NOTES AND COMMENTS

JUDICIAL PERFORMANCE IN THE FIFTH CIRCUIT*

JAMES MEREDITH'S odyssey in the federal courts began in late May, 1961, soon after the University of Mississippi rejected his application for admission. On May 31, 1961, claiming that the University blocked his admission and admission of others in his class solely because of race, Meredith filed a complaint against University officials in the Southern District of Mississippi.[1] For himself, Meredith sought the right to attend the University that summer; for his class, he sought undifferentiated treatment in future consideration of applications for admission. District Judge Mize set June 12 for the hearing on his motion for preliminary injunction, even though the first summer session was to begin four days before.[2] That first hearing was stopped in midstream when, as Judge Mize stated, other court business required his attention.[3] And on July 11, 1961, when hearings resumed, he continued the case for thirty days at the request of defendants because one of their attorneys, an Assistant Attorney General of Mississippi, had become ill.[4] Judge Mize did not attach importance to the strong possibility, later noted by the Court of Appeals for the Fifth Circuit, that the Attorney General's Office was sufficiently staffed to handle the case despite the illness of one of its members.[5] Six days later, the University's second summer session started. The hearing on plaintiff's motion for a preliminary injunction resumed on August 10, then recessed for four days, and finally concluded on August 16.[6] Although the last day of registration for the fall semester was September 28, Judge Mize took almost four months—until December 12, 1961—to render a decision which denied plaintiff's motion.[7]

Meredith successfully expedited his appeal, with the result that a hearing was held on January 9, 1962.[8] Three days later the Fifth Circuit affirmed the district court's denial of the motion for a preliminary injunction on the ground that the "muddy record" made it "impossible to determine whether there were valid non-discriminatory grounds for the University's refusing Meredith's ad-

*Research for this Comment included interviews with federal judges, lawyers, professors and officials of the federal government. Since most of the individuals requested that their identity not be disclosed, however, the footnotes simply refer to the information they provided as "Interview."

1. Meredith v. Fair, 199 F. Supp. 754 (S.D. Miss. 1961), *aff'd*, 298 F.2d 696 (5th Cir.), *petition for rehearing dismissed*, 298 F.2d 703 (5th Cir.), 202 F. Supp. 224 (S.D. Miss.), *motion for injunction pending appeal denied per curiam*, 305 F.2d 341 (5th Cir.), *rev'd*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).
2. Meredith v. Fair, 199 F. Supp. 754, 755 (S.D. Miss. 1961).
3. *Ibid.*
4. *Ibid.*
5. Meredith v. Fair, 305 F.2d 343, 352 n.9 (5th Cir. 1962).
6. *Id.* at 350.
7. *Id.* at 350-51.
8. Meredith v. Fair, 298 F.2d 696, 700-01 (5th Cir. 1962).

mission."[9] But the Fifth Circuit suggested that the district court proceed promptly with a trial on the merits [10] so that the issue might be resolved before February 15, 1962,[11] the last date for registration for the spring semester. Reacting to Judge Mize's handling of the hearings on the preliminary injunction, the Court of Appeals took pains to indicate how it wished the lower court to proceed.[12] The trial started on January 16, and was later continued until January 24; Judge Mize's decision was handed down on February 5, 1962. While his speed was not objectionable this time, his disposition was. His decree dismissed the complaint,[13] on the grounds that Meredith's admission had been denied for reasons others than race. Meredith immediately made a motion to the Fifth Circuit for an injunction pending appeal. He feared that further delay would moot his cause, since he was quickly approaching graduation at the Negro college he was then attending. The Court of Appeals denied the motion, suggesting instead that in order to postpone graduation, Meredith either drop out of school or take courses not leading to graduation.[14] The Court of Appeals did, however, expedite his appeal,[15] and on June 25, 1962 reversed the district court, finding that Meredith had been denied admission solely because of his race; it remanded with directions to grant the relief sought.[16] Circuit Judge Wisdom, speaking for the majority, chided the district court for its plodding performance:

> The net effect of all these delays was that the February 1961 term, the two summer terms of 1961, and the two regular terms of 1961-62 slipped by before the parties litigant actually came to a showdown fight. Some of these delays, as in any litigation, were inevitable. *Some are attributable to continuances of doubtful propriety and to unreasonably long delays by the trial judge.* We refer, for example, to the delay between the end of

9. 298 F.2d at 702-03.

10. *Id.* at 703.

11. Meredith v. Fair, 305 F.2d 341, 343 (5th Cir. 1962) (Tuttle, C.J., dissenting).

12. Judge Wisdom, speaking for the Fifth Circuit, mentioned five problems in the previous trial which District Judge Mize was to avoid in his handling of the forthcoming trial on the merits: (1) the court's circumscribing of the plaintiff's examination of witnesses, argument and introduction of evidence, and allowance of wide latitude to the defendants resulted in an omission of helpful evidence; (2) the court's limitation of evidence solely to the 1961 summer session was "clearly erroneous"; (3) the recent accreditation given to the Negro college Meredith was attending had a "material bearing" on the case; (4) the record was "not clear" to as whether the University gave Meredith any transfer credits; and (5) the record was "not clear" as to the significance attached by the University of Mississippi to the Negro college Meredith was attending. 298 F.2d at 702-03.

But these guidelines set forth by the Court of Appeals were not entirely respected on the remand. District Judge Mize disregarded the Fifth Circuit's observation that the limitation of evidence to the 1961 Summer Term was "erroneous"; he quashed "that part of a subpoena requiring the Registrar [of the University] to produce admission records for the February 1961 term . . . ." Meredith v. Fair, 305 F.2d 343, 351 (5th Cir. 1962).

13. Meredith v. Fair, 202 F. Supp. 224 (S.D. Miss. 1962).

14. Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962).

15. *Ibid.*

16. Meredith v. Fair, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

> the trial, August 16, and the entry of the district court's order, December 14. . . .[17]

The odyssey had not quite ended; during the summer of 1962, Circuit Judge Cameron four times stayed the remand directive.[18] Three times his stay was vacated by his brethren;[19] finally, Mr. Justice Black invoked his power to set aside the fourth stay order and thus effectuate the remand.[20] And once Judge Cameron's efforts to stay had been overcome, Judge Mize issued an injunction framed in terms narrower than the complaint to which he had been ordered to adhere: rather than affording relief as sought, to the class, he granted it only to Meredith.[21]

The delay characteristic of the *Meredith* case is not unique. Others have had similar encounters, one of the most shocking of which is that experienced by the Attorney General of the United States in *Kennedy v. Lynd*.[22] On January 19, 1961, after a written demand for voting records upon the registrar of Forrest County, Mississippi proved unsuccessful, the Attorney General sought an order in the Southern District of Mississippi requiring the registrar to make the records available for inspection and copying. Then followed what the Fifth Circuit described as an "interminable proceeding."[23] After six months had passed, the district court had not acted on the Attorney General's request.[24] On July 6, 1961, the Attorney General, taking another tack, brought an action, *United States v. Lynd*,[25] against the Forrest County registrar, seeking both temporary and permanent injunctive relief against alleged discriminatory registration practices; he soon moved for discovery of the voting records under Rule 34 of the Federal Rules.[26] However, this litigation, in the words of the Fifth Circuit:

> was delayed from time to time by dilatory motions, including motions to quash the Rule 34 motion, and including motions to make more definite statement, none of which, of course, should stand in the way of a prompt disposition of a motion for a temporary injunction.[27]

The burden imposed on the government by the trial court's action is typified by the effect of its sustaining of defendant's motion for more definitive state-

17. *Id.* at 351-52 (emphasis added).

18. Meredith v. Fair, 7 RACE REL. L. REP. 741, 742-45 (5th Cir. July-Aug., 1962) (issuance of stay orders by Judge Cameron on July 18, 28, 31 and August 6, 1962).

19. *Id.* at 742-45.

20. See Meredith v. Fair, 83 Sup. Ct. 10 (1962) (vacating of Judge Cameron's stay orders by Justice Black).

21. See Meredith v. Fair, 305 F.2d 343, 348, 361 (5th Cir.), *on remand*, 7 RACE REL. L. REP. 746, 747 (S.D. Miss. Sept. 13, 1962).

22. 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

23. 306 F.2d at 227.

24. United States v. Lynd, 301 F.2d 818, 820 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962).

25. *Ibid.*

26. 301 F.2d at 820.

27. *Ibid.*

ments: the court required the government to allege the name of each unsuccessful applicant for registration and date of each vain attempt to register while it simultaneously refused access to the records where this information could be most conveniently obtained. The trial on the motion for a preliminary injunction began on March 5, 1962, eight months after filing.[28] When the government finished presenting its case, District Judge Cox, who had taken over voting registration suits in the Southern District soon after his appointment by President Kennedy in late June, 1961,[29] granted a thirty-day recess in order to enable the defendant to prepare his case further and to file answers to the government's amended complaint.[30] Before granting the recess he declined either to grant or deny the government's motion that the court issue the preliminary injunction.[31] The Attorney General then sought an injunction pending appeal from the Fifth Circuit, because of the imminence of the approaching election.[32] The motion was granted April 18, 1962, the Fifth Circuit issuing its own temporary injunction;[33] when appeal was heard, Judge Cox was reversed.[34] The hearing on the merits, at which he is presiding, has not yet concluded.[35]

THE PROBLEM OF DELAY IN THE FIFTH CIRCUIT

The delays occasioned in *Meredith* and *Lynd*, and caustically noted by the appellate court, do not appear to be accidental or limited; they are a generic

28. *Ibid.*

29. Interview. For date of appointment of Judge Cox, see REGISTER, DEP'T OF JUSTICE AND THE COURTS OF THE UNITED STATES 71 (1962).

30. United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962).

31. *Ibid.*

32. *Id.* at 823.

33. *Ibid.* The Court of Appeals construed the lower court's non-action as an effective denial of preliminary relief, found that the plaintiff made a "clear showing" that the rights it sought to vindicate were being violated by the registrar, and concluded that

> the likelihood that the court's refusal to grant the temporary injunction will be reversed as an abuse of discretion is sufficiently great that we are warranted in protecting the rights of the Negro registrants pending a decision on this issue by this Court.

Ibid.

The imminence of the end of registration proceedings prior to the holding of an early election prompted the Court of Appeals to *issue the injunction itself*, rather than to send the remand directive to the trial court for issuance. *Ibid.*

34. United States v. Lynd, No. 19576, 5th Cir., July 15, 1963.

35. *Id.* at 3. Somewhat earlier, on February 15, 1962, Judge Cox dismissed the Attorney General's application for an order for production of county voting records on the ground that it had been "abandoned." Kennedy v. Lynd, 306 F.2d 222, 228 (5th Cir.), *cert. denied*, 371 U.S. 952 (1963). On July 7, 1962, the Fifth Circuit vacated this order and directed that the application be granted. *Id.* at 229. As noted by the court on appeal, Judge Cox's action ran directly against the grain of Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962), a precedent established by the Fifth Circuit in the weeks immediately preceding.

feature of civil rights litigation in the deepest south—Georgia,[36] Alabama,[37] Mississippi[38] and Louisiana.[39] It is true that in many cases the fact of undue delay can only be ascertained by surmise. But the frequent reaction of commentators[40] and appellate courts[41] as well as actions taken by these courts to alleviate its effect,[42] testify not only to the delay, but to its source—the reluc-

36. See, *e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th. Cir. 1963) (suit filed in Jan. 1962); Anderson v. City of Albany, Civil Action No. 731 (M.D. Ga. 1963) (hearing in Sept., 1962; dismissal of action nine months later); Kelley v. Page, Civil Action No. 727 (M.D. Ga. 1963) (hearing in Sept., 1962; dismissal nine months later); Bell v. Fulton DeKalb Hosp. Authority, Civil Action No. 7966 (N.D. Ga.) (action filed in June 1962, but is pending as of June, 1963). Part of this information was supplied by The Administrative Office of the United States Courts. See letter from Administrative Office of the United States Courts, to the *Yale Law Journal*, Oct. 8, 1963, on file in Yale Law Library (hereinafter cited as *Letter*).

37. See, *e.g.*, Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 11 (passage of two years before trial; trial completed Oct. 25, 1962; trial court denied injunction May 28, 1963); Nelson v. Grooms, 307 F.2d 76, 79 (5th Cir. 1962) (concurring opinion); Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962) (passage of one year from date of filing of one motion until its hearing); United States v. Doggett, Civil Action No. 2829 (S.D. Ala.) (action filed June, 1962, but is pending as of June 30, 1963); United States v. Atkins., 210 F. Supp. 441 (S.D. Ala. 1962) (action filed in April, 1961; trial held in May, 1962; decision entered in Nov., 1962). See also *Letter*.

38. See, *e.g.*, United States v. Ramsey, 8 RACE REL. L. REP. 156 (S.D. Miss. Feb. 5, 1963) (action filed July, 1961); United States v. Daniel, 8 RACE REL. L. REP. 154 (S.D. Miss. Jan. 4, 1963) (action filed on Aug. 3, 1961); United States v. Duke, Civil Action No. 610045 (N.D. Miss. 1963) (action filed in Oct., 1961; trial held in March, 1963; decision handed down in June, 1963); *In re* Coleman, 208 F. Supp. 199 (S.D. Miss. 1962), *aff'd per curiam*, Coleman v. Kennedy, 313 F.2d 867 (5th Cir.), *cert. denied*, 373 U.S. 950 (1963). See also *Letter*.

39. See, *e.g.*, United States v. Lucky, Civil Action No. 8366 (W.D. La.) (action filed in July, 1961; hearing held in March, 1963); United States v. Ward, Civil Action No. 8547 (W.D. La.) (action filed in Oct., 1961; trial held in Dec., 1962). See also *Letter*.

40. See Bickel, *Civil Rights: The Kennedy Record*, The New Republic, Dec. 15, 1962, p. 16; Wash. Post, March 7, 1963, p. A.20, col. 3; N.Y. Times, July 19, 1963, p. 8, col. 3; N.Y. Times, June 9, 1963, § 6 (Magazine), p. 80, col. 4; Bickel, *Civil Rights Boil-Up*, The New Republic, June 8, 1963, pp. 11-12; N.Y. Times, June 24, 1963, p. 19, col. 2; N.Y. Times, June 27, 1963, p. 18, col. 6; PELTASON, FIFTY-EIGHT LONELY MEN 93-134 (1961); Interviews. See also ATT'Y GEN. REPORT ON PROGRESS IN THE FIELD OF CIVIL RIGHTS, Jan. 24, 1963, p. 4.

41. See, *e.g.*, Davis v. Board of School Comm'rs of Mobile County, 318 F.2d 63, 64 (5th Cir. 1963); Nelson v. Grooms, 307 F.2d 76, 79 (5th Cir. 1962) (concurring opinion); Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 14; Meredith v. Fair, 305 F.2d 343, 351-52 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962); Kennedy v. Lynd, 306 F.2d 222, 227 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); Watson v. City of Memphis, 373 U.S. 526, 530 (1963).

42. See, *e.g.*, Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, p. 21 (issuance of remand directive effective immediately); United States v. Dogan, 314 F.2d 767, 775 (5th Cir. 1963) (issuance of remand directive effective immediately); Kennedy v. Bruce, 298 F.2d 860, 862 (5th Cir. 1962) (Fifth Circuit expedited the appeal by the United States Attorney General); Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962)

tance of district court judges to grant timely or compliant enforcement of civil rights. At pre-trial, trial, pre-verdict and post-appellate verdict stages, a district judge's considerable freedom to schedule and dispose of his calendar provides ample opportunity for subjecting plaintiffs to the passage of time, which, as in *Meredith*, may threaten to moot or, as in *Lynd*, to frustrate. The prevalence of delay tactics in civil rights cases, and their impact on the constitutional rights of litigants, warrants inquiry into the methods judges may use to achieve delay, and the instruments available to force greater adherence to traditional norms of impartial performance by the judiciary.

The Opportunities for Delay

District courts in the Fifth Circuit have delayed the ultimate disposition of civil rights litigation during pre-trial stages through unusual and perhaps unwarranted employment of various doctrines designed to enable courts to render informed decisions—doctrines which result in the case being temporarily dismissed. For example, several civil rights actions have been dismissed on the grounds that they were not properly class actions, or that the complaint was formally deficient.[43] The effect of such dismissals is not, of course, to deny permanently the plaintiff's requested relief. The dismissals may be reversed on appeal. In other instances the plaintiff may be able to file new complaints which comply with the wishes of the district court. More substantial delay may be obtained, as occurred in *Bailey v. Patterson*,[44] if the court is able to utilize the abstention doctrine, which postpones litigation in three judge district courts

(Fifth Circuit expedited Meredith's appeal); Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 426, 428 (5th Cir. 1963) (issuance of an injunction pending appeal eleven days after the district court denied injunctive relief); Bailey v. Patterson, 369 U.S. 31, 34 (1962) (order of abstention of Mississippi three-judge district court vacated and case remanded to a single judge "for expeditious disposition").

43. In Baldwin v. Morgan, 149 F. Supp. 224 (N.D. Ala.), *rev'd*, 251 F.2d 780 (5th Cir. 1958), District Judge Lynne dismissed a complaint for injunctive and declaratory relief filed by Negroes against discriminatory segregation in the Birmingham Railroad Station on the ground that it failed to state a cause of action: "No . . . federal court has a right to adjudicate a difference or dispute of a hypothetical or abstract character." *Id.* at 225. But the lower court's ruling on the insufficiency of the pleadings contravened repeated Fifth Circuit's decisions on the test required for the sufficiency of a complaint. *E.g.*, Des Isles v. Evans, 200 F.2d 614, 615 (5th Cir. 1952); Millet v. Godchaux Sugars, Inc., 241 F.2d 264, 265 (5th Cir. 1957). In the latter two cases, the test adopted by the Court of Appeals provided that a "motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. . . ." *Ibid.* Moreover, the district judge apparently did not take cognizance of the underlying theory of the Federal Rules that pleadings merely serve a "notice" function since more detailed factual development of the facts of the case can be obtained through use of the liberal discovery rules. 2 MOORE, FEDERAL PRACTICE ¶¶ 8.02-.03, at 1612-13 (2d ed. 1962). *Cf.* Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963.

See also, on question of class actions, Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963; Bailey v. Patterson, 206 F. Supp. 67 (S.D. Miss.), *rev'd in part and aff'd in part*, No. 20372, 5th Cir., Sept. 24, 1963.

44. 199 F. Supp. 595 (S.D. Miss.), *vacated per curiam*, 369 U.S. 31 (1962).

until potentially controlling questions of state law have been answered by the state judiciary.[45] It typically takes many years to get a final ruling in the state courts, since appeal to the state's highest court is usually taken. In the *Bailey* case, Mississippi District Judges Mize and Clayton, over the dissent of Circuit Judge Rives, sustained defendants' motion to abstain from passing on the issues raised until the Mississippi courts had determined as a matter of state law the scope of the statutes whose constitutionality was being challenged.[46] On appeal to the Supreme Court, a unanimous bench vacated the lower court's decision *per curiam*, finding the use of abstention patently frivolous,[47] since the issue raised was so well-settled as a matter of necessarily applicable federal law as to be "wholly insubstantial, legally speaking non-existent."[48] The vacation might well have been predicted; the delay resulting from appeal was nonetheless irremediable.

Substantial possibilities for delay arise not only from postponements prior to and during trial, but also from the district judge's control over the period of time between completion of a trial or hearing and the rendering of his decision.[49] A contemporary example is the handling by Kennedy-appointed District Judge Elliott [50] of three cases arising out of the "Albany Movement" in

45. See, *e.g.*, Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 224 n.20 (1960) (Black, J., dissenting); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749, 779 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 42 (1959) (dissenting opinion). See also Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960)

46. Bailey v. Patterson, 199 F. Supp. 595, 598 (S.D. Miss.), *vacated per curiam*, 369 U.S. 31 (1962); *compare* United States v. Lassiter, 203 F. Supp. 20 (W.D. La. 1962), *and* United States v. Pitcher, 7 RACE REL. L. REP. 223 (E.D. La. 1962), *with* Bailey v. Patterson, *supra*.

47. 369 U.S. 31, 34 (1962).

48. *Id.* at 33.

49. See, *e.g.*, United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962); Bailey v. Patterson, *supra* note 46 (continuance of doubtful propriety); Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, pp. 9, 19; *In re* Coleman, 208 F. Supp. 199 (S.D. Miss), *aff'd per curiam*, Coleman v. Kennedy, 313 F.2d 867 (5th Cir.), *cert. denied*, 373 U.S. 950 (1963) ("a demand stalled for more than a year by judicial delays and stays," N.Y. Times, June 4, 1963, p. 25, col. 2); Armstrong v. Board of Educ. of the City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 11 (passage of two years before trial; trial completed Oct. 25, 1962; trial court denied injunction May 28, 1963); Nelson v. Grooms, 307 F.2d 76, 79 (5th Cir. 1962) (concurring opinion); United States v. Ramsey, 8 RACE REL. L. REP. 156 (S.D. Miss., Feb. 5, 1963) (action filed July 6, 1961); Davis v. Board of School Comm'rs of Mobile County, 318 F.2d 63, 64 (5th Cir. 1963) (hearing on motion for preliminary injunction held on April 25, 1962; no decision on the motion by time of this Fifth Circuit decision on May 24, 1963); Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962); United States v. Atkins, 210 F. Supp. 441 (S.D. Ala. 1962); United States v. Daniel, 8 RACE REL. L. REP. 154 (S.D. Miss., Jan. 4, 1963) (action filed on Aug. 3, 1961); see also ATT'Y GEN. REPORT OF PROGRESS IN THE FIELD OF CIVIL RIGHTS, Jan. 24, 1963, p 4; United States v. Raines, 189 F. Supp. 121 (M.D. Ga. 1960); Meredith v. Fair, 199 F. Supp. 754, 755 (S.D. Miss. 1961) (postponement and continuance prior to trial).

50. For date of appointment, see REGISTER, DEP'T OF JUSTICE AND THE COURTS OF THE UNITED STATES 48 (1962).

Albany, Georgia;[51] Judge Elliott did not render decisions in two of the cases until nine months [52] after the consolidated hearing.[53] Delay in rendering a decision is compounded when a decision is entered which fails to follow binding authority, necessitating appeal, reversal, and remand. Such an occurrence in a lower federal court is regrettable for it represents an abdication of a district judge's duty to abide by the limiting directives of higher courts. But examples of disobedience of higher courts by a southern district judge in civil rights litigation are numerous.[54] In *Kennedy v. Bruce*, an action to require the production of county voting records, District Judge Thomas of the Southern District of Alabama rendered decisions, unaccompanied by opinions, denying the request some sixteen months after it was made.[55] The Fifth Circuit expedited the Attorney General's appeal and reversed the district court; prior Fifth Circuit decisions supporting the Attorney General's position, as the court noted, clearly controlled the outcome of these motions.[56] In *Stell v. Savannah-Chat-*

51. Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963 (where the Court of Appeals reversed Judge Elliott's dismissal of plaintiffs' complaint and consequent denial of injunctive relief); *id.* at 19-20; Interview. For objectives of the "Albany Movement," see Anderson v. City of Albany, *supra* at 4 n.2.

52. Interview.

53. Anderson v. Kelley, Civil No. 730, M.D. Ga., Feb. 14, 1963.

54. See Baldwin v. Morgan, 149 F. Supp. 224 (N.D. Ala. 1957), *rev'd*, 251 F.2d 780, 785 (5th Cir. 1958); Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 426 (5th Cir. 1963); Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, pp. 4-6; Kennedy v. Lynd, 306 F.2d 222 (5th Cir.), *cert. denied*, 371 U.S. 952 (1963) (ten days before district judge dismissed Attorney General's enforcement proceedings as abandoned Fifth Circuit handed down Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962)); Woods v. Wright (N.D. Ala. May 22, 1963), in N.Y. Times, May 23, 1963, p. 1, col. 7, and Bickel, *Civil Rights Boil-Up*, The New Republic, June 8, 1963, pp. 11-12 (failure to follow Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 [5th Cir. 1961]); United States v. Dogan, 314 F.2d 767, 771 (5th Cir. 1963), *reversing* 206 F. Supp. 446 (N.D. Miss. 1962); Kennedy v. Bruce, 298 F.2d 860, 862-63 (5th Cir. 1962).

55. 298 F.2d 860, 862 (5th Cir. 1962).

56. The Board of Registrars of Wilcox County, Alabama, had brought an action in an Alabama state court to enjoin the United States Attorney General from attempting to enforce a demand for the Wilcox County voting records. Kennedy v. Bruce, *supra* note 55, at 862. After the state court granted a temporary injunction as prayed, the Attorney General removed the case to the Southern District of Alabama, and then moved to dismiss the state court action on June 7, 1960. *Ibid.* On August 30, 1960, the Attorney General also applied for an order requiring the Wilcox County registrars to permit the Attorney General to inspect the county's voting records, whereupon the registrars moved to dismiss. *Ibid.* In rendering decisions adverse to the Attorney General, District Judge Thomas failed to abide by controlling Fifth Circuit precedent or else displayed a blatant ignorance of the law. As the Court of Appeals for the Fifth Circuit said in reversing the district court's actions:

> First, as to the refusal of the trial court to dismiss the complaint against the Attorney General filed in the State Court, we are unable to find any conceivable justification supporting the trial court's action. *Nine months prior to the entry by the trial court of this order* denying dismissal, this Court in State of Alabama *ex rel.* Gallion v. Rogers . . . expressly . . . decided that the State of Alabama had no

ham County Board of Education, a suit brought by Negroes to end school segregation, District Judge Scarlett denied the requested injunctive relief "solely on the basis" of a factual finding that although segregation existed, integrated schools were harmful to both races.[57] Responding to Judge Scarlett's clear abuse of discretion in failing to follow the Supreme Court decision in the *Brown* decision of 1954,[58] the Fifth Circuit shortly thereafter granted the Negroes an injunction pending appeal; unless it had taken such action, another school term would have passed without desegregation.

Once the appellate court has returned a case to the originating district, further opportunities for delay present themselves. The presence on the Circuit Court of some judges sympathetic to segregation has made possible substantial delays through staying of the effectiveness of injunctive remedy;[59] district judges may have similar power to enter a stay. Or, prior to framing an injunction after remand, the district judge may extend the period of several weeks which normally intervenes between circuit court decision and entry of an order in his court.[60] Finally, as did Judge Mize in the *Meredith* case, he may enter a decree which "misinterprets" the court's opinion,[61] either delaying full relief while modification is sought above, or avoiding grant of it altogether if weariness or inertia prevent an appeal. Such behavior, difficult to assess because proceedings on remand are rarely reported, may be inferred from recent, unusual behavior by the Fifth Circuit: rendering of decrees to be "effective immediately"[62] and, on occasion, framing the terms of the injunction to be entered by the district court.[63]

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power to entertain a suit seeking to review the discretion of or enjoin the acts of the Attorney General of the United States. (Emphasis added.)

Ibid.

In disposing of the trial court's dismissal of the Attorney General's applications for an enforcement order, the Fifth Circuit concluded that:

What was decided in the earlier case of Dinkens *et al.* v. Attorney General of the United States . . . affirmed . . . by this Court . . . clearly controls the disposition of this case.

Id. at 863.

57. 318 F.2d 425, 427 (5th Cir. 1963).

58. *Ibid.*

59. For a review of Circuit Judge Cameron's issuance of four successive stay orders in the *Meredith* case, see note 18 *supra*.

60. Or a district judge may permit the suspension of a desegregation order even after desegregation has commenced. Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958) (Lemley, J.).

61. See note 21 *supra*.

62. *E.g.*, Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962); Kennedy v. Bruce, 298 F.2d 860, 864 (5th Cir. 1962); Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963, p. 4; Anderson v. City of Albany, 321 F.2d 649, 658 (5th Cir. 1963); United States v. Dogan, 314 F.2d 767, 775 (5th Cir. 1963), *reversing* 206 F. Supp. 446 (N.D. Miss. 1962).

63. Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 428 (5th Cir. 1963); Davis v. Board of School Comm'rs, No. 20657, 5th Cir., July 9, 1963, *modified* July 18, 1963, pp. 3-4; Armstrong v. Board of Educ., No. 20595, 5th Cir., July 12, 1963, pp. 13-14.

The Need for Discipline

That delay should occur in the trial of a civil suit is not an unusual characteristic of the American judicial system. Recently, commentators have voiced their concern at the lengthy proceedings attendant to antitrust actions; the delay in processing personal injury actions has weighed heavily on the judicial conscience.[64] In itself, it may be that delay cannot be attacked without a broad charge against the entire judicial system. An essential distinction can be made, however. Delay in the antitrust context occurs in spite of the judge's efforts for expedition. But in the district courts of the Fifth Circuit, delay appears as a purposeful technique to postpone and perhaps moot the resolution of controversies over constitutional rights. And given the Fifth Circuit's history of reversing decisions of particular judges in the civil rights area,[65] avoiding a final (and thus appealable) decision may be the most effective technique for achieving these results.

When delay is the manifestation of an underlying bias against the established rules for resolving the principal issues between litigants it cannot be tolerated. This seems especially true where the rules have constitutional dimension. Many of these civil rights suits are class actions involving the rights not just of the plaintiffs but of many thousands of Negroes.[66] Delay in the bringing of a suit

64. See Olney, *An Analysis of Docket Congestion in the U.S. District Courts in the Light of the Enactment of the Omnibus Judgeship Bill*, 29 F.R.D. 217 (1962); McLaren, *Streamlining the Big Case— A Report by the Section of Anti-trust Law of the American Bar Association*, 23 F.R.D. 584 (1959); see generally *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

65. See, *e.g.*, note 87 *infra* (reversals of orders and decisions of Mississippi District Judge Cox); Bailey v. Patterson, 206 F. Supp. 67 (S.D. Miss. 1962) (Mize, J.), *rev'd*, No. 20372, 5th Cir., Sept. 24, 1963; Meredith v. Fair, 202 F. Supp. 224 (S.D. Miss.) (Mize, J.), *rev'd*, 305 F. 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962); United States v. City of Jackson, 206 F. Supp. 45 (S.D. Miss. 1962) (Mize, J.), *rev'd*, 318 F.2d (5th Cir. 1963). See also note 71 *infra* (reversals of injunctive orders issued by Louisiana District Judge West); Baldwin v. Morgan, 149 F. Supp. 224 (N.D. Ala. 1957) (Lynne, J.), *rev'd*, 251 F.2d 780 (5th Cir. 1958), 6 RACE REL. L. REP. 566 (N.D. Ala. Nov. 23, 1959), *rev'd*, 287 F.2d 750 (5th Cir. 1961); Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963 (plaintiff's motion for injunction pending appeal granted after Judge Lynne denied injunctive relief to end segregation in public school system).

66. *E.g.*, Boman v. Morgan, 4 RACE REL. L. REP. 1027 (N.D. Ala. Nov. 23, 1959), *rev'd sub nom.* Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Sawyer v. City of Mobile, 208 F. Supp. 548 (S.D. Ala. 1961); Cobb v. Montgomery Library Bd., 207 F. Supp. 880 (M.D. Ala. 1962); Jemison v. Christian, 6 RACE REL. L. REP. 522 (E.D. La. March 31, 1961), *aff'd*, 303 F.2d 52 (5th Cir.), *cert. denied*, 371 U.S. 920 (1962); Anderson v. Courson, 203 F. Supp. 806 (M.D. Ga. 1962); Taylor v. City Council, 7 RACE REL. L. REP. 227 (S.D. Ga. Feb. 9, 1962); Bailey v. Patterson, 295 F.2d 452 (S.D. Miss. 1961), *vacated per curiam*, 369 U.S. 31 (1962). Moreover, when the United States Attorney General brings a voting registration suit seeking to end discriminatory practices within a particular county, the decision handed down by the district court will usually have a substantial influence on the extent to which thousands of Negroes may register for future elections.

seeking to end segregation in schools to the trial stage will be accompanied by the passage of another school semester, thereby resulting in lost opportunities to attend an integrated high school or university. Similarly, delay in the granting of the United States Attorney General's application for an order for county voting records or in the handing down of a decision following a trial on a motion for an injunction to end discriminatory registration practices invariably postpones the enjoyment by many Negroes of their constitutional right to vote; an election may have occurred during the judicial delay, in which continued disenfranchisement helped segregationist forces to maintain their political dominance. The frustration undergone by Negro litigants now battling through the district courts probably inhibits the initiation of other suits by Negroes being denied their civil rights. Aggravating the problem of delay is its inherent irremediability; time once lost can not be regained. Furthermore, appellate courts' inability readily to review district court action occasioning delay may prevent them from cutting short the losses thus occasioned. For an appellate court's jurisdiction is essentially limited to hearing appeals from final decisions of district courts and to district court orders denying or granting injunctive relief.[67] Delay, and the ability of district courts successfully to administer it, is at the heart of the problem of the Fifth Circuit.

It might be contended that the judicial performance in civil rights litigation by some federal district judges in the Fifth Circuit does not warrant correction. By their dilatoriness, the argument might run, these members of the lower federal bench merely reflect the politically dominant ethos of the region. Although the national ethos endorses such changes, in the schoolroom, in public accommodations and at the ballot box, lower court judges, operating within the narrow confines of a local community, properly reflect that community's attitudes in interpreting and applying national law.[68] If unable to satisfy dominant local sentiment, the federal courts will only engender hostility toward themselves as well as disrespect for the national law. By temporizing, and thus paying heed to and reflecting the community's resistance to nationally imposed doctrine, the judges will be able to educate the resisting citizenry into gradual acceptance of these doctrines and thus assure that ultimate respect for the evolving law which can arise only from its incorporation into the local ethos. If some Negroes lose their rights—to attend an integrated school or to vote—such is an inevitable price of a judicial system. For the bench is not obliged to ride roughshod over the dominant local consensus for the sake of immediate implementation of the constitutional rights of a minority. Only if the lower federal bench indulges in high pressure enforcement of higher court mandates distasteful to ruling sentiments of the community at large, can such rights be

67. 28 U.S.C. §§ 1291-92 (1958).

68. For examples of pressures brought against the federal bench in the South in an attempt to influence decision-making—withholding of invitations to important social gatherings, adverse press comment, and the making of anonymous obscene telephone calls—see PELTASON, FIFTY-EIGHT LONELY MEN 9-10, 43 (1961).

protected immediately. And such action will destroy public confidence in the judiciary.

It may be further contended that objections to present handling of civil rights matters are particularly improper since what the critics seek is expedition. But the dockets of the Fifth Circuit and, presumably, of its districts are already the most congested of any of the nation's courts.[69] Given this pile-up, should civil rights litigation be handled expeditiously, to the detriment of litigants whose suits in the fields of tax, tort, contract, and admiralty have long been pending? Postponement of trials or decision days in non-civil rights actions invariably inconveniences non-civil rights litigants who have been awaiting the outcome in matters personally important to them, just as postponement may inconvenience civil rights litigants. There is no *a priori* reason for choice of one class of litigation or litigants over another. Calendar control rests within the discretion of the lower federal bench,[70] which is in fact best able to determine the preparedness of the litigants and to administer its caseload. Although a trial judge may give preferential calendar treatment to particular types of litigation, such preferences will reflect his knowledge of the communities he serves, and ought not be disturbed. Even if some district judges permit personal bias on the racial issue to influence their handling of civil rights suits,[71]

69. Armstrong v. Board of Educ., No. 20595, 5th Cir., July 12, 1963, p. 46; see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1962 209-10 (1963).

70. 28 U.S.C. § 137 (1958); Interviews.

71. Attention has recently been directed at some of President Kennedy's appointees to the lower federal bench in the Fifth Circuit, who are claimed to have segregationist leanings. For example, an article in the New York Times stated that:

> The delay engaged in by the courts in handling . . . civil-rights issues is hardly surprising when one considers that a number of Federal District Judges are segregationists. What is surprising to many Negroes who supported President Kennedy in the 1960 election is that some of his appointments to the judiciary are men of this type.

N.Y. Times, June 9, 1963, § 6 (Magazine), p. 80, col. 4. Indeed, some of the recent appointees have been quite forthright in vocalizing their posture both on or off the bench. Appointed in February, 1962 to sit in the Middle District of Georgia, Judge Elliott gave this explanation a number of years ago for his opposition to steps to end rural domination of Georgia politics: "'I don't want these pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws and other traditions,'" N.Y. Times, July 19, 1963, p. 8, col. 3; District Judge Elliott has delayed the disposition of civil rights cases concerning the "Albany Movement" in Albany, Georgia. *Ibid.*; see notes 50-53 *supra* and accompanying text.

Appointed in June, 1961, District Judge Cox, a close friend of Senator Eastland, has expressed pro-segregationist views while sitting in the Southern District of Mississippi. N.Y. Times, July 19, 1963, p. 8, col. 3; see Judge Cox's opinions in Brown v. State, 6 RACE REL. L. REP. 780 (S.D. Miss. Aug. 26, 1961), in which, in refusing to remove the cases of six "freedom riders" from a state court to a federal district court, he characterized the petitioners in the following terms: "This Court may not be regarded as any haven for any such *counterfeit citizens from other states deliberately seeking to cause trouble here among its people.*" *Ibid.* [Emphasis added.] The Court of Appeals for the Fifth Circuit

respect for the ordinary and necessary independence of the lower bench in matters essential to the smooth administration of a complex and crowded docket should engender reluctance to interfere.

Furthermore, even some advocates of expedition in civil rights enforcement might find district court dilatoriness unobjectionable, insofar as it contributed to an understanding of the problem of enforcement as a political one and prompted consideration of its solution by political means. Recognizing the need for implementation of the national consensus, these persons might urge that the judiciary can prompt the proper expression of this national consensus *only* through a refusal to impose the dictates of *Brown* [72] and its progeny [73] rapidly.

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has not been unaware of Judge Cox's dilatory handling of proceedings brought by the United States Attorney General. See Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); United States v. Lynd, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962). For Judge Cox's record in civil rights litigation, see note 87 *infra*.

Perhaps one of the most unsympathetic views toward prevailing legal doctrines in the civil rights area as well as toward the agitation of civil rights groups emanated from Kennedy-appointed District Judge West, who, in an opinion in which he ordered the East Baton Rouge School Board to produce a desegregation plan, stated:

> I could not, in good conscience, pass upon this matter today without first making it clear, for the record, that I personally regard the 1954 holding of the United States Supreme Court in the now famous Brown case as one of the truly regrettable decisions of all times. Its substitution of so-called "sociological principles" for sound legal reasoning was almost unbelievable. As far as I can determine, its only real accomplishment to date has been to bring discontent and chaos to many previously peaceful communities, without bringing any real attendant benefits to anyone.
>
> And even more regrettable to me is the fact that almost without exception the trouble that has directly resulted from this decision in other communities has been brought about not by the citizens and residents of the community involved, but by the agitation of outsiders, from far distant states, who, after having created turmoil and strife in one locality, are ready to move on to meddle in the affairs of others elsewhere.

Davis v. East Baton Rouge Parish School Bd., 214 F. Supp. 624, 625 (E.D. La. 1963). Judge West has enjoined demonstrations by the Congress of Racial Equality—presumably part of the outside agitators—at least on two occasions; he was reversed by the Court of Appeals for the Fifth Circuit on both occasions, however. N.Y. Times, Aug. 23, 1963, p. 12, col. 2 (Judge West's injunction called a "blow to the Negroes' campaign for equal political and employment rights" in Plaquemines, Louisiana); N.Y. Times, Aug. 30, 1963, p. 11, col. 1 (Fifth Circuit's setting aside of Judge West's order); Clemmons v. Congress of Racial Equality, No. 19703, 5th Cir., Sept. 12, 1963, *reversing* 201 F. Supp. 737 (E.D. La. 1962).

See also N.Y. Times, Oct. 6, 1963, § 1, p. 75, col. 1.

72. Brown v. Board of Educ., 347 U.S. 483 (1954).

73. See, *e.g.*, Boynton v. Virginia, 364 U.S. 454 (1960) (eating facilities connected with interstate transportation); Bailey v. Patterson, 369 U.S. 31 (1962) (transportation); New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd*, 358 U.S. 54 (1958) (golf courses and other facilities); Dawson v. Mayor and City Council, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (beaches and bath-

Dissatisfaction with judicial performance in this area or in the handling of voter registration issues, according to this line of reasoning, would not only underscore the impropriety of courts handling such volatile political issues, but, more significantly, might trigger congressional responses—such as creation of an administrative agency—made less likely when judicial activity is of sufficient effectiveness to reduce the pressure to change the status quo on those who might support such measures.[74] Such a political solution, putting enforcement of civil rights in the hands of a body designed for sensitivity to the national consensus, would avoid many of the problems associated with enforcement through the federal judiciary.[75] Judicial administration which vividly betrays its flaws of performance is all the more likely to prompt necessary change.

But all of these arguments ignore a fundamental postulate upon which a judicial system is grounded. Corresponding to the existence of courts as institutions for the protection and adjudication of rights is the duty of the judge to refrain from action postponing indefinitely the bringing of these rights to fruition; the trial judge, in particular, must in good faith decide cases by seeking out and effectuating doctrine established by higher judicial authority. The district judge's considerable freedom to innovate within the framework of the law is diminished to the extent that resolution of relevant issues by appellate authority to which he is subordinated is clear and recent. For an appellate court to affirm a court-enforceable right would be farcical if a trial judge were free to destroy the right through inaction or disregard. The judicial process ultimately "rests upon unreserved acceptance of and compliance with the decisions of the Court of last resort."[76] For an inferior court judge to defy the law as declared is for him to undermine the foundation of the very structure entrusted to his care; such conduct may well lead to more basic disrespect of the law as an institution than any momentary acquiescence to "public feelings" can prevent. Since recognition of the importance of the rights lost by delay in civil rights matters has frequently been expressed by both the Fifth Circuit and the Supreme Court, judicial temporizing as well as refusal to follow clearly applicable precedent must be considered such defiance. While the speed with

houses); Tate v. Department of Conservation and Dev., 133 F. Supp. 53 (E.D. Va. 1955), *aff'd per curiam*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956) (parks); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956) (beaches and swimming pools).

74. *Cf.* Winters, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

75. Amply staffed to conduct hearings on civil rights matters and supervise the enforcement of agency orders, a National Civil Rights Board, composed of members with three or five year terms, would enable the Senate periodically to review and evaluate the policies of the Board's members during the reappointment phases of the Board's existence. If dissatisfied with the policies formulated, the Senate would then be able to remove the members of the Board who were responsible for their formulation and implementation. The Senate lacks, of course, such a method of review over the federal judiciary, whose members serve for life "during good behavior." U.S. CONST. art. III, § 1.

76. N.Y. Times, Aug. 8, 1963, p. 1, col. 8 (speech by Justice Goldberg at the annual meeting of the American Bar Association).

which civil rights are obtained will often depend upon plaintiffs' willingness and ability to bring lawsuits, once such suits are brought, the clear mandate of appellate court decision is that they must be processed without unnecessary delay.[77] They have stated in explicit terms that the sentiments of the white community are not to be given dispositive weight in formulating the judicial remedies which are to end public segregation with "all deliberate speed."[78]

The right to orderly disposition of suits exists whether or not judicial enforcement of civil rights and, in particular, judicial formulation of anti-segregation policies and plans, is not the optimum means of treating the pressing national problem of race relations. It is not only that congressional creation of an administrative agency to formulate such policy, however much sounder as a means of dealing with the problem, is but a remote possibility. The courts having entered the field, the necessary discipline of the judiciary requires that lower court judges cooperate in the enforcement of the law as interpreted by appellate judges. So long as some district judges refuse to do so or do so dilatorily, reforms must focus upon improving methods of enforcement of higher court directives. And such solutions, if they go no further than to seek compliance with the spirit and rulings of higher court decisions, need not give rise to the countervailing objection that defendants' rights or the rights of other litigants in the federal courts will be prejudiced.

In devising such solutions, an important cautionary principle is that which calls for preservation of judicial independence. Independence of the judiciary has frequently been defined in terms of the freedom of the individual judge from the threat of penalty—whether loss of job, reduction of salary, or criminal sanction — for politically unpopular decisions.[79] Thus, constitutional re-

77. This mandate not only emerges from the recognition of the rights lost by delay in civil rights matters that has frequently been expressed by the Fifth Circuit, *e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 427 (5th Cir. 1963); Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962) (suggestion made by Court of Appeals to plaintiff to prevent mootness of his cause), but also from the Fifth Circuit's strong criticism of unnecessary delay in the district courts, *e.g.*, Meredith v. Fair, 305 F.2d 343, 351-52 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962); Kennedy v. Lynd, 306 F.2d 222, 227 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); Davis v. Board of School Comm'rs, 318 F.2d 63, 64 (5th Cir. 1963), its recurring issuance of remand directives whose mandates are effective immediately rather than weeks later, *e.g.*, United States v. Dogan, 314 F.2d 767, 775 (5th Cir. 1963), *reversing* 206 F. Supp. 446 (N.D. Miss. 1962); Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, and its expediting of appeals in civil rights litigation, *e.g.*, *ibid.*; Meredith v. Fair, *supra*.

Moreover, a clear mandate to speed up the pace of desegregation emanated from the recent Supreme Court decision of Watson v. City of Memphis, 373 U.S. 526 (1963), in which the Court stated that the lower courts' pace in administering desegregation was in many instances not consistent with the speed contemplated by the Court when it handed down the "all deliberate speed" formula. *Id.* at 530.

78. Aaron v. Cooper, 358 U.S. 1, 16, 22 (1958).

79. U.S. CONST. art. III, § 1: "The Judges . . . shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

quirements of life tenure and fixed salaries are defended for their contribution to a judiciary independent of momentary political disapproval.[80] "Reforms" to correct delay might be rejected if they occasion rash interference with judicial processes, decisions, or personnel. But this principle is not without its limitations. American political history reveals a continuous process of interaction between the judiciary and other branches of government, particularly on matters of political import.[81] Use of the appointment power, procedural reforms, and other means of shaping judicial response to these issues has long been thought appropriate, so long as it does not focus upon the person or decisions of a particular judge.[82] There is, moreover, a recognized need for internal discipline of the judiciary; the concept of judicial independence is to a large degree one of relationship with other branches of government. While, for the efficient performance of its duties, each level of the judiciary doubtless requires independence and discretion, internal discipline is not a matter merely of ad-

80. THE FEDERALIST Nos. 78-79 (Hamilton).

81. For instance, the hostility aroused in many states following the Supreme Court decision in *Ex parte* Young, 209 U.S. 123 (1908), prompted congressional enactment of a statute prohibiting a district court's granting of injunctive relief against the enforcement by a state official of a state statute alleged to be unconstitutional unless the application for such relief was heard by a three-judge district court. 28 U.S.C. § 2281 (1958). See also 42 CONG. REC. 4847 (1908) (remarks of Sen. Overman); *id.* at 4853 (remarks of Sen. Bacon). The congressional response to the political matter aimed by means of procedural reform to prevent the improvident issuance of such injunctions by a single judge and the concomitant unnecessary friction between state and federal authorities; Congress, it must be noted, did not intend to—nor could it—punish those judges who rendered the unpopular decision.

Another instance of interaction between Congress and the courts arose when the nation was troubled over the ease with which some federal judges issued labor injunctions in the first few decades of this century. RAYBACK, A HISTORY OF AMERICAN LABOR 295, 319 (1959). The response of Congress was the enactment of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958), depriving the district courts of jurisdiction to enter such injunctions except in specified instances:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, *except in a strict conformity with the provisions of this chapter*: nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. [Emphasis added.]

See also Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 102-04 (1958); 47 Stat. 71 (1932), 29 U.S.C. §§ 105-08 (1958).

82. Proposals for judicial recall posed a severe threat to judicial independence by opening the possibility that a member of the bench might be removed by the populace following the rendering of an unpopular decision. The gravity of this proposal prompted severe attacks against its adoption in various states. See, *e.g.*, Hornblower, *The Independence of the Judiciary; The Safeguard of Free Institutions*, S. Doc. No. 1052, 62d Cong., 3d Sess. (1913); Brown, *The Judicial Recall—A Fallacy Repugnant to Constitutional Government*, S. Doc. No. 892, 62d Cong., 2d Sess. (1912); *Report of American Bar Association Judicial Recall Committee 1912-1917*, in 1 CONSTITUTIONAL GOVERNMENT 579 (Brown ed. 1917).

ministration at each level. Discipline consonant with hallowed attitudes toward "independence of the judiciary" inheres in the structure of an appellate system through lower court acceptance of the law as declared and interpreted by higher courts. Judicially imposed discipline may go further than "housekeeping" or assuring compliance with the mandates of the law in individual cases, however, to "punish" or restrict a judge on account of an overall pattern of behavior on his part—as by removing a particular class of cases from his docket. In this case, the judicial action may constitute a substantial although less frequently noticed abridgement of judicial independence.

MEANS FOR CONTROLLING JUDICIAL PERFORMANCE

With the problem thus limited to that of obtaining good faith treatment of civil rights actions compliant with appellate directives, approaches to solution fall into two broad classifications. On the one hand, responsible officials—in this case, chiefly the President and the Congress—might seek either to avoid elevation to judicial office of men unwilling to follow judicial discipline or to remove or neutralize those judges who, after their appointment, showed a tendency to questionable decision or to delay. On the other hand, the appellate courts or some other body willing to follow the spirit and letter of their decisions might provide controls in particular cases, seeking to counterbalance the efforts of the reluctant district judge by their own willingness to take curative action against wrong decision or undue delay in those cases.

Control Over the Judge Who Decides

A. *Appointment*

It would seem that the easiest way to keep judges unwilling to submit to judicial discipline from the bench would be not to appoint them—to keep them off the bench in the first place. Yet this has not been done.[83] Of President Kennedy's eight appointments to district courts in Georgia, Alabama, Louisiana and Mississippi, for example, four have indicated a considerable reluctance to follow the letter and spirit of the prevailing law in the civil rights area.[84]

83. See note 84 *infra* and accompanying text. But, interestingly enough, of the sixteen Negroes that have ever been named to the federal bench, President Kennedy has appointed eight. N.Y. Times, Oct. 6, 1963, § 1, p. 75, col. 1.

84. President Kennedy appointed Judges West, Ellis, Ainsworth and Putnam to the lower federal bench in Louisana, REGISTER, DEP'T OF JUSTICE AND THE COURTS OF THE UNITED STATES 62-63 (1962); Judges Elliott and Morgan in Georgia, *id.* at 48; Judge Allgood in Alabama, 293 F.2d XII (1961); and Judge Cox in Mississippi, REGISTER, *supra* at 71. Criticism by civil rights supporters has been particularly directed at Judges West, Cox, Elliott and Allgood. For the record compiled by Judge Cox in civil rights litigation, see note 87 *infra*. For Judge Elliott's dilatory handling of such litigation, see notes 51-53 *supra* and accompanying text; see also note 71 *supra*. For Judge West's treatment of particular civil rights cases, see note 71 *supra*; Anderson v. Martin, 206 F. Supp. 700 (E.D. La. 1962) (three-judge district court case); McCain v. Davis, 217 F. Supp. 661, 669-71 (E.D. La. 1963) (concurring opinion). For Judge Allgood's handling of the reinstatement-of-expelled-Birmingham-school-children case, see Woods v. Wright (N.D. Ala. May 22, 1963), in N.Y. Times, May 23, 1963, p. 1, col. 7, and Bickel, *Civil Rights Boil-Up*, The

Part of the reason for their appointment may be ignorance of their views. A potential judge may comport himself in a manner generally consonant with the office of a trial court judge, but feel so strongly about one issue that when cases involving it come before him, he will be unable to submit to the authority of higher court doctrine. Certainly this is likely to be the case with Southern whites, whose strong feelings on the race issue need not color their views on other constitutional questions, labor policy, contracts or torts. Yet the principal pre-appointment examinations into professional competence and personal background, made by the American Bar Association's Standing Committee on the Federal Judiciary [85] and the F.B.I.,[86] respectively, are likely to take an overview. Thus, while Mississippi District Judge Cox's difficulties in dealing with the race issue are made abundantly clear by his record in civil rights cases,[87] the A.B.A. Committee rated him as "exceptionally well qualified"[88]—its highest recommendation [89]—when his name was proposed to them. Apparently, the Committee makes no effort to determine whether on particular issues a nominee would view his judicial duty as being to decide cases in a disinterested manner —whether he would permit personal or community biases to influence his con-

New Republic, June 8, 1963, pp. 11-12. The remaining four appointees have not sat on enough civil rights matters to show any clearly discernable trends.

85. *Proceedings of the House of Delegates: Midyear Meeting, Chicago, Feb. 23-24,* 45 A.B.A.J. 360, 364-65 (1959); 17 CONG. Q. ALMANAC 372, 375 (1961); Walsh, *Two Basic Steps Toward the Better Selection of Federal Judges,* 12 AM. UNIV. L. REV. 14, 20 (1963).

86. This practice has been a long-standing one. See Mitchell, *Appointment of Federal Judges,* 17 A.B.A.J. 569, 573 (1931); Walsh, *Two Basic Steps Toward the Better Selection of Federal Judges,* 12 AM. UNIV. L. REV. 14, 20 (1963).

87. See United States v. Wood, 295 F.2d 772 (5th Cir.), *reversing* 6 RACE REL. L. REP. 1069 (S.D. Miss. Sept. 21, 1961) (Cox, J.); Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir.), *reversing* 6 RACE REL. L. REP. 1161 (S.D. Miss. Dec. 22, 1961) (Cox, J.); Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963) (Fifth Circuit vacated Judge Cox's order which denied in effect the United States Attorney General's application for an order for county voting records); United States v. Lynd, No. 19576, 5th Cir., July 15, 1963 (reversal of Judge Cox's denial in effect of the Government's motion for a preliminary injunction against alleged discriminatory voting registration practices); Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963 (reversal of Judge Cox's order denying production of county voting records). Judge Cox has been affirmed only once in a reported civil rights case. *In re* Coleman, 208 F. Supp. 199 (S.D. Miss. 1962), *aff'd per curiam,* 313 F.2d 867 (5th Cir.), *cert. denied,* 373 U.S. 950 (1963). Yet this application by the United States Attorney General for an order for county voting records was "stalled for more than a year by judicial delays and stays." N.Y. Times, June 4, 1963, p. 25, col. 2. The ultimate disposition of two voting registration cases which Judge Cox has handled cannot be ascertained since there is no reported appeal in either of them at this time. For the district judge's disposition of these two cases, see United States v. Daniel, 8 RACE REL. L. REP. 154 (S.D. Miss. Jan. 4, 1963); United States v. Ramsey, 8 RACE REL. L. REP. 156 (S.D. Miss. Feb. 5, 1963).

88. 17 CONG. Q. ALMANAC 376 (1961).

89. *Proceedings of the House of Delegates: Midyear Meeting, Chicago, Feb. 23-24, 1959,* 45 A.B.A.J. 360, 364 (1962).

formity to established doctrine or his treatment of litigants in cases pending before him.[90] Of course, it can be argued that an attitude which hinders judicial performance in only a small proportion of cases is relatively unimportant, and need not—even should not, if the independence of the judiciary is to be preserved—be considered. But where a judge is to be appointed to a southern district judgeship, race matters will not likely prove an insignificant part of his docket, in either a numerical or a doctrinal sense. And where a point of view is as politically significant to the nation and the incumbent administration as that here involved,[91] it would seem that the President would find it to his advantage to take account of this factor in making his choices.

The most plausible impetus to such use of a presidential appointment power is founded in the necessity to placate important legislators from the state of the appointment.[92] Using the institution of senatorial courtesy, a senator from the state in which a district judgeship is to be filled can usually block nomination by voicing the magic words that the nominee is "personally obnoxious to me."[93] Another feature of this custom is the submission by the same Senator to the Chief Executive of a list of political nominees acceptable to him from

90. Interview; Bickel, *Civil Rights Boil-Up*, The New Republic, June 8, 1963, p. 12; 17 CONG. Q. ALMANAC 375 (1959).

91. See *Message from the President of the United States Relative to Civil Rights*, H.R. Doc. No. 75, 88th Cong., 1st Sess. (1963); ATT'Y GEN. REPORT ON PROGRESS IN THE FIELD OF CIVIL RIGHTS Jan. 24, 1963. The present Administration has also introduced a broad omnibus civil rights bill. H.R. 7152, 88th Cong., 1st Sess. (1963).

That the appointment power can be used to promote the policies favored by a President emerges from a glance at Theodore Roosevelt's statements concerning his views on appointments to the Supreme Court. When debating whether to appoint Oliver Wendell Holmes to the Court, President Roosevelt remarked that:

> . . . a judge of the Supreme Court . . . is not in my judgment fitted for the position unless he is a party man, a constructive statesman keeping in mind his relations with his fellow statesmen in other branches of the Government . . . Now I should like to know that Judge Holmes was in entire sympathy with our views, that is with your views [those of Cabot Lodge] and mine before I would feel justified in appointing him.

PRINGLE, THEODORE ROOSEVELT—A BIOGRAPHY 184 (1956). President Roosevelt also thought of naming Justice Horace H. Lupton of Tennessee who was "'right on the Negro question, right on the power of the Federal Government, right on the insular business, right about corporations, right about labor.'" *Id.* at 183.

92. *E.g.*, HAYNES, THE SELECTION AND TENURE OF JUDGES 23 (1944); HARRIS, THE ADVICE AND CONSENT OF THE SENATE 314 (1953); Comment, *The President Shall Nominate*, 33 ILL. L. REV. 809-10, 817-18 (1939); Sears, *The Appointment of Federal District Judges*, 25 ILL. L. REV. 54-55, 72-73 (1930). Federal district judgeships have long been considered objects of political patronage. HAYNES, *op. cit. supra* at 20-21; HARRIS, *op. cit. supra* at 315-17. A President thus will often use his appointment power to strengthen his political position in a locality, or to repay an old political debt. If he were to make an appointment to the lower federal bench which is locally unpopular, he would probably alienate some of his one-time supporters.

93. HARRIS, *op. cit. supra* note 92, at 217; Walsh, *Two Basic Steps Toward the Better Selection of Federal Judges*, 12 AM. UNIV. L. REV. 14, 19 (1963).

which the President normally makes his appointment.[94] Since senators from the southern states are almost unanimously both segregationist in sentiment and Democrat in name, these practices will create the strongest pressure for the appointment of judges with segregationist leaning when there is a Democratic President.[95]

At stake is the executive's chief instrument for shaping future judicial performance as well as the conformity of courts to their role in a judicial structure. A President who felt a responsibility for the proper enforcement of national law, particularly where the policies underlying such law form an important part of his program,[96] might not find himself powerless to overcome the stringencies of senatorial courtesy. For the Chief Executive has at his disposal a variety of weapons—among them, the threat to divert federal "pork-barrel" legislation or defense contracts, to veto a senator's pet proposal, or to deny him a voice in other patronage appointments. In presenting his candidate, the President might attempt to frame the issue of whether he should be ratified over the objection of a senator from his home state as a civil rights issue, not an issue of senatorial courtesy alone. Such an attempt might convince northern and western senators to ignore senatorial courtesy and vote for the confirmation of that particular nominee. In using these weapons, a President will probably alienate senators and representatives whose votes may be needed to pass proposed administration legislation. Thus, he usually must balance the risks of losing needed congressional support against the benefits to be derived—such as reduced friction in the judiciary and implementation of the *Brown* decision conforming to judicial and national expectations—from the appointment of judges fully willing to take their station in the federal judiciary. Recently, the balance has apparently been struck in favor of desirable administration legislative goals.[97]

B. *Removal or Assignment*

As a result, the nation is faced with increasing urgency with the question: What, if anything, ought to be done to reform the performance of a federal judge with life tenure who appears to be disregarding the mandate of his appellate court and the rights of litigants in his court both through delay and noncompliant decision? Possible answers may be separated, for analytic purposes, into three groups: those which remove the judge from office altogether; those which remove the judge from proximity to civil rights litigation; and those which control the flow of cases in his district so as to avoid or minimize the influence of his attitudes upon them. As a rough generalization, those controls are least effective which are most easily realizable. And those controls more easily realizable require greater involvement of the judiciary in the correction process.

94. *Proceedings of the House of Delegates: Midyear Meeting, Chicago, Feb. 23-24, 1959*, 45 A.B.A.J. 360, 364-65 (1959).

95. *Cf.* note 84 *supra.*

96. See note 91 *supra.*

97. See notes 71, 84 *supra.*

Thus, impeachment,[98] the most obvious way to control judges reluctant to enforce the law they have sworn to uphold, is at once the least practical and probably least desirable route. A majority vote of the House to bring charges,[99] plus conviction by a two-thirds vote of those senators present,[100] is necessary to effect removal;[101] only four times have the requisite votes been mustered.[102] It is dubious whether conduct relating to such a politically sensitive issue could ever secure them.[103] Further, such actions as failure to follow previous higher court mandates or dilatoriness in bringing a case to trial or in rendering decision are not within the usual ambit of impeachable behavior;[104] congressional inquiry here seems to trespass somewhat on judicial independence, by giving the appearance of penalizing for substantively wrong decision.[105] And provision for removal of judges from the federal bench by some means other than impeachment[106] is not only unlikely to be made, as a matter of political prac-

98. U.S. CONST. art. II, § 4.

99. BORKIN, THE CORRUPT JUDGE 192 (1962).

100. U.S. CONST. art. I, § 3, cl. 6.

101. U.S. CONST. art. I, § 3, cl. 7.

102. Since 1789 the Senate has tried only eight judges, convicting four and acquitting the other four. BORKIN, *op. cit. supra* note 99, at 195.

Even if congressional scrutiny of the charges against a judge does not result in an impeachment trial, a judge may resign to avoid further embarrassment; since 1789, seventeen of the fifty-five judges under congressional investigation have done just that. *Id.* at 204. But to a judge of more unyielding bent, impeachment is a ragged "scarecrow" indeed.

103. For intimation of a possible triggering of the impeachment power, see remarks by Rep. Celler, House Judiciary Committee Chairman. N.Y. Times, June 24, 1963, p. 19, col. 2.

104. Historically, in impeachment proceedings, Congress has usually focused on conduct outside the framework of decision-making in particular cases. Thus, impeachment charges have included: (1) commission of treasonous acts against the United States during the Civil War, 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2385-97, at 805-20 (1907) (impeachment of District Judge West Humphreys); (2) intoxication on the bench, *id.* at 681-710 (impeachment of District Judge John Pickering); (3) personal use of a private railroad car belonging to a railroad in receivership under supervision of the judge's court, *id.* at 948-80 (impeachment of District Judge Charles Swayne); (4) use of the judicial office to secure favors from litigants before the court, 6 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 498-512, at 684-708 (1935) (impeachment of United States Commerce Court Judge Robert Archibald). At times, however, the House has voted articles of impeachment for a judge's handling of a trial or his disobedience to statutory dictates. 3 HINDS, *op. cit. supra* at 711-71 (impeachment of Associate Justice Samuel Chase); *id.* at 681-70 (impeachment of District Judge John Pickering).

105. A danger exists in impeaching judges for rendering decisions contrary to binding authority. For what appears a failure by a district judge to follow higher court precedent may actually be an attempt to initiate a new approach to an old problem, but an approach unacceptable to an appellate court.

106. One proposal might incorporate the following plan. The Sumners' Bill, H.R. 146, 77th Cong., 1st Sess. (1941), which passed the House in 1941, 87 CONG. REC. 8168-69 (1941), but died in the Senate Judiciary Committee, provided that when the House of Representatives passes a resolution stating that it is of the opinion that there is reasonable

ticality, but is also rendered constitutionally dubious by the provision in Article III that federal "judges shall hold their offices *during good behavior*."[107] Congress might achieve the same effect as it would obtain by removal of the judge from the court system if it removed the trial of civil rights causes from the federal courts—say, by the creation of a national agency to handle such issues.[108] But the political difficulties and the fundamental nature of this change render it both unlikely and a subject beyond the scope of this Comment.

A judge might nonetheless be removed from proximity to civil rights litigation, either by revising his assignment or, possibly, by redrawing the lines of the district in which he sits. The latter would involve congressional creation of new district lines which would diminish the area from which litigation to be heard by present judges arose and create new districts to which suitable appointments might be made; this technique is of limited effectiveness and dubious political practicality.[109] But the possibility of reassigning judges to

ground for its belief that the behavior of any federal judge, except a Justice of the Supreme Court, has been other than good behavior within the meaning of that term as used in § 1 of article III of the Constitution, the Chief Justice has a duty to convene in special term a specially constituted circuit court of appeals of the circuit in which the allegedly misbehaving judge resides. The court is to be made up of three judges to be designated by the Chief Justice from within or without the circuit (except if a circuit judge is to be tried, no judge from the same circuit can serve). Thereupon, the United States Attorney General brings a civil action before the court to determine whether the accused judge should remain in office. The rules of procedure are to be set forth by the Supreme Court, but the trial is without a jury. If the circuit court finds that the judge's behavior falls outside the good behavior clause of § 1 of article III of the Constitution, it must enter a judgment of removal from office. Within thirty days after the entry of the judgment either the Attorney General or the defendant judge has a right to appeal to the Supreme Court on both the facts and the law.

For another example of a judicial method of removal as an alternative to impeachment, see New York's Court on the Judiciary. N.Y. CONST. art. 6, § 9a.

107. See note 117 *infra.*

108. See note 75 *supra.*

109. The creation of a new district, say, a Western District of Mississippi, would not prevent the bringing, and subsequent decision, of much civil rights litigation in other districts within the state. Although service of process runs statewide, particular civil rights proceedings may be brought only in specific districts. For example, enforcement proceedings to obtain county voting records can be brought, according to statutory dictates, only in the district where the registrar is located or where the records are. 74 Stat. 88 (1960), 42 U.S.C. § 1974(d) (Supp. IV, 1962). Since certain counties would not lie within the newly-created Western District, that district would not have jurisdiction over the proceeding. A more fundamental difficulty associated with the creation of a new district is that the carved-out jurisdiction would be the improper venue for civil rights causes arising outside that new district but within the state. The applicable venue statute provides that, in the absence of a specific venue statute, suits based on a federal statute "may be brought only in the judicial district where all defendants reside. . . ." 28 U.S.C. § 1391(b) (1958). Thus, a suit seeking injunctive relief against alleged discriminatory registration practices in a county in the eastern part of Mississippi, if brought outside the judicial district wherein the county is located, would have to be dismissed where the defendants made a timely objection to improper venue. FED. R. CIV. P. 12(b).

districts where they will not be confronted by segregation problems merits closer investigation.

The President has clear authority to accomplish such a transfer by reappointment—whether to another district or to a circuit court of appeals—to a circuit where civil rights issues will not arise in such great number.[110] But such reappointment would require the consent of both the Senate [111] and the affected judge, who might well be enjoying his role as a judicial Horatius.[112] The more interesting question is whether the President could avoid constitutional restrictions on his removal powers while effecting a permanent transfer of judicial district, by arguing that he had not interfered with the judge's constitutionally protected "office"[113] but was merely exercising executive prerogatives in assuring the efficient operation of the government.[114] Thus, the President might attempt to transfer a recalcitrant district judge from Mississippi to a vacant district judgeship in, say, Montana without seeking his acquiescence or prior Senate approval.[115] This would then give him the opportunity to make a new appointment to Mississippi, presumably one who would view his judicial duty in a more disinterested manner than his transferred predecessor. Should the term "office" be interpreted as referring to the position of district judgeship generally, there would appear to be no constitutional difficulty in effecting such a transfer. There would be no removal from an "office." But if "office" were interpreted as meaning the district judgeship of a particular district, the transfer would constitute a removal of the judge from his "office" by the President. And the latter interpretation seems more reasonable. When the Senate confirms a district judge's appointment, it specifies the appointment as being "for [a particular district]."[116] A similar phrase is used when the House votes articles of impeachment against a district judge.[117] A conception of "office"

110. For example, President Kennedy made use of his power to reappoint judges when he appointed Judge J. Skelly Wright, though not for the purpose indicated in the text, to the Court of Appeals for the District of Columbia after the latter's resignation from his district judgeship in the Eastern District of Louisiana. 298 F.2d VII (1962).

111. U.S. CONST. art. II, § 2, cl. 2.

112. BALDWIN, FIFTY FAMOUS STORIES RETOLD 76 (1933).

113. U.S. CONST. art. III, § 1.

114. Though the Supreme Court in Myers v. United States, 272 U.S. 52 (1926), upheld the power of a President to remove a postmaster from office, this precedent does not seem applicable here, since the Constitution sets forth both the term of the judicial office and the condition (lapse from good behavior) upon which removal may be effected. U.S. CONST. art. III, § 1.

115. Obviously, this move could be politically difficult with respect to *both* states involved.

116. *E.g.*, 107 CONG. REC. 5843, 18810, 19489 (1961) (confirmation of federal district judges for particular districts).

117. See, *e.g.*, 6 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 713 (1935) ("Articles of impeachment of the House of Representatives . . . against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928"); 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 786 (1907) ("Article

which has reference to a particular locale is also more consonant with accepted notions of judicial independence; it makes unlikely the creation of a judicial Siberia—say, the Northern District of Alaska—to which judges with whom a present administration disagrees may be dispatched. Certainly, without statutory authorization such action by the President would be untenable; even if such a statute were enacted, it would seem highly unsound from a constitutional perspective.

Although permanent reassignment, which would remove a judge from his district, is constitutionally dubious, temporary assignments of other judges to his district, both intracircuit and intercircuit,[118] may readily be justified on grounds of expediency in the administration of the business of the federal courts. A chief judge of a circuit is in fact empowered by statute to make temporary assignments of judges within the circuit to serve in other districts within the circuit.[119] Moreover, a chief judge of a circuit may, with the approval of the Chief Justice of the Supreme Court, obtain a temporary assignment to his circuit of a district [120] or circuit judge [121] from another circuit. Normally both kinds of temporary assignments are made for the sole purpose of reducing docket congestion. But even if this congestion arises only from the manner in which particular classes of suits are handled, intercircuit assignment of judges to handle that class of suit would seem to come within the statutory criterion of "necessity,"[122] and intracircuit assignments for the same purpose would seem to satisfy the statutory criterion of "public interest."[123] In effect, the decision as to both criteria is made by the circuit's chief judge alone, for

exhibited by the House of Representatives . . . against James H. Peck, judge of the district court of the United States for the district of Missouri. . . ."); *id.* at 960 ("Articles exhibited by the House of Representatives . . . against Charles Swayne, a judge of the United States, in and for the northern district of Florida . . ."). *Cf.* the Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1789):

> *And be it further enacted*, that there be a court called a District Court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed. . . .

118. 28 U.S.C. §§ 291, 292, 294 (1958).

119. 28 U.S.C. § 292 (1958).

120. 28 U.S.C. § 292(c) (1958).

121. 28 U.S.C. § 291(a) (1958). In addition, a circuit's chief judge may avail himself of the services willingly provided by those retired district or circuit judges of the circuit. 28 U.S.C. § 294(b) (1958).

122. 28 U.S.C. §§ 291(a), 292(c) (1958).

123. "In the public interest," which he alone apparently determines, 28 U.S.C. §§ 291(c), 292(b) (1958), a chief judge may temporarily assign a circuit or district or retired judge in his circuit to "discharge during the period of his designation and assignment, *all judicial duties for which he is designated and assigned.*" 28 U.S.C. § 296 (1958) (emphasis added). Thus if a chief judge felt that the "public interest" called for action—because of the delay in the disposition of civil rights suits by some district judges, the attendant harm suffered by litigants, and the increased number of appeals and reversals in these suits—he might be able to designate an available judge to hear civil rights litigation pending within the circuit.

the available evidence indicates that the Chief Justice of the Supreme Court rarely disapproves a request for an intercircuit assignment.[124] Thus, the Fifth Circuit could use either an intercircuit or intracircuit assignment of judges willing to dispose expeditiously of civil rights suits, to districts where such actions have arisen, as a means of reducing delay in the handling of civil rights suits.

A number of considerations militate against arranging assignments for this purpose, however. Perhaps the major objection arises from the difficulty of assuring that the transferred judge will sit in the litigation where his presence would be most helpful in avoiding delay. Control over division of business in a district is exercised by its chief judge[125] and if he is among those responsible for delay in the district, his use of assigned help will probably not remedy the situation.[126] The judicial council of the circuit, acting formally or through the chief judge of the circuit, might freeze the permanent judges of the district to the cases then before them, until such time as they have been disposed of.[127] This would leave a simultaneously assigned judge from without the district free to hear all causes filed during the weeks following, including such civil rights litigation as might arise. This remedy, however, is objectionable because of its extraordinary potential for aggravating frictions within the circuit. Fur-

124. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1961 48 (1962) [hereinafter cited as REPORTS with a particular date]; REPORTS, 1962, 80 (1963); REPORTS, March 1963, 36 (1963). *But see id.* at 36-37, where the Advisory Committee on Intercircuit Assignments of the Judicial Conference of the United States stated that before an intercircuit assignment of an active judge will be recommended, assistance should first be secured, if possible, from within the circuit or from the services of a senior circuit judge from without the circuit.

In arranging an intercircuit assignment, normally the chief judge of the short-handed circuit makes a request to the chief judge of a circuit from which help is sought. Interviews. Thereafter, the chief judge of the short-handed circuit addresses his request to the Chief Justice, who, in turn, sends it to the Advisory Committee on Intercircuit Assignments for their recommendation. Interviews.

125. Interviews. Thus, the chief judge of a multi-district court is in a position to determine the particular cases which a visiting judge might hear. And if assigned to a single judge district, the visiting judge's caseload would be determined by the resident judge.

126. The chief judge of the multi-judge Southern District of Mississippi, for example, is Judge Cox, 317 F.2d XII (1963), who, not only has been reversed regularly, in civil rights suits, but also has been leaden-footed in his disposition of these cases. See notes 25-32, 87 *supra* and accompanying text. In the multi-judge Northern District of Alabama, Judge Lynne, who has failed to follow binding higher court mandates on a few occasions, see note 65 *supra* and PELTASON, FIFTY-EIGHT LONELY MEN 84 (1962), presides as chief judge, 317 F.2d XII (1963). On the other hand, Chief Judge Christenberry of the Eastern District of Louisiana, 317 F.2d XII (1963), is of liberal bent. PELTASON, *op. cit. supra* at 19 n.17; see, *e.g.*, Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962) (affirmance of Judge Christenberry's granting of summary judgment for an injunction against the enforcement of a Baton Rouge segregation ordinance).

127. See notes 145, 148-51, 153 *infra* and accompanying text.

thermore, whatever benefits might be gained would not be secure. Since civil rights litigants usually seek equitable relief, a verdict favorable to plaintiffs will mark the beginning of their association with the court; continuous supervision of compliance to the decree and other long-term court involvement is commonplace.[128] Once the assigned judge has returned whence he came, the resident judges may enjoy considerable freedom to vacate, modify, or otherwise disrupt the enforcement of the decree.[129] If, on the other hand, the temporary judge seeks to exercise his statutory powers to supervise the continued enforcement of the decrees which he entered,[130] high costs of inefficiency may yet be posed in the form of travel expenses and calendar disruptions in his home district. Furthermore, community resentment at decisions imposing desegregation could only be heightened were such decisions rendered by an outsider, or "carpet-bagger," thereby enhancing the difficulties of the enforcement process.[131]

Similar to the power to make these extraordinary assignments is the ordinary power of the circuit's chief judge to determine the constitution of an appellate panel [132] and two-thirds of the personnel of a three-judge district court.[133] And a chief judge of a multi-judge district court has the power to determine which district judge will hear a particular case brought in that district.[134] This power could be used much as the President's appointment power may be used, to ensure that only judges willing to dispose of civil rights cases expeditiously and consistent with prevailing doctrine will hear them. Even then, of course, it would have to be exercised on a case-by-case basis, and

128. *E.g.*, City of Montgomery v. Gilmore, 277 F.2d 364, 368 (5th Cir. 1960); United States v. Mayton, 7 RACE REL. L. REP. 1136-37 (S.D. Ala. Nov. 15, 1962); United States v. Fox, 211 F. Supp. 25, 36 (E.D. La. 1962); Bush v. Orleans Parish School Bd., 205 F. Supp. 893, 895 (E.D. La. 1962). Detailed voting registrar reports and registration papers or school desegregation are often filed. See, *e.g.*, Alabama v. United States, 304 F.2d 583, 585 (5th Cir. 1962) (voting); United States v. Fox, 211 F. Supp. 25 (E.D. La. 1962) (voting); Augustus v. Board of Public Instruction of Escambia County, 8 RACE REL. L. REP. 58 (N.D. Fla. Nov. 29, 1962) (school desegregation). Sometimes the parties file additional motions with the court requesting supplemental relief or modification of the court's decree. See, *e.g.*, Kennedy v. Bruce, 7 RACE REL. L. REP. 1132 (S.D. Ala. Oct. 15, 1962); Calhoun v. Latimer, 188 F. Supp. 412 (N.D. Ga. 1960).

129. *Cf.* Guillory v. Administrators of the Tulane Univ. of La., 203 F. Supp. 855 (E.D. La.), *vacated*, 207 F. Supp. 554 (E.D. La. 1962) (vacation of Judge Skelley Wright's order of summary judgment by Kennedy-appointed District Judge Ellis).

130. 28 U.S.C. § 296 (1958).

131. Furthermore, in the case of a judge assigned from another circuit, the irritation which the permanent judge of a district may feel at being "displaced" may be matched by the outsider's unwillingness to serve in an assigned capacity, stemming from an "I-do-not-want-to-handle-the-dirty-laundry-of-another-circuit" feeling. Interview. This is particularly likely to be the case if the political tenderness of the issues involved is supplemented by complexity in either factual determination or rendition of decree.

132. Interview.

133. 28 U.S.C. § 2284(1) (Supp. IV, 1960).

134. Interview.

would depend upon the sympathies of the assigning judge. Moreover, use of the administrative power in a manner related to the judge's attitude toward the case smacks of partiality and violates a sense of propriety prevalent within the judiciary. It probably would create resentment in the judges not permitted to hear the cases. There is some evidence that this preventive control is being used in the Fifth Circuit.[134a]

C. *Administrative Supervision*

If appointment and assignment techniques fail to prevent a judge with an established penchant for delay or disregard of precedent from sitting on civil rights cases, the Executive, the Congress and the Judiciary may nonetheless each be able to influence the degree to which his influence is felt. The President's ability to control judicial performance after appointment is probably

134a. Since Bailey v. Patterson, 199 F. Supp. 595 (S.D. Miss. 1961), *vacated per curiam*, 369 U.S. 31 (1962), where the two sitting Mississippi district judges frivolously invoked the doctrine of equitable abstention to the detriment of Negro plaintiffs, three three-judge district courts—two of whose judges are designated by the circuit's chief judge—convened in Mississippi have consisted of two circuit judges who fairly regularly have upheld Negroes' constitutional rights. And in two of those cases the Negro plaintiffs did obtain their sought-for preliminary injunction; in the other case, the three-judge court dissolved itself. See United States v. City of McComb, 6 RACE REL. L. REV. 1169 (S.D. Miss., Nov. 27, 1961) (Judges Tuttle, Rives and Mize sat, but Judge Mize did not sign the order granting injunctive relief); United States v. Fraiser, 6 RACE REL. L. REP. 1167 (N.D. Miss. Dec. 5, 1962) (Judges Tuttle, Rives and Clayton sat); Clark v. Thompson, 204 F. Supp. 30 (S.D. Miss. 1962) (Judges Rives, Brown and Mize sat, but the court dissolved itself).

However, in United States v. Mississippi, Civil Action No. C-3312, S.D. Miss., a case now before a three-judge district court in Mississippi, the composition of the original panel—Circuit Judges Brown and Wisdom and District Judge Cox—recently has been changed. After Judge Wisdom stepped down from the panel, Judge Cameron, who has consistently voted against Negro plaintiffs, was designated to fill the panel. Interview. Thus, it appears that a consistent pattern of appointment of particular circuit judges to three-judge district courts in Mississippi is absent. Moreover, when one considers the variety of factors—such as health, availability for service, travel necessary—which are involved in the designation of judges by a circuit's chief judge, it seems impossible to document with exactness the reasons for a particular appointment.

For the record of the judicial performance of the judges on the Court of Appeals for the Fifth Circuit, see note 156 *infra*.

Judge Cameron has stated that the consistent liberal composition of the appellate panels found in twenty-two of twenty-five recent race cases indicates that "panel rigging" exists on the Court of Appeals. Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 30, 1963, p. 15. But the statistical compilation prepared by Judge Cameron, though suggestive, is far from conclusive. For instance, he does not reveal whether the initial composition of a panel that was scheduled to hear a particular case assigned to that panel was changed by the time that case came on for a hearing. Moreover, even if he could demonstrate that a particular panel was changed, any one of a number of considerations, such as ill health, may have accounted for the change. In addition, the recurring liberal bent of the panels may well be due to coincidence, since cases are assigned only by "pure chance," according to Judge Wisdom. N.Y. Times, July 31, 1963, p. 12, col. 4.

limited to the influence of his reappointment power;[135] judges interested in promotion in the federal courts might be influenced considerably by an expression of Presidential displeasure at their dilatory actions. The Congress has at least two alternatives: by providing, say, for three-judge courts in some or all forms of civil rights litigation it would give the chief judge of the circuit the power to flank a dissident forum judge with two more compliant brethren;[136] by establishing statutory preferences or other expediting procedures, Congress might be able to combat at least the problem of delay. But extension of the three-judge principle seems unlikely in view of the attendant costs in judicial efficiency,[137] even though it may appear that they are more appropriately paid in these circumstances than others.[138] Furthermore, civil rights litigants may be reluctant to rest the opportunity for enforcement of their constitutional

135. A President can, of course, selectively enforce court orders. Such a possibility seems more fanciful than real, however. See, *e.g.*, NEUSTADT, PRESIDENTIAL POWER 17 (1961) (Ex-President Eisenhower's enforcement of Little Rock, Arkansas integration order); N.Y. Times, Sept. 30, 1962, p. 1, col. 8 (President Kennedy's calling of Mississippi National Guard into federal service in enforcement of Meredith's admission order to the University of Mississippi); N.Y. Times, June 12, 1963, p. 1, col. 8 (President Kennedy's federalization of Alabama National Guard in order to enforce court order integrating University of Alabama). *But see* President Jackson's famous response to Chief Justice Marshall's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832): "'John Marshall has made his decision; now let him enforce it.'" Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 149 (1940).

136. The compromise civil rights bill which was recently passed by the House Judiciary Committee provides that three-judge district courts shall have jurisdiction over voting registration suits. N.Y. Times, Oct. 30, 1963, p. 22, col. 3.

137. The argument against conferring additional jurisdiction upon three-judge district courts, say, in the voting registration area, rests essentially on the increased flow of litigation to the Supreme Court's obligatory docket that would accompany enactment of such a proposal, thereby reducing the amount of cases which the Court could hear on a discretionary basis through the granting of certiorari. This consideration, it might be contended, is peculiarly significant at this time because of the increased number of three-judge district court cases on apportionment following the Court's decision in Baker v. Carr, 369 U.S. 186 (1962). Moreover, since almost all of the voting registration cases arise within the Fifth Circuit, the argument might continue to run, the increased burden that would be placed on the circuit judges—who would compose at least one-third of the special panel, 28 U.S.C. § 2284(1) (Supp. IV, 1960)—in the Fifth Circuit would be extremely costly when viewed against the fact that it has the most congested dockets in the country. Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 46. But these considerations might pale to some extent if the Fifth Circuit obtained additional judges. And account should be taken of the fact that three-judge district court cases are "given precedence and assigned for hearing at the earliest practicable day," 28 U.S.C. § 2284(4) (Supp. IV, 1960); thus, enactment of the proposal would promote the expedition of voting registration cases.

138. Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646, 1660 (1963).

rights on the attitude of any one judge, who may well be replaced by a judge of opposite bent.[139]

On the other hand, regulation of procedure encouraging expedition is more likely to be a part of future civil rights legislation. Thus, the House Judiciary Committee presently has under consideration a proposal to expedite the handling of voting registration suits brought by the Attorney General.[140] It would confer a duty upon the chief judge of the forum district "immediately to designate a judge in such district to hear and determine the case" following its filing, and then require the designated judge "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."[141] Though such legislation might have the beneficial effect of encouraging the Fifth Circuit to police more closely a district court's dilatoriness in assigning civil rights cases for trial,[142] the general language of the statute leaves the district court with continuing reservoirs of discretion in such determinations as, for example, what is "the earliest practicable date."

Given the weaknesses of controls thus far discussed, the most substantial influence over the performance of district court judges may rest in the judicial council of each circuit. In 1939, aiming to improve the supervision of court work through a judicially-controlled organization, Congress created in each circuit judicial councils consisting of its active circuit judges,[143] and endowed with broad power:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.[144]

139. But it appears that both Chief Judge Tuttle of the Fifth Circuit and Judge Brown, who is next in line for the chief judgeship of the circuit, 28 U.S.C. § 45(a) (1958), are of liberal bent and thus might, in the exercise of their discretion, designate judges to sit on the three-judge district courts who are prone to follow prevailing legal doctrines in the civil rights area. Assuming he does not retire, Judge Brown will be able to act as chief judge of the circuit until he reaches 70 in 1979. WHO'S WHO IN AMERICA 396 (1962).

140. H.R. 7152, 88th Cong., 1st Sess., § 101(d) (1963).

141. *Ibid.*

142. See notes 144-45, 150 *infra* and accompanying text. Moreover, if there is no available judge in the forum district to hear the voting case, the chief judge of the forum district then, under the proposed statute, H.R. 7152, 88th Cong., 1st Sess., § 101(d) (1963), must notify the chief judge of the circuit, who "shall then designate a district or circuit judge" to dispose of the case. *Ibid.* Thus, if the triggering contingency were to occur, the chief judge would then have the opportunity to designate a judge who is prone to dispatching civil rights litigation expeditiously.

143. 28 U.S.C. § 332 (1958).

144. *Ibid.* To aid its supervisory role, Congress conferred upon the chief judge of a circuit the duty to submit to the council quarterly reports on current docket conditions prepared by the Administrative Office of the United States. *Ibid.* These reports include, among other things, reports from the district judges as to cases held under advisement over a thirty-day period. Shafroth, *Modern Developments in Judicial Administration*, 12 AM. U.L. REV. 150, 160 (1963). Thus, through their own contacts with the district courts

If the circuit's judges do decide to act, they may issue an order designed to remedy the troublesome situation, say, directing a dilatory district judge to decide delayed cases before hearing any other cases.[145] But judicial councils, despite their broad statutory mandate, have acted in this manner infrequently.[146] This lack of use is largely due to a reluctance exhibited by most judges to issue formal orders probably embarrassing to their brethren. Many circuit judges, moreover, dislike involvement in the intricacies of court administration.[147] As a result, in most instances where a circuit has been faced with a problem for which judicial council action seems appropriate, it has chosen instead to act informally through the person of the chief judge.[148] The chief judge will contact the district judge concerned in a manner designed least to arouse the latter's resentment or create a commotion within the circuit.[149] Thus, if the district judge happens to be a member of a multi-judge district court, the chief judge of the circuit will normally contact the chief judge of the multi-judge court, who will then take some corrective action, such as discussing the matter with the individual or withholding new cases until the cases then under advisement have been disposed of.[150] Or should the district judge be the only member of the district court, the circuit's chief judge will typically contact him directly.[151]

The Fifth Circuit, if so inclined, might effectively use its judicial council to expedite the disposition of civil rights litigation in its district courts and control the bench's refusal both to respect litigants' rights to timely adjudication and to abide by higher court mandates. The judiciary apparently feels that such use of the judicial council would be appropriate. The Judicial Conference of the United States in adopting in 1961 a Report on the Powers and Responsibilities of Judicial Councils concluded:

> . . . The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts. (3)

and the statistical reports gathered or compiled by the Administration Office, the circuit judges become apprised to some extent of lagging performance and other causes for complaint directed against the lower federal bench.

145. Interviews.

146. Speech by Chief Judge Lumbard of the Second Circuit before the National Conference of Judicial Councils, May 19, 1960, at pp. 5, 9-10.

147. *Id.* at 8, 13.

148. Interviews; Judicial Conference of the United States, *Report on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess. 7 (1961) [hereinafter cited as *Report on Judicial Councils*].

149. Speech by Chief Judge Lumbard, *supra* note 146, at 10; Interviews.

150. Interviews.

151. Interviews.

> The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to accomplish these ends. . . .[152]

Moreover, there are techniques available to the Fifth Circuit's judicial council for dealing with the problems stemming from the performance of some of its district courts. A district judge can be prevented from hearing additional cases until he has disposed of those already pending.[153] Intracircuit assignments may be made assigning an available judge from a nearby district court to handle the cases normally assigned to the sidetracked judge. Further, where a district judge has compiled a record of reversals on appeal or abuses of discretion in disposing of civil rights suits, the council might order the questionably performing judge not to handle that type of litigation in the future, and then assign those cases to other available judges within the circuit. This last type of council action is not unprecedented. Acting through the person of its chief judge, another circuit directed a district judge not to handle a case in which he had been twice reversed; another judge was assigned to dispose of further proceedings.[154]

It is clear, however, why these steps are not taken in the Fifth Circuit. The active circuit judges are themselves deadlocked over the question of the proper disposition of civil rights litigation, and thus would probably be divided over the desirability of using the judicial council to control the performance of some of its district courts.[155] Of the nine judges on the bench, four have fairly regularly upheld Negroes' constitutional rights, two judges have quite consistently dissented from these decisions, and three judges have voted inconsistently.[156] Should the Fifth Circuit resolve its apparent division, the judicial

152. *Report on Judicial Councils* 8-9.

153. The Third Circuit's judicial council entered such an order. Speech by Chief Judge Lumbard, *supra* note 146, at 5-6.

154. Interview.

155. Further, the time required to hold judicial council meetings may make frequent holding of them in order to deal with questionable performances in district courts somewhat impractical, particularly in view of the Fifth Circuit's congested docket. Since the minutes of judicial council meetings are confidential, it is impossible to estimate the amount of time needed for the holding of these meetings. Interview. But if these meetings, which each circuit judge in active service must attend, 28 U.S.C. § 332 (1958), are held following *en banc* hearings of the Fifth Circuit, the amount of time needed to travel to a particular city for the holding of a council meeting would be obviated.

156. This analysis of the position of the circuit judge is perhaps borne out by Judge Cameron's characterization in a dissenting opinion of the four circuit judges who have sat on most race cases in recent years and who have rendered decisions favorable to civil rights plaintiffs as "The Four." Armstrong v. Board of Educ., No. 20595, 5th Cir., July 30, 1963, p. 15.

The regular upholding of Negroes' constitutional rights by Circuit Judges Tuttle, Brown, Wisdom and Rives is evident from, *e.g.*, Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962); Bush v. Orleans Parish School Bd., 308 F.2d 491 (5th Cir. 1962); Augustus v. Board of Public Instruction, 306 F.2d 862 (5th Cir. 1962); City of Shreveport v. United States, 316 F.2d 928 (5th Cir. 1963); Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962);

council would seem to be an effective tool for enforcing discipline upon the reluctant district judges.

Use of the judicial council, for at least some of the purposes suggested above, however, seems objectionable on grounds of its interference with judicial independence. If the measures taken by the council can fairly be identified as a sanction imposed for past behavior, rather than as a measure taken for administrative purposes (*e.g.*, the clearing of crowded dockets), it does not seem overly relevant that it is the judiciary rather than Congress or the Executive which is imposing the sanction. True, it may be maintained that the notion of "judicial independence" depends upon the possibility of self-discipline administered—as by mandamus—through the judicial hierarchy. But considerably less cogent is the argument that judges are justified in imposing sanctions which extend beyond the periphery of a single cause of action, even if these

City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960); Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir. 1963); Congress of Racial Equality v. Clemmons, No. 19703, 5th Cir., Sept. 12, 1963; Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963; Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963); Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963; Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962); United States v. Wood, 295 F.2d 772 (5th Cir. 1961); United States v. Lynd, 301 F.2d 818 (5th Cir. 1962); Dixon v. Alabama St. Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); United States v. Dogan, 314 F.2d 767 (5th Cir. 1963); Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961). *But see* Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962).

Judge Cameron is, by far, the most consistent dissenter from decisions in which his brethren grant civil-rights plaintiffs their requested relief. See United States v. Wood, 295 F.2d 772 (5th Cir. 1961); Dixon v. Alabama St. Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Alabama v. United States, 304 F.2d 583 (5th Cir. 1962); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Bailey v. Patterson, No. 20372, 5th Cir., Sept. 24, 1963. Judge Gewin, a Kennedy appointee, N.Y. Times, Oct. 6, 1963, § 1, p. 75, col. 1, ranks as the second most consistent dissenter. See, *e.g.*, Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963; Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963; Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir. 1963). *But see* Congress of Racial Equality v. Clemmons, No. 19703, 5th Cir., Sept. 12, 1963; Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963.

Judge Bell, another Kennedy appointee, N.Y. Times, July 19, 1963, p. 8, col. 3, usually concurs with or joins the majority in granting civil rights plaintiffs their requested relief. See, *e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963); Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962); United States v. Lynd, No. 19576, 5th Cir., July 15, 1963. Nevertheless, he has dissented from decisions favorable to Negro plaintiffs, Davis v. Board of School Comm'rs of Mobile County, No. 20657, 5th Cir., July 18, 1963, and from that part of a judgment of contempt imposing a fine on ex-Governor Ross Barnett, Meredith v. Fair, 7 RACE REL. L. REP. 761 (5th Cir., Sept. 28, 1962). Judge Jones has also been inconsistent in his decisions in the civil rights area. See Shuttlesworth v. Connor, 291 F.2d 217 (5th Cir. 1961); Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962); Meredith v. Fair, 7 RACE REL. L. REP. 761 (5th Cir., Sept. 28, 1962); East Baton Rouge Parish School Bd. v. Davis, 287 F.2d 380 (5th Cir. 1961). Judge Hutcheson, one-time chief judge of the Fifth Circuit, has compiled a record similar to Judge Jones' in recent civil rights cases. *Compare* Clark v. Thompson, 313 F.2d 637 (5th Cir. 1963), *with* United States v. Lynd, 301 F.2d 818 (5th Cir. 1962), *and* Ross v. Dyer, 312 F.2d 191 (5th Cir. 1962).

sanctions will save the cost to litigants and the judiciary of incessant appeals, thus serving an institutional, non-political function. The root of the principle of judicial independence seems to be the individual judge's ability to decide cases free from fear of reprisal save that, such as reversal, which serves to correct his disposition of the particular cause before him. Except in the rare case of impeachment—the formal statement of "not good behavior"—there will be no assessment of his work collectively, with rewards or sanctions conditioned on his accommodation to a given standard. If this is the value involved, then debilitating sanctions must be avoided regardless of their source. The threat of depriving a judge of his caseload—either in whole or in part—has the same impact on the judge's capacity to decide whether it stems from the judicial council or another body. And that salary may still be paid to a judge so restricted does not alter the fact that, in any fundamental sense, he has been removed from his office to the same extent as cases are kept from his docket. While temporary assignments to crowded dockets or an order to hear no new cases until a present calendar has been disposed of could be justified as administrative orders, action such as suspension of a judge from the hearing of particular classes of cases is in effect a partial removal.[157] As council action shades more clearly from "housekeeping" into "penal," then, it should be undertaken with increasing caution.[158]

D. *Review*

It must, unfortunately, be concluded that few of these controls promise substantial improvement in judicial discipline. All that can be said is that informal pressures, such as those generated by an interest in appointment to higher posts within the judiciary or by the moral suasion of fellow judges operating through the circuit's judicial council, may well be more effective than formal devices which may exacerbate already strained relations and impinge substantially on the judiciary's salutary sense of independence. Formal solutions to the problem through congressional action or judicial assignment tend to put all the weight of disciplining upon one man, the chief judge of the circuit, and may often be circumvented by a district judge, whose reluctance in race matters could be sharpened into active resistance by an attempt to discipline him. The ability of a judge to resist discipline, limited only by the near-impossibilities of impeachment or contempt,[159] is profound testimony to the importance of select-

157. As additional judges are appointed, moreover, the political character of the majority in a given judicial council may alter: those who advocate that serious disciplinary functions be given the majority must be prepared to accept the consequence of a change in its tenor.

158. The judges on the council, when administering sanctions, are in the curious position of (a) setting the standard whose violation brings punishment, (b) bringing the charge of violation, and (c) deciding the case and the penalty to be attached. Such behavior seems unjudicial. *But cf.* Friedman v. Court on the Judiciary, in N.Y. Times, Oct. 15, 1963, p. 30, col. 4, *cert. denied*, 32 U.S.L. WEEK 3134 (U.S. Oct. 15, 1963).

159. It is possible that a district judge could be held in contempt by a court of appeals for violating the terms of a writ of mandamus or formal judicial council order directed against him. See note 144 *supra* and accompanying text.

ing judges who will comply in the first instance. But if discipline is to be imposed upon a single judge, then perhaps it should come from within the judiciary itself. The most effective means of securing this discipline, although limited by the impact of the principle of judicial independence, would seem to be the judicial council of the circuit. And if such discipline cannot be achieved through the imposition of administrative controls, it is necessary to look to the sanctions available through review procedure, involving the litigation itself.

Control Over the Judge's Decision Process

It is, in fact, at the behest of litigants seeking relief from indiscretion below in particular causes that the judiciary's more traditional weapons of internal discipline are found. The very structure of appeal and reversal is part of this "disciplinary" structure; as a front-line defense against trial court misunderstanding of higher court directives binding upon him, reversal on appeal serves not only as a method of growth for the law but also as a means of instructing trial judges in the doctrines which ought to be applied. An appeal, as such, however, bears no formal consequence for the judge himself, save as he may be required to hear the cause again. And the disciplinary aspect of appeal depends for its success upon the validity of its underlying assumption—that trial judges will be seeking to apply the law in accordance with the directives of higher courts. If this assumption fails, and unless the judge can be made to obey high court mandates, both the administration of justice and the workability of a pyramidal judicial structure will be threatened by the flood of "wrong" decisions and appeals. For where a judge persists in misunderstanding or delay despite repeated corrections, reversal on appeal will not be a disciplinary step adequate to assure correct justice to potential litigants in the offending court.

Appeal may also be inadequate for the protection of the rights of the present litigant before the dissident judge. An appellate court's power to review on appeal is for most purposes limited to final judgments and interlocutory orders granting or denying injunctive relief entered by the district courts.[160] Often, however, this control has proved inadequate in the Fifth Circuit as a means of coping with the harmful effects of delay arising out of slow-footed handling of civil rights cases in southern district courts. For, as seen above, that delay may cause irreparable injury to a litigant's rights before a district court enters a final judgment or in the interim between the entry of the final order below and the rendering of the appellate decision. Reversal can not undo the harm wrought by the passage of time, such as loss of the chance to vote at a rapidly-approaching election. And delay itself, however counter to the suggestions of statute or appellate courts,[161] is not appealable error, but merely an "unfortunate incident" of litigation which the reviewing court may comment upon in a caustic or precatory way when the cause is brought before it on other

160. 28 U.S.C. §§ 1291, 1292(1) (1958).

161. See notes 77, 140-41 *supra* and accompanying text.

grounds.[162] Unless orders or inaction occasioning delay at the pre-verdict stages can be reviewed immediately, they cannot be reviewed at all.

Review of apparent pre-verdict delay will necessarily be limited by the traditionally broad discretion of the trial judge to order his business.[163] The party complaining to the appellate court would necessarily bear a heavy burden of showing that the delay was not reasonably a product of this traditional discretion. But if a trial judge has shown an apparent penchant for delay, this burden might be more easily met. And since the complaining litigant would necessarily be seeking an injunction-like form of remedy—one directing personal force against the judge—to prevent further delay, he may have achieved a result of higher disciplinary value than mere reversal on appeal.

The All Writs Statute [164] provides the circuit court with authority to intervene at pre-verdict stages. Section 1651 of the Judicial Code, derived from the Judiciary Act of 1789, presently provides, in part, that

> . . . The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.[165]

Under a settled construction of this section, a court of appeals has the discretionary power to issue writs of mandamus and prohibition and common law certiorari not only to aid its exercised or existing jurisdiction but also in aid of its prospective jurisdiction.[166] Thus, a court of appeals has the power—available as an auxiliary check over the disposition of orders in the lower courts in order to promote "justice"[167]—to review either a non-appealable interlocutory order of a district court or a failure by a court to act within a reasonable time in a proceeding to determine whether it should issue an extraordinary writ.[168]

The theory on which such review proceeds is that postponement of review of a particular interlocutory order or failure to act until the district court hands down a final decision or denies an interlocutory injunction would be improper because of the irreparable injury which litigants would suffer absent the opportunity to obtain review and relief promptly. The effect of such review could be to permit an appellate court to scrutinize those procedural orders or omissions which can cause delay but have little bearing on the ultimate disposition of the merits of the case. Thus, on petition for writ of mandamus the Fifth Circuit

162. See Meredith v. Fair, 305 F.2d 343, 351-52 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

163. See, *e.g.*, Nelson v. Grooms, 307 F.2d 76, 78 (5th Cir. 1962); FED. R. CIV. P. 42.

164. 28 U.S.C. § 1651 (1958).

165. *Ibid.*

166. MOORE, JUDICIAL CODE ¶ 0.03(51), at 468 (1949).

167. 6 MOORE, FEDERAL PRACTICE ¶ 54.10[4] at 104 (2d ed. 1953); Interview; see also Czuczka v. Rifkind, 160 F.2d 308, 309 (2d Cir. 1947); William Goldman Theatres, Inc. v. Kirkpatrick, 154 F.2d 66, 69-70 (3d Cir. 1946); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962).

168. MOORE, *op. cit. supra* note 166, ¶ 0.03(51) at 469.

reviewed a district court's order postponing a hearing on a motion for preliminary injunction seeking an end to racial segregation in the Birmingham, Alabama public school system.[169] Ordinarily an order postponing such a hearing would never be reviewed, for on an appeal from a final judgment the issue whether or not that postponement was an abuse of discretion would rarely be dispositive of the merits of the case. Yet the delays occasioned by such postponement, as discussed earlier, can have detrimental effects on the plaintiff's rights, if, for example, a new school term were to begin in the near future.

Similarly, the All Writs Statute could also be used to review an allegedly unreasonable delay by a district judge in the issuance of a decision following a hearing on the merits. Although the Fifth Circuit has not done so in recent civil rights litigation,[170] it might decide that such a delay was an abuse of discretion and order the district judge to render a decision within a specified time.[171] It is true that the language of decisions and court rules has emphasized that review by prerogative writs is subject to stringent limitations: that the writs are not issued as a matter of right, and that they are not to be used "as a mere short cut for an appeal."[172] But these limitations are largely irrelevant to the case where unreasonable delay is urged as the reason for issuing the writ.

169. Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962). The Fifth Circuit denied the petition for writ of mandamus, finding that it was within the district judge's discretion to stay the proceedings in one suit pending the outcome of a similar suit seeking school desegregation that was to be tried before another district judge of the same district in the near future. *Id.* at 78.

170. But the Fifth Circuit has considered a petition "in the nature of a writ of mandamus" which sought in part an appellate court order directing the trial court to make a prompt determination of plaintiffs' motion for a preliminary injunction which was under submission before Alabama District Judge Thomas. Davis v. Board of School Comm'rs, 318 F.2d 63, 64 (5th Cir. 1963). Although the Court of Appeals on May 24, 1963 denied the requested order on the ground that the district judge did not abuse his discretion, it nevertheless stressed that it was Judge Thomas's "duty . . . to promptly rule on this motion for preliminary injunction." *Ibid.* The district judge entered an order shortly thereafter, and thus the effect of an issuance of a writ of mandamus was achieved.

The Fifth Circuit's recent adoption of a rule governing the issuance of extraordinary writs, 5TH CIR. R. 13(a), on May 31, 1963 may presage greater use of this reviewing method.

171. This proposed use of the All Writs Statute is not unprecedented. See Steccone v. Morse-Starrett Products Co., 191 F.2d 197 (9th Cir. 1951); *In re* Watts, 214 F. 80 (2d Cir. 1914); *cf.* Czuczka v. Rifkind, 160 F.2d 308, 309 (2d Cir. 1947); see also 6 MOORE, *op. cit. supra* note 167, ¶ 54.10[4], at 92.

172. See, *e.g.*, *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947) ("Mandamus, prohibition and injunctions against judges are drastic and extraordinary remedies. . . . We are unwilling to use them as substitutes for appeal."); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 31 (1943) ("there are in this case no special circumstances which would justify the issuance of the writ. . . ."); *In re* Grossmayer, 177 U.S. 48, 49 (1900) ("A writ of mandamus . . . cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court"); MOORE, *op. cit. supra* note 166, ¶ 0.03(51), at 469. See also 5TH CIR. R. 13(a): "The petition shall contain . . . a statement of the reasons why the *extraordinary* writ of mandamus or prohibition should issue. . . ." [Emphasis added.]

Such delay is not subject to "appeal" at any stage in the trial proceedings. The limitation which will have principal effect, if a writ is sought, will be the appellate court's respect for the necessary discretion given district judges in managing their trial calendars and in determining the time needed to issue opinions.[173] But even if the appellate court feels the writ must be denied, it has the opportunity to apply the force of moral suasion—a force all the more strong for its implication that renewed attempt to seek the writ might not fail.[174]

If, as may often be the case, a litigant is unwilling to involve the judge who is trying his cause in the formal, courtroom process involved in procuring a writ under the All Writs Statute,[175] he might find it less objectionable to seek the aid of the judicial council of the circuit—whether acting informally through the person of its chief judge or formally through the issuance of an order—in resolving delay.[176] While the council's interests are chiefly administrative rather than appellate, so that they may be reluctant to hear complaints pertaining to particular actions, a litigant who could call attention to a judge's course of delay might also obtain immediate relief in his own cause. If a district judge has not scheduled a hearing on a case for an unreasonable amount of time, or has not dealt expeditiously with the preliminary motions in a case, it seems within the council's power to order its plodding brethren to cease handling the case. The council could then transfer the case to another judge for further disposition. Although such a transfer after trial appears to lead to a great waste in judicial energy, a transfer before a substantial amount of litigation has occurred, especially when in the pleading or preliminary motion stage, would not seem to be an excessive waste of judicial manhours. In the alternative, the council could direct the slow-footed judge to schedule a date for a hearing, perhaps even setting the date itself, or to decide on a preliminary motion at an early practicable time. And the council might order a district judge who, it believed, was considering a case which had been tried for an unreasonable amount of time, to render a decision within a specified period. To a lesser degree, the chief judge of the circuit, acting independently of the council, might also be able to achieve some expedition through application of informal pressures, if informed of the problem.

Application of the "offshoot" exception to the final judgment rule[177] provides another means for prompt scrutiny of a normally nonreviewable inter-

173. Another reason which partially explains an appellate court's reluctance to use the extraordinary writs is that in the reviewing procedure the judge is compelled to defend the action as a respondent. See 5TH CIR. R. 13(a)(b). For an expression of a circuit judge's reluctance to compel one of his brethren to act as a result of this form of adversary proceeding, see Circuit Judge Brown's concurring opinion in Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962).

174. *Cf.* Davis v. Board of School Comm'rs of Mobile Co., 318 F.2d 63, 64 (5th Cir. 1963).

175. Interviews.

176. The lack of indication that such a course of action has ever been undertaken does not mean that this path is unavailable to an aggrieved litigant.

177. 6 MOORE, FEDERAL PRACTICE ¶ 54.13 (2d ed. 1953).

locutory order. The offshoot rule permits the immediate appeal of certain orders entered by district courts which do not by a technical construction satisfy the final judgment rule.[178] Among these are an order vacating an attachment of a ship under an admiralty libel [179] and a denial of defendant's motion for an order demanding that the plaintiff put up a security bond prior to court action in a stockholder's derivative suit.[180] The 1949 Supreme Court decision in *Cohen v. Beneficial Industrial Loan Corporation* [181] set out the two-part rationale underlying appellate review of the so-called "collateral orders," offshoots from the main ingredient of the cause of action. First, since the order neither is a step toward final disposition of a case on the merits nor will be merged in final judgment, it is "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[182] Second, postponement of review of the order until final judgment would preclude effective review and cause irreparable damage to the litigant's right.[183] When these two conditions are met, the Court reasoned, a collateral order becomes for all effects and purposes a final judgment, and therefore comes within the spirit of the final judgment rule.

The Fifth Circuit has made use of the offshoot exception to review immediately a district court's disposition of a motion for a temporary restraining order. In the 1961 case of *United States v. Wood* [184] the United States filed suit under the Civil Rights Act of 1957, seeking *inter alia* to enjoin the criminal prosecution of John Hardy, a Negro voter registration worker, by the sheriff and registrar of Walthall County, Mississippi, on the theory that the state criminal suit was intended to "intimidate qualified Negro voters of the County from trying to register to vote."[185] Since the criminal suit was to begin two days after the government filed this action, it sought a temporary restraining order, which the district court denied.[186] The government then took an immediate appeal to the Fifth Circuit, during which the Mississippi Assistant Attorney General agreed to abate Hardy's prosecution. The United States argued that the denial of the temporary restraining order came within the "offshoot" exception to the final judgment rule. The government maintained that merely bringing Hardy to trial, regardless of the outcome, would intimidate Negro voters; therefore, to preclude review of the district court's denial of the temporary order—thereby effectuating the denial and allowing the criminal

178. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); *cf.* Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848).

179. Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950).

180. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

181. *Ibid.*

182. *Id.* at 546-57.

183. *Ibid.*

184. 295 F.2d 772 (5th Cir.), *reversing* 6 RACE REL. L. REP. 1069 (S.D. Miss. Sept. 21, 1961).

185. 295 F.2d at 774.

186. *Ibid.*

prosecution to go to trial—was to moot its case.[187] The Fifth Circuit in a two-to-one decision agreed with the government's contention.[188] The majority interpreted the Supreme Court decision in the *Cohen* case as approving "a practical construction" of the final judgment rule and held that, because postponement of review of this order before them would cause irreparable damage to the substantial rights of the party seeking prompt review, it was within the rule.[189]

In so doing, however, the majority recognized that it was extending the "offshoot" exception to orders never before held to be within its ambit.[190] Indeed, the rationale of the majority in *United States v. Wood* would logically apply to all denials of temporary restraining orders which are sought under allegations that maintenance of the status quo is necessary to preserve the effectiveness of subsequent relief. In all such cases the temporary restraining order has little, if any, bearing on the merits of the underlying cause; yet its denial, by hypothesis, will essentially moot the plaintiff's case by making impossible the subsequent granting of effective relief. Permitting appeals from denials of temporary restraining orders, given the results such appeals may often effectuate in civil rights cases, may be desirable. But it would not be without potentially regrettable consequences, such as an increase in congestion on the Fifth Circuit's overcrowded docket.[191]

In addition to enabling it to respond to pre-verdict delays in the district court, the All Writs Statute also permits an appellate court to grant requested equitable relief during the pendency of an appeal from a final judgment of a district court or from a denial or issuance of an interlocutory injunction by a district court.[192] By using this interim remedy, the Fifth Circuit has been able in some circumstances to mitigate the harm caused to litigants' constitutionally-protected rights by dilatory district judges.[193] In requesting such extraordinary relief, an appellant may rely upon various theories, all of which at one time or another have been entertained by the Fifth Circuit. The appellant may assert that injunctive relief is necessary in aid of the existing jurisdiction of the court

187. *Id.* at 777.

188. *Id.* at 778.

189. The Fifth Circuit's decision, extending the scope of court of appeals review over district court orders under 28 U.S.C. § 1291 (1958), was later paralleled by two Supreme Court decisions which broadened the statutory requirement of finality limiting the Court's jurisdiction to review state court judgments under 28 U.S.C. § 1257 (1958). See Local No. 438 v. Curry, 371 U.S. 542 (1963); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963).

190. 295 F.2d at 777.

191. Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 46.

192. See, *e.g.*, Aaron v. Cooper, 261 F.2d 97, 101 (8th Cir. 1958); Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963).

193. See, *e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 427; Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 30, 1963, pp. 4-6, 12-13.

of appeals which would "otherwise be defeated through mootness" of his appeal.[194] Or, he may assert that immediate injunctive relief is necessary to offset a clear abuse of discretion below and to avert irreparable damage to his right.[195] Finally, he may allege that injunctive relief is necessary in order to effectuate a previous judgment of the appellate court.[196] But in addition to finding that injunctive relief is necessary for one of these reasons, the appellate court, before granting an injunction pending appeal, must also decide that the likelihood is great that the appellant will ultimately prevail on the merits of his cause—that the factual and legal issues presented by the record are likely to be resolved in his favor.[197] And this requires the court to make at least a preliminary review of the record and the issues it presents,[198] with attendant costs in judicial time and energy. Where such a showing can be made, however, the appellant is able to obtain a quick and efficacious remedy—one which may have the effect of essentially disposing of the case on the merits and which can compensate for delays below by cutting as much as a year off the time effectively required for processing of the appeal.[199]

The Fifth Circuit has been very prompt in issuing injunctions pending appeal where it has felt them to be justified, and it has framed the terms of those injunctions so that they award the appellant meaningful relief.[200] For

194. Meredith v. Fair, 305 F.2d 341 (5th Cir. 1962) (denial of motion for injunction pending appeal). Over the dissent of Chief Judge Tuttle, the majority denied the injunction pending appeal on the ground that the hardship imposed on Meredith by non-attendance, when "balanced against other irreparable damages" which the parties to the suit could suffer if the district court's judgment was affirmed on appeal, was insufficient to warrant the issuance of an injunction, absent the opportunity "to study the *full* record and testimony on the hearing before the district court." *Id.* at 342. (Italics added.) The majority apparently felt that on the scanty record before the appellate court (the record submitted did not include the testimony in the trial on the merits) there was not a sufficient likelihood that the district court's judgment would be reversed.

195. See Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 427 (5th Cir. 1963) (granting of injunction pending appeal); United States v. Lynd, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962) (granting of injunction pending appeal).

196. Greene v. Fair, 314 F.2d 200 (5th Cir. 1963) (denial of motion for injunction pending appeal). A unanimous court denied the injunction because the appellant Greene failed to demonstrate the almost certain likelihood that the lower court's ruling would be reversed when his case was heard on the merits by the appellate court on a later date. *Id.* at 202.

197. 314 F.2d at 202.

198. *Ibid.* See also United States v. Lynd, No. 19576, 5th Cir., July 15, 1963, p. 1; Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962).

199. In the *Lynd* case, where the United States Attorney General unsuccessfully sought injunctive relief against alleged discriminatory practices in the district court, the Fifth Circuit granted an injunction pending appeal on April 10, 1962. United States v. Lynd, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962). Over a year later, on July 15, 1963, the Fifth Circuit reversed the district court's effectual denial of an application for the preliminary injunction. United States v. Lynd, No. 19576, 5th Cir., July 15, 1963.

200. Stell v. Savannah-Chatham County Bd. of Educ., *supra* note 195, at 428; Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 40

example, in *Stell v. Savannah-Chatham County Board of Education*,[201] where plaintiffs sought an injunction against continued school segregation, the Fifth Circuit, after finding that the district judge clearly abused his discretion and that any "further delay might prevent the enjoyment by the appellant of their clear rights as of the beginning of a new school year,"[202] granted an injunction pending appeal which ordered the School Board to submit a desegregation plan to the district court in about a month.[203] And the appellate court directed the entry of the injunction only eleven days after the district court denied the plaintiffs' request for injunctive relief.[204] It must be stressed, however, that this is an extraordinary remedy,[205] which will often be denied as unjustified. When denial occurs, the ordinary delay preceding hearing and decision on appeal, added to the delay occasioned below, may prevent the timely realization of constitutional rights.

Where an injunction pending appeal is not granted, similar if less dramatic reduction in the delay usually intervening between trial and appellate verdicts can be achieved by expediting the appeal—moving the case forward on the appellate court's calendar. Since cases on appeal are usually assigned for hearing in the chronological order of docketing,[206] a party taking an appeal ordinarily has to wait many months, even years, before having his case heard and decided. If a litigant is able to have the circuit court of appeals expedite his appeal, the date the court will review his case is advanced, often to as soon as a few weeks after the district court decision,[207] possibly preventing mootness of his cause or limiting the prejudice to his rights. For instance, in a proceeding brought by the Attorney General in August, 1960, to obtain a district court order permitting inspection of the voting records held by the Board of Registrars of Wilcox County, Alabama, the district judge, rather than

(case decided in district court on May 28, 1963); Davis v. Board of School Comm'rs of Mobile County, No. 20657, 5th Cir., July 12, 1963, *modified*, 5th Cir., July 18, 1963 (case decided in district court after May 23, 1963).

201. 318 F.2d 425 (5th Cir. 1963).

202. *Id.* at 427.

203. *Id.* at 428.

204. *Id.* at 425.

205. *Id.* at 426-27; see also Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963).

206. See Note, *Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 883 (1963); 5TH CIR. R. 17.

207. See United States v. Wood, 295 F.2d 772 (5th Cir.), *reversing* 6 RACE REL. L. REP. 1069 (S.D. Miss. Sept. 21, 1961); Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, pp. 40, 43 (indicates expediting of appeals in Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, and Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963); Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962).

In addition, the Court of Appeals has issued injunctions pending appeal on a number of occasions shortly after a decision has been made at the district court level. See Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963); United States v. Lynd, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962); Davis v Board of School Comm'rs of Mobile County, No. 20657, 5th Cir., July 9, 1963, *modified*, July 18, 1963; Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963.

granting the motion summarily as was intended by the statute's framers, waited a year, and then granted the Registrars' motion to dismiss.[208] By expediting the appeal, which led to reversal,[209] the Fifth Circuit enabled the Attorney General to proceed more quickly with his investigation for discriminatory registration practices in Wilcox County. And should this search bear fruit, the Attorney General will have been able to end such practices at an earlier time and thus, possibly, to have increased the number of Negro voters at the next election.

As in the case of the injunction pending appeal, strong pressures tend to inhibit use of the expedited appeal. The expediting of an appeal inevitably results in the postponement of decision days for cases previously pending, and thus inconveniences litigants who have been patiently awaiting decisions in their causes.[210] Therefore, a litigant must present to an appellate court reasons sufficiently weighty to justify this action.[211] A litigant's usual inability to do so partially explains the infrequent use of this device. Another reason perhaps accounting for judicial reluctance to grant leap-frog-like appeals is the disruption in calendar assignment of cases that may accompany a more rapid hearing of an appeal.[212] This disruptive effect may be aggravated in a circuit covering as large an area as the Fifth Circuit, for available circuit judges might be forced to travel long distances in order to fill a panel hearing an expedited appeal.[213] For these practical reasons, expediting appeals in the Fifth Circuit has its drawbacks; where it has been used, however, it has been an effective means of correcting questionable performance by district courts.

In considering the advantages of both expedited appeals and injunctions pending appeal, it must be recognized that neither remedy serves any disciplinary function with respect to the judge who has created the situation which now seems to require speed. Rather, each serves only to ameliorate harm already done by removing further delay which ordinarily would have been experienced. Both require showings which in most civil cases may be hard to make—probability of success and hardship in the case of the injunction pending appeal,[214] and substantial hardship for expediting appeals.[215] These burdens may be substantially lessened in the case of civil rights plaintiffs in the Fifth Circuit, however. That a denial of injunctive relief was made by a judge

208. Kennedy v. Bruce, 298 F.2d 860, 862 (5th Cir. 1962).

209. *Id.* at 862.

210. See Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 46 (dissenting opinion).

211. See Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963): "The rules [of this Court] provide for accelerated hearings in cases in which cause therefor in shown." In at least one instance, the Court of Appeals for the Fifth Circuit expedited a litigant's appeal apparently on its own motion. See Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962).

212. See, *e.g.*, Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, pp. 45-46 (dissenting opinion).

213. The Fifth Circuit ranges from Texas to Florida, including Mississippi, Louisiana, Alabama and Georgia.

214. See note 197 *supra* and accompanying text.

215. See note 211 *supra* and accompanying text.

who is consistently reluctant to administer the desegregation decisions may be a substantial factor pointing toward likelihood of appellant success; that lengthy delays have already occurred, and swift-passing civil rights are involved, may make it much easier to show the requisite hardship. While inspection of the record and consideration of the motion to expedite or enjoin will still be requisite, the presumption might almost be entertained that reason for the requested relief exists, subject to rebuttal by appellees.

Once its decision has been entered, an appellate court may wish to avoid the likelihood of further delay or misinterpretation of its decision. The delay, as seen above, may result either normally—a time lag of several weeks usually intervenes between decision day and forwarding of the remand directive [216] —or, possibly, from renewed "sluggishness" on the part of the district judge once the remand is received. The delay before the relief intended by the appellate court is effectuated may, as with all forms of delay, render additional hardship to civil rights plaintiffs seemingly already successful in obtaining their requested relief. To combat this unnecessary hardship the Fifth Circuit frequently sends the remand directive to the district court immediately upon decision;[217] corresponding to the speed on their part is doubtless a greater inclination to expect speedy entrance of the order by the court below. This procedure is not without its drawbacks—the short delay before a remand directive is sent to the district court permits litigants to adduce reasons for its stay or for a rehearing. Less frequently than it remands immediately upon decision, the court—perhaps fearing "misinterpretation" of its mandate below as well as delay—has actually framed the terms of the injunction which is to effectuate the opinion and then ordered its immediate transmission to the clerk of the district court for issuance.[218] When such action is taken, an additional advantage of normal procedure is lost. Injunctions are ordinarily framed by a district court in order to take advantage of that court's greater familiarity with the facts and setting of the case and consequent superior ability to include details better adapted to the circumstances.[219] In recognition

216. 5TH CIR. R. 32 (adopted May 31, 1963).

217. *E.g.*, Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962); Kennedy v. Bruce, 298 F.2d 860, 864 (5th Cir. 1962); Kennedy v. Owen, No. 20634, 5th Cir., July 3, 1963, p. 4; Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, p. 21; United States v. Dogan, 314 F.2d 767, 775 (5th Cir. 1963).

218. Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425, 428 (5th Cir. 1963); Davis v. Board of School Comm'rs of Mobile County, No. 20657, 5th Cir., July 9, 1963, *modified*, July 18, 1963, pp. 3-4; Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, pp. 13-14.

219. The Fifth Circuit's recognition of the district court's superior ability to provide for the details of an order is evidenced by the following phrase which appears at the end of some of its decisions:

> During the pendency of this order the trial court is further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order.

E.g., Armstrong v. Board of Educ. of City of Birmingham, No. 20595, 5th Cir., July 12, 1963, p. 14; Stell v. Savannah-Chatham County Bd. of Educ., 318 F. 2d 425, 428 (5th Cir. 1963).

of these advantages in using normal procedures, the Fifth Circuit has intimated that normal procedures are to be deviated from only in occasional instances.[220] At times, however, that court has concluded that the equities of the case before it dictate deviation.[221] In at least one case it has even gone so far as to enter its own injunction, bypassing the district court altogether.[222]

Use of each of the controls within the decision process, as here discussed, has been effective in restricting some of the harmful effects caused to litigants by dilatoriness and failure to follow prevailing legal doctrines. But each is available only during litigation and for a particular case—often, after much of the damage wrought by delay has been done. Except for the remedies arising out of the All Writs Statute, none has any disciplinary force on the offending judge. Even under the All Writs Statute, it is doubtful whether the discipline imposed by, say, a writ of mandamus issued in response to dilatoriness in one cause could ever extend to the judge's treatment of another case. The wheels turn, a new plaintiff comes into court, and the trial judge is free to proceed again until corrected. And even correction, it must be noted, will often be a difficult task, complicated by the discretion given district judges in equity matters. Patterns of judicial differentiation in dealing with evidentiary requirements or the question of the need for injunctive relief will be difficult to discover.

Conclusion

If the assumption of "good will effort" by the trial judge to comply with the spirit and letter of higher court directives breaks down, then, the traditional tools by which the judiciary secures its internal discipline may be unequal to the task—or involve such cost as to touch the administration of justice in the entire circuit. The judicial council, if developed, may offer the greatest potential for dealing with problems of continuing judicial unwillingness to follow appellate decisions. Its largely untested ability to discipline judges directly has greater breadth than the one-case diameter of mandamus. Congress, perhaps, could facilitate the judiciary's task of self-discipline by assigning greater scope and range of control over the course of trial proceedings to the appellate courts. But corresponding to increased breadth of discipline, even within the judiciary, is an increased danger of interference with judicial independence—a danger which may well dissuade the councils and Congress from action. The chief difficulty arises not from behavior of judges but from the appointment of men who in important areas will not observe the self-discipline upon which an appellate system is premised. The principal cure must be found in the appointment of judges who will disinterestedly comply with decisions of higher courts.

220. See 318 F.2d at 428; United States v. Lynd, No. 19576, 5th Cir., July 15, 1963, p. 3.

221. See, *e.g.*, Anderson v. City of Albany, No. 20501, 5th Cir., July 26, 1963, p. 21; United States v. Dogan, 206 F. Supp. 446 (N.D. Miss. 1961), *rev'd*, 314 F.2d 767, 775 (5th Cir. 1962).

222. United States v. Lynd, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962).