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The Chief Oversteps

Chief Justice Warren E. Burger has made a little-noticed and most curious move into the political arena. For years, Washington, D. C., has been embroiled in a controversy over a public-works project known as the Three Sisters bridge. The highway lobby persuaded Congress in 1968 to order the bridge to be built, but strong community resistance has fortunately prevented construction thus far.

Last October, the United States Court of Appeals ordered Secretary of Transportation Volpe to consider certain issues in the case such as the proposed use of park lands along the Potomac. The Nixon Administration appealed this sensible decision but recently the Supreme Court denied certiorari, that is, refused to hear the case, thus allowing the Court of Appeals decision to stand.

Such denials of certiorari are routine and are issued in behalf of the entire Court. What is most unusual is that Chief Justice Burger issued a personal concurring opinion explaining why he, at least, had rejected the appeal. He chided the Court of Appeals because it had "unjustifiably frustrated the efforts of the executive branch to comply with the will of Congress." He was only opposed to a Supreme Court review, he continued, because it would take too long—"almost a year."

Then the Chief Justice concluded with this observation: "Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the Three Sisters project, *even to the point of limiting or prohibiting judicial review of its directives." (italics added).*

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Even if read merely as a comment on this bridge dispute, the Chief Justice's remarks are gratuitous and unusual. Much worse, however, they can be read as a parable on the school busing controversy.

President Nixon opposed a constitutional amendment against busing because it would take too long—"almost a year" or longer. Mr. Nixon has instead sent to Congress a bill which would strip the Federal courts of their power to order a particular remedy—busing—to carry out the mandate of the Fourteenth Amendment. The Constitution does give Congress the power to define the appellate jurisdiction of the courts, but most legal scholars have interpreted this as a broad grant of authority and not one which should be used to obtain a particular result in a particular set of cases. The only contrary precedent is the Supreme Court's decision in *ex parte* McCardle, handed down in the unique atmosphere of Reconstruction a century ago.

It is not the proper function of the Chief Justice to advise Congress to curtail the jurisdiction of the courts, much less to urge them to do so in particular cases. Moreover, the basis in constitutional precedent for the Chief Justice's advice is extremely shaky.

President Nixon has frequently complained that the Supreme Court has intruded itself into the political domain. Chief Justice Burger would seem to be in need of a reminder that he ought not venture there—even to help out his good friend the President in the hot controversy over busing.