SPOTTSWOOD THOMAS BOLLING,
ET AL.,

Petitioners,

—vs.— No. 8

C. MELVIN SHARPE, ET AL.,

Respondents.

Washington, D. C.
Tuesday, December 8, 1953.

The above-entitled cause came on for reargument at 3:40 o'clock p.m.,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

GEORGE E. C. HAYES, ESQ., and JAMES M. NABRIT, JR., ESQ., *on behalf of the Petitioners.*

MILTON D. KORMAN, ESQ., *on behalf of the Respondents.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: Number 8, *Spottswood Thomas Bolling, et al.,* versus *C. Melvin Sharpe, et al.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Hayes?

OPENING ARGUMENT OF GEORGE E. C. HAYES, ESQ., ON BEHALF OF PETITIONERS

MR. HAYES: May it please the Court:

The case of *Bolling* v. *Sharpe* comes before this Court by reason of certiorari granted to the United States Court of Appeals for the District of Columbia, and the problems that we face are problems which are different from those which the Court has been hearing for the past two days; different because of the fact of our federal relationship; different because of the fact that there are no state-federal conflicts; different because of the fact that in our case there is no question of equality of facilities.

It is probably proper that I should begin by saying something by way of background in order to acquaint the Court again of the problems, as we see it, that we face in this jurisdiction. The minor petitioners in this case presented themselves to the authorities at the Sousa Junior High School, seeking admittance as students. They were denied admittance, and expressly denied it for no other reason than because of their race and color. They followed that up by going through each of the echelons with respect to the administrative authorities in the District of Columbia, and at each of the levels they were denied admission for no reason other than the question of their race or color.

This suit was then filed, asking by way of injunction, that they be admitted to these schools and that the Board of Education should not use as a means of excluding them the race and the color of these petitioners.

I have heard comment within the last few days about the concern that the seventeen states may have as to what this decision of this Court might be so as to know what they should do. I respectfully submit to this Court that not seventeen states but the world

at large is waiting to see what this Court will do as far as the District of Columbia is concerned, to determine as to whether or not the Government of the United States will say to these petitioners, if they are not entitled to the same liberties as other persons, that they are denied it simply because of their race and color.

When my colleague, Mr. Nabrit, and I—I should, perhaps, interrupt myself to say to the Court that it is our purpose to open our argument, divide fifty minutes of time between us, and then allow ten minutes for the closing; so I shall address myself to the feature with respect to the history as far as the statutes are concerned, and Mr. Nabrit will address himself to the things which seem pertinent to us by way of the inquiries made by this Court.

Turning, then, to this question of the history of the statutes, there has been a great deal said in the last few days about the statutes here in the District of Columbia having to do with the Fourteenth Amendment. I do not need to say to this Court that we are not concerned primarily with the Fourteenth Amendment. We rely rather upon the Fifth Amendment because of the fact that that applies to our jurisdiction. But a great deal has been said, as I have indicated to you, and as you will realize, with respect to the question of statutes here in the District of Columbia.

We find ourselves in the company of the distinguished Attorney General of the United States and his associates when we take the position that, as far as the statutes are concerned, as we conceive it, they are permissive and voluntary; they are not compulsory; and we believe that this Court can find, by looking at these statutes, or must find, either one of two things: either that they are permissive and voluntary, and that by so much, if they find that the Board of Education has construed them as being compulsory and has used them as a means of segregating Negroes, that then by its mandate this Court will say that the Board of Education is wrong in any such interpretation; or, if on the other hand, it were to be determined that they are, as a matter of fact, compulsory, that then this Court must, of necessity, say that they are unconstitutional if, as a matter of fact, they use as their yardstick nothing other than race or color.

It may, therefore, become important for us to look and see what was the atmosphere under which the statutes came upon the books.

MR. JUSTICE REED: Whether they are permissive or mandatory, would they not be unconstitutional in either case?

MR. HAYES: If they are permissive and voluntary, the answer would be that they would be unconstitutional; but that the constitutional question—and this is where we think the issue is, as we

presently see it—that until the issue is raised, that then, of course, the question of constitutionality has not been passed upon; and it is our position that we are presently at the place where that issue, as far as this Court is concerned and as far as the statutes are concerned, is for the first time being raised, and, therefore, Your Honor, to specifically answer your question, Justice Reed, the answer is, yes, we think it is unconstitutional in both instances, unconstitutional whether permissive and voluntary, unconstitutional whether by actual compulsion, and we think it is the present time when this Court should so determine.

MR. JUSTICE FRANKFURTER: Mr. Hayes, may I ask you what you mean by permissive? I am not talking about any legal implications, but am I wrong in thinking that Congress year after year passed appropriations for the maintenance of a system of segregation?

MR. HAYES: Your Honor is entirely correct with respect to the fact that they have passed appropriations. It is our position that the fact that Congress, having found a certain situation and having acted upon it, and having supplementarily issued or allowed appropriations, that that inaction on the part of Congress or that acceptance of a situation on the part of Congress does not still avoid the fact of the unconstitutionality which we ask Your Honors to determine.

With respect to the history of these statutes, I say there may be, therefore, some appropriate comment.

Slavery was abolished in the District of Columbia in April of 1862. In May of 1862, within approximately one month after the time of the abolition of slavery, two of these statutes that are presently on the books and under which the Board of Education is acting, were promulgated. Those are referred to, and they use the expression of "initiating education." That was not an actual fact, because they amounted to nothing other than appropriations, appropriations to an existing situation. What had happened had been that public education, as such, even among the whites at that time, had taken on no actual status.

As I have heard the suggestion within the last couple of days, I think it was from the Attorney General's office, from the Assistant there, that, as a matter of fact, from their point of view, what they were at that time attempting to do was to reach a situation which they found. It was not a question of them actually appropriating, of them actually initiating. It was the fact of their appropriating.

They found a situation existing. Public education was for the poor people. The persons who had money sent their children to

private schools, and public education had no such concept as is the present concept with respect to public education; and so, what happened was that Congress, finding that situation and desiring, as it unquestionably did desire, that something should be done for the Negro, just emancipated from slavery, attempted to do something in the way of appropriating moneys.

It is to be noticed that what they did or attempted first to do was to tax Negroes for their property, with an idea of Negro education in the public sense.

As I say, at that time it was not with respect to any public education, but rather in the nature of appropriations. There were no public schools so far as Negroes were concerned. It was not until 1864 that there was anything that purported to be a public school, as far as Negroes were concerned, and that was then in a private church, showing again that public education did not have the connotations that it presently has.

What they did was to attempt to give this Negro some opportunity for an education, and so it became a part of what the background was, that there was this appropriation for Negro education; and the things that happened subsequently, significantly so, were that in 1864 there was a requirement of compulsory education.

Now, that takes on, too, a different aspect, because as far as we are concerned, we find ourselves in a question of compulsory segregation, either announced, created or sanctioned by the Federal Government.

In 1864, I say then, they created compulsory education, and also provided that there might be the right of selection of persons who were white persons to send their children to a white school of their choice, and for Negroes to send Negro children to colored schools of their choice, the language at each time, if Your Honors please, being permissive in its character.

At no place in any of these enactments do we find language which specifically says, as they do in instances when the legislature feels disposed to say, "that this shall be a compulsory proposition as far as Negroes and whites are concerned," and the language in these statutes does not lend itself to anything other than permission rather than compulsion.

The enactments that came from that time forward, if Your Honors please—the question has been referred to of three lots which were to be given for the use of Negroes; another act which required that the money should be turned over to the Board of Education for Negro students because of the fact that moneys had been allocated and had not been properly applied.

Further along, the question of legislation having to do with

assistant superintendents of the schools—there was that legislation—or with respect to the question of Boards of Examiners, all simply addressing themselves to a situation begun back in 1862, and which had been, shall I say, winked at and carried forward from that time forward, but not legislated upon, not made compulsory. With respect to that situation, there has been, perhaps, some addressing of itself to the question as far as our courts are concerned, and I say our courts now, meaning the courts of the District of Columbia.

But I would call Your Honors' attention to the fact, in the first instance, the case of *Wall* v. *Oyster*, that there was no question there raised of a character which is being raised before this Court. What happened then was that the person who was the petitioner desired not to be placed in a colored school. She had taken the position that she would rather be held a part of the white race and therefore was asking not to be put into a colored school.

As Your Honors will see, that begins with the premise that the segregation in and of itself was all right; that all that the person wanted to do was to be put into a school which they believed would not put them among the Negroes; and so we say to you in that case there was no issue of the character that is here being raised.

My attention is called to the fact that, as far as an interpretation of the statute was concerned—and this has significance which I want to bring to Your Honors' attention—that back in 1869—and I am reverting, now—that back in 1869 there was an issue that was raised as to whether a colored child who had been given a permit to go to a white school should be allowed to go to that school, and that question was posed to the Office of the Corporation Counsel of the District of Columbia, who appears for the respondent in this case; and the Corporation Counsel at that time, in 1869, took the position that there was nothing in the statute that avoided this child being admitted to the white school, and the record seems to indicate that the child was admitted to this school, continued to go there until they finished the colored school.

We call Your Honors' attention to that, not that we think it in any sense changes the situation, but rather to show the indecision that was a part of the picture, rather to show that even there, then at the time of the early promulgation of the statute, there was the interpretation by the substantial office of the Government that it permitted of going into the white school and that that being the allowed circumstance, it was accepted as such, and no issue was raised further with respect to that.

MR. JUSTICE FRANKFURTER: Mr. Hayes, in those days roughly what was the proportion of the colored population to the total population, just as a rough guess? Don't bother if you—

MR. HAYES: I would not like to give Your Honor an inaccurate statement. We did have calculations, and I think that somewhere—

MR. JUSTICE FRANKFURTER: Don't bother.

MR. HAYES: Mr. Nabrit suggests there were in the District some 11,000 Negroes at that time. I do not know the proportion that there were—I mean, that held to the total population—but there were some 11,000 Negroes, and at that time, as I have indicated to Your Honors, the education which they were getting was that of the benign gentlemen who were the philanthropists, and that type of thing, rather than any question of public education. There was also at that time, as a part of the population situation which Your Honor has just asked me, after the time that slavery was abolished in the District, there was a great influx of freedmen into this area because of that circumstance, naturally because of that circumstance—there was this great influx.

I was addressing myself to the question of litigation in some sense that had come up. This litigation came again in the case of *Carr* v. *Corning*, and in that case—well, there were two cases, *Carr* v. *Corning* and *Browne* v. *Magdeburger*, and the two cases were combined because of the fact that inherent in them was the same proposition.

The *Brown* v. *Magdeburger* case—this proposition, the question as to whether or not there was a violation of the constitutional right of a student because of the fact of being required to go into a school where there was the alleged inequality; that they were required to go where there was a double shift of students, so far as they were concerned; and the same proposition was raised in *Carr* v. *Corning*, but there was the additional proposition in the *Carr* v. *Corning* case, which we have raised in this case, and that was as to whether or not segregation as such, whether or not segregation *per se* was unconstitutional.

That is the position which we are taking with respect to these cases, that segregation *per se* is unconstitutional, and that without regard to physical facilities, without regard to the question of curriculum, and that if, as a matter of fact, there is a designation that one must go to a particular school for no other reason than because of race or color, that that is a violation of the constitutional right; and, as this Court has said, wherever the issue is raised with respect to color, then it is upon the Government to show that the reason for it—that there is a reason that is a justifiable reason. I shall address myself to that in a moment or two, if I have the time.

But with respect to this *Carr* v. *Corning* case, we take the position that, as far as the *Carr* v. *Corning* case was concerned, it simply was decided incorrectly; that our court of appeals was simply wrong in its decision.

We call attention to the fact that there was in that case a dissenting opinion by Mr. Judge Edgerton, which we commend to this Court as being more nearly what the law should be with respect to that case. In that case, Judge Edgerton went on to say that it was an improper concept to be able to have education based solely upon race or color. Judge Edgerton in that case says:

> Appellees say that Congress requires them to maintain segregation—

—reading from page 48; page 48, Mr. Korman, in our original brief—

> The President's Committee concluded that congressional legislation 'assumes the fact of segregation but nowhere makes it mandatory.' I think the question irrelevant, since legislation cannot affect appellant's constitutional rights.

That is the position which we urge upon this Court, that it cannot be affected—that the constitutional rights of these people cannot be affected by legislation of any character; and Mr. Judge Edgerton in that case was saying the thing which we say to this Court, that in his opinion there was not any such showing as made the Board of Education take such a step, but that from his point of view it was irrelevant as to whether they did or not, because if it purported to affect the constitutional rights of these persons, that then there was no alternative but that the Court should declare it to be unconstitutional.

I have heard the question asked today as to under what heading it should come. This Court has told us under what heading it should come. It should come under the heading of liberty because this Court in *Meyer* v. *Nebraska* said it was a violation of the liberty of the person, which is the language of the Fifth Amendment upon which we stand, to deny to him their constitutional right, and that constitutional right was then an educational right, just as has been indicated to Your Honors before.

May I say this final word: that we believe that this Court has already determined this proposition in the *Farrington* v. *Tokushige* case where, with respect to the Hawaiian legislation, this Court struck down legislation saying that it was a violation of the person's constitutional right, talking about education, and referred to *Meyer* v. *Nebraska*, *Bartels* v. *Iowa*, *Pierce* v. *Sisters*, saying, "Yes, admittedly, they come under the Fourteenth Amendment, but, as far as the Fifth Amendment is concerned, the same thing is to be adopted"; and so we say to this Court that under whatever angle the situation is looked at in the District of Columbia, from

whatever aspect we take it, that this Court, as we conceive it, cannot say to a waiting world that we sanction segregation in the District of Columbia for no other reason than because of the fact that the skin of the person is dark. That, this Court has said, is suspect; that, you have said, is void; that, you have said, should not be sanctioned; that, we believe, must be your decision.

MR. CHIEF JUSTICE WARREN: Mr. Nabrit.

ARGUMENT OF JAMES M. NABRIT, JR., ESQ., ON BEHALF OF THE PETITIONERS

MR. NABRIT: If the Court please, we have for the past two days been engaged continuously in a concentrated and thorough attempt to recapture the spirit and mood of a significant period in the history of our country. The danger in this, as I see it, is that in a worthy attempt to project ourselves into the remote scenes of the 1860's and '70's, that we shall lack either the normal apperceptions of men of that day which, though inarticulate, nevertheless were a part of their own concept of day-to-day events, or we shall miss the motivations of legislators, though known then by all, though not set forth in specificity by any, which agitated both men and events 88 years ago.

At best, I fear that we shall recapture only the overtones of these historical settings, the outlines of the broad sweep of events; but I hope at least we shall have grasped the general delineation of the primary purpose and objectives.

Men do not always set forth explicitly the motives which cause them to act as they do, nor do congressmen always explain in detail either the objectives which they seek in proposed legislation or the reasons why they support or fail to support a particular bill. In this posture of these cases, then, it seems to us that we need to be reminded of two facts of great importance and significance, as we consider the District of Columbia case.

First, none of this exhaustive discussion of history, however illuminating it may be, can conceal the blunt fact that under a system of legalized segregation millions of American Negroes live in this land of opportunity, equality and democracy as second-class citizens, suffering all types of civil disabilities imposed upon them in every aspect of their daily lives solely because of their race and color. Today we deal only with one significant aspect of it, segregation in public school education.

In the second place, in this posture of the cases, we should single out the District of Columbia for different treatment, not alone because the District of Columbia brings this case under the Fifth Amendment, but because this is the Federal Government dealing with federal citizens. Here is no question of the delicate

relationship of state and Federal Government. Here we are dealing with the capital of the free world.

In this framework, we submit to the Court that the question before the Court is not merely the technical question of the construction of school statutes or the propriety or the reasonableness of the action of the respondents complained of here, but it is also the basic inquiry as to whether under our Constitution the Federal Government is authorized to classify Negroes in the District of Columbia as untouchables for the purpose of educating them for living in a democracy.

We say to the Court that this is not in line either with the principles of the Constitution of the United States, our ideals of democracy, nor with the decisions of this Court, nor with the executive orders of the President of the United States, nor with the orders of the Commissioners of the District of Columbia; and that so far as we have been able to find, with the exception of these school statutes, the training school in the District of Columbia and one or two other instances of that ilk, that there is in the District of Columbia no authority, no official, no body of responsible persons who takes the position that racial distinction should be imposed upon Negroes because of color, except for the respondents complained of here; and we say that these respondents do this in defiance of the decisions of this Court, the executive orders of the President of the United States, the policy of the District of Columbia Commissioners, and in that framework they violate federal policy, and that inconsistent position should lead this Court to deny these respondents the power which they claim to possess.

MR. JUSTICE FRANKFURTER: Have the Commissioners of the District expressed themselves on this subject?

MR. NABRIT: They have expressed themselves, Mr. Justice Frankfurter, as not having authority over the school board and, therefore, it is one of the phases of the life in the District of Columbia to which the thrust of their power does not reach.

MR. JUSTICE FRANKFURTER: Is the legislation of Congress clear that the school board is autonomous as to this question?

MR. NABRIT: I would like to—I will answer that, but I would like to answer it, instead of a yes or no—

MR. JUSTICE FRANKFURTER: You do whatever you want to; you give that before you get through.

MR. NABRIT: Yes. I want to answer that right now, Mr. Justice Frankfurter, because it is a peculiar situation.

In the District of Columbia the school board is not appointed

by the President of the United States; it is not appointed by the District Commissioners; it is not chosen by the voteless inhabitants of the District of Columbia. Rather, it is appointed by the District Court of the District of Columbia, and, as we understand the situation in the District of Columbia, we do not know to whom they are responsible.

[Laughter]

MR. NABRIT: That is the status of the school board in the District of Columbia.

MR. JUSTICE FRANKFURTER: They are appointed for a term?

MR. NABRIT: Of three years, and then they are either not reappointed or they are reappointed by the District Court of the District of Columbia.

MR. JUSTICE FRANKFURTER: By the District Court, you mean the whole bench of judges of the District, the United States District Court?

MR. NABRIT: Yes, sir; the United States District Court, a very unusual situation.

[Laughter]

MR. JUSTICE FRANKFURTER: Does the district court define their powers or does the Code of the District of Columbia define their powers?

MR. NABRIT: Their Code—you know, under our setup in that area we have some administrative functions in the courts.

MR. JUSTICE FRANKFURTER: Does the Code say anything about the problem, the segregation of the grade schools?

MR. NABRIT: No, sir.

MR. JUSTICE FRANKFURTER: This is just a pronouncement by the board?

MR. NABRIT: That is right.

MR. JUSTICE FRANKFURTER: And the board has pronounced—

MR. NABRIT: The board has pronounced it, although I notice—and this is something that the Court may reprimand me for, but I noted—in the brief and in the papers that counsel for the respondent is not certain as to what the positions of all his respondents are on this matter.

[Laughter]

MR. NABRIT: They are sued individually, you know.

MR. JUSTICE FRANKFURTER: All you have to do is read his brief; I do not know for whom he speaks.

MR. NABRIT: I neither, Mr. Justice Frankfurter.

MR. JUSTICE FRANKFURTER: I take it he will tell us before we get through.

[Laughter]

MR. NABRIT: Yes, I hope so.

So, in this posture of the cases, we would like to say to the Court—and I say this primarily, if this is proper, so that the Chief Justice might have this, because I said it to the Court—but I want it understood that our position is that, number one, the statutes governing the schools in the District of Columbia, which were passed immediately prior to and during the Civil War, without any thought of whether segregation was good or bad, when schools in the United States, public schools themselves, were at issue as to whether people ought not to educate their children privately or not—they were only thirty years old at that time—in the District of Columbia they were only six years old—and here were these Negroes; there were these three systems of schools, public schools for whites, Negroes excluded, a private school for Negroes and a private school for whites—system of schools; these are all systems—Congress looked at these schools for Negroes getting no support and authorized support for them from taxes from the Negroes themselves; that is the first bill. Obviously, that did not do much good.

They then authorized taxes from all of the persons in the District to be used for that purpose, and in this four-year period, ending in the middle of the Civil War, all of the basic statutes governing the schools in the District of Columbia were enacted.

Under that circumstance and in that case, it is inconceivable that Congress would do anything but make a provision for people who had no schooling, no question of separate or anything else. It was just providing for schools that were found there.

Now, our position is that the Court should construe those statutes as voluntary, meaning by that what the congressman said in talking about them—and I do not cite him for history, but I cite him for the point, for his saying the point that I want to say on this point, that he said Negroes could go to the schools. That is all I need.

That is voluntary. If that be true, until somebody complains in this Court about the exertion of the power of government to compel him to go to one of these schools, there is nothing unlawful about that situation. Therefore, we do not have a history of lawless action by people in the District of Columbia.

Now, if the Court takes that view, it can dispose of the District of Columbia case simply by saying the states do not authorize compulsory segregation of races in the District of Columbia in the public schools, and your action complained of here is unlawful and violates due process. We don't have to go into any constitutional question. We just find they don't have the authority.

Now, I suggest that this Court has always done that when it was faced with the statute which it had not interpreted, and one interpretation would lead to a constitutional result, and the other interpretation would lead to a nonconstitutional result.

And since we suggest to you that if these statutes compel it, they would violate our federal policy, they would violate the due process clause of the Fifth Amendment, the liberty aspect of it, it would violate section 41 and 43 of Title 8 of the Civil Rights Act, that under these circumstances the Court should construe these as merely voluntary statutes; and that in the event the Court doesn't agree, it has still to deal with the question of whether they are not in the nature of bills of attainder. So we suggest as our line of argument that the Court say there is no authority for the actions complained of. It is out of line with the District of Columbia. Now, the counsel for the respondents—

MR. JUSTICE REED: On whose part was the complaint?

MR. NABRIT: On the part of the pupils and the parents. Here are two systems of education. Everybody has been going in there without any complaint for sixty or seventy years.

MR. JUSTICE FRANKFURTER: Who has kept these children out of this?

MR. NABRIT: Before this?

MR. JUSTICE FRANKFURTER: Now.

MR. NABRIT: Oh, these respondents, these people—we have got them named. We have them all pointed out.

MR. JUSTICE FRANKFURTER: Do they make a justification for that?

MR. NABRIT: They do.

MR. JUSTICE FRANKFURTER: What do they say?

MR. NABRIT: On the grounds of race and color and that "we are compelled by these statutes."

MR. JUSTICE FRANKFURTER: Do they say the statutes com-

pel them or the statutes authorize them?

MR. NABRIT: Oh, no. They say they are compelled to do it. They don't make any technical differential between authority and compel. They say they are compelled by these statutes to do it.

MR. JUSTICE FRANKFURTER: Suppose we say the statutes do not compel them and then they say it is a matter of discretion: "We ourselves think it is a matter of discretion"?

MR. NABRIT: Well, all we would do—

MR. JUSTICE FRANKFURTER: Start a new suit?

MR. NABRIT: I was just going to tell you, we would file suit that day.

[Laughter.]

MR. JUSTICE FRANKFURTER: I am merely suggesting it is multiplying litigation instead of subtracting it.

MR. NABRIT: Well, at least we are going along with the line that the Court follows of restraining itself from engaging in decisions of constitutional questions when it may resolve the problem by a step less than that.

One other thing the Court may do—and I like the *Schneiderman* case because the Court did something there that I think we don't use enough.

MR. JUSTICE FRANKFURTER: You are for opinions that you like, is that it?

MR. NABRIT: That's right. I like this *Schneiderman* opinion, Mr. Frankfurter, because in that case the Congress passed, you will recall, an attachment statute in 1906. An alien was naturalized in 1927. About 1919, I believe, Mr. Justice Holmes enunciated that clear and present danger doctrine. In '42, when this Court passed on that statute for the first time, they read into that statute the intent which Mr. Holmes first discovered—I won't say discovered—announced, twenty years, almost, after the statute was passed.

Now, why can't the Court in this case read into these statutes an intent on the part of Congress not to segregate Negroes by compulsion following the *Schneiderman* case?

MR. JUSTICE FRANKFURTER: That is easier than worrying about what they debated in '66.

MR. NABRIT: Precisely. That is precisely our position.

Now, I would say, I want to say—I want to save ten minutes, but I want to say one thing on this matter of due process, because it seems to me the Court has had a remarkable record in dealing

with the exertions of power by the Federal Government on its citizens where it was based solely on race or color; and if I am correct, the only instances where the Court has permitted that to be done since *Dred Scott* has been in the case where war power was involved, and implied power essential to effectuate the war power. With great reservations the Court has permitted the Federal Government to make racial distinctions.

Now, I think that that establishes the fundamental principles upon which our case rests, and that it is in line with the policy of this Court, and we would there urge the Court under these considerations to hold that the respondents are without power in the District of Columbia to discriminate or segregate the Negro pupils solely on the basis of race and color.

MR. CHIEF JUSTICE WARREN: Mr. Korman?

ARGUMENT OF MILTON D. KORMAN, ESQ., ON BEHALF OF THE RESPONDENTS

MR. KORMAN: Mr. Chief Justice, may it please the Court:

At the outset I should like to state the position of the Corporation Counsel of the District of Columbia in this matter. I stand before the Court to defend acts of Congress which we believe to be lawful and constitutional. I stand before the Court to assert that this is not the forum wherein laws should be attacked because change is wanted. I stand before the Court, as we stood before the Court on May 1 of this year, to defend legislation which we think is valid legislation and constitutional legislation. I refer to the *Thompson* restaurant case. At that time, we found statutes enacted in 1872 and 1873 which required service to all well-behaved persons in any restaurant, hotel, or other place of assembly in the District of Columbia, irrespective of race and color.

For 75 or 80 years no one had attempted to enforce those laws. They were believed to be dead. They were called to our attention; we looked into the history of them; we studied the statutes and acts of legislatures thereafter. We studied the Constitution of the United States and the decisions of this Court, and we came to the conclusion that those statutes were valid, even though lying dormant for all those years, and that they were constitutional, and we came here to defend them.

Now, we say to the Court that there are statutes enacted by the Congress of the United States which provide for separation of races in the schools; that they have not lain dormant for 75 or 80 years, but they have been repeatedly legislated upon by the Congress of the United States. It appears that they are still valid, that it is still the policy of the Congress to maintain separate schools for the races in the District of Columbia, and we are here to de

fend the validity and the constitutionality of those laws.

MR. JUSTICE FRANKFURTER: When you say "we," am I to infer that means the Board of Education of the District of Columbia?

MR. KORMAN: You are, sir. I speak for the Board of Education of the District, although I admit very frankly in our brief that I have not talked to the individual members so far as their position on the sociological issue is concerned.

MR. JUSTICE FRANKFURTER: I do not know what that means.

MR. KORMAN: It means this—

[Laughter]

MR. KORMAN: From public statements that I have seen in the press, it appears that at least some members of the Board of Education are strongly convinced at this time that the time has come for a change in the system; that the time has come to integrate the schools of the District. Indeed, I concede that there is a strong movement in the District of Columbia from a number of sources to strike down segregation in all fields. The President of the United States has made the pronouncement that he expects to use all the power of his office to accomplish that end. The Commissioners of the District of Columbia have made a pronouncement that they intend to try to implement the statement of the President, and they have, in fact, taken action in that direction.

I say that there are many people in the District of Columbia who feel that way. By the same token, statements have come to me from a number of sources that there are others who think otherwise; indeed, I am constrained to believe that some members of the Board of Education believe otherwise. But as we see it, that issue, which is the one I called the sociological issue, is not the one involved here.

MR. JUSTICE FRANKFURTER: But my question is to elicit, not by anything other than what I read in your brief, that this is a strictly legal position which you take as an officer of the Court. I supposed the Corporation Counsel must represent appellants or respondents before the Court.

MR. KORMAN: That is right.

MR. JUSTICE FRANKFURTER: And it becomes relevant to know whether the Board of Education of the District maintains and has instructed the Corporation Counsel to maintain the position which you are putting and which you now plead before the Court.

MR. KORMAN: Yes, Your Honor.

MR. JUSTICE FRANKFURTER: Then you do speak for the Board of Education?

MR. KORMAN: Yes, I do.

MR. JUSTICE FRANKFURTER: All right.

MR. KORMAN: I speak for the Board of Education in that the position we take here today is the same position that we took here one year ago, and slightly more than a year ago, when we filed the original brief, and we have not changed our position on that. We advised the Board of Education what the law is; they do not tell us what the law is.

MR. JUSTICE FRANKFURTER: No, but clients do not have to pursue their rights under the law. They may take a position in advance of the law, and lawyers do not maintain positions. They merely maintain their clients' positions.

MR. KORMAN: May I say this to the Court: that the Board, while it is sued individually, is sued individually because it is not an entity, as a matter of law. The petition in this case asserts, and it is a fact, that the Board of Education itself denied these petitioners entry into the school that they claim they have a right to enter into.

MR. JUSTICE FRANKFURTER: I do not want to take needless time. It is a simple question. You tell the Court that you are here, as other counsel are here, under instructions appropriately given by their clients, and, of course, I will accept your word for it.

MR. KORMAN: At the time this case was first filed, the Corporation Counsel was asked by the Board of Education to defend it in the district court. We were definitely apprised of the position of the Board of Education.

The case arose in 1950. Since that time there has been a decided change in the personnel of the Board of Education. There are some eight of the nine members who have been replaced. Only one, Mr. Sharpe, still remains of the original defendants in the district court.

There has been no notification to us that the new Board—the Board as now constituted, and which denied to these petitioners the entry into the school which they claimed the right to enter—has changed its position in that regard. We have seen some statements in the press by some members of the Board which have been alluded to in the briefs.

MR. JUSTICE FRANKFURTER: I do not care about that, and

the reason why I think it is important is—I hope this is not improper for stating my own individual responsibility—to the extent that problems of this sort are settled outside a court of law, to that extent, in my opinion, the public good is advanced; and if, by any chance, settlements are made in various jurisdictions through the power of those who have power to settle it, I call it all to the good, without the need of litigation and adjudication and controversy. Therefore, I raised the question.

If you will give me assurance that you are here by the same right by which the State of South Carolina is represented by its counsel, and the State of Virginia—and the Commonwealth of Virginia—by its, of course, I repeat, I will accept your word.

MR. KORMAN: We are here on that condition; yes, sir.

MR. JUSTICE FRANKFURTER: Very well.

MR. JUSTICE BLACK: May I ask you, I do not quite understand you, because you stated—when was it, a year ago, that you said the Board had changed? Will you let us know in the morning, when the case comes up, whether the Board wants you to defend this case? It has raised some question in my mind, and I think—

MR. KORMAN: I do not know whether I can or not, Your Honor. The Board is composed of nine members; I do not know whether it is possible to get them together tonight or not.

MR. JUSTICE JACKSON: Isn't the Corporation Counsel by law made the representative of the Board?

MR. KORMAN: That is right.

MR. JUSTICE JACKSON: I think that settles it. You may have a row with your own clients, but that is not our business.

MR. JUSTICE FRANKFURTER: The question is, your client at the moment—

MR. KORMAN: My client is the Board of Education.

MR. JUSTICE FRANKFURTER: Yes, but they do not know it, apparently.

MR. KORMAN: There are a number of other respondents, who are the superintendents of schools, and some of the assistant superintendents of schools, and the principal of the Sousa Junior High School. They are all respondents in this case, and we were directed to represent them by order of the Commissioners of the District of Columbia specifically, because there were other respondents or defendants in the case, as originally filed, than the actual members of the Board of Education, and in those instances we get

an order from the Commissioners of the District of Columbia to represent the parties. We have such an order.

[Whereupon, at 4:30 o'clock p.m., argument in the above-entitled matter was recessed, to reconvene the next day.]