The grant of power under § 5 to "enforce" the Fourteenth Amendment carries with it subordinate authority to determine specific methods by which that amendment is to be enforced. As an incident of its enforcement authority, therefore, Congress may instruct the lower federal courts not to order mandatory busing in excess of the § 2(d) limits, so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.

Moreover, federal and state courts would probably pay considerable deference to the congressional factfinding upon which

the bill is ultimately based in determining the scope of constitutional requirements in this area. The Court has stated that, so long as it can "perceive a basis" for the congressional findings, Katzenbach v. Morgan, supra, 384 U.S. at 653, it will uphold a legislative determination that a situation exists which either directly violates the Constitution or which, unless corrected, will lead to a constitutional violation. Similar deference would be appropriate for findings under this bill, notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which might have supported or undermined the specific limitations on federal court decrees contained in § 2(d) of the bill. It is likely, however, that the time and distance limitations contained in § 2(d) of the bill would serve as legitimate benchmarks for federal and state courts in the future in devising appropriate decrees. To this extent, the exercise of congressional power under § 5 would be fully proper and effective.

Nor does it appear that the Neighborhood School Act would be interpreted to "dilute" Fourteenth Amendment rights merely because it denies a certain form of relief in the inferior federal courts or includes certain retroactivity provisions in §§ 2(f) and (g). Congress cannot, under § 5, prohibit a federal district court from granting a litigant all the relief that the Fourteenth Amendment requires. Moreover, the state courts would remain open to persons claiming unconstitutional segregation in education after this bill becomes law, and would be empowered -- indeed, required -- to provide constitutionally adequate relief.

Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation. Congressional power to enforce the Fourteenth Amendment is not a power to determine the limits of constitutional rights. Although it includes the power to limit the equitable discretion of the lower federal courts to impose remedial measures which are not necessary to correct the constitutional violation, the courts must retain remedial authority sufficient to correct the violation. And although Congress can express its view through factfinding, but subject to the limitations set forth in § 2(d) of the bill, that busing is an ineffective

remedial tool and that extensive busing is not necessary to remedy a constitutional violation, it is ultimately the responsibility of the courts to determine, after giving due consideration to the congressional findings contained in this bill, whether in a given case an effective remedy requires the use of mandatory busing in excess of the limitations set forth in § 2(d) of the bill.

In sum, Congress, pursuant to § 5, can: (1) limit the authority of federal district courts to require student transportation where it is not required by the Constitution; and (2) adopt guidelines, based on legislative factfinding, as to when busing is effective to remedy the violation, which guidelines will tend to receive substantial deference from the courts. Section 5 does not, however, authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation. This authority must be found, if at all, in the power of Congress under Article III, § 1 to restrict the jurisdiction of the lower federal courts.

D. Congressional Power Under Article III, § 1

Congress' authority to limit the equitable powers of the inferior federal courts has been repeatedly recognized by the Supreme Court. Article III, § 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See also U.S. Const., Art. 1, § 8, cl. 9 (giving Congress power to "constitute Tribunals inferior to the supreme Court"). It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of the court's jurisdiction was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction was accepted by the Supreme Court in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). That view remains firmly established today.

Congress' power over jurisdiction has been further recognized, most notably in cases under the Norris-LaGuardia

Act, to include substantial power to limit the remedies available in the inferior federal courts. In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris-LaGuardia Act which imposed restrictions on federal court jurisdiction to issue restraining orders or injunctions in cases growing out of labor disputes. In two cases under the Emergency Price Control Act, the Supreme Court recognized the power of Congress to withdraw certain cases from the jurisdiction of the inferior federal courts and to prohibit any court from issuing temporary stays or injunctions. See Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944).

The provisions of the Neighborhood School Act appear to be firmly grounded in Congress' Article III, § 1 power, as interpreted in Lauf, Lockerty, and Yakus, to control the inferior federal court jurisdiction. The bill does not represent an attempt by Congress to use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power. The bill does not instruct the inferior federal courts how to decide issues of fact in pending cases. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

Nor does the bill usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. The bill does not withdraw the authority of inferior federal courts to hear desegregation cases or to issue busing decrees, so long as they comport with the limitations in § 2(d) of the bill. This limited effect on the court's remedial power does not convert the judicial power -- to hear and decide particular cases and to grant relief -- into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases. Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Neither the text of the bill nor the legislative history appears to support the conclusion that the bill requires an automatic reversal of any outstanding court order that imposed a busing remedy beyond the limits specified in the bill. Such an attempt to exert direct control over a court order would raise constitutional problems associated with legislative revision of judgments. E.g., Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (on petition for mandamus). The "retroactive" effect is felt instead through a change in the substantive law, in this case the law of remedies, to be applied by courts in determining whether to impose or to

revise a busing remedy, coupled with the grant of authority to the Attorney General to seek relief on behalf of a student transported in violation of the Act. Upon the Attorney General's application, the court would itself determine whether the busing remedy was consistent with the Act. The bill, therefore, does no more than require the court to apply the law as it would then exist at the time of its decision in a "pending" case. See The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

The busing remedy is "pending" and not final to the extent that the court has retained jurisdiction over the case or the order is otherwise subject to modification by the court in the exercise of its equity jurisdiction. See United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). Prior to or in the absence of relief by the court from a previously imposed busing order, the parties before the court would be required to continue to perform pursuant to the court's order. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

E. Constitutionality of § 3(1)(D)

Section 3(1)(D) of the bill prohibits the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The effect of § 3(1)(D) is only to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

The limitation would restrict the litigating authority presently conferred upon the Department by Title IV to seek all necessary relief to vindicate the constitutional rights at stake. At least in cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be restricted to this limited extent. Because the restriction does not entirely preclude enforcement actions by the United States, § 3(1)(D) does not impermissibly limit the Executive's "inherent" authority to remedy constitutional violations, to the extent recognized in United States v.

Philadelphia, 644 F.2d 187 (3d Cir. 1980), or New York Times v. United States, 403 U.S. 713, 741-47 (1971) (Marshall, J., concurring). And because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, § 3(1)(D) does not exceed the congressional power over the enforcement authority that is granted.

Where federal funds are provided, § 3(1)(D) would be constitutional if read to preserve the Government's ability to fulfill its Fifth Amendment obligations by initiating antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits. The Department would be authorized to seek alternative remedies and to comment on the sufficiency of these alternatives. If the alternative remedies to busing are inadequate in a particular case to vindicate the rights at stake, the court would retain authority, subject, of course, to the Neighborhood School Act provisions, to order a transportation remedy. The Department could be asked to comment on the sufficiency of this remedy if ordered by the court.

Moreover, § 3(1)(D) would not appear to disable the Department of Justice from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the administrative agency was precluded from terminating federal funds. See Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

F. Due Process Clause

Finally, both the limitation on the courts under the Neighborhood School Act and on the Department of Justice under § 3(1)(D) should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, see Bolling v. Sharpe, 347 U.S. 497 (1954), as a deprivation of a judicial remedy from a racially identifiable group. These provisions neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. See Harris v. McRae, 448 U.S. 297 (1980).

As the law has developed, the courts will review statutory classifications according to a "strict scrutiny" standard either if they create a racial or other "suspect" classification, e.g., Hunter v. Erickson, 393 U.S. 385 (1969), or if they reflect an invidious discriminatory purpose. E.g., Village of Arlington Heights v. Washington Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); cf. Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion). Satisfaction of the strict scrutiny standard requires a classification that is narrowly tailored to achieve a compelling governmental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

First, these provisions, unlike the provision found unconstitutional in Hunter v. Erickson, *supra*, do not contain a racial classification. Mandatory busing for the purpose of achieving racial balance is only one of the circumstances in which student transportation is placed off limits to Justice Department suits or district court orders. The proposals prohibit Justice Department suits or court orders for the transportation of students specified distances or away from the schools nearest their homes for any reason. Moreover, a racial classification would not result even if these provisions limited advocacy or ordering of mandatory busing only to achieve racial integration. The issue of what sorts of remedies the Justice Department should advocate or the federal district courts should order simply does not split the citizenry into discrete racial subgroups. Cf. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

Second, there appears to be no evidence of purposeful discrimination. Whatever might be the arguable impact on racial minorities, the legislative history to date contains no suggestion of an invidious discriminatory purpose. To the contrary, the sponsors and supporters of these measures endorsed the decision in Brown v. Board of Education, 347 U.S. 483 (1954), and repeatedly stated their abhorrence of *de jure* segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of the bill did not suggest that any invidious purpose was present.

Accordingly, the bill will not be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purpose. This test is a highly deferential one. It is reasonably clear that the defects in busing noted by the proponents of the bill and discussed above would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advanced other rationales to support the measure, including that mandatory busing is a excessive burden on the taxpayer; that it wastes scarce petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons appear to be legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

It should be noted in closing that these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

Sincerely,

A handwritten signature in cursive script, reading "William French Smith".

William French Smith
Attorney General



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on the constitutional and legal issues raised by S. 139, 98th Cong., 1st Sess., entitled the "Public School Civil Rights Act of 1983." ^{1/} We conclude, first, that the factual findings in the bill will probably be given deference by the courts. Second, deference will probably not be accorded to those legislatively determined "facts" which appear actually to be conclusions of law on matters which have been the subject of prior holdings of the Supreme Court. Third, the restrictions imposed on the power of the inferior federal courts to order a remedy requiring school assignments or transportation of students on the basis of race does not appear to be a valid exercise of Congress's power pursuant to § 5 of the Fourteenth Amendment. Fourth, to the extent that the restrictions deprive the court of effective remedial

^{1/} With minor differences in language, S. 139 is practically identical to S. 1760, 97th Cong., 1st Sess., entitled the "Public School Civil Rights Act of 1983." Substantive differences include the addition of the last section of S. 139, which precludes removal of actions brought in state court, and the deletion of § 3(b)(4) of S. 1760, which related to available remedies.

power in a particular case, the restrictions would also exceed Congress's power under Article III to regulate the jurisdiction of the inferior courts. Finally, an attempt by Congress to confer jurisdiction on state courts to reopen and reconsider an order previously imposed by a federal court would not be consistent with limitations imposed by Article III and separation of powers.

I. The Provisions of the Bill

S. 139 declares that the assignment of students to public school by inferior federal courts on the basis of, or with regard to, race, color, or national origin has been counter-productive in a number of ways to the educational process and to society and good race relations in general. It declares also that school assignments based on race are unconstitutional and that there are alternative remedies for prior unconstitutional segregation. The bill provides that previously entered court orders based on race may be reopened and must be set aside unless a high standard of proof is met for continuing the prior order. The bill further provides that cases brought under the Act in state court may not be removed to federal court.

More specifically, section 2 of the bill recites Congress's findings that assignment of students by federal courts based on race 2/:

1. "has failed to demonstrate educational benefits commensurate with the disruption caused by such assignment;" see § 2(1)(C);
2. "has contributed to a significant deterioration of public schools . . . by inducing large numbers of families to

2/ The bill repeatedly uses the phrase "on the basis of or with regard to race, color, or national origin." For convenience, we will shorten the reference to "on the basis of" or "based on" race.

migrate away from . . . districts" subject to court orders; see § 2(1)(E) 3/;

3. "has contributed to the deterioration of public education by removing the neighborhood school as the focus of such education;" see § 2(1)(F);
4. "has disrupted the education of countless schoolchildren who must endure lengthy transportation . . . and must often forego participation in extracurricular activities . . . ;" see § 2(1)(G);
5. "has eroded community commitment to public schools and public education;" see § 2(1)(H);
6. "interferes with the right of parents to make decisions regarding the education of their children;" see § 2(1)(I);
7. "disrupts racial harmony by characterizing and classifying students on the basis of race or color and assigning them to schools on such basis;" see § 2(1)(J) 4/;

3/ The bill also contains a separate finding that

"whatever the basic cause of racial imbalance in the public schools, assignment of students to public schools on the basis of or with regard to race, color, or national origin results in more segregation of the races by inducing large numbers of families to migrate away from school systems subject to such assignment or by inducing large number[s] of families to seek alternatives to public school education."

See § 2(4). We might point out the typographical error in this subsection of the bill.

4/ This section does not refer to national origin.

8. "diverts significant amounts of financial resources away from direct improvement of the quality of education;" see § 2(1)(K);
9. "usurps the responsibilities and traditional functions of State and local authorities to provide an educational system meeting the distinct needs of the community;" see § 2(1)(L); and
10. "undermines public respect for the Government and its system of administering law and justice." See § 2(1)(M).

Additional congressional findings include the declarations that:

1. the assignment of students on the basis of race "violates constitutional and legal guarantees that individuals shall not be denied equal protection of the law [and] that individual rights shall not be abridged on the basis of [race];" see § 2(1)(A)-(B);
2. "past unconstitutional segregation, such as racial segregation enforced by law, is not a significant cause of existing racial imbalances in public schools;" see § 2(2); and
3. "since assignment of students to public schools on the basis of or with regard to race cannot be justified as a means of preventing or undoing racial discrimination by school authorities, such assignment is itself an unjustifiable practice of racial discrimination by the Government in violation of the fourteenth amendment." See § 2(3). 5/

5/ Section 2(3), for some reason, mentions only race, not color or national origin.

Section 3(a) of the bill recites Congress's finding that certain remedies are available for unconstitutional segregation "exclusive of court orders which assign students to public schools [on the basis of race]." ^{6/} As described in § 3(b), the acceptable remedies are limited to

"(1) legal injunctions suspending all implementation of a segregative law or other racially discriminating Government action;

"(2) contempt of court proceedings where such injunctions are not scrupulously obeyed;

"(3) programs without coercion or numerical quotas or specific goals based on racial balance that permit students to voluntarily transfer to other schools within the school district where they reside; and

"(4) other local initiatives and plans to improve education for all students without regard to [race]."

Section 4 states that Congress is acting pursuant to its authority under Article III of the Constitution and section 5 of the Fourteenth Amendment in order to protect public school students against discrimination on the basis of race.

Section 5 would amend 28 U.S.C. § 1343 by adding the prohibition that no inferior court established by Congress shall have jurisdiction to issue any order requiring the assignment or transportation of any student to public elementary or secondary schools, or excluding any student from public school, on the basis of race. The section further provides that any individual or school board or other school authority shall be entitled to seek relief "in any court" from such orders entered

^{6/} The meaning of § 3(a) is not entirely clear. We assume that the phrase "exclusive of court orders" which assign students based on race means "to the exclusion of" such orders. We may wish to communicate a suggestion regarding the clarity of the language employed.

prior to the enactment of the bill. Relief consistent with S. 139 7/ shall be granted with respect to existing decrees unless the court can make certain "conclusive findings" based on clear and convincing evidence. First, a finding is required that the acts which gave rise to the existing order intentionally and specifically caused, and in the absence of the order will continue to cause, students to be assigned or excluded from public school on the basis of race. For purposes of the subsection, such acts include "school district reorganization, school boundary line changes, school construction, and school closings." Such acts do not include, however, "legitimate efforts to employ public education resources to meet public education needs without regard to race, creed, or national origin." 8/ Second, a finding is required that the totality of circumstances has not changed since the issuance of the order to warrant reconsideration of the order. 9/ Third, a finding is required that no other remedy, "including those mentioned herein," would preclude the intentional and specific segregation. And fourth, a finding is required that the economic, social, and educational benefits of the order have

7/ The bill provides that "such plaintiffs shall be entitled to relief which is consistent with the provisions of this subsection and the Public School Civil Rights Act of 1981." We assume that the date was erroneously not changed when this provision was copied from S. 1760. If the correct date is "1983," S. 139 should be amended accordingly.

8/ We are unclear just what the exception for "legitimate efforts" is intended to encompass. The scope of the exclusion should be clarified in the legislative history or the text of the bill itself. We also observe that this provision is the only reference in the bill to "race, creed, or national origin." (emphasis added.) The remainder of the bill generally refers to "race, color, or national origin," a phrase which probably more closely conforms to the legislative intent. If so, proposed paragraph (b)(1)(2) should be amended accordingly.

9/ There is a grammatical error in this subsection of the bill, which, as drafted, requires the court to find that "the totality of circumstances have not changed." (emphasis added.)

clearly outweighed the economic, social, and educational costs of the order. 10/

Finally, the sixth section (erroneously numbered § 5) of the bill would amend 28 U.S.C. § 1445 (erroneously referred to as § 1455) by adding subsection (d) to provide that a civil action brought in state court seeking relief under S. 139 may not be removed to federal court.

II. Legal Status of School Assignments Based on Race

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (Swann I), the Supreme Court discussed the legal status of school assignments based on race. The objective, where there has been unlawful segregation on the basis of race, is "to eliminate from the public schools all vestiges of state-imposed segregation." Id. at 15. As the Court noted in Swann I, the basis for the holding in Green v. County School Board, 391 U.S. 430, 437-38 (1968), was that where there has been prior state-imposed segregation, school authorities have the "'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" Swann I, supra, at 15. The Court declared, for example, that school authorities have "broad discretionary powers" to establish an educational policy that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." Id. at 16. A court, in evaluating the constitutional sufficiency of actions by school authorities, will be guided by whether the remedy is "'feasible' and, by implication, 'workable,' 'effective,' and 'realistic' in the mandate to develop 'a plan that promises realistically to work, and . . . to work now.'" Id. at 31, quoting Green, supra (emphasis in original).

10/ Given that this section of the bill seems to be intended to require the court to determine whether the busing order is appropriate prospectively, it might be clearer if this finding were phrased to produce a balancing of the costs and benefits in the present and the future, rather than the past, as the bill as drafted seems to require.

Race or color may be considered in the search for remedies for unlawful segregation. In Swann, the Court rejected the view that, in the context of remedies, the Constitution required teacher assignments on a "color-blind" basis or that it prohibited assignment of teachers to achieve a particular degree of faculty desegregation. 402 U.S. at 19. "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." Id. at 25. Moreover, "attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools" was within the broad remedial powers of a court as an "interim corrective measure." Id. at 27. By contrast, "'[r]acially neutral' assignment plans . . . may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial segregation." Id. at 28.

In a related case, North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) (Swann II), the Supreme Court considered a state statute which provided, in pertinent part, that "[n]o student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating balance or ratio of race, religion or national origins." The statute further prohibited "[i]nvoluntary bussing of students in contravention of [the statute]." The Court held the statute invalid on the ground that it impeded implementation of desegregation plans required by the Fourteenth Amendment. The Court held:

"[I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

* * *

"We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race,

'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As we noted in Swann, supra, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."

Id. at 45.

Most recently, in Crawford v. Los Angeles Board of Education, 102 S. Ct. 3211 (1982), the Court upheld the validity of an amendment to the California constitution which limited the power of the state courts to order busing to cases in which the federal courts would have similar power. The Court quoted a statement of general principles by the California Supreme Court, which advised the state trial court that busing was "not a constitutional end in itself." Id. at 3214 n.3. It was simply one potential tool available for use to satisfy a school district's constitutional obligation which need not be available to satisfy any stricter standard imposed by state law. 11/

III. Recent Attempts by Congress to Restrict Assignment or Transportation of Students

In the last Congress, the Senate included in S. 951, the Department of Justice appropriation authorization bill for Fiscal Year 1982, certain restrictions on the authority of the inferior federal courts to order mandatory transportation of school children to schools other than those closest to their homes ("busing"). By letter of May 6, 1982, the Attorney

11/ In Washington v. Seattle School District No. 1, 102 S. Ct. 3187 (1982), decided the same day as Crawford, the Court struck down a limitation on a local school board's power to order busing. The Court held that the state initiative disadvantaged the minority in the political process. See Hunter v. Erickson, 393 U.S. 385 (1969).

General wrote to the Honorable Peter W. Rodino, Chairman, Committee on the Judiciary of the House of Representatives (hereinafter the "Attorney General's Letter"), to provide the Department's views on the student transportation provisions of that bill. The Attorney General concluded that the bill did not withdraw jurisdiction from the Supreme Court or limit the jurisdiction of the inferior federal courts to decide a class of cases. The effect of the bill, as construed, related only to one aspect of the remedial power of the inferior federal courts by limiting the court's power to order busing unless it was voluntary or "reasonable." Various conditions were attached to a finding of reasonableness, including time and distance restrictions.

The Attorney General noted the Supreme Court's ruling that the judicial power to impose a transportation remedy "may be exercised only on the basis of a constitutional violation." See Swann I, supra, 402 U.S. at 16. He also observed that "[t]he Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended might be unavoidable in order to vindicate constitutional rights." Attorney General's Letter at page 7. The Attorney General discussed the Court's ruling in Swann II that an absolute prohibition against a transportation remedy would contravene the command that all reasonable methods be available to formulate an effective remedy.

Because S. 951 imposed limitations on transportation remedies, the Attorney General considered whether the bill was a constitutional exercise of Congress's power under § 5 of the Fourteenth Amendment and Article III of the Constitution. He concluded that the limitation would be authorized under § 5 "to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. . . . Congress may instruct the lower federal courts not to order mandatory busing in excess of the . . . limits [of the bill], so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case." Attorney General's Letter at page 9. But, the Attorney General cautioned, "[u]nder § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation." Attorney General's Letter at page 10.

The Attorney General also concluded that the transportation restrictions of S. 951 "appear to be firmly grounded in Congress' Article III, § 1 power . . . to control the inferior federal court jurisdiction." The bill did not attempt to usurp the judicial function by instructing the court how to decide issues of fact in pending cases or by withdrawing all effective remedial power from the court. Moreover, because the bill did not mandate an automatic reversal of any outstanding court order, it did not pose the constitutional problem of legislative revision of judgments. Cf. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)(on petition for mandamus). See Attorney General's Letter at page 12.

IV. Legal Analysis of S. 139

A. Scope of Application

In one respect, S. 139 presents less of a problem constitutionally than S. 951 because S. 139 expressly applies only to the inferior federal courts. Although the Attorney General concluded that S. 951 had not been intended to apply to the jurisdiction of the Supreme Court, he acknowledged that that construction was debatable and that the language of the bill itself left open the possibility that it might have been construed as having the broader application. By separate letter, also dated May 6, 1982, to Chairman Thurmond of the Senate Judiciary Committee, the Attorney General discussed the constitutional limitations on Congress's power to withdraw jurisdiction from the Supreme Court. He expressed the view that congressional power in that regard is significantly more constrained than is its power to regulate the jurisdiction of the inferior federal courts.

B. Validity of Factfinding

Section 2 of the bill sets forth a number of "findings" by Congress with regard to the effect of busing on the educational system and on society. The Attorney General observed, in his letter to Chairman Rodino, that the courts customarily pay great deference to congressional findings of fact and the exercise of legislative power in response to such factual findings. Pursuant to the broad power conferred by § 5 of the Fourteenth Amendment, Congress may enact statutes to prevent

or remedy situations which it determines, on the basis of legislative facts, to be violative of the Constitution; and the congressional findings of fact will traditionally be upheld if the court can "perceive a basis" for them. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); see Attorney General's Letter at page 10; cf. Fullilove v. Klutznick, 448 U.S. 448 (1980)(plurality opinion). Such deference would be appropriate for the findings of fact in § 2(1)(C)-(M). 12/

C. Validity of "Findings" of Conclusions of Law

Deference would probably not be equally accorded to the "facts" set forth in § 2 which appear actually to be conclusions of law on matters which have been the subject of prior holdings of the Supreme Court; and the Court will undoubtedly feel free to reach its own conclusions on ultimate constitutional questions. These comments are particularly applicable to § 2(1)(A) and (B), § 2(2), and § 2(3).

Section 2(2), as set forth in Part I, recites that past unconstitutional racial segregation enforced by law is not a significant cause of existing racial imbalances in public schools. This finding is contrary to the finding made by numerous courts in specific factual situations prior to the entry of desegregation decrees. In Swann I, supra, the Supreme Court held that the judicial power to impose a transportation remedy "may be exercised only on the basis of a constitutional violation." 402 U.S. at 16. Moreover, once the

12/ The Attorney General's Letter noted that considerable deference would likely be paid to the findings of fact made in S. 951, "notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which might have supported or undermined the specific limitations on federal court decrees contained in [S. 951]." Attorney General's Letter at page 10. Although particularized research may not be as necessary in support of the more general findings in S. 139, we suggest that the proponents of the legislation will wish to provide a factual basis for these findings in the legislative history.

effects of the prior constitutional violation are eliminated, the court's remedial power is at an end. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). Thus, the courts are likely to presume as an initial matter that an existing decree was predicated on a previous constitutional violation and that whether the violation has been remedied or continues to go unremedied is a matter of factual determination in individual cases.

To the extent that § 2(2) is intended to affect retrospectively the validity or viability of previously entered decrees which ordered transportation to remedy the continuing effects of prior unconstitutional segregation, its effect would be limited by the rule of Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)(on petition for mandamus). Written by the Justices sitting as Circuit Justices, the opinions in Hayburn's Case agreed that Congress cannot require the federal courts to provide opinions that will be subject to executive or legislative revision. See also Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948)("Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855)("But it is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it."). 13/

13/ An illuminating discussion of the issues of executive and legislative revision of judgments appears in a draft opinion in Gordon v. United States, which was prepared by Chief Justice Taney who died before the decision was announced. The draft opinion is printed as an appendix at 117 U.S. 697. The actual opinion in Gordon appears at 69 U.S. (2 Wall.) 561 (1864).

Furthermore, to the extent that the finding in § 2(2) is intended to apply in pending cases, it may contravene the holding in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). In Klein, the Supreme Court refused to give effect to a provision which it found to instruct the Court to decide issues of fact a certain way in pending cases. Under the statute, the Court found, it was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely to the contrary. [¶] We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." Id. at 147.

A separate problem is raised by § 2(1)(A) and (B) and § 2(3), which, as set forth in Part I, recite that assignments based on race violate equal protection, abridge individual rights on the basis of race, and constitute race discrimination in violation of the Fourteenth Amendment. There is no doubt that the scope of congressional power under § 5 is very broad. See Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion). Congress, by virtue of the express grant of power to enforce the Fourteenth Amendment, is assigned the role in our constitutional structure to evaluate conflicting entitlements and determine the balance that will be struck between them. The Court has indicated that it will pay great deference to the legislative judgments that are made. Cf. Fullilove v. Klutznick, supra.

The congressional power, however, is not unlimited. As the Attorney General's Letter noted, the cases "rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to 'restrict, abrogate, or dilute' Fourteenth Amendment guarantees as recognized by the Supreme Court." Attorney General's Letter at page 9, quoting Katzenbach v. Morgan, supra, 384 U.S. at 651-52 n.10.

The Supreme Court has held that the Equal Protection Clause guarantees all students a constitutional right to be free from intentional racial discrimination or segregation in schooling. Brown v. Board of Education, 347 U.S. 483 (1954); see also Bolling v. Sharpe, 347 U.S. 497 (1954) (equal

protection component of the Due Process Clause of the Fifth Amendment). Moreover, to the extent that school assignments are necessary "to eliminate from the public schools all vestiges of state-imposed discrimination," Swann I, supra, 402 U.S. at 15, the assignments, and the concomitant requirement of student transportation, have been held to be appropriate as remedies, even in the face of challenges that such remedies would themselves be violative of the Constitution. In McDaniel v. Barresi, 402 U.S. 39 (1971), the Supreme Court reversed the Georgia Supreme Court, which had held that a desegregation plan adopted by the county school board violated the Equal Protection Clause "'by treating students differently because of their race.'" Id. at 41. The Supreme Court held that "[i]n this remedial process, steps will almost invariably require that students be assigned "'differently on the basis of their race.'" Id.

The principle that the Court is the ultimate arbiter of the Constitution was established in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); and it has not been seriously questioned since. See INS v. Chadha, 103 S. Ct. 2764, 2779-80 (1983). Therefore, the "findings" in § 2 of S. 139 could not be given the effect of prohibiting assignment or transportation of students in circumstances in which a court was to find that such a remedy was necessary fully to vindicate the constitutional rights of the victims of unlawful segregation.

D. Restrictions on Remedial Authority

S. 139 restricts the remedial authority of the inferior federal courts in two ways. Section 5 of the bill states that no inferior court established by Congress shall have jurisdiction to issue any order requiring assignment or transportation of students, or excluding any student from school, on the basis of race. Section 3 provides, in effect, that the remedies which are available are limited to injunctions against the segregative law or action, contempt of court proceedings, voluntary transfers of students, and local initiatives to improve education for all students. S. 139 thus differs significantly from S. 951, which did not absolutely prohibit the inferior federal courts from ordering busing but merely prohibited court-ordered busing if it was not voluntary or "reasonable," as defined by reference to specified time and distance limitations.

S. 139 asserts that the bill is based upon two sources of congressional power: Article III and § 5 of the Fourteenth Amendment. We shall examine the absolute prohibition of S. 139 in light of the Attorney General's conclusions with regard to the scope of congressional authority as discussed in his letter to Chairman Rodino. We shall discuss the § 5 power first.

1. Section 5 of the Fourteenth Amendment. In the two Swann cases, as discussed above, the Supreme Court held that student transportation might in some circumstances conceivably be a necessary feature of a remedial desegregation decree and that the State may not absolutely prohibit busing or assignments based on race if it would hamper the ability of local authorities effectively to remedy constitutional violations. On this basis, the Attorney General concluded that the restrictions on court-ordered transportation contained in S. 951 would be authorized under § 5 to the extent that they did not prevent the court from adequately vindicating constitutional rights, but not "when, in the judgment of the courts," such transportation in excess of the limits in S. 951 was "necessary to remedy a constitutional violation." Attorney General's Letter at page 11. In circumstances in which transportation which would have been considered "reasonable" under S. 951 was necessary to achieve an effective remedy, the absolute prohibition contained in S. 139 would present a legal obstacle to a remedial decree which would have been permissible under S. 951. On this basis, as a simple matter of logic, the likelihood that there would be circumstances in which S. 139 might exceed the scope of Congress's power under § 5 is greater than under S. 951.

Moreover, to the extent that S. 139 is intended to impose an outright prohibition of any assignment or transportation based on race, it far more closely resembles the North Carolina statute struck down in North Carolina Board of Education v. Swann (Swann II), supra, than S. 951. Unlike the state law at issue in Swann II, however, S. 139 purports to be an exercise of Congress's § 5 power to enforce the provisions of the Fourteenth Amendment. The bill specifically indicates that it is intended to protect the rights of all students not to be assigned to schools based on race. <The constitutional issue presented, therefore, is whether Congress's power pursuant to § 5 to enforce the Fourteenth Amendment is greater than the power of the States to take the same action.>

Moreover, because the courts have authority to order transportation only in cases where there is a continuing constitutional violation and only as a remedy for that violation, the prohibition contained in S. 139 would be relevant only in cases where the court was exercising its remedial authority to vindicate constitutional rights. The prohibition, then, as applied to the federal courts, as the enforcer of constitutional rights, cannot be viewed as an exercise of Congress's power to enforce the Fourteenth Amendment.

Katzenbach v. Morgan, *supra*, does not support the exercise of congressional authority in these circumstances. Katzenbach arose in the context of facts upon which the Court had held that certain conduct by the States was not prohibited because it did not violate the Fourteenth Amendment, *see* Lassiter v. Northampton Board of Elections, 360 U.S. 45 (1959), and Congress, in the exercise of its § 5 power, prohibited that conduct. *Cf.* Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131, legislatively overturning Mobile v. Bolden, 446 U.S. 55 (1980). *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, 39 (1981), *reprinted in* 5 U.S. Code Cong. & Ad. News 177, 179, 217 (1982). This potential assertion of congressional authority to preclude transportation arises in the context of holdings by the Court that certain conduct is prohibited because it does violate the Fourteenth Amendment, and Congress would be attempting to rely on its § 5 power to "impede" (as the Supreme Court put it in Swann II, *supra*, 402 U.S. at 45) the ability of the federal courts to develop a remedy for a violation of that prohibition. Nothing in the history or jurisprudence of the § 5 power supports its use in this context.

2. Article III. Article III, § 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *See also* U.S. Const. Art. I, § 8, cl. 9 (giving Congress power to constitute Tribunals inferior to the supreme Court). Generally speaking, Congress has very broad control over the jurisdiction of the inferior federal courts, *e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); and substantial power to limit the remedies available in the inferior federal courts; *e.g.*, Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938). With regard to the

transportation-limiting provisions of S. 951, the Attorney General concluded:

"[T]he bill [does not] usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. . . . Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts."

Attorney General's Letter at page 12.

As noted above, S. 139 is more restrictive than S. 951 of the jurisdiction of the inferior federal courts. The elimination of assignment and transportation remedies, plus the specification of what remedies are available, combine to create a situation in which the remedial authority retained by the inferior federal courts is less than that which would have been retained under S. 951. The limitation recognized by the Attorney General on the congressional power to control the jurisdiction and remedial authority of the inferior federal courts is fully applicable to S. 139: Congress cannot, consistent with Article III, impose on the courts the duty to exercise an essentially legislative function without any power to issue relief affecting individual legal rights or obligations in specific cases. Without the power to order effective relief, the court would not retain the jurisdictional minimum of a "case or controversy" within the meaning of Article III. See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-39 (1976) (Article III minimum requirement for standing is "actual injury redressable by the Court"); cf. Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington (August 8, 1793), printed in 3 Johnston, Correspondence and Public Papers of John Jay 488-89 (1891) (advisory opinions). The limitation on remedial authority contained in S. 139 could not, therefore, be supported under Article III if the limitation deprived the courts of "effective remedial power" on the facts of a particular case. See Attorney General's Letter at page 12. Thus, this provision will be upheld by the Court in those cases in which there are effective

alternative remedies, but we believe that the Court would not sustain the restriction if, in a particular case, it found that the lower court had substantive jurisdiction but had been stripped of the power effectively to remedy the constitutional violation before it.

E. Relief from Previously Entered Court Orders

The Attorney General's discussion in the letter to Chairman Rodino regarding constitutional restrictions on congressional attempts to reverse previously imposed court orders is generally applicable to § 5 of the bill. We believe that there are additional policy and legal implications of S. 139 which the Attorney General's Letter does not embrace.

1. Policy Issues. Assistant Attorney General Reynolds of the Civil Rights Division has previously stated the Department's position on reopening prior decrees. In a congressional hearing, he testified:

"[T]he Department's present thinking is to give this approach prospective application only. We, thus, do not contemplate routinely reopening decrees that have proved effective in practice. The law generally recognizes a special interest in the finality of judgments, and that interest is particularly strong in the area of school desegregation. Nothing we have learned in the ten years since Swann leads to the conclusion that the public would be well served by reopening wounds that have long since healed."

Hearing before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, printed at 128 Cong. Rec. S1046 (daily ed. Feb. 24, 1982).

These sentiments seem fully applicable to § 5 of S. 139. Unlike S. 951, however, S. 139 does not commit to the Attorney General's discretion, in the manner assumed by Assistant Attorney General Reynolds' testimony, whether to seek relief from a prior order. S. 139 provides instead that an individual, a school board, or other school authority subject to an outstanding order, may seek relief from that order. Given the

persuasive arguments against the promiscuous reopening of existing decrees, § 5 of the S. 139 is particularly troublesome because it does not lodge discretion in the Attorney General to exercise judgment regarding whether seeking relief in a particular case is truly in the best interests of all parties concerned.

2. Legal Issues: (a) Effect on existing court orders.

Section 5 of the bill also poses certain legal difficulties. The first relates to the effect on existing court orders. Section 5 of S. 139 does not by its terms purport to require an automatic reversal of any outstanding court order. Instead, the bill describes the general substantive law standards by which the validity of the order is to be judged by the court in response to an application by an individual or school authority subject to the order. The bill, however, does require the reopening and reexamination of outstanding court orders and requires the court, unless it can make certain specified "conclusive findings based on clear and convincing evidence," to grant relief from the order. 15/

The evidentiary standard of "clear and convincing evidence" is higher than the standard of preponderance of the evidence which is customarily required in civil litigation. Moreover, the court must revise an existing decree unless it found, as set forth in Part I, supra, that the acts of racial discrimination undergirding the prior order specifically caused, and, in the absence of the order, would continue to cause, school assignments based on race. In essence, the previous case would have to be retried and

15/ We are uncertain what "conclusive" findings are; we presume that they are findings of fact which are supported by evidence measured by a standard higher or more persuasive than would otherwise apply. It is by no means clear, however, what the authors of the bill have in mind, particularly when the term "conclusive findings" is coupled with "clear and convincing evidence." The text of the bill should be clarified or the legislative history of this provision should contain explanatory language to clarify the intended meaning.

the past acts have to be found to be a cause of present discrimination on the basis of race. 16/

This combination of factors -- the required reopening of existing orders upon application to the court and a substantive standard of proof which may be difficult to meet both as to the particular facts and the burden of proof -- might give rise to the impression of congressional intent to overturn the outstanding court decrees sub silentio. The more difficult Congress makes it for the courts to adhere to their prior orders, the more it might appear that Congress is attempting simply to require the courts to reverse their prior orders.

There are limits beyond which Congress cannot go to effect the reversal of outstanding court orders. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); cf. Chicago & Southern Air Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948). S. 139 goes further than S. 951 in approaching these limitations because of the specific findings that are required and the higher than usual burden of proof. Nevertheless, although we are quite concerned with the composite effect of the factors that we have mentioned, on balance, we do not believe that this aspect of S. 139 would fail to pass the constitutional test under Hayburn's Case. The issue, however, is not free from doubt; and legislative intent, as disclosed in hearings, debates, and reports, might tip the balance. The Supreme Court might

16/ The other findings that are required raise no significant legal issues. They are generally consistent with the constitutional principles relating to the court's power to order busing as well as other limitations on its equitable jurisdiction. For example, one additional finding which the court must make is that no other remedy would preclude the intentional and specific segregation. It is within Congress's power to provide that busing shall be a disfavored remedy to be used only as a last resort. Similarly, familiar principles of equity would ordinarily compel the court to review whether the totality of circumstances has changed to warrant reconsideration of the order and whether the economic, social, and educational costs of the order outweigh the corresponding benefits. See also note 10 supra.

find an impermissible intrusion on judicial functions if the legislative history discloses a clear and intentional assertion of congressional power to reverse court orders.

(b) Court empowered to grant relief. A second legal issue regarding relief from existing orders relates to whether the bill attempts to vest jurisdiction in the state courts to revise the final and interlocutory judgments and orders of federal courts. Section 5 of the bill provides that relief may be sought "in any court." The sixth section (erroneously designated § 5) provides further that an action commenced in state court "seeking a judgment for any relief described in this Act" may not be removed to district court. Although S. 139 does not, by its terms, expressly create jurisdiction in state court over a cause of action brought to obtain relief under the bill, the combined effect of these two provisions seems to indicate the congressional intent that the state courts would have such jurisdiction.

State courts are required to enforce federal constitutional rights and federal statutory rights at least to the extent that the state court has "jurisdiction adequate and appropriate under established local law" to adjudicate the action because it is analogous to state claims that the state courts entertain. See Testa v. Katt, 330 U.S. 386, 394 (1947). More recently, in FERC v. Mississippi, 456 U.S. 742, 760 (1982), the Supreme Court interpreted Testa to mean that state courts are required to "heed the constitutional command that 'the policy of the federal Act is the prevailing policy in every state,' [Testa, *supra*, 330 U.S.] at 393, 'and should be respected accordingly in the courts of the State.'" Id., at 392." (citation omitted.)

The problem with the creation by Congress of a cause of action under S. 139 in state court relates not to whether Congress has this power in the abstract, but what Congress can authorize the state court to do. S. 139 seems to envision that the state court will be empowered to grant relief from a previously imposed federal court order. To the extent that any previously imposed order is a final judgment, and thus beyond the direct reach of Congress, see, e.g., Chicago & Southern Air Lines, *supra*; Wheeling & Belmont Bridge, *supra*; Hayburn's Case, *supra*; it would seem to be similarly beyond the power of Congress to authorize the state court to alter the judgment.

To the extent that the previously imposed order is not a final judgment and the federal court has retained jurisdiction over the case, we do not believe that Congress can attempt to authorize a state court to reconsider, revise, or otherwise share the ongoing exercise of jurisdiction. Such a concept seems fundamentally inconsistent with Article III and constitutional principles of separation of powers between the Legislative and Judicial Branches as well as between the federal and state courts. Article III vests the judicial power of the United States in the federal courts. Although, as noted, the state courts are obligated, by virtue of the Supremacy Clause, to enforce federal constitutional rights, in a case in which the federal court has exercised jurisdiction over the case and has entered an order to the parties subject to the court's jurisdiction, we do not believe that Congress has the power to shift the primary locus of the enforcement power from the federal courts to the state courts where the congressional purpose and possibly the effect of the state court action would be review and revision of the outstanding federal court order.

We are not aware of any case specifically addressing the question whether Congress has the power to authorize a state court to assert jurisdiction to consider an order entered by a federal court in a case over which the federal court has retained jurisdiction. To our knowledge, the issue has never arisen before because Congress has not attempted such a scheme. Cases such as United States v. Klein, supra, and Eastern Kentucky Welfare Rights Organization, supra, however, hold that a component of jurisdiction of an Article III court is the power to grant relief. We believe Article III and separation of powers would preclude Congress from authorizing a state court to modify an outstanding federal court order. 17/

17/ In a case in which the inferior federal court's order is based upon an order of the Supreme Court or implements a judgment of that Court, there is an additional obstacle to state court jurisdiction. No other court, not even the lower federal court itself, has the authority to modify the Supreme Court's order or judgment. See, e.g., Utah Public Service Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969).

(c) Comity. In addition to the constitutional infirmity, state court jurisdiction over an outstanding federal court order would contravene settled principles of comity between the state and federal courts. See, e.g., Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964) ("While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions . . .") (footnotes omitted); Kline v. Burke Construction Co., 260 U.S. 226, 229 (1922) ("[W]here a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court.").

Moreover, in other contexts, settled principles of law require that a person seeking relief from a previously imposed court order move the court that imposed the order to grant relief. Cf. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); see also Walker v. City of Birmingham, 388 U.S. 307 (1967); Howat v. Kansas, 258 U.S. 181, 189-90 (1922); Wheeling & Belmont Bridge, *supra*. Accordingly, if Congress, through S. 139, alters the substantive law to be applied by an inferior federal court in school desegregation cases, then that court should be the forum in which the order is reconsidered, if it is to be reconsidered at all. Upon the application of an affected party, the federal court that imposed the prior order would itself determine whether that order was consistent with the substantive law as declared by S. 139 and whether the change the substantive law attempted by S. 139 was constitutional. We recommend, therefore, that § 5 of the bill be amended to make clear that "in any court" means any federal or, more narrowly and appropriately, the federal district court which imposed the order. We also recommend that the sixth section of the bill be deleted. If an action in state court is not authorized, the prohibition of removal becomes unnecessary.

V. Conclusion

It is the view of the Department of Justice that certain portions of S. 139 present serious constitutional questions. Specifically, we are concerned about the conclusions of law

contained in § 2(1)(A) and (B), § 2(2), and 2(3); the restrictions on the remedial authority imposed by §§ 3 and 5 on the power of federal courts to remedy constitutional violations; the possible appearance of a congressional attempt to reverse outstanding court orders because of the heightened burden of proof and the particular findings required under § 5; and the implication that §§ 5 and [6] create a cause of action in state court to reopen and revise previously imposed orders of a federal court. We also believe that if Congress is determined to create a cause of action for relief from outstanding orders, the decision whether to seek such relief should be committed to the discretion of the Attorney General. We have also pointed out certain provisions which are unclear as drafted and certain technical errors in the bill.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General