

## CHAPTER 4

**“More Than a Mere Word of Promise,” 1966–1968**

Fred Gray had been pacing the courtroom floor, questioning his witness, for what must have been an hour. It was a balmy day for late November in Montgomery. A warm breeze blew through the open windows. It carried the smells of the changing seasons through the tall limestone arches, standing like sentries along the walls of the Depression-era chamber, reaching up to the high, stenciled ceiling, with its semi-ornate beams and lights hanging down like dismal stalactites. The second floor of the federal courthouse was packed to capacity. Nervously shifting reporters and school officials filled the few rows of wooden benches behind the attorneys’ tables, and they jammed the gallery in the back.<sup>1</sup>

At the front of the room stretched a long bench. There sat judges Frank Johnson, Richard Rives, Hobart Grooms, and Virgil Pittman. Behind the judges, another high limestone arch receded into an antechamber and a blue wall adorned with gold stars. At the top of that wall, a clock was steadily ticking its way through the decorous silence. Before the panel of judges sat attorneys for the defendant state and local officials, the plaintiffs, and the United States. And in the middle of it all—at a simple wooden witness stand below the center of the judges’ bench—sat Austin Meadows, facing the attorneys, the gallery, the press, his colleagues, and, in a sense, the entire state of Alabama. Fred Gray decided that it was time.<sup>2</sup>

““Segregation,”” Gray began reading, slowly, “is a perfectly good word. It has been practiced throughout the ages for good results [and] used by the people of the civilized world for man’s greatest advancement.” Austin Meadows began to laugh. “Segregation,” Gray continued reading, “is the basic principle of culture, [whereby the] good join to separate themselves from the bad.” Did not the Lord set aside “segregated fruit for Adam and Eve,” and did Eve not disregard the Lord’s wish, forcing “honest men and women” to “work for their living ever since”? Meadows stopped chuckling

long enough to interject, “That’s right.” Gray paused briefly to look up, then resumed. Marriage, he read, “was the highest type of segregation,” without which “there would be no family unit,” and segregation was “one of the principles of survival throughout the animal kingdom,” for animals joined “their own kind to defend themselves by numbers against other animals that would destroy them without such segregated bond.” Gray again paused, this time for effect. “Birds of a feather,” he read, “truly flock together.”<sup>3</sup>

The usually stern and reserved federal judges began to grin. Gray finished reading, “Wild geese fly across this continent in V formation but they never join any other flock of birds. . . . The wild eagle mates with another eagle and not with any other bird. Red birds mate with red birds, the beautiful blue birds mate with other blue birds and so on through bird life. There can be segregation without immoral discrimination against anyone. Integration of all human life and integration of all animal life would destroy humanity and would destroy the animal kingdom.” Gray was reading from a memorandum that Meadows had written and sent to every local school superintendent in the state that summer. It was now autumn 1966, and the four-judge panel had been convened to hear witness testimony and oral arguments in both *Lee v. Macon County* and the recently filed *NAACP v. Wallace* case. Gray, as lead attorney for the plaintiffs in *Lee*, had set up the moment perfectly.<sup>4</sup>

Meadows had been uncooperative and equivocal earlier as Gray began to ask him about his affirmative duty under the 1964 *Lee v. Macon* court order. “Have [you] recommended or encouraged any superintendent of education to abolish segregation in his particular school system,” he asked. Meadows replied incoherently, “No, I don’t remember it, because I approach it from discrimination; nondiscrimination if that is necessary; I have told Superintendents if this is necessary to not discriminate, to integrate pupils, and then you must follow that and abide by that in your opinion, you should do it.” Gray asked if there were any records in his office that would indicate that he had taken any action to encourage desegregation. Meadows insisted, “Whatever they are, I have already furnished them to you.” Gray was more specific: were there any releases to local superintendents in which he had “promoted the elimination of racially dual school systems”? “No,” Meadows allowed, “I approach it from nondiscrimination.” Gray then offered the “segregation” memorandum into evidence and asked Meadows pointedly, “Is it your understanding that by circulating that release to the City and County Boards of Education, it would encourage them to segregate rather than to

integrate?” No, Meadows snapped, it was simply “an editorial statement on the word *segregation*. ” He was squirming uncomfortably in the witness chair. As Gray began again, Judge Rives instructed, “You might read the statement to us . . . if you will, Mr. Gray.”<sup>5</sup>

Just below the surface of the supposedly innocuous statement—which the court would later call a “racist parable”—lay the same white fears that had animated segregationist resistance since the Citizens’ Council had organized. Desegregation was abhorrent to God because it would lead to miscegenation, which would itself emasculate white men and ultimately lead to the destruction of Western civilization. If whites did not band together, they would be overrun by blacks. It was their moral obligation to defend segregation, provided they observed law and order in doing so. Meadows argued in his memo that a “time of reckoning” was coming on the “fundamental principles of segregation and non-discrimination.” The latter could be maintained, he argued, without destroying the former “in its truest sense.” By that November day in the courtroom in Montgomery, he would have to convince four federal judges that this was true. And they were laughing at him.<sup>6</sup>

The judges had decided that “common questions of law and fact” warranted the combined hearing of the two cases. The plaintiffs in both *Lee v. Macon* and *NAACP v. Wallace* were targeting the defiance campaign orchestrated by George Wallace. The court had declined to issue a contempt citation for the governor, but the stakes were still high. In *Lee*, Gray had reintroduced the prospect of an order forcing the state school board to use its authority over local boards to carry out desegregation on a statewide basis. Meanwhile, the Justice Department and the NAACP Legal Defense Fund were awaiting the adjudication of a consolidated set of appeals, including *U.S. v. Jefferson County Board of Education* and several other Alabama cases. They had asked the appellate court to explicitly order the adoption of the more stringent, revised HEW guidelines in cases throughout the Fifth Judicial Circuit. As the new year approached, a decade of tectonically slow movement in school desegregation litigation seemed ready to finally rupture the segregated southern education system. And Alabama looked to be the epicenter.<sup>7</sup>

## “Means to an End”

As all parties were preparing for the hearing in *Lee v. Macon* and *NAACP v. Wallace* that fall, many students, families, teachers, and administrators were dealing with the reality of token desegregation for the first time. Developments in the courtroom and in the halls of bureaucracy informed their daily lives, but their daily lives gave meaning to those battles at the same time. The seven thousand or so black students in desegregated, formerly all-white schools, young men and women, boys and girls, experienced everything from cautious friendship to outright hostility, from inspiration, hope, and reward to disillusionment, despair, and regret.<sup>8</sup>

Many white teachers went out of their way to be kind to black students, sometimes even shielding them from the behavior of white students. But just as often white teachers antagonized black students. Some teachers exploited the fact that some black children were unaccustomed to saying “yes, ma’am” and “no, ma’am.” As one student recalled, “[The teacher] got fed up because I got tired of her trying to make me say ‘yes, ma’am,’ and I started saying, ‘I think so.’” Other students reported teachers repeatedly using the word “nigger,” segregating their classrooms by race, allowing white students to avoid sitting next to or behind black students, and assigning black students older books and lab equipment. One girl revealed that her teacher told the class when discussing desegregation, “In a little time, our freedom will be gone.”<sup>9</sup>

Another student reflected that white students, who “knew nothing about black folks,” had been told, again and again, “to expect the worst of us.” Still, many black students insisted that white students were “not entirely hostile.” Some mused about family and peer pressure, saying, “You can tell some of them want to say something [friendly] to you, but they are scared that if they [do], then the other one is going to call them ‘Nigger lover’ and all that kind of junk.” Some explained that the pain of being ignored could be the worst, though there were, of course, a litany of abuses. By far the most common harassment was being called “nigger.” Beyond that, there was always the violence. “I’m tired of getting hit,” one student admitted, especially since “nothin’ [was] ever done about any of it.” One student in Choctaw County received a type-written message that read, “YOU AND YOURS SISTER ARE GOING TO GET THE HELL BEAT OUT OF YOU AND YOURS SISTER UNLESS YOU AND YOUR SISTER STOP COMMING TO SCHOOL. Go to your on negere schools.”<sup>10</sup>

For a lot of students, desegregation meant disillusionment. “Some people think that white people are higher class than Negroes,” one girl reported, “but from the way the children behave, they are lower class.” Many black students excelled in the classroom at their new schools, and one recalled that going to a white school “removed this mystique about white students being better.” Desegregation also meant sacrifice—of extracurricular activities, accolades, or student-voted designations. One student had been the president of his student council and president of his class. This would not be possible at the formerly all-white school to which he had transferred, and his family wondered if this would affect his scholarship prospects. His mother beseeched the school board to allow him to cancel his transfer request, saying he “really did not realize what he was doing.” The board denied the request.<sup>11</sup>

Disillusionment also came in the form of reproach from members of the black community. One girl remembered, “We had to deal with a lot of criticism, because [some people] just didn’t feel like this was something that needed to have been done.” She was called “stuck up” and accused of being aloof. One girl’s friend assumed that because she went to the white school that she and her family were “big Niggers” and “had a lot of money.” Others were accused of endangering their neighbors. “They said that our house was going to be burned and the Ku Klux Klan was going to get us and lots of people was going to get killed,” a girl said. Then “our house did get burned, and when it did people said, ‘That’s what I told you was going to happen.’”<sup>12</sup>

Finally there were the textbooks. Black students had traditionally been given hand-me-down books that were tattered and out-of-date—if they had been given any textbooks at all. But as transferring black students and their parents explored the newer history texts at white schools, they found something even more disturbing—a narrative that served as an apology for segregation and white supremacy. Though there were several such books, none was more controversial than *Know Alabama*, the official, state-approved history text for the fourth grade. It was written by Dr. Frank Owsley, a historian who once described former slaves as “half-savage blacks” who could “still remember the taste of human flesh.” He had also professed that the “purpose of [his] life,” was undermining the great “Northern myth” of the Old South by influencing fellow historians, who would then “teach history classes and write textbooks and . . . gradually and without their knowledge be forced into our position.”<sup>13</sup>

*Know Alabama* presented an idyllic, paternalistic portrait of slavery and plantation life in the antebellum period—“one of the happiest ways of life in Alabama before the War Between the States.” It featured the loving “Mammy,” who had dutifully earned the white children’s love by raising them with care. There were the field hands, with “rows of bright white teeth,” who happily “helped grow the cotton.” Most of them were “treated kindly,” because “the first thing any good master thought about was the care of his slaves.” There was the mistress, who was “the best friend the Negroes [had], and they [knew] it.” And there were the slave children who liked to play “cowboys and Indians” with the white children and who “gladly went off to be the Indian, to hide and to get [themselves] captured.”<sup>14</sup>

Then there was “Black Reconstruction,” when Republican “carpetbaggers” from the North “came to steal and cheat people,” and “scalawags” in the South “turned against their own people.” Fortunately, a group of men decided that they ought to “do something to bring back law and order.” Many a fourth-grade child read, “It happened that at this time a band of white-robed figures appeared [and] rode through the towns like ghosts and disappeared.” The Ku Klux Klan “did not ride often, only when it had to.” Whenever people did “bad, lawless things,” the Klan “would appear on the streets,” then “go to the person who had done the wrong and leave a warning,” or, if necessary, hold “court” in the “dark forest at night,” then pass “sentence” on “the criminals.” Eventually the Klan scared the carpetbaggers into going back north, upon which Negroes “decided to get themselves jobs and settle down to make an honest living.” When the last of the Republicans was run out of office by good, loyal Democrats, “law and order were restored,” and “there was no more need for the Ku Klux Klan.” Thus were the white children of the South indoctrinated.<sup>15</sup>

The problem was widespread enough that the U.S. House Subcommittee on Education began looking into the “problem of racially distorted textbooks” that fall. The USOE and the Council on Human Relations tried asking school boards to replace the books. In early November, George Wallace broached the subject in an interview with the *Citizen*. Wallace argued that HEW’S Harold Howe was “going to be in complete charge” of the content taught to children in the South and warned that “HEW bureaucrats” were going to “completely capture your child.” But there was hope. “We passed this law in Alabama,” he explained, speaking of the anti-guidelines law. “It’s now being attacked by the NAACP, but we felt that we could bring

[the conspiracy] out into the open [to] prevent a complete takeover of the school system before the people knew about it.”<sup>16</sup>

That November, Lurleen Wallace crushed Jim Martin in the gubernatorial general election—538,000 votes to 250,000, and sixty-five counties to two. Martin had campaigned on a cautious, intelligent defense of segregation, accusing George Wallace—his real opponent—of reckless defeatism. But voters had been mesmerized by Wallace’s racial demagoguery. Martin might have ridden a Republican surge, but his stance on segregation looked weak when up against Wallace’s brazen defiance. The incumbent governor’s powers of hypnosis allowed him to become the governor by proxy, but not before he and his administration had to stand trial in *Lee v. Macon* and *NAACP v. Wallace*.<sup>17</sup>

By the time the four-judge court convened to hear testimony later that month, pretrial motions had complicated the posture of the litigation. The defendant state officials in *Lee* had attempted to file a cross-claim against the United States, alleging that the revised HEW guidelines were unconstitutional. The attorneys for the state did not realize that the U.S. government was protected by sovereign immunity in this case. The Justice Department actually wanted to litigate the issue, however, so it acquiesced to the naming of Commissioner Howe and newly installed HEW secretary John Gardner as defendant parties. When all parties gathered at the federal courthouse in Montgomery, the issues before the court included the constitutionality of the anti-guidelines law and the latest tuition grant law, the constitutionality of the revised HEW guidelines themselves, the question of whether state officials had violated the injunction in *Lee v. Macon*, and whether or not state interference warranted some sort of statewide desegregation order.<sup>18</sup>

St. John Barrett led the CRD team that had, over the six weeks leading up to the trial, deposed seven state officials, thirty-eight local superintendents, HEW’s Howe, and the USOE’s lead investigator, Gene Crowder. The CRD wanted to establish that the state board had a prominent role in operating and perpetuating a statewide dual school system. Two things were of particular interest—the harassment campaign undertaken by Wallace and Meadows and a system of annual surveying conducted by the State Department of Education. State surveyors examined facilities in each school system every year and, in addition to labeling each school as either “Negro” or “white,” made recommendations as to whether each facility was in satisfactory

condition, in need of repair, in need of consolidation with another school, or in need of closure.<sup>19</sup>

The depositions added some unexpected value for the CRD. Most superintendents were cautiously cooperative and revealed limited efforts at compliance amid obvious intimidation from the state. Others were standoffish or recklessly racist and combative. J. R. Snellgrove candidly described the demographics of his Enterprise city school system with apparent disregard for the formality of the proceedings. “We have three sections of the nigger race in Enterprise,” he began. “Holly Hill doesn’t have anything except white people. There is not a nigger that lives over in that section of the community. I believe we have at this time,” he said, “ten niggers in the Hillcrest Elementary there.” The CRD attorneys tried to maintain stoic expressions as Snellgrove carried on, “College Street Elementary, 565 whites and 26 niggers. . . . Enterprise High School is 912 whites and ten niggers. Coppinville High School, 389 niggers, that’s seven through twelve.” Also at Coppinville, he said, “We have full time one white teacher, eighteen full time niggers and one part time white teacher.” He almost forgot, “Plus we have a guidance counselor over there. Of course, she is nigger.”<sup>20</sup>

When the trial itself finally began, Fred Gray called Austin Meadows to the witness stand. The tense and lengthy exchange between the lanky, young, bespectacled black attorney and the obdurate, old, and annoyed segregationist administrator was the centerpiece of the two-day affair. At one point, Gray asked Meadows about the state’s program to provide out-of-state tuition for black college students when the state’s black colleges did not offer a particular program. Meadows said, “I approved a grant for out-of-state aid for you to study law.” Gray acknowledged that Meadows had indeed approved Gray’s grant to attend Case Western Reserve School of Law when he was just out of Alabama State College for Negroes. And now there sat Meadows in the witness chair, forced to recount his interference before a packed courtroom, at Gray’s insistence.<sup>21</sup>

Meadows was visibly annoyed by Gray’s pointed and persistent questioning. He frequently put his feet up on the railing of the witness stand, wiped his nose with his tie, stared at the ceiling, and answered “yep” and “yeah” to the attorney’s questions. But he found it impossible to explain away the telegrams, letters, and memorandums uncovered by Gray’s team and the CRD. In addition to the “‘segregation’ is a perfectly good word” memo, there



were numerous telegrams to local school boards threatening to withhold state funds if they did not report on the status of their Form 441. There was also the telegram to the Lauderdale school board condemning its plan as “beyond the law,” as well as the letter to the Tuscaloosa officials offering more teacher units. Gray revealed that Meadows had offered to create more budget room for any system seeking to avoid black teachers in white classrooms.<sup>22</sup>

The attorneys for the defendant state officials called a number of local superintendents to the stand. They were attempting to show that Gene Crowder and the USOE had made “ridiculous demands” and that state officials had done nothing more than advise not going “beyond the law.” Opening up the local officials to cross examination, however, allowed Barrett and Gray to further expose the nature of the segregated state system and the extent of state control and harassment. Several superintendents reluctantly revealed that county school systems routinely accepted black students from autonomous city systems in order to keep the city schools all-white. Others admitted that, although their systems had reportedly been in compliance with the original guidelines, they never really were. Most damningly, multiple officials agreed that it “would take a court order” for them to ever desegregate at all, as that was the only way they could face the white community.<sup>23</sup>

The boldest move of the trial was undertaken by the man *Time* magazine described as “the most prominent segregationist lawyer in the country.” Mississippi’s John Satterfield had been brought in to bolster the state’s defense. Over the robust objection of both Barrett and Gray, Satterfield called Alabama’s senior U.S. senator, Lister Hill, to testify as to congressional debates on the HEW guidelines. Hill explained that Virginia senator Harry Byrd had argued in committee that the guidelines exceeded the statutory authority of the Civil Rights Act. The committee had, Hill recounted, subsequently issued instructions to HEW to avoid drafting “onerous guidelines that [contravened] legislative intent.” During cross-examination, Gray forced Hill to admit that, in his many years in the Senate, he had not once voted for a civil rights bill. When the defense rested its case, the court gave all parties thirty days to condense the mountain of evidence before it into briefs and deposition summaries, after the submission of which a hearing would be held. Then the court would finally decide the two cases.<sup>24</sup>

As the trial in Montgomery was wrapping up, the Fifth Circuit appellate court handed down its decision in a consolidated set of appeals from school

cases, initiated by the CRD and including *U.S. v. Jefferson County*, under which the opinion was rendered. John Minor Wisdom wrote for the majority: “*The only school desegregation plan that meets constitutional standards is one that works.*” The revised HEW guidelines, he argued, were the “best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.” To put an end to all of the “beyond the law” talk, Wisdom described the guidelines as “based on decisions of this and other courts, within the scope of the Civil Rights Act of 1964, prepared in detail by experts in school administration, and intended by Congress and the executive to be part of a national program.”<sup>25</sup>

Those who argued that the guidelines went “beyond the law” often pointed toward the 1955 holding of district judge John Parker in *Briggs v. Elliott*, one of the remanded *Brown v. Board* cases. Parker had contended, “The constitution does not require integration; it merely forbids discrimination.” In *Jefferson*, Wisdom described that portion of the opinion as “pure dictum”—it was tertiary to the issues before the court and was therefore not binding. This “*Briggs dictum*” had become a legal “cliché” that had drained *Brown* of its “significance.” Wisdom went even further, writing, “*The only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.*” The immediate goal had to be conversion to “a unitary, non-racial system—lock, stock, and barrel.”<sup>26</sup>

It was the first significant judicial indictment of freedom of choice. Wisdom contended that freedom of choice plans served to “preserve the status quo” and offered “little prospect of . . . ever undoing past discrimination or of coming close to the goal of equal educational opportunities.” While the court did not find freedom of choice itself to be unconstitutional, it held that it must only be allowed within a “*bona fide* unitary system,” in which there were “not white schools or Negro schools—just schools.” To get to that point, school boards under court order would have to adopt plans that met a new set of judicial standards, including facilities and program equalization and immediate desegregation of faculty and staff. The hope, Wisdom explained, was to make freedom of choice “more than a mere word of promise to the ear.” District judge Harold Cox, a committed segregationist, dissented and called for an en banc rehearing of the appeals. The entire appellate court would get to weigh in.<sup>27</sup>

Two weeks after *Jefferson* was handed down, Lurleen Wallace was sworn in as the state's first female governor, and her husband became its first governor-regent. The Wallaces would have a new partner in resistance, though. Austin Meadows had seen enough. Convinced the country was headed for a "tragic era," he opted to retire. His replacement was Ernest Stone, whose introduction to George Wallace had come via a letter he wrote in 1965, when Stone was a local superintendent. He told Wallace, "I will match my segregation philosophy and beliefs with any man in Alabama." His credentials, he explained, included being raised in a "sundown town" on Sand Mountain, where blacks were not allowed to travel after dark. His Jacksonville school board had registered compliance with HEW, but he insisted that the board did "*only* what [it] had to do in order to keep our schools open." Stone maintained that his State Department of Education would operate on the same principle. "Laws and court orders [had] to be obeyed," but he promised, "we will volunteer no more."<sup>28</sup>

Stone asked the court to discharge him as a defendant in *Lee v. Macon*, arguing that it was Meadows, not he, who had behaved badly. But, the court explained, the injunction followed the office, not the man. So Stone was forced to prepare for the upcoming joint hearing in *Lee* and *NAACP v. Wallace*. When the court convened in February, attention turned quickly to the guidelines. Judge Rives revealed reservations, in light of the recent decision in *Jefferson*. "It worries me," he admitted, "whether there is any requirement of integration beyond true freedom of choice. I think there are some Negro children," he continued, "who prefer to go to purely Negro schools and some white children who prefer to go to purely white schools." He asked the CRD's St. John Barrett, "If you classify students by race for the purpose of forced integration, aren't you coming close to depriving people of their rights under the equal protection provision of the Constitution?" And when the LDF's Henry Aronson suggested that freedom of choice was not working, Rives replied, "If the goal is to mix, I will concede that freedom of choice will not work, but if the goal is to abolish discrimination, then . . . it might work."<sup>29</sup>

After the hearing, the judges had to address a thorny issue of timing. The trial courts' decisions in *Lee v. Macon* and *NAACP v. Wallace* would be appealable directly to the Supreme Court, as they were decisions of a three-judge court. They might also contradict the coming ruling of the entire Fifth Circuit appellate court in the en banc *Jefferson* decision, insofar as the guidelines were concerned. This could create unnecessary confusion. The

guidelines were a secondary issue in *Lee v. Macon*, but the state had put them front and center in *NAACP v. Wallace*. Rives polled his fellow circuit judges, who decided that the court ought to wait for the *Jefferson* ruling before issuing its ruling in *Wallace*. In *Lee v. Macon*, the judges had decided that they should issue some sort of statewide order, but the guidelines issue had put forth the question of exactly who would be effected by it. By March Judge Johnson had convinced Judges Rives and Grooms that the court should bind every school system in the state that was not already under a court order, ignoring their HEW compliance status. This would allow the court to go ahead and hand down its ruling in that case.<sup>30</sup>

It came on March 22, 1967. Judge Johnson wrote the opinion, in which he blasted the defendant state officials. They had, “through their control and influence over the local school boards,” clearly “flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama.” Johnson meticulously recounted the myriad ways in which state officials had, since the reprieve in 1964, not only continued to neglect their constitutional duty to desegregate but also actively fought to thwart others’ efforts to do the same. “One of the most illegal ways” in which they had done this was in lying to local school systems and telling them not to go “beyond the law.” Additionally, there were the numerous incidents of “dramatic interference”—from Meadows’s ludicrous “racist parable” to the chastising telegrams, phone calls, and threats to call mass meetings. More importantly, the plaintiffs had presented “absolutely overwhelming” evidence that the state exercised “general supervision and operation” of local systems through control over construction, teacher assignments, transportation, and, most importantly, funding.<sup>31</sup>

Johnson condemned the tuition grant law with equal force. It was “unmistakably clear,” he wrote, when analyzing the law “in the historical context which gave rise to its enactment,” that it was “but another attempt” to “circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes.” The state had failed to provide any sort of rational basis for the law that trumped the plaintiffs’ assertion that it was an attempt to “fill the vacuum” left by the enjoined 1957 tuition grant law. The court warned that if the “concerted effort to establish and support a separate and private school system for white students” did not cease, then it would be

forced to declare the “private” system a state actor, which could bring the segregation academies under the statewide order then being issued.<sup>32</sup>

The court decided that the relief awarded in *Lee v. Macon* had to “reach the limits of the defendants’ activities.” Accordingly, the defendant state officials would be required to oversee the implementation of a “uniform state-wide plan for school desegregation.” Local school boards would not themselves be parties to the suit, but the court warned that they might be added as such in the future if they resisted the state’s directives. The “state’s plan” would be provided by the court and would therefore, to a certain extent, be the plaintiffs’ and the CRD’s plan. “For the time being,” the court decided that this would mean statewide freedom of choice. Johnson issued another word of warning, though. If “choice influencing factors,” like segregated faculties and inferior facilities and curricula at black schools, were not “eliminated,” then freedom of choice itself was a “fantasy,” and “some other method of desegregation” would become necessary. Echoing Judge Wisdom’s reasoning in *Jefferson*, Johnson explained that freedom of choice was “not an end in itself” but merely “a means to an end.”<sup>33</sup>

Ernest Stone effectively became an agent of the court. He was ordered to compel the ninety-nine school systems in the state that were not already under court order to adopt a model desegregation plan and to begin implementing it that fall. The model plan included provisions for the desegregation of pupils, faculty, staff, activities, and transportation. It required the publication of choice periods and explained when those periods should run and what choice forms should look like. It even included a sample letter to parents. School boards had twenty days to adopt plans and report to Stone, who was required to then report to the court. Stone was also required to develop a statewide plan for equalization, whereby the “physical facilities, equipment, services, courses of instruction, and instructional materials” in black schools would be brought up to par with those at formerly all-white schools.<sup>34</sup>

Johnson had very closely followed the “proposed decree” submitted by the CRD. While it was not unheard of for a federal court to maintain a close relationship with the Justice Department or for a judge to adopt a proposed decree wholesale, this was a special relationship. The legal scholar and former CRD attorney Owen Fiss called it the “truest sense of *amicus* ever in American law.” Johnson respected and trusted the CRD attorneys, especially John Doar. Doar understood this and always approached cases in Johnson’s court with the expectation that the judge was counting on CRD attorneys to

demonstrate not only a commanding understanding of the issues at law but also a willingness to act as the court's investigative arm. More than anything, both Johnson and Doar understood that the CRD had manpower, funding, and time, which the court did not. All that Johnson, Rives, and Grooms had were a few clerks and the already overburdened U.S. marshals.<sup>35</sup>

The symbiotic relationship between the court and the CRD would be pivotal moving forward through implementation, which itself would be unprecedented. The court had issued the first statewide "structural injunction" in U.S. legal history. As Wisdom had suggested in *Jefferson*, the judges insisted that a desegregation injunction ought to be remedial, in order to eradicate the effects of past discrimination. As CRD attorney Brian Landsberg later explained, "Because the racial segregation was systemic, the violation could be cured only by systemic relief." What made the *Lee v. Macon* decision unique, though, was the concept of enjoining state officials to provide *statewide* remedial relief. A federal court initiated the restructuring of a state institution, a process in which the court itself was, in effect if not in principle, the administrator, acting with the assistance of the plaintiffs' attorneys and the CRD and using the State Department of Education as the conduit.<sup>36</sup>

Not only was this kind of structural injunctive arrangement unprecedented, it also proved to be influential. Johnson himself would soon use an almost identical relief structure in cases aimed at reforming Alabama's prison system and mental health facilities in the 1970s. *Lee v. Macon* would also later serve as the inspiration for Alabama's landmark voting rights case, *Dillard v. Crenshaw County*, in which the state legislature was found to have systematically blunted the effect of the black vote.<sup>37</sup>

More immediately, *Lee* began to significantly alter the relationship between the federal courts and HEW. It resulted in a complete role reversal between the court and the USOE. The vision of Title VI of the Civil Rights Act had been that courts would establish desegregation standards, and the USOE would enforce those standards. But as the *Yale Law Journal* correctly predicted in reviewing the *Lee v. Macon* decision, the USOE in Alabama would soon be "at best . . . serving in an advisory role, helping the courts determine the applicable standards and then helping, in tandem with the Justice Department, to advise the courts on the adequacy of the desegregation plans submitted to school districts." The court had already embodied standards in its model plan, and it would now be in charge of enforcing

compliance. As events would soon demonstrate, not everyone at HEW accepted this arrangement.<sup>38</sup>

Perhaps the most significant impact of the March 1967 decision was its redefining the potential of a single desegregation case. It had eliminated the need for ninety-nine more cases, ninety-nine more sets of plaintiff families, or ninety-nine more actions brought by the CRD—and all of the time and costs associated therewith. The *Christian Science Monitor* called it “the most sweeping implementation of [*Brown*] yet rendered by a lower federal court.” The *Birmingham News* predicted “historic implications,” which seemed prescient when Jack Greenberg indicated that the LDF would seek “similar orders in other hard core states.” Both the LDF and the CRD soon did just that, resulting in omnibus desegregation orders in cases in Georgia, Mississippi, Texas, Arkansas, and South Carolina. Owen Fiss would later claim that he saw in Johnson’s adjudication “something as ingenious, as path-breaking, as innovative as *Marbury v. Madison*.”<sup>39</sup>

One week after the landmark decision, the full Fifth Circuit appellate court issued an 8–4 decision in the en banc rehearing of *U.S. v. Jefferson*, upholding the majority ruling and adopting Wisdom’s uniform decree, with minor changes, as the standard for the entire circuit. Greenberg observed that *Jefferson* and *Lee* together had finally put the LDF “in a position to bring about substantial school desegregation in the Deep South for the first time.” The Southern Regional Council called the decisions “the most significant school desegregation actions of the 1960s.” The *Yale Law Journal* concluded that the two were “judicial acknowledgments” that the “administrative process,” via HEW, was inadequate to the task of fulfilling the promise of *Brown*.<sup>40</sup>

Some of the arguments raised in dissent of *Jefferson* would prove to be highly influential themselves. Drawing on Judge Cox’s dissent to the trial court ruling, judges John Godbold and Griffin Bell argued that *Jefferson* constituted an “unclear and unfair” infringement on personal liberty. Godbold argued that freedom of choice was ultimately a choice “of associates.” In past litigation, this had meant the right to organize, but Godbold here meant “associational rights” that were “personal in nature.” By threatening an individual’s right to associate with one of his or her choosing, the court was sending “paternalistic authoritarianism” colliding “head-on” with “individual freedom.” While he couched this critique in terms of black schoolchildren and their families, who might choose to continue attending



all-black schools, the implications were clear. White individuals might also chose to associate with those of their own race by attending private schools or moving to the suburbs.<sup>41</sup>

A few weeks after the rulings, Frank Johnson made the cover of *Time* magazine. The piece was titled “Interpreter in the Front Line,” with the issue dedicated to “The Law and Dissent.” The cover featured an oil portrait of the judge, with his characteristic courtroom glare—a stern, thoughtful gaze directed right at the reader. Inside he described his legal philosophy in civil rights cases. “I’m not a segregationist, but I’m not a crusader either. I don’t make the law,” Johnson explained. “I don’t create the facts. I interpret the law.” He added, “I don’t see how a judge who approaches these cases with any other philosophy, particularly if he was born and reared in the South, can discharge his oath and the responsibility of his office.” The writer illustrated the beginning of a hearing in Johnson’s courtroom: “Through a door in the starry wall strides the judge, lean and tanned in his unvarying crisp black suit, white shirt and black tie. He usually shuns robes: ‘If a judge needs a robe and a gavel, he hasn’t established control.’”<sup>42</sup>

## “Now Let Them Enforce It”

The day after the en banc Fifth Circuit ruling in *U.S. v. Jefferson* was announced, the governor of Alabama went before the legislature, and on television, to address the state. Lieutenant Governor Albert Brewer accidentally introduced George Wallace. Considering the nature of the former governor’s new regency, Brewer might have been excused for the gaffe. The legally elected governor—Lurleen Wallace—was not flustered. While the former governor Wallace was holding closed-door meetings with local school officials and drafting a resolution of opposition to the *Lee v. Macon* ruling, the new Governor Wallace had been preparing to deliver this speech in opposition to the same. Twenty television stations and forty-three radio stations had descended on the capital, which, according to the governor’s office, made it the most widely covered political event in Alabama history. Frank Johnson had already telegraphed the Justice Department and advised John Doar, “You might make arrangements, as you see fit, to have the address taped.”<sup>43</sup>

Governor Wallace began by forcefully invoking the state’s motto, declaring, “Alabama and its elected officials dare defend our rights!” This



was met with thunderous applause. The recent decisions were, she explained, “calculated to destroy the school system of Alabama.” The governor called it “the last step toward a complete takeover of children’s hearts and minds,” which was “exactly what Hitler did in Germany.” *Lee*, in particular, “destroy[ed] the authority” of state and local officials by giving control over “every single aspect of the operation of every school system” in the state to “agents of the district court, who must execute the commands of three judges.” The judges would now demand “massive reassignment[s]” and “force white children to go to all-Negro schools, and Negro students to go to predominantly white schools.” They would throw dissenting parents in jail and forbid anyone to even discuss the order in a negative light. Worst of all, Lurleen Wallace bemoaned, the court was threatening “to have your elected public officials coerce local school boards and cut off state funds to any of our public schools and state colleges which fail to abide by their interpretation.” The average Alabamian probably did not appreciate the mind-boggling irony of such a statement.<sup>44</sup>

The governor articulated the southern segregationist’s distorted understanding of federalism, which federal courts had been trying desperately to dispel. She argued that the state’s police power was the “highest law” and stood “above the individual and above the three judge Federal district court.” She therefore issued a call to arms. The *Lee v. Macon* decision was “impossible” to implement and ought to be resisted “in every way possible.” The state was appealing and seeking a stay of the order, but Wallace also called on the legislature to “resolve itself into a committee of the whole,” which could then issue a “cease and desist” order to the court and place all authority over education in her hands. She concluded by attempting to channel Andrew Jackson (whose concern was Indian removal), announcing defiantly, “They have made their decree; now let them enforce it.” State Senator Alton Turner called it “the greatest speech [he] ever heard in eight years of service in the legislature.”<sup>45</sup>

Down the street, Frank Johnson began drafting a list of statements made by the governor that did “not appear to have any basis in fact.” At the same time, Fred Gray was preparing a memorandum in opposition to the state officials’ request for a stay. Gray included the full text of Wallace’s address as an attachment, which allowed Johnson to fashion his “list of statements” into a rebuttal in his order denying the stay request. Johnson explained that the recent order in *Lee* “did not involve any new or novel constitutional or

legal principles and did not add to the defendants' obligations to eliminate discrimination in Alabama's public schools." He wrote, "Interpretations of [the order] to the contrary are erroneous and not factually sound, particularly public statements, now a part of the record in this case, made by one of the defendants in this case to the following effect," at which point he paraphrased only some of the governor's more egregious claims—that the three judges would determine pupil and teacher assignments, that the court would require busing to achieve racial balance, that no one could criticize the order, and that it was "rendered in malice and animosity." Wallace's speech, Johnson recognized, was an attempt to mislead parents and school officials who were "not personally familiar with the decree."<sup>46</sup>

George Wallace went on record decrying the rulings too. His eye was increasingly trained on the presidency, and he would use every opportunity to denounce the federal government in ways that might resonate throughout the country. He called the *Lee v. Macon* decree an attempt at "intellectually moronic control of our children." The federal government would try to "cram [the] decree down our throats," he predicted, just as they had tried to tell southerners who to "let use our restrooms" and who they could "take a showerbath with." Wallace insisted defiantly, "You know what we goin' to tell them when they ask us to give 'em more in the schools of Alabama this fall? I'll tell you what we'll tell 'em," he said, "Goddamnit, we jus' ain't." Lieutenant Governor Albert Brewer, Wallace's former point man in the legislature, insisted, "People are not going to sit still for someone to come and tell them that their children must be transferred to a school of another race." He predicted, "You are going to have riots; you are going to have knifings and stabbings in every school in this state."<sup>47</sup>

Defiant rhetoric continued to encourage defiant action. And not everyone was committed to resistance within the bounds of law and order. Hate mail and death threats began to pour into the district court in Montgomery. Many thought Johnson was the only judge hearing the case, so he received the lion's share of harassment. He had a cross burned on his lawn. He received a letter from a group of self-described Vietnam veterans of dubious credentials calling themselves "FIVE VOLUNTEERS," who demanded that he "withdraw, rescind, cancel, void" the *Lee v. Macon* order. If Johnson chose to ignore the demand, they wrote, "Your son, an innocent person will pay the penalty first, then your mother who is also innocent, then will be your time." They assured him that his bodyguards would not be able to save him. The "volunteers" had

“plenty of practice killing Viet Congs off by the dozens,” and they would soon be “getting rid of some of the bastards” who were destroying “freedom in the U.S.”<sup>48</sup>

Rives and Grooms were not immune. Another letter addressed to all three judges was probably penned by the same “volunteers.” These “armed service men,” who had spent “two years in Vietnam killing, sniping, and going through hell,” insisted that the recent order of the court “MUST be rescinded—reversed—done away with altogether” or else the judges and their families would “not live to see the end of the year.” The group called out each judge individually. “Judge Grooms,” they warned, “that fine daughter of your [*sic*] will pay the penalty with you.” “Judge Johnson,” they continued, “If your son should survive he will have to enroll in a public school—not a private school this year.” Finally, they addressed Judge Rives: “YOU OLD SOB had better get ready also . . . the sooner we get rid of you the better it will be. ALL THREE OF YOU GET READY TO GO OUT LIKE A LIGHT.” Some went beyond threats. Someone bombed Johnson’s mother’s Montgomery home, blowing out windows and creating a two-foot hole beneath the house’s foundation, while the elderly Mrs. Johnson was in an upstairs bedroom watching television.<sup>49</sup>

At the same time, the state legislature was meeting as a “committee of the whole,” as Lurleen Wallace had suggested. It heard testimony from local school officials, some of whom revealed a sense of relief. School boards could now tell people that they had resisted as long as they could. When George Wallace and Ernest Stone called a meeting of state superintendents in the midst of the legislative hearings and Wallace called on the local officials to issue some sort of defiant resolution, they refused. Many local leaders seemed prepared to finally accept the inevitability of token desegregation. State leaders in other states evidently were as well. Wallace attempted to arrange a summit to chart a unified defiant course. Lurleen was dispatched to meet with other southern governors, but only four attended, issuing a statement condemning *Lee* and *Jefferson* but nothing more.<sup>50</sup>

On May 3, the three-judge court hearing *NAACP v. Wallace* finally rendered its opinion. The court held that the en banc decision in *U.S. v. Jefferson* was “entitled to such great deference and respect” that the court was “unwilling to depart from it.” The judges also determined that it was “too clear for extended discussion” that the Alabama anti-guidelines law was unconstitutional. A state could not simply nullify the effort of a federal agency to implement a federal statute. The court added several “ancillary

findings,” mostly to help facilitate the implementation of the *Lee v. Macon* decree and assuage anxieties created by the misinformation pouring out of Montgomery. The court insisted that any school systems facing funds deferral would have the opportunity for judicial review of that process and that compliance with HEW guidelines would not necessarily mean “compulsory mixing of the races,” only the elimination of the racially dual system. Finally, the court tried to underscore the primacy of the *Lee v. Macon* court vis-à-vis HEW. “As courts attempt to cooperate with executive and legislative policies,” they wrote, “so too [HEW] must respect a court order for the desegregation of a school system.”<sup>51</sup>

The four judges involved in *Wallace* and *Lee v. Macon* were prepared to leave the administration of the statewide decree in *Lee* to Judge Johnson alone. Judge Rives acknowledged in a letter to a fellow circuit judge who had admired the *Lee* opinion, “The glory belongs entirely to Judge Frank Johnson.” Rives added that Johnson had also agreed to take on “the vast amount of administrative work” to come. Johnson knew he would have the CRD and Fred Gray and Solomon Seay to assist him. John Doar had already stationed a team of attorneys in Montgomery to monitor state government and local school board activity. Johnson told Doar that he assumed any further state action would be predicated “upon the theory that it is incumbent upon the governor, in the exercise of her police power, to maintain ‘law and order.’” If so the CRD and Gray and Seay stood ready to enter the necessary motions for further relief.<sup>52</sup>

In mid-April, Ernest Stone delivered his first court-ordered report on local school systems’ desegregation plans. All but one system—Bibb County—had made some attempt to comply. The CRD found that half of the submissions were inadequate, however, and the court agreed. Most of the unacceptable plans included no specific provisions for faculty desegregation. Some systems had simply submitted press releases indicating that they were in compliance with the original HEW guidelines. Others had sent in signed Form 441-B agreements. A few had submitted plans that were completely inadequate even in providing for token pupil desegregation. The court ordered Stone to notify the most recalcitrant systems that more was needed. When four of those systems failed to respond satisfactorily, the CRD moved to have them added as defendant parties, and the court ordered the Autauga, Cullman, Pickens, and Bibb County school boards to show cause why they should not be individually enjoined.<sup>53</sup>

At a hearing in early May, the CRD informed the court that three of the four had agreed to adopt the court's model plan. In direct correspondence with Johnson, they had also agreed to certain localized provisions. For example, Cullman County had agreed that black students from a closed all-black school would no longer be bused out of the county. Bibb County came to the hearing prepared to fight the show cause order. The Bibb school board's attorney, Reid Barnes, made a bumbling argument, which St. John Barrett quickly discredited. The court then made Barnes's client the first local board to be individually enjoined in the litigation. The CRD then submitted an analysis of forty-eight revised desegregation plans it had previously deemed inadequate. Five of the plans remained unsatisfactory, so Johnson issued another show cause order. Three of those five boards subsequently decided to cooperate and were discharged as defendant parties. But by the end of June, Marion and Thomasville had become the second and third systems to be individually enjoined. Bibb County appealed its injunction.<sup>54</sup>

That summer Ernest Stone's office worked tirelessly compiling the required reports for the court. The state superintendent not only had to submit regular reports on individual systems' progress in implementing their pupil desegregation plans, he also had to formulate statewide plans for equalization of facilities, for the elimination of racially dual transportation systems, and for encouraging faculty desegregation. When Stone submitted these to the court, Johnson forwarded them to the CRD and to Gray and Seay for review. The CRD quickly determined that they were too vague and asked the court to order Stone to submit more specific plans. It then detailed what such plans might look like, including an itemized inventory of inequalities in the ninety-nine local school systems. The CRD also asked the court to have Stone work with the each local system in submitting individual equalization and transportation plans, which it could then scrutinize. The court granted the motions, with Johnson essentially copying the CRD's language verbatim.<sup>55</sup>

Where Stone had failed to fully take the initiative, the CRD had stepped in and gained a measure of direct control over the desegregation process. Johnson told John Doar, "This Court expects, and requires, your office to 'follow through' on these matters by consultation" with Stone and local school boards, "and, if necessary, as a final resort, by appropriate petition or petitions presented to the Court." This was the blueprint for the next year of implementation of the *Lee v. Macon* statewide decree. School boards would submit plans and reports to Stone, who would report to the court, which

would farm out review to the CRD and Gray and Seay, who would then make recommendations to the court. Complicating this arrangement was HEW.<sup>56</sup>

The court and HEW disagreed as to whether or not the ninety-nine *Lee v. Macon* systems were subject to the “final order” of a federal court. Per the revised HEW guidelines, this would automatically mean that they were “in compliance.” However, HEW officials insisted that, with the exception of Bibb, Marion, and Thomasville, these systems were not direct parties to the litigation and were therefore still subject to HEW scrutiny. This meant that school systems previously deemed noncompliant by HEW were still facing deferral of federal funding for the upcoming school year. But that prevented those systems from hiring and placing teachers, among other things, and therefore prevented them from implementing their court-approved desegregation plans. Judge Johnson conferred with Judges Rives and Grooms and advised Doar that HEW was “thwarting the implementation of our order.” He asked Doar to arrange a “high level conference” with HEW leaders and “work out some policy” that would guarantee continuing funds for the ninety-nine *Lee* systems.<sup>57</sup>

In the meantime, HEW investigators continued to pressure local officials. Johnson had assumed that HEW would bring motions before the court before it moved to defer or terminate funds, in the same way the CRD had been bringing motions before the court any time it found plans to be inadequate. But HEW was acting unilaterally. Doar insisted to the increasingly irritated judge that this was probably being directed by “some low level bureaucrat” who lacked the proper authorization. In fact, the new head of HEW’s Office of Civil Rights, Peter Libassi, had instructed investigators to proceed with the deferral process for noncompliant systems, regardless of their status in the *Lee* litigation. Upon learning this, the court considered enjoining HEW itself in some way, but Johnson decided that would be counterproductive. The court would soon need HEW to assist the CRD in monitoring compliance with court-approved plans, once “paper compliance” had given way to actual implementation.<sup>58</sup>

Matters came to a head in July, when HEW moved to terminate funds to the Lanett city school system. Lanett had adopted a satisfactory desegregation plan, as determined by the CRD and the *Lee* court. But HEW investigators cited the continuing use of an all-black high school and limited pupil desegregation, which the school board had promised the court it would address in the near future, as reasons to move for termination. HEW then

moved to defer funds to the Talladega County system, whose efforts to comply had been described at one point by Judge Johnson as “magnificent.” Johnson told his fellow judges on the *Lee* panel that the “ridiculous situation” now warranted an injunction against HEW leadership. He drafted and entered an order adding Peter Libassi, HEW secretary John Gardner, and HEW attorney James Dunn as defendant parties in *Lee v. Macon* and temporarily restrained them from terminating funds to any of the ninety-nine systems.<sup>59</sup>

At a hearing in late July, Johnson was compelled to comment from the bench on the bizarre circumstances, saying, “The court observes—and I guess it is permissible for me to say this—that there are several ironies in this case.” He admitted, “At this posture it has reached the point, almost, of being ridiculous.” The Justice Department attorneys already on the case were obligated to defend the HEW officials, while counsel for the defendant state officials found themselves in complete agreement with the court for once. St. John Barrett lobbied for HEW’s ability to continue with its regular program, calling Libassi to the stand, only to see the testimony frequently sidelined by arguments with Judge Rives, who at one point announced angrily, “We’ve gone about our limit in trying to work with HEW” The three judges agreed that HEW could continue to monitor compliance and even develop a factual record via administrative hearings. But it could not defer or terminate funds to the *Lee v. Macon* school systems without first bringing a motion before the *Lee* court.<sup>60</sup>

At the end of the hearing Johnson argued that, in filing their desegregation plans and submitting to the authority of the court, the ninety-nine *Lee* systems had become de facto parties to the litigation. To allow HEW to unilaterally terminate funds to those systems would be “an abdication on the part of the Court of its authority to require compliance with a court order.” There could be “no administrative supervision or review,” Johnson explained, “of a judicial decree.” He concluded, “The Court is the only authority to do it.” The court then ordered HEW to rescind its termination of funds to Lanett and enjoined the department from any further terminations without its approval. HEW’s Derrick Bell called it a “pseudo-legal” interpretation and lamented, “In Alabama, the decision certainly means that our basic tool for bringing about compliance—if not taken away—is at least placed in the background.”<sup>61</sup>

The opening of schools that fall saw another incremental increase in desegregation in Alabama and throughout the South, almost all of it through



some form of freedom of choice. In the ninety-nine *Lee v. Macon* systems, there were 7,441 black students and 541 black teachers in formerly all-white schools, and there were 346 white teachers in formerly all-black schools. Desegregation via the nineteen independent school cases in the state brought the number of students in desegregated assignments up to nearly sixteen thousand. But this remained a fraction of the state's black pupil population. And desegregated faculty assignments rarely exceeded more than one teacher of the minority race at a given school. The upshot was that almost all of the state's schools remained racially identifiable schools for mostly whites, or schools for just blacks. Until there were, in judge Wisdom's words, "just schools," freedom of choice looked to produce only a "token of tokenism."<sup>62</sup>

Further complicating matters were the ongoing efforts of state leaders to thwart the *Lee v. Macon* order. Judge Rives expressed confidence, writing in a letter to Judge Johnson, "I would doubt whether any intelligent person can hope to defeat our decree legally." But he cautioned, ominously, "It is the actually but covertly illegal moves which will probably trouble us most the attempts to work some people up into a frenzy and practically to substitute mob rule for a rule of law." The Wallace administration and its legislative allies were planning both types of resistance. The governor's office had instructed school boards that summer to send out forms to parents, asking them to indicate whether they would prefer that their child was taught by a teacher of their own race, or by a teacher of the opposite race. Some school boards added the sensible option, "I prefer that the board of education assign qualified teachers, regardless of race," and a few refused to circulate the forms. Wallace's demagoguery was still holding local officials hostage nonetheless. One superintendent who called the district court to complain suggested that "someone ought to go to jail," then abruptly told Johnson's law clerk to "forget he had called."<sup>63</sup>

Lurleen Wallace announced in August that the vast majority of the state's parents wanted a teacher of their own race for their children. This, she argued, was grounds for the *Lee v. Macon* court to admit that its March order was "erroneous" and to rescind it. It was also the purported basis for the passage on September 1, 1967, of the Teacher Choice Act. It declared that "all students, acting through their parent or guardian, shall be required to exercise a choice . . . of the race of [their] teacher." It continued, "No child shall be required to have a teacher of a race different from the one preferred by his or her parent or guardian except where the preference made does not



reflect the majority will of parents or guardians similarly situated.” The law threatened uncooperative school boards with termination of state funding, and it gave the governor the authority of enforcement through “such administrative action as is deemed necessary.”<sup>64</sup>

The legislature also passed yet another tuition grant act, the third since *Brown*. This incarnation called for the creation of a “Financial Assistance Commission,” appointed by the governor, that would administer funds for students attending private, nonsectarian schools across the state. The law was color masked, but no one misunderstood the purpose—to facilitate the growing white exodus from desegregating public schools. Fred Gray filed a motion for further relief in *Lee v. Macon*, asking the court to issue “the third—and hopefully last—strike” on tuition grant laws. Gray also asked the *Lee* court to enjoin enforcement of the teacher choice law. Gray argued, quoting from the March 22 order, “It constitutes the most recent—and reckless—form of ‘dramatic interference with local efforts to desegregate public schools.’” The CRD filed a supplemental complaint of its own in *Lee v. Macon*, while the state NAACP filed a similar motion in the *Brown v. Board of Education of City of Bessemer* case. George Wallace acknowledged that it was then “up to the judges,” but he added that an invalidation of the law would simply prove that the Constitution had “been raped” and that the courts had “taken over completely.”<sup>65</sup>

At the hearing on the motions in *Lee* in September, state officials’ attorneys introduced the results of the recent poll, which the judges found to have no value, even as an indication of what parents wanted. The defense also argued that the tuition grant law was a “freedom of choice plan” and that it could be used to help all students looking at private schools, regardless of race. Gray countered that, under the previous tuition grant law, “every dollar” was given “to students enrolled in all-white private schools established when the public schools desegregated.” And the stakes had since increased—prior to the March 22 ruling, only nineteen school systems were threatened with desegregation; now all of them were. The state was determined, Gray insisted, to ensure that the “magnitude of the refuge from desegregated education in Alabama” kept pace “with the implementation of *Brown*.” Judge Johnson tried repeatedly, to no avail, to get the state’s attorneys to admit to the law’s real purpose, asking why the state needed to “establish a school system in addition to the public school system already established.”<sup>66</sup>

The hearing had become an omnibus affair, reflecting the increasing complexity of the *Lee* case. In addition to the teacher choice and tuition grant acts, the court also had to consider a request to intervene and a motion to add more school boards as defendant parties. The CRD wanted the court to enjoin seven school systems for their failure to adequately address faculty desegregation. These systems had not only failed to place an adequate number of teachers in desegregated assignments, they had also assigned white teachers to black schools on a part-time basis and assigned black teachers to white schools only in roles like physical education instructor, vocational education instructor, study hall monitor, and librarian. The school boards argued that there were not enough teachers willing to take desegregated assignments. The court understood this to be evasive and sympathized with the CRD, but it was so late in the summer that the judges denied the motion.<sup>67</sup>

The request to intervene had been made by the Alabama State Teachers Association (ASTA), the state's black educators' organization. Sol Seay represented ASTA and told the court at the hearing that, when *Lee v. Macon* systems were forced to close substandard all-black schools, black teachers and administrators were summarily dismissed or demoted, in blatant disregard of the March decree. Seay also revealed that school boards were assigning uncertified white teachers to black schools or otherwise allowing young white teachers to use black schools as a "back door" to better assignments. Local systems were, at the same time, Seay explained, insisting that black teachers in white schools be "light, bright, or damned-near white." The court allowed ASTA to intervene as a plaintiff to help the court, through Seay, monitor this aspect of compliance.<sup>68</sup>

Two months after the hearing, in early November, the *Lee v. Macon* court declared both the teacher choice and tuition grant acts unconstitutional. Judge Rives wrote the opinions this time. The new grant law was "clearly" an "evasive scheme to circumvent *Brown*" by encouraging "private persons to engage in the kind of racial discrimination which would be condemned if attempted by the state." In striking the teacher choice law, Rives cited the Supreme Court's decision in *Loving v. Virginia*, in which the court overturned that state's antimiscegenation law and held that state laws using racial classification had to be "necessary to the accomplishment of some permissible state objective, independent of . . . racial discrimination." Rives

observed that race was, in fact, “the only factor upon which” the teacher choice law operated.<sup>69</sup>

The following month the Supreme Court affirmed all recent decisions in *Lee v. Macon*, including the March 22 order. At the same time it declined to review the Fifth Circuit’s decisions in *U.S. v. Jefferson County*. This was a strategic move. Agreeing to hear *U.S. v. Jefferson* would have had the effect of delaying the implementation of the many plans that were based on the Fifth Circuit’s model decree outlined in that decision. The model desegregation plan in *Lee v. Macon* was almost identical to the one in *Jefferson*. In affirming *Lee v. Macon*, the court indirectly placed its stamp of approval on the en banc Fifth Circuit’s decision in *Jefferson*, while ostensibly avoiding any further delay. School systems across the South would have to begin eliminating choice-influencing factors and start implementing system-wide, freedom-of-choice pupil desegregation.<sup>70</sup>

After passing on *Jefferson*, the Supreme Court agreed to hear the plaintiffs’ appeal in *Green v. County School Board of New Kent County*. Jack Greenberg and the LDF had appealed a recent decision of the en banc Fourth Circuit appellate court, which had upheld a Virginia federal trial court’s approval of New Kent’s desegregation plan. The plan applied freedom of choice to all grades, but it had resulted, as most others had, in only token desegregation. The LDF’s position was that freedom of choice did not appear to be bringing about the elimination of the dual racial system in the county and ought to be jettisoned. John Doar suggested that the CRD support the LDF’s appeal, and Derrick Bell at HEW’s Office for Civil Rights asked the CRD to include a statement of HEW policy in its amicus brief—freedom of choice plans were only acceptable under the HEW guidelines if they worked. This was the standard the court had just tacitly approved in affirming *Lee v. Macon*. Everyone expected a more forceful and direct ruling on the principle in *Green*.<sup>71</sup>

The CRD’s Stephen Pollack and others at the Justice Department thought that the court ought to bring the other judicial circuits in line with the Fifth Circuit and *Jefferson*, which Pollack called the “present high water mark” for school cases. Others, including the solicitor general, Ralph Spritzer, wanted the court to go even farther. Spritzer suggested asking the justices to declare freedom of choice per se unconstitutional and therefore overturn *Jefferson* and essentially every other desegregation decree then in effect. Pollack felt that this would threaten the progress that had recently been made.

It would also mean asking the court to go significantly farther than the other two branches of government had been willing to go. Pollack prevailed, but the CRD, HEW, and LDF were still asking a lot. If the Supreme Court declared freedom of choice unacceptable where it did not “work,” then many school systems across the South—still reeling from initial token desegregation—would soon have to confront a new reality.<sup>72</sup>

## **“Beyond Freedom of Choice”?**

Sol Seay first met Fred Ramsey, the superintendent of the Marengo County school system, in a narrow hallway in the federal courthouse in Montgomery. Ramsey was a large man at around six foot seven and 250 pounds. He approached Seay, introduced himself, and attempted to loom over the black attorney—who was not small, short, or passive himself. Ramsey proceeded to lecture Seay on the constitutionality of segregated schools. “Now, I’m not a racist, Seay,” he began. When he had finished, the Howard-educated Seay, who was representing ASTA at a hearing to be held in Judge Johnson’s chambers, suggested that perhaps Ramsey might just advocate for the return of slavery itself. The Black Belt educator quickly replied that, in that case, he would like to own Seay. The headstrong Seay insisted that Ramsey would not want that, because he would undoubtedly have to “make a house nigger” out of Seay, and surely he couldn’t have “this big black buck anywhere around the big house.”<sup>73</sup>

Not long after that, Seay had an encounter with Ramsey at the county courthouse in Linden, where the superintendent was scheduled to be deposed. Ramsey had made an unusual overture to Seay and the attorneys from the CRD, asking them to meet him in a separate boardroom prior to the deposition to confer. The CRD attorneys ignored the request, but Seay was curious to see what Ramsey was up to. When Seay opened the door to the room, he found it full of black teachers and administrators, all staring at him as he stood, frozen, holding the door ajar. Ramsey boisterously announced that he had invited his “good friends” to meet with Seay, so that the attorney could tell them what he planned to do “to help them feed their families” when he and the Justice Department succeeded in “shutting down the school system and leaving them with no jobs.” Stunned and livid, Seay turned and walked out the door.<sup>74</sup>

The episodes between Seay and Ramsey illustrated the evolution of both the mechanics of *Lee v. Macon* enforcement and segregationist resistance. As the attorney for ASTA, Seay drove all over the state to meet with school boards and craft faculty desegregation plans with protections for black educators. Like the CRD attorneys, Seay reported to the court and submitted such motions for further relief as he deemed appropriate. White resistance to black teachers was obdurate. Administrators like Ramsey believed it was their duty to frustrate faculty desegregation at every turn. Most of them accepted as a *fait accompli* that whites in majority black systems—like Marengo County—would flee the system *en masse* rather than accept integration. In their steadfast defiance of the *Lee v. Macon* court, which often brought political rewards, they facilitated the very exodus that they claimed to be trying to prevent.

While Seay barnstormed the state, boards of education began writing Ernest Stone and Judge Johnson complaining. Joe Payne, the superintendent of the Dale County system, told Stone, “It is getting to the point that we all dread to see someone come in or dread to hear the phone ring.” According to Payne, the black teachers were “not capable” of teaching in white schools. “They give tests and write words on the chalkboard with incorrectly spelled words,” he wrote, “They are using verbs in the wrong place, using plural words in the wrong place, their sentences are incorrect, they are using words in places they do not fit, and none of them have any discipline.” Of black students in white schools, Payne added, “It is disgusting for me to have to say, that 86 percent of them are failing.” He concluded, “These incapable Negro teachers is why these students are failing today in our white schools. If we have to lower our educational standards,” he insisted, “we might as well close the schools down and return to the jungles of prehistoric time.”<sup>75</sup>

Of course, any black teachers who struggled were no more incompetent than the white teachers who did so. Furthermore, if a few black teachers were at a disadvantage, it was because they had been educated in, and forced to teach in, the same segregated and inherently inequitable school system that was then being dismantled. White administrators simply did not care about the efficacy of black teachers until they began teaching white pupils. Regardless, the courts had repeatedly asserted that the dual school system would not be abolished (and especially freedom of choice could not work to abolish it) if choice-influencing factors were not eliminated so that systems could approach the status of “just schools.” Segregated faculties, along with

grossly inferior black school facilities and curricula, were at the top of the list of such factors and would thus remain the focus of the *Lee v. Macon* litigation throughout the spring and summer of 1968.

Judges Rives and Grooms agreed that this “most important and difficult” administrative phase of the case would be “necessarily left” to Judge Johnson’s “capable hands alone.” And Johnson’s plan for navigating it relied heavily on the CRD. John Doar had stepped down, making way for Stephen Pollack to head the division. Johnson told Pollack that winter that he had already scrutinized the CRD’s analysis of the ninety-nine school systems’ current desegregation plans. He indicated which systems he felt ought to be required to make changes. Generally, if a system had more than the statewide average of 6 percent of black students in desegregated schools, then they should expect leniency. Otherwise they should be required to further eliminate choice-influencing factors. Johnson told Pollack that he expected the CRD to “speak for the court” on these matters and even admonished the attorney for the division’s recent lag in response time to his communications.<sup>76</sup>

The changing posture of *Lee* and the beginning of Pollack’s tenure brought a change in the CRD’s role. Initially the CRD had been defending the “process of the court” against official interference, as a litigating amicus. Since the proceedings leading up to the statewide order, though, the CRD had been operating as plaintiff-intervenor or as a fully active litigant in the case. Pollack maintained that an active litigant should not speak for the court. He recommended that HEW’s Office of Civil Rights be solely responsible for contacting local school systems. He suggested that the CRD continue only in an analytical capacity, submitting analyses of systems’ plans to Stone and motions for further relief to the court as necessary. The CRD could still maintain an office in Montgomery, with attorneys available to consult with local school officials at their own discretion. After some initial resistance, Johnson called this arrangement “entirely satisfactory.”<sup>77</sup>

Reintegrating HEW proved to be more difficult. The court had curtailed HEW’s ability to defer or cut off funding to *Lee v. Macon* systems, but it still needed the department’s assistance. Meanwhile, Ernest Stone was trying to keep HEW investigators away from local school boards entirely. Stone wrote to Peter Libassi at the Office for Civil Rights and argued that HEW was making demands in excess of what was laid out in the March 1967 *Lee v. Macon* decree. Stone at one point despaired, “Our school boards, Mr.

Libassi, are near the breaking point!” Judge Johnson had to inform Stone that local systems were still required to cooperate with HEW field visits and requests for reports. This was, he explained, an integral part of how implementation of the statewide decree would proceed. HEW agents would work directly with local officials in crafting acceptable plans that comported with the expectations of the court. Stone and HEW would in turn report to the court on those plans. Finally, the CRD, Gray, and Seay would analyze all plans and advise the court.<sup>78</sup>

The arrangement got messier that spring, when it became clear that additional proceedings would be necessary to desegregate the state’s athletics systems. Alabama still operated with two athletics associations—the Alabama High School Athletic Association (AHSAA), for white and formerly all-white schools, and the Alabama Interscholastic Athletic Association (AIAA), for black schools. Only AHSAA was recognized nationally, meaning, among other things, that AHSAA state champions and record holders were given credit, regardless of what anyone in AIAA might have done. AHSAA was token desegregated, as a few black students attending formerly all-white schools had chosen to play sports. Indeed, many of them had been recruited by white coaches for this specific purpose. But this led to more serious problems, namely the harassment of integrated teams, most often by opposing teams’ fans but sometimes by the other teams themselves and at least once by state and local police. By early 1968, Judge Johnson had forwarded enough complaints to the CRD that it filed a motion with the court to force Stone to merge the two associations.<sup>79</sup>

After hearing testimony, the court in April entered an order directing the merger. The two associations would work together on a plan. Much to his dismay, Ernest Stone would be in charge of mediating the discussions. The court enjoined the ninety-nine systems from perpetuating the racially dual athletics system and informed them that if they chose to belong to any statewide association at all, it would have to be the one produced by the court-ordered merger. Johnson subsequently entered a similar order in the *Carr v. Montgomery County Board of Education* case, serving notice on the eighteen other *non-Lee* systems that they should assume that conformity would be required of them as well.<sup>80</sup>

The resulting negotiations between AHSAA and AIAA were unsurprisingly contentious. AIAA president Allen Frazier wanted compulsory scheduling between formerly all-white schools and all-black schools, but Stone and



AHSAA president Herman Scott argued that it would “kill” high school athletics, because formerly all-white schools would eliminate their athletics programs rather than play black schools. Stone also predicted that “blood [would] flow” if any of these “clashes of the races” ever took place, especially if black teams started running roughshod over white teams. Frazier also wanted some sort of organizational oversight on “recruiting” because, he told the court, he had received in the previous year numerous complaints about white schools “raiding” black schools and “taking away their best athletes.” In one case, black basketball players had tried unsuccessfully to transfer back to an all-black school after they were accused of “beating their own people.”<sup>81</sup>

The completed merger plan and new association, approved by the court in May, called for the creation of a biracial legislative council and central board. AHSAA’s Scott would become the executive secretary, with AIAA’s Frazier serving as associate executive secretary. There would be no compulsory interracial scheduling, but the use of geographical districts guaranteed that there would be games between formerly all-white schools and black schools. The plan allowed for investigations into the “raiding” of black players, but Scott would have full discretion in such cases. Sol Seay, whose offer to represent AIAA had been rejected, criticized the plan for this and other reasons. As long as there were racially identifiable schools, he argued, there would be a need for a black executive with substantive authority, and Frazier did not have that in the new regime.<sup>82</sup>

Faculty desegregation, meanwhile, became an even more encompassing concern that spring, not just in *Lee v. Macon* but also in *Carr v. Montgomery*. It had become clear that Montgomery officials were trying to work around a fall 1967 order. The school system’s desegregated faculty consisted of seven white teachers in all-black schools, and the school board had in the previous six months hired seventy-five new teachers and placed them all in schools in which their race was the majority. The board was also in the process of building three new schools in an affluent white neighborhood, tailored to the number of white students therein, and was openly marketing them as alternatives to token desegregated schools. The board had begun hiring an all-white faculty and staff, including a head football coach, who had been distributing a spring practice schedule to potential white players who wanted to come play at Jefferson Davis High. The board publicly announced that the



school would not have bus transportation, since white families in the area had automobiles.<sup>83</sup>

Johnson was livid. In February 1968 he entered an order citing the board's blatant disregard for the court's orders and explaining that further delays in implementation would "not be tolerated." Unless freedom of choice was used "more effectively and less dilatorily," he wrote, then the court would "have no alternative except to order some other plan used." He added a supplement to the board's existing desegregation plan that brought it in line with the model plan in *Lee v. Macon* and addressed the existence of the three new schools. Johnson ordered the board to provide transportation to the schools, to inform all student-athletes of their eligibility to play at them, and to send out form letters, drafted by the CRD, informing parents that their children were eligible to attend them. Finally, he instructed the board to send representatives to each black school in the system to explain to students directly that the school board would honor "the choice of each Negro student who chooses to attend Jefferson Davis High School during the 1968–69 school year, in the absence of compelling circumstances."<sup>84</sup>

The school board was horrified. The order created the possibility of substantially black schools in the dead center of the city's wealthiest white neighborhood. But the most controversial and influential aspect of Johnson's February order turned out to be the provisions for accelerating faculty desegregation. Johnson gave the board until the fall of 1970 to ensure that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system [roughly 3 to 2]." The system would need to have approximately one-sixth minority teachers in each school for the upcoming fall, then one-fifth the following fall, in 1969. Officials across the state, fearing application of this standard in *Lee* and other cases, lashed out at the use of "strict rules" and "set quotas for race mixing." The Montgomery board applied for a stay, pending appeal.<sup>85</sup>

Johnson then issued a surprising amendment to the February order. He first defended himself, arguing, "We have reached the point where we must pass 'tokenism,'" and calling the board's charge that his order was unprecedented "incorrect—in both law and fact." He explained that the 3:2 ratio for faculty desegregation was to be gradually achieved, noting that the Fifth Circuit had approved such benchmarks in *U.S. v. Jefferson*. He compared the transportation requirements to those already ordered in *Lee v. Macon*. He described the board's opening the three new all-white schools as

an “aggravated type of discrimination” that “fairness and justice” would “simply not permit.” And he characterized the court’s insistence that the board honor black students’ requests to attend Jefferson Davis High as a temporary measure intended to counteract that discrimination, which, he added, affected poor whites as well as blacks.<sup>86</sup>

Johnson then agreed, however, to stay “certain features of the order” to which the Montgomery board had “most strenuously” objected. This included the faculty desegregation guidelines and the transportation requirements. Johnson also agreed to change the language of the letter of notice to students, from “You are eligible to attend Jefferson Davis” to “You are eligible to choose to attend Jefferson Davis.” The *Montgomery Advertiser* tried to assuage white fears, arguing that the order, as amended, was “short of anything revolutionary.” Most reassuring of all, “Jeff Davis” High would “not be required to take *all* Negro applicants” as previously suspected. Reassuring or not, all of this was pending the review of the Fifth Circuit that summer.<sup>87</sup>

The appellate court had just heard an appeal in the *Davis v. Mobile* case. The LDF had, for the second time, appealed the trial court’s approval of the Mobile school board’s desegregation plan. The unified Mobile city-county system was the largest in the state, with ninety-three schools and seventy-five thousand pupils—thirty-one thousand of whom were black. The school board had adopted a hybrid geographic zone and freedom of choice plan for the city of Mobile and the suburbs of Prichard and Chickasaw, while maintaining just freedom of choice for the more sparsely populated rural areas of the county. In the metropolitan area, students new to the system, new to a zone, or moving from one school to another could elect to attend a school outside of their zone. But the board could boast a 100 percent increase in pupil desegregation from 1966–67 to 1967–68, with 29,031 black students, or 38 percent of total enrollment, in 33 desegregated schools. This was enough for district judge Daniel Thomas. It was not enough for the Fifth Circuit.<sup>88</sup>

Judge Homer Thornberry wrote the opinion of the unanimous three-judge panel. He called the pupil desegregation numbers in Mobile “superficially acceptable,” but he observed that “beneath the surface” the picture was “not so good,” especially when applying the qualitative standard of *U.S. v. Jefferson*. Not only were two-thirds of the system’s schools still completely segregated, the number of pupils in desegregated assignments had been skewed by the fact that four white students were attending formerly all-black

schools, thus adding all of those black students to the tally. There were only 692 black students attending formerly white schools. While this was a 200 percent increase over the previous year, it was still only 2 percent of the system's black student population. There were also twenty-seven hundred teachers in the system, of whom only fifteen (twelve black and three white) had chosen to work in desegregated assignments. Thornberry argued that this "hardly scratched the surface" of the problem.<sup>89</sup>

Again citing *U.S. v. Jefferson*, the court demanded that Mobile adopt a "pattern of teacher assignment" that did not perpetuate the racial identifiability of the county's schools. To begin with, the board was to assign at least one teacher of the minority race to each school, and, "wherever possible," it was to assign more. As for pupils, not only did the court find that the city's geographic attendance zones had been drawn to limit desegregation, it also found that "superimposing" freedom of choice options upon the attendance area plan had significantly reduced what effectiveness it might have otherwise had. Thornberry paraphrased Judges Johnson and Wisdom, insisting that freedom of choice was "not a goal in itself" and was "but one of many approaches" toward eliminating the dual system. "If it does not work," Thornberry wrote, "another method must be tried." The court ordered the board to redraw the attendance zones and insisted that students assigned to a particular zone could not transfer out "absent some compelling nonracial reason." It was the first time a court explicitly ruled that freedom of choice was not working and had to be abandoned. And it was a harbinger of things to come.<sup>90</sup>

Three weeks later, James Earl Ray shot and killed Martin Luther King Jr. in Memphis. The shocking murder outraged blacks across the country. The ensuing rioting might have served as an indication of the frustration and dismay felt by many blacks in the nation's cities, where ghettoization, unemployment, police brutality, and racism in general continued to stifle opportunity. But it mostly served to reinforce whites' preconceived notions about the volatile and violent nature of black communities. This was particularly troubling in the urban South, where segregationists stood ready to marshal these events as evidence that school desegregation was a threat to the well-being of their children. In Mobile newly organized white protest groups seized the opportunity to say, "We told you so." And the segregationist narrative of resistance began to shift toward highlighting a lack

of respect for law and order on the part of blacks—a shift that was shepherded by state leaders like George Wallace.<sup>91</sup>

Meanwhile, Lurleen Wallace’s physical condition rapidly deteriorated. She had been quietly battling cancer since the previous summer. By that April it had spread to her colon, liver, and lungs, and she weighed less than eighty pounds. When she died on May 6, Alabamians mourned the passing of the state’s first female governor, who had earned the adoration of her husband’s supporters while avoiding the ire of many of his enemies. George Wallace quickly returned to the national campaign trail, where he had spent the majority of his wife’s short term in office. Lieutenant Governor Brewer assumed the state’s top office. Brewer was keen to shore up his credentials as an ardent opponent of integration and an avid advocate for law and order. The escalating crisis in Mobile gave him an immediate opportunity to demonstrate both.<sup>92</sup>

Just over a week after Governor Wallace’s death, the Mobile school board began to release the names of schools affected by the March decree in *Davis*, prompting protests from white parents. When white residents of a middle-class neighborhood on the west side of the city learned that their children would be reassigned from Murphy High and its feeder schools to formerly all-black Williamson High and its feeders, they besieged a school board meeting. One indignant mother argued that sending her daughter through the all-black Maysville section to attend Williamson would endanger the child’s life. “I wouldn’t let my dog walk down some of those streets,” she claimed, “and yet you’re telling me I must send my 15-year-old daughter through one of the roughest sections of Mobile to go to school.” Another parent asserted that Maysville was “known to police as a jungle, the worst colored area in Mobile.” A third stood and declared furiously, “I’ll tell you now, my child is not going to that school, and that’s final. And I think that goes 100 percent for all of us who live in these neighborhoods that are affected.”<sup>93</sup>

Whites were realizing that the shield of tokenism was being pried away, and Albert Brewer seized upon their fear. He announced that Alabamians were “satisfied with the operation of the freedom of choice plan” and lamented that federal courts were using “innovation by judicial decree” to “[declare] that a person in this republic can no longer exercise a choice.” Meanwhile, as more and more details of the Mobile desegregation plan were released that spring and summer, white parents mobilized. They formed

organizations like Operation Snowball, Whites Organized for Rights Keeping (WORK), and simply Whites Rights. They planned to stage protests to pressure the district court, the Justice Department, and the school board. WORK leaders even suggested that school board members ought to defy the court and accept contempt citations and jail time.<sup>94</sup>

The most successful of the new segregationist groups was STAND—or Stand Together and Never Divide. The group’s founder, local tree surgeon Lamar Payne, modeled his organization after the Citizens’ Council and prided himself on its air of respectability and commitment to law and order. One of the group’s rallies drew nearly ten thousand people to a local National Guard armory, after which its attorney—Harvard-educated state senator and local Citizens’ Council leader Pierre Pelham—filed a motion to intervene in *Davis v. Mobile*. Pelham argued that increasingly violent and hostile black neighborhoods were a threat to white children. Judge Thomas granted the motion, and STAND entered the case.<sup>95</sup>

Blacks Mobilians also organized. One group resurrected was the once influential but long moribund Neighborhood Organized Workers (NOW). NOW began to hold mass meetings and stage protest marches on city hall and student pickets at black high schools. Not only did its leaders insist that city officials were not doing enough to end racial discrimination and inequality, they also brought a militant edge to their activism and rejected longtime leader John LeFlore’s strategy of patient accommodation. Many of NOW’s members had been influenced by former Student Nonviolent Coordinating Committee leader Stokely Carmichael, who was scheduled to speak at a NOW rally that summer. They were more receptive to “black power” than increasingly hollow promises of rewards in biracial cooperation.<sup>96</sup>

Leaders from NOW, STAND, and other groups all converged on Mobile’s Municipal Auditorium in late May when the school board held a community hearing. The meeting devolved into a circus when nearly one thousand angry whites stormed in and demanded to be heard. White parents yelled at board members, shouted down speakers, snapped back and forth with black parents and NOW members, and vowed to disrupt the current plan at any cost. When the wife of NOW president David Jacobs assumed the podium, three hundred whites staged a walkout. An incensed Jacqueline Jacobs shouted, “Run, run! You can’t run forever!” The spectacle flirted with complete chaos as Jacobs continued screaming and gesturing, and remaining whites responded in kind.<sup>97</sup>

When the police and the school board chairman finally restored order, Jacobs conceded that Maysville was a rough neighborhood. But her children, she said, had been forced to walk through it to go to Williamson. Why was it that no one cared until white children were faced with the same problem? The aging John LeFlore followed Jacobs, calling for calm and understanding. He was followed by local Catholic priest Leon Hill, whose parish was located in a predominantly black section of the city. Hill called for cooperation, arguing, “Changes are coming, whether we like it or not, so why delay, delay, delay?” The priest was mercilessly jeered and departed the podium upon receiving a particularly salient barb from one white parent: “How many kids do you have, father?”<sup>98</sup>

Several white parents spoke of gunfire, sirens, and screams coming from Maysville and of a “burden” that was “too great” for their children to bear. One parent argued, “We have begged, but we beg no longer. We have petitioned, but we petition no longer. We will stand together 100,000 strong—and more if necessary, [and] God being our helper, we will succeed in saving our children and our schools.” The applause that greeted those remarks was surpassed only by applause in response to the next white parent. “I don’t care how many plans you sit here and make, or how many court orders you get,” he said flatly, “My children are not going to Williamson or any other Negro school.” The sense of urgency was soon underscored by events in Washington.<sup>99</sup>

One week later, on May 27, the Supreme Court handed down its decision in *Green v. County School Board of New Kent County*. The school board had argued that its freedom of choice plan was adequate and that requiring it to do anything more—“compulsory integration”—would violate the Fourteenth Amendment. The court disagreed. As Justice William Brennan prepared to deliver the opinion of the unanimous court, Chief Justice Earl Warren slipped him a note that read, “When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*. Amen!” Brennan read, “What is involved here is the question whether the Board has achieved the ‘racially nondiscriminatory school system’ *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.” Token desegregation would not meet the measure. Brennan continued, “The fact that, in 1965, the Board opened the doors of the former ‘white’ school to Negro children and of the ‘Negro’ school to white children merely begins, not ends, our inquiry.”<sup>100</sup>

Like the trial court in *Lee v. Macon* and the appellate court in *U.S. v. Jefferson*, the Supreme Court did not go so far as to declare freedom of choice plans unconstitutional. If such a plan “offer[ed] real promise” of disestablishing the dual system, then it could be acceptable, though Brennan acknowledged that the “general experience” with freedom of choice had shown it to be ineffective, particularly in New Kent, where fewer than 15 percent of black children had chosen to attend formerly all-white schools and no white children had chosen to attend black schools. If school systems could not prove that freedom of choice was working to eliminate the racial identifiability of schools, and if trial courts determined that “other more promising courses of action” were reasonably available, then those systems, Brennan read emphatically, would have to “*come forward with a plan that promises realistically to work, and promises realistically to work now.*” The justices had embraced the thrust of *Jefferson*, *Davis*, and *Lee* and had heralded the beginning of the end of the era of tokenism.<sup>101</sup>

*Green* was fuel for Alabama politicians to add to the fire of defiance, which seemed to burn hottest in Mobile. Former lieutenant governor Jim Allen took to the port city in his campaign to replace the long-serving Lister Hill in the U.S. Senate. Referring to both *Green* and *Davis*, Allen told supporters at a rally, “These two decisions show the length to which the Washington crowd is going to take over our schools, our children, and the daily lives of our young people.” But “even the federal judiciary” would eventually “move in the face of aroused public opinion.” As an example, Allen offered Johnson’s recent modification of his order in the *Carr v. Montgomery* case. The court had backed off, according to Allen, when “public opinion was aroused and the people acted.” Such “action” would “do wonders” in Mobile too if the people would only resolve to make sure the courts knew that they were “not going to submit.” He added, “I stand with STAND . . . 100 percent.”<sup>102</sup>

Albert Brewer also poured it on. He applauded the efforts of STAND, asked the state’s congressional delegation to propose legislation that might somehow overturn *Davis*, *Carr*, and *Green*, and praised the Alabama Education Association for condemning the decisions. “There is a serious question,” he surmised, “as to how long we can continue to operate our public schools if the federal courts abandon all restraint and continue to encroach upon local control.” “Logically extended,” Brewer argued, “this rule can be applied to determine where a person lives and how he can make



a living.” Most people in Alabama, he explained, were perfectly happy with freedom of choice. He implicated the familiar enemy, the NAACP, claiming that a “very small, but vocal and suit-conscious minority” was responsible for frustrating the will of “people of all races.” Freedom of choice had to be salvaged, or individual rights and freedoms—not just states’ rights and local control—were at risk of being violated, perhaps even lost. Segregationist leaders had taken to defending that which the state had just fought for fifteen years to avoid.<sup>103</sup>

On June 9, 1968, STAND held another rally at the National Guard armory in Mobile. Anxiety was high on both sides of the color line, with some fearing widespread violence. Outside the armory Pierre Pelham told assembled media, “When you had token integration there was resistance, but now you’re way beyond that. You’re getting home. It’s a more personal thing.” Inside the building he assured the crowd that Brewer was prepared to commit “the full resources of the governor’s office” to “protect the public school system of [the] state.” He was convinced of the righteousness of their cause. “It is not you who are tearing down buildings and burning up cities,” he observed. Neighborhoods like Maysville were unsafe, in other words, because black people were violent. Pelham concluded, “No man, nowhere, would tell me to send my child to an unsafe school.”<sup>104</sup>

STAND’S William Westbrook took the podium next. Westbrook described STAND’S plans to coordinate marches on courthouses, assuming, as Jim Allen had suggested, that this would force the courts to demonstrate some sort of retreat. This would almost assuredly not work as described, but Westbrook and Pelham knew the crowd of white parents wanted a call to arms. Westbrook gave them one predicated on racist assumptions whose roots stretched down nearly three hundred years into the Alabama clay. He told them to show federal judges that they would not let their children “go into an environment that will make bums, loafers, hoodlums, and criminals out of them.” He asked them to “consider the impact” of “50,000 people heading to the courthouse . . . clean shaven and neatly dressed, to attend court in behalf of our children.” And if the school board felt like anything was inevitable, then board members ought to “get ready to go to jail in defiance of the open court orders.”<sup>105</sup>

Segregationists had fought token desegregation head-on and lost. Violent resistance, economic reprisal, and even lawmaking had all failed. It appeared to some that it was time to learn from the enemy. They had already



begun to mold the civil rights movement's strategic focus on constitutional individual rights into a rationale for continuing massive resistance—moving beyond freedom of choice meant deprivation of the individual freedoms of white parents and students. And they had begun arming themselves with the tactics of the nonviolent movement for black equality—protest marches and jail-ins. All that remained was to steal the rhetorical flourish. That night, Westbrook obliged. He closed his remarks at the armory, to the delight of the gathered, by evoking the recently murdered Martin Luther King. “We have had a dream too,” he declared. “Our dream,” he explained, “is we are not going to surrender our schools and our homes to the social-minded reformers and Constitution wrecking judges.” He concluded, defiantly, “We are not going to send our children to Negro schools, and that is a fact and not a fantasy.”<sup>106</sup>