NOTE

"INTEGRATION NOW":
A STUDY OF ALEXANDER v. HOLMES COUNTY BOARD OF EDUCATION

I. Introduction

It is hereby adjudged, ordered, and decreed:

1. The Court of Appeals' order of August 28, 1969, is vacated, and
the case is remanded to that court to issue its decree and order, effective
immediately, declaring that each of the school districts here involved
may no longer operate a dual school system based on race or color, and
directing that they begin immediately to operate as unitary school systems
within which no person is to be effectively excluded from any school
because of race or color. Alexander v. Holmes County Board of Education,

With these words the United States Supreme Court, in a per curiam de-
cision rendered on October 29, 1969, unmistakably announced that "the time
for delay is over" in the desegregation of southern public school districts.1 The
Court's order marked the culmination of a series of suits brought over a period
of several years concerning school desegregation in Mississippi.2 Though the
petition before the Court formally embraced only nine actions brought by
private Negro plaintiffs against fourteen Mississippi school districts,3 the Court's
disposition of the petition governed several additional suits instituted by the
Justice Department involving nineteen other Mississippi districts.4 Thus, the
ruling immediately affected a number of school systems in only one state; how-
ever, it "will affect far more than the 33 Mississippi districts directly involved.
It will apply to hundreds of communities in the South — and possibly to some
in the North, as well."5

2 Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964);
Singleton v. Jackson Municipal Separate School Dist. 355 F.2d 865 (5th Cir. 1966), injunction
pending appeal granted, 348 F.2d 723 (5th Cir. 1965); Adams v. Mathews, 403 F.2d 181 (5th
Cir. 1968); United States v. Hinds County School Bd., Civil No. 4075(J) (S.D. Miss.
May 13, 1969), rev'd, 417 F.2d 852 (5th Cir. 1969), delay in enforcement granted, Nos. 28030 &
3 Alexander v. Holmes County Bd. of Educ.; Anderson v. Canton Municipal Separate
School Dist. & Madison County School Dist.; Barnhardt v. Meridian Separate School Dist.;
Yazoo County Bd. of Educ., Yazoo City Bd. of Educ. & Holly Bluff Line Consol. School Dist.;
Hudson v. Leake County School Bd.; Killingsworth v. Enterprise Consol. School Dist. & Quit-
Wilkinson County Bd. of Educ.
4 These included the school systems of Hinds County, Kemper County, Natchez, Marion
County, South Pike County, Neshoba County, Noxubee County, Columbia, Amite County,
Covington County, Lawrence County, Wilkinson County, Lincoln County, Philadelphia and
Franklin County.
5 U.S. NEWS & WORLD REP., Nov. 10, 1969, at 45. In fact, Alexander's impact has
already been felt in several school districts other than the Mississippi systems directly in issue.
In Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970), a
consolidated appeal was taken from school desegregation orders of district courts in Texas,
Alabama, Louisiana, Georgia, and Florida, as well as Mississippi. Applying Alexander, the
Fifth Circuit held that since it would be possible to integrate faculties, staff, transportation,
athletics, and other activities during the school term of spring, 1970, but difficult to achieve
a merger of student bodies by that time, a two-step desegregation plan would be implemented.
More precisely, through *Alexander* the Court replaced the policy enunciated in its 1955 decision in *Brown v. Board of Education* [Brown I] of allowing school desegregation to proceed with "all deliberate speed" with a "new and much more rigorous standard: immediate compliance." Holding that the former standard "is no longer constitutionally permissible," the Court made absolute its previously established principle that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." In doing so, the Court effectively wrote "a legal end to the period during which courts have entertained various excuses for failure to integrate Southern schools."

Gone too was judicial tolerance for often endless stages of negotiation before dual school systems are abolished: the order established the principle that henceforth all pleas for exceptions to desegregation may be made only after integration is an established fact.

This Note will explore the factual background and the judicial history of *Alexander v. Holmes County Board of Education*. It will trace the progress of that suit through the federal court system, reviewing the arguments propounded by the litigants and the decisions rendered by the courts at each level. The *Alexander* case in itself presents a case study in school desegregation litigation in the deep South in recent years; the Supreme Court's ultimate disposition of the suit presents the course such litigation is likely to take in the future.

II. Background — A Profile of School Desegregation Litigation in Mississippi, 1954-68

Fifteen years after the Supreme Court's 1954 decision in *Brown v. Board of Education* [Brown I], in which the Court held that racially segregated public schools violated the equal protection clause of the fourteenth amendment, "only one of every six black pupils in the South attends a desegregated ele-

Under this plan, the first step, which includes merger of faculties and staff, would be accomplished by February 1, 1970; the second step, which includes student body integration, would be completed by the fall term of 1970. See also Northcross v. Board of Educ. of Memphis, 38 U.S.L.W. 4219 (U.S. Mar. 9, 1970), where the Supreme Court unanimously held that city schools in Memphis must institute unitary school systems in accordance with the *Alexander* precedent.

7 Id., at 301.
12 NEWSWEEK, Nov. 10, 1969, at 35.
13 The *Alexander* decision, however, will not necessarily result in an immediate turnabout by other reluctant school districts:

The court's pronouncement will not foreclose many delaying options still available to recalcitrant districts. The decision states a blunt principle of law, but it leaves to lower courts, HEW and the Justice Department the task of sorting out how to achieve what should, by the law, be instant integration. Aside from the 33 Mississippi districts directly affected by the ruling, other segregated Southern systems will await pressure from the Administration. Applying such leverage requires time.

mentary or secondary school." In Mississippi, the public schools remained "totally segregated" for ten years after the decision. Mississippi officials, who initially attempted open defiance of the Court's ruling, "soon turned to less obvious — and ingenious — devices for delay." Among these devices was a pupil placement law that "established a labyrinth of administrative procedures to ensnare those Negro students hardy enough to attempt to desegregate white schools." This law did prevent desegregation for a limited time; in 1963 the first public school desegregation suits brought in a federal district court in Mississippi were dismissed for failure to exhaust administrative remedies under the placement law. In 1964, however, the Fifth Circuit reversed the district court's dismissal of these suits, holding that since Mississippi law required segregated schools, Negro students who had unsuccessfully petitioned school boards for admission could maintain their actions without using or exhausting the administrative remedies under the placement law. On remand, the district court heard "voluminous testimony [offered] to show that allegedly innate racial differences furnish a reasonable basis for classifying school children according to race." While supporting these allegations, the court felt compelled to order the adoption of a plan that would have resulted in the desegregation of the Jackson school system by September, 1969. The plaintiffs appealed, urging that this plan's pace in achieving desegregation was too leisurely. Pending the outcome of their appeal, plaintiffs applied for injunctive relief from the district court's approval of the plan. In 1965 the Fifth Circuit granted the injunction. Looking at the standards of the Office of Education of the Department of Health, Education and Welfare [HEW], which set the fall of 1967 as "the target date for the extension of desegregation to all grades of school systems not fully desegregated in 1965-1966 as a qualification for Federal financial assistance" under title VI of the Civil Rights Act of 1964, the court held that "a good faith start requires designation of at least four grades for the 1965-1966 school year."

If Selma, Alabama, can commence with desegregation of four grades for 1965-1966, Jackson, Mississippi, can at least catch up. And indeed in

17 This is illustrated, for instance, by the events recounted in United States v. Barnett, 330 F.2d 369 (5th Cir. 1963).
18 Brief for Petitioners at 4. "If one lesson has been learned during these past fifteen years, it is that the ingenuity of the officials of the Mississippi school system should not be underestimated." Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 3, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) [hereinafter cited as Brief for Lawyers' Committee for Civil Rights Under Law].
20 Brief for Petitioners at 4.
21 Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964).
22 Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865, 866 (5th Cir. 1965).
23 Id. at 867.
24 Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965).
25 Id. at 730.
all but the most exceptional cases, all school districts commencing desegregation in fall 1965 should be expected to do as well.\textsuperscript{28}

When the actual appeal was decided by the Fifth Circuit in 1966, the court in effect sustained its earlier injunction by holding that the plan approved by the district court would be sufficient if the public schools complied with the standards promulgated by the Office of Education, including the objective of total school desegregation by September of 1967.\textsuperscript{29} In its opinion, the court referred obliquely to "freedom of choice" as a method of desegregation and noted that "[a]t this stage [1966] in the history of desegregation in the deep South a 'freedom of choice[''] plan is an acceptable method for a school board to use in fulfilling its duty to integrate the school system."\textsuperscript{30} The United States Commission on Civil Rights recently described freedom of choice as follows:

Under this method of desegregation, each family with children attending the public schools must choose the particular school their children will attend in the following year. White families almost invariably choose to have their children attend the predominantly white school, and most Negro families choose to have their children attend the all-black school.

Black parents who wish their children to attend an integrated school must make this affirmative choice. Although the Supreme Court stated in \textit{Brown II} that the burden of desegregation was upon the school boards, this method of desegregation places a large share of the burden upon those least able to carry it.\textsuperscript{31}

The Commission's report went on to state that "[o]ne of the primary reasons school districts undergoing desegregation favor freedom-of-choice plans is that they do not work."\textsuperscript{32} Several reasons for the ineffectiveness of freedom of choice plans were noted, among them the hostility of local whites toward desegregation:

Since white families almost always choose to have their children attend the predominantly white school, the burden of desegregating the schools in a district falls entirely upon the black families living there. Accordingly, most Negro families choose to have their children attend the all-black school, and those few black families who choose to send their children to the predominantly white school can be — and are — singled out and subjected to pressure and abuse.\textsuperscript{33}

The report pointed out that in a 1967 study the Commission had found that violence, threats, and economic reprisals against Negroes who chose to send their children to white schools led many parents to continue sending their children to the all-black schools.\textsuperscript{34}

As a result of these tactics, the desegregation of Mississippi school systems

\textsuperscript{28} \textit{Id.} at 731.
\textsuperscript{29} \textit{Singleton v. Jackson Municipal Separate School Dist.}, 355 F.2d 865, 870 (5th Cir. 1966).
\textsuperscript{30} \textit{Id.} at 871.
\textsuperscript{31} \textit{Civil Rights Comm'n Report} 14.
\textsuperscript{32} \textit{Id.} at 15.
\textsuperscript{33} \textit{Id.} at 20.
\textsuperscript{34} \textit{Id.}
proceeded at a snail's pace, despite the Supreme Court's declaration in 1964 that "[t]he time for mere 'deliberate speed' has run out." Finally, in the 1968 case of Green v. County School Board of New Kent County, the Supreme Court, while conceding that freedom of choice might be useful as a means of desegregation in some circumstances, noted that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation." The Court stated that if a freedom of choice plan "fails to undo segregation, other means must be used to achieve this end.

This decision gave new urgency to the "affirmative duty" to desegregate imposed upon southern school boards by the Fifth Circuit in its 1966 decision in United States v. Jefferson County Board of Education. In effect, Green made that duty immediate. Speaking for a unanimous Court, Mr. Justice Brennan said "'The time for mere 'deliberate speed' has run out .... The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.'" Specifically, the Court held that a freedom of choice plan employed in Virginia, which had produced no white cross-over and only a fifteen percent black cross-over, did not measure up to constitutional requirements because "[r]ather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board.

III. Alexander's Ascent to the Supreme Court

After the Green decision, district courts throughout the South were besieged with petitions seeking relief consistent with the Court's mandate that school boards adopt a desegregation plan that "promises realistically to work now." One such petitioner was Mrs. Beatrice Alexander, who filed suit in the District Court for the Southern District of Mississippi against the Board of Education of Holmes County, Mississippi. Mrs. Alexander, together with eight other Negro petitioners involved in similar litigation against thirteen other Mississippi school boards, was prepared to show that "the token results achieved by these [freedom of choice] plans [in the fourteen school districts] were even less than the results held insufficient in Green." The extent of student desegregation in the fourteen school districts sued by the private plaintiffs is illustrated by the following table:

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37 Id. at 440; see note 59 infra.
38 Green v. County School Bd. of New Kent County, 391 U.S. 430, 440 (1968), quoting from Bowman v. County School Bd. of Charles City County, 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion).
41 Id. at 441-42.
42 Brief for Petitioners at 5-6.
43 Id. at 6.
<table>
<thead>
<tr>
<th>District</th>
<th>Percentage of Negroes in All-Negro Schools 1968-69*</th>
<th>Percentage of Negroes in Predominantly White Schools 1968-69 (Projected)</th>
<th>Percentage of Negroes in All-Negro Schools 1969-70**</th>
<th>Percentage of Negroes in Predominantly White Schools 1969-70** (Projected)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anguilla</td>
<td>94.4%</td>
<td>5.6%</td>
<td>3.9%</td>
<td></td>
</tr>
<tr>
<td>Canton</td>
<td>99.5%</td>
<td>0.5%</td>
<td>0.1%</td>
<td></td>
</tr>
<tr>
<td>Enterprise</td>
<td>84%</td>
<td>16%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Holly Bluff</td>
<td>98.9%</td>
<td>1.1%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Holmes County</td>
<td>95.5%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Leake County</td>
<td>95.7%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Madison County</td>
<td>99.1%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meridian</td>
<td>91.4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Pike County</td>
<td>99.2%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quitman</td>
<td>96.1%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sharkey-Issaquena</td>
<td>94.6%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wilkinson County</td>
<td>98.1%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yazoo</td>
<td>91.2%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yazoo County</td>
<td>93.3%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* These figures are based upon the school districts' reports to the district court.

** The projections are based for the most part upon the freedom of choice forms completed during the spring of 1969, as compiled by the United States and submitted to the court of appeals.

But several district courts, including the District Court for the Southern District of Mississippi, refused to hear the petitioners' motions, thereby allowing the 1968-69 school year to begin under the freedom of choice plans then in effect in those districts. The aggrieved petitioners, Mrs. Alexander among them, consequently applied to the United States Court of Appeals for the Fifth Circuit for summary reversal of the district courts' refusal to grant expeditious relief. In *Adams v. Mathews*, a decision encompassing over forty cases similar to Mrs. Alexander's that had been consolidated on appeal, the Fifth Circuit ordered the district courts to treat these suits "as entitled to the highest priority" and to conduct hearings in each case no later than November 4, 1968, with regard to

(1) whether the school board's existing plan of desegregation is adequate "to convert [the dual system] to a unitary system in which racial discrimination would be eliminated root and branch" and (2) whether the proposed changes will result in a desegregation plan that "promises realistically to work now". An effective plan should produce integration of faculties, staff, facilities, transportation, and school activities (such as athletics) along with integration of students. (Footnote omitted.)

As a test for determining whether a free choice plan would be acceptable, the court established this standard:

If in a school district there are still all-Negro schools or only a small

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44 403 F.2d 181 (5th Cir. 1968).
45 Id. at 188.
46 Id.
fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*.

On remand from *Adams*, the District Court for the Southern District of Mississippi consolidated the nine cases brought by the private Negro plaintiffs with other suits brought by the United States against nineteen additional Mississippi school boards. These cases, including the suit brought by Mrs. Alexander, proceeded under the caption *United States v. Hinds County Board of Education*.

Following hearings that began in October, 1968, the district court was confronted with the problem of whether testimony that had been admitted regarding “(1) alleged disparities between the educational achievement of predominantly white classes and all-Negro classes and (2) community attitudes concerning desegregation,” was relevant in determining the validity of freedom of choice plans under *Green* and *Adams*. Arguing on behalf of the United States, the Justice Department urged that evidence which allegedly discloses disparities in achievement scores of white and Negro pupils, and expert testimony concerning alleged differences in the educability of children according to race, have repeatedly been held by the Court of Appeals to be irrelevant and immaterial to the consideration of whether a school district is meeting its constitutional obligations. . . .

The sole purpose of such evidence and testimony is to justify the continuation of dual systems of schools based on race. The defendants seek by this evidence and their experts . . . to maintain the status-quo in the face of their constitutional duty to disestablish their racially segregated system of schools.

The Justice Department further noted that the Supreme Court has held that community attitudes toward desegregation, e.g., attitudes evidenced by a mass exodus of whites from public schools that become “too” integrated, are likewise immaterial.

Applying the *Adams* test to the facts before the district court, the Justice Department, though suggesting that the test is disjunctive and that failure of one of its parts is a failure of the entire test, advocated that “each of the defendants . . . fails all of the parts” because no white child attends a predominantly Negro school in any of the defendant districts.

No defendant comes even close to that percentage of pupil integration which . . . the Supreme Court found inadequate in *Green* . . . .

No defendant approaches the ratio of faculty integration ordered for the

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47 *Id.*
49 *Id.* at 11-12.
51 See text accompanying note 47 *supra*.
present year by the Court of Appeals in *Montgomery County Board of Education v. Carr*\(^{53}\)...

In none of defendant's districts does a predominantly white school compete against an all-Negro school in athletics or any other type of endeavor. The records . . . are replete with evidence of overlapping bus routes and resulting transportation segregation.\(^{54}\)

The district court did not agree with the government's analysis of the issues. Though acknowledging that the cases were before it on motions to "update the Jefferson decree\(^{55}\) in all of these cases to comport with the requirements of *Green*,"\(^{56}\) the court in an unreported opinion on May 13, 1969, approved the freedom of choice plans for all of the defendant school districts. Insisting that "[i]t is incumbent upon the plaintiffs . . . to show a lack of substantial progress toward the disestablishment of a dual school system and the establishment of a unitary school system of both races,"\(^{57}\) the court held that, as a matter of law, plaintiffs had failed to satisfy this burden.\(^{58}\) Citing *Green* to uphold the freedom of choice plans,\(^{59}\) the court went on to praise the efforts of the defendants:

The facts and circumstances in practically all of these cases . . . show this Court to its entire satisfaction that these schools, operating under the freedom of choice plan, have operated in the very best of good faith with the Court in an honest effort to comply with and conform to all of the requirements of the [Jefferson] decree.\(^{60}\)

The court was unable to find a single instance where "any colored parent, or colored child did not do exactly what they wanted to do in deciding as to the school which the colored child would attend."\(^{61}\) Moreover, the court felt that the plans used offered the best means of implementing the wishes of white and black children alike:

The vast majority of colored children simply do not wish to attend a school which is predominantly white, and white children simply do not wish to attend a school which is predominantly Negro, and that ingrained and

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\(^{54}\) Id. at 16-17.

\(^{55}\) The district court looked upon the decree in United States v. Jefferson County Board of Education, 372 F.2d 836, aff'd on rehearing en banc, 380 F.2d 385 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967), as "the model decree for the establishment of a unitary school system as such plan was designed and approved by the United States Court of Appeals for the Fifth Circuit en banc." United States v. Hinds County School Bd., Civil No. 4075(J) at 5 (S.D. Miss., May 13, 1969).


\(^{57}\) Id. at 7.

\(^{58}\) Id. at 13.

\(^{59}\) Id. at 9. The court based its holding on the following passage from *Green*:

Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. *Green v. County School Bd. of New Kent County, 391 U.S. 430, 440-41 (1968).*

\(^{60}\) United States v. Hinds County School Bd., Civil No. 4075(J) at 9 (S.D. Miss., May 13, 1969).

\(^{61}\) Id. at 10.
inbred influence and characteristic of the races will not be changed by any pseudo teachers, or sociologists in judicial robes.\textsuperscript{62}

The district court supported its finding that the boards had not been remiss in their duties by citing difficulties caused by a provision in the \textit{Jefferson} decree that "[a]t no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of the choice made."\textsuperscript{63} In the court's version of the hearings, "[e]very school official . . . in every one of these cases . . . testified convincingly . . . that this provision . . . had interfered with a fair and just and proper operation of the freedom of choice plan in these schools."\textsuperscript{64} Thus, from the court's standpoint, the school boards themselves were not to blame for the statistics that showed a largely dual school system. Rather, the court asseverated, the responsibility should fall on the Fifth Circuit, the progenitor of the \textit{Jefferson} decree and its troublesome provision:

The Court finds from such circumstances and conditions that the mathematical statistics as to the working progress of the freedom of choice plan . . . is unfair, unjust, unrealistic and misleading. The plan has not failed. The Court [of Appeals] just has not allowed it to work.\textsuperscript{65}

Shortly after the district court's May thirteenth ruling, the petitioners and the United States moved the court of appeals for summary reversal or, in the alternative, for expedited consideration of the cases. On June 25, 1969, this motion was granted, and oral argument was set for July 2. Again the action proceeded under the caption \textit{United States v. Hinds County School Board}, and consolidated under this heading were the same cases adjudicated by the district court, including \textit{Alexander v. Holmes County Board of Education}. In its brief for the petitioners, the Justice Department marshalled statistical data to support its charge that the district court's approval of the defendants' free choice plans contravened the Supreme Court's decision in \textit{Green} and the direct mandate of the Fifth Circuit in \textit{Adams v. Matheus}. The Department contended that:

1. Each of the defendant school districts maintained all Negro schools; 66 from a total of 165 schools were all black. Not one white student had ever attended a traditionally Negro school in any of the districts.\textsuperscript{66} The following table\textsuperscript{67} shows the racial character of the schools in each district:

\begin{itemize}
\item \textsuperscript{62} Id. at 15.
\item \textsuperscript{63} Id. at 8, quoting from \textit{United States v. Jefferson County Bd. of Educ.}, 372 F.2d 836, 898, aff'd on rehearing en banc, 380 F.2d 385 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967).
\item \textsuperscript{64} \textit{United States v. Hinds County School Bd.}, Civil No. 4075(J) at 8 (S.D. Miss., May 13, 1969).
\item \textsuperscript{65} Id. at 12. As to the matter of faculty integration under the free choice plans, the court found that "[t]he evidence in this record does not show one single instance where there has been any discrimination on the part of any school authority in hiring teachers." \textit{Id.} at 17. The court did add, however, that a target date for faculty desegregation must be set by a plan and must be met pursuant to orders of the Fifth Circuit in previous cases. \textit{Id.} at 21, citing, \textit{United States v. Board of Educ. of Bessemer}, 396 F.2d 44 (5th Cir. 1968); \textit{United States v. Greenwood Municipal Separate School Dist.}, 406 F.2d 1086, 1093-94 (5th Cir. 1969).
\item \textsuperscript{66} Brief for Plaintiff-Appellant at 5, \textit{United States v. Hinds County School Bd.}, 417 F.2d 852 (5th Cir. 1969).
\item \textsuperscript{67} \textit{United States v. Hinds County School Bd.}, 417 F.2d 852, 855 n.1 (5th Cir. 1969).
\end{itemize}
2. More than 96 percent of the Negro students in these districts continued to attend traditionally black schools. Students in two districts were completely segregated by race, and the largest percentage of Negroes attending formerly all-white schools was only 10.6 percent.\(^68\) School activities also remained segregated; black and white schools did not compete in athletics in any of the districts.\(^69\) The following table\(^70\) shows the total enrollment by race for the 1968-69 school year in each district and the number and percentage of Negroes attending traditionally white schools:

<table>
<thead>
<tr>
<th>District</th>
<th>Total Number of Schools</th>
<th>All-Negro</th>
<th>All-White</th>
<th>Predominantly White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amite</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Canton</td>
<td>5</td>
<td>3</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Columbia</td>
<td>4</td>
<td>1</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Covington</td>
<td>7</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Forrest</td>
<td>9</td>
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<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Franklin</td>
<td>3</td>
<td>1</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Hinds</td>
<td>22</td>
<td>10</td>
<td>1</td>
<td>11</td>
</tr>
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<td>2</td>
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<td>2</td>
</tr>
<tr>
<td>Lawrence</td>
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<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Leake</td>
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<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Lincoln</td>
<td>6</td>
<td>2</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Madison</td>
<td>8</td>
<td>4</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>Marion</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Meridian</td>
<td>19</td>
<td>8</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>Natchez-Adams</td>
<td>15</td>
<td>7</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>Neshoba</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>North Pike</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Noxubee</td>
<td>6</td>
<td>3</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Sharkey-Issaquena</td>
<td>5</td>
<td>4</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Anguilla-Line</td>
<td>3</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>South Pike</td>
<td>7</td>
<td>2</td>
<td>-</td>
<td>5</td>
</tr>
<tr>
<td>Wilkinson</td>
<td>4</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>District</th>
<th>1968-1969 Enrollment</th>
<th>Negro</th>
<th>White</th>
<th>Negroes in White Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Number</td>
<td>Percentage</td>
<td></td>
</tr>
<tr>
<td>Amite</td>
<td>2,542</td>
<td>1,554</td>
<td>54</td>
<td>2.5</td>
</tr>
<tr>
<td>Canton</td>
<td>3,786</td>
<td>1,370</td>
<td>18</td>
<td>.5</td>
</tr>
<tr>
<td>Columbia</td>
<td>912</td>
<td>1,495</td>
<td>62</td>
<td>6.8</td>
</tr>
<tr>
<td>Covington</td>
<td>1,673</td>
<td>2,031</td>
<td>89</td>
<td>5.3</td>
</tr>
<tr>
<td>Forrest</td>
<td>1,035</td>
<td>4,281</td>
<td>112</td>
<td>10.6</td>
</tr>
<tr>
<td>Franklin</td>
<td>1,110</td>
<td>1,109</td>
<td>39</td>
<td>3.5</td>
</tr>
<tr>
<td>Hinds</td>
<td>7,536</td>
<td>6,521</td>
<td>441</td>
<td>5.9</td>
</tr>
<tr>
<td>Kemper</td>
<td>2,019</td>
<td>801</td>
<td>3</td>
<td>.1</td>
</tr>
<tr>
<td>Lauderdale</td>
<td>1,872</td>
<td>3,148</td>
<td>24</td>
<td>1.3</td>
</tr>
</tbody>
</table>

\(^{68}\) Brief for Plaintiff-Appellant at 7, United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969).

\(^{69}\) Id.

\(^{70}\) Id.
3. Less than 3 percent of the teachers in the defendant systems were employed on a full-time basis in schools of the opposite race. Seven districts had less than one full-time teacher per school assigned across racial lines. In the remaining systems, less than 1 percent of the faculties taught in schools in which their race was in the minority. The following table shows the total number of full-time and part-time teachers in each district and the number of teachers assigned across racial lines:

<table>
<thead>
<tr>
<th>District</th>
<th>Full- &amp; part-time teachers</th>
<th>Full-time desegregating teachers</th>
<th>Part-time desegregating teachers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Negro</td>
<td>White</td>
<td>Negro</td>
</tr>
<tr>
<td>Amite</td>
<td>95</td>
<td>66</td>
<td>0</td>
</tr>
<tr>
<td>Canton</td>
<td>120</td>
<td>81</td>
<td>3</td>
</tr>
<tr>
<td>Columbia</td>
<td>43</td>
<td>71</td>
<td>5</td>
</tr>
<tr>
<td>Covington</td>
<td>64</td>
<td>103</td>
<td>3</td>
</tr>
<tr>
<td>Forrest</td>
<td>43</td>
<td>122</td>
<td>4</td>
</tr>
<tr>
<td>Franklin</td>
<td>44</td>
<td>45</td>
<td>3</td>
</tr>
<tr>
<td>Hinds</td>
<td>295</td>
<td>281.9</td>
<td>22</td>
</tr>
<tr>
<td>Kemper</td>
<td>68</td>
<td>45</td>
<td>0</td>
</tr>
<tr>
<td>Lauderdale</td>
<td>82</td>
<td>131</td>
<td>8</td>
</tr>
<tr>
<td>Lawrence</td>
<td>50</td>
<td>81</td>
<td>10</td>
</tr>
<tr>
<td>Leake</td>
<td>87</td>
<td>90</td>
<td>0</td>
</tr>
<tr>
<td>Lincoln</td>
<td>38</td>
<td>74</td>
<td>0</td>
</tr>
<tr>
<td>Madison</td>
<td>147</td>
<td>66</td>
<td>0</td>
</tr>
<tr>
<td>Marion</td>
<td>48</td>
<td>96</td>
<td>4</td>
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<tr>
<td>Meridian</td>
<td>180</td>
<td>317</td>
<td>8</td>
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<tr>
<td>Natchez-Adams</td>
<td>484</td>
<td>40</td>
<td>0</td>
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<tr>
<td>Neshoba</td>
<td>35</td>
<td>86</td>
<td>0</td>
</tr>
<tr>
<td>North Pike</td>
<td>26</td>
<td>30</td>
<td>1</td>
</tr>
<tr>
<td>Noxubee</td>
<td>135</td>
<td>61</td>
<td>6</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>25</td>
<td>46</td>
<td>0</td>
</tr>
<tr>
<td>Sharkey-Issaquena</td>
<td>71</td>
<td>31</td>
<td>0</td>
</tr>
<tr>
<td>Anguilla-Line</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>South Pike</td>
<td>78</td>
<td>52.8</td>
<td>2</td>
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<tr>
<td>Wilkinson</td>
<td>97</td>
<td>39</td>
<td>0</td>
</tr>
</tbody>
</table>

71 Id. at 10.
72 United States v. Hinds County School Bd., 417 F.2d 852, 857 n.2 (5th Cir. 1969).
4. The record in each case contained illustrations of how the dual character of the particular schools might be eliminated by other methods of desegregation, such as zoning and pairing. "Thus," concluded the Justice Department, "the continued existence of all-Negro schools is not attributable to any factors extraneous to defendants' educational systems and is fully within their responsibility."\(^{77}\)

Buttressed by this empirical data, the United States importuned the court of appeals to find as a matter of law that, in view of *Green* and *Adams*, the district court's ruling was "clearly erroneous" and therefore freedom of choice must be abandoned in favor of some other plan "that promises realistically to work and promises realistically to work now." . . . [It is abundantly clear that freedom of choice cannot be used since it has not done the job that is constitutionally required, i.e., the job of converting a dual system into a unitary system.\(^{74}\)

Moreover, since the district court in its May thirteenth opinion had admitted its "utter incompetence" in the field of school administration,\(^{76}\) the government requested the court of appeals to remand the case with instructions to the district court that the assistance of experts from the Office of Education be sought "on an expedited basis" to help the defendants formulate "educationally sound, administratively feasible" desegregation plans that would provide for conversion to unitary, nonracial systems for the 1969-70 school year.\(^{76}\)

In an opinion rendered on July 3, 1969, the Fifth Circuit agreed with the government's allegation that the free choice plans were constitutionally inadequate. The court noted the total absence of white enrollment in black schools, the token enrollment of blacks in white schools, and the projected enrollment statistics for the 1969-70 school year, which augured little progress.\(^{77}\) Looking at the districts sued by the private plaintiffs, the court saw that the highest percentage of Negro cross-over to white schools was "16 percent . . . a degree of desegregation held to be inadequate in *Green*.\(^{77}\) Similarly taking cognizance of the continued segregation of school activities and faculties in the defendant school districts,\(^{79}\) the court was forced to hold that "[t]hese facts indicate that these cases fall squarely within the decisions of the Supreme Court in *Green* and its companion cases and the decisions of this Court,\(^{78}\) and that "[t]he proper conclusion to be drawn from these facts is clear from the mandate of

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73 Brief for Plaintiff-Appellant at 6, United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969).
74 Id. at 9-10, quoting from United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086, 1092 (5th Cir. 1969).
76 Brief for Plaintiff-Appellant at 13-14, United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969).
78 Id. at 855.
79 Id. at 855-57.
80 Id. at 856, citing United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086 (5th Cir. 1969); Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir. 1969); United States v. Indianola Municipal Separate School Dist., 410 F.2d 626 (5th Cir. 1969).
Adams v. Mathews . . .: 'as a matter of law, the existing plan fails to meet constitutional standards as established in Green.'

The July third decision decreed that the defendant school districts "will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems," meaning that alternative methods of desegregation, such as zoning and pairing, would be required to eliminate the dual character of the schools. Acceding to the government's suggestion, the court enjoined the defendants to collaborate with HEW experts from the Office of Education in the preparation of plans to disestablish the dual systems in question. The plans, which were to be effectuated with the beginning of the 1969-70 school year, were to cover "student and faculty assignment, school bus routes if transportation is provided, all facilities, all athletic and other school activities, and all school location and construction activities." The court set August 11, 1969, as the deadline for submission of the plans to the district court and August 27, 1969, as the date for actual implementation of the plans. In its modified order of July 25, 1969, however, the court of appeals moved the implementation date back to September 1, 1969.

On August 11, 1969, the date established by the Fifth Circuit for the submission of the new plans, the Office of Education submitted desegregation plans for the thirty-three school boards to the district courts. Thirty of the thirty-three plans provided for implementation of pairing and/or zoning at the start of the 1969-70 school year. The exceptions were plans for Hinds County, Holmes County, and Meridian, which asserted that problems peculiar to those districts required postponing full implementation until the beginning of the 1970-71 school year. In a letter to the district court on August 11, 1969, the then director of the Equal Opportunities Division of the Office of Education, Dr. Gregory R. Anrig, gave his evaluation of the HEW plans:

81 United States v. Hinds County School Bd., 417 F.2d 852, 856 (5th Cir. 1969).
82 Id.
83 Id. at 855.
84 Id. at 858.
85 Id. at 858-59.
86 Brief for Petitioners at 12.

A number of respondent school boards exercised their option to file alternative plans . . . These plans fall roughly into 3 categories.

First, some boards proposed the implementation of a "tracking" system, whereby students would be given achievement tests and, on that basis, assigned to one of two schools — a school for bright students or a school for the others. Formerly white schools would serve students scoring in the top 25% of their class, and Negro schools would serve the other students. The boards proposed that they be given three years to implement the plans, so that during the 1969-70 school year only grades 1-4 would be "desegregated" through achievement testing, while freedom of choice remained in effect in those grades not yet reached.

Second, some boards proposed geographic zoning or pairing plans, with achievement test results being used for student assignments within each school. Thus, there would be two first grades in each school: one for bright students and one for the others.

Third, some boards proposed plans provided [sic] for continued use of freedom of choice, but assuring that a substantial percentage of the enrollment of formerly all-white schools would be Negro through administrative assignments. These plans did not provide for the assignment of whites to Negro schools.

87 Id. at 12 n.12. Of course, all of the plans submitted first had to be accepted by the district court before they could be implemented.
I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing. In the cases of Hinds County, Holmes County and Meridian, the plans that we recommend provide for full implementation with the beginning of the 1970-71 school year. The principal reasons for this delay are construction, and the numbers of pupils and schools involved. In all other cases, the plans that we have prepared and that we recommend to the Court provide for complete disestablishment of the dual school system at the beginning of the 1969-70 school year. 

Despite the ostensible soundness of the HEW plans, on August 19, 1969, there occurred what some have called "a major retreat in the struggle to achieve meaningful school desegregation." On that date HEW Secretary Robert Finch sent a letter to Judge William Harold Cox, Chief Judge of the District Court for the Southern District of Mississippi, requesting that the plans HEW had submitted to the district court on August eleventh be withdrawn and that HEW be given until December 1, 1969, to submit new plans, implementation of those plans being left to an "unspecified future time."

Secretary Finch did not dispute Dr. Anrig's opinion that the plans were "educationally and administratively sound," but feared that the immediate implementation of the plans on September first for the 1969-70 school year would create "administrative and logistical difficulties" that would "produce chaos, confusion, and a catastrophic educational setback" to the many thousands of school children, black and white alike, in the affected districts. In his letter, the secretary confided that he was "gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year." Consequently, in order that the anticipated pitfalls might be obviated by further consideration and refinement of the plans, he felt constrained to ask for the delay, even though this would have the undesirable side effect of postponing desegregation in the thirty-three districts for another year.

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88 Id. at 13.
90 Brief for Petitioners at 13-14; CIVIL RIGHTS COMM'N REPORT 54.
91 Dr. Anrig himself never deviated from that view and declined to testify in support of Secretary Finch's position at the district court hearing on August 25, 1969. Brief for National Education Ass'n as Amicus Curiae at 8, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) [hereinafter cited as Brief for NEA].
93 Id.

When looked at in gross the fixed deadline had seemed feasible. When looked at in detail by the Secretary, however, he concluded there were too many unresolved problems to leave it possible for him to feel conscientiously that he could approve the plans. Much experience shows that desegregation plans are more effective, are more readily accepted and carried out, when there is some opportunity for preparation of the community, and particularly when the details of the plans can be explained to the teachers involved, and their support enlisted. Memorandum for the United States on Motion to Vacate the August 28, 1969, Order of the Fifth Circuit at 4-5, Alexander v. Holmes County Bd. of Education, 396 U.S. 1218 (Black, Circuit Justice, 1969) [hereinafter cited as Memorandum for the United States on Motion to Vacate the August 28, 1969, Order of the Fifth Circuit].
Though still involved in Mississippi school desegregation suits,\textsuperscript{94} and though troubled from within by lawyers from the Civil Rights Division protesting the Nixon administration’s seeming retreat on the school desegregation issue,\textsuperscript{95} the Justice Department proceeded to take the steps necessary to make HEW’s proposed delay a reality. The United States Attorney General filed a motion in the court of appeals on August 21, 1969, seeking modification of the court’s July 3, 1969, order to make it comport with the suggestions contained in the secretary’s letter. The private Negro plaintiffs, seeking to preserve the September 1, 1969, implementation date established by the Fifth Circuit in its order of July third, filed objections to the department’s motion, thus laying the foundation for the showdown between these plaintiffs and the government that was to climax before the Supreme Court.\textsuperscript{96} On August 22, 1969, the court of appeals orally granted leave to the district court to hear the motion for the extension, and on August twenty-fifth this hearing was held. The gist of what transpired at that time is set forth in the petitioners’ brief in \textit{Alexander}:

The delay was to be used for “the in depth peripheral studies such as curricular studies and financial studies required to implement these new plans” . . . . Moreover, the delay “would allow collaboration between the Office of Education and the defendant school districts to prepare for implementation of the terminal plans, thus resulting in better education and better community relations and consequently, an effective, workable desegregation of the defendant school districts and the conversion from a dual to a unitary system” . . . .

Although the letter of the Secretary of the Department of Health, Education and Welfare had referred to “administrative and logistical difficulties” requiring delay . . . no particular difficulty with respect to any particular school system was presented to, or found by, the district court. Instead, the district court found only the generalized and long anticipated need to redraw bus routes, reassign teachers, convert classrooms, adjust curricula and engage in “faculty and student preparation, including various meetings and discussions and the solutions therefor” . . . .\textsuperscript{97}

On August 26, 1969, the district court, perhaps not surprisingly, recommended

\textsuperscript{94} See note 4 \textit{supra} and accompanying text. Though the Fifth Circuit had decided the cases before it on July 3, 1969, the Justice Department was still responsible for seeing that the defendant school boards carried out the plans ordered for implementation on September 1, 1969.

\textsuperscript{95} It was reported that the equivocal nature of the Nixon administration’s July 3, 1969, policy statement on school desegregation (see note 164 \textit{infra}) coupled with the petition for further delay contained in Secretary Finch’s August nineteenth letter, led many disillusioned lawyers from the Justice Department’s Civil Rights Division to protest the administration’s policy concerning school desegregation. \textit{See N.Y. Times}, Aug. 27, 1969, at 1, col. 8; \textit{N.Y. Times}, Aug. 28, 1969, at 1, col. 4. The chief of the Civil Rights Division, Jerris Leonard, defended the administration’s stand, calling its critics “a lot of people who are frankly running off at the mouth.” \textit{N.Y. Times}, Oct. 3, 1969, at 25, col. 1. In fact, Mr. Leonard went so far as to fire the leader of the dissidents, Gary Greenberg, who reportedly “refused to compromise his views while arguing a desegregation suit against an Arkansas school district.” \textit{Time}, Oct. 31, 1969, at 77.

\textsuperscript{96} When the private plaintiffs objected to HEW’s request for the delay, the Justice Department found itself in something of a dilemma. Up to that point, it had been actively prosecuting the Mississippi school boards alongside the individual plaintiffs in consolidated actions; once it sided with HEW, however, it parted paths with the privately instituted companion cases and was forced to put its desegregation efforts in abeyance until the litigation over the delay question had been settled.

\textsuperscript{97} Brief for Petitioners at 15-16.
to the court of appeals that the government's motion for delay be granted. 98

On August twenty-eighth the Fifth Circuit granted the motion to extend in an unreported decision titled United States v. Hinds County School Board, 99 under which were again consolidated Alexander and the other school desegregation cases included in the court's July third order. Specifically, the Fifth Circuit withdrew September 1, 1969, as the final implementation date for the disestablishment of the dual school systems and substituted December 1, 1969, as the deadline for the submission of new plans to the district court, "with implementation to be left to a later date." 100 The court tacked a condition onto the extension, however, namely, that the plan as finally approved must promise "significant action" toward abolition of the dual systems during the 1969-70 school year. 101 The court in addition requested reports from the Office of Education by October 1, 1969, on each of the school boards' programs to "prepare its faculty and staff for the conversion from the dual to the unitary system." 102

Quickly reacting to this turn of events, on August 30, 1969, Beatrice Alexander and her fellow private plaintiffs applied to Mr. Justice Black, acting as Circuit Justice, for a stay of the Fifth Circuit's August twenty-eighth order and a reinstatement of its July third order. On September fifth, though realizing that the delay meant that another school year might elapse under freedom of choice, Mr. Justice Black reluctantly denied the application because he felt that he could not say definitely that the full Court would grant the relief sought, though he believed there was a "strong possibility" that it would. 103 Stating that it was "deplorable" to him to uphold the Fifth Circuit's August twenty-eighth ruling, he confided:

This conclusion does not comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity. I would then hold that there are no longer any justiciable issues in the question of making effective not only promptly but at once — now — orders sufficient to vindicate the rights of any pupil in the United

98 Id. at 16.
101 Brief for Petitioners at 17.

Although the Fifth Circuit required that the districts must take "significant action" to desegregate before the end of the 1969-70 school year, the courts have traditionally been reluctant to order far-reaching desegregation during the course of a school year. It is not, therefore, likely that meaningful desegregation will occur before the start of the 1970-71 school year. 103

States who is effectively excluded from a public school on account of his race or color.105

Having previously asserted that the phrase “all deliberate speed” was “only a soft euphemism for delay,”106 Justice Black concluded:

It has been 15 years since we declared in Brown I that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either “white” or “Negro” and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute. I fear that this long denial of constitutional rights is due in large part to the phrase “with all deliberate speed.” I would do away with that phrase completely.107

The private plaintiffs’ petition for writ of certiorari was filed September 23, 1969, and granted by the Supreme Court on October 9, 1969.108 The nine consolidated cases were to proceed under the name Alexander v. Holmes County Board of Education109 — to that decision itself we now turn.

IV. The Arguments Before the Supreme Court

The petitioners in Alexander were represented by the N.A.A.C.P. Legal Defense Fund; the United States by Solicitor General Erwin Griswold and Assistant Attorney General Jerris Leonard, chief of the Justice Department’s Civil Rights Division. The respondent school boards’ position was argued by Mr. John C. Satterfield of Mississippi. Amicus curiae briefs were filed by the Lawyers’ Committee for Civil Rights Under Law and by the National Education Association. A consideration of some of the points raised in the briefs submitted to the Court will serve to isolate the issues involved in Alexander and should contribute to a better understanding of the decision itself.110

According to the petitioners, the United States government, in authorizing and supporting Secretary Finch’s August nineteenth letter requesting delay in the desegregation of thirty-three Mississippi school districts, became “an apologist for delay” and an abettor of an inflexible district court that “repeatedly took unwarranted delays in hearing and determining the cases, approved obviously inadequate plans of desegregation, and went so far as to persistently harass civil rights lawyers.”111 Denouncing the defendant school districts as “adopting the

105 Id. at 1222.
106 Id. at 1219.
107 Id. at 1222.
108 Alexander v. Holmes County Bd. of Educ., 396 U.S. 802 (1969). The respondents’ cross-petition for certiorari was denied. Id.
109 The former caption used in these cases, United States v. Hinds County School Board, was no longer appropriate following the Fifth Circuit’s grant of the government’s request for delay, because this order was excepted to only by the private plaintiffs and not, obviously, by the United States.
110 Independent consideration of the brief submitted by Mr. Satterfield and Judge A. F. Summer, the Attorney General of Mississippi, has been omitted. This brief focused primarily on the broad school desegregation problem, rather than on the narrow issue of whether a delay should have been granted by the court of appeals.
111 Brief for Petitioners at 18, 19-20; cf. CIVIL RIGHTS COMM’N REPORT 39-46.
trappings of desegregation rather than the substance, and . . . implementing successful tactics for delay,” they urged that the only way to end dual school systems was for the Court to make it “unmistakably clear that there can be no more delays” and called upon the Court to “act to discourage recalcitrant school boards from seeking refuge from desegregation in protracted litigation.” In other words, they exhorted, “integration, not segregation, must be the status quo pendente lite.” Stressing the easily remediable nature of the “logistical and administrative difficulties” referred to by Secretary Finch in his letter and the lengthy period of anticipation preceding them, the petitioners expostulated: “In this sorry chronicle of footdragging by these school boards and the district court, the last thing that was needed was the federal government’s own initiative for delay.” These charges were substantiated, the petitioners felt, by the reports submitted to the district court on October 1, 1969, by the Office of Education on the progress of the local school boards toward devising programs to prepare faculty and staff for disestablishment of the dual systems. In the petitioners’ words, the reports indicated that the government’s “initiative for delay” had indeed produced the “predictable effect of inspiring the local boards to adopt a more resistant position” and showed that “the delay has produced nothing of educational significance.” The petitioners consequently argued:

This record . . . reveals that, notwithstanding the Solicitor General’s statement to the Court that the law is clear that “school boards today are constitutionally obligated to devise and implement plans that will accomplish [disestablishment] now” . . . the law is apparently not clear to the respondent school boards, the Department of Health, Education and Welfare, the Department of Justice, the district court and the Court of Appeals. This Court must therefore make unmistakably clear that there are to be no more delays:

No more delays to solve “administrative and logistical difficulties”;
No more delays to promote “better community relations”;
No more delays for “faculty and student preparation, including various meetings and discussions of the problems to be presented and the solutions therefor.”

This is the only rule of law which will effectively disestablish the dual school systems: 15 years is enough to solve administrative problems.

This is the only rule of law which will effectively deal with the problem of evasion: 15 years is enough to tolerate defiance of the Constitution. (Footnote omitted.)

Furthermore, continued the petitioners, in order to make administrative and judicial enforcement of desegregation work, the Court must not only make it clear that the time for delay has run out, but must also act to shift the burden of litigation from Negro school children to the school boards themselves by re-

112 Brief for Petitioners at 18.
113 Id.
114 Id. Of course, this corresponded with the Court’s ultimate holding: “Its basic message was integrate now, litigate later.” N.Y. Times, Oct. 30, 1969, at 1, col. 8.
115 See text accompanying note 97 supra.
116 Brief for Petitioners at 20.
117 Id. at 22.
118 Id. at 23-24.
quiring that integration, not segregation, be the status quo during litigation.\textsuperscript{119} The petitioners proposed that the principles to govern the Court in fashioning this kind of relief were well expressed in Mr. Justice Black's September fifth opinion on the petitioners' motion to stay the Fifth Circuit's August twenty-eighth order granting the delay.\textsuperscript{120} The petitioners concluded their argument with this analysis of the broad school desegregation problem:

We are now at the turning point in the history of school desegregation. Forceful and decisive action taken now by this Court can rally the lower courts and the executive to finish the process of school desegregation begun 15 years ago. Retreat at this critical juncture would pose a threat to the rule of law this Nation could ill afford.

Fortunately, the task is amenable to judicial solution. What is needed is to excise from the law earlier-tolerated justifications for delay and to assert the traditional equity function of the federal courts in such a way as to discourage, once and for all, resort to protracted litigation as a safe haven for the dual school system.\textsuperscript{121}

The United States answered these arguments in a memorandum filed in opposition to the petition for certiorari\textsuperscript{122} and in a supplemental memorandum filed after certiorari was granted.\textsuperscript{123} In the first memorandum, the government reasoned that since the desegregation plans to be formulated by HEW were not to be submitted until December 1, 1969, "[i]t cannot now be known whether petitioners will deem any of the provisions of these plans to be unsatisfactory in any respect."\textsuperscript{124} Observing that the crux of the petitioners' complaint was that the revocation of the September first deadline permitted the current school year to begin under the "constitutionally inadequate" freedom of choice plans,\textsuperscript{125} the government simply remarked that "the clock cannot be turned back so as to begin the school year in any other way."\textsuperscript{126} In its view, the pertinent question was not whether, in the extremely difficult circumstances of late summer, the court below should or should not have granted the extension of time deemed necessary by the Secretary of Health, Education and Welfare in order to enable his Department realistically and responsibly to make up for the tragic and frustrating default of the local school officials in these districts by doing the work which it was their obligation under the Constitution to have done.\textsuperscript{127}

\textsuperscript{119} \textit{Id.} at 25. Such relief, according to the petitioners, is within the traditional power of a court of equity since it is inherent in the nature of the judicial process that one side or the other shall be protected in its position while litigation is going on toward the end of determining the parties' ultimate rights. What a court of equity must ask itself is whether the one party or the other should be put at this risk? \textit{Id.} at 27-28.

\textsuperscript{120} \textit{Id.} at 26; see text accompanying notes 103, 107 supra.

\textsuperscript{121} Brief for Petitioners at 33.


\textsuperscript{125} \textit{Id.} at 6.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}
Rather, the question was "how, in the present circumstances, the overriding objective of these lawsuits, to which the United States is firmly dedicated, can be successfully and expeditiously achieved." The government's sentiment was that

the order of the court of appeals — formulated in the light of that court's close familiarity with these cases and distinguished experience in this field — constitutes an appropriate answer to this question. Petitioners do not suggest how the order could be improved or how, in any other respect, the objectives of these lawsuits would be furthered by this Court's review of the order at the present stage of these cases.129

Accordingly, the government proposed that the Court either deny the application for certiorari or else withhold action on the application until the situation "clarified" after the scheduled filing of the plans on December 1, 1969.130

After certiorari was granted, the United States filed a supplemental memorandum maintaining that even though it read Green as having held that "the time of gradual accommodation is ended" and that "today no unnecessary delay is tolerable,"131 still the court of appeals' order ought not be overturned because

The fact remains . . . that desegregation does not occur automatically and that disestablishment of a dual school system is often a somewhat complicated process. That is why a plan is usually necessary, and, unavoidably, a plan requires some time to formulate and some time to implement.132

The logical conclusion, said the government, was that "it is simply unreal to talk about instantaneous desegregation";133 even accepting the Green mandate that desegregation must be accomplished both "realistically" and "now," the formulation and implementation of a workable plan necessarily requires "several weeks of informed effort."134 Again noting that the time elapsed since the Fifth Circuit's order could not be recaptured,135 the government disapproved of the petitioners' proposition that the Supreme Court order back into effect the plans submitted by the Office of Education on August eleventh.

The Secretary of Health, Education and Welfare, whose Department wrote the plans, states that he needs additional time to study and perhaps correct or refine them, before he can give his approval. At present, then, the plans are not vouched for by the government's experts, and are not fully developed. Nor have the affected school boards had an opportunity to present their objections . . . . And, of course, the courts below have had no occasion to consider the plans.136 (Footnote omitted.)

128 Id. at 7.
129 Id.
130 Id.
132 Id.
133 Id.
134 Id.
135 Id. at 5.
136 Id. at 5-6.
In concluding, the United States took cognizance of the need for significant, prompt action in school desegregation but reiterated its belief that the relief sought was inappropriate.

As a general proposition, we agree that the burden should be shifted from the school children to the school boards. The history set forth in petitioners' brief shows the need for depriving the school boards of further incentive for delay. This does not mean, however, that all other educational and administrative considerations must be set aside. For many of the still segregated school systems the "varied local school problems" recognized in Brown I have not been eliminated by the passage of fifteen years. And, at all events, the relief proposed by petitioners seems particularly out of place in these cases at this time, since the plans on file are not fully developed and the outstanding order of the court of appeals requires final plans to be submitted imminently.\(^\text{137}\)

In its brief as amicus curiae, the Lawyers' Committee for Civil Rights Under Law scrutinized the "administrative and logistical difficulties" pleaded in Secretary Finch's letter and found them "wholly inadequate" to support the requested delay:

The Secretary's reference is to the defendant's assertion that the petitioners' constitutional rights must await (1) the redrawing of bus routes, (2) the reassignment of teachers, (3) the conversion of classrooms and (4) a program of preparation of the teachers and students involved.\(^\text{138}\) This fourth ground appears to be a euphemism for overcoming community resistance.

The supposed administrative and logistical difficulties asserted in support of the request for a further delay are wholly inadequate, particularly in the light of the long delay already encountered. There is nothing in the record to demonstrate that the redrawing of bus routes could take more than a few days. Even assuming that the second and third reasons (reassignment of teachers and the conversion of classrooms) will involve difficulties of substance for the school boards involved, it is scarcely credible that they outweigh the long overdue promise of equality or that these supposed difficulties cannot be adequately resolved after desegregation has been achieved.\(^\text{139}\) (Footnotes omitted.)

Regarding the fourth ground, the committee attacked a statement by Jerris Leonard that delay was in order because of widespread community resistance to integration and because of the Justice Department's lack of sufficient manpower to enforce an order demanding immediate desegregation.\(^\text{140}\) The

\(^\text{137}\) Id. at 6.
\(^\text{138}\) These were the findings of fact given by the district court in its August 26, 1969, opinion recommending that the government's request for delay be granted by the Fifth Circuit. See text accompanying note 97 supra.
\(^\text{139}\) Brief for Lawyers' Committee for Civil Rights Under Law at 3-4.
\(^\text{140}\) Id. at 5.

The chief of the Justice Department's Civil Rights Division said . . . that if the Supreme Court should rule . . . that schools must integrate immediately throughout the South, the order could not be enforced.

Referring to an appeal that the Court has already agreed to consider on an accelerated schedule, Jerris Leonard, an Assistant Attorney General, declared that "if the Court were to order instant integration nothing would change. Somebody would have to enforce that order."
committee observed that "neither of these arguments is sufficient or even cognizable by the courts" but nevertheless offered "to assist in the recruitment of the services of as many volunteer attorneys as may be needed by the Department for the purpose of enforcement of desegregation orders in these and other cases." (Footnote omitted.)

The other group supporting the petitioners in an amicus curiae brief was the National Education Association [NEA], which also felt that the difficulties asserted in the Finch letter were not "sufficiently significant to justify delay."

The tasks referred to by the HEW witnesses should together require a week or, at most, two weeks to complete. Where a school district could not complete the necessary work in the available time, the district court could have ordered a short delay in scheduled school opening. But there are no educational reasons — presented or existing — which would support a year's delay in effecting desegregation. Educators in the Office of Education concluded, after intensive investigations, that none of the districts here involved have sound reasons for delaying implementation of the plans submitted. There is nothing in this record to suggest that that conclusion was incorrect. (Footnote omitted.)

Supporting the need for quick action, the NEA brief pointed out the "enormous and irreparable injury" that segregated education imposes on black children:

First, there is the psychological damage to the black student, recognized by this Court in 1954, flowing from official maintenance of separate black schools. Second, it is established that black children, particularly in the South, are substantially less able to learn in an environment of racial isolation than in an integrated educational setting. Third, some school districts across the South still provide facilities for black students that are markedly inferior to those provided for whites, thus further reducing the quality of the education afforded black children.

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141 Brief for Lawyers' Committee for Civil Rights Under Law at 5.
142 Id. at 7.
143 Brief for NEA at 9.
144 Id. at 11.
145 Id. at 2.
146 "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority ... that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 3, quoting from Brown v. Board of Educ., 347 U.S. 483, 494 (1954).
147 "The United States Office of Education, in an official report based on a nationwide survey, found that 'the achievement of minority group children increases' in proportion to the level of 'the educational aspirations and backgrounds of fellow students ... .'" Brief for NEA at 3-4 (footnote omitted).
148 Id. at 2.

For example, the Commission on Civil Rights found that, in a sixteen-county area of Alabama, white-attended school buildings and their contents were worth an average of $981.00 per pupil. Those attended by blacks in the same area were worth only $283.00 per pupil. Id. at 4-5 (footnotes omitted).
The NEA lamented the failure of the judicial system to consider the "disastrous" consequences of racial segregation:

These consequences are accruing daily and cannot be reversed. A year's delay means that tens of thousands of black school children will endure another important segment of their education in racial isolation; many of these children will complete their education during that period. It is time that the question of delay be put in these human terms.\textsuperscript{149}

V. Assessments of the Decision

Reactions to Alexander ranged from exuberance to despair.\textsuperscript{150} Senator Edward Kennedy of Massachusetts, for example, saw the decision as timely and vital:

This decision begins to respond to the public clamor for equal treatment and impartial justice for all Americans, by striking down the nebulous phrase "all deliberate speed." Our Constitution does not give sanction to delays in any judicial proceedings. There is no reason why "deliberate speed" should have been allowed to hamper this one.\textsuperscript{151}

Southern reaction was not so enthusiastic:

Most of the Southern reaction mingled anger and resignation. Observed Paul Anthony, executive director of the Southern Regional Council: "A lot of people started to believe that integration could and would be delayed, and now — wham!" Alabama's Attorney General MacDonald Gallion called it the "Black Wednesday" decision. He feared, with only some hyperbole, that in the South "the public school system will become a colored school system." Some black educators in the South gloomily concurred. C. J. Duckworth, executive secretary of the predominantly Negro Mississippi Teachers Association, predicted: "Some districts will abolish public schools."\textsuperscript{152}

Senator Sam Ervin of North Carolina attempted to nullify the "integration now" effect of the opinion by proposing an amendment\textsuperscript{153} to the Civil Rights Act of 1964\textsuperscript{154} that would make freedom of choice the law of the land, notwithstanding the Supreme Court's caveat in Green that such plans may not always meet the test of constitutionality. The amendment would add to the Act a new title that, in Senator Ervin's words,

restores to local school boards their constitutional power to administer the public schools committed to their charge, confers upon parents the right

\textsuperscript{149} Id. at 2-3.
\textsuperscript{150} In the Justice Department's Civil Rights Division, whose attorneys had bitterly disputed the Administration's delay of the Mississippi deadline, exuberance was unrestrained. YES VIRGINIA, THERE IS A CONSTITUTION, read one of the handlettered placards that sprouted on office doors and walls. Jokes about Chief Justice Burger's split with the man who appointed him began to make Congressional rounds. "Did you hear the news?" ran one. "It just came over the wires. Nixon's withdrawn the nomination."

"Haynsworth?"
"No, Burger."

\textsuperscript{152} Time, Nov. 7, 1969, at 20.
to choose the public schools their children attend, secures to children the right to attend the public schools chosen by their parents, and makes effective the right of public school administrators and teachers to serve in the schools in which they contract to serve.\textsuperscript{155}

On the other hand, Senator Hugh Scott of Pennsylvania proposed an amendment\textsuperscript{156} that would add eight million dollars to the appropriations allotted by the House for the funding of title IV of the 1964 Civil Rights Act.\textsuperscript{157} That title makes available federal financial assistance to school districts undergoing the process of desegregation. Senator Scott noted that since the departments of Justice and Health, Education and Welfare “have pledged their full cooperation” in carrying out Alexander’s mandate “to terminate dual school systems at once and to operate now and hereafter only unitary schools,”\textsuperscript{158} there would be an increased need for the additional amount.

At the present time, there are over 1,400 school districts in the 17 Southern and border States that do not have unitary school systems. In the northern and western sections of the country, it is estimated that there are approximately 350 school systems with one or more schools having more than 50 percent minority student population. In light of the Supreme Court’s decision, it is not improbable to assume that all of these school districts could request assistance from title IV during fiscal year 1970.\textsuperscript{159}

The Ervin amendment died in the Senate Judiciary Committee; the Scott amendment was passed by the Senate on November 5, 1969.\textsuperscript{160}

Several ironies surround Alexander and the situation that engendered it. First and most important, perhaps, is the very real possibility that white “backlash” to the decision in the South will promote not new efforts toward integration, but continued efforts toward even greater segregation, at least in those school districts where black students are in the majority.

Both whites and Negroes... in Holmes County, where the suit leading to the High Court order originated, agree that the ruling will lead to less, not more, integration. They say it could even result in a completely segregated school system.

This outlook reflects the fact that Holmes County is more than 70% black. The outnumbered whites have grudgingly gone along with integration until now, but with the Federal Government trying to effect widespread integration, the prospect of white children attending predominantly black schools arise. And few... doubt the outcome: The whites will withdraw into an already flourishing private school system, abandoning the public schools to the blacks.\textsuperscript{161}

Second, the decision no doubt came as a surprise to the Nixon administration and to the many southerners who “believed that Warren Burger’s accession to Earl Warren’s chair would somehow ease judicial pressure for integration.”\textsuperscript{162}

\textsuperscript{156} Id. at S13789.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at S13792.
\textsuperscript{161} Wall Street Journal, Nov. 12, 1969, at 1, col. 1.
\textsuperscript{162} Time, Nov. 7, 1969, at 19.
Indeed, the Court's order to "integrate now" made the new Chief Justice, in Nixon's own words, an "extremist."

The decision for immediate school integration appeared to place all eight Justices of the Supreme Court within President Nixon's definition of an "extreme group."

At his last general news conference on Sept. 26 the President replied to a question about delaying school segregation [sic] with this statement:

"It seems to me that there are two extreme groups. There are those who want instant integration and those who want segregation forever. I believe that we need to have a middle course between these two extremes. That is the course on which we are embarked. I think it is correct." 3

Third, through its obscure policy statement issued on July 3, 1969, concerning school desegregation, 4 through Secretary Finch's August 19, 1969, letter asking for further delays, and through the Justice Department's active endorsement of that request in seeking the Mississippi federal district court's sanction for the delay, "the Nixon Administration brought [the Alexander] ruling upon itself." 5

The July third statement emphasized federal enforcement of school desegregation through litigation by the Justice Department rather than through threat of a withdrawal of federal funds by HEW; 6 Secretary Finch's letter and the Justice Department's action both sought to realize the administration's desegregation goals through the judicial, rather than the administrative, machinery of government. Thus, "the Administration's emphasis on working through the courts — an approach tending to make integration slower and less painful for the South — produced a Supreme Court demand for a faster pace." 7

Finally, there was irony in the Justice Department's uneasy alliance with segregationist lawyers in pressing for the desegregation delay:

After arguing before the Supreme Court last week, Jerris Leonard refused to pose for photographers with a lawyer who had supported his plea.

164 Statement by Robert H. Finch, Secretary of the Department of Health, Education and Welfare, and John N. Mitchell, Attorney General, July 3, 1969, in CIVIL RIGHTS COMM'N REPORT, appendix C. While not purporting to change HEW's "guidelines" — the general uniform standards used by the department to implement title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d to 2000d-4 (1964)—this statement nevertheless announced "new, coordinated procedures" for the federal effort to desegregate public school systems. The statement's ambiguous nature, which so upset some Civil Rights Division lawyers (see note 95 supra), was manifested in the acknowledgement that "[t]his administration is unequivocally committed to the goal of finally ending racial discrimination in schools, steadily and speedily, in accordance with the law of the land," while at the same time refusing to require the completion of desegregation in all districts by a "single arbitrary date" or by means of a "single, arbitrary system." Similarly, the statement said that desegregation plans, to be acceptable, "must ensure complete compliance with the Civil Rights Act of 1964 and the Constitutional mandate" but in the same breath allowed that in some districts "there may be sound reasons for some limited delay," at least where there are "bona fide educational and administrative problems."
166 Under title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d to 2000d-4 (1964), a federal agency extending financial aid under title IV of the Act has the power to cut off the funds flowing to any recipient discriminating against an intended beneficiary of the federal program on the basis of race, color, or national origin. This administrative control over the purse strings has been one of the primary means used by HEW to ensure compliance with the nondiscrimination requirements of title VI. See CIVIL RIGHTS COMM'N REPORT 5-6.
"That is one honor I will decline," said Leonard, who is chief of the Justice Department's Civil Rights Division. His reluctance was understandable. Leonard had just become the first Government lawyer ever to ask the high court for a delay in school desegregation. His unaccustomed ally was John C. Satterfield, of Mississippi, the most prominent segregationist lawyer in the country.168

VI. Conclusion

The phrase "all deliberate speed" was "never intended to be an invitation to indefinite postponement."169 The Supreme Court, by discarding that phrase completely and by demanding immediate compliance with the law, has now "brought an urgent new perspective to the complex and long-delayed process of integration."170 Initially, it is true, Alexander may provoke "confusion, scattered violence and, temporarily at least, some damage to public education in parts of the South."171 Indeed, it might have opened a veritable Pandora's box of administrative and educational headaches for "black" and "white" schools alike.172 Still, the decision was timely and necessary. Such a holding was the only effective way to put an end to the dilatory tactics used by unbending school boards to prevent black children from enjoying their constitutional right to attend an integrated school. "If the Supreme Court has again trod heavily on the domain of federal and local authorities, it is because these authorities have evaded their responsibilities for too long."173

Patric J. Doherty

168 TIME, Oct. 31, 1969, at 77. See note 150 supra. An editorial in the New York Times seized upon the unusual alliance between Leonard and Satterfield as the springboard for a caustic attack on the Nixon administration's vacillating policy on school desegregation: 'The shameful nature of the Government's case for delay was dramatized when the chief of the Justice Department's civil rights division appeared in the Supreme Court as the legal ally of those who pleaded the Southern cause. No comment on the Federal role is necessary beyond the summary by Senator Strom Thurmond. "The Nixon Administration stood with the South in this case," Senator Thurmond said. It will take a deliberate show of forthright leadership to make it clear that the Justice Department as well as the Department of Health, Education and Welfare will "now and hereafter," to borrow from the Court's words, stand with the law of the land, not with political expediency. N.Y. Times, Oct. 31, 1969, at 44, col. 1.


171 Id. at 19-20.

172 In his concurring opinion in Northcross v. Board of Educ. of Memphis, 38 U.S.L.W. 4219 (U.S. Mar. 9, 1970), Chief Justice Burger himself admitted that "the time has come to clear up what seems to be a confusion, genuine or simulated, concerning this Court's prior mandates." Id. at 4220. He rebutted the suggestion that the Court had failed to define a unitary school system by noting that "[i]n Alexander . . . we stated, albeit perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school because of race or color.'" Id. He then expressed his belief that the Court ought soon "resolve some of the basic practical problems" that the Alexander mandate to "integrate now" had precipitated: [A]s soon as possible . . . we ought to resolve some of the basic practical problems . . . including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court. Id. See also U.S. News & World Rep., Nov. 10, 1969, at 45 for a discussion of the difficulties involved in the enforcement of the Alexander order.