

## Back to the Future: ABA Law School Accreditation in the 21st Century and America's First Law School's Battle to Survive in the 1970s\*

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*In the mid-1970s, the ABA threatened to pull accreditation from the College of William & Mary's law school. The ABA's motives were questioned as it had never taken this step before. Would a more aggressive 21st century ABA have stripped accreditation from well-established schools like William & Mary? The reader can be the judge.*

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### Introduction

¶1 The American Bar Association, which determines whether graduating law students can sit for bar exams in most states, began accrediting U.S. law schools in 1923. In all the years that the ABA has been in the law school accreditation business, it had never revoked accreditation from a fully accredited school—until the spring of 2018.<sup>1</sup> At the May 10–12, 2018, meeting of the Council of the Section of Legal Education and Admissions to the Bar—the ABA's accreditation arm—approval was withdrawn from Arizona Summit Law School, which had been

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1. Email from Barry Currier, Managing Dir., ABA Section of Legal Educ. & Admissions to the Bar, to author (Nov. 16, 2017 9:12 EST); email from Mary McNulty, Senior Pub., Mktg. & Tech. Specialist, ABA Section of Legal Educ. & Admissions to the Bar, to author (Nov. 20, 2017 5:28 EST); email from James P. White, former ABA Consultant on Legal Educ., to author (Nov. 27, 2017 2:19 EST).

accredited since 2007.<sup>2</sup> On a roll, one year later the ABA pulled its accreditation of San Diego's Thomas Jefferson School of Law.<sup>3</sup>

¶2 In the mid-1970s, the future of a far more established law school—America's oldest actually—was in jeopardy when the ABA threatened to pull accreditation from the College of William & Mary's Marshall-Wythe School of Law. Was the threat genuine, or was it, as some suspected, a tool for the school to get additional faculty and staff, funding, and a new building? We will never know because the Commonwealth of Virginia, the college, and the law school eventually acceded to the ABA's demands.

¶3 The ABA seems to be getting serious about law school accreditation, but what role does it actually play? Does the ABA help maintain a quality legal education for law students and competent representation for those who hire lawyers? Or is it just a hammer used by law schools to get additional resources? What, if anything, can William & Mary's accreditation crisis four decades ago teach us about how law school accreditation works today?

¶4 In 2011, the *New York Times* wrote,

This has been a difficult year for the A.B.A. It has been peppered with insistent letters by members of Congress . . . over a number of accusations of failings. Among the contentions is that the organization has not done enough to prevent law schools from overstating the current job prospects of graduates. The A.B.A. has lobbed back lengthy and detailed letters to Capitol Hill, which have done little to lower the temperature. Threats of Congressional hearings have surfaced in the news media. In this volley of correspondence, the A.B.A. has noted that it would be an antitrust violation to cap or limit the number of law schools.<sup>4</sup>

But the ABA's problems were minor compared with what was happening in U.S. law schools, many of which suffered from recent graduates' low state bar passage rates, low employment, and high debt. These problems, along with plummeting applications, have been well documented. And in some respects, they have gotten worse over the last half-dozen years.<sup>5</sup>

2. Memorandum from Barry Currier, Managing Dir., ABA Section of Legal Educ. & Admissions to the Bar, Withdrawal of Approval: Arizona Summit Law School, [http://taxprof.typepad.com/taxprof\\_blog/2018/06/aba-pulls-arizona-summit-law-schools-accreditation.html](http://taxprof.typepad.com/taxprof_blog/2018/06/aba-pulls-arizona-summit-law-schools-accreditation.html) [https://perma.cc/38WL-A53B]; see also Stephanie Francis Ward, *Arizona Summit Loses Accreditation Approval, Which May Be a First for an Operating Law School*, A.B.A.J. DAILY NEWS, June 11, 2018, [http://www.abajournal.com/news/article/arizona\\_summit\\_loses\\_accreditation\\_approval\\_which\\_may\\_be\\_a\\_first\\_for\\_operat/](http://www.abajournal.com/news/article/arizona_summit_loses_accreditation_approval_which_may_be_a_first_for_operat/) [https://perma.cc/8U3L-5MUN]. Less than two weeks after losing its accreditation, Arizona Summit sought an injunction in the federal district court in Arizona “for declaratory and injunctive relief and damages to remedy the ABA's violations of due process in its role as an accrediting agency.” Complaint at 2, *Ariz. Summit Law Sch. v. Am. Bar Ass'n*, No. 2:18-cv-01580-DGC (D. Ariz. May 24, 2018).

3. Memorandum from Barry Currier, Managing Dir., ABA Section of Legal Educ. & Admissions to the Bar, Withdrawal of Approval: Thomas Jefferson School of Law (June 10, 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2019-06-10-notice-thomas-jefferson-withdrawal-of-approval.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2019-06-10-notice-thomas-jefferson-withdrawal-of-approval.pdf) [https://perma.cc/LK5Q-KFG4]; see also Stephanie Francis Ward, *ABA Approval Withdrawn for Thomas Jefferson School of Law*, A.B.A.J. DAILY NEWS, June 11, 2019, <http://abajournal.com/news/article/aba-approval-withdrawn-for-thomas-jefferson-school-of-law/> [https://perma.cc/CRJ5-SZTA].

4. David Segal, *For Law Schools, a Price to Play the ABA's Way*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html?mcubz=1> [https://perma.cc/A9DY-ARWE].

5. See Paul Campos, *The Law-School Scam*, ATLANTIC (Sept. 2014), <https://www.theatlantic.com/magazine/archive/2014/09/the-law-school-scam/375069/> [https://perma.cc/8MNZ-ZLLY]

¶5 J.D. enrollment, which peaked in 2010–2011 at 147,525 students, is down 25 percent; 111,561 students were enrolled in the 203 ABA-accredited, J.D.-conferring law schools in academic year 2018–2019.<sup>6</sup> Law school applications are down more than 40 percent, from a high of 100,600 in 2004 to 60,678 in 2018.<sup>7</sup> The numbers are so bad that *National Jurist* began an article on the 2017 entering J.D. class with these words: “Flat is the new up. At least when it comes to law school enrollment.”<sup>8</sup> Although the recent news is a bit better—the majority of U.S. law schools increased their 1L class sizes in 2018—enrollment is still a far cry from a decade ago.<sup>9</sup>

¶6 Since August 2017, Arizona Summit (lost its ABA accreditation), Whittier Law School (fully accredited), Charlotte Law School (on probation), Indiana Tech (provisionally accredited), and Valparaiso have closed.<sup>10</sup> John Marshall (Atlanta) is on probation, and UNT Dallas is provisionally accredited.<sup>11</sup> (Chicago’s John Marshall Law School was not on the ABA’s radar, but it will become part of the University of Illinois at Chicago.<sup>12</sup>) That still leaves 194 fully accredited, J.D.-conferring

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(describing the “fundamentally unsustainable social and economic model” of higher education); see also Mark Hansen, *What Do Falling Bar-Passage Rates Mean for Legal Education—and the Future of the Profession?*, A.B.A.J. (Sept. 1, 2016), [http://www.abajournal.com/magazine/article/legal\\_education\\_bar\\_exam\\_passage](http://www.abajournal.com/magazine/article/legal_education_bar_exam_passage) [https://perma.cc/KAK6-JLUJ]; Benjamin Barton, *Four Big Picture Trends to Watch in a Roiling Market: Crisis Is Just Another Word for Opportunity*, L. PRAC. (July/Aug. 2016), <http://www.mazdigital.com/webreader/39843> [https://perma.cc/BW6J-7489]; Elizabeth Oldon & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES (Dec. 17, 2014), <https://dealbook.nytimes.com/2014/12/17/law-school-enrollment-falls-to-lowest-level-since-1987/> [https://perma.cc/9C2N-SHNM]; Editorial Board, *The Law School Debt Crisis*, N.Y. TIMES (Oct. 25, 2015), <https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?mcubz=1> [https://perma.cc/73S9-DJ4V]; Natalie Kitroeff, *Are Lawyers Getting Dumber?*, BLOOMBERG.COM (Aug. 20, 2015), <https://www.bloomberg.com/news/features/2015-08-20/are-lawyers-getting-dumber-> [https://perma.cc/Z57P-AXC9].

6. ABA, *2018 Standard 509 Information Report Data Overview* (Dec. 14, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2018-509-enrollment-summary-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-509-enrollment-summary-report.pdf) [https://perma.cc/V4YK-WCHY]; see also Stephanie Francis Ward, *Law School Enrollment Is Up, According to New ABA Data*, A.B.A.J. (Dec. 14, 2018), [http://www.abajournal.com/news/article/slight\\_increase\\_for\\_law\\_school\\_enrollment\\_according\\_to\\_new\\_509\\_report\\_data](http://www.abajournal.com/news/article/slight_increase_for_law_school_enrollment_according_to_new_509_report_data) [https://perma.cc/F4X7-U6LZ].

7. Law School Admission Council, *Current Volume Summary* (data through Aug. 8, 2018), <https://www.lsac.org/document-library/130> [https://perma.cc/2AD8-69ZQ].

8. Tyler Roberts, *Why Flat Enrollment Is Great News for Law Schools*, NAT’L JURIST PRELAW (Jan. 13, 2017), <http://www.nationaljurist.com/prelaw/why-flat-enrollment-great-news-law-schools> [https://perma.cc/W8VR-KYYB].

9. Stephanie Francis Ward, *Rather Than Increasing 1L Class Size in 2018, Some Law Schools Shrunk Strategically*, A.B.A.J. (Jan. 3, 2019), <http://www.abajournal.com/news/article/rather-than-increasing-1l-class-size-in-2018-some-law-schools-shrunk-strategically/> [https://perma.cc/P66E-2ESK].

10. Staci Zaretsky, *Yet Another Troubled Law School to Close its Doors*, ABOVE THE LAW (Oct. 31, 2018), <https://abovethelaw.com/2018/10/31/another-troubled-law-school-to-close-its-doors/> [https://perma.cc/2KEE-5Y75]; Staci Zaretsky, *ABA Continues to Crack Down on Law Schools That Admit Students Who Can’t Pass the Bar Exam*, ABOVE THE LAW (Oct. 27, 2017), <https://abovethelaw.com/2017/10/27/aba-continues-to-crack-down-on-law-schools-that-admit-students-who-cant-pass-the-bar-exam/> [https://perma.cc/GZ3Y-Z6CK].

11. ABA, *ABA Approved Law Schools*, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) [https://perma.cc/ZVL6-NFN7].

12. Stephanie Francis Ward, *Chicago to Get a Public Law School: John Marshall Acquired by University of Illinois System*, A.B.A.J. (July 20, 2018), [http://www.abajournal.com/news/article/chicagos\\_john\\_marshall\\_law\\_school\\_acquired\\_by\\_ui\\_system/](http://www.abajournal.com/news/article/chicagos_john_marshall_law_school_acquired_by_ui_system/) [https://perma.cc/KW4F-YE74]; Dawn Rhodes, *UIC Approves Merger with John Marshall Law School*, CHI. TRIB. (July 19, 2018), <http://www.chicagotribune.com/news/ct-met-john-marshall-law-school-uic-20180719-story.html> [https://perma.cc/4SYN-E376].

law schools—with enrollment numbers at the same level as 1975–1976 when there were only 163 ABA-accredited schools.<sup>13</sup>

¶7 A consistent and considerable increase occurred in the number of law students from 1963–1964 to 2010–2011, after which enrollment began to decline.<sup>14</sup> With fewer applicants, acceptance rates soared from 56 percent in 2004 to 75 percent in 2017.<sup>15</sup> A 7 percent increase in applicants the following year—and probably also because a few schools that accepted nearly all of their applicants were no longer accepting new students—resulted in a slightly lower acceptance rate (72 percent) in 2018.<sup>16</sup>

¶8 Not surprisingly, the decrease in total J.D. enrollment coincides with the beginning of the Great Recession of 2008; students who matriculated in 2008 graduated in 2011. Simple math shows that law schools averaged about 680 J.D. students 40 years ago, and 540 students today.<sup>17</sup> That's a lot of lost tuition revenue. This financial pressure is compounded by an increase in scholarships and grants<sup>18</sup> and decisions by many schools to freeze or even reduce tuition.<sup>19</sup> Formerly cash cows for their universities, many law schools are going hat-in-hand to their central administration seeking money to operate.<sup>20</sup>

¶9 Below is data from the ABA of student enrollment in accredited law schools from 1963–1964 through 2018–2019.<sup>21</sup>

13. Data derived from ABA *Approved Law Schools*, *supra* note 11; ABA Section on Legal Educ. & Admissions to the Bar, *Enrollment and Degrees Awarded 1963–2012 Academic Years* (2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.pdf) [<https://perma.cc/SB5E-ENLV>]; post-2013 data at ABA Section on Legal Educ. & Admissions to the Bar, *Statistics* (2018), [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) [<https://perma.cc/PX6X-86N5>]; and ABA, *Statistics Archive*, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/statistics-archives/](https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/) [<https://perma.cc/3J8D-GPKE>].

14. *Enrollment and Degrees Awarded 1963–2012 Academic Years*, *supra* note 13.

15. Law School Admission Council, *Admission Trends: ABA Applicants, Admitted Applicants & Applications*, <https://www.lsac.org/data-research/data/admission-trends-aba-applicants-admitted-applicants-applications> [<https://perma.cc/UA48-DMND>]; Law School Admission Council, *Archive: 2000–2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, <https://www.lsac.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications> [<https://perma.cc/XR8P-GGWK>].

16. *Admission Trends: ABA Applicants, Admitted Applicants & Applications*, *supra* note 15.

17. See *Enrollment and Degrees Awarded 1963–2012 Academic Years*, *supra* note 13; *Statistics*, *supra* note 13; *Statistics Archive*, *supra* note 13.

18. Derek T. Muller, *The Percentage of Law School Enrollees Receiving Scholarships Continues to Climb*, EXCESS OF DEMOCRACY (Mar. 27, 2017), <http://excessofdemocracy.com/blog/2017/3/the-percentage-of-law-school-enrollees-receiving-scholarships-continues-to-climb> [<https://perma.cc/YA48-9LM4>].

19. See generally Elizabeth Olson, *Law School Is Buyers' Market, with Top Students in Demand*, N.Y. TIMES (Dec. 1, 2014), <https://dealbook.nytimes.com/2014/12/01/law-school-becomes-buyers-market-as-competition-for-best-students-increases/?mcubz=1> [<https://perma.cc/X8XJ-47L6>].

20. Paula Monopoli, *Bail Out Law Schools—But with Strings Attached*, BOSTONGLOBE.COM (May 9, 2014), <https://www.bostonglobe.com/opinion/2014/05/09/bail-out-law-schools-but-with-strings-attached/OqG0KrQKmLpmqOa8A009sK/story.html> [<https://perma.cc/3BVN-FG4W>]; see also William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013).

21. See *Enrollment and Degrees Awarded 1963–2012 Academic Years*, *supra* note 13; *Statistics*, *supra* note 13; *Statistics Archive*, *supra* note 13.

Year	ABA-accredited J.D.-Conferring Law Schools	J.D. Enrollment
1963–1964	136	46,666
1968–1969	138	59,498
1973–1974	151	101,675
1975–1976	163	111,047 (lowest until 2016–2017)
1978–1979	167	116,150
1983–1984	173	121,201
1988–1989	174	120,694
1993–1994	176	127,802
1998–1999	181	125,627
2003–2004	187	137,676
2008–2009	200	142,922
2009–2010	200	145,239
2010–2011	200	147,525 (peak)
2011–2012	201	146,288
2012–2013	201	139,055
2013–2014	201	128,710
2014–2015	202	119,775
2015–2016	203	113,900
2016–2017	204	110,951
2017–2018	204	110,156
2018–2019	203	111,561

Twenty-six law schools have been fully or provisionally accredited by the ABA since 1998.<sup>22</sup> It's hard to blame the universities or for-profit companies that established law schools a decade or two ago when enrollments—and revenue—were surging.<sup>23</sup> But there are two good targets: the federal government student loan program and the ABA.

¶10 Many have criticized a student loan program that is both too generous and too lax.<sup>24</sup> The federal government will loan a student money for living expenses and law school tuition—even for a non-ABA-accredited school—notwithstanding the

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22. Only six of these are public: UNLV (2000), Florida International (2004), Florida A&M (2004), U.C. Irvine (2011), UMass-Dartmouth (2012), and UNT Dallas (2017). ABA Section of Legal Educ. & Admissions to the Bar, *Alphabetical School List*, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/in\\_alphabetical\\_order.html](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order.html) [https://perma.cc/62Q5-HLAR]. UMass-Dartmouth took over an already existing school, Southern New England School of Law, in 2010. *Id.*

23. Alex Eichler, *Prediction: A Lot of Law Schools are Going to Disappear*, ATLANTIC (Apr. 25, 2011), <https://www.theatlantic.com/national/archive/2011/04/prediction-law-schools-going-disappear/349972/> [https://perma.cc/X83P-TRB9].

24. See, e.g., William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: Federal Loans Inflate College Budgets, But How Long Will That Last if Law Grads Can't Pay Their Bills?*, A.B.A.J. (Jan. 2012), [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills) [https://perma.cc/B9VF-TNM7].

quality of the school or, for want of better words, the quality of the student.<sup>25</sup> It took for-profit Charlotte School of Law's violation of Department of Education regulations and noncompliance with ABA standards for the agency to pull the plug on Charlotte's qualifying for federal student loan programs.<sup>26</sup> To combat the problem, others have proposed that schools assume some of the lending risk of student default, a position we agree with.<sup>27</sup>

¶11 How much money did Charlotte, owned by the for-profit InfiLaw System (which also owns Florida Coastal School of Law and now closed Arizona Summit Law School),<sup>28</sup> reap from the DOE's pool of money? "During the 2015–16 award year, CSL enrolled 946 federal aid recipients and received more than \$48 million in federal student aid funds, primarily federal student loans."<sup>29</sup> Charlotte Law closed down on August 11, 2017, after the ABA rejected the teach-out plan it submitted to the Council on Legal Education, and the University of North Carolina revoked, and then declined to extend, Charlotte's operating license.<sup>30</sup>

¶12 Our other target is the American Bar Association. Concededly, you could argue that the ABA is not blameworthy, that it could not be aggressive (or even assertive) after being subject to several lawsuits challenging the ABA accreditation process under federal antitrust laws.

¶13 In 1993, the Massachusetts School of Law (MSL) engaged in a five-year fight with the ABA in the media and in the courts. The legal battle ended in 1998 after MSL lost several district court cases and appeals to the Third Circuit and the U.S. Supreme Court. But a small victory was achieved when, after being sued by the U.S. Department of Justice for violating the Sherman Act, the ABA agreed to change its accreditation procedures.<sup>31</sup>

¶14 MSL wasn't the only party unhappy with the way the ABA accredits law schools—or the fact that it accredits schools at all. In 1989, four years before MSL's

25. *Paying for Law School*, LAW SCH. ADMISSIONS COUNCIL (2019), <https://www.lsac.org/choosing-law-school/paying-law-school> [https://perma.cc/A9BK-KQQN].

26. Letter from Susan D. Crim, Dir., U.S. Dep't of Educ. Admin. Actions & Appeals Serv. Grp. to Chidi Ogene, President, Charlotte Law Sch. (Dec. 19, 2016), <https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf> [https://perma.cc/HG8P-PHD2].

27. See Duke Cheston, *Skin in the Game*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Aug. 4, 2013), <https://www.jamesgmartin.center/2013/08/skin-in-the-game/> [https://perma.cc/T3X4-JGNY]; Richard Vedder, *Colleges Will Probably Soon Have "Skin in the Game,"* FORBES.COM (June 12, 2015), <https://www.forbes.com/sites/ccap/2015/06/12/colleges-will-probably-soon-have-skin-in-the-game/#45b5477b3282> [https://perma.cc/HK6G-LRXJ].

28. *Our Schools*, THE INFILAW SYSTEM (2015), <http://www.infilaw.com/our-schools-2/> [https://perma.cc/H4FA-W39K] (no longer listing Charlotte).

29. Press Release, U.S. Dep't of Educ., *Charlotte School of Law Denied Continued Access to Federal Student Aid Dollars* (Dec. 19, 2016), <https://www.ed.gov/news/press-releases/charlotte-school-law-denied-continued-access-federal-student-aid-dollars> [https://perma.cc/EJY9-U7ET].

30. Michael Gordon, *Attorney General Tells Charlotte School of Law: Close or Be Closed*, CHARLOTTE OBSERVER (Aug. 15, 2017), <http://www.charlotteobserver.com/news/local/article167250322.html> (last visited Sept. 12, 2019); Stephanie Francis Ward, *Charlotte School of Law Closes After ABA Legal Ed Council Rejects Teach-out Plan*, A.B.A.J. (Aug. 15, 2017), [http://www.abajournal.com/news/article/charlotte\\_school\\_of\\_law\\_must\\_close\\_north\\_carolina\\_ag\\_office\\_says](http://www.abajournal.com/news/article/charlotte_school_of_law_must_close_north_carolina_ag_office_says) [https://perma.cc/ZTJ2-BBCZ]; Letter from Kimberly van Noort, Vice Pres. for Acad. Programs, Faculty & Research, Univ. of N.C., to Chidi Ogene, Pres., Charlotte Sch. of Law (Aug. 15, 2017) (on file with author).

31. See Margot Slade, *A Little Law School Does Battle with the A.B.A.*, N.Y. TIMES (Feb. 4, 1994), <http://www.nytimes.com/1994/02/04/us/a-little-law-school-does-battle-with-the-aba.html?pagewanted=all&mcubz=1> [https://perma.cc/EU53-7B5S]. The U.S. Supreme Court ultimately denied MSL's petition for writ of certiorari, 522 U.S. 907 (1997).

lawsuit, third-year law students at CBN (the predecessor to Regent Law School in Virginia Beach, VA) sought a preliminary injunction requiring the ABA to provisionally accredit the law school. The court denied the plaintiffs' motion, granted the ABA's motion for summary judgment, and dismissed the suit.<sup>32</sup> Students at Barry University School of Law didn't learn much from the CBN lawsuit; they unsuccessfully sued in 2001 to force the ABA to provisionally accredit Barry.<sup>33</sup> In 2011, Lincoln Memorial University's Duncan School of Law claimed that the ABA violated antitrust laws and deprived the school of due process for denying it provisional accreditation.<sup>34</sup> LMU withdrew the lawsuit after the ABA allowed the school to resubmit its application for provisional accreditation.<sup>35</sup> More recently, Thomas M. Cooley Law School lost its motion for a temporary restraining order to prevent the ABA from publicizing its November 13, 2017, letter regarding the school's failure to meet ABA standards.<sup>36</sup> Although Cooley lost the battle, it won the war: in April 2018, the ABA reversed its decision that Cooley was not in compliance.<sup>37</sup>

¶15 The ABA is taking it from both sides regarding now-closed Charlotte. In May 2018, the law school sued the ABA for violating due process, shortly after its sister InfiLaw-owned school, Florida Coastal, sued the accrediting body.<sup>38</sup> One week earlier, a former professor at Charlotte Law, and a graduate of the law school, sued the ABA for negligently accrediting it.<sup>39</sup>

¶16 Although the ABA hasn't yet lost a court battle, it rarely bared its teeth for two decades after its 1995–1996 consent decree with the Department of Justice that fundamentally changed how it operated.<sup>40</sup> The ABA agreed (1) not to collect or

32. Zavaletta v. Am. Bar Ass'n, 721 F. Supp. 96 (E.D. Va. 1989).

33. Staver v. Am. Bar Ass'n, 169 F. Supp. 2d 1372, 1379 (M.D. Fla. 2001) (denying preliminary injunction sought by Barry graduates to force the ABA to provisionally accredit the school).

34. Lincoln Memorial Univ. Duncan Sch. of Law v. Am. Bar Ass'n, No. 3:11-CV-608, 2012 WL 137851 (E.D. Tenn. Jan. 18, 2012); see also Mark Hansen, *Duncan School of Law Drops Lawsuit Against ABA Over Accreditation Denial*, A.B.A.J. (Oct. 30, 2012), [http://www.abajournal.com/news/article/duncan\\_school\\_of\\_law\\_drops\\_lawsuit\\_over\\_accreditation\\_denial/](http://www.abajournal.com/news/article/duncan_school_of_law_drops_lawsuit_over_accreditation_denial/) [<https://perma.cc/N9B5-AW33>].

35. *Lincoln Memorial Drops Lawsuit Against ABA, Brings in New Leadership*, NAT'L JURIST (Oct. 31, 2012), [http://www.nationaljurist.com/prelaw/lincoln-memorial-drops-lawsuit-against-aba-brings-new-leadership](http://www.nationaljurist.com/prelaw/lincoln-memorial-drops-lawsuit-against-aba-brings-new-leadership/) [<https://perma.cc/D4QD-ZAZ8>].

36. *Thomas M. Cooley Law Sch. v. Am Bar Ass'n*, No. 17-13708, 2017 WL 6342629 (E.D. Mich. Dec. 12, 2017); see also Stephanie Francis Ward, *Cooley Law Seeks TRO to Prevent ABA from Releasing Accreditation Findings*, A.B.A.J. (Nov. 16, 2017), [http://www.abajournal.com/news/article/cooley\\_law\\_seeks\\_tro\\_to\\_prevent\\_aba\\_from\\_releasing\\_accreditation\\_findings](http://www.abajournal.com/news/article/cooley_law_seeks_tro_to_prevent_aba_from_releasing_accreditation_findings) [<https://perma.cc/4JHM-5X6J>]; Staci Zaretsky, *The ABA Claps Back Against Cooley Law in Fight over Admissions Standards*, ABOVE THE LAW (Jan. 10, 2018), <https://abovethelaw.com/2018/01/the-aba-claps-back-against-cooley-law-in-fight-over-admissions-standards/?rf=1> [<https://perma.cc/X7QC-7NZ6>].

37. David Fract, *The ABA Finds Thomas Cooley in Compliance, but Why?*, FACULTY LOUNGE (Apr. 28, 2018), <http://www.thefacultylounge.org/2018/04/the-aba-finds-thomas-cooley-in-compliance-but-why.html> [<https://perma.cc/EF88-RWSF>].

38. Paul Caron, *Second Law School Represented by Kirkland & Ellis Sues ABA Alleging Arbitrary Enforcement of Accreditation Standards*, TAXPROF BLOG (May 16, 2018), [http://taxprof.typepad.com/taxprof\\_blog/2018/05/second-law-school-represented-by-kirkland-ellis-sues-aba-alleging-arbitrary-enforcement-of-accredita.html](http://taxprof.typepad.com/taxprof_blog/2018/05/second-law-school-represented-by-kirkland-ellis-sues-aba-alleging-arbitrary-enforcement-of-accredita.html) [<https://perma.cc/QA3G-C66M>]; Stephanie Francis Ward, *Florida Coastal Sues ABA over Finding of Noncompliance with Accreditation Standards*, A.B.A.J. (May 10, 2018), [http://www.abajournal.com/news/article/florida\\_coastal\\_sues\\_aba\\_over\\_finding\\_that\\_school\\_is\\_out\\_of\\_compliance\\_with](http://www.abajournal.com/news/article/florida_coastal_sues_aba_over_finding_that_school_is_out_of_compliance_with) [<https://perma.cc/UD2A-DXU2>].

39. Paul Caron, *Former Prof, Student Sue ABA for Negligently Accrediting Charlotte Law School*, TAXPROF BLOG (May 14, 2018), [https://taxprof.typepad.com/taxprof\\_blog/2018/05/former-prof-student-sue-aba-for-negligently-accrediting-charlotte-law-school.html](https://taxprof.typepad.com/taxprof_blog/2018/05/former-prof-student-sue-aba-for-negligently-accrediting-charlotte-law-school.html) [<https://perma.cc/28R3-D7K4>].

40. *U.S. v. American Bar Association*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/case/us-v>

disseminate the salaries of law school employees, (2) to change its procedures so that the accreditation process would not be controlled by law faculty, and (3) to abandon policies that both denied accreditation to for-profit law schools and prohibited ABA-approved schools from accepting credits from nonaccredited schools. Lawyers being lawyers, the ABA didn't comply fully with the settlement agreement until 2006, after the Justice Department filed a petition asking a federal district court to hold the association in civil contempt.<sup>41</sup>

¶17 Because state bar associations ultimately determine who can practice law, some contend that the ABA's role in accrediting law schools *should* be muted.<sup>42</sup> Several of the ABA's critics write that accreditation requirements impede innovation, limit the number of minority law students and lawyers, and drive up the costs of both legal education and legal services.<sup>43</sup> Others, somewhat echoing the Department of Justice, say that the ABA and AALS act as cartels that benefit their (mostly white) law professor members, rather than law students and those who need legal services.<sup>44</sup> As former Lewis & Clark Law School Dean James Huffman put it:

[T]he core factor in the escalating cost of legal education is that the guild of law school professors long ago captured the combined regulatory apparatus of the American Bar Association (ABA) and the AALS. We law professors have constructed a legal education model that, first and foremost, serves faculty interests—higher salaries, more faculty protected by tenure, smaller and fewer classes, shorter semesters, generous sabbatical and leave policies, and supplemental grants for research and writing. We could not have done better for ourselves, except that the system is now collapsing.<sup>45</sup>

¶18 The Department of Education joined the fray in 2016, attacking the ABA for being too lax. In June 2016, the DOE's National Advisory Committee on Institutional Quality and Integrity proposed suspending the ABA's accreditation power for new law schools for one year for allowing law schools to enroll students who had a high chance of not completing law school or not passing the bar, and by not putting schools on probation for violating ABA standards.<sup>46</sup> Rather than suspend

-american-bar-association [<https://perma.cc/ZTD4-3UGE>]; *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996) (modifying the judgment); Steven A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, N.Y. TIMES (June 28, 1995) <http://www.nytimes.com/1995/06/28/us/justice-dept-forces-changes-in-law-school-accreditation.html?mcubz=1> [<https://perma.cc/5VZ6-P4JK>].

41. *U.S. v. American Bar Association*, *supra* note 40 (Justice Department petition for order to show cause why ABA should not be held in civil contempt for failure to comply).

42. See Derek T. Muller, *Why Is the ABA Still Accrediting Law Schools?*, EXCESS OF DEMOCRACY (Oct. 28, 2016), <http://excessofdemocracy.com/blog/2016/10/why-is-the-aba-still-accrediting-law-schools> [<https://perma.cc/UJJ2-GVP2>].

43. Marina Lao, *Discrediting Accreditation? Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035 (2001).

44. James Huffman, *America's Law School Cartel*, HOOVER INSTITUTION (Feb. 12, 2015), <http://www.hoover.org/research/americas-law-school-cartel> [<https://perma.cc/W7S4-P62C>]; see also George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998); George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637 (2003).

45. Huffman, *supra* note 44.

46. See Stephanie Francis Ward, *ABA Threatened with 1-Year Suspension of Law School Accreditation Powers*, A.B.A.J. (June 24, 2016), <http://www.abajournal.com/news/article/aba-threatened-with-1-year-suspension-of-law-school-accreditation-powers> [<https://perma.cc/QS R2-ZR9E>]; Kyle McEntee, *Transcript Reveals Debate over ABA's Accrediting Power*, BIG LAW BUSINESS (Aug. 3, 2016), <https://bol.bna.com/transcript-reveals-debate-over-abas-accrediting-power/> [<https://perma.cc/8FQU-RVUG>]; see also Elisabeth Olson, *Study Cites Lower Standards in Law School*

the ABA's accreditation power, the DOE's chief of staff gave the ABA 12 months to comply with DOE regulations, and another month to submit a compliance report.<sup>47</sup>

¶19 The DOE may be credited for at least trying to put a little more bite into the ABA's bark. Three years ago, the ABA failed in its attempt to tighten up Standard 316 dealing with bar passage rates by requiring a law school to show that 75 percent of its graduates pass a bar exam within two (rather than five) years. After fielding criticism from nearly half of the U.S. law school deans, the ABA House of Delegates voted down the proposal in January 2017. But in May 2019, with the Council of the ABA Section of Legal Education and Admissions to the Bar now having the final say on accreditation matters, the two-year rule is now in effect.<sup>48</sup>

¶20 It took 95 years for the ABA to revoke accreditation from a fully accredited law school. But in recent years, a more activist ABA de-accredited Arizona Summit and Thomas Jefferson, placed Charlotte School of Law on probation (essentially forcing the school to close), and censured Valparaiso and Texas Southern's Thurgood Marshall School of Law. Ave Maria, Florida Coastal, Thomas Cooley, and Appalachian also have been in the ABA's crosshairs.<sup>49</sup> Arguing for even more bite, Law School Transparency (LST) argues for a far more rigorous ABA, including more public sanctions, a required bar passage rate of 85 percent within two years of graduation, and an exam to identify students who should not continue school after the first year.<sup>50</sup>

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*Admissions*, N.Y. TIMES (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/business/dealbook/study-cites-lower-standards-in-law-school-admissions.html> [<https://perma.cc/T48U-4L6F>] (outlining law schools accepting more at-risk students).

47. Letter from Emma Vadehra, Chief of Staff, U.S. Dep't of Educ., to Barry A. Currier, Managing Dir., Accreditation & Legal Educ., ABA Section of Legal Educ. & Admissions to the Bar (Sept. 22, 2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/2016\\_september\\_doe\\_letter\\_re\\_recognition.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2016_september_doe_letter_re_recognition.pdf) [<https://perma.cc/FRA2-X9AD>]; see also Stephanie Francis Ward, *ABA Responds to Accreditation Panel's Threat to Suspend Its Role*, A.B.A.J. (Sept. 1, 2016), [http://www.abajournal.com/magazine/article/law\\_school\\_accreditation\\_aba\\_response](http://www.abajournal.com/magazine/article/law_school_accreditation_aba_response) [<https://perma.cc/3F5R-F323>]; Stephanie Francis Ward, *ABA Won't Be Suspended from Accrediting New Law Schools*, A.B.A.J. (Sept. 23, 2016), [http://www.abajournal.com/news/article/aba\\_wont\\_be\\_suspended\\_from\\_accrediting\\_new\\_law\\_schools](http://www.abajournal.com/news/article/aba_wont_be_suspended_from_accrediting_new_law_schools) [<https://perma.cc/3DD3-UP8V>].

48. Stephanie Francis Ward, *ABA House Rejects Proposal to Tighten Bar-Pass Standards for Law Schools*, A.B.A.J. (Feb. 6, 2017), [http://www.abajournal.com/news/article/aba\\_house\\_rejects\\_proposal\\_to\\_tighten\\_bar\\_pass\\_standards\\_for\\_law\\_schools](http://www.abajournal.com/news/article/aba_house_rejects_proposal_to_tighten_bar_pass_standards_for_law_schools) [<https://perma.cc/G52E-TV2F>]; see also Stephanie Francis Ward, *Proposal to Tighten ABA Bar-Pass Standards Criticized by Deans and State Bar President*, A.B.A.J. (Jan. 19, 2017), [http://www.abajournal.com/news/article/proposal\\_to\\_tighten\\_aba\\_bar\\_pass\\_standards\\_criticized\\_by\\_deans\\_and\\_state\\_ba](http://www.abajournal.com/news/article/proposal_to_tighten_aba_bar_pass_standards_criticized_by_deans_and_state_ba) [<https://perma.cc/YF5W-CWGK>]; Stephanie Francis Ward, *ABA Legal Ed Section's Council Adopts Tighter Bar Pass Standard; Clock for Compliance Starts Now*, A.B.A.J. (May 17, 2019), <http://www.abajournal.com/news/article/council-of-legal-ed-adopts-tighter-bar-pass-standard-and-clock-for-compliance-starts-now> [<https://perma.cc/Z3GQ-WW4R>].

49. Joe Patrice, *10 Law Schools Sanctioned by the ABA—More to Come?*, ABOVE THE LAW (Nov. 22, 2017), <https://abovethelaw.com/2017/11/10-law-schools-sanctioned-by-the-aba-more-to-come/> [<https://perma.cc/ND4U-BDDH>]; Staci Zaretsky, *ABA Cracks Down on Law Schools Admitting Students Who Can't Pass the Bar Exam*, ABOVE THE LAW (Nov. 17, 2016), <http://abovethelaw.com/2016/11/aba-cracks-down-on-law-schools-admitting-students-who-cant-pass-the-bar-exam/> [<https://perma.cc/R6DZ-AZWP>]; see also Karen Sloan, *ABA Sanctions Two More Law Schools for Lax Admissions*, LAW.COM (Nov. 16, 2016), <http://www.law.com/sites/almstaff/2016/11/16/aba-sanctions-two-more-law-schools-for-lax-admissions/> [<https://perma.cc/24W4-N8TF>] (now archived on Lexis Advance); Anonymous, *ABA Warns Ave Maria over Low Bar Passage Rate*, NAT'L JURIST (Sept. 2, 2016), <http://www.nationaljurist.com/national-jurist-magazine/aba-warns-ave-maria-over-low-bar-passage-rate> [<https://perma.cc/ZZ39-FUS6>].

50. *2015 State of Legal Education: Report Overview—The 30,000 Foot View*, LAW SCH. TRANSPARENCY (2015), <https://www.lawschooltransparency.com/reform/projects/investigations/2015>

¶21 With the proliferation of digital information, online media, and social network websites, what's been going on in the world of legal education over the last two or three decades is well documented and pretty easy to find. What is far less known—with contemporary newspaper articles, correspondence, and other documents buried in file cabinets—is how the William & Mary Law School, founded in 1779 as the first law school in the United States, was threatened with losing its ABA accreditation in the 1970s.

¶22 Because William & Mary's problems were both external (lack of funding from the Commonwealth of Virginia) and self-inflicted (neglect from the college administration), there is abundant correspondence to and from law school and college administrators, disgruntled students and alumni, and state officials. We also see an ongoing dialogue with the ABA, as well as numerous local newspaper articles that document what appeared to be the law school's near-death experience.

¶23 One may wonder whether the ABA was a paper tiger 40 years ago, baring its teeth at William & Mary even though it would never bite. Was it just a ploy by the ABA—with W&M a willing accomplice—to force the Commonwealth of Virginia to provide more funding and a new building for the law school, or was the ABA really prepared to pull the accreditation of America's first law school? You can be the judge.

### The William & Mary Law School Accreditation Crisis

¶24 On February 28, 1973, Peter L. Wolff, Assistant to the Executive Director of the Association of American Law Schools, sent a memorandum regarding the “forthcoming ABA-AALS joint visit to the College of William and Mary School of Law, which will take place on March 19–21, 1973.”<sup>51</sup> In anticipation of the inspection, School of Law Dean James P. Whyte directed J. Madison Whitehead, the law librarian, to do several things: enforce the no smoking rules, exclude all animals from the library, reshelve all books and periodicals, repair broken chairs, make sure chairs were neatly placed around tables, remove boxes from passageways, dust benches, and police all areas for neatness.<sup>52</sup> If getting into those weeds wasn't enough, Whyte also told Whitehead to “be prepared to explain to inspectors the state of the reclassification of the collection.”<sup>53</sup>

¶25 Not long after the site visit, the ABA and AALS submitted undated reports “based on information gathered by the team's visit and from the Inspection Questionnaire, dated March 1, 1973, prepared by Dean James P. Whyte of the School of Law.”<sup>54</sup> Early on, the accrediting bodies noted that the law school was approved by the ABA in 1932, admitted to the AALS in 1936, and had a distinguished history.

The College of William and Mary was chartered in 1693. The Marshall-Wythe School of Law traces its history to the creation of a professorship in Law and Police by resolution of

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/methodology/ [<https://perma.cc/RQZ2-A2V6>].

51. Memorandum from Office of Exec. Dir., Ass'n of Am. Law Schs., to Professor Thomas J. O'Toole, Professor Cameron Allen, & John P. Tracey, Esq. (Feb. 28, 1973) (on file with author).

52. William & Mary Law School Interdepartmental Communication (Mar. 12, 1973) (on file with author).

53. *Id.*

54. ABA, REPORT ON THE MARSHALL-WYTHE SCHOOL OF LAW (Mar. 18–21, 1973) (on file with author).

the Board of Visitors of the College on December 4, 1779, as part of a major revision in curriculum attributed to the influence of Thomas Jefferson, then Governor of the Commonwealth of Virginia and a member of the Board of Visitors. The chair of law at the College, first held by George Wyeth [sic], is the oldest in the United States.<sup>55</sup>

The ABA and AALS complimented William & Mary's top administrators, Vice President for Academic Affairs George R. Healy and President Thomas A. Graves, Jr., for being "well informed regarding all aspects of the law school and current trends in legal education," and wrote that neither evoked surprise "of the concerns of the team regarding the special needs of the law school in areas such as facility expansion, library resources, and increased salaries for the Dean and faculty."<sup>56</sup>

¶26 That was the high point. Although Healy and Graves "viewed the law school as a priority in the overall College administration . . . [u]nfortunately, the special problems and needs of this law school require more than a sympathetic institutional administration." The problems and needs "were largely the result of inadequate financial resources being appropriated by the legislature."<sup>57</sup>

¶27 Blaming the law school's budget woes on the Virginia General Assembly stemmed from the committee's finding that state funding depended on how the Commonwealth classified its universities.

William and Mary suffers from an invidious classification as compared with the University of Virginia. . . . Since the students must prepare for the same bar and serve the same population, this discriminatory practice is unjustified. The problem is compounded by the fact that the system operates to give William and Mary an inadequate financial budget, faculty salaries 30% lower than at Charlottesville, and deficient physical facilities.<sup>58</sup>

¶28 The team was not finished. Other concerns identified in the next eight pages of the report included

- large classes;
- unimpressive scholarly output by the faculty;
- a library with a weak collection, insufficient space, and a staff much too small;
- a weak clinical program; and
- inadequate administrative and student office space.<sup>59</sup>

Some of the inspection team's concerns were due to a surge in enrollment at the law school. From 190 students in 1969–1970, total enrollment one year later was 308 due to a huge entering class of 182 J.D. students. When the ABA visited in March 1973, the law school had 388 students. Had its representatives visited one year later, they would have found 459 students crowded into classrooms, the library, and student office space.<sup>60</sup>

¶29 Despite these problems, the ABA and AALS wrote that the law school is a sound, lively though not exciting, institution of learning where a relatively traditional

55. *Id.* at 2.

56. *Id.* at 3.

57. *Id.*

58. *Id.* at 4–5.

59. *Id.* at 5–12.

60. ABA Questionnaire, submitted by the Law School in 1974 (on file with author). Of those 459 students, 449 were J.D. candidates, only 10 of whom were women.

program of teaching and style of administration are followed. It has just passed through a period of rapid expansion. This has left it with sub-marginal physical facilities, significant library deficiencies, and an inadequate operating budget. Nevertheless, the quality of the School was not sacrificed during the expansion. Able leadership has left its mark.<sup>61</sup>

The ABA concluded that although the law school met its general goals, it failed to “fully satisfy 602(a) of the Standards” (the library collection) and that in the school’s “present overcrowded condition it falls short of the Standard 704 with respect to library seating.”<sup>62</sup> Finally, it required the law school dean to report to the ABA Section on Legal Education and Admission to the Bar on its progress regarding “the physical plant needs of the School”; these reports were to be submitted at least every six months.<sup>63</sup>

¶30 Vice President Healy wrote that the college was relieved that the ABA team laid “considerable blame upon Richmond and the state appropriations rather than the internal College administration” and “that their criticism did not, in sum, amount to a negative recommendation.”<sup>64</sup> Healy also hoped that the ABA/AALS report would result in substantially better state support.

¶31 On June 27, 1973, Millard H. Rudd, the consultant on legal education to the ABA (and soon-to-be executive director of the AALS), wrote to Dean Whyte, enclosing a copy of the reinspection report that would be submitted to the ABA Council and its Accreditation Committee. Rudd also wrote that he would notify William & Mary of the Council’s action after its August meeting.<sup>65</sup>

¶32 Unfortunately, we cannot uncover other documents regarding the 1973 inspection in our archival files from the date of Rudd’s letter until May 1975—nothing from the ABA or the AALS, and no internal memoranda. We can, however, cobble together some of what transpired during this two-year period from newspaper articles. Several documents from 1972 regarding ABA accreditation inspections shed further light on its accrediting process and purpose.

¶33 Six months before the W&M inspection, Rudd sent a memorandum to all law school deans whose schools were scheduled to be reinspected.<sup>66</sup> In his memo, Rudd wrote:

The foremost purpose of this [reinspection] program is to help the law school visited. To facilitate the accomplishment of this, the dean should write a letter to the visiting team describing the goals that the school has set forth for itself and evaluating how well the law school is accomplishing its objectives. This letter should also identify the areas of the law school’s strengths and those areas of its program that need additional attention.<sup>67</sup>

He continued: “A second purpose is, of course, to determine whether the law school remains in full compliance with the accreditation criteria,” and a “third purpose is to identify and report on the developments in curriculum, teaching,

61. REPORT ON THE MARSHALL-WYTHE SCHOOL OF LAW, *supra* note 54, at 12.

62. *Id.*

63. *Id.*

64. Internal Communication, George R. Healy, Vice Pres. for Acad. Affairs, William & Mary Law Sch., to James P. Whyte, Dean, William & Mary Law Sch. (June 8, 1973) (on file with author).

65. Letter from Millard H. Rudd, Consultant, ABA, to James P. Whyte, Dean, William & Mary Law Sch. (June 27, 1973) (on file with author).

66. Memorandum from Millard H. Rudd, Consultant, ABA, to Deans of Approved Law Schools Scheduled to be Reinspected (Sept. 1972).

67. *Id.* at 1.

research, public service, and the like at the law school that would be of interest to others in legal education.”<sup>68</sup>

¶34 The main purpose of the inspection process—from the ABA’s own mouth—was not to see whether a law school met the criteria for accreditation.<sup>69</sup> The “threat” of losing ABA and/or AALS accreditation was used as leverage for a law school to get what it needed (or wanted) from its parent university and, if it was publicly funded, the state government. An unfavorable ABA/AALS inspection report could help a law school that itself identified, for those accrediting bodies, “areas of its program that need additional attention.”<sup>70</sup>

¶35 The ABA Standards from the early 1970s do not seem to have been very rigorous. In an undated news release that appears to be from 1973, the ABA wrote that it “adopted new standards which set higher, but more flexible, requirements for ABA approval of law schools.”<sup>71</sup> The new standards required that a law school have at least six full-time faculty members (raised from the 1921 requirement of three full-time faculty), and at least one full-time teacher for every 75 students. The ABA also required that law schools “offer training in professional skills, such as counseling, drafting, and trial and appellate advocacy.”<sup>72</sup>

¶36 William & Mary reacted quickly to the ABA/AALS reports. A document that appears to be from 1974 indicates that W&M President Thomas A. Graves, Jr. appointed a Space Reassignment Committee, chaired by Executive Vice President Carter Lowance, “charged with the responsibility for equalizing the adequacy of facilities assigned to the various departments and schools and for making the best possible use of all available space.”<sup>73</sup> Half of the five-page report addressed the law school:

Most of the remaining implementation of the long-range plan for space utilization now depends upon the availability of the proposed Law Building. There has been a great deal of discussion of this project, in the press as well as elsewhere. The unacceptability of the present facilities available for the Marshall-Wythe School of Law in terms of the accreditation standards of the American Bar Association has been widely publicized and probably need not be reemphasized here, although the importance of meeting accreditation standards should certainly not be minimized.

...

It seems to be generally accepted that the present facilities of the School of Law are inadequate by any standards. Both the faculty and, probably more critically, the library are scattered across the campus among a number of buildings. In other words, something must be done.<sup>74</sup>

Getting into more detail, the report noted that

- converting Marshall-Wythe Hall into a law library would cost \$2,000,000 and would take 18 months;

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68. *Id.* at 2.

69. *Id.*

70. Press Release, ABA, Higher Requirements for Law Schools Approved by the ABA House of Delegates (1973?) (on file with author).

71. *Id.*

72. *Id.*

73. Utilization of Academic Space at the College of William and Mary, author unknown (1974?) (on file with author).

74. *Id.* at 3.

- such a remodeled library would be filled to maximum capacity from the start;
- renovating Old Rogers for the law school would cost \$1,600,000;
- the site would be more than a mile from the National Center for State Courts;
- the two old buildings would have limited life and high maintenance costs; and
- there would be no space to locate the law school during the renovation period.<sup>75</sup>

¶37 Stating that both the business and education schools would benefit by moving the law school off campus, the author wrote that a new law building was the logical choice.

In summary, William and Mary has developed a long range plan for utilization of academic space. The plan was recognized as a significant contribution by the State Council of Higher Education and other State agencies. We have moved forward with the implementation of the plan in good faith. Further progress is dependent upon the availability of the proposed Law Building. There appears to be significant advantages to the new buildings when compared to the available alternative. The advantages would apply to the entire College, not only the School of Law.<sup>76</sup>

Things appeared to be looking up at the law school; by 1974, the student body had doubled in only four years, there were more than 20 tenured or tenure-track faculty (12 under the age of 40), and the college appeared committed to addressing the accrediting agencies' concerns over its facilities.

¶38 Law school facilities actually had been on the college's radar for years. In a 1971 letter to a law student, Graves wrote:

While ideally we would have liked very much to construct a new Law School building, our plans to renovate Rogers Hall were based on conversations with State officials and with various College officials, including the Dean of the Law School. It became all too apparent to us that there was very little likelihood of getting a new Law School building within the next several years. However, as you know, the expansion of the Law School to an enrollment of approximately 400 students will make it essential that the School has more space within the immediate future.

...

Let me add that while William and Mary may be primarily an undergraduate institution in terms of numbers and character, its strength and prestige, in my opinion, as a great small national university is derived in a substantial way from the excellence of its graduate and professional schools. The Law School has my full and unqualified support in its efforts to move toward its full growth and the highest level of national prominence.<sup>77</sup>

¶39 A few months earlier, the media had picked up the story—one of many articles that would appear over the next several years. The January 10, 1974, *Richmond Times-Dispatch* reported “the Marshall-Wythe School of Law at the College of William and Mary received a ‘tremendous boost’ Wednesday with the governor’s request to the General Assembly for an expanded facility and a \$500,000 pledge

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75. *Id.* at 4.

76. *Id.* at 5.

77. Letter from Thomas A. Graves, Jr., Pres., Coll. of William & Mary, to Mr. Daniel J. Perry, student, William & Mary Law (Dec. 20, 1971) (on file with author).

from its alumni for support.”<sup>78</sup> D. Wayne O’Bryan, president of the Law School Association, “indicated that the pledge ‘was made on the assumption that the General Assembly will appropriate the \$4,850,000 necessary to construct a modern facility for the school of law.’”<sup>79</sup>

¶40 O’Bryan’s optimism was based on Governor Linwood Holton’s address at the opening session of the Virginia General Assembly where Holton “voiced strong support of Virginia’s two state-supported law schools . . . and that expansion in Williamsburg would allow for an additional 150 law students and would cost well below the \$12 million estimated sum for initial financing of a third state law school.”<sup>80</sup>

¶41 Despite a state budget shortfall, Holton said that “[o]ne capital outlay request in the budget deserves special comment, namely the proposed new building for expansion of the law school of the College of William and Mary.”<sup>81</sup> He continued:

Although there have been suggestions that a new law school be built in another area of the State, I feel that the Commonwealth simply cannot afford or support three state law schools. I therefore recommend that a new building be constructed at this, the oldest law school, after all, in the United States. I urge you to appropriate both planning and construction money at this session to enable us to dedicate this expansion of the Marshall-Wythe School of Law on July 4, 1976, the 200th anniversary of the signing of the Declaration of Independence. I can think of nothing more appropriate for us to do to commemorate this event.<sup>82</sup>

The *Times-Dispatch* contacted Dean Whyte, who “commented via telephone from Atlanta that the two announcements Wednesday ‘give more than a significant boost, they give a tremendous boost to our law school efforts.’”<sup>83</sup>

¶42 But what Holton wanted made little difference; his term as governor would end three days later. Newly installed governor Mills E. Godwin, Jr. and the General Assembly did not follow up on Holton’s grand scheme of having a legal center at William & Mary with a new law building located adjacent to the National Center for State Courts, a few blocks from the college’s main campus. It was time for lobbying by the college and its friends.

¶43 Soon after Godwin took office, B. Walton Turnbull (W&M ’49), Executive Vice President of United Virginia Bank (now Truist, after the 2019 SunTrust/BB&T merger),<sup>84</sup> wrote to state senator Edward E. Willey, making “a special plea for planning money for the new Marshall-Wythe School of Law.” After noting that Virginia’s three other law schools—the University of Virginia, T.C. Williams (University of Richmond), and Washington and Lee—all had or were building new law school facilities, Turnbull wrote:

78. State Staff, *W&M Law School Dean Hails ‘Tremendous Boost,’* RICHMOND TIMES-DISPATCH, Jan. 10, 1974, at A-6.

79. *Id.*

80. *Id.* Va. Gov. Linwood Holton, Address to the Gen. Assemb. (Jan. 9, 1974). The third state law school eventually would be George Mason, which took over the former International School of Law in 1979. See GEO. MASON UNIV., *George Mason University: A History*, <http://ahistoryofmason.gmu.edu/exhibits/show/prominence/contents/schooloflaw> [<https://perma.cc/LJ9Z-AZSQ>].

81. Holton, *supra* note 80.

82. *Id.*

83. State Staff, *supra* note 78.

84. SUNTRUST, *BB&T and SunTrust to Combine in Merger of Equals to Create the Premier Financial Institution* (Feb. 7, 2019), <http://investors.suntrust.com/news/news-details/2019/BBT-and-SunTrust-to-Combine-in-Merger-of-Equals-to-Create-the-Premier-Financial-Institution/default.aspx> [<https://perma.cc/H8PF-KNBL>].

William and Mary is the only college or university in the State, either public or private, that does not have a new building for its law school. In my judgment, it is a disgrace that the State has never been willing to provide William and Mary with adequate facilities to enable it to promote the Marshall-Wythe School of Law as Virginia's oldest law school. In light of the present situation and the continuing demand of students for a legal education, I urge you to strongly recommend that funds be allocated for planning the proposed new Marshall-Wythe Law School Building.<sup>85</sup>

¶44 Dr. Robert J. Faulconer (W&M '43) told state delegate J. Warren White that “[t]he proposal of Governor Godwin to defer building the new law school for William and Mary is unthinkable for several reasons,” including the National Center for State Courts’ future move to Williamsburg and the possibility of the law school losing its accreditation or closing, and that deferring building “can only mean indefinite postponement, for building costs are skyrocketing. . . . I know you will use your good offices to assure that the State, and nation’s oldest law school will not be destroyed for the sake of short term expediency.”<sup>86</sup>

¶45 At the end of 1974, the *Times-Dispatch* followed up with another article on the law school’s accreditation and the lack of progress toward a new law school facility. The reporter, Wilford Kale,<sup>87</sup> referring to a staff report issued on December 3 by the State Council of Higher Education, wrote, “the American Bar Association and the Association of American Law Schools feel that state support of the William and Mary law school is ‘submarginal’ and that accreditation of the law school is, therefore, in jeopardy until deficiencies are corrected.”<sup>88</sup> Dean Whyte was quoted as saying, “to say our accreditation is in jeopardy is a bit of an overstatement. We’re not on the verge of going out of existence.”<sup>89</sup>

¶46 Although the General Assembly eliminated from the 1976–1978 biennium budget former governor Linwood Holton’s request for \$4.8 million for a new law school building, it did provide funds for architectural planning, along with money to upgrade faculty salaries and the law library. Appreciating what they could get, the William & Mary administration did not want to ruffle feathers in Richmond. President Graves commented that the college would not ask the 1975 General Assembly for a new law school building because “[w]e’ve been asked only to submit a request [for funds] if they are absolutely of an emergency nature. I talk in terms of critical need and absolute need when I talk about a new law school building. . . . But I can not honestly talk about the new project as an emergency.”<sup>90</sup> Whyte followed Graves’s lead; the dean was “certain that the accreditation agencies ‘will give us plenty of time’ to secure our new building and meet their requirements.”<sup>91</sup>

¶47 Shortly thereafter, William Swindler, a constitutional law professor at the law school from 1958–1979, followed suit, writing that when the law school cele-

85. Letter from B. Walton Turnbull, Exec. Vice Pres., United Va. Bank, to Edward E. Willey, Va. State Sen. (Feb. 27, 1974) (on file with author).

86. Letter from Robert J. Faulconer, Founder, E. Va. Med. Sch., to J. Warren White, Jr., Va. Del. (Feb. 12, 1974) (on file with author).

87. Kale, a longtime Williamsburg resident, wrote a history of the college, *HARK UPON THE GALE: AN ILLUSTRATED HISTORY OF THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA*. The first edition was published in 1985, the second in 2007.

88. Wilford Kale, *New Building Called Cure for W&M Law School Ills*, *RICHMOND TIMES-DISPATCH*, Dec. 4, 1974, at B-2.

89. *Id.*

90. *Id.*

91. *Id.*

brated the 200th anniversary of George Wythe's appointment as Chair of Law and Police in December 1979, it "should be functioning out of a new law complex, consisting of its own building and a companion facility housing the headquarters of the National Center for State Courts. . . ."<sup>92</sup>

¶48 James White, Consultant on Legal Education to the American Bar Association, visited the law school on March 19–20, 1975. White was charged to report to the ABA's Council of the Section of Legal Education and Admissions to the Bar "on progress made and being made . . . with regard to concerns expressed in the previous inspection report."<sup>93</sup> After commending the college and law school for providing additional monies for "faculty support and library growth," White made the following points in a letter to Graves and Whyte:

The Law School has possibly the most inadequate physical plant of any ABA approved law school in the country. . . . It is my opinion, given the dearth of adequate and satisfactory condition of the facilities at the College of William and Mary, [a new law school building] should be of the very highest priority, both within the College and within the State College System. Continued instruction and research in existing facilities is not possible.<sup>94</sup>

...

The fringe benefit package available to the Marshall-Wythe School of Law faculty is one of the lowest in monetary value of all ABA approved law schools . . . . It seems to me very difficult for the oldest Law School in the United States to recruit the kind of faculty which the Dean and faculty wish to recruit, given the salary structure and fringe benefits of the Law School.<sup>95</sup>

...

Given the fact that the Library is in a bifurcated physical setting and that professional librarians should man both parts of the library at all times, it seems to me imperative that at least three additional professional librarians are provided in the forthcoming academic year. . . . It was anticipated that an additional \$35,000–\$40,000 be added to the book budget to compensate for inflation. . . . [T]his funding is badly needed to strengthen the Law School Library which is approximately at the range of 80,000 volumes, a minimum for a law school the size of the Marshall-Wythe School of Law. Additionally, more clerical staff are needed to adequately serve the existing Law School Library. A law library is the heart of the law school.<sup>96</sup>

...

It is imperative that the University Administration recognize the Law School as a graduate and professional institution—one that requires a higher FTE student funding than is given in normal undergraduate programs and akin to that level of support for graduate study at the doctoral level.<sup>97</sup>

...

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92. William F. Swindler, *Law School to Be Quartered in New Complex*, LEGAL ADVERTISER, Jan. 23, 1975, at 5.

93. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Dr. Thomas A. Graves, Pres., Coll. of William & Mary & James P. Whyte, Dean, William & Mary Law Sch. (May 15, 1975) (on file with author).

94. *Id.* at 2.

95. *Id.* at 3.

96. *Id.* at 3–4.

97. *Id.* at 4.

The school may not admit applicants who do not appear capable of satisfactorily completing the program. . . . I found that there was substantial influence by the Central Administration in admissions and some difficulties arising from this influence. . . . I would suggest that there cannot be interference or influence exerted by the Central Administration in the operation of their admission procedures.<sup>98</sup>

...

During my visit . . . six faculty members were recommended for promotion by the faculty Promotion and Tenure Committee . . . but were not recommended by the Vice President for Academic Affairs, Dr. Healy. Dr. Healy informed me that he believed there should be parity between promotion practices in the College of William and Mary and its Law School. . . . This matter is particularly troublesome to me and I believe will be troublesome to the Council and its Accreditation Committee. . . . I would suggest that the action of the University, taken in spite of the recommendations of the law faculty Promotion and Tenure Committee and Dean Whyte is clearly in violation of Standards 204 and 405.<sup>99</sup>

White concluded by asking the college to update him “as to developments which have taken place subsequent to my visit and matters about which I am particularly troubled, that is, funding and promotion.”<sup>100</sup>

¶49 Whyte and Graves replied to White on June 3, 1975.<sup>101</sup> As for the facility, they concurred that the “present facility is too small and crowded for our current enrollment,” that “plans have been completed for a new building,” that “the job of obtaining funding for construction of the new building remains and will continue to remain the number one priority of all William and Mary capital projects,” and that the college was “making every possible effort” to convince the State Council of Higher Education and state officials that a new law school building for W&M “should be first on the state-wide priority list for new educational buildings in the 1976–78 biennium.”<sup>102</sup> Strategically, they welcomed “any assistance the American Bar Association might choose to offer in convincing” the State Council and the General Assembly “of the urgent need for a new law building.”<sup>103</sup>

¶50 Whyte and Graves next addressed funding, writing that the college made substantial progress on salaries (rising from a median of 134th out of 148 law schools in 1973–1974 to 94th among 156 schools in 1974–1975), that the stability of senior faculty “has remained high,” and that by 1975–1976 they hoped to have four partially endowed chairs. As for the poorly funded law library, its 1975–1976 budget would increase 53 percent by 1977–1978.<sup>104</sup>

¶51 Addressing the fourth item in White’s May 15 letter, they wrote that recognizing the law school as a graduate and professional institution by the central administration “is manifest,” noting that FTE funding for law students was slightly higher than for undergraduates—\$1487 vs. \$1457. Finally, they noted that the law

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98. *Id.* at 4–5.

99. *Id.* at 5–6.

100. *Id.* at 6.

101. Letter from James P. Whyte, Dean, William & Mary Law Sch. & Thomas A. Graves, Pres., Coll. of William & Mary, to James P. White, Consultant on Legal Educ. to the ABA (June 3, 1975) (on file with author).

102. *Id.* at 1.

103. *Id.*

104. *Id.*

school's 1974–1975 budget, excluding the library, increased by 13.68 percent from the previous year.<sup>105</sup>

¶52 Whyte and Graves then addressed the ABA's concerns about admissions and promotion practices. As for admissions, there was a "misunderstanding," and "it can be stated without qualification that no one has been admitted to the law school who, on balance, appeared incapable of completing our program."<sup>106</sup> Regarding the central administration's failure to follow the recommendations of the law school's Promotion and Tenure Committee to promote six law faculty, "with our full support three of the six candidates . . . have been granted promotions following rather extended discussions"; they "do not believe that there were any violations of standards 205 or 405 in this matter, and we further respectfully submit that this matter need not be of concern to you or to the Council."<sup>107</sup>

¶53 The ABA's White wrote to Graves and Whyte on July 31, 1975, to report on the July 10–13 meeting of the ABA's Council of the Section of Legal Education and Admissions to the Bar and its Accreditation Committee.<sup>108</sup> As evidenced by this detailed resolution, the college's progress report had not alleviated the ABA's concerns:

WHEREAS, the Council has received and considered the progress report of President Graves of the College of William and Mary and Dean Whyte of its Marshall-Wythe School of Law dated June 3, 1975, and the report of the Consultant on Legal Education to the American Bar Association as the result of his visit to the College of William and Mary on March 19, 1975; and

WHEREAS, the Council has considered the recommendations of its Accreditation Committee; and

WHEREAS, the Council notes very grave concern with regard to the following matters:

- 1) the continued inadequacy of the law building of the Marshall-Wythe School of Law and the fact that portions of the School of Law are housed in four additional buildings other than the building of the School of Law;
- 2) the continued inadequacy of faculty salaries of the Marshall-Wythe School of Law, which are below the national median and below those schools in the geographical area in which the school is located;
- 3) the continued inadequacy of professional staffing support for the law library;
- 4) the continued need for additional strengthening of the law library;
- 5) the need for clarification with regard to the autonomy of the admissions process within the School of Law;
- 6) the law school promotion pattern and the equating of the law school promotion pattern with those of the undergraduate components of the College and the possible violation of Standards 205 and 405;

WHEREAS, the Council expresses increased concern because of the resignation of Dean Whyte at the conclusion of the 1974-75 academic year;

NOW, THEREFORE, BE IT RESOLVED, that the President of the College of William and Mary and the Dean of its Marshall-Wythe School of Law are hereby notified, pursuant to Rule IV (2), Rules of Procedure for Approval of Law Schools by the American Bar

105. *Id.* at 1–2.

106. *Id.* at 2.

107. *Id.* at 2–3.

108. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Dr. Thomas A. Graves, Pres., Coll. of William & Mary, and James P. Whyte, Dean, William & Mary Law Sch. (July 31, 1975) (on file with author).

Association, that the Council has reason to believe that the Marshall-Wythe School of Law of the College of William and Mary has failed to maintain the Standards established by the American Bar Association. Further, that unless the deficiencies shown in this resolution are resolved satisfactorily on or before December 1, 1975, the Marshall-Wythe School of Law of the College of William and Mary will be placed on the agenda of the Accreditation Committee at its first 1976 meeting for the purpose of determining whether a notice for a hearing shall issue.<sup>109</sup>

¶54 White wrote that if the Council concluded that the law school did not comply with the ABA standards, “it will take appropriate action for removal of the . . . School of Law from the list of law schools approved by the American Bar Association.”<sup>110</sup> He then outlined the process under Rule IV of the standards:

If the Council believed that an approved law school failed to maintain the Standards and did not resolve them by a certain date, a hearing would take place;

If after the hearing the Council believed the school was still not in compliance, the school could appear before the Council at yet another meeting, after which the Council would decide whether to “recommend to the [ABA] House of Delegates that the school should be removed from the list of approved schools.”<sup>111</sup>

¶55 White warned that “[i]f your Law School were removed from the list of schools approved by the American Bar Association, your graduates would not be eligible to take the bar examination in almost every American admitting jurisdiction.”<sup>112</sup> He concluded by offering “to assist both of you in any way you might find helpful in preparing your response . . . including a visit to meet with you and your Trustees and the law school faculty to discuss the action of the Council and its Accreditation Committee if you believe such a visit would be helpful.”<sup>113</sup>

¶56 White’s letter unleashed a storm of activity both inside and outside the college. President Graves wrote to R. Harvey Chappell, Jr. (W&M ’48, B.C.L. ’50, LL.D. ’84), a member of the college’s board of visitors and rector of W&M, “in response to the understandable concern expressed at the August meeting of the Executive Committee in regard to the July 31, 1975 letter . . . from James P. White.”<sup>114</sup> He focused on the law school’s facilities, offering various alternatives that “may be responsive to the concerns expressed in Mr. White’s letter.”<sup>115</sup>

¶57 Graves suggested that if the General Assembly moved forward with a referendum for a bond issue, and if the referendum passed, the law school could have a new building no later than September 1980:

Under this assumption, it is our judgment that the Law School should remain in its present facilities . . . for the next four years working out of them as best it can under conditions which are clearly less than ideal. This would have the Law School operating in Marshall-Wythe, in the basement of Bryan, to a very limited degree in James Blair, and to a very limited degree in Washington.<sup>116</sup>

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109. *Id.* at 2–3.

110. *Id.* at 3.

111. *Id.*

112. *Id.*

113. *Id.* at 8.

114. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to R. Harvey Chappell, Jr., Rector, William & Mary Bd. of Visitors (Aug. 14, 1975) (on file with author).

115. *Id.* at 1.

116. *Id.*

Graves believed “that this action . . . will be sufficient evidence of our responsiveness to the American Bar Association.”<sup>117</sup>

¶58 Alternatively, if the 1976 General Assembly did not move forward with a bond referendum, but acted “in a manner that is optimistic for 1977 and other conditions seem to suggest optimism, we would be inclined to urge that we hold out for the new building for one more year.”<sup>118</sup> If, however, there was “little reason to hope for better things in 1977, we would be inclined to encourage the Board to abandon the new building . . . and place as a top priority for the College the renovation of Rogers Hall and some more renovation of Marshall-Wythe for the Law School.”<sup>119</sup> Were this the case, Graves said that the size of the law school would have to be reduced to 350 students, as “we are agreed that it would be impossible to meet ABA standards for more than a brief period of time in a renovated Rogers and Marshall-Wythe at the present level of 450 students.”<sup>120</sup>

¶59 The college’s executive committee discussed alternative means of paying for a new building, including the issuance of state revenue bonds that would be funded by an annual tuition increase at the law school of almost \$1000 or an increase for *all* students at William & Mary of about \$150. The committee decided, however, that the “\$1,000 increase for law students would make the Law School non-competitive” and a “collegewide increase would not be responsive to the Commonwealth’s expressed desire that we hold down state college tuitions, and it would seriously affect internal relationships at the College.”<sup>121</sup>

¶60 Graves concluded by writing that “the fact that this letter has been written is increasingly known, and it is important that we dispel rumors and be in a position to respond positively to inquiries which we shall receive from the press and others.”<sup>122</sup> He also planned to use the ABA’s accreditation threat as leverage: “[w]e shall also be discussing how we can use this action by the ABA to our advantage in preliminary discussions with members of the General Assembly,” and he had “written to Carter Lowance [Governor Godwin’s chief of staff] toward this end.”<sup>123</sup>

¶61 On September 4, at the request of W&M Rector Harvey Chappell, Graves shared his August 14 letter with the college’s board of visitors, informed the board that White would return to the law school on September 16, and said that he would have “more to report to you on our strategy and plans at the [September] Board meeting.”<sup>124</sup>

¶62 The minutes of the law school’s first faculty meeting of the 1975–1976 academic year present a stark picture:

Dean Fischer [appointed acting dean following James Whyte’s resignation at the end of the 1974-75 academic year] reported that the letter from the A.B.A. recently received constitutes a bleak and harsh report. A.B.A. representative, J.P. White, is to be here on September 16th

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 3.

123. *Id.* at 3. Carter Lowance was chief of staff to five Virginia governors from 1950–1970, executive vice president at William & Mary from 1970–1974, and then served again as chief of staff when Mills Godwin began his second term as governor of Virginia in 1974. Carter Lowance Papers, 1860–1993, <https://srcguides.libraries.wm.edu/repositories/2/resources/2176> [<https://perma.cc/W479-FZZT>].

124. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to Bd. of Visitors of Coll. of William & Mary in Va. (Sept. 4, 1975) (on file with author).

and will see the President, Vice President for Academic Affairs, and Dean Fischer. Dean Fischer stated that he intends to mobilize the alumni, the Virginia Bar, and Justices Burger, Clark and Powell, in connection with the school's need for a new building. Deficiencies indicated by the A.B.A. report include building, library books and personnel, faculty salaries, admissions interferences, and rules regarding promotion, tenure, and appointments.

Professor Powell then moved that a copy be distributed to each faculty member. This motion was seconded but amended to the effect that no faculty member should release the contents of the report. As amended, the motion carried unanimously.<sup>125</sup>

¶63 It is worth noting that Dean Fischer intended to seek support from three Supreme Court Justices. Chief Justice Burger's and Justice Powell's connections to William & Mary were clear. Burger helped found the National Center for State Courts (now located adjacent to the law school) and served as chancellor of William & Mary from 1986–1993.<sup>126</sup> Powell was a Virginian and former partner in the Richmond law firm Hunton, Williams, Gay, Powell & Gibson.<sup>127</sup> Less clear is why Fischer would contact Clark, a Texan.<sup>128</sup> In addition to the motion to contact the legal elite, the faculty also voted to hold a special faculty meeting on September 16 “so that the entire faculty could meet with James White.”<sup>129</sup>

¶64 Graves, it appears, spent the better part of the autumn of 1975 dealing with the law school's problems. An unauthored “Statement on the Proposed New Building and Law Library for the Marshall-Wythe School of Law,” presented to the William & Mary Board of Visitors (BOV) at its September 19 meeting, described the law school accreditation problems as far back as the ABA/AALS August 1973 reinspection visit.<sup>130</sup>

¶65 “President Graves reported to the Board of Visitors . . . regarding the serious and critical situation at the Marshall-Wythe School of Law resulting from the wholly inadequate physical facilities that are now provided,” and he reminded the board that a new law school building had been the college's highest priority for the last three years.<sup>131</sup> These other points were made during the BOV meeting:

- In December 1974, the State Council of Higher Education took the position that:

[t]he College of William and Mary has an old and respected law school. The Council recommends that the Commonwealth would do well to increase its support from a marginal level to one which will enable it to maintain its reputation as a strong law school of national stature. With this support, especially in constructing its new building, the law school . . . will be able to expand to almost double its present size should any unforeseen need for lawyers develop;<sup>132</sup>

125. Minutes: Marshall-Wythe Sch. of Law, Sept. 5, 1975, at 2 (on file with author).

126. NAT'L CTR. STATE CTS., *The Warren E. Burger Award for Excellence in Court Administration*, <http://www.ncsc.org/about-us/awards/warren-e-burger-award.aspx> [https://perma.cc/85N2-5FME]; WILLIAM & MARY, *Post-Colonial Era Chancellors*, <http://www.wm.edu/about/administration/chancellor/postcolonial/index.php> [https://perma.cc/A8H6-5QCK].

127. OYEZ, *Lewis F. Powell, Jr.*, [https://www.oyez.org/justices/lewis\\_f\\_powell\\_jr](https://www.oyez.org/justices/lewis_f_powell_jr) [https://perma.cc/A338-PHW6].

128. OYEZ, *Tom C. Clark*, [https://www.oyez.org/justices/tom\\_c\\_clark](https://www.oyez.org/justices/tom_c_clark) [https://perma.cc/7FS3-ZY3P].

129. Minutes, *supra* note 125, at 3.

130. Statement on the Proposed New Building and Law Library for the Marshall-Wythe Sch. of Law (Sept. 19, 1975) (on file with author).

131. *Id.* at 1.

132. *Id.*

- The 1974 General Assembly provided \$218,750 in planning funds for a new building, but the Assembly had not as yet provided any construction funds;<sup>133</sup>
- A \$5,105,900 new law school building was the college's number one capital outlay project for the 1976–1978 biennium;<sup>134</sup>
- Graves informed the BOV that “the situation at the Law School was of an emergency nature. Failure to provide a new law school building and adequate funding for a law library . . . is seriously jeopardizing the Law School's continuing accreditation” . . . threatens “the future of the oldest professional law program in America” . . . and “would make it extremely difficult to attract an eminently qualified person to provide leadership to the Law School as its new Dean;”<sup>135</sup> and
- The National Center for State Courts' relocation to Williamsburg “was based largely on the assumption that the new building of the Law School would be adjoined to its headquarters on College land.”<sup>136</sup>

¶66 Viewing the situation as desperate, the board decided to pull out all of its guns—as well as the guns of others. It directed Graves

to make relevant portions of the ABA reports and recommendations public at this time and take all appropriate steps to bring the serious problem at the Law School to the direct attention of the State Council of Higher Education, the General Assembly, the Governor, and all other individuals and groups who are in a position to take positive action in providing capital outlay funds from the General Funds of the Commonwealth for the construction of the new building, and providing adequate M&O funds for the staffing and collections of the law library, at the 1976 General Assembly.<sup>137</sup>

The college's news office distributed a two-page press release in mid-September including the ABA's statements that the law school had “the most inadequate physical plant of any ABA approved law school in the country” and that the situation was “of an emergency nature.”<sup>138</sup> It also reported what Graves told the BOV: that the future of the law school was threatened, that it would be difficult to attract a new dean, and that the National Center for State Courts relocated to Williamsburg in anticipation of a new law school building next door to it.<sup>139</sup>

¶67 Graves sent numerous personal letters out and received several replies. One dated September 24, 1975, from W&M alumnus and Virginia state senator Hunter B. Andrews<sup>140</sup> thanked Graves “kindly for your letter of September 22 relative to the crisis at the Marshall-Wythe School of Law.”<sup>141</sup> Andrews assured Graves that he would “do whatever I can . . . to have a new law school built in Williamsburg.”<sup>142</sup>

133. *Id.*

134. *Id.*

135. *Id.* at 7.

136. *Id.*

137. *Id.* at 7–8.

138. Press Release, Coll. of William & Mary News Office, *Continued Delay on Funding a New Building* (Sept. 21, 1975) (on file with author).

139. *Id.* at 2.

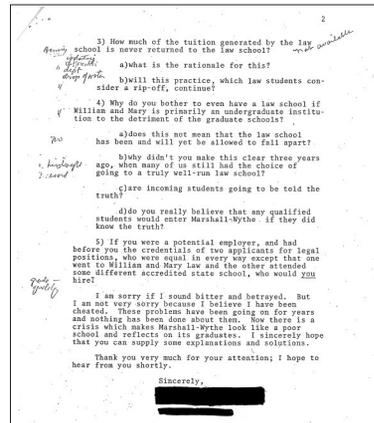
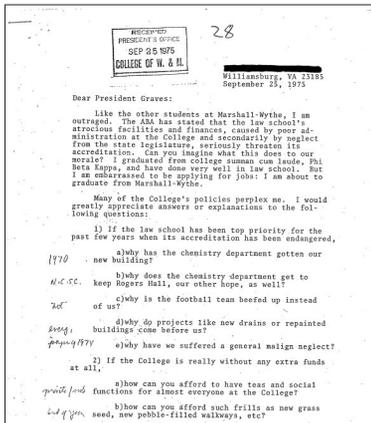
140. Patricia Sullivan & Michael D. Shear, *Hunter B. Andrews Dies; Va. Senate Majority Leader Powerful and Intimidating*, WASH. POST, Jan. 15, 2005, at B08.

141. Letter from Hunter B. Andrews, Sen., 1st Senatorial Dist., Commonw. of Va., to Dr. Thomas A. Graves, Pres., Coll. of William & Mary (Sept. 24, 1975) (on file with author).

142. *Id.* at 1.

Andrews's support came with a warning: "I am led to believe our friends in Northern Virginia will continue to push for a new law school at George Mason University; and I think we must be alert for this challenge."<sup>143</sup>

¶68 One of the more interesting documents in our files is a letter from a third-year William & Mary law student to President Graves, reproduced below with Graves's handwritten notes.<sup>144</sup>



Graves invited the student to "make an appointment . . . to come in and talk with me about the questions which you have raised in your letter. My experience suggests that there are always reasonable answers to reasonable questions, when people of good will get together and try to communicate on common ground."<sup>145</sup> Graves and the student did meet, and he sent her a letter sharing her concerns and expressing hope for progress.<sup>146</sup>

¶69 The local media was quick to note the law school's troubles,<sup>147</sup> but the most thorough reporting came from the law school's student newspaper, *Amicus Curiae*.<sup>148</sup> The September 30, 1975, issue had three stories plus an editorial on the accreditation crisis. The cover story began with Graves's September 24 press conference, traced the accreditation problem as far back as August 1973, and reprinted the entire July 1975 resolution of the ABA Council.

¶70 A second story quoted Acting Dean Fischer telling W&M law students that there was "no need for any panic or feeling of insecurity," and that "there is not

143. *Id.* The General Assembly did indeed authorize a law school for George Mason, but not until 1979. VA. LEGIS. INFO. SYS., 1979 *Uncodified Acts*, ch. 144, <https://law.lis.virginia.gov/un-codifiedacts/1979> [<https://perma.cc/R9ZE-LH5Z>].

144. Letter from [name deleted by author] to Thomas A. Graves, Pres., Coll. of William & Mary (Sept. 25, 1975) (on file with author).

145. Letter from Thomas A. Graves, Pres., Coll. of William & Mary to [name deleted by author] (Sept. 16, 1975) (on file with author).

146. *Id.*

147. Virginia Gabriele, *Law School Accreditation Said in Serious Jeopardy*, DAILY PRESS, Sept. 25, 1975 (on file with author); Ron Sauder, *ABA Accreditation Loss Possible, W&M Warned*, RICHMOND TIMES-DISPATCH, Sept. 25, 1975 (on file with author); Virginia Gabriele, *Godwin to Attempt to Save Law School*, DAILY PRESS, Sept. 26, 1975 (on file with author).

148. Margaret Askew & Mark Gregory, *ABA Report Threatens Law School Accreditation*, AMICUS CURIAE, Sept. 30, 1975, at 1, 4 (on file with author). *Amicus Curiae* articles can be accessed at the *William & Mary Law School Scholarship Repository*, <https://scholarship.law.wm.edu/newspapers/> [<https://perma.cc/KG29-M2XF>].

going to be any discreditation of this law school.”<sup>149</sup> It also reported on an “emergency meeting called by SBA President Guy Strong ‘to explain what has happened, to answer questions, and to allay student fears.’”<sup>150</sup>

¶71 The 130 law students who attended the September 24 meeting heard from Associate Dean Timothy J. Sullivan, who would serve as dean of the law school from 1985–1992 and as president of William & Mary from 1992–2005. Sullivan told the students that “a massive, coordinated effort on the part of faculty, students and alumni will be necessary to convince the public and the state legislators of the seriousness of the situation.”<sup>151</sup>

¶72 Trying to allay fears that a damaged law school reputation would harm students’ job searches, Sullivan told the assembly not to attach undue significance to the present situation, that prospective employers were more concerned with the individual than with the school he or she attends, and that students should point out to potential employers former students’ good professional records.<sup>152</sup> He also said that the University of Virginia and William & Mary were not treated equally by the state legislature, and that W&M law students were not treated fairly by the college: “Law students are being cheated in terms of tuition. You’re not getting your money’s worth.”<sup>153</sup> Finally, Sullivan urged the students to “act like lawyers in this situation. We need to get the facts and avoid an over-emotional reaction.”<sup>154</sup>

¶73 Yet another story in the *Amicus* was written by Student Bar Association President Guy Strong, who first attempted to calm his fellow law students: “it is important to stress that a ‘crisis’ does not exist anywhere except in the minds of the misinformed,” “even if the College and the General Assembly do nothing about the ABA report it would take at least one and perhaps two years before we became officially ‘unaccredited,’” and the ABA’s concerns, “except the new facility, could be made within the College without outside funding or assistance.”<sup>155</sup>

¶74 Strong blamed the central administration for the law school’s problems: “The part the College administration has played in the events leading [sic] up to the present drama should not be overlooked. Its lack of emphasis on the Graduate programs it controls is inexcusable, and the Law School has evidently been the victim of much of that neglect.”<sup>156</sup> He then wrote that W&M law students could not afford to be passive—“we must either help plug the leaks below decks or head for the life-preservers. . . . Dean Fischer has assured me that the students will be given an important role in this strong effort to squeeze the needed funds out of the increasingly tight-fisted public servants in Richmond.”<sup>157</sup>

¶75 Not finished, Strong criticized the administration’s decision not to widely share the full ABA report:

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149. *Fischer, Sullivan Discuss ABA Accreditation Report*, AMICUS CURIAE, Sept. 30, 1975, at 5 (on file with author).

150. *Id.*

151. *Id.* WILLIAM & MARY, *Timothy J. Sullivan*, <https://www.wm.edu/about/administration/president/about/history/twenty/sullivan/index.php> [<https://perma.cc/H2FK-KRKR>].

152. *Fischer, supra* note 149.

153. *Id.*

154. *Id.*

155. Guy Strong, *SBA President Calls for Release of Complete ABA Report*, AMICUS CURIAE, Sept. 30, 1975, at 3 (on file with author).

156. *Id.*

157. *Id.*

[a]lthough every Law faculty member has a full copy of the [ABA] report, they have been directed to keep the unrevealed sections strictly secret. . . . President Graves has to realize the adverse impact this whole matter is having on the placement of third-year students and future job opportunities of the other students enrolled here. For these reasons, I call on him to release the full ABA report to the student body without further delay.<sup>158</sup>

¶76 Finally, the *Amicus Curiae's* editor-in-chief called for

an exhibition of unity and purpose in seeking the necessary funding commitment . . . to correct the deficiencies at Marshall-Wythe which the ABA will be looking for on December 1. . . . Although the outlook is negative it is not entirely black and the events of September 24 may yet be the salvation of the being called Marshall-Wythe.<sup>159</sup>

¶77 We don't know how widely Graves or Fischer shared the entire ABA report, if at all, but a concerted lobbying effort began forthwith, which the college encouraged and tried to manage. An October 3 memorandum from Ross Weeks, Assistant to the President, updated Graves on the college's immediate efforts to ameliorate the negative repercussions of the law school accreditation matter, including

- having law professor William Swindler write an editorial in the *Virginia Gazette*, and offer the editorial to the *Richmond Times-Dispatch* and *Norfolk Virginian-Pilot*;
- arranging for Acting Dean Emeric Fischer to be interviewed on a local television morning show, and to try to have a segment of the interview included in evening news programs; and
- seeking *Times-Dispatch* editor Ed Grimsley's support for the law school.<sup>160</sup>

¶78 Weeks's message came with a warning: "Ed has detected the presence of a 'blitz' which could be counterproductive."<sup>161</sup> The blitz *had* begun. We have more than two dozen letters in our archival files from October 1975—presumably there were others we cannot account for—among college administrators, and between Graves and law school alumni, members of the Virginia General Assembly, the State Council of Higher Education, and the Virginia executive branch, about the law school's problems. All acknowledged the need to save William & Mary's law school. Some examples—

- From state senator J. Harry Michael, Jr., to Graves:

As you know, I have for several years advocated vigorously the proposition that we needed to expand and support in every way we could the Marshall-Wythe School of Law. Frankly, at the moment I simply don't know what we'll be able to do in the 1976 Assembly.<sup>162</sup>

- From Graves to state senator Hunter B. Andrews:

Thanks so much for your letter. . . . I realize of course that nothing definite will be known prior to the December 1 deadline which has been established

158. *Id.* at 8.

159. Editorial Staff, *Accreditation Problem Serious*, AMICUS CURIAE, Sept. 30, 1975, at 2 (on file with author).

160. Interdepartmental Communication from Ross Weeks, Jr., to Pres. Graves, Law School Image, Oct. 3, 1975 (on file with author).

161. *Id.*

162. Letter from J. Harry Michael, Jr., Commonw. of Va. Sen., to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 1, 1975) (on file with author).

by the ABA. I feel confident that I can help them understand how the timing works here. I received numerous letters of encouragement and support such as yours following our public statement and my hope is that this will be sufficient for the ABA to hold off pending such action as the General Assembly may wish to take.<sup>163</sup>

- From Graves to J. Harvie Wilkinson, Jr., chairman of the State Council of Higher Education for Virginia, about the law school building being given a “No. 3” priority by the Council while higher priority was given to community colleges:

I respectfully request that the State Council raise, on an emergency basis, the proposed building for the Marshall-Wythe School of Law to its No. 1 priority for capital outlay funds from the General Fund at the 1976 General Assembly, and communicate this action to the Governor and the Chairman of the Appropriations Committee.<sup>164</sup>

- From Graves to Daniel E. Marvin, Jr., Director, State Council of Higher Education:

In your letter you encourage us to make known to you any special items which we deem worthy of your further attention. Accordingly, we have prepared the enclosed “Request for Reconsideration” in which we have attempted to re-emphasize and to highlight certain areas in our budget which we feel warrant funding beyond your recommendations.<sup>165</sup>

- From a law school alumnus to Virginia governor Mills Godwin, Jr.:

[T]he matter of inadequate facilities is not a problem that has surfaced only within the last sixty days as was suggested at our meeting with Mr. Lowance. You will note from Dr. Graves’ statement that representatives of the American Bar Association visited the Law School as far back as August of 1973. At that time, the representatives identified budgetary and space problems of a serious nature.

I suggest that the loss of accreditation is not a situation that has recently been contrived in order to pressure you or the members of the General Assembly to include funds in the budget for the construction of a Law School building. I believe that this is evidenced by the letters referred to above.<sup>166</sup>

- From a William & Mary undergraduate and law school alumnus to Governor Godwin:

I am writing . . . to express my deep concern, shock and consternation concerning the law school’s possible loss of American Bar Association accreditation. It is an outrage that even a threatened loss of ABA accreditation is allowed to hang over the oldest and one of the most respected law schools in the Country.

The loss of ABA accreditation is obviously going to have a deleterious effect upon the school, and the ability of the school to attract high quality students on a nationwide scale. . . . It will inevitably have a detrimental effect

163. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to Hon. Hunter B. Andrews, Commonw. of Va. Sen. (Oct. 1, 1975) (on file with author).

164. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to J. Harvie Wilkinson, Jr., Chairman, State Council of Higher Educ. for Va. (Oct. 2, 1975) (on file with author).

165. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to Dr. Daniel E. Marvin, Jr., Dir., State Council of Higher Educ. for Va. (Oct. 9, 1975) (on file with author).

166. Letter from Sam T. Beale, 1968 William & Mary Law graduate, to Hon. Mills E. Godwin, Jr., Gov., Commonw. of Va. (Oct. 3, 1975) (on file with author).

upon the morale of the faculty of the school, and upon the ability of the school to attract outstanding professors. . . . Finally . . . the State of Virginia will look foolish allowing its oldest and most venerable institution of higher learning to suffer the ignominy of losing its accreditation, because the State is unwilling to lend adequate financial support.

I have seen a copy of an article in the Richmond Times-Dispatch that lends support to the urgency I see in this matter. The banner headline proclaims, "W&M LAW SCHOOL HELD LACKING." The connotation (sic) of the headline is, I believe, clear—the education offered by the Marshall-Wythe School of Law is inferior. This surely will be the reaction . . . should the school lose accreditation. One must search the article to find out that the inadequacies are not in the education offered by the school, but rather in the school's physical plant, the faculty salaries, and the understaffing and inadequate facilities of the law library. These "inadequacies" can easily be remedied by application of a simple solvent, state support.<sup>167</sup>

- From a law school alumnus to Graves:

Thank you for your letter of October 1, 1975 and the unexpected pleasure of meeting with you and Jim Kelly for a few minutes Thursday morning. I hope that your meetings with Delegate Lane and Merrill Pasco were fruitful. Based on the article in Sunday's Richmond paper, it would appear that Senator Willey is going to continue to be a problem.

Our meeting with Governor Godwin was quite cordial and lasted approximately 45 minutes to an hour. We went as friends expressing concerns and hopes and did not attempt to state or make demands. We clarified a number of points about which the Governor seemed to have some misunderstanding. We expressed the hope that the Governor might find some way to include the necessary funds for a new law school building. . . .

. . . My assessment is that the Governor's comments were more realistic than pessimistic or optimistic but clearly he gave us no assurance whatsoever that the funds we are seeking would be in the Executive Budget recommendations for the 1976–78 biennium.<sup>168</sup>

- From Graves to Daniel E. Marvin, Jr., Director, State Council of Higher Education:

Dennis Cogle and I very much appreciated you and your colleagues seeing us today. Your consideration of our requests and your interest and support for the College are very gratifying. . . .

I think you should have copies of the full text of our correspondence with the American Bar Association regarding the problems at the Law School.

Only in this way will you be able to judge objectively why we have elected to make public only those portions of the letter of July 31 from Mr. James P. White which are relevant to the interests of the members of the General Assembly and the Governor's Office and on which they are in a position to take action in support of the School. The other two issues, having to do with admissions and faculty promotions, are reflected inaccurately . . . which is an additional reason why we prefer that the text of such letters not be made public. The letter which Dean Whyte and I wrote to Mr. White on June 3 tries to correct the misimpressions. . . . You have my permission to share this correspondence with Harvie Wilkinson. At the same time, I think you will both

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167. Letter from John Boberg, 1968 William & Mary Law graduate, to Hon. Mills E. Godwin, Gov., Commonw. of Va. (Oct. 31, 1975) (on file with author) (emphasis in original).

168. Letter from Mark S. Dray, 1968 William & Mary Law graduate, to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 7, 1975) (on file with author).

understand why I believe it would not be in the best interest of the School, the State Council and the College to make these letters public.<sup>169</sup>

- From Philip M. Sadler, President of the Virginia State Bar, to Graves:

I think I can assure you that the whole legal profession in the State of Virginia is concerned about the accreditation of the George Wythe School of Law by the American Bar Association. If we in the State Bar can be of any assistance to you . . . please do not hesitate to call upon us.<sup>170</sup>

- From Andrew P. Miller, Attorney General of Virginia, to Graves:

I have read your letter of September 22nd with considerable interest and concern. It would be a tragedy indeed were the Marshall-Wythe School of Law to lose accreditation. . . . Obviously, the General Assembly must have an opportunity to become fully acquainted with the situation before acting on appropriations at the 1976 Session. I shall be greatly interested to see the proposal you will make to the General Assembly. . . . If I may be of specific assistance, please don't hesitate to communicate with me.<sup>171</sup>

¶79 While Graves was engaging with law school students and alumni, state officials, and the media, the William and Mary Law School Association, made up of ardent (and probably generous) law school alumni, conceived a plan to at least partially fund a new building. Hal Bonney, president of the association, shared it with Graves and the BOV:

I am directed by the William and Mary Law School Association to convey to you the following statement as a part of our desire to assist in every possible way in not only maintaining the accreditation granted by the American Bar Association but in efforts to have America's oldest law school become America's finest. . . .

Since the A.B.A. report involves deficiencies in addition to the physical plant, we presume these to be resolvable within the purview of the administration and/or the Board of Visitors. We convey the hope that they can and will be resolved immediately thereby avoiding some subsequent revelation that might impair the paramount efforts being directed toward the attainment of the facility. Indeed, these internal matters have too long existed unresolved. . . .

[T]he College holds more than 900 acres exclusive of the approximate 300 acres constituting its present campus. While keenly aware of the costly experience of educational institutions with too little land for expansion, we wonder however if it would not be timely to reassess the use of some of these distant, campus-detached properties . . . with the view of disposing of some acreage with the proceeds being used to help defray the cost of the new law school facility. . . .

[I]t would be timely for the Board of Visitors to adopt a formal resolution requesting the Council of the Section of Legal Education and Admissions of the Bar . . . to defer referral of this matter to the House of Delegates. . . . Surely the record of immediate past support of the Marshall-Wythe School of Law and the action of the College and State set forth in this letter could not be ignored.<sup>172</sup>

169. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to Dr. Daniel E. Marvin, Jr., Dir., State Council of Higher Educ. for Va. (Oct. 14, 1975) (on file with author).

170. Letter from Philip M. Sadler, Pres., Va. State Bar, to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 16, 1975) (on file with author) (incorrectly referring to the school as "George Wythe School of Law" in place of the "Marshall-Wythe School of Law").

171. Letter from Andrew P. Miller, Va. Atty. Gen., to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 14, 1975) (on file with author).

172. Letter from Hal J. Bonney, Jr., Pres., William & Mary Law Sch. Ass'n, to Thomas A. Graves, Pres., Coll. of William & Mary, and R. Harvey Chappell, Jr., Rector, Bd. of Visitors (Oct. 15, 1975) (on file with author).

¶80 Bonney's plan was also described enthusiastically, and in some detail, in the November 11 issue of the law school student newspaper:

If many students walk the halls of Marshall-Wythe with haunted eyes these days, the reason may be the ghostly flames that apparently only law students see threatening to engulf their small building. Whatever plans and efforts have been given birth by the minds of Dr. Graves and the Board of Visitors have been born beneath a blanket of silence. So perhaps it is not surprising that mutterings have arisen within the law school to the effect that faint violin notes hanging in the air outside the windows of Dr. Graves's office in Ewell Hall do not, in fact, originate from the adjacent Music Department but in reality herald the rebirth in college policy of that Neronian spirit that metamorphosed the glory of Rome into an overabundance of charcoal. Into this well of silence Judge Hal J. Bonney, Jr., the new president of the William and Mary Law School Association has thrown the gage of a practical plan, publicly voiced, for raising at least part of the funds needed for the new building. Reaction to the Bonney plan has been mixed, but no one has denied that as to simplicity or solidity it is so far the preeminent solution.<sup>173</sup>

¶81 Graves did not greet the association's suggestions with the same enthusiasm as the students, but he needed to reply diplomatically, which he did on October 20.<sup>174</sup> After writing that "[t]he December 1 deadline is now no longer a threat leading to possible dis-accreditation action by the ABA,"<sup>175</sup> Graves continued:

Mr. White's concerns, as expressed in his letter of July 31, regarding faculty salaries, faculty promotions and admissions, were based almost wholly upon misconceptions and misinformation which he had. Clarification was provided in his meeting with us on October 15. He now seems fully satisfied with those matters, and we are taking steps to ensure that further misconceptions and misinformation will not arise in the future. . . .

Mr. White has assured us . . . that he is sufficiently satisfied with the strenuous efforts and substantial progress being made, so that these matters will not be referred on December 1 for possible disaccreditation. Our job is to continue to make real progress and gain real support for the Law School, but the immediate threat is now behind us. Therefore, Harvey Chappell<sup>176</sup> and I are agreed that the resolution you suggest is not now necessary or desirable.

...

We have engaged one of the top consultants on land use in this area to advise us on these complicated and difficult matters that involve long-term major policy considerations for the College. The land you refer to in your letter is, of course, being examined as part of the study. As you can imagine, I'm sure, the decisions involved in the use of land (including its possible sale) involve the most complicated and sensitive issues, from environmental, legal, community, educational, and financial points of view, and it is difficult, if not impossible, to separate our decisions on one or two parts of the holdings in question, without seriously affecting the outcome of a long-run [sic: range?] plan of major value to the College. Furthermore, I know that the Board does not take lightly the disposition of any properties of the College, for the Board is ever mindful of the possible evolving needs of the College over many years in the future, long after all of us, who currently have some custodial or governing responsibility, are gone.

173. Terry Grinnalds, *College Land Sale Proposed for Funding Law Building*, AMICUS CURIAE, Nov. 11, 1975, at 1 (on file with author).

174. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to Hal. J. Bonney, Jr., Pres., William & Mary Law Sch. Ass'n (Oct. 20, 1975) (on file with author).

175. *Id.* at 1.

176. R. Harvey Chappell, Jr. (W&M '48, B.C.L. '50, LL.D. '84) was a member of William & Mary's Board of Visitors from 1968–1976, and rector from 1972–1976. Chappell created and was president of the William & Mary Law School Association in 1951–1952, and president of the Society of the Alumni in 1963–1964.

The suggestions which you have made are very much a part of the full range of possibilities and approaches currently being considered by the administration and Board of Visitors. I can assure you that your views will be given the most careful attention as we continue our deliberations and reach decisions in the months ahead.<sup>177</sup>

¶82 Bonney was not pleased. The U.S. Postal Service must have delivered mail very quickly between Williamsburg and Norfolk four decades ago, for the very next day, in an October 21 letter to Graves, Bonney requested “a copy of reports James P. White of the A.B.A. may make to the College on the subject.”<sup>178</sup> He was particularly irked at Graves’s and Chappell’s rejection of the Association’s resolution:

Respectfully, I would take exception to that summary disposition of the suggestion. I assure you that the Association would not have made it if we had not been persuaded, with good cause, that such a resolution would find reception on the part of State officials.

You should be on notice that to prematurely close the door to this possible solution might well result in no funding in 1976, when under the circumstances suggested funding may well be possible and the new facility started on its way in 1976.

I ask that the Board consider the proposal at its November meeting and preliminary to that meeting that liaison be had with State officials to determine their reaction.<sup>179</sup>

As far as we can tell, the board did not consider the Law School Association’s recommendation that the college sell some of its undeveloped land when it met in November.

¶83 Despite the extensive lobbying, it did not look like the General Assembly would fund a new building anytime soon. In an October 5 *Times-Dispatch* article, state senator Edward E. Willey, chairman of the powerful Senate Finance Committee,<sup>180</sup> said,

while he “is committed to support a new law school building at William and Mary . . . it is doubtful that there will be any funds available next year, in spite of a warning from the American Bar Association that the college could lose its law school accreditation because of its poor facilities.”<sup>181</sup>

¶84 A seasoned politician, Willey would not be easily swayed by the ABA, Graves, or anyone else. It also was a mistake to make Willey feel that he had been threatened.

“I know what Tom Graves wants,” Willey said. “He wants a new law school building but a lot of other people want something, too.”

177. Letter from Thomas A. Graves, *supra* note 174, at 2–3.

178. Letter from Hal J. Bonney, Jr., Pres., William & Mary Law Sch. Ass’n, to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 21, 1975) (on file with author).

179. *Id.*

180. According to Jeff Leen, *The Other Woman in the Jones Case*, WASH. POST, Jan. 29, 1998, at A1, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/willey012998.htm> [<https://perma.cc/A3DT-TRXD>],

Edward E. Willey Sr. rose from humble beginnings as a druggist in North Richmond to become one of the most powerful Virginia legislators of recent times, a man whose name now graces a major bridge spanning the James River. As the irascible chairman of the Virginia Senate Finance Committee, Willey controlled the state’s purse strings. He died in 1986, after 34 years in office, already a legend . . . Ed Willey Sr. and [House Speaker] A.L. Philpott were the two most powerful men in Virginia, said Richmond lawyer Joseph Kaestner. “They let the governor occupy the executive mansion and they did the rest.”

181. Wilford Kale, *Willey Urges Alternatives for Law Unit*, RICHMOND TIMES-DISPATCH, Oct. 5, 1975, at C-1 (on file with author).

Willey says he does not consider the release of the ABA report to the press to be an attempt to blackmail the State of Virginia. “But you ask Tom Graves where we’re going to get the money. The Medical College of Virginia has tried the same thing. They say their accreditation is threatened because of their hospital facilities.”

...

“You tell Tom Graves that he should make some kind of recommendation of where we can get this money, but not to tell the General Assembly how to spend the money.”

Willey said “my suggestion to him is that he’d better start shuffling [rooms] down there.” He indicated that reports to the State Council of Higher Education noted that there is “a lot of excess space down there, a lot of wasted space.”

“It seems like to me he’d better look around for a new and temporary plan for the near future.” . . . Willey indicated that it could be several more years before money would be available to construct the new law school building.

...

“There is a reality about all of this and I’m not going to let Tom Graves or anybody else threaten me.”<sup>182</sup>

Graves had been forewarned. The day before Willey’s letter arrived in his office, law school alumnus Mark Dray told Graves that “it would appear that Senator Willey is going to continue to be a problem.”<sup>183</sup>

¶85 While all this was happening, the ABA’s James White visited William & Mary on October 15. White scheduled three separate meetings: one with the law faculty; one with the law students; and one with Graves, Vice President for Academic Affairs George Healey, and acting law school Dean Emeric Fischer. After meeting with college officials and the law school faculty—and just before meeting with the students—White held a press conference explaining “why I am here and what has transpired, and what the current situation is.”<sup>184</sup> In his introductory remarks, White wanted the ABA’s concerns made clear:

Let me very briefly state, and this is for the press, and also for the students, and indeed anyone who wandered in off the streets, that the Marshall-Wythe Law School is a school approved by the ABA and it continues to be fully approved by the ABA.

Do you want me to repeat that statement? [And he did.] . . . [W]e are convinced that the school has a very good faculty. We believe that the quality of the school is good, the academic program, is good, and I hesitate to say this in front of the students but it has a good student body. The academic program at the school is a good program. This is not to say that we do not have grave concerns about the institution . . . [which] relate to several things, primarily the facilities of the law school.<sup>185</sup>

¶86 In addition to the “very inadequate” facilities, White recounted his earlier findings about the weak library collection, the small library staff, and the limited number of clinical programs.<sup>186</sup> He clarified what the ABA expected from the college by December 1, and occasionally injected some humor into his remarks:

The intent of the ABA is to assist the school in mainting [sic] standards and its development. It is not here as some sort of “super dragon” to impose sanctions on the school.

182. *Id.*

183. Letter from Mark S. Dray [J.D. ’68], to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 7, 1975) (on file with author).

184. Transcript of Press Conference held by Mr. James P. White, consultant to the Council on Accrediting of the ABA (Oct. 15, 1975) (on file with author).

185. *Id.* at 2.

186. *Id.* at 2–3.

We do not expect the problems to be solved by December 1 because wands have gone out of style.<sup>187</sup>

¶87 When asked what the ABA would do if the state did not commit to fund a new building, White replied,

Would we recommend to the House of Delegates in December action to remove approval to the school at that point? I think that's unlikely because I believe both the College and the State are responding in good faith given the financial exigencies and problems that exist. I hope that some solution can be devised that will satisfy the ABA. If no action has been taken than [sic] it is a very grave matter. What action the Council will take I do not know. That's asking me to determine what the jury will do before the facts have been submitted.<sup>188</sup>

¶88 White acknowledged that while no law school lost its ABA accreditation within the last decade,

[w]e have had for the first time since 1936 four show-cause hearings on law schools which have been considered by the ABA this year, and we will probably have about four or five more. . . . [T]he standards that we are operating under were new in 1973 and have been mandatory since February 1975. They are a good deal more strict than standards that once existed. In part this is a response to the public and the con[c]ern about consumer protection, it is a response to the highest courts of several states which have delegated since 1921 to the ABA the approval of law schools in order to permit graduates to take the Bar examination.<sup>189</sup>

¶89 The transcript concluded on a positive note, with White saying that although the law faculty's salaries<sup>190</sup> were third from the bottom among ABA-approved law schools several years ago, they had improved due to the efforts of Graves and Whyte.<sup>191</sup>

¶90 Both the *Newport News Daily Press* and *Richmond Times-Dispatch* published articles about the law school on October 15, the day White visited Williamsburg. Both papers reported that three weeks earlier, at a September 24 press conference, Graves stated that the law school's accreditation was at risk because of its terrible physical plant, and that other areas of concern were inadequate faculty salaries, inadequate professional staffing for the law library, and not enough books in the library.<sup>192</sup> The articles also noted what Graves had *not* disclosed—the ABA's concern over the law school's lack of control over student admissions and faculty appointments and promotions.

¶91 From the *Newport News Times Herald*:

One W&M official who asked not to be identified said the college and the law school administration do not want to divert attention from the need for a new law school building. "The new building is the most important thing. . . . Those other suggestions . . . regarding internal governance and admissions are just petty matters." W&M administrators, the offi-

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187. *Id.* at 3–4.

188. *Id.* at 5.

189. *Id.* at 5–6.

190. The ABA no longer collects data on faculty salaries after an antitrust suit by the Department of Justice. Holmes, *supra* note 40.

191. Transcript of Press Conference, *supra* note 184, at 7–8 (noting that the ABA collected the data and made it available to approved law schools).

192. Wilford Kale, *ABA Also Hit W&M Law School as Dependent*, RICHMOND TIMES-DISPATCH, Oct. 15, 1975, at B4 (on file with author); Virginia Gabriele, *Law School Recommendation Surfaces—Admissions, Promotions Autonomy*, NEWPORT NEWS DAILY PRESS, Oct. 15, 1975, at 3, 7 (on file with author).

cial said, fear that release of White's criticism of intracollege policies might give state legislators an excuse to ignore W&M's pleas for money to construct the new law building.<sup>193</sup>

¶92 From the *Times-Dispatch*:

A school spokesman declined to discuss the report Tuesday, which he said "pertained strictly to internal matters and the relationship of the law school with the rest of the college."

The ABA communication also indicated that the William and Mary administration should not have veto power over the law school faculty appointments and promotions.<sup>194</sup>

¶93 From the *Daily Press*:

William and Mary's Law School should have complete autonomy over admissions and faculty appointments and promotions, according to the American Bar Association.

...

The autonomy issue was not revealed during the Sept. 24 announcement of the law school's accreditation problems because it is an internal matter, according to President Thomas A. Graves Jr.

Calling the ABA report "private correspondence," Graves said he brought to the attention of the governor and the General Assembly only "those protions [sic] which require state funds to correct."<sup>195</sup>

¶94 The *Times-Dispatch* had another article on the law school the following day:

General Assembly financing for a new law school building during the coming biennium apparently is not crucial to the continued American Bar Association accreditation of the Marshall-Wythe School of Law at the College of William and Mary.

...

If the funds do not come through next year, White said, "we would hope that there is some sort of interim solution devised by the state and by the college that would satisfy our concerns."<sup>196</sup>

The law school was not happy to see any suggestion that a new building was not critical for its survival; this undermined its efforts to convince the college administration, the governor, and the Virginia General Assembly of the need to move quickly. Time was of the essence, and Graves was quoted in the law school student newspaper as saying,

I made it clear to Mr. White that it will not be possible to hold the College to the December 1, 1975 deadline in terms of responding definitely to the questions of facilities and resources, and he now has a good understanding for the way in which the Commonwealth of Virginia prepares and completes its budgeting process. With regard to that process, I advised him that the General Assembly would not adopt its budget legislation until March 1976, and that this legislation would then be subject to the Governor's approval thereafter.<sup>197</sup>

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193. Assoc. Press, *W&M Law School Issued Warning*, NEWPORT NEWS TIMES HERALD, Oct. 14, 1974 (on file with author).

194. Kale, *supra* note 192, at B4.

195. Gabriele, *supra* note 192, at 3.

196. Times-Dispatch State Staff, *Hope Seen for W&M Law School Rating*, RICHMOND TIMES-DISPATCH, Oct. 16, 1975, at C1, C15 (on file with author).

197. Margaret Askew, *ABA Consultant Explains Accreditation Problems*, AMICUS CURIAE, Oct. 28, 1975, at 4 (on file with author).

¶95 The same issue of *Amicus Curiae* included the complete text of Graves's presentation to the governor and the State Budget Advisory Committee. Graves sought funding "for proper staffing and acquisitions in the Law Library, where the deficiencies are now of critical proportions, according to the American Bar Association resolution."<sup>198</sup> Graves also reiterated what was at stake, including the educational status of the law school, its ranking, its ability to attract high-quality students, and its place as one of two state law schools in Virginia.<sup>199</sup>

¶96 Despite the gravity of the situation, at least one law student retained a sense of humor:

This spring the school will have a lottery . . . and each student will be given a number. Those who receive an even number will be allowed to use the library on Monday, Wednesday, and Friday, while those drawing an odd digit will be limited to Tuesday, Thursday, and Saturday use. (Sunday will be set aside for faculty members and their wives.)<sup>200</sup>

¶97 On October 17, Fischer called White to tell him about the *Times-Dispatch* article. Two days later, Graves and Fischer received a telegram from White with a blunt message:

DEAN FISCHER HAS INFORMED ME REGARDING PUBLICATION OF NEWS STORIES PUBLISHED SUBSEQUENT TO MY VISIT TO WILLIAM AND MARY ON OCTOBER 15. AS I UNDERSTAND THE TENOR OF THESE STORIES, THEY ARE INCORRECT. MY STATEMENT TO ALL PARTIES WAS THAT ADEQUATE FACILITIES FOR THE MARSHALL-WYTHE LAW SCHOOL ARE IMPERATIVE AND FAILURE OF THE COLLEGE AND THE COMMONWEALTH TO TAKE STEPS BY JULY 1, 1976 TO PROVIDE FOR ADEQUATE FACILITIES FOR THE LAW SCHOOL WOULD, IN MY OPINION, RESULT IN STEPS BEING TAKEN DURING THE SUMMER OF 1976 TO REMOVE APPROVAL BY THE ABA OF THE MARSHALL-WYTHE LAW SCHOOL.

THE POSITION OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR IS CLEARLY STATED IN MY LETTER OF JULY 31, 1975 ADDRESSED TO EACH OF YOU. THE COUNCIL EXPECTS PRIOR TO JULY 1, 1976 A SATISFACTORY RESPONSE TO ITS ACTIONS IF THE MARSHALL-WYTHE SCHOOL OF LAW IS TO REMAIN AN APPROVED LAW SCHOOL.<sup>201</sup>

¶98 Graves probably was not unhappy to receive the telegram; the ABA's leverage was back. In his letter to White on October 24, Graves wrote:

I regret the misinterpretation in the media regarding your remarks at the press conference. Having read the transcript, I find it difficult to imagine how that interpretation of what you actually said was made. . . . We shall be clarifying the facts and deadline to those who will most influence the decision within the next two weeks and before the Governor finalizes his executive budget.<sup>202</sup>

¶99 White wrote back on October 27, telling Graves and Fischer that while he enjoyed his meetings with the faculty and students, and that "the faculty is one of the real strengths of the law school," he was "naturally distressed with the report of

198. Mark Gregory, *Graves Presents Report to Va. Budgetary Comm.*, AMICUS CURIAE, Oct. 28, 1975, at 1, 8.

199. *Id.*

200. Ma Funt, *Up Against the Wall*, AMICUS CURIAE, Oct. 28, 1975, at 6 (on file with author).

201. Western Union Telex from James P. White, Consultant on Legal Educ. to the ABA, to Thomas A. Graves, Pres., Coll. of William & Mary, and Emeric Fischer, Prof., William & Mary Law (Oct. 17, 1975) (on file with author).

202. Letter from Thomas A. Graves, Pres., Coll. of William & Mary, to James P. White, Consultant on Legal Educ. to the ABA (Oct. 24, 1975) (on file with author).

the conferences that appeared in the press.”<sup>203</sup> White also wrote that he was “particularly concerned that these news reports may have mislead [sic] or disheartened faculty in light of my conversations with them” and hoped “you can each report to the faculty for the correctness of this matter.”<sup>204</sup>

¶100 Something else happening in the law school appears also to have been brewing for some time: an effort to make William B. Spong its next dean. Spong was well known and well connected in Virginia. Born in Portsmouth, Virginia, he graduated from Hampden-Sydney College and the University of Virginia Law School, served in both the state House of Delegates (1954–1955) and Senate (1956–1966), and was a U.S. senator from 1967–1973. Since being defeated in his 1972 reelection bid, Spong was practicing law in Portsmouth and teaching part-time at William & Mary Law School.<sup>205</sup>

¶101 An article in the November 4, 1975, *Richmond Times-Dispatch* reported that Spong was “the only person being considered by the College of William and Mary Board of Visitors” to be the next law school dean.<sup>206</sup> The board, it was reported, met in executive session on November 3 to consider a request by the law school’s search committee to bring to the board only one name—Spong—instead of the three that the board requested. It also wrote:

As early as May 9 [one week after James P. Whyte announced his resignation as dean], law school faculty members were suggesting Spong . . . as a man of national and statewide prestige and legal reputation who would serve the law school well.<sup>207</sup>

The article continued:

It is understood now that the major hurdles in the appointment lie in the agreements that will have to be worked out with college officials. Those talks involve questions of law school autonomy and definite lines of authority which Spong as dean would have regarding promotions and faculty appointments within the law school.<sup>208</sup>

¶102 On November 22, 1975, the BOV named Spong (who was then president-elect of the Virginia State Bar) dean and Dudley Warner Woodbridge Professor of Law, effective July 1, 1976.<sup>209</sup> Spong would step into his role even sooner; on January 1, 1976, he joined the faculty on a part-time basis as Woodbridge Professor and dean-designate.<sup>210</sup>

¶103 An article in the college newspaper also reported on Spong’s appointment, with more information on the “lines of authority” mentioned in the November 3 *Times-Dispatch* article:

203. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Thomas A. Graves, Pres., Coll. of William & Mary, and Emeric Fischer, Prof., William & Mary Law at 1 (Oct. 27, 1975) (on file with author).

204. *Id.* at 2–3.

205. Ronald L. Heinemann, *William Belser Spong Jr. (1920–1997)*, ENCYCLOPEDIA VIRGINIA, [https://www.encyclopediavirginia.org/Spong\\_William\\_Belser\\_Jr\\_1920-1997](https://www.encyclopediavirginia.org/Spong_William_Belser_Jr_1920-1997) [<https://perma.cc/3XGP-2LC4>].

206. Wilford Kale, *Spong Only Nominee for W&M Law Post*, RICHMOND TIMES-DISPATCH, Nov. 4, 1975, at A1 (on file with author).

207. *Id.* at A6.

208. *Id.*

209. Wilford Kale, *W&M Names Spong Head of Law School*, RICHMOND TIMES-DISPATCH, Nov. 23, 1975, at C1 (on file with author).

210. *Id.*

In a related action, the Board of Visitors stated its intention to modify its By-Laws by July 1, 1976, in order to provide for the Dean of the Law School to report directly to the President of the College, while working in close coordination and consultation with the Vice President of Academic Affairs on all matters having a direct relationship with College-wide policies, practices, and budgetary considerations.<sup>211</sup>

¶104 George Healy, Vice President of Academic Affairs,<sup>212</sup> was not at all happy. He shared his feelings in a four-page confidential memo to Graves:<sup>213</sup>

There were several things I criticized about the process of reaching a decision last week concerning the law school, importantly including the fact that the timing imposed left no room for the thoughtful exploration of implications and possible alternatives that should characterize any significant administrative decision.<sup>214</sup>

It got stronger:

As you know, I considered the arrangement [favoring the law school] laid down by Mr. Spong as a condition of his acceptance a poor idea when he belatedly announced it, and on reflection it strikes me as even worse.

...

I believe it is an exceedingly bad precedent to allow an individual, whoever he is, to lay down non-negotiable demands on the institution as a whole. A candidate reasonably can be expected to negotiate personally for things like titles and salaries. . . . [o]ne would expect him to explain what, if anything, the governance structures affecting his office he foresees as undesirable and would, if appointed, work to change through established channels.

...

Inevitably, the other professional schools will seek similar treatment; even more inevitably, Arts and Sciences will not allow that to happen without demanding comparable arrangements.<sup>215</sup>

¶105 As for how to respond “[t]o such clamor from the other schools and faculties,” Healy said he could not support a plan that would favor just the law school.<sup>216</sup> What he suggested, instead, was to study the “entire central administrative structure of the College, and to change it as needed to restore a reasonably equitable balance of apparent favor to the schools and faculties.”<sup>217</sup> Healy thought that this course of action had some risk, but he was not worried about offending Spong or the law school:

I recognize that such a charge might appear to Mr. Spong and the Law School to be in bad faith, since special favor was promised in his contractual arrangement. I don’t know how to avoid this, and quite frankly don’t much care whether such a reading is made or not. As I have indicated strongly before, I believe Mr. Spong negotiated with us in something less than timely candor, and the Board made its pragmatic decision in this case without making

211. *William Spong Named Dean of Law School*, WILLIAM & MARY NEWS, Nov. 25, 1975, at 1 (reporting bylaw revisions giving the law school more authority over appointments and promotions) (on file with author).

212. WILLIAM & MARY, PROVOST, HISTORY OF THE OFFICE, *George R. Healy*, <https://www.wm.edu/about/administration/provost/about/history/healy/index.php> [<https://perma.cc/3CW3-YHY9>].

213. Confidential Interdepartmental Communication from George R. Healy, Vice Pres. for Acad. Affairs, to Thomas A. Graves, Pres., Coll. of William & Mary, “Governance of the College” (1975) (on file with author).

214. *Id.* at 1.

215. *Id.*

216. *Id.*

217. *Id.*

any effort to ascertain how it would be received by the other schools and faculties, which I would at least regard as a form of bad faith. Moreover, I don't see how any reasonable person—and the Law School has at least several—could legitimately object to a general study which obviously is initiated and practically forced by a particular action favoring them, especially if . . . the most likely outcome . . . would leave their recently won “autonomy” pretty intact.<sup>218</sup>

¶106 Spong's appointment did not assuage Hal Bonney's fear about the future of the law school. After resigning as president of the Law School Association, Bonney wrote to Rector Harvey Chappell on December 15:

Certainly, any statements made by any of us relative to the College administration's support for or lack of support for the Law School will be self-serving. History shall be the judge. I would expect you to support the administration; too, there are perhaps things of which you are not aware. My conclusion is born neither of ignorance nor of haste. Indeed, I regret the necessity for having to reach such a conclusion, but I am not blind or dumb.

This is past. I hope very much that present and future action on the part of the administration will prove me wrong. This dish of crow I would eat with relish. However, the past would lead me to conclude that the College does not merit a law school. Boards of Visitors have not been aware and administrations—and law alumni I would hasten to add—have not promoted and fought for Marshall-Wythe. It is a history of neglect. I pray sincerely that we are coming out of this dark age and, therefore, I appreciate your assurance that every effort will be made to improve the resources.

...

Thank you especially for your goodwill relative to the Law School Association. My resignation as President is of no moment. It is a purely personal decision. . . . In fact, the opportunities for service and support outside of office have surprised me and, perhaps, I shall be more effective and certainly at greater liberty. Fortunately, I know many people and I plan to be active and always boosting the nation's oldest law school until it becomes the foremost.<sup>219</sup>

¶107 Good news was forthcoming; in January 1976, Governor Godwin included a new law school building and other capital projects in his proposed 1976–1977 biennium budget, to be paid for by additional taxes.<sup>220</sup> However, while Godwin proposed \$5,624,335 for the entire project, the General Assembly authorized less than 10 percent of that amount by the time it adjourned that spring.<sup>221</sup> Spong, at least according to media reports, was helpful securing the startup money.

¶108 According to the March 16 edition of the *Washington Post*, Assembly delegates credited Dean-Designate Spong's efforts as a major reason for the law school's funding. Spong remained in Richmond during the weekend session and consulted with Assembly members during the time when it appeared that the Assembly would adjourn without allocating any funds to M-W.<sup>222</sup>

¶109 While the General Assembly was putting its budget together, Graves and Fischer received a letter from the ABA's White informing them of recent action by

218. *Id.* at 3.

219. Letter from Hal J. Bonney, Jr., Pres., William & Mary Law Sch. Ass'n, to R. Harvey Chappell, Jr., Rector, William & Mary Bd. of Visitors (Dec. 15, 1975) (on file with author).

220. *New Marshall-Wythe Law Building Included in Gov. Godwin's Budget*, AMICUS CURIAE, Jan. 27, 1976, at 1 (on file with author).

221. Nathan Schenker, *Partial Funds Appropriated for New M-W Law Building*, AMICUS CURIAE, Mar. 23, 1976, at 1 (on file with author) (describing President Graves's gratitude).

222. *Id.*

the Council of the Section of Legal Education and Admissions to the Bar.<sup>223</sup> The Council first noted “significant improvement in the salary level of the School of Law” and “improvements . . . with regard to the autonomy of the students’ admission process and with regard to the faculty promotion process.”<sup>224</sup> But it then expressed “extensive concern [about] the continued gross inadequacy of physical facilities . . . and continued need for substantial additional funding for the Law Library.”<sup>225</sup>

¶110 Writing that the law school continued to meet the ABA’s standards, White announced a hearing would be held before May 1, 1976, “to determine whether the Standards have been violated and whether the Marshall-Wythe School of Law should be removed from the list of approved schools.”<sup>226</sup> If this wasn’t clear enough, White continued: “If the Council feels that Marshall-Wythe . . . is not in compliance with the Standards . . . it will take appropriate action for removal of the . . . School of Law from the list of law schools approved by the American Bar Association.”<sup>227</sup>

¶111 Spong and Acting Dean Fischer went to Chicago to speak to the ABA on May 13, 1976, after which an ABA hearing commissioner made several findings:

- The law school was in “total and complete compliance with Standard 205” regarding autonomy of the law school faculty over admissions.
- The law school was in compliance with standards regarding faculty compensation, as well as how promotion and tenure decisions were made. (Regarding salaries, the law school moved from 134th among 148 accredited law schools to 83rd among 156 schools in 1975–1976.)
- The law library had improved greatly: Carolyn Heriot would be the new director in July 1976; there were new acquisitions and cataloging librarians; the library would hire a reference librarian after Heriot came on board; and there were now six library assistants. Furthermore, the General Assembly nearly doubled the acquisition budget, from \$135,000 in 1974–1975 to \$258,000 in 1976–1977. The law school was in compliance with the ABA’s law library standards, except for its facilities.
- After noting that plans for a \$5 million new building had been completed and that the General Assembly appropriated \$486,150 for utilities and site work—and also authorized the governor to appropriate from the capital improvements budget up to \$5 million for a new building—the ABA wrote:

[W]hile the School of Law is not in compliance with Standard 701, the Commonwealth, the College and the School of Law are fully launched on a course that will lead to the construction of a new building. The representatives of the School of Law displayed to the Hearing Commissioner and the ABA Consultant an architects drawing of the proposed facility. From all appearances, it will be more than adequate and would appear to be a facility that would bring the School of Law into complete and total compliance with the ABA Standards.<sup>228</sup>

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223. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Thomas A. Graves, Pres., Coll. of William & Mary, and Emeric Fischer, Prof., William & Mary Law (Jan. 21, 1976) (on file with author).

224. *Id.* at 2.

225. *Id.*

226. *Id.*

227. *Id.*

228. Memorandum from James P. White, Consultant on Legal Educ. to the ABA, and L.

¶112 Notwithstanding those positive words, the hearing commissioner recommended that the council find the law school not in compliance with Standard 701, but it should continue accreditation on condition that “the Dean of the School of Law and the President of the College of William and Mary file statements with the Council prior to the February 1977 meeting and prior to the May 1977 meeting concerning the progress of the funding and construction progress of the new building.”<sup>229</sup> If there was a delay in the construction of the new building due to failure of funding, the council should “immediately docket a Rule IV hearing, directing the Law School to show cause why its accreditation should not be withdrawn.”<sup>230</sup>

¶113 Finally, after acknowledging the work of Fischer and Spong, the ABA wrote,

Undoubtedly, these two gentlemen would have preferred that the Hearing Commissioner recommend that the Council relax its vigil. Perhaps, one could find in their dedication and conviction a reason for doing so. As indicated, that is not the recommendation of this Hearing Commissioner. Accreditation Standards are not a personal matter. Neither may the Accreditation Standards be avoided by good will and good faith. The Standards are as applicable in hard times as they are in good times. The State, not the accrediting agency, must decide whether the Marshall-Wythe School of Law shall receive the necessary funding to bring it into compliance with the Standards.<sup>231</sup>

¶114 Both the college and the Virginia General Assembly must have felt pressure to fix the law school’s problems; Marshall-Wythe was not only the oldest law school in Virginia, but in the entire United States. William & Mary and the ABA had put so many eggs in the new building basket that no other solution was possible, and the college clearly wanted to avoid a Rule IV hearing.

¶115 With Governor Godwin on board, Marshall-Wythe’s situation continued to improve. The 1976 General Assembly finally applied the fix; it gave Godwin discretion to spend what was necessary to retain the law school’s accreditation as part of a \$25 million capital outlay package.<sup>232</sup>

¶116 We would be remiss not to note that, throughout the process, the ABA insisted that it was not pressuring the Commonwealth to spend funds; it was simply insisting on compliance with its standards.<sup>233</sup> That said, the accrediting body also mentioned that the new building would bring the school in “total compliance” with its standards—a facility that was projected to cost \$5,624,335.<sup>234</sup>

¶117 With all funds in hand—and despite the feeling of some members of the General Assembly that the college was using the ABA’s threats to hold the legislative body hostage—the new law school building went forward. Construction began March 22, 1978, with completion scheduled for the beginning of the 1980–1981 school year.<sup>235</sup> The new law building did open for the fall semester of 1980,<sup>236</sup> and in

Orin Slagle, Hearing Comm’r, to Members of the Accreditation Comm. (May 14, 1976), reprinted in *ABA Approves Plan*, AMICUS CURIAE, Aug. 23, 1976, at 1, 3 (on file with author).

229. *Id.* at 3.

230. *Id.*

231. *Id.*

232. Virginia Gabriele, *Law School Retains Accreditation*, VA. GAZETTE (date unknown) (on file with author).

233. *Id.*

234. *Id.*

235. William B. Spong, Jr., *Construction Has Begun*, 8 COLONIAL LAW 19 (1978), <http://scholarship.law.wm.edu/facpubs/1022> [<https://perma.cc/A335-TJQE>].

236. WILLIAM & MARY LAW SCH., *The William and Mary Law Library, A History*, <http://law.wm.edu>

an accommodating move, the ABA agreed to postpone its next inspection of Marshall-Wythe until after the building was completed.<sup>237</sup> As expected, the ABA never subjected William & Mary to the final accreditation hearing that it threatened.

### The Question

¶118 Would the ABA have pulled the school's accreditation if the school did not accede to the ABA's demands, or were its threats empty? Because the new building went forward as planned, we will never know how much danger William & Mary was actually in. That it took 95 years for the ABA to revoke accreditation from a fully accredited law school (Arizona Summit in 2018; Thomas Jefferson in 2019) makes it hard to imagine that it would make an example of the nation's oldest.<sup>238</sup>

¶119 But William & Mary had to—or at least thought it had to—convince the General Assembly that the survival of its law school was in the hands of state senators and assembly representatives. The college faced pressure from its students, its faculty, and its alumni. The ABA held show-cause hearings for four law schools in 1973—more than it had since 1936—and promulgated new, stricter accreditation standards in 1975.<sup>239</sup> The ABA was baring its teeth, and it is easy to see why college officials feared that it might actually bite.

¶120 William & Mary was not alone. J.D. enrollment in U.S. law schools more than doubled from 1963–1964 to 1973–1974, and schools across the country lobbied for new buildings based on (or perhaps assisted by) ABA threats.<sup>240</sup> The construction of the University of Iowa Law School's new building mirrored the process William & Mary went through. For Iowa, the process began in May 1978 when the ABA Accreditation Committee told UI that its law building was “woefully inadequate”—the very same language used at William & Mary.<sup>241</sup> In March 1979, Iowa Law faculty voted unanimously to construct a new building, and two years later the Iowa General Assembly authorized spending through the issuance of special bonds. But the story did not end there.<sup>242</sup>

¶121 In January 1982, Iowa Governor Robert D. Ray asked for more funding from the general assembly, just as Governor Godwin did in Virginia.<sup>243</sup> The legislators eventually provided the funding, but not until the Iowa Board of Regents

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.edu/library/about/history/index.php [https://perma.cc/C57D-MR3W].

237. Letter from James P. White, Consultant on Legal Educ. to the ABA, to William B. Spong, Jr., Dean, William & Mary Law (June 26, 1979) (on file with author).

238. Email from Currier, *supra* note 1; see also Mackenzie Kahnke, *Current Developments 2012–2013: Time for a Change: Ethics & Law School Accreditation*, 26 GEO. J. LEGAL ETHICS 805, 816 (2011) (noting that though the ABA has not granted every school accreditation since 2008, they had not revoked any accreditation either).

239. Press Release, ABA, *supra* note 70; ROBERT A. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 299 (2012).

240. See, e.g., UNIV. OF IOWA, *History of the Boyd Law Building*, <https://library.law.uiowa.edu/history-boyd-law-building> [https://perma.cc/37V5-GF7H]; W. Gary Vause, *Foreword: The Dean's Centennial Message*, 30 STETSON L. REV. 3, 5 (2000) (discussing a new law school building at Stetson); Anthony J. Sestric, *In Defense of Law Schools*, 53 J. MO. B. 232, 235 (1997) (mentioning new facilities at the University of Missouri at Columbia and Washington University in St. Louis).

241. *History of the Boyd Law Building*, *supra* note 239.

242. *Id.*

243. *Id.*

requested additional bonds to fund construction later that year.<sup>244</sup> That request came in response to an ABA threat: obtain funding by July 1, 1983, or lose accreditation.<sup>245</sup> The ABA threat ended the same time as William & Mary's; Iowa got its new building, and the ABA took no further action.<sup>246</sup>

¶122 Four decades later, the ABA de-accredited Arizona Summit and Thomas Jefferson, and sanctioned Valparaiso, Texas Southern, and Charlotte. The ABA never de-accredited Charlotte; the school closed because the Department of Education pulled its federal student loan funding.<sup>247</sup> Valparaiso, Indiana Tech, and Arizona Summit all decided to close their law schools, as did Whittier.<sup>248</sup>

¶123 One may ask whether the 21st century ABA, which *seems* to be more aggressive than the ABA of the 1970s, would have stripped accreditation from schools like William & Mary and Iowa. But by 1975, the ABA was operating under new, stricter standards in response to public concerns about consumer protection and state courts delegating to the ABA its approval for law school graduates to take a state bar exam.<sup>249</sup> Furthermore, by 1975, William & Mary seems to have addressed the ABA's concerns, except for its facilities.<sup>250</sup> As was the case at Iowa, pressure was now on the state to come up with significant funding for a new building.

¶124 The problems at the seven law schools subject to more recent ABA sanctions—problematic admission practices, weak academic programs, and low bar passage rates—are far different. They also are (or were) within the power of the law schools to address. Of the seven schools, only Texas Southern's Thurgood Marshall School of Law has state funding, and the state of Texas may not be able to solve the school's problems. The nonprofit universities—Indiana Tech, Whittier, and Valparaiso—chose to stop investing in their law schools. And of the three stand-alone schools—Arizona Summit, Charlotte, and Thomas Jefferson—only Thomas Jefferson remains, at the time of writing. Although the school appealed the ABA's de-accreditation decision, its many problems will probably be fatal.

## Conclusion

¶125 The reality for well-established and well-regarded (or at least *decent*) law schools is probably akin to what William & Mary faced in the 1970s: the ABA sets its standards, makes threats, and holds hearings. But if a school fails—like Arizona Summit, Charlotte, Indiana Tech, Valparaiso, and Whittier—it's unlikely to be because of the American Bar Association.

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244. *Id.*

245. *Id.*

246. *Id.*

247. Crim, *supra* note 26.

248. ABA, *supra* note 6.

249. Transcript, *supra* note 184.

250. At his October 15, 1975, press conference, White praised the William & Mary Law School faculty, the quality of the academic program, and the students. *Id.*