STATEMENT OF OLIVER W. HILL, ESQUIRE, BEFORE THE
JUDICIARY COMMITTEE OF THE UNITED STATES SENATE
IN SUPPORT OF THE CONFIRMATION OF LEWIS F. POWELL, JR.,
AS A JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. Chairman and members of the Committee, I am
Oliver W. Hill, an attorney at law practicing in Richmond,
Virginia, as a member of the law firm of Hill, Tucker and
Marsh. I thank the Committee for affording me this
opportunity to express my views on the question of the
confirmation of the nomination of Lewis F. Powell, Jr, as
a Justice of the Supreme Court of the United States.

My acquaintanceship with Mr. Powell began in the late
Forties when we were engaged in a common cause to remodel
the form and system of government for the City of Richmond,
Virginia.

From time to time from that period in the late Forties
until March, 1968, the name and activities of Lewis Powell
came to my attention by reason of his various activities
relating to the legal profession or in the performance of
some public function. Whenever the discussion concerned his
legal ability, it reflected him to be a lawyer of the highest
competence. He was also reflected as being a person of
excellent character, a highly motivated, public-spirited
citizen and a progressive moderate on racial questions.
In 1968, Governor Mills E. Godwin appointed Mr. Powell, nine other distinguished Virginians and me to a Commission on Constitutional Revision. The Commission had been authorized under a joint resolution passed by the Virginia General Assembly. Mr. Justice Albertis S. Harrison, Jr., of the Supreme Court of Virginia was its chairman. We were charged to formulate and submit our report within one calendar year and, in order to meet this requirement, it necessitated frequent meetings of the full Commission and its subcommittees. Mr. Powell and I served as the subcommittee for Taxation and Finance.

It is principally upon this background of my close association with the nominee during this period that I rely as the basis for my conclusion as to his fitness to serve on the Supreme Court of the United States.

The measure of a man can be determined as well from what he is for, as from what he is against.

By virtue of his experience acquired while on the School Board of the City of Richmond and the State Board of Education, Mr. Powell realized the need of a high quality of education in the schools throughout the Commonwealth. He was an ardent supporter of the new
education article in our constitution which, incidentally, is one of the strongest education articles in any state constitution in the country. This article provides for the legal support which will bring us closer to a realization of equal educational opportunities for every school child in Virginia, regardless of his race, geography or other circumstances.

Mr. Powell supported the provision which puts education for the first time into Virginia's Bill of Rights on the same plane with such other fundamental values as freedom of speech and free exercise of religion.

For the first time in its history, Virginia's Constitution now contains a prohibition against state discrimination against any person on the basis of race, color or religious conviction. This puts in the Virginia Constitution a solemn declaration of policy for the Commonwealth comparable to that which the 14th Amendment lays down in the Federal Constitution. Mr. Powell gave his whole-hearted support to the adoption of this clause.

Several years ago, in "Southern Politics in State and Nation", V. O. Key and Alexander Heard in writing about the members of Virginia's conservative ruling establishment stated that they demonstrated a sense of honor, an aversion to
open venality, a degree of sensitivity to public opinion, a concern for efficiency in administration, and, so long as it does not cost much, a feeling of social responsibility.

Mr. Powell not only has all of the best qualities of a conservative Virginian, including a feeling of social responsibility, but he has also demonstrated an awareness that in order to fulfill this responsibility, the Commonwealth must incur costs and that adequate measures should be established through which the necessary finances can be provided.

In order to accomplish this objective he labored earnestly for the abolition of some of Virginia's traditional concepts with respect to our revenues and debt management.

In other words, Gentlemen, although he is conservative in many respects, the fact that he exhibits a willingness to seek new solutions to problems where old methods have outworn their usefulness or demonstrated their inadequacy, has convinced me that he is a man whose heart is right; and I believe that this characteristic, coupled with his proven intellectual capacity, will impel him to reach the right decisions on most issues.

For these reasons I earnestly request that he be confirmed.
January 2, 1973

MEMORANDUM TO THE CONFERENCE

Re: Bradley v. Milliken (Detroit School Case)

I have been advised that a petition for rehearing en banc was filed in this case on December 22, and that the petition has not yet been acted upon. The Clerk of the Court of Appeals for the Sixth Circuit will promptly advise me as soon as an order is entered on the rehearing petition, which he anticipates will be by January 10.

P.S.
January 16, 1973

MEMORANDUM TO THE CONFERENCE

Re: Detroit School Case

The United States Court of Appeals for the Sixth Circuit entered an order this morning setting this case for reargument en banc on February 8. As the order recites, its effect under the court's rules is to vacate the judgment and opinion heretofore rendered by the panel of three judges.

P.S.
No. 72-549 - School Board of the City of Richmond v. State Board of Education of the Commonwealth of Virginia

No. 72-550 - Bradley v. State Board of Education of the Commonwealth of Virginia

From: White, J.

Before us for review is the judgment of the Court of Appeals for the Fourth Circuit which reviewed the judgment of the District Court, vacated the Order of the District Court entered on January 10, 1972, and dismissed the suit as against named state officials and the school boards and supervisors of Henrico and Chesterfield Counties. I would in turn vacate the judgment of the Court of Appeals and remand the case for further proceedings. As Harry Blackmun suggested in his note of April 25th, I am stating in summary form the reasons for my vote.

The District Court had ordered the creation of a single school division composed of the City of
opinion as resting on a desire to achieve a "viable" racial mix and the plan as a whole to be "the equivalent ... of the imposition of a fixed racial quota." (Appx. 570a) This was thought to be error because "[t]he Constitution imposes no such requirement and imposition as a matter of substantive constitutional right of any particular degree of racial balance is beyond the power of a District Court." (Appx. 570a)

Had the Court of Appeals stopped there, the district judge presumably would have been free to correct his error, but still within the boundaries of the expanded, consolidated area of the three districts. The Court of Appeals, however, went on to rule that the three school districts could not be consolidated and treated as a unit. Richmond, Henrico, and Chesterfield have been separate school districts for over 100 years, co-

terminous with the political boundaries of the City
past, but there was no evidence that they had in any way cooperated in this respect or in resisting desegregation. Resistance, though massive, had been individual. The 1902 Constitution and applicable legislation permitted the State Board of Education to designate two or more counties or counties and cities as a single school division. But the separate school boards in the combined units remained separate operating entities. The Court of Appeals also pointed out that school boards in Virginia had no power to tax and must depend on the county or other local governing body for their financing. Finally, under the new Constitution of the Commonwealth, a school division can be composed of more than one school district only on request of the school boards and the concurrence of the governing body of the county or city. The forced consolidation of the three districts ordered by the District Court was thus contrary to Virginia
consolidation involved "practicalities of budgeting and finance that boggled the mind." (Appx. 578a) Because the creation and operation of the three school districts was not intended to circumvent any federally protected right and because there was no evidence that the consequence of maintaining separate districts had impaired federally protected rights . . . "for there is no right to racial balance within even a single school district" . . . the Court concluded that "it was not within the district judge's authority to order the consolidation of these three separate political subdivisions of the Commonwealth of Virginia." (Appx. 580a-581a) Once it became clear that imposed segregation had been completely removed within the school district of the City of Richmond, "further intervention by the district court was neither necessary nor justifiable." (Appx. 581a) The three school districts were to be viewed separately and the necessary remedies imposed district by district.
or even as a matter of remedy for an adjudicated violation, strict racial quotas are not obligatory and very likely erroneous. In this sense, achieving racial balance would be no excuse whatsoever for a remedy crossing district lines; for, as the Court of Appeals said, "there is no right to racial balance within even a single school district." (Appx. 580a)

The district judge was not at liberty to impose racial quotas, within or without Richmond. But if he was free to merge school districts, to cross school district lines, or to consolidate Richmond, Henrico, and Chesterfield into one school district, would a desegregation plan for the entire area be adequate if it merely followed, exactly, the desegregation plans of individual districts -- that is, Richmond students would attend Richmond schools in accordance with the Richmond plan, Henrico students in accordance with the Henrico plan, and so on? I doubt that such a plan for the entire area would satisfy our cases; and,
plans would not be adequate for the consolidated area, for on that basis there would be identifiable white and black schools coexisting within relatively short distances of one another and the dual system would not have been eliminated root and branch.

But I would rather not rely on my view of this record in this respect nor on that of Mr. Kurland either. I would prefer that the Court of Appeals look at the case in this light, which it surely did not do. The Court conceded that the State's near plenary power over its political subdivisions could not be used as an instrument for circumventing the Fourteenth Amendment right "to attend a unitary school system"; the Tenth Amendment would then be in conflict with the Fourteenth and "it [is] settled that the latter will prevail." (Appx. 580a) Strangely, the Court of Appeals' only discoverable response to its own sally was that there was no right to a racial balance within a school district and so no right, for
to be explored. There should have been further inquiry: first, considering the three counties as a unit, whether the separate county plans fell short as an adequate federal remedy for past constitutional violations; and, second, if the answer to that question was in the affirmative, whether the shortcomings of the individual county plans provided a sufficient federal foundation for merging the three districts or in any other way crossing district lines so as to eliminate, to the extent reasonable and practicable, racially identifiable schools and hence disestablishing what had been dual school systems in each of the three Counties.

Historically, Virginia has not found it impossible to merge school districts even though individual districts retain their identity and remain dependent on their local governing entities for financial support. As the Court of Appeals recognized, the State School Board ordered such consolidation on
the same results may be achieved with the proper local consents. Consolidations of school districts do not appear to be the impossible undertaking the Court of Appeals envisaged. Judge Winter wrote in dissent below, but he was unchallenged when he pointed out the following:

"The Virginia Constitution was revised in 1970, the revisions becoming effective July 1, 1971. A consolidation of school districts of political subdivisions may now be effected only at the request (and with the consent) of the school boards and governing bodies of the affected political subdivisions. Va. Const. Art. VIII, § 5(a), as revised (1970); Va. Code Ann. § 22-30 (Cum. Supp. 1971). With the exception of this present requirement of consent, it is correct to say that under Virginia statutes enacted pursuant to both the former and the current State Constitutions, there were and are specific provisions governing (1) the composition, appointment and terms of members of a school board of a division composed of two or more political subdivisions, (2) the qualifications and duties of the consolidated..."
rules and regulations for the financial formula for the allocation of operating costs, capital outlay, and incurring of indebtedness for school construction, (8) the fiscal agent for the consolidated division, and (9) the effective date for formation of the Board and its assumption of the supervision and operation of all schools within the consolidated division. Va. Code Ann. §§ 22-100.3 to 22-100.11 (Cum. Supp. 1971). It may be added that in all respects the order of the district court complied with the provisions of existing state law, save only that of the requirement of consent and the school boards and governing bodies of all of the affected political subdivisions." (Appx. 586a-587a, n. 3)

The Fourteenth Amendment addresses itself to the States, as well as to their subdivisions. Local governmental lines did not suffice to frustrate proper remedial steps in Emporia or Scotland Neck, nor have they stood in the way of otherwise necessary or desirable remedies for other constitutional violations.
disregard of city or county boundaries, are obvious examples of this truism, particularly where a racial discrimination lies at the heart of the violation adjudicated. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Conceding that achieving racial balance or racial quotas in Richmond, Chesterfield, and Henrico County schools was neither required nor permissible, and surely no excuse for emasculating otherwise proper school district boundaries, I nevertheless would remand for the benefit of the Court of Appeals' view of what the profile of a proper plan would be if the three districts were to be treated as a unit and, in light of its opinion in this respect, to have its considered judgment as to whether the boundaries of each of the three districts must be adhered to in all respects. If not, a remand to the District Court for preparation of a new plan would probably eventuate.

I may have misread the opinion of the Court
be observed in fashioning remedies for invidious
discriminations under the Fourteenth Amendment. If
that was its ruling, in my view it was error; and I
would in that event remand the case for reconsidera-
tion by the Court of Appeals, freed of its misconcep-
tion of the controlling federal law.
No. 72-549 - School Board of the City of Richmond
v. State Board of Education of the Commonwealth
of Virginia

No. 72-550 - Bradley v. State Board of Education of
the Commonwealth of Virginia

From: Rehnquist, J.

I had thought following Conference discussion of these
cases and the exchange of memoranda afterward that I might
be able to join a remand of these cases, which would basically
disavow the Court of Appeals' reliance on the Tenth Amendment
but otherwise articulate pretty much the views that Potter
expressed at Conference, with which I found myself in agreement.
The view which Byron expresses in his memorandum seems to me
a good deal broader than what I had in mind, and so I thought
some purpose might be served in setting forth my view in
rough form. I think my approach would support either affirmance
or a limited remand.

Insofar as the Court of Appeals, in reversing the judgment
of the District Court, relied upon the Tenth Amendment, I
disagree. Plaintiffs are asserting claims which arise
under the Fourteenth Amendment, and certainly the Tenth
Amendment does not override the Fourteenth. Taking the
Court of Appeals' opinion as a whole, I do not actually think
that the majority placed primary reliance on the Tenth Amendment,
but if it would serve any useful purpose, I would join in voting to remand in order that they could consider the appeal unencumbered by whatever reliance they may have placed on it. I don't, however, think I could agree on an opinion simply stating that and no more, since the case has been argued and is here for decision.

Insofar as Byron's memorandum rejects the notion that a district court may *never* fashion relief in school cases which would result in the crossing of school district boundaries, I agree. But I think I would say that it may hardly ever do this, and I guess he wouldn't. I would think that sort of remedy for a Fourteenth Amendment right would be available only where the drawing of the boundary lines or use of the boundary lines were themselves a substantial element in the violation of the right, or where the boundary lines were observed largely in the breach. Examples which occur are manipulative use of lines by school authorities to enforce or preserve segregation, repeated disregard of the lines by school authorities with the result that substantial parts of the pupil population were in fact interchanged, or some sort of joint action by the three school districts of a similar nature.

*/ I think the majority of the Court of Appeals would agree, too. The discussion in Part III of the majority opinion, 572a refuting any idea of joint action by the three boards, indicates rather clearly that had that court thought there
My understanding of the record in this case leads me to believe that it doesn't afford a basis for any such finding. The school district boundaries here were drawn a century ago, and the only occasion on which they had been significantly changed have been as a result of the annexation of parts of the two counties to the City of Richmond. As I understand Virginia law, the change in the school district boundary would be an expected concomitant of the annexation, and since the effect of the most recent change in 1970 was to increase the ratio of whites to Negroes in the one of the three school systems which has the highest percentage of Negro students, it certainly cannot be said to have been done with any invidious intent.

I don't see, either, how the fact that schools close to the common border of two districts are close to each other really advances the constitutional argument. It is difficult to imagine two metropolitan school districts having a common border in which this would not be the case to some degree. The case of the Kennedy School, a part of the Richmond system but located within Henrico County, strikes me the same way; it is attended only by students from the Richmond district, and unless its location is shown to be part and parcel of some manipulative scheme, I do not see how this fact bears on the constitutional argument.
Petitioners in their brief, pages 16-18, contend *inter alia* that the school officials involved did not give adequate consideration to the effect of new construction in "perpetuating segregation or retarding desegregation". If such failure were established and found to have resulted in a failure on the part of one of the school districts to operate a unitary school system, that could be grounds for relief on an *intra* district basis; but I do not see how it could establish a constitutional basis for consolidating three otherwise separate districts.

Petitioners' treatment of the subject of interchange of students among districts is contained at pages 22-24 of their brief. It consists of references to other school districts in Virginia which have operated multi-county school systems for Negro students, and reference to a practice followed immediately after annexation changed the district boundaries whereby students temporarily attended classes in school districts in which they did not reside. I do not see how these facts would support the finding, even had one been made, that the three counties involved here either disregarded district lines or used them manipulatively to perpetuate segregation. In this connection, the Court of Appeals held (572a):

"But neither the record nor the opinion of the District Court even suggests that there was ever joint interaction between any of the two units
purpose of keeping one unit relatively white by
confining blacks to another."

The only evidence that seems to me arguably substantial
that school district boundaries have been disregarded in the
past is the State statute enacted in 1960 in furtherance of
a "freedom of choice" program. The Virginia General Assembly
authorized tuition grants to students for education
"in nonsectarian private schools in or outside, and in public
schools located outside, the locality where the children
was held unconstitutional in Griffin v. State Board of
Education, 296 F. Supp. 1178 (E.D. Va. 1969), and the
scholarship program was terminated in June, 1970.

It seems to me that there is a significant difference
between the State authorizing individual pupils to attend
public schools outside of the district in which they reside
if the pupil chooses to do so, and action by the State
or by the districts which would assign pupils across
district lines on the initiative of the governmental body.
Had plaintiffs sought relief in the form of court
authorization for individual pupils, on their initiative,
to attend schools in one of the other two districts, it
could have been fairly argued that this was only the
converse of what the State had previously sanctioned in
the form of tuition grants, and the State having been willing
could not constitutionally refuse them the right to cross
district lines on their own initiative. But this is not the
relief sought or granted by the District Court; that relief
consisted of a consolidation of the three districts, with
mandatory cross-district assignments to be made on the
authority of the court quite apart from pupil choice. I
do not think the earlier ten year operation of the tuition
grant program can be said to have countenanced the same
kind or extent of district boundary crossing which the
District Court has mandated.

The District Court and the petitioners also rely on
the fact that the State for a period of years after the
Brown decision fostered and encouraged segregated school
systems in the various school districts. There is no doubt
that it did, but I do not see what this adds to the conceded
fact that the three districts in question each maintained a
dual school system until recently. But the fact that the State
*/* I had had some difficulty finding the underlying documents
upon which the District Court appears to have relied in making
his finding that substantial amounts of these tuition grants
were paid to students in Richmond, Henrico, and Chesterfield
Counties, and that a substantial number of the recipients of
these counties attended school outside of the district in which
they lived. The District Court undoubtedly so found, at
pages 329-30, Pet. A. Both he at those pages, and the two
petitioners in their brief, referred to a series of exhibits
presumably introduced at the trial which support this finding
(PX 101, 112, 117, 118, 120), but my examination of the volume
containing the exhibits indicates that these are not contained
in it. At any rate, for purposes of discussion in the text,
I have assumed that the District Court's findings are supported
by these exhibits.
encouraged this sort of segregation does not offer a basis for lumping these three particular districts together, unless the State had lumped them together in its effort to maintain segregation. Putting these difficulties to one side, the logical consequence of petitioners' argument must be that by reason of State involvement, the entire State is to be treated as one school district, a position which neither they nor the District Court are willing to adopt.

It is undisputed that each of these three school districts for a long period of time denied Negroes their constitutional right to attend desegregated schools. Certainly our cases made clear that the District Court had ample authority to require corrective action on the part of these districts to remedy the wrong. But the District Court did not stop with requiring each of the separate districts to operate a unitary school system; it went further and in effect required the consolidation of three genuinely separate districts. Given my understanding of the record, I do not think this is a permissible remedy, and I guess it is here that I part company with Byron.

Byron says at page 10 of his memorandum that he would "remand for the benefit of the Court of Appeals' view of what the profile of a proper plan would be if the three districts were to be treated as a unit and, in light of his opinion in this respect, to have its considered judgment as to whether any plan other than the one proposed by petitioner would be constitutional."
considerations of the type that school boards customarily deal with which would lead one to decide that the three units would better be consolidated, but to me this is a far cry from the kinds of standards which can be derived from the Constitution or from the Court's previous decisions in this area.

I think the language which the Court of Appeals quoted from Swann, 402 U.S. 1, 16, tends to support this view:

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary."

The frequently quoted language from the Court's previous decisions -- "desegregated school system", "unitary school systems", absence of any "black schools" or "white schools" -- requires a reference to some governmentally defined system as a beginning point in the analysis. I do not see how, in the absence of the sort of exceptional circumstances which don't exist here, this starting point can be other than the school district in which the plaintiffs actually attend school.

If this limitation is to be disregarded solely because the command of the Fourteenth Amendment is addressed to the "State", there is no logical stopping place short of a State-
wide remedy which wholly disregarded district lines, and was limited only in terms of administrative factors such as the availability of school facilities, length of travel, and the like.

The fact that the State might voluntarily have authorized consolidation under State law does not, to my mind, have much bearing on the constitutional issue. Certainly the State had not authorized consolidation here. In *Wright v. Council of City of Emporia*, 407 U.S. 459, the Court did not consider it crucial that the State could have and probably would have authorized the splitting off of the Emporia city school system from the rest of the Greensville County district; it held that the Federal Constitution prevented the splitting of the district where the creation of the new district would have carved up an existing district, thereby at least partially frustrating the effect of a desegregation order to which the existing district was subject. If the possibility of State approval of a realignment of districts cannot be allowed to frustrate the enforcement of an otherwise established Fourteenth Amendment right in this area, it should likewise not be held to authorize a remedy which would not independently exist under the Constitution. I would suspect there are very few States which do not authorize school district consolidation under some provision of State law, whether by referendum,
consent of the governing bodies, or otherwise, so that this provision of Virginia law for purposes of Fourteenth Amendment analysis probably has a counterpart in every State of the union.

Under my line of reasoning, if I may call it that, I do not reach *Swann*-type issues as to whether the District Court was motivated by a desire to insure "racial balance" or a "viable racial mix", or whether he placed too much emphasis on bussing. These are questions which are reached only after the initial determination is made that the three districts are to be treated as a unit for school purposes. I think the basic thrust of Part III of the Court of Appeals' opinion, with which I substantially agree, was that on the facts of this case the District Court had no constitutional basis for making this initial determination.
MEMORANDUM FOR THE CONFERENCE

A word in reply to Bill Rehnquist's circulation in the Richmond school case.

The Fourteenth Amendment's proscription of denial of equal protection of the laws applies to the States, as well as to individual school boards as instrumentalities of the "state." Where essential to correct the maintenance of a dual school system, it is my position that the remedial power of a federal district court is not necessarily limited by political subdivision lines. This does not mean that district lines should not be respected where reasonably adequate remedies may otherwise be fashioned; nor does it mean at this point that district lines should be crossed in this case.

In the present case, the unreversed findings of the District Court were that political subdivision lines throughout the Commonwealth of Virginia have "been ignored when necessary to serve public education policies, including
segregation." 338 F. Supp., at 113. In these circumstances, it makes little difference if the fact is that the lines of these particular districts were not crossed to any great extent. The point is that the findings of the District Court call into question the State's whole argument with respect to the sanctity of district lines. In the words of the District Court: "[The district lines] have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." 338 F. Supp., at 83. The lines, even if never manipulated by the subject districts in this lawsuit, were never sacrosanct as a matter of state policy when segregation was the goal and should not stand as an insuperable barrier to an effective remedy in any of these three districts, each of which had officially maintained dual school systems. At the very least, if the Court of Appeals is wrong in thinking that in fashioning an effective remedy it was legally barred by the Tenth Amendment or otherwise from crossing district lines, must not the Court of Appeals have to overturn the District Court's findings as to the lack of integrity of school district lines in
Virginia if it is to rely on those lines as a barrier to an interdistrict remedy?
Detroit School Case

I am inclined to agree
with J. Miller's OP (A-239a)
that care should be rewarded for
full necessity after all
interested parties are in the
case. Perhaps we should
grant on this issue alone &
hold on all other.

[Handwritten note: Grant]

GOOD AGREEMENT

for obtaining
at this
time
but on
balance, let's

[Handwritten note: Grant]

November 16th Conference
List 1, Sheet 4

No. 73-434
MILLIKEN
v.
BRADLEY

No. 73-435
ALLEN PARK PUBLIC SCHOOLS, et al.
v.
BRADLEY, et al

PRELIMINARY MEMORANDUM

Cert to CA 6
(Phillips, C.J., Edwards,
Celebrezze, Peck, McCree, Lively;
Weick, Miller, dissenting;
Kent, concurring in part and
dissenting in part)

Timely
No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM

v.

BRADLEY, et al

1. Summary: This is a school desegregation case involving the school system of Detroit, Michigan, and the school districts in the surrounding metropolitan area. Petitioners seek review of the CA 6 en banc decision affirming certain findings of the district court relating to the racially discriminatory acts of the State defendants and the appropriateness of a desegregation plan involving the Detroit metropolitan area.

2. Facts: In 1970-71, 13.4% of the students enrolled in Michigan school districts were black and 84.8% were white. During the same period, 63.8% of the students enrolled in the City of Detroit school district were black and 34.8% were white.

In 1970, the plaintiffs, black and white students attending Detroit schools and their parents, filed the present action against the Detroit Board of Education and its members, the Detroit Superintendent of Schools, the Governor, the Attorney General, the Michigan State Superintendent of Public Education, and the Michigan State Board of Education. No school district other than Detroit was named as a defendant. The complaint alleged that the Detroit public school system was racially segregated as a result of the actions and policies of the
Detroit Board of Education and the State. It also alleged that a state statute, § 12 of 1970 PA 48, was unconstitutional because it had delayed implementation in 1970 of a racial balance plan adopted by the Detroit Board of Education.

The district court denied plaintiffs application for preliminary injunctive relief. CA 6 affirmed but held 1970 PA 48, § 12 unconstitutional.

On September 27, 1971, the district court issued its decision holding that the Detroit public school system was racially segregated as a result of actions of the Detroit Board and the State. The Detroit Board's actions related to segregative zoning, assignment, and school construction practices within the City. The State's actions related to the 1970 statutes previously held unconstitutional, the State's approval prior to 1962 of school site selection in Detroit, its denial of student transportation funds to Detroit while granting such funds to rural school districts, and its tacit approval of certain segregative cross-district transportation of students from one high school. The court also held that all school districts are instrumentalities of the State and that the State was thus legally responsible for the segregative actions of the Detroit Board. The court ordered submission of desegregation plans directed toward both the City of Detroit and the metropolitan area.

Later, 43 school districts within the surrounding counties of Wayne, Oakland, and Macomb filed motions to intervene. The court granted the motions but limited the districts' participation.

On March 24 and 28, 1972, the district court issued decisions rejecting desegregation plans involving only Detroit, stating in part: "Relief of
segregation cannot be accomplished within the corporate geographical limits of the city." The court noted that such a plan would make the Detroit system racially identifiable as black, involve excessive costs and transportation, would "not lend itself as a building block for a metropolitan plan", and would leave many schools 75 to 90% black.

On June 14, 1972, the court issued its decision establishing tentative boundaries for a metropolitan remedy and providing for a panel of 9 members to design plans for integrating Detroit schools and those of 53 metropolitan school districts with the three surrounding counties, Wayne, Oakland and Macomb.

On July 11, the court ordered the state defendants, including the state treasurer, to purchase or otherwise acquire 295 additional school buses to be used in the desegregation plan.

On July 20, 1972, the district court certified certain issues under 28 U.S.C. 1292(b). The issues relate to the following orders of the district court: (i) ruling on issue of segregation, Sept. 27, 1971; (ii) ruling on propriety of Metropolitan remedy, March 24, 1972; (iii) ruling rejecting Detroit-only desegregation plan, March 28, 1972; (iv) ruling on desegregation area and development of plan, June 14, 1972; (v) order for acquisition of transportation, July 11, 1972.

CA 6 stayed all the court's orders, except those relating to planning. On December 8, 1972, a CA 6 panel affirmed the district court's rulings.

On June 12, 1973, CA 6 en banc issued its decision affirming in part,
vacating in part, and remanding for further consideration. The court affirmed all the district court's findings regarding the segregative practices of the Detroit Board and the State. It also affirmed the district court's finding that a Detroit-only desegregation plan was inappropriate. It stated:

"The only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." The court therefore held that the district court had authority to order preparation of a metropolitan plan for cross-district assignment and transportation of students.

As to the school districts in the three-county metropolitan area, the court noted that no proof had been taken with respect to the establishment of the county boundaries. Some of these affected school districts had intervened, others were not parties, and none had been given an opportunity to offer proof on any issue. Citing Rule 19, Fed. R. Civ. P., the court held that these districts should be made parties. In vacating the district court's March 28, 1972 order, the court stated:

"On remand, any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties to this litigation, shall be afforded an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be relevant and admissible to such issues. The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party. However, the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on
the "Detroit-only" plans of desegregation, dated March 28, 1972."
The court also permitted the parties on remand to amend their complaint to
conform to the evidence.

Judges Weick and Miller filed dissenting opinions. Judge Kent dissented
in part and concurred in part.

3. Contentions: (a) Petitioners present a detailed attack on the
district court and CA 6 opinions. Petitioners first contend that the findings
regarding the discriminatory actions of the state officers are erroneous. They
argue that the State is not legally responsible for the actions of the Detroit
Board, that transportation funds were not used in a discriminatory manner,
not
that the State did/engage in discriminatory school site selection, and that 1970
PA 48, § 12 did not have a segregative effect. They point out that none of the
state defendants were personally found to have committed acts resulting in
de jure segregation.

(b) Petitioners argue that CA 6 erred in holding that a "Detroit-only"
desegregation remedy is unfeasible. Petitioners assert that the CA 6 decision
is in conflict with decisions of other circuits, including CA 4 in Bradley v.

(c) Petitioners also assert that the CA 6 erred in holding that a
multi-district remedy, requiring cross-district reassignment and transportation
of students, is constitutionally permissible. Petitioners contend that such a
remedy is not required to establish a "unitary" school system. Petitioners note that the plaintiffs' complaint alleged de jure segregation only within the confines of the Detroit School District and that no school district other than Detroit was made a party in the cause. Furthermore, the district court's finding of discrimination related only to the Detroit School System. There was no finding that the school district boundaries were drawn in a discriminatory manner or that the school districts in the tri-county metropolitan area committed acts of de jure segregation.

(d) Petitioners also argue that the CA 6 decision violates the due process rights of the affected school districts in the tri-county area since on remand they will not be allowed to litigate the decisive issues relating to the segregation of the Detroit school system, the feasibility of a "Detroit-only" plan, and the propriety of a multi-district remedy. They request this Court to vacate the district court's rulings on those issues.

(e) One of the Petitioners, a labor union representing the professional personnel of the Van Dyke School District, contend that they are unrepresented on the panel appointed by the district court. They contend that they should be permitted to participate in the panel's formulation of a desegregation plan.

Respondents, including the Detroit Board of Education, rely on the CA 6 opinion.

Respondents also contend that certiorari should be denied because a final school desegregation order has not been entered. Respondents list the
following issues still to be resolved by the district court: (1) the identities of the school districts to be included in a final desegregation plan, (2) the extent and type of transportation to be required, (3) the precise method of crossing school district boundaries to exchange pupils, (4) the number of pupils to be exchanged, and (5) the faculty involved. Respondents assert that a "factual vacuum" exists and that the issues cannot be properly evaluated at this point.

Petitioners respond that review is appropriate since the CA 6 holding that a metropolitan remedy is appropriate is in conflict with decisions of other circuits. The details of the desegregation plan are irrelevant to review of this issue. Furthermore, the district court will not receive new evidence on the issues relating to the State's discriminatory conduct, the feasibility of the "Detroit-only" desegregation plan, and the appropriateness of the metropolitan remedy. Petitioners contend that these issues are sufficiently important to merit review at this time. Otherwise, considerable time and money will be expended in future litigation.

In reply, respondents assert that petitioner school districts had a full opportunity to participate in the hearings on the metropolitan plans and were represented on the court-appointed panel.

4. Discussion: The central question is whether there is a "final decision" for purposes of appeal. Traditionally, a final judgment is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Thus, in the strict sense, there is no final decision
in this case. As the petitioners point out, however, many of the important issues have been resolved. Thus, the Court must determine whether review should be granted at this time in the interests of judicial economy and further expenditure of time and resources by the parties.

There are responses.

November 6, 1973
Buckley
Ops in Jt Appx
PRELIMINARY MEMORANDUM

November 16th Conference
List 1, Sheet 4
No. 73-436
THE GROSSE POINTE PUBLIC SCHOOL SYSTEM
v.
BRADLEY, et al

Cert to CA 6
(Phillips, C.J., Edwards, Celebrezze, Peck, McCree, Lively; Weick, Miller, dissenting; Kent, concurring in part and dissenting in part)

See Preliminary Memorandum in No. 73-435.
PRELIMINARY MEMORANDUM

November 16th Conference  
Cert to CA 6  

List 1, Sheet 4  
(Phillips, C.J., Edwards,  
Celebrezze, Peck, McCree, Lively,  
Weick, Miller, dissenting;  
Vent, concurring in part and  
dissenting in part)

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al

v.

BRADLEY, et al.

See Preliminary memorandum in No. 73-434.
WILLIAM J. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL., Petitioners

vs.

RONALD BRADLEY AND RICHARD BRADLEY, BY THEIR MOTHER AND NEXT FRIEND, VERDA BRADLEY, ET AL.

9/6/73 Cert. filed.

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