10-1972

Drummond v. Acree

Lewis F. Powell Jr.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No._____

ANN GUNTER DRUMMOND, ET AL.,

Petitioners

vs.

ROBERT L. ACREE, ET AL.,

Respondents

vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,

Respondents

Petition For A Writ Of Certiorari

To the United States Court of Appeals for the Fifth Circuit

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Wheeless Road

Grade	W	B
4	98	21
5	145	101
6	160	78
7	142	91
	545	291
	836	

34.8% B

Transportation Estimate.

Terrace Manor

To Glenn Hills	0
To Wheeless Road	304

Glenn Hills

To Terrace Manor	262
To Wheeless Road	0

Wheeless Road

To Glenn Hills	116
To Terrace Manor	315
Terrace Manor (internal)	53
Glenn Hills (internal)	70
Wheeless Road (internal)	126
Total transportation estimate (maximum)	1246

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ALTERNATE ELEMENTARY PLAN FOR TERRACE MANOR, GLENN HILLS AND WHEELESS ROAD

(May Be Used With Plans II, III and IV)

Schools	Totals By Race W	B	School
Terrace Manor	243	255	498
Glenn Hills	214	169	383
Wheeless Road	651	152	803
Totals	1108	576	1684

Data.

1. School Capacities:

Terrace Manor	21 classrooms	525 pupils
Glenn Hills	13	325
Wheeless Rd.	38	800

2. Pupils presently transported: 736.

Pupil Allocation Plan.

Terrace Manor

Grade	W	B
1	169	85
2	180	74
	349	159
	508	
	31.3% B	

Glenn Hills

Grade	W	B
3	164	79
4	50	47
	214	126
	340	
	37.0% B	

Data.

1. School Capacities:

Griggs	21 classrooms	525 pupils
Southside	15	375

2. Total presently transported: 196

Pupil Allocation Plan.

Griggs			Southside		
Grade	W	B	Grade	W	B
5	97	41	1	91	76
6	91	73	2	99	67
7	90	71	3	98	62
			4	99	58
	278	185		387	263
	463			650	
	40.0% B			40.5% B	

Transportation Estimates.

Griggs to Southside	255
Southside to Griggs	278
Southside (internal)	99
Total transportation estimate (maximum)	632

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National Hills

Grade	W	B
1	70	74
2	85	76
	155	150

305

47.2% B

Transportation Estimate.

Floyd	
To Garrett	191
To National Hills	150
Garrett	
To Floyd	118
To National Hills	80
National Hills	
To Floyd	71
To Garrett	61
Garrett (internal)	42
Total transportation estimate (maximum)	713

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE I

Per Cent
Black 40.1%

Schools	Totals By Race W	B	School
Griggs	0	438	438
Southside	665	10	675
Totals	665	448	1113

Merry

To Weed	88
To Robinson	168
Merry (internal)	45
Total transportation estimate (maximum)	504

ELEMENTARY SCHOOLS
COMBINED ZONE INFORMATION
PLAN III ZONE H

Per Cen
Black 43.1%

Schools	Totals By Race W	B	School
Floyd		461	461
Garrett	381	5	386
National Hills	233		233
Totals	614	466	1080

Data.

1. School Capacities:

Floyd	23	classrooms	575 pupils
Garrett	20		500
National Hills	14		350

2. Pupils presently transported: 125

Pupil Allocation Plan.

Floyd Grade	W	B	Garrett Grade	W	B
6	98	66	3	92	76
7	89	56	4	88	63
			5	92	55
	187	122		272	194
	309			466	
	40.0% B			41.6% B	

IN THE

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No.———

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vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a Writ of Certiorari issue to review the Judgment entered March 31, 1972 by the Uunted States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Judgment entered March 31, 1972 by the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 486 (1972) set forth in Appendix I. It affirmed the Order of the United States District Court for the Southern District of Georgia rendered January 13, 1972, reported at 336 F.Supp. 1275 (1972) and set forth in Appendix III.

JURISDICTION

Petition for Rehearing on the Judgment entered by the United States Court of Appeals for the Fifth Circuit was denied May 2, 1972 and is set forth in Appendix II. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Can an order of the District Court which requires that the racial composition of elementary schools be almost identical to the mathematical ratio of the entire system contrary to **Swann v. Charlotte-Mecklenburg Board of Education** 402 U.S. 1 (1971), **Winston-Salem/Forsythe County Board of Education v. Scott,** 404 U.S. 1221 (1972) be allowed to stand?
2. To what extent is the increased transportation of elementary students to achieve racial balance constitutionally permissible?
3. Does **Swann,** supra, require a school system, previously operating pursuant to a desegregation plan prepared by HEW and approved by the District Court, to immediately undergo massive busing without determining the feasibility of constitutionally acceptable, but less burdensome alternatives?

Data.

1. School Capacities:

Weed	12 classrooms	300 pupils
Robinson	16	400
Merry	22	550

2. Pupils presently transported: 122

Pupil Allocation Plan.

Weed

Grade	W	B
5	90	53
	143	
	37.0%	B

Robinson

Grade	W	B
6	90	55
7	92	57
	182	112
	294	
	38.1%	B

Merry

Grade	W	B
1	72	70
2	75	52
3	78	46
4	91	39
	316	207
	523	
	39.6%	B

Transportation Estimate.

Weed

To Merry 42

Robinson

To Merry 161

Data.

1. School Capacities:

Craig	20 classrooms	500 pupils
Hains	30	750

2. Total presently transported: 0

Pupil Allocation Plan.

Craig			Hains		
Grade	W	B	Grade	W	B
1	112	60	4	126	51
2	114	49	5	127	47
3	117	54	6	129	56
			7	111	45
	343	163		493	199
	506			692	
	32.2% B			28.7% B	

Transportation Estimates.

Craig to Hains	189
Hains to Craig	349
Total transportation estimate (maximum)	538

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE G

Per Cent
Black 38.8%

Schools	Totals By Race W	B	School
Weed	63	160	223
Robinson	40	121	161
Merry	485	91	576
Totals	588	372	960

4. Is the 1972 **Education Amendments Act** which restates a portion of § 407(a) **Civil Rights Act of 1964,** forbidding Courts to order bussing for racial balance, a Congressional expression that the interpretation of this language contained in **Swann** is incorrect?
5. Is the 1972 **Education Amendments Act** a Congressional determination on how best to implement the 14th Amendment so as to withdraw jurisdiction from the entire class of cases?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

1. Article I, Section 8, Clause 18 (Necessary and Proper Clause)
2. Article III, Section 1 and 2 (Jurisdiction Clause)
3. Section 1 of the 14th Amendment (Equal Protection Clause)
4. Section 5 of the 14th Amendment (Enforcement Clause)

STATEMENT

1. PROCEEDINGS IN THE DISTRICT COURT (PRIOR TO 1970)

Petitioners are a class of parents who were granted intervention in 1971.[1] At that juncture this case

[1] Petitioners/Intervenors are Ann Gunter Drummond, Mason Carter Clements, Mrs. S. Lee Wallace, Nadine Estroff, Douglas D. Barnard, Jr., Robert Beattie, Bill Perry, Dr. James R. Hattaway, William J. Salley, Patrick G. Smith, C. Dan Cook, Earl E. Hensley, William B. Kuhlke, Jr., George H. Streeter, George W. Fisher, Freddie Childress, Leona Norton, H. Weldon Hair, Howard W. Poteet.

was already seven years old having been commenced in 1964 by black parents seeking to desegregate the school system. This litigation has followed the evolution from "freedom of choice" in a pattern not dissimilar to other school districts.

Jurisdiction was assigned to the current District Court Judge shortly after his appointment in 1968. At a hearing held in December of that year the school board was directed to prepare a desegregation plan based on geographical zones and attendance areas. **Acree v. County Board of Education of Richmond Co., Ga.,** 294 F.Supp. 1034 (S.D.Ga. 1968).

Such a plan was submitted and approved on July 14, 1969. **Acree v. County Board of Education of Richmond Co., Ga.,** 301 F.Supp. 1285 (S.D.Ga. 1969). Shortly thereafter the school board was directed by the Court to seek the assistance of the Department of HEW in future planning.

2. PROCEEDINGS IN THE DISTRICT COURT (1970)

By order of February 3, 1970 the District Court required that the faculty be reconstituted on a racial balance of 60%-40% white to black. Accordingly, some 500 teachers were reassigned to achieve this distribution. Plaintiff subsequently appealed, and in July of 1970 the Circuit Court remanded this case for further findings. No decision was announced and jurisdiction was retained.[2]

Upon receipt of the Mandate, a Biracial Com-

[2] This portion of the chronology appears to conflict slightly with that set out in Appendix III. It is supported by entries in the docket kept by the Clerk of Court.

Data.

1. School Capacities:

Jenkins	15	classrooms	375 pupils
Fleming	32		800

2. Pupils presently transported: 163.

Pupil Allocation Plan.

Jenkins			Fleming		
Grade	W	B	Grade	W	B
1	64	49	4	41	51
2	62	51	5	30	26
3	71	35	6	40	50
			7	57	25
	197	135		168	152
	332			320	
	40.7% B			47.5% B	

Transportation Estimate.

Jenkins to Fleming	155
Fleming to Jenkins	194
Jenkins (internal)	22
Fleming (internal)	41
Total transportation estimate (maximum)	412

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE F

Per Cent Black 30.2%

Schools	Totals By Race W	B	School
Craig		346	346
Hains	836	16	852
Total	836	362	1198

Bungalow Rd.

Grade	W	B
3	170	118
4	161	130
	331	248
	579	
	42.8% B	

Transportation Eestimates.

White

To W. Gardens	159
To Bungalow Rd.	204

W. Gardens

To White	165
To Bungalow Rd.	145

Bungalow Rd.

To White	267
To W. Gardens	164
Bungalow Rd. (internal)	107
W. Gardens (internal)	68
Total transportation estimate (maximum)	1279

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE E

Per Cent
Black 44.0%

Schools	Totals By Race W	B	School
Jenkins	7	286	293
Fleming	358	1	359
Totals	365	287	652

mittee was appointed by the District Judge, charged with preparing recommendations for the possible pairing of schools in the system. Additionally, the desegregation plan developed by the Department of HEW had been completed and was submitted to the Court. It was approved by order dated August 3, 1970, with implementation scheduled for the forthcoming 1970-1971 school year.

Also incorporated in this order were the suggestions of the Biracial Committee on pairing, as well as majority to minority transfer provisions required by **Singleton v. Jackson Municipal Separate School District,** 419 F.2d 1211 (5th Cir. 1970). Also included was the proviso that space and free transportation be made available for the transferring student. **Ellis v. Board of Public Instruction,** 423 F.2d 203 (5th Cir. 1970).

3. PROCEEDINGS IN THE COURT OF APPEALS (1970-1971)

Pursuant to instructions, the Record had been returned to the Circuit Court in August of 1970 where it was retained for 11 months. During this period an entire school year was completed under the Plan devised by the Department of HEW. In April of 1971, the decision in **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971). was announced. Accordingly, this case was remanded by the Appeals Court on July 1, 1971 with instructions to devise a new plan in consonance with that opinion. **Acree v. County Board of Education of Richmond Co., Ga.,** 443 F.2d 1360 (5th Cir. 1971).

4. PROCEEDINGS IN THE DISTRICT COURT (1971-1972)

Defendant school board was instructed to commence preparation at once. In a subsequent order of July 28, 1971 the District Court further requested that the Office of Education, Department of HEW, make its full resources available in this regard.

A hearing on their proposals plan was scheduled for August 26, 1971. What transpired is described in the Court's Order:

> "To my amazement, the HEW officials did not show up at the August 26, 1971 hearing. Without notice or excuse, and at whose behest, I do not know, they did a disappearing act."[3]

Being understandably irate, the Court rejected the school board recommendation with dispatch. It was announced from the Bench that experts would be employed for the preparation of desegration plans to be filed by September 27, 1971. Two Rhode Island professors were subsequently chosen. They drafted a series of options for the District Judge which consisted of four Elementary Plans and two Secondary Plans.

Intervention was sought at this crucial point. It was granted on October 5, 1971 and Petitioners, freshly garbed with legal status, set out to resolve the existing impasse. Unfortunately this goal was not achieved, but efforts to do so were later recognized in open court by the District Judge who remarked:

> "I say you deserve a lot of credit for what you have tried to do, to bring these warring fac-

[3] Appendix III, Page A-13

Bayvale (internal) 136
Copeland (internal) 47

Total transportation estimate (maximum) 1560

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE D

Per Cent
Black 43.7%

Schools	By Race W	B	Totals School
White		710	710
W. Gardens	454	131	585
Bungalow Rd.	638	7	645
Totals	1092	848	1940

Data.

1. School Capacities:

White	31 classrooms	775	pupils
W. Gardens	24	600	
Bungalow Rd.	29	725	

2. Pupils presently transported: 544

Pupil Allocation Plan.

White			W. Gardens		
Grade	W	B	Grade	W	B
5	162	112	1	157	134
6	138	119	2	156	129
7	148	106			
	448	337		313	263
	785			576	
	42.9% B			45.7% B	

Pupil Allocation Plan.

Collins			Bayvale		
Grade	W	B	Grade	W	B
5	172	136	1	177	131
6	174	141	2	172	129
7	166	162	3*	50	25
	512	439		399	285
	951			684	
	46.2% B			41.7% B	

Copeland		
Grade	W	B
3#	134	105
4	171	144
	305	249
	554	
	44.9% B	

*25 each from SW corner of Collins attendance area.
SE corner of Copeland attendance area.
#remaining third graders

Transportation Estimate.

Collins	
To Bayvale	269
To Copeland	236
Bayvale	
To Collins	263
To Copeland	163
Copeland	
To Collins	265
To Bayvale	181

tions, in a terribly polarized city and community together."[4]

At the Intervenors request a hearing was held December 16th and 17th for the purpose of presenting evidence concerning the various Plans in question. Upon conclusion the Bench announced that no decision was forthcoming for 20 days. All counsel were called into Chambers and strongly advised to make a final effort at negotiation. Efforts to reach an agreement ultimately proved futile and on January 13, 1972 the Order complained of was entered.[5] **Acree v. Drummond,** 336 F.Supp. 1275 (S.D.Ga. 1972).

5 PROCEEDINGS BEFORE THE COURT OF APPEALS (1972)

Plaintiff immediately commenced an Appeal and both remaining parties Cross-Appealed. The United States Court of Appeals for the Fifth Circuit in an opinion rendered March 31, 1972 affirmed the ruling of the Lower Court.[6] **Acree v. County Board of Education of Richmond Co., Ga.,** 458 F.2d 486 (5th Cir. 1972). Petitioners sought Re-Hearing and were subsequently denied.[7]

Pursuant to the Order on the Mandate, Defendant school board prepared and presented a Constitutionally-acceptable plan for the desegregation of the secondary schools in the upcoming year. By order dated June 13, 1972 this plan was approved by the District Court.[8] No appeals were taken, and the time for doing so has expired.

[4] Transcript of proceedings December 17, 1971, Page 266.
[5] Appendix III hereto, details of Plan Appendix IV hereto.
[6] Appendix I hereto.
[7] Appendix II hereto.
[8] It is in sharp contrast with the severity of the elementary plan which Petitioners seek to have remoulded.

REASONS FOR GRANTING THE WRIT

I

THIS IS THE MOST EXTREME DESEGREGATION ORDER EVER ENTERED! IT GOES FAR BEYOND ANYTHING APPROVED BY THIS COURT, AND IF DEEMED VALID THE CRITERIA ESTABLISHED BY SWANN BECOMES ABSOLUTELY MEANINGLESS.

This claim, although extravagant, is well founded. All that is required to reach this conclusion in the present case is the application of principles established by **Swann,** and a comparison of results.

While this Court recognized the transportation of students as a permissible tool for desegregation, its use was not made mandatory. Much to the contrary there is a clear caution that the techniques used in Charlotte were made acceptable by the situation which confronted the District Court.

> **"On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable." (p. 30) (Emphasis added)

An overall reading of this decision leaves the indelible impression that the best which can be said of the District Court's order is that it was not reversed. It was never applauded and reflects only tepid acceptance. Restraint rather than adherence is implicit and inclines one to view it as the outward limits of discretion.

While a Court's authority to fashion appropriate remedies is correspondingly broad, it is not unrestricted.

Monte Sano

To Walker	244
To Lamar	73
To Lake Forest Dr.	60

Lake Forest Dr.

To Walker	139
To Monte Sano	95
Lamar (internal)	51
Monte Sano (internal)	91
Lake Forest Dr. (internal)	45

Total transportation estimate (maximum) 1462

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE C

Per Cent
Black 44.4%

Schools	Totals By Race W	B	School
Collins	0	928	928
Bayvale	618	42	660
Copeland	598	3	601
Totals	1216	973	2189

Data.

1. School Capacities:

Collins	41 classrooms	1025 pupils
Bayvale	29	725
Copeland	23	575

2. Pupils presently transported: 574.

2. Total presently transported: 546

Pupil Allocation Plan.

Walker

Grade	W	B
5	180	121
6	162	145
7	175	149
	517	415
	932	
	44.5% B	

Lamar

Grade	W	B
1*	40	24
2⁰	127	156
3*	49	15
	216	195
	411	
	47.4% B	

Monte Sano

Grade	W	B
3#	122	91
4	174	157
	296	248
	544	
	45.6% B	

Lake F. Dr.

Grade	W	B
1#	102	127
2¹	31	7
	133	134
	267	
	50.0% B	

*Lamar pupils only
#Less Lamar
¹Lake F. Dr. only
⁰all but Lake F. Dr.

Transportation Estimates.

Walker

To Lamar (2)	125
To Monte Sano (3,4)	216
To Lake Forest Dr. (1)	116

Lamar

To Walker (5,6,7)	153
To Monte Sano	54

> "No fixed or even substantially fixed guidelines can be established as to how far a court can go, **but it must be recognized that there are limits.**" (p. 28) (Emphasis added)

A recent lower court decision of considerable importance underscored this limitation, **Bradley v. The School Board of the City of Richmond, Virginia,** _____ F.2d _____ (4th Cir. 1972), decided June 5, 1972.

Although the outward parameters of **Swann** may be vague, certain prohibitions are most explicit. A prime example of what a District Judge may not do is illustrated by the claim that a particular degree of racial balance was required in Charlotte schools.

The record discloses that the order resulted in elementary schools whose composition ranged from 9% to 38% black as opposed to the system-wide average of 29%.

Chief Justice Burger articulated quite forcefully on this issue:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, **that approach would be disapproved and we would be obliged to reverse.**" (p. 24) (Emphasis added)

reiterated at **Winston-Salem/Forstyth County Board of Education v. Scott,** 404 U.S. 1221 (1972).

A comparison with the desegregation plan ordered for the elementary schools of Richmond County shows unquestionably that this imperative was either miscostrued or misapplied.

This plan required that 29 of the existing 42

elementary schools be paired or grouped into 10 separate zones with racial distribution as shown below:[9]

Zones	Schools	Pupils	% Black
A	4	1522	40.8
B	4	2154	46.1
C	3	2189	44.4
D	3	1940	43.7
E	2	652	44.0
F	2	1198	30.2
G	3	960	38.8
H	3	1080	43.1
I	2	1113	40.1
ALT.	3	1684	34.2
TOTALS	29	14,492	41.02 Overall Black

From the diagram one is forced to conclude that awareness of the 60%-40% racial composition of the whole system was not utilized simply as a useful starting point in shaping a remedy. In the final analysis Court-ordered clustering results in an overall black percentage that deviates only 1.02% from the system average.

Even the individual zones evidence a persistent abherence to this ratio. This point is illustrated by the permissible range of variation from the overall average. In Charlotte a fluctuaiton of 29% was accepted, whereas the latitude here is only 15% or 1/2 that amount. Stated conversely, the restriction imposed on Augusta was twice as extreme.

Based on all these factors, it cannot be said that "the very limited use made of mathematical ratios was within the discretion of the Court." On the contrary,

[9] Appendix V hereto.

Milledge

To Evans	210
To Telfair	205

Evans

To Milledge	15
To Telfair	10

Houghton

To Telfair	77
To Evans	120
To Milledge	185
Evans (internal)	15

Total Transportation estimate (maximum) 952

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE B

Per Cent
Black 46.1

Schools	Totals By Race W	B	School
Walker	0	799	799
Lamar	345	131	476
Monte Cano	528	27	555
Lake F. Dr.	289	35	324
Totals	1162	992	2154

Data.

1. School Capacities:

Walker	43 classrooms	1075 pupils
Lamar	23	575
Monte Sano	23	575
Lake Forest Dr.	13	325

Evans	90	2	92
Milledge	667	105	772
Houghton	140	272	412
Totals	901	621	1522

Data.

1. School Capacities:

Telfair	19 classrooms	475 pupils
Evans	23	575
Milledge	31	775
Houghton	22	550

2. Total presently transported: 120.

Pupil Allocation Plan.

Telfair

Grade	W	B
6	124	99
7	121	87
	245	186
	431	
	43.1% B	

Milledge

Grade	W	B
1	153	91
2	154	91
3	102	67
	409	249
	658	
	37.8% B	

Evans

Grade	W	B
4	121	100
5	126	86
	247	186
	433	
	43.0% B	

Transportation Estimate

Telfair

To Evans	19
To Milledge	86

it is the product of a desegregation plan which relied entirely upon them. Such a standard is Constitutionally impermissible.

These results are achieved by a massive increase in transportation. This is a volatile subject which **Swann** dealt with in a most guarded manner:

> "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." (p. 29)

Under the "Finger Plan" 9,300 additional elementary students were required to be transported from a total Charlotte elementary population of 44,000. No figures were reported on the number bused prior, but the total for the entire system amounted to 21%.

In Richmond County there are 21,795 elementary students, of which 6,945, or 31.86%, were already being bused.[10] The order of the District Court required a transportation increase of 6,172 elementary students.[11]

This escalation has very startling consequences, for it creates a situation in which 61.77% of the elementary school children must now be bused.

Even more drastic is the impact upon the students in the 29 schools paired or clustered. Under the HEW plan 21.57% of the students enrolled in these

[10]All computations concerning Augusta-Richmond County Schools are based on figures contained in the Munzer Plans, a portion of which is set out in Appendix V hereto.

[11]6,172 reflects the correct increase in elementary busing. It is in conflict with the figure of 5,681 as shown by the District Court's Order, Appendix III hereto, which fails to include Alternate Zone.

schools were bused, a figure which now soars to 64.16%.

In considering the elementary portion of the Charlotte plan the Circuit Court determined that its increases were too extreme. They illustrated this conclusion by a formula which provides a useful comparison here.[12]

Percentage Increase of Additional Elementary Students Bussed As Opposed To All Students

	Presently Bussed
Charlotte	39% or 33% as Computed by Minority
Richmond County	58%

By this standard the disparity is perhaps more apparent. The increased elementary busing in this case is at least 19% greater than the figure classified by one Court as too extreme.

Even though this portion of **Swann** was ultimately reversed there is no indication that such increases would be approved elsewhere. Certainly there is nothing to indicate that they could be expanded to an even greater extent.

Perhaps the most formidable consequence of the District Court's Order is the effect it has on the grade structure of elementary schools. Previously the school system had been operated on a 7-2-3 basis which enabled a child to complete the first seven years in one school.

Pursuant to this order 69% of the elementary schools have been paired or clustered. They no longer

[12] 431 F.2d 138, 147 (4th Cir. 1970).

attending increases in times and distances. However, it is a reasonable and feasible plan which could be easily organized and administered.

Plan III.

Plan III results in a relatively small increase in transportation over Plan II. Its main feature is the effect on Floyd School which is an inner Black school. The total number of schools affected is 26. This plan is considered reasonable and feasible. It results in rather extensive changes in the total school system and therefore poses a more complicated administrative problem.

Plan IV.

Plan IV results in virtually complete desegregation. One all-White and one all-Black school remain. However, 29 out of 38 elementary schools fall within the 30 to 50% range of per cent Black. The transportation is extensive and distances are approaching undesirable levels. Zone J, for example, probably requires more than 45 minutes transportation time each way for children traveling between Hornsby and either Hains or Fleming. This plan can be justified as reasonable and feasible if transportation time of about one hour each way is acceptable.

ELEMENTARY SCHOOLS
COMBINED ZONE INFORMATION
PLAN III ZONE A

Per Cent Black 40.8

Schools	Totals By Race W	B	School
Telfair	4	242	246

4. The proposed allocation of pupils to schools and the effects on composition of enrollment.
5. An estimate of transportation demanded to implement the proposed zone.
6. Comments when needed.
7. Two copies of this report contain maps for each plan. The maps indicate the various zoning combinations which comprise the particular zones.

The four plans for the elementary schools are organized to present four alternative levels of desegregation. The fundamental basis for each plan is explained below. It should be noted that in all four plans the Houghton School is closed because of its age and poor condition.

Plan I.

Plan I is a minimal plan which emphasizes desegregation of schools on the borders of the Black concentration in Augusta. In the main, Black schools are combined with contiguous and adjacent White schools. In only one case, a Black school is zoned with two nearby schools. This plan affects the enrollments of 16 schools and develops a minimum of transportation problems related to time and distance. This plan is not only reasonable and feasible but it can be easily organized and administered.

Plan II.

Plan II extends the amount of desegregation to moderate levels. The number of schools affected is increased to 21. Transportation is increased with

have a standard grade structure, as the number of grades in a particular school depends on the number of schools in its zone. The size of the zone also dictates the number of schools a child must now attend during the course of elementary education.

Seven zones are composed of either three or four schools. The students who attend these schools constitute 53% of the entire elementary population. Thus we have a situation which requires over 1/2 of the elementary children in the system to attend three or four separate schools in seven years.

The absurdity of this arrangement is emphasized by comparison with the "Finger Plan."[13] It served to pair or cluster 46% of Charlotte elementary schools in such a manner as to achieve a 1-4 and 5-6 grade structure.

By these categories compulsory changes are minimized. Elementary children will therefore attend, at the most, only two schools. This is a factor readily distinguished from the procrustean demands of the Augusta counterpart.

A portion of **Swann** is addressed directly to this combination of evils:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process." (p. 30)

Transportation of better than six of every ten elementary students, some over long distance, in conjunction with the requirement that 53% must attend

[13] 311 F.Supp. 265, 280, 281 (W.D. N. Car. 1970).

three or four elementary schools is indeed a situation which, "impinges on the educational process."

A school desegregation plan must also have room for pragmatic considerations. A restriction is implicit in **Swann:**

> "25. The remedial technique of requiring bus transportation of public school students for purposes of racial desegregation is within a Federal District Court's power to provide equitable relief, where . . .
>
> ****
>
> (2) **implementation of the District Court's decree is well within the capacity of the local school authority."** (Emphasis added)

This was resolved affirmatively in Charlotte for obvious reasons. The school system had a total operating budget of $51,000,000 of which approximately $500,000, or less than 1% (.0098), was spent for annual transportation costs.[14]

The cost of increased elementary transportation was determined to be $672,000, or only 1.2% of the annual budget. Combined with current transportation expenditures it amounted to no more than 2.3% of that budget.

A radically different situation exists for Augusta's school system whose annual budget is only $21,000,000. Of this sum $572,000 was spent for transportation before the Court order. This is 2.7% of the total budget and represents a larger portion than was spent in Charlotte even after the increased elementary costs.

Here the additional transportation will require $644,000,[15] or 3.7%, of the budget. When combined

[14] 431 F.2d 138, 156 (4th Cir. 1970).

[15] This is a minimum figure and requires that schools be opened at staggered hours ranging from 7:30-10:30 A.M.

APPENDIX V

SUGGESTED PLANS

related to

DESEGREGATION OF THE PUBLIC SCHOOLS

of

AUGUSTA AND RICHMOND COUNTY, GEORGIA

Prepared for Judge Alexander Lawrence

by

J. Howard Munzer

and

Myrl G. Herman

THE PUPIL DESEGREGATION PLANS

This report contains **four** plans for desegregating the elementary schools of Richmond County and two plans for desegregating the secondary schools. For purposes of clear presentation the design for these plans follows a uniform pattern. Each plan is noted by Roman numeral. Composite zones constituting each plan are labeled by capital letters. For example, Plan I contains five combinations of attendance zones. The combined zones are denoted as A, B, C, D and E. Each zone is organized separately. The information pertaining to each zone is as follows:

1. The zone designation.
2. Present enrollment data of schools in the zone.
3. Additional data on school capacities and transportation.

that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

Application of Proviso of Section 407(a) of The Civil Rights Act of 1964 To The Entire United States

Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

with current outlays it amounts to some 5.8%. The aggregate of these costs, irrespective of percentages, is $44,000 more than the comparable figure in Charlotte.

In the space of a single year this school system has been wrenched to an unbelievable extreme. Only 12 months ago schools were operated under an HEW plan approved by the District Court.

Without respite or interlude it is now decreed that an incredible gulf be leaped in a single bound. How has this all come about? The only plausible answer is that the lower court misread the requirements of **Swann.**

Very persuasive support for this proposition is found in the words of the District Judge wherein he categorizes it as the "Busing" and "Racial Ratio Case".[16]

Several other Courts have viewed it differently, and, I think, properly.

> "While this case approved the use of busing as one tool for school desegregation, it did not hold that the plan implemented in Charlotte was a Constitutionally commanded Plan, or that a less drastic Plan might not have met Constitutional requirements." **Davis v. Board of Education of North Little Rock, Ark.,** 328 F.Supp. 1197, 1204 (E.D. Ark. 1971).

Even more emphatically:

> **"We therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the Mecklenburg rule, it by no means directed that its commands be obeyed everywhere.** (p. 636)

[16]Appendix III hereto.

And later:

> "**Swann** approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. **It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation.**" GOSS v. BOARD OF EDUCATION OF CITY OF KNOXVILLE, TENN., 444 F.2d 632, 637 (6th Cir. 1971). (Emphasis added)

Recent Courts in some instances have even found busing to be undesirable. A graphic example may be seen in **Calhoun v. Cook,** _____ F.Supp. _____, (N.D. Ga. 1972) decided June 8, 1972. Here the District Judges for the second time expressly rejected a mass busing plan for Atlanta, Georgia.

This determination was reached after an incisive appraisal of busing, its ramifications, and the competing interests involved.

Such a conclusion is justified by the words of Chief Justice Burger:

> "A school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. **The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.**" (Emphasis added.) (pp. 15, 16)

This clearly contemplates that busing is a remedy that must be chosen and limited with regard to other values upon which it impinges.

The availability of less rending solutions is well illustrated by the secondary schools. A constitutional plan for their desegregation was approved by the

criminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(c) An applicable program means a program to which the General Education Provisions Act applies.

Provision Relating To Court Appeals

Sec. 803. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

Provision Authorizing Intervention in Court Orders

Sec. 804. A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

Provision Requiring That Rules of Evidence Be Uniform

Sec. 805. The rules of evidence required to prove

ported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(b) No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education), the Department of Justice, or any other Federal agency shall, by rule, regulation, order, guideline, or otherwise, (1) urge, persuade, induce, or require any local education agency, or any private nonprofit agency, institution, or organization to use any funds derived from any State or local sources for any purpose, unless constitutionally required, for which Federal funds appropriated to carry out any applicable program may not be used, as provided in this section, or (2) condition the receipt of Federal funds under any Federal program upon any action by any State or local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee. No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education) or any other Federal agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student where the time or distance of travel is so great to risk the health of the child or significantly impinge on his or her educational process; or where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondis-

same Court on June 13, 1972. It did not require the extremes of the elementary plan, more importantly, it was accomplished without significant increase in busing.

We therefore have a complete inversion with the burdens cast upon the young. Certainly this is a travesty **Swann** intended to avoid by recognizing that the limits on permissible transportation would be affected by many factors:

> **". . . but probably with none more than the age of the students." (p. 31)** (Emphasis added)

II

LEGISLATION ENACTED JUNE 23, 1972 IS IN APPARENT CONFLICT WITH CONCLUSIONS REACHED BY THIS COURT IN SWANN. ITS LANGUAGE HAS NOT BEEN INTERPRETED BY ANY COURT AND GIVES RISE TO ISSUES WHICH MAY AFFECT EVERY AREA OF THE COUNTRY.

The foregoing reflects quite aptly the vicissitudes of Constitutional interpretation in this area of law. Recent legislation promises further obfuscation and constitutes a valid quandary.

With passage of the EDUCATION AMENDMENTS OF 1972 Congress has rejuvenated issues once thought resolved. The relevant provisions are set out in Title VIII, § 803-806, captioned **"Prohibition Against Assignment or Transportation of Students to Overcome Racial Imbalance."**[17]

Of immediate significance is § 806 which directs

[17]Appendix IV hereto.

that a proviso, of the **1964 Civil Rights Act**, shall apply to the entire United States. The substance of this proviso is that no Court shall be empowered to order the transportation of students to achieve racial balance. It is a restatement of the identical language interpreted by **Swann** with the added requirement of uniform application.

Obviously, however, Congress did not subscribe to the meaning accorded their words by this decision. Had this not been the case there would have been no need for subsequent repetition.

All of this brings us to a perplexing impasse. § 806, on its face, seems to preclude an order such as the one contained in this case. A result entirely to the contrary was reached by **Swann** based primarily upon the disparate status of de jure and de facto states.

Both versions cannot be reconciled. The interpretation arrived at by this Court depends upon a distinction, while uniformity requirements of subsequent identical legislation demand that there be none.

A further example of the legislative intention to abrogate this historical distinction is provided by § 805 which states:

> "The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."

Discrimination by state authorities is a basic ingredient of the facto — de jure, dichotomy. The standards of proof in this regard have been quite different.

It does not prohibit busing as a means of achieving desegrate

APENDIX IV

EDUCATION AMENDMENTS OF 1972, ENACTED JUNE 23, 1972

TITLE VIII—GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

Prohibition Against Assignment or Transportation of Students to Overcome Racial Imbalance

Sec. 801. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome "racial imbalance."

Prohibition Against Use of Appropriated Funds For Busing

Sec. 802(a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be trans-

basis, with the provisions for "Desegregation of Faculty and Other Staff" as set forth in **Singleton v. Jackson Municipal Separate School District,** et al., 419 F.2d 1211 (5 Cir.). The School Board is directed to file semi-annual reports during each school year similar to those required in **United States v. Hinds County School Board** (5 Cir.), 433 F.2d 611, 618.

(8) The pending motions filed by the plaintiffs for appointment of a receiver for the Richmond County system and for adjudging the defendants in contempt will be held in abeyance, at least for the present.

(9) The evidence at the hearing on December 16, 1971, indicates that there are numerous instances where pupils are attending schools in zones outside their actual residence. The Board, Superintendent and school officials are ordered promptly to undertake corrective measures in respect to boundary observance. A report in that respect shall be furnished not later than February 1, 1972.

(10) The motion for award of attorney's fees to plaintiffs' counsel is granted. The amount of the fee will be settled on affidavits or, if necessary, following a hearing on the subject.

(11) The defendant Board will, as a part of the costs in the case, pay the compensation and expenses of Messrs. Munzer and Herman for their services to this Court and same are assessed as costs against defendants.

This 13th day of January, 1972.

ALEXANDER A. LAWRENCE
Chief Judge, United States District Court
Southern District of Georgia

Keyes v. School District No. 1, Denver, Colorado, 445 F.2d 990, 1006, (10 Cir. 1971).

Both of these sections are worded to insure absolute parity. Such a result is incompatible with the perpetuation of this hoary distinction. There must now be one uniform classification of states.

Consequently two alternative interpretations are possible. Either Congress has created a right of action in de facto states or the prohibition of Court ordered transportation applies in de jure situations.

The latter conclusion seems infinitely more plausible. It is substantiated by the fact that both provisions are contained in legislation which is clearly recognized as "anti-busing" in nature. This consideration is especially important with regard to § 806 whose language was first contained in the **1964 Civil Rights Act,** a measure concerned only with the promulgation of desegregation.

The prohibition of Court ordered transportation for racial balance is a legitimate exercise of the "enforcement powers" granted Congress by § 5 of the 14th Amendment. This is a positive grant of legislative power entrusting to Congress the same broad powers afforded them by the "Necessary and Proper" clause of the Constitution, Art. I, § 8, cl. 18. **Katzenback v. Morgan,** 384 U.S. 641, 651 (1966).

By restating the law in this manner Congress has imposed a simple and prudent restriction on how the goals of this Amendment are best accomplished. Desegregation is not proscribed, only a method. There are still half a dozen or more remedies, currently used

in school cases, which remain available to a District Court.

Article III empowers Congress to create inferior Federal Courts. The Constitution grants no original jurisdiction to such courts, it comes from Congress. It is axiomatic, therefore, that the body empowered to grant jurisdiction may take it away.

> "The congressional power to 'ordain and establish' inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." **Lockerty v. Phillips,** 319 U.S. 182, (1943).

Congress has therefore limited the jurisdiction of District Courts to issue busing orders. Jurisdiction is the power to declare the law and without it all that remain is to dismiss the cause. **Ex parte McCARDLE,** 74 U.S. 264 (1869).

(3) Minor adjustments in the Plan may be made by defendants as to alternate assignments in the instance of special education classes provided that the desegregation levels outlined in the plans are maintained.

(4) The Superintendent of Schools shall file a report in writing with this Court on January 19, 1972, detailing what has been done by him and by the defendant Board since this Order was signed in preparing, planning and carrying out the implementation of Phase One and Phase Two of Plan III. Similar written reports shall be filed by him at the end of each successive three-day period after such date until further order of this Court.

(5) Meanwhile, the Court will continue to consider and to endeavor to formulate and develop a feasible and sound plan of desegregation for the secondary schools in the system. At the earliest practicable time an Order in that respect will be entered. The secondary school plan approved and ordered by the Court will be implemented by defendants on September 1, 1972.

(6) The defendant Board and the Superintendent will file in this Court within 15 days a report showing the total enrollment during the present school year in every school in the system and the number of blacks and whites in each such school. The report will also include information as to racial composition of faculty and staff in the schools.

(7) It is further ordered that the Board shall immediately review existing staff and faculty racial ratios and shall forthwith comply, on a system-wide

that, there is at present no plan before the Court upon which it can act. Dr. Munzer and Mr. Herman presented two alternative plans for desegregation of secondary schools but at the hearing on December 16th last the possibility was raised that there might be discrimination against the plaintiffs in that Josey and Laney High Schools, which are all-black or practically so, would no longer be graduating schools whereas none of the predominantly white senior high schools have been thus treated in the plans. I have asked that the experts suggest alternative plans as to the secondary schools in the Richmond County system dealing with that problem.

ORDER

(1) It is ordered and decreed that the desegregation of the elementary schools in the Richmond County system shall be in accordance with this Order. Defendants are directed promptly to take all necessary steps to the end that Plan III shall be implemented in the three phases described in this Order. No stay will be granted pending any appeal by any party from this Order.

(2) Responsibility as to implementation will be and is imposed upon the Board and the Superintendent of Schools and they are ordered to fully and timely implement Plan III for the elementary schools. If the Board does not act promptly in any case in which any discretionary authority is conferred upon it by this Order, the discretion in that respect will be exercised by the Superintendent and he is directed in any such instance to act and full responsibility is imposed upon him.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the order entered January 13, 1972, and the judgment entered March 31, 1972, by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

O. TORBITT IVEY, JR.

Suite 500
The 500 Building
Augusta, Georgia 30902
Attorney for Petitioners

July 28, 1972

HARRIS, CHANCE & McCRACKEN

CERTIFICATE OF SERVICE

This is to certify that I have on this day served the Honorables Franklin H. Pierce, Leonard O. Fletcher, Jr., and J. H. Ruffin, counsel for respondents, by personally handing them three copies each of the within Petition for Writ of Certiorari.

This 28 day of July, 1972.

O. TORBITT IVEY, JR.
Suite 50
The 500 Building
Augusta, Georgia 30902
Attorney for Petitioners

ing schools designed to draw either from the white or black school population, not from both. New schools have been erected with resulting preservation of a segregated system. By and large, the Negro schools lie in the heart of a densely populated black area of Augusta. White schools follow residential patterns. Lack of new and more strategically located middle grade schools compound the problem.

Irrespective of obstacles, the Fourteenth Amendment, as construed by federal courts, demands that the dual system now in existence be "wiped out root and branch" and "not tomorrow but now." However, you cannot in one day chop down and dig up the stump of a tree which rooted two centuries ago. Desegregation will be delayed on the secondary level until September 1, 1972.[5] It must be fully accomplished by that date and will be. As I stated on another occasion, it is phantasy approaching autism to think that the Constitution of the United States treats Augusta differently from other places where a dual system is the result of **de jure** school segregation. Richmond County is no different from 42 other school districts in the Southern District of Georgia in which desegregation is now an accomplished fact; admittedly with travail in certain cases.

Earlier in this Order, I referred to some of the difficulties of mid-year desegregation, particularly high schools. At this time and during the current school year it would be chaotic, if not impossible, to implement any major plan in respect to desegregation of secondary schools in Richmond County. More than

[5] Of course, in event of appeal and reversal of this Order the Board must be prepared to desegregate all schools during this year.

race Manor and Wheeless Road schools. The percentage of black pupils in Glenn Hills and Terrace Manor are high, averaging 48.1 per cent in the two schools. If these schools should be combined with Wheeless Road School which is predominantly white, the average percentage of black upils would be 34.2. There is presently a total enrollment of 1,684 pupils in the three schools and a capacity of 1,650 according to school data. Consequently, there is a need for two additional classrooms which, logically, would accommodate a class at Glenn Hill school and a class at Wheeless Road school.

The result of combining Glenn Hills, Terrace Manor and Wheeless Road schools according to an analysis of pupil population and available space is shown below:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Terrace Manor	508	1-2	20	0-1	20	21	+1
Glenn Hills	340	3-4	13	0-0	14	13	—1
Wheeless Road	836	4-7	33	0-1	33	32	—1

SECONDARY SCHOOLS

The desegregation of the secondary school system in Richmond County presents the same difficulties that is experienced in any large urban school district. The problems stem not only from vestiges of State-imposed segregation but from the practice since 1954 of school boards perpetuating dual systems by build-

APPENDIX

BY THE COURT: These are appeals from the order of the district court dated January 13, 1972, directing implementation of a desegregation plan for the schools of Richmond County, Georgia. The history of this case is well documented by the district court. **Acree, et al v. Drummond, et al v. County Board of Education of Richmond County, Georgia. et. al,** ____ F. Supp. ____ (S.D., Ga., January 13, 1972).

The County Board of Education and Intervenors raise numerous objections to the desegregation plan being implemented by the district court, most of which do not even merit discussion. The major contention is that the district court erred in requiring "forced bussing" to achieve racial balance, in violation of the equal protection clause of the Fourteenth Amendment and of Title IV of the Civil Rights Act of 1964.[1]

In **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971), the Court made quite clear that bussing is an available tool for use by district courts in achieving school desegregation. In the instant case the district court utilized this tool along with the pairing, clustering and zoning methods long authorized by the Supreme Court and this court. **Swann v. Charlotte-Mecklenburg Board of Education, supra; Davis v. Board of School Commissioners of Mobile County,** 402 U.S. 33 (1971); **Boykins v. Fairfield Board of Education,** ____ F.2d ____ (5th Cir., 1972) [No. 71-3028, Feb. 23, 1972]; **Singleton v. Jackson Municipal Separate School District,** 432 F.2d 927 (5th Cir., 1970).

[1] 42 U.S.C. § 2000c.

education pupils at Robinson. Acceptable solutions include the following:

(1) Move 6 classes for special education to Weed Elementary School or

(2) Move Grade 6 to Weed Elementary School.

The Board of Education may adopt one or the other of these solutions.

Zone H

Zone H clusters Floyd, Garrett and National Hills elementary schools. Pupil population and available space analysis indicates the following as to Zone H:

	per Plan Pupils	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Floyd	309	6-7	12	0-0	12	23	+11
Garrett	466	3-5	19	20-3	22	20	—2
National Hills	305	1-2	12	0-0	12	14	+2

There is an indicated shortage of two classrooms at Garrett. Solutions for this problem include:

(1) The shifting of two special education classes to Floyd Elementary School or to National Hills.

(2) The shifting of Grade 5 from Garrett to Floyd Elementary School.

The Board of Education may adopt one or the other of these possible solutions.

ALTERNATIVE PLAN

(See pages 45 and 46 of original Munzer-Herman Plan)

The Alternative Plan includes Glenn Hills, Ter-

Zone B

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Walker	932	5-7	38	43-3	41	43	+2
Lamar	411	1-3	16	10-1	17	23	+6
Monte Sano	544	3-4	22	0-0	22	23	+1
Lake F.Dr.	267	1-2	11	0-0	11	13	+2

Zone C

Collins	951	5-7	38	19-2	40	41	+1
Bayvale	684	1-3	27	0-0	27	29	+2
Copeland	554	3-4	22	0-0	22	23	+1

Zone F

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or..—
Craig	506	1-3	20	0-0	20	20	0
Hains	692	4-7	28	0-0	28	30	+2

Zone G

Zone G, Plan III, clusters Weed, Robinson and Merry elementary schools. An analysis of pupil population and available space in Zone G shows:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Weed	143	5	6	0-0	6	12	+6
Robinson	294	6-7	18	40-4	22	16	—6
Merry	523	1-4	21	0-0	21	22	+1

No space or special education problems are involved in Zone G. A problem does exist which grows out of the need of six additional classrooms for special

The argument that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964 has been rejected in **Swann,** where the Court found no intent on the part of Congress to restrict the powers of federal courts to enforce the equal protection clause or "to withdraw from courts their historic equitable remedial powers." 402 U.S. at 17.

The board and intervenors contend, however, that the district court's order irreparably harms "quality education" in Richmond County. The district court should not, and did not, permit the use of such platitudes to perpetuate a dual school system, nor could it permit defendants to reply on the inferiority of certain school facilities to which children were to be transferred as a justification for continued racial discrimination. The Court in **Swann** stated unequivocally:

> "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. 402 U.S. at 16."

The Richmond County Board of Education has operated and continues to operate a **de jure** as well as **a de facto** segregated system, and has long been under order to desegregate. **See Acree v. County Board of Education of Richmond County, Ga.,** 399 F.2d 151 (5th Cir., 1968). Despite a clear duty, the Board has offered no viable **constitutional** alternative to the plan implemented by the court below, but instead has en-

gaged in conduct only designed to disrupt and delay

the disestablishment of a dual system.

From our review of the plan adopted by the district court and the evidence presented, we are of the firm view that there is no indication whatsoever that the transportation required as a result of the court's plan would adversely affect the health of the children or impinge on the educational process. We are also convinced that a **good faith** effort by the school board will overcome any logistical problems that might arise.

The issues raised by plaintiffs have been dealt with by our prior order of February 8, 1972, in which we required the district court to consider plaintiffs' alternate plan along with those submitted by the court's experts in the development of a unitary system for the secondary schools of Richmond County.

We too recognize the practical problems which forced the district court to delay implementation of a plan for the secondary schools, and there are now little more than two months remaining in the school year. However, in view of the serious delays which have occurred in this case over past years, we order that a plan be developed immediately for the secondary schools, that some demonstrable progress be made now[2] and that a schedule be adopted forthwith in order that a constitutional plan will be implemented at the beginning of the 1972-73 school year.

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The district court is required to take whatever steps are necessary under its equity powers to assure

[2] For example, transportation facilities needed as a result of the plan should be arranged, funds applied for, budget changes contemplated, etc.

As indicated by the above table, there is a shortage of eleven rooms at Southside. The school district data furnished by the Superintendent's office shows that Southside has fifteen rooms. This would give it a capacity of 375 pupils on the basis of 25 pupils per classroom. However, it is noted that at the present time the school has an enrollment of 675. It follows that there must be more than fifteen classrooms at Southside elementary. Plan III, Zone I, indicates a school population of 650 at Southside which is smaller than the present enrollment figure.

PHASE THREE, ELEMENTARY

The third and final phase of desegregation of the elementary schools in Richmond County involves Zones B, C, F, G, H, and the Alternative Zone outlined on page 45 of the original plan of desegregation. Phase Three will be fully implemented on September 1, 1972. I have deferred the desegregation of the schools in these zones until the beginning of the next school year and in doing so have taken into consideration the fact that the transposition from a dual system to a unitary system will involve adjustments of a major character and that it is impractical and unwise to convert the system overnight at mid-year.

Zones B, C and F in Plan Three present no space or special education problems. An analysis of pupil population and space availability in regard to the four Zones in question shows as follows:

PHASE TWO, ELEMENTARY

Zone E

Phase Two of the implementation of Plan III is approved and adopted and will be implemented not later than March 15, 1972. This Phase relates to Zone E and Zone I.

Zone E is made up of Jenkins and Fleming elementary which will be paired. No problem exists in respect to special education pupils.

An analysis of pupil population and available pupil space in the pairing of Jenkins and Fleming appears below:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for..'71 Ch./ Tchr.	Rms. Needed Plan..and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Jenkins	332	1-3	13	15-2	15	15	0
Fleming	320	4-7	13	22-2	15	32	+17

Zone I

Zone I involves the pairing of Griggs and Southside elementary schools. The transportation problem presents greater distances than Zones A, D or E. Griggs and Southside are located approximately 4.2 miles straight line distance from each other. The analysis of pupil population and available space indicates the following with respect to this Zone:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for..'71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Griggs	463	5-6	18	17-2	20	21	+1
Southside	650	1-4	26	0-0	26	15	—11

compliance and cooperation from the school board in implementing a plan for the secondary schools and in carrying out the three phases of its desegregation plan for the elementary schools of Richmond County.[3]

The order of the district court of January 13, 1972 is AFFIRMED as modified herein.

The mandate shall issue forthwith.

[3] The effect of the district court's plan, of course, is not to be ameliorated by such practices as segregation by race in the classroom. If the court receives evidence of such behavior, it should take further steps to enforce its decree. **See Moses v. Washington Parish School Board,** ____ F.2d ____ (5th Cir., 1972) [No. 71-2561, March 8, 1972].

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APPENDIX II.

United States Court Of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 2, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 72-1211 — Acree, et al vs. County Board of Education of Richmond County vs. Drummond, et al

---

Gentleman:

You are hereby advised that the Court has today entered an order on behalf of Intervenors-Appellees-Cross-Appellants denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By_____
DONNA BRADY
Deputy Clerk

/dlb

Zone A presents no serious transportation problem. The distances are not great between the clustered schools.

Zone D

Under Plan III, Zone D, White, Wilkerson Gardens and Bungalow Road elementary schools are clustered. The Zone embraces a rather small geographical area and transportation distances are relatively short. There is no indication of space problems resulting from special education pupils.

The plan proposed for clustering of these three elementary schools in Zone D is adopted and will be implemented at the same time as Zone A, that is, on or before February 14, 1972. The pupil population in the four schools in Zone D as related to available space will be approximately as is shown in the original plan. It is iluustrated in the table below:

	Pupils per Plan	Grades	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms* + or —
White	785	5-6	31	0-1	31**	31	0
Wilkinson Gardens	576	1-2	23	0-1	23**	24	+1
Bungalow Road	579	3-4	23	16-1	24	29	+5
					78	84	

*The last column shows the number of rooms in excess (+) if Plan III is implemented and if the special education population as of the Fall of 1971 does not move. The minus sign indicates room shortage.

**I assume that no classroom is needed since no grouping of special education children is indicated for these schools.

The Court leaves to the Board of Education (or Superintendent) the matter of determining whether Houghton Elementary should or should not be closed. If it is closed (and the evidence satisfies the Court that it is substandard) solution one which involves no change from the Plan as originally presented as related to standard classrooms and grades seems preferable. If it should be determined not to close Houghton and if it should be included in Zone A along with Telfair, Evans and Milledge, the following distribution of pupils is indicated by the Plan:

	Telfair			Evans		
	Grade	W	B	Grade	W	B
	6	124	99	3	102	67
	7	121	87			
		245	186			169
Total		431				
Percentage of Blacks			43.1%			39.5%

	Houghton			Milledge		
	Grade	W	B	Grade	W	B
	4	121	100	1	153	91
	5	126	86	2	154	91
		247	186		307	182
Totals		433			489	
Percentage of Blacks			43.0%			37.2%

	Telfair		Evans		Houghton		Milledge	
	Teach.	Child.	Teach.	Child.	Teach.	Child.	Teach.	Child.
Sp. Ed.	2	14	6	6	0	0	0	0
Rooms Avail.	19		23		22		31	
Rooms Needed	19		18		17		20	

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

CIVIL ACTION NO. 1179

ROBERT L. ACREE, et al.,
Plaintiffs

VS.

ANN GUNTER DRUMMOND, MASON CARTER CLEMENTS, S. LEE WALLACE, NADINE ESTROFF, DOUGLAS D. BARNARD, JR., ROBERT BEATTIE, BILL PERRY, DR. JAMES B. HATTAWAY, WILLIAM J. SALLEY, PATRICK G. SMITM, C. DAN COOK, EARL H. HENSLEY, WILLIAM B. KUHLKE, JR., GEORGE H. STREETER, GEORGE W. FISHER, FREDDIE CHILDRESS, LEONA NORTON, H. WELDON HAIR, HOWARD W. POTEET,
Plaintiffs in Intervention

VS.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants

ORDER

This case has been around since 1964. I came into it in the Fall of 1968.

At that time a freedom of choice plan was in effect in Richmond County schools. The total enrollment of white and black children in 1967-1968 was

approximately 35,750 students. Of 12,250 Negro students in the school population 5.5% chose to attend previously all-white schools. With one exception no white student had exercised freedom of choice to attend a previously all-black school.

Judge Scarlett held hearings in the Spring of 1968 on a motion by plaintiffs to adjudge the School Board in contempt and for summary judgment. He denied such relief. On oppeal the Fifth Circuit reversed that ruling. See 399 F.2d 151. The appellate court said:

> ". . . we think it quite appropriate to point to the fact on the undisputed statistics presented to us it is clear that, with respect to the Richmond County Board of Education, a plan of desegregating the schools, generally known as 'the freedom of choice' plan has not worked. It has not produced a unitary school system in which there are no longer Negro schools and white schools, generally known and recognized by all as such. Under these circumstances, it becomes the duty of the respondent Board, not only under the Supreme Court decisions above referred to, but under our Jefferson decree, to take additional important and effective steps."

After the ruling was handed down the Fifth Circuit Court of Appeals assigned the case to me. A hearing was held at Augusta in December, 1968. I said that freedom of choice was impermissible. It had not worked. The Supreme Court had made this clear in **Green v. County School Board of New Kent County,** 391 U.S. 430; 88 S.Ct. 1689, 20 L.Ed2d 716 where the highest Court ruled that freedom of choice must be an effective device promising "meaningful and immediate progress toward disestabilshing state-imposed segregation." The Court said that "The burden

	Pupils per Plan	Grade	Class Room Needs	Special Ed. For 1971	Rms. Needed Plan and Sp. Ed. '71	Rooms Available	Rooms +/—
Telfair	431	6-7	17	31-2	19	19	0
Evans	433	4-5	17	72-11	28	23	—5
Milledge	658	1-3	26	0-0	26	31	+5

As appears in the above table, there is a shortage of classrooms at Evans Elementary should no special education children be moved from that school. There are at least two solutions to this problem. Solution one would require the movement of five special education classes from Evans to Milledge. Solution two would call for movement of the fourth grade from Evans to Milledge, that is to say, the fourth grade as presented in the Munzer-Herman Plan III.

With respect to solution one, no change from Plan III as originally presented is required other than the movement of the special education children as referred to above.

Under the second solution, the following attendance results would obtain:

Telfair	**Milledge**			**Evans**		
	Grades	W	B	Grades	W	B
Same as in	1	153	91	5	126	86
original Plan	2	154	91			
	3	102	67			
	4	121	100			
		530	349			
	Total		879	Total		212
	Percentage of Blacks 38.5%			Percentage of Blacks 40.6%		

Houghton) and by Zone D (White, Wilkerson Gardens and Bungalow Road elementary schools). I will comment subsequently on the closing of Houghton elementary.

Phase Two will be implemented on or before March 15, 1972. This Phase involves Zones E and I under Plan III. The elementary schools affected are Jenkins and Fleming which will be paired and Griggs and Southside which will likewise be paired on or before March 15th next.

Plan III as related to other elementary schools in the system will be implemented on September 1, 1972.

Below is reviewed the effect of Plan III on the elementary schools with special relation to pupil population and available classroom space.

PHASE ONE, PLAN III

ELEMENTARY SCHOOLS

Zone A

At the evidentiary hearing on December 16, 1971, objections were raised by the Intervenors to the closing of Houghton elementary as proposed in each of the four elementary plans involving Zone A. Opponents thereof did not believe that the three other elementary schools in the Zone (Evans, Telfair and Milledge) would be capable of housing both regular classes and the special education classes, particularly the special education pupils at Evans.

An analysis of pupil population and available space in Zone A is set out below. It indicates that there is adequate space at Telfair, Evans and Milledge for all pupils, including special education children.

on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work **now.**"

I did not rule out freedom of choice altogether but stated that I would "give consideration to a plan formulated by the Board which combines automatic assignment of pupils within designated geographical zones and a limited freedom of choice of schools." See **Acree v. County Board of Education of Richmond County,** Georgia, 294 F. Supp. 1034. I directed that a zone or attendance area system be put into effect for the 1969-1970 school year.

On June 16, 1969, a hearing on the Board's plan was held at Augusta. Plaintiffs objected to it **in toto.** On July 14, 1969, I approved the plan presented as a temporary expedient. See 301 F. Supp. 1285. I pointed out:

> "The decisions of the Court of Appeals for the Fifth Circuit say that geographic zones are acceptable only if they tend to disestablish rather than reinforce the dual system of segregated schools. **Davis v. Board of School Commissioners of Mobile County,** 393 F.2d 690; **United States of America v. Greenwood Municipal Separate School District,** 406 F.2d 1086 (Feb. 4, 1969); **Henry v. Clarksdale Municipal Separate School District,** 409 F.2d 682. A school board must strive for promotion of desegregation and 'conscious effort should be made to move boundary lines and change feeder patterns which tend to preserve segregation.' See 393 F.2d at 694."
>
> I further stated:
>
> "I think the wisest thing to do at this time, certainly the most expedient, is to approve temporarily the Board's new zone system and permit

same to go into effect at the beginning of the coming (1969-70) school year. We will soon thereafter be able to judge its effects. Because of possible constitutional infirmities of the zoning plan it will not be permanent and this is not a final order."

My Order of July 16, 1969, directed the School Board and Superintendent to apply immediately to the Office of Education, H.E.W., for professional counselling and assistance looking to development of a satisfactory and legal plan at an early date.

Before such a plan could be developed and presented the plaintiffs filed an appeal to the Court of Appeals for the Fifth Circuit. This was in March, 1970. On July 1st of that year that Court remanded the case. See 443 F.2d 1360. The higher Court said:

> "Having examined the record and the briefs of counsel in the above styled and numbered cause, this Court is left with a very definite and indelible impression — the Richmond County, Georgia public schools are racially identifiable, both as to the faculty and the composition of the respective student bodies. If there is any hope remaining for the Richmond County public schools to operate as a unitary system by the commencement of the new school year — prompt and immediate action is required."

In compliance with the Order by the Fifth Circuit a hearing was held and evidence introduced on July 30, 1970. On August 3rd I approved a plan recommended by Health, Education and Welfare which I modified to include additional pairing. It was essentially a neighborhood plan. The Fifth Circuit had gone along with something similar in the case of **Ellis v. Board of Public Instruction of Orange County,**

with. To obviate the system being closed down indefinitely I permitted the carrying on of a dual system at the beginning of the year. It is still in effect.

Last June I handed down an Order which fully integrated the secondary schools in the Chatham County system (with one necessary exception.). I delayed action on the elementary level as the Board wished more time and had not been able to agree on a plan. My decision was appealed and the ruling reversed. This Court was instructed to "forthwith" desegregate the elementary as well as secondary schools. This was done by the Court early in September, 1971. The situation in the Chatham County school case differs only from the Richmond County case in that the former involved the beginning of a school year and the latter the middle of such a year.

I realize that February is a poor time to revolutionize a school system. Significant educational problems are especially involved in massive changes in student populations of senior high schools during the academic year. Student schedules have already been planned for the year. Athletic programs have been developed and implemented. Seniors have spent one half of the year in present locations and have planned senior year activities, including ordering rings and yearbooks.

But a start must be and will be made. It will commence with certain elementary schools and will be effectuated in three phases. Phase One of Plan III proposed by the Court's experts will be implemented not later than February 15, 1972. The initial implementation will apply to two clusters of elementary schools represented by Zone A (Telfair, Evans, Milledge and

buses would be required at a cost of $12,400 each with an annual operational cost of $5,000 per bus.[4] Under Plan III, 5,681 additional elementary students would be transported. On the secondary level, Plan I contemplates bussing of 1,644 additional high school and junior high students. Plan II (secondary) calls for the transportation of 2,150 more students than are now being bussed. The estimates of increased transportation needs are possibly over-estimated by Dr. Munzer and Mr. Herman.

Counsel requested the Court to delay implementation of any plan pending discussions among the parties as to devising one (particularly on the secondary school level) which would be satisfactory. I granted a twenty-day extension for that purpose. That period has passed without any agreement being reached. Of course, in any event, the parties would not be permitted to stipulate away the mandate of the Constitution as to establishment of a unitary school system — one in which there are neither white nor black schools, just schools.

On July 1, 1971, the Fifth Circuit ordered that this Court require the Richmond County School Board "forthwith" to constitute and implement a constitutional student assignment plan. That means now, at once, without delay or interval. Because of the Board's wilful failure to carry out its constitutional duty the mandate of the higher Court could not be complied

[4] The same objection as to cost of increased transportation was made in the Savannah case. With staggered bus schedules, the increased needs have been handled (though with difficulty) by the existing equipment. The Chatham County system has approximately the same number of buses as Richmond County and about the same enrollment.

Florida, 423 F.2d 203. I took that route. The plan in question was to be implemented at the 1970-1971 school year.

My Order of August 3, 1970, in the **Acree** case was appealed to the Fifth Circuit. Meanwhile, the "busing" and racial ratio cases, including **Swann v. Charlotte-Mecklenburg Board of Education** had reached the Supreme Court of the United States. The Court of Appeals held its ruling in abeyance pending a decision in **Swann** and the other cases. It was handed down by the Supreme Court on April 20, 1971. See 402 U.S. 1-48. That decision made it clear (I quote the syllabus in **Swann**) that:

(a) While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part.[1]

(b) A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool.

(c) The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual system is supported by the record, and the reme-

[1] The Fifth Circuit has been telling us for years that "If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools . . . then as a matter of law the existing plan fails to meet constitutional standards established in **Green.**" **Adams v. Mathews,** 403 F.2d 181.

dial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief.

On July 1, 1971, the Court of Appeals for this Circuit disapproved the plan which this Court had approved in July, 1970, to be put into effect during the current school year. It remanded the case, stating:

> "The judgment of the district court as it relates to student and faculty assignment is vacated and the case is remanded with direction that the district court require the school board forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in **Swann v. Charlotte-Mecklenburg Board of Education,** 1971, ___ U.S. ___, ___ ___ S.Ct. ___ ___ L.Ed.2d___, 39 Law Week 4437; **Carter v. West Feliciana Parish School Board,** 5 Cir., 1970, 432 F.2d 875, and **Singleton v. Jackson Municipal Separate School District,** 5 Cir., 1970, 419 F.2d 1211, insofar as they relate to the issues presented in this case."

The Court of Appeals has said that the prevailing system is a dual and an unconstitutional one. The racial statistics bear this out beyond all doubt. They reveal that in the elmentary schools during the 1970-1971 year seventeen were predominantly white and nine predominantly black.[2] There were four all-black elementary schools and one all-white. In eleven elementary schools the minority attendance was 5% or less of the whole and in three other schools the minority ratio was 10% or less of the entire school population..[3] On the secondary school level in 1970-

[2] I have used an 85% ratio as illustrating a predominantly white or predominantly black school.

[3] For example, at Southside this year there are 680 students of whom 8 are black.

At my suggestion, the Intervenors presented a plan for consideration. It is entitled "Quality Education Plan for the People of Richmond County, Georgia." The plan is nothing more than Freedom of Choice both for students and faculty. Since the Intervenors have a right of appeal from this Order the higher court can enlighten us as to my evaluation of the "plan" proposed. Anyone who has even casually examined the decisions of the United States Supreme Court and of the Court of Appeals for this Circuit must know that choice plans are not constitutionally acceptable in a case such as this. In fact, the latter Court said exactly as much concerning the Richmond County system. See 399 F.2d 152.

On October 8, 1971, Dr. Munzer and Mr. Herman returned to Augusta to confer with the Court concerning the proposed desegregation plans. On the same day, with counsel and the Superintendent of Schools present, the plans were explained and discussed by the experts in the courtroom.

A full evidentiary hearing was held on December 16-17, 1971, for the purpose of considering a plan and for hearing evidence which the Intervenors desired to offer in opposition thereto. Witnesses for the Intervenors testified as to the effect of the Munzer-Herman plans on the R.O.T.C. program and on the exceptional children and model reading programs. The Director of Transportation stated that the Richmond County school system has 97 buses, including four assigned to special education. Eighty-three operate daily and there are 10 spare buses. In the last school year more than 12,000 students of a total of 34,619 were bussed. It was estimated that under the proposed plan 27 new

and Johnson has 442 students, 39% black. The basic difference in the two secondary school Plans is that Plan I does not involve Sandbar Ferry or Sego whereas under Plan II these two schools are paired in such a way that Sandbar Ferry is grade 8 and Sego is grade 9.

After the plans were filed, I asked the parties for their analysis, comments and criticisms. The plaintiffs complained, among other things, that presently all-black Laney and Josey were reduced in status from graduating high schools and that this was not done in the case of any predominantly white senior high school.

The Board's response was of expected quality and content. It raises every carping, contumacious objection conceivable. It is a mishmash and embranglement of letters from individual members of the Board, the Superintendent and principals opposing desegregation of the system. There are resolutions, letters, speeches, newspaper clippings, et cetera. The response contributes less than nothing to the difficult problem the Board faced but fled.

Meanwhile, in October, 1971, I permitted a group of white parents to intervene who are opposed to busing, though they say they are not opposed to integration **per se.** I will add that if there is any way to dismantle a dual school system, and the Richmond County Board perpetuated one long after the 1954 decision in **Brown v. Board of Education,** 347 U.S. 483, I am not aware how the constitutional imperative can ever be achieved without substantially increasing the transportation of students.

1971, out of seventeen schools there was one all-black and two 99% black schools. There were six predominantly white schools in which the Negro ratio was less than 10% and two predominantly black schools with an attendance by white students of 6% or less. Two other secondary schools had a white ratio of 88% of the school population.

The current school year has produced inevitably (since the same plan is in effect) the same segregated picture. The projected attendance indicated that there are forty-one schools in which white students predominate. They have a total enrollment of 24,721 of whom 20,648 are white and 4,073 are black. In eighteen black schools in the system which have a total enrollment of 12,941 there are 360 white students (2.8%).

Following the decision of the Circuit Court of Appeals on July 1, 1971, I promptly ordered the Board to present a student and faculty assignment plan to this Court not later than July 21, 1971. I assigned a hearing on it for July 28th. Subsequently, upon oral request I extended to August 26th the time for presentation of such a plan. A hearing was held on that date.

To my amazement, the H.E.W. officials did not show up at the August 26, 1971, hearing. Without notice or excuse and at whose behest I do not know they did a disappearing act. The Board's behavior was no less contemptible. They passed the buck to the Superintendent of Schools, who, no doubt under instructions, presented a "plan" to the Court on behalf of the Board. What that individual did recommend does not surprise me in the light of his statement to this Court at the hearing held in Augusta on Decem-

ber 16, 1971. I inquired of him what plan he would suggest to the Court for the integration of the school system and his reply was, "Freedom of Choice." The plan presented by the School Superintendent at the "hearing" on August 26th last was to keep the school zones as they were except for two or three minor changes as to boundaries. One of them would have transferred about 100 white students to an all-black high school. This plan, so learned counsel for the Board informed me, made the system a unitary one, if it was not already such.

In **Acree v. County Board of Education of Richmond County,** 399 F.2d 151, the Court of Appeals said: "We think it not necessary to do more than call the attention of the respondent here to the extremely important obligation which is once more placed on the Board to assume its full responsibility to do all that is reasonably feasible, and **now,** to bring an end to the dual system of white and Negro schools in Richmond County." The Richmond County Board and its Superintendent have abdicated their responsibility. They have been contemptuous and intransigent. They have chosen to ignore the Constitution and the courts. Apparently, they, together with a segment of the population of Richmond County, deem themselves above and beyond the law. The Fourteenth Amendment is not to apply to those who find it not to their liking.

At the conclusion of the August hearing I stated that this Court would employ its own experts at the Board's expense to do what it and the school officials refused to do in the way of devising a plan of desegregation. Five days later the Court obtained the services of two well-known educators, experienced in desegre-

gation planning, Dr. J. Howard Munzer and Myrl G. Herman of the faculty of Rhode Island College.

Alternative plans were presented in the Munzer-Herman suggestions which were filed in this Court on September 27, 1971. The several Plans do not set out to establish any set numerical ratio of blacks to whites. However, through clustering and pairing it achieves a not dissimilar result.

Four elementary school plans are proposed. Plan I involves an unecceptable minimum amount of integration. Plan II involves more desegregation and Plan III (which I am adopting) even more. Plan IV would provide for maximum desegregation embraced and involved all but two elementary schools.

Two plans were presented for desegregation of the secondary schools. The plan is the same for the following schools: Josey, Murphey, Butler, Tutt, Langford, Richmond Academy and Laney. Under both Plan I and Plan II at the secondary level the schools mentioned would house the following grades.

Josey — Grades 8-9
Murphey — Grade 10
Butler — Grades 11-12
Tutt — Grades 8-9
Langford — Grades 8-9
Richmond Academy — Grades 11-12
Laney — Grade 10

In both Plan I and Plan II Tubman will house grade 8 and Johnson grade 9. However, under Plan I Tubman would have 511 students, 50% black, and Johnson would have 492 students, 45% black, whereas under Plan II Tubman has 461 students, 45% black,

No. A-250

Drummond, et al.

v. Reapplication For Stay

Acree, et al.

August , 1972

MR. JUSTICE POWELL, Circuit Justice.

This application, filed by parent-intervenors in this ~~public~~ school desegregation case[2] from Richmond County (Augusta), Georgia, seeks a stay of a judgment of the Court of Appeals for the Fifth Circuit. That court, on March 31, 1972, affirmed an order of the United States District Court for the Southern District of Georgia ~~#####~~ adopting a plan for the desegregation of 29 elementary schools in Augusta. Acree v. County Board of Education of Richmond County, 458 F.2d 486 (1972).

On two previous occasions, I have denied stay applications in this case. On February 11, 1972 I refused to stay the District Court's order pending appeal to the Fifth Circuit. After the Fifth Circuit's affirmance, I [again] denied a stay ~~sought by these same parties~~ because ~~no stay~~ that relief not had ~~yet~~ been ~~sought~~ requested from the appropriate Court of Appeals as required by Rule 27 of the Supreme Court Rules. Applicants immediately sought a stay from the Fifth Circuit,[1] which was denied.[1] ~~That stay having now been denied,~~ applicants have now reapplied to me.

This reapplication is premised solely on the contention that a stay is required under section 803 of the Education Amendments of 1972. That section, approved by Congress on June 23, 1972, reads in pertinent part as follows:

> "in the case of any order on the part of any United States District Court which requires the transfer or transportation of any student . . . for the purposes of achieving a balance among students with respect to race . . . , the effectiveness of such order shall be postponed until all appeals . . . have been exhausted . . . ."

Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972)(emphasis added). By its terms, the statute requires that the effectiveness of a District Court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purposes of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the busing of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result. ~~Indeed, in the section immediately preceding section 803, Congress demonstrated its ability to speak more broadly when it so desired.~~ In section 802(a), which precedes section 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the

program is to "overcome racial imbalance" ~~or to~~ or to "carry out a plan of desegregation." Education Amendments of 1972, Pub. L. 92-318, § 802(a) (June 23, 1972) (emphasis added). ~~Read together, it is~~ The juxtaposition makes clear that Congress intended section 803 to ~~###### be~~ significantly narrower in scope than section 802(a).

~~Furthermore,~~ In light of this Court's holding in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that section 407(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. The Chief Justice's interpretation of ~~that section,~~ section 407(a) which applied only to orders "seeking to achieve racial balance," is controlling here:

> "The proviso in [§ 407(a)] is in terms designed to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from the courts their historic equitable remedial powers." 402 U.S. at 17 (emphasis in original).

~~402 U.S. at 17.~~ By using language already given an authoritative interpretation by the Supreme Court, Congress must be presumed to have intended that ~~their~~ its

It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of Federal funds for the busing of students under any desegregation plan but limited the stay provisions of Section 803 to desegregation plans which seek to achieve racial balance.

~~Furthermore, in light of this Court's holding~~ in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that section 407(a) of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. The Chief Justice's interpretation of ~~that section~~ section 407(a), which applies only to orders "seeking to achieve racial balance," is controlling here:

> "The proviso in [§ 407(a)] is in terms designed to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from the courts their historic equitable remedial powers." 402 U.S. at 17 (emphasis in original).

Rider X

~~402 U.S. at 17~~ By using language already given an authoritative interpretation by the Supreme Court, the Congress must be presumed to have intended that ~~their~~ its

words receive the same interpretation.

The ~~threshold~~ question, therefore, must be whether the lower court order in this case was for the purpose of achieving a racial balance. This question was resolved by the Court of Appeals. Applicants claimed on their appeal that the District Court order called for forced busing to "achieve racial balance." 458 F.2d at 487. The court rejected that contention, citing the holding in Swann that bus transportation is ~~an available tool~~ in effecting school desegregation. Nothing in the District Court's opinion or final order, nor anything in the history of this protracted litigation,[2/] indicates that the court departed from the requirements and limitations of Swann.

Since the court order was not entered for the purpose of "achieving a balance among students with respect to race" in the Augusta elementary schools, section 803 does not apply. This stay application must, therefore, be denied.

It is so ordered.

words receive the same interpretation.

The ~~threshold~~ question, therefore, must be whether the lower court order in this case was for the purpose of achieving a racial balance. This question was resolved in the negative by the Court of Appeals. Applicants claimed on their appeal that the District Court order called for forced busing to "achieve racial balance." 458 F.2d at 487. The court rejected that contention, citing the holding in Swann that bus transportation is ~~an available tool~~ one of the permissible techniques in effecting school desegregation. Nothing in the

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For the purpose of acting on this application, I accept the holdings of the courts below that the order was entered ~~for the purpose of desegregating~~ to accomplish desegregation of a school system in accordance with the mandate of Swann and not for the purpose of achieving racial balance.

must, therefore, be denied.

It is so ordered.

Rider

FOOTNOTES

1/ A stay has also been denied by the United States District Court for the Southern District of Georgia on August 18, 1972.

2/ For a complete history of this litigation see the most recent opinion of the District Court. Acree v. Drummond, 336 F. Supp. 1275 (1972).

Draft as dictated on phone by Larry 8/31/72

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In short, as used in Section 407a the phrase "achieving racial balance" was used in the context of eliminating de facto segregation.

The Court went on to caution lower federal courts that, in the exercise of their broad remedial powers, their focus must be on dismantling dual school systems rather than on achieving perfect racial balance: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." This was said not in condemnation of existing techniques but in disapproval of ~~the~~ wooden resort to racial quotas or racial balance. Nothing in the instant statute or in the legislative history suggests that Congress used these words in a new and broader sense.

At most Congress may have intended to postpone the effectiveness of transportation orders in "de facto" cases and in cases in which district court judges have misused their remedial powers.

The question, therefore, must be whether the lower court order in this case was for the purpose of achieving racial balance as that phrase was used in Swann.