Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia

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Truth is sometimes stranger than fiction. So it was in 1960 when Elbert Tuttle became the Chief Judge of the United States Court of Appeals for the Fifth Circuit, the federal appellate court with jurisdiction over most of the Deep South. Part of the genius of the Republic lies in the carefully calibrated structure of the federal courts of appeal. One assumption underlying the structure is that judges from a particular state might bear an allegiance to the interests of that state, which would be reflected in their opinions. Forming panels of judges from each of several states is supposed to balance those interests, resulting in a less insular rule of law—one that reflects regional, not merely local, interests.

In 1960, there were nine United States Circuit Courts of Appeals stretching across the country. The First Circuit covered Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico; the Ninth Circuit, far to the west, held Arizona, Nevada, Montana, Idaho, California, Oregon, Washington, Alaska, Hawaii, and Guam. The Fifth Circuit, with headquarters in New Orleans, was comprised of Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas. In early 1954, six judges sat on the Fifth Circuit, one from each respective state. Tradition treats the judges' seats as dedicated to their state, so that when a judge dies or resigns, he is replaced by another judge from the same state.

Appointments to the Courts of Appeal are political; the President nominates a candidate who must be confirmed by the Senate. A corollary of that process is that appointees are typically vetted, whether formally or informally, by the President's party. In the solidly Democratic Deep South, the Democratic Party controlled appointments when a Democrat occupied the White House. Appointees were men of the region, steeped in the culture and history of the region.

But in 1954, Congress created another seat on the Fifth Circuit, and the Democrats, for the first time in twenty-one years, did not hold the White House. Dwight D. Eisenhower was president. Elbert Tuttle had been one of his key strategists. The fact that Elbert Tuttle was a
Republican was a difference that was widely known and appreciated. It seemed likely, however, to be the extent of his difference. A courtly man married to a woman raised in Georgia and Florida, he had, in most observable matters, easily fit in to Southern society.

Elbert Tuttle was, however, different. Born in California and raised in Hawaii, Elbert Tuttle was unfettered by the deep-seated racial prejudices that affected so many. He was a man who volunteered for overseas duty in World War II when in his mid-forties and saw hand-to-hand combat in the Pacific, who then returned home to take on Georgia’s county unit system, the source of the entrenched political power that buttressed the Talmadge dynasty. He was unafraid, a man who could not be deterred from doing his duty. Elbert Tuttle was different, and it was a difference which would have an enormous impact on the evolution of the civil rights revolution.

3. The county unit system had two branches, both of which gave disproportionate political power to rural areas. For purposes of the allocation of representatives in the General Assembly, Georgia’s 159 counties were divided into three groups. Under the 1945 Constitution, each of the eight most populous counties had three representatives, each of the next thirty had two, and each of the remaining 121 had one. For purposes of party primaries nominating candidates for Governor, Senator, and certain other state offices including seats on the appellate courts, the candidate receiving the highest popular vote in a county received the full vote of the county, that is, two votes for each representative in the General Assembly allotted to that county. See Louis T. Rigdon, II, Georgia’s County Unit System 3 (1961); see also Albert B. Saye, Georgia’s County Unit System of Election, 12 J. Pol. 93 (1950) (further explaining Georgia’s county unit system). In 1963, affirming the opinion of a three judge court on which Tuttle sat, the United States Supreme Court found the nominating branch which related to federal and statewide offices unconstitutional (the formula described above had been modified by legislation but still gave disproportionate weight to votes cast in rural counties). See Gray v. Sanders, 372 U.S. 368 (1963). In 1966, affirming the opinion of a three judge court for which Tuttle wrote the opinion, the Supreme Court found the state representative branch unconstitutional. See Toombs v. Fortson, 384 U.S. 210 (1966).

4. In the early nineties, Sara Tuttle would recall that one of her husband’s speeches opposing the county unit system had generated the only threat she took seriously. See Interview with Sara Tuttle, in Atlanta, Ga. (June 1, 1993).

5. Tuttle’s career had already given substantial clues to his character. As a young attorney, he organized a defense for an illiterate Black man accused of rape by a White woman. This episode is recounted in Anne S. Emanuel, Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle, 5 WM. & MARY BILL RTS. J. 215 (1996). He and his partner and brother-in-law, Bill Sutherland, had also represented Angelo Herndon, a young Black man sentenced to 20 years on the chain gang for inciting insurrection by passing out leftist literature, litigation which culminated in a landmark Supreme Court decision. See Herndon v. Lowry, 301 U.S. 242 (1937); Elbert P. Tuttle, Reflections on the Law of Habeas Corpus, 22 J. PUB. L. 325 (1973); see also Charles H. Martin, The Angelo Herndon Case and Southern Justice (1976).
Charlayne Hunter picked Wayne University for the most compelling and most common of reasons. For her, as for so many seventeen-year-olds, to go to college was to go “away.” Detroit was definitely “away.” Also, Charlayne, referred to as “Miss Turner” at Turner High in Atlanta, had edited the school paper, and Wayne had a journalism school. And there was one more thing, the most important element—Wayne wanted her. The University of Georgia (UGA) also had a school of journalism, and it qualified as “away.” Sixty miles northeast of Atlanta, the stately Athens campus represented another world. But the University of Georgia most definitely did not want her.

It was 1960, the historic decision in Brown v. Board of Education was six years old, but the undergraduate colleges of the Deep South’s public universities remained segregated. In the last decade of the twentieth century, it has become difficult to recall the extent of segregation just one generation earlier. Few wish to remember the South’s all-encompassing oppression of its Black citizens. Even George Wallace, who in his first inaugural address as Governor of Alabama in 1963 had stunned the nation and thrilled his supporters with his thundering pledge—“Segregation now, segregation tomorrow, segregation forever”—spent the last two decades of his life trying to explain it away. “Segregation,” he insisted in interviews beginning in 1977, “wasn’t about hate.... When I was young, I used to swim and play with blacks all the time. You find more hate in New York, Chicago and Washington, D.C., than in all the southern states put together.”

The facts belied that claim. The South was terribly cruel to its Black citizens, and Brown v. Board of Education barely made a dent for a number of years. In 1960, for example, six years after the Supreme Court had decided Brown, the undergraduate colleges of the South’s public universities remained segregated. One of the first challenges to this systematic exclusion occurred in Alabama. Atherine Lucy and Polly Myers first applied to the University of Alabama in 1952. Rejected by University officials because of their race, they took their cause to federal court. In

9. See infra note 49.
August of 1955, Judge Grooms of the Northern District of Alabama ruled for them; as the year ended, his order was affirmed by a panel of the Fifth Circuit.\footnote{See Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955), aff'd, 228 F.2d 619 (5th Cir. 1955). Judge Grooms entered an injunction restraining the University from refusing admittance to Lucy and Myers on August 26, 1955. On motion of the University, he stayed his order pending its appeal. Lucy and Myers asked a judge of the Fifth Circuit to vacate the stay, but their motion was denied. They then filed the same motion in the United States Supreme Court, where it was granted on October 10, 1955. See Lucy v. Adams, 350 U.S. 1 (1955). The Fifth Circuit per curiam opinion affirming Judge Grooms was rendered on December 30, 1955 and rehearing was denied on February 1, 1956. See Lucy v. Adams, 228 F.2d 619 (5th Cir. 1955).}

Autherine Lucy finally began classes in 1956 only to be expelled after three days for causing a disruption—a campus mob attacked her.\footnote{See Read & McGough, supra note 7, at 203.} A federal court upheld her expulsion.\footnote{See id. at 204.} Although that order might well have been overturned on appeal, Miss Lucy did not pursue the matter any further. By then, even this virtually indomitable young woman had been worn down.

Elbert Tuttle had been aware of Autherine Lucy's struggle, but uninvolved in it. In 1952, when Lucy first applied to the University, Tuttle was living in Washington. An Atlanta attorney and the state chairman of the fledgling Republican party, Tuttle had been appointed General Counsel to the Treasury. In 1954, shortly after \textit{Brown} was decided, Tuttle accepted a seat on the United States Court of Appeals for the Fifth Circuit. Over the next two years, Autherine Lucy's attorneys would turn to the Fifth Circuit more than once, but Tuttle was never on a panel that heard her case. He knew her story, however, and he understood the lessons it taught.

In 1960, Elbert Tuttle became Chief Judge of the Circuit. Court followers were surprised; the courtly and capable Richard Rives, a former president of the State Bar of Alabama, had been sworn in as Chief Judge just a year earlier, in 1959, at the age of sixty-four. Tradition would indicate that he would serve until he reached the age of seventy. But Rives found the administrative work of the Chief Judge disconcertingly burdensome, and his wife suffered from poor health. He stepped down in Tuttle's favor. Only years later would Rives admit another motivation; he so admired Tuttle that he thought him a likely candidate for the United States Supreme Court. Being Chief Judge, Rives calculated, would increase Tuttle's chances of appointment.\footnote{See id.}
So it was that in 1960, Elbert Tuttle became the Chief Judge of the United States Court of Appeals for the Fifth Circuit. Before a year had passed he had also become a lightning rod for the aspirations of civil rights plaintiffs and the anger and indignation of Southern political leaders. Thanks to his decisive intervention, Charlayne Hunter would attend the University of Georgia with her friend and high school classmate Hamilton Holmes. She would go on to become national correspondent for the MacNeil/Lehrer News Hour; he would go on to become an Associate Dean of the Emory University School of Medicine and Medical Director of Grady Memorial Hospital.

Charlayne Hunter’s and Hamilton Holmes’ exceptional careers came as no surprise to the NAACP leaders who had carefully selected them for their daunting role. “Both,” as Calvin Trillin wrote, “had always been considered perfectly cast for the role. Good-looking and well dressed, they seemed to be light-complexioned Negro versions of ideal college students.” Most importantly, they were psychologically strong and stable, requisites for the isolation and persecution they would face. And they were committed; they pursued their applications to the University of Georgia for almost two years.

Jesse Hill Jr., then chief actuary of the Atlanta Life Insurance Company, one of the most successful Black enterprises in the country, had been actively recruiting applicants to integrate Georgia’s university system since 1957. In 1958, Hill and his colleagues compiled a list of outstanding Negro high school students, and began interviewing them. Many were interested in attending UGA, Georgia State, or Georgia Tech, but for one reason or another, all faltered. In some cases, the mentors realized in their young charges a vulnerability to the...
kinds of attacks the state was sure to mount; in others, the Black
students and their parents lacked the will to go forward, knowing too
well what they faced. Many Black leaders resisted, warning Hill that he
would generate reprisals in the community, and chastising him with a
frightening thought: “You’re going to mess up some kids.”

A suit filed
in 1956 on behalf of three female applicants to the Georgia State College
of Business Administration (now Georgia State University) resulted in an
order finding all three academically qualified but holding that two of the
three, who had each borne a child conceived out of wedlock, were not of
good moral character. The third was in her forties, and before she could
enroll the General Assembly passed a law providing no one over 21 could
enroll in a Georgia college.

When the committee found Charlayne Hunter and Hamilton
Holmes in June of 1959, doubts fell away and they knew they had their
candidates. As Jesse Hill would recall, “I really didn’t have to recruit
those kids; they almost recruited me.”

Charlayne Hunter, the daughter of an African Methodist Episcopal
Army chaplain stationed in Texas and the manager of a realty company in
Atlanta, had been third in her high school class, president of the Honor
Society, and editor-in-chief of the school newspaper for two years. Her
classmate Hamilton Holmes was co-captain of both the football and bas-
ketball teams, president of his class his junior and senior years, and
valedictorian. Both of them wanted to go to the University of Georgia—
Charlayne for the journalism school, Hamilton because he followed the
football team, and because he had already decided on a career in medi-
cine and understood that UGA could give him the undergraduate
education he needed to reach his goal.

Hamilton Holmes, at seventeen, already understood first hand the
principle that had driven so much of the early years of what would
become the civil rights revolution: the victories would not come from
the political process, not in a country where most Black citizens had been
disenfranchised. They would come, if at all, in the federal courts.
Hamilton’s grandfather, father, and uncle had already proven that by
winning one of Atlanta’s first civil rights lawsuits. The subject was golf.

According to Holmes, his grandfather was not political, he was “just
a good, old-time country doctor.” His father and his uncle, on the other

19. Id. at 13.
21. See Qualifications for Admission to University System Act, Pub. L. No. 10,
22. TRILLIN, supra note 16, at 11.
23. Telephone Interview with Dr. Hamilton Holmes (Aug. 15, 1994).
hand, were political. Uncle Oliver was a minister and a civil rights leader; minister of a church in Savannah, he moved to Atlanta to direct his church’s civil rights activities nationally. Holmes remembered his father, Alfred, as an activist, a smart man who “wouldn’t take a back seat to anyone.”24 After graduating from college in 1939, he went to work in Detroit in the war factories. By 1941 he had a son, Hamilton Holmes III. He moved his family back to Georgia, but having gotten a taste of the relatively integrated society in Detroit, he never forgot it.

All three loved golf. They filed suit because they wanted to play golf and they did not have a decent course; it was as simple as that. Dr. Holmes did not start playing until he was in his fifties, but he was something of a natural; at eighty, he could shoot an eighty. His son Alfred, born in 1917, was too old to try out for the pro tour when golf finally integrated, but he was, Hamilton recalled, the national Negro champion for about ten years in the 1940s.25 At the privately operated Lincoln Golf Course, the nine short holes were littered with rocks and bricks. No other course in Atlanta was open to Black players, although approximately thirty percent of the city’s population was Black and the city operated seven golf courses. So in 1951, Dr. Holmes and his sons asked the city to allow them to play at Bobby Jones Golf Course and the city’s other public courses. The answer was no. No other recourse at hand, they filed suit in federal district court. The matter was set for trial before Judge Boyd Sloan.26

By the time Judge Sloan entered his order, Brown v. Board of Education had been decided. Judge Sloan found it inapplicable, however, noting that Brown rejected the doctrine that “separate but equal” provisions satisfied the equal protection clause only in the context of public education. In this case, however, the city had not provided separate but equal golf courses; it had not provided any at all. Judge Sloan ordered that the plaintiffs, and other Negroes similarly situated, be allowed to use the city’s golf courses on a substantially equal basis with White citizens, but postponed the effective date of his order to allow the city “a reasonable opportunity to promptly prepare and put into effect

24. Id.
26. See Holmes v. City of Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954). E.E. Moore, a graduate of Howard University Law School who had studied under Charles Hamilton Houston, was lead counsel in the litigation. Moore had moved to Atlanta in 1946 when there were only three Black attorneys in Atlanta. He handled much of the NAACP litigation, including the attempt to desegregate Georgia State University, until the late 1950’s when Donald Hollowell began to play a more prominent role. See Interview with E.E. Moore, Jr., in Atlanta, Ga. (August 4, 1993).
As the oldest grandchild, Hamilton Holmes had been sent to Tuskegee to live with and help his grandmother in September of 1952. He stayed with her until June 1955. Although he came home during the summers, he was away during much of the lawsuit. He did happen to be home, however, the day his grandfather, father, and uncle went to play the Bobby Jones Golf Course for the first time. Two other Black men joined the golfing party, and scores of other Black people brought their cars and traveled in a convoy with them in case of trouble. The mood was tense; no one knew what to expect. But the day was uneventful, except for its fundamental significance—Dr. Holmes and his sons had integrated Atlanta's golf courses. Black Americans had taken another significant step in the long, slow, arduous march away from slavery and toward equality.

Hamilton Holmes would carry on that tradition. He would become one of the first two Black students to attend the University of Georgia. And he would do it the same way—first, he would ask politely; then he would file suit in federal court. Along with Charlayne Hunter, Hamilton Holmes applied to the University of Georgia for the fall of 1959.

In Georgia, Ernest Vandiver was waging what would be a successful campaign for governor; a protégé of Herman Talmadge, he ran under the slogan "No, Not One." He would thunder from his bully pulpit that no, not one Black student would attend school with White students in the state of Georgia. A promise to Whites, a threat to Blacks, his pledge was backed up by state law providing that no educational institution serving both Black and White students could receive any state funding.

In that charged atmosphere, no one was surprised that Hamilton Holmes and Charlayne Hunter, despite outstanding records, were not admitted to the University of Georgia. Both Holmes and Hunter had been prepared for this rebuff, and they went on with their promising lives and began college. Charlayne attended Wayne State and Hamilton attended Morehouse College. Nonetheless, they pressed on with their applications to UGA. But using one ruse after another, the University kept them at bay. Simply keeping them at bay was enough. The issue

28. See S. Ernest Vandiver, Vandiver Takes the Middle Road, in Georgia Governors in An Age of Change 157, 159 (Harold P. Henderson & Gary L. Roberts eds., 1988) (stating that Vandiver later openly regretted his use of this slogan); Tom Baxter, Former Governors? Georgia's Got a Slew of Em, and Their Stories Too, ATLANTA CONST., Jan. 20, 1991, at M1 (also recounting Vandiver's later regret of the use of the slogan).
Desegregation of the University of Georgia would soon be moot as to them as they were nearly halfway through their college years.

On the state's side, the fight was waged at the highest levels. The Governor, Ernest Vandiver, had been elected on his stand of defiance to the United States Supreme Court. In 1956, as Lieutenant Governor, he invoked the doctrine of interposition and called Brown "utterly impossible of enforcement" at the annual meeting of the State Bar Association. Now he repeated the slogan on which he had campaigned: "No, Not One." Not one Negro child would study in a school where White children studied. Not one. In addition to the 1956 law cutting off all state funding for any school or college providing education to members of both "the white and colored races," in 1960, the Board of Regents passed a new rule restricting the right to transfer into the system, or within it. Moreover, the University System had created an internal appeal process in November of 1950, six weeks after Horace Ward, the University's first Black applicant, applied to the University of Georgia College of Law. The internal appeal process created a long delay, which worked in Ward's case. Ward's suit was not set for trial until December, 1956, by which time he was a first year law student at Northwestern University. Judge Hooper, a federal district court judge in Atlanta, dismissed Ward's suit prior to the trial, in part on mootness grounds.

The procedure adopted in 1950 required students appealing the denial of admission to appeal first to the President of the institution applied to, then to the Chancellor of the University System, and finally to the Board of Regents. This procedure never proved to be a stumbling block for Charlayne Hunter because she never had occasion to appeal. When the

30. *Georgia Bar Association, Report of Proceedings of the 73rd Annual Session of the Georgia Bar Association* 318 (May 24–26, 1956). Interposition was a form of outright defiance to the Supreme Court that purported to be within the law. First promulgated in the context of Brown in 1955 by James Jackson Kilpatrick, editor of the Richmond, Virginia *News Leader*, interposition was a completely discredited theory that each state could interpose its own sovereignty between the national government and the people of the state. In other words, the southern states could simply refuse to comply with the mandate of *Brown v. Board of Education*, or, for that matter, any other decision of the United States Supreme Court. See Mark Tushnet, *Making Civil Rights Law* 240–41 (1994).


32. See *Board of Regents of the University System of Georgia Minutes* 30 (Feb. 11, 1959).

33. See *Ward v. Regents of Univ. Sys. of Geor.*, 191 F. Supp. 491 (N.D. Ga. 1957). By 1960, Ward had earned his law degree and passed the Georgia Bar, and was assisting his former attorney, Donald Hollowell, in the Holmes and Hunter litigation. In 1979, Horace Ward was appointed to the federal bench by President Carter. Ward is presently a Senior Judge of the Federal District Court for the Northern District of Atlanta.
matter came on for trial in January of 1961, the University had yet to act on her application; it had simply repeatedly written, quarter after quarter, that she could not be considered for admission because the dormitories for female students were full. Hamilton Holmes, on the other hand, had finally been denied admission in November of 1960. His internal appeal, which the university argued was a predicate to litigation, had not been resolved because the Board of Regents found it impossible to convene, making it impossible for the Board to hear the appeal.\(^3\)

Not one, and certainly not two. The political apparatus of the entire state of Georgia rose up to block Hamilton Holmes and Charlayne Hunter from attending the University of Georgia. In the fall of 1960, both had completed their first year of college. They needed to be admitted to the University of Georgia soon or their case would be moot. Jesse Hill and his colleagues would be back in the high schools and homes of the city’s Black middle class looking for new candidates. The long struggle would begin again.

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On September 2, 1960, more than a year after Holmes and Hunter had first completed their applications, they filed suit. They were sure of their legal position, sure that they would prevail if the matter ever reached the United States Supreme Court. They were reasonably confident of winning in the Fifth Circuit Court of Appeals. But before there could be an appeal, there would have to be a trial. The trial would be in Athens where the defendant, William N. Danner, Registrar of the University, lived. It would be before Judge William A. (“Gus”) Bootle, the District Court Judge for the Middle District of Georgia. Decades later, Hamilton Holmes would recall that Bootle tried it fairly and that “the proceedings were dignified.”\(^3\) Even so, at the time he was not optimistic about the outcome. The matter was in the hands of the judge, and on a matter like this, Judge Bootle was not predictable. Although federal judges provided much of the leadership on race issues that was so sorely lacking in elected officials, their ranks included die-hard segregationists and obstructionists.\(^3\)

35. Telephone Interview with Dr. Hamilton Holmes, supra note 23.
36. For egregious examples, see MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 169 (1987) (discussing United States District Court Judge Harold Cox of Mississippi) and BASS, UNLIKELY HEROES, supra note 2, at 224 (discussing United States District Court Judge Franks Scarlett of Georgia).
Bootle, like Tuttle, was a Republican appointee, which gave the plaintiffs some ground for optimism. Unlike the Georgia Democratic party, which had been segregated by law until 1946, the Republican party had long been one of the very few integrated organizations in the state. Unlike Tuttle, however, Bootle had not been active in state party politics. Born in South Carolina, Bootle had come to Georgia to attend both undergraduate school and law school at Mercer University in Macon. In 1928, he became an assistant in the office of Scott Russell, the federal district attorney (now known as the U.S. Attorney). On election day Russell asked his young protege if he had voted that day; Bootle, then 26, said no, he had never voted. Russell responded with a serious piece of advice: "Well," he said, "you should vote. I'm not saying how you should vote but you should vote." Bootle went directly to the polls. In the presidential election, after some thought, Bootle voted for the Republican nominee, Herbert Hoover. After all, Al Smith had promised to repeal prohibition if he was elected, and prohibition gave Bootle most of his work.

Not long thereafter, Scott Russell announced his resignation. About that time, Representative Carl Vinson came to see Bootle about one of his clients. Vinson represented a young attorney who had charged his client too much for his work helping him collect veterans' benefits. As Bootle recalled it, the attorney had charged a reasonable amount, but more than a federal statute that regulated the matter allowed. Vinson said his client had simply made a mistake, that he had not known about the statute when he billed the client. Vinson had particular reason for concern. In the recent prosecution of a similar case, Bootle had won a conviction and the attorney had gone to jail. That attorney, Bootle explained to Vinson, had disputed what the client claimed had been charged. Bootle thought he was lying, and had proven it. Now Bootle told Vinson, "If he tells the truth and enters a plea, I think the judge will just give him probation."

The matter proceeded as Bootle had anticipated. The attorney admitted charging a fee that exceeded the statutory limit, but denied knowledge of the statute itself. The judge entered a sentence of conviction, but with Bootle's acquiescence, reduced the sentence to probation.

37. See Chapman v. King, 154 F.2d 460 (5th Cir. 1946).
38. Telephone Interview with William A. Bootle, former United States District Court Judge for the Middle District of Georgia (Oct. 3, 1994).
39. See id.
40. Id.
41. See id.
Back upstairs, Vinson, apparently impressed with how Bootle had handled the matter, lingered in his office. “Well Bootle, I suppose you want to be D.A.,” he said. 42 Bootle, who had not given that possibility much thought but who certainly wanted to keep his job, answered with alacrity, “Yes sir.” 43 The office of Federal District Attorney, however, was a presidential appointment. Although eminent and powerful, Vinson was a Democrat, and the Republicans held the White House.

Gazing out the office window, Vinson remarked, “Well, Bootle, you are a Republican, aren’t you?” 44 Having only voted once in his life, Bootle wasn’t much of anything, but recalling the one presidential vote he had cast, he felt comfortable laying claim to being a Republican. “Yes sir, I’m a Republican” he answered, and added, “I voted for Hoover.” 45

At that, Vinson invited Bootle to Washington, promising to introduce him to the President and the Attorney General. Bootle, who was getting married on November 24th and honeymooning in New York, added a stop in the District of Columbia to his honeymoon trip. When he reached Vinson’s office, Vinson greeted him warmly but then said, “I have changed my mind.” 46 Bootle’s heart skipped a beat, but Vinson had only changed his mind as to strategy. After all, he was a Democrat, and it was a Republican administration.

He sent Bootle to John Marshall, the deputy attorney general in charge of patronage, who took him to meet the Attorney General, John Sargent. Sargent disarmed him by asking if there were any old clocks in Georgia; it turned out his hobby was repairing old clocks. Having made the rounds, Bootle reported back to Vinson before going home to Georgia.

At their last meeting the well-seasoned Vinson told him, “Bootle, you’re going to get the appointment.” 47 Vinson was right. Bootle got the appointment. He held the office until 1933, when the Democrats regained the White House. 48 Bootle spent the next two decades in practice as well as teaching and even serving as acting Dean at his alma

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42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. When Franklin Roosevelt became President, Bootle resigned, as is customary for United States Attorneys. Explaining this, Bootle later said, “He and I had some philosophical differences. . . . They were resolved when it was agreed that I would resign as U.S. attorney and he would remain president. He construed that agreement that he would remain president for life. And he did.” Eric Velasco, Doing Justice to the Name: Judge Bootle, who was in ‘Vortex of the Civil-Rights Movement,’ Honored, MACON TELEGRAPH ONLINE, June 30, 1998.
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mater, Mercer University Law School. Then, on May 20, 1954, three
days after the historic decision in Brown v. Board of Education, Walter A.
Bootle was appointed a United States District Judge for the Middle
District of Georgia.

Despite all the sound and fury over the Brown decision, relatively lit-
tle had changed in the South some six years later when Hamilton Holmes
and Charlayne Hunter filed suit. In addition to Georgia, where Governor
Vandiver with his pledge “No, Not One” led the resistance, four other
Southern states had held out altogether. In August of 1960, no integration
at all had occurred in public elementary and secondary schools in Al-
abama, Georgia, Louisiana, Mississippi, or South Carolina. “Token
integration” had occurred in Arkansas, Florida, North Carolina, Tennes-
see, Texas, and Virginia.49 For instance, in Virginia 169 Negroes spread
among ten communities attended school with White children; the other
211,000 Negro children remained in segregated schools. In North Caro-
lina, the numbers were even worse. After four years of a “pupil
placement plan” meant to appease the federal courts without actually in-
tegrating the school, fewer than sixty Negro students attended mixed
schools, leaving 319,000 in segregated schools.50

The nation had followed the token integration in Arkansas.
“Integration”—nine Negro students attended Central High School in
Little Rock in the 1957–58 school year—had been accomplished in
Arkansas only by virtue of President Eisenhower’s decision to send federal
troops to enforce the court’s desegregation order. Resistance continued in
the streets and in the legislature, and in the summer of 1958, Judge
Lemley granted a petition by the school board to suspend compliance
until 1960–61.51 The order served to “renew the determination of states
which plan to resist desegregation.”52 In an expedited appeal, the Eighth
Circuit reversed Judge Lemley’s June 23rd order on August 18th.53 The
U.S. Supreme Court, in turn, expedited its review and affirmed the
Eighth Circuit’s ruling on September 12th.54 The clearly frustrated Court
seized the opportunity to announce that the three justices who had joined

49. See South Still Holds Out—It’s the Seventh Year and Few Schools are Mixed, U.S.
50. See As Schools Opened—Most Everywhere in South: Calm—and Still Segregated, U.S.
51. See Aaron v. Cooper, 163 F. Supp. 13, 28 (E.D. Ark. 1958). Less than two weeks
later, an immediate petition for writ of certiorari to the United States Supreme Court was
denied in an order remanding the case to the Eighth Circuit. See Aaron v. Cooper, 357
52. Educators in a Squeeze, Newsweek, July 14, 1958, at 80.
53. See Aaron v. Cooper, 257 F.2d 33 (8th Cir. 1958).
the Court since Brown was first decided "are at one with the Justices still
on the Court who participated in that basic decision as to its correctness . . . ." The Court announced firmly that the Brown decision "is now
unanimously reaffirmed."55 Despite the Court's resolve, it was clear in
1960 that in the Southern states, all deliberate speed was all deliberateness,
no speed.

In the hands of obstructionists, the standard of deliberateness became
the strategy of delay. Time and again, it worked. Delay gave the dema-
gogues time to rouse the rabble and gave the legislatures time to invent
creative legislation to ensure segregation. Because the education of chil-
dren was at issue, delay sometimes took the contestants out of the field by
allowing them to grow up as their claims for fairness languished in the
courts. Delay was fast claiming Hamilton Holmes and Charlayne Hunter.

Of the five hard core states where schools were still totally segre-
gated six years after Brown, four had managed to forestall integration at
the college and post-graduate levels as well. Only in Louisiana had Black
students sued, won, and actually attended state colleges and universities.56
In Alabama, Georgia, Mississippi, and South Carolina, not one, no not
one, Black student attended a publicly supported institution of higher
education with White students. Virtually no one expected that to change
any time soon.57 No one except, perhaps, two young and unrealistically
optimistic applicants to the University of Georgia.

Hamilton Holmes and Charlayne Hunter filed suit on September 2,
1960, and asked for a speedy hearing of their motion for a preliminary
injunction.58 Judge Bootle set the matter down for a hearing on Septem-
ber 9th. Counsel for the University appeared and asked for an extension.
Judge Bootle granted their motion, but gave them only five days. The
September 14th hearing lasted all day.

On September 25th, Judge Bootle issued his opinion. He set forth in
precise detail the tortuous path the plaintiffs' applications had taken: the
laborious correspondence, the continuous stream of deferrals and
rejections proffered by the University, even the Board of Regents'
transparent excuse of being unable to convene a quorum for failing to act
on Hamilton Holmes's appeal. He nonetheless denied the plaintiffs any
relief. He explained that an interlocutory injunction was not appropriate

55. Id. at 19.
56. See Ludley v. Board of Supervisors of LSU, 150 F. Supp. 900 (E.D. La. 1957),
aff'd, 252 F.2d 372 (5th Cir. 1958), cert. denied, 358 U.S. 819 (1958); Read &
McGough, supra note 7, at 200.
57. See William H. Robinson, Desegregation in Higher Education in the South, Sch. &
for two reasons. First, because the Board of Regents had not acted, the applicants had not exhausted their administrative appeals. In the face of its mighty intransigence, Judge Bootle carefully gave the University yet another chance to admit the two students. Second, the issue was too important for decision after only a preliminary hearing; a full trial was warranted and appropriate. Judge Bootle scheduled the matter for trial in December.  

The issue was grave and important. Its appropriate constitutional resolution was painfully obvious—the only real question was whether the University had refused to admit Hamilton Holmes and Charlayne Hunter because they were Black. Although everyone knew the answer, the plaintiffs had the burden of proving it. In a state where the Governor had pledged “No, Not One” Black student would attend school with White students and the legislature had passed a plethora of laws aimed at preventing that from happening, determining the answer to that question would nonetheless require a full scale trial.

The trial began on December 12th and ended on December 16th. Holmes and Hunter were represented by an impressive team of Black attorneys: Constance Baker Motley, a NAACP attorney from New York who was by then a veteran of innumerable civil rights trials in southern courtrooms; Donald L. Hollowell, an Atlanta NAACP attorney who would represent Martin Luther King Jr. at critical junctures in future years; and Horace Ward, who had been the first Black student to apply to the University of Georgia. They were assisted by Hollowell’s law clerk, Vernon Jordan, a recent graduate of Howard University School of Law. Motley and Ward would go on to become federal judges themselves. Hollowell would become the first Negro regional director of a

59. See id.


61. Hollowell represented King in a celebrated incident when, following King’s arrest for a sit-in at an Atlanta department store, a Dekalb County judge denied bail. Purporting to revoke a suspended sentence King had received for a traffic violation, Judge Oscar Mitchell sentenced King to hard labor at Reidsville State Prison and had him transported there immediately. Among others, John F. Kennedy, then a candidate for president, intervened on King’s behalf, leading Thurgood Marshall to remark to Hollowell, “Say, Hollowell, they tell me that everybody got King out of jail but the lawyer.” Clifford M. Kuhn, “There’s a Footnote to History!” Memory and the History of Martin Luther King’s October 1960 Arrest and Its Aftermath, 84 J. AM. HIST. 583, 584–87 (1997). Hollowell also represented King during the ill-fated Albany movement. See Louise Hollowell & Martin C. Lehfeldt, THE SACRED CALL: A TRIBUTE TO DONALD L. HOLLOWELL—CIVIL RIGHTS CHAMPION 165 (1997).
major federal agency, and Jordan would become a trusted adviser to President Clinton.

In 1960, they were working very hard with paltry resources against a foe enormously superior in size and strength. More dauntingly, the state and its officers were willing to go to virtually any length to defeat them, including lying under oath. In a sad spectacle, the Chairman of the Board of Regents, the Chancellor of the University System, the President of the University of Georgia, and the registrar of the University all testified to the effect that race played no role in admissions decisions at the University of Georgia.

* * *

On January 6, 1961, Judge Bootle issued a lengthy opinion. One by one he dealt with the state's contentions, and one by one he found them wanting. The students could not be denied access to federal court simply because they had not exhausted their administrative remedy, namely the appeal to the Board of Regents, because the Board of Regents had neglected to impose any time limit on its action. The regulation did not even require that the Board act in a reasonable time. If Holmes and Hunter could not sue until after the Board acted, it would simply never act. As Judge Bootle noted, the University had not yet, more than a year and a half later, acted on Hunter's application. Moreover, because a vote in either applicant's favor would cause the University to lose all state funding, the right to appeal did not really create a remedy.

Moving to the core question, armed with evidence the plaintiffs' legal team had discovered in a laborious search of University records, Judge Bootle found that the inadequate facilities argument used to defer Hunter's application had been a pretext. Holmes' case was different; he had been rejected, a decision made "from a review of [his] records and on the basis of [his] personal interview." Unlike most applicants, who were briefly interviewed at College Days, in the admissions office, or by neighboring alumni, Hamilton Holmes underwent a forty-five minute interview conducted by the registrar himself, Walter Danner; the Assistant Dean of Admissions, Paul Kea; and another admissions staff member,

62. See HOLLOWELL & LEHFELDT, supra note 61, at 213.
65. See id. at 401.
66. See HOLLOWELL & LEHFELDT, supra note 61, at 6; TRILLIN, supra note 16, at 38.
Dr. Morris Phelps. He was asked a number of questions, the court found, "which had probably never been asked of any applicant before," including whether he had ever attended inter-racial parties. "Apparently," Bootle wrote, "the interview was conducted with the purpose in mind of finding a basis for rejecting Holmes."

The committee evaluated Hamilton Holmes, who for over a year and a half had struggled to obtain admission to the University, as only average on seriousness of purpose; they also found him to be poor in verbal expression. Judge Bootle, however, had his own opportunity to observe the young man who would go on to become an Associate Dean at Emory and the Medical Director of one of Atlanta's largest hospitals. "[F]rom the evidence as a whole and particularly from Holmes' appearance as a witness at the trial," he wrote, "it is evident that, had the interview of Holmes been conducted and evaluated in the same manner as the interview of White applicants, Holmes would have been found to be an acceptable candidate for admission to the University."

Judge Bootle's order represented a tremendous victory for the plaintiffs, and for the entire civil rights movement. But problems remained, and again timing was one. Judge Bootle ruled on Friday, January 6th, only three days before registration for the winter quarter closed.

Nothing about this litigation had been easy, beginning with the simple matter of obtaining applications. Donald Hollowell had solved that problem with the help of Black janitors at the University. Now he needed registration packets, and there was no time for subterfuge. Early the next morning, Dr. Samuel Williams, head of the Atlanta chapter of the NAACP, Hollowell, Holmes and his father, and Julian Bond, traveling as a reporter for the Atlanta Inquirer, left for Athens—where the night before hundreds of students had burned crosses and shouted epithets. The Dean of Men, William "Bill" Tate, alone among prominent administrators, had struggled to stop the disorder. He put out one flaming cross after another and pulled down an effigy of Hamilton Holmes

68. Id. at 407.

69. "Holmes' interview record discloses that he was marked 'average' on physical appearance, poise, maturity, seriousness of purpose, and social adaptability, and 'poor' on verbal expression and cooperativeness." Id. at 408.

70. Id.

71. See id. at 410.

72. See Here is Chronology of Events Leading up to Integration Crisis at Georgia, MACON TELEGRAPH, Jan. 15, 1961, at 8; Bruce Galphin, U.S. Court Demands Desegregation Now, ATLANTA CONST., Jan. 7, 1961, at 1.
erected by a student mob at the University arch as he confiscated student identity cards for use in disciplinary proceedings.73

Undaunted by these events, the Holmes party walked onto campus the next morning and into the administration building shortly before it closed at noon. Hollowell, who had so recently cross-examined Walter Danner, now laid Judge Bootle's order before him. Danner, the named defendant, did not need another copy of the order; without looking at it, he handed over the registration materials. The Holmes party left the building as quietly as they had entered, walking again through a crowd of onlookers and reporters. They drove back to Atlanta without incident.

At the same time, Eugene Cook, the state's attorney general who had assisted in the litigation, drove toward Macon to deliver a motion for a stay of the order. Judge Bootle set the matter for hearing in the federal court in Macon at 9:30 a.m. on Monday. That Sunday, Governor Vandiver and his advisers holed up in strategy sessions. Charlayne Hunter flew back to Atlanta from Detroit, and Constance Baker Motley arrived from New York. Hamilton Holmes and his family celebrated a private triumph; the Atlanta Daily World reported that on Wednesday, Dr. Hamilton Holmes, Sr., shot his first hole-in-one at the Adams Park golf course. And in Macon, Judge Bootle, who had been hung in effigy in his hometown's Tattnall Square,74 passed the afternoon at home where a number of friends joined him. Thirty years later he would recall that the group included a number of doctors whom he did not know well.75 They came uninvited, by some consensus among themselves. There was no discussion of the events of the day, of why they had come. The afternoon passed quietly; when dusk fell and no threats had materialized, the stalwart group disbanded, taking their leave as unobtrusively as they had arrived.

Promptly at 9:30 the next morning, Judge Bootle convened court. Constance Baker Motley and Donald Hollowell appeared for the plaintiffs. On this day they were alone at the counsel table. Vernon Jordan and Horace Ward had journeyed in the opposite direction, northeast from Atlanta to Athens, where they accompanied Hamilton Holmes and his

73. See HOLLOWELL & LEHFEIDT, supra note 61, at 8–9; TRILLIN, supra note 16, at 53; see also Dean Tate Battles to Prevent Riots, MACON TELEGRAPH, Jan. 12, 1961, at 2.

74. See Bootle Hanged in Effigy Near Mercer Campus, MACON TELEGRAPH, Jan. 10, 1961, at 14. The effigy was hung from an arch at the entrance to the park, directly in front of Mercer University. Nearly four decades later Bootle would enjoy a rare honor when the federal courthouse in Macon was named for him; Eric Velasco, Courthouse Will Bear Name of Noted Civil-Rights Era Judge, MACON TELEGRAPH ONLINE (June 30, 1998) <http://www.macontelegram.com>.

75. See Interview with Walter Bootle, former United States District Court Judge, Middle District of Georgia, in Macon, Ga. (Aug. 30, 1994).
father and Charlayne Hunter and her mother to register at the University. They walked through the University arch, where Holmes had so recently hung in effigy, past groups of students, some merely curious, some threatening, past the by now ubiquitous press, to the administration building. They had only begun the process when a cheer rang out, and the 6'5” Vernon Jordan heard a student, peering into the office, call to others outside, “That big nigger lawyer’s not smiling now.” In moments the phone rang with the official news: Judge Bootle had stayed his order.

In Athens, Jordan, Ward, Holmes, Hunter, and their parents retired to the home of a local Black businessman, Ray Ware, who had offered them sanctuary earlier during the December trial. In Macon, Motley and Hollowell went in search of a telephone. This had become a custom for Motley, the mother of a young son. After every hearing she went directly to the clerk’s office and borrowed a phone to call home; that simple act had created a surprising bond between the White Southern clerk and the Black woman lawyer from New York. This call, however, was different. Motley was not calling home; she was calling Judge Elbert Tuttle in Atlanta. She and Hollowell found a phone in the courthouse and made the call. How soon, she asked, could Tuttle hear an appeal of Judge Bootle’s order granting the stay. How soon, Tuttle asked back, could she be in Atlanta? They agreed on 2:30 p.m., Tuttle asking Motley to give notice to the state’s attorneys. Before they hung up, he pointed out one more thing—he would not have jurisdiction until a notice of appeal was filed with the clerk of the Court of Appeals. Had one been filed? Not yet, but it would be, she assured him.

Tuttle knew about Bootle’s order that Holmes and Hunter be admitted; the whole state, and in fact much of the country, knew of it. Nonetheless, his chambers at the federal courthouse in Atlanta had been quiet that morning until Motley’s call. Moments after Tuttle spoke with Constance Motley, the work of the day was put aside and Tuttle’s law clerk had his marching orders to find whatever authority there was on reversing stays prior to full appeals. Most critically, find authority that a single appellate judge, sitting alone, could do it. Tuttle set himself to the task as well.

76. HOLLOWELL & LEHFFELDT, supra note 61, at 10–11.
77. See id.
78. See Interview with Walter Bootle, supra note 75.
79. See Telephone Interview with Donald Hollwell, Former NAACP Attorney (July 21, 1998).
80. See BASS, supra note 2, at 217; MOTLEY, supra note 60, at 137.
81. See Interview with Larry Custer, Former Law Clerk, Federal Court of Appeals, in Marietta, Ga. (June 29, 1997).
For the very judge who had entered an order to impose a stay pending appeal ordinarily indicated that the judge felt the ultimate outcome of the matter was questionable enough that the status quo should be maintained until it could be determined. That determination would usually be honored. Appellate courts would be reluctant to spend their time on an interlocutory stay when the entire matter would be resolved by the appeal itself. In this case, however, Judge Bootle indicated that he harbored no uncertainty about his decision. “As the Court sees it,” he wrote, “the particular problem is not difficult; it is not complicated. At the same time,” he continued, “every litigant has the right of appeal.”

In one regard the particular problem that now faced Tuttle was not difficult. The Court of Appeals could lift the stay; no one disputed that. Authorine Lucy, for example, had faced exactly the same situation Charlayne Hunter and Hamilton Holmes now faced. In 1955, she sought recourse in federal court when the University of Alabama rejected her application for admission. Judge Grooms of the federal district court in Alabama ruled in her favor in an order dated August 26, 1955. But, as Judge Bootle would do some five years later, he stayed his order pending full appeal. Lucy, like Holmes and Hunter, asked a judge of the Fifth Circuit (whose identity is unrecorded) to vacate the stay, but he denied the motion; she then appealed to the United States Supreme Court. In a per curiam opinion, the Court vacated the stay. By the time the Court ruled on October 10th, more than six weeks had elapsed. The fall term was well under way, so Lucy waited and finally began classes in 1956. All of the delay allowed hate mongers to fan the flames and passions to rise; her arrival on campus precipitated serious unrest, including an attack by a campus mob. The trustees promptly expelled her for causing a disruption.

In one sense, with the Lucy case in hand, Tuttle had his authority. On almost identical facts, the United States Supreme Court had vacated a stay pending full appeal. Even without the Lucy case, it was clear that on the merits, Holmes and Hunter were entitled to have the stay lifted. But did Tuttle, sitting alone, have the power to lift it?

As a judge of a Federal Circuit Court of Appeals, Tuttle was a creature of statute. The laws that created Tuttle’s position also established his jurisdiction and his power. Under those laws, the court sat in three judge panels. Matters of substance went to three judges, not one. But time was of the essence; this was a case in which justice delayed would likely be

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84. See Read & McGough, supra note 7, at 202. One might assume it was Judge Rives, as he was the Circuit Court Judge sitting in Alabama.
justice denied. Tuttle did not want to take the time to convene a panel. In January of 1961, he was the only judge on the Fifth Circuit who sat in Atlanta. Convening a panel of appellate judges meant bringing in two judges from other states in the circuit, and registration closed that very day. Like Atherine Lucy, Holmes and Hunter were in danger of winning the battle but losing the war. Moreover, the distressing end to Autherine Lucy’s long, courageous battle to study at the University of Alabama had been a serious blow to the rule of law itself. When Ms. Lucy was suspended because of student rioting, “the message flashed across the South that violence still works.”

Tuttle, certain of the correct ruling on the merits of the case, searched the law for the authority to act alone. He found it, in the very rule that had authorized Judge Bootle to grant the stay. The power given the district court judge to issue a stay pending appeal did “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.” Although this provision had apparently never been used by a single circuit court judge to reverse a district court order granting a stay, it was enough for Tuttle. Comfortable with his authority to hear the matter sitting alone, he took the bench precisely at 2:30 p.m.

Before the bailiff’s gavel fell, the Atlanta courtroom was swarming; members of the local and national press mixed with curious onlookers. The central figures in the drama, Hamilton Holmes and Charlayne Hunter, were not there; they were in Athens anxiously awaiting news. Their attorneys were not there either. It had been a frantic morning. Constance Baker Motley and Donald Hollowell had raced back to Atlanta from Macon and had gone directly to Hollowell’s Hunter Street office. There they frantically prepared the notice of appeal and other papers to present to the court. The NAACP regional office, headed by Ruby Hurley, was next door. Hurley’s secretary, using a typewriter with a blue ribbon, helped Hollowell’s secretary, using a black ribbon, with the work. Time permitting, the fastidious Hollowell would not have submitted multi-colored papers; even so, he enjoyed the symbolism.

Hollowell and Motley arrived in court, multi-colored documents in hand, at 2:32 p.m. Donald Hollowell would recall that it was not a good feeling to see Tuttle, legendary for his punctuality, already on the bench.

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86. See Trillin, supra note 16, at 42-43.
89. See Telephone Interview with Donald Hollowell, supra note 79.
90. See id.
Tuttle, for his part, simply continued the call of the case as they took their place at counsels' table. Across the aisle, Eugene Cook, the Attorney General of the State of Georgia, ostentatiously turned his chair and presented his back to the bench. B.D. "Buck" Murphy, a prominent Atlanta attorney who had been retained by the state on civil rights matters, argued for the state. The arguments were brief; Judge Tuttle did not brook delay. Nor could he be distracted from the matter at hand; he simply ignored Gene Cook's defiant gesture.

Constance Baker Motley no doubt took particular pleasure in that small victory; in 1954, when she rose to argue for the NAACP in the Mobile school case, Fifth Circuit Judge Louis Strum had turned his chair and sat with his back to her. Tuttle's law clerk, Larry Custer, also took particular note of Attorney General Cook's behavior. Custer had attended college at Emory University in Atlanta where he was editor of the *Emory Wheel*. Among his colleagues at the time were Charles Kuralt, editor of the college paper at the University of North Carolina at Chapel Hill, and Bill Shipp, managing editor of the Georgia student paper, the *Red and Black*. Shipp supported Horace Ward's attempt to become the first Black student in the law school. For his efforts, he was denounced on the floor of the Georgia House and asked to leave the University. Meanwhile the *Emory Wheel* attracted the attention of Georgia's Attorney General, Gene Cook, who wrote to take issue with an editorial advocating integration of the graduate programs. The student board began printing liberal positions under the not very subtle appellation Dermis Noir. Every time something appeared by Dermis Noir, Larry Custer sent a copy to Eugene Cook. Every time, in Custer's recollection, Cook wrote back.

After the attorneys had concluded their arguments, Tuttle announced that he would have a written opinion in a short time. Back in his chambers, Tuttle reflected on the arguments. Then he dictated an order, and issued it in less than an hour. Many in the courtroom had waited for the order; Tuttle's secretary, Mrs. Lillian Klaiss, handed out copies.

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91. See Interview with Larry Custer, supra note 81. More than three decades later, Donald Hollowell did not recall Cook's turning his chair. But, he remarked, "Gene was not above antics." Telephone Interview with Donald Hollowell, supra note 79.
92. See Motley, supra note 60, at 121.
94. See Interview with Larry Custer, supra note 81.
95. See id.
Short, spare, and to the point, the opinion was quintessential Tuttle. He began by citing Rule 62(g) for his authority to act, proceeded through a summary of the proceedings to date, and concluded with the reasons for his reversal. No showing was made, Tuttle noted, that there was substantial likelihood that the order would be reversed when appealed in the fullness of time. Meanwhile, the stay effectuated the ongoing denial of a constitutional right. That was not tolerable, Tuttle explained, and in that explanation lay much of the jurisprudence he would bring to bear on critical civil rights cases through the next decades:

The denial of a constitutional right, for whatever reason, cannot be said to be wanting in serious damage merely because the damage cannot be measured by money. Irreparable injury results in the denial of a constitutional right, largely because it cannot be measured by any known scale of value. I do not believe that the courts can deny relief when asked to prevent a continued denial of constitutional rights merely on the ground that the grant of relief will produce difficult or unpopular results. Nor can a court refuse to enforce rights guaranteed under the 14th Amendment because the State has taken such action as to make its problems of compliance more difficult or even impossible.

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.

Finding no basis for the grant of the stay by the trial court other than its recognition of the right of every litigant to appeal from an adverse decision, I have concluded that the stay was improvidently granted.96

The order ended with a cite to Lucy v. Adams, the case in which the United States Supreme Court had vacated the district court judge's stay of his own order desegregating the University of Alabama. That petition had been denied by a judge of the Fifth Circuit, and then presented to Justice Black. Justice Black, who could have ruled alone, took the petition to each member of the Court, which then issued a per curiam opinion lifting

Tuttle boldly took the opposite course; sitting alone, he lifted the stay, thereby reinstating Judge Bootle’s order on the merits.

Earlier in the morning, Donald Hollowell and Constance Baker Motley had been stunned and disappointed. They had not expected Judge Bootle to stay his order. The opinion had been forthright and comprehensive; the law was clear. Although Bootle agreed that was the case, he stayed the order “solely in order that the defendant in this case might exercise his legal right of appeal.”

Now it was the state’s attorneys who were stunned. Tuttle had lifted the stay. He had not waited for a record of the proceedings below; he had not convened a three judge panel. Sitting alone, the Chief Judge of the United States Court of Appeals for the Fifth Circuit issued a simple order. The plaintiffs’ right to relief was clear, he stated, and Judge Bootle’s order indicated that the state had been granted a stay for no reason other than the fact they had asked for it. That was not reason enough. Once again, Donald Hollowell raced to a phone. He called Vernon Jordan at the Ware house in Athens and gave his law clerk the news and his marching orders. Jordan and Ware took Holmes and Hunter back to the UGA campus; this time the school completed the registration process. Holmes and Hunter left the registrar’s office with their academic schedules in hand.

Between the time Bootle issued his stay, immediately following the 9:30 hearing in Macon, and the time Tuttle set it aside, following the 2:30 hearing in Atlanta, the Governor had taken the floor to address a joint session of the General Assembly at 1:00 p.m. The day before, after learning of Bootle’s order for the desegregation of the University, Governor Vandiver had invited fifty to sixty political leaders, all ostensibly his allies, to a meeting at the Governor’s mansion. They gathered on Sunday afternoon. The critical moment had come. The state could capitulate and allow the two Black students to enroll, or it could defy the order by closing the University. It was the same choice that would confront the legislature when the inevitable orders to desegregate elementary and secondary school systems became effective. An order requiring desegregation

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97. See Lucy v. Adams. 350 U.S. 1 (1955). Justice Black had the advantage of having his colleagues in the same building, so that he could expeditiously obtain their vote. In all likelihood he presented it to the entire Court in order to increase the effect of the order.


99. See Hollowell & Lehfeldt, supra note 61, at 13; Marion Gaines, Judge Tuttle Kills Delay at University, ATLANTA CONST., Jan. 10, 1961, at 1, 9. They returned to pay their fees the next day. See Bruce Galphin, U.S. Judge Bars Fund Cutoff; Supreme Court Denies Delay, ATLANTA CONST., Jan. 11, 1960, at 1.

100. See Vandiver, supra note 28, at 161; see also Interview by Kathleen Dowdey with Ernest Vandiver, former Governor of Georgia, in Atlanta, Ga. (June 23 1987).
of Atlanta schools to begin in September of 1961 had already been entered.\footnote{See Calhoun v. Latimer, 217 F. Supp. 614 (N.D. Ga. 1962), aff'd, 321 F.2d 302 (5th Cir. 1963), vac'd, 377 U.S. 263 (1964).} The costs of defiance were extraordinary, and they would be paid, for the most part, by the children. Nonetheless, man by man, the assembled power brokers voted to stay the course, until the governor’s floor leader in the House, Frank Twitty, stunned them by dissenting. “You can’t close the schools,” he told the Governor.\footnote{See Interview with Ernest Vandiver, supra note 100, at 10; Vandiver, supra note 28, at 160–61; James F. Cook, The Governors of Georgia, 1754–1995, 268–69 (1996) (discussing the Sanders and Twitty view that the public schools must remain open).} State Senator Carl Sanders, who would later be elected Governor, stood with Twitty.\footnote{See id.} Both made public statements that Sunday afternoon; they believed in segregation, they insisted, but not at the cost of closing the University, or the public schools.\footnote{See Legislative Delay Has Proved Costly, ATLANTA CONST., Jan. 9, 1961, at 4; see also Sanders, Twitty Oppose Closing of University, MACON TELEGRAPH, Jan. 9, 1961, at 1 (quoting Carl Sanders as stating "I don’t like to see any mixing of the races . . . but we are not going to adopt a head-in-the-sand attitude").} Nonetheless, when the Governor addressed a joint session of the legislature at 1:00 p.m. on Monday the 9th of January, he continued his strident support of segregation. But along with the racist rhetoric, he uttered a critical phrase: “We cannot abandon public education.”\footnote{1961 Ga. Laws 103; see Vandiver’s Declaration Is Praised, ATLANTA CONST., Jan. 10, 1961, at 1.} 

Addressing the General Assembly, Governor Vandiver described Bootle’s original order as “a sweeping edict, the harsh and vicious terms of which threaten to destroy or disrupt the University of Georgia.”\footnote{1961 Ga. Laws 102–03.} Even so, with Bootle’s stay in hand, he claimed victory. Within hours, however, Tuttle would set the stay aside, reinstituting the desegregation order. It remained to be seen whether Vandiver would abandon public education; it quickly became clear, however, that he would not abandon his commitment to segregation. He immediately directed the attorney general to appeal Tuttle’s action to the Supreme Court and at midnight he issued a public statement reaffirming his pledge of “No, Not One.” The University, he announced, would close for at least one week, beginning at noon the next day. He was, he said, simply complying with the state law that ordered all state appropriations cut off to any school that educated both Black and White students, and, he added, “It is the saddest duty of my life.”\footnote{Charles Pyles, S. Ernest Vandiver and the Politics of Change, in Georgia Governors in an Age of Change 143, 149 (Harold P. Henderson & Gary L. Roberts eds., 1988);
Although Vandiver was "a protege of Senator Herman Talmadge," he had begun his political career in Georgia as what passed for a moderate on racial issues in Georgia in the 1950s. Like every other Democratic candidate for a major office he supported segregation, but he had avoided the race-baiting, inflammatory rhetoric of his predecessors in office. That could not be said of Rev. William T. Bodenhammer, the Baptist minister who opposed Vandiver for the 1958 Democratic nomination for Governor. When Vandiver made a speech in 1957 in which he tried to lower the tone of racial rhetoric, the newspaper headlined its coverage, "Vandiver Urges Middle of Road." Bodenhamer seized on that as proof that Vandiver was "weak on segregation." Vandiver responded by heating up his own rhetoric, in particular, by using the fateful phrase "No, Not One" in the speech that opened his campaign for Governor.

Now, with the decisive moment at hand, he reverted to his earlier posture. He concluded his letter informing the President of the Senate and the Speaker of the House that he was closing the University with a recommendation that the 1956 statute prohibiting state funding of schools educating both Black and White students be repealed, and then clarified his own position: "I will not be a party to defiance of law, as a few would wish, or do anything which might foment strife and violence in an explosive situation." Ernest Vandiver, the Governor of Georgia, would not stand in the schoolhouse door.

He would carry on the fight in the courts, however. Constance Motley and Donald Hollowell had foreseen that the state would press on, taking the matter to the United States Supreme Court. Before they left the courthouse in Macon that morning, they had called Jack Greenberg at the NAACP New York office. Motley had brought Greenberg up to date, urging him to draft a response to the petition she anticipated the state would file and get it to the Supreme Court. They talked throughout the day, and early the next morning Greenberg was waiting at the


108. Cook, supra note 102, at 266.
109. See id.
110. See Charles Weltner, Southerner 25 (1966). Weltner, who would in 1966 decline to run for re-election to his seat in Congress rather than pledge loyalty to a Democratic ticket headed by Lester Maddox, recalled that Vandiver had, in his inaugural "No, Not One" speech, pledged "to resist the 'tyranny of the Supreme Court at every crossroad and every hamlet in Georgia, and to preserve segregated education by going to jail, if necessary .... Nevertheless, he was attacked by his opponent, a Baptist minister from Ty Ty, Georgia, as being weak on segregation." Id. at 25 (1966). A gospel singer named Lee Roy Abernathy also ran for the nomination. See Pyles, supra note 107, at 146.
111. See Vandiver, supra note 28, at 161.
112. Letter, supra note 107, at 114.
Supreme Court when the clerk opened his office. The clerk dryly noted that there was just one problem: Greenberg could not file a response until the state had filed its petition. About two hours later, the Georgia delegation, which had the advantage of traveling on a state plane, reached the Supreme Court with a seven page petition.

The next morning, as Attorney General Cook and two members of his team filed the state’s futile petition in the United States Supreme Court, Motley and Hollowell were back in Judge Bootle’s Macon courtroom alleging the immediate danger of irreparable harm and seeking a temporary restraining order against the governor himself, as well as the state’s auditor.

Judge Bootle recognized the enormous import of what he had been asked to do. Sensitive to the implications of a federal court controlling a state’s policy decisions, he had given the Governor and the Board of Regents every opportunity to retain control and act in compliance with the constitution. Stubbornly defiant, they had refused. Now, with his original order having been backed by Tuttle, the circuit’s chief judge, he did not hesitate to issue a temporary restraining order preventing the governor from cutting off funds from the University. The University stayed open.

Upon receiving that news, Governor Vandiver fired off a telegram to Bootle protesting the temporary restraining order but conceding that he would not defy it. When he was nonetheless served by a federal marshall at the governor’s mansion that evening, he raged at the insult. In truth, he was in all likelihood relieved. He had, figuratively, stood in the schoolhouse door; he had fought for segregation until the bitter end, and he could now concede with a semblance of dignity, and, more importantly, with the people of the state largely behind him. Georgians did not want their beloved University desegregated, but they wanted it closed even less. And if the parents would choose that ultimate form of resistance, few of their children would. Roy McCracken, a Vandiver ally and long time legislator, had told Vandiver he was going to Athens to retrieve his daughter. He came back to Atlanta alone. “She wouldn’t leave,” the surprised father told the governor. She was not alone. On Monday

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114. Two days later, after a full hearing, Judge Bootle entered a preliminary injunction, again ordering the Governor and the auditor not to restrict the flow of state funds to the University.
115. See Gene Britton, Bootle Order is Denounced by Vandiver, MACON TELEGRAPH, Jan. 11, 1961, at 1.
116. See id.
117. See Interview with Ernest Vandiver, supra note 100, at 10–11.
morning, January 9th, the *Atlanta Constitution* reported that "Lights burned late in the University of Georgia's old chapel Sunday night as it became the rallying point for students who want to keep the university open." By 9 p.m., the paper reported, they had accumulated some 2000 signatures. Alan Wexler, the managing editor of the student paper, the *Red and Black*, had called a meeting for 11 p.m., and they expected to gather hundreds more.\(^{118}\)

After Tuttle's order lifting Bootle's stay had been affirmed by the Supreme Court, after Bootle had enjoined the Governor from closing the University, Bootle entered yet another critical injunction. Holmes' and Hunter's first day of classes, Wednesday, January 11th, ended in student rioting protesting their presence. The Mayor of Athens charged that Vandiver delayed in deploying the state police to help quell the rioting, a charge Vandiver bitterly denied.\(^{119}\) The state police arrived around midnight, and transported Holmes and Hunter back to their homes in Atlanta in the middle of the night.\(^{120}\) Both were suspended by the University "for their own protection and that of other students."\(^{121}\) Their attorneys went back to Bootle, and on Friday afternoon he ordered them readmitted by 8 a.m. Monday.\(^{122}\)

Holmes and Hunter went back to Athens. The University of Georgia had been desegregated. The next year, the University of Mississippi would be desegregated, and the year after that, the University of Alabama. The tide had turned.

At the *Atlanta Constitution*, long time political cartoonist Cliff "Baldy" Baldowski sketched out three black robed men on a baseball diamond. Playing on the phrase "Tinker to Evers to Chance" with which sportswriter Franklin P. Adams had immortalized the 1910 Chicago Cubs infielders,\(^{123}\) he captioned his drawing "Bootle to Tuttle to Black."\(^{124}\) Long a baseball fan, Tuttle particularly prized it.

The state would continue to fight about details. Judge Bootle recalled attorneys for both sides appearing one day when he was sitting in

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119. See Vandiver Denies Delay in Rushing Aid to Athens Police During Riot, MACON TELEGRAPH, Jan. 13, 1961, at 1.
120. See id.
Columbus; something about the swimming pool had come up, they said, could he hear them out? When he left the bench for lunch, he called them into his chambers, where Attorney General Cook explained what had come up: were the two Negro students allowed to use the swimming pool under Bootle's order? “Well,” the judge asked, “is the swimming pool there for the students?”

“Yes,” replied the Attorney General.

“And aren’t they students?”

“Yes,” again.

“Take an order,” the judge told Hollowell, indicating that he should draft an order for the judge’s signature providing that his clients could use the swimming pool. As Hollowell left the office, Cook, who had been a classmate of Bootle’s at Mercer Law School, lingered. Bootle recalled that Cook averted his gaze as he glanced out the window and said, “Judge, we’re sorry to have to trouble you with all this, but you know how it is.”125 Bootle knew exactly what he meant. The political leaders in the South were not going to provide leadership on this issue; they were not going to take the heat, but were going to deflect it onto the federal bench instead. They would comply with the law, if at all, only under court order.

As was often the case throughout the South, the district court judge, Walter “Gus” Bootle, had borne much of the load. The trial court judges were the front line troops. Nonetheless, it was Tuttle’s decisive and virtually unprecedented intervention that carried the day. The newly installed Chief Justice of the United States Court of Appeals for the Fifth Circuit had made himself abundantly clear. On his watch, the constitutional rights of Black citizens of the Fifth Circuit would not be honored in the breech. In the matter of the desegregation of UGA, Georgia had been disarmed of its most potent weapon—delay. Tuttle’s conduct would prove to be a harbinger of things to come. Under his leadership, the Fifth Circuit would take the lead not simply in effectuating the mandate of Brown v. Board of Education, but in giving vibrant life to the equal protection clause of the Constitution and the landmark Civil Rights Act of 1964.126

The order in the UGA case would prove to be quintessential Tuttle—swift, decisive, well-grounded in the law, brooking no interference with constitutional rights, insisting on fundamental fairness. It was also self-effacing. Tuttle never even had his order published in the Federal Reporter, the repository for opinions of the Circuit Courts of

125. Interview with Walter Bootle, supra note 75.

126. 42 USCS § 2000a et seq.
Appeal. However brief its text, however unheralded its publication, it got the job done. A new message flashed across the South—in the states of the Fifth Circuit—in Alabama, Georgia, Florida, Louisiana, Mississippi, and Texas—justice would no longer be denied or delayed.