REHNQUIST ASKED FOR A BUSING BAN

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He Argued for Amendment in Memos Submitted in '70 at White House Request

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By DAVID A. ANDELMAN

Supreme Court Justice William H. Rehnquist in 1970 presented to the White House at its request a proposed constitutional amendment prohibiting busing as a means of desegregating school systems and a strong defense of the use of such an amendment.

The effect of the amendment, proposed while Mr. Rehnquist was a member of the Justice Department in two memorandums that have been obtained by The New York Times, would have been to prevent any sort of forced busing to achieve racial balance in a given school district.

In a concession that many conservative busing opponents have since made, however, the proposal would have permitted what had become known as "freedom of choice"—pupils voluntarily choosing to be bused to other schools within their districts, even if their motives were racial.

The two Rehnquist memorandums, dated March 3 and March 5, 1970, were prepared in response to a written request from the White House, according to White House aides who were closely involved.

The request, the aides say, went to various departments and specialists, particularly at the Justice Department and the Department of Health, Education and Welfare, for "thinking" on the entire question of busing to be fed into the debate then going on within the Administration.

The President decided at that time to postpone any de-

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cision on the question. But in recent Administration discussions leading up to the President's speech last night, the White House sources said, the thinking represented in the Rehnquist memorandums was very much alive.

Since taking his place on the Supreme Court, Mr. Rehnquist has not voiced any opinions about school busing or the Court's role in achieving school desegregation. Neither did he wish to comment yesterday on his memorandums of two years ago.

In the two memorandums, Mr. Rehnquist said that a constitutional amendment would resolve many of the difficulties inherent in antibusing legislation. Legislation, he said, would tempt each subsequent session of Congress to reopen the entire debate and raise the possibility of a multiplicity of conflicting interpretations in the lower Federal courts.

The proposed Rehnquist amendment, in addition to permitting the "freedom of choice" option, would also explicitly prohibit school districts from denying this choice to blacks or any group of pupils except on grounds of school capacity, unavailability of transportation or other "nonracial consideration."

In most districts, however, this is a moot point because white parents who have fought busing would be little inclined to submit voluntarily and black parents have often found themselves confronted with packed schools when they sought to initiate transfers for their children.

'Neighborhood Schools' Justified

Much of the detailed, closely reasoned memorandums consists of a justification of why "neighborhood schools" should be preserved and legalized under the Constitution and why "freedom of choice" should be permitted in an effort to break enforced segregation in some areas of the South by voluntary actions of parents and pupils.

Mr. Rehnquist wrote: "The words, 'freedom of choice' and 'neighborhood schools' do not arise in a vacuum but arise instead in a context of more than 15 years of litigation over what the Constitution does and does not permit local school boards to do when those boards deal with racially mixed student populations.

"The critical issue in the South now, which has in the past of course had in its schools a system of enforced segregation, by race, appears to be the 'freedom of choice' plan, whereunder a student is free to choose to attend some school or schools in the district other than the one to which he is initially assigned.

The New York Times

GAVE ANTIBUS PLAN: William H. Rehnquist, in Justice Department two years ago, offered White House antibus amendment. Mr. Rehnquist is now on Supreme Court.

"In the North, the critical issue (less in public focus at the moment than the issue of 'freedom of choice' in the South) is that of de facto seg- 'freedom of choice' in the South) is that of de facto segregation: Does the Constitution require a school district to take affirmative steps to achieve 'racial balance' among its schools, even though the 'inbalance' existing stems from residential segregation or other factors for which the school board is not responsible?"

In his second memorandum, Mr. Rehnquist said that the amendment would be drawn so as not to confuse local school boards. He wrote:

"If the zoning plan adopted bears a reasonable relationship to educational needs—if fair-minded school boards members could have selected it for non-racial reasons—it is valid regardless of the intent with which the particular school board may have chosen it. The result is to give some certainty to school boards, and not make every zoning attendance plan in a multi-racial school district depend on how the local Federal district judge sizes up the state of mind of the various school board members."

In pressing his case for a constitutional amendment over any form of legislation on the issue, Mr. Rehnquist, then Assistant Attorney General, Office of the Legal Counsel, said: "I believe that once the decision has been made [to take some action against school busing] the arguments in favor of doing it by a constitutional amendment heavily preponderate."

"Embodiment of the validation in a statute would invite unnecessary detail and would likewise invite frequent reopening of heated debates on the subject," he said.

And, he added, the use of a statute instead of an amendment "has the collateral effect of inserting Federal courts still further into the business of operating schools, rather than at least partially withdrawing them from that business."

"Section 1. No provision of the Constitution shall be construed to prohibit the United States, any state, or any subdivision of either, from assigning persons to its educational facilities on the basis of geographic boundaries, provided only that such boundaries are reasonably related to school capacity, availability of transportation, safety or other similar considerations.

"Section 2. No provisions of the Constitution shall be construed to prohibit the United States, any state, or any subdivision of either, from permitting persons to choose or transfer voluntarily among its educational facilities, provided only that the opportunity to choose or transfer is available either to all persons within its jurisdiction or to any eligible person, when standards of eligibility are reasonably related to school capacity, availability of transportation, availability of curriculum, safety or other similar considerations."