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THE POLITICAL ROLE OF LOWER FEDERAL COURTS:
RACE RELATIONS CASES IN THE FIFTH CIRCUIT,
1954-1967.

CITY UNIVERSITY OF NEW YORK, PH.D., 1978

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1978

THE POLITICAL ROLE OF LOWER FEDERAL COURTS
RACE RELATIONS CASES
IN THE FIFTH CIRCUIT, 1954-1967

by

Ann Mari Buitrago y Goodall

A dissertation submitted to the Graduate
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May 24, 1978
date

Philip Pastern
Chairman of Examining Committee

July 17, 1978
date

W. D. Gubaud
Executive Officer

James P. Levine

James F. Guyot

Daniel Kramer

Kenneth Sherrill

Supervisory Committee

The City University of New York

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Abraham Yeselson

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INTRODUCTION

This dissertation builds on the work of many scholars--social scientists, lawyers, jurists--who struggled against the dominance of a formalistic jurisprudence concerned exclusively with the rules, logical reasoning, and ideals of law. So long as such an approach to understanding law reigned, questions concerning the reciprocal influence of law and society, of law and human personality, of law and politics had no standing. Only after a sustained effort over two centuries were the challengers successful in inspiring and legitimizing a more realistic, empirical, and scientific approach to the study of law as a social and human institution.

This chapter examines the change from an analytic and formalistic to a more behavioral jurisprudence and then places the present study of the Fifth Circuit Court within the tradition of political jurisprudence.

Willard Hurst has observed that nineteenth century legal philosophy

produced little fruitful thinking about the social functions of judges ... it divorced the law and its agents from the grubby conflict of interests: the law was a self-sufficient system, its premises lawyer-made, its growth requiring only the logical development of what could be found in the Reports and the treatises.¹

A corollary to this view of the law held that judges

did not make law or policy but merely discovered it by the logical application of present "facts" to past principles. This was conceived as a value-neutral but highly technical process requiring a quiet temperament and specialized training in legal reasoning.

While Hurst's words may be an accurate description of the state of legal thought in the United States during the nineteenth century, Western European legal thought had been influenced by scholars searching for a fuller understanding of social life. As early as the eighteenth century Montesquieu challenged natural law theorists by arguing that human laws and justice result from various factors such as the local manners and customs as well as the physical environment.² But it was the nineteenth century that saw the proliferation of works based on the premise that society--its institutions and ideas--could be studied scientifically in the same way as any natural phenomenon. In England, the Benthamite Utilitarians, by stressing the role of legislation in improving human life, gave impetus to the scientific study of law.³ In France, the leader of modern positivism, Auguste Comte, invented the term 'sociology' to designate the whole field of social studies susceptible of scientific investigation.⁴ Darwin's work on natural selection and evolution appeared in 1859⁵ and was elaborated upon in the social sphere by Herbert Spencer⁶ as well as the English historical jurists (see below).

A similar but strikingly different contribution to the developing science of society was produced by Karl Marx.⁷ Employing a methodology, dialectical materialism, which he adapted from Hegel (turning it "right way up"), Marx studied the existing economic and class system of succeeding social epochs and concluded that there was a close interrelationship between the economic ordering of society and its dominant ideology, including the law. He concluded that the law, like the state, was a product of the economic order in a society. Legal ideas and institutions reflected the ideology of the dominant class which controlled and whose interests were served by current economic arrangements. The law--the legal system--was simply one of the means through which the state carried out its mission to secure the continued dominance of the ruling class over other classes in society and thus to assure the continuation of the existing order in society. In the Marxist analysis, the law--the courts, the judges, the judicial process, the legal system--is placed not merely in the great interacting web of a society, but close to the political center. The law and its agents are not viewed as servants or products of the whole society, but only of the most powerful, advantaged part of it.

Marx's insight into the central political role of the law was more striking than other nineteenth century sociologists. The major influence of social science on legal thinking, however, came from the sociological contributions

of scholars whose analyses were less politically threatening. The giant among the more influential sociologists was Emil Durkheim.

In his work On the Division of Labor and Society,⁸ Durkheim developed an inquiry into the correspondence between differences in social structure and differences in the law arising from those structures. Durkheim's functionalism, focusing on the mutuality of support and adaptation between institutions in a given society and the transmission of changes in one institution gradually to the rest, paralleled the juristic interests being addressed independently by the historical schools of Savigny and Maine.

Savigny and the German Historical School of Law,⁹ building on Hegel's notions, developed the idea of the organic nature of law as distinct from law as the work of a Legislator. Customary law, slowly distilled from the life of a particular people, was the product of a long and continuing historical process. In Savigny's view, law was certainly not a set of abstract rules devised for a society, but an integral part of a society deeply rooted in the social and economic order and embodying the traditional value-systems that give meaning to a society.

In England, Sir Henry Maine,¹⁰ substituting Darwin's ideas for Hegel's, established an English historical school of jurisprudence along different lines. Maine stressed the continuity between developments in the law and developments in other institutions and ideologies in society

from the primitive era to the modern. But what impressed him was the way in which, his historical studies revealed, the law was gradually adapted to a constantly changing society.

Thus, both Savigny and Maine and their followers stood as an internal challenge within the field of law to the analytical approach to law.

The twentieth century saw the spread of these ideas in legal philosophy to such an extent that nearly all political scientists and legal scholars now consider the judiciary as a political agency, judges as political actors, and their work product as political decisions. In an article published in 1964,¹¹ Martin Shapiro refers to the collective efforts that produced this new outlook on the role of law and the judiciary as "the political jurisprudence movement."¹² The proximate roots of this movement can be traced to developments both in the field of law and in the social sciences.

In the field of law, the development of two major schools of thought which undermined the nineteenth century mechanistic view of the judicial process referred to by Hurst--sociological jurisprudence and legal realism--constitute the proximate roots of the "political jurisprudence movement."

Sociological Jurisprudence

As noted above, viewing the law as a social artifact

susceptible to investigation with the scientific tools of sociology began in earnest during the nineteenth century. Among the leading jurists and sociologists involved in this endeavor were three German scholars--Rudolf von Jhering, Max Weber and Eugen Ehrlich. These three had a profound influence on the leading sociologist jurist of the Anglo-American world, Roscoe Pound.

Jhering¹³ conceived of the law as a method of bringing about and maintaining order in society. Society needed order and therefore created legal systems because society was composed of competing interests--largely but not exclusively economic. The law, he argued, had been created to function as an impartial mediator among the competing claims. Both the claims and the social values by which they must be measured Jhering asserted to be in a constant state of change. The practitioner of the law therefore must have a grasp of the underlying social forces to which he must adapt the technical principles of law inherited from an earlier and different state of social development. Only in this fashion can the natural conflicts of society be resolved and harmonized.

Weber's¹⁴ contribution to the sociology of law lay in his showing that legal systems both reflect and shape the underlying philosophy of the society of which they are a part. He put particular emphasis on the increasing constitutionalization of modern legal systems in keeping with the growing rationalization and bureaucratization of modern

society.

Ehrlich¹⁵ deepened resistance to viewing the law as a set of formal rules logically applied, by showing that the formal rules of a legal system were derived neither through metaphysical processes nor through disciplined rational thought. Rather, the source of the formal rules was what Ehrlich called "the living law," the actual social norms which govern all aspects of social life. This inner order by which society actually functions, Ehrlich saw as in a continual process of change to be empirically determined and conformed to by all social institutions including the legal system.

The introduction of this new mode of thought about the legal system to American intellectual circles occurred with the publication in 1911 of Roscoe Pound's famous article on "The Scope and Purpose of Sociological Jurisprudence."¹⁶ Pound, building on the work of German sociological jurists, analyzed the legal process as a form of social control by which conflicting and competing social interests are assessed and either accorded or denied legal recognition. Stressing the function of the courts in the American setting in effecting social control, Pound saw this function as a difficult and complex one for two reasons. First, the competing claims to be evaluated by courts are not static but change in accordance with social and economic developments. Second, a system of values is employed by the courts in order to make choices among the conflicting legal claims

presented to it. This is true, in Pound's view, whether the courts say they are simply following precedent (thus employing a bygone ideology) or trying to use contemporary standards (thus attempting to apply a new ideology).

Pound took it as an indisputable fact that legal decisions are inevitably based on an ideology, either consciously or unconsciously. Therefore, he concluded it would be preferable for those engaged in or studying the legal process to acknowledge that it is a form of "social engineering" and to begin a realistic assessment of the way courts actually function, including their relation to "the living law."

Such a realistic assessment would, of course, require the cooperative efforts of legal scholars and social scientists. Such cooperation seemed possible since the "revolt against formalism" was not confined to the field of jurisprudence.¹⁷ There was in fact, a general intellectual ferment corresponding to rapid changes in social and particularly economic life, evidence by new developments in many traditional fields of inquiry. In philosophy, William James introduced his philosophy of pragmatism, the principles of which were applied to notions of democratic social engineering by John Dewey.¹⁸ In the field of economics, Thorstein Veblen¹⁹ was urging a rejection of classical and abstract economics in favor of the empirical study of the connections between economic institutions and other aspects of social life. Charles Beard²⁰ brought attention to an approach to understanding history through analysis

of the underlying economic forces which determine the history and future development of civilization.

In the field of political science, the call to revolt against formalism was not heeded by students of the judiciary until much later. During the early part of the twentieth century the drive for a realistic assessment of the work of the legal system started by Pound on a general level was carried on within the field of law by a group referred to as "Legal realists."

Legal Realism

In a broad sense, the realist movement is part of the sociological movement in jurisprudence. Complementary and overlapping in concerns, the borderline is not always clear, particularly when the work of any individual scholar is under consideration. For instance, two jurists who prepared the ground for a more practical and skeptical approach to the law in the United States--John Chapman Gray and Oliver Wendell Holmes²¹--were clearly not realists themselves. Gray, in fact, was an exponent of analytical jurisprudence, but he admitted and insisted upon the great importance of non-logical factors--personality and prejudice, among others--upon the making of law. Holmes, an eloquent proponent of the need for legal theory, also wrote with great force on behalf of a skeptical and empirical definition of the law. In the oft quoted passage from his 1897 essay, Holmes wrote:

Take the fundamental question, what constitutes the law . . . You will find some text-writers telling you . . . that it is a system of reason, that it is a deduction from principles of ethics or admitted actions, or what not, which may or may not coincide with the decision. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English Courts are likely to do in fact. I am much of his mind. The prophecies of what the Courts will do in fact and nothing more pretentious are what I mean by the law.²²

A third jurist, Benjamin Cardoza, added legitimacy to the realistic appraisal of judges in his published lectures on The Nature of the Judicial Process, by asserting and then exploring the impact of non-rule forces on judges' decision-making. In one vivid passage he wrote of those who consider the whole process of judging to consist of searching and comparing precedents:

Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.²³

The views of these three distinguished jurists and thinkers served to articulate and legitimate concern with social and personal factors, a skeptical view, and an empirical approach to understanding the law and the legal system.

In the mainstream of the realist school were clearly identifiable writers such as Karl Llewelyn, Thurmond Arnold, and Jerome Frank.

In reaction to the view of law still prevalent both in textbooks and law school teaching which proceeded from what the law "ought to be," Karl Llewelyn published in 1931 an essay entitled "Some Realism About Realism" in which he set forth the common principles of the realist school.

1. Realism means a conception of law in flux and as a means to social ends, so that any part is to be examined for purpose and effect. It implies a concept of society which changes faster than the law.

2. Realism assumes a temporary divorce of 'is' and 'ought's purposes of study. Value judgments must always be appealed to in order to set an objective for any inquiry, but during the inquiry the description has to remain as largely as possible uncontaminated by the desires of the observer or by ethical aims.

3. Realism distrusts traditional legal rules and concepts in so far as they purport to describe what either Courts or people are actually doing. It accepts the definition of rules as 'generalised prediction of what the Courts will do.' It implied judicial creation of law.

4. Distrust of theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions.²⁴

Realist jurisprudence, he wrote, is "a movement in thought and work about the law," not a philosophy of the ends of law. It is a method of approach which seeks to find out what law is, not what it ought to be, investigating the social and psychological factors that make the law as well

as the social consequences of the law. Thus, realists turned to those sciences involved in exploring human behavior-- economics, criminology, sociology, and psychology--for aid in investigating specific aspects of the law.

Llewelyn himself, and Thurmon Arnold,²⁵ undertook empirical studies of the American Constitution as an institution organized to give "possibilities of action" to some segments of the population rather than as an institution whose behavior could be deduced from the logic of words on paper. In another study, Folklore of Capitalism,²⁶ Arnold analysed the ability of powerful corporations to sustain their policies of economic domination by enveloping their actions in the "myth of the sacred right of the individual."

Another and increasingly dominant tendency with realism concerned itself with analyzing the law from a psychological or psychoanalytical point of view. An early and renowned work of this kind was Jerome Frank's Law and the Modern Mind,²⁷ in which Frank makes a frontal attack on the "myth of certainty" so prevalent in traditional teaching and writing on the law. The craving for certainty, the counterpart of the Father complex or need for infallible authority, is fostered in the law, Frank argued, by establishing a

fictitious system of precedents or of complete codifications, hiding before themselves and others the fact that every case is unique and requires creative decisions.²⁸

Frank's proposal was for a "completely adult lawyer"

as exemplified by Oliver Wendell Holmes--a judge who needed no outside authority, was capable of entertaining a 'constructive doubt,' and able to develop the law in accordance with social advances because he was well trained in the social and natural sciences. He urged for judges and jurors alike, special training in fact-finding, evaluation of prejudices, and psychology of witnesses.

In sum, realists and the more practical sociological jurisprudents held three perspectives in common. First, they viewed decisions by judges as effected by social and psychological forces. Second, they viewed the law as in fact connected to fundamental moral and social arrangements and ideology. Third, they viewed the function of the legal system as a process of mediation and arbitration rather than adjudication in accordance with fixed rules. These three substantive perspectives were accompanied by a call--in line with the principle of a "temporary divorce of 'is' and 'ought'"--for systematic empirical testing of the "realistic" propositions offered in place of the traditional dogma. In fact, such a call was addressed in the main to social scientists since the lawyers of the realist persuasion did not possess the research methodology required to test their own hypotheses. In a 1966 essay on law and the social sciences, Julius Stone wrote:

It seems to be acknowledged, on all hands, though sometimes grudgingly, that the recent concern of behavioral scientists with legal and (especially) judicial decision-making continues, with better work-plans and instru-

ments, a main line of "legal realist" challenge of the twenties and thirties.²⁹

From the ranks of political science, Martin Shapiro made the same point a few years earlier:

From judicial realism, political jurisprudence derives a peculiar concern for the attitudes and behavior of judges and the environment of judicial decision. Indeed, many of the political jurists have devoted most of their efforts to devising a methodology that will allow them to refine and systematize the impressionistic insights of the realists by isolating and measuring the strength and direction of judicial attitudes and relating them to the actual patterns of decision.³⁰

Political Jurisdiction

Within the discipline of political science, the efforts to examine courts and judges more realistically proceeded from a variety of frameworks.³¹ Scholars such as Vose,³² Manwaring,³³ and Barker,³⁴ basing their work on David Truman's revival of Bentley's group theory,³⁵ viewed the judiciary as simply another area in which groups struggled for favorable political decisions. Another tack was to liken court behavior to the behavior of other political institutions, a perspective which guided Peltason's Federal Courts in the Political Process,³⁶ as well as Rosenblum's Law as a Political Instrument.³⁷ The approach most consciously identified with the 'realist' school was the 'behavioral' approach. The origin of this way of analyzing judicial politics is usually credited to C. Herman Pritchett. His 1948 watershed study entitled The Roosevelt Court used bloc analysis to demonstrate the existence on the Supreme

Court of different 'voting' groups based on common assumptions, premises, social, political, and economic attitudes.³⁸ Following Pritchett and building on his work came the methodologically increasingly more sophisticated work of Glendon Schubert, Joseph Tanenhaus, Sidney Ulmer, Stuart Nagel and others.³⁹

Various aspects of the judicial decision-making process were subjected to behavioral analysis in these studies. The relationship of attitudes and 'votes' on cases were studied by bloc analysis. The effect of judges' backgrounds--socioeconomic, political, and professional attributes of judges--on decisions interested Schmidhauser, Goldman, Veness, and Dannelski,⁴⁰ among many. Borrowing from social psychology, Murphy, Dannelski, and Howard subjected the Supreme Court to small group analysis,⁴¹ in which the activities of persuasion, bargaining, friendship, leadership, and social amenities are used to account for the outcome of cases. The concept of judicial role was also employed by researchers to explain decisions.⁴²

Realistic, as opposed to formal, inquiry into judicial recruitment and appointment was undertaken by Goldman, Schmidhauser, Grossman, Watson and Chase.⁴³ Finally, assessment of "impact"--or more properly, compliance with judicial decisions--began to receive "behavioral attention."⁴⁴

Although methodologically diverse, the research produced over two decades shared common premises. First, courts are political agencies in the sense that they consti-

tute an arena of government in which conflict over the allocation of values takes place. Second, judges are political actors in the sense that they are products of political factors and that they have sufficient autonomy to create norms as well as apply norms. Finally, an increasing interest in and use of David Easton's general systems model⁴⁵ permitted a graphic expression of the common starting point of judicial political studies--courts could be diagrammed as part of the "conversion" apparatus of the political system which processes demands into output and thus become subject to feedback.

What hopefully lies in the future is a common jurisprudential theory or even, more modestly, a theory of the judicial process. Periodic reviews of the field noted the uneven development of empirical knowledge about the judicial process.⁴⁶ For a time, little was known about the behavior of state courts and judges. Similarly, little attention was directed to the lower federal courts. Research into the federal judiciary initially focused almost entirely on the United States Supreme Court.⁴⁷ Generalizations about the workings of the federal court system were attacked as distortions occasioned by the "upper court bias" of the research from which the generalizations were derived.⁴⁸

In reaction to the "bias," scholarly attention turned increasingly toward the lower federal courts during the 1960s, so that a body of knowledge about circuit and district courts began to grow.⁴⁹ Not unexpectedly, such attention

was not focused evenly on all aspects of the workings of the lower courts. Most effort was directed towards investigating factors which might explain judicial decisions: variables such as party affiliations, demographic and personal background characteristics, the selection process, value attributes of judges, internal court processes and structures, and the like.

The second area where lack of research hindered the development of generalizations about the judicial process was the identification and description of the functions performed by the various levels of federal courts. With respect to structure and functions, as Theodore Becker has pointed out,⁵⁰ most research on the judiciary identifies the structure of courts as a given configuration of judges and the function of courts as "deciding case," interpreting the rules, "policy-making," and the like. Becker argues persuasively that it is more sensible to understand these behaviors as the structures of courts and to acknowledge that the work of identifying and describing the functions of courts--observable, objective consequences of structure--remains to be accomplished.

An approach that combines the function-identifying task outlined by Becker with the need to learn more about the lower federal courts is suggested by the research of two scholars--Vines and Dolbeare. The following section describes their work and the way in which the present dissertation builds upon it.

Research Design

Kenneth Dolbeare⁵¹ and Kenneth Vines⁵² report findings and offer interpretations that suggest a political function performed by the lower federal courts.

Vines studied federal district-circuit interactions in race relations cases 1954 - 1962. Dolbeare investigated trial-appellate interactions in both state and federal courts. Both report data indicating high levels of unreviewed policy-making and issue-shaping by the lower courts. This data--expressed as reversal rates, policy-change ratios and policy-change directions--led them to a similar conclusion.

Looking at their data from the perspective of its policy direction, its policy-change direction and its impact on the political system, Vines and Dolbeare both suggest that the data may indicate that middle appellate courts play a mediating role in the political system. Vines writes that if the high percentage of district-circuit disagreement is typical of and endemic to the lower courts, then "a continuing role of courts of appeals may be to bring decisions in the district courts in line with the national values of the political system."⁵³ Dolbeare reports that in the area of state cases pressing private economic claims, "there is a moderating effect of the appellate courts in the social interest" and that these courts "serve to enforce greater concern for the general interest against the property-rights-minded trial judges."⁵⁴

Hypothesizing a mediating function for the federal

courts seems reasonable from another perspective. The basic concern of courts is with the norms of society whether the source is statutes, constitutions, the morals and customs of the people, or the court itself. Both traditional and political jurisprudents agree to that. The contention of the traditionalists was that courts merely enforced norms while sociological jurisprudence, legal realism and political jurisprudence insist that courts also create norms. Courts are often placed(or place themselves) in the situation of having to enforce new norms that conflict with old norms.

But the norms of a modern society and government (or an activist court) change in response to the complex interplay of social, economic, international, and environmental forces. Courts are not infrequently required to enforce new norms (preferred by some) that conflict with the old norms (preferred by others). It seems likely that this old norm-new norm conflict would bear most heavily, within the federal system, on the lower federal courts, since they have closer connections than does the Supreme Court to the localities where new-norm opposition resides.

The plan of the dissertation is to test the hypothesis that one of the functions performed by the lower federal courts is that of mediating between conflicting national and local norms. The circumstances in which the lower federal courts are hypothesized to play a mediating role is characterized by the authoritative declaration of a new national norm, the implementation of which directly conflicts

with a widely practiced and strongly held local norm within the circuit.

The mediating function is conceptualized in this research as a series of ongoing interactions between appeals court panels and district judges, with the twin objectives of (1) avoiding open conflict and rejection of the new norm, and (2) achieving actual behavioral acceptance of the new norm. A court that is mediating will not be found making decisions which insist on total and immediate compliance with a new norm--that would be a role better described as "enforcer." Nor would a mediating court's decisions permit old norms of behavior to persist virtually unchanged--that would indicate that the court was acting as a "Local Defender." Rather, the work of a mediating court would be characterized by a realistic assessment of the power and tenacity of the old norm coupled with a commitment by the court to secure movement toward the implementation of the new norm. A court with such an outlook can be expected to employ its political and judicial autonomy as well as its instrument of power toward devising a creative, flexible and effective strategy in order to accomplish its aim of least conflict-most compliance.

On the basis of what is currently known about the lower federal courts, the courts of appeals appear to be more likely agents of mediation than the district courts. The recruitment and selection process, for example, results in appellate court judges with weaker ties to local commun-

ities and more exposure to national organizations. Nevertheless, since there are documented cases of district judges who devised strategies to move local communities toward compliance with new racial norms, and since mediation is conceptualized as a relationship, it seemed more prudent to hypothesize the mediation function as residing generally in the lower courts.

The choice of circuit and subject matter for testing the mediation hypothesis was governed by the need to secure an objective indication of the preconditions of mediation: (1) a declaration of a new national norm, and (2) the existence of an opposing local norm. These two conditions were met by selecting race relations cases in the Fifth Circuit during the period 1954 through 1967. The period 1954-1967 covers the leading Supreme Court decision in racial norms, Brown v. Board of Education, as well as all the major national civil rights legislation since the Civil War.⁵⁵ These events can be taken as indicating a new national norm, thus satisfying the first condition. As to the second condition, the Fifth Circuit embodies that region of the country with the most established local norms in opposition to changes in racial practices of the kind required by Brown v. Board of Education and the civil rights legislation. The circuit is made up of the states of Florida, Alabama, Georgia, Mississippi, Louisiana and Texas.

If the lower federal courts do perform a mediating function within the political system in the specified circum-

stances, evidence of such a function should manifest itself in the Fifth Circuit with respect to racial matters during the 1950s and 1960s.

The utility of this research extends beyond illuminating the functions of the federal judiciary with respect to the political system. If a method of identifying and describing functions can be devised, it will open what may be a fruitful approach to other aspects of the federal court system about which some controversy exists. With respect to the relationship among the three levels of federal courts--district, courts of appeal and Supreme Court--some researchers suggest that the lower federal courts serve as "handmaidens" of the Supreme Court in enforcing national norms.⁵⁶ Other research indicates that these courts act as defenders of local norms and values.⁵⁷ Vines and Dolbeare challenge both these models of the interaction patterns among the federal courts. Vines asserts that "a useful model of the federal court system has to include the decision-making pattern enacted in the lower courts,"⁵⁸ and joins Dolbeare in positing a "bottoms-up view" in which the "trial courts are the major policy-makers and issue-shapers based on local political forces and contexts, with occasional upper-court modifications and policy initiatives."⁵⁹ Dolbeare is certain that this model fits the state court systems, possibly applying with less force to the federal system because of its close connection to national considerations.⁶⁰ In his later study of

the federal system, Dolbeare concludes that perhaps the bureaucratic model best describes federal court relationships in the race relations area.⁶¹

It seems quite possible that these different patterns do not constitute true contradictory finding. It may be that the interaction patterns change depending on what function is being performed. If the functions that characterize the works of the lower courts can be demonstrated, then in the future research the relationship of the lower courts to the Supreme Court can be examined by function. The research reported thus offers the possibility of resolving the seeming conflict between the hierarchic and bureaucratic models by seeking to relate structural relationships to the functional performance with respect to specific issues and time periods.

Plan of Dissertation

The core of the dissertation is the direct testing of the mediation hypothesis with race-related cases in the Fifth Circuit. Collateral to that task, however, is an investigation of the relationship of the history, powers and personnel of the circuits courts in general, and within the Fifth Circuit in particular, to the mediation role. The results of this investigation form the subject matter of Chapters I, II, and III. These chapters pursue the question of whether the lower federal courts were intended and given the ability to perform a mediating function.

Chapter I raises the question of whether the Court of Appeals was created with the intention of adding a mediating court to the federal system. It reviews the historical development of the federal system and dwells particularly on identifying intentions of the contending forces as revealed in reports on the lobbying of non-governmental organizations and on the Congressional debates. The chapter concludes that while the literature does not permit a definitive answer, it is at least likely that a mediating function was intended for the Court of Appeals.

In Chapter II, one aspect of ability is investigated: namely, the ability of lower court personnel to mediate. Does the recruitment and appointment process by which judges are selected for the District and Court of Appeals courts produce a group whose backgrounds would equip them for mediation? Because the literature suggests noticeable differences in the backgrounds of both benches of the circuit, especially in the period 1954-1967 to see if this parochial cosmopolitan distinction emerges.

Chapter III takes up the other aspect of ability: do the lower federal courts possess institutional structures and powers that would enable them to mediate? Building on Chapter II, do the differences or similarities of each bench in background get strengthened or weakened by the institutional properties of their respective courts?

Chapters IV and V report on the testing of the mediation hypothesis with the case material. Chapter IV first

explains the case selection and case analysis procedures employed and concludes by illustrating the analytical categories with summaries of cases in each category. In Chapter V, the findings are reported and analyzed.

Chapter VI summarized the entire investigation, discusses conclusions drawn from it, and suggests fruitful lines of future research.

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CHAPTER I

INTENT: THE CREATION OF FEDERAL COURTS

In 1891, Congress added a set of intermediate courts of appeals to the federal judicial system, and between 1911 and 1925, effected major changes in their appellate jurisdiction. The question addressed in this chapter is whether these actions were motivated by a desire to create a mediating body in the federal system. Is there evidence in the historical record that suggests Congressional and/or extra-Congressional intent to have the lower federal courts perform a mediating function?

An attempt to answer the question of the intent of changes effected in 1891 requires some appreciation of the tangled and tortured history of the struggle that surrounded the creation and early reform of the federal judiciary. It began quietly enough at the Constitutional Convention of 1789 where the Judiciary Article occasioned little dispute.¹ What debate occurred focused on three questions, only one of which bears on our problem; that one being, Should there be lower federal trial courts? The Randolph or Virginia Plan contained a provision for such courts and was tentatively adopted by the delegates on June 4. The following day, Rutledge of South Carolina, supported by Sherman of Connecticut, moved for reconsider-

ation of that decision, arguing in favor of the principle of the Paterson or New Jersey Plan that all litigation at the trial stage ought to be left to state courts, appellate review by the Supreme Court being sufficient protection for federal interests. Over the opposition of Madison and Wilson, Rutledge and Sherman won the motion to reconsider and the subsequent motion to eliminate lower federal courts. The vote was 5 to 4, 2 states divided. Madison and Wilson countered with what they called a "compromise," the now familiar language which gives Congress the option to create lower federal courts. This motion was adopted by a vote of 8 to 2. It was, in the words of one scholar, "a seeming compromise which eventually gave them all,"² when in 1789 Congress passed the first Judiciary Act setting forth the organization and jurisdiction of the lower federal courts.

The 1789 Act created two sets of new courts for which the Supreme Court served as the appellate court.³ The new courts were called circuit courts and district courts. The district courts were made up of a separate set of judges, one per district--each state constituting a district. The circuit courts, however, were staffed by a combination of Supreme Court justices (two originally), and a district court judge from the circuit, the existing states being divided for this purpose into, originally, three circuits. Thus, originally and as it turned out, for some 80 years thereafter, the federal judiciary consisted of three sets of courts staffed by two groups of judges.

The circuit courts were the chief trial courts of the system, their jurisdiction extending to all matters triable under the federal statutes not reserved exclusively to the district courts. They also had exclusive original jurisdiction in diversity of citizenship cases (over \$500). The circuit courts were also given by the 1789 Act a small appellate jurisdiction from decisions in the district courts.⁴

The district courts were given jurisdiction over serious crimes; exclusive jurisdiction in admiralty, seizures under import, navigation and trade statutes, and seizures of land for violation of federal laws; concurrent jurisdiction with the circuit courts "where an alien sued for a tort based upon a violation of the law of nations or a treaty, where the federal government itself sued and the amount equaled \$100 or less, and in suits against consuls."⁵

This basic pattern of organization and relative authority persisted, with only a single important change, until the addition of new appellate courts in 1891. There were, to be sure, expansions and contractions of jurisdiction, but the district courts' jurisdiction never rivaled the circuit courts in importance. Of course, as states were added to the nation, new district courts were created, and circuits were both created and recomposed, but the basic structure and the relationship of the units to each other persisted.

The single change occurred in 1801 temporarily and permanently in 1869. The substantive provisions of the

Judiciary Act of 1801 were based on a study prepared by Attorney General Edmund Randolph, at the request of the first Congress and finally submitted to the Congress in 1800.⁶ However, the timing of the Act's passage was undoubtedly dictated by the desire of the lame-duck federalist-dominated Congress--overwhelmingly defeated at the polls in the 1800 elections by the Jeffersonian Republicans--to retain some control over federal policy by means of newly created judgeships carrying life-time tenure. The Act combined the elimination of circuit riding by Supreme Court justices with the establishment of the office of circuit judge, three to be assigned to each circuit to make up a fixed bench of circuit judges. The speedy repeal of this law by the incoming Republicans returned the federal judiciary to its three tier-two bench arrangement.

It was not until after the Civil War and before the full re-entry of the Southern states into national politics that this change was finally made permanent. In 1869, Congress adopted legislation which created the office of circuit judge and abolished the requirement for Supreme Court Justices to ride circuit to make up these courts.⁷

What was the nature of the resistance that delayed for 80 years giving the most important trial court in the federal system a fixed bench of judges? What were the competing interests that prevented Congress from responding to the pleas of Supreme Court justices that the travel requirement of circuit riding in an expanding nation was both a

physical burden and an impediment to the appellate work of the Supreme Court? Why were they unmoved by the repeated showings that the dockets of both the trial courts and the Supreme Court were not only never clear, they were in fact growing as jurisdiction expanded, population increased and the economy grew geometrically with every passing year? Why did appeals from the Attorneys General, bar members and bar associations that practice before the federal courts was increasingly onerous, costly, incompetent and unconscionably delayed have so little effect for so long? The fact that these seemingly well-supported and reasonable requests could not evoke a simple administrative reform for 80 years would appear to indicate that hidden below these 'easy issues' lay issues closer to the hearts, minds and pocket-books of groups with roughly equal power within the political order. Congress was, in short, deadlocked.

A complete explanation of the deadlock cannot be advanced with confidence since the scholarship on this point, while extensive, is not systematic, and thus does not yield a coherent picture of the social and economic connections of the public figures who advanced the various arguments for and against reform of the federal judiciary during this period. However, enough can be gleaned to suggest two lines of tension along which opposing groups battled during the sixty years prior to the Civil War.⁸

Pre-Civil War

First, it is abundantly clear that powerful partisan considerations worked against any reform that would enable the opposition to appoint tenured federal officers. Second, there was a continuing, albeit changing, conflict between those whose interests were best protected by power lodged in states and localities and those whose commercial and land interests were better protected by federal power. That is to say, each felt more secure with power exercised by the set of institutions over which their influence could be made manifest.

Positions taken up by states' rights advocates included repeated calls for the total abolition of the lower federal courts, leaving all trial work to the state courts; opposition to any expansion of the jurisdiction and personnel of the lower courts, even though it was less than the constitution permitted; and, as a defense against a fixed circuit bench, fulsome praise of Supreme Court Justices and the benefits derived from their riding circuit. For example, Senator Talbot of Kentucky thought that the effect of the Justices visiting the states on circuit would be to "preserve sentiments and feelings connected, in some degree, with the just pride, the sovereignty the constitutional independence (of the states)."⁹ He feared that if they were freed of circuit duty, the Justices would become national in their attitude--an attitude he, of course, dreaded. These positions, it need hardly be said, became increasingly intensified with

the South and the West, particularly by mid-century.

Supporting for expanding the jurisdiction and personnel of the lower federal courts as well as for the creation of a separate bench for the circuit courts was supplied by those with commercial interests and those involved in land speculations--originally Federalists and by the end of the period all the new and growing national and international enterprises, especially dominant in the Northeast. Professor John Frank, reporting on the result of his independent re-examination of reasons which lay behind giving federal, rather than state, courts the diversity jurisdiction, concludes as follows:

. . . the diversity jurisdiction in the federal constitution may fairly be said to be the product of three factors . . .

1. The desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.
2. The desire to permit commercial, manufacturing, and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interest.
3. The desire to achieve more efficient administration of justice for the class thus benefitted.¹⁰

The debate between these two forces was most often conducted in terms of such issues as the relative costs of the federal and state judicial systems, and the comparative competence of their judges; the growing backlogged dockets; threats to the health of Supreme Court Justices; the feasibility of riding circuit to California; and various arguments having

to do with principles of proper and efficient administration. Stating opposition or support for proposed legislation in terms of such issues had the double advantage of giving the participants--it was easy to be persuaded by "facts" to switch sides--tactical flexibility, and obviating the necessity to state plainly the interests each group was pursuing.

Post-Civil War

This "covering" debate continued to characterize discussion in and out of Congress throughout the post-Civil War period leading up to the adoption in 1891 of legislation creating the circuit courts of appeal. The central technical problem during this period became the Supreme Court's growing appellate backlog. We will discuss the origins of this problem before attempting to identify the main contending forces and the positions each side advocated with respect to the federal judiciary.

Because the circuit judge reform was delayed so long, the conditions it was designed to remedy had already been eclipsed by new developments, both material and ideological, which had been given great impetus by the Civil War. The old tensions over the federal judiciary, which began as a nationalist-states' rights struggle became capable of resolution only in 1869, when the major sources of opposition to the expansion of the federal judiciary was weakened by defeat in the war: to these older tensions were added new tensions, new groups, and new demands generated by the war.

The new demand hinged on a development that had been part of the "cover" issues of the earlier period--the alarming growth of the Supreme Court's backlog of appeals. The 1869 circuit reform had little impact on this condition, since by the time it was enacted, Supreme Court Justices had virtually ceased holding circuit court, leaving them in the hands of district judges. The appellate backlog was more importantly the result of the expansion of federal jurisdiction produced by Civil War constitutional amendments, war-related and economy-related statutes, as well as statutes directly increasing federal jurisdiction. A listing of these enactments merely repeats what an examination of almost any aspect of this period of American history reveals: the enormous impact of the interrelated forces of the Civil War and the growing commercial and industrial sectors.

<u>Amendments:</u>	Thirteenth Fourteenth Fifteenth
<u>Statutes (War):</u>	Reconstruction Acts Freedman's Bureau Acts Civil Rights Acts Force Bills
<u>Statutes (Economy):</u>	National Bank Acts of 1860's Bankruptcy Act, 1867 Sherman Anti-Trust Act, 1887 Granger Legislation, 1890's
<u>Jurisdiction:</u>	Removal Acts, 1863 and 1875.

Table I shows the impact of this legislation on the federal judiciary. Of particular importance in increasing the case-load of the federal courts, as well as forming a point of contention in the ensuing struggle, was the Removal Act of

1875, which also gave the federal courts, for the first time, the full extent of jurisdiction permitted under the Constitution.

TABLE 1

CASES PENDING ON SUPREME COURT AND CIRCUIT-DISTRICT
COURT DOCKETS BEFORE 1891 REFORM

Supreme Court		Circuit and District Court	
Year	Docket No.	Year	Docket No.
1850	253		
1860	310		
1870	636	1873	29,013
1880	1,212	1880	38,045
1890	1,816	1890	54,194

Source: Frankfurter & Landis, p. 60.

Literally, hundreds of proposed remedies for the problem of appellate backlog were suggested by the Attorneys General, Bar Associations, jurists, law professors and politicians both in and out of Congress. In the clash over remedies, "differences over the purposes which federal courts should subserve"¹¹ produced two distinguishable groupings: (1) those who urged retention of full federal jurisdiction and reorganization of the federal courts to include a new intermediate appellate court, and (2) those wanting merely to increase the federal judicial force to enable it to cope with the increased judicial business and/or to restrict federal jurisdiction so as to reduce the influx of cases.

Since the struggle was a long one during which conditions both political and economic were changing rapidly, groups were added and subtracted from each camp and some groups changed sides as developments altered their perceptions of where their interests could be best protected. Table II summarizes the alignment of forces, as reported in the literature.

The struggle actually had two turning points. The first was the success of the Radical Republicans in securing passage of the Removal Act of 1875 which, in addition to providing for removal of cases from state to federal court, expanded federal jurisdiction to its constitutional limits. This victory is variously interpreted in the literature as the last gasp of the Radical Republicans wanting to use federal power for reconstruction purposes, or as the first

TABLE 2

GROUPS FOR AND AGAINST CREATION OF A COURT OF APPEALS, 1865-1891

Period	For Court of Appeals For Increased Jurisdiction	Against Court of Appeals Against Increased Jurisdiction
Before 1876	A. Congress B. Radical Republicans (Reconstructionists) C. House	A. President B. Congressional Moderates + President Representatives of Defeated and Disenfranchised South C. Senate Radical Republicans
1880-1889	<u>Senate Coalition:</u> Eastern corporations The Bench Bar Associations (local) American Bar Assn. Attorneys-General President Supreme Court Justices	<u>House Coalition:</u> Populist-Granger Labor States rights forces in South and West
1890-1891	Senate House Eastern Capital Coalition States' Rights Bourbons	<u>Coalition:</u> Populist-Granger Labor

wave of the new industrial order seeking federal protection for corporations against state actions where Granger-Populist forces in state legislatures and elective state courts threatened their interests. It is certain that its passage was facilitated, if not entirely made possible, by the weak political position of the South prior to the 1876 "compromise." As the federal courts began to make decisions restricting or distorting the intention of the reconstruction statutes and amendments, Radical Republican support for expansion of the jurisdiction, power, and personnel of the federal judiciary began to diminish and turn finally to opposition. The key factor, then, in the first turning point, passage of the 1875 Removal Act, was the diluted force of Southern representation in Congress.

The second turning point--passage of the Court of Appeals Act in 1891--was preceded by a sustained effort to curtail federal judicial power, especially the ability of corporations to get their matters litigated in federal courts. The campaign for curtailment centered in the House, which after the readmission of the South in 1876, was often Democratic. The Senate, whether Republican or Democrat, resisted this effort. With the demise of Reconstruction, the key line-up in Congress appears roughly to have been Populist-Granger forces in control of majorities and key committees in the House versus corporate elites and their Bourbon allies in control of majorities and key committees in the Senate.

All during the 1880's the House, led on this issue by Representative Culberson of Texas, passed legislation curtailing federal jurisdiction and restricting removal jurisdiction. This legislation customarily died in the Senate Judiciary Committee. Bills creating new Courts of Appeals and eliminating circuit riding passed the Senate only to die in the House Judiciary Committee. Reform members of the House, notably McCrary of Iowa and Davis of Illinois, repeatedly offered bills to establish courts of appeals which failed to emerge from the Judiciary Committee.

Scholars of the federal judiciary seem to agree in their interpretation of this battle over jurisdiction and structural reorganization as one between Eastern capital and Southern and Western agrarianism with an overlay of old states' rights sentiment. The following passages from Frankfurter and Landis find echoes in succeeding studies by Evans in 1944, and Jacobs in 1962:

The debates in the House and particularly the vivid speeches in 1880, leave no doubt about the economic and political factors which determined men's votes. Traditional Southern sentiment in favor of state institutions and against extension of federal power was undoubtedly alive. But new forces and new factors had come into play and gave new pungency to old feelings. The effort to curb the federal courts was not a distinctly southern measure. A contest between eastern capital and western and southern agrarianism was at stake. The debate is significant because the real issues were put with candor. The case of the Eastern investor was stated with great force by George D. Robinson of Massachusetts:

"In all parts of the country there occur times of excitement. You say that if a corp-

oration shall go into a State to do business, let it abide by the law of the people where it seeks to do business. Yes, gentlemen, in times of peace and harmony and when there is no prejudice or excitement. But no State is always free from that. Massachusetts has had its periods of jealousy and prejudice; and there have been times in my recollection when some gentlemen of the South, if they belong to incorporated companies, could not have gone to Massachusetts and submitted their cases to the State juries and obtained the judgments that they ought to have obtained on the law and the facts.

And in the West there have been granger laws and granger excitements that have led people to commit enormities in legislation and extravagances in practice; and in the South-- why sir, history is too full for me to particularize.

Capital is needed to restore the waste places of the South and to build up the undeveloped West; it must flow largely from the old States of the East and from foreign lands. But it will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor.

I say, then, let us stand by the national courts; let us preserve their power."

This view was effectively entrenched in the Senate. The numerous appeals to that body from manufacturers, from business organizations and their lawyers found ready response among Senators who in other fields of legislation resisted the economic policies of the West.¹²

Evans:

Reorganization of the federal judiciary had more at stake than mere administrative reform. There was involved the fundamental issue of the purpose which the federal courts should serve. Eastern capital was locked in fierce sectional strife with Western and Southern agrarianism. It was a new phase of the century-old struggle between the states and the federal government, and the record of the federal courts had demonstrated both their inevitable alignment with a nationalistic philosophy and their greater remoteness from popular sectional social movements.¹³

Jacobs:

. . . when Congress debated structural changes in the judiciary, the ghost of John Adams' Judiciary Act of 1801 reappeared together with demands by the readmitted Southerners that the rights of the states be respected. In addition, rural granger interests sought to remove corporate cases from federal courts and bring them in state courts, for they felt they could control state judicial action by influencing the election of state judges. These controversies delayed until 1891 the establishment of intermediate appellate courts.¹⁴

The key to breaking this monumental deadlock lay in two conversions--Representative Culberson of Texas and Senator Evarts of New York. Both men had been leaders of the opposition to courts of appeals bills in the past decade. When a new bill--the Rodgers Bill--was introduced in the House in 1890, Culberson changed sides and supported the bill on the argument that a court appeals would end the "judicial despotism of circuit and district judges." In the Senate, Evarts, who had led the fight against the 1882 Bill (Davis Bill) both in the Senate and in the American Bar Association debates, had become a powerful member of the Senate Judiciary Committee. Having been converted to favor a court of appeals, he was given the task of reporting out a Senate substitute for the House Rodgers bill. The Evarts substitute differed from the Rodgers Bill in two important respects: (1) the Evarts bill divided appeals, sending the most important for direct review by the Supreme Court, the remainder to new courts of appeal, and (2) the old circuit courts with their trial jurisdiction were retained. These substitute provisions, to which the Senate yielded on a vote with no tellers,

originated with an American Bar Association committee and were worked out in a series of conferences between that committee and a sub-committee of the House and Senate Judiciary Committees, the conference committee presided over by Senator Evarts.

The conversion of Culberson and Evarts, while important, particularly as an indication that accommodations were being made outside the halls of Congress, did not constitute the whole of the power that won the battle. All through the 1880's, the Senate-Industrial capital forces had been gaining vocal allies, as Table II shows. Local bar associations memorialized Congress and carried on debates in their journals. The American Bar Association formed a committee to study the federal judiciary which circulated majority and minority reports which were widely discussed in legal periodicals. In addition, the ABA persuaded President Harrison to speak to the question of judicial reorganization in his first annual message to Congress in 1888. His remarks were brief but unequivocal:

The plan of providing some intermediate courts having final appellate jurisdiction of certain classes of questions and cases has, I think, received a more general approval from the bench and bar of the country than any other. Without attempting to discuss details, I recommend that provision be made for the establishment of such courts.¹⁵

Attorneys-General since 1885--Garland and Miller--pressed for Courts of Appeals in testimony on the various bills and spoke on behalf of court reorganization in public

forums. Supreme Court members, as well as members of the federal bench throughout the country, spoke out and authored articles for law journals on behalf of intermediate appellate courts.

This powerful coalition was able to achieve its objective against what had seemed unbeatable opposition in the House which was responsive to populist-granger, labor and states' rights sentiment, because it was able to "convert" the leadership of the old states' rights forces-- (the element commonly referred to as Bourbons)--the Southern ruling elite that effected the compromise of 1876. By 1925, the ground which the Eastern Industrial Coalition had to give in 1891 had been virtually regained. In 1911 with the enactment of the Judicial Code (revising and codifying federal law), the old circuit courts were abolished and all federal original jurisdiction assigned to the district courts. The 1925 Judicial Act made certiorari the dominant mode of appeal to the Supreme Court, thus effectively wiping out the 1891 two stream device and converting the courts of appeal to courts of "final appellate jurisdiction" for most federal cases.

The related factors not represented on the chart, but stressed in the literature as aiding the coalition favoring reorganization of the federal courts were (1) a growing trend in the late 1880's and 1890's away from laissez-faire toward regulation of the economy, and (2) a growing population, increasingly integrated business and social organizations

as well as improved transportation and communications, all of which required increased federal regulation. A more focused analysis along these lines is contained in Gabriel Kolko's study of this period of industrial capitalism, The Triumph of Conservatism. Kolko argues that the regulatory legislation of the 1890's and early 1900's, far from representing the need of a capitalism grown dangerously competitive and chaotic, for a beneficial system of profit-protecting regulation.¹⁵

Having reviewed the course of events which led to the formation of the modern lower federal court system with the question of intention in mind, let us return to the question directly: is there evidence in the literature that the addition of the courts of appeal and changes in their relationship to the district courts were motivated by a desire to create a mediating body?

Although the studies reported in the literature do not provide an answer with strong proofs--for reasons to be discussed presently--they do suggest a promising hypothesis that would, if proved, answer the question of intention in the affirmative. The hypothesis is that while other motivations contributed to the reorganization of the federal judiciary during the period 1890-1925, the character of the dominant groups whose alliance made the reform possible was such as to suggest that their motive was to create a court which would perform a mediating function in the federal system. The evidence that gives this hypothesis promise is

the switch by Southern Senators and Congressmen from an anti-to pro-court reorganization position. This move appears to indicate that a "compromise" was arrived at between forces championing the interests of eastern industrialism and those championing the interests of the Southern Bourbon states' rights forces. The "compromise" seems to have been to form a lower court system that would be national enough to fend off the populist-progressive threat to industrial capital, but local enough (through the recruitment and appointment process) to be understanding of local needs, at least the local needs of the dominant class.

The answer to the question of intention must be put tentatively in the form of a warranted hypothesis rather than an assertion because the studies of this period in the history of the federal courts do not undertake a systematic political and economic analysis of the events and actors involved in the major struggles. No re-examination of the Civil War-1925 period has been made since Warren's The Supreme Court in U.S. History in 1926 and Frankfurter and Landis' study, The Business of the Supreme Court in 1927. Articles since these two studies have simply adopted their conclusions without noticing, apparently, that many of the general conclusions and explanations are not "proved" in such a way as to satisfy contemporary standards in social science. For example, Frankfurter and Landis characterize the 1880-1891 struggle as one between eastern cap-

ital and populist-granger states' rightists. In reporting the protracted Congressional debates, however, they do not systematically report the party and region of the participants, much less trace their constituencies, party faction, economic, or private organizational connections. Nor are votes analysed for coalitions--not even obviously key votes such as a vote to recommit just before passage of the Rodgers' Bill in the House in 1890.

It takes nothing away from the great weight that ought to be given to the judgment of such careful scholars as Warren, Frankfurter and Landis to insist that something more than selected examples and quotations must be offered in support of those judgments before they can be built upon. It is easy to understand why Frankfurter and Landis did not produce a rigorous political analysis of those early struggles; devising a method for tracing the background of individuals, groups and ideologies through a struggle that involved both public bodies and private organizations and which lasted many decades is obviously a collective effort of considerable proportions. The pity is that Frankfurter and Landis have become frozen authorities rather than living inspiration to carry on the inquiry that they merely outlined.

In sum, the available evidence certainly does not preclude the possibility that the modern lower federal courts were intended from their inception to play a mediating role. Furthermore, the make-up of the winning, anti-

populist coalition strongly suggests the likelihood of such an intention. Finally, it is not unthinkable that a court formed on the forge of these contending forces would carve out a mediating role for itself in order to assure its own continued existence.

FOOTNOTES TO CHAPTER I

1. Max Farrand, ed. The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1911); 3 Elliott's Constitutional Debates 514, 545 (1901).

2. John P. Frank, "Historical Basis of the Federal Judicial System," Law & Contemporary Problems 11.

3. There are many standard sources which describe the early structure of the federal courts. Most easily accessible are Charles Warren, The Supreme Court in United States History. (Boston: Little Brown, 1923); Frankfurter and Landis, The Business of the Supreme Court (N.Y.: MacMillan Co., 1927); Henry M. Hart, Jr. and Herbert Wechsler, The Federal Courts and the Federal System (Brooklyn: Foundation Press, 1953). Recent dissertations on the lower federal courts also contain summaries of the historical development of federal courts. See L. S. Loeb, Judicial Blocs and Judicial Values (American University, 1964); B. Atkins, The Effect of Panel Decision-Making on the U.S. Courts of Appeals (Univ. of Kentucky, 1970). See also the articles cited throughout this chapter. It should be noted, however, that most scholarship on the history of federal courts is derivative, reflecting the influence of Warren and Frankfurter and Landis.

4. There was also a provision transferring the jurisdiction of the district courts to the circuit courts on the occasion of the ill health or death of a district court judge. Erwin C. Surrency, "A History of Federal Courts," 28 Missouri Law Review 215 (1963).

5. Ibid., p. 216.

6. Ibid., p. 217.

7. Ibid., p. 232.

8. The analysis presented in the remainder of the chapter is based on information found in the following sources: Frankfurter and Landis, op. cit.; Surrency, op. cit.; Frank, op. cit.; Warren, op. cit.; Herbert Jacobs, "Courts As Political Agencies: An Historical Analysis," in Vines & Jacob, Studies in Judicial Politics (New Orleans: Tulane Studies in Political Science, Vol. III (1962); Evan E. Evans, "Fifty Years of the U.S. Circuit Court of Appeals,"

Missouri Law Review, Vol. IX, No. 3 (June 1944).

9. Surrency, op. cit., p. 229.
10. Frank, op. cit., p. 28.
11. Frankfurter and Landis, op. cit., p. 86; see also Evans, op. cit., p. 199.
12. Frankfurter and Landis, op. cit., pp. 91-92.
13. Evans, op. cit., p. 199.
14. Jacobs, op. cit., p. 29.
15. Quoted in Frankfurter and Landis, op. cit., p. 97. The speech was delivered on Dec. 3, 1889.
16. Gabriel Kolko, The Triumph of Conservatism (N.Y.: Free Press of Glencoe, 1963).

CHAPTER II

ABILITY: A COMPARISON OF THE BACKGROUND CHARACTERISTICS
OF DISTRICT AND APPELLATE JUDGES

The only study, since the 1940's, of the "path to the federal courts" that is both systematic and historical was made in 1958 by Richard Burke.¹ Burke analyzed all appointments to federal courts in the 20th century (up to 1955) by level of court, by Administration, by factors influencing nominations, and by patterns of recruitment. His analysis was based entirely on primary sources--the files and records of the Senate Judiciary Committee, Office of Attorney General, and the American Bar Association's Committee on the Federal Judiciary. The purpose of the study was to isolate "factors of importance in the nomination and confirmation of Federal judges, of developing patterns and types of appointments, and of formulating this 'politics' into meaningful and significant generalizations."²

A study published in 1933 by Mott et. al.³ provides some data on federal judges in the early twentieth century. With that exception, no other study of the federal courts has produced--or attempted to produce--the detailed and systematic description of each bench found in Burke's work. Those studies immediately preceding Burke (Haynes⁴ and Harris⁵) or immediately following (Grossman⁶, Goldman⁷,

Curzan,⁸ Chase⁹) contain little data by level of court. For the most part, their research interest focuses on Presidents since Truman. They either seek to show that one has made "more political" or "better" or "more liberal" appointments than another (Goldman, Curzan); that the recruitment and selection process was different in one administration than another (Harris, Grossman, Goldman, Chase); or that the selection and nomination process are distortions (or not) of that set forth in the Constitution (Haynes, Harris).

The primary question of this Chapter is the extent to which lower court judges possess personal and social characteristics which might foster or at least not hinder mediation. One might also inquire whether the process of selection and confirmation itself has any effect on the kind of judges that are placed on the bench, but in the end, it is the characteristics of the judges that are most relevant.

To approach this question, we will have to rely on the Burke and Mott studies to provide the historical data to add to the data collected for the 5th Circuit benches 1954-1967. Between them, these two studies cover the lower federal courts from 1900 to 1955.

Selection-Confirmation Process

Before turning to the comparative data on the characteristics of lower federal court judges, one must ask whether the process of selection and confirmation, and historical changes in that process, reveals forces at work that might produce judges capable of performing a mediating role.

The post-1940 literature on selection-confirmation falls into two camps, corresponding to two sets of decades. Those writing in the 1940's and 1950's (Haynes, Wigmore,¹⁰ Harris and Burke) conclude (and complain) that Supreme Court nominations and District Court nominations are "owned" by Presidents and Senators respectively. The complaint stems from two sources: first, that Presidents and Senators treat these judgeships as partisan patronage jobs to be handed out to lawyers politically loyal to them, rather than to highly qualified and experienced professional non-political lawyers (Harris, Haynes and Burke)¹¹. The following quotation from Burke captures the idea:

The system of appointing Federal judges is political and is dominated by two highly political institutions--the Presidency and the Senate. The men nominated to fill these offices are mostly actual politicians, former politicians or political lawyer. The most influential factors in securing nomination to these offices are personal and political, not professional.¹²

A second source of irritation to these scholars is their contention that the Senate has violated the Constitution in expropriating the President's power over district judges and the President has aided the drift away from the Constitution by surrendering his power to leaders of his party (in the state where the vacancy occurs) if there is no Senator of his party from the state (Harris, Wigmore, Haynes).¹³

However, the 1940-1950's scholars are agreed that up to that period, Presidents had a much freer hand in selecting

judges for the Court of Appeals. Although a Senator from the nominees' state usually has veto power, if he is of the President's party, he does not expect to be able to exercise positive control over the nomination.¹⁴

Scholars studying nominations to the federal courts in the 1960's-1970's (Grossman, Goldman, and Chase)¹⁵ charge that earlier scholars overestimated the President's loss of power with respect to district judgeships--that if a President chose to insert himself with respect to district judge appointments, he could win. Further, they report that data gathered on nominations since Truman shows a move toward Presidential power.

However, they seem to confirm for their period the findings of the earlier scholars with respect to circuit judges--that the balance of power shifts markedly in favor of decision-making by the President's men. As Grossman puts it, the President's latitude is greatest in the Supreme Court nominations, least (but not non-existent) with district court nominations, while nominations to the Courts of Appeals can go either way but more often go to the President.¹⁶

What the more recent research makes clear--and Chase writes it more eloquently than most¹⁷--is that what is involved at each level of court, is not a single decision-maker but an "interplay of forces" with many parties of interests who, if the circumstances are such, may be in a position to exercise a veto.

Most of the "interplay of forces" is dictated by

custom and tradition.¹⁸ The Constitution provides only that the President appoint federal officials with the advice and consent of the Senate. Federal law requires that district judges at the time of appointment reside in the district to which they are to be appointed and that court of appeals judges reside in the circuit to which they are appointed. Custom dictates that appointees be lawyers; that they ordinarily be of the President's party; that within a circuit each State be represented outright or in rotation if there are not sufficient judgeships; that the appointees be a friend or political supporter of the major decision maker and/or his party (or his faction). Senate rules place major responsibility in the hands of the Senate Judiciary Committee; custom developed the practice known as "Senatorial courtesy" whereby the other Judiciary Committee members will reject a nomination if a Senator (of the President's party) from the state involved in the appointment sends back his "blue slip" with the notation that the candidate is "personally objectionable" to him. The custom of Senatorial courtesy has its major effect on district court appointments, although a President may try to avoid it by delaying or refusing to nominate anyone. With respect to the Court of Appeals, there is limited Senatorial courtesy--limited to a Senator (of the President's party) from the state from which the candidate comes. It is also limited in the sense that the President may avoid the effect of the "blue slip" veto by shifting to another state. If there is

no "affected" Senator of the President's party, Presidents frequently consult party leaders in the relevant state. However, Senators often consult with state party leaders concerning appointments, unless, of course, there is factional strife.

Custom is also responsible for the portion of the nomination process that is handled by the executive branch. Since the Pierce Administration, "clearance" has been done by the Attorney General's office, usually delegated by the Attorney General to a Deputy Attorney General.¹⁹ The Deputy Attorney General's staff both initiates a search and coordinates the suggestions of others. The "others" in the case of district courts are usually the relevant Senators or state party leader if there is no Senator of the administration's party; candidates themselves, occasionally the President or his Staff in the White House; Justice Department or national party; occasionally the American Bar Association or local bar. In the case of a court of appeals vacancy, the "others" include the President; the Attorney General, his deputy and the deputy's assistants; Senator(s) (of the President's Party) of the state; political leaders of President's party--national and in the state where the vacancy occurs; high level administration people; law school deans; candidates on their own behalf; members of the judiciary.

The Deputy Attorney General's staff sets up a file²⁰ for each of the recommendations received and begins staff work that involves ordering an FBI check; noting informal

evaluations where they differ from a person's formal letter; and checking and cross-checking with Senator(s), party leaders, President's White House staff. Eventually the Deputy Attorney General's staff forwards a list of possible candidates to the ABA Committee on the Federal Judiciary²¹ which, among other steps, checks candidates' local reputations. Clearly, the Justice Department staff members are in a key position to influence nominations. They control the information flow and are thus the only participants in a position to know everything and to generate--or fail to generate--information to defeat or support the preferences of the other participants or their own.²²

It seems clear that the recent scholarship that has identified all these forces--Presidential, Senatorial, party, professional, administrative--and described their interaction has advanced our understanding of the selection-confirmation process beyond "Senators own district judge-ships, Presidents own Supreme Court appointments and probably court of appeals nominations as well." However, a careful reading of Grossman, Goldman and Chase indicates that a few idiosyncratic cases aside, in the ordinary course of the vast majority of appointments, Senators or State party leaders choose district judges and Presidents or their delegated agents at the national level choose court of appeals judges. Put another way, all the researchers are in agreement that while factors such as geography, ethnicity, and extreme ideology are important in a general sense, the common

and persisting qualification for securing a district judgeship is to either be politically active in support of or a friend of the relevant Senator or State party leader, or both. To secure an appointment to the court of appeals, it would be well to be politically active in support of the national party or administration, and not an enemy of the Senator from your state (if of the Administration's party).

Thus, with respect to the question relevant to the mediation hypothesis--is there evidence that the selection process itself favors the selection of judges with the capacity to mediate--all the major research since 1940 covering, variously, appointments since 1921, answers the question affirmatively. That is, the process allows for and possibly favors (1) circuit judges with looser local ties and stronger national ties than district judges, and (2) district judges with strong local connections. On the basis of the selection process alone, one would predict that if a mediating function is performed by the lower federal courts, it will be by the court of appeals judges, not the district judges.

Characteristics of Lower Court Judges: 1900-1967

Most published, and unpublished, work on the lower federal courts, if the subject is alluded to at all, asserts that the appellate bench is more cosmopolitan than the district bench.²³ Two kinds of supporting evidence are presented. One type consists of reasoning from the differ-

ential effects of the selection process. Peltason²⁴ strengthens this by stressing that the localism and cosmopolitanism of the judges at appointment is maintained and strengthened by the situation of their work. District judges remain tied to a limited locality, subject to daily contact and the consequent pressures of local opinion. While their professional and financial life is secure, their social life and that of their family and friends can be-- and has been--subject to ostracism and harassment if their conduct departs from strongly held local norms. Appellate judges, on the other hand, appear to have more diffuse local ties to begin with, and after appointment, so the argument goes, are able to wander like free spirits throughout the circuit. Sitting in different locations, their work takes them from one urban center to another, giving them flexibility in living arrangements and variety in social life. Such a situation provides the possibilities of developing ideas at variance with local views, and also provides the means of escaping the consequences of any conflict. Furthermore, appellate work is collegial--cases are heard by rotating panels of three judges so that opposition to local values neither develops nor has to be maintained in professional isolation. Peltason and Vines-Richardson²⁵ all offer this account of differences between the two benches.

The second type of evidence for asserted differences in the two benches is exemplified by the work of Vines and Dolbeare. It centers on a finding of a different output

measured in terms of votes or change ratios on categories of cases: pro and anti-Negro in civil rights cases; for and against civil liberties claims; for and against claims of labor; and for and against change in urban policy.

In his study of district and appellate judges involved in deciding metropolitan cases,^{26*} Dolbeare presents some data comparing the two groups of "judges in terms of policy-change ratios (as a % of total decisions) vs. background characteristics."²⁷ (See Table 3).

The policy change ratios of Southern appellate judges far exceeds that of Southern** district judges in all cases taken together (37% vs. 16%) in civil rights race relations cases (55% vs. 9%) and in civil rights free speech-criminal law police practices cases (46% vs. 17%). The same trend appears for Northern judges in the race relations area (31% vs. 11%) but not the other two areas, nor on all cases. Dolbeare does not report the overall change ratios of appellate judges, so it is not clear whether the observed relationship between the Southern judges on two issues and overall (and among Northern judges on one issue) is counteracted by weak-relationships shown on the remaining issues.

*He includes seven of the largest cities plus 13 other cities over 150,000 population. He studied all the judges involved in all urban public policy cases from 1900-1967. Thus, neither all sitting district nor appellate judges are in his sample.

**Southern judges are those in Atlanta, Houston, Miami, Nashville, New Orleans, and the relevant courts of appeals. "Northern" is the remainder, apparently.

TABLE 3

Policy-Change Ratios of District Court and Courts of Appeals Judges,
by Subject Areas and Selected Judicial Characteristics

Classification	Judicial Characteristics ^b	District Courts		Courts of Appeals	
		Total Judges	Policy- Change Ratio (Percent)	Total Judges	Policy- Change Ratio (Percent)
All Cases	Southern	44	16	115	37
	Northern	216	13	443	7
	Held prior state office	144	8	250	12
	No prior state office	107	21	297	15
Civil rights race relations	Southern	11	9	48	55
	Northern	9	11	26	31
	Held prior state office	13	8	27	44
	No prior state office	7	14	47	49
Civil rights free speech-crimi- nal law po- lice prac- tices	Southern	6	17	22	46
	Northern	96	11	202	2
	Held prior state office	59	8	116	5
	No prior state office	42	17	106	7
Habeas corpus police prac- tices	Southern	15	13	27	0
	Northern	90	14	164	11
	Held prior state office	53	9	82	13
	No prior state office	49	20	103	6
All others	Southern	9	33	18	33
	Northern	21	14	51	6
	Held prior state office	19	5	25	8
	No prior state office	11	45	41	17

Source: Kenneth Dolbeare, Federal District Courts & Urban Policy, p. 394 (Table 12.9).

The other background variable Dolbeare connects with policy-change ratios is whether or not a judge held state office prior to appointment. For all cases, considering the district judges only, the policy change ratio is higher for those who held no prior state office (21% vs. 8%). Among court of appeals judges, the differential is only 3% (15% vs. 12%). Looking at only civil rights cases, the effect is similar:

	<u>District Judges</u>	<u>Court of Appeals Judges</u>
No prior State Office	14%	49%
Prior State Office	8%	44%

The civil rights-race relations sample is also divided into Northern and Southern judges of each bench (but not controlled for state office experience) with the result that Southern judges on the courts of appeals had higher change-ratios than their Northern brethren, whereas there is little difference among district judges on a regional basis:

	<u>District Judges</u>	<u>Court of Appeals Judges</u>
South	9%	55%
North	11%	31%

As can be seen, the policy-change ratio of Southern (and Northern) court of appeals judges is much greater than Southern district judges (55% vs. 9%).

These data seem to show that the holding (or not) of State office does distinguish the decisional behavior of district judges, but has little to do with how court of appeals judges vote on urban issues. However, something is affecting court of appeals judges--Southern and Northern--that distinguishes them markedly from district judges on civil rights issues. One wishes Dolbeare had tested for "Held national office."

He reports in another table²⁸ that 13% of his 124 District judges had held federal office, compared to 47% holding state office and 40% listed as private practice only. Other items indicating "localism" are reported in this table, but comparable data for court of appeals judges is not reported with the exception of "state office" and location of court (North-South). Most of his comparative data is among District Judges where he finds:

Those few who had held federal office were particularly sensitive to the race relations claim at the city level. Similar but smaller effects occurred in the free speech/church-state civil rights area.²⁹

Those judges with the strongest local ties, measured in terms of birthplace, family longevity in the community, and careers were slightly more likely to support city policy than others . . . chiefly in race relations case. . . .³⁰

Kenneth Vines has done sophisticated and pioneering work on the lower federal courts. One thing he has not undertaken, however, is a systematic comparison of district and appeals courts. Every article he has published, as well as the book he co-authored with Richard Richardson,

asserts that the impact of differences in background, paths to the court, institutional perspective and the like explain differences in the decisions of the two levels of courts. But such factors do not become research questions subject to empirical demonstration.

In his 1963 article on the role of the courts of appeals,³¹ Vines reports that Southern district and appeals courts handle race relations cases in different ways. In the years 1954-1962, the appeals courts of the Fourth, Fifth and Eighth Circuits made higher percentages of pro-Negro decisions than the district courts which originally tried the cases. All circuits together decided 75% of their cases in favor of Negroes compared to 51.3% for all district cases.³² The subsequent empirical search for explanatory variables concerns only district judges. Vines found that district judges with two characteristics decided "fewer" cases in favor of Negroes: (1) districts with large Negro population; (2) judge's background of experience in state government and close ties to the state political and social structure.³³ The explanation of the appeals judges' behavior takes the form of a "suggestion" that background geography, selection process, work experience, produce judges less tied to a particular locality and therefore, ". . . we might suppose that circuit court appointees . . . have national viewpoints and political connections more frequently than their district court colleagues."³⁴

The following year, Vines published a study involving

Southern district judges only.³⁵ He investigated the relationship of background variables (party, birthplace, place of education, religion, prior work) of district judges (categorized by decisions in race relations cases as Segregationists, Moderates and Integrationists) and a district variable (% Negro population). Table 12 of Vines' study reveals an important finding with respect to the effect of previous work experience.

. . . Service of judicial candidates as federal attorneys, when not combined with office holding in the state political structure, seems to have marked out many members of the Integrationist group for deviation from traditional Southern values. It is important that the future judge has not undergone commitment to the state political system. Not identified with the state political system, the judge may be more sympathetic toward national values and less sympathetic toward Southern efforts to resist federal policies.³⁶

It is possible to reason from this data that a bench with a small percentage of judges who held state jobs could be expected to make a higher percentage of race relations cases in a pro-Negro direction. Therefore, one would expect that Vines' next report would seek to explain the 75-50% difference reported in 1963 by the work histories of the appeals judges.

The next work Vines published was a book co-authored with Richardson, The Politics of the Federal Courts.³⁷ It contains a small amount of data comparing the backgrounds of the two levels of courts. Table 4, reconstructed from their figures, shows that in 1963 (the only year covered

TABLE 4

LOCALISM IN THE BACKGROUNDS
OF DISTRICT AND APPEALS JUDGES, 1963

<u>Background of Judges</u>	<u>District Judges</u>	<u>Appeals</u>
Born in district of court	57.7%	
Born in states of court (circuit)*	66.6%	77.1%
Educated at law school in same state as court (circuit)*	60.5%	86.4%
Held prior judicial office**		
Federal	21.8%	46.4%
State	41.2%	25.2%

*For appeals judges this means they were born/educated in the state from which they were appointed to the Court of Appeals.

**Includes district attorney, assistant district attorney, special government counsel, clerk of court, and city, county or state attorney. Other judgeships are not included.

Source: Richardson and Vines, The Politics of the Federal Courts (1970), pp. 72 and 77 (Tables 4 and 8)

in the relevant chapter) higher percentages of appeals than district judges were tied to their respective states by birth and legal education.

However, a comparison of each group of judges in terms of federal/state work connections shows that greater percentages of appeals than district judges had some federal judicial experience (excluding judgeships) prior to appointment as federal judges (46.4% vs. 22%). District judges more frequently came to the federal bench with state judicial experience. The possible impact on the direction of decision-making is not made explicit anywhere in this book. In fact, only one comparison of appeals to district decision-making direction appears and it is not explicit. The total number of cases and the number of libertarian and non-libertarian cases appealed to and reversed by three courts of appeals is reported. From these data a "% anti-civil liberties" figure can be calculated for each bench.³⁸ For the Fifth Circuit the figures are:

	<u>% Anti-Civil Liberties</u> <u>Decisions, 1956-1961</u>
District Courts	90.8%
Appeals Courts	66.8%

The fact that so little analysis has been done by level of court requires that we speak in simple ways about the politically relevant characteristics of the two lower court benches. From the data gathered by the two studies

referred to earlier--Burke and Mott--as well as data gathered on the Fifth Circuit benches for this dissertation, I have selected those characteristics that are, arguably, related to a judge's capacity to mediate.

Of the background characteristics reported by Burke and Mott, those related to experiences that might be taken as indications of parochialism or cosmopolitanism are presented in Table 5, along with data for the Fifth Circuit in the 1954-1967 period. The only such characteristics for which data is available for the whole of the 20th Century are governmental, administrative and legislative work experience (federal or state) and other political experience (party, county, city, defeated candidates for public office).

Table 5 shows that if state and federal experience is combined, the two benches did not differ from each other in either administrative or legislative backgrounds during the 1900-1929 period. Twenty-two percent (22%) of all district judges compared to twenty-three percent (23%) of appeals judges had held administrative posts prior to appointment. A slightly greater proportion of district (34%) than appeals judges (30%) had served in a legislative body. More marked is the relative dominance of legislative over administrative backgrounds.

Burke's figures for the following period (1929-1955) show a drop in prior legislative experience to 19% for district judges and 11% for appeals judges: These data seem to suggest a shift in recruitment patterns: district judges

TABLE

POLITICAL BACKGROUND OF DISTRICT

	<u>1960-29(1)</u>	<u>1929-1955(2)</u>	<u>1954-1967(3)</u>	<u>19</u>
	All Circuits Dist. Judges	All Circuits Dist. Judges	5th Circuit District Judges (N=60)	C
<u>Admin. Experience</u>				
Federal (5)	> 22%	19%	25% (15)	>
State		20%	17% (10)	>
<u>Legis. Experience</u>				
Federal	> 34%	9%	7% (4)	>
State		10%	22% (13)	>
Other Political Experience(6)	-	21%	48% (29)	

1. Source: Mott et al, op. cit., Table III, p.149. Published state employment.
2. Source: Burke, op. cit., Tables 7 and 8, pp. 372-373.
3. See Appendix A.
4. Source: Burke, op. cit., Table 3, pp. 205-06.
5. The category includes U.S. Attorneys
6. This category includes county attorneys, mayors, party of

TABLE 5

POLITICAL BACKGROUND OF DISTRICT AND APPELLATE JUDGES, 1900-1967

<u>1929-1955(2)</u>	<u>1954-1967(3)</u>	<u>1900-1929(1)</u>	<u>1921-1955(2)</u>	<u>1921-1955(4)</u>	<u>1954-1967(3)</u>
All Circuits Dist. Judges	5th Circuit District Judges (N=60)	All Circuits Ct. Appeals Judges	All Circuits Ct. Appeals Judges	5th Circuit Court of Appeals Judges	5th Circuit Ct. Appeals Judges (N=17)
19%	25% (15)	> 23%	26%	31% (4)	35% (6)
20%	17% (10)		12%	7.6% (1)	47% (8)
9%	7% (4)	> 30%	7%	7.6% (1)	18% (3)
10%	22% (13)		4%	-	24% (4)
21%	48% (29)	-	25%	15.3% (2)	47% (8)

. cit., Table III, p.149. Published data contained figures for combined federal and

., Tables 7 and 8, pp. 372-373.

., Table 3, pp. 205-06.

U.S. Attorneys

county attorneys, mayors, party officials, unsuccessful candidates, etc..

continuing, although at a reduced level, to come to the bench with legislative experience, with its attendant ties to local needs and interests; appeals judges coming to the bench from administrative work (38%), two-thirds of it at the federal level. This development would seem to suggest that the court of appeals bench was indeed becoming more national in its political experience and ties. However, during the same period, 39% of district judges also had prior administrative experience, about half of it at the federal level.

Data for all circuits for the 1954-1967 period is not available for comparison, so that the data for the Fifth Circuit for that period is susceptible of two interpretations. Either the trend toward administrative backgrounds accelerated or the Fifth Circuit developed asymmetrically. The data show that 42% of all district judges and 82% of all appellate judges in the circuit had administrative experience. The notion that appeals judges are more cosmopolitan because they have more national ties is given a heavy blow by the split between federal and state administrative experience of the two benches. More distinct judges held administrative jobs at the federal than at the state level (25% vs. 17%) whereas more circuit judges had their administrative experience at the state level (47% vs. 35%). While it is true that a higher percent of appellate than district judges held federal administrative posts (35% vs. 25%), the data does not present a clear picture of

a district bench cut off from national connections and influences. Furthermore, 47% of the appeals bench obviously retained local connections.

With respect to legislative background, the two benches of the Fifth Circuit either show a marked increase from 1929-1955 in recruitment of persons with legislative experience (from 19 to 29% of district judges, from 11% to 42% of appellate judges), or, again, the Circuit is not representative. In the Fifth Circuit, fewer judges come to both benches with legislative than administrative backgrounds. Most of the district judges' legislative experience is in state legislatures (22% vs. 7%), but the same is true of the appellate judges (24% vs. 18%). However, a higher percentage of appellate judges served in Congress (18% vs. 7%). Clearly, district judges of the Fifth Circuit are less involved in the national legislature.

The remaining category--other political experience--indicates that for the period 1929-1955, district and appellate benches had roughly the same proportion of judges who had been mayors, county attorneys, party officials or run for public office (21% vs. 25%). In the Fifth Circuit, 1954-1967, the pattern was the same, although the level increased to 48%, perhaps indicating a general politization of appointees, but certainly showing the Fifth Circuit well above the all-circuit norm of the previous period. Concerning the search for evidence of local versus national ties, it should be noted that the activities counted in

this category are probably better taken as indicating local other than national ties.

Evaluating the data of Table 5 as a whole, there does not seem to be compelling evidence of great differences in the two groups of judges with respect to their political backgrounds. The appellate judges, as a group, appear to have more legislative and administrative experience than the district bench. However, that experience is as locally based as the district judges. Table 5 does not lead one to accept the assertion that judges of the court of appeals are obviously more cosmopolitan than district court judges--and certainly not those sitting in the Fifth Circuit from 1954-1967.

If the Burke-Mott categories are abandoned (the comparative and historical dimension with it) and Fifth Circuit political activity data 1954-1967 is recalculated, the results are as displayed in Table 6. Roughly similar percentages of district (25%) and appeals (29%) judges report work in their political party-campaign director, national convention delegate, state party chair and the like. In addition, if appointment as U.S. Attorney is taken as an indication of party connections, an additional 12-13% of each bench can be assumed to have been involved in party activity prior to appointment. Combining the two measures of involvement with party, 38% and 41% respectively of district and appeals judges were so engaged. There appears to be no significant difference between the two benches with

respect to party work.

However, aggregating the judges on each bench who had at some time held non-judicial appointed or elective office, state or federal, reveals a marked difference between district and appeals benches. More than ten percent more of the district bench was sufficiently involved in party politics to run for or get appointed to public office (72% vs. 59%). This measure of difference, however, does not distinguish state from federal level connections, so that it merely suggests that both benches are composed of politically active judges but does not speak to the question of whether one bench is notably more national in its political orientation.

In order to test for national-local influence differences between the two benches, certain background information--location of birth, higher education, and work--was dichotomized into two categories, South and non-South. The results are presented in Table 7. The logic behind this operation is that if the appellate bench judges have more national influences at crucial stages of their life, then the assertion that they are potentially more cosmopolitan than the district judges gain support. In reading Table 7, it must be recalled that high figures are taken to indicate broader contacts and at least the possibility of more cosmopolitan frame of reference. Low figures, on the contrary, indicate a more parochial set of life experiences.

TABLE 6
REPORTED PRIOR POLITICAL ACTIVITY OF
JUDGES OF DISTRICT COURTS AND COURTS OF APPEALS
FIFTH CIRCUIT, 1954 - 1967

	<u>District Court*</u> <u>Judges</u>	<u>Court of Appeals</u> <u>Judges</u>
	(N = 60)	(N = 17)
Appointed/Elected to Non-Judicial Office (Federal and State)	72% (43)	58.8% (10)
Direct Party Work	25% (15)	29.4% (5)
	38% (23)	41% (7)
U.S. Attorney (if no party work reported)	13% (8)	11.8% (2)

* Column total exceeds 100% because judges appear in more than one category.

Source: Who's Who in America. See Appendices A and B.

TABLE 7

NATIONAL AND REGIONAL EXPERIENCES OF DISTRICT AND APPELLATE
COURT JUDGES, FIFTH CIRCUIT, 1954-1967

	<u>District Judges</u>	<u>Court of Appeals Judges</u>
<u>Some Non-Circuit Early Experience</u>	(N = *)	(N = *)
Birthplace, College or Law School	35.0% (21)	29.5% (5)
-Birth only	20.0% ()	23.5% (4)
-College only (Law School not incl)	13.5% (8)	25.0% (4)
-Law School only	15.5% (9)	20.0% (3)
Non-South Region of Work	13.3% (8)	29.5% (5)
Non-South Region of Work, Elected/Appointed federal office (incl U.S. Attorney)	53.3% (31)	58.8% (10)
Some National Influence	50.0% (30)	58.8% (10)
National Influence Only	1.6% (1)	12.1% (2)
Elected/Appointed Office in South	62.0% (37)	53.0% (9)
Some Regional Influence (birth, schools or work)	98.3% (59)	88.2% (15)
Regional Influence Only	46.6% (28)	41.0% (7)

Source: Who's Who in America. See Appendices A and B.

* Data was not reported for every judge for every item. Therefore, the District Judge "N" ranges between 58 and 60; the Court of Appeals Judges "N" ranges between 15 and 17.

Overall, the data seem to show that the district bench does in fact have closer ties to the region than the appellate bench. In all but one measure of connections outside the South, the court of appeals judges exceed the district judges.³⁹ The exception is region of birth and schooling taken together. If judges for whom any one of these events occurred outside the circuit are considered subject to more cosmopolitan influences, then the district bench exceeds the appellate bench in such influences by about 5%. It should be noted, however, that by narrowing to a circuit/non-circuit distinction, the "national" influence on district judges is disproportionately exaggerated. This is so because some of the non-circuit schooling of district judges occurred in the upper South, whereas all of the appellate judges non-circuit schooling was also outside the region.

The remaining factors reported in Table 7 indicate that the appellate bench was subject to more national influences than the district bench. For some items, the differences are not great but they all run in the same direction. Higher proportions of appellate judges attended college or law school outside the circuit. Twice the percentage of appellate judges worked outside the South as did district judges. The difference is reduced if region of work is combined with elected or appointed federal office (58.8% vs. 53.3%), but it is well to recall that an appointment as U.S. Attorney--a local office in many senses--is taken

as non-regional work. Combining all items indicating non-circuit or non-regional experience, the appellate branch exceeds the district bench by almost 9%.

The lower part of the table explores the "localness" of each court. On each measure the district bench rates higher than the appellate bench. Not only is the pattern consistent but is about a 10% differential on two items--elected or appointive office in South and the combined regional influence measure (birthplace, schooling or work).

The third estimator of the localism or "nationalism" of each bench--percentage of judges who had experienced only one influence or the other prior to appointment to the federal judiciary--follows the pattern of the other factors. The appellate bench has a greater proportion of judges exposed to national influences only (12% vs. 1.6%), the district bench a greater proportion with regional influences only (47% vs. 41%).

The lower half of the table contains a cautionary note: the local connections of court of appeals judges should not be minimized. 88% had sustained some regional influence prior to appointment--by birth, education or work. A majority held elective or appointive office in the region prior to appointment. The overwhelming majority were born, educated, and were employed within the circuit or the region. More cosmopolitan in background than their bretheren of the district courts--almost certainly; carpet-baggers--hardly.

In her study of the Fifth Circuit Court of Appeals for the years 1952-1966, Curzan found only "work outside South" was an indication of a judge's civil rights views (based on pro-con votes). She found a slight correlation between "location of education" and civil rights votes, but none with geographical place of birth, religion, elective office in South, appointive office Federal and State, age at appointment, or activity in Bar Association. It is interesting to note that the "non-South region of work" item on Table 7 represents the largest difference between the two levels of Court (17%).

Because the direct testing of the mediation hypothesis (Chapters IV and V) employs decisions by only a portion of each bench, Table 8 shows a comparison of the respective benches with the judges from that bench involved in deciding the pool cases. The panel judges from the appellate court are unrepresentative of their bench on four items: work outside the region (40% vs. 30%), some national influence (70% vs. 59%), national influence only (20% vs. 12%), holding elected or appointed office in the region (40% vs. 53%), and some regional influence (80% vs. 88%). These departures from the characteristics of the bench all run in the same direction. The panel judges show stronger ties to the national scene and weaker ties to the region than their brethren. The district judges who decided the pool cases are similarly "unrepresentative" of their benches on two items: a smaller proportion had worked outside the

TABLE 8

COMPARISON NATIONAL-REGIONAL EXPERIENCES OF DISTRICT & APPELLATE BENCHES
WITH JUDGES DECIDING TEST CASES
FIFTH CIRCUIT, 1954-1967

	<u>District Judges With Pool Cases</u>	<u>District Bench</u>	<u>CA Judges on Panels</u>	<u>Court of Appeals Bench</u>
	(N = 31)		(N = 10)	
N-S Region of Birth or School	35.5% (11)	(35.0%)	30% (3)	(29.5%)
N-S Region of Work	* 9.6% (3)	(13.3%)	*40% (4)	(29.5%)
N-S Region of Work, elected/appts federal office (incl US Attny)	54.8% (15)	(53.3%)	60% (6)	(58.8%)
Some nat'l infl (Items 2,3,4,7 or 5)	* 42.0% (13)	(50.0%)	* 70% (7)	(58.8%)
Nat'l Infl only	* 3.2% (1)	(1.6%)	* 20% (2)	(12.1%)
Elected Appt'd Office in Region	61.0% (19)	(62.0%)	* 40% (4)	(53.0%)
Some Regional Influence (birth, schools or work)	96.7% (30)	(98.3%)	* 80% (8)	(88.2%)
Regional Infl Only	* 51.6% (16)	(46.6%)	40% (4)	(41.0%)

Source: Who's Who In America.

*Denotes differences discussed in the text.

region (9.6 vs. 13%) and had some national influence (42% vs. 50%). On the other item, Regional Influence Only, they exceed the bench by 5% (51.6% vs. 46.6%).

The subgroup of each bench seems to exaggerate the basic difference between the two courts. The appeals court panel judges are more cosmopolitan, the district judges more parochial than the groups from which they are drawn. Possible explanations of this data will have to be deferred until the case data is examined.

To sum up: the aggregate background data for both courts 1900-1967 is not found sufficient to establish the often asserted national-local oriented distinction between district courts and court of appeals judges. However, similar data for the Fifth Circuit courts, 1954-1967, does show a marked difference between the two benches. The appellate bench appears to have more influences from outside the circuit and region, particularly in the area of work, than the district bench, while at the same time evidencing moderately strong regional ties. The district judges, on the other hand, have been more exclusively involved in the circuit and region, a smaller proportion having been exposed through schooling or work to non-regional influences.

Finally, we have observed that these tendencies appear in exaggerated form in the group of judges from each bench who decided the cases under study.

These data permit certain tentative conclusions.

To return to our original question about the effect

of the recruitment-confirmation process, it does appear warranted to suggest that the process does select somewhat different types of judges for each of the lower court benches. The data presented does not prove such a proposition, but it does not defeat it.

On the basis of Table 7, it seems safe to conceive of court of appeals judges as possessing characteristics--experience outside the region that could lead to an appreciation of new national norms and values coupled with important experience and ties to the region that could enable them to understand and value local norms--that might incline them to perform a mediating role. District judges seem to be much poorer candidates for mediation although there certainly are a few district judges who possess the requisite experience.

Two pieces of unpublished research bear on this point. In a 1967 study of role perception as an explanatory variable of en banc decisions by the Fifth Circuit Court of Appeals (1957-1966), Rich identified three perceived roles: Activist and policy-making, Federalizing, and Restraint. He defines the roles as follows:⁴⁰

1. Activist and policy-making--little different: from Supreme Court in initiating change.
2. Federalizing--an instrument for bringing state policy into line with national policy.
3. Restraint--provides stability and deliberateness in the law, stress stare decisis.

Rich's "federalizing" role is close to the notion of mediation. Six judges gave voice to this concept, although in his combined measure only five fully qualified as "federalizers." They described the role of their appellate level court in the following words:⁴¹

Ainsworth:

Judge of C of A must be aware that what he does has potent effect in the community. He is primarily concerned with reviewing in an extremely careful way what went on below to assure due process of law. The Judge of the C of A is a protective barrier--he is searching for truth. He must also remember that he is an instrument of National, not State policy. The very volume of cases and the diversity of cases places heavy responsibility on C of A Judge--he is final word in majority of cases. Must remember that he is merely appointed, not annointed.

Ball:

In the time in which we are living, the Federal Courts have become more relevant than the State Courts. The State Courts in many instances will not take over the cases that they should (Habeas Corpus, etc.). Circuit Court can help as a federalizing agency, attempting to maintain "balance of power" and responsibility between state and federal governments, The Circuit Court must apply national policy, but should do so with restraint. The District Judge is bound by the facts and the controlling law. The Justices of the Supreme Court make judicial policy.

Tuttle:

The Judge of the C of A should look on matters with a national view. The C of A is the first opportunity for a "national" view of the policy considerations away from the provincial setting of the trial court. Because of the extreme pressure on the Supreme Court, the C of A should take steps to relieve some of this pressure. The C of A is the Court of last resort in 90-97% of cases. Should therefore assume some degree of activity in defining

and protecting the individual under the Constitution. Supreme Court will break down if it has to make all policy decisions. If every growth or modification of the Cl. or power of Equity was left to S. Ct., either growth or modification would not occur or S. Ct. would break down under the load. 5th Circuit has gone further than Supreme Court in some cases, but was anticipating next appropriate modification. In 5th & 6th Amend. cases S. Ct. has been more conservative than many of the other Federal Courts.

Wisdom:

The Judges of the Court of Appeals occupy a Federalizing role. It is their mission to bring State policy in line with National policy. They are insulated from the local scene and not subject to the emotional pressures to be found there. They have less latitude in rendering decisions since they are bound by Supreme Court decisions. His primary mission is to free the political system from friction. He carries out policy, does not make policy. District Judge is quite different. He is bound by evidence and law in the individual case, must render immediate decision. Also more sensitive to local pressures and customs.

Of the six judges giving some expression to this role (either on open-end or structured questions), four (Tuttle, Wisdom, Thornberry, Ainsworth) either worked or were schooled outside the circuit. The other two (Bell and Rives) appear to have had no such experiences. Of the five who on all measures perceive the role of the courts of appeals as "federalizing," only one reports no non-regional influence; among the six who think these courts should play a "Restraining" role, one-half had experienced some national influence while the other half appears region-bound.

Since Rich (nor anyone else) did not investigate district judges' perceptions, we have no way of assessing the

relative strength of the various role perceptions. However, another unpublished dissertation investigates the "function, impact and political relevance" of Federal district courts. Based largely on an exhaustive mining of the papers of an Iowa district judge, William F. Riley, supplemented by interviews with other district judges in the Eighth Circuit, this study by Robert Carp finds that

. . . to all intents and purposes, the judicial circuit is the real universe and the only meaningful source of reference for federal district judges. When the federal trial judge looks beyond his own immediate district and/or state, he sees his judicial circuit; and only rarely does his vision extend beyond the geographic limits of that circuit.⁴²

Carp found evidence of the parochialism of district judges stemming from local needs and conditions.⁴³ He discovered Judge Riley's (and other interviewed judges'), contacts with local lawyers and officials were frequent, whereas he (and they) had virtually no contact with any national officials.⁴⁴

In his examination of Judge Riley's role perceptions he found five aspects to Riley's perception of the role of a district court judge: broker between the disputing parties, defender of civil liberties, abstainer from partisan political activity, leader in legal profession (local), defender of dignity of "the judgeship" which he considers a semi-sacred institution. There appears no hint of any concept of a "mediating" or "federalizing" role. Unfortunately, Carp did not question his group of sitting judges on this

point.⁴⁵

In evaluating what these two studies add to the data of the present investigation, it must be admitted that Rich's report that some judges' perceive their role to be "mediating" does not vouchsafe its actual performance. Similarly, Carp's negative finding with respect to one district judge does not permit the conclusion that district judges do not perceive their role as "mediating." Nonetheless, the cumulative effect of (1) Rich's finding that some appellate judges are consciously trying to perform a mediating role; (2) Carp's evidence of district judge parochialism, and lack of evidence of a perceived mediation role; and (3) my finding of a national-local difference in political experience between district and appeals court benches in the Fifth Circuit is to strengthen the validity of testing the mediating hypothesis in terms of the actual work of the lower federal courts. A related effect is to make it seem more likely that the results of that test will show the appellate rather than the district judges performing the mediating function.

Finally, the exaggeration of the local-national characteristics with respect to the "pool" judges raises the possibility that additional factors are at work. The next chapter is devoted to the question of whether the lower courts possess the structure and powers that would facilitate or at least not hinder the development of the mediation function. These factors may provide some insight into

the "exaggeration" phenomenon.

FOOTNOTES TO CHAPTER II

1. Richard Burke, The Path to the Court: A Study of the Federal Judiciary Appointments (Ann Arbor, Michigan: University of Michigan Press, Microfilm, 1959). An unpublished Ph.D. dissertation completed in 1958 at Vanderbilt University.

2. Ibid., p. 1.

3. Rodney Mott, Spenser D. Albright & Helen Semmerling, "Judicial Personnel," Annals of the American Academy of Political and Social Science 168 (1933) 143-55. It should be noted that some data was collected in the 1940's by a former Circuit judge. See Evans, "Political Influences in the Selection of Federal Judges," Wisconsin Law Review (1948), 330-351, 334-335.

4. Evan Haynes, The Selection and Tenure of Judges (Newark, N.J.: National Conference of Judicial Councils, 1944).

5. Joseph P. Harris, The Advice and Consent of the Senate (Berkeley: University of California Press, 1953).

6. Joel B. Grossman, Lawyers & Judges: The ABA and the Politics of Judicial Selection (N.Y.: John Wiley & Sons, 1965).

7. Sheldon Goldman, Politics, Judges & The Administration of Justice (Harvard University: 1965, unpublished Ph.D. dissertation). Also "Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts," Western Political Quarterly 18 (1965) 755-762.

8. Mary H. Curzan, A Case Study in the Selection of Federal Judges: The Fifth Circuit Court, 1953-1963 (Unpublished Ph.D. dissertation, Yale University, 1968). A summary of this dissertation is available in Xerox. The dissertation itself is sealed so that most of its supporting data is unavailable. The work is based heavily on interviews attained under a secrecy agreement.

9. Harold W. Chase, Federal Judges: The Appointing Process (Minneapolis: University of Minnesota Press, 1972).

10. Dean Wigmore, "Editorial," 25 Illinois Law Review 929 (1930).

11. Harris, op. cit., p. 314ff; Haynes, op. cit., pp. 21-23; Burke, op. cit., pp. 215, 241, 329, 351-370.

12. Burke, ibid., p. 370.

13. Harris, op. cit., pp. 314-17; Haynes, op. cit., pp. 22-23; Wigmore, op. cit., pp. 930-31.

14. Burke, op. cit., pp. 21, 197-98; Harris, op. cit., pp. 314-15; Haynes, op. cit., p. 23.

15. Grossman, op. cit., pp. 53-54; Chase, op. cit., pp. 11-13; Goldman, Politics, Judges and the Administration of Justice, pp. 104-15.

16. Grossman, op. cit., p. 54.

17. Chase, op. cit., p. 35.

18. The following account of the selection-nomination process is based largely on Grossman, Burke, Chase, op. cit.

19. Originally, Presidents personally, then the White House staff, handled judicial appointments. As government grew and became more complex, appointments were handled by the State Department, then the Department of Justice. See Burke, op. cit., pp. 15-16.

20. Burke, op. cit., appends copies of the standard forms used by the Eisenhower Administration, as well as the copy of the "blue slip" used by the Senate Judiciary Committee.

21. The ABA formed a Committee on the Federal Judiciary in 1946. For a brief period during the last of the Truman and the beginning Eisenhower administration, they submitted lists of candidates to the Attorney General's Office on their own initiative. This practice was terminated on the request of the Eisenhower administration. Thereafter, the ABA resumed simply rating candidates submitted to them by the Justice Department. See Grossman, op. cit., pp. 69-71.

22. See also Richard Richardson and Kenneth Vines, The Politics of the Federal Courts (1970), p. 63, 69.

23. Curzan, op. cit., pp. 22-23; J. W. Peltason, Fifty-Eight Lonely Men (N.Y.: Harcourt, Brace & World, Inc., 1961), pp. 21-28; Richardson and Vines, op. cit., pp. 70-73; Vines, "The Role of the Circuit Courts of Appeals in the Federal Judicial Process," Midwest Journal of Political Science, VII (No. 4) Nov., 1963, pp. 311-14;

Richardson and Vines, "Review, Dissent and the Appellate Process," Journal of Politics, Vol. 29, (1967), p. 603.

24. Peltason, op. cit., pp. 28, 132.
25. Peltason, ibid.; Richardson and Vines, loc. cit.
26. Dolbeare, op. cit.
27. Ibid., p. 394 (Table 12.9).
28. Ibid., p. 386 (Table 12.5).
29. Ibid., p. 389.
30. Ibid., p. 387.
31. Kenneth N. Vines, "The Role of Circuit Courts of Appeal in the Federal Judicial Process: A Case Study," Midwest Journal of Political Science, VII (No. 4) Nov. 1963.
32. Ibid., p. 310. The 6th Circuit showed an opposite relationship: District Courts 69.6% vs. Appeals Court 58.3%.
33. Ibid., pp. 310-11. This is a report of a finding. No data is presented nor any indication made of what measures were used.
34. Ibid., p. 311.
35. Kenneth N. Vines, "Federal District Judges and Race Relations Cases in the South," Journal of Politics, Vol. 26 (May, 1964). Vines used all the district courts in the eleven states of the Confederacy.
36. Ibid., pp. 355-56. Table 12 appears on p. 354.
37. Richard J. Richardson & Kenneth N. Vines, The Politics of the Federal Courts (1970).
38. Ibid., pp. 127 and 133 (Table 4 and Table 6).
39. The non-local factor for District Judges was maximized by counting any experience out of the Fifth Circuit as "national." This had no effect on appellate judges all of whose "out of circuit" activity was also "out of region." The district judges, however, had schooling or work in the upper South. The point is, every effort was made to capture the "broadening" experiences of district judges.
40. Francis M. Rich, Jr., Role Perception and Prece-

dent: Orientation as Variables Influencing Appellate Judicial Decision-Making: An Analysis of the Fifth Circuit Court of Appeals (Unpublished Ph.D. Dissertation, Univ. of Georgia, 1967), pp. 92-93.

41. Ibid., pp. 86, 89.

42. Robert A. Carp, The Function, Impact and Political Relevance of the Federal District Courts: A Case Study," (Unpublished Ph.D. Dissertation, University of Iowa, 1969), p. 160.

43. Ibid., Chapters 9 and 10.

44. Ibid., Chapter 8.

45. Ibid., Chapter 5.

CHAPTER III

ABILITY: A COMPARISON OF THE CASE-HANDLING & ADMINISTRATIVE
POWERS OF DISTRICT AND APPELLATE JUDGES

In the last chapter, we saw that some evidence exists, which suggests differences between district and appellate judges along a local-national dimension. District judges appear more parochial in their background, appellate judges more cosmopolitan. Whether these differences produce differences in behavior will be analyzed in subsequent chapters, but before doing so, one other possible influence on the behavior of each set of judges should be analyzed.

The central question raised in this chapter is whether the powers and organizational structure of their respective courts would help or hinder the development of a mediating role. Structurally, the federal courts have two aspects. One aspect is involved in case decision-handling; the other with the administrative tasks of the courts. In studies of the lower federal courts, B. B. Cook,¹ and Carl Baar² suggest that these two sets of relationships among federal judges cannot be entirely separated. They impact on each other in important ways.

Accordingly, I will discuss the powers and organization of the case-handling and administrative tasks before assessing an interactional point which appears to have impli-

cations for the mediation hypothesis.

Powers and Structure of Case-Handling
in The Lower Federal Courts

District Courts

Jurisdiction and decision-making tools: District courts are the trial courts of the federal system. As indicated in Chapter I, Congress has assigned them jurisdiction over all matters civil and criminal allowed to the federal courts by the Constitution.³ A listing of the categories of jurisdiction occupy sections 1330-1303 of Title 28 of the U.S. Code. In general, they render decisions of fact and law in criminal and civil cases arising under federal treaties, laws, or the Constitution. They have jurisdiction over cases between citizens of different states or between citizens and aliens, as well as cases concerning admiralty or maritime law.

The Constitution also gives the district courts full equity power to devise remedies, in the interest of fairness and justice, where they are not provided or prohibited by statute or the Constitution.⁴ In civil cases, orders of various kinds--injunctions, prohibitions, cease and desist--and various levels of specificity are commonly issued by district court judges--before, during and at the conclusion of a trial. Orders staying orders can be issued. Often pre-trial hearings are held or delayed; subpoenas issued to compel the production of witnesses or documents; and

decisions are made concerning the receipt and timing of the receipt of documents at the direction of the judge.

Composition of districts and assignments of judges:

Geographically, federal district courts may encompass a whole state, and federal law requires that a district judge reside in the district for which he is appointed.⁵ If Congress can be persuaded that a heavy caseload or transportation difficulties warrant, divisions within a state are created--in some states "Northern" and "Southern" divisions; in others "Eastern" and "Western"; occasionally a third division is created and called the "middle" division. Additional judges are authorized when new divisions are created. Never have the boundaries of federal district courts crossed state boundaries.

The purview of the work of district judges, therefore, has always been a state or portion of a state. There was one major effort to reorganize the lower federal courts in a way that would have broadened the work of district (and court of appeals) judges. After he was President, William Howard Taft campaigned for "a system by which the whole judicial force of circuit and district judges could be distributed to dispose of the entire mass of business promptly."⁶ On his appointment as Chief Justice, he and Attorney General Daugherty attempted to persuade Congress to create district judges-at-large. Daugherty created a 5-man committee of district judges and U.S. Attorneys who issued a report

favoring judges-at-large who could be mobilized by the Chief Justice at the suggestion of the Attorney General and senior circuit judges to be sent to hold court anywhere they were needed. The committee submitted a bill to Congress proposing, at Taft's suggestion, 18 such judgeships. Taft, Daugherty and the Committee supported their proposal with two arguments: it would be cheaper than adding more permanent district judges (no clerks or marshals) and it would clear congested dockets wherever they appear. Defenders in the Senate Judiciary Committee spoke of equipping the judiciary with judges whose service would "be really of a national character."⁷

Judges of a national character seemed to be just what the opponents feared. Fish, who has studied this episode in detail, concludes:

An outside judge whose judicial philosophy was unknown and whose decisions might reflect norms prevalent elsewhere was automatically suspect.⁸

Taft himself perceived "his" judges were unpopular because they would be free from "those ameliorating local influences so dear to a man who is 'up against it.'"⁹

The bill died in committee. But in 1921, Taft, Daugherty and the committee were successful in securing legislation providing for modified assignment of district judges without their consent, but with the consent of the Chief Justice and the Chief Judge of the circuits sending and receiving.¹⁰ The present provisions for assignment of

district judges outside his court of appointment are as follows:

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

(c) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(d) The Chief Justice of the United States may designate and assign temporarily any district judge to serve as a judge of the Court of Claims, the Court of Customs and Patent Appeals or the Customs Court upon presentation to him of a certificate of necessity by the chief judge of the court in which the need arises.¹¹

Thus, the experience of a district judge may be widened somewhat by the Chief Judge of that circuit. He may be assigned to sit on Court of Appeals panels along with two appellate judges. He may be assigned to hold a single-judge district court out of his district, or even out of his state. Finally, he may be assigned by the Chief Justice of the Supreme Court, with the agreement of the Chief Judge of his Circuit, to serve on one of the specialized federal courts.

A district court is composed in two ways. For all

ordinary matters, a district court is composed of a single judge. Congress has provided, however, for a special three-judge district court to hear cases which raise new or extraordinary constitutional questions in which a state statute is challenged. The Fifth Circuit Court of Appeals has never issued a local rule specifying the composition of such courts, so that their composition is governed in part by statute and in part by custom. The statute provides that the district Judge with whom the case is filed automatically becomes a member of the court. The other two members, one of whom must be a circuit judge, are appointed by the Chief Judge of the circuit.¹² Appeals from decisions of three-judge courts are taken directly to the Supreme Court, but all ordinary cases, those tried by a single judge, are appealable to the Court of Appeals of which the district court is a part. Richardson and Vines have found that only about 10% of the cases heard in district courts are appealed, so the district judge's view of the law and the facts determines the final outcome of most cases brought to federal court.¹⁴

Other powers: District judges possess a great deal of discretionary power. The strong tradition of the independence of the trial judge has successfully protected these federal judges from interference with the management of their dockets, even when the cause of a severe backlog is senility, incompetence, laziness, or veniality. (See discussion of the Chandler case, below) In addition to controlling their

own dockets, the times of holding and adjourning court are determined by district judges, although locations of courts are provided for by Congress. These, and other matters, are often provided for by the promulgation of local rules as provided by federal law.¹⁴ If a district court is a multi-judge court (several divisions), then the rules must be the product of agreement among the judges. Only if the district judges in any state are unable to agree upon the adoption of rules, is interference authorized. In such circumstances, the law provides that the Judicial Council of the circuit (to be discussed later) shall make the necessary orders.¹⁵

Finally, district judges also have the power to appoint a variety of court personnel: clerks, marshals, criers, referees in bankruptcy, referees in election registration, and the like.

Courts of Appeal

Jurisdiction and decision-making tools: The Courts of Appeals have jurisdiction of appeals from all final decisions of the district courts (except decisions of three-judge district courts which are appealed directly to the Supreme Court)¹⁶; of appeals from interlocutory orders of district courts which grant, continue, modify, refuse or dissolve injunctions or refuse to dissolve or modify injunctions (same exception)¹⁷; and a variety of administrative orders from such agencies as the National Labor Relations

Board, the Securities and Exchange Commission, and the Foreign Trade Zones Board.¹⁸ They, like other federal courts, have equity power to devise remedies in the interest of fairness and justice.

The main thrust of the work of the appeals court judges is to review the work of trial judges with respect to the conduct of the trial (and any pretrial matters), the interpretations of relevant law, and the application or fashioning of punishment or remedies. If all seems in order, the appeals court affirms the decisions of the lower court in writing, commonly with an opinion specifying the reasoning behind the decision. If they disapprove, there are several possible responses. These will also be in writing, commonly with a reasoned opinion.

1. They may reverse the decision and remand it to the lower court to reconsider what has been done in light of the appeals court's criticism.
2. They may reverse and remand with directions as to what the district court must do, e.g. hold more hearings on certain points, order the School Board to submit a certain kind of plan by a certain date, render a decision.
3. They may reverse and remand, but frame the exact order to be issued by the lower court or specify what it may not do (delay further, take testimony on constitutionality of the 14th amendment on racial inferiority, allow certain parties to

intervene).

4. They may reverse and issue an order directly from the Court of Appeals.

In addition to these considerable tools, the Courts of Appeals have been given the authority under the All Writs Statute¹⁹ to issue the extraordinary writs (mandamus, prohibition, and common law certiorari), at pre-verdict stages of a case. The statute also allows the granting of equitable relief during the pendency or issuance of interlocutory injunctions (injunctions-pending-appeal). In addition, a court of appeals can "expedite" an appeal--take it ahead of its normal place on its docket.

These powers enable a court of appeals to (1) secure review of the work of a district judge at preliminary stages, and (2) to receive final decisions earlier than it ordinarily would. Thus, the appellate judges do not have to be passive receivers of the work product of district judges on a time schedule determined by them.

Composition of circuits and assignments of judges:

For purposes of creating courts of appeal, the United States (and territories) are divided into eleven areas called circuits. Each state is assigned to a circuit (see Chart A), each circuit being composed then of several states. As with the districts, circuits do not cut across state boundaries. There is one court of appeals²⁰ for each circuit. The number of judges comprising each court of appeals has changed, presumably in response to increases in the workload

in the various circuits.

The geographical purview of the courts of appeal judges has greater scope than district judges. Federal law requires only that they reside somewhere within the circuit,²¹ giving an appellate judge a choice of several states, although ordinarily he has an established home and political connections in a given state prior to appointment. More important, the U.S. Code specifies certain locations in which divisions (panels) of the courts of appeal must sit. In the Fifth Circuit during the period under study, appellate courts sat regularly at Atlanta, Georgia; Montgomery, Alabama; Fort Worth, Texas; Jacksonville, Florida; and New Orleans, Louisiana,²² and from time to time at other locations convenient to the litigation being brought.

A court of appeals "court," for purposes of hearing and deciding any case appealed to it, is composed of a three-judge panel. Since the 1930's and 1940's, most circuits have been large enough to sustain a variety of panels. Up until 1948, it was customary practice in circuits with more than three judges to use a panel rotation system.²³ In all circuits, assignments to panels are made by the chief judge of the circuit or his designate.²⁴ In the others, it is done "informally," researchers reporting that inquiries yield the response that the chief judge makes the assignments randomly.²⁶ A sitting judge on the Fifth Circuit during the 1960's explained to the New York Times editors

that panels in his circuit were selected by "pure chance."²⁷

A possible explanation of the disproportional representation of certain background characteristics among "panel" judges as compared to the total bench--an effect noted in Chapter II, is that it occurred by pure chance. Another is to suggest that the assignment system informally employed by the Chief Judge of the Fifth Circuit was not random but governed by a preference. This will become a key question in the chapters dealing with the Fifth Circuit case data, and I will discuss the findings of other researchers along with my own at the conclusion of those chapters.

For present purposes, the point to be stressed is that in composing court of appeal panels, the Chief Judge is not restricted to active court of appeal judges. Also eligible to sit on panels are senior (retired) judges and district judges. A section of the U.S. Code (Section (d) of 28 U.S.C. 294 (c)) directs the Chief Justice of the United States to maintain a roster of senior (and willing) judges and empowers the Chief Justice to assign them where they are needed. The relevant sections of the U.S. Code read:

Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of this court to perform such judicial duties in such court as he is willing and able to undertake.²⁸

The chief judge of a circuit may designate and assign one or more district judges within the division thereof whenever the business of

that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.²⁹

The final variation on possible assignments for court of appeals panels is an institution known as en banc. A court of appeals sitting en banc is composed, at present, of "all circuit judges in regular active service" and any senior judge who sat on the court (that is, was a member of the panel) which decided the case originally. An en banc court can be ordered by a majority of active court of appeals judges;³⁰ it can be requested by litigants or by any active judge on petition to the chief judge who then polls all active judges.³¹ In the Fifth Circuit, Local Rule 25(a) made explicit the two considerations that were to govern the ordering of en banc hearings or rehearings:

- (1) When necessary to secure or maintain uniformity or continuity in the decisions of the Court, or
- (2) When unusually important or novel questions are to be decided.³²

This rule, as well as the custom surrounding the appointment of three-judge district courts³³ and the "routine" empanelling of courts of appeal were the source of great dissension among appellate judges of the Fifth Circuit during the period under study.

As with district judges, appeal judges may be loaned by their chief judge to serve in other circuits or on the specialized federal courts.

Other Powers: Just as the essentially fixed single-judge structure of the district courts emphasizes the independence and discretionary powers of a district judge, the peripatetic collegial structure of the appeals court emphasizes the discretionary powers of the Chief Judge of a circuit. A chief judge:³⁴

1. Assigns judges to the appeals panels and assigns them cases.
2. Assigns judges (appeals and district) to three-judge district courts.
3. Receives requests for en banc hearing and polls the active judges.
4. Can assign district judges to hear cases out of their district.
5. Can agree or refuse to loan a district or appeals judge to another circuit.
6. Can request a judge (district or appeals) from another circuit to be temporarily assigned to his circuit. If agreed to by sending chief judge and the Chief Justice, the borrowed judge's assignments are made by the requesting Chief Judge.
7. Appoints a clerk, librarian, and other such officials.

As a bench, the appeals court has the same discretionary powers as a district judge. They can set the times of holding and adjourning court, and decide to hold court in places additional to those required by the U.S. Code.

They can also promulgate local rules. An example of how local rules can affect decision-making can be seen in four of the rules promulgated by the Fifth Circuit Court during the period under study (See Chart B).³⁵ Rule 25(a) specifies the procedure for invoking an en banc hearing and determines eligibility of judges for participation. It was adopted May 31, 1961 in response to complaints concerning the way such hearings were convened in the Meredith Case.³⁶ The charge of procedural irregularity was made by Judge Benjamin Cameron against Chief Judge Elbert Tuttle and grew out of the effort by the Court of Appeals panel to put an end to delays, irregularities and misapplications of the law by district judges Cox and Mize.

Rule 32, as adopted in 1963, closed loopholes in the previous version under which a mandate could be effectively stayed for at least 31 days by the simple expedient of petitioning for a rehearing on day 21 (Automatic 21 days for mandate to issue plus automatic 10 days after petition for rehearing denied). The 1963 version differs in two ways: it permits the panel to shorten the 21 days in any case, rather than "precedence" cases only, and it permits only a seven-day stay between denial or rehearing and the issuance of the mandate. These rule changes appear to be a response to the manipulation of the old rule by, for instance, lawyers for the University of Mississippi in the Meredith Case for purposes of delay. The other change in the rule seeks to remedy the practice of some district judges of not

CHART B
SELECTED LOCAL RULES, FIFTH CIRCUIT

Subject

En banc:

- 1961: Rule 25(a) - Majority active; judges order;
Party request goes to panel
first; Any circuit judge may
initiate
- 1962: Same
- 1963: Rule 25(a) - Same
- 1968- Rule 12 - repeats language of 28USC 46(c);
1973: Any active judge may suggest; States
who is eligible to sit en banc

Death or Separation from Office:

- 1961: Rule 19 - Death of a Party
- 1962: Rule 19 - amended; Add "or separation from
office"; Provides for substitution
of new public official for one who
dies or resigns during pendency of
case
- 1963: Rule 19 - Same - as amended
- 1968- Rule 19: Rescinded (unknown)
1973:

Writ of Mandamus or Prohibition Against Judges:

- 1961: No information
- 1962: No comparable data
- 1963: Rule 13(a)
- 1968- No comparable Rule*
1973:

Issuance of Mandate:

- 1961: No information

1962: Rule 32 - Mandate issues after 21 days unless rehearing requested. If rehearing denied mandate stayed for 10 add'l days; In precedence cases, mandate shall issue after 7 days unless otherwise ordered.

1963: Rule 32 - 21 days after decision (unless ordered shorter or copy of judgment and opinion constitute a mandate unless formal one issued; Petition for rehearing stays mandate; mandate issues 7 days after petition is denied; No recall except to prevent injustice.

1968- No comparable rule*
1973:

Source: Local Rules (published) by West Publishing Co.,
1968 and 1963; miscellaneous copies filed with
A.O.

* But Rule 6 (1968-73) provided that where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court.

carrying out the decisions of the appeals panels on the grounds that they had never received a mandate, only a copy of the opinion. The 1963 rule provided that unless a separate order is issued, a copy of the judgment and opinion constitutes a mandate.

Rule 13(a) concerned the issuing of a Writ of Mandamus. It sets out the procedure to be followed in applying for the writ and specifies the role of the responding parties. Applications for this writ, which became common in the Fifth Circuit during the period under study, were clearly a response by lawyers for Negro litigants in civil rights cases to various delaying tactics of district judges: failure to hold hearings, failure to carry out the appeals court mandate; failure to render opinions after trial. By 1968 the rule was dropped.

Rule 19 has an interesting history. As a rule providing for the various consequences occasioned by the death of one party to a suit, it had been a local rule for many years. However, a 1962 provision was added, covering the death or resignation of a public official involved in litigation by providing for automatic substitution of the subsequent office holder. This rule change was undoubtedly a response to the attempt of counsel for voting registrars and other public officials to get cases dismissed by having their clients resigns. This tactic had some legal foundation in the case, U.S. v. Alabama et al³⁷ in which District Judge Frank Johnson dismissed a suit against the State of

Alabama and two Macon County voting registrars because they had "resigned," and the State and the Board of Registrars could not be sued under the 1957 Civil Rights Act. This state of the law was changed by the 1960 Civil Rights Act³⁸ which authorized district courts to hear suits against a state for preventive relief.

Conclusions

In this part of the chapter, I have set forth the powers of and structures employed by district and appeals courts in their case-handling tasks in order to ascertain whether such factors might effect judges' ability to mediate. I will review this information by the categories employed--jurisdiction, composition and assignment, and other powers--in terms of two questions: (1) are there powers or structures relevant to mediation?, and (2) is the impact likely to be greater on one bench or the other?

Jurisdiction and decision-making tools: Both courts have sufficiently wide jurisdiction so that cases of local-national conflict could be expected to be brought before them. However, the district courts hear many more cases than the appellate court. Since only 6 to 10% are ever appealed, district judges are likely to have many more unreviewed opportunities to adjust local and national norms than the courts of appeals. In addition, both have equity power which could be an important tool in finding ways to adjust national policy to local conditions, particularly if those

conditions are changing. The impact of the jurisdictional factors would appear to be roughly the same for each bench.

The decision-making tools, though different for each bench, seem equally useful as tools of mediation. A district judge has the parties in court, hears them, can question them, can explore widely the questions at issue and investigate the possibilities for resolution of the conflict. He has equity power to enable him to devise ways to move local practice closer to national requirements. He can retain supervision of a case until satisfied with the outcome, requiring further actions both private and public, including periodic reports to the court and to the public. He has the sanction of contempt of court to assure the carrying out of his orders. Finally, he has the tradition of the independence of trial judges, in light of which appeals judges tend to give great deference to the decisions of trial judges, on the grounds that they heard and saw the witnesses and know the local situation better than judges one remove.

The power of review available to appeals judges, however, is, on inspection, a varied and flexible tool. The powers to issue extraordinary writs provides more leverage, and the assignment powers of the Chief Judge even more.

In short, there seems no marked difference between the two benches with respect to either the impact on the ability to mediate of jurisdiction or decision-making tools.

Composition and Assignment: These factors, arguably, have an impact on the ability to mediate through controlling whether a judge has a narrow or wide exposure to the rest of the judicial and political system. The composition of their circuits and location of their courts (panels) as well as the nature of their assignments gives appellate judges a wider exposure than district judges. For the most part, district judges work in one portion of a state, occasionally sitting on a circuit panel or a special three-judge court, but even these are often in their own state, if not their own district. Considering the larger number of district judges compared to the small number of circuit panels or requests for district judges by other circuits, the scope of a district judge's work is unavoidably narrow. Richardson and Vines write:

The lack of centralization and coordination in the districts ensures that the individuality of the separate districts is maintained. Each district is a separate, largely self-contained political unit with little administrative relation to the other districts and little direction and coordination from above. For example, before lawyers may practice before a district court, they must qualify to practice before that particular court.³⁹

The appellate judges, on the other hand, are drawn by the larger geographical boundaries of their court and by their assignment to rotating panels out of the location of their residence. Fewer in number, each appellate judge sits frequently with various district judges, occasionally with judges from other circuits, and repeatedly with active col-

leagues on the regular circuit panels and when the court sits en banc.

Furthermore, the differences in the physical location of the two courts would seem to make it easier for the appeals judges to mediate. Their lack of special ties with any particular community means they can demand changes in local practice with more impunity than district judges.

Other powers: Among the other powers available to lower court judges, two seem most relevant to the task of mediation: the power to make appointments and assignments, and the power to make local rules.

District judges could use their appointment power to select local lawyers--as referees in voting rights cases, for example--who would be knowledgeable about local conditions but committed to bringing local practice more in line with national requirements.

The powers of the Chief Judge to assign judges and allocate the appellate docket give him some opportunity--although not a free hand--to select judges who would mediate, to hear cases involving strong local-national norm conflicts. For example, charges that the Chief Judge of the Fifth Circuit during the period under study, Elbert Tuttle, used his assignment powers to this end were made by Circuit Judge Benjamin Cameron, as noted above.⁴⁰

The Chief Judge of a multi-judge district does not have the wide assignment powers of the Circuit Chief Judge, but he does have the power to distribute the caseload among

the judges of the district. Presumably, he could use this power to put local-national norm conflict cases in the hands of a judge more inclined to mediate than another. Very little research has been done on the office of the Chief District Judge so that the literature provides no evidence one way or the other.

Because of the very considerable powers of the Chief Judge, the Circuit bench seems better supplied with mediating tools in this area than the district judges.

Both sets of courts can promulgate local rules, but since no research at all has been done on their use to achieve substantive political ends, it is impossible to compare the two benches in this respect. Our study of the development of circuit local rules from 1954 to 1967 suggests that the Fifth Circuit bench adopted local rules that appear to constitute efforts to thwart the attempts of some district judges and litigants to avoid the impact on local custom of new national norms in the civil rights area. If this suggestion is warranted--only a written record of the pre-adoption discussion or interviews with participants could determine the question--then, clearly, not only can circuit benches use local rule power to mediate, but the Fifth Circuit bench did so, at least during a certain period. It is perfectly possible, however, that a study of all the local rules in the district courts of the Fifth Circuit would show at least some district judges using this power in the same way.

Summary

To sum up, both benches possess case-handling powers and structures that would facilitate the performance of a mediating function. Of the various categories of powers and structures examined, only the composition of the "courts" and the assignment powers of the Chief Judge of the Circuit seem to put the circuit bench in a more favorable position with respect to mediation. In terms of jurisdiction, decision tools, and the power to adopt local rules, the two benches seem equally equipped.

Powers and Structure of Lower Federal Court Administration

The institutions involved in the administration of the federal courts were gradually developed during the 20th century. They include at present the Judicial Conference, Circuit Conferences, Circuit Councils, the Administrative Office, and the Federal Judicial Center. All are statutory bodies created by Congress.

The Judicial Conference, created in 1922,⁴¹ consists of the Chief Justice of the Supreme Court and the Chief Judge of each circuit. Selected circuit and district judges attend the twice yearly (September and January) meetings of the Conference as visitors. In 1959, provision was made for one district judge to be elected by the Circuit Conference in each circuit to attend the Conference as a delegate. The Director of the Administrative Office, ranking members of Congressional Judiciary Committees, and assorted interest

groups, such as the American Bar Association and Securities and Exchange Commission frequently attend.

The Conference is empowered to concern itself with discussing and developing policies on such matters as expediting dockets, changes in rules and procedure, budget, personnel policy, and ethical problems. Policies decided upon--especially budget and requests for more personnel--are communicated to Congress, generally by the relevant Conference committees. Either the Administrative Office of the Federal Courts or the Circuit Councils are called upon to implement Conference policies. For instance, in 1960 a seminar for new judges was established by the Conference, and is conducted in each circuit by the Administrative Office (later by the Judicial Center), usually during meetings of the Circuit Conference. The following year, the Judicial Conference authorized a series of seminars for veteran judges and lawyers.⁴² The Conference is required to meet annually at the call of the Chief Judge. All judges of the circuit--district and appeals--are required to attend and not leave without the permission of the Chief Judge. Also invited to attend the public portions of the meeting are the Attorney General, U.S. Attorneys of the circuit, Deans of circuit law schools, Chief Justices of State Supreme Courts, members of Congress, and Supreme Court Justices. Attendance by members of the circuit bar has been mandatory since 1948.

It is obvious that the Conference attempts to serve

as an educational and communications link between the bench and the bar. It also provides a platform for national spokesmen to address the regional judiciary. For instance, a representative from the Administrative Office usually speaks on the state of the Judiciary including a recounting of Congressional criticisms. The Conference Meetings have become sounding boards for proponents of Judicial Conference policies, particularly those which the Circuit Conference is called upon to implement.

Both the Judicial and the Circuit Conferences operate by committees. The circuit committees work closely with their counterparts in the Judicial Conference. The circuit committees, however, are quite autonomous, and have never become mere agents of the national committees. They see themselves, and apparently have always functioned, as grass roots conduits to the national level, both judicial and Congressional.⁴⁴

The chairpersons and ranking members of the Judicial Conference Committees--all lower court judges--have become the vital links between the Judiciary and Congress. Fish writes, ". . . these judges develop a clientele relationship with the Appropriations and Judiciary Committees . . . their chairmen . . . and staffs."⁴⁵ He suggests their role is analogous to that played by the head of an executive department or agency: "They organize and coordinate lobbying campaigns and act as the judiciary's spokesmen on Capitol Hill."⁴⁶

A final task conducted at the annual Circuit Conference meeting consists of the election by district judges and by circuit judges of delegates from each group to the next Judicial Conference.

Also established in 1939, the Circuit Councils are required to meet twice a year. A council is composed of all the judges appointed to the Court of Appeals of the circuit. District judges, who have lobbied for years for representation on the Councils, have so far only succeeded in gaining access to some meetings at the pleasure of the Council. At Council meetings, the Chief Justice reports to the Council on matter discussed or decided at the Judicial Conference. The Judicial Conference in turns clears with the Councils on important matters such as budget and manpower.

The powers of the Council are extensive. Section 332 of the Judicial Code provides that "each judicial council shall make all necessary orders for the effective and expeditious administration of the business within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."⁴⁷ Under this broad general grant of power, circuit councils have performed (or considered) such legislative, executive and judicial functions as:

1. Hanging portraits of former luminaries of Bench and Bar on barren walls of the federal courthouse in Foley Square (no action taken).

2. Devising schemes to facilitate the flow of judicial business in district courts where backlogs persist.
3. Exclusion of interested party from a trial.
4. Lawyer's right to appear in a case.
5. Investigating, determining facts and fashioning remedy with respect to numerous administrative complaints of "untoward conduct," e.g. malfeasance, senility, alcoholism, failure to attend seminar for new judges, failure to submit reports to the Administrative Office, misclassification of court personnel, delays, unethical or criminal conduct (nepotism, corruption), behavior of supporting personnel.
6. Sitting as "Council of State" in disciplinary jurisdiction: bringing charges, sitting in judgment, deciding it, and setting the penalty.⁴⁸

More specific grants in the U.S. Code and in statutes require the Council to assent to fix the time and place of holding courts, district and circuit; it must pass on and approve a district court's plans for representation of indigent defendants and for selection of juries; it resolves differences among district judges over rules and orders concerning district court business; it intervenes in the appointment of bankruptcy referees if there is district court disagreement; it can also remove a magistrate under circumstances of a tie-vote among district judges.⁴⁹

In part by statute and in part by custom, it often plays a ratification role in the Chief Judge's exercise of his assignment powers. Fish finds that Chief Judges "tend to invoke the prestige of the councils rather than act on their own . . . whenever special circumstances arise."⁵⁰ Council approval is often sought for assignment and district judges within the circuit and both district and circuit judges outside the circuit; for cancelling assignments of enfeebled retired judges; for refusing a request for inter-circuit assignments.

On its own authority, the Council can direct a judge to maintain his abode at or near a particular place of holding court within his district.⁵¹ It can also certify the permanent mental or physical disability of district and circuit judges who refuse to retire.⁵²

The Administrative Office was established in 1939⁵³ and in effect transferred the administration of the federal courts from the Department of Justice to the judiciary. The Office is headed by a Director appointed by the Supreme Court. Its duties are assigned by the Supreme Court and by the Judicial Conference. The major functions performed by the Administrative Office involve housekeeping and staff functions (budget development and expenditure, supplies, personnel records), as well as collecting and reporting judicial statistics to the Judicial and Circuit Conferences (number and types of cases, median time from filing to disposition, length of trials, cases under advisement

and the like). Over the years, the Office took on staff and liaison functions for the Judicial Conference (and its committees) in its dealings with Congress.⁵⁴

In 1967, Congress created the Federal Judicial Center⁵⁵ to stimulate, coordinate and conduct research and planning in administrative problems and continuing education and training for personnel of the judicial branch. The Center publishes a newsletter The Third Branch: A Bulletin of the Federal Courts, in order to facilitate communication. This new agency is virtually autonomous. It is supervised by a special board which formulates policies and priorities and selects the director. The Chief Justice, Director of the Administrative Office, as well as two appellate and three trial judges elected by the Judicial Conference, constitute the board.

Conclusions

Evaluating the administrative apparatus of the federal courts in terms of the same questions employed in the previous section leads to the conclusion that there are powers and structures relevant to the performance of a mediation function and that on balance their impact is likely to be greater on court of appeals judges.

The Judicial Conferences involve the meeting of national, local and regional members of the judiciary and are thus settings in which lower court judges can become aware of the ideas and concerns of their more national brethren, as well as members of Congress and the Executive.

But this exposure is available only to relatively few district judges, compared to circuit judges. Furthermore, that exposure is episodic, involving for any given judge, at most, a few years as delegate. Since there are fewer of them, circuit judges attend more regularly. The major impact, obviously, falls on the chief judges of the circuits who sit twice a year as a national body with other national figures to work out policies. Through the Judicial Conference committees, they are in touch throughout the years with members of Congress.

Furthermore, the Circuit Conference, while it may expose all the judges of the circuit to national influences, is reportedly the most parochial of the judicial bodies. One of the reasons circuit conference resolutions waned as significant elements in the policy-making process was Chief Justice Warren's (and others') objection that they were too accessible to parochial interest groups.⁵⁶

In any case, the body with the most potential for mediation, the Circuit Council, is composed entirely of appellate judges. Both as a structure and as a set of powers, the Council possesses properties of great relevance to mediation. They are led by the most national figure in the lower federal courts (The Chief Judge), composed of the inferior judges with the most susceptibility to both national and local influence and equipped by Congress with a broad general grant of powers with which to supervise the judges of the appeals and district courts within its circuit. The

Circuit Councils were designed to be the "linchpins"⁵⁷ of the federal judiciary's administrative structure for adjusting national policies to local conditions. Evaluating their performance over the period 1939-1970, Fish concludes that rather than the "veritable lightening rods" they could have become, the Councils have been for the most part "pillars of passivity."⁵⁸ Chief Justice Warren in a speech to the American Law Institute in 1969, singled out "the failure of the Judicial Councils to do their jobs" as the one weakness of the Court system.⁵⁹

In an effort to explain this phenomenon, Fish and Cook suggest three reasons. First, they see the role of the Chief Judge as key, as so much depends on the leadership he gives to the Council. It seems that most Chief Judges have not attempted to develop council powers. They stress, secondly, the great attachment most federal judges have to the idea of local self-government and the independence of all judges, but particularly trial judges. A strong piece of evidence of this factor is the Chandler case. Judge Stephen S. Chandler of the Western District of Oklahoma (10th Circuit) has been a critic of administrative centralization and a defender of the independence of the trial judge from "supervision and control." In 1964 he wrote in an article for the American Bar Association Journal:

In recent years, there has been noticeable a gradual assumption by a few appellate court judges of a patronizing attitude toward the trial judge, and a stretched-out hand to clutch supervisory power over him. There are evidences of immature treatment of trial

judges, with occasional punitive gestures to keep them in line.⁶⁰

On December 13, 1965, the 10th Circuit Council issued an order removing all current and future cases from Chandler's docket.⁶¹ On February 4, 1966, they ordered all cases pending as of December 28, 1965 restored. Between the two orders, Chandler petitioned the Supreme Court. The court refused to stay the 10th Circuit order and refused Chandler permission to file a petition. They suggested, however, that the council should hear their investigation promptly and allow Chandler to appear with counsel. Chandler refused to attend the hearing, since he denied the Council's authority to examine his judicial activities, and eventually petitioned the Supreme Court for a writ of mandamus or prohibition against the Council. The Supreme Court held that Chandler had not made a case for mandamus but it avoided deciding the basic question of whether the Circuit Councils have the power to abridge the traditional role of "sovereign" district judge. However, in dicta the majority expressed the view that supervision of "his manner of conducting judicial business" does not destroy the trial judge's independence in deciding cases. Justices Black and Douglas disagreed, stating that the Councils have no power to discipline trial judges, make them into second-class judges: ". . . there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge."⁶²

In her 1971 study of attitudes of 7th Circuit judges toward the issues raised by the Chandler case, Cook concludes that those judges holding the Douglas-Black-Chandler position on trial judges' autonomy ". . . will be retiring from the system and that the new, socialized judges are accepting their role inside the bureaucratic structure . . . as a matter of course."⁶³ This finding lends credence to Fish's notion that strong attachment to the idea of the independence of trial judges has formed a barrier to the development of the powers of the circuit councils.

A third factor which has served to keep Circuit Councils from developing their full potential, Fish argues, is the fact that circuit judges have conflicting relationships with district judges. They review their decisions, may sit with them at the various judicial conference and committee meetings, may sit with them on three-judge or appeals courts, and may have personal relations with them as well. Thus, they wish to avoid unnecessary friction and so develop a "certain judicial etiquette," "diplomatic accommodation" which can find acceptable expression in terms of the deference to the tradition of local judge independence discussed above.⁶⁴

A fourth factor which immobilizes Circuit Councils is discussed in the Yale Law Review⁶⁵ in connection with the efforts of the Fifth Circuit Court to control district judges who were engaging in dilatory tactics in civil rights cases. That such tactics were employed by district

judges throughout the circuit is made clear in Table 9.

The Fifth Circuit Council could have ordered such judges to hear delayed cases ahead of others. It could have issued orders preventing district judges from hearing other cases until they disposed of those pending (see Chandler case above). The Chief Judge, with their backing, could have assigned a nearby judge to hear delayed cases. They could have removed cases from a district judge who did not follow precedent or carry out circuit mandates. The council took none of these actions because in fact the judges who made up the appeals bench during the crucial period for civil rights cases (1954-1967) were themselves divided into factions and deadlocked. The Yale editors identified the factions as Tuttle, River, Wisdom and Brown vs. Cameron, Gewin, Bell, Jones, and Hutcheson. NAACP lawyers practicing in the Fifth Circuit during this period agree,⁶⁶ as do most journalists and academics⁶⁷ whose work concerns the Fifth Circuit, and Judge Cameron. Nevertheless, it remains a supposition that this is the reason for Council inaction, as there is no direct evidence that these factions--Cameron's THE FOUR and THE FIVE--were factions on this issue. There has to be some doubt since on decisions in civil rights cases, Bell, Jones and Hutcheson were inconsistent. Even Gewin occasionally voted with two of the FOUR on a panel. Therefore, it may have been unanimous objection to interfering with the independence of trial judges through administrative measures, rather than by means of the

TABLE 9

EXAMPLES OF DELAYS IN PROCESSING CIVIL RIGHTS CASES
BY DISTRICT JUDGES, FIFTH CIRCUIT

Georgia: Kelley v. Page and
Anderson v. City of Albany
Filed 1/62
Hearing 9/62
Decision 6/63 (Dismissed)

Alabama: Armstrong v. Bd.
Filed 1960
Trial 10/62
Decision 5/63 (injunction denied)

Kennedy v. Bruce - hearing one year
after filing

U.S. v. Duggett
Filed 6/62
Pending 6/63

U.S. v. Atkins
Filed 5/61
Trial 5/62
Decision 11/62

Mississippi: U.S. v. Ramsey
Filed 7/61
Decision 2/63

U.S. v. Daniel
Filed 8/61
Decision 1/63

U.S. v. Duke
Filed 10/61
Trial 3/63
Decision 6/63

Louisiana: U.S. v. Lucky
Filed 7/61
Trial 3/63

U.S. v. Ward
Filed 1/61
Trial 12/62

tools pertaining to review: expediting appeals, issuing mandates immediately on decision, writing orders for district court, issuing its own injunction, issuing special writs, such as injunctions-pending-appeal and writs of mandamus.

Nonetheless, it is true that the Fifth Circuit Council could have countered most of the problems with resisting judges in a more direct fashion by exercising its administrative authority. Given the course of the Chandler case, however--1965 to 1970--it is not clear that the substantive problems would have reached speedier resolution.

Summary

On the case-handling side of the work of lower federal courts, both district and appeals courts have the means to perform a mediating function, but the structure of the "courts" and the powers of the Chief Judge puts the appellate court in what appears to be amore advantageous position.

On the administrative side, the powers and structures relevant to mediation seem to be principally with the appeals judges and especially with the Chief Judge.

FOOTNOTES TO CHAPTER III

1. Beverly Blair Cook, "Perceptions of the Independent Trial Judge Role in the 7th Circuit," Law and Society Review 6:615 (May 1972), p. 617.

2. Carl Baar, "The Growth of Federal Judicial Administrative Structures: Implications for Judicial Behavior," Paper delivered to the 28th Annual Meeting of the Midwest Political Science Association, Chicago, Ill. 1970.

3. Art. III, Sec. 2.

4. Art. III, Sec. 1.

5. 28 USC 134(b).

6. Peter G. Fish, The Politics of Federal Judicial Administration (Princeton: Princeton Univ. Press, 1973), p. 25.

7. Ibid., p. 29.

8. Ibid., p. 29.

9. Ibid., p. 28.

10. Ibid., pp. 29-30.

11. 28 USC 292.

12. 28 USC 2284.

13. Richard Richardson and Kenneth Vines, The Politics of the Federal Courts (1970), p. 80. Figures are for 1960.

14. 28 USC 2071, 2072, 2075.

15. 28 USC 137.

16. 28 USC 1291.

17. 28 USC 1292.

18. 28 USC 1291.

19. 28 USC 1651.

20. Until 1948 when the statute changed the title to United States Courts of Appeals, these courts were called the Circuit Courts of Appeals.

21. 28 USC 44.

22. 28 USC 48. See also Rule 3, Local Rules of the Fifth Circuit (1963). By 1968 Local Rule 3 provided for annual versions to be held in Houston, Texas, and Jackson, Mississippi as well.

23. 28 USC 46.

24. Louis S. Loeb, "Judicial Blocks and Judicial Values in Four Selected United States Courts of Appeals, 1957-1960 Terms," (American University Ph.D. Dissertation, 1964), p. 39.

25. Idem.

26. Idem. See also Atkins, op. cit., p. 6 and 158 (fn. 14).

27. New York Times (July 31, 1963), p. 12, col. 4.

28. 28 USC 294(c). Section (d) directs the Chief Justice of the U.S. to maintain a roster of senior judges willing to serve and empowers the Chief Justice to assign such judges where they are needed.

29. 28 USC 292(a). The Fifth Circuit has never promulgated a rule concerning the composition of panels.

30. 28 USC 46(c).

31. Rule 25(a), Local Rules of the Fifth Circuit (1961-68). In 1968, the Rule was renumbered Rule 12 and all reference to the role of the Chief Judge was dropped. Reference is made to Rule 35 of the Federal Rules of Appellate Procedure.

32. Rule 25(a), Local Rules of the Fifth Circuit (1963) (adopted in 1961, in effect until 1968). See Appendix J.

33. There has never been a local rule in the Fifth Circuit governing the composition of 3-judge courts.

34. 28 USC 291.

35. A reconstruction of the rule fight in the Fifth Circuit during the 1960's is hampered by a lack of complete documentation. Neither the Clerk's Office nor the Librarian of the Circuit has copies of local rules prior to 1968.

The Administrative Office of the Federal Courts expressed outrage at this dereliction of plain duty but A.O. has copies of prior rules only back to 1961 (unless the undated rules are pre-1961). Furthermore, A.O. cannot give assurance that their set is complete. Leading Eastern law schools have discarded pre-1968 local rules.

36. Meredith v. Fair 298, F2d 696 (1962); 305 F2d 341 (1962); 305 F2d 343 (1962); 306 F2d 374.

37. U.S. v. Alabama et al, 171. F Supp. 720 (1959). 267 F2d 808 (1959); 80 Sct 924 (1960). The two registrars were dismissed--allowed to resign--because they turned over voting records to the U.S. Commission on Civil Rights. See 171 F. Supp 720.

38. Civil Rights Act 1960, Title VI, subsection (b). Actually this section was placed in the act in response to Johnson's decision in U.S. v Alabama. See legislative history.

39. Richardson and Vines, op. cit., p. 93. See also p. 99.

40. Armstrong v. Bd. of Education of City of Birmingham. 219 F Supp 542, 323 F2d 337.

41. 48 Stat. 837.

42. Peter G. Fish, op. cit., pp. 367-78.

43. Administrative Office Act of 1939; 53 Stat. 1223.

44. Fish, op. cit., p. 355.

45. Ibid., p. 318.

46. Idem.

47. 28 USC 322.

48. Fish, op. cit., pp. 397-98.

49. Ibid., p. 397-98.

50. Ibid., p. 396.

51. Ibid., p. 397.

52. 28 USC 372(b).

53. 53 Stat. 1223.

54. Fish, op. cit., p. 125 Passim.

55. 81 Stat 664. See Fish, Ibid., pp. 369-78.
56. Fish, op. cit., p. 361.
57. Ibid., p. 379.
58. Ibid., p. 404. Both phrases are Fish's.
59. B. B. Cook, op. cit., p. 60.
60. 50 ABAQ 125 (1964).
61. Cook, op. cit., pp. 620-21. Most writers on the Chandler case, including Cook, do not specify the charges against Chandler. Richardson & Vines, however, refer to a charge of malpractice. See The Politics of the Federal Courts, p. 111.
62. Cook, op. cit., p. 622.
63. Ibid., p. 626.
64. Fish, p. 406.
65. Note, "Judicial Performance in the Fifth Circuit," 73 Yale Law Journal (1963), pp. 118-201.
66. Shirley Fingerhold, "The Fifth Circuit Court of Appeals," in Leon Friedman (ed.) Southern Justice (N.Y.: Random House, 1965), pp. 215ff.
67. Mary Curzan, op. cit.; Rich, op. cit., pp. 90, 98; Peltason, op. cit., pp. 25-9; Vines, "Review, Dissent and The Appellate Process," op. cit., pp. 612-13.

CHAPTER IV

METHODOLOGY

This chapter will explain the methodological procedures used in selecting and analyzing the case material with which to test the mediation hypothesis. I will first describe the way in which cases were selected. Next, I will explain the scheme devised for analyzing the selected cases. Finally, the analytical categories will be illustrated with selected case material.

Case Selection: A group of cases appropriate for testing the hypothesis were chosen by applying the selection rules listed below to the total pool of race-related cases reported in the Race Relations Law Reporter for the Fifth Circuit between 1954 and 1968.

Selection Rules:

- (1) Eliminate all categories of cases not relevant to the hypothesis, e.g. criminal law, trial procedures, federal jurisdiction. (The categories are those employed by the Race Relations Law Reporter.)
- (2) Choose cases which have been decided by both district and appellate courts and that have at least one full opinion each by the district and appeals court.

- (3) Eliminate all categories having too few cases to cover a substantial portion of the time period, e.g. public accommodations, organizations, and a miscellaneous category.

This procedure yields a pool of 117 cases in the five categories: public school education, colleges and universities, elections, government facilities, and transportation. Table 10 shows the breakdown of the cases by category indicating the percentage each group of pool cases represents of its category, the number of technical rejections, and the unconsolidated and consolidated count of cases. Because of the number, complexity and length of the opinions, a determination was made to use only public school education and election cases for testing purposes. This case pool of seventy-seven cases appealed to the Court of Appeals was further reduced by eliminating nine election cases that did not deal with voter registration and nine cases deemed peripheral to public school education.¹ Thus, the final case pool numbers 60:37 school desegregation cases and 23 voter registration cases. Consolidation of similar cases by the Circuit Court further reduces the interaction units in each category to 33 and 22 respectively for a total of 55. (See Table 11).

The public school desegregation cases cover the years 1955 through 1967 and originated in each of the six states within the Fifth Circuit. The voter registration cases first appear in district court in 1957 and continue until

TABLE 10
RACE RELATED CASES IN FIFTH CIRCUIT
1954-1967
(by category)

	Cases reported in District Courts	Cases Appealed to Court of Appeals	Appealed Cases Removed from Pool	<u>Cases in Test Pool:</u>	
				Unconsolidated Pool Cases	Consolidated Pool Cases
Colleges and Universities	30	12 (40%)	-	-	-
Government Facilities	62	21 (34%)	-	-	-
Public Accommodations	37	4 (11%)	-	-	-
Transportation	25	10 (40%)	-	-	-
Elections (Voting Registration)	101	32 (31%)	9	23	22
Public School Desegregation	143	46 (32%)	9	37	33
TOTALS	398	124 (31%)	18	60	55

TABLE 11
 CONSOLIDATED ELECTION AND PUBLIC SCHOOL
 DESEGREGATION CASES IN THE FIFTH CIRCUIT, 1954-1967

	Cases in District Court	Cases Appealed to Court of Appeals	Rejected	<u>Cases in Test Pool:</u>	
				Unconsolidated in District Court	Consolidated
Elections	101	32	9	23	22
Public School Desegregation	<u>143</u>	<u>46</u>	<u>9</u>	<u>37</u>	<u>33</u>
TOTALS	244	78	18	60	55

1966. No voting cases were appealed from the district courts to circuit panels in Texas, Georgia or Florida. It must be remembered that a group of cases has been eliminated from our pool of "appealed" cases: cases originally heard and decided by three-judge district courts (composed of two district judges and a circuit judge) and appealed directly to the Supreme Court. These cases include such landmark cases as *Larche v. Hannah* (1959), *U.S. v. Louisiana* (1963), and *U.S. v. Mississippi* (1964).²

The fifty-five cases in the test pool are distributed reasonably evenly within the circuit, with the exception of a lack of any voting cases from Georgia, Texas and Florida.

During the period being studied, 1954-1967, sixty-nine district judges were sitting in the circuit. Of these sixty-nine judges, 10% (7) had voting cases, and 31% (27) had school desegregation cases appealed to the court of appeals. Analyzed by state, the percentage of district judges appealed from ranged from a low of 25% to a high of 50%, as shown in Table 12.

Of the 17 regular Fifth Circuit Court of Appeals judges who were on the bench during this period, about 70% (12) sat on school desegregation panels; 65% (11) sat on voting panels. In addition to regular court of appeals judges, twelve district judges and eleven appellate judges from other circuits sat on appeals panels, the latter by designation.

TABLE 12
% OF DISTRICT JUDGES APPEALED FROM FIFTH CIRCUIT
1954-1967 BY STATE AND CATEGORY OF CASE

	<u>School Cases</u>	<u>Voting Cases</u>	<u>N=</u>
Mississippi	25%	50%	4
Alabama	50%	23%	6
Georgia	50%	- *	8
Louisiana	42%	25%	12
Texas	38%	- *	24
Florida	33%	- *	15
TOTAL			69

* No cases appealed to Court of Appeals

Case Analysis: Conceiving of mediation as a process rather than a static condition affects the nature of the evidence taken as an indication of mediation. A commonly used procedure for establishing district-circuit relationships consists of counting "votes" on cases which have been dichotomized for and against the variable under study (in this case, segregation or discrimination) and converting them into affirmance and reversal rates. Two deficiencies of this procedure render it of little utility for the purposes of this study.³ First, simple reversal/affirmance rates obscure other dimensions of disagreement such as non-unanimous opinions and dissents, yet persisting patterns of these disagreements form a significant aspect of the relationship between the district and circuit courts. Secondly, reversal/affirmance rates do not reveal the different degrees of finality involved in appellate decisions which can range from flat reversals to simple remands which leave district judges substantial discretion. Under reversal rate calculations, both kinds of decisions are counted as reversals although the interactions between the two courts are quite different in each case.

Since upholding the hypothesis requires evidence of interactions, evidence was sought in the language of the opinions and in the supporting actions taken in cases decided initially by district courts and reviewed by appellate panels. Four distinct patterns or modes of interaction can be imagined.

- Mode 1: The District Judge is resisting a new national norm and defending the old local norm, while the Court of Appeals undertakes to move the District Judge (and those litigants whose views he represents) closer to the national norm.
- Mode 2: The District Judge undertakes to move the resisting litigants closer to the new national norm, while the Court of Appeals supports and encourages the District Judge in this endeavor.
- Mode 3: The District Judge is resisting the new norm and defending the old, while the Court of Appeals supports and encourages him in this resistance.
- Mode 4: The District Judge undertakes to move resisting litigants closer to the new norms, while the Court of Appeals supports and encourages this resistance.

Modes 1 and 2 would constitute effective mediation by the lower courts, one focusing on the appellate level, the other on the district level. The effectiveness of the mediation in Mode 4 is problematical: Court of Appeals reversals might or might not leave the District Judge with sufficient discretion to carry on a mediating function with respect to the litigants. Mode 3, however, precludes any mediating function.

Therefore, the first task in testing the mediation hypothesis is to determine whether there is distinctive language and actions corresponding to the hypothesized modes.

The interactions between the district and appeals "courts" were classified by mode for each of the selected cases. The language and actions taken to constitute "mediation," "resistance," and "support" that make up each mode

are reproduced in Appendices F (for school desegregation cases) and G (for voting registration cases). Appendix H lists each case with its mode classification. Appendix I lists the cases by mode, district judge and panel composition.

In the remainder of the chapter, I will illustrate the different modes with narrative descriptions of several cases that were classified, using the criteria in the Appendices, into each mode.

Mode 1: School Desegregation Cases

St. Helena Parish School Board v. Lawrence Hall:

This case represents the attempt by Louisiana parents, aided by the N.A.A.C.P., to desegregate the East Baton Rouge school system. They first filed suit in 1951 but saw no forward movement until 1960 when District Judge J. Skelly Wright issued an undated "from-after"* injunction which was affirmed by the Court of Appeals panel.⁴ In 1961 the Louisiana state legislature passed a law requiring a popular referendum in any school district before desegregation could take place, even if a court order had been issued requiring desegregation. The legality of the referendum requirement was litigated to the Supreme Court and

* An undated "from-after" injunction provides that maintaining a segregated school system is unlawful from and after such time as arrangements can be made to implement its discontinuance. A "dated" from and after injunction sets a date certain for the submission of a plan.

back, wending its way through the state court system. Meanwhile, in 1961 Judge Wright was appointed to the District of Columbia Court of Appeals so that Hall's continued annual petitions to the district court were assigned to Judge Wright's replacement, Judge Gordon West. In 1962, 1963 and 1964 West refused to require the Board of Education to begin desegregating the school system by offering a plan. In 1964 he actually held a hearing but continued to decline to issue an order of any kind. In response to a letter from Hall, Judge West stated that he would not rule before the 1964-5 school year commenced.

Following West's refusal to rule, Hall petitioned the Court of Appeals for a writ of mandamus to compel West to act. West declined to respond to the mandamus petition but adopted the response of the Board's counsel, the Attorney General of Louisiana.

The case, Hall v. West,⁵ was heard by a panel composed of Tuttle, Rives, and Wisdom. The decision was dated July 9, 1964. The unanimous opinion, written by Judge Tuttle, was blunt and critical. It noted the unjustified delays and private conferences (ex parte) between Judge West and the school board lawyers. It remarked on the "startling if not shocking lack of appreciation of the clear pronouncements of the Supreme Court and this Court during the past year which make it perfectly clear that time has run out for a district court to temporize . . ."⁶ Reviewing the controlling Supreme Court decisions

requiring more speed in compliance, Judge Tuttle then reminded Judge West that "this Court called specific attention to this language in a series of cases written by us during the last year, including Stell v. Savannah-Chatham, Armstrong v. Board, Calhoun v. Latimer, and Gaines v. Dougherty. In light of these decisions it is plain that no District Court any longer has the discretion to deny injunctive relief in a situation such as here presented."⁷

Tuttle then spelled out the more precise limits of discretion left to district courts by the Grooms case in which the Court said:

We have now made it plain by cases which it is an affectation to cite that a plan of desegregation must be offered (by the Board) or the District Court must fashion its own plan. . . .⁸

Then it proceeded to show that if it were required in order to secure the necessary results, the Court was prepared to further narrow the discretion allowed to district judges:

We now state it is equally plain by cases which it is an affectation to cite further that if the District Court in these circumstances fails to perform its duty to "fashion its own plan," then it falls to the lot of the Court of Appeals to require it to do so.⁹

Noting that the Court cannot afford the time taken up by allowing each case to appear before it two or three times, Judge Tuttle concluded that the only way to secure a clear rights involved in this case was to grant a writ of mandamus:

It is reasonably clear that an order from us directing merely that he enter a judgment in this case would mean simply that the case would be back here again because of his clear indication that he does not propose to enter the proper order until directed to do so. We cannot afford the delay and it would tend to destroy the confidence of litigants in our judicial system.¹⁰

So saying, the panel wrote the order for West to issue. On receiving the writ from the Court of Appeals, West announced that he would scrupulously comply and on July 13 ordered Board to submit a plan by July 24 that would meet the appeals panel's standards.

Following West's order that they submit a plan to him by July 24, the Board of Education met on July 18 and voted not to submit a plan voluntarily because their constituents did not wish them to and because to do so would risk the dangers of disorders. In court a few days later, the Board reported to West their refusal to submit a plan.¹¹ Simultaneously, Hall submitted a plan for immediate desegregation involving non-racial zones and no discrimination in school activities. West, obviously addressing the Board, pointed out that he no longer had any discretion and would be forced to assume that the Board's non-action implied acquiescence in Hall's plan. The only other interpretation of their behavior, he said, was contempt of court. Nevertheless, he tried one last move to get the Board to assume the responsibility for authorizing a plan by giving them until noon July 24. If they failed, he said, "it will be conclusively presumed to be their considered opinion that

that the plaintiff's plan is best" and West would order it.¹²

West seemed to have devised a strategy to force the onus away from himself and on to the Board. However, the Board and the Court were both saved by the federal government. The Board appeared in Court on the 24th and called to West's attention that the Civil Right's Act of 1964 (passed and signed into law in July, 1964) created a Community Relations Service in the Office of Education to assist local communities in developing plans. They asked for an extension of time to be able to make such a request and West granted it with alacrity saying that such a request did not require the concurrence of both parties.¹³

The Community Relations Service also moved with alacrity, because on August 6 the parties are back in court with a developed plan which West ordered on his own motion. It was a 2 grades a year, top down, 6 year plan.¹⁴

West reported in open court that he had secured the oral approval of two of the circuit panel judges prior to issuing the order on August 6 and had submitted a copy to the whole panel for approval after issuing it. The panel approved the order and amended their mandamus accordingly so that West and the Plan he ordered remained under Court of Appeals control.¹⁵

In July 1965 the United States intervened and was successful in getting West to amend the Plan to meet new circuit standards spelled out in the Locket, Price, and

Singleton cases which were decided earlier in the summer.¹⁶

However, after the landmark Court of Appeals decision in Stout v. Jefferson in late December 1966, West returned to his resisting ways. He insisted that Hall and the other seven Louisiana cases he consolidated with it, were not parties on that appeal and therefore the decision in Stout did not apply directly to them. Saying that he was interpreting the Stout principles, West found that since there was only de facto segregation in the Louisiana schools, the HEW guidelines required by Stout did not apply. Nevertheless, he ordered the time table stepped up.¹⁷

On appeal, the circuit panel granted a motion for summary judgment and in a two sentence opinion remanded the cases to be "amended" in light of the Jefferson decision.¹⁸

On remand, West wrote a long protest against the Court of Appeals mandate arguing that there was no evidence to warrant a Jefferson decree. He complained that the panel granted a summary reversal without holding a hearing. Nevertheless, even though it was clear to West that Hall had not proved that he was entitled to it, he entered the order as directed by the Appeals Court.¹⁹

Bell v. Rippy

This is one of the earliest school desegregation cases filed in the Fifth Circuit. It involved the attempt to desegregate the Dallas, Texas school system. Filed in 1956, the case was still active in 1965. Over the ten years two district judges handled the case: first Judge Atwell

and then, on Atwell's retirement, Judge Davidson.

In the first decision (September 16, 1955) Judge Atwell followed a line of reasoning that led him to dismiss the case without a hearing. The reasoning involved assumed that Sweatt v. Painter and Plessy v. Ferguson were the law: "When similar and convenient free schools are furnished to both white and colored . . . there then exists no reasonable ground for requiring desegregation." Dallas, he contended, provided such schools. However, without mentioning the Brown case by name, Atwell hinted that the Supreme Court expected local institutions and lower courts to "do away with" segregation after working out a plan. Nevertheless, he held that granting "an injunction in this case would ignore the equities that present themselves for recognition"20

The appeals panel (Hutcheson, Brown, Cameron) reversed Atwell's decision and ordered him to hold full hearings on the issues. In a per curiam opinion, the court said:

We think it quite clear that there is no basis in evidence for the action taken by the district judge, none in law for the reasons given by him in support of his actions.²¹

Judge Cameron dissented, supplying more sophisticated arguments in support of Atwell's holding. He stressed primarily (1) a district judge's discretion with Brown v. Board recognizes; (2) the unique and special problem of each child and each school; (3) the impossibility of reversing ninety years of segregation swiftly. Cameron's basic

factual premise was that the School Board was studying the matter and should not be disrupted with court orders.²²

On remand, Atwell followed Cameron's lead, saying he found him "most convincing and somewhat elaborate in his citation and reasoning." For himself, he attacks the Brown decision as based not on law but on "modern psychological knowledge" which Justice Frankfurter said a court was not competent to evaluate. Nonetheless, Atwell held a hearing "on order of circuit court" and found the Dallas Schools separate but equal. The only question in Atwell's view was whether keeping the races apart constituted a deprivation of rights. That question he never answered. He simply asserted that the Board was studying the matter of desegregation; it was spending money to that end. He also argued that since the Dallas Schools were overcrowded "it would be wrong to throw whites out to let Negroes in." Concluding that no injunction was needed, he dismissed the case again.²³

The appeals court (Rives, Jones, Brown) found the "basic facts . . . simple and undisputed": the schools are segregated and the twenty-eight children in the suit were discriminated against because of race. The principles of law were also "simple and well understood": plaintiffs need not exhaust state administrative remedies in order to claim rights in federal court; overcrowding cannot be presented or relieved by excluding pupils by race; pupils can be separated by ability, health, etc. but only on an indi-

vidual basis.²⁴

Writing for the court, Judge Rives addressed these words to the Board and to the Superintendant of Schools, assuring them he did not impugn their good faith:

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, is not enough. There must be compliance at the earliest practicable date.²⁵

Rives also had praise for the plaintiffs. He called them moderate for not asking for immediate, en masse desegregation; for recognizing that time is needed even if problems are approached with goodwill.

The panel reversed and remanded the case from Atwell with directions that he issue a "from-after" injunction, which they wrote for him, and retain jurisdiction of the case. Before this order could take effect the Board of Education petitioned for a rehearing on the grounds that a newly passed Louisiana law would prevent them from obeying such an order. The law provided for local option elections before abolition of a segregated school system in any district; forbid boards of trustees or other such bodies from acting to abolish segregation; required petitioning by twenty percent of qualified voters of a district; provided for transfer of student from one school to another without regard to race; and finally denied certain funds to any school whose trustees violated the law and made individual violation a misdemeanor punishable by a fine of not less than \$100 nor more than \$1,000.²⁶

In denying the Board's petition for a rehearing, the circuit panel pointed to the court's sworn duty to support the constitution, a duty no state law can relieve it of. It is the same duty, it wrote, "which rest on members of the several legislative and all executive and judicial officers of the several states."²⁷

On September 5, before he had received a copy of the panel's mandate, Atwell called counsel before him and made a statement in which he reargued all the old issues-- overcrowding, teacher shortage, difference in aptitude, and added the threatened loss of money. He asserted that the order the circuit court directed him to issue would "unsettle the tranquility of the separate but equal system. Of his own reaction, he wrote:

It is difficult, gentlemen, for me to approve such an order but this is the law of the land and it is my duty to do what I am ordered by a higher court . . .²⁸

He then, without further hearing or asking counsel for suggestions or arguments, directed them to draft an order requiring "integration to be permitted in the coming mid-winter term of the schools."

On appeal, the same panel--Rives, Jones and Brown-- reversed with criticism and directions, although they denied Rippy's petition for mandamus as unnecessary. They criticized Atwell for acting without hearings, without waiting for their mandate, for picking the mid-winter term, for making the change system-wide and for changing the terms

of the injunction from "requiring" to "permitting" segregation.

The following passage from Rives' opinion shows him trying to instruct Atwell in how to perform his "mediating" function. His basic point was that Atwell had issued an order the terms of which exceed those required by the panel and had asserted that he is doing so on orders from the circuit.

The Board has the authority and they are required to make the necessary arguments referred to. If they fail promptly to meet their primary responsibility to the satisfaction of plaintiff, appellees and others similarly situated, then the duty will devolve upon 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. It seems to us that the district court did not do this . . . 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, the local district court, and lastly the appellate courts) prescribed in Brown . . .

We thought, and still think, that this court's mandate made it clear that before a more specific date fixed and before more orders or judgements entered, the School Board should be accorded reasonable opportunity to promptly meet their responsibilities. If plaintiffs or others claim they have failed to do so, then hearing of evidence of all parties. Further, the court should retain jurisdiction to require compliance with its judgement.²⁹

The Dallas School Board's next move, in May 1958, was to try to get the federal court--Atwell--to tell them how they would be affected if they complied with his orders

by suing the State Commissioner of Education. Atwell dismissed the case for lack of jurisdiction and the appeals court--Tuttle, Brown and Wisdom--affirmed the decision. The Board then declared its intention to maintain segregation in the school system during the 1958-59, pending interpretation by state courts of the law requiring local option elections before desegregation and withdrawing state funds.³⁰

At this juncture, Atwell became ill (he was 89 years old in 1958) and the Dallas litigation was assigned to Judge T. Whitfield Davidson, aged 82 at the time.

When the plaintiff--now Borders--moved in 1959 for compliance with the 1958 Atwell order, Davidson held hearing in August, 1959 and denied the request. He found that the School Board "not only made a prompt and reasonable start but are also proceeding toward good faith compliance at the earliest practicable date." That is, they were "diligently studying the problems." Davidson concluded, in short, that "further time should elapse before the Court decides on a definite date for desegregation . . ." Meanwhile, the Board should circulate petitions to call an election in conformance with the 1959 Texas law. He recessed the hearing until April 1960.³¹

On appeal in March 1960, a panel of Rives and Wisdom (with Cameron dissenting) held Davidson in error for not requiring the School Board to submit a plan in time to be ruled on by the time of the recessed hearing, April 1960.

Since that date was approaching, the circuit modified Davidson's order to require the Board to submit such a plan within thirty days and ordered Davidson to hold hearings on it within a further thirty days of submission.³²

The Board's plan was submitted on April 30, 1960. On May 25, Davidson rejected the plan on the grounds that it would lead to amalgamation. The plan provided for desegregating a grade each year with provisions for white students to transfer if the assigned school "previously served colored students only (and vice versa) or if the majority of students in the grade were of a different race." Even this obviously fraudulent plan was not to go into effect unless and until a "petition election has been held and a vote favorable to desegregation has been obtained." Praying that "an all wise Creator guide you," Davidson recessed the hearing until June 14, urging the Board to give the plan further thought, making it plain that he favored setting aside certain schools for those who want an integrated education. "If integration is so desirable," he asked, "Why not do it by consent?"³³

Davidson's ruling was accompanied by a long and remarkable tour de force against the proposition that white and black children can be integrated without injury to their educational opportunities.³⁴ The opinion has eight major headings:

1. INTEGRATION OF RACES BY FORCE

Here the argument runs that a court decree is

force and history--biblical and secular--shows that hate is generated by force and never leads to amicable relations. Praising Eisenhower for seeing that passing laws does not result in "someone liking someone else" ("When Ike so reasoned, it was the Texan in him. It sounds like home folks talking."). In evidence of this proposition, Davidson offers the conflict between Ishmael and Isaac, between Arabs and Jews, and between French settlers and Arabs in Algeria.

2. PROCEED TOO RAPIDLY

Assessing the accomplishments of "integrated" societies, Davidson contrasts Quebec with Haiti, Cuba with Costa Rico ("All is peace, progress and beauty in Costa Rico while blood and discord flow in Cuba.") But it was Puerto Rico that carried the most weight with Davidson: "No southern Negro ever shot up the halls of Congress or killed the President's guard."

3. SLAVERY

Davidson's point in this section is that the Negro's advance from slavery "has been the most marvelous story ever told," due to the good relations between plantation owners and slaves, and despite the selfish carpet-baggers. The planters taught the slaves English and converted them to Christianity. In return, the slaves showed "great loyal devotion" during the absence of the men during the Civil War. They and the "Mistresses" ran the plantation with good production until Sherman's March. Twice Davidson stresses that the slaves did not molest the "mistress . . .

because of the fear of hell" and because the Mistresses were physicians and healed the slaves when they were sick.

When freed, the slaves wept or so Davidson's grandmother told him, as did the grandmother of an outstanding member of the Dallas bar, Neth Leachman. The selfish carpet baggers, however, came to lead the ex-slaves and cause them to forget God and start race riots. However, when President Hayes withdrew federal troops, the "Negroes and sons of former Mistresses were together again." Davidson points with approval to the leadership of Booker T. Washington ("He told the Negro to climb by excellence.") whom he, in the company of the Superintendent of Instruction, had heard speak at Wiley University, Marshall, Texas. "When the choir at Wiley sang 'Swing Low Sweet Chariot,' no grand operas has ever surpassed it," according to Davidson. Another point in favor of Wiley in Davidson's view was that as long as Dr. M. W. Dogan was President (and Davidson was City Attorney), no Wiley students were ever in trouble with the law. Other indications of achievement under the Plessy v. Ferguson doctrine of separate but equal were cited by Davidson -- Joe Louis, the number of Negroes in boxing and now baseball.

The section concludes with stories of how well his grandfather and great grandfather treated their slaves, as did Thomas Jefferson. Pointing to a Negro lawyer in the courtroom, and praising him as a follower of Booker T. Washington's precepts, Davidson asserted that "no one holds

any animus toward W. J. Durham."

Finally, Davidson argues, it is clear that Negroes have race pride, and do not want the purity of the race defiled, as Negro ministers and lodges constantly stress. The section concludes with a story against race mixing told to Davidson by "an elderly darkie."

4. THE TRAGIC ERA

The story of the horrors of Reconstruction is recounted by Davidson to explain why Southerners oppose integration even though race relations are good. He recounts tales of reconstruction in Harrison county and the massacre of whites in Haiti to show that it is

. . . fear that again a designing power
from afar . . . (will) tell (the Negro) that
the power is his and to take over the country
. . . fear that there will be a strip from the
Potomac to the Brazos of amalgamated spots run
by Negroes and unscrupulous whites.

5. HOME-RULE--THAT BOON OF LOCAL SELF-GOVERNMENT

In this section, Davidson drew on the words of the Declaration of Independence, the Magna Carta (Section 56), The Bill of Rights, Marcus Aurelius, Patrick Henry, Alexander Stevens, John Calhoun, Lincoln, Woodrow Wilson, and Franklin Delano Roosevelt in support of local government and States' rights. A selection of quotations shows the thrust of Davidson's point:

When a national power by force moves in
upon a locality in disregard of the consti-
tution as long understood and laws of a state
and ordinance of a city acting without the
consent of the governed and thus arbitrarily
overturns a social order, a usage and tradition

of its people, it can but wound the pride of such people.³⁵

Right of State to regulate whiskey traffic, right of the State to operate its public schools, right of state to expand its tax money . . . has been so well and so long recognized that it has been in the minds of the people an unalienable right, a part of their civic and political existence. Integration by force annuls these rights and is one of the hurdles that must be overcome to make it acceptable without protest. And when the general public fully realizes that amalgamation of necessity will follow, the protest will be even more vigorous and violent from both races.³⁶

6. RACIAL INTEGRATION IN HISTORY

In this section, Davidson argues that "racial integrity" has "served civilization on two great historic occasions." If the Jews had integrated with the Egyptians, "we wouldn't have the Ten Commandments"; if the Macabees had not resisted the Hellenization of Antiochus, there would have been no New Testament and thus no Christian civilization.

The section closes with further praise of Booker T. Washington's Wiley University speech and a general nostalgia for the days when "the influential White man was his leader and the colored man was the boy or his ward and friend." The Southern Negro feels kindly toward his white neighbor, Davidson concludes, ". . . and is freer from wrong doing than his brethren who have strayed into other fields."

7. INTEGRATION WITHOUT LOCAL APPROVAL

The burden of this section is that without the approval of parents and students, integration with approved

transfers will end up, as in the District of Columbia, with all-white and all-black schools. The problem could be solved, Davidson urges, by Franklin Roosevelt's concept of local government, except that it is precluded by the Brown decision, or by Booker T. Washington's rule of excellence, except that it is precluded by the requirement of "instantaneous integration by force." Therefore, a third formula, rule by consent of the governed "is the only formula that should be used until integration is fully tried."

The remainder of the section raises the spectre of intermarriage. A grade-a-year plan takes twelve years, but the end product is to channel all children together. "Children will marry whomever they associate with," Davidson writes, and cites the experience of armies. In the long run, amalgamation is the "most objectionable of all features of integration" in Davidson's view.

8. INTEGRATION RUSHES ON TO AMALGAMATION

Citing Allan Nevins to the effect that "two currents flowing together . . . will become one," Davidson reasserts that neither race wants amalgamation and then concludes by comparing Southern and Northern Europe:

Northern Europe 'line breeds' like cattle-men do cows. Southern Europe class breeds . . . We do not say the people of Sicily and the fringes of the Mediterranean are not equal to the people of the northern belt of the continent, but we do say that they are not superior.³⁷

At the beginning and again at the end of his opinion, Davidson criticized the Negro plaintiffs. He started by

complaining that Borders objected to the Board's Plan, but offered no alternative--"He just wants unconditional surrender from the Board and total and complete integration." At the conclusion, Davidson, in referring to "some but not many" in Dallas who "favor integration enthusiastically," explains that "We have some of our Negroes who are being used and are in good faith. No doubt plaintiff in this litigation among them." These Negroes, he asserts, do not represent the majority of Negroes.

It must be recalled that this long opinion was in support of a decision by Davidson to reject the Board's grade-a-year plan with liberal transfer rights, and adopt a plan on June 4 that provided for the school board to "survey parents and pupils as to who does and does not want integration and then give each what he wants." Davidson's understanding of the requirements of the Brown decision and Fifth Circuit precedent was that the courts were "limited to the mandate calling for integration. Beyond that school management will be left entirely to the school authorities." He continued:

A white school board may not refuse a colored child the right to enroll among pupils of the white race, but our judgment is that the courts will not interfere with the arrangement of the schools so long as there is due respect for the orders of integration. And the court will not direct the school board as to what school the child may attend if the board thinks that an allocation would be helpful to the school system and even to the child himself in certain cases.³⁸

The school board would bear in mind that

the judge of this court acts with them more in an advisory capacity than in a mandatory decree. His rulings will disagree with the school board only when they transgress the orders of the law. . .39

If that message was not plain enough, Davidson prepared a list of "can and can't do's":

- CAN'T: 1. Can't refuse to enroll a Negro child in school. But pupil cannot select own school.
 2. Vice versa.
 3. "You cannot do as you prefer to do, but you must do as the law commands you to do."
 4. Cannot discriminate between children because of race or color.
 5. "You will not go out and draft or force children of either race to come in and be integrated. They must offer and ask."

- CAN: 1. Assign child to school best suited to child and best interest of system.
 2. White child who makes self obnoxious in integrated school may under placement law be put in another school.
 3. Vice versa!
 4. Without purposely and intentionally discriminating between races, may assign pupils to schools other than nearest them. Example: if pampered white boy in integrated school and becomes selfish, proud and vain, creates disturbance; Or if overgrown Negro boy should be by premature growth inclined to sex and should write verses on the blackboard of an obscene character designedly for the white girls to read or should make improper approaches to them so as to provoke trouble."40

Judge Rives wrote the opinion (December, 1960) for the reviewing panel of Rives, Tuttle and Jones. After reviewing the history of the case, Rives calls the approved plan evidence of "a total misconception of the nature of the

constitutional rights asserted." There is no right to attend school with whites, he said, but to equal protection of the laws, to be treated as individuals. In any event, such a plan had already been condemned by a Fifth Circuit Court in Houston v. Ross, and so Davidson's decision in that regard is reversed.⁴¹

Interestingly, the School Board had also appealed Davidson's decision, asking the Circuit Court to approve Plan 1, its first choice. The plaintiffs asked for an order admitting them to school in the coming term on a non-discriminatory basis. The appeals panel was sympathetic to the plaintiff's request "in view of the frustrating history of this litigation." But

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 . . . To that end, we direct that the district court approve Plan No. 1, as amended . . . In so doing, we do not mean to approve a twelve year plan insofar as it postpones full integration. The District Court has not said whether that much delay is necessary . . . Further action by the District Court should be guided by the rule stated in Brown: "The burden rests on the defendants to establish that such time is necessary . . ."⁴²

Davidson issued the orders as directed by the circuit panel but made it abundantly clear he was doing so only at their direction. In the order he stressed the wide authority over transfers possessed by the school board.⁴³

The opinion in support of this order became Davidson's standard opinion each time the case appeared in his court. It read:

We are here now faced with the mandate of the Appellate Court directing us to enter a decree setting aside the plans of the School Board of Dallas which gave the child and the parents the right of choice along with integration and instead to enter a decree of forcible integration in disregard of the schools' plans and the constitution and laws of Texas.

Should a judge act when his conscience says no and where every sense of right and fair play says no, or should he under such conditions hold himself disqualified?

To abolish a long established social status or educational system by force is un-American. Such may be amicably done only by consent of the parties affected. The Court's decree may take effect through the office of the United States Marshal or with the soldier's bayonet, it is force just the same.

The people of Dallas by 4 to 1 majority vote stand for segregation. They have integration now not by consent, not by choice, but by force. If the medicine is bad and the result the same, what matters it to those concerned if it is given in twelve doses instead of one?

In a case as recently decided as December 8, 1960, Mallery, Judge, Wash., 357 P.2d 702, 703 in the Price v. Evergreen Cemetery Company, it said:

"This case is more significant for what it reveals, than for what it decides. It reveals an ultimate aspiration of the Negro race.***

"This case demonstrates that the Negro desegregation program is not limited to public affairs. The right of white people to enjoy a choice of associates in their private lives is marked for extinction by the N.A.A.C.P. Compulsory total togetherness of Negroes and whites is to be achieved by judicial decrees in a series of Negro court actions."

This unhappy controversy is not of our making. Our white people assuredly did not seek it. Our Negro friends and citizens did not start it. It is here, here, by remote origin and control, one of many suits brought throughout the South. The man from afar understands not our problem as do we. Our slogan hath ever been rule by consent of the governed. Our founding fathers could and would have solved

this problem without bitterness. To them local self-government was a complete answer. They could cheerfully observe the rule they had helped to make.

Our laws are not unilateral in their operation. Where the colored child may be embarrassed and given an inferiority complex by not being allowed to sit in white classes in the school room, then in the same school room the white child through the same psychological process may be found also subject to inferiority complex by reasons of being required by force to sit in classes which neither she nor her parents desired. The rights of the one are equal to the rights of the other.

Our colored neighbor is not unlike his white brother in the love of authority and the exercise of power. We have in our land a chain of black belt counties reaching from the Potomac to the Brazos in which the blacks hold a majority vote. The denial of the right to rule or the failure of the duty to rule well will in a future day rise to a national controversy. The N.A.A.C.P. will have every reason to be in that controversy and fight that it now has in this.

When state lines are abandoned for one purpose they are broken for all purposes. We cease to be a nation of federated states but a solidified whole.

The right to local self-government is everywhere a right of free men. Crush to earth, 'twill rise again, for 'tis an inseparable part of freedom intself.

The late Justice Brandeis once declared: The most comprehensive and valued right of man is to be let alone. *Omnstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944. Dallas is not being let alone. The laws and constitution are not being let alone but are all changed without the consent of those who must live under them.

Movement towards social and economic equality is towards a sameness of existence. The closer we come to what people call "one" the nearer we are to the end beyond which the excellence of achievement halts at a dead eddy.

Never have we at any time entertained one unkind thought toward the colored race. My wet nurse as a child was a Negro woman. My play-fellows were often her children. She was good to me. I would not hold back her race but would give them equal opportunity with any other race in matters of choice. I would not hold them back.

I would say to the colored child as I would say to the white child, hitch your wagon to a star and rise. Yes rise, rise by the course of excellence and superiority of achievement, and not by force.

Our Constitution was written to forestall unhappy conditions as that which now confronts us. When the Constitution was submitted to the several states for ratification an almost uniform protest went up from the states because it did not contain a bill of rights. Such was especially true in the states of Virginia, New York and North Carolina. The great oratorical powers of Patrick Henry seconded by the outstanding voice of George Mason almost defeated ratification in Virginia. The vote stood 189 to 179. Madison who was pushing the ratification had the backing of Washington else he would have lost. And then to succeed he promised the convention that every effort would be made to amend the Constitution with a bill of rights, and such was true of North Carolina and other states. In fact, North Carolina refused to ratify at all until the amendments were added.

When the Constitution was ratified and most of the states had asked for the adoption of a bill of rights as an amendment thereto, it is worthy of note that the first item in the proposed bill of rights coming up from each state dealt with the rights of the state of local control in language like this:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nowhere in the Constitution is the matter of education delegated to the Federal government. Our late President Franklin D. Roosevelt, though liberal as he was in thought, declared: "All powers not expressly delegated to the national government still belong to the states."

The Constitution is the compass, the rudder and the anchor of the ship of state. Without it comes tyranny or chaos. It is the citadel of the rights of free men. It must be preserved and must be preserved as written.

The oath to uphold and defend the Constitution is made a duty of every judge of every court. The decree here entered is one of that line of decisions leveling and annulling constitutional limitation on arbitrary powers of government. It bypasses Article X of the Bill of Rights

as though it had never been written. History will mark this as an epoch in the lives of the American people and particularly so as in the judicial powers of our nation. Though we sign the decree as required by the mandate of our higher court, so deeply do we feel the effects upon the future we must let the record show that at least one judge would dissent.

One final word to the people of Dallas; Stand calmly by constituted authority.

To the colored man, you are fully aware of having won in the courts of the land a history--making legal battle. If it calls for a triumph, remember the precept of General Grant at Appomattox:

"Never crow over the reverses of an intolerable adversary."

In our courts your lawyers will tell you never to provoke a difficulty. Sound ethics and good manners tell us not to unnecessarily provoke the ill will of those with whom we live. In this long continued trial your lawyers and your people have conducted themselves with that courteous decorum which commands the respect of the United States Court and the public. It well behooves you to help avoid such untoward scenes and conditions as have prevailed in other cities.

To the white man we would say that while every decision rendered by a Court does not become the law of the land yet if the judgment so rendered puts in motion edicts of the law and agencies of government, do not, though you disapprove, resort to violence in any form. It injures your cause. It does harm and subjects you to ultimate defeat and humiliation. Let the admonition of George Washington in his farewell address be your guide:

"Towards the preservation of government and the permanency of state it is requested that you discountenance irregular opposition to acknowledged authority."⁴⁴

In 1964, plaintiffs filed to speed up desegregation in keeping with new circuit decisions. Davidson held hearings and concluded that since things were going well in Dallas and since the grade-a-year Plan was a final decree of the Circuit Court it was not modifiable. He added to

his standard opinion these words:

Those who live at a distance think there is hate between the races. I've been here all my life and have never found any hate.⁴⁵

Again he told the Wiley College story including Booker T. Washington's speech, adding that former President Dagan's grandchildren send him graduation announcements.

In a July 1965 per curiam decision, Tuttle, Hutcheson and Brown vacated Davidson's judgment and remanded to the District Court for immediate hearings on the School Board's revised Plan (adopted June 23) to complete desegregation by September 1967. It directed Davidson to require the desegregation of Grade 12 in 1965 as required by Locket v. Board.⁴⁶

On August 27, on remand, Davidson held a hearing and concluded that desegregating grade 12 in 1965 would not be in the "best interest of students and would result in redistributing the next graduating class among several junior high buildings, disruption of student programs and undue administration burdens."⁴⁷

On September 1, Tuttle, Rives and Bell entered a per curiam opinion granting an injunction-pending-appeal. Accusing Davidson of "treating the language contained in our previous opinion as a suggestion rather than as a mandate," the Court continued:

In view of the repeated statements of this court during the summer months in remanding cases to District Courts, the inclusion of the 12th grade as a part of desegregation plans

and the clear statement contained in the opinion of this Court in Lockett v. Muscagee, referred to in the June 22nd order of this Court . . . we conclude that on the appeal from this latest order there is no reasonable likelihood that this Court will not require the inclusion of the 12th grade as embodied in our opinion of July 2, 1965.⁴⁸

The mandate was to issue immediately without the customary 21-day delay.

Mode 1: Voter Registration Cases

U.S. v. Lynd

This case involved the effort of U.S. Attorney General, Robert Kennedy, to secure the voting records of Forest County, Mississippi (1974 Title III, of the Civil Rights Act of 1960) and for an injunction against discriminatory practices in the county (1971 Title III of the Civil Rights Act of 1960). The case began in July 1960, and was still continuing in 1965. The District Judge to whom the case fell was Harold Cox, appointed by the Kennedy Administration in the same month.

The Attorney General initially filed for a Section 1971 injunction against discrimination in registering voters in Forest County (July 1960). After hearing the government's case in March 1962, Judge Cox granted the Registrar a thirty-day recess but denied the government a temporary injunction to remain in effect during the thirty-day period. The government went to the court of appeals for an injunction-pending-appeal.

Meanwhile, the government sought to amend its complaint

by asking under discovery rule 34 for the production of the same documents it had demanded (under a Section 1974 suit initially filed in August 1960) in January 1961 for enforcement. Cox ruled that by adding the document request to the Section 1971 suit now on appeal, the government had effectively abandoned the original Section 1974 case which he then "remands . . . to the files of this Court."⁴⁹

Judge Tuttle, for the Appeals Panel (Tuttle, Hutcheson and Wisdom) reviewed the history of the Attorney General's "fruitless attempts" to get the Forest County voting records even though the Court of Appeals, in Kennedy v. Bryce held that "the order should issue as a matter of course."⁵⁰ He noted that the Lynd case was "delayed from time to time with dilatory motions, including motions to quash a Rule 34 motion, motions to make more definite, none of which should stand in the way of prompt disposition." At the March 1st hearing--some eight months after the suit was filed--more motions by defendant--to delay and increase the level of proof--were allowed by Judge Cox. Hearings were finally held on March 5 and 7, 1962. At these hearings, Defendant Lynd presented no evidence nor cross-examined government witnesses. At their close, Lynd asked for and was granted a thirty-day recess in response to the granting of which the government asked for a temporary injunction. Judge Cox refused to grant or refuse the injunction, possibly in an effort to preclude appeal.

Tuttle reviewed the trial in detail, stressing that

in spite of Cox's refusal to order the production of records, the government had "proved without question that serious discrimination took place during the Lynd administration" by producing sixteen white and sixteen Negro witnesses.

On the question before the court--whether to grant an injunction-pending-appeal, Tuttle concluded that the likelihood that Cox's refusal of a temporary injunction would be reversed sufficiently great to warrant protecting Negro rights pending a decision on the merits of the appeal. He ordered the injunction against various discriminatory practices to issue immediately from the Court of Appeals since registration was soon to stop because of an early election.

In August, 1962, in response to a mandate from the Court of Appeals in a contempt case (in Re Lynd) Cox granted the Attorney General's Section 1974 application and ordered Lynd to produce the Forest County voting registration records.⁵¹

The appeal on the merits of Cox's denial of a temporary injunction was decided by the Court of Appeals (Brown, Wisdom and Bell) in July 1963.⁵² The opinion, per Curiam, affirmed its previous decision to reverse and concerned itself with criticizing the first trial as a means of guiding Cox in the conduct of the trial on a permanent injunction which is about to take place. The injunction-pending-appeal was continued "in full force until the district court disposes of the case," and Cox was urged to

move with dispatch since "issuance of an injunction by this court is most unusual. . . . The objective is to terminate the preliminary injunction of this court at the earliest possible time so that all further other orders will be those of the District Court."

Judge Bell, concurring in the result, wrote a separate opinion in which he expressed his view that while the Court had the power under the All Writs Act to grant an injunction-pending-appeal, it was his judgment that

" . . . it was more properly a matter for mandamus. The issue did not go to a denial of temporary relief as such but to a delay in granting or denying the relief and this court should have spoken to the District Court through a Writ of Mandamus."

This would have afforded the District Court a chance to be heard. It might have avoided the necessity of this court taking the case over prior to a decision in the District Court.

"It would also have avoided the contempt hearings that occurred since granting the injunction pending appeal, resulted in no further action on the main case in District Court.

"This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice when courts depart from the time-tested processes of law."⁵³

The contempt proceeding against Lynd for violating the Court of Appeals injunction-pending-appeal was decided by the same day July 15, 1963.⁵⁴ Lynd was found guilty of civil contempt and ordered to perform the following actions:

- (a) Register a named 43 Negroes illegally denied registration and mail them prepaid registration cards
- (b) Cease requiring Negroes to read, write or interpret any section of Mississippi Constitution

more difficult than Whites and none not used for Whites between 11/60 and 3/5 (Names sections.)

- (c) Cease using errors and omissions to reject Negroes if meet following standards:
 - (1) 21
 - (2) Citizen and resident of
 - (3) Mississippi--two years
District--one year
 - (4) No disqualifying convictions
 - (5) Not an idiot or insane
 - (6) Can read and write and reasonably interpret Mississippi Constitution
 - (7) Support Constitution of U.S. and Mississippi.

To notify of deficiency of any of these on application form and allow to correct error/omission.

- (d) Permit U.S. Attorney General to have records

Lynd was to

- (a) Perform 2(a) in 10 days
- (b) 5 days later file written signed statement that he has complied and "will faithfully abide by and comply with the judgment . . . and failing such compliance Theron C. Lynd shall be committed to and remain in the custody of the U.S. Attorney General for imprisonment until compliance and performance is effected."⁵⁵

The main trial in District Court was resumed on April 4, 1964 and produced a voluminous record which Cox complained about in his opinion on January 20, 1965 as "difficult for a trial judge to examine and analyze under such circumstances."⁵⁶ "Such circumstances" seems to refer to the fact that the government has simultaneously (April 1964) charged Lynd with further violations of the 1963 contempt order. The court of appeals panel (Brown, Wisdom, Bell) purposely delayed action in the contempt case "in the hope that the decision of the District Court would effectively dispose of such matters."⁵⁷

Cox's opinion--rather incoherent and rambling--is divided between findings of fact and conclusions of law. On the fact side, Cox began by finding no evidence that the State of Mississippi "did anything to discriminate so the U.S. Attorney General is not entitled to any relief against the State." The opinion continued with a long series of non-sequiturs purporting to show that Lynd did not discriminate but also admitting that he registered illiterate whites and reviewing case by case instances of illegal rejections of Negroes. A little later, Cox stated that the Attorney General's documents show Negroes were discriminated against: "The Court must necessarily conclude under such circumstances, as it does, that this registrar has under such circumstances discriminated against these citizens." But then Cox excused Lynd for these actions because "he did not know his duties when he took the job and he has vastly improved, particularly since this case has been in this court. He has tried hard."

After a further recital of individual cases, Cox returned to the theme of sympathy for the Registrar, Theron Lynd. He needed help, Cox wrote, namely to be relieved of "constant pressure and strain exerted upon him by the Federal Government during the last several years." Lynd may have "invited what he got," but he should not be constantly harrassed and intimidated by the Federal Government and militant citizens groups who, "under the pretension of working for proper registration, have actually done that

objective a grave disservice."

Cox's conclusions of law really amounted to a decree written in non-technical terms:

- (1) Permanent injunction against Registrar from discriminating granted
- (2) Registrar to aid applicants in filling out forms
- (3) For one year, use only fourteen (listed) section of Mississippi Constitution to examine (suggestion of appeals panel) to be placed in a container, applicants to draw. Not a bar exam--reasonable grading. No help.
- (4) After one year, use only 70 sections. (list)
- (5) Register all who pass, promptly
No need to set number he must handle at same time.
- (6) Applicants to cooperate with Registrar and "not participate in any course of conduct calculated to harass and irritate the registrar"
- (7) Applicants to appear alone; others ordered to desist from interfering on premises.⁵⁸

Having issued this order, Lynd concluded that it was not necessary to find a "pattern and practice" of discrimination at this time (reserving jurisdiction on that question) "because the Registrar can discharge his duties without resort to such a remedy." Very likely the key to understanding why Cox produced such an incoherent opinion lies in his desire not to "allow" the facts to add up to a finding of "pattern and practice." Such a finding, under settled law of the circuit (see U.S. v. Duke, U.S. v. Wood and Mississippi) would require a "freezing order" to eliminate the effects of past practices and bar them in the future. Before passage of the Voting Rights Act (1965) freezing was based on Section 1971(e) of the Civil Rights Act of 1964 and consisted of allowing Negroes to be tested and registered on the same standards that in past practice applied to whites.

The Court of Appeals (Brown, Wisdom, Bell) decided this case and the contempt case against Lynd on the same day, July 16, 1965, and issued separate opinions and orders in each case.⁵⁹

In the main case, Bell's opinion found four errors in Cox's work: (1) He failed to make a finding of a "pattern and practice" when the evidence demanded it; (2) he therefore erred in failing to order freezing; (3) he failed to provide for the preservation and availability of records; (4) he failed to award costs to the United States. On the basis of these errors, the Court of Appeals wrote the decree for Cox to order--and made it issue forthwith.

In the contempt case, Lynd was again found guilty of several major types of violations. For instance, Lynd applied a double standard in grading interpretations of the Constitution ("This case graphically demonstrates how such tests are the engines of discrimination.") In addition, the Court found that Lynd violated the previous order that he give all applicants assistance in filling out the forms. Not only did he not give assistance, he printed cards and posted notices to the contrary. Lynd was ordered to register 280 applicants he had rejected, remove the signs, post the Court Order conspicuously and file a report in two days." "At the snails' pace to date," wrote Judge Brown for the Court, "it will take decades to eradicate the evil."⁶⁰

Mode 2: School Desegregation

Flax v. Potts was an action brought by Negro parents

aided by the NAACP seeking to end compulsory segregation in the Fort Worth, Texas, public schools.⁶¹ It was initiated in the fall of 1961, after the Flax children were denied admission to a "white" school nearest their home. Judge Brewster heard the case in November 1961 and decided it in December.

As to the facts, Brewster found that the Fort Worth school system had been segregated for 78 years and would continue to be segregated unless he ordered otherwise, because the School Board and the administrative staff held a strong conviction that a dual system of separate but equal divisions is the best plan. Noting that the Board had been studying the question of desegregation for seven years before the suit was instituted, and that study intensified their belief in a segregated system. "These convictions," wrote Judge Brewster, "are held in absolute good faith. They are deeply rooted and firmly fixed. They believe that segregation made their school system the best in the country."

All of these facts--the Board's demeanor, the deep rooted nature of their convictions, and the genuine pride in the present system--"all make it apparent that there is no reasonable probability within the foreseeable future of a voluntary change" in their policy of segregation.⁶² With this reasoning, Brewster disposed of the Board's argument that Flax did not pursue the administrative remedies available under the Texas Pupil Placement law. "Nothing the Plain-

tiffs could have done would have changed that policy," since they were rejected because of race. Again, Brewster stressed that the finding did not "impute bad faith to the school officials," since they believed their decision was the best one and further the Board stood in jeopardy of state penalties if they abandoned segregation.⁶³

On conclusions of law, Brewster found he had jurisdiction; that the Negro parents had the basis for a proper class action; that there was not a new constitutional question requiring a three-judge court. He declared that a dual school system violated Plaintiff's rights under the 14th Amendment; that the Flax children were not required to submit to the administrative procedures of state law because they were eligible for admission on all grounds except race; that the Pupil Placement Law, if not unconstitutional on its face, was unconstitutional as administered.⁶⁴

The following spring, the School Board moved to have Brewster hold a new trial on various grounds: in his previous opinion, what he called "facts" were conclusions; he erred in allowing the case as a class action; erred in not making Plaintiffs use administrative remedies.⁶⁵

In overruling the Board's motion for a new trial, Brewster, in effect, expanded his previous rather brief holding into a fully argued opinion. A great portion of it was devoted to a tour de force on the question of the alleged necessity of exhausting administrative remedies, citing and quoting circuit authority. Although the tone

is scholarly and unrelenting in the final outcome, Brewster maintains his respectful acceptance of the sincerity of the Board's beliefs.

The Board appealed Brewster's ruling. The panel's decision in February 1963 (Brown, Bell and Simpson, D. J., Florida)⁶⁶ written by Judge Brown, began with praise for Judge Brester: "The detailed and able opinion of the District Court greatly simplifies our treatment of the case." On the substantive merits, Brown wrote, "there cannot be the slightest doubt that the District Court's order was a moderate and restrained response to the imperative need for judicial action."⁶⁷ Praise for the judge was followed by praise for the School Board: "The Board in this case-- unlike some of these suits--acknowledge Brown v. Board of Education and its binding effect."⁶⁸

In the body of the opinion, Brewster was upheld on every point (administrative remedies, class action, three judge court) his reasoning adopted and his language quoted. "The result is," wrote Brown, "that the District Court must be affirmed. The cause is remanded for receipt of a plan from the Board in terms satisfactory to the District Court under the controlling principles of Bush v. Orleans, Augustus v. Escambia Board, and Ross v. Dyer."⁶⁹ A footnote (#6) orders the thirty days to start running on receipt by District Court of the appeals court mandate, and further noted that an appeal to the Supreme Court will not suspend the mandate unless the Supreme Court grants a stay. No appeal

was taken to the Supreme Court.

Judge Bell dissented over footnote #6--on the question of when the thirty days should start running. He thought it should be not on receipt but when it was made the judgment of the District Court. Although it was only a matter of a few days,

In my view, absent some compelling reason, we should never interfere in matters of this kind with an orderly solution being brought about by the District Courts and the responsible parties on the scene. This is doubly true where the modification has not been sought. This record demonstrates that the District Court is acting in good faith and proceeding with what it deems to be deliberate speed. The plaintiffs do not contend otherwise, and we should not for a moment inject this court into the local affairs of Fort Worth under the circumstances.

Back in District Court, the Board waived its right to appeal further and asked that the mandate issue immediately and filed a Plan shortly after the mandate was received by the District Court.⁷⁰

The Board's Plan was grade-a-year beginning with first grade and reaching Kindergarten in 1975. Students were to enroll in currently assigned schools (i.e. segregated) and then apply for transfer by notifying both principles between August 15 and 29.

Flax objected that the transition was too long; all grades should be desegregated in 1963; adult education should be included; students should register at nearest school; kindergarden should be desegregated.

Brewster concluded that desegregating all at once was

too fast, but the Plan needed modification. In 1963, first grade (and adult education classes) had to be desegregated by each child enrolling in "the school he would go to if there never had been segregation." (Brewster pointed out that it may not be the nearest.)

In the fall of 1964, kindergarten would be desegregated. Negroes had never been allowed into either kindergarten or adult class on the grounds that they are fee schools and therefore not "public." Brewster ruled this practice untenable. But he stated that he delayed kindergarten one year so that adult "extremists on both sides . . . who put their own prejudice ahead of the welfare of school children and of the community," would not use the children as pawns."⁷¹

As to the total transition period, Brewster announced that he did not agree to twelve years, but would decide later on the pace "as I see how it goes."

Finally, he disallowed Flax's request that Negro students be allowed to commute to take courses not offered in the still segregated grades on two grounds: (1) the unavailability of the courses was not due to discrimination, but to lack of interest, and (2) commuting was too disorderly in terms of school administration.

Subsequently, the Board accelerated its own plan whereby all grades through junior high school were desegregated by Fall 1966; senior high school by Fall 1967. In February 1966 the Board adopted a resolution assigning

teachers on a non-racial basis. All of this occurred, apparently, without any court orders. In September, 1966, Flax moved to have Brewster order the senior high school and all faculties desegregated beginning the Fall Term, 1966. Brewster denied the motion in a brief note.⁷²

Mode 2: Voter Registration

U.S. v. Ward and Louisiana Section 1971 (of the Civil Rights Act, 1960), a case brought by the U.S. Attorney General, to enjoin discrimination in voter registration in Madison Parish, Louisiana. It was filed before Judge Ben Dawkins in October, 1961. Trial was held in December, 1962. The U.S. filed briefs in April 1963. The Defendant Registrar, Ward, never filed briefs, despite reminders and requests from the District Judge.

In his opinion after the initial trial,⁷³ Dawkins found that Ward and her mother had been registrars of Madison Parish for 39 years. Under Louisiana law, everyone registered to vote every four years. The last registration began in January 1961. Looking over the statistics, Dawkins observed that no Negro had been registered to vote in this century prior to trial in U.S. v. Ward.⁷⁴

Dawkins found that Mrs. and Miss Ward both used the identification requirement (if identification papers are in doubt, can require two voters to vouch) to discriminate against Negroes. He listed five acts of discrimination, essentially showing that the Registrars always required Negroes to have two vouchers; they never accepted other iden-

tification--licenses, receipts, library cards, letter from a citizen. In 1964, several Negro applicants were sent to the Sheriff who said he was tired of their trying to register and none would as long as he was sheriff.⁷⁵

In September 1962, just prior to the trial, the State Election Board adopted a new "citizenship" test taken from the Department of Justice manual for aliens applying for citizenship. All applicants had to answer 4 out of 6 questions correctly, and had to read and write from dictation from the preamble to the U.S. Constitution.

Previous to these new requirements, a citizen could be registered if she or he was twenty-one years old, a resident and possessed no criminal record. The application form was used for information only.

When the new requirements were adopted, Ward abandoned her strict identification requirements for Negroes. Since the trial began, 174 had been registered.

Dawkins concluded that "unless restrained, the Registrar may continue to engage in discriminatory acts and practices, although at trial Miss Ward testified she would not do so."⁷⁶

On the question of law, Dawkins held that the court had jurisdiction, the Attorney General was authorized to bring suit, that acts and practices of the Registrar are actions of the State, that Section 197(a) forbids any distinctions in voting based on race. He found that the facts compelled him to conclude that "Negroes were systematically

excluded from registering to vote" in violation of the Section 1971(a) and the 14th and 15th Amendments, as does the two voucher practice for Negroes only. The law, he wrote, required that the Registrar accept any reasonable identification from Negroes; identification cannot be used to impose a heavier burden on Negroes than on whites.

The decree⁷⁸ issued by Dawkins enjoined the Registrar from discriminating generally, and specifically from

1. Refusing to accept reasonable proof of identification such as (lists 3 categories)
2. Applying different and more stringent qualifications, requirements, procedures and standards to Negroes

Dawkins also ordered Registrar to submit Progress Report by 10th of each month. Report to include:

1. Dates and places applications received
Hours office open
2. Action on applications
Name, race, date of application
If rejected, reason.

Finally, Dawkins ordered the Registrar to make all records available to U.S. Attorney General and assigned costs to be paid by Ward.

Judge Brown wrote the opinion for the panel composed of Brown, Rives and Maris, a Third Circuit Appeals Judge. The decision was handed down on August 11, 1965.⁷⁸ The U.S. had brought the appeal on the question of whether a finding of a pattern and practice of flagrant discrimination the District Court should have applied the "freezing" principle to allow Negroes to be tested in the same manner as formerly

applied to whites rather than allowing the current higher standard to apply to all.

The appeals court answered this question in the affirmative and so modified and reversed the District Court. But Brown suggested that Dawkins was "pulled" into error, rather than "Falling" into error. He was "pulled" by the Fifth Circuit decision on the Atkins case which "perhaps led him to conclude that only under the most extraordinary circumstances should a freeze order be employed."⁷⁹ The appeals court, wrote Brown, comes to its decisions out of experience at trying to discover what would make voting rights real. The court learned that "the relief required becomes successively more exacting as successive cases come to us" and traced the development from Duke through Walthall County, Ward (Mississippi) to Lynd.

In addition to the facts considered by Dawkins, the appeals court put emphasis on the fact that Madison Parish action which affected the change in permanent registration (resulting in 1,790 whites permanently registered and 174 Negroes) on February 14, 1963; that illiterates were legally registered until 1960; and that any interpretation test was declared illegal in U.S. v. Louisiana. They noted that although the U.S. proposed a freeze order to the District Court, Dawkins did not explain why he rejected it.

Concluding that the case demanded a freeze order for at least two years, Brown wrote:

. . . when on final hearing, facts compel a finding of a discriminatory pattern and practice,

it is mandatory not discretionary to make the critical finding and Section 1971(e) . . . It is too vital a part of the Congressional scheme to be left to the choice of the judge in each case.

On the question of issuing the decree, the appeals panel admitted that ordinarily they would reverse with directions to the District Judge to enter an order with a Ward-Lynd format with a two-year minimum, using current age-residence eligibility. However, good administration and the need of relative uniformity within the circuit--not because of "any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied,"⁸⁰--led them to write the decree for the District Judge to issue.

The opinion concluded with a lecture to Registrars and indirectly to District Judges;

Registrars must come to learn that as a final hearing of evidence supports it, a Judge must find a pattern and practice of discrimination; he must set in motion Section 1971(e) (freezing) machinery; next, he must enter a decree with freeze provisions that would overcome past discrimination. The handwriting is indeed on the wall--in Mississippi Ward, in Lynd, and now in Louisiana Ward.⁸¹

Brown also criticized Dawkins for assessing costs to Registrar in place of to the State and for not uttering "a single possible whisper of a suggestion" in support of this use of discretion.

In this, as in other voter registration cases in Louisiana, the State Attorney General has been the right arm of the State on behalf of the Registrars. The battle is between two sovereigns. As the unsuccessful litigant, there is no reason why the State should not bear the

usual consequences of such a venture.⁸²

The following month, September, 1965, Dawkins entered the decree written by the appeals court. In October, a petition for rehearing was granted by Maris, Brown and Rives because the Voting Rights Act had been passed almost coincidentally with their August decision. Accordingly, they rewrote the Ward decree to conform with the Act: no tests for five years.

The next day Dawkins issued the new decree.

Mode 3: School Desegregation

Calhoun v. Latimer: an action brought by Negro parents in the Fall of 1958 to desegregate the public schools of Atlanta, Georgia. As in Texas, State law required segregation and threatened any school that desegregated with loss of financial support. The case was set for trial by the Fall of 1959 before Judge Hopper. In June 1959, the Court declared that segregation existed, that it must be terminated, and that the Board must submit a Plan by December, 1959.⁸³ The Board submitted a Plan on December 1 and a hearing was held on December 30. Over objection of the plaintiff Calhoun, Hopper approved (in final form, on January 18, 1960) a plan that provided that all students remain in their assigned schools unless their requests to transfer to another school were granted by the School Board; new and beginning students were to be assigned by the Superintendent in accordance with standards including the possibility of friction, disorder, the psychological effect on students,

home environment, and morals. The Plan called for desegregating a grade every year, commencing with grade 12.⁸⁴

Hooper's responses to certain objections to the Plan raised by Calhoun indicate a stance closer to resistance than to mediation.

(1) In stressing that the Brown decision did not require integration, but merely forbid the state to segregate by race, he concluded that assigning children to schools by residence patterns did not constitute assignment by race.

(2) Requiring a plan to be submitted two years from the date of filing the suit showed the Court was moving speedily.

(3) Plaintiffs argued that two criteria for judging transfer requests were irrelevant and therefore could not be applied: the possibility of disorders or friction and possibility of breaches of the peace, ill will, or economic retaliation within the community.

Hooper's response was that "factors cannot be used where factors pertain to color or race," and it was not necessary to determine "at this time" whether these factors would be used without regard to race.

(4) Plaintiff's objections to six other factors⁸⁵ were dismissed "if the factors are used nondiscriminatively. After all, the Brown decision is based in part on the psychological effects of certain practices."

A final objection to making the implementation of the Plan contingent on the enactment of permissive statutes

by the Georgia Assembly was also rejected by Hooper. He approved the Plan in its final form on January 18, 1960, but declined to order it into effect in September 1960,

reserving such ruling until a Commission, appointed by the Georgia Legislature, in January 1960, should have an opportunity to make its report, the report being due May 1, 1960.⁸⁶

When the report was filed, Hooper held a hearing on May 9 after which he ordered the Plan to commence in September 1961. The language of the opinion Hooper wrote in explanation of that decision seems to indicate (1) his understanding that the Plan he was approving "would cause little mixing" in Atlanta, and (2) his support for the other portion of Texas law that required approval by a local election before desegregation could commence:

In the first place, such Order of Court could have no effect except to close the Atlanta schools and risk the danger of all of Georgia's schools being closed. In the second place, the Georgia Legislature in January, 1960 had for the most part been elected upon their promises to the people that they would not under any circumstances permit any integration in any school in Georgia, and they felt bound by these promises.

Some may think that the appointment of the Study Commission by the Legislature had no other purpose than to obtain a year's delay. As to that this Court cannot say. However, the Court thinks the appointment of the Commission was a wise step and that much progress has resulted therefrom. Hearings were held in every Congressional District in Georgia, many witnesses were heard, and the purposes of the study and the situation faced by Georgia, were carefully explained to the people of Georgia by the able chairman of the Commission, Honorable John A. Sibley, an outstanding attorney and banker of this state. It was reported that numerically three out of five of the witnesses favored maintaining segregation, even though it

might result in abolishing the Georgia public school system. That fact alone, however, shows a decided shift in public opinion in Georgia. This Court is confident that, except for the education of the people by such Commission, the vote would have been overwhelmingly against any integration, whatever the consequences.

This Court on May 9, 1960 therefore, had the feeling that the best interests of Georgia would be served by permitting a new legislature to be elected, with full knowledge by most of our people as to the real issues involved, and the possible disastrous consequences which could flow from the failure of the Georgia Legislature to permit the Atlanta Plan to become effective.

It now seems clear that the people of Atlanta and Fulton County would prefer to have said Plan put into operation, than to have Atlanta's schools closed. It is quite evident that many other populous centers in Georgia have the same feeling. This feeling is not shared by citizens living in the rural areas for two reasons. First, they do not have the residential patterns that exist in the cities, which patterns as formerly pointed out by this Court, would result in the schools located in the white areas being practically all white and those located in negro areas to consist almost altogether, if not totally, of negroes. Such a situation, coupled with a Pupil Assignment Plan on application of the students, would cause little mixing. The residential patterns in the country, however, would not give this advantage. Second, the people in our rural areas have the feeling that if any integration is permitted in Atlanta, or other city in Georgia, it will be but a beginning which will in time spread to their areas.⁸⁷

* * *

This Legislative Committee recommended five specific statutes or resolutions to be passed by the General Assembly in 1961. Recommendation No. 1 and Recommendation No. 2 pertain to constitutional amendments, which if proposed to the people in January, 1961 cannot be voted upon until the general election in November, 1962, after the schools have commenced in September.

Recommendation No. 5 however, reads as follows:

"That the General Assembly consider whether, in view of the urgency created by the Atlanta case and other cases which may be brought, it will propose to maintain total segregation throughout the state or whether it will choose a course designed to keep the schools open with as much freedom of choice to each parent and community as possible; and, if it chooses the latter course, that it enact legislation enabling each school board or other local body to establish a pupil assignment plan; empowering the people of each community to vote whether to close their schools in the event of integration or to continue the operation of said schools; and enabling each parent to withdraw his child from an integrated school and have the child reassigned to a segregated school or receive a tuition grant or scholarship for private education."

That portion of Recommendation No. 5 suggesting legislation permitting the people of each community to elect as to whether they adopt a Pupil Assignment Plan, or whether they close their schools, is worthy of careful study. That is to say, should the Legislature permit Atlanta to put into effect in September, 1961 the proposed Plan, the State of Georgia would free itself of the danger which it faces, to-wit, that the closing of the Atlanta schools in September, 1961 would, under application of the principles of law in the Virginia case set forth above, result in the closing of all the public schools in Georgia.

The majority vote of the Legislative Committee makes it clear that the majority of the Committee are opposed to any integration, but they hold the conviction that, since integration is inevitable, it is better to allow each community of the state to decide for itself whether to risk the closing of its schools. The majority report is made by men having the best interests of Georgia's common school system at heart, and includes the Chancellor of the University System and the Superintendent of Schools of Georgia. It also includes the Chairman of the Board of Regents of Georgia, and other outstanding Georgians.

This Court wishes to make clear that the Court has no desire to meddle into the affairs of the Georgia Legislature or the State of Georgia, but is making a sincere effort to enable the people of Georgia and its legislature to make a decision in this matter, if they so desire,

that will prevent the closing of the schools of Georgia. This is a matter of grave concern to the people of Georgia and in particular, to the parents having children of school age but not having sufficient funds with which to provide a private school for their children.⁸⁸

Prior to the beginning of the second year of the Plan, Calhoun filed a motion for further relief. (April 1962)⁸⁹. Hooper, in his decision of November 15, 1962, denying the relief asked for, complained that the Plan had been adopted in the first place, "at the insistance of Plaintiff; that Plaintiff had dropped an appeal of the Court of Appeals; that the motion was too vague and indefinite, merely repeating original objections and adding objections to segregation of teachers and extra-curricular activities. He ruled that the school system was a dual system "only" in the grades not reached; that there was no evidence that the Board designated schools as Negro or white or maintains segregated extra-curricular activities.

A major objection which Hooper answered at length centered on the practice of giving special tests to Negro pupils wishing to transfer to "white" schools. He found, however, that the Board discontinued that practice in September 1962 and now gave the Standard SCAT (School and College Ability Test) to all pupils.

Hooper also found that while proximity to the school was also considered in transfer decisions and area lines were changed to relieve overcrowding, there was no evidence that the Board was using these factors to maintain a dual

system.

In addition to objecting to the Plan in operation, Calhoun had submitted a new Plan which accelerated the time table to bring completion in 1965 with the desegregation of grades 1, 2 and 3. In declining to accelerate, Hooper wrote,

This suggestion by plaintiffs' counsel that the Court summarily speed up the Plan already adopted without any evidence to show that the new Plan is practicable or feasible, is no doubt inspired by one or more recent decisions by appellate courts which do summarily establish a Plan of Desegregation. In all such instances, however, that action was taken by appellate courts because the school authorities in question had not proposed a Plan, or the district judge in question had not ordered a Plan. This Court finds no precedent for a trial judge summarily changing and speeding up a Plan, already in operation for two years, without some facts or circumstances requiring the same.⁹⁰

He continued, stressing that "many local conditions" mitigated against adopting "a more speedy transition." The Atlanta population was forty percent Negro; there was a rapid influx of school-age children into the system, a shortage of classrooms requiring use of church buildings and double sessions, problems of slum clearance and changes in residential patterns.

Hooper concluded with these words:

There were in Atlanta 116,000 pupils, of which approximately forty per cent, or some 46,400, were Negroes. There was a rapid influx of children of school age into the city and a shortage of some 580 class rooms, many classes then being held in churches and other buildings, and many having double sessions. Other problems confronted the School Board, caused by

slum clearances and changes in residential patterns, to which may now be added complications arising out of large tracts of land being condemned for expressways.

The appeals court decision, written by Griffin Bell for a panel composed of Lewis,* Bell and Rives, and delivered on June 17, 1963, affirmed Hooper's actions.⁹¹ Bell declared the "bare bones" of the case before the appeals court were contained in the suggestion in Calhoun's proposed new plan that

(d)esegregation would be provided on the basis of drawing school zone lines for each school and assigning all children living in the zone to the school without regard to race or color.⁹²

The question, wrote Bell, of "whether the assignment of children to the same segregated schools with the right to transfer is permissible is a question not heretofore before this Court." He reviewed circuit cases (Bush v. Augustus and Boston v. Rippey) and concluded that

The Atlanta Plan when considered in its over-all scope, falls within the ambit of these benchmarks, if properly and fairly administered. (emphasis added)⁹³

Judge Rives' dissent attacked the basis of the court's decision: on their reading of the evidence of fair administration of the Plan and on their interpretation of the precedent circuit cases.⁹⁴

With respect to the various administrative practices, two discussed by Judge Rives serve to illustrate his difference from the majority. On the matter of procedures used

* Tenth Circuit, sitting by designation.

in making transfer decisions, he wrote:

The essential fact, as disclosed by the record before us, is that the schools of the City of Atlanta do not have a single grade, in either the grammar or high schools, in which Negro children are permitted to become students on the same basis as are white children. In other words, whatever may have produced this result, it is not disputed that it is impossible for a Negro student in the top three grades, which have, under the Atlanta plan, been "desegregated," to enter such desegregated school without being subjected to requirements that do not apply to any white student in the grade. This comes about by reason of the fact that, while the basis for first considering applications of a Negro student for a transfer to a white school is the test normally conducted during the school year for all students, both white and Negro alike, the Negro student seeking to transfer is required to meet standards based upon an analysis of his tests and also based upon a "personality inter-school, or who came into the grade from a lower grade by reason of having been in a "feeder" system as to which all white students are in white schools and all Negro students are in Negro schools.

As is pointed out by the majority opinion:

"The standard used was that the transferee (the Negro student) had to score a grade at least equal to the average of the class in the school to which transfer was requested."

And, as also pointed out in the majority opinion:

"Each student (transferee) was also given a personality interview by school officials to determine probable success or failure in the new school."

On the face of it, of course, this means that if a Negro student seeks a transfer from Booker T. Washington High School (Negro) into the twelfth or eleventh grade at Northside High School, a white school, the Negro student has to demonstrate from his record at Booker T. Washington that his grade was "at least equal to the average of the class" in Northside, whereas every passing student entering that grade from the lower grade in North-

side High School would automatically be admitted in such grade. Of course, it would be ridiculous to suggest that before students passing from eleventh grade Northside to twelfth grade Northside could be admitted to the twelfth grade their prior record must have equaled the average of the class in the eleventh grade. It takes no professional testimony to indicate the absurdity of such a requirement. Yet this is precisely the requirement which is imposed on every Negro transfer student. Moreover, so long as an eleventh grade student attains the passing standard re- being subjected to a "personality interview" by school officials to determine probable success or failure in the twelfth grade.⁹⁵

On the question of whether there are segregated school zones, Judge Rives disputes the majority's opinion that there is no evidence one way or the other:

While the trial court stated, "neither does the evidence show that defendants are maintaining a dual system of school attendance area lines," and the majority opinion says, "even if it may be said that there is a dual system in Atlanta, and the evidence does not so disclose" (emphasis added), both statements are incorrect. The Superintendent of Schools, who was the only witness, testified as follows on page 90 of the Record:

"Q. And by whom are these administrative lines drawn?

"A. By the area superintendent in cooperation with the school officials, local school officials.

"Q. And these lines serve to delineate the area for particular elementary schools?

"A. Yes, to the degree that it is necessary to balance one school's attendance.

"Q. Now, in the areas where the housing is mixed racially, that is, the areas where Negroes and whites live in the same area, these lines would overlap, so to speak, wouldn't they?

"A. Well, formerly they were drawn separately for white and Negro schools.

"Q. And how are they drawn now?

"A. They are drawn on the basis of the Pupil Placement Law under which we are operating. There has been no change in the elementary situation.

"Q. Now, you say the lines are drawn now pursuant to the Pupil Placement Laws. Is that

a state law or is that the plan?

"A. That is the plan.

"Q. And you say the lines are drawn pursuant to that?

"A. The same lines that were in existence in 1960 are in existence at the present time.

"Q. I see.

"A. With variations that have been made. There have been no specific changes in those lines.

"Q. And you still have separate lines which would relate to the white elementary schools; is that right?

"A. Roughly, yes."⁹⁶

This evidenciary aspect of Judge Rives dissent is summed up in the following passage:

It seems to me that the majority opinion justifies the continued approval of the present plan on the assumption that it is "not based on consideration of race," because the opinion states:

"* * * it can also be said that there is an option under the Atlanta plan just as there is under the New Orleans and Houston plans, assuming the plan is applied to transfers as well as assignments of all new students (which, of course, it is not) in desegregated grades, and is not based on consideration of race (which it plainly is)." (Emphasis added.)

Since the assumption on which the opinion rests is demonstrably not correct, the opinion cannot be logically supported.⁹⁷

In precedent circuit cases, Rives read Augustus to say that dual systems must be eliminated in grades one and two by 1963, and that at least in a grade a year. The Bush case increased the requirement to abolishing the dual system in grades one through five by 1964, and at least a grade a year thereafter.

In conclusion, Rives commented:

It is clear to me, as it must be to any who read and understand these two decisions by this Court, that if we accept the decision

represented by the majority opinion in this case, the Court will have stepped backward from the position it has previously taken after long and mature deliberation, and that this Court will have deliberately required a prompter compliance with the Supreme Court's decision in New Orleans and Pensacola than is being required in Atlanta, a community in which all the evidence and the opinions of the district court and of the majority clearly indicate accomodation to the requirements of the Constitution can be expected to be made with a minimum of difficulty.⁹⁸

Rives' dissent has been presented in some detail because in denying a petition for rehearing, Bell and Maris stated that they had affirmed on the premise that "such deficiencies as were found" would be "adjusted" by the School Board or by the District Judge. They then spelled out and forbade all the practices involving racial discrimination--except the zone lines criticized by Rives. They also did not accelerate the Plan. Judge Rives dissented without opinion.

Calhoun appealed to the Supreme Court and at the hearing the Board claimed it had adopted "additional provisions" with respect to free transfers. Calhoun urged that they were inadequate and the Plan too slow. The Supreme Court vacated the judgments in the lower courts and remanded the case to the District Court to appraise the Board's new resolutions in "a proper evidentiary hearing."⁹⁹ The Supreme Court Per Curiam opinion also called attention to its rulings on the need to speed up the process of desegregation (Watson, Griffin, and Gross cases).

On remand, Hooper held a hearing promptly and issued

an order promptly.¹⁰⁰ Noting the Supreme Court's cases urging speed, and new circuit cases (Lockett and Bivinis) requiring complete desegregation by 1968, Hooper asserted that these cases "mandates to this court." Thereupon he ordered Atlanta to begin desegregating from "the bottom up" (Kindergarden and first grade) in 1965 and two grades a year thereafter, so that all grades would be desegregated by 1968.

He did not rule, however, on the assignment of teachers, athletic programs, banquets, and other issues "not remanded by the Supreme Court."

Mode 3: Voter Registration

U.S. v. Ramsey and Mississippi¹⁰¹ was an action by the U.S. Attorney General for an injunction under Section 1971(c) of the Civil Rights Act, 1960 to prevent the Registrar of Clarke County, Mississippi from refusing to give registration tests to Negroes. The case was heard by Judge Harold Cox in February 1963.

Judge Cox found that Ramsey who was eighty-two years old and had been Registrar since 1953, was not an official or agent of the state. He was elected by the citizens and paid out of county funds so the state had no part in his illegal acts.

His substantive findings of fact included:

1. Although there were some 1500 irregularities in the Registrar's office, most had nothing to do with discrim-

ination. The irregularities included: registering unqualified citizens; illegally registering those probably qualified but who did not bother to go to the office to register. There were 1289 citizens registered by proxy; 307 applications have the same handwriting. All of these "irregulars" were white. In addition, white illiterates were registered and the Registrar could not explain how that happened. The Registrar also "knew little about" the names of Negroes put on the rolls in 1961 when they were needed for a state jury and then stricken.

2. However, Negroes were discriminated against. Although less than twelve (since 1953) "took the trouble" to go to the Registrar's office, those who did were told by the Registrar to "go home and think over and let him know their decision under existing political conditions in the county." He wasn't refusing, wrote Cox, but the "inescapable effect" was to deny Negroes their rights since he had never told a white citizen to go home and think it over. In fact, Cox pointed out, whites often registered for the whole family. "It was illegal, but customary."

Other practices alluded to by Cox were that of the "less than 12" Negro teachers who tried to register (out of 70 Negro teachers in the county) all had to take a test, whereas some whites took the test, others did not. In the end, three Negroes were registered, the last in 1962 and none has applied since.

3. Cox found no evidence that Ramsey had given

harder tests to Negroes than to whites: "that is not one of his faults."

From these facts, Cox concluded that while Ramsey had discriminated against Negroes in not giving them tests, there was no pattern and practice of discrimination because these illegal actions were taken "among both races." And he concluded there was no State participation.

In the section entitled "Conclusions of Law," Cox found he had jurisdiction and that the U.S. was entitled to an injunction to restrain the Registrar from refusing to give testa and notifying applicants promptly of the results and the like. However, the bulk of the section was an argument as to why a finding of "pattern and practice" was not justified, and therefore "freezing" not required. Cox argued that while the Registrar's office was "run very loosely," it was because the Registrar had "little knowledge of his duties" not because he had a scheme or systematic procedure. Admitting that he deliberately and improperly denied Negroes the right to register, did nothing to encourage, aid, or assist Negroes as he did whites, "yet no pattern and practice of the Registrar in such respect is established by the evidence . . ."¹⁰²

The gross irregularities, Cox asserted, were simply an over-zealous plan to register all whites. He thought it was a fair inference that some of the candidates for election were responsible for the irregularities. "These are not matters of direct concern in this Act (The Civil

Rights Act) but are local matters not involving civil rights of Negroes but involving rights of other qualified Voters in the County."¹⁰³

In conclusion, Cox decided that there was no justification for the court to

. . . order the Registrar to violate the law by registering Negro citizens in such manner. The practice should desist.¹⁰⁴

The detailed "judgment" went beyond Cox's findings of fact and law in enjoining a variety of "practices." In it, he also assigned the costs of the state's litigation to the U.S., and the cost of the U.S. litigation to the Registrar. However, the judgment did not issue as an injunction. Cox simply mailed a certified copy to the attorneys "without need for issuance or service of a writ of injunction."¹⁰⁵

On appeal before Hunter (District Judge), Cameron and Rives, Cox was upheld on (1) his dismissal of the case against the State, (2) finding of no "pattern and practice" was within his discretion, and (3) denying freezing.¹⁰⁶

Hunter's opinion praised Cox's opinion as "an intelligent . . . effort" and the judge himself for "maintaining a delicate balance between state and federal relations" in his "sweeping injunction."¹⁰⁷ Later in the opinion, Cox received more favorable comment from Hunter for acting "very discreetly" and "not permit(ing) his zeal to needlessly supplant local responsibility."¹⁰⁸

The appeals court also denied the U.S. request to set amplified standards for the Registrar on the grounds that

it would require him to violate state law. Furthermore, Hunter argued, the Registrar has been making a "good faith attempt" to do better and has succeeded. In evidence, Hunter cited the following: the Registrar had not committed any acts of discrimination since ordered to stop; the Election Commissioners had purged the roll of 24 improperly registered white voters; and the Registrar had registered 42 of the 63 Negro applicants between January and November 1963.¹⁰⁹

Judge Rives agreed with the majority in dismissing the case against the State, in extending the orders to Ramsey's successors, and in requiring monthly reports. On the major issues, however, Rives dissented: the finding of "pattern and practice" was at variance with the facts which clearly demonstrated systematic discrimination and therefore clearly erroneous. Worse, Rives argued, the majority held that the district judge has the discretion to omit a finding, "not to make a specific finding." Surely, they can not mean, wrote Rives, that a district judge has the discretion to find "no pattern and practice" when the facts found by the district judge demonstrate a "pattern and practice." On the other hand, the statute--Section 1971 of the Civil Rights Act--provides for a mandatory duty to make some finding: "the courts . . . shall make a finding." Even Senator Eastland, during Senate debate, read the statute as mandating a finding.¹¹⁰

On the question of freezing, Rives found the majority's effort to meet it by reference to "progress since the Dis-

strict Court decision" inadequate. The progress was meager and in any case did not rectify the effect of past injustices.

Finally, Rives derided the majority's "hopes" and "feelings" that Mississippi will "handle the matter" thereby obviating the need for federal intervention. To their pronouncement that "only when the state shirks its responsibility" does the federal authority enter, Rives responded

But the state and its subdivision have shirked this responsibility: the prior violations of both the federal and state constitutions are appalling.¹¹¹

The government petitioned for a rehearing. Between the decision--February--and the rehearing decision--April--one of the judges in the majority--Cameron--died. In an unsigned, per curiam opinion, the Court reversed itself on the question of "pattern and practice" and declared Cox to be clearly in error. The question of relief (i.e. freezing) was remanded to the District Court for a ruling in light of the new holding. It appeared as if, with Cameron's influence removed, Rives was able to win Hunter over.¹¹² However that may be, the decision on rehearing takes the case out of the Mode 3 category, although the struggle between Cox and Circuit panels continued until November 1965 when the appeals panels issued a decree based on the 1965 Voting Rights Act. Up until that time, Cox had successfully avoided making a finding of present "patterns and practices" even though ordered to do so by the appeals court.¹¹³

These six cases were not chosen because they are the prototypes of their modes. Each mode consists of a range of language and behaviors (see Appendices F and G). Since no single case contains all the language or behaviors indicative of its mode, it was necessary to select the smaller number of cases that would display the widest range of classification criteria.

FOOTNOTES TO CHAPTER IV

1. The nine cases eliminated from the voting case pool are:

<u>Case</u>	<u>Category</u>
1. <u>Gomillion v. Lightfoot</u> (Ala.):	Redistricting
2. <u>Hill v. Huger</u> (Ala.) :	Reapportionment
3. <u>U.S. v. Dogan</u> (Miss.) :	Poll Taxes
4. <u>U.S. v. Bruce</u> (Ala.) :	Intimidation
5. <u>U.S. v. Dallas Co.</u> (Ala.) :	Intimidation
6. <u>U.S. v. Harvey</u> (La.) :	Intimidation
7. <u>U.S. v. Edwards</u> (Miss.) :	Intimidation
8. <u>Hamer v. Campbell</u> (Miss.) :	Injunction
9. <u>MFDP v. Dem. Party of Miss.</u> :	Injunction

The nine cases eliminated from the public school desegregation pool are:

1. <u>Reed v. Pearson</u> (Ala.)	: "Mixed Blood"
2. <u>Frazier v. East Baton Rouge Bd.</u> (La.):	Fired Teachers
3. <u>Henry v. Coahoma Bd.</u> (Miss.)	: Fired Teachers
4. <u>U.S. v. Greene Co. Bd.</u> (Miss.)	: Fired Teachers
5. <u>Allen v. La. State Bd.</u> (La.)	: Trade School
6. <u>Angel v. La. State Bd.</u> (La.)	: Trade School
7. <u>Lemon v. Bossier</u>	: Federal Military
<u>U.S. v. Bossier</u> (La.)	installation
8. <u>U.S. v. Madison Co.,</u>	: Federal Military
(Huntsville, Ala.)	installation
9. <u>U.S. v. Gulfport</u>	: Federal Military
<u>U.S. v. Biloxi</u> (Miss.)	installation

2. Citations can be found in Appendix J Cases Cited.

3. For a discussion of these and other deficiencies of crude reversal rates, see J. Woodward Howard, "Litigation Flow in Three U.S. Courts of Appeals," Law and Society Review (Fall, 1973), pp. 40-42.

4. 5 RRLR 654; 287 F2d 376.

5. 9 RRLR 669.

6. Ibid., p. 670.

7. Ibid.

8. Ibid.
9. Ibid.
10. Ibid., p. 671.
11. 9 RRLR 1227.
12. 9 RRLR 1231.
13. Ibid.
14. 9 RRLR 1235.
15. 9 RRLR 1258.
16. 10 RRLR 1067.
17. 12 RRLR 1286.
18. 12 RRLR 1289.
19. Ibid.
20. 133 F Supp.811; 1 RRLR 318.
21. 233 F2d 796; 1 RRLR 649.
22. 233 F2d 798.
23. 146 F Supp 485; 2 RRLR 32.
24. 247 F2d 268; 2 RRLR 805.
25. Ibid., p. 269.
26. Ibid.
27. 2 RRLR 985.
28. 2 RRLR 985.
29. 250 F2d 690.
30. 3 RRLR 656.
31. 4 RRLR 877.
32. 5 RRLR 392.
33. 184 F Supp. 402; 5 RRLR 679.
34. 5 RRLR 684.

35. 5 RRLR 690.
36. 5 RRLR 692.
37. 5 RRLR 695.
38. 5 RRLR 696.
39. 5 RRLR 698.
40. 5 RRLR 699.
41. 5 RRLR 1048.
42. Ibid., 1050.
43. 195 F Supp 732, 6 RRLR 746.
43. 195 F Supp 732, 6 RRLR 746.
44. Ibid., 747-749.
45. 9 RRLR 1310.
46. 348 F2d 158; 10 RRLR 1173.
47. 10 RRLR 1175.
48. 10 RRLR 1175.
49. 7 RRLR 480, 1171.
50. 301 F2d 818; 7 RRLR 480.
51. 306 F2d 22.
52. 321 F2d 26; 8 RRLR 1089.
53. Ibid.
54. 349 F2d 785, 790; 10 RRLR 1236.
55. Ibid., 1236-8.
56. 10 RRLR 1224.
57. 10 RRLR 1243.
58. Ibid., 1231.
59. 10 RRLR 1233, 1243.
60. Ibid., 1245.

61. 6 RRLR 1006.
62. 6 RRLR 1008.
63. 6 RRLR 1010.
64. Ibid.
65. 7 RRLR 385; 204 F Supp. 458.
66. 8 RRLR 86; 313 F2d 284.
67. Ibid., 87; 285.
68. Ibid.
69. Ibid., 90; 287.
70. 8 RRLR 554; 218 F Supp. 254.
71. Ibid., 555; 255.
72. 11 RRLR 1807.
73. 8 RRLR 1527; 222 F2d 617.
74. Ibid. The figures are:

	<u>1960</u>	<u>As of Aug. 1, 1962</u>	<u>As of Feb., 1963</u>
Whites eligible	3,334	-	-
Whites registered	2,713	1,760	1,918
Negroes eligible	5,181	-	-
Negroes registered	0	0	174.

75. 8 RRLR 1529.
76. 8 RRLR 1531.
77. 8 RRLR 1532.
78. 349 F2d 795; 10 RRLR 1215.
79. Ibid., 1218.
80. Ibid., 1221.
81. Ibid.

82. Ibid., 1222.
83. 4 RRLR 576.
84. 5 RRLR 57-9; 5 RRLR 650; 1887 F Supp 401.
85. 5 RRLR 58. The factors were:
 1. Psychological qualification for type of teaching
 2. Psychological effect on pupil
 3. Home environment of pupil.
 4. Maintenance or severance of social and psychological ties.
 5. Ability to accept or conform to new environment.
 6. Morals, conduct, health and personal standards.
86. 5 RRLR 650.
87. 5 RRLR 651.
88. 5 RRLR 652.
89. 7 RRLR 1054; 217 F Supp. 614.
90. 217 F Supp 616.
91. 321 F2d 302.
92. Ibid., 309.
93. Ibid., 310.
94. Ibid., 312.
95. Ibid., 312-13.
96. Ibid., 314-15.
97. Ibid., 313.
98. Ibid., 316.
99. 8 RRLR 515; 84 S. Ct. 1235.
100. 10 RRLR 621.
101. 8 RRLR
102. Ibid., 158.

103. Ibid.
104. Ibid., 159.
105. Ibid.
106. 9 RRLR 233.
107. Ibid., 236.
108. Ibid., 237.
109. Ibid., 235.
110. Ibid., 238.
111. Ibid., 239.
112. 9 RRLR 807.
113. 11 RRLR 294, 297, 298.

CHAPTER V

FINDINGS

Before turning to the findings, I will review the logical steps that lie behind the proposition being tested.

The hypothesis to be tested asserts that mediation between national norms and local norms is one function performed by the lower federal courts for the political system. It is a function dialectical in character. It is dialectical in the sense that it consists of a pattern of interactions among the defenders of local norms and supporters of national norms, the direction of which is movement toward the new national norms. Unlike the "Enforcer" function, mediation does not consist of an authority-subject relationship. Those performing the mediation function can be recognized by their involvement in devising and employing a strategy calculated to achieve movement toward the new national norms, but which recognizes the need to accommodate to the power realities of the defenders of the old norm.

It is hypothesized that the mediation function could be performed by both or either level of the lower federal court system. Thus, two modes of mediation can be imagined: Mode 1 in which the District Judge resists a new national norm and defends the old local one, while the Court of Appeals undertakes to move the District Judge (and those

litigants whose views he represents) closer to the national norm; Mode 2 in which the District Judge undertakes to move the resisting litigants closer to the new national norm, while the Court of Appeals supports and encourages the District Judge in this line of endeavor.

The other possible combinations-- Mode 3 resisting District Judge combined with resisting Court of Appeals; and Mode 4 mediating District Judge combined with resisting Court of Appeals--would not result in the effective performance of the mediating function assuming the case is appealed.

If the latter two modes of interaction are found to be the dominant ones, the mediating hypothesis would be defeated. It should be noted, however, that the relationship between the two courts is sometimes a cooperative one. In modes 2 and 3 both courts are attempting to move the litigants in the same direction. This interactional pattern produces both the best and the worst opportunities for mediation. Mode 2 represents the most effective mediation. In Mode 3, however, mediation is not even attempted by either court. Therefore, the strongest indication that the mediating hypothesis is incorrect would be a finding that the dominant pattern of the courts' interactions is Mode 3. The strongest indication that the hypothesis is upheld would be a finding that the dominant pattern is Mode 2.

In the previous chapter, the language and actions taken as constituting the expected behavior for each mode

was specified and illustrated with case descriptions. The question addressed in this chapter concerns which mode was found to predominate in the work of the Fifth Circuit courts when the interactions between the two levels of courts are classified according to the scheme outlined in Chapter IV and Appendices F and G.

Table 13 reports the percentage and number of cases classified into each mode. It shows that in both areas--voting and school desegregation--Mode 1 is predominant. In more than two-thirds of each group of cases, the interactions between the two courts were made up of district judges speaking and acting in behalf of local norms and appeals panels trying by word and deed to move these judges and local officials closer to national norms. Mode 2--mediating district judge and supportive appeals panels--is the next most frequent pattern, accounting for about a quarter of the interactions, 24% and 25% respectively. Thus, the two modes that involve mediating by one or both levels of lower courts constitute 93-95% of these interactions with respect to cases in these two areas of civil rights.

Only one of the patterns that would have supported the "null hypothesis" appeared at all in the cases. Eight percent of voting cases and 5% of school desegregation cases involved the interactions specified as Mode 3. In 2 cases in each group, resisting district judges were supported in this behavior by appeals panels. No instances of Mode 4

TABLE 13

SCHOOL DESEGREGATION AND VOTING REGISTRATION CASES,
1954-1967, FIFTH CIRCUIT, CLASSIFIED BY MODE

<u>Mode</u>	<u>Voting Cases</u>	<u>School Desegre- gation Cases</u>
	(N = 25)	(N = 35)
1 (R-M) *	68.0% (17)	68.5% (24)
2 (M-S) *	24.0% (6)	25.8% (9)
3 (R-R) *	8.0% (2)	5.7% (2)
4 (M-R) *	0	0
TOTAL	100%	100%

- * R-M = Resisting District-Mediating Appeals Court
M-S = Mediating District-Supportive Appeals Court
R-R = Resisting District-Resisting Appeals Court
M-R = Mediating District-Resisting Appeals Court

interactions occurred. Thus, the cases provide very little evidence against the hypothesis.

Table 13 also sheds some light on the question of whether it is the appeals or district courts that, in Vines' phrase, bring local practices more in line with national policy."¹ The data show the appeals court more involved in mediating than the district courts, since appeals court mediation is represented in both Mode 1 and Mode 2. This is the result anticipated by the analysis of the background and institutional characteristics of each bench in Chapters II and III. We are now able to determine whether the judges identified with the various modes of interaction show differences in these characteristics. This investigation involves several steps.

Table 14 lists the district judges by mode and by issue area. In order to compare all district judges who performed a mediating function with those who did not, it is necessary to combine the judges of Mode 1 and 3 to get the total group of "resistors," and then compare them to the judges in Mode 2. Table 15 reports the results. Although a higher percentage of resisting judges was born or educated outside the South, only 4.8% had work experience outside the South, compared to 33% of the mediating judges. Conversely, 52% of the resisting judges served only in state government prior to their appointment compared to 33% of the mediators. Among the mediating judges, 33% had no other government service, except with the fed-

TABLE 14
FREQUENCY DISTRIBUTION OF DISTRICT JUDGES IN EACH MODE
(BY CASES)

<u>Mode</u>	<u>Voting Cases</u>	<u>No. Cases</u>
Mode 1 (R-M)	Thomas (Ala.)	4
	Dawkins (La.)	4
	Cox (Miss.)	5
	Clayton (Miss.)	2
	Ainsworth (La.)	1
	West (La.)	1
Mode 2 (M-S)	Johnson (Ala.)	2
	Dawkins (La.)	2 dual
	Cox (Miss.)	1 dual
	Wright (La.)	1
Mode 3 (R-R)	Dawkins (La.)	1
	Cox (Miss.)	1
<u>Mode</u>	<u>School Desegregation Cases</u>	<u>No. Cases</u>
Mode 1 (R-M)	Thomas (Ala.)	2
	Mize (Miss.)	1
	Elliott (Ga.)	2
	Scarlett (Ga.)	2
	Lynne (Ala.)	3
	Atwell (Tex.)	1
	Davidson (Tex.)	

<u>Mode</u>	<u>School Desegregation Cases</u>	<u>No. Cases</u>
	Estes (Tex.)	1
	Dooley (Tex.)	1
	Choate (Fla.)	1
	Lieb (Fla.)	
	Grooms (Ala.)	1
	Whilehurst (Fla.)	
	Carswell (Fla.)	
	Hunter (La.)	1
	Bootle (Ga.)	1
	Sheehy (Tex.)	1
	West (La.)	3
Mode 2	Scarlett (Ga.)	1
(M-S)	Simpson (Fla.)	1
	Ellis (La.)	1
	Connally (Tex.)	1
	Dawkins (La.)	1
	Brewster (Tex.)	1
	Wright (La.)	3
Mode 3	Rice (Tex.)	1
(R-R)	Hooper (Ga.)	1

R-M = Resisting District-Mediating Appeals Court

M-S = Mediating District-Supportive Appeals Court

R-R = Resisting District-Resisting Appeals Court

TABLE 15
BACKGROUND CHARACTERISTICS OF DISTRICT JUDGES,
FIFTH CIRCUIT, 1954-1967, BY MODE

	<u>Non-S Birth</u>	<u>Non-S School*</u>	<u>Some State Work**</u>	<u>Some Fed Work</u>	<u>Work</u>	<u>Work Only</u>	<u>Work Only</u>
Modes 1&3							
N = 21	19%	24%	76%	33%	4.8%	52.3%	9.5%
(Resistors)							
Modes 1, 3&2							
N = 3	0%	0%	66.6%	0%	0%	66.6%	0%
(Ambivalent)							
Mode 2							
N = 6	0%	16%	50%	50%	33.3%	33.3%	33.3%
(Mediators)							
Column Order	1	2	7	4	3	6	5

* College and/or law school, D.C., counted as non-South.

** U.S. Attorney counted as federal work.

eral government, compared to 9.5% among resisting judges. While the percentages are based on small numbers (so that addition or subtraction of one figure can change them markedly) the direction of the differences conforms to the expectation that work experience outside the region produces men less ready to defend the region's customs against change.

Tables 16 and 17 list the circuit judges (district judges can sit on appeals panels) who sat on appeals panels by mode and frequency for each issue area. In order to compare the background and institutional influences to those of the district judges, visiting and district judges must be eliminated, leaving only court of appeals judges. As can be seen from the tables, certain judges sitting on panels whose output was classified as a given mode, dissented from the decision of the panel, and thus cannot have their work so classified. Accordingly, in order to put the appeals judges into groups comparable to the district judges, dissents must be subtracted. Doing so does not eliminate any judge from a mode, but by reducing the frequency of the behavior, it changes his ranking. Table 18 shows the appeals judges grouped by mediating and non-mediating modes of behavior for each issue area.

The first matter to deal with in Table 18 is the non-mediating category, Mode 3. This category involves four panels of judges deciding three cases.² Of the 10 judges involved, two were district judges and one was from out of

TABLE 16

Frequency Distribution of Circuit Judges on Panels, by Mode:
School Desegregation Cases

<u>Judge</u>	<u>Mode 1</u>	<u>Mode 2</u>	<u>Mode 3</u>	<u>Totals</u>	<u>Rank</u>
Tuttle	17	10	2 (d)	29	1
Rives	22	4	1 (d)	27	2
Brown	17	5	1	23	3
Wisdom	14	4	0	18	4
Bell	13 (d,d)	4	1	18	4
Jones	9	6	0	15	5
Hutcheson	9	3	1	13	6
Gewin	8	1	1	10	7
Thornberry	6	1	0	7	8
Cameron	4 (d,d,d,d)	1	0	5	9
Cox ⁺	3(d,d)	1	0	4	10
Maris ⁺⁺	3	0	0	3	11
Johnson ⁺	0	1	1	2	12
Moore ⁺⁺	2	0	0	2	12
Simpson ⁺	1	1	0	2	12
Mize ⁺	0	2	0	2	12
Hunter ⁺	1	0	0	1	13
Brewster ⁺	1	0	0	1	13
Groomes ⁺	0	1	0	1	13
Whitaker ⁺	1	0	0	1	13
Lewis ⁺⁺	0	0	1	1	13
Lynne ⁺	1	0	0	1	13
Ainsworth ⁺	1	0	0	1	13
Goldberg	1	0	0	1	13
Carswell ⁺	1	0	0	1	13

d dissent
 + district judge
 ++ designated judge, out of circuit

TABLE 17

Frequency Distribution of Circuit Judges on Panels, by Mode:
Voter Registration Cases

<u>Judge</u>	<u>Mode 1</u>	<u>Mode 2</u>	<u>Mode 3</u>	<u>Totals</u>	<u>Rank</u>
Tuttle	12	2	0	14	1
Wisdom	10	3	0	13	2
Rives	7	3	1(d)	11	3
Brown	5	3	0	8	4
Cameron	5	2(d)	1	8	4
Jones	5	2	0	7	5
Hutcheson	3	1	0	4	6
Bell	3	0	0	3	7
Gewin	3 (d)	0	0	3	7
Borah	3	0	0	3	7

* Judges who decided less than three cases have been excluded. Six judges decided two cases each; 10 judges decided one case each. With the exceptions of Judge Thornberry, these judges were either district judges assigned to an appeals panel or out-of-circuit judges sitting by designation.

TABLE 18

COURT OF APPEALS JUDGES INVOLVED IN MEDIATING AND NON-MEDIATING MODES*

	<u>Voter Regis.</u>	<u>School Desegr.</u>	<u>Totals</u>	<u>N Rank</u>	<u>Voter Regis. & School Desegr.</u>
Tuttle	14	27	41	1	1
Rives	10	24	34	2	0
Brown	8	22	30	4	1
Wisdom	13	18	31	3	0
Jones	7	15	22	5	0
Bell	3	15	18	6	1
Hutch	4	12	16	7	1
Gewin	3	9	12	8	1
Cameron	6	1	7	10	1
Thornberry	2	7	9	9	
Goldberg	0	1	1	11	

* District judges and judges from other circuits have been excluded.

** Modes 1 and 2 minus dissents

*** Mode 3 minus dissents. Since the numbers were so small, the areas were combined.

the circuit. In addition, there were three dissents, two of which eliminated Judge Rives. This leaves seven judges whose behavior and institutional connections qualify them for this category. One further difficulty arises. One of the cases--U.S. v. Ramsey--was first decided by a panel composed of Cameron, Hunter (D.J.) and Rives (dissenting). The decision, clearly Mode 3, was reversed on rehearing and become a Mode 1 interaction. Between the first decision and the rehearing, Judge Cameron died. Apparently, Judge Rives was able to persuade Judge Hunter to his dissenting views in the absence of Judge Cameron. With the category thus reduced to six judges, each with a single instance of Mode 3 behavior, it seems only possible to note that supporting resistors was not a phenomenon of the magnitude that permits further analysis.

This leaves us in the posture of treating the Court of Appeals judges as a single group of mediating judges, some with greater strength than others, as evidenced by dissents in Mode 1 and 2. Table 19 presents a three-way comparison of the background characteristics among mediating appeals judges, mediating district judges and resisting district judges. In the three categories indicating experience outside the region and experience with national level politics, the appeals judges rate higher than the resisting district judges. More resisting district judges have had exclusive connections with state government (52% v. 22%), but 76% of these judges have had some experience with state

TABLE 19
COMPARISON OF BACKGROUND CHARACTERISTICS OF
MODE 1 & 3 DISTRICT AND MODE 1 & 2 APPEALS JUDGES
FIFTH CIRCUIT, 1954-1967

	<u>Non-South Birth</u>	<u>Non-South Education*</u>	<u>Non-South Work</u>	<u>State Work Only</u>	<u>Fed. Work Only</u>	<u>Some State Work</u>
Appeals Judges** (Mediating) N = 9	33.3%	33.3%	44.4%	22.2%	33.3%	33.3%
District Judges (Mediating) N = 6	0%	16.0%	33.3%	33.3%	33.3%	50.0%
District Judges (Resisting) N = 21	19.0%	24.0%	4.8%	57.3%	9.5%	76.0%

* College and/or law school

** Judge Goldberg was not used in the computations since he sat on only one panel.

government compared to only 33% of the appeals judges. Except for their birth and education, which is more Southern than either of the other two groups, the mediating district judges resemble their mediating brethren on the appeals bench.

Nonetheless, it must be noted that with one exception, none of the indicators of national influence, "cosmopolitanism," is much above 40%: it is more commonly 30%. If cosmopolitanism is what produces mediating behavior, it might be expected to permeate the court more extensively.

A review of the cases decided by the mediating district judges (see Table 14) helps to explain the low level of cosmopolitanism among that group. Two judges--Frank Johnson and J. Skelly Wright--account for 6 of the 14 Mode 2 interactions. Both judges have national experiences. Judge Johnson is a Republican from an Alabama county which voted to stay in the Union when the South seceded. He was educated entirely in the South.³ He held no state or local office, but was appointed as U.S. Attorney for the Northern district of Alabama by the Eisenhower Administration (1953-1955) just prior to his appointment to the District Court (1955). Judge Wright was also born and educated in the South after which he taught high school (1931-1935) and lectured in English History at Loyola University (1936-1937). From 1937-1942, he was an Assistant U.S. Attorney in New Orleans. The year prior to his appointment as District Judge (1949), he was made U.S. Attorney for the Eas-

tern district of Louisiana. After World War II, he practiced law in Washington, D.C. (1946-1948).

Three additional Mode 2 judges--Harold Cox, Frank Scarlett and Benjamin Dawkins--appear in more than one mode. Six of Judge Cox's seven interactions with the appeals court were classified as "resisting" (5 in Mode 1, 1 in Mode 3). The one occurrence of Mode 3 behavior was at the end of a long series of stern warnings and actions by appeals panels. Cox's background is without substantial national influence. Educated at the University of Mississippi Law School, he practiced law in Jackson from 1924 to 1961 at which time the Kennedy Administration appointed him District Judge of the Southern District of Mississippi. From 1950 to 1961, he had been Chairman of the Hinds County Democratic Party Executive Committee.

Judge Scarlett makes two appearances in Mode 1. In one, the Stell Case, the appeals court finally issued the order itself after four years of litigation. The occasion of Scarlett's Mode 2 behavior was a case involving a suit brought by white property owners against the Savannah, Georgia School Board. Scarlett dismissed the suit with mediating language and was affirmed by the Court of Appeals. Like Cox, Scarlett was a political lawyer who chaired the local Democratic Executive Committee for many years (1925-1945). His private law practice was interrupted by 10 years as Solicitor of the City Court of Brunswick, Georgia (1919-1929).

The third judge, Ben Dawkins, also had only Southern connections. Educated at Tulane and Louisiana State University, he practiced law in Monroe and Shreveport prior to his appointment as district judge in 1953. However, his activities were not centered on a political party, but on social welfare organizations--Children's Service Bureau, Child Guidance Clinic, and the Caddo Parish School Board, of which he was President from 1950 to 1953. Like Cox, Dawkins appears in all three modes, but unlike Cox, the cases in Mode 2 represent a change in behavior from his earlier Mode 1 cases. It is important to note that Dawkins' Mode 1 cases occurred between 1958 and 1962, whereas his Mode 2 cases covered the period 1965-1967. Charles Hamilton reports, in his study of voting cases in the South, that NAACP lawyers, as well as Justice Department attorneys, viewed Dawkins as "educable."⁴

Thus, while Dawkins may not represent the strongest type Mode 2 behavior, he belongs in the category without reservation. Scarlett and Cox, however, are marginal members of the category.

Of the remaining four judges, two have connections out of the region. Ben Connally was born in Texas, took his undergraduate work and law degree at the University of Texas. However, he received an LLM from Harvard University in 1934, following which he practiced law in Houston from 1934 until he was appointed district judge in 1949. His Harvard connection seems to have counteracted the strong

local tie of being a member of the Texas Connally family, for the initiative was all his in devising ways to move the School Board.

Frank Ellis' brief tenure as an active judge in the Eastern district of Louisiana (1962-1965) came at the end of a long career as a political and corporate lawyer. In the 1940's, he held both elective (State Senate) and appointive office (Special Assistant Attorney General). In the 1950's, he was a member of the Democratic National Committee and a delegate to the National Convention in 1952 and 1954. The year before he was appointed district judge by the Kennedy Administration, he was chairman of the Democratic Party of Louisiana, and worked in Washington as National Director of the Office of Emergency Planning, thereby becoming a member of the National Security Council. The case that brings Ellis into the Mode 2 group, Bush v. Orleans is a case he took over from Wright, when Wright was appointed to the D.C. Appeals Court.

Both Bryan Simpson of Florida and Leo Brewster of Texas have totally Southern backgrounds. Both were educated at their state universities, and began practicing law in a good size city (Jacksonville and Fort Worth). Both were state attorneys. Simpson, however, deviated by serving as a state judge from 1939 to 1950. They both have absolutely clear title to their Mode 2 classification.

Summing up, it is possible to account for the fact that rather small percentages of "cosmopolitanism" among

district judges in Mode 2 results in substantial mediating behavior by considering two distorting influences. First, the fact that four judges with national backgrounds decided nearly half the cases in the category is not reflected in an unweighted count. Secondly, the titles to two technically correct classifications--both involving "parochial" judges--are clouded.

However, understanding the strong effect of "cosmopolitanism" on court of appeals judges begins with noticing the rank ordering column of Table 6. A substantial gap appears between Rank 4 and Rank 5 (31 vs. 22 mediating decisions). If this is taken as a dividing line, the appeals judges fall into two groups: Tuttle, Rives, Brown, Wisdom and the rest. It will be recalled that this is exactly the factional split Judge Cameron alleged existed on the bench.⁵ If the group Cameron called "THE FOUR" is compared to the rest of the mediating appeals judges--which can be called "THE FIVE"--the results are as shown on Table 20. The Four are markedly more cosmopolitan in background than The Five. Three quarters of them were born or educated out of the region. Chief Judge Elbert Tuttle was born in California, attended high school in Hawaii, college and law school at Cornell. Judge John Brown was born and educated in the midwest (University of Nebraska (AB), University of Michigan (JD)).

One of the group worked outside the South. Tuttle did news and editorial work on the New York Sun, practiced

TABLE 20
BACKGROUND CHARACTERISTICS OF COURT OF APPEALS JUDGES,
FIFTH CIRCUIT, 1954-1967 BY FACTION

	<u>Non-South Birth or School</u>	<u>Non-South Work</u>	<u>Federal Work Only</u>	<u>State Work Only</u>	<u>Federal & State Work</u>
The FOUR [*]	75%(3)	25%(1)	50%(2)	0	0
The FIVE ^{**}	20%(1)	20%(1)	20%(1)	80%(4)	0

* The FOUR = Tuttle, Brown, Rives, Wisdom

** The FIVE = Cameron, Bell, Hutcheson, Jones, Gewin.
Thornberry was dropped to make the group
correspond to Cameron's.

law in Washington, D.C. from 1946 to 1953, when he was appointed General Counsel and head of the legal division of the Treasury Department by the Eisenhower Administration. The following year he was appointed to the Court of Appeals for the Fifth Circuit. On this measure, The Four do not differ from The Five who also have one member who worked outside the region. Judge Warren Jones was born in Nebraska and educated there, and at the University of Denver. Following admission to the Colorado Bar in 1924, he was appointed deputy district attorney for the city and county of Denver.

Both Tuttle and Wisdom held appointive office with the Federal Government--Tuttle with the Treasury Department, Wisdom with the President's Committee on Government Contracts. From The Five, only Judge Cameron held any federal office. He was a U.S. District Attorney in Southern Mississippi in 1929. Except for that year, Cameron was engaged in private practice in his home town of Meridan, Mississippi from 1914 to 1955, the year Eisenhower appointed him to the Court of Appeals.

The largest difference between the two groups is in their connection with state and local government. No member of The Four held any appointive or elective state or local office, whereas four members of The Five held such office. Judge Hutcheson's background is both southern and political. Born in Houston, he was educated at the University of Virginia and University of Texas where he received his LLB

in 1900 with first honors. After admission to the Bar, he joined his father's law firm. From 1913 to 1917 he was Chief Legal Advisor of the City of Houston. Elected Mayor in September, 1917, he resigned in April to accept appointment to the district court from President Wilson. In 1931, Hoover sent him to the Court of Appeals.

Judge Walter Pettus Gerwin has a similar background. Born and educated in the South, he practiced law for one year in Birmingham, fifteen years in Greensboro, and ten years in Tuscaloosa. From 1939 to 1943, Gerwin was a member of the Alabama House of Representatives, and became a county prosecutor following that (1943-1951). This involvement in party politics is also reflected in membership on the Alabama Democratic Party Executive Committee from 1943 to 1947.

Before turning to the work of other scholars, it should be noted that in addition to the background variables reported on above, two others--age and religion--were investigated with the recent Goldman research in mind. Neither variable was found relevant to the mediating or non-mediating behavior among Fifth Circuit judges. The leading investigator of background characteristics on the courts of the Fifth Circuit also reports no correlation between these two factors and her various measures of "segregationist" and "integrationist" behavior (see fn. 7).

The work of four other scholars has dealt with the Fifth Circuit in such a way as to produce conclusions

about groupings among the judges. The most impressionistic of these studies, based on an unspecified number of civil rights cases in the 1960's by the editors of the Yale Law Journal,⁶ categorizes the judges as follows:

Pro-Civil Rights: Tuttle, Rives, Wisdom, Brown

Anti-Civil Rights: Cameron, Gewin

Inconsistent: Bell, Jones, Hutcheson.

Mary Curzan bases her classification schemes on pro- and anti-Negro litigants civil rights decisions from 1953-1966.⁷ In her bipartite scheme--segregationists and integrationists--the ranked judges are simply divided in half. It happens that the % pro-Negro scores at each side of the dividing line are 65% and 66%. The lowest score for an "Integrationist" appeals judge is 75% (Jones), while the highest score for a "segregationist" appeals judge is 48% (Gewin). She also cuts the ranked judges into thirds, thus creating a "moderate" group. The appeals judges in their appropriate category are shown on Table 21.

Between the Yale editors and Curzan, there is agreement over Gewin and Cameron as anti-civil rights, agreement over Tuttle and Wisdom as integrationists, agreement over Jones as a swing figure, but disagreement over Brown and Bell.

A third study by Rich employs bloc analysis on all en banc cases decided during the period 1957-1966.⁸ Rich discovers two blocs, which he labels "Bloc A" and "Bloc B," each with a .67 cohesion.

Bloc A

Bell
Gewin
Jones
Hutcheson
Cameron
Coleman
Godbold

Bloc B

Tuttle
Wisdom
Brown
Rives

Leaving aside Coleman and Godbold, who came on the bench in 1965 and 1966 respectively, these blocs reproduce Cameron's FOUR and FIVE exactly and, with the exception of Brown, and the addition of Rives and Hutcheson, correspond to Curzan's bipartite classifications. However, what Rich says about the blocs is striking. He reports that in civil rights cases, Bloc B disappears, while Bloc A is strong. In "due process" cases, however, Bloc B reappears and Jones-Hutcheson-Cameron form a dissenting bloc.

On the basis of my findings, Curzan's findings, and the assessment of the Yale editors, it is almost beyond belief that Bloc B disappears in civil rights cases. It appears to the rest of us, as well as to Judge Cameron, to be pre-eminently a civil rights bloc.

Another study employing bloc analysis was done by Louis Loeb.⁹ In this study, Loeb uses both en banc and panel cases¹⁰ reviewed by the Supreme Court and reports getting too few participations in the Second, Fifth and Ninth Circuits to yield good conclusions. The only bloc he discovers in the Fifth Circuit is composed of Hutcheson-Tuttle-Cameron. He calls it a 67% "agreement" bloc."¹¹ Loeb's work does not seem to advance our understanding of

TABLE 21

% PRO-NEGRO LITIGANTS DECISIONS BY COURT OF APPEALS JUDGES,
FIFTH CIRCUIT, 1953-1966*

Segregationists:

Gewin (48%)
Cameron (5%)

Integrationists:

Tuttle (85%)
Wisdom (82%)
Bell (80%)
Brown (78%)
Jones (75%)

Segregationists:

Gewin
Cameron

Moderates:

Brown
Jones

Integrationists:

Tuttle
Wisdom
Bell

Source: Mary Curzan, op. cit., pp. 27-31.

* Judges who had less than three cases reported in the Race Relations Law Reporter were not included. Judges Rives and Hutcheson both had more than three cases but do not appear on Curzan's data sheets.

the Fifth Circuit appreciably.

Leaving his work aside, the findings of three other studies--Yale editors, Curzan and Rich--seem in rough agreement about the factions on the circuit bench. Curzan's different placement of Bell, Jones and Wisdom may be the result of her methodological requirement that each decision be classified as pro- or anti-Negro litigant. It is not only that there is a certain subjective element involved in such assignments--there is in my method, too. But when each decision is treated as a discrete event, rather than as part of a series of interactions moving in an observable direction, then differences of classification are even more likely to occur. There seems no way to explain the absence of Hutcheson and Rives from her data, since they each appear in many more than the required three civil rights cases reported in RRLR.

The simple frequency distribution of the appeals judges on all cases (Table 22) suggest, however, that more than background characteristics are involved in producing the dominance of the mediating modes revealed in Table 13. The rank order follows factional lines, with the "mediating" or "pro-civil rights" faction dominating the panel assignments. A recalculation of these figures by faction (Table 23) shows The Four sat on 51% of the school desegregation case panels compared to 32% for The Five. On the voter registration case panels, The Four sat on 44% while The Five sat on only 25%. Further, if only the "mediating"

TABLE 22
FREQUENCY DISTRIBUTION OF COURT OF APPEALS JUDGES, FIFTH CIRCUIT,
ON VOTER REGISTRATION AND SCHOOL DESEGREGATION CASE PANELS,
1954-1967

<u>Rank</u>	<u>Judge</u>	<u>Number of Panels</u>
1	Tuttle	43
2	Rives	37
3	Wisdom	31
4	Brown	31
5	Jones	22
6	Bell	21
7	Hutcheson	17
8	Gewin	13
9	Cameron	13

TABLE 23
COMPARISON OF PANEL ASSIGNMENT BY FACTION,
FIFTH CIRCUIT COURT OF APPEALS, 1954 - 1967*

	School Cases (N=189)	Voting Cases (N= 96)
"The Four"	51% (98)	44% (43)
"The Five"	32% (61)	25% (24)

* Columns do not total 100% because there were panels on which neither faction was represented.

TABLE 24

OPINION WRITING ON SCHOOL & VOTING CASE PANELS
FIFTH CIRCUIT, 1954-1967

<u>Appeals Judges</u>	<u>On School Panels (N=63)</u>	<u>Write Signed Opinions (N=44)</u>	<u>On Voting Panels (N=32)</u>	<u>Wrote Signed Opinions (N=20)</u>
2 Tuttle	46.0% (29)	27% (13)	37.5% (12)	35% (7)
5 Wisdom	26.9% (17)	11% (5)	37.5% (12)	5% (1)
1 Rives	42.8% (27)	25% (11)	37.5% (12)	5% (1)
3 Brown	39.6% (25)	6% (3)	21.8% (7)	30% (6)
* Cameron	9.5% (6)	-	21.8% (7)	-
4 Bell	26.9% (17)	11% (5)	6.2% (2)	10% (2)
7 Hutcheson	19.0% (12)	2% (1)	12.5% (4)	5% (1)
6 Gewin	19.0% (12)	9% (4)	9.3% (3)	- (0)
7 Jones	22.2% (14)	2% (1)	25.0% (8)	5% (1)
Ainsworth	1.5% (1)	- (0)	- (0)	- (0)
Coleman	- (0)	- (0)	- (0)	- (0)
Dyer	- (0)	- (0)	- (0)	- (0)
Godbold	- (0)	- (0)	- (0)	- (0)
Goldberg	1.5% (1)	- (0)	- (0)	- (0)

TABLE 24 (cont.)

Simpson	- (0)	- (0)	- (0)	- (0)
Thornberry	7.9% (5)	- (0)	6.2% (2)	- (0)
Borah	- (0)	- (0)	- (0)	- (0)

District Judges

Brewster	(1)	(0)
Johnson	(2)	(1)
West	(0)	(1)
Christenberry	(0)	(1)
Mize	(2)	(1)
Simpson	(2)	(0)
Cox	(2)	(0)
Bootle	(0)	(2)
Lynne	(0)	(1)
Hunter	(1)	(0)
Moore	(2)	(2)

* Rank on total opinions written. Judge Cameron is not ranked as he wrote no opinions.

panels are considered, in school cases, The Four made up a majority on 34, The Five only on 15 of the panels. In the voting cases, the comparable figures are 15 and 2.¹²

The case for the dominance of The Four is also supported by the data on signed opinions. Table 24 presents the number and percentage of opinions written by each judge in both categories of cases. It will be noticed that The Four occupy ranks 1, 2 and 3 with Bell edging Wisdom out of 4th place by one opinion. One member of The Five wrote no opinions (Cameron) and two wrote two a piece (Hutcheson and Jones). Refigured into percentages by faction (Table 25), the dominance of The Four becomes more obvious. One of that group wrote the opinion in 73% of the school cases, and 75% of the voting cases.

There seems little question that the faction composed of Tuttle, Rives, Brown and Wisdom had an impact disproportionate to their numbers on the substance and direction of the civil rights work of the Fifth Circuit during most of the 1950's and 1960's. It seems a reasonable conclusion that it is this small group of judges which is largely responsible for the finding that the Fifth Circuit performed a mediating function. Judge Cameron seems to have been correct in charging that a minority controlled the work of the court on civil rights cases. Was he also correct in charging that not the luck of the draw, but a calculated "misuse" by the Chief Judge of his power to compose the panels toward the end of stacking them with his ideological

TABLE 25
COMPARISON OF OPINION WRITING BY FACTION,
FIFTH CIRCUIT, 1954 - 1967

	Opinions in School Cases (N = 45)	Opinions in Voting Cases (N = 20)
"The Four"	73% (32)	75% (15)
"The Five"	24% (11)	20% (4)

* Columns do not total 100% because some opinions were assigned to non-faction members.

companions was responsible for the minority control?

Two pieces of research by Burton Atkins take up this question. In the first study--his Ph.D. dissertation, 1970--Atkins raises the question as to what extent judicial gerrymandering permeates decision-making at the Court of Appeals level.¹³ Using Guttman Scale analysis and Kendall Rank Order correlation on en banc decisions of the Fifth Circuit Court of Appeals for the years 1957-1959, yielded two findings: That the court was highly consensual, showing no bloc formation, and that the Chief Judge did not use panel assignment to achieve substantive outcome.¹⁴ There are several problems with accepting this finding, one being that it covers a very short period, even of Hutcheson's Chief Judgeship. But the chief problem is that it defies common sense to test the gerrymandering hypothesis on a Hutcheson Court, when everyone, including Atkins,¹⁵ knows that the heyday of dissensus on the Fifth Circuit occurred under Tuttle's Chief Judgeship in the 1960's. Atkins explains that he had to drop the Tuttle Court because there were too many possible panels.¹⁶

It is not surprising then that a few years later, Atkins attacked the problem again, and this time found a way to solve the methodological problems. In an article co-authored by William Zanolvia,¹⁷ their research plan was described as follows. To avoid having to classify members of the court by ideology, they took The Four as a clique, and the remainder of the court as a non-Four clique. They

then compared "probabilities of assignment to panels (on race relations cases) dominated by each of the groups and finally attribute policy preference to them by examining the outcomes of their decisions."¹⁸ The policy outcomes were dichotomized pro- and anti-black plaintiffs. Two Tuttle courts were analyzed: 1960 to 1963, the date of Cameron's charge of gerrymandering, and 1963 to 1966, the year Rives retired, thereby technically dissolving The Four. They also made a probability assessment of the Hutcheson's race relations case assignments, 1958-1959.

Comparing the distribution of panels actually chosen to a model of panels that could be expected to be chosen if randomly selected, Atkin-Zavonia found striking differences between the two distributions for the early Tuttle Court, 1960-1963. Panels composed of a majority of Non-Four members occurred seven times, whereas they could be expected to occur seventeen times. Conversely, panels with a majority of The Four were expected to occur fifteen times, and actually occurred twenty. Moreover, panels entirely composed of members of The Four, expected twice only, occurred eleven times.¹⁹

In addition, they found that the composition of the panel did make a difference in the direction of the Court's opinion. Approximately 67% of the decisions rendered by The Four panels were pro-civil rights decisions compared to only 50% of the decisions rendered by the non-Four.²⁰

The Atkins-Zavonia data strongly suggest that "Tuttle

allowed a minority of the court to have disproportionate power over the determination of race relations policy in the fifth circuit" during the period 1960 to 1963.²¹

Similar calculations were made for the court during two years of Hutcheson's Chief Judgeship (1958-59) with different results. The panels appeared in about the frequencies indicated by the theoretical model. Furthermore, Four and non-Four panels tend to support pro-civil rights positions with "fairly equal proportions."²² Non-Four panels decided six cases pro- and two anti-civil rights; Four panels decided all nine of their cases pro-civil rights. In contrast, Tuttle's 1960-1963 panels showed marked differences. Non-Four panels decided four cases pro- and four cases anti-civil rights.²³ Four majority panels, however, rendered twenty-one pro-civil rights decisions, and only ten anti-civil rights decisions.²⁴

In short, the Atkins-Zavonia data show that Tuttle gerrymandered and Hutcheson did not. It also shows that in terms of policy outcome, Tuttle had more reason to gerrymander than Hutcheson.

Their investigation of the Tuttle court during the period 1963-1966 found a close match between the theoretical and observed frequency distributions, but the null hypothesis could not be rejected,²⁵ that the differences occurred by chance. However, in the policy outcome dimension, they found that the "support rate of the two kinds of panels . . . was virtually identical--87% for non-Four dominated

panels in contrast to 88% for panels dominated by The Four. They conclude, therefore, that during the 1963-1966 period, Tuttle did not gerrymander the panels, but that may have been because he did not need to in order to get the decisions he favored.

Thus, the Atkins-Zavonia data support the findings of the present study that the performance of a mediating function by a circuit court does not depend entirely on the systematic selection of "cosmopolitan" judges. A minority of such judges on the Fifth Circuit bench has been shown capable of multiplying their chances of "winning" by using the administrative powers of the Chief Judge. Seen in this light, judicial politics differs little from the politics of other arenas.

FOOTNOTES TO CHAPTER V

1. Kenneth Vines, "The Role of The Circuit Courts of Appeals in the Federal Judicial Process," Midwest Journal of Politics, VII, No. 4, (Nov. 1963), p. 319.

2. Sharp v. Lucky falls in this category, but it could not be used since its opinion was a per curiam signed by Judge Brown. It was included in the calculations for Table 13.

3. Johnson graduated from The Gulf Coast Military Academy (Mississippi) in 1935; from the Massey Business College (Birmingham) in 1937; and received his law degree from the University of Alabama in 1943.

4. Charles V. Hamilton, The Bench and the Ballot (New York: Oxford University Press, 1973), pp. 157-58.

5. Dissenting in Armstrong v. Board of Education in the City of Birmingham 323 F2d 337, 1963 (5th Cir.) For the details of Cameron's allegations, see p. above.

6. 73 Yale Law Journal 1963, p. 121.

7. Mary Curzan, A Case Study in the Selection of Federal Judges. p. 26ff. Since her pool of judges are those sitting between 1953 and 1966, it seems most probable that the cases were selected to correspond. However, she does not specify and the tables are not labeled.

8. Frances M. Rich, Jr., Role Perception and Precedent Orientation As Variables Influencing Appellate Judicial Decision-Making (Univ. of Georgia, Ph.D., 1967), p. 82.

9. Louis Loeb, Judicial Blocs and Judicial Values in Four Selected U.S. Courts of Appeals, 1957-1960 terms (American Univ. Ph.D., 1964).

10. Burton Atkins, The Effect of Panel Decision-Making on the U.S. Court of Appeals (University of Kentucky, Ph.D. 1970) pp. 21-3, writes a persuasive criticism of this method.

11. Loeb, op. cit., p. 93.

12. The other panels had one or more non-faction judges.

13. Atkins, supra cit., p. 14.
14. Ibid., pp. 135, 143, 148ff.
15. Ibid., pp. 14-15.
16. Ibid., p. 165, fn. 1.
17. Burton Atkins and William Zavonia, "Judicial Leadership On the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit," Western Political Quarterly, XXC (Dec. 1972) 626.
18. Ibid., p. 703.
19. Ibid., pp. 704-05. To test the null hypothesis, they used the Kolmogorov-Smirnov one-sample test. The null hypothesis could be rejected.
20. Ibid., p. 705.
21. Ibid., pp. 705-06.
22. Ibid., p. 707.
23. Ibid.
24. Ibid., p. 705.
25. Ibid., p. 707.

CHAPTER VI
SUMMARY, CONCLUSIONS AND SUGGESTIONS
FOR FURTHER RESEARCH

Understanding the federal courts as a part of the political order has been a persistent, if not major, interest among political scientists of various methodological persuasions. As was made evident in the Introduction, the larger part of this interest has focused, until more recently, on the Supreme Court, so that until the last decade or two, knowledge of the lower federal courts has been meager and unsystematic. A quantitative and qualitative breakthrough occurred with the publication of work by Jack Peltason, Kenneth Vines, Richard Richardson, and Kenneth Dolbeare. Drawing an hypothesis from the insights and speculations of these scholars, the present dissertation attempted to test that hypothesis in two ways. First, existing research data was analyzed to determine whether (1) the creation of the lower federal courts; (2) the selection and confirmation of lower court judges; (3) the background characteristics of the judges; (4) the institutional structure, judicial powers and tools of the lower courts; (5) the administrative structure and powers of the lower courts supported the hypothesis that one of the functions performed by these courts is that of mediating between national and local norms and

values when they are in conflict.

The second way of testing the hypothesis consisted of classifying the interactions between the two lower courts according to criteria developed by operationalizing the terms of the hypothesis.

Analysis of Previous Research

An analysis of the major research on the history of the federal courts--Warren and Frankfurter-Landis--from which more recent work is derivative, is presented in Chapter I. The analysis found that the interests, attitudes and behavior of the contending groups in the struggle to establish the modern lower federal courts were such as to suggest that they intended these courts to perform a mediating function. The industrial capital group wanted a court national enough to protect its interests from Populist-Progressive forces entrenched in elected state courts. The Southern Bourbon group which emerged as the dominant group in the post-Civil War South, needed a court sensitive to values, such as segregation, which supported their power locally. These two groups appear to have struck a "compromise" that permitted legislation widening the jurisdiction of the federal courts, and adding intermediate appellate courts which left the most local district courts with all the trial jurisdiction. Caution must be exercised in asserting such a conclusion, however, since the research supporting it is not sufficiently systematic to meet modern sci-

entific standards. Nevertheless, the evidence seems persuasive enough to save the mediation hypothesis for further testing.

Leaving the question of whether the lower federal courts were intended to perform a mediating function, Chapters II and III turn to the question of their ability to perform such a function. In Chapter II, the selection-confirmation process as well as its product--judges with particular background characteristics--were analyzed in order to determine whether the judges appear to have the capacity to mediate.

Studies of the selection-confirmation process itself indicate that factors inherent in that process favor the selection of appellate judges with a blend of local and national political connections and district judges with more exclusively local political connections. Such factors include the relative weakness of geographical ties with respect to appellate appointments compared to district appointments, and the relative dominance of Presidents or their "men" in selecting appeals court nominees compared to the relative dominance of Senators with respect to district judges.

A review of all available personal and political background data for lower court judges from 1900 to 1955, while revealing some differences between the two groups of judges, showed they were not sufficient to establish a local-national distinction. The appellate judges had more legis-

lative and administrative experience than district judges, but that experience was to a marked degree locally based. However, more recent data for the judges of the Fifth Circuit, especially data generated for the present study covering 1954-1967, show a marked difference between the two benches with respect to two factors: (1) the holding of appointed state vs. federal office prior to appointment, and (2) a composite measure of South vs. non-South experiences (birth, schooling, work). On both measures, the appeals judges were found to have a more cosmopolitan background than district judges. Local influences, however, still formed a considerable part of their background. "Fugitive" data¹ from other researchers support the finding. Dolbeare found that appeals judges made a higher percentage of decisions demanding policy-changes than did district judges. Vines found differences between two benches on such factors as education and state vs. federal prior judicial office, but he does not connect them to decisional outputs. Curzan was able to correlate "work outside the South" with "votes" on civil rights cases, but she does not analyze her data by level of court.

More pertinent findings are those of Rich and Carp. The Fifth Circuit judges Rich categorized as holding a role perception labeled "federalizing," a concept close to "mediating," had more national influences in their backgrounds than the judges holding other role perceptions. Carp's work on district judges revealed not only many parochial influences, but no hint of a role concept suggesting

"mediation."

Chapter III evaluates the case-handling structure and powers as well as the administrative structure and powers of district and appeals courts in terms of the possible impact on the ability to mediate. With respect to jurisdiction and decision-making tools, the two benches seem equally able to mediate. However, the composition of the courts of appeals results in the exposure of appeals judges to the social, economic, and cultural diversities within the circuit; the assignment pattern of multi-judge courts (panels, 3-judge district courts and en banc courts), reduces their isolation in conflicts between local and national values. In addition, the chief judge of the circuit, through his power of appointment and assignment, possesses on behalf of the appeals court important tools of mediation.

On the administrative side, the Judicial Conference, and, to a lesser extent, the Circuit Conference supplement regional professional associations with national ones, but the impact of this broadened association is greater for appeals than district judges. Undoubtedly, the major impact falls on the Chief Judges, all of whom meet regularly as the Judicial Conference with high executive and Congressional leaders.

With respect to the means of mediation, the administrative body with powers that would lend themselves to such work is the Circuit Council, composed of all appeals judges and chaired by the Chief Judge. However, apparently these

powers are seldom used in any circuit, principally out of deference to the "independence" of district judges.

In summing up the analysis of prior research with respect to the capability of the lower federal courts to perform a mediating function, the following conclusions seem warranted:

1. The modern lower federal courts seem to have been created (in 1891) with the expectation that they would mediate between local and national norms and values.

2. While both district and appeals benches possess members whose background characteristics and experience contains the combination of local and national factors conducive to mediating, the appeals bench as a group was, in the Fifth Circuit during 1954-1967 especially, more cosmopolitan than the district judges as a group.

3. While the organization and powers of both the case-handling and administrative aspects of the district and appeals courts are sufficient to the performance of the mediation function by either court, the appeals bench, and most particularly the chief judge of the circuit, have both more powerful incentives and superior tools for mediation.

One leaves the secondary material, then, with the expectation that in a situation of conflict between strong local and new national norms, the lower federal courts and particularly the appeals court will attempt to mediate. In order to test this expectation, a group of civil rights cases

decided and appealed in the Fifth Circuit between 1954 and 1967, were analyzed.

Analysis of Civil Rights Cases

The interactions between district and circuit judges in all appealed school desegregation and voter registration cases (1954-1967) were analyzed, in chapters IV and V, for evidence of mediation.* Four logically possible modes of interaction were projected:

Mode 1 - Resisting District - Mediating Appeals Court

Mode 2 - Mediating District - Supportive Appeals Court

Mode 3 - Resisting District - Resisting Appeals Court

Mode 4 - Mediating District - Resisting Appeals Court

The requisite behaviors by each court were operationalized into a classificatory scheme for each mode (see Appendices F & G) by which each set of interactions was evaluated.

This procedure showed (Table 13) that mediating behavior dominated the work of the lower courts in the civil rights area in roughly 90% of the cases. It also revealed that the bulk of the mediating work was done by appeals judges, as expected.

Tables 15 and 19 report a patterned connection between "parochial" or "cosmopolitan" factors in a judges' backgrounds and mediating behavior in civil rights cases. Specif-

* It is, of course, possible that mediation occurred also at the trial level in cases that were not appealed. Since this dissertation focuses on interactions between district and appeals courts, these unappealed cases were not analyzed.

ically, as a group higher percentages of mediating judges have worked in other regions and/or have worked for the federal government rather than state government while non-mediators have worked principally in their region and for state government.*

Comparing mediating appeals judges, mediating district judges and non-mediating district judges revealed that in general mediating district and appeals judges are similar in having more national influences in their background than non-mediating district judges. However, it may be argued that the absolute percentages (and numbers of judges) is too low to the percentages of "cosmpolitan" factors, for instances seldom rise above 40%--to account for little over 90% of the cases exhibiting mediating behavior. This argument may have particular force with respect to the appellate judges whose behavior is so overwhelmingly mediating (Mode 1 and Mode 2).

If there is any force to that argument, further investigation provides a possible answer. It appears that an additional factor--the institutional structure and powers of the appeals court--had a multiplying effect on the impact of the background characteristics of the most "cosmopolitan" judges. Decision-making and opinion writing of civil rights cases were dominated by a faction of four appeals judges

* It was not possible to make such a comparison among appeals judges as non-mediating was too infrequent a phenomenon.

whose backgrounds were the most national. (See Tables 20, 22, 23, 24, and 25). The Chief Judge of the circuit belonged to this faction and seems unquestionably to have used his powers of assignment to give a decisive role in these cases to those judges most inclined to play a mediating role.

Support for this conclusion was found in the work of other scholars, most directly the work of Atkins-Zanovia in showing that Chief Judge Tuttle departed markedly from a model of random panel assignments in the direction of "gerrymandering" in favor of his faction.

In conclusion, the present study has been able to identify a mediating function in the work of the lower federal courts under the hypothesized conditions. A connection between mediating behavior and a more cosmopolitan background was established. But the discovery that the strength of this connection lay, at least in part, in the ability of the Chief Judge to compose and therefore "stack" the appeals panels, means more investigation of other circuits and other issues must be undertaken before it can be asserted with confidence that one of the persisting functions of the lower federal courts is mediating between conflicting local and national norms.

Suggestions for Future Research

Five major areas in which research on the federal courts--whether related to the mediation hypothesis or not--should be undertaken.

One area was identified in Chapter I. Much work remains to be done on the creation of the courts of appeals. The legal and organizational history is well documented but the political history has failed to draw the attention of systematic scholars. At least for those scientists whose work has persuaded them that political forces operate in some dialectical fashion, an understanding based on an analysis of the changes in interacting forces with respect to the federal judiciary in the modern political system. Such an analysis must be based on (1) a painstaking identification of the governmental and non-governmental participants; (2) an investigation of their interests, attitudes and connections (and changes in these) with other participants and other societal institutions and individuals; and (3) an analysis of the larger social forces that form the framework within which action with respect to the federal judiciary occur.

A second line of inquiry which would eliminate a general deficiency for all scholars of the judiciary, is the systematic gathering of background characteristics for all federal judges by level of court. At the present, it is simply impossible to make comparisons between benches over time. The absence of such data simply precludes the asking of certain kinds of questions concerning the federal judiciary.

More directly related to the mediation hypothesis are three other lines of inquiry. Even without the effect of

faction wedded to administrative power on our finding of mediating behavior in the Fifth Circuit, the hypothesis needs to be tested in other circuits using other issues which place a circuit in conflict with national norms. If there are positive findings, especially if there is no factional involvement, the level of certainty would rise that a real function has been identified.

If confidence can be maintained that the hypothesis is worthy of continued investigation, then two other research strategies could be employed. One would involve a study of the minutes of circuit council meetings to ascertain whether they contain evidence of the use of administrative powers for mediation purposes, consciously or unconsciously. A second strategy would consist of an analysis of political and legal journals in the circuit, speeches and articles by circuit judges, and articles in the circuit press. The focus of such an inquiry would be a search for evidence of role perceptions: do judges of the circuit see themselves as mediators? Is there a difference between district and appeals judges' perceptions? Are either district or appeals courts seen by the various social-political-economic-legal forces within the circuit as mediators? What role expectations, if any, do these forces entertain for the federal courts in their area?

In a very revealing article, adapted from a speech presented as the Second Annual Robert G. Storey Lecture at Southern Methodist University in 1966, Judge John Minor

Wisdom testifies to the fact that at least one judge was fully aware of the mediating role he played during the 1960's. Furthermore, in making the speech and having it published in the Southwestern Law Journal under the title, "The Friction-making, Exacerbating Political Role of Federal Courts," Judge Wisdom evidenced a desire to have an educative impact on the understanding and expectations of the community he "expected to be upsetting" for some time to come. With respect to the political role of the federal courts in his circuit with regard to civil rights, he concluded,

First, it is evident, at least in the deep south states, that many federal district courts take a more narrow view than the circuit court of their federal function to bring state and local policy into line with national policy, especially in civil rights cases involving protection of constitutional rights of individuals against invasions by the state. This is mainly because of the district courts' frontline exposure to the effects of localism. I repeat, I do not use the term with any invidious connotation.

Second, in litigation involving federal-state conflicts, the relatively insulated position of the circuit court and its regional character as a representative of six states makes it appropriate that the circuit court bear the brunt of bringing state or local policy into line with national policy. This principle would not relieve the district court of responsibility in cases that clearly call for federal relief, but it tends to protect the local standing of the district court in the doubtful cases involving an extension--a logical and proper extension but still an extension--of an accepted function, our court has had to resort to a number of forceful measures. We have ordered mandates to be issued forthwith. We have treated a district court's long non-action on a motion as a denial of the motion. We have issued injunctions pending appeals. We issued guidelines for the benefit of school boards and district courts long before

HEW guidelines were issued. There is no doubt that the necessity of scrutinizing findings of fact and questioning a trial judge's exercise of discretion involve a danger of improper appellate intrusion into the proper sphere of a trial court. Both circuit court and district courts may find themselves on the brink of matters traditionally beyond their competence. But awareness of this danger should not frustrate the performance of the federalizing function.

Third, the relative latitude allowed the circuit court, because of the dearth of explicit directions it receives from the Supreme Court and because the circuit court is, in 95 per cent of federal cases, the court of last resort, increases the importance of its federalizing function independently of the Supreme Court. For example, contrary to the usual impression, there are so few Supreme Court decisions on school desegregation that inferior courts must improvise in dealing with de facto segregated schools, faculty integration, site selection of schools, and many other problems. To this extent, the Fifth Circuit is forced into a policy-making position as to decisions only tangentially dependent on the Supreme Court. In the total exercise of our court's function, the civil rights field is only one among many fields of federal-state conflict and sectional differences in attitude. The federalizing role is of major importance in labor law, oil and gas, taxation, agricultural controls, and in many other areas of the law. To carry out this function effectively, the regional character of the circuit courts must be preserved. Division of the Fifth Circuit, for example, would greatly impair the effectiveness of its federalizing function.²

FOOTNOTES TO CHAPTER VI

1. The phrase was first encountered in David Truman, The Governmental Process (New York: Knopf, 1971).
2. John Minor Wisdom, "The Frictionmaking, Exacerbating Political Role of Federal Courts," Southwestern Law Journal, Vol. 21 (1967), pp. 426-7.

APPENDICES

- A. Background and Political Information, Court of Appeals Judges, Fifth Circuit, 1954-1967.
- B. Background and Political Information, District Court Judges, Fifth Circuit, 1954-1967.
- C. Appointment Data, Court of Appeals Judges, Fifth Circuit, 1954-1967.
- D. Appointment Data, District Judges, Fifth Circuit, 1954-1967.
- E. Text of Selected Local Rules.
- F. Criteria for Classification by Mode: Public School Desegregation Cases.
- G. Criteria for Classification by Mode: Voter Registration Cases.
- H. List of Cases Selected by State, Location, Judge, Mode, and Time Period: School Desegregation and Voter Registration.
- I. Cases, District Judges, and Appeals Panels by Mode.
- J. List of Cases Cited.

APPENDIX

BACKGROUND AND POLITICAL INFORMATION, COURT OF APP

Ea

<u>Judge</u>	<u>Ideology</u> *		<u>Role</u> *	<u>Segr/Integr.</u> <u>Classif.</u> **
1.* Ainsworth	C/L	(M)	Federalizing	I
2. Bell	C	(C)	Restraint	I
3. Brown	Not interviewed	-		I(M)
4. Cameron	" "	-		S
5. Coleman	C/Strong L	(C)	Restraint	-
6. Dyer	C/L	(M)	"	I(M)
7. Gewin	Strong C	(C)	"	S
8. Godbold	Weak C	(L)	Activist	-
9. Goldberg	L	(L)	"	-
10. Hutcheson	Not interviewed	-		S
11. Jones	C	9c0	Restraint	I(M)
12. Rives	C/L Infl	(M)	Federalizing	-
13. Simpson	Con	(M)	Restraint	-
14. Thornberry	C/L Infl.	(M)	Federalizing	-
15. Tuttle	C/L Infl	(M)	Federalizing	I
16. Wisdom	L	(M)	Federalizing	I
[17.] Borah	Not interviewed	-		-
[18.] Sibby	" "	-		-
[19.] Holmes	" "	-		-

*The numbers correspond to those used by Rich to avoid ident are based on Rich's interviewers. C= Conservative; L = Liberal, M=M

**These classifications are those used by Curzan. The designa and signifies "Moderate."

APPENDIX A

FORMATION, COURT OF APPEALS JUDGES, FIFTH CIRCUIT, 1954-1967

Role *	Segr/Integr. Classif. **	Early Northern Influence			Nat'l	Parochial		Nat'l		Religion	Party	No. of Panels
		Region of Birth	Region of College	Region of Law School		Worked in DCorNorth	Elected Office Local/State	Appt'd Office Local/State	Elected Office National	Appt'd Office National		
Federalizing	I	S	S	S	-	X	-	-	X	Rc	D	1
Restraint	I	S	S	S	-	-	X	-	-	P	D	19
-	I(M)	MW	MW	MW	-	-	-	-	-	P	R	32
-	S	S	S	S	-	-	-	-	X	P	NL	13
Restraint	-	S	S	DC	X	X	X	X	X	P	D	0
"	I(M)	MW	MW	S	-	-	-	-	-	NL	NL	0
"	S	S	S	S	-	X	X	-	-	P	D	15
Activist	-	NL	-	-	-	-	-	-	-	-		0
"	-	NL	-	-	-	-	-	-	-	J		1
-	S	S	S	S	-	X	X	-	-	P	D	16
Restraint	I(M)	MW	W	S	X	-	-	-	-	P	NL	22
Federalizing	-	S	S	-	-	-	-	-	-	P	D	39
Restraint	-	S	-	S	-	X	X	-	-	P	D	0
Federalizing	-	S	S	-	X	X	X	X	-	P	D	7
Federalizing	I	W	NE	NE	X	-	-	-	X	P	D	41
Federalizing	I	S	S	S	X	-	-	-	X	P	R	29
-	-	S	S	S	-	-	-	-	X	P	R	2
-	-	S	S	S	-	-	X	-	-	NL	NL	0
-	-	S	S	S	-	X	-	-	-	NL	NL	0

by Rich to avoid identifying the judges. The "Role" and "Ideology" assignments are subjective; L = Liberal, M=Mixed. Any seeming incongruities are Rich's.

by Curzan. The designation (M) represents Curzan's tripartite classification

APPENDIX
BACKGROUND AND POLITICAL INFLUENCE
FIFTH CIRCUIT

Judge *	Integ/ **	Segr.	Early National Influence			National	
			Region of Birth	Region of College	Region of Law School	Worked in D.C. or North	Eligible
<u>Mississippi:</u>							
*Mize	1	-	S	S	S	-	
*Clayton	2	S(M)	S	-	S	-	
*Cox	3	S	S	-	S	-	
Russell	4	-	-	-	-	-	
<u>Alabama:</u>							
*Lynne	5	-	S	S	S	-	
*Thomas	6	-	S	-	S	-	
*Grooms	7	S	Up. S	NL	NL	-	
*Johnson	8	S(M)	S	S	S	-	
Allgood	9	S	S	S	S	-	
Puttman	NL 10	I	-	-	-	-	
<u>Georgia:</u>							
*Bootle	11	I(M)	S	-	S	-	
*Elliott	12	S	S	S	S	-	
*Scarlett	13	-	S	S	S	-	
*Hooper	14	-	S	-	S	-	
Morgan	15	I(M)	S	MW	S	X	
Davis	16	-	S	S	NL	-	
Smith	16	-	S	NE	S	-	
Sloan	18	-	S	S	-	-	

APPENDIX B

AND POLITICAL INFORMATION DISTRICT COURT JUDGES
FIFTH CIRCUIT, 1954-67

<u>fluence</u>	<u>National</u>	<u>Parochial</u>	<u>National</u>						
Region of Law School	Worked in D.C. or North	Elected Local/ State	Appt'd Local/ State	Elected National	Appt'd National	Reli- gion	Party	Signif. Jud.Exp.	Party Work
S	-	-	X	-	-	P	D	4+	X
S	-	X	-	-	-	P	D	4+	X
S	-	-	-	-	-	NL	D	None	X
-	-	-	-	-	-	-	-	NL	NL
S	-	X	-	-	-	P	D	+4	-
S	-	-	X	-	-	P	NL	None	-
NL	-	-	-	-	-	P	NL	None	-
S	-	-	-	-	^X USAtty	NL	R	None	X
S	-	-	-	-	X	NL	NL	None	-
-	-	-	-	-	-	-	-	NL	NL
S	-	-	-	-	X	P	R	None	-
S	-	X	-	-	-	NL	NL	None	X
S	-	-	X	-	-	P	D	None	X
S	-	X	X	-	-	P	D	4+	-
S	X	X	X	-	-	-	D	None	X
NL	-	X	-	-	^X USAtty	P	D	None	-
S	-	X	X	-	-	P	D	+4+	-
-	-	X	X	-	-	NL	NL	+4+	-

Appendix B (cont'd)

Appendix B (cont'd)			Early National Influence			Nati
Judge *		Integ/** Segr.	Region of Birth	Region of College	Region of Law School	Worked in D.C. or North
<u>Texas:</u>						
*Atwell	19	-	MW	S	S	-
*Davidson	20	-	S	N	-	-
*Rice	21	-	S	-	S	-
*Dooley	22	-	S	-	S	-
*Connally	23	-	S	S	S/NE	-
*Shoehy	24	-	S	S	S	-
*Ingrahan	25	S	SN	-	DC	-
*Estes	26	-	S	S	S	-
*Brewster	27	I	S	-	S	-
Hannoy	28	-	S	S	S	-
Thomason	29	-	Up S	S	S	-
Cecil	30	-	S	S	S	-
Fisher	21	-	S	S	S	-
Garza	32	I	S	S	S	-
Hughes	33	-	Up.S	Up.s	Up _{DC} ^s	X
Noel	34	-	S	S	S	-
Spears	35	I	S	S	S	-
Suttle	36	-	S	-	s	-
Thornberry	37	-	S	S	S	X
Guinn NL	38					
Roberts NL	39					
Seals	40		S	-	S	-
Singleton NL	41					
Taylor NL	42					

National Influence		National	Parochial		National							
Region of College	Region of Law School	Worked in D.C. or North	Elected Local/ State	Appt'd Local/ State	Elected National	Appt'd National	Religion	Party	Signf. Jud. Exp.	Work		
S	S	-	X	-	-	US Atty	NL	R	None	-		
N	-	-	X	-	-	-	P	D	None	X		
-	S	-	X	X	-	-	NL	NL	-4+	-		
-	S	-	-	-	-	-	P	D	None	-		
S	S/NE	-	-	-	-	-	P	D	None	-		
S	S	-	-	X	-	-	NL	D	None	-		
-	DC	-	-	-	-	-	P	R	None	X		
S	S	-	X	-	-	-	P	NL	None	-		
-	S	-	-	X	-	-	NL	NL	None	-		
S	S	-	-	X	-	-	NL	NL	+4	-		
S	S	-	X	-	-	-	P	D	None	-		
S	S	-	-	-	-	-	P	R	None	X		
S	S	-	X	-	-	-	P	NL	4 yrs	-		
S	S	-	X	X	-	-	RC	NL	None	-		
Up.s	Up _{DC} s	X	X	-	-	-	P	D	4+	-		
S	S	-	-	X	-	-	P	D	None	-		
S	S	-	-	X	-	-	P	D	None	-		
-	S	-	-	-	-	-	NL	NL	None	-		
S	S	X	X	X	X	-	P	D	None	-		
									NL	NL		
									NL	NL		
-	S	-	-	-	-	US Atty	NL	NL	None	-		
									NL	NL		
									NL	NL		

Appendix B (cont'd)

Early National Influence					Nati	
Judge*		Integ/ Segr.	Region of Birth	Region of College	Region of Law School	Worked in D.C. or North
<u>Louisiana:</u>						
*Wright	43		S	S	S	X
*Hunter	44	S(M)	S	S	Up.S (DC)	-
*Dawkins	45	S	S	S	S	-
*Ainsworth	46	I	S	-	S	-
*West	47	S	NE	NE/S	S	-
*Ellis	48	S(M)	S	S	S	X
Christianberry	49	-	S	S	S/N	-
Putnam	50	I	S	S	S	-
<u>Florida:</u>						
*Whilehurst	51	-	S	S	S	-
*Choate	52	I(M)	MW	-	MW	X
*Lieb	53	S(M)	MW	MW	Up.S. DC	-
*Carswell	54	S	S	S/N	S	-
*Simpson	55	-	S	-	S	-
McRae	56	I	S	S	S/Eng	X
Dyer	57	I	MW	MW	S	-
Young	58	-	MW	S	S/NE	X
Fulton NL	59	S	-	-	-	-
Mehrtens	60	-	S	-	S	-
Scott	61	-	MW	-	S	-
Cabot	62	-	S	-	S	-
Atkins	63	-	Up.S.	S	S	-
Barter	64	-	S	-	S	-
DeVane	65	-	S	S	S	X

<u>Influence</u>	<u>National</u>	<u>Parochial</u>	<u>National</u>						
Region of Law School	Worked in D.C. or North	Elected Local/ State	Appt'd Local/ State	Elected National	Appt'd National	Reli- gion	Party	Signf. Jud.Exp.	Work
S	X	-	-	-	U.S. Atty	RC	D	None	-
Up.S (DC)	-	X	X	-	-	RC	NL	None	-
S	-	X	-	-	-	P	NL	None	-
S	-	X	-	-	X	RC	D	None	-
S	-	-	X	-	X	P	NL	None	-
S	X	X	X	-	X	NL	D	None	X
S/N	-	-	X	-	US Atty	NL	D 2	None	-
S	-	X	X	X	-	RC	NL	+4	-
S	-	-	X	-	-	NL	NL	+4	-
MW	X	-	X	-	X	NL	R	None	X
Up.S. DC	-	-	-	-	U.S. Atty	RC	R	None	-
S	-	-	-	-	U.S. Atty	P	NL	None	-
S	-	-	X	-	-	P	D	+4	-
S/Eng	X	-	X	-	X	NL	NL	None	-
S	-	-	-	-	-	NL	NL	None	-
S/NE	X	-	X	-	U.S. Atty	NL	NL	None	X
-	-	-	X	-	-	-	-	None	-
S	-	-	X	-	-	NL	NL	None	-
S	-	-	X	-	-	P	NL	4+	-
S	-	X	X	-	-	P	D	4+	-
S	-	-	-	-	-	RC	NL	None	-
S	-	-	X	-	-	P	NL	4+	-
S	X	-	X	-	X	P	D	None	-

Appendix B (cont'd)

Judge*	Integ/ Segr.**	Early National Influence			Natio
		Region of Birth	Region of College	Region of Law School	Worked in D.C. or North
<u>Louisiana:</u>					
Mitchell	NL 66				
Heebe	NL 67				
Cassibry	68 -	S	S	S	-
Boyle	69 -	S	-	S	-

* Starred judges are those whose school and/or vote selected to test the mediation hypothesis.

** S = Segregationist;
I = Integrationist.

The classifications are according to Curzan.
classification and signifies "Moderate"

<u>onal Influence</u>		<u>National</u>		<u>Parochial</u>		<u>National</u>				
Region of College	Region of Law School	Worked in D.C. or North	Elected Local/ State	Appt'd Local/ State	Elected National	Appt'd National	Reli- gion	Party	Signf. Jud. Exp.	Work
									NL	NL
									NL	NL
S	S	-	X	X	-	-	NL	D	4+	X
-	S	-	-	-	-	U.S. Atty X	RC	D	None	-

whose school and/or voting cases form the group of cases
iation hypothesis.

according to Curzan. The (M) represents Curzan's tripartite
d signifies "Moderate."

APPENDIX C

APPOINTMENT DATA - COURT OF APPEALS JUDGES,
FIFTH CIRCUIT, 1954-1967

	<u>Appointed</u>	<u>Status, 1967</u>	<u>Remarks</u>
<u>Florida</u>			
Louie W. Strum	1950	1954 (died)	
Warren L. Jones	1955	1966, Senior	
Bryan Simpson	1966	active	
David W. Dyer	1966	active	
<u>Georgia</u>			
Samuel H. Sibley	1931	1949, Senior	
Robert L. Russell	1949	1958, died	
Elbert P. Tuttle	1954	1955, died	
Griffin B. Bell	1961	1968, Senior	Chief Judge, (1961-67)
		active	
<u>Alabama</u>			
Richard T. Rives	1951	1966, Senior	Chief Judge, (1960-61)
Walter P. Gewin	1961	active	
John C. Godbold	1966	active	
<u>Mississippi</u>			
Edwin R. Holmes	1936	1954, senior	
Ben F. Cameron	1955	1961, died	
James P. Coleman	1965	1965, died	
		active	
<u>Louisiana</u>			
Wayne G. Bonah	1949	1957, senior	
John M. Wisdom	1957	1966, died	
Robert A. Ainsworth, Jr.	1966	active	
		active	
<u>Texas</u>			
Joseph C. Hutcheson	1931	1964, senior	Chief Judge, (1958-60)
John R. Brown	1955	active	Chief Judge, (1967-
Homer Thornberry	1965	active	
Irving L. Goldberg	1966	active	

APPENDIX D

APPOINTMENT DATA - DISTRICT JUDGES
FIFTH CIRCUIT, 1954-1967

<u>Judge</u>	<u>Appointed</u>	<u>Status, 1967</u>	<u>District</u>
<u>Mississippi (4)</u>			
Mize	1937	1965 (D)	S
Clayton	1958	1967*	N
Cox	1961	active	S
Russell	1965	"	S
<u>Alabama (6)</u>			
Lynne	1946	active	N
Thomas	1951	"	S
Grooms	1953	"	N
Johnson	1955	"	M
Allgood	1961	"	N
Pittman	1966	"	M & S
<u>Georgia (8)</u>			
Davis	1945	1961	M
Scarlett	1946	active	S
Hooper	1949	1967	S
Sloan	1951	1965	N
Bootle	1954	active	M
Morgan	1961	"	N
Elliott	1962	"	M
Smith	1965	"	N
<u>Louisiana (12)</u>			
Christianberry	1947	active	E
Wright	1949	1962**	E
Hunter	1953	active	W
Dawkins	1953	active	W
Ainsworth	1961	1966*	E
Putnam	1961	active	W
West	1961	active	E
Ellis	1962	1965	E
Mitchell	1966	active	E
Heebe	1966	active	E
Cassibry	1966	active	E
Boyle	1966	active	E

APPENDIX D (continued)

<u>Judge</u>	<u>Appointed</u>	<u>Status, 1967</u>	<u>District</u>
<u>Texas (24)</u>			
Davidson	1936	1965	N
Hannay	1942	active	S
Rice	1945	1964	W
Thomason	1947	1963	W
Dooley	1947	1966	N
Connally	1949	active	S
Sheehy	1951	1967	S
Cecil	1954	1958	E
Ingraham	1954	active	S
Estes	1955	active	N
Fisher	1959	active	E
Brewster	1961	active	N
Garza	1961	active	S
Hughes	1961	active	N
Noel	1961	active	S
Spears	1961	active	W
Suttle	1964	active	W
Thornberry	1963	1965*	W
Guinn	1966	active	W
Roberts	1966	active	W
Seals	1966	active	S
Singleton	1966	active	S
Taylor	1966	active	N
Atwell	1923	1954, senior 1961, died	N
<u>Florida (15)</u>			
Barker	1940	1959	S
Devane	1943	1958	S N(after 1947)
Simpson	1950	1966*	S
Whitehurst	1950	1961	N & S
Choate	1954	1965	S
Lieb	1955	active	S
Carswell	1958	active	N
McRae	1961	active	S
Dyer	1961	1966*	S
Young	1961	active	N & S
Fulton	1963	active	S
Mehrtens	1965	active	S
Scott	1966	active	M
Cabot	1966	active	S
Atkins	1966	active	S

*Appointed to U.S. Court of Appeals, Fifth Circuit

**Appointed to U.S. Court of Appeals, District of Columbia

APPENDIX E

Text of Selected Local Rules,

U.S. Court of Appeals

Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

Before TUTTLE, Chief Judge, and RIVES, JONES,
BROWN and WISDOM, Circuit Judges.

ORDER.

It is ordered by the Court that there is hereby adopted the following rule of this Court; to be known as Rule 25 a:

A hearing or rehearing before the Court en banc as permitted by Section 46 (c) of Title 28, United States Code, may be ordered by a majority of the Circuit Judges in active service for any reason which appears to them sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or continuity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided.

Consideration by each of the Circuit Judges in active service of whether to order a hearing or rehearing en banc may be initiated by any Circuit Judge at any time. A motion or suggestion of counsel for hearing or rehearing en banc is considered by the members of the court or division to which the case is assigned. A formal order as to en banc hearing or rehearing is not entered unless a hearing or rehearing en banc is ordered. An order for rehearing en banc may direct whether the case or any feature thereof is to be re-argued orally, and

whether the filing of additional briefs is requested.

It is further ordered that paragraph 2 of Rule 7 of the Rules of this Court be amended so as to read as follows:

2 (a) Each attorney who has practiced law for five years or more, or who is of or over the age of thirty years, at the time of his admission, shall pay to the Clerk an admission fee of \$20.00.

2 (b) Each attorney who has practiced law for less than five years, or who is under the age of thirty years, at the time of his admission, shall pay to the Clerk an admission fee of \$10.00.

2 (c) An attorney who is appointed by the Court to represent an appellant in forma pauperis, and who has the qualifications for admission required by this rule shall be admitted to practice in this Court without the payment of an admission fee.

Filed May 31, 1961.

Administrative Office File Copy: ^{no} date

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before: TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN,
GOLDBERG, AINSWORTH, GODBOLD, DYER and SIMPSON, Circuit Judges.

O R D E R

It is ordered by the Court that Rule 25(a) is amended so as now to read as follows:

RULE 25(a)

(a) When Hearing or Rehearing en Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing en Banc. A party

a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing en Banc. A party may suggest the appropriateness of a hearing or rehearing en banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Rehearing en Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest a rehearing en banc, the suggestion must be made within the time prescribed by Rule 29 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

BY THE COURT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

RULE 32 is amended to read as follows:

ISSUANCE OF MANDATE

Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

COURT RULE

Rule 32

ISSUANCE OF MANDATE

Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RULE 13a

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION.

(a) Petition for Writ; Service and Filing.

Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk with proof of service on the respondent judge or judges and on all parties to the action in the district court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the extraordinary writ of mandamus or prohibition should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The

sented and of the relief sought; a statement of the reasons why the extraordinary writ of mandamus or prohibition should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition may be accompanied by supporting brief or memorandum. Upon receipt of the prescribed docket fee the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the district court. All parties other than the petitioner shall also be deemed respondents with the judge or judges named respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter but the petition shall not thereby be taken as admitted. If briefs are required, the clerk shall advise the parties of the dates on which they are to be filed. The proceeding shall be given preference over ordinary civil cases.

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(c) Form of Papers; Number of Copies. All papers may be typewritten. Four copies, including an original, shall be filed with the clerk, but the clerk may direct that additional copies be provided.

Adopted May 31st, 1963.

COURT RULE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Rule 13a

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION

(a) **Petition for Writ; Service and Filing.** Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk with proof of service on the respondent judge or judges and on all parties to the action in the district court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the extraordinary writ of mandamus or prohibition should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition may be accompanied by supporting brief or memorandum. Upon receipt of the prescribed docket fee the clerk shall docket the petition and submit it to the court.

(b) **Denial; Order Directing Answer.** If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the district court. All parties other than the petitioner shall also be deemed respondents with the judge or judges named respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter but the petition shall not thereby be taken as admitted. If briefs are required, the clerk shall advise the parties of the dates on which they are to be filed. The proceeding shall be given preference over ordinary civil cases.

(c) **Form of Papers; Number of Copies.** All papers may be typewritten. Four copies, including an original, shall be filed with the clerk, but the clerk may direct that additional copies be provided.

Adopted May 31st, 1963.

FILED

[B]

Let Day of June 1961

Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON,
JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

O R D E R

It is ordered that Rule 19 of this Court be amended by changing the caption to read "Death or Separation from Office of a Party," and by adding to said rule subparagraph 4, reading as follows:

"4. When a public officer is a party to an appeal in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. Costs shall be taxed as provided by Rule 31 of this Court unless otherwise ordered to avoid any injustice occasioned by the substitution."

RULES OF THE
UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

NEW ORLEANS, LA.

1963

RULES OF THE
UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

NEW ORLEANS, LA.

1963

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Circuit Justice
HUGO L. BLACK

Chief Judge
ELBERT P. TUTTLE

Circuit Judges
JOSEPH C. HUTCHESON, Jr.
RICHARD T. RIVES
BEN P. CAMERON
WARREN L. JONES
JOHN R. BROWN
JOHN MINOR WISDOM
WALTER P. GEWIN
GRIFFIN B. BELL

Senior Circuit Judge
WAYNE G. BORAH

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RULES OF THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Rule 1

NAME

The court adopts "United States Court of Appeals for the Fifth Circuit" as the title of the Court.

Rule 2

SEAL

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Fifth Circuit" in two lines in the center, with a dash beneath.

Rule 3

TERMS

A session of this court shall be held annually at the city of Atlanta, Ga.; at the city of Montgomery, Ala.; at the city of Fort Worth, Tex.; at the city of Jacksonville, Fla.; and at the city of New Orleans, La., and shall be adjourned to such other times and places as the court may from time to time order and designate.

Rule 4

QUORUM

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time; or, in the absence of any judge, the

RULES OF THE U. S. COURT OF APPEALS

clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

Rule 5

CLERK

1. The clerk's office shall be kept in the city of New Orleans.

2. The clerk shall not practice, either as attorney or counselor, in this court or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by 28 U.S.C. 951 and shall give bond in an amount and with sureties to be approved by the Director of the Administrative Office of U. S. Courts, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the minutes of the court.

4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court, except as provided in Rule 23(a), and except that he may release such records or papers without a court order for a limited time for purposes of printing, or upon request of a party or his counsel to facilitate preparation of a brief in a pending appeal.

Rule 6

MARSHAL, CRIER, AND OTHER OFFICERS

The marshal in person or by deputy when required and a crier when available shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

RULES OF THE U. S. COURT OF APPEALS

Rule 7

ATTORNEYS AND COUNSELORS

1. All attorneys and counselors admitted to practice in the Supreme Court of the United States or any District Court of the United States, upon filing certificate of such admission with the Clerk of this court, and upon taking an oath or affirmation in the following form, viz:

I, ..., do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court uprightly and according to law, and that I will support the Constitution of the United States.

(a copy of which shall be filed with the clerk), shall become attorneys and counselors of this court; provided, however, that any attorney or counselor eligible to admission as an attorney and counselor of this court may be admitted to practice, on motion in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

2. (a) Each attorney who has practiced law for five years or more, and who is of or over the age of thirty years, at the time of his admission, shall pay to the clerk an admission fee of \$20.00.

(b) Each attorney who has practiced law for less than five years, or who is under the age of thirty years, at the time of his admission, shall pay to the clerk an admission fee of \$10.00.

(c) An attorney who is appointed by the court to represent an appellant in forma pauperis, and who has the qualifications for admission required by this rule shall be admitted to practice in this court without the payment of an admission fee.

3. Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

RULES OF THE U. S. COURT OF APPEALS

Rule 8

PRACTICE

Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court.

Rule 9

PROCESS

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

Rule 10

APPEALS IN CIVIL ACTIONS

1. Federal Rules of Civil Procedure, adopted by the Supreme Court pursuant to Act of June 19, 1934, as amended, Nos. 46, 50, 51, 73, 74, 75, and 76, are adopted as rules of this court in cases to which they apply.

2. When the appeal is in forma pauperis the Clerk of the District Court shall transmit only the original record to this court, including the reporter's transcript, if any.

Rule 11

APPEALS IN BANKRUPTCY

1. Appeals in proceedings in bankruptcy and in controversies arising in proceedings in bankruptcy taken under Sections 24 and 25 of the Bankruptcy Act as amended June 22, 1938, in respects not provided for in said Sections or by the General Orders in Bankruptcy, shall be governed by the rules for appeals in civil actions.

2. When the judgment appealed from involves less than \$500, the allowance of the appeal by this court may be obtained as follows: The usual notice of appeal will be given in the lower court and the usual record prepared and transmitted to the clerk of this court with evidence of notice to the appellees of the date of transmittal, accompanied with a brief petition for allowance

RULES OF THE U. S. COURT OF APPEALS

of the appeal. Upon receipt of the record the clerk will docket the case and ten days thereafter will present the petition and record to the court if in session, and if not in session to a judge thereof, for allowance of the appeal. During the delay of ten days typewritten briefs may be filed in support of or opposition to the allowance. If the court or judge allows the appeal the case will then follow the usual course of appeals.

3. Appeals from orders and judgments not final in their nature shall not stay other proceedings in the cause except upon order of the judge of the District Court or a judge of this court.

Rule 12

APPEALS IN ADMIRALTY

1. Where new evidence shall be admissible in this court the evidence by testimony of witnesses shall be taken under a commission to be issued from this court or from any court of the United States under the direction of a judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission and notice to the opposite party, his agent or attorney, accompanied with a copy of the interrogatories so filed, requiring him to file cross-interrogatories within twenty days from the service of such notice.

2. Appeals in admiralty are otherwise governed by the general rules of this court.

Rule 13

APPEALS IN CRIMINAL CASES

Appeals in criminal cases are governed by the rules made by the Supreme Court touching practice and procedure in such cases. In the matters not covered thereby the general rules of this court shall govern.

Rule 14

OBJECTIONS TO EVIDENCE IN THE RECORD

In all cases heard in this court no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

RULES OF THE U. S. COURT OF APPEALS

Rule 15

TRANSLATIONS

Whenever any record transmitted to this court upon appeal shall contain any document, paper, testimony, or other proceedings in a foreign language without a translation thereof made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk to the end that this court may order that a translation be supplied and printed with the record.

Rule 16

DOCKETING CASES

1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. If the record on appeal is not filed in this court within the periods provided by Rule 39(c) of the Federal Rules of Criminal Procedure or Rule 73(g) of the Federal Rules of Civil Procedure, whichever may be applicable, the clerk shall refuse to accept it unless so ordered by this court or a judge thereof. The order or orders of enlargement shall be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the case docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly sued out or allowed. And in no case shall the appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of this court.

2. But the appellee may at his option docket the case and file the record with the clerk of this court, and if the case is docketed and a copy of the record filed with the clerk of this court by the appellant within the time above prescribed and limited, or by the appellee within forty days thereafter, the case shall stand for argument at the term.

3. Upon the filing of the record brought up by appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases the appellant, on filing the record, shall pay the \$25.00 filing fee to the clerk either in cash or by money order or certified check.

RULES OF THE U. S. COURT OF APPEALS

Rule 17

DOCKET

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term or adjourned term; and if a case is called for hearing at two terms successively and upon the call at the second term neither party is prepared to argue it, the case will be dismissed at the cost of the appellant, unless sufficient cause is shown for further postponement.

Rule 18

IMPERFECT RECORDS

If the record filed in any case is imperfect, the same may be corrected as provided in Federal Rule of Civil Procedure, No. 75(h).

Rule 19

DEATH OR SEPARATION FROM OFFICE OF A PARTY

1. Whenever, pending an appeal in this court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representative shall not voluntarily become a party, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representative shall become a party within 60 days, the party moving for such order, if appellee, shall be entitled to have the appeal dismissed, and if the party so moving shall be appellant, he shall be entitled to open the record, and on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however*, That a copy of every such order shall be personally served on said representative at least 30 days before the expiration of such 60 days.

2. When the death of a party is suggested, and a representative of the deceased does not appear within 10 days after the expiration of such 60 days, and no measures are taken by the opposite party within that time to compel appearance, the case shall abate.

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3. When either party to a suit in a district court of the United States shall desire to prosecute an appeal to this court from any final judgment or decree rendered in the district court, and at the time of suing out such appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such appeal may procure the same and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such appeal as in other cases. And within 30 days after the filing of the record in this court the appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the appeal was taken or sued out and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States or in the District of Columbia, and stating therein the name and character of such representative and the State or Territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that unless such representative shall make himself a party within 90 days the appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous: *Provided*, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least 30 days before the expiration of such 90 days: *Provided also*, That in every such case, if the representative of the deceased party does not appear within 10 days after the expiration of such 90 days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required by the opposite party, the case shall abate: *And provided also*, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the suit shall proceed and be heard and determined as in other cases.

4. When a public officer is a party to an appeal in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any

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misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. Costs shall be taxed as provided by Rule 31 of this Court unless otherwise ordered to avoid any injustice occasioned by the substitution.

Rule 20

DISMISSING CASES

Whenever the appellant and appellee in an appeal, pending in this court, shall by their attorneys of record sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Rule 21

MOTIONS

1. All motions to the court shall be reduced to writing and served on opposing counsel and shall contain a brief statement of the facts and objects of the motion. Preliminary or procedural motions and petitions need not be printed, but may be filed in four legibly typed copies.

2. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

Rule 22

PARTIES NOT READY

1. Where no counsel appears and no brief has been filed for the appellant, when the case is called for trial the appellee may have the appellant called and the appeal dismissed.

2. Where the appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the appellant, and to give judgment according to the right of the case.

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3. When a case is reached in regular call of the docket and there is no appearance for either party, the case shall be dismissed at the cost of the appellant.

Rule 23

RECORD ON APPEAL FROM THE DISTRICT COURTS

(1) *Composition of the Record on Appeal.* The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(2) *Transmission of the Record on Appeal; Pagination of the Record; Return.* In criminal cases, the clerk of the district court shall transmit the record within the time allowed the appellant for filing under the provisions of Rule 39(c) of the Federal Rules of Criminal Procedure. In all other cases, the clerk shall transmit the record within the time allowed the appellant for filing under the provisions of Rule 73(g) of the Federal Rules of Civil Procedure.

The parties are encouraged to agree by written stipulation on file that designated parts of the record which they do not intend to have printed shall not be transmitted, in which event the clerk of the district court shall retain such parts subject to the order of this court. This court may order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, in which event the clerk of the district court shall retain the record subject to the order of this court.

Prior to transmission, the clerk of the district court shall number the pages of the record, including those of the transcript, and shall attach his certificate identifying the parts thereof with reasonable definiteness. After the appeal has been disposed of, the record shall be returned to the district court.

(3) *Transcript of Proceedings; Time for Ordering; Duty of Appellant Where Partial Transcript is Ordered.* Unless a transcript of the trial proceedings is on file, within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings as he deems necessary for the appeal. If the appellant orders a transcript of only a part of the proceedings, he shall, within the time above provided, file and serve on the appellee a statement of the points on which he intends to rely on the appeal. If the appellee deems

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a transcript of other parts of the proceedings to be necessary, he shall immediately order such transcript from the reporter or procure an order from the district court requiring the appellant to do so.

(4) *Record for Preliminary Hearing in the Court of Appeals.* If, prior to the time the complete record on appeal is transmitted, a party desires to make in the court of appeals a motion for dismissal, for admission to bail, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of the party shall transmit to the clerk of the court of appeals such of the original papers as the party shall designate.

(5) *Retention of the Record in the District Court.* If a judge of the district court is of the opinion that it is necessary that the record be kept in the district court during the appeal, he shall make an order to that effect. In such a case, the clerk of the district court shall retain the record subject to the order of this court, and, in lieu thereof, shall transmit to the clerk of the court of appeals a copy of the order and a certified list of the docket entries and copies of such parts of the record as the parties may designate.

Rule 23(a)

PRINTING RECORDS

1. Within five days after the record is deposited in this court, if either party considers that the whole of it is not necessary to be considered by the court, he may file with the clerk, together with an affidavit or acknowledgment of service on the opposite party or parties, or his or their counsel, a request that only designated portions be printed. Within five days from the date of such service, the opposite party or parties may file with the clerk a request for the printing of such portions as he or they think necessary. Only the portions of the record which have been designated, together with the requests therefor, shall be printed; but the court may refer to other portions or cause others to be printed if found needful. If on hearing the case it appears that either party has requested unnecessary parts of the record to be printed, the cost thereof may be imposed by the court upon such party or his counsel.

2. The Court Printer shall promptly cause an estimate to be made of the cost of printing the portions of the record so designated, or if no designation has been made, of printing the entire

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record, and the clerk shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within 15 days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court.

3. The clerk shall deliver the record in all cases to be printed forthwith after the payment of such estimate, and upon delivery of the printed record shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

4. Twenty-five (25) copies of the record will be printed, and a larger number may be printed on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall not supervise the printing and indexing of the record, but shall deliver the record, together with the designations of the parties to the Court Printer for prompt printing in accord with said designations. There shall be omitted from the printed records the following:

(a) Commissions to take testimony, and the formal captions to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(b) All process in the nature of subpoenas, citations, summons, and removal proceedings except the order of removal and original pleadings, unless from the statement of points it appears that some issue is raised which makes it necessary for the court to inspect such papers, and then only such as are involved.

(c) In every record wherein any pleading, exhibit or other paper appears at more than one place, such pleading, exhibit, or other papers shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

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The clerk shall distribute the printed copies to the Judges of this Court as required. If the cost of printing the record shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost shall exceed the printer's estimate, the amount of such excess shall be paid to the clerk before he shall file or deliver the printed record or any copies thereof.

6. In case of reversal, affirmance, or dismissal with costs, the amount of the costs of the printing of the record shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sums therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing.

8. When an appeal is allowed in forma pauperis under the provisions of the act of June 25, 1910, the clerk shall file the record and docket the case without prepayment of fees or costs or for the printing of the record, and without requiring security therefor.

9. In lieu of having the record printed under the supervision of the clerk of this court, appellant may, within five days after the parties have designated or stipulated as to the record on appeal under Rule 75 of Civil Procedure, or an agreed statement has been approved by the district court under Rule 76 of Civil Procedure, file with the clerk of the district court, together with an affidavit or an acknowledgment of service on the opposite party or parties, on his or their counsel, a request that specified portions of the record on appeal be printed prior to its transmission to this court. Within five days from the date of such service, the opposite party or parties may file with the clerk of the district court a request for the printing of such other portions as he or they think necessary. In lieu of specifying the parties may stipulate what portions of the record shall be printed. Appellant shall then have printed the portions of the record which have been specified or stipulated, together with the requests or stipulations therefor, such record to be properly prepared and indexed in accordance with the rules of this court. One copy shall be certified by the clerk of the district court; the certified copy, together with 25 other copies, shall thereupon be trans-

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mitted to and filed with the clerk of this court. This court may refer to the unprinted portions or cause any such to be printed if found needful. If on hearing the case it appears that either party has requested unnecessary parts of the record to be printed, the costs thereof may be imposed by the court upon such party or his counsel. Records in criminal cases may by like procedure be printed under this paragraph.

10. In lieu of having the record printed under subsections 3 and 9 of Rule 23(a), counsel for appellant may at his option have the record produced by the multigraph, duplicator or mimeograph method, (must be clear and readable), and file in this Court ten copies of the record, one of which shall be duly certified under the hand and seal of the Clerk of the District Court. The record thus produced must be on opaque and unglazed paper size 8½ by 11 inches with a 1½ inch margin, neatly stitched on the left hand side and with a thick cardboard cover on both front and back. No volume shall contain more than 300 pages. Counsel for appellant shall serve opposing counsel with three (3) copies of said record and file his certificate with the clerk of this court as to such service.

11. Should any party designate a portion of the record to be printed which any appellant who is required to advance the costs for such printing shall deem unnecessary, such appellant may after five days' notice apply to the trial judge, whether the printing is under Paragraph 1 or Paragraph 9 of this Rule, for an order that such portion be not printed. If such judge is of opinion that such portion or any part of it is unnecessary to the determination of the appeal, he may order that the same be not printed.

Rule 21

BRIEFS

1. The clerk shall mail a notice to each party or his counsel so soon as the record by printing, or otherwise, is in final form for a hearing. The counsel for the appellant, or petitioner, shall file, unless the time is extended, with the clerk of this court within thirty days from the receipt of such notice and at least fifteen days in ordinary cases and five (5) days in preference cases before the case is set for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court who has entered an appearance in the case; together with a certifi-

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cate that a copy has been mailed to or previously served on the opposite party or parties. Four copies of typewritten briefs in behalf of poor persons in forma pauperis cases, with a like certificate of service, shall be sufficient.

In cases arising in the Canal Zone the brief shall be filed twenty-five (25) days and in preference cases five (5) days before the case is called for argument, with a certificate of service of a copy on the opponent.

2. This brief shall contain, in order here stated—

(a) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(b) A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not specified.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited so much thereof as may be deemed necessary to the decision of the case shall be printed at length, as an appendix.

(d) Every brief of more than 20 pages shall contain on its front flyleaves a subject index with page references, followed by a list of all authorities referred to, alphabetically arranged, with references to the pages of the brief where cited.

3. The counsel for appellee or respondent shall unless the time is extended file with the clerk of this court within twenty (20) days from the service upon him of opponent's brief, and at least five days before the case is set for argument in either ordinary or preference cases, twenty copies of a printed brief, with a certificate that a copy has been mailed to or personally served on his opponent or opponents. His brief shall be of a like character with that required of the appellant or petitioner, except that no specification of errors shall be required and no statement of the case unless that presented by the appellant or petitioner is controverted.

4. Reply or supplemental briefs in printed form, and containing a certificate of service upon opposing counsel, may be filed at any time without special leave of court.

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5. When, according to this rule, an appellant is in default, the case may be dismissed on motion; and when an appellee is in default he will not be heard, except by request of the court.

6. When no counsel appears for one of the parties and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Rule 24(a)

BRIEFS—ALTERNATIVE PROCEDURES

In lieu of the procedure for the printing of the records and filing of briefs as heretofore allowed under Rules 23(a) and 24, the parties may, by stipulation filed in this court within ten (10) days after the filing of the record, defer the printing of the record until a date within twenty (20) days after the filing of the brief of the appellee. In such event, the briefs of the parties may be prepared as follows:

(1) References in the briefs to material in the record shall be to the original pages thereof. References to pages of the record other than the transcript shall be prefixed by the letter R; references to pages of the transcript shall be prefixed by the letter T. When the printed record is subsequently prepared, each page thereof shall indicate, both at the top outer margin and by parenthetical insert at appropriate places within the text of the material reproduced, the pages of the original record at which the reproduced material may be found.

(2) Instead of the method provided in (1) above, within the time allowed the parties for filing their respective briefs, each party shall file a typewritten copy of his brief. References in the typewritten briefs to material in the record shall be made as in (1) above. When the printed record is subsequently prepared, references to the pages of the printed record shall be substituted, and the briefs shall be printed and filed in final form within 20 days after the date on which the printed record was filed.

If either of the above methods of preparing the briefs is used, designations of the parts of the record which each party intends to print shall be filed and served at the time the respective briefs are initially filed, unless a stipulation between the parties governing and limiting the printing of the record has previously been filed.

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Rule 25

ORAL ARGUMENTS

1. The appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Not more than one-half hour on each side will be allowed for the argument, without special leave of the court; and the court may allow such less time as shall appear to it to be sufficient for a fair presentation of the questions involved in any case. Counsel will not be permitted to read from briefs, records, or decisions. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing.

Rule 25(a)

EN BANC HEARING OR REHEARING

A hearing or rehearing before the Court en banc as permitted by Section 46(c) of Title 28, United States Code, may be ordered by a majority of the Circuit Judges in active service for any reason which appears to them sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or continuity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided.

Consideration by each of the Circuit Judges in active service of whether to order a hearing or rehearing en banc may be initiated by any Circuit Judge at any time. A motion or suggestion of counsel for hearing or rehearing en banc is considered by the members of the court or division to which the case is assigned. A formal order as to en banc hearing or rehearing is not entered unless a hearing or rehearing en banc is ordered. An order for rehearing en banc may direct whether the case or any feature thereof is to be re-argued orally, and whether the filing of additional briefs is requested.

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Rule 26

FORM OF PRINTED RECORDS AND BRIEFS

(a) *Form of Printing.* Briefs and records may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs and records may be submitted only with permission of the court, except in behalf of poor persons in forma pauperis cases. All matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and records produced by the standard typographic process shall be bound in volumes having pages $6\frac{1}{4}$ by $9\frac{1}{4}$ inches and type matter $4\frac{1}{4}$ by $7\frac{1}{4}$ inches. Those produced by any other process shall be bound in volumes having pages $8\frac{1}{2}$ by 11 inches and type matter not exceeding $6\frac{1}{2}$ by $9\frac{1}{2}$ inches with double spacing between each line of text other than quoted matter. In patent cases the pages of the briefs and records may be of such size as to permit incorporation of patent documents.

(b) *Content of Covers.* The front cover of the brief, and/or the record shall show the following: (1) the name of the court and the number of the case; (2) the title of the case; (3) the nature of the proceeding (e. g., Appeal; Petition to Review, etc.) and the name of the court, agency or board below; (4) the title of the document (e. g., Record, Brief for Appellant; Brief for Petitioner or Respondent, etc.); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(c) *Omissions; Reproduction of Testimony.* Omissions in the text of papers or of testimony must be indicated by asterisks. A proper notation as to the title of any document omitted and an explanation of the reason for its omission should appear at the place where such document would have been reproduced in the record, and should be indexed, except for those documents excluded from printing under Rule 23(a) 5(a) and (b) above. Pages containing testimony must indicate the pages of the reporter's transcript at which the testimony appears. If testimony is reproduced, a question and its answer may be contained in a single paragraph.

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Rule 27

COPIES OF RECORDS AND BRIEFS

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

Rule 28

OPINIONS OF THE COURT

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be filed.
2. The opinions of the court shall be filed by the clerk of this court and bound at the end of each term for preservation.

Rule 29

REHEARING

A petition for rehearing may be presented only within twenty-one days after entry of judgment, unless by special leave granted by the court, or one of the judges. Twenty copies must be filed, accompanied by proof of service. It must be printed and must briefly and distinctly state its grounds without argument, be supported by certificate of counsel to the effect that it is presented in good faith and not for delay, and if petitioner desires, he may file a written brief in support. The petition will not be granted or permitted to be argued unless a majority of the court so determines.

Rule 30

INTEREST

1. In cases where the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.
2. In all cases where an appeal shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding

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10 per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases of equity, unless otherwise ordered by this court.

4. In cases of admiralty, damages and interest may be allowed, if specially directed by the court.

Rule 31

COSTS

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the court. The cost of the reporter's transcript from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

Rule 32

MANDATE

Mandate shall issue at any time after twenty-one days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the

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mandate will be stayed for a further period of ten days. No further stay will be granted unless applied for within the delay given above. A mandate once issued will not be recalled except by the court and to prevent injustice. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case:

Provided, that in all cases entitled to precedence in this court, under section 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

Rule 33

CUSTODY OF PRISONERS PENDING A REVIEW OF PROCEEDINGS IN HABEAS CORPUS

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover the review; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

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Rule 34

MODELS, DIAGRAMS, AND EXHIBITS
OF MATERIAL

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court, on appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the clerk for inspection of the court, on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Rule 35

ASSIGNMENT OF CASES FOR HEARING

1. Thirty days prior to the opening of a regular session of this court at Atlanta, Montgomery, Fort Worth, and Jacksonville, and thirty days prior to the opening of the various sessions at New Orleans, the clerk is directed to assign cases returnable at said places that are ready for hearing; in such manner as may be most convenient to expedite the business of the court.

2. Any appeal returnable at Atlanta, Montgomery, Fort Worth, Jacksonville, or New Orleans may be assigned for hearing at any other place of holding court for a more prompt hearing, on consent of the parties or on motion of either party or on the court's own motion.

Rule 36

ASSIGNMENT OF JUDGES

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges,

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so many of the district judges, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may, at any time, by particular assignment, designate any district judge to sit as aforesaid.

Rule 37

RESPECTING REVIEW OF DECISIONS OF THE
TAX COURT OF THE UNITED STATES

1. Every petition for review of a decision of the Tax Court of the United States shall set forth briefly the nature of the controversy, shall declare the court in which review is sought, shall contain assignments of error separately stated and numbered in respect of each and every error asserted and intended to be argued, and shall be verified by the petitioner or his attorney of record.

2. If error is assigned in the admission or rejection of evidence, or on the ground that a finding of the court is unsupported by any evidence, a statement of the evidence submitted to the court shall be prepared by the petitioner. Such statement shall contain in narrative form the evidence material to the assignments of error and shall be prepared by the parties and settled by a member of the court in accordance with the general equity rules promulgated by the Supreme Court of the United States.

3. The party applying for a review shall file his petition with the clerk of the Tax Court and serve a copy thereof with notice of filing on the opposite party or parties. The review shall be taken by such filing and notice.

4. The provisions of Rule 23 shall, with appropriate substitutions, govern the composition and transmission of the record on review in Tax Court cases, except that the Clerk of the Tax Court shall transmit the record within 60 days of the date on which the petition for review is filed unless the time for transmission is enlarged by the Tax Court or by a member of this court.

5. If such record is not delivered to the clerk of this court within sixty days from said filing and notice or before the expiration of the time enlarged by order, a motion to dismiss the petition for delay may be made and shall be granted, unless good cause be shown for the delay.

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6. A petition for review of a decision of the Tax Court of the United States shall be heard and disposed of (a) at the October session of this Court in Atlanta, Georgia, if the return of the tax in respect of which the liability arises was filed with a collector of internal revenue in the State of Georgia or in the State of Florida; (b) at the October session of this Court in Montgomery, Alabama, if the return of the tax in respect of which the liability arises was filed with a collector of internal revenue in the State of Alabama; except that (c) any case that is docketed too late to be heard in Atlanta or Montgomery at said sessions, shall, unless otherwise specially ordered, be assigned for hearing at sessions of this Court in New Orleans, Louisiana. All other petitions for review of decisions of the Tax Court shall be heard and disposed of at the sessions of this Court held in New Orleans, Louisiana. The provisions of Section 2 of Rule 35 of this Court may be applied in the case of any petition for review of a decision of the Tax Court. Any other proceedings which may be taken or prosecuted in connection with a case brought before this Court from the Tax Court may be heard and disposed of at any session of this Court.

Rule 38

RESPECTING REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

1. Upon the filing of a petition for enforcement or review of orders of the National Labor Relations Board, the Board shall within 40 days therefrom, prepare, certify, and file with the Clerk of this Court, one copy of the entire record, consisting of pleadings, testimony, and evidentiary exhibits, provided that exhibits which cannot conveniently be copied in the record may be sent up in the original. In lieu of actually transmitting the entire transcript to the Clerk of this Court, the Board may file with the Clerk, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record in the proceedings, adequately describing each and indicating its page numbers; the custodian of the records of the Board, shall, thereupon retain and hold all the material comprising the record in the proceeding for and on behalf of the Clerk of this Court and subject to his orders and shall transmit the same or any part thereof to him when and if required by the Court for its use in the review proceedings. The filing of a certified list of the material in the record and the holding of such material for and subject

RULES OF THE U. S. COURT OF APPEALS

to the directions of the Clerk of the Court shall be deemed the full equivalent of the filing of the entire transcript of the record in the Court. Upon the filing of said certified record or the list in lieu thereof, the Clerk of this Court shall then notify the counsel for the parties of said filing. Within fifteen days of said filing, the petitioner shall serve on the respondent a designation of the portions of the testimony and evidentiary exhibits that said petitioner intends to particularly rely upon, and which petitioner intends to print as an appendix to its brief. The petitioner shall cause to be printed in this Court the pleadings in the case before the Board, including its decision and order, and shall serve five copies upon the opposing parties and shall file 20 copies thereof with the Clerk of this Court. Such portions of the testimony or evidentiary exhibits as are particularly relied upon by either party must be printed either in his brief or as an appendix thereto with page references to the record. Five copies of petitioner's brief and appendix must be served upon opposing parties and 20 copies filed with the Clerk of this Court within 30 days from the date of the filing of the printed record and the same number of copies shall be served and filed by the opposing parties within 20 days from the receipt of the petitioner's brief and appendix. The Clerk of this Court is authorized to allow the withdrawal of the volume of testimony or evidentiary exhibits by either party for the purpose of preparing the designation of the portions they intend to rely upon and for the printing of such portions as an appendix to their briefs, for a limited time. The Clerk of this Court is directed hereafter to return to the Board the original evidentiary exhibits and testimony when the case has become final in this Court.

Answer to Application for Enforcement

2. When an application for enforcement of an order of the Board is filed, the respondent shall, within 20 days after the service of the application upon him, file with the Clerk of this Court his answer to the application, together with a copy thereof for the applicant for enforcement. The answer shall be served by the Clerk in the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure. If the respondent fails to file an answer within the time prescribed, the Court may by reason of the default, enter a decree granting the relief prayed.

RULES OF THE U. S. COURT OF APPEALS

Cross-Applcation for Enforcement

3. When a petition for review of an order of the Board is filed, the Board may, if this Court has jurisdiction to enforce the order, file a cross-application for its enforcement, together with a copy thereof for the petitioner for review. The cross-application shall be served by the Clerk in the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure. No answer need be filed thereto.

Prehearing Conferences

4. In any review or enforcement proceeding, the Court may in its discretion direct the attorneys for the parties to appear before the Court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the Court. The Court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceedings, unless modified to prevent manifest injustice.

Preparation of Decrees Enforcing Orders— Settlement—Entry

5. When an opinion of this Court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the Court has not entered the decree, the agency, board, commission, or officer concerned shall within ten days serve upon the respondent and file with the Clerk a proposed decree in conformity with the opinion. If the respondent objects to the proposed decree as not in conformity with the opinion, he shall within five days thereafter serve upon the agency, board, commission, or officer concerned and file with the Clerk a proposed decree which he deems to be in conformity with the opinion. The Court will thereupon settle and enter the decree without further hearing or argument.

RULES OF THE U. S. COURT OF APPEALS

Certification of Judgment

6. After the determination of the case, a copy of the opinion and judgment shall be certified to the lower tribunal, in lieu of mandate in the usual course.

Rule 39

ENFORCEMENT AND REVIEW OF ORDERS OF OTHER BOARDS, COMMISSIONS, ADMINISTRATIVE AGENCIES OR OFFICERS

Where this Court is given jurisdiction to review, enforce, or set aside the order of any board, commission, administrative agency or officer by a petition to this Court, the proceedings, where not otherwise provided by applicable statute or rule, shall conform as near as may be to the proceedings above prescribed for the review of orders of the National Labor Relations Board. In each case the agency, board, commission or officer concerned shall be named as respondent. The United States shall also be deemed a respondent, if so required by statute, even though not so designated in the petition.

Rule 40

RECORDS FOR LAW LIBRARY OF CONGRESS

The clerk shall deposit in the Law Library of Congress at Washington, one copy of the printed record in every case hereafter submitted to this court for its consideration, and of all printed motions and briefs therein.

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†

*Mr. Drake has
checked -*

LOCAL RULES

of the

UNITED STATES COURT OF APPEALS

for the

/ FIFTH CIRCUIT

Supplementing the
Federal Rules of Appellate Procedure

Adopted April 16, 1968
Effective July 1, 1968

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOCAL RULES

SUPPLEMENTING THE FEDERAL RULES OF APPELLATE PROCEDURE

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORDER

Effective July 1, 1968

Before BROWN, Chief Judge, and TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, and CLAYTON, Circuit Judges.

It is ORDERED that the Federal Rules of Appellate Procedure (F.R.A.P.), as adopted by the Supreme Court of the United States by order entered December 4, 1967, pursuant to 28 U.S.C. §§ 2072 and 2075, and 18 U.S.C. §§ 3771 and 3772, and transmitted by the Chief Justice to the Congress, as herein supplemented, shall govern the procedure on appeals to this Court from and after July 1, 1968.

It is further ORDERED, pursuant to Rule 47 of the Federal Rules of Appellate Procedure, that the following local rules be and hereby are adopted to supplement the Federal Rules of Appellate Procedure in the Fifth Circuit:

Rule 1.

NAME, SEAL AND PROCESS

(a) Name. The name of this court is "United States Court of Appeals for the Fifth Circuit."

(b) Seal. The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Fifth Circuit" in two lines in the center, with a dash beneath.

(c) Writs and Process. Writs and process of this court shall be under the seal of the Court and signed by the clerk.

Rule 2.

SESSIONS—PLACE OF HEARING

(a) Sessions. Sessions of this Court shall be held annually, pursuant to 28 U.S.C. § 48, at the cities of New Orleans,

Louisiana; Atlanta, Georgia; Jacksonville, Florida; Fort Worth, Texas; and Montgomery, Alabama. Sessions of this Court shall also be held annually at the cities of Houston, Texas and Jackson, Mississippi and at such other places as the Court may from time to time order and designate.

(b) Place of Hearing. Any appeal returnable at any of the above referenced cities may be assigned for hearing at any other place of holding court for a more prompt hearing, on consent of the parties or on motion of either party or on the court's own motion.

Rule 3.

CLERK

(a) Location. The Clerk's office shall be in the city of New Orleans, Louisiana.

(b) Release of Original Papers. The Clerk may release original records or papers without a Court order for a limited time for purposes of printing, or upon request of a party or his counsel to facilitate preparation of a brief in a pending appeal.

(c) Office to Open. The office of the Clerk, with the Clerk or a deputy in attendance, shall be open for business on all days except Saturdays, Sundays, New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day.

(For other duties of Clerk, see Rule 45, F.R.A.P.).

Rule 4.

MARSHAL, CRIER, AND OTHER OFFICERS

The marshal in person or by deputy when required and a crier when available shall be in attendance during the sessions of the Court, with such number of messengers as the Court from time to time may order.

Rule 5.

ATTORNEYS AND COUNSELORS

(a) Each attorney who has practiced law for five years or more, and who is of or over the age of thirty years, at the time

of his admission, shall pay to the Clerk an admission fee of \$20.00.

(b) Each attorney who has practiced law for less than five years, or who is under the age of thirty years, at the time of his admission, shall pay to the Clerk an admission fee of \$10.00.

(c) An Attorney who is appointed by the court to represent an appellant in forma pauperis, and who has the qualifications for admission under Rule 46(a), F.R.A.P., shall be admitted to practice in this court without the payment of an admission fee. (For additional provisions regarding Attorneys and Counselors, see Rule 46, F.R.A.P.).

Rule 6.

PRACTICE

Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court.

Rule 7.

APPEALS IN CRIMINAL CASES

FIFTH CIRCUIT PLAN UNDER THE CRIMINAL JUSTICE ACT OF 1964

- (1) The provisions of the plan for the district court shall be applicable on appeal when not in conflict with the supplemental provisions.
- (2) In the event that counsel for a defendant is appointed in the district court and a timely notice of appeal is filed, said counsel shall continue to represent the defendant on appeal unless, or until, he is relieved by the Court of Appeals.
- (3) If trial counsel desires to be relieved from representing the defendant on appeal, he shall file with the Clerk of this Court four legible copies of a typed motion requesting such relief and stating the grounds or reasons therefor, but shall continue to represent the defendant on appeal unless, or until, relieved by the Court.

- (4) If a defendant for whom counsel was appointed in the district court desires new counsel, the defendant shall file with the Clerk of this Court a legibly handwritten or typewritten motion requesting such relief, which motion shall be submitted to and ruled on by the Court.
- (5) If at any time on appeal the Court finds that the defendant is financially unable to pay counsel whom he had retained, or if a defendant who has waived the appointment of counsel in the district court does not also waive the appointment of counsel on appeal, the Court may appoint counsel to represent the defendant on appeal. The Court may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings.
- (6) In every criminal case appealed in forma pauperis by order of the district court or by order of this Court, where an appellant is not represented by counsel, the Clerk shall forthwith notify the appellant that he has the right to be represented and that counsel will be appointed for him if he is financially unable to employ counsel.
- (7) In those cases appealed by counsel appointed under the Act by the trial court, and where such counsel has not been relieved by this Court, the Clerk, upon receipt of the duplicate notice of appeal required to be forwarded under Criminal Rule 37, shall notify said counsel that an order will be entered by this Court within 10 days appointing him to represent the appellant, unless he desires to be relieved as counsel as provided in Paragraph (3) of this order.
- (8) In cases where the defendant was found by the district court to be financially unable to employ counsel, the Court of Appeals may accept this finding and appoint an attorney without further proof.
- (9) In cases where the appointment of an attorney under the Act is to be made for the first time on appeal, the Clerk, before submitting the order of appointment to

the appropriate Judge of this Court, shall request the appellant to execute a form of affidavit as to his financial inability to employ counsel, substantially as prescribed by CJA Form 3 applicable to the district courts. Upon the appellant's return of this form of affidavit, duly executed, a copy of same will then be served by the Clerk of this Court upon the appropriate U. S. Attorney, with advice that within fifteen (15) days after his receipt of same, unless a reasonable extension therefor is granted by the Court or by the Clerk for the Court upon his request, he may furnish proof that the appellant's affidavit is false. Such further action may then be taken or directed by the appropriate Judge, upon the Clerk's submission of all the available evidence to him as may to him then appear appropriate.

- (10) The Court or any Judge of the Court who resides in the state in which is located the district court from which the appeal is prosecuted may select any new counsel required by order of the Court to be provided on appeal for a defendant financially unable to pay counsel, and may enter the appropriate order appointing such counsel.
- (11) Counsel who represent on appeal a defendant financially unable to pay counsel, shall, in the event of affirmance or other decision adverse to the defendant, advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and shall file such petition, if requested by the defendant.
- (12) In all cases the Court may authorize payment for representation on appeal of a defendant financially unable to pay counsel as provided in subsection (d) of Section 3006A, Title 18, United States Code. For representation of a defendant on appeal, the compensation to be paid an attorney shall in no event exceed \$500 in a felony case and \$300 in a case involving only misdemeanors.
- (13) Travel expenses or other services necessary to adequate representation on appeal may be requested by counsel in an ex parte application to the Court, as

provided by subsection (c) of Section 3006A, Title 18, United States Code. Counsel shall not incur such expenses or services without prior authorization of the Court, unless in the interests of justice the Court finds that the timely incurring of such expenses or services could not await prior authorization, in which event the Court may ratify such expenses or services after they have been incurred.

- (14) The vouchers and other forms to be used on appeal shall conform so near as may be appropriate to the vouchers and other forms appearing in Appendix 1 to the Report of the Committee to Implement the Criminal Justice Act of 1964, approved by the Judicial Conference of the United States at a Special Session held on January 13, 1965. The Clerk of this Court is authorized to make any necessary or appropriate changes in such vouchers and other forms for their use on appeal.
- (15) The Court commends to the law schools located in the Fifth-Circuit consideration of the plan for furnishing research help to appointed counsel, adopted by the University of Virginia for its "Criminal Law Research Organization" as explained in the attached extract from page 119 of "The Barrister," 1964, of that University.*

* "The Criminal Law Research Organization was formed at the University in 1960 under the sponsorship of Phi Delta Phi legal fraternity on the premise that justice under law is better administered when the poor as well as the rich are afforded complete appellate privileges. CLRO provides research assistance in the form of memoranda and briefs for attorneys representing indigents and attorneys who do not have access to adequate research facilities. It is believed that by providing this assistance not only will persons without means be accorded equal opportunities but that such efforts will lead to a more concerned administration of criminal justice.

"CLRO is not to be confused with similar institutions. Unlike the usual 'legal aid clinic' its work is concentrated on research, an activity in which students' aptitudes, aided by extensive library facilities, can be most effectively put to use.

"The Organization provides the opportunity to obtain valuable experience in research and legal draftsmanship. A large part of future work will come from the Fourth Circuit Court of Appeals through the Appellate Legal Aid Department, headed by Mr. Ronald P. Sokol.

"In addition to valuable experience, the members have the satisfaction of having assisted in the preparation of an actual case, which is an experience not usually obtainable in law school."

Rule 8.**DOCKETING CASES**

(a) **Failure to Docket Record.** If the record on appeal is not lodged in this Court within the period provided by Rule 12, F.R.A.P., the Clerk shall refuse to accept it unless so ordered by this Court.

(b) **Orders of Enlargement.** The order or orders of enlargement entered by the District Courts shall be filed with the Clerk of this Court.

(c) **Application for Enlargement.** Any motion the granting of which will result in an aggregate extension of time in this Court totalling more than thirty days for filing a transcript of testimony in any case on appeal shall be accompanied by a letter from the court reporter containing an explanation of the reasons for any previous delay, the necessity for the further extension requested, and a statement verifying that the request has been brought to the attention of, and approved by, either the District Judge who tried the case, or the Chief Judge of the District.

(d) **Filing Fee.** In all cases the appellant, on or before filing the record, shall pay the \$25.00 filing fee to the Clerk either in cash or by money order or certified check. All counsel desiring to appear in a particular case shall sign an appearance on a form prescribed by the Clerk.

(For other provisions relating to the docketing of appeals and the filing of records, see Rules 11 and 12, F.R.A.P.).

Rule 9.**DISMISSING CASES**

(a) **Dismissal by Appellant.** In all cases where the appellant or petitioner files a motion to withdraw his appeal or agency review proceeding, the Clerk, after notice to the opposing party, shall enter the case dismissed or withdrawn and issue a copy of the entry to the Clerk of the District Court as and for the mandate, and to the parties.

(b) **Failure to Prosecute.** When an appellant in either a

docketed or non-docketed appeal, other than an appeal in forma pauperis from a judgment of conviction or from the denial of a petition for writ of habeas corpus or denial of a petition filed under 28 U.S.C. § 2255, fails to comply with the rules of this Court requiring the processing of such appeal to a hearing, the Clerk shall, after issuance of the notices as required by the rules, notify appellant or his counsel that upon the expiration of fifteen (15) days from the date thereof the appeal will be dismissed for want of prosecution under the Court's rules, unless prior to that date appellant remedies the default. Should appellant fail to comply within said fifteen-day period, the Clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the Clerk of the District Court as and for the mandate. In no case shall the appellant be entitled to remedy his default after the same shall have been dismissed under this rule, unless by order of this Court.

(c) Failure of Appellant to File Briefs in Forma Pauperis Appeals:-

1. In those instances where counsel has been appointed for an indigent person or is retained in a pauper appeal and fails to fulfill his responsibility for filing briefs, such appeal shall not be dismissed, but the Court may enter an order directing counsel to show cause why disciplinary action should not be taken against him, or the Court may refer the matter for further inquiry to a District Judge to act as a special master, or such other action shall be taken as the Court may deem appropriate.

2. In habeas corpus cases and cases filed pursuant to 28 U.S.C. § 2255, where appellant is not represented by counsel on appeal and there has been a failure to file a brief on behalf of appellant, such appeal shall not be dismissed but the Clerk shall refer the case to the Court for its direction as to the further processing of the appeal and for such other action as the Court may deem appropriate.

(For other provisions regarding dismissals, see Rule 42, F.R. A.P.).

Rule 10.**MOTIONS**

Unless otherwise ordered by the Court, no motion shall be orally argued.

(For other provisions regarding motions, see Rule 27, F.R.A.P.).

Rule 11.**ORAL ARGUMENTS, EXPEDITING OR
CONTINUING ORAL ARGUMENTS**

(a) Number of Counsel to be Heard. Only two counsel will be heard for each party on the argument of a case, and the time allowed may be apportioned between counsel in their discretion.

(b) Expediting Appeals. The Court may, on its own motion or for good cause shown on motion of either party, advance any case for hearing, and prescribe an abbreviated briefing schedule.

(c) Continuance of Hearing. After a case has been set for hearing, it may not be continued by stipulation of the parties or their counsel, but only by an order of the Court on good cause shown; and engagement of counsel in other Courts will not be considered good cause except in extraordinary and unusual circumstances.

(d) Criminal Justice Act Appeals. Attorneys appointed by the Court under the Criminal Justice Act must appear for oral argument unless excused by the Court for good cause shown.

(e) Submission without Argument. A party or parties intending to waive oral argument must communicate this fact to the Clerk in writing in advance of the date of hearing. (For other provisions regarding oral argument, see Rule 34, F.R.A.P.).

Rule 12.**EN BANC**

A suggestion for a hearing or rehearing en banc may be

made as provided in Rule 35 of the Federal Rules of Appellate Procedure or by any judge of the Court in active service on his own motion. A Court en banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the Court or division at the original hearing thereof. (See also Rule 35, F.R.A.P., 28 U.S.C. § 46(c), and *Allen v. Johnson*, 5 Cir., 1968, 391 F.2d 527. See Rules 40, 32(a) and 31(b), F.R.A.P., on time for filing, form of petition, number to be filed, filing and service of petition for rehearing.).

Rule 13.

APPENDIX TO THE BRIEFS

(a) **Withdrawing Original Records for Reproduction.** The Clerk shall, upon receipt of the original record, promptly notify the appealing party or his counsel in writing of his receipt of such record. Within five (5) days from the date of receipt of such written notice the appellant or his counsel shall withdraw the record for reproduction of the appendix in the form prescribed by Rule 32, F.R.A.P., by a printer of his own selection.

As used in this Rule the term "printer" includes an establishment capable of reproducing the record by any of the methods and in the form required by Rule 32, F.R.A.P.

In those cases in which the parties are proceeding under Rule 30(c), F.R.A.P., wherein the briefs are filed prior to the reproduction of the appendix, appellant or his counsel will likewise be responsible for withdrawing the record for reproduction within five (5) days after appellee's brief is served upon him.

(b) **Time for Filing Appendix.** The date of filing of the record for computing the 40 day period prescribed by Rule 30(a), F.R.A.P., for filing the appendix, and by Rule 31(a), F.R.A.P., for filing the brief of the appellant shall be the date of the Clerk's notice under paragraph (a) above.

Rule 14.**COSTS**

Supplementing Rule 39(c), F.R.A.P., the Clerk in taxing costs for printing thereunder shall tax such costs at rates not higher than those generally charged for such work in New Orleans except that the actual cost shall be taxed when the cost of such printing was less than the rate generally charged in New Orleans.

Rule 15.**RECALL OF MANDATE**

A mandate once issued will not be recalled except by the court and to prevent injustice.

(For other provisions relating to Mandates, see Rule 41, F.R.A.P.).

Rule 16.**RECORDS FOR LAW LIBRARY OF CONGRESS**

The Clerk shall deposit in the Law Library of Congress at Washington, one (1) copy of the reproduced record, motions and briefs in every case.

It is so ORDERED effective July 1, 1968.

APPENDIX F

CRITERIA FOR CLASSIFICATION BY MODE:

PUBLIC SCHOOL DESEGREGATION CASES

MODE 1: Evidence Of Resisting District JudgesA. Language in Opinions

1. Defense of segregation on variety of grounds
 - (a) History and experience shows it wise
 - (b) Bible requires it
 - (c) Local choice should control
 - (d) Scientific findings show it necessary or wise
2. Distinctive grounds used to justify delay
 - (a) administrative complexities
 - (b) local opinion creates potential for disruption-violence
 - (c) overcrowding
 - (d) residence patterns
 - (e) integration not required, just desegregation
 - (f) Negro litigants did not personally complain or make application
3. Difference in evaluation of motives, needs, intentions and assertions of contending parties
 - (a) With respect to School Boards, accepts mere assertions of planning for desegregation as satisfying a timely

APPENDIX F (cont'd)

beginning; assumes that Board will obey the law even in face of evidence to the contrary; accepts blatantly fraudulent plans.

- (b) With respect to Negro litigants, impunes hostile or unworthy motives; interprets needs and desires of Negroes as a group as contrary to demands of litigants.

4. Interpretations of law and governmental powers

- (a) With respect to state defensive actions, accepts them at face value or asserts as a legal doctrine that state action stops federal action; asserts states' rights doctrine; harsh criticism of rulings and procedures of Supreme Court, Court of Appeals for Fifth Circuit and federal government generally.
- (b) With respect to Brown v. Board of Education, one or more of the following positions are characteristic:
 - (1) Reargues the "facts", wisdom and legality of the decision (14th Amendment not legally adopted)
 - (2) Distinguishes case: decision applies only to Brown litigants
 - (3) Construes the "Flexibility" provided for in decision to mean no action required of local board if District Judge so determines (see (2) and (4d))
 - (4) Ignores decision, proceeds as if Plessy or Sweat were the controlling decisions

APPENDIX F (cont'd)

- (c) Relies for precedent on civil rights decisions of other circuits when in disagreement with Fifth Circuit decisions; relies on old cases or cases from other areas of the law, principally commercial law.
- (d) Emphasizes wide discretion possessed by district judges generally and especially with respect to school desegregation cases.

- 5. Clear disparity between findings of fact and decision rendered.

B. Action in Support of Opinions

- 1. Dismissal/denial of relief
- 2. Delay and lag:
 - (a) long delays before hearing cases or between hearing and decision
 - (b) clearly unwarranted request for three judge court
 - (c) failure to assign specific time for compliance with a required action (e.g., undated from-after injunctions), particularly in latter part of period.
 - (d) failure to order a plan (or to update existing plan) in conformance with previously announced standards of circuit or Supreme Court.
- 3. Holds ex parte conferences with School Board members and lawyers
- 4. Does not retain jurisdiction
- 5. Does not assign costs or, alternatively, misassigns costs.

APPENDIX F (cont'd)

MODE 1: Evidence of Mediating Court of Appeals Response to Resisting JudgesLanguage in Opinions and Accompanying Action

The pattern is one of increasingly severe criticism of procedures, findings of fact and interpretations of law. There are four levels of severity characterized by both a shift in the pointedness of the language and a shift in the scope of the action taken.

Level 1: criticism accompanies by reversal or qualified reversal (reverse in part, affirm in part, or occasionally "modify") and remand to District Judge with procedural directions.

Level 2: criticism accompanied by reversal with substantive directions to issue specified types of orders.

Level 3: criticism accompanied by reversal and an order written by the appeals panel to be issued by the District Judge; or granting of an injunction pending appeal to be issued by the District Judge.

Level 4: criticism accompanied by reversal and a direct issuing of the order by the appeals panel; or granting an injunction pending appeal issued by the appeals panel; or granting a writ of mandamus against a District Judge.

APPENDIX F (cont'd)

MODE 2: Evidence of Mediating District JudgesA. Language in Opinions

1. No defense of segregation. Expression of understanding of the importance and sincerity of belief in segregation to school board members and many citizens in community accompanied by clear assertion of its illegality. Finding of segregation rests on established pattern and practice of school system and/or state or municipal law, not on individual proof of discrimination.
2. With respect to delays, generally intolerant.
 - (a) rejection of the six justifying grounds for delays commonly accepted by "resisting" judges (see Mode 1, A2).
 - (b) grounds for delay in starting date or dates for subsequent steps, based on evidence of plan to overcome the obstacle; delay generally agreed to by both parties.
3. More even handed appraisal of litigants' motives, needs, intentions and assertions.
 - (a) expression of legitimacy of Negro right to equality under law as well as of their frustration at continued denial of these rights.
 - (b) bare assertion of fact or promises of action by School Board not accepted without evidence. However, there are expressions of praise for constructive steps and attitudes by school board and community.

APPENDIX F (cont'd)

- (c) recognition of the cross-pressures school Boards experienced between the requirements of federal agencies (e.g. courts, HEW) and the requirements of state legislatures, governors and courts as well as the local community; in extreme cases the assurance of protection against retribution from state agencies.

4. Interpretations of Law and governmental powers

- (a) rejection of states' rights doctrine in general and claim that state defensive actions stop federal actions; assertion of federal supremacy in its fields; acceptance of authority of court of appeals and Supreme Court.
- (b) With respect to Brown v. Board of Education, one or more of the following positions are characteristic:
 - (1) acceptance of decision as controlling law in school cases
 - (2) affirmative teaching of its meaning and implications to litigants
 - (3) rearguing or intervening in order to argue not permitted
 - (4) "flexibility" permitted by Supreme Court interpreted to exist within framework of a concrete plan of phased movement toward complete desegregation
- (c) careful following of most recent fifth circuit and Supreme Court cases for use as precedent in interpretation of law and establishing relevant standards of performance.

APPENDIX F (cont'd)

- (d) use of discretion but absence of language indicating perception of its being undermined.

- 5. Congruance between findings of fact and decisions rendered.

B. Actions in Support of Opinions

- 1. No cases dismissed. Granting of declaratory relief on showing of segregation accompanied by granting in early period an undated from-after injunction; in later period, a dated injunction.
- 2. Delay and Lag:
 - (a) intolerant of delays as evidenced by prompt hearings, shorter time lapse between hearing and decision, rejection of rehearings for delay, shorter compliance periods.
 - (b) Orders contain current circuit and/or Supreme Court standards as minimum; plans updated on own initiative or on petition without litigation to court of appeals.
- 3. Never held ex parte hearings.
- 4. Always retain jurisdiction.
- 5. Assign costs to "winners".

APPENDIX F (cont'd)

MODE 2: Evidence of Court of Appeals Supportive Response to Mediating JudgesA. Language in Opinions

1. Adopts line of reasoning employed by District Judge
2. Extensive quotation from District Judge's opinion.
3. Expands and strengthens the arguments supporting District Judge's opinion, e.g., moving from an opinion that rests on narrow or technical points to an opinion broadly grounded on historical and/or constitutional points.
4. Praise of District Judge for
 - (a) scholarship
 - (b) correct and timely following of precedents
 - (c) clarity of record with respect to facts and relevant interpretations of law
 - (d) procedural fairness
 - (e) expedition hearings and decisions

B. Actions in Support of Opinions

1. High percentage of affirmances
2. Suggestion that even stronger action would be upheld.
3. Deny Registrant's requests for stays-pending appeal.

APPENDIX F (cont'd)

School Desegregation Cases

Mode 3. Evidence of Resisting District Judges

See Mode 1.

APPENDIX F (cont'd)

School Desegregation CasesMode 3. Evidence of Court of Appeals Supportive Responses to Resisting JudgeA. Language in Opinions

1. Stress the flexibility allowed by the Brown v. Board of Education decision.
2. Adopts or initiates argument that undue intrusion of federal government, including courts, would upset state/federal balance. Only shirking of responsibility justifies federal interference.
3. Strong defense of the discretionary power of district judges.
4. Holds that finding of "pattern of practice" is not mandatory, even in cases where discrimination is flagrant.
5. Stress importance of local responsibility.

B. Actions in Support of Opinions

1. High percentage of affirmances

APPENDIX G

Criteria for Classification by Mode:
Voter Registration Cases

Mode 1: Evidence of Resisting District Judges

A. Language in opinions

1. Nothing comparable to defense of segregation, except see A-4 and some items in A-3-b.
2. Distinctive grounds used to dismiss
 - (a) No clear facts showing discrimination exists
 - (b) Technical "errors" such as letters addressed to correct person but incorrect title
 - (c) Not enough Negroes registered to determine
 - (d) Drops from or refuses to add slate to suit on argument that Registrar or Board of Registrars is the sole responsible agent.
3. Difference in evaluation of motives, needs, intentions and assertions of contending parties
 - (a) With respect to Negro litigants and lawyers, impunes motives; impunes honesty of their testimony; lectures both against harrassing and intimidating Registrars, including suing; refers to discrimination as maladministration;
 - (b) With respect to Registrar, finds their testimony honest and forthright; accepts assertions of facts or denial

APPENDIX G (cont'd)

of actions at face value; accepts excuses which are patent shams; accepts promises of discontinuance of discriminatory practices; supplies excuses not reflecting intention for Registrar when evidence compels finding of discriminatory practices; asserts Negroes do not want to register.

4. Interpretations of law and governmental powers
 - (a) Assert that control of right to vote resides with state and federal government (strong form); or asserts as a matter of comity federal government ought not to interfere (weak form); asserts admitted illegalities are matters for local correction.
 - (b) Assert doctrine that a sovereign state is incapable of fraud; that actions of Registrars are not state actions, because Registrars are local officials.
 - (c) Assert that production of records is barred by Hannah v. Larche; prosecuting agency cannot demand records.
 - (d) Grant request for three judge court, although constitutional issue has been settled by higher court.
5. Clear disparity between findings of fact and decision rendered.

B. Action in Support of Opinions

1. (a) Dismissal/denial of relief
 - (1) Sends copy of judgment rather than injunction when discriminatory acts have been discontinuous

APPENDIX G (cont'd)

- (2) Dismisses state from case before final orders
 - (3) Fails to order trial on facts
 - (4) Declines to order Registrar to answer interrogatories
 - (5) Does not order freezing.
 - (b) Pattern and practice:
 - (1) Declines to find pattern and practice
 - (2) Declines to find "pattern and practice", but reserves jurisdiction
 - (3) Finds "pattern and practice" only against previous Registrars
 - (c) On production of documents
 - (1) Refuses to dissolve state court order preventing production of documents and records
 - (2) Orders limited production of documents
 - (d) Construes various Civil Rights Act provisions as excluding simultaneous suits
2. Delay and Lag
- (a) Entertains dilatory motions
 - (b) Refuses to grant or deny a motion, thus preventing an appeal
 - (c) Grants recesses

APPENDIX G (cont'd)

3. Accepts challenged Referee's reports without giving reasons.
4. Nothing comparable: no failure to retain jurisdiction.
5. Does not assign costs, or alternatively, misassigns costs.
6. Makes substantive decisions with supporting opinions supplying reasons.

APPENDIX G (cont'd)

Mode 1: Evidence of Mediating Court of Appeals Response
To Resisting JudgesLanguage in Opinions and Accompanying Action

The pattern is one of increasingly severe criticism of procedures, finding of fact and interpretations of law. There are four levels of severity characterized by both a shift in the pointedness of the language and a shift in the scope of the action taken.

Level 1: criticism accompanied by reversal or qualified reversal (reverse in part, affirm in part, or occasionally "modify") and remand to District Judge with procedural directions.

Level 2: criticism accompanied by reversal with substantive directions to issue specified types of orders.

Level 3: criticism accompanied by reversal and an order written by the appeals panel to be issued by the District Judge; or granting of an injunction pending appeal to be issued by the District Judge.

Level 4: criticism accompanied by reversal and a direct issuing of the order by the appeals panel; or granting an injunction pending appeal issued by the appeals panel; or granting a writ of mandamus against a District Judge.

APPENDIX G (cont'd)

Mode 2: Evidence of Mediating District Judge (Voting)A. Language in Opinions

1. Expression of importance of right to vote finds segregation on basis of pattern and practice, not individual proof
2. Distinctive grounds used to dismiss
Rejection of grounds for dismissal; does not dismiss Johnson
3. Difference in evaluating motives, needs, intentions and assertions of contending parties
 - (a) Asserts legitimacy of Negro rights
 - (b) No assertions without evidence accepted but praise for constructive steps and attitudes of local officials.
 - (c) Indicates awareness of cross-pressures felt by local officials.
4. Interpretations of law and governmental powers
 - (a) Accepts powers of national officers to inspect; asserts that state action cannot frustrate national purposes, review discretion of U.S. Attorney General or enjoin statutory duties; asserts that Hannah v. Larche does not apply when function is investigation not prosecution.
 - (b) Asserts State responsible for acts of officials including Registrars
 - (c) Follows precedent
 - (d) Uses discretion but no perception of attack

APPENDIX G (cont'd)

B. Action in Support

1. (a) Dismissal/denial of relief
 - (1) Always issues injunction even if practices have ceased
 - (2) Does not dismiss state before final orders
 - (3) Orders trial on facts
 - (4) Orders Registrar to answer interrogatories
Calls witnesses Defense won't
 - (5) Orders freezing.
 - (6) Fashions mandatory not just prohibitory decrees
 - (7) Refuses contempt order of Registrar making progress
 - (8) Denies motion to purge
 - (b) Finding of pattern and practice
 - (1) Finds pattern and practice
 - (2) Finds it against present Registrar
 - (c) On production of documents and records
 - (1) Dissolves state court orders barring production
 - (2) Unlimited production
2. Delay and Lag
 - (a) No dilatory motions entertained

APPENDIX G (cont'd)

(b) Always rules promptly

(c) Grants no reverses

3. Referees Reports:

Initial deferral in appointing referee so
state officials can regain integrity by
acting fairly under Court's guidance

4. Nothing comparable: jurisdiction retained

5. Assigns costs properly

6. Opinions:

Writes opinions in support of all substan-
tive decisions.

APPENDIX G (cont'd)

Mode 2: Evidence of Court of Appeals Supportive Response to Mediating JudgesA. Language in Opinions

1. Adopts line of reasoning employed by District Judge
2. Extensive quotation from District Judge's opinion.
3. Expands and strengthens the arguments supporting District Judge's opinion, e.g., moving from an opinion that rests on narrow or technical points to an opinion broadly grounded on historical and/or constitutional points.
4. Praise for District Judge for
 - (a) scholarship
 - (b) correct and timely follow of precedents
 - (c) clarity of record with respect to facts and relevant interpretations of law
 - (d) procedural fairness
 - (e) expediting hearings and decisions

B. Actions in Support of Opinions

1. High percentage of affirmances
2. Suggestion that even stronger action would be upheld.
3. Deny Registrar's requests for stays-pending-appeal.

APPENDIX G (cont'd)

Mode 3: Evidence of Resisting District Judges

See Mode 1

APPENDIX G (cont'd)

Mode 3: Evidence of Court of Appeals Supportive Response to Resisting JudgesA. Language in Opinions

1. Adopts or initiates argument that undue intrusion of federal government, including courts, would upset state-federal balance. Only shirking of responsibility justifies federal interference.
2. Strong defense of the discretionary power of district judges.
3. Holds that finding of "pattern and practice" is not mandatory, even in cases where discrimination is flagrant.
4. Adopts or initiates argument that setting registration standards would force Registrars to violate state laws.
5. Stresses importance of local responsibility.

B. Actions in Support of Opinions

High percentage of affirmances.

APPENDIX H

List of Cases Selected by State,
Location, Judge, Mode and Time Period:Voter Registration CasesandSchool Desegregation Cases

APPENDIX H (cont'd)

MISSISSIPPI: VOTING CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Cox	<u>U.S. v. Lynd</u> <u>In re Lynd</u>	1	Forrest Co.	1961-1965 1962
Cox	<u>In re Coleman</u> <u>Campbell</u> <u>Ashford</u>	2	Lauderdale Co. Madison Co. Hinds Co.	1962-1963
Cox	<u>Kennedy v.</u> <u>Owen</u>	1	General	1962-1963
Cox	<u>U.S. v. Ramsey</u>	1	Clarke Co.	1963-1965
Cox	<u>U.S. v. Wood</u>	1	Walthall Co.	1963-1966
Cox	<u>U.S. v. Ward</u>	1	George Co.	1964-1965
Clayton	<u>In re Lewis</u>	1	Bolivar Co.	1962-1964
	<u>U.S. v. Duke</u>	1	Panola Co.	1963-1964

APPENDIX H (cont'd)

ALABAMA: VOTING CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Johnson	<u>U.S. v. Alabama</u>	2	Macon Co.	1959-1965
Johnson	<u>Alabama v. Rogers</u>	2	[Elmore Co.]	
Johnson	<u>In re Crom Dickens</u>		Montgomery Co.	1960-1961
Thomas	<u>Kennedy v. Bruce</u>	1	Wilcox Co.	1962
Thomas	<u>U.S. v. Mayton -Scarborough</u>	1	Wilcox Co.	1962-1965
Thomas	<u>U.S. v. Logue</u>	1	Wilcox Co.	1964-1965
Thomas	<u>U.S. v. Majors (Atkins)</u>	1	Dallas Co.	1962-1965

APPENDIX H (cont'd)

LOUISIANA: VOTING CASES

<u>District Judge</u>	<u>Cases</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Dawkins	<u>Sharp v. Lucky</u>	3		1957-1959
	<u>Reddix v. Lucky</u>	1		
Dawkins	<u>In re Bruce</u>	1	Bossier Parish	1962-
	<u>In re Clement</u>		Webster Parish	
	<u>In re Platt</u>		De Soto Parish	
	<u>In re Mitchell</u>		Cado Parish	
Dawkins	<u>U.S. v. Ward</u>	1	Madison Parish	1963-1965
Dawkins	<u>U.S. v. Clement</u>	1	Webster	1964-1966
Dawkins	<u>U.S. v. Crawford</u>	1	Red River	1964-1966
West	<u>U.S. v. Palmer</u>	1	E. Feliciana	1964-1966
	<u>In re Palmer</u>			
	<u>U.S. v. Harvey</u>		W. Feliciana	
Ainsworth	<u>U.S. v. Fox</u>	1	Plaquemines	1962-1964
Wright	<u>In re Coleman</u>	2		

APPENDIX H (cont'd)

FLORIDA: SCHOOL CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Choate, Lieb	<u>Gibson v. Bd.</u>	1	Dade County (Miami)	1957-1959
Choate	<u>Holland v. Bd.</u>	1	Palm Beach Co.	1957-1963
White- hurst	<u>Mannings v. Bd.</u>	1	Hillsborough Co.	1958-1963
Simpson	<u>Braxton v. Bd.</u>	2	Duval Co.	1962-1967
Carswell	<u>Augustus v. Bd.</u>	1	Pensacola	1960-1967

APPENDIX H (cont'd)

LOUISIANA: SCHOOL CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Wright ³ Ellis ⁴ (62)	<u>Bush v. Orleans</u>	2	New Orleans	1955-
Wright West ('64)	<u>Hall v. St. Helena</u>	1	Baton Rouge	1951-1957
Wright West	<u>Davis v. East</u> <u>Baton Rouge</u>	2 1	E. Baton Rouge	1960-1967
West	<u>Carter v. Schl.</u> <u>Board West</u> <u>Feliciania</u>	1		1965-1967
[Ellis]- No appeal				
Dawkins ⁵	<u>Banks v. Clar-</u> <u>borne Parish</u> <u>Jones v. Caddo</u> <u>Maria</u>	2	Consolidated with <u>Stout</u> on appeal. Counted as one case under <u>Andrews</u> <u>v. Monroe.</u>	1965-1967
Hunter	<u>Valley v.</u> <u>Rapides Parish</u>	1		1965

APPENDIX H (cont'd)

GEORGIA: SCHOOL CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Hooper	<u>Calhoun v. Latimer</u>	3	Atlanta	1958-1965
Scarlett	<u>Chandler v. Bd.</u>	2	Savannah	1962-1963
Scarlett	<u>Stell v. Savannah -Chatham</u>	1	Savannah	1963-1967
Scarlett	<u>Gibson v. Glynn Co.</u>	1	Brunswick	1963-1964
Elliott	<u>Gaines v. Dougherty Co.</u>	1	Dougherty Co.	1963-1966
Elliott	<u>Lockett v. Bd.</u>	1	Muscagee Co.	1964-1965
Bootle	<u>Bivinis v. Bd.</u>	1	Bibb Co.	1964-1967

APPENDIX H (cont'd)

TEXAS: SCHOOL CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Estes	<u>Jackson v. Rawdon</u>	1	Mansfield (rural)	1955-
Arwell Davidson	<u>Bell v. Rippy,</u> etc.	1	Dallas	1955-1965
Dooley	<u>Avery v. Wichita Falls</u>	1	Wichita Falls	1956?
Connally Connally	<u>Ross v. Rogers</u> in an action <u>Hightower v.</u> <u>McFarda</u> not counted	2	Houston	1957-
Brewster	<u>Flax v. Potts</u>	2	Fort Worth	1961-1966
Rice	<u>Miller v. Barnes</u>	3		1963-1964
Sheehy	<u>Price v. Denison</u>	1		1964-1965

APPENDIX H (cont'd)

ALABAMA: SCHOOL CASES

<u>District Judge</u>	<u>Case</u>	<u>Mode</u>	<u>Place</u>	<u>Year</u>
Grooms	<u>Boykin v. Bd.</u>	1	Fairfield	1965-1967
Lynne	<u>Brown & U.S. v. Bd.</u>	1	Bessamer	1965-1967
	<u>Stout v. Jeff. Bd.</u>	1	Jefferson Co.	1965-1967
	<u>Armstrong v. Bd.</u>	1	Birmingham	1963-1964
Thomas	<u>Davis v. Bd.</u>	1	Mobile	1963-1967
	<u>U.S. v. Wilcox Co.</u>	1	Wilcox Co.	1966

APPENDIX I

Cases, District Judges
and Appeals Panels by Mode

Mode 1: Voting Cases

- (1) Cox: U.S. v. Lynd
Panels: (1) Tuttle,* Hutcheson, Wisdom
(2) Brown, Wisdom, Bell
(3) Brown, Wisdom, Bell (PC)*
- (2) Cox: Kennedy v. Owen
Panels: (1) Tuttle, Gewin (c), Rives (PC)
- (3) Cox: U.S. v. Ramsey (2d appeal)
Panels: (1) Rives (c&d)*, Hunter++, Cameron (PC)
(2) Hutcheson, Brolon, Morgan++
- (4) Cox: U.S. v. Wood
Panels: (1) Tuttle, Jones, Anderson+
(2) Gewin, Thornberry, West (PC)
- (5) Cox: U.S. v. Ward
Panels: (1) Woodbury+, Wisdom, Bell

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- * Underlining indicates the opinion writer
PC per curiam, no signed opinion
(d) dissent
(c) concurrence
(c&d) concurs in part, dissents in part
+ judges from out-of-circuit, sitting by designation
++ district judge

APPENDIX I (cont'd)

Mode 1: Voting Cases (cont'd)

- (6) Dawkins: Reddix v. Lucky
Panels: (1) Borah, Tuttle, Cameron
(2) Tuttle, Borah, Cameron (d)
- (7) Dawkins: Sharp v. Lucky (1st appeal)
Panel: Tuttle, Borah, Cameron (d)
- (8) Dawkins: In re Boyce
Panel: (1) Rives, Brown, Wisdom
- (9) Thomas: Kennedy v. Bruce
Panels: (1) Tuttle, Rives, Wisdom
- (10) Thomas: U.S. v. Majors
Panels: (1) Rives, Hayes+, Cameron(c)
- (11) Thomas: U.S. v. Mayton
Panels: (1) PC [Gewin dissents]
(2) Hutcheson, Brown, Christianberry++
(3) Tuttle, Edgarton++, Smith+
(4) Tuttle, Edgarton++, Smith+
- (12) Thomas: U.S. v. Logue
Panels: (1) Woodbury, Jones, Gewin (PC)
- (13) Clayton: In re Lewis
Panels: (1) Tuttle, Jones, Johnson++ (PC)
- (14) Clayton: U.S. v. Duke
Panels: (1) Tuttle, Rives, Wisdom

APPENDIX I (cont'd)

Mode 1: Voting Cases (cont'd)

- (15) Ainsworth: U.S. v. Fox
Panels: (1) Rives, Jones, Bootle
- (16) West: U.S. v. Palmer
Panels: (1) Tuttle, Jones, Wisdom (all signed)
 (2) Wisdom, Whitaker, Thornberry

Mode 1: School Cases

- (1) Grooms: Boykins v. Board
Panel: Wisdom, Thornberry, Cox(d)
- (2) Lynne: Armstrong v. Board
Panels: (1) Rives, Tuttle, Gewin(d)
 (2) Wisdom, Gewin, Bell
 (3) Maris, Gewin, Bell
- (3) Lynne: Brown v. Bessemer
Panel: (1) Hutcheson, Rives, Jones (PC)
- (4) Lynne: Stout v. Jefferson
Panels: (1) Hutcheson, Rives, Jones
 (2) Wisdom, Thornberry, Cox
- (5) Thomas: Davis v. Board
Panels: (1) Tuttle, Rives, Bell(d) (PC)
 (2) Brown, Wisdom, Bell (c&d) (PC)
 (3) Maris+, Gewin, Bell
 (4) Tuttle, Thornberry, Lynne++

APPENDIX I (cont'd)

Mode 1: School Cases (cont'd)

- (6) Thomas: U.S. v. Wilcox Co.
Panel: Brown, Gewin, Thornberry (PC)
- (7) Scarlett: Stell v. Savannah-Chatham
Panels: (1) Tuttle, Rives, Bell
(2) Marist+, Gewin, Bell
(3) Tuttle, Gewin, Ainsworth++
- (8) Scarlett: Gibson v. Glynne Co.
Panel: Rives, Brown, Bell
- (9) Elliott: Gaines v. Dougherty Co.
Panel: Tuttle, Wisdom, Carswell++(d)
- (10) Elliott: Locket v. Board
Panel: Tuttle, Moore+, Bell
- (11) Bootle: Bivinis v. Board
Panel: Tuttle, Moore+, Bell
- (12) Estes: Jackson v. Rawdon
Panel: Hutcheson, Rives, Brown
- (13) Atwell Davidon: Bell v. Rippy
Panels: (1) Rives, Jones, Brown
(2) Hutcheson, Cameron(d), Brown(PC)
(3) Rives, Jones, Brown
(4) Rives, Cameron(d), Wisdom(PC)
(5) Rives, Tuttle, Jones
(6) Tuttle, Hutcheson, Brown(PC)
(7) Tuttle, Rives, Bell(PC)
(8) Tuttle, Brown, Wisdom

APPENDIX I (cont'd)

Mode 1: School Cases (cont'd)

- (14) Dooley: Avery v. Wichita Falls
Panel: Rives, Tuttle, Cameron(d)
- (15) Sheehy: Price v. Denison
Panel: Brown, Bell, Hunter++
- (16) Choate-Lieb: Gibson v. Board
Panels: (1) Rives, Jones, Brown
(2) Rives, Brown, Wisdom
- (17) Choate: Holland v. Board
Panel: Rives, Brown, Wisdom
- (18) Whitehurst: Mannings v. Board
Panel: Tuttle, Rives, Simpson++
- (19) Carswell: Augustus v. Board
Panel: Rives, Tuttle, Brown
- (20) West: Hall v. St. Helena (2-4th appeal)
Panels: (1) Tuttle, Rives, Wisdom
(2) Tuttle, Rives, Wisdom(PC)
(3) Brown, Jones, Goldberger(PC)
- (21) West: Davis v. East Baton Rouge (2d appeal)
Panel: Wisdom, Thornberry, Cox(PC)
- (22) West: Carter v. West Feliciana Board
Panel: Rives, Jones, Gewin

APPENDIX I (cont'd)

Mode 1: School Cases (cont'd)

(23) Hunter: Valley v. Rapides Parish

Panel: Hutcheson, Rives, Jones(PC)

(24) Mize & Cox: Evers v. Jackson
Singleton v. Jackson
Hudson v. Leake
Mason v. Biloxi

Panels: (1) Hutcheson, Cameron, Brown(PC)

(2) Hutcheson, Bell, Brewster++

Mize (3) Hutcheson, Brown, Wisdom

(4) Whitaker+, Wisdom, Thornberry

APPENDIX I (cont'd)

Mode 2: Voting Cases

- (1) Dawkins: U.S. v. Ward
Panel: (1) Maris+, Rives, Brown
- (2) Dawkins: U.S. v. Clement
U.S. v. Crawford
Panel: Brown, Burger+, Wisdom(PC)
- (3) Wright: In re Palmer
Panel: (1) Tuttle, Wisdom
- (4) Cox: In re Coleman
Panel: Rives, Wisdom, Bootle++(PC)
- (5) Johnson: Alabama v. Rogers
Panel: Tuttle, Jones, Mize++(PC)
- (6) Johnson: U.S. v. Alabama
Panels: (1) Hutcheson, Jones, Cameron
(2) Rives, Brown, Cameron(d)

Mode 2: School Cases

- (1) Wright: Bush v. Orleans
Panels: (1) Tuttle, Rives, Brown
(2) Tuttle, Hutcheson, Jones
(3) Hutcheson, Rives, Tuttle(PC)
(4) Cameron(d), Tuttle, Wisdom(PC)
- (2) Wright: Hall v. St. Helena
Panel: Tuttle, Jones, Mize++

APPENDIX I (cont'd)

Mode 2: School Cases (cont'd)

- (3) Wright: Davis v. East Baton Rouge
Panel: Tuttle, Jones, Mize++
- (4) Ellis: Bush v. Orleans
Panel: (1) Wisdom, Rives, Brown
- (5) Dawkins: Andrews v. Monroe
Panels: (1) Gewin, Tuttle, Bell(PC)
(2) Wisdom, Thornberry, Cox++
- (6) Simpson: Braxton v. Board
Panels: (1) Tuttle, Jones, Johnson++
(2) Tuttle, Brown, Bell(PC)
- (7) Connally: Ross v. Rogers
Panels: (1) Rives, Jones, Wisdom(PC)
(2) Tuttle, Hutcheson, Brown
- (8) Brewster: Flax v. Potts
Panel: Brown, Bell, Simpson++
- (9) Scarlett: Chandler v. Board
Panel: Jones, Bell, Grooms++(PC)

APPENDIX I (cont'd)

Mode 3: Voting Cases

- (1) Dawkins: Sharp v. Lucky (2d appeal)
Panel: PC [Brown concurring]
- (2) Cox: U.S. v. Ramsey (1st appeal)
Panel: Cameron, Hunter++, Rives(c&d)

Mode 3: School Cases

- (1) Rice: Miller v. Barnes
Panel: Hutcheson(c), Gewin, Tuttle(d)
- (2) Hooper: Calhoun v. Latimer
Panels: (1) Bell, Lewis+, Rives(d)
(2) Tuttle, Brown, Johnson++(PC)

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Avery v. Wichita Falls Ind. School District. 2:28; 2:319; 2:592.

Banks v. Clairborne Parish School Bd. 10:1543; 12:120; 12:748. (See Hall v. St. Helena.)

Bill v. Rippy. 1:318; 2:32; 2:805; 2:984; 2:985. (See Brown v. Rippy, Borders v. Rippy, Dallas v. Edgar.)

Bivinis v. Bd. of Public Ed. & Orphanage, Bibb Co. 9:639; 10:126; 10:617; 12:807; 12:1873.

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294 (1955).

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9:667; 9:1747. (See also U.S. v. Louisiana,
Williams v. Davis.)

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5:650; 6:976; 7:1054; 8:502; 9:515; 10:621. (See
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of Atlanta.)

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10:1059; 12:1285; 12:1289. (See Hall v. St.
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9:1238; 11:175. (See Singleton v. Jackson.)

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al.)

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et al.)

In Re Campbell. 7:1169; 8:153.

In Re Coleman. 7:1169; 8:153. (Coleman v. Kennedy)

In Re Lynd. 7:1171; 7:1156. (Kennedy v. Lynd) (See U.S.
v. Lynd.)

In Re Mitchell. 7:1154; 7:1161. (See Kennedy v. Bryce
et al.)

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