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Public School Desegregation in Virginia from 1954 to the Present

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PUBLIC SCHOOL DESEGREGATION IN VIRGINIA FROM 1954 TO THE PRESENT

by

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PREFACE

This dissertation is an examination of the struggle to desegregate the public schools of Virginia from 1954 to 1972. The Supreme Court in Brown v. Board of Education attacked the social foundation of eleven southern states when it declared that racially segregated schools were "inherently unequal." Brown I, in fact, was one of many controversial decisions made by the Supreme Court as it reflected the egalitarian spirit of the 1950's and 1960's. By 1970, however, a growing list of legal scholars questioned the wisdom and effectivemess of the Warren Court's judicial activism. A major target of this criticism was the Brown decision. In 1970, when I began my research, it was apparent that the school desegregation decision was in deep trouble. My major objective was to trace the tortuous path of the school cases in one southern state in order to determine the most significant forces in slowing or advancing the implementation of the Brown decision. I chose Virginia since it was and continues to be a key state in the school litigation.

In addition to examining the politics of school desegregation, I investigated the roles of the federal and state courts in interpreting Brown I as well as the performance of Virginia's Negro leadership in pressing for school integration. My study of Virginia discusses the tremendous resources

available to a state intent on thwarting a Supreme Court ruling. My dissertation supports the thesis that the Supreme Court's ability to oversee a social revolution, without the full support of Congress and the President, is limited and sometimes counter-productive.

In the course of my research and writing I incurred numerous debts. Professor Alfred H. Kelly, who directed this dissertation, offered many constructive suggestions. Professor Richard Miles read the entire dissertation and added several valuable observations. My wife Claudia not only provided encouragement but also typed much of the dissertation. Finally, the librarians and archivists at Wayne State University, the University of Virginia, and the Virginia State Library were generous in offering their services.

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INTRODUCTION

On May 17, 1954, the United States Supreme Court in Brown v. Board of Education declared that segregated schools were inherently unequal.[1] The Court held that the laws which either required or permitted separate schools in seventeen states violated the equal protection clause of the Fourteenth Amendment. The decision marked a watershed in the long struggle of the American Negro to destroy all vestiges of second-class citizenship. The Negro triumph, in part, was an indication of growing concern in the United States about the obvious inequities in American society which had been made especially apparent by the egalitarian rhetoric of World War II and the Cold War. It also symbolized the Negro's increasing economic and political power which could no longer be overlooked by the leaders of the United States. Finally, victory before the Supreme Court was an important source of black pride, since it was the result of a well-conceived legal strategy devised by a band of skillful black lawyers.[2]

For the eleven Southern states, by contrast, May 17, 1954, was referred to as "Black Monday." The Brown decision

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[1] 347 U.S. 483 (1954).

[2] Alfred H. Kelly, "The School Desegregation Case," in Quarrels That Have Shaped the Constitution, ed. by John A. Garraty (New York: Harper & Row, 1962), pp. 244-54.

had a double meaning for the South. For, as C. Vann Woodward has written: "It reversed a constitutional trend started long before Plessy v. Ferguson, and it marked the beginning of the end of Jim Crow."[3] The immediate reaction of the South, depending on the region, varied from hysteria or disbelief to a grudging reluctance to accept the "law of the land." Bewilderment evolved into a policy of massive resistance whereby southern political leaders attempted to organize both state and regional defiance to the Brown decision. At the root of southern defiance was the commitment to a hierarchical society based on white supremacy and a belief in Negro inferiority. This neo-Bourbon political tradition was buttressed by small, manageable electorates and malapportioned state legislatures.[4]

A fundamental aspect of the South's resistance was directly related to Chief Justice Earl Warren's opinion in the Brown decision. Southern conservatives charged that the Supreme Court had departed from the law, and, in effect, had amended the Constitution on the strength of certain findings in psychology and sociology. Resistance was justified, in part, on the claim that nine new justices would reverse the Brown decision. Theoretically, the South's criticism of the Brown decision was not without foundation. Justice Warren

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[3]C. Vann Woodward, The Strange Career of Jim Crow, (London, Oxford, New York: Oxford University Press, 1966), p. 147.

[4]Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's (Baton Rouge: Louisiana State Press, 1969), pp. 237-50.

himself had dismissed the historical evidence as "inconclusive." While he cited the decisions involving the desegregation of graduate schools, his application of them to the case at hand was not convincing even to legal scholars sympathetic to the decision. A survey of the legal journals indicates that most "friendly critics" would agree with Robert Harris' observations that "...the decision in the Segregation Cases was a great decision. The opinion, on the other hand, was not a great opinion."[5] The technical plausibility of the South's case helped to shift the argument from vulgar racism to a point in constitutional law. By focusing on legal points massive resisters were able to win the support of citizens reluctant to be identified with the extremists. As the Warren Court made other controversial decisions, especially in the area of federal-state relations, the South hoped to gain greater support in its campaign to reverse the Brown decision.

The Supreme Court and the lawyers of the National Association for the Advancement of Colored People recognized that the task of implementing the school decision would be formidable. From the NAACP's point of view, the anticipation of

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[5]Robert J. Harris "The Constitution, Education and Segregation," Temple Law Quarterly, XXIX (Summer, 1956), p. 432. For a discussion of the friendly critics see Ira M. Heyman, "The Chief Justice, Racial Segregation and the Friendly Critics," California Law Review XLIX (March, 1961), 104-25. Heyman's article includes a discussion of Herbert Wechsler's influencial analysis, "Toward Neutral Principles of Constitutional Law," in the Harvard Law Review, 73 (November, 1959), p. 35. A defense of the Supreme Court is found in Charles L. Black Jr. "The Lawfulness of the Segregation Decisions," Yale Law Journal LXIX (January, 1960), pp. 421-30.

resistance accounted for the Supreme Court's delay in delineating the principles for implementation until May 31, 1955, in the second Brown decision.[6] From the NAACP's point of view, Virginia, on the surface, offered several advantages as a starting point for a successful campaign to desegregate the schools of the South. Among these were a relatively small Negro population (22.2 per cent in 1950), regional variety, and a tradition of non-violent race relations. Equally significant, the Virginia Conference of the NAACP was the largest of any Southern state at the time of the decision. The organization had formed its own legal counsel under the able direction of Oliver W. Hill. Virginia, instead, chose to assume the lead in the South's defiance of the Brown decision.

Since 1954, Virginia has passed through essentially three stages in its efforts to defy or to cope with the Brown decision. The first stage, and by far the most controversial, was the period of massive resistance between 1954 and 1959. During these years, Virginia refused to comply with the Brown decision. Instead, it adopted legislation which ultimately closed the schools in three school districts. Today, men prominently associated with the policy defend it as basically constructive. The legislation and litigation, according to their explanation, bought time which permitted Virginians to adjust to the revolution in race relations. Thus, this interpretation concludes, when Virginia's schools opened their

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[6] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

doors to Negroes for the first time in February of 1959, there was no violence.[7] This interpretation has been contested. In a recently published study of Virginia politics, J. Harvie Wilkinson questioned whether the rhetoric of massive resistance actually had the cooling effect which its proponents later claimed for it. Taking issue with another basic tenet of the massive resisters, Wilkinson concluded: "Massive resistance was more a calculated maneuver than an emotional imperative."[8]

In 1959 Virginia passed into the second phase of the school struggle which lasted until 1968. This period was dominated by time-consuming litigation, a bitter feud in Prince Edward County, and finally the active participation of the federal government in the desegregation process following the passage of the Civil Rights Act of 1964. The most significant legal development during this period was the Supreme Court's qualified rejection of the freedom of choice assignment plan. Racially neutral on its face, freedom of choice, in practice, was a clever scheme for perpetuating segregated schools. In Green v. County Board of New Kent County (1968),[9] the Supreme Court held that a freedom of choice assignment plan was unacceptable unless it led to desegregated schools. The Green de-

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[7] Interviews.

[8] J. Harvie Wilkinson III. Harry Byrd and the Changing Face of Virginia Politics, 1945-1966. (Charlottesville: The University of Virginia Press, 1968), p. 151.

[9] 391 U.S. 430 (1968).

cision meant that the test of subsequent school plans was their capacity to achieve school integration.

Following the Green decision, Virginia entered a third stage of the desegregation controversy which has aroused emotions recalling the frenzy of massive resistance. In Virginia, the new phase of the school debate was centered in those cities where relatively large Negro populations and racially separated neighborhoods stand as formidable obstacles to desegregation. Although the Supreme Court accepted busing as a tool of integration in Swann v. Charlotte-Mecklenburg (1971),[10] in 1972 the future of the school desegregation experiment was still unclear. The emergence of busing as a national political issue, resegregation in America's urban areas and an apparent decline in enthusiasm for integration among whites and Negroes led one constitutional expert, Alexander Bickel, to suggest that "the desegregation movement stands at the point where it may be abandoned."[11]

The wavering of the public mood on integration, in turn, seemed to encourage a limited retreat on the part of the Supreme Court. Although it accepted busing as a desegregation tool, the Court, in Swann, criticized racial balancing and wrote that school systems with racially identifiable schools

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[10] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[11] Alexander M. Bickel, The Supreme Court and the Idea of Progress (New York, Evanston, and London: Harper and Row, 1970), pp. 150-51.

were not necessarily objectionable.[12] In 1972, the Court's conclusions were not encouraging to advocates of unconventional plans for achieving integration such as the crossing of political boundaries.

The purpose of my dissertation is to trace the segregation cases in Virginia from Brown to consolidation. In so doing my research was guided by several questions: Why did Virginia choose massive resistance? What were the most important factors in determining the pace of implementation after massive resistance? How did the federal district judges respond to their role in implementing the Brown decision? My major conclusion is that massive resistance was avoidable. Although Virginians were not integrationists, initially many able leaders thought that a local option plan would work in Virginia. The switch to massive resistance was made possible by the extraordinary influence of black belt legislators in the Virginia Democratic party, the editorial skill of James J. Kilpatrick and the prestige of Virginia's senior Senator, Harry F. Byrd. Although the resort to race politics enabled the Byrd Organization to defeat the Republican party in 1957, the moderate and conservative wings parted company with the failure of massive resistance. In 1960 Virginia turned to local option and until 1966 was very successful in limiting desegregation to token numbers. Despite an active legal campaign by the Virginia NAACP, real progress toward desegrega-

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[12] Swann, 402 U.S. 1, 24 (1971).

ting public schools was not realized until NAACP lawyers were reinforced by the federal government following the Civil Rights Act of 1964. However, this linkage between desegregation and the leadership of the federal government was threatened as busing and consolidation became national issues. Furthermore, after eighteen years black Virginians as well as white were divided as to the wisdom of maintaining the struggle to integrate Virginia's schools.

PART I. VIRGINIA AND THE RISE OF MASSIVE RESISTANCE

CHAPTER I

BACKGROUND

In 1954, Virginia possessed the potential for compliance as well as resistance to the Brown decision. Two characteristics of the Old Dominion suggested the possibility of a policy of gradual adjustment to the Brown ruling. One was its relatively small Negro population, and the other was its social and economic diversity.[1]

The total population of the Commonwealth in 1950 was 3,318,680, of which approximately 22.2 percent was black.[2] Of even greater significance was the uneven distribution of the Negro population. In thirty-two counties, all except three located in the western portion of the state, Negroes did not exceed ten percent of the white population. The ratio of Negroes to whites ranged from ten to forty percent in thirty-five counties centered in the central Piedmont. However, twenty-seven of these counties contained Negro populations below thirty percent. Only thirty-one Southside and Tidewater

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[1]Robbins Gates, The Making of Massive Resistance: Virginia's Politics of Public School Desegregation, 1954-1956 (Chapel Hill: North Carolina Press, 1962), pp. 1-2; Benjamin Muse, Virginia's Massive Resistance (Bloomington: Indiana University Press, 1961) pp. 1-2.

[2]Gates, p. 12.

counties had populations where the Negro ratio exceeded forty percent. Of the thirty-two independent cities, twenty-four registered Negro populations under thirty percent.[3]

If one accepted the theory that the obstacles to desegregation were reduced when the number of Negroes was small, a desegregation scheme which made accommodations for regional differences seemed quite plausible. In fact, in some of the southwestern counties which bused their sparse numbers of Negro children to regional high schools, desegregation appeared to be an administrative necessity.[4]

There were other regional variations that worked to erode the notion of a monolithic Virginia. Foremost among these was the growth of the state's urban areas, especially in suburban Washington, D.C. and around Hampton Roads. Here Virginia's racial orthodoxy already had been severely tested. The Arlington-Fairfax area, the state's fastest growing region, was heavily populated by employees of the federal government, who often migrated from other states. This made the Tenth Congressional District more cosmopolitan and somewhat of a political enigma. On local and state levels, it elected

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[3] Ibid., pp. 1-12.

[4] Doxey A. Wilkerson, "Some Correlates of Recent Progress Toward Equalizing White and Negro Schools in Virginia" (unpublished Ph.D. dissertation, New York University, 1958), pp. 233-67. The author described several southwestern counties which had such small Negro populations that the school children were bused to a regional Negro high school. Economically, desegregation of white schools was less expensive than building a Negro school.

relatively liberal candidates, but in national elections, it tended to support conservatives.

The area around Hampton Roads, including the cities of Norfolk and Newport News, was dominated by the United States Navy and the shipping industry. Economically linked to the federal government and housing a large population of military personnel, it was not surprising that the area demonstrated a greater willingness to co-operate with national policies. Nor was it surprising that three of the first five desegregation suits in the state were filed in Arlington, in Norfolk and in Newport News.

The Ninth Congressional District, in the southwestern corner of Virginia, was another political maverick. Known as the "Fightin' Ninth," it was the only region in the Old Dominion where the two-party system had remained viable for the first half of the twentieth century. Its uniqueness was attributed to the negligible role the Negro played in its history, to a diversified economy which included the troubled mining industry of its far western counties and, finally, to its distance from Richmond, Virginia's capital.

Northwest of the "Ninth" sprawled the Shenandoah Valley. Basically rural, the Sixth and especially the Seventh Congressional Districts could be expected to support the state Democratic party.

To the east rested the Piedmont, wedged between the Blue Ridge Mountains and the Tidewater. With the exception of the industrialization around the Richmond-Petersburg-Hopewell

area, it was basically rural and politically conservative. Unlike Arlington or Norfolk, Richmond had powerful links with Virginia's past. Its beautiful capitol and monuments to Confederate war heroes were an ever-present reminder of Richmond's and Virginia's history. The city's two daily newspapers, the Richmond Times-Dispatch and the Richmond News Leader, were especially influential in affecting state political policy. They were the principal newspapers read by state officials and legislators when the General Assembly was in session. Their advantage was augmented by the prestige and skill of their editors, Virginus Dabney of the Times-Dispatch, and, especially after 1954, James Jackson Kilpatrick of the News Leader.[5]

Although there were fresh political breezes in Virginia, the most salient feature of its politics for the first half-century was its impressive consensus. Much of this was due to the skillful organization of the Democratic party, which in the 1950's was guided by its aging patriarch, Senator Harry Flood Byrd. The strength of the Democratic party was in rural Virginia, where it appealed to the rustic virtues of hard work, individualism and integrity.

The party's political base lay principally in the black belt, where the most potent issue was race. As expected, the

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[5]James Latimer, "Virginia Politics, 1950-1960" (Richmond: unpublished manuscript, 1961), pp. 12-17. Mr. Latimer is the highly regarded political writer for the Richmond Times-Dispatch. The paragraphs describing Virginia's demographic differences were drawn from his manuscript which he permitted me to read.

greatest resistance to the Brown decision came from the Southside, the name given to the region where most of the black belt counties are found. In these tobacco and peanut counties, the pattern of Negro subordination had its roots in ante-bellum Virginia. From the "great fear" produced by Nat Turner's rebellion, through Reconstruction, and down to the present, the region's politics concentrated on perpetuating white supremacy. Race relations here were characterized by paternalism, a sense of place and reportedly a lack of violence.[6] Behind the veneer of its plantation past, one Virginian has described the Southside as a "bleak country of red clay and scrub pine; of somnolent small towns; of marginal, worked-out farms; of much poverty, ignorance, and prejudice."[7]

The poverty which prevailed in these counties weighed more heavily on its Negroes, who suffered from poor schools and little economic opportunity. The well-known violation of the "separate-but-equal" doctrine was especially flagrant in the Southside. Even after 1941, as Virginia made steady progress toward equalizing its schools, these counties lagged behind the remainder of the state. Desegregation was opposed on the theory that it threatened white civilization with the specter of racial amalgamation.[8]

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[6]Wilkinson, pp. 9-22.

[7]Cabel Phillips, "Virginia--The State and the State of Mind," New York Times Magazine, July 28, 1957, p. 49, quoted in Wilkinson, p. 10.

[8]Wilkerson, pp. 74-80.

The Southside wielded political power far in excess of its actual population. In this respect, its influence compared favorably to the black belts of other Southern states.[9] Several factors combined to give the Southside an ascendant role in Virginia politics. First, in a state where the popular vote in general elections had been steadily declining since 1900, the proportion of Southsiders voting continually exceeded the remainder of the state. Second, the uniform antipathy to Federal spending, to "big" government in general and to the Supreme Court's civil rights decisions meant that the vote would be overwhelmingly conservative. Third, because of the consensus, the Southside's representatives in the General Assembly enjoyed greater longevity. As a result, they usually received the best committee assignments and chaired the strategic committees.[10] Their privileged position in the General Assembly was furthered by a slight overrepresentation in the Southside's favor.[11] Finally, the interests of the black belt were well represented in the hierarchy of the Democratic party. For example, during the school struggle major roles were played by the congressional representatives of the

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[9]V. O. Key, Jr. and Alexander Heard, Southern Politics In State and Nation (New York: Vintage Books, A Division of Random House, 1959), pp. 5-10.

[10]Wilkinson, pp. 51-52.

[11]Gates, p. 26.

Fourth and Fifth Congressional Districts, Watkins Abbitt and William "Bill" Tuck.

The response to the school cases was to be determined by the consensus achieved in the Democratic organization. The organization was a perpetuation of oligarchical rule which had its roots in colonial Virginia. Until recently, the tradition had been interrupted only by Reconstruction and the Readjustor movement. During this brief interlude, Virginia had witnessed greater mass participation in government, as well as an effort to institute certain democratic reforms. At the same time, the Old Dominion had been racked by corruption associated with railroad politics and ballot box stuffing. At the turn of the century, during the progressive era, conservative Virginians were able to regain power on a platform aimed at restoring integrity to government. A series of cautious reforms, including the strengthening of the State Corporation Commission, were achieved at the expense of popular democracy.[12]

A key to the new organization's success was its ability to limit the size of the electorate to a "manageable" number. A major step in restricting the size of the electorate was taken in the Constitutional Convention of 1902. Ostensibly aimed at eliminating the Negro from the state's political life, the poll tax and "understanding" tests drafted by this

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[12]Raymond H. Pulley, Old Virginia Restored: An Interpretation of the Progressive Impulse, 1870-1930 (Charlottesville: The University Press of Virginia, 1968), pp. 34-42, 104-08.

assembly were also aimed at disfranchising poor whites in politically insecure counties. The subsequent provision for a Democratic party primary and skillful organization completed the political foundation which thereafter endured for some sixty years.[13]

In the 1920's a youthful Harry Byrd managed to take charge of the organization at the point when age had caught up with the Old Guard. In Raymond H. Pulley's view, the young politician admirably satisfied the tradition of Virginia politics. A descendant of the first William Byrd and a self-made success in business, he was Horatio Alger wrapped in a pedigree. In 1926, at the age of thirty-eight, Harry Byrd was elected governor. During his four year tenure, by liberally applying the techniques of business, he won much acclaim for consolidating the administration of the state's government.[14] Byrd also strengthened the governor's office by expanding his appointive power through shortening the ballot. He described this reform as "a reactionary step, for it reaffirms the wisdom of our fathers and admits that they knew what they were about," since from "1776 to 1852, not a single State official was elected by direct vote of the people."[15] Also, as governor, he so successfully committed Virginia to a policy of "pay as you go" regarding the financing of highways, that the program

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[13] Ibid., pp. 69-91, 126-31.

[14] Ibid., pp. 177-78.

[15] Quoted in Ibid.,p. 179.

became, until recently, an unassailable tenet of the Commonwealth's fiscal policy.[16] Moving to the United States Senate in 1933, Byrd continued to oversee Virginia politics, while he jousted with the economic programs of the welfare state.[17] As the 1950's opened, Senator Byrd still loosely guided the organization which V. O. Key aptly described as "a political museum piece."[18]

The explanation for the organization's longevity was not limited to electoral advantages. Among leading Virginians, a remarkable consensus existed concerning the operation and purpose of government. J. Lindsay Almond once likened it to "a club" or "a loosely knit association" composed of men "who share the philosophy of Senator Byrd."[19] Following this analogy, Byrd's role was more like chairman of the board than political boss.

The first priority of the "club" was to provide honest and efficient government. The organization's honesty, as its

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[16] Ibid., pp. 180-81. Virginia's reputation as a low-tax state was based on the absence of a general sales tax. Consequently urban areas were hit hard since they contributed a larger share of state revenue from corporate and individual income taxes while also bearing the burden of local services (Wilkinson, pp. 41-43).

[17] Latimer, pp. 26-27. Ironically Senator Byrd and Franklin D. Roosevelt were sworn into office on the same day, March 4, 1933. Byrd apparently enjoyed referring to himself as "one of the last of the old New Dealers." He claimed that his political philosophy had not budged from the Democratic platform written in 1932.

[18] Key, p. 19.

[19] Time, September 22, 1958, p. 16, quoted in Wilkinson, p. 16.

frugality, was legendary. A sense of noblesse oblige, already centuries old, accompanied the responsibility to provide good government. The notion of government service as the duty of a gentleman was bolstered by the token salary received by a member of the General Assembly. A tradition of government by an elite extended into the 1960's, but has been eroded by such reforms as reapportionment and the repeal of the poll tax.[20]

While a consensus existed, all was not left to chance. The success of the organization was also related to an almost mysterious ability to impose a certain uniformity on political activity. Although unstructured, methods existed for evaluating, elevating and possibly disciplining ambitious politicians who desired to move from the courthouse to the top of the heap. Usually, the State Compensation Board and the circuit court judges were singled out by observers as helping to insure regularity. The former, chaired for many years by E. R. Combs, a Byrd lieutenant, set the salaries and office expenses of locally elected officials who also handled state business. The Board was a perennial target of anti-organization Democrats and Republicans, who charged it with using its power to advance the fortunes of the Democratic

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[20] Invariably organization men reminded me during interviews that no legislator could be "paid off." Even critics of the organization attested to its honesty.

organization.[21]

Virginia's forty circuit judges were elected by the General Assembly for eight year terms and were delegated broad appointive powers, including the naming of the Electoral Board, the Welfare Board and the School Trustee Electoral Board. Since the local legislators recommended, and the Democratic caucus nominated circuit court judges, the election was perfunctory. Although often little was known about the judge, it could be safely predicted that his politics were orthodox.[22] Because the School Trustee Electoral Board appointed the school boards in most counties, the circuit judge could indirectly influence school policy.

Also contributing to the organization's stability was the provision for a certain amount of competition within the ranks. Nevertheless, when several men sought the same office the "nod" from Byrd usually tipped the balance in favor of the Senator's candidate.

The path of a Virginian who sought a career in politics usually followed a familiar pattern. An aspiring politician often earned a law degree, preferably at the University of

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[21] Wilkinson, pp. 31-35, 52-53. Investigations of the State Compensation Board have never proven foul play.

[22] Ibid., Circuit judges in Virginia have a good reputation in Virginia. Not until the recent 1971 session of the General Assembly has the routine of electing judges been altered. Now prospective judges are invited, but not required, to answer questions in a public hearing before the Courts of Justice Committees of both houses of the General Assembly. See Richmond Times-Dispatch, January 28, 1971, p. A-1.

Virginia. He then practiced law, often with an eye on the position of commonwealth's attorney for some locality. After he established a local reputation, election to the General Assembly or Congress could follow. If a politician passed these hurdles and proved to be capable and reliable, he hoped for the organization hierarchy's support for the governorship. Nevertheless, an ambitious man who had successfully cultivated the courthouse clique could win the organization's endorsement without being the hierarchy's first choice. Such was the case of J. Lindsay Almond, who was governor during the collapse of massive resistance.[23]

Finally, the organization's political successes meant that the development of political opposition was difficult to mount. The anti-Byrd Democrats were badly organized, poorly financed, and without an electoral base. Anti-organization Democrats supported the national Democratic party, urged public reforms and attempted to expose organization double-dealing.[24] Despite their weaknesses, in the 1949 Democratic primary, Francis Pickens Miller almost stole the Party's nomination for governor away from John Battle, the organization candidate. The narrow margin of victory was viewed as a sign of disillusionment with the organization's frugality.[25]

In 1949, the state Republican party held its first pri-

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[23] Ibid., p. 24.

[24] Key, pp. 27-34.

[25] Wilkinson, pp. 91-98.

mary in the history of Virginia. A major obstacle to the G.O.P.'s success was that ideologically many Republicans were in agreement with Byrd democrats. Thus, some political observers believed that Battle's victory over the more liberal Miller was due to Republicans who "crossed-over" to vote in the Democratic primary.[26]

By 1954, the organization was still in command, but its mastery of Virginia politics was no longer as effortless as it had been in the past. In the 1953 gubernatorial race, the Republicans almost defeated the Democratic candidate. The organization standard bearer in this campaign was Thomas B. Stanley, a colorless but dedicated Byrd democrat. Stanley had served his time as a state delegate for sixteen years before going to Congress where he sat from 1946 to 1953. A country boy, Stanley, with initial help from his father-in-law, had earlier become a wealthy furniture manufacturer. Both he and his wife, Anne Bassett Stanley, had been generous contributors to the organization's campaign chests. The nomination of this easy-going businessman appeared to be a reward for dedicated service. Either unwilling or unable to speak on major issues, Stanley quickly acquired the sobriquet, "Mr. No Comment." While Stanley was a fumbling speaker, his opponent, state Senator Ted Dalton, was an articulate and sophisticated campaigner. The Radford Republican attacked the state's electoral laws, the power of the circuit judges and the state's effort in pro-

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[26]Latimer, pp. 34-35.

viding public services. Apparently, Dalton was defeating Stanley until he suggested financing highway improvements through revenue bonds. The breach of "pay-as-you-go" permitted Senator Byrd to enter the campaign and to rescue the outclassed Stanley. Though defeated, Dalton polled 182,887 votes to Stanley's 225,878, the best showing of any Republican candidate in the twentieth century. The Dalton vote very likely indicated his great personal appeal as well as the growing demand of Virginians for a more progressive and energetic government. Otherwise, the Republican party fared badly as indicated by the election of only five Republicans to the House of Delegates, a loss of one from the previous Assembly.[27]

Governor Stanley's poor election showing left many concerned about his ability to handle the duties of the Governor's office. Among organization men apprehension turned into temporary fury following Stanley's Inaugural Address. Contradicting one of his few campaign promises, the Governor proposed a penny increase in the gasoline tax. During the 1954 General Assembly, the proposal died a quiet death.[28]

Already troubled, Stanley also faced an uprising in the organization from a group of relatively young and ambitious Democrats nicknamed "Young Turks". The primary goal of the "Turks" was to reform the organization without upsetting its structure. One major objection to organization policy was its

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[27] Ibid., pp. 54-62.

[28] Ibid., p. 63.

poor record in providing public services. According to national statistics, Virginia ranked near the bottom in public education, health and welfare. The "Turks" were also disenchanted with the hierarchy's reluctance to advance younger members into positions of power. The group was especially distressed with the manner in which committee assignments were distributed by the Speaker of the House, E. Blackburn Moore, a confidant of Senator Byrd.[29]

Intra-organization feuding surfaced in a fierce debate to suspend state Senator Harry Byrd, Jr.'s Tax Credit Act of 1950. The law provided for a rebate to taxpayers of general funds collected in excess of budget estimates. The "Turks" revolted at the end of the 1954 session of the General Assembly when it was announced that $7,000,000 was to be returned to the taxpayers. Believing that the money should be used to aid the needy public school system, they formed a coalition in the House, suspended the Byrd law and amended the budget to increase its appropriation by $7,000,000 for public services. Foiled in the more conservative Senate, a compromise was worked out in which a third of the money was added to the budget. The press generally regarded the concession as a significant victory for the "Turks," and predicted that the organization thereafter would have to pay greater attention to its younger members and the issues they raised.[30]

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[29] Ibid., p. 64.

[30] Ibid., pp. 64-65.

Prior to Brown v. Board of Education, Governor Stanley had gotten off to a bad start. The organization was still in command, but political victories now were achieved with greater difficulty. The tradition of the organization, with its "adding machine mentality," clashed increasingly with the growing demand for public services.[31] The Supreme Court's decision offered the organization a new opportunity to exploit the race issue, in order to thwart the "Young Turks" and to demolish the Republican party. Yet the school decision posed a dilemma, since one wing of the organization, if pushed to the brink, preferred social and economic progress to loyalty to Senator Byrd. Ultimately the organization was destroyed by the school issue, since the conservative wing was to refuse to retreat, once massive resistance was demonstrated to be a bankrupt policy.

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[31]The phrase is borrowed from Key, p. 27.

CHAPTER II

REACTION TO BROWN I

Before 1950, the Negro struggle for equal educational opportunity in Virginia focused on a legal campaign to increase the salaries of Negro teachers, to improve the student-teacher ratio in black classrooms, and to equalize the value of black and white school facilities.[1] The difference in the value of black and white school property, in particular, demonstrated the sham of the "separate but equal" doctrine in Virginia. In 1947, the per capita value of Negro school property was still only 47.3 percent of white school property. However, as a result of a flurry of equalization suits directed by black lawyers, by 1951 the relative value of Negro school property jumped to 64.9 percent.[2] Successes in Surry, Gloucester, and King George counties led one unnamed Negro lawyer to observe that "between 1948 and 1950, half of the counties with large Negro populations were ready for suits---if we had had the money to handle them."[3] Black lawyers were so successful in federal courts that G. Tyler Miller, the

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[1] Wilkerson, pp. 76-78, 149-91, 248-54.

[2] Ibid., p. 78

[3] Quoted in Ibid., p. 267.

State Superintendent of Schools, asked them to be more patient. He justified this request by arguing "that the quality of the education program depends more upon the teacher than upon the buildings or any other factors."[4]

In September of 1950 the NAACP Legal Defense and Educational Fund decided to change its legal strategy. Instead of pursuing equalization suits, the NAACP chose to concentrate its entire legal effort on abolishing segregated schools.[5] For the black lawyers of the Virginia NAACP, now organized into a legal staff under the able direction of Oliver W. Hill, the transition from equalization to desegregation suits was easy. In northern and southwestern counties the case for desegregated schools was strong, since Negro children were forced to leave their own counties to receive an education in regional Negro schools.[6] Also, Negro lawyers were convinced that an equal education could not be obtained in segregated black schools, even in those counties where equalization suits had been won. They were persuaded that the equalization of physical plants was not capable of destroying the white community's view that black schools and their graduates were inferior.[7] Thus one attorney actively involved in these cases

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[4]Richmond Times-Dispatch, September 19, 1948, quoted in Wilkerson, p. 267.

[5]Kelly, "The School Desegregation Case," p. 257.

[6]Wilkerson, p. 268.

[7]Interview, Oliver W. Hill.

recalled: "We were careful never to affirm the validity of segregation. We looked forward to the time when an integration case would emerge."[8]

On May 23, 1951, the Virginia NAACP filed a desegregation suit against the school board of Prince Edward County. When one considered the leading role played by the Virginia NAACP in the equalization suits, a desegregation case originating in Virginia was no surprise. However, the decision to initiate proceedings in Prince Edward County was quite accidental and ultimately unfortunate. The legal counsel apparently had planned to test the Plessy precedent in Pulaski County, where no Negro schools existed. However, on April 23, 1951, the Negro high school students of Prince Edward County organized a strike to protest the dreadful conditions prevailing in the black high school. Lacking guidance, the students sought the advice of two black Richmond lawyers, Oliver Hill and Spotswood Robinson, III. Both men were understandably cautious in approaching a case in a Southside county. Traditionally, Southside Negroes were less militant, and therefore less disposed to accept the rigors of a lengthy law suit. Furthermore, in rural areas, the Negro was more exposed to all forms of community harassment. Finally, Hill and Robinson knew that the greatest opposition to desegregation would come in the Southside. Despite such liabilities, the NAACP, according to Hill, decided to handle the case because

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[8]Wilkerson, p. 268.

of the dedication exhibited by the students. The only conditions of the NAACP, subsequently accepted, were that the parents agree to authorize and support a suit aimed at desegregation rather than equalization.[9]

The change in the NAACP's legal strategy had an ironic but not unexpected effect as Virginia proceeded with even greater haste to bridge the gap between Negro and white school facilities. In 1950, Governor John Battle inaugurated a progressive program for financing public school construction in Virginia. Historically the localities were responsible for bearing the cost of school construction. But under Battle's prodding, the 1950 General Assembly appropriated $45,000,000 for school construction grants to the localities and promised another $30,000,000 when it met in 1952.[10] Although the so-called Battle Funds were designed to upgrade all schools, generous grants were made to Southside counties for the construction of new black schools. For example, $300,000 of the Battle money was used to help construct the new Negro high school in Prince Edward County and another $400,000 was earmarked to assist in the construction of a black school in Dinwiddie County.[11] A civic leader in the latter county ob-

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[9]Bob Smith, They Closed Their Schools (Chapel Hill: University of North Carolina Press, 1965), pp. 42-69. The original case was Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (E.D. 1952).

[10]Wilkerson, pp. 98-99.

[11]Ibid., p. 282.

served: "Before the Prince Edward case, nothing happened in Dinwiddie County."[12] By achieving actual equality, state officials hoped to ameliorate conditions prevailing in Virginia's Negro schools and also to improve their case for preserving segregated schools. A superintendent of schools in the Hampton Roads area recalled: " It was believed, especially by people, that if we equalized we wouldn't have to integrate."[13]

The net effect of the integration suit on equalization was dramatic. The per capita value of Negro school property jumped from 64.9 percent in 1951 to 86.2 percent of white schools in 1954.[14] After the Brown decision, despite efforts of Governor Stanley, the value of Negro property dipped to 78.1 percent. The reasons for the decline are numerous. Some school districts, no doubt, saw cutting back funds as a way of penalizing Negroes for their stubborn commitment to desegregation. Other districts did not want to build new Negro schools until the effect of the Brown decision and Virginia's response was clarified.[15] No doubt a number of Negroes would have preferred equalization to the strained race relations resulting from the Brown decision. However, one minister voiced the opinion of many Virginia blacks who fought for integrated

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[12] Quoted in Ibid., p. 282.

[13] Ibid.

[14] Ibid., p. 78.

[15] Ibid., pp. 283-86.

schools when he said: "Before the integration cases, they (white leaders) were patronizing; we had 'good relations,' no problems. They thought of us as children. Now they have to respect us whether they like us or not."[16]

The immediate impact of the 1954 decision was somewhat softened when the Supreme Court postponed issuing any specific orders for implementation until the states had opportunity, in further argument, to make suggestions regarding implementation.[17] The decision to postpone the decree led to the unusual situation where the Supreme Court delayed the enforcement of a constitutional right. Fear of widespread evasion of an immediate order plus some sympathy for the difficulty in changing traditional racial patterns accounted for the delay.[18]

In Virginia the initial response to the Brown decision was mild. On May 18, 1954, Governor Stanley made a brief but statesmanlike comment to the press. He counseled Virginians to respond "calmly and take time to carefully and dispassionately consider the situation before coming to conclusions on steps which should be taken." Rather than acting hastily, Stanley promised to call on representatives of state and local

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[16]Quoted in Ibid., p. 285.

[17]Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[18]Albert P. Blaustein and Clarence Clyde Ferguson, Jr., Desegregation and The Law: The Meaning of the School Segregation Cases (New York: Vintage Books, 1962), pp. 160-62.

government to devise a plan which would be "acceptable to our citizens and in keeping with the edict of the court." Astonishingly the statement concluded that the "views of leaders of both races will be invited in the course of these studies."[19] The intent of the speech was to leave the Governor a maximum amount of flexibility. He had not committed the state to any program except a further study of the situation. The statement was made without the aid of organization advice. Obviously, the Governor intended to move cautiously until the "word" came in from the organization.

Stanley's reference to biracial cooperation was a slip for which he later received some criticism from anti-organization sources. Has Stanley ever seriously considered working with black leaders? The answer was provided on May 24 when five Negro leaders, including Oliver Hill, were invited to the Governor's office. Stanley congratulated the leaders on their legal triumph, but requested that they accept voluntary segregation. To a man this proposal was rejected. The Negro delegates recognized that desegregation could not be achieved immediately throughout the state. Nevertheless, they urged the Governor to make a start toward desegregation. The meeting was a failure and marked the end of any significant interaction on the school issue between the leaders of both races for the next six years.[20]

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[19] Richmond Times-Dispatch, May 18, 1954, p. 1.

[20] Gates, p. 30; interview with Oliver Hill.

The reaction of the Governor was not unexpected. Whereas Virginia's Negroes had been relatively well treated, they had nevertheless been considered wards of the state. After 1954 white Virginians reminded the state's black citizens that white money paid for Negro schools. By creating ill will, the warning continued, Negroes only jeopardized black education.[21] The refusal of Virginia's Negroes to submit to such a threat marked a new stage of activism among black leaders which would be manifested in Virginia's politics during the 1960's.

Initially Virginia's elected officers and opinion makers seemed to believe that the solution to the school crisis was through a policy of local option supplemented by private education. Writing to the powerful state senator from the Southside, Garland Gray, Stanley said: "I do not agree with the decision but I believe defiance of the Court would tend to aggravate the situation and deprive us of the chance of coming to some understanding that would minimize the effects of the ruling on our social and educational systems."[22] One month after the Brown decision, Attorney General J. Lindsay Almond told Virginus Dabney that according to reports,

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[21] Report of the Commission on Public Education to the Governor of Virginia, Garland Gray, Chairman, (Commonwealth of Virginia: Division of Purchase and Printing, 1955), p. 7. Subsequently cited as the Gray Report.

[22] Letter, Thomas B. Stanley to Garland Gray, May 24, 1954, Virginia State Library Archives, Stanley Letter File. Local option would permit a school district to decide whether it wished to desegregate. If a locality voted against integration, some provision for easing the transition to private education was expected.

northern and southwestern counties would "let the Negroes into white schools and eliminate colored teachers." Almond thought a solution could be worked out for the Southside counties but cautioned Dabney that "there is a lot of politics in this thing." The Attorney General noted certain politicians were already "sounding off about being 'unalterably' opposed to any integration at all for the benefit of the voters."[23] James Jackson Kilpatrick, editor of the Richmond News Leader, also subscribed to local option and private education as a suitable solution to the school problem. In addition, he thought that "Given enough time, a great part of the problem--especially in the cities--could be handled by the re-location of school buildings, and the gerrymandering of enrollment lines."[24]

Newspaper editorials, with their emphasis on the problems and possibilities of a gradual approach, reflected the ideas expressed in private correspondence. Postponement of the enforcement order was interpreted as evidence that the Supreme Court recognized the complexities of school desegregation. The Richmond Times-Dispatch also referred to the significance of the decision for Negro teachers. The paper pointed out that white parents would not readily allow their

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[23]Letter, Virginus Dabney to D. Tennant Bryan, June 23, 1954, University of Virginia Archives, Dabney Letter File.

[24]Letter, James J. Kilpatrick to Harry F. Byrd, May 20, 1954, University of Virginia Archives, Kilpatrick Letter File.

children to be taught by Negroes and suggested, for this reason, that caution was needed.[25]

Although Stanley and Almond seemed to lean toward local option, the men who were generally regarded as the organization's top hierarchy never subscribed to any policy that could be represented as compliance. They were massive resisters before the phrase was coined. Foremost among this group were Senator Byrd and Congressmen Howard W. Smith, Watkins Abbitt and William Tuck. Smith was the powerful chairman of the House Rules Committee, while the latter two represented the Fourth and Fifth Congressional Districts in Virginia's Southside. In the General Assembly, E. Blackburn Moore, Speaker of the House, and Garland Gray were usually considered part of the inner circle.[26] They viewed the Supreme Court's decision to postpone implementation as an opportunity to build up opposition to its ruling. The view was expressed by Gray in a letter to Stanley in which the former warned the Governor about the consequences of any delay by Virginia's leaders in expressing their indignation with the Brown decision. The result, he said, would be that "our people may be slowly pushed into a position of accepting the decision of the Supreme Court." The stake in the issue for the Southside, he continued, was "our culture and racial purity," since desegregation would lead "to intermarriage between the races."[27]

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[25] Richmond Times-Dispatch, May 18, 1954, p. 1.

[26] Identification through interviews.

[27] Letter, Garland Gray to Thomas B. Stanley, May 20, 1954, Virginia State Library, Archives, Stanley Letter File.

The organization, of course, could place great pressure on Stanley and Almond. The Governor's administration had not started well, and if he mishandled the school issue, would be viewed eventually as a disaster. Stanley readily accepted the advice of the organization hierarchy, and especially that of Senator Byrd, who had saved him in 1953. While recognizing that the governorship was a tough spot for any man at this time, Byrd exhibited some concern over Stanley's ability to handle the situation. He wrote to Kilpatrick that Stanley "will need all the assistance and advice he can get."[28]

Though strong-willed and considered a good lawyer, Attorney General Almond's freedom of action was restricted by his personal political ambitions. Because of his unpredictability and independent streak, Almond had never been fully accepted by the organization's hierarchy. However, by 1954, the Attorney General had won statewide recognition for his defense of Virginia in the Prince Edward case. Almond intended to use this fame as a springboard to the governorship. In fact, in 1948, he had left a seat in Congress for the office of attorney general with the belief "that the new position would put me on a direct route to the governorship." Acting on this assumption, Almond sought Byrd's approval for his candidacy in 1953. Unsuccessful in this bid, the Attorney General later said:

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[28]Letter, Harry F. Byrd to Jack Kilpatrick, May 19, 1954, University of Virginia, Archives, Kilpatrick Letter File.

> I saw that I had reached the end of the political road unless I went out on my own . . . I began cautiously laying the foundation that would be my approach to the governorship in 1957. I accepted nearly every opportunity to speak on public issues, and at considerable sacrifice, I kept myself before the people.[29]

As part of his strategy, Almond acted discreetly at high level policy meetings where he was confronted with politically loaded questions. Almond himself stated: "I was very careful to stay in my place as legal adviser."[30] He did not want to be identified with an unpopular position or to be tagged as an integrationist.

While the Attorney General later emphasized his differences with the organization, they appear to have been exaggerated. He shared with other Virginia political leaders a strong commitment to states' rights and racial separation. Even in 1964, Almond admitted that while he accepted the desegregation of graduate schools, he was opposed to the "throwing together" of tender, adolescent children.[31] Perhaps the crucial difference was that Almond always recognized that if the federal government exerted its power, the states would have to submit. Yet this realization was easily subordinated to his political aspirations. As was demonstrated by

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[29]Luther J. Carter "Inside Byrd's Organization", Norfolk Virginian-Pilot, June 7, 1964, p. 1. On June 7, 8 and 9, Almond permitted an interview in which he discussed his role in massive resistance. By 1964 he was considered the martyr of massive resistance.

[30]Ibid.

[31]Ibid.

his subsequent gubernatorial campaign, Almond was, above all, an opportunist.

By early June, it was apparent that the organization was going to use the grace period provided by the Supreme Court to build a case against desegregation. On June 1, Governor Stanley announced that of five hundred letters which he had received, practically all opposed desegregation. Nine days later, he suggested that most Negroes preferred separate-but-equal education.[32] The announcement was followed on June 20 by a defiant resolution signed by twenty state legislators from Virginia's Fourth Congressional District. The Southsiders pledged their "unalterable opposition to the principle of integration of the races in the schools."[33]

More ominously, on June 26, Governor Stanley asked for the repeal of Section 129 of the Virginia Constitution which provided that the General Assembly "shall establish and maintain an efficient system of public free schools throughout the state." The operation, Stanley explained, would give the General Assembly the power to eliminate the public schools in any or all parts of Virginia. Finally, the Governor pledged to "use every legal means at my command to continue segregated schools in Virginia."[34]

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[32] Richmond Times-Dispatch, June 2, 1954, p. 1, June 11, 1954, p. 13.

[33] Ibid., June 21, 1954, p. 1.

[34] Ibid., June 27, 1954, p. 1.

While asking for the repeal of Section 129, Stanley said that he had no intention of abolishing the public school system. Anti-organization Democrats and Republicans were not satisfied with this qualification. Delegate Robert Whitehead, a respected anti-Byrd Democrat, recalled that among certain legislators there existed a strong aversion to public education. He feared that the repeal of Section 129 could evolve into a wholesale abandonment of public education. Assuring the people of the Old Dominion that he was no integrationist, Whitehead urged Virginia to chart a course between "the leadership of the radical elements of the NAACP, rabid for integration at any cost, and that of the Tories whose concern for the public school system has never been more than skin deep."[35] Whitehead spoke for a substantial minority of Virginians who believed that the state's progress depended more on maintaining education than maintaining segregation. As Whitehead's speech indicated, the greatest threat to the effectiveness of moderate segregationists was that they would become identified with the NAACP and integrationists.

The reluctance of moderate political leaders to become too closely associated with the Virginia NAACP meant that the Negro position would not be represented at all in the political forum. Furthermore, the NAACP position was distorted as Virginia's leaders subjected the Negro organization to a barrage of derogatory epithets. In August, Attorney General

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[35] Ibid., June 29, 1954, p. 10.

Almond charged that the Negro organization would be better named the "National Association for the Agitation of Colored People." He promised that the NAACP was "not going to write the ticket in Virginia."[36]

On August 28, Stanley announced the appointment of thirty-two legislators to study the school problem. The absence of Negroes, businessmen or educators on the Commission on Public Education represented a triumph for the irreconcilables. Earlier, while Stanley had been pondering the composition of his committee, Gray advised him that "I do not have much confidence in any solution that might be suggested by professional educators, clergymen or negroes [sic]."[37] In a letter to a constituent which found its way to Howard Smith's desk, Representative Tuck wrote that the worst aspect of a biracial commission was that it "would endeavor to find ways of integrating. My view is that we should study ways how not to integrate."[38] Some newspapers and religious organizations had attempted to influence Stanley to stick to his earlier promise of a more broadly based commission but had obviously

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[36] Ibid., August 20, 1954, p. 1; August 26, 1954, p. 1.

[37] Ibid.; Letter, Garland Gray to Thomas B. Stanley, May 20, 1954, Virginia State Library, Archives, Stanley Letter File.

[38] Letter, William M. Tuck to Harry E. Cassidy, June 29, 1954, University of Virginia, Archives, Smith Letter File.

failed.[39] The Governor justified his departure by explaining that any problem relating to public education must first pass the General Assembly. "The more first-hand information members of the Legislature can obtain, the better equipped they will be to deal with the problem."[40]

If Southsiders were happy with the decision to limit the commission to legislators, they were overjoyed with Stanley's appointments. While there were at least two members from each congressional district, nineteen came from districts which had black belt counties. The Fourth (Southside) had six representatives, while the more populous Second (Norfolk-Princess Anne) and the Tenth (Arlington-Fairfax) had only five. On the important eleven-man executive committee, the Ninth was not represented. The absence of Ted Dalton, the leading state Republican, along with Robert Whitehead and Armistead Boothe, prominent anti-organization Democrats, was significant.[41]

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[39]Gates, pp. 31-32. The Lynchburg News and Norfolk Virginian-Pilot were critical of Stanley while the News Leader came to his defense. Bill Tuck backed up Stanley by writing that "you are one hundred per cent right, in my opinion, in not appointing a bi-racial commission." Letter, William M. Tuck to Thomas B. Stanley, August 30, 1954, Virginia State Library, Archives, Stanley Letter File.

[40]Richmond Times-Dispatch, August 29, 1954, p. 1.

[41]Gates, pp. 34-36. Organization men defended the distribution of the Gray Commission with the argument that since the problem was in the black belt, legislators from this region should have the most to say about the problem.

When the commission held its first meeting on September 13, Governor Stanley set the tone for its work by reasserting the view that "public sentiment" and the "best interests" of Virginia demanded segregation. Stanley reiterated the position that his major goal was to "use every legal means at my command to preserve segregated schools in Virginia."[42] The influence of the conservatives on the commission was demonstrated immediately by the selection of State Senator Garland Gray as chairman.[43] Thus, the Gray commission was hardly a fact-finding body of the best talent in Virginia. Although Governor Stanley had suggested that the Commission conduct hearings throughout the state, the only public session was held in Richmond on November 15, 1954. In fact, between Stanley's announcement and the Commission's report on November 11, 1955, a cloud of secrecy hung over the body.

What took place in these private meetings? Basically a split existed between the Southsiders and legislators who believed that some accommodation would have to be made with the Brown decision. Southsiders urged that Virginia completely disregard the Brown decision. Fearing the precedent of even token desegregation in any part of the state, the irreconcilables demanded that Virginia assume a state-wide posture of resistance. This position was expressed by Robert Y. Button,

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[42] Richmond Times-Dispatch, September 14, 1954, p. 1.

[43] Ibid., August 29, 1954, p. 1.

a state senator from Culpeper, to Howard Smith. "I realize the appeal in giving the utmost freedom to the local school boards in the operation of the schools," Button wrote, "but I am afraid if this is done there will be integration in certain counties where the problem is not very acute." Senator Button believed that the basis for opposing desegregation in the Southside would be damaged if after "a reasonable number of years a considerable portion of the State would have integrated schools. . . ." The Culpeper Senator predicted that the Southside might abandon its public schools rather than integrate. He preferred "a statewide plan that would prevent any integration . . . even though certain counties might prefer to integrate immediately."[44]

Politically, the black belt politicians argued that their public careers were finished if they were "soft" on integration. At the same time, Southsiders recognized the advantages of using the school issue to enhance their political careers. Garland Gray, for example, in early October, publically said, "I don't intend to have my grandchildren go to school with them."[45] Consequently, if another politician took

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[44]Letter, Robert Button to Howard W. Smith, July 20, 1954, University of Virginia, Archives, Smith Letter File. Culpeper County is in the northern Piedmont, and in 1950, it had a Negro population estimated at 27.9 percent. Senator Button was a reliable organization man and served on the Gray Commission.

[45]Richmond Times-Dispatch, October 6, 1954, p. 1.

a more compromising position in the black belt, he opened himself up to the charge that he was an "integrationist."

During the secret meetings of the Gray Commission, a substantial number of men believed that some accommodation had to be made with the Brown decision. This group, composed of legislators outside the black belt, was equally shocked by the Supreme Court's ruling and also preferred segregated schools. While sensitive to the Southside's problem, the accommodationists, many of them lawyers, argued that, however disagreeable, the Brown decision was the "law of the land." When the Southsiders suggested that either the Governor or the General Assembly assume control of the schools, the accommodationists, aided by the advice of counsel David J. Mays, suggested that such a move was legally impossible. Mays was of the opinion that Virginia could not hide behind the Eleventh Amendment's provision prohibiting suits against a state. Having a good legal argument and aware that some areas could tolerate token desegregation, the accommodationists eventually urged a policy of local option. Permitting the individual localities to decide whether they wished to desegregate, the accommodationists argued, would satisfy the Supreme Court as well as the Southside.[46] While the accommodationists had certain immediate advantages, time was on the side of the resisters. The hiatus

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[46]A description of the meetings came from interviews with members of the Gray Commission. The minutes of the meetings are still unavailable. David J. Mays was a prominent Richmond lawyer who also won a Pulitzer Prize for his biography of Edmund Pendleton.

between Brown I and Brown II offered the resisters an opportunity to summon arguments for defying the Supreme Court.

While the Gray Commission was meeting, other important developments, both private and public, took place. Of immense importance to Virginia's response was the position taken by Senator Harry Byrd. Following the Brown decision, the Senator had briefly commented that Brown was "the most serious blow that has been struck against the rights of the States in a matter vitally affecting their authority and welfare."[47] How deeply Senator Byrd would involve himself in this problem was at first unknown. While he had interceded in the 1953 gubernatorial election, the Senator wrote Kilpatrick that Washington responsibilities were making it difficult for him to devote much attention to Virginia affairs.[48] However, by August, Senator Byrd seemed actively involved in an attempt to direct Virginia policy.

Unknown to the public, the Senator tried unsuccessfully to persuade Stanley and Almond to withdraw from the school desegregation cases. By August, however, Almond wrote to Byrd: "It is my understanding from reliable sources that some are endeavoring to prevail upon the Governor that Virginia should withdraw from any further connection with the case." The

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[47]Richmond Times-Dispatch, May 18, 1954, p. 1.

[48]Letter, Harry F. Byrd to James J. Kilpatrick, May 12, 1954, University of Virginia, Archives, Kilpatrick Letter File.

Attorney General opposed the strategy and was concerned about the political ramifications. "That which we have known and believed in, sometimes called the 'organization,' might well founder in the event of the absence of thinking and a courageous and constructive program with reference to this explosive subject." The Attorney General hoped "that certain forces in Virginia will not be permitted to kick this subject around as a political football." If the public sensed a difference of opinion, Almond predicted that it "could prove fatal."[49]

Clearly Senator Byrd was among those pressing Stanley to pull out of the case. On August 30, Byrd sent a copy of the Almond letter to Howard Smith, and indicated his displeasure with the Attorney General's "irrevocable decision to appear before the Supreme Court even though he is not authorized to do so by the Governor."[50] Several days later, the Senator wrote Smith that he could not understand why the Governor "changed his mind" on the Supreme Court strategy. Byrd added that he had invited Almond to visit him in Washington for a discussion of the issue. Yet, Byrd thought, "it would be futile." Momentarily frustrated, he concluded: "It appears to me the whole matter is being handled very

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[49]Letter, J. Lindsay Almond Jr. to Harry F. Byrd, August 16, 1954, University of Virginia, Archives, Smith Letter Files.

[50]Letter, Harry F. Byrd to Howard Smith, August 30, 1954, University of Virginia, Archives, Smith Letter File.

injudiciously, but I do not know what we can do."[51] Almond sidestepped a meeting with Byrd by writing that prior speaking engagements made this impossible.[52] Most likely the encounter would have been uncomfortable for both men. Governor Stanley apparently considered pulling out of the case, but had been persuaded by Almond against this course.

Why had Senator Byrd urged Virginia to withdraw from the Brown case? The exchange of letters indicated that Byrd believed that withdrawal would emphasize Virginia's unwillingness to recognize the Supreme Court's authority over state education. Furthermore, Byrd and others may have thought that they could argue that the enforcement decree did not apply to Virginia, if the state did not participate in the suit. Support for this interpretation is suggested by the fact that Alabama, Georgia and Mississippi refused to enter, for similar reasons, amici curiae arguments.[53]

Among irreconcilables local option and continued participation in the Brown case were opposed, because they were considered to be signs of compliance with the Supreme Court's decision. The major goal of the resisters was to convince the public that no justification for compliance existed.

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[51]Letter, Harry F. Byrd to Howard W. Smith, September 2, 1954, University of Virginia, Archives, Smith Letter File.

[52]Letter, J. Lindsay Almond Jr. to Harry F. Byrd, September 2, 1954, University of Virginia, Archives, Smith Letter File.

[53]Blaustein and Ferguson, Jr., p. 159.

To accomplish this objective, organization speakers lashed out at the Supreme Court. Representative Tuck, in a typical fire-eating speech, charged that the Supreme Court was a "super legislature," and that it played into the hands of the Communists by splitting the races. In referring to the supposed advantages won by the "Communists in Moscow," Tuck hoped to counter the argument that segregation harmed American foreign policy in the developing Asian and African nations. Furthermore, by implication, Tuck introduced the conspiracy thesis as a possible explanation for the Brown decision. Besides the Communist conspiracy, Tuck fretted over the clerical conspiracy. The former Governor assured Virginians that segregation was not un-Christian.[54]

Attorney General Almond, a tub-thumping orator from the old school, joined Tuck in attacking the Warren Court. The Brown decision, he charged, defied the Constitution by amending the Fourteenth Amendment and repealing the Tenth Amendment. Emphasizing that education was the exclusive right of the states, Almond declared that he would defend this right to the end of his public life. Speaking to a group which had just passed a resolution opposing integration, the Attorney General promised: "In Virginia, we cannot and we will not have colored teachers to teach white children."[55] Although he was the chief law officer of the

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[54] Richmond Times-Dispatch, October 15, 1954, p. 1.

[55] Richmond Times-Dispatch, October 27, 1954, p. 1.

state, Almond seemed to encourage evasion of Virginia's compulsory attendance law. The Attorney General doubted whether any "Commonwealth's Attorney would dare to prosecute" a violation of the school law. If such a case developed, he believed that "no jury will convict on charges of non-attendance in integrated schools."[56]

The organization also attempted to speak for Virginia's Negroes. Political leaders asserted that the Brown decision and not white Virginians were responsible for the apparent differences between the races. Almond explained that the Brown ruling not only undermined "the concepts, principles and mores of the South," but "cares nothing for the welfare of the Negro race."[57] The races, Congressman Tuck explained, "understand each other's problems and we have been able to maintain mutual respect." He predicted that "we will continue to coexist on the same sort of basis despite the handicaps put upon us by this decision."[58] Governor Stanley also suggested that Negroes actually preferred separate schools. Furthermore, the Governor thought that desegregation would be upsetting psychologically for Negro children at the bottom of white classes.[59]

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[56] Norfolk Virginian-Pilot, October 28, 1954, p. 1.

[57] Richmond Times-Dispatch, August 26, 1954, p. 4.

[58] Ibid., October 15, 1954, p. 1.

[59] Norfolk Virginian-Pilot, June 11, 1954, p. 12.

In addition to speeches, the resisters helped to organize "spontaneous" demonstrations of public indignation with the Brown decision. The irreconcilables who met in Petersburg on June 20, for example, initiated a letter-writing campaign to the Governor. As a result, sixty-one localities submitted resolutions supporting segregated schools.[60]

More significant was the creation of an organized interest group, the Defenders of State Sovereignty and Individual Liberties, committed to protecting segregation. Though more responsible, the Defenders played a role in Virginia similar to the White Citizens Councils of other states. Chartered by the State Corporation Commission on October 26, 1954, the Defenders was organized in Virginia's Southside. Among the founders of the group was J. Barrye Wall, editor and publisher of the Farmville Herald in Prince Edward County. Wall's newspaper subsequently became a mouthpiece for the Defenders. The officers of the organization included respected businessmen and public servants.[61] Consistent with Virginia's general policy, Defenders' objectives emphasized respectability. A concerted effort was made to avoid any association with extremist groups like the Klu Klux Klan. The Defenders recognized that its credibility as a respectable organization rested on support from state political leaders. Racial violence would have jeopardized such a

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[60]Smith, p. 88.

[61]Gates, pp. 36-38.

favorable association.[62] The group's certificate of incorporation indicated that its goal was to foster states' rights. All applicants signed a statement which contained a provision that "segregation of the races is a right of the state government."[63]

The founders of the Defenders emphasized that one of its purposes was to maintain peace by channeling discontent. However, one observer wrote that the group concentrated on encouraging "a spirit of legal rebellion." A symbiotic relationship seemed to exist between Byrd Democrats and the Defenders. The former provided speakers who lent respectability, whereas the latter provided "grass roots" opposition to the Brown decision.[64]

The Gray Commission, emotional speeches and the development of a "grass roots" organization were designed to develop state-wide conformity to the Democratic organization's viewpoint. However, in the fall of 1954, an alternative approach was submitted by sources outside the organization's hierarchy. Heading the opposition was Armistead L. Boothe, a state delegate from Alexandria, identified with the Young Turks. Boothe was alarmed by Stanley's recommendation of June 25, to revoke Section 129 of the Virginia Constitution.[65]

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[62] Smith, pp. 98-99.

[63] Gates, p. 37.

[64] Smith, p. 88.

[65] Supra, p. 29.

Fearing the consequences of an amendment, Boothe sent a "Turkey-gram" to members of the General Assembly. In the circular, he indicated that Stanley's proposal was a threat to public education which could seriously divide the Democratic party. He urged the assembly to search for a solution which conformed with the Brown decision.[66] Boothe followed the memorandum with a questionnaire which polled the legislators regarding their attitudes on desegregation, Section 129, and related questions. The results, which were made public, indicated an almost unamimous opposition to forced desegregation. In the face of the Brown decision, however, most legislators seemed to prefer a policy of local option.[67]

All the signs indicated that Boothe's efforts would carry little weight with Governor Stanley and his advisers. State Senator Button, before filling out the questionnaire, requested the advice of Howard Smith. The wily old Democrat recommended that Button ignore the questionnaire. "Frankly, I do not think the Governor is going to pay very much attention to Armistead's representation."[68]

Following the appointments of the Gray Commission, Delegate Boothe persisted in his efforts to influence public

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[66]A copy of the Turkey-gram is in the Smith Letter File. Though undated, it must have followed Stanley's statement of June 25th.

[67]Southern School News, Vol. 1, No. 2 (October, 1954), p. 14.

[68]Letter, Robert Button to Howard W. Smith, July 13, 1954, University of Virginia, Archives, Smith Letter File.

opinion. He recommended that Virginia should present an implementation scheme to the Supreme Court when the case was reargued.[69] In October, Boothe publically endorsed a plan of local option. By eliminating discrimination and segregation wherever no social problem is created by it, Boothe argued, Virginia would be demonstrating "good faith" as well as recognizing regional differences.[70] In fact, however, the Alexandria Democrat was no rabid integrationist, even with respect to areas with relatively small Negro populations. In these localities Negro enrollment would be limited to "outstanding Negro students who have all the mental, moral and physical qualities to attend and pass through any school of their choice whether it be white or colored if they are in their proper geographical districts." The result of such careful selection, Boothe predicted, would mean "that a predominantly white school may have a limited number of qualified Negro students who want to go there."[71]

The Boothe plan won the public support of only a few prominent politicians, among them anti-organization Democrat Robert Whitehead. Whitehead proposed "...a solution that will be within the law as finally interpreted by the highest court in the land, and yet with the least possible disloca-

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[69] Richmond Times-Dispatch, August 25, 1954, p. 1.

[70] Norfolk Virginian-Pilot, October 21, 1954, p. 1.

[71] Ibid., October 23, 1954, p. 6.

tion of our present system. This is not the time for demagogic harangues by persons in or out of public office. Our present situation should not be used as a vote-getting springboard on which to inflame the voters of Virginia."[72]

In turn, Whitehead was denounced by Representative Tuck for his endorsement of local option. The imflammable Tuck charged that Whitehead was a "double-crosser" and an "integrationist."[73] Several days later the Norfolk Virginian-Pilot, which supported both Boothe and Whitehead, remarked that influential citizens seemed to be afraid to express themselves.[74] The Tuck-Whitehead exchange certainly did not encourage dissent. Nevertheless, local option, because of its flexibility, was a very attractive solution to Virginia's problem.

On November 15, 1954, the Gray Commission held its only public hearing, in the Richmond Mosque. Some 2,000 people gathered in the Richmond auditorium to listen to approximately 130 speakers deal with the question: "What course should Virginia follow in light of the Supreme Court decision in the segregation cases?"[75] The hearing, in part, was a necessary formality, since Stanley and the Gray Commis-

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[72]Richmond Times-Dispatch, October 22, 1954, p. 1.

[73]Ibid., October 23, 1954, October 25, 1954, p. 1.

[74]Editorial, Norfolk Virginian-Pilot, November 1, 1954, p. 6.

[75]The Richmond News Leader, November 16, 1954, p. 1.

sion members had led the public to believe that the study commission would hold a number of state-wide fact-finding sessions. Rather than seeking information, the Richmond meeting was converted into another attempt to establish a point of view. By stating the question so loosely, the Gray Commission invited rabid segregationists to shout down the Brown decision. Recognizing the political possibilities of the assembly, large delegations, especially in the Southside, were organized for a trip to Richmond.[76] The Norfolk Virginian-Pilot believed a false question had been raised, since the commission permitted Virginians to perceive the issue as a choice between integration versus segregation. Virginia, the Norfolk newspaper stressed, should devote its energy to preserving the public school system by working out a reasonable accommodation with the Brown decision.[77]

As expected, the Richmond hearing accomplished nothing. Attitudes ranged from total noncompliance, to a dedicated effort to conform to the Brown decision. A close correlation between location, black belt or northern Virginia, and expressions of defiance or compliance was observed.[78] Perhaps the most significant result was that Virginians not ade-

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[76] Ibid., November 5, 1954, p. 6.

[77] Editorial, Norfolk Virginian-Pilot, November 5, 1954, p. 6.

[78] Gates, pp. 39-41.

quately represented on the Gray Commission prevented extreme segregationists from dominating the hearing. Following the ordeal, the Gray Commission announced that it had no plans for further hearings. The Richmond meeting was never repeated.[79]

On November 15, Virginia submitted a brief to the Supreme Court in preparation for oral arguments. Regarding the specific questions asked by the Court, Virginia opposed any deadline for ending segregation. Also, the Old Dominion preferred giving the lower courts jurisdiction over the cases rather than appointing a special body to supervise implementation. "Neither court decree nor executive order can force in those sections (where citizens have stated they will not consent to compulsory integration) a result so basically opposed by a majority," the brief defiantly stated. In issuing a decree, Virginia thought standards of health, housing and scholastic achievement must be taken into consideration. Reversing the NAACP argument, the Old Dominion contended that a final decree should be postponed until the effects of integration on students was documented. The Brown decision, Virginia warned, had raised the "spectre of impending educational chaos."[80]

The NAACP's brief was more specific in its recommenda-

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[79] Richmond Times-Dispatch, November 25, 1954, p. 1.

[80] Ibid., November 16, 1954, p. 1.

tions. The Negro lawyers wanted the Supreme Court to designate September, 1955 or September, 1956, as the date for opening schools on a desegregated basis. In response to Virginia's defiant actions, the NAACP no longer trusted any gradual program of desegregation.[81]

The note of defiance in Virginia's brief was struck again in a preliminary report submitted by the Gray Commission announcing that it intended to "explore avenues toward formulation of a program, within the framework of the law, designed to prevent enforced integration of the races in the public schools of Virginia." The recommendation was based on an analysis of public opinion derived from the public hearing, "communications" with the Governor, "conversations with the people," and "actions" taken by school boards and boards of supervisors. Not only were these "communications" unsophisticated as a measure of public opinion, they were also somewhat contrived. Most white Virginians, to be sure, opposed integration. Yet, in many parts of the state, gradual desegration was apparently regarded as preferable to closing the public schools. The Gray Commission recognized this, since it contended that any desegregation plan depended on "local conditions" as well as the support of the "majority of the people." While the Commission predicted school closures or the impairment of public education in many areas of the state, it

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[81] Ibid.

implicitly admitted that many sections could also adjust to the problem posed by the Brown decision.[82]

The preliminary Gray Report amounted to a compromise between the Southsiders and the accommodationists. When combined with the November 15 brief, the report also indicated that in parts of Virginia there would be total defiance of the Brown decision. Governor Stanley and Attorney General Almond approved of the report. However, the editors of a number of newspapers expressed dissatisfaction. Two newspapers, the Newport News Daily Press and the Danville Bee, considered any plan premature until the Supreme Court had issued an implementating decree. Focusing on the virtual absence of public hearings, the Roanoke Times commented: "Doesn't the commission trust the people or has it made up its mind about what it will do?" Even more scathing was the Norfolk Virginian-Pilot which charged that the Gray Commission had perverted its purpose. The Commission, one editorial exclaimed, had not attempted to study methods by which the traditional system of education could be changed without harming public schools or race relations. Instead, the Commission had concerned itself "with establishing a point of view in Virginia."[83] The preliminary report of the Gray Commission marked the end of the first phase of Virginia's response to

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[82] Ibid., January 20, 1955, p. 1.

[83] Southern School News, Vol. 1, No. 6 (February, 1955), p. 11.

the Brown decision. The Gray Commission would now turn its attention to an examination of "legal methods" for circumventing the Court's ruling.

Thus while most Virginians were critical of the Supreme Court's decision, large areas of Virginia were expected to conform with an implementation order. However, the hierarchy of the Democratic organization, based in the Southside, never favored compliance with the Brown decision. Unable to secure a moratorium on desegregation from Virginia's Negro leaders, Governor Stanley dedicated himself to preserving segregated schools. The Governor's position reflected his personal convictions as well as the sentiments of the organization's leaders to whom Stanley was indebted.

The enormous influence of the black belt on Governor Stanley was indicated by the composition of the Gray Commission. In commission meetings, extreme segregationists could not only protect their interests but detect individuals who were "soft" on integration. Attorney General Almond, extremely ambitious for the office of governor, was most sensitive to the political implications of the school issue. While recognizing that race politics would make an adjustment to the Brown decision more difficult, he more than equaled Tuck and Gray in encouraging defiance. Almond realized that without the Southside's support, he had no chance for the Democratic nomination.

Despite disproportionate representation on the Gray Commission, the diehard segregationists were unable to im-

pose a statewide defiance of the Brown decision. Any threat to public education, especially Section 129, would have immediately ripped the organization apart. In order to be acceptable to all wings of the organization, a school plan would have had to preclude massive school closings. The drift toward local option represented a compromise between resisters and accommodationists. Nevertheless, the ingrediants for a statewide policy of massive resistance lingered just below the surface. The organizational hierarchy was willing, and the enemies (the NAACP and the Supreme Court) had been identified. Only a catalyst was needed to generate an explosion.

CHAPTER III

FROM LOCAL OPTION TO INTERPOSITION

Following the preliminary Gray Report, Virginia began the search for a technique by which localities could subvert the Brown decision. On February 25, 1955, the director of the State Department of Conservation and Development, Raymond V. Long, announced that Seashore State Park would be leased to a private operator. The decision had been prompted by a suit filed in 1951 by Negroes to use the park. According to Long, the lease was necessary to protect Virginia's investment by insuring the park's continued use at the estimated average of 200,000 persons per year. Victor J. Ashe, a well-known Negro attorney in Norfolk, announced that he would attempt to block the lease on the grounds that it was an illegal attempt to maintain a segregated facility.[1]

The Seashore case had a significant bearing on the school issue. If Virginia escaped an order to desegregate a public park by leasing the facility to a private operator, the same technique could possibly be used to "save" public schools ordered to desegregate. In the federal district court of Judge Walter E. Hoffman, the Negro plaintiffs asked

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[1] Richmond Times-Dispatch, February 26, 1955, p. 1.

for an order temporarily restraining the negotiation of the lease. Judge Hoffman, aware of the relationship between recreation and the school issue, asked Virginia's counsel: "If the state of Virginia has authority to lease a State park, would it not be possible for a municipal corporation to lease its public schools to private individuals?" Henry T. Wickham, special assistant to the Attorney General, answered affirmatively.[2] Believing that the lease could be a "forerunner" of other action, Hoffman granted the temporary injunction sought by the Negroes.[3]

On July 7, 1955, Judge Hoffman issued a permanent injunction prohibiting further exclusion from Seashore State Park by race and requiring a provision against discrimination in any lease negotiated with a private operator. The proposed lease was unconstitutional, wrote Hoffman, because it proposed "to accomplish by indirection exactly what all courts have said cannot be done."[4]

The significance of the Hoffman decision was not missed by the state press. A Richmond Times-Dispatch editorial concluded that the ruling "put all plans to lease public school property to private persons in grave jeopardy."[5]

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[2] Ibid., March 13, 1955, p. 1.

[3] Ibid.

[4] Tate v. Department of Conservation and Development, 133 F. Supp. 53, 56 (E.D. Va. 1955).

[5] Editorial, Richmond Times-Dispatch, July 9, 1955, p. 8.

Criticizing state leadership, the Norfolk Virginia-Pilot wrote that Virginia gained nothing by endeavoring to avoid integration by "short-cuts and circuitous routes."[6] Following the park ruling, the state announced that Seashore State Park would be closed, while the eight remaining parks would be operated on a segregated basis.[7]

Another measure directly related to the Brown decision was the announcement by the State Department of Education of a major revision in teacher contracts. Instead of offering a nine month contract, school boards were allowed to insert a clause in a teacher's contract which permitted the board to terminate the contract after thirty days notice. Secondly, the new contracts would designate the name of the school to which the teacher was assigned, rather than merely the county or city. The change was made, according to the State Department of Education, to anticipate a decrease in enrollments in case the Supreme Court ordered an immediate end to racial segregation. However, the new provision would also apply to teachers whose classes suffered a decline in attendance.[8] Some observers believed that the contract revision was intended to serve as an incentive to Negro teachers to persuade pupils to remain in Negro public schools. One

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[6]Editorial, Norfolk Virginian-Pilot, July 9, 1955, p. 8.

[7]Editorial, Richmond Times-Dispatch, July 13, 1955, p. 8.

[8]Ibid., April 6, 1965, p. 1.

paper suspected that the effect was to threaten Negro teachers with unemployment if Negro children transferred to white schools. Negro teachers would consequently be reduced to "recruiting agents."[9] The third district of the Negro Virginia Teacher's Association agreed with this analysis and denounced the thirty day rule as an evasive device which would drive teachers out of the profession.[10]

While Virginia searched for methods of evading a desegregation order, the State's attorney made a final plea before the Supreme Court. During the oral argument, Virginia stressed several themes. One was that the effect of desegregation on white children was unknown. Academically, satistics were cited which indicated the Negro scholastic achievement was well below that of white children. Virginia's lawyers suggested that desegregated classrooms would disrupt the normal education of white children. Moreover, the effects of mere physical contact with Negro children were unknown. Records of tuberculosis, syphilis, gonorrhea and illegitimate births showed that their incidence was exceedingly high among the Negro population.[11] Archibald G. Robertson, counsel for Virginia, added that the record "of disease and

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[9]Editorial, Norfolk Virginian-Pilot, April 20, 1955, p. 6.

[10]Richmond Times-Dispatch, April 17, 1955, p. 1.

[11]Leon Friedman, ed., Argument: The Oral Argument Before the Supreme Court (New York: Chelsea House Publishers, 1969), p. 428.

illegitimacy is just a drop in the bucket compared to the promiscuity." He concluded that "white parents at this time would not appropriate the money to put their children among other children with that sort of background."[12]

Secondly, the defendants argued that a statewide decree was untenable, considering the regional differences in Virginia. The "most powerful single influence on racial attitudes," Attorney General Almond submitted, was the ratio of Negroes to whites in a county or city. Considering Virginia's various attitudes and traditions, Almond hoped that each locality would be free to deal with the school problem in its own way.[13]

Thirdly, Virginia warned the Court that the state faced "the bleak prospect of serious impairment or possible destruction of our public school system." Such an eventuality, Almond contended, must be weighed against the Negro demand for immediate enforcement of the desegregation decision. In fashioning an order, the Attorney General reminded the Supreme Court that it dealt with "the warp and woof of their (Virginia's) mores of life..." The Attorney General recognized the power of the Supreme Court to enforce a gradual adjustment of school policy, but added "that does not mean enforced integration to us in Virginia." In closing, Almond reminded the Court that the Eighteenth Amendment was

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[12] Ibid.

[13] Ibid., pp. 428-35.

repealed "because it affected the way of life of the American people."[14]

The lawyers for the NAACP asked the Supreme Court for an entirely different decree. In their oral arguments, Spotswood Robinson, III, and Thurgood Marshall, for the plaintiffs, asked that the Court's order provide for the initiation of administrative steps preparatory to the assignment of Negro children to desegregated schools in Prince Edward County in September 1955 or 1956.[15] The request was grounded on the principle that the right to a desegregated education was both "personal and present." To delay, the Negro lawyers contended, would mean that some Negro children would lose forever rights guaranteed by the Fourteenth Amendment.[16]

The NAACP lawyers countered Virginia's arguments in several ways. The discrepancy in scholastic achievement, they argued, proved that segregated schools were not equal. Regarding educational problems caused by differences in ability, Thurgood Marshall had a simple solution: "Put the dumb colored children in with the dumb white children, and put the smart colored children with the smart white children --that is no problem."[17] Marshall also objected to a decree that took into consideration regional differences. The Negro

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[14] Ibid., pp. 431-35.

[15] Ibid., pp. 384, 394.

[16] Ibid., pp. 390-92, 394, 409.

[17] Ibid., p. 402.

attorney asserted "that there is no local option on the Fourteenth Amendment in the question of rights..."[18] Finally, Marshall argued that the threat of closed schools was exaggerated. Although he admitted that white parents did not want their children attending schools with Negroes, Marshall argued that these same parents would prefer desegregation to closed schools.[19]

On May 31, 1955, Chief Justice Earl Warren read the order implementing the 1954 ruling. The Supreme Court remanded the cases to the lower courts, ordering them to work out solutions with the local school officials based on "equitable principles." The guidelines established by the Supreme Court were very vague. District court judges were to consider local problems, but also require "a prompt and reasonable start toward full compliance." No deadline was set by the Supreme Court for the completion of the desegregation process except that it should be accomplished "with all deliberate speed."[20]

Virginia enthusiastically endorsed the second Brown decision. The Richmond Times-Dispatch observed that the Supreme Court had responded to Southern opinion. An editorial predicted decades of litigation, especially if subse-

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[18] Ibid., pp. 399-400.

[19] Ibid., p. 399.

[20] Brown v. Board of Education, 349 U.S. 294, 299-301 (1955).

quent school cases were not treated as "class actions." Gerrymandering, academic testing, repealing 129, modifying compulsory assignment laws and local option were all suggested as possible tactics of evasion. The Norfolk Virginian-Pilot thought the Court's ruling was "a wise attempt to adjust constitutional principles and practical problems." Governor Stanley was urged by the Norfolk paper to take the lead in prompting "good faith compliance." A note of criticism came from the Lynchburg Daily Advance which pointed out that the Supreme Court had passed "the toughest part of what it brought into being on the lower courts." District court judges would soon appreciate the observation.[21]

Virginia's Negroes were disappointed with the second Brown decision. During the year that had elapsed since the first decision, the Democratic organization had indicated that it would exploit every chance to evade the decision. The loose language of the Brown decision only multiplied the opportunities for evasion.[22]

Following the second Brown decision, Virginia continued its search for techniques to thwart desegregation. On June 10, the Gray Commission suggested to the Governor and State Board of Education that Virginia maintain segregated

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[21]Editorial, Richmond Times-Dispatch, June 1, 1955, p. 8; Editorial, Norfolk Virginian-Pilot, June 1, 1955, p. 4; Southern School News, Vol. 1, No. 10 (June, 1955), p. 8.

[22]Interview with Oliver Hill; Richmond Afro-American, June 4, 1955, p. 1.

schools for the 1955-1956 school year. Desegregation, according to the recommendation, was not "practicable or feasible from an administrative standpoint or otherwise." A special session of the General Assembly was considered unwise until the Commission on Public Education could submit a legislative plan.[23]

The Commission's proposal worried the Norfolk Virginian-Pilot which preferred some sign of compliance. An editorial suggested that some school districts could "initiate a system designed to achieve an orderly equitable adjustment." Attacking the secret nature of the Gray Commission, the editorial observed: "The risk of doing nothing grows the greater because the record of the Gray Commission suggests a purpose to do as little as possible."[24] Whereas the Richmond Times-Dispatch thought the Commission's position was sound, the editor thought some desegregation could be initiated in southwest Virginia or the Shenandoah Valley.[25]

The Gray Commission obviously feared local initiative. Though the June 10 policy declaration did not have the force of law, the Commission hoped that local school boards would follow a statewide policy. Two weeks later, Governor Stanley and the State Board of Education announced that they would

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[23]Richmond Times-Dispatch, June 11, 1955, p. 1.

[24]Editorial, Norfolk Virginian-Pilot, June 12, 1955, p. 6.

[25]Editorial, Richmond Times-Dispatch, June 12, 1955, p. 8.

follow the advice of the Commission and make segregation in public schools the official policy of Virginia for the coming school year. Had a local school board attempted to desegregate, the Board would have been unsure of its response.[26] When faced with the same question, Stanley responded weakly that "he wouldn't like to answer."[27] The school boards, fearful of making an unpopular decision, seemed to prefer shifting the responsibility for desegregating the schools to the state.

Virginia's leaders decided that they would not take any steps toward desegregation unless ordered to do so. Since neither President Dwight D. Eisenhower nor Congress indicated any eagerness to prod the South, the entire burden to force action rested on the lower courts. However, since the courts could not act until suits were filed, the ultimate responsibility for engineering desegregation rested with the NAACP. On June 4, 1955, an emergency meeting of NAACP officials from all the Southern states was held in Atlanta. In an eight-point directive, the NAACP promised legal action in the fall of 1955 against recalcitrant school districts. Litigation was to be preceded by petitions to school boards with the hope of forcing compliance by enlisting the support of various community organizations.[28]

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[26] Richmond Times-Dispatch, June 24, 1955, p. 1.

[27] Norfolk Virginian-Pilot, June 26, 1955, pt.2, p. 1.

[28] Richmond Times-Dispatch, June 5, 1955, p. 1.

In Virginia, Oliver Hill summed up the NAACP philosophy: "If no plans are announced or taken by the time the school begins this fall, 1955, the time for law suits has arrived...only in this way does the mandate of the Supreme Court...become fully operative."[29] On June 30, 1955, W. Lester Banks, Executive Secretary of the Virginia Conference, sent a directive to the state branches which stated: "It is the immediate job of our branches to see to it that each school board begins to deal with the problem of providing non-discriminatory education." Along with this message, Banks sent petitions and instructions concerning their use. Anticipating future legal difficulties he cautioned: "The signing of the petition by a parent or guardian may well be only the first step to an extended court fight. Therefore, discretion and care should be exercised to secure petitioners who will--if need be--go all the way."[30]

The NAACP effort to mount an effective campaign against segregated schools was to be described as an insidious campaign skirting the boundaries of the law. Almost immediately, Almond reviled the Negro organization as "drunk with power and hell-bent to preserve chaos."[31] The Richmond

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[29] Ibid., June 8, 1955, p. 1.

[30] Report of the Committee on Offenses Against the Administration of Justice, "Appendix 12," (Commonwealth of Virginia: Division of Purchase and Printing, 1957), p. 49.

[31] Southern School News, Vol. II, No. 2 (August, 1955), p. 12.

Times-Dispatch joined in this condemnation by attacking the NAACP for its "aggressive insistence on complete integration in every walk of life."[32]

Virginia's decision to postpone any desegregation for a year while it searched for evasive measures was assisted by the action of several lower federal courts in the cases remanded to them by the Supreme Court. On July 15, 1955, a special three-judge district court ruled on the South Carolina case, Briggs v. Elliott. The district court, in a per curiam opinion, enjoined the defendant school board from making racially discriminatory assignments, but only after it had made the necessary adjustments "with all deliberate speed." The court retained jurisdiction of the case, but the school board had won a delay. Because the three judges then decided to discuss the meaning of the Brown decision, the impact of the Briggs ruling was far-reaching for the South. In a concise obiter dictum, the judges explained that the Supreme Court

> has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains . . . . The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs of voluntary action. It

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[32]Editorial, Richmond Times-Dispatch, August 16, 1955, p. 12.

> merely forbids the use of government power to enforce segregation.[33]

The Briggs dictum applied two prevailing ideas regarding the Fourteenth Amendment to the Brown decision. First, the three judges recalled that historically courts had held that the Fourteenth Amendment prohibited state, but not private, racial discrimination. Therefore, the three judges believed that the federal courts were not required to interfere with the choice of white and Negro parents to send their children to segregated schools. Secondly, the dictum made use of the untested understanding that the Fourteenth Amendment imposed no positive obligation upon the States to achieve racial equality. If public schools remained segregated after racially discriminatory policies were abolished, the federal courts were under no obligation to order the states to go further in achieving desegregation. The two ideas expressed in the Briggs opinion held out hope to the South that desegregation could be contained by either encouraging voluntary segregation or by devising assignment schemes which ostensibly had no relation to race.[34]

Much of the influence of the Briggs dictum has been attributed to the prestige of Judge John J. Parker of the United States Court of Appeals, Fourth Circuit, who presided

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[33] Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[34] Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform (Cambridge: Harvard University Press, 1968), p. 28.

over the court which wrote the opinion. Judge Parker was widely regarded as the premier jurist of the South. While Briggs was a per curiam opinion, it was generally ascribed to Judge Parker.[35] Far into the 1960's, defiant school boards and conservative federal judges cited the Briggs doctrine as authority for opposing affirmative action to desegregate. For Negro lawyers, Briggs proved to be a thorny obstacle in their efforts to achieve actual desegregation.

On July 18, 1955, another three-judge court ordered Prince Edward County School Board to admit students without regard to race "with all deliberate speed." As in the South Carolina case, the court authorized a delay pending necessary arrangements and retained jurisdiction over the case. The court specifically stated that it was impossible to operate the school on a desegregated basis by September of 1955.[36] Governor Stanley concurred with the opinion, since the court's decision confirmed his earlier policy declaration. He did not believe the opinion necessitated "any hurry-up or unduly rushing into a special session of the General Assembly" to work out school problems.[37] The Democratic organization did not want a special session until the Gray Commission

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[35] Blaustein and Ferguson, Jr., Desegregation and the Law, pp. 178-79.

[36] Davis v. County School Board of Prince Edward County, I Race Rel. L. Rep. 82 (E.D. Va. 1955).

[37] Norfolk Virginian-Pilot, July 20, 1955, p. 1.

could settle on a plan to prevent enforced integration.

Hints of Virginia's plans to deal with desegregation came in September. On the twelfth, Stanley announced that he planned to call a special session for November to consider legislation designed to prevent enforced integration.[38] Two days later, the Governor announced that he would ask for a ruling on the constitutionality of Item 210 of the Appropriations Act for 1954-56, which provided tuition grants to any school for the children of servicemen killed or disabled. At issue was whether this appropriation, granted for twenty-six years, violated Section 141 of the Virginia Constitution which prohibited appropriations of public funds for private schools. When State Comptroller Sidney C. Day, Jr., notified Almond that he would stop all payments under Item 210, the stage was set for a "friendly suit."[39] Virginia's newspapers recognized that there was a relationship between the suit and some sort of plan to finance private education on a large scale.[40]

While the Gray Commission delayed its report pending the suit, opposition to the proposed special session developed. Republican Ted Dalton argued that the school issue could be debated in the regular session on January 1956. A

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[38] Richmond Times-Dispatch, September 13, 1954, p. 1.

[39] Ibid., September 15, 1955, p. 1.

[40] Editorial, Norfolk Virginian-Pilot, September 16, 1955, p. 6; Editorial, Richmond Times-Dispatch, September 18, 1955, p. 2B.

special assembly so close to the regular session, Dalton feared, would invite steamroller tactics. Since the thirty-two men of the Gray Commission would exert a great deal of influence as so-called "experts," Dalton's anxiety was well-founded.[41] With state elections in November of 1955, the Virginian-Pilot also opposed giving lame duck legislators the opportunity to make decisions having an effect in 1956. The Norfolk newspaper hoped for the election of more Young Turks and suspected that Stanley was uneasy over the possibility. A sampling of the General Assembly also demonstrated a preference for postponing action on the school problem until the regular session.[42]

Prior to the decision of the Virginia Supreme Court of Appeals, the organization's hierarchy also made a public bid to influence the Gray Commission. In a letter to the Commission, Representatives Tuck and Abbitt announced that they favored a plan which made "public financial support of integrated public schools dependent upon the will of the people of each county or city wherein integration of the races in the schools may take place." Closed schools were preferable to desegregated education, they argued, because "of the revulsion of the people to the forced integration thereof and against their will."[43] Speaking to the Defenders on the same

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[41] Norfolk Virginian-Pilot, September 28, 1955, p. 6.

[42] Editorial, Ibid., September 14, 1955, p. 6; Editorial, October 12, 1955, p. 6.

[43] Ibid., October 25, 1955, p. 1.

day, Tuck promised to battle any attempt "to distort the minds, to pollute the education, to defile and make putrid the pure Anglo-Saxon blood that courses through the innocent veins of our helpless children." No room for compromise existed on the school issue, according to Tuck. "We are for integration or we are against it."[44]

The Tuck-Abbitt version of local option actually provided three layers of defense against integration--the school board, the board of supervisors or governing body, and finally the people. As Tuck and Abbitt later explained to Governor Stanley:

> The proposal does not envision extending to the voters of a county the right to bring about integration in such counties as Arlington and Charles City, but it does give the people in these counties the right to defeat integration after it has been put upon them by the school board and the governing bodies of the localities as a last and final stop gap: In other words, it is just one additional safeguard reserved to the people of the localities.[45]

Considering the procedure for appointing school board members, the probability of placing the issue before the people in many communities would have been doubtful.

Senator Byrd indicated his approval of the Tuck-Abbitt

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[44] Ibid., p. 8. In June 1955, Tuck had suggested a plan which included repealing Section 129, providing tuition grants, and withdrawing state appropriations from desegregated schools. Letter, William M. Tuck to Thomas B. Stanley, June 22, 1955, Virginia State Library, Archives, Stanley Letter File.

[45] Letter, William M. Tuck and Watkins M. Abbitt to Thomas B. Stanley, May 10, 1956, University of Virginia, Archives, Smith Papers.

plan, believing that "it in no wise conflict[ed] with the Supreme Court decision." Significantly, he added that he was not sure this was the final answer but warned that "Negro children will suffer the most if some substitute school system is forced upon those localities."[46]

After Attorney General Almond's action against Comptroller Day, the Gray Commission and the Governor remained silent regarding the proposed special session. The impetus and guidelines for further action were finally provided by the Virginia Supreme Court of Appeals on November 7, 1955, when it held the tuition grant program unconstitutional. In Almond v. Day, the Court ruled that Item 210 not only violated section 141 but also the provisions for separation of church and state in the Constitutions of Virginia and the United States. Since private schools were not sufficiently endowed, tuition grants were described by the court as an appropriation to a private school, "its very lifeblood." Furthermore, the violation of the Constitution was not avoided by paying the grants to the parents or guardians of the children, for they were "merely the conduit or channel through whom the aid from the State to the school is transmitted." Recognizing the relationship between its ruling and rumored school legislation, the Court observed:

> To sustain the validity of Item 210 . . . would mean that by like appropriation the General Assembly might divert public funds to the support of a system

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[46] Norfolk Virginian-Pilot, November 1, 1955, p. 1.

> of private schools which the Constitution now forbids. If that be a desirable end, it should be accomplished by amending our Constitution in a manner therein provided. It should not be done by judicial legislation.[47]

Pronouncing the decision to be "eminently correct," Attorney General Almond announced that Virginia could "now chart her course accordingly."[48] Governor Stanley thought the ruling would be helpful to the Gray Commission and the General Assembly.[49]

Sounding a note of caution, the Norfolk Virginian-Pilot wondered whether a tuition grant plan would be constitutional following an amendment of Section 141. An editorial expected that public support of private schools would violate the expanding concept of "state action" under the Fourteenth Amendment. Above all, the editorial expressed a fear that Virginia's public school system was about to be uprooted.[50]

On November 11, 1955, after approximately fifteen months of deliberation, the Gray Commission delivered a report to Governor Stanley. The major recommendations of the Gray Plan called for a system of local assignments and tuition grants plus "legislation to provide that no child be required to attend a school wherein both white and colored are

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[47] Almond v. Day, 197 Va. 419, 427-431 (1955); 89 S.E. 2d 851, 857-59 (Va Sup. Ct. of App. 1955).

[48] Norfolk Virginian-Pilot, November 8, 1955, p. 1.

[49] Richmond Times-Dispatch, November 8, 1955, p. 1.

[50] Editorial, Norfolk Virginian-Pilot, November 9, 1955, p. 6.

taught . . . ." Because of Almond v. Day, the Commission advised the Governor to summon a special session of the General Assembly to initiate the process whereby Section 141 could be amended.[51]

The Gray plan represented a compromise between strong segregationists and accommodationists. To the satisfaction of the total resisters, the report stated in several places that one objective was to prevent "enforced integration." Moreover, a variety of suggestions were made with the intention of easing the transition from public schools to private schools. Included among these were provisions for educational levies or cash appropriations where schools were closed; expansion of the Virginia Supplemental Retirement Act to accommodate teachers who switched from public to private schools; and the authorization of local school boards to shorten the school year in "an emergency situation." However the provision for pupil assignments by local school boards meant that localities with small Negro populations could move cautiously toward desegregation. A variety of "non-racial" factors to guide school boards in making assignments ensured the prospect of token desegregation.[52]

The recommendations of the Gray Report were also prefaced by a brief presentation of the Brown decision, and this became the official Virginia interpretation. The effect

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[51] Gray Report, p. 8.

[52] Ibid., pp. 9-12.

of the analysis was to encourage disrespect for the Supreme Court's decision and to provide an excuse for ignoring it in the black belt. The Gray Report stated the Supreme Court had overturned a method of providing public education secured by history and earlier decisions such as Plessy v. Ferguson (163 U.S. 537) and Gong Lum v. Rice (275 U.S. 78). However, the importance of the school decision, the Report emphasized, extended beyond public education to the nature of constitutional democracy. The Brown decision meant "that the most fundamental of the rights of the states and of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be by the process of judicial legislation."[53]

The Supreme Court's reliance on psychological and sociological research in overturning legal precedent was stressed by the Commission. Of the scholars listed in the famous footnote, only Gunnar Myrdal was cited by name. He was described as "a European sociologist of slight experience in the United States" who suggested "that the adoption of the Constitution was in its inception a fraud upon the common people and that in his opinion it is now an outworn document."[54] The Gray Report thus seemed to officially substantiate the impression given by extremists of a conspiracy associated with the Brown decision.

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[53] Ibid., p. 6.

[54] Ibid.

The Gray Report won widespread approval in Virginia. The Richmond Times-Dispatch described it as halfway between two extremes, with local option as its distinguishing feature.[55] The Norfolk Virginian-Pilot described the recommendations as an earnest attempt to solve Virginia's problems.[56] However, the NAACP and the Defenders, on opposite poles of public opinion, expressed dissatisfaction with the Commission's report. The former described the proposals as "legally indefensible, morally wrong and economically unsound."[57] The Defenders, dissatisfied with the assignment plan, thought the Gray Plan was a harbinger of desegregation.[58]

On November 14, Governor Stanley announced that he would call for a special session of the General Assembly to meet on November 30, 1955. The legislators were asked to approve a bill which would permit a popular referendum on the question of calling a constitutional convention to amend Section 141 of the Virginia Constitution.[59] Using the Convention system of amending the Constitution, Section 141

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[55]Editorial, Richmond Times-Dispatch, November 13, 1955, p. 6.

[56]Editorial, Norfolk Virginian-Pilot, November 13, 1955, p. 6.

[57]Richmond Times-Dispatch, November 14, 1955, p. 1.

[58]Ibid., November 13, 1955, p. 1.

[59]Ibid., November 15, 1955, p. 1.

could be altered in a matter of months.[60]

The debate over the Gray Report, however, was not the only item on the minds of Virginians wrestling with the school issue. On November 21, 1955, the Richmond News Leader entered the first of a series of editorials devoted to the theme of interposition. The enthusiastic response to the ideas associated with James Madison, Thomas Jefferson, John C.Calhoun and John Taylor of Caroline County turned the tide in favor of defiant segregationists who had reluctantly signed the Gray Report.

The leading figure in the Virginia campaign to pass a resolution of interposition was James J. Kilpatrick. At the age of thirty-one, Kilpatrick succeeded Douglas Southall Freeman, the distinguished biographer of Robert E. Lee, as the editor of the Richmond News Leader.[61] For Kilpatrick, the Brown decision marked a turning point in his career. His persuasive editorials not only played an important role in paving the way for massive resistance, but they also won a national reputation for their author. Once Virginia chose

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[60] Constitution of Virginia, Art. XV, Sec. 197. The Virginia Constitution provided an alternative method to the convention system for amending the Constitution. A majority vote for the proposed amendment in successive meetings of the General Assembly, followed by the ratification of a majority of the electorates made the amendment a part of the Constitution.

[61] Muse, p. 20. Though born in Oklahoma, Muse observed that Kilpatrick succeeded in becoming "more Virginian than Virginia."

massive resistance, he became the Old Dominion's most articulate defender of the South's social and political traditions. The Richmond editor's pungent writing style was admirably suited for sallies against the Supreme Court and the federal "octopus."

Kilpatrick's attraction to interposition apparently was inspired by a short pamphlet on the subject written by William Old, an elderly country lawyer.[62] As late as June 1955, Kilpatrick seemed to see no option for Virginia other than to battle the Brown decision by time consuming litigation. "To defy the court openly would be to enter upon anarchy; the logical end would be a second attempt at secession from the Union. And though the idea is not without merit, it is impossible of execution. We tried that once before."[63] Accepting the consequences of local option in Southside Virginia, Kilpatrick believed that:

> abandonment of public schools anywhere would be a tragedy, it would be a bad thing, to be undertaken only as a last resort. But I also feel that there is one thing that would be even worse than abandonment, and that is the dire consequences of integration in those areas of heavy negro [sic] populations where the education of both races would suffer thereby and the vitality and integrity of our white society inevitably would be debased by the compulsory intimacy of

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[62] Southern School News, Vol. II, No. 9 (March, 1956), p. 14. William Old was subsequently made a circuit court judge as a reward for his contribution to massive resistance.

[63] Editorial, Richmond News Leader, June 10, 1955, p. 10.

prolonged racial mixing.[64]

Yet, in principle, local option meant submitting to the Supreme Court, since some schools would be desegregated. Kilpatrick hoped that Virginia's opposition to the Supreme Court would be more decisive and dramatic. By uniting Virginia's past with its present, interposition offered the Old Dominion a set of ready-made ideas, heroes, and symbols for a more defiant stand.

Between November 1955 and February 1956, Kilpatrick persuaded, cajoled and generally directed Virginia's legislators in the drafting of a resolution of interposition. Writing to Robert Whitehead, a staunch critic of interposition, Kilpatrick thought that "some approach could be found, through an eloquent Resolution of Interposition, that would elevate this whole controversy above the sorry level of racial segregation and put it on a high plane of fundamental principles."[65] The fundamental principle or "transcendent issue" according to Kilpatrick, was spelled out by the Gray Commission's warning that with the Brown decision, the Constitution could be altered at the whim of the Supreme Court. The Constitution, the Richmond editor asserted, had been

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[64]Letter, James J. Kilpatrick to Robert Whitehead, June 10, 1955, University of Virginia, Archives, Whitehead Letter File.

[65]Letter, James J. Kilpatrick to Robert Whitehead, November 24, 1955, University of Virginia, Archives, Whitehead Letter File.

amended without resort to the procedure outlined in Article V of the Constitution.[66] Regardless of one's position on integration, Kilpatrick believed:

> All Virginians, liberal and conservative alike, from the Tidewater or the Valley, are united in a devotion to the Constitution and a reverence for its proper administration. If we fail now to make at least an effort to preserve the Constitution from the greedy hands of the Supreme Court, bent upon shaping it as a thing of wax, we shall have failed as Americans and Virginians in an hour of solemn cirsis.[67]

Portraying the school issue as a grave constitutional crisis, Kilpatrick urged that Virginia's last resort was the "right of interposition." He defended interposition by recapitulating the theory of state sovereignty refined by John C. Calhoun. Kilpatrick explained to his readers that the Union was a compact of sovereign states who delegated certain specific powers to the central government. If the central government broke the compact in a "deliberate," "palpable" or "dangerous" way, interposition was the last resort of the states. The Civil War, an editorial explained, "in no way altered the basic structure of the compact." All the Civil War demonstrated was that "when one group of States is determined by force to contest the effort of another group of States to withdraw from the Union, law and sovereign rights are blown to the four winds and the issue is resolved on

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[66] Editorial, Richmond News Leader, November 21, 1955, p. 10.

[67] Ibid., November 23, 1955, p. 10.

naked force alone."[68]

For Kilpatrick the grievance was clear, and he urged the legislators to use the special session to pass a resolution of interposition. The editorial gave four reasons for immediate action. The first was that Virginia's policy, whatever the result, should be based on "fundamental principles." The legislators who had descended upon Richmond were reminded: "This is our heritage. This is our tradition. This was the philosophy of the great men who walked in the halls of our own Capitol." Secondly, interposition elevated the controversy from race to constitutionalism. "There is a tactical advantage in higher ground, and we would do well to seek it," the editor counseled. Thirdly, Virginia, by acting promptly might provide the spark to unite the South against the Supreme Court. Lastly, the Gray plan, while supportable, was a policy of expediency rather than principle. Local assignment and tuition grants implied recognition of the Brown decision. "This newspaper would submit that Virginia can stand on fundamental principles, where on expediency we must fall."[69]

The enthusiasm for interposition came at a rather awkward moment. Public attention had been focused on amending Section 141 of the Virginia Constitution since the decision

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[68] Ibid., November 22, 1955, p. 10; November 23, 1955, p. 10.

[69] Ibid., November 29, 1955, p. 12.

of Almond v. Day. On the night of November 29, members of the Gray Commission reportedly debated the merits of interposition until after midnight. Officially they decided against pushing for interposition because of the "exigencies of time and the understood conditions of the Assembly's special session made it impossible to develop the plan properly."[70] Privately Kilpatrick told Tom Waring, editor of the Charleston News and Courier, that the decision

> was wholly a matter of political expediency, for members of both the House and State Senate were wildly enthusiastic about the plan and might have gone off ill-prepared unless they had been restrained. The difficulty that finally caused us to put it off until January was our fear that many persons, whose votes we need in a State Referendum in January would feel that interposition had solved everything and would stay away from the polls.[71]

Delaying action on an interposition resolution was probably advised for two other reasons. First, since the special session had been called for the limited purpose of passing a bill to hold a referendum, interpositionists probably feared that altering the session's objective would hurt the chances of passing the bill with an emergency clause. Without a four-fifths vote in each house, the referendum bill would not become effective until ninety days after the session's adjournment. Secondly, to win a decisive victory in the referendum, the total resisters recognized the need of

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[70] Ibid., December 1, 1955, p. 14.

[71] Letter, James J. Kilpatrick to Tom Waring, December 9, 1955, University of Virginia, Archives, Kilpatrick Letter File.

winning the support of moderate organization men. For example, ex-Governors Colgate Darden and John Battle could be expected to support the Gray Plan, but not interposition. Thus, the General Assembly agreed to limit its action to the referendum bill requested by Governor Stanley and to bills having the unanimous consent of the Assembly.[72]

Despite the General Assembly's action, James Kilpatrick's editorials introduced the idea that Virginia's response to the Brown decision could be converted from a grudging, limited compliance to a glorious crusade to save the United States Constitution. A variety of words and phrases were associated with the crisis, such as: "superlegislature," "rape of the Constitution," "transcendent issue" and "fundamental principles." Thus, not only extreme segregationists but moderate segregationists were attracted by Kilpatrick's seemingly more sophisticated arguments. For example, FitzGerald Bemiss, a moderate who later voted against the massive resistance laws, was, at first, attracted to the Kilpatrick editorials. After referring to the Gray Plan in a letter, he said, "But far more important is the solemn matter of these most fundamental principles which are covered in Jack Kilpatrick's editorial series . . . . Jack has attracted a great deal of attention in the great public service of

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[72] Richmond Times-Dispatch, December 1, 1955, p. 1.

developing this series."[73]

As usual, opposition to the Kilpatrick editorials came from anti-organization sources. In a letter to Kilpatrick, Robert Whitehead wrote:

> Frankly, I do not understand their [the editorials] purpose, and in all candor, I must say that I think they are serving no good purpose in the present troublesome period.
>
> The doctrine of nullification and secession became obsolete at Appomattox in April, 1865. With their death, interposition also died.
>
> I see no point in resurrecting the dead in order to vex the living. In my opinion, nothing but harm can come from it.[74]

Before the House of Delegates, Whitehead continued his attack on those who advocated ignoring the Brown decision. The Nelson County Democrat reminded his colleagues that the "Constitution, as construed by the Supreme Court, whether its construction be right or wrong, is the supreme law of this land, and every member of this Assembly has taken an oath to support it." Whitehead wondered how the leaders of Virginia could "expect our people to obey the decision of our [Virginia] courts, if we incited them to ignore the decisions

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[73]Letter, FitzGerald Bemiss to Prescott S. Bush, December 21, 1955, University of Virginia, Archives, Kilpatrick Letter File. Later Bemiss altered his position so that he never was identified with interposition enthusiasts. His dissatisfaction with interposition was prompted by a study of several books sent to him by a lawyer friend. Although Bemiss subsequently voted for the interposition resolution, he viewed his vote a mere protest against the Brown decision.

[74]Letter, Robert Whitehead to James J. Kilpatrick, November 25, 1955, University of Virginia, Archives, Whitehead Letter File.

of the highest court in the land."[75] The Norfolk Virginian-Pilot supported Whitehead in his criticism of interposition. Such a "fantasy," an editorial charged, would only "encourage those who believe that quick and complete abandonment of the schools should be forced upon the State."[76]

Thus during 1955, Virginia had concentrated its efforts on devising a program for "preventing enforced integration" in the black belt countries. Not strong enough to force a state-wide plan, arch segregationists signed the Gray Report which permitted local option. Even school districts which chose to desegregate, following a court order, could erect a variety of obstacles which would either postpone or restrict desegregation to token members. Gradualism was endorsed by the second Brown decision and an important dictum written in Briggs v. Elliott. Years of litigation were predicted before any meaningful desegregation would be achieved. Yet to many of the organization hierarchy, local option was the path of expediency and ultimately capitualation. However, no inspiring slogan, banner or mission had been found to unite Virginia. The gap was filled by worn-out state sovereignty arguments, forcefully written by a zealous champion of Virginia society, James J. Kilpatrick. In December,

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[75]Remarks of Delegate Robert Whitehead of Nelson County before the House of Delegates of Virginia on December 1, 1955, pp. 2-3.

[76]Editorial, Norfolk Virginian-Pilot, December 1, 1955, p. 6.

nevertheless, the role of interposition in Virginia's response to the Gray Plan was unclear. Whether interposition would be used to replace the Gray Plan or be viewed as merely a "dignified protest" was yet to be determined.[77]

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[77]Editorial, Richmond Times-Dispatch, December 2, 1955, p. 5. The editorial thought interposition would serve as a "dignified protest."

CHAPTER IV

REFERENDUM AND INTERPOSITION

As scheduled, the General Assembly met in special session on November 30, 1955, to consider legislation requested by the Gray Commission and endorsed by Governor Stanley. The legislators were asked to pass a bill which would provide for a popular referendum on the question of calling a constitutional convention to amend Section 141 of Virginia's Constitution, prohibiting the appropriation of public funds for private schools. On December 2 the House of Delegates and the Senate passed the referendum bill by virtually unanimous votes of 93 to 5 and 38 to 1. The following day, Governor Stanley set January 9 as the date of the referendum.[1]

The almost unanimous decision of the General Assembly was not an endorsement of total resistance to the Supreme Court. Legislators from districts outside the Southside accepted the Gray Commission's analysis that without tuition grants there would be no education in the black belt. Considering the example of Prince Edward County, the prospect

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[1] Richmond Times-Dispatch, December 3, 1955, p. 1; December 4, 1955, p. 1.

of massive school closures in the black belt could not be denied.[2] During a public hearing, George H. Parker, Jr., Commonwealth's Attorney for Southampton County warned: "There'll be no appropriations for schools by the Board of Supervisors . . . if a single colored child enters a school with whites."[3] The same fear was expressed by J. Randolph Tucker, a Richmond delegate who served on the Gray Commission and subsequently voted against the massive resistance laws. Tucker argued "that localities with heavy Negro population would close their schools rather than integrate. Tuition grants make up the best method the commission could devise to assure education would continue in these localities. . . ."[4]

The idea that localities outside the Southside had a responsibility to help the black belt counties was also expressed by Robert Whitehead. In a speech before the House of Delegates, he stressed that he thought a local assignment plan would be a satisfactory solution to Virginia's problems. However, Whitehead reasoned that a rejection of the referendum bill might jeopardize the local assignment plan. Whitehead

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[2]Gates, pp. 46-47. Anticipating a desegregation order, a private educational corporation was formed in the spring of 1955 in Prince Edward County. The board of supervisors was prepared to withhold public funds if the schools were desegregated. In July of 1955, the district court granted a delay and the board of supervisors made appropriations on a monthly basis. Five other black belt counties followed Prince Edward's example and financed their public schools on a monthly basis.

[3]Norfolk Virginian-Pilot, December 1, 1955, p. 1.

[4]Richmond Times-Dispatch, December 2, 1955, p. 1.

viewed the Gray Plan as a compromise and expected black belt legislators to fight local assignment unless they were assured tuition grants. Considering the tuition aid plan and pupil assignment program as part of a "double-barrel approach," Whitehead announced that he would "vote to permit the people to share in the decision as to the proposed change." He only hoped that "the private schools which may come into existence as the result of tuition grants for pupils from public funds will not dangerously impair the functioning of our public school system."[5] The position of Tucker and Whitehead convinced many legislators that by voting for the referendum bill public schools would not be destroyed.

From December 4 to January 9, Virginia politics were dominated by the referendum campaign. For Governor Stanley and the proponents of amending Section 141, a convincing referendum victory depended on capturing the uncommitted white voters outside of the black belt. The pro-amendment campaign concentrated on convincing the voters that an affirmative vote in no way damaged the future of public schools. To insure the credibility of their position, the pro-referendum forces utilized men and women prominently associated with education in organizing and explaining their position. Governor Stanley,

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[5] Remarks of Robert Whitehead of Nelson County before the House of Delegates of Virginia on December 1, 1955, p. 1. Since he was considered a friend of public education, Whitehead's endorsement of the referendum bill helped to win support from legislators who feared that tuition grants were a big step toward the disestablishment of public education.

for example, named Dr. Dabney Lancaster, former State Superintendent of Public Instruction and president emeritus of Longwood College, to direct the privately financed State Referendum Information Center.[6] Other prominent Virginians enlisted by the pro-referendum campaign included former Governor John S. Battle; Colgate Darden, the president of the University of Virginia and former Governor; Dowell J. Howard, the State Superintendent of Education; and Thomas C. Boushall, the president of the Bank of Virginia and a member of the State Board of Education. In endorsing a vote for the amendment, a Times-Dispatch editorial stressed that such distinguished friends of public education would not associate themselves with a campaign to destroy Virginia's public school system.[7]

Colgate Darden provided the most dramatic moment of the campaign. Among the most effective speakers for the referendum, Darden paused in the middle of the campaign to urge the pro-amendment leaders to proclaim their commitment to Section 129 of the Virginia Constitution which required the legislature to maintain "an effective system of free public schools."[8] The request raised two underlying fears held by Darden and his friends. First, they were concerned that defiant segregationists might use the referendum as a mandate for imposing a statewide

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[6] Richmond Times-Dispatch, December 10, 1955, p. 1.

[7] Editorial, Ibid., December 15, 1955, p. 20.

[8] Richmond Times-Dispatch, December 21, 1955, p. 1.

policy of segregation. Secondly, they wanted some assurance that Negro public education would not be abandoned by bitter whites of the black belt. On the latter issue, the State Referendum Information Center did not rule out the closure of Negro schools. Regardless of the amendment, the Center explained, a locality could refuse to appropriate money.[9]

Although pressed for an answer to Darden's question, Governor Stanley remained evasive. If Negro schools were closed, Stanley thought "the General Assembly undoubtedly will be given consideration to any further steps that should be taken."[10] The Governor also believed that raising the issue of Section 129 would only confuse the people.[11] Finally, on December 28, Stanley relented and announced that he would "strongly recommend to the General Assembly that it exercise its authority to see that the provision of Section 129 of the Constitution is fully carried out."[12] The answer was still vague enough to permit a locality to close its public schools. Darden, however, expressed his satisfaction and made a strong appeal for the passage of the referendum.[13]

Virginians opposed to the referendum formed the Virginia Society for Preservation of Public Education. A variety of

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[9]Editorial, Norfolk Virginian-Pilot, December 18, 1955, p. 6; December 21, 1955, p. 6.

[10]Quoted in Editorial, Norfolk Virginian-Pilot, December 21, 1955, p. 6.

[11]Ibid., December 23, 1955, p. 6.

[12]Richmond Times-Dispatch, December 29, 1955, p. 1.

[13]Ibid., December 31, 1955, p. 1.

anti-organization Democrats and Young Turks, such as Armistead Boothe and Stuart B. Carter, were associated with this group. Their objections to the tuition grants were that they would not work, were of doubtful constitutionality, and would undermine the public schools.[14] The emphasis on saving the public schools was consistent with Boothe's earlier endorsement of local option.

The anti-amendment campaign lacked organization, money and outstanding personalities. Furthermore, it did not win the support of important interest groups in the state. Two organizations, the Virginia Federation of Labor and the Virginia Council on Human Relations, which opposed the amendment, did not have much influence among white voters. Ministers who spoke out against the amendment and favored compliance with the Supreme Court's decision were considered to have gone beyond their religious domain.[15] The alleged threat posed by the ministers to passage of the amendment was dismissed by the jest: "They may have the preachers, but we've got the congregations."[16] Finally, only two major daily newspapers, the Norfolk Virginian-Pilot and the Norfolk Ledger-Dispatch, opposed passage of the referendum bill.[17]

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[14] Ibid., December 20, 1955, p. 1.

[15] Gates, pp. 79-81.

[16] Richmond Times-Dispatch, January 1, 1956, p. 1.

[17] Gates, p. 82.

Ten days before the referendum, the State Referendum Information Center released a major policy statement on the Gray Plan. The statement emphasized that tuition grants and local assignment were necessary to prevent forced integration and that there was no obligation to integrate under the Brown decision. "If you believe in local self-government by people who know local customs and local needs, you should vote on January 9 for the Convention."[18] The effect of this announcement was to broaden the January 9 referendum beyond the limited question of calling a convention to amend Section 141. Thus, pro-amendment forces portrayed the referendum as a test of the entire Gray Plan.

In a thorough analysis of the referendum campaign, Robbins Gates later wrote: "However confused the issue may have become, no citizen of Virginia could claim that he had purposely been left uninformed."[19] Recent documents demonstrate that the suspicions of Darden and other moderate organization men that the Gray Plan was to be dropped were well-founded. Before the referendum was held, the organization's hierarchy decided to drop the Gray Plan and adopt a more belligerent stance toward the Supreme Court. However, the enthusiasm for

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[18] Richmond Times-Dispatch, January 1, 1956, p. 1.

[19] Gates, p. 74.

interposition was checked as a precaution against endangering the margin of victory in the referendum.[20] Editor Kilpatrick was especially eager to push on with interposition. He wrote Harry Byrd, Jr. that his correspondents in Mississippi and South Carolina were urging the adoption of an interposition resolution in Virginia. Since the Old Dominion did not possess the same racist image, they thought a Virginia resolution "would carry far greater national impact than the same action in South Carolina, Georgia, or Mississippi."[21] The idea of a united Southern front also appealed to Senator Harry Byrd. Congratulating Kilpatrick on his splendid exposition of interposition, Byrd mentioned that Senator James Eastland of Mississippi said that the editorials were "gaining great popularity all through the South." Relating this to the Virginia referendum campaign, Byrd said: "Above all, we must not compromise our convictions by premature legislation." Plainly, the Virginia Senator did not want Virginia to commit itself to the Gray Plan and limited compliance to the Supreme Court's decision. However, Byrd advised the enthusiastic editor to cool temporarily the interposition fires because nothing should be said "that will injure the big vote we must secure on January 9, as this will be the foundation stone for our future

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[20]Letter, James J. Kilpatrick to Tom Waring, December 9, 1955, University of Virginia, Archives, Kilpatrick Letter File.

[21]Letter, James J. Kilpatrick to Harry Byrd, Jr., December 19, 1955, University of Virginia, Archives, Kilpatrick Letter File.

battles."[22] Thus, several weeks before the referendum, the organization's hierarchy prepared to convert the expected victory at the polls into a mandate for total resistance to the Supreme Court's decision.

A combination of local and Southern enthusiasm for interposition plus the encouragement of Senator Byrd intensified Kilpatrick's ardor for defiance. The Richmond editor assured Byrd that interposition "is basically and fundamentally sound, it transcends the race issue, and it offers hope for a check and balance that must be asserted against the Supreme Court before all reserved powers of the States are whittled away by judicial legislation." Kilpatrick wrote of his eager anticipation for the conclusion of the referendum campaign since

> the necessity for keeping interposition statements under wraps will have ended. You can imagine how impatient I am to put aside the Gray Commission's program, which is a hodgepodge of expediency and compromise, in favor of a direct, forthright stand based upon fundamental principles of our Constitution. Like yourself, I am convinced that if as many as ten or eleven States would unite in a single front, the court would find its mandates almost impossible of enforcement.[23]

Just as Virginia had been the capital of the Confederacy, Senator Byrd and editor Kilpatrick hoped to make it the leader

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[22]Letter, Harry F. Byrd to James J. Kilpatrick, December 23, 1955, University of Virginia, Archives, Kilpatrick Letter File.

[23]Letter, James J. Kilpatrick to Harry F. Byrd, December 28, University of Virginia, Archives, Kilpatrick Letter File.

of the South's struggle against the Supreme Court's attack upon white supremacy.

Some hint that the Gray Plan was to be "put aside" was given during the referendum campaign. On December 17, 1955, Senator Byrd issued a statement placing all of his immense prestige behind the referendum. "The conditions confronting us are such that we will succeed better by going on a flexible basis or on a basis of standby legislation than by attempting to enact complete and final legislation to begin with the school term next September." By postponing action, Byrd suggested that "it is possible that some form of action can be accepted as a pattern for all the Southern states. The battle to preserve our public school system may last for many years and we may find it necessary to change our tactics from time to time." The Senator then suggested that not even the Supreme Court fully endorsed the Brown decision. "If segregation was illegal on May 17, 1954, as declared by the Supreme Court, then it was illegal in September, 1954, when the Supreme Court permitted the schools to continue on a segregated basis.[24]

Governor Stanley also made several comments during the referendum campaign which hinted at a reversal of Virginia's policy. On December 19, Stanley indicated that he would not

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[24] Richmond Times-Dispatch, December 18, 1955, p. 4. Byrd also mentioned that Negroes would suffer the most from desegregation since "the cost of schools is borne nearly entirely by the white population." Apparently Byrd still hoped that black citizens could be frightened into pursuing a course of voluntary segregation.

decide on recommending the Gray Plan to the General Assembly until after the referendum.[25] Three days before the referendum, Stanley told a statewide radio audience that a "no vote" was a vote "for mixed schools in Virginia."[26] Apparently, by underscoring the race issue, the Governor was attempting to erect some rationale for interpreting the expected triumph as authority for delaying action on the Gray Plan.

On January 9, the referendum to hold a limited constitutional convention was adopted by an impressive margin of 304,154 votes to 146,164 votes.[27] As expected, the percentage of voters who went to the polls in each district was greatest where the number of Negro voters was the highest. Black belt whites voted emphatically for the amendment, most likely with the hope of preventing enforced desegregation anywhere in Virginia. Significantly, Negroes voted with the same unanimity against calling a constitutional convention. Outside the black belt, the referendum carried all but ten counties, although with lower percentages.[28]

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[25] Ibid., December 20, 1955, p. 1.

[26] Ibid., January 7, 1956, p. 1.

[27] Ibid.

[28] Gates, pp. 86-95.

The reasons for pro-amendment votes were unclear in white areas outside the black belt. The endorsement of a constitutional convention by Battle, Darden, and Lancaster probably influenced a number of white voters. Others obviously shared racial views similar to the Defenders. However, many probably voted "yes", hoping that the Gray Plan could help Southside Virginia without damaging local control of education. Many Virginians assumed that they would continue to control local school policy as well as the rate of desegregation.

A cautious analysis of the referendum was made by the Richmond Times-Dispatch, which supported the amendment of Section 141 as a means of saving the public schools. According to an editorial, the referendum was only a "first step toward putting the Gray Plan into effect." The Commission's goal, the editor emphasized, was "to avoid enforced integration not to avoid all integration." Furthermore, the editorial added, the Commission never recommended closing "the entire public school system of Virginia." A policy of gradual desegregation, consistent with "Judge Parker's ruling" was the course advised by the Times-Dispatch.[29]

With the referendum safely won, the organization's inner circle concentrated on distorting the meaning of the referendum. Leading the way was the determined editor of the News Leader who wrote: "Overwhelmingly, Virginia wants

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[29]Editorial, Richmond Times-Dispatch, January 10, 1956, p. 12.

no part of integrated public schools. Beyond question, Virginia objects to the Supreme Court's usurpation of power beyond its authority."[30] Senator Byrd added his prestige to this interpretation by observing that the referendum was simply an indication of "the opposition of the people to integration."[31]

After misrepresenting the purpose of the referendum, Kilpatrick urged that Virginia alter its strategy. He opposed an early constitutional convention which also meant postponing the other recommendations of the Gray Plan. Instead of acting on the Gray Plan, Kilpatrick urged the General Assembly, which was to meet on January 11, to act on a resolution of interposition.[32] He explained that interposition was an "announcement" by a state that an "alleged infraction" of the Constitution "be judged by all the States." Moreover, the editor asserted, erroneously, that enforcement of the "objectionable construction" was suspended by activating the process of interposition.[33]

The Times-Dispatch, assuming a moderate stance, thought interposition "would be a useful and important

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[30]Editorials, Richmond News Leader, January 10, 1956, p. 12.

[31]Richmond Times-Dispatch, January 11, 1955, p. 1.

[32]Editorial, Richmond News Leader, January 10, 1956, p. 12.

[33]Editorial, Richmond News Leader, January 12, 1956, p. 12.

gesture" only as a symbol of protest.[34] More critical of interposition was the Virginian-Pilot which argued that the idea was falsely described as a technique for evading the Brown decision. Furthermore, the editor warned that interposition with its "intent to circumvent the Supreme Court decision" could taint the Gray Plan with illegality.[35]

The controversy over Virginia's school policy was further complicated by an announcement from the Arlington School Board that it intended to implement a local plan of desegregation. The Arlington plan called for gradual desegregation beginning with the elementary schools in 1956, junior high in 1957, and senior in 1958. Segregated schools would be provided for children of parents who were opposed to desegregation. However, the parents would have to provide the transportation to the segregated schools. The plan was defended as being consistent with the recommendations of the Gray Plan and the tradition of local control of education. The Arlington proclamation led to a heated debate over state and local responsibility for public education. Garland Gray was furious and proposed a moratorium on local action "until

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[34]Editorial, Richmond Times-Dispatch, January 11, 1956, p. 12.

[35]Editorial, Norfolk Virginian-Pilot, January 14, 1956, p. 6.

the State's policy is finally determined by the Governor and the duly elected representatives of the People of the Commonwealth."[36]

On January 11, the regular session of the General Assembly convened and five days later it deferred the Gray Plan to a special session. The rationale given by the legislators was that the Assembly would be occupied fully with normal legislative matters. A Constitutional Convention was set for March 5 by the Assembly.[37] The Times-Dispatch approved of the delay and believed that a special session in June would allow the Assembly sufficient time to pass an assignment plan and tuition grants for September.[38]

The delay worked to the advantage of resisters attempting to win support for interposition. On January 19, 1956, State Senator Harry C. Stuart, along with thirty-four other members of the Virginia Senate, introduced a resolution of interposition. The act was rich with Virginia symbolism. Stuart was the great nephew of J.E.B. Stuart and January 19 was the anniversary of Robert E. Lee's birth.[39] However, the

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[36]Richmond Times-Dispatch, January 15, 1956, p. 1.

[37]Ibid., January 17, 1956, p. 1.

[38]Editorial, Ibid., p. 12.

[39]Richmond Times-Dispatch, January 20, 1956, p. 1.

Stuart resolution did not satisfy more rabid interpositionists since it contained a startling omission: it did not declare the Brown decision "null and void." Instead, the resolution pledged "to take all appropriate measures, honorably, legally, and constitutionally available to us to resist this illegal encroachment upon our sovereign powers."[40] Although Kilpatrick had argued that a resolution of interposition automatically suspended the implementation of the Brown decision, the Stuart resolution rejected this interpretation. Specifically, the interpositionists agreed to omit a clause, favored by Kilpatrick, which had stated that Virginia's school segregation law was still "in full force and effect." As Kilpatrick explained, a strong resolution was dropped on the recommendations of State Senators Robert Button and Albertis Harrison who counseled that only a mild declaration had a chance of winning acceptance outside the South.[41]

Instead of interposition, Virginia's leadership hoped, as Kilpatrick explained, to explore all tactics for preventing "enforced integration of our schools until the question of the court's decree is put to rest."[42] By employing every available evasive maneuver, Virginia segregationists hoped to prevent

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[40] I Race Rel. L. Rep. 445

[41] Richmond News Leader, January 19, 1956, p. 14.

[42] Ibid.

integration on the theory that an amendment to the federal Constitution or a subsequent Supreme Court decision would reverse the desegregation decision. Organization men pointed to other examples where the Supreme Court had responded to political pressure by reversing controversial decisions. Defiance also served the Democratic organization in another way. By postponing desegregation the Party could claim to have exhausted every method of preventing desegregation. The longer the struggle endured, the longer the political benefits. No potential massive resister publicly spoke of winning time to ease racial tensions so that Virginia could eventually desegregate. Instead, defiant segregationists, as explained by the News Leader, promised "litigation, legislation, appeals to sister States for a Constitutional amendment, judicial proceedings within our State courts" in an effort to block enforcement of the Brown decision.[43]

The unwillingness of Virginia's legislators to accept an extreme nullification statement indicated that a majority recognized the theoretical and practical shortcomings of Kilpatrick's argument. When Delegate Robert Whitehead denounced the watered-down resolution of interposition, the exasperated Kilpatrick moaned:

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[43] Ibid., January 27, 1956, p. 10.

> There was a time when Virginia could recognize the face of tyranny. We had strong men in this Commonwealth then, fearless men, who loved liberty, men who would resist usurpation. What has become of this spirit? How has our heritage been wasted?[44]

On February 1, the General Assembly approved the Stuart Resolution by votes of 36 to 2 in the Senate and 90 to 5 in the House of Delegates.[45] A number of legislators prefaced support of Virginia's declaration by stating that their vote represented a protest rather than an attempt to nullify the Supreme Court's decision. Robert Whitehead again warned: "The lack of general resistance to the adoption of this resolution stems from the fact that a large portion of the membership is laboring under the delusion that it is nothing more than a strong protest against the May 17, 1954, decision." (his emphasis)[46] Despite the concessions of the interpositionists, Whitehead was worried that Virginians later would misconstrue the Stuart Resolution as a legislative endorsement for total resistance. Whitehead concluded by indicting Kilpatrick for confusing the people and leading them "to think that he has discovered a staff on which they can lean, when in fact it is but a broken reed."[47]

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[44] Ibid., January 23, 1956, p. 10.

[45] Richmond Times-Dispatch, February 2, 1956, p. 1.

[46] Remarks of Delegate Robert Whitehead of Nelson County before the House of Delegates of Virginia on February 1, 1956.

[47] Ibid.

In the Senate, Ted Dalton made a speech similar to Whitehead's. "We're spinning our wheels on a big word that is going to mislead our people into thinking it will preserve separate schools."[48] Looking into the future, Dalton predicted that the resolution was only strengthening the legal case of the NAACP as an example of circumvention. Exasperated by the Assembly's conduct, Dalton concluded: "Are we going to cry at the moon?"[49]

Probably only a few legislators thought that Virginia had accomplished anything of substance by passing the resolution. Most agreed with the sponsor of the resolution, Harry Stuart, who confessed: "The resolution in itself will not legally suspend the enforcement of the decision in Virginia."[50] However, he hoped that the resolution would "set in motion a chain of actions that will not only impede the enforcement of it in Virginia, but will entirely obliterate the decision in Virginia and elsewhere."[51] Only a very few shared Kilpatrick's zeal for recapturing the spirit of 1798. Mills Godwin, a black belt senator and a massive resister who was later to become governor, remarked: "I am just so glad that I have a chance to raise my voice in behalf of this great principle."[52]

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[48] Richmond News Leader, February 1, 1956, p. 1.

[49] Ibid.

[50] Ibid., January 27, 1955, p. 1.

[51] Ibid.

[52] Richmond Times-Dispatch, February 2, 1956, p. 3.

Publicly and privately Kilpatrick admitted that little of substance was accomplished by the Stuart Resolution. Legally, Kilpatrick wrote, "our action was persuasive, declaratory, expressive of policy and opinion--nothing more. As for the future, it can be said at the moment only that Virginia has made her appeal; we must wait for our sister States to respond."[53] Similar expressions combining both wishful thinking and realism were expressed by Kilpatrick in a letter to Senator Byrd. With the resolution about to be passed, the Richmond editor wrote that while "we hope earnestly that interposition will void the Supreme Court's decision, we cannot say as a matter of certainty that that will be the effect. I imagine that it will depend entirely upon how much force the Supreme Court is able to exert in carrying out its mandates. If Eisenhower should send troops in to enforce the court decision, I believe we would find that our resolution had not actually 'voided' these decisions at all."[54]

Technically the extreme interpositionists like Kilpatrick were forced to make major concessions. They would have preferred joining Mississippi, Alabama, and Georgia in "nullifying" the Brown decision.[55] However, numerous lawyers among the Virginia legislators recognized that they could not

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[53]Editorial, Richmond News Leader, February 2, 1956, p. 12.

[54]Letter, James J. Kilpatrick to Harry F. Byrd, January 30, 1956, University of Virginia, Archives, Kilpatrick Letter File.

[55]I Race Rel. L. Rep. 440 (Miss); I Race Rel. L. Rep. 438 (Ga.); I Race Rel. L. Rep. 437 (Ala.).

overlook the Civil War and a hundred years of constitutional history. Though they disagreed with the decision, moderate segregationists accepted the jurisdiction of the federal courts and the federal government's power to enforce the law. The extremists, nonetheless, won an important strategic victory. In subsequent months the legislative history of the resolution, as Robert Whitehead predicted, was forgotten and massive resisters were able to use the Stuart Resolution to justify the school closing laws.

While the attention of the General Assembly was focused on the interposition debate, other bills were introduced which anticipated massive resistance. John B. Boatwright, a staunch segregationist from Buckingham County, introduced a bill which would have prohibited the spending of state funds for racially mixed schools.[56] Though unsuccessful, Boatwright's bill indicated the determination of some legislators to adopt massive resistance immediately.

The General Assembly did pass legislation aimed at disciplining Arlington County and discouraging similar local initiative. Oddly enough, Arlington was the only Virginia county to elect its own board of education. On January 30, 1956, Delegate Frank Moncure of Stafford County introduced a bill which repealed the statutory provision providing for

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[56] Richmond Times-Dispatch, January 25, 1956, p. 6.

the popular election of school boards.[57] Calling for the defeat of the bill, a Richmond Times-Dispatch editorial chastised Moncure and the other patrons of the legislation for their "unjustifiable interference with local self-government and an attempt to change the rules in the middle of the game."[58] Nevertheless, the bill easily became law.[59] Under pressure, the Arlington School Board assured the General Assembly that they would postpone desegregation until a statewide policy had been formulated.[60]

Delegate Boatwright also introduced another bill aimed at correcting the unorthodox views of the northern Virginians. Boatwright's legislation would have prohibited certain classes of federal employees from serving on school boards or holding other local offices. At the end of February the bill was defeated.[61]

Aside from the interposition resolution, however, the most controversial proposal relating to education was a joint House Resolution introduced by the conservative Speaker of the House, E. Blackburn Moore. The resolution, presented to the House on February 20, declared that public schools should

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[57] Richmond News Leader, January 30, 1956, p. 1.

[58] Editorial, Richmond Times-Dispatch, February 1, 1956, p. 16.

[59] Acts of General Assembly, Chapter 591, Reg. Sess. 1956, p. 949.

[60] Richmond Times-Dispatch, February 6, 1956, p. 1.

[61] Richmond News Leader, February 10, 1956, p. 1., February 29, 1956, p. 1.

continue to be operated on a segregated basis for the 1956-1957 school year. Uncertainty regarding the date and the length of the special session plus the need for time for local administrative adjustments were among the reasons offered for postponing desegregation.[62] Strategically, the recommendation was consistent with the policy outlined in the interposition resolution which was to use all "appropriate measures" to resist the Brown decision. Postponing action would also allow the organization time to develop a case for abandoning the Gray Plan. Though not a law, the Moore resolution, if passed, would have carried great weight with the Governor.

Outside the black belt, Virginia newspapers attacked the Moore resolution. Before the resolution was drawn up the Times-Dispatch charged its sponsors with "bad faith." An editorial argued that the Gray Plan and the pro-amendment campaign had recommended "haste so as to provide educational aid in the school years 1956-1957." Citizens who voted to aid black belt counties and to facilitate desegregation in regions with few Negroes, the editor remarked, were not told "that the people really voted on January 9 not to have any integration at all."[63]

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[62] Richmond Times-Dispatch, February 21, 1956, p. 1.

[63] Editorial, Richmond Times-Dispatch, February 13, 1956, p. 14.

This sense of betrayal was especially strong in southwest Virginia where the Negro population was negligible. The editor of the Bristol Herald Courier recalled that politicians had stumped the southwest "exhorting haste in protecting our fellow Virginians in the east and promising local option to localities where integration might be acceptable."[64] Joining the Times-Dispatch and the Bristol Herald Courier were the Lynchburg News, Charlottesville Daily Progress, Roanoke Times, Danville Bee, Staunton News Leader, Norfolk Virginian-Pilot and the Lynchburg Advance, to name a few.[65] Generally the papers believed that the Moore resolution patently violated the "good faith" requirement of Brown II and endangered the effort to restrict desegregation through the local option scheme. The Charlottesville Daily Progress wrote that Virginia had to choose between "segregation in Arlington and a few similar localities or the protection of the rest of the State against the desegregation decree."[66]

The Richmond News Leader, not surprisingly, supported the Moore resolution and repudiated local option. Though not a law, the editor held that "the localities, as creatures of

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[64]Quoted in the Richmond Times-Dispatch, February 27, 1956, p. 12.

[65]Ibid., February 23, 1956, p. 6, February 27, 1956, p. 6. On these dates the Times-Dispatch listed the newspapers supporting and defending the Moore Resolution.

[66]Quoted in the Richmond Times-Dispatch, February 23, 1956, p. 6.

the State, or children of the State, would be expected to obey such policy declarations implicitly." Recalling the resolution of interposition, the editorial suggested that to permit local assignment would be viewed as a "surrender by the State to the very encroachment to which we have just declared that we would never surrender."[67] As Whitehead predicted, the organization interpreted interposition as broadly as possible.[68] Furthermore, whereas the organization defended a localities privilege to close public schools, it attacked local authority to maintain desegregated public schools. The attempt to impose a statewide school policy involved a mass of contradictions.

The Moore resolution also contributed to a confrontation between its sponsor and Attorney General Almond, both suspected of having designs on moving to the Governor's mansion. Two days after the resolution was introduced, the Attorney General observed that it would not be consistent with "deliberate speed."[69] Supporting Almond was Lieutenant Governor A.E.S. Stephens who believed the Moore resolution would make Virginia's position "legally untenable."[70] In

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[67]Editorial, Richmond News Leader, February 13, 1956, p. 10.

[68]See page 110 for Whitehead's observations.

[69]Richmond News Leader, February 22, 1956, p. 1.

[70]Ibid., February 20, 1956, p. 1.

reply, Moore argued that the resolution was consistent with his interpretation of "deliberate speed." which was still undefined by the federal courts.[71] Byrd's close friend charged that no person could oppose his resolution if he "opposes the mixing of the races in the public schools."[72] Almond side-stepped the attempt to paint him as an integrationist by stating that the Moore resolution would be a "dangerous weapon in the hands of the opposition." Any plan designed to avoid the "serious impairment or destruction" of race mixing, the Attorney General continued, must fall "within the framework of the law."[73]

In the midst of the Moore-Almond exchange, Senator Byrd issued a brief statement from Washington calling for massive resistance:

> If we can organize the Southern States for massive resistance to this order [to desegregate] I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South.
>
> In interposition, the South has a perfectly legal means of appeal from the Supreme Court's order.[74]

Byrd's statement was probably timed to give maximum support to a declaration against the Brown decision which was being

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[71] Richmond Times-Dispatch, February 22, 1956, p. 6.

[72] Ibid.

[73] Richmond News Leader, February 27, 1956, p. 1.

[74] Richmond Times-Dispatch, February 25, 1956, p. 1.

drafted by southern senators and representatives.[75] But the statement also may have been designed to win votes for the Moore resolution. The interaction of state and regional policy statements figured to bolster resistance in both spheres.

Despite Senator Byrd's intervention the Moore resolution died in the Senate Rules Committee in early March, after being passed by the House of Delegates. In presenting his resolution Speaker Moore clashed with some members of the Rules Committee. Lieutenant Governor Stephens wondered if Moore intended to brand "anyone who opposes this resolution as an integrationist." Avoiding the question, Moore stuck to the position that Virginians should resort to every possible delay and would make "a big mistake if we speedily move into a position which permitted a start toward integration." Senator Edward Breeden of Norfolk replied that he wanted segregated schools but, referring to Almond's objections of the Moore resolution, said: "It's a matter of whether the lawyer's advice should be followed or the layman's." Most senators apparently objected to taking action which appeared to conflict with the Gray Plan or which might hurt Virginia's case in court.[76]

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[75] Ibid. On the same day that Byrd's statement was printed, the Times-Dispatch reported that Southern leaders were working on a regional policy statement.

[76] Ibid., March 9, 1956, p. 1. The Moore resolution, in an amended form, passed the House on February 28 by a vote of 62-34. The amendment stated that the resolution should not influence the Governor's decision to call a special session.

On March 11, ninety-six southern congressmen and senators adopted a so-called "Southern Manifesto" pledging themselves "to use all legal means" to reverse the Brown decision. Virginia's two senators and all of its representatives signed the Manifesto.[77] In an effort to win broad support the declaration omitted the use of words such as "interposition" and "nullification." Senator Byrd described the Manifesto as "part of the plan of massive resistance we've been working on and I hope and believe it will be an effective action."[78]

Although Senator Byrd had coined the term "massive resistance," Virginia still balked at accepting this policy. The General Assembly adjourned without passing any genuine massive resistance legislation. However, the legislature indicated a readiness to move toward total defiance at a more suitable time. Beside passing the Moncure Bill, the Assembly approved a resolution, introduced by Samuel E. Pope, to prevent interscholastic or intramural athletic competition between the races. The Times-Dispatch considered the Pope resolution "wrong and indefensible," and believed it brought "Virginia

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[77] Ibid., March 12, 1956, p. 1. Virginia's two Republican Representatives, Richard Poff and Joel Broyhill, joined their Democratic colleagues in signing the declaration. Eventually 101 of the 128 Southerners in Congress signed the "manifesto". Albert Gore, Lyndon B. Johnson, and Estes Kefauver were the only Southern Senators who failed to sign the document.

[78] Ibid., March 13, 1956, p. 1.

and the United States into disrepute in many parts of the world."[79] Though the resolution was not a law, Attorney General Almond relied upon it in advising school officials to maintain segregated athletic competition.[80]

Along with legislation aimed at regulating school policy, the General Assembly passed another law designed to harass the desegregation efforts of the NAACP. The statute gave the courts the authority to require the disclosure of certain information by parties who brought suits against school boards.[81] For example, the courts could request the names of contributors supporting school litigation or require oaths that the case was instituted by the actual plaintiffs named in the suit. Delegate John J. Williams, one of the sponsors of the legislation, admitted that the law intended to hinder the NAACP.[82]

In early March while the General Assembly completed its work, the delegates to the constitutional convention voted unanimously to amend Section 141 of the Virginia Constitution. The amendment permitted the General Assembly and local governing bodies "to appropriate public funds for Virginia students in public and nonsectarian private schools." The convention,

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[79] Editorial, Ibid., March 12, 1956, p. 16.

[80] Ibid., March 26, 1956, p. 1.

[81] Acts of the General Assembly, Chapter 670, Reg. Sess., 1956, p. 1026.

[82] Richmond Times-Dispatch, February 21, 1956, p. 1.

which included ten Defenders, also endorsed interposition by a vote of 35 to 3.[83]

With the work of the General Assembly and the constitutional convention completed, Virginia waited for the Governor to designate a date for a special session of the General Assembly to act on the recommendations of the Gray Committee. Governor Stanley resisted pressure to move rapidly on the Gray Plan. During the referendum campaign the Governor had pressed for speedy action. However, the Governor now viewed the Gray Plan as "standby proposed legislation for such time as it's deemed proper." Instead Stanley hoped Virginia would find "some method whereby we might continue, even beyond the next school year, our present system."[84]

The struggle over school policy, as the referendum campaign and the meeting of the General Assembly demonstrated, was deeply enmeshed in politics. The seeds of the organization's destruction were contained in the school issue. One wing of the organization represented by Colgate Darden and John Battle was convinced that any deterioration of Virginia's schools threatened social and economic programs of the state. Though segregationists, they preferred accommodation to school closures. Governor Stanley's weak endorsement of Section 129 was aimed at alleviating some of their fears.

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[83] Ibid., March 8, 1956, p. 1.

[84] Ibid., Richmond Times-Dispatch, March 10, 1956, p. 1.

The extreme segregationists were not strong enough to risk total resistance until the Supreme Court and interposition were made the major issues in Virginia politics. The massive resisters, through Kilpatrick's editorials, emphasized that the Brown decision was not only a bad decision, but part of a trend which threatened: "the whole concept of this Union, (of which) the greatest feature of its architecture, was the concept of dual sovereignty. . . ."[85] Thus, the defense of constitutional government, as interpreted by the states, superceded Virginia's obligation to public education or to obey the law. Perhaps even more significant, the legitimacy of the Brown decision was made to appear debatable. Furthermore, Virginians were told that legal methods were available for evading the desegregation order. Even interposition, counseled Senator Byrd, was a "legal means" of challenging the Supreme Court. As a result, conservative politicians could support their black belt colleagues without indulging in racial epithets.

Despite the pressure for massive resistance, many legislators were uneasy about abandoning the Gray Plan. After the referendum campaign, advocating total resistance seemed dishonest. Many legislators had rationalized their interposition vote as a mere protest which in no way conflicted with their support of local option.

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[85] Richmond News Leader, February 2, 1956, p. 12.

In the debate on the Moore resolution, the underlying issue of race surfaced. Moreover, in voting on the Moncure Bill, Pope resolution, or the NAACP Bill, legislators knew that their commitment to segregation was also being tested. The manipulation of the race issue was the lever for imposing orthodoxy in the organization. The politically ambitious, like Attorney General Almond, recognized that to be "soft" on integration meant losing the black belt and the endorsement of Senator Byrd. Loyalty to white supremacy and constitutional principles interacted to give the organization a tremendous political advantage.

Ironically by emphasizing "fundamental principles," the organization was forced to compromise its greatest source of pride--integrity. The conduct of the referendum campaign was riddled with deception. Interposition raised hopes which its author and defenders recognized as patently false. By giving alternating interpretations of Virginia's interposition resolution, massive resisters only compounded the confusion. While accusing the federal government of totalitarianism, the General Assembly demonstrated its intolerance in efforts to discipline Arlington County and the NAACP.

The rise of massive resistance was not the result of a statewide grass roots movement. The Democratic organization was determined to defy the Supreme Court from the very beginning. However, limited compliance as outlined by the Gray Commission

seemed to be Virginia's only alternative. With the interposition mania, coupled with regional resistance, the Democratic organization thought itself strong enough to adopt a more defiant course.

CHAPTER V

MASSIVE RESISTANCE

In the spring and early summer of 1956 action on the school issue stalled temporarily, as the Old Dominion waited on its Governor to call a special session of the General Assembly. Plainly, Governor Stanley contemplated delay until the federal courts ordered white schools to admit Negro children. Thus the timing of the special session would be determined, in part, by the aggressiveness of the NAACP lawyers in the courts. Recognizing that no school district would voluntarily desegregate, Spotswood Robinson and Oliver Hill announced their intention to litigate intensively until white school doors were open to Negro children. "We feel that we have been more than patient," the lawyers explained.[1] Establishing September 1956 as the target date for desegregation, the NAACP represented Negro parents in suits filed in Newport News, Norfolk, Arlington and Charlottesville. Unlike the Prince Edward case, which was renewed, the new litigation was instituted in more favorable settings. None of the new suits

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[1] Richmond Times-Dispatch, April 22, 1956, p. 1.

were in the black belt, and with the exception of Charlottesville, all were in urban areas.[2]

Defendant school boards were placed in an awkward position between a possible court order to desegregate and an informal state policy of preserving segregated schools. Representatives of school boards pressed Governor Stanley to call a special session so that school officials could present some evidence of meeting the requirements of the Brown decision to the federal judges. Finally Governor Stanley asked the Gray Commission to reassemble in order to find a plan of legally avoiding desegregation.[3]

While Governor Stanley procrastinated, Byrd, Smith, Tuck and Abbitt worked feverishly to devise a school plan for the Governor. Congressman Howard Smith played the leading role in developing legal gambits for evading court orders to desegregate. Smith suggested that Virginia could prevent integration by withholding funds from desegregated schools, by using the state police power to close mixed schools, or by merely disregarding the state's obligation to provide public education under Section 129 of the Virginia Constitution. The last recommendation was offered on the theory that Sections 129 and 140, (voided by Brown) were inseparable. By repealing Section 140, Smith argued, the Supreme Court had upset the

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[2]Southern School News, Vol. II, No. 11 (May, 1956), p. 3; Vol. 2, No. 12 (June, 1956), p. 13; Vol. 3, No. 1 (July, 1956), p. 11.

[3]Richmond Times-Dispatch, May 1, 1956, p. 1.

Commonwealth's ability to provide an "efficient" public education under Section 129.[4]

Representative Smith's major objective was to lay the foundation for a dramatic confrontation between the Federal Government and Virginia. He recommended two methods for creating such a clash. First, he suggested that the General Assembly should assume complete responsibility for desegregating public schools. Then, citing the Eleventh Amendment, the General Assembly would withdraw its consent to be sued after refusing to integrate public schools. Secondly, Smith believed that any assignment plan should provide an appeals system which left the ultimate judgment of student placement to the Governor.[5] When the Governor refused to assign a Negro child to a white school, Smith predicted that the Supreme Court would be placed "in the embarrassing position of having to issue an order against a Governor of a sovereign state, which they could not enforce."[6]

The recommendations offered by Smith would also serve Virginia in other ways during the school crisis. By employing evasive legal tactics, he predicted, Virginia could tie up desegregation litigation for several years. Moreover, if the Governor and the General Assembly assumed greater respon-

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[4]Undated memorandum in Box 110 of the Smith Letter File, University of Virginia, Archives, Smith Letter File.

[5]Ibid.

[6]Letter, Howard W. Smith to Harry F. Byrd, May 4, 1956, University of Virginia, Archives, Smith Letter File.

sibility, Smith reasoned that the pressure on local school boards would be relieved.[7] Excited by the prospects of this strategy, Judge Smith urged Senator Byrd to join him in placing his ideas before Governor Stanley. "One voice crying in the wilderness seems to make no impression."[8]

Each of the suggestions made by Judge Smith was dubious constitutionally. Even he doubted their validity in a court of law. Writing to David J. Mays, counsel for the Gray Commission, Smith explained: "May I repeat what I said last night that I haven't the faintest idea of winning any case on this subject before the Supreme Court and these suggestions are made with the idea of raising and stressing every possible point in the litigation."[9] Consuming time and embarrassing the Supreme Court were uppermost in Smith's mind.

Despite Smith's influence, David J. Mays wrote him that the recommendations regarding the Eleventh Amendment would offer Virginia no legal defense. Sterling v. Constantin (287 U.S. 378) and Ex Parte Young (209 U.S. 123), Mays continued, made "it pretty clear to me that the Governor of the State is subject to injunctive order in the Federal Court when

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[7]Undated memorandum, Smith Letter File.

[8]Letter, May 4, 1956.

[9]Letter, Howard W. Smith to David J. Mays, May 10, 1956, University of Virginia, Archives, Smith Letter File.

he is violating rights under the Federal Constitution."[10] Nonetheless Smith met with the Gray Commission in Richmond on May 26, in order to introduce his views. The secret meeting, like many during this period, was attended by other representatives of the organization's hierarchy. While Smith introduced his legal arguments, Representative William Tuck pointed out the political advantages of "walking the last mile." Tuck argued that by using every tactic of delay, the organization would satisfy the voters that it had made very effort to obstruct desegregation.[11] With an election in 1957 in the offing, this strategy carried considerable weight with the Commission's members, especially those from the Southside.

As a result of the meeting with the Commission and the exchange with David Mays, Smith dropped his affection for the Eleventh Amendment as a legal ploy. Writing to State Senator Curry Carter, Smith explained: "I do not think there is any sure answer to the problem except the purse strings. As the State Constitution requires the Commonwealth to conduct a segregated system of schools, as well as an efficient system, it seems to me that the Legislature if it chose to do so, is fully

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[10]Letter, David J. Mays to Howard W. Smith, May 25, 1956, University of Virginia, Archives, Smith Letter File.

[11]The meeting is mentioned in a letter from Howard W. Smith to Honorable Curry Carter, June 4, 1956, University of Virginia, Archives, Smith Letter File. An interview with a participant of the meeting, who preferred to remain unnamed, discussed the issues covered by Smith and the remarks made by Representative Tuck.

justified in denying funds to integrated schools."[12] As subsequent events proved, a consensus rapidly developed among the massive resisters that segregation in all of Virginia's schools could be maintained only by a fund-withholding policy.

By June, the Governor still had not set the date of a special session. Attorney General Almond publicly asked Governor Stanley to call an emergency meeting of the Assembly. In charge of providing legal counsel for the school boards, Almond urged the state legislature "to meet the attack of the National Association for the Advancement of Colored People. I have fought to the end of my legal rope."[13]

Almond's plea brought to the surface a difference of opinion among Virginia's elected officials. E. Blackburn Moore wondered if the Attorney General intended to "fight for a continuance of segregated schools . . . or does he desire legislation that would permit any form of integration for this coming school year?"[14] Endeavoring to maintain his reputation as an uncompromising segregationist, Almond charged Moore with "deliberately distorting and misrepresenting my position." Pointing out that Moore offered no plan for Virginia, the Attorney General promised to "continue the fight

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[12] Ibid., Smith to Carter.

[13] Richmond Times-Dispatch, June 1, 1956, p. 1.

[14] Ibid., June 4, 1956, p. 1.

to preserve segregation in the Virginia public school system." Despite the House Speaker's attempt to portray him as "soft" on integration, Almond was "sure the people of Virginia do know who has waged the fight against the NAACP."[15] The Moore-Almond exchange ended with the House Speaker asking that the Attorney General specify the legislation he preferred. Speaker Moore firmly opposed any legislation "which would put the stamp of state approval on integration in any public school of Virginia."[16] In recalling the incident eight years later, Almond interpreted Moore's attack as "a calculated attempt to embarrass me when I announced for governor. I knew at the time when Moore cackled it was an echo of Byrd's chirp."[17]

Following the Gray Commission's recommendation, Governor Stanley announced on June 6 that a special session of the General Assembly would be convened within ninety days.[18] By mid-June massive resisters were apprehensive about the forthcoming meeting of the Legislature. On June 15 a group of Southsiders, who could be counted on to defy the Supreme Court, held a private meeting in Petersburg. Discussing the conference with Judge Smith, Garland Gray said: "We agreed that

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[15] Ibid.

[16] Ibid., June 5, 1956, p. 1.

[17] Norfolk Virginian-Pilot, June 8, 1964, p. 1.

[18] Richmond Times-Dispatch, June 7, 1956, p. 1.

unless something is done between now and the call of the Session to bring some pressure on other members of the Legislature, we may reach Richmond and finally enact some of the Gray Commission's program. The group I met with today is willing to go to any extreme that may be necessary to prevent integration anywhere in Virginia." Senator Gray reminded Judge Smith that "to prevent ill-advised legislation in the coming Session, it is going to be necessary for everyone to use all the influence that he can between now and whatever date the Assembly convenes." The consensus of the conference was also relayed to the Governor, by phone, from Petersburg. Gray reported that the Governor was "apparently of the same opinion as we are and like us also, he is becoming satiated with attorneys who constantly think only in terms of compliance."[19]

Filled with apprehension, the organization hierarchy scheduled a meeting for July 2 in Byrd's Washington office in order to prepare a plan for the upcoming session. Four items were suggested by Gray for the conference's agenda. First, Gray suggested that Virginia issue a declaration dedicating itself to segregated public schools. Secondly, he thought that state funds should be withheld from school districts which decide to desegregate their schools. Thirdly, he urged

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[19]Letter, Garland Gray to Howard W. Smith, June 15, 1956, University of Virginia, Archives, Smith Letter File.

that the right to sue local school boards be repealed except for contractual disputes. Finally, Gray believed that all contested school assignments should be handled by the Governor. Meeting as planned, the participants worked out the fundamentals of the school plan presented by Governor Stanley on August 27.[20]

The exact date of the special session was delayed pending the outcome of desegregation suits in the federal courts. Since Judge Hoffman postponed the hearings in the Norfolk and Newport News cases until November, the Governor focused his attention on the litigation being conducted in Charlottesville, Arlington and Prince Edward County. Governor Stanley probably hoped that the courts would accept Virginia's legal arguments or at least postpone segregation for another year. The hope was short-lived. During the Charlottesville hearing, on July 12, Judge John Paul informally concluded that the Negro plaintiffs were entitled to a decree which permitted them to enter white schools in September, 1956. Judge Paul did not conceal from the litigants that his opinion was influenced by

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[20]Letter, Garland Gray to Honorable Howard W. Smith, June 19, 1956, University of Virginia, Archives, Smith Letter File. The letter stated that the following state legislators would attend the meeting: J. D. Hagood, C. W. Cleaton, Samuel E. Pope, Jack Daniel, Mills Godwin, Stuart Wheatley, and Garland Gray. Most likely Watkins Abbitt and Bill Tuck joined Smith and Byrd. Attorney General Almond did not attend but stated that David J. Mays gave them the "straight dope" on the law. Norfolk Virginian-Pilot, June 8, 1964, p. 1.

recent events in Virginia. Up to the constitutional convention, Virginia seemed to be acting in good faith, said Paul. But, he continued: "Then something happened. I don't know what. But from that day since, nothing has been done except to follow the policy of calculated delay. I don't think I am being unduly critical in saying that because I think the governor, himself, admits that this is his purpose: to do nothing until forced to do so. . . ."[21] While Judge Paul did not want his court to be a party "to a policy which has as its purpose delay and evasion of the Supreme Court of the United States," he was no social revolutionary. According to the Judge, the Brown decision did not mean "that everybody can run to whatever school he wants to attend. . . . I don't think any decree should be sweeping enough to say to every Negro child in Charlottesville 'you can go to whatever school you want.'" A variety of "legitimate reasons for discrimination" in assigning pupils existed, Judge Paul concluded.[22]

In his written opinion and decree of August 6, Paul swiftly disposed of the defense's argument. "It has long been settled that suits against state officers to restrain the enforcement of state laws which contravene the Federal Constitution are not suits against state." On this point Judge Paul cited Sterling v. Constantin (287 U.S. 378) and

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[21] Quoted in Southern School News, Vol. III, No. 2 (August, 1956), p. 12.

[22] Richmond News Leader, July 13, 1956, p. 1.

Ex Parte Young (209 U.S. 123). The judge also agreed with the plaintiffs that the school superintendent could not be dismissed as a defendant and that the Negro plaintiffs could bring suit without making formal application to attend a white school. Judge Paul observed that following a request by the plaintiffs' attorneys to reorganize the public schools, the school board's reply indicated that they had no intention of complying with the Supreme Court's decision. Application to Charlottesville schools would amount to a time-consuming and useless formality. The Charlottesville School Board was ordered to discontinue its discriminatory admissions policy beginning in September, 1956.[23] Three weeks later, Judge Paul suspended his injunction pending the school board's appeal to a higher court.[24]

At the end of July, Judge Albert V. Bryan rejected Virginia's legal arguments in the Arlington school case. Bryan's injunction provided for the admission of Negro children to elementary schools on January 31, 1957, and to junior and senior high schools in September, 1957. The delay was aimed at giving the defendants an opportunity to adjust to any legislation passed by the General Assembly.[25]

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[23] Allen v. School Board of the City of Charlottesville, I Race Rel. L. Rep. 886, 888-89 (W.D. Va. 1956).

[24] I Race Rel. L. Rep. 890.

[25] Thompson v. County School Board of Arlington County, 144 F. Supp. 239, 241 (E.D. Va. 1956).

As Judge Paul had done in the Charlottesville case, Bryan commented on the meaning of the Brown decision. Drawing on the Briggs dictim, Bryan wrote that the Supreme Court did not "compel the mixing of the different races in the public schools. . . . The order of the court is simply that no child shall be denied admission to a school on the basis of race or color." The Judge emphasized that his opinion did not nullify present or future assignment plans as long as they were not based on race. Concluding his opinion, Bryan predicted that "compliance with that [Brown] ruling may well not necessitate such extensive changes in the school system as some anticipate."[26]

The Charlottesville-Arlington cases established several important precedents for desegregation cases in Virginia's federal courts. First, the cases demonstrated that federal district judges, thought Virginians by birth, meant to uphold the Supreme Court's ruling in the segregation cases. Total noncompliance and far-fetched legal arguments were to receive little sympathy. Secondly, the judges indicated that they did not intend to supervise a social revolution or operate a local public school system. They accepted the interpretation of the Brown decision written in Briggs v. Elliott. Thirdly, the judges, especially Bryan, invited the state government to adopt a pupil assignment plan. The judges hinted that other criteria besides race and time-consuming plans of appeal might well result in only token desegregation which the courts

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[26] Id. at 240.

nonetheless would find acceptable.[27] The editor of the Times-Dispatch wrote that the rulings of Judges Paul and Bryan would form the background of the special session. The opinions, the editor thought, meant that any school plan devised by the General Assembly must permit some desegregation.[28]

On July 23, Governor Stanley officially launched Virginia down the road to massive resistance. Setting August 27 as the date for the special session, Stanley said that he intended to recommend cutting off state funds to schools which integrated their classrooms. The Governor also opposed any plan which accepted the principle of racial integration.[29]

The announcement actually came as no surprise to Byrd's opponents, since word of the Washington meeting was common knowledge. Recognizing that Stanley was lodged in the Byrd-Tuck-Abbitt-Smith camp, the anti-organization Democrats pondered the political ramifications of massive resistance. Martin A. Hutchinson, who challenged Byrd in the 1946 Democratic primary for the Senate, wrote: "Suppose Moore [E. Blackburn Moore] or some other candidate boldly stated that if

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[27]Judge Sterling Hutcheson, who would handle the Prince Edward case, proved to be an exception to the role. In a series of decisions Hutcheson postponed a desegregation order because of the tremendous opposition to desegregation which developed in Prince Edward County.

[28]Editorial, Richmond Times-Dispatch, August 1, 1956, p. 10.

[29]Ibid., July 24, 1956, p. 1.

elected Governor he would see that the schools were operated just as they have been come what may: Would not such an appeal have considerable support in Virginia?"[30] Robert Whitehead told Cabell Phillips, a prominent journalist born in Virginia, that "it now appeared that the Negro issue could be exploited to advantage by Byrd and his crowd for many years to come, and that I had heard the boast has been made that it was good for 25 years."[31] Byrd Democrats might challenge the Hutchinson-Whitehead statements of anti-organization Democrats. Yet the subsequent campaign of Attorney General Almond proved that Hutchinson and Whitehead were accurate political forecasters.

In order to insure the success of massive resistance, the Gray Commission had to accept the fund cut-off. Many members of the school study commission believed that the Gray plan was still the best method of dealing with the desegregation order in Virginia. Moreover, many commission members winced at the inconsistancy between supporting local option and tuition grants during the referendum campaign, and then supporting a fund witholding plan at the special session.[32]

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[30]Letter, Martin A. Hutchinson to Robert Whitehead, July 31, 1956, University of Virginia, Archives, Whitehead Letter File.

[31]Notes of Robert Whitehead, August 2, 1956, University of Virginia, Archives, Whitehead Letter File.

[32]Editorial, Richmond Times-Dispatch, July 23, 1956, p. 12. The editorial elaborated on the inconsistency between fund witholding and pupil assignment.

Southside legislators played a prominent role in countering the argument of the adherents of the Gray Plan. They sought understanding for their plight by arguing that any sort of compromise, in the racially tense black belt, meant certain political defeat. Black belt legislators reminded their opponents that supporting the Gray Plan was easier where there was no "Negro problem." Finally, the massive resisters appealed for loyalty to the Democratic organization. They argued that once fund withholding had failed, Virginia could fall back on the Gray Plan. In the process, the Southsiders asserted, desegregation would have been postponed and their electorate satisfied that Virginia had "walked the last mile."[33]

Before the public, the massive resisters played on racial fears and also argued that the opportunity for permanently containing or regulating desegregation was nonexistant. Representative Tuck summarized this point of view when he warned:

> There is no middle ground, no compromise. We're either for integration or against it and I'm against it. . . .

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[33]The position of Southside legislators was derived from interviews with two members of the Gray Commission who took opposing points of view on fund withholding. The position that the political realities prevented anything but the most extreme stance by a black belt politician is still held today. Mills Godwin, for example, has said "that no member, especially from Southside, could have stayed in the General Assembly, who had not held strong views on integration of the public schools." Quoted in M. Carl Andrews, No Higher Honor: The Story of Mills E. Godwin (Richmond: Dietz Press, 1970), p. 41.

> If they [other regions of Virginia] won't stand with us then I say make 'em. We cannot compromise. . . . We may have to have five, ten, or one hundred special sessions or even have the Assembly stay in constant session. . . . If you ever let them [Negroes] integrate anywhere the whole state will be integrated in a short time.[34]

Tuck was correct only in predicting that Negro leaders would not be satisfied with token integration. However, he was dreadfully wrong in forecasting integration "in a short time."

One of the staunchest defenders of Governor Stanley's position was James Kilpatrick. The Richmond editor literally laid out the strategy of the massive resisters in the editorial pages of the Richmond News Leader. Following Stanley's announcement, Kilpatrick came to the Governor's defense. To adopt pupil assignment, the editor wrote, would be "a concession that the Supreme Court had acted lawfully." Furthermore, any compromise was "an abandonment . . . of the constitutional principles so ringingly asserted just a few months ago." Without offering an explanation, the editor argued that white people "are less ready for it [desegregation] than they were two years ago."[35] The unwillingness of Virginia's highest elected officials to offer leadership and defiant editorials by Kilpatrick certainly helped to explain the deteriorating situation.

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[34] Richmond Times-Dispatch, July 28, 1956, p. 1.

[35] Editorial, Richmond News Leader, July 24, 1956, p. 6.

The News Leader believed that Virginia's goal "should be to fight a holding action." Thus, if "a year's delay can be gained, then let us gain it." The purpose of evasion was to give other states a chance to react to the Brown decision. Pointing out that courts reverse decisions or that some future amendment might guarantee segregated schools, Kilpatrick wrote "we may yet win unqualified victory."[36] Even more significant, delay provided "that much more time for resistance to harden and determination to grow more resolute." The editor never argued that time could be used to ease the problems of adjustment. In viewing the future, editor Kilpatrick often recalled the example of Prohibition. If fifteen years were needed to repeal the Eighteenth Amendment, he wrote, "we ought to be willing to fight as long to win reversal of Brown v. Board of Education."[37]

The purpose of raising constitutional arguments was to shift the argument away from race. However, with crucial legislative decisions about to be made, Kilpatrick also exploited the race issue. He argued that if concessions were made and then the Supreme Court reversed itself, Virginia might not be able to undo the damage. "The eggs, will have been scrambled then."[38] Using Washington, D. C. as a test case, Kilpatrick played on the themes of racial violence and sexual offenses

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[36] Ibid., July 27, 1956, p. 10.

[37] Ibid., August 28, 1956, p. 10.

[38] Ibid., July 24, 1956, p. 10.

associated with desegregated school systems.[39] Negroes, the editor charged, have "demonstrably lower aptitudes for learning and shockingly different standards of moral behavior. . . ."[40] Racial mixing, Kilpatrick was sure, would be more harmful to whites than helpful to Negroes. "Once our schools are race-mixed, that last essential barrier to complete racial amalgamation will have been abandoned." The result, the editor predicted, would be to reduce the South "to the melancholy status of another Cuba, a Puerto Rico, a Brazil."[41]

The Kilpatrick editorials spelled out a strategy and a psychology of resistance. The plan initially had a certain flexibility since even Kilpatrick admitted that as a last resort, Virginia might have to resort to an assignment plan.[42] The idea that Virginia could eventually retreat to something like the Gray Plan appealed to legislators reluctant to follow the Southside. However, the emphasis on "fundamental principles" and racial fears eventually cancelled political flexibility. Once massive resistance was adopted, politicians were

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[39] Ibid.

[40] Ibid., August 1, 1956, p. 12.

[41] Ibid., August 6, 1956, p. 12.

[42] Ibid., July 27,1956, p. 10. Kilpatrick wrote that "pupil assignment is the last resort, not the first."

not able to admit that the hot rhetoric was a charade.

On August 21 and 22, Stanley's recommendations won the grudging endorsement of the Gray Commission. The executive committee supported the Governor by a narrow 6-4 vote, while the full Commission approved the new policy by a 19-12 margin. With a few exceptions, the split in the voting demonstrated a significant correlation between a member's vote and the Negro population of his constituency.[43]

With the special session about to meet, Senator Byrd made an effort to ensure victory for a program of total resistance. From his home in Berryville, the Senator said:

> If Virginia surrenders, . . . the rest of the South will go down, too. . . . I am a law abiding citizen . . . but I do not believe the Supreme Court is so sacred we can't criticize it. . . . Why can't we fight this thing with every ounce of energy and capacity? I think we are on strong ground.[44]

As Governor Stanley prepared to welcome the emergency assembly, the Richmond Times-Dispatch wrote that not a single daily newspaper outside the Southside and Tidewater backed the Governor. A survey of the Virginia dailies emphasized that editors were not only annoyed by the abandonment of the Gray Plan, but feared that closed schools would hinder

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[43] Richmond Times-Dispatch, August 22, 1956, p. 1; August 23, 1956, p. 1.

[44] Ibid., August 26, 1956, p. 1.

economic development and invite federal intervention.[45] Countering the criticism from the press, Governor Stanley claimed that ninety-five percent of Virginia's white citizens supported his policy.[46]

Addressing the General Assembly on August 27, Governor Stanley, amid cheers and rebel yells, outlined his plan to prevent integration in Virginia.[47] The objective was to be reached by closing schools about to be desegregated by withholding state funds. Fund cutoff was to be complemented by a proposal to provide tuition grants for students who wished to attend private, non-sectarian schools. Other suggestions included state legal assistance to school boards and retirement coverage for public school teachers moving to private schools.[48]

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[45] Editorial, Ibid., p. 2D. The News Leader (Editorial, August 27, p. 10) wanted a year's delay but preferred a plan worked out by Donald Richberg, former chairman of the National Recovery Administration and Charlottesville resident. Presented to the General Assembly by state Senator Edward O. McCue of Charlottesville, the McCue-Richberg plan called for the General Assembly to assume control of public education and to defend itself from a suit by use of the Eleventh Amendment. In no way original, the idea had been suggested by Representative Howard Smith and Judge William Old before being championed by Richberg and McCue.

[46] Ibid., August 24, 1956, p. 1.

[47] Ibid., August 28, 1956, p. 1.

[48] Inaugural Address and Addresses delivered to the General Assembly of Virginia by Thomas B. Stanley, 1954-1958 (Commonwealth of Virginia: Division of Purchase and Printing, 1958), pp. 1-8.

In defending his program, Governor Stanley concentrated on three issues. First, Stanley argued that any future school closures did not violate Section 129 of the Virginia Constitution since, by definition, integrated schools were automatically not "efficient." Secondly, the Governor held that the state would not be responsible for closing Virginia's schools. "If any school is closed, it will be because a person, or persons, of one race seeks to force his way into a school in which the opposite race is taught." Finally, Governor Stanley reminded the Assembly of its duty to uphold the constitutional principles enunciated in the interposition resolution.[49]

The opposition to the Stanley Plan was more formidable than during the referendum campaign. Colgate Darden, Dabney Lancaster and Thomas C. Boushall, all of whom had campaigned for the amendment of Section 141, opposed the Governor.[50] Lancaster, who had directed the State Referendum Information Center, was especially disillusioned. He disclosed that Governor Stanley had "convinced me that the original recommendation of the Gray Commission offered the best hope of avoiding integration." Darden charged that the Stanley Plan was unconstitutional, disrespectful of local government, and harmful

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[49] Ibid., pp. 5-8.

[50] Gates, p. 169.

to areas with small Negro populations. He predicted that the measure would generate great hostility toward the Southside.[51]

The Darden-Lancaster views, presented to a public hearing early in September, were met by firm endorsements of the Stanley Plan from Representative Tuck, Abbitt and Smith.[52] The Senate floor leader, Mills E. Godwin, Jr., who read the statement of the organization's hierarchy to the hearing, also elaborated on the evils of the Brown decision. "Integration, however slight, anywhere in Virginia would be a cancer eating at the very life blood of our public school system." Regarding Virginia's response to the Supreme Court's decision Godwin emphasized: "If we think it is right, we should accept it without circumvention or evasion. If it is wrong, we should never accept it at all. Men of conscience and principle do not compromise with either right or wrong."[53]

During the public hearing all the familiar arguments for and against the Stanley Plan were repeated. However, Henry T. Wickham, Jr., special assistant to the attorney general, and David J. Mays, counsel for the Gray Commission, clarified several aspects of the Stanley Plan. Wickham pointed out that the plan was designed to prevent integration rather

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[51] Richmond Times-Dispatch, September 2, 1956, p. 1.

[52] Ibid., September 8, 1956, p. 8.

[53] Ibid., September 5, 1956, p. 1.

than to provide "a legal defense against integration suits."[54] Mays thought that fund witholding might get through the courts if the localities were permitted to operate with local funds. Turning to the matter of an assignment plan, he warned that one would be approved by the federal courts only if it offered the aggrieved party the opportunity for relief. Cutting off funds, Mays contended, tainted the constitutionality of any Virginia assignment policy.[55] Considering legal advice and the early district court decisions, the proponents of the Stanley Plan were aware of its constitutional shortcomings. The legal criticisms of the Stanley Plan were neutralized or confused on September 10 when Attorney General Almond rendered an opinion supporting the constitutionality of fund witholding. He said the General Assembly had the power to define an "efficient" school system. The Legislature, Almond believed, had no duty to support an "inefficient, or in other words, desegregated school system."[56]

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[54] Ibid.

[55] Ibid., September 6, 1956, p. 1.

[56] Ibid., September 10, 1956, p. 1. Later when Almond had become the celebrated martyr of massive resistance, he claimed that he had told the Governor that fund witholding would not be accepted by the courts. If this was true, the record still shows that he played an important role in the passage of legislation which he viewed as hopelessly unconstitutional. His private beliefs in no way reduced his responsibility for developing support for massive resistance. Norfolk Virginian-Pilot, June 8, 1964, p. 1.

The opponents of the Stanley Plan introduced bills that would have permitted either statewide or local referenda on the fund witholding measure. The purpose of the bills was to reduce the likelihood of massive school closings by giving the people an opportunity to retain control over local school policy.[57] The Governor, in turn, hoped to win greater support for his major bill by offering two bills (H.B. 77 and S.B. 56) which were designed to reduce fears of massive school closings. Originally, Stanley's bill (H.B. I) would have closed a school district's elementary schools, if an attempt was made to desegregate one elementary school, or a school district's secondary schools, if an attempt was made to desegregate one high school.[58] On September 12, Stanley offered the new bills which had the effect of limiting the school closing fund cut-off provisions to the school where admission was sought by a member of the opposite race. Included in the new bills were provisions which attempted to confer legal immunity on the Governor and General Assembly or their representatives.[59] As Robbins Gates observed, the attempt to place the Governor and General

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[57]Gates, pp. 176-78.

[58]H.B. 1, Journal of the House, Extra Sess. 1956.

[59]S.B. 56, Journal of the Senate, Extra Sess. 1956. The bill specifically stated that neither the Governor nor the state was to be subjected to a law suit while carrying out school policy. House Bill 77 provided the same sort of immunity to school board members.

Asembly between the Supreme Court and the school boards was a "magnificent obsession that had haunted Virginia's segregationists from the very first."[60]

The effort by Governor Stanley to widen the margin of victory was not successful. The advocates of the Gray Plan were able to force votes on a local option amendment to Stanley's bill in both the Senate and the House. By votes of 59 to 39 and 21 to 17, the House and Senate respectively defeated the attempt to amend Stanley's bill. The challenge turned back, the Governor's forces passed an unamended bill by a 61 to 37 vote in the house and a 22 to 16 vote in the Senate.[61] During the House debate, Howard H. Adams, Chief patron of the Stanley Bill urged the delegates to support the Governor because: "It is our duty and responsibility to see that our racial purity and distinctiveness is maintained at all costs. Our country can remain the world leader it is in no other way."[62] The opponents questioned the constitutionality of the Stanley Bill and urged a more flexible plan. Though defeated, the local optionists put up a determined fight.

Virginia did not enter massive resistance with an impressive consensus in the General Assembly. The votes on fund

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[60]Gates, p. 181.

[61]Richmond Times-Dispatch, September 18, 1956, p. 1.

[62]Ibid.

withholding seemed to support Delegate Harry B. Davis' observation that Virginia reacted "as if it were two states."[63] With two exceptions, black belt legislators voted against local option. Republicans (all seven for local option), the Arlington delegation, and urban legislators (Richmond, Norfolk, and Roanoke) voted almost unanimously for local option. While no integrationists, the urban legislators recognized that housing patterns would slow the pace of desegregation in the cities. Moreover, they feared that the possibility of school closings, would threaten economic growth. The area outside the black belt where the organization won most dramatically was in rural Virginia. Loyalty to the organization and the tradition of rural, conservative rule helped to explain the vote of men without a "black problem."[64]

After the battle over fund withholding, the remaining bills which supplemented the school closing measure easily passed the General Assembly. Altogether the legislature passed twenty-three bills which dealt with the school problem.[65] After fund cut-off, the most important as a barrier against desegregation was the law creating a three-man pupil placement board. The placement board was given the authority to assign all pupils in the state according to "nonracial" criteria.

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[63] Ibid.

[64] Gates, pp. 184-88.

[65] Southern School News, Vol. 3, No. 4 (October, 1956), p. 16. This number has a brief description of the twenty-three bills passed by the General Assembly.

The assignment guidelines were vague enough to prevent the possibility of assigning any Negro child to a white school. A cumbersome system of appeals was devised so that the complainants would be unable to receive relief during the school year.[66]

The major constitutional flaw of the assignment plan was its association with the school closing law. If the placement board assigned a Negro to a white school, which was unlikely, the Negro would be denied relief since the school would be closed. The Governor would then take over the school and attempt to reorganize it so that classes could be resumed on a segregated basis. If unsuccessful, the school could be returned to the local officials and presumably be operated with local funds.[67] The remote possibility of local financing, was the "loophole" that some Virginians believed would save Virginia's assignment plan.[68]

The special session also passed legislation which helped individuals and communities to move from public to private education. Of these measures, the most important

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[66] Acts of the General Assembly, Chapter 70, Extra Sess. 1956, pp. 74-77. The pupil placement board was expected to relieve pressure on the local school boards from desegregation suits. Other statutes which were intended to ease the problems of the localities included state legal aid and permission to appropriate school funds on a monthly basis.

[67] Ibid., Chapter 68, pp. 69-72.

[68] Southern School News, Vol. 3, No. 4 (October, 1956), p. 16.

required state and local governments to provide funds for students seeking to enroll in private non-sectarian schools. The tuition grant was not to exceed the normal per pupil cost of attending a public school in the locality where the grant was requested.[69] Besides providing tuition grants, the General Assembly amended the Virginia Supplemental Retirement Act so that teachers moving from public to private schools would not lose state retirement benefits. Finally, the State Board of Education was prohibited from refusing to accredit any school or diploma issued by a school using a building or facilities which did not meet the standards of the State Board.[70]

Related to the school legislation was a package of laws designed to harm, if not eliminate NAACP legal action in Virginia. The so-called anti-NAACP laws included: provisions requiring the registration of persons or organizations involved in racial litigation, broader definitions and harsher penalties for lawyers engaging in legal malpractice, and the establishment of two joint committees to investigate organizations involved in racial activities and the effectiveness of the laws against malpractice.[71] The anti-NAACP laws were

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[69]Acts of the General Assembly, Chapters 56, 57, 58, 62, Extra Sess. 1956, pp. 56-60, 62

[70]Ibid., Chapters 39, 65, pp. 42-48, 65.

[71]Ibid., Chapters 31-37, pp. 29-42.

a product of the intense hatred generated against the Negro organization following the Brown decision. The legislators most interested in the legislation believed that the NAACP did not represent the "average" Negro. Delegate C. Harrison Mann, on introducing the legislation said: "He doubted seriously that Virginia Negroes would have brought a single school suit had they not been stirred up from the outside."[72] Some of the more conservative legislators viewed the organization as subversive.[73] Though unsympathetic with the NAACP's objectives, both Richmond newspapers opposed the legislation as a threat to traditional constitutional freedom.[74] The anti-NAACP legislation passed easily, although the Richmond Times-Dispatch reported that many legislators privately opposed the laws, but feared being labelled "friends of the NAACP" or "integrationists."[75]

During the emergency session, the rationale of massive resistance was explained and defended by Albertis S. Harrison, Jr., a highly regarded black belt Senator.

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[72] Richmond Times-Dispatch, September 11, 1956, p. 1.

[73] Interviews

[74] Richmond Times-Dispatch, September 29, 1956, p. 8., Richmond News Leader, September 10, 1956, p. 10.

[75] Ibid., September 21, 1956, p. 1.

> By sovereign legislative act instructing the sovereign head of a sovereign state to preserve the peace and tranquility, and to forbid compulsory integration, S.B. 56 would seek to force the federal courts to decide the presently undecided question of whether a state must operate integrated schools and compel children to attend them. So far, the federal courts have said only that a state may not segregate children by race.

Virginia, Harrison concluded, was defining "the legal battleground for the ultimate test of state sovereignty."[76]

Senator Harrison's analysis contained two major constitutional themes. The first was the anachronistic theory of dual sovereignty popularized by Kilpatrick. Though organization leaders apparently recognized the shortcomings of interposition, they continued to endorse it as an option open to Virginia. Secondly, Harrison made use of the Briggs interpretation of the Brown decision to argue that Virginia's obligation to desegregate public schools was unclear. When combined, the two ideas persuaded enough legislators that massive resistance was a perfectly legal maneuver. The explanation also helped to combat the charge that the legislators were setting a bad example by resisting the law of the land.

The minimum objective of the school closing legislation was to delay a desegregation order by introducing other issues for litigation. In the immediate sense, many legislators thought that by postponing desegregation by even one year, scores of

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[76] Ibid., September 22, 1956, p. 1.

white students would "move up one more grade without the risks and evils of race mixing."[77] More optimistic were those who hoped that as part of a southern response, Virginia's resistance would persuade either Congress or the Supreme Court to reverse the school decisions. Others wished to see whether the President would use troops in a confrontation with the Governor. Regardless of the outcome of Virginia's legislation in the courts, the massive resisters explained, the state could fall back to the Gray Plan. The people, the organization leaders argued, would be satisfied that Virginia's leaders had exhausted all "legal tactics" for preventing desegregation.

In the long run, the school closing legislation was doomed for several reasons. First, the plan completely ignored regional differences in Virginia. If threatened with school closings, areas outside the black belt would refuse to sacrifice their public schools for the sake of the Southside. Second, the laws clashed with the tradition of local control over education. If Virginians disliked policies dictated from Washington, many also questioned orders from Richmond. Finally, the federal courts of Virginia had already indicated that they would rule against blatant attempts to evade the Brown decision.

Massive resistance marked the high point of a strategy to retard the pace of desegregation through time-consuming litigation. Although sometimes viewed as just another tactic in

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[77]Editorial, Richmond News Leader, August 28, 1956, p. 10.

Virginia's legal arsenal, total resistance was transformed into a sacred goal. In leading Virginia down the path of massive resistance, Senator Harry Byrd and Southside legislators played the leading roles. The Senator's commitment to massive resistance was magnified by the view that Virginia was the test state of the South. If desegregation failed in Virginia, Byrd thought the South would triumph in its attempt to reverse the school decision. For the Southside, the political heart of the Byrd organization, desegregation clashed with over three hundred years of history. Regardless of the political ramifications, black belt legislators would have been massive resisters. In adopting the course of massive resistance, they risked and ultimately succeeded in fracturing the organization. Yet total resistance offered political opportunities since the race issue in an emotional atmosphere could be used to devastate political opponents. With the race issue, rural Virginia made its stand against the nationwide equalitarian movement which would ultimately increase the power of the Negro and the cities. As 1956 passed into history the organization turned its attention to winning the gubernatorial election, to defending massive resistance in the federal courts and to discrediting the opponents of Virginia's school policy.

PART II. THE DECLINE OF MASSIVE RESISTANCE

CHAPTER VI

THE 1957 STATE ELECTION

On November 17, 1956, Virginians received some insight into the political and legal ramifications of the Commonwealth's school policy. Unwilling to risk the loss of another opportunity, J. Lindsay Almond announced that he would seek the Democratic party's nomination for governor in the 1957 primary. On the same day Judge Walter J. Hoffman hinted that he would declare unconstitutional the recently enacted pupil placement plan.[1]

Attorney General Almond's announcement was unusual in two ways. First, most political observers could not recall any recent politician declaring his candidacy so early. Second, Almond's political plans were made public without observing the customary formality of consulting Senator Byrd. Ever since 1954, Almond had devoted every possible moment to building up support for his candidacy. As Attorney General he had continuous contact with local sheriffs, commonwealth's attorneys, clerks and other members of the organization's infrastructure. By securing the support of the grass roots and by acting early, Almond hoped to present the organization's

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[1] Richmond Times-Dispatch, November 18, 1956, p. 1.

hierarchy with a fait accompli before his competition could organize.[2]

In order to win the organization's approval the Attorney General had to have the endorsement of the black belt. Undoubtedly a segregationist, Almond, the lawyer, had some doubts about the future success of massive resistance. But, Almond, the politician, recognized that his political future depended on out doing any segregationist candidate. Thus, in declaring his candidacy, the Attorney General remarked: "For more than five years I have fought to save our public school system from destruction and to defend Virginia's right to govern in her own internal affairs and in the lawful exercise of her inherent constitutional sovereignty. . . . I shall continue to fight with never diminishing faith that right will ultimately triumph."[3] In seeking the governorship Almond subsequently outstripped any Virginian in his dedication to the maintenance of segregated education.

Almond's strategy worked perfectly. Garland Gray, considered Almond's major challenger, hurriedly canvassed the organization, and determined that he could not secure adequate support. On December 6, the state Senator from Waverley announced that he would not seek the Democratic party's nomination. In a brief statement Gray said that the school crisis

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[2]Luther J. Carter, "State House Bid Delayed", Norfolk Virginian-Pilot, June 8, 1964, p. 1.

[3]Richmond Times-Dispatch, November 18, 1956, p. 6-D.

was the most serious the Commonwealth had faced in recent generations. Considering the circumstances, Gray thought that "a division among the proponents of segregated schools, . . . would be far-reaching and perhaps even disastrous."[4]

On the same day, Delegate Robert Whitehead announced that he would not enter the Democratic primary. Any hope the anti-organization Democrat had of being a factor in the primary was dashed by Gray's withdrawal from the contest. Only a split in the organization would have provided anti-Byrd Democrats with a chance in the race for the nomination.[5]

On December 11, Senator Harry Byrd endorsed Almond's candidacy. The Senator described Almond as "a candidate tried and tested by many years of arduous public service as a judge, congressman, and attorney-general of Virginia. He is well equipped to deal with the extremely difficult problems now confronting Virginia." Equally significant was Byrd's advice "to begin promptly" the organizational work for the November campaign instead of waiting until after the primary.[6] Political observers could not recall an instance when Senator Byrd had spoken so candidly or so early. James Latimer, Richmond Times-Dispatch's political reporter, described Byrd's

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[4] Southern School News, Vol. III, No. 7 (January, 1957), p. 11.

[5] Ibid.

[6] Richmond Times-Dispatch, December 12, 1956, p. 1.

performance as "a rare evocation of command powers."[7] Although the Virginia patriarch predicted an unprecedented victory, he wanted to take nothing for granted.

Within a month, the organization closed its ranks behind the fiery Attorney General. Almond's hard work and political boldness paid off, since the major obstacles to his success now were eliminated. Avoiding a fratricidal war, the Democratic organization turned its attention to smashing the GOP and winning a mandate for massive resistance.

Ironically, on the day that Almond dedicated his candidacy to preserving segregated schools, he listened to Judge Walter J. Hoffman attack Virginia's Pupil Placement Plan, one of the bulwarks devised by the special session to prevent integration.[8] The hearing before Judge Hoffman, on November 17, was prompted by motions entered by the school boards of Norfolk and Newport News which asked the court to dismiss desegregation petitions filed by Negro parents. The school boards contended that the newly enacted assignment plan provided the plaintiffs with an administrative remedy which must be exhausted before relief was sought in the federal courts. Consolidating the two cases, Judge Hoffman restricted the argument to the constitutionality of the placement law since related issues

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[7]James Latimer, p. 83.

[8]Norfolk Virginian-Pilot, November 18, 1956, p. 1.

were about to be disposed of by the Fourth Circuit Court of Appeals in the appeal from the Arlington-Charlottesville decisions.[9]

During the hearing the NAACP lawyers argued that the Pupil Placement Act was unconstitutional in intent and failed to provide an adequate administrative remedy. The Negro lawyers explained that the assignment plan was one part of an elaborate attempt to defy the Supreme Court. The lawyers for the defense retorted that the intent of the legislators was unclear and that the assignment plan was unrelated to other legislation passed by the General Assembly. Moreover, they maintained that regardless of the General Assembly's intent, the plan permitted a locality to operate a desegregated school system with local funds. Because of this loophole, the defense contended, the Virginia plan was no different from North and South Carolina statutes upheld by the Fourth Circuit Court of Appeals.[10]

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[9] Richmond Times-Dispatch, October 19, 1956, p. 1. Judge Walter Hoffman, who heard the Norfolk and Newport News cases, was an Eisenhower appointee. The Republican candidate for Attorney General in 1953, Judge Hoffman was widely criticized by massive resisters. Not only were his decisions unpopular, but Hoffman frequently chastized the Democrats for the brand of leadership they offered the state. Today Judge Hoffman is an outspoken critic of busing and applauded by those who formerly scolded him. During massive resistance, the style rather than the substance of Hoffman's decisions made him unpopular. As Judges Paul and Bryan, Hoffman was guided by the Briggs dictum in dealing with school cases.

[10] Norfolk Virginian-Pilot, November 18, 1957, p. 1. The Fourth Circuit Court of Appeals upheld the North Carolina plan in Carson v. Warlick, 238 F. 2d 724 (4th Cir. 1956) and the South Carolina plan in Hood v. Board of Trustees, 232 F. 2d 626 (4th Cir. 1956).

Judge Hoffman left little doubt that the future of the Pupil Placement Plan was in jeopardy. "If I had to rule on it today I would throw it out the window."[11] Equally annoying to Virginia's political leadership was Judge Hoffman's practice of questioning the motives which prompted the emergency legislation. "Was it or was it not a design to flaunt the decision of the Supreme Court . . . which . . . I'm bound to follow?" The legislation was "good politically," Judge Hoffman observed, but it did not "reflect good judgment."[12] Judge Hoffman even taunted Attorney General Almond by interrupting him in the midst of an explanation of the assignment plan to comment: "They sure made it complicated didn't they?"[13] Virginia, Hoffman continued, had no alternative but to attempt to implement the Brown decision. "We've got it and we've got to eat it."[14]

Prior to Judge Hoffman's decision, the Fourth Circuit Court of Appeals upheld the district court decisions in the Arlington and Charlottesville cases.[15] With Judge John J. Parker writing the opinion, the court agreed that the Eleventh

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[11] Richmond Times-Dispatch, November 18, 1956, p. 1.

[12] Norfolk Virginian-Pilot, November 18, 1956, p. B-1.

[13] Ibid.

[14] Richmond Times-Dispatch, November 18, 1956, p. 1.

[15] School Board of Charlottesville v. Allen, 240 F. 2d 59 (4th Cir. 1956).

Amendment provided no protection to state officials or agencies attempting to obstruct the enjoyment "of individual rights under the Constitution. . . ."[16] Noting the intransigency of the school boards, the court found the decrees ordering desegregation to be reasonable. "The decrees do not attempt to direct the school officials as to how they shall perform their duties or exercise the discretion vested in them by law, but simply forbid them to discriminate against the plaintiffs, or other Negro children similarly situated. . . ."[17] Finally the court held individual applications for admission were unnecessary considering the stated policies of the school boards. Equity, the court observed, "does not require the doing of a vain thing as a condition of relief."[18] The court distinguished the cases at bar from Carson v. Warlick on the grounds that in the latter case "an adequate administrative remedy had been prescribed by statute. . . ."[19] While the Virginia Pupil Placement Plan was not an issue, the court's emphasis on "adequate" administrative remedies strengthened the case of the Negro plaintiffs in Norfolk and Newport News.

On January 11, 1957, the newly created Pupil Placement Board was placed in jeopardy when Judge Hoffman ruled that the

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[16] Id. at 63.

[17] Id. at 64.

[18] Ibid.

[19] Ibid.

Pupil Placement Act was unconstitutional.[20] In determining the constitutionality of the placement plan, Judge Hoffman examined the events leading to the special session as well as the laws passed in conjunction with the assignment plan. After discussing the Gray Report, the interposition resolution, and remarks made by Governor Stanley, the judge concluded that the Pupil Placement Plan was part of a scheme to defy the Supreme Court and was therefore "unconstitutional on its face."[21]

Even if the intent of the General Assembly was not unconstitutional, Judge Hoffman held that the assignment plan failed to offer the plaintiffs an adequate administrative remedy. The Virginia plan had several serious flaws according to Judge Hoffman. First, most children were automatically prevented from attending a desegregated school by a requirement that they remain in the school they were presently attending until graduation. The only exceptions to this rule were students who moved or demonstrated a "good cause" for requesting

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[20] Adkins v. School Board of the City of Norfolk, 148 F. Supp. 430 (E.D. Va. 1957). On December 25, 1956, Governor Stanley appointed Hugh V. White, Nansemond County School Superintendent, Beverly H. Randolph, a Richmond attorney who lived in Charles City County, and Andrew A. Farley, publisher of the Danville Register and Danville Bee to the Pupil Placement Board. Since all three men lived in the black belt and were opposed to desegregation, their selection seemed to guarantee segregated schools for Virginia.

[21] Id. at 436.

a transfer. Judge Hoffman thought a successful demonstration of a "good cause" was "problematical."[22] Second, the plaintiffs were subjected to a variety of criteria aimed at preventing integration. The most onerous was the requirement that the Placement Board consider the effect of a pupil's assignment on the "efficient operation" of the school. Since the lawmakers during the special session had defined an "efficient" school as a segregated school, Judge Hoffman observed that "the Pupil Placement Board would indeed be derelict in its duty if it ever permitted admission of a Negro child in a school heretofore reserved for white children, and vice versa."[23] Third, if not automatically eliminated, a student unhappy with his assignment faced a procedure of administrative appeals which could consume as much as 105 days before court action. Judge Hoffman feared that the school year would be over before the student received satisfaction which might not even apply to admission to the next grade.[24] Finally, if a Negro was eventually assigned to a white school, the effort would be negated by the activation of the school closing and fund withholding statutes. The judge dismissed the argument advanced by the defendants that local financing provided a "loophole" which preserved the constitutionality of the assignment plan.[25] As

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[22] Id. at 441.

[23] Id. at 442.

[24] Id. at 443.

[25] Id. at 444.

a result of the "loophole", Judge Hoffman predicted that the class of schools ultimately affected would be left with a "mere pittance to what is required to operate the public schools in any community."[26]

Judge Hoffman distinguished the Virginia plan from North and South Carolina statutes upheld by the Fourth Circuit Court of Appeals. The North Carolina plan contained neither fund withholding nor school closing provisions. The South Carolina plan provided for fund cut off, but it did not order integrated schools to be closed.[27] Although the objective of the two Carolinas was similar to Virginia's, the Old Dominion's bold statement of purpose prevented its plan from falling under the precedent of Carson v. Warlick. In surveying the events up to and including the 1956 special session, Judge Hoffman concluded: "The pattern is plain-the Legislature had adopted procedures to defeat the Brown decision. In doing so it is safe to say that Chapter 70 (the assignment plan) is invalid on its face."[28]

Although Judge Hoffman voided the assignment plan, like Judges Paul and Bryan, he endorsed the interpretation of the Brown decision in Briggs v. Elliot. "Nothing herein shall be construed as automatically granting to plaintiffs the right to enter schools of their choice." As long as race was not a criteria for assignment, Judge Hoffman wrote "there is no

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[26] Id. at 439.

[27] Id. at 445.

[28] Ibid.

inherent right of any child to attend any particular school in which children of another race are in attendance."[29]

Despite the ruling, Virginia was left with a lot of maneuverability. A future placement plan consistent with the Briggs and Carson opinions was not precluded by the Hoffman decision. Even the Pupil Placement Board was still in business since no injunction preventing it from meeting was asked for by the plaintiffs. "Unless and until lawfully prevented," the three-man board announced that it intended "to carry out its duties and responsibilities under the Pupil Placement Act in strict accordance with its terms."[30]

The Prince Edward County case provided the only exception to the trend of federal court decisions chipping away at massive resistance. On January 23, 1957, Judge Sterling Hutcheson, a native of Southside, Virginia, refused to designate a date for beginning the desegregation of Prince Edward's public schools.[31] Quoting liberally from the second Brown decision, Judge Hutcheson concluded that "it is clear that the law must be enforced but the Court is conscious of the variety of problems of a local nature constituting factors to be considered in the enforcement."[32] Although citizens deprived of

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[29] Id. at 446.

[30] Richmond Times-Dispatch, January 15, 1957, p. 1.

[31] Davis v. County School Board of Prince Edward County, 149 F. Supp. 431 (E.D. Va. 1957).

[32] Id. at 435.

their constitutional rights were entitled to a remedy, Judge Hutcheson thought that "in view of the grave and perplexing problems involved, the exercise of that right must be deferred."[33] Considering the provisions for closing Prince Edward's public schools, Hutcheson believed "a continuation of the present method could not be so harmful as an interrupted education."[34]

A presence of a large Negro school population coupled with the propaganda of the Defenders made the Prince Edward suit the most difficult of the early Virginia school cases. Judge Hutcheson correctly predicted that Prince Edward County would close its public schools rather than integrate. However, by refusing to set a date for instituting even the most gradual plan of desegregation, Judge Hutcheson's decision, in effect, rewarded resistance to the Brown decision. Applied to other school districts, the Hutcheson decision held out the hope that by demonstrating potential racial unrest a desegregation order would be postponed. The Richmond Times-Dispatch thought Hutcheson's ruling would be useful in the Newport News case where the Negro was approximately forty-three percent of the population and white resistance to desegregation was reported

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[33] Ibid.

[34] Id. at 439.

to be strong.[35] Perhaps, the editor wrote, Judge Hutcheson had provided the Supreme Court with a "rationale for relaxing its pressure on the 'black belts' of the South."[36]

In early February, Judge Hoffman ordered the school boards of Newport News and Norfolk to desegregate their public schools beginning in September, 1957.[37] The basis for Judge Hoffman's ruling in both cases was the failure of the school board to take any steps toward complying with the Supreme Court's decision.[38] Judge Hoffman saw no indication that "prolonged delay will lead to leadership in the direction of compliance." Extensions of time because of local unrest, Judge Hoffman argued, were used instead to devise methods of preventing desegregation.[39] Thus, reliance on community unrest as a defense against a desegregation order, used in the Prince Edward case, was rejected in the Norfolk case.

Although an extremely unpopular decision, the substance of Judge Hoffman's opinion was by no means radical. After referring to the Briggs dictum, the judge emphasized that housing

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[35] Editorial, Richmond Times-Dispatch, January 25, 1957, p. 12.

[36] Ibid.

[37] Adkins v. School Board of the City of Newport News, II Race Rel. L. Rep. 334 (E.D. Va. 1957) Beckett v. The School Board of Norfolk, II Race Rel. L. Rep. 337 (E.D. Va. 1957).

[38] Adkins at 335-36; Beckett at 339.

[39] Adkins at 336.

patterns would restrict actual desegregation. Natural and artificial boundaries, Hoffman explained, would preserve segregated schools. "I do not know of any particular law that prevents the so-called gerrymandering of the school areas."[40] In prescribing a gradual plan of desegregation in Newport News, Judge Hoffman anticipated "ample time to arrange for any necessary reallocation . . . of white school children."[41]

The Hoffman decisions were subjected to greater criticism than the earlier decisions of Judges Bryan and Paul. Unlike the latter judges, Hoffman's rulings followed the passage of the massive resistance legislation. Since he ignored the special legislation, except as evidence of bad faith, the judge was viewed as a traitor. The Richmond Times-Dispatch charged that when Hoffman "donned the judicial robes of a federal court, he detached himself from his state, and became an instrument of federal power." If he was torn between federal and state loyalty, the editor suggested that Hoffman "could have resigned."[42]

The heated response to Hoffman's decision was also related to his method of dealing with the cases. In both decisions Judge Hoffman delivered his opinion immediately following the hearings from notes or extemporaneously. Although the procedure quickened the pace of the litigation, Hoffman opened himself to

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[40] Ibid.

[41] Ibid.

[42] Editorial, Richmond Times-Dispatch, February 13, 1957, p. 14.

the charge of having prejudged the cases.[43] Just as irritating to massive resisters was Hoffman's habit of interrupting his legal opinions with occasional criticisms of Virginia's political leaders. Scoffing at the claim that more time was needed to develop a better solution, Hoffman observed: "I have heard no proclamation from our distinguished leaders announcing plans to reverse themselves."[44] Although Hoffman's observations were accurate, their result was to invite public censure and to challenge the credibility of his rulings.

The criticism leveled at Judge Hoffman was also related to the campaign for governor. The organization intended to make massive resistance the central issue of the campaign. However, if the heart of the resistance legislation was voided by November, 1957, the Democratic claim that the Brown decision was reversible would lack credibility. Also the federal court decisions strengthened the case for a local assignment plan which the expected Republican candidate, Ted Dalton, was known to favor. The organization suspected Judge Hoffman, who had been the Republican candidate for Attorney General in 1953, of helping his old running mate along. Thus, Senator Byrd personally lashed out at the judge. Speaking at Hampton Roads Byrd confessed: "Had I known he would resort to prejudiced and political statements I would have fought his confirmation

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[43] Ibid. February 12, 1957, p. 1; February 13, 1957, p. 1.

[44] Richmond News Leader, February 12, 1957, p. 1.

as long as I could stand on my feet." Hoffman's conduct, Byrd thought, "could not fail to cause bitter resentment and inflame public opinion."[45] The Virginia senator left the impression that Judge Hoffman's decisions would be overturned by a court less politically motivated. Also, Senator Byrd appeared to be repaying Judge Hoffman for his criticism of the organization.

In addition to attacking Judge Hoffman, massive resisters took advantage of other opportunities to suppress, ridicule or ignore critics of the school closing policy. A brief controversy was precipitated by an unsigned "Statement of Conviction on Race" issued by the Richmond Ministers Association in late January. The statement accused Governor Stanley and a majority of the legislators of taking "long strides toward a vindictive dictatorial way of government, foreign to our tradition and guaranteeing years of tension if not tragedy among the citizens of Virginia."[46] Especially odious to the ministers was the law requiring the registration of individuals or groups engaged in promoting or obstructing desegregation. The ministers viewed the law as an attempt "to restrict the open, free criticism of its the [General Assembly's] coerced rule by forbidding unhampered freedom to discuss the matter or to enter litigation

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[45] Norfolk Virginian-Pilot, May 10, 1957, p. 1.

[46] Editorial, Norfolk Virginian-Pilot, February 1, 1957, p. 1.

over it. Adding insult to injury, it has, furthermore, exempted politicians and political groups from these restrictions."[47]

In response to the ministers' charge, Delegate James M. Thomson, the zealous chairman of the Committee on Law Reform and Racial Activities, announced that he planned to study the statement in order to determine whether it violated recent legislation regarding racial activities. The ministers were warned that they "may criticize all they want . . . but if they are urging legislation to foster integration or segregation they would be getting themselves into trouble."[48] Although the Richmond News Leader joined the ministers in their criticism of the registration law, the editor ridiculed the historical and legal justification for the statement. Editor Kilpatrick was especially amused by the ministers' reluctance to identify themselves unlike the legislators whom they attacked.[49] The incident demonstrated that the effectiveness of the ministers as a pressure group was easily checked since they could not advance too far ahead of their congregations.

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[47] Richmond News Leader, January 29, 1957, p. 1. Section nine of the statute said: "This act shall also not apply to any person, firm, partnership, corporation, association, organization or candidate in any political election campaign. . . ." Acts of the General Assembly, Chapter 32, Extra Sess., 1956, p. 33.

[48] Ibid. The Committee on Law Reform and Racial Activities was one of the two committees created by the special session to harass the NAACP. James M. Thomson is the brother of Mrs. Harry Byrd, Jr.

[49] Editorial, Ibid., p. 10.

Almost overlooked in the attempt to portray a unanimous support of massive resistance was a report submitted by the Richmond First Club offering a five point program for achieving desegregation.[50] The plan which included such criteria as geography and student achievement would have allowed only token desegregation. A non-partisan organization of business and professional men, it had submitted a report, similarly ignored during the debate over interposition, which concluded that desegregation could work in the Richmond public schools.[51] Though unsuccessful in presenting its case, the Richmond First Club demonstrated that some influential citizens preferred limited desegregation to the school closing legislation.

Another casulty of massive resistance was State Senator Blake T. Newton who was not reappointed to the State Board of Education when his term expired. As a legislator and as a board member, Newton had opposed the Stanley Plan. Though Stanley explained his decision as an effort to give all regions better representation on the Board, the Governor's objective was widely viewed as an attempt to secure a majority vote in favor of his position.[52] The goal was achieved with the appointment of the arch-segregationist State Senator Garland Gray to the State Board of Education.[53]

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[50] Richmond Times-Dispatch, March 1, 1957, p. 1.

[51] Ibid., February 24, 1956, p. 1.

[52] Norfolk Virginian-Pilot, January 29, 1957, p. 1.

[53] Richmond Times-Dispatch, February 15, 1957, p. 1.

As the federal courts chipped away at the school-closing legislation and massive resisters attempted to thwart unorthodox views of the school crisis, Virginia settled down to a long political campaign. Without serious opposition in the primary, the Democratic organization concentrated its efforts on demolishing the Republicans. The major issue of the campaign was massive resistance. The organization argued that only by completely disregarding the Supreme Court could Virginia preserve segregation. In mid-March Senator Harry Byrd set the tone for the campaign. Speaking in Richmond, he said: "We have a right to defy the Supreme Court, if we do so without violence and do not try to overthrow the government." Arguing that the Brown decision overturned a precedent upheld in the Gong Lum case, Byrd concluded: "I say we still have a right to choose between these two." The Senator explained that massive resisters were incorrectly identified as school closers. Instead Byrd described resisters as school savers since he believed that it was impossible to "have integration in Virginia and preserve the public schools." By ignoring the Supreme Court, Senator Byrd held out the hope that the Brown decision would be reversed.[54]

Ted Dalton, who would be the Republican standard bearer, explained the GOP's position on desegregation. He charged that Senator Byrd raised false hopes by holding out the possibility that the Supreme Court would reverse the Brown decision.

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[54] Ibid., March 15, 1957, p. 1.

Attacking massive resistance, Dalton favored a pupil assignment plan similar to the one adopted by North Carolina. "Keep the schools white as possible under law and order but, by all means, keep the public schools."[55] The soundness of Dalton's position was reinforced on March 25 when the United States Supreme Court declined to review Virginia's appeal of the Fourth Circuit's decisions in the Charlottesville-Arlington cases.[56] As a result, school desegregation in the two localities by September of 1957 appeared likely.

Although consistent with federal court decisions, Dalton's stance had obvious political liabilities. Following the Republican's remarks, Governor Stanley invited Dalton to enter the campaign as an "integregationist" which Stanley defined as any person "willing to accept any integration. . . ."[57] The plan to exploit the race issue was repeated at the Jefferson-Jackson Day Dinner held in Richmond on March 29, 1957. James Latimer reported that privately the organization hoped that Ted Dalton would run for Governor. The Democrats, according to Latimer, aimed "quite simply and frankly, to paste the label 'integrationist' all over Dalton if he runs--and they're sure they can make it stick through the campaign propaganda battle."

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[55] Norfolk Virginian-Pilot, March 25, 1956, p. 1.

[56] Ibid., March 26, 1957, p. 1.

[57] Ibid., March 27, 1957, p. 1.

The Democrats hoped "to clobber him so badly as to demolish him and the GOP as a force in state level politics for years to come."[58]

Perhaps no man was more aware of the legal fragility or political potential of massive resistance than the Democratic candidate for governor, J. Lindsay Almond. As attorney general, he had been cautious in his legal opinions so that as late as July of 1957 Almond's resister credentials were still being questioned.[59] But in the course of the election campaign, using all of his oratorical skills, Almond became the champion of massive resistance. Attacking the local assignment plan proposed by Dalton, Almond claimed it would "not and cannot preserve the public school system from the destructive effects of integration."[60] The admission of several Negro children to North Carolina schools under a local placement plan proved, Almond charged, that Dalton "embraces and accepts the principle of race mixing in the public schools."[61] As a result, the Democratic candidate warned, the

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[58] Richmond Times-Dispatch, March 29, 1957, p. 1.

[59] Editorial, Richmond Times-Dispatch, July 5, 1957, p. 14.

[60] Norfolk Virginian-Pilot, July 7, 1957, p. 1.

[61] Ibid., July 25, 1957, p. 1.

"NAACP and 'fellow travelers'" would be aided in reaching their goal of a "totally amalgamated society."[62]

The highlight of Almond's campaign was his promise to provide a plan that would save Virginia from a desegreation order. The Dalton plan, he explained, not only legalized integration, but, through litigation, turned over "to the NAACP the placement of Negro children in white schools. This is government by NAACP in Virginia. This I cannot embrace. This I will resist with every honorable means at my command." Almond's solution was "a position of flexibility so as to meet to the best advantage any condition which may arise and adopt [Virginia's] power and government machinery to the most effective means in resisting integration." Above all Virginia must not "compromise with principle."[63] When challenged by Dalton to reveal his plan, Almond weakly replied that he did not want to expose it to the NAACP.[64]

In his campaign, Ted Dalton attacked the secrecy and machine-like quality of the Byrd organization. Virginia's defense of states' rights, he asserted, was accompanied by an attack upon local rights.[65] The Republican candidate explained that Almond had no alternative plan for maintaining segregated

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[62] Richmond Times-Dispatch, September 11, 1957, p. 1.

[63] Ibid., August 27, 1957, p. 1.

[64] Ibid., August 24, 1957, p. 3.

[65] Ibid., September 14, 1957, p. 2.

public schools. The example of North Carolina showed, according to Dalton, that a state could strengthen its legal position "by token compliance with the Supreme Court decision."[66] Virginia, he explained, would either have no public schools or public schools accompanied by some desegregation. The choice was not between integration and segregation as the Democratic party led the voters to believe.[67] Finally, Dalton ridiculed the argument that the Supreme Court would reverse itself. "Think about it--don't be swayed by somebody who can holler the most for white supremacy."[68]

Legally, Ted Dalton's position was stronger than Lindsay Almond's. With the various federal district court rulings, the ability of the state to maintain segregated schools throughout the state in the fall of 1957, without school closings, appeared questionable. The only legal tactic left to Virginia's attorneys was to slow the judicial process by a series of time-consuming appeals. The Democratic organization recognized, that considering its campaign promises, a court order to desegregate public schools might have a dramatic effect on the election returns.

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[66] Ibid., July 25, 1957, p. 1.

[67] Ibid., July 30, 1957, p. 4.

[68] Richmond Times-Dispatch, September 17, 1957, p. 1.

The dim future of the school closing laws was made more apparent on July 13, 1957, when the Fourth Circuit Court of Appeals affirmed Judge Hoffman's desegregation order and his interpretation of the placement laws.[69] Attorneys for the Norfolk and Newport News school boards immediately announced their intention to appeal the decision before the Supreme Court. Simultaneously, the school boards' lawyers asked the Fourth Circuit Court to stay its desegregation order pending action by the Supreme Court. Since circuit courts normally refused stays when a review was being sought from the Supreme Court, massive resistance was in serious trouble.[70] The Norfolk Virginian-Pilot predicted that "the distance to the last ditch of resistance in the federal courts may be shorter than the Stanley Plan authors thought it would be. The distance . . . might be measured in months rather than years."[71] Virginia won a reprieve in the Norfolk-Newport News cases when the Fourth Circuit Court decided to grant the requested stay. Since the Supreme Court was adjourned until October and Judge Hoffman said he would not order desegregation during a school year, segregated schools were preserved for another year in the Norfolk-Newport News area.[72]

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[69] School Board of the City of Newport News v. Atkins; School Board of the City of Norfolk v. Beckett, 2 Race Rel. L. Rep. 808 (4th Cir. 1957).

[70] Norfolk Virginian-Pilot, July 14, 1957, p. 1.

[71] Editorial, Ibid., p. 4.

[72] Norfolk Virginian-Pilot, July 19, 1957, p. 1.

Desegregation orders were still in effect in Charlottesville and Arlington. Pending the Supreme Court ruling on the Norfolk-Newport News cases, Attorney General Almond asked Judges Paul and Bryan to stay their decrees. The state argued that the judges should wait until the United States Supreme Court ruled on the pupil placement law which had not been an issue in the Charlottesville-Arlington cases.[73] For contradictory reasons Almond's legal strategy was successful.

In the Charlottesville case, Judge Paul, as a matter of courtesy, suspended his decree pending action by the United States Supreme Court. However he also enjoined the enforcement of the pupil placement law in Charlottesville until the Supreme Court acted. Thus, Charlottesville's Negro pupils were not required to apply with the pupil placement board as a prerequisite for attending a white school.[74]

The following day, July 27, Judge Bryan ruled that the stay issued by the Fourth Circuit Court of Appeals was not a sufficient reason for postponing his ruling. However, Judge Bryan rejected the plea of the NAACP that the original desegregation order be amended so as to specify that Arlington students could bypass the pupil placement law. Since the law had not been an issue in the Arlington case, Judge Bryan believed

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[73] Ibid.

[74] Allen v. School Board of Charlottesville, 2 Race Rel. L. Rep. 986 (W.D. Va. 1957).

that the NAACP request was premature.[75] Consequently, the Negro plaintiffs would have to apply with the Pupil Placement Board for a transfer in order to test the law's constitutionality. Bryan concluded: "In this way, specificity and precision will be given to each complaint, it will be individualized and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents than at hand."[76] The latter observation seemed to preclude the use of class action suits by the NAACP. As Attorney General Almond later commented, the ruling appeared "to foreclose any NAACP concept of mass integration."[77]

The effect of the Bryan-Paul decisions were identical--the postponement of desegregation orders. However, quick action on the part of Arlington's Negro plaintiffs provided Judge Bryan with another opportunity to integrate Arlington's white schools. Following Bryan's ruling, a number of Negro students applied for transfers with the Pupil Placement Board. Their applications were rejected "for reasons which the board deems to be good and sufficient."[78] Returning to the district court on September 14, Judge Bryan ordered the Arlington School Board

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[75] Thompson v. School Board of Arlington County, 2 Race Rel. L. Rep. 810, 811 (E.D. Va. 1957).

[76] Id. at 811.

[77] Norfolk Virginian-Pilot, July 30, 1957, p. 1.

[78] Ibid., August 30, 1957, p. 1.

to admit seven Negroes to previously all white schools.[79] In Judge Bryan's opinion the administrative remedies of the Pupil Placement Act were "too sluggish and prolix to constitute a reasonable remedial process." The only explanation for the Pupil Placement Board's action, thought Judge Bryan, was a "simple adherence to the prior practice of segregation." He added that for a Negro to submit "to that act amounts almost to assent to a racially segregated school." In conclusion, Judge Bryan reminded the defendants that seven Negroes in a white school population of 21,245 could hardly have a significant impact on public education in Arlington.[80]

Since Bryan had set September 23 as the date of admission, his ruling posed a sticky problem for the organization. Virginia's attorneys immediately made plans to seek a suspension of the order pending another appeal to the Fourth Circuit Court of Appeals.[81] Fortunately for the Democrats, Bryan granted a stay of his order on the grounds that tremendous injury would result if his order was reversed.[82] Considering that the Fourth Circuit Court of Appeals had already turned down an appeal from Norfolk and Newport News on the same issue, Bryan's ruling was

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[79] Thompson v. School Board of Arlington County, 2 Race Rel. L. Rep. 987 (E.D. Va. 1957).

[80] Id. at 788-91.

[81] Norfolk Virginian-Pilot, September 15, 1957, p. 1.

[82] Ibid., September 19, p. 1.

extremely generous. Thus, once again, the Democratic organization was spared the embarrassment of closed schools prior to the November 5 election.

The flow of adverse federal district and appellate court rulings had worried the organization hierarchy. Congressman Howard Smith warned that Almond must be prepared for an adverse ruling from the Supreme Court on the Norfolk appeal. He cautioned: "It will catch us in the middle of a gubernatorial campaign in which segregation is the chief issue."[83] Congressman Burr P. Harrison, who represented the Shenandoah Valley, was even more alarmed. He wrote Smith: "By the appointment of a Commission, the support of its plan, and the enactment of laws constituting a different scheme, we have placed ourselves in a position before the people of saying that we have the answer and we are suffering today when the people examine our 'answer' and conclude that we have been inconsistent and that our present laws constitute no answer." Harrison reminded Smith that in the Shenandoah Valley, with its slight Negro population, voters did not like the fund cut off plan.[84]

On October 7, Attorney General Kenneth C. Patty appeared before the Supreme Court with the request that the Court defer

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[83]Letter, Howard W. Smith to Honorable Burr P. Harrison, September 30, 1957, University of Virginia, Archives, Smith Letter File.

[84]Letter, Burr P. Harrison to Howard W. Smith, October 9, 1957, University of Virginia, Archives, Smith Letter File.

action on the Norfolk case. The reason given for requesting the delay was "to avoid confusion, prevent conflict, and promote comity between federal and state courts, conformable with established doctrine of the Court."[85] Circumstantial evidence indicated that the Democrats did not want a United States Supreme Court ruling until after November 5. The Democrats were not to have their way as the Supreme Court dealt another blow to massive resistance on October 21, 1957, by refusing to review the Fourth Circuit Court's decision upholding Judge Hoffman.[86] Ted Dalton immediately called for a special session but Governor Stanley and Lindsay Almond pretended that the Court's action had no significance.[87] Stanley rather dryly commented: "There is no cause for school patrons, faculties or pupils to be apprehensive."[88] Almond, in his typical fashion, told an audience

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[85] Norfolk Virginian-Pilot, October 8, 1957, p. 1. The Virginia Supreme Court of Appeals was about to rule on a case dealing with the placement plan, Defebio v. School Board of Fairfax County, 100 S.E. 2d 760 (Va. Sup. Ct. of App. 1957). The Defebio case was not exactly analogous to the Norfolk case since the plaintiffs were white. As it turned out the appeal of the white plaintiffs was rejected by the Virginia Supreme Court because the plaintiffs failed to show a violation of equal protection of the laws. Kenneth Patty replaced Lindsay Almond as Attorney General during the political campaign.

[86] Ibid., October 22, 1957, p. 1.

[87] Ibid.

[88] Ibid., October 23, 1957, p. 1.

in Princess Anne County: "I have faith that the decision ultimately will be reversed since the record of the Supreme Court is one of reversing itself because it doesn't know what it's doing or what it's talking about."[89] Dalton replied that "after losing round after round in federal courts . . . [Almond] should be more aware than anyone else that the Supreme Court will not reverse itself."[90]

For Ted Dalton the trend of federal court decisions was not enough to overcome the integrationist tag which Almond and the organization had pinned on him. The organization deceptively but successfully portrayed the election as offering Virginians a choice between white schools or integrated schools. Senator Byrd told a Leesburg audience that the Virginia contest would have far reaching effects "because this is the first Southern state wherein the issue has been clearly defined in a state election as being between integration and segregation."[91] In addition to fighting the integrationist label, national events were also unkind to Ted Dalton. In the midst of the campaign a school crisis developed in Little Rock, Arkansas. When Governor Orville Faubus summoned the Arkansas National Guard, preventing desegregation, Almond approved. "It's very apparent that he [Faubus] faces a crucial situation of non-acceptance by the people." As governor, Almond promised to "exercise every resource

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[89] Ibid., October 25, 1957, p. 1.

[90] Ibid., October 26, 1957, p. 1.

[91] Ibid., October 8, 1957, p. 1.

to preserve law and order everywhere in Virginia." Reluctant to criticize a Republican president and fearful of alienating voters, Dalton evasively observed that limited information prevented him from commenting on the situation.[92] Virginia's political observers recognized the resolution of the Little Rock situation would determine the limits of Virginia's resistance. The editor of the Richmond Times-Dispatch hoped that Faubus would "somehow manage to vindicate the right of sovereign states to control its own affairs, including its public schools."[93]

When President Eisenhower sent federal troops into Little Rock, the Democrats siezed the issue in a final effort to embarrass Dalton. Almond declared that Little Rock was only a "token of what will transpire in Virginia and throughout the South if these states are compelled to mix races in their public schools. I say Little Rock is a living example of Mr. Dalton's concept of limited integration." The Democratic candidate accused President Eisenhower of abdicating leadership "for motives of political expediency to the demands of a power crazed minority pressure group." Then Almond challenged Dalton to "tell the people whether he endorses and approves of the President's hasty action and the derogation of the rights of a sovereign state."[94]

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[92] Ibid., September 4, 1957, p. 1.

[93] Editorial, Richmond Times-Dispatch, September 7, 1957, p. 12.

[94] Norfolk Virginian-Pilot, September 25, 1957, p. 1; September 26, 1957, p. 1.

Faced with a political dilemma of choosing between party loyalty and the realities of Virginia politics, Dalton asked President Eisenhower to withdraw the troops. The Republican candidate, however, did not challenge the legality of the President's action. Instead, Dalton chose to argue that the President had broken with the 1956 party platform.[95] Albertis S. Harrison, the Democratic candidate for Lieutenant Governor, said Dalton responded too late. Arguing that the troops were unnecessary, Harrison held that "through sheer force the President of the United States stripped the states of their sovereignty."[96]

Along with the Little Rock crisis, the newly enacted Civil Rights Bill was also unpopular in Virginia. Senator Byrd identified Dalton as part of an anti-Southern phalanx which included President Eisenhower, Attorney General Herbert Brownell, and the NAACP.[97] The Republican candidate suffered from the sharp dip in the President's popularity as a result of Little Rock and the Civil Rights Bill.

When the votes were tabulated, to no one's surprise, Almond had soundly defeated Dalton by a vote of 326,921 to 188,628. By receiving thirty-seven percent of the vote, the Republican party lost eight percentage points off its total

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[95] Ibid., September 29, 1957, p. 1.

[96] Ibid., October 2, 1957, p. 1.

[97] Richmond Times-Dispatch, October 12, 1957, p. 1.

in 1953.[98] Considering the manipulation of racial themes and unpopular national events, the Republican candidate nonetheless made a respectable showing. Dalton thought that Little Rock had destroyed him. "It wasn't a little rock, it was a big rock."[99] The Arkansas confrontation obviously had hurt the Republican candidate, but well before Little Rock he was beaten by the exploitation of the race issue in Virginia. Only a court order prior to the election desegregating several public schools could have upset the organization's strategy. Desegregation would have led to school closings, dissatisfaction outside the black belt, and the revelation that Virginia had to pursue a course similar to the one proposed by Dalton.

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[98] Latimer, p. 86.

[99] Richmond Times-Dispatch, November 7, 1957, p. 1.

CHAPTER VII

THE COLLAPSE OF MASSIVE RESISTANCE

Before the new governor took office, several important developments occurred on the school front. After approximately a year, the two committees investigating the NAACP made their reports. The Committee on Offenses Against the Administration of Justice, chaired by Delegate John Boatwright, concluded its findings by charging ten NAACP lawyers, including Oliver Hill and Spotswood Robinson III, with illegally promoting and soliciting litigation.[1] The committee charged that Negro plaintiffs often were unaware that desegregation was the goal of the school suits; that sometimes individuals did not know they were party to a suit; that the NAACP paid lawyers' fees and court costs regardless of the plaintiffs' ability to pay; and that the NAACP generally solicited business.[2]

The NAACP used several arguments in combatting the charges. First, it held that the Virginia statutes were un-

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[1] Report of the Committee on Offenses Against the Administration of Justice (Commonwealth of Virginia: Division of Purchase and Printing, 1957), p. 20.

[2] Ibid., pp. 16-19; Report of the Committee on Law Reform and Racial Activities (Commonwealth of Virginia: Division of Purchase and Printing, 1959), pp. 8-11.

constitutional. Second, even if the laws were valid, the NAACP argued that it was not involved in illegal activity. Finally, the Negro organization refused to disclose the names and addresses of its membership on the grounds that members would be subject to local harassment.[3]

Appearing before the investigative committees and fighting the attempts to obtain the membership lists absorbed the time and resources of the NAACP lawyers. Such diversions prompted speculation that the Negro attorneys "may well find themselves too limited in time and resources to take the offensive with any new desegregation suits."[4] Delegate James M. Thomson, Chairman of the Committee on Law Reform and Racial Activities, reportedly remarked that his committee had acquired enough information to keep the NAACP from litigating which, "after all [is] the heart of the organization."[5] Considering the purpose of the legislation, the findings were no surprise. Consequently, the Virginia Conference of the NAACP, as massive resisters hoped, was forced to defend its very existence while directing the school litigation.

Following Almond's election, the Fourth Circuit Court

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[3]National Association For Advancement of Colored People v. Patty, 159 F. Supp. 503, 507 (E.D. Va. 1958). In his opinion, Judge Soper has a concise discussion of the organization of the NAACP and of the effects of Virginia's attempt to restrict or destroy its influence.

[4]Richmond News Leader, February 27, 1957, p. 1.

[5]Ibid., March 14, 1957, p. 3.

of Appeals reversed Judge Hutcheson's decision that unfavorable conditions justified delaying desegregation in Prince Edward County. The court held that a person "may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights."[6] Endeavoring to soften the effects of the ruling, the court reminded the district court judge that segregation did not have to be abolished "at once with respect to all grades in the schools, if a reasonable start were made to that end with deliberate speed considering the problems of proper administration."[7] Applied to other areas of Virginia, the Fourth Circuit Court's ruling meant that the threat of racial unrest provided no defense against a desegregation order. Yet the court continued to emphasize that the most limited compliance would satisfy the Supreme Court.

On January 11, 1958, Governor J. Lindsay Almond, Jr., delivered his inaugural address. A month earlier, Senator Byrd had urged Almond to make "a great address such as you are capable of delivering on the encroachment of the Federal Government upon the States with special reference to the seg-

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[6] Allen v. School Board of Prince Edward County, II Race Rel. L. Rep. 1119 (4th Cir. 1957).

[7] Id. at 1120.

regation decision. . . ."[8] The address was no disappointment to Byrd, as Almond devoted ninety percent of his speech to the themes of the federal invasion of state powers and his mandate to resist such encroachments. Almond pointed to the "tyranny of majority" as the fundamental threat to democracy. Paradoxically, he said, the greatest menace to Virginia came from "minority spokesmen" who were "armed out of political expediency with inordinate power to force their will upon the majority."[9] On the school issue, the new governor held that sound education and desegregation were incompatible in Virginia. He predicted that "integration anywhere means destruction everywhere. And to paraphrase a great statesman, I say to you simply that I have not been elected Governor to preside over the liquidation of Virginia's schools."[10] Almond made only two recommendations to the General Assembly. One, a direct product of the Little Rock crisis, was a request for the power to close any school policed by federal authorities. Second, Governor Almond wanted the legislature to establish a commission devoted to the study of constitu-

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[8] Letter, Harry F. Byrd to J. Lindsay Almond, December 10, 1957, University of Virginia, Archives, Kilpatrick Papers.

[9] "Inaugural Address of J. Lindsay Almond, Jr.," January 11, 1958, in Inaugural Address and Addresses delivered to the General Assembly by J. Lindsay Almond, Jr. 1958-1962 (Commonwealth of Virginia: Division of Purchase and Printing) pp. 4, 8.

[10] Ibid., p. 7.

tional government.[11]

The next day the General Assembly went to work on a number of measures designed to repair the weaknesses in the massive resistance armor. The supplementary legislation won virtually unanimous approval in both houses, despite further indications from the federal courts that the defiance was doomed.

To improve Virginia's case before the federal courts, the legislators amended the Pupil Placement Act. The word "efficient" which had given the placement law difficulty in the district courts, was eliminated. Also, the long list of criteria for judging assignments was replaced by the less elaborate phrase found in the North Carolina placement plan.[12] The intention of the amendments was to improve the appearance of the assignment plan so that the Negro plaintiffs would have to retest its constitutionality.[13] In explaining the purpose of the legislation, Almond stressed: "We are not coming around to the North Carolina viewpoint as far as the policy of this state is concerned."[14] However, as long as the placement plan was related to school closing and fund cut-off legislation, the courts would regard such attempts to

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[11] Ibid., pp. 6-8.

[12] Acts of the General Assembly, Chapter 500, Reg. Sess., 1958, p. 638.

[13] Norfolk Virginia-Pilot, February 14, 1958, p. 1.

[14] Ibid.

purify the assignment law as superficial.

At Governor Almond's request, the General Assembly eliminated the "loophole" in the school closing legislation which permitted a locality to operate desegregated schools without state funds. The new legislation provided that the Governor was not required to return a closed school to local authorities upon the requests of the Board of Supervisors and the Board of Education.[15] Thus the possibility of desegregation in a community unwilling to tolerate closed schools was virtually prohibited.

The General Assembly also passed the legislation requested by the Governor in his inaugural address. The so-called "Little Rock bill" provided for the closure of any school policed by federal authorities.[16] A second bill, nicknamed "Little Rock Junior," authorized the Governor to close all of the remaining schools in the school district.[17] The legislature also passed a bill creating the Virginia Commission on Constitutional Government and appropriated funds to subsidize its work.[18] The Virginia Commission on Constitutional Government would devote the next ten years to expounding the doctrines of states' rights and strict construc-

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[15] Acts of the General Assembly, Chapter 631, Reg. Sess., 1958, p. 939.

[16] Ibid., Chapter 41, p. 26.

[17] Ibid., Chapter 319, p. 367.

[18] Ibid., Chapter 233, p. 275.

tion through publications, seminars on constitutional government, and meetings with like-minded groups throughout the nation. In 1968, the organization's efforts came to an end when the General Assembly refused to appropriate the funds needed to maintain its operation.[19]

Complementing the legislation which dealt with school districts and the assignment plan were another series of bills designed to hobble the NAACP. The General Assembly consolidated into one body the two legislative committees created to harass the NAACP--the Committee on Offenses Against the Administration of Justice. When Delegate Kathryn H. Stone of Arlington submitted an amendment providing for opening committee hearings to the public, she was rudely rebuked. The sponsors of the legislation consolidating the committee, Delegates Boatwright and Thomson, were categorically opposed to any amendment from Delegate Stone since they considered her unfriendly to the legislation. Delegate Frank P. Moncure viewed the amendment as automatically ill-conceived, since "the lady from Arlington is an integrationist and has admitted it on the floor of the House."[20]

Three other measures were passed by the legislators to hamper the effectiveness of the NAACP. First, a joint reso-

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[19]In 1968 the General Assembly repealed the statute creating the Commission on Constitutional Government. See Acts of the General Assembly, Chapter 536, Reg. Sess., 1968, p. 759.

[20]Richmond News Leader, February 21, 1958, p. 1.

lution was passed which requested the Virginia State Bar to take action against cases of unethical and illegal practice of the law. The bar was directed to use the findings of the Boatwright and Thomson committees. Second, tax deductions for contributions to organizations involved in litigation in which they were not a party were made illegal. The law's objective was to undercut the financial resources of the NAACP. Finally, the General Assembly approved a bill which required non-stock corporations to disclose their membership rolls if they were accused of illegal practice of the law.[21]

The continued tenacity of the massive resisters in their efforts to obtain the NAACP membership lists came at a moment when the future of such a tactic seemed to have no prospect of holding up in the federal courts. On January 21, 1958, prior to the introduction of the bill, a three-judge federal district court found that the 1956 legislation requiring the NAACP to disclose its membership was prohibited by the First, Fifth, and Fourteenth Amendments.[22] Judge

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[21] Acts of the General Assembly, HJR, No. 50, Reg. Sess., 1958, p. 1102; Chapter 34, p. 22; Chapter 506, p. 644.

[22] National Association for Advancement of Colored People v. Patty, 159 F. Supp. 503, (E.D. Va. 1958). The registration statutes were Chapters 31 and 32 of the acts passed by the 1956 special session. The court focused its attention on Chapter 32 which required the registration of persons or organizations engaged in (1) promoting or opposing racial legislation, (2) advocating racial integration or segregation, (3) raising or expending funds to promote litigation or (4) whose activities led to racial conflict. The NAACP and the Virginia Conference agreed that they were involved in the first three activities. The NAACP Legal Defense and Education Fund admitted that it engaged in activities two and three.

Morris Soper, who wrote the majority opinion, held that the legislation was part of Virginia's plan of massive resistance to the Brown decision. He found that the Negro organization, as a result of the laws, had suffered a decline in revenue while individual members were the victims of assorted harassments.[23] The result, Judge Soper concluded, was unquestionable a restriction of the rights of free speech and due process.[24] The major issue, to Judge Soper, was whether or not Virginia had exceeded its police powers in passing the registration legislation. His conclusion was that the restrictions placed on free speech were unjustified since the Negro organizations endeavored "to abide by and enforce the law and have not themselves engaged in acts of violence or disturbance of the public peace."[25] The discriminatory character of the legislation, Judge Soper wrote, was "emphasized by the exemption of persons engaged in a political election campaign who are free to speak without registration whereas persons having no direct interest in elections as such and concerned only with securing equal rights for all persons are covered by the Statute."[26] Although organizations advocating segregation, like the Defenders, also had to register, Judge Soper

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[23] Id. at 515-16.

[24] Id. at 524, 528.

[25] Id. at 526.

[26] Id. at 525.

wrote that equality of treatment was not a result. "Registration of persons engaged in a popular cause imposes no hardship while, as the evidence of this case shows, registrations of names and persons who resist the popular will would lead not only to expressions of ill will and hostility but to loss of members by the plaintiff's Association."[27]

Judge Soper was especially critical of Virginia's attempt to identify the names of NAACP financial contributors or fund raisers. He believed that the attempt to damage the financial ability of the NAACP to support litigation was possibly the most important part of Virginia's plan to prevent desegregation. On this point Soper observed: "The right of access to the courts is one of the great safeguards of the liberties of the people and its denial or undue restriction is a violation of the due process clauses of the Fifth and Fourteenth Amendments." The requirement that every contributor register, Soper concluded, was oppressive and "part of a deliberate plan to impede the contributors in the assertion of their constitutional rights."[28]

The court also voided the statutes defining the crime of barratry. In an expanded definition of barratry, the law made it illegal for a person or persons without a direct interest in a case to contribute to the expense of the litigation. Legal aid societies were excluded as agencies which

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[27] Id. at 527-28.

[28] Id. at 528.

dealt with the general public on a variety of legal matters.[29] To Judge Soper, the major issue raised by this statute was whether Virginia could make it a crime for an organization to contribute money to defend the cause of civil rights.[30] Although Judge Soper readily acknowledged Virginia's rights to maintain high standards of legal practice, he held that the barratry statute violated the equal protection and due process clauses of the Fourteenth Amendment. The equal protection clause was violated because the statute "forbids the plaintiffs to defray the expenses of racial litigation while at the same time it legalizes the activities of legal aid societies that serve all needy persons in all sorts of litigation."[31] By attempting "to put the plaintiff corporations out of business by forbidding them to encourage and assist colored persons to assert rights established by the decisions of the Supreme Court," Judge Soper found the statute in violation of the due process clause.[32] Judge Soper concluded that the Negro organizations were not engaged in soliciting or stirring up litigation, but instead were devoted to instructing and assisting Negroes in the realization of their rights.[33]

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[29] Acts of General Assembly, Chapter 35, Extra Sess., 1956, p. 36.

[30] NAACP v. Patty at 531.

[31] Id. at 533.

[32] Ibid.

[33] Ibid.

Judge Soper refused to interpret the constitutionality of two other statutes which dealt with malpractice on the grounds that the laws were too vague. Judge Walter Hoffman concurred with Judge Soper to give the NAACP its victory.[34]

Judge Sterling Hutcheson wrote a lengthy dissent which was devoted to an essay on the doctrine of abstention. At stake in this case, Judge Hutcheson wrote, was "the traditionally delicate balance between the courts of the states and the federal courts."[35] The federal courts, he argued, were not to construe a state statute involving a federal right until the state court had acted. The basis for this rule was the "fundamental concept of separate sovereigns embodied in the Constitution of the United States."[35]

Despite the district court's ruling, the legislators passed a new registration bill into law.[37] Delegate Harrison Mann, who had sponsored the 1956 bill, defended the new bill on the grounds that the district court's decision was subject to a reversal by a higher court.[38] Considering the political liabilities of identification with the NAACP, legislators did oppose a measure designed to vex the Negro organization. The

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[34] Id. at 533-34.

[35] Id. at 535.

[36] Ibid., at 540.

[37] Acts of the General Assembly, Chapter 419, Reg. Sess., 1958, p. 549.

[38] Richmond News Leader, February 25, 1958, p. 1.

sponsors of the legislation also believed that it had a good chance of being upheld by the state courts.

This opinion was bolstered by a decision of the Supreme Court of Appeals of Virginia on the day before the federal district court's decision, holding that the power of investigative committees to subpoena the membership lists of the NAACP was a "reasonable exercise of the state's police power."[39] The "obvious purpose" of the legislation, the court held, was to direct "the committee to investigate and report on the manner in which such malpractice laws are administered and enforced. . ."[40] Thus the Virginia Supreme Court rejected the incontrovertible evidence that the real purpose of the legislation was to handcuff the NAACP. In construing statutes the court retreated to the position that it was "well-settled that it is not within the functions of the judiciary to inquire into the motives which inspire the legislature to enact laws."[41]

The apparent consensus on massive resistance in the General Assembly disguised continued differences between urban and rural legislators which surfaced on other issues. The "country boys" made two unsuccessful attempts to reverse the

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[39] National Association For the Advancement of Colored People v. Committee on Offenses Against the Administration of Justice, 101 S.E. 2nd 631, 639. (Va. Sup. Ct. of App., 1957).

[40] Id. at 640.

[41] Ibid.

growing influence of urban and black Virginia which were directly related to the school question. On January 29, Garland Gray introduced a bill which provided that prospective voters would have to register on blank sheets of paper without the benefit of any advice from the registrar. The bill's unstated purpose was reportedly to frustrate the registration of Virginia's Negro citizens.[42] However, many legislators opposed the measure because they believed the NAACP would carefully instruct blacks so that only uninformed whites would be disfranchised.[43] Urban legislators were also reminded that the rural wing of the Democratic organization had thrived on a restricted electorate. After vigorous debate, the bill was passed in an amended form which allowed the applicant to refer to the pertinent provision of the Virginia Constitution during the registration.[44]

Another attempt by rural legislators to maintain the status quo surfaced in the form of a House Resolution which declared that population should be de-emphasized as a factor in redistricting the General Assembly in 1962. The sponsor of the legislation, Delegate John H. Daniel, believed that the perpetuation of rural dominion in the General Assembly

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[42] Richmond Times-Dispatch, January 30, 1958, p. 1.

[43] Ibid.

[44] Ibid., March 5, 1958, p. 1. The bill passed the House of Delegates by a narrow vote of 50-46. Two days later the bill passed the Senate by 32-0.

would ensure "sound government."[45] After a successful filibuster, organized by urban legislators, the House of Delegates passed instead a resolution which retained population as the primary criteria for reapportioning the General Assembly.[46] The inability of rural legislators to push their resolution through the House was a sign that the grip of the conservative wing of the Democratic organization was not as strong as massive resistance indicated. Although urban legislators supported much of massive resistance, they were not about to surrender the prospect of future power on the school issue.

Another indication of the split within the organization was demonstrated by the response to Senator Harry Byrd's announcement on February 10 that he would not run for reelection in 1958. Although the Senator desired to devote more time to his invalid wife, Byrd reversed his decision two weeks later. Most political observers believed that Byrd's reassessment was prompted by the prospect of a battle for his Senate seat between ex-Governors John Battle and William Tuck. A Battle-Tuck primary was expected to evolve into a feud having the prospect of undermining massive resistance and the organization. To prevent such a destructive cam-

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[45] Ibid., February 20, 1958, p. 1.

[46] Ibid., March 5, 1958, p. 1; March 6, 1958, p. 1.

paign, Byrd decided to seek re-election.[47]

With the adjournment of the General Assembly, Governor Almond prepared for the expected school closings in the fall. In February, the Fourth Circuit Court of Appeals upheld Judge Bryan's order admitting seven Negro children to white schools.[48] In May, the Supreme Court refused to review the Fourth Circuit's ruling in the Arlington case so that Virginia was left without any other legal recourse.[49] Consequently, Arlington, like Norfolk and Charlottesville, appeared likely to have either desegregated or closed schools in September of 1958.

Governor Almond and his attorney general, Albertis S. Harrison, recognized that Virginia had exhausted all of its legal ploys in behalf of massive resistance. At a high level meeting in Washington on July 2, 1958, this viewpoint was stressed by Harrison. According to the Attorney General, however, Representative Howard Smith still "hoped at some time there would be a test of the right of a Governor of a state to interpose the sovereignty of such State." Attorney General Harrison pointed out that this alternative was elimi-

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[47]Latimer, pp. 87-88. Byrd easily defeated Dr. Louise Wensel, a physician from Augusta County by 317, 221 to 120, 224 (p. 89).

[48]School Board of Arlington County v. Thompson, 3 Race Rel. L. Rep. 187, (4th Cir. 1958).

[49]Arlington School Board v. Thompson, 3 Race Rel. L. Rep. 423 (4th Cir. 1958).

nated by the Little Rock precedent. Governor Almond, Harrison explained, would find himself "in the same position as Governor Faubus if he uses either the state police force or the National Guard to prevent the enforcement of an order of one of our Virginia Federal Judges."[50]

Of greatest distress to Harrison was the failure of the Democratic organization to work out a well-conceived plan to cope with the expected desegregation order. Despite the massive resistance propaganda, the Attorney General predicted that only a quarter of Virginia would "close their schools rather than integrate." Arlington, Charlottesville, and Norfolk were expected to insist on reopening the public schools. Harrison believed that eventually a private school system would emerge in areas with dense Negro populations once black enrollments surpassed token levels. Until then, he urged the organization to provide a formula for the transition period. If the organization failed to provide a plan, Harrison warned, "it will be supplied by others, and we may be in even more travail."[51]

The confidential views of the Attorney General illuminated a major problem for the Almond Administration. Recognizing that the legal realities dictated a retreat from mas-

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[50]Letter, Albertis S. Harrison, Jr., to Howard W. Smith, July 11, 1958, University of Virginia, Archives, Smith Letter File.

[51]Ibid.

sive resistance, Almond and Harrison were discomforted by the inflexibility of the organization's hierarchy. Thus the last months of massive resistance were dominated by Governor Almond's attempt to deal with the dilemma of satisfying the courts while averting political disaster.

Anticipating a crisis in the fall, Almond intended to exploit all the remaining legal loopholes for evading a desegregation order before closing the schools. The Governor hoped to satisfy the people of Virginia that he had utilized every legal maneuver to prevent desegregated schools. The legal developments took several directions. One was an attempt to capitalize on a ruling delivered on June 20 by Federal District Court Judge Harry L. Lemley in Arkansas, which ordered the postponement of desegregation in the Little Rock case for two and one-half years.[52] Judge Lemley considered his decision a "tactical delay," necessitated by the violent opposition to the Brown decision in the Arkansas city.[53] Until Judge Lemley's order was reversed, Virginia's leaders argued that desegregation would be accomplished by turmoil similar to that experienced by Little Rock. A second development was the formulation of local assignment plans designed to prevent desegregation in Charlottesville and Norfolk where Judges Paul and Hoffman had discredited the Pupil Placement

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[52] Aaron v. Cooper, 163 F. Supp 13 (E.D. Ark. 1958).

[53] Ibid., at 28.

Board.[54] Finally, a half-hearted effort was made to argue that the General Assembly's revision of the Placement Act justified new litigation.

One by one the last legal maneuvers were knocked down by the federal courts. On August 18, the Eighth Circuit Court of Appeals overruled Judge Lemley's order on the grounds that if upheld it "would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means."[55] On September 12, after a special term, the Supreme Court in Cooper v. Aaron upheld the Court of Appeals in a brief per curiam order.[56] Two weeks later the Court delivered an expanded opinion signed by all the justices, which declared that the rights of Negro children "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation."[57] The Court traced the turmoil in Little Rock "directly . . . to the actions of legislators and executive officials of the State of Arkansas . . . which reflect their own determination to resist this Court's decision in the

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[54] Southern School News, vol. V, No. 2, (August, 1958), p. 6.

[55] Aaron v. Cooper, 257 F. 2d 33, 40 (8th Cir. 1958).

[56] Aaron v. Cooper, 78 S. Ct. 1399 (1958).

[57] Cooper v. Aaron, 358 U.S. 1, 17 (1958).

Brown case."[58] Although the Little Rock decision was a warning to the South in general, Governor Almond believed that the justices wrote their opinions "with their eyes on Virginia," where several schools were already closed. The Court's opinion, Almond declared, "indicts and insults every state legislator, every state judicial officer, and every governor whose convictions relating to the oath 'to support this constitution' differ from the court's."[59] Taking issue with the Governor's interpretation, the editor of the Norfolk Virginian-Pilot wrote that the Court instead had demolished the false idea that "legislation and litigation will buy time, and that in time something may turn up" which will reverse the Brown decision.[60]

On August 18, the same day that the Eighth Circuit Court of Appeals reported its decision in the Little Rock case, the Norfolk School Board announced that it rejected the applications of all one hundred and fifty-one Negroes who sought admission to white schools.[61] Using the assignment criteria established by the School Board, one hundred and twenty-three students were eliminated for failing to meet scholastic requirements, for refusing to submit to testing

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[58] Id. at 15.

[59] Norfolk Virginian-Pilot, October 1, 1958, p. 1.

[60] Editorial, Ibid., p. 4.

[61] "School Board Resolution of August 18, 1958," III Race Rel. L. Rep. 945.

procedures, or for other "equally cogent reasons." The remaining twenty-eight students were rejected on the grounds that their educational progress would be hindered by racial isolation, by too many school transfers, or by possible racial conflicts.[62] On August 25, Judge Hoffman told the Norfolk School Board that racial isolation or the expectation of racial disorder were not acceptable legal grounds for denying applications to white schools.[63] The School Board's position was most difficult. If it refused to admit some Negroes, the School Board was subject to a contempt citation from Judge Hoffman. However, by admitting Negro students, the school closing law would be activated. Furthermore, the Circuit Court of the City of Norfolk, on the request of segregationists, had issued an injunction forbidding the School Board to make any assignments on the grounds that this was the responsibility of the State Pupil Placement Board.[64] Faced with a difficult choice, the School Board, on August 29, announced that it would assign seventeen Negroes to white schools in September.[65]

Massive resisters reacted to the Norfolk decision by

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[62] Ibid., at 945, 946.

[63] "District Judge's Statement of August 25, 1958" 3 Race Rel. L. Rep. 946 at 951-52.

[64] Coley v. Brewbaker, III Race Rel. L. Rep. 944.

[65] "School Board's Report of August 29, 1958," III Race Rel. L. Rep. 955.

rededicating their opposition to the Supreme Court. By coincidence, the Norfolk announcement was made a day before the annual meeting of the Democratic organization's faithful at Senator Byrd's apple orchard in Berryville. Seated on apple crates and munching box lunches, the quasi-political rally listened approvingly as the Senator vilified the Supreme Court and the NAACP. Byrd charged: "It is the Warren Court school decision that has forced this ordeal upon us." The Court's accomplice was the NAACP, which the Senator described as "a fourth branch of the federal government." The leader of the Democratic organization urged his followers to continue the fight against the Warren Court "fortified by the belief that we are fighting to preserve the fundamental principles of our constitutional democracy."[66]

More specifically, the leaders of massive resistance believed that Governor Almond had not properly utilized the Pupil Placement Ace in the struggle to preserve segregation. Representative Watkins Abbitt urged: "If the Pupil Placement Act is ever going to be used, it has to be used now."[67] In his editorials, James Kilpatrick tore into Almond for not using the "cleaned-up" assignment plan. The editor wondered: "If the Governor of Virginia won't defend the laws of Virginia, who will?"[68]

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[66] Richmond Times-Dispatch, August 31, 1958, p. 1.

[67] Richmond News Leader, September 1, 1958, p. 1.

[68] Editorial, Ibid., August 30, 1958, p. 6. Two weeks

As pressure for some dramatic act of resistance mounted from organization stalwarts, Governor Almond made his only attempt to prepare Virginia for the end of massive resistance. At a September press conference, the Governor dismissed the pleas to interpose the Pupil Placement Board between the federal courts and the Norfolk School Board or any other school board. As long as the statute was tied to school closing laws, Almond realized, the federal courts would not re-examine the assignment plan because of a few superficial alterations. School closing and fund cutoff were all that remained to prevent desegregation. On the subject of interposition, Almond frankly stated that:

> I've tried to make it clear the question is the power of the federal government. I must recognize that no state could require a citizen to confine himself to state judicial remedies in solution of a federal question involving his rights.
>
> So long as school boards are under the coercive powers of the court, no act can relieve the school board members of their responsibilities to that court as determined by the court.[69]

Governor Almond also sympathized with the Norfolk School Board's decision to assign Negro pupils to white schools. He

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later Kilpatrick publically apologized to Almond and Harrison. The editor explained that the Pupil Placement Act was an "empty thing" which had been destroyed by Judges Paul and Hoffman. Editorial, Ibid., September 13, 1958, p. 8. The apology followed a two hour conversation between Kilpatrick, Almond, and Harrison in which the state officials ostensibly convinced the editor that the Pupil Placement Act provided Virginia with no legal defense. Letter, James J. Kilpatrick to J. Segar Gravatt, September 19, 1958, Univeristy of Virginia, Archives, Kilpatrick Letter File.

[69] Norfolk Virginian-Pilot, September 3, 1958, p. 1.

explained that he could not "criticize a lawyer who refuses to advise his client to go to jail."[70] Perhaps Almond was also suggesting that he had no intention of going to jail to satisfy massive resisters.

No powerful organization Democrat, including the Governor, had ever offered such a candid assessment of Virginia's massive resistance. The Governor's observations were an admission that Virginia was at the end of the line. Yet, because of the political risks, Almond refused to call a special session of the General Assembly, because that would show "no faith in what we have tried to do thus far to protect our schools."[71] Politically, school closings were virtually necessary in the hope that massive resisters would be satisfied that the Governor had "walked the last mile" in the defense of segregated schools.

Two days after his press conference, Governor Almond succumbed to political pressure and reversed his position on the Pupil Placement Act. Most likely his statement of September 2 was a trial balloon aimed at detecting signs of support for a shift in school strategy. Speaking for massive resisters on September 3, Garland Gray said: "The Pupil Placement Board was provided by the legislature to intervene in situations such as this. I support wholeheartedly the po-

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[70] Ibid.

[71] Ibid.

sition taken by the Defenders."[72] The next day, the Governor delivered a statement to school officials which proclaimed that the authority to assign students rested with the Pupil Placement Board. "The Court may assume the power but lacks the authority to make the assignment or enrollment itself."[73] Because of the nature of the injunctive process and the Briggs dictum, Governor Almond advised school officials that they were under no obligation "to operate any public school, whether integrated or not."[74] Referring to state court injunctions in the Norfolk and Charlottesville cases, the Governor warned that for "a school board to violate such state injunctions . . . would be susceptible to the construction that the action was voluntary and wilful."[75] Almond increased the pressure on school boards by reminding them that the responsibility for school closing rested on their shoulders. He hoped that "no charge be justifiably made that any School Board has thwarted the will of the overwhelming majority of the people of Virginia . . ."[76]

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[72] Ibid., September 4, 1958, p. 1.

[73] "Governor's statement of September 4, 1958," III Race Rel. L. Rep. 959.

[74] Ibid.

[75] Ibid. In Charlottesville the judge of the corporation court issued an injunction prohibiting the local school board from making any assignments until October 15, 1958. Southern School News, vol V, No. 3 (September, 1958), p. 6.

[76] Ibid.

The Governor's statement won the approval of the massive resisters. Agreeing with Almond that school boards could not assign pupils to schools, Representative Tuck declared that consequently "the federal courts had no authority to enter any orders directing them to do so, and such orders are a nullity and ought not to be obeyed."[77] However, the Norfolk School Board announced its intention to continue enrolling students under the local assignment plan.[78] On September 18, Judge Hoffman ordered the admission of Negro students to Norfolk's white school and dissolved the state court injunction.[79] On September 27, following the refusal of the Fourth Circuit Court of Appeals to stay the order to desegregate, the Governor issued an order closing six of Norfolk's white senior and junior high schools.[80] Ironically, all of the city's Negro schools opened on September 29.

The same pattern of events occurred in Charlottesville. After finding the local assignment plan unsatisfactory, on September 9, Judge John Paul ordered the admission of twelve Negro children to Charlottesville's white schools. Judge Paul

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[77] Richmond News Leader, September 5, 1958, p. 1.

[78] "School Board Statement, Resolution of September 5," 3 Race Rel. L. Rep. 960.

[79] Text of Hoffman's opinion, Norfolk Virginian-Pilot, September 19, 1958, p. 12.

[80] School Board of the City of Norfolk v. Beckett, 3 Race Rel. L. Rep. 961 (4th Cir. 1958); "Governor Orders Closing of Schools," 3 Race Rel. L. Rep. 963.

admitted that it was "unpleasant to be at odds with the government of my own state." But he did not believe that Virginians were "less able to cope with a new and different situation than the people of . . . other states."[81] Following an unsuccessful appeal to the Fourth Circuit Court of Appeals, Governor Almond closed two Charlottesville schools on September 19.[82] Like Norfolk, neither a local assignment plan nor the Pupil Placement Board prevented school closings in Charlottesville.

The first school closed by Governor Almond, however, was the Warren County High School in Front Royal. The Warren County suit was not filed until August 29, 1958, the day the Pupil Placement Board refused the applications of twenty-six Negroes attempting to enter the all white high school. Since the Negro high school students were bused out of the county to receive their education, the suit involved a blatant case of racial discrimination.[83] On September 8, 1958, Judge John Paul ordered the Warren County School Board to admit twenty-two Negro students to the white high school.[84] During the

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[81] Norfolk Virginian-Pilot, September 10, 1958, p. 1.

[82] Southern School News, Vol. V, No. 4 (October, 1958), p. 3.

[83] Ibid., Fifty-nine Negroes were bused approximately fifty-five miles to Manassas Regional High School. They were boarded there during the week and returned home on the weekends. Another forty-seven Negro pupils traveled to Berryville daily, a round trip of about fifty miles.

[84] Kilby v. School Board of Warren County, 3 Race Rel. L. Rep. 972 (W.D. Va. 1958).

hearing Judge Paul indicated that Virginia would gain little by postponing the desegregation order. "I think you will agree that two or three years ago the atmosphere was much more favorable to the acceptance of integrated schools than it is now. The last two or three years have been consumed by officers of the state government and politicians building hostility."[85] On September 12, Governor Almond closed the Warren County High School following an unsuccessful appeal to the Fourth Circuit Court of Appeals.[86]

In September of 1958 nine schools were closed in three Virginia communities, and approximately 12,700 children were forced out of their normal school routine. Arlington County narrowly missed an order closing its schools. On September 17, 1958, Judge Bryan approved the transfer of four Negro children to white schools, but postponed their admission until mid-term since school had already started.[87]

The only legal triumph of the massive resisters was in the Prince Edward County case. The Fourth Circuit Court of Appeals had reversed Judge Hutcheson's refusal to set a date for the beginning of desegregation in the Southside County.[88]

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[85] Norfolk Virginian-Pilot, September 9, 1958, p. 1.

[86] Southern School News, vol. V, No. 4 (October, 1958), p. 3.

[87] Ibid.

[88] Allen v. School Board of Prince Edward County, 249 F. 2d. 462, (4th Cir. 1957).

On remand, Judge Hutcheson decided, in a rather unique opinion, that the Prince Edward School Board could have until 1965, or ten years after Brown II, to comply with the desegregation decision.[89] The ruling was based on the assumption that there was no evidence "that in accepting new theories of social and moral reform, the modern human is any more adaptable than that of the Athenians of 500 B.C."[90] Thus Judge Hutcheson held that Prince Edward should have ten years to adjust to the Brown decision, since the Athenians were given the same period to adjust to the laws of Solon.[91] Even the finality of this order was qualified by the assertion that the court could "modify it by accelerating or extending that date of compliance . . . as the best interest of the parties and the public may appear. . . ."[92]

The school closings meant that the Almond administration would have to find a politically graceful method of reopening the schools. The method settled upon was to institute a suit in the Virginia Supreme Court of Appeals that would test the constitutionality of the tuition grant plan and the school closing legislation. The suit was expected to achieve two objectives. First, if the Virginia Supreme Court of

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[89] Allen v. School Board of Prince Edward County, 164 F. Supp. 786 (E.D. Va. 1958).

[90] Id. at 792.

[91] Id. at 794.

[92] Ibid.

Appeals declared the massive resistance legislation unconstitutional, Governor Almond hoped to avoid the charge that he had capitulated to the federal government. The administration figured that most Virginians would accept the verdict of the state's highest court on massive resistance. Second, by knocking down the school closing law, the Supreme Court of Appeals would give the tuition grant plan a new vitality. Almond and Harrison expected Virginia to move in the direction of a private school system, and they expected tuition grants to play an important role in such a transition. They recognized, however, that tuition grants would meet with great difficulty in federal courts if granted to individuals where no public schools existed. When State Comptroller Sidney Day refused to issue tuition grants on the grounds that their relationship to the school closing legislation made them unconstitutional, the stage was set for the friendly suit filed by Attorney General Harrison.[93]

Subsequent events demonstrated that the Almond-Harrison strategy did not have the approval of Senator Byrd, who did not budge from the position of massive resistance. Senator Byrd, Howard Smith, Bill Tuck and their followers wanted Governor Almond to meet the federal authorities at the school house door. Nevertheless, the Attorney General attempted to explain the purpose of Harrison v. Day to the Senator.

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[93] Norfolk Virginian-Pilot, September 14, 1958, p. 1.

Harrison wrote:

> It was certain that suits were going to be filed in the Federal courts attacking the school closing law and the fund cut-off law. We felt that we would have no chance whatever of sustaining these laws in the Federal courts, and, furthermore, that if the laws were to be tested, such test should come in the State's own appellate court.[94]

Several months later, the Attorney General admitted that the administration held out little hope for a favorable verdict in the Virginia Supreme Court.[95]

Though Almond expected the state and federal courts to knock down the school closing legislation, he failed to prepare Virginians for the end of massive resistance. The Governor instead continued to engage in race-baiting and discouraged any discussion of compromise. If Virginia surrendered, Almond predicted that the state would be left "in the defenseless position of having white teachers teaching Negroes and Negro teachers teaching white pupils."[96] After nine Virginia schools were closed, Almond pledged: "I will never voluntarily yield to that which I am convinced will destroy our public school system."[97] Unwilling to accept any responsibility for the closed schools, the Governor asserted: "If

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[94]Albertis S. Harrison, Jr., to Harry F. Byrd, September 22, 1958, University of Virginia, Archives, September 22, 1958, Smith Letter File.

[95]Albertis S. Harrison, Jr., to Harry F. Byrd, January 6, 1959, University of Virginia, Archives, Smith Letter File.

[96]Norfolk Virginian-Pilot, September 17, 1958, p. 1.

[97]Ibid., October 1, 1958, p. 1.

public education is destroyed in Virginia, the sole responsibility for that unhappy and tragic event must rest and abide with those official and unofficial, who have confederated together to achieve that result."[98] Governor Almond did not want to expose himself to charges of capitulating to the Federal Government. Besides, he had built up the hopes of many a segregationist by promising that he had a plan to preserve segregated schools. By yielding reluctantly to the verdict of Virginia's highest court, Almond hoped to end massive resistance without splitting the organization. Ultimately the plan failed.

One development that Almond and other organization men hoped to avoid was voluntary desegregation by a Virginia city or county. Massive resistance had been sold on the principle that it had the support of the entire state. After the high school in Front Royal was closed, Almond urged all the counties to "stand firm in this crisis so the state may utilize every avenue possible to prevent the destruction of public schools in Virginia."[99] While Virginia had pictured itself as the defender of the states against an oppressive federal government, ironically it was, for the moment, completely insensitive to local differences within the state. Discouraging local action, Almond said: "The political subdivisions

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[98] Ibid.

[99] Ibid., September 17, 1958, p. 1.

are creatures of the people through the General Assembly with the people retaining all the powers unless they have conferred them in the General Assembly to exercise."[100] On this point the News Leader was characteristically blunt. It simply stated that

> there's no such thing as local rights. The localities exist by sufference of the State as a whole. Whatever rights the counties and cities have are no more than revocable privileges, and it might be just as well, at this particular time.[101]

Former Governor Tuck was even more forceful in his disapproval of independent local action against state policy. "Some don't want to stand. As much as I love local self-government, I say if they don't want to stand make them stand."[102] The News Leader, which had prided itself on raising transcendent principles, also appealed to white racism in order to discourage local action. It made the familiar argument that "Our society is predicated upon the maintenance of a social wall between the races."[103] This principle was bolstered by statistics demonstrating that the role of illegitimate births among Negroes far exceeded that of whites. In Warren County, for example, the editor emphasized that one of four Warren

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[100] Ibid.

[101] Editorial, Richmond News Leader, September 8, 1958, p. 12.

[102] Richmond News Leader, November 13, 1958, p. 5.

[103] Editorial, Ibid., September 15, p. 10.

Negroes was illegitimate.[104]

If the localities were not to be permitted to deal with their problems, what solution did the state offer? Rejecting interposition, the Governor and his advisers thought more seriously about encouraging the conversion of Virginia's public school system to a private school system over a period of years.[105] From 1954 through the Gray Plan, some form of private education had been contemplated. Amending Section 141 had been done in recognition of the financial difficulties related to the establishment of private schools. The constitutionality of tuition grants was vital to the transition to private schools. More so was the willingness of Virginians to put up with the Spartan conditions characteristic of such a venture.

Private school foundations sprouted in Charlottesville, Arlington, Warren County and Norfolk.[106] Generally classes were held in vacant homes and other make-shift buildings. Governor Almond made a concerted effort to encourage the private school experiment. "From the standpoint of culture, refinement, education, patriotsm and loyalty," he predicted

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[104] Ibid.

[105] Norfolk Virginian-Pilot, September 17, 1958, p. 1.

[106] Since Prince Edward County was not forced to desegregate in the fall of 1958, it held its plans for private schools in reserve.

that Virginia's future citizens would not be inferior.[107] Yet the early experiments demonstrated that private education could not win widespread support except in towns and small cities. In communities like Charlottesville, Front Royal in Warren County and Farmville in Prince Edward County, leaders of private school movements found it easier to mobilize the community. Carpenters, bricklayers, and other skilled workers were willing to donate their services in order to maintain segregated schools.[108]

The city of Norfolk demonstrated the difficulty of converting to a private school system in a large metropolitan area. A booming seaport, businessmen feared that closed schools would prompt the Navy to loosen its connections with the community, and discourage private industry from moving into the area. Though reluctant to take a public stand, Norfolk businessmen, like their colleagues throughout the state, eventually used their influence to urge the re-opening of the closed public schools.[109] Though at times curiously apathe-

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[107] Norfolk Virginian-Pilot, September 26, 1958, p. 1.

[108] Bob Smith, They Closed Their Schools (Chapel Hill: University of North Carolina Press, 1965), pp. 163-168. A similar effort is described by Clyde Walter Mathews, A Study of the Political and Economic Effects of School Integration on Front Royal and Warren County, Virginia. M.A. Thesis, East Carolina College, 1963.

[109] Luther J. Carter, "Desegregation in Norfolk," The South Atlantic Quarterly 58 (Autumn, 1959), 507-520. A hundred prominent businessmen signed a full page advertisement supporting public schools which appeared in both Norfolk papers on January 26, 1959, after state and federal courts had knocked down the school closing laws. Businessmen,

tic about the future of their public schools, the citizens of Norfolk indicated that they would not support a private school system. A private school corporation in Norfolk was able to raise only fourteen thousand dollars in a fund drive advertised as a test of strength for the private school movement.[110]

Another crucial factor in any private school operation was the attitude of the public school teachers. In the case of Virginia, as in other Southern states, the teachers had to make a choice between supporting public education or the racial mores of the community. In Norfolk, the teachers voted to support desegregated schools if they could not be reopened on any other basis.[111] Furthermore, Norfolk teachers refused to teach in the private schools organized by the Tidewater Educational Foundation, and only reluctantly

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Carter argued, feared the General Assembly would withdraw their support for the port and highway improvements prior to the court decisions (p. 518).

[110] Ibid., p. 519. An example of Norfolk's apathy was the sparse participation of the city's voters on a referendum held on November 18, 1958. The referendum asked the voters whether or not they wished the control of the schools returned to the city on an integrated basis and at increased expense. Only twenty-one thousand of some fifty thousand qualified voters participated in the referendum. By a vote of 12,340 to 8,172, the citizens of Norfolk preferred to keep the schools under state authority. Since the question presented to the voters was drafted to encourage this result, the meaning of the referendum was unclear. (Carter, p. 515).

[111] Washington Post, October 5, 1958, p. 1. On October 4, the Norfolk Education Association voted 4-1 in favor of desegregation, if schools could not be opened otherwise.

agreed to supervise tutoring groups. Neither substitute, the Norfolk teachers held, could "adequately and efficiently replace our public schools."[112] The stand taken by the Norfolk teachers earned the rebuke of Representative Tuck who charged that the teachers were "unwilling to stand up for principles . . ." had "little devotion to the great profession to which they belong . . ." and were "undertaking to coerce them [the children] to return to integrated schools." The result, Tuck predicted, would be to "make of our little children a seed bed for the infiltration and implantation of spurious views and doctrines."[113] In contrast, the teachers in small cities and towns like Farmville and Front Royal moved more easily from public to private schools.[114]

Up to the fall of 1958, the Virginia Education Association had been extremely cautious regarding its statements on massive resistance. Nevertheless, on October 30, the VEA passed a resolution by a 4-1 margin which expressed "grave concern" over the school closings and asked for a special legislative assembly which would "assure the continued operation of the Virginia public schools as a state supported function."[115] The vote was taken after the teachers listened to

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[112] Richmond Times-Dispatch, October 9, 1958, p. 1.

[113] Richmond News Leader, November 13, 1958, p. 5.

[114] Smith, p. 168.

[115] Norfolk Virginian-Pilot, October 31, 1958, p. 1.

the Governor condemn the NAACP, elaborate on the penalties of mixed faculties, and describe the Supreme Court as a "cancer gnawing at the heart of our constitution."[116] On the following day, Lieutenant Governor A.E.S. Stephens observed dejectedly "when you pick up a newspaper and see that a large body of teachers has voted not to participate in a private school movement, you ask yourself 'where is their loyalty.'"[117]

The private school movement received other jolts. In Charlottesville and Warren County, Judge Paul enjoined private schools from employing publicly paid teachers idled by the school closing.[118] Also the Virginia Congress of Parents and Teachers defeated a resolution supporting massive resistance by a tie vote, 557-557. It then adopted a resolution in favor of local option by a narrow 515-513 margin.[119] These votes came after Almond promised that he would not permit white and colored to be taught together in the public schools.[120]

By mid-October the Virginia press, with the exception of the Richmond dailies, had turned against massive resistance.[121] Finally in mid-November the News Leader and the

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[116] Ibid.

[117] Richmond Times-Dispatch, November 1, 1958, p. 1.

[118] Norfolk Virginian-Pilot, October 9, 1959, p. 1.

[119] Ibid., October 23, 1958, p. 1.

[120] Richmond Times-Dispatch, October 21, 1958, p. 1.

[121] Muse, p. 96. In November businessmen also applied pressure on Almond to open the schools. Generally they were

Times-Dispatch called for a change in strategy. Editor Kilpatrick wrote that such Supreme Court rulings as Cooper v. Aaron meant that Virginia had to abandon its legal position. The 1956 laws, he continued, had accomplished their goal which was "to deter integration and to buy time." Kilpatrick urged Virginia to move in the direction of a private school system based on tuition grants. To guarantee the constitutionality of the grants he cautioned that they should not be "geared in any way to the integration controversy." The combination of tuition grants and private schools provided Virginia's only hope of maintaining "both segregation . . . and education in the indefinite future."[122] Although a private school policy would damage public education, the editor concluded that considering the threat of integration to society, "such a prospect no longer holds great terrors."[123]

Although the News Leader was resigned to the destruction of the 1956 legislation, it was not giving up the battle against the Supreme Court. One of the keys to the new defensive strategy was a "policy of studied contempt by the State for the Supreme Court."[124] In contriving litigation and leg-

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concerned about the cost of private education and the regressive effect of closed public schools on the economy (Muse, pp. 106-10, 120-21).

[122]Editorial, Richmond News Leader, November 12, 1958, p. 10.

[123]Ibid., November 13, 1958, p. 12.

[124]Ibid., November 10, 1958, p. 10.

islation, Kilpatrick thought in terms of prolonged struggle. In a debate with Thurgood Marshall, Kilpatrick said:

> The hope of the white South is that in time--over the next fifteen years or so--the rest of the country will awaken to the damage that is done to constitutional government by the usurpation of the Supreme Court.[125]

Although the South's economy and race relations might be damaged, Kilpatrick believed this preferable to "the evils of race mixing." The Richmond editor predicted that Thurgood Marshall had "won the last inch of ground he will win easily."[126]

Governor Almond took advantage of the shift in editorial policy to announce a new plan. Responding to a suggestion offered by a Richmond Times-Dispatch editorial, Almond said that he would select a new school study commission if Virginia's school closing laws were knocked down by the courts.[127] Since the laws were expected to be invalidated, the prospect of returning to some form of a placement plan seemed imminent. Governor Almond, at the last moment, admitted that "it's very probable that there will be Negro children in the schools in Norfolk, Charlottesville and perhaps everywhere." He confessed that after the massive resistance

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[125] Charleston News and Courier, November 17, 1958, in Facts on Film.

[126] Ibid.

[127] Richmond Times-Dispatch, November 13, 1958, p. 1.

laws, "I have no weapon left."[128]

Byrd, Tuck and Abbitt did not share Almond's resignation over the fate of massive resistance. Tuck refused to make any concession and promised to support "every firm and determined effort to prevent mixing of the races in our schools. If we shed the armor of principle, there is nothing for which to fight."[129] If integration was forced by the courts, Representative Abbitt thought "the Negro schools would be closed and the whites will educate their children in private schools. There is plenty of money."[130] The refusal of the organization hierarchy to turn away from massive resistance would plague Almond to the end of his administration.

After one year in office, Almond's promise to preserve segregated education was all but shattered. The most glaring fault of the Governor's first year was his failure to prepare the Old Dominion for the end of massive resistance. As a lawyer, he recognized the limitations of Virginia's power to obstruct a federal court order to desegregate. But, with the exception of one brief attempt, at the beginning of September, Almond spoke the rhetoric of resistance. In his heart, no doubt, Almond wished he could make good his campaign promises. More importantly, the Governor recognized that to proclaim the end of massive resistance meant breaking with

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[128] Norfolk Virginian-Pilot, January 4, 1959, p. 1.

[129] Ibid., November 13, 1958, p. 1.

[130] Ibid., January 4, 1959, p. 1.

Senator Byrd and the heart of the Democratic organization.

Governor Almond was partly responsible for his predicament. The Governor had led the politicians and the people to believe that he had a variety of tactics in his legal arsenal. But by 1958, the federal courts had cut through a variety of legal obstacles to desegregation which, in turn, triggered Virginia's school closing laws in three communities. Of the 12,700 students barred from their regular classes, 10,000 were from Norfolk. The resort to makeshift classrooms, especially in Norfolk, was terribly inadequate. Confronted with the consequences of the 1956 legislation, the Governor saw that outside of the Southside, most Virginians would not accept such chaos. Thus, Almond moved in the direction of a return to local assignment and tuition grants. A decision by the Virginia Supreme Court was expected to give Almond the political leverage to lead Virginia out of massive resistance.

CHAPTER VIII

RETURN TO LOCAL OPTION

On January 19, 1959, the Virginia Supreme Court of Appeals declared the legal foundation of massive resistance unconstitutional.[1] In a 5-2 decision, the majority of the justices rejected Attorney General Harrison's argument that a conditional relationship existed between Section 129, which provided for a statewide system of public schools, and Section 140, which had required the separation of races in the public schools. Consequently, the court held that when Section 140 was invalidated by the Brown decision, Section 129 was left unaffected, since the two sections were "independent and separable."[2] The court also found that the school closing and fund cutoff statutes were prohibited by the Constitution of Virginia, since they left the public schools without the support required by Section 129. Virginia, the court ruled, "must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled

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[1] Harrison v. Day, 106 S. E. 2d 636 (Va. Sup. Ct. App., 1959).

[2] Id. at 644.

and taught together, however unfortunate that situation may be." An "efficient system," the court continued, was to be determined by the number of teachers and the quality of the facilities, rather than by its racial composition.[3] Finally, the tuition grant plan was invalidated on the grounds that supporting funds were derived from money normally appropriated for the public schools. However, if properly appropriated, the court had no objection to tuition grants per se.[4] Thus the Governor and General Assembly were assured that an amended tuition grant plan would be endorsed by the state court. In its concluding remarks the court sympathized with Virginia's political leaders. The majority opinion attacked the United States Supreme Court's "lack of judicial restraint evinced . . . in trespassing on the sovereign rights of this Commonwealth." The legislation passed by the General Assembly was described as "an understandable effort to diminish the evils expected from the decision in the Brown case."[5]

On the same day that the Virginia Supreme Court issued its decision, a three-judge federal district court in James v. Almond enjoined the enforcement of the school closing laws in Norfolk.[6] In a per curiam opinion the court ruled that Vir-

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[3] Id. at 646.

[4] Id. at 645, 647.

[5] Id. at 647.

[6] James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959). This suit was instituted by a group of white parents. See Paul L. Puryear, "The Implementation of the Desegregation De-

ginia violated the equal protection and due process clauses of the Fourteenth Amendment by closing some Norfolk public schools while maintaining others. The court added: "We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination."[7] But as long as Virginia operated a public school system, schools could not be selectively closed for racial reasons. Even if Virginia withdrew its support from public schools, the court held that while the schools relied on public funds, localities would be required to satisfy the Fourteenth Amendment.[8]

Governor Almond was expected to acquiese in the state court's ruling. The Richmond News Leader accepted the judicial verdict and seemed to be clearing a path for Almond's retreat from massive resistance. Editor Kilpatrick wrote: "The slate is clean now, and for our own part we have no regrets. These laws were intended to interpose the power of the State between Federal courts and local school officials; the laws were intended, in Madison's famous phrase, 'to arrest the progress of the evil' and this they have done. Let them rest in peace."[9] Yet, to the astonishment of most political anal-

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cision in the Federal Courts of Virginia: A Case Study of Legal Resistance to Federal Authority" (unpublished Ph.D. dissertation, University of Chicago, 1960), pp. 344-47.

[7] Id. at 337.

[8] Id. at 338.

[9] Richmond News Leader, January 20, 1959, p. 10.

ysts, on the evening of January 20, Governor Almond told a state audience that: "We have just begun to fight." The Governor said he would not surrender to amalgamationists and those who closed "their eyes to the livid stench of sadism, sex, immorality and juvenile pregnancy infesting the mixed schools of the District of Columbia and elsewhere. . . ." Once more Almond promised not to "break faith" with the people of Virginia who elected him.[10]

The speech was a political blunder. Besides passing up the opportunity provided by Harrison v. Day to retreat gracefully, Governor Almond once again raised the false hope that somehow desegregation could be prevented. Five years later, Almond explained that fatigue and tension were responsible for the slip. "My underlying thought and motivation was to show the people that we had done everything we could do."[11] Byrd, Tuck, and Abbitt enthusiastically endorsed Almond's January remarks.[12]

One week later massive resisters were furious when Governor Almond reported to an extra session of the General Assembly that the state and federal court decisions meant that some Virginia public schools would be integrated in February of 1959. During his speech, Almond recommended the repeal of the compulsory school statute, asked for immediate action on

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[10] Norfolk Virginian-Pilot, January 21, 1959, p. 1.

[11] Ibid., June 9, 1964, p. 1.

[12] Muse, p. 129; Wilkinson, 146.

a new tuition grant plan unrelated to public school funds, encouraged the development of private education, suggested the passage of stricter laws associated with school violence and announced his intention to appoint a commission to study a variety of problems associated with public education. With the exception of his emergency recommendations, Almond asked the legislature to recess until the commission made its report.[13]

In addition to outlining his school proposals, Almond devoted considerable time to defending his management of massive resistance. He was most concerned about the charges that neither the Governor nor the Attorney General had exhausted their options in maintaining segregated schools. Exercising the police power, interposing the Pupil Placement Board, or locking the school doors, Almond explained, could not save Virginia from the effects of a Federal Court order. Placing his past promise to save Virginia's segregated schools in the background, he said: "I have repeatedly stated that I did not possess the power and knew of none that could be evolved that would enable Virginia to overthrow or negate the overriding power of the Federal Government."[14] Anticipating a fierce struggle in the extra session, the Governor

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[13]"Address to the General Assembly," January 28, 1959, in Inaugural Address and Addresses delivered to the General Assembly of Virginia by J. Lindsay Almond, Jr., 1958-1962 (Commonwealth of Virginia: Division of Purchase and Printing,) pp. 3-10.

[14]Ibid., p. 9.

hoped that the legislators would not allow their convictions to jeopardize the future of Virginia. The plea was to no avail as the General Assembly readied itself for a bitter struggle on the future of Virginia's public schools.[15]

Except for bitter-end segregationists, Virginians indicated that Almond's position was realistic. The Richmond Times-Dispatch applauded the Governor's approach to the school problem. "It has taken great courage on the part of Governor Almond to accept the reality of our situation, and to avoid mere theatrics of resistance, which would accomplish nothing except the loss of dignity for the state as a whole."[16] Considering the unfavorable reaction throughout the nation to continued resistance, the News Leader also supported the Governor's proposals as "the wise man's course." Kilpatrick reminded his readers "that it is in the rest of the country that ultimately the war must be won."[17]

The Richmond dailies emphasized that some school desegregation must not be construed as evidence of a change of heart in Virginia. "The simple fact is that we have come to another stage in our resistance program," observed the Times-

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[15]Ibid., p. 10.

[16]Editorial, Richmond Times-Dispatch, January 31, 1959, p. 6. On February 4 the Times-Dispatch published editorials from around the state supporting Governor Almond. On February 2 the results of a public opinion poll showed two to one support for Almond.

[17]Editorial, Richmond News Leader, January 29, 1959, p. 12.

Dispatch.[18] The editor predicted that the experience of Washington, D.C. would not be duplicated "if Virginia continues to fight with the will and determination shown in the past four years."[19] Echoing the morning newspaper, the News Leader added that "Virginia does not submit to integration in the thought that race-mixing is morally right, because we conceive race-mixing to be morally wrong."[20] Virginia, the editor emphasized, was merely acquiescing to a superior force.[21]

Following Governor Almond's speech, the General Assembly went to work on his recommendations amid rumors that rabid segregationists intended to place the blame for desegregation on Almond's shoulders. Nevertheless, legislators supporting the Governor easily passed tuition grant legislation, repealed the compulsory attendance law and made bombing threats unlawful.[22] Simultaneously the Almond forces were beating back legislative attempts by the segregationist bloc to restore massive resistance. A bill sponsored by Garland

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[18] Editorial, Richmond Times-Dispatch, January 31, 1959, p. 6.

[19] Ibid.

[20] Editorial, Richmond News Leader, February 2, 1959, p. 10.

[21] Ibid.

[22] Acts of the General Assembly, Chapters 1-4, Extra Sess., 1959, pp. 3-5, 76,77.

Gray which would have placed all school funds in the hands of the Governor, who was to distribute the money to segregated schools only, was killed in the Senate Finance Committee.[23] Another bill giving the Governor the power to close inefficient, in other words integrated schools, was defeated in the Senate by a vote of 17 to 22.[24]

On February 2, the legislature recessed until March 31, when the assembly reconvened to consider the report of the school study commission. On the same day that the legislature recessed, Negro students, for the first time in Virginia's history, entered white public schools without incident.[25] Assessing the day's events, the Times-Dispatch viewed the lack of violence in Arlington and Norfolk as consistent with "the reputation of Virginia for law and order."[26] Virginia's nonviolent tradition combined with Governor Almond's program, the editor predicted, would result in the "orderly containment of the amount of integration in

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[23] Richmond Times-Dispatch, February 1, 1959, p. 1.

[24] Ibid., February 3, 1959, p. 1.

[25] Ibid.

[26] Editorial, Ibid., p. 12. On February 10, Alexandria desegregated its public schools. On February 18, Warren County High School opened its doors to 21 Negroes, but none of the white students returned. Over four hundred white students returned in September, 1959. Southern School News, vol. V, No. 9 (March, 1959), p. 14. Charlottesville was permitted to reopen its schools on a segregated basis until September, after submitting an acceptable plan for desegregating the schools with the federal courts. Southern School News, vol. V, No. 8 (February, 1959), p. 1.

the schools of the Commonwealth."[27]

The first victories of the Almond forces and the integration of the Commonwealth's public schools were bitterly received by the Southside delegation. State Senator Mills Godwin, who was a champion of massive resistance, believed that with the integration of Virginia's public schools "the rape of our constitutional rights is an accomplished fact."[28] In reviewing the past three years, Godwin said: "And let it be firmly understood that those of us who support the massive resistance laws . . . have no apology to make. We would gladly do so over again and we believe the people of Virginia would give us their full support."[29] Joined by other extreme segregationists, Godwin promised to continue the search for new anti-integration legislation. The refusal of the conservative wing of the Byrd organization to surrender was a portent of future legislative battles over school legislation.

On February 4, Governor Almond appointed forty legislators to devise a program for Virginia's public schools which would minimize desegregation. Unlike the Gray Commission, which had been heavily weighted in favor of the Southside, this Commission had four representatives from each

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[27] Ibid.

[28] Ibid., p. 5.

[29] Ibid.

congressional district. Almond named Mosby G. Perrow, Jr., of Lynchburg the chairman of the study commission.[30] Senator Perrow joined a small cadre of normally loyal organization men who supported the Governor throughout the special session.

The format of the Perrow Commission was similar to the Gray Commission. One public hearing was held, but the substantive issues were hammered out in private meetings. Ironically, the conservative leadership of the organization attacked the Commission for its closed meetings. To meet the charge, Perrow invited Representatives Tuck and Abbitt to appear before the commission and offer their suggestions. Both men rejected the offer and claimed that no solution could be found to Virginia's problems until the meetings were open to the public. Tuck described the "so-called program of 'containment'" as a "subterfuge and another name for integration."[32]

The major objective of the bitter-enders was to persuade the Perrow Commission to recommend an amendment repealing Section 129. In a letter to Perrow, Representative Howard W. Smith placed all his prestige behind such an action. Repeal of 129, Smith argued, would "leave to the electorate and to their elected Legislature complete freedom of

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[30] Ibid., February 5, 1959, p. 1.

[31] Muse, p. 163.

[32] Norfolk Virginian-Pilot, March 5, 1959, p. 1.

action to determine their future course." Significantly, he added that this "would not mean the abolition of public education, unless the people of Virginia who have the right to make the determination should so decide." Congressman Smith thought that Virginia had a choice between "private schools with tuition grants from the State, or integration. You and I know that the agitators from without the State who exert a powerful influence will not submit to token integration."[33]

The Richmond News Leader joined the proponents of repealing Section 129. "So long as it remains on the books, members of the General Assembly are caught in a dilemma by which they stand legally obligated to support schools that they morally cannot support."[34] Abolishing Section 129 was directly related to the private school movement championed by segregationists. As long as the obligation to provide a system of public schools remained, Kilpatrick warned that the tuition grant plan was in legal trouble. Dropping Section 129, the News Leader explained, was consistent with Virginia's effort "to minimize the consequences of these rulings [Harrison v. Day and James v. Almond] and to delay their impact until new defensive steps can be taken."[35]

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[33]Letter, Howard W. Smith to Mosby G. Perrow, Jr., March 5, 1959, University of Virginia, Archives, Smith Letter File.

[34]Editorial, Richmond News Leader, January 20, 1959, p. 10.

[35]Ibid.

To editor Kilpatrick, the construction of "genuinely private schools" offered "a strategic concept on which a prolonged war may be waged."[36] Furthermore, private schools were glamorized as experiments in progressive education. Public schools supposedly would profit from the competition provided by private schools. The editor predicted that the possible result in ten or twenty years could be "a truly outstanding system of schools in Virginia--some public, some private--and all geared to community wishes."[37]

While massive resisters favored the repeal of Section 129, Governor Almond cautioned the Perrow Commission against that alternative.[38] Public education, the Governor stressed, was vital to Virginia's economic progress.[39] Before the Perrow Commission, Almond and Attorney General Harrison urged the adoption of a school plan that supported continued public education, but which also provided for local option, facilitated the development of private schools and generally guaranteed no enforced integration.[40]

While the Perrow Commission met, Roy Wilkins,

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[36]Editorial, Ibid., January 29, 1959, p. 2.

[37]Editorial, Ibid., February 11, 1959, p. 11.

[38]Minutes of the Perrow Commission, February 11, 1959, Whitehead Letter File.

[39]Lorin A. Thompson, "Virginia Education Crisis and Its Economic Aspects," New South, 14 (February, 1959), pp. 3-8.

[40]Minutes, Whitehead Letter File.

Executive Secretary of the NAACP, created a storm by urging Virginia's Negroes to apply to white schools "not by twos and threes, but by the hundreds."[41] Even among Virginia's white moderates this reminder to Negroes that they could not relax their efforts following the demise of massive resistance was considered extremely dangerous. Robert Whitehead, who was considered a moderate, thought the "NAACP and some of the Federal judges as dangerous as the die-hard segregationists."[42] In a letter to Oliver Hill, Whitehead urged the NAACP to be less forceful in its demands and described Wilkin's speech as "harmful and detrimental and contrary to the best interest of all concerned."[43]

Hill and Wilkins disagreed categorically with Whitehead. Wilkins pointed out that in Norfolk, of the 151 Negro children who applied for transfers to white schools, only 17 had been accepted. At this rate, 2500 Negroes would have to apply to secure 250 admissions amounting to only two and one-half percent of the total white enrollment. The essence of Wilkins' argument was that "we must encourage a substantial number of applications in order to secure more than a mere

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[41] Norfolk Virginian-Pilot, February 16, 1959, p. 1.

[42] Letter, Robert Whitehead to Colonel Francis Pickens Miller, University of Virginia, Archives, Whitehead Letter File.

[43] Letter, Robert Whitehead to Oliver W. Hill, Mr. Spottswood W. Robinson, III, Dr. J.M. Tinsley, February 17, 1959, University of Virginia, Archives, Whitehead Letter File.

trickle of admissions."[44] Hill explained: "For Negroes to lie quietly and pretend to be satisfied with token desegregation would not only be dishonest, but it would not accomplish anything of a constructive nature." To Hill, the only true friends of public education were those who firmly believed "in our Declaration of Independence . . . guaranteed by the Constitution of the United States."[45]

Moderate segregationists, like Robert Whitehead, feared the white reaction to Negro objectives would strengthen the position of the rabid segregationists in the General Assembly. For example, State Senator Godwin immediately attacked Wilkins' statement and asked:

> Virginia and her leaders to stand fast, resist with courage, assert her constitutional rights.
>
> We must be willing to make some sacrifices and take such actions as a deplorable situation demands.
>
> To do less would make us summer patriots and unworthy of our heritage as Virginians.[46]

Other critics of Wilkins seemed to believe that desegregation above token levels would precipitate white flight from the public schools. No legislator disagreed with Robert F. Williams, the Executive Secretary of the Virginia Education Association, when he appealed to Negro parents to practice

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[44]Letter, Roy Wilkins to Robert Whitehead, February 26, 1959, University of Virginia, Archives, Whitehead Letter File.

[45]Letter, Oliver Hill to Robert Whitehead, February 20, 1959, University of Virginia, Archives, Whitehead Letter File.

[46]Norfolk Virginian-Pilot, February 17, 1959, p. 1.

"massive voluntary segregation to help insure free mass education."[47] The plea was virtually identical to Governor Stanley's request in his May, 1954, meeting with Negro leaders.[48] The end of massive resistance was reminiscent of the reaction to the Brown decision. White leadership continued to counsel their black counterparts to be satisfied with the form rather than the substance of their victory.

The unwillingness of the Negro leaders to drop their efforts to make the Brown decision a reality prompted a vicious attack on the NAACP by the News Leader. The assault was sparked by Oliver Hill's remark that communication between whites and Negroes broken by massive resistance could "easily be reunited once the white people decide to work constructively upon the problems, real and fancied, incident to the elimination of racial segregation."[49] Editor Kilpatrick objected that white citizens had done enough since they had carried "the social burden of Negro crime, Negro illegitimacy, and Negro disease." The responsibility for the breakdown of race relations was Oliver Hill's, asserted Kilpatrick, for "coercing the white people, in disrupting their schools, in tearing old relationships to shreds." The only

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[47] Richmond Times-Dispatch, March 5, 1959, p. 1.

[48] See supra, p. 32.

[49] Editorial, Richmond News Leader, January 30, 1959, p. 10. Hill made the statement during a radio broadcast following Governor Almond's speech of January 20, 1959.

goal of Hill and the NAACP, explained Kilpatrick, was "to ram total integration down the throats of white people utterly unwilling to accept it."[50]

As a result of the furor raised by massive resistance, white political leaders demonstrated little confidence in Virginia's ability to desegregate beyond a token level. Fearful of further exploitation of the race issue, moderate segregationists hoped that the NAACP would slow down its legal efforts. Simultaneously, segregationists like Kilpatrick, continued to describe Virginia's problems as the result of the unreasonable policies of the NAACP. On the other hand, Negro leaders, given the experience of desegregation, were convinced that their goals could be achieved only by continued pressure. Oliver Hill promised that there would be "no let up in the activities of Negroes until we are granted the full and unremitted rights of an American citizen."[51]

On March 6, the Perrow Commission held its only public hearing. Although the entire spectrum of opinion was heard, the so-called freedom-of-choice plan championed by Leon Dure, a former journalist turned gentleman farmer, attracted the greatest attention.[52] Dure did not attack desegregated

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[50] Ibid.

[51] Norfolk Virginian-Pilot, March 7, 1959, p. 1.

[52] Muse, 161; Southern School News, Vol. VII, No. 10 (April, 1961), p. 7. Dure launched a one man campaign on behalf of "Freedom of choice" and freedom of association.

education, but argued instead that every student should have the opportunity to receive a tuition grant in order to facilitate enrollment in a qualified private school, regardless of religious affiliation, if he desired to leave the public schools.[53] The theoretical basis of freedom of choice, according to Dure, was the supposed "right" of association or disassociation which Dure contended was guaranteed by the First Amendment. As a result of compulsory attendance laws, Dure argued, the freedom to associate or disassociate, had been surrendered, with the exception of the well-to-do who could afford the expense of private education. Tuition grants, he believed, would restore freedom of choice and negate the advantages of wealth. By distributing the grants to the individual student rather than the private school, Dure believed Virginia could avoid the expanding definition of state action under the Fourteenth Amendment.[54]

Freedom of choice was appealing for several reasons. First, the idea permitted segregationists to obscure their intense racial opposition to desegregation by an appeal to more neutral abstract principles. Second, freedom of choice financed by tuition grants offered a method of underwriting the private school movement. Finally, some were attracted to the plan as a means for reducing the opposition to even token

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[53] Richmond Times-Dispatch, March 7, 1959, p. 1.

[54] Leon Dure, "Individual Freedom Versus State Action," Virginia Quarterly Review, 38 (Summer, 1962), pp. 400-09.

desegregation.

Two University of Virginia law professors, Dean F.D.G. Ribble and Hardy Cross Dillard, expressed their doubts concerning the constitutionality of the tuition grant plan. Dean Ribble predicted the invalidation of the program by the federal courts unless it was part of a general scheme to achieve desegregation. Professor Dillard thought that the Supreme Court's decision upholding an Alabama pupil assignment plan offered Virginia a better formula for controlling the rate of desegregation.[55] Dillard also believed that the federal courts examined the consequences as well as the motives of school legislation. If the result of the tuition grant policy was the perpetuation of segregated schools, Dillard expected the grants to be declared unconstitutional.[56]

The NAACP also registered its objection to the establishment of a tuition grant program. "No one in a democratic society has the right to have his private prejudices financed at public expense," declared Oliver Hill.[57]

For the remainder of March, the Perrow Commission worked on a school plan. At the same time, the massive resisters made one final bid to influence the Governor and the

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[55]Richmond Times-Dispatch, March 7, 1959, p. 1. The Alabama case was Shuttlesworth v. Birmingham Board of Education of Jefferson County, 358 U.S. 101 (1958).

[56]Hardy Cross Dillard "Freedom of Choice and Democratic Values," Virginia Quarterly Review, 38 (Summer, 1962), pp. 410-35.

[57]Richmond Times-Dispatch, March 7, 1959, p. 1.

Legislature. Dominated by the Defenders and supported by Southside Virginia, an organization entitled the "Bill of Rights Crusade" sponsored a march to Richmond. On March 31, a crowd estimated at 5,000, mostly from the Southside, occupied Capitol Square demanding the General Assembly to invoke the resolution of interposition. The rally proved to be unsuccessful and marked the decline in number and influence of Defender-type rallies.[58]

The next day, April 1, the Governor released the report of the Perrow Commission signed by thirty-one of the forty members. Before making their recommendations the commission members denounced integration, but found that Virginia had exhausted every legal means of resistance in the face of the superior force of the Federal Government.[59] Turning to the future of Virginia's schools, the Perrow Commission recommended a package of bills which permitted the localities to choose whether or not they wished to desegregate. In localities which desegregated, scholarships were to be available to students who desired to attend nonsectarian private schools.[60]

Equally significant, the Perrow majority recommended

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[58]Muse, pp. 160-61; Southern School News, Vol. V, No. 11 (May, 1959), p. 2.

[59]Report of the Commission on Education to the Governor of Virginia, Mosby G. Perrow, Chairman (Commonwealth of Virginia: Department of Purchases and Supply, 1959), p. 5.

[60]Ibid., pp. 12-18.

against amending Section 129. According to the majority's interpretation of Section 135 of the Virginia Constitution, the General Assembly was only required to make a minimum appropriation which was insufficient to support the schools of a locality. Believing that the localities were not constitutionally required under Section 136 to provide funds for public education, the Perrow forces asserted that communities could prevent desegregation without abolishing Section 129.[61] The Perrow Report tried to insure Virginia's general commitment to public education and simultaneously to calm the fears of Southside legislators. The plan virtually duplicated the recommendation of the Gray Commission which the legislators

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[61] Ibid., pp. 9-12, Section 135 of the Constitution stated: "The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and the cities; and an amount equal to the total that would be received from an annual tax on property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school to be the basis of such apportionment. And the General Assembly shall make such other appropriations for school purpose as it may deem best, to be apportioned on a basis provided by law." According to the majority report, the revenue received from the interest on the literary fund, the capitation tax (two-thirds of 1.50), and the property tax amounted to only $9,000,000 of a budget of $163, 370, 000. Thus the operation of public schools depended on state and local money beyond the minimum funds. However, such funds, the majority argued, were appropriated at the discretion of the General Assembly (Section 135) and the localities (Section 136). The Perrow Report held that by tradition, state funds were triggered by a local appropriation. By refusing to provide money for public schools, the majority report thought localities could successfully close their schools.

had dropped for massive resistance nearly three years earlier.

The dissenting report, signed by nine bitter-end segregationists described the majority report as a containment policy which would allow "a locality to proceed with as much integration as that particular locality desires . . . . We are not willing to strive simply for containment."[62] The major recommendation of the minority report was to repeal Section 129 and to amend other sections of the Constitution so that the General Assembly could "refuse to support any integrated school and provide for educational and tuition grants without restriction."[63]

The majority report had constitutional weaknesses which the minority Commission members readily pointed out. Mills Godwin thought that the majority raised a "foolish hope" by suggesting that a locality could prevent integration by refusing to appropriate funds. Citing Harrison v. Day and James v. Almond, which required the operation of all public schools under Section 129, the black belt Senator was on firm

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[62] Ibid., p. 23.

[63] Ibid., p. 24. Delegate James M. Thomson, who signed the minority report, also wrote a separate dissenting statement. He revealed that the Commission had turned back a proposal to permit a referendum on the question of amending Article Nine of the Virginia Constitution [Education and Public Instruction] by a vote of 22-16.

legal ground.[64]

Anticipating constitutional objections, the Perrow majority admitted that the case of Harrison v. Day could invalidate local school closings. However, after receiving the advice of counsel, including Attorney General Harrison, the majority was satisfied that its recommendations would be "upheld by our court, should the question be presented to it."[65] Like the massive resistance legislation, the Perrow plan was expected to prompt lengthy and expensive litigation. If declared unconstitutional, the time consumed in court was expected to delay desegregation in black belt counties for a number of years.

With the publication of the Perrow Report, the division within the Democratic organization became more apparent. Representative Watkins Abbitt considered the Perrow plan a "complete surrender to integrationists."[66] Agreeing with Abbitt, Representative Tuck added that "we need more resistance, not less."[67] However, Lieutenant Governor A. E. S. Stephens, a longtime organization stalwart from the Southside, explained: "It's not capitulation. It's just realism, drawing up lines for the next battle in a long, long war."[68]

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[64] Norfolk Virginian-Pilot, April 2, 1959, p. 1.

[65] Report of the Commission on Education, p. 9.

[66] Richmond News Leader, April 2, 1959, p. 1.

[67] Ibid.

[68] Ibid., April 4, 1959, p. 1. Lieutenant Governor

The News Leader, long the champion of statewide massive resistance, endorsed the switch to local option. Kilpatrick wrote: "So long as there was the faintest hope of preserving a State power to separate the races, it was important to act as a State; it was imperative that we maintain a Statewide policy. Now that the state line has been breached, we will have to fight a different sort of fight."[69]

On April 6, 1959, Governor Almond asked the General Assembly to pass into law the proposals offered by the Perrow Commission. The Commission's plan, the Governor argued, permitted massive resistance to continue on the individual level through freedom-of-choice. Believing the repeal of Section 129 unnecessary, Almond asserted that neither the state nor the federal constitution required a locality to support public schools. The future of the Perrow Plan, of course, rested on the accuracy of this judgement.[70]

In the General Assembly a battle shaped up between the Almond-Perrow forces and their critics over the assignment plan and over a referendum offered by the latter to amend

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Stephens stuck by the Perrow-Almond plan during the Extra Session. In 1961 he was defeated in the Democratic primary for Governor by Attorney General Harrison. During the campaign, Stephens broke with the organization and lashed out at its leadership.

[69]Editorial, Ibid., March 6, 1959, p. 12.

[70]"Address to the General Assembly," April 6, 1959, in Inaugural Address and Addresses delivered to the General Assembly of Virginia by J. Lindsay Almond, Jr., 1958-1962, (Commonwealth of Virginia: Division of Purchases and Printing), p. 4.

Article IX of the Constitution, which dealt with Education and Public Instruction and included Section 129. The opposition preferred retaining the three-man placement board rather than adopting the local assignment plan advanced by the Perrow Commission. A Southside Delegate, Samuel E. Pope, remarked: "I can't see any difference between the Perrow and the Dalton assignment plan. I don't believe a locality should have the right to assign a single pupil."[71] Along with other massive resisters, Delegate Pope thought that "if there is to be integration, we should make sure the court does the assigning."[72] Bitter-end segregationists, in short, viewed local assignment as an open invitation to massive desegregation. A pupil placement board, composed of "right-thinking" men and women, was viewed as a more reliable buffer against desegregation, especially in localities outside Southside Virginia.

The administration's advocacy of local assignment was partly legal and partly practical. The state Pupil Placement Act, designed to prevent desegregation, had been rejected by three federal district courts. Eventually a new statewide assignment plan, which resulted in some desegregation, was acceptable to the federal courts. But in 1959, Governor Almond contended that the state would have to bear the

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[71] Richmond Times-Dispatch, April 5, 1959, p. 1.

[72] Norfolk Virginian-Pilot, April 8, 1959, p. 1.

unnecessary expense of a permanent state agency.[73] Local assignment was not only less expensive, but consistent with local initiative in school policy. Advocates of local assignment also pointed to the effectiveness of such a policy in North Carolina, where Negro admissions were limited to sixteen in one year.[74]

The legislative battle over the Perrow Plan was complicated by politics. According to rumors, Governor Almond expected to use the victory to capture a wing of the Democratic organization in order to promote his future political fortunes. Simultaneously, the bitter-end segregationists reportedly planned to pin the failure of massive resistance on the Governor. They hoped to frustrate Almond's ambitions and also to prove their loyalty to massive resistance. Consequently, the entire debate took place in an atmosphere in which the very unity of the Democratic organization seemed to be at stake.[75]

The debate over amending Article IX of the Virginia Constitution involved a most serious threat to public education. On April 9, Delegate W. Stuart Wheatley, a diehard massive resister, introduced a joint resolution to amend Article IX. In effect, the amendment, which included a

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[73] Address, April 6, 1959, p. 7.

[74] Richmond Times-Dispatch, April 24, 1959, p. 2.

[75] Latimer, unpublished manuscript, p. 93; Richmond Times-Dispatch, April 17, 1959; April 26, 1959.

provision for repealing Section 129, gave localities the option of selecting between public or private schools.[76] Thus the massive resisters accepted the inevitability of desegregation in localities which chose to operate public schools. But in the black belt the conversion from a public to a private school system was to be reinforced by striking out the state's obligation to provide a statewide public school system. The major legal flaw in the amendment was that the state was to continue to provide funds for the institutions replacing public schools.[77] Under the expanded definition of "state action," such schools were subject to the prohibition of the Fourteenth Amendment, even though they were designated as private schools. Only the few Southside localities prepared to privately finance their schools could have strengthened their legal position from the repeal of Section 129.[78]

The Almond-Perrow forces continued to oppose any revision of the state's obligation to provide a statewide system of public schools. To neutralize the opposition's proposal, the Almond-Perrow forces introduced a bill which called for an advisory referendum in November of 1959. The referendum

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[76]Journal of the House of Delegates, A.J.R. 23, Extra Sess., 1959, p. 114.

[77]Ibid., p. 116.

[78]Prince Edward County, for example, already indicated its readiness to drop public education. Whether or not other black belt counties would follow suit was still uncertain.

was to ask the voters to advise the legislators on the question of whether or not Virginia should contine to operate and support public schools.[79] The question was purposely broad so that even higher education was included. The advocates of the bill presumably wrote the resolution to insure a large "yes" vote.[80] They hoped the massive resisters would lose enthusiasm for their amendment, if faced with the prospect of a referendum designed to serve as a mandate for Virginia's public schools.

With the aid of some unprecedented parliamentary maneuvering, the administration was successful in passing its assignment bill and blocking the bid to repeal Section 129 of the Virginia Constitution. As expected, the Senate Education Committee, dominated by Southsiders, killed the administration's local placement bill.[81] But in the House of Delegates, a similar bill squeezed through its Education Committee by a 9-8 vote.[82] On April 16, the House passed the bill by a narrow 53 to 46 votes.[83] During the House debate, Delegate Whitehead turned to the black belt legislators and said: "I know you're up a creek gentlemen . . . . But the time has

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[79] Journal of the House of Delegates H.B. 104, Extra Sess., 1959, p. 151; Richmond Times-Dispatch, April 16, 1959, p. 1.

[80] Richmond Times-Dispatch, April 23, 1959, p. 1.

[81] Ibid., April 15, 1959, p. 1.

[82] Ibid., April 14, 1959, p. 1.

[83] Journal of the House of Delegates, H.D. 50, p. 164.

come when we're going to legislate for all Virginia."[84] Though Whitehead pointed to the numerous safeguards against desegregation for the Southside, Delegate Pope considered the bill automatically suspect since it had the support of "liberals and integrationists. I say when these people favor it, we had better look in the woodpile for the proverbial you-know-what."[85] Convinced that the Senate Education Committee planned to smother the House's assignment bill, the Almond-Perrow forces successfully converted the Senate into a Committee of the Whole by a narrow 20-19 vote.[86] This parliamentary tactic precipated emotional charges and countercharges which threatened to split the Democratic organization in half. Leading the criticism was State Senator Harry Byrd, Jr., who charged: "This action, we believe, has grave potential consequences for the future. This action shatters precedent going back at least seventy-five years."[87] By another one vote margin, the Committee of the Whole reported the assignment bill to the Senate floor where it was passed by a

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[84] Richmond Times-Dispatch, April 16, 1959, p. 1.

[85] Norfolk Virginian-Pilot, April 16, 1959, p. 1.

[86] Journal of the Senate, April 17, 1959, p. 156; Richmond Times-Dispatch, April 19, 1959, p. 1. To give the Perrow forces their one vote majority, Senator Stuart B. Carter was flown in from Botetourt County where he was recuperating from an operation. Senator Robert F. Baldwin, who would have supported Almond was in Europe.

[87] Richmond Times-Dispatch, April 23, 1959, p. 1.

vote of 21-18.[88] As the Committee of the Whole, the Senate also passed an innocuous bill making compulsory attendance optional for each locality.[89]

The Almond-Perrow forces had to make some concessions in order to get their placement plan through the legislature. Lacking the four-fifths majority to pass the bill as an emergency measure, the administration agreed to accept March 1, 1960, as the effective date of the measure. In another important compromise localities were to remain under the authority of the existing Pupil Placement Board until their school boards and governing bodies elected to adopt a local assignment plan.[90] By retaining the Pupil Placement Board, Virginia was left with a dual assignment system. For several years school districts continued to operate under the direction of the Board in order to prolong the assignment process and also to escape the onus of admitting Negro children to white schools. In practice, the Placement Board dealt primarily with assignments which were appealed from the local level. Usually contested assignments involved black students who were protesting their assignments to black schools.

The resolution to repeal Section 129 was defeated in the House of Delegates by a narrow margin of 45 for to 53

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[88] Journal of the Senate, H.B. 50, Extra Sess., 1959, p. 218.

[89] Ibid., H.B. 68, Extra Sess., 1959, pp. 201-02.

[90] Southern School News, Vol. V, No. 11, (May, 1959), p. 2.

against.[91] Representatives of urban and white belt Virginia combined to defeat the massive resisters. A white belt delegate, Lawrence H. Hoover, argued that no area of Virginia demanded a constitutional change except the Southside.[92] Delegate Harrison Mann of Arlington cautioned Southsiders that when public schools closed their doors "that is the day you will open up your private schools to integration."[93]

Ironically, the referendum bill, sponsored by the Almond-Perrow forces, passed the House of Delegates by a 54 to 42 vote, with the massive resisters voting in the negative.[94] Diehard segregationists now were very apprehensive about the results of a referendum which asked the people to choose between public schools with some integration or continued massive resistance. In the Senate, the referendum bill was buried in the Privileges and Election Committee. Since the bill had sidetracked the amendment resolution, the Perrow forces were not perturbed. The administration preferred to take the spotlight off the school problem and turn to other issues, rather than to rekindle emotions by another referendum.[95]

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[91] Journal of the House, H.J.R. 23, Extra Sess., p. 194.

[92] Richmond Times-Dispatch, April 21, 1959, p. 1.

[93] Ibid.

[94] Journal of the House, H.B. 104, Extra Sess., pp. 226-27.

[95] Richmond Times-Dispatch, April 23, 1959, p. 1.

The remainder of the Perrow legislation moved easily through the General Assembly. All the measures were designed to aid the localities in their efforts to resist desegregation. Among the most important were the tuition grant plan, a procedure for selling public school property, free transportation for pupils attending nonsectarian private schools, and permission for a locality to cut its budget in thirty days.[96]

The massive resisters hoped to make the Perrow legislation the major issue in the July Democratic primary and the November, 1959, state election. If moderates were turned out of office, the resisters planned to return to the General Assembly in January, 1960, with the goal of modifying or repealing the legislation of the 1959 special session. Moderates, however, were not defeated by resisters in the primary or general elections so that the Perrow legislation remained secure during the regular session of the Legislature.[97] The only challenge to the administration's package of laws was a bill which proposed to delay the effective date of local assignment by two years. Passed by the narrowest of margins in the House, 50-49, the bill was killed in the Senate by a 21

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[96] Acts of the General Assembly, Chapters 53, 68, 47, 69, Extra Sess., 1959, pp. 52, 56, 91-93.

[97] Southern School News, Vol. 6, No. 2 (August, 1959), p. 13.

to 19 vote.[98] New school legislation was limited to several measures providing greater state and local aid to private schools. Localities were given the power to appropriate funds for "educational purposes," and taxpayers were given local tax deductions for gifts to nonsectarian private schools. The tuition grant plan was altered so that each elementary child would receive $250.00 and each secondary child $275.00, unless per pupil cost of instruction in a locality was a smaller figure.[99]

The school issue, oddly enough, produced less excitement than the debate over the three percent sales tax in the 1960 session of the General Assembly. Generally, legislators agreed that Virginia needed more revenue to keep up with the costs of public services demanded by an increasing population. However, the sales tax posed a great number of problems including the sticky matter of distribution between the counties and the cities. Moreover, the sales tax had acquired the reputation in Virginia as a "last resort" tax.[100] The conservative wing of the organization, led by Harry Byrd, Jr., succeeded in defeating the bill and substituting a patchwork

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[98] Journal of the House of Delegates, H.B. 723, Reg. Sess., 1960, p. 617; Journal of the Senate, H.B. 723, Reg. Sess., 1960, p. 957.

[99] Acts of the General Assembly, Chapters 191, 448, 461, Reg. Sess., pp. 202-03, 703-05, 721.

[100] Richmond News Leader, January 27, 1960, p. 1.

of taxes to provide the needed revenue.[101] In the midst of the legislative battle, Governor Almond charged that the opposing lines were determined by his efforts to save public education in Virginia.[102] Delegate James Thomson replied for the massive resisters that Almond "might have put it the other way--a lot of his opposition is coming from those people he let down on the school segregation question."[103] Some segregationists were genuinely distraught because Almond had not stood at the school house door. Faithful Byrd Democrats feared that Almond would pose as a public school saver to challenge the traditional leadership of the organization. After the sales tax was killed by the House Finance Committee, the naturally combative Almond singled out Speaker E. Blackburn Moore and Harry Byrd, Jr., and charged: "If these gentlemen want to play it rough, that suits me, for the remainder of the administration and for the days to come after the close of the administration."[104] In describing the opposition as unconcerned with the public interest, Governor Almond cut himself off from the organization. The break marked the end of his political career and plagued him prior to his appointment to the Court of Customs and Patent

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[101] Ibid., March 12, 1960, p. 1.

[102] Ibid., February 1, 1960, p. 1.

[103] Ibid.

[104] Ibid., February 18, 1960, p. 1.

Appeals.[105]

Accompanying the legislative events of 1959-1960 were important developments in the courts which gave some indication of the future issues which would divide white school boards and Negro plaintiffs. One stream of litigation dealt with the theory and implementation of placement plans devised by local and state school officials. The use of assignment criteria had been widely hailed in the press and in the General Assembly as assuring token desegregation. Segregationists were encouraged by the Supreme Court's per curiam decision upholding an Alabama Placement Law clearly designed to prevent desegregation.[106] In a series of suits, NAACP lawyers attacked the discriminatory application of assignment plans. Their major objective, however, was to persuade the federal courts that school districts had an obligation to desegregate schools rather than just preventing discrimination.

In 1959 and 1960 the NAACP met with mixed success in

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[105]At the end of his administration, Almond, in his typically blunt manner, directed some unflattering remarks toward the Senator Harry Byrd and the organization. After some controversey, he was named to the Court of Customs and Patent Appeals.

[106]Shuttlesworth v. Birmingham Board of Education, 358 U.S. 101 (1958). The Supreme Court upheld an Alabama federal district court which ruled that the Alabama Pupil Enrollment Act was more analogous to the North Carolina school plan than Virginia's placement plan. Shuttlesworth v Birmingham Board of Education, 162 F. Supp. 372. (N.D. Ala. 1958). When the Alabama legislature drafted the plan, individual members indicated that their objective was to prevent desegregation. The plan included a member of vague criteria which aimed at preventing desegregation. Southern School News, Vol. V, No. 6 (December, 1958), p. 3.

their assault on the placement law. In reviewing the rejection of twenty-six Arlington Negroes, the Fourth Circuit Court of Appeals found that their "applications for transfers were subject to tests that were not applied to the applications of white students asking transfers."[107] The circuit court returned the case to the lower court with instructions that neither the school board's nor the district court's action should serve as precedents for "future action."[108] On remand Judge Bryan ordered twelve Negro students previously rejected for academic reasons admitted to white schools, since white students with comparable achievement scores were admitted to the same schools. However, consistent with the Briggs dictum, Judge Bryan refused to order the school board to devise a desegregation plan.[109]

In the Norfolk case, Judge Hoffman side-stepped the implications of the Fourth Circuit Court of Appeals opinion in rejecting the application of one hundred and thirty-four Negro students to white schools.[110] The plaintiffs argued

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[107] Hamm v. County School Board of Arlington County, 264 F. 2d 945, 946 (4th Cir., 1959).

[108] Ibid.

[109] Thompson v. School Board of Arlington County, 4 Race Rel. L. Rep. 609, 610-11, (E.D. Va. 1959). In the Arlington case Judge Bryan rejected overcrowding, psychological testing and adaptability as suitable assignment criteria, but he did uphold geographical and attendance zones.

[110] Beckett v. School Board of the City of Norfolk, Va. 181 F. Supp. 870 (E.D. Va. 1959).

that the Norfolk placement plan was unconstitutional since Negro students seeking admission to white schools were automatically subjected to a battery of tests which white students applying for the identical school were spared. The school board based its distinction on the grounds that an assignment leading to desegregation resulted in an "unusual circumstance."[111] Judge Hoffman rejected the plaintiffs' contention by arguing that the school plan was not unconstitutional unless the assignment criteria were applied in an illegal manner. The admission of seventeen Negro students, Hoffman believed, was proof that the school board was not attempting to prevent desegregation. In evaluating any assignment plan, Hoffman wrote that the court must balance individual rights against the mores of the community. "We are dealing not with the individual right, but with the resulting condition brought about by the granting of the right. The constitutional right lies in the denial of admission because of race--not in the prerequisite leading up to such denial."[112]

One result of Judge Hoffman's ruling was that only a limited number of extraordinarily bright Negro children could expect to be admitted to white schools. This forecast was tempered by the observation that Negro admissions to white schools should not "forever be confined to such Negro

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[111] Id. at 873-74.

[112] Id. at 874.

children who have superior intelligence."[113] Although desegregation was restricted, Judge Hoffman reminded the litigants: "The United States Supreme Court has never suggested that mass mixing of races is required in the public school."[114] The Norfolk School Board had devised a plan which was expected to provide "orderly transition to a racially nondiscriminatory school system."[115]

The Hoffman decision complemented the transition in Virginia's politics. The Almond-Perrow forces submitted its placement plan on the theory that the federal courts would restrict desegregation to a mere trickle. The refusal of Judge Hoffman to assign any of the Negro plaintiffs strengthened the credibility of the Almond-Perrow position. Furthermore, by clinging to the Briggs dictum, Hoffman stated that Virginia did not have to provide a desegregated school system, but merely a "nondiscriminatory school system." Ironically, with the end of massive resistance, Judge Hoffman and Governor Almond, antagonists for three years, now found themselves agreeing on Virginia's school policy.

To the NAACP lawyers, rulings such as those of Judges

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[113] Id. at 872.

[114] Id. at 873.

[115] Ibid. The Fourth Circuit Court of Appeals upheld Judge Hoffman in Hill v. School Board of City of Norfolk, 282 F. 2d 473 (4th Cir. 1960). The Court gave much weight to Judge Hoffman's efforts up to 1959 and the belief that the Norfolk plan was merely an interim measure.

Bryan and Hoffman indicated that with the end of massive resistance they faced a new but equally difficult road. To settle for a "nondiscriminatory school system" meant to surrender the substance of the Brown ruling. The obstacles to desegregation inherent in placement plans and grade-a-year plans prompted Thurgood Marshall, still director-counsel of the NAACP's Legal Defense and Education Fund, to remark: "Now we're in for real hard legal maneuvering in court, counter-motions and back and forth. They're going to try and delay. We're going to try and push ahead. It's going to be more litigation now than before. We're going into what I call a lot of fast play around second base."[116]

As pupil assignment laws were being scrutinized, Virginia's statutes permitting localities to close their schools, by refusing to appropriate the required funds were also about to be tested. On May 5, 1959, the Fourth Circuit Court of Appeals reversed Judge Sterling Hutcheson's decision giving Prince Edward County until 1965 to comply with the Brown decision. In a per curiam opinion, the Court ruled that Prince Edward County's school officials had been given sufficient time to cope with their school problems. Since Prince Edward County had taken no action and planned no future action, the Court instructed Judge Hutcheson to order the Southside county to make plans for desegregating its

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[116] Southern School News, Vol. VI, No. 8, (February, 1960), p. 16.

schools by September, according to the state placement laws.[117]

The Prince Edward County Board of Supervisors answered the ruling by refusing to appropriate funds for public schools in the budget adopted in June of 1959. Property taxes were reduced by fifty-three percent, and the Prince Edward School Foundation made plans to operate a private school for white children. The foundation reported that it had collected about $300,000, or seventy percent of its budget. The faculty was to be composed of the same white teachers formerly employed by the public schools. Expecting tuition grants to be declared unconstitutional, the Board of Supervisors, at first, made no provisions for such aid.[118] Beginning with the September, 1959, school year, Prince Edward County's public schools were to be closed for five years. During this period the legislators, lawyers, and judges debated the constitutionality of a county's right to close its public schools and the state's constitutional responsibility when this occurred. Ironically, Virginia's most infamous example of resistance to the Brown decision came after massive resistance had been abandoned as a state policy.

Measures adopted by the Norfolk City Council, somewhat analogous to Prince Edward County's were declared unconstitu-

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[117] Allen v. School Board of Prince Edward County, 266 F. 2d 507 (4th Cir. 1959).

[118] Southern School News, Vol. VI, No. 1 (July, 1959), p. 6.

tional by Judge Walter Hoffman. On January 13, after approving other actions which restricted the use of public funds for education, the City Council passed a resolution declaring that it would not authorize the transfer of money to the School Board for any class above the sixth grade.[119] Explained as a measure to preserve the public safety, the decision was regarded as a vindictive action aimed at the city's Negroes who, with the exception of the black plaintiffs, were unaffected by the school closures.[120] After issuing a preliminary injunction against the enforcement of the ordinances and resolutions, Judge Hoffman refused to lift the order because "Council's action is tantamount to an evasive scheme or device seeking to perpetuate the program of massive resistance in the public schools of the city of Norfolk."[121] On May 18, the Fourth Circuit Court of Appeals agreed with Judge Hoffman's ruling that the Council's action was part of the plan of massive resistance.[122] The Court found that the Council had "invaded the domain of the School Board and attempted to exercise the power to operate the schools vested in the school authorities."[123] Citing Harrison v. Day, the

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[119]"City Council Resolution of January 13, 1959," 4 Race Rel. L. Rep. 44.

[120]Puryear, p. 351.

[121]James v. Duckworth, 170 F. Supp. 342, 351 (E.D. Va. 1959).

[122]Duckworth v. James, 267 F. 2d 224 (4th Cir. 1959).

[123]Id. at 228.

opinion emphasized that the highest state court held that "Section 129 of the State Constitution requires the State to maintain an efficient system of public schools throughout the State."[124] Applied to Prince Edward County, school closures also ran the risk of clashing with the state's obligation under Section 129.

In September of 1959 eighty-six Negroes in five Virginia localities reported for their first full year of desegregated public school education. Prince Edward County was the only locality to completely abandon the operation of public schools. In Warren County four hundred white children returned to Warren High School after a year of schooling at the County's private school or assorted schools around the community.[125] Besides Prince Edward and Warren counties, only Charlottesville and Norfolk were reported to be operating private schools which were a direct result of an order to desegregate public schools.[126]

On October 22, 1958, another vestige of massive resistance was attacked when Judge Hoffman ordered the Norfolk School Board to consider all applications for placement

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[124] Ibid.

[125] Southern School News, Vol. VI, No. 4 (October, 1959), p. 14. Besides Warren County, Norfolk, Charlottesville, Alexandria and Arlington County were desegregated. Five years after the first Brown decision, eighty-six Negroes were attending public schools with white children.

[126] Ibid., Vol. VII, No. 11 (May, 1960), p. 10.

without reference to the instructions of the Virginia Pupil Placement Board until its assignment policy was altered.[127] The State Board's policy of racial assignments, Hoffman wrote, not only denied Negro children their rights under the Fourteenth Amendment but also was an unconstitutional application of the revised Pupil Placement Act.[128] Independent of the written opinion, Judge Hoffman told the State Placement Board to assign four Negroes to the Norfolk school "or take the consequences."[129] On November 2, 1959, fearful of a contempt citation, the Virginia Pupil Placement Board assigned four Negroes to white schools for the first time in its three year history.[130] Though massive resisters were bitter, Judge Hoffman's decision once again complemented the political objectives of the Almond administration. Admission of a few Negroes allowed the Pupil Placement Board to make the legal argument that its purpose was not to prohibit desegregation. At the same time, Negro admissions could be restricted to a handful of applicants.

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[127] Beckett v. School Board of Norfolk, 185 F. Supp. 459 (E.D. Va. 1959). During the hearing one school member admitted that he could not conceive of a set of circumstances which would permit him to assign a Negro to a white school. The other board members said they would admit the "perfect child" under "perfect conditions."

[128] Id. at 462. The Fourth Circuit Court of Appeals upheld Judge Hoffman in Farley v. Turner, 281 F. 2d 131 (4th Cir. 1960).

[129] Southern School News, Vol. 6, No. 5 (November, 1959), p. 9.

[130] Ibid., Vol. VI, No. 6 (December, 1959), p. 2.

Between January of 1959 and March of 1960, Virginia dropped its policy of statewide massive resistance and adopted a program of containment under the title of "freedom of choice." Passive resistance was not a new idea, for Virginia's leaders had proposed a similar strategy in November of 1955, in the form of the Gray Plan. The end of massive resistance was not a triumph of integrationists over segregationists. Instead, moderates within the Democratic organization joined by anti-Byrd Democrats and a few Republicans recognized that Virginia had reached the end of its legal rope. The confusion precipitated by school closings and the effect of such a condition on Virginia's economic program, convinced moderate and urban organization politicians that public schools must be preserved.

The transition from massive to passive resistance was bolstered by the successful example of similar programs in such states as North Carolina.[131] However, the success of Virginia's neighbor in restricting desegregation raises the question of the effectiveness of massive resistance as a device for blocking integration. In defense of Virginia's policy, Mills Godwin, Jr., said that it "gave our people time to adjust to what inevitably had to happen."[132] Yet, as of

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[131] Ibid., Vol. VI, No. 4 (October, 1959), p. 1. In September of 1959 North Carolina had seven desegregated school districts to five for Virginia.

[132] M. Carl Andrews, No Higher Honor: The Story of Mills E. Godwin, Jr. (Richmond: Dietz Press, Inc., 1970), p. 42.

1959, there was no evidence of significant progress over the previous five years on the part of Virginians to accept desegregation. The major claim of the resisters is that in February of 1959 desegregation was not accompanied by violence. More convincing is the alternative explanation that Virginia's tradition of non-violence and preventive measures taken by the administration prevented disorder.[133] Moreover, the first localities to desegregate, Norfolk and Arlington, offered to take steps to desegregate as early as 1955-1956 but were blocked by the massive resisters. The tensions created in predominately white Warren County and continued resistance in Prince Edward County were examples of escalating tensions encouraged by appeals to "transcendent principles." The Southsiders who marched to Richmond felt cheated. They would have agreed with Danville Councilman John W. Carter that Governor Almond "surrendered your constitutional rights as if he owned them and had a right to give them away."[134]

Resistance based on legislation of doubtful constitutionality and "transcendent principles" had several unfortunate consequences. First, negotiation and compromise were impossible. Secondly, false hopes were continually raised and regularly disappointed. Consequently, white Virginians were convinced that the fault was with the courts. Black

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[133]Latimer, 91 1/2; Wilkinson, pp. 150-51.

[134]Southern School News, Vol. VI, No. 6 (December, 1959), p. 2.

Virginians, on the other hand, were disillusioned with the unresponsiveness of the legal process. Although subjected to much abuse, even Virginia's most controversial judges stayed within the interpretation of the Brown decision rendered by Judge Parker in the Briggs and Carson cases. In 1959, decisions in Arlington and Norfolk suggested that Virginia could satisfy the federal courts by prohibiting racial discrimination, even though this did not result in significant desegregation.

The switch to a containment policy placed a severe strain on the bonds of the Democratic organization. The beleaguered Governor, a victim of his own ambition and rhetoric, became a champion of public education. Formerly willing to cut off his right arm to prevent desegregation, after massive resistance Almond exclaimed that "closing down the public schools meant going back to the dark ages."[135] The threat posed by Almond to the Democratic organization proved to be exaggerated. His coalition was too fragile and included men with strong ties to the organization. In 1961, the Democratic organization selected Attorney General Albertis S. Harrison, Jr., as its candidate for governor. Highly respected and acceptable to both wings of the organization, Harrison won a hard-fought Democratic primary and then rolled to an easy victory in the general election.[136]

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[135] Ibid., Vol. VI, No. 5 (November, 1959), p. 9.

[136] Wilkinson, pp. 239-40.

For the NAACP, Virginia's adoption of the Perrow Plan meant another round of litigation in its attempt to make school desegregation a reality. The NAACP had successfully attacked a variety of constitutional arguments presented by the state and defendant school boards to prevent integration. The resort to the Eleventh Amendment, to a variety of unreasonable administrative remedies, to threats of community violence and to the police power all had been knocked down by the courts. However, assignment plans, tuition grants and a variety of other evasive techniques still faced NAACP lawyers. But their foremost legal task was to convince the courts that the Brown decision meant that school boards had the positive obligation to desegregate rather than the negative duty of prohibiting racially discriminatory assignments.

The Negro lawyers of Virginia were still plagued by the state's effort to limit their effectiveness through the anti-NAACP laws. In NAACP v. Patty, a three-judge federal court declared Virginia's registration and barratry statutes unconstitutional.[137] However, on appeal from the state of Virginia, the United States Supreme Court, in Harrison v. NAACP, overruled the lower court in a 6-3 decision.[138] In the majority's opinion, delivered by Justice John Marshall Harlan, the major issue was whether the federal courts should

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[137] NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958), is discussed on page 199.

[138] Harrison v. NAACP, 360 U.S. 167 (1959).

have deferred action until the state courts had construed the statutes.[139] After a discussion of the doctrine of abstention, Justice Harlan concluded that the district court had acted prematurely in considering the Virginia statutes which he considered "fairly open to interpretation."[140] In dissent, Justice William Douglas wrote: "We need not--we should not--give deference to a state policy that seeks to undermine federal law." The appeal to the abstention rule, he continued, was a "delaying tactic that may involve years of time and that inevitably doubles the cost of litigation."[141] Thus, once again the NAACP would have to return to the state courts, a legal arena which they tried to avoid.

The Supreme Court's decision appeared to be part of a "tactical withdrawal" of the Warren Court after a series of controversial decisions between 1954 and 1957 in civil rights and civil liberties.[142] Despite the setback, oddly enough, NAACP leaders urged that the organization's members no longer hide their identity. Before the annual meeting of the Virginia Conference Oliver Hill said: "We must stop being afraid. The time has come for Negroes to stand up and say

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[139] Id. at 176.

[140] Ibid.

[141] Id. at 184.

[142] Walter F. Murphy, Congress and the Courts: A Case Study in the American Political Process (Chicago and London: The University of Chicago Press, 1962), pp. 245-46.

they belong to the NAACP."[143]

Oliver Hill's exhortations anticipated a new and more militant stage in the civil rights movement. Soon Negro students would launch sit-ins in Virginia and throughout the South.[144] The adoption of more militant tactics not only aggravated whites, but posed a challenge to the leadership of the NAACP, which had struggled to achieve civil rights by relying on the legal process. As the Negro turned to more aggressive tactics, the NAACP, considered subversive during massive resistance, gained some respectability in Virginia.

Beginning in 1960, the leaders of the Old Dominion embarked on a new course which accepted the prospects of some desegregation. At the head of the Democratic organization, Senator Harry Byrd still disapproved of this accommodation to the Brown decision. At his annual picnic in Berryville, Senator Byrd ended his silence on Virginia affairs and declared: "I stand now as I stood when I first urged massive resistance. I believe now, as then, that it's either massive resistance or massive integration."[145]

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[143] Southern School News, Vol. VI, No. 5 (November, 1959), p. 9. Hill still defended the NAACP's right to withhold membership lists.

[144] Southern School News, Vol. VI, No. 9 (March, 1960), p. 5.

[145] Ibid., Vol. VI, No. 4 (October, 1959), p. 15.

PART III. THE DESEGREGATION CASES IN VIRGINIA, 1959 to 1972

CHAPTER IX

PRINCE EDWARD COUNTY

Beginning in 1960 the school issue slowly moved off the center stage. The gubernatorial victory of Albertis S. Harrison, Jr. in 1961 brought a low-keyed official to the governor's mansion whose temperament was perfectly suited for cooling the fires of massive resistance. With the exception of the Prince Edward County suit, the school battle was quietly waged in the federal courts for the remainder of the Almond administration and during his successor's tenure.

Between 1959 and 1964 state and federal courts struggled with several basic questions regarding the Prince Edward County school case: Could a state or federal court order a county to levy taxes to support public schools? What was the state's constitutional responsibility in the face of the county's inaction? Unfortunately, compromise between white and Negro leaders on these questions was difficult, since both sides viewed the stalemate as having far-reaching effects on desegregation in Virginia and in the South.

The NAACP saw the Prince Edward case as a major test of its ability to realize the goal of a desegregated education for every Negro child in Virginia. When the white segregationists

offered to establish private schools for Negro children at the end of 1959 with the aid of tuition grants, black leaders advised against accepting the offer.[1] The example of private Negro schools subsidized by state money had unpleasant legal ramifications for the NAACP. In 1963 W. Lester Banks, executive-secretary of the Virginia Conference of the NAACP, said: "Had there been any wide acceptance of private schools, it would have had a disastrous effect on other Negro centers, in the Black Belt and elsewhere in the South. Even if the case was still prosecuted, the effect would have been disastrous."[2] By accepting tuition grants the NAACP's case against the grants would have been damaged. By refusing to compromise, the NAACP expected that a large number of Negro children would be without adequate education for at least two years. The unhappy effects of closed schools for blacks children was accepted as part of the sacrifice required to achieve better schools. Also, Negro leaders expected Prince Edward's resistance to break in the face of economic problems and a hostile state and national public opinion.[3] Oliver Hill told a group of Prince Edward Negroes:

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[1] Southern School News, Vol. VI, No. 7 (January, 1960), p. 2. In They Closed Their Schools, Prince Edward County, Virginia, 1951-1964 (Chapel Hill: The University of North Carolina Press, 1965), p. 172, Bob Smith wrote that Prince Edward County's white leaders hoped the Negroes would accept tuition grants so that white children could also apply without fear of having the grants declared unconstitutional.

[2] Smith, p. 197.

[3] Ibid., p. 193.

"All you will lose will be one or two years of Jim Crow education. But at the same time, in your leisure you can gather more in basic education than you would get in five years of Jim Crow schools."[4] Unfortunately Hill underestimated the determination of whites to prevent desegregation and overestimated the residual benefits of closed schools.

The white segregationists of Prince Edward argued that fundamental constitutional principles were at stake in the school issue. The federal courts had ruled that Virginia, as long as it operated a public school system, could not close some of the state's public schools. But, argued those who wanted to close the public schools, federal courts could not force a locality to appropriate money for public schools.[5] Consequently, Prince Edward's lawyers and its only paper, the Farmville Herald, published and edited by J. Barrye Wall, held that Prince Edward whites were fighting for the principle of no taxation without representation. Southsiders featured themselves as representing the entire South in a struggle against judicial tyranny.[6]

Prince Edward segregationists had the implicit support of Governor Harrison during the course of the court litigation.

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[4] Southern School News, Vol. VII, No. 7 (January, 1960), p. 2.

[5] Smith, p. 152.

[6] Ibid., p. 189.

As Attorney General, Harrison thought Virginia would eventually adopt a dual school system--part public and part private.[7] After Harrison was elected governor in 1961, he adopted the position that his office and the General Assembly could do nothing to solve the plight of school-less Prince Edward County Negroes. The Governor held that public schooling was a joint state and local effort. If the state stepped in to support public education in Prince Edward County it "would necessarily result in a similar type of operation in other counties."[8] Virginians, Harrison thought, would not long accept the responsibility of supporting another county's burden of educating its school children.[9]

Initially, then, in 1959, segregationists believed that a victory for Prince Edward County would facilitate the development of private schools throughout the black belt. However, due to the economic expense and the success of various assignment plans in frustrating desegregation, other counties did not follow the exact example of Prince Edward County. Consequently by 1962, the litigation in question appeared irrelevant.

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[7]Letter, Albertis S. Harrison to Honorable Howard W. Smith, July 11, 1958, University of Virginia, Archives, Smith Letter File.

[8]Letter, Albertis S. Harrison to Honorable John C. Webb, April 22, 1963, Virginia State Library, Archives, Harrison Letter File.

[9]Ibid.

As Bob Smith observed: "What good would it do to prove that legally counties could raise money and close public schools in favor of private schools if none wished to do this?"[10] In the end Prince Edward whites only managed to postpone the day when a few white children, unable to pay the private school tuition, would return to public schools with the black children of the county.

In the summer of 1960, lawyers for the NAACP asked the district court to order Prince Edward County to operate its public schools, to prohibit officials from disposing of public school property and to prevent the use of public funds for the support of private schools. The closing of the county's public schools, the plaintiffs argued, denied Negro children a public education in violation of Section 129 of the Virginia Constitution and the Fourteenth Amendment of the United States Constitution. In April the district court permitted the NAACP to file a supplemental complaint which attacked the use of public funds in support of private schools.[11]

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[10] Smith, p. 161. The Prince Edward case persuaded other rural counties to establish private schools without abandoning public schools.

[11] Southern School News, Vol. VII, No. 1 (July, 1960), p. 8; Vol. VII, No. 8 (February, 1961), p. 5; Vol. VII, No. 11 (May, 1961), p. 5. The next phase of the litigation was handled by Judge Oren R. Lewis who replaced Judge Sterling Hutcheson on the latter's retirement. Prince Edward County did not use tuition grants during the 1959-1960 school year. But for the 1960-1961 school year Prince Edward County supplemented private contributions by provisions for state and local tuition grants and a twenty-five percent tax credit for contributions to private non-secretarian schools (Southern School News, Vol. VI, No. 12 (June, 1960)), p. 12.

Accompanying the effort to reopen Prince Edward's public schools was a vigorous debate over the state tuition grant plan. In November the Virginia Education Association passed a resolution condemning tuition grant abuses. The teacher's organization charged that parents already sending their children to nonsectarian private schools were profiting from the program. The association wanted grants limited to children whose parents objected to their attendance at a desegregated school. Local public school officials were also fearful of a pupil exodus which would also result in a reduction of state funds based on per-pupil attendance.[12] Dr. Edward E. Haddock, State Senator from Richmond, summed up the fears of public school educators throughout Virginia when he warned: "Unless this law is repealed, it will drain the lifeblood out of our public school system and increase the tax burden even more on an already overburdened public."[13]

The defense of tuition grants was led by James J. Kilpatrick of the Richmond News Leader who joined this debate with the same zeal that he demonstrated during the interposition controversy. Virginia, Kilpatrick explained, was embarking upon an experiment in progressive education. For the first time in American history, wrote Kilpatrick, "a State has given up,

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[12] Ibid., Vol. VII, No. 6 (December, 1960), p. 6.

[13] Ibid., Vol. VII, No. 7 (January, 1961), p. 7.

voluntarily, its monopoly in education that came about by the use . . . of tax money in public institutions only."[14] The editor reasoned that "the State's proper interest is in the education of its children--not necessarily in the public education of its children, and not in the segregated education of its children--but simply in any education that meets State academic requirements."[15] In response to those who feared the collapse of public education, Kilpatrick countered by arguing that the impact of the new private schools would be "wonderfully good." Competition, he thought, would have the same salubrious effect on public education as in other aspects of American life.[16] Thus, Kilpatrick and other proponents of "freedom of choice" asserted that a bona fide plan must provide grants for all applicants, even those attending private schools established before the desegregation decision.[17]

The emphasis on educational pioneering had a practical side. Adherents of freedom of choice, subsidized by tuition grants, knew that the plan faced difficulty in the federal courts as long as it was identified with the desegregation controversy.

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[14] Editorial, Richmond News Leader, April 4, 1960, p. 12.

[15] Ibid., December 8, 1959, p. 12. Today this argument has been taken up by the proponents of tuition vouchers.

[16] Ibid., June 24, 1960, p. 12.

[17] Southern School News, Vol. VII, No. 7 (January, 1961), pp. 7-11.

Thus, when Kilpatrick discussed the accomplishments of the 1959 extra session of the General Assembly he completely misrepresented its objective. He wrote: "The program reflected the General Assembly's proper interest in education totally."[18] Turning to the actual application of the tuition grant program editor Kilpatrick stressed that the "questions of racial integration . . . no longer have anything to do with the granting of pupil scholarships."[19] Yet, statistics provided by a News Leader survey disproved the editor's claim. In November of 1960, the survey showed that 6,104 scholarships had been approved by localities. Significantly, 4,863 of the grant recipients were located in communities involved in desegregation suits. At least 3,158 of the students in desegregated communities were using their grants to attend newly established private schools.[20] Neither the history nor the implementation of the tuition grant plan supported the thesis that scholarships were independent of the desegregation controversy.

Tuition grants and the Prince Edward case were issues in the 1961 Democratic primary. Harrison, the organization

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[18] Editorial, Richmond News Leader, December 5, 1960, p. 12.

[19] Ibid.

[20] Richmond News Leader, November 30, 1960, p. 1. Between 1959 and 1960, the number of grants approved had increased by 1,599. However much of this increase was due to the approval of 1,324 tuition grants in Prince Edward County. Norfolk did not report whether the students who received grants used them to attend private or public schools.

candidate, was opposed by Lieutenant Governor A. E. S. Stephens, a Southsider who unexpectedly attacked the organization in the fashion of an anti-Byrd Democrat. Stephens' running mates were Armistead Boothe, for Lieutenant Governor, and T. Munford Boyd, a University of Virginia law professor for Attorney General. Joining Harrison were Mills Godwin and Robert Button, both identified with the conservative wing of the organization. The organization candidates endorsed the tuition grants without qualification and believed that Prince Edward County should be allowed to handle its school problems without state interference. The Stephens-Boothe-Boyd slate endorsed tuition grant plans but were critical of its abuses.[21] "They were not meant for people already in private schools," Boothe explained.[22] The Stephens slate also favored reopening Prince Edward's public schools, even if the governor and the General Assembly were required to intervene.[23] As the campaign developed, the most interesting contest proved to be between Armistead Boothe and Mills Godwin since their records on the school issue were most distinguishable.

Byrd Democrats received unexpected help during the campaign from Attorney General Robert F. Kennedy and the Justice

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[21] Southern School News, Vol. VII, No. 10 (April, 1961), p. 7.

[22] Ibid., Vol. VII, No. 11 (May, 1961), p. 6.

[23] Ibid., Vol. VIII, No. 1 (July, 1961), p. 2.

Department. On April 26, 1961, the Attorney General filed a petition with Judge Oren B. Lewis of the federal district court asking him to permit the Justice Department to enter the Prince Edward case as a co-plaintiff. The request marked the first time that the federal government took the role of a complaining party in a desegregation suit. The Justice Department asked the court to stop payment of state and county grants to the county's private school, to prohibit local tax credits in favor of Prince Edward's private schools and to order the county's officials to reopen the public school. Until the public schools of Prince Edward were reopened, the Justice Department requested that the court order the state to withhold funds from all Virginia localities. The legal basis of the Justice Department's intervention was its interest in preserving the judicial process and administration of justice against attempts to undermine them by circumvention and nullification.[24]

Attorney General Kennedy's intervention was condemned by all of Virginia's political leaders. Although the Justice Department's objective was to open Prince Edward's public schools and not to close Virginia's public schools, Byrd Democrats emphasized the ramifications of the latter possibility. By opposing the Justice Department, organization Democrats were placed in the unfamiliar role of public school savers. Byrd

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[24] Ibid., Vol. VII, No. 11 (May, 1961), p. 1.

Democrats predicted that to give in on the Prince Edward case would merely invite greater federal tyranny. Representative Watkins M. Abbitt, Jr. described the intervention as "an attempt by totalitarian executive action and judicial usurpation of power to make hollow shells of our state and local government and assume dictatorial control over purely local functions."[25] The News Leader denied that Prince Edward County was disobeying any court order. "The federal courts have no right to command Prince Edward County to operate any particular schools. All the courts can lawfully do is to say to Prince Edward County, 'You must treat all residents of the county alike.'"[26] Since all students were prevented from attending the public school and all students were qualified to receive tuition grants, Kilpatrick reasoned that there was no discrimination.

On June 24, Judge Oren Lewis denied the request of the United States to enter the Prince Edward case.[27] In his opinion, Judge Lewis held that neither the Rules of Civil Procedure nor federal statutes gave the Justice Department the authority to intervene in the case.[28] Moreover, Judge Lewis rejected the major contention of the Justice Department which

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[25] Ibid., p. 5.

[26] Editorial, Richmond News Leader, April 27, 1961, p. 10.

[27] Allen v. School Board of Prince Edward County, VI Race Rel. L. Rep. 432 (E.D. Va. 1961).

[28] Id. at 434.

was that Virginia's conduct was comparable to that of Little Rock or New Orleans and thus in contravention of a federal court order. In Virginia and Prince Edward County, "there has been no known defiance of this Court's orders."[29] In contrast to the use of violence, Judge Lewis wrote that the court had not yet determined whether or not a community violated an order to prohibit assignments based on race by closing its schools. Until it was determined that a court order was violated, Judge Lewis found no justification for the intervention of the United States. Furthermore, Judge Lewis was of the opinion that he could not rule on the validity of Prince Edward's action until Virginia's courts had construed the county's obligation under the state constitution.[30] Finally, in spite of the Justice Department's denials that it did not want to close all of Virginia's schools, Judge Lewis wrote that to permit the federal government to intervene "could jeopardize the education of several hundred thousand Virginia children."[31]

The attempted intervention by the Justice Department played directly into the hands of the old massive resisters. Though it attempted to underscore the plight of the Negro children, the Justice Department gave ardent segregationists another

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[29] Id. at 435.

[30] Id. at 435, 438.

[31] Id. at 438.

opportunity to assert their argument that the defense of local rights rather than desegregation was the issue in the Prince Edward case. Federal intervention also undermined the position of the Stephens slate which had indicated greater determination to use state power to open Prince Edward's public schools.

On July 11, Albertis Harrison won the Democratic gubernatorial primary by defeating A. E. S. Stephens by a vote of 199,519 to 152,639. Mills Godwin and Robert Button won by slightly smaller margins. While the organization seemingly was as strong as ever, the voting returns demonstrated that it was relying more heavily than ever on the dwindling rural white vote. Harrison received only fifty-three percent of the urban vote but won an impressive seventy-one percent in the Southside. Godwin's margin of victory in the cities was slightly over a thousand votes, but he also carried the Southside by a lopsided margin. The results of the election suggested that the school issue had lost its political value. With the establishment of a consensus that Virginia could not return to massive resistance, the elections of the 1960's would hinge more on differences between urban and rural interests.[32]

On August 25, 1961, Judge Lewis issued his ruling on the two questions raised by the NAACP in the Prince Edward litigation. As expected, Judge Lewis refused to deal with questions of the constitutionality of Prince Edward County's decision to close the public schools. In reviewing the previous holdings,

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[32]Wilkinson, Harry Byrd, pp. 239-240. Harrison easily defeated the Republican candidate, H. Clyde Pearson.

Lewis indicated that in construing Section 129 of the state constitution, the Virginia Supreme Court of Appeals in Harrison v. Day appeared to determine "that public schools must be maintained in Prince Edward County, Virginia."[33] But the Judge believed that the defense's contention that public education was a local rather than a state responsibility under the Virginia Constitution must be settled. Since the question of authority over public schools involved interpreting the Virginia Constitution, Judge Lewis decided to defer a ruling on this matter until the state courts had acted.[34]

Turning to the issue of local tax credits and state and local tuition grants, Judge Lewis found them to be unlawful as long as Prince Edward County refused to operate its public schools.[35] Judge Lewis did not say that state and local aid to a private school was illegal per se. In Prince Edward County local grants and tax credits became "unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County)."[36]

A number of Virginia's editors saw Lewis's decision as an opportunity to end the Prince Edward litigation. Their hope

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[33] Allen v. County School Board of Prince Edward County, 198 F. Supp. 497, 500 (E.D. Va. 1961).

[34] Id. at 500-01.

[35] Id. at 504.

[36] Id. at 503.

was that Prince Edward County would reopen some of its public schools in order to solidify the tuition grant plan.[37] Leading the editorialists was James Kilpatrick, one of Prince Edward County's staunchest admirers. In urging county officials to open a few public schools, Kilpatrick reasoned: "It would be good for white and Negro children (if for different reasons); it would be good for the county's economy, and it would be good for the rest of Virginia in the stability it would give the 'Freedom of Choice' plan."[38] By eliminating blatant violations of freedom of choice in Virginia, Kilpatrick thought the state would strengthen its case for tuition grants in the federal courts. Since the white children of Prince Edward County would continue to attend private schools, Kilpatrick reminded the county that its social and educational goals were not compromised by reopening some public schools. Finally, Kilpatrick suggested that to win the right to close public schools was ultimately self-destructive. Though not belittling the county's legal struggle, Kilpatrick observed

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[37]Editorials, Richmond Times-Dispatch, August 30, 1961, p. 20. In its survey of editorial response to Judge Lewis' decision the Charlottesville Daily Progress, Lynchburg News, Roanoke Times, Norfolk Virginian-Pilot joined the Times-Dispatch and News Leader in hoping that Prince Edward would open its public schools in order to save the tuition grant plan.

[38]Editorial, Richmond News Leader, August 30, 1961, p. 12.

that "beyond the delimited area of what is right; a course of action can be legal and still be, in a deeper sense, wrong."[39]

The leaders of Prince Edward County refused to budge from their position that principle precluded any compromise. In analyzing the Lewis opinion, J. Barrye Wall, editor of the Farmville Herald, believed that the Virginia Supreme Court must settle the question of Prince Edward's authority over public schools. Furthermore, Wall stressed the fact that Lewis did not specifically rule that tuition grants to segregated private schools would be upheld if the public schools were reopened.[40] Determined to preserve its private schools without opening public schools which permitted desegregation, the Prince Edward School Foundation launched a statewide campaign for private contributions to subsidize students unable to pay tuition fees.[41]

Following Judge Lewis' opinion the NAACP asked the Virginia Supreme Court of Appeals for a writ of mandamus directing the Prince Edward County Board of Supervisors to levy taxes and appropriate funds for the operation of public schools.[42] The crux of the NAACP's argument was that under Section 129 of the Constitution Virginia was required to operate public schools. Boards of Supervisors, the plaintiffs argued, were "mere

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[39] Ibid., August 25, 1961, p. 12.

[40] Farmville Herald, August 29, 1961, p. 4-A.

[41] Richmond News Leader, August 28, 1961, p. 1.

[42] Southern School News, Vol. VIII, No. 4 (October, 1961), p. 4.

administrative agencies of the State," and could not be relieved of their duties under Section 136 to provide funds for public schools.[43] In reply, the state and the county argued that Section 136 authorized but did not require localities to appropriate funds for public schools.[44] The defense also contended that to order the board of supervisors to finance public education would destroy the principle that citizens cannot be taxed without their consent or that of their representatives.[45]

While the Virginia Supreme Court weighed the presentations of the litigants, the General Assembly gathered in Richmond for its regular biennial session. Unlike the previous three regular sessions, the desegregation question was virtually neglected. Toward the end of the session, John C. Webb of Fairfax made an effort to amend the budget bill in the House of Delegates so that state funds could be provided to "correct the appalling condition" of Prince Edward County. The amendment was defeated by a voice vote of the House members. Inaction was defended on the grounds that the problem was a county matter and that nothing should be done to interfere with the litigation before the state and federal courts.[46]

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[43] Ibid., Vol. VIII, No. 5 (January, 1962), p. 8.

[44] Ibid.

[45] Richmond Times-Dispatch, January 9, 1962, p. 3.

[46] Southern School News, Vol. VIII, No. 9 (March, 1962), p. 1. Governor Harrison joined the General Assembly in championing a "hands off" policy.

On March 5, 1962, the Virginia Supreme Court of Appeals, in a unanimous decision ruled that the Virginia Constitution imposed no duty on the county's board of supervisors to levy taxes or appropriate money for the support of public schools.[47] The court held that the board of supervisors was a legislative body and that taxing was a legislative function not subject to judicial control.[48] The court emphasized that under Section 136 a locality was authorized but not required to raise money for public schools. Regardless of the meaning of Section 129, the court found that this section was aimed at the General Assembly and therefore, irrelevant to the present proceedings.[49]

Southside legislators and Governor Harrison were pleased with the state court's decision.[50] The decision, however, did not point to any solution to the school problem. Rumors spread that the county would voluntarily open its school in order to receive tuition grants, since they seemed to have won the legal issue. However, if the county intended to open the public schools, it had no intention to reopen them on a desegregated basis. Rather than reopening the entire school system, the Board of Supervisors was reported to be willing to appropriate money for a few Negro schools.[51]

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[47] Griffin v. Board of Supervisors of Prince Edward County, 124 S.E. 2d 227 (Va. Sup. Ct. App. 1962).

[48] Id. at 233.

[49] Id. at 231-32.

[50] Richmond Times-Dispatch, March 6, 1962, p. 2.

[51] Ibid., March 11, 1962, p. B-1.

But any such plan was dropped when the attorneys for the Negro plaintiffs announced that they would renew their fight in the federal courts. Believing that they had satisfied Judge Lewis' instructions to test certain sections of the Virginia Constitution in the state courts, the Negro attorneys returned to his court asking him to rule on the federal constitutional issues. Besides seeking an order reopening the public schools, the NAACP requested that the temporary injunction on tuition grants be made permanent.[52] With the legal issues unresolved, Prince Edward's Board of Supervisors for the fourth consecutive year, decided against appropriating funds for public schools.[53]

In May of 1962 when the case was reargued before Judge Lewis, he was critical of the NAACP lawyers. During a lengthy oral argument, the Judge charged that the NAACP attorneys had failed to follow his directions prescribed in August.[54] According to Judge Lewis, they had been instructed to ask the Virginia Supreme Court whether Prince Edward County had violated the Fourteenth Amendment and Section 129 of the Virginia Constitution. Counsel for the plaintiffs argued that no agreement was

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[52] Southern School News, Vol. VIII, No. 10 (April, 1962), p. 16. Judge Lewis had implied that tuition grants would be enjoined only until public schools were reopened. The NAACP appealed this decision in the Fourth Circuit Court of Appeals on the grounds that public funds converted the private schools into de facto public schools. On April 4 Judge Lewis extended the injunction of tuition grants until public schools were reopened.

[53] Ibid., Vol. IX, No. 1 (July, 1962), p. 1.

[54] Judge Lewis' directions are found in Allen v. County School Board of Prince Edward County, 198 F. Supp. 497 501 (E.D. Va. 1961). See page 295.

made to raise federal issues in the state court. After a sharp exchange with Judge Lewis, Robert L. Carter, of New York, said that any order to argue a federal issue before a Virginia state court would be appealed. The NAACP position on Section 129 was that it operated on the General Assembly and not the county.[55] Judge Lewis took the position that the "paramount issue" was whether county schools "can be closed in the face of 129. This should have been answered five years ago."[56] Yet in Harrison v. Day, decided in January of 1959, the Virginia Supreme Court of Appeals supposedly decided this question. Judge Lewis himself acknowledged as much in his August, 1961, ruling when he wrote, "it would appear from this decision that the Supreme Court of Appeals of Virginia had determined that public schools must be maintained in Prince Edward County, Virginia."[57] Unlike Judge Lewis, Robert L. Carter believed that instead of Prince Edward's obligation under Section 129, the primary question was "whether the closed schools violate the United States Constitution and the Fourteenth Amendment."[58]

Judge Lewis' comments led numerous observers to believe that he would order the Negro plaintiffs to return to the state court.[59] However, on July 25, 1962, Lewis held that Prince

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[55] Richmond Times-Dispatch, May 19, 1962, p. 1.

[56] Ibid.

[57] Allen v. County School Board of Prince Edward County, 198 F. Supp. 497, 500 (E.D. Va. 1961).

[58] Richmond Times-Dispatch, May 19, 1962, p. 1.

[59] Southern School News, Vol. VIII, No. 12 (June, 1962), p. 10.

Edward County's public schools "may not be closed while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers."[60] In his opinion, the Judge neatly summarized the major issues of fact and law. In examining the purpose of closing its schools, Judge Lewis asserted that without question the object of Prince Edward was to defy the Brown decisions. After citing the pertinent sections of the Virginia Constitution, and the tradition of state and local responsibility for operating public schools, Lewis found no basis for the county's claim that public schools were strictly a local matter outside the purview of the Fourteenth Amendment. Furthermore, Judge Lewis thought Prince Edward's defiance was not strictly limited to the community, since it had the approval of state school officials and state attorneys.[61] Finally, Judge Lewis considered the county as

> an agency or arm of the state government. The United States Constitution recognizes no governing units except the federal government and the states. A contrary position would allow a state to evade its constitutional responsibilities by carve-outs of small units. At least in the area of constitutional rights, specifically with respect to education, a state can no more delegate to its subdivision the power to discriminate than it can itself directly establish inequalities.[62]

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[60] Allen v. County School Board of Prince Edward County, 207 F. Supp. 349, 355 (E.D. Va. 1962).

[61] Id. at 352, 353.

[62] Id. at 354.

Judge Lewis ordered Prince Edward County to open its schools in September, 1962. As an incentive, Judge Lewis wrote that the injunction placed on tuition grants would be lifted with the resumption of classes in public schools.[63]

The leading state newspapers urged Prince Edward County to submit to the federal court's ruling.[64] Editorialists united in the view that the Prince Edward stalemate was resulting in irreparable damage to the Negro children as well as to the image of Virginia in the nation and the world. Pragmatically, the resumption of classes was advised, once again, as a method of strengthening the tuition grant plan.[65] But Prince Edward remained intransigent as its editorial spokesman, J. Barrye Wall, reminded his readers that the county's position was "fundamental to the perpetuation of the republic."[66]

Judge Lewis' ruling failed to end the deadlock in Prince Edward County. The lawyers for the school board appealed the district court's ruling to the Fourth Circuit Court of Appeals and simultaneously asked for a ruling in the state circuit court

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[63] Id. at 355.

[64] Editorials, Richmond News Leader, July 27, 1962, p. 8; Richmond Times-Dispatch, July 27, 1962, p. 8; Lynchburg News, July 27, 1962, p. 6; Norfolk Virginia-Pilot, July 27, 1962, p. 4; Roanoke Times, July 27, 1962, p. 6.

[65] In July the State Department of Education reported that 8,518 grants were approved during the 1961-1962 school year valued at $2,074,690. This amounted to 391 more grants than the previous year. The figures were found in the Southern School News, Vol. IX, No. 2 (August, 1962), p. 3.

[66] Editorial, Farmville Herald, July 27, 1962, p. 1.

of Richmond on Section 129.[67] When Judge Lewis stayed the execution of his order pending action by higher federal courts, Prince Edward's schools were closed for the fourth consecutive year.[68]

While the Prince Edward case was lodged in the federal court for almost a year, similar issues were raised in Powhatan County, where the school population was almost evenly divided between Negro and white students. In the face of rumored school closures, a desegregation suit was instituted on behalf of Negro school children. On January 2, 1963, Federal District Judge John D. Butzner ordered that three plaintiffs be admitted to white schools and enjoined the Powhatan School Board from making assignments based on race.[69] Moreover, Judge Butzner, after citing the Prince Edward case, entered an injunction prohibiting the closing of public schools.[70] Although the Butzner ruling may have prevented a repetition of the Prince Edward disaster, his decision met with a mixed reaction. The moderate Norfolk Virginian-Pilot praised Butzner's wisdom in preventing another school closing.[71] However, the Richmond dailies were

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[67] Southern School News, Vol. IX, No. 2 (September, 1962), p. 3.

[68] Allen v. County School Board of Prince Edward County, 7 Race Rel. L. Rep. 1080 (E.D. Va. 1962).

[69] Bell v. County School Board of Powhatan County, 7 Race Rel. L. Rep. 1083 (E.D. Va. 1963).

[70] Id. at 1087. The next day Butzner stayed the desegregation order but remained firm on the injunction against school closings.

[71] Norfolk Virginian-Pilot, January 5, 1963, p. 4.

furious with Butzner's decision to prevent local officials from withdrawing financial support from the public schools. "The issue (taxation without representation) is greater than whether or not there shall be public schools in any county," wrote the Times-Dispatch.[72]

Something equally fundamental was also bothering segregationists. In the Powhatan case, as in desegregation suits throughout the state, the NAACP attorneys were beginning to argue that ever since 1955 every school board had a duty to desegregate.[73] The objective was to smash the well-known dictum enunciated by Judge Parker in Briggs v. Elliot. In the Powhatan case, Judge Butzner refused to issue an order requiring the school board to desegregate the schools.[74] Yet, if the court could prevent a school from closing, the News Leader, for one wondered why the same court could not order school boards to take steps to ensure the desegregation of all public schools. "The next step is an injunction directed to white parents of the county, commanding them to march their children by lockstep into the school rooms, lest the three Negro

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[72]Editorial, Richmond-Times-Dispatch, January 5, 1963, p. 4.

[73]This point will be developed in the next chapter. Not until 1965 did Negro attorney ask for an order which required a school district to insure a desegregated education for every black student.

[74]Bell v. County School Board of Powhatan County, 7 Race Rel. L. Rep. 1083, 1086 (E.D. Va. 1963).

plaintiffs be forever wounded in their hearts and minds for want of white companionship."[75] Editor Kilpatrick, to his regret, proved to be an able forecaster of the future court holdings requiring school boards to draft plans for desegregating public schools. No matter what the federal courts said, Kilpatrick and his approving readers believed that desegregation trampled upon the so-called right of white parents to send their children to schools which were overwhelmingly white.

The futility and confusion surrounding the Prince Edward case were magnified in 1963. The attorneys for Prince Edward County went to the state courts in order to obtain a decision on the county's responsibility to provide public schools under state or federal law. The strategy of the Prince Edward lawyers was based on the hope that higher federal courts would be influenced by a judgment made by the highest court of Virginia.[76] In the Richmond Circuit Court, the county's position was upheld by Judge John Wingo Knowles. Finding no federal statute requiring a state to operate a public school, Judge Knowles emphasized that in Virginia, public education was based upon "the theory of home rule and local option."[77] He upheld tuition grants for the same reason.

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[75]Editorial, Richmond News Leader, January 4, 1963, p. 8.

[76]Southern School News, Vol. IX, No. 10 (April, 1963), p. 5.

[77]Board of Supervisors of Prince Edward County v. Griffin, (Circuit Court, City of Richmond) 8 Race Rel. L. Rep. 94, 109-10.

Though in agreement with Judge Knowles' reasoning, both Richmond newspapers continued to urge Prince Edward County to open its public schools. After praising Knowles' judicial reasoning, Editor Kilpatrick concluded that the time had come "to think a little less about rights, and to think a little more about wrongs."[78] His counterpart on the morning paper, Virginius Dabney, made the same plea. Dabney also correctly predicted that the Knowles decision was bound to be overruled by a higher federal court.[79] Governor Harrison meanwhile remained immovable in the face of the growing criticism of his do nothing policy while the case was in the courts. He broke his silence only to point out that Judge Knowles' ruling vindicated the state's position.[80] To intervene, Harrison remarked again, meant "extensive and far-reaching revision of laws relating to public schools and taxation."[81] In retrospect, the plea of helplessness lacked credibility. In 1956, Harrison played a key role in "extensive" legislation which prevented a locality from opening its schools against the wishes of the state. A major assumption of massive resistance was that education was a state rather than a local responsibility. In 1959, Virginia legislators once again passed "extensive" legislation to ensure token

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[78] Editorial, Richmond News Leader, March 29, 1963, p. 10.

[79] Editorial, Richmond Times-Dispatch, March 29, 1963, p. 10.

[80] Richmond Times-Dispatch, March 21, 1963, p. 2; March 18, 1963, p. 5.

[81] Ibid. March 29, 1963, p. 5.

desegregation. One of the saddest ironies of the Virginia school crisis was that the legislators were willing to pass "extensive" legislation to close a maverick school, but were unable to pass "extensive" legislation to keep a school open.

One perceptive explanation for the governor's inaction was given by the editor of the Norfolk Virginian-Pilot. "Mr. Harrison, the NAACP, Prince Edward authorities, and the people of Virginia are waiting for the Supreme Court to make them do their duty."[82] Paradoxically, a state which cherished home rule and vilified the Supreme Court had placed itself in a position in which only the Supreme Court could open the schools of Prince Edward County. Politically a court solution had several advantages. First, the public schools would be opened, an objective which most state political leaders and editorialists publicly supported. Second, the Governor, a Southsider, would have to make no apologies to his colleagues within the organization once classes resumed. The state government had supported Prince Edward County to the end of the judicial rope. Finally, court action would permit the organization to once again lead the way in crying out against judicial legislation.

On August 12, 1963, after a delay of a year, the Fourth Circuit Court of Appeals vacated Judge Lewis' ruling that Prince Edward County must be reopened as long as Virginia's public schools were open in the remainder of the state. The three-judge panel split 2-1, with the majority holding that the

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[82] Norfolk Virginian-Pilot, March 22, 1963, p. 4.

district court should have abstained until state courts had decided questions of state law.[83] In the majority opinion, Judge Clement F. Haynsworth, Jr. subscribed to three major arguments consistently made by Virginia segregationists. First, he cited Briggs v. Elliot and repeated the familiar dictum that neither a state nor a locality was required to integrate its schools as long as admission policies were not racially discriminatory. As if to put the legal debate over the Briggs dictum to rest, Judge Haynsworth implied it was no longer an issue since "the negative application of the Fourteenth Amendment is too well settled for argument."[84] Judge Haynsworth believed that the school closings were not a violation of a court order since the county had "abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination."[85] Third, Haynsworth considered Prince Edward's private school effort genuinely independent rather than a clever evasion of the Brown ruling in which the state conspired.[86] Ultimately the question of the "state action", according to the Judge, rested on a "determination, under state law of Virginia's

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[83] Griffin v. Board of Supervisors of Prince Edward County, 322 F. 2d 332 (4th Cir. 1963).

[84] Id. at 336.

[85] Ibid.

[86] Id. at 337-38.

role in the operation of public schools in Virginia "by the Supreme Court of Appeals."[87]

In a brief dissenting opinion, Judge J. Spencer Bell wrote that public education was indisputably a state function in Virginia as evidenced by provisions for state funding, a State Board of Education, and State Superintendent of Public Instruction.[88] Judge Bell objected strenuously to the majority's opinion that school closing was "a permissible compliance with the Supreme Court's order."[89] Then, significantly, he took issue with the Briggs dictum. "Equal educational opportunity through access to nonsegregated public schools is secured by the Constitution. The state has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee."[90]

An appeal was made by the NAACP to the United States Supreme Court. However, before the Supreme Court acted the Virginia Supreme Court of Appeals ruled on the appeal from the state circuit court. In a 6-1 decision the highest Virginia Court upheld the lower state court.[91] Prince Edward could not

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[87] Id. at 340.

[88] Id. at 345.

[89] Id. at 348.

[90] Ibid.

[91] County School Board of Prince Edward County v. Griffin, 133 S.E. 2d. 565 (Va. Sup. Ct. App. 1963).

be compelled to appropriate funds "by the General Assembly, by this court or by any authority except its own people."[92] Localities, the court held, were merely "authorized" to appropriate local funds which then triggered state aid.[93] In a semantical argument, the majority held that Section 129 required the General Assembly to provide an "efficient system" of public schools but not a particular school or group of public schools.[94] To permit the General Assembly to assume the county's responsibility would result in a "centralization of control and of operation foreign to the spirit as well as to the letter of the Constitution."[95] The majority also upheld tuition grants to Prince Edward students and saw no violation of the Fourteenth Amendment.[96]

Chief Justice John W. Eggleston wrote a sharp dissent. Interpreting Section 129 literally, Judge Eggleston argued that the General Assembly had the responsibility not only to establish but to maintain a public school system. By providing funds to the local school board, the General Assembly, wrote Judge Eggleston, in no way interfered with local operation. To the Chief Justice the local-state distinction made by the majority was contrived.[97] Since he viewed the localities as agents of the state, Judge Eggleston saw the school closing as a direct violation of the equal protection clause of the Fourteenth

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[92] Id. at 576.

[93] Ibid.

[94] Id. at 572-73.

[95] Id. at 578.

[96] Id. at 579

[97] Id. at 582-84.

Amendment.[98] In a prophetic conclusion, the Chief Justice predicted: "The refusal of the highest court of this State to recognize here the rights of the citizens of Prince Edward County, guaranteed to them under the Constitution of the United States, is a clear invitation to the federal courts to step in and enforce such rights. I am sure that that invitation will be promptly accepted. We shall see!"[99]

The Fourth Circuit and Virginia's Supreme Court decisions brought Virginia no closer to a solution of the Prince Edward problem. The Roanoke and Norfolk papers were critical of the state and federal court decisions. Although the Richmond papers approved of the decisions, they remained firm in their belief that legal victories were self-defeating.[100] In September of 1963, however, Negro children attended full time schools for the first time in four years under the direction of the Prince Edward Free School Association, the result of cooperation of federal, state and local leaders. Using public school buildings and financed by private donations, the schools were viewed as a stop-gap measure aimed at ending the educational drought

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[98] Id. at 584.

[99] Ibid.

[100] Editorials, Roanoke Times, August 14, 1963, p. 6; December 4, 1963, p. 6; Norfolk Virginian-Pilot, December 3, 1963, p. A-4; Richmond News Leader, August 13, 1963, p. 10, December 3, 1963, p. 18; Richmond Times-Dispatch, August 13, 1963, p. 12, December 3, 1963, p. 22.

for black children. Negro leaders gave their support on the condition that they would not be expected to relax their effort to win a favorable court decision.[101]

On May 25, 1964, ten years after the first Brown decision, the United States Supreme Court in Griffin v. School Board of Prince Edward County held that Prince Edward County had violated the Fourteenth Amendment by closing its public schools.[102] Writing for the majority, Justice Black found that the public schools had clearly been closed with the intent of preventing desegregation. If a state permitted its public schools to be closed, he emphasized that the "object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[103] Black agreed with the district court's order enjoining tuition grants and tax credits as long as public schools were closed. Furthermore, he suggested that the district court, in order to prevent discrimination, "may" require the Board of Supervisors to levy taxes for the support of public schools.[104] On this controversial point of the decision, Justices Clark and Harlan registered dissents.[105] The threat of such an unprecedented order probably

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[101] Southern School News, Vol. X, No. 4 (October, 1963), p. 3. Bob Smith has a good discussion of the background events in They Closed Their Schools, pp. 236-40.

[102] Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

[103] Id. at 231.

[104] Id. at 232-33.

[105] Id. at 234.

was influenced by the case's long and complicated history. Justice Black observed: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by public schools in other parts of Virginia."[106]

The Virginia reaction to the Griffin decision was not monolithic. Congressman Watkins Abbitt, who represented Prince Edward County, immediately introduced a bill in the House of Representatives which would have prohibited a federal court from requiring a state or a locality to levy a tax. Crying out against "brazen power" and "judicial dictatorship," Abbitt charged that the Griffin decision destroyed "the separation doctrine."[107] Temporarily, he was joined by the News Leader which said that the Supreme Court's decision amounted to a "dictatorship imposed by judicial oligarchy" since it undermined the principle of "no taxation without representation."[108] However, the Roanoke Times and Norfolk Virginian-Pilot were more critical of the inactivity of Prince Edward County and generally supported the decision.[109] To Governor Harrison, the most significant aspect

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[106] Ibid.

[107] Southern School News, Vol. X, No. 12 (June, 1964), p. 10.

[108] Editorial, Richmond News Leader, May 26, 1964, p. 10.

[109] Editorial, Roanoke Times, May 26, 1964, p. 6.

of the ruling was that the Supreme Court's opinion did not categorically rule out the use of tuition grants. "If the Court wanted to say they [tuition grants] were illegal, it had a wonderful opportunity to do so," commented the Governor.[110] Roanoke, Norfolk, and Richmond papers joined Governor Harrison in emphasizing that the most important issue related to the Prince Edward case was the future of the tuition grant plan.[111] Editor Kilpatrick saw a splendid opportunity for a trade in which Prince Edward would voluntarily reopen its classes in return for a resumption of tuition grants and a Negro promise to keep hands off the Prince Edward School Foundation.[112]

Because of the great concern for preserving the tuition grant plan, Virginians were concentrating their attention on another Southside county case which raised some of the same issues found in the Prince Edward litigation. In August of 1963, the Surry County School Board elected to close its white public school following instructions from the State Pupil Placement Board to enroll seven Negro students. White students, with the aid of tuition grants, enrolled in the newly created white private schools. Unlike the Prince Edward case, however, the county continued to operate its two Negro public schools. The Negro

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[110] Southern School News, Vol. X, No. 12 (June, 1964), p. 10.

[111] Ibid. and Editorial, Richmond Times-Dispatch, May 26, 1964, p. 18; Editorial, Richmond News Leader, May 29, 1964, p. 14.

[112] Editorial, Richmond News Leader, May 29, 1964, p. 14.

plaintiffs immediately asked for an injunction requiring the reopening of the closed public school and restraining the payment of tuition grants.[113] Advocates of the tuition grant plan were under the impression that federal courts would uphold the plan provided that public schools were available for Negro students. The Surry County Case was accordingly viewed as an important test case.[114]

On June 18, 1964, Federal District Judge John D. Butzner ordered the school board to reopen its white school and enjoined further tuition grants.[115] In comparing the Surry case to the Prince Edward case, the availability of Negro public schools was not considered a significant distinction. Butzner wrote: "Both situations are variations upon the same theme. State and County funds are used to perpetuate racial segregation in the schools of Surry County."[116] The effect of Butzner's decision was limited by his conclusion that the order applied specifically to Surry County and not to any other communities or the tuition grant plan itself.[117]

Both admirers and critics of Butzner recognized that his decision was a big step in the direction of overturning the

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[113] Southern School News, Vol. X, No. 3 (September, 1963), p. 18; Vol. X, No. 4 (October, 1963), p. 3.

[114] Editorial, Richmond News Leader, June 4, 1964, p. 10. Editor Kilpatrick entitled his editorial "The Big Case" in which he defended the tuition grant plan.

[115] Pettaway v. County School Board of Surry County, 230 F. Supp. 480 (E.D. Va. 1964).

[116] Id. at 485-86.

[117] Id. at 486-87.

the tuition grant program. Editor Kilpatrick viewed the ruling as "the worst yet" of a series of rulings amounting to a "rape" of the Constitution.[118] On the other hand, the Norfolk Virginian-Pilot praised the "courageous" Butzner for shattering "the hopes of the Deep South and Southside Virginia of setting up a device where an entire white public school system would simply put on a private guise to perpetuate segregation."[119]

Following the Butzner decision, the NAACP continued to attack the tuition grant plan until it was declared unconstitutional in 1969. Although Prince Edward County finally opened its public schools in the fall of 1964, Negro attorneys asked the district court to prohibit tuition grants for the 1964-1965 school year. Judge Lewis agreed to enjoin retroactive tuition grants but not payments for the coming school year. He cited the Supreme Court's failure to rule on tuition grants in Griffin as authority for his decision.[120] The Negro plaintiffs, thereupon, appealed to the Fourth Circuit Court of Appeals which consolidated the Prince Edward and Surry County cases since they dealt with the same issues.[121]

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[118]Editorial, Richmond News Leader, June 22, 1964, p. 12.

[119]Editorial, Norfolk Virginian-Pilot, July 20, 1964, p. 10.

[120]Allen v. County School Board of Prince Edward County, IX Race Rel. L. Rep. 1313 (E.D. Va. 1964).

[121]The Surry School Board appealed Butzner's ruling prohibiting tuition grants and ordering attorney's fees.

On December 2, 1964, in a unanimous decision of five judges, the Fourth Circuit Court of Appeals ruled that tuition grants to Surry County and Prince Edward County were unconstitutional.[122] In an opinion written by Judge Simon Sobeloff, the court dealt with several key aspects of the tuition grant debate. Accepting the argument of the Negro attorneys, the court found: "The involvement of public officials and public funds so essentially characterizes the enterprise in each of the counties that the Foundation schools must be regarded as public facilities in which discrimination on racial lines is constitutionally impossible."[123] Knocking down a basic argument of the defenders of tuition grants, the court said: "It is of no importance whether grants are made directly to Foundation schools or indirectly through the conduit of pupil subventions for restricted use as tuition fees. In the circumstances disclosed in the present cases there is a transparent evasion of the Fourteenth Amendment."[124] Finally, the court dismissed the argument that tuition grants were guaranteed by the right of freedom of association. "The clear and unavoidable implication of the Brown decision is that white persons have no constitutional right to associate in publicly maintained facilities on a segregated basis. We do not deal here with the right of persons to send

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[122] Griffin v. Board of Supervisors of Prince Edward County, 339 F. 2d 486 (4th Cir. 1964)

[123] Id. at 492.

[124] Ibid.

their children to segregated schools at their own expense."[125] The decision of the Fourth Circuit Court of Appeals applied only to Prince Edward and Surry counties, but held out little hope for other localities employing public funds in segregated schools.

After the victory in the Fourth Circuit, the Negro attorneys attacked the tuition grant laws "on their face" in a suit against the State Board of Education and ten localities. In Griffin v. State Board of Education a three-judge district court held that tuition grants were not automatically unconstitutional.[126] Tuition grants to private schools, the court ruled, only violated the equal protection clause when they represented the "preponderant", "main", or "greater part" of the financial support.[127] In the case at hand the court found that Virginia was "nurturing segregated schools" and enjoined further grants as long as the private schools excluded Negroes and received preponderant financial support from the state.[128]

In response to the legal attack, the General Assembly met in December of 1964 at the request of the Governor to "purify" the tuition grant plan. New legislation was passed

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[125] Id. at 493.

[126] Griffin v. State Board of Education, 239 F. Supp. 560 (E.D. Va. 1965).

[127] Id. at 565.

[128] Ibid.

which provided that grants could not exceed the per-pupil cost behind public school pupils and that teachers in all private nonsectarian schools were eligible for state retirement benefits, not just the teachers in private nonsectarian schools organized after 1956. The legislators also repealed a series of laws which had been passed to facilitate the construction of private schools. Private schools would no longer benefit from laws permitting them to ignore zoning and building ordinances, allowing local tax credits to citizens contributing to private schools, and providing transportation grants in order to bus private school children.[129]

The Negro attorneys were not satisfied with either the legislation or the judicial action concerning tuition grants. Almost immediately private schools recognized that they could easily circumvent the ruling by establishing a quota of tuition grant students which would be below fifty percent. Consequently, the newly created private schools figured to receive substantial benefits from the grant program without falling under the court's preponderant rule. However, the chairman of the NAACP's legal staff, S. W. Tucker, was determined to press the case against tuition grants until the presence of only one tuition-grant child in a segregated school was construed as an unconstitutional state action.[130] In February, 1969, four years after

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[129] Southern School News, Vol. XI, No. 6 (December, 1964), p. 11.

[130] Ibid., Vol. XI, No. 10 (April, 1965), p. 7.

Tucker had designated his goal, the same three judges who had established the "preponderant" rule declared the tuition grant statutes unconstitutional.[131] In re-evaluating the 1965 decision, the court emphasized that its old ruling had to be adjusted in accordance with two intervening United States Supreme Court rulings upholding federal district court decisions in Louisiana and South Carolina.[132] Based upon the interpretation of these cases, the district court found that "any assist whatever by the State towards provision of a racially segregated education exceeds the pale of tolerance demarked by the Constitution."[133] Thus, the tuition grant statutes were put to rest almost ten years after they were introduced as an integral part of a plan to prevent "enforced desegregation."[134]

As of the fall of 1970, only a handful of white students attended Prince Edward County's public schools. The outcome of the litigation in 1964 did not undermine the community's commitment to segregated education or to its private schools. Likewise, for Negroes, the legal victory did not result in desegregation. Only the future can tell whether white students

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[131] Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969).

[132] Louisiana Financial Assistance Commission v. Poindexter, 389 U.S. 571 (1968); South Carolina State Board of Education v. Brown, 393 U.S. 222 (1968).

[133] Griffin v. State Board of Education, 296 F. Supp. 1178, 1181.

[134] Southern School News, Vol. XI, No. 6 (December, 1964), p. 1.

will ever return in significant numbers to the public schools. The Prince Edward case demonstrated the limitations of the judicial process in cases where a community's opposition to desegregation was extreme and either implicitly or explicitly supported by the state's political leaders. Prince Edward County also showed that the policy of passive resistance based on local differences could be as effective in prohibiting desegregation as the earlier strategy of massive resistance. In their zeal to defend local rights, Virginia's leading newspapers parted company with Prince Edward for several reasons. First, they saw the litigation as senseless, since, win or lose, the schools would remain segregated in the county. Second, they wanted Negro children in school and an end to unfavorable national publicity. Finally, Prince Edward's resistance jeopardized the tuition grant plan which was the heart of the freedom to choose a segregated education, especially in rural Virginia.

CHAPTER X

LITIGATION, 1959-1964

The stalemate in Prince Edward County dominated the publicity given to the segregation activities in Virginia from 1959 to 1964. However, in the Old Dominion, the extreme measures adopted by Prince Edward County were the exception and not the rule. Nevertheless, by employing more subtle techniques, desegregation progressed at a snail's pace following the collapse of massive resistance. By the fall of 1963, only 3,720 or 1.63 percent of Virginia's Negroes were attending schools with white children.[1] After 1959 school boards found a variety of techniques for upsetting Negro efforts to enter white schools. This chapter will trace the stream of litigation instituted by black attorneys as they attempted to knock down the evasive devices of token desegregation.

Between 1959 and 1964, the NAACP lawyers had their greatest success in the Fourth Circuit Court of Appeals. In a number of cases the district court judges upheld plans which, on their face, were not discriminatory, but which had the result of perpetuating token desegration. On appeal the Fourth Circuit Court frequently overturned the lower courts and, in turn,

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[1] Southern School News, Vol. X, No. 11 (May, 1964), p. 1.

forced school boards to draw up more liberal desegregation plans. The case for tokenism was built on the apparently unshakeable dictum enunciated in Briggs v. Elliott[2] by a three-judge federal district court in South Carolina which included Judge John J. Parker, the South's leading jurist at the time. This court wrote that Brown did not order integration but required merely the prohibition of student assignments based on race.[3] Under this dictum, racially separate schools did not violate the Fourteenth Amendment as long as an assignment was racially neutral on its face. Judge Parker's prestige in the South, the long accepted theory that a state's obligation under the Fourteenth Amendment was negative rather than positive, and the favorable results from a Southern white viewpoint made the Briggs opinion a formidable legal obstacle to desegregation. Consequently, school boards utilized a variety of placement methods which superficially were unrelated to race, in order to limit desegregation. Academic testing, grade-a-year plans, dual attendance zones, minority transfers, and the neighborhood school were a few of the assignment techniques used to restrict black enrollment. The black students who initially succeeded in passing through this maize were usually of the highest calibre. The official rationale for this policy was that most Negro

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[2]Briggs v. Elliott, 132 F. supp. 776 (E.D. S.C. 1955).

[3]Id. at 777.

children would suffer psychologically if they were placed in more competitive schools. Unofficially, white school officials and parents believed that their children were spared the supposed threat to quality education resulting from desegregation. As a result, in the early 1960's desegregation was limited to brighter and usually older black children. But legally and educationally such a policy was intolerable to the NAACP.

The State Pupil Placement Board ably assisted local school boards in their efforts to slow the pace of school desegregation. The Board, controlled by massive resisters from its inception in 1956, was reformed in July of 1960. Three members were appointed by Governor Almond, since the previous threesome was unwilling to bridge the gap from a policy of massive resistance to passive resistance. The new Placement Board recognized that its legal viability depended on assigning a few Negroes to white schools, and in July, for the first time in its history, the Board reflected Virginia's new school policy and voluntarily assigned a Negro to a white school. However, the Board's conservative position on desegregation was insured by its carefully selected membership, which included Dr. E. J. Oglesby, a mathematics professor at the University of Virginia and president of the Albermarle-Charlottesville chapter of the Defenders of State Sovereignty and Individual Liberties.[4]

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[4]Southern School News, Vol. VII, No. 2 (August, 1960), p. 10.

The Pupil Placement Board, in theory, handled all the assignments of Virginia's public schools unless a school district at the request of its school board and governing body, chose to withdraw from its authority.[5] In practice, the Board rubber-stamped most assignment recommendations by the local officials and considered carefully only contested assignments. Usually these were black students who desired to enter a white school. As a result, the desegregation procedure was more complicated and also had the effect of shifting the responsibility for desegregation away from local school officials on controversial cases.

Beginning in 1959 and 1960, Negro attorneys conducted litigation which directed the school boards to apply assignment criteria equally to white and black children. As early as March of 1959, in Hamm v. County School Board of Arlington County (1959), the Fourth Circuit Court of Appeals held that Negro applications for transfer were not to be subjected to tests which were not applied to white students.[6] The following year, in April, the Fourth Circuit of Appeals forcefully reiterated this rule regarding the use of residence and academic

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[5]Local school officials preferred to have the Virginia Placement Board take the responsibility for assigning black children to white schools. Not until 1961 did the first school districts withdraw from the supervision of the Placement Board. Following the passage of the Civil Rights Act of 1964, this trend accelerated until the Placement Board was dissolved in 1966.

[6]Hamm v. County School Board of Arlington County, 264 F. 2d 945 (4th Cir. 1959).

achievement in Jones v. School Board of Alexandria (1960).[7] However, the court carefully added that both criteria "could be properly used as a plan to bring about racial desegregation in accordance with the Supreme Court's directive."[8] Furthermore, in line with the Briggs dictum, the court saw no reason to order "the complete reassignment of all pupils in the public schools of Alexandria."[9]

In Blackwell v. Fairfax County School Board (1960), Negro plaintiffs charged that the Fairfax grade-a-year plan was discriminatory and dilatory.[10] Fifteen Negro children had been refused admission to white schools because they did not fall within the prescribed grades of the School Board's assignment plan. The plaintiffs contended successfully that the speed of desegregation was too slow under the school board's plan. In accepting the plaintiff's argument, District Judge Albert V. Bryan did not categorically rule out such plans. Instead, he emphasized that they must be judged according to the character of the community. Since the Negro school population of

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[7] Jones v. School Board of City of Alexandria, 278 F. 2d. 72, 77 (4th Cir. 1960).

[8] Ibid.

[9] Id. at 76.

[10] Blackwell v. Fairfax County School Board, 5 Race Rel. L. Rep. 1056 (E.D. Va. 1960).

Fairfax County was less than four percent, Bryan considered the fear of racial friction an unacceptable justification for such a cautious desegregation plan.[11]

Another scheme for delaying desegregation in Virginia was the minority transfer plan. The Charlottesville Board of Education was the first of Virginia's school boards to have its minority transfer plan tested in the federal courts.[12] The Charlottesville assignment plan placed all elementary school students in the school of their residential district. However, any student assigned to a school where the other race predominated was permitted to transfer to a school where his or her race prevailed. The minority transfer was designed to rescue white elementary students located in the city's only predominately black residential district. The assignment plan for secondary students also worked to the disadvantage of Negro students. White students attended the only white public high school in the city whereas black students were required to attend the black high school unless they lived closer to the white school and passed an aptitude test.[13]

On December 18, 1961, in Allen v. School Board of Charlottesville, (1961), Judge Paul upheld the minority transfer

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[11] Id. at 1058. Three years later the Fourth Circuit Court of Appeals ruled in Jackson v. School Board of City of Lynchburg, 321 F. 2d 230, 233 (4th Cir. 1963), that grade-a-year plans were not acceptable in Virginia.

[12] Allen v. School Board of City of Charlottesville, 203 F. Supp. 225 (E.D. Va. 1961).

[13] Ibid.

plan for elementary schools, but found the high school plan discriminatory.[14] In evaluating the elementary school plan, Paul acknowledged that it fell "far short of any complete or enforced integration. In fact, it contemplates that there should be no compulsory integration. Nevertheless, this court feels it is permissible and is not discriminatory."[15] Judge Paul found no evidence of discrimination in the minority transfer plan because both white and black children were permitted to exercise this option. However, Negro attorneys objected that black children residing in the predominately Negro elementary school district should be allowed to transfer out like their white counterparts. In reply, Judge Paul explained: "In insisting that Negroes resident in Jefferson district (the Negro district) attend Jefferson school the authorities are merely following the principle of requiring pupils to attend the school within their area of residence."[16] Judge Paul firmly believed that the law did not require forced integration and thought the majority of both races supported this view.[17]

In overturning the high school plan and ordering freedom of choice for secondary students, Judge Paul contradicted his emphasis on the neighborhood principle and minority transfer used in upholding the elementary school plan. The most

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[14] Ibid.

[15] Id. at 227.

[16] Ibid.

[17] Ibid.

objectionable part of the secondary assignment plan, to Judge Paul, was its discriminatory use of academic testing. As a result only above average Negro students were automatically enrolled.[18] Judge Paul gave no explanation for adopting a freedom of choice plan for the high schools. However, he rejected freedom of choice on the elementary level because he thought the result "would be chaotic with some schools practically deserted and others crowded beyond capacity."[19]

The Charlottesville precedent was adopted by other federal district court judges in Virginia. In Arlington Judge Oren B. Lewis upheld a minority transfer provision which was combined with a neighborhood assignment plan.[20] Relying heavily on Judge Paul's opinion, Lewis wrote: "To prohibit the right of transfer, granted both Negro and white pupils under like condition, would be to require assignment of all pupils solely on the basis of residence, resulting in the enforced integration of all public schools."[21] The law, Lewis held, did not require integration, and, he added, "a substantial number of both Negro and white parents desire the right to send their children to a school in which a majority of their race attend."[22]

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[18] Id. at 228-29.

[19] Id. at 227.

[20] Thompson v. County School Board of Arlington County, 7 Race Rel. L. Rep. 45 (E.D. Va. 1962).

[21] Id. at 49.

[22] Ibid.

Judge Lewis agreed with Judge Paul that freedom of choice invited administrative chaos.

In Jackson v. Lynchburg, (1962), Judge Thomas J. Michie reached the same conclusion as Judges Paul and Lewis.[23] Judge Michie believed that without a minority transfer plan white parents would abandon public schools in Lynchburg and throughout the South.[24]

The minority transfer in combination with neighborhood school assignments was widely viewed as the best method for achieving Virginia's goal of no enforced desegregation. Following the Charlottesville and Arlington decisions the Richmond-Times-Dispatch approvingly observed: "If the rulings of Judges Lewis and Paul continue to prevail in Virginia, no child in this state will ever be forced to attend a school in which most of the other students are of another race."[25] By 1962, schools boards had found out that the minority transfer and residential assignments were the best means of satisfying the courts' prohibition against discrimination and restricting desegregation in Virginia's public schools. School officials dropped other assignment criteria such as achievement tests rather than applying them to white children which risked greater desegregation.

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[23] Jackson v. School Board of City of Lynchburg, 203 F. Supp. 701 (W.D. Va. 1962).

[24] Id. at 705.

[25] Editorial, Richmond Times-Dispatch, March 23, 1962, p. 10.

In Dillard v. School Board of Charlottesville (1962), the Fourth Circuit Court of Appeals in a narrow 3-2 decision held unconstitutional the use of minority transfers.[26] In Charlottesville all 149 white elementary students who would have attended the Negro elementary school exercised their option to transfer out of the school. The school board argued that the transfers were not discriminatory, since all the children had the same opportunity to exercise the option to transfer.

In a per curiam opinion, the majority held that the apparent equality of the minority transfer plan was not significant "if the purpose and effect of the arrangement is to retard integration and retain the segregation of the races."[27] Enrollment statistics proved to the majority's satisfaction, that "the actual effect of the rule is unequal and discriminatory."[28] Finally the court held that personal preferences of both races were more equitably honored "not by restricting the right of transfer but by a system which eliminates restrictions for the right."[29] The majority indicated that its decision was in line with rulings by the Fifth Circuit Court which had already invalidated a minority transfer plan and the Sixth Circuit which had warned that the minority transfer plan could become uncon-

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[26] Dillard v. School Board of City of Charlottesville, 308 F. 2d 920 (4th Cir. 1962).

[27] Id. at 923.

[28] Ibid.

[29] Id. at 923-24.

stitutional if it perpetuated segregation.[30]

There were separate dissenting opinions by Judge Albert V. Bryan, recently elevated to the circuit court, and Judge Clement Haynsworth, Jr. Though desegregation was retarded, Judge Bryan did not consider the result a violation of the Brown decision. The Fourteenth Amendment, Bryan held, did not "guarantee a student an integrated school to attend."[31] The concentration of Negroes in one elementary school, Bryan wrote, was not by design but by residence. Until housing patterns changed, Judge Bryan argued that Negroes "must abide by rules and regulations based on just and fair district lines."[32] Bryan defended the minority transfer rule as "permitting a child to express his wishes . . . even though his wishes be based on racial grounds."[33] Yet such a rule, countered the Negro plaintiffs, did not permit a Negro living in the same district to exercise his choice.

Judge Haynsworth elected to discuss the psychological basis for the minority transfer. Haynsworth believed that compared to segregated education, attending a school with a majority of another race was "a much more searing experience."[34]

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[30] Id. at 923. The cases cited by the court were Boson v. Rippy, 285 F. 2d 43 (5th Cir. 1960); Goss v. Board of Education of City of Knoxville, 301 F. 2d 164 (6th Cir. 1962).

[31] Id. at 925.

[32] Id. at 926.

[33] Id. at 927.

[34] Id. at 928.

Though he believed that the problem of adjustment existed for both races, Haynsworth, in effect, saw the minority transfer as necessary to retain the support of the white community for public schools.[35]

Virginia's Attorney General Robert Y. Button considered the Dillard decision "one of the most far-reaching decisions entered by any court involving segregation in schools since Brown v. Board of Education."[36] Considering the decisions already handed down in the Fifth and Sixth Circuit Courts of Appeal, the claim was an exaggeration.[37] Moreover, the majority's opinion did not upset the Briggs dictum. In voiding the minority transfer, the Fourth Circuit said it preferred a plan which eliminated all restrictions on transfers. This was freedom of choice, but not a holding which required desegregation. Thus, the Dillard decision dealt a blow to school boards using the minority transfer but was narrow enough to permit the adoption of other evasive assignment plans by school authorities.[38]

On May 22, 1962, in Green v. School Board of Roanoke, (1962), the Fourth Circuit Court of Appeals reversed another district court decision when it rejected an assignment plan

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[35] Id. at 929.

[36] Southern School News, Vol. IX, No. 4 (October, 1962) p. 2.

[37] Boson v. Rippy, 285 F. 2d 43 (5th Cir. 1960); Goss v. v. Knoxville, 301 F. 2d 164 (6th Cir. 1962).

[38] Southern School News, Vol. IX, No. 4 (October, 1962) p. 2.

which included dual attendance zones and a "feeder system" devised by the City of Roanoke.[39] Initially all black children, regardless of residence, were placed in segregated schools. Negroes, who attended the black elementary schools in one section of the city, were, on graduation, automatically placed in black schools which served this zone exclusively. As a result of the so-called "feeder system," a black child once again was placed in a segregated school even if he lived closer to a white school. A Negro child who requested a transfer to the closer white school faced two more hurdles. First, the student had to score "well above" the median of the white class to which he or she sought enrollment. Even if successful, the application was refused if the child's brother or sister were not above the median of the classes which they chose to enter. Citing its opinions in cases from Charlottesville, Norfolk, and Alexandria which held that assignment and transfer criteria must be applied equally, the Fourth Circuit Court of Appeals had no difficulty voiding the Roanoke pupil assignment plan.[40]

In the Roanoke case, the Fourth Circuit Court also singled out the State Pupil Placement Board for special criticism. Technically the State Board made all the assignments for Roanoke. In actual practice the court showed that the State Board

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[39] Green v. School Board of City of Roanoke, 304 F. 2d 118 (4th Cir. 1962). Dual attendance zones referred to a practice where a school district had one set of attendance lines for black children and another set for white children.

[40] Id. at 122-23.

considered only local assignments which were protested. On contested Negro applications, the court found that the State Board "wanted to know if there were any Negro pupils who cannot be excluded from attending white schools except for race."[41] The court's conclusion was that the State Board was preoccupied with race, "and its approach was to find some excuse for denying the Negroes' applications for transfers."[42]

The decisions nullifying dual attendance zones, academic tests for Negroes only, and the minority transfer led to an adjustment in assignment policy by the State Pupil Placement Board and local school boards in the direction of freedom of choice. On May 14, 1963, E. J. Oglesby reported that the distance a Negro lived from a white school and academic qualifications were no longer to be considered in placing a Negro student. Oglesby promised: "If a Negro child wants to attend a school on the opposite side of the county, he will be assigned to that school if a white child in his area is entitled to attend the same school."[43]

Although the thrust of the Fourth Circuit Court of Appeals' decisions was to force school authorities to adopt freedom of choice assignment plans, this court refused to abandon the Briggs dictum as demonstrated in the Richmond school case Bradley v. School Board of Richmond.[44] The fear of black engulfment was

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[41] Id. at 123.

[42] Ibid.

[43] Southern School News, Vol. IX, No. 12 (June, 1963), p. 19.

[44] Bradley v. School Board of City of Richmond, 317 F. 2d 429 (4th Cir. 1963).

especially pronounced in the capital city where, by 1960, black enrollment exceeded white enrollment in the public schools.[45] The Richmond school officials, however, were very successful in limiting desegregation to a token number through the employment of dual attendance zones, a feeder system and a discriminatory use of achievement tests.[46] Furthermore, the Richmond school officials disclaimed any responsibility for integrating the schools by arguing that this responsibility belonged to the Pupil Placement Board.[47] On May 10, 1963, the Fourth Circuit Court enjoined Richmond's discriminatory practices and registered its disbelief that school authorities were unaware of the decisions in Charlottesville, Norfolk, Alexandria and Roanoke which had spoken on these issues.[48] In criticizing the Richmond school officials, the court charged that their assignment plan was not only discriminatory, but that the plan also "demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation."[49] Thus, the court suggested that the Brown decision meant that school officials must attack segregation as well as discrimination. However, in its conclusion, the court returned to the

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[45] Staff Reports submitted to the United States Commission of Civil Rights, Civil Rights U.S.A., Public Schools Southern States, 1962, (Washington, D.C.: Government Printing Office, 1962), pp. 185-88.

[46] Bradley, 317 F. 2d 429, 31-34.

[47] Id. at 435-36.

[48] Id. at 437.

[49] Ibid.

guidelines of Briggs v. Elliot. The plaintiffs, the court held, were not "entitled to an order requiring the defendants to a general intermixture of the races in the schools but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil because of the pupil's race." (the court's emphasis)[50]

By the fall of 1963, the NAACP litigation was yielding steady but not dramatic results. In February of 1959 Negroes entered white schools in Virginia for the first time, a total of thirty blacks being so enrolled. In September of 1963, the beginning of the fifth school year since the end of massive resistance, this number increased to 3,721 or a mere 1.57 percent of the black students enrolled in Virginia's schools.[51] However, Negro lawyers had successfully overturned a number of devices to perpetuate token desegregation such as the dual attendance zones, feeder systems, discriminatory achievement tests and minority transfer plans. With these victories in the background and the most extensive civil rights bill in the nation's history before Congress, Virginia's Negro leaders were ready to attack what Roy Wilkins described as "the largest and

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[50] Id. at 438. On March 18, 1963, in anticipation of the Fourth Circuit Court's order the Richmond School Board dropped dual attendance zones and the feeder system for a "freedom of choice" plan.

[51] Southern School News, Vol. X, No. 6 (December, 1963), pp. 1, 5.

and most successful token integration program in the country."[52] S. W. Tucker, chief attorney for the Virginia NAACP, promised a "big push" to end all segregation in Virginia. The NAACP's effort would end, Tucker promised, "only when there are no white and Negro schools in Virginia, only public schools."[53] As a first step toward implementing this goal, W. Lester Banks, executive-secretary of the NAACP announced that petitions were to be sent to all 128 biracial schools districts asking them to desegregate their schools.[54]

Consistent with their strategy to end all segregated schools, the NAACP initiated suits against school districts which it believed had not gone far enough in eliminating segregation. In pursuing this litigation, the black lawyers continually advanced the argument that the Brown decision prohibited segregation as well as discrimination. In Fairfax County, with a sparse Negro population, the plaintiffs argued that the existence of all Negro schools was evidence of discrimination. Judge Lewis, in Blakeney v. Fairfax County School Board, (1964), disagreed and found that children attended all-Negro schools "solely on account of their place of residence or by choice."[55] When the Negro plaintiffs appealed the decision,

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[52] Ibid., Vol. X, No. 5 (November, 1963), p. 8.

[53] Ibid., Vol. X, No. 7 (January, 1964), p. 2.

[54] Ibid., Vol. X, No. 11 (May, 1964), p. 4-A.

[55] Blakeney v. Fairfax County School Board, 226 F. Supp. 713, 715 (E.D. Va. 1964).

the Fourth Circuit Court of Appeals wrote that "the injunction to prohibit a system of segregated schools . . . should have been granted."[56] On remand, Judge Lewis found the question moot since all the plaintiffs had been assigned to white schools and all Negro children were permitted to attend the closest white school upon request.[57] Judge Lewis denied that the school board had to choose between integrating or closing white schools, as the plaintiffs demanded. "The Supreme Court, he emphasized, had not ordered enforced integration. It has outlawed discrimination."[58] Anticipating the future course of the litigation, Judge Lewis added that school authorities would never have to transport students "for the purpose of integrating those segregated schools."[59]

In Beckett v. School Board of Norfolk, (1964), Judge Walter Hoffman adopted the same position as Judge Lewis in upholding a desegregation plan which utilized a combination of freedom of choice and neighborhood assignments.[60] The Negro

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[56] Blakeney v. Fairfax County School Board, 334 F. 2d 239, 240 (4th Cir. 1964).

[57] Blakeney v. Fairfax County School Board, 231 F. Supp. 1006 (E.D. Va. 1964).

[58] Id. at 1009.

[59] Ibid.

[60] Beckett v. School Board of City of Norfolk, 9 Race Rel. L. Rep. 1315 (E.D. Va. 1964).

attorneys, who pressed for the elimination of all identifiable Negro schools, argued that Norfolk's plan was not adequate until both faculties and student bodies were racially balanced. Judge Hoffman made no apologies for the schools which were still segregated. "This is the principle of the neighborhood school which had received at least tacit approval of the United States Supreme Court when certiorari was denied in Bell v. City of Gary."[61] Continuing, Hoffman thought that "a freedom of choice plan, so long as all children living within a designated area have an equal choice available, is constitutional."[62] Finally, Hoffman emphasized: "A racially desegregated school system was not intended to correct racial imbalance in certain schools."[63] Judge Hoffman argued that desegregation in Norfolk was de facto rather than de jure. Implicit in Hoffman's opinion was the belief that the law of desegregation should not treat Norfolk any differently than a northern city such as Gary.

The demand to desegregate faculties had several objectives. First, the Negro attorneys argued that the racial composition of a faculty contributed significantly to the identification of a school as a white or black school. Second, lawyers

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[61] Id. at 1317. See Bell v. City of Gary, 324 F. 2d 209 (7th Cir. 1963) cert. denied 377 U.S. 924 (1963) in which the federal courts upheld a neighborhood school plan for Gary, Indiana.

[62] Ibid.

[63] Ibid.

hoped to protect black teachers and administrators who were often released following the implementation of a desegregation order.[64] There were a number of educational and sociological reasons for demanding desegregated faculties. The ability of black and white faculty members to work together was, and is still viewed as indispensable in achieving an integrated, as compared to a desegregated, school system. Also, many educators considered it necessary for black children to see Negroes in administrative and supervisory positions.[65] However, the Negro attorneys met stiff resistance in their advocacy of desegregated faculties. Judge Hoffman remarked: "If it is not incumbent upon a school board to 'force' integration among the pupils, why is it required that a school board 'force' integration upon the school faculties."[66]

The tenacity of the Negro attorneys reaped some results in the number of Negroes entering white schools in the fall of 1964. The 11,833 Negroes who attended classes with white students far exceeded earlier expectations for that year. Of all the southern states only Texas had more black students in white schools. Nevertheless only 5.07 percent of Virginia's black

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[64] Southern School News, Vol. XI, No. 2 (August, 1964), p. 5.

[65] Interview, Dr. Robert T. Greene, director of the Technical Assistance Program to assist Virginia School Divisions on Problems Relating to Desegregation.

[66] Beckett v. School Board of City of Norfolk, 9 Race Rel. L. Rep. 1315 (E.D. Va. 1964).

enrollment was in white schools.[67] In terms of numbers, the NAACP strategy of massive litigation was not successful. The time-consuming legal process, as Virginia's leadership expected, worked to the advantage of segregationists. However, the NAACP did succeed in maintaining a steady pressure upon Virginia to integrate its schools. When Congress passed the 1964 Civil Rights Act the NAACP was prepared to take advantage of the federal legislation.

By 1964 the status of the Virginia Conference of the NAACP, as an organization within Virginia, was more secure. For several reasons the campaign to limit the Virginia NAACP's effectiveness had failed. First, the anti-NAACP laws of 1956 and 1959, because of their rather poorly disguised purpose, never received broad editorial support from Virginia's newspapers. Second, the lawyers for the NAACP were never convicted of any gross indiscretions regarding the practice of law. Finally, as a result of the litigation testing the anti-NAACP laws, the activities of this civil rights organization won broad quarantees from the Supreme Court protecting its activities. In NAACP v. Button (1963),[68] the Supreme Court declared

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[67] Southern School News, Vol. XI, No. 6 (December, 1964), p. 1.

[68] N.A.A.C.P. v. Button, 371 U.S. 415 (1963). The other anti-NAACP laws were declared unconstitutional by the Virginia Supreme Court of Appeals in NAACP v. Harrison, 202 Va. 142 (1960), 116 S.E. 2d 55 (1960) and the circuit court of Richmond in NAACP Legal Defense and Education Fund v. Harrison, 7 Race Rel. L. Rep. 864 (1962).

declared unconstitutional the last Virginia statute aimed at thwarting the NAACP, and took a big step in the direction of making the supervision of litigation a constitutionally privileged activity under the Fourtheenth Amendment.[69] This law prohibited attorneys from accepting employment or compensations from persons or organizations which were not parties to judicial proceedings. In the Supreme Court's opinion written by Justice Brennan, the Court said "the activities of the NAACP, its affiliates and legal staff are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession. . . ."[70] Thus as the Negro Revolution in the United States entered a more militant phase, the NAACP appeared decidedly more respectable to white Virginians. On the ninth anniversary of the Brown decision the Norfolk Virginian-Pilot wrote it was "time to re-evaluate the entire civil rights scene." In comparison to the Black Muslims and Martin Luther King, the editor thought: "The NAACP . . . now seems conservative in its reliance on the courts."[71]

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[69]Harry P. Kalven, The Negro and the First Amendment (Chicago: The University of Chicago Press, 1965), pp. 75-86.

[70]Id. at 428-29.

[71]Editorial, Norfolk Virginia-Pilot, May 17, 1963, p. 10.

In the Fall of 1964, with its legal position strengthened and its spirits buoyed by legal victories and the Civil Rights Act of 1964, S. W. Tucker, Chairman of the legal staff of the Virginia NAACP announced that suits would be filed asking the courts to order school boards to initiate plans to end segregation. Beginning in 1965, Negro attorneys embarked on a legal campaign to place every black child in an integrated classroom.[72]

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[72] Southern School News, Vol. XI, No. 5 (November, 1964), p. 8.

CHAPTER XI

THE ATTACK UPON FREEDOM OF CHOICE

Beginning in 1965 the NAACP concentrated its legal effort on persuading the federal courts that the Brown decision meant all Negro children had the right to attend desegregated public schools. After unsuccessfully petitioning Virginia school boards to draw up voluntary desegregation plans, in March of 1965 Negro lawyers filed eight law suits asking the courts to order the defendant school boards to take the initiative in desegregating their classrooms. Negro lawyers promised as many as fifty such suits in Virginia until the responsibility for desegregation was shifted from solitary Negroes to the respective school boards.[1]

By 1965 the greatest legal obstacle to desegregation was the freedom of choice plan. Although it permitted students to enroll in any school within a school district, the initiative for admission and the burden of transportation were placed with the Negro parent or child. In other words, responsibility for desegregating the public schools still rested with the blacks rather than the school officials. Black leaders feared a casual acceptance of freedom of choice for two reasons. First,

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[1] Southern School News, Vol. XI, No. 10 (April, 1965), p. 7.

they were convinced that parental inertia meant that actual desegregation would be negligible. W. Lester Banks, executive secretary of the Virginia Conference of the NAACP, wrote to the state branches that white school officials were aware that "Negro parents are too indifferent, too afraid and too satisfied and contented to accept the responsibility of helping their children escape from the damaging effects of a Jim Crow educational system."[2] Secondly, without white students in "black" schools, Negro leaders were persuaded that the "black" schools would not receive the same financial support as "white" schools.[3]

On April 7, 1965, in a 3 to 2 decision a freedom of choice plan was upheld by the Fourth Circuit Court of Appeals in Bradley v. School Board of the City of Richmond.[4] In 1963 the city's school officials erased all school boundaries, although free choice was limited by the enrollment capacity of the school which the student desired to attend. The Negro plaintiffs did not question the existence of a freedom of choice plan, but argued that the plan failed to eliminate segregation. However, in the opinion of the majority, written

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[2] Ibid., Vol. XI, No. 12 (June, 1965), p. 5.

[3] Richmond Times-Dispatch, November 18, 1971, p. C-1. Financial statistics reported by the Citizens for Excellent Public Schools, a Richmond biracial organization dedicated to strong public education, supported this argument.

[4] Bradley v. School Board of the City of Richmond, 345 F. 2d 310 (4th Cir. 1965).

by Judge Clement Haynsworth, the Briggs dictum still governed desegregation suits. "It has been held again and again . . . that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination," wrote Haynsworth.[5] Within the boundaries of the Briggs dictum, it followed logically that freedom of choice was a perfectly "acceptable device for achieving a legal desegregation of schools."[6] Although free choice resulted in little desegregation, Haynsworth found this the result of "voluntary associations" which were not prohibited by the law.[7]

Failing to see any mandate under the Constitution to order actual desegregation, Judge Haynsworth also saw the plaintiffs plea for desegregated faculties as irrelevant in this case. The plaintiffs, he wrote, had failed to demonstrate any relationships between teacher assignments and pupil discrimination. Curiously, although Haynsworth saw the connection between teacher-pupil desegregation as "speculative," he predicted that desegregation in teacher placement would be achieved after the elimination of pupil discrimination.[8]

The dissent, written by Judge Simon Sobeloff, doubted that the Richmond scheme was "a plan of desegregation." The test of any desegregation plan, Sobeloff argued, depended on whether the initiative came from the school board and whether

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[5] Id. at 306.

[6] Id. at 318.

[7] Id. at 316.

[8] Id. at 320-21.

the plan achieved actual results.[9] Sobeloff suggested that freedom of choice might be just another "strategic retreat to a new position behind which the forces of opposition will regroup."[10] His opinion was predicated on the testimony of a Richmond school official who saw no obligation to integrate schools, and on Richmond's long record of resistance to desegregation. Considering the history of lost opportunity, Sobeloff charged that school administrators must "bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory."[11] On the subject of faculty desegregation, Sobeloff saw a direct relationship between the racial composition of faculty and student bodies. The racial complexion of the faculty, he explained, contributed to the identification of schools as either "white" or "black." Sobeloff envisioned no obstacle to simultaneously desegregating teachers and pupils.[12]

On the same day that the Richmond school plan was accepted, the Fourth Circuit Court of Appeals upheld a school assignment plan based on geographic zoning in the city of Hopewell.[13]

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[9] Id. at 321.

[10] Id. at 322.

[11] Ibid.

[12] Id. at 324.

[13] Gilliam v. School Board of the City of Hopewell, 345 F. 2d 325 (4th Cir. 1965).

The plaintiffs had claimed that some of the school lines were gerrymandered to preserve segregation and that the general result of the assignment plan was to promote segregation. However, the Court, through Haynsworth, found that the school boundaries were not gerrymandered to perpetuate segregation.[14] Haynsworth agreed that segregation was increased but added that this was not because of school board policy but because of existing "residential segregation."[15] More importantly, Judge Haynsworth believed that the law offered no legal method of destroying segregated schools in Hopewell or similar school systems. "The Constitution," he wrote, "does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."[16]

Judges Simon Sobeloff and J. Spencer Bell in a separate concurring opinion accepted the concept of a neighborhood system but with a significant reservation. They counseled: "In applying the neighborhood school concept, the school board . . . must keep in mind its paramount duty to afford equal educational opportunity to all children without discrimination; otherwise, school building plans may be employed to perpetuate and promote segregation."[17] By inference, the

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[14] Id. at 328.

[15] Ibid.

[16] Ibid.

[17] Id. at 329.

Sobeloff-Bell qualification meant that the neighborhood school, though convenient, was not sacred when it interfered with equalizing educational opportunity.

The Haynsworth-Sobeloff exchange presented, in microcosm, the two poles of the school debate from 1965 to 1972. Judge Haynsworth accepted freedom of choice assignment plans, endorsed the neighborhood school, and opposed techniques for ensuring actual desegregation. Judge Sobeloff thought that the true test of any school plan under the Brown decision was its contribution to desegregating the schools. The logical extension of this position was an approval of faculty desegregation, busing, consolidation, or any other technique which seemed to increase the probability of school desegregation.

The Richmond Times-Dispatch approved of the Fourth Circuit's decision in Bradley and warned that "unless it wants to break new ground and go beyond the 1954 ruling, the high tribunal will uphold the view so soundly presented yesterday by the Fourth Circuit majority."[18] However, when the NAACP proceeded immediately to appeal the Bradley and Gilliam cases, the Warren Court responded by indicating a readiness to explore techniques for maximizing school desegregating.[19] In granting certiorari, the Supreme Court consolidated the Bradley and

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[18]Editorial, Richmond Times-Dispatch, April 8, 1965, p. A-16.

[19]Bradley v. School Board of the City of Richmond, 382 U.S. 103 (1965).

Gilliam cases for the limited purpose of determining whether the Fourth Circuit could approve school plans without considering, in a full hearing, the effect of alleged racial discrimination in faculty apportionment on the student assignment plans. On November 15, 1965, the Supreme Court found "no merit to the suggestion [by the Fourth Circuit Court of Appeals] that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative."[20] Thus, the Court remanded the case to the district court for full evidentiary hearings on this issue. In March of 1966, Judge John D. Butzner, Jr. approved a faculty desegregation plan for Richmond which provided for recruitment and assignment policies aimed at desegregation.[21]

In seeing a symbiotic relationship between faculty and student segregation, the Supreme Court, for the first time, went beyond affirming Brown I to engage cautiously in the details of desegregation.[22] Although it restricted the hearing in the Bradley and Gilliam cases to faculty assignments, the

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[20] Id. at 105.

[21] Bradley v. School Board of the City of Richmond, XI Race Rel. L. Rep. 1289 (E.D. Va. 1966).

[22] Jack Greenberg, "The Supreme Court, Civil Rights and Civil Dissonance," Yale Law Journal, 77 (July, 1968), 1520. Greenberg saw the Bradley case as the Supreme Court's first attempt at outlining the details of desegregation. He suggested that the Civil Rights Act of 1964, by giving school desegregation legislative support, sparked greater judicial activism in implementing Brown I.

Supreme Court wrote that this did not preclude further examination of the school plans. Furthermore, it warned: "Delays in desegregating school systems are no longer tolerable."[23] Thus, the Supreme Court gave notice of its impatience with "deliberate speed" and forewarned its subsequent disapproval of school plans which did not lead to desegregation.

The attempt to make desegregated education a reality in Virginia and elsewhere, gained impetus from the passage of the Civil Rights Act of 1964.[24] Up to 1964 the burden of desegregation had rested completely on the shoulders of black children and the courts. However, the Civil Rights Act of 1964 provided the federal government with an administrative method of attacking segregated schools. Title VI of this law prohibited discrimination in federally funded programs.[25] Refusal to comply triggered a procedure for termination of federal funds.[26] Thus, the Office of Education in the Department of Health, Education, and Welfare, to which was delegated the responsibility of promoting desegregation, was armed with a powerful financial weapon in its assault on dual school systems. To Southerners the federal government's financial leverage appeared even more

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[23] Bradley, 382 U.S. at 105.

[24] 78 Stat. 241, 42 U.S.C. 2000 a-1 (1964).

[25] Civil Rights Act of 1964, sec. 601, 78 Stat. 241 (1964), 42 U.S.C. 2000d (1964).

[26] Civil Rights Act of 1964, sec. 602, 78 Stat. 241 (1964), 42 U.S.C. 2000d-1 (1964).

ominous when Congress increased the amount of federal funds for southern schools in the Elementary and Secondary Education Acts of 1965.[27] Finally, the Civil Rights Act of 1964 provided a mechanism by which the United States Attorney General was permitted to initiate suits against stubborn school boards.[28]

The story of HEW's educational victories and defeats in Virginia has already been told by Gary Orfield.[29] At first glance, the results of the federal government's effort, when contrasted with the first ten years of implementation, were dramatic. The percentage of Negro students in desegregated schools jumped from five percent in 1964, to eleven percent in 1965, to twenty percent in 1966.[30] However, this picture of relatively impressive progress in the rate of desegregation in Virginia was in fact distorted, since HEW was most successful in the less resistant areas of Virginia, where the Negro population was small.[31] By contrast, desegregation in Virginia's black belt counties, following three years of freedom

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[27]79 Stat. 27 (1965), 20 U.S.C. 236 (1965).

[28]Civil Rights Act of 1964, sec. 407, 78 Stat. 241 (1964), 42 U.S.C. 2000 c-6 (1964).

[29]Gary Orfield, The Reconstruction of Southern Education (New York: John Wiley & Sons, 1969), pp. 208-63.

[30]Ibid., 227, 250-57.

[31]Ibid. 227.

of choice, was frozen at token levels.[32]

There were four broad explanations for the failure of the federal government in Tidewater and Southside Virginia. First, federal implementation of desegregation guidelines was not vigorous. HEW, for example, used its most potent weapon, the fund cutoff, infrequently and reluctantly. This caution was partially explained by the political pressure applied by Southern politicians on HEW to relax the enforcement of desegregation guidelines. Equally important, however, HEW officials believed that the fund cutoff worked its greatest damage on the poor and the black who desperately needed federal funds. Politically and educationally, in other words, the fund cutoff technique had serious strategic drawbacks.[33] Also contributing to the ineffectiveness of the federal government in Virginia was the poor record of the Justice Department in instituting desegregation suits. Limited staffing, concentration on the Deep South, and cumbersome public complaint procedures were factors in the Justice Department's inactivity in Virginia.[34]

A second obstacle to desegregation was the freedom of choice plan. Although HEW considered the elimination of

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[32]Report of the Virginia State Advisory Committee to the United States Commission on Civil Rights, "The Federal Role In School Desegregation In Selected Virginia Districts," 1968, pp. 24-25. (Mimeographed.)

[33]Orfield, Southern Education, pp. 259-63.

[34]Ibid., p. 256

desegrated schools its ultimate objective, local officials interpreted the adoption of freedom of choice plans, whatever the result, to be legal and final.[35] Thus, by initially accepting freedom of choice, HEW officials lost their capacity to negotiate new school plans which would provide for greater desegregation.

Thirdly, state and local officials played an important role in the failure of desegregation in the black belt counties. The Virginia State Advisory Committee to the Commission on Civil Rights found that one of the keys to destroying dual school systems involved changing the attitude of local school officials. In black belt counties, the Committee reported that school officials took no initiative to end discrimination until there was a complaint.[36] On the state level, the Department of Public Instruction did not prod local officials to increase the pace of desegregation. The deputy superintendent of the State Department of Education, Harry Elmore, who administered the state's compliance with the 1964 Civil Right's Act, thought that it was unwise "politically or otherwise. . . for our department to align itself with the federal government."[37] Furthermore, Elmore refused to allow his office to become "a means

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[35] Ibid., p. 244; Virginia State Advisory Comm., pp. 13, 21.

[36] Virginia State Advisory Comm., pp. 9, 22-23.

[37] Bradley v. School Board of the City of Richmond, 338 F. Supp. 67, 153 (E.D. Va. 1972).

of getting information that HEW should get from the locality."[38] Although the state officials, according to Gary Orfield, saw themselves as "neutral bystanders, conveying information,"[39] their "neutrality" benefited local officials opposed to desegregation.

Finally, federal implementation of desegregation guidelines in Virginia was hindered by national disaffection with the civil rights movement. Initially, in Virginia, HEW won its early desegregation victories by capitalizing on the last stages of the national drive for civil rights and the movement's impact on Virginia's politics. The grip of the rural leadership over the fortunes of the Democratic party was finally weakened by the rapid increase of the Negro vote and the steady growth of the urban delegation to the state's General Assembly. Virginia's blacks also benefited from federal action which facilitated voter registration.[40] Likewise, urban Virginia picked up eleven seats in the 1964 General Assembly as an aftermath to the Supreme Court reapportionment ruling in Reynolds v. Sims.[41]

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[38] Id. at 152. It was not until 1970 that the Virginia Department of Education applied for a federal grant to establish a staff trained to assist school boards in the transition from a dual to unitary school systems. Id. at 154.

[39] Orfield, p. 220.

[40] Buni, Negro in Virginia Politics, p. 229; Wilkinson, Harry Byrd, pp. 258-59, 334.

[41] 337 U.S. 533 (1964); Wilkinson, p. 248.

The impact of the new voting trends was best represented in the 1965 race for governor which was won by Mills Godwin, a former massive resister. The Godwin platform made education Virginia's highest priority and won the endorsement of labor, Negroes, conservative businessmen, and organization stalwarts.[42] By 1967, however, it was politically possible, for various reasons, to take a stand against desegregation guidelines that extended beyond freedom of choice. First, the waning of the national civil rights movement removed a source of important pressure of Virginia's politicians. Second, resegregation in the northern cities made Virginia's relative progress in school desegregation appear more dramatic and defensible. This was especially so since freedom of choice was considered the limit of the law. Thirdly, in view of national racial problems, the attempt by the federal government to go beyond freedom of choice encouraged a conservative rural-suburban voting coalition against further desegregation techniques.[43] This convergence of the national mood with state opposition to steps beyond freedom of choice threatened to bring desegregation to a standstill. Fearing such a result, the NAACP Legal Defense and Education Fund and the Virginia Conference of the NAACP looked to the courts for rulings which would break the stalemate.[44]

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[42] Wilkinson, pp. 263-84.

[43] Orfield, pp. 260-63.

[44] Ibid.

After the Fourth Circuit Court of Appeals upheld freedom of choice in the Richmond case, civil rights lawyers consistently asked the courts to move beyond freedom of choice to increase the speed of school desegregation. Between 1965 and 1967 the assault upon freedom of choice made some headway in western and northern Virginia where the Negro population was small. In these "pepper and salt" areas, the black lawyers argued that there was no administrative obstacle to complete desegregation. Freedom of choice, they submitted, applied only to urban areas. For example, in Bell v. School Board of the City of Staunton[45] the black plaintiffs won an important victory when the city schools were ordered to close all "Negro" schools and to assign all students according to non-racial geographic zones.[46] Although Judge Thomas J. Michie did not reject the principle of freedom of choice, he thought geographic zones were superior in areas of sparse Negro population.[47]

The breakthrough in the campaign against freedom of choice was achieved on May 27, 1968, in the Supreme Court's decision in Green v. County School Board of New Kent County.[48] New Kent County was a sparsely populated black belt county east

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[45] Bell v. School Board of the City of Staunton, 249 F. Supp. 249 (W.D. Va. 1966).

[46] Id. at 251.

[47] Ibid.

[48] 391 U.S. 430 (1968).

of Richmond, in which white and black students were bused to segregated schools located at opposite ends of the county. Since freedom of choice had not succeeded in desegregating the public schools, the plaintiffs asked for assignment plans based on geographical zoning. Justice William J. Brennan's opinion laid to rest the dictum that the Brown decision merely prohibited discrimination as Judge Parker had written in Briggs v. Elliott. Instead, Justice Brennan asserted, "the transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."[49] Moreover, the school boards, rather than the parents, were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[50] A school board, the Court held, must produce a plan that promised "to work now"[51] rather than at some distant undetermined point in the future.

The Supreme Court did not categorically rule out the use of freedom of choice as a technique for attacking segregation. However, freedom of choice was reduced to only one of a number of means potentially useful in desegregating public schools. If other methods promised to be more effective, the Court said, "freedom of choice must be held unacceptable."[52]

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[49] Id. at 436.

[50] Id. at 437-38.

[51] Id. at 439.

[52] Id. at 441.

In Richmond, whose schools had been operating under a freedom of choice plan since 1965, the News Leader blasted the Supreme Court for trying "to satisfy the capricious appetites of sociology gone mad." The ruling, the editorial continued, was "merely the logical extension of the mistaken notions of equalitarianism that have affected the Court for years." In undermining the so-called principle of free choice in public education, the paper contended that the Court "denied the ability of parents--white and black--to select the schools their children will attend." Finally, contrary to the "sociology of the New Left," the News Leader explained that de facto segregation was the "will of the people, black and white."[53]

The shock registered by the News Leader was not shared by the more moderate Virginian-Pilot. The Norfolk paper reminded its readers that the circuit courts and the "Supreme Court Justices have been indicating that the Brown rules are no longer adequate."[54] However, the Virginian-Pilot doubted the wisdom of the broad condemnation of identifiably Negro schools. From the perspective of the city, the New Kent case was easy since that county's housing was, in effect, already integrated. But, the advantages of massive desegregation in Norfolk were outweighed by the costs of achieving this goal, according to the Virginian-Pilot.[55]

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[53]Editorial, Richmond News Leader, May 28, 1968, p. 14.

[54]Editorial, Norfolk Virginian-Pilot, May 28, 1968, p. 14.

[55]Ibid., June 3, 1968, p. 16.

Following the Green decision, the desegregation controversy was centered in Virginia's cities, especially Norfolk and Richmond, which had large black populations. The NAACP asked the courts to order the school boards to devise assignment plans which eliminated black schools. As a guideline, the NAACP lawyers thought that the ratio of black to white students in each school should reflect the racial composition of the entire school system. In order to achieve this goal, where housing patterns served as obstacles to integration, the black plaintiffs considered bus transportation a legitimate desegregation tool. The appeal to destroy barriers to desegregation through busing, however, touched off an emotional response which paralleled the reaction to Brown I.

In the federal district court, black plaintiffs challenged the Norfolk assignment plan which left large percentages of Negro children in all black schools. The plaintiffs argued that the law required the elimination of all black schools and that busing was a legally acceptable means of achieving this goal. In Beckett v. School Board of Norfolk (1969), Judge Walter Hoffman held that constitutional principles did not require racial balancing in each individual school when busing was required to accomplish this end.[56] Although Hoffman recognized the adverse effects of segregation, its remedy, he wrote, had to be consistent "with a sound educational system."[57] In his

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[56] Beckett v. School Board of City of Norfolk, 308 F. Supp. 1274, 1276 (E.D. Va. 1969).

[57] Id. at 1283.

judgment, busing was an obnoxious remedy particularly when it involved young children. In addition to the expense of busing, its "principle [sic] vice," Hoffman wrote, was "the time required in getting to and from school."[58]

In Norfolk, the school board defended its assignment plan by arguing that the board was guided by the most recent social science data. The perpetuation of black schools was defended by the school board on the grounds that the social class mix of the student body, rather than race was the most important factor in determining school assignments. This contention was based on the famous study, Equality of Educational Opportunity, better known as the Coleman Report, which found that the most significant correlate of educational achievement for all children was the social class mix of the student body.[59] More importantly, the Coleman Report found that the student milieu had its greatest "effect on those [students] from educationally deficient backgrounds."[60] In Beckett v. Norfolk (1969), Hoffman accepted the information regarding the influence of social class as evidence against the advisability of correcting racial imbalances. As far as educational achievement was concerned, he considered race "definitely a secondary factor."[61] In fashioning an assignment plan for Norfolk, Hoffman observed: "We

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[58] Id. at 1302.

[59] James S. Coleman et al., Equality of Educational Opportunity (Washington, D.C.: Government Printing Office, 1966), p. 304.

[60] Ibid.

[61] Becket 308 F. Supp. 1274, 1285.

cannot believe that the Supreme Court, in requiring 'desegregation,' has merely ordered a mixing of racial bodies without consideration of the social class factor."[62]

The assumption that attainment of the best social class mix was a primary objective also served as an argument against busing and eliminating all black schools. Forcing desegregation, Judge Hoffman stressed, led to the flight of the white middle class from the city. As a result, he concluded, the best educational mix would be permanently unobtainable in Norfolk schools.[63] Furthermore, Hoffman saw nothing objectionable in all-black schools when the majority of their enrollment was middle class.[64] He bolstered his case for retaining all-black schools by citing the evidence of educational experts who thought desegregation worked best in schools which were sixty to seventy percent white.[65]

In fashioning a busing plan for Norfolk, Judge Hoffman made a plea for a national application of the desegregation laws. "We cannot believe that the Constitution may be interpreted one way for a group of states, and still another way for

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[62] Ibid.

[63] Id. at 1287-88.

[64] Id. at 1285. This contradicted the findings of Racial Isolation which indicated that middle-class black students benefited academically from integrated classrooms.

[65] Id. at 1290-91.

the remaining states."[66] The target of Hoffman's dissatisfaction was the de facto "escape hatch" of Northern cities. Although the Civil Rights Act of 1964 prohibited busing to achieve racial balance,[67] the courts held that this provision only applied to situations of de facto segregation.[68] However, Hoffman declared that all school segregation--North and South--was essentially de jure. Listing discriminatory legislation in state after state prior to 1954,[69] Hoffman concluded: "Even when such statutes were repealed prior to 1954, the pattern of segregation may have been so well established that its continued existence could only be de jure."[70] Thus Hoffman proposed that the courts should no longer consider the "de jure - de facto issue . . . a determinative factor in arriving at what is required under Brown I."[71] Instead, Hoffman suggested that the affirmative mandate to desegregate must fit

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[66] Id. at 1305.

[67] Civil Rights Act of 1964, sec 407 (a) (2) Stat. 241 (1964), 42 U.S.C. 2000 c-6 (1964).

[68] U.S. v. Jefferson County Board of Education, 372 F. 2d. 836, 878-86 (5th Cir. 1966); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S.1, 17 (1971).

[69] Beckett, 308 F. Supp. 1274, 1311-1315.

[70] Id. at 1304.

[71] Id. at 1305.

the circumstances of the school systems.[72] Courts were not required to order the "impossible . . . unreasonable, unpracticable."[73] Applying this rule to Norfolk, Hoffman refused to order busing in the first three grades or to erase all of Norfolk's black schools.[74]

The case that Judge Hoffman made for sectional equity was a powerful one. Reasonable men also were impressed by his logic that the attempt to achieve the perfectly desegregated school system was self-defeating, given the willingness of white parents to leave the system. The moderate Virginian-Pilot agreed with Hoffman's thesis that the distinction between de jure and de facto segregation was "a distinction without a difference." An editorial saw Hoffman's views as a "return to sanity."[75] Virginia also hoped that a tougher policy toward the North might bring relief to the South. But the most significant aspect of Hoffman's opinion was his use of social science data to defeat desegregation. Hoffman justified continuation of all-black schools as consistent "with sound educational principles." Thus, Judge Hoffman's opinion realized the fears of earlier commentators of the first Brown decision. Some legal scholars were apprehensive that Brown I rested too heavily on

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[72] Ibid.

[73] Id. at 1278.

[74] Id. at 1279.

[75] Editorial, Norfolk Virginian-Pilot, January 1, 1970, p. A-8.

social science evidence. New evidence, they had feared, might be used to slow or stop the desegregation process.[76]

To the plaintiffs in the Norfolk case, Hoffman's ruling was totally unacceptable, and in the Fourth Circuit Court of Appeals they immediately appealed Hoffman's decision refusing to order busing in the first three grades and limiting desegregation to schools which were sixty percent white.[77] The Fourth Circuit found Hoffman's order impermissable in view of the Supreme Court's decisions in Green v. New Kent County and Alexander v. Holmes and ordered the school boards to devise a plan so that "no pupil is excluded because of his race from a desegregated school."[78] Moreover, the Court held that the

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[76]Edmond Cahn, "Jurisprudence," New York University Law Review, 30 (January, 1955), 150. Professor Cahn did not find Brown I determined on social scientific evidence, but he warned of the dangers of basing constitutional rights on such evidence. Herbert Wechsler, "Toward Neutral, Principles of Constitutional Law," Harvard Law Review, 73 (November, 1959), 31-35. Professor Wechsler like Cahn did not think Brown I was decided on social science data, but did point out the legal problems raised by such evidence.

[77]Brewer v. School Board of the City of Norfolk, 434 F. 2d. 408 (4th Cir. 1970).

[78]Id. at 1410. The Court found nineteen black elementary schools, eleven all white elementary schools, three all black junior high schools and one all white senior high school in Norfolk. In Alexander v. Holmes, 396 U.S. 19 (1969), a Mississippi desegregation case, the Supreme Court reaffirmed the Green decision by holding that the "obligation of every school district is to terminate dual school systems at once and to operate hereafter only unitary schools."

legal ramifications of the social science data were unconstitutional. A "rigid adherence to quotas," wrote the Court, "preserves traditional racial characteristics of its schools."[79] The result "is the antithesis of a racially unitary system."[80]

In August of 1970, Judge Hoffman accepted a Norfolk desegregation plan which provided for more extensive busing in order to desegregate the schools. Although he authorized the new school plan, Hoffman caustically observed that it was accomplished with "a gun at my back."[81] In other words, his freedom of action was restricted by the higher courts. Predictably, Judge Hoffman could not resist one more parting verbal slap at the NAACP and the federal government who, he charged, were "forcing integration solely for the purpose of mixing bodies."[82]

As the federal courts ordered school boards to make desegregation a reality in Norfolk, the school controversy returned to Richmond, where on March 10, 1970, black plaintiffs asked that freedom of choice be abandoned for a unitary school system. Since freedom of choice failed to desegregate the schools the plaintiffs asked the court to accept a busing plan which, they hoped, would destroy the dual school system in Richmond.[83]

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[79] Id. at 411.

[80] Ibid.

[81] Norfolk Virginian-Pilot, August 13, 1970, p. 1.

[82] Ibid.

[83] Richmond News Leader, March 10, 1970, p. 1.

This plea touched off an explosion. Although opposition to busing was vigorous in every Virginia city, Richmond's past and present combined to set off a reaction reminiscent of massive resistance. Since 1954, the capitol city, especially through its daily newspapers, had provided a stream of arguments protesting the invasion of states' rights by the federal judiciary. As the voice of Richmond's conservative white Westend, the editorial pages of the city's jointly-owned newspapers lashed out at busing and the courts.

The defense of individual liberty and states' rights explained only a part of the city's reaction. Beneath the rhetoric was the more fundamental question of whether or not Richmond was on the verge of becoming a black city. Unlike Lynchburg, Roanoke, or Norfolk, black students already made up a majority of the school population.[84] In 1970, the total white population of the city, supplemented by a contested annexation, barely exceeded the Negro population.[85] The critics of busing correctly viewed the composition of the schools as a factor in maintaining the white balance. They recognized that, between 1965 and 1970, freedom of choice had played an important role in perpetuating white schools and checking white flight. Thus, crosstown busing to achieve desegregation was not only

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[84] Richmond Times-Dispatch, July 24, 1970, p. A-1. When the suit was reopened, sixty percent of the 50,000 Richmond public school system was black. Norfolk's schools included 24,000 Negro students, or approximately forty-two percent of the total enrollment.

[85] Richmond Times-Dispatch, May 10, 1971, B-1.

an educational problem, but a vital issue in the political, social, and economic future of the city.

In the spring and summer of 1970, as the Richmond School case was considered by the federal district court, the Richmond newspapers flailed away at the concept of enforced desegregation. In developing their case, the Times-Dispatch and News Leader emphasized several major themes. First, in opposing busing, the Richmond dailies attempted to disconnect their protest from the heritage of massive resistance. They formulated an argument which offered a broad urban appeal rather than one that was narrowly southern. In March of 1970, for example, the News Leader charged: "Integration is one thing: By and large the nation accepts it. But busing is quite another thing: Busing for the purpose of integration is unacceptable to most Americans."[86] Secondly, the editorials vehemently attacked the claims of educators who claimed that integration increased educational achievement. A News Leader editorial reported: "Scientific thought remains divided. Some sociologists believe that white children suffer when educated in all black schools; others believe that black children who attend integrated schools lose their sense of racial identity and pride."[87] The Times-Dispatch preferred "to educate children where they are, with special attention to basic educational needs . . . over

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[86]Editorial, Richmond News Leader, March 16, 1970, p. 8.

[87]Ibid., July 29, 1970, p. 10.

feather-brained machinations to juggle racial percentages."[88] Thirdly, the Richmond papers passed as defenders of black culture. A News Leader editorial explained that: "Now, through forced integration Negroes find their racial culture and their racial identity threatened and increasing numbers of them no longer want forced togetherness. They want their own schools, in which their culture can be preserved, and they want to exercise control over their schools."[89] Mimicking the rhetoric of black nationalists, the News Leader claimed that: "It is racist to contend that a child cannot get a good education unless he is in a class with X or Y or Z number of children of another race."[90] Finally, the editorials played on the arbitrary nature of the federal judiciary. The editors embellished the principle of free choice and asked Virginia's leaders to make their stand on this issue. "Freedom of choice does not smack of massive resistance," wrote the News Leader.[91] It is "what makes this country tick," claimed the Times-Dispatch.[92] Two years after the Green decision, the News Leader still claimed that "Richmond's school problems . . . stem from a lack

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[88]Editorial, Richmond Times-Dispatch, March 13, 1970, p. F-6.

[89]Editorial, Richmond News Leader, July 22, 1970, p. 12.

[90]Ibid., July 24, 1970, p. 10.

[91]Ibid., July 30, 1970, p. 10.

[92]Editorial, Richmond Times-Dispatch, July 19, 1970, p. F-6.

of clear definitions and constitutional interpretations of the Supreme Court of the United States."[93]

Between March and August of 1970, the opponents of busing received two major setbacks. First, an effort by fourteen Virginia legislators to persuade Governor Linwood Holton to direct the state to intervene in all desegregation suits and to suspend all desegregation plans until the Supreme Court ruled on racial balance was a failure.[94] Recalling the past, the petition of the legislators, some of whom were veteran "massives," held that "the state is primarily responsible for the operation of an efficient public school system."[95] The News Leader which supported their strategy, wrote, "The public hears time and again that in Virginia, the localities are creatures of the State. By the same reasoning, the State is the level of government to stand firmly on freedom of choice especially as the doctrine has been practiced in Richmond."[96] But Governor Holton resisted the pressure to make Virginia a party to the Richmond suit. Urging calmness and rationality, Holton counseled against dragging the schools into the thicket of political expediency.[97]

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[93]Editorial, Richmond News Leader, August 26, 1970, p. 10.

[94]Richmond News Leader, July 29, 1970, p. 1.

[95]Ibid.

[96]Editorial, Ibid., July 30, 1970, p. 1.

[97]Richmond News Leader, August 4, 1970, p. 1.

The second defeat for the antibusing forces was inflicted by a new federal district court decision which concluded that transportation was "an acceptable tool" for achieving a unitary school system.[98] Judge Robert R. Mehrige, Jr. rested his opinion on three major points. First, he demonstrated that the change in the racial composition of the public schools since the adoption of freedom of choice in 1965 was minimal.[99] The Mehrige opinion on this point was especially strong, since the Richmond School Board admitted that it was not operating a unitary school system.[100] Next, Mehrige held that Richmond's segregation was de jure. Racially restricted covenants, public housing, and urban renewal projects, he wrote, were designed to perpetuate segregation. The Judge concluded: "Negroes in Richmond live where they do because they have no choice."[101] Since "residence in a neighborhood is denied to Negro pupils solely on the ground of color," he rejected a neighborhood school plan as an acceptable alternative to busing.[102] Finally, Judge Mehrige wrote that since the

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[98] Bradley v. School Board of the City of Richmond, 317 F. Supp. 555, 576 (E.D. Va. 1970). The interim mixing plan ordered in this decision called for the transportation of approximately 13,000 students. On April 5, 1971, Judge Mehrige approved a plan which added another 8,000 students to those already bused to school.

[99] Id. at 560-61.

[100] Id. at 558.

[101] Id. at 564.

[102] Id. at 566.

Green decision school officials had the affirmative duty to dismantle dual school systems.[103]

The Mehrige opinion carefully defined the terms which had evolved in the course of the school litigation. In the Norfolk case, Judge Hoffman had used the findings of educational testing to argue for white majorities in desegregated schools. However, Judge Mehrige now argued that the establishment of majority white classrooms had no relation to the requirements of the law. Richmond's constitutional responsibility was to create a unitary school system, and, to effectuate a unitary school system "a racial balance is not required."[104] But what was a unitary school system? According to Judge Mehrige it was a school system in which the "racial identities of the schools" were not "readily discernible."[105]

Judge Mehrige's decision made him the most unpopular public official in the Richmond area. Yet, his ruling was the logical culmination of the Brown decision. The dilemma of federal judges, like Mehrige, was capsulized by Alexander M. Bickel, Yale Professor of Law and a critic of busing. Federal judges who wished to guarantee equal educational opportunity, he observed, ordered busing "because that's all a court knows how to do" to achieve this goal under the Constitution.[106]

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[103] Id. at 576.

[104] Id. at 564.

[105] Ibid.

[106] Bill Connelly, "Bickel, Busing Foe, Hits Amendment," Media General News Service in Richmond Times-Dispatch, March 3, 1972, p. A-4.

However, when the Supreme Court in 1971 upheld busing as a method for achieving desegregation, Judge Mehrige's opinion and his refusal to stay his busing order were vindicated.[107]

Between 1965 and 1970 the campaign to eliminate segregated schools scored several important victories in Virginia and the South. The most important was the Green v. New Kent County decision which held that school boards had an "affirmative duty" to create unitary school systems. With this ruling the Supreme Court put to rest the Briggs dictum which held that under Brown school boards merely had to prohibit discrimination. Once the Supreme Court announced that school boards had to take all steps necessary to destroy dual school systems, busing decisions followed and were ultimately upheld in the Swann decision.[108]

These legal victories for desegregation, substantial as they were, were nonetheless, paralleled by a dramatic change in the nation's mood on racial matters. For a moment, in 1965 and 1966, the federal government worked in tandem with the state's energetic NAACP, in spite of a national decline in civil rights enthusiasm. By 1967, however, the federal government responded to the general deterioration in race relations by attacking segregation less aggressively. Against this background, the responsibility for destroying segregation in Virginia's most

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[107] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[108] Ibid.

resistant regions, the cities and the black belt, once again rested with black plaintiffs and the courts.

In Virginia, the desegregation struggle focused on Norfolk and Richmond. Judges Hoffman and Mehrige were confronted with the problems of desegregating cities with difficult administrative problems due to racial housing patterns. Judge Hoffman adopted the position that the requirements of the law must be adjusted to the situation. He disliked busing and predicted that resegregation would neutralize the effects of busing. Although overruled by the higher courts, Hoffman's position won approval in the state. To legal realists, Hoffman's rulings offered a common sense approach. Yet to the black plaintiffs, his decision menant a denial of desegregated education to Negro children. Since no alternative means of desegregating schools was proposed, the plaintiffs doggedly pressed for and won a busing order.

In Richmond, Judge Mehrige argued that regardless of the obstacles to desegregation presented by a city, the Brown decision demanded the immediate creation of a unitary school system. Yet, his opinion was so unpopular that it prompted another wave of white departures from the already majority black public schools. Consequently, both the Richmond School Board and black plaintiffs saw a consolidation with two neighboring counties, Henrico and Chesterfield, as the only means

of assuring a desegregated school system in Richmond and the metropolitan area. Thus, the intractable school problem invited solutions which seemed totalitarian and self-destructive to some and necessary to others. The federal courts, in turn, seemed to be irresistably bound to a course which invited a constitutional crisis. For Richmond, the explosion occurred on January 10, 1972, when Judge Mehrige ordered the consolidation of Richmond, Henrico and Chesterfield public schools.

CHAPTER XII

THE RICHMOND CONSOLIDATION CASE

The decision by Judge Robert Mehrige, Jr. to permit busing as a technique for achieving a unitary school system did not conclude the Richmond litigation. Instead, Judge Mehrige's ruling prompted the Richmond School Board and the black plaintiffs to seek still another remedy for Richmond's predominately black school system. In order to insure Richmond students an integrated education, they asked the district court to order the State Board of Education to merge the city school system with those of the adjoining counties of Henrico and Chesterfield. The consolidation case had nationwide significance, since it offered a possible method of combating urban resegregation by crossing political boundaries to desegregate several school systems with one judicial stroke. Ironically, after ten years of litigation, the major parties in the Richmond case were united in one of the most controversial school cases in Virginia and the nation since Brown I.

With the busing decision, the interests of the school board and the black plaintiffs had become almost identical. The Richmond city schools were already sixty-four percent black and school officials expected the busing order to accelerate

white flight and resegregation. The end result of this process, in the school board's judgment, was a loss of confidence in the Richmond public schools.[1] Black leaders shared the school board's concern for the future of Richmond's schools. They expected the school merger to broaden the economic base of the school system and to increase the opportunities of black and white children to receive a desegregated education.[2]

Underlying the school problem was also a concern for the future stability of Richmond. The reality of rising expenditures and the spector of a shrinking tax base, (an urban dilemma throughout the nation), threatened the future of Virginia's capitol. School merger was viewed by some as a method of fostering greater regional planning, as a means of slowing white flight, and as a way of encouraging open housing. If the citizens of the metropolitan area were unable to escape the city's problems, according to this theory, self-interest would dictate positive action to insure the city's continued vitality. Leading black and white spokesmen also hope that a merger would persuade whites to open their neighborhoods as

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[1] Richmond Times-Dispatch, August 20, 1971, p. A-1. School Superintendent L. D. Adams accounted for the poor reading and achievement scores of city students by their low "socioeconomic level." The proposed metro school system contemplated 105,000 students, of which 78,000 would be bused. The new school system was expected to be about thirty-four percent black. Before the trial Henrico schools were eight percent black and Chesterfield schools nine percent black.

[2] Richmond News Leader, February 4, 1971, p. 20.

a means of avoiding busing.[3] To the plaintiffs, the future of the city and its schools were inseparable. With the help of the federal courts, they hoped to persuade the counties that a healthy city was worth the cost of the inconvenience accompanying consolidation.[4]

The action taken by the Richmond School Board, however, only escalated the ill-will existing between the city and the counties. In the 1971 meeting of the General Assembly, both Henrico and Chesterfield counties, the principal targets of Richmond's school consolidation suit, made applications for city charters. The motivation of the counties was twofold. First, they hoped that city status might prove useful in fighting a school merger. Before a joint hearing of the Senate and House committees on counties, cities and towns, Linwood E. Toombs, a member of the Henrico County Board of Supervisors, said: "I wouldn't deny for one moment that one of the large considerations in this charter bill was the current joinder motion that the city filed."[5] Secondly, city status offered a guarantee against future annexation suits

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[3] Richmond Times-Dispatch, August 17, 1971, p. A-1. Thomas C. Little, Richmond's associate superintendent testified that merger would spark open neighborhoods; Richmond Afro-American, January 15, 1972, p. 1. Henry L. Marsh III, Richmond's black Vice-Mayor predicted that Judge Mehrige's decision would help remove discrimination in housing and jobs.

[4] Richmond Times-Dispatch, August 17, 1971, p. A-1.

[5] Richmond News Leader, February 4, 1971, p. 20.

planned by Richmond.[6] Many county residents did not want to be absorbed by the city, especially after Judge Mehrige's busing decision. The urgent request by the counties for a city charter was one expression of the volatility of the emotion-laden school issue. The General Assembly's solution was a compromise which imposed a five year moratorium on annexations and on granting city charters in the Richmond area.[7] It hoped that time and study might afford the Richmond area and the state an opportunity to deal with this problem in a calmer atmosphere.

As the metropolitan area waited for the consolidation trial, it turned its attention to the busing controversy. The Richmond newspapers represented the position of the antibusing forces as they surveyed the busing experiment in Richmond and the nation. Regarding the city's experiment, most of their attention was focused on administrative breakdowns and racial tensions which accompanied the transition from freedom of choice to crosstown busing. School violence, a sensitive public issue, received special treatment in the News Leader. An editorial entitled "The Schools Decline," included a list of violent acts by race which showed that white students were always the victims of interracial conflict.[8] Although the News Leader offered several explanations for the disorders,

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[6] Ibid.

[7] Acts of the General Assembly, Chapter 234, Reg. Sess. 1971, p. 466.

[8] Editorial, Richmond News Leader, March 8, 1971, p. 10.

the editorial had the effect of confirming white opinion that racial harmony was best achieved through separation. The Richmond School Board, in turn, recognized that a crucial factor in winning the public's confidence in the schools rested on its ability to insure the safety of city students.

In their efforts to record the failure of busing, the Richmond newspapers frequently clashed with Governor Linwood Holton, who repeatedly rejected the dismal picture painted in their editorials. Although he opposed forced busing to achieve racial balance, he stated that because of the efforts of "young people", busing was making a positive contribution to race relations in Virginia.[9] As the father of four children in Richmond's public schools, the Governor said: "I am seeing my children learn, as they can in no other way, how to get along with children from backgrounds completely different from our own. I am seeing young people getting along, enjoying themselves, and incidentally, setting an example from which we parents and politicians could well benefit."[10] Given the undoubted inconvenience and racial tensions, the Governor offered Virginians and the nation another side of the story.

Holton's stance also was taken at a significant political risk. Conservative Democrats, who were drifting into the Republican party or voting an Independent ticket, reminded

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[9] Richmond Times-Dispatch, November 12, 1971, p. B-1

[10] Quoted in Editorial, Richmond News Leader, October 1, 1971, p. 18.

him that their votes had helped to put him in office.[11] A dramatic, forceful stand against busing by Holton might have opened the possibility of higher office as the champion of a Republican-Conservative Democratic coalition. Instead, Holton's moderate leadership of the Republican party faced a strong challenge from the conservative wing of his party.

On April 20, 1971, Virginia learned that the resort to the United States Supreme Court offered no immediate relief to the critics of busing. In Swann v. Charlotte-Mecklenburg Board of Education,[12] the Court appeared unruffled by the waves made by the antibusing forces. The Court found "no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school."[13] The pronouncement against busing in Title IV of the 1964 Civil Rights Act, a hope of busing foes, was limited to "the situation of so-called 'de facto segregation.'"[14] The Court's objective, as in 1954, remained "to eliminate from public schools all vestiges of state-imposed segregation."[15]

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[11]Editorial, Richmond News Leader, May 11, 1970, p. 11. In the 1969 election conservative Democrats supported Holton instead of the Democratic party's candidate, William Battle, who was considered too liberal.

[12]402 U.S. 1 (1971).

[13]Id. at 30.

[14]Id. at 17.

[15]Id. at 20.

The initial response of Richmond newspapers was to denounce the Supreme Court decision. Criticizing the Court's "grotesque logic," the Times Dispatch wrote that Swann established a "dual standard on school integration in this country."[16] Swann was just one more "assault upon the hated South," screamed the News Leader. The Court's decision, it continued, destroyed "freedom of choice" in the South and threatened this liberty in the entire nation.[17]

Although Swann apparently offered the South no relief, portions of the opinion were construed as "weak beacons of hope."[18] The Supreme Court, a Times-Dispatch editorial reported, said objections to busing "may have validity" when busing endangered a child's health or hindered his education.[19] This qualification was viewed as a possible issue in any busing case. The editorial also found encouragement for the fight against school merger. It reported the Supreme Court's objections to racial balancing and to yearly desegregation adjustments by school authorities "once the affirmative duty to desegregate has been accomplished," unless there was subsequent discriminatory action.[20] Since the newspaper argued that the

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[16]Editorial, Richmond Times-Dispatch, April 21, 1971, p. 10.

[17]Editorial, Richmond News Leader, April 10, 1971, p. 10.

[18]Editorial, Richmond Times-Dispatch, April 25, 1971, p. 8.

[19]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) quoted in Ibid.

[20]Ibid.

city and county schools were desegregated already and that the counties had not drawn their political boundaries to preserve segregation, it saw no requirement for further action under Swann. The Court's statement that racial balancing was not required, the Times-Dispatch believed, provided the crux of the case against school consolidation.[21] As subsequent events demonstrated, the defense lawyers liked the editor's analysis.

After the Swann decision the only hope for the antibusing forces was federal legislation or a constitutional amendment which would prohibit busing to achieve desegregation. Of the two approaches, the Richmond newspapers preferred the amending process. Even President Richard Nixon's proposed antibusing legislation, which included permanent restraints of questionable constitutionality on busing,[22] was considered less attractive than an antibusing amendment. The Times-Dispatch viewed Nixon's antibusing program as "a commendable attempt" to remedy the busing issue.[23] However, even if the Nixon plan got through Congress and the current Supreme Court, the editorial sought the "more lasting relief" of an antibusing amendment.[24]

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[21] Ibid.

[22] Professor Alexander Bickel discussed the constitutional infirmities of President Richard Nixon's proposed busing legislation in "What's Wrong With Nixon's Busing Bill?" The New Republic, April, 1972, pp. 19-22.

[23] Editorial, Richmond Times-Dispatch, March 19, 1972, p. 6.

[24] Ibid.

The support of the Richmond newspapers for the amending process was not limited to antibusing action. The Richmond dailies also advocated a direct attack on the Supreme Court's power of judicial review and the concept of an independent judiciary. The News Leader asked President Nixon to propose a constitutional amendment empowering Congress to send all "dubious decisions" of the Supreme Court to the highest appellate courts of the states. If a majority of the fifty highest state courts differed with the Supreme Court's ruling, then the judgment was to be reversed.[25]

A second technique for curbing the federal courts was sponsored by Senator Harry F. Byrd, Jr. and endorsed by the Times-Dispatch. Senator Byrd's proposed constitutional amendment provided for the reconfirmation of all federal judges every eight years. The Times-Dispatch argued that this was the only method of checking "judicial autocrats."[26] The paper's enthusiasm for the Byrd amendment was increased by the expectation that the plan offered a way of removing Judge Robert Mehrige from the bench. The proposals discussed by the Richmond newspapers were not new, but rather amounted to hybrid forms of past attempts to restrict the Supreme Court's judicial power. Nonetheless, school cases involving measures which attacked the most stubborn obstacles to desegregation

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[25]Editorial, Richmond News Leader, March 13, 1972, p. 14.

[26]Editorial, Richmond Times-Dispatch, February 25, 1972, p. 14.

risked the Court's prestige and raised fears of a constitutional crisis.

Another consequence of the decision to press for an antibusing amendment was a schizophrenic reaction in Richmond to the outcry against busing in northern cities like Detroit, Pontiac, Boston, and Indianapolis. On the one hand, there was an undisguised sense of vindication. The News Leader wondered why the national media did not portray the events as "symptoms of regional hysteria and sickly racist minds."[27] After the Department of Health, Education and Welfare accused Boston of operating segregated schools, the satisfaction of the antibusers was complete. To the Richmond papers, Boston represented the citadel of "sociology gone wild" and "do gooderism."[28] The problems of Boston, according to a Times-Dispatch editorial, had "its delicious ironies, as savored from a Southern perspective."[29]

Although they relished the accounts of northern turmoil, the Richmond newspapers urged their readers to shun vindictiveness. The Times-Dispatch advised that "too much is at stake to wallow in the ironies of the situation."[30] Instead, Virginians were urged by the News Leader to recognize that "compulsory busing" would "become a thing of the past," only

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[27]Editorial, Richmond News Leader, September 22, 1971, p. 10.

[28]Editorial, Richmond Times-Dispatch, December 4, 1971, p. 14.

[29]Ibid.

[30]Ibid., October 28, 1971, p. 14.

if it were made a national issue.[31] "With the Supreme Court sticking by its interpretation that the Constitution requires children to be assigned on the criterion of color," wrote the Times-Dispatch "there becomes but one alternative for citizens who believe in the rule of law and opposing busing. And that is to amend the Constitution."[32] The strategy of the South was grounded on a faith in history which also had guided Virginia's massive resisters in the 1950's. This was the belief that, as in the First Reconstruction, the South's salvation was in the North.

In the summer of 1971 the attention given to busing gave way to an individual concentration on the consolidation trial. In opposing consolidation, the Richmond newspapers alternated between playing on emotions and demanding judicial restraint. In tones mildly reminiscent of Massive Resistance, the News Leader condemned the proposed merger as ill-advised, since the Richmond School Board and the NAACP were on the same side of the argument. The former was described as a "virtual lackey of the NAACP."[33] Consolidation was variously described as a "capitulation to perversity," "pernicious racism" and a

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[31]Editorial, Richmond News Leader, September 22, 1971, p. 10.

[32]Editorial, Richmond Times-Dispatch, October 28, 1971, p. 14.

[33]Editorial, Richmond News Leader, August 30, 1971, p. 10.

luxuriant crop of bosh."[34] However, the papers also argued that merger raised an unprecedented constitutional question. The Times-Dispatch warned that, if upheld, consolidation would establish the principle "that an unelected judge could ignore at will the political jurisdictions the people, acting through their democratic institutions, have set for themselves."[35] Given the urban dilemma, it suggested that a better way to tackle this problem is to make possible orderly growth of the cities through procedures that elected representatives provide."[36] Finally, the Times-Dispatch insisted that white majority schools, one objective of consolidation, exceeded the Court's desegregation requirements, humiliated Negroes and required unreasonable personal sacrifice without ensuring an increase in educational achievement.[37] Thus the Richmond newspapers presented an argument that appealed to white segregationists, black separatists, disgruntled suburbanites and advocates of judicial restraint.

In August and September of 1971, the Richmond School Board and the black plaintiffs answered their critics before Judge Mehrige. The plaintiffs' argument was grounded on the charge that, due to housing patterns, the Richmond metropolitan

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[34] Ibid., May 5, 1971, p. 14; August 30, 1971, p. 10.

[35] Editorial, Richmond Times-Dispatch, May 6, 1971, p. 12.

[36] Ibid.

[37] Ibid.

area operated a racially dual school system. Moreover, the appellants argued that state action contributed to the residential segregation upon which the schools were built. They contended that the State Board of Education had the authority and responsibility to ignore political boundaries in order to insure rights under the Fourteenth Amendment. Finally, the plaintiffs believed that for academic and social reasons the racial composition of the schools should reflect the racial ratio of the larger community. The metro area, they urged, shared a community of interest which included providing a desegregated education for all its children.[38]

In making its argument for establishing majority white schools, the plaintiffs relied heavily on the testimony of Richmond born Thomas Pettigrew, Harvard Professor of Social Psychology. A persuasive advocate of integration, Professor Pettigrew joined Judge Mehrige and Governor Holton as a major villain of the antibusing-consolidation forces. Pettigrew supported school consolidation for academic and non-academic reasons. As an educator, he was persuaded by all the major studies of desegregation, such as Equality of Educational Opportunity and Racial Isolation in the Public Schools, that integrated schools increased the achievement of black students. However, the mere mixing of bodies or desegregation, Pettigrew cautioned, was not necessarily productive educationally.

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[38] Richmond Times-Dispatch, August 17, 1971, p. 1, August 19, 1971, p. 1.

Integrated education was achieved only when desegregation was combined with "a climate of interracial acceptance." Studies suggested that "interracial acceptance" was the variable which accounted for the consistently better performance of Negroes in integrated schools.[39] The stability required for meaningful integration, Pettigrew testified, was enhanced by the metro provision to keep the Negro enrollment between twenty and forty percent in all schools. Whereas black attendance below twenty percent was considered tokenism, black enrollment above forty percent precipitated white flight. The implementation of the merger, Pettigrew believed, would make Richmond the envy of urban America.[40]

Given the controversy generated by the conclusions regarding the academic value of integration,[41] both methodological and emotional, Pettigrew also offered several non-academic reasons for supporting consolidation. The elimination

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[39]Thomas F. Pettigrew, Racially Separate or Together? (New York: McGraw-Hill Company, 1971), pp. 64-66. Professor Pettigrew made the same argument in his testimony during the Richmond consolidation trial which was reported in the Richmond Times-Dispatch, August 19, 1971, p. 1. Professor Pettigrew endorsed the findings of Equality of Educational Opportunity or the Coleman Report which concluded that the most important factor in determining academic achievement was the student's family class background. Since only one-fourth of America's Negroes were middle-class, Pettigrew saw the dividends of the social class mix as another argument for school integration. See Racially Separate or Together, pp. 57-67.

[40]Richmond Times-Dispatch, August 19, 1971, p. A-1.

[41]For a discussion of the Coleman Report by educators who support and attack its findings see Vol. 38, No. 1 of the Harvard Educational Review (1968).

of majority black schools, he emphasized, was the surest method of changing the community's unfavorable opinion of these schools. Furthermore, in an integrated school, Negro students acquired experience in dealing with white people and white institutions. Both, according to Pettigrew, contributed to the post-school success of Negro students.[42] Above all, integrated education provided the best method of preparing all children to live in an interracial world. For this reason, Pettigrew stressed, it was as important for white students as black students to attend integrated schools.[43]

The county and state defendants rebutted the plaintiffs' case point by point. They asserted that the counties and the city already operated unitary school systems. Neither a meaningful integration nor a racial balance was required by the law. Residential housing patterns, including Richmond's black ghetto, were considered the result of private choice. The defense denied that a community of interest existed between the counties and the city. Besides, argued Henrico lawyer R. D. McIlwaine, III., a "community of interest" lacked "constitutional standing" and standards of measurement. Finally, the defendants found no authority giving the State Board of Education the power to merge the school systems without

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[42]Lecture given by Professor Thomas Pettigrew at the University of Richmond, April 24, 1972.

[43]Richmond Times-Dispatch, August 19, 1971, p. A-1.

their consent. According to this argument, education was a local rather than a state responsibility.[44]

One central theme of the defense's case was that the city's objective was political rather than educational. Merger, Henrico County Manager E. A. Beck claimed, was "an annexation attempt . . . a way to accomplish by the back door what they couldn't by the front door."[45] The counties not only refused to see a community of interest, but also viewed their struggle as a defense of local government.

The defense also attempted to nullify the testimony of Professor Pettigrew. Their expert witness was Professor Clifford P. Hooker, a white education-finance specialist from the University of Minnesota. Claiming no expertise in educational psychology, Professor Hooker offered the observation that establishing majority white schools was "racist" and "paternalistic."[46] Furthermore, he thought it "insulting" to Negroes when white researchers identified black schools as sub-standard and claimed some knowledge for remedying the situation.[47] In effect, Dr. Hooker adopted the position

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[44] Richmond Times-Dispatch, September 15, 1971, p. A-1.

[45] Ibid.

[46] Ibid. September 10, 1971, p. A-1.

[47] From a portion of a brief submitted by the State of Virginia and the Counties of Henrico and Chesterfield to the Fourth Circuit Court of Appeals and published, in part, by the Richmond News Leader, April 13, 1972, pp. 16-17.

advanced by black separatists that white educators were incompetent to deal with Negro educational problems.

Almost four months after the trial, on January 10, 1972, Judge Robert R. Mehrige, Jr., ordered the consolidation of the Richmond, Henrico and Chesterfield school systems.[48] Each of the major questions raised during the trial was settled in favor of the plaintiffs. First, Judge Mehrige found "individual facilities and entire [school] systems racially identifiable" in the metropolitan area.[49] Pursuance of desegregation policies and the achievement of "some results," the claim of the counties, did not "relieve them of the remainder of their affirmative obligation."[50] Secondly, the court declared that racial differences in public school enrollment were directly related to public and private discrimination in the sale of housing.[51] Although, he did not charge that school officials had gerrymandered school boundaries, Mehrige found that school construction "contributed substantially" to school segregation.[52] School authorities, he emphasized, "may not" be constitutionally permitted "to reproduce in school facilities

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[48] Bradley v. The Board of the City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972).

[49] Id. at 80.

[50] Id. at 104.

[51] Id. at 84.

[52] Id. at 86.

the prevalent pattern of housing segregation."[53] To do so, was to prolong by state action "the effects of discrimination."[54] Finally, Judge Mehrige ruled that the State Board of Education had the legal authority and constitutional responsibility to merge the school districts. The State Board's involvement in local education was extensive[55] and, in the past, had ignored political boundaries for educational purposes.[56] In Mehrige's judgment, political boundaries, when unrelated to educational needs, did not prevent the Court or the State Board from crossing school lines to secure the rights of Negroes under the Fourteenth Amendment.[57]

In ordering a merger, Judge Mehrige was impressed by the evidence of educators that black schools, in white areas, were "perceived as inferior."[58] This stigma, he was persuaded by educational experts, not only penalized the child in school, but accompanied the individual throughout life.[59] However, Mehrige emphasized that racial identifiability, of concern to educators, was also "a legal concept--a conclusion of law, ultimately. . . ."[60] In this case, the "law's demands parallel those of educators."[61] Thus, he concluded, that "meaningful integration in a bi-racial community is essential to equality of education, and the failure to provide it is violative of the Constitution of the United States."[62]

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[53] Id. at 84.
[54] Ibid.
[55] Id. at 116-19.
[56] Id. at 83.
[57] Ibid.
[58] Id. at 81.
[59] Ibid.
[60] Id. at 80.
[61] Ibid.
[62] Ibid.

Judge Mehrige devoted a large portion of his opinion to the topics of busing and racial balance. Concerning the former, Mehrige accumulated significant data supporting the argument, that for reasons unrelated to desegregation, busing was already extensive in the counties. In the 1969-1970 school year the counties bused over forty-seven thousand students at an expense approaching a million and a half dollars.[63] Although the metro plan expected to bus an estimated seventy-eight thousand students in 1971-1972, sixty-eight thousand students already were transported to schools in the three school districts.[64] Even the time of the bus rides, limited to one hour-one way, under the metro plan, seemed less excessive when compared to past practices. In 1942, for example, the State Board of Education permitted a one way bus ride of ninety minutes for secondary students.[65]

Regarding racial ratios, Judge Mehrige believed that a twenty to forty percent black enrollment promised the greatest stability for the new school system.[66] The court did not consider this figure arbitrary, but, instead, "established by the Richmond area."[67] Thus, the court accepted the goal of civil rights lawyers that school assignments should reflect

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[63] Id. at 161-62.

[64] Id. at 188.

[65] Id. at 159.

[66] Id. at 194.

[67] Id. at 186.

the racial composition of the larger population.[68] With the establishment of racially stable schools, Mehrige believed "there seems to be beneficial effect upon community perceptions of the faculty, the teachers' expectations, and even the administration."[69] Integration, still offered "each race . . . a substantially greater opportunity to develop realistic attitudes toward the other race, productive of friendships and positive social behavior.[70] Finally, although impressed with the educational impact of majority white middle-class schools, Mehrige emphasized that consolidation was ordered so that "racial desegregation would be made possible."[71]

The Richmond newspapers described the decision as a "bugle call for what could be the final, decisive battle in the agonizing fight to preserve locally-controlled neighborhood public schools in America."[72] Although differing with Mehrige on points of law and fact, the newspapers concentrated their attack on the social objectives of his decision. The Times-Dispatch wrote that the opinion "warmly endorsed the

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[68] Id. at 194. On this point Mehrige quoted with approval Professor Pettigrew's statement that he would not adhere to the forty percent maximum where the Negro population exceeded forty percent.

[69] Id. at 186.

[70] Id. at 195.

[71] Id. at 196.

[72] Editorial, Richmond Times-Dispatch, January 25, 1972, p. A-12.

pernicious gibberish of those social engineers who argue, in effect, that a school system's primary function is to promote racial togetherness, not to give children the best possible academic education."[73] The paper reminded Negroes that the decision "was insulting to black children in particular."[74] When combined with the promise to "bus dollars,"[75] the appeal to black pride sounded like a subtle bribe to exchange money for a cessation of the integration campaign.

The Richmond Afro-American, the city's black weekly, applauded the Mehrige decision. If upheld, the order meant that whites could no longer "run across a city or county line in order to escape desegregated schools." The editor rejected the nostrums of segregationists and separatists and reasoned that: "Unless black and white work together to eliminate the massive problems in both equal and quality education, they cannot be solved. Only ignorance and bitterness grow out of the efforts to run away."[76] The Afro-American reminded its readers that: "A major facet of education is teaching young Americans what many of their parents never learned--how to live with each other in mutual respect."[77]

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[73] Ibid. January 11, 1972, p. A-14.

[74] Ibid.

[75] Ibid. December 4, 1971, p. A-14.

[76] Editorial, Richmond Afro-American, January 22, 1972, p. 4.

[77] Ibid. March 18, 1972, p. 4.

The commitment to school integration championed by the NAACP and the Afro-American, however, was challenged by Negroes who were disenchanted with that goal. Roy Innis, national director of the Congress of Racial Equality, announced that his organization intended to file "friend of court" briefs in the higher courts on the side of the state and counties.[78] Instead of integration, CORE demanded black community controlled schools. Integrated schools were attacked by Innis on the grounds that they implied "blackness was bad," aimed at "whitening black minds" and prevented the improvement of black culture.[79] The appeal to emotions was combined with an argument that community controlled schools permitted Negroes "to maximize resources."[80] The school described by Innis was, in effect, an instrument of black community action.

The debate between CORE and the NAACP over educational policy was only a facet of CORE's challenge to the NAACP leadership of the black community. Although Innis commended the NAACP's contribution to the civil rights movement, he thought it was blinded by white defiance to alternative strategies for equal educational opportunity.[81] Moreover, CORE rejected

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[78] Richmond Times-Dispatch, January 16, 1972, p. B-1.

[79] Tape recording of a debate between Roy Innis and Henry Marsh, III, Richmond Vice-Mayor, Virginia Union University, January 26, 1972.

[80] Ibid.

[81] Ibid.

the NAACP's goal of an interracial society. "Let's face it," Innis exclaimed, "black and white life styles are basically different."[82] To Richmond's black leaders, community control was viewed as a return to the past. Their apprehensions were not relieved by the voluntary nature of the act--separatism rather than segregation. The CORE proposal raised too many unanswered questions. How long and how generously would whites support black controlled schools? How could racial myths be changed through separation?[83] Nevertheless, a sizeable number of young blacks, frustrated by delay, viewed integration suspiciously. They, along with their leaders, presented a new dimension to the school struggle in Virginia.

In the counties, the consolidation decision was followed by several protest demonstrations and by reports of newly formulated plans to send children to private schools. However, the focus of attention was on the courts where the school merger battle was expected to be won or lost. As predicted by most observers, the Fourth Circuit Court of Appeals reversed the Mehrige ruling in a 5-1 decision.[84] The majority found that the city and the county had eliminated "the last vestiges of state-imposed segregation" and had established

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[82] Ibid.

[83] Ibid.

[84] Excerpts of the Fourth Circuit's opinion printed by the Richmond Times-Dispatch, June 7, 1972, p. A-6.

"unitary school systems."[85] Since the Constitution was not violated, Judge Mehrige "had exceeded his power of intervention."[86] Although the majority agreed that Negroes had been past victims of housing discrimination, it saw no "interaction between any two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another."[87] Finally, the majority judges thought Judge Mehrige's zeal for desegregation led to a remedy which went beyond the authority of the courts. The majority chastized Mehrige for failing to "sufficiently consider . . . a fundamental principle of federalism incorporated in the Tenth Amendment."[88] The Fourth Circuit's ruling left the next move of legal strategy to the Richmond School Board. As a result of the Fourth Circuit Court's action, consolidation was postponed, but the ultimate fate of metropolitan schools hinged on the results of the School Board's appeal to the Supreme Court.

In the Richmond case, Judge Mehrige held that political boundaries must fall where there were great discrepancies in the racial identities of adjacent political units. School officials, he believed, could not constitutionally superimpose school districts over residential areas which were segregated by public or private action. The major question, not decided

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[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

in Swann but raised in Richmond, was whether school segregation as a "consequence of other types of action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree."[89] The answer had nationwide ramifications since it was applicable to urban centers throughout America. In ordering a school merger, Judge Mehrige stressed the continuity between Bradley and Brown. The central role of public education in preparing Americans to live economically and socially productive lives, found in Brown, was reaffirmed by Mehrige. However, he emphasized that his decision was not tied to social science data but to the Constitution. Consolidation, Mehrige wrote, was the "first, reasonable and feasible step toward the eradication of the effects of past unlawful discrimination."[90]

In opposing the school merger, anticonsolidationists relied on themes familiar to the school controversy since 1954. However, in 1972, the prospect of a segregationist victory on the merger issue was enhanced also by several important developments. First, the angry reaction to efforts to destroy racial isolation in northern cities won new allies for the South. The demand for equity in the application of

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[89] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22 (1972).

[90] Bradley v. School Board of the City of Richmond, 338 F. Supp. 67, 105 (E.D. Va. 1972).

desegregation laws was finally heard, as anxiety over busing was translated into legislative and executive action aimed at relieving school boards. Secondly, segregationists attempted to exploit the division among blacks over school policy. The rejection of integration by black separatists was used as evidence by the Richmond newspapers to challenge the continued legitimacy of the NAACP's leadership in the school issue. Lastly, segregationists hoped the politics of desegregation would force a judicial retreat by the Supreme Court. After a second reading of the Swann opinion, the Court's foes found reasons for guarded optimism. The Court's pronouncements against racial balancing and yearly adjustment of racial ratios after "official action" to eliminate discrimination were considered especially important by the defense. In the spring of 1972 the interaction of national politics and judicial policy making weighed heavily on the minds of many Virginians as they awaited the next stage of the desegregation controversy.

CONCLUSION

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After eighteen years, the struggle to desegregate Virginia's schools had made great headway but was far from over. Statistics showed that in 1971-72, 99.4 percent of Virginia's black students were in integrated schools.[1] However, the significance of this achievement was diminished by the large number of desegregated schools where white students were almost negligible. For example, thirteen hundred Surry County Negroes were counted as attending racially mixed schools, although there were only seventeen white students in attendance. In the cities, where busing accounted for the greatest increase in desegregation over the previous year, predominantly black schools existed and white flight threatened to increase their numbers. The present obstacles to desegregation in black belt counties and large cities indicated that the future of public school integration was not assured, despite rosy statistics. This chapter will identify the factors which have shaped Virginia's reluctant accommodation with the Brown decision.

The traditional structure of Virginia's political environment played a vital role in determining the state's

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[1] Richmond News Leader, April 25, 1972, p. 19. In 1970-71, 87.2 percent of Virginia's Negroes were listed in integrated schools.

response to the segregation cases. In 1954, some sections of the Old Dominion, where the Negro population was small, were prepared to desegregate the public schools by mixing the students and dropping Negro teachers. In the cities, Virginia's leaders expected shifting residential patterns to neutralize the Brown decision. From the beginning however, the leadership believed a different solution had to be worked out for Southside Virginia, where white supremacy had its deepest roots. After some deliberation, the Gray Commission recommended a local option plan which provided a flexible approach to school desegregation. This approach was unfortunately discarded, not because of a state-wide grass roots rebellion, but because of a decision made by the state's governing elite.

The switch in strategy was possible only because of the structure of Virginia's politics. As a result of discriminatory voting laws, malapportioned electoral districts, and effective political organization, decision-making was monopolized by the Byrd wing of the Virginia Democratic party. At this level, black belt politicians had extraordinary influence. This advantage was used to press for a state-wide policy to resist desegregation. More importantly, the closed nature of the political process permitted Byrd Democrats considerable manuverability which facilitated the co-ordination of an effective resistence campaign.

In shifting to Massive Resistance, the Byrd Machine saw an opportunity to strengthen its position in Virginia and, for a moment, believed it could defeat the Supreme Court in

the school battle. Hope for a victory over the Court was encouraged by the belief that the federal government did not have the resources nor the inclination to challenge massive school closings. Also, the Organization believed that Virginia's reputation for moderation in race relations would give its unequivocal rejection of school desegregation tremendous influence throughout the nation. The first step in this plan, which was easily accomplished, was to win a mandate for segregation in Virginia. Appeals to white supremacy and the defense of states' rights accounted for a series of segregationist victories which culminated in the passage of the school closing laws and the gubernatorial victory of Lindsay Almond in 1957. However, in 1959, Massive Resistance crumbled after federal judges, despite local pressure, assigned black children to white schools and after the school closing laws failed to win support outside the South. When Governor Almond announced that Virginia would obey the law, the Organization was left badly divided.

Massive Resistance did not end Virginia's struggle to keep its public schools white. In 1959-60 the school closing laws were replaced by legislation designed to contain integration. A pupil placement board and a tuition grant law were the backbone of the new program. In addition to giving immediate relief to white parents, the new legislation was expected to tie up the desegregation process in the federal courts, where the state and the localities were well-equipped to provide the manpower and financial resources to defend

school boards. The return to local option was not accompanied by a change of heart regarding racial separation but was expected to buy time and to slow integration until the national mood proved more favorable to the segregationists' cause.

Passive resistance proved to be eminently successful. Five years after Massive Resistance, less than two percent of Virginia's Negroes were in schools with white children. Virginia's skill in blocking integration demonstrated that the courts, by themselves, were incapable of desegregating Virginia's public schools. In part, the problem of the courts was inherent to the judicial system. Black lawyers flooded Virginia's courts with suits testing assignment plans. Litigation moved slowly and the courts lacked broad powers of enforcement. Moreover, the loose language of Brown II played into the hands of segregationists. By failing to establish clear desegregation guidelines, the Supreme Court invited litigation and seemed to sympathize with the white South. Although Virginia judges (with one notable exception, Judge Sterling Hutcheson) assigned Negroes to white schools, they consistently held that school boards were not required to integrate schools but to prohibit discrimination. This principle spawned devious assignment plans and invited criticism of the later affirmative order to desegregate, enunciated in Green v. County Board of New Kent County. Finally, and perhaps most importantly, Virginians simply contested the legitimacy

of the federal courts' authority to revolutionize the traditional pattern of race relations in the South. This argument was strengthened by the contention that, in Brown I, the Supreme Court abandoned the rules of jurisprudence to legislate social attitudes.

The plodding pace of desegregation was finally jolted by the active intervention of the federal government in 1964. In the 1950's, massive resisters benefited from President Eisenhower's refusal to publicly endorse the Brown I decision. However, the Civil Rights Act of 1964 placed the power of the federal government behind school desegregation. The ability to regulate the flow of large amounts of federal money into Virginia's schools contributed to a sharp increase in school desegregation. When the administrative effort bogged down on the acceptability of "freedom of choice" assignment plans, the Supreme Court freed it in Green v. County Board of New Kent County. The administrative-legal assault on segregation was aided by an upheaval in Virginia politics. Largely due to federal legislation and Supreme Court rulings which broadened the base of the electorate and reapportioned electoral districts, a period of political flux was precipitated in Virginia. The political uncertainties caused by a new pool of black voters led to greater implementation of the Brown decision, although it was not accompanied by a conversion regarding the wisdom of public school integration. Thus, the period after 1964 demonstrated that the most successful formula for undermining segregated schools depended on co-operation between

the federal courts, Congress, and the Administration. This combined effort broke down in 1970 when black plaintiffs asked the courts to order school boards to adopt busing plans as a technique for eliminating racially isolated schools in Virginia. Although the Supreme Court accepted busing as a desegregation tool in Swann v. Charlotte-Mecklenburg Board of Education, the decision met national criticism as busing plans were ordered throughout the United States. Presidential and congressional attacks on transportation plans designed to increase integration signaled the erosion of federal teamwork on the school issue.

When Judge Robert R. Mehrige ignored political boundaries to merge the Richmond, Henrico and Chesterfield school districts, the struggle to desegregate public schools approached another watershed. If upheld by the Supreme Court, the Richmond case offered a method of desegrating schools in large metropolitan areas, where residential housing patterns led to racially isolated schools. However, as the issues raised in the consolidation case approached the Supreme Court, Virginia's outcry against busing and involuntary metropolitan co-operation was matched in all sections of the nation.

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