RACE, CIVIL RIGHTS, AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

By

JOHN MICHAEL SPIVACK

A DISSERTATION PRESENTED TO THE GRADUATE COUNCIL OF
THE UNIVERSITY OF FLORIDA
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

1978

ACKNOWLEDGEMENTS

In apportioning blame or credit for what follows, the allocation is clear. Whatever blame attaches for errors of fact or interpretation are mine alone. Whatever deserves credit is due to the aid and direction of those to whom I now refer. The direction, guidance, and editorial aid of Dr. David M. Chalmers of the University of Florida has been vital in the preparation of this study and a gift of intellect and friendship. Without his persistent encouragement, I would long ago have returned to the wilds of legal practice. My debt to him is substantial. Dr. Larry Berkson of the American Judicature Society provided an essential introduction to the literature on the federal court system. Dr. Richard Scher of the University of Florida has my gratitude for his critical but kindly reading of the manuscript.

Dean Allen E. Smith of the University of Missouri College of Law and Fifth Circuit Judge James P. Coleman have me deepest thanks for sharing their special insight into Judges Joseph C. Hutcheson, Jr., and Ben Cameron with me. Their candor, interest, and hospitality are appreciated. Dean Frank T. Read of the University of Tulsa School of Law, who is co-author of an exhaustive history of desegregation in the Fifth Circuit, was kind enough to confirm my own estimation of the judges from his broad and informed perspective.

I owe very special thanks to Judges John R. Brown, Warren L. Jones, Richard Taylor Rives, Elbert Parr Tuttle, and John Minor Wisdom. I am,

of course, grateful for the time they took from busy schedules to talk with me. But there is more. To meet them, to know them as more than the minds behind judicial opinions has been one of the real privileges of my life. They are the honor, the dignity, the beauty of law. I can only say of them, it was the South's good luck they served us on the Fifth Circuit, and not on the Supreme Court, where they deserved to be.

The debt I owe Patricia Spivack, my wife, friend, and counselor, can not be measured. Her personal sacrifice not only was necessary to the completion of this study, it created the opportunity to even begin it. It is a debt I shall not soon be able to repay.

PREFACE

On May 17, 1954, the nine Justices of the United States Supreme Court initiated the most far reaching change in the South since the abolition of slavery. In four cases consolidated under the title of Brown v. Board of Education of Topeka, they decided that the practice of requiring by law the racial segregation of children in the public schools was in violation of the constitutional guaranty of the equal protection of the law. The least democratic branch of the federal government had mandated the reversal of centuries of discrimination and a half-century of national acceptance of Southern race relations. The law of the land had been remade, but as was true with all judicial decisions, this did not necessarily change behavior. Whether or not the promise of Brown would be fulfilled depended upon the success of efforts to implement and enforce that decision. What follows is a crucial part of that story.

The genesis of this study was a desire to understand the performance of the South's federal judges in the early years after the Brown decision. This topic was suggested by two books on the role of the Southern federal judges in school desegregation and voting rights cases. Jack Peltason's 58 Lonely Men, and Charles Hamilton's The Bench and the Ballot. Both authors divided the judges into three categories. The "Integrationist" category contained a small minority of the judges. These judges agreed completely with the Supreme Court and actively promoted and extended the

process of desegregation. A "Segregationist" category constituted a majority of the judiciary. These judges favored racial segregation, disagreed with the Supreme Court, but were also committed to the rule of law. They did not wish to force compliance with Brown, but they obeyed the Supreme Court mandate. They were capable of being educated by attorneys for blacks who brought suit to desegregate the schools and would correct clear cases of discriminatory treatment. The last category, consisting of a large minority of the Southern judges, was described as "Die-Hard" or "Resistors." These men took segregation of the races as an article of faith and attempted to prevent or delay the impact of the Supreme Court decision and the application of national racial policy in the South.

Peltason and Hamilton dealt with the Southern federal judges as a whole, but they concentrated upon the role and activities of the District Courts. The scant attention they paid to the Courts of Appeals conformed to the general pattern of the historical literature. Interest has been limited to the policy setting body and final forum, the Supreme Court, and the trial level of the federal system, the District Courts. While political scientists have been concerned with Appeals Court administration, predicting the behavior of appellate judges, and the political nature of the judicial process, historians seem to have ignored these courts. Nevertheless, it was apparent that the Courts of Appeals merited investigation, for they were the final arbiter in well over 90 per cent of all federal litigation and an even higher percentage of the desegregation suits well into the 1960's.

What I most wanted to understand was why the judges reacted so differently to their role in desegregating the Deep South. How could

Peltason's and Hamilton's three part typology be explained, if indeed their analysis was correct. A reading of the cases convinced me that there was a discernible pattern among the judges, and that pattern was accurately reflected in the proposed categories. It had been my experience as a practicing attorney, confirmed by the literature, that most Southern judges shared a roughly similar background. Most were Democrats, educated either in the South or at the most prestigious of the Ivy League schools, brought up in comfortable circumstances, and active practitioners of general law. I hoped to determine what factors or influences led these judges to follow the very diverse routes that Peltason and Hamilton described.

The vehicle by which I chose to examine the development of the Court of Appeals judges was the school desegregation litigation in the Fifth Circuit, which includes most of the Deep South states, in the years immediately following the Brown desegregation decisions. This period, from 1954 to 1961, I believed was the most difficult time for the Fifth Circuit Judges. Resistance to integration was entrenched, for the notion of racially mixed schools was so new to the South. The Supreme Court, after it had delivered its landmark decisions, more or less retired from active participation in desegregation. The Eisenhower Administration did not push for enforcement, and Congress passed no meaningful civil rights legislation until 1964. The Civil Rights Movement was yet in its infancy. These were the years of the heyday of the White Citizens Councils, and their more violent brethren, the reborn Ku Klux Klan lurked in the piney wood wings. As a result, the lower federal courts were virtually on their own in the enforcement process, during the most difficult period of Southern resistance. Not since the first reconstruction

were the contradictions of public opinion and community pressures on the one hand and the requirements of the law on the other greater, and on the earlier occasion, the pressures won. Thus, the contrasting paths chosen by the Appeals judges would be most clearly delineated.

It was immediately apparent that I could not hope to examine all of the desegregation cases. Such an endeavor would have occupied decades rather than years, since I intended to give as complete as possible a description of each case and there were literally hundreds of cases. I therefore sought a limited number of school cases tried during the Eisenhower years to serve as examples of different patterns. The primary requirement in each instance was that the Fifth Circuit Court of Appeals played an important role in the litigation. The three suits I settled upon involved the schools of Miami, Dallas, and New Orleans. The Miami case was relatively uncomplicated, involved little controversy, and resulted in voluntary but token integration. It was typical of the majority of the school cases. Both the Dallas and New Orleans cases were long struggles, involving multiple hearings and bitter-end resistance. In the Dallas cases, the problem centered around two District Court judges who made every effort possible to prevent or delay the enforcement of Brown. In New Orleans, the District Court and Court of Appeals were arrayed against the entire state government machinery of Louisiana.

The judges I chose to examine were those who were either on the Court in 1954 or came to serve at least until 1961. That list consisted of seven men: Joseph C. Hutcheson, Jr., Richard Taylor Rives, Elbert Parr Tuttle, Warren L. Jones, Benjamin F. Cameron, John R. Brown, and John Minor Wisdom. As so often happens, real life does not fit

conveniently one's preconceived assumptions. My intended examination of the three-part typology described by Hamilton and Peltason was impossible, for these men did not share a similar background. Further, this group of men could hardly be described as typical Southern judges. Five of them were Republicans, all appointed to the Court of Appeals by Eisenhower, and three had not been born, raised, or educated in the South.

Thus it seemed that my study had come to an abrupt halt. As I read the cases and interviewed the judges, only Hutcheson and Cameron are no longer alive, I realized that these men needed no organizing principle, no theory, to justify their story being told. Perhaps they were atypical and impossible to categorize because they were unique individuals who performed a monumental service for their country. The Court of Appeals for the Fifth Circuit led the way in desegregation and formulated policies that the Supreme Court later adopted. All but two of the judges were, each in their own way, great men, and their convocation on one court at the same time was unforeseen good fortune for the South. Whatever success the South has experienced in reversing three hundred years of discrimination and prejudice is owed not alone to the courageous civil rights activists and martyrs, the Southerners of good will, and the national policy makers. It is in no small part due to the men of the Fifth Circuit Court of Appeals who first came together in the 1950's. I therefore decided to at least begin to tell their story.

The following study attempts to acquaint the reader with the setting in which the judges operated and the seven men who had such an impact upon racial equality in the South. The federal court system and its procedures are outlined to provide the institutional background. Southern attitudes during the 1950's provide the counterpoint to the legal and

constitutional standards established by Brown and give some idea of the pressures the judges faced. Before examining each of the three desegregation suits, which serve as examples of the litigation as a whole, brief biographical information introduces the judges. The final chapters are devoted to examination of the lives, attitudes, and philosophies of the men of the Fifth Circuit.

TABLE OF CONTENTS

Abstract of Dissertation Presented to the Graduate Council
of the University of Florida in Partial Fulfillment of the Requirements
for the Degree of Doctor of Philosophy

RACE, CIVIL RIGHTS, AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

By

John Michael Spivack

August, 1978

Chairman: David M. Chalmers
Major Department: History

This dissertation examines the performance of seven judges of the United States Court of Appeals for the Fifth Circuit in school desegregation cases in the years between the announcement of Brown v. Board of Education of Topeka et al. in 1954 and the end of the Eisenhower Administration in 1961. The federal judicial system and its procedures and the climate of opinion in the South are described to illustrate the countervailing pressures on the federal judges.

Three desegregation suits are examined, each of which is representative of different problems faced by the Court of Appeals. The cases involve the public schools of Miami, Florida; Dallas, Texas; and New Orleans, Louisiana. Emphasis is placed upon the interaction between the federal judges and the communities and between the District and Appeals Courts.

John R. Brown, Benjamin F. Cameron, Joseph C. Hutcheson, Jr., Warren L. Jones, Richard Taylor Rives, Elbert Parr Tuttle, and John Minor Wisdom are the judges included within the study. With the exception of Cameron and Hutcheson, all are still alive and sit on the Court of Appeals for

the Fifth Circuit. Information obtained through personal interviews relating to their background, experience in the desegregation cases, and judicial philosophy is presented. Judge Hutcheson's first law clerk, Dean Allen E. Smith of the University of Missouri College of Law, was interviewed in his stead and Judge James P. Coleman, Cameron's replacement on the Court and close friend, provided information about Judge Cameron.

Five of the judges were Republican, but of this number, three were the most forceful advocates for an extensive role for the federal courts. Four of the judges were born, reared, and educated in the South, but two of them were consistent enforcers of school desegregation. One of the non-Southerners adopted the most conservative philosophical position on the role of the federal courts. Thus, characteristics such as political identification, social background, and place of birth provide little insight into the judges' attitudes about desegregation and the proper function of the federal courts.

Due largely to the efforts of four of the judges, John R. Brown, Richard Taylor Rives, Elbert Parr Tuttle, and John Minor Wisdom, the Court of Appeals for the Fifth Circuit took the lead in enforcing the Brown desegregation decisions. Virtually alone, they developed policy and procedure that was eventually adopted by the Supreme Court and applied to the nation at large. These four men combined intellect, leadership, integrity, courage, and administrative talent to enforce national standards of racial equality upon the South.

It is argued that the Court of Appeals for the Fifth Circuit in the period examined by this study was uniquely blessed by judicial greatness. The fortunate accident of bringing together on one court Judges Brown,

Rives, Tuttle, and Wisdom, due in part to the independence of the Eisenhower Administration from political debt to southern Democratic Senators, was primarily responsible for the relative success and lack of violence in desegregating the public schools in the Deep South. During the period of greatest resistance to integration, the Court broke down the legal barriers and reaffirmed the primacy of the Constitution.

CHAPTER I
THE INSTITUTIONAL SETTING

The purpose of this chapter is to provide basic information about the federal court system and to focus in particular on the United States Courts of Appeals. The organization of the system will be outlined, and a hypothetical civil case will be followed in the courts from original filing through Supreme Court decision to illustrate the procedure involved. Special attention will be given to the development and operation of the Courts of Appeals and particularly the Court of Appeals for the Fifth Circuit.*

The Federal Court System

Organization of the Federal Courts

The founding provisions for the federal judicial system can be found in the U.S. Constitution and the legislation which was immediately enacted to implement the basic grants of power. Article III, Section 1, vested the judicial power of the new government in one Supreme Court and inferior courts which were to be established by Congress. The jurisdiction of the Supreme Court, to be discussed subsequently, was set forth in Article III, Section 2. Article I, Section 8, among other powers, gave Congress the power "to constitute Tribunals inferior to the Supreme Court."

*In the following discussion, all references will be to the federal courts unless otherwise specified and will describe them as they operate at the present time.

These constitutional grants allotted power and vested jurisdiction, but they established no courts nor provided for any judges. That task was accomplished by the Congress in its first session by the passage of the Judiciary Act of 1789. The specific provisions of that legislation will be detailed in the course of the discussion, but it is here sufficient to know that the Supreme Court, Circuit Courts, and District Courts were set up, and judges were authorized for these courts.

The District Courts

The lowest tier of the federal court system,[1] the trial courts of the system, are the United States District Courts. There are ninety-four of these courts, eighty-nine in the fifty states, and one each in the District of Columbia, the Canal Zone, Guam, Puerto Rico, and the Virgin Islands.[2] Each state has at least one district, but many have two or three districts, and New York, California, and Texas, each has four. Except for the district of Wyoming, which includes portions of Yellowstone National Park which extends into other states, districts do not cut across state lines, although many districts, due to increases in population and caseload, are divided into divisions.[3] Each district has between one and twenty-seven judges depending on the volume of cases in that district.

---

[1]This does not include the U.S. Magistrates, known as Commissioners before 1968, who perform minor judicial duties and do not constitute official courts of record. Richard H. Reimer, A Guide to Court Systems (5th ed.; New York: Institute of Judicial Administration, 1971), p. 13.

[2]The United States Courts: Their Jurisdiction and Work (Washington, D.C.: U.S. Government Printing Office, 1975), p. 7.

[3]Reimer, Guide to Court Systems, p. 3.

In those districts with more than one judge, the most senior judge in terms of service, provided he is under seventy years of age, is the Chief Judge.[4]

Almost all cases in the District Courts are heard by one judge. The only exception to this rule is that by statute (28 USC Sec. 2281) when an injunction is sought in the District Court to restrain the enforcement, operation, or execution of a state statute by a state officer or by an administrative agency, the case must be heard by a three-judge panel, one of whose judges must be a Circuit Judge from the Court of Appeals.[5]

The jurisdiction of the District Courts is quite broad (the basic grant is found in 28 USC Secs. 1331 and 1332), constituting the main locus of original, or trial, jurisdiction in the federal courts. The major components of that jurisdiction include: all offenses against the laws of the United States, all civil actions in which the amount in controversy exceeds $10,000 and is between citizens of different states, or citizens of a state and foreign states or their citizens, and all civil actions in which the amount in controversy exceeds $10,000 and which arises under the Constitution, laws, or treaties of the United States. Additionally, the District Courts have been given jurisdiction over certain civil actions regardless of the amount in controversy, among which are included tax cases, civil rights cases, cases involving suits allowed against the United States, cases involving the regulation of interstate commerce, and habeas corpus proceedings.[6]

---

[4] The United States Courts, p. 7.

[5] Reimer, Guide to Court Systems, p. 8.

[6] Charles Bunn, A Brief Survey of the Jurisdiction and Practice of the Courts of the United States (5th ed.; St. Paul, Minnesota: West Publishing Co., 1949), pp. 36-69, passim.

A portion of the jurisdiction of the District Courts is exclusive and not shared with state courts. In these instances, cases may be brought only before the federal courts. The exclusive jurisdiction of the District Courts is an expression of the need for uniform law on matters in which the states have no interest and may not interfere. The most common of these cases include admiralty and maritime cases, bankruptcy proceedings, patent and copyright cases, cases involving fine, penalty or forfeiture under federal law, and cases involving the seizure of federal property. The District Courts also share a large portion of their judicial power with the state courts. This is known as concurrent jurisdiction and makes up the majority of the civil actions heard in the federal courts.[7] Such cases may be brought before either the proper state court or the District Court.

Concurrent jurisdiction is a recognition that both federal and state governments may have a legitimate interest in the legal regulation of the conduct of its citizens. Whether a case will be brought in the federal or state courts is initially determined by the plaintiff. The differences between the two sets of courts are no longer substantive, for both are bound by the applicable law. For example, suits brought under federal statutes in state courts must be decided according to those statutes. Similarly, cases filed in the federal courts because of diversity of citizenship must be decided according to applicable state law. Today, the choice of court usually depends upon the perceived sympathies and expertise in the federal or state systems.

---

[7]Reimer, Guide to Court Systems, pp. 4-5.

To equalize the position of both parties and prevent the plaintiff from having complete control of the forum, all actions which are brought in state courts and are also within the concurrent jurisdiction of the District Courts may be removed, or transferred, to the federal courts. The proceedings in the state court are then stayed or held in abeyance. This removal right extends to federal officers and administrative agencies sued in state courts as well as to all other defendants. Whether the removal to the federal courts is proper is determined by the District Courts.[8] If the removal is not proper, the case is transferred back to the state courts.

The selection of federal judges appears to be a simple process. All federal judges are appointed by the President with the advice and consent of the Seante. In fact, the selection process is involved in partisan politics and is quite complex, involving many participants. The initiation of the candidacy of any aspirant to a District Court judgeship may be the Senator from the state in which the District Court vacancy appears, particularly if he is of the same political party as the President, by the President himself or his advisors, by local party leadership in the state involved, by the candidate for the judgeship himself, or even by an influential federal judge already on the bench.[9] In most cases, more than one of these participants is actively involved in suggesting men to fill the vacancy. From these sources and from other contacts within

---

[8] Bunn, Jurisdiction and Practice, pp. 126-141, passim.

[9] Richard J. Richardson and Kenneth N. Vines, The Politics of Federal Courts: Lower Courts in the United States (Boston: Little, Brown & Co., 1970), p. 58.

the state, the Deputy Attorney General recommends a list to the Attorney General, who in turn suggests candidates to the President.[10]

The necessary qualifications for candidates for a District Court judgeship are both formal and informal. The only absolute requirements are that the candidate must be a lawyer and reside within the district. Ideally, the candidate's record will give assurance of independence and dignity on the bench.[11] In fact, the most important qualification is that the candidate must have given loyal and active political service to the President's party. It is no surprise, therefore, that the vast majority of appointments to the federal bench have gone to active members of the Presidential party. Two further factors are particularly important in District Court appointments: The candidate must be personally and politically acceptable to the U.S. Senator from the state involved[12] and must have substantial local ties and a good reputation. The latter may involve being born in the district or state and having gone to law school in the state.[13]

Once the President has a list of possible candidates for the District Court judgeship, the screening process which began with the Deputy Attorney General continues in earnest. The candidates have already been screened for legal and judicial qualifications and political activities

---

[10]Harold W. Chase, Federal Judges: The Appointing Process (Minneapolis: University of Minnesota Press, 1972), p. 17.

[11]Henry J. Abraham, The Judicial Process (2nd ed.; New York: Oxford University Press, 1968), p. 27.

[12]The tradition of Senatorial courtesy gives the Senator near veto power over the District Court appointments and limits the appointment power of the President considerably. Chase, Federal Judges, pp. 7-11.

[13]Richardson and Vines, Politics of Federal Courts, pp. 71-73.

and attachments by the Justice Department. The relevant Senators' candidates are usually included on the list, and other candidates are informally cleared with the Senators to make certain that none of them are personally obnoxious to them. Further informal screening may take place through contacts with local party organizations and interest groups, such as bar associations within the district. The Federal Bureau of Investigation also conducts an investigation of the background of the candidates.[14]

At this point formal governmental screening is complete, but since the early 1950's, a private organization has participated in the process. In 1946 the American Bar Association (hereinafter referred to as the ABA) established a Standing Committee on the Federal Judiciary to "improve the quality" of federal judges. By the early 1950's, the ABA Committee had established a working relationship with both the Attorney General and the Senate Committee on the Judiciary.[15] Since that time, all candidates for the federal bench have been submitted to the ABA Committee for examination. Through the membership of the Committee and contacts with bar groups and lawyers who have had dealings with the candidates, the qualifications of the men are examined. The Committee then sends a report to the Attorney General rating those on the list as extremely well qualified, well-qualified, qualified, or not qualified.[16] While the influence of the Committee depends upon the working relationship of

---

[14] Ibid., p. 58.

[15] Joel B. Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection (New York: John Wiley & Sons, 1965), pp. 64-69.

[16] Chase, Federal Judges, p. 20.

its Chairman and the President's advisors,[17] the ABA's report carries considerable weight in the Senate. The President may nominate anyone on the list, regardless of the rating given by the Committee, but nominations of those rated not qualified have been relatively rare.

After the screening process has been completed, the President sends his nomination to the Senate for confirmation. While very few refuse the prestigious position of federal judge, the potential nominee has been consulted to make sure that he or she will accept. Hearings are held by the Senate Committee on the Judiciary. In the absence of the invocation of Senatorial courtesy or some unexpected revelation, nominations for District Court judgeships are reported out of Committee almost pro forma. Full Senate confirmation of the nomination usually follows quite rapidly. Once confirmed in office, federal judges hold office for life, or "during good behavior." Removal of federal judges can then be accomplished only by death, retirement, or impeachment and conviction.[18]

In the relatively few cases in which the Senate either substantially delayed confirmation or rejected the President's nominee, the causes fit into a few categories. The most important of these was political opposition to the President, the nominee's involvement or identification with some controversial question, a personal animosity against the nominee or his sponsors, invocation of Senatorial courtesy, or the limited ability of the nominee.[19] The prevalence of questions such as these, in those few cases where delay or rejection occur,

---

[17] Ibid., p. 121.

[18] Abraham, Judicial Process, pp. 41-43.

[19] Ibid., pp. 80-85.

demonstrates that the selection of District Court judges is deeply involved in politics, and that partisan party considerations are the single most important factor in their selection.[20]

The Courts of Appeals

The intermediate tier of the federal court system is the United States Courts of Appeals.[21] There are eleven of these courts, one each for the numbered circuits and one for the District of Columbia. The ten are 1) First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island; 2) Second Circuit: Connecticut, New York, and Vermont; 3) Third Circuit: Delaware, New Jersey, Pennsylvania, and the Virgin Islands; 4) Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia; 5) Fifth Circuit: Alabama, the Canal Zone, Florida, Georgia, Louisiana, Mississippi, and Texas; 6) Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee; 7) Seventh Circuit: Illinois, Indiana, and Wisconsin; 8) Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota; 9) Ninth Circuit: Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii; and 10) Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.[22]

---

[20] Jack W. Peltason, Federal Courts in the Political Process, Short Studies in Political Science (Garden City, New York: Doubleday & Company, 1955), pp. 30-31.

[21] Prior to 1948, these courts were known as the United States Circuit Courts of Appeals. Reimer, Guide to Court Systems, p. 7.

[22] Ibid., p. 7.

The number of judges on the Courts of Appeals varies from circuit to circuit, depending on the demands of the caseload each circuit handles. At present, the authorized Court of Appeals judgeships are as follows: 1) D.C.--nine; 2) First--three; 3) Second--nine; 4) Third--nine; 5) Fourth--seven; 6) Fifth--fifteen; 7) Sixth--nine; 8) Seventh--eight; 9) Eighth--eight; 10) Ninth--thirteen; and 11) Tenth--seven.[23] The most senior judge in terms of service provided he is under seventy years old serves as the Chief Judge of the Court of Appeals for each circuit. After seventy, appeals judges may retire and take senior status, and receive the same pay as the sitting judges, or may resign completely and have their pensions set at the time of resignation. As in the District Courts, the senior judges are available for such part-time duty as they are able and willing to perform.

Most cases in the Courts of Appeals are heard by panels of three judges, appointed by rotation on a case by case basis. Occasionally, when the backlog of pending cases is very great and congestion on the docket becomes a real problem, District Court judges may be temporarily assigned to decision panels. Assignment by rotation spreads the work of the Court of Appeals among different combinations of judges. While each circuit follows its own procedures, in order to avoid inconsistency between decision panels within a given circuit or to decide particularly important cases, all of the judges of the Court of Appeals will hear a case together, called sitting en banc.[24]

---

[23]James E. Langner and Stephen Flanders, Comparative Report on Internal Operating Procedures of United States Courts of Appeals (Washington, D.C.: Federal Judicial Center, 1973), p. 77.

[24]Reimer, Guide to Court Systems, p. 8.

The work of the United States Courts of Appeals is limited almost entirely to appellate jurisdiction, reviewing the propriety of the decisions of other courts and governmental bodies. The basic statement is found in 28 USC Sec. 1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, and the district court of the Virgin Islands, except where direct review may be had in the Supreme Court.[25]

These appeals are by right to the complaining party and not within the discretion of the courts. There are cases in which the Courts of Appeals are bypassed in appealing District Court decisions (appeals going directly from the District Court to the Supreme Court), and they include 1) decisions of three-judge District Courts, 2) special legislative situations, and 3) cases of imperative and immediate public importance.[26]

The other basic segment of the jurisdiction of the Courts of Appeals consists of appeals from decisions of certain federal administrative agencies, such as the National Labor Relations Board, the Security and Exchange Commission, and the Federal Trade Commission, and the enforcement of their orders.[27] These appeals are numerous, and together with appeals from final decisions of the District Courts, constitute over 95 per cent of the caseload of the Courts of Appeals. These courts also

---

[25]Bunn, Jurisdiction and Practice, p. 187.

[26]Abraham, Judicial Process, p. 164.

[27]Hart & Wechsler, The Federal Courts and the Federal System 55 (2nd ed., 1973).

hear appeals from District Court interlocutory orders (those which are temporary and not final) and issue special writs (commands to act or refrain from acting).[28] Finally, although usually thought of as regular appellate business, the Courts of Appeals examine prisoner petitions and other pro se matters.

The selection process and tenure for Courts of Appeals judges are the same as those for the District Court judges. There are some practical differences, however, which relate quite clearly to the constituency of the Courts of Appeals. Since the circuits consist of more than one state, local political groups and individual Senators have both less influence in the selection process and proportionally less interest in the nominations. Invocation of Senatorial courtesy is still possible, but unless several Senators are involved, it is more easily overridden. This gives the President and his advisors greater independence in choosing their nominees. There is also a general recognition that the Courts of Appeals are more national and less provincial in scope and orientation than the District Court,[29] further limiting the acceptable influence of local interests. Because Court of Appeals appointments are both perceived to be and are in fact of great importance,[30] influential sitting judges have greater impact and involvement in the screening of candidates once the nominations are made, through direct communication with

---

[28]Bunn, Jurisdiction and Practice, pp. 191-92.

[29]Jack W. Peltason, 58 Lonely Men: Southern Federal Judges and School Desegregation (Urbana, Illinois: University of Illinois Press, 1961), p. 28.

[30]Courts of Appeals are the final arbiters of over 98 per cent of all appeals in the federal courts. Reimer, Guide to Court Systems, p. 8.

the ABA Committee or with the Senate Committee on the Judiciary. This is particularly true when the candidates have been judges previously and estimates of their judicial abilities, temperament, and attitudes can be made.

Party affiliation, past political activity and support, and competent legal and judicial experience remain the most important qualifications for office, but, although there is no set rule, an additional qualification may be state of residence. Seats on the Courts of Appeals are distributed proportionally among the states in each circuit, and when a vacancy occurs, it is usual for the nominee to come from the home state of the previous occupant. This procedure is not always followed, for political reality may prevent such succession. For example, the liberal District Court judge from the Eastern District of Louisiana, J. Skelly Wright, clearly deserving of a promotion to the appeals bench, was appointed to the Court of Appeals for the District of Columbia, rather than to the Court of Appeals of the Fifth Circuit where political opposition to him was widespread.

The Supreme Court

At the apex of the federal judicial system stands the Supreme Court of the United States, the most powerful court in the world and probably the most highly respected. There are nine justices on the Supreme Court, and with the exception of Roosevelt's attempted reorganization of the Court in 1937, there have been no serious attempts to alter the structure of the Court since 1869. The Supreme Court sits in Washington, D.C., and holds sessions approximately thirty-six weeks each year, starting

with the first or second Monday in October and continuing to the end of June.[31] The justices are recruited primarily from two sources, judges who are currently serving in federal or state courts and federal or state government officials. Only in a few cases, an outstanding legal scholar, law professor, or eminent practicing attorney has been chosen.

The jurisdiction of the Supreme Court is very specific and includes all cases arising under the Constitution, laws, and treaties of the United States, admiralty and maritime cases, cases involving foreign states and their ambassadors or other citizens, federal land grant cases, disputes between two states, cases to which the United States is a party, and cases between citizens of different states.[32] This seems a very broad grant of judicial power, but in fact, the jurisdiction of the Supreme Court has become fairly narrow through judicial self-restraint.

The exclusive original jurisdiction of the Court is limited to two types of cases, controversies between two or more states and actions against ambassadors, ministers, consuls and their staffs, not inconsistent with the "general law of nations." The concurrent original jurisdiction of the Supreme Court consists of three types of cases: actions brought by foreign ambassadors or ministers or to which consuls of foreign states are parties, controversies between the United States and a state, and actions brought by a state against citizens of another state or aliens.[33] This original jurisdiction accounts for an extremely small

---

[31]Abraham, Judicial Process, p. 190.

[32]U.S. Const., art. III, sec. 2.

[33]Bunn, Jurisdiction and Practice, pp. 221-22.

percentage of the Supreme Court's business, the remainder consisting of appelate jurisdiction.

There are several means of obtaining Supreme Court review of lower court decisions. Decisions of the District Courts and the Courts of Appeals are appealed directly to the Supreme Court, where the United States is a party and an Act of Congress has been held unconstitutional or where the decision of a three-judge District Court is involved.[34] The largest percentage of cases reviewed by the Supreme Court are the decisions of the Courts of Appeals. There are three primary methods by which a Court of Appeals case may be reviewed in the Supreme Court. The most rarely employed device is that of certification. The Court of Appeals may certify any question of law to the Supreme Court requesting instruction on legal issues.[35] A much more frequently employed route of review is appeal by right from the Courts of Appeals. Appeal by right exists only in cases in which the Court of Appeals has held a state statute invalid as repugnant to the Constitution, laws, or treaties of the United States, and the appealing party has relied upon that statute.[36] The third method of review of Court of Appeals (and in some cases District Court) decisions is by petition for writ of certiorari. The writ of certiorari is sought to obtain immediate review of lower court decisions in those cases where review by appeal is not available. This permits review on a broad spectrum of issues, limited only by the necessity to pique the interest of at least four Supreme Court justices. This method

---

[34] Ibid., pp. 225-31, passim.

[35] Reimer, Guide to Court Systems, p. 10.

[36] Bunn, Jurisdiction and Practice, p. 232.

of review gives the Supreme Court discretionary power over its own jurisdiction. To grant certiorari, calling for the entire record of proceedings in the lower court to be brought before the Supreme Court for review, an affirmative vote of four justices is required.[37]

The Supreme Court also reviews final decisions of the highest court of a state in which a case may be heard. Review is obtained by appeal when the validity of a United States statute or treaty is questioned and denied or when there is a constitutional challenge to the validity of a state statute and its validity is upheld. The process is by writ of certiorari when a question such as the above is raised or when there is a claim of title, right, privilege, or immunity under the Constitution, laws, or treaties of the United States and that claim is denied.[38]

The jurisdiction of the Supreme Court, unlike that of most other courts, is largely discretionary, for even in cases of appeals by right, the Court must decide that a substantial federal question is involved. Due to the growth of population and the complexity of modern life, the potential caseload of the Court is extremely large, and this has led to a concern that the Court might be overburdened. In response to this possibility and the Court's desire to preserve its power for important cases, certain maxims of judicial self-restraint have been developed over time. These self-imposed restrictions have reduced the scope of Supreme Court jurisdiction. The following list is not meant to be complete, but it does include the most important such rules: 1) Before the Supreme Court will examine an issue, a definite "case or controversy" between two

---

[37]Abraham, Judicial Process, pp. 176-80.

[38]Bunn, Jurisdiction and Practice, p. 235.

adversaries under the Constitution must exist, involving rights and prevention of wrongs related to the parties bringing the suit; 2) The parties bringing the suit must have "standing to sue," that is they must be personally interested in the outcome of the suit; 3) The Supreme Court will not render advisory opinions; 4) The complaining party must refer to a particular live issue and constitutional provision upon which he relies; 5) The Supreme Court will not pass upon the constitutionality of a statute or official action at the instance of one who has availed himself of its benefits; 6) Complainants must follow proper lower court procedure and exhaust all possible judicial and administrative remedies; 7) The federal question involved must be substantial, the pivotal part of the appellant's case, and part of his rather than his opponent's defense; 8) Questions of fact, as distinguished from those of law, are not normally accepted as proper bases for review; 9) The Supreme Court will defer to certain executive and legislative actions by classifying issues otherwise proper as "political questions" and will not review such questions; 10) Challenged statutes carry a presumption of validity; 11) If a case brought for review can be decided on other than constitutional grounds, it will be so decided; 12) The Supreme Court will not impute illegal motives to lawmakers; 13) If a statute is held unconstitutional, where possible such determination will be limited to the offending section; and 14) Laws may be evil, stupid, or tyrannical, but unless they violate the Constitution they will not be struck down.[39]

The selection of Supreme Court Justices follows the same procedure as that designed for the selection of all federal judges. Because of

---

[39]Abraham, Judicial Process, pp. 355-376.

the national scope of the Supreme Court and the importance of its decisions, there are important differences. Clearly, the input of individual Senators and local party organizations is reduced to a minimum. While it is still possible to reject a nominee for the Supreme Court, the grounds must be other than the invocation of Senatorial courtesy or political party considerations. The political party of the nominee remains a factor in the original selection, but the question of the coincidence of the nominee's values and those of the President become much more important in the selection decision.[40] Further, the process of screening and examination of the nominee is more detailed and the hearings before the Senate Committee on the Judiciary are of much greater importance. The nominee's judicial values and attitudes, his probity and intellectual accomplishments, and his past activities are carefully scrutinized. Moreover, it is rare that any sitting judge will comment on the nominee, for that judge may become a colleague of the nominee or may have his decisions reviewed by the nominee. Finally, while the President and his advisors have greater independence in the selection process, the potential list of candidates is circumscribed due to the demands for excellence which the importance of the Supreme Court in our system requires.

Other federal courts

The District Courts in the United States, the Courts of Appeals, and the Supreme Court are the best known of the federal courts, but there are several other courts, of both general and specific jurisdiction,

---

[40]Peltason, Federal Courts, p. 32.

which are part of the federal judicial system. These courts can be divided into two general classifications, legislative courts and constitutional courts, the latter including the courts already mentioned. The difference between the two is based on the nature of the power under which they were created. Constitutional courts were created under the constitutional grant of power to Congress to establish inferior federal courts in Section 1 of Article III and Section 8 of Article I. Legislative courts were created under the Congressional legislative power found in Article I, Section 8 of the Constitution dealing with such things as its powers over the Territories.[41]

The constitutional courts

The District Courts in the District of Columbia and in the Commonwealth of Puerto Rico are exactly like the District Courts in the fifty states. Their jurisdiction covers the same matters, judges sit for life (good behavior), and are paid the same as other District Court judges, and these courts share their authority with local institutions of judicial power.[42]

The other constitutional courts not previously mentioned are all of a specialized nature. The busiest of these is the Court of Claims. The Court of Claims consists of seven judges who sit in Washington, D.C., and fifteen commissioners who act as trial judges and sit in any part of the country most convenient to the parties. The commissioners hear cases and prepare their opinions, appeals from which may be taken to the judges

---

[41] The United States Courts, p. 7.

[42] Ibid., p. 7.

of the Court of Claims. These appeals are either heard by panels of three judges or by the Court sitting en banc. All appeals from the decisions of the Court of Claims are heard by the Supreme Court on writ of certiorari. While the jurisdiction of the Court covers a variety of cases, all involve suits by individual citizens or corporations against the federal government for money damages where Congress has specifically waived the sovereign immunity of the United States.[43]

The United States Court of Customs determines controversies concerning the classification and valuation of imported merchandise for the purpose of assessing customs duties. The Court consists of nine judges and is divided into three divisions of three judges each. No more than five of these judges may be from any one political party. The Customs Court usually sits in New York City, but may sit from time to time at other major ports of the United States.[44]

The United States Court of Customs and Patent Appeals also sits in New York City and is the forum for appeals from the Customs Court. The Court of Customs and Patent Appeals also reviews decisions of the Patent Office and the United States Tariff Commission. Appeals from this court are taken to the Supreme Court on writ of certiorari. The Court consists of four associate judges and one Chief Judge.[45]

---

[43] Ibid., p. 8.

[44] Reimer, Guide to Court Systems, pp. 11-12.

[45] Ibid., p. 12.

The legislative courts

Included among the legislative courts are the District Courts for the Canal Zone, Guam, and the Virgin Islands. The judges of these courts are appointed for terms of eight years, and unlike the judges of the constitutional courts, may have their salaries reduced during their terms of office. These District Courts all have one judge each. The jurisdiction of these courts is not limited to the types of cases defined by the Constitution as within the federal judicial power, but includes all types of cases. These courts do not share their judicial power with any local judicial agency, and may be given duties which are not strictly judicial in nature. All appeals from the decisions of these District Courts are heard in the Courts of Appeals.[46]

Although not technically part of the federal judicial system, the United States Tax Court and the United States Court of Military Appeals function in a judicial capacity. The Tax Court decides controversies between taxpayers and the Internal Revenue Service involving the underpayment of federal income, gift, and estate taxes. Its decisions are appealable by right to the Courts of Appeals and are also subject to further review by the Supreme Court on writ of certiorari. The Tax Court is made up of sixteen judges who are appointed for terms of fifteen years. A Chief Judge is responsible for the administration of the Court and is elected by the judges for a term of two years. There are also five commissioners, appointed by the Chief Judge, who form the Small Tax Division, headed by a judge appointed by the Chief Judge. The Court is

[46] The United States Courts, p. 7.

divided into divisions for hearing cases. The office of the Tax Court is in Washington, D.C., but it hears cases in 110 cities with each presided over by a single judge or commissioner.[47]

Court martial decisions in the armed forces are referred to a Board of Review within the Defense Department. Appeals from the Board of Review are heard by the United States Court of Military Appeals. The Court sits in Washington, D.C., and consists of three judges from civilian life appointed for terms of fifteen years. Review by this court is discretionary in some cases and required in others. For example, all death penalty cases must be reviewed.[48]

The following diagram is a simple picture of the federal court system for easy reference. The labeling is self-explanatory. The Court of Military Appeals is not included, for its decisions are reviewed within the Executive branch of government. The connecting lines represent the routes of review.[49]

Administration of the Federal Court System

Much of the day to day business of the courts is done by administrative and legal staff assistants within each court, and long-term planning is done by specifically designed administrative bodies. No examination of the federal judicial system would be complete without some mention of their activities.

---

[47] Ibid., pp. 9-10.

[48] Reimer, Guide to Court Systems, p. 13.

[49] Ibid., p. 19.

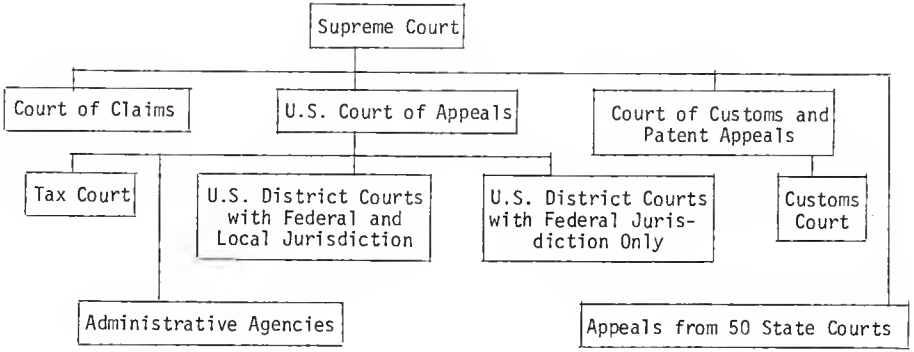


Figure 1. Federal Court System

Court Support Personnel

The personnel assigned to the federal courts can be divided into two broad categories. The first is that of the court clerks and their staff. The clerk's staff is responsible for the day to day operation of the courts and is in charge of the almost overwhelming flow of paperwork. The clerk's staff performs a variety of functions, including the docketing of cases, receipt of documents and notification of parties, calendaring cases for hearing, attending to the publication of the court's decisions, handling motions for judicial action, and overseeing the legal libraries which almost all federal courts maintain.[50] The clerks see that the parties are kept aware of the requirements of prosecution of their actions, and that the judges are kept aware of their assignments.

The second category of court support personnel consists of those who provide the judges with legal assistance. Law clerks are typically recent law school graduates with outstanding records. Although the practice varies from court to court, most law clerks are selected by the individual judge for whom they work. These appointments are temporary, two years being the usual maximum, and the salaries of the law clerks are paid out of the general appropriation for the federal courts. The duties of the law clerks usually include researching questions of law, preparing legal memoranda for the judges, and occasionally preparing draft opinions for the judges. Since the early 1960's, particularly in the Courts of Appeals, the position of staff attorney has developed. Again practice varies, but these lawyers are usually older, receive higher compensation, and serve longer terms. In some courts, the position of staff attorney

[50]Langner and Flanders, Internal Procedures, pp. 67-68.

is permanent. Unlike the law clerks, staff attorneys service the entire court rather than one judge. Their duties may include those of law clerks, but in addition they often process prisoner petitions, decide simple, unopposed motions, and prepare final opinions, all under the supervision of a judge. The growth of the staff attorney position has developed in response to the exploding caseload in the federal courts.[51]

The Administrative Office of the United States Courts

The Administrative Office of the United States Courts performs the administrative duties of the federal court system. It is headed by a Director appointed and supervised by the Chief Justice of the Supreme Court. The Office supervises referees in bankruptcy, probation officers and other court personnel, disburses the operating funds of the courts, and prepares reports and conducts surveys related to the operation of the court system. The Federal Judicial Center is the planning and research arm of the Administrative Office. The Center conducts research, makes recommendations for reform, and educates and trains new federal judges.[52]

The Judicial Conference of the United States

The Judicial Conference is charged with the responsibility of resolving administrative problems involving the circuits, making recommendations to Congress concerning legislation affecting the federal judicial system, and examining the conduct of the federal judiciary. The Judicial

---

[51] Ibid., pp. 69-73.

[52] Reimer, Guide to Court Systems, p. 17.

Conference is required to meet once each year, although it presently meets twice a year. The Conference is composed of the Chief Justice of the Supreme Court, the Chief Judges of the Courts of Appeals, the Chief Judge of the Court of Customs and Patent Appeals, the Chief Judge of the Court of Claims, and a District Court judge from each circuit chosen by the Court of Appeals judges for a term of three years at the annual meeting of the Judicial Conference of the circuit.[53]

Administrative Bodies on the Circuit Level

Each circuit has a Judicial Council made up of the judges of its Court of Appeals. It meets semi-annually to efficiently dispose of the caseload in each district within the circuit. Its primary duty is the assignment of judges. Additionally, each circuit has a Judicial Conference, which consists of the judges from the Courts of Appeals and District Courts and invited members of the federal bar within the circuit. The Conference meets annually to discuss common problems, recommend reforms for the improvement of the administration of the courts, and conduct seminars for the newly-appointed judges.[54]

Process and Procedure: The Paper Journey Through the System

It would be impossible to give a fully detailed analysis of the procedures of the federal courts in a relatively short presentation. The guidelines for processing cases are the Federal Rules of Civil

---

[53] Ibid., p. 16.

[54] Ibid., p. 17.

Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, portions of Title 28 of the United States Code, and other more specialized rules. The rules are prescribed by the U.S. Supreme Court and must be reported to the Congress by the Chief Justice. Most courts also maintain local rules which vary from but are not in conflict with the general provisions. As indicated, there are different rules for civil and criminal cases. Instead of a detailed and technical review of all rules of procedure for the federal courts, a good idea of what happens can be gained by following a case through the judicial system. A simple civil action will serve as our example, such as an action brought by a Florida citizen against a Texas citizen for the specific performance of a contract, for our interest is in the general provisions rather than special circumstances. We will assume that one of the parties to the action will choose to seek review of the decision of the court, and that there is a legal basis for such review.

Civil actions are commenced in the District Courts by filing a complaint with the clerk of the court.* This complaint must contain a short and plain statement of the grounds upon which the court's jurisdiction is based, a statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for relief to which the pleader deems himself to be entitled (FRCP, 8). As soon as the complaint is filed, a summons is issued by the clerk and served by a U.S. Marshal on the named defendant. The summons, which includes a copy of the

---

*Repeated citation to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure would be cumbersome. In the following discussion, where appropriate, references to the above will be within parentheses and abbreviated respectively as FRCP or FRAP with the number of the relevant rule as follows: (FRCP, 3).

complaint, states that the defendant must respond or face a judgment against him by default. While the exact nature of the required service depends upon the legal character of the defendant, unless the defendant can not be found, service is normally personal. The Marshal or other authorized person making service then files with the court proof of service upon the defendant. This is called return (FRCP, 4).

The defendant must file his answer to the complaint with the court within twenty days of the service of the summons and complaint (FRCP, 12). The answer must contain denials of the allegations of the complaint, statements that the defendant is without sufficient knowledge to respond to the allegations, and/or any affirmative defenses which deny the legal impact of the allegations. Any allegations which are not answered in this way are deemed admitted as true (FRCP, 8). These pleadings are filed with the clerk of the court and the parties see to the service of copies upon each other.

When the answer is filed, the plaintiff has twenty days to file and serve on the defendant a reply which may deny any counter-claim the defendant may have raised in his answer. The defendant may then file an answer to the reply. In most cases, this closes the pleadings (FRCP, 7). Either party may file motions for judgment on the pleadings, to make the pleadings more definite, or to strike a portion of the pleadings. These motions are disposed of before the trial begins (FRCP, 12).

When the complaint was originally filed, the action was given a file number and docketed, entered on the brief record of the proceedings in court, by the clerk's office. It thus became part of the flow of litigation in the court. The action is not yet scheduled for trial, for the Federal Rules of Civil Procedure are designed to limit the

subjects which will be at issue. There are numerous provisions for pre-trial discovery to give each party an opportunity to learn about, discuss, and limit the disagreement between them (FRCP, 26-37). The element of surprise has been substantially reduced in federal actions. Moreover, a great deal of effort is usually expended by the attorneys to negotiate a settlement out of court on completely private terms, and such a settlement may occur even after the trial has begun. The courts encourage the settlement of cases to reduce their caseload and the level of acrimony.

In the event that no settlement is reached, and all pleadings have been filed, motions disposed of, and pre-trial discovery completed, the action is ready to be scheduled for trial. In virtually all federal trials, the parties have a right to trial by jury. This right is not automatic, however, for trial by jury must be demanded in writing, filed with the court and served on all other parties to the action. If this demand is not made, the right to trial by jury is waived, and the case is heard by the judge (FRCP, 38). The action is then either designated as a jury action or as a court action (FRCP, 39). The action is then placed on the trial calendar for hearing and a date is set (FRCP, 40). The attorneys must then be prepared to present their case on the date specified. This does not necessarily mean that the case will then be heard, for a negotiated settlement is still possible. There may also be requests filed for postponements by the parties, or the estimate made by the clerk of the time needed for trying preceeding cases may be inaccurate, requiring the rescheduling of the trial date. Eventually, however, the action will come to trial.

It seems unnecessary to give an account of the actual conduct of the trial. Television has given most people a reasonably good notion of what occurs in court, except that there is a good deal less drama and much more tedium in reality. Examination and selection of a jury, if one is involved, presentation of evidence through witnesses and documentary presentation, opening and closing statements of the attorneys, rulings on objections, and instructions given to the jury by the judge are all quite familiar. At the close of the trial, if the action is tried by a jury, the jury retires to deliberate, and a verdict is subsequently rendered. If the action is tried by a judge, he usually takes the case under advisement and proceeds with the next case scheduled. He will then prepare a decision containing both findings of fact and conclusions of law thereupon (FRCP, 52). In more and more cases today, the judge will announce the decision from the bench rather than prepare a written opinion. After the decision has been announced, judgment is entered by the clerk of the court (FRCP, 54 & 58). In the absence of any appeal, the judgment would then be enforced.

We have assumed in our case that appeal is taken from the decision of the District Court. For a brief time, the responsibility for the case is divided between the District Court and the Court of Appeals.[55] Appeals are usually commenced by filing a notice of appeal with the clerk of the District Court within sixty days of the entry of judgment. This notice of appeal contains a specification of the party taking the appeal, designates the judgment or portion thereof from which appeal is taken, and names the court to which appeal is taken. The clerk serves notice

---

[55] Langner and Flanders, Internal Procedure, p. 11.

of the appeal on the other party or parties to the action (FRCP, 3 & 4). While not required in several circuits, notice of appeal is often also served on the clerk of the Court of Appeals. The party taking the appeal is required at the same time to file a bond for the costs of the appeal, usually $250, with the clerk of the District Court (FRAP, 7).

In order to prevent the enforcement of the judgment of the District Court, the appellant must also apply for a stay of judgment pending appeal in the District Court. If the application is denied, the appellant may seek a stay from the Court of Appeals (FRAP, 8). A record of the proceedings in the District Court must be prepared to bring the appeal to the higher court. The record consists of all papers and exhibits filed in the District Court, a certified copy of all docket entries (the history of the case) made by the clerk, and a transcript of all or part of the proceedings prepared by a District Court reporter. Within ten days of filing the notice of appeal, the appellant must order the transcript from the reporter and make arrangements for payment of the cost of the transcript (FRAP, 10). The responsibility for physically assembling the record for appeal lies with the clerk of the District Court. When the record is complete, in any case within forty days of the filing of the notice of appeal, the clerk of the District Court transmits it to the clerk of the Court of Appeals with an endorsement of the date of transmission (FRAP, 11). The responsibility of the District Court is then concluded.

Within the time allowed for the transmission of the record from the lower court, the appellant pays a docket fee to the clerk of the Court of Appeals, and the clerk enters the appeal upon the court's docket. Upon receipt of the record, it is filed by the clerk, and all parties

are notified of the date of filing (FRAP, 12). The case now becomes part of the business of the Court of Appeals.[56]

Within forty days after the record has been filed, the appellant files a brief with the clerk and serves copies of it on all other parties to the action. The appellee has thirty days after service of the apellant's brief to file and serve his own brief. The appellant will then have fourteen days to file and serve a reply brief. Failure to file briefs may result in the dismissal of the appeal or disallowance of oral argument (FRAP, 31). These briefs are the written legal arguments of the parties. They contain a statement of issues involved on appeal, a statement of the facts of the case and the proceedings in the lower court, the legal argument of the parties, and a conclusion stating the relief sought (FRAP, 28). In addition, the appeallant is required to file an appendix to his brief which includes the relevant docket entries in the lower court proceedings, findings or opinions, the judgment or order appealed from, and any other parts of the transcript to which the particular attention of the court is directed (FRAP, 30).

The record and the briefs of the parties constitute the bulk of the materials which the Court of Appeals will consider in arriving at its decision. The court will not hear the testimony of witnesses nor in almost all cases reconsider the facts as determined by the lower court.

As pointed out previously, the Courts of Appeals hear cases in panels of three judges. Once the appeal is docketed, either the Chief Judge of the circuit or the clerk assigns the case to a randomly selected

---

[56]Copies of all papers filed with the clerk of the Courts of Appeals are served on all other parties to the action.

and constituted three-judge panel. In making the assignment, the Chief Judge or the clerk tries to accomplish an even distribution of the case-load. The record and the briefs of the parties are then distributed to the three-judge panel. Most Courts of Appeals now employ a screening procedure to speed up hearings and reduce the backlog of cases. Frivolous appeals without merit may be dismissed, some appeals may be decided without oral argument, and others may require limited oral argument only. These decisions, regardless of protestations to the contrary, are within the discretion of the judges. In any case, after consideration of the record and the briefs, if one of the judges decides that oral argument is necessary, oral argument will be held.[57]

In the event that oral argument is to be held, the clerk's staff then schedules the appeal for hearing, and the schedule is then submitted for the approval of the hearing panel. This scheduling is based on the experience of the court in prior sessions regarding the amount of time necessary to hear appeals.[58] The clerk then advises the parties of the time and place at which oral argument is to be heard (FRAP, 34).

Prior to oral argument, the judges read the record and the briefs submitted by the parties. In addition, they often read memos prepared for them by their law clerks or by staff attorneys dealing with the legal issues presented. At one time, oral argument of a case on appeal was the most important element of the case. The time allowed each side was almost unlimited, and because there was very little briefing, the bulk of

---

[57] William L. Whittaker, Description of the Operating Procedures of the United States Court of Appeals for the Fifth Circuit (Washington, D.C.: Federal Judicial Center, 1973), pp. 5-6.

[58] Ibid., p. 7.

the parties' legal argument was contained in the oral presentation. Today, except in extraordinary cases in which prior approval has been granted, the rules limit each side to thirty minutes (FRAP, 34). Each party, however, rarely has a full thirty minutes for argument. The judges are active participants in oral argument and frequently interrupt the attorneys to ask questions or attack weak points in their argument. The judges may seek to determine the logical extension of an attorney's argument as applied to hypothetical circumstances. It has been argued that oral argument adds little to the presentation of a case on appeal because the legal issues have been covered thoroughly in the written briefs. Most judges, however, and almost all attorneys, continue to feel that oral argument is an important aid in sharpening the issues before the courts.

Decision procedures vary from circuit to circuit, but all follow a similar general pattern. Usually, at the close of oral argument, the next case on the calendar is called for argument. Hearings are usually set for four days each week during the scheduled session. The fifth day of the week is set aside for the conferences of the judges or for opinion reading.

At the conference, most often held on the Friday of a hearing week, the three-judge panel discusses the cases that have been heard during the week. The simple cases are disposed of first by rapid agreement, and in those cases an oral decision from the bench will be subsequently announced. In these cases, the parties are notified of the decision by the clerk, and no decision or opinion is published. In cases requiring written opinions limited to a brief exposition of the action of the court and the precedent relied upon, the court will prepare a *per curiam*

opinion. This is an opinion of the entire court rather than authored by an individual judge. These opinions are unsigned and may even be prepared by a law clerk or staff attorney. They are published in the official reports of the Courts of Appeals, the Federal Reporter.[59] If the requirements of informing the legal community, as well as the parties to the action, are not great, a form of opinion usually called a "memorandum" is employed. The memorandum decision is not published, and it may not be cited as precedent in future cases. The court may also prepare a simple "order" which is a judgment without explanation that merely disposes of the issue in controversy. This is most often a simple statement that the decision of the lower court is affirmed.[60] The burden of increased caseload in the Courts of Appeals has made the use of these shortened forms of decision more popular with the judges.

The most characteristic form of decision in the Courts of Appeals, traditionally associated with appeals tribunals, is the signed, written opinion. At the post-hearing conference, the three judges discuss the case and arrive at a tentative decision. If all three agree, the most senior judge assigns the writing of the opinion. If there is a split, the most senior judge of the majority of two assigns the opinion. An attempt is made to assign opinion writing so that the burden is evenly distributed. With the research aid of his law clerk, the assigned author then prepares a draft opinion which will be circulated to the other members of the panel. Any revisions which either all or a majority can accept are then incorporated into the opinion. If there is any dissent,

---

[59]Richardson and Vines, Politics of Federal Courts, p. 121.

[60]Langner and Flanders, Internal Procedures, pp. 51-52.

the disagreeing judge has the option of preparing a dissenting opinion. The preparation of these opinions can take up to six months or longer. When the opinion or opinions are complete, the judgment of the court is announced, and the opinions are read from the bench.

All full written opinions are published in the official reports of the court. The criteria for publication, now generally agreed to by all of the circuits, also determine whether a case will be decided by a full, signed opinion, a per curiam opinion, or one of the simplified forms of decision. Generally, opinions will be published where one of the following is true: 1) the opinion establishes, alters, or modifies an existing rule of law; 2) the opinion involves a legal issue of continuing public interest; 3) the opinion criticizes existing law; 4) the opinion involves a historical review of the law that has not been previously presented; 5) the opinion either solves or creates a conflict in the law; and 6) the opinion involves a case in which there is a published opinion in the lower courts.[61]

After the court renders its judgment, regardless of the form that judgment takes, the clerk notes the judgment on the docket which constitutes entry of judgment. On that date, the clerk mails a copy of the opinion, or if there is none the judgment and notice of the date of entry of judgment, to all parties (FRAP, 36). The mandate of the court, consisting of a certified copy of the judgment and a copy of the opinion if any, and any direction as to costs, is issued twenty-one days after the entry of judgment (FRAP, 41). This mandate is the binding direction of the Court of Appeals, either to the parties or to the lower court, that its decision be complied with.

---

[61] Ibid., p. 51.

Again, we have assumed that appeal will be taken from the decision. In this situation, the party seeking review in the Supreme Court must apply for a stay of mandate pending application to the Supreme Court for a writ of certiorari. Notice of this application for stay is served on all parties, and the period of the stay is usually thirty days. If the clerk receives notice from the clerk of the Supreme Court that the appellant has filed an application for certiorari in that court, the stay continues until final decision by the Supreme Court. If the Supreme Court denies certiorari, the mandate issues immediately (FRAP, 41).[62]

Review in the Supreme Court in our case is initiated by filing a petition for writ of certiorari with the clerk of the Supreme Court. This petition will contain identification of the judgment appealed from, a short brief stating the errors in the court below with legal citations in support, a prayer for issuance of the writ, and most important, a showing that the appeal is within the jurisdiction of the Supreme Court as established by law and self-imposed limitation. Forty copies of the petition must be filed with the clerk, who then enters the case on the regular appellate docket and serves notice and copies of the petition on the other parties to the action. The other parties have thirty days in which to file a brief in opposition to the petition for certiorari.

---

[62] We have assumed that our hypothetical case makes its way up the entire hierarchy of the federal court system, but it must be remembered that the Supreme Court receives petitions for writs of certiorari in less than 2 per cent of actions filed in the federal courts. Recall further that appeals by right to the Supreme Court exist only where constitutional issues are involved, that the Supreme Court has the discretion to deny review even in these cases, that about 90 per cent of the Supreme Court caseload comes up on writs of certiorari, and that the Supreme Court has developed many working rules which limit review on certiorari to a narrow range of cases. Our simple case, based on diversity of citizenship jurisdiction and involving more than the statutory minimum for federal jurisdiction ($10,000), would thus be rarely found on the Supreme Court docket.

The clerk keeps the petition until he receives the opposing brief or for thirty days from the date of filing. The clerk then distributes copies of the petition and any opposing briefs to each of the nine justices. The practice of each justice varies, but most have their law clerks prepare legal memoranda dealing with the legal issues presented by the petition and brief in opposition. These memoranda are then circulated among the nine justices.

As stated previously, the normal annual term is thirty-six weeks, running from early October to late June. The Court hears oral argument for the first four days in about two weeks of each month. The other two weeks are reserved for opinion writing and consideration of the cases.[63] Each Firday during or preceeding a week in which cases are argued or opinions announced the justices meet in formal conference. Before the justices take up the cases which have been argued before the Court, they consider the applications for review, both appeals and petitions for certiorari.[64] If the justices feel no issue of importance is involved, the appeal or petition for certiorari will be denied, and the judgment of the lower court will stand. If four of the justices believe the merits of the case call for review by the Supreme Court, the petition for certiorari will be granted and the full record of the case in the lower court will be forwarded to the Supreme Court. Notice to all parties that the petition for certiorari has been granted is then issued, and briefs on the substantive issues of the cases are prepared and filed by both parties with the clerk and served upon each other. Once the record in

---

[63]Abraham, Judicial Process, p. 192.

[64]Anthony Lewis, Gideon's Trumpet (New York: Vintage Books, 1964), pp. 31-41, passim.

the Supreme Court is complete and all briefs are filed and served, the clerk schedules the action for oral argument and notifies the parties of the date of the hearing.

The procedures for review of briefs, preparation of legal memoranda, and oral argument before the Supreme Court are much the same as before the Courts of Appeals. Each side is usually allowed one hour for the presentation of its case, but the provisions for expanded oral argument are somewhat more liberal than in the Courts of Appeals. Oral argument before the Supreme Court is often a grueling experience, for the questions put by the justices expose the weakest points of each attorney's argument.

Three Fridays of each month are usually reserved for the formal conference of the justices, lasting from ten in the morning until the late afternoon. After the applications for review are considered and resolved, the justices begin discussion of the cases presented at oral argument during the preceeding week. A formal procedure is followed in these discussions, the Chief Justice giving his views first, followed by the rest of the justices in descending order according to their seniority. At the close of the discussion of each case, a tentative vote is taken, each justice voting in ascending order of seniority with the Chief Justice voting last. The Chief Justice, or the most senior member of the majority when the Chief Justice votes with the minority, then assigns preparation of the opinion to one of the justices.[65] The burden of opinion writing is spread as evenly as possible, but the Chief Justice has considerable discretion in assigning opinions so that the special expertise of a justice can be utilized.

---

[65] Ibid., pp. 39-41.

Each justice is responsible for the opinions assigned to him. He prepares a draft opinion with the aid of his law clerks. Once the draft has been completed, it is circulated among the other justices. The case may then become a subject of discussion at the Friday conferences again. Suggestions are passed back and forth, and the opinion continues to be reshaped until the decision and language draw the support of a majority of the justices. The language of the opinion is extremely important, for a moderate, well-reasoned opinion may convert the earlier dissenters. Because of this shaping process, most Supreme Court opinions are compromise documents. Those justices who disagree are free to prepare dissenting opinions, and those who agree with the decision of the Court but do not subscribe to the language or the reasoning of the majority may prepare concurring opinions.

When the final decision is reached, it is announced orally by the justices in Court. This occurs on opinion Mondays, those Mondays during the term when the Supreme Court is not hearing oral argument. All cases which have been decided are announced, beginning with the most junior justice. The principal author or authors of the opinions in each case announce the decision of the Court. The judgment of the Court is then entered by the clerk in the Supreme Court docket, and the parties are mailed copies of the opinions. These opinions are then circulated throughout the legal community by publishing services, published in pamphlets by the U.S. Government Printing Office, and later printed in the permanent volumes of the United States Reports and the Supreme Court Reporter.[66] While a Supreme Court decision may take many forms, in most

---

[66] Ibid., pp. 185-192, passim.

cases the decision of the lower court is affirmed or reversed, and the Supreme Court orders the lower court to proceed in accordance with the announced decision. In the normal course of events, this mandate is carried out by the lower court, and the journey of our hypothetical case through the federal court system is complete.

The description above seems much simpler than reality, for the various ways in which rehearings, motions, and postponements can delay the process have been omitted. Even without delaying tactics or special procedures required in a complex case, the time elapsed from the original filing of the complaint to the mandate of the Supreme Court would have consumed well over a year. The cost of this process is a further complicating factor. The expense of the appeal to the Courts of Appeals alone would preclude most of the public from even making the attempt.*

---

*It would be rather difficult to provide a general estimate of the costs of processing an action all the way through the federal court system. There are too many variables including attorney's fees, travel expense, and the length and complexity of the trial. Some notion of the rather large expense involved, however, can be gained from an estimate of the expenditure involved in appealing a case to the Courts of Appeals. Notice of appeal and the docket fee are each $50; the necessary transcripts run to approximately $300 per day; printed briefs and appendices would usually cost between $300 and $400; and the average travel expense in the Fifth Circuit would be about $250. If one adds to this the mileage costs and $20 per day fee for witnesses in the District Court, and at least $40 to $50 for filing and service of each copy of the complaint in the lower court, the total almost always exceeds $1500 or more. This does not, of course, include attorney's fees and would apply to a rather simple case. Attorneys Robert A. Harper and Aaron Green, private telephone interviews held in Gainesville, Florida, July 8, 1976, and July 12, 1976, respectively.

The Courts of Appeals

The Development of the United States Circuit Courts--Courts of Appeals

Pursuant to its constitutional power to create lower federal courts, Congress passed the Judiciary Act of 1789.[67] This was the basic document of the federal court system. It provided for the organization of the Supreme Court and created two tiers of lower federal courts. Thirteen judicial districts with one court and one judge each were established, and these districts were organized into three circuits, the Southern, Middle, and Eastern, each with one court, manned by two Supreme Court justices and one District Court judge.[68] The original jurisdiction of the Circuit Courts and District Courts consisted of 1) private civil litigation involving diversity of citizenship; 2) all civil litigation to which the United States was a party, cases in which $500 or more was in controversy being tried in the Circuit Courts; 3) all criminal cases under United States laws to be tried in the Circuit Courts, with minor offenses tried in the District Courts; and 4) removal jurisdiction from the state courts. Appellate jurisdiction was by review on writ of error from final decisions of the District Court in civil cases involving more than $50 and admiralty and marine cases over $300.[69]

As a result of the election of 1800, the Federalists were replaced in the Presidency and the Congress by the Jeffersonian Republicans. The

---

[67] 1 Stat. 73.

[68] Reimer, Guide to Court Systems, p. 2.

[69] Hart & Wechsler, Federal Courts, 39-40.

last position of Federalist strength was the federal judiciary, and one month before Jefferson took office, Congress reorganized the lower courts. The now twenty-three District Courts were reorganized into six circuits, and specifically designated Circuit Court judges were appointed.[70] Enough additional Federalists were appointed to maintain control of the federal judiciary.

The court reorganization did not last long under the Republican administration. In 1802, the circuit judges were dispensed with, the reorganization of 1801 repealed, and the Circuit Courts staffed with one Supreme Court justice and one District Court judge each.[71] There was no further change in the Circuit Courts until after the Civil War, which weakened the resistance of the states to the federal courts and broke the stalemate which had essentially frozen court sturcture since 1789.[72] In 1869, Congress authorized a specifically designated circuit judge for each of the existing nine circuits[73] (the Seventh, Eighth, and Ninth circuits were actually created in 1866),[74] and each circuit now consisted of one judge from each of the three types of federal courts. By the same legislation, the amount of circuit riding done by Supreme Court justices was substantially reduced.[75]

---

[70]Act of Feb., 13, 1801, 2 Stat. 89.

[71]Act of April 29, 1802, 2 Stat, 156.

[72]Herbert Jacob, "The Courts as Political Agencies: An Historical Analysis," 8 Tulane Studies in Political Science (1962), 9.

[73]Act of April 10, 1869, ch. XXII, 16 Stat. 44.

[74]U.S. Congress, Senate, Committee on the Judiciary, Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served During the Period 1801 Through May, 1972, 92nd Cong., 2nd sess., 1972, 141, 157, 175.

[75]Hart & Wechsler, Federal Courts, 44.

The Circuit Courts remained unchanged until 1891. In that year, the Circuit Court of Appeals Act of 1891 was passed.[76] This legislation provided for the creation of a Circuit Court of Appeals for each circuit, each with three judges, two of whom were designated circuit judges. While these courts had appellate jurisdiction, they were also general courts of record and had no general appellate jurisdiction over the District Courts.[77] This continued until 1911, and for that twenty year period there were again two tiers of trial courts in the federal system. The only change during that time was the creation of a Circuit Court of Appeals for the District of Columbia in 1893.[78]

In 1911, the three tier system of the federal courts as it operates today was finally established. The Circuit Courts as tribunals of original jurisdiction were abolished, and the new Circuit Courts of Appeals of the existing circuits were established as purely appellate courts.[79] The only change in structure since 1911 occurred in 1948 when the name of the courts was changed to the United States Courts of Appeals and the most senior circuit judge was made Chief Judge of the circuit with certain administrative duties.[80] In 1929, the Tenth Circuit was established with its own court,[81] completing the system. The only changes since 1929 have dealt with the creation of additional judgeships for the

---

[76]Act of March 3, 1891, ch. 517, 26 Stat. 826.

[77]Hart & Wechsler, Federal Courts, 47.

[78]Legislative History of U.S. Circuit Courts, 31.

[79]Act of March 3, 1911, ch. 231, 36 Stat. 1131.

[80]Act of June 25, 1948, ch. 646, 62 Stat. 870.

[81]Legislative History of U.S. Circuit Courts, 193.

Courts of Appeals to meet the expanding caseload. These additions have been provided by increments of one or two judges at a time, or by major increases in the system by omnibus judges bills.[82]

The Function and Role of the Courts of Appeals

The most obvious functions of the Courts of Appeals are shared with other courts, such as ensuring against miscarriages of justice and limiting the scope of conflict in our society, but the Courts of Appeals' existence within a larger framework also imposes further responsibilities. These courts must help procure fair trial in the District Courts, make the rulings of the District Courts within each circuit more consistent, and help make the administration of justice and the interpretation of law more uniform throughout the country, a duty shared with the Supreme Court.[83] The duties of the Courts of Appeals are also substantive, for these courts evaluate and determine the propriety of decisions of the lower courts, give administrative leadership, and most importantly, participate in the growth, development, and adaption of the common law to the realities of common experience.[84]

It is useful to look at the Courts of Appeals from the perspective of the judges, as they see their role. Research in this area by J. Woodford Howard of the Federal Judicial Center has revealed two major

---

[82]Richardson and Vines, Politics of Federal Courts, p. 49.

[83]Herbert Jacob, Justice in America: Courts, Lawyers, and the Judicial Process (2nd ed.; Boston: Little, Brown and Co., 1972), pp. 192-93.

[84]Langner and Flanders, Internal Procedures, p. 2.

and three ancillary role perceptions on the part of federal appeals judges.[85] One major role was that of the "Adjudicator," in which the social effects of a decision were stressed.* In this view, judges placed particular emphasis on the finality of decisions and of finding justice in each case. This immediate result orientation was tempered somewhat by a stated allegiance to legal stability and the principles of stare decisis. The other major role was that of the "Ritualist," in which the decisional process itself was emphasized. In this view, judging was seen as an end in itself, and great importance was placed on the production of satisfactory written opinions. The reasoning of the decision was thought to be more important than the specific results in the individual case.

The most traditional of the ancillary role perceptions was that of the "Administrator." In this view, the judges stressed their administrative function in the federal judicial system, particularly supervision of District Courts and administrative agencies and winnowing less important cases from the appellate stream. Many judges also believed they had a role to perform as an "Educator." The judges maintained that there was an obligation to educate the bar, the administrative agencies, and the higher state courts as to the demands of justice and enlightened law. They also believed they had a responsibility to make the general public more familiar with the ways in which the legal system could solve problems. The most controversial role perception was that of the "Lawmaker." The view of the judge as legislator, while acknowledged by many judges,

---

[85] J. Woodford Howard, Role Perceptions on the U.S. Courts of Appeals for the 2nd, 5th, and D.C. Circuits (Washington, D.C.: Federal Judicial Center, 1973), pp. 4-15.

*The titles used are Howard's.

received cautious endorsement by few. Only the most activist of the Court of Appeals judges accepted this view of their role within the system.

Another approach to the function or role of the Courts of Appeals emphasizes its relationship to the other courts in the system.[86] First, while subject to the review of the Supreme Court, the Courts of Appeals are largely independent. The number of cases reviewed by the Supreme Court is so small that the primary locus of systematic judicial review is in the Courts of Appeals. Therefore, these courts have the main responsibility for supervising the application and interpretation of national and state law in the District Courts and administrative agencies. A further result of the small volume of cases which reaches the Supreme Court is that the Courts of Appeals are the main providers of finality in the federal judicial system. These courts also serve to filter cases in the system and to shape issues on the way to the Supreme Court. The Courts of Appeals also actively engage in policy formation, for they develop areas of specialization in which they achieve almost total independence.

Regardless of the perspective, clearly the traditional view of the Courts of Appeals as mere middlemen between the District Court trial level and the Supreme Court should be discarded. Rather, they are independent sources of power and policy which effectively formulate national law residually and regionally. The Courts of Appeals perform functions

---

[86] J. Woodford Howard, The Flow of Litigation in the United States Courts of Appeals for the Second, Fifth, and District of Columbia Circuits (Washington, D.C.: Federal Judicial Center, 1973), pp. 65-75.

which for reasons of constituency, procedure, caseload, and interest, can not be performed by other federal courts.

The Business of the Courts of Appeals

The business of the Courts of Appeals consists almost entirely of appeals from decisions of the District Courts and certain administrative agencies. It is useful to have some information about the volume of cases that appear before these courts, the reasons for that volume, and the type of cases heard.

The Courts of Appeals handle appeals from the District Courts in four major areas; United States criminal cases, United States civil cases, private civil cases, and bankruptcy proceedings. Along with appeals from administrative agency rulings, the above make up the bulk of the appeals caseload.[87] The types of cases heard have changed little, but there has been a marked change in the volume of work for the Courts of Appeals. In 1960, there were 87,421 filings in federal District Courts, and by 1972, the filings were up to 143,216. This increase is substantial, but it is dwarfed by the explosion in the appeals caseload. In 1960, 3,899 appeals were taken to the Courts of Appeals, but in 1972, there were 14,535 appeals taken.[88] This increase has overburdened the Courts of Appeals, for a similar expansion in the number of authorized judgeships has not taken place. In the 1960's alone, the caseload

---

[87] Will Shafroth, "Survey of the United States Courts of Appeals," 42 Federal Rules Decisions 243, 294 (1967).

[88] Henry J. Friendly, Federal Jurisdiction: A General View (New York: Columbia University Press, 1973), p. 31.

increased approximately 200 per cent while there was a 43 per cent increase in the number of judgeships.[89] By the mid-1970's, with no further increase in judges, the caseload had increased another 120 per cent.[90] As a result of this appeals explosion, the time required for disposal of cases in the Courts of Appeals has lengthened considerably creating a growing backlog of pending cases.[91]

There are many possible explanations for the expanded caseload, which has made the Courts of Appeals proportionally the busiest courts in the system. Over the long term, the appeals explosion is part of the general increase in the resort to court action. The urbanization of America concentrated large numbers of people, upset traditional patterns of social relations with an attendant increase in criminal activity, and involved the courts with what were formerly private social matters.[92] The federal judicial system has received increased usage as a result of the growth of population, increased personal wealth, increased personal mobility, car ownership and use, and increased economic activity.[93] Thus, the courts are being employed more often as an avenue of redress for social, economic, and political problems. In particular, the Courts of

---

[89] Hart & Wechsler, Federal Courts, 56.

[90] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (Washington, D.C.: Commission on Revision of the Federal Court Appellate System, 1975), p. 1.

[91] Annual Report of the Director of the Administrative Office of the United States Courts (Washington, D.C.: Administrative Office of the United States Courts, 1964), pp. 132-33.

[92] Jacob, Courts as Political Agencies, pp. 38-41.

[93] Christopher A. Manning, Judgeship Criteria: Standards for Evaluating the Need for Additional Judgeships (Chicago: American Judicature Society, 1973), p. 3.

Appeals have suffered from an increased rate of appeals from an already growing caseload in the District Courts. Specifically, the growth of criminal appeals may be traced to the passage of the Criminal Justice Act in 1964 which provided free legal counsel for all indigent defendants.[94] At present, although the rates of appeals vary substantially, almost one in three of all contested District Court decisions are appealed.[95]

The heavy caseload has had a real impact on the Courts of Appeals. Many of the screening procedures designed to speed the flow of litigation were developed in the 1960's when the appeals explosion began. It is possible that these and other short cut procedures have had some influence on substantive decisions. Further, evidence suggests that fairly routine trials in the District Courts are often transformed in the Courts of Appeals into major civil liberties cases.[96] The care with which these cases must be heard is threatened by the increasing backlog of cases and the resulting demand for speed. One might argue that the lower federal courts are no longer physically able to do their appointed work.

The Court of Appeals for the Fifth Circuit

The Court of Appeals for the Fifth Circuit is in many ways the most interesting and perhaps the most important of all the Courts of

---

[94]Jerry Goldman, "Federal District Courts and the Appellate Crisis," 57 Judicature 211, No. 5 (December, 1973), 211-13.

[95]Howard, Flow of Litigation, p. 14.

[96]Richard J. Richardson and Kenneth N. Vines, "Review, Dissent and the Appellate Process: A Political Interpretation," 29 Journal of Politics 597 (1967), pp. 600-01.

Appeals.* The Fifth Circuit is the largest of the Courts of Appeals, with the largest caseload and the largest population served. The problems of the Courts of Appeals are most acute here and have had the greatest impact on internal procedures. While these problems are largely administrative and procedural, including overworked judges, increasing backlogs of cases, delay in hearing cases, coordination with the other circuits to arrange for aid through the assignment of visiting judges, lack of cohesion and loss of collegial nature of the court, their solution has constantly engaged the interest of the Administrative Office of the United States Courts and the Judicial Conference of the United States. Failure to solve the problems of the Fifth Circuit raises serious questions about the continued functioning of the entire judicial system. Thus, the Fifth Circuit serves as something of a laboratory for attempts to modernize the Courts of Appeals while maintaining the quality and tradition of their justice.

The Fifth Circuit is unique in a substantive as well as an institutional sense. It has been at the center of one of the most difficult legal, social, and political problems in our recent experience, the redefinition of the relationship between blacks and whites. In the 1950's and early 1960's, a large portion of civil rights cases were decided here. Precisely in that section of the country where racial relations were both an essential part of the culture and most out of step with the demands of justice and the times, the Fifth Circuit Court of Appeals was the final arbiter. The slow-moving but eventually

---

*Unless otherwise specified, all references to a court in this section refer to the United States Court of Appeals for the Fifth Circuit. The term "Fifth Circuit" is used hereinafter to refer both to the Court and to the organizational division.

successful enforcement of national law and policy in the South was in no small degree the result of the judicial statesmanship of the Fifth Circuit.

The Fifth Circuit was originally established as part of the court reorganization of 1801. At that time it consisted of South Carolina, North Carolina, and Georgia. In 1866, the circuit was altered to contain the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. The only subsequent addition was that of the Canal Zone in 1948. From the date of its creation, forty-three judges have served on the Court, and the size of the Court has grown from the original compliment of three judges in 1801 to its present roster of fifteen active appeals judges.[97] The greatest growth in size has occurred since 1948 when the Court was expanded to six judges. Today, the Fifth Circuit Court of Appeals is the largest English-speaking court in the world.[98] The central office and courthouse is located in a new Italian Renaissance building in New Orleans, Louisiana. The majority of its sessions are held there. The Court also holds sessions for from one to three weeks each year in Houston and Fort Worth, Texas; Atlanta, Georgia; Montgomery, Alabama; Jacksonville, Florida; and Jackson, Mississippi.

The business of the Court is not unlike that of the other Courts of Appeals, but there are local peculiarities which are worth mentioning. The most obvious characteristic of the Court's business is its volume. Although only one of eleven, the Fifth Circuit decided almost 25 per cent

---

[97] Legislative History of the U.S. Circuit Courts, 3, 105-17.

[98] Leslie A. Steele, "A New Home for the Fifth Circuit Court of Appeals," 47 Florida Bar Journal 450 (July, 1973).

of all cases disposed of after hearing or submission in the Courts of Appeals by 1970.[gg] The primary litigant in these cases, both as appellant and appellee, has been the United States government, reducing but not eliminating the Court's role as a forum for private litigation. The Court also handles more cases involving states or state agents as parties than do the other Courts of Appeals, and it hears a disproportionate share of civil liberties cases. The fields in which the Court has been most active include admiralty, civil rights, federal taxation, labor relations, insurance, and prisoner petitions.[100]

Another view of the Court's business may be had by examining rates of appeal and reversal in the Fifth Circuit. Approximately 30 per cent of District Court decisions and less than 2 per cent of administrative orders are appealed. Of these appeals, the Court reverses or otherwise modifies the lower decision after hearing in about one-third of the cases. The rate of appeal is rather low, but the rate of reversal is the highest among the Courts of Appeals. In particular, the decisions of the Tax Court, the National Labor Relations Board, and the District Courts in civil rights cases were subject to the highest reversal rate.[101] Of special interest is the difference in the Court's reversal rate of certain districts within the circuit. There is real evidence of an urban-rural split within the Fifth Circuit, particularly with regard to civil rights cases. The districts with the highest rates of reversal were Northern Florida, Northern Georgia, Southern Mississippi, and Southern

---

[gg] Howard, Flow of Litigation, p. 3.

[100] Ibid., pp. 6-7, 9-12.

[101] Ibid., pp. 13-29, passim.

Alabama. The districts with the lowest reversal rates were Eastern Louisiana and Southern Texas.[102] This difference in reversal rates illustrates the diversity of the circuit, in this case between the rural Old South and the large urban areas of New Orleans and Houston. The Court's responsibility of representing national judicial power in the region and maintaining uniformity in the law is thus particularly difficult.

Another approach to the business of the Court is to examine the rate of dissent on the Court, indicating the social and philosophical degree of disagreement among the judges. It must be noted that there is much less dissent in the Courts of Appeals than in the Supreme Court. While the regional base of the circuits may provide judges who have similar attitudes, the main reason for the lower reversal rate is a function of size. The Supreme Court has nine justices, and dissent is often collegial. The vast majority of cases in the Courts of Appeals are heard by three-judge panels, and dissent is of necessity a lonely experience.[103] Thus, it is surprising that the Fifth Circuit rate of dissent of 14 per cent is the highest among the Courts of Appeals.[104] The most notable aspect of dissent in the Fifth Circuit is its fairly consistent nature, for dissent is most likely when Oistrict Court decisions are reversed, occurring with the greatest frequency in civil liberties cases. Dissent in the Fifth Circuit therefore usually constitutes an expression of illiberal

---

[102] Ibid., p. 31.

[103] Burton M. Atkins, "Judicial Behavior and Tendencies Toward Conformity in a Three Member Small Group: A Case Study of Dissent Behavior on the U.S. Courts of Appeals," 54 Social Science Quarterly 41 (June, 1973).

[104] Richardson and Vines, Review, Oissent, p. 609.

feeling, for the dissent upholds District Court decisions which deny claimed civil liberties. The major exception to the rule is labor cases in which dissent is usually pro-labor.[105]

The Courts of Appeals are all operated according to the same broad procedures, previously discussed. Each one, however, has considerable freedom in arranging its internal procedures dealing with the rules under which cases will be heard and processed and the personnel who will aid the judges in fulfilling their responsibilities. The local peculiarities of each court usually reflect the problems faced by each court, and this is certainly true of the Court of Appeals for the Fifth Circuit. The following examples of Fifth Circuit operating procedure reveal the concern with its heavy caseload and growing backlog of pending cases.

The staff of the Court is organized much the same as other Courts of Appeals into clerk's staff, staff attorney personnel, and library staff. The Court has the largest clerk's staff among the circuits (33) and the largest total staff (42), in keeping with its caseload. The clerk's staff, including several varieties of deputy clerks and secretaries, is responsible for docketing, calendaring, some unopposed, procedural motions, publications, and notification. There are three staff attorneys who handle pro se matters after docketing, provide legal advice to deputy clerks who handle prisoner correspondence, prepare proposed orders or opinions for summary calendar or pro se cases as directed by the Chief Judge, abstract current "slip" or summarized opinions, and are occasionally involved in screening cases. The staff attorney positions are permanent in the Fifth Circuit, and they are under

---

[105]Richardson and Vines, Politics of Federal Courts, pp. 136-38.

the supervision of the chief administrative officer of the circuit, the Circuit Executive. The law library of the Court is one of the largest and is the only one among the Courts of Appeals with a lawyer serving as librarian. There are four positions on the library staff handling over 120 law reviews, journals, and court report services.[106]

The Fifth Circuit has developed many internal procedures which differ from the general requirements of the Federal Rules of Appellate Procedure. While filing notice of appeal with the clerk of the District Court whose judgment is appealed is the general rule, in the Fifth Circuit, a copy of the notice of appeal is also sent to the clerk of the Court of Appeals and the appropriate court reporter.[107] This informs the Court at the earliest possible time of an appeal, and it also alerts the court reporter as to probable demands on his time. The practice has also developed in the Fifth Circuit for reporters to contact the appellant's attorney to determine if a transcript of the District Court proceedings will be required.[108] Pro se matters, where parties act on their own behalf, are handled by the staff attorneys. They process applications for leave to appeal in forma pauperis, applications for the appointment of counsel, and preliminary preparation of cases in which the party has no lawyer.[109]

All cases are docketed immediately upon receipt of notice of appeal, but criminal cases are docketed first, and court reporters must give

---

[106] Langner and Flanders, Internal Procedures, pp. 67-90, passim.

[107] Ibid., pp. 11-12.

[108] Whittaker, Fifth Circuit, p. 2.

[109] Ibid., p. 4.

priority to preparing transcripts in criminal cases. This is part of the special procedure instituted under Chief Judge Elbert P. Tuttle in the 1960's to expedite criminal appeals. This procedure provides for early review of appeals by clerical and staff attorney personnel, early consultation with the attorneys, accelerated filing of record and briefs, and advanced hearing dates. There is also a special deputy "monitoring" clerk to see that all papers and briefs are filed on schedule and to obtain the agreement of the parties to schedules.[110] Most cases are placed on the general docket, but appeals taken in forma pauperis go on the miscellaneous docket, being transferred to the general docket if granted.[111]

The Fifth Circuit has the most complete and far-reaching screening procedure among the Courts of Appeals. The Chief Judge appoints a panel of judges to screen pending appeals. The panel determines the extent, if any, of oral argument to be allowed in each case, but if the oral argument is allowed, a different panel will be assigned to hear the case. The screening panel may determine that the appeal is frivolous and dismiss it, by unanimous vote assign the case to the summary calendar for disposition without argument, or place the case on the regular calendar for either limited oral argument or full oral argument not to exceed thirty minutes per side. If the case is assigned to the summary calendar, immediate written notice is sent to the parties.[112] Through this device, the Court has been able to limit the cases given full

---

[110]Langner and Flanders, Internal Procedures, pp. 14-16, 39-40.

[111]Whittaker, Fifth Circuit, p. 4.

[112]Langner and Flanders, Internal Procedures, pp. 35-38.

argumentation to the most important and saved considerable judicial man-hours.

During the course of proceedings in the Courts of Appeals, the attorneys often file both procedural and substantive motions requesting anything from an extension of time to file briefs to a dismissal of the appeal based upon the briefs and record. These motions can considerably delay the progress of an appeal, and the Fifth Circuit has adopted procedures to reduce that delay. Certain procedural and unopposed motions may be acted upon by the clerk of the court, subject to review by a judge on timely request by an adversely effected party. Additionally, the clerk is required to file notice with the Court when granting a motion will delay the appeal. Some motions may be granted by a single judge, but most go to a designated "motions" panel. Motions are decided solely on the papers and briefs, with no oral argument unless the Court orders it. Staff attorneys usually process motions and prepare memoranda on pro se motions and petitions. If motions in a case are filed subsequent to the assignment of the case to a particular hearing panel, the motions are heard by that panel rather than the motions panel.[113] The motions panel also rules on emergency matters when the Court is not in regular session.[114]

The briefing procedures in the Fifth Circuit also reflect the concentration upon speed. The time requirements for filing appeals briefs, answering briefs, and reply briefs, are shorter than required by the Federal Rules of Appellate Procedure. The general time limits are forty

---

[113] Ibid., pp. 25-29.

[114] Jerome D. Chapman, "Expediting Equitable Relief in the Courts of Appeals," 53 Cornell Law Review 12 (November, 1967).

days, thirty days, and fourteen days, respectively. In the Fifth Circuit, the time requirements are thirty-five days, twenty days, and seven days. To facilitate the filing of briefs in cases where funds are a problem, such as appeals filed in forma pauperis, typewritten briefs may be substituted for the normally required printed briefs.[115]

Judges are selected for hearing panels by the Chief Judge rather than by the clerk of the court, who has that responsibility in some circuits. In making these assignments and in setting the calendar with the clerk, the Chief Judge takes into account the number of cases in the "ready" pool, the availability of senior judges and visiting judges from other circuits, and personnel, travel, and space requirements.[116] Unlike some circuits, in the Fifth Circuit, all written decisions are still published in one form or another. In those cases in which no opinion is written, the decisions appear in tabular form in the Federal Reporter.[117]

The special or local procedures examined above relate to the primary problem of the Fifth Circuit, its heavy caseload. Some argue that this workload exceeds the Court's capacity.[118] At the least, the caseload is a problem, for even though the number of judges on the Court has expanded faster than on any other Court of Appeals, the caseload per judge is also

---

[115] Langner and Flanders, Internal Procedures, pp. 18-20.

[116] Ibid., p. 44.

[117] Ibid., pp. 52-55.

[118] Charles Alan Wright, "The Overloaded Fifth Circuit: A Crisis in Judicial Administration," 42 Texas Law Review 949, No. 7 (October, 1964).

increasing.[119] The most common recommendations for alleviating the problem are splitting the Fifth into two circuits or establishing more judgeships for the circuit. The second recommendation brings up the other major problem of the Fifth Circuit, its size.

As previously mentioned, this court is the largest, with fifteen active judges, creating serious operational difficulties. There is a loss of the special sense of collegial decision-making so essential to appellate courts. The Court's size and the large geographical area it covers also make judicial conferences and en banc proceedings cumbersome. The size of the Court also increases potential intra-circuit conflict, for the larger the number of judges, the larger the number of panels, and the larger the number of possible interpretations of the law.[120] The continued expansion of the Court has aggravated the problems of communication, administration, and uniformity in interpretation.

In response to this problem, the Court has adopted certain informal practices. There is constant consultation among the judges by phone and monitoring of slip opinions to try to avoid inconsistency among the panels. No en banc proceedings are held unless a judge specifically requests one within a certain time after filing. In an effort to prevent intra-circuit conflict, non-panel members may circulate letters of criticism to the full Court after examining slip opinions. The clerk will then hold up publication of the opinion until there is a chance

---

[119] Shafroth, Survey of the United States Courts, pp. 253, 269.

[120] Commission on Revision, Structure and Internal Procedures, pp. 57-58.

for an exchange of views and modification of the opinion.[121] Unfortunately, these practices have only eased rather than solved the problems of the Fifth Circuit.

The federal court system is thus our institutional setting. Within the requirements of that system, men must perform their judicial duties while remaining a functioning part of their environment and participants in the life of their communities. The inevitable tension which results is a vital element of this dissertation.

---

[121] J. Woodford Howard, Decision Making Procedures in U.S. Courts of Appeals for the 2nd and 5th Circuits (Washington, D.C.: Federal Judicial Center, 1973), pp. 5-10.

CHAPTER II
THE SOUTHERN SETTING

On May 17, 1954, Chief Justice Earl Warren announced the decision of the United States Supreme Court in Brown v. Board of Education of Topeka, et al.,[1] four cases which had been consolidated for hearing. It was that segregation of white and Negro children in the public schools of a state solely on the basis of race, even if the facilities were equal, constituted a denial to the Negro children of the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution.* In its implementing decision a year later,[2] the Court held that the primary responsibility for ending segregation in the schools was the burden of local school authorities, acting in good faith and overseen by the federal courts. Thus, the lower federal courts were involved in an attack on one of the venerable institutions of the South.

In the previous chapter, the structure and procedure of the federal court system was described. The courts do not operate in a vacuum, however, but within an environment influenced by the personal characteristics of the judges, their political loyalties, and the values, opinions, and

---

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

*The cases which were consolidated into Brown v. Board of Education of Topeka included appeals from state and federal courts in Delaware, Kansas, South Carolina, and Virginia. Hereinafter, the cases will be referred to either as Brown or Brown v. Board of Education.

[2] Brown v. Board of Education of Topeka, et al., 349 U.S. 294 (1955).

beliefs of their communities and regions. It is therefore essential to an understanding of the way the courts of the Fifth Circuit handled their oversight task, to consider their southern setting.

It is the purpose of this chapter to examine that climate of opinion from the time of the Brown decision in 1954 until the election of John F. Kennedy in 1960. In order to understand that setting, the background of belief, the nature of the South and of Southerners, as well as the reaction to the Brown decision will be examined.

It would be difficult to deny that the citizens of each region of the United States, in many cases even of individual states, feel that they have a special character, and that their region is in some way unique. Few, however, feel their difference more strongly than Southerners. In spite of the growing homogeneity of all Americans as a result of mass communications, marketing, and increased mobility, the South has been and is still perceived as being somehow different or special.

A note of caution must be stated before proceeding with our description of the South and Southerners. The South is in many ways an intellectual construct, symbolic rather than real. That symbol has value as a generalization, but the conventional wisdom now accepts that there are many Souths.* Miami, Atlanta, and Houston are very different from one another, and all three have little in common with the black belt of the Deep South. It has been reasonably argued that the border states

---

*Some include within the South only the eleven states which constituted the Confederacy: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Others might add to this list the border states of Kentucky, Maryland, Missouri, and West Virginia, and the state of Oklahoma. The discussion hereafter applies to both definitions.

(Kentucky, Maryland, Missouri, Oklahoma, and West Virginia), the "peripheral" South (Texas, Tennessee, Florida, Arkansas, and North Carolina), and the Deep South (Alabama, Georgia, Louisiana, Mississippi, and South Carolina), and Virginia are three rather distinct sections.[3] The notion of a South, however, will be useful to analyze the background of the climate of opinion in the 1950's. What follows is not intended as an exhaustive description of the South and Southerners. Rather, those aspects of the South which will illuminate the subsequent discussion will be presented.

Before proceeding with our analysis, one further caution seems in order. What follows is based on the observations of men who have written about the region. Proper evaluation of their work requires attention to the perspective from which they see the South. Some of the men are very much insiders, Southerners writing about themselves and their home. This is clearly the case with William D. Workman, Brooks Hays, James M. Dabbs, W.J. Cash, and Hodding Carter. They represent the Old South as either segregationists or moderates. Other Southerners, like Ralph McGill and Hodding Carter, III, though very much a product of the South, strongly dissented from the region's racial attitudes. Others who have written about the South, such as Numan V. Bartley, Jack Peltason, James Silver, Howard Zinn, and Keith McKean are essentially outsiders, national commentators on the regional scene. While their views may be based on experience within the South, they write about others and not themselves. The distinction between these two groups of men must be kept in mind.

---

[3] E.g., Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's (Baton Rouge, Louisiana: Louisiana State University Press, 1969), p. 68.

One way to approach southern values and culture is to divide them into two patterns or streams of thought that are important for Southerners.[4] One treats men as individual actors, emphasizing self-reliance and individual opportunity. This attitude is akin to the modern idea of equality. The second viewpoint is patriarchal. In this picture of society, notions of caste and class, family, birthplace, and attachment to the southern past are stressed.[5] The South is thought of as a large family with white men filling the roles of father and provider, white women as homemakers, and most blacks as children to be governed, protected, or chastized. With regard to the latter, there has often been a real noblesse oblige whereby responsibility for others is both felt and taken. At the same time, these "wards" have been subject to rapacious exploitation.[6]

That the South is a region of contradiction is also demonstrated by the conflicting values of the southern black belt planters, bankers, and merchants, who have traditionally ruled state politics in the Deep South.[7] They were committed to what they believed was a traditional southern view of life, elements of which included attachment to white supremacy, a distrust of democratic principles, a belief in an organic and closed society, states' rights and sovereignty, and a distrust of city life and politics. However, many of these men were also attracted

---

[4]Keith F. McKean, Cross Currents in the South (Denver: Alan Swallow, 1960), pp. 7-8.

[5]Ibid., pp. 9-20, 36-38.

[6]Ralph McGill, The South and the Southerner (Boston: Little, Brown and Company, Atlantic Monthly Press, 1959), p. 27.

[7]Bartley, The Rise of Massive Resistance, pp. 17-18.

to desperately needed economic progress in the South and its possibilities for pecuniary gain.[8] The difficulty has lain in the contradicting nature of the two desires. It was the persistence of agrarian values, the rigidity of the social structure, the in-group nature of the political structure, the weakness of social responsibility, and the conformity of thought and behavior, which hampered regional economic progress.[9]

Perhaps the most basic paradox about the South was that the very qualities of that region which most would agree were laudable, or at least were appealing, were also the source of some of its least admirable qualities. W.J. Cash wrote that:

> Proud, brave, honorable by its lights, courteous, personally generous, loyal, swift to act, often too swift, but signally effective, sometimes terrible in its action--such was the South at its best. And such at its best it remains today, despite the great falling away in some of its virtues. Violence, intolerance, aversion and suspicion to new ideas, an incapacity for analysis, an inclination to act from feeling rather than thought, an exaggerated individualism and a too narrow concept of social responsibility, attachment to fictions and false values, above all too great attachment to racial values and a tendency to justify cruelty and injustice in the name of those values, sentimentality and a lack of realism--these have been its characteristic vices in the past. And despite changes for the better, they remain its characteristic vices today.[10]

Hodding Carter maintained there was an appealing attachment to pride, honor, and family; a concern and interest in history and the romance of

---

[8] Ibid., pp. 237-50, passim.

[9] William Nicholls, Southern Tradition and Regional Progress (Chapel Hill: University of North Carolina Press, 1960), p. 15.

[10] W.J. Cash, The Mind of the South (New York: Alfred A. Knopf, 1941), pp. 428-29.

myth; and the rugged individualism of a society not so far removed from frontier life. Connected with these values, there was also an almost casual attitude toward violence; an intransigent conservatism; and a mental and moral conformity with the power to bind whole communities.[11]

The concern with the past, which Hodding Carter discerned in a feeling of resentment against the North as a conquering nation and a view of Appomattox as an event of only yesterday,[12] often produced an inability to see reality. Yet, in the South, there was a fatalism not characteristic of the rest of the country. This sense of life was molded by an acceptance of failure and defeat as part of one's common experience.[13] The South was, in ways, a defeated nation subjected to occupation. This endurance, and refusal to believe that things will always turn out for the best, has always seemed to make the Southerner more at home with the world and less restless, and Southerners have both benefited and lost as a result.

Since the past and the present are more important than the future, the values of relaxation, leisure, manners, formal courtesy, and neighborliness are part of what James McBride Dabbs calls the Southern Heritage.[14] Similarly, the political and social attitudes of the South emphasize the conservation of past beliefs and practices, a tendency to

---

[11]Hodding Carter, Southern Legacy (Baton Rouge, Louisiana: Louisiana State University Press, 1950), pp. 24, 50-52.

[12]Ibid., p. 19.

[13]James McBride Dabbs, "Into the Modern World," in We Dissent, ed. by Hoke Norris (New York: St. Martin's Press, 1962), pp. 138-39.

[14]James McBride Dabbs, The Southern Heritage (New York: Alfred A. Knopf, 1958), pp. 27-30.

accept the world as it is rather than to change it, and a general hostility to reform and ideology. Further, if one seeks comfort from the present and identification from the past, the critical and inquiring attitude necessary for change in the future is not developed. These qualities led to an emphasis on the local, immediate, concrete aspects of life and a changeless and ordered social structure.[15]

One of the most informative qualities of Southerners is that, above all else, they value a sense of "place."[16] This feeling is clearly expressed in the southern emphasis on one's family and close relationship with one's kinfolk. The relations between blacks and whites depends upon an awareness that each has a given "place" which is proper. The southern sense of "place," however, is much more than a kind of family and social identification, for it also has a physical meaning. In describing their own qualities, Southerners point to their deep "love of the land."[17] This is a deep attachment to the soil. It is almost a feeling that Southerners are a product of their land. The closest attachment is to one's home, but it is also expressed by love of one's community, county, and state. One of the Southerner's reasons for the determination to remain southern and defend the region against "outside intervention" is the importance of the land and the rights attached to it. The southern tradition of national patriotism, notwithstanding the Civil War, is the broadest expression of this sense of "place." It has therefore always

---

[15] James McBride Dabbs, Who Speaks for the South? (New York: Funk & Wagnalls Company, Inc., 1964), pp. 3-8.

[16] Dabbs, The Southern Heritage, p. 33.

[17] Ibid., p. 26.

been more important for Southerners to know who they were rather than what they did.

One further crucial characteristic of the South must be here mentioned; that is, the dominance of race. Most controversies in the South, regardless of the subject, seem to resolve themselves into questions of race. The two constants of southern life have been the conviction that the races should be separate and that there must be white domination in the South.[18] These convictions were originally put into practice through slavery and then through segregation, a symbol of the Old South and its victory over Reconstruction.[19] The maintenance of white supremacy has been the central value of southern life. It should not be surprising, therefore, that the Brown decisions were seen as a direct attack on the South, to be resisted though they were the supreme law of the land.

While there was an absence of genuine liberal alternatives in the South, the black-belt leadership did have some opponents. These included neopopulist mavericks like Huey Long of Louisiana, and an increasing number of conservative businessmen in the "New South" tradition.[20] Partly as a result of the slowly growing influence of such men and the desire to improve regional economic performance, the 1940's were something of a liberalizing period in the South. Moreover, the racism of the Nazi enemy in World War II made easy acceptance of racism in the South more difficult to maintain. While the major patterns of

---

[18]Carter, Southern Legacy, pp. 87, 146.

[19]Dabbs, The Southern Heritage, p. 127.

[20]Bartley, The Rise of Massive Resistance, pp. 20, 25. See also, C. Vann Woodward, Origins of the New South 1877-1913 (Baton Rouge: Louisiana State University Press, 1951), and Carl N. Degler, The Other South: Southern Dissenters in the Nineteenth Century (New York: Harper & Row, 1974).

discrimination remained, the years after the war saw a grudging acceptance that segregation would end one day, and there were even signs of a breach in that practice through voluntary desegregation in a few southern colleges.[21]

This trend was checked to some extent by real dissent in the late 1940's. The Dixiecrats represented social, economic, and political revolt against the New and Fair Deals and the beginnings of more active national involvement in southern racial practices. The Dixiecrats countered attacks on southern social institutions and reasserted the ideology of states' rights.[22]

It was clear that the nation would not continue to ignore the legal structure of racial discrimination which had prevailed in the South from the 1870's through World War II. In the early 1950's, the cases which became Brown vs. Board of Education were under consideration in the federal courts. In reaction, Southern legislatures, particularly in Georgia, began preparation of laws to circumvent an expected Supreme Court ruling which would end segregation in the schools.[23]

On May 17, 1954, the United States Supreme Court announced its decision in Brown vs. Board of Education. That decision overturned more than a half century's acquiesence in the southern practice of segregation as long as separate facilities were equal.[24] Speaking for the Court, Chief Justice Earl Warren held that separate was inherently unequal in

---

[21]Hodding Carter, III, The South Strikes Back (Garden City, New York: Doubleday & Company, Inc., 1959), pp. 12-15.

[22]Bartley, The Rise of Massive Resistance, pp. 31-32.

[23]Ibid., pp. 53-55.

[24]See Plessy vs. Ferguson, 163 U.S. 537 (1896).

education and that therefore segregation of the schools deprived black plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment. Because of the complexity of the problem and the broad variety of local conditions, the Court restored the case to its docket and ordered further argument on the issue of appropriate relief. In the second Brown decision, announced on May 31, 1955, the Court ordered that desegregation of the public schools was to be worked out by local school authorities under the watchful eye of the lower federal courts. The plaintiffs, and all students, were to be admitted to public schools on a racially non-discriminatory basis with all deliberate speed. The speed and degree to which the Brown decisions were enforced thus largely depended on the attitude adopted by the South.

The immediate reaction to Brown varied from place to place, but some generalizations can be made. In the border states, there was either token compliance or preparation for compliance as plans for desegregation were proposed.[25] In the peripheral South, there was little action either in compliance or resistance, and a good deal of watchful waiting.[26] On the other hand, in most of the Deep South, there was strong opposition to the ruling, and, with the exception of Alabama, legislation was passed making compliance with Brown, in effect, a violation of state law.[27] With the possible exception of Mississippi, whose reaction was symbolized by Judge Tom Brady's "Black Monday" speech excoriating the Supreme Court and

---

[25]Thomas D. Clark, The Emerging South (New York: Oxford University Press, 1961), p. 187.

[26]Bartley, The Rise of Massive Resistance, p. 68.

[27]Ibid., p. 77.

its decision,[28] the general mood of the South was, however, calmer than many had expected and little concrete action was taken.

Brooks Hays, at the time a moderate Congressman from Little Rock, has since argued that "the calm that initially prevailed in the South was eventually broken by the establishment of the White Citizens Councils and the increased activity of the NAACP."[29] The pressures for enforcement of Brown by the NAACP and the activities of the Citizens Councils and similar movements unified and maintained opposition through the 1950's.[30] Added to these forces was the impact of the second Brown decision in 1955 which set forth the general procedures by which localities would present plans for school desegregation and proceed to compliance with the law. Through the 1950's, immediate reaction in the South became a set climate of opinion. To determine the atmosphere in which the courts were required to apply the mandate of Brown, it is now necessary to examine the ideas and strategies of its opponents and to try to understand why and how the particularly hostile environment developed. Segregationists were the most important group of men during the period under consideration, for they were vocal and organized, and they represented the views of the vast majority of southern citizens. According to James W. Silver, a dogma for most segregationists (the following example referring to Mississippi) would include the following articles of faith:

---

[28]Carter, III, The South Strikes Back, p. 26.

[29]Brooks Hays, A Southern Moderate Speaks (Chapel Hill: University of North Carolina Press, 1959), p. 88.

[30]Carter, III, The South Strikes Back, pp. 16-17.

a) the biological and anthropological "proof" of Negro inferiority
b) the presumed sanction of God as extrapolated from the Bible
c) the present state of affairs as one that is desired and endorsed by Negroes and whites alike
d) the repeated assurance that only through segregation can law and order prevail
e) a view of history which declares that there has been a century of satisfactory racial experience in Mississippi
f) a constitutional interpretation which denies the validity of the Supreme Court desegregation decisions.[31]

To complete this dogma, add a political belief in the supremacy of states' rights,[32] and, as Numan V. Bartley argues, a belief that the civil rights movement was the result of conspiracy and manipulation by outside, un-American forces.[33]

In the tense atmosphere which followed the Brown decisions, the influence and activity of the Ku Klux Klan increased. There was an increase in its membership and appeal to sympathizers, but with the exception of Alabama, the Klan did not gain the power and prestige in the 1950's similar to that it had in the 1920's. Where the Klan was active, its propensity for violence was an effective force for absolute conformity of white opinion, a consistent goal of the segregationists.[34] Unfortunately for the Klan, state political leaders and the White Citizens Councils provided more socially acceptable and seemingly responsible

---

[31]James W. Silver, Mississippi: The Closed Society (New York: Harcourt, Brace & World, Inc., 1966), pp. 149-50.

[32]Ibid., p. 22.

[33]Bartley, The Rise of Massive Resistance, p. 170.

[34]Ibid., pp. 201-208.

alternatives. These two groups set the tone and developed the tactics of the segregationist South.

The Citizens Council was first organized by planter Robert Patterson in Sunflower County, Mississippi, in the summer of 1954. Patterson had heard Judge Brady's "Black Monday" speech and was convinced of the need for an organization to provide effective opposition to, in his view, the clearly erroneous Brown decision. By the fall of 1954, the Citizens Council was out in public, advertising itself as a responsible organization committed to preserving segregation, preventing violence [a reference to the Klan], and reactivating the precepts of states' rights. The Council was extremely popular in Mississippi, and by the end of the year was a force in state and local politics. In October, 1955, the organization newspaper, "The Citizens' Council," began publication, and by the next year, the Citizens Councils had 80,000 members and had expanded to other states in the South. In April of 1956, the national organization, the Citizens Councils of America, was established. Eventually it grew to 300,000 members. By the beginning of 1958, the Citizens Councils dominated Mississippi politics and white community opinion, was quite powerful in Alabama and Arkansas, and had varying degrees of influence elsewhere.[35]

The Citizens Councils employed several tactics. The most important of these included counterattack against the efforts of the NAACP to find plaintiffs for school desegregation suits, organization of large scale protest, presentation of the cause of "constitutional government," and the assertion of the doctrine of interposition (to be discussed

---

[35]Carter, III, The South Strikes Back, pp. 30-197, passim.

subsequently).[36] Economic pressure was brought to bear against individual blacks and their organizations, and a constant stream of anti-black literature was distributed.[37] The Citizens Councils demanded total white conformity for the cause of segregation and brought intense social and economic pressure against the few southern whites who spoke in favor of compliance with Brown.[38] The Councils also organized boycotts of national companies in retaliation for what they viewed as unfriendly attitudes to southern racial policies.[39]

In general, rural and working class whites in the South were segregationist and most urbanites were somewhat more moderate.[40] Thus, most of the Citizens Council membership outside of Mississippi was rural and working class.[41] In Mississippi, however, the Citizens Council membership and other segregationist leaders were drawn from the "best people" of the state.[42] In that state and elsewhere, the involvement of such people gave added respectability to the organizations and further isolated white liberals and moderates.[43]

---

[36] Ibid., p. 72.

[37] Ibid., pp. 109-12, 123-24, 137.

[38] Ibid., pp. 143-47.

[39] Ibid., p. 159.

[40] J.W. Peltason, 58 Lonely Men: Southern Federal Judges and School Desegregation (New York: Harcourt, Brace & World, 1961), pp. 33-34.

[41] Bartley, The Rise of Massive Resistance, p. 104.

[42] Hodding Carter, III, "Meanwhile in Mississippi--Solidarity Forever?," in We Dissent, ed. by Norris, p. 91.

[43] Ibid, pp. 94-95.

Segregationists in the South were not limited to those who belonged to specific organizations committed to white supremacy.* If the Citizens Councils and secondarily the Klan served as the workers and zealots for segregation, the real white supremacy leadership outside of Mississippi came from entrenched politicians.[44] The national as well as the state and local leadership of the South opposed desegregation. Nineteen U.S. senators and eighty-two U.S. Congressmen signed the "Southern Manifesto" in 1956, opposing the Supreme Court's ruling and federal intervention in the public schools.**

Separation of the races was to be defended by a campaign of "massive resistance." The entire South would use all steps short of violence or secession to oppose desegregation of the schools. The two essential doctrines for this position were the primacy of states' rights in such "local" matters as education, and the more aggressive doctrine of "Interposition," according to which state sovereignty would be interposed between the federal courts and local school boards and officials.[45] Under this doctrine, schools did not have to comply with federal court orders

---

*In a general sense, the term segregationist applies to all who favored separation of the races, and thus would include a majority of all white Southerners. Here, the term is used in a narrower sense to describe political leaders committed to complete opposition to the implementation of the Brown decision.

[44]Samuel DuBois Cook, "Political Movements and Organizations," in The American South in the 1960's, ed. by. Avery Leiserson, with an Introduction by Alexander Heard (New York: Frederick A. Praeger, Publisher, 1964), p. 133.

**Among those Southerns who did not sign the Manifesto were Senators Albert Gore and Estes Kefauver of Tennessee, U.S. Representatives Dante Fascell of Florida, Jack Brooks, Homer Thornberry, W.R. Poage, Jim Wright, and George Mahon of Texas, and the entire delegations from Oklahoma and Kentucky. Lyndon Johnson and Sam Rayburn were not asked to sign.

[45]Bartley, The Rise of Massive Resistance, pp. 126-128.

to present desegregation plans and admit all students without discrimination based on race. Since the schools were operated under the authority of the states, federal court orders directing them to take certain actions were without legal force. The theory of "interposition," and the entire campaign of massive resistance, including state legislative attacks on Brown, was first developed in Virginia in 1955 and became the example for the Deep South.[46] A vast majority of Virginians favored segregation, and even a bare majority favored closing the public schools rather than submitting to integration.[47]

The basis of massive resistance and interposition was a denial of the validity of the Brown decisions, and this was the position taken by Virginia and the Deep South. While most of the South was unified by 1958, the peripheral South did not really adopt the logic of massive resistance. Rather than direct opposition, it attempted to avoid compliance with the Brown decision.[48]

Two methods of avoidance employed by the state legislators were pupil placement laws and subsidies to private schools, not subject to the Brown decision. Pupil placement laws which were not discriminatory on their face but which allowed local school boards broad latitude to continue separate school systems were largely successful, particularly

---

[46]Ibid., pp. 111, 134.

[47]Robbins L. Gates, The Making of Massive Resistance: Virginia's Politics of Public School Desegregation, 1954-1956 (Chapel Hill: University of North Carolina Press, 1962), p. xix.

[48]Bartley, The Rise of Massive Resistance, pp. 138-44, 292.

after the concept was not disallowed by the Supreme Court.[49] Likewise, the closing of public schools by localities and state grants to private all white academies met with some success in Mississippi, Alabama, and Virginia.[50]

This legislation and the statutes which made compliance with Brown a crime were useful to segregationists, but they were aided also by the passive nature of the judicial process and the national political climate. Southerners were able to find conservative allies in the North for their attack on the Supreme Court by combining the causes of segregation and security consciousness.[51] Further, judicial action depended upon the initiation of lawsuits by individuals or organizations like the NAACP, for the Brown decisions gave the lower federal courts no real mandate beyond the supervision of locally originated desegregation plans. In the absence of a suit, the courts could not order schools to desegregate. To prevent blacks from bringing such suits, coercion, intimidation, political and legal attacks against both the NAACP and individual blacks, and, on occasion, violence were employed.[52]

---

[49]Peltason, 58 Lonely Men, pp. 78-82. The Supreme Court refused to review a decision of the Fourth Circuit Court of Appeals, Carson vs. Warlick, 2 RRLR 16 (1956), which held that a pupil assignment law was not inherently discriminatory or unconstitutional, but which warned that if applied in a discriminatory fashion, such a law might be held unconstitutional.

[50]Ibid., pp. 193-94.

[51]Bartley, The Rise of Massive Resistance, pp. 290-291.

[52]Peltason, 58 Lonely Men, pp. 57-65. A word should be added about violence. Violence in the 1950's was directed against supporters of the Brown decision. Violence included more than physical attacks against individuals, for official failure to curb mob violence was an aspect of the problem. Further, the possibility of violence was used by local officials as a legal claim that the need to maintain order excused officials from obeying desegregation orders. Peltason, 58 Lonely Men, pp. 136-146.

Thus, an overall segregationist strategy was developed to avoid, or at least postpone, the effect of the Brown decision. This strategy, described by J.W. Peltason, moved from step to step as follows: 1) mobilization of political power to discourage school boards and judges from proceeding against segregation; 2) creation of obstacles to make it difficult for blacks to take desegregation suits before judges; 3) persuasion of southern federal judges not to issue desegregation orders through legal argument; 4) cricumvention of those orders which were issued; 5) persuasion of school boards that they had no obligation to desegregate or cooperate with judges in any way; and 6) attacking the Supreme Court, its decisions, and its personnel.[53]

The Case for the South by William D. Workman, a South Carolina newspaperman,[54] published by Devin-Adair six years after the Brown decision, provides frame and flavor of much of the "respectable South" thinking. Workman believed that the South was the most homogeneous section of the nation. It was a large clan based on its Northern European heritage and spared from the waves of immigration. The South retained its frontier virtues and relied on custom and its history as guides for action. The South had long been the subject of hatred in the North and merely asked to be left alone. After all, Workman argued, the South had not sought to impose its mores on other regions.

The basic conflict over the Brown decision, according to Workman, went beyond the issue of segregation. In his view, the Supreme Court had twisted the Constitution so as to remove its heart, the Tenth Amendment.

---

[53] Ibid., p. 40.

[54] William D. Workman, Jr., The Case for the South (New York: Devin-Adair Company, 1960).

The Supreme Court had become an instrument of absolutism in the conflict between the rightful sovereignty of the states and the overextension of the authority of the federal government. This was particularly pernicious since federal imperialism proceeded on the basis of due process and equal protection, "broad and fuzzy"[55] terms at best.

The issue of segregation was misrepresented in the national news media, for the South was unable to get a fair hearing. In fact, segregation was not prejudice and white supremacy but "preferential association."[56] The best Southerners rejected both integration and the KKK and supported the Citizens Councils. Further, it was the only possible social organization in the South to insure domestic tranquility, as no other region had the same percentage of Negroes in its population. Discontinuance of segregation would ruin southern education as the influx of Negroes would lower school standards. While it was clear that individual Negroes could be brilliant and successful, Negroes were inferior to whites as a race. Ironically, the Brown decision and pressure from the North made things more difficult for the Negro and reversed a growing trend to increased racial cooperation.

Workman also warned against the champions of integration among whom he included the NAACP, the AFL-CIO, the Americans for Democratic Action, the National Council of Churches, and the Anti-Defamation League of B'nai Brith, some of which he labeled as "red-front"[57] organizations. None of them realized that true Americans (read Southerners) would never

---

[55] Ibid., p. 36.

[56] Ibid., p. 46.

[57] Ibid., pp. 190-191.

be told what to do. These integrationists, including "moderates," were the modern day abolitionists, fanatics and martinets, dangerous to the peace of society. Finally, the South would never accept integration and be made the subject of a vast social experiment.

Refusing to be classified as a bigot, Workman did feel that changes in the status of Negroes in the South were in order. To improve their lot without destroying the fabric of southern life, he suggested 1) a relaxation of barriers to voluntary association, 2) the extension to Negroes of greater personal dignity, and 3) improved housing for Negroes. These changes were, however, dependent upon Negroes behaving as responsible citizens, a task Workman believed they had not always performed.

Although William Workman probably spoke for the vast majority of Southerners, there were other voices. Southern moderates, difficult as it is to define the term, were the largest non-resistance group. They did not favor the desegregation of the schools, but most had values higher than segregation and believed in obedience to the law.

Brooks Hays, the U.S. Representative from Little Rock until unseated by a Citizens Council candidate in 1958, had long been known as a southern moderate, and he so classified himself. Though he questioned the constitutionality and judgment of the Brown decisions, he favored obedience to the law and was firmly committed to maintaining the public school system of the South. Hays believed that "the South really has few prejudiced white people who cannot be persuaded to justice and Christian charity."[58]

---

[58]Hays, A Southern Moderate Speaks, p. 222.

Hays' moderation must not be misread. He had little belief in the power or the right of federal lawmakers and courts to redirect southern life. He maintained that "in the last analysis, it will be the churches and the local community organizations that will provide solutions to the problems of civil rights."[59] Thus, he argued for a piecemeal, voluntaristic approach to school desegregation, proceeding no more rapidly than the attitude of local communities would permit. Hays, after all, did sign the "Southern Manifesto" in 1956 and voted against the Civil Rights Bill of 1957 as a federal interference in local responsibilities.[60]

Hays' view was reasonably representative of a group of men who became Governors in the South towards the end of the decade. Governors Carl Sanders of Georgia, Ernest Hollings and Donald Russell of South Carolina, and Terry Sanford of North Carolina were part of this new breed.[61] Perhaps the most forward looking of the moderate political leaders was Governor Leroy Collins of Florida. In response to threats of violence over Negro lunch counter sit-in demonstrators in Tallahassee, Collins made a statewide television address in which he called for compliance with the law and stated that merchants had a moral obligation to extend the full services of their establishments to the public they claimed to serve. Prophetically, he reminded Floridians that "We can never stop Americans from struggling to be free."[62]

---

[59] Ibid., p. 195.

[60] Ibid., pp. 89, 100-101.

[61] Coleman B. Ransome, Jr., "Political Leadership in the Governor's Office," in The American South, ed. by Leiserson, pp. 215-17.

[62] Leroy Collins, "But in Florida--We Cannot Wash Our Hands," in We Dissent, ed. by Norris, p. 110.

The most powerful force for moderation was the desire of Southerners for economic progress. Moderates argued that the segregationists were creating turmoil in the South and discouraging national business leaders from seeking the advantages of the South for plant location. Thus, conservative business leaders, particularly those interested in attracting new industry, counseled against measures which would disrupt the peace, close public schools, and bring the region into disrepute. This business oriented concern was one of the keys to the eventual defeat of die-hard segregationist power.[63]

The interests which motivated the business leadership, and the economic benefits available if southern segregationism was modified, brought the steady erosion of massive resistance. At the end of 1960, Numan Bartley summed it up, writing that:

> . . . the future of public education and the stability of the governmental process, rather than segregation and desegregation became the central issues. This situation led to a shift away from massive resistance, a shift that was conservative rather than reformist, that brought social stability rather than social change.[64]

The concern for profit had become more powerful than the concern for race.

While many applauded them, the moderates were also viewed from a different perspective. Perhaps the moderates really constituted a majority in the South, which believed in either segregation or desegregation, but lacked the courage of their convictions. Ralph McGill offered

---

[63]McGill, The South and the Southerner, p. 238.

[64]Bartley, The Rise of Massive Resistance, p. 320.

the forceful conclusion that "the practicing moderates contributed largely to the undoing of a fine honorable word. As events developed in the South's travail of race, the self-styled moderate turned out to be one who stood on the sidelines wringing his hands and urging both parties in the conflict to be calm."[65] Many who considered themselves to be moderates sought a token compliance with Brown through gerrymandering school districts, allowing the integration of a low number of "quality" Negro students, and making use of the inherent delays in the legal process.[66]

By contrast white liberals in the South were a small and somewhat lonely group of men and women in the 1950's which had little impact on the regional climate of opinion. No major political office-holder during the period could be called liberal on the issue of school desegregation.* With few exceptions such as Ralph McGill of the Atlanta Constitution, southern liberals were without an effective public voice. Those few local newspapermen, clergy, and ordinary citizens who dared to oppose the majority view were subject to social ostracism, economic coercion, and at times, physical violence.[67] Dissent on matters of race was simply not acceptable. There were prominent individuals from the South who were committed to desegregation and equality, but they were without any real influence.

---

[65]McGill, The South and the Southerner, p. 283.

[66]Robert A. Leflar and Wylie H. Davis, "Devices to Evade or Delay Desegregation," in Desegregation and the Supreme Court, ed. by Benjamin Murr Ziegler (Boston: D.C. Heath and Company, Problems in American Civilization, 1958), pp. 97-98.

*In this discussion, the term liberal describes those who completely endorsed the Brown decision and looked forward to the end of discrimination and segregation in the South.

[67]Bartley, The Rise of Massive Resistance, pp. 193-95.

Perhaps the only effective force for desegregation in the 1950's in the South was the NAACP, although it had to overcome substantial difficulties. The majority of black Southerners were in no position to challenge the status quo by urging enforcement of the Brown decision, few blacks could or would pursue school desegregation suits as plaintiffs. The organization was the subject of both legal harassment and, in some cases, physical violence. Nevertheless, the NAACP was at least able to prosecute enough school desegregation suits to keep the issue before the federal courts. Direct confrontation through the courts was the only available means and eventually proved effective.[68] With the exception of isolated activity such as the Montgomery bus boycott in 1956, the NAACP was the only meaningful black instrument in support of integration in the South of the 1950's.

This chapter has briefly examined the background of southern attitudes, the initial reaction to the Brown decision, and the southern response in the 1950's. The South was overwhelmingly opposed to the desegregation of its public schools. As the 1950's ended, the South, excluding the border states, had taken no serious steps to desegregate its public schools, despite the rulings of the Supreme Court. The first and most uncontrovertable reason for the failure of the Brown decision in the 1950's was the reality of Southern opposition to desegregation. This failure, however, did not belong to the South alone. The segregationists used states' rights as an instrument to immobilize the national government, and the Eisenhower administration and Congress as well

---

[68]Howard Zinn, The Southern Mystique (New York: Alfred A. Knopf, 1964), p. 41.

provided little support for even moderate Southerners.[69] In fact, it was probable this reluctance to act reflected majority opinion of the nation. In the event, national inaction made the most recalcitrant school boards and southern federal judges the pacesetters, and it was not until the Little Rock school crisis in 1957 that the administration was forced to make any efforts to see that the federal courts were obeyed.[70] In most cases, the default of responsible leaders who were capable of changing long held views left state and local leadership in the South to extremists.[71] The failure of local leadership was particularly true with regard to the southern Bar, for a large proportion of southern lawyers supported or created segregationist arguments which they knew or should have known had little legal basis.[72] The failure of leadership was doubly unfortunate, for where enlightened leadership did operate, as in Atlanta, at least the beginning of peaceful desegregation was possible.[73]

The most belligerant and determined segregationists were from the rural black belt in the Deep South.[74] In most of the South, through malapportionment and special devices such as the county unit system, rural areas were vastly overrepresented in relation to the growing urban and suburban populations. Not until the mid-1960's would this imbalance

---

[69] Peltason, 58 Lonely Men, pp. 45-49.

[70] Ibid., pp. 52-55.

[71] Cook, "Political Movements and Organization," in The American South, ed. by Leiserson, p. 134.

[72] McGill, The South and the Southerner, p. 227.

[73] Zinn, The Southern Mystique, pp. 20-21.

[74] Bartley, The Rise of Massive Resistance, pp. 96, 103.

begin to be corrected. In the 1950's, the imbalance gave added power to the forces for segregation.

There seemed to be little hope for real change in the South. Even before the Kennedy administration took office, however, there were signs that offered encouragement to southern moderates and liberals. First, the conflict between the desire for economic progress and the racial ideology of the Old South was becoming increasingly sharp. Increasingly often toward the end of the decade, the first set of values were seen as more important than the continuation of segregation.[75] Southerners began to realize it was important to maintain the public schools, integrated or not, in order to attract new industry.[76] The key to this adjustment in most of the South was that before there was a real change in the way Southerners thought about race, there was a significant change in the way they acted about their schools.[77]

As a result of the Brown decisions, and faced with Southern refusal to comply, the federal courts became the frontline force in the desegregation of southern schools. Even though the courts had to wait for others to act first, there was enough litigation of the issue to keep the courts involved. This presence was important, for the courts, particularly the courts of appeals, constituted a national force for compliance in the South. Even though the Brown decision was enforced only in a few selected areas and by small degrees, and then only by legal

---

[75] Zinn, The Southern Mystique, pp. 8-9, 50-52.

[76] Ibid., pp. 22-23.

[77] Ibid., pp. 18, 38-39.

coercion, the slowly growing incidence of school desegregation orders became a more common part of southern life.

The federal courts were thus entrusted with the primary responsibility for desegregation in southern public schools.[78] Until the Little Rock decision in 1958, the burden rested on the federal district courts at the trial level and on the courts of appeals. The judges of these courts were mostly Southerners. They lived in Southern communities, and practiced law with Southern colleagues. Their courts were staffed and operated in an atmosphere that was bitterly hostile to the law the judges were bound to enforce. Clearly, this charted the path of the courts and their judges between the Scylla of the Constitution and the Charybdis of their lives within the Southern setting.

---

[78]Bartley, The Rise of Massive Resistance, p. 65.

CHAPTER III
THE JUDGES (1): THE PERSONAL SETTING

The first two chapters have described the structure and operation of the federal court system, particularly the Court of Appeals for the Fifth Circuit, and the climate of opinion in the South after the Brown v. Board of Education decisions. This chapter briefly profiles the judges who served on the Fifth Circuit Court of Appeals from Brown to the end of the Eisenhower years. These men made decisions which were intimately connected with changing the racial arrangements traditional to the South, and it is their response as men and judges to their environment, their office, the national Constitution, and the pressures for stability and change which is the central concern of this study.

The purpose of this chapter is to briefly introduce the judges of the Court of Appeals for the Fifth Circuit.* This introduction will be limited to basic biographical information. All of the men who served on the Court from May 17, 1954, until the end of 1960 will not be covered in this study.

The seven judges included are, in the order of their seniority: Joseph C. Hutcheson, Jr., Richard Taylor Rives, Elbert Parr Tuttle, Benjamin Franklin Cameron, Warren LeRoy Jones, John R. Brown, and John

---

*Subsequent reference to the Court of Appeals for the Fifth Circuit will be to the Court of Appeals or Court unless otherwise noted.

Minor Wisdom. Inclusion or exclusion[1] of the judges was determined by reference to several factors. All of the judges included either served for the entire period or were appointed after the Brown decision and were still on the bench at the end of 1960. All of the judges included participated in major school desegregation decisions during the period involved. The judges included either wrote opinions for the Court of Appeals or wrote dissenting or special concurring opinions.

Among those men excluded from the study, only Wayne G. Borah remained on the Court of Appeals more than seven months after the first Brown decision. Borah retired some two and one-half years after Brown, but he participated in only one school desegregation case of any note, and in that instance wrote no opinion. Thus, with the exception of Judge Wisdom who was appointed in mid-1957, the judges under study served for all or most of the period. They all heard more than one school desegregation case, and in the absence of Supreme Court activity, served as the final arbiters on this explosive issue for most of the Deep South. The brief introductions which follow will be in the order of the judges' seniority on the Court of Appeals.

---

[1]Those not included in this study are Wayne G. Borah, Edwin R. Holmes, Robert L. Russell, Louie W. Strum, and the inactive senior judge, Samuel H. Sibley. Judge Borah sat on the Court of Appeals from October, 1949, until December, 1956; Judge Holmes from April, 1936, until November 1954; Judge Russell from October, 1949, until January, 1955; and Judge Strum from October, 1950, until July, 1954. U.S. Congress, Senate, Committee on the Judiciary, Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served During the Period 1801 Through May, 1972, 92nd Cong., 2nd Sess., 1972, 104.

Joseph C. Hutcheson, Jr.

Judge Hutcheson was born in Houston, Texas, on October 19, 1879, the son of a well-known lawyer and two time U.S. Representative. He was educated at the Bethel Military Academy in Virginia and attended the University of Virginia. In 1900 he received his law degree from the University of Texas, where he was elected to the honorary Order of the Coif. After admission to the practice of law in Texas in the year of his graduation from law school, he became a member of his father's Houston law firm. He remained with the firm until 1918.

From 1913 to 1917, Hutcheson was the chief legal advisor to the city of Houston and was mayor from 1917 to 1918. In the latter year, President Woodrow Wilson appointed him as a United States district judge for the Southern District of Texas. Hutcheson sat on the district court for twelve years, until 1930. Having established a reputation as an able judge and an outstanding legal scholar, he was appointed to the Fifth Circuit Court of Appeals by President Hoover. Thereupon began an almost unprecedented period of service of some thirty-seven years, as U.S. circuit judge from 1931 to 1964 and as a senior* circuit judge from 1964 to 1968. During that period, Judge Hutcheson was Chief Judge of the Fifth Circuit from 1948 to 1959, when at the age of eighty, he was

---

*When federal District and Appeals Court judges reach the age of seventy, they may elect either to resign or to retire and take status as a senior judge. Senior judges retain full salary and are called upon to hear cases as the need arises and as their health allows. Senior judges regularly inform the Chief Judge of the Circuit regarding their availability for duty and the Chief Judge makes the assignments.

required to relinquish the Chief Judgeship. Judge Hutcheson died on January 18, 1973, at the age of ninety-four.[2]

During his years on the bench, Judge Hutcheson was active in professional, civic, and public affairs. He was a member of the Executive Council of the American Law Institute, the Harris County, Texas, and American Bar Associations, and the ABA Special Committee on the Restoration of the Inns of Court. Judge Hutcheson was also the American chairman of the Anglo-American Commission of Inquiry dealing with Palestine from 1945 to 1946. An advocate of tough but equal justice, Hutcheson was an early member of the Advisory Committee of the National Association of Legal Aid Organizations. A man of far ranging interests, he was also a member of both the Houston Philosophical Society and the Philosophical Society of Texas.[3] He published numerous legal articles, but he was best known for his Judgment Initiative (Chicago: Foundation Press, 1938), in which he set forth his view of the usefulness of the informed "hunch" in decision-making.

Richard Taylor Rives

Judge Rives was born in Montgomery, Alabama, on January 15, 1895. He was a student at Tulane University for one year from 1911 to 1912 and is the only judge included in this study who did not attend law school. He prepared for a legal career in the traditional manner, by reading and studying law in the offices of Hill, Hill, Whiting and Stern in Montgomery.

---

[2] Who Was Who in America, V (Chicago: Marquis Who's Who, Inc., 1973), p. 360.

[3] Ibid.

His only law degree was an honorary L.L.D. from the University of Notre Dame, in 1966. Judge Rives displayed such aptitude in his studies that he was admitted to the practice of law in Alabama in 1914 at the age of nineteen. Prior to entering into practice, he served in the National Guard on the Mexican Border in 1915 and 1916 and was a first lieutenant in the Signal Corps of the American Expeditionary Forces in World War I from 1918 to 1919.

Judge Rives practiced law in Montgomery from 1920 until 1951. During that period he was active in local Democratic party politics and served as an Alabama Delegate at the 1940 National Democratic Convention. In 1951, President Truman appointed Rives to the Court of Appeals. He served as Chief Judge from 1959 to 1960 and took senior judge status in 1966.

Judge Rives has been active in professional organizations during his career as a lawyer and a judge. Prior to his judicial tenure, he was president of both the Montgomery and Alabama Bar Associations and an active member of the American Bar Association. He was also selected as a honorary member of the Order of the Coif. As Chief Judge of the Fifth Circuit, he was a member of the Judicial Conference of the United States in 1959 and 1960, and from 1961 to 1967, he served on the Judicial Conference Advisory Committee on Appellate Rules.[4]

Elbert Parr Tuttle

Judge Tuttle was born in Pasadena, California, on July 17, 1897. He spent his youth in California and Hawaii and was a student at the

[4] Who's Who in the South and Southwest (13th ed.; Chicago: Marquis Who's Who, Inc., 1973), p. 636.

Punahou Academy in Honolulu from 1909 to 1914. Tuttle received a bachelor's degree from Cornell University in 1918 and his law degree from the same institution in 1923. As a student, he was elected to the Order of the Coif and Phi Kappa Phi. Judge Tuttle worked as a newspaperman in New York on the New York Evening Star and in Washington, D.C. on the Army & Navy Journal and the American Legion Weekly in 1919. He moved to Atlanta, Georgia, and was admitted to the practice of law in that state in 1923. Judge Tuttle continued practice in Georgia and after 1946 in Washington, D.C., with the firm of Sutherland, Tuttle and Brennan.

Judge Tuttle served in the army during World War II and was discharged in 1946 as a colonel. In the reserves, he was the commander of the 108th Airborne Division from 1947 to 1950. He retired as a brigadier general in the U.S. Army Reserve. From 1953 to 1954, Tuttle was General Counsel for the Treasury Department. In the latter year, President Eisenhower appointed Tuttle to the Court of Appeals, where he still serves as a senior circuit judge. From 1961 to 1967, Tuttle was Chief Judge of the Circuit, and he took senior status in 1968.

Judge Tuttle has been very active in professional organizations and civic affairs. His service reflects his stature as a judge and an Atlanta community leader. He is past president of the Atlanta Bar Association (1948), a member of the American Bar Association, the American Law Institute, and past president of the Atlanta Chamber of Commerce in 1949. As Chief Judge of the Circuit, Tuttle was a member of the Judicial Conference of the United States from 1961 to 1967 and the Judicial Conference Subcommittee on Federal Jurisdiction from 1969 to 1975. He has been chairman of both the Judicial Conference Advisory

Committee on Judicial Activities since 1969 and on Civil Rules since 1971. Judge Tuttle's civic activities have been equally numerous. From 1947 to 1949, he was Trustee of the Atlanta Community Chest, and in 1951, he was the vice-president of the Atlanta Community Planning Council. He has also served as a trustee of the Interdenominational Theological Center, Cornell University, Atlanta University, Spelman College, Morehouse College, and Piedmont Hospital.[5]

Benjamin Franklin Cameron

Judge Cameron was born in Meridian, Mississippi, on December 14, 1890. He received his college degree from the University of the South in 1911 and his law degree from Cumberland University in Lebanon, Tennessee, in 1914. While a law student, Cameron was also a teacher of Latin and German and the athletic director of the Norfolk Academy in Virginia from 1911 to 1913. His involvement with sports continued the next year as athletic director of Cumberland University. In 1914, Judge Cameron was admitted to the Mississippi Bar and engaged in the private practice of law in Meridian until 1955. He also served as a United States Attorney for the Southern District of Mississippi after 1929. In 1955, at the suggestion of several southern Democrats,[6] Cameron was appointed to the Court of Appeals by President Eisenhower. He remained on that Court until his death on April 3, 1964.

---

[5] Who's Who in America, II (38th ed.; Chicago: Marquis Who's Who, Inc., 1974), p. 3125.

[6] Mary Hannan Curzan, "A Case Study in the Selection of Federal Judges: The Fifth Circuit, 1953-1963" (Ph.D. Dissertation, Yale University, 1968), p. 41.

Judge Cameron's professional activities were limited to his memberships in the Lauderdale County, Mississippi, and American Bar Associations. His civic activities and outside interests reflected, in part, Cameron's continuing interest in young people and athletics. From 1945 until his death, he was a trustee of the R.D. Sanders Foundation, and from 1943 to 1945, he was the Chairman of the Board of Regents of the University of the South. In 1940, Cameron was the chairman for Mississippi of the Finnish Relief Fund. He had additionally been the president of the Choctaw Area Council of the Boy Scouts of America, vice-president of the Mississippi State Council of the YMCA, and the president of the Meridian Touchdown Club.[7] Judge Cameron had the distinction of being the first Republican from Mississippi to be named to the Federal Courts of Appeals in over half a century.[8]

Warren LeRoy Jones

Judge Jones was born in Gordon, Nebraska, on July 2, 1895. He did not receive a college degree, but graduated cum laude from the University of Denver School of Law in 1924, after serving in the army during the First World War. He was admitted to the Colorado bar in 1924 and in the same year was a deputy district attorney for the city and county of Denver. He practiced law in Denver in 1925, and the next year moved to Jacksonville, Florida. Judge Jones practiced law in that city until 1955, when he was appointed to the Court of Appeals bench by President Eisenhower. In 1966, he took senior status.

---

[7] Who Was Who in America, IV (1968), p. 149.

[8] "Judge Ben Cameron, 73, Dead: Made Attempt to Block Meredith," New York Times, April 4, 1964, p. 27.

Judge Jones has been active in both professional and civic organizations which reflect both his interests and activities. He was past president of the Jacksonville (1939) and Florida (1944) Bar Associations and is a member of the American Bar Association, and past president of the Jacksonville Chamber of Commerce (1955). Jones is also a member of the American Judicature Society, the American Law Institute, the Maritime Law Association, the New Orleans Bar Association, and a Judicial Fellow of the American College of Probate Counsel. He was the recipient of the Lincoln Diploma of Honor from Lincoln Memorial University in Harrogate, Tennessee, and received an honorary L.L.D. from Stetson University in 1955. Judge Jones is also a well-known collector of Lincolniana.[g]

John R. Brown

Judge Brown was born in Funk, Nebraska, on December 10, 1909. He was brought up in Nebraska and received his undergraduate degree from the University of Nebraska in 1930. At the University of Michigan, Brown compiled a straight "A" record, was a member of the law review and the Order of the Coif, and received his law degree in 1932. He subsequently received honorary L.L.D.'s from the University of Michigan (1959) and the University of Nebraska (1965). Upon graduation, Judge Brown moved to Houston, Texas, and was admitted to the Texas bar in 1932. He practiced law in Houston until 1955 as a member of the firm of Royston & Rayzor, specializing in the practice of admiralty and maritime law. During World War II, Brown served as an officer in the Army Air Force's Transportation Corps in the Pacific Theatre from 1942 to 1946.

---

[g] Who's Who in the South and Southwest (13th ed.), p. 384.

Brown was appointed to the Court of Appeals by President Eisenhower in 1955, and he still serves on that Court. He has been Chief Judge of the Circuit since 1967. Judge Brown was active in Republican politics prior to his appointment to the federal bench. He was the chairman of the Harris County Republican Committee in Texas from 1953 to 1955. He has also been active in professional organizations as a member of the Houston, Texas, and American Bar Associations, the American Judicature Society, and the American Law Institute. He is a member of the ABA Committee on Admiralty and Maritime Law, the Maritime Law Association and its Committee on Admiralty Rules, and the U.S. Association of ICC practitioners. Judge Brown is also an Elder of the Presbyterian Church.[10]

John Minor Wisdom

Judge Wisdom was born in New Orleans, Louisiana, on May 17, 1905. He received his undergraduate degree from Washington & Lee University in 1925, and studied literature at Harvard University and law at Tulane University, receiving his law degree from the latter in 1929. During his legal studies, he was selected for the Order of the Coif. Wisdom was admitted to the practice of law in Louisiana in 1929 and was a corporation lawyer in New Orleans until 1957. Beginning in 1938, and for many years thereafter, he was a part-time professor of law at Tulane University. Wisdom served as an officer in the Air Force during World War II, leaving the service in 1946 as a lieutenant colonel.

---

[10] Ibid., p. 90.

Judge Wisdom was active in Republican politics, serving as National Committeeman for Louisiana from 1952 to 1957 and was also a member of the Republican Executive Committee. He was an early supporter of Eisenhower's nomination in 1952 over Senator Taft of Ohio and was the chairman of the Southern Conference for Eisenhower. In recognition of his service to the Republican party and his outstanding legal reputation, Wisdom was appointed to the Court of Appeals by President Eisenhower in 1957. Judge Wisdom is now second in seniority to Chief Judge John R. Brown. He will not, however, become Chief Judge upon Brown's retirement, for Wisdom is already past the age of seventy.

Wisdom has been very active in professional and civic affairs and his interests are fairly broad. In addition to his memberships in the New Orleans, Louisiana, and American Bar Associations, he is also an active member of the Inter-American Bar Association and is past president of the Foreign Policy Association. Judge Wisdom was a member of the President's Commission on Government Contracts and is presently a member of the Multi-District Litigation Panel. He is a member of the Louisiana and American Law Institutes. Wisdom is a Trustee of Washington & Lee University and was treasurer of the New Orleans Community Chest and president of the New Orleans Council of Social Agencies.[11]

These seven men constitute the central element of this study. They were, in effect, the decision-makers of last resort in the legal battle over school desegregation in the formative years between 1954 and 1960. They operated in an environment generally hostile to their responsibility

---

[11] Ibid., p. 828.

of carrying out the Supreme Court mandate of the Brown decisions. The national administration was somewhat less than vigorous in its direction or enforcement of the policy announced in Brown, and at least in terms of specific application to the Fifth Circuit, the Supreme Court provided no guidance. These judges, Hutcheson, Rives, Tuttle, Cameron, Jones, Brown, and Wisdom, were indeed at the eye of a social hurricane.

It is sometimes tempting to conclude that certain aspects of any person's past are consistently useful tools for predicting subsequent behavior. In the present context, that consideration might lead one to expect that a roughly contemporary group of southern judges, such as the subjects of this study, would be either hostile to a policy of desegregation in the schools or at least suspicious of judicial involvement with social policy. That assumption would here be unwarranted. All of the judges studied are non-ethnic Protestants, and in that regard they are typical of a homogeneous South. These men come from an era prior to the present growth and mobility so characteristic of the present South, for the youngest of their number is sixty-eight years old. Until their appointment to the Court of Appeals, these judges had engaged primarily in the private practice of law.

For a group of southern judges, there are, however, several perhaps untypical elements in their collective biography. One of their number never attended law school. Three of them were born and spent their early years outside of the South and also attended colleges and/or law schools outside the South. More importantly, five of the seven men were or are Republicans and all but two were appointed to the Court of Appeals by President Eisenhower, a Republican. Finally, and most unusually, only

one of these men had any judicial experience prior to their appointment to the Court of Appeals. In these circumstances, facile assumptions based on the southern setting are dangerous at best.

Table 1. Judges of the Court of Appeals for the Fifth Circuit

Name	Date of Birth	Birthplace	Boyhood Home	College	Law School	Place of Practice	Pol. Party	Appt. Date
Joseph C. Hutcheson, Jr.	10/19/1879	Houston, Texas	Houston, Texas	U. Va.	U. Texas	Houston, Texas	Dem.	1931
Richard T. Rives	1/15/1895	Montgomery, Alabama	Montgomery, Alabama	Tulane	None	Montgomery, Alabama	Dem.	1951
Elbert P. Tuttle	7/17/1897	Pasadena, California	Honolulu, Hawaii	Cornell	Cornell	Atlanta, Georgia	Rep.	1954
Ben F. Cameron	12/14/1890	Meridian, Mississippi	Meridian, Mississippi	U. of the South	Cumberland	Meridian, Mississippi	Rep.	1955
Warren L. Jones	7/2/1895	Gordon, Nebraska	Gordon, Nebraska	None	U. Denver	Jacksonville, Florida	Rep.	1955
John R. Brown	12/10/09	Funk, Nebraska	Holdrege, Nebraska	U. Nebraska	U. Michigan	Houston, Texas	Rep.	1955
John Minor Wisdom	5/17/05	New Orleans, Louisiana	New Orleans, Louisiana	Washington & Lee	Tulane	New Orleans, Louisiana	Rep.	1957

CHAPTER IV
THE CASES (1): THE FACTUAL SETTING, GIBSON v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY

The previous three chapters have set forth the institutional, regional, and personal backgrounds of the seven Court of Appeals Judges for the Fifth Circuit. It is now time to see Judges Hutcheson, Rives, Tuttle, Cameron, Jones, Brown, and Wisdom in action. Therefore, each of the next three chapters will deal with a public school desegregation case that came before the Fifth Circuit Court between 1954 and 1960.

During the years of the Eisenhower Administration, the Fifth Circuit Court of Appeals heard numerous public school desegregation cases. Since the focus of this study is on the Court and the Judges, not the developing case law of school desegregation, no attempt has been made to review them all. The three cases which have been chosen, Gibson v. Board of Public Instruction of Dade County (1956-1959), Borders v. Rippy (1955-1961), and Bush v. Orleans Parish School Board (1951-1964),* are from Florida, Texas, and Louisiana, respectively. Each represents a different

---

*With the exception of Gibson v. Board of Public Instruction of Dade County, the cases here reviewed had several different titles, reflecting changing or additional parties to the suit and different court levels. The names of the cases which have been set forth above are those which most readily identify them. Since they involved a lengthy series of decisions, legal citations will be reserved until the point at which they are specifically appropriate. Unless otherwise stated, hereafter the cases will be referred to in the text respectively as the Gibson case, the Rippy or Dallas case, and the Orleans Parish case.

problem for the Judges. While all three cases deal with school desegregation, each has a unique nature.

The first of the cases to be reviewed, Gibson v. Board of Public Instruction of Dade County, is the simplest of the three and involved the Court of Appeals in correction of lower court decisions. The decisions themselves precipitated but did not directly require the first integration of public schools in the state of Florida. Borders v. Rippy dealt with the integration of public schools in Dallas, Texas. It required the Court of Appeals to spend many years battling with two district court judges who refused, as long as possible, to implement the Brown desegregation decisions. Finally, Bush v. Orleans Parish School Board was one of the most complex and lengthy desegregation cases ever decided. It required the Court of Appeals to continually support a lone district court judge against the Governor, the Legislature, and most of the State officers of Louisiana.

Before beginning a review of the Gibson case, a word of guidance seems in order. While the Orleans Parish and Rippy cases were as important as any decided during this period in the Fifth Circuit (the first public school integration in Florida took place in Miami and was connected with the Gibson decisions), no claim is made here that these three cases had the greatest impact. It would probably be impossible to pick any such single public school desegregation case since the Brown decisions. The three cases were chosen for their inherent interest and as representative of the various situations that the Appeals Court Judges faced. Beneath the welter of legal maneuvering, the cases are being used as a vehicle to illustrate the attitudes and judicial behavior of Judges Hutcheson, Rives, Tuttle, Cameron, Jones, Brown, and Wisdom.

In the federal courts of the United States, the case of Gibson v. Board of Public Instruction of Dade County involved two hearings in the U.S. District Court for the Southern District of Florida, and two hearings before the Court of Appeals for the Fifth Circuit.[1] While the supervision of the courts lasted longer, the legal struggle--from the original filing of the suit until the second decision in the Court of Appeals--took approximately three and one-half years.[2] The cases were heard in the district court by Judges Emett C. Choate and Joseph P. Lieb and in the Court of Appeals by Judges Rives, Jones, and Brown, and then by Rives, Brown, and Wisdom. Gibson was typical of the majority of desegregation litigation in the 1950's. The attempt of school officials to employ a Pupil Assignment law as a desegregation plan was upheld in the local federal District Court. The Court of Appeals reversed these decisions, holding such a statute insufficient where the school system remained segregated. It was also typical that the litigation produced no clear-cut result, for integration in Miami took place voluntarily on a token basis in reaction to rather than as a consequence of the suit. The last reported decision in the Gibson case resulted in returning the case to the District Court for continued supervision.

The original suit was an action for a declaratory judgment for the right of black school children to attend public school in Dade County

---

[1] Gibson v. Board of Public Instruction of Dade County, 2 RRLR (Race Relations Law Reporter) 9 (S.D. Fla. 1956); 246 F.2d 913, 2 RRLR 784 (5th Cir. 1957); 170 F.Supp. 454, 4 RRLR 21 (S.D. Fla. 1958); 272 F.2d 763, 4 RRLR 859 (5th Cir. 1959).

[2] The original suit was filed on June 12, 1956, and the second Appeals Court decision was announced on November 24, 1959. Miami Herald, July 24, 1957, p. 1, col. 6; Gibson v. Board, 272 F.2d 763.

without discrimination based on race or color. The primary legal issues raised dealt with the right of the plaintiffs to bring suit and the sufficiency of certain Florida legislation (to be discussed subsequently) as compliance with the requirements of the Brown decisions. The ruling by the U.S. Supreme Court on May 17, 1954, that segregation in the public schools was unconstitutional brought no immediate change to Southern education. In the absence of voluntary compliance by local school boards, it was necessary for black parents to bring suit. Thus, throughout the South, NAACP attorneys began a search for parents who would attempt to enroll their children in previously all white schools and, if necessary, to act as plaintiffs in desegregation suits.

This was the case in Miami, Florida, where petitions were being circulated in the black community to find willing parents. The local NAACP attorney, Howard Dixon, sought children who lived near white schools because the current policy was one of nearest school assignment. If entrance were denied and meetings with school board officials produced no results, suit would be filed in the federal courts.[3] Florida's Attorney General, Richard Ervin, warned the state NAACP not to push integration until the U.S. Supreme Court had ruled whether it was to be immediate or gradual.[4] This apparent confrontation was avoided, however, for both sides appeared to be willing to wait for the second Brown decision which would hopefully establish the procedure for desegregating the schools. Dr. G.W. Hawkins, the acting president of the Miami NAACP, assured public officials that there would be no push for integration during the 1954-1955 school year, and that the NAACP wanted voluntary

---

[3] New York Times, August 19, 1954, p. 21, col. 2.

[4] Miami Herald, August 19, 1954, p. D1, col. 8.

desegregation. The circulation of petitions, Hawkins said, was merely a device to let the public know how the black community felt.[5]

No legal action was taken until 1956 when the Gibson case was filed. In the intervening period, the U.S. Supreme Court handed down its ruling in the second Brown decision, calling for desegregation of the public schools with "all deliberate speed" under plans submitted by local school boards under the guidance of the federal district courts. Also in the interim, the Dade County Board of Public Instruction, in response to requests from black parents for the enrollment of their children in previously all white schools, issued a statement of policy which read in part:

> It is deemed by the Board that the best interests of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school commencing the current school term (Fall, 1955) remains unchanged. Therefore, the Superintendent, principals, and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a nonintegrated basis.[6]

Dade County would therefore take no steps to desegregate its public schools on a voluntary basis. On June 12, 1956, Theodore Gibson, local president of the NAACP, filed suit on behalf of his son, Theodore, Jr., and five other black school age children in the federal District Court for the Southern District of Florida, seeking the desegregation of Dade County's public schools.[7]

---

[5] Ibid., September 1, 1954, p. C1, col. 2.

[6] Gibson v. Board, 246 F.2d 913, 915, 2 RRLR 784.

[7] Miami Herald, July 24, 1957, p. 1, col. 6.

G.E. Graves acted as the attorney for the plaintiffs and Jack Lloyd represented the Board of Public Instruction (referred to hereinafter as the Board).[8] The action filed by Graves sought a declaratory judgment to sustain plaintiffs' right to attend a nonsegregated school in Dade County, Florida, in accordance with the Supreme Court's rulings in the two Brown decisions. The black students contended that in accordance with its stated policy, the Board continued to operate the public schools on a segregated basis, and this constituted a violation of their constitutional rights under the Fourteenth Amendment of the U.S. Constitution. The Board countered, in its motion to dismiss the complaint, that no black student had made specific application for transfer to or enrollment in a white school. The District Court shared this view and dismissed the complaint.

As Judge Choate viewed the case, the primary legal issue was whether or not his court had jurisdiction to decide the matter, whether an actual controversy existed upon which he could rule. As his decision made clear, Judge Choate answered the question in the negative. He agreed that the district court had jurisdiction to render a declaratory judgment in civil rights cases, but went on to point out that "Declaratory judgments can be rendered only in cases of actual controversy, and this Court is not empowered to render any advisory opinions."[9] Since the plaintiffs did not allege in their complaint that the Board denied them admission to an integrated school, nor that any applications for admission were made, the lack of the essential element, denial by the Board

---

[8] Ibid.

[9] Gibson v. Board, 2 RRLR 10.

of the students' constitutional rights, divested "the Court of the power to proceed further in this proceeding."[10]

With regard to the Board's statement of policy that the public schools would continue to operate on a "nonintegrated" basis, Judge Choate found it to be at most "a threat to deprive the Plaintiffs of their rights but it does not constitute a deprivation as a matter of law."[11] Whether the Board would follow its own statement of policy or the Brown ruling could not be determined, but the Judge was confident that the Board members were honorable and did not take lightly their oaths to support the Constitutions of the United States and Florida. As Judge Choate saw the responsibilities of the district courts under the second Brown decision, his Court was not to make policy for school boards, but, quoting from Brown, 349 U.S. 301, "to consider the adequacy of any plans . . . to meet these problems and to effectuate a transition to a racially nondiscriminatory system."[12] Since there had been no plan proposed by the Board, nor any act by the Board in denial of the black students' rights, no justiciable cause was presented to the Court. Judge Choate therefore dismissed the plaintiffs' suit without prejudice.* Obviously, the plaintiffs were not pleased with Judge Choate's ruling and instructed their attorney to file an appeal with the U.S. Court of Appeals for the Fifth Circuit. The arguments of the parties remained

---

[10] Ibid.

[11] Ibid.

[12] Ibid., p. 11.

*Dismissal of a suit without prejudice provides no impediment to a future refiling of the same suit once the defect has been remedied.

the same in the higher court, and the essential legal question continued to be whether or not the plaintiffs had raised a justiciable controversy.

The case was heard in the Appeals Court by a panel composed of Judges Richard Taylor Rives, Warren L. Jones, and John R. Brown. Judge Rives prepared the opinion for an unanimous court, reversing Judge Choate, and the decision was announced on July 23, 1957.[13] The Court disposed of the contentions of the Board out of hand by referring to two other recent decisions. Quoting both the lower court opinion and that of the Court of Appeals in Bush v. Orleans Parish School Board (also covered by this study),[14] Judge Rives ruled that the Board's position was without merit. In the present circumstances, it was not necessary for the black children to make application for admission to any particular school. In explanation, Rives cited as precedent a recent Fourth Circuit case as follows:

> Defendants argue, in this connection, that plaintiffs have not shown themselves entitled to injunctive relief because they have not individually applied for admission to any particular school and been denied admission. The answer is that in view of the announced policy of the respective school boards (that segregation would continue) any such application to a school other than a segregated school maintained for Colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief.[15]

---

[13] Gibson v. Board, 246 F.2d 913, 2 RRLR 784.

[14] 138 F.Supp. 337, 340 (E.D. La. 1956) and 242 F.2d 156 (5th Cir. 1957).

[15] School Board of City of Charlottesville v. Allen, 240 F.2d 59, 63-64 (4th Cir. 1956).

The Appeals Court also denied the Board's contention that the plaintiffs were not entitled to relief because they had failed to exhaust administrative remedies available under the recently passed Florida Pupil Assignment Law of 1956.[16] No law passed by any legislature, Rives stated, could justify violation of the Constitution of the United States. As long as segregation continued in Dade County schools, consideration of the effect of any Florida laws on the assignment of pupils would be premature.[17] Thus, Judges Rives, Jones, and Brown held that the district court had erred in dismissing the complaint. They reversed its judgment and remanded the case for further action in the lower court.

After a little over one year in the federal court system, the Gibson case was back where it had started; Dade County's public schools were still segregated. The only issue that had been decided was that Theodore Gibson, Jr., and his friends did not have to apply for admission to a particular all white school in order to have the right to prosecute their federal suit. However, the situation in Dade County had changed. Just prior to the announcement of the district court decision in November, 1956, Dade County's "Little White House" conference on education, which included representatives of most major civic groups, had called for at least some integration of the public schools, rather than closing them down.[18] Further, the legislature of Florida had provided the Board with a means by which it could avoid the maintenance of an obvious segregation policy. On July 26, 1956, the "Pupil Assignment Law" was

---

[16]Fla. Stat. Ann., Sec. 230.232, Chap. 31380 (1956).

[17]Gibson v. Board, 2 RRLR 785.

[18]New York Times, November 22, 1956, p. 43, col. 1.

enacted, providing for the assignment of public school students on the basis of several non-racial factors.[19] The statute allowed school boards to continue segregating their schools without appearing to do so. The factors to be considered were objective, but school boards were free to apply them as they saw fit.

Although the school superintendent of the Dade County school system, Dr. Joe Hall, told the district court, now with Judge Lieb on the bench, that there was no segregation in his county, the black students continued to seek admission to all white schools with no success. Hall argued that assignments were made according to the Florida Pupil Assignment Law, which did not mention race and was evidence of Florida's and Dade County's good faith compliance with the Brown decision.* Further, Hall said, Gibson had not appealed the denial of his application according to the new law's procedure, and thus had not exhausted administrative remedies available to him.[20] The Board also argued that the plaintiffs were not entitled to maintain the suit as a class action. If such a contention were sustained, in order to desegregate the public schools,

---

[19]The Act was passed to promote the "health, safety, good order and education of Floridians." The factors to be considered in pupil assignment included: intangible social scientific factors; socio-economic class consciousness of pupils; intellectual ability; scholastic proficiency; available facilities and teaching capacity; effect of admission of new students on established academic programs; moral, ethical, cultural backgrounds and qualifications, etc. 1 RRLR 924-25, citing Fla. Stat. Ann., Sec. 230.232.

*Dr. Hall's denial that segregation was still the policy in Dade County was difficult to reconcile with comments he made regarding school admission applications not covered by the Gibson suit. In dealing with the denial of four black students' applications for admission to Orchid Villa Elementary School, an all white school located in a neighborhood that was changing from white to black, he admitted that the race of the students was one of the factors considered. New York Times, September, 27, 1958, p. 43, col. 4.

[20]Ibid., August 21, 1958, p. 14, col. 4.

each individual black child seeking admission to a previously all white school would have to file suit in federal court if their application for admission was denied. The chilling effect of such a laborious and expensive process is obvious.

In their suit amended to emphasize as plaintiffs' prayer for relief, Reverend Gibson and the black parents asked for 1) a declaratory judgment that certain portions of the Florida Constitution and Florida law be declared unconstitutional in that they violated the Fourteenth Amendment of the Constitution of the United States by requiring segregation by race in the public schools of Florida; 2) an order of the Court requiring the Board to promptly present a desegregation plan for the Dade County schools; and 3) an injunction preventing the Board from requiring plaintiffs or other Negroes to attend any particular Dade County public schools because of their race.[21] The Board contended that the offending statute and portion of the Constitution had been rendered void by the Brown decision; that the Board's resolution to continue segregation had been superseded by the passage of the Pupil Assignment Law by the Florida Legislature in July, 1956; and that all subsequent pupil assignments were and continued to be made in accordance with the provisions of that Law.[22]

Judge Lieb heard the case without a jury, and on December 22, 1958, presented his opinion. Referring again to the Orleans Parish case cited by Judge Choate in the earlier district court hearing, he ruled that the plaintiffs were entitled to

---

[21] Gibson v. Board, 170 F.Supp. 454, 4 RRLR 21, 22 (S.D. Fla. 1958).

[22] Ibid., 4 RRLR 22-23.

bring the action as a class suit and the Florida statute and Constitutional provision[23] were unconstitutional,[24] but denied the plaintiffs' request for a court ordered plan for desegregation of the schools and an injunction against the Dade County School Board. Judge Lieb also held that while the requirement of segregation was unconstitutional, the Pupil Assignment Law was valid and met the requirements of a reasonable desegregation plan. Students would be assigned to schools without reference to race under the new law. Further, since the plaintiffs had not directly challenged the Pupil Assignment Law, it was entitled to a presumption of validity.[25] The only relevant state law was the Pupil Assignment Law, and the previous practice of segregation under the State Constitution and laws (now void) and the 1955 Board resolution (now superseded) did not excuse the plaintiffs from following the procedures provided for by the Pupil Assignment Law. In the present case, Lieb argued, plaintiffs had withdrawn and abandoned appeals before the Board of Public Instruction after their applications for admission were denied by the School Superintendent. If the plaintiffs believed that they were being denied admission because of their race, they had this appeal available to them, as well as a further review by the State Board of Education. Then and only then, could they appeal to the courts. The

---

[23]The statute prohibited the operation of any public, private, or parochial school in which blacks and whites were taught or boarded together. The Constitutional provision read as follows: "White and colored children shall not be taught in the same schools, but impartial provision shall be made for both." Fla. Stat. Ann., Sec. 238.09, Chap. 19355 (1939) and Fla. Const. art. 12, sec. 12 (1885).

[24]Gibson v. Board, 4 RRLR 23.

[25]Ibid.

Supreme Court of the United States had approved just such a procedure in Shuttlesworth v. Birmingham Board of Education, Alabama, 358 U.S. 101 (1958), a case which had arisen in the Fifth Circuit. Further, the Alabama law there involved and the Florida law in the present case were almost identical. In neither instance was the law invalid on its face, and any improper application of both laws would only be revealed by following the review procedures provided. Therefore, Judge Lieb held, the plaintiffs had adequate remedies available to them under the Pupil Assignment Law.[26]

As a result of two and one-half years of litigation, the only change which had occurred was the formal declaration that Florida's segregation provisions were invalid. However, no black students had been admitted to any white schools. The races were as separate in education as they had always been under the Florida Constitution of 1885. Nevertheless, Gibson's suit was essential for desegregation in Dade County. The School Board could no longer claim a legal justification for segregating the schools, a substantial barrier to vindicating the plaintiffs' constitutional rights.

With court-ordered plans and injunctive relief denied to them, Gibson and the NAACP now looked to Miami's Orchid Villa Elementary School where four black students were seeking admission.[27] The Board of Public Instruction of Dade County had a surprise in store for those trying to desegregate the public schools. In an action which drew the praise of Florida Governor Leroy Collins and the denunciation of many of the state

---

[26] Ibid., pp. 23-25.

[27] Miami Herald, December 28, 1958, p. C1, col. 7.

legislators, on February 18, 1959, the Board voted to admit four black students to previously all white Orchid Villa Elementary School.[28] The students involved were Sherry Joseph, age six; Irene Amanda Glover, age seven; Jan Glover, age nine; and Gary Range, age six.[29] All of them were children of middle class black families.*

The members of the Board, Jess Yarborough, C.T. McGummon, Robert S. Butler, Jane Roberts, Anna Brenner Meyers, C. Raymond Van Dusen (Chairman), and Helen J. Vosloh, were a varied group of individuals, running the gamut from segregationist to integrationist and including both northerners and southerners.[30] However, they were all relatively united regarding the strategy that the Board should follow. The proposal was initiated by Board member Dr. Robert S. Butler as a means to integrate the public schools through the application of the Pupil Assignment Law rather than through litigation.[31] Small scale, voluntary integration was seen as a way to avoid mass, court ordered integration, to demonstrate the Board's good faith attempts to comply with the Brown decision, to establish the Pupil Assignment Law as an acceptable plan for desegregating the Dade County public schools, and to forestall NAACP attorney Edwin L. Davis'

---

[28] New York Times, February 19, 1959, p. 19, col. 1. Orchid Villa Elementary was located in an area of low income whites which was beginning to change into a black neighborhood. Hostility to desegregation in this situation was intense.

[29] Miami Herald, Febraury 19, 1959, p. 1, col. 4.

*The parents were Robert N. Prymus, a barber, and his wife (the Glover children), a cafe owner, Selwyn Joseph and his wife, and Oscar Range, a funeral home owner. Ibid., p. 11, col. 2.

[30] Ibid., p. 7, col. 3.

[31] Ibid., p. 1, cols. 4 and 7.

threat to extend race-mixing under the Pupil Assignment Law to test the Board's good intentions.[32]

As the opening of the 1959 fall term approached, it became obvious that few whites would attend Orchid Villa with the four new black students. Only ten white children were registered for a school which only the year before had 420 students.[33] In fact, on opening day only eight of the white children appeared for classes. Both the School Superintendent and NAACP head Theodore Gibson agreed that this under-utilization of the school could not be the answer. Additional requests for transfer by black students were being considered by the Board.[34] Although desegregation remained peaceful and drew renewed praise from Governor Collins,[35] a few more white students came to Orchid Villa, but the highest number reached was only fifteen. The School Superintendent recommended that about 400 more black students be admitted to Orchid Villa. Three hundred and seventy-nine black students were so assigned, and the white teaching and administrative staff was replaced by a black one, with a substantial likelihood of white transfers out of Orchid Villa. Theodore Gibson charged that the Board was acting in bad faith. At the same time, the Board refused the transfer applications of five other black students, including his son, to previously all white

---

[32] Ibid., February 19, 1959, p. 7, col. 1, and Febraury 20, 1959, p. 2, col. 7.

[33] Ibid., September 8, 1959, p. 1, col. 2, and September 9, 1959, p. 1, col. 1.

[34] Ibid., September 9, 1959, p. 1, col. 1.

[35] New York Times, September 10, 1959, p. 24, col. 4, and Miami Herald, September 10, 1959, p. 1, col. 4.

schools.[36] Perhaps in response to the cricisms raised by Gibson, the white student applications for transfer out of Orchid Villa, now almost entirely black, were denied by the Board on the recommendation of Dr. Hall.[37]

The circle for Orchid Villa Elementary School was now complete. What had once been a white elementary school with a few token black students was now a black elementary school with a few token white students. All of the effort to establish the Board's good faith in the application of the Pupil Assignment Law and to demonstrate that the Law constituted a valid desegregation plan for the Dade County schools had hardly been a success.

While Gibson's lawyer had predicted that the real test of desegregation in Dade County would come at the Orchid Villa Elementary School, he did not abandon prosecution of Gibson's suit. Joined by Robert L. Carter of New York City as co-counsel,[38] Attorney Graves appealed Judge Lieb's decision to the Court of Appeals for the Fifth Circuit. The case was heard by Judges Rives, Brown, and a relatively new addition to the Court, John Minor Wisdom. As before, Judge Rives wrote the opinion expressing the unanimous judgment of the Court, which was handed down on November 24, 1959.[39]

---

[36] Miami Herald, October 8, 1959, p. 1, col. 2.

[37] Ibid., October 22, 1959, p. 1, col. 5.

[38] New York Times, November 26, 1959, p. 1, col. 1.

[39] Gibson v. Board, 272 F.2d 763, 4 RRLR 859 (5th Cir. 1959).

Most of the issues involved in the original action had already been determined in the two previous district court hearings and the earlier hearing in the Court of Appeals. The Appeals Judges really had to determine only whether the Florida Pupil Assignment Law was a desegregation plan which met the mandate of the second Brown decision, a question they answered in the negative. The Dade County School Board maintained that the Pupil Assignment Law met the Brown demand for a desegregation plan, and that the Law had been fairly and equitably applied. Theodore Gibson, Jr., and the NAACP totally disagreed.

In his decision, Judge Rives provided a brief history of the Florida Pupil Assignment Law which had been passed soon after Gibson's original complaint had been filed. The School Board initially adopted an "Implementation Resolution" which indicated that pupil assignments would be made according to the new law, but kept them as they had been before for the school year 1956-57.[40] Thereafter, the Board would assign all students individually.

The forms to be used were cards which did not indicate any choice of schools but in one corner the solitary word "School" was followed by a blank. There was no indication that the Board would consider assigning black children to other than their hitherto segregated schools. With a very few exceptions, all of those engaged in the process (principals, teachers, and parents) were unaware that the Board's previous policy of segregation had been abandoned.

At the time of the district court's remand hearing in the Fall of 1958, complete actual segregation of teachers and students continued to

---

[40] Ibid., 4 RRLR 860.

exist in Dade County. Further, and quite importantly according to Judge Rives, certain census records and other Board forms continued to reflect a formally segregated, dual school system. For example, a Board form, caption "PUBLIC SCHOOLS, DADE COUNTY, FLORIDA, 1958-59 SUBSTITUTE TEACHERS GUIDE,"[41] listed the various schools in the county under the headings "WHITE" and "NEGRO." Superintendent Hall explained that the list did not refer to pupils but indicated that instructional personnel were all either one race or the other, but his argument met with little success before the Court. Rives argued that the distinction had little meaning, since schools with all black teachers also had all black students and no white ones. Public school segregation continued, he said, at the time of the trial.[42] Therefore, the Pupil Assignment Law together with the Board's "Implementing Resolution" did not constitute an acceptable desegregation plan nor a reasonable start toward compliance with Brown. The machinery provided by the law and resolution could be used either to desegregate the schools or to continue segregation.[43]

To instruct the lower court, the litigants, and any possible future litigants, Rives discussed the Shuttlesworth case relied upon by Judge Lieb in the district court. That decision was affirmed by the Supreme Court "upon the limited grounds on which the District Court rested its decision,"[44] and limited its approval of the Alabama School Placement

---

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Ibid., citing Shuttlesworth v. Birmingham Board of Education, 358 U.S. 101 (1958).

Law "to the constitutionality of the law upon its face."[45] Judge Rives distinguished Shuttlesworth from Gibson by pointing out that in the former the plaintiffs had exhausted their administrative remedies and confined their attack to the constitutionality of the law on its face. The Shuttlesworth case afforded no support for the district court's opinion for in that case the plaintiffs had limited their attack to the constitutionality of the law as it was written, not as it was applied. In the present case, the situation was quite different, for the plaintiffs argued that the Pupil Assignment Law was not a desegregation plan and had been applied unfairly.

Judge Rives reaffirmed the Court of Appeals previous ruling that as long as Dade County's schools remained segregated, it would be premature to consider the effect of the Pupil Assignment Law. Since there were no integrated schools at the time of trial, assignment of students could not be constitutional. Judge Lieb's decision was therefore reversed, and the case sent back to the district court. Judge Rives advised the Board to submit a desegregation plan, and if the district court approved the plan, a transition period would be allowed for the changeover to a desegregated school system. In any event, the district court was to proceed in accordance with the Court of Appeals and Brown opinions and retain jurisdiction over the case.[46] Rives, for the unanimous court, did not, however, order a speed-up in desegregation for Dade County, nor did he rule on Theodore Gibson's request for immediate desegregation.[47] The

---

[45] Ibid., p. 862, citing Shuttlesworth v. Board, 162 F.Supp. 384.

[46] Ibid.

[47] Miami Herald, November 25, 1959, p. 1, col. 1.

Court of Appeals limited its ruling to the precise question presented: Did the Florida Pupil Assignment Law serve as a desegregation plan for the Dade County schools? The Court's answer was no.

There were to be no more decisions from the Court of Appeals nor the district court in the Gibson case, either within the time period covered by this study or thereafter. The district court maintained jurisdiction, but the parties to the suit initiated no further legal action.* Henceforth, desegregation proceeded by negotiation and compromise. Theodore Gibson, Jr.'s involvement with the desegregation of Dade County's public schools was not quite finished, however, for he continued to seek admission to a previously all white school. In June of 1960, the Board announced its decision to expand desegregation in Dade County by admitting two sisters, Barbara and Rosetta Pearson, to Fulford Elementary School and North Miami Beach Junior High School, respectively. At the same time this decision was reached, the Board denied applications for admission by twelve other black students to all white Miami Jackson High School. Among those twelve applicants was Theodore Gibson, Jr.[48] The Board gave no reasons for any of these decisions.

The situation in Dade County had changed substantially since the Gibson case was first filed in 1956. State statutes requiring

---

*The Court of Appeals had suggested that the Board submit a plan for the application for admission of plaintiffs and other black students without regard to race to any schools for which they were qualified. In January, 1960, the Board filed a plan in the District Court "consistent with the higher Court's mandate," and in March, 1960, the District Court issued an order approving the Board's plan. Ernest Lacalomito, Deputy Clerk of the U.S. District Court for the Southern District of Florida, private telephone interview in Miami, Florida, June 15, 1978.

[48]Miami Herald, June 30, 1960, p. 1, col. 5.

segregation had been invalidated, and by the beginning of the school year in the Fall of 1962, the ongoing process of integration of the public schools was proceeding slowly but smoothly and was no cause for disturbance.[49] The plaintiffs, Gibson et al., were forced to complete their public education in Dade County in racially segregated schools, but the suit they brought induced the Board of Public Instruction to begin a program of token integration. Once begun, that program, and the slow shift of public sentiment in favor of maintaining the public school system in Florida, was hard to limit. Token desegregation was replaced in the late 1960's and early 1970's with active integration under HEW guidelines and a new policy in the Fifth Circuit.

It would be misleading to generalize the situation in Dade County and its relatively peaceful surroundings to all of Florida or the rest of the South. Clearly, the circumstances in Miami were not typical, for a large segment of the population was not Southern in either birth, upbringing, or outlook. As evidenced by the results of the "Little White House" meeting in 1956, a majority of the civic leaders in the area were at least prepared to accept some integration to maintain the public school system. The federal courts were not faced with implacable opposition. The litigation, however, was fairly typical of the great majority of the school cases during the 1950's. Gibson was a relatively simple case. The district court decisions reflected local attitudes, but were arguably in conformity with the Brown decision. The Court of Appeals, in reversing those decisions, indicated that the error of the lower court had been a misreading of the Supreme Court's mandate.

---

[49] New York Times, September 7, 1962, p. 30, col. 7.

Finally, the issues of law and fact were not complex, and the district court did not defy the Appeals Court's rulings.

Thus, Gibson v. Board of Public Instruction of Dade County was a relatively unremarkable case, except that it dealt with the first public school desegregation in Florida and was the catalyst for the beginning of voluntary desegregation in Miami. It never attracted real national attention or comment. That this was true becomes even clearer when Gibson is compared to the two subsequent desegregation cases which will be examined. These features made Gibson a fair representative of the mass of desegregation suits, and thus essential for inclusion within this study.

CHAPTER V
THE CASES (2): THE FACTUAL SETTING, BORDERS v. RIPPY

In the previous chapter, the relatively uncomplicated case of Gibson v. Board of Public Instruction of Dade County was examined. The legal issues there involved included the right of the plaintiffs to bring suit, the status of the school board's alleged desegregation plan as compliance with the Supreme Court desegregation decision, and the impact of state law on desegregation of the public schools. The Gibson case was important largely as an example of the majority of school cases decided in the Fifth Circuit during this period. It was the exception rather than the rule for desegregation suits to require more than a few hearings. Further, desegregation in Miami came not as a direct result of the litigation but rather as a voluntary reaction against it. The case which is the subject matter of this chapter involves many of the same issues, but where Gibson was relatively simple, it is complex. The factual situation was not really more involved, but the relationship between the District Court and the Court of Appeals for the Fifth Circuit was quite different. This change made Borders v. Rippy* a model of conflict between the two lower tiers of the federal court system.

---

*This case had several different names during its journey through the federal courts. What follows is a full citation for all of the hearings which were reported. Bell v. Rippy, 133 F.Supp. 811, 1 RRLR 318 (N.D. Tex. 1955); Brown v. Rippy, 233 F.2d 796, 1 RRLR 649 (5th Cir. 1956); cert. den. Rippy v. Brown, 352 U.S. 878, 77 S.Ct. 99 (1956); Bell v. Rippy, 146 F.Supp. 485, 2 RRLR 32 (N.D. Tex. 1956); Borders v. Rippy, 247 F.2d 268, 2 RRLR 805 (5th Cir. 1957); pet. for rehearing, Borders v. Rippy, 2 RRLR 984 (5th Cir. 1957); Borders v. Rippy, 2 RRLR 985 (N.D. Tex.

The litigation in Borders v. Rippy took almost six years in the federal courts, from 1955 to 1961, before desegregation of the schools was begun. Between the District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals, there were over twelve hearings in the case, equally divided between the two courts.[1] From 1955 through 1957, the case was tried in the district court by Judge William H. Atwell and from 1958 through 1961 by Judge T. Whitfield Davidson. During the various hearings in the Court of Appeals, all seven of the Judges included in this study, at one time or another heard the case.

The purpose of the suit was desegregation of the public schools of Dallas, Texas. The legal issues involved can be separated into the two basic categories: procedural questions and substantive questions. Included in the first category were 1) whether or not the original action constituted a timely filed justiciable controversy, and 2) whether or not the plaintiffs, black school-age children, had exhausted available

---

1957); Rippy v. Borders, 250 F.2d 690, 3 RRLR 17 (5th Cir. 1957); Borders v. Rippy, 4 RRLR 877 (N.D. Tex. 1959); Boson v. Rippy, 275 F.2d 850, 5 RRLR 392 (5th Cir. 1960); Borders v. Rippy, 184 F.Supp. 402, 5 RRLR 679 (N.D. Tex. 1960); Boson v. Rippy, 285 F.2d 43, 5 RRLR 1048 (5th Cir. 1960); Borders v. Rippy, 195 F.Supp. 732, 6 RRLR 746 (N.D. Tex. 1961). For the balance of this chapter, individual citations will be given for each hearing. The choice of Borders v. Rippy as the generic name for the case was based upon both frequency and common usage. The last hearing in the case occurred after the end of the period under examination. It is included to indicate the final disposition. All decisions and hearings in the case were not published in the official law reports.

[1]The Supreme Court was very briefly involved in this case. In Rippy v. Brown, 352 U.S. 878, 77 S.Ct. 99 (1956), the Court denied certiorari, thus in effect affirming the first decision of the Court of Appeals for the Fifth Circuit. From that time on, the Court of Appeals was the final arbiter.

administrative remedies under state law before seeking review in the federal courts. Among the substantive matters to be determined were 1) the timing or pace of desegregation in Dallas, 2) the good faith of the efforts toward desegregation by the Dallas School Board, and 3) the impact of Texas public school law upon the rights of the plaintiffs and the duties of the defendant.

Although these legal questions had to be resolved before desegregation began, the real story of Borders v. Rippy was the relationship between the District Court and the Court of Appeals, and the reaction of the lower court judges to the opinions of the Appeals judges. The reasonably amiable process of education observed in the Gibson case was absent here, for the judges of the District Court and the Court of Appeals had quite different views of what the Supreme Court required of them under the Brown desegregation decisions.*

The action in Borders v. Rippy was filed originally in July, 1955, as Bell v. Rippy.[2] The plaintiffs were twenty-eight black children who were denied entrance to the public schools nearest their homes because of their race and were assigned to public schools maintained for Negroes.

---

*Research on this chapter presented some serious difficulties. Reference to the Dallas case was very limited in the New York Times and attempts to obtain relevant portions of the Dallas News through inter-library loan have produced nothing. Of the six and one-half year period requested, only one month (in the wrong time period) has arrived. Nothing has come in for the last several months even though a subsequent request was made. As a result, the information in this chapter is limited almost entirely to that found in the reported decisions. A further difficulty lies in the fact that not all hearings in and activity by the courts was reported either in the official legal reporting system or in the Race Relations Law Reporter. As a result, a very limited amount of the material presented has been reconstructed through reference to reported decisions.

[2]See, Boson v. Rippy, 275 F.2d 859, 5 RRLR 392 (5th Cir. 1960).

The defendant, Dr. Edwin L. Rippy, was sued in his capacity as the president of the Board of Trustees of the Dallas Independent School District (referred to hereinafter as the Board or School Board).[3] At trial, the basic facts were agreed to by the defendant, for the Board admitted that the plaintiffs had been denied admission because of their race.

The position of the School Board had been established even before the suit was first heard for trial. In response to the Brown desegregation decisions, the Board had issued statements of policy in July of 1955. First, the Superintendent of Schools was directed to begin a detailed study of the schools and the difficulties that would have to be met under an integrated school system. The Board then unanimously approved a statement of policy as follows:

> It was reported that this School System has been, is at present and will be obligated to continue an intensive study of the problems involved in twelve specific areas,* and that reports would be made to the public of these studies periodically. It will be impractical to attempt integration until these studies are completed. Therefore, the Superintendent of Schools is hereby instructed that there

---

[3] Borders v. Rippy, 247 F.2d 268, 2 RRLR 805 (5th Cir. 1957).

*The twelve areas were "1. Scholastic boundaries of individual schools with relation to racial groups contained therein. 2. Age grade distribution of pupils. 3. Achievement and state of preparedness for grade level assignment of different pupils. 4. Relative intelligence quotient scores. 5. Adaption of curriculum. 6. The overall impact on individual pupils scholastically when all of the above items are considered. 7. Appointment and assignment of pupils. 8. The relative degree of preparedness of white and negro teachers; their selection and assignment. 9. Social life of the children within the school. 10. The problems of integration of the Parent-Teachers Association and the Dad's Club Organization. 11. The operation of the athletic program under an integrated system. 12. Fair and equitable method of putting into effect the decrees of the Supreme Court." Borders v. Rippy, 247 F.2d 268, 2 RRLR 805, 806 (5th Cir. 1957).

> shall be no alteration of the present status of the schools of this district in the term beginning September 1955.[4] (footnote added)

In the meanwhile, the public schools of Dallas, Texas, would continue to be segregated. It was against the implementation of the above policy that the plaintiff school children sought relief.

The suit in Bell v. Rippy[5] was a class action heard in the U.S. District Court for the Northern District of Texas by Judge William H. Atwell. The plaintiffs asked for a declaration of their rights to attend the schools of Dallas on a non-segregated basis and injunctive relief against the officials of the Dallas schools to prevent them from maintaining a segregated school system. They cited the Brown decision as the direct basis for their claim. In reply, the School Board maintained that it was complying with the desegregation decision, by undertaking its study.

In his very brief opinion upholding the School Board's position, rendered on September 16, 1955, Judge Atwell noted that although the Supreme Court had declared segregation in the schools illegal and unconstitutional, schools for whites and blacks in Dallas were substantially equal, a fact "of which the court had judicial knowledge."[6]

---

[4] Ibid.

[5] 133 F.Supp. 811, 1 RRLR 318 (N.D. Tex. 1955).

[6] Bell v. Rippy, 1 RRLR 319. This statement constituted what is known as "judicial notice." By this device, judges may consider evidentiary matter which has not been proved in court but which is widely accepted as true by common knowledge. Thus, for example, one need not prove that the sun appears to rise in the East. Of course, judicial notice, like any other legal device, may be subject to abuse.

According to Atwell, all of the law as declared by the various courts in the country, "agreed upon the proposition that when similar and convenient free schools are furnished to both white and colored that there exists no reasonable ground for requiring desegregation."[7] Judge Atwell further argued that the Supreme Court required that segregation be done away with only after the local school officials and the lower courts had worked out a proper desegregation plan. Since there was as yet no plan, to grant injunctive relief would be premature, would ignore the equities, and would usurp a function to the court not contemplated by the Supreme Court. Judge Atwell therefore dismissed the case without prejudice to be refiled at some later date.[8]

The black school children immediately appealed Judge Atwell's ruling to the Court of Appeals for the Fifth Circuit. The appeal was heard under the name, Brown v. Rippy,[9] before Chief Judge Hutcheson and Circuit Judges Cameron and Brown. The decision reversing the lower court was rendered in a per curiam* opinion on May 25, 1956, from which Judge Cameron dissented.

In its very brief opinion, the Court concluded that the district court had mishandled the case completely. The district judge had apparently declined to hear any evidence, believing that there were no

---

[7] Ibid.

[8] Ibid.

[9] 233 F.2d 796, 1 RRLR 649 (5th Cir. 1956).

*Per curiam opinions are those prepared by the court as a whole rather than authored by a single judge speaking for the court. They are generally brief and most often used in cases in which the law is clear and there is little real dispute over facts.

facts in dispute and that the plaintiffs had agreed with the explanation given by the Board. Indeed, the plaintiff school children argued on appeal that the lower court judgment was entered under a complete misapprehension of both the facts and the law.

In disposing of Judge Atwell's rather novel procedure and reading of the law, the Court of Appeals was both blunt and terse:

> We think it quite clear that there is no basis in the evidence for the action taken by the district judge, none in the law for the reasons given by him in support of his action. The judgment is accordingly VACATED and REVERSED and the cause is REMANDED with directions to afford the parties a full hearing on the issues tendered in their pleadings.[10]

One rarely finds such a direct and complete rejection of lower court action. Apparently, the majority felt there was nothing of merit in Judge Atwell's opinion to warrant discussion.

With such a clear expression of disapproval, one would not expect any disagreement on the Court of Appeals. In fact, Judge Benjamin Cameron entered a lengthy and empassioned dissent which was characteristic of his view in desegregation suits. The burden of that opinion was that the Board had acted in good faith and the plaintiffs' suit was indeed premature. Cameron argued the Supreme Court had clearly recognized that the problem would take time to work out and that primary responsibility and authority for desegregating the schools would rest with state and local authorities. He urged that "as long as these officials were proceeding in good faith with deliberate speed . . . the

---

[10]Brown v. Rippy, 1 RRLR 650.

Supreme Court did not intend that they be subjected to harassment by vexatious suits or by the intervention of the courts."[11] Courts should not act until local school officials had an opportunity to do so. Judge Cameron further argued that the suit was premature because the plaintiffs had not first exhausted administrative remedies available to them.*

According to Judge Cameron, the facts showed that the Dallas school authorities were proceeding in good faith to desegregate the schools and had agreed that the plaintiffs had the right to attend the schools of their choice without regard to race. He maintained that there was no justiciable controversy, for "the only point at issue related to timing."[12] The administrative and budgetary difficulties involved in desegregating schools which had been segregated for ninety years was more than sufficient justification for the Board's denial of the plaintiffs' requests for admission, and required allowing the school authorities to apply their expertise to resolve any problems. Dallas had over one hundred schools and nearly 100,000 students. Each of the schools and students presented a different circumstance to be considered in "light of many other considerations besides race."[13] Moreover, Cameron said that nothing in the plaintiffs' complaint nor in the facts showed that the Board was not acting in good faith.

---

[11] Ibid., p. 651.

*What these administrative remedies were was never made clear.

[12] Ibid., p. 653.

[13] Ibid., p. 652.

The decision was unacceptable to the Board, but the Supreme Court denied their request for certiorari, declining to hear the case and in effect affirming the Court of Appeals decision.[14] The Board also issued its "Second Statement on Desegregation by the President of the Board" which concluded that:

> The Board recognizes its responsibility to implement the decree of the Supreme Court, but it reaffirms its studied opinion that it would be derelict in this regard if it ordered an alteration in the status of its schools until its understanding of the problems involved is as comprehensive as possible and its plans for such changes are completed. This Board feels that it cannot and should not in good conscience accept the responsibility for the manner in which the decree of the Supreme Court is to be carried out until it has had sufficient time within which to formulate plans which must be to the best interests of this school district, its children, and the community.
>
> * * *
>
> Therefore, for the immediate future this Board feels that any change is premature and instructs the Superintendent of Schools to continue a segregated school system for the school year 1956-1957.[15]

The School Board would therefore do nothing towards desegregating the schools. Instead, it would continue to study and watch before it would carry out its responsibility, so clearly fixed by the Supreme Court and identified by Judge Cameron in his dissent.

On remand, the case was again heard in the district court by Judge Atwell under the title, Bell v. Rippy.[16] The contentions of the parties remained as they had been in the original suit. Atwell repeated his

---

[14] Rippy v. Brown, 352 U.S. 878, 77 S.Ct. 99 (1956).

[15] Borders v. Rippy, 2 RRLR 806-807.

[16] 146 F.Supp. 485, 2 RRLR 32 (N.D. Tex. 1956).

earlier performance in the suit and again dismissed the suit without prejudice on December 19, 1956.[17]

Judge Atwell's opinion combined a disregard for the Brown decision and his novel counterpart to civil rights, civil wrongs. He noted that the Court of Appeals had reversed his opinion and commented that Judge Cameron's dissent was "most convincing and somewhat elaborate in his citation and reasoning."[18] The Judge then went on to point out the long-standing tradition of segregated schools in Texas and the very recent desegregation decisions of the Supreme Court. The Supreme Court, Atwell opined, had "based its decision on no law but rather on what the court regarded as more authoritative, modern psychological knowledge."[19] The Judge then said that the evidence showed substantially equal education was available to "white and colored" pupils and the sole question was whether keeping apart the two races was a deprivation of any constitutional right.* He felt that the School Board was doing its best to comply with the rulings of the Supreme Court and its "suggestion" that the parties carefully seek to integrate.[20]

This creative reasoning provided the prologue for the main thrust of Judge Atwell's argument. The suit was brought "under the national

---

[17]Bell v. Rippy, 2 RRLR 33. Judge Atwell was indeed a venerable jurist. At the time of the second Rippy hearing in his court, the Judge was eighty-six years of age. New York Times, December 20, 1956, p. 1, col. 2, and p. 33, col. 3.

[18]Bell v. Rippy, 2 RRLR 32.

[19]Ibid., p. 33.

*Apparently, Judge Atwell did not believe the Supreme Court had settled the question.

[20]Ibid.

civil rights of the Constitution" and not under state statutes which required segregation, as the attorney for the Board argued. Thus, there were national civil rights for all people provided by the Constitution. There being civil rights, Judge Atwell argued, there were also "civil wrongs." There were about 119,000 students in Dallas, 15 per cent of whom were black. Dallas was growing and the School Board was constantly increasing its expenditures to expand school facilities. Since the white schools were already overcrowded, integration would require white students to get out to make room for black students. That would be "unthinkably and unbearably wrong."[21] It would be a "civil wrong." Thus, Judge Atwell argued, no equity required the granting of the requested injunctive relief, and the School Board should be given ample time to continue its attempts to solve the problem.

Again, the plaintiffs sought the reversal of Judge Atwell's decision in the Court of Appeals. The case was heard this time under the name of Borders v. Rippy,[22] before Circuit Judges Rives, Brown, and Jones, who once again reversed Judge Atwell's decision. The decision was rendered in an opinion written by Judge Rives for an unanimous court on July 23, 1957.

In his opinion, Rives recounted the basic facts of the case and the School Board's claims that it was complying with the Supreme Court decisions, that the schools were overcrowded,and that the scholastic aptitudes of the black and white students were so far apart that there were insufficient teachers to adequately instruct those pupils. He also noted

---

[21] Ibid.

[22] 247 F.2d 268, 2 RRLR 805 (5th Cir. 1957).

the Board's claim that the plaintiffs had not appealed to the State Commissioner of Education as required under the laws of Texas and thereby had failed to exhaust their administrative remedies.

Citing a series of cases decided within the Fifth Circuit (including the case which will be the subject of the next chapter), Rives held that the School Board and the Superintendent had "denied the plaintiffs the right to attend public schools of their choice solely on account of their race or color,[23] and this action alone deprived the plaintiffs of their constitutional rights. No administrative review could constitute a prerequisite to seeking redress in the federal courts. As to the Board's claim that overcrowding prevented immediate desegregation, Rives rejected it as an excuse for excluding pupils on the basis of race.[24]

Rives then announced what served as a basic philosophy of the Fifth Circuit Court of Appeals in school desegregation cases for the 1950's and the early 1960's. "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."[25] The Court reversed its policy in 1967 in the case of U.S. v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), on rehearing en banc, 380 F.2d 385 (5th Cir. 1967), under the leadership of John Minor Wisdom, who called for affirmative action to achieve integration lock, stock, and barrel. The Court was to move from passive desegregation to active

---

[23] Borders v. Rippy, 2 RRLR 807.

[24] Ibid.

[25] Borders v. Rippy, 2 RRLR 807.

integration. Constitutional rights were denied when plaintiffs were excluded because of their color, and it was not a sufficient answer to say that the Board had made a prompt and reasonable start toward good faith compliance. Judge Atwell's district court had a responsibility to retain jurisdiction to require actual good faith compliance, Rives said, "Faith by itself, however, without works, is not enough. There must be 'compliance' at the earliest practicable date."[26]

Applying these standards, Judge Rives ruled that the lower court decision had to be reversed. The plaintiffs' prayer for relief had only asked that the Board be required to desegregate its schools with "all deliberate speed." For the Court, Rives held that "at least to that much they are certainly entitled,"[27] and directed the district court to enter such a decree.

The Rippy case did not immediately return to the district court for a third hearing. After the appeal from Judge Atwell's second opinion was taken but before the Court of Appeals decision was announced, the Texas legislature took certain steps to maintain a segregated school system throughout the state. On May 23, 1957, Governor Price Daniel signed into law two pieces of public school legislation. The first was a "Pupil Placement Act"[28] which gave school boards the authority to assign pupils based on a number of standards, and provided for limited appeals and state court review. The provisions of this Act were similar to the Florida pupil assignment law discussed in the Gibson case. It also

---

[26] Ibid., pp. 807-808.

[27] Ibid., p. 808

[28] Chapter 283 of the 1957 Texas Legislature, Vernon's Annotated Civil Statutes of Texas, Art. 2901(a).

provided that no children would be forced to attend racially mixed schools if their parents or guardians objected.

The second law,[29] which was to be involved in subsequent litigation in the Rippy case, required a local option election in each school district on the abolition of the dual or segregated schools. In order to abolish segregated schools, 20 per cent of the qualified voters in a school district had to sign a petition calling for an election. Future desegregation by any other means would be illegal.* Any individual who violated its provisions would be fined and in any school district that had already been integrated without the local option election, the schools would be ineligible both for accreditation and for "Foundation Program Funds," i.e., all state financial aid. In other words, no segregation, no money. In addition, in a special session, the legislature created further obstacles to school integration. It passed a school closing law which provided for closing the schools when violence or the danger of violence could only be prevented by the use of troops; a law authorizing the Attorney General to aid school boards in litigation in federal courts challenging the constitutionality of state statutes; and a law requiring the registration and filing of information by any organization engaged in activities designed to interfere with the operation of the public schools by the State of Texas.[30]

---

[29]Chapter 283 of the 1957 Texas Legislature, Vernon's Annotated Civil Statutes of Texas, Art. 2900(a).

*A few school districts in Texas had already been integrated. In those districts, the local option election could abolish the integrated system and return to the dual school system.

[30]See, 3 RRLR 87-91.

Based on the passage of these laws, the Dallas school officials petitioned the Court of Appeals for a rehearing. The case was heard, for the third time, by Judges Rives, Jones, and Brown, and their decision was announced in a per curiam opinion on August 27, 1957.[31] Despite the Board's argument that the Dallas School District would lose six million dollars a year of state aid and individuals who carried out the order would be penalized, the Court denied the petition for rehearing. Texas law would not be permitted to interfere with federally guaranteed rights. Referring to the local option election law, the Court said:

> That Act, of course, cannot operate to relieve the members of this Court of their sworn duty to support the Constitution of the United States, the same duty which rests upon the members of the several state legislatures and all executive and judicial officers of the several states. We cannot assume that that solemn sworn duty will be breached by any officer, state or federal. If, however, it should be, then the Board of Trustees of the School District and the persons carrying out the order to be issued by the district court are not without their legal remedies.[32]

The Board could not, therefore, take refuge in a statute the Court of Appeals at least intimated was of questionable validity.

Now, the Rippy case was returned to Judge Atwell's court, and on September 5, 1957, he reluctantly followed the judgment of the Court of Appeals.[33] The result of his order, he commented, would unsettle the

---

[31] Borders v. Rippy, 2 RRLR 984 (5th Cir. 1957). This decision was not published in the official reports.

[32] Ibid., p. 985.

[33] Borders v. Rippy, 2 RRLR 985 (N.D. Tex. 1957). The order of the district court was not published in the official reports.

tranquility of the Dallas schools "which has existed in a proud form for many years under which both the colored and white pupils have had equal school facilities and splendid teachers . . . ,"[34] but he was forced to obey the higher court. Now, after two years of delay in which neither a plan nor any start had been made toward desegregation, Judge Atwell asked the attorneys for both parties to prepare an order for his approval which would include a detailed plan for complete integration, to commence in four months time.[35] The Court of Appeals had asked for desegregation with all deliberate speed, and now Judge Atwell was going to give it to them.

This time the defendant School Board appealed the district court decision. After two and one-half years of legal sparring, a federal court, reluctant though the judge may have been, had ordered them to integrate the Dallas schools by a specific date uncomfortably near in the future. This fourth appeal was heard in the Court of Appeals as Rippy v. Borders,[36] again before Circuit Judges Rives, Jones, and Brown. Judge Rives once more wrote the opinion which was handed down on December 27, 1957.*

According to Rives, Judge Atwell had again misconstrued the mandate of the Court of Appeals. Judge Rives noted that Atwell's order had been entered with no further hearing. No new testimony was heard and Atwell

---

[34] Ibid., p. 986.

[35] Ibid.

[36] 250 F.2d 690, 3 RRLR 17 (5th Cir. 1957).

*In this rare example of federal judicial speed, the Court of Appeals had reviewed the Rippy case three times and the District Court once within a six month period.

decided the case solely on the record to date. The attorneys for both sides were asked to do no more than draft suggested orders. In this, and in the substance of his injunction, Atwell had again erred. Atwell's order was excessive, restraining and enjoining the defendants from "requiring or permitting segregation of the races." This was a misreading of the law and the Court of Appeals directions, for only the requirement of segregation was forbidden. As had been stated earlier, only racially discriminatory segregation was unconstitutional. Atwell had therefore gone well beyond what the Court had required when he restrained the School Board from permitting segregation. Thus, Atwell's injunction was too broad.[37]

The plaintiffs had asked for no more than desegregation with all deliberate speed, and the Court of Appeals mandate had fixed no specific date. Further, those with the primary authority and responsibility for desegregating the schools were the school authorities. Only if they failed in that responsibility to the satisfaction of the plaintiffs, should the district court make a determination and order further steps. According to Rives, the district court must "exercise its own judgment and discretion."[38] Clearly, he argued, Judge Atwell had not done this, for he had only reproduced an erroneous version of the Appeals Court ruling.

Therefore, the Court of Appeals reversed Atwell's decision and ordered him to retain jurisdiction for any further proceedings that were necessary:

---

[37] Rippy v. Borders, 3 RRLR 19-20.

[38] Ibid., p. 20.

> The school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility . . . and then if the plaintiffs, or others similarly situated, should claim that the school authorities have failed in any respect to perform their duty, there should be a full and fair hearing. . . .[39]

The problem was therefore back in the hands of the School Board, which now had to proceed with planning for desegregation. The Court of Appeals had avoided what it had viewed as a precipitous desegregation in Dallas, and for the first time one of its decisions received favorable local comment.[40] Further action was taken on April 16, 1958, when the district court entered an order enjoining the defendants from segregating the schools "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed. . . ."[41]

The school authorities of Dallas had not, however, resolved their difficulties with regard to Texas law. In both the federal and state courts, in separate but related suits against the Texas State Commissioner of Education, the Dallas School District sought to clarify its legal standing under the previously mentioned local option election statute and the desegregation order of the federal district court. The school authorities apparently could not obey the federal or state

---

[39] Ibid., p. 21.

[40] New York Times, December 28, 1957, p. 6, col. 2. Local citizens said the reversal of Atwell's ruling would provide a breathing spell and prevent Dallas from becoming another Little Rock. The NAACP was not pleased with the decision.

[41] See, Boson v. Rippy, 275 F.2d 850, 5 RRLR 392, 393 (5th Cir. 1960).

requirements without violating the other. They sought a declaratory judgment to resolve this dilemma. In both the federal and state suits, the School Board was unsuccessful as trial court dismissals were affirmed on appeal.[42]

In reaction to the failure of the above effort in the federal court, and prior to the filing of its suit in the state courts, the Board issued another statement of policy.[43] It announced that it was filing suit in the state courts to hopefully achieve judicial unanimity.* Until that suit was determined, there would be no change in the status of the Dallas public schools. Thus, the Superintendent was instructed to continue segregation in the schools for the 1958-1959 year.

Throughout the prosecution of the Rippy case, the plaintiffs had displayed continued patience. The constant delays, however, finally forced a request for immediate action. Thirteen months after the last district court order had been entered, they filed a "Motion for Further Relief" on May 20, 1959. In it they asked for an order directing the

---

[42] In the federal suit, Circuit Judges Tuttle, Brown, and Wisdom upheld the dismissal of the suit because there was no justiciable controversy nor was there any federal statute giving the district court jurisdiction over the suit. Dallas Independent School District v. Edgar, 255 F.2d 421, 3 RRLR 656 (5th Cir. 1958). The state court suit met with a similar fate because the plaintiffs had not attacked the constitutionality of the statutes involved, and since the suit was in reality against the state, it could not be maintained without the legislature's consent. Dallas Independent School District v. Edgar, 328 S.W. 2d 201, 4 RRLR 878 (Ct. Civ. App. Tex. 1959).

[43] See, Statement on Desegregation, 3 RRLR 788 (1958).

*Filing and prosecuting the state action provided the school authorities with a further justification for delaying production of a desegregation plan.

Board to comply with the earlier judgments and the April 16, 1958, District Court order by:

> Immediately operating all schools under their supervision in the Dallas Independent School District on a nonracial and nondiscriminatory basis; and that defendants be further directed to now permit plaintiffs and all Negro minors similarly situated to enter, matriculate and study in schools under their supervision without regard to race or color.[44]

The Board responded on July 27, that "each day of delay in integrating Dallas schools lessened the danger of violence."[45]

The hearing on the "Motion for Further Relief" was held on July 30, 1959. Attorneys for the school children argued that the Board was admittedly still operating segregated schools in defiance of federal court degrees. Therefore, there was no substantial controversy at issue. However, to allay the fears of the defendants, plaintiffs would be willing to accept the beginning of the 1960 school year as a reasonable date to begin integration. The defense attorney disagreed saying that the plaintiffs were in too great a hurry and that the Board was doing its best to comply with all the law.[46]

At the conclusion of the argument, Federal District Judge T. Whitfield Davidson, who at the age of 81 had replaced Judge Atwell the year before, delivered a lengthy oral opinion preliminary to entrance of his decision. He concluded by warning that integration was surely coming,

---

[44]See, Boson v. Rippy, 275 F.2d 850, 5 RRLR 392, 393 (5th Cir. 1960).

[45]New York Times, July 28, 1959, p. 14, col. 4.

[46]See, Boson v. Rippy, 5 RRLR 393-94.

but he for one, could not say when. He refused to set any date, except that it "would not be now":

> . . . an appropriate order will be that the School Board be instructed to further study this question, and that some definite action be taken, perhaps towards holding this election or doing other things, sometime next spring, but we cannot say definitely whether or not it will take place at any particular time, day, month or year, we don't know, because we don't know what tomorrow may bring forth.[47]

The plaintiffs then asked the district court to make a final ruling on their motion.

Judge Davidson entered his order and decision on August 4, 1959.[48] In that order, the Judge made several findings of fact including the following: 1) The School Board was proceeding toward good faith compliance with the rulings of the Supreme Court, the Court of Appeals, and the District Court; 2) the School Board was diligently studying methods and plans used elsewhere to avoid strife and violence; 3) the School Board was rightfully pursuing remedies in the state courts of Texas, and such remedies had not been exhausted; 4) it was physically impossible and impracticable to begin integration either in September of 1959 or 1960; 5) that further time should elapse before the Court set any date; 6) that plaintiffs had agreed integration should not be put into effect immediately; but 7) that initial steps should be taken to prepare for a

---

[47] Ibid., p. 394. This oral opinion included a remark that whites had a right to maintain their racial integrity. New York Times, July 31, 1959, p. 24, col. 5.

[48] Borders v. Rippy, 4 RRLR 877 (N.D. Tex. 1959). As was true of much of the litigation in the Rippy case, this decision was not published in the official reports.

local option election.[49] Davidson then denied the plaintiffs' motion, retained jurisdiction over the case, and recessed the hearing until the first Monday in April of 1960.[50] The plaintiffs immediately filed notice of appeal ". . . from the decree and final judgment . . . denying Plaintiffs' motion for further relief . . .,"[51] and for a fifth time, their attorney went before the Court of Appeals.

The appeal from Judge Davidson's decree was heard in the Court of Appeals as Boson v. Rippy,[52] before Circuit Judges Rives, Cameron, and Wisdom. The per curiam opinion, overruling Davidson and requiring the submission of a desegregation plan, was announced on March 11, 1960, and a petition for rehearing was denied on April 8, 1960.

The brief opinion of the Court dealt with the two contentions raised by the School Board and a perceived shortcoming in Judge Davidson's decision. In answer to the contention that the district court order was not a final judgment and therefore not subject to appellate review, the Court held that Judge Davidson's order was in effect a refusal to modify an injunction, a judgment appealable under 28 U.S.C.A. Sec. 1292(a)(1).[53]

Secondly, in response to the defendant's contention that the Court of Appeals was limited in its scope of action to the precise language of the notice of appeal,* the Court held that the notice merely described

---

[49] Ibid., p. 877-78.

[50] Ibid., p. 878.

[51] See, Boson v. Rippy, 5 RRLR 394.

[52] 275 F.2d 850, 5 RRLR 392 (5th Cir. 1960).

[53] Ibid., p. 394.

*The precise language of the notice of appeal, which is intended to inform the opposing party as to the portion of a decision which is contested, read as follows: ". . . from the decree and final judgment

the judgment from which appeal was taken, was not intended to limit the scope of the appeal, and did not have that effect.[54]

Finally, with regard to the substantive matters involved, the Court held that Judge Davidson should have required the Board to make a reasonable start toward compliance by requiring it to submit a desegregation plan for consideration at the April, 1960, hearing. The Court therefore ruled that the Board had to submit a desegregation plan within thirty days from the date of final judgment of the Court of Appeals. The district court was directed to hold a full hearing on that plan and any objections to it within thirty days of the submission of the plan.[55] At last a schedule for at least a first step in the integration of the Dallas public schools had been set.

To no one's surprise, Judge Cameron dissented from both the result and the reasoning of the per curiam opinion, because he thought the Court exceeded its legitimate authority and interfered with appropriate local action. First, Cameron maintained, the Court of Appeals had no jurisdiction to hear the appeal. The statute cited by the majority as the basis for the Court's jurisdiction, according to Judge Cameron, did not cover the present case. The plaintiffs at trial, he said, had abandoned their demand for immediate desegregation, therefore the appeal related

---

entered in this action of the 4th day of August, 1959, denying Plaintiffs' motion for further relief praying for a judgment and decree of the Court directing and requiring the Defendants to immediately desegregate the schools in the Dallas Independent School District." Ibid.

[54] Ibid.

[55] Ibid., pp. 394-95.

only to "a matter of timing."[56] Certainly, a party might not take an appeal from the district court's setting of its own docket, and that was what was here involved since the abandonment of the demand for immediate desegregation left only that portion of the Davidson order which recessed the suit until April of 1960. Any disagreement with the April date was a questionable basis for review even if the matter had been raised at the hearing, which it was not, and even if appropriate motions had been made or notice given, both of which were omitted, appeals from interlocutory rather than final orders were to be allowed only when jurisdiction was absolutely clear. Thus, the plaintiffs were not appealing from a refusal to modify an injunction, and the Court had no jurisdiction to hear the case.[57]

Judge Cameron also felt that the majority had interfered with the role of local school boards and the district courts by modifying Judge Davidson's order by requiring the submission of a desegregation plan on a specific date. In the Brown implementing decision, Cameron pointed out, the Supreme Court had placed primary responsibility for desegregation on the local authorities and the district courts. The Supreme Court had relied on the discretion of those closest to the scene and most familiar with the special problems of each school system. This discretion had been properly exercised by Judge Davidson, and it was not within the powers of the Court of Appeals to set aside that discretion in the absence of clear error.[58]

---

[56] Ibid., p. 395.

[57] Ibid., p. 396.

[58] Ibid., pp. 396-97.

Finally, Judge Cameron argued that the majority had given no consideration to the impact of the Texas statutes requiring a local option election to abolish the segregated school system and providing for the assignment and transfer of pupils. The statutes had only been indirectly involved in the litigation, and there had been no ruling on their constitutionality by either the state or federal courts. If the statutes were valid, Cameron said, they were binding, and the Court of Appeals could not proceed as if they did not exist. If the direction of the Court of Appeals was followed, the defendants would be forced to violate valid Texas law. Therefore, no action should be taken until the status of the Texas laws was determined. Judge Cameron contended that just such a procedure could have been initiated by the plaintiffs at the April hearing Judge Davidson had scheduled and which the Court of Appeals had canceled. Thus, since the constitutionality of the statutes had never been challenged, the Court of Appeals should stay its hand until such a challenge was resolved.[59]

As in his prior dissent, Judge Cameron's basic position was that the federal appellate courts were operating beyond both their legitimate jurisdiction and the requirement of local authority and responsibility established by the Supreme Court in the desegregation decisions. To achieve what the majority wanted in the area of social reform, Cameron felt the Court of Appeals was ignoring well-established legal principles. He, for one, would continue to conform to proper procedures in handling school desegregation suits.

---

[59] Ibid., pp. 398-99.

The Rippy case was then returned for the fifth time to Judge Davidson's court for action according to the mandate of the Court of Appeals, and was heard under the title, Borders v. Rippy.[60] Because of the size and complexity of the Dallas school system, the Board maintained that the administrative plans for the school year beginning in September, 1960, had already been made, therefore its plan was designed to go into effect in September of 1961.[61] Desegregation would proceed on a grade per year basis with arrangements for slow adaptation to the change provided for teachers, students, and parents. Specifically, it included the following provisions: 1) Prior to the implementation of the plan, a local option election, as required by Texas law, would be held, and if the vote was negative, the plan's implementation would be delayed until such an election produced an affirmative result; 2) desegregation would proceed on a grade by grade basis beginning with the first grade and would be completed after twelve years; 3) non-racial school zoning would be established for each grade as it was desegregated; 4) application for transfer would be granted for good cause, which included a) when a white child would otherwise attend a previously all black school, b) when a black child would otherwise attend a previously all white school, and c) when any student would otherwise attend a school where the majority of the students in the school or grade were of a different race; 5) prior to the beginning of desegregation, teachers of both races would attend study groups and work shops to aid in their adjustment; and 6) parents would be asked to participate in orientation meetings and seminars to prepare for

---

[60] 184 F.Supp. 402, 5 RRLR 679 (N.D. Tex. 1960).

[61] Borders v. Rippy, 5 RRLR 680.

desegregation. The plan also included a detailed calendar setting forth the dates for the teacher and parent meetings.[62]

The plaintiffs had opposed the Board plan as being too slow and too long delayed, but Judge Davidson characterized the plaintiffs' position as "a demand for unconditional surrender of the Board's position and calls for total and complete integration only."[63] The Brown decision, he maintained, did not require such a result. The only proper way to have integration was by consent, not force. After all, he argued, government by the consent of the governed was the basis for the American political system. Judge Davidson, therefore, rejected the School Board's plan since it would force integration (and by the way lead to amalgamation of the races), and continued the case to give the Board time to come up with another plan. Davidson suggested as an acceptable alternative a plan providing for white schools, black schools, and integrated schools to which students would be assigned based on free choice. Thus, he argued, those who wanted integration could have it immediately rather than having to wait.[64]

---

[62] Ibid., pp. 681-684.

[63] Ibid., p. 685.

[64] Ibid., p. 696. If the above had been the entirety of Judge Davidson's opinion, his rather novel interpretation of the requirements for a non-segregated school system would make the decision most interesting. In fact, the bulk of his lengthy decision dealt not with the Rippy case, but with historic social, political, religious, and economic aspects of segregation. Davidson's opinion is one of the most remarkable judicial statements produced during the entire school desegregation struggle. He argued that integration was bad for society and that slavery had in some ways benefited the Negro. Segregation was no barrier to individual success, but merely reflected the South's attachment to the traditional values of local self-government and racial integrity. The following examples from that peroration give the flavor of his view.

Questioning the necessity for speedy integration, Davidson argued that history had shown that integration had been unsuccessful by citing

The School Board thereupon submitted an amended plan for Judge Davidson's approval. Although still preferring its original plan, the

---

the contrast between the "high standards" of the French-speaking Canadians of Quebec (where separation had been maintained) and the depressed conditions in the integrated societies of Haiti and Puerto Rico. Integration had retarded the development of every land where it had existed. Davidson then launched upon a review of the history of the black man in the South, which he argued was the background for the current difficulties.

Slavery was indeed a blight upon our past, Davidson said, and in particular the horror of the slave ship. Thus, referring to the newly landed slave, Davidson said "to be freed from his recent captors and from the foul condition of the ship was for a moment a relief no doubt to this poor fellow when he was inducted into the wide open space of a Southern plantation with open air, food and kindness." Slavery was beneficial for the imported African, Davidson said, for he was taught the English language, converted to the blessings of Christianity, and tended by the merciful mistress of the plantation as a physician. As a result, the Negro slaves were a good and loyal people as proved by the way they ran the plantations under the supervision of the heroic mistress during the Civil War. Davidson demonstrated this by reference to the "many, many" slaves his grandfather had owned.

Unhappily, the Negro was corrupted after the war by his new master, the carpetbagger, the Judge said. But fortunately, the corruption was only temporary, as the old relationships in the South were renewed. Then, according to Davidson, the Negro learned the key to his future from Booker T. Washington, and that key was excellence. By excelling, negroes could avail themselves of the "equal opportunities" available to them. One only had to look at the successes of individual Negroes to see that this was true, thus proving that the sixty year old system of segregation had been no handicap to the Negro.

Southern people today resisted integration, according to Davidson, because they feared that the tragic era of Reconstruction would again occur. The abuses of Reconstruction were ended, he said, only when home rule, "that boon of local self-government," was restored. Only a people governed by consent, according to its social order, usage, and tradition, were a contented, law abiding people.

Segregation of the races, like the Chinese Exclusion Act, Davidson maintained, did not represent hatred for the excluded or segregated but rather a concern for local self-government and the right to determine one's own affairs. Indeed the great gift of Western Civilization from the Romans through the repeal of Prohibition by individual states was the right of local self-government. Clearly, "the crowning item of the Constitution is Article 1D of the Bill of Rights."

Along with local self-government, another gift of civilization and "a God-given right" was racial integrity, according to Judge Davidson. The very base upon which Christianity was built, he said, was the Hebrew's successful defense of their racial integrity. The Southern Negro recognized this fact and approved of it. The relationship between the races was a healthy one, for the Negro looked upon his influential

Board provided for the three school approach he had recommended.[65] The plaintiffs vigorously contested the amended plan.

Judge Davidson issued a "Supplemental Opinion" on June 4, 1960. He noted that the courts under the Brown decision were limited to the mandate calling for integration and would not interfere with the actual management of the schools. The School Board was in charge of operating the schools, and if that operation was conducted according to the amended plan for desegregation,* the Board would be in compliance with the Supreme Court's mandate. He therefore approved the amended plan submitted by the Board.[66]

At last, the Dallas schools had a desegregation plan that had been approved by a federal court. Whether or not this approved plan was going to be put into operation was problematical, for both the plaintiff school children and the School Board, for the sixth time appealed

---

white friend as a "counselor, an advisor or if need be a champion."

All of this, Davidson argued, showed that local self-government and racial integrity were expressed in the notion of government by the consent of the governed. This was what all people really wanted. Unfortunately, such an arrangement had been partially denied by the Supreme Court in its desegregation decisions. However, that Court had allowed substantial discretion for local authorities to work out their problems. Since he was determined to prevent amalgamation of the races, which of course led to degeneration, Davidson would require the School Board to come up with an alternative to its plan requiring total and complete integration. Thus ended Judge Davidson's virtuoso performance. Ibid., p. 685-695.

[65] Ibid., p. 699.

*Judge Davidson required a further alteration in the plan so that the requirement of holding the local option election should not be a condition of the desegregation plan.

[66] Ibid., pp. 697-99.

the District Court decision to the Court of Appeals for the Fifth Circuit.* In the interim, before the Court of Appeals ruled on the appeal, a local option election was held on August 4, 1960. At least the white citizens, for black voting was reportedly light, expressed their opinion clearly. The vote was 7,416 for integration and 30,324 against it.[67] Until the Court of Appeals ruled, the School Board had apparently discharged its duty.

The Rippy case was heard on appeal as Boson v. Rippy[68] before Chief Judge Rives and Circuit Judges Tuttle and Jones. Judge Rives wrote the opinion reversing Davidson and reinstating an amended version of the Board's original plan, and it was announced on November 30, 1960. At the outset, the Court disposed of the issue of the impact of the Texas local option election law. The issue was simple, for according to Judge Rives, "It goes without saying that recognition and enforcement of constitutional rights cannot be made contingent upon the result of an election."[69] With regard to the desegregation plan, the Court disappointed both the plaintiffs and the Board.

The Court had no doubt that Davidson's approval of the three school plan had to be reversed. It showed a total misconception of the plaintiffs' constitutional rights. Equal protection meant that plaintiffs were to be treated as individuals without regard to race or color.[70]

*Specifically, the plaintiffs appealed from Davidson's approval of the amended Plan No. 2, and the defendants took an appeal from the disapproval of amended Plan No. 1.

[67] New York Times, August 7, 1960, p. 84, col. 2.

[68] 285 F.2d 43, 5 RRLR 1048 (5th Cir. 1960).

[69] Boson v. Rippy, 5 RRLR 1049.

[70] Ibid., p. 1050.

Rives said that the true meaning of the Constitution was best expressed by Mr. Justice Harlan in his classic dissent in Plessy v. Ferguson, 163 U.S. 537 (1895):

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[71]

Rather than removing a forbidden classification, Judge Davidson had approved a plan adding another such classification. State support of any schools requiring racial segregation was unconstitutional.[72]

Regarding the first plan submitted by the Board, Rives held that with the elimination of that part of the plan allowing transfers on the basis of race, it would be approved. This approval did not extend to the Board's proposed twelve-year schedule Rives warned, for it might not be necessary to have that much delay. Judge Rives granted that the plaintiffs might be frustrated that no more definite judgment was rendered, but he said he was reluctant to substitute the Court of Appeals' judgment for that of the district court. Only to the extent necessary to ensure a full start to compliance with the required termination of segregation would such substitution take place. Finally, given the past history of the case, Rives reminded the district court that the burden was on the School Board to establish justification for any further delay.[73]

---

[71] Ibid.

[72] Ibid.

[73] Ibid., pp. 1050-51.

On December 7, 1960, Rives entered a supplemental opinion to more strongly emphasize that the portion of the desegregation plan providing for transfer for racial reasons was impermissible. It was felt necessary to do this because the Sixth Circuit Court of Appeals had held that similar provisions were not unconstitutional in a Nasville school case.[74] Rives and his brother judges disagreed, saying that:

> . . . with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school.[75]

The provisions of the eliminated transfer section were also objectionable, according to Rives, because it applied a different rule of law for the Dallas School District than that applied to the rest of the schools of the state under Texas law.[76]

The above was the last hearing in the Court of Appeals in the Rippy case. That Court had finally indicated its approval of a desegregation plan for the Dallas schools beginning in September, 1961. All that remained was the reinstatement of the approved plan, with the offending transfer provision eliminated, by the district court. On June 27, 1961, Judge Davidson complied with the Court of Appeals direction and approved the grade-a-year plan in the sixth decision in the case in the District Court. Davidson also ordered the Board to administer transfers so as

---

[74] Ibid., citing Kelly v. Board of Education of Nashville, 270 F.2d 209 (6th Cir. 1959).

[75] Boson v. Rippy, 5 RRLR 1049, 1052.

[76] Ibid., pp. 1052-53.

not to discriminate between the races, and he retained jurisdiction in case any further decrees were necessary.[77]

Not surprisingly, in his opinion, Davidson berated the Court of Appeals for overriding the desires of the people of Dallas, destroying the Tenth Amendment of the Constitution, and crushing the right to local self-government. He had, Davidson said, been forced to ignore his own conscience and his notions of fair play. Though he vigorously dissented from what he was forced to do, Davidson did urge the people of Dallas to stay calm and stand by constituted authority.[78]

With Judge Davidson's parting salvo, the Rippy case was finished with its almost six year journey through the federal judicial system. The desegregation of the Dallas schools could now begin, only seven and one-half years after the Supreme Court had determined that black school children were denied their constitutional rights by segregation in the public schools. The degree to which segregation would end in Dallas would now depend on the situation outside of the courtroom.

In the event, desegregation in Dallas was generally peaceful. For a year before the final decision, civic leaders had been preparing the community for integration. The slogan for Dallas was going to be law and order, for most citizens wanted to avoid the tension and violence symbolized by Little Rock.[79] When the schools opened on September 6, 1961, integration began without incident as Dallas appeared to be ready

---

[77]Borders v. Rippy, 195 F.Supp. 732, 6 RRLR 746,747 (N.D. Tex. 1961).

[78]Ibid., pp. 747-49.

[79]New York Times, September 3, 1961, p. 45, col. 4.

to accept the change. However, integration was token at best, for in a school system of well above 100,000 students, only ten black girls and eight black boys attended integrated first grade classes.[80] For most of the white citizens of Dallas, the momentous change was rather easy to accept. Subsequent meaningful and complete integration took several years to occur, and required a reorientation of the policy of the Fifth Circuit and an alteration of public opinion.

In the Rippy case, the Court of Appeals had a difficult role to fulfill. If the results of the local option election on desegregation were an accurate reflection of the sentiment of the majority of the people of Dallas, the Court was dealing with a community overwhelmingly opposed to what the Court was bound by law to accomplish. The defendant School Board of Trustees of the Dallas Independent School District was at the least not very cooperative. It sought to delay the impact of the Brown decision by every legal means available. It is possible to argue, of course, that their reluctance to act was at least in part due to the conflicting demands of the Court of Appeals and the legislature of Texas. Certainly, the State of Texas had made its opposition to desegregation clear in the statutes passed by the legislature. However, the main obstacle to the Court's enforcement of Brown was the lower federal court whose primary responsibility it was to see that compliance with the Supreme Court's mandate was accomplished.

Given the nature of the task, even a unified federal judiciary would have had a difficult time. Unfortunately for the Court of Appeals, district judges William H. Atwell and T. Whitfield Davidson effectively

---

[80] Ibid., September 6, 1961, p. 23, col. 1.

delayed implementation of desegregation for almost six years. These two men gave support and encouragement, through their decisions and opinions, to those in Dallas who either wanted to avoid integration, delay it as long as possible, or limit its impact. Thus, the Court of Appeals was required to drag the district court along, kicking and screaming all the way, into obedience to the supreme law of the land. Here there was no gentle education of the lower court, as had been true in the Gibson case.

The Court of Appeals also had a substantial impact on desegregating the Dallas schools. It will be recalled that in Miami, desegregation was begun independently of the federal litigation. In the Rippy case, only the decisions of the Court of Appeals forced the Dallas school authorities to begin the task. It is true that the Court proceeded hesitantly at times, for example when it reversed Judge Atwell's petulant order for immediate desegregation.[81] It might also be argued that the Court of Appeals was too cautious in not calling for immediate and complete desegregation at the termination of the long process of litigation. However, one must consider the context of the times in the Court's insistence on the primary responsibility and authority of local school officials and the district court. The judges of the Court of Appeals felt they could do no more than force the above to obey the law and perform their responsibilities.

Perhaps the delay involved in the extended litigation served a useful purpose, even though the postponement of the enforcement of the constitutional rights of the black school children was difficult to

---

[81] Rippy v. Borders, 250 F.2d 690, 3 RRLR 17 (5th Cir. 1957).

justify. When integration finally began, even though it was initially little more than token, there was no violence and it proceeded smoothly. Though it seems clear that the process could have begun several years earlier with the full and complete cooperation of the Dallas School Board, at least the protracted legal struggle provided a period in which the citizenry were prepared to accept desegregation. It would be rather difficult, however, for one to attempt to balance the arguments for and against delay.

In the final event, the suit brought in Borders v. Rippy finally was successful. The Dallas schools did begin to end segregation. That such a limited result would be legally insufficient in the Fifth Circuit in five years time does not detract from the accomplishment. The Court of Appeals for the Fifth Circuit met its responsibility. In the face of local and state opposition, it was able to correct the excesses of two recalcitrant district judges and to force the District Court for the Northern District of Texas to apply and enforce federal law and the people of Dallas to carry it out. In the next and final case to be examined, the Court was faced with a very different problem. In New Orleans, the Court of Appeals would be called upon to support and affirm a district court against a state and community in judicial and legislative revolt against the supreme law of the land of the United States.

CHAPTER VI
THE CASES (3): THE FACTUAL SETTING, BUSH v. ORLEANS PARISH SCHOOL BOARD

In the Dallas desegregation controversy, the judicial conflict was essentially between the Court of Appeals and the District Court. In the New Orleans case, the protagonists were the District Court for the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit on one side and a good part of the governmental machinery of the state of Louisiana on the other. What distinguished this contest from most others in the Deep South was its intensity, and the disorder it engendered.

Between 1954 and 1961, the Governors and the Legislature of Louisiana employed every conceivable means short of armed insurrection to prevent the New Orleans School Board from complying with federal court desegregation orders. The city of New Orleans and its civic leaders exercised little influence over events due to their own quiescence and the activity of the State government. The School Board was rarely cooperative, but a good deal of its hesitance was a result of being caught between the mutually exclusive demands made upon it by the state and the federal courts. Throughout the history of the litigation, these federal courts were the only supporters of the rights of black school children in Orleans Parish.

The legal issues involved in Bush v. Orleans Parish School Board* were not terribly complex, requiring either detailed analysis or explanation. The School Board did not really contest the black childrens' right to attend school on a non-discriminatory basis. Rather, the disagreement concerned timing and procedure. Instead, the almost continual parade through the doors of the federal courthouse was produced by the persistence both sides displayed and the ingenuity of Louisiana segregationists. The plaintiffs refused to give up in the face of interminable delay, and laws to prevent integration without specifically mentioning race were repeatedly adopted. Neither side would surrender its basic position. These attributes once more called into question the supremacy of federal over state law. It would be difficult to imagine an issue of greater importance, for our system of government depends upon that supremacy, and its reaffirmation was one of the important results of the suit.

The Bush case also demonstrated the tragic delay that often accompanied attempts to provide workable remedies confirming rights guaranteed by the Constitution. From the genesis of the conflict to its conclusion, over twelve years of federal court action elapsed. The individual black school children who were the plaintiffs in this case never attended

---

*It would be impossible to provide a full citation for Bush v. Orleans Parish School Board. There were slightly over forty different hearings held in its course, five of which were in the Court of Appeals and six in the Supreme Court. Further, in 1960, it was consolidated with companion cases Williams v. Davis and U.S. v. Louisiana. Additionally, two related cases, State v. Orleans Parish School Board and Singlemann v. Davis, were heard in the Louisiana courts. Therefore, individual citations will be provided where they are appropriate. The name Bush v. Orleans Parish School Board (referred to subsequently also as the Bush or Orleans Parish case) will be used as the generic term to designate the entire legal contest.

school in an integrated classroom in Orelans Parish, Louisiana. As seemed so often true in desegregation suits filed in the 1950's, those who bore the legal burden of making the Brown decisions effective in the real world did not reap the benefits of their eventual success.*

In the course of the Orleans Parish case, all seven judges of the Court of Appeals for the Fifth Circuit included within this study took part in its decision. Additionally, Circuit Judge Wayne T. Borah, who retired shortly thereafter, participated in the three-judge district court hearing which initiated the federal court decision-making process. In the District Court for the Eastern District of Louisiana, Bush was heard before Judges J. Skelley Wright, who served through mid-1962, Herbert Christenberry, who participated in all of the three-judge district court decisions, and Frank Ellis, who replaced Wright in 1962 after Wright had been named to the Court of Appeals for the District of Columbia. With only one exception, all were in basic agreement on the proper course to be followed.

The desegregation of the New Orleans schools proceeded by clearly discernible steps. The first stage, consisting of the rather extended development of events, lasted from approximately 1952 through the early months of 1960. The period of real crisis, with move and countermove occurring on an almost daily basis, lasted from around May, 1960, until May of 1961. The final stage, from June of 1961 into late 1964, brought the cooling-off of conflict and slow resolution of outstanding issues.

---

*While the Bush case extended well beyond 1960, most of the important decisions and developments occurred before 1961. Later developments and decisions which were important will be here included to provide a completed view of the case.

This changing pace of developments will serve as the outline for subsequent discussion of Bush v. Orleans Parish School Board.

Delay: 1952-1960

If one were to have chosen a major city in the Deep South that might experience relatively peaceful desegregation, New Orleans would have been an excellent candidate. Given the obvious limitations of the relationship, blacks and whites had lived in harmony in New Orleans for decades prior to the 1950's. For example, New Orleans had less residential segregation than any other large city in the North or South.[1]

In November of 1951, a group of black school children, through their parents, petitioned the Orleans Parish School Board to end its practice of racially segregating the public schools and to admit them and other black students to schools on a nondiscriminatory basis. The request was denied, and in February of the next year, they appealed the local decision to the State Board of Education. In August of 1952, the State Board replied that most of their request was totally within the purview of the local School Board and refused to overturn the latter's decision.[2]

With the legal and financial support of the Louisiana NAACP, the black children then filed a complaint in the federal district court on September 5, 1952.[3] The action thus commenced, under the title of Bush

---

[1]Morton Inger, Politics and Reality in an American City: The New Orleans School Crisis (New York: Center for Urban Education, 1969), p. 9.

[2]See, Orleans Parish School Board v. Bush, 242 F.2d 156,158 (5th Cir. 1957).

[3]Inger, Politics and Reality, p. 17.

v. Orleans Parish School Board, sought relief both from the disparate conditions in the white and black schools of New Orleans and from discrimination based simply on the fact of racial segregation. The suit sought a declaratory judgment that segregated schools, and Art. XII, Sec. 1 of the Louisiana Constitution which mandated them, were unconstitutional as being a denial of the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.[4] Both parties agreed to suspend all action on the complaint until the U.S. Supreme Court handed down its decision in Brown v. Board of Education.[5] They agreed that prior action in the case would be premature.

After the first opinion in the Brown case, the Louisiana Legislature embarked upon a program of legislation designed to circumvent the Supreme Court's ruling. During its 1954 session, the Legislature amended Art. XII, Sec. 1 of the state Constitution to provide for racially segregated schools not because of race, but "in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State. . . ."[6] The Louisiana Legislature also passed statutes which restated the requirement of segregated schools, provided penalties for school boards and individuals who failed to meet the law's requirements, and gave total discretion for pupil assignment to the parish superintendent of schools, so long as he maintained segregation.[7]

---

[4]See, Orleans Parish v. Bush, 242 F.2d 158.

[5]Inger, Politics and Reality, p. 17.

[6]Art. XII, Sec. 1 of the Louisiana Constitution, as amended by Act 752 of 1954.

[7]Acts 555 and 556 of 1954.

After the enactment of these laws, the plaintiff school children again petitioned the School Board to discontinue segregation. No reply to this was received, and earlier hope that New Orleans would voluntarily abide by the Brown decision disappeared.[8] The plaintiffs filed an amended complaint to include in the action the new Louisiana provisions; the School Board filed a motion to dismiss the case; and the state of Louisiana sought to intervene to file a motion to dismiss the suit as being one against the State.[9] Thus, the stage was set for a federal court decision.

The suit was initially heard by a three-judge district court consisting of Circuit Judge Wayne Borah and District Judges Herbert Christenberry and J. Skelly Wright.* The black children, through a request for a declaratory judgment and injunctive relief, sought admission to the Orelans Parish schools on a nonsegregated basis. On February 15, 1956, the district court announced its decision in a per curiam opinion.[10] The court held that the Supreme Court's decision in the Brown case was clear: Racial discrimination in the public schools was unconstitutional; all

---

[8]See, Orleans Parish v. Bush, 242 F.2d 160. The School Board's original attorney was Sam Rosenberg, a local leader of the B'nai Brith Anti-Defamation League. He had told the Board that the law was against it and refused to argue the case. The Board then hired Gerald Rault, an attorney for the Savings and Loan of which Emile Wagner, a member of the School Board and one of New Orleans' leading segregationists, was president. Inger, Politics and Reality, p. 18.

[9]See, Orleans Parish v. Bush, 242 F.2d 160.

*The parties to the suit requested a three-judge court under the provisions of 28 U.S.C. Sec. 2281 since the constitutionality of Louisiana statutes was in question.

[10]Bush v. Orleans Parish School Board, 138 F.Supp. 336, 1 RRLR 305 (E.D. La. 1956).

contrary statutes (those requiring segregation) were void; and as a result, there was no serious constitutional question presented which had not already been decided by the Supreme Court. Therefore, Judges Borah and Christenberry withdrew from the case, and it proceeded as it had been originally filed.

On the same day, Judge Wright handed down the first of his many decisions in Bush v. Orleans Parish School Board.[11] The plaintiffs' position was that segregation of the schools deprived them of the equal protection of the laws guaranteed by the Fourteenth Amendment, and that under the Brown decision, the Board should be restrained from continuing that practice. The School Board argued that the suit should be dismissed because: 1) It was a suit against the state of Louisiana, filed without the consent of the state and thus barred by the doctrine of sovereign immunity; 2) there was no justiciable controversy presented because no plaintiff had been denied admission to a particular school; and 3) the plaintiffs had not exhausted administrative remedies available to them.[12] Wright agreed with the plaintiffs' position and granted the relief they sought.

Judge Wright addressed himself to each of these contentions and found them to be without merit. First, Wright said, a suit against an officer or agent of a state acting illegally was not a suit against the state. The Brown desegregations cases were suits just like the one before the court, as were most other desegregation cases. If such a suit was barred by sovereign immunity, certainly some federal court would have

---

[11] 138 F.Supp. 377, 1 RRLR 306 (E.D. La. 1956).

[12] Ibid., pp. 306-07.

noticed it. As to the existence of a justiciable controversy, the Judge maintained that if the deprivation of constitutional rights through the Board's requirement of segregation was not such an issue, none existed at all. Wright further ruled that the plaintiffs had exhausted all administrative remedies. The appeals procedure established by Act 555 of 1954 had been held invalid by the three-judge court and thus could not be relied upon. Even if the Pupil Placement Act (Act 556 of 1954) was not invalid as part of the 1954 segregation package, it was invalid because it was an unlawfull delegation of legislative authority to the superintendents of schools since it contained no standards for assignment. Further, the school children had made repeated efforts to be assigned to nonsegregated schools. To require thousands of children to make further application, particularly since the Board had refused to desegregate the schools, would be to require a vain and useless gesture.[13]

Judge Wright then granted the temporary injunction sought and ordered the School Board to desegregate its schools "with all deliberate speed."[14] While the schools would not be desegregated overnight, for that constituted a revolution in Southern mores requiring patience and understanding, Wright warned the Board that the difficulties surrounding desegregation would not be allowed to deny the plaintiffs their rights as freeborn Americans.[15]

The immediate reaction of the School Board was to seek direct review of the three-judge decision in the Supreme Court. On April 5, 1956,

---

[13] Ibid., pp. 307-08.

[14] Ibid., p. 308.

[15] Ibid.

the School Board sought a writ of mandamus from the Supreme Court to order further hearings on the constitutionality of Louisiana's segregation laws before a three-judge court.[16] In Orleans Parish School Board v. Bush, the Supreme Court denied mandamus.[17]

While the School Board was trying to avoid enforcement of Judge Wright's order, the Louisiana Legislature began its 1956 session. In view of the federal proceedings, additional legislation regarding the schools was felt to be necessary. In June and July, the Governor signed three measures designed to maintain the existing system. The first of these required a certificate of eligibility and good moral character signed by the parish superintendent of education for admission to any of the publicly financed universities in the state.[18] No guidelines or standards were included within the act, thus giving the superintendent complete discretion. The second of the statutes was more direct, as it provided for the suspension of the compulsory school attendance law wherever integration of the schools was required by court order.[19]

The last of the 1956 laws was clearly related to the federal litigation, for it applied only to New Orleans. This legislation required

---

[16] New York Times, April 16, 1956, p. 10, col. 1.

[17] 76 S.Ct. 854, 351 U.S. 948 (1956). Throughout the course of the Orleans Parish case, the Supreme Court periodically rendered brief decisions without opinions. In each instance, these decisions upheld the action of the District Court for the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit. The following are the citations to those rulings. 77 S.Ct. 1380, 354 U.S. 921 (1957), cert. denied; 81 S.Ct. 28, 364 U.S. 803 (1960), motion and stay denied; 81 S.Ct. 260, 365 U.S. 569 (1960), stay denied; 81 S.Ct. 1917, 367 U.S. 908 (1961), aff.; 82 S.Ct. 119, 368 U.S. 11 (1961), aff.

[18] House Bill 437 of 1956.

[19] House Bill 438 of 1956.

the separate use of school buildings by black and white students and white teachers and black teachers could only instruct children of their race, and a Special School Classification Committee of the Louisiana Legislature was created with the sole power to classify and reclassify the public schools, subject only to the ratification of the Legislature as a whole. These provisions applied only to cities with a population in excess of 300,000.[20] The only city in Louisiana which met this qualification was New Orleans.

The state of Louisiana had made it very clear that it was committed to opposing desegregation in New Orleans. The Legislature had also sought to prevent the School Board from being subject to a court order to desegregate by taking unto itself the authority to classify the Orleans Parish schools.

Meanwhile, the School Board had appealed Judge Wright's order on the grounds that he had erred in his findings and that the evidence at trial had not warranted the issuance of a temperary injunction. The case was heard as Orleans Parish School Board v. Bush,[21] before Judges Rives, Tuttle, and Brown. The decision, prepared by Judge Tuttle for an unanimous court and announced on March 1, 1957, affirmed the lower court's ruling and held the Louisiana segregation laws unconstitutional.* Although the issue of sovereign immunity in suits of this kind had been settled in the Brown case, because both the Board and the Louisiana Attorney General had urged it so strongly, Judge Tuttle went to some

---

[20] Senate Bill 350 of 1956.

[21] 242 F.2d 156 (5th Cir. 1957).

*On April 5, 1957, a further rehearing was denied.

lengths to discuss the issue. While it was true, he said, that suits to compel state action were generally barred in the absence of agreement by the state to be sued, the suit before the Court did not seek to compel state action. Rather, Tuttle argued, it sought to prevent state action in violation of the plaintiff children's rights. If the laws under which the Board purported to act were invalid, then the Board was acting without the authority of the state.[22]

The claim that the plaintiffs had failed to exhaust their administrative remedies was without merit, for under the law when the suit was originally filed (before the enactment of the 1954 laws), the plaintiffs had followed all possible administrative procedures. Further, even if the 1954 laws were applied, plaintiffs had sought an end to the practice of segregation, not specific assignment to particular schools. Since assignment by Louisiana law could be made only to segregated schools, plaintiffs could not be required to do a "vain and useless act."[23]

In response to the Board's claim that the school children had shown no proof of actual or immediate irreparable injury which would entitle them to a temporary injunction, Tuttle said the denial of their constitutional rights represented an irremediable loss. Further, the scope of the injunction was limited and contained no immediately compulsive features applicable to the Board.[24]

Judge Tuttle then addressed the central issue, the constitutionality of the 1954 Louisiana Constitutional amendment and statutes. Unless the

---

[22] Ibid., pp. 160-61.

[23] Ibid., p. 162.

[24] Ibid.

changes in the law altered the situation, the plaintiff school children would be entitled to their declaratory judgment under the reasoning of the Brown desegregation cases. The only change that Tuttle saw was that segregation of the races in the public schools was no longer based on race but on the exercise of the state police power to promote the public health and safety.[25]

The state had introduced affidavits indicating that blacks had a higher percentage of undesireable traits such as lower intelligence ratings and higher rates of illegitimacy and social diseases. Such characteristics had never before been the basis of pupil classification or assignment. To employ them now and identify blacks with those traits was unthinkable and revealed what was at the heart of the classification, race. Further, while the states retained extremely broad police powers, that power was "limited by the protective shield of the Federal Constitution."[26] Thus, police power did not entitle a state to violate its citizens' constitutional rights. Most importantly, Judge Tuttle argued, Louisiana was attempting to accomplish precisely what was expressly forbidden by the Brown desegregation decisions. Classification of pupils by race was no longer permissible, even in the exercise of a state's police power.[27] Thus, the 1954 segregation legislation passed by the Louisiana Legislature was unconstitutional and void.*

---

[25] Ibid., p. 163.

[26] Ibid.

[27] Ibid., p. 164.

*The Court also held that the Pupil Assignment Act passed in 1954 was unconstitutional since it contained no standards and gave the superintendent the power to assign students arbitrarily. This was a particularly serious fault given the history of pupil assignments made under this law. Ibid., pp. 164-65. Judge Tuttle also summarily held that plaintiffs' suit was a valid class action.

In affirming Judge Wright's decision, Tuttle remarked that the limited scope of the inunction and the willing acquiescence in delay by the plaintiffs* provided the School Board an ample opportunity to display its good faith in complying with the desegregation order. While sufficient time would be allowed to arrive at desegregation, even if the Board did not act in good faith, the Court would meet its responsibilities and vindicate the constitutional rights of the black school children.[28]

Almost immediately the School Board was back in Judge Wright's court attempting to avoid the desegregation order. It filed a motion to vacate the injunction because the plaintiffs had not filed a $1,000 bond with the court as required by Wright's original decree. The plaintiffs then filed the required bond, which was approved by the district court on June 19, 1957. One week later, Judge Wright, in an unreported decision, denied the School Board's motion to vacate.[29] The School Board appealed this denial to the Court of Appeals.

The case was heard this time before Chief Judge Hutcheson and Judges Tuttle and Jones. Tuttle again wrote the opinion, affirming Wright's decision, which was announced on February 15, 1958.[30] Judge Tuttle noted that it was not until after the previous Court of Appeals

---

*That the plaintiffs accepted delay was evidenced by the fact that their attorneys took no steps to force implementation of Judge Wright's 1956 order until mid-1959. Inger, Politics and Reality, p. 18.

[28]Orleans Parish v. Bush, p. 166.

[29]See, Orleans Parish School Board v. Bush, 252 F.2d 253, 3 RRLR 171,172 (5th Cir. 1958).

[30]Orleans Parish School Board v. Bush, 252 F.2d 253, 3 RRLR 171 (5th Cir. 1958).

opinion had been announced that the Board first complained of plaintiffs' failure to file the bond. It was clear to Tuttle that the Board was now raising the issue for the purpose of delay. It was true that such bonds were required to protect against injury incurred from wrongfully issued injunction,[31] but in the present instance, the technical failure on the part of plaintiffs had caused no injury. The injunction had required no specific act, the School Board had not been injured, and the defect had been cured when the plaintiffs filed the required bond. In any event, the early failure to file had been waived by the School Board by its failure to complain upon the appeal of Judge Wright's order.[32]

By this time, Judge Wright was clearly dissatisfied with the progress made by the School Board toward compliance with his desegregation order. That order was now two years old and no preparations had been made. Wright warned the Board that he wanted no more delaying tactics, for he saw no disputable facts remaining in the case.[33] It could not have pleased him, therefore, when a new Board motion to vacate the injunction was filed.

It will be recalled that during the 1956 legislative session, a statute was passed transferring the power to classify the schools of Orleans Parish from the School Board to a special committee of the Legislature. It was upon this basis that the Board now sought to vacate the desegregation order entered against it, for the Board claimed it no longer had control over the classification of Orleans Parish schools.

---

[31] Rule 64(c), F.R.C.P.

[32] Orleans Parish v. Bush, pp. 172-73.

[33] New York Times, April 3, 1958, p. 11, col. 5.

Judge Wright's brief opinion of July 1, 1958, denied the Board's motion and reflected his impatience with the School Board.[34] He simply stated that:

> It would serve no useful purpose to labor this matter. The Supreme Court has ruled that compulsory segregation by law is discriminatory and violative of the equal protection clause of the Fourteenth Amendment. [Citation omitted] Any legal practice, however cleverly contrived, which would circumvent this ruling, and others predicated on it, is unconstitutional on its face. Such an artifice is the statute in suit.[35]

The injunction against the Board's operation of the public schools on a segregated basis was made permanent.

At the same time, the Louisiana Legislature was holding its regular session for 1958. At this session, an even more extensive series of segregation statutes was enacted. These laws provided the state with an arsenal of weapons to combat court-ordered desegregation of the public schools. First, the Legislature recognized the likelihood that a good deal of federal litigation would occur in the future. Thus, the lawmakers provided for the continuation and preservation of the salary of any school official called away from his normal duties as a result of federal action relating to desegregation.[36] This possibility certainly existed, for the Legislature also authorized the Governor to close the schools or reopen schools, continue salaries when such schools were closed, treat students of such closed schools as if they were attending

---

[34]Orleans Parish School Board v. Bush, 163 F.Supp. 701, 3 RRLR 649 (E.D. La. 1958).

[35]Ibid., pp. 650-51.

[36]Act 187 of 1958.

school, and sell such schools to private citizens who wished to operate private schools.[37] The Legislature also authorized the establishment of "Educational Cooperatives" to provide primary and secondary education facilities.[38]

The lawmakers also provided a system of tuition grants for children who attended private, non-sectarian schools where no public segregated schools were available in the parish. These grants could be funded from local tax revenues.[39] In preparation for the above, the Legislature also authorized a study of the efficiency of public education and set up an interim school placement program similar to those in use in Florida and Texas.[40] This statute also contained the following miscellaneous provisions: 1) denied to local school boards the right to comply with federal court integration orders; 2) gave local school boards full discretion in pupil assignment; 3) allowed students from adjoining parishes to be admitted into each other's schools; and 4) provided that no students would be required to attend integrated schools. All of the above statutes established penalties for the violation of their provisions.

The School Board was determined to avoid the district court desegregation order, and therefore it appealed Judge Wright's ruling on the impact of the 1956 law which had removed the control of classification of schools from the Board to the Legislature. Chief Judge Hutcheson and Judges Rives and Tuttle heard the case in the Court of Appeals. In a

---

[37] Act 187 of 1958.

[38] Act 257 of 1958.

[39] Act 258 of 1958.

[40] Act 259 of 1958.

per curiam opinion dated June 9, 1959, and a denial of a petition for rehearing written by Judge Tuttle and dated July 15, 1959, they affirmed Judge Wright's 1956 district court decision,[41] and said that the constitutionality of the 1956 statute was immaterial. If state officers (the School Board) performed their duties in violation of the U.S. Constitution, they could be enjoined from continuing such acts. Moreover, the operation of the Orleans Parish schools effectively remained in the hands of the School Board, and it was therefore properly subject to the lower court's injunction.[42]

On the petition for rehearing, Judge Tuttle made it as clear as possible to the Board that its tactic of denying responsibility would not succeed. The Board argued that federal courts should abstain from ruling on the constitutionality of state laws until the highest court of the state made its ruling. Tuttle agreed, but said that situation was not before the Court. It had repeatedly been held that the School Board could not continue to operate the schools on a segregated basis. No Louisiana statutes could make such operation permissible, regardless of the nature of those laws.[43] The message to both the Board and the Legislature was clear: No artifice will prevent obedience to federal law.

By now the litigation was eight years old and five years had passed since the Supreme Court's landmark Brown decision of 1954. As a result of all the delays experienced in the case, attorneys for the plaintiff school children filed a motion for further relief in the district court. The Board had continually dragged its heels, and as a

---

[41] Orleans Parish School Board v. Bush, 26B F.2d 78, 4 RRLR 5B1 (5th Cir. 1959).

[42] Ibid., p. 5B3.

[43] Ibid.

consequence, on the same day Judge Tuttle's opinion was announced, Judge Wright ordered the School Board to present a desegregation plan in court by March 1, 1960. At a subsequent conference of the parties on October 9, 1959, Judge Wright extended the deadline until May 16, 1960.[44] Orleans Parish finally had to provide a desegregation plan by a specified date.

Whatever might have been the sentiment of the School Board members at this point, that body had lost control of the situation, for the state of Louisiana now began to take an even more active role in the case. The Louisiana Attorney General brought an action for declaratory relief in the Civil District Court for Orleans Parish seeking interpretation of the 1956 statute transferring classification power to the Legislature. The state court held that the statute conferred upon the Legislature the right to classify the Orleans Parish schools as all white, all black, or mixed.[45] A private citizen intervened and appealed to the state supreme court contending that the statute could not be interpreted as allowing a "mixed" classification. The Louisiana Supreme Court held that it had no jurisdiction to hear the case because the statute had not been ruled invalid and transferred the case to the Orleans Parish Court of Appeals.[46] The Court of Appeals affirmed the Civil District Court's decision, holding that the Legislature reserved to itself the sole power to classify the schools and indicated that "at some future time it might become desireable to establish" schools which were integrated.[47]

---

[44] Ibid., pp. 583-84.

[45] State v. Orleans Parish School Board, 5 RRLR 72 (Civ.D.Ct. La. 1959).

[46] State v. Orleans Parish School Board, 118 So.2d 127, 5 RRLR 74 (La. 1960).

[47] State v. Orleans Parish School Board, 118 So.2d 471, 5 RRLR 375 (C.A. La. 1960).

This litigation extended from mid-1959 through mid-March of 1960. As a result, the School Board was faced with a federal requirement, to present a desegregation plan, and a state requirement, providing that the only legitimate authority for classifying the Orleans Parish schools rested with the Louisiana Legislature. Therefore, the School Board approached the federal court deadline in a state of paralysis. The only action it took was to hold a poll in New Orleans to determine whether the citizens would prefer to integrate their public schools or close them.[48] The results of that poll showed that among white parents the vote was 12,299 in favor of closing the schools and 2,707 in favor of keeping them open even if integrated. Among black parents the corresponding vote was 679 to 11,407. Lloyd Rittiner, president of the School Board, indicated he would disregard the votes of black parents since it was, he said, the whites who supported the schools and elected the Board.[49]

Thus, when the School Board appeared in Judge Wright's court on May 16, 1960, it was empty-handed. The Board told the Judge that it had not prepared a desegregation plan, for it believed it did not have the power to do so. Since the original desegregation order was now over four years old, and the Board had not met its responsibilities, Wright would force them to. He thereupon ordered all public schools in New Orleans desegregated with the beginning of school in September, 1960. All first graders would attend the school nearest their homes, regardless of race, and school transfers would be allowed if not based on race.[50] The time had at last come for the New Orleans schools.

---

[48] New York Times, May 1, 1960, p. 81, col. 1.

[49] Ibid., May 8, 1960, p. 67, col. 1.

[50] Bush v. Orleans Parish School Board, 5 RRLR 378 (E.D. La. 1960).

The School Board immediately sought a stay of Judge Wright's order in the Court of Appeals. The motion for stay was heard by Judges Tuttle, Cameron, and Wisdom. In a five-line per curiam opinion dated June 2, 1960, Judges Tuttle and Wisdom denied the motion for a stay, while Judge Cameron entered a lengthy dissent.[51]

Judge Cameron's dissent was based on both legal and factual grounds. As to the latter, he insisted that enforcement of Judge Wright's order would revolutionize the lives of students and parents of New Orleans and that as a result, "nothing but chaos could result and the enforcement of the order would be accompanied by nothing but harm to the children, the parents and the teachers of both races and to the entire community."[52] The legal basis of Cameron's dissent, and one that he had continually raised in desegregation cases, was that the district court judge had exceeded his authority by declaring a law of Louisiana unconstitutional. Such power was reserved, Cameron said, to a three-judge court.[53] Finally, Cameron argued, the Brown decision did not require integration but prohibited racially discriminatory state action, and as far as he was concerned, no such action had been proven in the case.[54]

The Major Battle: 1960-1961

With the opening of the regular session of the Louisiana Legislature in July of 1960, the pace of the New Orleans desegregation case

---

[51] Orleans Parish School Board v. Bush, 5 RRLR 655 (5th Cir. 1960).

[52] Ibid., p. 658.

[53] Ibid., pp. 658-59.

[54] Ibid., pp. 657-58.

increased, and what had been a frustrating legal controversy was transformed into a domestic crisis. The legal maneuvering which had gone before was merely prologue. The chief protagonists were no longer Earl Benjamin Bush and those he represented (the plaintiff black school children) and the Orleans Parish School Board. Indeed, they became pawns in the conflict. Now the battle lines were drawn between the judicial power of the United States (represented by the District Court for the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit) and the state of Louisiana (represented by its Governor, Legislature, and other state officials). The victims were the parties to the suit, the school system of Orleans Parish, and the reputation of the city of New Orleans.

The singing Governor of Louisiana, Jimmie H. Davis, made his position, and coincidently that of the Legislature, quite clear as the 1960 session got under way. He vowed that the "New Orleans schools would remain segregated"[55] in the fall. To give substance to that vow, the Legislature enacted an even more extensive series of laws designed to ensure the continuation of segregation. Many of these statutes were reenactments of earlier legislation which had either been specifically declared unconstitutional or whose validity was open to serious question as a result of court decisions.

The Legislature sought to prevent any integrated school from operating. It made furnishing free textbooks or other school supplies to any integrated schools illegal and cut off state funding for lunch programs in such schools,[56] reenacted the statute calling for the state

---

[55] New York Times, July 6, 1960, p. 19, col. 4.

[56] Act 333 of 1960.

board of education study of the efficiency of the public schools, and prohibiting any general reallocations of students until the study was completed.[57] As evidence of the state's commitment to resisting court ordered integration, the Legislature provided that in the event that any public school or school system was threatened with integration, the Governor was authorized to close all public schools, protect school property, treat teachers and students as if the schools were still open, and even sell the schools to private agencies or corporations.[58] The Legislature restated its sole power to reclassify schools for use by another race and further provided that the Governor was to take personal control of any school ordered to desegregate.[59] The Governor was also again given the power to close any public school in cases of disorder, riots, or violence, or where necessary to prevent such occurrences, and to reopen the school when its peaceful operation could be assured.[60] Similar measures were passed for application to state trade and special schools.[61] Finally, the lawmakers again required all children applying for the first time to public or private schools to furnish a birth

---

[57]Act 492 of 1960. This statute also set forth general criteria for the guidance of local school boards in making individual reassignments. Among these standards were the availability of transportation; the effect of the admission of new students on established academic programs; the scholastic aptitude, relative intelligence, and mental energy of the pupil; and the psychological effect on the pupil of attendance at a particular school.

[58]Act 495 of 1960.

[59]Act 496 of 1960. It was also provided that any suits brought to challenge this Act or any section of it had to be brought against the state of Louisiana.

[60]Act 542 of 1960.

[61]Acts 579 through 582 of 1960.

certificate specifying age and race to the principal.[62] Thus, the state of Louisiana made clear its intention that the public schools would be either segregated or closed.

The position taken by the state was not without its effects. There were some indications that business leaders in New Orleans now favored token integration rather than closing the public schools.[63] People in New Orleans not previously identified with opposition to segregation formed the Committee for Public Education (CPE) to maintain public education even if this meant accepting some integration. This support, meager though it was, and fears that the schools would be closed, made it possible for the School Board to edge toward token desegretation.[64]

At the same time, however, the School Board's legal position was made no easier, for the state courts had held that under Louisiana law (Act 496 of 1960) only the Legislature has the power to classify and reclassify the public schools.[65] Therefore, the integration of the New Orleans schools ordered by the federal courts could only be accomplished by the Legislature. The earlier decisions in the federal courts were only in personam* judgments and did not bar subsequent

---

[62]Act 541 of 1960.

[63]New York Times, August 14, 1960, p. 56, col. 4.

[64]Inger, Politics and Reality, p. 28. The members of the School Board throughout the crisis were Lloyd Rittiner, an oil company executive, Louis Riecke, a lumber man, Matthew Sutherland, an insurance executive, Theodore Shepard, a shrimp importer, and Emile Wagner, an attorney and bank official. All but Wagner, who was an ardent segregationist, were moderates. Inger, Politics and Reality, p. 16.

[65]State v. Orleans Parish School Board, 5 RRLR 659 (Civ.D.Ct. 1960).

*Such judgments apply only to individuals and do not necessarily dispose of the legal and factual matters in a case. A judgment in rem determines not only the legal standing of individuals but also resolves all

action in another jurisdiction.[66] The School Board was therefore enjoined from reclassification of "negro or non-negro" schools.

The School Board's position was soon made even more uncertain. On August 17, 1960, Governor Davis announced that he was superseding the Orleans Parish School Board and taking over direct control and management of the Orleans Parish public schools under the provisions of Act 496 of 1960.[67] The next day, the Attorney General of Louisiana, Jack P.F. Gremillion, published an open letter justifying the Governor's action of the previous day. He argued that under the statute, the Governor was required to take this action.[68]

Reaction to the Governor's action was immediate. On the same day Governor Davis made his announcement, a suit was filed in the district court by thirty white parents of Orleans Parish school children for an injunction to prevent the Governor from interfering with the operation of the New Orleans schools. This suit, instigated by CPE, under the title Williams v. Davis, was consolidated with the Orleans Parish case for hearing.[69] It was an important political step, for at least some white parents were now committed to supporting open schools. The filing of the suit also provided the School Board with a viable alternative to pro-segregation or pro-integration. The Board could now simply

---

legal questions regarding the subject matter. An in rem judgment bars legal action in any other jurisdiction.

[66] Ibid., p. 660.

[67] 5 RRLR 661.

[68] 5 RRLR 663-666.

[69] Inger, Politics and Reality, pp. 30-31.

support keeping the schools open. On August 20, the School Board announced that the schools would open on September 7, 1960.[70]

The decision in the consolidated case of Bush v. Orleans Parish School Board and Williams v. Davis was delivered by a three judge district court, Circuit Judge Rives and Judges Christenberry and Wright, on August 17, 1960.[71] They once more held Louisiana statutes unconstitutional. The history of the proceedings was briefly recounted, including the fact that upon plaintiffs' motion, the Governor and the Attorney General of Louisiana were made additional party defendants in the suit.[72] The court then considered the impact and validity of several Louisiana statutes and the state court injunction.

With regard to Act 496 of 1960 (Legislature's sole power to classify schools and the Governor's operation of schools where court-ordered integration) and the state court injunction, the judges left no room for doubt. The statute granting the Legislature the right to decide whether or not a school would be segregated was unconstitutional. The Brown decision had made it clear that no one had that right. For the same reason, the Governor had no right to operate the public schools on a segregated basis as required by the statute in question.[73]

The court also held unconstitutional other Louisiana laws which had as their sole purpose the continuation of segregation. Among these

---

[70] 5 RRLR 662.

[71] 187 F.Supp. 42, 5 RRLR 666 (E.D. La. 1960).

[72] Ibid., 5 RRLR 667.

[73] Ibid., pp. 667-68. Obviously, the state court injunction was void, for it was based on an unconstitutional statute.

statutes were Act 256 of 1958 (right to close any school ordered integrated); Act 495 of 1960 (right to close all schools if one integrated); Act 333 of 1960 (no textbooks for integrated schools); Act 555 of 1954 (enforcement of segregation through police power); and Act 319 of 1956 (white and black schools to be continued).[74] The district court also determined that Act 542 of 1960 (right to close any school threatened with violence and disorder), while not specifically predicated upon integration, was also unconstitutional, for "the purpose of the act is so clear that its purpose speaks louder than its words."[75]

Finally, the execution date of Judge Wright's May 16, 1960, desegregation order was extended from the opening of school in September until November 14, 1960. This was done as a result of the confusion created by the Governor's August 17 announcement and the state court injunction. While the plaintiffs opposed the extension, the court noted that the School Board members, with the exception of Emile Wagner, had demonstrated their good faith by appearing at the hearing.[76] The four moderate Board members had met with Judge Wright privately and assured him that although they had no desegregation plan of their own, they would comply with his desegregation order.[77] Now, eight years after the original filing of the desegregation suit and four years after New Orleans had first been

---

[74] Ibid., p. 668.

[75] Ibid. The Court also cited Attorney General Gremillion for contempt for his behavior and remarks made in and near the court. Ibid., pp. 668-69.

[76] Ibid., p. 668. On August 31, 1960, Judge Wright sitting alone issued a stay order conforming to the decision of the three-judge court. Ibid., p. 669.

[77] Inger, Politics and Reality, p. 32.

ordered to end segregation in its schools, a hesitant and fearful School Board had to plan for desegregation.

By October 10, 1960, over 130 black first graders had indicated a desire to attend formerly all white schools. School Board president Rittiner said the students selected to integrate the schools would be chosen according to the criteria set out in the Pupil Placement Act (Act 492 of 1960), and it was unlikely that more than a few black students would attend any previously white school.[78] The Board selected two white schools which had low student test scores to be desegregated, so that the black students would have a chance to adjust. These schools were William Frantz Primary School and McDonogh No. 19 School, both of which were in the same low-income white neighborhood. The choice, supposedly scientific, was rather unfortunate, for anti-black sentiment was high in this neighborhood. Further, segregationists could concentrate their efforts since both schools were in the same area, and the neighborhood was adjacent to St. Bernard Parish, the political base of the powerful segregationist, Leander Perez.[79]

Dr. James F. Redmond, the Superintendent of the Orleans Parish schools, announced two weeks later that five of the black students had finally been selected to initiate integration.[80] The selection of these schools and students was thought to give the best chance for an uneventful desegregation in New Orleans. Indeed, the Board had reason to believe all would go well, for in early November, 1960, against

---

[78] New York Times, October 11, 1960, p. 36, col. 6.

[79] Inger, Politics and Reality, pp. 36-39.

[80] New York Times, October 28, 1960, p. 21, col. 1.

vigorous opposition from segregationists, moderate Board member Sutherland was reelected.[81]

The Board had not, however, considered the implacability of Governor Davis' and the Legislature's opposition to integration. In early November, the Governor convened the first of several consecutive extraordinary sessions of the Louisiana Legislature held during late 1960 and early 1961, and a package of twenty-eight bills to combat the court-ordered November 14 integration deadline was passed.[82] The statutes passed covered a broad variety of measures designed for the maintenance of segregation. Much of the legislation consisted of reenactments of earlier laws declared unconstitutional in the federal courts.[83]

---

[81] Inger, Politics and Reality, p. 47.

[82] New York Times, November 5, 1960, p. 24, col. 2.

[83] Repeated citation for these statutes seems unwarranted. The laws in question are Acts 1 through 28, 1st Ex.Sess. 1960. They were all signed into law by Governor Davis on November 8, 1960. Support for this "segregation package" was overwhelming. While some of the Senators from New Orleans opposed parts of the package, even they voted for the Interposition Resolution. In the House, for example, Interposition passed by 100 to zero. New York Times, November 7, 1960, p. 1, col. 2, and November 9, 1960, p. 14, col. 3. What follows is a brief description of the laws enacted.

Act No. 1. Appropriated $168,000 from the general fund to pay the costs of the session.

Act No. 2. An "Interposition Resolution" against federal actions dealing with the operation of schools in Louisiana. The Resolution argued the historic basis for interposition and that the Brown desegregation decisions were unconstitutional. Under the Tenth Amendment to the U.S. Constitution, Louisiana had full sovereignty, and the federal court decisions in the Orleans Parish case were therefore null and void. The sovereignty of Louisiana was interposed between the federal courts and those organizations and individuals allegedly subject to federal courts' orders until the Brown decisions became the law of the land through proper constitutional amendment.

Acts Nos. 3 through 9. These statutes repealed previous legislation which had been declared unconstitutional in the federal courts. They were respectively: Act 319 of 1956, Act 542 of 1960, Act 496 of 1960, Act 256 of 1958, Act 333 of 1960, and Act 555 of 1954.

Acts Nos. 10 through 14. With very little change in language, these acts reenacted some of the above statutes declared unconstitutional

The activities of the Governor and the Legislature were met promptly by the plaintiffs in the Williams case which had been consolidated with

---

and on the same day repealed by the Legislature. These were respectively: Act 542 of 1960, Act 256 of 1958, Act 495 of 1960, Act 333 of 1960, and Act 555 of 1954.

Act No. 15. Allowed the State Sovereignty Commission, which had been created during the regular 1960 session, to employ legal counsel and set his compensation.

Act No. 16. Expanded the powers of the state police to include "any other related duties imposed upon them by the legislature." Specifically, restriction upon state police activities within municipalities having their own police forces was removed.

Act No. 17. Suspended the powers of the Orleans Parish School Board and vested them in the legislature. Some employees of the School Board were also made subject to the exclusive control of the legislature.

Act No. 18. Provided that when any school board ceased to exist, the legislature would appoint trustees to take custody of the funds of that board and set the funds aside for the use of the children.

Act No. 19. Repealed a statute designating the Orleans Parish school superintendent as the treasurer of the school board.

Act No. 20. Only schools operated "in conformity with the constitution and laws of the state" and state board of education policy and rules were to be accredited by the state board of education. That is, only segregated schools were accredited.

Act No. 21. School boards were prohibited from operating if any schools under their jurisdiction were ordered to integrate. Any school official or other officer who operated schools in violation of the statute would be guilty of malfeasance and subject to removal from office.

Act No. 22. Any schools which were operated on an integrated basis were to be closed and the school property sold.

Act No. 23. Any teacher teaching an integrated class would have his or her license revoked and any school officials permitting this were also to have their licenses revoked and would be fired.

Act No. 24. Promotion and graduation credits were denied to any student who attended schools in which any classes were integrated.

Act No. 25. Repealed statutes concerning the nomination and election of members of the Orleans Parish School Board and authorized the legislature to make new provisions for the creation and election of a new Board.

Act No. 26. Prohibited the transfer of any students from schools in which they were registered in September, 1960, unless the students changed their residence.

Act No. 27. Repealed major sections of the state law requiring compulsory school attendance.

Act No. 28. Made the provisions of Act No. 23 (revocation of teachers' licenses) applicable to trade and other special schools.

Act No. 29 provided that trade and special schools would be closed if they were operated on an integrated basis.

The legislature was not content with passing this exhaustive package of segregation laws. By Resolution, it established a committee with

the original suit in the district court. They asked for an injunction against the enforcement of certain of the newly passed statutes on the ground that they were merely replacements for statutes which had earlier been declared unconstitutional. On November 10, 1960, Judge Wright granted the requested temporary injunction.[84] To grasp the extent of state opposition to the desegregation orders of the federal court, the breadth of Judge Wright's restraining order is most instructive. His order, reproduced below in part, was typical of several succeeding orders in the Orleans Parish case. It read:

> IT IS ORDERED that the Honorable Jimmie H. Davis, Governor of the State of Louisiana; the Honorable Jack P.F. Gremillion, Attorney General of the State of Louisiana; the Honorable A.P. Tugwell, Treasurer of the State of Louisiana; the Honorable Roy R. Theriot, Comptroller of the State of Louisiana; the Honorable Shelby M. Jackson, State Superintendent of Public Education of the State of Louisiana; Major General Raymond H. Fleming, Adjutant General of the State of Louisiana; Colonel Murphy J. Roden, Director of Public Safety of the State of Louisiana; the Orleans Parish School Board and its members, namely Lloyd J. Rittiner, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard, Jr., and Emile A. Wagner, Jr.; James F. Redmond, Parish Superintendent of Schools for the Orelans Parish School Board; Edward F. LeBreton, Charles Deichmann, Risley C. Triche, P.P. Branton, Wellborn Jack, Vail Deloney, William Cleveland, E.W. Gravolet [members of the special legislative committee]; the State Board of Education of the State of Louisiana and its members, Joseph J. Davies, Jr., Isom J. Guillory, Alfred E.

---

the authority to institute suits to enforce and carry out the provisions of Act No. 2, the Interposition Resolution (House Concurrent Resolution (HCR) 9, 1st Ex.Sess. 1960). The Legislature further demonstrated its purpose by implementing provisions of Act No. 17 by delegating to an eight-member legislative committee the full control of the Orleans Parish schools (HCR 10, 1st Ex.Sess. 1960).

[84]Orleans Parish School Board v. Bush, 5 RRLR 1001 (E.D. La. 1960).

> Roberts, Merle M. Welsh, Raymond Heard, Mrs. Eleanore H. Meade, Leon Gray, George T. Madison, F.E. Cole, Nash C. Roberts and Robert H. Curry, and all those persons acting in concert with them, or at their direction, be, and they are hereby restrained and enjoined from enforcing the provisions of the statutes enacted pursuant to House Bills Nos. 10, 11, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, of the First Extra Session of the Louisiana Legislature of 1960, and from otherwise interfering with the operation of the public schools for the Parish of Orleans by the Orleans Parish School Board, pending hearing of plaintiff's motion for a preliminary injunction.[85]

New Orleans was tense as it awaited the beginning of desegregation on November 14. City police were ordered to guard Judge Wright's home, and a unit of federal marshals was present in reserve to prevent interference with Wright's order.[86] As the fateful day approached, Louisiana officials made another last minute try to prevent integration. On Saturday, November 12, the state superintendent of schools, Shelby M. Jackson, called a school holiday for the next Monday. The schools would not be open on November 14 for integration to take place.[87]

On Sunday, November 13, the Legislature, still sitting in its first extra session, passed three resolutions bearing on the matter. First, it withdrew from the special legislative committee earlier established the power to administer the schools of New Orleans and transferred that power to the Legislature as a whole.[88] The legislators then repealed the School Board decision to integrate the schools of New Orleans, dismissed Orleans Parish Superintendent of Schools, Dr. James F. Redmond,

---

[85] Ibid.

[86] New York Times, November 12, 1960, p. 1, col. 7.

[87] Ibid., November 13, 1960, p. 1, col. 6.

[88] HCR 17, 1st Ex.Sess. 1960.

and Samuel I. Rosenberg, the School Board attorney, and took over the funds of the New Orleans schools.[89] November 14 was declared a school holiday and an increased force of sergeants-at-arms was sent to New Orleans to prevent the opening of any school.[90]

Immediately, the plaintiffs in the Bush case petitioned Judge Wright for a restraining order to prevent the implementation of Jackson's order and the legislative resolution. Judge Wright granted the order (but not a motion for civil contempt against Jackson that plaintiffs had sought) and expanded the injunction to include the resolution which attempted to deprive the School Board of its powers to operate the schools and to dismiss Redmond and Rosenberg. Haste was required, and Wright signed his order at 9:45 p.m. on November 13.[91] On the next day, Wright granted another temporary restraining order against the state officials earlier named from interfering with previous orders of his court. Additionally, Wright restrained the enforcement of House Concurrent Resolution No. 23, adopted only minutes before the court hearing, which addressed out of office the members of the Orleans Parish School Board.[92]

On the morning of November 14, 1960, three black girls entered the first grade at McDonogh No. 19 School, and one black girl became a first grader at the William Frantz Primary School.[93] They represented the first integration below the college level in the five resisting states of the

---

[89] HCR 18, 1st Ex.Sess. 1960.

[90] HCR 19, 1st Ex.Sess. 1960.

[91] Orleans Parish School Board v. Bush, 5 RRLR 1004 (E.D. La. 1960).

[92] Ibid., p. 1006.

[93] New York Times, November 15, 1960, p. 1, col. 1.

Deep South, South Carolina, Georgia, Alabama, Mississippi, and Louisiana.[94] The scene at the two schools was unpleasant as hundreds came to jeer and shout epithets at the six-year olds. Attendance by whites at these two schools was almost non-existent, the result of a boycott and fear of rising tension which had resulted in eleven arrests on the second day of school.[95]

In this atmosphere of fear and racial hostility, the Louisiana Legislature continued its attack against federal court ordered desegregation. On November 15, 1960, it passed Resolutions which: 1) condemned the federal court injunctions against state officials and called on Louisiana Congressmen and Senators to draft plans to "obtain relief from this complete destruction and abuse of our democratic processes;[96] 2) condemned court-ordered integration and called on other states to invoke the doctrine of interposition in a coordinated campaign;[97] and 3) once again addressed the members of the Orleans Parish School Board out of office.[98]

The situation in New Orleans subsequently worsened. On November 16, over 2,000 white youths rioted, rampaging through the streets of the city. There were numerous assaults on blacks, and later in the day, black and white young men attacked each other, resulting in over fifty arrests. Tensions were further exacerbated by a mass meeting of 5,000

---

[94] Ibid., November 11, 1960, p. 25, col. 5.

[95] Ibid., November 16, 1960, p. 1, col. 3.

[96] HCR 20, 1st Ex.Sess. 1960.

[97] HCR 21, 1st Ex.Sess. 1960.

[98] HCR 23, 1st Ex.Sess. 1960.

members of the Louisiana Citizens Councils.[99] The New Orleans police under Chief Joseph Giarrusso performed well, however, and by the end of the week, tension had eased and there were no more outbreaks of violence.[100] Official peace keeping could not, unfortunately, prevent the parents of the black girls who had integrated the schools from being subject to harassment and intimidation. One parent lost his job as a service station attendant.[101]

Through all of this, the Louisiana Legislature continued its dogged performance. Without pausing, Governor Davis reconvened the Legislature into its second extra session of the year. On November 17 and 18, the Legislature passed Resolutions: 1) commending white parents of Orleans Parish who kept their children out of the integrated schools; 2) stating that the actions of the Orleans Parish School Board were illegal and that all banks and others having financial arrangements with the Board were not authorized to receive or expend funds on its behalf; 3) calling for the disqualification of Judge J. Skelly Wright from sitting in the Orleans Parish cases because of his prejudice and bias against Louisiana; 4) criticizing the actions of the federal courts in the Orleans Parish case; 5) calling on Judge Wright to recuse himself from the case; and 6) criticizing the failure to convene a three-judge district court to hear the motions for restraining orders and calling for an audit of the Orleans Parish School Board finances.[102] Louisiana lawmakers were not ready to end the battle.

---

[99] New York Times, November 17, 1960, p. 1, col. 4.

[100] Ibid., November 20, 1960, p. 72, col. 6.

[101] Ibid., November 22, 1960, p. 28, col. 5.

[102] HCR 1 and SCR 1, HCR 2, HCR 3, HCR 5, HCR 6, and HCR 7, 2nd Ex. Sess. 1960, respectively.

In this situation, the parties to the Orleans Parish suit cooperated, for both realized that the Board was in what appeared to be an untenable position. To obey federal court orders would necessitate violation of state laws. To obey state law would possibly subject the Board to a contempt citation. As a first step, both parties asked a three-judge court, Circuit Judge Rives and Judges Christenberry and Wright, to designate the United States as amicus curiae. The court, on November 25, authorized this entrance of the Attorney General and the U.S. Attorney into the suit both to have the benefit of their views and perhaps to restrain the Louisiana state officials.[103] The Legislature responded on November 28 and 29, 1960, by passing resolutions which memorialized the state's U.S. Senators and Representatives to seek a constitutional amendment to clarify authority over state public schools, and ordered all New Orleans banks holding School Board funds to transfer them to the Legislature.[104]

Meanwhile, the situation in New Orleans, while rioting had ceased, was little improved. At the two integrated schools, the boycott by white students was almost total. Out of a normal enrollment of nearly 1,000 white students, only two were regularly attending school. The vast majority of white students had transferred to schools in St. Bernard Parish, the stronghold of Leander Perez.[105] Slowly, a few white students came back to the integrated schools, but the severity of the situation

---

[103]Orelans Parish School Board v. Bush, 5 RRLR 1007 (E.D. La. 1960).

[104]HCR 20 and 23, 2nd Ex.Sess. 1960, respectively.

[105]New York Times, November 29, 1960, p. 40, col. 6.

was demonstrated by the fact that it was considered a hopeful sign when a total of twelve to fifteen whites attended school with the four black girls.[106]

Each morning at the two schools, black students and those whites who dared were sheparded to school by parents and at times federal marshals. Both sides of the street were lined with women who heckled and jeered at the children, and often pushed and shoved parents and those helping them. These were the notorious "Cheerleaders" described by John Steinbeck in Travels with Charlie. In the face of this abuse, the officials of New Orleans, including the liberal reform mayor, deLesseps Morrison, stood mute.[107] It was clear that only the federal courts would exert the leadership and direction so sorely needed.

On November 30, 1960, the three-judge district court composed of Circuit Judge Rives and Judges Christenberry and Wright, delivered an extensive opinion dealing with the school desegregation in New Orleans and the activities of the Louisiana Legislature.[108] The court declared twenty-three of the statutes passed by the Legislature in its first extra session unconstitutional, and also refused to vacate its order requiring desegregation. After reconfirming its jurisdiction in the cases, particularly with regard to enjoining the Louisiana Legislature,[109] the judges proceeded to discuss the central element in the legislative program, "Interposition."

---

[106] Ibid., December 2, 1960, p. 14, col. 2, and December 3, 1960, p. 48, col. 1.

[107] Inger, Politics and Reality, p. 53.

[108] Orleans Parish School Board v. Bush, 188 F.Supp. 916, 5 RRLR 1008 (E.D. La. 1960).

[109] Ibid., pp. 1009-10. Louisiana claimed that under the Eleventh Amendment, federal courts had no power to enjoin state legislatures. The

The court pointed out that the Legislature had clearly set the tone for its legislation in the Interposition Resolution when it declared its intention "to maintain racially separate school facilities. . . ."[110] The rest of the legislation passed was based on Interposition, and regardless of its substance, if Interposition fell, the other statutes would fall as well. Essentially, the judges argued that "the doctrine denied the constitutional obligation of the states to respect those decisions of the Supreme Court with which they do not agree."[111] This doctrine, the court said, might conceivably have had some validity under the Articles of Confederation, but the keystone of Interposition, that the country was formed as a compact of states, had been disavowed in the Preamble of the Constitution. It was the people and not the states which had established the Constitution.

Interposition, the Court maintained, would make a mockery of the Constitution and deprive the nation of the ability to enforce its laws. Moreover, even the champions of Interposition granted that federal law and the decisions of the Supreme Court were controlling in areas not included under the Tenth Amendment. However, delimitation of that Amendment, at least under our federal system, was left to one Supreme Court, whose decisions enunciated organic law to which legislative acts

---

court agreed, but pointed out that the state legislature was not legislating when it attempted to take over operation of the New Orleans schools. Rather, it said, that body was acting as an administrative organ, and as such was subject to injunction when it acted in an unconstitutional manner.

[110] Ibid., p. 1010.

[111] Ibid.

were subordinate. Thus, the judges said, the Supreme Court was the final arbiter of constitutionality and the state's proceedings were subject to its review. States could not review the proceedings of that court, and Louisiana could not deny the impact of the Brown case. Further, since appeal from lower federal court decisions could only be ultimately had in the Supreme Court, the states could not review decisions on constitutionality in the lower federal courts. Interposition in general and the Louisiana Interposition Resolution in particular were therefore not constitutional and were void and without effect.[112]

The other legislation of the first extra session, stripped of any possible protection by virtue of Interposition, fell of its own weight, the Court argued. Acts 10 through 14 were almost verbatim reenactments, the minor changes being stylistic, of statutes previously declared unconstitutional. Acts 16, 20 through 24, and 26 and 27 constituted an interlocking series of laws designed to prevent the successful operation of any desegregated schools in Louisiana and were also therefore unconstitutional. Acts 17, 18, and 25 were designed to abolish the Orleans Parish School Board and address out of office the members of the Board. The design here was plain, and that design was to prevent desegregation and thereby deprive black citizens of their constitutional rights. Claims that these measures pertained only to administrative matters within the state did not suffice, for acting in a constitutional manner to accomplish an unconstitutional end was in itself unconstitutional.[113]

Finally, in response to a motion by the Board to postpone the effective date of desegregation due to the turbulent local conditions,

---

[112] Ibid., pp. 1010-13.

[113] Ibid., pp. 1013-15.

the court made it clear that the violence and disorder that the Governor and the Legislature had encouraged by their statements and actions would not be allowed to further postpone desegregation. "Thus law and order are not here to be preserved by depriving the Negro children of the constitutional rights."[114] Therefore, the state officials previously named were restrained from enforcing the unconstitutional statutes.

Predictably, the Louisiana Legislature did not take its chastizement quietly. On December 3, 1960, it enacted a resolution condemning as dangerous the three-judge district court opinion and reaffirming that Interposition was the public policy of Louisiana. On the same day, the Legislature also reenacted previously repealed statutes creating the Orleans Parish School Board, and set up a program of tuition grants for children attending non-profit private non-sectarian schools.[115] On the next day, the newly created Orleans Parish School Board was given the power to borrow, receive and disburse funds for the operation of the schools, and the banks holding the funds belonging to the "old" Board were ordered to release them to the "new" one regardless of any federal court orders.[116]

The general disorder connected with the desegregation crisis finally began to have an effect on the well being of New Orleans. By the first week of December, a near-Depression level slump was taking place in downtown New Orleans. The retail shops which catered to

---

[114] Ibid., p. 1016. The holding was affirmed by the Supreme Court on December 12, 1960. Citation earlier provided.

[115] HCR 26 and Acts 2 and 3, 2nd Ex.Sess. 1960, respectively.

[116] HCR 27 and 28, 2nd Ex.Sess. 1960.

tourists and hotels and restaurants were experiencing their worst times in almost thirty years.[117] This economic slump produced some activity on behalf of the School Board. While there were no white children in school at McDonogh No. 19, twenty-three white children attended classes at William Frantz school, and an organization designed to break the white boycott, Save Our Schools, Inc., began to operate under the leadership of Mrs. N.H. Sand.[118] However, those parents and their supporters who broke the boycott were subject to harassment, and a few lost their jobs.[119]

An additional difficulty facing the New Orleans schools was a real financial crisis. Under the direction of the Legislature and in violation of federal court orders, the banks had virtually frozen the funds of the School Board. The teachers at the two desegregated school, and most of the 1300 non-teaching employees of the school district had not been paid since October 28, 1960.[120] Thus, even though the moderates were beginning to support the School Board against the Legislature, there was a real possibility that the schools would be forced to close due to lack of funds.

The Louisiana Legislature continued its second extra session, producing more grist for the legal mill. Support was restated for the idea of separate but equal schools, but the Legislature assured its black citizens that this represented no animus toward them. The lawmakers

---

[117] New York Times, December 6, 1960, p. 1, col. 2.

[118] Ibid., December 7, 1960, p. 26, col. 3.

[119] Inger, Politics and Reality, pp. 56-57.

[120] New York Times, December 8, 1960, p. 28, col. 1.

also declared their intention to pay school employees, including teachers, who refused to participate in integration and not to pay those who did.[121] They also limited the powers of the Orleans Parish School Board by repealing legislation empowering it to hire its own attorney, and made it a misdemeanor to obstruct any Louisiana court order or judicial process.[122] The capstone of the new legislation was the statute passed on December 15, 1960, which authorized the sale of the schools when the schools had been indefinitely closed under state law.[123]

The antics of the Governor and the Legislature, and, more importantly, the economic crisis in New Orleans finally brought some tangible response from the leadership of the community. One hundred of the major business leaders issued a statement calling for law and order and obedience to federal court orders.[124] The businessmen could hardly have enjoyed the image of New Orleans that was being portrayed in the national media. The situation had gotten so bad that as the next payday for the school system approached, offers of financial aid from private citizens were announced. For example, Ellen Steinberg, the daughter of a St. Louis investment broker, offered a half-million dollars to help keep the public schools open.[125]

Its financial difficulties forced the School Board back to the district court to seek the release of funds the New Orleans banks were

---

[121] HCR 29 and 34, 2nd Ex.Sess. 1960.

[122] Acts 5 and 6, 2nd Ex.Sess. 1960.

[123] Act 7, 2nd Ex.Sess. 1960.

[124] New York Times, December 14, 1960, p. 28, col. 3.

[125] Ibid., December 18, 1960, p. 1, col. 3.

withholding under Louisiana statute. Additionally, the city of New Orleans was withholding tax revenues which in normal course would have been handed over to the Board for operation of the schools. The Board also sought the release of these funds.

Once more the three-judge district court consisting of Rives, Christenberry, and Wright, had to restate the obvious. By their decision of December 21, 1960, the judges held all statutes which "directly or indirectly" required segregation of the races in public schools unconstitutional; enjoined the state from enforcing those laws; enjoined the banks from refusing to honor checks drawn on the Board's account; and directed the city to turn over taxes collected for the schools.[126] A few days later, most of the employees and the teachers at the integrated schools received their first paychecks in almost two months.[127] Thus, 1960 closed for the New Orleans schools on an uncertain but hopeful note.

In the early months of 1961, developments in the Bush case continued apace. The growth of moderate opinion in New Orleans was evidenced by the same 100 businessmen who had earlier issued the law and order statement. They took out an ad in the New Orleans Times-Picayune in support of keeping the schools open.[128] However, the boycott of white parents remained in effect, and those few who broke the boycott continued to be subject to threats and intimidation.* Federal marshals

---

[126] Orleans Parish School Board v. Bush, 190 F.Supp. 861, 5 RRLR 1023 (E.D. La. 1960).

[127] New York Times, December 24, 1960, p. 9, col. 2.

[128] Inger, Politics and Reality, pp. 62-63.

*The nature of the pressure against white parents who dared to take their children to integrated schools can be seen in the case of John N. Thompson. His nine-year old son, Gregory, was the first white student to attend McDonogh No. 19 with the three black girls on January 28,

were still required to escort the black children to school each day.[129] The Louisiana Legislature continued to be active. It once again removed the Orleans Parish School Superintendent, James F. Redmond, from office and declared him an usurper in office. This subjected Redmond to a new law making usurpation in office a misdemeanor.[130] During the fifth consecutive special session, Governor Davis proposed and the Legislature passed a law allowing local option elections to close public schools if they were ordered integrated.[131] As a result of this and the earlier actions of Louisiana officials in contravention of federal court orders, the federal government pursued a contempt action against those officials, the primary goal of which was to obtain the release of some $350,000 in federal funds earmarked for the New Orleans schools. Only as a result of week-long negotiations between Attorney General Kennedy and Louisiana

---

1961. A few days later his eight-year old brother, Michael, joined him. Thompson, who was an assistant counter manager at a Walgreen's in New Orleans, lost his job the same day Gregory went to school. The next day his job was restored, company officials maintaining that the earlier firing had been an unfortunate error. Two days later, the Thompsons were told by their landlord to vacate their residence within a week, because thirty-five of New Orleans' citizens had harassed Gregory on his way to school. On February 2, 1961, the Thompson family left New Orleans for good. New York Times, January 28, 1961, p. 16, col. 3; January 29, 1961, p. 69, col. 5; January 31, 1961, p. 14, col. 4; February 1, 1961, p. 39, col. 3; February 2, 1961, p. 17, col. 4.

[129] New York Times, January 15, 1961, p. 75, col. 1.

[130] Ibid., January 13, 1961, p. 32, col. 5. Less than two months later, on March 1, Redmond resigned. Ibid., March 1, 1961, p. 20, col. 1.

[131] Ibid., February 16, 1961, p. 23, col. 6 and February 21, 1961, p. 39, col. 1.

leaders were the funds released to pay New Orleans teachers, eliminating the need for further prosecution of the contempt action.[132]

The U.S. Attorney in New Orleans, M. Hepburn Many, a Republican who had agreed to continue in office at the request of the Kennedy Administration,* then sought an injunction to prevent the enforcement of Louisiana enactments which attempted to remove the School Board's attorney and the entire Orleans Parish School Board and to address the Orleans Parish Superintendent of Schools out of office.[133] On March 3, 1961, a three-judge court again composed of Circuit Judge Rives and District Judges Christenberry and Wright granted the temporary restraining order sought.[134] The judges were blunt in berating the Legislature for its continual violation of the orders of the court. They said:

> Certainly Louisiana's legislators cannot seriously have expected us to condone new devices for re-establishing an unjust racial discrimination which the highest court in the land has repeatedly condemned as unconstitutional. On the other hand, we are reluctant to assume that this is defiance merely for the sake of defiance, for it is unthinkable that, without even the excuse of possible success, a state would deliberately expose its citizenry to the unseemly spectacle of lawgivers, sworn to uphold the law, openly flouting the law.[135]

---

[132] Ibid., February 17, 1961, p. 1, col. 2 and February 25, 1961, p. 6, col. 3.

*It should be recalled that the United States had entered the case earlier as amicus curiae.

[133] Act 5, 2nd Ex.Sess. 1960, Act 4, 3rd Ex.Sess. 1960, and SRC 7, 3rd Ex.Sess. 1960, respectively.

[134] Bush v. Orleans Parish School Board, 191 F.Supp. 871, 6 RRLR 74 (E.D. La. 1961).

[135] Ibid., p. 76.

In answer to legislators' argument that only a reshuffling of school personnel was involved and that the new appointees would obey all federal court orders, the court maintained that this legislation had to be viewed in the context of the extended history of the litigation. That history was one of "delay, evasion, obstruction, defiance, and reprisal,"[136] the judges remarked. Further, the current circumstances also condemned the legislation, for making such trivialities the subject of special session legislation indicated there was more to the statutes than mere personnel shifts. "The pattern is obvious," said the court, for wresting control from the current school board indicates that the "ultimate goal remains to block desegregation of the public schools and frustrate the enjoyment of constitutional rights."[137] The court would not allow this to happen and granted the requested restraining order.*

Two months later the U.S. Attorney was back before the same three-judge court seeking to enjoin two statutes produced by the second extra session of the 1961 Legislature.[138] These laws established criminal penalties for giving or accepting any inducement to send school children to integrated schools, and similar penalties were provided for offering to do or doing any act to induce such school attendance. On May 4, 1961, the court granted an injunction against the enforcement of those laws.[139]

---

[136] Ibid.

[137] Ibid., p. 77.

*The decision was affirmed by the Supreme Court in a two line opinion which stated that Louisiana's arguments were "without substance" and the unconstitutionality of the laws was not "a matter of doubt." Denny v. Bush, 81 S.Ct. 1917, 367 U.S. 908 (1961).

[138] Acts 3 and 5, 2nd Ex.Sess. 1961.

[139] Bush v. Orleans Parish School Board, 194 F.Supp. 182, 6 RRLR 413 (E.D. La. 1961).

The court admitted that equity rarely restrained the enforcement of criminal statutes, but these laws were not ordinary criminal laws. They were instead emergency enactments designed to prevent desegregation by threatening jail for parents who dealt with integrated schools, and the effect on and the threat to the rights of parents was immediate. The statutes were clearly unconstitutional, and a temporary injunction was therefore appropriate relief.[140]

These actions concluded the crisis phase of the desegregation contest in New Orleans. The remainder of 1961 saw a general resolution of community attitudes which led to the relatively peaceful reopening of the public schools in September of 1961. Serious legal questions remained, but they were not decided in an atmosphere of violence and tension. More importantly, active interference by the Governor and the Legislature ended, as people in New Orleans began to take the initiative. Solid community backing for the School Board was created by civic leaders and the attitude of the new municipal administration of Mayer Vincent H. Schiro, Jr., who replaced Morrison in July of 1961.

First, all four of the black girls who integrated the New Orleans schools were promoted to the second grade, and over sixty more black students applied for transfer to formerly white schools.[141] About ten days later, over 1600 of New Orleans' elite attended a testimonial dinner in honor of the four moderate School Board members. This meeting finally established community support for the public schools even if they were

---

[140] Ibid., pp. 414-16. This decision was also affirmed by the Supreme Court. Gremillion v. U.S., 82 S.Ct. 119, 368 U.S. 11 (1961).

[141] New York Times, June 20, 1961, p. 30, col. 6.

subject to some integration.[142] In August, a large contingent of these business and civic leaders again ran an ad in the Times-Picayune. This time it specifically called for peaceful desegregation.[143]

For the 1961 school year, the School Board made a careful, politically sound choice of four new schools to be desegregated, rather than the "educationally scientific" choice of working class neighborhoods that had been made the year before. These schools were in or near areas of "substantial" citizens who were typical of the growing moderate segment of New Orleans opinion. Hope for the new school year was also high because the Louisiana Legislature was not in session.[144]

When school opened on September 7, although only eight more black pupils entered the first grade and the white boycott was still very effective, there were no demonstrations or violence.[145] Through 1961, the situation in the schools changed slowly, for opposition to integration continued. There were, after all, only twelve black students attending school with whites and only six schools with token integration. In 1962, the pace of desegregation quickened as the Roman Catholic Archbishop, Joseph Rummel, finally ordered all of the parochial schools desegregated. By the beginning of the new school year, 104 blacks had integrated twenty public schools in New Orleans,[146] and more white students returned to integrated schools.

---

[142] Inger, Politics and Reality, pp. 64-65.

[143] Ibid., p. 67.

[144] New York Times, August 20, 1961, p. 1, col. 2.

[145] Ibid., September 8, 1961, p. 19, col. 1.

[146] Ibid., April 2, 1962, p. 1, col. 3, and September 7, 1962, p. 30, col. 5.

Mopping Up: 1961-

The period covered by this study ended well before the following legal action, but a brief review of its content and impact provide a necessary conclusion to the New Orleans desegregation story. The numbers of black students attending integrated schools showed that the pace of desegregation in New Orleans was very slow. As a result, the plaintiffs petitioned for further relief in the district court, also complaining that black schools were unconscionably overcrowded and poorly equipped. In his last decision in this case,* Judge Wright held that the operation of the Orleans Parish schools was still discriminatory.[147]

Judge Wright argued that Orleans Parish still maintained a dual school system, under which pupils were assigned to schools according to race. If transfer to a school maintained for the other race was desired, the student was given a test, and assignment was then made according to Louisiana's Pupil Placement law. Application of this placement procedure to a dual school system could not be allowed, the judge ruled, but the real constitutional vice was the School Board's failure to test all pupils rather than just those who sought transfer. To alleviate the overcrowding in the black schools, to correct the placement system, and to finally vindicate the rights of the black plaintiffs, he ordered that beginning in September of 1962, the first six grades of the New Orleans

---

*On December 15, 1961, Judge Wright was named to the District of Columbia Court of Appeals. He had been in line for a vacancy on the Fifth Circuit Court, but that nomination was blocked by Senator Russell Long of Louisiana. Ibid., December 16, 1961, p. 18, col. 6.

[147]Bush v. Orleans Parish School Board, 204 F.Supp. 568, 7 RRLR 19 (E.D. La. 1962).

schools had to be integrated.[148] Children in those grades would attend the schools nearest their homes without regard to race. As long as a dual system was maintained, the Pupil Placement Act could not be applied to any student in the dual system.

Judge Wright's ruling momentarily rekindled the crisis atmosphere. The almost universal reaction in New Orleans was unfavorable. The School Board voted five to zero to appeal the order, but also planned to wait for Judge Wright's successor, Frank Ellis, a former Director of the National Office of Emergency Planning, to take the bench.[149]

When Ellis took Wright's place, the School Board immediately asked for a new trial. It contended that the expanded desegregation order was based on erroneous findings that facilities for black students were not equal to those provided for white, that the Board had not made a prompt and reasonable start to desegregation, and that the Pupil Placement Act was not applicable. Ellis rejected all of the Board's contentions.[150] However, he also ruled that a May, 1962, Board Resolution to comply with the orders of the court combined with the order he had drafted represented an active plan of desegregation that would "adequately protect plaintiffs' rights as well as the aspirations for order sought by all reasonable men."[151] Therefore, Ellis withdrew Wright's order, reestablished a grade-a-year plan, abolished the dual system on a similar grade-a-year

---

[148] Ibid., pp. 20-21.

[149] New York Times, April 7, 1962, p. 12, col. 1, and April 10, 1962, p. 29, col. 3.

[150] Bush v. Orleans Parish School Board, 205 F.Supp. 893, 7 RRLR 349 (E.D. La. 1962).

[151] Ibid., p. 354.

basis, and limited the applicability of the Placement Act only to pupils where the dual system had been eliminated.[152]

Both parties appealed from Ellis' ruling to the Court of Appeals. The plaintiffs objected to the withdrawal of Judge Wright's six-grade desegregation order, and the Board objected to the limitation on the use of the Pupil Placement Act. Judge Wisdom wrote the opinion for himself and Judges Rives and Brown.[153] The Court, in effect, gave something to both parties. The desegregation plan was slightly expanded to provide some desegregation for second and third graders in 1962-1963 by allowing them to transfer limited only by "administrative feasibility," but the essential grade-a-year nature of the program was retained.[154] The Pupil Placement Act was held to be applicable to all students as long as it was used in a nondiscriminatory fashion, even though part of the system was still operated on a dual basis. The determining test for such use would be the good faith of the Board.[155] Finally, the dual system of separate districts for each race would be abolished for the first five grades by 1964 and thereafter on a grade-a-year basis.[156]

The School Board thereupon produced a "Transitory" and a "Long-Range Desegregation Plan" for the schools. The plan differed from the Court of Appeals order in that the Transitory Plan maintained the same

---

[152] Ibid.

[153] Bush v. Orleans Parish School Board, 308 F.2d 491, 7 RRLR 693 (5th Cir. 1962).

[154] Ibid., p. 702.

[155] Ibid., pp. 699-701.

[156] Ibid., p. 703.

attendance districts as had previously existed, but three schools had their designation changed from white to Negro in order to alleviate overcrowding. The Long-Range Plan called for grade-a-year desegregation and redistricting.[157] Armed with these plans, the Board sought a rehearing to obtain modification of the Court of Appeals judgment. Judge Wisdom again wrote the opinion for the Court,[158] holding that the Transitory Plan was in accordance with the spirit of his previous opinion. A conference with attorneys for both sides produced agreement, and the Court approved the Transitory Plan. Decision on the Long-Range Plan was held in abeyance pending further study by the Court and the plaintiffs' attorneys.[159] On September 1, 1962, pursuant to Wisdom's ruling, Judge Ellis granted his approval of the Transitory Plan as the desegregation plan for the school year 1962-1963.[160] The Orleans Parish schools were finally to run under a plan agreed to by both parties and the federal courts.

Finally, on May 18, 1963, over several objections raised by the plaintiffs, Judge Ellis approved the Board's Long-Range Plan.[161] In

---

[157] Ibid., pp. 704-06.

[158] Ibid., p. 706.

[159] Ibid., p. 707.

[160] Ibid., p. 708.

[161] Bush v. Orleans Parish School Board, 230 F.Supp. 509, 8 RRLR 532 (E.D. La. 1963). Plaintiffs' objections included complaints that: 1) More delay in complete desegregation was unnecessary; 2) conversion to single zone attendance districts was not to be made rapidly enough; 3) no provisions were made for lateral transfer for children above the first two grades; 4) there was no protection against discrimination in assignment of pupils; 5) no relief was provided for overcrowding in black schools; 6) no desegregation was provided for kindergartens; 7) no provision was made for non-racial admission to schools for exceptional children; 8) no provision was made for non-racial admission to trade

response to these objections, Ellis said that since the matters complained of could now be handled administratively and continuing supervision by the federal courts would protect against renewed discrimination, it would be premature to rule on them. The plaintiffs always had available to them recourse to the federal courts in the form of petitions for further relief. With the exception of two hearings related to kindergarten attendance,[162] Judge Ellis' summation reflected the new environment of peaceful--if slow--progress:

> As the length of the hearing and these findings indicate, the epic struggles are over. Now the Court and the Parties must solve the knotty administrative problems. . . . Generally, so long as the Board indicates good faith and honesty in the administration of its plans, the Court will leave the public school system to those who know it best.[163]

While full and meaningful desegregation for New Orleans' schools would not be realized until a complete reorientation of the law and the temper of the community occurred in the late 1960's and early 1970's, the essential legal battle for school desegregation had been won.

Conclusion

The essence of the desegregation controversy in New Orleans was conflict between the federal courts and the state of Louisiana. New

---

and night schools; 9) no provision was made for non-racial assignment of teachers; 10) no provision was made for building schools without regard to race; and 11) districts could be changed by the Board without safeguards against discrimination. 230 F.Supp. 511.

[162]Bush v. Orleans Parish School Board, 9 RRLR 667 and 1747 (E.D. La. 1964).

[163]Bush v. Orleans Parish, 230 F.Supp. 517.

Orleans was a test of endurance for federal judicial authority and in no small measure for the black plaintiffs and their supporters. The struggle lasted well over a decade during which the district court and its judges consistently faced and overcame vehement state opposition. These efforts were strengthened by the legal and moral support of the Court of Appeals. The judges involved in the New Orleans case, with the sole exception of Judge Cameron, were unmoved by the vigorous opposition to their orders. The refusal of the judges to bow to adverse public opinion was particularly noteworthy, for all but Judges Brown, Tuttle, and Jones were lifelong Southerners, and Wright and Wisdom were natives and residents of New Orleans. Through the efforts of these men, the city of New Orleans and the state of Louisiana were educated in their responsibility of obedience to federal law. In the following few chapters, examination in more detail will be provided into the nature of the Court of Appeals Judges who helped launch what was essentially a peaceful social revolution in Southern education.

CHAPTER VII
THE JUDGES (2):
JOHN MINOR WISDOM AND JOSEPH C. HUTCHESON, JR.*

We are often told in the social sciences that what a man is can tell us a great deal about what he thinks. If we know where someone was born, raised, and educated, the social and economic position of his family, and other such factors, the political, social, and even moral attitudes of the individual should be predictable. By placing men in certain categories we often feel we are explaining them. This tendency is reinforced by its usefulness as a tool for organizing the historian's raw data. Categorization seems to give order and meaning, as it provides a familiar landscape in which to analyze people's actions. This process has particular force when the subject of discussion is an emotional one, such as the subject of this study, racial integration of the public schools.

The seven judges of the U.S. Court of Appeals for the Fifth Circuit who will be discussed, John R. Brown, Benjamin F. Cameron, Joseph C. Hutcheson, Warren L. Jones, Richard Taylor Rives, Elbert Parr Tuttle, and John Minor Wisdom, could be categorized in many different ways. For the most part, however, these classifications reveal little about how they perceived desegregation, their role in its enforcement, and their performance in the crucial years after the Brown decisions.

In that period, it was the South which was most involved in the struggle. Four of the judges, Cameron, Hutcheson, Rives, and Wisdom,

---

*Joseph C. Hutcheson, Jr., 1879-1973. Appointed to Fifth Circuit 1931, served to 1968. John Minor Wisdom, 1905-. Appointed to Fifth Circuit 1957.

were born, reared, and educated in the states of the Confederacy, therefore their attitudes and performance should have been predictable. However, though three of the four did not seem to be sympathetic to the idea of school integration, only one of them actually adopted a negative stance toward enforcement of the Brown decision. The fourth Southerner proved himself to be one of the most forceful and influential advocates of judicially enforced social change. The three judges who did not arrive in the South until their adulthood presumably did not share the traditional Southern view of relations between the races, but one of their number was almost totally inactive in the enforcement of national policy.*

Trying to classify the judges based upon their political affiliation proves to be of little value as well. It is an anomoly that five of these seven judges, serving on a Southern Court, were Republicans. Only Hutcheson and Rives were Democrats. While it is a very broad generalization, one might expect to find Republicans taking a more conservative stance on matters of judicial activism and school integration. It could be argued, of course, that in the 1940's and 1950's, Democrats in the South were more likely to be conservative and Republicans, more liberal. This would seem particularly so in this case, for all five of the Republican judges were appointed by and had supported President Eisenhower, who represented the more liberal wing of the Party. This indicator also fails, however, for two of the Republicans were quite conservative and

---

*It should also be kept in mind that these non-Southerners were brought up in an era when the idea of integration was not widely accepted. Tuttle and Jones were both in their early 60's and Brown was near 50 during the period covered by this study.

one of them was actively opposed to the enforcement of Brown. Further, while both Democrats were traditionalists of the Old South, one of them came to defy the traditions of his community.

There are other characteristics such as interest in academic scholarship, variety of training and educational experience, and degree of participation in politics and public office which might be used to separate these seven men into different categories, but all fail as meaningful predictors of judicial action or attitude. It is possible, however, to divide the judges into the general categories of liberal and conservative, as those terms are understood today. This division, the only one which seems to have any validity, is based upon their observed behavior in the desegregation controversy and their view of the judicial role as revealed through their own comments and the opinions of others.

It is difficult, of course, to measure such imprecise terms as liberal and conservative. The difficulty is further compounded by the fact that many different issues and attitudes will be discussed. Using this distinction to organize the discussion of the seven men might be artificial and introduce distortion, but awareness of that possibility offers some protection against it. As must be obvious by now, in the opinion of this writer, the judges are beyond categorization. They are, if nothing else, supremely individual. Therefore, for purposes of interest, analysis, and frankly convenience, the following comparative method seems most profitable. This chapter will cover two Southern-born judges, John Minor Wisdom and Joseph C. Hutcheson. Both were scholars and enormously influential and well-known judges. Wisdom and Hutcheson, however, took divergent paths in the desegregation struggle. The next chapter will deal with Richard Taylor Rives and Benjamin F. Cameron. Both

of these men were deeply Southern in background and attitude and traditional in their judicial approach, but one was the prisoner of his past, while the other became synonomous with the words courage and character. The last chapter will examine the three non-Southern judges, John R. Brown, Warren L. Jones, and Elbert Parr Tuttle. Two of the three were vigorous judicial activists, who attempted to devise remedies to give reality to the rights confirmed by Brown, while the third remained a passive, strict authority advocate, who was representative of the attitude of most Appeals judges.

A final word in introduction before beginning the study of the seven judges. The Fifth Circuit Court of Appeals was involved in one of the most troubling and difficult issues in our nation's experience. That it more than met its responsibility, took leadership in hammering out the means whereby Brown would be enforced, and oversaw a largely bloodless social revolution in the South, was really a matter of serendipity. In the 1950's, that Court and the country was served by a fortunate conclave of giants. In one way or another, five of the judges were great men and judges. A sixth judge was a tragic figure, reminding one of the protagonists of the classic Greek drama. The seventh judge, solid, competent, and workmanlike, seemed a small and pale figure only in comparison. As Dean Frank Read of the University of Tulsa School of Law, an outstanding authority on the desegregation and civil rights litigation in the Fifth Circuit, has said, "No other court in the country could have done what they [the Court of Appeals for the Fifth Circuit] did. It was unique."[1]

---

[1]Frank T. Read, private interview in Tulsa, Oklahoma, September 7, 1977.

John Minor Wisdom and Joseph C. Hutcheson, Jr., were born twenty-six years apart, but they shared some judicial values in common. Both scholarly men, they represented the best in two different generations of judging. In their view the law was a dynamic and living force. Wisdom and Hutcheson expressed their attitudes in very different ways, but the quality and erudition of their decisions and their devotion to a concept of justice unite them as judges.

Both judges had deep roots in the South. Hutcheson's father, Joseph, served as a captain in the Confederate Army and moved from Virginia to Houston, Texas, immediately after the Civil War. He became one of the leading attorneys in the community and served two terms in the U.S. House of Representatives. Hutcheson senior was so much a part of the South that he continued to be known as Captain Hutcheson, even during and after his days in Congress.[2] Judge Wisdom's father, who operated a successful insurance firm in New Orleans, was a student at Washington College in Virginia while Robert E. Lee was its president, and came to know him well. Judge Wisdom and his two brothers, Norton, an attorney, and William B., an advertising executive, followed their father's example and attended the renamed Washington and Lee.[3]

---

[2]Leon Jaworski, "A Lifetime of Judicial Service: Joseph C. Hutcheson, Jr.," 24 Texas Bar Jour. 1107 (December, 1961).

[3]John Minor Wisdom, private interview in New Orleans, Louisiana, July 29, 1977. All subsequent references in the discussion of the judges, except where noted, will be to personal interviews with the judges, or in the cases of Cameron and Hutcheson, both of whom are deceased, with those interviewed in their stead. Some references will not be attributed and will be styled "Confidential communication," following the practice used by T. Harry Williams in Huey Long (New York: Alfred A. Knopf, 1969). Most of that information is on tape and will be held in strict confidence for an appropriate period of time. Repeated citation of interviews, except where necessary will not be made.

Hutcheson and Wisdom seem to have had normal and happy youths, both being active and vigorous young men. Wisdom was an athlete. He was the city doubles champion in tennis and quarterback of a sandlot football team,[4] but found time to become an eagle scout and embark on a life-long career of voracious reading in history and literature. Hutcheson's mother died when he was quite young, and he was greatly influenced by his father.[5] He developed a reverential love for his father which repeatedly manifested itself in his later life.[6]

Judge Hutcheson's education was fairly typical for an upper class Southerner of the late 1800's. His "academic training" at the Bethel Military Academy in Virginia and the University of Virginia must have included a good deal of work in the classics of literature and the Bible, for his subsequent decisions, writings, and lectures were replete with such allusions. At the age of twenty-one, in 1900, Hutcheson graduated as valedictorian of the University of Texas Law School and immediately joined his father in law practice in Houston.[7] He never considered any other career.

Hutcheson practiced law with his father's firm from his graduation from law school in 1900 until 1918. During that period, he absorbed the traditions of the law from his father and a legal practice in an almost

---

[4]Judge Wisdom in his early years displayed a firm grasp of priorities. Not large in physical stature, he broke his jaw in a game and decided to forego a "promising" football career. Wisdom interview.

[5]"Joseph C. Hutcheson, Jr.," 13 Texas Bar Jour. 50 (1950).

[6]Dean Allen E. Smith, University of Missouri College of Law and the first law clerk employed by Hutcheson, private interview in Columbia, Missouri, August 15, 1977.

[7]13 Texas Bar Jour. 50.

frontier setting. He was a different breed of Texas lawyer in those days, however, for his legal training and classical education set him apart from most of his colleagues. He acquired a deserved reputation as a legal scholar at a time when many of the members of the Texas Bar were practicing law on the basis of Texas statutes, Blackstone, and personal connections. In his later years, Hutcheson often told a story about a revered member of the Texas Bar who had come to him for help. The lawyer had said: "Joe, I have got a wonderful lawsuit, and I need your help. You know, Joe, I am hell with the jury (and he was), but the law is a lion in my path."[8]

From 1913 to 1917, Hutcheson served as the chief legal advisor to the city of Houston. He moved up to Mayor in 1917, but the next year, Woodrow Wilson appointed him as the federal District Judge for the Southern District of Texas. He served on that bench for over twelve years, until 1931 when Herbert Hoover elevated him to the Court of Appeals for the Fifth Circuit. It was one of Hutcheson's great prides that he, an avowed Democrat, had been selected for the Appeals bench by a Republican President.

Hutcheson's record on the District Court had been impressive, for, as the only judge in the busiest District in the country, he had managed to keep his docket current, write over 200 opinions, and serve one month each summer in the Southern District of New York.[9] He became known for

---

[8]Joseph C. Hutcheson, Jr., "We Be of One Blood, You and I, of One Law, One Faith, One Baptism," 20 Miss. L.J. 284 (No. 3, May, 1949). Address at the annual dinner of the Southern Law Review Conference at the University of Mississippi on March 26, 1949.

[9]Jaworski, "Lifetime of Judicial Service," p. 1108.

his mastery of the principles of law and equity, his capacity for work, his accuracy in judgments, and the strength and style of his opinions. He was rarely reversed. He ran his court with strict discipline and was called a "martinet" by some: "No smoking, no noise, no reading--a dignity you could almost cut with a knife."[10] He was also, however, a champion of individual rights, of whom it was said that violating his ideas of right and wrong, of fairness and justice, was like "monkeying with a naked bolt of lightening."[11] He viewed himself as a Jeffersonian liberal, dedicated to the preservation of the dignity and value of the individual against the machinations of authority.

Judge Wisdom's path to the law was not as direct. At Washington and Lee, he took every Literature course that was offered, but still managed to complete his degree in three years. Hoping to become a critic, he went to Harvard for graduate work in English. His roommate was a young law student, and this contact with legal studies turned Wisdom to the law. Most Louisiana attorneys considered it essential to get their training in Louisiana, where the legal tradition was based on the French Civil Law rather than the English Common Law, so Wisdom returned home to attend Tulane. Wisdom felt that Tulane in those days was rather weak, and he remained interested in the law only through the efforts of individual teachers such as Rufus Harris and his fascination with classes in Torts and Conflicts of Law, which he said dealt in "challenging and metaphysical concepts." To make up for what he felt were deficiencies in his legal training, Wisdom engaged in extensive reading in the law,

---

[10] Walter P. Armstrong, "Joseph C. Hutcheson, Jr.: Chief Judge, Fifth Circuit Court of Appeals," 35 ABA Jour. 547 (1949).

[11] Ibid., 548.

a practice he continues to this day to familiarize himself with new subject matter.

While Judge Hutcheson had a place waiting for him when he finished law school, Judge Wisdom had to make his way on his own. Wisdom began practice in 1929 in partnership with a close friend, Sol Stone.* Times were so bad, however, that Wisdom and Stone were forced to take outside jobs with Monroe and Lemann and Phelps and Dunbar, the only firms at the time in New Orleans that paid young lawyers as associates. Eventually, Wisdom and Stone made a go of their own firm, handling every variety of case except criminal matters, and Wisdom became one of the leading attorneys in New Orleans. One of his early triumphs was a price fixing case against Calvert and Seagrams distillers. The subject was fairly important, for as Wisdom put it, "Fixing prices on liquor, well that's a sore subject in New Orleans. Fixing prices is worse than fixing prices on milk in other places."[12] Wisdom remained in private practice until President Eisenhower named him to the Court of Appeals in 1957, in recognition of his service to the GOP.

Judge Wisdom's appointment to the Court of Appeals, after a distinguished career as a New Orleans attorney was no surprise. Even though he had established a reputation for skill and erudition,** Wisdom was

---

*Originally known as Wisdom and Stone, it eventually became Wisdom, Stone, Pigman, and Benjamin. After Wisdom went on the bench, the name was changed to Stone and Pigman, and it is known today as Stone, Pigman, Walther, Wittmann, and Wittmann. Wisdom said that the firm's standards were always high, accepting new associates only from the class leaders at the outstanding law schools. In the tradition of New Orleans legal practice, it remained relatively small (twenty lawyers or less). Wisdom interview.

[12] Ibid.

**From the mid-1930's on, Wisdom regularly taught law at Tulane, and was on the faculty of the Appellate Judges Seminar at New York University. He felt that teaching was good for a judge, because young law students

equally entitled to the seat as a legitimate political debt. He had been a Republican since his college days, both because he was committed to the two party system and his vigorous opposition to the Long machine.* Wisdom was active in Republican politics. He moved on from being a Harold Stassen organizer in 1948 to establishing the first Dewey-Warren club in the country. In 1952, Wisdom was one of the leading Southern campaigners for Eisenhower, and his handling of the delegate contest between Taft's Louisiana delegation and Wisdom's Eisenhower group was one of the turning points at the Chicago convention. Wisdom managed the delegate contest as if it were a law suit, and was so successful that the Texas Eisenhower delegation adopted the same procedure.[13]

---

were sharp, well-informed, and disinclined to accept pat answers. Wisdom interview.

*Wisdom felt that Louisiana was still paying a price in political corruption as a legacy from the Huey Long era.

[13]John Wilds, "Judge Wisdom--GOP General," The States-Item, January 11, 1977, sec. B, p. 1. This article contains an account of Wisdom's role in the 1952 election and the strategy of the Republican contest in Louisiana. Wisdom was apparently one of the men who recommended Nixon as Eisenhower's running mate, but after seeing the "Checkers" speech, regretted his advice and tried to get Nixon removed. One of Wisdom's fond memories was of a delegate battle in the Fifth Ward in New Orleans, which included the French Quarter. There were a total of nine registered Republicans in the ward, a fact Wisdom had verified by reference to the official records. Four were for Taft and four were for Eisenhower. The ninth, a wealthy dowager named Mrs. Schwartz, was wavering, but Wisdom had won her over to the Eisenhower forces. The Taft people, who represented the party organization, were fairly certain Wisdom had been successful, so they scheduled the caucus at the house of a black mid-wife in the Quarter, hoping that this would dissuade Mrs. Schwartz from attending. When to their consternation she in fact arrived and cast her vote for Eisenhower, they dragged two strangers off the street and voted them for Taft. Wisdom and his people then bolted the meeting, held a rump caucus on the sidewalk, and selected Eisenhower. The next day he had Mrs. Schwartz in his office, and she called her son. Her comment was "Bernard, you just don't know what fun is until you've registered Republican."

During the general election, Wisdom was the Chariman of the Southern Committee for Eisenhower (of which his future colleague Elbert Tuttle was the Vice-Chairman) and also became the Republican National Committeeman. After the GOP victory, Wisdom was offered many positions but turned them all down.* He had committed himself to building Louisiana's Republican organization, which had previously been kept small to control patronage when the GOP won national elections. He was still involved in this when the first vacancy occurred on the Fifth Circuit Court of Appeals. He therefore declined, and recommended his close friend from Georgia, Elbert Parr Tuttle, who was given the seat. The next logical vacancy occurred in 1957 when Wayne Borah, also from Louisiana, retired. Wisdom now wanted the judgeship, for he enjoyed research and writing and had always felt he could be a good judge. His loyal service and friendship with Eisenhower and others in the administration such as Herbert Brownell and William Rogers served him well. In 1957, Wisdom was appointed to the Court of Appeals,[14] as what the Judge believes was President Eisenhower's personal choice.

Judges Wisdom and Hutcheson reacted to the Brown desegregation in contrasting ways. Judge Hutcheson was a traditional, conservative Texas Democrat. It would be unfair to call him a segregationist, but he was

---

*After Eisenhower's election, Wisdom did agree to serve on the Commission on Government Contracts which dealt with enforcing anti-discrimination regulations.

[14]Wisdom's appointment had to overcome the strong opposition of Senator Eastland of Mississippi. In 1955, Wisdom had supported and aided the appointment of Benjamin Cameron to the Court of Appeals. Cameron now came to Wisdom's aid, for he passed along Wisdom's suggestion that Cameron would be comfortable with Wisdom on the Court. With this assurance, Eastland, who ran the Senate Judiciary Committee, dropped his objections. The degree of the later disagreement between Cameron and Wisdom belied Wisdom's assurance. Confidential communication.

hardly a social reformer. He was not happy with the Brown decision, less for the immediate result than for what he believed would be done in its name. He was not in sympathy with the idea of desegregation in general and was particularly unhappy with the role the courts came to play in what he thought was a social rather than a legal issue.[15] He believed in stability in law and the importance of the slow evoluation of new legal concepts. Though stare decisis was a guide for rather than a limitation upon judges, Hutcheson felt that Brown was too sharp a break with the past. He was never recalcitrant or actively obstructed the implementation of the Brown decisions, but avoiding that implementation would have pleased him.[16]

Notwithstanding his discomfort with what he viewed as Supreme Court meddling with local affairs, Hutcheson obeyed his oath of office. He was not often involved in hearing school cases, and almost never wrote opinions on the subject, but he did not dissent from decisions which were clearly called for by the Brown precedent. Hutcheson was past seventy-five at the time of most of the desegregation decisions, and toward the end of the period under discussion, he had suffered a stroke which limited his activity. Thus, Judge Hutcheson played a limited role in the desegregation controversy. It was probably fortunate that he was so little involved, for he abhored the activist role the Court of Appeals eventually took in the cases. Some who observed him, however, maintained that after his illness, Hutcheson's attitude became more flexible.

---

[15] Smith interview. Most of the material regarding Judge Hutcheson's views on Brown and desegregation came from Dean Smith, the Judge's former law clerk, but the general tenor of his comments was confirmed by other sources.

[16] Read interview.

John Minor Wisdom's reaction to the Supreme Court's desegregation decision was quite different.* He was not at all surprised by the holding in Brown. The Judge maintained that anyone with intelligence could have seen integration in the schools coming, and that there were numerous legal signposts leading to the inevitable result in Brown. At first he did not like the step-by-step approach adopted by the Supreme Court and felt the language "all deliberate speed" should never have been used. In retropsect, however, Wisdom admitted that full integration in 1954 might have been impossible. With regard to the general issue, Wisdom felt that "integration was inevitable in the long run and an absolute must for this country."[17]

Judge Wisdom was quite active in the school desegregation cases and participated in all three discussed in this study. He consistently decided in favor of the black plaintiffs, and as his experience with the issue broadened, became more impatient with delaying tactics.[18] Interviewed in the later 1970's, he had come to feel that the decisions during the 1950's and early 1960's had lost a good deal of their significance as the Court of Appeals moved on to what became known as affirmative action. In the earlier period, getting a first grade integrated, even on a token basis, seemed like a major accomplishment, but since the mid-1960's, such limited steps were clearly insufficient. Indeed, by 1966, Wisdom

---

*The Brown decision was coincidently announced on Judge Wisdom's birthday, May 17.

[17]Wisdom interview.

[18]At least one source argued that Judge Wisdom did not start his involvement with the desegregation cases as a fire-eating liberal, and that his progressive views were slow to develop. Confidential communication.

authored a major decision applying Department of Health, Education and Welfare guidelines as a legal standard and calling for integration, "lock, stock, and barrel."[19] Even in the earlier cases, Wisdom had displayed a willingness to adapt and improvise procedures to enforce the Supreme Court's mandate.

Wisdom's experience in the New Orleans case was instructive, for he was a life-long resident of that city and steeped in its historical traditions. The Judge never felt he had any problems dealing with the attempts of the Louisiana Legislature to prevent integration. The legislation, he argued, was made up of "gimmicks," even though they became more sophisticated as the earlier laws were rejected. They all aimed at maintaining segregation and were therefore "blatantly unconstitutional." Wisdom felt the community pressures on him were minimal, although he and his family were subjected to some abuse. Two of his dogs were poisoned, some snakes were thrown into his yard, and middle-of-the-night treatening calls were a regular occurrence. All of this, Wisdom maintained, was "par for the course." The real problem the judges faced was not danger to themselves or community disapproval, but the difficulty of obtaining compliance in a South that passionately believed that integration was judge-made and not required by the Constitution, making it difficult to obtain compliance.

An understanding of the attitudes of these two men can be gained from examining their views of what Courts of Appeals do and of a judge's life. Judge Hutcheson rarely spoke of the Courts of Appeals or of

---

[19] United States v. Jefferson County Board of Education, 372 F.2d 836 (1966). This decision became the basis for subsequent national desegregation policy. Even Judge Wisdom's language was adopted by the Supreme Court.

"roles" that judges were called upon to fulfill. He seemed to reject any notion of judges as social engineers. The judge had only one duty to perform, and that was to decide the case before the court in the best way possible. This did not include a formalized view of social responsibility. Judges simply judged cases. In application, there was little introspection involved, for Judge Hutcheson "saw his duty and he done it."[20]

Hutcheson was one of the most prolific authors on the bench, and when one examines his writing, an almost totally different portrait emerges. Here we find a philosophical man, deeply interested in the nature of law and how law grows and evolves. The contradiction may be explained in part, if not resolved, by the fact that the source for his philosophy, as well as his practice as a judge, was the great tradition of the Common Law. Thus, for Hutcheson, "the law is not mere theory but living force . . . the life of the law is a struggle, for the idea of laws is an eternal becoming. . . ."[21] Hutcheson's feeling for the law as a changing instrument for justice was profound, for he believed the essence of the Common Law was flexibility and the changing application of constant principles.[22]

---

[20]Smith interview. Dean Smith felt this practical approach was what Hutcheson really believed rather than the "theories" he expounded in his writing. The latter, Smith thought, was just for show.

[21]Joseph C. Hutcheson, Jr., Law and Liberty Reconciled: The Principle of Our Free Society, the Spirit of its Laws (Journalism Laboratory Press of Wahsington and Lee University, 1953), p. 57.

[22]Joseph C. Hutcheson, Jr., "The Law Do Move," 7 A.L.S. Rev. 1044 (1933).

In Hutcheson's view, the connection between the judges and evolving Common Law was intimate and personal. Just law had its seat in the bosom of every judge who decided cases as nearly as possible to the "ought to be" as established method would allow.[23] Judging was administering justice, and whether judges performed well depended on their having an "exalted notion of their function, the administration of justice according to law. . . ."[24] One can hardly doubt the personal element in Hutcheson's view of what he did, for it was an essential part of his understanding that judges had a basic standard for their decisions. This included the received wisdom from the past, as embodied by the great Common Law precedents and the dictates of accepted procedure and rules of conduct, but an even more demanding standard was involved. Courts did their duty only in so far as they applied the basic values of honor, patriotism, and the right, which derived from an "irrefutable natural world,"[25] that is, natural law. From this, one can sense the attitude which limited Judge Hutcheson's activism and his interest in what he called "the irridescent beauty of a changing law."[26] The values of the past and tradition were paramount. As Hutcheson put it, "the really, the deeply wise, the rememberers know better. They have always

---

[23]Joseph C. Hutcheson, Jr., "This Thing Men Call Law," 2 U. of Chicago L. Rev. 4 (No. 1, December, 1934).

[24]Joseph C. Hutcheson, Jr., "Judging as Administration," 7 A.L.S. Rev. 1069 (1933).

[25]Hutcheson, Law and Liberty Reconciled, p. 19.

[26]Hutcheson, "Judging as Administration," p. 1074.

known that the good life, social as well as individual, is rooted deep in proven, though changing traditions and ideas."[27]

In many ways, Judge Hutcheson's views and practices were enigmatic. His most comprehensive statement of what being a judge involved first appeared in a Cornell Law Review article and subsequently became the basis for a book. It expressed a candor about the process of judicial decision-making which was rare, particularly coming from a sitting Court of Appeals judge. The philosophy expressed was very much in accord with the school of legal realism that had received some currency from the work of Jerome Frank. In this statement, Hutcheson admitted the degree to which judges placed their personal standards, tempered of course by the requirements of law and precedent, within a supposedly objective process. He said:

> I knew that "judges are depositories of the laws like the oracles, who must decide in all cases of doubt and are bound by an oath to decide according to the law of the land," but I believed that creation and evolution were at an end, that in modern law only deduction had place, and that judges must decide "through being long personally accustomed to and acquainted with the judicial decisions of their predecessors". . . . I knew of course, that some judges did follow "hunches"--"guesses" I indignantly called them . . . [but] I came to see that instinct in the very nature of law itself is change, adaption, conformity, and that the instrument for all of this change, this adaption, this conformity, for the making and nurturing of the law as a thing of life, is the power of the brooding mind . . . [so] after canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for

---

[27] Joseph C. Hutcheson, Jr., We March But We Remember (Houston: Alpha Law Brief Co., 1941, 1967), p. 15.

> the feeling, the hunch--that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[28]

One could hardly find a conception of judging more conducive to activism, for Hutcheson had effectively argued that judges were ruled by largely their own notions of justice; the precise legal reasoning of erudite opinions were merely justifications constructed after the fact. How then is one to explain what one observer called Judge Hutcheson's passive view of what the Courts of Appeals could do in the school desegregation cases?[29] He demanded that strict procedural requisites be met and argued that courts could not reach out beyond the most limited questions brought before them by litigants. Surely part of the explanation must lie in Hutcheson's lack of sympathy for the entire process of desegregation, and his rejection of what he called "social engineering" by judicial fiat. Beyond that, however, some basis for what seems a contradiction may be found in Hutcheson's political faith.

While Hutcheson was a deeply committed, life-long Democrat, he was very much opposed to the New Deal. This opposition went even beyond personal enmity to "that bastard Roosevelt," who Hutcheson felt, along with many others, denied him the Surpreme Court seat to which he was entitled.[30] Hutcheson saw himself as a "Liberal of the Jefferson,

---

[28]Joseph C. Hutcheson, Jr., Judgment Intuitive (Chicago: The Foundation Press, Inc., 1938), pp. 517-19.

[29]Confidential communication.

[30]Confidential communication. One of the reasons many thought Hutcheson was never elevated to the Supreme Court was that despite what were then considered liberal views, he was too independent of thought and unpredictable to find favor in the Roosevelt Administration. Jaworski, "A Lifetime of Judicial Service," p. 1150.

Madison, Lincoln, Wilson school . . . a lover of liberty, and not . . . a worshipper of state power."[31] In fact, the essence of being an American was the habit of protecting one's rights against government.[32] The New Deal and Roosevelt represented "European, bastardized ideas of Liberalism."[33] Hutcheson's special enmity was reserved for administrative agencies which regulated, accused, investigated, judged, and disposed. These were the "planners," the "state worshippers," the worst of which was the National Labor Relations Board, an agency that Hutcheson took delight in lambasting.[34] With regard to NLRB enforcement cases, the Supreme Court could do whatever it wanted to but he, Hutcheson, was going to continue to do what was right!

Judge Hutcheson was a firm believer in the maxim that government is best which governs least. His great enemy was the state, the edifice of distant, arbitrary power which claimed to know more about what the citizen needed than the citizen himself knew. Hutcheson believed there was a clear choice between forms of political and economic life, one of which was the traditional path in a free society that valued individual freedom and dignity above all else. The other form was that which revered the government, the state which employed law as a mere instrumentality by

---

[31] Joseph C. Hutcheson, Jr., "Restraint, the Price of Freedom," address at the 22nd Founder's Day dinner of the Lawyers Club at the University of Michigan, April 28, 1950, reprint, p. 3.

[32] Ibid., p. 5.

[33] Ibid., p. 9.

[34] Joseph C. Hutcheson, Jr., "New Instruments of Public Power," address to annual meeting of State Bar of California at Coronado, California, September 26, 1946, reprint, p. 8. This distaste extended to the Supreme Court when it engaged in superfluous preaching and dicta on administrative matters, or as Hutcheson called it, "bewordling." Ibid., p. 14.

which to order the life of the governed.[35] Jefferson and Madison were thus his patron saints; the Federalist Papers was his Bible. His political faith and creed were that a government which entrusts power to men over other men must not only control the governed but must also control itself.[36] Hutcheson was, in short, a bona-fide nineteenth century liberal.

It was clear to those who knew him that Judge Hutcheson enjoyed many things about being a federal judge. The honor and respect one received from other judges and lawyers was important, for he had learned from his father the value of one's reputation among peers. Additionally, Hutcheson was motivated by a sense of public service and duty, also a result of his father's influence. Further, being a federal judge gave Hutcheson the opportunity to demonstrate his dedication to principle by announcing deeply held beliefs and standing by them, and to fulfill his ambitions to excell and be a man of importance. These attitudes led Hutcheson to gear his entire life to the needs and requirements of the Court. He had little or no social life and maintained a very demanding work schedule until his stroke forced him to slow down.

Being a federal judge was not, however, without its costs for Hutcheson. Perhaps due in part to his own personality and in part to his elevated sense of propriety, Hutcheson found the life of an appellate judge a lonely one. He viewed his position as ceremonial as well as substantive, particularly after he became Chief Judge of the Fifth Circuit

---

[35] Hutcheson, Law and Liberty Reconciled, p. 15.

[36] Joseph C. Hutcheson, Jr., "Separation of Powers and Administrative Law," address to National Shorthand Reporters Association at Houston, Texas, August, 1936, reprint, p. 13.

in 1948. As a result, he cut himself off from friendships among lawyers and found many of his relationships to be artificial. He was an autocratic Chief Judge, and ran the Fifth Circuit with a rather firm hand. All of this fitted Hutcheson's picture of the proper behavior for a federal judge.

Notwithstanding Hutcheson's very clear sense of honor, duty, and respect, and his strict demeanor, in the company of his father, he was a defferential son. It would be impossible to overestimate the influence his father had on him. One habit of Hutcheson's illustrates the point quite well. "When he was a judge, sitting on the bench, his father would stick his head in the courtroom and say, 'Joe, it's time for lunch,' interrupting the court proceedings. The judge would bang the gavel and recess court and go out to lunch with his dad."[37]

John Minor Wisdom's view of the courts and the task set for them bears a superficial similarity to that of Hutcheson. Like Hutcheson, Wisdom believed that courts exist to dispense justice with an even hand. Although he has not been as public a writer of articles and books as Hutcheson, Wisdom's learning and philosophical breadth were displayed in his opinions. Some of his critics contended that he took too long in preparing opinions,[38] but Wisdom labored over those documents and was usually the man chosen to write opinions which required sophisticated analysis, historical development, and policy considerations. His performance earned him the reputation as the scholar of the Fifth Circuit.

Wisdom, like Hutcheson, saw an intimate relationship between the judge, the world in which legal decisions had effect, and the process of

---

[37]Smith interview.

[38]Confidential communication.

reaching decisions. The effective judge always had to begin from a neutral position, but once a decision was reached, he had to be willing to support his position like an advocate.* Here, however, Wisdom's similarity with Hutcheson ended, for the former's conception of the administration of justice produced a judicial activism so much more extensive than Hutcheson's that it became totally different in nature. Certainly consistency in the law was an essential and important element in a judge's occupation, but precedent or stare decisis was not as important as the situation before the Court. As Wisdom said, "the problem that is most important is the solution of the case and its impact on the future, not how past decisions effect it."[39] It was here, in his highly developed sense of social responsibility within the judicial system, that Wisdom most clearly departed from Hutcheson.

Judge Wisdom has frankly stated that the federal courts have a political and social role in our system.[40] While he felt the relationship had been overplayed by some academics, Wisdom was convinced that the connection between law and social change was an intimate one. It was impossible to avoid that connection, for "a case can't be considered outside of its social context."[41] Courts did not operate in a principled vacuum, isolated from the everyday struggle. Thus, he maintained federal

---

*This was one of the reasons Wisdom felt that a broad experience in practice was a better preparation for becoming a judge than extended academic study.

[39]Wisdom interview (emphasis added).

[40]John Minor Wisdom, "A Southern Judge Looks at Civil Rights," 42 F.R.D. 437 (1967), p. 453.

[41]Wisdom interview.

courts operated governmentally "to bring local policy in line with national policy . . . and adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally created or federally-protected rights."[42] In effect, the federal courts acted as a buffer-mediator between government and the individual.

Wisdom's activism could also be distinguished from Hutcheson's by the nature of their attitude toward government. Unlike the Texan, Judge Wisdom always believed that history favored a strong national government. The nation, he argued, thrived and lived with Jeffersonian principles, so lauded by Hutcheson, but under a Hamiltonian view of government that "rejects as archaic the maxim that the least government is the best government."[43] Indeed, Wisdom felt that the most important power of the federal courts was to enforce and protect federal rights of individuals against local deprivation, particularly in civil rights cases. It was precisely this function that the federal courts performed in the school desegregation cases.

Judge Wisdom also had a clearly developed view of the different functions the various levels of federal courts should perform. The Supreme Court was responsible for providing the broad outlines of policy. The highest court provided a skeleton of law upon which the lower courts, particularly the Courts of Appeals, put the flesh of action and development. The Courts of Appeals both brought local policy in line with national and provided the final arena for settling almost all disputes.

---

[42] Wisdom, "A Southern Judge Looks at Civil Rights," p. 454.

[43] Ibid., p. 455.

Courts of Appeals were creative bodies, deferring to District Courts only on matters of fact. The District Courts were the front-line of the judicial system as triers of fact, but they were also the entry point or beginning of the creative process. The nationalizing role of the Courts of Appeals was particularly important to Wisdom, for the broader constituency of that Court freed judges from the parochial prides and prejudices that were often evidenced in the District Courts. The greater variety of backgrounds of the judges and the required adjustments one with another was a positive influence.*

These relationships were easy to see in the school desegregation cases. The Brown decisions had delegated a broad discretion to the District Courts. This worked poorly, Wisdom maintained, because the problem in civil rights was most often attachment to local custom, and the exposure to localism gave the lower courts a narrow view, in most instances, of the nationalizing role of the federal courts. Courts of Appeals were therefore required to step in and give detailed instructions to the District Judges. The burden of protecting the individual therefore fell to the Courts of Appeals, Wisdom argued, and quite properly since they were less exposed to built in pressures and allegiences than the District Courts. Unnecessary difficulty was caused because the Supreme Court did not provide a real guideline upon which to build the law.[44]

---

*Wisdom interview. It was just this opposition to parochialism that has led Wisdom to oppose splitting the Fifth Circuit in two though its large size has caused some administrative difficulties. The loss of diversity would be a serious mistake as far as Wisdom was concerned, for the logic of the process would lead to smaller, more limited Circuits. The Courts of Appeals would lose their special federalizing function and be no more than another level of District Courts.

[44]Wisdom, "A Southern Judge Looks at Civil Rights," pp. 457-461, passim.

It must be obvious from the above, that innovation was an essential element of Wisdom's philosophy of judging. Courts had a responsibility to address current problems and had to view their field of endeavor as broadly as possible. Of necessity, courts legislated and did not simply find and apply existing standards. This active, legislative role was appropriate, Wisdom maintained, for the policy setter was the Supreme Court, and the interpreter and developer was the Court of Appeals. In the school desegregation cases, the legislative responsibility was clear. The Supreme Court, forced to take the lead at first due to executive and congressional inaction, had explained the constitutional commandment. The Courts of Appeals were then called upon to provide the means by which the Constitution was to be enforced, that is to legislate, because local authorities would not voluntarily obey, and the President and Congress refused to act. Wisdom disliked the involvement of the Courts of Appeals in detailed school administration, but there had been no other choice in the absence of any other active agent.

John Minor Wisdom also found the life of a federal judge to be very satisfying, particularly as an appellate judge. Chief among the rewards for Wisdom was the opportunity to research and write on a broad spectrum of legal issues. Being a judge involved a life-long process of education, an opportunity to exercise and challenge the mind. This personal, intellectual benefit was combined with satisfaction in being able to participate in what seemed to be an almost artistic creative enterprise, the evolution and development of the law. Wisdom's pleasure in this regard extended beyond those areas of law which might first come to mind, such as constitutional issues and civil rights, to more technical fields such as taxation, corporate law, and oil and gas law. Additionally,

Wisdom found reward in being able to extend ideas of fairness and justice to those for whom such concepts had been illusory.

Judge Wisdom disliked only one feature of his life on the Court of Appeals. He did not have the time to do all of the reading he wanted to. He did not, however, feel that federal judges were overworked. Experience on the bench provided any judge with the ability to give full attention to his tasks, without denying himself the ordinary pleasures. As Wisdom put it, "I never heard of a Judge's handicap going up."[45] One's social life need not suffer either, for Wisdom maintained he never felt isolated nor forced to alter or abandon long-standing friendships. As long as one behaved with propriety, friends within the legal profession would not presume upon their friendship. In sum, Judge Wisdom felt there were very few careers that would provide him with the satisfaction he had had as a federal judge.

Some mention must be made of the special feelings of Judges Hutcheson and Wisdom toward the Fifth Circuit Court of Appeals. They both took particular pride in the work of the Court and its nature as an institution, but this pride was expressed in very different ways. For Judge Hutcheson, the Fifth Circuit was the only real Court of Appeals. The Fifth was a binding agent for the South, at least in so far as the law was concerned. The Court was the highest institutional expression of his region, and if nothing else, Hutcheson was a regional man. Having spent some fifty years as a judge within the Fifth Circuit, thirty-seven of which as judge on the Court of Appeals, Hutcheson developed a very close, personal identification with the Court. The Fifth Circuit was his home,

---

[45]Wisdom interview.

and he felt the same relationship between himself and the Court that Charles DeGaulle saw between himself and France. The Fifth was Hutcheson's Court, and as Chief Judge, he ran it his way.

Not surprisingly, Judge Wisdom's pride in the Fifth Circuit Court of Appeals was not based on any notion of regionalism, but rather upon the role of the Court in bringing the South in line with national policy. When the Executive and Legislative branches of the federal government, local governments and school boards, state governments, and even the Supreme Court after the initial decision in Brown, all failed to exert either leadership or support in trying to solve the most important social question of the era, the Fifth Circuit assumed their responsibilities as well as its own. He was extremely proud of the Court's record, for as he put it, "I think when some courts were undecided what to do about desegregation and were dragging their feet, I think we more or less led the way."[46] A Southern court provided the guidance, even the leadership, which the Supreme Court later extended to the entire nation.

As a final means of gaining insight into these two influential men, examination of the opinions of their colleagues and other observers is most useful.* There was a basic consensus of opinion about Judge Hutcheson. He was viewed as a forceful, independent-minded and persuasive man. Current Chief Judge John R. Brown viewed him as an active

---

[46] Ibid.

*The source for the comments in this section are the interviews with the other judges, Dean Smith, Dean Read, and others who wish to remain anonymous. Most comments will be attributed to their source, but some will be treated as confidential communications. There is a delicate situation here, for five of the judges are still alive and sitting on the Fifth Circuit bench. This method will be followed in the two subsequent chapters dealing with the other judges.

and prolific judge who had great talent as an administrator. He kept all of the judges working and moved a great caseload through the Fifth Circuit. Brown also saw him as an accomplished writer who put "novel ideas in noble form."[47] He was a particularly forceful advocate of his viewpoint, and his "vigor [was] a reflection of his own fearless independence and rectitude."[48] In some ways Brown felt he was a "crusty, haughty" man, particularly as a District Judge, who could be abrupt in running his court. Hutcheson's personality mellowed after his stroke, Brown felt, as the Judge welcomed the genuine sympathy he received. In substantive matters, Hutcheson would not experiment or innovate, but though he was reluctant in civil rights, he always tried to support constitutional rights and requirements.[49]

John Minor Wisdom also noted Hutcheson's abilities as a judicial advocate. He was a lobbyist for his view and would often attempt to change opinions by phoning the other judges on a panel. Hutcheson was, Wisdom said, a very effective judge for an incredible number of years, but may have stayed on the Court beyond his days of top performance.[50]

Judge Elbert Parr Tuttle had recollections of Hutcheson as a great classical scholar, who often did intellectual battle with the great Learned Hand. Tuttle also remembered Hutcheson as an effective advocate, who would appeal even to deference to age, experience, and friendship to

---

[47]John R. Brown, "Hail to the Chief: Hutcheson, the Judge," 38 Texas L. Rev. 140 (No. 2, December, 1959), pp. 140-44.

[48]Ibid., p. 145.

[49]John R. Brown, private interview in Houston, Texas, August 24, 1977.

[50]Wisdom interview.

gain his point. Debates with Hutcheson were never acrimonious, however, as the Judge never confused differences of opinion with personal hostility. Hutcheson's independence of mind was evidenced by his frequent practice of announcing his views early in the hearing of a case. Tuttle thought Hutcheson was bright and quick even in his later years but wondered if at times Hutcheson was more interested in turning a neat phrase than worrying about the result in a case.[51]

Judge Hutcheson was a man of vast experience in the law. It has been said of him that through his long years of service, great learning and vigor, and forceful opinions, Hutcheson was exceeded by very few judges in shaping the law as applied and interpreted in the federal courts.[52] Hutcheson's abilities and familiarity with the law were attested to by his former law clerk, Dean Smith. The Judge's library was totally inadequate because Hutcheson rarely had to do any research. He remembered all the law he knew, and that was a substantial body of literature.[53] Hutcheson was a forthright and punctilious man who valued strength of character. To be worth anything, he liked to say a man had to have courage, to stand up for his opinions, and to count for something.

---

[51]Elbert Parr Tuttle, private interview in Atlanta, Georgia, August 26, 1977. Judge Hutcheson's facility with words was also demonstrated in the expression of a sense of humor that was surprisingly self-deprecating in a man of his nature. What follows is a specially delightful example. "At first, as a lawyer and advocate for my client, I was an inducer of errors. Next, as a trial judge and earnest advocate for the right solution, I was a producer of errors. Now as an appellate judge, a member of a 'court which lives by correcting the errors of others and adhering to its own,' in theory a reducer of errors, I am, I fear, in fact a conducer thereto." Joseph C. Hutcheson, Jr., "Law is a Many Splendored Thing," 19 Ala. Law. 146,150 (No. 2, April, 1958).

[52]"Judge Hutcheson to Retire," 28 Texas B. Jour. 7 (December, 1965).

[53]Smith interview.

His toughness and insistence upon the responsibility of the individual was reflected in his dislike for en banc hearings in the Court of Appeals. Since it took only one good Texas Ranger to quell a riot and control a mob, he once commented it should take only three Appeals Judges to decide any case.[54]

The generally shared view of John Minor Wisdom was that of absolute respect for his brilliance. Chief Judge Brown called him one of the greatest judges he ever knew and stated that in racial and school desegregation, John Minor Wisdom had a greater influence than any other judge in America. The fact that his opinions were both far reaching and scholarly indicated Wisdom's mental energy. Brown valued what he called "Wisdom's remarkable facility for extending court remedies but knowing where the limits are."[55]

Judge Hutcheson also respected Wisdom's intelligence, even though he would surely disagree with the extension of the Court's supervision of the schools that Wisdom led. Hutcheson was, however, a bit uncomfortable with Wisdom's style, for he viewed him as an eccentric.[56] Even Benjamin Cameron, who disagreed vehemently with Wisdom on desegregation, liked him and respected his abilities.[57] Judge Tuttle called Wisdom the most scholarly member of the Court. Tuttle's greatest compliment for Wisdom

---

[54]Richard Taylor Rives, private interview in Montgomery, Alabama, July 27, 1977.

[55]Brown interview.

[56]Smith interview. Dean Smith made specific reference to Hutcheson's discomfort when Wisdom would arrive in his chambers in tennis sneakers.

[57]Read interview.

was that he, Tuttle, was truly flattered that he Wisdom agreed so much of the time.[58]

Dean Read, and others, have viewed Wisdom as aptly named, for they see him as the brightest sitting appellate judge in the country. He was one of the real judicial giants of the century, at the least on a par with the great justices of the Supreme Court. His scholarship and sense of history were unmatched, his opinions impecable in terms of style, clarity, and law. Wisdom was a perfectionist and did not suffer fools gladly, but clerks and secretaries loved working for him as he was also warm and loving. Judge Wisdom was fearlessly principled and would not alter his view on a matter of importance.[59] Even now as a senior judge, Wisdom is a powerful force on the Court of Appeals.[60] In short, even in the company of outstanding judges, John Minor Wisdom was the most highly respected as a judge. Only Richard Nixon's Southern strategy denied him a deserved seat on the Supreme Court.

---

[58]Tuttle interview.

[59]Read interview and confidential communication. Alone among the Judges of the Fifth Circuit Court of Appeals, Judge Wisdom refused to sign a letter in support of the nomination of G. Harold Carswell for the Supreme Court. In Wisdom's view, Carswell simply did not have the necessary quality.

[60]Confidential communication. Some of the other judges on the Fifth Circuit Court chafe under the intellectual dominance of Wisdom, and while Chief Judge Brown is a demanding administrator, he never cajoles Wisdom to turn out his opinions more rapidly.

CHAPTER VIII
THE JUDGES (3):
RICHARD TAYLOR RIVES AND BENJAMIN F. CAMERON*

John Minor Wisdom and Joseph C. Hutcheson, Jr., were men of the South, but their background was hardly typical of that slow moving, Magnolia stereotype of the early twentieth century. Wisdom was raised in New Orleans, a cosmopolitan city, and had a broad educational background. Judge Hutcheson was as much a man of the frontier as a Southerner, and Houston was a bustling boom town. Richard Taylor Rives and Benjamin F. Cameron, however, did grow up in an atmosphere which seemed closer to the national image of the Old South. The Rives family had lived in the Montgomery, Alabama, area for generations, and Ben Cameron's family were long-established Mississippians. The two men were very much a part of the Southern tradition and shared many beliefs. Both had a conservative view of the law and of the function of judges, and a traditional approach to matters of social relationships. These men, alike in so many ways, however, had very dissimilar careers. Richard Taylor Rives rose above the received values of his background and established himself as one of the most courageous judges in our times. Ben Cameron remained trapped by his heritage and became a lonely and tragic figure on the Court of Appeals.

---

*Benjamin F. Cameron, 1890-1964. Appointed to Fifth Circuit 1955, served to 1964. Richard Taylor Rives, 1895-. Appointed to Fifth Circuit 1951.

Cameron was the son of a Presbyterian minister[1] and received his early schooling in a private academy. From the little information available, he seems to have spent an active childhood, both physically and intellectually, as he became a scholar of classical languages and at various times in his life, a football coach.* His formal schooling at the University of the South and Cumberland University was a classical if limited one. Cameron found time while in law school to teach at Norfolk Academy in Virginia, and to serve as a coach at Cumberland. He retained an active interest in the University of the South and became the Chairman of its Board of Regents. While a young man, Cameron developed an interest in horses, and this avocation remained an important part of his life. Cameron maintained a home in Minton, Alabama, and kept his horses there. Until his heart attack in the late 1950's, the Judge often invited friends and colleagues to this retreat and displayed his horsemanship.[2]

Ben Cameron practiced law in Meridian, Mississippi, from 1914 to 1955, when he was named to the Court of Appeals for the Fifth Circuit.

---

[1] Frank T. Read, private interview in Tulsa, Oklahoma, September 7, 1977.

*The information about Judge Cameron, who died in 1964, comes primarily from a private interview with Judge James P. Coleman, former Governor of Mississippi and Cameron's replacement on the Court of Appeals, in Ackerman, Mississippi, on August 17, 1977. Coleman did not know Cameron until the latter was a well-established lawyer, and information about Cameron's youth was unavailable. The Judge's widow is still alive but does not give interviews. His son, Winston, who is a practicing attorney, would not consent to an interview. Judge Coleman believed the family had no desire to discuss the Judge's career, for Cameron's position has become unpopular and his experience on the Court was unpleasant. As a result, the only insight obtainable derived from what others have said about the Judge and from Judge Coleman's remarks.

[2] Coleman interview.

From 1928 to 1932, he was a United States Attorney for the Southern District of Mississippi in the Hoover Administration. For the balance of those forty-one years, he engaged in a general private practice. Cameron developed a reputation as a well-read, effective, and tenacious lawyer. Reflecting his upbringing, Cameron's demeanor was always dignified, and to some, rather stern and straight-laced. He had a mania about smoking, not allowing it in his home, and he was also a total abstainer from alcohol. He remained an active and staunch Presbyterian througout his life.[3] Cameron handled all varieties of civil cases, and many of his clients were well-known businessmen and politicians in the State.

Cameron was named to the Court in 1955. Although he had established a fine reputation as an attorney, an important basis for the appointment was the fact that Cameron was one of the very few genuine Republicans in Mississippi. Eisenhower was looking for a Mississippi Republican to replace a retiring Democratic appeals judge from Mississippi. Although Cameron was a bitterly anti-New Deal Republican he was also very close to the Democratic political leaders of the state and received their endorsement. His appointment was also supported by John Minor Wisdom, a particular favorite of Eisenhower. His appointment received the support of both the Mississippi NAACP and White Citizens Councils.[4]

---

[3]Judge Cameron hardly fit the image of the bourbon-drinking, cigar smoking Mississippi lawyer, but in one regard at least, he was clearly a "good ole boy." Reflecting his constant interest in athletics, Cameron became a rabid University of Mississippi football fan. Indeed, after his heart attack, he was unable to even listen to broadcasts of Ole Miss games since he became too agitated for his health. Read interview.

[4]Elbert Parr Tuttle, private interview in Atlanta, Georgia, Agusut 26, 1977. Cameron seemed to be all things to all people if these "strange bedfellows" were any indication.

Judge Rives' youth was, according to him, very ordinary and he "did what every boy does."[5] His grandparents had come to Montgomery and had done rather well. The family had been wealthy, but they were wiped out after the Civil War. His father had planned to be a gentleman farmer, but lack of funds, and an unsuccessful attempt at farming in Texas, brought him back to Montgomery, where he became a road builder. While Rives did not remember his childhood as desperate, he described it as one of genteel poverty. The Rives' reduced circumstances had a direct impact on his education.

Rives had been a good student in secondary school, but the atmosphere was not one which encouraged scholarship. Most of his friends dropped out of school to go to work, and there were only nine boys in his graduating class. However, Judge Rives won a tuition scholarship to Tulane, and this grant, plus a $400 loan from his school teacher* sister saw him through his first year. Although he did well, there was no more money available, and Rives' formal education came to an end. He had been interested in the exact sciences and mathematics, and he wanted to become a chemist. This was impossible without further education, so an alternative career had to be found. His father was close friends with a prominent attorney in Montgomery named Wiley Hill. Young Richard was therefore sent to Hill to "read law" and prepare for the Bar Exam in the tradition of the small town, Blackstone lawyer.

---

[5]Richard Taylor Rives, private interview in Montgomery, Alabama, July 27, 1977.

*Rives had one other sister who was a housewife and two brothers, one of whom became an optician, and the other served with Rives in the National Guard on the Mexican border and in Europe.

Rives remembered Wiley Hill* as "a magnificent lawyer, the best lawyer I have ever known."[6] He had a splendid, logical mind and although he was a very shy person, Hill became a lion in the courtroom. Hill spent a few hours each week instructing Rives and directing his legal studies. Although he felt that law school was better than reading law in general, Rives believed he learned a good deal because Hill was such a fine teacher. Rives spent two years reading law, and even during that period, wrote legal briefs for Hill. In 1914, Rives passed the Bar Examination at the age of nineteen and was admitted to practice in Alabama. He immediately began work for the Hill firm at a salary of $75 per month.** With the exception of service with a local National Guard unit on the Mexican border in 1915 and 1916, a few months as an Assistant City Attorney in Montgomery, and a brief period of service in the Army Signal Corps in Europe in 1918, Rives remained with the firm until 1949, eventually becoming a senior partner.

Judge Rives' practice in Montgomery included all types of cases, and although civil suits were the bulk of the paying business, the Hill firm also handled criminal matters. It was the only large firm in

---

*Wiley was the uncle of Senator Lister Hill of Alabama.

[6]Rives interview.

**Rives told a marvelous story about another young lawyer who had just graduated from the University of Alabama and was working for Hill at no pay in order to gain experience. He was asked to prepare a brief on a particular matter. He did so and presented it to one of the partners. The partner said it was fine, but he wanted to see the young man's authorities. The young lawyer replied, "I thought you wanted to know what I thought." He had included no legal authorities. Rives interview.

Montgomery which did any criminal work. A large portion of Rives' work was plaintiff's practice, and he felt this experience and his criminal work gave him a good understanding of juries. More importantly, for Rives, it was a source of pride. Speaking of successful attorneys who represent only affluent clients, Rives said, "I must say, however, that what they have gained in security they have often lost in the freedom and independence that come from representing many poor plaintiffs, rather than a few rich defendants."[7] Rives' independence was proved by his actions, for he often took unpopular cases with blacks as plaintiffs.[8]

Rives was very active in social and professional organizations, and established himself as one of Montgomery's leading citizens. He belonged to most of the exclusive clubs in the community* and derived great pleasure from the social life of Montgomery society. Rives was clearly what would be called a member of "The Establishment," and he enjoyed that position.[g] He was also active in local and state Bar organizations and became involved with problems of professional standards as early as 1923. By 1934, he had become president of the Montgomery Bar, and in 1940 was president of the State Bar Association. In that office, he helped start a state bar journal, The Alabama Lawyer, and he initiated the Law Institute which held discussions around the state on legal subjects.

As a practicing lawyer, social figure, and state bar official, Judge Rives was no radical. He subscribed to the generally accepted social and

---

[7]Richard T. Rives, "Trying a Case for the Plaintiff," 2 Ala. Law. 407 (October, 1941).

[8]Read interview.

*These clubs were all reserved for whites only.

[g]Confidential communication.

political views of his community. Rives, however, also had an inate sense of fairness. For example, in 1946 Rives had voiced his opposition to the proposed Boswell Amendment to the Alabama Constitution. This Amendment limited voting to those who could read and write, understand and explain any article of the U.S. Constitution, were of good character, and understood the duties and obligations of citizenship. All of these factors were to be determined by the State Board of Registrars. In an address at the Montgomery Museum of Fine Arts, Rives argued that the Amendment was pernicious because it gave the Registrars arbitrary power. Blacks who could qualify by reading and writing should be allowed to vote and the Amendment could be used to disqualify all blacks. Whites could also be kept from voting. To Rives, racial prejudice was the instrument of selfish interest.[10] Although Rives believed that whites were superior to blacks, trickery, as he characterized the Boswell Amendment, was not a legitimate way to preserve that supremacy. Today Rives comments that the Amendment was "just too much."[11]

Rives stayed with the Hill firm until 1949. In that year, he went into practice by himself, although he had some trepidation about starting out anew in his mid-fifties. He took this step in anticipation of his son's graduation from law school at the University of Michigan. Father and son were close and wanted to practice law together. Their plan was not fulfilled due to the greatest tragedy of Judge Rives' life. On April 1, 1949, while Richard, Jr., was riding in a car driven by another

---

[10]Richard T. Rives, "An Argument Against the Adoption of the Boswell Amendment," 7 Ala. Law. 291 (July, 1946), pp. 292-94.

[11]Rives interview. Judge Rives had made his position clear on matters of constitutional rights before he went on the Court.

young man near Jacksonville, Florida, he was killed in a crash.* Rives practiced alone for two more years until he was named to the Court of Appeals by President Truman, keeping busy with a heavy volume of work, primarily plaintiffs' work and criminal cases. There was so much business that Rives took another attorney into the firm, John Godbold, who ironically also became a judge on the Fifth Circuit Court of Appeals.

Rives was very active in Alabama Democratic politics. He had been a delegate to the 1940 National Democratic Convention and was an active participant in political campaigns for Lister Hill as U.S. Senator and the successful gubernatorial campaigns of his close friend from Montgomery, Bibb Graves. In one of these campaigns, Rives headed the Graves Speakers Bureau. Throughout the 1940's, Judge Rives was a major figure in Alabama campaigns, for he had the standing to influence votes by his endorsement of candidates.

When Leon McCord of Alabama retired, Rives was named to the Court of Appeals. McCord wanted to run for governor and asked Rives if he wanted the seat he was vacating. "I sure did" was Rives' response. Since Rives was known and respected by Senators Hill and Sparkman, Attorney General McGrath, and the President, his appointment was assured. Rives was notified that the announcement of his appointment was going to be made in a rather novel way. He was arguing a case before the U.S. Supreme Court, and in the middle of his presentation, he received a note from McCord indicating that everything had been cleared. Rives said he almost

---

*Judge Rives never completely recovered from this loss. He still mourns for his son, almost thirty years later. One informant felt at least one of the many legitimate reasons why Rives was named to the Court of Appeals in 1951 was sympathy over the death of his son. Confidential communication.

collapsed, and when he recovered his composure, he looked up and saw Justice Felix Frankfurter smiling and nodding at him.[12]

Although Rives was very pleased, it was a measure of his humility that he also had qualms about going on the Court. He sought the advice of Justice Hugo Black, who had been a close friend. Rives was concerned because he had little experience in administrative law, for example, he knew nothing about National Labor Relations Board cases. He told Black he wondered if he wasn't stepping in over his head. According to Rives, Black thought Rives was "pulling his leg." Black replied that on close cases, when they came to the Supreme Court, the judges balanced each other out. Therefore, he told Rives, "You can't do any real harm."[13]

The reaction of Rives and Cameron to the Brown desegregation decisions, similar though the men were, could not have been more divergent. Cameron was completely opposed to the Supreme Court's ruling. Fairness to all in school matters was already guaranteed by laws on the books and in particular by the separate but equal doctrine. Segregation in the schools was an established system, and attempting to integrate the schools would wreck the schools of Mississippi. Cameron bore no animus to blacks, but racial relations in the South were harmonious based on segregation. In any event, the Constitution was not meant to provide for the enhancement of federal power and interference with local matters, such as schools, by judicial fiat.[14]

---

[12] Rives interview.

[13] Ibid.

[14] Coleman interview. Subsequently, when Cameron came on the Court of Appeals, he voiced the opinion that the Fourteenth Amendment should not be applied in the South. Tuttle interview.

Judge Cameron heard two of the cases covered by this study, and in each instance, he dissented from the holding of the majority. His position in all three hearings was the same, and reflecting his belief that the issues involved were strictly legal rather than moral or social, Cameron based his dissents on what he viewed as the Court's misuse and improper application of equitable remedies. In Cameron's eyes, when the precedents said one must exhaust administrative remedies, failure to do so was a fatal flaw in the lawsuit. Whether or not further proceedings within a state's administrative machinery was futile was beside the point. Cameron's dissents were evidence of his legal craftsmanship, however, for examined in a factual vacuum, they were logical, well written, and difficult to assail. This was a bit ironic, for Cameron prided himself on being a practical judge, concerned with the results of the individual case before the Court.[15] His constant dissents, continued in cases beyond the scope of this study, cost Judge Cameron a great deal, for he effectively lost all impact and influence on the Court. He remained recalcitrant and inflexible, and the other judges no longer took his contributions in conference very seriously.[16] Cameron was never on the positive side in the civil rights cases before the Court of Appeals.[17]

Ben Cameron's view of the function of the Court of Appeals was in keeping with his philosophy on other matters. He was, it must be granted, true to his beliefs and consistent in their application. Cameron was a strict constructionist of the first order. The words of the Constitution

---

[15]Coleman interview.

[16]Confidential communication.

[17]Read interview.

and the laws were plain, and it was the judge's job to apply those provisions to the case before him. If the law was not clear, it was the job of the legislature to correct the ambiguity and not of judges. He believed strongly that judges should not legislate for that would be usurping the function of another branch of government. If the "law was not there, he would not supply it," and the litigants would be directed to Congress for their eventual relief.[18] Cameron would not go one inch beyond what statute and precedent required. Even his close friend Judge Coleman called him an inflexible, ultra-conservative judge.[19]

For Judge Cameron, the heart of the Constitution, and the core of his political ideology, was the Tenth Amendment. The greatest danger he saw in the school desegregation cases, aside from the revolution in the customs of the South, was enhancement of federal power at the expense of individual state sovereignty. It might almost be said that Cameron knew no allegiance higher than to the state of Mississippi.[20] Since he believed himself to be a man without prejudice, at least part of his negative stance in the school cases was a result of this fierce localism.[21]

Cameron was very proud of being a judge, for he held the occupation in high esteem. Judges were essential to the operation of a just system, for their pursuits were truth and justice. Before he went on the Court of Appeals, he put it this way, "A lawsuit, after all, is dedicated to finding out the truth wherever the truth happens to lie, and to bring it

---

[18] Coleman interview.

[19] Ibid.

[20] Confidential communication.

[21] Coleman interview.

finally before the arbiters of law and fact, who shall try to deal out justice."[22] Cameron was even more proud to perform this function on the Fifth Circuit Court of Appeals, for he believed that Court to be the highest, most respected Southern judicial institution. The Court was thus an important part of the South, speaking for its judicial and legal traditions.[23] This was what made the Fifth Circuit Court so special

---

[22]Benjamin F. Cmaeron, "Fundamentals of Practice in Federal Courts from the Standpoint of a Practical Trial Attorney," 24 Miss. L.J. 345 (No. 4, October, 1953), p. 348.

[23]Cameron's allegiance to the Fifth Circuit Court of Appeals was best demonstrated during the greatest internal crisis the Court ever faced, a crisis which had been caused by Cameron himself. In 1961, Cameron charged that Chief Judge Tuttle had gerrymandered the hearing panels so that in all civil rights cases, at least two among Judges Brown, Rives, Tuttle, and Wisdom, whom Cameron called "The Four Horsemen" (later shortened to "The Four"), would hear the case and insure a favorable result for black plaintiffs. Judges were supposed to be assigned to hearing panels on a random basis, and Tuttle's actions were therefore unconscionable. In fact, Chief Judge Tuttle did not make the panel assignments, as he had designated Judge Brown as the assignments judge. Judge Brown argues that no tampering existed, since 1) while he assigned panels, the Clerk of Court set the docket, and there was no way to tell which panels would hear which cases; 2) Judges Hutcheson, who had had a stroke, and Cameron himself, who had suffered a heart attack, were often not available for duty, making the pool of judges more restricted; 3) certain judges had requested that they not be assigned with certain other judges to hearing panels, so that the possible combinations were limited; and 4) some judges who had come on the Court after 1960, had requested not to be assigned to civil rights cases if possible. Whether or not the hearing panels were stacked has remained an open question.

In any event, Cameron's charges led to further investigation, by the judges themselves, and a judicial conference to air the matter in 1962 was held in Houston, Texas. There is no way of knowing exactly what transpired at that meeting, but a few things are clear. There were vigorous arguments and a showdown between Cameron and the Four took place. All except Cameron agreed that it was important the judges of the Fifth Circuit stand together in public view. However, before the close of the Conference, still dissatisfied with the explanation on assignments and free to carry on his crusade in public, Cameron called off the investigators from the Administrative Office of the United States Courts. Cameron saw that the Court could only be damaged as an institution by proceeding further, and he had no wish to do that. He even came to see his constant dissents and negative posture had cost him all of his effectiveness as a judge. Confidential communication.

rather than its performance in any particular cases, its huge size, or the monumental volume of its litigation.

Finally, Cameron truly enjoyed his position as a judge, and he never felt isolated or removed from old friends and acquaintances. Litigation from the Meridian area was never very heavy, so it did not interfere with Cameron's relationships with former colleagues at the bar.[24] However, though the impact of Cameron's philosophical isolation and loneliness may be difficult to estimate, his disputes with other members of the Court must have dulled his enjoyment of being an appeals judge.

Judge Rives, while not a champion of integration by any means, took a very different position. He believed that the trend toward the Brown decision was clear in earlier cases. The judges had been applying the separate but equal doctrine in the college cases, but they all knew that the black schools were not equal. All of the judges on the Court at that time believed that blacks should have better schools, but they believed they had gone as far as they could. Rives was surprised only by the "deliberate speed" language in the implementing decision. He could not understand why one's constitutional rights should not be enforced immediately. It turned out, Rives said, that the Supreme Court was right, because it took time to make such a great change.

On the matter of segregation in general, Rives' position was a clear example of the salutory effects of dedication to the rule of law and obedience to one's oath as a judge. As mentioned previously, Rives was no radical. He was a tradition-minded, conservative Southern Democrat. At the same time, Rives was never committed to segregation as an item of

---

[24]Coleman interview.

faith, and he was a passionately fair man. The evidence of this in his years of practice was clear, and Rives maintained that this attitude came from his father.* For him and for the Judge, it was "just an innate idea of what's right and wrong."[25] In applying this standard to the desegregation cases, Rives took the position that the Supreme Court had taken a stand, and he would simply follow the law.

Judge Rives sat on all three cases included within this study and wrote the opinion for the Court in both hearings in the Gibson case and in many of the hearings in the Rippy case in Dallas.** His opinions reflected his moderate attitudes. He allowed school boards and District Judges both time and discretion to work out desegregation plans, but any evidence of delay for its own sake or of less than good faith compliance with the Supreme Court's directions, brought his swift rebuke.***

Rives was not, by nature, an activist on the Court, but he was willing to stretch equitable remedies to their full extent to see that black plaintiffs' rights were not abridged. Rives readily admitted he was not terribly comfortable in this posture. He was happiest with

---

*The judge's father had been a member of the original Ku Klux Klan of Reconstruction days, but his attitude toward personal relations with blacks had become essentially to "judge each man as an individual." Rives' mother, on the other hand, was, in his words, "a dyed-in-the-wool rebel" with a full measure of racial prejudice.

[25]Rives interview.

**Rives was also the opinion writer in the cases which grew out of the Montgomery bus boycott in 1955 which launched Martin Luther King, Jr., on his career. Rives found for the black plaintiffs and was joined in his opinion by Alabama District Judge Frank Johnson.

***He was particularly hard on District Judges Davidson and Atwell, describing the former as a "dyed-in-the-wool racist" and the latter as a "law unto himself."

freedom of choice plans, and at the outset, consciously attempted to follow the path of Chief Judge John Parker of the Fourth Circuit Court of Appeals. Parker had maintained that Brown and the Constitution did not require integration but rather desegregation, which he took to mean the prohibition of discriminatory segregation in the schools. Judge Rives felt this was an accurate reading, particularly for a period of transition. It was not long before Rives altered his view and started to enforce grade-a-year mandatory desegregation plans. In hindsight, both approaches seem rather hesitant and certainly insufficient to achieve full integration in the schools. At the time, particularly from a Southern court, they represented real change. In any event, Rives came to see that the distinction between integration and desegregation was specious, and eventually supported Judge Wisdom's push for integration, "lock, stock, and barrel."[26]

Judge Rives paid a very heavy price for his position on desegregation. Rives himself said he suffered no more than any other judge on the Court from his decisions, and in any event, judges had to expect some unpleasantness when they made rulings that were unpopular in the community. He did admit that he received what he characterized as "bad fan mail," and that he lost some sleep over calls at all hours of the night,* but he was never forced to seek protection as was true of Alabama Federal District Judge Frank Johnson. The Judge, however, underestimated the

---

[26]Rives interview. Rives said he tried not to be a crusader, but the growth of his ideas as he gained experience in the school cases moved him close to the activist stance taken by Judges Brown, Tuttle, and Wisdom.

*Some of these midnight messages referred to Mrs. Rives as the "Soon to be Widow Rives."

impact of the reaction in Montgomery. It will be recalled that Rives was a very public and social man, who enjoyed the comradeship of friends and associates and delighted in the club life of Montgomery. Thus, the withdrawal of his membership by virtually all of the clubs he belonged to was a particularly bitter blow. Old friends refused to see him, even to the extent of crossing the street to avoid contact with him.[27] Rives' ostracism from Montgomery society was reinforced by editorials in the local paper that instructed the people of Montgomery to shun him completely.[28] Rives was treated as a pariah within his own community. He was almost totally isolated from the life he best loved. District Judge Johnson was also ostracized from his community. Where Rives was a social man, Johnson was by nature something of a loner. He had been raised in the hills in northern Alabama and preferred doing his job and hunting and fishing. New to the southern part of the state, he never really liked the social life and suffered much less than Rives.[29] Not content with this sequestration, some of Montgomery's less civilized citizens completed the treatment by desecrating the grave of Rives' son.[30] Rives truly became the Job of the Court of Appeals for the Fifth Circuit.

Throughout his years of trial, Rives continued to abide by his oath of office. He never once allowed this harassment to influence his decisions on the Court. In fact, Rives wrote many of his opinions during and after the most active period of his personal troubles. It was a

---

[27]Confidential communication.

[28]Read interview.

[29]Confidential communication.

[30]Confidential communication.

measure of his courage and dedication that the community pressures never dissuaded him. Rives' performance is even more remarkable when one considers that he was, in his own words, no crusader, for at least in those early years, he shared at least some of the attitudes of Judge Cameron. The contrast between their performance, however, could not have been more stark.

Although Judge Rives was a conservative man, his views about the Courts of Appeals were much more flexible than those of Ben Cameron. First, Rives felt that the Courts had a tremendous responsibility to follow and develop law based upon Supreme Court decisions because the Courts of Appeals were the final forum in over 90 per cent of all cases. In general, the consistency of the law, and its use as a guide for behavior in society, was more important than the result in an individual case, but in most instances, one could reconcile the two. Rives firmly believed that "you can't let hard cases make bad law."[31] This reflected the Judge's essentially traditional attitude toward precedent. Rives, however, also believed that Courts of Appeals did legislate, and they had to reconcile themselves to that difficult task. This did not mean that judges ought to experiment with their own particular attitudes. It was the duty of the judge to follow the law regardless of his own personal desires.

Courts of Appeals had to be independent in their judgments, for while they were national courts which brought the uniform application of federal standards, they also had to deal with the unique problems and experiences in different areas of the country. Thus, Courts of Appeals should not

---

[31] Rives interview.

decide cases based upon what the Supreme Court might do with a case on appeal. This independence, Rives argued, should be directed toward dispensing justice fairly to all litigants.[32] Federal judges were uniquely situated to perform this task, as for example, in the desegregation cases in the South. District Judge Frank Johnson had argued that the Southern Bar had not supported the federal courts as it should have, but Rives said he understood the lawyers' reluctance. Federal judges were protected economically from the impact of their unpopularity, but the local attorney was in a very exposed position.

Rives believed there were no particular problems for the Fifth Circuit Court of Appeals in the desegregation cases just because it was a Southern court. The Court was national in scope, impact, and orientation, so it was natural for there to be some conflict between it and the more parochial District Courts.[33] With regard to his experience as an Appeals Judge, Rives felt his friendships had not been interfered with, even as a result of the desegregation controversy.* A judge need not become

---

[32]Even though Rives was no activist or judicial experimenter, his attachment to fairness and justice led him to support and extol the Federal Rules of Civil and Appellate Procedure as modified from 1948 on. As he put it, "These rules have made many of the day-to-day problems of procedure a matter of administration, to be finally resolved by the common sense of the trial judge rather than a matter of law, to be settled only after expensive and wearisome appeals. . . . The second of the great accomplishments of the Federal Rules is that they have subordinated technicalities which might otherwise bar the path of justice." Richard T. Rives, "A Court of Appeals Judge on the Federal Rules," 17 Ala. Law. 324, 328-29 (July, 1956).

[33]For example, Rives believed there may have been times when District Judge Whitfield Davidson purposely misunderstood Court of Appeals decisions. Rives interview.

*Judge Rives' forgiving nature allowed him to overlook the ostracism to which he was subjected.

isolated from friends in the Bar as long as social contact was avoided when they were trying cases before you. He particularly enjoyed working with all of the Court of Appeals Judges during his quarter century on the Court. The only thing Rives did not enjoy about his duties was the administrative responsibility he had as Chief Judge of the Circuit from 1959 to 1960.*

The colleagues and observers of Judges Cameron and Rives have provided an important addition to the relatively limited portrait so far presented.** Opinions regarding Richard Taylor Rives were rather consistent, but there was substantial disagreement about Ben Cameron, particularly on a personal level.

Apparently, Judge Hutcheson had no great love for Ben Cameron. He was too closely allied, Hutcheson believed, with the Mississippi politicians who had helped secure his seat on the Court. He also felt that Cameron was not a particularly admirable man and in some ways was weak and injudicious. It really nettled Hutcheson that Cameron was always querulous about his health, and this made it unpleasant to serve with him.[34]

John Minor Wisdom considered Ben Cameron to be a fine lawyer, a real scholar, and a close friend. He saw him as a very strong states rights man, who had been brought up with constitutional views which

---

*Rives voluntarily stepped down as Chief Judge after one year, but remained on active status on the Court. He did not take senior status until 1966.

**Unlike the other deceased Appeals Judge, Hutcheson, Ben Cameron wrote very little, and insight is thereby limited. Judge Rives, while a cooperative subject to interview, was so modest that he obscured the nature of his contributions. Further, Rives is not in the best of health, and his memory and energy were rather limited.

[34]Allen E. Smith, private interview in Columbia, Missouri, August 15, 1977.

unfortunately had no validity in the modern world. In his view, Cameron considered himself the ambassador from Mississippi to the federal courts. As Wisdom put it, Cameron was a great nineteenth century mind.[35]

Chief Judge Brown remembered Cameron as a warm and sweet man, for whom he had a great deal of affection, even though when he first came on the Court, Cameron so vociferously disagreed with his views on desegregation that Brown considered leaving the Court. Brown felt that Cameron was incapable of movement on civil rights and desegregation, and this negativism and his illness cost him all of his effectiveness. Cameron's intransigence was such that in the case which grew out of James Meredith's integration of the University of Mississippi, he acted alone to set aside and stay the decisions of a hearing panel. Such action was unheard of on the Fifth Circuit Court of Appeals. Eventually, Brown and the other judges came to ignore Cameron on judicial matters.[36]

Judge Elbert Tuttle's recollections of Ben Cameron were much the same as Judge Brown's. Tuttle remained friendly but avoided him on matters of dispute, particularly after Cameron had argued that the Fourteenth Amendment should not apply to the South. Cameron was an interesting man, Tuttle said, for he felt it was a moral obligation to invite blacks to his home. Cameron also had contributed funds to a Negro college whose president was also the head of the state NAACP.* Tuttle did have some administrative difficulties with Cameron over the latter's

---

[35]John Minor Wisdom, private interview in New Orleans, Louisiana, July 29, 1977.

[36]John R. Brown, private interview in Houston, Texas, August 24, 1977.

*This may be a partial explanation for the NAACP's endorsement of Cameron for the Court of Appeals.

appointment to three-judge District Courts in Mississippi when Tuttle was Chief Judge. After Cameron's remark about the Fourteenth Amendment, he was never appointed in Mississippi again. Thus, while their personal relationship remained upon reasonable terms, judicially and philosophically, they were at opposite poles. Tuttle summed up Cameron by saying, "he gave the impression of wishing he could start firing on Fort Sumter every Monday morning."[37]

Ben Cameron became a tragic figure on the Court of Appeals for the Fifth Circuit. A first class legal craftsman, a dedicated attorney, a classical scholar, and an outdoorsman, Cameron had it in him to be a Renaissance man. Like the Greek heroes, however, he was destroyed by one of his most deeply held values, commitment to a traditional past. Unfortunately for Cameron and the Court, his was a wasted intellect. His dedication to an inflexible set of principles, out of touch with a changing world, cast Cameron in the role of a negative, lonely dissenter and cost him all his influence as a judge. Ben Cameron never grew beyond his provincial background.

No one disliked Richard Taylor Rives. Judge Hutcheson felt that Rives was, very much like himself, a Southern, conservative, and honorable man who believed in the basic traditions of the South. Rives was a dear, sweet man who, despite the limited economic circumstances of his youth, was a member of the natural aristocracy of the South. Hutcheson felt that Rives was the sort of man with whom it was an honor to serve. He was quite at ease with Rives as a colleague.[38]

---

[37]Elbert Parr Tuttle, private interview in Atlanta, Georgia, August 26, 1977.

[38]Smith interview.

Judge Rives also got high marks from John Minor Wisdom as a conscientious and hardworking judge, but Wisdom argued that he was hesitant in civil rights cases at times. According to Wisdom, Rives was not an activist in civil rights and relied far too long on Judge Parker's distinction between integration and desegregation.[39] However, in other respects, he believed Rives to have liberal impulses, for example in cases dealing with the protection of the rights of the accused. Wisdom also commented on Rives' dedication to quality on the Fifth Circuit Court. Judge Rives was very effective as a judge even though he was quite old and in less than excellent health, and when he felt he could not perform up to his highest standards, Rives returned cases to the hearing panel for reassignment. Although he did not particularly enjoy his administrative duties as Chief Judge, Wisdom believed that Rives relinquished that position to Elbert Tuttle because he thought Tuttle would be better at the job. Thus, although Wisdom had some reservations, he felt that no judge was more "upright and forthright" than Rives, and when it really mattered, Rives was generally on the right side.[40]

Chief Judge Brown also had a high opinion of Judge Rives, and called him one of the most wonderful people he had ever met. Rives always knew the law, wrote well-documented and constructed opinions, and had a surprisingly liberal bent on many issues. Certainly Rives was not as flexible or "reckless" as Brown felt he, Tuttle, and Wisdom had been in

---

[39]Wisdom was critical of Rives' position in refusing to prosecute Governor Ross Barnett of Mississippi for contempt in the James Meredith case and for allowing the Montgomery city parks to close rather than integrate. Wisdom interview.

[40]Ibid.

devising remedies or sanctions to meet long-standing discrimination. Unlike the other members of "The Four," Brown said, Rives could not accept the notion that to protect constitutional rights and correct legitimate grievances, it might be necessary to give unconstitutional preferences until a balance was achieved. However, Rives could always be counted upon to prevent the overt denial of constitutional rights and to enforce the Supreme Court's mandate in desegregation cases. Rives was also an incredibly hard worker, and considering the real pain he suffered, his whole life had been given to the Court. Of all his virtues, Rives was most characterized by a deep and abiding courage and a forgiving nature that Brown felt was beyond normal capability.[41]

If anything, Judge Tuttle was even stronger in his praise of the Alabama Judge. Tuttle called Rives "as fine a man as I have ever known,"[42] and pointed to the value of life tenure in allowing Rives' total objectivity in the desegregation cases. Rives, he said had made extreme sacrifices for his fine judicial philosophy. Tuttle compared his own situation in Atlanta, where at least part of the community and more importantly the newspapers supported him, with that of the hostility and isolation which Rives faced in Montgomery. Tuttle particularly appreciated Rives' courage, for as a Southerner, Rives made it easier for the non-Southerners, Tuttle and Brown. Rives was, quite simply, a magnificent man and judge. He was the epitome of that feature so essential to justice, judicial independence and integrity.[43]

---

[41] Brown interview.

[42] Tuttle interview.

[43] Ibid.

The tragedy of Ben Cameron consisted of what he did to himself. Richard Rives' tragedy consisted of what was done to him. It would have been easy to adhere to the social mores of Montgomery. Rives, not a crusader, out of sympathy with vigorous judicial experimentation, and certainly no social radical, could have taken refuge in procedural niceties and garnered the support and admiration of his community. As much an Alabama man as Cameron was a Mississippian, Rives could have remained the social and political lion of Montgomery. He did not. Instead, he adhered to a commitment that had always been the hallmark of his legal career. Richard Taylor Rives believed in the rule of law, in obedience to one's oath of office, in doing his job. The Supreme Court had spoken, and Brown v. Board of Education was the law of the land. The law was going to be enforced by the Court of Appeals for the Fifth Circuit and its judge from Alabama. The path Rives took brought him and his family suffering and pain, notwithstanding his own modesty, kindness, and forgiving nature. Regardless of the pressures, any plaintiff, black or white, before Judge Rives could expect fairness and the full measure of constitutional protection. Rives was the man of courage. He was a genuine hero.

CHAPTER IX
THE JUDGES (4):
JOHN R. BROWN, ELBERT PARR TUTTLE, AND WARREN L. JONES*

Different in many ways and alike in others, Richard Rives, Ben Cameron, John Minor Wisdom, and Joseph Hutcheson, Jr., had at least one thing in common. They were Southerners. They shared a relationship with that special past which is the South. John R. Brown, Elbert Parr Tuttle, and Warren L. Jones were not from the South. Brown and Jones were raised in Nebraska and Tuttle grew up in California and Hawaii. Their youth, education, and early experiences took place in different regions of the country, but they did have some things in common. All three arrived in the South at the start of their legal careers, and all of them were Republicans from their earliest political interests.**

If Brown, Tuttle, and Jones were different from the Southerners, there was at least as great a contrast within the group. From diverse backgrounds, Brown and Tuttle developed similar judicial attitudes, particularly on civil rights matters. Jones, whose youth was much like Brown's, developed judicial attitudes which were more like Ben Cameron's

---

*Warren L. Jones, 1895-. Appointed to Fifth Circuit 1955. Elbert Parr Tuttle, 1897-. Appointed to Fifth Circuit 1954. John R. Brown, 1909-. Appointed to Fifth Circuit 1955.

**Elbert Tuttle settled in Atlanta in 1923, Warren Jones came to Jacksonville in 1925, and John Brown moved to Houston in 1932. Regardless of their place of birth, these three men became Southern judges.

than any of the other judges, if not in his substantive beliefs, at least in his view of the role of the courts. Brown and Tuttle were both activists, liberal in outlook and innovative in their approach. Judge Jones became an archtypal appeals judge, basically conservative and committed to following precedent.

Present Chief Judge John R. Brown grew up in the small Southwestern Nebraska community of Holdrege. His parents had received very little formal education, but his father was successful in the general merchandise business and his mother managed to raise seven children. Brown's youth was spent in "the normal pursuits of a small town boy," and he combined an active outdoor life with good grades in what he considered an excellent local school system.[1] He was an accomplished debater in school because he enjoyed speaking and had developed a very large vocabulary. He often displayed this talent for his father in "discussions" with the elder Brown's friends. By coincidence, Brown's boyhood hero was Abraham Lincoln, who had generated some reputation with his own debating abilities.

Brown majored in business administration at the University of Nebraska. Brown's father had convinced him to become a lawyer, and the Judge enrolled in a six-year program that combined undergraduate and legal education. While in college, Brown concentrated on history, economics, and philosophy, and avoided science and mathematics as much as possible. Before Brown started law school, he transferred to the University of Michigan, where he made straight A's and was named to the Law Review. He took the general course of study, but repeated his college

---

[1]John R. Brown, private interview in Houston, Texas, August 24, 1977.

emphasis by avoiding as many of the technical courses as he could. He also gained practical experience, working two summers with the Holdrege law firm of a Clarence Davis. Brown believed his law school experience was an excellent preparation, for it provided a deep study in theory and concept. He felt that with a grounding in the basics, one could then master the law in any field through individual study and experience.[2]

Brown graduated with his law degree in 1932, at the depths of the Great Depression. There were no opportunities in Holdrege, so he decided to look for a job in Texas. He had no connections and knew no one, so he went from one major city to another, calling the law firms listed in the phone book.* Brown was well received and got a lot of encouragement, but there were no jobs to be had in Dallas, Fort Worth, San Antonio, Corpus Christi, and so on. Finally, in Houston, Brown was attracted to a firm because of what he said was its strange name, Royston and Rayzor. The firm specialized in Admiralty law, a field about which Brown knew absolutely nothing. He was hired by Newton Rayzor and began work in a small branch office the firm maintained in Galveston, Texas. Brown spent most of his time learning Admiralty and Maritime law and studying for the Texas Bar examination.**

Brown did well, however, as he found the study of maritime principles in the federal and state courts fascinating, and he participated in some cases which developed new principles in the field. During World

---

[2] Ibid.

*This is terrifying way to look for a law job even in the best of times. In 1932, such a method revealed either naivety or unbounded optimism.

**On the eve of the Bar Exam, Brown learned he would not be required to take the Exam to be admitted to practice in Texas.

War II, Brown spent four years overseas, putting his legal experience to good use. He served in Australia on a Maritime Claims Assessing Commission, in Manila as a cargo movement officer, and as port commander at Port Sabu and Leyte in the Philippines. Brown had contact with high level officials in the shipping business, and dealt with enlisted men from all walks of life. He found the experience to be a maturing one and learned that large organizations could be operated efficiently. Brown also felt his time in the service helped him overcome a tendency toward procrastination, which lost him some cases when he was a young lawyer.

At the end of the war, Brown returned to Royston and Rayzor, and spent the next three years working on litigation which had arisen out of the Texas City Disaster, primarily gathering and organizing documents and data and scheduling the witnesses. Brown remained with the firm, establishing himself as one of the leading admiralty lawyers in the country, until he was named to the Court of Appeals in 1955.

John Brown had been a Nebraska Republican. He became active in politics in Texas around 1948, and served on the state GOP Committee. In 1950, he was working for Eisenhower. The Texas delegation, like the Louisiana delegation, was involved in a challenge at the 1952 Chicago Convention, and Brown helped William Rogers prepare the case for the Eisenhower delegates. During the general election, Brown campaigned for Eisenhower and became the Harris County Republican Chairman. Brown had always wanted to be a judge and he wanted a federal appointment even though it involved a substantial economic sacrifice.[3] His appointment

---

[3]At the time he was appointed, federal judges were being paid $17,500. In his last year of private practice, Brown earned close to $60,000. Ibid.

to the Court of Appeals was based both on his reputation as an attorney and his loyal service to the Republican Party.

Although Elbert Tuttle was born in California, he spent the first six or seven years of his life in Washington, D.C., where his father was a clerk with the War Department. Tuttle's father then took a job with the Immigration Service and the family moved to Los Angeles. Tuttle started school there, and when his father worked on the Mexican border in 1906 and 1907, he was taught by his mother.[4] Tuttle's father then took a job with the Hawaiian Sugar Planters Association, and the family moved to Honolulu. Tuttle went to school at the Punahou School, a private academy that had been founded in 1841, and was the school to which the leading white families sent their children. Punahou School became an aristocratic institution of sorts, as the best families of the Islands enrolled their children.

As a youngster growing up in Hawaii, Tuttle had an almost idyllic life. He did well enough in school, but spent more time in extracurricular pursuits. Tuttle took part in all of the school sports, managed the school magazine, and wrote the school news for the Honolulu newspaper. Tuttle and his older brother, Malcolm, helped to revive the sports of surfing and outrigger canoe racing, and they spent an inordinate amount of time at Waikiki Beach.* His life was not all recreation, however, for

---

[4]Judge Tuttle said that his mother was a very broad-minded woman who had little prejudice, but he was taught at home so he would not have to go to school with Mexican children. When the family moved to Honolulu, Tuttle was placed in a private school, but this time the children to be avoided were "natives." Elbert Parr Tuttle, private interview in Atlanta, Georgia, August 26, 1977.

*This vigorous early life has served Judge Tuttle well. On the day of our interview in Atlanta, it was rather damp and raw. The interview was scheduled to begin at 10:00 a.m. Judge Tuttle arrived about ten minutes late. He apologized, for he had just completed a quick nine holes of golf. The Judge is eighty years of age.

Tuttle developed a rather specific ambition quite early. Although his father had not gone to college, his interests were catholic, and he was a storehouse of information. Tuttle and his father often discussed politics, and the young man learned a good deal about government structure in Hawaii, which was without home rule. He developed an interest in politics and put it to practice, becoming the president of his class and winning a debate on the affirmative side on the issue of Hawaiian statehood. Tuttle decided to become a lawyer, go into politics, and become the Senator from Hawaii.[5]

Elbert Tuttle went to college and law school at Cornell University on the advice of his high school German teacher. Tuttle's brother Malcolm wanted to be an engineer, and the teacher told them that Cornell offered the best combination of law and engineering. Tuttle concentrated on history and political science, but by his own admission, did very little studying. "In four years of college, I saw the inside of the library three of four times."[6] Tuttle spent most of his time working on the college newspaper, of which he became editor-in-chief. He was also active in campus politics and "the party circuit" at Cornell. While waiting to be accepted to law school, he worked on newspapers in New York and Washington.

By the end of his first term in law school, Tuttle was first in his class. Although he and his new wife did not neglect their social life, Tuttle was motivated to work harder to maintain his high marks. He learned quickly and did well enough to work on the side as a publicity man

---

[5]Tuttle interview.

[6]Ibid.

and fund raiser for Cornell's YMCA campaign. Tuttle wanted a wide-reaching general practice, and he and his brother-in-law, Bill Sutherland, decided to go into practice together. Seeking a warm, pleasant climate, Tuttle claims that they just picked Atlanta on a map.* Tuttle moved there in 1923 and spent the first six months as an associate with the firm of Anderson, Rountree and Crenshaw, at $175 per month. In the meanwhile Sutherland had gone to work for Jones, Evins and Moore, and then Miller and Chevalier, tax specialists, in Washington, D.C. His $2,500 earnings were enough to pay for rent and a secretary for one year, and the two young lawyers opened their own firm.[7]

Elbert Tuttle and Bill Sutherland began their practice in Atlanta in 1924. By informal agreement, they split their duties, with Sutherland concentrating on tax work, and Tuttle handling the general practice. The firm did tax work on referral from other law firms, and Tuttle had to participate in tax cases as well. He also managed to do a good deal of general trial work and handle estates and trusts as well. During World War II, Tuttle served in Europe and retired with the rank of Brigadier General. Immediately afterwards, Tuttle and Sutherland opened an office in Washington, D.C., to handle the heavy volume of their federal tax and administrative practice. In 1948 he was elected President of the Atlanta Bar. When President Eisenhower took office in 1953, Tuttle was selected as the General Counsel for the Treasury Department. In that capacity, Tuttle prepared Treasury's position papers and supervised all

---

*Atlanta was in the South, a state capital, and a growing city, centrally located. Ibid.

[7] Ibid.

the lawyers within the Department. He was also the Treasury Department representative on the National Security Council.[8] Tuttle left this position to take his seat on the Court of Appeals in 1954.

Judge Tuttle's family had been Republican, but Tuttle's allegiance was also based on his distaste for Georgia Democratic politics. The Democratic Party was the personal preserve of the Governor, and there was no real organization. The voters had little voice because of this personal tradition and the county unit rule. A Democratic oligarchy ran the state and ran it lily-white, having effectively disenfranchised Georgia blacks. As the Republican State Chairman, Tuttle hoped to open the Party to blacks and to build a real organization, believing that the Republican Party in Georgia represented the only potential effective liberal voice in the state.[9]

Judge Tuttle led the Georgia delegation for Eisenhower at the 1952 Convention and was the Vice-Chairman of the Southern Committee for Eisenhower. When John Minor Wisdom turned down the offer of the newly created seat on the Fifth Circuit Court of Appeals, William Rogers came to Tuttle with the offer. Tuttle knew very little about the Court of Appeals; he had children to educate; and was reluctant to take the position which would cut his income in half. Rogers virtually begged him to take the job, and after his family urged him to do so, Tuttle agreed. Tuttle argued his appointment was no particular recognition of his talents,

---

[8] Tuttle believed the distinguishing characteristic of the Eisenhower group was its inexperience in the ways of Washington. He felt this made them more careful with "the rules of government." For example, he said there was very little politics involved in the operation of the Treasury Department. Ibid.

[9] Ibid.

but rather was his by a process of elimination. As he put it, "I had no difficulty getting appointed to the Court of Appeals, because I was the only Republican in Georgia who could read and write who had a law degree."[10] His choice was a happy one, for after a quarter of a century on the bench, he believed that being a Court of Appeals Judge was the greatest job in the world.

Warren L. Jones was born and raised in the small town of Gordon, Nebraska. He described his youth as "typical of a small town boy at that time."[11] He was a hard working youngster, and while still in high school, owned and operated a horse and wagon delivery service for local retail merchants. After he graduated from High School, Judge Jones worked for several wholesale and retail grocery concerns in Lincoln, Nebraska, and Van Tassell, Wyoming. During the First World War, Jones served as a non-commissioned officer in the Medical Training Corps at Fort Riley, Kansas. After the war, he worked for his brother in the Bank of Van Tassell in Wyoming. He remained in Wyoming until 1921, when he decided to go to law school.[12]

Warren Jones did not attend college before he entered law school. He was working in his brother's bank in Van Tassell, Wyoming, when he decided to become an attorney. He chose the University of Denver because it was the nearest law school. Jones' success at law school was the result of the primary lesson he learned while there, the necessity of

---

[10] Ibid.

[11] Warren L. Jones, private interview in Jacksonville, Florida, July 18, 1977.

[12] Ibid. Judge Jones declined to discuss the substance of his life and judicial role. He reviewed the notes of the interview and limited the use of its content.

hard work.[13] During his last year in school and prior to his admission to the Colorado Bar, Jones worked as a Deputy District Attorney in the office of the Denver District Attorney. Then with two of his classmates he opened his own firm in Denver. They handled enough cases to survive, but the fees were too small to support the firm. Jones decided to relocate, and when he learned of an opening in the firm of Fleming, Hamilton, Diver and Lichliter,* he moved to Jacksonville, Florida, in 1925.

Judge Jones practiced law in Jacksonville for thirty years before he was named to the Court of Appeals in 1955. Jones specialized in Estates and Trusts, Banking Law, and Timberlands Title disputes, and became the firm's senior partner. The Judge was very active in Bar Association affairs, served on many committees, and eventually became President of the Jacksonville Bar in 1939 and the Florida Bar in 1944. Jones' primary interest outside of his profession was Lincolniana. His grandfather had known Lincoln personally and willed thirty books on Lincoln to the Judge. Jones collected some six thousand books and pamphlets on Lincoln which he donated to Louisiana State University.[14]

Judge Jones maintained that his activity in politics had been very limited. He had been active in Republican politics in Denver, but decided that political activity and a legal career was an inappropriate combination.** The route to political inactivity in Florida in the 1920's

---

[13] Ibid.

*The firm is now known as Mahoney, Hadlow and Adams, and is the largest law office in North Florida.

[14] Ibid.

**Judge Jones was reluctant to discuss politics. He asked that no reference be made to it in connection with his appointment to the Court of Appeals. I honor that request as much as possible but some explanation for that nomination is necessary. Nothing in what the Judge said in confidence reflects poorly upon him.

was to be registered as a Republican, for all of the action was found in the Democratic primaries. Jones remained a Republican, and personally knew many of the national GOP spokesmen. When he was appointed by Eisenhower in 1955, Jones took the seat on the Court of Appeals that had been held by Louis Strum.[15]

Brown, Tuttle, and Jones' views of the Brown decisions and desegregation seem to have been alike in terms of broad policy. About the process of implementation and what that required of the judicial system, Judge Jones disagreed quite clearly with Brown and Tuttle. They adopted the activist role with relish, while Jones held to a more passive, more traditional attitude.*

Judge Brown felt that desegregation was long overdue in the schools and in society. The Brown decision was one hundred years late, but was about as good as could be expected from a Supreme Court which had little previous experience in public school desegregation cases. Nevertheless, it may have been a mistake for the Supreme Court to openly declare that the problem of desegregation would take a long time to solve. Brown felt this language gave the delayers a ready made argument. It was not until well after Brown was decided that he himself felt a real sense of commitment. He came to realize that it was naive to believe that Southerners

---

[15] Ibid.

*Throughout the chapters on the judges, conclusions drawn by the writer have been based directly upon the comments of the judges themselves, observers (both identified and confidential), the judges' performance in the cases, and published remarks by these men. In the case of Warren Jones, his reticence and limited participation in the decisions makes the process rather difficult. As a result, heavier reliance than usual has been placed on other peoples' comments about him, most of which were confidential. At times, a good deal has been read into rather brief statements, and although the conclusions are supported by the limited evidence available, there has admittedly been considerable guesswork involved.

would immediately obey the law simply because the Supreme Court had made its decision. However, Judge Brown was very surprised with the reaction in Little Rock, for he believed that city would desegregate with little opposition. He did feel his attitude was vindicated in some respects, for considering the heavy volume of cases and what transpired in other sections of the country, desegregation was accomplished in the South with relatively little violence.

In each of the cases discussed in this study, Judge Brown held for the school children attempting to integrate the schools. Although the situation immediately after Brown was tranquil, he felt the almost uniform reaction of the Texas Bar was hostile. As a result, the earliest desegregation decisions in Texas were designed primarily to maintain the peace rather than integrate the schools. What was most fascinating, though, was "how the courts grew in the perception of the problems and the remedies needed."[16] For example, Judge Rives had favored Pupil Placement Plans, and while Brown went along with Rives at first, he came to see that such remedies were insufficient. Unlike Rives, he began to see that only affirmative remedies would be effective to enforce the law. In the New Orleans situation, for example, Brown felt that some of the Louisiana legislation was plausible if one did not look behind the language. The intent to prevent integration was clear, however, and he convinced the panel to pierce the state's evasions. As Brown put it, the only way to give meaning to the law was to let "figures speak and Courts listen."[17] The greatest failure in desegregation, Brown felt,

---

[16]Brown interview.

[17]Ibid.

was that the federal courts were virtually on their own. The failure of Congress to enact any solid legislation prior to 1964 resulted in not only a lack of Congressional leadership but a negative influence.

According to John Brown, the Courts of Appeals articulated the law so that people could conform their conduct. Thus, judges were necessarily involved in clarifying the law to make it understandable. This meant that legislation in the Courts of Appeals was inevitable and that judges had a creative role. Judge Brown was not uncomfortable with this requirement, for in his view it could not be avoided. "I don't think you can adjudicate without determining policy."[18]

The goal of this judicial process was always to do justice and give the relief to which the litigants are entitled. This required arriving at a rather delicate balance between what the law required and what the factual situation demanded. One often had to strain to give relief, but judges had to try to avoid putting their deeply held beliefs in opposition to clear, positive statutes. Brown admitted that he had sometimes overridden statutes to right a wrong, but that this impulse was what he believed made good judges. As to the impact of precedent, it was not surprising that Brown believed that the "construction of a statute should be fairly free of stare decisis when conditions are really changed."[19] The particular job of the Court of Appeals in the desegregation cases was to secure the rights of black school children. This was an example of the real importance of the judicial approach, and that was to correct

---

[18]Remarks of Judge Brown at a Panel Discussion of Paul Oberst's paper, "The Supreme Court and States Rights" at the Second Annual Alumni Seminar of the University of Kentucky in Lexington, Kentucky, June, 1959, 48 Ky. L.J. 63 (Fall, 1959), p. 93.

[19]Brown interview.

wrongs being done in the name of the law. As Brown saw it, the only real problem the Court had with the desegregation cases was their very heavy volume. This problem was the result of the relatively easy legal nature of the litigation, for the issues were not complex in De Jure segregation. His position, and that of the Court of Appeals, was quite simple. Judge Brown believed that most of the issues that came before the Court, regardless of their substance, essentially were matters of due process. If a statute or course of action interfered with desegregation, it was invalid. In civil rights matters, Brown felt that the national or federal nature of the Court of Appeals was evident. Brown believed that our system of federalism meant there were rights of national citizenship,[20] and the Court of Appeals was simply applying the standards of national citizenship to localized problems.

Judge Brown viewed himself as a liberal, which meant that there were many injustices in the world that remained to be corrected. In sharp distinction to his fellow Houstonian, Judge Hutcheson, Brown was not anti-government. Life was complicated, and the real failure of government, particularly of the legislative branch, lay in not taking action when it should. As a result of this legislative neglect or lack of fortitude, the federal courts were too often saddled with finding the solution to too many social problems. Although Brown believed it was entirely appropriate that judges be asked to deal with difficult and controversial issues, there was a limit to their capacity. In the absence of strong legislative leadership, the Judge said some problems simply could not be solved in the Courts.

---

[20] Brown, 4B Ky. L.J. 95.

Brown clearly enjoyed being a Circuit Judge. He derived great satisfaction from being "an instrument for improvement" and being able to make a meaningful contribution to the betterment of society. The life was also never boring, for one dealt with an infinite variety of problems, and meeting this responsibility was very rewarding. Being a judge also broadened acquaintances within the Bar and gave one the opportunity to have real impact on reforms within the profession. One need not suffer isolation from the members of the Bar, as long as judges did not mind a little criticism and did not try to act like a saint. Finally, the Judge candidly admitted that he enjoyed the social prestige which attended what he felt was an honorable position. A social man who enjoyed the company of other lawyers, he took pleasure in the natural tendency of lawyers to seek the company of influential judges.

The only feature of judicial life that Brown disliked was that he felt overworked. The extra work required by the heavy burden of administrative duties he performed as Chief Judge of the Fifth Circuit, however, provided some compensations. While being Chief Judge gave him no additional impact on judicial matters, it required more personal contact with the other jedges and demanded that he be more accessable. The large amount of litigation in the Fifth Circuit also gave Judge Brown the opportunity to employ his innovative administrative talents. He was justifiably proud of the screening system that he devised to attack court congestion.*

---

*This screening process, described in Chapter I, has been criticized by many lawyers and judges for overemphasizing speed at the expense of thoroughness, but it has been supported by the Supreme Court.

Judge Brown took great satisfaction in the performance of the Fifth Circuit Court of Appeals. While he felt its quality in other fields, such as business law, had been slighted, Brown believed its foremost accomplishment was taking the lead in the school desegregation and voting rights cases. In the absence of legislative or Presidential action, the effort to secure full constitutional rights for blacks took place primarily in the Fifth Circuit. Although the Supreme Court took the large step in setting policy, it provided very little guidance. It was the Fifth Circuit which performed the task of demonstrating to school boards, state officials, and recalcitrant District Courts, that devious means could not be used to avoid what the Constitution demanded. This substantive accomplishment, Brown felt, was accompanied by the most spectacular innovations in procedure which made justice real by making it speedy.[21]

Elbert Tuttle's reaction to the Brown decisions was quite like that of Judge Brown. His immediate reaction was that although the change would take time, there would be no real problem since the Supreme Court had spoken. He did not anticipate either the degree of opposition or the volume of litigation that was generated. Tuttle maintained that he was neither a scholar nor a student of the Supreme Court, but he was surprised that Brown was decided on the equal protection argument. He personally had no opposition to integration and was happy to enforce the Brown decision. Tuttle's only question about Brown was the "all deliberate speed" language in the implementing decision. Tuttle felt some time would be necessary, but he believed the Supreme Court's language was a bit more ambiguous than it needed to be.

---

[21] Brown interview.

Judge Tuttle sat in both the Dallas and New Orleans cases, and was particularly active in the latter case. It was a difficult variety of litigation, because its primary object was delay. The defendants in the desegregation suits knew they had little chance of winning. Each individual school district litigated desegregation even though, for example, an identical suit may have been decided against a neighboring school district. Black plaintiffs were forced to bring actions all over a state, since school boards were not directed to comply with clearly applicable decisions unless they were parties to the specific suit. In the New Orleans case, Tuttle constantly struck down the "futile" efforts to avoid desegregation through new legislation. Unlike Judge Wisdom, Tuttle felt the results of the case were significant even though the Court accepted a limited amount of desegregation to satisfy the suit. Although he was aware of the hardships suffered by the token black students, Tuttle felt it was of paramount importance to break the system. The stone wall of Southern practice had to be breached.[22]

Tuttle maintained that he tried to allow school boards and local District Courts sufficient time to work out the very real problems they had, but he felt that three of four years was certainly sufficient time to at least initiate desegregation programs. He came to favor affirmative action remedies, because public officials looked only to their limited self-interests and the Southern Bar did not support upholding the law as declared by the Supreme Court.[23] Tuttle felt that District Judges

---

[22]Tuttle interview.

[23]Tuttle was not intolerant, for he recognized that one of the factors enabling him to act independently was the life tenure federal judges enjoyed. Ibid.

often did not go far enough in implementing clear legal principles, and that a small minority tried to actively delay the cases. Tuttle recalled that in one instance he had had to issue a writ of mandamus to force a District Judge to proceed with a case. Thus, while Judge Tuttle was patient and willing to accept less in the way of integration than might seem appropriate, he was also ready to take extraordinary steps to see that Brown was enforced. His commitment to the principles embodied in that decision was clear, and as he put it, in all the years of hearing such cases, he "never heard a convincing argument from the segregationists."[24]

Elbert Tuttle's motivation and his view of the role of the Courts of Appeals was almost identical to that of John Brown. He emphasized the fact that in the vast majority of cases, the Court of Appeals was the forum of last resort; thus it had the twin responsibility of resolving individual litigants' rights and creating developments in the law that affected everyone. Therefore, part of the role of such courts was to make new law on a broad range of issues. Judges were inevitably involved in legislation, even if it was interstitial. At the heart of this essentially creative process was the desire to do justice.

The Courts of Appeals also served as filters for the Supreme Court. In matters of civil rights, for example, where the Supreme Court had not ruled, the Court of Appeals "should extend the law as far as we felt the Supreme Court would go."[25] This would afford relief for the plaintiffs and avoid overloading the calendar of the Supreme Court

---

[24] Ibid.

[25] Ibid.

which could indicate its approval of the decision by simply denying certiorari.

In the matter of desegregation, the Court of Appeals for the Fifth Circuit had very clear and specific responsibilities. The Court had to be the primary guarantor of the constitutional rights for which no one else had acted. While he found it both inappropriate and unfortunate that the Court was forced to become so deeply involved in the operation of the schools, the rights of the plaintiffs required that activity. Like Brown, he saw a major cause of difficulty in the fact that each case had to be fought out, school district by school district. This process increased the delay in enforcement of desegregation, which was already characteristic of the litigation. The Fifth Circuit therefore had to be willing to innovate and use new techniques to protect constitutional rights. Tuttle argued that:

> It devolved upon the appellate courts to a greater extent than had theretofore been usual in American jurisprudence, to fashion means to give effect to principles of law, once firmly established, much more rapidly than would be possible if full sway were allowed to the normal procedural maneuvering.[26]

The Fifth Circuit, therefore, mandated prompt hearings in the District Courts, accelerated the setting of appeals in the Court of Appeals, provided temporary relief through the issuance of injunctions, and issued stays against adverse District Court rulings in school desegregation and voting rights cases.[27] When delay was no longer legitimate, the Court of Appeals had to accelerate the judicial process.

---

[26] Elbert Parr Tuttle, "Equality and the Vote," 41 N.Y.U. L. Rev. 245 (April, 1966), p. 257.

[27] Ibid., p. 264.

Tuttle's judicial philosophy was decidedly activist. He described himself as a liberal judge, and he defined that term as a judge who, when presented with a record that showed injustice, wanted to help, to correct the abuse. Judges had to correct injustice unless they were forbidden to do so by law. In dealing with these situations, where adverse precedent was clear and absolute, the liberal judge had only two choices. He might seek to change it within the limits of the law, or if this was impossible, the judge had to learn to live with the precedent. It was in these difficult cases, where justice and law seemed to conflict, that the en banc proceeding was most appropriate. The key, for Tuttle, was doing right unless you were prohibited.

Tuttle often found himself straining at the law to do justice. He had no hesitance in "advancing the Art of Jurisprudence," for much in law was imprecise. For example, Tuttle said that while Brown dealt only with the schools, the Fifth Circuit Court expanded its application even where there was no Supreme Court authority. This was not, in his view, outside the tradition of the Common Law, for it had developed through the advancement of new concepts of just and humane treatment.[28]

There was nothing about being a Court of Appeals Judge that Tuttle disliked. The job was without parallel in terms of personal satisfaction. Being Chief Judge added no weight or influence on decisions, and, in fact

---

[28]Tuttle interview. Tuttle referred to the criticism the Court received from the Southern Press, and at times from Judge Cameron, for always deciding cases in favor of the black plaintiffs as an example of misunderstanding this progressive nature of the Common Law. His explanation for the pattern of decisions was quite simple, the plaintiffs had always been right. As he put it, "Anyone who couldn't make a case for the plaintiff in a racial discrimination case shouldn't have graduated from law school."

unpopular administrative actions could reduce one's influence, but there was a real sense of accomplishment in providing leadership for the Court. Judges were very human, and he mentioned the deep pleasure he felt in defeating men like Leander Perez on desegregation. What Tuttle liked most, and what he felt was most important, was the independence life tenure gave judges in a position where one could "work to achieve a public service in the administration of justice and creating developments in the law for all."[29] That was what was important, Tuttle said, the chance to do something worthwhile.[30]

---

[29] Ibid.

[30] Judge Tuttle's valuation of his job as a chance to serve, to do something worthwhile, is reflected in a commencement address he gave at the Emory University Law School in the mid-1950's. Though he admitted it might sound preachy, it was a genuine statement of his commitment. He said:

"The professional man is in essence one who provides service. But the service he renders is something more than that of the laborer, even the skilled laborer. It is a service that wells up from the entire complex of his personality. True, some specialized and highly developed techniques may be included, but their mode of expression is given its deepest meaning by the personality of the practitioner. In a very real sense his professional service cannot be separate from his personal being. He has no goods to sell, no land to till. His only asset is himself. It turns out that there is no right price for service, for what is a share of a man worth? If he does not contain the quality of integrity, he is worthless. If he does he is priceless. The value is either nothing or it is infinite.

So do not try to set a price on yourselves. Do not measure out your professional services on an apothecaries scale and say, 'Only this for so much.' Do not debase yourselves by equating your souls to what they will bring in the market. Do not be a miser, hoarding your talents and abilities and knowledge, either among yourselves or in your dealings with your clients.

Rather be reckless and spendthrift, pouring out your talent to all to whom it can be of service. Throw it away, waste it, and in the spending it will be increased. Do not keep a watchful eye lest you slip, and give away a little bit of what you might have sold. Like love, talent is only useful in its expenditure, and it is never exhausted. Certain it is that man must eat; so set what price you must on your service. But never confuse the performance, which is great, with the compensation, be it money, power, or fame, which is trivial." Elbert Parr Tuttle, "Reflections on the Law of Habeas Corpus," 22 J. Pub. L. 325, 333-34 (1973).

Not surprisingly, Judge Tuttle took great pride in the accomplishments of the Court of Appeals for the Fifth Circuit. Both as one of its members and as Chief Judge, Tuttle felt the Court had been operated with efficiency and performed well under the burden of the heaviest caseload in the country. More importantly, Tuttle maintained, from 1956 to 1972 the Court made the great difference in breaking down the legal bars to integration. The Fifth Circuit led that advance to more just and humane treatment, largely either in advance or in the absence of Supreme Court guidance. During the critical years, the crucial asset of the Court was its near unanimity in favor of civil rights. Until all of the major legal principles were settled, there had been no effective dissent. Tuttle's greatest personal pride was the concrete result, the real and immediate improvement in the lives of the black plaintiffs who were fighting for their rights.[31]

Warren Jones sat in all three of the cases discussed, but he wrote no opinions and did not indicate his position publicly. He felt that "the Brown decision of the Supreme Court was not wrong," but "the decision should have been one word, affirmed."[32] The Court, in his view, had legislated Plessy v. Ferguson out of existence. He did feel that the Brown decision relied too heavily on sociology, but he obviously accepted the decision, for he did not dissent from panel decisions based on the clear holding of that case. If a law or practice required racial segregation in the schools, Jones held it to be invalid.

Jones provided a marked contrast to Judges Brown and Tuttle both in his attitude toward the Court of Appeals and to being a judge, and his

---

[31] Tuttle interview.

[32] Jones interview.

willingness to discuss these matters. His conservatism was one which implied rather limited functions for the judicial system. In the federal system, Jones argued there were occasions when the Supreme Court had to take what he called a "revisionist" role.[33] District Courts and Courts of Appeals should never adopt this stance, however, for their purpose was much more restricted. District Courts were intended to hear cases and reach decisions based on strict adherence to stare decisis. The duty of the Courts of Appeals was to "find the law," that is to decide simply if the District Court decision was right or wrong according to the precedents. "Reliance on precedent should be avoided only when doing so would provide a ridiculous result."[34] The rule for judges then was obey the precedents, tempered only by the demands of realism.

Jones' view of the judicial system placed judges and courts within a strictly legal setting, for he adamantly believed that the federal courts should not be on the forefront of social change. Courts of Appeals judges should not take on the mantle of crusaders for certain causes;[35] strict objectivity was the essential requirement of the judicial temperament. Obviously, for Jones, the role of the courts in all varieties of cases was passive, for they were charged with the duty of applying specific, well-established principles only to those disputes brought before the Court and not the general condition of society. These beliefs were squarely within the main stream of American Jurisprudence, and

---

[33] Ibid. The Judge felt revisionist was a more appropriate word in this instance than legislative, although that was clearly what he meant.

[34] Ibid.

[35] Ibid.

would probably be supported by a majority of presently serving appellate judges. His insistence on obedience to precedent is certainly a major feature of traditional American legal education.

Although he offered no specific explanation, Jones felt that the life of a federal judge was a good one. He did not feel that the Court of Appeals for the Fifth Circuit was unique on matters of substance, but rather because of its heavy caseload and the size of the Circuit. This led to the development of procedures which were "in some respects different from those which are generally prevalent."[36] Jones did not indicate whether or not he approved of these innovations.

As was true with the other judges, a great deal about Brown, Tuttle, and Jones can be learned from the views of colleagues and observers.* These observations leave one with the obvious impression that John Brown and Elbert Tuttle were extraordinary men and judges, and that Warren Jones was a solid, reliable man, suffering only in comparison with the unusual talents and character of the others.

Judge Hutcheson was ambivalent in his feelings about John Brown. At least from a philosophical point of view, he must have had some reservations about Brown. Although both were activist judges, Judge Hutcheson's bent was quite conservative in practice, while Brown was an avid innovator. Judge Brown's aggressive and somewhat flamboyant style may have caused Hutcheson some discomfort, for he was a rather severe and

---

[36] Ibid.

*Three of the men interviewed did not comment upon the members of the Court. Judge Jones declined to make any statements about the men he served with on the Court. Judge Rives limited his remarks to saying they were all fine men. Judge Coleman felt he could not speak about Ben Cameron's personal feelings about his colleagues.

straight-laced individual. Certainly their social backgrounds were a contrast, Hutcheson the Texan, the frontier aristocrat, and Brown, the small-town Midwesterner.[37] There was no information, however, that would lead one to believe that Hutcheson did not value Brown's judicial and administrative abilities. It was Hutcheson, for example, who had first asked Brown to take the responsibility for assigning judges to hearing panels when Brown had only been on the Court of Appeals for a short time.

Elbert Tuttle thought highly of Judge Brown, particularly his abilities as an administrator. Tuttle thought Brown was imaginative and hard-working, and he credited Judge Brown as the force which had made a fifteen-judge court work as a unit. Tuttle believed his judicial philosophy was very much the same as Brown's, particularly Brown's liberal position on matters of civil rights and race.[38] John Minor Wisdom agreed with this assessment, for he believed Brown usually came out on the "right" side in his decisions.[39]

John Brown's greatest contribution may well have come after the period of this study as Chief Judge of the Fifth Circuit Court of Appeals, a position he still holds. He has established himself as the premier judicial administrator in the country,[40] for he has been a pioneer in procedural reforms. He pushes and cajoles his judges and keeps the

---

[37]Dean Allen E. Smith, private interview in Columbia, Missouri, August, 15, 1977.

[38]Tuttle interview.

[39]John Minor Wisdom, private interview in New Orleans, Louisiana, July 29, 1977.

[40]Dean Frank T. Read, private interview in Tulsa, Oklahoma, September 7, 1977.

mountainous caseload of the Fifth Circuit moving. His methods are often abrupt, but he gets the work of his Court done.[41] His success in this area, however, should not obscure his substantive contribution in the desegregation cases. His Republicanism was of the Ripon Society brand, and his commitment to civil rights was as deep as any member of the Court. His forcefulness in administration was reflected in his attitude toward the school cases; it was time to get moving. To this end, Brown was never hesitant to fashion extraordinary remedies to provide relief. John Brown had that rare combination of administrative and technical skill and humane instincts for fuller justice for all.

It would be impossible to overestimate the esteem in which Elbert Parr Tuttle has been held. Unless perhaps one found a recalcitrant District Judge whom Tuttle had chastized, or heeded Judge Cameron's unfound charges, one could not hear an unfavorable remark about the man. Not only was Tuttle respected, but he was the recipient of warm personal affection, regardless of disagreement on matters of substance. A clear example of this was the opinion of Judge Hutcheson.

When Tuttle first came on the Court of Appeals, Hutcheson was not sure that he would be a fine judge, because Hutcheson believed him to be primarily a tax lawyer with only narrow experience. It turned out quite the opposite, but although Tuttle was much more flexible and innovative than Hutcheson, the latter came to respect Tuttle's abilities as a judge. Hutcheson believed Judge Tuttle to be an aristocrat in the best sense.

---

[41] Judge Brown's directness was reflected in his opinions which were often spiced with pithy remarks. While they were usually short and to the point, his flamboyant style and aggressive posture were at times reflected in hyperbole. Confidential communication.

Tuttle's finest characteristic, as far as Hutcheson was concerned, was his combination of forceful advocacy and genteel manners.[42] The Texan had great respect for a man who would stand up for his beliefs, but he also appreciated what he saw as the Southern tradition of manners. The greatest compliment Hutcheson paid Tuttle was that he thought of him as a Southerner, regardless of Tuttle's consistent extension of desegregation and the "unfortunate circumstances" of his birth outside of the South.

John Minor Wisdom thought Tuttle was the best sort of Judge in every way. The features of Tuttle's character that Wisdom most prized were his integrity and his willingness to work. Even while he was Chief Judge, with its attendant administrative duties, Tuttle worked harder than any other judge and wrote more opinions. Not only did he produce quantity, Tuttle's opinions were written in the grand style but without extravagence.[43] Tuttle's character and integrity were beyond reproach, for as Wisdom said, he was the "Soul of Rectitude."* Wisdom, in fact, attributed a good part of the Fifth Circuit's record in desegregation to Tuttle's strength of character as Chief Judge. As Chief Judge, Tuttle combined an actue awareness of the need to move on desegregation and a natural understanding of command and people. Wisdom believed Tuttle was uniquely

---

[42] Smith interview.

[43] John Minor Wisdom, "Chief Judge Tuttle and the Fifth Circuit," 53 Cornell L.Rev. 6 (No. 1, November, 1967).

*Tuttle's reputation for unquestioned honesty made it particularly rankling for him in a rare case of criticism to be accused by Cameron of gerrymandering panels in desegregation cases, particularly since he was not responsible for making the assignments.

suited to lead the Court to a fuller implementation of Brown and to keep it together at the same time.[44]

Judge Brown pointed to many of the same qualities in his estimation of Elbert Tuttle. Tuttle was a born leader with the ability to make very different kinds of people work well together. His intellectual competence was beyond challenge, and he was a fast worker who turned out volumes of opinions. Tuttle's logic was almost perfect, reflected both in his opinions and discussions in conference. Tuttle also had an imperturbable nature and great patience in dealing with problems and people. Finally, and above all else, Brown wrote, Tuttle had a strong moral character, for "I think Elbert Tuttle is incapable of being unfair."[45] All of these qualities were combined with a genuine dedication to the realization of full civil rights for all citizens. Judge Brown put this paean quite simply when he said of Tuttle, "He is the most perfect man I have ever known."[46]

Dean Frank Read has called Judge Tuttle a giant on the bench, who combined the best features of other great judges on the Fifth Circuit Court of Appeals. Like Brown, he was an outstanding administrator and Chief Judge, and he held the Fifth together. While not the monumental scholar and intellect that Wisdom was, Tuttle was extremely bright, and wrote clear and logical opinions. Like Judge Rives, Tuttle had absolute integrity and courage, for he was an early champion of civil rights. And

---

[44]Wisdom interview.

[45]John R. Brown, "Judge Elbert Tuttle: Jurist," 16 J. Pub. L. 279 (No. 2, 1967), p. 283.

[46]Brown interview.

like Judge Hutcheson, Tuttle was decisive and strong, to which any foot-dragging District Judge could attest. Tuttle was simply a magnificent man.[47]

By any measure, Elbert Parr Tuttle was a true aristocrat in the very best sense of the word. The concept of noblesse oblige had real meaning for Tuttle, for he believed his gifts, his success, and his position required of him dedication and commitment to service. While some might describe these attitudes as paternalistic, they would be missing his basic belief in equality before the law. It was no coincidence that he was and remains an advocate for minority rights, be they social or political.* Perhaps the citation on an honorary Doctor of Laws conferred by Harvard in 1965 best expressed Tuttle's stature: "The mind and heart of this dauntless judge enhance the great tradition of the federal judiciary."[48]

Warren Jones was in some respects the most difficult of the judges to assess. He declines to talk about himself and even his colleagues have seen him as something of an enigma. The most important factor in arriving at a fair estimate of Jones as a jurist was the stature of the men with whom he served.

---

[47] Read interview.

*In our interview, he did not think it important enough to mention his military record even though most of his friends and colleagues still refer to him as General Tuttle. His record indicates that during World War Two, he fought in Guam, Okinawa, Leyte, and the Ryukus. He was wounded and cited for exceptional and meritorious service while Battalion Commander of the 304th Field Artillery of the 77th Division. He was awarded the Bronze Star, the Legion of Merit, the Purple Heart with oak leaf cluster, and the Bronze Service Arrowhead. Arthur Dean, "A Tribute to Judge Elbert P. Tuttle," 53 Cornell L. Rev. 2 (No. 1, November, 1967).

[48] Ibid., p. 5.

Judge Hutcheson thought Jones was a fine and reliable man, whose conduct as a judge was always proper. Jones represented the point of view of the business and banking community and could always be counted upon to do the appropriate conservative thing. Even though he never accepted the Southern racial views, Hutcheson found him a compatible fellow worker. Jones was not the sort of man to challenge tradition, and the Texan felt he was properly unsympathetic to social engineering.[49]

John Minor Wisdom believed Jones had a first rate mind and that the rare opinions that he wrote employed simple, direct language. Wisdom felt Jones was at the opposite pole philosophically, for he was a super-conservative and had a very restricted view of the Court of Appeals' role, both in the desegregation cases and in general.[50] Jones did not take an active role in the school cases, and did not seem particularly interested in them during the 1950's.

Judge Brown agreed with Wisdom that Jones contributed little during the desegregation cases, but Jones also provided a necessary element on the Court. He would not force civil rights and felt "The Four" were going too fast and too far. As a result, by arguing for contrary results, Brown believed Jones provided a negative cautionary strength. Nevertheless, Brown felt Jones could be counted upon in the school cases if the precedent was clear and unchallenged. He would follow the authorities, such as the Brown decisions, but would not go beyond them.

---

[49]Smith interview.

[50]Wisdom interview. In the school desegregation cases, Wisdom felt that Jones had little or no impact.

While Jones could be crochety, with an acid sense of humor, Brown felt they had a pleasant working relationship.[51]

Elbert Tuttle considered Jones to be an excellent lawyer and a moderate in the desegregation cases. As was true of himself and Judge Brown, he believed that Jones had never become receptive to the Southern tradition on race. Tuttle described Jones as a "no-nonsense" man whose approach to the Court's work was more conservative than his own. Jones was, for example, content to accept nearly authoritative limits on new courses of action.[52]

The common thread woven through these comments, beyond the obvious appraisal of Jones as a conservative judge, was their brevity. Jones' colleagues had very little to say about him. This is certainly due in part to his reticence, lack of substantial activity in the desegregation litigation, and the fact that Jones was not a particularly sociable man. He was a quiet, conservative man, simply going about his job. Like the majority of federal appellate judges, Jones was a strict stare decisis man who believed in a passive role for the Courts.[53] The job of judges was to follow the law. Jones rarely wrote opinions and had no great desire or talent in that direction.[54] His record in civil rights was consistent, for although he dissented from new legal advances, once these

---

[51]Brown interview.

[52]Tuttle interview.

[53]Read interview.

[54]Warren Jones was not a particularly hard working judge. There are some who say he was tired of practicing law and accepted his judicial appointment as an alternative to retirement. Confidential communication.

changes became legal precedent, unlike Ben Cameron, Jones would follow them.

Jones was a solid, competent Court of Appeals Judge, who drew little criticism or praise. To attain such a position was a substantial achievement, for in the legal profession, only a seat on the United States Supreme Court was more exalted. If he seemed something of an invisible man, or as Frank Read has called him, "The Grey Horse,"[55] it was only because he sat on the Fifth Circuit Court of Appeals with a cast of giants. Each of the other judges were unique, special, and in some respects larger than life, even in failure. Warren Jones was not.

---

[55]Read interview.

CHAPTER X
CONCLUSION

Speculation is not supposed to be a part of history. It is difficult enough for the researcher to try to determine how the tale unfolded without burdening oneself with what might have been. Consider, however, what might have happened in the South if there had been a different cast of characters on the Fifth Circuit Court of Appeals. If the judges of that Court had not combined their belief in equal justice, dedication to the rule of law, and patience with the inherent weaknesses and shortcomings all of us share, how would integration have come to southern schools? What would have been the result of that social revolution? If the judges had required immediate and complete integration in the mid-1950's, would the South still have public schools? Might there not have been unprecedented racial violence, even by the standards of our troubled past. Suppose, alternatively, the judges had bowed to public opinion and community pressure. Desegregation suits might still clog the federal court dockets and impatient and outraged black Southerners might have begun a revolution in earnest. Were these possibilities imaginary horribles? Fortunately, we did not have to find out. In difficult circumstances, perhaps haltingly at times, the South was forced by the Court of Appeals and the Judges of the Fifth Circuit to obey one of the most basic of our deeply held national beliefs, the equality of every human being before the law.

In each case examined in this study, the Court was faced with a different task although the aim, enforcement of Brown v. Board of Education, was the same. In Miami, a relatively simple litigation gave reasonable and well-intentioned community leaders an opportunity to exert their influence and begin a process of voluntary though token integration. The community was educated to the necessity of taking some responsibility on its own. Though the first steps were designed to prevent the massive integration threatened by court action, it was a start. In Dallas, the Court was faced with the necessity of forcing two foot-dragging District Court Judges to obey the Supreme Court's mandate and abide by its own directions. This was an internecine struggle and divided the federal courts against themselves. The Court of Appeals would not allow the traditional discretion of trial courts to prevent or interminably delay desegregation. In New Orleans, the Court of Appeals was called upon to aid and support a federal District Court against the Governor, the Legislature, the entire Executive Branch of the Louisiana government, and local opinion. What became a real test of strength and will between state and federal power was waged by the two courts alone. Against the best efforts of Louisiana and the implacable hostility of most of New Orleans, the Court of Appeals and the District Court succeeded in at least breaking down the formidable legal barriers against integration of the schools.

This study has been an enlightening journey of discovery for the writer. While federal courts may be examined as institutions, the central fact about the performance of the Court of Appeals was that the men, the judges examined here, and not the law, were responsible for the eventual success of integration in Southern schools. All seven of them

did not participate equally in that accomplishment, but all demonstrated an individuality that defied conventional categorization, a feature often neglected in considering the nature of collegial courts. At least four of the seven judges were substantial men even before their contact with the problems of desegregation. Their own special talents and characteristics, combined with outstanding service in that controversy, made them exceptional judges and men.

John Brown, Richard Rives, Elbert Tuttle, and John Minor Wisdom, names unfamiliar to those outside the legal profession, were jurists of the first order on a par with the legendary figures of the Supreme Court. They became known as "The Four" and what a quartet they were. Men of impeccable social standing and professional accomplishment, they became the foremost champions of the disadvantaged in the South. These judges, sharing a compassion for the victims of injustice, an intense sense of social responsibility, and an abiding faith in the rule of law, each brought their own particular abilities to the Fifth Circuit Court of Appeals. They guided the South through its early adjustment to the constitutional standard for racial equality and slowly evolved desegregation policy for the entire nation.

Wisdom, Brown, and Tuttle shared an impatience with delay in the implementation of the Brown decisions which led them to innovative procedures resulting in acceleration of the administration of justice. They recognized that special measures were necessary to correct the years of segregation. Long before other courts took similar measures, these three men adopted remedies in desegregation suits which later became programs for affirmative action. Where possible, they avoided imposing the heavy hand of federal judicial operation of the schools, but when necessary,

they were not loath to extend their powers to the fullest. They managed to destroy the legal barriers to school integration while coping with the largest caseload in the largest Circuit in the federal judicial system.

John Minor Wisdom's particular contribution was his intellect. A life-long student of law, and the society within which it operates, he was the scholar of the Fifth Circuit. Whenever an opinion called for historical development, legal scholarship, or philosophical depth, Wisdom was most often called upon to be the author. His work was always characterized by clarity, style, and precision, and it has become part of the literature of the law. Even today, in his early 70's and after serious health problems, Wisdom's mental energy and excellence are without peer. Although he has taken senior status, he still exercises intellectual domination on the Court. Wisdom is quite simply the finest appellate judge of at least the last quarter century.

John Brown's paramount abilities were in administration and became most evident during his tenure as Chief Judge of the Circuit, well after the period under discussion. He initiated the most far reaching procedural innovation in any federal court. During the 1950's, Brown was one of the first on the Court of Appeals to see that traditional remedies were not sufficient to desegregate the schools and to suggest the use of extraordinary steps to cut through the delaying tactics of the segregationists. As was true of Wisdom and Tuttle, Brown consistently decided in favor of the black plaintiffs and pushed the process of integration forward. Brown was to become the outstanding court administrator in the country but has always kept as his guiding principle the correction of injustice.

The special quality Elbert Parr Tuttle brought to the Court was his complete and unquestioned integrity. Even his most bitter opponents on desegregation retained a deep respect for him as both a man and a judge. Tuttle was one of the most widely respected judges of the last few decades, and his unimpeachable character was an important element of the Fifth's fine performance. He was, perhaps, the most complete of all the judges examined, for he combined a fine intelligence and writing style, an ability to lead and gain cooperation, and a passion for doing right. Like Brown and Wisdom, he was willing to innovate and experiment, to go to the frontiers of the law to give meaning to the equal protection of the laws. Tuttle was no legal mechanic, but rather an artist of jurisprudence.

Richard Taylor Rives was not an innovator or a judicial activist as were the other members of "The Four." Essentially a conservative man, he was at home with the traditions of the South. He was no liberal advocate of school integration and was quite content to take a slower, more traditional judicial approach to desegregation. Yet, Rives may have contributed the most to the Fifth Circuit Court of Appeals, for in the face of the most extreme isolation and disapproval of his community, he demonstrated unflagging courage. While Rives' opinions were not as consistently in favor of black plaintiffs in all civil rights suits as Brown, Tuttle, and Wisdom, in the school desegregation cases he repeatedly overruled delay and chicanery and enforced the mandate of Brown. As the years passed, be became less inclined to adopt the slow approach to desegregation, but even in those early years when it mattered most, Judge Rives almost always was found on the proper side of the question. He was the best example possible of the judicial temperament, for he

knew that above one's personal attitudes, above the desire of one's community, stood the judge's oath of office and the rule of law. Having suffered and sacrificed the most, Judge Rives may have attained the highest distinction.

Joseph C. Hutcheson, Jr., was not one of "The Four." In fact, he was most unsympathetic to their activist position. A judge of the old school, a writer of opinions in the grand style, and a classical scholar, Hutcheson was, however, one of the most widely known and respected judges of his era. For many years, he was the Fifth Circuit Court of Appeals. In the thirty-seven years he served on that Court, he participated in the development and interpretation of many fields of law. Although he represented an earlier era in the South and did not favor the Brown decision, Hutcheson's basic belief in individual liberty and the obligation to obey the requirements of the Constitution prevented him from taking a negative stance. He was not deeply involved with the desegregation litigation, but when he did participate in those cases, he obeyed the Supreme Court's mandate. Judge Hutcheson's most important contribution to the Fifth Circuit Court of Appeals, aside from his many years of service, was the prestige and continuity he gave the Court. He also provided a clear example of the independence of mind that became so characteristic of the Court.

One might almost lose sight of the stature of these judges were it not for the other two men who served on the Court during our period, Benjamin Cameron and Warren Jones. Cameron was the tragic figure of the Court, for his formidable legal talents were wasted. He was wedded to a judicial, social, and constitutional philosophy that was more appropriate in the nineteenth century. Cameron's attachment to states'

rights and the traditional racial policies of the South made him a constant dissenter, so removed from the thinking of his colleagues that he lost all of his effectiveness. When he died in 1964, Cameron was an isolated, embittered man who finally realized what he had lost. It was unfortunate that the learning and logic displayed in his constant dissents were not put to use in cooperation with the other members of the Court. Like many other Southerners of talent and substance, Cameron was a prisoner of his past.

On any other Court of Appeals, Warren Jones would have been a highly respected and influential judge. He was steady, reliable, and competent, dedicated to the tradition of stare decisis and the limited nature of the judicial function. In the Fifth Circuit, Jones almost disappeared in the company of giants. His record in the desegregation cases was surprisingly good, for though he felt Brown was being applied too far and too fast, he followed it as clear precedent. In the litigation as a whole, Jones contributed little beyond his natural inclination for restraint. Judge Jones is a good standard to which the other judges might be compared, for he was fairly typical of most federal appellate judges.

It must occur to any student of history or law that the position of judge is a most respected one. We select certain men and women and say to them, "We trust you to be fair, objective, and honest in deciding disputes between us." Others may make the laws, the rules by which we agree to conduct our behavior. Others are given the power to command us in emergencies, even to the extent of jeopardizing our lives. We even are willing to entrust to others the task of instructing our children. Judges, however, are asked to apply and interpret those rules and give

practical meaning to our rights and obligations. We expect the judge to employ his learning, his experience, and his wisdom, to provide us justice. It has been the unfortunate fact that these requests were rarely met in full. During the years of the Eisenhower Administration, in most difficult circumstances, the Judges of the Court of Appeals for the Fifth Judicial Circuit more than met that request. They were one of the most important forces for moving the South toward racial justice and equality while setting a standard for the rest of the nation as well. They have been a telling justification of the unique American judicial system.

APPENDIX A
SUPREME COURT DECISIONS IN
BROWN ET AL. v. BOARD OF EDUCATION OF TOPEKA ET AL.*

Brown et al. v. Board of Education of Topeka et al.

Argued December 9, 1952--Reargued December 8, 1953--
Decided May 17, 1954.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments

---

*Footnotes omitted in all decisions.

undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question--the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954."

It is so ordered.

Brown et al. v. Board of Education of Topeka et al.

Reargued on the question of relief April 11-14, 1955--Opinion and judgments announced May 31, 1955.

MR. CHIEF JUSTICE WARREN delievered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such

proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case--ordering the immediate admission of the plaintiffs to schools previously attended only by white children--is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

APPENDIX B
COURT OF APPEALS DECISIONS IN
GIBSON v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY*

Gibson v. Board of Public Instruction of Dade County

United States Court of Appeals, Fifth Circuit, July 23, 1957.

Before RIVES, JONES and BROWN, Circuit Judges

RIVES, Circuit Judge.

Negro children eligible to attend the public schools of Dade County, Florida, by their parents as next friends, filed a class action alleging irreparable injury and deprivation of their constitutional rights by the Board of Public Instruction and the Superintendent of Public Schools of that County. The complaint averred that each of the children seeks admission to the public schools of the County without racial segregation; that the defendants maintain and supervise such schools "under a system which provides certain schools for the education of white children only and others for the education of colored children only"; that the plaintiffs have petitioned the Board of Public Instruction to abolish racial segregation in the public schools of the County as soon as is practicable in conformity with the decision of the Supreme Court of the United States in Brown v. Board of Education, 349 U.S. 294 (1955), but that the Board has refused, and, instead, adheres to a statement of policy in part as follows:

> "It is deemed by the Board that the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school commencing the current school term remains unchanged. Therefore, the Superintendent, principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a nonintegrated basis."

The complaint prayed for declaratory and adjuntive relief.

Upon motion of the defendants, the district court dismissed the complaint holding that it did not set forth a justiciable case or controversy, and did not allege that the plaintiffs had sought admission to any

---

*Footnotes omitted in all decisions.

particular school or had been denied the right to attend any school because of their race.

The issue of justiciable controversy under such a complaint has been settled in Bush v. Orleans Parish School Board, 138 F.Supp. 337, 340 (E.D. La. 1956), affirmed by this Court in 242 F.2d 58 (5th Cir. 1957).

Under the circumstances alleged, it was not necessary for the plaintiffs to make application for admission to a particular school. As said by Chief Judge Parker of the Fourth Circuit in School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59, 63, 64 (4th Cir. 1956):

> "Defendants argue, in this connection, that plaintiffs have not shown themselves entitled to injunctive relief because they have not individually applied for admission to any particular school and been denied admission. The answer is that in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for Colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief." 240 F.2d at pp. 63, 64.

The appellees urge also that the judgment should be affirmed because the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Law of 1956, Chapter 31380, Laws of Florida, Second Extraordinary Session, 1956. Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools.

The district court erred in dismissing the complaint. Its judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gibson v. Board of Public Instruction of Dade County, Florida

United States Court of Appeals, Fifth Circuit, November 24, 1959.

Before RIVES, Chief Judge, and BROWN and WISDOM, Circuit Judges.

RIVES, Chief Judge.

This action, filed June 12, 1956, sought a judgment declaring Article 12, Section 12 of the Constitution of the State of Florida and Section 228.09 Florida Statutes Annotated to be violative of the Fourteenth Amendment to the Constitution of the United States. That much has been conceded by the defendants from the beginning. The complaint further prayed that the Board of Public Instruction be ordered to desegregate the public schools of Dade County and be enjoined from requiring the plaintiffs and other Negroes of school age to attend or not

to attend particular public schools because of their race. The district court dismissed the complaint because the plaintiffs had not made application for admission to a particular school. This Court reversed and, in effect, held that a primary and positive duty rested upon the Board of Public Instruction to comply with the May 17, 1954, ruling of the Supreme Court in Brown v. Board of Education, 347 U.S. 483. That holding was clearly required by the implementing decision, Brown v. Board of Ecuation, 1955, 349 U.S. 294, 300, 301, now reaffirmed in Cooper v. Aaron, 1958, 358 U.S. 1, 7.

[Further Relief Denied]

Upon remand, after a full hearing, the district court rendered final judgment declaring the Article of the State Constitution and the Section of the State Statutes under attack to be violative of the Fourteenth Amendment, as admittedly they are, but denying any further relief to the plaintiffs. The present appeal is from that judgment.

To some extent the facts have been set forth in the former opinion of this Court and in the opinion of the district court upon remand. The bases for the rulings of the district court sufficiently appear in the following two extracts from its opinion:

> "As to the prayer of the complaint that the Court order the defendants to promptly present a plan of desegregation of the schools, the Court finds that the Florida Pupil Assignment Law enacted by the Legislature of Florida since the filing of this suit meets the requirements of such a plan and the demands of the plaintiffs. . . .
>
> . . .
>
> "The plaintiffs now have available to them adequate remedies under the Pupil Assignment Law for any of their grievances pleaded in the complaint. The record shows that they have not pursued them and until they do so and have been denied their rights they are not entitled to injunctive relief."

Gibson v. Board of Public Instruction of Dade Co., Fla., 170 F.Supp. 454, 457, 459.

The Florida Pupil Assignment Law was enacted on July 26, 1956, more than a month after the complaint in this case had been filed. Prior to the enactment of that law, it is conceded that the Public Schools in Dade County were racially segregated. Within a month after the enactment of the Pupil Assignment Law, the Board of Public Instruction of Dade County adopted an "Implementation Resolution." For the next school year 1956-57, then about to commence, that resolution assigned en masse the children to the same schools in which they were then enrolled, and assigned unregistered pupils "to the school in which he or she would have been registered had he or she been present." As to school terms after 1956-57, however, the resolution provided:

> "Section 3. Prior to the close of the 1956-57 school year or such other date as the Board may specify and each year thereafter this Board,

> pursuant to the provisions of the Pupil Assignment Law, will assign to a school for the following year each child theretofore attending a school by assignment from this Board. The record of all assignments shall be open for inspection in the office of the superintendent, and, in addition thereto, notice of assignment shall be given to each pupil and his parents.
>
> "Section 4. This Board will assign to a school for the 1956-57 school term and each year thereafter each qualified child, not heretofore attending a school by assignment from this Board, whose parent applied for admission of such child. Such assignment will be made pursuant to all of the provisions of the Pupil Assignment Law. Application for admission shall be made on forms to be approved by the board and made available at the office of the superintendent and the principal of each school. When completed, such applications shall be submitted by the superintendent for action by the board. Records of assignments hereunder shall be open for inspection in the office of the superintendent, and notice of assignment shall promptly be given the pupil and his parents should the application for admission to a specific school be denied."

A card form of application for admission was approved by the Board. That form contained no clear indication that the applicant should indicate any choice of schools, but contained in its upper left-hand corner the single word "School: . . ." followed by a blank space. No notice or advice from the Board or Superintendent was given to the children and their parents, or to the school principals and teachers who received their applications for admission, to the effect that Negro children, or their parents for them, were now permitted to have considered fairly by the Board any choice to attend a school other than an all-Negro school. With very few possible exceptions, they all remained unaware that the pre-existing policy of the Board might have been changed. Under such circumstances, it is obvious that the pupil assignment cards manifested no conscious preference for continued segregation on a voluntary basis.

[Segregation Prevailed]

At the time of trial, in the Fall of 1958, complete actual segregation of the races, both as to teachers and as to pupils, still prevailed in the public schools of the County. A census record card kept by the Board on each pupil still showed the designation of his race by the initials "W.N.Y." The Superintendent explained: "Well, that form just hasn't been corrected. We have a multiplicity of forms, and all of them have been corrected except that one, that I know of." However, another Board form, captioned "PUBLIC SCHOOLS, DADE COUNTY, FLORIDA, 1958-59 SUBSTITUTE TEACHERS GUIDE," listed under the word "WHITE," 12 Senior High Schools, 32 Junior High Schools, and 107 Elementary Schools, and under the word "NEGRO," 4 Senior High Schools, 5 Junior High Schools, and 19 Elementary Schools. The Superintendent explained that that list did not

refer to pupils, but meant simply that, "The personnel, the instructional personnel are all one or the other." The distinction is not very meaningful so long as the schools having all Negro teachers also have all Negro pupils, and no other schools have any Negro teachers or pupils. From a careful study and consideration of the entire record, the conclusion is inescapable that the plaintiffs and the members of the represented class have not been afforded a reasonable and conscious opportunity to have their choice of school considered by the enrolling authorities. For all practical purposes, the requirement of racial segregation in the public schools continued at the time of trial.

That being true, we cannot agree with the district court that the Pupil Assignment Law, or even that the Pupil Assignment Law plus the Implementing Resolution, in and of themselves, met the requirements of a plan of desegregation of the schools or constituted a "reasonable start toward full compliance" with the Supreme Court's May 17, 1954, ruling. That law and resolution do no more than furnish the legal machinery under which compliance may be started and effectuated. Indeed, there is nothing in either the Pupil Assignment Law or the Implementing Resolution clearly inconsistent with a continuing policy of compulsory racial segregation.

[Alabama Case Cited]

The district court cited in support of its decision Shuttlesworth v. Birmingham Board of Education, N.D. Ala. 1958, 162 F.Supp. 372. The judgment in that case was affirmed by the Supreme Court "upon the limited grounds on which the District Court rested its decision." Shuttlesworth v. Birmingham Board of Education, 1958, 358 U.S. 101. The district court had limited its decision in that case so as not to pass separately upon any particular tests, parts or sections of the Alabama School Placement Act. (See 162 F.Supp. at pp. 382, 382.) The decision was further limited to the constitutionality of the law upon its face. (See 162 F.Supp. at p. 384.) The district court in the present case would extend the effect of the holding in the Shuttlesworth case, saying:

> "The three-judge court in the Birmingham case also denied all injunctive relief to the plaintiffs and left them to the fair operation of the School Placement Law and the remedies therein provided. The Court in that case was likewise considering the issue raised by the complaint as a basis for the application for an injunction that despite the passage of the Pupil Placement Law, Negro students were still being assigned to the same schools on a basis of segregation of the races irrespective of the nearness of other public schools to the homes of the plaintiffs."

Gibson v. Board of Public Instruction of Dade Co., Fla., supra, 170 F.Supp. 454, 458, 459. The plaintiffs in the Shuttlesworth case, supra, did in fact exhaust their administrative remedies under the Alabama School Placement Law. (See 162 F.Supp. at pp. 372, 373.) The Shuttlesworth case in the district court was confined to an attack upon the constitutionality of the Placement Law on its face, and no evidence was offered to sustain the parts of the complaint charging discrimination

by any means other than by the Placement Law upon its face. (See 162 F.Supp. at pp. 375, 376.) In our opinion, the Shuttlesworth case affords no support for the decision of the district court in the present case.

On the first appeal in this case, we said that so long as the requirement of racial segregation continues throughout the public school system it is premature to consider the effect of the law providing for the assignment of pupils to particular schools. (See 246 F.2d at 914, 915.) Obviously, unless some legally non-segregated schools are provided, there can be no constitutional assignment of a pupil to a particular school. We do not understand that the Fourth Circuit has ruled to the contrary. The net effect of its rulings, as we understand them, is that the desegregation of the public schools may occur simultaneously with and be accomplished by the good faith application of the law providing for the assignment of pupils to particular schools. If that understanding is correct, then we readily agree.

In that connection, the Board may, if it chooses, submit for the consideration of the district court a plan whereby the plaintiffs and the members of the class represented by them are hereafter afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities. In the event of the submission and approval of such a plan, the district court might properly wait a reasonable time for the necessary administrative action before finding whether further proceedings are necessary. In any event, the district court should proceed in accordance with this opinion and with the two opinions of the Supreme Court in Brown v. Board of Education, supra, and should retain jurisdiction during the period of transition. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

APPENDIX C
COURT OF APPEALS DECISIONS IN
BORDERS v. RIPPY*

Brown v. Rippy

United States Court of Appeals, Fifth Circuit, May 25, 1956.

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM:

The suit was brought by Negro children of school age against the President and members of the Board of Trustees of the Dallas Independent School District and others for a declaratory judgment and an injunction. It had for its object the entry of a judgment requiring the defendants to desegregate with all deliberate speed the schools under the jurisdiction, and to cease their practices of segregating plaintiffs in elementary and high school education on account of race and color.

The claim was that the defendants, though obligated to do so, were conspiring to neglect to proceed as required by law.

The defendants denied that they were proceeding or proposing and conspiring to proceed in violation of law, to force segregation upon plaintiffs on account of their race and color. Alleging in effect that they were proceeding, and would continue, as required in and by the decisions of the Supreme Court, to proceed with all deliberate speed with the change over from segregated to non-segregated schools, they prayed that all relief, declaratory and injunctive, be denied.

When the case was called, instead of a hearing on evidence or agreed facts, there was a running colloquy between judge and counsel, in which after admitting that at least some of the plaintiffs had sought and been denied admission on a non-segregated basis, the defendants' counsel vainly tried to offer, in explanation and support of their action, evidence of the matters pleaded by them.

Declining to hear the evidence, apparently under the mistaken view that the plaintiffs had agreed to the facts pleaded by defendants, though the record showed the exact contrary, the district judge, determining that the suit was premature, denied the injunction prayed and ordered the suit dismissed without prejudice to the right of plaintiffs to file it at some later date.

Appealing from that order plaintiffs are here insisting that the record shows that the judgment was entered under a complete misapprehension both of the law and of the facts and must be reversed.

---

*Footnotes omitted in all decisions.

The defendants here urging that the action of the court responded to the facts as shown of record and to the law as declared in the decisions of the Supreme Court, insist that the suit was premature and was properly dismissed without prejudice.

We think it quite clear that there is no basis in the evidence for the action taken by the district judge, none in law for the reasons given by him in support of his action. The judgment is accordingly VACATED and REVERSED and the cause is REMANDED with directions to afford the parties a full hearing on the issues tendered in their pleadings.

[Dissent]

CAMERON, Circuit Judge, Dissenting.

I.

The Court below stated, as one of its reasons for dismissing the complaint without prejudice, the following:

> "The direction from the Supreme Court of the United States requires that the officers and principals of each institution, and the lower Courts, shall do away with segregation after having worked out a proper plan. That direction does not mean that a long time shall expire before that plan is agreed upon. It may be that the plan contemplates action by the state legislature. It is not for this Court to say, other than what has been said by the Supreme Court in that decision.
>
> "To grant an injunction in this case would be to ignore the equities that present themselves for recognition and to determine what the Supreme Court itself decided not to determine. Therefore, I think it appropriate that this case be dismissed without prejudice to refile it at some later date. Give them some time to see what they can work out, and then we will pass upon that equity." [Emphasis supplied.]

The Court below was evidently referring to what the Supreme Court said in its two segregation decisions:

> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. . . ."
>
> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the

> governing constitutional principles. . . . At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . . To that end the courts may consider problems relating to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve system of determining admission to the public schools on a non-racial basis, the revision of local laws and regulations which may be necessary in solving the foregoing problems. . . ." [Emphasis added.]

In my opinion, the Court below was justified in using its discretion to dismiss this action without prejudice on the ground that it was prematurely brought. It seems clear that the course of action fixed by the Supreme Court contemplated that school boards and other state officials should take hold of the complex problem and work it out with the aid and in the light of their superior knowledge of the problem in all of its ramifications. These state officials were to work in an administrative capacity under the plans detailed in these two opinions. The Supreme Court recognized that the problem should be viewed as a whole and that time would be required and that the state authorities should be given full primary responsibility, as well as authority, to solve the problem in the light of local conditions. As long as these officials were proceeding in good faith and with deliberate speed to do this, it is clear to me that the Supreme Court did not intend that they should be subjected to harassment by vexatious suits or by the intervention of the courts. It was the "action of the school authorities" which courts were to pass upon at the proper time and after there had been opportunity for such action. The scheme did not contemplate that the courts should anticipate or seek to control such action or should impede it by too close chaperonage. "Action" is defined as "an act or thing done,"--i.e. already performed.

The principles controlling in such a situation were announced in a recent decision of the Supreme Court in a situation not unlike that with which we are here dealing.

That case involved the question whether judicial action would be taken to arrest the functioning of the First and Second Renegotiation Acts on constitutional grounds before administrative remedies had been exhausted. The Supreme Court held that such a short-circuiting of the administrative remedy would be "a long overreaching of equity's strong arm," and used this language in reaching that conclusion:

> "The doctrine [exhaustion of administrative remedy] wherever applicable, does not require merely the initiation of prescribed administrative procedures. It

> is one of the exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention. The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress [here the Supreme Court] has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene. . . . To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination." [Emphasis added.]

Again, in Myers v. Bethlehem Corp., Mr. Justice Brandeis, citing a score of cases, stated: "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedies have been exhausted. . . . Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered to relieving the defendant from the necessity of a trial to establish the fact."

And this Court has applied the principle in a series of cases involving claims under the Fourteenth Amendment. The first of these was Cook, et al. v. Davis, 1949, 178 F.2d 595, cert. den. 340 U.S. 811. A District Court in Georgia had intervened by injunction in favor of Davis, who claimed that he was discriminated against as a Negro teacher. This Court wrote an exhaustive opinion in reversing that decision and used this language:

> "The broad principle that administrative remedies ought to be exhausted before applying to a court for extraordinary relief, and especially where the federal power impinges on State activities under our federal system, applies to this case. 'No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, citing many cases relating to relief by injunction. We held in Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F.2d 97, that the same principle applies to relief by declaratory decree. 'The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary

> relief of a court of equity (citing many cases), is of special force when resort is had to the federal courts to restrain the action of state officers.'. . ."

II.

The situation before the Court below furnishes an excellent illustration of the wisdom and relative necessity or permitting the school authorities to apply their experience, judgment and investigative facilities to the solution of the problem. Dallas County has one hundred twenty school buildings, housing for instruction 78,691 white children and 14,593 Negro children. Each of those schools and each of the children presents a separate problem to be dealt with in the light of many other considerations besides race. It is not humanly possible that the District Courts consider and resolve those problems in all of their details and intricacies.

The Northern District, in which Dallas County is situated, has ninety-nine other counties whose legal business must be handled by three active District Judges. If the Court below is to be compelled to take jurisdiction of this action and try it, there is no reason why every other school child in Dallas County and in the Northern District of Texas, both white and Negro, should not file suit and demand a hearing, and procure an adjudication of his own individual problems.

III.

Under accepted equitable principles a court should accept and exercise jurisdiction only when it is made clearly to appear from the pleadings that the school officials are not performing their administrative functions in good faith. The complaint here fails entirely to charge any facts tending to sustain such a thesis and the answer refutes it completely. The Court will presume that the state officials are acting honestly and that they will expeditiously give plaintiffs all relief to which they are entitled. Davis v. Arn, 5 Cir., 1952, 199 F.2d 424.

The complaint alleges that the twenty-seven plaintiffs on September 5, 1955, applied for admission to certain schools in Dallas Independent School District: One applied to a junior high school; eight applied to a high school; and the residue applied to four separate elementary schools. In each instance it is alleged that the principal of the school conspired with the superintendent of public schools to deprive plaintiffs of the right immediately to attend the specified schools based upon their race and color.

The complaint contains no charge at all that the school officials did not act in good faith in denying them such immediate entry or that the facts did not justify such denial. The complaint prayed for a declaratory judgment declaring the statutes of the State of Texas under which defendants assumed to act unconstitutional, and defining the legal rights and relations of the parties; and for injunction, both temporary and permanent against any enforcement by the defendants of the Texas Statutes referred to. The answer contains this statement:

> ". . . Defendants deny there is any scheme or conspiracy to circumvent or evade the law or to deprive any child, student or other person of their

> civil rights. The principals of the various schools were following the instructions issued to them by the administrative staff. The administrative staff and the district trustees are now and have been making an honest, bona fide, realistic study of the facts to meet the obligations the law has placed upon them to provide adequate public school education and to perfect, as soon as possible, a workable integrated system of public education."

It was further shown from the sworn answer and the stipulations of counsel that the Dallas Public School System has operated for ninety years as a segregated system and that budget procedures looking to the raising of funds by taxation had been formulated and bonds issued on that basis and upon the enumeration of white and Negro students already made. The details of the budget are controlled by state laws and practices, and thereunder statistical data is gathered in January of each year. The budget for the school year had reached an advanced state of preparation when the Supreme Court decision was published on the last day of May, 1955, and it was impossible to make the necessary adjustments and allocations of students and teachers by the beginning of the school year in September, 1955.

In order that all might be advised of this, the superintendent of schools issued a statement on July 13, 1955, advising that a detailed study of all of the problems inherent in desegregating was in progress and the details of that study were set forth. Thirty-five million dollars in bonds had recently been issued and the capital improvements involved therein would have to be changed. Sixty percent of the money for operating the Dallas schools came from the State of Texas, and the Attorney General had ruled that funds could be allocated for the coming year only on the segregated basis existing when appropriations were made and plans for the school year set in motion. Complete chaos and a complete breakdown in public school education for both White and Negro students would result if the school officials should undertake a haphazard effort to deal specially with isolated individuals and the six schools involved in the suit out of the total of one hundred twenty. The situation required an over-all adjustment based upon a consideration of the entire school system, and granting to all individuals and classes the right spelled out in these Supreme Court decisions.

IV.

These facts were known to the plaintiffs and their attorneys when they applied for admission to the six schools mentioned, and when, one week thereafter, this civil action was begun. Anyone willing to accept facts would know that the relief demanded in the suit could not be afforded in so short a time. That relief was threefold. (1) A judgment was sought declaring the Texas Statutes unconstitutional. These statutes have been declared unconstitutional by the Supreme Court of Texas and defendants do not take issue with the averments of the complaint in this regard and nothing is presented for the Court to decide. (2) Plaintiffs prayed that the rights of the parties be declared. There was no controversy between the litigants as to their respective rights. Plaintiffs

claimed the right to be admitted to schools without discrimination because of race or color. The defendants freely admitted that right. The only point at issue related to timing. There was no "actual controversy" between the parties, and, therefore, no jurisdiction was conferred on the Court by 28 U.S.C.A. 2201 and Rule 57 F.R.C.P. (3) Injunctions, preliminary and permanent were sought. There was no threat by the defendants to do anything plaintiffs did not want done or to omit doing anything plaintiffs wanted done. Defendants solemnly declared their readiness to admit plaintiffs to schools on an integrated basis when the problem could properly be worked out. The very basis of injunctive relief is threatened action or failure to act by one party in derogation of established rights of the other party. The rights claimed by the plaintiff are admitted and neither the pleadings nor the proof reflect any threat by the defendants to violate those rights. Therefore, there is no basis for injunctive relief.

> "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law . . . or the final authority of a state court to interpret doubtful regulatory laws of the state. . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. . . ."

V.

The majority opinion reverses the judgment dismissing the complaint without prejudice and orders the Court below to "afford the parties prompt and full hearing on the issues tendered in their pleadings." To permit judicial proceedings to be in progress while the school authorities are seeking to perform duties defined by the Supreme Court as primary is not only to provide duplication of effort and to bring the two proceedings into inevitable conflict, but it is to cast into confusion a scheme which the Supreme Court spelled out with clarity. Particularly is this true where, as here, it is perfectly plain that the school authorities have not had time to study the complexities of the problem and to come up with the proper answers.

It is not reasonable that the Supreme Court would have placed primary responsibility in a group commissioned to act administratively with the

expectation that this group would be hampered or vexed in accomplishing their task severely difficult at best, by contemporaneous litigation directed towards fashioning a club to be held over their heads. Such a judicial intervention would connote a distrust of the functioning of the preliminary administrative process and would cast those conducting it under a handicap of suspicion so great as to thwart at the threshold the orderly carrying out of the procedures so plainly delineated by the Supreme Court.

Moreover, that course would, in my opinion, contravene the principles and policies so carefully worked out by this Court in Cook v. Davis, supra, and the other cases following it; and would repudiate the approval we gave to the action of the trial Court in Davis v. Arn, supra, where the complaint had been dismissed as premature, and the language we there used (p. 425):

> "We cannot assume that if plaintiffs had pursued that remedy they would have been denied the relief to which they were entitled. The presumption is the other way. As the complaint does not allege that plaintiffs have availed themselves of the state administrative remedies open to them under the Act, their resort to a federal court to control state officers in the performance of their duties is premature." [Emphasis added.]

It is my opinion that it was within the competence of the Court below to dismiss without prejudice this prematurely-brought complaint and that, in doing so, it followed the spirit and letter of the Supreme Court's opinions and also vindicated the true function of the judicial process. I would affirm.

Borders v. Rippy

United States Court of Appeals, Fifth Circuit, July 23, 1957.

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge.

Twenty-eight negro children appeal again to this Court from another judgment of the district court dismissing their complaint in which they sought relief for themselves and other negroes similarly situated on account of their exclusion from certain public schools of Dallas solely because of their race and color.

The basic facts are simple and undisputed. Rosa Sims, ten years of age, and Maude Sims, nine, applied for admission to the John Henry Brown School, four blocks from their home. The school principal showed their father a directive from the School Board "saying that no negro children could go to school with the whites," and denied them the right to enter because they were negroes. Instead, they went to Charles Rice Elementary

School distant from their home "about eighteen blocks across heavy traffic." Like treatment from various public schools of Dallas was accorded to each of the other negro children plaintiffs.

The testimony of the Assistant Superintendent and of the Superintendent of the Dallas Independent School District disclosed the steps which had been taken to comply with the school segregation decisions, Brown v. Board of Education, 347 U.S. 4B3, decided on May 17, 1954, in which the final judgments were entered on May 31, 1955, 349 U.S. 294. On July 13, 1955, the Board of Education made a statement of policy in which it instructed the Superintendent of Schools to proceed with a detailed study in the following areas:

> "1. Scholastic boundaries of individual schools with relation to racial groups contained therein.
> "2. Age grade distribution of pupils.
> "3. Achievement and state of preparedness for grade level assignment of different pupils.
> "4. Relative intelligence quotient scores.
> "5. Adaption of curriculum.
> "6. The overall impact on individual pupils scholastically when all of the above items are considered.
> "7. Appointment and assignment of principals.
> "8. The relative degree of preparedness of white and negro teachers; their selection and assignment.
> "9. Social life of the children within the school.
> "10. The problems of integration of the Parent-Teachers Association and the Dads Club Organization.
> "11. The operation of the athletic program under an integrated system.
> "12. Fair and equitable method of putting into effect the decrees of the Supreme Court."

On July 27, 1955, the following was unanimously approved:

> ". . . It was reported that this School System has been, is at present and will be obligated to continue an intensive study of the problems involved in 12 specific areas, and that reports would be made to the public of the results of these studies periodically. It will be impractical to attempt integration until these studies have been completed. Therefore, the Superintendent of Schools is hereby instructed that there shall be no alteration of the present status of the schools of this district in the term beginning September 1955."

Nearly a year later, on June 13, 1956, the Board issued its "Second Statement on Desegregation by the President of the Board" concluding as follows:

> "The Board recognizes its responsibility to implement the decree of the Supreme Court, but it reaffirms its studied opinion that it would be

> derelict in this regard if it ordered an alteration in the status of its schools until its understanding of the problems involved is as comprehensive as possible and its plans for such changes are completed. This Board feels that it cannot and should not in good conscience accept the responsibility for the manner which the decree of the Supreme Court is to be carried out until it has had sufficient time within which to formulate plans which must be to the best interest of this school district, its children, and the community.
>
> . . .
>
> "Therefore, for the immediate future this Board feels that any change is premature and instructs the Superintendent of Schools to continue a segregated school system for the school year 1956-57."

The Assistant Superintendent testified that there were about 119,000 children in the public schools of Dallas of which about 16-2/3 per cent, one out of every six, were negroes. The Superintendent testified that immediate desegregation would result in mixed classes in all of the senior high schools with one possible exception, and in a large number of the elementary schools; that most of the school buildings are completely filled and white children would have to be displaced to let negro children come in; that there is a difference in scholastic aptitudes of white children and negro children, the average difference at the first grade level being one and one-half years, and the older the children the greater the gap, so that in high school senior classes it would be around three and one-half years; that, having the differential in mind, there were not enough teachers available to impart adequate instruction to both negro children and white children; but no child is refused admission because he is retarded. He testified categorically that he was still continuing segregation based upon races in the Dallas Independent School District."

[Exhaustion of Remedies]

The appellees insist that the judgment should be affirmed because of the failure of pleading or proof to show that each plaintiff has exhausted his administrative remedies, under Article 2653-367 of the Revised Civil Statutes of Texas, by appeal to the State Commissioner of Education. Texas State law gave the Board and the Superintendent the power to act, and, in the exercise of such power, they denied the plaintiffs the right to attend public schools of their choice solely on account of their race or color. By such action the plaintiffs have been deprived of the constitutional rights, and they are not required to seek redress from any administrative body before applying to the courts. Bruce v. Stilwell, 206 F.2d 554, 556 (5th Cir. 1953); Carter v. School Board of Arlington County, Va., 182 F.2d 531, 536 (4th Cir. 1950); Bush v. Orleans Parish School Board, 138 F.Supp. 337, 341 (E.D. La. 1956), affirmed in Orleans Parish School Board v. Bush, 242 F.2d 156, 162 (5th Cir. 1957); see also Browder v. Gayle, 142 F.Supp. 707, 713 (M.D. Ala. 1956), affirmed per curiam 352 U.S. 903.

Other applicable principles of law are equally simple and well understood. Overcrowding in public school rooms cannot be lawfully prevented or relieved by excluding pupils on the basis of their race or color. Clemons v. Board of Education of Hillsboro, 228 F.2d 853, 857 (6th Cir. 1956).

[Segregation by Race Forbidden]

The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5th Cir. 1957). Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.

So long as they are excluded from any public school of their choice solely because of their race or color the plaintiffs are being denied their constitutional rights. It is not a sufficient answer to say that the school board has made "a prompt and reasonable start" and is proceeding to a "good faith compliance at the earliest possible date" with the May 17, 1954 ruling of the Supreme Court. The district court must retain jurisdiction to ascertain and to require actual good faith compliance. Brown v. Board of Education, 349 U.S. 294, 299, 301; Avery v. Wichita Falls Independent School District, 241 F.2d 230, 235, (5th Cir. 1957).

We do not impugn the good faith of the Board, of the Superintendent, or of any of the school authorities. Indeed, we note with appreciation the sincere statement of their counsel that ". . . it is to be hoped that the aftermath which occurred in Mansfield will not be similar in Dallas." Faith by itself, however, without works, is not enough. There must be "compliance at the earliest practicable date." Brown v. Board of Education, 349 U.S. 294, 300 (1955); School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59, 64 (4th Cir. 1956); Willis v. Walker, 136 F.Supp. 177, 181 (W.D. Ky. 1955).

In their prayer on this appeal, appellants are moderate. They do not pray for any immediate or en masse desegregation, but, recognizing that still further time may be needed for the admittedly difficult problems to be solved even if they are approached in a spirit of good will on all sides, their prayer is:

> "Wherefore, appeallants pray that the judgment below be reversed and that the court below be instructed to enter an order requiring appellees to desegregate the schools under their jurisdiction 'with all deliberate speed.'"

At least to that much they are certainly entitled and it is so ordered and adjudged. See 28 U.S.C.A. §2106.

REVERSED WITH DIRECTION.

Borders v. Rippy

United States Court of Appeals, Fifth Circuit, August 27, 1957.

Before RIVES, JDNES, and BROWN, Circuit Judges.

PER CURIAM.

By petition for rehearing the appellees express their apprehension that, under the terms of an Act of the 1957 Texas Legislature approved by the Governor on the 23rd day of May, 1957, and to become effective on to-wit August 23, 1957, their obedience to the order of the district court to be issued upon remand, pursuant to the directions of this Court, may result in the loss to the School District of some six million ($6,000,-DOD.DD) dollars a year of aid from the State of Texas and in the imposition by the State of penalties upon the persons carrying out such order. That Act, of course, cannot operate to relieve the members of this Court of their sworn duty to support the Constitution of the United States, the same duty which rests upon the members of the several state legislatures and all executive and judicial officers of the several states. We cannot assume that that solemn sworn duty will be breached by any officer, state or federal. If, however, it should be, then the Board of Trustees of the School District and the persons carrying out the order to be issued by the district court are not without their legal remedies. The petition for rehearing is

DENIED.

Rippy v. Borders

United States Court of Appeals, Fifth Circuit, December 27, 1957.

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge.

Upon the last appeal, this Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment restraining and enjoining the defendants from requiring segregation of the races in any school under their supervision from and after such time as might be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision in Brown v. Board of Education of Topeka, 349 U.S. 294, and further directed the district court to retain jurisdiction of the cause for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with such judgment. Borders v. Rippy, 5th Cir. 1957, 247, F.2d 268.

After he had received the opinion of this Court, but before our mandate had issued, the District Judge called counsel before him and made a statement "as to his determination," in part as follows:

> "This Court is now called upon to issue an order in accordance with the Circuit Court's decisions and directions. That order not only unsettles the tranquility of the Dallas Public Schools which has heretofore existed in a proud form for many years under which both the colored and the white pupils have had equal school facilities and splendid teachers, but it also takes from the Independent School District a large necessary amount of State funds if and when desegregation is ordered.
>
> "It is difficult, gentlemen, for me to approve this order, but this is a land of the law and it is my duty to do what I am ordered to do by the higher Court, and I therefore ask you gentlemen of counsel to prepare an order in accordance with the ruling of the United States Circuit Court of Appeals for this Circuit, as outlined in its opinion upon the original case and upon the motion for rehearing, and I should like to have you gentlemen of counsel to prepare the order to be approved by each of you as to form, ordering integration to be permitted at the coming mid-winter term of the schools and not before that time. Let your order contain the practical portion of the School Board's division of districts and institution of schools."

Without any further hearing, without any evidence other than that appearing in the record which led to our reversal, and without inviting suggestions or arguments from counsel on anything save as scriveners in the drafting of an order to effectuate his prior determinations, the District Judge thus picked the mid-winter school term of 1957-58 as the time to start system-wide desegregation.

["Requiring" vs. "Permitting"]

After our mandate had been received, but still without any further hearing, and professedly upon the decision and order of this Court and the record theretofore made in the cause, the District Judge restrained and enjoined the defendants "from requiring or permitting segregation of the races in any school under their supervision, beginning and not before the mid-Winter school term of 1957-58" (Emphasis ours).

Upon the same record, the District Judge had theretofore expressed his opinion that: "I think that the testimony shows completely that the school authorities here in charge of this Independent School District are certainly doing their very best to comply with the ruling of the Supreme Court of the United States." This Court in turn had said that: "We do not impugn the good faith of the Board, of the Superintendent, or of any of the school authorities." (247 F.2d 268, 272).

We have emphasized the words "or permitting segregation of the races" in the district court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants "from requiring segregation of the races in any school under their supervision" (emphasis supplied). Likewise in our opinion, we had pointed out that it is

only racially discriminatory segregation in the public schools which is forbidden by the Constitution. That point was emphasized in the Arlington, Virginia Case in which Chief Judge Parker of the Fourth Circuit quoted with approval the apt language of District Judge Bryan:

> "'It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 [74 S.Ct 686, 98 L.Ed. 873] and 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child in not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

School Board of City of Charlottesville, Va., v. Allen, 4th Cir. 1956, 240 F.2d 59, 62.

[Duty of Court]

In our opinion on the last appeal, we noted that the then appellants prayed for no more stringent order than one "requiring appellees to desegregate the schools under their jurisdiction 'wtih all deliberate speed'" (247 F.2d 272). Accordingly, this Court's mandate fixed no date for desegregation more specific than "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision in Brown v. Board of Education of Topeka, 349 U.S. 294." The authority to administer the public schools is vested in the appellants, the Board and the Superintendent, and, of course, they are the ones required to make the necessary arrangements referred to in the judgment to be entered by the district court as directed by our mandate. If the school authorities fail promptly to meet their primary responsibility to the satisfaction of the plaintiffs, appellees, and others similarly situated, then the duty will devolve upon the district court to hold a hearing to decide whether they have done so and, if necessary, to proceed further so as actually and effectively to require compliance. In the performance of that duty, the district court must exercise its own judgment and discretion in accordance with the applicable principles of law set forth in Brown v. Board of Education of Topeka, supra. It seems to us that the district court did not do this in entering the judgment appealed from, but apparently considered itself bound to enter that judgment by the mandate of this court. That was not in accord with the mandate nor with the order of responsibility (first

the school authorities, then the local district court, and lastly the appellate courts) prescribed in Brown v. Board of Ecuation of Topeka, supra:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." (349 U.S. at p. 299.)

[Time Allowed]

We thought, and still think, that this Court's mandate made it clear that before a more specific date should be fixed and before any orders or judgments should be entered to require compliance with the judgment directed in that mandate, the school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility in the premises, and then if the plaintiffs, or others similarly situated, should claim that the school authorities have failed in any respect to perform their duty, there should be a full and fair hearing in which evidence may be offered by any and all parties, and further that the Court should retain jurisdiction to require compliance with its judgment.

The judgment of the district court is therefore reversed and the cause remanded with directions to enter a judgment in accordance with the mandate of this Court issued on September 7, 1957 and in accordance with this opinion, and to retain jurisdiction for such further hearings and proceedings and the entry of such orders and judgments as may be necessary or appropriate to require compliance with such judgment. In view of the reversal on appeal, the petition for mandamus is not necessary and leave to file said petition is denied.

REVERSED WITH DIRECTIONS. LEAVE TO FILE PETITION FOR MANDAMUS DENIED.

Dallas Independent School District v. Edgar

United States Court of Appeals, Fifth Circuit, May 23, 1958.

Before TUTTLE, BROWN and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge.

This is an appeal from an order of the District Court dismissing a suit by the Dallas School District against the Texas State Commissioner of Education and other state officials. It sought to have the district court enter a declaratory judgment determining its right under two state laws dealing with the appellant's duty to carry out the mandate previously entered by the district court that it desegregate the schools under its jurisdiction with all deliberate speed. Borders v. Rippy, 5 Cir., 247 F.2d 268. These two statutes, which were already in force when the case of Borders, et al. v. Rippy was last here for decision may be found in Vernon's Annotated Civil Statutes, 2900-a and 2901-a. They seek, in short to circumscribe the power of any Texas school district to desegregate its public schools, which we held in the Borders case must, on the record, be done in the Dallas Independent School District.

In effect, the petition of appellant in this litigation says to the District Court: "You have ordered us to desegregate, although you have not set a date; now our creator, the State of Texas, has told us (1) if we do so without an election it will withhold our share of state funds and subject our officers to penal sanctions, and (2) we may not reassign or transfer individual students without certifying that such reassignment or transfer is in accord with certain prescribed standards; now, you tell us whether to comply with your order in view of the action of the state of Texas, and if we do, tell us how we will be affected by the Texas laws."

[No U.S. Statute Cited]

Appellant points to no federal statute or provision of the federal constitution pursuant to which this proceeding is filed. It alleges generally that it is a civil action that arises under the constitution and laws of the United States, but fails to point to the statute or clause of the constitution on which it relies except to say, further, that it is under 28 U.S.C.A. §1343(3), the civil rights jurisdiction statute, and 28 U.S.C.A. 1981 and 1983, the civil rights substantive statutes.

Appellant cites no authority for the proposition that a governmental unit, like a state-created school district is a "person" which can complain of state action denying it equal protection of the laws. Moreover, the complaint makes no affirmative allegation as to its legal contention vis-a-vis the appellees. It does not attack the constitutionality of the state statutes under the federal constitution; it does not even assert an adverse claim as against the appellees to the effect that they cannot legally enforce the state statutes. At most, it says: Here is the court's mandate; here are the statutes; we don't know how they will affect us; you enter a judgment "declarative of the rights, duties and obligations of the plaintiff to a United States Court of competent jurisdiction carrying out the final mandate of the United States Court and its position in relation to the two recently adopted legislative enactments."

[No Place to Complain]

The appellants' brief asserts that it, being a creature of the state and "owing its existence ot legislative enactment, could not complain to

a court of an unconstitutional act. If the legislature can create, it can later decimate," citing City of Trenton v. State of New Jersey, 262 U.S. 182. This is self evident, and so too is it equally plain under Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, that the appellant cannot assert a claim against the state, since "all school districts are subject to the plenary power of the Legislature." (This quotation comes from appellant's brief.) This being so, there is obviously no justiciable controversy stated here. This would, of course, require the dismissal of the complaint for failure to assert a claim on which relief could be granted. But it also, and more importantly, because it touches on the district court's jurisdiction, demonstrates the inapplicability of the civil rights statutes to a claim of this kind. Thus, there is no statute giving the district court jurisdiction of such an action.

The dismissal was required, both for want of federal jurisdiction and for failure to state a cause of action for declaratory relief.

The judgment is AFFIRMED.

Boson v. Rippy

United States Court of Appeals, Fifth Circuit, March 11, 1960; Rehearing denied, April 8, 1960.

Before RIVES, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

PER CURIAM.

This class action seeking admission of Negro children to the Dallas public schools on a non-racial basis was commenced in July 1955. Its history may be traced through many reported opinions on various stages and phases of the litigation, e.g. Bell v. Rippy, D.C.N.D. Tex. 1955, 133 F.Supp. 811; Brown v. Rippy, 5 Cir. 1956, 233 F.2d 796; certiorari denied Oct. 22, 1956, 352 U.S. 878, 77 S.Ct. 99, 1 L.Ed.2d 79; Bell v. Rippy, D.C.N.D. Tex. 1956, 146 F.Supp. 485; Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690; see also Dallas Independent School District v. Edgar, 5 Cir., 1958, 255 F.2d 455.

[District Court Judgment]

The present phase begins with the entry by the District Court on April 16th, 1958, of a final judgment in part as follows:

> "It is, Therefore, the Order, Judgment and Decree of the Court that the Defendant Independent School District of Dallas, its Board of Education, a Corporation, and its agents, its servants, its employees, their successors in office and those in concert with them, who shall receive notice of this order, be, and the same are hereby, restrained and enjoined from requiring and permitting

> segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the decision of the Supreme Court in Brown vs. Board of Education of Topeka, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1983], and retaining jurisdiction of the cause for such further hearings and proceedings and the entry of such orders and judgments as may be necessary or appropriate to require compliance with such judgment."

[Motion for Further Relief]

On May 20, 1959, about thirteen months after the entry of said judgment, the plaintiffs filed their "Motion for Further Relief," which concluded with the following prayer:

> "Wherefore, plaintiffs respectfully pray the Court to enter an order directing and requiring defendants to comply forthwith with this Court's judgment and orders issued April 16, 1958, by immediately operating all schools under their supervision in the Dallas Independent School District on a nonracial, nondiscriminatory basis; and that defendants be further directed to now permit plaintiffs and all Negro minors similarly situated to enter, matriculate and study in schools under their supervision without regard to race and color.
>
> "Plaintiffs also pray the Court to allow them their costs and for such other and further relief, judgments and decrees as may appear equitable and just in the premises."

The defendants replied to the motion, and prayed, "that this Honorable Court overrule and deny Plaintiffs' said Motion."

[Statements at Hearing]

The hearing on the motion and answer was held on July 30, 1959, at which time counsel for the respective parties made opening statements as follows:

> "Mr. Durham:
>
> "If the Court will permit me I can state it very shortly.
>
> "The plaintiffs filed suit some time ago, and Your Honor knows the history of it.
>
> "The substance of the motion is that the Dallas Independent School District, in face of the April 16th judgment, is still being operated on a racial

segregated basis, and we ask the Court to enter a decree directing the defendants to comply with that decree.

"The defendants have filed an answer to our motion, and in Allegation 10 they admit that the School District is still being operated on a racial segregated basis in the face of the April 16th judgment; therefore, on the face of the record there appears to be no substantial controversy to the main issue that the school is being operated on a racial segregated basis. We, therefore, believe that the case at that point, that a decree should be rendered on the face of the record directing the School Board to bring in a plan of desegregation within a reasonable time, which would provide for desegregation beginning September, 1960.

"This would alleviate the fear of defendants that stress reference to that being impractical to do it September, 1959, or in the middle of the term.

"Therefore, we believe, on the face of the record, there being no substantial controversy, the plaintiff would not be required to offer any evidence on the motion.

"Mr. Strasburger:

"If your Honor please, we respectfully disagree with opposing counsel. As we view the issue today it is simply whether or not we have complied with the former order, that we move with all deliberate speed. We feel that we have moved with all deliberate speed, and will continue to do so.

"Our pleadings join issue with them, that they are not entitled to the relief they pray for today, that they are in too big a hurry, that the best interests of all the children and all the community demands that we continue as we have continued in the past and doing our dead level best to stay within the Constitution and laws, and within the rulings of the Court, not only of the United States but of the State of Texas."

[Court's Oral Opinion]

The Court proceeded to hear all of the testimony offered by the parties, and at the conclusion of the hearing delivered a long oral opinion which comprises thirteen pages of the printed record and concludes as follows:

"From the evidence before us, and from the statement of counsel for the plaintiffs, it is not urged before September 1960. Just what problem will be confronting you in 1960, or by the fall of 1960, the Court can hardly foresee. I can only say to you, put your house in order for integration, for it is ahead of you.

"We will not name any date, nor will we write any order, except that we have not reached the time,

> to which counsel for plaintiff agrees, that integration can take place this year.
>
> "I think an appropriate order will be that the School Board be instructed to further study this question, and that some definite action be taken, perhaps toward holding this election or doing other things, sometime next spring, but we cannot say definitely whether or not it will take place at any particular time, day, month or year, we don't know, because we don't know what tomorrow may bring forth."

The plaintiffs then moved ". . . that the Court enter an order disposing of Plaintiffs' motion and for such other and further relief as they may be entitled to in the premises."

In response to that motion, the Court on August 4, 1959, entered its order in part as follows:

> "That the prayer of the Plaintiffs for an order directing and requiring Defendants to immediately desegregate is denied; but this Court retains jurisdiction of this cause for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with this Order as well as the judgment of the Appellate Courts, and this hearing is recessed for the time being to be resumed on the first Monday in April, A.D. 1960."

On August 12th, 1959, the plaintiffs filed their notice of appeal ". . . from the decree and final judgment entered in this action on the 4th day of August, 1959, denying Plaintiffs' motion for further relief praying for a judgment and decree of the Court directing and requiring the Oefendants to immediately desegregate the schools in the Dallas Independent School Oistrict."

The order of August 4, 1959, refuses to modify an injunction, and this Court, under 28 U.S.C.A. §1292(a)(1), has jurisdiction of an appeal from that order. Compare Allen v. County School Board of Prince Edward County, Va., 4 Cir., 1957, 249 F.2d 462.

[Appeal Scope Not Limited]

The language which we have quoted from the notice of appeal simply describes the judgment or order from which the appeal is prosecuted and was obviously not intended to limit the scope of the appeal, and does not have that effect.

Upon consideration of the evidence, and of the entire record, we find no error in the order appealed from except an error of omission. The Court should have required the defendants to "make a prompt and reasonable start toward full compliance" with its original injunction order of April 16th, 1958, and to that end, it should have required the defendants to submit a plan for effectuating a transition to a racially nondiscriminatory school system in time for such plan to be considered and ruled on by the Court on the date to which the hearing was recessed, vis., the first Monday in April, 1960. See Brown v. Board of Education,

1955, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083. That date being almost at hand, the order of the district court is modified so as to require the defendants to "make a prompt and reasonable start toward full compliance" with its injunction order of April 16th, 1958, and to that end, within thirty days from the date on which the present judgment of this Court of Appeals becomes final, to submit a plan for effectuating a transition to a racially nondiscriminatory school system; and further that the District Court, within thirty days after the submission of such plan, hold a full hearing upon the plan so submitted and on any objections which may be filed thereto. As so modified the judgment or order of the District Court is affirmed.

Modified and affirmed.

CAMERON, Circuit Judge, dissents.

* * *

Dissent

CAMERON, Circuit Judge (dissenting).

For several reasons I cannot subscribe to the result announced and the reasons given in the per curiam opinion in which the majority has concurred.

I.

I do not think the case is legally before us. We have no jurisdiction, except that conferred by statute. The per curiam opinion rests jurisdiction upon 28 U.S.C.A. §1292(a)(1) providing for appeals from interlocutory orders of district courts "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." This appeal does not, in my opinion, come within the ambit of the statute.

The proceeding which led to the order appealed from was a "motion for further relief" filed by appellants May 20, 1959. The only specific relief prayed for was "an order directing and requiring defendants to comply forthwith with this Court's judgment and orders issued April 16, 1958, by immediately operating all schools under their supervision . . . on a nonracial, nondiscriminatory basis; and that defendants be further directed to now permit plaintiffs and all other Negro minors similarly situated to enter, matriculate and study in schools under their supervision without regard to race and color." The appellants abandoned the prayer for immediate desegregation at the very outset of the hearing on the motion of May 20, this being the statement of their counsel: "We, therefore, believe that the case at that point, that a decree should be rendered on the face of the record directing the School Board to bring in a plan of desegregation within a reasonable time, which would provide for desegregation beginning September, 1960. This would alleviate the fear of defendants that [sic] stress reference to that being impractical to do it September, 1959 or in the middle of the term."

[Immediate or Future Desegregation?]

All of the discussion had between the attorneys and all of the questions to witnesses related, not to the prayer for immediate desegregation, but

to a plan for desegregation sometime in the future. In the order entered by the court at the conclusion of the hearing, the court stated: "Plaintiffs stated in open court that desegregation should not be put into effect this year."

Based upon the statements of appellants' attorneys and upon this finding, the court ordered: "That the prayer of the plaintiffs for an order directing and requiring defendants to immediately desegregate is denied." Appellants have never taken the position that this portion of the order was erroneous, but, as stated, the order was entered after appellants had abandoned that contention and had made known their position to the court below.

The appeal was taken, therefore, solely from the residue of the order, which reads:

> ". . . but this Court retains jurisdiction of this cause for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with this order as well as the judgment of the appellate courts, and this hearing is recessed for the time being to be resumed on the first Monday in April, A.D. 1960."

[Matter of Timing Presented]

The only appeal before us, therefore, relates, not to any order "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions." There is presented to us here nothing but a matter of timing. No request was made by appellants that the recess provided for in the order be for a shorter period, or that the case be set for hearing on the only remaining issue at any other time than that fixed by the court. After appeallants had abandoned the prayer for immediate integration, there was nothing remaining but the oral statement of the attorney that he believed that an order should be entered directing the School Board to bring in a plan of desegregation within a reasonable time. Assuming that this statement should be interpreted as a motion, the Rules of Procedure provide for notice and hearing of any motion.

We should not, in my opinion, concern ourselves with the setting of the docket of the district courts or other minutiae of trials. In any event, if appellants were dissatisfied with the April setting, the point should have been raised when the court stated orally that it was passing the remaining question before it until April; or by a motion to the trial court requesting an earlier setting, followed by petition to us for leave to proceed by mandamus. No such action was taken or motion filed below and no such action has been taken before us. If it had, we should, in my opinion, meet such an effort with language similar to that used by the First Circuit:

> ". . . We do not think that 28 U.S.C. §1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular

> to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice."

A final judgment is the general prerequisite for an appeal and an interlocutory appeal is definitely the exception. Moore's Commentary on the United States Judicial Code, page 481, et seq., and see Cobbledick v. United States, 1940, 309 U.S. 323, 324, 60 S.Ct. 540, 84 L.Ed. 783; and Baltimore Contractors, Inc. v. Bodinger, 1955, 348 U.S. 176, 185, 75 S.Ct. 249, 99 L.Ed. 233.

II.

The "Implementing Decision" of the Supreme Court, Brown v. Board of Education of Topeka, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083, contains this language:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts."

The cases were sent back to the district courts sitting where the problems arose, not to the Courts of Appeal. It was recognized that the local boards had problems which were unique, and experience has shown that these problems are as complex as they are local. The judges upon whom the Supreme Court cast the onus of collaborating with the local school boards were those situated in the locales where the problems existed and who logically had a good grasp of those problems.

[Transgression of Important Policies?]

What the majority does here transgresses, in my opinion, against policies which the Supreme Court thought important and which reason and common sense make compellingly so. I do not think we ought to interfere with the progress of the School Board and the local district judge in working out these local problems. They have an intimate knowledge of the problems and are in best position to work them out. The Judges who constitute this Court have lived their lives at points far distant from the locale of these problems and could not possibly be in as good position to solve them as the district judge who has spent his life with them. It is our duty, as it seems to me, to leave their solution to these local citizens, trusting their wisdom and their good faith. This record does not, in my judgment, present any reason to question either.

The Supreme Court thought that the local judges could "best perform this judicial appraisal." They can do so after considering, in the light of their own experience, the evidence of what the problems consist of and what the School Board has done and is doing to cope with them.

The hearing in the court below consisted of the testimony of three witnesses, the president of the School Board, the superintendent of schools, and the assistant superintendent. From them the court below learned the attitude of the appellees and the school officials generally towards compliance with the orders of the courts, the studies which had been made and the complexity of the problems involved in dealing with 119,000 school children with 3,800 teachers, occupying 134 school buildings.

After hearing all of the evidence the court below stated in its oral opinion: "The only question is, how soon must it [i.e. integration] be. From the evidence before us, and from the statement of counsel for the plaintiffs, it is not urged before September, 1960. Just what problem will be confronting you in 1960, or by the fall of 1960, the Court can hardly foresee. I can only say to you, put your house in order for integration, for it is ahead of you. . . ."

[Findings and Order Below]

Four days later, pursuant to motion of the appellants, and without any objection to the proposed April setting, the court entered its written findings and order in which it stated in part:

> "The Court is of the opinion and so finds . . . that the defendants have not only made a prompt and reasonable start but are also proceeding toward a good faith compliance at the earliest practicable date with the May 17, 1954 ruling of the Supreme Court and the judgments of the United States Court of Appeals, Fifth Circuit, as well as the judgments and orders of this Court entered pursuant thereto; and the defendants' actions constitute good faith implementation of all governing constitutional principles; that the defendants have diligently studied the problems involved and the methods and plans used elsewhere in a genuine effort to avoid the strife and violence which had taken place in some areas . . . : . . . and that some further time should elapse before the Court decides on a definite date for desegregation in order that new conditions, developments and evidence might be considered; . . . ."

The court thereupon recessed the hearing until the first Monday of April, 1960, after appellants had made no objection to that date proposed orally by the court and had filed nothing in the court below in the way of a request for an earlier hearing.

As stated, the only evidence in the record was given by the school officials, and from that and the statement of counsel for the appellees, the court made its findings. It did not deny any request urged by the appellants and did not refuse anything even suggested by them. The court below was vested with discretion, and it has exercised that discretion.

I do not think it lies within the proper powers of this Court to set that discretion aside under the circumstances of this case; and if we had the power to do it, I do not think the evidence would justify our substituting our judgment for that of the court below.

III.

(a) In their defensive pleadings to the appellants' motion for further relief upon which the case was heard by the court below, appellees pled specially the act of the 1957 session of the Texas Legislature, c. 283, approved by the Governor May 23, 1957, and effective ninety days thereafter. Among other things, they said with respect to said legislative enactment:

> ". . . they allege that they have and are now pursuing all of their legal remedies with reference to an Act of the 1957 Texas Legislature . . . as suggested or directed in the opinion of the United States Court of Appeals, Fifth Circuit, as set out it 247 F.2d 268, in that they filed an appropriate action in the federal courts which was dismissed for want of jurisdiction of which this Honorable Court can take judicial notice; and they filed a similar suit thereafter in the state court of Texas and an appeal from the decision of the . . . District Court of Dallas County, Texas, is now pending in the Court of Civil Appeals for the State of Texas, Eleventh District at Eastland, Texas [Dallas Independent School Dist. v. Edgar, 328 S.W.2d 201]. . . .
>
> "Further specially answering, defendants say that they had not thought that they had the power or right or that it would be appropriate for them to initiate the steps necessary to an election with reference to the 1957 Texas Legislature, but that if either this Honorable Court or the plaintiffs desire it, they will undertake to make such necessary steps."

[Texas School Statutes]

The first reference in the foregoing quotation is to the statement of this Court upon petition for rehearing in a former decision of this case, Borders v. Rippy, 5 Cir., July 23, 1957, 247 F.2d 268, 272, that the appellees here "are not without their legal remedies." Pursuant to their construction of the quoted language of the decision of this Court, appellees promptly instituted an action in the United States District Court praying for a declaration of their rights under the two Texas statutes. This Court affirmed the action of the district court declining to assume jurisdiction, both because the complaint disclosed no federal jurisdiction and it failed to state a claim upon which relief could be granted. In that case, we quoted the titles to the two Texas statutes whose meaning, validity and application the appellees sought to have declared. One of the statutes, Article 2900a of Title 49, Vernon's Texas Civil Statutes, 1959 pocket part p. 204, makes it illegal for a board of trustees to abolish the dual public school system the Texas Legislature

had established and provides that, if the Act shall be violated, the school district shall be ineligible for accreditation and for the receipt of any Foundation Program funds, and that the individuals violating the Act shall be guilty of a misdemeanor and subject to fine.

The second Act of the Texas Legislature, the title of which was quoted by this Court (255 F.2d at page 456), Article 2901a, 1959 pocket part, Vernon's Annotated Civil Statutes of the State of Texas, p. 205 et seq., deals elaborately with the assignment of pupils and the transfer of pupils, teachers and funds by local school boards, in connection with which cf. Shuttlesworth v. Birmingham Board of Education, U.S.D.C.N.Dist. Ala. 1958, 162 F.Supp. 372, affirmed 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145. Neither of these statutes was involved in the case of Borders v. Rippy and neither was in existence when, on Dec. 26, 1956, the district court entered the judgment in that case, which this Court dealt with in its decision of July 23, 1957, 5 Cir., 247 F.2d 268. Since in the decision of that case we were testing the correctness of the trial court's ruling as based upon the record then before us, neither of these statutes was ever properly before this Court.

[Statutes Bind, If Valid]

The statutes are, in my opinion, if valid, binding upon the appellees here, and if their constitutionality is questioned, the court below should stay its hand while that question is dealt with in the Texas courts. Empire Pictures Distributing Co. v. City of Fort Worth, 5 Cir., 1960, 273 F.2d 529, and the Supreme Court cases there cited and discussed. If it is not possible to conduct such a hearing in the state courts of Texas, the questions raised by the appellees based upon the statutes will still remain in the case and, in my opinion, the appellees are entitled to have them resolved before they are required to take any step in this litigation which may be in derogation of said statutes.

(b) As stated above, Article 2900a of Vernon's Annotated Civil Statutes of Texas was called to the attention of this Court by Petition for Rehearing filed by the appellees in Borders v. Rippy, supra, and this Court said with respect to it (247 F.2d 272):

> "That Act, of course, cannot operate to relieve the members of this Court of their sworn duty to support the Constitution of the United States, the same duty which rests upon the members of the several state legislatures and all executive and judicial officers of the several states. We cannot assume that solemn sworn duty will be breached by any officer, state or federal. If, however, it should be, then the Board of Trustees of the School District and the persons carrying out the order to be issued by the district court are not without their legal remedies."

The record in that case reveals that neither party had relied upon nor mentioned the statute in the court below or in the presentation of the case to this Court upon the appeal until after our decision of June 23, 1957 had been rendered. The Act had not become effective under its terms when, on August 6, 1957, the Petition for Rehearing was filed. The main thrust of this Petition was that the dismissal without prejudice

by the trial court should be affirmed so that appellants might have the opportunity to file a new action challenging, before a three-judge court, the constitutionality of the new statutes of Texas in keeping with the procedure they had taken in their original action.

[Function of April Hearing]

At the April hearing which the court below fixed--and which, without jurisdiction, in my opinion, so to do, this Court has, in the majority opinion, cancelled--all questions raised by the pleadings would have been considered and passed upon. Included in these questions would have been the constitutionality of these statutes, assuming that appellants followed the procedure adopted in their original complaint in this case, of attacking the constitutionality of Texas school laws and praying that a three-judge court be convened to try the issue. That no power is vested in a single district judge or in us upon appeal from his ruling, to grant an injunction restraining the enforcement of a state statute on the ground that it violates the Constitution of the United States is made abundantly clear by a decision just rendered by the Supreme Court reiterating its long established holding that such power is committed solely to a statutory court of three judges, 28 U.S.C.A §2281.

[Statutes Never Challenged]

At all events, it is clear that the statutes have never been challenged before the court below or before us; and in the absence of such a challenge, jurisdiction has bever been lodged in this Court to express any opinion concerning the constitutional validity or efficacy of such statutes. The Supreme Court has recently repeated principles long established which forbid a court from passing upon the constitutionality of a state statute unless called upon to do so in such a way that the question cannot be avoided, United States v. Raines, Feb. 29, 1960, 80 S.Ct. 519, 322:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power--'the gravest and most delicate duty that this Court is called upon to perform.' Marbury v. Madison, 1 Cranch, 137, 137, 177-180, 2 L.Ed. 60. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

The applicability of the Texas statutes to the case made by the pleadings can hardly be doubted and they ought, in my opinion, to be submitted, along with all the other questions involved, for an orderly hearing in due course, to the court below.

For the foregoing reasons, I respectfully dissent.

Rehearing denied: CAMERON, Circuit Judge, dissenting.

Boson v. Rippy

United States Court of Appeals, Fifth Circuit, November 30 and December 7, 1960.

Before RIVES, Chief Judge, and TUTTLE and JONES, Circuit Judges.

RIVES, Chief Judge.

This action seeking an end to enforced racial segregation in the public schools of the Dallas Independent School District was first dismissed without prejudice by the district court in September 1955. This Court reversed with directions to afford the parties a full hearing. The Supreme Court denied cerioriari.

After hearing the testimony, the district court again dismissed the action without prejudice. This Court reversed with directions that the district court enter an order requiring the defendants to desegregate the schools under their jurisdiction "with all deliberate speed."

The district court construed such directions to require immediate en masse desegregation, and, accordingly, against its own expressed better judgment, entered an order enjoining the defendants "from requiring or permitting segregation of the races in any school under their supervision, beginning and not before the mid-Winter school term of 1957-58." That order was again reversed by this Court with more specific directions to accord the school authorities "a reasonable further opportunity promptly to meet their primary responsibility in the premises, and then if the plaintiffs, or others similarly situated, should claim that the school authorities have failed in any respect to perform their duty, there should be a full and fair hearing in which evidence may be offered by any and all parties, and further that the Court should retain jurisdiction to require compliance with its judgment."

The district court then entered a general order requiring desegregation "with all deliberate speed." No further court proceedings appear until some thirteen months later, when the plaintiffs filed their "motion for further relief" praying for immediate desegregation of the public schools. The district court denied immediate desegregation, but retained jurisdiction and recessed the hearing from August 4, 1959, to the first Monday in April 1960. Upon appeal this Court modified the order of the district court "so as to require the defendants to 'make a prompt and reasonable start toward full compliance' with its injunction order of April 16th, 1958, and to that end, within thirty days from the date on which the present judgment of this Court of Appeals becomes final, to submit a plan for effectuating a transition to a racially nondiscriminatory

school system; and further that the District Court, within thirty days after the submission of such plan, hold a full hearing upon the plan so submitted and on any objections which may be filed thereto." In conformity with such an order, the defendant school authorities filed in the district court a twelve-year, "stair-step" plan of desegregation starting with the first grade in September 1961, and proceeding by the desegregation of one additional grade a year until all twelve grades in all public schools have been desegregated.

The district court disapproved this plan and required the defendants to file "an alternate desegregation plan more in keeping with the Court's oral opinion." The alternate plan was promptly filed, providing for the separating and grouping of the schools into white, Negro and mixed schools, and for canvassing parents and pupils in order to learn "who does and who does not want integration, and thereby give all concerned what they prefer, as far as is practical and possible."

The district court expressed the opinion that the holding of an election under Article 2900a of the Revised Civil Statutes of Texas should not be made a condition of a plan of desegregation, again rejected Plan No. 1, and ordered the defendants to amend Plan No. 2 by eliminating the paragraphs which make an election and favorable result conditions of the plan. In conformity with such opinion and order, the defendants resubmitted both plans amended so as not to depend upon the outcome of an election. The district court again rejected Plan No. 1, overruled the objections of the plaintiffs to Plan No. 2 as amended, and approved that plan. The plaintiffs appeal from the approval of Plan No. 2 as amended, and the defendants appeal from the disapproval of Plan No. 1 as amended.

We agree with the district court that the holding of an election under Article 2900a of the Revised Civil Statutes of Texas should not be made a condition of a plan of desegregation. It goes without saying that recognition and enforcement of constitutional rights cannot be made contingent upon the result of any election.

Plan No. 2 as amended, which was approved by the district court, would continue the practice of enforced segregation in the all white and all Negro schools and would require the operation of mixed schools if parents and pupils of both races so desired. That plan evidences a total misconception of the nature of the constitutional rights asserted by the plaintiffs. Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to "the equal protection of the laws" is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color. The dissenting view of the elder Mr. Justice Harlan in Plessy v. Ferguson, 1895, 163 U.S. 537, 559, has been proved by history to express the true meaning of our Constitution:

> ". . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Instead of removing the forbidden classification according to race or color, that plan adds another such classification. Virtually the same plan has already been condemned in the Southern District of Texas and by this Court. Houston Independent School District, et al. v. Ross, 5 Cir., 1960, 282 F.2d 95, 96. State support of schools in which segregation of the pupils is required by law cannot be squared with the constitutional command of equal protection of the laws. Cooper v. Aaron, 1958, 358 U.S. 1, 19.

The district court's approval of Plan No. 2 as amended must be reversed. As to Plan No. 1 as amended, we are of the opinion that paragraph 6, quoted in the margin, should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application might tend to perpetuate racial discrimination. Compare Kelly v. Board of Education of City of Nashville, 1958, 361 U.S. 924.

The brief on behalf of the school authorities states: "Plan No. 1 represents the first choice and best judgment of the School Board in exercising 'the primary responsibility for elucidating, assessing and solving' the 'varied local school problems,' placed upon local school authorities by the Supreme Court's opinion in the Brown case." On the other hand, the appellants insist that the district court "should have ordered the Dallas School authorities to admit appellants and all other Negroes similarly situated to public schools under their supervision on a racially nondiscriminatory basis at the start of the ensuing school term." The appellants further pray--and with much reason, in view of the frustrating history of this litigation--that this Court should here render a definite judgment. We are reluctant to substitute our judgment for that of the district court, and are willing to do so only to the extent necessary to assure a prompt start toward full compliance and reasonable, even though conservative, progress toward bringing about the end of racial segregation in the public schools "with all deliberate speed." See Brown v. Board of Education, 1955, 349 U.S. 294, 299. To that end we direct that the district court approve Plan No. 1 as amended, eliminating therefrom paragraph 6 quoted in footnote 13, supra.

In so directing, we do not mean to approve the twelve-year, stair-step plan "insofar as it postpones full integration." See Evans v. Ennis, 3 Cir., 1960, 281 F.2d 385, 389. The district court has not expressly passed on whether that much delay is necessary, or whether the speed is too deliberate. It retains jurisdiction of the action during the transition. See Kelly v. Board of Education of City of Nashville, supra; Aaron v. Cooper, 8 Cir., 1957, 243 F.2d 361, 364. After the approval of Plan No. 1 as amended, with the elimination of paragraph 6, the future orders of the district court should be governed by the rule so well stated in Brown v. Board of Education, 1955, 349 U.S. 294, 300, 301:

> "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to

> the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."
>
> * * *

Reversed and remanded with directions and for further proceedings.

Supplemental Opinion

RIVES, Circuit Judge:

Further consideration has persuaded us to elaborate upon that part of the opinion which reads:

> "As to Plan No. 1 as amended, we are of the opinion that paragraph 6, quoted in the margin,[13] should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application might tend to perpetuate racial discrimination. Compare Kelly v. Board of Education of City of Nashville, 1959, 361 U.S. 924.
>
> "[13]
>
> "'6. The following will be regarded as some of the valid conditions to support application for transfer:
>
> "'a. When a white student would otherwise be required to attend a school previously serving colored students only;
>
> "'b. When a colored student would otherwise be required to attend a school previously serving white students only;
>
> "'c. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.'"

The case cited, while not authority, expresses the doubt of the Justices who thought that certiorari should be granted as to whether similar provisions of the Nashville plan are constitutionally invalid. We are so doubtful of the validity of the provisions of Paragraph 6 that we think they should not be included in the plan.

We fully recognize the practicality of the argument contained in the opinion of the Sixth Circuit holding that similar provisions are not unconstitutional. Kelly v. Board of Education of Nashville, 6 Cir., 1959, 270 F.2d 209, 228, 229, 230. Indeed, this Court has adopted the reasoning in Briggs v. Elliott, E.D.S.C. 1955, 132 F.Supp. 776, relied on by the Sixth Circuit, and has further said:

> "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

Borders v. Rippey, 5 Cir., 1957, 247 F.2d 268, 271.

Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school.

> "Oistinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. Yick Wo v. Hopkins, 118 U.S. 356; Yu Cong Eng v. Trinidad, 271 U.S. 500; Hill v. Texas, 316 U.S. 400." Hirabayashi v. United States, 1943, 320 U.S. 81, 100.

The special provisions of the eliminated paragraph 6 are objectionable also on another score. They would apply a rule of law to the desegregated public schools of the Oallas School District different from that applicable to other public schools in the State of Texas. That paragraph would apparently deprive the Oallas Board of all discretion, and place it under the absolute duty to transfer the pupil upon application when one of the "valid conditions," entirely racial, exists. On the other hand, under the law generally applicable, the Board has a wide discretion in transferring pupils from school to school. As was noted in Shuttlesworth v. Birmingham Board of Education, N.O. Ala., 1958, 162 F.Supp. 372, 378; aff'd, 1958, 358 U.S. 101: "By virtue of its authority to administer and supervise the public schools, the defendant Board might provide for the assignment of pupils to particular schools upon any reasonable and legitimate basis." In the public schools of Texas generally, the subject of transfer is covered by the provisions of Article 2901a, Section 4, Vernon's Texas Civil Statutes:

> "Sec. 4. Subject to appeal in the respect provided, each Local Board of School Trustees shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those

functions. Subject to review by the Board as provided herein, the Board may exercise this responsibility directly or may delegate its authority to the Superintendent or other person or persons employed by the Board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic program; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environ-psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

"In considering the factors and the effect or results thereof the Board or its agents shall not consider and shall not use as an element of its evaluation any matter relating to the national origin of the pupil or the pupil's ancestral language.

"Local Boards may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth." (Emphasis ours.)

The eliminated Paragraph 6 seems to us to conflict with the Texas statute just quoted. Whether so or not, however, that Texas statute makes it clear that the eliminated Paragraph 6 is superfluous. The Board already had ample authority to transfer pupils from school to school upon any reasonable and legitimate basis. Of course, the

elimination of Paragraph 6 in no way affects or detracts from that authority. To avoid any possible misunderstanding, however, it seems appropriate to call attention to the caveat emphasized by the Supreme Court in affirming the Shuttlesworth decision:

> "All that has been said in this present opinion must be limited to the constitutionality of the law upon its face. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State."

Shuttlesworth v. Birmingham Board of Education, N.D. Ala., 1958, 162 F.Supp. 372, 384; aff'd, 1958, 358 U.S. 101.

In view of this extension of the opinion, it is ordered that the mandate not issue until twenty-one (21) days from this date, and the time for filing any application for rehearing is extended accordingly.

APPENDIX D
COURT OF APPEALS DECISIONS IN
BUSH v. ORLEANS PARISH SCHOOL BOARD*

Orleans Parish School Board v. Bush

United States Court of Appeals, Fifth Circuit, March 1, 1957, Rehearing Oenied April 5, 1957.

Before RIVES, TUTTLE and BROWN, Circuit Judges.

TUTTLE, Circuit Judge.

This is an appeal in an action on behalf of certain New Orleans Negro school children from a judgment of the District Court for the Eastern District of Louisiana enjoining appellant "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083]."

The principal grounds of appellant's attack on the validity of this order are: (1) This was a suit against the State of Louisiana and is prohibited by the XIth Amendment to the Constitution; (2) The complaint failed to state a claim on which relief could be granted; (3) The court erred in holding that the provisions of Art. XII, Sec. 1 of the Louisiana Constitution-LSA requiring separate schools for white and colored children and that all of Louisiana Act 555 and Section 1 of 556 of 1954 LSA-R.S. 17:81.1, 17:331-17:334, requiring segregation and assignment of pupils respectively in public schools were invalid; (4) The proof on behalf of plaintiffs and countershowing by defendant did not warrant the issuance of a temporary injunction. These points as well as subsidiary questions will be discussed after a brief statement of the factual background.

On November 12, 1951, appellees petitioned the School Board "to end at once the practice and custom of discriminating against Negro students solely on account of their race and color and admit these Negro children and all others similarly situated to the public schools of Orleans Parish which have heretofore and are now restricted to the enrollment of white children." This petition was denied by official action of the Board on November 26, 1951. On February 19, 1952, an appeal was taken to the State Board of Education; no reply having been received, appellees

*Footnotes omitted in all decisions.

again, on August 14th, requested action on their petition; on August 27th a reply was received over the signature of the Secretary of the State Board, which while not categorically denying the petition stated: "The Board feels that many of the items included are wholly within the jurisdiction of the Board." On September 5, 1952, the original complaint in this action was filed. It alleged great disparities between the physical plant and the content of the curricula of Negro and white schools, and also alleged discrimination because of segregation per se. It alleged that the Board was pursuing a policy and custom of maintaining separate schools for white and Negro children under the provisions of Art. XII, Sec. 1 of the Louisiana Constitution. It sought a declaratory judgment on the questions, among others, (a) "whether the policy, custom, practice and usage of the defendants . . . in denying on account of race or color to infant plaintiffs and other similarly situated . . . educational opportunities, advantages and facilities . . . equal to the educational opportunities, advantages and facilities afforded and available to white children . . . is unconstitutional and void as being a denial of the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States;" (b) "whether Article XII Sec. 1 of the Constitution of 1921 of the State of Louisiana which prohibits infant plaintiffs from attending the only public schools of Orleans Parish where educational opportunities, advantages and facilities equal to those afforded all other qualified pupils . . . are available and force them to attend secondary schools in Orleans Parish solely because of race and color is unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States." It also prayed a judgment declaring that the separate schools provision of Article XII, Sec. 1 of the Louisiana Constitution is a denial of the equal protection clause of the Fourteenth Amendment and is therefore unconstitutional and void, and for a permanent injunction enjoining defendant Board from following such provision as being in contravention of rights guaranteed under the United States Constitution.

By stipulation proceedings on this complaint were suspended on account of the pendency of the School Segregation cases in the Supreme Court of the United States.

After the first opinion in the Brown case the State Legislature of Louisiana proposed and the people adopted an amendment to Art. XII, Sec. 1 of the State Constitution which had already provided, in effect, that all public elementary and secondary schools should be operated separately for white and colored children by adding that "This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard." The Legislature then promptly enacted Acts 1954, No. 555 and 556. Section 1 of 555 merely repeated the constitutional requirement of separate schools. Section 2, 3 and 4 provide for penalties to be imposed on local boards and an individual failing to observe the requirements as to separate schools in Section 1. Section 5 is a separability clause. Act 556, adopted at the same time, is the pupil assignment statute. It provides for assignment of each pupil each year by the parish superintendent to a particular school, and, without providing any standards other than those of Act 555 for separation of the races, provides for an appeal to the local board and then to the State Board and thereafter to the state district court.

Following the enactment of these laws, appellees petitioned the school board to take immediate steps to reorganize the schools under its jurisdiction on a nondiscriminatory basis. No reply was made to this or to a subsequent petition, but the board engaged counsel to "defend, as special attorney for the Board, both in the trial court and in the Courts of Appeal" the action then pending. Soon thereafter appellees filed a first amended complaint setting up the provisions of the amended constitution and the newly enacted statutes, a prayer for declaratory relief holding them invalid and renewing their prayer for preliminary and permanent injunction against the enforcement by the board of the provisions of the new laws.

The defendant board filed its motion to dismiss and the state of Louisiana prayed the right to intervene solely for the purpose of filing a motion to dismiss the suit as being one against the State. No order appears to have been entered allowing this intervention and the State is not appearing as a party on this appeal, although a brief has been tendered on behalf of the State as amicus curiae. Its petition for leave to file is hereby granted and its brief has been considered by the Court.

Nature of the Suit

[1] We consider first whether there is any merit in appellant's contention that this is in fact a suit brought by citizens of the State of Louisiana against the State. Of course such a suit is prohibited by the principle of sovereign immunity and by analogy to the Eleventh Amendment to the Constitution of the United States. Hans v. State of Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.

It would seem hardly worth our considering this contention in light of the fact that all of the School Segregation Cases were actions of the same type as the one before us (suits against a state official or board operating under State authority) were it not for the fact that both the appellant and the Attorney General of the State urge it so strongly upon us. The burden of their argument is that this is a suit to compel state action, which under a long line of cases, including Great Northern Life Insurance Company v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121, and Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, falls within the prohibition whether nominally against the State or against state officials. But this suit does not seek to compel state action. It seeks to prevent action by state officials which they are taking because of the requirements of a state constitution and laws challenged by the plaintiffs as being in violation of their rights under the Federal Constitution. If in fact the laws under which the board here purports to act are invalid, then the board is acting without authority from the State and the State is in nowise involved. That a federal court can entertain a suit where such a situation is alleged has long been recognized. In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 453, 52, L.Ed. 714, the Supreme Court said in such a case as this:

> ". . . It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the state of Minnesota so far as

> litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.
>
> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335, relied on by the trial court, is the most recent pronouncement of the Supreme Court to the same effect. See also School Board of City of Charlottesville, Va. v. Allen, 4 Cir., 1956, 240 F.2d 59, where the Court of Appeals for the Fourth Circuit held a suit such as this not to be one against the State of Virginia.

There is no merit in the claim of appellant that the court was without jurisdiction to try this case as being a suit against the state. The substance of this suit is that the school board is unconstitutionally forcing them to attend schools that are segregated according to race and their prayer is that the board be enjoined from continuing to do so. If plaintiffs are right in their contention, then they can obtain complete relief from this defendant, because any sanctions compelling it to continue its illegal conduct fall when the Court determines that such sanctions are illegal.

Exhaustion of Administrative Remedies

[2] The second ground of appellant's motion to dismiss was its contention that the complaint fails to state a claim on which relief can be granted. The first basis for this attack is that, assuming all the allegations as to unconstitutional acts by the defendant to be true, the plaintiffs have not pursued their administrative remedies for relief before filing of their suit. In asserting this contention appellant seems to overlook completely the fact that when this suit was filed there was no pupil assignment law on the statute books. So far as has

been called to our attention the plaintiffs did all they were required to do administratively in 1951 to seek relief from the condition of which they were complaining, i.e. inequality and discrimination between the facilities of white and colored schools and the discrimination resulting per se from the operation of a segregated school system. They applied to the defendant for relief and appealed its adverse decision to the state board which remanded them to the local board. Where else they could go administratively is nowhere suggested by appellant, which argues the entire matter as though there had been a pupil assignment statute on the books.

[3] But assuming that the trial court and we should view this question in the light of conditions after the passage of the 1954 acts, which, however, we do not decide, there is still no merit in appellant's argument. Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students. As patrons of the Orleans Parish school system they are undoubtedly entitled to have the district court pass on their right to seek relief. Jackson v. Rawdon, 5 Cir., 235 F.2d 93, cert. denied 352 U.S. 925, 77 S.Ct. 221, 1 L.Ed.2d 160, and see School Board of City of Charlottesville, Va. v. Allen, supra.

Moreover, so long as assignments could be made under the Louisiana constitution and statutes only on a basis of separate schools for white and colored children to remit each of these minor plaintiffs and thousands of others similarly situated to thousands of administrative hearings before the board for relief that they contend the Supreme Court has held them entitled to, would, as the trial judge said, "be a vain and useless gesture, unworthy of a court of equity, . . . a travesty in which this court will not participate." See Adkins v. School Board of City of Newport News, D.C.E.D.Va., 148 F.Supp. 430.

Proof of Actual or Immediate Irreparable Injury

[4] A further basis for appellant's claim that the suit should be dismissed was that there was no showing of actual or immediate irreparable injury. It may well be argued to the contrary that, assuming that plaintiffs are being denied their constitutional right to equality with members of the white race in their educational opportunities, every day that passes counts as an irremediable loss to the school child thus discriminated against. The simplest answer to this contention, however, is in the limited action of the court, which was well within what was prayed for by appellees. It declared the rights of the parties as they prayed and restrained the board from "requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, supra."

Such an order, while in the form of a preliminary injunction, contained no immediately compulsive features so far as relieving the plaintiffs of day by day injury was concerned. Inasmuch as they do not complain of the failure of the court to afford them immediate relief it seems to us that there is little ground for the board to do so on this particular ground.

Constitutionality of Louisiana Constitution and Laws

We have heretofore dealt with contentions advanced by appellant which it says entitle it to a dismissal of the action whether or not the plaintiffs are being denied their constitutional rights. We now come to the question whether under the statutes of Louisiana enacted pursuant to the amendment to that State's constitution the legal position of the parties here differs from that which the litigants occupied in the School Segregation case, supra. Obviously if nothing new or different has been added the plaintiffs are entitled to a declaratory judgment declaring their right "to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration" to abolish segregation in the Orleans parish school system. Jackson v. Rawdon, supra, 235 F.2d at 96.

The new circumstance to which appellant points is the amendment to the Louisiana constitution which, in effect, provides that there shall continue to be racially separate schools, which separation is stated for the first time to be "in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race." There is also the new pupil assignment law which we have already discussed.

[5] Appellant nowhere in its brief undertakes to explain the process of reasoning by which it seeks to have this Court conclude that racial segregation in the schools is any less segregation "because of race" merely because the stated basis of adhering to the policy is in the exercise of the State's police power. Nor does the brief filed by the Attorney General of Louisiana discuss the issue. However, the affidavits introduced on the hearing for preliminary injunction make clear what the briefs do not. They deal with the alleged disparity between the two races as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births, in all of which statistical studies one race shows up to poor advantage. This represents an effort to justify a classification of students by race on the grounds that one race possesses a higher percentage of undesirable traits, attributes or conditions. Strangely enough there seems never to have been any effort to classify the students of the Orleans Parish according to the degree to which they possess these traits. That is, there seems to have been no attempt to deny schooling to, or to segregate from other children, those of illegitimate birth or having social diseases or having below average intelligence quotients or learning ability because of those particular facts. Whereas any reasonable classification of students according to their proficiency or health traits might well be considered legitimate within the normal constitutional requirements of equal protection of the laws it is unthinkable that an arbitrary classification by race because of a more frequent identification of one race than another with certain undesirable qualities would be such reasonable classification.

[6] The use of the term police power works no magic in itself. Undeniably the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution. Thus, for instance, municipal zoning laws passed to require racially segregated residential zoning have been struck down under the Fourteenth Amendment. In Buchanan v. Warley, 245

U.S. 60, at page 74, 38 S.Ct. 16, at page 18, 62 L.Ed. 149, the Supreme Court said:

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore the exercise of this power, embracing nearly all legislation of a local character is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

To the same effect see the Georgia case of Carey v. City of Atlanta, 143 Ga. 192, 84 S.E. 456, L.R.A. 1915D, 684.

[7, 8] Probably the most clear cut answer to this effort by the State of Louisiana to continue the pattern of segregated schools in spite of the clear and unequivocal pronouncement of the Supreme Court in the School Segregation cases is that this is precisely what was expressly forbidden by those decisions. Whatever may have been thought heretofore as to the reasonableness of classifying public school pupils by race for the purpose of requiring attendance at separate schools, it is now perfectly clear that such classification is no longer permissible, whether such classification is sought to be made from sentiment, tradition, caprice, or in exercise of the State's police power.

From what we have said the conclusion is obvious that the state constitutional provisions as to maintaining separate schools for white and colored children is in direct conflict with the equal protection clause of the Fourteenth Amendment and is void and of no effect. The same is true of the statute designed to implement this constitutional requirement, Act 555, of 1954.

[9] We next come to the Pupil Assignment Law. Although we have already expressed the view that this statute did not have the effect of preventing the commencement and maintenance of this action, the role it might have in the future disposition of the case by the trial court makes it appropriate for us to answer appellant's contention that that court erred in holding it invalid.

Whatever might be the holding as to the validity of an administrative pupil assignment statute containing reasonably certain or ascertainable standards to guide the official conduct of the superintendent of the local school board and to afford the basis for an effective appeal from arbitrary action, Act 556 is not such a statute. The plaintiffs, seeking to assert their right to attend nonsegregated schools as guaranteed them under the Constitution, would be remitted to an administrative official guided by no defined standards in the exercise of his discretion. In such

circumstances no number of hearings or appeals would avail them anything because it would be impossible for them to bring forward any proof bearing on whether they possessed those attributes, qualifications, or characteristics that would bring them within the group of students permitted to attend the particular school or schools. Attempts by statute to give any official the power to assign students to schools arbitrarily according to whim or caprice are legally impermissible, especially if considered in light of the history of assignments made in a manner that has now been held to be unconstitutional and of the recently readopted requirement of the state constitution reaffirming such unconstitutional standards, which is reinforced by the heavy sanctions against any official permitting a departure therefrom contained in a companion statute. Such a statute is unconstitutional either because it has on its face the effect of depriving appellees of their liberty or property without due process of law or as having implied as its only basis for assignments the prohibited standard of race. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and Davis v. Schnell, D.C.S.D. Ala. (3 judge court), 81 F.Supp. 872, affirmed, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093. Thus we need not determine whether the enactment of this law contemporaneously with Act 555 and closely following the readoption of the racially separate schools provision of the state constitution, under circumstances that make it plain to all that the Assignment Act too was a further effort to stave off the effect of the Supreme Court's school decisions, is sufficient of itself to condemn it as part of the illegal legislative plan comprehended in Act 555, although this is precisely the type of determination on which the three judge court in Davis v. Schnell, supra, based its decision striking down an amendment to the Alabama constitution. Nor is it necessary for us to pass on the possible validity of a statute that would merely grant to school officials the power to promulgate rules of attendance, zoning of school population, transfers and the like, so long as all such rules are applied in a manner as to affect all pupils without regard to their race, and are not used as a mere screen to perpetuate compulsorily segregated schools contrary to the court's order.

[10] There remains the complaint of the appellant that this is not truly a class action. What we have heretofore said with respect to the nature of the relief sought makes it clear that there is no merit in this contention. Here is a well-defined class whose rights are sought to be vindicated. We think that our decisions in Adams v. Lucy, 5 Cir., 228 F.2d 619, certiorari denied 351 U.S. 931, 76 S.Ct. 790, 100 L.Ed. 1460, and Board of Supervisors of L.S.U., etc. v. Tureaud, 5 Cir., 225 F.2d 434, affirmed en banc, 5 Cir., 228 F.2d 895, certiorari denied 351 U.S. 924, 76 S.Ct. 780, 100 L.Ed. 1454, by clearest implication reject appellant's contention that in such a situation the named plaintiffs may not bring a class action on behalf of themselves and all others similarly situated. See also Carter v. School Board of Arlington County, Va., 4 Cir., 182 F.2d 531, and Frasier v. Board of Trustees of University of North Carolina, D.C., 134 F.Supp. 589, affirmed per curiam 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848.

Moreover, it is worthy of note that the series of cases generally known as the School Segregation cases themselves were all class actions in the same sense as is the one before us.

In sum, therefore, we find no basis for the appellant's attack on the order entered by the trial court. The able and experienced trial judge gave full recognition to the administrative difficulties attendant upon changing the schools of the Parish of Orleans, including as it

does, the schools of the City of New Orleans, from the established pattern of segregation on account of race. Although requiring immediate acceptance of the principle of non-segregated schools he allowed the Board time to put it into effect. Clearly implying that arrangements should be started at once, he nevertheless fixed the date after which there were to be no further distinction based on race at "such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Edcuation."

[11, 12] It is evident from the tone and content of the trial court's order and the willing acquiescence in the delay by the aggrieved pupils that a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil. Nevertheless whether there is such acceptance by the Board or not, the duty of the court is plain. The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties. However undesirable it may be for courts to invoke federal power to stay action under state authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them.

The orders of the trial court are

Affirmed.

Orleans Parish School Board v. Bush

United States Court of Appeals, Fifth Circuit, February 15, 1958.

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge.

This is a second appearance of this case here and the second attempt to have the court set aside a preliminary injunction entered on February 15, 1956, in favor of plaintiffs, Bush, et al., and against the defendant, Orleans Parish School Board, the sole ground for its reappearance after we affirmed the trial court's order on the merits, being the claim that the temporary injunction was void because the plaintiff failed to make the $1,000 bond that was required to be made in the court's injunction order until after affirmance of the injunction by this Court.

[Decree Below]

The temporary injunction which was issued by the trial court required no immediate affirmative action or cessation of action. It provided as follows:

> "IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Orleans Parish School Board, a corporation and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, supra."

There then followed the paragraph relating to the bond:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a bond be filed by plaintiffs herein in the sum of One Thousand Dollars ($1,000.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained, said bond to be approved by the Clerk of this Court."

The plaintiffs filed no bond immediately thereafter or at any time pending the appeal that was timely taken by the defendant school board. Neither on the appeal nor by motion in the district court did the Board take exception to the failure of the plaintiff to make bond until after this Court published its opinion affirming the injunction order. Then, for the first time, it filed its motion with the trial court "to vacate, set aside and to declare the preliminary injunction issued herein on February 15, 1956, to be null and void and without effect on the ground that plaintiffs have failed to file the bond required by the decree of this Court and by the law."

Thereupon the plaintiffs filed their bond, which was approved on June 19th by the trial judge. Thereafter, on June 26th, the motion to vacate came on for a hearing and was denied by the trial court. This appeal is from the order of denial.

[Rule 64(c), FRCP]

The appellant here contends that Rule 64(c) of the Federal Rules of Civil Procedure requires the making of the bond as a condition precedent to the becoming effective of the temporary injunction, that since none was made "the preliminary injunction was not in effect or in fact issued during this sixteen months period." From this appellant argues that when thereafter the bond was filed this could not cause the injunction to "issue" for the first time. No authorities are cited by appellant in support of this assertion. The School Board relies on cases which hold that a failure of the district court to make provision for the issuance of a bond are void. See Chatz v. Freeman et al., 7 Cir., 204 F.2d 764.

The appellees take the position that the requirement of security by rule 64(c) was intended to protect a party against damage caused by the

wrongful issuance of a temporary injunction, citing United States v. Onan, 8 Cir., 190 F.2d 1, 7; that in this case the injunction order has been affirmed on appeal and it obviously therefore was not erroneously issued; thus appellant could not possibly suffer any damage. They contend that if the failure to file the bond had any effect, it was a mere irregularity which was cured by its subsequent execution. See Standard Bonded Warehouse Co. v. Cooper, 4 Cir., 30 F.2d 842, 845.

[Jurisdiction of Appeals Court]

Although the point is not raised by appellees, who rest confidently on the merits, we must consider the threshold question whether the order of the trial court is reviewable. Normally, of course, the Courts of Appeals review only final orders. There is an exception under 28 U.S.C.A. §1292 as to certain interlocutory orders relating to injunctions. This section provides:

> "The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders . . . granting, continuing modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ."

Since, obviously, the order which required the making of bond could not be void because of a subsequent failure to make it, the appellant's motion to declare the injunction to be null and void and without effect will be treated as a motion to "dissolve" the injunction. As such the order refusing to do so is appealable.

We have heretofore affirmed the order of the trial court. Thus, no asserted defect in that order can now be considered by us. All we can consider is what transpired subsequent to the entry of the temporary injunction. As we have already pointed out, the injunction required no act on the part of the defendants, and in fact it prohibited no specific act in the sense that the defendants could be found in violation of the order without further definitive injunctive order by the court. The fact that the bond was not executed could not, therefore, conceivably have damaged the defendants. That this is so is eloquently testified to by the failure of the defendant itself to take notice of the omission. The affirmance by this Court of the judgment before defendants sought to have it vacated has settled for all time that defendants have not been, and can never be, "wrongfully enjoined" by the order. The bond was functus officio when made by the plaintiffs. Their failure to make it earlier, when it might have had an office to perform, was waived by the defendant when it let the order stand against it until affirmed on appeal.

Judgment AFFIRMED.

Orleans Parish School Board v. Bush

United States Court of Appeals, Fifth Circuit, June 9, 1959.

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

PER CURIAM.

This is the third appearance of this case here. On February 15, 1956, the District Court entered a preliminary injunction ordering "that the defendant, Orleans Parish School Board, a corporation, and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083]."

This order was appealed to this court and was here affirmed, 5 Cir., 242 F.2d 156. The Supreme Court denied certiorari, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436. Subsequently a motion to vacate this preliminary injunction on a technical ground was denied by the trial court and on appeal this order was also affirmed, 5 Cir., 252 F.2d 253. The Supreme Court again denied certiorari, 356 U.S. 969, 78 S.Ct. 1008, 2 L.Ed.2d 1074.

On April 16, 1958, asserting that on July 13, 1956, long before it filed its previous motion to dismiss the injunction, the Legislature passed and the Governor of Louisiana approved Act 319 of the Acts of 1956, LSA-R.S. 17:341 et seq., which deprives the Board of the power to change the racial classification of the Orleans Parish schools, it moved again to dismiss the action on the ground that it "is not a proper party defendant herein."

The Act of 1956 is entitled "An Act To establish a method of classification of public school facilities in any city with a population in excess of 300,000 (in which class New Orleans fits) to provide for the exclusive use of school facilities therein by white and Negro children respectively, the mode of changing the classification of any schools therein, and to provide that white teachers shall teach only white children and Negro teachers shall teach only Negro children." The Act undertakes to provide that a legislative commission shall be appointed to recommend such classifications, to be finally acted upon by the legislature itself, thus depriving the Parish Board of its power to alter its existing pattern of white and negro schools.

Appellant urges that the legislature may under this method, classify some schools as non-segregated schools, although such action would be violative of the provision in the act which requires that teachers of each race teach only members of their own race.

The trial court held that this statute was unconstitutional on its face and denied the motion to dismiss. The court then entered a permanent injunction against the Board in the precise terms of its prior preliminary order quoted above. The Board has appealed.

We affirm the judgment of the trial court. It is immaterial whether the 1956 law is held by the State Supreme Court to be constitutional or unconstitutional so far as concerns the correctness of the trial court's judgment. It has long been held that the state officers found to be operating state institutions or performing state functions contrary to the provisions of the Constitution may be enjoined from continuing such acts. Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156. The trial court has now determined, in accordance with the duty imposed upon it by the United States Supreme Court in Brown v. Board of Education of Topeka, supra, that appellees here are entitled to an order directing the Orleans Parish Board to cease operating racially segregated schools at an unspecified future date. Since, under the Act of 1956, the operation of the Orleans Parish schools is still confided to the appellant Board, it is still the proper party to be made subject to any proper court order touching upon the manner of the operation of the schools under its control.

Judgment affirmed.

ON PETITION FOR REHEARING.

TUTTLE, Circuit Judge.

The petition for rehearing is DENIED. Since it appears from appellant's petition for rehearing, citing the two Supreme Court cases most recently applying the principle of federal court abstention from ruling on the constitutionality of, or construing, state laws until they are interpreted by the state courts, Louisiana Power & Light Co. v. City of Thibodaux, 79 S.Ct. 1070, and Harrison v. National Association for the Advancement of Colored People, 79 S.Ct. 1025, that it does not understand the basis of our decision, we shall attempt to make more clear what was decided in the short per curiam opinion.

Nothing in either of these cases touches upon the issue before us. No cause for abstention by the federal court is shown merely because a suit is brought against state officials whose conduct may be affected by untested state legislation. It is only when the federal court is called on to interpret such state statute or rule on its constitutionality that the rule applies.

In the first of these two cases the trial court was called upon to construe a Louisiana statute. The entire issue before the district court was to be resolved by such construction. In the Harrison case the suit before the three-judge federal court was for the purpose of attacking the constitutionality of the Virginia statute, which had not been construed by the Virginia courts. The court pointed out that the state court construction of it might obviate the necessity for the federal court to make a decision as to its constitutionality.

Here, it has been held repeatedly that the appellant School Board cannot legally continue to operate the public schools confided to its management on a racially segregated basis. No statute of the State of Louisiana can make such management of the schools legally permissible. It makes no difference how the state laws may be changed in order to take away from the Board the power to change the operation of the schools to a non-segregated basis. The Board still cannot operate them illegally. The plaintiffs, under long recognized principles, enunciated by us in Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, can, by

injunction, prevent the operating agency from acting on behalf of the state in an illegal manner to their injury. Thus, this Board is still the only proper party to be enjoined and it is subject to injunction even though the state in its wisdom might see fit to deprive it of the power to operate legally.

We do not reach any question of construction of the state laws at all, once it is determined that this defendant is the agency engaged in the operation that has now been held to be illegal as to these plaintiffs. No conceivable construction of the state statute can affect this result in the slightest degree. Moreover, it must be borne in mind that this is not a diversity action, but it is an action brought by citizens of the State of Louisiana by virtue of a federal law giving the district court jurisdiction to entertain such a suit. There was no basis for the trial court to abstain from proceeding to a final decision and order in the case, and no basis for us to remand it for a stay.

Orleans Parish School Board v. Bush

United States Court of Appeals for the Fifth Circuit, June 2, 1960.

Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

Refusal to Stay, Fifth Circuit, June 2, 1960

Per Curiam:

The motion filed by Appellant on May 31, 1960 praying a stay of the order entered by the Honorable J. Skelly Wright, the trial judge, on the 16th day of May, 1960, having been fully considered the same is hereby denied.

Dissent

CAMERON, Circuit Judge, Dissenting:

In dissenting from the order of this Court denying the motion of Orleans Parish School Board to stay pending appeal the enforcement of the order of the district court of May 11, 1960, I feel constrained to outline briefly my reasons. The order of the district court provides:

> "IT IS ORDERED that beginning with the opening of school in September, 1960, all public schools in the City of New Orleans shall be desegregated in accordance with the following plan:
> A. All children entering the first grade may attend either the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.
> B. Children may be transferred from one school to another, provided such transfers are not based on consideration of race."

The motion for stay presented to us recites that the Board's appeal from the order of the district court involves that court's denial of its motion to vacate the court's order requiring it to present a plan of integration in connection with which denial the district court, acting through a single judge and not in conformity with the statutes providing for three-judge courts, 28 U.S.C. §2281, ruled that a statute of the State of Louisiana, Act 319 of 1956, under which the School Board was making the request, was unconstitutional as being in violation of the Fourteenth Amendment of the Constitution of the United States. The motion further avers that application for stay had been made to and denied by the district court, averring further that the appeal presented serious and substantial questions of law upon which this Court should be permitted to pass, and that irreparable injury would result to appellant, to the citizens of New Orleans and possibly to all the citizens of the State of Louisiana if said order should be enforced. I am of the clear opinion that the order is of doubtful validity and that the circumstances set forth in the motion for stay require that its enforcement be held in abeyance until the appeal can be reached in due course by this Court.

I.

There are several reasons why the order appealed from may by this Court be found to be invalid. It involves, in a vital respect, the lives of eleven thousand twenty-four school children and their parents, marking a radical departure from the conditions under which they have, up to now, lived their lives. And it inevitably involves the community at large.

The Supreme Court in the series of Segregation Cases held that wide discretion was reposed in the district courts, and emphasized that such courts were to conduct hearings to determine conditions prevailing at the time their orders should be entered. And by Rule 52(a), F.R.C.P. it is provided: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." [Emphasis added.] The order appealed from here was entered without the hearing of any evidence at all. There was nothing before the court upon which it could base its order, except its own knowledge or "what it read in the papers." The requirement that the district court make findings of fact and conclusions of law was inserted so that the appellate courts could test whether the discretion vested in the district courts had been properly exercised.

It is settled in this Circuit that segregation as such is not condemned and that integration is not required by the Fourteenth Amendment. Its prohibition is against state action depriving "any person" of life, liberty or property without due process of law and denial "to any person" the equal protection of the laws.

The district court did not have before it any proof that any person included in the group to which the order was made to apply had been denied the equal protection of the laws. It simply ordered that the public schools in the City of New Orleans "shall be desegregated in accordance with the following plan." It thereupon sought to deal with a group of children, which we find from an affidavit attached to the

motion for stay presented to us, included six thousand nine hundred eighty-two Negro children and four thousand forty-two white children. It gave each of said children the right to attend the school nearest his or her home. The showing before us, but not before the district court, was that, in the last school year, a large percentage of children, both Negro and white, were not assigned to schools nearest their respective homes, but to the nearest school which was able to accommodate them, this being necessary because of the crowded conditions existing in both white and Negro schools.

Under these conditions it is, it seems to me, manifest that, if any considerable number of the six thousand nine hundred eighty-two Negro children should demand entrance into "the formerly all white public school nearest their homes," nothing but chaos could result and the enforcement of the order would be accompanied by nothing but harm to the children, the parents and the teachers of both races and to the entire community. I think it exceedingly doubtful if the court below had the power, of its own motion and without calling witnesses before it, to give it some knowledge of the situation, to enter an order of such breadth and scope amounting in reality to an order for a sort of scrambled or pell-mell integration.

II.

I am also exceedingly doubtful of the power of the court below to declare Article 319 of the Laws of Louisiana of 1956, RS 17:344, unconstitutional in the course of conducting the proceedings which led to the entry of the order before us. The Orleans School Board had, by proper pleadings, brought this state statute before the court below contending that, under it, the Legislature of the State of Louisiana had been given jurisdiction of the school matters involved in the suit, to the exclusion of the School Board. If the authority of the School Board to act in the matter before the court had been taken away from the Board and had been vested in the legislature, the court had no right to enter the order it did enter without first striking down the Louisiana Statute. According to the application before us and the exhibits, the court below did this by declaring the Act unconstitutional. This, it seems to me, the district court had no right to do.

The last time such an action has been taken with the sanction of the Supreme Court was when, in 1908, the Attorney General of Minnesota was convicted of contempt of court for violating an order of a United States District Court of that state striking down a Minnesota statute. In his dissenting opinion in that case, Mr. Justice Harlan used this language quoted in Florida v. Jacobson, infra: "We have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign state from proceeding to enforce the laws of the state passed by the legislature of his own state, and thereby suspending for a time the laws of the state. . . ."

To correct the situation brought about by the Young case, the Congress in 1910 passed the statutes which now are 28 U.S.C.A. §§2281-2284, providing that attacks upon state statutes on the ground that they violate the Federal Constitution must be heard by a three-judge court. What the judge below did in this case is in line with a practice sporadically observed in this Circuit in recent years in Segregation Cases. But

all doubt concerning the legality of such a practice has been removed by the recent decision of the Supreme Court in Florida Lime & Avocada Growers, Inc. et al. v. Jacobson, Director, etc., Mar. 7, 1960,---U.S.---, 28 L.W. 4165, et seq. The Court quoted from an opinion by Mr. Chief Justice Taft these words:

> "The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible or necessary conflict between federal and state authority always to be deprecated."

The Court proceeded to a full discussion of the statutes, their history and application, and to indicate that the statutes should be interpreted broadly to insure that a single federal judge should not offend state authorities by any ruling in the course of a trial which adjudicated that a state statute was in contravention of the Federal Constitution. Certainly it is apparent that the judge below, acting by himself, did just this. Such a short-circuiting of established statutory proceedings was not, in my opinion, permissible and I think that, at very least, the question thus raised is a substantial one.

Being of the opinion that the action of the court below is not, on the showing before us, sustainable and that the challenge made by the appeal is probably substantial and in good faith, I think it is our duty to stay the execution of the order until we can pass upon the appeal. I therefore dissent from the contrary action by the majority.

Bush v. Orleans Parish School Board

United States Court of Appeals for the Fifth Circuit, August 6 and 28, 1962.

Court of Appeals Opinion, August 6, 1962

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge.

The Orleans Parish School Board maintains a dual school system in the City of New Orleans. A dual school system is a compulsory biracial system in which certain schools are designated for Negro students and staffed by Negro personnel and certain other schools are designated for

white students and staffed by white personnel. Each school draws students from its own attendance area. The city, therefore, is divided into geographical districts (zones) for Negro schools that are separate but often overlap the districts for white schools.

May 16, 1960, the District Court for the Eastern District of Louisiana ordered desegregation of public schools in New Orleans on a stepladder plan of desegregating a grade a year commencing with the first grade for the 1960-61 term. Two years later, the district court modified the 1960 Plan by an order entered April 9, 1962, and by a second order entered May 29, 1962. The plaintiffs and the Orleans Parish School Board appeal from the court's second order. We approve the order except as this Court now modifies it.

I.

This case goes back to November 1951 when certain Negro school children, through their parents, petitioned the Orleans Parish School Board to desegregate the New Orleans public schools. September 4, 1952, they filed a school desegregation suit against the Board. At that time there were five school segregation cases pending in the United States Supreme Court. The plaintiffs and the School Board agreed to suspend litigation until the Supreme Court should have decided the constitutional issues in the School Segregation Cases. The Supreme Court heard argument on these cases in December 1952, put them back on the docket in 1953 and, after the cases were reargued, announced its decision May 17, 1954, in Brown v. Board of Education.

Six years ago, on February 15, 1956, the district court entered a preliminary injunction ordering the School Board to desegregate the New Orleans schools "with all deliberate speed." Up to that time the Board's opposition to desegregation had been dictated for the most part by long-standing customs and laws long on the statute books. After the injunction was issued the Louisiana legislature enacted a massive body of laws intended to preserve segregation in the schools. For over three years the Orleans Parish School Board seemed hopelessly bogged down in a morass of confusing, harassing legislation. Finally, when it was apparent that the Board could not take independent action, the district court, July 15, 1959, ordered a desegregation plan filed March 1, 1960. Later, the court extended the deadline to May 16, 1960. In April 1960, the Orleans Parish Court of Appeals ruled that under Act 319 of 1956 the legislature, not the Board, had the right to reclassify schools classified by race. Caught again in the middle between Louisiana courts and federal courts, the Board was empty-handed on May 16, 1960. As a result, on that date, having received no plan from the Board, the district court ordered the New Orleans schools desegregated under its own plan of desegregating a year at a time according to a step-ladder program, beginning September 1960. The order reads:

> "IT IS ORDERED that beginning with the opening of schools in September 1960, all public schools in the City of New Orleans shall be desegregated in accordance with the following plan:
> "A. All children entering the first grade may attend either the formerly all white public school nearest their homes, or the formerly all negro public school nearest their homes, at their option.

> "B. Children may be transferred from one school to another, provided such transfers are not based on considerations of race."

July 29, 1960, the State of Louisiana, through its Attorney General, obtained an injunction in the state courts restraining the Board from desegregating public schools in New Orleans. August 17, the Governor of Louisiana, acting under a 1960 law, took over control of public schools in New Orleans. August 27, 1960, a three-judge district court struck down these actions, declared unconstitutional seven Louisiana segregation laws, ordered the Orleans Parish School Board to comply with the order to desegregate, and restrained the Governor and any other state official from interfering with the operation of public schools in New Orleans. August 29 the Board conferred with the district judge to whom the case had been assigned and informed him that the Board, no longer pinned down by restrictive statutes, was at last able to comply fully with his order. The Board asked for a short stay. The district judge postponed the commencement of the Plan to November 14, 1960. In this order he observed that:

> ". . . the Court [was] impressed with the sincerity and good faith of the board, each member of which personally appeared, with the exception of member, Emile A. Wagner, Jr., who was absent from the city at the time. . . ."

In public session the Board adopted the grade-a-year Plan and announced its intention to comply with the court's orders.

The Louisiana legislature did not remain idle. The Governor of the State called five consecutive extra sessions of the legislature (unprecedented in Louisiana) for the purpose of preventing the Board from proceeding with the desegregation program. Among other actions, the legislature seized the funds of the Orleans Parish School Board, forbade banks to lend money to the Board, removed as fiscal agent for the state the Bank which had honored payroll checks issued by the School Board, ordered a school holiday on November 14, addressed out of office four of the five members of the Board, later repealed the Act creating the Board, then on two occasions created a new School Board for Orleans Parish, still later addressed out of office the Superintendent of Schools in Orleans Parish, and dismissed the Board's attorney. The federal courts declared these and a large bundle of related acts unconstitutional.

One hundred and thirty-four Negro children applied for admission to "white" public schools in New Orleans. November 14, 1960, four Negro girls were admitted to two white schools. Small as this may seem in terms of effective desegregation, this was the first time since the founding of the public school system in New Orleans in 1877 that Negro children have attended classes with white children. The effect of this profound change in social customs produced demonstrations, picketing, stone-throwing and turmoil that continued for months; all white parents withdrew their children from one of the schools and all but a handful of parents withdrew their children from the other school. These are facts of life difficult for the ordinary layman to ignore, notwithstanding the instructions in Cooper v. Aaron, 358 U.S. 1, that community hostility to

desegregation cannot be considered as a factor in determining what constitutes "deliberate speed." Nevertheless, the Board stood steadfast. The school year ended much more quietly than it began.

In September 1961 eight Negro children, chosen from 66 applicants, were admitted to four schools formerly considered "white" schools, making a total of twelve Negro children in the first and second grades in six white schools. There were comparatively no disturbances at the desegregated schools during the 1961-62 school year.

On February 14, 1962, 101 additional Negro pupils moved to intervene and for a preliminary injunction. They alleged that the pupil assignment procedures denied Negro pupils in the first grade the right to attend non-segregated schools "at their option," as provided in the 1960 Plan. The complaint also alleged that pupil placement procedures operated to limit desegregation to a few pupils, while maintaining the established segregation pattern, and that the Negro schools were overcrowded. (There are 37,845 white students in 64 schools and 55,820 Negro students in 53 schools in Orleans Parish.) After a full hearing, March 5, the district court filed an opinion, April 3, holding that the Board had not complied with the May 16, 1960, order; that the Board continued to maintain a dual system and used pupil placement procedures discriminatorily. The court ruled:

> "An analysis of the test program demonstrates that the Board, instead of allowing children entering the first grade to make an election as to the schools they would attend, assigned all children to the racially segregated schools in their residential areas. Then, after being so assigned, each child wishing to exercise his right to elect pursuant to the court's plan of desegregation was subjected to the testing program. No children other than first grade were required to take the test. . . . This failure to test all pupils is the consitutional vice in the Board's testing program. However valid a pupil placement act may be on its face, it may not be selectively applied. Moreover, where a school system is segregated, there is no constitutional basis whatever for using a pupil placement law. A pupil placement law may only be validly applied in an integrated school system, and then only where no consideration is based on race."

In line with this ruling, April 9 the Court entered a temporary injunction forbidding the Board to apply the Louisiana Pupil Placement Act to any pupil as long as the Board operates a dual school system based on racial segregation.

In addition, the district court found: "The evidence shows that 5,540 negro elementary school children are on platoon, but no white. The evidence shows further that the average class size in the Negro elementary schools is 38.3 pupils compared to 28.7 in the white, that the pupil-teacher ratio in the elementary school is 36.0 to 1 for Negro, 26.1 to 1 for white, and that Negro classes are conducted in classrooms converted from stages, custodians' quarters, libraries and teachers' lounge rooms, while similar classroom conditions do not exist in the white schools."

Because of this finding, the court in its April 9 order accelerated the stepladder program by three grades. Under the May 16 decree, commencing in September 1962, all children entering grades one through six were given the option to attend the public school nearest their homes, whether the school was formerly all-white or all-negro. The basis for the cut-off at the sixth grade was evidence showing platooning in Negro schools through the first six grades. As everyone well understood, the order amounted to effectively desegregating the first six grades since there had been so little desegregation in the first and second grades during the two years the 1960 Plan was in effect.

April 17, 1962, the School Board moved for a new trial on the grounds that the district court erred (1) in ordering the first six grades desegregated and (2) in holding that the Louisiana Pupil Placement Law may be applied only where dual school systems based on race have been eliminated.

The district judge to whom the New Orleans School Case fell by chance in 1952 was Judge J. Skelly Wright, an able, courageous, and experienced judge. In the middle of April, 1962, Judge Wright was sworn in as a member of the Court of Appeals for the District of Columbia. Shortly thereafter Judge Frank B. Ellis succeeded Judge Wright.

May 1, the district court stayed the April 9 order and granted a new trial under Rule 59, Fed. R. Civ. P., but decided that no new tesimony need be heard. May 29, 1962, Judge Ellis readopted the year by year plan, commencing with the first grade in September 1962 and modifying the expanded order of April 9 in several important respects. The order of May 29 reads:

> "It is therefore the order of this Court that the order of April 9, 1962, be and the same is hereby modified as follows:
> 1) The order to desegregate the first six grades by September 1, 1962, is WITHDRAWN.
> 2) Beginning with the opening of school in 1962, every child in the City of New Orleans entering the first grade may attend the formerly all-white or formerly all-negro school nearest his home, at his option.
> 3) Each year, beginning with the opening of school in 1963, the children in one additional higher grade beginning with the second grade may attend the formerly all-white or formerly all-negro school nearest his home, at his option.
> 4) Children may be transferred from one school to another provided such transfers are not based on consideration of race.
> 5) Beginning in September of 1963 the dual system of separate geographical districts in the 1st and 2nd grades shall be abolished, and each year thereafter as each succeeding higher grade is integrated the dual system shall be abolished contemporaneously therewith.
> 6) The Louisiana Pupil Placement Law may be applied to any child only where dual school systems based on race have been eliminated and assignments are made without regard to race."

The School Board appeals from this order on the ground that the district court erred in ruling that the "Pupil Placement Law may be applied to any child only where dual school systems based on race have been eliminated." The Board does not take the position that it may permanently maintain a dual school system and apply the Act; the Board contends that during a period of transition to a racially non-discriminatory system, it may use the Act. The plaintiffs appeal on the ground that the district court erred in requiring desegregation only at the first grade level in September 1962 and in providing for desegregation of the other grades on a step-by-step plan.

II.

The area of agreement between the orders of April 9 and May 29 and their supporting opinions is larger and more significant than the area of disagreement. In the supporting opinions the two district judges agreed on the basic aspects of the problem:

(1) the Orleans Parish School Board had never submitted a plan itself and had not complied with the 1960 Plan for desegregating public schools in New Orleans;

(2) the technique for maintaining segregation was the unconstitutional, discriminatory application of the Louisiana School Placement Act to Negroes only;

(3) the effectiveness of the Act as a technique for maintaining segregation depended on the continued use of a dual or biracial system of school districts.

There is considerable agreement on the solution of the problem. Both district judges accept the principle set forth in the original 1960 order; effective desegregation requires that when the first grade is desegregated children entering that grade shall have an option to attend the school nearest their homes, whether in any case the school was formerly an all-white or all-negro school. Both agree that this must be accomplished without prior assignment of children to segregated schools. The order of April 9 accomplishes this by providing:

> "(C) As long as the defendant, Orleans Parish School Board, operates a dual school system based on racial segregation, the Louisiana Pupil Placement Act shall not be applied to any pupil."

Somewhat more drastically, the order of May 29 similarly provides:

> "5) Beginning in September of 1963 the dual system of separate geographical districts in the 1st and 2nd grades shall be abolished, and each year thereafter as each succeeding higher grade is integrated the dual system shall be abolished contemporaneously therewith.
> 6) The Louisiana Pupil Placement Law may be applied to any child only where dual school systems based on race have been eliminated and assignments are made without regard to race."

The April 9 order does not in terms abolish the dual system, but it forbids the Board to use the Pupil Placement Act as long as the Board operates the dual system. The May 29 order allows a year for planning but picks up this year by requiring the abolition of the dual system for the first and second grades in September 1963. This order affirmatively allows the Board to use the Pupil Placement Act only where the dual system is eliminated. Both orders are ambiguous in that it is not clear whether the Act may be applied in any grade, as long as there are segregated grades controlled by the dual district system. The intention of the Court may have been to prohibit the application of the Act to segregated grades.

The essential difference between the two orders is that the order of April 9 establishes the option for the first six grades while the order of May 29 establishes the option for the first grade, commencing with the opening of school in September 1962. Important as this difference is to New Orleans, we regard as more important the constitionality of the Board's application of the Pupil Placement Act within the framework of the dual system of racial zones.

III.

A. Recently, in Augustus v. Board of Public Instruction of Escambia County, June, 1962, a case not yet reported, Judge Rives commented, "Unfortunately . . . the appellee Board, like so many others, administered the pupil assignment law in a manner to maintain complete segregation in fact." Here, too, we are compelled to say that the Orleans Parish School Board maintained virtually complete segregation in fact.

The 1960 Plan gave each child an unrestricted option to attend the school nearest his home, whether it was formerly an all-white or an all-negro school. But the Board did not allow the children to exercise this option on entering the first grade. Instead, the Board assigned all children to racially segregated schools in their residential area as determined according to the Board's maps of separate Negro and white school districts for New Orleans. The Board then used the placement tests only for applications for transfer. The 130 Negro children who failed their first grade tests in 1960 stayed where they were assigned; no white children were given any tests as a prerequisite to entering the first grade in white schools.

The evidence fully supports the findings of the district court. Judge Wright found:

> "To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form."

Even more strongly, Judge Ellis found:

> "In New Orleans the statute was used solely for transfer, rather than assignment and transfer as required by the statute. The statute was applied solely to negroes and in the context of a bi-racial system. It goes without saying that although the 'School Placement Law furnishes the legal machinery

> for an orderly administration of the public schools in a constitutional manner,' . . .'[the] obligation to dis-establish imposed segregation is not met by applying placement or assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before.' If pupil assignment cannot be made on the basis of race, it irresistably follows that the prerequisite to assignment may not be applied along racial lines. It does no good to say that the Pupil Placement Law is applied solely to transferees without regard to race when the procedure is so devised that the transferees are always negroes. . . . This Court cannot countenance the present application of the Louisiana Pupil Placement Law in the present status of the Orleans Parish Schools. To believe that desegregation can be effected here with all deliberate speed through application of the Pupil Placement Law is indeed no more than 'a speculative possibility wrapped in disuasive qualifications.' However, if dual school systems are eliminated and the Pupil Placement Law is administered even-handedly without overtones of race, the constitutional inhibition is alleviated. Once a child is given the opportunity to choose a school on a non-racial basis, he may be segregated according to academic ability. The mechanics of the plan to be constitutionally applied by the Board would also necessitate a dissolution of the dual schools system."

The School Board insists that the plan was applied to both white and Negro children. This is no doubt true--with respect to all Negro children applying for transfer to Negro schools and all white children applying to white schools. This is a proper constitutional use of the Act. But when, purportedly as a vehicle for desegregating, the Board applied the Act to Negro first graders only after they had already been assigned to segregated schools in a dual school system, the Board used the Act discriminatorily.

In this aspect of pupil assignment the facts present a clear case where there is not only deprivation of the rights of the individuals directly concerned but deprivation of the rights of Negro school children as a class. As a class, and irrespective of any individual's right to be admitted on a non-racial basis to a particular school, Negro children in the public schools have a constitutional right to have the public school system administered free from an administrative policy of segregation. Geographical districts based on race are a parish-wide system of unconstitutional classification. Of course, it is undoubtedly true that Brown v. Board of Education dealt with only an individual child's right to be admitted to a particular school on a non-racial basis. And it is also true, as the second Brown opinion pointed out, that courts must bear in mind the "personal interest" of the plaintiffs. In this sense, the Brown cases held that the law requires non-discrimination as to the individual, not integration. But when a statute has a state-wide

discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation.

We affirm the holding of the district court that the Orleans Parish School Board applied the Louisiana Pupil Placement Act unconstitutionally.

B. A number of cases have severely restricted the use of Pupil Placement Laws. In a recent case the Sixth Circuit ruled: "Since [Brown v. Board of Education] there cannot be 'Negro' schools and 'white' schools. There can now be only schools, requirements for admission to which must be on an equal basis without regard to race. . . . The admission of thirteen Negro pupils, after a scholastic test, which the white children did not have to take, out of thirty-eight who made application for transfer, is not desegregation, nor is it the institution of a plan for non-racial organization of the Memphis school system." Northcross v. Board of Education of City of Memphis, 6 Cir., 1962, 302 F.2d 819.

This Court, like the district court, condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation. When the Act is appropriately applied, to individuals as individuals, regardless of race, it has no necessary relation to desegregation at all. The Act recognizes the power of discretion in a School Board that inheres without benefit of the statute. The Act establishes, for the transfer of students, criteria which in many instances are so obvious as to be unnecessary (an intelligence test, for example) and in other instances are vague, conflicting, and administratively infeasible. Putting to one side the potentialities of the Pupil Placement Act as an element in the technique of maintaining segregation, the statute is an unusual experiment in education. By means of the Act student bodies can be so controlled that substantially all of the students in any one or more of the schools will be on the same intellectual and cultural level and have the same social background. The wisdom of this policy is not for the courts. It is especially not the business of federal courts how a state operates its schools or experiments with educational theories: as long as the state and its agents do not violate the Constitution. The Orleans Parish School Board may interpret the Placement Act as it pleases and apply it as and when it pleases--as long as placements under the Act are made without racial discrimination.

This is to say that the New Orleans School Board may not use the Act in the future as it has used it in the past. The Act is not an adequate transitionary substitute in keeping with the gradualism implicit in the "deliberate speed" concept. It is not a plan for desegregation at all.

There are legitimate uses of the Act. Here is one important example. Under the 1960 Plan the Board, correctly we think, interpreted the Plan as applicable only to the first grade; the Negro children attending white schools were to be the apex of a widening triangle. There is a sound educator's reason for such a plan: It makes for easier educational adjustments. Had the dual system been done away with in the

in the first grade the Plan, although initiated six years after Brown and although a twelve year plan, would have been in compliance with the "deliberate speed" concept established by the Supreme Court. This conclusion seems implicit in the order of the district court in May 1960. But when the dual system was continued and the Pupil Placement Act applied only after first graders were assigned to segregated schools, it became apparent that desegregation in New Orleans would be a pencil point, not a widening triangle. The transfer of twelve Negro children to white schools over a two-year period is not the institution of a gradual plan for a non-racial school system. It is not even a good start. The children entering the second and third grades in 1962-63 have not had the option supposedly given them in the 1960 Plan. At this late date in the year, however, a large number of lateral transfers from the second and third grades commencing in September 1962 would create serious administrative difficulties. Therefore, in order to bring these grades within the scope of the 1960 Plan, as nearly as is now feasible, we modify the May 29 order so that children attending the second and third grades in 1962-63 will be given the limited right to transfer to the school nearest their home under a good faith, non-discriminatory application of the Pupil Placement Act to such transfers.

There are other possibilities for a good faith use of the Act during the transition to full desegregation. The Orleans Parish School Board operates one of the finest schools in the country for superior students, Benjamin Franklin High School. To be admitted, students must meet exceptionally high intellectual standards. School adjustments between Negro and white students meeting on the same intellectual plane should not be difficult. And, eight years after Brown v. Board of Education is not too soon for a qualified Negro to be admitted to Benjamin Franklin High School. We suggest that the Board consider opening all four high-school grades at this school to Negroes who can meet the school's exacting requirements. Here, too, although the dual or biracial system now controls the high schools, would be a proper place for the good faith, non-discriminatory use of the Pupil Placement Act.

Again, the time will come when desegregation may necessitate transfers from overcrowded to undercrowded schools. In such cases, the Pupil Placement Act may be a useful tool, if it is accompanied by a good faith avoidance of resegregation.

There are doubtless other situations in which effective grade by grade desegregation may be accomplished along with the good faith use of the law providing for the assignment of a pupil to a particular school. At this stage in making the difficult adjustment to a non-racial school system it is too early to throw the Pupil Placement Act overboard. In New Orleans and elsewhere the problems are so varied, the administrative difficulties so numerous, the possible solutions so unpredictable that courts are not in a position to bar absolutely the use of the Act by a school board sincerely attempting an orderly transition to full desegregation by a fixed date. To a great extent the gradual abolition of dual districting will render the Act obsolete as an instrument (genuine or false) for desegregation. At this point, it is better to keep desegregation procedures flexible.

We do not overlook the fact that the members of the Orleans Parish School Board have earned a reputation for integrity and strength of character. The district judge who held against them, yet praised their good faith, said in his last opinion in this case: "The School Board

here occupies an unenviable position. Its members, elected to serve without pay, have sought conscientiously, albeit reluctantly, to comply with the law on order of this court. Their reward for this service has been economic reprisal and personal recrimination from many of their constituents who have allowed hate to overcome their better judgment."

When a case involves the administration of a state's schools, as federal judges we try to sit on our hands. But--we must serve notice that the Act is not a desegregation plan and that this Court cannot tolerate discrimination in the name of the Act. The key to the problem is the elimination of dual or biracial school zones. The limiting principle is clear: the Act may not be used discriminatorily. The touchstone is good faith.

IV.

When we come to the question of accelerating or decelerating the year-by-year plan adopted in 1960, we are struck by the lack of a sound basis for acceleration or deceleration. There was substantially the same evidence of overcrowding in 1960 as in 1962. The most logical decree to have rendered in April or May 1962 would have been an order requiring the Board to bring ths school system into compliance with the original plan of the district court which was approved by this Court. Such an order would give the second-graders and third-graders the same option the first-graders have under the May 29 decree. Unfortunately, at this moment in this case there is too large a gap between logic and experience. The experience the Orleans Parish School Board has gone through to bring about the admission of twelve Negro children to white classes is some indication of the problems that would be created if, this late in the year, three grades were ordered completely desegregated. We are talking now about administrative problems, whatever their source, not community hostility to desegregation as such or problems of law and order as such.

The 1960 grade-a-year desegregation Plan for New Orleans is similar to the plan today in Atlanta, Houston, Dallas, and Nashville. It is as sound now as it was in 1960. We modify the May 29 order, therefore, so that, within the bounds of administrative feasibility, the second and third grades will have an additional measure of desegregation, even if they are not on the identical basis as the incoming first grade. This will be accomplished by allowing pupils now enrolled in the second-grade and third-grade in segregated schools to be transferred in the 1962-63 term. In addition and in order to bring about further compliance with the 1960 Plan, we have broadened the base for abolition of dual districts. The May 29 order allows dual districts during the 1962-63 term, but commencing September 1963 does away with the dual system in the first and second grades. That takes care of the first grade for 1962-63 but not the second and third grades which were supposedly desegregated in the 1960 Plan. To do justice to children who are in these grades, without effecting too violent a change administratively, we provide for the additional abolition of the dual systems in the fourth and fifth grades for the 1964-65 term. Thereafter, as in the district court's order, dual districting will be abolished on a grade a year basis.

V.

This Court approves the district court's orders of May 29 and April 9, 1960, amending and clarifying the desegregation plan of the Orleans Parish School Board set forth in the order of May 16, 1960, except as modified below:

1. Beginning with the opening of school in 1962, every child in the Parish or Orleans entering the first grade shall have the option of attending the formerly all-white or formerly all-Negro school nearest his home.
2. Each year, beginning with the opening of school in 1963, every child in one additional higher grade, beginning with the second grade, may attend the formerly all-white or formerly all-Negro school nearest his home, at his option.
3. Each child enrolled in the second and third grade for the school year 1962-63 may transfer to the formerly all-white or formerly all-Negro school nearest his home, at his option.
4. The Board may transfer children from one school to another provided that the Board does not base such transfers on racial considerations.
5. Negro children who attended formerly all-white schools in 1960-61 and 1961-62 and Negro children who have registered for attendance at formerly all-white schools in 1962-63 and subsequent years may not be transferred or assigned to an all-Negro school against their wishes. If the transfer of white students from such schools would result in resegregation, the Negro children shall be afforded an opportunity to attend a nearby formerly all-white school without being subjected to tests for transfer under the Pupil Placement Act.
6. In September 1963 the dual system of separate geographical districts for the first and second grades shall be abolished. In September 1964 the dual system shall be abolished for the first five grades. Each year thereafter, as each succeeding higher grade is desegregated the dual system shall be abolished contemporaneously therewith. As the dual system is abolished, the Board shall submit to the Court for approval its maps and plans for a single system of geographical school districts.
7. The Louisiana Pupil Placement Act may be applied only when the Board makes placements without regard to race. In such situations the Board will be expected to base its application of the Act on high standards of good faith.

The judgment below is AFFIRMED in part and REVERSED in part. The case is REMANDED to the district court for action consistent with this opinion.

Court of Appeals Opinion, August 28, 1962

Before RIVES, BROWN and WISDOM, Circuit Judges.

WISDOM, Circuit Judge:

The Orleans Parish School Board has filed an application for a rehearing in which it has prayed that this Court's judgment of August 6,

1962 in this cause be set aside or modified in certain respects. The basis for the request for modification rests on the Board's adoption of (1) a Long Range Plan and (2) a Transitionary Plan for the scholastic year 1962-63 for the desegregation of the public schools of New Orleans. Attorneys for the Board submitted the plans to the district court. After a conference with the attorneys for both the appellants and appellees, who were in agreement on the Transitionary Plan, the district court approved the substance of this plan subject to further orders of this Court. The district court also approved the substance of the Long Range Plan. The attorneys for the Negro plaintiffs, the appellants, have neither approved nor disapproved of the Long Range Plan; they request time within which to study the details of this plan.

I.

The action of the Board in adopting detailed plans for submission to the district court represents a forward step in the proper direction of recognizing local responsibility for preparing desegregation plans and putting such plans into effect. We observe again that desegregation procedures, within reasonable limits, must be flexible in order to fit local needs and new situations as they arise and present problems. Here, as in Augustus v. Board of Public Instruction of Escambia County, 5 Cir., 1962, F.2d , we say that the primary responsibility for judicial supervision lies with the district court. It is the tribunal best qualified to wrestle with specifics. "We are reluctant to substitute our judgment for that of the district court . . . Further amendments to the plan may be suggested by the plaintiffs and will occur to the Board, now acting in good faith, and to the district court, and operation of the plan will be supervised by the district court, all to the end that complete desegregation of the public schools may be accomplished 'with all deliberate speed.'" In all of the school segregation cases, "the district court will, of course, retain jurisdiction throughout the period of transition. Brown v. Board of Education, 1955, 349 U.S. 294, at 301." Nevertheless, it is our duty to review the action of the district court and, in the proper case, to modify the orders of that court and of this Court.

II.

The Long Range Plan is not to take effect until September, 1963. And, the Board's plans for the scholastic year 1963-64 are identical with the orders of the district court and this Court. The suggested modification is not to take effect until September 1964. In the meanwhile, the Board has directed the Superintendent of Schools to prepare, by December 1, 1962, a detailed study of ways and means of abolishing the presently existing bi-racial school zones in the Parish of Orleans. Until the Board and its Superintendent have had an opportunity to complete such a study, and until there has been a hearing before the district court with full opportunity for the plaintiff's attorneys to oppose this Long Range Plan, it is premature for this court to consider the proposal. Accordingly, we take no action on that plan at this time. So that there will be no misunderstanding and no cause for unnecessary delay, we now say to the Board that the mandate of the Court previously issued in this cause does not forbid the preparation and submission to the district court of the Long Range Plan or other plans and recommendations for

modifying the presently existing court-approved plan for desegregation of New Orleans Schools.

III.

The substance of the Transitionary Plan is in accord with the language and spirit of the opinion of this Court of August 6. The attorneys for the appellants approved the proposal, without qualification, and the district court has approved it, subject to orders of this Court.

The primary purpose of the recommended modification of this Court's order is to alleviate overcrowding in Negro schools. This is to be accomplished, in good part, by converting McDonogh 19, Judah P. Benjamin and William O. Rogers Schools, into Negro schools. The Board avers that as a result of this conversion, plus the completion of construction projects during 1962-63, approximately 5000 Negro students will be taken off the platoon system. In addition, the size of classes in eighteen Negro schools will be reduced. Any child, without regard to race, who attended McDonogh 19, William O. Rogers, or Judah P. Benjamin Schools in the scholastic year 1961-62 may attend either the white school or the Negro school in his residence district. Negro children who registered at these schools for the year 1962-63 will be within the uni-racial system for the year 1963-64.

In view of the agreement by the parties and the approval of the district court of the Board's Transitionary Plan, paragraph five of the order of this Court of August 6, 1962, is herewith modified to permit the Orleans Parish School Board to make such changes in the administration of McDonogh 19, William O. Rogers, and Judah P. Benjamin Schools as will be necessary or proper in order to carry out the provisions of its Transitionary Plan.

The petition of the Orleans Parish School Board is herewith granted in part and denied in part. It is ordered that the mandate be issued forthwith in accordance with this opinion and judgment of the Court.

SELECTED BIBLIOGRAPHY

A. Materials Relating to the Federal Judicial System

Books

Abraham, Henry J. The Judicial Process. 2nd ed. New York: Oxford University Press, 1968.

Bunn, Charles. A Brief Survey of the Jurisdiction and Practice of the Courts of the United States. 5th ed. St. Paul, Minn.: West Publishing Co., 1949.

Chase, Harold W. Federal Judges: The Appointing Process. Minneapolis: University of Minnesota Press, 1972.

Cound, John J., Friendenthal, Jack H., and Miller, Arthur R. 1974 Civil Procedure Supplement. St. Paul, Minn.: West Publishing Co., 1974.

Friendly, Henry J. Federal Jurisdiction: A General View. New York: Columbia University Press, 1973.

Goldman, Sheldon, and Jahnige, Thomas P., eds. The Federal Judicial System: Readings in Process and Behavior. New York: Holt, Rinehart & Winston, 1968.

Grossman, Joel B. Lawyers and Judges: The ABA and the Politics of Judicial Selection. New York: John Wiley & Sons, 1965.

Hart & Wechsler's the Federal Courts and the Federal System. 2nd ed. Mineola, N.Y.: The Foundation Press, Inc., 1973.

Jacob, Herbert. Justice in America: Courts, Lawyers, and the Judicial Process. 2nd ed. Boston: Little, Brown and Company, 1972.

Jones, Harry W., ed. The Courts, the Public, and the Law Explosion. Englewood Cliffs, N.J.: A Spectrum Book, Prentice Hall, Inc., 1965.

Lewis, Anthony. Gideon's Trumpet. New York: Vintage Books, 1964.

Manning, Christopher A. Judgeship Criteria: Standards for Evaluating the Need for Additional Judgeships. Chicago: American Judicature Society, 1973.

Murphy, Walter F., and Pritchett, Herman. Courts, Judges, and Politics: An Introduction to the Judicial Process. New York: Random House, 1961.

Peltason, Jack W. Federal Courts in the Political Process. Garden City, N.Y.: Doubleday & Company, 1955.

Reimer, Richard H. A Guide to Court Systems. 5th ed. New York: Institute of Judicial Administration, 1971.

Richardson, Richard J., and Vines, Kenneth N. The Politics of Federal Courts: Lower Federal Courts in the United States. Boston: Little, Brown and Company, 1970.

Schubert, Glendon, ed. Judicial Decision-Making. New York: Free Press of Glencoe, Macmillan Co., 1963.

Articles

Atkins, Burton M. "Decision Making Rules and Judicial Strategy on the United States Courts of Appeals." Western Political Quarterly, XXV (1972), pp. 626-642.

_____. "Judicial Behavior and Tendencies Toward Conformity in a Three Member Small Group: A Case Study of Dissent Behavior on the U.S. Court of Appeals." Social Science Quarterly, LIV (1973), pp. 41-53.

_____, and Zavoina, William. "Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit." American Journal of Political Science, XVIII (1974), pp. 701-712.

Goldman, Jerry. "Federal District Courts and the Appellate Crisis." Judicature, LVII (1973), p. 211.

Goldman, Sheldon. "Conflict and Consensus in the United States Courts of Appeals." Wisconsin Law Review, MCMLXVIII (1968), p. 461.

_____. "Voting Behavior on the U.S. Courts of Appeals Revisited." American Political Science Review, LXIX (1975), p. 491.

Haworth, Charles R. "Screening and Summary Procedures in the United States Courts of Appeals." Washington University Law Quarterly, MCMLXXIII (1973), pp. 257-326.

Jacob, Herbert. "The Courts as Political Agencies--An Historical Analysis." Tulane Studies in Political Science, VIII (1962), pp. 9-50.

Prettyman, E. Barrett. "The Duties of a Circuit Chief Judge." American Bar Association Journal, XLVI (1960), p. 633.

Richardson, Richard J., and Vines, Kenneth N. "Review, Dissent and the Appellate Process: A Political Interpretation." Journal of Politics, XXIX (1967), pp. 597-616.

Steamer, Robert J. "The Role of the Federal District Courts in the Segregation Controversy." Journal of Politics, XXII (1960), p. 421.

Steele, Leslie A. "A New Home for Fifth Circuit Court of Appeals." Florida Bar Journal, XLVII (1973), pp. 450-453.

Wright, Charles Alan. "The Overloaded Fifth Circuit: A Crisis in Judicial Administration." Texas Law Review, XLII (1964), p. 949.

Official Government Reports

Administrative Office of the United States Courts. Annual Report for fiscal year ending June 30, 1963. Published in conjunction with the Report of the Judicial Conference of the United States in the year 1964. Washington, D.C.: U.S. Government Printing Office, 1964.

Commission on Revision of the Federal Court Appellate System. Structure and Internal Procedures: Recommendations for Change. Washington, D.C.: n.p., 1975.

Committee on the Judiciary, United States House of Representatives, 94th Congress, 1st Session. The United States Courts: Their Jurisdiction and Work. Washington, D.C.: U.S. Government Printing Office, 1975.

Committee on the Judiciary, United States Senate, 92nd Congress, 2nd Session. Legislative History of the United States Courts of Appeals and the Judges Who Served During the Period 1801 Through May 1972. Washington, D.C.: U.S. Government Printing Office, 1972.

Howard, J. Woodford, Jr. Decision Making Procedures in U.S. Courts of Appeals for the 2nd and 5th Circuits. Washington, D.C.: Federal Judicial Center, 1973.

_____. The Flow of Litigation in the United States Courts of Appeals for the Second, Fifth, and District of Columbia Circuits. Washington, D.C.: Federal Judicial Center, 1973.

_____. Role Perceptions on the U.S. Courts of Appeals for the 2nd, 5th, and D.C. Circuits. Washington, D.C.: Federal Judicial Center, 1973.

Langner, James E., and Flanders, Stephen. Comparative Report on Internal Operating Procedure of the United States Courts of Appeals. Washington, D.C.: Federal Judicial Center, 1973.

Shafroth, Will. "Survey of the United States Courts of Appeals." Federal Rules Decisions, XLII (1967), p. 243.

Whittaker, William L. Description of the Operating Procedures of the United States Court of Appeals for the Fifth Circuit. Washington, D.C.: Federal Judicial Center, 1973.

Unpublished Materials

Harper, Robert A., Attorney at Law. Private telephone interview. Gainesville, Florida, July 8, 1976.

Green, Aaron, Attorney at Law. Private telephone interview. Gainesville, Florida, July 12, 1976.

B. Materials Relating to the Southern Climate of Opinion

Books

Bartley, Numan V. The Rise of Massive Resistance: Race and Politics in the South During the 1950's. Baton Rouge: Louisiana State University Press, 1969.

Carter, Hodding. Southern Legacy. Baton Rouge: Louisiana State University Press, 1950.

Carter, Hodding, III. The South Strikes Back. Garden City, N.J.: Doubleday & Company, 1959.

Cash, Wilber J. The Mind of the South. New York: Alfred A. Knopf, 1941.

Clark, Thomas D. The Emerging South. New York: Oxford University Press, 1961.

Dabbs, James McBride. The Southern Heritage. New York: Alfred A. Knopf, 1958.

_____. Who Speaks for the South? New York: Funk & Wagnalls Company, Inc., 1964.

Degler, Carl N. The Other South: Southern Dissenters in the Nineteenth Century. New York: Harper & Row, 1974.

Eaton, Clement. The Mind of the Old South. Baton Rouge: Louisiana State University Press, 1964.

Gates, Robbins L. The Making of Massive Resistance: Virginia's Politics of Public School Desegregation, 1954-1956. Chapel Hill: University of North Carolina Press, 1962.

Hamilton, Charles V. The Bench and the Ballot: Southern Federal Judges and Black Voters. New York: Oxford University Press, 1973.

Havard, William C., ed. The Changing Politics of the South. Baton Rouge: Louisiana State University Press, 1972.

Hays, Brooks. A Southern Moderate Speaks. Chapel Hill: University of North Carolina Press, 1959.

Leiserson, Avery, ed. The American South in the 196D's. New York: Frederick A. Praeger, 1964.

McGill, Ralph. The South and the Southerner. Boston: Little, Brown and Company, Atlantic Monthly Press, 1959.

McKean, Keith F. Cross Currents in the South. Denver: Alan Swallow, 196D.

Morris, Willie, ed. The South Today: 1DD Years After Appomattox. New York: Harper & Row, 1965.

Myrdal, Gunnar. An American Dilemma: The Negro Problem and Modern Democracy. New York: Harper & Row, 1944, 1962.

Nicholls, William H. Southern Tradition and Regional Progress. Chapel Hill: University of North Carolina Press, 196D.

Norris, Hoke, ed. We Dissent. New York: St. Martin's Press, 1962.

Peltason, Jack W. 58 Lonely Men: Southern Federal Judges and School Desegregation. Urbana, Illinois: University of Illinois Press, 1961, 1971.

Sarratt, Reed. The Ordeal of Desegregation: The First Decade. New York: Harper & Row, 1966.

Silver, James W. Mississippi: The Closed Society. New York: Harcourt, Brace & World, Inc., 1966.

Thorp, Willard. A Southern Reader. New York: Alfred A. Knopf, 1955.

Woodward, C. Vann. Origins of the New South 1877-1913. Baton Rouge: Louisiana State University Press, 1951.

Workman, William D. The Case for the South. New York: Devin-Adair Company, 196D.

Zeigler, Benjamin-Murr, ed. Desegregation and the Supreme Court. Boston: D.C. Heath & Company, Problems in American Civilization, 1958.

Zinn, Howard. The Southern Mystique. New York: Alfred A. Knopf, 1964.

C. Materials Relating to the Cases

Book

Inger, Morton. Politics and Reality in an American City: The New Orleans School Crisis of 196D. New York: Center for Urban Education, 1969.

Newspapers

Miami Herald. August 19, 1954-November 25, 1959.

New York Times. August 19, 1954-September 7, 1962.

Legal Cases

Bell v. Rippy. 133 F.Supp. 811, 1 RRLR 318 (N.D. Tex. 1955); 146 F.Supp. 485, 2 RRLR 32 (N.D. Tex. 1956).

8orders v. Rippy. 247 F.2d 268, 2 RRLR 805 (5th Cir. 1957); 2 RRLR 984 (5th Cir. 1957); 2 RRLR 985 (N.D. Tex. 1957); 4 RRLR 877 (N.D. Tex. 1959); 184 F.Supp. 402, 5 RRLR 679 (N.D. Tex. 196D); 195 F.Supp. 732, 6 RRLR 746 (N.D. Tex. 1961).

8oson v. Rippy. 275 F.2d 85D, 5 RRLR 392 (5th Cir. 1960); 285 F.2d 43, 5 RRLR 1D48 (5th Cir. 196D).

8rown v. 8oard of Education of Topeka. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

Brown v. Rippy. 233 F.2d 796, 1 RRLR 649 (5th Cir. 1956).

Bush v. Orleans Parish School 8oard. 138 F.Supp. 336, 1 RRLR 3D5 (E.D. La. 1956); 138 F.Supp. 337, 1 RRLR 3D6 (E.D. La. 1956); 5 RRLR 378 (E.D. La. 1960); 5 RRLR 655 (5th Cir. 196D); 191 F.Supp. 871, 6 RRLR 74 (E.D. La. 1961); 194 F.Supp. 182, 6 RRLR 413 (E.D. La. 1961); 204 F.Supp. 568, 7 RRLR 19 (E.D. La. 1962); 2D5 F.Supp. 893, 7 RRLR 349 (E.D. La. 1962); 3D8 F.2d 491, 7 RRLR 693 (5th Cir. 1962); 230 F.Supp. 5D9 (E.D. La. 1963); 9 RRLR 667 (E.D. La. 1964); 9 RRLR 1747 (E.D. La. 1964).

Dallas Independent School District v. Edgar. 255 F.2d 241, 3 RRLR 656 (5th Cir. 1958); 328 S.W.2d 2D1, 4 RRLR 878 (Ct.Civ. App. Tex. 1959).

Denny v. 8ush. 367 U.S. 908 (1961).

Gibson v. Board of Public Instruction of Dade County. 2 RRLR 9 (S.D. Fla. 1956); 246 F.2d 913, 2 RRLR 784 (5th Cir. 1957); 170 F.Supp. 454, 4 RRLR 21 (S.D. Fla. 1958); 272 F.2d 763, 4 RRLR 859 (5th Cir. 1959).

Gremillion v. U.S. 368 U.S. 11 (1961).

Kelly v. Board of Education of Nashville. 270 F.2d 209 (6th Cir. 1959).

Orleans Parish School Board v. Bush. 351 U.S. 948 (1956); 242 F.2d 156 (5th Cir. 1957); 354 U.S. 921 (1957); 252 F.2d 253, 3 RRLR 171 (5th Cir. 1958); 163 F.Supp. 701, 3 RRLR 649 (E.D. La. 1958); 268 F.2d 78, 4 RRLR 581 (5th Cir. 1959); 187 F.Supp. 42, 5 RRLR 655 (E.D. La. 1960); 188 F.Supp. 916, 5 RRLR 1000 (E.D. La. 1960); 364 U.S. 803 (1960); 365 U.S. 569 (1960); 190 F.Supp. 861 (E.D. La. 1960); 367 U.S. 908 (1961); 368 U.S. 11 (1961).

Rippy v. Borders. 250 F.2d 690, 3 RRLR 17 (5th Cir. 1957).

Rippy v. Brown. 352 U.S. 878 (1956).

School Board of City of Charlottesville v. Allen. 240 F.2d 59 (4th Cir. 1956).

Shuttlesworth v. Birmingham Board of Education, Alabama. 358 U.S. 101 (1958).

Singlemann v. Davis. 188 F.Supp. 916, 5 RRLR 1000 (E.D. La. 1960).

State v. Orleans Parish School Board. 5 RRLR 72 (Civ.D.Ct. La. 1959); 118 So.2d 127, 5 RRLR 74 (La. 1960); 118 So.2d 471, 5 RRLR 375 (C.A. La. 1960); 5 RRLR 659 (Civ.D.Ct. La. 1960).

U.S. v. Jefferson County Board of Education. 372 F.2d 836 (5th Cir. 1966); on rehearing en banc, 380 F.2d 385 (5th Cir. 1967).

Unpublished Materials

Lacalomito, Ernest, Deputy Clerk of the U.S. District Court for the Southern District of Florida. Private telephone interview. Miami, Florida, June 15, 1978.

D. Materials By and About the Judges

Books

Hutcheson, Joseph C., Jr. Judgment Intuitive. Chicago: The Foundation Press, Inc., 1938.

Hutcheson, Joseph C., Jr. Law and Liberty Reconciled: The Principle of Our Free Society, the Spirit of Its Laws. Lexington, Virginia: Journalism Laboratory Press of Washington & Lee University, 1953.

_____. Law as Liberator: The Principle of Democracy in America, the Spirit of Its Laws. Chicago: The Foundation Press, Inc., 1937.

_____. We March But We Remember. Houston: Alpha Law Brief Co., 1941.

Who Was Who in America. Vols. IV & V. Chicago: Marquis' Who's Who, Inc. 1961-1968, 1969-1973.

Who's Who in America. 38th ed. Vol. II. Chicago: Marquis' Who's Who, Inc. 1974-1975.

Who's Who in the South and Southwest. 13th ed. Chicago: Marquis' Who's Who, Inc. 1973-1974.

Articles

Armstrong, Walter P. "Joseph C. Hutcheson, Jr.: Chief Judge, United States Court of Appeals for the Fifth Circuit." American Bar Association Journal, XXXV (1949), p. 546.

Brown, John R. "Free Will in the Frontiers of Federalism." Michigan Law Review, XLVIII (1960), p. 999.

_____. "Hail to the Chief: Hutcheson, the Judge," Texas Law Review, XXXVIII (1959), p. 140.

_____. "Judge Elbert Tuttle: Jurist." Journal of Public Law, XVI (1967), p. 279.

_____. "Supreme Court and States Rights." Kentucky Law Journal, XLVIII (1959), p. 92.

_____. "The Trumpet Sounds: Gideon--A First Call to the Law School" Texas Law Review, XLIII (1965), p. 312.

Cameron, Benjamin F. "Fundamentals of Practice in Federal Courts from the Standpoint of a Practical Trial Attorney." Mississippi Law Journal, XXIV (1953), p. 345.

Dean, Arthur H. "A Tribute to Chief Judge Elbert P. Tuttle," Cornell Law Review, LIII (1967), p. 1.

Hutcheson, Joseph C., Jr. "The Advocate in the Trial Court." University of Illinois Law Forum (1956), p. 172.

_____. "The Common Law of the Constitution." Texas Law Review, XV (1937), p. 317.

Hutcheson, Joseph C., Jr. "The Faith of Our Fathers." Georgia Bar Journal, XIV (1951), p. 149.

_____. "The Glorious Uncertainty of Our Lady of the Law." Judicature, XXIII (1939), p. 73.

_____. "In Praise of Lawyers and Lawing." Tennessee Law Review, XXI (1949), p. 20.

_____. "Judging as Administration." American Law School Review, VII (1934), p. 1069.

_____. "The Judgment Intuitive: The Function of the Hunch in Judicial Decision." Cornell Law Quarterly, XIV (1929), p. 274.

_____. "The Judicial Power of the United States: A Sober Approach to an Intoxicating Theme." Texas Law Review, XXXVII (1959), p. 375.

_____. "The Law Do Move." American Law School Review, VII (1934), p. 1044.

_____. "Law Is a Many Splendored Thing." Alabama Lawyer, XIX (1958), p. 146.

_____. "The Lawyer Advocate Keeps Law a Living, Growing Thing." Texas Bar Journal, IV (1941), p. 127.

_____. "The Principle and Price of a Living Law." Washington & Lee Law Review, X (1953), p. 147.

_____. "This Thing Men Call Law." University of Chicago Law Review, II (1934), p. 1.

_____. "We Be of One Blood, You and I, of One Law, One Faith, One Baptism." Mississippi Law Journal, XX (1949), p. 284.

_____. "The Worm Turns, or a Judge Tries Teaching." Illinois Law Review, XXVII (1932), p. 355.

Jaworski, Leon. "A Lifetime of Judicial Service: Joseph C. Hutcheson, Jr." Texas Bar Journal, XXIV (1961), p. 1107.

"Joseph C. Hutcheson, Jr." Texas Bar Journal, XIII (1950), p. 50.

"Judge Hutcheson to Retire." Texas Bar Journal, XXVIII (1965), p. 7.

"Judge Ben Cameron, 73, Dead: Made Attempt to Block Meredith." New York Times, April 4, 1964.

Rives, Richard T. "An Argument Against the Adoption of the Boswell Amendment." Alabama Lawyer, VII (1946), p. 291.

Rives, Richard T. "A Court of Appeals Judge on the Federal Rules." Alabama Lawyer, XVII (1956), p. 324.

_____. "Trying a Case for the Plaintiff." Alabama Lawyer, II (1941), p. 407.

Tuttle, Elbert P. "Equality and the Vote." New York University Law Review, XLI (1966), p. 245.

_____. "Reflections on the Law of Habeas Corpus." Journal of Public Law, XXII (1973), p. 325.

Wilds, John. "Judge Wisdom--GOP General." The States Item, January 11, 1977.

Wisdom, John Minor. "Chief Judge Tuttle and the Fifth Circuit." Cornell Law Review, LIII (1967), p. 6.

_____. "Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases." Law and Contemporary Society, XXXIX (1975), p. 133.

_____. "A Southern Judge Looks at Civil Rights." Federal Rules Decisions, XLII (1967), p. 437.

Unpublished Materials

Brown, John R., Chief Circuit Judge. Personal interview. Houston, Texas, August 24, 1977.

Coleman, James P., Circuit Judge. Personal interview. Ackerman, Mississippi, August 17, 1977.

Curzan, Mary Hannah. "A Case Study in the Selection of Federal Judges: The Fifth Circuit, 1953-1963." Ph.D. Dissertation, Yale University, 1968.

Hutcheson, Joseph C., Jr. "The March of the Federal Constitution." Address on Constitution Day, Houston, Texas, September 17, 1933.

_____. "New Instruments of Public Power or the Administro-Judicial Process and the Struggle for the Supremacy of Law." Address at annual meeting of the State Bar of California, Coronado, California, September 26, 1946.

_____. "Restraint, the Price of Freedom." Address at Founders Day Dinner of the Lawyers Club of the University of Michigan, Ann Arbor, Michigan, April 28, 1950.

_____. "Separation of Powers and Administrative Law." Address at National Shorthand Reporters Association meeting, Houston, Texas, August, 1936.

Jones, Warren L., Senior Circuit Judge. Personal interview. Jacksonville, Florida, July 18, 1977.

Read, Frank T., Dean, University of Tulsa College of Law. Personal interview. Tulsa, Oklahoma, September 7, 1977.

Rives, Richard Taylor, Senior Circuit Judge. Personal interview. Montgomery, Alabama, July 27, 1977.

Smith, Allen E., Dean, University of Missouri School of Law. Personal interview. Columbia, Missouri, August 15, 1977.

Tuttle, Elbert Parr, Senior Circuit Judge. Personal interview. Atlanta, Georgia, August 26, 1977.

Wisdom, John Minor, Senior Circuit Judge. Personal interview. New Orleans, Louisiana, July 29, 1977.

BIOGRAPHICAL SKETCH

John Michael Spivack was born in New York City on June 22, 1942. He was educated at Columbia University (B.A., 1964), New York University (L.L.M., 1968), and the University of Florida (J.D., 1967, M.A.T., 1973, Ph.D., 1978). He practiced labor law in Atlanta, Georgia, representing management and in Harrisburg, Pennsylvania, representing labor.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

David M. Chalmers, Chairman
Professor of History

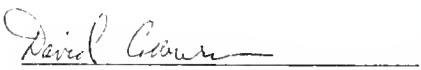
I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Arthur L. Funk
Professor of History

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

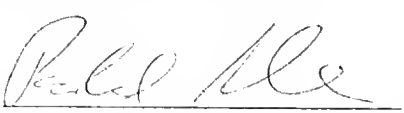
Lyle N. McAlister
Professor of History

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



David Colburn
Associate Professor of History

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



Richard Scher
Associate Professor of Political Science

This dissertation was submitted to the Graduate Faculty of the Department of History in the College of Arts and Sciences and to the Graduate Council, and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

August, 1978

Dean, Graduate School