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## A JUDGE REMEMBERS RICHMOND IN THE POST-*BROWN* YEARS

ROBERT R. MERHIGE, JR.\*

I am pleased to participate in any event that pays tribute to Justice Powell. Although the *Law Review* has asked me to discuss my years as a federal judge charged with implementing the Supreme Court's endorsement of desegregation, any account of my years on the bench necessarily begins with Lewis F. Powell, Jr. I am proud to recall that when I was under consideration for appointment to the federal bench, Lewis Powell, then president of the American Bar Association, led the contingent of Richmond lawyers who went to Washington, D.C. to speak on my behalf. I am indeed fortunate to have enjoyed a long personal and professional relationship with such a truly great man.

I do not think anyone would have guessed back then that newspapers in Richmond would ultimately come to describe me as some kind of a social engineer who was willing to infuse his own personal philosophy into his school desegregation decisions. I had not been a crusader for civil rights during my twenty plus years as a practicing attorney. I am embarrassed to admit that before my nomination to the bench, I had been too busy with my own life and the demands of a busy trial schedule to focus on the problems of racial discrimination. My mental justification for my inaction, if indeed I gave it that much thought, was that I as an individual treated everyone alike. Somehow I accepted that as justification for what I now view as an inexcusable disregard of my moral responsibilities, both as a lawyer and as a man.

My primary efforts were inadequate in that they were directed only to those perceived injustices in which I was involved as counsel. My concerns seldom extended beyond that parameter even though as a young lawyer in Richmond I was faced daily with the realities of race-based discrimination. For instance, I remember that back when I first became a member of the bar, all male black lawyers were addressed by their first names and were never called "mister" as were their white counterparts. This was an archaic and demeaning practice, so I made it my custom to formally address all attorneys, and to shake hands with opposing counsel, whether black or white. That even this small gesture annoyed others says much about Virginia's entrenched antagonistic view toward racial integration.

I was sworn in as a United States District Judge on August 30, 1967. Over ten years had passed since the Supreme Court's repudiation of the "separate but equal" doctrine, yet public schools in Richmond, and indeed in much of Virginia, remained rigidly segregated. Virginia had led the South

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in massive resistance to the Supreme Court's edict that school systems should be integrated with "all deliberate speed." Virginia initially responded to *Brown v. Board of Education*<sup>1</sup> with absolute defiance. Indeed, one state senator, who was later to serve as Governor, stated after *Brown*:

Integration, however slight, anywhere in Virginia, would be a cancer eating at the very lifeblood of our public school system. The *Brown* decision is either right or wrong. 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.

Schools were closed rather than integrated. It is reported that Judge Sterling Hutcheson of the Eastern District of Virginia chose to step down from the bench rather than to enforce the law.

By 1959, Virginia's strategy of massive resistance faltered as it became clear that the federal courts would not turn a blind eye to what amounted to overt state-enforced segregation. Segregationists in Virginia, and throughout the South, became more creative. Relying on Judge Parker's pronouncement that the Constitution "does not require integration. . . . [i]t merely forbids discrimination,"<sup>2</sup> state and local authorities adopted freedom-of-choice plans to comply with the letter of the law.

Under these freedom-of-choice plans, each student was assigned to a particular school, usually the neighborhood school the child had been attending previously. Because housing patterns were strictly segregated both by law and by custom, the racial composition of the schools reflected the lack of racial diversity in the neighborhoods. All students were then allowed a "free transfer" to the school of the student's choice. In most instances, this meant that a small percentage of the black students would choose to attend the previously all white school, while no whites would attend the black school. "Black schools" and "white schools" thus remained in place.

Many viewed freedom-of-choice plans as a moderate and reasonable response to the desegregation question. Indeed, prior to my appointment to the federal bench, the United States District Court for the Eastern District of Virginia in Richmond had approved the plans. Ultimately, the constitutionality of the plans was challenged in the Supreme Court. In his arguments to the high Court, State Senator Frederick T. Gray articulated Virginia's defense of the freedom-of-choice plan:

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

2. *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (Parker, J., construing Supreme Court's ruling in *Brown*). As J.W. Peltason has noted, many southerners clung to Judge Parker's dictum that the *Brown* decision required only desegregation, not integration. See J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 23 (1971) (discussing Judge Parker's attempt to calm southern fears); *Is Freedom of Choice Illegal?*, RICH. NEWS LEADER, May 1, 1969, at 6 (stating that "Judge Merhige may forget that the United States Supreme Court has never explicitly denied [the *Briggs* decision]").

The state may remain neutral with respect to private racial discrimination. Desegregation (i.e. the elimination of state enforced segregation solely because of race) is a legal question; integration (the compulsory assignment of pupils to achieve intermingling) is an educational question, best left for decision by educators, for educational purposes, on the basis of educational criteria. A freedom-of-choice plan alone honors this distinction.<sup>3</sup>

The Supreme Court rejected Virginia's freedom-of-choice plan based on evidence that the plan was ineffective as a tool of desegregation.<sup>4</sup> The Court observed that after nearly three years of operation, the freedom-of-choice plan utilized by New Kent County had failed to achieve a unitary school system. Eighty-five percent of the black children remained in the traditionally all black school, while not a single white child attended the same.<sup>5</sup> The Supreme Court further held that New Kent County's freedom-of-choice plan impermissibly placed the burden of dismantling the dual school system on children and parents, rather than on the school boards as *Brown* had dictated.<sup>6</sup>

The message of *Green* was inescapable: the Supreme Court was now interested in results. As one commentator has noted, with *Green*, the Supreme Court recognized that "centuries of discrimination could not be overcome by benign indifference," and thus the Court shifted from the modest beginning of "thou shalt not segregate" to the position that "thou shalt integrate."<sup>7</sup>

The Supreme Court's decision in *Green* came down on May 28, 1968, some nine months after I had been sworn in as a United States District Court Judge. Upon hearing of the Supreme Court's decision, I naively thought that the era of resistance to desegregation in Virginia's school systems, whether through overt or indirect means, was coming to a close. Adherence to the law was something I took for granted. The "all deliberate speed" mandate of *Brown* had invited delay, if not defiance. Reasonable individuals differed on whether *Brown* required integration, or merely prohibited overt state-sanctioned discrimination. Now that the supreme law of the land affirmatively and unequivocally required school districts to take direct action to achieve integration, I fully expected prompt, if begrudging, compliance.

The day after Virginia's freedom-of-choice plan was struck down in *Green*, Samuel W. Tucker, who had argued the case for the plaintiffs in

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3. Brief for the Respondents at 32, *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (No. 695).

4. See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (rejecting Virginia's freedom-of-choice plan).

5. *Id.* at 441.

6. *Id.* at 441-42.

7. Ronald J. Bacigal & Margaret I. Bacigal, *A Case Study of the Federal Judiciary's Role in Court-Ordered Busing: The Professional and Personal Experiences of U.S. District Judge Robert R. Merhige, Jr.*, 3 J.L. & Pol. 693, 697 (1986-87).

the Supreme Court, came to my chambers seeking a hearing date in reference to the *Green* case. This effort was followed in rapid succession with motions to reopen each and every school case that had come through the Richmond Division. The exact number escapes me, but I am reasonably certain that between the school cases within the jurisdiction of the Eastern District of Virginia and those which Judge Dalton of the Western District asked me to handle, I found myself with more than forty school cases.<sup>8</sup> This was a sufficient number to lead an editorial writer of one of our local papers, so I am told, to describe me as the "commissar of education."

The Supreme Court pronounced in *Green* that "[t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation."<sup>9</sup> However, even federal judges acting out of sincere motivations differed on what the law required. Governor Godwin quoted United States District Judge Walter Hoffman, a judge well known for his firm upholding of the mandates of the Supreme Court in reference to *Brown* and its progeny, as saying that it was "difficult to understand just what the law was" in regard to the pace of school integration.<sup>10</sup> When a federal judge in Tulsa ruled that "good faith compliance" satisfied the law even though de facto racial imbalances resulted, I suppose that some Virginians began to wonder why they had been cursed with Bob Merhige. The Richmond News Leader, apparently echoing the frustrations of many citizens, asked, "why . . . can't Judge Merhige interpret the [f]ederal law here as U.S. District Judge Daugherty interprets it in Oklahoma?"<sup>11</sup>

The mandate of the Supreme Court in *Green* could not, in my view, have been more emphatic. In its unanimous opinion the Court held that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."<sup>12</sup>

As I reflect on those days, the *Green* case was about as simple a school case as could be imagined. New Kent County's utilization of a freedom-of-choice plan had effectively maintained the patterns of segregation that had previously been mandated by law. New Kent County had only two schools, one a white school, and the other an all black school. All one had to do to desegregate those schools was to make one a grammar school and the other a high school. Although I never had occasion to draw a school desegregation plan, and *Green* was my first association with a school case, the solution in this case seemed obvious and simple to me.

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8. Before coming to the federal bench, Judge Dalton had been a member of the Virginia state legislature and had made two unsuccessful bids for the governor's seat. Because Judge Dalton had been outspoken in his denunciation of massive resistance during his political career, he thought it would be inappropriate for him to preside over the school cases.

9. *Green*, 391 U.S. at 439.

10. *Is Freedom of Choice Illegal?*, *supra* note 2, at 6.

11. *Id.*

12. *Green*, 391 U.S. at 439.

New Kent County's initial defense was that to convert the schools would require extensive renovations. Although the plaintiffs contended that the schools could be ready for desegregation within a matter of weeks, the defendants insisted that the anticipated renovations would take considerably longer. The tactics used by the New Kent School Board were not unlike those used by the leadership of other localities. Whenever possible, I tried to proceed slowly to give the community time to adjust.

Unfortunately, my attempts to accommodate the communities only led to more delay. One school district argued that they needed more time to convert an all white school into a racially mixed grammar school. The school board cited such renovations as lowering the urinals so that the younger students could be accommodated. Because the school board made the claim with a straight face, I was forced into a fact-finding mission to determine that the urinals were not, in fact, excessively high. Can you imagine the scene! Ridiculous scenarios such as these eventually caused me to depart from my cautious and accommodating approach. Samuel W. Tucker was correct when he counseled me that "you don't help the dog by cutting off a little of his tail at a time."

As to the political context of desegregation, I was constantly reminded that President Nixon was opposed to what became the favored political subject—busing—despite the fact that busing did not begin with school desegregation. In the counties where there were great distances between schools, busing children to school was simply a fact of life. Busing thus had been employed in Virginia for many years prior to the Supreme Court's action, although it was generally utilized only for the benefit of white students. Samuel Tucker reported that when he attended grammar school, only white children were afforded the use of buses. Black children were, if they wished to attend, forced to walk to school. Mr. Tucker often referred to the fact that he had "bootlegged" a high school education by using a Washington, D.C. address in order to attend high school, for in his home county the education of black children did not include high school.

Busing, though necessary, became a reason for disagreeing with integration plans. Indeed, in some instances, the practical argument against busing could be easily made. Time spent riding to and from school was, and is, largely unproductive. Nevertheless, because of the physical locations of schools, it was necessary.

In cities such as Richmond, generally the schools for whites were in much better condition than the schools in black neighborhoods. The bottom line was that the children were paying for the conduct of prior generations who had maintained, by custom and law, segregated neighborhoods. The policies of the federal government in restructuring housing loans to what the bureaucrats referred to as "homogeneous neighborhoods" were also to blame.

Those forty school cases were heard in turn, and the court repeatedly ordered the various school boards to abandon freedom-of-choice plans in favor of plans which would effectively desegregate their schools. The response of the community was both rapid and harsh. I was told at the time

that the local newspapers were continuously critical of the court's action and expressed their criticism almost daily in both their editorials and the printing of letters from the public. The opposition was continuous. Letters literally poured into my office, and the threats were of a serious enough nature to cause the marshal's service to assign between eight and eleven marshals to guard duty at my home twenty-four hours a day, to accompany my youngest son to school, and to escort my wife whenever she left the property. For almost two years I never left my home without the company of one or more United States Marshals. The United States Attorney's office reported that on at least two occasions one or more persons endeavored to solicit money for use in hiring someone to assassinate me.

It was indeed an unpleasant time for me and my family. The Ku Klux Klan paraded around my home every Sunday for months. Another hostile group would from time to time organize what they referred to in signs as "Merhige's funeral dirge." On these days a hearse, with a long row of cars behind, would circle the courthouse, sometimes for hours at a time. In the interim, my dog was shot, my guest house was burned to the ground, and calls for my impeachment emanated not only from what might be described as "ordinary citizens," but from state legislators, at least one United States Senator, and one congressman. Indeed, one of my claims to fame is that at one point my name was substituted for that of Chief Justice Earl Warren on a billboard which formerly read "Impeach Warren."

All was not as grim as perhaps these statements indicate, for I got some perverse pleasure out of composing a form letter to respond to the hundreds of letters which I received, most of which condemned me as being un-American and unworthy, both as a judge and as a man. Frankly, I did not read those letters, although my secretary kept me abreast of their tenor. All letters threatening any member of my family were sent to the United States Attorney. In any event, my response to the letters went something like this:

Dear Sir or Madam:

The Judge does not read correspondence involving cases pending before the court. He did ask that I, a member of his staff, respond by thanking you for your kind wishes. Those wishes and your prayers are deeply appreciated by both him and his family.

Very truly yours,  
(signed) A Staff Member

Once a group of men came to the courthouse announcing that they were members of the Ku Klux Klan and intended to make a citizens arrest of me for allegedly "violating the Constitution." Upon their unsuccessful attempt, they announced to the television cameras that while they could not get to me in the courthouse, they would make their citizens arrest at another time and another place, perhaps in church.

Although the Klan never made good on its threat to arrest me, many of my friends and family were, for a time, understandably disturbed by the possibility that I might be abducted by the KKK. Shortly after the threat,

I was relaxing on a Sunday morning, cleaning my swimming pool while a friend of mine paddled around the pool in a floating chair. We were chatting, and my friend asked where the marshals were. I assured him that they were around somewhere, probably patrolling the property. Not satisfied, my friend demanded to know what action I would take if the KKK came to arrest me right then and there. I said, "I'd look at you and I'd say, Judge, if I were you I'd get the hell out of that pool." Within seconds, my friend paddled to the side and ran toward the house, and I was soon surrounded by marshals inquiring as to what the difficulty was.

I foolishly believed, especially as my decrees were appealed and affirmed by my appellate court and certiorari was denied by the Supreme Court, that the public, although perhaps reluctant, would accept the law as the law. Certainly, in my opinion, those who threatened not only me but the welfare of my family, and those who picketed the court house by the hundreds, were totally irresponsible and totally unappreciative of the fact that ours is a country of law. I was shocked at the response. One could understand resentment toward a judge if, for example, he were entering decrees which affected so many people and those decrees were continually reversed by appellate courts, but such was not the situation. Out of some forty-two desegregation cases I decided, only two did not stand on appeal.<sup>13</sup> I recognized that many citizens did not like the court's decrees, but I lived in hope that the intelligent people would ultimately understand that the law was the law, and I must say that hope ultimately came to pass, although it was some years in coming.

It would be unfair to leave the impression that every citizen acted irresponsibly. Many were courageous. Governor Holton, in particular, who had school-age children, publicly escorted them to public schools in accord with the desegregation decree. The Governor's actions were even more remarkable given that because the Governor's mansion was located on state, not city property, the Governor's children were technically exempt from the court's busing order. His actions brought criticism from a segment of the public, but his courage was a great source of comfort to me. Indeed, his actions helped to alleviate my concern that I had unfairly subjected my own family to danger.

Among others who exhibited courageousness in their vocal support of quiet adherence to the law was my friend, J. Sargeant Reynolds, a state senator and then Lieutenant Governor. There were, I am sure, many others,

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13. Dale Eisman, *Judge Merhige Makes His (Bench) Mark*, RICH. TIMES-DISPATCH, AUG. 28, 1977, at G1. One of the cases that did not stand on appeal was the *Emporia* case which was reversed by the Fourth Circuit Court of Appeals, which in turn was reversed by the United States Supreme Court. See *Wright v. County Sch. Bd.*, 309 F. Supp 671 (E.D. Va. 1970), *rev'd*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972). The other case was the Richmond consolidation case, which also was reversed by the Fourth Circuit Court of Appeals. *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va. 1971), *rev'd*, 462 F.2d 1058 (4th Cir. 1973), *aff'd by an equally divided Court*, 412 U.S. 92 (1973). As a former member of the Richmond School Board, Justice Powell declined to participate in the case.



though many local political leaders by their silence left little doubt as to their feelings of discontent. Of course, I will never forget the tenacious courage of Samuel Tucker, law partner of Oliver W. Hill, who acted as counsel for the plaintiffs in many of the cases. Neither will I forget the many defense lawyers, such as Fred Gray, Bolling Hobbs, and my late colleague D. Dortch Warriner, who, though disagreeing with the court's decrees, refused to participate in encouraging the personal attacks upon me and my family.

It has been a long time since the first order in accord with *Green* was entered and even longer since *Brown*, and we are, in my view, still searching for a truly integrated system of education. Nevertheless, we have made progress, though hopefully not as much as we will in the same period of time in the future.

African-Americans are at long last receiving, to a great extent, the treatment envisioned by the Fourteenth Amendment. Our citizenry is at long last conscious of the educational deprivation to which some of our citizens have been subjected, and time, morality, and the law give great promise of ultimate equality in education as well as in other aspects of our lives.