Post 9/3/71

Much Ado About Busing

"Clear as a bell"—that is the way we characterized Chief Justice Burger's opinion for a unanimous Supreme Court in the Swann case in April—the ruling which held that lower federal courts may authorize a considerable measure of busing, non-contiguous zoning and related procedures for the purpose of overcoming the effects of past official school segregation. What was utterly clear, in our view, was that the court was *not* requiring the use of these techniques for the purpose of creating racial balance; it was upholding their use as an instrument of desegregating school systems that had formerly been segregated by law. This perception did not require an enormous amount of interpretative skill on our part—the Chief Justice made it very plain in the rulings that came down that day:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse."

And again:

> "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy."

In our estimation, the Chief Justice did no more than restate these principles in his comment the other day on a school case in Forsyth County, North Carolina. While refusing Forsyth County school officials a stay they were seeking (in his capacity as Circuit Justice), Mr. Burger was careful to point out that his turning down of their plea on circumstantial and procedural grounds in no way amounted to an endorsement of certain views taken by the district judge in their case—views that may or may not misread Swann but which suggested to the Forsyth County Board of Education that in consequence of the Swann decision, it was obliged to bus its way to "racial balance." The Chief Justice did not comment on any of the other Southern (or Northern) busing cases now working their way through courts.

There may have been valid reasons for the Chief Justice to restate these fairly obvious facts, to enunciate once again exactly what the court had and had not said in its so-called busing decision last spring, although we are not exactly sure what they were. It is unusual for a justice to write several pages dealing with the merits of a lower court's judgment when he is refusing to stay its execution and the impact of the Chief Justice's words is to question the correctness of that judgment even though he took pains to say the record was too skimpy to permit a definitive conclusion. But be that as it may, the most troubling aspect of the Chief Justice's opinion is the interpretation that may be placed on it by those who oppose busing for any purpose. Because he emphasized only the limits of the Swann decision his words are likely to be used in an effort to persuade lower court judges to do less than that decision actually requires.

This latter point is also applicable, unfortunately, to the White House's repeated forays into the subject. Mr. Nixon and his spokesmen have unceasingly restated their opposition to mandatory busing for the purpose of "achieving racial balance" as if they were opposing something that has been authorized by statute or Supreme Court rulings. The President and his advisers must know as well as anyone else that the overwhelming preponderance of busing schemes now being tested in the courts as well as those which have been put into effect are not the result of court orders to bus for the purpose of achieving "racial balance." Rather they are schemes that come within the meaning of the Swann ruling that certain such measures are permissible and may even be necessary as a means of erasing the vestiges of the old, mainly Southern *de jure* segregated school systems.

After his meeting with the President the other day, HEW Secretary Elliot Richardson indicated that he and Mr. Nixon were in accord on busing—and then went on to restate their position. It is, again, essentially no more and no less than federal statutes and the Swann ruling prescribe. By implying that it somehow *is* different, however, the White House has managed, over time, to undermine public confidence in those busing schemes which have been ordered, to suggest that they are being undertaken in the name of furthering racial balance for its own sake, not in the name of completing the process of desegregation. It is a clever ploy, but has not done much for public understanding. And it has done real harm to those school officials and community leaders in the South who are trying—at some social and political risk to themselves—to gain public acceptance and support of what the courts have authorized, of what is bound to come about.