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Tribute to Chief Judge Elbert P. Tuttle

Arthur H. Dean

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A TRIBUTE TO CHIEF JUDGE ELBERT P. TUTTLE

AN APPRECIATION OF JUDGE ELBERT PARR TUTTLE

Arthur H. Dean†

When the writer first met Elbert P. Tuttle, he was an associate editor of *The Cornell Daily Sun*. The writer was a lowly competitor. Tuttle explained the work so courteously and clearly that friendly and sympathetic relations were established—which still continue.

World War One intervened, and Tuttle served as a second lieutenant in the Army after training at Plattsburg.

He married a most charming girl, Sara Sutherland of Newman, Georgia. They have two children.

We were to meet again in the fall of 1922 as classmates at the Cornell Law School, where Tuttle was editor-in-chief of the *Quarterly* and the writer was managing editor.

In volume seven of the *Cornell Law Quarterly*, Tuttle wrote a note[1] on the now famous case of *Truax v. Corrigan*,[2] in which he criticized the opinion of Mr. Chief Justice Taft. In the opinion, Justice Taft "laid down a rule which . . . would have put an end to [practically] every legislative enactment that gave countenance to a curtailment of property rights, irrespective of the urgency of conflicting rights."[3]

While in law school, Tuttle financed and built a small apartment house on the Cayuga Heights Road. So, as a law student, he was struggling with contractors, contractors' liens, and union jurisdiction. He rented one of the apartments to Professor Charles K. Burdick of the

† Member of the New York Bar. A.B. 1921, LL.B. 1923, Cornell University.

1 7 CORNELL L.Q. 251 (1922).

2 257 U.S. 312 (1921).

3 7 CORNELL L.Q. 251, 252 (1922).

Cornell Law School, and his problems in not wishing to offend a beloved teacher, while sticking up for his rights as a landlord, somewhat complicated his student and editorial life.

He and Sara rented a Faculty House from Professor Samuel P. Orth on East Avenue, just a few feet away from Boardman Hall, then the home of the Law School. There he and Sara often entertained us with gracious Southern hospitality and delicious food, while we bored poor Sara to death by pursuing the dialectics of the law, of which we never tired.

Studying under Woodruff, Bogert, Burdick, MacCaskell, and Stevens, we revered Brandeis, Cardozo, Learned Hand, Holmes, Hughes, Ames, Roscoe Pound, Williston, Lord Mansfield, and Sir George Jessel.

After graduation, Tuttle went to Atlanta to practice law with his brother-in-law, William A. Sutherland, where he had a distinguished career and argued many important cases.

One of the highlights of Tuttle's career as a lawyer was his able and successful representation of the petitioner in the celebrated case of *Johnson v. Zerbst.*[4] In that case the Supreme Court held that Tuttle's client, a defendant in a criminal prosecution, could not be held to have waived his sixth amendment Constitutional right to be represented by counsel by merely acquiescing to a trial without counsel.

The Court said that the only type of waiver it would accept would be "an intentional relinquishment or abandonment of a known right or privilege."[5]

Unlike many newcomers to the South (he is a native of California but grew up in Honolulu), Tuttle did not acclimatize himself to local Democratic politics but remained a strong Republican and active in that party's work.

In World War Two, as a lieutenant colonel, he fought in Guam, Okinawa, Leyte, and the Ryukyus. He was wounded and cited for exceptional and meritorious service in military operations while serving as Battalion Commander of the 304th Field Artillery of the 77th Infantry Division Artillery Battalion, United States Army. He was awarded the Bronze Star, the Legion of Merit, the Purple Heart with oak leaf cluster, and the Bronze Service Arrowhead.

At the end of World War Two, he returned to Atlanta and became president of the Atlanta Bar Association and vice-president of the Georgia State Bar Association and was nominated by President Truman to be a Brigadier General in the Officers Reserve Corps.

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4 304 U.S. 458 (1938).

5 *Id.* at 464.

He served effectively at the Republican Convention in 1952. He was a member of the Georgia delegation and, along with Ambassador Henry Cabot Lodge, who was then Dwight Eisenhower's campaign manager, Tuttle helped to bring about the nomination of General Eisenhower.

After Eisenhower's inauguration in 1953, Judge Tuttle was appointed as chief counsel to the Treasury Department. In September 1954, he was appointed to the bench as a judge on the Court of Appeals for the Fifth Circuit, with headquarters in New Orleans. He was appointed Chief Judge in 1961. Tuttle has recently relinquished the Chief Judgeship but he will remain on the Fifth Circuit as a Circuit Judge.

Since becoming a member of the Fifth Circuit Court of Appeals, Judge Tuttle has demonstrated once again his well-known character, integrity, and judicial ability by taking a leading role in judicial efforts to guarantee the free and equal exercise of constitutional rights to all Negroes and whites living within the states of the Fifth Circuit. Perhaps Judge Tuttle's efforts in this field may be best appreciated by recalling the role that he has played in cases attempting to secure for Negroes their constitutionally-guaranteed right to participate meaningfully in Southern political life. The writer speaks specifically of Judge Tuttle's role in the Georgia reapportionment cases, the numerous voter-registration cases that he has considered, and the *Julian Bond* case.

Judge Tuttle participated in the decision of three important cases challenging the methods of legislative apportionment in the State of Georgia. He was a member of the three-judge district court that held the Georgia county-unit system, pursuant to which the state's primaries had been conducted, unconstitutional as it was then structured.[6]

Subsequently, Judge Tuttle participated in the first case in which the apportionment of a United States congressional district was challenged.[7] A majority of the three-judge district court on which Judge Tuttle was sitting voted to dismiss the complaint because it presented a "political" question. However, Judge Tuttle dissented from the dismissal. The United States Supreme Court agreed with the position taken by Judge Tuttle in his dissent, and reversed the district court. Justice Black, writing for the majority, said:

> We agree with Judge Tuttle that in debasing the weight of appellant's votes the State has abridged the right to vote for mem-

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6 Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962), *modified*, 372 U.S. 368 (1963).

7 Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962), *rev'd sub nom.* Wesberry v. Sanders, 376 U.S. 1 (1964).

> bers of Congress guaranteed them by the United States Constitution, that the District Court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss this suit.[8]

In the final Georgia reapportionment case, Judge Tuttle, writing for a three-judge district court, held unconstitutional the method by which the Georgia legislature was apportioned.[9]

Although the field of attempting to secure the right to vote for Negroes living in the South was once a flourishing area of the law, the Voting Rights Act of 1965[10] has supplanted most of the court-made law on the subject. However, Judge Tuttle's James Madison Lecture at the New York University School of Law is an illuminating account of the way in which the Fifth Circuit was often required to use its ingenuity in order to overcome the intransigence of state voting officials.[11]

Judge Tuttle's concern that Negroes be permitted to participate effectively in the political process of the South is most recently reflected by his dissent from the holding of a three-judge district court in the *Julian Bond* case.[12] The district court upheld, over Judge Tuttle's dissent, the refusal of the Georgia legislature to seat Julian Bond, an elected Negro state representative who had made public statements opposing United States involvement in Vietnam. Subsequently, the United States Supreme Court reversed the three-judge district court.[13] The Supreme Court agreed with Judge Tuttle that the Georgia legislature could not refuse to seat Representative Bond.

An indication of the high esteem in which Judge Tuttle is held may be gleaned from a telegram that he received from Ralph McGill of Atlanta. In *Armstrong v. Board of Education*,[14] Judge Cameron of the Fifth Circuit, who has consistently opposed Judge Tuttle in civil rights cases and who had not been assigned to that particular case, filed a dissenting opinion on his own initiative. In the dissent Judge Cameron attacked Chief Judge Tuttle for allegedly assigning the four "liberal" judges, who comprised a minority of the Fifth Circuit bench, to most of the important civil rights cases.[15] In response Mr. McGill sent the following telegram to Judge Tuttle:

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8 Wesberry v. Sanders, 376 U.S. 1, 4 (1964).

9 Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962), *aff'd per curiam*, 384 U.S. 210 (1966).

10 42 U.S.C. § 1973 (Supp. I 1965).

11 Tuttle, *Equality and the Vote*, 41 N.Y.U.L. REV. 245, 263 (1966).

12 Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.), *rev'd*, 385 U.S. 116 (1966).

13 Bond v. Floyd, 385 U.S. 116 (1966).

14 323 F.2d 333 (5th Cir. 1963), *cert. denied*, 376 U.S. 908 (1964).

15 *Id.* at 358.

> That fellow in New Orleans reminds me of a favorite adage "Listen to the fool's reproach; it is a kingly title." Don't let that New Orleans character concern you. Your integrity is a great rock and the slander of little men will be forgot in a few days. All good wishes.

At the Harvard Commencement exercises on June 17, 1965, Judge Tuttle received an honorary degree of Doctor of Laws with a citation reading: "The mind and heart of this dauntless judge enhance the great tradition of the federal judiciary."

In June 1949, Tuttle was elected a trustee of Cornell University where he has brought realism and clarity to the board's work. As chairman, the writer relishes Judge Tuttle's timely interventions, help in our discussions, and decisive courage in the field of social relations.

He is a warmhearted, generous, courageous person with a sterling character, a Puritan sense of conscience, and a no-nonsense attitude about what the Constitution really means.

The character of the man may be judged by what he said in an address to the students of Emory University:

SERVICE

> The professional man is in essence one who provides service. . . . In a very real sense his professional service cannot be separate from his personal being.
>
> He has no goods to sell, no land to till.
>
> His only asset is himself.
>
> It turns out that there is no right price for service, for what is a share of a man worth?
>
> If he does not contain the quality of integrity, he is worthless.
>
> If he does, he is priceless.
>
> The value is either nothing or it is infinite.

It was never necessary for Tuttle to discuss his duty and to weigh the pros and cons of personal consequences. He saw his duty clearly and acted accordingly.

We are proud to salute him as a distinguished Cornellian, fellow American, and friendly participant in the great field of civil rights for all, without distinction as to race, color, or previous condition of servitude.

CHIEF JUDGE TUTTLE AND THE FIFTH CIRCUIT

John Minor Wisdom†

Before putting pen to paper I asked two men who have worked closely with Elbert Tuttle how, in a word, they would describe his outstanding quality. One of the men is the Deputy Clerk of Court for the Fifth Circuit; the other is a member of our court. The overburdened Deputy Clerk somehow remembered that Judge Tuttle's first opinion concerned electric motors.[1] He hesitated a moment, then answered, "Judge Tuttle's been going like an electric motor ever since his first opinion back in October 1954." Our brother judge did not hesitate. "I can give it to you in one word: integrity." Each of these answers correctly characterizes Judge Elbert Parr Tuttle.

The motor has never run down. Year after year, Judge Tuttle sits more often and writes more opinions than any other judge on the court. What is more, no other judge on the court allows himself as short a lapse of time between the post-argument conference, when an appellate case is tentatively decided, and the final draft of the opinion. No one should infer, however, that the high speed at which Judge Tuttle works affects the quality of his judicial craftsmanship. Llewellyn would say that Judge Tuttle's decisions are in the Grand Style: They reflect respect for precedent and legal tradition, but they are guided by reason and principle.[2] Judge Tuttle writes lean, strong English. He has a purist's feeling for the right word and correct syntax, and a good newspaperman's discriminating eye for the siguificant details and how to place them in logical order.[3]

Judge Tuttle served as Chief Judge for six and one-half years. During this period the motor has been running at a greatly accelerated speed. The administrative duties of any Chief Judge are more time-consuming than lawyers and laymen realize. The duties are especially taxing in the Fifth Circuit, which is the busiest federal circuit. In the last six years our appellate caseload has doubled: 1188 appeals were filed during our 1966-67 term. In 1954, when Judge Tuttle was appointed to the bench, the court was increased from six to seven judges. A few years later it was increased to nine. We now have a court unique

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† Circuit Judge, United States Court of Appeals for the Fifth Circuit.

1 C. & H. Air Conditioning Fan Co. v. Haffner, 216 F.2d 256 (5th Cir. 1954).

2 K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36 (1960).

3 *See, e.g.*, Tuttle, *Equality and the Vote*, 41 N.Y.U.L. REV. 245 (1966) (7th annual James Madison Lecture of the New York University School of Law).

in the American judicial system: thirteen active judges and three working senior judges.[4] This is an experiment in judicial administration that will have far-reaching consequences.[5] In addition, we have a large number of three-judge district courts—forty-five last term, twice as many as in any other circuit.

Contrary to common opinion, the civil rights movement is not primarily responsible for the great surge of litigation in our circuit. The three basic causes are: (*1*) the growth of industry and population in Texas, Florida, Georgia, and Louisiana and, to a lesser extent, in Alabama and Mississippi; (*2*) the general increase in federal question litigation; and (*3*) the recent influx of post-conviction appeals. Judge Tuttle and the rest of us in the court would be busy if we never had a civil rights case. Moreover, when it comes to difficult cases, I would as soon struggle with guidelines in a de facto segregation case as with the problems in a Texas or Louisiana case involving, in one package, oil and gas law, community property, and federal taxes.

Of course, a court with federal jurisdiction over six of the eleven Confederate States does carry a heavy part of the burden of civil rights litigation. Judge Tuttle's judicial career has coincided with the Negroes' march toward equality that began with the *School Segregation Cases.* He was appointed to the court only a few months after the Supreme Court decided the first *Brown* case in May 1954.[6] Since then, day in and day out, Judge Tuttle has lived with civil rights problems. So have we all. But he has been responsible for shepherding a court of very unsheeplike judges at a time of social ferment, when the court, as an institution, was exposed to the severe stresses and strains produced by civil rights litigation.

Because the Fifth Circuit draws its judges from a broad region, it is better insulated from local prejudices and parochial prides than a smaller court drawn from a more homogeneous region. A large number of judges from as many as six states is an advantage to a court of appeals in performing its function as a federalizing agency.

Unfortunately, an oversized court for a broad region generates two vices. First, the fact that our judges live in ten different cities and

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[4] There is one vacancy on the Court of Appeals for the Fifth Circuit. At present there are three judges from Texas, one from Mississippi, and two each from Alabama, Florida, Georgia, and Louisiana. The district tier consists of 59 active judges and 10 senior district judges.

[5] Four judgeships are temporary. The Judicial Conference of the United States has recommended that these judgeships be made permanent and that two additional judgeships be established.

[6] Brown v. Board of Educ., 347 U.S. 483 (1954).

sit in seven different places in six states complicates judicial administration and tends to deinstitutionalize the court. Second, like any group of fifteen men from six states, our judges vary widely in temperament, background, politics, social outlook, inherited traditions, and acquired convictions. After a period of modest apprenticeship, many judges develop work habits, a style of writing, a way of constructing an opinion, and a general approach to decision-making almost impervious to suggestions from other members of their court. As Justice Walter V. Schaefer, one of the country's finest judges, has remarked, there is always "[t]he danger . . . for the judge that his image of the ideal judge may be the face that looks back at him from the mirror as he shaves."[7] But judges develop an independence of mind unrelated to pride of opinion and the charm of the face in the mirror. In final analysis, every decision turns on the conscience of the individual judge. A judge's independence is, of course, relative. It is restricted by the Constitution, statutes, decisions of the Supreme Court, *Erie* and many other doctrines, the nature of the judicial function, and all the traditional curbs on judicial initiative imposed by the requirements of jurisdiction, stare decisis, standing, and the accepted procedural restraints of an adversary system of litigation. But it is the individual judge's conscience that tells him whether he is honestly interpreting the Constitution, giving full weight to a statute, and logically applying the law to the facts—in short, whether he is deciding in accordance with The Law.

Thus, besides administering a circuit having an unprecedented flood of litigation, the Chief Judge of the Fifth Circuit has had to administer an unusually large and complicated judicial institution composed of nine to fourteen independent thinkers at a time when there are strongly conflicting views on the meaning of the Constitution and the proper application of principles of American federalism. Only a man with Judge Tuttle's rectitude, self-discipline, tolerance for the opinion of others, and unselfish dedication to a federal judge's obligations, could have shepherded the Fifth Circuit through the history-making but divisive problems the court has confronted since 1960 and still have retained the affection of all his brothers on the court. Judge Tuttle retires as Chief Judge from a strong, respected court that is also a cohesive judicial institution. In good part, this must be attributed to his scrupulous regard for the integrity of the federal system and for the system of law itself.

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[7] Schaefer, *Good Judges, Better Judges, Best Judges*, 44 J. AM. JUD. SOC'Y 22, 23 (1960).

This brings me back to the point my brother judge made, that Elbert Tuttle's outstanding quality is his *integrity*. This is the attribute litigants and lawyers look for first in a judge. Properly so. I relate it, however, not just to moral and intellectual honesty which judges share with other men, and not just to that high level of integrity which federal judges should share with all other judges and with Caesar's wife. I relate it also to Judge Tuttle's profound understanding of the importance of preserving the integrity of federal judicial process. Justice Frankfurter has said:

> To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with . . . judicial power.[8]

These are the qualities a court expects of its chief judge. Elbert Tuttle did not disappoint us.

Justice Frankfurter had reference to the presuppositions of judicial process generally. I refer to the presupposition that the integrity of judicial process in the federal system requires federal courts to stand an around-the-clock watch over the Constitution and laws of the United States. Reliance of litigants upon other guardians and other forms of protection is not enough when the rights of the nation and nationally-created or nationally-protected rights are jeopardized by state or local action. Judge Tuttle has pointed out:

> It was not until the Emancipation Proclamation created a new, easily identifiable class of citizens, having in common with each other the distinguishing characteristics of race, color, poverty, illiteracy, and lack of attachment to the land, that it became apparent that neither a commonality of interests nor the multiplicity of interests among citizens would be adequate to protect the peculiar interests of the new class. It must be borne in mind that, *politically*, the Negro population of the Southern states did not *exist* prior to the adoption of the thirteenth amendment to the Constitution. [While, of course, the thirteenth amendment abolished slavery, it took section one of the fourteenth amendment to give the former slaves citizenship within the state of their residence and the United States.]
>
> Then, for the first time, the people of the United States found it necessary to interpose national prohibitions affecting the elec-

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8 Rochin v. California, 342 U.S. 165, 171-72 (1952).

> torate. This was accomplished, of course, by the adoption of the fifteenth amendment.[9]

Judge Tuttle early recognized one of the key facts about civil rights. "In resisting change, especially in political and sociological areas, time is what counts."[10] Accordingly, it has

> devolved upon the appellate courts, to a greater extent than had theretofore been usual in American jurisprudence, to fashion means to give effect to principles of law, once firmly established, much more rapidly than would be possible if full sway were allowed to the normal procedural maneuvering."[11]

Immediate issuance of the mandate is one of the unusual procedures our court has employed.[12] Another is resort to the All Writs Statute for authority to issue an injunction pending appeal.[13] In some voting cases, we have been faced with newly enacted registration requirements which, though constitutional on their face and administered without discrimination, actually harmed unregistered Negroes by "freezing" the imbalance resulting from past discrimination. In such cases we have relied on the so-called "freezing" principle to enjoin enforcement of the requirement.[14] The "freezing" principle is grounded in the court's equity power to eliminate the discriminatory effects of the past as well as to bar discrimination in the future.[15]

The adversary system of litigation, even with benefit of class actions, is an inefficient instrument for effecting socio-legal changes on a broad scale. Until Congress adopted the Civil Rights Act of 1964, school desegregation in the Deep South seemed almost hopelessly bogged down. School desegregation plans differed widely from district to district in content and in extent of enforcement. To develop uniform school plans and to avoid a trial court's misunderstanding of our decisions, our court worked out boiler plate decrees, which in effect amounted to guidelines, long before the Department of Health, Education, and Welfare issued its guidelines.[16]

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9 Tuttle, *supra* note 3, at 247-48 (emphasis in original).

10 *Id.* at 264.

11 *Id.* at 257.

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

13 United States v. Lynd, 301 F.2d 818, 823 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962); *see* Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORNELL L. REV. 12, 16-20 (1967).

14 United States v. Duke, 332 F.2d 759, 768 (5th Cir. 1964); United States v. Louisiana, 225 F. Supp. 353, 393 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

15 United States v. Duke, 332 F.2d 759, 768-69 (5th Cir. 1964); United States v. Louisiana, 225 F. Supp. 353, 393 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

16 United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966),

In the broad field of civil rights, federal courts have had to contend with every form of state opposition from "massive resistance" and the "doctrine of interposition" to sophisticated circumvention in the form of subtle state involvement in private discrimination. The issues raised in the civil rights decisions test the strength of our federal system and the capability of federal courts to perform their political mission in the body politic. Civil rights issues, if I may disagree with Burke Marshall, do not "cut into the fabric of federalism."[17] Civil rights were woven into the fabric when the Constitution and the Bill of Rights replaced the Articles of Confederation. Or they became a part of the fabric of federalism when the Civil War Amendments created unique rights inherent in national citizenship. The civil rights decisions carry out the design of the federal system by making meaningful constitutionally-created and congressionally-protected rights that otherwise are meaningless or frustrated in state courts. Federal legal supremacy, a necessary consequence of the supremacy clause, is therefore essential to the integrity of judicial process and serves as an important instrumentality in making the system workable.

This is not the place for an extended study of Judge Tuttle's opinions. Nor am I the one to make the study. It is impossible for me to dissociate the Tuttle in the opinions from the Tuttle in conference, in council, in correspondence, in public, in private, in all his relations with me and with other members of the court. But one conclusion is inescapable: Judge Tuttle has made an enduring contribution to American federalism by his insistance on preserving the integrity of judicial process in federal courts. This has been accomplished within the framework of the Constitution and within accepted bounds of judicial restraint. Anyone who knows Elbert Tuttle at all knows that his sensitive conscience would not permit him to deviate from The Law: Judges above all men must obey the rules. I salute a great Judge.

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adopted en banc, 380 F.2d 385 (1967); Lockett v. Board of Educ., 342 F.2d 225 (5th Cir. 1965); Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963). For voting cases, see United States v. Palmer, 356 F.2d 951 (5th Cir. 1966); United States v. Ward, 345 F.2d 857 (5th Cir. 1965). On exclusion of Negroes from juries, see, *e.g.,* Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

17 B. MARSHALL, FEDERALISM AND CIVIL RIGHTS 81 (1964).