THE WHITE HOUSE
WASHINGTON 8/17/84

TO: John Roberts

FROM: ***Richard A. Hauser***
Deputy Counsel to the President

FYI: X

COMMENT: _____

ACTION: _____

U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

August 17, 1984

MEMORANDUM FOR: Honorable Richard A. Hauser
Deputy Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

SUBJECT: Chicago Desegregation Case

Here are some background materials on our filing today in the Chicago desegregation case. I have talked with John Roberts about this.

Attachments

BACKGROUND
ON
UNITED STATES v. CHICAGO BOARD OF EDUCATION

Event: On Friday, August 17, the Department of Justice will ask the Seventh Circuit Court of Appeals to "stay" (i.e., suspend until the appellate court decides the case) a district court order requiring the United States to, among other things, provide the Chicago Board of Education with $103 million for the forthcoming school year and propose legislation ensuring that Chicago receives at least $103 million in future years. This money will be used to fund a desegregation program for Chicago's public schools. We will simultaneously appeal the case to have the district court order overturned in its entirety. Civil rights groups and the City of Chicago may criticize us for this.

I. Facts: On August 13, 1984, District Judge Shadur in Chicago entered an order which imposes a variety of substantial obligations upon the United States. The underlying desegregation lawsuit was settled in 1980 by a consent decree between the United States and the Chicago Board of Education. One provision of that consent decree required both the United States and Chicago to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."

The district judge has concluded that this "good faith effort" provision now requires the United States to do a number of things. The most noteworthy are these:

(1) Give Chicago $103.858 million for this school year and, in any event, $29 million from the Department of Education by Wednesday, August 22nd.

(2) Propose and support legislation which will ensure Chicago gets at least $103.858 million for this and subsequent school years.

(3) Oppose legislation which would keep Chicago from getting at least this much money each year.

(4) Require all parts of the Executive Branch to look for money for Chicago.

II. Position of the U.S.: The district court's unprecedented and intrusive order is an egregious violation of the doctrine of separation of powers, impermissibly interferes with relations between the Executive and Legislative Branches of the Federal Government and, by judicial fiat, redirects to Chicago funds that the Secretary of Education had already allocated to other needy

school districts to support local education and desegregation efforts. This irreparable injury to the United States Government and local school districts should be preempted by the Court of Appeals. It is entirely unreasonable to read the consent decree as broadly as the district court judge here did.

III. Relationship to Administration Philosophy: The Administration has consistently stressed that courts should not engage in "judicial activism" that impermissibly interferes with the legislative and executive functions of Government. Our opposition to the district court's attempt to restrain the President from exercising his most basic and exclusive constitutional duties is consistent with this policy.

IV. Anticipated Criticisms and Planned Department of Justice Responses:

Criticism: The Reagan Administration is attempting to undermine Chicago's desegregation program.

Response: The Administration will not allow a federal judge to dictate to the President how to make the funding decisions entrusted to his discretion or how to conduct his relations with Congress. Chicago is completely free to fulfill its responsibility to desegregate its schools and the Administration supports these efforts. We do not believe, however, that a federal judge can require taxpayers across the country to fund this program, at the expense of other worthy education and desegregation activities in other communities.

Criticism: The Reagan Administration is reneging on a legal commitment entered into by a prior Administration.

Response: Wrong. The consent decree does not commit the United States to act as an "insurer" for Chicago, requiring that the Federal Government provide all desegregation funds that Chicago is either unwilling or unable to raise in order to cure its own prior segregation. Nor did the decree "contract away" the President's right and obligation to perform his constitutional duties. The context of the decree establishes that the district judge's interpretation of its language is clearly erroneous and would render the decree unconstitutional.

V. Talking Points:

° The district court's interpretation of the language in the decree is simply wrong.

- The district court's action is an unprecedented usurpation of the functions entrusted to the Executive Branch.

- The district court's order would shift the lion's share of federal desegregation and education funds to Chicago at the expense of other needy school districts.

- The Administration fully supports Chicago's desegregation efforts but does not believe that a federal judge can unilaterally require other federal taxpayers to foot the bill for them.

THE WHITE HOUSE
WASHINGTON

8/20

TO: John Roberts

FROM: ***Richard A. Hauser***
Deputy Counsel to the President

FYI: X

COMMENT: _____

ACTION: _____

U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

August 17, 1984

MEMORANDUM FOR: Honorable Richard A. Hauser
Deputy Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

SUBJECT: CLARKSDALE BAPTIST CHURCH v. GREEN, ET AL.

Attached are some background materials on a filing we plan to make on Monday. I have talked to John Roberts about this case.

Attachments

BACKGROUND ON
CLARKSDALE BAPTIST CHURCH v. GREEN, ET AL.
(Sup. Ct. No. 83-2110)

EVENT: On Monday, August 20th, the Department of Justice is filing in the Supreme Court a response to a petition seeking review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit. Clarksdale Baptist Church -- which may be supported in this matter by Congressman Trent Lott -- wants the Supreme Court to rule that the Court of Appeals has wrongfully failed to exclude it from the scope of a particular injunction. In certain cases, this injunction bars tax-exempt treatment in the absence of evidence of nondiscrimination on racial grounds. It will be the position of the Department, however, that since there has not yet been any denial of tax-exempt status, it would be premature for the Supreme Court to hear this case.

FACTS: In 1976, a group of parents of black children attending public schools in Mississippi sought and obtained a court order involving the Internal Revenue Service's policy of denying tax-exempt treatment to racially discriminatory private schools. The order emphasized implementation of the policy against schools that had been adjudicated discriminatory in other proceedings, and schools that had been formed or expanded while nearby public schools were undergoing desegregation. A school operated by the Clarksdale Baptist Church fell into the latter category, which meant that, to retain its tax-exempt status, the school would have to demonstrate by "clear and convincing evidence" that it was not racially discriminatory. The school instead took the position that as a religious school it had complete immunity and should not be required to respond to the inquiries that the IRS had addressed to it. Proceedings were stayed pending decision in the Bob Jones University case, in which the University claimed the same immunity based upon its religious orientation. The immunity was, however, disallowed by the Supreme Court in its Bob Jones decision.

Following the Bob Jones decision, the District Court and the Court of Appeals have rejected the Clarksdale claim for complete immunity, but there has still been no ruling on its tax exemption. Congress has provided a special method of court proceeding for organizations claiming tax exemption if that exemption is denied by the IRS, and the Supreme Court has held that such organizations cannot circumvent such a proceeding by an anticipatory suit against the Commissioner.

POSITION OF THE U.S.: It will be the position of the U.S. in the response to be filed in the Supreme Court that since the Court has already decided that religiously oriented schools are not immune to the requirement against racial discrimination, there is not yet anything in this case for the Court to decide. The IRS has made no determination that the Clarksdale school is discriminatory, and has not sought to revoke its tax exemption. If and when it does, Clarksdale can contest such a determination in the procedure for judicial review provided by the Congress.

RELATIONSHIP TO ADMINISTRATION PHILOSOPHY: First, the Supreme Court has held that racially discriminatory schools, whether or not religiously oriented, are not entitled to tax exemption, and has thus established the law of the land. As a matter of policy, the Administration has always agreed with this result. Second, Congress has provided specific procedures by which a school can contest a charge that it is discriminatory. The Administration will continue to be careful to see that those procedures are fully and freely available. Third, however, the Administration's philosophy of judicial restraint dictates that the Supreme Court not be asked to decide cases before they are "ripe" for review.

ANTICIPATED CRITICISM: That the Administration is failing to protect the First Amendment and freedom of religion.

Answer: Wrong. The courts, the Internal Revenue Service, and the Department of Justice believe that religiously oriented schools should be able to show preference to their co-religionists in admissions and similar matters, but believe they should not be able to discriminate on a racial basis and keep their tax exemption.

TALKING POINTS:

¶. The Administration believes as a matter of policy -- and the Supreme Court has ruled as a matter of law -- that racially discriminatory schools are not entitled to tax exemptions, whether or not they are religiously oriented.

¶. If Clarksdale Baptist School is denied its tax exemption, and it disputes a finding that it is racially discriminatory, then it can use the proceedings provided by Congress to challenge this denial.

¶. Meanwhile, however, there has been no decision in this case denying the Clarksdale Baptist School its tax exemption, nor has there been any finding that the school is racially discriminatory. Until the IRS makes that decision, it makes no sense for the Supreme Court to hear this case.

The New York Times

DATE: 8-20-84
PAGE: B7

U.S. Appeals Integration Case

CHICAGO, Aug. 19 (AP) — The Justice Department plans to appeal a Federal district judge's order that the Government turn over $28.75 million in desegregation money to the Chicago Board of Education.

The action, announced Friday, was denounced by Robert Howard, an attorney for the Board of Education. He warned that vital programs would be cut at the city's most deprived schools if the Department of Education refused to distribute the money.

The Justice Department asked the United States Court of Appeals for the Seventh Circuit to stay the judge's order until the appeal was resolved.

On Aug. 10 Judge Milton I. Shadur ordered the Government to turn the money over to the board and criticized the Government for breaking its promise to help the board pay for desegregation programs in Chicago schools.

In Washington, Mark T. Sheehan, a spokesman for the Justice Department, said: "Judge Shadur's order is so broad-ranging that it concerns far more than the civil rights division itself. It seeks to compel the executive branch in its dealings with Congress over the budget and appears to invade the powers of the President and raise serious questions of the separation of powers."

ASSOCIATE DEPUTY ATTORNEY GENERAL
WASHINGTON

August 23, 1984

MEMORANDUM FOR: John G. Roberts, Jr.
Associate Counsel to the
President

FROM: Roger Clegg RC
Associate Deputy Attorney
General

Per our conversation.

Attachment

No. 84-2405

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL SUMMARY

The United States filed this school desegregation suit pursuant to 42 U.S.C. 2000c-6 and 2000d et seq.. The district court had jurisdiction under 28 U.S.C. 1345, 42 U.S.C. 2000c-6 and 42 U.S.C. 2000d-1.

An order was entered on August 13, 1984. On August 17, 1984, the United States filed a notice of appeal and a motion in this Court for a stay pending appeal. This Court has jurisdiction of the appeal from the order entered on August 13, 1984, under 28 U.S.C. 1292(a)(1).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2405

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the district court erred in interpreting paragraph 15.1 of the Consent Decree to require that the United States:

A. engage in a wide range of lobbying and other legislative activity in order to secure money from Congress especially for the Board;

B. turn over to the Board funds sufficient to make up the difference between the amount the Board has in its desegregation budget and the amount that it "needs" to fund its desegregation plan (over $103 million this year);

C. search the accounts of every Executive Branch agency for funds that are unused or about to lapse; and

D. give the Board every remaining penny in the Secretary of Education's Discretionary Fund and one-half the money in the Title IV account without regard to the valid statutory and administrative criteria that would otherwise govern the Secretary's distribution of these funds to other deserving grantees?

2. Assuming the district court's interpretation of paragraph 15.1 is correct, is the Consent Decree judicially enforceable?

STATEMENT OF THE CASE

A. Procedural history

This case is on appeal after a hearing in the district court on remand from this Court's judgment of September 9, 1983 (United States v. Board of Educ. of City of Chicago, 717 F.2d 378).

On September 24, 1980, the United States filed its Complaint, together with a proffered Consent Decree, in this case (App. 1-29), 1/ alleging that the Chicago Board of Education ("Board") had established and maintained racial and ethnic segregation of students in the City of Chicago public schools in violation of the Fourteenth Amendment and Titles IV and VI of the Civil Rights Act of 1964 (id. at 1, 4-6). The Consent Decree, entered by the district court the same day, required the Board to develop a plan to desegregate the schools and to remedy the effects of past segregation of black and Hispanic students (App. 12-27). The Decree also provided, in ¶ 15.1, that (App. 20):

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The court approved on January 6, 1983, the desegregation plan formulated by the Board (United States v. Board of Educ. of City of Chicago, 554 F. Supp. 912 (N.D. Ill. 1983)). On May 31, 1983, the Board filed a "Petition * * * for an Order Directing

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1/ The designation "App." refers to the Appendix, and the designation "Br. App." refers to the separately bound Brief Appendix; both are being filed with this Brief.

Compliance by the United States with Provisions of the Consent Decree Concerning Financial Support" (App. 30-88). On June 30, 1983, the district court issued Findings of Fact and Conclusions of Law (reported at 567 F. Supp. 272) and entered an order (id. at 285-290). That order, in addition to prohibiting the Secretary of Education from reserving or expending certain funds, 2/ directed the Executive Branch of the government to engage in a number of administrative and legislative activities designed to secure federal funding for the Board's desegregation plan.

On appeal, this Court affirmed in part, vacated the remedial order, and remanded (717 F.2d 378). Holding that the United States had violated ¶ 15.1 of the Consent Decree to the extent that it had failed to give the Board "available" funds, this Court instructed the district court on remand to verify its finding that certain funds were in fact "available."

On remand, the district court held extensive hearings on that and other issues. On June 8, 1984, the district court entered Findings of Fact and Conclusions of Law (Br. App. 1-261), reiterating its finding that the United States had violated its obligations under the Consent Decree, and finding as well that because of such violations the United States' obligation was no longer to be measured by "availability," but by the Board's "unmet needs" with respect to all aspects of its desegregation

2/ That order was modified on July 26, 1983; September 27, 1983; October 5, 1983; November 21, 1983; and July 13, 1984; all of these orders are contained in Appendix A to United States' Motion for a Stay Pending Appeal, filed in this Court on August 17, 1984.

plan. The court calculated that the Board's unmet needs totalled $103.858 million, which the United States was obliged to pay.

On June 26, 1984, pursuant to the district court's direction (Docket p. 31), the United States filed a report to the court of the steps it had taken and planned to take to "find and provide" funds for the Board's desegregation plan. The Board, meanwhile, twice moved, and was twice granted permission to delay, for a total of six weeks, submission of a proposed remedial order (see Appendix B to the United States' Motion for a Stay Pending Appeal, filed in this Court on August 17, 1984).

On August 7, 1984, the Board filed a proposed remedial order. The district court held a hearing on August 10, 1984, and on August 13, 1984, entered the Order from which the present appeal is taken (Br. App. 266-284).

Because the Order stated (id. at 283, ¶ 20) the district court's view that "[t]here is no occasion for the stay of any portion [thereof] pending any appeal by the United States," the United States filed a Motion for Stay Pending Appeal directly in this Court on August 17, 1984. On August 20, 1984, this Court granted the stay motion and established an expedited briefing schedule.

B. Facts

1. Background

Chicago's Board operates the third largest public school system in the United States, comprising over 450,000 students of whom, as of 1980-1981, 60.8% were black and 18.4% were Hispanic

(Br. App. 7). In 1979, the Board applied to the (then) Department of Health, Education, and Welfare (HEW) for a grant under the Emergency School Aid Act (ESAA) (App. 3, 9), which at that time was the principal source of federal aid specifically designed for assistance to local school districts undergoing desegregation. 3/ On April 9, 1979, HEW notified the Board that it was ineligible for such a grant because the Chicago school system was racially and ethnically segregated in violation of Title VI of the Civil Rights Act of 1964, and the Board had failed to develop an adequate desegregation plan (App. 3, 9; U.S. Ex. 1 (June 1983 Hearing), Document ("Doc.") 33, pp. 1-2).

After the Board had failed both to rebut HEW's findings and to initiate a satisfactory desegregation plan, 4/ HEW opted,

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3/ Congress adopted ESAA in 1972, 20 U.S.C. 1601 et seq. (1976); after repeal and reenactment in 1978, the statute was codified at 20 U.S.C. 3191-3207 (Supp. II 1978). The purpose of the grants, which were awarded on a competitive basis, was to meet the needs of desegregating school districts, to encourage school districts voluntarily to eliminate minority group isolation, and to aid school children in overcoming the educational disadvantages of such isolation. Applications for assistance under ESAA were reviewed for the educational quality of the proposed program, 20 U.S.C. 3200, as well as to determine whether the applicant school district met the specified civil rights eligibility requirements of ESAA, 20 U.S.C. 3196(a)(1) and (c)(1). Assistance available under ESAA included basic grants, 20 U.S.C. 3197; special programs and projects, 20 U.S.C. 3198(a); and educational television, 20 U.S.C. 3201. Out-of-cycle assistance was available to help local education agencies meet educational needs arising from the implementation of desegregation plans adopted too late to serve as the basis for a basic grant application (34 C.F.R. 280.60(b)(1982)).

4/ Due to the unresolved issue of compliance, HEW rejected another ESAA application from the Board in 1980 (App. 4).

rather than undertaking fund termination proceedings, 5/ to refer the matter to the Department of Justice for appropriate enforcement proceedings (U.S. Ex. 1, Doc. 33 at 9-10).

2. Negotiation of the Consent Decree

On April 21, 1980, the Attorney General notified the Board that the United States was prepared to file suit unless the Board would agree to develop and implement a comprehensive desegregation plan (U.S. Ex. 1, Doc. 27 (Notice Letter)). Representatives of the Board and the Department of Justice negotiated over a period of several months before reaching agreement (see U.S. Ex. 1, Doc. 16, 17, 18, 20, 21, 22, 23b). Throughout these negotiations, the Board's principal concern was that it retain eligibility for the millions of dollars in federal financial assistance it was already receiving, and that it be granted priority consideration for what-

5/ Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. It provides for alternative means of enforcement, one of which is termination of the assistance. Accordingly, the finding of noncompliance by HEW potentially jeopardized all of the Board's federal assistance. It is undisputed that Chicago was receiving a great deal of such assistance; in Fiscal Year ("FY") 1980, it amounted to more than $80 million in funds from the Department of Education (Report of the United States of July 15, 1983, docket no. 280, p. 15). The record also reflects that the Board received approximately $90 million for use in school year 1983-1984 in the form of ECIA block grants; Bilingual Education funds; Vocational Education Act funds; and funds granted pursuant to Impact Aid, "Follow Through," and assistance to handicapped children. See Stipulations (filed with pre-trial order) nos. 209, 210, 338-343. Citations to the relevant statutes appear in the Report, pp. 14-15.

ever additional assistance was available specially for school districts that were undergoing desegregation [see, particularly, U.S. Ex. 1, Docs. 18, 21, 22, 23a]. Internal memoranda of the Department of Justice and reports of negotiating sessions reflect the parties' focus upon the timing involved in qualifying the Board for an ESAA grant and possibly for a planning grant under Title IV; 6/ only if the parties entered into a consent decree by September 1980 could the Board qualify for an ESAA planning grant for FY 1981 (id. at Doc. 18). The United States' position from the start had been that while the Board might well qualify for some federal program assistance, the Constitution requires the Board to bear the entire responsibility for ensuring that its school system operated free of discrimination (U.S. Ex. 1, Docs. 27, 37). In recommending suit, then-Assistant Attorney General Days stated (id. at Doc. 37, p. 2):

6/ Title IV of the Civil Rights Act of 1964 authorizes grants for technical assistance to school districts in the preparation, adoption, and implementation of desegregation plans, including coping with special educational problems occasioned by desegregation, 42 U.S.C. 2000c-2. The Secretary has implemented this provision by establishing, through regulations, state education agency projects and desegregation assistance centers (DAC's), 34 C.F.R. 270, Subpart B, Subpart C.

Title IV also authorizes grants for in-service training for teachers and other school personnel and employment of specialists to assist in dealing with problems incident to desegregation, 42 U.S.C. 2000c-4, and grants to and contracts with higher education institutions for training institutes designed to improve the ability of teachers and other school personnel to deal with special educational problems connected with desegregation, 42 U.S.C. 2000c-3.

> Despite the temptation to dangle the prospect of additional federal funds before a financially strapped school board to induce settlement, it remains our conviction that Chicago must agree to come into compliance with the law on the basis of the merits of the proposed suit and not in return for financial assistance.

The government was willing, however, to assist the Board in finding and qualifying for available federal funding for a desegregation plan, to be developed in accord with mutually agreeable guidelines eventually set forth in the Consent Decree (U.S. Ex. 1, Docs. 22, 27, 37). The record reflects that Mr. Days hoped, at the time, that the government could assist the Board in finding ESAA funds and funds from federal grants intended for compensatory educational programs (id. at Doc. 37, pp. 6-7). 7/ But, as the parties have stipulated, the United States refused to agree to any commitment of federal financial support "specific as to form and amount * * * in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government funding, or a variety of other matters" (Br. App. 9). Accordingly, it was agreed in ¶ 15.1 of the Consent Decree that each party would be "obligated to make every good faith effort to find and provide

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7/ Additionally, Mr. Days hoped that in addition to funds that could be provided directly to the Board under such programs, the process of desegregation could be assisted by a coordinated approach to other federal programs in Chicago (e.g., housing, transportation). (See U.S. Ex. 1, Doc. 37 at 3-6; see also Docs. 8, 10, 13, 16, 39). This expectation was built into ¶ II(1) of the Consent Decree (App. 22). Other, more specific provisions concerning timing of the Board's future applications for ESAA funds were also set out (Attachment A to Consent Decree, App. 29).

every available form of financial resources adequate for the implementation of the desegregation plan" (App. 20).

3. Development of the Plan

The Consent Decree set out a series of broad general principles to govern the Board's development of a detailed desegregation plan. The Plan was developed in two stages. First a series of fairly skeletal recommendations for "Educational Components" was drawn up (see generally Br. App. 19-20) and filed with the court on April 15, 1981. 8/ On January 22, 1982, the Board submitted its Comprehensive Student Assignment Plan (docket no. 126).

The Comprehensive Plan outlined what the Board had budgeted for its desegregation plan for school year 1981-1982. The total "desegregation" budget, according to this document, was $39.3 million, of which $23 million was for educational programs at "Remaining Racially Identifiable Schools" and about $6.1 million for the "Options for Knowledge" program (id. at 319). The desegregation plan as a whole, including both the April 1981 submission and the January 1982 submission, was approved by the court on January 6, 1983 (United States v. Board of Educ. of City of Chicago, 554 F. Supp 912 (N.D. Ill. 1983)).

4. Federal Assistance Received Subsequent to the Plan

The Report of the United States of July 15, 1983 (docket no. 280), the Plan of the United States for Supporting the Desegregation

8/ The Educational Components document appears in the record as Ex. 3 to the Harrison Deposition and is filed in a black binder. It is referred to in finding 115 (Br. App. 19-20).

Plan, filed November 10, 1983 (Docket No. 365), and the July 26, 1984, Report to the district court set out in detail the assistance the United States has made available to the Board since the formulation of the Plan. 9/ Only the grants received after entry of the Consent Decree are reviewed here.

In April 1981 the United States and the Board jointly moved the district court to hold the Board in "interim compliance," and the motion was granted (docket no. 35). This paved the way for approval of an "out-of-cycle" ESAA grant for $1.8 million (Br. App. 117).

In Fiscal Year ("FY") 1980 and FY 1981, the Board also received awards, under Title IV, of $422,800 and $298,639. These were the largest grants awarded to local education agencies in those years (ibid.). Also in 1981, Northeastern Illinois University received a $248,604 Title IV grant for the sole purpose of conducting a training institute for Chicago school personnel (June 24, 1983, Affidavit of Jack A. Simms). In FY 1983, the Illinois Office of Education and the desegregation assistance centers at Indiana University and the University of Wisconsin-Milwaukee received $300,000 for Title IV services to the Board (July 15, 1983 Report at 23). In FY 1984, Title IV grantees that provide services to the Board were given priority so that they would be able to offer $426,523 in services to the Board that year (Report of June 26, 1984 at 6).

9/ See, particularly, the tables at pp. 14-15 of the July 15, 1983, Report and note 5, supra, of the Statement, for updated figures on block grants and categorical assistance.

In October 1983, the Board received an additional $20 million specially appropriated by Congress; this special grant is discussed infra at 52-59.

5. The Board's Petition

On May 31, 1983, the Board filed a "Petition * * * for an Order Directing Compliance by the United States with Provisions of the Consent Decree Concerning Financial Support." It contended that the United States had reneged on its ¶ 15.1 obligation to make best efforts to "find and provide" available funds for the Plan (App. 30-83). Hearings were held in June 1983, and, on June 30, 1983, the district court entered its Findings of Fact, Conclusions of Law, and Order (567 F. Supp. 272).

The court found that the Board had made all good faith efforts to find resources to fund its desegregation plan, had spent almost $58 million in 1982-1983, and was planning to increase that by about $10 million in 1983-1984 (567 F. Supp. at 274, 281). Although the Board had received more federal assistance in FY 1983 than in FY 1980, the court held that most of these funds were not intended and did not apply to "desegregation" expenses (id. at 274).

The court concluded (id. at 277, 278) that the United States had violated its obligation under ¶ 15.1 in a number of ways. First, the court found that there were funds in the Department of Education's appropriation for FY 1983 for which the Board was at least theoretically eligible: funds allocated

under Title IV of the Civil Rights Act of 1964 for desegregation related purposes (42 U.S.C. 2000c-4), and at least some of the funds in the Secretary's Discretionary Fund (20 U.S.C. 3851(a)). 10/ Additionally, the court found that the FY 1983 Title IV funds were appropriated for five other programs into an account called "Special Programs and Populations." While some of those funds were earmarked for certain existing programs, the court determined that much of the money could be reprogrammed either to Title IV or to the Discretionary Fund -- programs for which the Board was theoretically eligible (id. at 284). The Secretary's statutory interpretations and policy choices, to the extent that they made funds unavailable to Chicago, the court held, were themselves violations of ¶ 15.1 of the Consent Decree (id. at 280, 282).

Second, the court noted that in 1981, the President had adopted a policy of phasing out categorical grants and grants to individual school districts in favor of block grants to States. The court regarded this policy as a violation of the Consent Decree. Similarly, policy decisions of the Executive to reduce the total amount of federal financial assistance available to school districts, not to request larger appropriations from the Congress for Title IV or the Discretionary Fund, and to phase out ESAA were held by the Court to violate ¶ 15.1 of the Consent

10/ The Secretary's Discretionary Fund is a small portion of the Educational Consolidation and Improvement Act, 20 U.S.C. 3801, et seq. (ECIA). Most of the ECIA is dedicated to block grants.

Decree, notwithstanding the nationwide scope of these decisions (id. at 275-276, 280).

Finally, the court found violations in the Secretary's refusal to seek congressional reappropriation of miscellaneous unused funds and funds about to lapse back to the Treasury for Chicago's desegregation plan (id. at 276, 278). The court reasoned that ¶ 15.1 bound the Executive Branch to use every power at its disposal -- whether characterized as administrative or legislative -- to find and provide funding for the Board and that every failure to use those powers constituted a violation (id. at 283). According to the district court, even if use of legislative-type powers was not contemplated by ¶ 15.1, the use of these powers to make funds unavailable demonstrated bad faith (id. at 282).

Finally, the court concluded that the United States' "bad faith" had altered its obligation. Whatever that obligation had been originally, now the United States under ¶ 15.1 was to furnish funds in an amount sufficient to satisfy the Board's "unmet needs" (ibid.). 11/ The court further held that the United States' "bad faith" entitled the Board to comprehensive injunctive relief.

The court preliminarily enjoined the United States from expending before August any funds from the Discretionary Fund or the Special Programs and Populations account (or funds which might be appropriated to those accounts for FY 1984) except for certain

11/ That "unmet need" was found to be $14.6 million (id. at 287); the source of that figure is unclear.

funds already obligated, and directed the government to take steps to prevent the lapse of certain "excess" funds which might eventually be put to the use of the Board's desegregation plan (id. at 289). 12/ In addition, the court enjoined the government to take affirmative steps, both administrative and legislative, to find and provide additional funds for Chicago (id. at 288).

6. The First Appeal (717 F.2d 378)

This Court, on the first appeal, agreed with the district court that ¶ 15.1 imposes a substantial obligation on the government to provide available funds to the Board (717 F.2d at 383), and that this obligation involves more than rendering procedural assistance (ibid.). This Court hastened to point out, however, that substantial constitutional issues would be raised by construing the Consent Decree as an enforceable promise to shape Executive policy and priorities to fit the needs of a particular school district (ibid.). Accordingly, this Court affirmed the district court's judgment that the United States had breached the Consent Decree to the extent that there were funds available and the government had refused to give any of them to Chicago (ibid.). This Court also held that while a "temporary" freeze on the Secretary's ability to expend certain funds was appropriate, the district court should have allowed the United States an opportunity to formulate a remedial proposal rather than subjecting a co-equal branch of government to a detailed remedial

12/ As indicated earlier, that Order was modified a number of times prior to August 13, 1984. See note 2, supra.

decree (id. at 384). Accordingly, this Court vacated the remedial order except as to the freeze, and remanded to the district court with instructions to "verify" the availability of federal funds (id. at 383 n. 8).

7. Subsequent Congressional Action

Soon after the first appeal was decided, Congress took two actions that relate directly to this case. On October 1, 1983, Congress passed a temporary appropriation for FY 1984 in the form of a continuing resolution (Pub. L. No. 98-107, 97 Stat. 733) which contained a provision inserted by Representative Yates of Chicago appropriating $20 million for the express purpose of funding the Consent Decree (Br. App. 162-163). 13/ Three days later Senator Weicker introduced an amendment to the Senate version of the Department of Education Appropriation Act for FY 1984. That provision, which ultimately was incorporated in the conference bill which passed on October 31, 1983 (Pub. L. No. 98-139, 97 Stat. 895), provides (Br. App. 164):

> No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for Northern District of Illinois on June 30, 1983: Provided, that the court's decree entered on September 24, 1980, shall remain in full force and effect.

In light of these congressional actions, the United States moved that the Board's petition be dismissed on the ground that the

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13/ Based upon this, the United States moved on October 5, 1983, to have the district court's Order of June 30, 1983 (as amended) vacated, and for a declaration that the United States was now in compliance (docket no. 356). The court denied the motion, but did modify the freeze order (docket no. 357).

Yates bill fully satisfied any obligation that the United States might have under ¶ 15.1 of the Decree and that none of the frozen funds were even arguably "available" (docket nos. 363-364). The district court denied that motion (docket no. 379).

8. The Hearing on Remand

The remand hearing took place in March 1984. Consistent with the district court's earlier determination that the United States' obligation under the Consent Decree was to be measured by the Board's unmet need, the Board introduced its estimate as to the cost of the educational components of the Plan for a single school year: $108,785,468 (see Board's Exhibit No. 28). This figure underwent some revision in the course of trial (see Board's Exhibit 117 and Br. App. 83-90), and was further modified by the court after evaluation of the Board's contentions 14/ (see generally Br. App. 94-101). The total, $103,858,642, was found by the court to represent the Board's unmet need (Br. App. 82). 15/

C. The District Court's Findings and Conclusions on Remand

On June 8, 1984, the district court entered its Findings of Fact and Conclusions of Law.

1. First, the district court concluded that argument on the following findings was foreclosed by this Court's previous

14/ The table at Br. App. 83 already incorporates deletions made by the district court, e.g., the "Magnet Schools" entry reflects the court's deletion of the proposed residential high school estimated to cost $9 million.

15/ The court's findings and conclusions are discussed in greater detail in Part C of this Statement.

affirmance: (1) that the United States had violated ¶ 15.1 by failing to give available funds to the Board (Br. App. 174); (2) that the court's freeze of funds pending "verification" of the amounts available was proper (ibid.); and (3) that $90 million of federal aid received by Chicago in block grants and bilingual aid did not count toward fulfillment of the United States' obligation under ¶ 15.1 (id. at 175).

The court concluded that this Court had not, "implicit[ly]" or "explicit[ly]," ruled as to the correctness of the district court's determination that the scope of the United States' obligation (Br. App. 175) is co-extensive with the Board's unmet needs. The two questions clearly remaining to be resolved, according to the court, were (1) what level of funding was "adequate for full implementation" of the desegregation plan and (2) what were the United States' present remedial obligations (id. at 177). 16/

2. The first of these questions was resolved by the Board's presentation of its plans for educational components, almost all of which the court approved (Br. App. 49-93) as materially aiding the successful implementation of the Plan (id. at 178-183 and 192-195). The court rejected the United States' contention that at least some of the components which the Board

16/ The court reaffirmed (Br. App. 177) all previous findings and conclusions. The court also decided that, since the only basis stated by this Court for vacating the remedial order was that it was premature, this Court had implicitly approved the remedial order as appropriate (id. at 175-176).

claimed to be unable to afford were in fact in operation and being paid for by the Board's own funds (Br. App. 54-55).

The court reasoned that ¶ 15.1 represents a "mutual" obligation -- joint and several -- akin to that of joint obligors (Br. App. 183-186). Thus, the United States' "share" is equal to that portion of approved "desegregation" expenses which the Board cannot afford. On the assumption that the Board's $67 million desegregation budget for 1984-1985 would cover none of the educational components described in the Plan, the court concluded that their entire cost, $103.858 million, represented the United States' "share" (Br. App. 82). 17/

3. In determining the United States' present remedial obligation, the court began with the premise that in formulating ¶ 15.1, the parties contemplated that the Executive Branch would use both its administrative and its political powers to secure funds for Chicago's Plan (Br. App. 248-251, 254-257). The court rejected all arguments that -- even apart from the Weicker Amendment -- the possible uses of the frozen funds were circumscribed by committee directives, regulations, and permissible exercises of Secretarial discretion (Br. App. 139-159, 195-215). As for

17/ In this connection, the court rejected any suggestion that the United States' "share" was necessarily limited either by the maximum amount the Board might have expected, at the time the Consent Decree was signed, under the old ESAA program, or by the $14.6 million figure of the previous decision, or by the Board's prior $40 million estimates (see Br. App. 186-190). The court also rejected the contention that in passing the Yates bill and the Weicker Amendment, Congress intended to place a $20 million limit on what Chicago would be given from federal FY 1983 and FY 1984 funds (id. at 216-219).

the Weicker Amendment, the court held it merely represented an attempt legislatively to unfreeze the funds, not to reserve them exclusively for grantees other than Chicago (Br. App. 220-227). 18/ Indeed, the court reasoned that were the Weicker Amendment read otherwise, it would violate Separation of Powers and possibly violate the Fifth Amendment because it would "divest" the Board of the interest in the frozen funds which the court's earlier decision had given it (Br. App. 228-235). Therefore, the frozen funds were "available," according to the court, but none of the released FY 1983 funds had been provided to Chicago, nor had the United States indicated that it plans to provide any remaining 1983 or 1984 funds to the Board.

The court further concluded that all the government's legislative initiatives, including the Weicker Amendment, were designed to make funds "unavailable" to the Board. The special $20 million appropriation for the Board in the Yates bill could not be counted toward fulfillment of the United States' obligation under the Consent Decree because -- apart from its being too little -- it was passed despite, not because of, Executive Branch efforts. 19/ The Administration's role in drafting the Weicker

18/ That the Department of Education had provided to Congress more explicit language in lieu of the Weicker Amendment as passed, the court held, was simply a demonstration of the United States' bad faith effort to deny funds to Chicago (Br. App. 236).

19/ The Yates bill had passed earlier as a "free-standing" special appropriation and had been vetoed. It was vetoed because the President believed, as he made clear in the accompanying Veto Statement, that the district court's actions leading to adoption of the Yates bill raised significant "separation of powers" problems. See note ___, infra. As a rider to the omnibus appropriations resolution, the bill was immune from being separately vetoed.

Amendment, though it did not render funds unavailable, nonetheless demonstrated, the court held, the Secretary's "bad faith." In addition, the court found that the government acted in bad faith by continuing to pursue its policy of declining to ask Congress to fund programs in which the Board would be eligible to participate, and of refusing to seek reprogramming or congressional reappropriation of funds intended for other programs, but which had not been used or had lapsed.

As in the first decision, the court added that even if one were to construe the Decree as not promising positive legislative initiatives, the government's negative initiatives showed bad faith and would warrant correction in an affirmative remedial order that required the Secretary to request appropriations from Congress. No problem of Separation of Powers would be created by such a decree, the court held (Br. App. 251-257), for the Executive Branch is capable of binding itself to forego some of its discretion, and there is nothing about a "best efforts" clause that renders such an agreement impossible to enforce.

In light of the United States' bad faith conduct, the court held that the United States' duty is not limited to turning over "available" funds to the Board, but rather that the United States must now, one way or another, secure for and provide to the Board $103.858 million in federal funds (Br. App. 241-251, 259-260).

D. The Remedial Order

On August 13, 1984, the district court entered its Remedial

Order, 20/ which this Court has stayed pending appeal. Paragraphs 10, 11 and 13 (Br. App. 273-274, 276) of the Order declare the United States to have a present, "unconditional" (¶ 11 Br. App. 274) obligation to find and provide $103.858 million to the Board, for school year 1984-1985, and direct the Executive Branch 21/ to take "every step within its legal authority" (¶ 10 Br. App. 273) to do so. Those steps include actions that are both administrative and legislative in nature. Paragraph 10 also incorporates the court's Conclusion Nos. 131-143 of June 8, which set forth a variety of required political activities. In ¶ 13 (Br. App. 275-276) and ¶ 14 (id. at 276-277) of the Order the court directs the United States to turn over to the Board all $17.0 million of FY 1984 money remaining of the frozen

20/ On August 10, 1984, the district court entered a "Supplement to Remedial Order" (Br. App. 263-265). The Order itself is at Br. App. 266-284.

21/ Paragraph 11 of the Remedial Order states: "As discussed in Conclusion 160, the Consent Decree is a binding obligation of the United States as such, not of the Executive Branch" (emphasis added). Paragraph 11 further states that, in light of the "Executive Branch violations" which have "completely undermined the ability of the United States to comply fully with the Consent Decree" through the process referred to in Paragraph 10 (i.e., requiring the Executive Branch to take every step within its legal authority to find and provide the Board with $103.858 million for the upcoming school year), "this Court further determines the United States has an unconditional obligation to provide Board with $103.858 million * * *." This provision, particularly when read in conjunction with the referenced Conclusion 160 (Br. App. 258-259), reasonably admits of an interpretation requiring not only the Executive Branch, but also -- remarkably -- Congress to fulfill the "unconditional" obligation of the "United States" to provide the Board with over $103 million for the forthcoming school year.

Discretionary Fund, and one half -- $11.775 million -- of the remaining Title IV funds by August 22, 1984 (ibid.).

The Order requires the United States to formulate a plan by October 1 of each year to come up with the rest of the $103.858 million for this year and a similar amount for each school year for the foreseeable future (see ¶¶ 15 and 17 Br. App. 277-282). The steps the United States must take include:

(1) identifying funds in any agency appropriation which may be provided to the Board "without further congressional action" including the Department of Education's Salaries and expenses subaccount and the Office for Civil Rights and "Gift and Bequest" accounts (¶¶ 10, 15(a) Br. App. 273, 278);

(2) identifying funds wholly unrelated to desegregation assistance in any agency appropriation that will lapse at the end of the fiscal year and proposing legislation seeking to have these funds reappropriated by Congress to be provided to the Board (¶¶ 10, 15(b) Br. App. 273, 278-279);

(3) requesting supplemental and new appropriations for the Department of Education that will be specifically earmarked for the Board's desegregation efforts (¶¶ 10, 15(e) Br. App. 273, 279);

(4) identifying and supporting any legislative initiatives that would provide funds for the Board (¶ 15(c), (d) Br. App. 279); and

(5) opposing any legislation designed to decrease the amount of funds that could be provided to the Board (¶¶ 10, 15(f) Br. App. 273, 279).

In a document styled "Supplement to Remedial Order," entered August 10, the district court dismissed the government's constitutional concerns and excoriated the United States for filing an "anarchic document" to which "totalitarian governments might * * * respond positively" (Br. App. 264) and for "voicing * * * theories of government" reminiscent of Louis XIV (Br. App. 263).

SUMMARY OF ARGUMENT

This Court held in the prior appeal of this case (717 F.2d 378 (1983)) that, in signing the Consent Decree, the United States incurred a "substantial" obligation to provide the Board with available funds. The case was remanded for resolution of two remaining issues: to verify what funds were available, and to determine the present scope of the United States' obligation with reference to them.

The district court, however, proceeded on remand to reach beyond the issues that this Court directed to be decided and interpreted ¶ 15.1 of the Consent Decree in a manner wholly at odds with principles governing the construction of consent decrees involving government officials, as set forth in this Court's recent decision en banc in Alliance to End Repression v. City of Chicago and United States Department of Justice, Nos. 83-1853, 83-1854 (Aug. 8, 1984). In Alliance, this Court held in an analogous situation that ambiguous language in a consent decree involving the

government should not lightly be interpreted to surrender important constitutional responsibilities or commit the United States to an obligation more draconian than could have been imposed after a trial. Id. at 9-15.

Nonetheless, the district court construed ¶ 15.1 in a manner that, if upheld on appeal, would constitute an unprecedented intrusion by the Judiciary into the constitutionally assigned functions of the two other political branches. The Order purports to bind immediately the President's exercise of his power to recommend or oppose legislative measures as he deems "necessary and expedient." Congress is consequently deprived of the judgment of the Executive Branch regarding the ordering of national priorities, and the American people are deprived of the interplay of information and views between the two democratically elected branches. Such a reading of ¶ 15.1 violates a basic principle of construction by assuming that the Attorney General bargained away the President's constitutional powers and obligations. Not only could the Attorney General not make such a commitment, but, even assuming such a construction, the courts could not enforce it.

Moreover, because the district court concluded that the United States must effectively insure the Board against its inability to pay for the plan to remedy the Board's past unconstitutional actions, other worthy grantees are deprived of their funds, notwithstanding Congress' and the Executive's determination of their eligibility. The order requiring federal funding of the plan to the extent that the Board is unable to do so (an

amount that exceeds $103 million for this year alone) contravenes the legislative purpose underlying the various funding statutes in question and compels the Secretary to act in an unauthorized manner.

The district court's order disregards the fundamental doctrine of the Separation of Powers, usurps powers constitutionally committed to the Executive, and chills the normal interchange between the political branches. Equally mistaken is the district court's apparent belief that its finding of prior violations of the Consent Decree expands judicial power to order relief beyond the parties' original undertaking and, indeed, beyond constitutional bounds.

The decree as read by the district court is unenforceable. If the United States entered such an unconscionable "bargain," it would be the district court's duty to call upon the parties to renegotiate ¶ 15.1 and, failing that, to declare the decree rescinded and set the case down for trial. Correctly read, however, ¶ 15.1 limits the government's obligation to seeking and providing an equitable share of all forms of available assistance, i.e., funds appropriated by Congress for desegregation implementation and for which the Board is eligible under applicable criteria. Such a very real obligation provides Chicago its fair share of available federal funds without denying assistance to other worthy applicants. It is an obligation that the United States has faithfully fulfilled.

ARGUMENT

I

THE DISTRICT COURT'S INTERPRETATION OF PARAGRAPH 15.1 OF THE CONSENT DECREE IS INCONSISTENT WITH GOVERNING LEGAL PRINCIPLES

In its opinion in the prior appeal (717 F.2d 378 (1983)), this Court held that

> the United States' obligations under the decree go beyond assisting the Board in locating and applying for federal funds, and that ¶15.1 imposes a substantial obligation on the government to provide available funds to the Board. [Id. at 383; emphasis added].

At the same time, this Court acknowledged the "significant constitutional issue" that would be raised were ¶ 15.1 interpreted to obligate the United States to refrain from making "broad policy decisions * * * that [have] the effect of reducing the amount of federal funds provided to local educational agencies for desegregation expenses" (ibid.).

This court declined to address that issue, however, "[s]ince the district court also found that the United States had funds available for use by the Board but failed to provide them to the Board * * * " (ibid.). But even as to this "narrower and more discernible ground" (ibid.) for affirmance, this Court expressly instructed the district court to "verify the availability of these funds during the proceedings that will be held on remand" (id. at 383 n. 8).

This Court did not further define the scope of the United States' commitment under ¶ 15.1. Of central importance here, the Court did not decide what funds should be deemed "available" for purposes of ¶ 15.1. Nor did it decide what portion of any available form of assistance the United States was obligated to provide. Instead, this Court left the resolution of these questions to the district court on remand. The principal issue raised by this appeal is whether the district court properly resolved these questions.

We submit that, for purposes of ¶ 15.1, "available" forms of financial resources can only mean funding sources that, through the appropriation process, have been designated by Congress for implementation of desegregation and for which the Board is eligible under the general criteria established by the funding agency. 22/ By

22/ It goes without saying that in the "effort to find and provide every available form of financial resources," the parties to the Decree remain subject to the constitutional and statutory appropriations process. It is fundamental constitutional law that money may not be paid from the Treasury except pursuant to congressional appropriation (Art. I, Section 9 of the U.S. Constitution). An appropriations act, by its nature, limits the availability of funds for obligation by the Executive to specified purposes, time, and amount. U.S. General Accounting Office, Principles of Federal Appropriations Law 3-2 (1982). Only in this sense -- in accordance with the purposes specified by Congress in appropriations acts -- can financial resources be said to be "available." See ibid. No action by the Executive in the legislative sphere -- supporting or opposing legislation -- can have any bearing on efforts to find or provide available funds. Such actions may help to influence what funds will be available; however, the United States' obligation under ¶ 15.1 relates only to the subsequent question of how funds, once made "available" through congressional appropriation, are identified and disbursed.

[Footnote continued]

its terms, ¶ 15.1 obligates the United States to "find and provide" to the Board all such "available forms" of funding. Pursuant to that commitment, it must give to Chicago an equitable share of every available fund, consistent with the criteria governing grants among other similarly situated applicants; it does not mean, obviously, that the Board is entitled to all the money in every available fund.

The district court, however, adopted a far more expansive construction of the United States' obligations. In the district court's view, the United States is obliged to: (1) engage in a wide range of lobbying and other legislative activity in order to secure money from Congress especially for the Board (¶¶ 15(b)-(f), 17(a)-(c) Br. App. 278-279, 281-282); (2) turn over to the Board all the money that the Board says it "needs" to fund its desegregation plan (over $103 million this year) (¶¶ 10, 15(i) Br. App. 273, 280); (3) search the accounts of every Executive Branch agency for funds that are unused or about to lapse; and (4) give the Board every remaining penny in the Secretary of Education's Discretionary Fund and one-half of the money in the Title IV

22/ [Continued]
Accordingly, money that must be moved from one account to another, to the detriment of the congressionally intended beneficiaries of the first account, is not "available," either as that word is commonly understood, or as it is used in its technical sense in the federal appropriations field. See ibid. Nor is money "available" in the ordinary sense when it is in fact unavailable until the Secretary of Education has rewritten his regulations in order to remove administrative constraints on its use.

account without regard to the valid statutory and administrative criteria that would otherwise govern the Secretary's distribution of these funds to other deserving grantees (¶ 14(a), (b) Br. App. 276-277). In construing the Decree in this way, the district court erred as a matter of law.

The proper principles for construing government consent decrees are set forth in this Court's recent decision in Alliance to End Repression v. City of Chicago and U.S. Department of Justice, Nos. 83-1853, 83-1854 (7th Cir., Aug. 8, 1984) (en banc). In that case, a consent decree between plaintiffs and the Justice Department provided that the FBI "shall not conduct an investigation solely on the basis of activities protected by the First Amendment" (Slip op. 3). The district court held that this provision prevented the FBI not only from initiating an investigation of a group on the basis of the groups' political beliefs, but also from initiating an investigation based solely on speech that could not itself be made the subject of criminal prosecution (id. at 5). In reversing the district court's holding, this Court articulated for the first time the principles governing the interpretation of consent decrees regulating a public institution (id. at 9). In particular, this Court held that a court should not construe a decree entered into by the government in a way that assumes that the government "knowingly bartered away important public interests merely to avoid the expense of a trial" (ibid.). Equally important, this Court held that in construing such a consent decree, a court

should not conclude that the government has "surrendered its constitutional obligations" (id. at 22).

The district court, in Alliance, did not follow these principles of interpretation. Under the district court's construction of the decree, this Court explained, "the Justice Department bargained away some of its essential investigative powers and got nothing in return but a saving of some litigation expenses" (id. at 12). Moreover, the district court's interpretation meant that the Justice Department, in entering into the consent decree, had violated "the President's constitutional obligation to 'take [c]are that the [l]aws be faithfully executed'" (id. at 11 (citation omitted)). In these circumstances, this Court held, the district court erred as a matter of law in its interpretation of the decree.

This case is squarely governed by the principles established in Alliance. As we demonstrate below, the district court's reading of the consent decree goes far beyond merely assuming that the Attorney General bargained away "important public interests" and "got nothing in return but a saving of some litigation expenses." Id. at 9, 12. As a purely monetary matter, it is plainly ludicrous to suggest that the Attorney General, to avoid the cost of litigation, entered into an open-ended agreement obligating the United States to fund any significant shortfall between the Board's desegregation budget and its needs -- a short-

fall determined by the district court to exceed $103 million for this year alone. While the expense of litigating this case would have been substantial, it could have been done for considerably less than $103 million. This monetary obligation, however, pales next to the "important public interests" detailed below, bargained away by the Attorney General under the district court's reading of the Consent Decree. In the words of this Court in Alliance (Slip op. 12): "[A] proper decree formulated after trial would not have been more Draconian" to the United States. Indeed, in contrast to the party alignment in Alliance, the United States is the plaintiff in this case, and was not at risk of having relief of any kind entered against it had the case gone to trial, let alone extreme measures like those ordered by the district court under the Consent Decree. 23/ The principles of consent decree interpretation articulated in Alliance -- a case in which the government was a defendant accused of violating the plaintiff's

23/ In contrast, the remedial burden imposed on the Board under the Consent Decree was less onerous than that which could have been imposed by the court after full litigation. Chicago's desegregation plan, developed by the Board, requires no mandatory transportation, defines schools as "desegregated" if they have a 30% minority and 30% white student population, and measures desegregation with respect to "minorities" only, rather than with respect to blacks and Hispanics considered separately. See United States v. Board of Educ. of City of Chicago, 554 F. Supp. 912 (1983). These and other provisions of the plan were vigorously criticized by commenting organizations, such as the NAACP and Urban League, as inadequate and were acknowledged by the district court to be less rigorous and sweeping than other available desegregation techniques. Id. at 913 n. 1, 918-927.

constitutional rights -- should apply with even greater force in cases, such as this, in which the government is the plaintiff discharging its statutory enforcement responsibility. 24/

Finally, as we also show below, the district court's construction of the consent decree attributes to the Executive Branch obligations that it cannot constitutionally contract to undertake and that a court cannot constitutionally enforce. Thus, to the extent that the less intrusive interpretation of ¶ 15.1 suggested by the government would avoid these constitutional problems, this Court should, as a prudential matter, adopt it. St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981); NLRB v. Catholic Bishop, 440 U.S. 490, 500-501 (1979). For these reasons, the district court's decision must be reversed.

A. The Consent Decree Should Not Be Construed to Interfere with the Constitutional Powers of the Executive Branch

The district court's interpretation of ¶ 15.1 intrudes on the President's authority under Art. II, §3 of the Constitution

24/ The commitment of such a high level of benefits out of general tax revenues would also violate the Antideficiency Act (the principal statutory embodiment of Congress' power of the purse). Under the Antideficiency Act, federal officers or employees may not make or authorize expenditures exceeding an amount available in an appropriation or involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341. The very fact that the district court must order the United States to reprogram funds and seek reappropriations, supplemental appropriations, and new appropriations eloquently demonstrates that the United States could not have obligated itself to provide these funds under the Antideficiency Act.

to propose legislation that he deems necessary and expedient, and on his constitutional authority under Art. 1, §7 to veto legislation. Accordingly, the district court's order implicates almost all of the concerns that have animated discussions of the Separation of Powers doctrine. These concerns include the political question doctrine, Baker v. Carr, 369 U.S. 186, 222 (1962); the recognition that the Judiciary may not interfere with duties committed to executive discretion, either by the Constitution or by statute, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803); and the need to exercise restraint when judicial action would undermine the respect due a co-equal branch, or would interfere with sensitive responsibilities of the President, Nixon v. Fitzgerald, 457 U.S. 731, 753-54, 756 (1982), or when the question to be resolved is peculiarly unsuitable for answer by the judiciary. Alliance, supra, slip op. at 20.

The most far-reaching aspect of the court's construction of the consent decree is its requirement that the President and his delegates undertake a variety of political activities, including proposing and supporting certain legislation and opposing other measures, in order to secure from Congress additional money for the Board. 25/ The court's interpretation of ¶ 15.1, by regulating the content of the President's communications with Congress and restricting the political discourse that is vital to

25/ These activities are described in detail at pp. 21-24, supra.

the day-to-day relationship between the Executive and Legislative Branches of government, interferes with the President's constitutional authority to recommend to Congress such measures as he believes proper. If the federal budget is to reflect the considered judgment of both political branches as to how the limited resources of the government should be allocated among numerous competing demands, the President must be free to take part in the political process without constraint. It is a dialogue in which the judiciary has no part. As Chief Justice Marshall put it in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165 (1803), "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience." See also Kiem v. United States, 177 U.S. 290 (1900); Decatur v. Pauling, 39 U.S. 497, 516 (1840) (Taney, C.J.). Similarly, in Smith v. United States, 333 F.2d 70, 72 (10th Cir. 1964), the Court of Appeals for the Tenth Circuit stated "it would thwart every constitutional canon for this court to order an arm of the Executive Department to demand action by the Legislative Department." Yet that is precisely what the district court ordered in this case. It has construed the consent decree to override the President's discretion with respect to the myriad decisions on legislative matters that are fundamental to his role as President and to which the language of the Consent Decree

neither expressly nor implicitly refers.

Further, the district court's order mandates not only what the President must say in his dialogue with the Congress, and the degree of enthusiasm with which he must say it, but also what he may not say. By prohibiting the President from opposing certain legislation, even if he does not believe it to be in the Nation's best interest, the district court intrudes upon the President's constitutional right to veto bills he opposes. 26/ U.S. Const., Art. I, §7. The Attorney General lacks authority to bind the President to such an arrangement, and the court could not enforce such an arrangement in any event. (See p. 65, infra.) To the extent that the district court read into the consent decree, by implication, any such constraints on the President's constitutional powers, its strained interpretation must give way to one more reasoned -- one that does not seek to invade the exclusive province of the President -- if the decree is to survive.

As this Court said in Alliance, supra (Slip op. at 20):

> A due regard for the separation of powers, the flexibility of equity, the ambiguity of the decree, ... the sensitivity and importance of the subject matter, and the limitations of judicial competence argues against precipitating a premature

26/ Indeed, the district court's requirement that the Executive Branch oppose any legislation designed to decrease funds for the Board would appear, on its face, to require the President to support any bill containing such funding, regardless of the presence in the bill of other, unrelated provisions that the President regards as objectionable and would otherwise veto.

confrontation between the judicial and executive branches. [27/]

B. On Remand the District Court Failed to Conduct the Focused Inquiry Directed by this Court.

As previously discussed, supra at p. 26, in the first appeal of this case this Court directed the district court on remand to verify that appropriated funds, no part of which was provided to the Board, were "available" for that purpose. To the extent any such available funds were identified on remand, we understand this Court's prior decision to require the United States to include the Board among the grantees receiving a portion of such funds.

The district court, however, did not proceed in accordance with this Court's remand order. First, it read "available" in ¶ 15.1 to mean (at least) any appropriation made to the Department

27/ As previously discussed, supra at pp. 26-36, the district court's interpretation of the Consent Decree in this case is plainly unreasonable since it will require the expenditure by the Executive Branch of hundreds of millions of dollars, an extremely "improvident commitment" for the United States to have made. White v. Roughton, 689 F.2d 118, 121 (7th Cir. 1982). Such a commitment would have made the United States, as plaintiff, "so inept a bargainer that it gave the [Board] * * * substantive entitlements to which [it] had no possible claim." Ibid. Moreover, the district court's interpretation of the decree also raises questions of whether the Assistant Attorney General who signed the consent decree impermissibly waived the sovereign immunity of the United States or exceeded his delegated authority to settle cases. 28 C.F.R. § 0.160. Accordingly, this Court should, under Alliance, seek an alternative interpretation of the decree that avoids these conclusions.

of Education without regard to its purpose or any limitations on administrative discretion imposed by legislation, implementing regulations, or prudential administrative practices (Br. App. 195-215). It thus viewed the failure of the Secretary to include the Board in certain fund disbursement programs, to allocate additional funds to Chicago even at the expense of other grantees, and to convert appropriations from their intended purposes by whatever administrative or legislative steps might be required, as evidence that the United States failed to carry out its consent decree obligation. Ibid.

With respect to the amount of the government's obligation, the district court reached its conclusion -- that the government was required to furnish all sums which the Board needed but did not have -- by two lines of reasoning. First, as an interpretive matter, it simply construed ¶ 15.1 as meaning that the United States had agreed to finance any shortfall between the Board's desegregation budget and its needs. (Id. at 12-16, 183-185). As an alternative, the district court developed a sort of penalty doctrine, i.e., since the United States had defaulted on its commitment to find and provide available resources, it must now move beyond mere "availability" and fund the entire desegregation program to whatever extent the Board's resources are insufficient. (Id. at 241-243).

In the pages that follow, we set forth our views that ¶ 15.1 cannot be stretched to cover the Board's unmet needs and that there is no basis in law for rewriting an agreement to find and provide such resources as may be "available" for desegregation purposes into an elastic commitment to underwrite a multi-million dollar desegregation remedy. Our point here, however, is that on remand the district court did not confine itself to this Court's careful instructions. It did not seek to identify available funds appropriated for desegregation programs and order the United States to include the Board among the grantees of such funds. Rather, it expanded the concept of availability beyond recognition, misconstrued ¶ 15.1 to require federal funding in an amount equal to the Board's financial requirements, and created a new measure of contractual relief by redefining the United States' undertaking. These reasons standing alone compel reversal and a second remand with unmistakable directions.

C. The Consent Decree Cannot Reasonably Be Construed As a Promise of the United States to Provide All Money the Board Needs to Operate Its Plan

The principal failure of the district court rests in its expansive construction of the term "available," viewing ¶ 15.1 as an unlimited commitment by the United States to provide to Chicago, from whatever source, such funds as are necessary to make up any difference between the Board's desegregation budget and

its needs. The court was unconcerned that its order ignored the regular appropriations process, 28/ contravened the purpose for which funds were appropriated, and impinged on other legitimate funding responsibilities of the federal government. Instead, it treated the United States as an insurer, underwriting the financial responsibility for the Chicago desegregation plan to the extent that the Board could not meet costs.

There is no record support for the proposition that the Attorney General entered into an agreement to write a blank check

28/ For example, paragraph 15(b) of the district court's Remedial Order requires the United States to identify for possible congressional reappropriation all "excess funds" in any agency. The district court defines such "excess funds" to include funds which are expected to lapse, and specifically directs the Executive Branch to identify and report by September 15, 1984, "any funds that may lapse in any agency account at the end of fiscal year 1984," with a similar September 15 reporting requirement for succeeding fiscal years (Br. App. 278). Even putting aside the extraordinary government-wide administrative burden this requirement places on the United States (there are, for example, 1200 separate appropriations accounts, many of which are subdivided into major activities), the requirement cannot possibly achieve its purpose of obtaining such reappropriations before the end of each fiscal year without fundamentally changing the federal budget process. Because the fiscal year ends on September 30 of each year, a September 15 report identifying funds expected to lapse in that fiscal year would be at best a forecast. Such a forecast, however, would be highly unreliable -- far too unreliable to serve as a basis for proposed reappropriation legislation -- because funding decisions throughout September would cause any estimate to fluctuate daily. Moreover, any request to the Congress to reappropriate such estimated funds would require prompt review and approval by various congressional subcommittees, an unusual and cumbersome procedure which would raise controversial budget issues, and which would not likely be completed by the end of the fiscal year.

on the United States Treasury to the Chicago School Board for all of its unmet desegregation needs solely to induce the Board to perform its constitutional responsibility not to discriminate on the basis of race or national origin in the operation of its schools. Nor would the Attorney General have had authority to make such an improvident promise even if he had been so inclined. Government agencies may only enter into obligations to pay money pursuant to a grant of authority by Congress. National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977); cf. Schweiker v Hansen, 450 U.S. 785 (1981). Neither Title IV nor Title VI, nor any other federal statute, authorizes a fund commitment of the magnitude contemplated here. To the contrary, Congress has enacted an elaborate and comprehensive legislative scheme for funding various desegregation programs around the country. Different funding statutes provide the Department of Education with different appropriations earmarked for specific purposes. By design, these appropriations are national in scope and operation; they are to be utilized to meet the needs of a host of grantees throughout the country, not a single grantee. It undermines the legislative purpose if commitments are made by the Executive Branch to distribute funds to one particular grantee to the exclusion of others. Yet, that is precisely what the court below held to be the promise made by the Attorney General in ¶ 15.1.

More particularly, the district court concluded that the following funds "have been and currently are 'available' to the United States within the meaning of Section 15.1" (Br. App. 203): (1) "[a]ll remaining fiscal year 1983 Title IV funds and all fiscal year 1984 Title IV funds" (ibid.), (2) "the nonstatutorily directed" portion of the Secretary's Discretionary Fund (id. at 208), (3) the funds in the Special Programs and Populations account other than those allocated to Title IV (id. at 212), and (4) fiscal year 1984 funds in the Department of Education's Salaries and Expenses and Office for Civil Rights subaccounts and any Gift and Bequest account funds which have not been committed for other purposes and are not reasonably necessary for other Department functions (id. at 212-214); (¶¶ 14(a), 14(b), 15(a), 16, 17, Br. App. 276-278, 281).

To be sure, the referenced statutes vest broad discretion in the Secretary of Education with regard to their implementation. But that discretion is limited by Congress' legislative purpose underlying its appropriation decision. Plainly, the Secretary cannot as an exercise of his discretion allocate to a single grantee all the funds appropriated under a statute to assist a number of grantees. How much goes to each grantee and in what increments is clearly a determination appropriately left to the Secretary, and within that framework he may undoubtedly decide, as circumstances warrant, that one or more potential grantees shall

receive less or indeed nothing at all. But for the Secretary to commit (by consent decree or otherwise) all, or substantially all, of the "available" funds under such a funding statute to but one grantee would so offend the statutory objective as to be an improvident promise of the sort that the Court in Alliance recently determined to be unenforceable against the government. That is not, of course, our view of the United States' commitment in ¶ 15.1. Rather, the government's ¶ 15.1 commitment, as we understand it, was to include Chicago among the grantees of each of the various "available forms of financial resources." A close look at the various funding alternatives will help to clarify this understanding.

1. Secretary's Discretionary Fund

The Secretary's Discretionary Fund consists of six percent of the funds appropriated under Chapter 2 of the Education Consolidation and Improvement Act (ECIA), 20 U.S.C. 3813(a). In carving this portion out of the ECIA block grant program, Congress intended to set aside a special fund to address certain national needs. That intention is evident both from the legislative history of the authorizing and appropriation statutes and congressional directives regarding the projects to be funded out of the Discretionary Fund. In 1981 the Senate Report accompanying the passage of the ECIA identified the uses to which the Secretary could put Discretionary Fund money as "national dissemination activities, research

and demonstration projects, and technical assistance programs." S. Rep. No. 97-139, 97th Cong., 1st Sess. 897 (1981). For FY 1984 the Secretary was "directed" in House and Senate reports to use specified sums to fund the National Diffusion Network 29/ and law related education projects 30/ (H.R. Rep. No. 98-357, 98th Cong., 1st Sess. 110 (1983); see also H.R. Conf. Rep. No. 98-422, 98th Cong., 1st Sess. 21 (1983)). The committee stated that the remaining funds were to be used

> to conduct evaluations and studies of the implementation and impact of chapter 2; and to support other activities of national significance that address the Secretary's priorities including special initiatives to follow up on the recommendations of the National Commission on Excellence in Education.

S. Rep. No. 98-247, supra, at 129.

Significantly, however, Congress intended no part of the Secretary's Discretionary Fund to be utilized for operational expenses of desegregation. Those costs were, consistent with

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29/ The National Diffusion Network is a program designed to identify, disseminate information about, and replicate programs which have been particularly successful in meeting the educational needs of educationally deprived and other children throughout the United States. See Affidavit of Lee E. Wickline, Appendix C to United States' Motion for a Stay Pending Appeal, pp. 379-385.

30/ The Law Related Education Program "is designed to provide persons with knowledge and skills pertaining to the law, the legal process, the legal system, and the fundamental principles and values on which these are based." The purpose of the program is to enable children, youth, and adults to become more informed citizens (49 Fed. Reg. 23595 (June 6, 1984)).

congressional purpose, to be funded through the ECIA Chapter 2 block grant funds separately appropriated by Congress. 20 U.S.C. 3811-3842. 31/ Notably, Chicago received $6 million in FY 1984 as a block grant, and chose to devote $1.8 million to desegregation. While the district court faults the Secretary for not providing additional monies out of the Discretionary Fund for desegregation operational expenses, 32/ it fails to appreciate

31/ For example, the need to improve the quality of teaching at the elementary and secondary level has been identified by the Secretary as an unmet national need within the scope of the Discretionary Fund. A local education agency could submit an application that addresses this need by proposing a demonstration project implementing a teacher incentive plan to attract and retain qualified teachers. If one element of that project was institution of a merit pay system for teachers, the teacher salaries, including any merit pay increments, would be local operating expenses not eligible for funding under the Discretionary Fund. However, costs of the project which could be funded might include, for example, the costs of planning the project, evaluating or testing the effects of the project, and disseminating information about the project throughout the country. See 48 Fed. Reg. 13220, 13221-13222 (March 30, 1983); 49 Fed. Reg. 30080, 30081 (June 29, 1983); 48 Fed. Reg. 56257, 56258 (December 20, 1983).

With respect to the Board's desegregation plan, a project paying the costs of planning, studying the effectiveness of, and disseminating the results of the effective schools model, for example, would be eligible costs under the Discretionary Fund. However, the basic costs of operating the project at the local level -- for example, teacher salaries, development or purchase of curriculum materials, equipment and the like -- would constitute local operating costs ineligible for funding.

32/ The court below concluded that some portion of the Discretionary Fund must be made available to Chicago under two of the stated purposes for which the Discretionary Fund could be used. (see 20 U.S.C. 3851(a)(2) and (a)(4)). This position failed, however, to recognize that Congress had effectively removed the Discretionary Fund as an available source of revenue for Chicago's operational desegregation expenses by determining that funds for such purposes were to come from the block grant statute, thereby precluding the result forced on the Secretary by the district court.

that Congress divorced this Fund from the block grant statute precisely to make it available for enumerated purposes other than such operational expenses. 33/

Accordingly, the district court's order that the Secretary provide $17 million in Discretionary Fund appropriations to the Board for use to defray operational expenses runs directly contrary to the express will of Congress to use those funds for programs outlined in legislative reports. If such a commitment had in fact been contained in ¶ 15.1, it certainly would have been an improvident promise that the United States could not have fulfilled without impermissibly disregarding the very purpose for the appropriation. Executive agencies are not "free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress * * * [and, therefore, have] a practical duty to abide by such expressions." In re LTV Aerospace Corp., 55 Comp. Gen. 307, 325-326 (1975).

33/ Further evidence of this legislative design is seen in the appropriation decision tied to the Discretionary Fund. The total Discretionary Fund appropriation for fiscal year 1984, as in fiscal year 1983, is $28,765,000, out of which $11,475,000 must be used to fund three statutorily mandated programs, S. Rep. No. 98-247, 98th Cong., 1st Sess. 129 (1983). An additional $11.7 million of the Discretionary Fund is devoted to funding the programs directed by Congress in House and Senate reports. Clearly, the small amount of money remaining (less than $6 million) could not have been considered by Congress as an appropriation for operational support for local desegregation activities on a nationwide basis, and indeed all available evidence points precisely in the opposite direction.

2. Title IV

The analysis and conclusion are no different with respect to Title IV Funds. The Secretary of Education is authorized to provide desegregation assistance under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, et seq. While the allocation pursuant to this statute is largely left to the Secretary's discretion, Congress plainly contemplated that Title IV services would be distributed to many grantees, not reserved for one or a few. Indeed, the statute directs the Secretary to undertake an evaluation of grant applications based on stated criteria "and such other factors as he finds relevant." 42 U.S.C. 2000c-4b.

Beginning in fiscal year 1982, the Secretary of Education altered the distribution formula under Title IV in light of the reduced amount of appropriated money. 34/ Under the new method of distribution, Title IV money was made available to state educational agencies and regional desegregation assistance centers, which would in turn serve the needs of local educational agencies, rather than directly to local educational agencies as had been the prior practice. Congress confirmed this change and it was explicitly acknowledged in both the House and Senate reports accompanying the fiscal year 1983 and 1984 appropriations bills, which stated that the $24 million appropriated for training and

34/ Congress reduced the appropriations for Title IV programs to $24 million beginning in fiscal year 1982.

advisory services authorized by Title IV are to support state educational agency projects and desegregation assistance centers. 35/

No discernible impact was felt by Chicago as a result of this procedural change. The Board remains eligible for essentially the same measure of assistance under Title IV as in the years prior to 1982. 36/ For fiscal year 1984, pursuant to its obligation under ¶ 15.1, the Department of Education has provided a competitive priority under applicable regulations (34 C.F.R. 270.20(b);

35/ H.R. Rep. No. 97-894, 97th Cong., 2d Sess. 99 (1982); S. Rep. No. 97-680, 97th Cong., 2d Sess. 107 (1982); H.R. Rep. No. 98-357, 98th Cong., 1st Sess. 110 (1983); S. Rep. No. 98-247, 98th Cong., 1st Sess. 130 (1983).

36/ The Board received direct grants of $422,800 in fiscal year 1980 and $298,639 in fiscal year 1981, the largest awards given to local educational agencies for race desegregation in those years (Br. App. 117). Also in 1981, Northeastern Illinois University's race desegregation assistance center received a grant to provide training services to Chicago teachers, valued at $248,604 (June 24, 1983 Affidavit of Jack A. Simms). In fiscal year 1983, Title IV grantees were prepared to provide at least $300,000 in desegregation services to the Board, at its request (July 15, 1983 Report at 23). Under the statute and the regulations, 42 U.S.C. 2000c-2, 34 C.F.R. 270.32(b), a desegregation assistance center may provide services only upon request from a local educational agency. The Board made no such request for the 1983-1984 school year (Brady testimony, p. 475).

270.38(d)) to Title IV grantees which would serve the Board. 37/

The district court, however, viewed this response as insufficient and ordered that the Secretary grant $11.7 million, almost half of the total funds appropriated under Title IV, to one grantee -- the Board (¶ 14(b) Br. App. 277). Again, such a promise would be inconsistent with the legislative purpose underlying the funding statute, and thus would exceed the Secretary's Title IV authority. Title IV is a nationwide program; it is the only program devoted exclusively to funding desegregation; every year there are at least 150 applicants. Congress desired to have Title IV funds distributed broadly as reflected most clearly in its enumeration of criteria to be considered by the Secretary in making grants. The statute and regulations unmistakably envision a competition for grants among the full range of applicants. 38/

37/ The value of the services available to be provided to the Board is $428,573 (June 26, 1984 Report at 6).

38/ See 42 U.S.C. 2000c-4(b); 34 C.F.R. 270.74(b). 42 U.S.C. 2000c-4(b) states (emphasis added):

> In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Secretary shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

It is, in these circumstances, error as a matter of law to conclude, as did the district court, that Title IV funds in their entirety -- or even in substantial part -- are "available" to Chicago. See note 22, supra. Nor can it reasonably be maintained that Congress intended these funds to be awarded in a manner that disproportionately benefits a single grantee at the expense of the many other deserving applicants.

In the instant case, the Secretary has established criteria and found the Board eligible for services pursuant to a grant under those criteria. Moreover, the statutes and regulations outlining competition criteria were in existence at the time the Consent Decree was entered. It would transgress the bounds of permissible judicial action to order more.

3. Special Programs and Populations Account

The district court's reading of ¶ 15.1 of the Consent Decree as a commitment by the Secretary to reprogram into the Title IV account funds appropriated for other purposes within the Special Programs and Populations account suffers the same infirmity. As this Court has noted, the programs that Congress intended to be funded from the Special Programs and Populations account are "unrelated to desegregation," (717 F.2d at 381 n. 5). Thus, reprogramming in the manner suggested would effectively defeat the very purpose for which Congress appropriated the Special Programs funds in the first place. It is unreasonable

to conclude that the United States would have acted so improvidently as to agree to undertake a fund diversion, through reprogramming, that undoes what Congress intended to do. 39/ Indeed, the language of ¶ 15.1 belies such a reading of the Decree, for the very essence of "reprogramming" is not to "find and provide" available funding sources, but to convert that which is undeniably unavailable into "available" desegregation funds. See note 22, supra.

4. Other Department of Education Funds

The court also concluded that fiscal year 1984 funds in the Department of Education's Salaries and Expenses and its Office for Civil Rights subaccounts which have not been committed for

39/ Before funds are reprogrammed, the assent of the pertinent appropriations committees is sought by the Department of Education (see In Re LTV Aerospace Corp., supra), and such assent is rarely forthcoming if the Department cannot show that the reprogrammed funds are not needed for the specific purposes for which they were originally appropriated. The practice contemplated by the district court, however, was to reprogram for Chicago's use funds appropriated by Congress for a number of other worthwhile, and as yet unfulfilled, purposes. The funds in the Special Programs and Populations account, in addition to Title IV, Chapter 2 state block grants and the Discretionary Fund, are intended to support General Assistance to the Virgin Islands, Pub. L. No. 95-561, § 1524, 92 Stat. 2379; Territorial Teacher Training, Pub. L. No. 95-561, § 1525, 92 Stat. 2379; the Follow Through Act, 42 U.S.C. 9861-9868 (repealed by Pub. L. No. 9735, effective October 1, 1984); and Women's Educational Equity, 20 U.S.C. 3341-3348. A description of the programs can be found in the Affidavits in Support of United States' Motion for a Stay, filed August 17, 1984.

other purposes and are not reasonably necessary for other Department functions "have been and currently are 'available' to the United States within the meaning of Section 15.1" (Br. App. 212). 40/ The Salaries and Expenses and the Office for Civil Rights subaccounts are part of an account entitled Departmental Management (Pet. [Board's] Exhibits 57 at I-I24, 64, 66). Reprogramming of funds is not permitted between accounts, as it is between subaccounts or programs within a subaccount (Christensen testimony, p. 1123; Principles of Federal Appropriations Law, United States General Accounting Office, Office of General Counsel, pp. 2-28 through 2-30) (June, 1982)). Therefore, none of the funds within these accounts is even arguably available to the Board without legislative action which, as we have argued supra (pp. 32-36) the district court cannot order.

40/ The district court also concluded that funds in the Gift and Bequest account have been and are "available" (Br. App. 212). There is no Gift and Bequest account, as such; what the court may be referring to is an account entitled "Contributions" in which the Department places contributions from outside sources. Such contributions may be given for restricted purposes. There are virtually no funds in that account at the present time.

5. Congressional action in passing the Yates bill and Weicker Amendment confirms that appropriated education funds are to be distributed broadly to serve nationwide needs and not disproportionately reserved for the Board

By district court order, as of July 1983, there was a "freeze" on disbursement of the bulk of funds appropriated for fiscal year 1983 and also on those to be appropriated for fiscal year 1984 under the Title IV, Discretionary Fund, and Special Programs and Populations accounts. 41/ Although the Secretary had reserved 1983 funds for many grantees throughout the country, the court's order prevented the Secretary from obligating the funds.

In response to that freeze, Congress enacted the so-called Yates bill and the Weicker Amendment to restore the funds to their pre-freeze status so that the Secretary of Education could finance those nationwide programs as Congress had intended. While the district court correctly concluded that the Yates and Weicker provisions do not preclude the Board from receiving any of the frozen funds (see Conclusions 83, 98, 100, 102), it is equally clear that Congress intended by enactment of these provisions to reconfirm that the Board could not properly be regarded as entitled to all, or a disproportinate share, of these funds.

The Yates bill is Section 111 of Pub. L. No. 98-107, 97 Stat. 733, the continuing resolution for Fiscal Year 1984. This section (97 Stat. 742) provides:

41/ Pursuant to the court's orders $48.137 million remained frozen. This represented approximately two-thirds of the funds appropriated for fiscal 1983 to those accounts.

> There is hereby appropriated $20,000,000 to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans", to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the consent decree entered in United States district court in the case of the United States of America against the Board of Education for the City of Chicago (80 C 5124) on September 24, 1980.

On July 29, 1983, Congressman Yates initially offered the provision as a means of carrying out the federal government's agreement with the Board in this case, and to "allow funds restricted by the Court to be distributed to school systems which would have received certain grants had the Court not acted." 129 Cong. Rec. H5990 (daily ed., July 29, 1983). The Congressman cited examples of "Follow Through" grants and state block grant funds under the ECIA affected by the district court's freeze. Id. at H5990-H5991. Congressman Conte also adverted to the problems created "throughout the country" by the freeze on expenditures of discretionary funds in elementary and secondary education. Id. at H5990 (remarks of Rep. Conte). 42/

42/ The House passed the amendment. 129 Cong. Rec. H5991 (daily ed., July 29, 1983). The Yates provision was inadvertently omitted from the Senate version of the bill, an omission corrected by Congressman Yates on August 1, 1983. 129 Cong. Rec. H6126 (daily ed., August 1, 1983). The House (ibid.) and the Senate (129 Cong. Rec. S11293) passed the provision correcting the omission, and on August 13, 1983, the President vetoed the measure. The President stated the veto was based on his "conviction that the Constitution and its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress." 19 Weekly Comp. of Pres. Doc. 1133 (Aug. 13, 1983).

The Yates bill was again proposed in September 1983. 43/ During debate, Congressman Pursell expressed his understanding that the effect of the provision was to enable the Secretary to comply with the consent decree and to

> enable * * * the Secretary to comply with the provisions of the fiscal year 1983 appropriations law and to fund all activities affected by the judicial impoundment in proportion to the amount they otherwise would have been funded.

129 Cong. Rec. H7631 (daily ed., Sept. 28, 1983) (emphasis added). The Yates bill was enacted as part of Pub. L. 98-107.

The Weicker Amendment, enacted as Section 309 of Pub. L. 98-139, the Department of Education Appropriation Act for FY 1984 (97 Stat. 895), provides:

> No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for the Northern District of Illinois on June 30, 1983: Provided, that the court's decree entered on September 24, 1980, shall remain in full force and effect.

The district court found (Br. App. 163-164) that just before Senator Weicker offered his amendment, a member of the staff of the Senate Appropriations Committee asked the Department of Educa-

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43/ It was included in the fiscal year 1984 continuing resolution reported by the House Appropriations Committee on September 22, 1983. See Section 111 of H.J. Res. 367, H.R. Rep. No. 98-374, 98th Cong., 1st Sess. Pt. I, p. 15 (1983). That resolution was superceded by a simplified version, H.J. Res. 368, proposed by Congressman Whitten on September 28, 1983. 129 Cong. Rec. H7625 (daily ed., Sept. 28, 1983). The Yates bill was included in the simplified version, ultimately enacted as Pub. L. No. 98-107, 97 Stat. 733, 742.

tion to draft language to ensure that funds other than the $20 million would not be available to fund the Decree. In response, the Department of Education provided two alternatives to the staff member.

On October 4, 1983, Senator Weicker offered the second alternative and the Senate passed it by voice vote. 129 Cong. Rec. S13506-S13507 (daily ed.). The text of that provision is as follows:

> No funds appropriated in any act to the Department of Education for fiscal year 1983 and 1984 other than those appropriated by Section 111 of Public Law 98-107 shall be available to fund the consent decree of 1980 between the United States and the Board of Education of the City of Chicago.

There was no debate on the amendment. In explaining his proposal, Senator Weicker emphasized the need to end the freeze (129 Cong. Rec. S13506-S13507 (daily ed., Oct. 4, 1983)):

> It is our understanding from the Department of Education's General Counsel, that this language is needed to unfreeze the approximately $50 million in fiscal year 1983, and an undetermined amount in fiscal year 1984, that a Chicago Federal judge has frozen in order to satisfy the Federal obligation in the desegregation case, U.S. against the Board of Education of the City of Chicago.
>
> The continuing resolution includes a provision which appropriates $20 million for this purpose from unobligated guaranteed student loan funds. My concern in offering this amendment is for those education programs which are being denied funding because their funds have been frozen pending the outcome of this case.
>
> Such programs affected are: Follow Through, women's educational equity, civil rights training,

aid to the Virgin Islands and territories and the secretary's discretionary fund.

According to the Department, these frozen funds would remain available beyond fiscal year 1983 by virtue of their being held over by the judge.

If additional funds are required to satisfy this case beyond the $20 million available, we will certainly do whatever we can to provide these funds at the appropriate time. 44/

On October 5, 1983, Congressman Conte stated that he had abandoned his plan to introduce legislation because the Senate

44/ Later the same day, Senator Weicker sought and obtained unanimous consent to modify his amendment. The modified version was ultimately enacted. The district court erroneously found that the modified version was an alternative proposed by the Department of Education (Br. App. 164). In fact, the record reflects (Board Ex. 82) that the Department's alternative differed substantially from Senator Weicker's.

The entire Senate discussion of the modified version of Senator Weicker's amendment is as follows (129 Cong. Rec. S13535 (daily ed., Oct. 4, 1983)):

Mr. WEICKER. Mr. President, this is a modification of my earlier amendment regarding the frozen education funds. It will insure that the money is used for its intended purposes; that is, follow through on civil rights training and education [sic]. At the same time, it does not release the Government from any further liability in the case. What we have tried to do is work with the administration and those who have a sense of special interest, in the sense of representing the State of Illinois and Chicago. I think the amendment does just that.

Mr. PROXMIRE. Mr. President, I have had an opportunity to discuss this with Senator Dixon and Representative Yates. I am very grateful to the Senator from Connecticut for making this modification. It certainly improves the amendment and makes it serve the purpose it was meant to serve.

The PRESIDING OFFICER. Is there objection? The amendment is so modified.

had passed the Weicker Amendment, which he believed fulfilled the same purpose (129 Cong. Rec. H8017 (daily ed., Oct. 5, 1983)). He expressed a desire to

> free up the fiscal year 1983 funds the judge is still holding hostage in that case, and get those funds out to the many, many States that are suffering devastating impacts in their programs, like civil rights training, as a result of this judicial impoundment. 45/

The October 20, 1983, Congressional Record contains an extension of remarks by Congressman Conte concerning the Weicker

45/ The full text of his remarks follows:

> The purpose of the amendment I was considering, as well as what was done in the Senate, is to free up approximately $45 million in fiscal year 1983 education funds currently frozen by the district court in the court case. This $45 million is being held in limbo as a potential judgment fund and, as a result, a majority of States that had expected to receive these funds are encountering severe difficulties in keeping a number of programs going. The affected programs include Title IV, civil rights training, follow-through, women's educational equity, national diffusion network, and projects in the Secretary's discretionary fund.
>
> In the civil rights training program, in my State alone, 19 people are faced with losing their jobs and the same applies to programs in States across the country, from California to Florida, to New York, to Michigan to Mississippi.
>
> The intent of this amendment and of the action taken by the Senate is more or less a quid pro quo. If we are going to provide $20 million to fulfill what the Government's obligation may be in fiscal year 1983, and that has not even been finally decided yet, we should at least free up the fiscal year 1983 funds the judge is still holding hostage in that case, and get those funds out to the many, many States that are suffering devastating impacts in their programs, like civil rights training, as a result of this judicial impoundment.

Amendment in which he set forth his understanding of that provision (129 Cong. Rec. H8470 (daily ed., Oct. 20, 1983)) (emphasis added):

> Mr. Speaker, I would like to set forth my understanding of the conference agreement concerning Section 309. Section 309 is intended to insure that the fiscal year 1983 and 1984 funds enjoined by the court in the litigation between the United States and the Chicago Board of Education are released for awards to the intended grantees and contractors selected by the Department of Education. These funds were appropriated for projects throughout the country and are to be spent for the purposes for which they were appropriated, as set forth in the relevant House and Senate reports.

The clear legislative history of these provisions evinces an unambiguous congressional purpose to restore to the Secretary of Education the power to disburse these funds to eligible grantees throughout the country, many of which were in danger of extinction because of the freeze. In consequence of these congressional enactments, the court released some of the frozen funds. And, while the Secretary was free to grant some of the unobligated part of the previously frozen funds to Chicago in the normal application process, which he did, the Weicker Amendment made clear that such funds were not to be regarded as reserved for the Board's exclusive use. As surely as the Yates and Weicker provisions cannot be read wholly to preclude the Board from receiving any part of the previously frozen funds, they cannot be read to entitle the Board to the "lion's share" of

those funds at the behest of the district court and at the expense of other grantees. 46/

Thus, it is clear that Congress intended its appropriated education funds to be used for the benefit of school children in Connecticut, Rhode Island, Michigan, and elsewhere throughout the country as well as in Chicago. This nationwide purpose was not expressed for the first time during debate on the Yates and Weicker provisions. That debate simply confirms the intent of Congress when the relevant legislation was enacted. No one is more aware of that broad purpose than the Executive Branch officials charged with distributing funds to deserving recipients. Under the circumstances, it strains reason to conclude that those officials would have agreed to a provision that would result in funneling the bulk of available funds to a single recipient.

46/ The district court concluded that the Weicker Amendment's language leaving the Consent Decree in "full force and effect" leaves to the Court the determination as to what portion of the previously frozen funds should be allocated to the Board (ibid.). The court stated that the provision represents a legislative determination "that the Executive Branch should regain control of the funds, after which the rights to ultimate distribution of the funds would simply be in accordance with law -- not dictated by the statute itself" (id. at 226-227). The implication of this language is that the Court (enforcing the "law" as required by the Consent Decree) and not the Secretary (distributing the funds in accordance with the requirements of the "statute") has ultimate control of the previously frozen funds. This understanding is clearly incorrect.

The Board argued, and the district court agreed (Slip op. 227-234), that our interpretation would render the Weicker Amendment unconstitutional. This contention is without merit. The district court never gave Chicago such an "interest" in the funds (e.g., by a judgment) that could render Congress' intent to make the funds available to other grant recipients a "taking" in violation of the Fifth Amendment.

II.

THE RELIEF GRANTED BY THE DISTRICT COURT IN THE AUGUST 13, 1984 REMEDIAL ORDER IS: (A) INCONSISTENT WITH THE TERMS OF THIS COURT'S REMAND; (B) PREDICATED ON A MISAPPLICATION OF EQUITABLE RE-REMEDIAL PRINCIPLES; AND (C) BEYOND THE REMEDIAL POWER OF THE JUDICIAL BRANCH

A. The District Court's Proceedings on Remand Did Not Conform to This Court's Directions

As noted previously, supra at pp. 36-39, the district court exceeded the terms of the remand order issued by this Court in the first appeal. It should again be directed, with specificity, to limit its consideration on remand to the following questions only:

(1) Has the United States failed to find and provide available forms of financial assistance from among funds appropriated for implementation of school desegregation programs and for which the Board is eligible under the general criteria established by the funding agency, identifying all such funds with particularity as to program and amount.

(2) As to such funds the United States may be ordered to include the Board among the grantees thereof and allocate to the Board an amount determined by application of the relevant criteria of the funding agency.

The district court should be further instructed that it shall not require the United States to seek further appropriations or reappropriations, to divert funds, by reprogramming or otherwise, or to disregard programmatic regulations or procedures requiring competitive awards.

B. The District Court's Findings of "Bad Faith" as a Predicate to Imposing Additional Remedial Obligations Overstep Judicial Authority and Invade the Exclusive Province of Congress and the President

Moreover, in concluding that it could impose "additional * * * burdens" (Br. App. 241; citation omitted) on the United States as a consequence of the United States' supposed "willful and bad faith violations" of the Decree (id. at 238-241), the district court overstepped the bounds of appropriate judicial inquiry and profoundly intruded into the constitutionally vested discretion of the President and into relations between him and the Congress.

As discussed above (supra at 32-35), it is within the exclusive authority of the President to propose, support, oppose, sign, or veto legislation, as he and only he deems necessary and expedient. Few concepts are so fundamental to the democratic character of our Republic as this. In concluding that the United States has "persistent[ly]" engaged in "willful and bad faith violations" of the Decree, however, the district court arrogated to itself the authority to second-guess the President's judgments on legislative policy, and has imposed severe monetary liability on the United States as a consequence of the President's exercise of his constitutional discretion. Thus, the court predicated imposition of additional burdens on the United States on, inter alia, the President's support for a proposal by Representative Conte to earmark funds (Br. App. 236, ¶ 120(a)); Executive Branch preparation of a legislative

proposal to release funds to their intended grantees (id. at ¶ 120(b)); Executive Branch assistance to Senator Weicker in preparing an amendment to the Department's annual appropriation that was intended to resolve this litigation (id. at 237, ¶ 121(a)); preparation of alternative language for consideration by the conference committee (id. at ¶ 121(b)); preparation of language for inclusion in the committee report (id. at 237-238, ¶ 121(c)); distribution of "talking points" to members of the conference committee explaining the President's position on the legislation (id. at 238 ¶ 121(d)); and the President's decision not to seek from Congress various forms of additional funding for the Board (id. at 240, ¶ 125(a), (b), (c), (d), (g)).

The President's decisions to support or oppose legislation, his provision of assistance to Members of Congress, and his communications with Congress are not subject to judicial inquiry (Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915)), and no contract, consent decree, or court order could, consistent with the Constitution, subject such decisions to judicial inquiry. Accordingly, the district court erred in relying on this purely political activity in finding that the United States had acted in bad faith, and further erred in imposing additional burdens on the United States in consequence of it. If the President's actions in the political arena have been improvident, the remedy is likewise political -- it resides in the voting booth, not in the courts.

C. The District Court Misapplied Equitable Remedial Principles in Concluding that the Purported Violations of the Consent Decree Warranted Imposing Remedial Obligations Not Contained in, or Contemplated by, the Consent Decree

The district court erred by imposing entirely new burdens on the United States in disregard of the plain language of ¶ 15.1 of the Decree. In imposing an unconditional obligation on the United States to pay the Board $103.858 million, the court required that the United States pay an amount based on the Board's statement of its need, rather than a determination of what funds are "available." Even the most expansive reading of the Consent Decree cannot support a requirement that the United States pay the Board whatever sum it needs for desegregation and cannot produce itself.

The district court has attempted to justify its alteration of the terms of the Decree by stating (Conclusion of Law No. 127 Br. App. 241):

> [A] court may impose "additional consistent burdens" designed "to ensure implementation of the decree" when a party to a consent decree has failed to comply with his obligation. Brewster v. Dukakis, 675 F.2d 1, 4 (1st Cir. 1982).

The Brewster case, however, undercuts the court's position. In Brewster, private plaintiffs had entered into a consent decree with various members of the executive branch of the Commonwealth of Massachusetts. The Commonwealth defendants agreed in the Consent Decree to undertake improvements in the care and treatment of residents at a state institution for the mentally disabled, and to "use their best efforts to insure the full and timely financing of this Decree." Brewster v. Dukakis, supra,

675 F.2d at 2. After the Massachusetts legislature failed to appropriate sufficient funds to finance the decree, plaintiffs returned to the district court for further injunctive relief. Finding that the Commonwealth defendants had not used their best efforts to obtain funding, the district court imposed various additional requirements not in the original decree. Among these was an unconditional obligation to fund fully all programs planned for the fiscal year. The First Circuit vacated this requirement, stating (id. at 5, footnote omitted):

> Although the court can order appellants to do what they are required to do under the terms of the consent decree -- to make best efforts -- the court cannot require appellants to go beyond what their good faith professional best efforts can reasonably be expected to accomplish.

Similarly, the court in this case may, within constitutional and statutory limits, order the United States to make every effort to "find and provide * * * available form[s] of financial [assistance]" (App. 20), but it may not alter the terms of the Consent Decree to impose a vastly more onerous burden on the United States than anything it agreed to in the Consent Decree. The district court has not simply imposed an additional, consistent burden on the United States; rather, it has imposed an entirely new burden that is inconsistent with the original agreement and understanding between the parties. The United States could not and would not have agreed to underwrite the Board's financial obligation to the extent of any shortfall between what the Board had and what it needed. The district court thus transgressed the fundamental

principle of equitable relief requiring it to tailor the scope of the remedy to fit the nature of the violation. Milliken v. Bradley, 418 U.S. 717, 744 (1974); Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976). Accordingly, the district court's order must be reversed. 40/

In our discussion of how ¶ 15.1 should be read, we noted that the district court's reading of the provision renders its requirements unconstitutional and beyond the power of the judiciary to enforce. Therefore, if this Court concludes that the United States has agreed in the consent decree to restrict the President unconstitutionally in his dealings with Congress (see pp. 32-35, supra) or to commit unlimited financial assistance in contravention of its legal authority (see pp. 38-42, supra), the Consent Decree must be declared invalid and unenforceable. See United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (opinion of Rubin, J.). Because, however, only one subsection (¶ 15.1) of an extensive and otherwise unobjectionable desegregation decree would thereby be rendered unenforceable, the parties should be allowed an opportunity to re-

40/ There is also a problem of a jurisdictional nature with the Remedial Order. Certain aspects of the Order (e.g., ¶ 14 Br. App. 276-277) direct federal officials to pay a sum certain to the Board. To this extent, the Order directs the payment of funds from the public treasury based upon the Consent Decree, which is, at bottom, a contract. Thus, a district court is without jurisdiction to order such relief in an amount over $10,000 by virtue of the express provisions of 28 U.S.C. 1346(a)(2). That provision remits contract claimants seeking more than $10,000 to the Claims Court.

negotiate that subsection. Pursuant to the decree, a valid -- indeed, laudable -- desegregation plan is being implemented and, if possible, should not be disturbed. Of course, should the parties be unable to renegotiate a decree valid in all its particulars, the only recourse, unfortunately, would be to set aside the consent decree and schedule the case for trial on the merits. E.g., Williams v. Vukovich, 720 F.2d 909, 927 (6th Cir. 1983).

CONCLUSION

For the foregoing reasons, the Remedial Order should be reversed.

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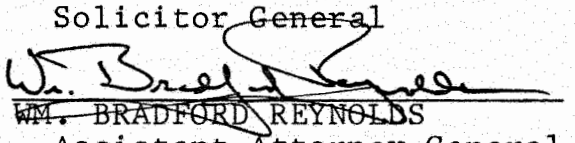

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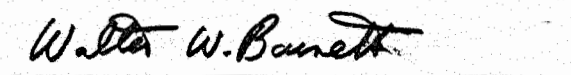

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I hereby certify that two copies of the attached brief and one copy each of the Brief Appendix and Appellant's Appendix were served upon Board counsel Hugh R. McCombs, Jr., by hand, and upon remaining counsel listed below by regular United States mail on August 23, 1984.

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