THE WHITE HOUSE

WASHINGTON

February 15, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Justice Report on S. 139 (Anti-Busing Bill)

OMB has asked for our views by close of business today on the above-referenced proposed Justice Department report. The 26-page letter to Strom Thurmond was prepared by the Office of Legal Counsel. It outlines the concerns of the Department with respect to S. 139, the "Public School Civil Rights Act of 1983," an anti-busing bill. S. 139 contains numerous Congressional findings concerning the pernicious effects of busing, prohibits lower federal courts from ordering busing, and permits reopening of previously-entered busing decrees, which are to be overturned unless the court makes several findings concerning currently existing intentional segregation. The bill states that it is based on Congress's Article III authority over the inferior federal courts and its power pursuant to § 5 of the Fourteenth Amendment.

The Justice report concludes that courts would defer to the legislative findings of fact, but would not defer to conclusions of law expressed as findings of fact in the bill. With respect to the prohibition on federal busing orders, the Department concludes that Congress only possesses power to impose such a limitation if effective alternative remedies for unconstitutional segregation exist. If a court in a particular case determines that busing is necessary to remedy intentional racial segregation, it will strike down the prohibition in the bill preventing it from ordering such relief. The report objects to the authorization to reopen existing busing decrees on policy grounds, and concludes that this provision is unconstitutional to the extent it authorizes state courts to re-examine federal court orders.

The analysis in the Justice report is largely based on the even lengthier May 6, 1982 letter sent by the Attorney General to Representative Rodino, concerning a similar bill. I spent several months in my previous incarnation disputing Ted Olson's approach to these issues; the May 6 Attorney General letter signalled Olson's victory in the extended internal debate. Olson reads the early busing decisions as

holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation.

I do not agree with his reading of the early cases. The holdings of those cases stand for the proposition that busing is permissible, and that state statutes limiting the authority of federal courts to order busing are unconstitutional. A far different question is presented when Congress attempts to limit the authority of the federal courts. Congress has authority under § 5 to enforce the Fourteenth Amendment, and can conclude -- the evidence supports this -- that busing promotes segregation rather than remedying it, by precipitating white flight. Even if Olson's reading of the 13-year old early busing cases is correct, we have now had over a decade of experience with busing. If that experience demonstrates that busing is not an effective remedy, Congress can legislate on the basis of that experience. Olson's analysis treats stray dicta in the old cases as binding despite experience to the contrary. I would conclude that it is within Congress's authority to determine that busing is counterproductive and to prohibit federal courts from ordering it. Our own litigation policy is based on such a view, and it strikes me as more than passing strange for us to tell Congress it cannot pass a law preventing courts from ordering busing when our own Justice Department invariably urges this policy on the courts.

As noted, however, Olson's view has already gone forward as the Administration view, and it would probably not be fruitful to reopen the issues at this point.

Attachment