SPOTTSWOOD THOMAS
BOLLING, ET AL.,

Petitioners,

—vs.— No. 8

C. MELVIN SHARPE,
ET AL.,

Respondents.

Washington, D. C.
Wednesday, December 9, 1953.

Oral argument in the above-entitled cause was resumed, pursuant to recesss,

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:

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

JAMES M. NABRIT, JR., ESQ., *on behalf of the Petitioners.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 8, *Spottswood Thomas Bolling, et al.*, v. *C. Melvin Sharpe, et al.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Korman?

ARGUMENT OF MILTON D. KORMAN, ESQ.,
ON BEHALF OF RESPONDENTS—RESUMED

MR. KORMAN: May it please the Court:

When the Court rose on yesterday, we were having some discussion concerning the right of Corporation Counsel to appear here as counsel for the respondents. On yesterday I made certain statements to the Court. I should now like to document those statements to some extent.

Section 1301 of the Code of Law for the District of Columbia provides that the Corporation Counsel

> . . .shall be under the direction of the Commissioners and shall have charge of the conduct of all law business of said District, among other things.

And it provides further that:

> He shall perform such other professional duties as may be required of him by the Commissioners.

I said to you on yesterday that the last action of the respondent members of the Board of Education as set forth in the complaint filed in this case below was to deny to the petitioners admission to the Sousa Junior High School, which is set apart for the instruction of white students. You will find that statement on page seven of the record.

I have in my hand a copy of a letter sent by Mrs. Elise Z. Watkins, the secretary of the Board of Education, to Mr. George E. C. Hayes, with copies to Mr. Merican and Mr. Nabrit, under date of November 6, 1950. I shall not read the whole letter. It acknowledges receipt of a letter from Mr. Hayes, Mr. Merican and Mr.

Nabrit under date of October 31, 1950, requesting admission of the petitioners to the Sousa Junior High School. The letter continues:

> In reply to your letter, you are advised that the following motion was passed by the Board: 'That the Board feels it has fulfilled its obligation as far as it is capable and that the request to send children to the Sousa Junior High School be denied.'

On the bottom of that is this certification by Mrs. Watkins:

> I hereby certify that this letter embodies the action of the Board of Education taken at its meeting on November 1, 1950. I am familiar with all of the actions of the Board of Education since that time, and the Board of Education has taken no action to rescind or change in any manner its action on November 1, 1950, as reflected in this letter to Mr. George E. C. Hayes, dated November 6, 1950.

I said to you on yesterday that the Board of Education—

MR. CHIEF JUSTICE WARREN: What was the date of that certificate, sir?

MR. KORMAN: That certificate is dated—it is not dated, Your Honor. It was signed yesterday evening. It is a copy of a letter written November 6 with an up-to-date certification as of today.

MR. CHIEF JUSTICE WARREN: Thank you.

MR. KORMAN: I said to you on yesterday that the Board of Education had requested the Commissioners to direct the Corporation Counsel to represent them in this action, and that the Commissioners had so directed us. I have in my hand a copy of a letter prepared by Mrs. Watkins, the secretary of the Board of Education, and I have also in my hand a duplicate original of that letter dated November 13, 1950, which came to the office of the Corporation Counsel. The letter is to the Board of Commissioners of the District of Columbia, and without burdening the Court to read the whole thing, it asks the Commissioners to direct the Corporation Counsel to represent all of the respondents in two civil actions, one of which is *Bolling* v. *Sharpe*. Mrs. Watkins has put this certification as of last evening on a copy of that letter:

> I hereby certify that the foregoing is a true and correct copy of the letter sent by me to the Board of Commissioners, D. C., under

date of November 13, 1950, at the direction of the President of the Board of Education.

This is the usual letter which is sent to the Board of Commissioners whenever the Board of Education or its members or its public school officers have been sued, and is in accordance with Chapter 1, Article 9, section 1 of the rules of the Board of Education, which provide, when legal advice or service as counsel is desired by the Board of Education upon matters relating to the administration of school affairs, application shall be made to the Commissioners, D. C., for the services of the Corporation Counsel of the District of Columbia.

Mrs. Watkins continues:

I am familiar with all of the actions of the Board of Education since the date of the letter of which the foregoing is a copy, and certify that the Board of Education has taken no action to rescind the request of the President of the Board of Education that the Board members, the superintendent of schools, and the public school officers be represented by the Corporation Counsel of the District of Columbia in regard to the civil actions enumerated in the foregoing letter.

In the case of *Denney* v. *Callahan* in 294 Federal 992, it was held that the rules of the Board of Education have the force and effect of law.

I have in my hand a certification by Mr. G. M. Thornett, secretary for the Board of Commissioners, D. C., prepared last evening, certifying—I shall read it:

I hereby certify that the following is a true and exact excerpt from the minutes of the meeting of the Board of Commissioners of the District of Columbia on November 14, 1950.

I shall not read the whole order, but I say to the Court that it contains a direction to represent the various members of the Board of Education and the various school officers named as respondents in this case denominated *Spottswood Thomas Bolling, et al.* v. *C. Melvin Sharpe, et al.* There has been no withdrawal of any of that, and I should be very glad if the Court desires to file

these copies with the Clerk of this Court, with sufficient copies for each member of the Court, if required.

I may say to you further that on last evening Mr. West, the Corporation Counsel, Mr. Gray, the Assistant Corporation Counsel, and I held what might be called a four-way telephone conversation with Mr. Sharpe, the President of the Board of Education, and we were assured by him that we have the right to stand before you and say that we represent the members of the Board of Education in this controversy.

This morning Mr. Sharpe telephoned me about ten-thirty to say that of his own volition he had contacted all the members of the Board of Education, and that he could say to me that, in his own words, one hundred percent they say that I have the right to stand before you to represent them in this controversy; that they want decided the question of the constitutionality and the validity of the acts of Congress under which the dual school system in the District of Columbia is being maintained.

MR. JUSTICE BLACK: May I ask you, then, this question? The reason I asked you the question yesterday was not that I doubted your right as Corporation Counsel to defend them if they wanted the case defended. You say they want the constitutionality decided.

MR. KORMAN: And the validity of these acts.

MR. JUSTICE BLACK: I understand that. The thing that disturbed me, more from what had been said, I gathered the impression there is the implication that perhaps the majority of the Board were going to change the rules; and, if so, I did not think that the Court should be called upon to decide the constitutionality of the rules.

MR. KORMAN: May I say this, Mr. Justice Black. I do not understand that there is a majority of the Board that has such a feeling. I am not sure. It may be that that is the case.

MR. JUSTICE BLACK: That was the cause of my interest in the question I asked you. That was the point in my mind.

MR. KORMAN: But I may say to you further, sir, that our position as legal advisers to the Board is that they have not the right to make any change in the system, because we firmly believe, and I hope to establish to you in argument today, that the acts of Congress require the maintenance of separate schools for white and colored children in the District of Columbia, and that those acts of Congress are constitutional.

I may say to you further, that that has been passed on indirect-

ly by this Court in the case of *Plessy* v. *Ferguson* in 1896, directly by the United States Court of Appeals for the District of Columbia in 1910 in the case of *Wall* v. *Oyster*, and directly and specifically in the cases of *Carr* v. *Corning* and *Browne* v. *Magdeburger* in 1950 by the United States Court of Appeals for the District of Columbia Circuit, holding in so many words that the acts of Congress required the maintenance of separate schools for white and colored children, and that those acts of Congress are constitutional.

It does not lie in my mouth to say to the members of the Board of Education that they have a right to fly in the face of such decisions, and I say to you that they could not make any change as we understand the law, and I think as they understand the law, however much any of them might want the law to be otherwise.

MR. JUSTICE BLACK: Of course, that would be a different lawsuit. I don't suppose that the Corporation Counsel would have a right to defend the Board or require them to appear as defendants if a majority of them decided that they wanted to change the rule. Now, I can understand mandamus might be filed against them or something of that kind.

MR. KORMAN: I would think that under those circumstances, sir —I don't know whether we would be called on to represent them or not, but if we were, I would feel constrained to go before the Court and confess error, because we believe the law is otherwise.

As I said to the Court on yesterday, we stand here to maintain the validity of these acts of Congress, just as we stood before this Court in May and asked this Court to sustain the validity of other legislative enactments in the *Thompson* restaurant case; that in the one case segregation is inveighed against and that in the other it is required, is to us a legal immateriality. We say that Congress has a right and that the legislature which enacted the other laws had the right, to pass such laws, and they are in effect in the District of Columbia.

I should like to touch on the question of the kind of decree which might be entered by the Court in the event of unconstitutionality. I take this up at this point because I believe that the Court will not reach that point, but I think that in respect of the Court's wishes, I should say something about it, because the question was asked.

MR. JUSTICE DOUGLAS: Are you going to reach the legal questions, whether the District of Columbia statutes—

MR. KORMAN: I expect to cover that further.

MR. JUSTICE DOUGLAS: —are mandatory or are merely permissive?

MR. KORMAN: Yes, I expect to reach that. We have suggested in our brief on reargument that the Court should not enter any detailed decree. On page 17 of our brief we merely make this suggestion:

> The soundest suggestion that counsel for respondents can make to the Court concerning the nature of the order, if unconstitutionality is to be decreed, is that the Court make recognition of the necessity for proper preparation and changes which appear essential to perfect integration in all jurisdictions and remand the cases to the respective district courts with instructions for such courts to prepare decrees directing the immediate commencement of such preparation, with periodic investigation by the district courts of the progress thereof, with direction that, in accordance with the principle of unconstitutionality of separation of races in schools, integration be commenced at the earliest possible date, and that complete integration be accomplished by a definite future date, not to exceed in any jurisdiction more than a maximum period of time.

And we do not suggest any maximum period of time.

MR. JUSTICE JACKSON: If you can't, how are we going to? How are we going to be better informed on that than you?

MR. KORMAN: I don't know that you can be, Your Honor, and I don't know that I can help, and I don't know that any counsel here can help the Court, for the reason that it appears in the District of Columbia and in many of these states legislation may be necessary, as has been suggested by members of the Court. Some officers may move slower than others, some may resign, not want to serve at all, and so forth. Those are contingencies which I frankly don't know how the Court can deal with.

Perhaps it might be better—and I know that my friends on the other side will disagree with this—that no positive future date be set, but that the matter be left to the district courts, because I don't think that anyone can now determine what those lengths of time will be. Certainly I can't predict what time may be required to get Congress to act on something.

MR. CHIEF JUSTICE WARREN: Mr. Korman, is there any legal question involved in remanding this to the District Court of

the District of Columbia, in view of the fact that the district court itself appoints the members of the Board of Education, who are the appellees in this case?

MR. KORMAN: I don't think so, sir.

I may say, sir, that there have been many cases that have come before that court involving the Board of Education since the Organic Act of 1906, when they got the authority to appoint members of the Board of Education, and the record will show that they have dealt quite firmly and severely with the members of the Board when necessary. I don't think there is any tie between the members of the bench and the members of the Board, so that it would be at all embarrassing in any way for them to take positive and firm action if necessary, even in opposition to wishes of some of the members of the Board. I don't anticipate that that would ever come up.

Indeed, my thought is that the matter would be worked out quite amicably. I am inclined to believe that the Board of Education, if there should be a mandate from this Court that segregation is unconstitutional, would take immediate steps to try to plan and work out the desegregation of the schools of the District of Columbia as quickly as possible.

I have made some suggestions in the brief concerning things that I believe are necessary to be done before the actual reshuffling of children takes place. I don't believe that my opponents agree with me.

Indeed, I am not at all sure that all of the members of the Board of Education, from some public statements I have seen in the press, agree with some of the things that I have said; but I assure the Court that I did not pluck them out of the air. I consulted with the chief executive of the Board of Education, the Superintendent of Schools, at some length. I consulted with representatives of the United States Government in the United States Department of Education. I consulted with others, and I have read on the subject; and I am firmly of the belief that some preparation and indoctrination of the teachers to handle integration is a prime prerequisite.

My friends on the other side take me to task for this, and they say that these things are not necessary; but yet, there is a strange situation developed. In their reply brief, on page 17 and on page 16, they have an indication that the American Friends Service Committee has conducted courses of instruction for some 120 enrollees in four classes or seminars extending from last March until November of this year.

It is not shown whether the 120 enrollees were thirty who enrolled four times in each of the four seminars. There are, however, 3,500 to 3,600 teachers in the public school system. I should like to call the Court's attention to the fact that in the appendix to the brief which we have filed on reargument, there is a letter from the Superintendent of Schools of the District of Columbia which shows that instructional courses have been provided for recreational workers, so that they will be properly indoctrinated in the handling of integration in recreation areas, and we find that those courses were put on a voluntary basis, and at the expense of these organizations: The National Conference of Christians and Jews, the Jewish Community Council of Greater Washington, the American Friends Service Committee, the Washington Interracial Workshop, the Washington Federation of Churches, the Catholic Interracial Council, the Washington Urban League, and the Unitarian Fellowship for Social Justice.

Now, strangely enough, in this yellow-backed brief which was filed as a friend of the court last year, before this case was argued, we find these organizations, among others, that are advocating the striking down of segregation in the district court: The Catholic Interracial Council, the Commission on Community Life of the Washington Federation of Churches, the Friends Committee on National Legislation, the Jewish Community Council of Washington, the Unitarian Fellowship for Social Justice, the Washington Interracial Workshop, the Washington Urban League.

And so we see that the organizations that are urging this Court to strike down segregation are conducting courses to instruct teachers and workers in the proper way to handle integration, and if that is not an acknowledgment that it is necessary, then I don't know what is.

May I say one thing further. The complaint in this case asks for a declaratory judgment that the acts of Congress under which separate schools are conducted in the District of Columbia are unconstitutional. It would seem to me that a decree by this Court that segregation is unconstitutional would require the lower court to enter such declaratory judgment, and that would indeed cover the whole situation in the District of Columbia, and not just this handful of students who have brought this suit; and so I don't think we have the problem that was suggested by Mr. Justice Jackson, that the decree would only go to the immediate petitioners.

MR. JUSTICE JACKSON: You have all of your authorities here?

MR. KORMAN: Sir?

MR. JUSTICE JACKSON: All of your authorities are in this litigation, aren't they?

MR. KORMAN: Yes.

MR. JUSTICE BLACK: The petition asks that we enter a declaratory judgment, or the Court does, stating that the defendants are without right, construing the statutes having to do with public education as requiring the Board to do this. That is the first question that has to be decided, isn't it?

MR. KORMAN: I think so, sir.

MR. JUSTICE BLACK: And I would assume that it should be construed in a way possible so that we don't reach a constitutional question.

MR. KORMAN: That has been the policy of this Court; but by the same token, it has been the policy of this Court, as expressed in the *Butler* case, every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to judge any statute in contravention of them, but under the frame of our government, no other place is provided where the citizen may be heard to urge that law fails to conform to the limit set upon the use of a granted power. When such a contention comes here, we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

Now, I realize that that is not completely apposite, because it does not go to the constitutionality, but to construction, which is a different thing; but I believe I can demonstrate to you that these acts of Congress do require the maintenance of separate schools.

MR. JUSTICE BLACK: Has it been construed by the local district court or the local court of appeals—

MR. KORMAN: Yes, sir.

MR. JUSTICE BLACK: —in this respect?

MR. KORMAN: In this respect. They have been twice so construed, in the case of *Wall* v. *Oyster* in 1910, and in the combined cases which were consolidated for argument and consolidated opinion, *Carr* v. *Corning* and *Browne* v. *Magdeburger*, decided in 1950.

MR. JUSTICE FRANKFURTER: Did Judge Prettyman in the *Carr* case explicitly deal with this problem? He sustained the segregation and he sustained the constitutionality, but was it an issue in that case, whether the segregation was to be sustained because that was the system which the Board enforced, or that segregation was sustained because the statutes compelled the court to enforce them?

MR. KORMAN: The question was raised in that case, and Judge Prettyman—

MR. JUSTICE FRANKFURTER: Did he discuss that problem, Mr. Korman. That is what I want to know.

MR. KORMAN: He reviewed all of the statutes, and then he said—

MR. JUSTICE FRANKFURTER: And said segregation is constitutional?

MR. KORMAN: No. He said this. It is set forth more fully in the brief we filed last year. I have this quote in my notes. After citing the various statutes, he said:

> These various enactments by Congress cannot be read with any meaning except that the schools for white and colored children were then intended to be separate.

That was his conclusion, and I think I can demonstrate that to you by reviewing the statutes, which I should like to do.

MR. JUSTICE FRANKFURTER: I am not questioning that, but as I remember his opinion and as I remember Judge Edgerton's dissent, they did not clinch, if I may use a vulgarism, on that question.

MR. KORMAN: I am quite in agreement with you that Judge Prettyman and Judge Edgerton did not clinch on that question.

MR. JUSTICE FRANKFURTER: That is all I am trying to find out, the scope of the decision on that question.

MR. KORMAN: But Judge Clark clinched pretty well on that.

MR. JUSTICE FRANKFURTER: In that case?

MR. KORMAN: Yes.

MR. JUSTICE FRANKFURTER: Was there an opinion by Judge Clark?

MR. KORMAN: No. He joined Judge Prettyman in the majority

MR. JUSTICE FRANKFURTER: How can a concurring judge go beyond what he concurs with, unless he says so? I don't understand that.

MR. KORMAN: Well, my understanding—

MR. JUSTICE FRANKFURTER: He may have done so from the bench, but so far as my reading goes, which is all I have in these matters, I did not see that that issue was in contest between the

judge who wrote the majority opinion and the judge who wrote the dissent.

MR. KORMAN: I don't think it was in contest between those two, no.

MR. JUSTICE FRANKFURTER: All right, that is all there is in the books. I have no private edition of their opinion.

MR. KORMAN: Well, sir, Judge Clark joined with Judge Prettyman—

MR. JUSTICE FRANKFURTER: But he could not join more than what Judge Prettyman wrote.

MR. KORMAN: No, but he joined that much, and Judge Prettyman wrote—

MR. JUSTICE FRANKFURTER: So I read Judge Prettyman's opinion—

MR. KORMAN: And I think it bears out my opinion.

MR. JUSTICE FRANKFURTER: Very well.

MR. KORMAN: May I then proceed to a review of these enactments? I think it should be said to the Court that in 1862 Congress passed an Act on April 16 by which the slaves in the District of Columbia were freed, and slavery was abolished. At that time there was in the District of Columbia two cities and a county, all of which were ruled by Congress. There was the City of Washington and the City of Georgetown, and the county, which was ruled, governed, by a levy court; and the legislation for all of them was by Congress. About a month later, on May 20, Congress provided for schools for the county. Up to that time there had been no schools at all in the county. There had been, for some years, public schools in the cities for white children, but not for colored children.

In the Act of May 20 setting up the colored schools, setting up the schools in the county, there was a law enacted, some 36 sections, and in one of those sections, section 35, as I recall, they provided schools, separate schools, equal schools, for the colored children. May I refer to the Act itself and read you some of the—

MR. JUSTICE DOUGLAS: What Act is this?

MR. KORMAN: This is the Act of May 20, 1862.

MR. JUSTICE DOUGLAS: That was the first one?

MR. KORMAN: Yes, sir. That was the one which set up schools in the county for white and colored children.

MR. JUSTICE DOUGLAS: Is this in your brief?

MR. KORMAN: No, this is in the petitioners' brief on page 23. It is set out *in extenso,* and we did not set it out again.

> And be it further enacted, that the said levy court may in its discretion, and if it shall be deemed by said court best for the interest and welfare of the colored people residing in said county, levy an annual tax of one-eighth of one percent on all the taxable property in said county outside the limits of the cities of Washington and Georgetown, owned by persons of color, for the purpose of initiating a system of education of colored children in said county.

Discussions on this indicate that there were not many colored people in the county.

> . . . levy an annual tax of one-eighth of one percent on all the taxable property in said county outside the limits of the cities of Washington and Georgetown, owned by persons of color, for the purpose of initiating a system of education of colored children in said county, which tax shall be collected in the same manner as the tax named in section 13 of this Act. And it shall be the duty of the trustees elected under section 9 to provide suitable and convenient rooms for holding schools for colored children, to employ teachers therefor, and to appropriate the proceeds of said tax to the payment of teachers' wages, rent of school rooms, fuel and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a full, equal and useful instruction of the colored children in said county.

I think I might skip down to the last sentence at the bottom o that page:

> And said trustees are authorized to receive any donations or contributions that may be made for the benefit of said schools by persons disposed to aid in the elevation of the colored population in the District of Columbia.

And so you see that here is Congress setting up a system of schools in the County of Washington for white children, and in one section of the same Act, setting up separate schools for colored children, and saying that they shall be equal in all respects. It seems to me that this is the beginning of the "separate but equal" doctrine.

Now, then, on the next day, May 21, 1862, the Congress set up schools for colored children in the cities, the cities of Washington and Georgetown, and therein they provided a tax of ten percent on the property of colored persons for the maintenance of these colored schools. Now, unusually enough—and I have to burden the Court with reading—but this is an Act of four sections.

My friends yesterday spoke about the striking down of the Black Codes, and here we see in one Act the establishment by the Congress in the District of Columbia, of separate schools for Negro children and the striking down of the Black Codes, all in one Act:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the passage of this Act it shall be the duty of the municipal authorities of the cities of Washington and Georgetown, in the District of Columbia, to set apart ten per centum of the amount received from taxes levied on the real and personal property in said cities owned by persons of color; which sum received for taxes, as aforesaid, shall be appropriated for the purpose of initiating a system of primary schools, for the education of colored children residing in said cities.

This is section 2:

> And be it further enacted, that the board of trustees of public schools in said cities shall have sole control of the fund arising from the tax aforesaid, as well as from contributions by persons disposed to aid in the education of the colored race, or from any other source, which shall be kept as a fund distinct from the general school fund; and it is made their duty to provide suitable rooms and teachers for such a number of schools as, in their opinion—

—not classes, but "such number of schools as, in their opinion"—

> . . . will best accommodate the colored children in the various portions of said cities.
>
> Section 3. And be it further enacted, that the board of trustees aforesaid shall possess all the powers, exercise the same functions, have the same supervision over the schools provided for in this Act, as are now exercised by them over the public schools now existing in said cities by virtue of the laws and ordinances of the Corporation thereof.

Obviously, they mean the setting up of separate schools for the Negroes.

Now, section 4—and this strikes down the Black Codes in the same Act:

> And be it further enacted, that all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offenses; and that upon being legally convicted of any crime or offense against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offense; and all acts or parts of acts inconsistent with the provisions of this Act are hereby repealed.

So it seems to me that thereby is a positive demonstration that Congress wanted to do something for these newly freed slaves, but at the same time, while giving them these rights of the white man, the right to be tried in the same courts, the right to be subject only to the same punishments and so on, all of these things in the same Act, and sets up for him separate schools.

MR. JUSTICE REED: What Act is that?

MR. KORMAN: That is the Act of May 21, 1862, 12 Stat. 394, page 407.

MR. JUSTICE REED: Is that in here?

MR. KORMAN: The citation is in there, but the full text is not in

my brief.

MR. JUSTICE DOUGLAS: It is 12 what?

MR. KORMAN: 12 Stat. 407.

Now then, that was on May 21. On July 11, in the same year, Congress established a board of trustees for colored schools. You see, these schools had been set up under the existing board of trustees, which handled the white schools, and they established a separate board of trustees for the colored schools; and they transferred the authority from the board of trustees of the schools, as set forth in the Act of May 21, to the new board of trustees for colored schools; and in that connection, may I read to the Court something that was said by Senator Grimes on the Senate floor at the time that was being considered:

> I am instructed by the Committee on the District of Columbia, to whom was referred the bill of House of Representatives No. 543, relating to schools for the education of colored children in the cities of Washington and Georgetown in the District of Columbia, to report it back and recommend its passage.

And then, after something further which is not concerned here, he said this: "The motion was agreed to"—this is from the *Congressional Globe*—

> The motion was agreed to and the bill was considered as in the Committee of the Whole. It provides that the duties imposed on the board of trustees of the public schools of the cities of Washington and Georgetown in the District of Columbia, by virtue of an Act entitled 'An Act Providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for Other Purposes,' approved May 21, 1862, be transferred to Daniel Breath, Zales J. Brown, and Zena C. Robbins and their successors in office, who are now to be created a board of trustees of the schools for colored children in those cities, who are to possess all of the powers and perform all the duties conferred upon and required of the trustees of public schools in Washington and Georgetown by the Act referred to.
>
> These trustees—

And I am still quoting—

> . . . are to hold their offices for the respective terms of one, two, and three years to be determined by lot, and it is to be the duty of the Secretary of the Interior on the first day of July, 1863 and annually on that date thereafter to appoint from among the residents of those cities a trustee in place of the one whose term has expired.

And so on. The bill became law.

The next enactment that we find with reference to the schools is on June 25, 1864, which established a board of commissioners of primary schools in the county, and that provided for the purchase of sites, for the erection of schools, for the regulation of the number of children, the fixing of tuition and so on. That contained in section 16 this provision:

> That any white resident of said county shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said county he or she may think proper to select, with the consent of the trustees of both districts and any colored resident shall have the same rights with respect to the colored schools.

But I can't see how possibly anyone could think that Congress intended otherwise than that those schools should be separate.

Section 18 provided funds to be set up or collected for the maintenance of those children according to the census, the proportion of colored children to white children of school age. Now, in that connection I would like to read to you something that was said by Representative Patterson in the House when that bill was being considered. He said this:

> In the twentieth section we have endeavored to give efficiency to the system by requiring attendance at school under a penal enactment. This is in accordance with the school laws in most of our northern cities, and would seem to be especially necessary here.

And then further on he said this:

> But the most important feature of the amendment is to be found in the seventeenth and eighteenth sections, and in the proviso of the

> nineteenth section which provides for separate schools for the colored children of the District. To accomplish this, we have provided that such a portion of the entire school fund shall be set aside for this purpose as the number of colored children between the ages of six and seventeen bear to the whole number of children of the District.

Now, let us follow the chronology of some of the things done by Congress; and I should like to point out to you, which I think probably is rather well known to the Court, that because of its plenary legislative power over the District of Columbia, the Congress, if I may use the expression, frequently uses the District for testing purposes. They put through bills here which they later enact into national policy; and I find in Bryan's *History of the National Capital*, page 133, this statement:

> Some years prior to the attempt to commit the Government to a national policy of internal improvements through a District measure, the District had been made the battleground upon which for nearly four decades the contest over slavery was waged. The field of action was chosen not because of concern in the District, but because there the Congress had the power of exclusive legislation and could at a stroke do away with the entire system.

And so we find that in 1862 they struck down slavery in the District; but it was not until three years later that they proposed the Thirteenth Amendment, which accomplished it for the rest of the nation. And so it was with other things, as I shall demonstrate to you.

And further on in this same book, at page 259, we find this statement. It is only indicative of the thinking of the time:

> In Alexandria, the loss of the banks was especially felt and there was great anger and excitement. At a town meeting held in that place, resolutions were adopted declaring that if Congress looked upon the District as a 'field of legislative experiment' the people of the several states are called upon to relieve us of political bondage.

That was the attitude of the people in those times, and that was what Congress did. And so, it seems to me that when you find the Congress making these enactments for the District of Co-

lumbia, setting forth as they abolish slavery here, later on for the whole country, as I shall show you; giving the right of suffrage to the Negroes in the District, later on for the whole country; the District of Columbia is the testing ground, and it seems to me it should lend weight to some of the arguments that were made here earlier concerning the intention of Congress in framing the Fourteenth Amendment. But I won't touch on that; I think that has been fully covered.

On February 1, 1865, there was a resolution proposing the Thirteenth Amendment abolishing slavery. I have already pointed out to you that that was done for the District in '62. In March of '65 there was the right of the Negroes to ride on streetcars. The Act of July 23, 1866, was—that was right at the time the same Congress was proposing the Fourteenth Amendment—passed an Act enforcing the payment of the proportionate share of the taxes for the colored schools, which had been provided for earlier, as I read. Apparently it wasn't being paid on time, and they put some teeth in it, and put a ten percent penalty in it if it wasn't paid on time.

And then, on July 28, 1866, that same Congress which proposed the Fourteenth Amendment passed this Act transferring certain lots, and this was the language:

> . . . for the sole use of the schools for colored children.

And further on in the Act:

> . . . to be used for the colored schools.

And providing that if they were not so used, there should be reversion to the United States. Then, as I told you earlier, on January 8, 1867, the right to vote in elections in the District was given to the Negro. And in 1869 there was the bill to abolish the separate school boards and transfer all of this to one school board; and it passed, but it was vetoed because the President said the Negroes here did not want that, and it was not passed over the President's veto. It died.

And then my friends refer to a memorial by the City Council of Washington to the Congress. They refer to that on pages 44 and 45 of their brief, that the City Council of Washington memorialized Congress to strike down segregation in the schools, and that is true. The City Council of Washington did memorialize Congress to strike down segregation in the schools, but it was a fruitless gesture. It was a vain effort. Nothing came of it. So that we see that the Congress, in spite of the memorialization by the

Council of the city, refused to take such action; and it seems to me that that definitely establishes the intent of Congress.

But my friends made one mistake in their brief when they cited the memorial by the City Council to the Congress to change the school system. They cited a page, and I thought I had better look at it, and so if you will refer to—and I shall not take the time to read it, because I see my time is running out—the Washington, D. C. Council, 67th Council, 1869-1870, at pages 828 and 829, and later on—

MR. JUSTICE JACKSON: Are those set forth in your brief?

MR. KORMAN: No, Your Honor.

MR. JUSTICE JACKSON: I wonder if you are going to rely on our memory?

MR. KORMAN: I shall be very glad to submit these references in writing, if the Court would permit. These are things which I found only recently.

MR. JUSTICE JACKSON: It is pretty hard to—I would think you would file a supplemental brief setting forth this. It would be advisable if you think it is important, because it will all be out of mind.

MR. KORMAN: Well, let me say this: I shall briefly refer to what this says.

MR. JUSTICE JACKSON: All right. I am not trying to stop the argument. I am simply suggesting.

MR. KORMAN: Yes, I understand that.

The Council of the City of Washington took to task rather severely by a resolution a member of the school board who had issued a certificate to a colored girl to enter a white school. They quoted a report, an opinion by the Corporation Counsel. There was no Corporation Counsel at that time. There was an opinion by some lawyer for the District of Columbia Government then that, once having got the ticket, they couldn't deny this girl the right to enter this school; and the Council takes that very much to task and says that the man ought to be fired for doing such a thing.

On February 21, 1871, the legislative assembly of the district was created, combining the cities of Washington and Georgetown and the county into one; but there was no integration of the schools provided for. In the 41st Congress, there was the specific bill by Senator Sumner to integrate the schools, and there was a great deal of debate found in the Congressional Record; but the bill did not pass.

In the 42nd Congress, in 1872, there was a bitter debate on a similar bill to integrate the schools, but it failed of passage. And then the legislative assembly passed the acts which I mentioned earlier which gave to the Negro the right to enter all restaurants and places of public assembly, but they did not legislate on this subject of schools, because they knew they could not.

They gave the Negro all sorts of rights and powers in the District, but they did not legislate on schools because they couldn't; and that was at the time when Mr. Sumner, the Senator from Massachusetts, was a member of the District Committee in the Senate, and I have no doubt that they acted under his prodding, and yet they took no action because they knew that the schools were intended to be separate.

And then in 1900 a school board was provided for of seven paid members of the school board, a superintendent and two assistant superintendents, one of whom, under the direction of the superintendent, shall have charge of the schools for colored people; and the Organic Act of 1906 came along, when they reorganized the whole school system; and the reason, Mr. Nabrit, why they provided for the appointment for the Board of Education by the judges was because they felt that the judges were incorruptible and the school board appointed by them would not be subject to the vagaries of politics and pressure groups. And you will find that in discussion on the subject.

Then I should like to call your attention to the Teachers' Salary Act of 1945, and of 1947, which says essentially the same thing. May I read some of those provisions to the Court:

> There shall be two first assistant superintendents of schools, one white first assistant superintendent for the white schools who, under the direction of the superintendent, shall have charge of general supervision over the white schools, and one colored first assistant superintendent for the colored schools who shall have direction of those schools.

And so on through enactments right up to the present day. Each year, as has been pointed out, Congress appropriates for this separate system of schools and provides so much money for the colored schools, so much money for the white schools, as is set up in the request for appropriations.

I might call your attention further, in addition to the appendix which was filed and which is the order of the Commissioners of the District of Columbia striking down segregation in certain areas and which contains in it a recognition by them that there are certain areas in which they have no power to act because it has

been taken care of and provided for by the Congress of the United States—and with that I shall leave it to the Court and ask the Court to take into account the arguments which were set forth in our brief filed in 1952.

MR. JUSTICE REED: Mr. Korman?

MR. KORMAN: Mr. Justice?

MR. JUSTICE REED: The matter referred to here as being Acts of the Congress for the benefit of the District of Columbia Government, are they stated in your brief?

MR. KORMAN: The Act of the Congress relating to the District of Columbia?

MR. JUSTICE REED: Yes.

MR. KORMAN: All of the Acts?

MR. JUSTICE REED: That you referred to this morning. For instance, 12 Stat. 407.

MR. KORMAN: Yes, sir, they are referred to in my brief. They are not set out *in extenso*, but they are referred to and those citations of statutes are set forth in the brief.

MR. JUSTICE REED: Which brief is that?

MR. KORMAN: That is the 1952 brief. The brief that was filed this time touched only upon the fourth and fifth questions asked by the Court. We took the position—

MR. JUSTICE REED: There is a section called "The Acts of Congress providing for education of children in the District of Columbia," which is section 2 of your brief.

MR. KORMAN: The latest brief?

MR. JUSTICE REED: No. This is the 1952 brief.

MR. KORMAN: Yes, sir. That contains those acts, the reference to them. You will find at the bottom of page twelve the list of these enactments.

MR. JUSTICE REED: That you referred to this morning?

MR. KORMAN: That's right, sir.

MR. CHIEF JUSTICE WARREN: Thank you.
Mr. Nabrit?

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

MR. NABRIT: If it please the Court:

Counsel for respondents, in answer to the question of referring the decision as to action to be taken, if the Court would find that segregation in the District of Columbia is not authorized, to the district court as satisfying some inquiries upon the Court, he quoted from the Act in which the authority for the judges to do this—in which it was stated that the purpose was to confer the power of appointment in a group of persons who were noncorruptible.

Under American jurisprudence, however, we would suggest to the Court that in considering due process, we have not let the incorruptibility or noncorruptibility of the persons involved permit us to entrust to them both the appointive and reappointive power of boards, and then the judicial power to distinguish between litigants who are contesting the rights of the board and the board on the basis that their incorruptibility satisfies the requirements of due process.

We don't suggest in any way or question the corruptibility or the impeccability or the character of the judges. All we suggest to the Court is that there appears to be an impropriety in the District of Columbia where the District judges appoint the members of the board, and if they don't like them, they don't reappoint them—and when I say "don't like them," I mean it in the high sense. They don't reappoint them. And yet, when we sue the Board of Education, these same judges pass upon the actions of the board.

Now, we merely suggest to the Court that there appears to be some impropriety in that. And again, counsel for respondents take the position that the attitude of Congress with respect to racial distinctions in the District of Columbia can be gathered by reading certain phrases in these statutes. Now, counsel neglects some very important things in doing that.

Number one, out of the eleven basic statutes governing the control of schools of the District of Columbia, nine of those statutes were passed between 1862 and 1866. Of those nine, seven of them were passed before 1864, by the end—between 1862 and 1864. At that stage of history in this country, two things ought to be borne in mind by the Court. One, we were on the verge of the Civil War in 1862. We were in the midst of the Civil War thereafter until 1864, I merely speak of that period because the war continued. Number two, during that period public education itself was in an elementary stage of development. The public education for anybody in the District of Columbia, even whites, was in such

a fragmentary and rudimentary situation as not to be dignified by the name of public educational system.

Now, in that historical framework, where Congress provided funds—and Mr. Grimes said in both of these Acts to which Corporation Counsel referred your attention, that these were revenue acts to give to systems—I should not use the word "systems"—to Negro schools some financial support in a situation where there were three types of schools, a so-called public school system for whites, private schools for whites, and private schools for Negroes —now, without using the word "separate," without using any words of compulsion, when Congress provided that sort of system to say that the intent of Congress was to provide for racial distinctions in education, when at the same time in every other Act of Congress beginning with the Emancipation Act which he referred to; the elimination of the Black Codes, which he referred to; the Civil Rights Act; the Acts giving the District of Columbia Negroes electoral rights; the Acts enacted immediately after the enactment of the Fourteenth Amendment, those dealing with restaurants, public places in the District of Columbia; those in the Civil Rights Act of 1875—every one of those Acts of Congress provided against any distinction on the basis of race or color with respect to Negroes. It is inconceivable that in this type of fragmentary educational system the Congress there intended to manifest an intention to impose a racial distinction. There is no basis for such a supposition. So that we must read these statutes, if we are going into history, in the light of the historical background where we find it.

Now, we suggest to the Court, however, if it does not agree, that it is not necessary to do that. They can look in these statutes in vain for any language which provides any type of penalty or punishment or disability for the mixing of Negroes and whites in the public schools in the District of Columbia.

In *Ex parte Endo* this Court has said this: that when the Government, the Federal Government, imposes restraints upon its citizens based upon race, or when it restrains its liberty—I think we can say the Court went that far—that the restraint must be justified by the language used in specificity. The justification for the restraint must be found in the words used, and we suggest to the Court that no such condition exists with respect to these statutes.

Now, in the third place, we say with respect to these statutes, that the Court does not agree with that, that the Court should give these statutes an intent which is in conformity with the decisions of this Court, the policy of the Government, both executive and legislative, as we have indicated.

I think it also highly important to call this to the attention of the Court: that the President of the United States, President Truman, the Attorney General of the United States during Mr. Truman's Presidency, President Eisenhower, the Attorney General now under President Eisenhower, Attorney General Brownell, both of the executive officers of the highest position in this country of the major political parties, including the highest legal officers of the United States, have stated: One, these statutes do not compel or authorize segregation; two, that segregation is unlawful and unconstitutional in the District of Columbia.

Now, I suggest that under those circumstances, that is much more persuasive than the position taken because some statutes authorize the Corporation Counsel to represent the Board of Education. Those statutes do not authorize him to determine, contrary to all of the legal opinion, that these persons must compel segregation in the public schools. He says that is his opinion, and he cites for that *Carr* v. *Corning*.

Now, in *Carr* v. *Corning*, the Court decided that these statutes, in the framework with which we have been dealing with them, indicated that Congress did not intend to lift the question of segregation in education out of the hands of Congress, and under the facts in that case they found equality. The Court did not reach the question which we ask the Court to decide here, whether or not the Government has the power to impose racial distinction in affording educational opportunity to citizens in the public schools in the District of Columbia solely on the basis of race or color; so that *Carr* v. *Corning* is of no help; and if *Carr* v. *Corning* had decided that, there would be no doubt about our position, that would have no binding effect on this Court when, for the first time, this Court is called upon to decide as to the lawfulness of this type of action by the Federal Government.

Now, as far as *Wall* v. *Oyster* is concerned, that was the case in which a Negro girl was admitted to the white schools. Shortly after she was admitted, it was found out that some far ancestor of hers in the past had a few drops of Negro blood, but it could not be discerned by looking at her. They put her out, and she tried to get back; and the issue was on the basis of the classification, and the court said that the District had the power to classify, and that their classification of you as a Negro could not be contested. Now, the court said that, well, underlying that wasn't there an assumption that this was a proper separation of the races in the District? I would say yes, but that was not the issue.

Furthermore, *Wall* v. *Oyster* points out the basic thing that is wrong in this whole situation, and that is, there is no justification for the separation of these races except on a basis of inferiority, because in *Wall* v. *Oyster* this girl was in the school, no question being raised about her, the same person. When they found out she

had this drop of Negro blood in her, she became unfit to associate with the others in the classroom, and she was put out, not because of anything that was wrong, other than that she possessed this Negro blood.

That, we say, is inconsistent with the Constitution of the United States; and nothing has been said by the Corporation Counsel in this Court in the last argument or this which offers to this Court any suggestion of any reason or any justification for this separation of races by the exertion of governmental power, save and except there is something in the nature of the Negro which makes him unfit to associate with the whites in the public schools. And that, we say, is against the policy of the Federal Government and against the Fifth Amendment of the Constitution of the United States.

Now, I want, if I have a minute or two, to say something to the Court about this matter of relief and about the question of—well, I did not mean to say anything about the power of the Court. My answer to the question about the power of the Court is, of course, the Court has its power under its equitable power to give any type of relief which the Court thinks is desirable, and with that we have no quarrel. We think, however, that the Court might raise a question itself as to whether it should exercise the power in these cases so as to give any type of gradual relief.

In the District of Columbia we go further: We say to the Court that the District of Columbia itself does not ask for any gradual relief. We assert no gradual relief is necessary. Under those circumstances, we would think that the Court, having no reason to give gradual relief of itself, would consider gradual relief not to be involved in the District. If that be sound, that would leave the question of what type of decree the Court should enter.

In our judgment, the Court should not enter a detailed decree. In our judgment, we have a time within which we think the Court should require the respondents to grant the relief requested, and that is that the Court enter a decree that these respondents be restrained from operating and managing these schools in the District of Columbia on the basis of racial distinctions alone, by the beginning of the next school term succeeding the issuance of the decree. So that if the decree were issued—it is a supposition contrary to fact—if the decree were issued in January, the next term would be September; if it were issued in May, the next term would be September. Now, if it were issued in June, the last day, it would still be September. In our judgment, there would then be sufficient time for whatever normal administrative problems arise in the adjustment of an integrated system to be resolved in the District.

We like to point that out to the Court: Number one, they talk about the reshuffling of students. There are 105,000 students. A normal administrative procedure would take the cards of all the students in the elementary grades, group them, group those cards of the students in junior high, group those in the senior high, so that you have your school populations in your cards; get maps for your areas in the District of Columbia divided for convenience; select either five or ten or whatever number of students you want represented by a pin, and put a pin in that map to show the number of students in each area.

You have the capacity of every school building in the area in each of the categories, and it is a simple proposition to distribute them; so simple is it that in the District of Columbia they do it every year, if not every other year, for the separate Negro system, and for this separate white system which they impose on us. Now, in order to do it for both, all you do is to coalesce this mechanical action.

The second thing they say that is so difficult is that they have some teachers with different seniorities, and that when you get two lists together of these eligibles, you do not have any way to do that. This Court has decided in any number of these labor cases that where we have collective bargaining agreements, and you have seniority and these lists, in the decision of the Court these lists are put together and there is no difficulty. As a matter of fact, the superintendent of schools has announced that they are going to combine the lists for all teachers of physical education this year. It is just as simple to combine lists for all else; so there is no difficulty as to that.

The next thing, they say it is difficult because you have got to indoctrinate the teachers. We know it is much better, the more teachers have some training in intercultural relations, the better it is. We do not dispute that. But in the District of Columbia 85 percent of the teachers of the 3,500 teachers have served and are serving today on integrated committees, so they have not been isolated in a vacuum. All of the officers operate that way, largely groups of students operate that way. All of that is in our brief.

In addition to that, over two hundred of them will have been trained for intergroup living and activities and work before March, so that we have a nucleus if we only use those trained or if we only use those who belong to their amalgamated or integrated teachers union, to furnish a nucleus of teachers experienced enough to do this.

All of that calls for simply administrative judgment. So that these evils and obstacles which the Corporation Counsel—although he takes the position that gradualism is not necessary, he postulates

to this Court in a form to require the same time that gradualism requires—seems to have no substantial basis or merit; and therefore we suggest to the Court that these respondents be required to conform to a mandate of this Court, assuming the Court decided that segregation is unconstitutional, that this or that that action is not lawful, that they do this at the beginning, by the beginning of the next succeeding school term; and, to be specific, since we hope the decision will come some time during this next year, that it be September, 1954, at the beginning of the school year.

I would like to say as one final sentence, if I may, that America is a great country, in which we can come before the Court and express to the Court the great concern which we have, where our great government is dealing with us; and we are not in the position that the animals were in George Orwell's satirical novel *Animal Farm*, where after the revolution the dictatorship was set up and the sign set up there, that all animals were equal, was changed to read, "but some are more equal than others." Our Constitution has no provision across it that all men are equal, but that white men are more equal than others.

Under this statute and under this country—under this Constitution and under the protection of this Court, we believe that we, too, are equal.

[Whereupon, at 1:20 o'clock p.m., the argument was concluded.]