From: Jack Bass, "Unlikely Heroes,"
Simon and Schuster, New York, 1981, 352 pp.

7

Skelly Wright and New Orleans

. . . we are, all of us, free-born Americans with a right to make our way unfettered by sanctions imposed by man because of the work of God.

—JUDGE J. SKELLY WRIGHT, 1956[1]

DURING A CHRISTMAS EVE PARTY in the United States Attorney's office, J. Skelly Wright sat at a window in the post office building and looked across the narrow street at the Light House for the Blind, where sightless people from New Orleans were arriving for another Christmas celebration. He watched the blind people climb the steps to the second floor. There, someone met them. He watched a blind Negro led to a party for blacks at the rear of the building. A white blind person was led to a separate party.

More than thirty years later, he recalled the scene. "The blind couldn't segregate themselves. They couldn't see. There was somebody else doing it for them." He continued, "It had an effect on me. It affects me even now.

[1] *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337.

"It didn't shock me. I looked at it twice, believe me, but it didn't shock me. It just began to eat at me. And it eats at me now. It began to make me think more of the injustice of it, of the whole system that I had taken for granted. I was getting mature, too, thirty-five or thirty-six, and you began to think of things. When you go to bed at night, you think of it. That was the beginning really."[2]

Outwardly, about the only resemblance between James Skelly Wright and John Minor Wisdom was that both were lawyers born and reared in New Orleans. They grew up in different worlds, Wright in a poor working-class neighborhood, the second of seven children in a Catholic family, his father a plumbing inspector who worked as a small contractor when jobs were available. Although blacks lived a block away, he knew none except for the maid who helped his mother once a week. Skelly Wright attended public high school, then the local Loyola University. He taught high school English, then enrolled at Loyola Law School, finishing in night classes while teaching during the day.

Although Wright was never active politically, an uncle served on the City Commission and in 1936 used his influence with newly elected U.S. Senator Allen Ellender, a stalwart in the Long organization, to help his nephew get appointed as assistant United States Attorney. World War II interrupted plans to go into private practice, and as a Coast Guard officer, Wright commanded a subchaser in the North Atlantic and then served as an embassy attaché in London. He married an admiral's daughter who worked at the embassy, Helen Patton, then returned after the war to New Orleans as senior assistant to U.S. Attorney Herbert Christenberry.

In 1948, after President Truman had appointed Christenberry a district judge, Wright became U.S. attorney. In the summer of 1949, Fifth Circuit Judge Elmo P. Lee of Louisiana died unexpectedly. Wright began thinking, "Why the hell shouldn't I be a judge?"

He discreetly inquired whether veteran District Judge Wayne Borah was interested, learned he wasn't, and after a week called Attorney General Tom Clark. Wright had worked with Clark

[2] Interview with J. Skelly Wright, January 15, 1979.

earlier as part of an antitrust task force, and they had talked occasionally during the 1948 campaign about what was happening in Louisiana, where Dixiecrat Strom Thurmond ran as the official Democratic candidate and Truman's name wasn't even on the ballot. Russell Long had just won a special election for a Senate vacancy, and Truman—deserted by the regular Democrats in Louisiana—treated them with disdain.

The President picked Wright for the vacancy without even consulting the Louisiana Senators, and his name was on a list of nominations at the White House when Chief Judge Hutcheson learned of it on a trip to Washington. By then, Clark had been appointed to the Supreme Court. Hutcheson told the new Attorney General that Wright was too young for the appeals court, and that the appointment should go to Borah, a district judge appointed by Calvin Coolidge. Borah got a call from the Attorney General, who gave him an hour to decide, and accepted. Truman appointed Wright to fill Borah's seat on the district court. He was thirty-eight, then the youngest judge on the federal bench.

Skelly Wright's background gave little clue to the strong sense of humanity that deepened as it became swept along in the tide of the Warren Court. But even before *Brown*, Wright broke precedent in the deep South in two race cases. He ordered the admission of black students to Louisiana State University Law School, acting on an earlier Supreme Court decision, on grounds that the law school for blacks at Southern University was unequal.[3] Old friends began to give Wright a funny look. Again before *Brown*, he ordered LSU to admit a black undergraduate, on the same grounds. This time, the Fifth Circuit reversed him. After *Brown*, the Supreme Court sent the LSU case back down, and Wright ruled in light of the new precedent.

He later ordered the desegregation of New Orleans city buses and parks, and compliance followed. But by 1960, when the New Orleans public schools became the first in the deep South to admit blacks to previously all-white schools, political hysteria had set in

[3] The first two graduates were Ernest Morial, later the first black to serve in the modern Louisiana state legislature and a state judge before his election as mayor of New Orleans in 1978, and Robert Collins, who was appointed by President Carter as the first black federal district judge in the South.

and the city's elite initially failed to offer leadership.[4] At the height of the crisis, a poll in New Orleans showed that more than 90 percent of the public recognized Wright by name. He was the "integration judge." Only 70 percent could name the mayor of New Orleans, and fewer could name the governor of Louisiana.

By the end of 1960, Skelly Wright had become the most hated man in New Orleans. Pairs of federal marshals alternated in eight-hour shifts at his home to ensure his physical safety, and they escorted him to and from work. With few exceptions, old friends would step across the street to avoid speaking to him.

Somewhat like Frank Johnson, Skelly Wright was basically a loner who didn't go out of his way to make or maintain social contacts when the community ostracized him. He became friendly with Wisdom after the latter went on the bench, but the two sat together on only one case. During his most troubled time in New Orleans, Wright remembers Wisdom as one who extended friendship. They visited each other at home, sometimes joined each other for lunch, and exchanged confidences about what the court was doing in civil rights.

Although Wright later readily acknowledged that his sympathies supported his actions as a judge, "it wasn't the thing that made me do what I did in New Orleans. I did it because the Supreme Court had said it, and there wasn't any way out except subterfuge. Other judges were using subterfuge to get around the Supreme Court, delays and so on, but I grew up around federal courts and had respect for them, and I tried to carry on tradition. . . . But I think the key in all of this is doing justice within the law. You have to stay within the law, but you can press against the law in all directions to do what you perceive to be justice. And sometimes you can press too far, and it might be counterproductive. But just as long as you stay within the law, and really not go overboard and disregard the law, I think it's justified to do what's right. I know that sounds like gobbledegook . . . but there're certain things that remain pretty accepted as what the law is, and it's just a question

[4] Of the many accounts of the New Orleans school crisis, perhaps the best is Morton Inger's *Politics and Reality in an American City: The New Orleans School Crisis of 1960* (New York: Center for Urban Education, 1969).

of how vigorously, how enthusiastically you embrace these things, particularly in the civil rights area.

"I guess I am an activist, but I want to do what's right. When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done—and then you look at the law to see whether or not you can do it. That might invert the process of how you should arrive at a decision, of whether you should look at the law first, but [with me] it developed through making decisions, which involves resolving problems. . . . And I am less patient than other judges with law that won't permit what I conceive to be fair. Now, there's a legitimate criticism of that, because what's fair and just to X may not be fair and just to Y—in perfect good faith on both sides. But if you don't take it to extremes, I think that it's good to come out with a fair and just result and then look for law to support it."[5]

Such candor about deciding cases might shock many lawyers and law professors, but Wright's reflections after thirty years on the bench are less likely to surprise those fellow judges who understand that the discretion given them in exercising judgment allows and requires more than the mechanical application of the law.

Centered on Wright, the New Orleans school desegregation case involved forty-one separate judicial decisions between 1952 and 1962. As much as any case, *Bush* v. *Orleans Parish School Board* tested the supremacy of federal law. No southern state matched the vigor, imagination, and frenzy displayed by Louisiana in battling to maintain segregated public schools.

In part, this was because no other state could claim a Leander Perez, Wright's neighbor down the street, whom Morton Inger in his book about the New Orleans school crisis aptly called "the poet laureate of the racists." Perez orchestrated both state and local resistance to desegregation in New Orleans.

If Perez maintained a residence in New Orleans, it was his rule of nearby mineral-rich Plaquemines Parish that established him as a behind-the-scenes power in Louisiana politics for almost half a century. His manipulation of leases for vast oil and sulfur deposits made him a multimillionaire after his rise to power. In

[5] Interview with Wright, January 15, 1979.

the 1920s, he allied himself with Huey Long and played a key role in masterminding Long's successful fight against impeachment, from which Long emerged as the dominant personality in the state's political history.

Thereafter, Perez became a permanent force in statewide politics. Candidates he supported consistently received more than 90 percent of the vote in isolated Plaquemines Parish, where the vote in some precincts exceeded the number of adult inhabitants. During the months the legislature met in Baton Rouge, Perez moved there also, a shadowy figure who drafted legislation about mineral rights and other matters that interested him. Race mattered to him almost as much as oil leases.

The school desegregation case had begun in 1952, when Oliver Bush, PTA president at a black school and father of thirteen children, filed a class action suit in September, an act that climaxed months of quiet protest by black parents against schools that were clearly unequal physically; some of them operated on double sessions while white schools contained empty classrooms. The case went to Judge Wright, but both the Inc. Fund lawyers in the case and those representing the school board approved Wright's decision to suspend a decision until after the Supreme Court decided *Brown*. The case remained inactive until 1956, when the school board reactivated it by requesting Wright to dismiss the Bush complaint.

From there on, the case illustrated a classic interplay between the trial and appellate federal courts and how they maintained the rule of law against the most furious legal assault of any state against the supremacy clause of the Constitution.

By 1956, resistance to desegregation had intensified throughout the South. Even in Texas, where many school districts with few black students voluntarily ended segregation, voters in 1956 endorsed by four to one their support of continued public school segregation and also endorsed the doctrine of "interposition" to halt what the ballot termed "illegal federal encroachment." Interposition, based on an abandoned eighteenth-century concept that the state could "interpose" its sovereignty when a state decided the federal government had exceeded its authority, ignored both the supremacy clause of the Constitution and the political lesson of

the Civil War. The doctrine of interposition was disinterred by the massive resisters in Virginia, and its chief propagandist was James Jackson Kilpatrick, then editor of the *Richmond News-Leader*, whose editorials were reprinted throughout the South. Among ideas used to mislead and confuse the white masses in the South, none proved more mischievous.

In 1956 and 1957, a siege mentality took hold of southern legislatures. The Alabama legislature, in its interposition resolution, declared the Supreme Court decisions relating to racial segregation in the schools "are as a matter of right, null, void, and of no effect." Although Governor Jim Folsom compared the legislature's action to that of "a hound dog baying at the moon," Folsom was on his way out.

Mississippi made it a crime to create a disturbance by advocating nonconformance with the "established traditions, customs, and usages of the state of Mississippi." Louisiana suspended compulsory school attendance and established "moral standards" certification for entry into institutions of higher learning. Georgia called on its Congressmen to introduce a resolution of impeachment against Justices Warren, Black, Reed, Frankfurter, Douglas, and Clark because of their "pro-communist, anti-states' rights decisions." In Florida, an official seven-member committee that included three state judges submitted a report recommending to the legislature laws to evade the Supreme Court decisions on desegregation.

The most sophisticated of the legal devices set up to evade and delay the mandate of *Brown* were the pupil placement laws, elaborate schemes which established an administrative maze which if applied fairly would minimize, if not prevent, enrollment of blacks in previously all-white schools. As written, most appeared neutral on their face.

After the Bush case became reactivated, Judge Wright asked that a three-judge district court be assigned. Statute required this for challenges to the constitutionality of a state law except when a law was so obviously unconstitutional that there was no "serious" question.

On February 15, 1956, a three-judge court of Circuit Judge Borah and District Judges Christenberry and Wright struck down the segregation laws as "invalid under . . . Brown." They made it clear there was no serious question that other efforts to circumvent

Brown would also be unconstitutional and turned the case back to Wright.

His order, issued the same day, dismissed the argument that the state could maintain segregation based on its police powers. Wright cautiously ordered the school board to no longer require segregation in any of its schools, the first judge in the Fifth Circuit to do so. But only after such time "as may be necessary," he said, to arrange for admission of children to schools on a nondiscriminatory basis "with all deliberate speed." He pointed out that the injunction did not mean the schools "would be ordered completely desegregated overnight or even in a year or more."

On a Sunday morning at home, while still drafting his order, Judge Wright picked up a program from a Mardi Gras ball and began writing on the back: "The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance and from all of us of whatever race.

"But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, free-born Americans with a right to make our way unfettered by sanctions imposed by man because of the work of God."

Almost a quarter century later, those words from his 1956 order, encased in glass, adorned the desk in Chief Judge J. Skelly Wright's chambers in the U.S. Court of Appeals for the District of Columbia.

A man of rare candor, Wright said he was not a religious person at all, but "there are a lot of religious people in New Orleans and a lot of those religious people were bigots on the race question, and I put this in to get to those people—and it got to some of them, couldn't help but get to some of them. . . . It was deliberate, done to make them reflect. And I was looking for support. I wanted to get the job done."[6]

Wright also held the pupil placement act unconstitutional in its application. To require administrative hearings for each of the thousands of black children in order for them to get the relief the Supreme Court had said they were entitled to, Wright stated,

[6] Ibid.

"would be a vain and useless gesture, unworthy of a court of equity. It would be a travesty in which this court will not participate."

The school board's appeal of Wright's 1956 order reflected the well-known views of Perez, who had become one of the board's attorneys, in a brief that concluded that its twenty-one exhibits "establish only too well that a large segment of our Negro population has little or no sense of morality and that to intermingle them with the white children in our public schools could well corrupt the minds and hearts of the white children to their lifelong and perhaps eternal injury."

The state of Louisiana now was attempting to argue that classification by race represented a rational and therefore *reasonable* exercise of the state's police power to protect public health, safety, and morals because of alleged inherent differences between the races.

A panel of Rives-Tuttle-Brown heard the appeal and unanimously upheld Wright. Tuttle took apart the state's argument and exposed its racist core. The affidavits produced by the state, he said, "make clear what the briefs do not. They deal with the alleged disparity between the two races as to intelligence ratings, school progress, incidence of certain disease, and percentage of illegitimate births, in all of which statistical studies one race shows up to poor advantage. . . .

"Strangely enough, there seems never to have been any effort to classify the [white] students of the Orleans Parish according to the degree to which they possess these traits. . . . it is unthinkable that an arbitrary classification by race because of a more frequent identification of one race than another with certain undesirable qualities would be a reasonable classification."

Tuttle also struck down the pupil assignment act as unconstitutional on its face because there were no standards to prevent its discriminatory application and the only implied basis for assignment was race.

The Fifth Circuit denied a request by the school board for an *en banc* hearing, and the Supreme Court denied cert. It was only the beginning.

Several Texas cases in 1956 gave focus to problems that would follow throughout the Fifth Circuit. In Mansfield, where blacks

accounted for more than 20 percent of the enrollment, the local school system provided segregated elementary schools, but a single high school—for whites only. Blacks could attend high school in Fort Worth, twenty miles away, but had to supply their own transportation.

When black parents sought admission of their children to the high school in Mansfield, they didn't seek integration of the elementary schools. District Judge Joe Estes, an Eisenhower appointee, accepted the school board's decision to buy a school bus to transport the Negro pupils to Fort Worth as "making the start toward 'obeying the law.' "

A Fifth Circuit panel of Hutcheson-Brown-Rives reversed Estes and directed him to order the board to admit the black students. Hutcheson's opinion noted there were "no administrative difficulties," but only "a difficulty arising out of the local climate of opinion." Hutcheson pointed out that the Supreme Court in *Brown II* had specifically stated: "It should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

After Estes ordered the immediate admission of all qualified black students to Mansfield High School, moderate leadership failed to emerge in Mansfield. A newly formed Citizens Council found support from the local newspaper editor. Crosses were burned in the Negro residential section, and a crowd of more than two hundred whites attended the hanging of a black effigy from the school building on registration day. One sign carried by a member of the crowd read: "A Dead Nigger is the Best Nigger."

On August 31, four days after Judge Estes issued his order, Governor Allen Shivers ordered the Texas Rangers to Mansfield. A Democrat who had supported Eisenhower in 1952, Shivers announced: "It is not my intention to permit the use of state officers or troops to shoot down or intimidate Texas citizens who are making orderly protest against a situation instigated and agitated by the National Association for the Advancement of Colored People. At the same time we will protect all persons of all races who are not themselves contributing to the breach of peace. If this course is not satisfactory under the circumstances to the Federal Government, I respectfully submit further that the Supreme Court, which is responsible for the order, be given the task for

enforcing it. . . . I hope that the U.S. Supreme Court will be given an opportunity to view the effect of its desegregation decision on a typical law-abiding Texas community."

Under the circumstances, the black parents decided to accept the forty-mile-round-trip bus ride to Fort Worth, and no black children showed up to register at Mansfield High School.

Governor Shivers boasted that Mansfield proved racial controversies could be settled nonviolently. At a press conference, President Eisenhower characterized Mansfield's troubles as a local responsibility.

Another Texas case at this time, *Avery* v. *Wichita Falls*, portended other problems. The situation at Wichita Falls, where approximately a thousand of the thirteen thousand pupils were black, was far more complex than at Mansfield.

Black parents applied for admission in September 1955 to the Barwise School, a white elementary school located near the main black residential area of Wichita Falls. They were turned down and filed suit the following January to attend the school nearest their home on a desegregated basis.

At about the same time, construction was completed on a new school in a white residential area. At the beginning of 1956, the entire all-white student body and faculty at Barwise was transferred to the new school. The Barwise school was renamed in honor of a former Negro principal in the school system, was opened on an announced policy of desegregation, and was operated throughout 1956 as an all-black facility. The superintendent announced that the children of the black plaintiffs were attending a "desegregated" school and that it might be possible that by mid-1957 "the entire school system could be desegregated."

Lawyers for the Negroes argued that at the least they were entitled to an injunction requiring the board to complete desegregation "with all deliberate speed."

District Judge Joseph B. Dooley granted the board's motion to dismiss the suit. "I think it would be premature for the court to interfere," he stated. "Impatience and precipitancy of spirit are not, I am convinced, nearly so reliable a course as that of depending upon these authorities, once you have substantial evidence that they are acting in good faith and with a real and honest purpose to go ahead. . . ."

Before an appeal by the black parents could be heard by a Fifth Circuit panel of Rives-Tuttle-Cameron, actual desegregation occurred at one of the two white high schools when fifteen blacks joined 411 whites during a summer session. By fall, the schools were segregated again because no blacks applied to any of the white schools despite an announced policy of nondiscrimination.

Tuttle, then a very junior member of the court, believed it would be helpful to frame a model desegregation decree on which to base uniform standards for the Fifth Circuit. Rives, who would remain the most conservative of The Four on school cases, disagreed. Cameron wanted to uphold the district judge's dismissal. In the majority opinion, Rives affirmed the district judge's refusal to issue an injunction because the board had sufficiently made "a prompt and reasonable start" toward desegregation, but Rives emphasized the board's action "were steps, but no more than steps, toward compliance," and that the district judge should retain jurisdiction.

Cameron dissented. In this first dissent on a civil rights case, Cameron expressed himself in temperate language. "Practically every responsible person in a place of public leadership has stated that this problem will be solved only as men's hearts are reached and touched," Cameron wrote. Returning the case to the district court, he continued, would inevitably "thrust back into the field of controversy a problem which can, in my opinion, move towards real solution only in an atmosphere of repose and harmony."

Of special significance, the majority opinion in the Wichita Falls case incorporated what became known in civil rights circles as the "*Briggs* dictum" of the Fourth Circuit. *Briggs* v. *Elliott* was a South Carolina case that was one of the four cases involved in the *Brown* decision. After the Supreme Court sent it back to South Carolina, Chief Judge John J. Parker of the Fourth Circuit wrote for a three-judge district court that all the Supreme Court had decided was "that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom

to choose the schools they attend. *The Constitution, in other words, does not require integration. It merely forbids discrimination. . . .*" (Emphasis added.)

The Inc. Fund did not appeal Parker's order to the Supreme Court, in part because of their thin resources and in part because they feared it might be upheld. The failure of the Supreme Court to set standards or to impose a timetable in *Brown II* made it uncertain how they would rule if the *Briggs* dictum was challenged, particularly in an atmosphere in which the Court itself was under heavy attack from Congress and the President was offering no support.[7]

Although Tuttle said later that he and others "wrote around" *Briggs*, its adoption in the Wichita Falls case slowed down school desegregation in the Fifth Circuit for almost a decade.

In 1956, the year after he wrote the *Briggs* dictum, Parker approved North Carolina's pupil placement law as constitutional on its face. The pupils, noted Parker, "cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed these will obey the law, observe the standards, prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration."[8]

The Supreme Court denied cert in the case. The decisions authorized a policy by which North Carolina, Parker's home state, projected a national image of moderation while effectively keeping all but a handful of blacks in segregated schools. The designers of the pupil placement law in North Carolina included men who were friends of Judge Parker's.

Parker's less-quoted, but disingenuous, comment in *Briggs* that "nothing . . . takes away from the people freedom to choose the schools they attend" provided the basis for the later "freedom-of-

[7] The explanation of the Inc. Fund's reason for not challenging the *Briggs* dictum was based on interviews with Constance Baker Motley, Robert Carter, and Jack Greenberg, all active at the time in devising Inc. Fund strategy.

[8] *Carson* v. *Warlick*, 238 F. 2d 724.

choice" desegregation plans. His sweeping assertion, which suggested some fundamental right was involved, ignored the fact that there had never been any "freedom to choose." Blacks were assigned to black schools, whites to white schools, and the specific school assignments were made by school administrators. But the ringing quality of the phrase "freedom to choose" was one the South grasped a decade later as though it were holy writ. With the prospect of harassment and intimidation, few blacks would exercise their "free choice" to attend "white" schools, and whites in the South surprised nobody by not choosing to attend "black" schools.

Had "massive resistance" elsewhere in the South not placed the region in a morally indefensible position, a policy of sophisticated evasion based on Parker's legal concepts might have allowed the South to retain essentially segregated schools with a few token, mostly middle-class blacks in the "white" schools.

A new concept emerged after Chief Judge Harvey M. Johnsen of the Eighth Circuit Court of Appeals stated in 1959 that an Arkansas district had failed to take steps "to disestablish segregation" in the school system.[9] At the Inc. Fund, Mrs. Motley remembered, "we joked about 'disestablishmentarianism,' but we took off from there." Until then, the Inc. Fund's arguments had focused on reassigning black pupils to white schools, and Judge Johnsen's concept came as a surprise. From that point on, the Inc. Fund argued that "school authorities had the duty to take affirmative action to disestablish the dual school system and to merge them into one."[10] The Fifth Circuit would become the legal battleground that decided the issue.

Just as Wright in 1956 had ruled the Louisiana pupil placement law unconstitutional in its application, Johnsen's Eighth Circuit ruling similarly interpreted the Arkansas version of the pupil placement laws. In 1958, the Supreme Court had upheld an opinion by Judge Rives (in *Shuttlesworth*) in a three-judge district court case that held the Alabama placement law constitutional "on its face." Rives specifically warned that the act "may be

[9] *Dove* v. *Parham*, 271 F. 2d 132, 135.

[10] Interview with Constance Baker Motley, June 21, 1979.

declared unconstitutional in its application." Louisiana and other southern states immediately passed replicas of the Alabama statute. In a substantive sense, the Supreme Court's decision in *Shuttlesworth* served to reaffirm the principle of "all deliberate speed," demonstrating that the Supreme Court at the time remained unwilling to directly confront state schemes obviously designed to thwart actual school desegregation. The burden of implementing *Brown* would remain with the lower courts for another decade.

Its thin forces spread elsewhere, the Inc. Fund didn't pursue Skelly Wright's 1956 order in New Orleans, but two years later the school board activated the case by contending it lacked authority to obey Wright's decree because the legislature had created a new Special School Classification Committee.

Wright summarily dismissed the challenge. He declared that "an artifice, however cleverly contrived, which would circumvent this ruling, and others predicated on it, is unconstitutional on its face." A Hutcheson-Rives-Tuttle panel affirmed Wright.

Before Wright's next order in 1960, the political harvest that Orval Faubus reaped at Little Rock through his defiance had left its mark on Louisiana. Former Governor Jimmie Davis, who wrote the lyrics of "You Are My Sunshine," defeated progressive Mayor deLesseps (Chep) Morrison of New Orleans in a runoff for governor in which each attempted to outdo the other as a defender of segregation. Morrison, who led the first primary, managed only to tarnish his image. Davis got the support of the third-place finisher, segregationist state Senator Willie Rainach (pronounced Ray-nack). A true believer who wore a broad tie emblazoned with a Confederate flag and ranted against "mixing of the bloods," Rainach and the White Citizens Council not only elected Davis, who previously had run on a platform of "peace and harmony," but forced him into a position of extreme defiance. The New Orleans school desegregation issue dominated the campaign.

In *Cooper* v. *Aaron*, the Little Rock case, the Supreme Court had declared in 1958 that the constitutional rights of children to attend school without racial discrimination "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive

schemes for segregation whether attempted 'ingeniously or ingenuously.' "

By May 16, 1960, Wright's deadline for the school board to submit a desegregation plan, the board—faced with a referendum in which 80 percent of the white parents supported closing the schools rather than integrating them and a state court ruling that the legislature now had authority to assign students in New Orleans schools—had presented no plan. On May 16, Wright issued an order for desegregation to begin in September—the first district judge in the Fifth Circuit to set a specific starting date—and ordered that black children entering the first grade be given an option of attending the all-white school nearest their home.

The Louisiana legislature responded with another round of legislation and gave the governor authority to take control from any school board under court order to desegregate. In August, Governor Davis assumed control of the New Orleans schools, which triggered a suit by a white parents' group to keep the schools open. By this time, there had been more than four years of what Wisdom would characterize in a subsequent opinion as a "morass of confusing, harassing legislation"—with much more to come.

Rives, who a year before had assumed duties as chief judge, named himself and Judge Christenberry to join Wright on a special three-judge district court. With solid support from Rives and the stalwart Christenberry and with the additional authority granted by *Cooper* v. *Aaron*, Wright wrote an opinion that declared "unconstitutional on its face" the act that gave the governor control of the schools. The court also struck down seven other statutes as unconstitutional.

In addition, the court held flamboyant Attorney General Jack P. F. Gremillion in contempt. At the hearing, Gremillion had protested and asked for a five-day delay after Rives allowed the attorney for the white parents to place affidavits in the record rather than call witnesses. Rives read from the rules of federal procedure, which clearly authorized his ruling, then told the attorney, "You may proceed."

At that, Gremillion shouted, "How can this be fairness and justice, if you are going to come in here and just run roughshod over us?"

Even patient Judge Rives showed mild irritation, but said, "You may reserve your objections, and I hope you will do it in a manner respectful to this court."

Gremillion sat down muttering, loud enough for the court reporter to hear him, about a "den of iniquity."

As the other lawyer began to speak, Gremillion stood and muttered, "I'm not going to stay in this den of iniquity." He then strode out of the courtroom, and Rives leaned over to Christenberry and whispered, "Herbert, we've got to do something about that young man."

As Gremillion reached the door to the courtroom, he spat at two black women who represented a PTA group, then stalked down the hallway, bellowing he had left a "kangaroo court." Gremillion's elderly assistant asked for and received permission to leave.

After the attorney for the white parents finished, Thurgood Marshall, who represented Bush for the Inc. Fund, said: "This is no longer a case of Negro children seeking their constitutional right. This is now a challenge by the officials of the State of Louisiana to the sovereignty of the United States. The duty of this Court is clear."

Gremillion sobbed with relief when he was given a suspended jail sentence after his contempt hearing. Although Gremillion announced Louisiana had reached the end of its legal strategy, Governor Davis insisted that the federal injunction was not binding on him, and he eluded federal marshals who attempted to serve the court order on him.

With school ready to open, the moderate majority of the school board asked Wright to postpone his decree until November 14, the beginning of the second quarter, because the state's interference had prevented them from adequately preparing for school opening. Despite objections by Thurgood Marshall, Wright granted the delay and the Supreme Court refused to stay his order.

The delay allowed segregationist pressure to build on the governor, who called a special session of the legislature on November 4 that in five days of frenzy passed twenty-nine segregation laws, including an interposition resolution that authorized arrest of federal marshals or judges who attempted to enforce *Brown*. The

legislature also created an eight-member committee of legislators to take control from the New Orleans school board.

On November 10, Judge Wright issued a preliminary injunction against the governor, Attorney General, state police, National Guard, state superintendent of education, "and all those persons acting in concert with them" and enjoined them from enforcing the newly passed statutes.

A day later, Attorney General William Rogers gave clear notice that the Justice Department would not tolerate violence or defiance. "Any resistance, or obstruction or interference with federal court orders," he warned, "will be in violation of federal law."

The next day, State Superintendent of Education Shelby Jackson declared a state school holiday for November 14, desegregation day in New Orleans. Wright responded with a restraining order against the holiday and ordered a contempt hearing for Jackson. When the legislature passed a resolution declaring November 14 a school holiday, Wright added the entire state legislature to the list of named officials enjoined from interfering with the desegregation order. On November 14, the day that four Negro first-graders entered two white schools, the legislature passed a resolution removing the members of the New Orleans school board. Thirty minutes later, Wright issued a temporary restraining order against its enforcement. In New Orleans, pressures mounted immediately for a white boycott of the two schools.

The next night, Perez provided a climactic ending to a mass rally attended by five thousand at the Municipal Auditorium with the impassioned plea, "Don't wait for your daughter to be raped by these Congolese. Don't wait until the burr-heads are forced into your schools. Do something about it now!"[11] Perez also opened the still-segregated public schools in neighboring St. Bernard's Parish, which he also dominated politically, to children boycotting the desegregated schools.

On November 25, Rives, Christenberry, and Wright requested the Justice Department to enter the case as amicus curiae, friend of the court. Five days later, the court struck down the interposition resolution. Wright wrote a scholarly analysis of the history of

[11] *New York Times*, November 28, 1960, p. 34.

the theory of interposition and concluded that "if taken seriously, it is illegal defiance of constitutional authority." Without the support of the Interposition Act, he wrote, "the rest of the segregation 'package' falls of its own weight."

In addition to those previously enjoined from interfering in any way with the operation of the New Orleans public schools, the court added all district attorneys, the sheriffs of all parishes, the mayors and chiefs of police of all incorporated municipalities, "and all other persons who are acting or may act in concert with them."

Although Wright wrote all the orders issued by the three-judge court, he suggested to Rives and Christenberry that they be released as unsigned, per curiam (by the court) opinions. Wright's notoriety by then was such that the Louisiana legislature had passed a resolution directing the state attorney general to ask him to remove himself from the case on grounds of bias. News accounts of the unsigned orders would attribute them to the court rather than to Wright, thus deflecting some of the heat from him and also adding greater credibility to the opinions. Rives and Christenberry, neither of whom changed a word in the orders that Wright wrote, readily agreed.

As it did five other times in the New Orleans battle, the United States Supreme Court affirmed the three-judge court, dismissing Louisiana's challenge as "without substance." In the months ahead, the Louisiana legislature exhausted itself in four more special sessions that passed more unconstitutional laws that were struck down.

Although Wright had included the legislature in the injunction against interfering with the schools, he also realized that legislators could not be held in contempt for passing laws. That was their job. Even if the laws were designed to interfere with the schools and were blatantly unconstitutional, the legal process provided that they be challenged, struck down, and their enforcement enjoined.

By the end of January 1961, Wright faced a situation in which the boycott efforts and their accompanying harassment reached their peak. Angry talk of defiance filled the air after the legislature returned for another special session and was threatening to close the New Orleans schools by withholding funds.

An impending contempt trial posed the issue of potential arrest

and jailing of State Superintendent of Education Shelby Jackson, who had publicly advised that the New Orleans school board was under no legal obligation to obey the federal courts. Contempt charges against other state officials loomed as a distinct possibility. The state officials were all Democrats, and many had campaigned for John F. Kennedy, the new President.

Wright faced a state-federal confrontation potentially as serious as any since the Civil War. The immediate question for him was whether the new administration in Washington would enforce his court's orders. Early in February, he called Burke Marshall, the newly appointed Assistant Attorney General in charge of the Civil Rights Division. The thirty-eight-year-old Marshall had just been hired by Attorney General Robert Kennedy, primarily on the recommendation of Deputy Attorney General Byron (Whizzer) White.

The thirty-five-year-old Kennedy's background and experience were of politics, the legal staffs of Senate committees, where his investigation of organized crime and labor racketeering attracted national attention, and brief service in the Justice Department. An activist who enjoyed the full confidence of the new President, for whom he had served as national campaign manager, Robert Kennedy was a man whose life was characterized by personal growth and whose dominant quality was determination.

Historian Arthur Schlesinger, Jr., Robert Kennedy's biographer, says the quiet, self-effacing Marshall quickly impressed Kennedy with his "precise mind, incorruptible character, dry humor and intense moral conviction. There was no one on whose judgement he [Kennedy] relied more during the rest of his life."[12] But when Wright called, Marshall and Kennedy were still little more than strangers.

Marshall discussed the New Orleans situation with Kennedy, and they considered the full political and policy implications. There was no consultation with the White House or other members of the Cabinet. Robert Kennedy said, "We'll have to do whatever is necessary." It was with that decision, Marshall said later, that he knew he and Robert Kennedy would get along.

[12] Arthur Schlesinger, Jr., *Robert Kennedy and His Times*, paperback ed. (New York: Ballantine, 1979), p. 311.

In a joint oral history interview the two of them had several years later with Anthony Lewis, who had covered the Kennedy Justice Department for *The New York Times*, Kennedy discussed his reaction to the New Orleans situation. "The United States government couldn't back down," he said.

Lewis: "Well, that was one way of looking at it, that now seems right and seemed right to many at the time, but it hadn't been the previous position. . . ."

Kennedy: ". . . it seemed so logical that what we had to do, we should do. It was just taken for granted that the United States had to do what needed to be done."

The basic issue facing the Kennedy Justice Department, Marshall said in the Lewis interview, was that "someone had to back down. Either the court or us or the state." The decision, Marshall explained, "was whether or not the Department of Justice was going to accept full responsibility for enforcement of school orders or whether it wasn't. The fact is, it never had, before then. . . . Either they were going to back down or they were going to end up in contempt and with [us] having to jail important public officials."[13]

In his conversation with Wright, Marshall had learned that one of the reasons desegregation had been postponed in New Orleans the previous fall was pressure from the Justice Department to delay it until after the presidential election. Until Wright's revelation, the postponement had been attributed solely to a request by the moderate majority on the school board, who met with Wright and promised to comply with the court order, but asked for more time to resolve administrative problems. They also hoped to build community support and believed privately that a delay would help the reelection campaign of one of their moderate members.

But Wright revealed to Marshall that his decision to postpone desegregation was significantly influenced by the Justice Department's response to Wright's inquiry about enforcement of the court's order, with marshals or troops if necessary. Wright had discussed the matter in late August with the local United States attorney, M. Hepburn (Hep) Many, a Republican protégé of Judge Wisdom's who had been fully supportive of the desegregation

[13] Robert Kennedy and Burke Marshall, in recorded interview by Anthony Lewis, December 4, 1964. John F. Kennedy Oral History Program.

effort. Many had worked behind the scenes with the school board's moderates and their attorney and had helped instigate the private suit by white parents after the state threatened to close the schools, a suit designed to broaden the base of support for keeping the schools open. At one point, Many received an irate telephone call from Senator Eastland, who had read a newspaper account of a speech by Many, which to Eastland sounded like a call for federal troops, if necessary. In their conversation, Eastland denounced Judge Wright as "a no-good son of a bitch." Many told the Senator he would not listen to that kind of language about the judge before whom he practiced. When Eastland repeated the epithet, Many hung up.

After Wright asked Many about the Justice Department's commitment to enforce his desegregation order at the opening of school in September, Many conferred in Washington with Deputy Attorney General Lawrence Walsh and Assistant Attorney General Harold A. (Ace) Tyler, head of the Civil Rights Division. They decided that federal intervention would be provocative and that a delay would strengthen the school board's moderates, and they obviously understood the potential political impact of "another Little Rock" in the fall presidential campaign. Tyler followed Many back to New Orleans on a separate plane, talked more with him, visited briefly with Wisdom, an old friend, and the next morning went to Montgomery to brief Judge Rives.[14]

Wright was unaware of anything except a visit to him that morning by Many, who told him of Tyler's visit to New Orleans the previous evening. Many said that the Justice Department wanted to help with the problem, but that it would be less severe if Wright postponed desegregation until after the election. "He made it clear to me that if I waited until after the election they would give me all the support that I needed," Wright recalled. "I don't think anyone was crude enough to suggest to me that they wouldn't give me support if I didn't wait, but it was clear to me that if I did wait, they would [give support]. It was a very important consideration to me because I was helpless. I had no way of enforcing the order. I knew I wasn't going to get any help out of the police, state or city, so I had to work with Washington . . . to get this job

[14] Interview with M. Hepburn Many, May 16, 1980.

done because I knew that I was going to be alone, totally and absolutely alone. . . . I was interested in getting this job done without killing people."[15] When the school board had requested to Wright that he postpone desegregation, he recognized the idea had some merit. Postponement until after the election might lessen the furor, and the school board's promise to comply with the court order also meant they were rejecting the state government, a position that warranted consideration.

But years later, he was unsure whether he would have granted the delay solely on the request by the school board, which the Negro plaintiffs opposed. After Tyler's visit, the choice was easy, Wright said, because his primary concern was to get a difficult job done with as little disorder as possible. Although the court's postponement assured full support by the Justice Department after the election, it also gave time for Perez and other diehards to pressure the governor and legislature to renew and refocus their opposition, whipping up an atmosphere far more frenzied than the resignation that existed just before the schools opened in September.

In the oral history interview with Lewis, Robert Kennedy suggested that Marshall tell the story about Wright and the Eisenhower Justice Department. "I think it's damn interesting," said Kennedy. "What it is is a contrast, I think. It tells better than anything else, almost, the contrast between what they were doing and what we were trying to do."

Wright's request to the Eisenhower Justice Department, Kennedy said, "was rather interesting because in view of Little Rock and all the rest of it, one would think that [sending the marshals] would almost be automatic." That the Eisenhower administration would play election politics on the issue of enforcement of federal court orders, Kennedy said, was "interesting."[16]

During the 1960 presidential campaign, John F. Kennedy had emphasized, quoting Franklin D. Roosevelt, that the presidency is "above all, a place of moral leadership." Kennedy's view of presidential leadership in civil rights and of a creative and expansive presidency contrasted sharply with Eisenhower's style and approach.

* * *

[15] Interview with Wright, May 15, 1980.

[16] Kennedy and Marshall interviews with Lewis, December 4, 1964.

One of Marshall's valuable confidential contacts in dealing with the crisis was state senate President Pro Tem Robert Ainsworth of New Orleans, an able man and former chairman of the board of managers of the Council of State Governments, who refused to continue as floor leader for the governor during the special sessions. He led a small band of state senators who resisted the most blatant segregationist bills. Ainsworth's quiet efforts reflected leadership at the time perhaps second only to that of state Representative Maurice (Moon) Landrieu, who cast the lone vote opposing suspension of the rules in the first special session in November and who alone voted against every one of the segregationist bills and resolutions.

Ainsworth, a classmate of Skelly Wright's at Loyola Law School who had developed a thriving law practice and faced a promising political career, became one of President Kennedy's district judge appointees. President Johnson later elevated him to the Fifth Circuit Court of Appeals. Landrieu later provided dynamic leadership as mayor of New Orleans and served in President Carter's Cabinet as Secretary of Housing and Urban Development.

On February 16, 1961, the Kennedy Justice Department entered the New Orleans case and expanded charges against State Superintendent of Education Jackson. The Justice Department also acted to block the legislative efforts to cut off funding for the New Orleans schools.

At the contempt trial, Jackson lost his bluster. When Wright asked if he intended to interfere with the operation of the New Orleans schools, Jackson answered "No" in a quavering voice so low that Wright repeated the question and told him to speak up so that everyone in the courtroom could hear. Jackson escaped a jail sentence after reporting a "heart attack" that many at the Justice Department later believed was related more to political than to physical conditions.

With support by the full federal judiciary and ultimately the Justice Department and by his own personal resolve, Skelly Wright broke the back of the state's effort at massive resistance and prevented the closing of the New Orleans public schools. He upheld federal supremacy under the Constitution by facing down the full force and power of the entire state of Louisiana.

8

The Pursuit of Justice

. . . none of the politicians really understand what a high price it is to appoint bad judges.

—NICHOLAS DEB. KATZENBACH[1]

JUST BEFORE THE 1960 PRESIDENTIAL ELECTION, Judge Rives called Judge Tuttle on the telephone and told him, "Now, Elbert, I am going to step aside as chief judge today. I wanted to let you know."

In January, Tuttle as chief judge took extraordinary action that averted a civil rights crisis for the Kennedy administration even before it was called into New Orleans. Two days before the first Negro students were scheduled to enroll at the University of Georgia, District Judge William Bootle stayed his own integration order when it was appealed by the university. Lawyers for the students immediately appealed, and Tuttle on the same day acted alone to restore Bootle's original order. The Supreme Court the next day upheld Tuttle's action, clearing the way for the students to enroll on schedule.

Although Rives had found the administrative duties as chief judge burdensome and often was staying up almost all night to nurse a sick wife, years later he revealed his real reason for stepping aside after little more than a year. He admired Tuttle's

[1] Interview with Nicholas DeB. Katzenbach, October 18, 1979.

ability and believed that the increased status might help Tuttle get appointed to the Supreme Court if Richard Nixon won the presidential election. Had Tuttle known Rives's motives at the time, he would have advised him it was an appreciated, but useless, gesture, that with three southerners already on the Supreme Court (Hugo Black of Alabama, Tom Clark of Texas, and Stanley Reed of Tennessee), Tuttle believed there was no chance of his getting an appointment.

Tuttle's action on the University of Georgia case quickly tipped off the Kennedy Justice Department to the special quality of the judges they were inheriting on the Fifth Circuit Court of Appeals.

The story of the Kennedy Justice Department is a familiar one. They were bright young men, trained at the best Ivy League law schools, who were committed to, but not publicly identified with, the principles of equality and simple justice that propelled the civil rights movement. Their central thesis, as stated by Robert Kennedy, was, "The right to vote is basic, and from it flow all other rights."

They believed deeply in the traditional concept of federalism, that basic responsibility for law and order in the highest sense of those words rested with the states, and that ultimately the people and officials of the South must accept responsibility for compliance with an interpretation of the Constitution that meant both traumatic change to the region and the promise of legal equality at last to the descendants of slaves emancipated almost a century earlier.

First and foremost, they were lawyers, men Victor Navasky characterized as committed "to negotiation, [the] idea that reasonable men can work things out, [the] assumption that confrontation should always be avoided and that mediation rather than coercion is the proper way to achieve social change."[2]

Congress was in no mood to pass new civil rights legislation, and the policy of the new administration began as a strategy "to litigate, not legislate," a strategy predicated in part on the knowledge they would be judged by men who shared their views about the Constitution and its protection of human rights.

In contrast to the passive quality of the Eisenhower administration, the Kennedy activists openly identified with aspirations of the

[2] Victor S. Navasky, *Kennedy Justice* (New York: Atheneum, 1971), pp. 164–165.

civil rights movement and its leaders. They also raised expectations about the federal role. In terms of the legal process, they became interventionists, but at times came into conflict with the tactics of a revolutionary movement with a life of its own. Justice Department action often came in response to initiatives taken by civil rights activists.

When Mississippi native James Meredith decided to apply for admission to his home state university, neither the Inc. Fund nor the Justice Department agreed with the timing, but the Inc. Fund had little choice when Meredith asked for their help. An Inc. Fund official remembers the Justice Department—whose agenda placed priority on voting—repeatedly called the Inc. Fund and asked that they postpone Meredith's application. After waiting a few days, the Inc. Fund moved ahead. "We felt that by taking the initiative they had no alternative but to follow us," said Jack Greenberg, "and that turned out to be a correct judgment."[3]

While the Justice Department emphasized voting and the Inc. Fund emphasized school desegregation, a rising consciousness was stirring within southern Negroes. It responded to the daily indignity of denial of service or having to stand while others sat to purchase food at a lunch counter, being addressed by one's first name rather than with courtesy titles by store clerks or city clerks, closed access to jobs as well as schools—in short, to a system based on racism. As northern Negroes knew from experience, the right to vote didn't eliminate the root problem. But in the South, racism was codified into law. Voting would make a difference, but human dignity involved more than voting.

Ultimately, the integrity, commitment to justice, and examples set by judges such as Skelly Wright, Frank Johnson, and The Four enabled the Justice Department to persuade civil rights leaders to contain their protest in legal channels, to make it a nonviolent revolution, to believe that the federal courts could serve as an instrument of justice.

Less than three months after intervening in New Orleans, the new Justice Department vividly learned just how close beneath the surface racial violence lurked in the deep South. Without formally

[3] Interview with Jack Greenberg, June 21, 1979. Greenberg is director-counsel for the NAACP Legal Defense and Education Fund, Inc.

notifying the Justice Department, the Congress of Racial Equality set out to test the 1960 Supreme Court decision, *Boynton* v. *Virginia*, which outlawed segregated facilities in interstate transportation terminals. At Anniston, Alabama, the Ku Klux Klan organized a mob that confronted two buses carrying integrated groups of "freedom riders." Although the mob firebombed a Greyhound bus and destroyed it, a determined Alabama highway patrolman stopped them from assaulting the riders. However, several riders on a Trailways bus were assaulted and viciously beaten at a different location.

The next day, another mob attacked the freedom riders when they arrived at the bus terminal in Birmingham, where police failed to show up for ten minutes. Police Commissioner Eugene (Bull) Connor explained that many of his men were given the day off for Mother's Day, but an FBI informant in the Klan later revealed publicly that the delay in the police arrival had been prearranged.

On Monday, Robert Kennedy dispatched his administrative assistant John Seigenthaler to Birmingham as the President's special representative. Seigenthaler visited the hospital and found the other freedom riders at the airport, "scared to death" and with a "bunch of mean, surly police" at the air terminal.

After Connor arrested a second group, Seigenthaler met with Governor John Patterson, who in 1960 had strongly supported Kennedy. Patterson called in his cabinet and launched a twenty-minute demagogic diatribe against the Kennedys, banging his desk with his fist, talking of letters of support from throughout the country, and declaring, "If marshals come into Alabama, there will be blood in the streets! If troops come into Alabama, our National Guard will declare war!"

Seigenthaler had never witnessed so unbelievable a performance. When it ended, he responded, "Governor, I've heard everything you say and the only thing I can tell you is that American citizens have the right to ride buses through Alabama, and if you can't protect them, we're going to provide them protection. And we'll begin with marshals, and if that doesn't work, we'll take it up with troops. And there really isn't any option for us on that. So it isn't really a question of whether you provide security. If you don't provide it, we have to, but it seems to me we ought to talk about how to get this problem off your hands and into the hands of

people in Mississippi and Louisiana. Can't we come to some understanding about how to get this problem off your back?"

Patterson's attitude changed, but he turned to Floyd Mann, his director of public safety, and he said, "Floyd, I don't think you can protect them."

Mann, an able professional law enforcement officer, seemed to Seigenthaler the only person in the room to understand what was at stake. He replied: "Governor, I can protect them. We can protect them if you want to."

Mann then outlined how state police would escort the bus from Birmingham to Montgomery, a police car in front and another behind the bus, and transfer security duty to the city police when the bus reached Montgomery.[4] Seigenthaler telephoned Robert Kennedy in the governor's presence to report the agreement, and Patterson issued a statement that the state of Alabama was perfectly capable of protecting guests and visitors to the state.

Kennedy made the widely reported telephone call to the Greyhound manager in Birmingham in which the Attorney General finally said in exasperation that somebody "better get in touch with Mr. Greyhound" to find someone willing to drive the bus. Kennedy, referring to the negotiations with Patterson, said, "We've gone to a lot of trouble to make it possible for these people to move, and now it's all falling down because you don't have a driver." The manager, who taped the call and released it to local authorities, believed Kennedy meant he had gotten CORE to put on the freedom rides. That sentence was used over and over again in the next two years to discredit Kennedy, who later said, "I never recovered from it."[5] Mr. Greyhound finally found a driver.

The riders had insisted on making local stops to make their point, but the driver closed the door and, in Seigenthaler's words, "drove like a bat out of hell. He wasn't stopping for anybody."[6]

Seigenthaler drove ahead of the bus with John Doar, Burke Marshall's number-one assistant and later his successor, and they ate a quick breakfast in Montgomery. As the bus pulled into Montgomery and approached the bus terminal, Seigenthaler dropped Doar off at the federal courthouse adjacent to the terminal.

[4] Interview with John Seigenthaler, September 7, 1979.

[5] Robert Kennedy, in Lewis interview, Notebook 5, Tape III, p. 4.

[6] Interview with Seigenthaler, September 7, 1979.

Doar walked to the third floor, where FBI agents were observing and photographing the terminal below.

Meanwhile, a message had gone out over the police radio directing officers to stay away from the bus terminal, and the city police escort peeled away from the bus two blocks before it reached the terminal. A mob of more than three hundred whites descended on the bus when it arrived.

Doar reported to Kennedy over the telephone as the passengers came off the bus: "It's terrible. It's terrible. There's not a cop in sight. People are yelling 'Get 'em, get 'em.' It's awful."[7]

To Seigenthaler, "It looked like a teeming anthill. They were all over them . . . screaming, and raising hell, and beating the hell out of them. I circled back, came back down the other side of the street. There were three women [college students from Nashville], one black, two white, who got into a taxicab driven by a black man, who wouldn't take them as an integrated group. He said he could only take the black woman in a black taxi cab. The two white women had to get out. As I came down the street, a group of the mob surrounded them. There was an old, fat, gray-haired white woman with a pocketbook on a strap who was hitting this girl on the head, and a skinny kid in a white tee shirt was dancing backward in front of her like a boxer, punching her in the face. And the crowd was just delighted with it. I saw only the one girl. I blew hell out of the horn and bounced up on the curb. Everybody stopped and turned around. I jumped out, went around, grabbed her by the arm, and brought her back to the driver's side. At that point, I saw the second girl get in the back seat of the car. I pushed this girl in, got her almost under the wheel, and she stopped and said, 'Mister, don't do this. This is not your fight. You're going to get hurt.' And I said, 'Get in the car.' And she said, 'No, Mister, I'm non-violent. Don't worry about what they do to me. I don't want to get you hurt. You shouldn't get in this.' I said, 'Get in the goddamn car,' and tried to push her in the car, whereupon a couple of 'em wheeled me around and said, 'Who are you?' And I said, 'Get back. I'm a federal man.' "

That was the last thing Seigenthaler remembered. Someone

[7] Edwin Guthman, *We Band of Brothers* (New York: Harper & Row, 1971), p. 51.

smashed him over the ear with a lead pipe. Seigenthaler remembered nothing, not even hitting the ground. There he was kicked and beaten and finally kicked underneath the car. When he regained consciousness, a Montgomery police lieutenant had placed him, covered with blood, in the car. "Looks like you've got into some trouble," the officer said.[8]

Seigenthaler believed no one was killed only because Floyd Mann had rushed to the terminal when he learned what happened, pulled his gun, and fired several shots to begin breaking up the mob before the city police arrived in force.

Under the American form of federalism, police power—maintenance of law and order—is a state and local responsibility. Even in protecting federal rights, the federal government can step in only if that state demonstrates it is unable or unwilling to do the job. Immediately after the riot at the bus terminal on Saturday, a standby plan worked out by the Justice Department went into action.

That night, Doar drove from Montgomery to a lake cottage where Judge Frank Johnson was spending a fishing weekend. Doar arrived at 11:30 P.M. They sat across the kitchen table from each other, and Johnson carefully read the government's application for a temporary restraining order against several Alabama Klan groups. He gave the matter thoughtful consideration. He then signed the order and set the matter down for a prompt hearing. Doar recalled, "The atmosphere . . . was as businesslike as in his courtroom."[9]

The purpose of the Klan order was to prevent continued interference with interstate travel, and another order was directed at the Montgomery police's failure to provide protection for interstate travelers.

Because the federal government is authorized to enforce federal court orders, the issuance of these orders by Johnson provided authority to mobilize a force of six hundred federal marshals and agents from the Border Patrol and other federal agencies, who were deputized for marshal duty in Alabama under the direction of Deputy Attorney General Byron White.

The next night, Mann teamed up with federal marshals and an

[8] Interview with Seigenthaler, September 7, 1979.

[9] John Doar, in Introduction, Robert F. Kennedy, Jr., *Judge Frank M. Johnson, Jr.: A Biography* (New York: Putnam, 1978), p. 15.

unenthusiastic National Guard unit to break up a much larger mob that burned a car in front of the Dexter Avenue Baptist Church, where Martin Luther King and his followers were holding a mass rally, and threatened to burn the church with the Negroes inside. Robert Kennedy spoke by telephone to King to reassure him and to Patterson about the urgency of restoring order. King and his followers were unable to leave the church until after 4:00 A.M.

The Justice Department ultimately resolved the larger issue by petitioning and then exerting pressure on the reluctant and independent Interstate Commerce Commission to order an end to segregated facilities in interstate transportation terminals. The Justice Department petition of the ICC was itself an extraordinary act. Even after the ICC acted, it took federal court orders to achieve final compliance in Mississippi.

But the immediate problem after Montgomery involved getting freedom riders safely to Jackson, Mississippi, where they insisted on going. Former Governor J. P. Coleman, who had supported Kennedy in 1960 and later was appointed by Lyndon Johnson to the Fifth Circuit Court of Appeals, called Robert Kennedy and warned him that Governor Ross Barnett couldn't be trusted, that the riders would never reach Jackson alive.

For several days after the riot scene in front of King's church, Robert Kennedy held as many as a dozen daily telephone conversations with Senator James Eastland about what was going to happen when the freedom riders reached Mississippi. Despite his racist rhetoric that Robert Kennedy would acknowledge helped create a climate in which violence and terrorism became the ultimate expression of defiance, Eastland adhered strictly to the political code of the United States Senate, and he and the Kennedys developed a curiously respectful political and personal relationship.

Eastland finally assured Kennedy that there would be no violence, but that the riders would be arrested when they reached the terminal in Jackson. Kennedy, whose major concern was safety at this point rather than the right to travel freely in interstate commerce, trusted Eastland's assurances and in effect concurred in the arrests, knowing that eventually the convictions would be overturned.

At one point in the negotiations, the cynical Barnett invited Byron White to get on the bus and ride over to Jackson and have

dinner with him. "You'll have the nicest ride," Barnett said. "You'll be just as safe as you were in your baby crib."

New York lawyer William Kunstler made his first trip to the South, on behalf of the American Civil Liberties Union, to investigate the legal situation after the arrests in Jackson. Kunstler went unannounced to Governor Barnett's office in the state capitol, asked to see the governor on an urgent matter, and to his surprise was ushered in.

As Kunstler prepared to leave, Barnett stopped him and asked, "Just why are you mixed up with these troublemakers?"

Kunstler stammered out a cliché-filled explanation about brotherhood and equality, and Barnett gave him a quizzical look. "Mr. Kunstler, do you have any children?"

When Kunstler replied he had two daughters, Barnett's tone hardened. "Mr. Kunstler, what would you think if your daughter married a dirty, kinky-headed, fieldhand nigger?"

In his book *Deep in My Heart*, Kunstler reports that it was his turn to raise his voice. "I think that such a step would be her own responsibility. She has a right to select her own husband."

The governor looked stricken. "Mr. Kunstler," he roared, "that sounds like some of the Eleanor Roosevelt junk. If it were my daughter, I'd disown her."

When Kunstler tried to point out he didn't believe that marrying white women was the goal of Negroes involved in the civil rights movement, Barnett retorted, "That's all the niggers want. Besides there hasn't been a single society yet where they integrated and the society hasn't collapsed."

A few days after his visit with Barnett, Kunstler and Jack Young, a black lawyer in Jackson, filed a habeas corpus petition to remove the freedom rider trial to federal court. They were turned down by District Judge Sidney Mize and then, on appeal, by the Fifth Circuit in a case involving Dr. Elizabeth Porter Wyckoff, a graying woman in her forties who had taught Greek at Mount Holyoke College. She was the first white woman arrested in Jackson as a freedom rider and later worked on voter registration in southern Georgia.

Judge Tuttle felt absolutely frustrated in turning down her appeal. The applicable statute specifically provided that no relief could be granted by the federal courts until exhaustion of state

remedies. "At that time I said we have no assurance that the State of Mississippi will totally disregard constitutional rights of these people," Tuttle recalled years later. "Of course, I knew they would disregard it and of course they did. . . . There was just nothing that anybody could do about it. And so a clearly unjust arrest, an unjust eighteen months of litigation in the state court couldn't, as far as I could find, be avoided."[10]

Robert Kennedy's willingness to subordinate protection of federal rights to maintenance of order would return to haunt his Justice Department. Tacit approval of the arrests of the freedom riders when they reached Jackson avoided violence, but it signaled to Mississippi officials that they need not respect federally protected rights. By late August, almost four hundred riders had spent time in Mississippi jails and prisons, charged with provoking a breach of the peace. Almost four years passed before their rights were fully vindicated by the United States Supreme Court.

The experience of the freedom rides and the assault on Seigenthaler—the fact that the President's representative, a man seen daily in the halls answering correspondence and issuing statements in the name of the Attorney General, could have been killed—clearly affected attitudes in the Justice Department. The experience settled early the question of whether the federal government would be willing to commit troops, if necessary, to enforce civil rights. Only two months earlier, Kennedy had told journalist Peter Maas, "I don't think we would ever come to the point of sending troops." He believed then that the administration would not allow a situation ever to deteriorate to that point, that state officials would preserve order. On the night the mob threatened to burn King's church with the Negroes inside, federal troops were waiting in planes at nearby Fort Benning, Georgia, and were almost ordered to Montgomery.

When Robert Kennedy called on Eastland before confirmation hearings on his nomination as Attorney General, Eastland leaned back in his chair, his face wreathed in cigar smoke, and ruminated about the Department of Justice. He had got along with Attorney General Rogers, he said, but added: ". . . Did you know that he

[10] Interview with Elbert P. Tuttle, September 22, 1979.

never brought a civil rights case in the state of Mississippi?" With that Eastland winked broadly at Kennedy. Kennedy interpreted the wink as meaning (as he put it later) "that Bill Rogers hadn't met his responsibility and done his duty in Mississippi, and Jim Eastland felt a certain amount of contempt for him."[11]

(In fact, the Eisenhower Justice Department brought two suits in Mississippi, both filed in the week before President Kennedy's inauguration on January 20, 1961.)

Eastland had casually known Bobby Kennedy as a staff counsel for Senate committees, and for ten years had sat right in front of Senator John F. Kennedy, often turning around to talk in the Senate chamber. "He didn't know how to put proposals through Congress," Eastland said later of Kennedy as President. "We had him blocked." On the day President Kennedy was assassinated, Eastland was driving through the Shenandoah Valley of Virginia on his way to Mississippi when he noticed a flag at half-staff in a small town, and the same thing a little farther down the road. He switched on his radio, heard the news, turned his car around to head back to Washington, and said to his wife, "Good God, Lyndon's President. He's gonna pass a lot of this damn fool stuff."[12]

Schlesinger said that Robert Kennedy, "with his Irish weakness for rogues, liked Eastland . . . and Eastland evidently liked him, too." In Kennedy's words, Eastland "always kept his word, and he always was available, and he always told me exactly where he stood and what he could do and what he couldn't do. He also told me who I could trust and who I couldn't trust in the state of Mississippi." Kennedy added that Eastland "never made any effort to stop us from doing anything in the state of Mississippi, or try to impede anything that we did in the state."[13]

That may be a slight exaggeration. Nicholas Katzenbach, who succeeded White as Deputy Attorney General and then succeeded Kennedy after Johnson became President, got an angry call once from Eastland, who declared that civil rights workers were threatening to invade his four-thousand-acre plantation in Sunflower

[11] Arthur Schlesinger, Jr., *Robert Kennedy and His Times*, paperback ed. (New York: Ballantine, 1979), p. 252.

[12] Interview with James O. Eastland, November 14, 1980.

[13] Schlesinger, *Robert Kennedy*, p. 322.

County to register Eastland's Negro field hands. "That's private property, and you keep them out of there," Eastland ordered.

Katzenbach explained he had no authority to tell civil rights workers where they could or couldn't go, then advised Eastland he could solve the problem by getting everyone on his place—several dozen families—registered. "They'll all vote for you, anyway," Katzenbach said. Eastland pondered a moment, agreed it was a good idea, and said, "I'll do it today." When civil rights workers called the Justice Department the next day to give notice they were planning to go on Eastland's plantation and register his workers, Katzenbach advised them to first make sure they weren't already registered.[14]

After the freedom rides, the Kennedy Justice Department directed its efforts on voting registration and brought fifty-seven voting suits, thirty of them in Mississippi, including one in Eastland's Sunflower County.

Of all the people in the Justice Department, none got along better with Eastland—or understood him better—than Katzenbach, a humanistic former law professor and a bear of a man whose sense of humor and self-deprecating style offset an intellectual depth that otherwise would have been overpowering. An exceptionally skillful negotiator who could unblock an impasse by compromising language without sacrificing principle, Katzenbach believed Eastland didn't really care about race, that his only genuine interests were money and politics. Eastland regarded Katzenbach as his "buddy," and called him immediately after voting against his confirmation as Attorney General to succeed Kennedy under President Johnson. "That goddamn Javits!" Eastland exploded. "Asking for a roll call. Nick, you know I wanted you to be Attorney General."

Katzenbach replied, "That's all right, Senator. It's probably good for both of us."[15] Katzenbach understood Eastland's position. When Kennedy had introduced Burke Marshall to Eastland as his choice to head the Civil Rights Division and as "the man who is going to put the Negroes in your white schools in Mississippi,"

[14] Interview with Katzenbach, October 18, 1979.
[15] Ibid.

Eastland made it clear he would vote against him. As he put it, "I'd vote against Jesus Christ if he was nominated for that position."[16]

Despite what the Constitution says about presidential appointment of federal judges upon the advice and consent of the Senate, the selection process for district judges became turned around in the evolution of the unwritten political rules of the Senate. The Senators from each state, either by seniority or rotation if both belong to the same party, or otherwise by prerogative of the Senator who belongs to the same party as the President, initiate the selection process by "advising" who should be nominated. Although the administration can veto a Senator's choice, which allows room for negotiation, the Senate will withhold its "consent" and refuse to confirm a nominee for district judge whom a Senator from that state declares "personally obnoxious." Because of deference to the party in power, the administration's position is stronger when neither Senator belongs to the same party as the President. Under Eisenhower, no Republican Senators represented any southern state.

But other reasons also accounted for the much-criticized failures that marred the early record of the Kennedys in picking federal judges in the deep South—the states within the Fifth Circuit. As Navasky points out in *Kennedy Justice*, Robert Kennedy learned from mistakes and after early 1962 "he nominated no more judicial disasters." But considerable damage already had been done by then.

With Robert Kennedy's background limited to politics and government service in Washington and John F. Kennedy a non-lawyer and product of the Senate, they accepted the realities of the system. The political realities—having to deal with Congress at a time when the seniority system was at its peak and dominated by southern Democrats committed to the defense of segregation, either because of conviction or their perception of political reality at home—ruled out any thought of challenge to the system by the Kennedys.

But the Kennedys also failed to recognize that judgeships are

[16] Schlesinger, *Robert Kennedy*, p. 310.

qualitatively different from other forms of patronage. Federal judges—who serve for life—determine individual rights and the quality of justice in America. In addition, in a broad range of economic issues, matters of intergovernmental relations, and the entire system of criminal justice, few positions match the potential power of a federal judge in shaping public policy. For an administration that recognized civil rights as a moral issue and adopted a strategy built around litigation, the power and discretion of obstructionist district judges to delay and erect procedural roadblocks could and did dissipate tremendous amounts of energy, waste thousands of man-hours by Justice Department lawyers, and divert attention of the best minds from the larger issues that were involved.[17]

"By temperament," wrote Navasky, "Robert Kennedy was an activist who tended to regard the bench as a sort of premature retirement. He simply *assumed* that top talent would be most interested in the active life of the executive branch. It never occurred to him to have Byron White and his deputies mount a talent hunt for judges the way he got Sargent Shriver . . . to mount a talent hunt for New Frontiersmen. Judge-picking was more of a processing than a searching operation." Kennedy had difficulty understanding why White would give up the action of Deputy Attorney General for an appointment to the Supreme Court.[18]

The Kennedy style and commitment to civil rights contrasted with the policy of President Eisenhower. According to Katzenbach, "Bobby . . . always said that Eisenhower did that one courageous act [used federal troops at Little Rock] and that was the last thing he was heard of in civil rights. Which is about right."[19]

But it is a mistake to dismiss the Eisenhower record on civil

[17] The most cited comparison of Eisenhower and Kennedy appointments to Fifth Circuit judgeships, a Yale dissertation by Mary Curzan, concludes that Eisenhower appointed five segregationists, eight moderates, and two integrationists and that Kennedy appointed five segregationists, three moderates, and eight integrationists. Because she includes Frank Johnson among the Eisenhower "segregationists" and fails to include one of The Four among the "integrationists," the classifications seem to have little meaning.

[18] Navasky, *Kennedy Justice,* pp. 255, 256.

[19] Interview with Katzenbach, October 18, 1979.

rights with the justified criticism of his failure to exert moral leadership or openly support the Supreme Court decision in *Brown*, about which he privately indicated his disapproval to Earl Warren.[20]

Eisenhower's attitude was reflected in his response to a reporter who asked in 1956 if he would care to use his "tremendous reservoir of good will among the young people" and advise them how to conduct themselves when segregationists were organizing student boycotts as a few border-state school districts were about to open for the first time on an integrated basis. The President responded: "Well, I can say what I have said so often: it is difficult through law and through force to change a man's heart. . . . We must all . . . help to bring about a change in spirit so that extremists on both sides do not defeat what we know is a reasonable, logical conclusion to this whole affair, which is recognition of equality of men."[21]

But when Eisenhower talked about extremists, he seemed to equate the NAACP, which was seeking to vindicate constitutional rights established by the Supreme Court, with the Citizens Councils, the "respectable" segregationists seeking defiance of the Supreme Court's decisions. Eisenhower failed to understand that the law itself and changes made under it give legitimacy to the social order that follows and bring about a change in attitudes. In Montgomery, for example, white bus passengers changed their attitudes after they changed their seats.[22]

Burke Marshall understood the point very well. "But laws *can* change the hearts of men," he would say, stressing that it was the law that set the climate that made change possible. Just as important was its enforcement. "Knowledge that the law is going to be enforced is vital. Very often that knowledge alone makes conciliation possible."[23] The very significant Kennedy administra-

[20] See Earl Warren, *Memoirs* (Garden City: N.Y.: Doubleday, 1977), p. 291.

[21] Transcript, President's news conference, September 5, 1956.

[22] J. W. Peltason, *58 Lonely Men* (Urbana, Ill.: University of Illinois Press, 1971), pp. 46–47.

[23] Quoted in Walter Lord, *The Past That Would Not Die* (New York: Harper & Row, 1965), p. 119.

tion record of conciliation, quietly working to get local officials and community leaders to take the initiative to work out problems, largely went unrecorded. Conflict makes news, but removal of conflict seldom is noticed.

Although Eisenhower felt no passion about civil rights, significantly he yielded to his first attorney general, Herbert Brownell, who did. A Wall Street lawyer in his mid-fifties with a strong background in liberal Republican politics when he became Attorney General after managing the Eisenhower campaign, Brownell possessed a quiet commitment to civil rights that rivaled that developed by the Kennedys. Brownell's Justice Department asked the Supreme Court in *Brown II* to order all segregated school districts to submit a desegregation plan within ninety days or face a judicial order for immediate integration. The order for "all deliberate speed," Brownell believed, "was almost an invitation to stall and delay. . . . We felt that it would take time under the best of circumstances and with lots of court fights and so forth, but we felt the important thing was to get started and get all the plans in and . . . before the court at the same time. It would have been a much better enforcement program."[24]

Whatever the federal role, realistically the ultimate burden in challenging the intractability of the deep South would fall on Negroes. A few months after the Supreme Court handed down its "all deliberate speed" order, NAACP lawyers Thurgood Marshall and Robert Carter wrote: "In short, we must face the fact that in the deep South, with rare exceptions, desegregation will become a reality only if Negroes exhibit real militancy and press relentlessly for their rights. And this would have been the situation no matter what kind of decision the Court had handed down."[25]

The question was what role the executive department would play. Solicitor General Simon Sobeloff, a liberal Republican from Baltimore, had assured the Supreme Court in 1955 that in addition to the judiciary's role in achieving compliance, "Every officer and agency of government, federal, state, and local, is likewise charged

[24] Interview with Herbert Brownell, October 17, 1979.

[25] Quoted in Lester B. Granger, "Some Suggested Next Steps In Furtherance of Desegregation In Education," *Journal of Negro Education*, 24 (1955), p. 397.

with the duty of enforcing the Constitution and rights guaranteed under it."[26]

Brownell contended the Justice Department could intervene in suits only if requested by school authorities or the judge after a court order was issued, and he sought additional authority. He initiated and then maneuvered the Eisenhower administration into a position of having to support what became the Civil Rights Act of 1957, the first civil rights act this century.[27] It created the Civil Rights Commission, provided for a Civil Rights Division in the Justice Department and a new Assistant Attorney General to head it, and for the first time gave the Justice Department specific authority to intervene in cases of voting discrimination.

But the new Civil Rights Act failed to retain the strongest element from Brownell's original drafts. After Eisenhower's apparent withdrawal of support at a press conference, the Senate deleted Title III, which would have authorized the Attorney General to initiate school desegregation suits and to seek court injunctions against other forms of discrimination. (Among those supporting Title III was Senator John F. Kennedy.)

In 1960, a second Civil Rights Act under the Eisenhower administration extended authority to intervene in cases of voting discrimination. The acts codified basic recommendations made by the President's Committee on Civil Rights that President Truman appointed in 1947, but whose report, "To Secure These Rights," had gone unheeded.

Brownell believed that Eisenhower should be judged by deeds and not words. The Eisenhower administration desegregated the District of Columbia, including the public schools, extended desegregation of the armed forces that had begun under President Truman, and created the President's Committee on Government Contracts to enforce a nondiscrimination clause, the committee on which Wisdom served.

"When the showdown came and he had a good case for intervening," Brownell said of Eisenhower, "he intervened in a way

[26] Supplemental Memorandum for the United States on the Further Argument of the Question of Relief, *Brown* v. *Board of Education*, filed April 21, 1955 (quoted in J. W. Peltason, *58 Lonely Men*).

[27] For Brownell's role, see J. W. Anderson, *Eisenhower, Brownell, and the Congress* (University, Ala.: University of Alabama Press, 1964).

that broke the back of the southern resistance [at Little Rock]. . . . He was not belligerent about it in the sense that he should blast all the time. That was part of his technique and he knew it was a very, very serious social problem, one that had been created by a previous Supreme Court decision [Plessy] on which southern states had built their social system, and that it was not going to be cured overnight. The events proved him right. . . . But he never had the idea that it would be settled socially by anything that he could do except sort of an Abraham Lincoln approach trying to bind up the wound as much as you could, but maintain the supremacy of the federal government and enforce the law. I think it was, given the conditions at that time, the right kind of leadership to exercise."[28]

Brownell had planned to leave the administration and return to private practice before Little Rock, but events there delayed his departure. When he left, he said the government's position had now been clearly defined "in this case and future cases." Eisenhower failed to follow up after sending in troops. The new Attorney General, William Rogers, disclosed there would be no prosecution of those who led the riots. This bolstered those preaching defiance. Segregationist Federal Judge Harry J. Lemley the next year agreed to a request by school officials that they be allowed to resegregate because of the disorder created by illegal interference by Governor Orval Faubus and other state officials. At a White House press conference, Eisenhower said nothing to dispel rumors in Washington that he regretted the *Brown* decision; he felt the Court should allow southern communities to move more slowly and agreed with Judge Lemley's decision.

The next day, August 28, 1958, the Supreme Court met in a rare special session to hear the case, *Cooper* v. *Aaron*. In an unprecedented move, each of the Justices, including three who had come on the Court since *Brown* was first decided, individually signed a forceful and powerfully written opinion striking down Lemley's order. The Supreme Court placed blame for the disorder on the governor and state legislature and declared that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

[28] Interview with Brownell, October 17, 1979.

Justice Frankfurter bluntly declared in a concurring opinion that granting the delay would have meant that "law should bow to force. To yield to such a claim would be to enthrone official lawlessness. . . . For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but to the presuppositions of a democratic society."

Eisenhower, as usual, made no comment about the Supreme Court opinion, its last major statement on school desegregation for another decade. Eisenhower's policy of nonintervention and his plea for "understanding" of the South's problems encouraged resistance at the state and local level and undercut southern moderates, who were urging the region to move along because the law required it.

However, with its record in support of *Brown* before the Supreme Court, desegregation of the District of Columbia and the military, the committee on government contracts, the 1957 and 1960 Civil Rights Acts, and intervention in Little Rock, the Eisenhower administration's deeds did outperform his words. He viewed his judicial appointments as more than an extension of political patronage. From the beginning, Brownell emphasized to Eisenhower the importance of quality in selecting judges, and he easily persuaded him.

After the school desegregation decision, Brownell said, "We definitely . . . tried to appoint judges who would be fair-minded and didn't have a record of pro-segregation support. . . . In many cases, I didn't accept senatorial recommendations in the southern states."[29]

Eisenhower came to the White House uninfected by intimacy with the mores of senatorial courtesy, and his appointment of Solicitor General Sobeloff to the Fourth Circuit Court of Appeals, which includes Virginia and the two Carolinas, provided the greatest contrast with the Kennedy administration's acceptance of the traditional way of doing business with the Senate. Although strongly backed by two Republican Senators from Maryland, the liberal Sobeloff ran into strong opposition from all southern Senators. Judiciary Chairman Eastland said of Sobeloff: "The

[29] Interview with Brownell, October 17, 1979.

kindest thing that can be said about the nominee is that he is on the borderline of Red philosophy."[30]

Southern Senators charged that Eisenhower violated time-honored custom by choosing a judge from Maryland, when by rotation it was South Carolina's turn for an appointment. (The next appointment went to South Carolina's Clement F. Haynsworth, a Harvard Law graduate and member of one of the state's distinguished families. Although Haynsworth was later rejected for the Supreme Court, a victim of the political fallout from rejection of Justice Abe Fortas as Chief Justice, Haynsworth's record on civil rights basically was that of a centrist.) Sobeloff's nomination languished for a year in the Judiciary Committee. On the Senate floor, all six Senators from the Carolinas and Virginia declared the nominee "personally obnoxious," but Sobeloff's ultimate confirmation clearly demonstrated that although unpopular appointments required a struggle, the political code of the Senate recognized presidential prerogative to select circuit court judges.

In the transition with the Eisenhower administration, the new Justice Department learned from Attorney General Rogers that, unlike district judgeships, the final prerogative in selecting circuit court judges rests with the administration.

On May 20, 1961, President Kennedy signed the Omnibus Judgeship bill and asserted: "I want for our courts individuals with respected professional skill, incorruptible character, firm judicial temperament, the rare inner quality to know when to temper justice with mercy, and the intellectual capacity to protect and illuminate the Constitution and our historic values. . . ."[31]

The bill created seventy-one new judgeships, including two on the Fifth Circuit Court of Appeals, and the president's soaring rhetoric soon produced hollow echoes. Speculation quickly arose that Skelly Wright might get elevated to the Fifth Circuit Court of Appeals, a suggestion that infuriated Eastland, who had helped keep the judgeship bill bottled up until a Democratic administra-

[30] Peltason, *58 Lonely Men*, p. 24.
[31] Navasky, *Kennedy Justice*, p. 244.

tion came to power and who let the Justice Department know he was adamantly opposed. Senator Russell Long bluntly told the Kennedys he couldn't win reelection the next year if Wright went to the circuit court in New Orleans.

Tuttle meanwhile urged the Justice Department to promote Wright. Burke Marshall sent the Attorney General a memo recounting a conversation with Tuttle, who said, "We need him. He'd be a great boost to those of us on the Fifth Circuit."[32]

That fall, Wright—who knew the odds against him and understood that political reality would force strong opposition from southern Senators—received a call at home from Robert Kennedy. They had never spoken to each other before. Wright recalled, "He said, 'I've been holding up two nominations to the Fifth Circuit, hoping I could put you in one of them. I've been holding them up for six months. I checked again with the Senators, and it's impossible.' I said, 'I respect your judgment.' "

In an interview, Wright added, "Maybe I should have said, 'Why don't you fight the bastards?' But I just said, 'I respect your judgment.' Politically, they needed some votes in the Senate. And that was the end of it."[33]

A few months later, Wright got a call on a Friday from Byron White, who told him, "Barrett Prettyman [judge of the U.S. Court of Appeals for the District of Columbia] is going to announce he's taking senior status on Tuesday. The President wants to announce that you're going to be his replacement at the same time." It was the first Wright had heard of it. The plan provided a political solution that would recognize Wright's performance with a promotion, offend no southern Senators, and in fact please them by removing him from the South.

Not long after the announcement of Wright's appointment, Robert Kennedy met for lunch with the law clerks at the Supreme Court. Hugo Black's clerk, who the year before had clerked for Rives on the Fifth Circuit, expressed strong disappointment to the Attorney General about not appointing Wright to the Fifth Circuit. The clerk believed the administration could overcome any objec-

[32] Interview with Seigenthaler (who as Robert Kennedy's administrative assistant saw the memo), September 7, 1979.

[33] Interview with Wright, January 15, 1979.

tions if they were willing to fight and knew that Black, a former Senator and a friend and admirer of Wright's, shared those views.

Just before leaving New Orleans, Wright on April 9, 1962, issued a final order speeding up the pace of school desegregation in the city. After almost two years, only twelve Negro children had been transferred, despite two hundred applications. In addition, more than 5,500 Negro elementary children were on double sessions because of overcrowding, while white schools had empty classrooms. The average pupil-teacher ratio in the Negro schools was 36:1, compared with 26:1 in the white schools. Wright ordered that all children in the first six grades be allowed to choose either the white or Negro school nearest their residence.

His successor, Judge Frank Ellis, promptly cut back the order to first-graders only.

In August, a Fifth Circuit panel of Wisdom, Brown, and Rives modified the Ellis order. Wisdom wrote the opinion, which reflected the uncertainty in the minds of the judges during a period of transition in the law of school desegregation. Wisdom recognized the difficulties faced by the school board and their "reputation for strength and character" in the face of "economic reprisal and personal recrimination" from the community.

His opinion ordered that second- and third-graders be given an opportunity to transfer and that desegregation apply to the first five grades by 1964 to conform with Wright's original grade-a-year plan. Overcrowding was relieved by converting three former white elementary schools to Negro schools.

Although Wisdom agreed with both Wright and Ellis that the Pupil Placement Act had been applied unconstitutionally, he overruled them and said, "At this stage in making the difficult adjustment to a non-racial school system it is too early to throw the Pupil Placement Act overboard. . . . It is better to keep desegregation procedure flexible." Further experience would show that school boards throughout the South would at best use the pupil placement acts as devices that gave the appearance of legitimacy to desegregation plans that failed to produce results. Wisdom's hope for legitimate use of the pupil placement acts never materialized.

After Wright went to Washington, he returned on occasion to

sit as a visiting judge with the Fifth Circuit Court of Appeals. His action in a 1964 case, *Lefton* v. *City of Hattiesburg, Mississippi*, suggests what his appointment to the Fifth Circuit would have meant. The panel on which Wright was sitting—with Bell and Rives—received an emergency motion involving forty civil rights workers engaged in a voter registration drive who were arrested two days after the Mississippi legislature passed an anti-picketing statute. District Judge Sidney Mize turned down their petition to remove the case from state to federal courts in part because none of their attorneys was a member of the bar of the Southern District of Mississippi.

When the emergency motion came to Wright's attention, he thought it outrageous that a person could be deprived of his choice of lawyers in a federal court. He wrote an opinion holding that the district court rules "may not be allowed to operate in such a way as to abridge the right of any class of litigants to use the federal courts or to deny the Sixth Amendment right of criminal defendants to counsel of their choice." Rives agreed with Wright's opinion, and Bell wrote a separate concurring opinion that expressed caution about removing cases from state courts.

The case reflected Wright's entire judicial career, throughout which he reacted to issues of constitutional protection of fundamental civil rights with the same controlled passion as The Four.

For the two Fifth Circuit openings created by the Omnibus Judgeship Act, Kennedy appointed Griffin Boyette Bell, his forty-three-year-old state campaign manager in Georgia, and fifty-two-year-old Walter Pettus Gewin of Alabama.

In line for one vacancy was Marc Ray (Foots) Clement, Kennedy's state campaign manager in Alabama, who practiced law in the university town of Tuscaloosa, where he served as mentor to bright, progressive, and politically ambitious young men at the University of Alabama. Clement died unexpectedly, and reportedly his deathbed wish was that the judgeship go instead to his law partner, Walter Gewin.

A quiet, patient, unassuming man who lived in a modest frame house in a middle-class neighborhood, Gewin had served as president of the Alabama Bar Association and once served a four-year term in the state legislature. Senators Lister Hill and John

Sparkman were the kind of men to whom fulfillment of a deathbed wish from a loyal friend and supporter would be a point of honor. And by 1961, each was a powerful senior member of the Senate.

Louis Oberdorfer, the Assistant Attorney General in charge of the Tax Division, was sent to Alabama to check out Gewin and was told specifically to check only his legal competence and reputation as a lawyer.[34] Oberdorfer, a former clerk to Justice Black, was a native of Alabama who often was called on to assist in civil rights crises and also to help check out the backgrounds of southern judicial nominees. It was clear Gewin would be appointed unless there were professional flaws, and there were none. The Justice Department did check with Rives, who supported the nomination. Gewin was no racist, but it took time for him to develop a sensitivity to the injustice of racial discrimination. He went on the court with a strong belief in the good faith of state and local officials and a conservative view of judicial restraint and procedure in dealing with civil rights matters that segregationists like Eastland appreciated.

Gewin, whose writing style at times flashed with eloquence, became an unusually thorough legal researcher, in part because of a Depression-era scholarship to Emory University, where he spent a year of graduate study in library science, before returning to the University of Alabama for law school. Unlike Cameron, Gewin avoided shrillness, but his early dissents reflected conservative instincts shared by Cameron, and Gewin at times took sharp issue with strongly worded Fifth Circuit reversals of district judges.

Although characterized in his early years as one of Kennedy's segregationist appointees, a turning point for Gewin came in *Miller* v. *Amusement Enterprises*, a landmark decision he wrote that extended the reach of the public accommodations section of the 1964 Civil Rights Act. In strong, simple prose, Gewin sketched the facts almost in the form of a short story:

"Mrs. Miller, in response to Fun Fair's advertisement that 'Everybody come,' took her two children, Daniel age 12 and Denise age 9, to the park to ice skate. At the skate rental counter she asked for skates for Denise, who has a fair or light complexion, and the attendant, thinking the little girl was white, promptly handed

[34] Interview with Louis Oberdorfer, September 17, 1979.

Mrs. Miller a pair of skates. Daniel, dark-complexioned, who had been sent back to the Millers' car for heavy socks, then joined his mother and sister. The rented skates were soon discovered to be too small and Mrs. Miller returned to the rental stand and placed two skates on the counter. In the meantime the attendant had discovered that the child was Negro and he left the skate room to inform the manager of the situation. As the manager approached the counter, Mrs. Miller stated to him that the skates did not fit. The manager snatched the skates off the counter and announced to Mrs. Miller that Fun Fair did not 'serve colored.' The people standing in line waiting to rent skates began to giggle, and Denise, frightened and disappointed at not being allowed to skate, started crying. As Denise stood there crying others in line appeared to be amused. Mrs. Miller and her children quickly left the park."

Gewin said later, "I don't think anybody could read the facts without being deeply touched. If it had been a grown person I don't think it would have affected me nearly as much."[35]

From a personal intolerance of mistreating children, Gewin developed sensitivity to the injustice of racial discrimination. In school cases, Gewin felt it very important that school boards "have the feeling they are listened to." He eventually joined in what became the liberal wing of the court in important school cases in the early 1970s. Years later, after both had taken senior status but still sat regularly on panels, Gewin joined Wisdom for lunch one day in New Orleans. "You know, John," Gewin said, "I've come a long way." Wisdom agreed he had.

As a judge, Gewin drank coffee regularly at a Tuscaloosa café with a blue-collar clientele, because he believed working people and judges needed to see one another, and he also personally picked up mail from his post office box. There he noticed a man he didn't know who glowered menacingly at him daily.

Gewin worried that an embarrassing incident might develop and one day called Judge Rives for advice. Gewin expressed concern that "suppose the man calls me a no-good son of a bitch"—fighting words in Alabama.

Rives replied, "I know it will be hard for you to do, but I'd

[35] Interview with Walter Gewin, May 27, 1979.

just say, 'I disagree with you, brother'—and get in that elevator as fast as you can."[36]

Gewin and Bell often kidded each other about the respective merits of Alabama and Georgia. At a Fifth Circuit Judicial Conference soon after the *Miller* case, Gewin remarked to Bell that he was from Nanafalia, Alabama.

"Why Walter, I had no idea you were from Nanafalia," Bell said. "I'd never heard that."

"You know, Griffin," replied Gewin, "the more you learn, the more tolerant you will become."

Bell was an easy choice for the Kennedys. He had served as Georgia state campaign manager for them and, as Governor Ernest Vandiver's chief of staff, had helped devise the strategy by which the state of Georgia moved toward relatively peaceful acceptance of school desegregation. Vandiver had campaigned on a slogan of "No, not one," meaning no Negroes would be allowed to attend school with whites in Georgia. Bell also worked to ease the admission of the first black students at the University of Georgia just days after President Kennedy's inaugural. A few months later, Robert Kennedy called Bell to give him notice that Kennedy would be making a Law Day speech at the University of Georgia, and that Bell might want to plan a trip out of state. Instead, Bell handled arrangements for Kennedy's visit, met him at the Atlanta Airport, and joined him on the podium.

It was Kennedy's first speech as Attorney General and the first by any Attorney General in the South on the subject of civil rights. To his astonishment, the audience applauded when he defended the Supreme Court school desegregation decision as "the law" and declared that "if the orders of the court are circumvented, the Department of Justice will act. We will not stand by and be aloof."

In addition to his own political claim, Bell's nomination to the Fifth Circuit was sought by Vandiver, who had done a very big favor in the campaign after earlier bringing together a group of moderate southern governors to organize for Kennedy.

In Robert Kennedy's oral history interview with Lewis, he revealed that Vandiver had played a key role in one of the most

[36] Ibid.

important political episodes of the campaign, the release of Dr. Martin Luther King, Jr., from jail, where he was being held without bond after an arrest for a driving violation. "Someone called me from Georgia and said the governor would like to speak to me," Kennedy told Lewis.[37]

John F. Kennedy had made a telephone call at 6:30 that morning to Vandiver, waking him, and asked if there was anything the governor could do to get King out of jail, that it would be "of tremendous benefit to me if you could." The election was tight, and there were reports of a significant shift toward the Republicans among black voters. Vandiver agreed to try. He managed to arrange the release through an intermediary who was a close personal friend of both the governor and the judge who had jailed King. Unable to locate John Kennedy on the campaign trail, Vandiver called Robert.[38]

Robert Kennedy called the judge, then immediately notified his brother so that he could call Mrs. King. John Kennedy made a well-publicized call to express his concern and tell her he was working on getting her husband released, and he received credit among black voters when King was released a few hours later.

After the election, Vandiver wrote President Kennedy, urging the appointment of Griffin Bell to the Fifth Circuit, and coordinated support for him by both of Georgia's senators.

A native of Americus, a small city in southern Georgia, Bell served as an Army transportation officer in World War II, then attended Mercer Law School in Macon and began practicing in Savannah in 1948, five years before joining King and Spaulding as a partner. Later, he brought in another talented and even more soft-spoken southern-Georgia lawyer, Charles Kirbo, who became chief advisor to a later governor, Jimmy Carter. When Bell retired after fifteen years on the circuit court and returned to King and Spaulding early in 1976, Wisdom believed the reason was to work in Carter's presidential campaign, with an eye to becoming Attorney General and possibly a Supreme Court Justice.

Robert Kennedy viewed Bell as a moderate who would enforce the Supreme Court's decision on civil rights. When Bell was

[37] RFK, in Lewis interview, Notebook 5, Tape I, p. 5.
[38] Interview with Ernest Vandiver, June 20, 1980.

nominated for Attorney General, a highly critical analysis of his record on school desegregation and other civil rights matters was compiled by the southern regional office of the American Civil Liberties Union in Atlanta, but was toned down by the national ACLU before its submission to the Senate Judiciary Committee. Although Bell came under heavy fire from Senate liberals before his confirmation, he significantly received support from the new Judiciary Committee chairman, Senator Edward Kennedy, who had his staff carefully check to confirm Bell's role when Robert Kennedy spoke at the University of Georgia.[39]

A dominating and forceful personality who possessed administrative ability, political skills, an innovative mind, a quietly combative spirit, and a seeming lack of ideology, by the end of the 1960s Bell had emerged on the Fifth Circuit as the leader of a conservative bloc that frequently clashed on school desegregation issues with a liberal wing led by Wisdom. Although Bell retained strong reservations about "busing" as a tool for desegregation, his Justice Department supported busing plans before the Supreme Court in the important Dayton and Columbus cases in 1979. As a judge, Bell basically seemed to believe that *Brown* required that Negro children be allowed to freely attend school with whites, but not an affirmative duty of school boards to create attendance zones that would ensure integration.

On the other hand, Bell in the 1960s persuaded reactionary District Judge Frank Scarlett to join him in an innovative desegregation order that placed a rural school district in Georgia in receivership after the school board failed to act on desegregation. When the press reported what the judges had done, Scarlett attempted to find out if he could remove his name from the order. That order served as a model for the controversial plan ordered by District Judge Arthur Garrity for Boston schools almost a decade later.

Bell's capacity for manipulating others earned him a reputation as a wheeler-dealer on the court, but he also demonstrated a masterful ability to accommodate competing interests. When the Supreme Court ordered immediate midyear massive integration plans in thirty Mississippi school districts in 1970, Judge Brown

[39] Confidential interview.

assigned Bell to direct the operation. He spent weeks bringing civil rights lawyers, school board attorneys, and school superintendents together to work out detailed plans, and he drew praise from all sides.

As Attorney General, Bell appointed a black court of appeals judge, Wade H. McCree, as Solicitor General and a black Inc. Fund lawyer, Drew Days III, to head the Civil Rights Division, and he worked with President Carter on a systematic effort to appoint the first black federal judges throughout the South.

Bell and Gewin both began service on the Fifth Circuit on October 6, 1961, with interim appointments so they could begin work on the overloaded backlog of cases. But their appointments would not become final until after confirmation hearings by the Senate Judiciary Committee and approval by the Senate the following March. At an initial meeting with Tuttle, Bell suggested that the sensitivity of race cases was such that they might create problems for Gewin at the confirmation hearings.

Tuttle agreed and said he would not assign such cases to Gewin until after confirmation and for the same reason would also withhold such assignments from Bell.

The first Kennedy appointment to a district judgeship, and one that would become the most notorious, was that of Eastland's good friend in Mississippi, W. Harold Cox. *The New York Times* noted in a 1965 "Man in the News" profile that Cox had been Eastland's college roommate, a relationship that subsequently has been widely reported. In fact, he wasn't.

Their fathers had been friends and political allies in Sunflower County, where Cox's father was sheriff and Eastland's a prosperous planter. Cox attended Tulane University, but entered law school at the University of Mississippi. He and Eastland, then an undergraduate at Ole Miss, were friends there, but never roommates.

In Eastland's first race for the Senate, the story is told in Jackson that Cox met with Eastland, opened his checkbook, said he needed enough to pay his rent and that the balance was available for the campaign. Even if apocryphal, the story accurately portrayed their relationship. Cox for years served as Hinds County (Jackson) Democratic chairman and established a solid profes-

sional reputation as a corporate lawyer. Cox had known for years that Eastland would appoint him to a judgeship the first chance he got, and because of his role in holding up the Omnibus Judgeship bill until after Kennedy's inauguration, Eastland felt entitled to the first appointment.

Some two dozen Mississippi lawyers and judges gave Cox high marks in American Bar Association interviews. Lawyers respected by review chairman Leon Jaworski were convinced that Cox would be fair-minded. Bernard Segal of Philadelphia, a liberal Republican who was the very active national chairman of the ABA Judicial Selection Review Committee, personally flew to Jackson to meet with Cox, who had never joined the Citizens Council or established any public record on civil rights issues. After lunch with Cox, Segal was sufficiently disturbed about Cox's racial views that he called Robert Kennedy to express deep concern.[40]

At Segal's suggestion, Kennedy invited Cox to Washington and questioned him about his willingness to enforce the Constitution as interpreted by the Supreme Court. "He assured me that he would," Kennedy said later. "He was the only judge, I think, that I had that kind of conversation with. He was very gracious; and he said that there wouldn't be any problem. . . . I was convinced that he was honest with me, and he wasn't."[41]

Kennedy apparently remained uneasy about appointing Cox as a district judge, a role that in southern Mississippi would be crucial to the whole strategy of the Kennedy administration in dealing with civil rights. At Kennedy's direction, Byron White asked Eastland to find out if Cox would be interested in the Fifth Circuit Court of Appeals, and Eastland called him from the Attorney General's office.[42] Cox, who knew where the action was, said he didn't want the appeals court appointment. He wanted to stay in Mississippi as a trial judge.

In 1955, when Eastland had suggested both Cox and District Judge Sidney Mize for the Fifth Circuit seat that went to Cameron, they were rejected by William Rogers, then Deputy Attorney

[40] Interview with Bernard Segal, November 2, 1979.
[41] Schlesinger, *Robert Kennedy*, p. 331.
[42] Interview with Eastland, November 14, 1979.

General. "There was nothing in his [Cox's] record to cause you to have any concern," Rogers later explained. "My concern was based on the fact that Jim Eastland was so eager for him."[43]

The most prescient observation made at the time of Cox's appointment came from Roy Wilkins, executive secretary of the NAACP, who warned, "For 986,000 Negro Mississippians, Judge Cox will be another strand in their barbed wire fence, another cross over their weary shoulders and another rock in the road up which their young people must struggle."[44]

But with nothing adverse in Cox's record, a major fight by the Kennedys with the chairman of the Judiciary Committee clearly seemed unwarranted. There was nothing to suggest that once on the bench, Cox would become equally infamous for his vituperation as for his notoriously bad record on civil rights. In three fourths of his civil rights cases, he was reversed. Cox for two decades compiled an unmatched record of judicial conduct that not only obstructed civil rights progress in Mississippi, but undermined respect for the federal courts.

Cox, who once referred to Negroes seeking to register to vote as "acting like chimpanzees" and characterized litigation by black teachers trying to protect their jobs as "colored people's antics," as recently as the mid-1970s engaged in the following colloquy with a Jackson police officer in a trial in which white policemen admitted their use of the term "nigger."

Cox: "In the past have you ever heard somebody say he's a good nigger?"

Capt. Bennett: "Yes sir."

Cox: "Is there any animosity in that?"

Capt. Bennett: "No sir, it's a different thing."

Cox: "I never could see it, I mean that's the way it used to be with me, I'll tell you that. I'm just like these officers, I don't use it now and haven't in many years. I was told after I got on the bench that that was derogatory and I quit it—tried to."

Before the end of the 1970s, Cox's performance had become embarrassing even to Eastland, who reportedly sent an emissary to

[43] Interview with William P. Rogers, July 18, 1979.

[44] Navasky, *Kennedy Justice*, p. 251.

suggest to Cox that he take senior status, a suggestion Cox rejected.[45]

However, Cox did take pride in his role of presiding over the trial in which the murderers of three civil rights workers in 1964 were convicted of federal civil rights violations. At breakfast in a motel restaurant one day, Cox approached W. F. (Bill) Minor, the nationally respected veteran Jackson bureau chief for the *New Orleans Times-Picayune*, and asked Minor if he knew any of the jurors. Minor mentioned one who worked for a state agency, a man whose integrity he respected. Cox appointed the man foreman of the jury later that day.

Cox later told civil rights lawyer Mel Leventhal in an informal discussion about the case: "Those guys went too far. If they had beat up those civil rights workers, I could have understood. But killing them—they went too far. They had to go to jail."[46]

Soon after Cox went on the bench, Tuttle visited Jackson for a three-judge district court hearing and for the first time confronted the huge mural behind the bench of the Negroes picking cotton and strumming the banjo for the white masters. Cox and others wanted the Fifth Circuit to schedule regular hearings of cases in Jackson, where Fifth Circuit panels did not sit because of the proximity to New Orleans. Tuttle considered the mural's heavy symbolism inappropriate to the neutrality of a courtroom, especially one in which Negroes would be seeking vindication of constitutional rights. He told Cox the Fifth Circuit would not meet in Jackson with that painting on the wall behind the judges. Cox had it covered, and it remained so as long as Tuttle was chief judge.

Tuttle once remarked about Robert Kennedy's meeting with Cox, "The trouble with that interview is that they were talking different languages. When Bobby asked him if he would uphold the law of the land, he was thinking about *Brown* v. *Board of Education*. But when Cox said yes, he was thinking about lynching. When Cox said he believed Negroes should have the vote, he meant two Negroes."[47] The Cox interview, as well as the one Rogers had

[45] Carol Caldwell, "Harold Cox: Still Racist After All These Years," *The American Lawyer*, July 1979, p. 29.

[46] Interview with Mel Leventhal, July 18, 1979.

[47] Navasky, *Kennedy Justice*, pp. 250–251.

with Cameron earlier, suggests that the lack of familiarity with the South may have resulted in failure to ask the right questions. Had they asked Cox and Cameron their view of states' rights—a code word for segregation among more sophisticated white southerners at the time—the Justice Department might have gotten a better idea of what to expect from the Mississippians.

With nothing in the record against Cox and with Kennedy's failure to probe deeply into why Cox came so highly recommended by Eastland, the Kennedys were trapped by the system, especially when Eastland's Judiciary Committee soon would be asked to pass its approval of NAACP chief counsel Thurgood Marshall to the Second Circuit Court of Appeals.

Several former officials in the Kennedy Justice Department attributed some of the initial bad selections in part to the faith of Deputy Attorney General Byron White in the integrity of lawyers. White apparently felt that a professionally respected and competent lawyer, if appointed to the federal judiciary, would carry out the laws as a matter of professional integrity, regardless of personal belief or philosophy.

With time the Kennedys learned that judicial appointments could be negotiated with Senators and that it wasn't necessary to accept a poor recommendation. For example, they pushed Georgia's Senators to replace a segregationist recommended for a district judgeship and got Lewis Morgan, a moderate who met White's professional expectations and who eventually moved up to the Fifth Circuit. The Kennedys also managed to appoint high-caliber judges like Robert Ainsworth in Louisiana, the last choice of Senator Ellender on a list of thirteen names he submitted, and William A. McRae in Florida, a Rhodes Scholar with a distinguished legal career as a practicing attorney and law professor. McRae was suggested by Governor Leroy Collins after the two Florida senators had recommended a lawyer who received low ratings from both the American Bar Association and the Kennedy "spotter" in Florida.

But in the cases of two of the disappointing early Kennedy appointments of district judges in the Fifth Circuit, the ABA upgraded its initial informal "unqualified" ratings of Clarence Allgood of Alabama and E. Gordon West, one of Russell Long's political satraps in Louisiana and his former law partner. Allgood, although

supported by some politically active blacks in Alabama (blacks who were politically active with southern Democrats at that time tended to be accommodationists who had little to do with the civil rights movement), had an undistinguished record as a bankruptcy referee in Birmingham. West as a judge would receive the most severe reprimand given any district judge by the Fifth Circuit Court of Appeals after his handling of a civil rights case. In one of his opinions, he characterized *Brown* as "one of the truly regrettable decisions of all time" and from the bench would denounce desegregation efforts as Communist-inspired. Unlike some of the others, he eventually demonstrated professional growth as a judge.

For an administration pledged to enforcing civil rights, few appointments were worse than District Judge Robert Elliott in Georgia, a leader in the walkout of the Georgia delegation at the 1948 Democratic national convention in protest of the party's stance in support of civil rights. A former Talmadge floor leader in the legislature, in 1952 he had declared his support of the county-unit system that ensured rural domination of Georgia politics by asserting, "I don't want these pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws and traditions." On the bench, Elliott's reversal rate of 90 percent in civil rights cases (during Kennedy's tour as Attorney General) exceeded even Cox's, and Elliott proved to be an ardent defender of segregation who issued harsh rulings against civil rights workers.[48]

With the record of Hugo Black in mind and his repudiation of early affiliation with the Ku Klux Klan, Burke Marshall never accepted the view of critics who contended that Elliott's blatantly segregationist past record should have been enough to automatically disqualify him for consideration. The Elliott appointment was made only after Judge Tuttle's views were sought.

Tuttle had placed himself on the spot when he called Robert Kennedy soon after he became Attorney General to emphasize the importance of appointing southern judges who would enforce the Supreme Court's mandate. Despite strong personal reservations about Elliott, Tuttle asked Judge William Bootle for his opinion and passed on to the Justice Department Bootle's view that Elliott

[48] Navasky, *Kennedy Justice*, p. 247.

would be fair. According to Marshall, the Elliott appointment wouldn't have been made if Tuttle had objected. Tuttle also learned from the experience, and did express private objections to some later potential nominees.[49]

In some regards, the selection of Frank Ellis to replace Skelly Wright in Louisiana represented the worst appointment of all. Although not in a class with Cox, West, or Elliott on civil rights matters, Ellis was a man of demonstrated poor judgment, which is what led to his appointment. After serving as John Kennedy's Louisiana state campaign manager, Ellis settled for an appointment as director of the Office of Civil Defense Mobilization after expecting a Cabinet appointment. He turned out to be an inept administrator, and his zealous pushing for his pet fallout-shelter program irritated the President. Theodore Sorensen, special counsel in the Kennedy White House, relates in his memoir *Kennedy*: "Upon learning that Ellis planned to fly to Rome to seek a testimonial from the Pope in behalf of the Ellis plan to install a fallout shelter in every church basement, the President gently suggested that it would be a mistake to bother the Pope at that time."[50]

Navasky quotes a source who was present as saying, "It was during one of the periodic emergency evacuation tests that the President began to wonder what it would be like sealed in with Ellis, as evacuation procedures specified, in the event of a genuine emergency. Not long thereafter he began to consider the possibility of changing Ellis's job." Navasky added: "Although it strains credulity that the President would so cavalierly undermine the integrity of the judiciary, the fact remains that he was unhappy with Ellis's performance in Washington but nevertheless felt that he owed Ellis a debt as one of his earliest and most effective Southern supporters. In one of the few direct Presidential interventions in the district court judge-picking process, JFK decided to use the impending Wright vacancy to solve the problem of the Ellis presence. He instructed [the Justice Department] that Ellis was his choice and therefore the conventional inquiries [to Louisiana's Senators] would not be necessary."

[49] Interviews with Marshall, October 19, 1979, and Tuttle, September 22, 1979.

[50] Theodore C. Sorensen, *Kennedy* (New York: Harper & Row, 1965), p. 613.

Senator Long, an old friend of Ellis, didn't object, but Senator Allen Ellender, who had recently defeated Ellis in a hard-fought primary and considered him unqualified, strongly objected. Navasky reports that President Kennedy personally contacted Ellender, who remained adamant, but that Robert Kennedy talked with the ABA committee, which found Ellis qualified, and that President Kennedy pursued the appointment, convinced (correctly) that Ellender couldn't afford to oppose Ellis because it would appear to be retaliation for Ellis's primary challenge.

Before the full Judiciary Committee acted on Ellis, Bernard Segal turned over evidence, uncovered after the ABA found him qualified, that Ellis had not received one of the degrees he claimed on his résumé, and other minor discrepancies. There was also evidence that Ellis allegedly was receiving drugs on the prescription of a New York physician, and Segal urged Senator Roman Hruska on behalf of the ABA committee that he reopen the Eastland subcommittee hearings. Hruska said it was out of his hands, and Byron White said nothing could be done about it. The ABA committee decided not to fight, that damaging Ellis's reputation would serve no useful purpose if he was going to be appointed anyway.[51]

One member of the Kennedy Justice Department told the author that Ellis "was the only appointment we knew was bad when we made it." The Ellis appointment, when combined with other mediocrities and worse, gave a hypocritical ring to President Kennedy's rhetoric in signing the Omnibus Judgeship bill, and it deprived the Justice Department of making a moral as well as political argument when confronted by Senators who had their own political reasons for nominating less than ideal candidates for judicial appointments.

"The trouble," said Nicholas Katzenbach in reflecting on his service as Deputy Attorney General under Robert Kennedy and then as his successor, "is that none of the politicians really understand what a high price it is to appoint bad judges . . . [who are] going to be there twenty, twenty-five years."[52]

[51] Navasky, *Kennedy Justice*, pp. 273–276.

[52] Interview with Katzenbach, October 18, 1979.

Permission to reprint the preceding excerpt has been requested.

Unlikely Heroes

JACK BASS

The dramatic story of the Southern judges of the Fifth Circuit who translated the Supreme Court's *Brown* decision into a revolution for equality

SIMON AND SCHUSTER · NEW YORK

(1981) 352 pp.