

Office of the
Assistant Attorney General

Washington, D.C. 20530

7 APR 1982

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Busing

I have a few additional thoughts concerning the busing debate:

Throughout the discussions of busing in the courts, Congress, and the literature, there is little effort to define terms. What is "busing"? Nearly everyone acknowledges the destructiveness of cross-town busing in the context in which it has been implemented in some cities. However, even the most ardent opponents of busing concede that it may be necessary to reassign some students to accomplish desegregation and if bus transportation is the normal, natural and necessary means of conveying a child to a different school, this time in his own neighborhood, that kind of "busing" to achieve desegregation is not objectionable. Not every manifestation of transportation is troublesome - yet virtually every form of legislation addressed to the problem fails to adequately distinguish between the bad and the good. Senator Johnston's Neighborhood School Act is a reasonably good attempt, however.

I believe our internal debate has been slightly misfocused. It is my view that our busing policies are entirely consistent with Supreme Court pronouncements on the subject and that it is both unnecessary and highly inadvisable to adopt strained and narrow interpretations of the Court opinions to justify our policies. Doing so implies that our policies are justifiable only under the narrower interpretations. As a result, those who disagree with our policies can attack not only the policies but the legal analysis which underlies them. Our exposure to criticism is substantially increased, particularly if our legal conclusions are vulnerable.

You have forthrightly and repeatedly stated your opposition to segregation; unhesitatingly articulated your support for conscientious efforts to eradicate racially discriminatory student assignments and the segregative efforts of past intentional racial discrimination; and have agreed that the basic remedial obligation of school boards is to eliminate all vestiges of state-imposed segregation.

You have also stated that busing has been both unsuccessful and destructive. In your May 22, 1981 speech to the American Law Institute you stated that "rather than continuing to insist in court that the only and best remedy for unconstitutional segregation is pupil reassignment through busing, the Department will henceforward propose remedies that have the best chance of both improving the quality of education in the schools and promoting desegregation." You went on to declare that "when the transportation of pupils significantly impinges upon the educational process itself, we must find better remedies to promote both desegregation and improved quality of education."

The American Law Institute Speech is very important because it was your first comprehensive statement of your policies on the subject of busing. I recall that it was carefully crafted to give you the greatest possible flexibility under existing Supreme Court decisions. Those decisions, in my judgment, provide you with that flexibility. Indeed, they allow ample opportunity to take the position in virtually any context that busing is not the advisable remedy for accomplishing desegregation and improving the quality of education. However, I do not believe that the cases would permit a conclusion that busing could never be ordered by a court or could be prohibited outright by a state legislature or Congress. The reasons are simple and, to me, obvious: First, courts do not like to say that any particular remedy may "never" be necessary. Why should they? Second, there are so many potential combinations and permutations of population densities and school district configurations that any particular definition of the limits on busing might not allow solution of a particular school desegregation problem. Hence, why allow total removal of a remedy that may later be necessary?

The Supreme Court in North Carolina v. Swann, 402 U.S. 43 (1971) expressly, unequivocally and unanimously declared that a state may not absolutely prohibit "involuntary busing" or "assignments of students for the purpose of creating a racial balance" because this would conflict with the "duty of school authorities to disestablish dual school systems." This does not strike me as an unreasonable or surprising result given the considerations I have mentioned above. Furthermore, I submit that if the states may not render themselves incapable of "effectively remedy[ing] constitutional violations," Congress may not do so either.*/ If "bus transportation [is] an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it", Congress may not enact an "absolute prohibition against use of such a device" any more than state authorities can. We should not be reluctant to publicly acknowledge that this is the law. It does not interfere with the policies you have announced.

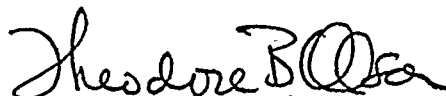
It has been argued that while North Carolina v. Swann precludes state prohibitions of busing, the Federal Government is not similarly restrained because it is not under the same affirmative obligation to root out a segregated school system which the state which created it is under. However, a federal institution (Congress) can surely not engage in affirmative action to prevent citizens from attaining their constitutional right to be free of de jure state imposed segregation. Hence a federal prohibition of busing would be as vulnerable as a similar state law. I have found no authority which would support the contrary proposition.

None of this means that we must advocate busing. We can and should oppose busing "when", as you put it, "the transportation of pupils significantly impinges upon the education process itself" or would lead to hardships or ultimately greater racial imbalance. There is no reason to deviate at all from these policies given our firm views concerning the damage which is caused by busing.

*/ I am not addressing the Article III question here - a separate issue discussed fully in my earlier opinion.

In short, there is no inconsistency in our approach and the Supreme Court's rulings and we need not read these cases in a manner inconsistent with what they clearly mean in order to justify our positions. Doing so unnecessarily impairs our credibility and hampers our ability to convince others of the integrity and legitimacy of our positions.

Finally, given the response from the civil rights community which our position on Johnson-Helms will undoubtedly generate, I think that we need to use the OLC Opinion to explain our position that Johnson-Helms is constitutional and to demonstrate exactly why and how we reached that conclusion. If we do not use it, I think we are missing an important opportunity to provide a thorough, comprehensive and detailed justification for our views. Furthermore, it manifests broader Department of Justice support for the conclusion reached. In this situation, I believe it is important to signify as broad a range of agreement on our position as possible.



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