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EXPEDITING EQUITABLE RELIEF IN THE COURTS OF APPEALS

Jerome I. Chapman†

Among the sterling accomplishments of the Fifth Circuit Court of Appeals under the leadership of Chief Judge Tuttle, one of the finest has been the development of techniques for expediting effective appellate relief in exigent circumstances. A survey of these imaginative and valuable techniques is, I believe, an appropriate part of the *Review's* tribute to Judge Tuttle, who was instrumental in their development.

I

DELAYED APPELLATE REVIEW—A CASE IN POINT

In August 1948 Lyndon B. Johnson narrowly defeated Coke Stevenson in the Texas Democratic primary for United States Senator. Alleging irregularities in the vote count, Stevenson asked the federal district court to enjoin Johnson's certification as the party's nominee. On September 23, although the court's jurisdiction was dubious,¹ it issued a preliminary injunction. Under Texas law Johnson's name could not appear in the Democrats' column on the general election ballot unless the injunction were lifted by September 30.

Johnson needed speedy relief, but he was unable to obtain it from the Fifth Circuit, which was then in recess. On September 24, Chief Judge Hutcheson heard arguments in chambers on Johnson's motion to set aside the injunction pending appeal. Judge Hutcheson ruled that, sitting alone, he was powerless to grant any relief other than to set the case down for hearing on October 4, the next regularly scheduled court day.² Since relief on that date would have been meaningless, Johnson appealed to Justice Black of the United States Supreme Court. On September 29, after hearing lengthy arguments in open court, Justice Black ordered the injunction stayed until further order of the Supreme Court.³

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¹ See *Johnson v. Stevenson*, 170 F.2d 108, 111 (5th Cir. 1948). Moreover, the injunction was ill-advised. It could have caused great injury to Johnson and needless expense to the state, whereas denial would not have prejudiced Stevenson's ultimate right to relief.

² *Johnson v. Stevenson*, No. 12,529, 5th Cir., Sept. 24, 1948 (order on motion for stay of preliminary injunction).

³ See *Johnson v. Stevenson*, 335 U.S. 801 (1948).

The rest is anticlimactic. Johnson was immediately certified as the Democratic nominee. On October 4, the Fifth Circuit heard his appeal and, three days later, held that the district court lacked jurisdiction.⁴

The *Johnson* case—which illustrates the kind of urgent situation in which the lower court effectively becomes the court of last resort unless some form of expedited appellate review is available—raises a number of interesting questions about the appellate process. Why was a single circuit judge unable to grant the relief that a single Supreme Court justice could grant? Why was a three-judge panel, or even a two-judge quorum,⁵ unable to convene earlier? Was it really necessary for the court of appeals to forfeit jurisdiction, as a practical matter, simply because it was not scheduled to hear arguments until after meaningful relief could have been granted?

These questions are now largely academic, at least in the Fifth Circuit. Single circuit judges have not only stayed injunctions,⁶ but have also granted mandatory injunctions denied by the court below.⁷ Moreover, since the spring of 1963, a pre-assigned panel has always been available to rule on motions and emergency matters whenever the Fifth Circuit is in recess. The court has heard appeals within a few days, and sometimes even within a few hours, of the lower court's ruling.⁸ In some instances, it has acted before the lower court has made any ruling at all.⁹ In these and other ways, discussed below, the

⁴ *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948).

⁵ In *Tobin v. Ramey*, 206 F.2d 505 (5th Cir. 1953), the losing party petitioned for rehearing on the ground that only two judges had heard his appeal. In denying the petition, the court held that two judges constitute a quorum.

⁶ See, e.g., *Kelly v. Page*, No. 20,720, 5th Cir., July 25, 1962 (Tuttle, C.J.), referred to in *Kelly v. Page*, 335 F.2d 114, 117 n.2 (5th Cir. 1964).

⁷ *Woods v. Wright*, 8 RACE REL. L. REP. 445 (5th Cir. 1963) (Tuttle, C.J.) (temporary restraining order); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964) (petition seeking an order "in the nature of an injunction"); *Arrow Transp. Co. v. Southern Ry.*, No. 19,928, 5th Cir., Aug. 8, 1962 (temporary restraining order), referred to in *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 662 n.4 (1963). See also *Holmes v. Danner*, 5 RACE REL. L. REP. 1069, 1091 (5th Cir. 1961) (Tuttle, C.J.) (petition to vacate stay order granted); *Aaron v. Cooper*, 261 F.2d 97, 101 n.1 (8th Cir. 1958) (injunction by two judges while court was in adjournment).

⁸ E.g., *NAACP v. Thompson*, 321 F.2d 199 (5th Cir. 1963) (15 days); *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425 (5th Cir. 1963) (11 days); *United States v. Dallas County*, 5th Cir., July 27, 1963 (about 5 hours), referred to in *United States v. Dallas County*, 229 F. Supp. 1014, 1015 (S.D. Ala. 1964), and *Armstrong v. Board of Educ.*, 323 F.2d 333, 350-51 (5th Cir. 1963) (dissenting opinion).

⁹ *Hall v. West*, 335 F.2d 481 (5th Cir. 1964) (mandamus); *United States v. Lynd*, 301 F.2d 818 (5th Cir.), cert. denied, 371 U.S. (1962) (appeal, see p. 15 *infra*).

court has mobilized itself to do equity on short notice, as the exigencies of the situation require.

II

TECHNIQUES FOR EXPEDITING APPELLATE RELIEF

A. *Assuming Appellate Jurisdiction Early*

In order to afford expeditious appellate relief in urgent situations, it has sometimes been necessary to make appellate review available at an early stage in the litigation. When the district court enters a final judgment or an order granting or denying a preliminary injunction, invoking appellate jurisdiction raises no serious problems. But the conventional doctrine is that issuance or denial of a temporary restraining order is not appealable.¹⁰ Nevertheless, courts have properly entertained appeals from such orders where failure to do so would, as a practical matter, vitiate appellate review.

Sections 1291¹¹ and 1292(a)(1)¹² of the Judicial Code have both been relied upon as statutory bases for allowing appeals from temporary restraining orders. In *United States v. Wood*,¹³ the Government sought to enjoin an unlawful state prosecution of a civil rights worker, alleging that the very act of prosecution would have a chilling effect on a local voter-registration drive then entering a critical stage. Since the district court's denial of the temporary restraining order determined "substantial rights of the parties which will be irreparably lost if review is delayed until final judgment,"¹⁴ the court of appeals found the order sufficiently "final" to be reviewable under section 1291.¹⁵

¹⁰ See, e.g., *Connell v. Dulien Steel Prods., Inc.*, 240 F.2d 414 (5th Cir. 1957).

¹¹ 28 U.S.C. § 1291 (1964) provides:

Final Decisions of District Court

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

¹² 28 U.S.C. § 1292 (1964) provides in part:

Interlocutory Decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

¹³ 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

¹⁴ *Id.* at 778.

¹⁵ Similar tests have been applied in *Wirtz v. Powell Knitting Mills Co.*, 360 F.2d 730, 732 (2d Cir. 1966), and *Woods v. Wright*, 334 F.2d 369, 373-74 (5th Cir. 1964); cf.

In *Dilworth v. Riner*,¹⁶ also an action to enjoin an unlawful prosecution, appealability was predicated both on the concept of finality expounded in *Wood* and on section 1292(a)(1). Emphasizing that the court below had denied the temporary restraining order after an extensive hearing, the court held that the lower court's action was, in substance, the denial of a preliminary injunction.

The *Dilworth* rationale for applying section 1292(a)(1) is too broad. The fact that the trial judge holds a hearing before passing on a motion for a temporary restraining order should not in itself render his decision on the motion reviewable. It is proper to recognize, however, that in certain circumstances the decision on such a motion may have the same practical impact as an order granting or denying a preliminary injunction.¹⁷ The pragmatic test of finality under section 1291, on the other hand, seems eminently sound. Based on the traditional principle that substance governs, rather than form, the *Wood* approach recognizes that the reasons for the nonappealability of temporary restraining orders often do not apply in exigent situations, in which court orders, even though of limited duration, may be dispositive of substantial rights. Review plainly should be allowed, even with respect to technically "non-final" orders, "[w]here the effect of a district court's order, if not reviewed, is the death knell of the action"¹⁸

The logical, if conceptually awkward, extension of the pragmatic test occurred in *United States v. Lynd*.¹⁹ At the close of a fairly extensive hearing in the district court, the Government moved for a preliminary injunction against continued racial discrimination in voter registration on the part of a Mississippi County Registrar and others. Fourteen days later, the district court having failed to rule on the motion, the Government appealed.²⁰ Noting the lengthy delays previously permitted by the trial court, the court of appeals held that "[t]he movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a 'refusal,' " appealable under section 1292(a)(1).²¹

Amdur v. Lizars, 372 F.2d 103, 105-06 (4th Cir. 1967); *Empire Nat. Bank v. Penfield Coal & Coke Co.*, 354 F.2d 873 (3d Cir. 1966).

¹⁶ 343 F.2d 226 (5th Cir. 1965).

¹⁷ See 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 (2d ed. 1966).

¹⁸ *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 121 (2d Cir. 1966); accord, *Wirtz v. Powell Knitting Mills Co.*, 360 F.2d 730, 732 (2d Cir. 1966).

¹⁹ 301 F.2d 818 (5th Cir.), cert. denied, 371 U.S. 893 (1962).

²⁰ Record at 1216.

²¹ 301 F.2d at 822.

In *Davis v. Board of School Commissioners*,²² the district court had also failed to rule on a motion for a preliminary injunction against a segregated school system.²³ The court of appeals refused to allow an appeal in this case, however, apparently because there was no evidence that the trial court had been improperly dilatory. But the opinion admonished the district court that it had a "duty . . . to promptly rule on this motion" and that "this court must require prompt and reasonable starts, even displacing the District Court discretion, where local control is not desired, or is abdicated by failure to promptly act."²⁴

The principle lesson of *Lynd* and *Davis* is a sound one: a district court's inaction may be tantamount to a "denial" of a preliminary injunction. But the criteria for applying this lesson in other cases have not been clearly delineated. In *NAACP v. Thompson*,²⁵ the court proffered the following general formulation:

This question must be tested in the same way as other discretionary acts of the trial court. If the posture of the case is such that the plaintiff's rights have been so clearly established that a failure of the trial court to grant the injunctive relief would be set aside by an appellate court as an abuse of discretion, then for the trial court to fail to enter an order either granting or denying the relief sought may be considered [an appealable action] . . .²⁶

Although the certainty of a reversal and inordinate trial delay are both relevant, neither is sufficient to justify allowing an appeal²⁷ prior to any decision in the lower court. The critical question should be how urgently a ruling is needed in the particular circumstances. Where time is of the essence, the failure to rule on a motion for preliminary injunction may properly be viewed as a denial of the motion.

B. *Granting Mandatory Injunctions Pending Appeal*

Stays of lower court rulings by an appellate court are quite common and well accepted. Occasionally, however, the situation calls for affirmative appellate relief, in the nature of a "mandatory interlocutory injunction." Lawyers seem to have a phobia with regard to this form

²² 318 F.2d 63 (5th Cir. 1963) (per curiam).

²³ Instead of ruling on the motion, the trial court entered an order continuing the case pending a 30-day period for the submission of briefs. The appeal was noted 13 days later. Record at 41.

²⁴ 318 F.2d at 64.

²⁵ 321 F.2d 199 (5th Cir. 1963) (Tuttle, C.J.).

²⁶ *Id.* at 202.

²⁷ It should be noted that review of trial court inaction might also be obtained by mandamus. See *Hall v. West*, 335 F.2d 481 (5th Cir. 1964).

of relief,²⁸ but the Fifth Circuit's recent experience reveals that the device is often not the bogey some have thought it to be.

A typical example of a mandatory interlocutory injunction may be found in *Stell v. Savannah-Chatham County Board of Education*.²⁹ On May 13, 1963—nearly nine years after the Supreme Court held that states may not maintain racially segregated public schools³⁰—the district court refused to grant a preliminary injunction ordering a Georgia school board to begin desegregation. The basis of the court's decision was that it was better for all concerned to leave the schools segregated.³¹ On May 24, 1963, the court of appeals issued an injunction pending appeal. The court ordered the district court to require the school board immediately to draw up a plan for desegregating at least one grade per year, beginning with the 1963-64 school year. The order was to "remain in effect until the final determination of the appeal . . . on the merits," and, during its pendency, the trial court was directed "to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order."³²

The critical issue for an appellate court asked to accord relief such as that granted in *Stell* is one of discretion, not of power. The courts of appeals have the power to grant "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."³³ It is perhaps debatable whether an injunction not aimed simply at maintaining the status quo is in aid of "jurisdiction" or agreeable to "principles of law." But there should be no substantial doubt that a court of appeals, which can order mandatory injunctive relief after a leisurely briefing schedule and the usual delays resulting from calendar congestion, has the power to do the same thing provisionally at an earlier stage in the appeal.

A number of criteria for the exercise of this power can be derived from the recent Fifth Circuit cases. To a large extent, the criteria parallel those applicable to a motion for preliminary relief in the lower courts. Thus, where the right to provisional relief is clearly established by prior decisions, the court of appeals may properly accord such relief itself when the lower court fails in its duty to do so. In school desegrega-

²⁸ None of the cases indexed under "mandatory preliminary injunctions" in MODERN FEDERAL PRACTICE DIGEST, *Injunction* § 133 (1960), has a kind word for this class of injunctions.

²⁹ 318 F.2d 425 (5th Cir. 1963).

³⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³¹ See 318 F.2d at 427.

³² *Id.* at 428.

³³ All Writs Act, 28 U.S.C. § 1651 (1964).

tion cases, for example, the court of appeals correctly awarded interlocutory relief on a number of occasions when recalcitrant district judges repeatedly ignored the Supreme Court's mandate that school boards had to make "a prompt and reasonable start" toward desegregation.³⁴ In the more typical case, however, where the lower court's decision cannot be treated as a blatant departure from settled authority, the criteria for appellate interlocutory injunctions are somewhat more complicated.

The strength of the appellant's case on the merits, as it appears from the briefs and pleadings, has been considered important in several cases. In *Greene v. Fair*,³⁵ for example, the court denied an injunction pending appeal because the appellant had not demonstrated "that there is great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits . . ."³⁶ On the other hand, an injunction pending appeal was granted in *Harris v. Gibson*³⁷ because of the "strong probability" that the appellants would ultimately prevail, and because they would be "irreparably" injured if the injunction were denied. And in *United States v. Lynd*,³⁸ the injunction was based on the appellant's "clear showing that rights which it sought to vindicate were being violated," and that, absent provisional relief, these violations would persist "for some considerable period."³⁹

It is quite proper, in the ordinary case, that preliminary relief should be denied unless the court is persuaded by a relatively quick examination of the papers before it that the case has exceptional merit. Although cases involving injunctions are generally given calendar preference over other appeals, a litigant should not be accorded special priority merely because he filed a motion for temporary relief. The court should not be expected to give the same sort of consideration to a motion for temporary relief as it would give on plenary review.⁴⁰ Otherwise all appellants, except those desiring delay, would seek temporary relief.

³⁴ *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955). For cases awarding interlocutory relief, see, e.g., *Armstrong v. Board of Educ.*, 323 F.2d 333 (5th Cir. 1963); *Davis v. Board of School Comm'rs*, 322 F.2d 356 (5th Cir. 1963).

³⁵ 314 F.2d 200 (5th Cir. 1963) (per curiam). See also *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 635 (6th Cir. 1962); *NAACP v. Thompson*, 321 F.2d 199, 202-03 (5th Cir. 1963) (Tuttle, C.J.) (dictum).

³⁶ 314 F.2d at 202.

³⁷ 322 F.2d 780, 782 (5th Cir. 1963). See also *Woods v. Wright*, 8 RACE REL. L. REP. 445, 447 (5th Cir. 1963) (Tuttle, C.J.).

³⁸ 301 F.2d 818 (5th Cir.) (Tuttle, C.J.), cert. denied, 371 U.S. 893 (1962).

³⁹ *Id.* at 823.

⁴⁰ This is not to say that the court is unable to do so. Many cases are decided in a

Even if the appellant can quickly demonstrate a strong case, however, the mere likelihood that a case will be reversed after plenary consideration should not be sufficient for the court of appeals to exercise its injunctive power. The appropriate division of labor between trial and appellate courts rests primary responsibility for questions of provisional relief with the former, partly because the trial court is in a superior position to ascertain the facts. Appellate courts should be most reluctant to issue interlocutory injunctions where disputed factual issues are critical to the decision.⁴¹ Even where no facts are in dispute, precipitous appellate intervention at the early stages of litigation might complicate the lawsuit and actually result in a loss of time. Moreover, since there are serious problems in enforcing appellate court injunctions,⁴² the power should be used with some restraint. An interlocutory appellate injunction should usually be granted only when the issues involved are of great moment or when severe and irreparable harm will otherwise result.

An exception to the requirement that the appellant must demonstrate that he will probably prevail on the merits is made where injunctive relief is essential to keep a case alive for later appellate review. In *Jiminez v. Barker*,⁴³ for example, the Ninth Circuit, in an *ex parte* proceeding, temporarily enjoined the appellee from deporting the appellant. Had he been deported, the case would have become moot before the court could give it further consideration. Nine days later, the court dismissed the appeal *sua sponte* as frivolous.⁴⁴ Interlocutory injunctive relief seems appropriate in such circumstances. The court's interest in preserving its own jurisdiction is strong enough to override any formalistic objections to "mandatory interlocutory injunctions,"

fairly short time. Although briefs and oral arguments prepared in a hurry may not be of the highest quality, they are likely to be at least as good as the general run of briefs and arguments with which the court regularly deals.

⁴¹ In some situations, the courts of appeals may be called on to resolve factual disputes in the course of granting provisional relief. See *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966); Note, *Preliminary Injunctions for the FTC in Merger Cases*, 52 *CORNELL L.Q.* 461, 468 (1967).

⁴² The Fifth Circuit has sought to minimize enforcement problems by directing the district court to enter injunctions instead of granting them itself. On occasion, however, the court has found itself sitting to hear evidence in an action for contempt of its orders. See, e.g., *United States v. Lynd*, 349 F.2d 790 (5th Cir. 1965). Though problems involved in dealing with contempt of an appellate court are beyond the scope of this article, it should be noted that such contempts are not uncommon, particularly with respect to appellate court enforcement of administrative orders.

⁴³ 252 F.2d 550 (9th Cir. 1958).

⁴⁴ Another illustrative case is *Public Util. Comm'n v. Capitol Transit Co.*, 214 F.2d 242 (D.C. Cir. 1954).

and it should make no difference whether or not the appellant can demonstrate the probability of reversal. Of course, even here the merits of the case are relevant, and if it is manifestly clear that the appellant will *not* prevail, obviously no relief should be accorded.

C. *Expediting Implementation of the Appellate Decision*

Ordinarily, there is some delay before a judgment of the court of appeals takes effect. In the Fifth Circuit, the court's mandate usually issues twenty-one days after judgment, and is stayed automatically upon the timely filing of a petition for rehearing.⁴⁵ At times, however, the circumstances demand immediate effectiveness of the court's order.

In *Kennedy v. Bruce*,⁴⁶ for example, the district court had denied the Government's request for the production of voting records to which it was indisputably entitled. Reversing the decision, the Fifth Circuit ordered that its mandate issue forthwith "[b]ecause of long delay that has already occurred since the filing of the application that should have been granted as a matter of course . . ."⁴⁷ In other cases, mandates have issued forthwith to enjoin a continuing deprivation of constitutional rights⁴⁸ or because of the imminence of some critical event—such as the start of a new school term or the close of a voter-registration period.⁴⁹

Prior to May 31, 1963, the Fifth Circuit's Rules did not provide for expediting the issuance of the mandate. On that date, the Rules were amended to provide that the mandate would issue within the prescribed time "unless the time is shortened or enlarged by order."⁵⁰ At present, the rules of four circuits still provide for delayed mandates and mandatory stays upon the filing of petitions for rehearing.⁵¹ The rules should be amended explicitly to permit the court to effectuate its rulings forthwith where it is advisable to do so. Even in the absence of such an amendment, however, the issuance of immediate mandates probably can be accomplished in exigent cases on the basis of general equity powers.

After an appellate court's mandate issues in an equity suit, there still may be important, and time-consuming, unfinished business—the framing of the decree. Customarily, this is the task of the district court.

⁴⁵ 5TH CIR. R. 32.

⁴⁶ 298 F.2d 860 (5th Cir. 1962) (Tuttle, C.J.).

⁴⁷ *Id.* at 864.

⁴⁸ *Anderson v. City of Albany*, 321 F.2d 649, 658 (5th Cir. 1963) (Tuttle, C.J.).

⁴⁹ *Harris v. Gibson*, 322 F.2d 780, 782 (5th Cir. 1963) (school); *United States v. Lynd*, 301 F.2d 818, 823 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962) (voter registration).

⁵⁰ 5TH CIR. R. 32. For an early example of the use of the rule, see *Kennedy v. Owen*, 321 F.2d 116, 117 (5th Cir. 1963).

⁵¹ D.C. CIR. R. 25(c)-(d); 6TH CIR. R. 24; 9TH CIR. R. 26; 10TH CIR. R. 28.

In a distressing number of civil rights cases, however, southern district judges have failed to carry out the Fifth Circuit's rulings.⁵² As a result, the court of appeals has been compelled to formulate its own decrees and order their entry, sometimes verbatim, by the district courts.

Appellate courts clearly have the power to formulate decrees.⁵³ Indeed, in the early days of American law, the power was exercised regularly.⁵⁴ Nevertheless, the practice is not usually favored today. Even while framing desegregation and voting rights decrees with relative frequency, the Fifth Circuit has noted that "it is clearly more desirable for injunctive relief to be granted at the level of the trial court rather than by an appellate court if the same necessary results can be accomplished."⁵⁵

There are several reasons for preferring to leave the drafting of decrees to the district court. First, the trial judge will often be in a superior position to obtain knowledge of the facts on which the order must be based. Second, it is ordinarily a more efficient division of labor to relegate the details of the decree to the trial judge. Finally, since there is usually more than one proper way to frame the decree, comity and humility suggest deference to the judge below.

But the first reason is sometimes inapplicable, and the others are not always persuasive. Since the decree entered in many cases is drafted by the winning counsel, or jointly by both counsel, decree-framing is often merely a matter of passing on the suitability of the lawyers' handiwork. The appellate courts are probably as adept at such a task as the lower courts. This is not to say that appellate decree-framing should become common. But if factual issues need not be resolved, the traditional aversion to appellate decree-framing should not be difficult to overcome where the pressures of time or the need for uniformity⁵⁶ makes it advisable for the appellate court to frame the relief itself.

III

EMERGENCY APPELLATE REVIEW DURING RECESS

Because the judges of most circuit courts are drawn from several states, it is often difficult to convene a panel on short notice when

⁵² For a discussion of the cases and suggested solutions, see Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963).

⁵³ See *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425, 427-28 (5th Cir. 1963).

⁵⁴ R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 306 (1941).

⁵⁵ *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425, 428 (5th Cir. 1963) (Tuttle, C.J.).

⁵⁶ See Tuttle, *Equality and the Vote*, 41 N.Y.U.L. REV. 245, 261 (1966). See also Wisdom, *Chief Judge Tuttle and the Fifth Circuit*, 53 CORNELL L. REV. 6, 10-11 (1967).

the court is in recess. But emergencies are as likely to arise during recess as when the court is in session, and techniques for expediting appellate relief in urgent situations are of little value if no tribunal is available which can utilize them.

One solution to this problem is to allow a single circuit judge to act on interlocutory motions. In *Woods v. Wright*,⁵⁷ for example, the superintendent of the Birmingham school system had ordered the suspension, a few days before the end of the school term, of a large number of Negro students who had participated in civil rights demonstrations. The demonstrations were not during school time, and there was no indication that any of the students were truants. On May 22, 1963, the district court refused a temporary restraining order against the suspensions, even though they would have resulted in the students' losing credit for the entire school year. At seven o'clock that evening, Judge Tuttle heard arguments in open court. Shortly thereafter he granted the appellants' motion for a temporary injunction, ordering the superintendent to rescind his suspension edict and to do all in his power immediately to notify the suspended students that they could return to school. In view of the strength of the appellants' case and the exigencies of their situation,⁵⁸ the judge ruled that it was his "duty to maintain the status quo of these individual students to the end that their education is not illegally interfered with until the case can be argued and decided in the Court of Appeals."⁵⁹

The authorities usually cited to sustain action such as that in *Woods* are the All Writs Act⁶⁰ and Rule 62(g) of the Federal Rules of Civil Procedure.⁶¹ Reliance on the rule is misplaced. Although it recognizes that the power to grant temporary injunctions may reside in a single circuit judge, it does not itself confer the power. Reliance on the All Writs Act, on the other hand, seems sound. Such reliance has been attacked on the ground that the statute deals only with the authority of a "court," and not with that of a "judge,"⁶² but this distinction is not persuasive. While the court of appeals tradi-

⁵⁷ 8 RACE REL. L. REP. 445 (5th Cir. 1963).

⁵⁸ When the case was ultimately decided on the merits, the court strongly criticized the lower court's failure to grant relief as a violation of its "duty" to protect the movants against the "clear and imminent threat of an irreparable injury amounting to manifest oppression . . ." *Woods v. Wright*, 334 F.2d 369, 375 (5th Cir. 1964) (Jones, J.).

⁵⁹ *Woods v. Wright*, 8 RACE REL. L. REP. 445, 447 (5th Cir. 1963) (Tuttle, C.J.).

⁶⁰ 28 U.S.C. § 1651 (1964), quoted at p. 17 *supra*.

⁶¹ See, e.g., Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.) (Wright, J.), cert. denied, 377 U.S. 978 (1964); *Woods v. Wright*, 8 RACE REL. L. REP. 445, 447 (5th Cir. 1963) (Tuttle, C.J.).

⁶² Note, *The All Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324, 328 (1965).

tionally sits in three-judge panels, the Judicial Code plainly recognizes the validity of action by a "court" of fewer than three judges.⁶³ In addition, although the concept of inherent judicial power has not been carefully developed, it is at least arguable that there are basic attributes of the judicial office which sustain a single appellate judge's power to afford interlocutory relief in exigent situations.

Whatever a single judge's basic powers, the court of appeals has the power to grant affirmative interlocutory relief, and it should be able to delegate its power to one of its members where justice requires. The Rules of the Supreme Court expressly provide that "writs of injunction may be granted by any justice in cases where they might be granted by the court."⁶⁴ Most circuits also have rules with respect to interlocutory relief by a single judge which, while not as explicit as the Supreme Court's rule, may imply a delegation of the necessary authority to protect the parties and the court's jurisdiction in appropriate cases.⁶⁵ The rules generally contemplate that the single-judge action which they authorize will not substantially affect the disposition of the appeal on the merits. But this limitation should not preclude a judge from issuing mandatory orders that are necessary to preserve appellate jurisdiction. In such cases the failure to grant relief would have an even more substantial effect on the ultimate disposition of the appeal.

Approving an injunction issued by two of its judges, the court in *Aaron v. Cooper*⁶⁶ stated the arguments against permitting a single judge to render other than routine interlocutory relief.

The object of the practice [of having at least two judges rule on interlocutory injunctions] is to prevent any attempt at "shopping" as to such applications; to make the soundness of the action on such applications more certain; and to avoid the public unseemliness of a single circuit judge setting up his judgment against that of another individual judge (district judge).⁶⁷

These arguments are not dispositive. The notion that it is "unseemly" for a single circuit judge to grant interlocutory injunctions in urgent cases is not persuasive. Single Supreme Court justices often have

⁶³ 28 U.S.C. § 46(c) (1964) provides that "cases and controversies shall be heard and determined by a court or division of *not more than three judges . . .*" (Emphasis added.) See also 28 U.S.C. § 46(d) (1964) (quorum).

⁶⁴ SUP. CT. R. 51(1).

⁶⁵ Authorizing orders "preparatory to hearing": 1ST CIR. R. 4(2); 2D CIR. R. 4(b); 5TH CIR. R. 4(2); 6TH CIR. R. 3(3); 7TH CIR. R. 4(b); 8TH CIR. R. 4(c); 9TH CIR. R. 5(2); 10TH CIR. R. 4(2) (Chief or Senior Judge only). See also 1ST CIR. R. 26(5); 3D CIR. R. 30(3); 4TH CIR. R. 33; 10TH CIR. R. 22(3).

⁶⁶ 261 F.2d 97 (8th Cir. 1958).

⁶⁷ *Id.* at 101 n.1.

granted temporary relief denied by a three-judge court of appeals or an even larger state supreme court.⁶⁸ Nor does it necessarily follow that additional judges make the soundness of a decision more certain. In any event, where only one judge is available in time to afford effective relief, the question whether an extra hand will contribute substantially is academic. Finally, although judge-shopping may be a serious evil in some circumstances, fear of this practice should not require an absolute prohibition on single-judge injunctions. Less drastic, but sufficiently effective, defenses against judge-shopping may be established.⁶⁹

The soundest solution to the problem of granting effective emergency relief during recess in a geographically dispersed circuit is that adopted by the Fifth Circuit in the spring of 1963. For each week that the court is in recess, an interim panel is pre-assigned to handle both routine motions and emergency matters. Most of the work, typically amounting to ten to twenty applications per week, has been of a routine nature. This work must be performed in any event, and the assignment of these jobs to rotating panels makes for a fair allocation of the work load. More important, the regular assignment of interim panels means that when emergencies arise a three-judge body is ready for action.⁷⁰

CONCLUSION

The foregoing has been a survey and analysis of the techniques that the Fifth Circuit has utilized within this decade for quickening the pace of appellate practice in exigent circumstances. Although these techniques were developed for the most part in response to the South's massive resistance to the civil rights movement,⁷¹ they need not be limited to that region or that era. Even for the most conservative jurists, these techniques are, in the words of Cardozo, "a doctrine for

⁶⁸ See Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 1000-13 (1964).

⁶⁹ The 8th Circuit's two-judge rule (see *Aaron v. Cooper*, 261 F.2d 97, 101 n.1 (8th Cir. 1958)) does not prevent the judge for whom the moving party has shopped from shopping himself for a like-minded colleague. A better approach would be to assign to a specific judge or judges the task of considering emergency motions during each recess and to keep the assignments secret.

⁷⁰ When a hearing is called for and the assigned panel members cannot conveniently meet, the practice has been either to permit one or two of the members to conduct the hearing and report to the absent members or to "vouch in" other available judges to form a panel. In extreme cases requiring oral presentation, modern devices such as the long-distance conference telephone call might also be called into play.

⁷¹ See Tuttle, *Equality and the Vote*, 41 N.Y.U.L. Rev. 245, 257 (1966).

emergencies—a weapon of peaceful revolution to be kept under lock and key, and employed with circumspection in hours of stress and strain”⁷² For those who prefer Llewellyn’s philosophy, they are part of “the daily leeways [which] are there not for neglect but for use.”⁷³ In either view, they constitute an important development in our equity jurisprudence.

⁷² Address by Hon. Benjamin N. Cardozo, 55 N.Y. STATE BAR ASS’N REP. 263, 272 (1932).

⁷³ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 220 (1960).