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## The Kennedy Justice Department's Enforcement of Civil Rights: A View from the Trenches

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**PART IV**

**JFK AND THE UNITED STATES**

## Chapter 17

# The Kennedy Justice Department's Enforcement of Civil Rights: A View from the Trenches

Brian K. Landsberg

### Introduction

The Kennedy Justice Department faced challenges with no modern precedent: the Southern defiance of the Supreme Court's decision in *Brown v. Board of Education*, the rise of non-violent protests on a massive scale, and the Administration's desire to break a racial caste system that it did not fully understand. Reconstruction provided a precedent for federal action, but the President was, to some extent, a captive of the myth that federal intervention had been a colossal failure, leading only to misrule and racial division.

Much has been written about President Kennedy's mixed record on civil rights — his philosophical commitment to equality, his ambiguous votes on civil rights bills as a Senator, his letter regarding Dr. Martin Luther King, Jr.'s prison term in Georgia, his decision not to make civil rights a priority at the beginning of his presidency, his appointment of racist federal judges in the South, his proposal of comprehensive civil rights legislation after two and a half years as President, and so on.<sup>1</sup> In the 1960's and 1970's, several books and articles focused critically on the work of the Kennedy Department of Justice relating to civil rights.<sup>2</sup> According to those critiques, the Department's voting rights enforcement was ineffectual, it refused to protect civil rights workers from official and private violence, and it was only reactive with respect to school desegregation. Reevaluation of one aspect of the work of the Division during that period yields a more nuanced and largely positive picture and suggests that scholars should take a second look.<sup>3</sup>

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<sup>1</sup> See, e.g., Nick Bryant, *The Bystander: John F. Kennedy and the Struggle for Black Equality* (Basic Books 2006); Ted Sorensen, *Counselor: A Life at the Edge of History* (Harper 2008).

<sup>2</sup> See, e.g., Haywood Burns, *The Federal Government and Civil Rights, in Southern Justice* (Leon Friedman ed., Random House 1965); Victor S. Navasky, *Kennedy Justice* (Atheneum 1971); Richard Harris, *Justice: The Crisis of Law, Order and Freedom in America* (E.P. Dutton & Co. 1970).

<sup>3</sup> This period preceded my own work with the Civil Rights Division. I was offered a job with the Division in the fall of 1963, but could not begin work until cleared by the FBI and funded by Congress. I was in the air from Sacramento to Washington, D.C. on

I approach this topic as a lawyer, not as a historian or political scientist, who would view the work of the Justice Department solely through the lens of politics. The political lens is important, but I believe that a complete understanding of the Kennedy Justice Department must also be based on the placement of the Civil Rights Division's work in its legal and practical framework. The Division exercises limited enforcement authority, defined primarily by statutes. In January 1961, the Division was three years old, the newest and smallest Division in the Department of Justice. The Department enforced the law through court actions. The courts had not yet defined the scope of forbidden state discrimination, had found limits on coverage of private action, and tried criminal cases before virtually all-white juries who sympathized with the existing racial caste system. There was no federal police force, and the Federal Bureau of Investigation was more interested in bank robbers and Communists than in racial discrimination. While nominally a part of the Department of Justice, in practice the FBI was the private fiefdom of J. Edgar Hoover.

In evaluating the performance of the Civil Rights Division, it is not enough to ask what the Division could have done in any individual instance. Racial discrimination against African-Americans was the norm in the deep South, so it was inevitable that, given the Division's limited staff,<sup>4</sup> the Division failed to act in some instances. One must evaluate those failures in the context of the overall performance of the Division.

Moreover, in assessing whether the Division should have stretched the law, taken extra-judicial actions, or imposed a heavier Federal law enforcement presence, one must bear in mind the precedential impact of government decision-making during the civil rights era. We must ask whether we want a Department of Justice that stretches the law, takes extra-judicial actions, or imposes a heavy Federal law enforcement presence.

After first briefly sketching out the circumstances under which the Kennedy Civil Rights Division operated, I will begin to paint a picture of the work of the Division on a micro scale; I believe this approach will help fill in the picture painted by those who have written at a macro level. This is a longer-term project. For this paper, I have relied primarily upon reports of the Civil Rights Division on its voting rights cases, Annual Reports of the Attorney General, Civil Rights Commission reports, court opinions, and the files of one Division attorney who served during that period. Together, these sources portray a small band of lawyers and support staff engaged in a Sisyphean effort to secure the right to vote, while at the same time devising ways to combat racial segregation of schools and interstate transportation. The Division did this even though Congress failed to authorize a direct frontal attack on racial segregation.

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November 22, 1963, when the pilot informed us that President Kennedy had been shot. I began work in January 1964, under President Johnson and Attorney General Robert F. Kennedy.

<sup>4</sup> See *infra*, 4-5.

The turbulent years, 1961-63, saw so much civil rights activity, race-based discrimination and violence that it is difficult to single out any one issue as most important. Michal Belknap has written about the Department's record in response to violent intimidation of African-Americans in the South, in his article, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*.<sup>5</sup> I have written about the Civil Rights Division's enforcement of Voting Rights, in *Free at Last to Vote: The Alabama Origins of the Voting Rights Act*. My paper will not focus on those important areas, but will look at the Kennedy Justice Department's record in combating school segregation — an area where the Department's authority was much less clear. Despite the lack of clear authority, the Kennedy Justice Department actively adopted innovative legal techniques to bring about school desegregation.

## **I. Limits on Authority**

The Department of Justice was created by Congress in 1870. Its authority is defined by the legislature. The Supreme Court can, in turn, expand or shrink the definition provided by the legislature. For example, Congress in 1875 granted the Department of Justice authority to prosecute individuals who discriminatorily denied access to public accommodations based on race, but the Supreme Court declared that law unconstitutional in *The Civil Rights Cases* of 1883, effectively limiting the authority Congress had bestowed on the Department of Justice. In 1957, Congress considered a civil rights bill that included Title III, which would have given the Department extensive authority to bring suits against those that violated constitutional rights. Over the objection of then-Senator John F. Kennedy, Title III was stripped from the bill, which was subsequently enacted as the Civil Rights Act of 1957. It was this law that created the Civil Rights Division. When the Kennedy Administration took office, the Division's statutory jurisdiction was limited to enforcing laws against racial discrimination in voting, criminal deprivations of civil rights, and slavery. Burke Marshall, who became the Kennedy Administration's Assistant Attorney General for Civil Rights in May of 1961, observed in an interview for *Eyes on the Prize*:

[W]hen the Kennedy Administration started, the only... statutory authority it had through the Department of Justice was... in voting rights. So that the first goal of the Department of Justice was to bring a whole lot of voting rights cases....<sup>6</sup>

Marshall took the limitations on the Department of Justice's authority seriously. He recognized the long term dangers if the Department were to take the law into its own hands, or to seek to act without the permission of Congress or the courts. Marshall did

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<sup>5</sup> 33 Emory L.J. 93 (1984).

<sup>6</sup> *Eyes on the Prize* Interview with Burke Marshall (Nov. 4, 1985), available at <http://digital.wustl.edu>.

not mention the criminal laws in his interview, presumably because it was virtually impossible to get a Southern all-white jury to convict a white person for a crime of violence against civil rights workers. And, the Division generally did not bring cases to enforce *Brown v. Board of Education*'s ban on school segregation, because it had no statutory authority to bring such cases. Burke Marshall's top assistant, John Doar, explained:

We didn't have any jurisdiction to bring school cases at that time, and we only entered school cases as friends of the court, or if there was a violation of a federal court order.<sup>7</sup>

Congress had, in short, not granted the Department authority to address the many facets of the racial caste system in an effective way. John Doar described the strategy:

I was engaged with ... trying to see that the laws were enforced or building a record of why the existing laws weren't effective. And ... you do that by trying to make the existing laws as effective as you can. And that's what we did.<sup>8</sup>

## II. History and Makeup of the Civil Rights Division

As mentioned previously, the Division was formed in December 1957, as a result of Congress' passage of the Civil Rights Act of 1957. Initially, the nucleus of its lawyers was composed of lawyers from the Civil Rights Section of the Criminal Division. Under President Eisenhower, the Department of Justice began its Honors Program, hiring the best qualified law school graduates instead of relying on the old system of cronyism and patronage. The first Division career attorney hired under Attorney General Kennedy was a Republican, Arvid Sather. In addition, the Attorney General kept John Doar, a political appointee toward the end of the Eisenhower administration, in the number two post in the Division.

Burke Marshall described the Division at the beginning of his tenure as Assistant Attorney General this way:

Many of the lawyers in the civil rights division were young and had recently been recruited. They were recruited because they had a commitment to the cause of racial justice, but they didn't know anything, in a way, they had no experience ... with the reaction that was going to take place to, against the movement for racial justice. The Attorney General was new in his job.... I was out of a big law firm in Washington with a corporate practice....<sup>9</sup>

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<sup>7</sup> Eyes on the Prize Interview with John Doar (Nov. 15, 1985), *available at* <http://digital.wustl.edu>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Marshall interview, *supra* note 6.

The Division, which four years earlier began with a staff of fifteen lawyers, had barely over twenty on January 20, 1961, when President Kennedy was inaugurated. The Division grew from this modest beginning, eventually reaching a size of about 40 attorneys in August 1963.<sup>10</sup> The Division had initially been composed primarily of “desk” lawyers, who reviewed files, made recommendations, but did not spend much time in the areas where the racial caste system was entrenched. By the time the Kennedy administration took office, Assistant Attorney General Harold Tyler and his top assistant, John Doar, had already begun to change the way the Division operated. Attorney General Kennedy embraced the new style: sending attorneys into the field in order to create relationships with local people, to begin understanding how the caste system operated, and to find the best cases to litigate. This new style was, in part, necessitated by the limited usefulness of the Federal Bureau of Investigation, whose leader, J. Edgar Hoover, had a “mindset that was anti-civil rights movement” and who viewed the Bureau’s job with respect to civil rights investigations very narrowly.<sup>11</sup> Division attorneys were expected to work very hard and to work long hours. Thus, career attorney David L. Norman estimated that he worked an average of 25 hours of overtime per week. The Annual Report for the year ending June 30, 1961 noted that the field work “has required a serious work load problem, as evidenced by the fact that twenty-five Division attorneys have spent an accumulated 904 days in the field during the past fiscal year.”<sup>12</sup>

The Division worked primarily through lawsuits in the federal courts. Some southern U.S. District Court Judges, including some Kennedy appointees, were often hostile to civil rights, some regarded civil rights cases skeptically, and only a few were strong enforcers of civil rights. Under the law, district judges’ findings of fact could be overturned by higher courts only if they were “clearly erroneous,” a very significant barrier to any fact-based appeal. So the Division sought to present iron-clad cases; it treated every case as if it would lose in the district court and have to take an appeal under the exacting, clearly erroneous standard of review.

The Division had no police force available to enforce the law. In cases of emergency, U.S. Marshals could be deployed, and in a few extreme cases the President was able to deploy the military and nationalize the national guard. The Kennedy administration had a well-founded belief that a national police force, or a regional one confined to the South, posed great danger to liberty and the federal system and would not, in any event, be effective in stopping racial violence directed at civil rights workers. Indeed, killings of civil rights activists Viola Liuzzo and James Reeb in Selma, Alabama

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<sup>10</sup> Testimony of Attorney General Robert F. Kennedy, Committee on the Judiciary, United States Senate, 242 (Aug. 1, 1963).

<sup>11</sup> *Ibid.*

<sup>12</sup> Annual Report of the Attorney General 1961, 167-68.

and the shooting of James Meredith during his march in Mississippi occurred during a period of heavy federal presence.

Despite its limited authority, the Civil Rights Division fought a multi-front war. Top priority was given to the right to vote, both because that was where the Division's authority was greatest and also because it was viewed as a right that, once secured, would lead to other rights. Although the Congress had rejected a proposal that would have given the Division broad authority to vindicate other constitutional rights, including the right to equal education, the Division treated school desegregation as a high priority. It participated in several cases as a "litigating amicus curiae," a status initially justified as related to enforcement of court orders. It filed amicus curiae briefs with the Solicitor General in Supreme Court cases involving school desegregation and sit-ins. It also sought to bring desegregation suits on behalf of children in military families in school districts in Mississippi, Alabama, Maryland, and Virginia. It brought suits to desegregate interstate transportation facilities, such as bus stations and airports. And, it worked on solutions to various violent crises, such as the Freedom Rides, bombings in Birmingham, interference with desegregation, and the sit-ins. One can get a small picture of the range of the Division's activities, and of what Richard Reeves calls the "density of event,"<sup>13</sup> from a chronology I have created, which primarily lists Civil Rights Division activity in court. The chronology is attached to this paper.

### **III. School Desegregation**

The Deep South reacted to *Brown v. Board of Education* by adopting a posture of massive resistance. When President Kennedy took office, no schools in Alabama, Georgia, Mississippi or South Carolina were desegregated, and only one African-American student attended a desegregated school in Louisiana.<sup>14</sup> Today, it is difficult to understand the depth and breadth of Southern white resistance to school desegregation. Efforts to enforce *Brown* faced multiple obstacles including repression of the primary initiator of desegregation cases, NAACP; state legislation; threats of violence; uncertainty as to what steps *Brown* required; and lack of resources. One obvious solution was to enlist federal law enforcement. In theory, refusal to desegregate violated a criminal statute forbidding official conduct that willfully deprived any person of constitutional rights. However, that statute had normally been used to prosecute violent acts by government officials, and in any event, it was clear that no southern jury would convict an official for enforcing the state's segregation laws. The Eisenhower Justice Department was of the view that the ambiguities of *Brown* would make it difficult to bring criminal prosecutions against school officials who failed to desegregate. Attorney General Brownell opined that "the discretion vested in the district courts" by *Brown* was a barrier

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<sup>13</sup> Richard Reeves, *President Kennedy: Profile of Power*, 19 (Simon & Schuster 1993).

<sup>14</sup> 1961 United States Commission on Civil Rights Report, Vol. 2, Education, 238.



to prosecute under the federal criminal civil rights statute.<sup>15</sup> Neither desegregation nor respect for the rule of law would be promoted by criminal prosecutions that were guaranteed to fail. The more promising route was to bring civil suits seeking to enjoin school segregation. These would not require a jury trial. However, Congress had not authorized the Department of Justice to bring civil suits to desegregate the schools.

The Attorney General could have decided to bring desegregation suits despite the lack of congressional authority. There was some precedent for the Justice Department's non-statutory authority<sup>16</sup>. However, in both the Eisenhower and Kennedy administrations, the Department took the position that without congressional authorization it could not bring a civil suit to enjoin violations of the Constitution. There were policy, practical, legal, and political reasons for this position. As a policy matter, such suits would be inconsistent with respect for the separation of powers as Congress had rejected Part III of the Civil Rights Act of 1957. Practical considerations included the Civil Rights Division's limited staff and its decision to emphasize suits against discrimination in voter registration. Legally, the Congress' decision to delete Part III from the Civil Rights Act of 1957 would likely have led courts to infer that Congress meant to limit the Department's authority to what was explicitly granted. The legislative history of the Act reflects that the deletion of Part III stemmed largely from a desire not to "approve the race-mixing decision of the Supreme Court of May 1954."<sup>17</sup> This point was underscored by the contrast between the powers granted to the Civil Rights Division [to bring voting discrimination cases] and those granted to the Civil Rights Commission [to investigate voting discrimination AND denials of equal protection of the laws]. Politically, proceeding without congressional authority might alienate moderates on whom the Administration would have to rely to get its program through Congress and Congress was unlikely to increase staff size to enable a school desegregation initiative.

The Kennedy Justice Department's approach to school desegregation has drawn criticism. Victor Navasky described it this way: "Candidate Kennedy had promised innovative litigation to speed school desegregation, but President Kennedy ignored the counsel of men like Harvard's Paul Freund and Mark De Wolfe Howe, Philip Elman of the Solicitor General's office and William Taylor (eventually director of the Civil Rights Commission under LBJ), who advised, according to a confidential memo prepared by civil rights aide Harris Wofford, that the government could sue to desegregate schools

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<sup>15</sup> See Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice*, 138 (University Press of Kansas 1997).

<sup>16</sup> See *In re Debs*, 158 U.S. 562 (1895).

<sup>17</sup> Statement of Senator Richard Russell of Georgia and other materials reprinted in Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* 12, 187 n. 43 (University Press of Kansas 1997).

with no new legislation.”<sup>18</sup> The critics of the Kennedy Justice Department do not discuss the legal merits of this approach nor do they consider the consequences that might have ensued if the government were to bring school desegregation suits and the courts rejected the suits on the ground that the Attorney General lacked authority to bring them.

The decision not to assert a general power to enforce *Brown* did not, however, mean that the Kennedy Justice Department would ignore school desegregation. Robert F. Kennedy gave his first speech as Attorney General at the University of Georgia Law School in May 1961. The Attorney General showed great courage when, before an auditorium of Southern whites plus the two lone African-Americans attending the University of Georgia, Kennedy expressed personal agreement with the decision in *Brown v. Board of Education*. He urged the people of the South to comply with *Brown*, whether they agreed with it or not. He noted that he had already conferred with Southern officials on a variety of issues and was “trying to achieve amicable, voluntary solutions without going to court” in school desegregation cases. However, if voluntary efforts failed, he said the Department would take legal action to enforce the laws. Stressing the need for national unity, he issued a challenge: “For on this generation of Americans falls the full burden of proving to the world that we really mean it when we say all men are created equal and are equal before the law.”<sup>19</sup>

The Attorney General’s speech made clear his commitment to school desegregation, both because it was right and because the law demanded it. The question, according to one critic, is whether “there was a clear dissonance between Kennedy’s words and his actions.”<sup>20</sup> I think that is too simplistic a question. It fails to place the words and actions in the context of the time. It also fails to recognize that inspirational words may coexist with practicing the art of the possible. Finally, it fails to take account of developments over time. The critique challenges this course of action: instead of trying to assert a general authority to bring school desegregation cases, the Justice Department followed a more cautious course of action. The Department tried through negotiation with local school officials to bring about peaceful desegregation in some

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<sup>18</sup> Victor Navasky, *Kennedy Justice* 97-98 (Atheneum 1971); see also Nick Bryant, *supra* note 1, at 250-260 (alleging that Attorney General Kennedy “had no intention of hastening the pace of school integration,” and criticizing failure to intervene forcefully and the reliance on seeking “compliance without confrontation,” as he put it). *But see*, J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* 253 (Harcourt, Brace and World 1961) (Peltason criticizes the solely reactive role of the Eisenhower administration and notes that the Kennedy Justice Department had “started to take a more active role in school desegregation cases.”).

<sup>19</sup> Speech of Robert F. Kennedy, University of Georgia Law School (May 6, 1961) available at <http://www.rfkmemorial.org/lifevision/universityofgeorgialawschool/>.

<sup>20</sup> Nick Bryant, *supra* note 1, at 260.

urban school districts.<sup>21</sup> More important, the Civil Rights Division looked for other means of enforcement. It followed a multi-prong approach: traditional amicus curiae participation in desegregation cases; enlarging the traditional amicus role; bringing suit or intervening in private suits in order to enforce existing federal court orders; bringing suit on behalf of children of federal employees in federally impacted school districts; and the use of emergency powers to combat interference with school desegregation orders. Some of these techniques had already been used in the Eisenhower administration.

### **A. Traditional Amicus Curiae Participation in Desegregation Cases**

The Rules that apply to the Supreme Court and U.S. courts of appeal allowed the United States to participate in cases in those courts as amicus curiae [friend of the court]. The U.S. had done so in *Brown v. Board of Education*, first urging an end to the doctrine of separate but equal and later arguing that “the vindication of the constitutional rights involved should be as prompt as feasible.”<sup>22</sup> Early in the Kennedy administration, the Department of Justice was invited to file a brief in a school desegregation case in New York. It filed such a brief in the district court in May 1961 and another in the court of appeals during the summer of 1961.<sup>23</sup> In January 1963, the Department filed a brief as amicus curiae in the only school desegregation case to reach the Supreme Court during the Kennedy Administration. Assistant Attorney General Burke Marshall argued the case in the Supreme Court in March. The issue in that case was the validity of a desegregation plan, which allowed students whose race was in the minority in the school to which they were assigned to transfer to a school in which their race was in the majority. The Department argued that the plan was unconstitutional, and the Court agreed.<sup>24</sup> The Department also pointed out the snail’s pace of school desegregation in the South and argued that *Brown* required “the elimination of segregation as soon as possible,” and that the school boards had a heavy burden to justify any delays. The brief argued: “A prerequisite of every acceptable plan of desegregation is that it move definitely and expeditiously away from the old regime of racial discrimination.”<sup>25</sup>

### **B. Enlarging the Traditional Amicus Curiae Role**

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<sup>21</sup> Nick Bryant, *supra* note 1, at 255.

<sup>22</sup> Brief of United States on Relief at 4, *Brown v. Board of Education*, 349 U.S. 294 (1955).

<sup>23</sup> *Taylor v. Bd. of Educ.*, 191 F. Supp. 181 (S.D.N.Y.), *aff’d*, 294 F.2d 36 (2d Cir. 1961), *cert. denied* 368 U.S. 940 (1961).

<sup>24</sup> *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963).

<sup>25</sup> Brief of United States, *Goss v. Bd. of Educ.*, 1963 WL 105481 (U.S.).

The Department also sought to enlarge the traditional role of an *amicus curiae* — to file legal briefs and present oral argument advising the court how to rule — as the Department sought to use the *amicus curiae* role to actually litigate cases by undertaking activities hitherto limited to the parties, such as examining witnesses and filing motions. The possibility of an enlarged role had emerged in 1957, during the Eisenhower Administration, in a case involving violent interference with desegregation in Clinton, Tennessee and then during the Little Rock school desegregation process, when the Governor of Arkansas had interfered with desegregation orders of the federal court. In Clinton, the Department participated in examining witnesses in a criminal contempt hearing, and in Little Rock the Department moved for an order enjoining the Governor from further interference.<sup>26</sup> In November 1960, the Department entered the New Orleans desegregation case to challenge a Louisiana interposition statute that interfered with a federal court order; it continued in that role under the Kennedy administration.<sup>27</sup> Less than two months after President Kennedy’s inauguration the Department successfully applied for an order in two Louisiana cases, designating the United States as *amicus curiae* and allowing it to file a motion to have a Louisiana statute that would have allowed school districts to close the schools rather than desegregate them declared unconstitutional.<sup>28</sup> In 1962, the Department became a litigating *amicus curiae* in James Meredith’s suit to desegregate the University of Mississippi, where it became embroiled in contempt proceedings against Mississippi Governor Ross Barnett. In 1963, the Department became a litigating *amicus* in a suit to desegregate Macon County, Alabama.<sup>29</sup>

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<sup>26</sup> *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957); *U.S. v. Faubus*, 2 Race Rel.L.Rep. 958 (1957).

<sup>27</sup> *Bush v. Orleans Parish Sch. Bd.*, Civ. No. 3630 (E.D. La.). Louisiana’s interposition statute provided: “That the decisions of the Federal District Courts in the State of Louisiana, prohibiting the maintenance of separate schools for whites and negroes and ordering said schools to be racially integrated in the cases of *Bush v. Orleans Parish School Board*, *Williams 935 et al. v. Jimmie H. Davis*, Governor of the State of Louisiana et al., *Hall et al. v. St. Helena Parish School Board*, *Davis et al. v. East Baton Rouge School Board*, *Allen et al. vs. State Board of Education*, involving the Shreveport Trade School, and *Angell vs. State Board of Education*, involving five (5) other trade schools maintained and operated by the State of Louisiana, all based solely and entirely on the pronouncements of *Brown vs. Topeka Board of Education*, are null, void and of no effect as to the State of Louisiana, its subdivisions and School Boards and the duly elected or appointed officials, agents and employees thereof.” Act No. 2 of First Extraordinary Session (1960).

<sup>28</sup> *Hall v. St. Helena Parish Sch. Bd.*, 287 F.2d 376 (5th Cir. 1961); *Davis v. E. Baton Rouge School Board*, 287 F.2d 380 (5th Cir. 1961).

<sup>29</sup> *Lee v. Macon County Bd. of Ed.*, 221 F.Supp. 297 (M.D.Ala. 1963).

### **C. Bringing Suit or Intervening in Private Suits in Order to Enforce Existing Federal Court Orders**

It was a short step from the role of litigating amicus to actual intervention in suits or even attempting to bring a suit on behalf of the United States. The Eisenhower administration had attempted to bring a suit against Louisiana to declare its interposition law unconstitutional. That case was not presented as a desegregation case but as a case to prevent state interference with court orders to local school boards to desegregate.<sup>30</sup> The Department's entry into the New Orleans case as amicus, however, rendered it unnecessary for the court to reach the question of whether the Attorney General could bring a separate suit. The Kennedy administration's first foray into being a party in a school desegregation case came in April 1961, when the Attorney General moved to intervene in the Prince Edward County, Virginia case, one of the cases the Supreme Court had decided in *Brown v. Board of Education*. The school board in Prince Edward County had voted to close the public schools rather than comply with the Supreme Court's mandate. The Attorney General attempted to justify intervention in the case as necessary to prevent obstruction of court orders. The trial court refused to allow the intervention because it had not found that the closure obstructed its orders and because Congress had refused to enact Part III of the Civil Rights Act of 1957, a refusal that effectively barred the government from bringing actions furthering desegregation.<sup>31</sup> However, the Civil Rights Division became an amicus curiae in the case, and Assistant Attorney General Burke Marshall presented the government's arguments in the court of appeals in January of 1963. By the end of 1963, the Civil Rights Division successfully sued Governor George Wallace to enjoin his interference with desegregation in three school districts.<sup>32</sup>

### **D. Bringing Suit on Behalf of Children of Federal Employees in Federally Impacted School Districts**

The Civil Rights Division singled out one set of school districts where it believed it could legitimately bring school desegregation cases; the 587 school districts in southern and border states that received federal funds for school construction because they enrolled children of personnel stationed or employed at military installations. While "almost a score" of those districts had agreed to desegregate by 1963, most did not. The Division filed a "pilot" case in September 1962 against Prince George County, Virginia, school system. It won the case the following June, eleven days after President Kennedy proposed the Civil Rights Act of 1963.<sup>33</sup> The court agreed that the contract the school

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<sup>30</sup> *U.S. v. Louisiana*, Civ. No. 10566 (E.D. La. 1960).

<sup>31</sup> *Allen v. County Sch. Bd. of Prince Edward County*, 28 F.R.D. 358 (1961). Later the court held the closure unconstitutional, *Allen v. County Sch. Bd. of Prince Edward County*, 207 F.Supp. 349, 355 (E.D. Va. 1962).

<sup>32</sup> *U.S. v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963).

<sup>33</sup> *U.S. v. County Sch. Bd. of Prince George County*, 221 F. Supp. 93 (E.D. Va. 1963).

board had signed in order to receive over a million dollars of federal construction money obligated it to follow state law, and that the district had not followed Virginia's pupil placement law when it assigned African-American military dependents to all-black schools. The court emphasized that the ruling did not authorize the United States to sue to vindicate the personal rights of the children. It treated the case solely as one to enforce a contract. The Civil Rights Division brought similar cases against four school districts in Alabama, Louisiana and Mississippi. In May 1963, before the favorable decision in the Prince George County case, the courts in three of those cases ruled against the United States; the court in the fourth case, decided that August, declined to follow the ruling in Prince George County.<sup>34</sup> The Kennedy Civil Rights Division appealed three of the cases. The Fifth Circuit affirmed in early 1964 and the Supreme Court refused to review that decision.<sup>35</sup> The court disagreed that the school districts were under any contractual obligation to desegregate and also held that the United States had not shown that the segregation burdened the exercise of the war power of the United States. Both rulings were based in part on the lack of any congressional authorization for suit asserting either theory.

#### **E. Use of Emergency Powers to Combat Interference With School Desegregation Orders**

The Justice Department played a major role when hostile reaction to desegregation orders led to crisis. President Eisenhower had sent federal troops to enforce a federal court school desegregation order in 1957. President Kennedy issued a Presidential proclamation deploying federal troops and marshals again in support of federal court orders desegregating the University of Mississippi in 1962 and another to support desegregation of the University of Alabama in 1963. Also, in 1963, the President called the Alabama National Guard into national service to support orders to desegregate public schools in Mobile, Tuskegee and Birmingham. Each of these moves was reactive. There was an interesting shift in the statement of grounds for each of the 1963 Presidential proclamations. The proclamation of June 11, 1963, regarding desegregation of the University of Alabama, refers to an unlawful combination of the Governor and others "against the authority of the United States" and concludes: "WHEREAS this unlawful combination opposes the execution of the laws of the United States and threatens to impede the course of justice under those laws [the President commands them to cease and desist]." Three months later, however, the proclamation regarding the public school desegregation concluded by noting that the "unlawful ... combinations ... so hinder

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<sup>34</sup> *U.S. v. Biloxi Municipal Sch. Dist.*, 219 F.Supp. 691 (S.D. Miss. 1963); *U.S. v. Gulfport Mun. Separate Sch. Dist.*, 219 F.Supp. 691 (S.D. Miss. 1963); *U.S. v. Madison County Bd. of Educ.*, 219 F. Supp. 60 (N.D. Ala. 1963); *U.S. v. Bossier Parish Sch. Bd.*, 220 F.Supp. 243 (W.D. La. 1963).

<sup>35</sup> *U.S. v. Madison County Bd. of Ed.*, 326 F.2d 237 (5th Cir. 1964) *cert. den.* 379 U.S. 929 (1964).

the execution of the laws ... of the United States within the State of Alabama, that a part or class of its people is deprived of rights ... named in the Constitution and secured by law....”<sup>36</sup> The earlier proclamation reflected the position, evident in all the Kennedy administration’s actions in school desegregation cases up to June 1963, that the Justice Department was not entering or bringing cases to vindicate individual rights of African-American children, but to enforce federal government interests, either in enforcement of federal court orders or of federal contracts. Shortly after the June proclamation President Kennedy made his speech proposing the Civil Rights Act of 1963, which would authorize the Attorney General to bring suit or intervene in suit to ensure the orderly desegregation of the schools. Under the Act, the Attorney General could bring such a suit upon receipt of a written complaint from a parent who was unable to initiate appropriate litigation. This proposal may have inspired the change in the later proclamation, to emphasize that Governor Wallace was depriving school children of individual rights.

#### IV. Conclusion

Should the Kennedy Justice Department have taken bolder, more aggressive steps to end school segregation in the South?

Richard Reeves tells us that one of President Kennedy’s favorite lines from Shakespeare comes from Part I of *Henry IV*. Glendower says, “I can call spirits from the vast deep,” and Hotspur replies: “Why so can I, or so can any man; But will they come when you do call them?”<sup>37</sup> It would have been easy enough for the Department of Justice to file suit against all the segregated school systems in the South, or against a sampling of them. The hard questions come after the lawsuit has been filed. Does the law support the suit? Do the facts? What shall the remedy be? More aggressive government litigation to desegregate the schools could succeed only if the Southern courts agreed that the Justice Department had authority to bring such cases.

There was reason to believe that such suits would be symbolic but not effective. As the columnist Walter Lippman explained, excision of Part III from the 1957 Civil Rights Act meant, “that the right against school segregation was ‘not to be enforced by the executive power of the Federal Government.’”<sup>38</sup> In retrospect, the Fifth Circuit’s ruling in the impact aid school desegregation cases confirms that assertion of such broad authority would have met with failure, at least in the lower courts. Even the victory in Prince George County came in a judicial opinion making it clear that the government had no authority to sue on behalf of the rights of African-American children. The role that the

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<sup>36</sup> Proclamations 3542 and 3554.

<sup>37</sup> Richard Reeves, *President Kennedy: Profile of Power*, 491 (Simon & Schuster 1993).

<sup>38</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 325 (Oxford University Press 2004) (quoting Walter Lippman).

Department played instead, while more limited, was more firmly based in its law enforcement role and history. The Department took forceful action, not only against obstruction and noncompliance with desegregation orders, but also in support of more desegregation. Its brief in the *Goss* case was unequivocally in favor of speeding up the pace of desegregation.

One must view the desegregation issue in light of Congress' refusal to get involved. Critics of the Kennedy Administration would put it differently. They fault President Kennedy for waiting over two years before proposing a comprehensive civil rights act that would empower the Department of Justice to bring school desegregation cases. He could, of course, have proposed that legislation in 1961. To paraphrase Hotspur, however, one must ask, would Congress have passed the law if Kennedy had proposed it? Even in 1963, the President's civil rights legislation proposal was a huge gamble. By the time of his assassination, it was clear that Congress would not pass the bill that year.

I believe that the Civil Rights Division's performance, within the resource<sup>39</sup> and legal restraints, did advance school desegregation. The first phase of desegregation consisted largely of getting at least token compliance. Most initial desegregation occurred in the border states. By 1958-59, 733 of the 2,839 biracial school districts in the 17 southern states had desegregated to some extent. In the last two years of the Eisenhower administration only 44 desegregated, 31 voluntarily and 13 under federal court order. Four states' school districts remained totally segregated.<sup>40</sup> The pace of desegregation quickened during the Kennedy Administration, with over 400 more school districts desegregating.<sup>41</sup> Only Mississippi remained entirely segregated, despite the election of Governor George Wallace in Alabama, whose campaign slogan was "segregation today, segregation tomorrow, segregation forever." Firm steps by the Department of Justice at the Universities of Mississippi and Alabama and in the three desegregating school districts in Alabama had ensured that states would no longer use force to exclude African-Americans from formerly white schools. The Supreme Court, after eight years of relative silence, followed the Department's recommendation in *Goss*, ruling against the minority to majority transfer policy and also indicating that the time for delay had ended. The Department of Justice was involved in a growing number of cases.

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<sup>39</sup> Perhaps the Justice Department could have been overcome their resource limitations, though it is clear that without a large infusion of new lawyers it would have been impossible for the Civil Rights Division to simultaneously pursue the litigation to enforce the right to vote and also undertake a multi-state offensive against school segregation. Attorney General Kennedy said that if the Civil Rights Act of 1963 were enacted, he would ask for an additional 40 lawyers, doubling the size of the division. Kennedy testimony, *supra* note 10, at 241-242.

<sup>40</sup> United States Commission on Civil Rights, 1961 Report, Education, 39.

<sup>41</sup> United States Commission on Civil Rights, 1963 Staff Report, Public Education, 162.



The President had urged adoption of a bill drafted by the Division that would enable the federal government to become the primary player in bringing about school desegregation, a bill that would become law seven months after President Kennedy's death.

The path to complete desegregation [i.e., every school district under a lawful desegregation plan] took years to complete. Although a bi-partisan version of President Kennedy's Civil Rights bill was enacted in 1964, more than eight years passed before the South was fully desegregated. The rocky road after 1964 contradicts the claims that if the Department of Justice had only asserted authority to bring desegregation cases sooner, the schools of the South would have come into quick compliance with *Brown*.

The Department of Justice is a law enforcement agency, not a free agent to roam at will among policies that seem attractive or even morally compelling. Viewed in that light, the Kennedy Department of Justice set an appropriate standard for enforcement of civil rights, a standard that has largely prevailed ever since.