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The Helms Amendment: A Congressional Attempt to Restrict Mandatory Busing in Desergregation Cases

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THE HELMS AMENDMENT: A CONGRESSIONAL ATTEMPT TO RESTRICT MANDATORY BUSING IN DESEGREGATION CASES

I. Introduction

Congress, on a yearly basis, appropriates money to the judicial and executive branches of government for use in performing their functions. The 1982 appropriations bill for the Judiciary and the Departments of Justice, State, and Commerce contains an anti-busing amendment (hereinafter referred to as the Helms Amendment).[1] The controversial enactment reads:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring any sort of action to require directly or indirectly the transportation of any student to a school other than to the school which is nearest the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.[2]

As indicated by an ardent supporter of the Amendment, "this language is clear and precise. . . . It means that the Justice Department is not to press a court to order mandatory school busing to achieve racial balance."[3]

Mandatory busing is a highly controversial issue. There is distinct disagreement within American society as to the utility

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1. Amendment 96 to S. 951, 97th Cong., 1st Sess., 127 CONG. REC. S6602 (daily ed. June 19, 1981). Debate on this Amendment, also known as the Johnston Amendment, was closed on September 16, 1981. 127 CONG. REC. S9727 (daily ed. Sept. 16, 1981). Representative Collins of Texas has introduced an identical amendment in the House. H.R. 3462 § 13, 97th Cong., 1st Sess., 127 CONG. REC. H2796 (daily ed. June 9, 1981).

Neither S. 951 nor H.R. 3462 have been voted on as of publication, however, similar legislation was passed by the 96th Congress but was subsequently vetoed by President Carter. H.R. 7584, 96th Cong., 2d Sess., 126 CONG. REC. S14306 (daily ed. Nov. 12, 1980). Given the current political atmosphere, this legislation can be expected to be passed and signed into law in 1982.

2. S. 951, *as amended*, 97th Cong., 1st Sess., 127 CONG. REC. 56602, (daily ed. June 19, 1982).

3. 126 CONG. REC. S14306 (daily ed. Nov. 12, 1980) (remarks of Senator S. Thurmond).

of busing as a desegregation remedy. In addition to arousing emotional differences of opinion among the people with respect to the busing issue, the Helms Amendment raises certain constitutional questions. As enacted, this legislation may offend the traditional separation of powers doctrine. Specifically, the Helms Amendment may be an unconstitutional infringement by Congress on the Executive and Judicial branches of the federal government. Furthermore, the Helms Amendment may violate certain equal protection guarantees contained in the Constitution. If found to dilute these equal protection rights, this enactment would be an improper use of Congressional authority.

This comment will explore the constitutional questions posed by the Helms Amendment and focus upon the power of Congress to prohibit the Executive branch of government from seeking an available remedy in desegregation cases. The analysis will not attempt to resolve the debate regarding the use of mandatory busing. Rather, it will emphasize Congressional use of the appropriations function to restrict the remedial powers of the other branches of government. In order to examine these issues it is necessary to begin with a brief discussion of the desegregation decisions from which the busing remedy evolved.

II. THE BROWN DECISION AND ITS PROGENY

The adverse impact of racial segregation on the education of minority school children was first recognized in *Brown v. Board of Education.*[4] In this landmark decision, the Court held the separate-but-equal doctrine of *Plessy v. Ferguson*[5] unconstitutional. The Court found that segregation deprived the Black children of equal educational opportunities, regardless of the equality of the physical facilities.[6] In speaking for the majority, Chief Justice Warren stated:

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4. 347 U.S. 483 (1954).

5. 163 U.S. 537 (1896). *Plessy* involved the separation of races, not in education, but in transportation. The case, however, became the cornerstone for the adoption of the "separate-but-equal" doctrine in the field of public education. *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); Berea College v. Kentucky, 211 U.S. 45 (1908); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

6. 347 U.S. at 493.

> To separate [the minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[7]

In light of this finding, the Court concluded that the separate-but-equal doctrine had to be abolished in the area of public education. "Separate educational facilities were inherently unequal."[8]

The following year, the Supreme Court ruled that the primary responsibility for desegregation of the dual school systems lies in the hands of the local school boards.[9] The majority in *Brown v. Board of Education (II)*[10] reasoned that "[f]ull implementation of these constitutional principles [would] require solution of varied local school problems."[11] Therefore, the local boards would be responsible for desegregating the schools, with the local district courts overseeing the implementation process. The Court directed the school boards to "make a prompt and reasonable start toward full compliance" with the earlier *Brown* decision.[12] Desegregation was to occur "with all deliberate speed."[13]

The aftermath of the *Brown* decision brought with it massive resistance in the South. The Court remained silent about the implementation process for several years.[14] "Enforcement of the desegregation requirment was left largely to the lower court litigation - and to the political arena".[15] During this time period, the desegregation efforts being made by many local school boards were less than significant. Impatient with this inactivity, the Supreme Court took charge of the situation in 1964.[16]

> The time for mere"deliberate speed" has run out, and that phrase can no longer justify denying . . . school chil-

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7. *Id.* at 494.
8. *Id.* at 495.
9. Brown v. Board of Educ., 349 U.S. 294 (1955).
10. *Id.*
11. *Id.* at 299.
12. *Id.* at 300.
13. *Id.* at 301.
14. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 766 (10th ed. 1980).
15. *Id.*
16. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

> dren their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia.[17]

The duty of the school boards to eliminate segregation became immediate. Various schemes were devised by the boards in an attempt to comply with the desegregation mandate, but many of these programs were struck down by the Court. Among these unacceptable plans were state preference laws,[18] neighborhood school plans,[19] "freedom of choice" plans[20], and "free transfer plans."[21]

While the aforementioned desegregation plans were being rejected as constitutionally unacceptable, one particular plan withstood strong opposition. In *Swann v. Charlotte-Mecklenburg Board of Education*,[22] the Supreme Court supported the use of student transportation, stating that mandatory busing was an acceptable tool in the desegregation process.[23] Since *Swann*, courts have uniformly upheld the constitutional validity of mandatory busing. Therefore, not only is bus transportation an integral part of the public education system,[24] it is a critical factor in disestablishing the traditional dual school

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17. *Id.* at 234.

18. *See* Kelly v. Board of Educ. of City of Nashville, 159 F. Supp. 272, 277-78 (D. Tenn. 1958). The court struck down a plan which authorized local school boards to provide separate schools for white and black children whose parents voluntarily elected that their children attend schools with members of their own race.

19. Neighborhood school plans called for assignment of students to the school nearest their place of residence which provides the appropriate grade level and type of education. They were deemed unconstitutional if an alternative plan would result in a far greater degree of desegregation. Valley v. Rapides Parish School Bd., 434 F.2d 144 (5th Cir. 1970). Furthermore, a school board may not use a neighborhood school policy as a mask to perpetuate racial discrimination. *See* Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 522 (C.D. Cal. 1970).

20. Under the freedom of choice plan, each pupil could annually choose between the areas' predominately black or predominately white schools. Those pupils who did not make a choice were assigned to the school they previously attended. Freedom of choice plans were declared constitutionally unacceptable where alternative desegregation methods were available. *See* Green v. County Bd. of Educ., 391 U.S. 430, 441 (1968). *See generally* Raney v. Board of Educ., 391 U.S. 443 (1968); United States v. School Dist. No. 151, 404 F.2d 1125 (7th Cir. 1968).

21. Like freedom of choice plans, free transfer plans permitted children to freely transfer from their assigned school to another school. These plans were deemed constitutionally impermissible where more effective means to achieve desegregation were possible. United States v. School Dist. No. 151, 404 F.2d 1125, 1135 (7th Cir. 1968).

22. 402 U.S. 1, 30 (1971).

23. *Id.*

24. *Id.* at 29.

system.[25]

Numerous years have passed since the *Brown* Court mandated the desegregation of the public school system. As the Supreme Court has recently noted, however, the effects of state imposed segregation are still present.[26] Until all remnants of prior de jure segregation[27] have been eliminated, local school boards are under a constitutional obligation to disestablish the dual school system.[28]

III. The Executive and Judicial Branches' Role In Desegregation Cases

The Executive and Judicial branches of the federal government have both encouraged and enforced the implementation of appropriate transportation schemes to alleviate segregation. The Helms Amendment, however, appears to hinder such action by restricting the funds necessary for enforcement of busing policies. Since such restrictions will trigger a constitutional challenge to the Helms Amendment arising out of Congress' encroachment on the remedial powers of the Executive and Judicial branches, it is important to analyze the effect of the amendment on these governmental departments. Before exploring this impact, however, this comment will briefly examine the role of the Judiciary and Justice Department in the desegregation effort.

A. *The Role of the Judiciary in Desegregation*

Since the *Brown* decision, the federal courts have taken charge of overseeing the desegregation process. Local school boards became answerable to the district courts regarding their integration plans. Any violations of the *Brown* mandate, as well as any procrastination on the part of local school officials, were settled in the courtroom. As a result, the federal courts have been the instrumental force in fashioning remedies for non-compliance with the desegregation order. In fash-

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25. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 473 (M.D. Ala. 1967).

26. Columbus Bd. of Educ. v. Pennick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

27. *De jure* segregation is racial separation of people as a direct result of state-imposed segregation, rather than a result of economic and geographical factors or "racially neutral official acts." Columbus Bd. of Educ. v. Pennick, 443 U.S. 449, 456 (1979).

28. *Id.* at 458.

ioning judicial remedies, the courts have recognized the importance of student transportation. As the court noted in *Swann*, the remedial technique of requiring busing of public school students for purposes of racial desegregation is within a court's power to provide equitable relief.[29]

Since *Brown II*, there have been attempts by Congress to limit the ability of the Judiciary to mandate busing as a remedy.[30] At times, the impetus to outlaw forced busing came from the Executive branch.[31] Both proposed and enacted legislation demonstrate attempts by the Executive and Legislative branches of government to restrict the court's power in the desegregation area. To date, this legislation has not succeeded in limiting the court's ability to order busing in school desegregation cases. The Helms Amendment represents one more attack, albeit an indirect attack, on the court's remedial powers. Before this congressional enactment can be labeled successful in this regard, it must withstand strong constitutional challenges.

B. *The Role of the Justice Department in Desegregation*

The present role of the Justice Department in school desegregation is: (1) to monitor and enforce existing Court orders requiring student desegregation in cases in which the United States is a party; (2) to defend legal challenges to the power and authority of the HEW[32] to promote non-discrimination in federally funded programs;[33] (3) to enforce statutory prohibitions against discrimination in employment by public

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29. 402 U.S. at 30.

30. *See, e.g.*, Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 93-380, 88 Stat. 484, 517 (1974).

31. *See* H.R. 13916, 92d Cong., 2d Sess. §3(a) (1972); H.R. 13915, 92d Cong., 2d Sess. (1972). These bills were sent to Congress by President Nixon. One bill called for a moratorium on additional student transportation, with all existing court-ordered busing stayed. The other bill provided that no court implement a desegregation plan that would increase the average number of students transported over the preceding year's average.

32. HEW has been split into the Department of Health and Human Services and the Department of Education. However, the Reagan administration has cast doubt on this scheme and because the relevant cases refer to HEW, this comment will use HEW.

33. The court's decision in Brown v. Califano, 455 F. Supp. 837 (D.D.C. 1978), *aff'd*, 627 F.2d 1221 (D.C. Cir. 1980), has subsequently limited HEW's enforcement powers in desegregation cases. For a more detailed discussion, *see* text accompanying notes 43-58 *infra*.

and private educational institutions; (4) to pursue additional cases involving de jure segregation of students; (5) to enforce the rights of non-English speaking students to participate in the benefits of public education; (6) to enforce equal opportunity in housing (often a most necessary precursor of school desegregation); and (7) to investigate and prosecute instances of violent interference with school desegregation.[34]

The priority of the Education Section of the Justice Department is to monitor desegregation orders in an effort to insure compliance by the school boards. Often, this duty includes the monitoring of court-ordered transportation plans, with the Justice Department having the option of using the judicial process to force compliance with the order.[35] As stated in *Brown v. Califano*,[36] "[t]his option is especially meaningful, given the Departments' historic role in civil rights enforcement. . . ."[37]

The Helms Amendment directly abolishes this particular enforcement option. Its effect is to remove the Executive Department from the area of mandatory busing. Rather than attack the courts' power to order busing, Congress is attempting to eliminate student transportation by restricting the primary enforcement agency's ability to seek busing. This indirect attack on forced busing through the appropriations function is constitutionally valid only if Congress would have the power to directly abolish the busing remedy.[38]

IV. The Constitutionality Of The Helms Amendment

A. *An Infringement On The Notion of Separation Of Powers.*

The Helms Amendment does not make mandatory busing illegal, nor does it directly limit the court's ability to order student transportation. This legislation merely prohibits the Justice Department from seeking the busing remedy in school

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34. Ross, *The Role of the Justice Department in School Desegregation*, 19 How.L.J. 64 (1975).

35. *Id.* at 64.

36. 627 F.2d 1221 (D.C. Cir. 1980).

37. *Id.* at 1232.

38. 126 Cong. Rec. 14309 (daily ed. Nov. 12, 1980) (Senator Weicker quoting a letter from Daniel Pollitt, a professor at the University of North Carolina at Chapel Hill). *See, e.g., Pollitt, Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on Busing Orders*, 50 N.C. L. Rev. 809 (1972).

desegregation cases. Thus, the major issue is whether Congress can use the "power of the purse" to restrict the Justice Department from seeking and enforcing the busing remedy in federal courts.

The Helms Amendment seems to represent a dangerous encroachment on the Executive and Judicial branches of the federal government. The Amendment restricts the ability of the courts to review constitutional violations and fashion appropriate remedies.[39] In addition, this enactment restricts the prosecution of discrimination cases by the appropriate arm of the Executive Branch; namely the Justice Department.[40]

1. *Infringement Upon The Judiciary*

The Helms Amendment does not expressly affect the Judicial Branch of government. It does, however, significantly reduce the power of the courts to implement desegregation by removing an important remedy from judicial cognizance. If Congress cannot directly limit the court's ability to proscribe the busing remedy, any indirect encroachment upon this remedial power is similarly improper.[41]

Since the Supreme Court decision of *Marbury v. Madison*,[42] this country has accepted the notion that the Judiciary is the interpreter of the Constitution. It was in the performance of this function that the courts fashioned the busing remedy. Congress, by this enactment, may be unconstitutionally encroaching on the interpretive powers traditionally reserved to the courts.

Congressional ability to limit busing depends in large part upon the powers conferred to the Legislature under Section 5 of the fourteenth amendment. Section 5 grants Congress the power to enforce, by appropriate legislation, fourteenth amendment guarantees. The courts have found that the availability of a desegregated school system is guaranteed under the fourteenth amendment, and that busing is the only adequate means of assuring such guarantees. In light of this finding it would appear that enactment of the Helms Amendment not only falls outside Congress' Section 5 powers, but also infringes upon the Judiciary's remedial function. Limits upon

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39. 126 CONG. REC. 14309 (daily ed. Nov. 12, 1980)(remarks by Senator Weicker).

40. *Id.*

41. *Id.*

42. 5 U.S. (1 Cranch) 137 (1803).

Congressional action under Section 5 will be discussed later in this comment.

2. *Infringement Upon The Executive Branch*

a. *The Esch and Eagleton-Bidden Amendments.* Two recent Congressional enactments attempt to limit the enforcement powers of an executive agency in the desegregation area. The statutes are directed at the Department of Health, Education, and Welfare (HEW), the agency primarily charged with enforcing Title VI of the Civil Rights Act[43] in the field of education. These statutory enactments, commonly known as the Esch[44] and Eagleton-Biden[45] Amendments, prevent HEW from relying on Title VI to order the implementation of desegregation plans that require the busing of students to schools other than those closest to their homes.[46]

The constitutionality of these amendments was at issue

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43. 42 U.S.C. §2000(d) (1976). Title VI prohibits discrimination on the basis of race, color, or national origin under any program receiving federal financial assistance.

44. The Esch Amendment was enacted as §215(a) of the Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 517, 20 U.S.C. §§ 1701-1721 (Supp. V 1975). It provides:

> No court, department, or agency of the United States shall . . . order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

20 U.S.C. § 1714(a) (Supp. V 1975). The amendment's broad language was narrowed, however, by another provision of the 1974 Act which reads:

> [T]he provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

20 U.S.C. § 1702(b) (Supp. V 1975).

45. The Eagleton-Biden Amendment was enacted as part of Pub. L. No. 95-205, 91 Stat. 1460 (1977). It provides:

> None of the funds contained in this Act [HEW's appropriation] shall be used to require, directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, in order to comply with Title VI of the Civil Rights Act of 1964. For the purposes of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition described in this section does not include the establishment of magnet schools.

Id.

46. Brown v. Califano, 455 F. Supp. 837, 838 (D.D.C. 1978), *aff'd*, 627 F.2d 1221 (D.C. Cir. 1980).

before a United States District Court in *Brown v. Califano*.[47] There the plaintiffs asserted that the statutes violated their equal protection guarantees. The court found that HEW had two enforcement options in cases where publicly-funded school systems were not integrated.[48] The first option involved a decision by the HEW to terminate public-funding of any school system which failed to comply with busing orders.[49] Although this funding decision was reviewable by the courts, it was the result of an Executive Department initiative. This provision gave HEW the power to implement busing orders independently of the Legislative and Judicial branches of the government.

The second enforcement option available to HEW was to refer desegregation cases to the Department of Justice.[50] Upon referral, the Justice Department could initiate a suit for relief designed to insure compliance with the desegregation mandate.[51]

In *Califano*, the plaintiffs contended that HEW's unimparied ability to insure equality in education through the fund termination process was a constitutional necessity and, therefore, the Esch and Eagleton-Biden amendments were unconstitutional.[52] The court, however, found that neither the Esch nor the Eagleton-Biden amendments prevented HEW from pursuing the referral alternative where, in the agency's judgment, transportation is warranted.[53] This finding was critical to the court's holding. The majority opinion clearly emphasizes that the constitutional challenge to these statutes falls short because of the referral alternative. Specifically, the court stated:

> [T]he fact remains that the Esch and Eagleton-Biden Amendments leave untouched the litigation enforcement option that permits the Civil Rights Division of the Department of Justice, upon referral of a case from HEW, to pursue legal action and obtain the full measure of appropriate relief, including student transportation if war-

47. *Id.*
48. *Id.* at 839.
49. 45 C.F.R. §§ 80.8-.10 (1977).
50. 45 C.F.R. § 80.8(a) (1977).
51. 28 C.F.R. § 50.3 (1977).
52. 455 F. Supp. at 840.
53. *Id.*

> ranted, against the offending recipients. In short, contrary to the situation presented in *Swann*, the statutes involved in the case at bar, do not qualify as "flat" or "absolute prohibitions" against the use of *needed transportation remedies*. While they remove one setting out of which busing orders may originate, they quite clearly preserve student transportation as an available method of insuring equality in education.[54]

The court noted that these amendments worked a significant adjustment in the ways in which the Executive branch may go about insuring equal opportunities in education.[55] However, since neither amendment operated by its express terms to foreclose the availability of remedies necessary to guarantee constitutional rights, the challenged statutes were upheld by the court.[56]

The importance that the court placed upon the ability of the Department of Justice to litigate in these matters cannot be overemphasized. In upholding the constitutionality of the amendments, Judge Sirica warned that:

> Should further proceedings in the case reveal that the litigation option left undisturbed by these provisions cannot, or will not, be made into a workable instrument for effecting equal . . . educational opportunities, the Court will entertain a renewed challenge . . . on an as applied basis.[57]

On appeal, the circuit court reaffirmed Judge Sirica's well-reasoned opinion.[58] The appellate court noted that the lower court's finding of an alternative *federal* avenue to effect transportation remedies saved the amendments from constitutional challenge on their face.[59]

b. *Applying Brown v. Califano to the Helms Amendment.* Under the *Califano* rationale, the Helms Amendment appears to be an ill-fated attempt by Congress to eliminate the last available avenue open to the executive branch with respect to the busing remedy. By enacting this amendment,

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54. *Id.* at 841 (emphasis added).

55. *Id.* at 843.

56. *Id.* It is important to note that the constitutional attack on these provisions, as well as the court's holding in the case, related only to the facial constitutionality of the amendments. The court did not reach the issue of whether the amendments were unconstitutional in effect.

57. *Id.* (emphasis omitted).

58. 627 F.2d 1221 (D.C. Cir. 1980).

59. *Id.* at 1234.

Congress has completed a two-step process that results in the eradication of all federally initiated busing orders. It is interesting to note that the Legislature has accomplished this sequential elimination without addressing the real issue of whether busing should continue to be an acceptable remedy for school desegregation.

The two-step process used by Congress involved three amendments, all enacted as floor amendments to appropriations bills. The first step was the enactment of the Esch and Eagleton-Biden Amendments, discussed above; the second, and final, step was the enactment of the Helms Amendment.

The Esch and Eagleton-Biden Amendments prohibited the HEW from seeking the busing remedy through the fund-termination process, a previously effective method of insuring compliance with *Brown I and II*. While prohibiting this action on the part of HEW, these amendments left untouched the power of HEW to refer desegregation cases to the Department of Justice for enforcement through the litigation process.[60] Due to this available alternative, the amendments withstood constitutional attack.[61]

With the enactment of the Helms Amendment, Congress will complete the second step of the anti-busing scheme. By prohibiting the Justice Department from seeking the busing remedy, the executive branch of government becomes powerless to protect the rights of those deprived of equal protection in certain school desegregation cases.

The enactment of these anti-busing amendments creates an interesting phenomenon. With respect to busing, the only remedy of the executive branch left untouched is the ability of HEW to transfer desegregation cases to the Department of Justice for litigation. However, this is an empty alternative, for once the case is transferred, the Justice Department is foreclosed from participating in any suit which seeks the busing remedy. Therefore, through a well-timed, indirect, two-step process, Congress has accomplished what it may not have had the power to do directly; that is, forbid the Executive Branch of the federal government from seeking the busing remedy in school desegregation cases.

Should the Helms Amendment be allowed to stand, the

60. 455 F. Supp. 837.
61. *Id.*

fears of Judge Sirica will be realized; namely, this enactment will have "the practical effect of taking the core out of the government's overall Title VI enforcement program . . . ."[62] Furthermore, not only is the Justice Department restricted under the Helms Amendment, but the Judiciary's remedial power in desegregation cases is also severely diminished.[63] Therefore, under the Court's reasoning in *Califano*[64], this legislation appears to be an unconstitutional violation of the traditional separation of powers doctrine.

B. *Violation of Equal Protection under the Laws.*

Freedom from segregated school systems is a constitutional right.[65] As noted by Justice Powell in his concurring opinion in *Keyes v. School District No. 1*:[66]

> Although nowhere expressly articulated in these terms, I would now define it as a right, derived from the Equal Protection Clause, to expect that once a State has assumed responsibility for education, local school boards will operate integrated school systems within their respective districts. This means that school authorities must make and implement their customary decisions with a view toward enhancing integrated school opportunities.[67]

In *Fullilove v. Klutznick*,[68] the Court stated that Congress could not use its spending power in a manner that vio-

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62. *Id.* at 843.

63. The court's power is restricted in that it will be denied judicial scrutiny of those cases in which the Justice Department would ordinarily seek the busing remedy. Senator Weicker states:

> Let me ask, who is it who is going to enforce the Constitution of the United States? Who is it that is going to bring to the recognition of the judiciary the inequities of life which are violations of the Constitution and of law? Who is charged with that responsibility if indeed it is not the Justice Department of the United States?

126 CONG. REC. S14308 (daily ed. Nov. 12, 1980) (remarks of Senator Weicker).

64. 455 F. Supp. at 837.

65. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Bd. of Educ., 391 U.S. 430 (1968).

66. 413 U.S. 189 (1973).

67. *Id.* at 225-26 (Powell, J., concurring in part and dissenting in part) (emphasis omitted).

68. 448 U.S. 448 (1980). This case involved a constitutional challenge to a requirement in a congressional spending program. The program provided that 10% of federal funds granted for local public works projects must be used by the states to procure services and supplies from minority businesses.

lates equal protection.[69] Therefore, to be sustained as a proper exercise of Congressional authority, the Helms Amendment must withstand an equal protection argument. Upon such a challenge, Congress will base the legitimacy of this legislation upon Section 5 of the fourteenth amendment. The Helms Amendment must fall within the powers granted to Congress under that section.

Section 5 of the fourteenth amendment "is a postive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[70] "By including Section 5, the draftsmen [of the Constitution] sought to grant to Congress, [with respect to the fourteenth amendment,] the same broad powers contained in the Necessary and Proper Clause."[71] Thus, the purpose of the legislation must be to promote a particular, legitimate and constitutional end.

> [L]et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.[72]

To be constitutional under Section 5, the Helms Amendment must be found to enforce the guarantees of the Equal Protection Clause. It appears that this legislation cannot be construed to accomplish this end. Rather than operating to secure the guarantee of equal protection under the laws, the Helms Amendment serves to restrict a constitutional right, i.e., the right to be free from the effects of a dual school system.[73] In restricting the use of a particular remedy in desegregation cases, Congress is diluting the rights of minority school children to equal protection of the laws. In some cases, the effect is not only to dilute those rights, but to actually remove from judicial review what may prove a necessary remedy to eliminate illegal discrimination.[74]

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69. The Court based its decision on the equal protection component of the due process clause of the fifth amendment. *Id.* at 480-92.

70. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

71. *Id.* at 650.

72. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

73. *See* notes 65-67 *supra* and accompanying text.

74. 126 CONG. REC. S14309 (daily ed. Nov. 12, 1980) remarks by Senator

In writing for the majority in *Katzenbach v. Morgan*,[75] Justice Brennan articulated the limits upon Congress when enacting legislation under Section 5:

> . . . [Section] 5 does not grant Congress power to exercise discretion . . . and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of that Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.[76]

Congress' attempt to limit the federal court's power to extend to racial minorites constitutionally protected rights places special burdens on those minorities seeking to implement constitutional guarantees and, thus, dilutes their equal protection rights.[77] Since racial classifications are a suspect classification,[78] a court must strictly scrutinize such Congressional action and uphold it only if supported by a compelling state interest.[79]

In light of the limitations of Congress' power to dilute equal protection rights, the Helms Amendment may be unconstitutional upon strict scrutiny. Given the frequency with which school boards have felt the need to adopt transportation plans to eliminate segregation, it can hardly be said that this amendment does not hinder desegregation. This enactment completely restricts the principal enforcement agency in this area from seeking a major, if not sole, remedy for a constitutional violation. It is difficult to imagine a more profound dilution of equal protection rights.

Racially separate educational facilities are inherently unequal.[80] To the extent that segregation exists, the fourteenth

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Weicker.

75. 384 U.S. 641 (1966). *Morgan* involved a constitutional challenge to § 4(e) of the Voting Rights Act of 1965. This section provided that no person who has successfully completed the sixth primary grade in Puerto Rico could be denied the right to vote because of an inability to read or write English. Plaintiffs contended that this federal statute prohibited the enforcement of New York election laws, which required an ability to read and write English in order to meet voting eligibility requirements.

76. *Id.* at 651-52, n.10 (1966).

77. J. Nowak, HORNBOOK ON CONSTITUTIONAL LAW 695 (1978) [hereinafter cited as Nowak].

78. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

79. Nowak, *supra* note 77, at 695.

80. 347 U.S. 483, 495 (1954).

amendment allows and requires appropriate remedies, including transportation.[81] The Helms Amendment effectively terminates the busing remedy. Although the legislation does not restrict the courts from ordering busing, the practical effect of preventing the Justice Department from enforcing busing plans is to abolish the remedy. Therefore, what remains is a right without a remedy. The deprivation of a constitutionally-based remedy is the same as a deprivation of a constitutional right.[82]

V. CONCLUSION

Since the *Brown* decision in 1954, the courts have attempted to insure that minority students are guaranteed the right to equal protection of the laws in the area of public education. In so doing, they have confronted long-standing patterns of discrimination among the racial elements of American society. Nonetheless, the Judiciary, along with Congress and the Executive Branch have attempted to insure equal educational rights for all citizens.

The Helms Amendment represents an encroachment upon the executive and judicial branches of government. Specifically, it removes the executive branch from any litigation that involves student transportation and thus removes the busing issue from judicial review.

Section 5 of the fourteenth amendment grants Congress the power to enact legislation that enhances equal protection guarantees. The Helms Amendment, however, does not appear to fall within the remedial powers conferred upon Congress by this section. Rather than enhancing equal protection rights, this amendment dilutes the rights of minority students to attend integrated schools. If the courts make such a finding, the Helms Amendment will probably be held unconstitutional.

Today, almost three decades since the *Brown* decision, the words of Chief Justice Warren still ring true:

> Today, . . . education is perhaps the most important function of state and local governments. Compulsory school

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81. *See* United States v. Watson Chapel School Dist., 446 F.2d 933, 937 (1971).

82. 126 CONG. REC. S14310 (daily ed. Nov. 12, 1980) (remarks by Senator Kennedy). The Senator referred to mandatory busing as a "constitutional-based" remedy because it is "an effective and appropriate remedy for a constitutional violation."

> attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . In these days . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available on equal terms.[83]

Mandatory busing may not be the solution to discrimination in education. Elimination of a remedy that offers even the slightest positive contrication, however, without offering a more productive alternative, is a step backward in the struggle for equal educational opportunity.

Thomas D. Lawless

83. 347 U.S. 483, 493 (1954).