"WITH ALL DELIBERATE SPEED:" THE FIFTH CIRCUIT COURT DISTRICT JUDGES AND SCHOOL DESEGREGATION

THESIS

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During the years following Brown v. Board of Education, the U.S. district courts assumed the burden of implementing that decision across the country. The purpose of this study is to examine the role of the district court judges in the Fifth Circuit Court of Appeals in that effort.

The primary sources used are the district, appellate and Supreme Court opinions. This study concludes that many background variables used to study judicial behaviour are ineffective in this geographical area because of the homogeneity of the judges' backgrounds. But, as indicated by the Johnson appointments, a president can select judges that have a particular attitude toward an issue such as integration, if he has the desire and the political acumen to do so.
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Normally, federal district judges perform their work in almost total obscurity. Even on appointment, there is little news coverage unless the individual concerned has some prior prominence or the appointment is controversial for some reason. Yet, the work of these judges is important. Their decisions are subject to review by the higher courts, but just as the Supreme Court interprets the Constitution, prior Court decisions, and Congressional legislation, the district courts perform the same function for each case that comes before them. Examples of how different judges can differ on the same issue will be presented in this thesis.

Because of the obscurity in which they work and the varied legal principles they are called upon to interpret, it is difficult to determine whether there is any relationship between the opinions of the judges and the viewpoint of the incumbent president or the judicial philosophy of the president who originally appointed them. Rarely are the decisions of judges given newspaper coverage, and rarely do presidents make precise statements on issues as varied as the rights of the accused in criminal trials, the issues involved in civil suits, income taxes, or even principles as esoteric as those involved in the adjudication of admiralty law. In recent years, however, one issue has arisen in which incumbent
presidents have almost been forced to make some statement, and the opinions written by district judges have frequently received extensive press coverage. The issue, school desegregation, came to prominence with the Supreme Court decision in Brown v. Board of Education in 1954.\textsuperscript{1}

The reactions of the presidents since that decision in 1954 fortunately can be grouped into three distinct periods. The periods are: the presidency of Dwight D. Eisenhower from 1955 to 1960; the combined presidencies of John F. Kennedy and Lyndon B. Johnson from 1961 to 1968; and the presidency of Richard M. Nixon from 1969 to 1972, the cutoff date chosen for cases included in this study. This makes it possible to compare the overall percentage of cases decided in favor of integration for each period, and to make some comparison of the judicial behaviour of the individual judges in this area with the presidents who appointed them. The Fifth Circuit, which encompasses the states of Florida, Georgia, Alabama, Louisiana, Mississippi, and Texas, was chosen to place some limitation on the cases covered, and because this geographical area had as much judicial activity concerning desegregation as any other prior to 1972.

\textsuperscript{1}347 U.S. 483 (1954).
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CHAPTER I

METHODOLOGY

The approach used in this thesis is a combination of both the traditional method of dealing with judicial topics, where individual opinions are scrutinized and compared with precedents and similar decisions, and a quantitative approach. The methodology is traditional in that the opinions of some of the individual judges are compared to indicate the wide range of latitude available to judges in the area of school desegregation. This study is quantitative in that a total of 204 opinions written by district judges in the Fifth Circuit was reviewed and then the results were tabulated to determine if any correlation exists between the judges' decisions and the public statements of the then incumbent presidents, the presidents who appointed the judges, and other aspects of the judges' backgrounds. The specifics as to how this was accomplished are forthcoming, but first it is appropriate to review the literature pertaining to the judiciary and the district courts in particular.

The literature on the federal judiciary is now replete with works that use quantitative methodology or that treat judges as part of the overall political system. Noteworthy examples are: Schubert's *The Judicial Mind Revisited*, a
continuation of Schubert's study of judicial attitudes of Supreme Court justices;¹ Schmidhauser's The Supreme Court, dealing with the relationship between the backgrounds of the Supreme Court justices and their behaviour on the bench;² and, The Federal Courts as a Political System by Goldman and Jahnige, which treats the courts as part of the overall, national political system.³

Although most of the traditional and quantitative works have focused on the Supreme Court alone, a few scholars have begun to deal with the unique position of and the specific workings of the district courts. Richard J. Richardson and Kenneth N. Vines have written a monograph covering district courts which examines the position of these courts in the American political system. This work is excellent in its coverage of the relationship between the district courts and the national government and its coverage of the nomination process.⁴ In Federal Courts in the Political Process, Jack W. Pelatson also focuses on the district courts


as an integral part of the total federal judicial system; and, in Fifty-Eight Lonely Men he deals with the problems that were faced by district judges in the states that form the traditional South concerning desegregation during the years immediately following the Brown decision.

Kenneth M. Dolbeare's quantitative study of the federal judiciary in twenty different metropolitan areas studies elements of localism and the judges' prior experience and their effect upon behaviour on the bench. Although he did not limit himself to desegregation or civil rights, he did indicate that the federal judiciary did, to a degree, function as an ongoing part of the local political process even though they were tied to the national judicial system. He also demonstrated that the judges' prior experience affected their judicial behaviour, particularly if their prior experience had been in the state political system.

In a study concerning the Michigan Supreme Court, Sidney Ulmer discovered party affiliation was an important

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predictor of the judges' judicial behaviour. Likewise, Stuart Nagel in an article that dealt with all state supreme courts for the year 1955 on which there were judges from both major political parties, found that Democrats had a tendency to vote in a more liberal manner on all the issues he covered. Nagel studied issues as varied as criminal law, tax law, business relations law and personal injury law. However, David Adamany failed to discover party affiliation to be as significant as Ulmer had, in a study Adamany did on Wisconsin Supreme Court justices.

Perhaps the previous work that is most closely related to this thesis is Kenneth Vines' article on district judges and cases concerning race relations in the South. Vines surveyed 291 different district court cases concerning race relations. He relied on information provided by the Race Relations Law Reporter, published by the Vanderbilt University Law School, to identify the race related cases. The cases Vines surveyed covered the period from May 1954 to

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October 1962. He found that the black litigants won approximately half of the cases in his sample, but the percentage of cases won jumped to 60 percent in the area of education. Probably his most significant finding was that Republican judges had a higher tendency to favor blacks in civil rights than Democratic judges.\textsuperscript{11}

Vines attributed Republican judges' affinity to favor black litigants to the fact that Republican presidents were not bound strictly to Senatorial courtesy in the appointment of district judges as were Democratic presidents because of a shortage of Republican Senators in the South.\textsuperscript{12} This did provide an indication that the president who appointed the judges did have some bearing on later judicial behaviour.

In addition to the above, Vines found some indication that there was a relationship between certain variables in the judges' backgrounds and their decisions in racial matters, but in most cases the findings were statistically insignificant, or the results could be questioned because the similarity of the judges' backgrounds provided very few cases where there was a significant number who differed from the norm. For example, Vines found that Catholic judges tended to favor integration, but the table indicates that


\textsuperscript{12}Ibid., p. 351.
he was dealing with only two judges who listed Catholicism as their religion.\textsuperscript{13}

As previously stated, the purpose of this thesis is to examine the approaches taken by the district judges in the Fifth Circuit from 1955 to 1972. To obtain the required cases, \textit{The Federal Supplement} was screened to locate the opinions on school desegregation written by Fifth Circuit Court judges for the indicated period.\textsuperscript{14} A total of 204 opinions was located and read to determine whether or not they were in favor of integration. \textit{The Federal Supplement} was also used by Kenneth Dolbeare to obtain the cases he needed for the previously mentioned article on the district courts in urban areas. Dolbeare quoted a letter from the editorial council of the West Publishing Company in which it was stated that all decisions are published except for a few that are not made available for publication.\textsuperscript{15}

The risks of relying on such a source are apparent. An examination of opinions does not provide information as to whether a judge simply refused to issue an order, or whether a judge deliberately delayed action on or refused to hear a

\textsuperscript{13}\textit{Ibid.}, p. 353.

\textsuperscript{14}\textit{The Federal Supplement} (St. Paul, Minn.: West Publishing Co., 1932-). This is a continuing publication that reports all district court opinions.

complaint. In addition, there are those few decisions that the West Publishing Company states are not available; and, unopposed cases could result in a simple court order with no written opinion. These, also, would not be included in The Federal Supplement.

The justification for using a source such as The Federal Supplement is, as Dolbeare stated in his article, there is no other way to compile this type of information except to examine the complete transcripts of each individual district court.¹⁶ This would be an immensely time consuming and expensive task for an area as large as the Fifth Circuit. Additional justification, at least in this instance, is that most school desegregation cases were opposed and, therefore, written opinions would be required.

The judges were placed in different categories as follows. After the opinions were read, the voting records of the individual judges were tabulated to determine which judges could be classified as supporting integration, moderate towards integration, or opposed to integration. To be included in one of the categories, a judge had to have written at least two opinions. Those with a record of 67 percent or higher in favor of integration were placed in the supporting category. The precise figure of 67 percent was chosen so that a judge who handed down three decisions would

¹⁶Ibid.
not be placed in the supporting category with a record of two decisions for integration and one against or vice versa. Likewise, the figure of 33 percent was set to delimit the opposed category. Those in between, obviously, formed the moderate category.  

The decisions handed down by panels of more than one judge were included in the overall figures to determine if the percentage of decisions favoring integration changed according to the statements of the incumbent president, but were not counted when totalling the records for individual judges. In the total of twenty-seven such panel decisions, there was not one dissent registered in The Federal Supplement, and dissents are recorded in this publication. This is a strong indication of a reluctance on the part of the district judges to write dissenting opinions in such instances, even where a judge disagreed with the majority. As examples, Orma R. Smith, who had a record of five decisions favoring

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17 The difficulty of placing judges in different categories based on as few as two decisions is accepted. The more decisions that a judge hands down, obviously the more certain a researcher can be about his judicial attitude toward a certain issue. However, it was necessary to use as few as two in order to obtain a representative sample of judges to work with. As it is, many district judges from the Fifth Circuit were not included because they wrote only one or no opinions at all concerning desegregation. Also, the content of the judges' opinions did, for the most part, provide additional justification for placing them in their respective categories; and, because of the nature of the data, it was not possible at any rate to run tests for statistical significance.
black plaintiffs and none opposed, did not write a dissent as part of a three-judge panel that held against the black plaintiffs;18 and, likewise, E. Gordon West, who was strongly opposed to integration, did not write a dissenting opinion to a three-judge panel decision that favored the black plaintiffs.19

After the figures were compiled, the overall percentage of opinions that favored integration was tabulated. In addition, the percentage of opinions that favored integration was tabulated for the periods 1955 to 1960, 1961 to 1968, and 1969 to 1972, which coincide with the previously mentioned Eisenhower, Kennedy-Johnson, and Nixon eras. Further, it was determined that thirty-six judges had handed down two or more decisions, and these judges were then classified as favoring, moderate or opposed to integration. The final step in tabulation was to ascertain whether some type of correlation existed between the presidents who made the appointments and the behaviour of the judges in school desegregation cases. Also, a check was made to find out if anything definite could be stated about other variables from the judges' backgrounds, such as political party or religion.

A reasonable amount of biographical material was located for most of the thirty-six judges who participated in two or more opinions. The bulk of the information was obtained from various publications put out by the Marquis Who's Who Publishing Company, and, in the few instances where they were available, from the Senate Judiciary Committee reports. For some of the appointments made by President Johnson, background information on the judges was obtained from an article by Harold W. Chase in the Minnesota Law Review. Where necessary, the offices of the judges were contacted by telephone to obtain information deemed pertinent.

As will be shown, there is no significant relationship between the opinions of the individual judges and the public statements of the incumbent presidents; at least in the area of school desegregation cases. However, there is an indication that a president can select district judges that are predisposed to vote in the manner he desires, if only for certain specific issues. Attempts to find a relationship between the judges' attitudes toward school desegregation and other elements of the judges' backgrounds were not as successful, primarily because the backgrounds of the district


court judges from the Fifth Circuit are and have been essentially the same.

As previously mentioned, one of the factors that makes a study such as this possible is that even with an issue that has received as much publicity as school desegregation, the district judges still retain a great degree of latitude in the decisions they hand down. The purpose of the following chapter is to discuss the nature and workings of the position that federal district judges have in the overall national judicial and political system. Because of its close relationship to this topic, the nomination and appointment procedures for district judges is also covered.
CHAPTER II

THE UNIQUE DUTY OF THE DISTRICT JUDGES

John Minor Wisdom, judge, Fifth Circuit Court of Appeals, set forth a simple description of the duties of the federal district courts when he wrote that this duty was the "destined role of bringing local policy in line with national policy."\(^1\) But, at the same time, he called this function "the frictionmaking, exacerbating, political role of federal courts."\(^2\) This role, he wrote, was properly political because it dealt with stresses and strains within the body politic that result from conflicts between the federal and state governments, and with conflicts between private citizens and state governments in those areas where the rights of the citizens do have some form of federal protection.\(^3\)

Continuing, Wisdom wrote that it could be expected that local customs, prejudice and parochialism would hinder the will of the inferior courts to force local policy to conform with national policy. Also, he noted that a federal


\(^2\)Ibid.

\(^3\)Ibid.
judge might feel that the respect given to his court could be jeopardized if his court was viewed as being ahead of or to the left of the Supreme Court or the appropriate circuit court. Accordingly, Wisdom felt it was appropriate that the "brunt of unpopular decisions" should be born by the higher or circuit courts. 4

With the above, Wisdom places the courts in a mediating role where local values come into contact with national policy, but allows for the fact that the lower courts will feel the strongest pressure from local influences. Richardson and Vines, in their studies, set forth a model of federal court interaction that casts the district courts in just such a mediating or conciliatory position. They state that this is where there is a meeting of the legal subculture and the values of the democratic subculture. The result of this conflict is "a diffusion of national values, tempered by local considerations and behaviors." 5

It is of definite advantage in understanding the ambiguous position of district judges to analyze the nomination and appointment process for these judges. In their book, Richardson and Vines describe the basic procedure, which on the surface appears simple; and, in many cases is.

4 Ibid., p. 419.

The president advises the Senate Judiciary Committee and the American Bar Association along with the related state and local bar associations of his nominee for a judicial position. The Senate Judiciary Committee then sends a "blue slip" to both senators from the state where the vacancy exists. The "blue slips" provide the individual senators with an opportunity to express an objection to the appointment if they have one. No reply is indicative that the senators have no objection to the appointment. Normally, an objection from a senator of the same party as the president is taken seriously, but an objection from a senator from the opposing party is not given as much weight.6

As in any simple description, the presumption is left that the process is also simple. The implication left here is that the president, senators and the involved law associations come to an agreement--assuming a favorable Federal Bureau of Investigation inquiry--and the nomination and appointment is secured without difficulty. Richardson and Vines, possessing greater perception, themselves present evidence that the process is not as simple and frequently other individuals become involved in the process.

One of the examples set forth by Richardson and Vines concerns the nomination of John Morrissey by President Johnson for a district judgeship in Massachusetts. According

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to the authors, the nomination was made by Johnson because of a pledge to the Kennedy family, and the nomination had the strongest possible support from Senator Edward Kennedy. The interest in this case is that the nominee had the approval of both the president and the appropriate senator, and it was apparent that Morrissey could have and was about to receive Senatorial approval. In the meantime, however, opposition arose from the bar associations and the general public concerning Morrissey's legal education and qualifications.7

In his article on the Johnson nominations to the judiciary, Chase confirms the fact that public pressure had been aroused by citing articles in The New York Times indicating that Morrissey had gone to Georgia solely for the purpose of obtaining a law degree from a three-month diploma mill and that he had alleged connections with a deported Mafia figure. Chase also mentioned another type of intervention that, although unusual, did occur in this instance. This action came about when Judge Wyzanski, a federal district judge from Massachusetts, wrote a letter to the Senate Judiciary Committee stating that he did not believe that Morrissey had the necessary legal qualifications, and that he did not feel he had the determination to obtain

7Ibid., pp. 63, 64.
the required expertise. Thus a nomination for a federaljudgeship was blocked even though the nominee had the supportof both the president and the appropriate senator.

The nomination of Ben Cooper for a district judgeshipin New York was another incident that Richardson and Vinesused as an example of a departure from the norm in judicialappointments. In this instance there were no Democraticsenators from the State of New York; however, EmmanuelCeller was at that time an influential member of the Houseof Representatives from New York. Accordingly, PresidentKennedy took Celler's suggestion to nominate Cooper for aposition as a district judge. As was the situation withMorrissey's nomination, there were vigorous protestsconcerning Cooper's qualifications.

Kennedy had used his presidential prerogative to giveCooper an interim appointment to the vacancy while Congresswas not in session. And again, the unique event occurredwhere there was intervention from a sitting judge, but thisetime it was in favor of the appointee. Chief JudgeSylvester Ryan, from the district where Cooper was holdinghis interim appointment, wrote a letter to the Senate

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Judiciary Committee recommending Cooper. This time Kennedy and Celler held on, and Cooper received his judgeship.\(^{10}\)

Another example of odd events that can interfere with a judicial appointment is well illustrated in Jerry Landauer's article in *The Wall Street Journal* about the aspirations of Wisconsin State Supreme Court Justice Myron L. Gordon for a district judgeship in his state. Gordon wanted the nomination and had gone to Washington, D.C., to present his case to the Wisconsin senators, Gaylord A. Nelson and William Proxmire. The initial appearances were that Gordon would receive the two senators' support and a nomination from President Johnson. But, other circumstances were about to surface.\(^{11}\)

Ordinarily members of the House are not queried on judicial appointments, but in this instance, the Congress had just recently approved the creation of additional federal judgeships, one of which was in Wisconsin. Accordingly, the senior House member from Wisconsin, Clement J. Zablocki, was given a voice in naming the man to fill this position. Zablocki wanted a judge of Polish descent—Gordon was Jewish.\(^{12}\)

\(^{10}\)Ibid.


\(^{12}\)Ibid.
Another factor working against Gordon was that if he did receive the appointment to the federal bench, conservative Governor Warren P. Knowles would then get an opportunity to make an interim appointment to replace Gordon on the State Supreme Court. A recent Knowles' appointment to fill a vacancy had just tipped the balance in favor of conservatives on that court. Gordon had been elected to the State Supreme Court with liberal backing, in particular, labor unions. Many felt he had an obligation to remain on the State Supreme Court. Landauer quoted George A. Haberman of the Wisconsin AFL-CIO as saying, "We spent a lot of time, money and effort getting him elected and we have every right to assume he'll fill out the ten-year term. Our investment in him demands that he stay where he is and we've told him so." Accordingly, a nomination that should have gone through without difficulty got bogged down because of a balance of power in state politics.

This does not mean that every time a judicial appointment becomes available the battle lines are drawn. In fact, for most appointments, an agreement is reached informally between the president or his representative from the Department of Justice and the appropriate politicians from the given state, and the nomination goes through

\[13^{13}\text{Ibid.}\]
with little dispute and news coverage. The point to remember is that appointment pressures can be brought to bear from both the national and the state or local level. This fact reinforces the previously mentioned opinions of Richardson, Vines, and Wisdom that district judges occupy an ambiguous position that requires them to balance national and local interests.

Thus, in any normal issue, the district judge must and does balance national law with local pressures and possibly prejudices. This normally remains unnoticed, if for no other reason than the fact that district judges are usually ignored—unless they are presiding over a case with some notoriety. However, school desegregation cases do receive publicity, and the next chapter will show how the ambiguous position of the judges was aggravated in this particular issue. This extra aggravation was the result of the wording of the Brown decision, itself, and because of the actions of national and state and local leaders.
CHAPTER III

THE PRESSURES OF THE DISTRICT COURTS:

THE SUPREME COURT, PRESIDENT,
STATE AND LOCAL LEADERS

Considering the position of the district courts, in which they are required to balance national legal values with the values of the many, different and unique local areas; it is easy to imagine the difficulties the courts faced when they had to interpret and enforce the principles set forth by the Supreme Court in Brown v. Board of Education.\(^1\) Resistance quickly formed in many of the states and this, in itself, was a sufficient hindrance, but the district judges were faced with other problems emanating from the phraseology of the second Brown, or implementing the decision of 1955. Writing for the Court, Chief Justice Earl Warren stated that the responsibility for determining how and when integration would take place for each school or school district would be decided at the district level; and, as is well known, no deadline was set for the final integration of all schools. Instead, Warren used that now famous phrase, "with all deliberate speed...."\(^2\)

\(^1\)347 U.S. 483 and 349 U.S. 295.

A good deal of attention has been placed on the fact that the Court set no specific deadline, and this is by no means inappropriate. However, emphasis should also be placed on the manner in which the lower courts were directed to handle these difficult decisions. In his opinion, Warren stated that the lower courts should, in forming their decisions, take into consideration the principles of equity, which imply flexibility and adjustment between private and public needs in framing remedies. Although he did write that this did not mean the courts should yield because of simple disagreement, his statement that the courts "may properly take into account the public interest"\(^3\) did provide a form of argument for those who wished to resist integration.

Nevertheless, there were also indications that the Court would show determination in backing this decision. Both opinions were written by the Chief Justice, and both were unanimous decisions with no absentees or abstentions.\(^4\) Unfortunately for the district courts, it was not long after these two decisions that the body politic, particularly in the states encompassed within the Fifth Circuit Court of Appeals, made known its desire to circumvent these decisions in any manner possible.

Frank Smith, who was a congressman from Mississippi at the time of the Brown decision, described some of the effects

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\(^3\)Ibid., p. 300.

these decisions brought about in that state. According to Smith, it was possible during the period from 1948 to 1954 to maintain a somewhat moderate position on race and still remain in politics, but this began to disappear rapidly after the Brown decision. He described how the decision gave impetus to the formation of the Citizens Councils and made it possible for some individuals to achieve status they would not have been able to obtain otherwise by simply talking the loudest about the race issue.5

In precise terms, Smith wrote, "Talking nigger or nigra had changed from a custom to a necessity for acceptance in most circles by 1956..."6 This type of reaction that Smith explained, helps to explain the wide degree of support that was given to the Southern Manifesto submitted in both the House and the Senate on March 12, 1956.

Eventually signed by 101 senators and congressmen from the south, this paper declared that the Brown decision was "a clear abuse of judicial power."7 The motives of those states that declared their intention to resist integration by any means that were lawful were commended, and the paper noted that almost all prior legal precedents were contrary to the Brown decision. In addition, the paper stated that

6 Ibid., p. 105.
opposition to integration was founded on the rights of parents to control the education and lives of their children.\textsuperscript{8}

Of those states that comprise the Fifth Circuit Court of Appeals, four of the six, Alabama, Georgia, Louisiana, and Mississippi had unanimous representation in that all the senators and congressmen from those states signed the manifesto. It should be noted that Lyndon B. Johnson, then Senate Majority Leader, and Sam Rayburn, then Speaker of the House, did not sign the paper. Southern leaders explained that neither of the two were asked because of their leadership roles in Congress, and it was not the purpose of the paper to attempt to reflect the policy of the national Democratic Party or the party leadership of either House of Congress. However, it should be noted that in addition to Johnson and Rayburn, sixteen of the twenty-one other members of the House from Texas also did not sign the manifesto. Texas Senator Price Daniel did. In the other state within the Fifth Circuit Court's jurisdiction, Florida, Representative Dante Fascell was the only member of Congress who declined to sign the manifesto.\textsuperscript{9}

In addition to the above, there was other quick and significant action taken within the jurisdiction of the

\textsuperscript{8}Ibid., pp. 416-7.

\textsuperscript{9}Ibid.
Fifth Circuit. By 1961, Alabama had passed a total of at least twenty-seven acts or resolutions of the state legislature to hinder integration. They encompassed such matters as requesting Congress to limit the jurisdiction of the federal courts; interposition and nullification; authorization of separate schools for parents who voluntarily elected to have their children attend segregated schools; and, the provision of funds for private schools where such schools were not available, thus making it possible to avoid court integrated schools. In the same period Florida passed at least fifteen similar laws or resolutions; Louisiana at least eighty; Georgia at least thirty-nine; Mississippi at least twenty-eight; and Texas at least nine.¹⁰

Due to the amount of publicity the desegregation cases were to receive, the public attitudes displayed by the various presidents who held office while the litigation was taking place cannot be ignored. In addition, part of the purpose of this thesis is to determine if the overall proportion of decisions that favored integration changed in any degree to conform with the public statements of the incumbent presidents. Eisenhower was in office when the Brown decision was first announced in 1954, and the remaining six years of his presidency covered the initial efforts

on the part of blacks to put the principles of that decision into effect.

In *Fifty-Eight Lonely Men*, Jack W. Peltason described how Eisenhower refused to make a strong commitment to back the Brown decision with public statements that showed either his personal backing of the decision or his willingness to use the power of the Executive Branch of the government to enforce the decision in any manner possible. On the contrary, Peltason noted that Eisenhower made statements to the effect that the refusal to obey court orders should be dealt with by moral conversion rather than law enforcement, and that the federal government should not interfere with any particular state unless it was shown that that state could not handle the problem of integration by itself. Peltason also stated that the use of federal troops in Little Rock, Arkansas by Eisenhower in 1957 was brought about because the federal authorities, having made no plans for such difficulties, had no option but to use the troops. The constant argument running through Peltason's discussion of Eisenhower's actions is that his failure to take any positive action did encourage those who were opposed to integration.¹¹

E. Frederic Morrow, a black man who worked as an administrative officer during the Eisenhower administration, expressed the opinion that some definite progress in the area of the advancement of Negroes did come about during this period; yet, he also expressed disappointment at some of the events connected with civil rights that occurred during Eisenhower's presidency. In particular, Morrow stated that he had expressed a complaint about the speeches of Howard Pyle, former Governor of Arizona, who in 1956 was making speeches in the South in which he was stating that the people of the South had little to fear from Eisenhower in the area of civil rights. Morrow also expressed the opinion that Eisenhower did not use sufficient initiative or imagination in dealing with the uprisings related to desegregation in Little Rock in 1957.\textsuperscript{12}

The Kennedy administration was to bring a new outlook and feeling of vigor to the issue of school desegregation and civil rights as a whole. Even Eisenhower's administrative officer, Morrow, supra, wrote that during the 1960 election campaign Kennedy had gained a significant edge over Nixon in appealing to the black vote. Morrow placed emphasis on the actions of Kennedy after the jailing of

Martin Luther King, Jr., in Atlanta late in the campaign. While Nixon and his aides hesitated because they thought any interference or statement would be bad strategy, Kennedy moved with alacrity. He wired the mayor of Atlanta and made a personal phone call to Mrs. King to state his concern. The effect these actions had on King's release may have been insignificant; but, according to Morrow, Kennedy's action caught the attention of the black community, and he believed that it contributed significantly to Kennedy's narrow election victory.\(^{13}\)

In his memoirs concerning his relationship with Kennedy, Theodore C. Sorenson stated unequivocally that the president was willing to use the full powers of the federal government to insure that desegregation would take place. Sorenson explained in detail the maneuvering between Kennedy, the Justice Department and Governors Ross Barnett of Mississippi and George C. Wallace of Alabama to let each governor know that the federal government intended to back up the federal court orders for the integration of the University of Mississippi in 1962 and the University of Alabama in 1963. According to Sorenson, both governors were left with little more than to make feeble public gestures to let the citizens of their states know that they,

\(^{13}\)Ibid., pp. 294-7.
themselves, did oppose the integration of the two universities.14

Although much of the maneuvering mentioned above took place behind the scenes, still the actions of Kennedy and the Justice Department were known to many people, if only to the extent that it was recognized that the administration did back the efforts to integrate both universities. In addition, Sorenson did mention several incidents that indicated that Kennedy was willing to publicly back his stand on school desegregation. As early as 1957, in a state-wide telecast in Georgia, Kennedy stated that it was his opinion that the Brown decision had become part of the law of the land. Also, in a speech at Vanderbilt University in May 1963, just prior to the confrontation with Wallace over the University of Alabama, Kennedy pointedly remarked on the necessity of obeying the law. He added that this was particularly necessary where it concerned the freedom of others, and that any citizen who did otherwise was not living up to his obligations. Many may have missed these pointed remarks, but Wallace, who was present at the speech, made it clear at a press conference that he had gotten the message and disagreed with it.15


15 Ibid., pp. 102, 492.
When Johnson succeeded Kennedy, he had several difficulties to deal with. The assassination was the issue that was on everyone's mind, and Johnson was looked on as a Southerner and a crafty politician--neither qualification was appealing to many who had backed Kennedy. To add to the above, what Johnson had accomplished in the area of civil rights had been largely overlooked.

Tom Wicker explained the manner in which Johnson's notable achievements during his senatorial career had come to be ignored by a large part of the general public. Johnson organized the hearing committee that resulted in the downfall of Senator Joseph McCarthy--an event that Kennedy had almost totally ignored--but, most of the credit went to Eisenhower, who had done no more than ignore the Wisconsin demagogue. Likewise, Johnson was responsible for the maneuvering that slipped the 1957 and 1960 civil rights bills past southern resistance, but, in this instance, he was as much criticized for his compromises on the bills as praised for getting them passed. However, once in the presidency, Johnson moved quickly to reverse that derogatory image.

According to Wicker, the event that started the reversal of Johnson's image on civil rights was his address to a joint session of Congress on November 27, 1963, just

five days after Kennedy's death. In a speech that was filled with emotion, intensified by the recent assassination of Kennedy, Johnson stated that he intended to continue the program of his predecessor. In particular, he stated that there could not be a better memorial to the former president than to pass the civil rights bill that Kennedy had been working on. And, Johnson was to prove true to his word. As a result of Johnson's commitment, the civil rights bill was passed the following June, 1964, even though it required the use of a cloture petition, never before used for a civil rights bill.

The assumption of the presidency by Richard M. Nixon was to bring about a retreat from the active support for school desegregation on the part of the presidency. Robert Evans, Jr., and Robert D. Novak explain in their book on the Nixon presidency how Nixon had been forced to rely on the support of southern delegates to gain the Republican nomination in 1968. The result was that when he won the election, Nixon was indebted to many southern politicians, none more so than Strom Thurmond of South Carolina. Not only was Nixon indebted to these politicians,


but the time was a crucial one for school desegregation. Because of previous court decisions and guidelines set up by the Department of Health, Education, and Welfare, a number of southern school districts was about to lose federal financial support if they did not submit plans for desegregation within periods ranging from within a month to two years. Southern politicians, including the powerful Thurmond, began contacting the Nixon administration to call in the debts they felt they had coming. The result was that Robert Finch, Secretary of HEW, reluctantly began to take whatever action was possible to delay these actions. And so, the die was cast. A black population that had been leery of a Nixon presidency became convinced their premonitions were correct.19

As has been shown, in normal circumstances the federal district courts occupy, at best, an ambiguous position. With the Brown decision the tenuousness of the position of these courts was increased because of the broad dictum, but imprecise language of the two opinions. The increased publicity and intervention by politicians at all levels of government could do little to decrease the difficulties of the courts in these school desegregation cases.

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A general examination of the positions taken by the different presidents, Eisenhower, Kennedy, Johnson, and Nixon confirms the earlier contention in this thesis that the public actions of the presidents can be grouped into the three periods, 1955 to 1960, 1960 to 1968, and 1969 to 1972. In the first period, there is the inactivity of Eisenhower. The second period covers the activism in school desegregation of Kennedy and Johnson, and the third covers the retreat from active presidential support for desegregation brought about by Nixon. What remains is to determine what effect, if any, the above circumstances have had on the actions of individual district judges in the Fifth Circuit.
CHAPTER IV

IMAGINATION AND ORIGINALITY FROM THE BENCH

Because of the position of the district judges as a focal point between national and local interests, and the imprecise language of the two Brown decisions, the district courts had a great deal of latitude within which to interpret the desegregation cases. The purpose here is not to present an overview of the 204 opinions surveyed for this thesis. Such an overview or summation will be presented in the next chapter. In this chapter, selected opinions from seven of the judges will be reviewed to indicate the wide range of interpretations that were possible, at least for the first fifteen to eighteen years after the Brown decisions. The first judge to be considered is one who made it obvious in his opinions that he opposed school desegregation.

In arguing against the results of the Brown decision in May, 1960, Judge T. Whitfield Davidson of the Northern District of Texas pursued a historical argument to the subject. Davidson admitted the evils of slavery, but went on to mention that many of the slaves had been treated well. Talking about his own great-grandfather, he stated that this man had built brick houses so that his slaves could be comfortable, and that he had taught them to be
good bricklayers and farmers. Continuing, he wrote that his
great-grandfather had a Negro for a foreman and never
allowed a slave to be whipped unless he, himself, approved
of the punishment. Davidson also mentioned that when the
slaves were told of their freedom, many "wept at the feet
of their mistress, not because they were free but because
they were parting from someone they loved." ¹

Davidson went on to describe how the relationship
between the blacks and whites was destroyed when after the
Civil War the slave found a new leader in the carpetbagger,
who had come to the South only for his own selfish reasons.
During this period race riots remained a probability, and
the Negro was taught to forget his God. Salvation came
when President Hayes withdrew the army from the South, and
according to Davidson, "the Negro now looked round and ere
long he and the son of his former mistress were together
again, almost as before." ²

In the same opinion, Davidson stated that equal
opportunity in the classroom already existed in the city
of Dallas for both races, and that the southern people
were resisting integration because of fear that the tragic
era of the ten years of Reconstruction might be repeated.
He observed that the right of racial integrity came from

²Ibid.
God, and, stated that if the Hebrews had not maintained their racial integrity, the Ten Commandments would never have been handed down on Mount Sinai. Needless to say, this decision went against the black plaintiffs, and Davidson upheld a plan for establishing integration by setting aside particular schools to be attended only by those who desired to attend a desegregated school.\(^3\)

The following year Davidson wrote an opinion that partially relied upon the right of self-government. He stated that it was un-American to abolish long established institutions and brought forth the information that the city of Dallas had voted four to one to maintain segregation—failing to mention that local elections cannot, in any manner, override Supreme Court decisions. He continued, "This unhappy controversy is not of our making. Our white people assuredly did not seek it. Our Negro friends and citizens did not start it. It is here, here by remote origin and control, one of many suits brought throughout the South. The man from afar understands not our problems as we do."\(^4\)

Davidson also stated that if a "colored child" is embarrassed and made to feel inferior by not being in class with white children, then also the white child would suffer similarly by being forced to sit in classes that neither

\(^3\)Ibid., pp. 408-20. 
the child nor the parents desired. His conclusion was that integration was being brought about by force, and that the white child's rights should be considered equally with the rights of the black child.\(^5\)

Another judge who stood strongly in opposition to desegregation was Sidney C. Mize from the Southern District in Mississippi. In 1962 Mize wrote an opinion in which he held that a Mississippi law requiring state officers to prevent the implementation of desegregation resulting from the Brown decision was constitutional. He based his decision on the fact that the Mississippi law stated that the state officers were to use "any lawful, peaceable or constitutional means...." Therefore, according to Mize, the state officials were not required to directly oppose the United States Constitution, and thereby said the law was not unconstitutional.\(^6\)

In another decision in 1964, Mize wrote that the black plaintiffs had accepted by their refusal or inability to contest the issue the following: that Negro children had different learning habits from whites; that Negroes were better off in separate classes with teachers of their own race; that such classes were the only means to deal with

\(^5\)Ibid.

the differences between the races; and, that these differences were genetic and not a result of environment. His conclusion from the above premises was "that integration—not segregation—injures the Negro school child."  

An indication of the type of oddities that can arise, given an issue such as desegregation, is the fact that the case mentioned immediately above is the only decision, of four written by Mize, that favored integration. After all he had said, the judge still held that any legislative or administrative interference with a Supreme Court decision was unconstitutional.

The Eastern District in Louisiana produced one of the most adamant opponents to desegregation, Judge E. Gordon West. West was not only consistent in writing opinions opposing integration, but even went to the point of ignoring motions by the black plaintiffs, delaying hearings, and then simply not writing an order after he had heard a case. This resulted in the extraordinary circumstance in which a circuit court issued a writ of mandamus to a district judge ordering him to issue an order to the defendant school board. The circuit court even went to the point of stating

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that this order will require the concerned school board to submit a plan for integration.\(^9\)

Judge West defended his actions in his own opinion, written to comply with the circuit court's writ, by stating that their facts were in error, and that where no action was taken it was because all parties were in agreement. In addition, he claimed that what would have been inappropriate would have been for him to have "acted less like a Judge and an Arbitrator and more like a bull in a china shop by ignoring completely the local conditions and circumstances involved, and simply ordering the immediate desegregation of all schools in St. Helena Parish without regard to the possible consequences thereof."\(^{10}\)

Before going further, it is necessary to make some judgement on Judge West's defense. To begin with, if all parties were in agreement as to no action being taken, then the black plaintiffs would not have sought relief at the circuit court level. Also, the Fifth Circuit Court of Appeals was not directing him to order the immediate desegregation of all schools in St. Helena Parish, but merely that the school board submit a plan for establishing an integrated school system.

\(^9\)Hall v. West, 335 F. 2d 481 (5th Cir. 1964).

This brush with the appellate court was not to deprive West of his consistency in opposing integration. In 1967 he stated that segregation was acceptable as long as it was not a direct result of action taken by the school board, and as late as 1970 he dismissed a complaint against a public school for lending books, leasing public buildings, and providing transportation for students attending a private school on the grounds that plaintiffs lacked standing to sue.

One of the earliest judges to take the opposing view from those mentioned above, the position favoring integration, was Judge J. Skelley Wright, also from Louisiana. As early as 1958 Wright stated in an opinion that the Supreme Court had decided in the Brown decision that segregation violated the equal protection clause of the Fourteenth Amendment and was therefore unconstitutional. To this point, there is no more than a general reiteration of the substance of the Brown decision itself, but Wright went on to add the following: "Any legal artifice, however cleverly contrived, which would circumvent this ruling and others predicated upon it, is unconstitutional on its face."

This then was one of the initial precedents for declaring


unconstitutional the multitudinous laws passed by state legislatures in their attempts to bypass the Brown decision.

Just as those judges opposed to integration tended to base their arguments on local customs or difficulties, those that favored integration showed an equal tendency, as displayed above by Wright, to rely on the opinions of the upper courts, particularly the Supreme Court. In 1966 Judge Virgil Pittman of the Southern District in Alabama, a moderate in desegregation cases, displayed a good example of this propensity. In a desegregation case he stated that he was aware of the emotional impact and disruption that would occur concerning both parties, regardless of how the decision was formed. He then went on to rely on the authority of the Supreme Court by stating that twelve years had passed since the original Brown decision; and, therefore, desegregation had become an established fact, both legally and historically. With this authority behind him, Pittman was then able to go on to rule in favor of the black plaintiffs.14

Another judge with a moderate record on integration who would rely on a similar type of argument was Winston E. Arnow of the Northern District in Florida. In 1969, Arnow bolstered one of his opinions not only by referring to the fact that the Brown decision had been in effect for fifteen years.

years, but by noting that any court decision can be changed by a constitutional amendment. He then went on to argue that in that fifteen years "there has been no amendment changing it, nor, for that matter, so far as this court knows, has any such amendment even been seriously considered or proposed by any substantial number of people."15

Perhaps the staunchest proponent of integration over an extended period of time was Judge Frank M. Johnson, who, as Chief Judge for the Middle District in Alabama, had frequent opportunities to preside over desegregation disputes. Johnson, also, consistently used as his main argument a long list of decisions, starting with the Brown decision, that mandated desegregation. On at least one occasion that list consisted of fourteen separate citations.16

In an opinion written in 1968, Johnson not only cited the number of years that the Brown decision had been in effect, but went on to state that those fourteen years meant that the law could no longer tolerate any undue delay in desegregating the public school system. This statement preceded by three months the Supreme Court's declaration in the Green case that mere deliberate speed was now out.17


17 Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968).
In the same opinion he considered the expansion of black schools in certain locations to be definite evidence of the school board's attempt to continue a dual school system.\(^{18}\) In 1972, he went as far as to hold that a private school that was segregated could not use municipal recreational facilities as that was an encouragement for segregation.\(^{19}\)

The above indicates that it certainly was possible for judges to approach the issue of desegregation in different manners; however, it is much more difficult to determine why each chose the course they did. What is shown in this chapter is evidence to support the contention set forth previously by John Minor Widom, Richard J. Richardson, Kenneth N. Vines, and maintained in this thesis, that the federal district courts function in a manner to resolve the differences between national and local interests. This can be seen in the frequent references to local circumstances and to the decisions of the Supreme Court or the appellate courts that appear in the opinions that were examined. As to why each judge chose his particular course, the voting record of the thirty-six judges who wrote two or more opinions in desegregation cases will be surveyed along with certain aspects of their backgrounds to determine if there is any relationship between those particular elements


of the judges' backgrounds and their judicial behaviour in desegregation cases.
CHAPTER V

THE JUDGES, THEIR BACKGROUNDS AND THE PRESIDENTS

An overview of the opinions that were written by Fifth Circuit Court judges during the period covered by this thesis, has two separate areas to be considered. The first, and by far the most obvious, is to look at the total percentage of cases that favored integration and determine if this percentage changed in relation to the public image of the incumbent presidents towards desegregation. The second is to analyze the individual judges identifying any relationship between the judicial behaviour of the judges toward school desegregation and significant aspects of their background, or with the presidents who appointed them to the bench.

An examination of all 204 opinions surveyed for this thesis indicated that 61.7 percent favored integration. Broken into the presidential periods, the following results are obtained. During the Eisenhower period, 1955 to 1960, 43.5 percent of the decisions were in favor of integration. The Kennedy-Johnson period, 1961 to 1968, yielded a favorable percentage of 64.7, and the Nixon period, 1969 to 1972, had 63.5 percent of the opinions favoring desegregation.
A first glance at the difference between the Eisenhower period and the Kennedy-Johnson periods, 43.5 percent versus 64.7 percent, gives the appearance that the public stance on school desegregation by the incumbent presidents did have an effect. However, as can be seen in Table 5.1, only twenty-three opinions were written during the Eisenhower years, slightly over 10 percent of the total. This factor definitely diminishes the importance of the low percentage during this period as a change of just three decisions would place the Eisenhower period almost on a par with the other two periods.

**TABLE 5.1**

PERCENT OF CASES FAVORING INTEGRATION BY PRESIDENTIAL PERIOD

<table>
<thead>
<tr>
<th></th>
<th>Eisenhower</th>
<th>Kennedy-Johnson</th>
<th>Nixon</th>
</tr>
</thead>
<tbody>
<tr>
<td>For</td>
<td>10 (43.5%)</td>
<td>55 (64.7%)</td>
<td>61 (63.5%)</td>
</tr>
<tr>
<td>Opposed</td>
<td>13 (56.5%)</td>
<td>30 (35.3%)</td>
<td>35 (36.5%)</td>
</tr>
<tr>
<td>Total</td>
<td>23 (100.0%)</td>
<td>85 (100.0%)</td>
<td>96 (100.0%)</td>
</tr>
</tbody>
</table>

In addition to the above, there is additional information that can be used to aid in this comparison. In the previously mentioned article by Kenneth N. Vines, he reported that in his sample blacks won 60.7 percent of the
cases they took to court in the field of education. Neither Vines area or time period conform directly to the Eisenhower period that is being dealt with here. Vines area covered all the states considered to be part of the traditional South and his period extended from May 1954 to October 1962. But, he had a large sample that concerned education, half of the 291 cases he surveyed, and his percentage of cases favoring blacks, 60.7, approximates the percent of decisions favoring integration for the Kennedy-Johnson and Nixon periods in this thesis.¹ This gives credence to the contention that if more desegregation decisions had been written during the Eisenhower period, the percent that favored blacks would approach the results obtained for the other two periods.

Thus, there is little or no evidence to support a belief that the public statements of the incumbent presidents had any effect on the judges that were already on the bench. As has been shown in previous chapters, there is a distinct difference in the public image that was put forth by Eisenhower, then Kennedy and Johnson, and finally Nixon in regards to desegregation. However, the data does not show any significant change in the percentage of cases favoring blacks between the three periods.

There are several problems involved in attempting to relate the judges' backgrounds with their records concerning desegregation cases. The first, and possibly foremost problem is that the judges' backgrounds are very similar. The place of birth was determined for twenty-eight of the thirty-six judges being examined. Of these, only four were born outside the traditional South. E. Gordon West of the Eastern District in Louisiana was born in Massachusetts, and William H. Atwell of the Northern District in Texas was born in Wisconsin. Both had records opposing integration. The other two known to have been born outside the traditional South were Joseph P. Lieb of the Southern District in Florida, born in Minnesota, and Harlan Hobart Grooms of the Northern District in Alabama. These two were classified as moderate toward integration. What background information that is available on these four indicates that all four had taken residence in the South no later than their completion of law school. A further examination of the background information available for the district judges analyzed in this study shows that any geographical movement in their lifetime normally took place within the South.

The degree of participation in politics that these judges may have had prior to their appointments was also difficult to determine. If a judge listed two years in the state legislature, it could be assumed that this was accurate. But, there is no reasonable way of determining
how many times a judge may have run for office and lost, or how many times he may have worked in a campaign for other individuals. However, a knowledge of the appointment process, does make it possible to state that more than likely all had some degree of participation in politics in order to be considered for the nomination. In an article dealing with the appointment process for federal judges, Harold W. Chase noted that this participation was not only necessary, but went on to state that in order for an individual to be in serious contention for a judicial appointment, an aspirant must state that he wants such an appointment and actively seek it.  

There are some aspects about the backgrounds of the judges for which there is more accurate information. One of these aspects is law school. However, as can be seen in Table 5.2, there is no indication that the location of the law school they attended had any effect on their judicial attitude toward integration. Almost all went to law school in the traditional South, and the distribution of the others shows no definite pattern.

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TABLE 5.2

JUDGES' ATTITUDES TOWARD INTEGRATION
AND LOCATION OF LAW SCHOOL

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>North</td>
<td>0 (0.0%)</td>
<td>2 (100.0%)</td>
<td>0 (0.0%)</td>
<td>2 (100.0%)</td>
</tr>
<tr>
<td>South</td>
<td>7 (25.9%)</td>
<td>9 (33.3%)</td>
<td>11 (40.8%)</td>
<td>27 (100.0%)</td>
</tr>
<tr>
<td>Mixture*</td>
<td>1 (25.0%)</td>
<td>1 (25.0%)</td>
<td>2 (50.0%)</td>
<td>4 (100.0%)</td>
</tr>
</tbody>
</table>

Unknown = 3

*Refers to those who indicated attending a law school in two different geographical locations, such as North and South, or in a border state.

NOTE: S = Segregationist, M = Moderate, I = Integrationist. This does not mean that a judge can be classified as such in his personal life, but are terms of convenience for the charts used in this thesis. S stands for one considered opposed to integration or less than 37% opinions favoring integration. I stands for one whose opinions favored integration 67% or more. M Stands for those in between. These classifications are the same as those established in Chapter I. Also, because of the nature of the data--every chart has empty cells or cells with small frequencies, less than five--none of the common measures of association or level of frequency such as chi square could be used. The classifications S, M, and I and the statement on statistical measures holds true for all charts in this thesis.

Another aspect of the judges' backgrounds for which information is available is religion; but, once again, as can be seen in Table 5.3, there is not very much that can be said concerning this variable. It is perhaps significant that none of the Catholics or Jews fall into the segregationist
category; however, the total of the two combined is only seven, and four of these fall into the moderate category. Also, the distribution of the Protestants among the three categories—thirty percent segregationist, forty percent moderate and thirty percent integrationist—does not vary significantly from the breakdown for all judges disregarding background variables, twenty-two percent segregationist, thirty-nine percent moderate and thirty-nine percent integrationist.

TABLE 5.3

JUDGE'S ATTITUDES TOWARD INTEGRATION AND RELIGION

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protestant</td>
<td>7 (30.4%)</td>
<td>9 (39.2%)</td>
<td>7 (30.4%)</td>
<td>23 (100.0%)</td>
</tr>
<tr>
<td>Catholic</td>
<td>0 (0.0%)</td>
<td>4 (66.7%)</td>
<td>2 (33.3%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>Jewish</td>
<td>0 (0.0%)</td>
<td>0 (0.0%)</td>
<td>1 (100.0%)</td>
<td>1 (100.0%)</td>
</tr>
<tr>
<td>Unknown</td>
<td>= 6</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

An area in which we do not find much difference in the overall percentages, but in which one significant fact definitely stands out, is that concerning the occupation of the judges at the time of their appointment. Reviewing Table 5.4, it can be seen that there is not significant
distribution among those judges that are lumped together in the category for private practice at the time of their appointment. Likewise, the distribution for judges who were in the state judiciary at the time of their appointment is not unusual. However, the fact that all five judges who were United States Attorneys at the time of their appointment fall into the integrationist category is definitely significant.

Of the five who had previously been United States Attorneys, Herbert W. Christenberry and James Skelley Wright were appointed by President Truman, Frank M. Johnson by President Eisenhower, and William Wayne Justice and Woodrow B. Seals were appointed by President Johnson. It is interesting that the two appointed by Truman were his only two appointments that were classified in the integrationist category.

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Practice</td>
<td>6 (26.1%)</td>
<td>10 (43.5%)</td>
<td>7 (30.4%)</td>
<td>23 (100.0%)</td>
</tr>
<tr>
<td>State Judge</td>
<td>1 (16.7%)</td>
<td>3 (50.5%)</td>
<td>2 (33.3%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>U.S. Atty</td>
<td>0 (0.0%)</td>
<td>0 (0.0%)</td>
<td>5 (100.0%)</td>
<td>5 (100.0%)</td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>
Kenneth Vines, in an article cited earlier, did not find holding a federal office to be a factor in a judge's later behaviour on the bench in racial matters. However, his remarks concerning other aspects of a judge's background may help to explain the unique position of the five judges who had been former United States Attorneys. Vines stated that the local values and attitudes are normally reinforced during a Southern lawyer's legal training and practice. He noted, however, that southern lawyers who came into contact with other values and attitudes were more likely to demonstrate different judicial behaviour—in particular, when they had had an opportunity to gain a more cosmopolitan outlook on political and legal activities.³

If Vines is correct, then an analysis of the position and duties of a United States Attorney can provide an explanation as to why individuals who held such a position demonstrate a different judicial behaviour concerning racial matters than other judges with a southern background. The principal duty of a United States Attorney is to enforce federal law, not to adjudicate state or local law. In addition, a United States Attorney is more likely to have contact with colleagues from outside his own geographical area. And, most importantly, the federal appointment

automatically removes an individual from reliance on the local legal and social structure.

The next aspect of the judges' backgrounds to be considered is that concerning political party. At first glance, this variable appears to have some, but not a great deal of effect on judicial behaviour concerning school desegregation. Reviewing Table 5.5, it can be seen that the Democrats have a higher proportion of segregationists, 25.0 percent versus 12.5 percent, and a lower proportion of moderates, 35.8 percent versus 50.0 percent. This is partially counterbalanced because the proportion of Democrats in the integrationist category, 39.2 percent, is slightly higher than the proportion for Republicans, 37.5 percent, and by the fact that there are only eight Republicans in the sample. However, as will be shown later, this difference can be considered to be more significant than it does here. This will be indicated by reviewing the behaviour of the judges in school desegregation cases as it relates to the president who made the initial appointment.
TABLE 5.5

JUDGES' ATTITUDES TOWARD INTEGRATION
AND THEIR POLITICAL PARTY

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democrat</td>
<td>7 (25.0%)</td>
<td>10 (35.8%)</td>
<td>11 (39.2%)</td>
<td>28 (100.0%)</td>
</tr>
<tr>
<td>Republican</td>
<td>1 (12.5%)</td>
<td>4 (50.0%)</td>
<td>3 (37.5%)</td>
<td>8 (100.0%)</td>
</tr>
</tbody>
</table>

Reviewing Table 5.6, the most prominent feature is obviously the record of the Johnson appointees. Of thirteen appointments, nine fall in the integrationist category, three fall in the moderate category, and only one falls in the segregationist category. Nixon's percentage of integrationists approximates Johnson's, 66.7 percent for Nixon versus 69.2 percent for Johnson; but, there is little significance here as Nixon appointed only three judges. Kennedy shows a poor record in this area with 60.0 percent of his appointees falling in the segregationist category, 40.0 percent in the moderate category and none in the integrationist category. However, again it must be noted that Kennedy only appointed five judges that appear here. Accordingly, the primary question from these findings is why the high record favoring integration for the Johnson appointees.
### TABLE 5.6

**JUDGES' ATTITUDES TOWARD INTEGRATION AND THE PRESIDENT WHO APPOINTED THEM**

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt</td>
<td>1 (50.0%)</td>
<td>1 (50.0%)</td>
<td>0 (0.0%)</td>
<td>2 (100.0%)</td>
</tr>
<tr>
<td>Truman</td>
<td>2 (33.3%)</td>
<td>2 (33.4%)</td>
<td>2 (33.3%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>0 (0.0%)</td>
<td>5 (83.3%)</td>
<td>1 (16.7%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>3 (60.0%)</td>
<td>2 (40.0%)</td>
<td>0 (0.0%)</td>
<td>5 (100.0%)</td>
</tr>
<tr>
<td>Johnson</td>
<td>1 (7.7%)</td>
<td>3 (23.1%)</td>
<td>9 (69.2%)</td>
<td>13 (100.0%)</td>
</tr>
<tr>
<td>Nixon</td>
<td>0 (0.0%)</td>
<td>1 (33.3%)</td>
<td>2 (66.7%)</td>
<td>3 (100.0%)</td>
</tr>
</tbody>
</table>

**NOTE:** William H. Atwell, appointed by Coolidge, is not included in this table.

In his article on the Johnson appointments to the judiciary for the period 1963 to 1966, Harold W. Chase states that, unlike his predecessors Johnson informed his subordinates that he wanted them to go along with the senators' desires as much as possible in considering judicial appointments. This was to be particularly true if the senators were from the Democratic Party. This would indicate that the Johnson appointees would be even more controlled by local interests. However, Chase noted that
there was a definite qualifier to this order, and that was that the candidates had to be acceptable.\(^4\)

Chase also provided other information that could explain why Johnson's appointments went so strongly pro-desegregation. Chase stated that Johnson was a very people-oriented man. He considered the district judgeships to be important in themselves and to the individuals who received them. Accordingly, Johnson was familiar, at least to some degree, with each individual being considered for appointment. Also, he often advised his subordinates to contact specific individuals, whom Johnson was familiar with, to check on the availability and fitness of a candidate for a judicial appointment.\(^5\)

Added to the above is information provided by Barefoot Sanders, who worked in the Justice Department during Johnson's presidency. Sanders stated that many aspects of an individual's background and qualifications were considered in the pre-appointment investigation, but that definitely the candidates attitude toward desegregation was one of those considerations.\(^6\)


\(^5\) Ibid.

\(^6\) Telephone conversation with Barefoot Sanders, August 21, 1975.
Thus it appears clear that Johnson considered the desires of the senators from his own party to be important, but he also had his own desires and criteria. In addition, he himself was a Southerner, and was well acquainted with the politicians he had to deal with. As a result, it is not surprising that Johnson was able to deal adequately with the senators from the Fifth Circuit states, yet at the same time, get what he wanted in at least one area of judicial behaviour.

The effect of the Johnson appointments can be seen by reviewing Table 5.7, which groups the judges by party, but with the Johnson appointments excluded. Noteworthy is the fact that the percentage of judges that fall in the integrationist category for Democrats falls from 39.2 percent to 13.3 percent and the number in the segregationist category rises from 25.0 percent to 40.0 percent.

**TABLE 5.7**

<table>
<thead>
<tr>
<th></th>
<th>S</th>
<th>M</th>
<th>I</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democrat</td>
<td>6 (40.0%)</td>
<td>7 (46.7%)</td>
<td>2 (13.3%)</td>
<td>15 (100.0%)</td>
</tr>
<tr>
<td>Republican</td>
<td>1 (12.5%)</td>
<td>4 (50.0%)</td>
<td>3 (37.5%)</td>
<td>8 (100.0%)</td>
</tr>
</tbody>
</table>
With the Johnson appointments removed, the Republican judges turn out to have a significantly higher record of decisions in favor of integration. This is in keeping with Vines' findings in the previously mentioned article. Vines attributed this fact to the one party system in the South, which have, at least in the past, effectively kept Republicans from seriously running for many public offices. Candidates for office often must pay tribute to regional values and differences, even if it is only lip service. Those who do not run for office, or do not take it seriously, would not be as rigidly tied to those values and differences. Also, Republican presidents were not as bound to senatorial courtesy as had been Democratic presidents because of the absence of Republican senators in the Fifth Circuit Court area. 7

If the information on political party and judicial behaviour towards desegregation is combined with the information on the opinions written by judges who had been United States Attorneys, there is support for the contention that the more an individual is removed from continuous reinforcement of local values and attitudes, the better the chances are that that person can show a more independent judicial philosophy in a delicate area such as desegregation. Unfortunately, the biographical data available for the judges

examined in this thesis is too similar to say much more in this area.

Of particular significance in the findings developed in this chapter is the fact that the incumbent presidents appear to have had little effect on the number of opinions that were handed down in favor of integration. This appears unusual as not only can an incumbent president exert exceptional moral weight in delicate issues such as desegregation, but the president has the ability to mobilize all the manpower and influence of departments such as the Justice Department and the Department of Health, Education, and Welfare to back up his personal inclinations. Regardless, it was shown that district judges, at least to a limited degree, can maintain their independence on the bench.

Johnson may have been an exceptional case as far as the issue of desegregation is concerned because he was a Southerner and had a strong personal knowledge of the politics of the South and the individuals concerned. However, his success in obtaining judges who went his way in this issue does point out that a president can exert significant influence at the time a federal judge is appointed.
CHAPTER VI

CONCLUSIONS

In coming to a final summation it is necessary to again review the position of the district courts in American society. The district courts are the lowest level of the federal judiciary; and, as was previously mentioned, they often function as a focal point where national, legal values come into contact with local customs and prejudices. It is then the responsibility of the district judge to resolve this conflict. As was also previously covered, the language of the two Brown decisions was ambiguous, but this was a situation that would not remain unchanged.

If it is true that the original decisions did not provide specific guidelines for the district judges, the specifics were to come. In the Singleton decision (December, 1969), heard by the Fifth Circuit Court of Appeals sitting en banc, the following guidelines were set forth: a student must be allowed to transfer from a school in which his race is a majority to one in which his race is a minority, site selection for school construction must be done in a manner that will not reinforce a pattern of segregation, if a school district grants transfers to a school outside the district it must be done on a
nondiscriminatory basis, and testing could not be used as a means for assigning pupils to specific schools until a unitary school system had been established within the district.¹

The above decision was handed down to bring the district judges into line with opinions that had been handed down by the Supreme Court since the Brown decision. Moreover the Supreme Court itself would soon go further in setting specific guidelines. In the Charlotte-Mecklenburg decision handed down in April, 1971, the Court stated that any student taking the option for a majority to minority transfer must be provided free transportation, district judges were given a wide latitude in altering school zones, and bussing could be used as a tool in establishing an integrated school system.² By this time, the guidelines handed down by the upper courts were becoming specific.

The effect of the increasing firmness of the decisions at all levels of the federal courts was significant. By 1970 the number of black children attending majority white schools was higher in the South, thirty-eight percent, than

¹Singleton v. Jackson Municipal Separate School District, 419 F. 2d. 1211 (5th Cir. 1969).

in the North, twenty-eight percent. However, the entire federal court system from the district courts straight up through the Supreme Court represents only one element of society as a whole. The National Association for the Advancement of Colored People chose to use the federal courts in attacking segregation because they believed that they did not have a reasonable chance to do so at the state level or in the United States Congress. In this they were probably correct, but what the courts can do is limited. Frank M. Johnson, Jr., one of the Fifth Circuit Court's district judges with a consistent record favoring integration, summed up the work of the federal courts in late 1969. At that time he noted. "It is ironic and tragic that as the end of State imposed segregation in the South comes into view, the perhaps more intractable problem of de facto segregation looms ahead."

James S. Coleman, the sociologist whose findings were originally used to support the use of bussing to bring about desegregation, has recently expressed misgivings

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about some of the court ordered bussing. He stated that some of the court orders have hastened the flight of white people from central city areas to the suburbs. Also, he feels that this experience is hardening the resistance to social change on the part of those that have been affected by these court orders. An extreme example of reaction to court-ordered bussing to end desegregation occurred in Durham, North Carolina, where parents gave legal custody of their children to friends living outside the city to avoid the bussing order.6

With the above in mind it is now possible to analyze the behaviour of the district judges of the Fifth Circuit toward desegregation, and evaluate this behaviour. To begin with, as has been shown, district judges do maintain a certain degree of independence. That independence remains even with an issue as sensitive as desegregation. This was indicated by the fact that the percentage of opinions favoring desegregation did not change significantly as the presidents changed their stance toward the issue.

Unfortunately, because of the similarity of the backgrounds of the judges whose opinions were studied for this thesis, it is difficult to state why each judge chose to take a stand either favoring or opposing integration. However, there is some evidence to back up the contention

6Newsweek, 15 September 1975, pp. 51-2.
that the more a judge has contact with a value system that differs from his own area, the more likely he will be to react more independently on the bench in sensitive issues such as school desegregation. This is indicated by the behaviour of the judges who were former United States Attorneys, all of whom fell into the category favoring integration. This is further backed up by the tendency of Republicans to favor integration. The one party system has meant that many Republicans were not as completely integrated into the southern social and legal system as their Democratic counterparts. In addition, Republican presidents had more freedom in appointing district judges in the South because they were not bound by senatorial courtesy.

The number of Johnson appointees that favored integration in their decisions indicated that, although the district judges do maintain a reasonable degree of independence, it is possible for a president to select district judges who will support a particular judicial philosophy if he tries hard enough and has the finesse to get whom he wants. However, if a president is attempting to appoint district court judges that will support his own judicial philosophy over a wide spectrum of issues, it is doubtful he can be as successful.

Finally, it must be realized that both the independence and the authority of district judges is limited. The original
Brown decision was imprecise in its language, but over a period of years the higher courts did narrow the latitude that was left to the district levels. Also, over the years, those private citizens that are firmly opposed to integration have developed more subtle and or drastic means to resist desegregation orders. The district courts are significant and can have tremendous immediate impact, but they are, and will remain, just one segment of the total social, economic and political system of the United States.
APPENDIX A

THE JUDGES AND BACKGROUND INFORMATION

<table>
<thead>
<tr>
<th>Judge</th>
<th>Party</th>
<th>Appointing President</th>
<th>Religion</th>
<th>Occupation on Appointment</th>
<th>Law School ***</th>
<th>Position on Integration ***</th>
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<tr>
<td>Arnow, Winston E.</td>
<td>D</td>
<td>J</td>
<td>P</td>
<td>Pvt. P.</td>
<td>S</td>
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<td>Atkins, Carl C.</td>
<td>D</td>
<td>J</td>
<td>C</td>
<td>Pvt. P.</td>
<td>S</td>
<td>I</td>
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<td>Atwell, William H.</td>
<td>R</td>
<td>C</td>
<td>P</td>
<td>Unk.</td>
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<tr>
<td>Bootle, William A.</td>
<td>R</td>
<td>E</td>
<td>P</td>
<td>Pvt. P.</td>
<td>S</td>
<td>M</td>
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<tr>
<td>Brewster, Leo</td>
<td>D</td>
<td>K</td>
<td>U</td>
<td>Pvt. P.</td>
<td>S</td>
<td>M</td>
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<tr>
<td>Cabot, Ted</td>
<td>D</td>
<td>J</td>
<td>P</td>
<td>Unk.</td>
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<td>M</td>
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<tr>
<td>Connally, Ben C.</td>
<td>D</td>
<td>T</td>
<td>P</td>
<td>Pvt. P.</td>
<td>M</td>
<td>S</td>
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<td>Davidson, T. Whitfield</td>
<td>D</td>
<td>R</td>
<td>P</td>
<td>Pvt. P.</td>
<td>U</td>
<td>M</td>
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<tr>
<td>Dawkins, Ben, C., Jr.</td>
<td>D</td>
<td>E</td>
<td>P</td>
<td>Pvt. P.</td>
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<td>M</td>
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</table>
Ellis,
Frank B.  D  K  P  Pvt. P.  S  S

Grooms,
Harlan H.  R  E  P  Pvt. P.  M  M

Guinn,
Ernest  D  J  U  Pvt. P.  S  S

Heebe,
Frederick J. R.  D  J  U  State Judge  S  I

Hooper,
Frank A.  D  T  P  State Judge  S  S

Hunter,
Edwin Ford, Jr.  D  E  C  Pvt. P.  N  M

Johnson,

Justice,

Keady,

Krentzman,
Ben  D  J  U  Pvt. P.  S  I

Lawrence,
Alexander A.  D  J  P  Pvt. P.  S  I

Lynne,
Seybourne H.  D  T  P  State Judge  S  M

Lieb,
Joseph P.  R  E  C  Pvt. P.  N  M

Mize,
Sidney C.  D  R  P  Pvt. P.  S  S

Noel,
James L., Jr.  D  K  P  Pvt. P.  S  S

Pittman,
Virgil  D  J  P  State Judge  S  M

Pointer,
Sam C.  R  N  P  Pvt. P.  U  I
<table>
<thead>
<tr>
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<th>School</th>
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<tr>
<td>Putnam, Richard J.</td>
<td>D K C</td>
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<td></td>
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<td>U M</td>
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<td></td>
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<td>S I</td>
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<td>S S</td>
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<td>Wright, James S.</td>
<td>D T C</td>
<td></td>
<td>U.S. Atty.</td>
<td>S I</td>
</tr>
</tbody>
</table>

* C = Coolidge; R = Roosevelt; T = Truman; E = Eisenhower; K = Kennedy; J = Johnson; N = Nixon.
** P = Protestant; C = Catholic; J = Jewish; U = Unknown.
*** N = Northern School; S = Southern School; M = Mixed or Border State.
**** S = Segregationist; M = Moderate; I = Integrationist.
APPENDIX B

CASES USED FOR CHARTS IN CHAPTER V

Acree v. County Board of Education of Richmond Co., Ga.,

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Alabama State Teachers Association v. Alabama Public School
  and College Authority, 289 F. Supp. 784 (D. Ala.
  1968).

Alabama State Teachers Association v. Lowndes County Board

Allen v. Board of Public Instruction Broward Co., Florida,

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Armstead v. Starkville Municipal Separate School District,

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Armstrong v. Board of Education of City of Birmingham,
  1963).

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Baker v. Columbus Municipal Separate School District,


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