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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF WILLIAM C. CRAMER

AUTHORITY TO FILE

All parties having consented, this Amicus Curiae brief is filed on behalf of William C. Cramer, Member of Congress from the 8th Congressional District of Florida, author of the amendment to section 401 (b) of the Civil Rights Act of 1964 prohibiting the assignment of students to public schools to overcome racial imbalance.

QUESTIONS ADDRESSED

1. Does section 5 of the Fourteenth Amendment empower the Congress to formulate legislative guidelines for enforcing the equal protection clause of that Amendment?

2. Is Title IV of the Civil Rights Act of 1964, relating to Desegregation of Public Education, a Constitutional expression of the authority conferred by section 5?

3. Was Title IV intended to be applied nationally or sectionally?

4. Does *de facto* segregation occur in the South?

5. Does the establishment of *de jure* quotas by the Courts constitute the assignment of students to public schools in order to overcome racial imbalance in violation of section 401 (b) of Title IV of the Civil Rights Act of 1964?

6. Are officials or courts of the United States 'empowered' to issue orders to bus pupils or students from one school to another or from one school district to another to racially balance student bodies although section 407 (a) of Title IV of the Civil Rights Act of 1964 specifically prohibits such orders?

I.

THE CONSTITUTIONAL SETTING

At the time the Constitution was being discussed by the Founding Fathers, the institution of slavery was prevalent throughout the former colonies—both North and South. How slaves were to be counted in the apportionment of power divided the Constitutional Convention. At one time, it broke up over the question. At no time, however, was the issue of Negro rights in any of its present ramifications within the contemplation of the drafters of the Charter.

When continued reservations of certain key leaders forced the adoption of the first Ten Amendments, they were added as a limitation on the power of the new Federal Government rather than as an inhibition on any of the powers then reserved to the States.

In the years following ratification, the issue of slavery became critical as the Nation expanded to the West. During this period, in the landmark Dred Scott decision, the rights of Negroes were further circumscribed.

Not until the post-Civil War period were the Dred Scott disabilities legislatively removed (in 1866). And not until the approval and ratification of the 13th, 14th,

and 15th Amendments were Constitutional protections relative to the treatment of Negroes finally adopted. At the time of their approval, however, many States—North, South, and Border—continued to maintain effective dual systems of laws for blacks and whites. Consequently, while Negroes were emancipated, their rights remained proscribed in law, customs, mores and tradition. In *Plessy* v. *Ferguson*,[1] the practice of providing 'separate but equal' accommodations was given formal judicial sanction. It remained the law of the land for the next half century.

In the Thirties and Forties, cases challenging the 'separate but equal' doctrine were pressed upon the courts. Not until the first *Brown* decision in 1954, however, was the doctrine, as it applied to education, finally overturned. Since then, the courts have played an increasingly activist role in effecting an end to segregation in public education.

But, the reach of the courts in such matters is Constitutionally circumscribed. All that was prohibited by the 14th Amendment was State action denying the equal protection of the laws because of race, color, or previous condition of servitude. Once such *de jure* denials were removed, the oversight authority of Federal courts logically ceased.

As to how such disabilities were to be removed, the amendment itself leaves no doubt. Section 5 categorically states that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." This language makes it abundantly clear that the framers of the Fourteenth Amendment envisioned that the Congress of the United States, that is the elected representatives of the sovereign people, would have the final say in formulating guidelines for enforcing its provisions.

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[1] 163 U.S. 537 (1896).

[1a] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Granted this authority, it follows that once the "power to enforce" has been exercised in accordance with the language and tenor of the amendment, the courts are duty bound to give full expression to the legislative will for, to do otherwise, would contravene the law and violate Constitutional responsibilities. By the same token, if the Congress, in exercising its "power to enforce", exceeded duly conferred Constitutional authority, then the courts would be bound to strike down such measures.

Insofar as the question of school desegregation is concerned, the Congress has seen fit to act. On July 2, 1964, after lengthy deliberations, it approved and the President signed into law the Civil Rights Act of 1964, Public Law 88-352, 88th Cong., 2d Session, 78 Stat. 241. In the years since its passage, the Act has been the subject of both Executive action and Judicial interpretation. Unfortunately, in the process, the language and purpose of the National Legislature in approving it has frequently been misconstrued. Hence, the Congressional plan has been repeatedly contravened.

The aim of this brief is to present a selective legislative history of the Civil Rights Act of 1964. By doing so, it is hoped that those misconceptions which presently cloud, and at times compromise, the full and effective implementation of the Act's Constitutionally-conferred Congressional purposes can, once and for all, be laid to rest.

II.

LEGISLATIVE HISTORY OF TITLE IV

On June 19, 1963, President Kennedy submitted to the Congress a proposed Civil Rights Act of 1963. In a message accompanying the omnibus package, the President complained of "the slowness of progress toward primary and secondary school desegregation", noting that it was more than 9 years since the Supreme Court's decision in the *Brown* case. To speed the process of school desegregation, the President called on Congress to "assert its

specific Constitutional authority to implement the 14th Amendment." [2] Specifically, he recommended the enactment of a two-pronged approach for achieving desegregation in the public schools. The first was designed to accelerate the litigation process while, at the same time, relieving private individuals of the responsibility for initiating and prosecuting school desegregation cases. As expressed by the President: "Authority would be given the Attorney General to initiate in the Federal district courts appropriate legal proceedings against local public school boards or public institutions of higher learning—or to intervene in existing cases . . ." under the conditions set forth in the measure.[3]

The second prong of the President's plan proposed a program of Federal technical and financial assistance to aid school districts in the process of desegregation. As stated in the President's Message: [4]

> "As previously recommended, technical and financial assistance would be given to those school districts *in all parts of the country* which, voluntarily or after result of litigation, are engaged in the process of meeting the educational problems flowing from *desegregation or racial imbalance* but which are in need of guidance, experienced help, or financial assistance in order to train their personnel for this changeover, cope with any difficulty and complete the job satisfactorily (including in such assistance, loans to a district where State or local funds have been withdrawn or withheld because of desegregation)." [Emphasis added]

The Administration bill was introduced in the House of Representatives by Congressman Celler, Chairman of the Committee on the Judiciary. It was designated H.R.

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[2] House Doc. 124, 88th Cong., 1st Sess. at 6 (1963).

[3] Id. at 6 and 7.

[4] Ibid.

7152, and referred to the Judiciary Committee and, in turn, to an appropriate subcommittee for consideration.

As introduced, Title III of the bill relating to "Desegregation of Public Education" consisted of ten sections. The first, (301), contained definitions. The next 5 sections (302 through 306) dealt with technical assistance to facilitate desegregation in the public schools. Sections 303 through 306, as originally introduced, in addition to desegregation, were also concerned with "other plans designed to deal with problems of racial balance in school systems." Indeed, throughout these sections, the term "racial balance" and "measures to adjust racial imbalance" were used repeatedly, as the following language will confirm:

> Sec. 302. The Commissioner shall conduct investigations and make a report to the President and the Congress, within two years of the enactment of this title, upon the extent to which equal educational opportunities are denied to individuals by reason of race, color, religion or national origin in public educational institutions at all levels *in the United States, its territories and possessions,* and the District of Columbia.
>
> Sec. 303. (a) The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit, to render technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools *or other plans designed to deal with problems arising from racial imbalance in public school systems.* Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation or racial imbalance, and making available to such agencies personnel of the Office of Education or other persons *specially equipped to advise and assist them in coping with such problems.*

(b) The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel *to deal effectively with special educational problems occasioned by desegregation or measures to adjust racial imbalance in public school systems.* Individuals who attend such an institute may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for dependents and including allowances for travel to attend such institute.

Sec. 304 (a). A school board which has failed to achieve desegregation in all public schools within its jurisdiction, *or a school board which is confronted with problems arising from racial imbalance* in the public schools within its jurisdiction, may apply to the Commissioner, either directly or through another governmental unit, for a grant or loan, as hereinafter provided, for the purpose of aiding such school board *in carrying out desegregation or in dealing with problems of racial imbalance.*

(b) The Commissioner may make a grant under this section, upon application therefor, for—

(1) the cost of giving to teachers and other school personnel inservice training *in dealing with problems incident to desegregation or racial imbalance in public schools;* and

(2) the cost of employing specialists in problems incident *to desegregation or racial imbalance and of providing other assistance to develop understanding of these problems by* parents, school children, and the general public.

(c) Each application made for a grant under this section shall provide such detailed information and be in such form as the Commissioner may require.

> Each grant under this section shall be made in such amounts and on such terms and conditions as the Commissioner shall prescribe, which may include a condition that the applicant expend certain of its own funds in specified amounts for the purpose for which the grant is made. *In determining whether to make a grant,* and in fixing the amount thereof and the terms and conditions on which it will be made, *the Commissioner shall take into consideration* the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; *the nature, extent, and gravity of its problems incident to desegregation or racial imbalance, and other such factors as he finds relevant.*
>
> * * * *
>
> Sec. 305. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, and on such conditions, as the Commissioner may determine.
>
> Sec. 306. The Commissioner shall prescribe rules and regulations to carry out the provisions of sections 301 through 305 of this title. [Emphasis added]

Although there were more complex titles in the bill, the proposed extension of technical assistance to problems related to 'racial imbalance' quite naturally focused congressional attention on Title III. Consequently, during the course of hearings on this provision, questions were repeatedly directed to witnesses in an effort to ascertain what the term 'racial imbalance' as used in the bill actually meant. Congressman Cramer, in particular, persistently sought a definition of this elusive phrase, but without success.[5]

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[5] Hearings on H.R. 7152 before Subcom. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. at 1782, 1888-1889, 2084-2086, 2138, 2163, 2234-2236 (1963).

Upon conclusion of the hearings, the Subcommittee met in Executive Session for 17 days to consider the omnibus bill. Ultimately, it struck out of H.R. 7152 all after the enacting clause and inserted an amendment in the nature of a substitute. The amended version was thereafter recommended to the full Judiciary Committee. It contained a reworked version of old Title III, renumbered Title IV, embodying a number of major and minor changes. The most significant of these was the elimination from the Title of all authority to extend financial assistance to overcome problems of 'racial imbalance.' Various reasons were assigned for these deletions. As stated in the Report: [6]

> ". . . The Committee failed to extend this assistance to problems frequently referred to as 'racial imbalance' as no adequate definition of the concept was put forward. The Committee also felt that *this could lead to the forcible disruption of neighborhood patterns*, might entail inordinate financial and human cost and create more friction than it could possibly resolve." [Emphasis added]

The full Judiciary Committee, in its consideration of the bill, also adopted an amendment in the nature of a substitute. The Committee substitute was practically the same as the Subcommittee proposal relating to methods to effect desegregation in public education. As finally approved, however, the renumbered Title was limited to authorizing suits by the Attorney General to further "the orderly achievement of desegregation in public education." As the analysis of the reported bill contained in the Committee's report confirms, all mention of or reference to the controversial notion of 'racial balance' was stricken from the Title: [7]

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[6] House Report 914, 88th Cong., 1st Sess. at 21-23 (1963).

[7] **Id. at 23-24.**

Section 401 contains definitions including the definition of "desegregation" as the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin.

Section 402 would direct the Commissioner of Education to conduct a survey and report to the President and Congress, within 2 years from enactment, concerning the lack of availability of equal educational opportunities by reason of race, color, religion, or national origin in public educational institutions at all levels.

Section 403 would authorize the Commissioner, upon the application of any State or local educational agency, to furnish technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools.

Section 404 would authorize the Commissioner to arrange with colleges and universities for the operation of institutes for special training designed to improve the ability of teachers and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by school desegregation. Stipends could be paid to those attending such institutes in amounts specified by the Commissioner.

Section 405 (a) would authorize the Commissioner, upon application by a school board, to make a grant to defray the cost of (1) providing inservice training to teachers and other school personnel in dealing with problems incident to desegregation, and (2) employing specialists to advise in respect of such problems.

Section 405 (b) would direct that in passing on an application for a grant, the Commissioner take into consideration the total amount available for the grant program, other pending applications, the financial condition and resources of the applicant, and the seriousness of its problems incident to desegregation.

Section 406 would authorize payments pursuant to a grant or contract under title IV to be made by the Commissioner in advance or by way of reimbursement.

Section 407 (a) would confer authority upon the Attorney General to institute civil suits in the Federal district courts in order to achieve desegregation in public schools and colleges. He could bring suit when he received a written complaint from parents that the school board in their district had failed to achieve desegregation, or from an individual that he had been denied admission to or continued attendance at a public college by reason of race, color, religion, or national origin. As a prerequisite to suit, the Attorney General would be required to certify that the signers of the complaint were "unable to initiate and maintain appropriate legal proceedings" for relief, and that the institution of an action would materially further the public policy favoring the orderly achievement of desegregation in public education. It is not intended that determinations on which the certification was based should be reviewable.

Section 407 (b) provides that the Attorney General may deem a person "unable to initiate and maintain appropriate legal proceedings" within the meaning of subsection (a) if such person is unable to bear the expense of the litigation or obtain effective legal representation, or when the Attorney General is satisfied that the institution of the litigation by such person may result in injury or economic damage to him or his family.

Section 407 (c) provides that the term "parent" includes any person standing in loco parentis.

Section 408 provides that in any action or proceeding under title IV, the United States is to be liable for costs the same as a private person.

Section 409 provides that nothing in title IV shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Despite these changes, Congressman Cramer's fears were still not allayed. They prompted him to pen these prophetic words in the Report: [8]

> "[A]s a matter of legal craftsmanship, this bill is inexpertly drafted, imprecisely worded and imperfectly oriented to the very problems it professes to solve. The ambiguity of its language creates a cloud of obscurity which conceals its potential consequences. While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope. *What the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended . . .*" [Emphasis added]

Title IV was considered on the Floor of the House of Representatives on February 6, 1964. In all, eight amendments were proposed and two were adopted. Of particular moment was one offered by Congressman Cramer providing that the definition of "desegregation" in section 401 (b) "shall not mean the assignment of students to public schools in order to overcome racial imbalance." In explaining the need for and meaning of his amendment, the Florida lawmaker declared: [9]

> "Mr. Chairman, this amendment is very simple. *It does precisely and unequivocally what the proponents of the bill indicate they wanted to do. That is, to strike 'racial imbalance' from the bill* and from this title which I otherwise, in its present form, believe is still in the bill as I have said before many times.

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[8] House Report 914, 88th Cong., 1st Sess. at 112 (1963).

[9] 110 Cong. Rec. 2280 (1964).

> "In the hearings before the committee I raised questions on 'racial imbalance' and in the subcommittee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words 'racial imbalance' proposed by the administration.
>
> "*The purpose is to prevent any semblance of congressional acceptance or approval . . . to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*" [Emphasis added]

At the conclusion of his remarks, Congressman Celler, Chairman of the Judiciary Committee and a Floor Manager of the bill, sought recognition: [10]

> "Mr. CELLER. Mr. Chairman, will the gentleman yield?
>
> "Mr. CRAMER. I yield to the gentlemen from New York.
>
> "Mr. CELLER. Mr. Chairman, the amendment offered by the gentleman from Florida is acceptable.
>
> "The CHAIRMAN. The question is on the amendment offered by the gentleman from Florida (MR. CRAMER)."

The Cramer amendment was thereafter unanimously adopted by the House.

On February 10, 1964, the House passed and sent to the Senate the proposed Civil Rights Act of 1964, including amended Title IV. In that Body, supporters of the omnibus legislation moved for immediate consideration of the House bill in order to avoid referring it to the Judiciary Committee, traditionally hostile to such measures. Their efforts were successful. In the early stages of the Floor debate that followed, proponents expressed the hope that the House bill would be accepted without modification, thus obviating the necessity of extended consid-

[10] Ibid.

eration of the bill and a House-Senate Conference. This effort did not succeed, however. In consequence, the Senate deliberated on H.R. 7152 for 83 precedent-smashing days.

As in the House, one of the principal concerns of Senate Members was the meaning and application of 'racial balance' insofar as the amended version of the bill was concerned. Because of grave reservations on this score, additional clarifying amendments were demanded as the price for approval of the bill. Their literal effect was to deny any "official" or "*court*" of the United States the power "to issue any order seeking to achieve a racial balance in any school requiring the transportation of pupils or students from one school to another or one district to another in order to achieve such racial balance, or otherwise enlarge the *existing power* of the court to insure compliance with constitutional standards." [11] Since "existing power" as asserted by the courts at the time, comprehended only ending segregation in the schools, not promoting integration, Congress sought to make it crystal clear that no enlargement of that authority was contemplated by the Act. In other words, it, rather than the courts, would set the guidelines for desegregating public schools. No better elucidation of this can be found than in the amplifying remarks of then-Majority Whip Hubert Humphrey speaking for the Managers of the bill: [12]

> "Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged *racial imbalance* in public schools. *The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation*, and indeed, said as much in section 401 (b). However, *to make this doubly clear, two amendments* dealing with this matter are *proposed.*

[11] 110 Cong. Rec. 12714 (1964).

[12] Id. at 12717.

"The first provides that nothing in title IV 'shall empower any 'court' or 'official' of the United States to issue 'any order' seeking to achieve 'a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.' *This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.*

"*Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'*

"*Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.*" [Emphasis added]

Senator Javits of New York, a staunch proponent of civil rights, likewise sought to reinforce these understandings: [13]

"Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill. . . . Therefore *there is no case in which the thrust of the statute* under which the money would be given *would be directed toward . . . bringing about a racial balance in the schools.*

[13] Id. at 12714.

> If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have *an open and shut case* under Section 603. *That is why we have provided for judicial review.* The Senator knows as a lawyer that we never can stop anyone from suing, *nor stop any Government official from making a fool of himself,* or from trying to do something that he has no right to do . . ." [Emphasis added]

From the foregoing, it is evident that the Senate was fully cognizant of the ambitions of some 'courts' and 'officials' to enlarge the legislative plan from one aimed at ending segregation to one seeking to end so-called racial isolation by compelling racial balance in the Nation's public schools. Both through amendments and colloquy it attempted to nip these ambitions in the bud, as witness the following exchange between Senator Robert Byrd of West Virginia and Administration-spokesman Senator Humphrey: [14]

> "Mr. Byrd of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title IV school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?
>
> "Mr. Humphrey. *I do.*
>
> * * * *
>
> [Mr. Humphrey.] "[*T*]*he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race.* The bill *does not attempt to integrate* the schools, but it does attempt to eliminate segregation in the school systems. *The natural factors such*

[14] Id. at 12715, 12717.

as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional." [Emphasis added]

As already mentioned, debate in the Senate went on for 83 record-breaking days. Along the way, it became obvious to all concerned that the necessary ⅔'s vote for cloture, i.e. to shut off debate, could not be obtained unless sufficient clarifications and assurances were provided by the managers of the bill and appropriate amendments had been offered and accepted. Consequently, the Senate leadership, in consultation with the Attorney General, drafted a substitute containing them. The compromise measure won over a sufficient number of Senators to secure the necessary strength to effect cloture and the filibuster was ended. Nine days later, the Senate passed and sent to Conference a reworked version of H.R. 7152 containing the anti-busing guarantees of sections 401 (b) (the Cramer Amendment) and 407 (a).

On July 2, 1964, the House concurred with Senate amendments and the Civil Rights Act of 1964 was signed into law by then-President Lyndon Johnson.

III.

JEFFERSON AND BEYOND— THE SECOND RECONSTRUCTION

A. The Promise of Uniformity

Shortly after the Civil Rights Act of 1964 became the law of the land, a three-judge panel of the Fifth Circuit Court of Appeals undertook to review a consolidated group of school desegregation cases.[15] Their "distinctive features" declared the tribunal, are that they "require us

[15] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), commonly referred to as *Jefferson I*.

to re-examine school desegregation in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW)." [16]

The panel evidenced its sensitivity and awareness of its role in the constitutional scheme of things when it declared in its opinion:

> "More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation." [17]

And again, when it said:

> "When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy." [18]

And again:

> "We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy . . ." [19]

This apparent desire and determination to conform to its constitutional role as interpreter of the Nation's laws in order to effectuate national goals was commendable. Unfortunately, performance failed to measure up to promise. As the following analysis will show, the Court, in rendering its decision, repeatedly misconstrued and misinterpreted the Congressional will. Standing alone, each of its errors of construction represented a serious departure from what Congress intended. In synergistic combination, their effect has been to provide the judicial underpinnings for a radical revamping, recasting and re-

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[16] Id. at 845.

[17] Id. at 850.

[18] Id. at 856.

[19] Id. at 859.

ordering of Congressional priorities, policies, and purposes.

In the process, the Congressional will has been blurred and blunted and the promise and potential of the Civil Rights Act of 1964 has gone unrealized and unfulfilled.

B. The De Facto-De Jure Distinction

The goal of proponents of those provisions of the Civil Rights Act of 1964 dealing with education (Titles IV and VI) was to provide a uniform Federal approach for ending discrimination in the Nation's public schools. This aim was underscored by President Kennedy in his Message to Congress proposing enactment of the measure:

> "This is not a sectional problem—it is nationwide. . . . A national domestic crisis also calls for bipartisan unity and solutions." [20]

It was echoed in the Report of the House Judiciary Committee:

> ". . . H.R. 7152, as amended, resting upon [constitutional] authority is designed as a step toward (sic) eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." [21]

And re-echoed on the Floor in both Houses of Congress:

> " 'E Pluribus Unum'. We want unity. Equity begats unity. We want one and the same treatment for all." [22]

The Court in *Jefferson I* exhibited its perception of the pitfalls of a piecemeal approach in this memorable passage from its opinion:

> "In sum, the lack of uniform standards has retarded the development of local responsibility for the ad-

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[20] House Doc. 124, 88th Cong., 1st Sess. 13 (1963).

[21] House Report 914, 88th Cong., 1st Sess. at 18.

[22] Senator Pastore, a principal spokesman for the bill, 110 Cong. Rec. 7059 (1964).

> ministration of schools without regard to race or color. What Cicero said of an earlier Athens and an earlier Rome is equally applicable today." [23]

But the type of uniformity it had in mind was of a peculiar variety. By judicial fiat, it was to apply to Rome and Athens, Georgia (and other communities in the South), not to the Nation as a whole. Adopting the "ingenious though illogical distinction" [24] between so-called *de facto* and *de jure* segregation, it concluded that Congress had intended that the 'equal protection clause' was to be applied unequally and that, in effect, every manifestation of racial isolation in the South constituted *de jure* segregation. Whether Congress could have passed sectionally directed legislation had it wanted to is open to serious doubt. That it never contemplated such a double standard, is not, however. For the Court to have imputed such an intention was to thwart congressional will and, in the process, raise the spectre of a Second Reconstruction in America—one effected by judicial ukase.

The Court's rationale for this divisive rendering of the Union of States was this: Since the South was the area of the Nation which had maintained dual systems of education imposed by law prior to *Brown I*, the South required special rules for rehabilitation and reform—by implication, in perpetuity.

From a purely judicial standpoint, there would, at first blush, appear to be some justification for this view. The reason: It is generally presumed that the *Brown* decisions focused on the special problems of dual school systems in the old Confederacy. As a matter of fact, however, half of the consolidated group of cases decided in *Brown* actually originated elsewhere, i.e. in Kansas and Delaware. Thus, the notion that these decisions were con-

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[23] *Jefferson I* at 861.

[24] *United States* v. *Jefferson County School Board*, 380 F.2d 385 (C.A. 5, 1967), commonly referred to as *Jefferson II* at 398, Judge Gewin dissenting.

fined to the South is without foundation. So too is the unsupported proposition that the Congress intended the Civil Rights Act of 1964 to either establish or perpetuate arbitrary sectional differences. Indeed, everything the National Legislature said and did confirmed a contrary intention. In the words of Senator Pastore: "There must be only one rule to apply to every State." [25]

Yet the Court made short work of such evidences. The "similarity of pseudo *de facto* segregation in the South to actual *de facto* segregation in the North", it declared, "is more apparent than real." [26] Only "segregation resulting from racially motivated gerrymandering is properly characterized as '*de jure*' segregation",[27] it asserted. And, such gerrymandering, in the Court's lights, occurred only in the South.

The Court therefore concluded that:

> "Adequate redress . . . calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the State's system of *de jure* school segregation and the organized undoing of the effects of past segregation." [28]

Perhaps the most curious of the curious reasoning resorted to by the Court to justify the legislative lobotomy it was performing related to the role attributed to the author of section 401 (b). In commenting on his reasons for offering this provision, it blandly asserted that:

> ". . . Congressman William Cramer, who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require busing to overcome *de facto* segregation." [29]

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[25] Senator Pastore, 110 Cong. Rec. 7059 (1964).

[26] *Jefferson I* at 876.

[27] Id. at 876.

[28] Id. at 866.

[29] Id. at 879.

Having reached this conclusion, it interpreted his proposal in this way:

> "The affirmative portion of this definition, down to the 'but' clause, describes the assignment provision necessary in a plan for conversion of a *de jure* dual system to a unitary, integrated system. The negative portion, starting with 'but', excludes assignment to overcome racial imbalance, that is acts to overcome *de facto* segregation." [30]

It then determined that:

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation in *de jure* segregated schools." [31]

In effect, therefore, the Court decided that the Cramer Amendment did not mean what it said. Although the language declared that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", it found that the author intended only a limited prohibition. What Congressman Cramer and his colleagues wanted, according to the Court, was to prevent racial balance in *de facto* areas (all presumably in the North), not in his own constituency in the South where all separation of the races was presumed to be *de jure* in nature.

That the Court attributed such an intention to the Florida lawmaker seems hardly credible. In point of fact, what he actually sought to accomplish through his amendment was something quite different. From the debates, it is evident that the common understanding of Members of Congress at the time of its consideration was that *de facto* segregation was separation of the races by personal choice or preference and that such separation occurred in all sections of the Country—South as well as North. *De jure* segregation, on the other hand, was separation imposed by law or color of law. While primarily confined

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[30] Id. at 878 referring to Section 401 (b) of the Act.

[31] Ibid.

to the South, it was recognized that insidious manifestations existed in all parts of the Nation. The Civil Rights Act of 1964 embodied these understandings. Its aim was to root out all forms of *de jure* segregation nationwide. *De facto* segregation, however, that is the right of free association as reflected in neighborhood living patterns, was to be left alone wherever it occurred—North or South.

The contrary holding of the three-judge panel in *Jefferson I* that the Civil Rights Act of 1964 contemplated a double standard of administration, flies in the face of these understandings. Unfortunately, it was approved by the Court of Appeals, sitting in banc, in *Jefferson II* and thereafter, in one form or other, in a steady line of cases emanating from the Fifth and other Circuits ever since. Some have even gone so far as to assert, in effect, that Black neighborhoods in the South are *de jure* segregated per se. Through such arbitrary determinations, the literal and logical distinction between *de facto* (by choice) and *de jure* (by law) segregation which Congress believed it had written into the Civil Rights Act of 1964, has been all but obliterated.

C. Desegregation and Racial Balance

The Fourteenth Amendment provides that no State shall deny to any of its citizens the equal protection of the laws. The negative character of that enjoinder has been uniformly adhered to through the years.

In 1883, for example, the Supreme Court of the United States in the *Civil Rights Cases* [32] unequivocally held that the Fourteenth Amendment is a prohibition against State action and only State action. Mr. Justice Bradley delivered the opinion of the Court in which the principle was stated:

> "It is State action of a particular character that is prohibited. . . . [The amendment] nullifies and makes

[32] 109 U.S. 3, 11 (1883).

> void all State legislation, and State action of every kind, which denies to any the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. . . ."

More recently, the Supreme Court reaffirmed those principles in *Burton* v. *Wilmington Parking Authority* [33] when it announced that the *Civil Rights Cases*, "embedded in our constitutional law" the principle "that the action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States."

In *Briggs* v. *Elliott*, this view was upheld when the Court, seeking to "point out exactly what the Supreme Court had decided and what it has not decided" in *Brown* declared:

> "It has not decided that the federal courts are to take over and 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 integregation. It merely forbids discrimination." [34]

The same view was espoused in *Queen Cohen* v. *Public Housing Administration*, when Judge Rives, speaking for the Court, stated:

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[33] 365 U.S. 715, 721 (1961).

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

> "Neither the Fifth nor the Fourteenth Amendments operate positively to command integration of the races, but only negatively to forbid governmentally enforced segregation." [35]

President Kennedy, in submitting his Civil Rights Message in 1963, however, urged that the Congress scrap this approach in favor of a radical new one. What he proposed, in effect, was that the time-honored, judicially approved distinction between desegregation and integration be extinguished by legislative fiat and a new standard requiring racial balance substituted. In the President's words:

> "As previously recommended, technical and financial assistance would be given to those school districts *in all parts of the country* which, voluntarily or as the result of litigation, are engaged in the process of meeting the educational problems flowing from *desegregation or racial imbalance . . .*" [36] [Emphasis added]

The language of the bill accompanying the Presidential Message embodied this approach. As proposed, it contained a series of provisions whose enactment would have had the effect of legislatively approving the requirement of 'racial balance' as an equivalent of or supplement to desegregation. Members of Congress were, of course, aware of the implications of President Kennedy's proposal and they did what they thought was necessary to eliminate such provisions from the bill.

At first blush, some of the statements of the Court in *Jefferson I*, convey the impression that the National Legislature succeeded. On page 849, for example, the opinion states:

> "Congress decided that the time had come for a sweeping Civil Rights advance, including *national*

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[35] 257 F.2d 73, 78 (C.A. 5, 1958).

[36] Message to Congress, H.Doc. 124, 88th Cong., 1st Sess. at 7 (1963).

> legislation to speed up *desegregation* of public schools and to put teeth into enforcement of *desegregation.* Titles IV and VI together constitute *the congressional alternative to court-supervised desegregation.*" [Emphasis added]

And again, on page 851 of the opinion:

> "In April 1965, Congress for the first time in its history adopted a law providing general federal aid—a billion dollars a year—for elementary and secondary schools. It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving Federal assistance must meet *uniform national standards* for *desegregation.*" [Emphasis added]

But such statements were mere windowdressing. Far from adhering to the desegregation objectives Congress set forth, the Court, in easy stages, proceeded first to undermine and then recast them. "There is not one Supreme Court decision", it declared, "which can be fairly construed to show that the Court distinguished 'desegregation' from 'integration' in terms or by even the most gossamer implication . . ." [37] Manifestly, therefore, "the duty to desegregate schools extends beyond mere 'admission' of Negro students on a non-racial basis." [38] Having established this it was but a short step to a declaration that:

> "The Constitution is both color blind and color conscious." [39]

> "Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the bet-

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[37] *Jefferson I,* 846 n.5. It did not, of course, because at the time the decision was rendered it obviously felt that universally accepted semantic differences did not require it to.

[38] Ibid.

[39] Id. at 876.

> ter teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation, must necessarily be based on race." [40]

And from this to citing with approval the proposition that:

> "The courts and HEW cannot measure good faith or progress without taking race into account. '*When racial imbalance infects a public school system,* there is simply no way to alleviate it without consideration of race.' " [41] [Emphasis added]

In this fashion, "the unquestioned intent of Congress as illustrated by the legislative history" was obliterated, as was the former generally understood distinction between desegregation and integration.[42]

But the Court was still not content. "Some of the difficulty in understanding the Act and its legislative history", it stated, "arises from the statutory use of the undefined term 'racial imbalance'. It is clear, however, from the hearings and debates that Congress equated the term, as do the commentators, with '*de facto* segregation', that is, non-racially motivated segregation in a school system based on a single neighborhood school or all children in a definable area." [43]

Having reached this conclusion, it then went on to sanction racial balancing in non *de facto* areas i.e. all of the South, in this way:

> "The provision referring to percentages (in HEW Guidelines) is a general rule of thumb or objective administrative guide for measuring progress in de-

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[40] Id. at 877.

[41] Ibid. Citing Wright, Public School Desegregation: Legal Remedies for *De Facto* Segregation, 16 West. Res. L.Rev. 478, 489 (1965).

[42] *Jefferson II* at 407, Cox dissenting.

[43] *Jefferson I* at 878.

> segregation rather than a firm requirement that must be met." [44]

It further observed that:

> "Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system." [45]

Thus was the transition made from *de facto* to *de jure*, from desegregation to integration and, finally, from ending racial classifications to *de jure* quotas and balancing.

In the years since its rendering, the misinterpretations of legislative meaning and intent reflected in *Jefferson* have been enlarged and expanded upon. In the process, what amounts to a wholesale diversion of the will of the National Legislature as expressed in the Civil Rights Act of 1964 has taken place. Thus:

Where Congress desired that the provisions of the Act be uniformly applied in all fifty States, not on a sectional basis, the Courts have limited effective coverage to the old Confederacy.

Where Congress struck the notion of racial balance as an equivalent of or supplement to desegregation from the original bill, the Courts have treated the matter as if it had never been considered.

Where Congress, seeking to accord its negative action positive standing, specifically amended the Act to provide that desegregation shall not mean the assignment of students to overcome racial imbalance, the Courts have circumvented its intention by ruling that the prohibition applied only in *de facto* areas of the North, not at all in the South where all segregation was held to be *de jure* per se.

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[44] Id. at 886-887.

[45] Id. at 888.

Where Congress defined desegregation to mean the assignment of pupils "without regard to their race", the Courts have decided that the opposite was intended; that classification by race was necessary to remove the effects of past racial classification.

Where Congress sought to forestall attempts by courts or officials to bus students to achieve racial balance, the courts have approved what amounts to *de jure* quotas to measure compliance with their orders.

Where Congress sought to preserve neighborhood schools, the courts have set the stage for dismantling them.

IV.

CONCLUSION

The fundamental purpose of the Supreme Court in *Brown I* was to end legalized discrimination in public schools in order to improve the quality of education for Negro children. For a decade, decisions of the Court echoed and re-echoed this objective.

In enacting the Civil Rights Act of 1964, the Congress sought to further this end. Its aim was to provide the legislative wherewithal to marshal the full resources of the Federal Government to enhance the educational opportunities and, in the process, the quality of life, for Black Americans.

Unfortunately, almost before the ink was dry on this landmark measure, the Courts and the Executive began to circumvent Congress' handiwork. From a measure specifically designed to end segregation in the interest of education, it was reframed and reformulated until today it is cited as a statutory prop for balancing for balance's sake, for destroying neighborhood integration in order to accomplish racial integration, and, in an Orwellian exercise in 'doublethink', for perpetuating classification by

race in order to remove the inequities created by racial classification. Small wonder, under the circumstances, that increasing numbers of Americans of both races are disillusioned, that Congress is concerned, that the Executive is confused, and that the Judiciary, as evidenced by the diversity of its opinions, is bewildered.

Ironically, the present disillusionment and disenchantment would probably never have developed had the Courts and the Executive kept their respective eyes on the educational ball and on the carefully-considered measures that the people's representatives in the National Legislature framed to assist them. When, pursuant to its constitutionally-delegated authority that it "shall have power to enforce by appropriate legislation the provisions of" the Fourteenth Amendment, Congress passed the Civil Rights Act of 1964, its stated and restated objective was to provide the means for ending *segregation* in public education. This was the aim, the ideal, the raison d'etre.

To insure that this oft-stated goal would be strictly followed, the Congress provided what it considered to be satisfactory safeguards and assurances. These included the following:

(1) the Act would be uniformly applied in all 50 States;

(2) desegregation would not comprehend the notion of racial balance as either an equivalent or supplement;

(3) no assignment of students would be made to overcome racial imbalance;

(4) neighborhood schools would be maintained.

This desegregation theme runs through Congress' deliberations in Committee, its reports, and its debate on the Floors of both Houses. Its fundamental, its sole, its exclusive aim was to make the statute conform to Judge Parker's decision in *Briggs* that the Constitution is color

blind, not color conscious.[46] Managers of the bill emphasized and re-emphasized their understandings in this regard for, had they not, the necessary votes for passage of this extremely controversial measure would never have been forthcoming.

Unfortunately for the cause of civil rights and of education, the Courts and the Executive have misconstrued the Congressional will. As a result, a widening gulf between the promise of the Act and the performance of the Executive and the Courts in implementing and interpreting it has developed.

Justice Brandeis, one of the greatest civil libertarians ever to grace the bench, once said: "Experience teaches us to be most on our guard to protect liberty when the Government's purposes are beneficent."

It would be the ultimate irony if 'beneficent' attitudes on the part of well-meaning Executive and Judicial civil rights proponents had the ultimate effect of indelibly branding into the public consciousness the false notions that Blacks had to be treated unequally in order to be equal; that they are unable to either teach or learn from one another; that they, like some American Indians, in their own interest, must be made permanent wards of an all beneficent State.

Yet, is not this precisely what is happening?

What is to be done? Obviously, the Courts are at a judicial crossroads. If their efforts to improve educational opportunities for Black Americans are not to bear rancid fruit, they simply cannot continue to ignore the political, social, constitutional, and legislative mandate of the Civil Rights Act of 1964.

Some may argue that it is already too late; that past mistakes of interpretation cannot now be undone. But

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

such assertions are falacious. After all, the Supreme Court waited half a century to undo *Plessy*. A mere half decade has passed since the 'balancing' trend began.

A vast reservoir of racial good will still exists. The opportunity to move ahead thus remains. If reason rules, progress will be great. But, if it does not, then a harsh night of disharmony, disruption, and discord will descend upon our land as a new era of Reconstruction—this time judicially imposed—rends the Nation assunder once again.

If this comes to pass, who can seriously argue that the cause of education for Black Americans, or for that matter, for any American, will be advanced?

Respectfully submitted,

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