Procedural Innovation, the Rule of Law, and Civil Rights Justice

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[T]o none will we deny or delay right or justice.
Magna Carta, chapter 40, 1215

Justice . . . must be . . . Plena, Full, for justice ought not to limp, or be granted piece-meal; and Celeris, Speedy . . . Because delay is a kind of denial.
Chief Justice Edward Coke,
Institutes of the Law of England 1642

*Among the most inscrutable and plaguing roadblocks to implementing the Rule of Law in the United States and abroad has been delay—both postponement required by legal substance and procedure and delaying tactics offensively employed by parties and jurists who oppose clearly established law. The results include denial of justice and destabilization of our democratic legal system. This Article proposes the key of courts employing innovative and courageous procedural mechanisms to thwart delay and breakthrough the logjam of resistance to the Rule of Law. The Federal Circuit Court of Appeals governing six Southern states—Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas—during the post-*Brown v. Board of Education *(1954) years provides an exemplar of how court systems can surmount dilatory and obstructive tactics to deliver justice.*

This six-state circuit—then known as the Fifth Circuit—included officials, jurists, and communities vehemently opposed to desegregation and determined to avoid the dictates of Brown through delay and obstruction. In response, innovative and bold federal appellate judges employed legal methods others had not recognized or used as broadly to spur justice: expediting appellate hearings, making mandates effective immediately upon judgment, deeming traditionally non-appealable orders (such as a temporary restraining order denial) appealable, issuing injunctions pending appeal based upon the All Writs Statute and Federal Rule of

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Civil Procedure 62(g), dictating the substance of the trial court's order upon remand, and deciding appeals by a single-judge panel. Contemporary opponents screamed foul—but the reforms stood and resulted in expedited justice.

Although others have lauded the post-Brown Federal Circuit Court governing the Deep South for its procedural ingenuity and resulting expeditious advances in post-Brown civil rights, this Article adds four critical dimensions: (1) diving deeper and broader (including through assimilation of prior scholarship) into the basis for and ingenuity of these procedures in civil rights cases; (2) extending appreciation of the long-term effect of these bold moves in future decades, including today; (3) proposing three replicable keys to the court's successfully subjugating delay and obstruction: proactively structuring and employing local rules and procedures, applying procedural rules assertively in non-traditional ways, and harnessing what this Article terms "potential power" laws to grant the court the greatest and most flexible authority; and (4) arguing for the broad employment of this bold procedural approach when democratic legal systems globally confront systemic or purposeful obstruction. The Article, in sum, proposes a flexible paradigm for courts to employ to overcome incapacitating delay and resistance, and consequently deliver justice, through procedural assertiveness and undaunted mettle.

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INTRODUCTION

On May 4, 1963—a Saturday and school holiday—student Linda Cal Woods engaged in a "peaceful demonstration against racial segregation" in Birmingham, Alabama.[1] She was arrested and charged with "parading without a license."[2] On May 20, Woods received a letter from her public-school principal suspending her for the remainder of the school term, which ended on May 31.[3] Over 1,000 African American students received the same suspension or expulsion.[4] Woods filed suit for herself and other suspended students, including assertions of denial of due process and equal protection.[5] On May 22, District Judge Clarence W. Allgood denied Woods' motion for a temporary order to restrain enforcement of the expulsions, commenting the "Court was shocked to see hundreds of school children ranging in age from six to sixteen running loose and wild without direction over the streets of Birmingham and in the business establishments."[6] Woods appealed the denial of the temporary restraining order (TRO) immediately on May 22.[7] Fifth

1. Woods v. Wright, 334 F.2d 369, 370–71 (5th Cir. 1964).
2. *Id.*
3. *Id.* (stating the superintendent—the appellee—required the principal to expel the students).
4. JACK BASS, UNLIKELY HEROES 208 (1981).
5. *Woods*, 334 F.2d at 371.
6. *Id.* at 371 n.2.
7. Jerome I. Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORNELL L.

Circuit Chief Judge Elbert Tuttle agreed to hear oral arguments on the TRO denial that same day at 7:00 p.m.[8] Chief Judge Tuttle decided the appeal with dispatch, dictating an order that evening enjoining enforcement of the schools' expulsion and suspension orders, ordering that all students "be permitted to return to their respective classes as regular students immediately," and requiring that the superintendent inform students that they should return to school the next day, May 23, 1963.[9]

To make this order, Chief Judge Tuttle had to make numerous innovative and bold procedural moves: (1) hearing and deciding the appeal as a single Circuit Judge—instead of as a three-judge panel—basing his authority on the All Writs Act, 28 U.S.C.A. §1651(b), Federal Rule of Civil Procedure 62(g), and an Eighth Circuit decision, *Aaron v. Cooper*;[10] (2) considering the denial of a TRO, which is "normally" not appealable, as an appealable order;[11] (3) issuing an injunction pending appeal "an unusual thing at that time";[12] and (4) expediting the appeal by hearing and deciding the appeal on the same day as the district court's ruling.[13]

Fifth Circuit Judge James Cameron harshly criticized Chief Judge Tuttle's ruling in *Woods*, asserting the Chief Judge had "no jurisdiction" to "hear or dispose of the motion for temporary injunction" including because the "improvident order" "effectively dispos[ed] of the case on its merits."[14] Judge Cameron claimed that four Fifth Circuit judges—whom he labeled "The Four" and who "stood together consistently in decisions on civil rights"— "thwarted" his efforts for the Court's Judicial Council or the full Court to make an "authoritative ruling on the legality of the order[.]"[15]

But Chief Judge Tuttle remained unswayed. To him, "[I]t seems plain that we

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REV. 12, 22 (1967-68).

8. Armstrong v. Bd. of Educ. of City of Birmingham, 323 F.2d 333, 354 (5th Cir. 1963) (Cameron, J., dissenting) (quoting Tuttle's order in *Woods*); BASS, *supra* note 4, at 207.

9. *Armstrong*, 323 F.2d at 355 (Cameron, J., dissenting); Chapman, *supra* note 7, at 22; DEBORAH H. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 57 (1988).

10. 28 U.S.C. §1651(b); FED. R. CIV. PROC. 62(g); Aaron v. Cooper, 261 F.2d 97, 106 (8th Cir. 1958) (concluding "three-judge district court is not required" for issuance of an injunction when acts of statute officials constitute a violation of federal law); *see also Armstrong*, 323 F.2d at 355 (quoting Tuttle's conclusion in *Woods*, "[i]t is clear" that the Court of Appeals had "jurisdiction of this appeal" as contemplated in the All-Writs Act and he has "jurisdiction and the power to grant the relief here sought[,]" (citing *Aaron* and Rule 62(g)).

11. FRANK T. READ AND LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 189 n.* (1978); *Armstrong*, 323 F.2d at 355 (Cameron, J., dissenting) (quoting Tuttle's order in *Woods*, relying on All-Writs Act, Rule 62(g), and *Aaron*).

12. Clifford M. Kuhn, *Creating a Peaceful Revolution in Race Relations: An Oral History with Judge Elbert Parr Tuttle*, 2 GA. J.S. LEGAL HIST. 149, 161 (1993); BASS, *supra* note 4, at 207–08; *Armstrong*, 323 F.2d at 355.

13. *See* Elbert P. Tuttle, *Equality and the Vote*, 41 N.Y.U. L. REV. 245, 264 (1966) (discussing "accelerated settings of appeals" to defeat delay in "school cases" and "voter rights cases"); Kuhn, *supra* note 12, at 160 (discussing Fifth Circuit policy of granting "expedited appeal" in civil rights cases).

14. *Armstrong*, 323 F.2d at 356 (Cameron, J., dissenting); *see* READ & MCGOUGH, *supra* note 11, at 189–90.

15. *Armstrong*, 323 F.2d at 353 n.1, 356 (Cameron, J., dissenting) ("The Four" included Chief Judge Tuttle and Judges Richard T. Rives, John Minor Wisdom, and John R. Brown).

have here a case of some 1,000 students who were engaged in legally permissible activities illegally arrested for exercising this constitutional right" and that "the illegality of the arrests was necessarily apparent to the officials."[16] Recognizing the need for expedited relief, Chief Judge Tuttle concluded, "[E]very day that passes counts as irremediable loss to the school child thus discriminated against[,]" which, in *Woods*, would mean the loss of an entire school term.[17] Years later, he remained convinced, appreciating that "the expulsions would have meant hundreds of high school seniors would have missed graduation" and concluding he "had full justification in reinstating those thousand school children that close to the end of a term which they otherwise would have lost."[18] Indeed, in June 1964, a three-judge Fifth Circuit panel agreed with Chief Judge Tuttle that the appellate court had jurisdiction based on the TRO denial and issuing an injunction pending appeal was proper.[19]

Woods' case—with its intensity at the center of civil rights conflicts—was one of many before the Fifth Circuit Court of Appeals during the decades after the Supreme Court declared segregation unconstitutional in *Brown v. Board of Education* in 1954.[20] The circuit that stretched from Florida to Texas, and included the Deep South states of Georgia, Alabama, Mississippi, and Louisiana, "emerged as the nation's premier civil rights tribunal."[21] The Court served as a significant force in moving the South towards racial equality and justice and set a standard for the country as a whole.[22] The Fifth Circuit was in the vortex of the civil rights revolution and, more than any other court, had to fight continuous integration battles under trying circumstances.[23] By 1981, one scholar assessed that the Fifth Circuit had "excelled beyond any reasonable expectation" in "adherence to constitutional duty in the face of a hostile local environment."[24] While another scholar concluded that much of the "drama and national attention" concerning civil rights "swirled around the beleagu[e]red Fifth Circuit, which sometimes seemed to be redeeming, almost single-handedly, the promise made in *Brown*."[25]

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16. BASS, *supra* note 4 (Tuttle also commented that the previous Monday, the United States Supreme Court had voided the convictions of African Americans protesting against segregation).

17. BASS, *supra* note 4, at 209.

18. *Id.* (quoting from 1979 interview with Judge Tuttle); READ & MCGOUGH, *supra* note 11, at 189; Kuhn, *supra* note 12, at 161 (Tuttle explained the "Birmingham school children" would "have lost a whole term of school if I did not enter the order immediately").

19. Woods v. Wright, 334 F.2d 369, 373–75 (5th Cir. 1964).

20. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 487 (1954) ("*Brown I*"); *see also* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 300–301 (1955) ("*Brown II*").

21. Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149, 1152 (1981) [hereinafter Read, *Bloodless Revolution*]; *see also* HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891–1981, at 10, 192 (1984) (describing the six Fifth Circuit states and their split into the Fifth and Eleventh Circuits in 1981).

22. JOHN M. SPIVAK, RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT 170–71 (1990).

23. Read, *supra* note 21, at 1150.

24. Read, *supra* note 21, at 1152; *see also* OWEN M. FISS, The Civil Rights Injunction 88–89 (1978) (concluding that "many" federal judges "lived up to the[] unreasonable expectation" of being "heroes"—"they fought the popular pressures" with "great personal sacrifice and discomfort").

25. COUCH, *supra* note 21, at 123.

Woods also reflects how the Fifth Circuit successfully outflanked obstructionist citizens and judges who sought to avoid integration through their principal strategies: delay and unyielding resistance. Fifth Circuit judges were well aware of litigants' and judges' attempts to prolong litigation or avoid rulings in order for the status quo of segregation to remain intact. In response, the Court applied what Fifth Circuit Judge John Minor Wisdom termed "forceful measures"[26]—many involving innovative and bold procedural mechanisms. As a consequence, the court sped cases involving undeniable infringement of constitutional rights forward towards justice and tamed efforts to undermine the Rule of Law established by Supreme Court and Fifth Circuit authority.

This Article employs the Federal Circuit Court of Appeals governing six Southern states during the post-*Brown* years as an exemplar of how justice systems can surmount delay and obstructive tactics to deliver timely justice. The Article points to the key of courts employing courageous and innovative procedures to overcome obstruction and intransigence to established (albeit controversial) law.

Others have praised the post-*Brown* Fifth Circuit for its procedural ingenuity and resulting promptness in delivering civil rights justice. But this Article adds four significant facets by (1) examining more deeply and broadly (including by assimilating previous scholarship) the basis for and resourcefulness behind the Circuit's procedures in civil rights cases; (2) presenting the continuing effect of the bold procedural advances in future decades continuing to today; (3) proposing replicable tools and approaches based on the court's success in expediting justice and applying the Rule of Law; and (4) advocating for broad employment of the court's bold procedural approach in democratic legal systems globally to combat purposeful or systemic delay and obstruction in delivering justice. In sum, the Article presents an approach to overcome injurious delay and resistance and apply the Rule of Law through procedural boldness and innovation.

The Article establishes this argument in four parts: Part I concerns the import of the Rule of Law in our democratic legal system and the debilitating effect of delay—whether purposeful or systemic—and obstruction on effective delivery of justice. Part II turns to how officials and judges in the South after *Brown* employed delay tactics in an attempt to resist and defeat *Brown*'s mandate for desegregation. Officials and citizens avoided *Brown*'s commands, and when brought into court to force compliance, federal district courts were often complicit in delaying justice, through postponement of hearings and rulings and outright refusal to follow Supreme Court and Fifth Circuit authority requiring civil rights justice. The district courts' rulings conflicting with established law resulted in further delay as a result of appeal and remand.

Part III presents the Fifth Circuit's innovative and bold use of procedure to enforce the Supreme Court's judgment in *Brown*. Four judges in particular—

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26. John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411, 426 (1967).

derisively labeled The Four—drew procedural rules, local rules, and elastic statutes into use to address specific procedural quagmires—in particular, how to have jurisdiction and decide an appeal in a circumstance where traditionally the court would not have possessed the power to do so. This included when the district court failed to rule, an order was customarily not appealable, or only a single judge was available to hear an emergency appeal. Part III lays out the specific methods these federal appellate judges employed to spur justice, including (a) expediting appeals, (b) making the mandate effective immediately, (c) considering previously non-appealable rulings (or non-rulings)—such as orders regarding temporary restraining orders and refusal to rule on a motion for injunction—appealable, (d) issuing injunctions pending appeal under the authority of the All Writs Statute and Federal Rule of Civil Procedure 62(g), (e) prescribing the substance of the district court's order on remand, and (f) rendering appellate rulings by a single-judge (instead of a three-judge) panel.

Part IV proposes keys to the Fifth Circuit's successful approach to overcoming obstruction and delay through innovative procedures. Moreover, this Part submits that these methods are replicable in other democratic societies (as adapted to particular legal and judicial systems) to address delay in the administration and delivery of justice. Central are three components: (1) employing and further shaping local rules and procedures to give the Court power to consider appeals, (2) interpreting rules of procedure broadly to give the court jurisdiction and power to rule, and (3) employing what this Article terms "potential power" laws to vest the appellate tribunal with the full extent of appellate jurisdiction sanctioned by that law.

As Chief Judge Tuttle explained, there was "no limit to the point to which we would make an effort to find some means within the law to correct what we saw clearly had been an injustice."[27] Yet, as one of Chief Judge Tuttle's former law clerks recognized, although the techniques arose largely in response to the South's widespread resistance to the civil rights movement, "they need not be limited to that region or that era."[28]

I. THE CENTRALITY OF THE RULE OF LAW AND THE DEBILITATING EFFECT OF DELAY IN LEGAL PROCESS

The Rule of Law is foundational and integral to the United States system of justice.[29] The rule demands that all persons, entities, and institutions are accountable to publicly promulgated, equally enforced, and independently adjudicated laws.[30]

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27. BASS, *supra* note 4, at 215; *see id.* (describing how employing previously unused authority enabled the court to provide expeditious relief in civil rights cases).

28. Chapman, *supra* note 7 at 24.

29. *See* Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet But Crucial Role in Achieving Racial Justice*, 78 UMKC L. Rev. 617, 630 (2010).

30. *Overview – Rule of Law*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law [https://perma.cc/8BGE-LN2M] (last visited May 29, 2024); *see also* Theo J. Angelis & Jonathan H. Harrison, *History and Importance of the Rule of Law*, Working

The concept includes the principle—dating from the Magna Carta in 1215—that "no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of the powers of government."[31] Both formal and procedural principles form part of the Rule of Law: the formal principles include "generality, clarity, publicity, stability, and prospectivity of the norms that govern society" while the procedural aspects concern the processes to administer these norms—such as courts and an independent judiciary.[32] Some accounts also contend that the Rule of Law includes substantive ideals—such as consistency with international human rights.[33] Internationally, democracies emulate and implement the Rule of Law as a central precept[34] while organizations promote the Rule of Law worldwide, citing resulting reductions in corruption, poverty, and disease, and increased protections from injustice.[35]

A central requirement of the Rule of Law is that "law must be—and must be seen to be—fully and fairly enforced, by open, accessible, and impartial tribunals."[36] The Rule of Law demands these tribunals "exercise their power within a constraining framework, of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preference or ideology."[37] Likewise, the Rule of Law requires citizens to comply with and respect the legal norms and accept legal determinations of their rights and duties,

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Paper, WORLD JUSTICE PROJECT, 4 (2003), https://worldjusticeproject.org/sites/default/files/documents/history_and_importance_of_the_rule_of_law.pdf [https://perma.cc/2TN9-7U55] (stating analogous definition).

31. Sandra Day O'Connor, Sup. Ct. Just., First Ann. White Lecture, Ind. Univ. Sch. L., Indianapolis, Indiana, Apr. 2, 2002, quoted by Angelis & Harrison, *supra* note 30, at 12.

32. Jeremy Waldron, *The Rule of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2020 ed.), Edward N. Zalta, ed., https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/ [https://perma.cc/J4RB-7LVM]; *see* Madison, *supra* note 29, at 629 (explaining that the Rule of Law and procedure were "both enacted to protect us from human bias and allow for equal justice before the law").

33. *Overview –Rule of Law*, *supra* note 30; Waldron, *supra* note 32 (stating that position that the Rule of Law comprises substantive components is "much more controversial" than the concept that the Rule of Law includes formal and procedural aspects); *see also* Angelis & Harrison, *supra* note 30, at 3–4 (recognizing substantive element in statement in Universal Declaration of Human Rights of 1948, declaring "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law").

34. Madison, *supra* note 29, at 630.

35. *See, e.g.*, *About Us*, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us [https://perma.cc/T95F-J9TH] (last visited May 29, 2024) (originally an American Bar Association initiative in 2006 and, as of 2009, an independent organization "working to create knowledge, build awareness, and stimulate action to advance the Rule of Law worldwide"); Rule of Law Program, STAN. L.S., https://law.stanford.edu/rule-of-law-program/#slsnav-neukom-center-for-the-rule-of-law [https://perma.cc/KST6-498T] (last visited May 29, 2024); *Rule of Law Program,* CARTER CTR., https://cartercenter.org/peace/ati/index.html [https://perma.cc/HMQ9-3GUE] (last visited May 29, 2024). *See also* Angelis & Harrison*, supra* note 30, at 21–39 (discussing modest accomplishments in rule-of-law reform efforts as of 2003, yet positive and significant association between Rule of Law factors and economic growth, social stability, and promotion of democracy, and protection of civil and human rights).

36. Angelis & Harrison, *supra* note 30, at 3; *see also* Lord Hacking, *The Rule of Law Papers: Preface*, 43 INT'L LAW. 3, 3 (2009) (recognizing the Rule of Law "has to be applied equally to all").

37. Waldron, *supra* note 32 (designating this as "the most important demand of the Rule of Law").

even when they disagree or when their interests conflict with others' interests.[38]

Yet implementation and acceptance of the Rule of Law can experience bumps and obstructions. Predominant among them is delay, which "can unquestionably frustrate the achievement of justice."[39] Centuries of complaints regarding delays in justice—reflected in Chapter 40 of the Magna Carta in 1215, Sir Edward Coke's Institutes in 1642, and centuries thereafter—all encapsulate the sentiment of the well-known statement attributed to Gladstone that "justice delayed is justice denied."[40] Such delay could result in delivering justice "too late to benefit the claimant."[41] "[A]ny significant lapse of time" between the start of a cause of action and a legal remedy "increases the loss suffered by the innocent party."[42]

Conversely, delay acts as a weapon for those who desire to postpone or moot the application of the law—and thus to defeat justice.[43] Postponement enables judges who do not accept and apply (as the Rule of Law requires) the mandates of a higher court—or who passively do not act because of timidity or fear of violent public reaction.[44] This failure to rule or to follow the clear dictates of higher authority constitutes an abdication of the lower court's duty.[45] And a failure to abide by binding authority further exacerbates delay, with the resulting need for appeal, reversal, and remand.[46] Moreover, delay and obstruction in applying the settled law of a higher court in a population resisting that law entrenches and intensifies resistance.[47]

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38. *Id.*

39. Lord Dyson, Master of the Roles, *Delay Too Often Defeats Justice*, Law Soc'y, Magna Carta Event, Apr. 22, 2015, at 7, https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf [https://perma.cc/4XR3-6GLT].

40. *Id.* at 6–9; *see also id.* at 8–9 (noting "[c]omplexity, expense and delay are three inter-related problems" described as "the 'unholy trinity' of civil procedure).

41. *Id.* at 8.

42. Wayne Martin, Chief Justice of Western Australia, *Because Delay Is a Kind of Denial*, AUSTRALIAN CTR. JUST. INNOVATION, 9 (May 17, 2014), https://www.supremecourt.wa.gov.au/_files/Timeliness%20in%20the%20Justice%20System%20-%20Ideas%20and%20Innovations%20Martin%20CJ%2017%20May%202014.pdf [https://perma.cc/2Q8X-X6UQ]. For examples concerning the effects of delay on legal rights and the Rule of Law, see Press Release, European Parliament News, Hungary: Member States Have an Obligation to End Attacks on EU Values (July 13, 2022), https://www.europarl.europa.eu/news/en/press-room/20220711IPR35008/hungary-member-states-have-an-obligation-to-end-attacks-on-eu-values [https://perma.cc/44J3-6D7G] (stating delay in acting under European Union Treaty provisions to protect EU values in Hungary would be breach of rule of law principle); Raymund Narag, *Philippines' Dark Secret: Lengthy Pretrial Detention*, RAPPLER (Oct. 19, 2018), https://www.rappler.com/voices/thought-leaders/214533-analysis-lengthy-pretrial-detention-philippines-little-dark-secret/ [https://perma.cc/L3HG-QUSN]; Henri Strydom, *Justice Delayed Is Justice Denied – The Importance of an Expeditious and Reasoned Judgement*, LAWTONS AFRICA (South Africa) (Aug. 13, 2020), https://www.lawtonsafrica.com/post/justice-delayed-is-justice-denied-the-importance-of-an-expeditious-and-reasoned-judgement [https://perma.cc/C7Z8-F87B].

43. *See* Notes and Comments, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 99 (1963).

44. *Id.* at 97, 99; Frank T. Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Educ., 39 LAW & CONTEMP. PROBS. 7, 18 (1975) [hereinafter Read, *Judicial Evolution*].

45. *Judicial Performance in the Fifth Circuit, supra* note 43, at 97.

46. *Id.*

47. Kuhn, *supra* note 12, at 160 (Judge Tuttle comments regarding resistance by local officials to school desegregation).

II. EMPLOYING DELAY AND OBSTRUCTION TO DEFEAT THE RULE OF LAW: OFFICIALS AND DISTRICT JUDGES IN THE POST-BROWN SOUTH

In the U.S. South, resistance to the mandate of *Brown v. Board of Education*—holding separate schools for black and white students were unconstitutional and requiring desegregation—was intense and widespread during the decades after the 1954 decision.[48] State opposition ranged from massive resistance to the doctrine of interposition[49] to sophisticated evasion through indirect state involvement in private discrimination.[50] Time was the principal weapon of the Southern political structure that sought to impede the Supreme Court's mandate in *Brown* for racial equality.[51] Delay granted legislatures time to invent creative legislation to buttress segregation and allowed demagogues time to rouse like-minded resisters.[52] These antisegregation Southerners hoped that delay would diminish interest in the country, like it did after post-Civil War Reconstruction.[53] Fifth Circuit Chief Judge Tuttle recognized that, resisting desegregation, "politicians would fight for a delay of another year, and they wouldn't comply with the law unless they themselves were compelled by court order."[54] Chief Judge Tuttle saw clearly that "time was worth fighting for in the minds of these officials."[55]

Likewise, in district courts in the Fifth Circuit, "delay" in civil rights cases "appear[ed] as a purposeful technique to postpone and perhaps moot the resolution of controversies over constitutional rights."[56] Because the Fifth Circuit often reversed certain district judges in civil rights cases, avoiding a final, appealable order provided an "effective technique for achieving these results."[57] District courts would often postpone hearings in civil rights cases for months, sometimes remanding them to state courts, and, if they held a hearing, would wait months to rule.[58] Moreover, when district judges failed to follow the Supreme Court's and Fifth Circuit's mandatory authority under *Brown*, further delay resulted because of a necessary appeal, reversal, and remand.[59]

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48. *Brown I*, 347 U.S. at 487; *see also Brown II*, 349 U.S. at 300–301.

49. Joel W. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing* Brown v. Board of Education, 78 TUL. L. REV. 2207, 2226–27 (2004) (describing the doctrine of interposition as the belief that a state "interposes" its sovereignty against enforcement of federal laws that it considers violate the Tenth Amendment to the Constitution).

50. Arthur H. Dean, *Tribute to Chief Judge Elbert P. Tuttle*, 53 CORNELL L. REV. 1, 11 (1967–68).

51. BASS, *supra* note 4, at 213; *see* Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L 1, 10 (1999) ("It was clear in 1960 that in the Southern states, all deliberate speed was all deliberateness, no speed.").

52. Emanuel, *supra* note 51, at 14.

53. BASS, *supra* note 4, at 213.

54. Kuhn, *supra* note 12, at 160.

55. *Id.*

56. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 99; Read, *Judicial Evolution*, *supra* note 44, at 14 (school integration cases "became mired in delaying tactics and obstructionism" in the "eleven states of the Confederacy").

57. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 99.

58. BASS, *supra* note 4, at 214.

59. *Id.* at 97; *see* READ & MCGOUGH, *supra* note 11, at 191 ("By the early sixties, the reluctance,

Few Southern district judges unhesitatingly mandated compliance with *Brown* and *Brown II*.[60] Critics propose that the passive Southern district judges lacked courage, feared their community's reaction, or opposed *Brown* like other members of their community.[61] Fifth Circuit Judge John Minor Wisdom advanced a more generous reason for the district court's reluctance or failure to rule: because a district judge is more personally accountable to the local community and bar than an appellate court, a federal judge in a conservative community would not desire to "jeopardize the respect due the court in all of his cases by appearing to be ahead and to the left of the Supreme Court and [the Fifth Circuit Court of Appeals]" in civil rights cases.[62] Regardless of the reason for district courts' failure to mandate compliance with *Brown*, it was necessary for the court with appellate jurisdiction over these noncomplying district courts—the Fifth Circuit Court of Appeals—to find a way to prod them to institute what the Supreme Court and Fifth Circuit demanded: racial equality.[63]

III. THE FIFTH CIRCUIT'S COURAGEOUS AND CREATIVE USE OF PROCEDURE TO ENFORCE THE SUPREME COURT'S MANDATE IN *BROWN V. BOARD OF EDUCATION*

In 1966, Fifth Circuit Chief Judge Elbert Tuttle recognized that "our whole society depends upon the reasonably ready acquiescence of the people to the Rule of Law."[64] "Lawyers do not ordinarily like to litigate principles of law already decided against them," but, in civil rights cases, it was "the practice of recalcitrant official defendants to treat each case as if no precedent had already been established by the federal courts."[65] Consequently, he appreciated that "[i]n the whole field of civil rights, however, in some of the states of the Fifth Judicial Circuit, the usual rules have not applied. In resisting change, especially in political and sociological areas, time is what counts."[66] As a result, "[i]n the courts" in civil rights cases, "it was first apparent that more speed was called for than could normally be achieved by the regular processing of trial and appeal."[67]

Accordingly, in the 1960s Chief Judge Tuttle and numerous of his fellow judges on the Fifth Circuit, including the other members of "The Four"—Judges

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even intransigence, of some of the district courts to follow the lead of the Fifth Circuit became noted nationally.").

60. Read, *Judicial Evolution*, *supra* note 44, at 18 (1975).

61. *Id.*; Read, *Bloodless Revolution*, *supra* note 21, at 1159.

62. Wisdom, *supra* note 26, at 419 (concluding that it was therefore "appropriate" that "the appellate court bear the brunt of unpopular decisions").

63. *See Judicial Performance in the Fifth Circuit, supra* note 43, at 100 ("Delay, and the ability of district courts successfully to administer it, is at the heart of the problem of the Fifth Circuit.").

64. Tuttle, *supra* note 13, at 257, 264.

65. *Id.*; *see also* READ & MCGOUGH, *supra* note 11, at 192 (noting that Fifth Circuit judges became increasingly exasperated with district court's noncompliance with *Brown II*'s mandate to desegregate with "deliberate speed").

66. Tuttle, *supra* note 13, at 264.

67. *Id.*

Richard T. Rives, John Minor Wisdom, and John R. Brown—implemented "innovative," "radical," and "valuable" procedural breakthroughs that accelerated the provision of justice.[68] Chief Judge Tuttle noted that the procedural remedies were "shaped to meet the problem of enforcement" and served to "finally ma[k]e it plain that the prize of delay could no longer be won."[69] As one of Chief Judge Tuttle's former law clerks concluded, among the many accomplishments of the Fifth Circuit under Tuttle's leadership, "one of the finest" was "the development of techniques for expediting effective appellate relief in exigent circumstances."[70] Supreme Court Chief Justice Earl Warren commended Chief Judge Tuttle for combining administrative abilities with "great personal courage and wisdom to assure justice of the highest quality without delays which might have thrown the Fifth Circuit into chaos."[71] As President Lyndon Baines Johnson wrote to Tuttle upon his stepping down as Chief Judge, "All who believe in the Rule of Law, and the protections it offers to all citizens, owe you an enduring vote of thanks."[72]

The procedures included expediting the appeal on the docket to hear the appeal faster than the normal course; making the mandate—the court's order that its ruling be implemented—effective immediately, instead of the accustomed twenty-one days after issuance; deeming traditionally non-appealable trial court rulings or failure to rule appealable; issuing an injunction during appeal; delineating the contents of the order the trial court must issue on remand; and deciding an appeal by a single judge, instead of a three-judge appellate panel.[73]

But these bold procedural innovations met resistance from restraint-oriented, conservative Fifth Circuit judges, including Judges Ben Cameron, Walter Gewin,

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68. SPIVAK, *supra* note 22, at 170–71 (stating Tuttle, Brown, and Wisdom were willing to "innovate and experiment, to go to the frontiers of the law to give meaning to the equal protection of the laws" and Rives's recognition that the Rule of Law was above the desire of one's community); BASS, *supra* note 4, at 22, 24, 213; Chapman, *supra* note 7, at 12; *see* BARROW & WALKER, *supra* note 9, at 43, 55 (noting Tuttle "often resorted to extraordinary procedural maneuvers to insure that the Supreme Court's *Brown* mandate was diligently enforced"); COUCH, *supra* note 21, at 122 (the "procedures for hastening appeals" were "a creative response to a crisis"); Read, *Bloodless Revolution*, *supra* note 21, at 1154–55 (stating Rives, Brown, Tuttle, and Wisdom "were destined to become giants in the integration battles then looming on the horizon").

69. Tuttle, *supra* note 13, at 264; *see also* SPIVAK, *supra* note 22, at 171 (conveying that Judge Brown saw insufficiency of traditional remedies and suggested "the use of extraordinary steps to cut through the delaying tactics of the segregationists"); BASS, *supra* note 4, at 216 (noting "such procedural reform provided powerful armament with which to attach the entrenched resistance to desegregation"); Read, *Judicial Evolution*, *supra* note 44, at 14 (stating the "difficult and complex legal battles" gave "incentive for the courts to devise and refine equitable remedies to adequately cope with the ingenuity of the die-hard segregationists").

70. Chapman, *supra* note 7, at 12; *see also* COUCH, *supra* note 21, at 121 ("The new procedures were hardly illegal, and have been justified and praised on the basis of the unique situation then existing.").

71. READ & MCGOUGH, *supra* note 11, at 182 (quoting Chief Justice Warren's tribute to Judge Tuttle).

72. ANNE EMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION 315 (2011).

73. For discussion of each of these procedures, see *infra* Sections III(A)–(F). *See also* Wisdom, *Frictionmaking*, *supra* note 26, at 426 (Judge Wisdom describing procedures); Dean, *supra* note 50, at 10 (quoting Judge Wisdom describing procedures).

Warren Jones, and Griffin Bell.[74] Indeed, the procedural practices and legal reasoning of The Four produced increased internal discord in the court, which escalated into public view through strongly worded dissents.[75] Moreover, Judges Cameron and Gewin challenged Chief Judge Tuttle's approach to expediting procedures at a Fifth Circuit Council meeting in May 1963—a challenge that ended in a draw, with The Four in favor of the procedural methods.[76] Judge Cameron's irritation with what he regarded as manipulative ploys by a group of his colleagues was intense.[77] He depicted members of The Four as "bent upon the exaltation of federal sovereignty" and "debasement of state sovereignty."[78] He protested that "so much haste has been made and so many procedural innovations have been utilized that the general impression has grown up and has been expressed that this Court has one set of procedures covering racial cases and another set covering all other cases."[79]

The resistance was not without cause: Chief Judge Tuttle and others assertively pressed the procedural mechanisms into areas where and in ways that they had not been used before. But while conservative and restraint-oriented Fifth Circuit Judges, such as Judge Cameron, labeled such procedural techniques as illegal and unjustified, as established below, the procedural innovations stood on a solid legal foundation and had long-lasting effects on the operations of the Fifth Circuit and beyond.

A. Expediting Appeals

On June 26, 1963, the Fifth Circuit heard "full and extended" oral argument in six cases on an emergency basis.[80] All six involved desegregation, voting rights, or related civil rights claims arising from African American protests, street demonstrations, and arrests.[81] In three of the six cases, the plaintiffs sought relief, the district court ruled, the losing party appealed, and the Fifth Circuit heard oral argument in nineteen days or less.[82] Five of the cases had been docketed for appeal within that month.[83] This was at odds with the usual appellate process, which is inherently slow: courts assign cases for briefing and oral argument in the order of docketing, and an appealing party may wait numerous months or years for a court to hear and decide the appeal.[84]

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74. BARROW & WALKER, *supra* note 9, at 57 (discussing the "philosophical oppos[ition]" of these judges "to the use of activist and extraordinary procedures that Tuttle was involving with increased frequency"); *see also* JOEL WILLIAM FRIEDMAN, CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM 250 (2009).

75. FRIEDMAN, *supra* note 74, at 246, 250.

76. BARROW & WALKER, *supra* note 9, at 57.

77. *Id.* at 250; *see also* BASS, *supra* note 4, at 223 ("[T]he changed procedures incensed Cameron . . . .").

78. BARROW & WALKER, *supra* note 9, at 43.

79. Armstrong v. Bd. of Educ. of City of Birmingham, 323 F.2d 333, 358 (5th Cir. 1963) (Cameron, J., dissenting on petition for rehearing).

80. *Id.* at 348–52 (Gewin, J., dissenting).

81. *Id.*

82. *Id.* at 351.

83. *Id.* at 348–52; *see also* READ & MCGOUGH, *supra* note 11, at 186.

84. *Id.* at 185–86; *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 131.

Fifth Circuit Judge Gewin disapproved of the six expedited appeals, describing litigants forced to appeal "on unusually short notice, without sufficient time, in some cases, to prepare a brief," "hurriedly prepared" briefs, and allowance of lengthy oral arguments, which was contrary to the Court's usual practice of denying oral argument on emergency relief appeals.[85] Judge Gewin noted the "almost 500 cases pending in this court as of June 26, 1963," which the court would consider "in the normal course of the court's business," but that the six cases "received special emergency attention."[86] Judge Gewin critically assessed:

> The workload of this court is currently the heaviest of any Court of Appeals in the nation. The record of this court in hearing and deciding cases is as good as any. That record cannot long endure if certain cases are to be given special attention and considered on a preferential basis. In the vast number of cases now pending before this court are matters of tremendous importance involving business affairs, taxes, property, personal injuries, life and liberty. With deference and full respect, I feel it is my duty to express the opinion that the 6 cases which were fully argued on June 26, 1963, were not of such overwhelming importance as to take precedence over all other cases then pending in this court.[87]

Likewise, Judge Cameron charged that no statute, Fifth Circuit Rule, or Federal Rule of Civil Procedure contained a "provision for advancement of cases or taking them up out of time."[88]

But the purported lack of such an explicit rule did not inhibit Chief Justice Tuttle and his like-minded Fifth Circuit Judges from making expedited hearings in civil rights and race cases "standard operating procedure."[89] Indeed, in 1963, a per curiam opinion by Chief Judge Tuttle and Judges Jones and Bell recognized that "[t]he rules [of this Court] provide for accelerated hearings in cases in which cause therefor [sic] is shown."[90] In denying emergency relief, the panel recognized the high bar to merit an accelerated, emergency hearing: the appellant must demonstrate a "great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits."[91] However, as Judge Tuttle later described, in civil rights cases involving racial discrimination, it was "perfectly obvious that the plaintiffs were entitled to win" based on clear Supreme Court and Fifth Circuit authority.[92]

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85. *Id.*

86. *Id.*

87. *Id.* at 351–52.

88. *Id.* at 358 (Cameron, J., dissenting on petition for rehearing).

89. READ & MCGOUGH, *supra* note 11, at 186.

90. Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963); *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 131–32.

91. *Greene*, 314 F.2d at 202.

92. Kuhn, *supra* note 12, at 160; *see also* READ & MCGOUGH, *supra* note 11, at 186 (in Fifth Circuit, "expedited hearings were available to parties who could demonstrate an actual need for immediate relief"); Read, *Judicial Evolution*, *supra* note 44, at 18 (because Fifth Circuit's "appellate

So the clerk "advanced those cases" when filed, and the court would "always" grant a plaintiff's motion to expedite the cases and "dispose[d] of it promptly."[93]

The result was a remarkable speed in disposition. As examples, in 1963, the Fifth Circuit docketed and heard oral argument in two cases in eleven and thirteen days of the lower court's ruling—and in one appeal, within four hours of disposition below.[94] In others, the Fifth Circuit heard the expedited appeals within weeks of the lower court ruling.[95] The Court forthrightly recognized that it accelerated disposition to address "continuing" "deprivation of constitutional rights."[96] For example, in *Kennedy v. Bruce*, the District Court for the Southern District of Alabama delayed ruling on an order for inspection of voting records (which "should have been granted as a matter of course") for over a year before and then granted the registrar's motion to dismiss,[97] The Fifth Circuit "accelerated the setting of the case," "placing it on the next available calendar for argument and submission," and reversed the district court.[98] The expeditious reversal enabled the U.S. Attorney General to proceed more rapidly with investigating discriminatory practices in voter registration in Wilcox County, Alabama.[99]

Although Judge Cameron considered orders giving cases "preferential treatment" to be "entered without authority,"[100] the expedited treatment the Fifth Circuit provided for civil rights cases in the 1960s became standard practice broadly—both within and beyond the Fifth Circuit. By spring 1963, the Fifth Circuit instituted a new practice: the continual availability of a preassigned panel to rule on emergency matters and motions when the court was in recess.[101]

Just four years later—and thus only four years after Judges Cameron and Gewin protested that the court had no legal authority to expedite appeals—the newly enacted Rules of Appellate Procedure included the sweeping Rule 2. The rule provided a court of appeals, on its own or on a party's motion, may—"to expedite its decision or for other good cause—suspend any provision of these rules in a

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calendar clogged with school appeals, it granted priority treatment to school cases").

93. Kuhn, *supra* note 12, at 160.

94. *See* Stell v. Savannah-Chatham Cnty. Bd. of Educ., 318 F.2d 425, 426 (5th Cir. 1963) (eleven days); NAACP v. Thompson, 321 F.2d 199, 199, 201 (5th Cir. 1963) (thirteen days); United States v. Dallas Cnty. (5th Cir 1963) (appellate hearing within four hours, with appellate ruling the following day), *cited in* United States v. Dallas Cnty., 229 F. Supp. 1014, 1015 (S.D. Ala. 1964); *see also* Chapman, *supra* note 7, at 13, 13 n.8 (citing cases and noting short time before hearing on appeal);

95. United States v. Wood, 295 F.2d 772 (5th Cir. 1961) (about two weeks); *see also* Meredith v. Fair, 305 F.2d 341, 342 (5th Cir. 1962); *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 130–31, 131n.207 (citing cases).

96. Anderson v. City of Albany, 321 F.2d 649, 658 (5th Cir. 1963); *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 104 n.77.

97. Kennedy v. Bruce, 298 F.2d 860, 862–64 (5th Cir. 1962); *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 130–31.

98. *Kennedy*, 298 F.2d at 862.

99. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 131.

100. *Armstrong*, 323 F.2d at 358 (Cameron, J., dissenting on application for rehearing).

101. Chapman, *supra* note 7, at 13, 24.

particular case and order proceedings as it directs."[102] The 1967 Advisory Committee notes specified: "The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules."[103]

By 1974—and again in 1978—the Fifth Circuit Rules included specific provisions for "expediting appeals" allowing the court "on its own motion, or for good cause shown on motion of either party," to "advance any case for hearing, and prescribe an abbreviated briefing schedule."[104] Likewise, by 1978, the local rules provided that a single judge could rule on a motion to expedite an appeal.[105] Moreover, by 2004, numerous federal circuits had adopted local rules allowing expedited appeals—with the Fifth Circuit's rules incorporating two provisions: one for motions to expedite appeals and one concerning expedited appeals.[106] And today, those Fifth Circuit rules remain: permitting "Motions to Expedite Appeal" and for the court to expedite "on its own motion or for good cause on motion of either party."[107] The same standards apply as did in 1963: "[o]nly the court may expedite an appeal and only for good cause."[108]

Unquestionably, during the decades following the height of Fifth Circuit's controversial expedition of civil rights cases, the federal rules and procedures have further embraced what Chief Judge Tuttle and his Fifth Circuit colleagues recognized—and boldly, consistently implemented: the need for a prompt hearing and decision where the facts and law clearly establish deprivation of constitutional rights. In contrast, Judges Cameron's and Gewin's complaints of the legal illegitimacy of accelerating appeals are distant and faint.[109]

B. Immediately Effective Decrees

In 1963, a commenter noted the "unusual behavior" by the Fifth Circuit Court of Appeals in the "rendering of decrees to be 'effective immediately.'"[110] At that time, the mandate—meaning the court of appeals' command or order directing the

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102. FED. R. APP. PROC. 2.

103. *Id.* at Notes (quoting Notes of Advisory Committee on Rules—1967).

104. 5th Cir. R. 11(b) (1974); 5th Cir. R. 15.4 (1978).

105. 5th Cir. R. 10.2.12 (1978).

106. Joseph J. Gavin, *The Subtle Birth of Activism: The Federal Rules of Appellate Procedure*, 2004 MICH. ST. L. REV 1101, 1126, 1126 n.178 (noting procedures adopted by Third, Fourth, Fifth, and Sixth Circuits, and citing Fifth Circuit rules 27.5 (motions to expedite appeals) and 34.5 (expedite appeals)).

107. *Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit*, Feb. 2024, R. 27.5, R. 34.5, https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/5thcir-iop [https://perma.cc/W9J4-YAGN].

108. *Id.* at R. 27.5; *see also* Greene v. Fair, 314 F.2d at 202 (recognizing 1963 standard of "accelerated hearings in cases in which cause therefore is shown"); *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 131–32.

109. Criticisms do exist that the power to expedite appeals is one of several sources of judicial activism under the Federal Rules of Appellate Procedure. *See* Gavin, *supra* note 106, at 1126.

110. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 98.

trial court to take a certain action—was usually issued twenty-one days after the court rendered judgment in the appeal, although filing a petition for rehearing stayed the mandate issuance.[111] As a result, a court of appeals judgment ordinarily took effect after some delay post-judgment.[112]

But as Chief Judge Tuttle appreciated, because Southern officials denied that the Supreme Court and Fifth Circuit had established precedent guaranteeing African Americans' civil rights, a "county-by-county" series of lawsuits became necessary "to vindicate rights that even the most reluctant defendant must have recognized were regularly being denied" African American citizens.[113] As a result, Chief Judge Tuttle noted, the courts of appeals needed to "fashion means" to effectuate principles of established law "much more rapidly than would be possible if full sway were allowed to the normal procedural maneuvering."[114] The "first unusual procedural means" that the Fifth Circuit devised to meet this need was "immediate issuance of the mandate."[115]

In February 1862, in the voter-records case *Kennedy v. Bruce*, Chief Judge Tuttle and Judges Rives and Wisdom ordered the mandate issued immediately "[b]ecause of long delay that has already occurred since the filing of the application that should have been granted as a matter of course."[116] The Fifth Circuit similarly required immediate issuance of the mandate at the time of the judgment in other appeals to enjoin the ongoing deprivation of constitutional rights or because of an imminent significant event, such as the close of a voter registration period or the start of a new school term.[117]

The Fifth Circuit decided almost all the cases cited below (all but the exception of *Anderson*) prior to May 11, 1963, during which time the court had no explicit local rule providing for expediting issuance of the mandate.[118] One attorney (a previous clerk of Chief Judge Tuttle) proposed that, even without a specific rule, the court likely had general equity powers to issue an immediate mandate in exigent cases.[119] On May 11, 1963, the Court amended its rules to provide that a mandate would be issued within the normally prescribed time "unless the time is shortened or enlarged by order."[120] In subsequent decades, the federal and Fifth Circuit procedures further entrenched and expanded the court's ability to immediately issue

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111. Chapman, *supra* note 7, at 20 (citing then-5th Cir. R. 32).

112. *Id.*

113. Tuttle, *supra* note 13, at 257.

114. *Id.*

115. *Id.*

116. *Kennedy*, 298 F.2d at 864.

117. Chapman, *supra* note 7, at 20, 20 nn.48–49 (including citing cases); *see also* Anderson v. City of Albany, 321 F.2d 649, 658 (5th Cir. 1963) (continuing deprivation of constitutional rights through segregation); Harris v. Gibson, 322 F.2d 780, 782 (5th Cir. 1963) (school term starting four days after judgment); United States v. Lynd, 301 F.2d 818, 823 (5th Cir. 1962), *cert denied*, 371 U.S. 893 (1962) ("pendency of termination" of voter registration before election).

118. Chapman, *supra* note 7, at 20.

119. *Id.*

120. *Id.* (citing 5TH CIR. R. 32 (1963)).

a mandate. Almost sixty years later, the Federal Rules of Appellate Procedure reflect almost exactly the amendment enacted in 1963, stating "[t]he court may shorten or extend the time" to issue a mandate "by order."[121] Further, Fifth Circuit internal operating procedures provide that the "court may direct" the clerk to "immediately issue the mandate[.]"[122] What Fifth Circuit Judge Wisdom acknowledged was an "unusual procedure" in the 1960s to boldly protect civil rights is no longer novel, but instead the "[i]mmediate issuance of the mandate" is an unquestioned prerogative of the Court.[123]

C. Rendering Previously Non-Appealable Orders Appealable

1. Temporary Restraining Orders

In July 1961, John Hardy, an African American resident of Nashville, Tennessee and member of the Student Non-Violent Coordinating Committee, came to Mississippi to encourage black residents to register and vote.[124] After conducting a voter registration school for several weeks in Walthall County, Hardy accompanied applicants to the registrar's office beginning in late August.[125] On September 7, 1961, the county voting registrar, John Q. Wood, struck Hardy on the back of the head with a gun while Hardy was departing the registrar's office.[126] The same day, the county sheriff arrested Hardy for "disturbing the peace and bringing an uprising among the people."[127] On September 20—two days before the scheduled date for Hardy's trial in Mississippi state court—the United States sued the registrar and other local officials in federal court under the Civil Rights Act, claiming that Hardy's prosecution was designed to and would intimidate the qualified African Americans of Walthall County from attempting to register to vote, and sought a TRO pending a hearing for a preliminary injunction.[128] The following day, the federal district court denied the motion for a TRO, an order the United States appealed.[129]

In response to appellees' motion to dismiss based on lack of jurisdiction, Fifth Circuit Judge Rives, joined by Judge Brown, employed an "extraordinary" procedure: the offshoot exception to the final judgment rule.[130] The court

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121. FED. R. APP. PROC. 41(b).

122. 5TH CIR. R. 41, I.O.P.

123. John Minor Wisdom, *Chief Judge Tuttle and the Fifth Circuit*, 53 Cornell L. Rev. 6, 10 (1967–68); Wisdom, *supra* note 26, at 426 (stating, in "performing our appellate function" including in "civil rights cases involving protection of constitutional rights of individuals against invasions by the state," the Fifth Circuit had—among other measures—"ordered mandates to be issued forthwith.").

124. United States v. Wood, 295 F.2d 772, 775 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

125. *Id.*

126. *Id.* at 776.

127. *Id.*

128. *Id.* at 774.

129. *Id.* at 774–75.

130. *Id.* at 776–78; *see also* BARROW & WALKER, *supra* note 9, at 43; *Federal Courts—Procedure—Denial of a Temporary Restraining Order Is Appealable Where Delay Would Render Appeal Ineffectual*, 76 HARV. L. REV. 638, 638–41 (1963).

recognized that, ordinarily, the denial of a temporary restraining order does not qualify as an appealable interlocutory (or nonfinal) order under 28 U.S.C.A. § 1292(a)—which allows appeals of orders refusing an injunction—and was not appealable otherwise.[131] The court acknowledged that neither the Supreme Court nor any Federal Circuit Court of Appeals had "directly considered" whether the denial of a temporary restraining order may "under certain circumstances" be considered a final, appealable decision under 28 U.S.C.A. § 1291.[132] Section 1291 grants the courts of appeals jurisdiction of appeals from "all final decisions of the district courts of the United States."[133]

In *Wood*, Judge Rives made two bold conclusions. First, Judge Rives determined that the temporary restraining order denial was, as "a practical matter," a "final disposition of the Government's claimed right to prevent the prosecution of Hardy" through injunctive relief because of the short time before Hardy went to trial, and, second, that the Supreme Court had "approved a practical construction of section 1291" so that "an order, otherwise nonappealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under section 1291."[134]

Judge Cameron vehemently dissented, labeling the majority's holding regarding the appealability of the TRO denial as "glaringly wrong" and "so distressingly destructive of the cooperative relationship which should exist between state and federal sovereignties."[135] Cameron derided that "the question ha[d] never been decided by the Supreme Court or any Court of Appeals" and the majority based its holding on the government's argument based on the "special circumstances" in the case.[136]

But Judge Cameron's critique did not affect the majority outcome in *Wood*; six months later, the United States Supreme Court denied certiorari.[137] Three years later, in 1964, the Fifth Circuit cited *United States v. Wood* as its sole authority supporting its conclusion in the Birmingham school case *Woods v. Wright* (discussed at the beginning of this article) that the Fifth Circuit had jurisdiction based on an order denying a temporary restraining order.[138] Fifteen years later—in 1977—the Fifth Circuit referred to "the *Wood* rule" as "impart[ing] Section 1291 finality to [an]

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131. *Wood*, 295 F.2d at 777 (citing 28 U.S.C. § 1292(a)).

132. *Id.*

133. 28 U.S.C. § 1291.

134. *Wood*, 295 F.2d at 777–78; *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 126–28; Chapman, *supra* note 7, at 14–15 ("[C]ourts have properly entertained appeals from such [temporary restraining] orders where failure to do so would, as a practical matter, vitiate appellate review."); Dilworth v. Riner, 343 F.2d 226, 229–30 (5th Cir. 1965) (holding temporary restraining order denial was an appealable order where full-scale hearing, which was in substance a preliminary injunction hearing, and where temporary restraining order denial would have sent appellants immediately to trial in state court, rendering their rights under Civil Rights Act moot).

135. Woods v. Wright, 334 F.2d 369–74.

136. *Id.*

137. United States v. Wood, 369 U.S. 850 (1962) (denying certiorari); *see* BASS, *supra* note 4, at 216.

138. *Woods*, 334 F.2d at 373–74.

order[.]"[139] By 2005, multiple federal circuits recognized that "when a grant or denial of a TRO might have serious, perhaps irreparable consequences, and can be effectively challenged only by immediate appeal," the court of appeals "may exercise appellate jurisdiction."[140] Still today, *Wood*'s jurisdictional holding remains solid—for one of the only exceptions making a temporary restraining order appealable continues to be where denial "is equivalent to a dismissal of the claim, thereby rendering moot the underlying request for an injunction."[141]

2. Refusal to Rule on a Motion for Injunction

The Fifth Circuit encountered yet another roadblock to assuming appellate jurisdiction where trial courts failed to apply established law: the trial court's refusal to rule, resulting in the absence of an appealable order. In *United States v. Lynd*, the United States sought to obtain a temporary injunction against the voting registrar of Forrest County, Mississippi, to cease discriminatory practices and acts based on race in voting registration in Forrest County.[142] The Fifth Circuit described the efforts by the United States to obtain an injunction and a ruling on its motion—after numerous delays based on dilatory motions:[143]

> Notwithstanding the well-nigh impossible task of showing the true facts, the witnesses produced by the government proved without question that certain serious discriminations had taken place during the term of office of the defendant Lynd. At the conclusion of the presentation by the government of its evidence, the State and the defendant Lynd both reserved the right of cross examination and deferred such cross examination. The defendants then declined to put on any evidence but stated that it would take thirty days to be prepared to file answers to the amended complaint and to prepare for introducing defense witnesses. Thereupon the government moved the Court to issue a temporary injunction. Without doing so, and declining either to grant or refuse a temporary injunction, in terms, the court failed to comply with the motion and granted a recess of thirty days to permit the defendants to file their answer and to prepare for proving their defensive case.[144]

Fourteen days after the hearing, the district court still failing to rule, the United

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139. Huckeby v. Frozen Food Express, 555 F.2d 542, 546–48 (5th Cir. 1977).

140. Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005) (quoting Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995) and citing United States v. Wood, 295 F.2d 772, 778).

141. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2962 (3d ed. 2022) (discussing *Woods* as the "[i]llustration").

142. United States v. Lynd, 301 F.2d 818, 820–23 (5th Cir. 1962), *cert. denied*, 371 U.S. 893 (1962).

143. *Id.* at 820.

144. *Id.* at 821; *see* Tuttle, *supra* note 13, at 258–59.

States appealed.[145] Chief Judge Tuttle, Judge Joseph Hutcheson, and Judge Wisdom hit forcefully and decisively—with no elaboration on its significance—the question of the court's jurisdiction. The defendants contended that the appellate court had no jurisdiction because that the trial court "did not enter a formal order 'refusing' a temporary injunction."[146] As one of the limited exceptions to the rule that only final judgments constitute appealable orders, 28 U.S.C.A. § 1292(a) provides (and provided in 1962 at the time of *Lynd*) that courts of appeals have jurisdiction over appeals of district court interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions."[147] Without citing authority other than the statute, section 1292, Chief Judge Tuttle noted that the trial court "simply failed" to rule, even though the government formally moved for a ruling during and at the end of its evidentiary presentation.[148] He concluded that "[t]he movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a 'refusal,' so as to satisfy the requirements of Section 1292" and, as such, the order was appealable.[149] The United States Supreme Court considered the defendants' appeal of Chief Judge Tuttle's holding in *Lynd* and denied certiorari.[150]

A year later, in *Davis v. Board of School Commissioners of Mobile County, Alabama*, the Fifth Circuit concluded that refusal to rule on a preliminary injunction was not an appealable order, evidently because there was no evidence of improper delay by the trial court.[151] But the Court cautioned the trial court that it had a "duty" to "promptly rule on th[e] motion for preliminary injunction."[152] Noting each court's duty to uphold *Brown*—which was "binding on all District Courts and All District Judges, just as it is binding on" the Fifth Circuit—and its requirement to desegregate schools, the Fifth Circuit admonished that it "must require prompt and reasonable starts, even displacing the District Court discretion, where local control is not desired or is abdicated by failure to promptly act."[153]

Later Fifth Circuit decisions trimmed *Lynd*'s holding to require that a failure to grant a temporary injunction is appealable only when the trial court abuses its discretion.[154] The Fifth Circuit also further elucidated that the key to *Lynd*'s holding

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145. Chapman, *supra* note 7, at 15 (citing *Lynd* Record at 1216).

146. *Lynd*, 301 F.2d at 822.

147. 28 U.S.C. § 1292(a)(1); *see Lynd*, 301 F.2d at 822; *see also* READ & MCGOUGH, *supra* note 11, at 187 (describing exception and Fifth Circuit efforts to use exception to address lack of rulings by dilatory judge).

148. *Lynd*, 301 F.2d at 822.

149. *Id.*; *see also* Tuttle, *supra* note 13, at 259; Chapman, *supra* note 7, at 15 (describing holding).

150. United States v. Lynd, 371 U.S. 893 (1962).

151. Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 318 F.2d 63, 64 (5th Cir. 1963); *see also* Chapman, *supra* note 7, at 16.

152. *Davis*, 318 F.2d at 64; *see also* Chapman, *supra* note 7, at 16.

153. *Davis*, 318 F.2d at 64; *see* also Chapman, *supra* note 7, at 16.

154. NAACP v. Thompson, 321 F.2d 199, 202 (5th Cir. 1963) (stating that appealable failure to rule if "failure of the trial court to grant the injunctive relief would be set aside by an appellate court as an abuse of discretion"); Overton v. City of Austin, 748 F.2d 941, 952 (5th Cir. 1984) (citing *Davis* for

was the pressing need for the injunction "[i]n view of the immediate pendency of termination of registration proceedings prior to an early election."[155] But *Lynd*'s substance remained intact—and by 1981, the Fifth Circuit viewed *Lynd*'s holding that a "district court's failure to rule on [a] motion for injunction is equivalent to denial of [an] injunction and appealable as such" as illustrative of the court's consistent position that an order's appealability "depends not on terminology but on the substantive effect of the order."[156]

Current legal parlance now refers to the principle that "originated" in the Fifth Circuit in *Lynd* and other cases as the "constructive order" doctrine.[157] As Circuit Courts—including the Third, Seventh, and Fifth Circuits—recognize, a district court's failure to rule on a motion for a preliminary injunction may be appealable "on an interlocutory basis where the effect of the court's silence is to force the aggrieved party to endure the effects of the conduct of which the party complains."[158] As such, the exception remains true to its sought purpose during the post-*Brown* years: to avoid subjecting litigants to the very conduct that they sued to avoid—the denial of their constitutional civil rights.

D. Injunctions Pending Appeal

Yet *Lynd* involved yet another "procedural innovation" that, as Chief Judge Tuttle described, gave "much prompter effect to rights which the court concludes are clearly overdue": the granting of an injunction *pending appeal*.[159] Commentators credit the issuance of the injunction pending appeal in *Lynd* as "expan[ding] the circuit's assumed powers," enabling the court to efficiently and quickly circumvent attempts by recalcitrant district judges to avoid adhering to the Supreme Court's dictates in *Brown*. This innovation transformed the Fifth Circuit into the "center of action" and altered "the internal working structure" of the federal court system.[160]

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the proposition that the failure to grant a temporary injunction is not appealable unless there is abuse of discretion by district judge); *see* Parker Livestock, LLC v. Oklahoma Nat'l Stock Yards Co., 590 Fed. App'x 737, 742 (10th Cir. 2014).

155. *Overton*, 748 F.2d at 952 (noting "immediately effective relief was vital in *Lynd* and quoting *Lynd*, 301 F.2d at 823); *see* Chapman, *supra* note 7, at 16 (concluding failure to rule should equate to denial of the motion "[w]here time is of the essence").

156. Roberts v. St. Regis Paper Co., 653 F.2d 166, 169–70 (5th Cir. 1981).

157. 19 Fed. Proc., L. Ed. § 47:165 (concerning constructive order doctrine, crediting Fifth Circuit with originating doctrine, and citing *Lynd* and *NAACP v. Thompson*).

158. *Id.*

159. Tuttle, *supra* note 13, at 257; *see* READ & MCGOUGH, *supra* note 11, at 187 (describing as "a new solution to the crisis created when a district court judge was clearly in error"); *Judicial Performance in the Fifth Circuit*, *supra* note 42, at 125–26; Wisdom, *supra* note 123, at 10 (Judge Wisdom describing "resort to the All-Writs Statute for authority to issue an injunction pending appeal" as one of the "unusual procedures our court has employed"); Kuhn, *supra* note 12, at 161 (Tuttle describing issuing injunction pending appeal as "an unusual thing at that time").

160. BASS, *supra* note 4, at 218–220 (describing "Tuttle's bold use of the All-Writs Statute [as] almost breathtaking"); READ & MCGOUGH, *supra* note 11, at 187; FRIEDMAN, *supra* note 74, at 247; *see also* Chapman, *supra* note 7, at 16–17 (describing that, at the time of writing in 1967–68, "[l]awyers seem[ed] to have a phobia with regard to mandatory interlocutory injunctions . . . but the Fifth Circuit's

In *Lynd*, the United States requested the Fifth Circuit to enjoin alleged violations of voting rights of African American residents of Forrest County, Mississippi pending disposition of the appeal on the merits.[161] In sweeping terms, Chief Judge Tuttle, joined by Judges Hutcheson and Wisdom, proclaimed:

> Such a motion for injunction pending an appeal is to be found in the All-Writs Statute, 28 U.S.C.A. § 1651, which provides 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." Rule 62(g) of the Federal Rules of Civil Procedure, 28 U.S.C.A. also provides that the authority granted to the District Court to grant relief pending an appeal does "not limit any power of an appellate court or of a judge or justice thereof * * * to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate or preserve the status quo or the effectiveness of the judgement subsequently to be entered."[162]

Based on the evidence before the trial court and the clear Fifth Circuit precedent establishing that the Government was entitled to an order by the trial court authorizing it to inspect the voting records under the Civil Rights Act, the *Lynd* court "conclude[d] 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 [black] registrants pending a decision on this issue by this Court."[163] But Chief Judge Tuttle cited no precedent for the issuance of an injunction pending appeal by the court of appeals—because there was none.[164] Chief Judge Tuttle's decision then "[e]xpressly enjoined" the defendants, the Forrest County Registrar and the State of Mississippi, from undertaking numerous actions related to denying African American applicants the right to apply and register to vote on the same basis as white applicants.[165]

Although Chief Judge Tuttle's opinion unhesitatingly relied upon the All Writs Statute as authorizing its issuance of the injunction pending appeal, *Lynd* represented an unprecedented use of that statute.[166] With roots dating back to the Judiciary Act of 1789, the All Writs Statute served, and still serves, as the fountainhead of equity jurisdiction in the federal courts.[167] Historically district courts—not courts of

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recent experience reveals that the device is often not the bogy some have thought it to be").

161. *Lynd*, 301 F.2d at 819.

162. *Id.*; *see* 28 U.S.C. § 1651; FED. R. CIV. PROC. 62(g) (The Federal Rules of Appellate Procedure were not yet in effect). *See* FED. R. APP. PROC. Historical Note (stating the United States Supreme Court adopted the Federal Rules of Appellate Procedure in 1967 and the rules became effective in 1968).

163. *Lynd*, 301 F.2d at 819, 820–23.

164. *Id.*; READ & MCGOUGH, *supra* note 11, at 296.

165. *Lynd*, 301 F.2d at 823; *see* Tuttle, *supra* note 13, at 259.

166. READ & MCGOUGH, *supra* note 11, at 187–88; BASS, *supra* note 4, at 218.

167. READ & MCGOUGH, *supra* note 11, at 187–88; BASS, *supra* note 4, at 218–19; *see also Judicial*

appeals—employed the All Writs Act and did so with wide discretion.[168]

But no language in the statute barred courts of appeals from applying the Act.[169] Chief Judge Tuttle is universally attributed with discovering and employing the authority of the All Writs Statute for the issuance of an original injunction by a court of appeals.[170] *Lynd*'s expansive holding represented a departure from time-tested, ordinary procedures.[171] The result: the court of appeals wrested the timing of relief out of trial courts' control and made the court of appeals' orders subject to contempt.[172] Indeed, the court of appeals later sat as the trier of fact for contempt of its orders in *Lynd*.[173] One contemporary legal commenter anticipated that granting of such injunctions pending appeal could overcome pre- and post-verdict delays by a district court by effectively disposing of the case on the merits and could shorten by as much as a year the time to process an appeal.[174]

Judge Griffin Bell complained of the pitfalls of this unprecedented extension. In a special concurrence to a subsequent opinion in the *Lynd* appeal, Judge Bell recognized the court of appeals' power under the All Writs Statute but objected that the court should have handled the issue by mandamus and given the trial court the opportunity to rule.[175] Judge Bell opined that the appellate court might have avoided having to "tak[e] the case over" prior to a trial decision and the "multitudinous handling" through "contempt hearings and otherwise" since the grant of the injunction by appeal.[176] To Judge Bell, the case served "as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice when courts depart from the time-tested processes of law."[177]

But the United States Supreme Court did not reflect Judge Bell's reservations. Instead, the high court denied certiorari, implicitly condoning or not objecting to the Fifth Circuit's newly enunciated power to issue injunctions pending appeal.[178]

Although such injunctive power enhanced the appellate court's power and scope, after *Lynd*, the Fifth Circuit strictly circumscribed the circumstances meriting such extraordinary relief.[179] The court granted an injunction pending appeal only if

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Performance in the Fifth Circuit, *supra* note 43, at 124; Note, *The All-Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324, 324–26 (1965).

168. READ & MCGOUGH, *supra* note 11, at 187; BASS, *supra* note 4, at 219.

169. READ & MCGOUGH, *supra* note 11, at 187.

170. *Id.* at 188.

171. *Id.* at 296.

172. *Id.* at 296–97.

173. *Id.*

174. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 128–29.

175. United States v. Lynd, 321 F.2d 26, 28 (5th Cir. 1963) (Bell, J., concurring) ("*Lynd II*"); *see* READ & MCGOUGH, *supra* note 11, at 297.

176. *Lynd II*, 321 F.2d at 28.

177. *Id.*

178. United States v. Lynd, 371 U.S. 893 (1962) (denying certiorari); *see* BASS, *supra* note 4, at 220; *see also* READ & MCGOUGH, *supra* note 11, at 188 (stating United States Supreme Court "implicitly approved the practice" in 1963).

179. READ & MCGOUGH, *supra* note 11, at 187–88; BASS, *supra* note 4, at 220 (noting the need to restrict use of the appellate court's power to issue interlocutory injunctions if use is precipitous and

the applicant demonstrated there was "a great likelihood, approaching near certainty" that the court of appeals would agree with his position when the case came before the court on appeal.[180] Likewise, the court considered that it had the power to grant an injunction pending appeal to prevent "irreparable damage."[181] In school desegregation cases, the court awarded interlocutory injunctive relief when noncompliant district judges ignored the Supreme Court's directive that school boards make a "prompt and reasonable start" towards desegregation.[182]

Even with this high bar, the injunction pending appeal became a primary tool for civil rights attorneys impeded by recalcitrant district judges, a widely used remedy in school desegregation cases, and a "forceful measure[] to expedite relief."[183] A year after *Lynd* in May 1963, the Fifth Circuit in *Stell v. Savannah-Chatham County Board of Education*—in an opinion authored by Chief Judge Tuttle and joined by Judges Rives and Bell—held that the district court clearly abused its discretion by refusing to grant an injunction ordering a Georgia school board to begin desegregation.[184] The district court had instead recognized that the Savannah-Chatham schools were racially segregated and permitted intervention by parties whose sole purpose was to introduce evidence as a basis to request the Supreme Court to reverse *Brown*.[185] Eleven days later, the Fifth Circuit granted the injunction pending appeal again citing the All Writs Statute, noting that "the 'All Writs' statute is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power."[186] It concluded the statute "should be invoked only in 'extreme cases'" and "[t]his is such a case."[187] The court then ordered the district court to issue an injunction requiring the school board to submit a desegregation plan to the district court within five weeks.[188]

Two months later, in *Armstrong v. Board of Education of City of Birmingham*, the court issued what one scholar considers "[t]he most celebrated, though not the first, instance of the Fifth Circuit's use of a controversial procedural device" to accelerate the languid pace of complying with *Brown*.[189] The background to the Birmingham

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results in further delay, "disputed factual issues are critical" to the issue, and in light of the "serious problems in enforcing appellate court injunctions").

180. READ & MCGOUGH, *supra* note 11, at 187–88; *see, e.g.*, *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963); *United States v. City of Jackson, Miss.*, 519 F.2d 1147, 1154 (5th Cir. 1975); *see also* Chapman, *supra* note 7, at 18.

181. Harris v. Gibson, 322 F.2d 780, 781–82 (5th Cir. 1963); *see also* Chapman, *supra* note 7, at 18.

182. Chapman, *supra* note 7, at 17–18 (citing *Brown*, 349 U.S. 294, 300 (1955) and examples of cases awarding interlocutory relief: *Armstrong*, 323 F.2d 333, 333 (5th Cir. 1963), and Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 322 F.2d 356, 356 (5th Cir. 1963)).

183. BASS, *supra* note 4, at 220; COUCH, *supra* note 21, at 120.

184. Stell v. Savannah-Chatham Cnty. Bd. of Educ., 318 F.2d 425, 426–28 (5th Cir. 1963); *see Judicial Performance in the Fifth Circuit*, *supra* note 43, at 129–30; Chapman, *supra* note 7, at 17.

185. *Stell*, 318 F.2d at 427.

186. *Id.* at 426; *see also* EMANUEL, *supra* note 72, at 269–70.

187. *Stell*, 318 F.2d at 426–27.

188. *Id.* at 428; *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 130; COUCH, *supra* note 21, at 120.

189. FRIEDMAN, *supra* note 74, at 246–47.

school ruling had been explosive: the Fifth Circuit took judicial notice "of the fact that violence and disorder have erupted in Birmingham."[190] This environment resulted in the student demonstrations and suspensions that led to Chief Judge Tuttle's single-judge ruling in *Woods v. Wright*, discussed in this article's introduction.[191] As Fifth Circuit Judge Rives recognized, "The question now is not approval or disapproval of the law; but whether the law, order, and the educational process will prevail over violence and disorder."[192]

In *Armstrong*, the district court denied an injunction to desegregate the Birmingham schools on the basis that not all "administrative remedies" had been exhausted—a holding directly contrary to Supreme Court and Fifth Circuit precedent.[193] Judge Rives, joined by Chief Judge Tuttle, recognized that the litigation had been pending for more than three years, and there must, at a minimum, be a "good faith start" towards awarding the plaintiffs and fellow-students their long-delayed constitutional rights.[194] The Fifth Circuit reversed, issued an injunction on appeal, and spelled out the order that the district court should issue, requiring that the school board submit a desegregation plan within five weeks (by mid-August 1963) which would "make an immediate start in the desegregation of the schools of Birmingham."[195]

Judge Gewin dissented to the "unusual action" of issuing an injunction pending appeal under the circumstances and argued that the injunction improperly decided the merits of the case.[196] Along with criticizing the substantive holding, Gewin objected to the issuance of an injunction pending appeal on the grounds that such injunctive relief by the appellate court should only be granted after the trial court refused to grant interlocutory relief—which he claimed occurred in *Stell*, but not in *Armstrong*.[197] He cautioned that "it was never intended that the All Writs Act should be used as a substitute for appeals, and this is true even though hardship may result from delay."[198] Judge Gewin requested an en banc rehearing of the case on numerous grounds, including the "unique procedure involved" and the "importance of this case" as to "the motion for injunction pending appeal."[199] The full court denied his request.[200]

But Judge Cameron dissented from the denial of the rehearing, claiming the panel decision involved "questions of procedure which ha[d] for some weeks

190. Armstrong v. Bd. of Educ. of the City of Birmingham, 323 F.2d 333, 361 (1963).
191. *See supra* Introduction.
192. *Armstrong*, 323 F.2d at 362.
193. *Id.* at 334–36.
194. *Id.* at 338.
195. *Id.* at 338–39; *see* COUCH, *supra* note 21, at 120–21.
196. *Armstrong*, 323 F.2d at 339–40 (Gewin, J., dissenting).
197. *Id.* at 343–45.
198. *Id.* at 344.
199. *Id.* at 352.
200. *Id.*

plagued and [were] still plaguing the Court."[201] He asserted there existed "sharp divi[sion] on these questions" among the court's judges and attorneys and the public were "displaying open concern" with inconsistent positions by the court.".[202] Among numerous other criticisms, Judge Cameron decried the *Armstrong* panel decision as "substitut[ing] a hearing on 'injunction pending appeal' for a hearing on appeal" that decided the "merits of the case" without "any record of the evidence in the lower court" or the "questions of law and fact" before the lower court.[203] Judge Cameron proposed that if the "Court [was] to regain the stature it owned" prior to Chief Judge Tuttle assuming the duties of Chief Judge, the court must "forsake the special procedures which have been discussed and adhere to those which are 'time-tested' and legal."[204]

But Judges Cameron and Gewin's criticisms did not dissuade the majority on Fifth Circuit panels; the court granted several injunctions pending appeal in desegregation cases beginning in the summer of 1963.[205] This equitable remedy reflected the evident frustration and impatience of a majority of the court with obdurate district court judges and the slow pace of desegregation since *Brown* nine years prior.[206]

Moreover, each of these cases reflects the centrality of the injunction as a remedial device in civil rights cases to require desegregation and prohibit racial discrimination.[207] This flexible equitable remedy enabled courts (at various stages of trial and appeal, including pending appeal) to order a person to perform or not perform future acts—and, in the case of civil rights cases, was often directed against state officials.[208] As Fifth Circuit Judge Jones recognized in 1964, "We are fully aware of the reluctance with which Federal Courts should contemplate the use of the injunctive power to interfere with the conduct of state officers. But when there is a deprivation of a constitutionally guaranteed right the duty to exercise the power cannot be avoided."[209] As Owen M. Fiss concluded in *The Civil Rights Injunction*, civil rights litigation presented courts with tasks that could not be accomplished through other remedies such as damage judgments or criminal prosecution.[210] The injunction could accommodate the group character of discrimination claims, allowed for specificity, prospective orders, and continued supervision stretching

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201. *Id.* at 352–53 (Cameron, J., dissenting on petition for rehearing en banc).

202. *Id.* at 353.

203. *Id.*

204. *Id.* at 359.

205. COUCH, *supra* note 21, at 120; *see*, *e.g.*, McCoy v. Louisiana State Bd. of Educ., 332 F.2d 915, 916–17 (1964) (injunction pending appeal granted in college desegregation case); Harris v. Gibson, 322 F.2d 780, 782 (5th Cir. 1963) (injunction pending appeal to avoid irreparable damage from racially segregated schools).

206. *Id.*

207. *Id.* at 122–23; FISS, *supra* note 24, at 4; *see also* FISS, *supra* note 24, at 94 (recognizing that "the civil rights era teaches that procedure is, and should be, ineluctably tied to the merits and nature of the underlying substantive claim").

208. *Id.*

209. Woods v. Wright, 334 F.2d 369, 374–75; *see* COUCH, *supra* note 21, at 122–23.

210. FISS, *supra* note 24, at 87.

over long time periods, and allowed easy modification of orders as conditions, facts, and the law evolved.[211] Indeed, the use of the injunction—both issued pending appeal and otherwise—to restructure a social institution became a tool employed to address ills in numerous areas, including reformation of mental hospitals and prisons, environmental protection, and reapportionment of state legislatures.[212]

Six years after Chief Judge Tuttle ingeniously recognized the Court of Appeals' authority to employ the All Writs Act to issue an original injunction by a federal appellate court in *Lynd*, the United States Supreme Court adopted the Federal Rules of Appellate Procedure in July 1968.[213] Newly-enacted Rule of Appellate Procedure 8—which remains largely unchanged today—specifically authorizes the court of appeals to issue "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending."[214] The rule includes the condition that Judge Gewin complained was not met in *Armstrong*: the requirement that the party first move and obtain a ruling in the district court.[215] But an exception to Rule 8 provides that although a party must ordinarily first seek relief from the lower court,[216] a party may first file a motion for injunctive relief in the court of appeals if the motion "show[s] that moving first in the district court would be impracticable."[217] Likewise, Federal Rule of Civil Procedure 62(g) contains substantially the same provisions that Chief Judge Tuttle relied on in *Lynd* in 1963:[218]

> [The rule] does not limit the power of the appellate court or one of its judges or justices (1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or (2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.[219]

Moreover, courts continue to recognize the power of a federal appellate court to issue injunctive relief pending appeal "when to do so, in effect, is to give the appellant the ultimate relief being sought."[220] The high bar that the Fifth Circuit

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211. *Id.*

212. *Id.* at 4–5; BASS, *supra* note 4, at 20–21, 227.

213. *See* FED. R. APP. PROC. Historical Note (stating Federal Rules of Appellate Procedure became effective in July 1968).

214. FED. R. APP. PROC. 8(2).

215. *See* Armstrong v. Bd. of Educ. of the City of Birmingham, 323 F.2d 333, 342–45 (5th Cir. 1963) (Gewin, J., dissenting).

216. 16A WRIGHT & MILLER, *supra* note 141, § 3954; FEDERAL PRACTICE AND PROCEDURE § 2962 (3d ed. 2022).

217. FED. R. APP. PROC. 8(2)(A)(i); *see also* Jill Weiber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. STATE UNIV. L. REV. 1319, 1323 (2016) (outlining the injunction pending appeal in the appellate courts under Rule 8).

218. *See* United States v. Lynd, 301 F.2d 818, 819.

219. FED. R. CIV. PROC. 62(g).

220. 11 WRIGHT & MILLER, *supra* note 141, § 2904; *see also* Chapman, *supra* note 79, at 17 ("[T]here should be no substantial doubt that a court of appeals, which can order mandatory injunctive relief after a leisurely briefing schedule and the usual delays resulting from calendar congestion, has the power to do the same thing provisionally at an earlier stage in the appeal.").

required a party to meet for affirmative injunctive relief in 1963 likewise forms the test in federal courts generally almost sixty years later: "[T]he appellant will be required to show a great likelihood that he will prevail when the case finally comes to be heard on the merits and that a denial of interim relief will result in irreparable injury."[221] Where a moving party meets this standard, the federal courts of appeals have issued injunctions pending appeal in a diverse range of cases—ranging from requiring a woman to submit to a blood transfusion to restraining Arlington Memorial Cemetery officers from prohibiting religious and ritual services by Native Americans at the cemetery.[222] The result has been the flexibility to structure relief pending appeal as needed, including to avoid ongoing infringement of civil rights.

E. Dictating the Substance of District Court's Order on Remand

In January 1961, James Meredith, an African American resident of Mississippi, began his efforts to enroll as a University of Mississippi student.[223] A year later, Fifth Circuit Judge Wisdom concluded, "This case was tried below and argued here in the eerie atmosphere of nevernever land."[224] Nine months after Judge Wisdom's decision, Meredith was an Ole Miss student—but this occurred only after a riot resulted in the death of two people, twenty-eight federal marshals suffered gunshot wounds, 132 marshals suffered other injuries, and six thousand federal troops ultimately restored order on the University of Mississippi campus.[225]

In the midst of the Fifth Circuit's numerous hearings in the case, Judge Wisdom disagreed with Mississippi's counsel that "there [wa]s no state policy of maintaining segregated institutions of higher learning" and, instead, took "judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges."[226] The Fifth Circuit concluded there was "no valid, non-discriminatory reason for the University's not accepting Meredith" and, instead, there was "a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders."[227] Ultimately, on appeal of a final judgment after trial on the merits, the panel of Judges Wisdom and Brown and District Judge DeVane reversed the district court's judgment denying Meredith admission and issued an injunction "secur[ing] his admission" to the University, "with directions" to the district court to issue the

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221. 11 WRIGHT & MILLER, *supra* note 141, § 2904 (citing cases where test applied).

222. *See* Application of Pres. & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1001–02, 1004 (D.C. Cir. 1964) (blood transfusion); Satiacum v. Laird, 475 F.2d 320 (D.C. Cir. 1972) (religious and rituals at cemetery); 11 WRIGHT & MILLER, *supra* note 141, § 2904 n.30 (citing these and other cases).

223. Meredith v. Fair, 298 F.2d 696, 698 (5th Cir. 1962).

224. *Id.* at 701; *see* BASS, *supra* note 4, at 172 (noting quote).

225. BASS, *supra* note 4, at 172; Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 342 (1985).

226. *Meredith*, 298 F.2d at 701.

227. Meredith v. Fair, 305 F.2d 343, 361 (5th Cir. 1962).

injunction that Meredith had prayed for in his complaint.[228]

A month later, the day after the court's mandate became effective, Fifth Circuit Judge Cameron—who was not a member of the panel that decided the case—signed an order staying the enforcement of the mandate.[229] Wisdom forthrightly deemed it "unthinkable" that a judge who was not a member of the panel be allowed to "frustrate the mandate of the Court."[230] He also deemed Cameron's stay ineffective, as the court had no control over the case after issuance of the mandate.[231]

More broadly, Wisdom concluded that the previous mandate to issue the injunction "as prayed for in the complaint" was too loose—and instead made "explicit the meaning that was implicit" by spelling out the terms of the injunction ordering Meredith's admission.[232] The Fifth Circuit directed the district court to issue a permanent injunction enjoining and compelling officials and "all persons having knowledge of the decree" to admit Meredith to the University of Mississippi and to not interfere with his admission or attendance.[233] In addition, the Fifth Circuit entered its own preliminary injunction, enjoining and compelling the same persons to admit Meredith and allow his continued attendance at the University of Mississippi.[234] As Chief Judge Tuttle later explained, the Fifth Circuit issuing its own injunction meant that it would not have to depend upon the intractable district judge to enforce the order—and if Mississippi officials did not comply, they would face "contempt of *our* court."[235]

But maintaining control subjected the appellate court to ongoing and time-consuming burdens:[236] ultimately the Fifth Circuit entered judgments of civil contempt against the Governor of Mississippi, Ross Barnett, and the Lieutenant Governor, Paul Johnson, for personally obstructing enforcement of the Fifth Circuit's injunction mandating Meredith's enrollment.[237] The Fifth Circuit also instructed the United States attorney general to prepare criminal charges against Governor Barnett and Lieutenant Governor Johnson, leading to a Supreme Court holding—issued almost two years after the Fifth Circuit issued its injunction—that they were not entitled to a trial by jury on criminal contempt charges.[238] Fifth Circuit Judge Brown considered the criminal contempt of a sitting Governor "one of the great constitutional crises of the United States."[239]

Likewise, the court in *Lynd* experienced "serious problems in enforcing

228. *Id.* at 344.
229. Meredith v. Fair, 306 F.2d 374, 375 (5th Cir. 1962).
230. *Id.* at 376.
231. *Id.*
232. *Id.* at 378–79; BASS, *supra* note 4, at 180.
233. *Meredith*, 306 F.2d at 378.
234. *Id.*
235. BASS, *supra* note 4, at 180.
236. *Id.* at 180.
237. *Id.*
238. *Id.*; *see United States v. Barnett*, 376 U.S. 681 (1964).
239. BASS, *supra* note 4, at 200 (quoting Judge Brown).

appellate injunctions"[240] where the court sat to hear evidence concerning contempt of its orders.[241] Three years after the Fifth Circuit issued its injunction enjoining officials in Forrest County, Mississippi from denying African Americans the right to apply and register to vote, *Lynd* was still on the court's docket with "a proceeding for civil contempt for disobedience of the orders of th[e] Court" against the County voting registrar.[242]

As a result of the difficulties in supervising its own orders and likely because of growing dissension within the court over issuance of novel relief, the Fifth Circuit modified its approach in early 1963.[243] Instead, as manifested in *Stell*, the long-running Savannah, Georgia desegregation case, the court declined to issue its own injunction.[244] Chief Judge Tuttle, writing for the court, recognized:

> We have heretofore concluded that this Court has the power to grant an injunction pending the final hearing of the case on the merits in the Court of Appeals. However, it is clearly more desirable for injunctive relief to be granted at the level of the trial court rather than by an appellate court if the same necessary results can be accomplished. Included in the powers of the Court of Appeals under the All-Writs Statute, is the power of the Court of Appeals to frame the terms of an injunction and direct the trial court to enter such injunction and make it the order of the trial court.[245]

By 1967, as a former Fifth Circuit law clerk acknowledged, "The Fifth Circuit ha[d] sought to minimize enforcement problems by directing the district court to enter injunctions instead of granting them itself."[246] Chief Judge Tuttle observed that "more and more we took to framing the precise order to be entered upon remand" with the aim "to avoid any misunderstanding on the part of the trial court as to exactly what kind of an injunctive order our court had decided was appropriate in the circumstances."[247]

But the court shifted its approach over time from a request to a command. For example, in May 1964, the court in *United States v. Duke* stated that it would "not attempt to frame the terms of the order to be issued by the trial court, but it is strongly *suggested*" what the terms of the order should include.[248] In June 1965, in the last hearing of the *Lynd* case, the court specified "[t]he District Court is *directed*

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240. Chapman, *supra* note 7, at 19.

241. United States v. Lynd, 349 F.2d 790, 791–95 (5th Cir. 1965); *see* Chapman, *supra* note 79, at 19, 19 n.42.

242. *Lynd*, 349 F.2d at 791.

243. READ & MCGOUGH, *supra* note 11, at 188.

244. *Stell*, 318 F.2d at 427–28; *see* READ & MCGOUGH, *supra* note 11, at 188.

245. *Stell*, 318 F.2d at 427–28; *see* READ & MCGOUGH, *supra* note 11, at 188.

246. Chapman, *supra* note 7, at 19 n.42.

247. Tuttle, *supra* note 13, at 261.

248. United States v. Duke, 332 F.2d 759, 770–71 (5th Cir. 1964) (emphasis added); *see* Tuttle, *supra* note 13, at 261.

upon remand to enter forthwith the following judgment in this matter" and delineated the contents of the order.[249]

The court employed this procedural tool of dictating the terms of the injunctive order for the trial court to enter upon remand in numerous central civil rights decisions, including the Savannah, Georgia, Mobile, Alabama, and Birmingham, Alabama desegregation cases.[250] Further, in various of these same cases, the court nevertheless acknowledged the district court's need for flexibility in crafting needed terms, providing: "the district court [wa]s further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order" "[d]uring the pendency of this order."[251] Decades later, these rulings in civil rights cases spelling out the terms of the injunction upon remand remained intact, as did the recognition "that appellate courts are not as well equipped as trial courts to enforce injunctive orders."[252]

F. Appellate Ruling by a Single Judge

On September 2, 1960, Hamilton Holmes and Charlayne Hunter filed suit alleging that they had been wrongfully denied admission to the University of Georgia.[253] Six years after the Supreme Court's *Brown* decision declaring that segregated educational institutions were unconstitutional, all of the public university undergraduate colleges in the Deep South remained segregated.[254] Some African Americans had sought admission, but college officials employed delaying tactics in the form of admission and appeals processes until the student's educational years passed—and their complaints became moot.[255]

Holmes and Hunter experienced such delaying tactics. They had applied to the University of Georgia in June 1959, and a year and a half later in January 1961, the

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249. United States v. Lynd, 349 F.2d 785, 787 (5th Cir. 1965) (emphasis added); *see* Tuttle, *supra* note 13, at 261.

250. *Stell*, 318 F.2d at 428; Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 322 F.2d 356, 359 (5th Cir. 1963); Armstrong v. Bd. of Educ. of Birmingham, 323 F.2d at 338–39; *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 132–33, 133 n.218; BASS, *supra* note 4, at 224. Moreover, the Fifth Circuit further expanded its practice of dictating the terms of the district court's decree in *Jefferson I* and *II*, in which the court wrote the terms of the desegregation decree based on Guidelines of the United States Office of Education, Department of Health, Education, and Welfare and held that the terms of the decree applied to not just the cases before the court, but to cases throughout the circuit. United States v. Jefferson Cnty. Bd. of Educ. (*Jefferson I*), 372 F.2d 836, 893–96 & App. A (5th Cir. 1966) ("[T]he provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools."); *see also* United States v. Jefferson Cnty. Bd. of Educ. (*Jefferson II*), 380 F.2d 385, 390 (5th Cir. 1967) (including "Corrected Decree" based on HEW Guidelines); Read, *supra* note 21, at 1159–60 (discussing *Jefferson I* and *II*).

251. *See, e.g.*, *Armstrong*, 323 F.2d at 339; *Stell*, 318 F.2d at 428; *Davis*, 322 F.2d at 359; McCoy v. La. State Bd. of Educ., 332 F.2d 915, 918 (5th Cir. 1964) (desegregation of Louisiana public college); *see Judicial Performance in the Fifth Circuit*, *supra* note 43, at 132–33, 133 n.219.

252. 11 WRIGHT & MILLER, *supra* note 141, § 2904 (Injunction Pending Appeal).

253. Emanuel, *supra* note 51, at 10.

254. *Id.*

255. *Id.* at 8–9, 14.

University had not considered Hunter's application.[256] The University finally denied Holmes's application in November 1960, and his subsequent internal university appeal (a predicate to admission) did not proceed because "the Board of Regents had found it impossible to convene."[257] After a full trial, Judge William A. Bootle of the Middle District of Georgia shot down such delaying tactics. He concluded that the Georgia Board of Regents' administrative remedy was inadequate as (1) officials were not required to rule on an appeal within any prescribed period of time or even a "reasonable" time period and (2) Georgia officials were not "free" to admit African Americans under Georgia law, as the University would lose appropriations from the legislature.[258] The district court concluded that Holmes and Hunter had "been denied admission as students solely because of their race and color."[259] Judge Bootle permanently enjoined the University of Georgia registrar and associated officials from refusing to consider African American applicants, including Holmes and Hunter, upon the same conditions and terms applicable to white applicants to the University.[260] The court concluded Holmes and Hunter were "fully qualified for immediate admission" and the registrar and other officials were therefore enjoined from refusing to enroll them as students beginning Winter Quarter 1961 or in approaching quarters.[261]

Yet three days after Judge Bootle's January 6, 1961 ruling, he granted a stay and suspension of the decree pending the outcome of an appeal to the Fifth Circuit.[262] The stay was a significant roadblock: classes began at the University of Georgia two days later.[263] The same day that Judge Bootle granted the stay, counsel for the black applicants Holmes and Hunter contacted Fifth Circuit Chief Judge Elbert Tuttle—who had only been Chief Judge for a month.[264] He agreed to hear the motion to vacate the stay that afternoon in his offices in Atlanta.[265] Chief Judge Tuttle and his law clerk then put aside other work for that day and focused on locating authority for vacating a trial court's stay pending appeal—particularly for a single appellate judge, sitting alone, to do so.[266] Within hours, the students' counsel had filed a notice of appeal, and both sides appeared before Chief Judge Tuttle in his Fifth Circuit office.[267]

After hearing arguments from both sides, Chief Judge Tuttle—acting alone—

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256. Holmes v. Danner, 191 F. Supp. 394, 401 (M.D. Ga. 1961).
257. Emanuel, *supra* note 51, at 10.
258. *Holmes*, 191 F. Supp. at 401.
259. *Id.* at 402.
260. *Id.* at 410.
261. *Id.*
262. *Id.* at 412; READ & MCGOUGH, *supra* note 11, at 184.
263. Emanuel, *supra* note 51, at 17; COUCH, *supra* note 21, at 110.
264. Emanuel, *supra* note 51, at 17; READ & MCGOUGH, *supra* note 11, at 184; COUCH, *supra* note 21, at 110.
265. Emanuel, *supra* note 51, at 10.
266. *Id.* at 19.
267. BASS, *supra* note 4, at 217.

issued his order vacating the stay.[268] As authority for his ruling as a single judge, Chief Judge Tuttle relied upon Federal Rule of Civil Procedure 62(g).[269] Rule 62 grants power to a district court to grant stays or injunctions pending appeal.[270] But Chief Judge Tuttle relied on subsection (g) in vacating the stay, which states that Rule 62 "does not limit the power of the appellate court or one of its judges or justices" to "suspend, modify, restore, or grant an injunction—while an appeal is pending."[271]

As Chief Judge Tuttle later described, he informed the parties: "[I]n my opinion, there is nothing to appeal in this case. The Supreme Court has held many, many times in higher education that you can't exclude people on account of race . . . So I will enter an order ordering their admission immediately."[272] In his order, Chief Judge Tuttle concluded there was "no substantial legal question apparent from which the defendant can appeal."[273] He also concluded that the stay resulted in the ongoing denial of a constitutional right, and "[i]rreparable injury results in the denial of a constitutional right, largely because it cannot be measured by any known scale of value."[274]

Tuttle asserted,

> I am of the opinion that the quickest disposition that can be made of this case, so far as granting these plaintiffs their right to an education in a State institution, as the trial court has clearly found that they are entitled to, is the best solution not only for them but for all others concerned.[275]

He ordered reinstatement of the January 6 injunction ordering integration.[276] As a result, Holmes and Hunter appeared for admission in time to register for classes for that university term.[277] The University of Georgia immediately appealed. And the following day, the Supreme Court denied the defendant's motion to vacate Chief Judge Tuttle's order.[278]

Chief Judge Tuttle's decisive 1961 appellate ruling as a single judge and reliance on Rule of Civil Procedure 62(g) as authority marked a sharp turn from the Fifth Circuit's position thirteen years earlier in the infamous challenge to the Texas Senatorial primary election involving Lyndon Baines Johnson.[279] After Johnson narrowly defeated Coke Stevenson in the 1948 Texas Democratic primary for the

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268. Emanuel, *supra* note 51, at 10.
269. COUCH, *supra* note 21, at 110.
270. FED. R. CIV. PROC. 62; *see* BASS, *supra* note 51, at 217.
271. FED. R. CIV. PROC. 62(g).
272. Kuhn, *supra* note 12, at 161.
273. COUCH, *supra* note 21, at 110.
274. Emanuel, *supra* note 51, at 23 (quoting *Judge Tuttle's Edict Setting Aside Stay*, ATLANTA CONST., Jan. 10, 1961, at 6 (citations omitted)).
275. *Id.*
276. COUCH, *supra* note 21, at 110; BASS, *supra* note 4, at 217.
277. Emanuel, *supra* note 51, at 24.
278. COUCH, *supra* note 21, at 110; BASS, *supra* note 4, at 217–18; Kuhn, *supra* note 12, at 161.
279. Chapman, *supra* note 7, at 12–13.

United States Senate, Stevenson alleged irregularities and asked the federal district court to enjoin Johnson's certification as the Democratic nominee.[280] The federal district court—albeit with questionable jurisdiction—issued a preliminary injunction on September 23.[281] Texas law mandated that Johnson's name could not be listed on the ballot as the Democratic nominee unless the injunction was lifted by September 30.[282] The day after the injunction was issued, September 24, Fifth Circuit Chief Judge Hutcheson heard arguments concerning Johnson's motion to set aside the injunction pending appeal.[283] Hutcheson ruled that he was powerless to grant any relief, sitting alone, other than schedule the case for hearing on October 4, when the Fifth Circuit would next convene.[284] Chief Judge Hutcheson rejected Rule of Civil Procedure 62(g) and the All Writs Statute as grounds for authority.[285] The Fifth Circuit's official historian describes, "Consistent with his conservatism, Hutcheson did not feel that he had greater authority than any other circuit judge, or that he could enlarge the powers of the office."[286]

Because relief falling after September 30 was pointless, Johnson appealed to the United States Supreme Court for a hearing before the circuit justice, Justice Hugo Black.[287] Black heard lengthy arguments in open court on September 29 and ordered the injunction stayed until the Supreme Court issued further orders.[288] As a result, Johnson received immediate certification as the Democratic nominee.[289] Five days after Justice Black's ruling, on October 4, the Fifth Circuit heard Johnson's appeal, and on October 7, held that the district court had no jurisdiction.[290]

By the 1960s, numerous Fifth Circuit judges were no longer hesitant to innovatively employ rules and statutes in order "to do equity on short notice, as the exigencies of the situation require[d]."[291] Indeed, two years after Chief Judge Tuttle's single-judge ruling to enforce desegregation at the University of Georgia, he again ruled as a single judge to order readmission of a thousand African American students to Birmingham public schools pending the Fifth Circuit's appellate review of their suspension (as discussed in this Article's introduction).[292] But by the time of the 1963 Birmingham ruling, Chief Justice Tuttle relied upon not only Rule of Civil Procedure 62(g), but also the All Writs Statute, 28 U.S.C.A. § 1651(b), as

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280. *Id.* at 12.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* (citing Johnson v. Stevenson, 170 F.2d, 108 (5th Cir. 1948) (order on motion for stay of preliminary injunction)).
285. Josiah M. Daniel, III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1, 53 (2012).
286. COUCH, *supra* note 21, at 75;
287. Chapman, *supra* note 79, at 12; Daniel, *supra* note 284, at 53.
288. Chapman, *supra* note 7, at 12; *see* Johnson v. Stevenson, 335 U.S. 801, 801 (1948).
289. Chapman, *supra* note 7, at 13.
290. Johnson v. Stevenson, 170 F.2d at 111.
291. Chapman, *supra* note 7, at 13.
292. READ & MCGOUGH, *supra* note 11, at 184; *see also supra* Introduction.

establishing his "jurisdiction and the power to grant the relief sought."[293]

This progressive approach to single-judge appellate rulings met strong backlash within the court. Challenged on his authority to act alone, Chief Judge Tuttle called a meeting of the Fifth Circuit Judicial Council (composed of all active Fifth Circuit judges)—and deliberately scheduled it to meet the day after high school graduation in Birmingham, on May 29, 1963.[294] In a footnote to his dissent in *Armstrong*, Judge Cameron divulged the meant-to-be-confidential Judicial Council proceedings:

> The power of a single Circuit Judge to act in certain instances including the power to grant injunctive relief was next discussed. It was not possible to resolve the question of power by rule or otherwise due to an even division among the members of the Council as to the presence or absence of such power, and because some felt that it was not the appropriate subject matter of a rule.[295]

Judges Brown, Rives, and Wisdom joined Chief Judge Tuttle in supporting the power; Judges Jones, Bell, Gewin, and Cameron opposed—with Judge Hutcheson absent as a result of ill health.[296]

Notwithstanding the voting stalemate, the Fifth Circuit's stretch in employing single-judge interlocutory rulings spread. In 1964, District of Columbia Circuit Judge Skelly Wright cited both the All Writs Act and Rule 62(g) to support his assured conclusion that "[t]he power of a single judge to issue such emergency temporary writs cannot be disputed."[297] Judge Skelly Wright cited Chief Judge Tuttle's opinion in *Woods v. Wright* as authoritative support when ordering black "students be admitted to the Birmingham public schools".[298] On these authorities, Judge Skelly Wright issued an emergency writ ordering that physicians could administer lifesaving blood transfusions to a patient who objected on religious grounds.[299]

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293. Armstrong v. Bd. of Educ. of Birmingham, 323 F.2d 333, 355 (5th Cir. 1963) (Chief Judge Tuttle's order in *Woods v. Wright* quoted in Judge Cameron's dissent in *Armstrong*). Tuttle also cited Aaron v. Cooper, 261 F.2d 97, 101 n.1 (8th Cir. 1958) (approving an injunction issued by two judges and stating the All-Writs Act, "28 U.S.C. § 1651(b) empowers an individual judge to issue an alternative writ or rule nisi")); *see Armstrong*, 323 F.2d at 355 (Cameron, J., dissenting); *see also* Chapman, *supra* note 7, at 23–24 (discussing *Aaron*). For another example of Chief Judge Tuttle's finding in the All-Writs Act "the power to act alone" to vacate a trial court's order in the case of a peaceful march led by Martin Luther King, Jr. in Albany, Georgia, see EMANUEL, *supra* note 72, at 237. *See also* Kelly v. Page, 335 F.2d 114, 117–18 & n.2 (5th Cir. 1964) (related opinion).

294. *Armstrong*, 323 F.2d at 356 & n.4 (Cameron, J., dissenting); BASS, *supra* note 4, at 223–24; READ & MCGOUGH, *supra* note 11, at 190.

295. *Armstrong*, 323 F.2d at 356 & n.4 (Cameron, J., dissenting).

296. BASS, *supra* note 4, at 226.

297. Application of President & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1005–06 (D.C. Cir. 1964)
("The power recognized by Rule 62(g) and the All-Writs Statute, 28, U.S.C. § 1651, inheres in the single Supreme Court Justice and the single circuit court judge equally, each exercising the same power within the 'respective jurisdictions' of his court."); *see also* Chapman, *supra* note 7, at 22 & n.61; 16A WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3954 n.36.

298. Application of President & Dirs. of Georgetown Coll., Inc., 331 F.2d at 1005–06.

299. *Id.* at 1001–02, 1011.

Even as the courts relied on Rule 62(g) as authority for a single-judge ruling, commentators noted that the Rule recognizes that a single judge may possess the power to grant temporary injunctions, but does not confer the power.[300] But, as noted, the All Writs Act does grant that power.[301] Still others have criticized relying on the All Writs Act as authority for actions by a single judge because the statute refers to the authority of a "court" and not that of a "judge."[302] But as former Fifth Circuit law clerk, Jarome Chapman, recognized in 1967, the Judicial Code provided—and still provides—for the valid action of a court of less than three judges.[303]

In addition, other sources of authority supported the power of a single judge to grant affirmative interlocutory relief.[304] The Supreme Court's rules provided that "writs of injunction may be granted by any justice in cases where they might be granted by the court."[305] Numerous circuits—including the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits—had rules relating to a single judge issuing orders "preparatory to hearing," although some were not as specific as the Supreme Court's rule.[306] For example, the Fifth Circuit's Rule 4(2) provided that "[a]ny judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof."[307] As Chapman argued in 1967, the power of a single judge under such provisions should be read broadly—so that the single judge could grant relief as "necessary to preserve appellant jurisdiction."[308]

Moreover, the same Fifth Circuit Judicial Council meeting in May 1963 that resulted in a deadlock on the power of a circuit judge to act alone in certain instances resulted in another Fifth Circuit procedural innovation to address the need for granting effective emergency relief: "emergency panels."[309] As a result, the circuit consistently had available a preassigned panel to rule on routine motions and emergency matters whenever the court was in recess.[310] These panels enabled civil rights lawyers to attain immediate judicial rulings in "explosive situations" and made it unnecessary for a single judge to act—thus avoiding the controversial issue of a single appellate judge ruling alone.

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300. Chapman, *supra* note 7, at 22; Note, *The All-Writs Statute and the Injunctive Power of a Single Appellate Judge*, *supra* note 167, at 328 (stating criticism).

301. Chapman, *supra* note 7, at 22–23.

302. *Id.* at 22; *see* Note, *The All-Writs Statute and the Injunctive Power of a Single Appellate Judge*, *supra* note 167, at 328 (stating criticism).

303. 28 U.S.C. § 46(c) (West) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . ."); Chapman, *supra* note 79, at 22–23; *see also* 28 U.S.C. § 46(d) (West) ("A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum").

304. Chapman, *supra* note 7, at 23, 23 n.64.

305. Revised Sup. Ct. R. 51(1) (1954); Revised Sup. Ct. R. 51(1) (1967) (stating same rule).

306. Chapman, *supra* note 7, at 23, 23 n.65 (citing 1st Cir. R. 4(2), 2d Cir. R. 4(b), 5th Cir. R. 4(2), 6th Cir. R. 3(3), 7th Cir. R. 4(b), 8th Cir. R. 4(c), 9th Cir. R. 5(2), 10th Cir. R. 4(2)).

307. 5th Cir. R. 4(2) (1963).

308. Chapman, *supra* note 7, at 23.

309. *Id.* at 13, 24; BASS, *supra* note 4, at 236.

310. Chapman, *supra* note 7, at 13, 24.

Yet four years after the Fifth Circuit judges split on the issue of the power of a single-judge appellate panel and adopted a method to avoid the need for single-judge rulings, the Supreme Court's Rule Advisory Committee embraced the approach of the Fifth Circuit's innovators.[311] The Advisory Committee affirmed the propriety of rulings by a single-judge appellate panel pending appeal—sanctioning the Fifth Circuit's (and subsequently other courts') progressive use of procedures. Federal Rule of Appellate Procedure 8—both upon effectiveness in 1968, and currently—specifies that, although motions challenging "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending . . . normally will be considered by a panel of the [appellate] court," in "an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge."[312] The district court must first consider the motion or the moving party must show that "moving first in the district court would be impracticable."[313] Further, as authorities continue to recognize, the power of a single judge of the court of appeals to consider a stay or injunction pending appeal derives from Federal Rule of Civil Procedure 62(g), the All Writs Statute, and Rule of Appellate Procedure 8(a).[314]

Moreover, Rule of Appellate Procedure 27(c)—as adopted in 1968 and as effective today—provides that a "circuit judge may act alone on any motion," but may not dismiss or otherwise determine an appeal or other proceeding."[315] The Advisory comments specify that "stays or injunctions *pendente lite*" are among the motions a single judge may entertain—and are then subject to review by the court.[316] These rules make clear: what was unorthodox and called for innovative rule application by the Fifth Circuit in 1960s civil rights cases now constitutes the accepted standard—and is yet another imprimatur of the pioneering approaches adopted by the court of appeals in ensuring application of the rule of law and, consequently, civil rights justice.

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311. BASS, *supra* note 4, at 226.

312. FED. R. APP. PROC. 8(a)(2)(D). This specific provision through "amendment to the Judicial Code" addressed prior criticism that the All-Writs Statute did not provide injunctive power to a single appellate judge. *See* Note, *The All-Writs Statute and the Injunctive Power of a Single Appellate Judge*, *supra* note 167, at 335.

313. FED. R. APP. PROC. 8(a)(1).

314. 11 WRIGHT & MILLER, *supra* note 141, § 2908 (Judgement).

315. FED. R. APP. PROC. 27(c); *see* FED. R. APP. PROC. 25(a)(3) ("If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk."); 16A WRIGHT & MILLER, *supra* note 297, § 3954 (Jurisdiction).

316. FED. R. APP. PROC. 27 advisory committee notes to the 1967 adoption; FED. R. APP. PROC. 27(c); *see* 16A WRIGHT & MILLER, *supra* note 297, § 3954 (Jurisdiction).

IV. THE KEY OF LOCAL AND PROCEDURAL RULES AND EMPLOYING "POTENTIAL POWER" LAWS

In 1963, a Yale Law Journal Note author wrote in urgent and frustrated terms of "the problem of delay" by district court judges in the Fifth Circuit in civil rights litigation.[317] The author warned of the dire consequences of the district judges "postponing indefinitely" the "protection and adjudication of rights" and not "effectuating doctrine established by higher judicial authority."[318] He cautioned, "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.'"[319] To counteract such lower court's refusal and dilatoriness, "reforms must focus upon improving methods of enforcement of higher court directives."[320]

As established above, the Fifth Circuit stepped in, pinpointed the problem of intentional dilatoriness, and unhesitatingly and creatively employed procedures to knock down obstructionists' proposed hurdles to enforcing constitutional rights. An assessment of the court's approach and success in taming delaying tactics and enforcing civil rights yields three central and replicable keys: (1) employing local rules and procedures to empower swift appellate action; (2) applying procedural rules expansively, to grant the appellate court jurisdiction and power to act over a broad range of trial court rulings; and (3) identifying and boldly using "potential power" laws—in this case, the All Writs Statute and laws governing what constitutes an "appealable" order—to derive legitimate but previously unused sources for appellate power. These approaches—along with the underlying requirements of innovation and courage—provide promise for appellate jurists seeking ways to spur justice when intentional or systemic delay and obstruction plagues their legal system.

A. Employing Local Rules and Procedures

Local rules have been typecast as "procedural villains."[321] This criticism stems from local rules being a source of variation between districts and circuits in the federal judicial system, which contravenes a principle underlying the Federal Rules of Civil Procedure since enactment in 1938: that uniform procedural rules apply across all federal courts.[322] The respected procedural scholar Charles Alan Wright

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317. *Judicial Performance in the Fifth Circuit*, *supra* note 43, at 93–94.

318. *Id.* at 103.

319. *Id.* (also quoting speech by Justice Goldberg at annual American Bar Association meeting as stated in N.Y. Times, Aug. 8, 1963, p. 1, col. 8, stating the judicial system "rests upon unreserved acceptance of and compliance with the decisions of the Court of last resort").

320. *Id.* at 104.

321. Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 416 (2010).

322. *Id.*; 12 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 3152 (Evolving Treatment of the Problem of Local Rules).

characterized local rules as the "'soft underbelly' of federal procedure."[323] In 1967 testimony before a House subcommittee, one law professor assessed that "[t]he Federal courts of this country are becoming a kind of procedural Tower of Babel because of the differences in local rules."[324]

But the federal law and rules clearly authorize courts of appeals to prescribe local rules governing cases before their court. Effective in 1948, 28 U.S.C.A. §2071 provides that all courts of appeals "may from time to time prescribe rules for the conduct of their business."[325] The 1967 adoption of the Federal Rules of Appellate Procedure "continue[d] the authority now vested in individual courts of appeals by 28 U.S.C. § 2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court."[326] Rule of Appellate Procedure 47 enables "[e]ach court of appeals acting by a majority of its judges in regular active service" to "make and amend rules governing its practice."[327] Further, local rules are "desirable along several dimensions" including transparency, significant judicial participation, and uniformity in application across the judicial district.[328]

Moreover, with respect to the focus of this Article, local rules and court practices proved empowering in delivering civil rights justice through two mechanisms: expediting appeals and making the mandate immediately effective upon judgment.

Three lessons flow from the court's expedition of civil rights cases. First, the lack of an explicit rule did not inhibit the court from expediting civil rights cases. Instead, the court adopted the practice of the clerk "advancing" civil rights cases upon the filing of appeals, as such cases often experienced delay in the district court, and it was "perfectly obvious that the plaintiffs were entitled to win."[329] Second, in 1963, the court—speaking through Chief Judge Tuttle—recognized that "the rules of this Court ma[d]e possible a prompt hearing of all regularly docketed appellate cases" and "provide for accelerated hearings" in cases that meet a high bar: showing "cause therefore" by establishing a "great likelihood, approaching near certainty" that the appellant will succeed on appeal.[330] So notwithstanding what Judge Cameron protested was an absence of an explicit local rule,[331] Chief Judge Tuttle, with other judges agreeing, recognized that the Rules did allow for expedited

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323. Note, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 (1966) (quoting Charles Alan Wright); *see* 12 WRIGHT & MILLER, *supra* note 322, § 3152 n.8 (including quote).

324. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1259 (1967) (quoting Professor M. Rosenberg); *see* 12 WRIGHT & MILLER, *supra* note 322, § 3152, § 3152n.9.

325. 28 U.S.C. § 2071(a) (West).

326. FED. R. APP. PROC. 47 advisory committee notes to the 1967 adoption.

327. FED. R. APP. PROC. 47(a); *see also* FED. R. CIV. PROC. 83(a) (granting district courts power to "adopt and amend rules governing its practice" also "substantially continu[ing]" 82 U.S.C. § 2071) (West).

328. Jordan, *supra* note 321, at 458.

329. Kuhn, *supra* note 12, at 160.

330. Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963); *see also Judicial Performance in the Fifth Circuit*, *supra* note 43, at 131–32.

331. Armstrong v. Bd. of Educ. of Birmingham, 323 F.2d 333, 358 (5th Cir. 1963 (Cameron, J., dissenting on petition for rehearing).

appeals—but the appellant must meet the high standard for immediate relief.[332] Third, by the 1970s, the Fifth Circuit adopted explicit provisions in its local rules (which also reflected the Federal Rules of Appellate procedure enacted in 1967) allowing for expedited appeals on the court's own motion or on a party's motion "for good cause shown."[333] Clearly, the court perceived a need to further justice by expediting numerous civil rights cases, adapted its practices, recognized implicit rules, and ultimately adopted explicit local rules to successfully accelerate appellate hearings.

Similarly, the Fifth Circuit based its power to declare its judgment immediately effective—instead of waiting the accustomed twenty-one days to issue the mandate—on its implicit powers and on local rules and procedures, buttressed eventually by Federal Rules of Appellate Procedure. Similar to expedited appeals, the court's recognition of its power to issue an immediately effective mandate went in three phases: (1) an unquestioning assertion of the court's power to do so (even without an explicit rule)—arguably based on the court's general equity powers;[334] (2) the adoption of a local rule to codify the court's practice;[335] and (3) the larger adoption of the practice in both subsequent Fifth Circuit procedures and—for all appellate courts—in the Federal Rules of Appellate Procedure.[336]

In sum, the lack of local rules did not hold the court back from unabashedly asserting its power—but then it employed the tool of its local rules and procedures to reinforce and solidify its practices expediting justice. This allowed for a flexible and targeted—and court-controlled—approach to successfully defeating litigants' and trial judges' delay and obstruction tactics.

B. Applying Procedural Rules Expansively

A second key to the Fifth Circuit's successful, unflinching approach to combating delay and delivering civil rights justice was the court's expansive application of the powers granted by the Federal Rules of Civil Procedure. In particular, the court's broad interpretation of the authority granted by Rule 62(g) propelled both the court's issuance of injunctions pending appeal and rendering appellate rulings by a single judge. In both instances, Chief Judge Tuttle relied on Rule 62(g) as a source of his authority to act in previously untrodden ways.[337] He relied on the rule notwithstanding its lack of an unambiguous grant of power, for it provided that the authority granted to the district court to grant relief pending an appeal does

> "not limit any power of an appellate court or of a judge or justice thereof * * * to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order

332. *See* Kuhn, *supra* note 12, at 160; READ & MCGOUGH, *supra* note 11, at 186.

333. 5th Cir. R. 15.4 (1978).

334. Tuttle, *supra* note 13, at 257; Kennedy v. Bruce, 298 F.2d 860, 864 (5th Cir. 1962); Chapman, *supra* note 7, at 20, 20 nn.48–49.

335. Chapman, *supra* note 7, at 20 (citing Fifth Cir. R. 32 (1963)).

336. 5th Cir. R. 41, I.O.P.;

337. United States v. Lynd, 349 F.2d 785, 819 (5th Cir. 1965); FED. R. CIV. PROC. 62(g).

> appropriate or preserve the status quo or the effectiveness of the judgement subsequently to be entered."[338]

As Chief Judge Tuttle's former law clerk recognized, the rule recognizes that an appellate court or judge may possess the power to grant injunctions, but it does not overtly confer power.[339]

But this lack of explicitness did not deter Chief Judge Tuttle and other members of the court from relying upon Rule 62(g) as (1) the court's only authority supporting appellate rulings by a single judge in *Lynd* and (2) one of its primary authorities to support issuing injunctions pending appeal.[340] Instead, Chief Judge Tuttle used uncompromising language, referring to Rule 62(g) as part of the grant of authority to the court.[341] Yet perhaps noting this potential weakness, after the first single-judge appellate ruling in the University of Georgia desegregation case, the court relied upon both Rule 62(g) *and* the All Writs Statute as authority for its single-judge appellate rulings.[342] Further, what could be considered a stretch of the rules in relying on Rule 62(g) in 1961 and 1963 became over the next decades the standard: there is broad recognition of the power of a federal appellate court to issue injunctive relief on appeal and that a single judge may rule on various motions, including injunctions pending appeal.[343]

The Fifth Circuit's approach to expansively applying the Federal Rules of Civil Procedure to promote efficient justice aligns with the aim of the Rules. The Rules drafters' commitment "was to a civil practice in which all parties would have ready access to the courts and to relevant information, and practice in which the merits would be reached promptly and decided fairly."[344] The drafters desired to preserve "substantive justice from the onslaught of an outcome determinative procedural quagmire, and valued procedural efficiency chiefly as a means to that end."[345] As the Chairman of the Supreme Court Rules Advisory Committee, William D. Mitchell, testified to a House Committee, the "rules attempt . . . to get rid of technicalities and simplify procedure to get to the merits."[346] Although debates exist concerning the past aspirations and current goals of the Rules of Civil Procedure,[347] the approach of the

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338. *Lynd*, 301 F.2d at 819; FED. R. CIV. PROC. 62(g).

339. Chapman, *supra* note 7, at 22; Note, *The All-Writs Statute and the Injunctive Power of a Single Appellate Judge*, *supra* note 167, at 328 (stating criticism).

340. *Lynd*, 301 F.2d at 819; COUCH, *supra* note 21, at 110; FED. R. CIV. PROC. 62(g).

341. *See Lynd*, 301 F.2d at 819; COUCH, *supra* note 21, at 110.

342. Armstrong v. Bd. of Educ. of Birmingham, 323 F.2d 333, 355 (5th Cir. 1963 (Chief Judge Tuttle's order in Woods v. Wright quoted in Judge Cameron's dissent in Armstrong).

343. 11 WRIGHT & MILLER, *supra* note 141, §§ 2904, 2908; FED. R. APP. PROC. 8(2)(A)(i), 27(c); *see also* Chapman, *supra* note 7, at 17; FED. R. APP. PROC. 25(a)(3).

344. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised*, 139 U. PA. L. REV. 1901, 1906 (1989).

345. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181 (1989).

346. *Id.* at 2179, 2179 n.4 (quoting testimony of Mitchell before the House Committee; Mitchell also bemoaned that "[t]he books are full of meritorious cases destroyed by technicalities").

347. *See* Carter, *supra* note 345, at 2180.

Fifth Circuit in employing the Rules to advance the case towards substantive rulings that support justice and the rule of law unquestionably served the drafters' intent.

C. Identifying and Using "Potential Power" Laws

A third integral component of the Fifth Circuit's effective approach to defeating delay tactics was the court's seeking and then expansively employing what this article terms "potential power" laws. These are laws that hold the promise of broader application and grant of court power than how courts presently employ the law. The propriety of applying these laws beyond their traditional usage stems from both (1) the nonspecific terms of the law and (2) the fact that the novel usage would be in line with equity and enable parties to avoid forfeiting their legal rights as a result of a nonsubstantive, procedural roadblock.

The two dominant "potential power" laws effectively employed by the Fifth Circuit to serve equity and to foster efficient consideration of civil rights cases were the All Writs Statute, 28 U.S.C.A. §1651, and a broad reading as to what constitutes appealable orders under 28 U.S.C.A. §§ 1291 and 1292.[348] The All Writs Statute served as the foundational basis for the court's power to issue orders based on equity. The Statute's broad terms provided a flexible basis for action by a court—particularly for a court such as the Fifth Circuit that was actively and innovatively applying equitable remedies. The language applied to "all courts established by Act of Congress" and empowered them to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[349]

Up until Chief Judge Tuttle's 1962 ruling in *Lynd*, only district courts employed the All Writs Statute, and not the courts of appeals, even though the language of the Statute did not restrict courts of appeals from using the Statute.[350] The All Writs Statute's expansive language and Fifth Circuit jurists' proactive desire to identify bases for its equitable jurisdiction to serve justice converged. The result was recognition of the All Writs Statute as the basis for the court's authority to issue injunctions pending appeal and for single-judge appellate rulings.[351]

Likewise, the court employed the nonrestrictive (or at least pliable) language in the two statutes that define the jurisdiction of appellate courts: section 1291, which states that courts of appeals have jurisdiction from all "final decisions of the district courts," and section 1292, which provides limited instances when the courts of appeals have jurisdiction over interlocutory (or nonfinal) orders, including interlocutory orders "granting, continuing, modifying, refusing or dissolving

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348. 28 U.S.C. § 1651 (West); 28 U.S.C. §§ 1291–92 (West).

349. 28 U.S.C. § 1651 (West).

350. READ & MCGOUGH, *supra* note 11, at 187–88; BASS, *supra* note 4, at 218–19.

351. United States v. Lynd, 301 F.2d 818, 819 (5th Cir. 1962), *cert. denied,* 371 U.S. 893 (1962); Read & McGough, *supra* note 11, at 188; Armstrong v. Bd. of Educ. of Birmingham, 323 F.2d 333, 355 (5th Cir. 1963) (Chief Judge Tuttle's order in *Woods v. Wright* quoted in Judge Cameron's dissent in Armstrong);Application of President & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1005–06 (D.C. Cir. 1964); *see, e.g.,* Stell v. Savannah-Chatham Cnty. Bd. of Educ., 318 F.2d 425, 427–28 (5th Cir. 1963).

injunctions, or refusing to dissolve or modify injunctions."[352]

The Fifth Circuit garnered expanded jurisdiction in civil rights cases from each of these sections—each of which served the court's purposes of efficient and efficacious justice. The court read section 1291 broadly in *Wood* to conclude that "final decisions" encompass a denial of a TRO—concluding the denial was a "final disposition" as a "practical matter" because of the short time before expiration of the right to prevent a civil rights worker's prosecution so that the order "determine[ed] substantial rights" that would be "irreparably lost."[353] This was a broad, creative reading that enabled the court to address the substance of an essential and irretrievable legal claim: an unconstitutional denial of civil rights.

Likewise, in *Lynd*, the court again adopted a broad and resourceful approach—this time to the interlocutory appeal statute, section 1292—finding that, when a party was entitled to a ruling, a court's failure to rule amounted to a "refusal" to rule, which qualified as grounds for interlocutory appeal under section 1292.[354] The holdings portray a court that sought to identify and employ laws that presented available avenues of jurisdictional power. The court then employed these laws boldly to cut through procedural obstruction and delay and get to justice on the merits.

CONCLUSION

In confronting widespread opposition and determined obstructionism in the post-*Brown* South, the Fifth Circuit acted with resolve and innovation. Not only did the court display courage but the Fifth Circuit also proactively sought procedural solutions that would give the court power to contend against the dilatory ploys of Southern officials and federal district court judges. The court activated this enhanced jurisdiction and authority by enlisting local rules and procedures, rules of civil procedure, and broadly written substantive laws. This federal court of appeals experience provides a roadmap for courts and legal institutions regarding successful approaches to bypass or tame systematic and intentional delay and obstruction in a justice system. Through unflinching mettle and proactive identification and use of rules and laws to decisively defeat obstruction, jurists can ensure efficient, efficacious application of the Rule of Law—and, consequently, of justice.

352. 28 U.S.C. §§ 1291–1292 (West).
353. United States v. Wood, 295 F.2d 772, 777–78 (5th Cir. 1961).
354. *Lynd*, 301 F.2d at 822.