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Name of Correspondent: James C. LUKR

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: memo to Department of Education re: Proposed DOJ report on S.139, the Public School Civil Rights Act of 1983, a bill to prohibit the lower Federal Courts from issuing orders requiring mandatory assignment or transportation of students to public school on the basis of race.

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CULL-DLL	ORIGINATOR	84/01/20 BLS		C	84/02/15 JV
CVAT 18	Referral Note: 1	84/01/20 BLS		C	84/02/15
CULFIEL	Referral Note: S	84/02/15 JV	~~AF~~ C	~~A~~	84/02/15 JV
	Referral Note: Feb 15 84 FF memo to B. Blum				
	Referral Note:	/ /			/ /
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	Referral Note:				

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A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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THE WHITE HOUSE

WASHINGTON

February 15, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Justice Report on S. 139
(Anti-Busing Bill)

Counsel's Office has reviewed the above-referenced proposed testimony. We have no objection to sending it to the Hill.

FFF:JGR:aea 2/15/84
cc: FFFielding/JGRoberts/Bubj/Chron

THE WHITE HOUSE

WASHINGTON

February 15, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Justice Report on S. 139 (Anti-Busing Bill)

OMB has asked for our views by close of business today on the above-referenced proposed Justice Department report. The 26-page letter to Strom Thurmond was prepared by the Office of Legal Counsel. It outlines the concerns of the Department with respect to S. 139, the "Public School Civil Rights Act of 1983," an anti-busing bill. S. 139 contains numerous Congressional findings concerning the pernicious effects of busing, prohibits lower federal courts from ordering busing, and permits reopening of previously-entered busing decrees, which are to be overturned unless the court makes several findings concerning currently existing intentional segregation. The bill states that it is based on Congress's Article III authority over the inferior federal courts and its power pursuant to § 5 of the Fourteenth Amendment.

The Justice report concludes that courts would defer to the legislative findings of fact, but would not defer to conclusions of law expressed as findings of fact in the bill. With respect to the prohibition on federal busing orders, the Department concludes that Congress only possesses power to impose such a limitation if effective alternative remedies for unconstitutional segregation exist. If a court in a particular case determines that busing is necessary to remedy intentional racial segregation, it will strike down the prohibition in the bill preventing it from ordering such relief. The report objects to the authorization to reopen existing busing decrees on policy grounds, and concludes that this provision is unconstitutional to the extent it authorizes state courts to re-examine federal court orders.

The analysis in the Justice report is largely based on the even lengthier May 6, 1982 letter sent by the Attorney General to Representative Rodino, concerning a similar bill. I spent several months in my previous incarnation disputing Ted Olson's approach to these issues; the May 6 Attorney General letter signalled Olson's victory in the extended internal debate. Olson reads the early busing decisions as

holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation.

I do not agree with his reading of the early cases. The holdings of those cases stand for the proposition that busing is permissible, and that state statutes limiting the authority of federal courts to order busing are unconstitutional. A far different question is presented when Congress attempts to limit the authority of the federal courts. Congress has authority under § 5 to enforce the Fourteenth Amendment, and can conclude -- the evidence supports this -- that busing promotes segregation rather than remedying it, by precipitating white flight. Even if Olson's reading of the 13-year old early busing cases is correct, we have now had over a decade of experience with busing. If that experience demonstrates that busing is not an effective remedy, Congress can legislate on the basis of that experience. Olson's analysis treats stray dicta in the old cases as binding despite experience to the contrary. I would conclude that it is within Congress's authority to determine that busing is counterproductive and to prohibit federal courts from ordering it. Our own litigation policy is based on such a view, and it strikes me as more than passing strange for us to tell Congress it cannot pass a law preventing courts from ordering busing when our own Justice Department invariably urges this policy on the courts.

As noted, however, Olson's view has already gone forward as the Administration view, and it would probably not be fruitful to reopen the issues at this point.

Attachment

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

January 18, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

199699

Department of Education

SUBJECT: Proposed Department of Justice report on S. 139, the Public School Civil Rights Act of 1983, a bill to prohibit the lower Federal courts from issuing orders requiring the mandatory assignment or transportation of students to public schools on the basis of race.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Wednesday, February 15, 1984.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure
cc: John Cooney
Fred Fielding
Mike Uhlmann
Naomi Sweeney
Karen Wilson
Barry White

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

Dear Mr. Chairman:

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

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

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

I. The Provisions of the Bill

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

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

1. "has failed to demonstrate educational benefits commensurate with the disruption caused by such assignment;" see § 2(1)(C);

2. "has contributed to a significant deterioration of public schools . . . by inducing large numbers of families to

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

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

3. "has contributed to the deterioration of public education by removing the neighborhood school as the focus of such education;" see § 2(1)(F);

4. "has disrupted the education of countless schoolchildren who must endure lengthy transportation . . . and must often forego participation in extracurricular activities . . . ;" see § 2(1)(G);

5. "has eroded community commitment to public schools and public education;" see § 2(1)(H);

6. "interferes with the right of parents to make decisions regarding the education of their children;" see § 2(1)(I);

7. "disrupts racial harmony by characterizing and classifying students on the basis of race or color and assigning them to schools on such basis;" see § 2(1)(J) 4/;

3/ The bill also contains a separate finding that

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

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

4/ This section does not refer to national origin.

8. "diverts significant amounts of financial resources away from direct improvement of the quality of education;" see § 2(1)(K);

9. "usurps the responsibilities and traditional functions of State and local authorities to provide an educational system meeting the distinct needs of the community;" see § 2(1)(L); and

10. "undermines public respect for the Government and its system of administering law and justice." See § 2(1)(M).

Additional congressional findings include the declarations that:

1. the assignment of students on the basis of race "violates constitutional and legal guarantees that individuals shall not be denied equal protection of the law [and] that individual rights shall not be abridged on the basis of [race];" see § 2(1)(A)-(B);

2. "past unconstitutional segregation, such as racial segregation enforced by law, is not a significant cause of existing racial imbalances in public schools;" see § 2(2); and

3. "since assignment of students to public schools on the basis of or with regard to race cannot be justified as a means of preventing or undoing racial discrimination by school authorities, such assignment is itself an unjustifiable practice of racial discrimination by the Government in violation of the fourteenth amendment." See § 2(3). 5/

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

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

> "(1) legal injunctions suspending all implementation of a segregative law or other racially discriminating Government action;
>
> "(2) contempt of court proceedings where such injunctions are not scrupulously obeyed;
>
> "(3) programs without coercion or numerical quotas or specific goals based on racial balance that permit students to voluntarily transfer to other schools within the school district where they reside; and
>
> "(4) other local initiatives and plans to improve education for all students without regard to [race]."

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

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

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

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

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

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

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

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

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

II. Legal Status of School Assignments Based on Race

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

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

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

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

> "[I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."
>
> * * *
>
> "We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race,

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

Id. at 45.

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

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

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

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

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

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

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

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

IV. Legal Analysis of S. 139

A. Scope of Application

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

B. Validity of Factfinding

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

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

C. Validity of "Findings" of Conclusions of Law

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

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

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

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

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

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

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

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

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

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

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

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

D. Restrictions on Remedial Authority

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

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

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

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

It is clear that there are circumstances in which Congress has the power to legislate and the States do not. These circumstances include, at a minimum, matters of national concern under the Constitution. Moreover, with regard to legislative authority under the Fourteenth Amendment in particular, the history and purpose of that Amendment demonstrate the intent to expand federal power at the expense of the States. For example, the power of the State itself became more subject to control by Congress pursuant to § 5. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.")

In the context of S. 139, it is not necessary to explore the full extent of congressional power under § 5 because we do not believe that removing the remedial authority of the inferior federal courts to order reassignment of students and concomitant transportation represents an appropriate exercise of Congress's § 5 power. The authority granted under § 5 is to enforce the provisions of the Fourteenth Amendment. 14/ For purposes relevant here, the essential language of the Amendment is: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." These prohibitions have been consistently interpreted to apply only against state action. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Thus, we believe that if the prohibition of student transportation based on race was intended to enforce the right of equal protection under the Fourteenth Amendment, the prohibition would be directed to the States and school districts, and not to the inferior federal courts. The power to legislate to enforce the obligation of the States not to deprive the citizens of equal protection would simply not seem broad enough to encompass legislation regarding the powers of the federal courts.

14/ The discussion, supra, in text that the power to "enforce" cannot be used to "restrict, abrogate, or dilute" Fourteenth Amendment rights as recognized by the Supreme Court is fully applicable here.

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

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

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

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

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

Attorney General's Letter at page 12.

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

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

E. Relief from Previously Entered Court Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

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

Sincerely,

Robert A. McConnell
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

February 15, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Justice Report on S. 139 (Anti-Busing Bill)

OMB has asked for our views by close of business today on the above-referenced proposed Justice Department report. The 26-page letter to Strom Thurmond was prepared by the Office of Legal Counsel. It outlines the concerns of the Department with respect to S. 139, the "Public School Civil Rights Act of 1983," an anti-busing bill. S. 139 contains numerous Congressional findings concerning the pernicious effects of busing, prohibits lower federal courts from ordering busing, and permits reopening of previously-entered busing decrees, which are to be overturned unless the court makes several findings concerning currently existing intentional segregation. The bill states that it is based on Congress's Article III authority over the inferior federal courts and its power pursuant to § 5 of the Fourteenth Amendment.

The Justice report concludes that courts would defer to the legislative findings of fact, but would not defer to conclusions of law expressed as findings of fact in the bill. With respect to the prohibition on federal busing orders, the Department concludes that Congress only possesses power to impose such a limitation if effective alternative remedies for unconstitutional segregation exist. If a court in a particular case determines that busing is necessary to remedy intentional racial segregation, it will strike down the prohibition in the bill preventing it from ordering such relief. The report objects to the authorization to reopen existing busing decrees on policy grounds, and concludes that this provision is unconstitutional to the extent it authorizes state courts to re-examine federal court orders.

The analysis in the Justice report is largely based on the even lengthier May 6, 1982 letter sent by the Attorney General to Representative Rodino, concerning a similar bill. I spent several months in my previous incarnation disputing Ted Olson's approach to these issues; the May 6 Attorney General letter signalled Olson's victory in the extended internal debate. Olson reads the early busing decisions as

holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation.

I do not agree with his reading of the early cases. The holdings of those cases stand for the proposition that busing is permissible, and that state statutes limiting the authority of federal courts to order busing are unconstitutional. A far different question is presented when Congress attempts to limit the authority of the federal courts. Congress has authority under § 5 to enforce the Fourteenth Amendment, and can conclude -- the evidence supports this -- that busing promotes segregation rather than remedying it, by precipitating white flight. Even if Olson's reading of the 13-year old early busing cases is correct, we have now had over a decade of experience with busing. If that experience demonstrates that busing is not an effective remedy, Congress can legislate on the basis of that experience. Olson's analysis treats stray dicta in the old cases as binding despite experience to the contrary. I would conclude that it is within Congress's authority to determine that busing is counterproductive and to prohibit federal courts from ordering it. Our own litigation policy is based on such a view, and it strikes me as more than passing strange for us to tell Congress it cannot pass a law preventing courts from ordering busing when our own Justice Department invariably urges this policy on the courts.

As noted, however, Olson's view has already gone forward as the Administration view, and it would probably not be fruitful to reopen the issues at this point.

Attachment

THE WHITE HOUSE

WASHINGTON

February 15, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Justice Report on S. 139
(Anti-Busing Bill)

Counsel's Office has reviewed the above-referenced proposed testimony. We have no objection to sending it to the Hill.

FFF:JGR:aea 2/15/84
cc: FFFielding/JGRoberts/Bubj/Chron

THE WHITE HOUSE

WASHINGTON

February 15, 1984

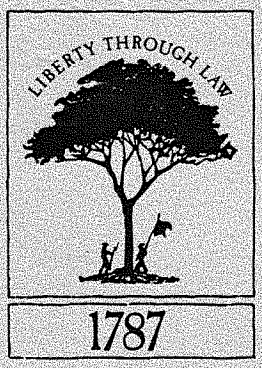
MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Justice Report on S. 139
(Anti-Busing Bill)

Counsel's Office has reviewed the above-referenced proposed testimony. We have no objection to sending it to the Hill.

FFF:JGR:aea 2/15/84
cc: FFFielding/JGRoberts/Bubj/Chron



CONSTITUTIONAL IMPACT STATEMENT

Constitutional Analyses of Legislation Pending Before the House and Senate Judiciary Committees.

The Civil Rights Act of 1984

S. 2568/H.R. 5490

The Center for Judicial Studies
632 Constitution Ave. N.E.
Washington, DC 20002

202-544-1776

Note: Constitutional Impact Statements released by the Center for Judicial Studies are limited to the constitutional aspects of legislation before Congress, take no position on the public policy objectives contained therein, and should not be construed as an attempt to assist or obstruct the enactment of any bill or resolution before Congress. The views expressed by the Visiting Scholars do not necessarily represent those of the staff or Advisory Board of the Center for Judicial Studies.

June 1, 1984

THE CIVIL RIGHTS ACT OF 1984

S. 2568/H.R. 5490

The Civil Rights Act of 1984, aptly described by Senator Robert Packwood (R.-Ore.) as "a simple bill with global ramifications,"[1] has been proposed as a corrective for one aspect of the Supreme Court decision in Grove City College v. Bell.[2] This statement will analyze briefly some implications of the proposed act with respect to federalism and other aspects of the constitutional system.

The Grove City Decision

Title IX of the Education Amendments of 1972[3] bars sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College, a private institution, has always refused federal and state financial assistance. Its students receive federal Basic

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1. Cong. Rec., April 12, 1984, S4589.

2. 104 S. Ct. 1211 (1984).

3. 20 U.S.C. Sec. 1681(a).

Educational Opportunity Grants (BEOGs), which go directly to the students to pay tuition and other educational expenses. The Department of Education ruled that Grove City College itself was a "recipient" of "Federal financial assistance" and demanded that the College execute an Assurance of Compliance with Title IX's nondiscrimination provisions. The College denied that it was made a "recipient" by the fact that some of its students received BEOGs, and refused to sign the Assurance of Compliance.

The Supreme Court ruled, first, that the College was a "recipient" of "Federal financial assistance," despite the fact that "federal funds are granted to Grove City's students rather than directly to one of the College's educational programs."[4] The Court went on to decide, however, that the "education program or activity" of the College that was "receiving" federal assistance and that therefore was subject to Title IX, was not the College as a whole but only its financial-aid program.[5]

In holding that Title IX has only program-specific application, the Supreme Court rejected the contention that receipt of federal aid by any component of the college would bind every aspect of the college's activity by the Title IX prohibitions against sex discrimination. Instead, the re-

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4. 104 S. Ct. at 1220.

5. 104 S. Ct. at 1222.

ceipt of BEOGs by its students requires the college to comply with Title IX only in the operation of its financial aid office; the rest of the college's activities are not bound by Title IX. The correctness of this interpretation is a matter of dispute.[6]

Impact of Grove City on Age, Handicap and Race Discrimination

The key phrase, "program or activity," used in Title IX, is used also in the three main statutes banning discrimination on account of age, handicap, or race in federally aided programs.[7] Title IX, Section 504 and the Age Discrimination Act were all modeled in this respect on Title VI of the Civil Rights Act of 1964. The Grove City decision therefore raises the likelihood that the same kind of "program-specific" interpretation will be given to those other statutes as well as to Title IX. The judicial precedents

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6. Compare the testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor, May 22, 1984, with the Statement of Senator Edward M. Kennedy (D.-Mass.), Cong. Rec. April 12, 1984, S4585.

7. Those statutes are the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101, et seq.); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C., Sec. 794 et seq.); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000 d et seq.).

appear to confirm this prospect[8]. It is important to remember, moreover, "that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs."[9] A program-specific interpretation of those statutes, therefore, would have an impact far beyond the area of education. Senator Kennedy expressed his concern that, after the Grove City decision, "the protection from discrimination provided by the government to the elderly, minorities and the disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education."[10]

The Intent of the Sponsors of the Civil Rights Act of 1984

S. 2568 and its companion, H.R. 5490, were introduced, in Senator Kennedy's words, "to restore Title IX, Title VI, Section 504, and the ADA to their intended force and cover-

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8. See, for example, Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980); see also Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

9. Testimony of Clarence M. Pendleton, Jr., Chairman of U.S. Commission on Civil Rights before House Committees on Judiciary and Education and Labor, May 16, 1984, p. 4.

10. Cong. Rec., April 12, 1984, S4586.

age."[11] "What difference does it make to a disabled student," asked Senator Robert Dole (R.-Kans.) in co-sponsoring S. 2685, "if the student financial aid office is in compliance with Section 504, if none of the school's academic programs are accessible?"[12] The bill makes three changes in all four laws:

> 1. The "general prohibition language in each statute is modified to delete 'program or activity' and generally to substitute the term 'recipient.' Thus, each of the four laws would prohibit discrimination 'by a recipient of' - rather than 'under a program or activity receiving' - 'Federal financial assistance.' In Title IX, the limitation to education is retained; that is, the prohibition would run against an 'education recipient' in place of an 'education program or activity.'"[13]
>
> 2. A definition of the term "recipient" is added to each of the four statutes, as will be discussed below.
>
> 3. The enforcement section of each of the laws is modified so as to enlarge the power of the agencies to terminate funding, as will be discussed below.

Senator Packwood summarized the changes as follows: "That any receipt of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that

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11. Cong. Rec. April 12, 1984, S4586.

12. Cong. Rec. April 12, 1984, S4590.

13. Statement by Senator Alan Cranston, Cong. Rec., April 12, 1984, S4594.

only the particular assistance supporting noncompliance will be subject to termination."[14] Senator Robert Dole (R.-Kans.), in co-sponsoring S. 2568, stressed that the bill was intended as a limited remedial measure: "I believe it should be emphasized that the sole purpose of this legislation is to restore Title IX to the broad coverage which marked its enforcement prior to Grove City, and to keep the other three civil rights laws intact. It is not the intent of the sponsors to break new ground."[15]

There is reason to believe, however, that the limited expectations of the sponsors of S. 2568 are unrealistic. This analysis will examine the likely effects of the bill in two general respects: its use of the expansive term "recipient" and its increase of the enforcement power of the agencies.

The Meaning and Effect of "Recipient"

The four statutes amended by S. 2568 now cover "any program or activity receiving federal financial assistance." [References herein will be to S. 2568 rather than to its companion, H.R. 5490] S. 2568 would amend those statutes to cover any "recipient" ("education recipient" in Title IX) of

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14. Cong. Rec., April 12, 1984, S4589.

15. Cong. Rec., April 12, 1984, S4590.

such assistance. In all four statutes, incidentally, "tax exemptions and deductions would continue to be excluded from the definition of Federal financial assistance."[16] The term "recipient" is defined in S. 2568 as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."[17]

Assistant Attorney General Reynolds maintains, contrary to the claim of the sponsors of S. 2568, that the definition of "recipient" in S. 2568 exceeds the definition of that term in the existing regulations under Title VI, Title IX and Section 504, in that "a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded programs or activities; by contrast, under

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16. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec., April 12, 1984, S4590.

17. Sec. 2(b)(2).

[S. 2568], a recipient is to be covered in its entirety."[18] In any event, it is clear that, under S. 2568, "when an entity receives federal aid for one of its parts or subdivisions, the entity - and not the specific subunit of the entity - is the recipient."[19] Senator Cranston made this plain in his explanation of S. 2568:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[20]

If federal aid is extended, not to the entity as a whole but directly to one of its subunits, the entity as a whole (and consequently all other subunits) will be covered if the entity itself "receives support" from the aided subunit. As Senator Cranston explained, "Where Federal financial assistance is extended to a subunit of an entity, the question whether the entity itself and all of the other subunits of the entity would be covered would turn on the question of whether the entity "receives support" from the pro-

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18. Reynolds testimony, supra.

19. Statement of Senator Edward M. Kennedy, Cong. Rec., April 12, 1984, S4586.

20. Cong. Rec., April 12, 1984, S4594.

vision of the assistance to the subunit - for example, by receiving a portion of the assistance to help defray overhead costs. If the entity receives such support, it and all of its subunits are subject to the anti-discrimination ban, just as they would be if the entity itself received assistance directly from a Federal agency or through a third party."[21]

S. 2568 contains no definition of the terms, "receives support," "entity" and "subunit," among other undefined terms. As Senator Alan Cranston (D.-Cal.) explained, "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services."[22]

On the one hand, aid to a State government would bring all the counties, cities, villages, school districts, etc., in that state automatically within the coverage of the age, sex, handicap and race discrimination statutes and regulations. For example, if the state receives a categorical grant for its highway department, then, if the state itself is the "recipient," all activities of the state government, including the prison system and state professional licensing boards, would become subject to the civil rights laws, which incidentally, are administered under regulations

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21. Cong. Rec., April 12, 1984, S4595.

22. Cong. Rec., April 12, 1984, S4595.

using an "effects" test, as will be discussed below. The same conclusion would follow under block grants as well. These results are automatic. On the other hand, if federal aid is given to one of the "subunits" of the State, e.g., a water district or school district, then the State as a whole is covered in all its activities and subdivisions so long as it "receives support from the extension of Federal financial assistance" to that subunit. Similarly, federal aid given to one department or campus of a university could subject every activity of the university to federal regulations regarding age, handicap, sex and race discrimination. If a university engages in non-educational, commercial activities, those activities could be covered by all four acts if aid were given to any part of the university.

As a practical matter, all states already receive federal aid given directly to themselves or through their subdivisions. The likely result of the enactment of S. 2568 therefore would seem to be an immediate extension of federal regulatory power with regard to age, sex, handicap and race discrimination, to virtually all the activities of every state and political subdivision in the land. Similar conclusions would follow in the private sector with respect to aid extended to subsidiaries and affiliates of corporations as well as to the corporations themselves.

Title IX now applies to "any education program or activity receiving Federal assistance." Under S. 2568, Title IX and the regulations adopted to enforce it would apply to

any educational program incidentally conducted by a non-educational institution if that non-educational institution received federal assistance for any purpose even if it received no assistance directed toward its educational program. Senator Kennedy illustrated this by the following example: "A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison - including its educational programs - would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and these statutes are not limited to education."[23]

This result would apply as well to training and other educational programs conducted by a corporation which receives any federal assistance, including, perhaps, as will be discussed below, its receipt of food stamps from "a person." Furthermore, since S. 2568 defines a "recipient" as a "transferee of any . . . entity . . . to which Federal financial assistance is extended (directly or through another entity or a person)," and since "transferee" is nowhere defined in the bill, one can only speculate as to the ultimate potential reach of S. 2568 coverage.

These conclusions become even more striking in light of the Grove City definition of aid to the person as aid to the

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23. Cong. Rec., April 12, 1984, S4586.

institution. If one student at a single campus of a state university system used a BEOG, the entire university could be covered by all four acts. The apartment building owned elsewhere by that university and rented to the general public could be required to install ramps for the handicapped, etc. The Grove City decision attempted to forestall the further extension of this principle by stating, "Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX . . . ."[24] But S. 2568, if enacted, would manifest precisely that intent. A "recipient" includes any of the listed types of entities "to which Federal financial assistance is extended (directly or through another entity or a person)." Although S. 2568 does not include a "person" as a "recipient," an entity from among the listed types would become a "recipient" if it received federal assistance "through . . . a person." So why would S. 2568 not apply all four acts to the grocer who took food stamps?

Senator Cranston did emphasize that nothing in S. 2568 is intended "to change the consistent interpretation" of the four statutes "excluding from coverage as 'recipients' in-

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24. 104 S. Ct. at 1217-18, n. 13.

dividuals and businesses which may ultimately receive federally provided dollars - such as a clothing store from whom a retiree purchases a suit with a social security check or a landlord whose tenant pays the rent with funds from supplemental security income payments, and others similarly situated - as well as the individual beneficiaries - the social security and SSI recipients themselves - of such programs."[25] While it is true that the individual retiree is not a "recipient" under S. 2568, the plain language of the bill includes the grocery or clothing store to which he negotiates his Social Security check. "Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate."[26]

S. 2568 is given a further reach by the Supreme Court's 1983 interpretation of Title VI in Guardians Assn. v. Civil

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25. Cong. Rec., April 12, 1984, S4595.

26. Testimony of William Bradford Reynolds, supra; see also Prof. Chester E. Finn, Jr., Civil Rights in Newspeak, Wall St. Journal, May 23, 1984.

Service Commission of the City of New York.[27] The Court held that although discriminatory intent is necessary to show a violation of Title VI itself, nevertheless, proof of "discriminatory effect" will suffice to create liability for a violation of the regulations issued under Title VI rather than of Title VI itself.[28] Under Grove City, regulations outlawing conduct which has an unintended racially discriminatory effect are limited in their impact to the programs or activities that receive federal assistance. Under S. 2568, however, a requirement of affirmative action on racial discrimination could apply to all recipients as expansively defined in that bill.

The Expanded Agency Enforcement Power Under S. 2568

Serious implications are raised by S. 2568's expansion of the enforcement power of administrative agencies. Under S. 2568, in the words of Senator Cranston, "all of the existing procedural safeguards that the four laws provide for before Federal funds may be terminated are retained without change - the government's initial duty to attempt resolution of the violation through conciliation, notice to the recipient of any adverse finding, opportunity for hearing, 30

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27. 103 S. Ct. 3221 (1983).

28. See 103 S. Ct. at 3235, n. 1 (separate opinion of Powell, J., Burger, C. J. and Rehnquist, J.).

days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and the right to judicial review of any decision to terminate funding."[29]

According to the existing law, however, the power of the agencies to terminate funding is program-specific, i.e., the termination is limited to funding for the particular program or activity which is found to be in noncompliance.[30] S. 2568, by contrast, would permit the enforcing agency to terminate any "assistance which supports"[31] the noncompliance. In this respect, S. 2568 would open the door to termination of funding to an innocent program if that program "supports" another program that is in noncompliance. And it would seem clear that if a program is in noncompliance, assistance to the parent entity may be cut off on the theory that assistance to the whole provides support to the discrimination by the part.

At this point it will be useful to compare the parameters of S. 2568 with respect to basic coverage, on the one

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29. Cong. Rec., April 12, 1984, S4595.

30. See North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir., 1969); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984); see also testimony of Clarence M. Pendleton, Jr. Chairman, U.S. Commission on Civil Rights, before House Committees on Judiciary and Education and Labor, May 16, 1984.

31. See Sec. 2(c)(2)(C).

hand, and fund termination on the other. Senator Cranston explained his view of this as follows:

> Thus, in place of the "program-specific" coverage improperly imposed by the Supreme Court, coverage of all components of the recipient would be restored.
>
> "This broad construction of the entity covered by the nondiscrimination laws would apply to such areas as executing assurances of compliance, investigation of charges, and private rights of action and judicial actions by the United States to obtain injunctive or declaratory relief to bring about compliance.
>
> "With respect to the power to terminate funds or refuse to grant funds, the statutory scheme would be different. It would retain the basic concept of "pinpointing"; that is, limiting the termination of funds to those funds which have a specific nexus to the discrimination that is found."[32]

Senator Cranston's distinction is precarious, however, in light of the language of S. 2568 which would appear to make the power of fund termination practically as broad as the extremely broad definition of "recipient." As Senator Cranston himself stated:

> I would note that in our proposal, both the definition of recipient and the pinpointing provision use similar terms with respect to receiving "support" and assistance which "supports". In the former case, an entire organization, institution, or other entity meets the definition of "recipient" if Federal assistance directly to a subunit results in the parent entity also receiving some appreciable "support." In the case of pinpointing, only assistance that "supports" noncompliance may be cutoff. In both situa-

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32. Cong. Rec., April 12, 1984, S4595.

> tions, the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, services.[33]

In light of the indefiniteness of "supports," which is not defined in S. 2568, it would seem clear that the "specific nexus to the discrimination" which Senator Cranston says is required for termination of funding, is a less than exacting restraint on the discretion of the agencies with respect to fund termination. This expanded potential for termination of funding is significant despite the fact that termination "has been actually used in only a handful of cases through the history of these laws."[34] The mere prospect of termination is a powerful inducement to compliance with federal agency directives. That inducement will be significantly increased by the grant of authority to the agency to cut off not only the funds of the program or activity that actually discriminates but also the funds of any entity or part thereof that directly or indirectly "supports" the discrimination.

Other aspects of S. 2568 would merit discussion here were it not for the limitations of space. For example, it is not at all unrealistic to describe S. 2568 as a "back door Equal Rights Amendment," in that the virtually univer-

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33. Cong. Rec., April 12, 1984, S4595.

34. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec. April 12, 1984, S4590.

sal character of various types of federal aid to education, combined with the "effects" test which could outlaw even unintentional discrimination, could endow federal agencies with the power to impose upon education recipients, by administrative action, many, if not most, of the requirements that would have been imposed upon them by the Equal Rights Amendment itself.

Another issue is presented by the fact that S. 2568 retains the private right of action which exists under the four statutes and it continues the provision for attorneys' fees in such actions.[35] In view of the expansion of coverage under S. 2568 and the "effects" test which can forbid even unintentional discrimination, the inducement to litigiousness here is apparent. A further problem with S. 2568 arises from the fact that each agency administering the four statutes would have the responsibility to regulate all the activities of entities receiving federal assistance. This raises the prospect of added paper work, interagency conflicts, multiplicity of complaints, duplication of effort and involvement by agencies in areas in which they have neither expertise nor experience. Nor does S. 2568 provide for interagency referrals to alleviate this problem. Another potential problem is created by the exposure of federal administrators to an increased risk of personal liability through their failure to enforce the four statutes affected

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35. See Consolidated Rail Corporation v. Darrone, 104 S. Ct. 1248 (1984).

by S. 2568, especially in light of the expanded definition of recipients and the employment of the "effects" test for discrimination at least in the race area.[36]

The overall effect of S. 2568 on the present enforcement mechanism under the four statutes was generally summarized by Dr. Michael Horowitz, General Counsel of the Office of Management and Budget:

> Currently, limitation of coverage to programs and activities receiving Federal assistance serves as a "regulatory breakpoint", restricting burdens and liability to those programs and activities in which the Federal government has some financial interest; and by limiting review and investigatory authority over Federally assisted programs and activities to agencies with expertise in them. And the current "pinpoint provision", by providing definite limits to the scope of any penalties which agencies might impose, has had a similar moderating effect. S. 2568 would remove these "breakpoints", while at the same time retaining all current judicial interpretations and agency practices under the referenced acts. As a result, standards such as the "effects test" would become applicable to all of a recipient's programs and activities, not just those receiving Federal funds.[37]

Some Constitutional Implications of S. 2568

The foregoing analysis should make it apparent that S. 2568 may be criticized as vague and uncertain, for example,

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36. See National Black Police Assn. v. Velde, 712 F.2d 569 (D.C. Cir., 1983), cert. den., 52 U.S.L.W. 3791 (April 16, 1984).

37. Michael Horowitz, Memorandum, Analysis of S. 2568: The Civil Rights Act of 1984.

in its failure to define important terms such as "receives support," "entity," "submit," "assistance which supports" and others. While it is important that Congress avoid what the Supreme Court has called "the shoals of unconstitutional vagueness,"[38] and while "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,"[39] it is likely that the lack of precision in S. 2568 could be remedied by the regulations issued to enforce it, which regulations can impose obligations beyond those specifically imposed by the statute itself.[40] The imprecision of S. 2568, therefore, would argue strongly in favor of clarifying amendments before its enactment but it would not justify a prediction that, without such amendments, S. 2568 as implemented would be held unconstitutional for vagueness.

Another constitutional question is raised by the expansion of federal regulatory power that would be effected by S. 2568. Private entities as well as state and local governments would be subject to pervasive regulation with respect to age, handicap, race and sex discrimination, on

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38. Buckley v. Valeo, 424 U.S. 1, 78 (1976).

39. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

40. See Guardians Assn. v. Civil Service Commission of the City of New York, 103 S. Ct. 3221 (1983).

account of the expansive definition of "recipient" in S. 2568, its expansion of agency enforcement power and the virtual universality of federal aid. These regulatory exposures could be burdensome. However, "Congress may fix the terms on which it shall disburse federal money to the States"[41] and, with respect to private recipients, "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[42] While the regulations sanctioned by S. 2568 would be more extensive and more intrusive than those already in place, they would appear to differ more in degree than in kind from those heretofore approved by the courts.[43]

The point of these observations is not to endorse the increase that S. 2568 would effect in federal regulation of the private lives of Americans, but to suggest merely that it is unlikely that the Supreme Court will find S. 2568 unconstitutional on that account. The decision would seem to be for the Congress rather than for the courts.

A more difficult question is posed by the impact of

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41. Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

42. Wickard v. Filburn, 317 U.S. 11, 131 (1942).

43. See, for example, Detroit Police Assn. v. Young, 608 F.2d 671 (6th Cir., 1979); United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977); EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Assn. for Retarded Citizens v. Olson, 561 F. Supp. 473 (D, N.D., 1982); La Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir., 1982).

S. 2568 on state governments themselves. If S. 2568 were enacted in its present form, it would instantly subject virtually every operation of every state and local government in the land to the potential supervision of federal agencies with respect to age, handicap, race and sex discrimination, including unintentionally discriminatory conduct that has discriminatory effects, with the attendant potential for affirmative action requirements. Such a massive preemption of state authority would seem to be contrary to the spirit, if not the letter, of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment was long regarded as a mere "truism," reciting the obvious fact that all powers not delegated are reserved.[44] In 1976, surprisingly, the Supreme Court declared an Act of Congress unconstitutional on the basis of Tenth Amendment principles.[45] Usery held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the wage and hour provisions of the Act to virtually all public employees. The Supreme Court declared that to the extent that the act overrode "the State's freedom to structure integral operations in areas of traditional governmental

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44. See U.S. v. Darby, 312 U.S. 100, 124 (1941).

45. National League of Cities v. Usery, 426 U.S. 833 (1976).

functions," such as fire, police, sanitation, public health and parks and recreation, the Act was "not within the authority granted Congress by the commerce clause."[46] The Usery decision, however, has been severely limited by later Supreme Court rulings.[47] In any event, the Court in Usery specifically noted that it was not deciding whether the Tenth Amendment was a limit on Congress' spending power, its power to enforce the Fourteenth Amendment or its war power.[48] And in Bell v. New Jersey,[49] the Court held that the states are bound by regulations attached to a federal grant voluntarily accepted by the states. The Court rejected the claim that the restrictions violated the Tenth Amendment:

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The

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46. 426 U.S. at 852.

47. See Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264 (1981); United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

48. 426 U.S. at 852, n. 17; 426 U.S. at 854, n. 18; see North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 536, n. 10 (E.D., N.C., 1977), aff'd mem., 435 U.S. 962 (1978); see generally, Rotunda, Usery in the Wake of Federal Energy Regulatory Commission v. Mississippi, 1 Constitutional Commentary 43 (1984).

49. 103 S. Ct. 2187 (1983).

> State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[50]

The potential displacement of State authority and private autonomy by S. 2568 is so extensive as to justify Dr. Michael Horowitz's conclusion that, "buttressed by the legislative history created to date, the bill if passed would largely eliminate the remaining distinctions between Federal and State, and Federal and private, concerns."[51] Nevertheless, there is no sufficient basis to expect that S. 2568, if enacted and implemented by appropriate regulations, would fail to survive a constitutional challenge in court. The decision of the Congress on S. 2568, therefore, is likely to be conclusive.

It should be mentioned here that alternatives are available which would achieve the limited objective of overturning the challenged aspect of the Grove City case without inviting the difficulties involved in S. 2568.[52]

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50. 103 S. Ct. at 2197.

51. Horowitz, Memorandum, supra.

52. See, for example, Senator Packwood's simple proposal (S. 2363) to amend Title IX "by striking out 'education program or activity,' and inserting in lieu thereof "education program, activity or institution.'" More extensive coverage would be provided by Dr. Horowitz' proposal "to amend Title IX to prohibit discrimination based on race, color, national origin, age or handicap as well as sex and to provide that any assistance to an educational institution would result in coverage of all of its education programs." (Horowitz, Memorandum, supra).

If a limited alternative is not substituted for S. 2568, and if that measure is enacted in its present form, it will effect a radical and massive expansion of federal power in the subject areas.

Charles E. Rice
Visiting Scholar
Center for Judicial Studies
June 1, 1984

THE WHITE HOUSE

WASHINGTON

June 18, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Commerce, Agriculture and Labor Draft Reports on S. 2568, the Civil Rights Act of 1984

Counsel's Office has reviewed the above-referenced draft reports, and finds no objection to them from a legal perspective.

cc: Peter J. Rusthoven

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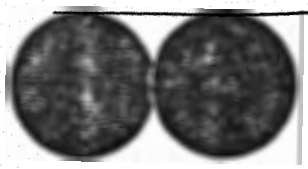

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Name of Correspondent: Brandon Blum

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Subject: Proposed changes to Agency reports (Labor, Agriculture, Commerce) on S. 2568

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOU	ORIGINATOR	84/06/18		C	84/06/18 JV
CUAT 18	Referral Note: R	84/06/18 JV		C	84/06/18 JV
	Referral Note: response by phone	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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B - Non-Special Referral
C - Completed
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

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	Approval or signature ☐
	Comment ☐
	Prepare reply ☐
	Discuss with me . ☐
	For your information ☐
	See remarks below ☐
FROM Branden Blum	DATE 6/18/84

REMARKS

Proposed changes to Agency reports (Labor, Agriculture, Commerce) on S. 2568

Per your request, attached is a copy of the suggested changes. Please advise me of any comments by 4:30 TODAY.

cc: J. Cicconi
F. Fielding
L. Verstandig
M. Uhlmann

SPECIAL

no objection by telephone, but delete "actually" = 3rd line of 4a insert

OMB FORM 4
Rev Aug 70

June 18, 1984

MEMORANDUM TO: Branden Blum

FROM: Mike Horowitz

SUBJECT: Proposed Changes to Agency Statements Regarding S. 2568

DEPARTMENT OF LABOR:

The second and third paragraphs should be changed to read:

> With regard to our responsibilities in administering the various federal grant programs, we are concerned that clarification of the bill's requirements is necessary if we are to avoid adversely affecting the willingness of private sector employers to get involved in programs under the Job Training Partnership Act (JTPA) as well as the Emergency Veterans' Job Training Act.
>
> In that regard, we are concerned that the broad language of S. 2568, together with the statements in the reports of the House Judiciary and Education and Labor Committees that, as a result of this legislation, "a recipient of federal financial assistance will understand that receipt of federal funds means it is covered throughout its operations" -- see page 26 of the Judiciary Committee's report), would be perceived by many employers as expanding the substantive scope Department of Labor regulations under these statutes to employer activities totally unrelated to the operation of the federally assisted training programs; resulting in increased reporting, exposure to compliance reviews, and other regulatory burdens. Faulty or not, such a perception, if prevalent among employers,could have significant adverse consequences for training and employment programs.

The following paragaph should be inserted between the final paragraph on page 1 and the first paragraph on page 2:

> S. 2568's broad language extending coverage not only to direct recipients, but to any "successor, assignee, or transferee of any [entity] to which Federal financial assistance is extended ... ", would, absent clarification, create further uncertainty among employers and the entities with which they do business.

COMMERCE

The following paragraph should be inserted following the third paragraph on page 1:

> While the following discussion deals with the impact of covering all of the programs and activities of recipients, we should at this time note that the bill's current language might, absent clarification, expand the definition of who is a "recipient" for purposes of coverage of these statute in unforeseen ways. S. 2568 would extend coverage not only to all operations of a recipient, but to "any successor, assignee, or transferee of any ... entity ... to which Federal financial assistance is extended (directly or through another entity or a person)". It is not clear exactly what kind of relationship with a Department of Commerce-funded entity would subject another entity to coverage as a "recipient" as well. Our concern in this regard is heightened by the extremely broad language in the reports of the House Education and Labor and Judiciary Committees on this legislation (they specify, e.g., specify that Guaranteed Student Loans and payments under Medicaid and Medicare would trigger coverage of the institutions at which those benefits are exercised and leave the clear implication that they intend that grocery stores which redeem food stamps would be considered as "recipients" as well).

The following language should be added at the conclusion of the final paragraph on page 1:

> (The reports of the House Judiciary and Education and Labor Committees on this legislation, however, by repeatedly referring to Guaranteed Student Loans as bases for coverage of colleges and universities even though the courts have held that they are excluded from coverage on the same basis as the loan guarantees administered by the Department of Justice, might in the absence of further clarification cast some doubt on their continued exclusion should S. 2568 be enacted in its present form.)

AGRICULTURE

The following language should be inserted before the final paragraph on page 2:

> Finally, we would note that the reports of the House Education and Labor and Judiciary Committees on this legislation appear to have artfully left the door open for coverage of grocery stores which accept food stamps. (The reports state that the respective committees "[believe] the Supreme Court adequately addressed this issue in the Grove city College ruling", and then quote a footnote in which the Supreme Court simply noted that food stamps by students does not trigger coverage of the colleges and universities they attend. The House report concludes that "H.R. 5490 would not alter this section of the opinion. The legislation reflects the reasoning of the Court in finding student assistance to be aid to the school. Under the bill, as has always been true, neither the landlord whose rent is paid with the proceeds of an AFDC or SSI check, nor the grocer who is paid for food from an SSI check, is covered as a result of that transaction". [Emphasis added]. The Committees thus clearly imply that grocery stores would be covered -- particularly since they explicitly state that reimbursements under medicare and medicaid, which operate in a similar manner, would suffice to trigger coverage. For the sake of the food stamp program, we would hope that your Committee would act to clarify this issue.

THE WHITE HOUSE

WASHINGTON

June 29, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Op-Ed Draft Concerning Supreme Court's Decision in Memphis Firefighters v. Stotts

Carol Dinkins has sent Craig Fuller a draft op-ed piece prepared by Brad Reynolds on Memphis Firefighters v. Stotts. The draft spells out the Department's interpretation of Stotts, noting that the opinion sanctions "make whole" relief under Title VII only for individual victims of discrimination, not classes of people. The draft stresses that outreach types of affirmative action are not affected by the opinion, nor are voluntary or unilateral affirmative action programs not involving court orders or participation. The op-ed piece notes that whether quotas in these areas can survive constitutional challenge was a question expressly reserved in Stotts. In this draft Reynolds announces that the Department will review pre-1981 consent decrees (there are of course no quotas in post-1981 decrees) to determine if they need to be changed in light of Stotts. He stresses that any changes would be prospective only.

I agree with Dinkins that the op-ed draft is a positive statement. There is considerable confusion over the Department's view of Stotts, and the appearance of this piece would help clear the air. Attached is a memorandum for Fuller noting no legal objection to the draft.

Attachment

THE WHITE HOUSE

WASHINGTON

June 29, 1984

MEMORANDUM FOR CRAIG L. FULLER
ASSISTANT TO THE PRESIDENT
FOR CABINET AFFAIRS

FROM: RICHARD A. HAUSER Original signed by RAH
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Op-Ed Draft Concerning Supreme Court's Decision in Memphis Firefighters v. Stotts

Counsel's Office has reviewed the above-referenced op-ed draft, and finds no objection to it from a legal perspective.

RAH:JGR:aea 6/29/84
cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

June 29, 1984

MEMORANDUM FOR CRAIG L. FULLER
ASSISTANT TO THE PRESIDENT
FOR CABINET AFFAIRS

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Op-Ed Draft Concerning Supreme Court's Decision in Memphis Firefighters v. Stotts

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cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84 / 06 / 28

Name of Correspondent: Carol Dinkins

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Op-ed draft concerning Supreme Court's decision in Memphis Firefighters v. Stotts.

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HOU	ORIGINATOR	84 06 28			/ /
	Referral Note:				
CURT 18	D	84/06/28		S	84/06/29
	Referral Note:				FOB
		/ /			/ /
	Referral Note:				
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ACTION CODES:
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5/81

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

June 28, 1984

MEMORANDUM TO: Craig Fuller
Assistant to the President for Cabinet Affairs

FROM: Carol E. Dinkins
Deputy Attorney General

Attached is what I consider a positive draft Op-ed piece done by Brad Reynolds to clear the air concerning the Supreme Court's recent decision in Memphis Firefighters v. Stotts. If you think that some limited circulation for comments is needed, I would appreciate receiving comments through you as soon as possible. We would, however, like to place the piece next Monday or Tuesday at the latest.

cc: ✓Fred F. Fielding
Counsel to the President

Twenty years ago this summer Congress passed the momentous Civil Rights Act of 1964, outlawing discrimination based on race, color or ethnic origin. In this anniversary year, the Supreme Court has reaffirmed the vitality of the principles underlying that legislation in Memphis Firefighters v. Stotts. The Stotts decision merits thoughtful attention.

In Stotts the Supreme Court reviewed a district court order, affirmed by the Sixth Circuit Court of Appeals, which directed the financially strapped City of Memphis to release senior white firefighters and retain black firefighters with less seniority in order to preserve the racial balance achieved through use of hiring quotas required under an earlier consent decree. The Supreme Court reversed, holding that seniority rights in such circumstances control the order of layoff.

The fact that the Court should favor seniority in this case can hardly come as a surprise. On prior occasions, the Court has consistently recognized that in passing the 1964 civil rights laws Congress did not intend to interfere with bona fide seniority systems. The importance of Stotts thus lies not so much in the Court's adherence to its earlier position as in why the Court felt compelled to reach such a result.

The answer lies in Title VII of the Civil Rights Act of 1964 (as amended in 1972), which prohibits discrimination in employment. That statute, as interpreted by the Court, expressly

limits courts in the exercise of their remedial powers to grant relief to individuals only -- not to members of particular groups -- and only to the extent necessary to "make whole" actual victims of the employer's discriminatory conduct. The less senior black firefighters retained on the force were concededly not themselves victims of discrimination. Protecting them from layoff thus went well beyond the Title VII limits on a court's authority to provide "make whole" relief.

It overstates the case, however, to suggest that Stotts spells the death knell either of affirmative action or affirmative action quotas. Plainly, affirmative outreach and recruitment programs aimed at bringing increasing numbers of minorities into the workforce (i.e., "affirmative action" in its most traditional sense) remain unaffected by the decision. And since Stotts speaks only to court-ordered relief, it leaves undisturbed a variety of voluntary affirmative action programs entered into without court approval or participation, such as the one upheld by the Supreme Court in Steelworkers v. Weber, which did involve quotas. Also not addressed in Stotts is the separate question of the lawfulness of race-preferential "affirmative action" programs adopted unilaterally by municipalities or other political subdivisions of state or local governments -- again without court approval or participation. Whether such arrangements can survive a constitutional challenge under the Fourteenth Amendment is a question explicitly reserved in Stotts.

Courts are no longer free after Stotts, however, to order relief in an employment case under Title VII (either by consent decree or following trial) that goes beyond "making whole" identifiable victims of discrimination and confers benefits (whether seniority or otherwise) on nonvictims by reason of their membership in some preferred racial group. As Senator Hubert Humphrey ~~expounded~~ stated over and over again at the time of the law's enactment, Title VII does not permit courts to order quotas or similar remedies designed to achieve or maintain racial balance in the workforce. The Supreme Court has now removed whatever doubts lingered on that score.

Obviously, Stotts is relevant to the work of the Civil Rights Division of the Department of Justice. In terms of consent decrees in which the Department, since 1981, has been a party, Stotts changes nothing because the decision is entirely consistent with the enforcement policy followed for the past three years. That policy, in general terms, is to seek relief for individual victims of discrimination and to oppose racial quotas.

As for consent decrees in place prior to 1981, the Division will review these on a case-by-case basis to determine whether in light of Stotts they need to be altered. The law is prospective in application, so any changes in the decrees would affect only the future.

Stotts is a triumph for civil rights. The individual rights to be free from racial discrimination won out over a claim of group entitlements. Quotas fell to "make whole"

relief. Victims were recognized over those unable to claim victim status. Equal opportunity prevailed over equal results.

Such is, of course, the genius of the nondiscrimination statutes of 1964. They were enacted not to benefit any discrete class or to prefer a particular group, but, rather, to ensure that every American will be treated the same as every other, without regard to race, color or ethnic origin. Stotts commands the federal courts to make that promise a reality in the employment sector. No more fitting interpretation of Title VII could come in its twentieth anniversary year.

THE WHITE HOUSE

WASHINGTON

July 2, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Op-Ed Draft Concerning Supreme Court's Decision in Memphis Firefighters v. Stotts by Brad Reynolds

Richard Darman has now asked for comments by 5:00 p.m. today on the draft op-ed piece by Brad Reynolds on Memphis Firefighters v. Stotts. You will recall that we received a copy of the draft when the Deputy Attorney General sent it to Fuller. I reviewed the draft at that time, and you signed a memorandum for Fuller advising him that we had no legal objection to the piece.

Steve Galebach, the acting Mike Uhlmann, discussed the piece with me this afternoon. He thinks it would be better, in the paragraph beginning on page 2, to clarify our position on the issues unresolved by Stotts. The paragraph in question notes that Stotts does not affect affirmative action outreach programs or certain types of affirmative action quotas. As written, the draft does not make clear that we support the former and oppose the latter. The last sentence on the page is particularly confusing, since "such arrangements" could refer to outreach programs, quotas, or both. (I assume it is intended to refer only to quotas.)

The attached draft for Darman notes, as the memorandum for Fuller did, that we have no legal objection. It goes on, however, to suggest adding a discussion of the sort outlined above.

Attachment

THE WHITE HOUSE

WASHINGTON

July 2, 1984

MEMORANDUM FOR RICHARD G. DARMAN,
ASSISTANT TO THE PRESIDENT

FROM: RICHARD A. HAUSER Original signed by RAH
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Op-Ed Draft Concerning Supreme Court's Decision in Memphis Firefighters v. Stotts by Brad Reynolds

Counsel's Office has reviewed the above-referenced op-ed draft, and finds no objection to it from a legal perspective.

We do, however, recommend revising the full paragraph on page 2. As written, the paragraph makes the valid point that affirmative action outreach and recruitment programs and certain types of quotas are unaffected by Stotts. The point should also be made that we fully support affirmative action outreach and recruitment programs, and oppose quotas. Without such a statement at this point in the piece, the reader could be left with the impression that the Administration is ambivalent about affirmative action outreach and recruitment programs or with the equally erroneous impression that we support certain types of racial quotas. The Administration opposes quotas, even those unaffected by Stotts.

The last sentence on page 2 should be changed so it is clear that "such arrangements" refers to quotas only and not outreach or recruitment programs. The sentence could be read to suggest the latter are subject to constitutional challenge, which is not the case.

RAH:JGR:aea 7/2/84
cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

July 2, 1984

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cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

ID # 186903 CU

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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Richard Dunavan

☐ MI Mail Report **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Op-Ed Draft concerning Supreme Court Decision in Memphis Firefighters vs. Stotts by Brad Reynolds

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HOU		ORIGINATOR	84 07 02			1 1
		Referral Note:				
CURT 18		D	84 07 02			84 07 02 5:00pm
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5/81

Document No. 186903cs

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/2/84 ACTION/CONCURRENCE/COMMENT DUE BY: 5:00 p.m. TODAY

SUBJECT: OP-ED DRAFT RE SUPREME COURT'S DECISION IN MEMPHIS FIREFIGHTERS VS. STOTTS BY BRAD REYNOLDS (Prepared by Justice)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	McMANUS	☑	☐
MEESE	☐	☐	MURPHY	☐	☐
BAKER	☐	☑	OGLESBY	☑	☐
DEAVER	☐	☑	ROGERS	☐	☐
STOCKMAN	☑	☐	SPEAKES	☐	☐
DARMAN	☐P	☑SS	SVAHN	☑	☐
FELDSTEIN	☐	☐	VERSTANDIG	☑	☐
FIELDING	☑	☐	WHITTLESEY	☑	☐
FULLER	☐	☐	_____	☐	☐
HERRINGTON	☐	☐	_____	☐	☐
HICKEY	☐	☐	_____	☐	☐
McFARLANE	☐	☐	_____	☐	☐

REMARKS:

Please provide any edits by 5:00 p.m. today, July 2nd.

Thank you.

RESPONSE:

JUN 32 PM 11:10 1984

Richard G. Darman
Assistant to the President
Ext. 2702

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

June 28, 1984

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Assistant to the President for Cabinet Affairs

FROM: Carol E. Dinkins
Deputy Attorney General

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