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J. SKELLY WRIGHT: THE CAREER AND
CONSTITUTIONAL APPROACH OF A FEDERAL
JUDGE.

The Louisiana State University and Agricultural
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THIS DISSERTATION HAS BEEN MICROFILMED EXACTLY AS RECEIVED.
J. SHELLY WRIGHT: THE CAREER AND
CONSTITUTIONAL APPROACH OF A
FEDERAL JUDGE

A Dissertation

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy

in

The Department of Political Science

by

Patricia A. Behlar
B.A., Louisiana State University in New Orleans, 1966
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August, 1974
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FOREWORD

In the United States, judicial biography has long been popular in the field of public law. The quantity and quality of American judicial biography is held in high regard in other parts of the world. The biographical approach has both limitations and advantages. Its greatest limitation is that it is concerned with the particular rather than the general. However much information a judicial biography may yield about a particular judge, it tells one nothing about judges as a whole. If the judicial biographer infers a relationship between the subject's background and his approach to the law, that relationship cannot be transferred to the judicial process generally. There remains the possibility that the judge

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2See Clifford L. Pannam, "Judicial Biography--A Preliminary Obstacle," University of Queensland Law Journal, IV (1961), 57-72. The author laments the dearth of judicial biography in Australian legal and political literature and expresses the hope that the condition will be remedied.
who is the subject of the biography represents a unique or a rare case in the judicial process. Because of this inability to generalize, judicial biography is not popular with behaviorally oriented political scientists.¹

As Peltason has pointed out, judicial biography tends to be more popular with the "historical-philosophical-legal school." Advantages of the biographical approach are that it can be used as a medium of instruction for those who do not normally read judicial opinions; it serves as a framework for the study of ideas; and it places judicial decisions in historical context. Moreover, political scientists who are not inclined toward the writing of judicial biographies sometimes find them useful as sources of data.²

Between 1951 and 1954, numerous doctoral dissertations in public law were biographical in character—over twenty-five per cent.³ Individual judges continue to be

¹Even studies which are broader in scope than biographies cannot always yield generalizations. Because of the complexity of the appointment process, Eisenstein was unable to make generalizations about the appointment of United States Attorneys. See James Eisenstein, "Counsel for the United States: An Empirical Analysis of the Office of United States Attorney" (unpublished Ph.D. dissertation, Yale University, 1968), pp. II 32-33.


³Ibid., 215-216.
the subjects of numerous dissertations. During the period from 1960 through 1969, the vast majority of biographies, case studies, and studies of judicial philosophy have focused on Justices of the Supreme Court; only two have taken lower federal court judges for

their subjects. But the federal judges of the District Courts, the Courts of Appeals, and the specialized courts merit greater attention than they have received. As Judge Carl McGowan has pointed out, the effectiveness of the Supreme Court "depends in some considerable degree upon the supporting structure of inferior federal courts . . . ." In spite of the greater visibility of


Supreme Court Justices, it is these lower court judges who dispose of the overwhelming majority of cases arising in the federal judicial system. In 1968, the Courts of Appeals terminated 8,264 cases, and the District Courts terminated 98,365 cases.\(^1\) Obviously, the Supreme Court is able to review relatively few of the cases decided by lower court judges.

This dissertation focuses on a lower court judge. It is a judicial biography of Judge J. Skelly Wright, who is currently on the United States Court of Appeals for the District of Columbia Circuit. Since Peltason has rightly cautioned against the development of a "scholarly one-upmanship" in which the lives of obscure judges are researched,\(^2\) it is appropriate to ask, "Why Judge Wright?"

J. Skelly Wright is hardly disqualified by obscurity. He has been at the center of the controversy over school segregation.\(^3\) His handling of the segregation issue is

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\(^2\)Peltason, p. 216.  

\(^3\)See Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), in which he held de facto segregation in the District of Columbia unconstitutional. That decision evoked caustic comment from Carl Hansen, former Superintendent of Schools in the District, in his Danger in Washington: The Story of My Twenty Years in the Public Schools in the Nation's Capital (West Nyack, N.Y.: Parker Publishing Company, 1968). Segregation controversies were not new to Judge
the only part of his lengthy public career to receive a significant amount of scholarly attention.\textsuperscript{1} And yet Judge Wright has decided a wide range of constitutional issues during his more than twenty years on the federal bench as a District Judge and as a Court of Appeals Judge. This dissertation examines those issues and Judge Wright's approach to them.

Wright's legal career has been even more diverse than service at two levels of the federal judiciary. He has also served as an Assistant United States Attorney and participated in the prosecution of the "Louisiana Wright, for it was he who began the desegregation of public schools in Louisiana while he was a Federal District Judge in the Eastern District of Louisiana.

Scandals." He resigned his position as Assistant United States Attorney to go into private practice in Washington, D.C., during which time he argued two cases before the Supreme Court of the United States. In 1948, he returned to government service as United States Attorney for the Eastern District of Louisiana and served in that position until he was elevated to the federal bench. His experiences as prosecuting and defense attorney undoubtedly helped to shape his judicial approach.

Since Judge Wright probably has many productive years ahead of him, the author did not have the benefit of his papers. Without access to draft opinions, there is no way of knowing whether the Judge might have been less certain about the proper disposition of some cases than his published opinions indicate. This obstacle, however, has not prevented the writing of biographies of Supreme Court Justices while they lived, and it has not proved insurmountable in this case. If there is

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1 Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Johnson v. United States, 333 U.S. 10 (1948). According to Erwin N. Griswold, lawyers in private practice rarely argue more than one case before the Supreme Court. He was undoubtedly referring to lawyers not located in Washington. See his "Practice Before the Supreme Court of the United States," Federal Bar Journal, XXIX (Summer, 1970), 150.
consistency in the Judge's opinions, one may assume that he has resolved whatever initial doubts there might have been.¹

Judge Wright's reported opinions are available in the Federal Supplement and the Federal Reporter, Second Series. His constitutional opinions have been examined through mid-1970—more specifically, through Volume 429, Federal Reporter, Second Series. Constitutional cases in which he participated but did not write opinions were also examined. Newspapers, Senate Judiciary Subcommittee hearings, and the Congressional Record are among the sources that have been used. The Judge's off-the-bench writings are numerous. Interviews with associates and members of the Judge's family provided other sources of information.

Following the procedure used by Leo Katcher for his biography of Earl Warren,² the author informed Judge Wright of the proposed biography, and he indicated that he had no objections to it. Persons who were interviewed were told

¹For a discussion of this problem, see Howard, Mr. Justice Murphy, p. 484. Also see his "On the Fluidity of Judicial Choice," American Political Science Review, LXII (March, 1968), p. 50. The problem is not unique to studies of the judicial process. Students of legislative roll-call voting experience a similar problem and resolve it in much the same way. See Judson L. James, American Political Parties: Potential and Performance (New York: Pegasus, 1969), pp. 152-153.

that Judge Wright was aware of what was being done and were shown his letter, if they indicated a desire to see it. The interviews were unstructured. Unlike Katcher, who did not interview Warren, the author requested and received an interview with Judge Wright.

Following Woodford Howard's approach, this study emphasizes public career more than private life. It relies on Wright's own words when possible "in order to flesh out the character," as Howard put it, and provides the reader with a basis for making independent judgments.¹

Garraty has suggested that biographies should be chronological in form for the simple reason that a person's life unfolds chronologically.² This study follows Garraty's suggestion, but with a modification. Although it treats the two phases of Wright's judicial career separately, within each phase of his career the study is concerned with his approach to constitutional issues; therefore, it departs from pure chronology and is organized around constitutional issues. Each issue, however, is considered chronologically in order to illustrate any

¹Howard, Mr. Justice Murphy, pp. vii-viii. Arthur L. Goodhart also considered that "As a general rule it is best to leave a judge to speak for himself both inside and out of court." Quoted in John P. Reid, "Irresponsible and Unimaginative: The Lawyer and the Historian as Judicial Biographer," Law Library Journal, LVII (May, 1964), 135.

changes in Judge Wright's constitutional approach over time. Where background information was necessary, the author followed the acceptable procedure of drawing upon sound secondary sources.¹

The thesis of this study is that J. Skelly Wright has adopted the values of political liberalism and has been a policy-oriented judge. The term "liberalism" is used here in a manner similar to the way it is used in quantitative studies. A liberal judge is one who tends to be for the governmental agency in regulation of business cases; tends to favor the constitutional claims of individuals who raise civil rights issues in either criminal or noncriminal contexts; tends to favor tenants as opposed to landlords; and tends to favor the federal government in disputes with the states.² Walter Murphy's definition of a policy-oriented judge is adopted here. The term describes a judge "who is aware of

¹Ibid., p. 214.

²See Sheldon Goldman, "Politics, Judges, and the Administration of Justice: The Background, Recruitment, and Decisional Tendencies of the Judges on the United States Courts of Appeals, 1961-4" (unpublished Ph.D. dissertation, Harvard University, 1965), pp. 37-38. Goldman designates a "liberal" position in considerably more categories of cases than those mentioned above, but they are not applicable here because they are nonconstitutional. Also, because of the nature of Goldman's study, he is concerned only with the way a judge votes. This study goes beyond Wright's voting position.
the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims."¹ This dissertation attempts to illustrate Wright's liberalism and policy-orientation within the context of a judicial biography—a judicial biography of an eminent and controversial jurist on what has been termed the nation's second most important court.²


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ABSTRACT

The dissertation is a judicial biography of Judge J. Skelly Wright. It is based primarily on newspaper sources, Judge Wright's judicial opinions and off-the-bench writings, and personal interviews with the Judge's associates, members of the Wright family, and Judge Wright himself. The thesis of the dissertation is that Judge J. Skelly Wright has adopted the values of political liberalism and has been what Walter Murphy has called a "policy-oriented" judge; that is, a judge "who is aware of the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims."¹

Since the dissertation is a biography, its organization is basically chronological. The first chapter deals with Wright's background and pre-judicial career. It suggests that his liberal outlook has sprung from his working-class background, his pre-judicial experiences in the United States Attorney's office, and his defense of

civil rights before the Supreme Court while in private practice. The next five chapters examine the substance of Judge Wright's constitutional law as a District Judge, his elevation to the Court of Appeals for the District of Columbia Circuit, and the substance of his constitutional law while on the latter court. The dissertation examines Wright's approach to economic regulation, the Bill of Rights, and voting rights. It also examines the segregation controversies in which he has been involved, both in Louisiana and in the District of Columbia. The discussion of his constitutional law is interspersed with illustrations of how Wright has attempted to influence policy: openly reluctant application of law with which he disagrees coupled with pleas that the law be reconsidered; eloquent opinions in support of policy with which he agrees; suggesting in his opinions arguments which counsel might test in future litigation; use of the Court of Appeals' supervisory power; attempting to influence public opinion through off-the-bench activity.

The dissertation concludes with an evaluation of Judge Wright's more than twenty years of judicial service. His service is evaluated from the standpoint of technical competence, his interpretation of the judicial function, and the values he has promoted. Using the success of his opinions in surviving appeals and professional respect as criteria, the dissertation concludes that Judge Wight has
indeed been technically competent. The dissertation also makes the normative judgment that Judge Wright's policy-oriented interpretation of the judicial function is a valid one and that the values he has promoted are consistent with democratic theory.
CHAPTER I

THE ROAD TO A FEDERAL DISTRICT
JUDGESHIP

The Early Years

James Skelly Wright, born January 14, 1911, and
destined thirty-eight years later to put on the robe of
a Federal District Judge, did not emerge from the economic
and social elite of his native New Orleans. If one looks
to paternal occupation, as Schmidhauser did in his study
of Supreme Court Justices,¹ one finds that James Edward
Wright, the father of the future judge, was a plumber
by trade. James E. Wright had only an elementary school
education, but he steadily provided for his large family.
There were eight children born to the Wrights. James
Skelly, known to family and friends as Skelly, was the
third.²

Skelly was Mrs. Wright's maiden name, and it was
from the Skelly side of the family that Skelly got the

¹John R. Schmidhauser, The Supreme Court: Its
Politics, Personalities, and Procedures (New York: Holt

²Personal interviews: James Edward Wright, Jr.,
New Orleans, La., September 2, 1970, and Edward F. Wright,
political connections that were important in his early career. Mrs. Wright came from a politically active family. Her father, Jim Skelly, was a member of the Louisiana House of Representatives. Her brother, Joseph Patrick Skelly, served as Commissioner of Property on the New Orleans Commission Counsel and was one of the leaders in the Regular Democratic Organization, the political machine that controlled New Orleans politics. Although Mr. Wright stuck to his plumbing and was not active in politics, Mrs. Wright was always politically active. She served on the Parkway Commission, the Playground Commission, and was a Democratic ward leader in the Twelfth Ward, where the Wrights lived.

Their home was on Camp Street near Napoleon Avenue, which was "a neighborhood of working people." Skelly and the other Wright children attended the neighborhood public school. Their mother, in addition to her political activity, was active in the Mothers' Club of the school and played Santa Claus for the children each year. After elementary school, Skelly went on to Warren Easton High, a public school for boys, and, according

1 Ibid.


3 Interview: James E. Wright, Jr.
to his older brother, always got good grades without much effort. While at Warren Easton, he was elected a City Commissioner for Boys' Day, the only "elected office" for which he ever ran.\(^2\)

When his high school days were over, Skelly attended Loyola University on a scholarship, where he majored in philosophy.\(^3\) He was also involved in school activities, serving as business manager of the school newspaper, chairman of the dance committee, and editor of the yearbook. Obviously not lacking in social skills, the personable young man became national president of his fraternity, Alpha Delta Gamma. His graduation in 1931 did not end his association with Loyola. He enrolled in law school at that institution. His legal education, however, was obtained mainly in night classes because he had a daytime job as a teacher at Fortier High, a public school for boys. At Fortier, he taught algebra and English history and had the distinction of winning a new hat by being elected most popular teacher. Among his students were his own younger brother, Jim, and, when he substituted for an English teacher, Russell Long, who would later be elected United States Senator from

\(^1\)Interview: Edward F. Wright.


\(^3\)Interview: Edward F. Wright.
Louisiana. Wright continued to teach even after his graduation from law school in 1934.

During these early years, Skelly Wright was always interested in politics but was never active in even a minor capacity. In view of the political orientation of his family, one might have expected at least some political activity, and yet it did not happen. Although his older brother, Eddie, sometimes took Mrs. Wright to the polls and to political meetings, Skelly was not involved even to that extent. As a boy, however, he was close to the Skelly family, often staying with them at their house in Long Beach, Mississippi. His first political appointment was due to the backing of his uncle, Joe Skelly.

In 1937, there were some vacancies in the United States Attorney's office. Although Assistant United States Attorneys are formally appointed by the Attorney General, at that time appointments in the Eastern District of Louisiana were effectively made by United States Senator Allen J. Ellender. Commissioner Skelly recommended his nephew to Senator Ellender, and Wright got the appointment.

1Interview: James E. Wright, Jr.
2Interviews: Edward F. Wright, Hon. J. Skelly Wright.
3Personal interviews with Mrs. Margaret Hotard and Mrs. Joseph P. Skelly, New Orleans, La., August 29, 1970.
4Interview: Hon. J. Skelly Wright.
The new Assistant United States Attorney, fresh from the high school classroom, had a rather inauspicious beginning, losing the first case he ever tried.¹ Undeterred by a disappointing start, he was an ambitious young man who often spent his spare time reading the United States Code Annotated.² Wright worked hard and performed well in the job.³ Initially, he was assigned to the narcotics docket. He had a place to sleep at the office, and when he was working on a case, he would sometimes be there for days at a time.⁴ One narcotics case which he successfully prosecuted in 1938 involved the alleged racketeer, Carlos Marcello.⁵ As a result of the narcotics conviction, Marcello would later be ordered deported from the United States, and Wright, as a District Judge, would uphold the constitutionality of the deportation order.⁶

¹Ibid.
²Personal interview with Kathleen Ruddell, May 21, 1971. Miss Ruddell was secretary to Rene Viosca, United States Attorney for the Eastern District of Louisiana.
³Rene Viosca, his former superior, retained a highly favorable impression of the quality of Wright's service. Personal interview with the Hon. Rene A. Viosca, Judge (retired), Civil District Court, Parish of Orleans, July 20, 1971.
⁴Interview: Edward F. Wright.
⁵James E. Wright, Jr., letter of September 10, 1970 to the author.
Narcotics prosecutions, of course, were not the extent of Wright's service as Assistant United States Attorney. He assisted United States Attorney Rene Viosca in prosecuting the case of *United States v. Classic*. The case involved election fraud in the Democratic primary for the United States House of Representatives and was prosecuted under the Civil Rights Act of 1870. When the District Judge decided that Congress' power over elections did not extend to primaries, the Government took the case to the Supreme Court on direct appeal, and the Court reversed the decision, asserting that the primary was an integral part of the election process. Indirectly, the *Classic* decision had a fatal effect on white primaries.

In reviewing Wright's years as Assistant United States Attorney, it is impossible to overlook the "Louisiana Scandals," the prosecution of members of Huey Long's organization after the death of the "Kingfish." During the most intense periods of activity, the United

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3 In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court extended the principle that primaries are an integral part of the election process and held that the Fifteenth Amendment prohibited states from denying participation in primaries on the basis of race.
States Attorney's office worked night and day. Week­ends were especially busy because indictments were pre­sent­ed to the grand jury on Monday. The United States Attorney's staff was a closely knit group. Members of the staff came from opposing political factions, some were even helping to prosecute friends and acquaintances, and yet they worked well together. During this time, Wright, like the other Assistants, was kept busy per­forming such tasks as helping to draft indictments and taking witnesses before the grand jury.¹ Wright himself has said:

The high point of my service as Assistant U. S. Attorney was during the Louisiana Scandals. It was a time of high excitement—for prosecutors, anyway. I guess for defendants, too. For a young man still in his twenties, I was, more or less, thrust into a relatively important position, where I was able to learn about people as well as law.²

The Louisiana Scandals prosecutions went on almost until World War II.

Wright became involved in war-related activity even before the United States formally entered the War when the United States seized Axis vessels in American ports in the spring of 1941. Two Italian ships, the Ada 0. and the Monfiore, were then docked at Chalmette, Louisiana. Shortly before they were seized, their crews,

¹Interview: Kathleen Ruddell.
²Interview: Hon. J. Skelly Wright.
acting on instructions from Rome, damaged the machinery and left the ships to obstruct the harbor. Consequently, the United States Attorney's office took action against them. Assistant United States Attorney Wright charged the officers and crewmen with conspiracy to commit sabotage, and the grand jury returned indictments. The emotional climate was such that convictions were inevitable.¹

In December of 1941, Wright exchanged his position as Assistant United States Attorney for that of Lieutenant, j. g., in the United States Coast Guard. Initially, he did communications work in Louisiana, but eventually he got sea duty and was assigned to the Coast Guard cutter Thetis. On his first day on board, the Thetis, while on an escort run, sank a German submarine off the coast of Florida. Approximately eighteen months later he was transferred to England, where he served on the legal staff of Admiral Stark. While in England, in 1945, he married Helen Patton, a native of Washington, D. C. She was then employed by the Government and was assigned to London in connection with the

Lend-Lease Program. When Wright, by that time a Lieutenant Commander, was discharged from the Coast Guard in November of 1945, he and Mrs. Wright returned to New Orleans, where he resumed his position as Assistant United States Attorney. They were there, however, only until May of 1946, when Wright resigned his position in order to go into private practice in Washington, D. C.¹

Skelly Wright's Washington law practice was relatively brief, lasting less than two years. It occurred during the immediate post-war period; therefore, many wartime rules and regulations were still in effect and giving rise to a plethora of legal questions—questions relating to such matters as wage and price controls, rationing of commodities, and recovery of excess profits. Among Wright's clients were a shipbuilder and a steamship company, both based in New Orleans, and a Louisiana-based oil interest.² Most of his clients, in fact, were


²John L. Ingoldsby, Jr., letter of December 28, 1970, to the author. Mr. Ingoldsby, a Washington attorney, is a former law partner of Judge Wright.
Louisiana interests that were having problems with the Federal Government. By his assessment, he was operating at a relatively low level of importance.\(^1\)

Although he did not have a prominent place in the legal establishment, his Washington location provided the opportunity for him to approach, as an advocate, the very pinnacle of the American legal structure, the Supreme Court. As a public service, without fee, he espoused the cause of Willie Francis, a seventeen year old black male, whom Louisiana intended to electrocute for murder. It was to be the State's second attempt, the first having aborted due to the mechanical failure of a portable electric chair.\(^2\) In his brief and supplemental brief to the Supreme Court,\(^3\) Wright argued that a second attempt at electrocuting Francis would be a denial of equal protection of the law, since other condemned murderers sit in the chair only once, and that it would also constitute double jeopardy, violating the due process

\(^1\)Interview: Hon. J. Skelly Wright.


\(^3\)The source for the following references to attorneys' briefs is *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 374 (1947), *U.S. Supreme Court Briefs and Records* (Microfilm), October Term 1946, Roll 8, Vol. 329, filmed by the University of Chicago Library.
clause of the Fourteenth Amendment. At an earlier stage in the legal struggle over Willie Francis' life, Bertrand De Blanc, the attorney who handled his appeal to the Louisiana Supreme Court, unsuccessfully argued that another execution attempt would violate the State constitutional ban on cruel and unusual punishment. Wright picked up the reference to cruel and unusual punishment and tied it to the Fourteenth Amendment's guarantee of due process of law. John L. Ingoldsby, Jr., who was Wright's law partner, has said:

I think that he started off by not believing that the theory had any merit and that it was nothing more than a desperation move because nothing else could be thought of, but by the time he appeared to argue it in the Supreme Court, he had convinced himself that actually a "cruel and unusual punishment" was involved, or was threatened.1

The brief itself amounted to a two-pronged attack. Wright attacked the fairness of Francis' trial, noting that it had taken only eight days to try, convict, and sentence him. Francis' appointed trial lawyer had introduced no evidence in his client's behalf, nor had he appealed the conviction or moved for a new trial. Precisely what happened at the trial was unknown because there was not even a stenographic record. These charges were cogently answered, however, in the State's opposing brief. The State replied that no evidence had been

1Ingoldsby letter.
introduced in Francis' behalf because there was none. Defense counsel had no obligation to manufacture any. He did not move for a new trial or appeal because there were no grounds. As for the lack of a stenographic transcript, that was the case in thousands of Louisiana criminal trials because under the Louisiana Constitution there could be no appeal on the facts.

Wright's other line of attack was aimed at the second attempt to execute Francis. It contained a judicious mixture of intellectual and emotional appeal. Wright did not argue that the Fourteenth Amendment incorporated the double jeopardy clause of the Fifth Amendment or the cruel and unusual punishment clause of the Eighth Amendment. He considered that Willie Francis' case went beyond any theory of incorporation. The double jeopardy and cruel and unusual punishment involved in the Francis case contravened fundamental principles of liberty and justice, which were protected by the due process clause of the Fourteenth Amendment. The issue, as he framed it, was whether an individual had a right to an instant and humane death at the hands of the State, or whether the State might prolong his physical or mental suffering, either intentionally or through a blunder. If the individual did indeed have a right to an instant and humane execution, then the fact that it was prolonged through error rather than malice was irrelevant, since
the individual's suffering was the same in either case. Wright was well aware that the psychological make-up of Supreme Court Justices includes the emotions, so he described the first attempt to electrocute Francis.\footnote{More recently, he described it in a documentary on capital punishment produced by Truman Capote but which the television networks considered too controversial to telecast at a time when cases challenging the constitutionality of capital punishment were pending before the Supreme Court. See Dwight Whitney, "I Want It on the Air!" \textit{T V Guide}, XVIII (July 4, 1970), pp. 5-9.}

He said, in an unabashed appeal to the emotions:

The petitioner jumped. The chair moved. His lips puckered and swelled. What effect that current of electricity had on this man's mind or upon his soul no one will ever know. No one on this earth can tell how close to the hereafter Willie Francis actually was at the time that current of electricity was applied to his body. No living being can appreciate the suffering, the torture, both physical and mental, that Willie Francis has already undergone. No other living being has been so close to death and through no fault of his own brought back into this life so that the State of Louisiana may give a repeat performance.\footnote{Appellant's brief at 8, \textit{Louisiana ex rel. Francis v. Resweber}, 329 U.S. 374 (1947), \textit{U.S. Supreme Court Briefs and Records} (microfilm), October term 1946, Roll 8, Vol. 329, filmed by the University of Chicago Library.}

While there is little doubt that the condemned man underwent mental suffering, it was not so clear that he underwent physical suffering. Whereas Wright argued that Francis received electric current and experienced
physical pain, the State denied that any current had reached him. Both sides had supporting affidavits from witnesses. But uncertainty about the facts did not affect Wright's oral argument. On November 18, 1946, he stood before the nine Justices and argued his case well. Some of the Justices questioned him at length, and he responded with competence and conviction.¹

The decision was not rendered until January 13, 1947, the day before Wright's thirty-sixth birthday. The result was that he lost his first Supreme Court case by a close vote of five to four, and ultimately Willie Francis lost his life. Justices Reed, Vinson, Black, and Jackson rejected the double jeopardy argument because they considered the case no different in principle from retrying an individual due to an error of law and governed by Palko v. Connecticut.² Cruel and unusual punishment was not threatened because the State was not employing cruel methods of execution. As for the mental anguish, that was present in any death sentence. There was no denial of equal protection of the law because Francis was not singled out for the treatment he received; it was an accident. The charges of an unfair trial were simply unsupported by the record. The remaining vote against Francis and Wright was cast by

¹Ingoldsby letter. Mr. Ingoldsby was present in Court during the argument.

²302 U.S. 319 (1937).
Justice Frankfurter, who did not believe a second attempt to execute the petitioner would violate standards of civilized decency.¹

Wright's only other appearance before the Supreme Court occurred in December, 1947. It was a search and seizure case and, unlike the majority of cases he handled, did not originate in Louisiana. The case originated as a narcotics prosecution in the Western District of Washington and reached the Supreme Court when the defendant, a hotel proprietor, challenged the validity of the search through which the evidence against her was obtained.

The Government's position was that the search was incident to a valid arrest. The arresting officers asserted that they could smell opium when they entered the hotel hallway and that the odor came from the petitioner's apartment. Without obtaining an arrest warrant or a search warrant, they knocked on the petitioner's door. When she answered their knock, a police detective testified that he said, "I want you to consider yourself under arrest because we are going to search the room."

The Government argued that since the search was incident to a valid arrest, a search warrant was not required. Although the officer told the woman that she

¹Louisiana ex rel Francis v. Resweber, 329 U.S. 374 (1947). The four dissenters, Justices Burton, Douglas, Murphy, and Rutledge, would have remanded the matter to resolve the question of whether Francis got any current.
was under arrest because he was going to search the room, the Government contended that it was simply his inartful way of informing her that she was under arrest and that he did not consider the legal implication of his choice of words. Wright's answer was that there had been ample time to get a warrant. Since the officers did not do so, the search was unlawful, and the fruits of the search inadmissible as evidence. Nor could the search be justified as incident to a valid arrest. While arrests without warrants were permissible in some circumstances, Wright argued that standards were more stringent when a person's home was involved.¹

This time the decision was in favor of Wright's client by a margin of five to four. The opinion of the Court by Justice Jackson noted that the only reason for failing to get a search warrant was inconvenience and slight delay. That was not sufficient to justify the search of a permanent residence when flight was unlikely. He agreed that the search had been incident to an arrest, but not a valid arrest. The officers had no probable cause to make an arrest until they entered the apartment and saw that the defendant was the only person present; however, without a warrant, the entry itself was unlawful. "Thus," said Jackson, "the

¹Johnson v. United States, 333 U.S. 10 (1948), U.S. Supreme Court Briefs and Records (Microfilm), October Term 1947, Roll 1, Vol. 333, filmed by the University of Chicago Library.
Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do.\(^1\) The result of the decision was that the Department of Justice had to change its manual of instructions for United States Attorneys throughout the country in regard to searches and seizures.\(^2\)

Shortly thereafter, Wright returned to the Eastern District of Louisiana and himself became a United States Attorney. The vacancy arose in early 1948, when Herbert Christenberry was appointed to the federal bench. Since President Truman was not expected to win reelection in November, there were few candidates for what appeared to be a job without a future. For a combination of nostalgic and practical reasons, Wright decided that he would like to have the job for a short time. Before he left New Orleans, he had been First Assistant and thought he would like to take the next step. On the practical side, he thought it would help his Washington practice, to which he had every intention of returning. Since he had primarily represented New Orleans interests, a short period of service as United States Attorney would give him an opportunity to renew old contacts and establish

\(^1\)Johnson v. United States, 333 U.S. 10, 16-17 (1948).

\(^2\)Ingoldsby letter.
new ones. Consequently, he informed Senator Ellender of his interest in the position, and he got it.¹

While Wright was United States Attorney, he became involved, in a gingerly fashion, in the investigation of attacks on the civil rights of blacks, particularly voting rights. At the time, there was not much that he could do because juries would not convict and grand juries would not indict. But he presented the cases to the grand jury, more as a matter of education for the jurors than with the expectation that the law would take its course. He had grown up in a segregated society, but his years in the Coast Guard had exposed him to racial practices in other parts of the United States, as well as in other countries. His military service and his exposure to cases involving attacks on the civil rights of blacks all played a part in the lengthy and generally indeterminate process by which his own racial attitudes were transformed.²

For the most part, however, his short term as United States Attorney was uneventful. Wright has described it as "undistinguished." He had assistants who were willing and eager to work, and he let them.³ In a case involving the sale of bonds for the construction of the New Orleans Union Passenger Terminal, he did

¹Interview: Hon. J. Skelly Wright.
²Ibid.
³Ibid.
manage to generate some animosity towards himself which resurfaced at the time of his appointment to the bench.

Judicial Nomination and Confirmation

When Harry S. Truman confounded the experts and won the 1948 presidential election, it was not immediately apparent that the turn of events would benefit Wright. He still wanted to return to Washington and had indicated as much to Senator Allen J. Ellender and other political leaders. He withheld his resignation while they searched for a successor.¹

A replacement for Wright was not immediately forthcoming, and while the search went on, a vacancy developed on the Court of Appeals for the Fifth Circuit. The vacancy resulted from the death of Judge Elmo Pearce Lee, a Louisianian. It was expected that he would be replaced by another Louisianian; therefore, Louisiana's Senators submitted a list of acceptable replacements to the Department of Justice. The list included the name of J. Skelly Wright.² The nomination, however, went to a man whose name was not submitted by the Senators. On October 15, 1949, the Senate received the nomination of Judge Wayne G. Borah of the Eastern District of

¹Ibid.
Louisiana for elevation to the Court of Appeals for the Fifth Circuit. Skelly Wright was nominated to replace him as Judge for the Eastern District of Louisiana.¹

Both nominations were recommended by the American Bar Association, but Judge Borah's party affiliation made his nomination something of a surprise. He was a Republican who had received his judicial appointment from Calvin Coolidge in 1928.² Such an "out-party" nomination represented a deviation from the normal practice of making judicial appointments from the President's party.³ But there are usually political reasons for such deviations, and so there was in this instance.

Louisiana's Senators had not supported Truman in 1948, but rather had supported the Dixicrat candidacy of Strom Thurmond, and thus found themselves without much influence on the administration. Wright had not campaigned for Thurmond and had made no enemies in the

administration. He informed people he knew in the Justice Department of his interest in the vacant judgeship and was seriously considered for the position. His age, however, was an impediment. He was then thirty-eight years old, which was considered young for an appellate judge.\(^1\)

While in Washington for a Judicial Conference, Judge Joseph Hutcheson, then Chief Judge of the Fifth Circuit, recommended to Attorney General Howard McGrath that in view of Judge Borah's years of distinguished service on the District bench he be promoted to the Fifth Circuit, Court of Appeals. Judge Hutcheson's recommendation was acceptable for a number of reasons, not the least of which was that it gave the administration an opportunity to ignore the recommendations of Louisiana's Senators. The appointment of Judge Borah also permitted the administration to make a bipartisan gesture without actually increasing the number of Republicans on the bench. His


\(^2\)Interview: Hon. J. Skelly Wright.
elevation to the Fifth Circuit created a vacancy on the District Court which was filled by a Democrat—J. Skelly Wright.¹ The United States Senators from Louisiana acquiesced in the arrangement, and, in a matter of days, the Senate routinely confirmed Borah's nomination.²

Wright's nomination was not handled so expeditiously. Congress adjourned before the Senate took action on several of Truman's judicial nominations, with Skelly Wright's among those that were deferred.³ He had to be content with a recess appointment.⁴ That appointment made him the youngest Federal Judge in the United States in 1949.⁵

Not until March of the following year did the Senate take up the question of Wright's confirmation. The nominee had an impressive array of endorsements: Senators

¹Ibid.


⁴U.S. Senate, Subcommittee of the Committee on the Judiciary, "Hearings, Nomination of Hon. J. Skelly Wright to be U.S. District Judge for the Eastern District of Louisiana," (March 1, 1950), unnumbered page between p. 1 and p. 2. (Stenographic transcript in files of Senate Judiciary Committee.) Hereafter cited as Senate Judiciary Subcommittee, "Hearings, Wright Nomination to E.D. La."

⁵State-Times, August 31, 1960, p. 1A.
Ellender and Long; all the Congressmen representing the Eastern District of Louisiana; the American Bar Association; the Federal Bar Association; the Louisiana Bar Association; the New Orleans Bar Association; the Baton Rouge Bar Association; the Law Schools of Louisiana State University, Tulane University, and Loyola University; the Chief Justice of the Louisiana Supreme Court; and individual lawyers. Although many of his supporters would later forsake him, at the time the Senate considered his nomination to the District Court, only a single voice was raised in opposition.¹

Wright's confirmation was opposed by one Maurice R. Woulfe, a New Orleans attorney. He said that Wright, while serving as United States Attorney, had persecuted him by causing him to be indicted for conspiracy to commit offenses against the United States in connection with his suit to prevent the marketing of bonds for the New Orleans Union Passenger Terminal. He argued that the Grand Jury that returned the indictment was under Wright's influence. The subcommittee did not place much credence in Mr. Woulfe's charges, and Senator McCarran, the chairman of the subcommittee, expressed the opinion that Woulfe's quarrel should be with the grand jury and not with Wright.²

¹Senate Judiciary Subcommittee, "Hearing, Wright Nomination to E.D. La.," p. 2.
²Ibid., pp. 2-42.
Judge Wright was present at the hearing and was given an opportunity to answer the charges leveled against him. He did this by reading a report which he made to the Department of Justice in August of 1949. In his report, he noted that the City of New Orleans and the railroads had been acting pursuant to an order of the Interstate Commerce Commission in constructing the terminal and that Woulfe conspired to prevent free and fair competition among those desiring to bid on the bonds in violation of Title 15, Section 20 of the United States Code.\(^1\)

When, on the day before the bids were to be opened, a suit was filed raising issues that had already been fully litigated, the Mayor, the City Attorney, and the attorney for the Union Station Terminal Board called on Wright and showed him a telegram from a New York bond attorney which read: "Suggest you consider indictment under Title 15 Section 20 USCA on grounds action brought for sole purpose of preventing bidding on bonds of common carrier." Wright said he agreed to do it but gave Woulfe and others involved an opportunity to explain their position to the grand jury. Most of the other plaintiffs testified that they had been duped by Woulfe into signing what they thought was only a petition

\(^{1}\)Ibid., pp. 53-54.
regarding the location of overpasses and underpasses. They withdrew from the suit when they found out what they had really signed.\textsuperscript{1}

According to Wright's version, the grand jury was so incensed by what it heard that it immediately voted for the indictment even though he had counseled delay. Rather than persecuting Woulfe, he had actually been a restraining influence, since one member of the Justice Department had suggested broadening the indictment, and the General Counsel of the Interstate Commerce Commission hoped for a successful prosecution. Eventually, however, the indictment was \textit{nol prossed} when Woulfe's suit was withdrawn.\textsuperscript{2}

The hearing concluded when, after a short recess during which he consulted with his lawyer, Woulfe withdrew his objection to Wright.\textsuperscript{3} Three days later, the Judiciary Committee voted in executive session to report favorably on the nomination.\textsuperscript{4} On March 8, 1950, Wright was confirmed as District Judge for the Eastern District of Louisiana.\textsuperscript{5}

\begin{footnotes}
\begin{enumerate}
\item Ibid., pp. 55-57. \quad \item Ibid., pp. 57-60.
\item Ibid., pp. 64-66.
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When Skelly Wright received his judicial appointment, he brought with him to the federal bench the influences of his earlier years. His working class origin, his student years during the Great Depression; his advocacy of civil rights cases before the Supreme Court, and his exposure while in the United States Attorney's office to attacks on civil rights all coalesced to produce a lasting concern for the "have-nots" of society. As a judge, he could give expression to that concern through the policies he promoted in both the civil rights and the economic spheres.
CHAPTER II

FEDERAL DISTRICT JUDGE: ECONOMIC REGULATION

As a Federal District Judge, Skelly Wright presided over a number of controversies involving economic regulation by various governmental units. By their very nature, such regulations work to the greater advantage of some interests than others. The "losers" in other public policy arenas often try to have adverse decisions reversed by the federal judiciary. But Wright generally approved of governmental regulation of the economy, considering it necessary to prevent chaos that would hurt all parts of society. He usually exercised his discretion to support the decisions of other policy-makers, and the trend of the law simplified his task. Insofar as economic matters were concerned, the Supreme Court had adopted what was essentially a legitimizing role since 1937, and Wright followed the lead of the Supreme Court.

When there is little ambiguity in Supreme Court pronouncements, a policy-oriented judge must comply with Supreme Court policy, even that which is contrary to his own preferences, or risk reversal and consequent damage
to his professional reputation. Should a policy-oriented judge fall into professional disrepute, his ability to influence public policy would be seriously impaired. Judge Wright attempted to solve this dilemma by using his judicial opinions to express vehement disagreement with public policy he deemed objectional, even while he upheld its constitutionality. He used his opinions to bolster the authority of the governmental unit being challenged—national, state, or local—when he had no objection to that governmental unit's policy.

Defender of Economic Regulation

The regulation of transportation by state and local government was an area in which Judge Wright consistently bolstered the authority of the policy-making agency. During his first year on the bench, he was called upon to adjudicate a dispute in which the plaintiff sought protection in the Contract Clause of the Federal Constitution against an exercise of police power by local government. The plaintiff was a railroad that leased a railroad station from the City of New Orleans. The railroad interpreted its lease as conferring a right to grant a parking monopoly to Yellow Cabs and sought an injunction against the use of the parking area by other cab companies. A City ordinance, however, permitted all taxi cabs to park outside the station to pick up and

discharge passengers. Since the United States Constitution prohibits the impairment of contracts, it was up to Wright to determine whether the ordinance impaired the contract of lease between the City and the railroad.

Had the monopoly prevailed, one of its consequences would have been the denial of taxi service to the railroad's black patrons. Public accommodation laws did not exist, and Yellow Cabs were "white" cabs. Wright prevented this denial of service by supporting the City's right to exercise its police power. He looked to the specific terms of the lease and found that the City had reserved its police power over the station. Whatever else the police power might include, it includes the right and obligation of keeping public streets and areas adjacent thereto free and open to lawful competition between taxicabs. It is also part of the police power of the city to make available to incoming passengers at railroad stations adequate transportation, including taxicabs.¹

Another railroad was party to a case in the Baton Rouge Division of Louisiana's Eastern District, and Wright exercised his discretion by refusing to take jurisdiction,² thus supporting the decision of a state administrative agency. The railroad had discontinued passenger service between Slidell, Louisiana and New Orleans without the permission of the Interstate Commerce Commission or

¹Ibid., 771.

the Louisiana Public Service Commission. The latter agency ordered the service restored.

The railroad sought an injunction restraining the Public Service Commission from enforcing its order. It was their argument that enforcement of the order would result in deprivation of railroad property without due process of law. The railroad, however, had abandoned four and a half miles of track in New Orleans without the authorization of the Interstate Commerce Commission, which the law required it to have. "Certainly the railroad's position in a court of equity is a very unhappy one," remarked Wright. "It is praying for a federal injunction while standing in violation of a federal statute." Since the railroad had the facilities to perform the services in question, the Public Service Commission had authority to make such decisions regarding intrastate commerce. If the Commission's decision in any way infringed upon federal rights, those rights should be defended in the state courts. The Judge showed no inclination to undercut the institutions of state government, either administrative or judicial. The Federal District Court "though having jurisdiction, must refuse to exercise it as a matter of equitable discretion," said Wright.

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1 Ibid., 253.
3 120 F.Supp. 250, 252.
Undoubtedly the federal courts did have jurisdiction when constitutional questions were raised, and state experimentation in solving problems created by the increasing mobility of Americans often raised such constitutional questions. Judge Wright's court was the forum in which such legislation was placed under judicial scrutiny. The laws were the Louisiana Watercraft Statute,\(^1\) which was modelled on the Louisiana Nonresident Motorist Statute of 1928, and the Nonresident Motorist Statute as amended in 1956. In dealing with these laws, the Judge proved to be responsive to state needs and disinclined to hamper the state with legal doctrines which may once have had some basis in fact but which the passage of time had transformed into legal fictions.

The Watercraft Statute made nonresident operators of vessels in Louisiana waters subject to suit in state courts should the vessels be involved in accidents or collisions while within the State. In upholding the constitutionality of nonresident motorist statutes, the United States Supreme Court had read into a nonresident's use of a state's highways an implied consent to suit in the courts of that state. The Court reasoned that a state would not have permitted nonresidents to use its highways in the absence of such consent. This line of

\(^1\)According to Wright, this was the first law of its kind in the United States. See Tardiff v. Bank Line, 127 F.Supp. 945, 946 (E.D. La. 1954).
reasoning was necessary because once the nonresidents went home, they were no longer personally within the jurisdiction of the courts of other states, and in 1878, the Supreme Court, in Pennoyer v. Neff, had required that a state court have personal jurisdiction over the parties to a suit before legal action could be taken in that state's courts. Building upon Supreme Court reasoning in nonresident motorist cases, the Watercraft Statute equated the operation of a vessel by nonresidents within Louisiana waters with appointment of the Louisiana Secretary of State as attorney for service of process regarding any suit brought against the nonresidents in Louisiana courts. The Secretary of State would then notify the nonresidents of the suit against them.

In Tardiff v. Bank Line, a British corporation was being sued under the terms of the Watercraft Statute. The Bank Line admitted the constitutionality of the Nonresident Motorist Statute but attacked the constitutionality of the Watercraft Statute by attempting to distinguish it from nonresident motorist statutes. Nonresident motorist statutes were said to derive their force from a state's power to bar nonresidents from its highways. Bank Line denied, however, that one could infer any consent to being sued in state courts from the operation of a watercraft

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195 U.S. 714 (1878).

in the state's waters, since no state can exclude nonresidents from its navigable waters. This was said to be precluded by the constitutional grant of legislative power over foreign and interstate commerce to Congress and the extension of the judicial power of the United States to all admiralty cases.

In Judge Wright's estimate, these constitutional provisions did not stand in the way of a state's reasonable exercise of its police power over its waterways. The real question was whether process might be served on nonresidents through the Secretary of State because they were no longer present in the State. This Wright answered affirmatively. If the defendant had sufficient contact with the State, traditional notions of fair play were not violated.

Wright denied that there was any real distinction between the Nonresident Motorist Statute and the Watercraft Statute. It was, he said, a mere fiction that a state could exclude nonresidents from its highways. He expressed the view that the Supreme Court had only taken that position so that it could sustain state nonresident motorist statutes without having to overrule Pennoyer v. Neff.

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1Art. I, Sec. 3. 2Art. III, Sec. 2, cl. 1.
3127 F.Supp. 945, 947.
4Ibid.
The question resurfaced when the Louisiana Legislature amended its Nonresident Motorist Statute in 1956 and made it applicable to insurance companies covering non-resident motorists. The constitutionality of the amendment was questioned in Judge Wright's court by an insurance company which did not do business in Louisiana but which had written liability insurance for a nonresident of Louisiana who became involved in a traffic accident while in the State.¹

The Judge's opinion reflects his continuing belief that law should be responsive to social change. He began:

This case involves another attempt via state statute further to whittle down the once revered doctrine of Pennoyer v. Neff . . . . Like most similar attempts, it succeeds because the considerations which gave rise to the personal jurisdiction doctrine of Pennoyer v. Neff are no longer valid. Rather than physical presence in the state, all that was necessary was "minimal contacts plus 'reasonableness,' 'justice,' and 'fair play.'"² In support of this, Wright quoted from an opinion in which Justice Frankfurter brushed aside the doctrine of implied consent as the basis of state court jurisdiction in such cases. It was not consent to be sued that justified legislation of this type...
but rather "the inroad which the automobile has made on the decision of Pennoyer v. Neff . . . as it has on so many aspects of our social scene."¹

Since the automobile insurer in the case then before the court did not do business in Louisiana, Wright was left with the question of whether there was sufficient contact with the State to warrant state jurisdiction. He decided that the contact was sufficient because the test is qualitative not quantitative. In unequivocally defending the legitimacy of the State's action, he said:

If the defendant insurer harbored any doubt in the matter, it should have excluded Louisiana from the coverage of its policy. Having agreed to cover Louisiana risks, it cannot deny Louisiana courts the right to determine its liability on claims arising from accidents occurring in this state. . . . The interest of the state in the safety of her highways, the care and hospitalization of persons injured thereon, the availability within the state of witnesses to the accident, the provision in the statute for actual notice to the non-resident insurer by registered mail, all combine to make certain that the maintenance of the suit within the state does not offend "traditional notions of fair play and substantial justice."²

¹Olberding v. Illinois Central R. Co., 346 U.S. 338, 340 (1953) quoted at Ibid., 156, n. 1. Preceding Wright and Frankfurter by many years, Justice Brandeis said, "And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety." Kane v. New Jersey, 242 U.S. 160, 167 (1916).

²159 F.Supp. 155, 159.
Wright's decision was clearly motivated by recognition of the state's interest in the welfare of its people rather than by a policy orientation hostile to insurance companies. In a later case, he permitted an insurance company that would have been subject to numerous suits in Louisiana courts arising out of the same accident to remove the case to the Federal District Court under that court's diversity of citizenship jurisdiction and utilize a civil procedure called interpleader whereby all claimants were required to make their claims in one suit. It was not a case of following an unambiguous Supreme Court pronouncement because there was no precedent in the federal courts for granting interpleader in such a situation. The case was hardly visible to the general public, but it provides evidence of Wright's competence as a judge. The Pan American Fire & Casualty Company v. Revere opinion is cited in one of the leading reference works on federal procedure as a very careful opinion. 

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2 Ibid., 482.

Numerous controversies relative to transportation were decided in Judge Wright's court, but it was not the only area in which he supported State economic decisions. He firmly supported the Louisiana Supreme Court's authority to decide who held title to valuable oil land.\(^1\) A disappointed litigant attempted to have a decision of the State Supreme Court reviewed in the Federal District Court, while denying that "review" was its object. It took the position that the District Court should exercise its diversity jurisdiction and permanently enjoin enforcement of the State Supreme Court's judgment because that court had acted in violation of the Louisiana Constitution and laws, thereby denying the litigant property in violation of the due process and equal protection clauses of the Federal Constitution. This was an argument which Wright found totally unacceptable. He observed that the case was not based upon allegations of lack of notice, or hearing, or perjury, or other fraud in the state court proceedings. Plaintiff here simply alleges that the Supreme Court of Louisiana has misapplied the Louisiana law in reaching its result. If this is not seeking a review of a state court decision it represents a distinction without a difference.\(^2\)

He acknowledged that under some circumstances, the idea of sitting in judgment on another court could be


\(^2\)Ibid., 237.
appealing. "But," he added, "absent a compelling jurisdic­tional basis, it is a temptation which should be resisted."¹ And he did resist, just as he did when state legislators and administrators engaged in economic regulation.

Considering Wright's support for state policy makers in economic matters, one would hardly expect him to be less sympathetic to the national government in anti-trust prosecutions, nor was he. When a group of insurance agencies formed the New Orleans Insurance Exchange and attempted to control the market by boycotting insurance companies that sold through nonmembers of the Exchange, the United States Attorney took action against them.² The members of the Exchange found Judge Wright not at all persuaded by their arguments that their boycott did not unreasonably restrain trade and that they were not engaged in interstate commerce. He merely cited the Supreme Court's holding in United States v. Southeastern Underwriters Association³ that insurance across state lines is interstate commerce. Even though the challenged activity was local, it affected interstate commerce and so was subject to regulation.⁴ Since the members of the Exchange

¹Ibid., 240.


³322 U.S. 544 (1944).

policed one another to see that the boycott was maintained, Wright considered the group in reality a private super-governmental agency which prescribes rules for the regulation and restraint of interstate commerce, provides extra-judicial tribunals for determination and punishment of violations, and thus trenches beyond the power of the national and state legislatures, in addition to violating the Sherman Act.¹

To Wright, federalism stood as no barrier to congressional regulation of the American economy or to prosecutions for violation of Congress' regulations, even when those violations did not extend across state lines. His view of the commerce clause was an expansive one. Nor has his view of the commerce clause diminished. More recently he has said:

The new reach of the commerce clause results in part from the transfiguration of American economic life during the past century. Innovations in communications and transportation, encapsulated in the concept of an ongoing, accelerating "industrial revolution," have succeeded in nationalizing our commercial system.²

This is not to suggest that considerations of federalism meant nothing to Wright. Federalism meant that the states were free, under their police power, to regulate the economy within their political boundaries. As his decisions illustrate, he lent strong support to exercises of police power by the State of Louisiana.

¹Ibid., 920.

Critic of Limitations on Competition

In marked contrast with his general support for policy makers in economic matters was Judge Wright's vigorous condemnation of governmental decisions which had the effect of limiting competition and placing a burden on the "little man." As a policy-oriented judge, he used his discretion to hamper public policy that limited competition. He was not always free to obstruct the objectionable policy, but even when he was not, he was free to criticize.

The case of Seismograph Service Corporation v. Offshore Raydist\(^1\) gave Wright an opportunity to do more than criticize. The real culprits were some unscrupulous businessmen who took advantage of an independent inventor and secured a patent on his invention. But the case was also part of a broader conflict between the courts and the Patent Office, which took place during the 1940's and 1950's.\(^2\)

The conflict between courts and Patent Office revolved around the standard of patentability. As Wright stated the issue:

*The elusive concept of patentable novelty or invention stands at the threshold of every patent*


application. Unless it tends "to promote the Progress of Science and useful Arts" it does not meet the standard of invention set up in the Constitution itself. U. S. Const. art. 1, sec. 8.1

Wright asserted that the Supreme Court had long taken the position that the Constitution contemplates the issuance of a patent as a reward only for discovery or invention which adds to our knowledge and makes advances in useful arts possible. The purpose of granting patents has never been to stifle creativity and competition and create a class of speculative schemers who make no contribution to the advancement of useful arts. "In spite of the insistence on the part of the courts that this constitutional standard be met before a patent monopoly is recognized," said Wright, "the Patent Office has continued to patent 'every trifling device, every shadow of a shade of an idea' which is presented to it."2

In the case immediately before Judge Wright, the Patent Office had granted a patent to Seismograph Service on a system for determining, by the use of radio waves, the exact location of vessels engaged in tidelands oil exploration. The owner of Offshore Raydist, one Hastings, had been working on such a system for some time, and Seismograph was able to acquire the information necessary for securing its patent only by approaching Hastings and


2Ibid.
leading him to believe that they were interested in a joint venture. During the negotiations, they extracted his knowledge. Seismograph found out also that Hastings needed to acquire the rights to a patent held by someone else in order to perfect the system and was then negotiating to purchase those rights. Through Seismograph's patent counsel in Washington, one of his associates, and an unwitting employee of the Patent Office—termed by Wright, "a very sordid part of this case"—Seismograph was able to learn specifically which patent rights Hastings was attempting to acquire. Acting independently of Hastings, Seismograph secured the necessary rights, patented the system, and petitioned the court for an injunction to bar Hastings from infringing the patent.

In denying the request for the injunction, Wright's opinion veritably bristled with moral indignation. "And now," he said, after scathingly summarizing the facts, "Seismograph has the effrontery to come into a court of equity to ask that its patents, so obtained, be used to enjoin the work of the very man who gave them life." He made it clear that any patent obtained through fraud and dishonest dealings would not be enforced in a court of equity. Each case would have to be decided on its own merits. Said Wright:

\[^1\text{Ibid.}, 349.\]  \[^2\text{Ibid.}, 355.\]  \[^3\text{Ibid.}, 354.\]
No single test can be applied in all cases where improper acquisition of business information is charged. The inventiveness of the devious mind staggers the imagination. It is simply the difference between right and wrong, honesty and dishonesty, which is the touchstone in an issue of this kind.  

Wright declared that the patent was invalid. In his view, the Patent Office should never have granted it. The process was already being used in other fields, such as electronic engineering. Applying a known process in another field did not meet the constitutional standard of invention; "that is, it did not meet the stricter standards of the courts as opposed to the less stringent requirements of the Patent Office. Wright's felicific conclusion was that enforcement of the constitutional standard would reinstitute competition between the litigants, right the wrong done to Hastings, and free the oil industry and the general public from "the tender mercies of a monopolist."  

Wright's preference for competition was not merely an idiosyncrasy. Since the late nineteenth century, the

1Ibid., 353-354.  
2Ibid., 352-353.  
3Ibid., 356. Seismograph appealed the decision on grounds that Judge Wright had exhibited prejudice against the company. The Court of Appeals, however, affirmed the decision. In language no less cutting than Wright's, Judge Rives accused the plaintiff of "erroneous concepts of fair play in business morals and ethics" and of being guilty of "deception, knavery, and misrepresentation." Seismograph Service Corp. v. Offshore Raydist, 263 F.2d 5, 21 (5th Cir. 1958).
law has promoted competition in this country to a greater extent than it has in Europe, although it can hardly be said that the United States economy approximates the model of laissez-faire prescribed by Adam Smith. In 1890, Congress enacted the Sherman Antitrust Act,\(^1\) which outlawed contracts, combinations, and conspiracies in restraint of interstate and foreign commerce. This was followed some years later by the Clayton Act,\(^2\) which prohibited any price discrimination which might have the effect of diminishing competition. With the exception of the 1920's, the courts fostered competition and looked upon price-fixing with hostility. During the Great Depression of the 1930's, business survival assumed greater importance than competition, and Congress acted to permit states to fix prices through state "fair trade" laws.\(^3\)

Like others of its kind, the Louisiana Fair Trade Act permitted producers and retailers to enter into contracts under which the producers retained the right to

\(^1\)26 Stat. 209.
\(^2\)38 Stat. 730, chap. 323 (1914).
set minimum prices at which their products could be sold. In the 1950's, the Fair Trade Act was attacked by Schwegmann Brothers, a chain of super markets in the New Orleans metropolitan area. Schwegmann had met with some success when the Supreme Court decided that those parts of state fair trade laws applying to nonsigners of fair trade contracts were not exempt from the provisions of the Sherman Antitrust Act.\(^1\) This decision was typical of the courts' lack of sympathy for fair trade acts as compared with Congress, which is more accessible to retail lobbies. In order to exempt fair trade acts, even as they applied to nonsigners of fair trade contracts, from the provisions of the Sherman Act, Congress passed the McGuire Act,\(^2\) thus nullifying Schwegmann's earlier victory in Court.

Nevertheless, Schwegmann continued to sell products at less than fair trade prices. Eli Lilly & Company, a manufacturer of drugs, sought an injunction in the Federal District Court enjoining Schwegmann from selling Lilly's products below the fair trade minimum.\(^3\)


\(^3\)Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F.Supp. 269 (E.D. La. 1954). Lilly was represented by the law firm of John M. Harlan, whom Eisenhower would appoint to the Supreme Court. John Minor Wisdom, subsequently appointed to the Court of Appeals for the Fifth Circuit, represented Schwegmann.
Schwegmann's response was to attack the constitutionality of both the McGuire Act and the Louisiana Fair Trade Act.

In Wright, Schwegmann found a Judge who was oriented toward the consumer and was, therefore, sympathetic to his position. Wright referred to the defendant as an efficient merchant who permitted the public to reap some of the benefits of that efficiency in the form of lower prices. But the Judge's personal sympathies did not control his disposition of the case.

He felt constrained by the law, and so he rejected the defendant's arguments. Precedent was clear to him, and he followed it. In 1939, the Supreme Court had decided that fair trade acts were constitutional in Old Dearborn Distilling Co. v. Seagram Distillers Corporation. According to the rationale of the Supreme Court, manufacturers did not sell their trade-marks, brand names, or the good will attached to them when they sold their products to retailers. Fair trade laws were said to be appropriate means for enabling the manufacturer to protect the good will attached to his trade-mark. Such laws did not violate due process or permit private interests to exercise legislative power. According to the Court, private interests were merely protecting what was theirs.

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1Ibid., 270.  
2299 U.S. 183.  
3109 F.Supp. 269, 271.
Having disposed of the question of the constitutionality of the laws, Wright was still left with the question of whether the plaintiff's petition for an injunction against Schwegmann should be granted. This was dependent upon a showing that continued violation of the Fair Trade Act would result in irreparable injury to Eli Lilly & Company. Although it would appear that Schwegmann's cheaper prices would result in a greater quantity of Lilly's products being sold, that company produced affidavits in evidence to show that other retailers would take Lilly's products off their shelves rather than compete with Schwegmann's lower prices. They would sell the products of Lilly's competitors--products on which they could make higher profits under fair trade agreements. Wright reluctantly concluded that "as long as state fair trade laws are safe from constitutional attack, the manufacturer is not safe from the wrath of the retailer," and issued the injunction.¹

Wright did not have to be omniscient to know that his decision would be appealed. Schwegmann had already experienced some success in Supreme Court litigation. It was a near certainty that he would carry his fight against the state fair Trade Act up the judicial ladder. Consequently, Wright, a policy-oriented judge, produced an

¹Ibid., 272.
opinion liberally salted with footnotes containing material which might be used by a higher court, should it decide to reverse his decision.

His opinion certainly did not reflect neutrality. He noted that Schwegmann was not selling Lilly's products at a loss to attract customers. Schwegmann was making ten to fifteen per cent profit. Selling at the fair trade price would have produced a profit of thirty-five to forty per cent.\(^1\) Wright pointed out that although fair trade acts were rationalized with the argument that they were a means by which a manufacturer could protect the good will attached to his trademark, it was actually retail dealers, not manufacturers, who had been lobbying for legislation of this type.\(^2\) He even went so far as to cite a British command paper on the favorable economic effects of price competition.\(^3\)

It is reasonable to assume that lower court judges try to avoid rendering decisions that would be reversed by a higher court, since a reversal amounts to a public statement that the judge was incorrect, and

\(^1\)Ibid., 270, n. 6. In a statement to the press after the adverse decision in the District Court, John Schwegmann, Jr. stated that in some cases he would be forced to make a profit in excess of fifty per cent. He called it "profiteering at the expense of the sick." *Times-Picayune* (January 14, 1954), p. 3.


\(^3\)Ibid., 271, n. 11.
judges share the common human characteristic of aversion to public reprimand. In the Eli Lilly case, the sanction of reversal by a higher court undoubtedly affected Wright's decision. But through the opinion in which he explained the decision, Wright succeeded in structuring the issue in such a way that reversal on the proper grounds would mean not that he was wrong, but that he was correct.

In the Eli Lilly case, Wright almost pleaded to be reversed. He indicated that it might be time to re-examine critically the economic implications of fair trade legislation. In his words:

> Perhaps after twenty years of experience under fair trade acts, the Supreme Court may conclude that the real purpose of these acts is not to protect the good will of the manufacturer, and that price-fixing under these acts is not an appropriate means to that perfectly legitimate end, but is in fact an end in itself. In other words, it may well be found that the real purpose of fair trade legislation is to protect the retailer from competition with another retailer who, because of his efficient merchandising methods, is able to reduce his distributive costs and consequently his retail prices. That is a matter, however, which addresses itself to the Supreme Court.

Schwegmann, as expected, announced that he would appeal.

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1Walter F. Murphy, Elements of Judicial Strategy, p. 104.


3Times-Picayune, January 14, 1953, p. 3.
A three-judge panel of the Fifth Circuit Court of Appeals affirmed Wright's decision, but not unanimously. Judge Edwin Holmes, the dissenter, relied heavily on Wright's opinion but was less concerned with precedent than with the burden placed on the consumer by fair trade legislation. Like Wright, he referred to Schwegmann as an efficient retailer. The majority, however, agreed that Old Dearborn was still controlling and that any changes in its status could emanate only from the Supreme Court. The Supreme Court itself declined the invitation to re-examine the issue, and Wright got less satisfaction than usual from one of his decisions surviving appeals. An economic policy of healthy competition would have been more satisfying.

But when competition is healthy and when it is destructive often depends upon one's vantage point. To the small dairies in the state, the Louisiana Orderly Milk Marketing Act of 1958, which closely regulated the dairy industry and permitted the Agriculture Commission to set minimum prices with the approval of two-thirds of the producers, was considered legislation to prevent chaos.

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2Ibid., 793.
3Ibid., 792.
4Cert. denied 346 U.S. 856 (1953); reh. denied 346 U.S. 905 (1953).
in the industry and prevent business failures on the part of small dairies. But Wright's policy orientation was toward the interests of the unorganized consumer, which made the arguments of the large processors and distributors who attacked the Orderly Milk Marketing Act appealing. They argued that the Act impeded healthy competition, causing consumers to pay higher prices, and depriving them, the large producers, of property without due process of law. As with the Fair Trade Act, the issue of the delegation of legislative power to private interests was also raised. The large producers sought to have a three-judge District Court declare the Act unconstitutional. ¹

In an opinion in which he was joined by Judges Wisdom and Christenberry, Wright declined to overturn the legislation, but neither did he sustain it. Since similar litigation was in the state courts, the Federal District Court would wait until Louisiana's highest tribunal had interpreted the Act. ² The court struck a small blow for competition by granting a temporary injunction enjoining enforcement of the Act until the State courts could decide the issue on the merits. The injunction was justified on grounds that it would prevent irreparable damage to the plaintiffs while the matter was

²Ibid., 199.
being litigated in the State courts. Under State law, enforcement could not have been enjoined pending appeals; therefore, Wright and his colleagues acted.¹

But the kinds of action taken by Judge Wright when dealing with price-fixing did not include the assignment of constitutional status to the policy of price competition that he favored. He did not have the law on his side as he did when dealing with the Patent Office. It was established law that State governments might fix prices and might also permit private interests to participate. It was constitutional public policy but, in Wright's opinion, unwise policy which would place on the consumer the burden of higher prices.

This does not mean that his only alternative was passive acquiescence. It does mean that he was constrained by his judicial role to resort to less spectacular forms of judicial activity than declaring acts unconstitutional. His preference for an economic policy fostering lower consumer prices was expressed by attacking the premise on which price-fixing in the form of fair trade acts had been based—that they were a means by which manufacturers could protect the reputation of their products. He pointed out that they were really devices by which retailers raised their prices to artificially high levels. He was, in effect, sending out

¹Ibid.
a message to his judicial superiors on the Supreme Court requesting that they redefine the bounds within which he, as a lower court judge, was required to work. ¹

When newly enacted state legislation would have decreased price competition in the dairy industry, there was the temporary injunction to maintain the status quo pending state court interpretation of the statute. Although Wright and his colleagues disavowed any such intention, ² there was, of course, a possibility that state court interpretation would be influenced by federal judges' attitudes toward price-fixing. But the possibility was not realized. ³

In his economic decisions as a District Judge, Wright found one overriding principle grounded in the Constitution: That all levels of government might legitimately regulate the economy. Federalism meant that state and local government might enforce economic regulation.

¹ Martin Shapiro has discussed Supreme Court activity in terms of messages directed to lower court judges, administrators, and lawyers in The Supreme Court and Administrative Agencies (New York: The Free Press, 1968). Obviously, messages may also move in the opposite direction.

² 169 F.Supp. 197, 199.

³ The act was upheld in Schwegmann Bros. Giant Supermarkets v. McCrory, 112 So.2d 606 (1959). Oddly enough, some years later the State Supreme Court found the price-fixing provisions of the Liquor Control Act unconstitutional. It was called an "ignoble flight from competition," which was not related to "the general health, morals, or welfare of the people." Reynolds v. Louisiana Board of Alcoholic Beverage Control, 185 So.2d 794, 812 (1966).
regulations within their political boundaries. The concept of federalism, however, stood as no barrier to the national government's prosecution of activity which was entirely local, if that activity affected interstate commerce. As the following chapter illustrates, federalism was even less a barrier to the judicial protection of civil rights.
CHAPTER III

FEDERAL DISTRICT JUDGE: CIVIL RIGHTS

While J. Skelly Wright gained professional stature through his disposition of cases involving economic regulation, he became visible to a larger public through his civil rights decisions. This chapter examines his commitment to the values of fairness in criminal procedure and equal access to the ballot, as well as his growing commitment to racial equality in schools and public facilities.

Criminal Procedure

When Skelly Wright took his seat on the Federal District bench, his position required him to decide considerably fewer constitutional cases involving questions of criminal procedure than would face him later in the District of Columbia Circuit. But some such cases were brought before him, and his early career gave him a balanced background from which to judge these constitutional claims.

While his experience in arguing appeals before the Supreme Court made him sensitive to the procedural rights of defendants, his prosecutorial background made

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him aware that not all constitutional claims raised by criminal defendants were valid ones. He defined the judicial role as that of guardian of constitutional guarantees, but he weighed each case on its merits. He could set aside the sentence of a young man who, without assistance of counsel and before an information was drawn up against him, had agreed to plead guilty to a crime. There had been a violation of the defendant's "constitutional right to be represented by counsel at every stage in the proceeding . . . ."¹ But Wright could also reject the due process claims of two convicted rapists when only one of several witnesses later changed his story. Said Wright:

This court has, in effect, retried the petitioners for the offense of which they have been convicted. While it must be owned that the conviction of a Negro of rape of a white female in this state should be subjected to the severest scrutiny, on the basis of the record made here, this court cannot say that these petitioners were denied due process of law.

His rejection of some constitutional claims hardly reflected insensitivity to matters of criminal procedure. He was, in fact, highly critical of existing practice and constitutional interpretation regarding interrogation, confessions, and the right to counsel, though his

position as a lower court judge denied him the degree of freedom in making new law that Supreme Court Justices have. When a black man convicted in the state courts of murder sought to relitigate certain issues in habeas corpus proceedings, Wright was constrained by the state of the law to decide against him. The conviction was based upon an allegedly coerced confession made without assistance of counsel while being held in custody pending investigation of some robberies. The defendant did not obtain counsel until the court appointed a lawyer to defend him—a lawyer whom Wright described as "a good one."

At the trial, the judge heard testimony from the defendant and the police officer who was said to have coerced him. The judge ruled that the confession was not the product of coercion and was admissible. Wright permitted the ruling to stand, but it was clear that he was not at all satisfied with the law which he had to apply. His opinion was as critical of the Supreme Court as of the police. Said Wright:

1United States ex rel. Goins v. Sigler, 162 F.Supp. 256 (E.D. La. 1958) aff'd, 272 F.2d 148 (5th Cir. 1959). This was the second hearing on the matter. The first hearing was oral; there were no written responses. At its conclusion, Judge Wright dismissed the petition for habeas corpus and vacated the stay of execution. On appeal, the Court of Appeals for the Fifth Circuit ordered a new hearing with written responses. 250 F.2d 128 (1957). The new hearing did not change the result.
Unquestionably, Goins did not receive all the constitutional protection a court sworn to uphold the Constitution would have liked him to have received. He should have had a lawyer sooner than he did. He should not have been subjected, while in custody, to examination by police at odd hours of the night. In spite of the fact that definite progress is being made in the protection of constitutional rights, much is yet to be accomplished. Police do not insist on having a lawyer represent an accused from the moment of his arrest and some persons accused of crime unfortunately have no way of obtaining counsel until the court appoints one to represent them. In the interim, violation of constitutional rights remains an ever present possibility. . . . Here petitioner's failure to obtain counsel earlier cannot be attributed to the State of Louisiana. . . . The state court transcript shows he had a fair trial and a vigorous defense. . . . He has had due process of law under the Fourteenth Amendment as that clause is currently being interpreted.¹ (Emphasis added).

Obviously, Wright would not be lax in protecting the procedural rights to be defined by the "Warren Court." When he became a Circuit Judge and a much greater proportion of his work involved constitutional questions related to criminal procedure, he often spoke out against procedures leading to unequal swearing contests between defendants and police over the circumstances surrounding confessions.

Voting Rights

As with criminal procedure, Wright's exposure to voting rights cases began early in his judicial career.

His initial response to racial discrimination in the registration of voters was a brief, eight-paragraph opinion in which he simply noted that the complaining blacks possessed all the qualifications to vote under Louisiana law, and he enjoined the offending registrar from further refusing to register eligible blacks.\(^1\) The registrar publicly stated that he would abide by the decision.\(^2\)

Several years later, in the turmoil following the desegregation decisions, Citizens Council members and the Registrar of Voters collaborated to purge the rolls of eighty-five per cent of the blacks registered to vote in Washington Parish. The United States sought injunctive relief for them under the Civil Rights Act of 1957.\(^3\) The defendants admitted that they were acting under color of state law, but they took the position that the section in question was unconstitutional because it could be interpreted as permitting the United States to take action against private individuals and thus exceeded the reach of the Fifteenth Amendment.\(^4\)

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\(^1\) *Dean v. Thomas*, 93 F.Supp. 129 (E.D. La. 1950).
\(^3\) 42 U.S.C.A., sec. 1971 (c).
Wright found this so lacking in merit that he would have simply dismissed it without saying more if it were not for the fact that another District Court had accepted such an argument and held the same section unconstitutional.\(^1\) That court's decision was, of course, not binding on Judge Wright, and he exercised his discretion by refusing to follow it.\(^2\) He noted that although the statute did not use the specific words "under color of law," it used words having the same meaning. He did not stop there; he took the opportunity to lecture the defendants:

In a democratic society there is no greater offense than illegally depriving a citizen of his right to vote. Such discrimination strikes at the very foundation of constitutional government. This offense is compounded when, as alleged here, it is committed under the guise of enforcing the law. The United States has made the solemn charge that these defendants have committed such an offense. Instead of challenging the constitutionality of the Civil Rights Act of 1957, these defendants should be searching their souls to see if this charge is well founded.\(^3\)

The Judge found that the charge was indeed well founded. He ordered the stricken names replaced on


\(^2\)It was ultimately reversed by the Supreme Court. **United States v. Raines**, 362 U.S. 59 (1960).

\(^3\)177 F.Supp. 355, 360.
the voting rolls. Persons whose names were stricken were not required to reregister.¹

The disfranchisement scheme had been a form of retaliation against civil rights activity and court decisions aimed at erasing racial barriers in various public facilities, particularly the schools. Judge Skelly Wright was one of the leading actors in the desegregation controversy.

The Desegregation Controversy

Wright's part in the desegregation controversy preceded the Supreme Court's decision in Brown v. Board of Education.² Only six months after the Senate confirmed his nomination as District Judge, a black took legal action to gain admission to the law school of Louisiana State University.³ Since the case preceded Brown, Judges and opposing counsel operated within the confines of the "separate but equal" doctrine. But that doctrine ceased to be very confining when the Supreme

³Morning Advocate, September 14, 1950, p. 1; Times-Picayune, September 14, 1950, p. 36. The black litigant was represented by local counsel, A. P. Tureaud, as well as by Thurgood Marshall, then general counsel for the NAACP.
Court, in *Sweatt v. Painter*, a case which also dealt with legal education, looked beyond the comparison of physical facilities and took intangibles, such as the reputation of schools, into consideration.

Still, "separate but equal" remained the rule, and Roy Wilson's attorneys did not challenge it. Nor did they attack the admission policies of the University as a whole, stating at pretrial conference that their suit applied to the Law School only. In court argument revolved around the *Sweatt* case with the attorney for the University attempting to distinguish the two cases. He pointed out that the State of Louisiana provided legal education for blacks at the Law School of Southern University. It was an established institution, not one hastily constructed, as in the *Sweatt* case, simply to avoid having to admit a Negro applicant to the state university. Thurgood Marshall, counsel for Wilson, responded that Southern, although available to blacks, was inferior to the Law School of Louisiana State University. He argued that the physical facilities were inferior and that none of the Southern law professors

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1. *339 U.S. 629 (1950).*

advanced degrees or the previous teaching experience of law professors at Louisiana State University.¹

Judge Wright, the junior member of the three-judge court, wrote the unanimous opinion.² It was a very different kind of opinion from those he would write later. It consisted almost entirely of a listing of findings of fact and conclusions of law. He did not question that the State had acted in good faith, but among the findings was the fact that Southern Law School, although not the product of a desperation effort to keep from having to admit Wilson to Louisiana State University, was only three years old, while the law school at Louisiana State had been in operation since 1906. The plant of the latter school greatly exceeded the plant value of Southern. When Southern's law school was established, the State Board of Education declared that it was intended to meet the highest possible standards. "However," observed Wright, "the policy of the State Board of Education has not in this comparatively short period of time been effectuated and the Law School of Southern University does not afford to plaintiff educational advantages equal or substantially equal to those that he

¹Morning Advocate, September 30, 1950, p. 1; Times-Picayune, September 30, 1950, p. 11.
he would receive if admitted to the Department of Law of the Louisiana State University and Agricultural and Mechanical College. The court held that the equal protection clause of the Fourteenth Amendment required that Wilson be admitted to the law school of Louisiana State University.

The opinion provides no evidence that Wright disapproved of the "separate but equal" doctrine. He applied it without a hint of criticism, although on other occasions he did not hesitate to express disapproval of the law which his position required him to apply. One may speculate as to why Wright did not exhibit the same degree of resistance to the "separate but equal" doctrine as he did to the Fair Trade Act (see preceding chapter), for example.

A number of possibilities suggest themselves. One significant factor is that the Wilson case occurred during Wright's "freshman" year on the bench and, as a new judge, he may have been reluctant to provoke controversy, especially since the plaintiff did not question "separate but equal." There is also the fact that in the Wilson case he was not writing only for himself as he was in the "Fair Trade" case. In Wilson, he had to take into consideration the views of the other two members of the

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1Ibid., 987.
2Ibid., 988.
other two members of the court. Another possibility (and, in fact, Judge Wright's own explanation\(^1\)) is that he got what he considered a just result and so felt no need to question established constitutional doctrine. And, finally, there is the possibility that the opinion contains no evidence of disapproval of "separate but equal" simply because Wright did not disapprove of it and only assigned constitutional status to the value of desegregation after the Supreme Court did.

If that was the case, it would not be long before the Supreme Court would reject "separate but equal". Louisiana officials, however, were unprepared. In commenting on impending Supreme Court action, the Governor of Louisiana indicated that the State would be unaffected by the decision. He said that the State had provided "adequate" facilities for Negroes, given equal salaries to Negro teachers, and greatly improved the Negro schools.\(^2\)

Segregation cases continued to be litigated within the context of "separate but equal." The rule was binding on federal judges until the Supreme Court decided otherwise, and the Supreme Court had not yet acted when A. P. Tureaud, Jr. sued in Wright's court claiming that

\(^1\)Interview: Hon. J. Skelly Wright.

\(^2\)Times-Picayune, June 9, 1953, p. 18.
he was denied admission because of his race to the six-year arts and sciences and law program at Louisiana State University. As in the Wilson case, Wright found that Southern University and Louisiana State University were not substantially equal. He held that "in conformity with the equal protection clause of the Fourteenth Amendment, that the plaintiff and all others similarly qualified and situated are entitled to educational advantages and opportunities available within the state, at the same time, upon the same terms and substantially equal to those which the state provides and makes available to other residents and citizens of the state."  

What followed Wright's decision in Tureaud v. Board of Supervisors, in 1953, vividly illustrates how the ambiguities of law often allow different alternatives to lower court judges. Before the Supreme Court rendered its decision in Brown, Wright's Tureaud decision was reversed by a three-judge panel of the Court of Appeals for the Fifth Circuit, Judge Richard Rives dissenting.  

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1In this program, a student spends three years in the College of Arts and Sciences and three years in Law School, with the first year of Law School serving to complete requirements for an arts and sciences degree.


3Board of Supervisors v. Tureaud, 207 F.2d 807 (5th Cir. 1953).
The basis for the reversal was not that Wright had erred in his finding of inequality, but that he had exceeded his jurisdiction by acting alone rather than convening a three-judge court as the law requires when the constitutionality of a state statute or state constitutional provision is at issue.\(^1\) Judge Rives not only expressed his disagreement with the majority but was lavish in his praise of Judge Wright for "commendably . . . shoul-der[Ing] the responsibility imposed upon him by law."\(^2\) Rives denied that the constitutionality of any of Louisiana's statutes or constitutional provisions was involved, and so there was no need for a three-judge court. The Louisiana Constitution required "separate free public schools." Rives assumed that meant "separate but equal," leaving Wright with only the factual determination of whether the schools were equal. He said:

The learned district judge, himself a distinguished Louisiana lawyer, assumed that the State Constitu-
tion would be given that reasonable construction of which it was susceptible so as not to be viola-
tive of the Federal Constitution. I think the district judge was right.\(^3\)

The matter did not end there; it went to the Supreme Court. In a brief per curiam opinion rendered one week

\(^1\)Ibid., 809.
\(^2\)Ibid., 810.
\(^3\)Ibid., 812.
after the first Brown decision, the Court said:

The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded for consideration in the light of the Segregation Cases decided May 17, 1954, Brown v. Board of Education . . . and conditions that now prevail.¹

The final four words of that per curiam opinion provided fuel for continuing the obstruction of Wright's decision.

The Fifth Circuit Court sent instructions to Wright which were simply a paraphrase of the Supreme Court's per curiam opinion. Without further hearings, Wright again enjoined the Board of Supervisors of Louisiana State University, and the Board of Supervisors again appealed. The appeal was heard by Judges Rives and Cameron of the Fifth Circuit and Judge Dawkins of the Western District of Louisiana. Writing for himself and Judge Dawkins, Rives said that Wright's decision was affirmed. The fact that it had been based upon "separate but equal" did not invalidate the result, even though the Supreme Court had since rejected "separate but equal."

The Brown decision itself was the precedent. That case involved more than Oliver Brown's appeal. One of the cases included under the title Brown v. Board of Education was an appeal from a state court decision which had

granted relief to black litigants under the "separate but equal" doctrine. In Brown, the Supreme Court affirmed that decision.¹

Judge Cameron, in dissent, expressed the opinion that Wright had disobeyed the mandates of the Fifth Circuit Court and the Supreme Court in failing to hold further hearings. He seized upon the final words of the Supreme Court's per curiam opinion. As Cameron put it:

It is not conceived that the District Court could escape the duty to consider "conditions that now prevail" on so technical a ground as that mentioned in the majority opinion. The order of the Supreme Court and its mandate made it clear that it was introducing an entirely new ingredient into the case and was commanding that the District Court consider evidence with respect to it. The District Court had no jurisdiction to dispose of the case in any manner except in strict obedience to the command of the Supreme Court and of this court.²

Judge Rives responded to this by taking the rather unusual step of writing a concurring opinion, even though he had himself written the majority opinion. Speaking solely for himself, he noted that the Supreme Court had vacated the judgment of the Court of Appeals (from which Rives had dissented) and not the District Court's judgment.³ While it was perfectly clear to Cameron that the Supreme Court required Wright to hold new hearings, it

¹Board of Supervisors v. Tureaud, 225 F.2d 434 (1955). See also Blaustein and Ferguson, pp. 48-49.
²225 F.2d 434, 437.
³Ibid., 446.
was equally clear to Rives that he was not so required. "If such facilities are actually unequal in other ways in addition to being separate," he pointed out, "then we judicially know, certainly in the case of a college as distinguished from the grade public schools, that there are no 'conditions that now prevail' which would authorize denying equal opportunities to all students, regardless of race."\(^1\)

When it appeared that the matter had finally been settled, Judge Dawkins decided to change sides. He went over to Cameron's side and, on rehearing, Wright was again reversed. Rives, apparently feeling that he had already said it all, dissented without opinion.\(^2\) Wright and Rives were finally vindicated when the Court of Appeals for the Fifth Circuit, sitting \textit{en banc}, reversed the most recent decision and reinstated the previous one, adopting Rives' reasoning.\(^3\) The litigation, which was begun before the first \textit{Brown} decision, was not concluded until 1956, almost a year after the second \textit{Brown} decision, when the Supreme Court denied certiorari.\(^4\)

\(^1\)\textit{Ibid.}, 447.


\(^3\)\textit{Board of Supervisors v. Tureaud}, 228 F.2d 895 (1956).

It was in that same year that a frenzy of segregationist activity took place throughout the South. In response to the Brown decisions, the Louisiana legislature, like that of numerous other Southern states, passed a resolution of interposition. The doctrine of interposition rests upon the theory that the Federal Union was formed by a compact among the states, and that each state may determine for itself when the compact has been violated. The Supreme Court's disposition of the Brown cases was said to be such a violation, and the State of Louisiana resolved to place its authority between the Supreme Court and the people.

The legislature followed the interposition resolution with a number of segregation acts which, according to the Times-Picayune, dealt "with everything from square dances to law suits." In attempting to maintain segregation in Louisiana colleges, the legislature made a


2July 15, 1956, p. 23.
certificate of eligibility and good moral character
signed by an applicant's high school principal and the
State Superintendent of Education a requisite for admis-
sion to a state institution of higher learning. The
legislature also provided that any public school prin-
cipal who signed such a certificate for a black student
would lose his job. Wright referred to this legisla-
tion as

another attempt by the Louisiana Legislature to
preserve, by law, segregation in the educational
institutions of the state. This attempt, while
more subtle than its predecessor, nevertheless
fails because the Fourteenth Amendment of the
Constitution "nullifies sophisticated as well as
simple-minded modes of discrimination. 1

Compliance with decisions ordering the desegrega-
tion of institutions of higher education and other
public facilities 2 did not come quickly or easily. But
Wright did what he could to hasten the process. Usually
a person who objects to an administrative decision must


2 Judge Wright enjoined enforcement of state laws
requiring segregation in public transportation. Davis v.
Morrison, Civil No. 6418 (E.D. La. May 24, 1957), Race
Relations Law Reporter, II (October, 1957), 996 aff'd,
252 F.2d 102 (5th Cir. 1958). He also enjoined the
enforcement of laws denying blacks the use of New Orleans
City Park. Detiege v. New Orleans City Park Improvement
Assoc., Civil No. 2601 (E.D. La. May 27, 1957). He joined
Judges Wisdom and Christenberry in holding unconstitu-
tional a statute prohibiting interracial athletic con-
149 (E.D. La. 1958). He joined Judges Wisdom and West in
enjoining interstate bus companies from complying with a
state court order requiring segregation in their terminal
facilities. United States v. Pitcher, Civil No. 2516
exhaust administrative remedies before taking his complaint to the courts. But Wright decided that it would be useless for a black denied admission to Louisiana State University to exhaust administrative remedies when he already had a letter from the Registrar advising him that it was against the Board of Supervisors' policy to admit blacks.¹ Nor did Judge Wright require that blacks break laws requiring segregated public transportation before the laws could be tested. He said, "It is not the Court's view that in our civilization it is necessary to have incidents requiring arrests to have the rights of people declared."²

Decisions banning segregation in public facilities and in state colleges were very unpopular, but the desegregation of public schools below the college level produced the most intense resistance. After a three-judge court decided that three judges were not required,³ the desegregation of Orleans Parish public schools was primarily under the direction of Judge Wright. He assigned constitutional status to the equal treatment of

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¹Unreported. The decision was affirmed in Board of Supervisors v. Fleming, 265 F.2d 736 (5th Cir. 1959).

²Quoted at 252 F.2d 102, 103.

public school children, regardless of race, and vigorously exercised the powers of his office to promote that policy.

Had Wright been at all inclined to frustrate the integration of the schools, the arguments of the School Board gave him ample opportunity, but he was not inclined to permit technicalities to obscure the merits of the case.¹ He was particularly impatient with the School Board's argument that the suit should be dismissed because the plaintiffs had not exhausted administrative remedies. They argued that one of the 1954 segregation laws provided the opportunity to obtain a hearing from the Superintendent of Schools and the School Board, if the school assignment of any particular child was not satisfactory. Wright replied that the Act was invalid because it was part of the unconstitutional scheme to preserve segregation. Even when considered alone, the Act was invalid because it delegated legislative authority without any standards on which to base the assignment of children. He noted that the Board had, in fact, been asked on three occasions to assign children to

¹The School Board won only a minor point when Wright agreed that the new Orleans Parish Superintendent of Schools had not been properly made a defendant. He added, "The objection to the balance of the amended complaint, however, is highly technical in nature, and even if well taken, would not result in a dismissal of the action, but only in giving the plaintiffs time to amend." Bush v. Orleans Parish School Board, 138 F.Supp. 337, 340 (E.D. La. 1956).
nonsegregated schools. The Board had refused and indicated that it would resist desegregation. Wright said:

To remit each of these minor children and the thousands of others similarly situated to thousands of administrative hearings before this Board, to seek the relief to which the Supreme Court of the United States has said they are entitled, would be a vain and useless gesture, unworthy of a court of equity. It would be a travesty in which this court will not participate.¹

Judge Wright issued a decree which could hardly be described as radical. He followed the "all deliberate speed" formula of the second Brown decision and gave the School Board considerable leeway in determining how to meet its constitutional responsibilities.² The decree merely enjoined the School Board from permitting or requiring segregation after the time required to make

¹Ibid., 341.

²In the early stages of the controversy, he also gave the state courts opportunity to fulfill their responsibilities voluntarily. When a state court illegally enjoined the NAACP from conducting activities in Louisiana, Wright instructed the organization to use state appellate procedure. See Lewis v. Louisiana ex rel. Leblanc, Civil No. 1678 (E.D. La. April 4, 1956), Race Relations Law Reporter, I (June, 1956), 576. When the state courts would not protect the rights of the NAACP, the federal district court finally acted. See Louisiana ex rel. Le Blanc v. Lewis, No. 55,899 (19th Jud. Dist. Ct., Parish of East Baton Rouge, La., April 24, 1956), Race Relations Law Reporter, I (June, 1956), 571; Louisiana ex rel. Gremillion v. NAACP, (Ct. of Appeal of La., 1st Cir., November 26, 1956), Race Relations Law Reporter, II (February, 1957), 185; Times-Picayune, November 27, 1956, p. 1; Louisiana ex rel. Gremillion v. NAACP, 181 F.Supp. 37 (E.D. La. 1960).
arrangements for desegregation "with all deliberate speed," as required by the Supreme Court. But the language of Wright's opinion provided a clue that although he was cognizant of the problems attendant desegregation, he did not consider the "all deliberate speed" formula a license for inaction. His words were:

The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.¹

Wright retained jurisdiction of the matter. The "all deliberate speed" decree was not the end of the desegregation controversy but only the beginning. The State legislature took control of the Orleans Parish schools and gave to a legislative committee the power to classify schools according to race. The committee's classification was subject to confirmation by the full legislature. Unlike his first Bush decision, Wright did not write a lengthy opinion when this latest issue was presented to him. He noted that litigation in the Bush controversy was long-standing and simply said that segregation by law is a violation of the Fourteenth Amendment. "Any legal artifice, however cleverly contrived, ¹Ibid.
which would circumvent this ruling, and others predicated on it, is unconstitutional on its face. Such an artifice is the statute in suit."¹

By mid-July of 1959, the Orleans Parish School Board had taken no action towards implementing the "all deliberate speed" decree. Noting that the Board's only action had been to appeal his decision,² Wright ordered the Board to produce a plan and suggested, but did not order, a grade-a-year plan. Although the NAACP wanted an order that would require desegregation by September, 1959, Judge Wright gave the Board until March, 1960, to produce its plan and hopefully generate some support. He realized that the peaceful desegregation of the schools was not solely in the hands of the School Board. "Our news media, our public and private leaders, our church men, and the public generally will share the responsibility for that decision," he said, and he expressed confidence that they would be on the side of law and order.³

The campaign in the Democratic gubernatorial primary indicated that Wright's confidence was not well

²The decision was affirmed in Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir. 1957), cert. denied 354 U.S. 921 (1957).
well placed. Jimmie Davis, the ultimate victor at the polls, stressed his past support for segregation and "separate but equal." Another leading contender was de Lesseps S. Morrison, Mayor of New Orleans, who was considered a "moderate" on the issue of race. He too extended segregationist credentials to the public. As evidence that he could handle the race problem, he said that there had been no racial trouble and no integration in New Orleans.\(^1\) The following spring, Attorney General Jack Gremillion pledged to preserve "our Southern Way of Life" at a convention of the Louisiana Peace Officers' Association.\(^2\) The School Board got no support from City or State political leaders. It was equally lacking in support from the economic elite of New Orleans.\(^3\)

A week before the Board's desegregation plan was due, Gerald Rault, special attorney for the School Board, moved that Wright vacate his earlier orders. In denying the motion, Wright said:

> I will tell you now publicly what I have already told you in chambers. I am not going to hold any member of the school board in contempt if they do not present a plan by May 16, but if

\(^1\) *Times-Picayune*, October 9, 1959, pp. 6, 13.

\(^2\) *Morning Advocate*, April 28, 1960, p. 11.

they do not present a plan, I will come up with one. There will be a plan.¹

He was sympathetic to the Board's lonely position, but he would yield no further. The School Board's conscientious implementation of a plan it had itself devised would undoubtedly have been a more effective way to desegregate the schools, but even if that were not forthcoming, Wright was determined that the process begin.

On May 16, the Board informed Wright that it had no desegregation plan and that only the legislature could desegregate the schools consistent with state law. Within a matter of hours, Judge Wright filed his own plan.² The order was as follows:

   It is ordered that beginning with the opening of school in September, 1960, all public schools in the City of New Orleans shall be desegregated in accordance with the following Plan:

   A. All children entering the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.

   B. Children may be transferred from one school to another, provided such transfers are not based on consideration of race.³

¹Times-Picayune, May 17, 1960, p. 3.
The School Board's response to Wright's order was ambivalent. A majority of the members recognized the inevitability of integration and hoped to keep the schools open. The President of the School Board called upon civic organizations for assistance in preparing the public so that violence might be avoided. But the unpopularity of cooperating too closely with the federal court led the School Board to create an impression of resisting. The Board passed a motion calling on the Governor to interpose the sovereignty of the State between itself and the federal court. It was hoped that the Governor would invoke the doctrine of interposition during the summer so that the matter could be settled by the time the schools opened.¹

The Governor was then pledging open and segregated schools in September, but he did not say how he would accomplish the feat.² The Attorney General took the matter into the state court system, and a state district court enjoined the School Board from complying with Judge Wright's desegregation order.³ The activity of

the Governor and the Attorney General prompted the NAACP to move that those officials be made defendants in the Bush case. Their motion was granted by Judges Rives, Christenberry, and Wright, and a hearing was set for August 23.\(^1\) The following day, Governor Davis took control of the schools, and some white parents joined the suit seeking an injunction to enjoin the closure of the schools.\(^2\)

Following a postponement resulting from the federal marshal's inability to serve notice on Davis and Gremillion, a stormy hearing took place. During the proceedings, Gremillion called the court a den of iniquity and a kangaroo court. His performance, which he concluded by flinging down a law book and walking out of the courtroom, resulted only in a contempt citation.\(^3\) The three-judge court rendered a decision unfavorable to the Attorney General and the segregationist cause. In this latest phase of the Bush litigation, the court held unconstitutional a plethora of segregation statutes. The Governor, the Attorney General, the State Treasurer, and the State Superintendent of Schools were all enjoined from enforcement of the unconstitutional

\(^1\)Times-Picayune, August 17, 1960, p. 1.

\(^2\)Ibid., August 18, 1960, pp. 1, 3.

\(^3\)Ibid., August 27, 1960, pp. 1, 2; Race Relations Law Reporter, V (Fall, 1960), 668-669.
statutes and from further interference with the operation of the schools. The court also enjoined the Orleans Parish Civil District Court Judge from enforcing his injunction against the School Board. The School Board was ordered to comply with Judge Wright's decree.¹

Shortly thereafter, Wright met with School Board and NAACP attorneys. The School Board asked for a one-year delay in implementing the desegregation order. The NAACP opposed any delay at all in desegregating the schools. Wright took a middle course. He indicated that he was impressed by the good faith of the School Board and agreed that intervention by the Governor and the Civil District Court made orderly compliance with the desegregation order by the time the schools opened virtually impossible. He, therefore, granted a delay of nine and a half weeks, during which time the Board could determine how many blacks desired to be transferred and could plan their course of action with the Judge. According to the delay order, the schools would be integrated on November 14, 1960.²

The NAACP was not pleased with the delay. Thurgood Marshall and A. P. Tureaud attempted to have Judge Richard

²State Times, August 31, 1960, p. 1; Times-Picayune, August 31, 1960, pp. 1, 3.
Rives, Chief Judge of the Fifth Circuit, set aside the delay order. For that purpose, they phoned Rives at his home in Montgomery, Alabama. When Rives denied their request, they filed no formal motion and acquiesced in the delay.¹

The School Board finally began to prepare for integration, while at the same time attempting to hold the number of black children admitted to predominantly white schools to a minimum. Since the schools would be segregated when classes began, blacks would have to take the initiative and request that their children be transferred. In determining which requests to grant, school administrators considered an elaborate list of factors taken from the Louisiana Pupil Placement Act, which was enacted during the regular legislative session of 1960. The Board also determined that racially integrated classes would be segregated according to sex.²

As a result of the elaborate transfer procedure used by the Board, only five black children were to attend previously all white schools, and state officials attempted to block even that. The Governor called the legislature into special session (four others would follow), and the legislature proceeded to pass an

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Interposition Act and an administration-sponsored segregation "package." Some New Orleans legislators resisted, not because they favored integration, but because they wanted to keep the schools open and because the segregation measures jeopardized New Orleans home rule status.¹ Nor were legislators the only State officials to take action. The State Superintendent of Schools, Shelby Jackson, declared November 14 a statewide holiday in order to interfere with the desegregation schedule.²

There was nothing subtle about the actions of state officials, and Judge Wright's reaction was equally lacking in subtlety. When New Orleanians picked up their morning newspapers on Monday, November 14, they found bold-print headlines across the front page: "U.S. Judge Enjoins Legislature." In his office late Sunday night, Wright had issued an injunction against the entire legislature, the Governor, Lieutenant Governor, Attorney General, State Superintendent of Schools, and numerous other officials. His temporary restraining order forbade the use of sergeants-at-arms at the integrated schools to prevent integration. It forbade any action taking control of the schools from the


elected School Board, including dismissal of the local superintendent of schools or the School Board's attorney. The temporary restraining order also enjoined the execution of Shelby Jackson's declaration of holiday or any action "interfering with or circumventing the orders of this court."\(^1\) Jackson himself was cited for contempt of court.\(^2\) When on Monday the legislature passed a resolution addressing the School Board out of office, Wright enjoined the legislature for the second time within twenty-four hours.\(^3\)

On November 18, Judges Rives and Christenberry joined Wright to conduct hearings on the constitutionality of the Interposition Act and the "segregation package" which followed it. At the hearing, the attorney for the School Board and the attorney for the NAACP agreed that interposition had no validity.\(^4\) In the per curiam opinion which followed, the Judges rejected the State's contention that the legislature was beyond the federal courts' injunctive power. The court noted that neither the legislature nor any of its members had been enjoined from the performance of legislative functions, but when they attempt to act as administrators of local schools, they

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\(^1\) *Times-Picayune*, November 14, 1960, p. 1.


can be restrained from implementing unconstitutional measures.\(^1\) As for the Interposition Act, it had been on the books in resolution form since 1956. That the legislature gave it statutory form in 1960 did not change its character. According to the court:

> It neither requires nor denies. It is a mere statement of principles, a political polemic, which provides the predicate for the second segregation package of 1960, the legislation in suit. Its unconstitutional premise /that a state legislature may overrule a Supreme Court decision/ strikes with nullity all that it would support.\(^2\)

What the Interposition Act attempted to support was the reenactment, with slight changes in wording, of statutes previously held unconstitutional. The court considered it all part of a general scheme to deny rights and so was unconstitutional. When the School Board requested another delay because of its precarious legal and financial status, the court refused. In the court's view, there had been too much delay already, and there was no evidence that further delay would do any good.\(^3\)

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\(^2\)188 F.Supp. 916, 926-927.

\(^3\)Ibid., 928-930. For full text of the Interposition Act, see Ibid., 930-936. For a summary of the acts and resolutions held unconstitutional, see "Appendix B," Ibid., 936-938.
The School Board's precarious financial situation resulted from House Concurrent Resolution No. 2 of the second special session of 1960. The resolution advised the banks that the Board had no authority to withdraw, borrow, or spend money. The State disavowed any responsibility for the debts of the School Board, and the City of New Orleans, which collects taxes due the School Board, decided to withhold that money until it was ascertained who was running the schools.¹ The legislature's position, in spite of federal court action, was that it was itself running the schools. It transferred the funds of the Orleans Parish School Board to the legislative account and warned the banks that they dealt with the School Board at their own risk. Since the School Board was in the untenable position of being under court order to integrate while lacking the funds with which to do so, it took its problem to Judge Wright.²

Initially, Wright dismissed the petition that four New Orleans banks be enjoined from refusing to honor School Board checks because the matter had not been brought within the framework of the Bush case.³ Taking


³Ibid., December 6, 1960, pp. 3, 4.
the cue, the Board filed the complaint as a part of the Bush case, asking that a three-judge court enjoin the City of New Orleans from failing to turn over taxes levied by the Board and collected by the City and enjoin the banks from refusing to honor School Board checks.\footnote{Ibid., December 7, 1960, p. 8.} At the subsequent hearing, Governor Davis was in court for the first time in the long course of the litigation. Also present was United States Attorney M. Hepburn Many, defending the United States' interest in maintaining the integrity of the judicial process. Although the legislature had fired the School Board's attorney, the court permitted him to stay in order to facilitate an orderly presentation of the case. When the hearing was concluded, the court took under advisement the petition to enjoin the banks, as well as petitions by the NAACP and the United States Attorney that the court enjoin enforcement of the legislature's latest attempt to set up a new school board.\footnote{Ibid., December 17, 1960, pp. 1, 16.}

Shortly thereafter, the court issued the requested injunctions, noting that ever since the School Board had belatedly attempted to comply with court orders, it had been harassed by the legislature and other state officials. During this harassment, it sought, through
its counsel, the aid of the court in fulfilling its responsibilities. By firing the School Board's attorney, the legislature attempted to prevent the Board's seeking court aid and thus was one of the "less sophisticated attempts" to preserve segregation.¹

As the desegregation controversy continued into 1961, Shelby Jackson, the Superintendent of Schools, continued to ignore requests of the Orleans Parish School Board for funds, textbooks, supplies, and certification of teachers. As a result, United States Attorney M. Hepburn Many moved that contempt charges against Jackson be expanded. At the contempt hearing, Wright was not vindictive and probably hoped to avoid creating a martyr for the segregationist cause. Many, who has been described as "a longtime Republican who reputedly hated Louisiana Democrats more than he hated integration,"² appeared to want nothing less than a jail sentence for Jackson.

During the proceedings, Wright asked Jackson whether his attorney's statement that he intended to comply with court injunctions and not interfere with the operations of the elected School Board was correct. Jackson replied, "I cannot legally recognize the dismissed

²Crain, p. 288.
Orleans parish school board because I am forbidden by the legislature, but I am not interfering and will not interfere."¹ His answer satisfied no one, least of all Many, who wanted to proceed with the case. Wright, however, pressed Jackson for a more definite answer. Jackson replied that he would have to comply with injunctions of the court until they were changed.

Addressing the United States Attorney, Wright said:

Mr. Jackson has stated that he intends to comply with the injunctions and that he will not interfere. It is obvious that Mr. Jackson has experienced some emotional strain. Wouldn't we be justified in persevering in the hope that he will be faithful? Let's not stir the water. What this situation needs is calmness, not agitation. That might be better than assuming that he will not comply. Regardless of his actions in the past, I am inclined to give him a chance, even if you think it is a small chance, and I think it is a small chance.²

Many remained dissatisfied with Jackson's answers, but the other two members of the judicial threesome supported Wright. Jackson was given three weeks to purge himself of civil contempt.³ Without officially recognizing the School Board, he did begin to provide needed financial resources for the Orleans school system.⁴

As the 1960-61 school year drew to a close, the NAACP attacked the School Board's pupil placement plan

as inconsistent with Judge Wright's desegregation order. The NAACP sought to have all New Orleans public schools integrated when the schools opened the following September. The plan put into effect by the School Board had not softened resistance to integration, but had resulted in the integration of only two schools in close proximity to one another, thereby permitting segregationists to concentrate their opposition. But Wright did not immediately move in the direction that the NAACP desired. The School Board had the opportunity to move forward with desegregation on its own initiative but chose instead to move backward. It resolved to resegregate one of the previously integrated schools by designating it an all-black school and transferring the white students, but not the few black children enrolled, to other schools. The Board's justification for the action was that it would permit 1,350 blacks to be taken off a platoon system. In other words, "separate" was the price of "equal." In response to a petition by the NAACP on behalf of the black children who would be denied the right to a desegregated education, Wright granted a temporary restraining order, and the Board rescinded its resolution.

A later hearing investigating the complaint that the School Board was using complex administrative procedure

to limit desegregation revealed that the Board's efforts were indeed half-hearted ones. In his testimony, the Superintendent of Schools for Orleans Parish admitted that the School Board had no plans for accelerating the pace of integration for the 1962-63 school year even though over 5,000 black children and no white children were being platooned on a part-time schedule. The School Board attributed these conditions to lack of money, noting that taxes to produce revenue for the schools had been voted down in two recent elections.

If the parents of a black first grader attempted to transfer their child out of these crowded conditions and into a white school, they were required to file an application for transfer. In deciding whether to permit the transfer, school administrators evaluated the child's health, home environment, and score on the aptitude test which the Pupil Placement Act required of all first grade children, but not of children in the grades not immediately affected by desegregation. If the transfer took place but the child did not make a satisfactory adjustment, the Board could transfer him back to his original school. The School Board justified the addition of this procedure to Wright's desegregation plan as a measure to

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see that the children were "intellectually and psychologically acceptable" in the schools to which they sought to be transferred.¹

In one of his last decisions as a District Judge, Wright rejected the rationalization proffered by the School Board and held that the Pupil Placement Act was unconstitutional as applied. In Wright's words:

This failure to test all pupils is the constitutional vice in the Board's testing program. However valid a pupil placement act may be on its face, it may not be selectively applied. Moreover, where a school system is segregated, there is no constitutional basis whatever for using a pupil placement law. A pupil placement law may be validly applied in an integrated school system, and then only where no consideration is based on race. To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form.²

But he mitigated his criticism of the School Board somewhat by his sympathetic understanding of the plight of its members. He pointed out that

The School Board here occupies an unenviable position. Its members, elected to serve without pay, have sought conscientiously, albeit reluctantly, to comply with the law on order of this court. Their reward for this service has been economic reprisal and personal recrimination from many of their constituents who have allowed hate to overcome their better judgment. But the plight of the Board cannot affect the rights of school children whose skin color is no choice of their own. These children have a right to accept the constitutional promise of equality before the law, an equality we profess to all the world.³

¹Ibid., 570.
²Ibid., 570-571.
³Ibid., 571.
He knew from his own experience the kind of abuse the members of the School Board were undergoing. He and some of his relatives received abusive and anonymous telephone calls. His home was under police protection for a time, and at one point a cross was burned on his lawn.

Judge Wright's part in the controversy over the desegregation of the Orleans Parish School System came to an end in April, 1962. He amended his grade-a-year order to require the desegregation of grades one through six when the schools opened in September, 1962. His amended order prohibited the application of the Pupil Placement Act as long as a dual school system continued to exist. The *Times-Picayune* predicted that Wright's order would result in an exodus of whites from the public schools, leaving an almost total black enrollment as in the District of Columbia.

The order, however, was not implemented. When Judge Wright left New Orleans to take his seat on the Court of Appeals for the District of Columbia Circuit, his successor, Judge Frank Ellis, retreated from this

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1Personal interviews: Mrs. Margaret Hotard; James E. Wright, Jr.

2*New York Times*, June 1, 1958, p. 41.


4April 5, 1962, p. 16.
position.\textsuperscript{1} This retreat was called the School Board's biggest victory in the prolonged fight to preserve segregation.\textsuperscript{2}

While some fought to preserve the system of segregated education, others fought to dismantle it, and all of the fighting was not over the Orleans Parish public schools. Four years after his order to the Orleans Parish School Board to desegregate with all deliberate speed, Wright conducted hearings on petitions to enjoin the East Baton Rouge Parish School Board, the St. Helena Parish School Board, and trade schools operated by the State from continuing to operate on a segregated basis.\textsuperscript{3} Over the objections of blacks who wanted him to require submission of desegregation plans by a specific date and of whites who wanted no integration,\textsuperscript{4} Judge Wright issued "all deliberate speed" orders and allowed these officials the same opportunity to live up to their constitutional responsibilities that he had allowed the Orleans Parish School Board.\textsuperscript{5}


\textsuperscript{3}Morning Advocate, March 15, 1960, p. 1A


\textsuperscript{5}Angel v. Louisiana State Bd. of Educ., Civil No. 1658 (E.D. La. May 24, 1960), aff'd 287 F.2d 33 (5th Cir. 1961); Davis v. East Baton Rouge Parish School Board,
The reaction of the St. Helena Parish School Board was to attempt to close the schools pursuant to a referendum authorized by an act of the legislature. Before rendering a decision on the constitutionality of the act, Judges Wisdom, Christenberry, and Wright invited opinions from the Attorneys General of all the States on two questions: (1) Would a state deprive children of due process of law or equal protection of the laws if it ceased to provide public education? (2) Would the answer be the same if it were done on a local option basis following a vote reflecting the consent of the electorate?\(^1\) The court also ordered opposing counsel to supplement the record with additional evidence on the act's legislative history, the private school facilities available to both races in St. Helena Parish, the amount and source of funds expended on education in the Parish, and any other facts pertinent to the question of constitutionality.\(^2\)

Oral argument was held on August 4, 1961. In presenting the State's case, Attorney General Gremillion


\(^2\) Times-Picayune, May 2, 1961, p. 12.
took the position that public education was a privilege, not a right. Harold Greene, from the Civil Rights Division of the Department of Justice (The United States participated as amicus curiae.), argued that closure of the schools in St. Helena Parish would constitute denial of equal protection based upon race and geography. He also urged that denial of voting rights would be involved, since Louisiana had a literacy requirement.  

On August 30, 1961, Judges Wisdom, Christenberry, and Wright held the school closing law unconstitutional. They considered it an obvious attempt to deny constitutional rights to blacks, and, as long as public schools were in operation in other parts of the State, the legislation denied equal protection of the laws to all citizens of St. Helena Parish. The Judges commented on the poverty of the Parish, which made it unlikely that accreditable private schools could operate without state financial support. "It would be a miracle," they said, if a single accreditable private school for Negroes could be established in St. Helena within the foreseeable future. To speak of this law as operating equally is to equate equal protection with the equality Anatole France spoke of: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

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1Ibid., August 5, 1961, pp. 1, 3.
3Ibid., 655.
The court made it clear that the local option provision was irrelevant. No political subdivision might do what the state itself is prohibited from doing, and a majority may not lawfully invade the constitutional rights of a minority even if it first holds a referendum. A school board could not evade the requirements of the Brown decisions by closing the public schools under its jurisdiction.¹

A case involving a private school, Tulane University, indicates that a fundamental change in Wright's attitude toward segregated education had taken place since his uncritical acceptance of the "separate but equal" doctrine during the pre-Brown years. Apparently the Brown decisions provided the needed spark. The determined application of those decisions in the face of obstruction and defiance by state and local officials then pushed him to a position in advance of the Supreme Court.

The Tulane case² grew out of the University's compliance with the provision of Paul Tulane's will that his money be used for the education of "white young persons." Two blacks who had been denied admission to Tulane because of their race charged that they had been

¹Ibid., 658-659.

denied equal protection of the laws in violation of the Fourteenth Amendment. The Fourteenth Amendment, however, prohibits discriminatory state action; it does not reach discrimination by private individuals or private institutions. ¹

Tulane insisted that it was a private institution and, therefore, immune from the requirements of the equal protection clause. The administrators of the University would have been perfectly happy, however, to have the racial restriction in Paul Tulane's will declared unenforceable so that they might voluntarily admit blacks. Their motives were not particularly egalitarian. Some of their applications for foundation grants had been rejected because of their admissions policy. ²

Judge Wright gave the Tulane administrators only half of what they wanted. Citing Shelley v. Kraemer, ³ he held that the racial restriction in the bequest was unenforceable in the courts, as the administrators had hoped he would, but he did not find that Tulane was beyond the reach of the Fourteenth Amendment, although they had hoped he would do that too. The University had

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¹ See the Civil Rights Cases, 108 U.S. 3 (1883).
² 203 F.Supp. 855, 858.
³ 334 U.S. 1 (1948).
been originally a state institution called the University of Louisiana. As a result of an arrangement with the State, the administrators of the Tulane Fund took over the operation of the university, but, as late as 1944, the legislature instructed the university to award scholarships without regard to sex, indicating to Wright that the State had not completely abandoned control. Tulane still had a unique tax exemption, revenue from certain land not relinquished by the State, and had the Governor, the State Superintendent of Education, and the Mayor of New Orleans on its governing board.1 Wright held that all of this indicated enough state involvement to make the Fourteenth Amendment binding on the administrators of Tulane University.

Although Wright's judgment was vacated by his successor,2 it can be reconciled with the concept of "state action" being developed by the Supreme Court.3 It was what he said rather than what he held that went beyond the existing state of the law. Wright questioned whether any school could be so "private" as to be immune to the equal protection clause. He viewed education as

1 203 F.Supp. 855, 859.


a matter of great public interest. The magnitude of that interest was such that the state bore responsibility for the conduct of all educational institutions. When the state chose to carry out a part of its educational responsibilities through nongovernmental agencies, it passed on to those agencies the constitutional prohibitions binding on the state. He said:

Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how "private" they may claim to be. But the special circumstances of this case do not require us to go so far.¹

The change in Wright's approach to the segregation issue becomes even more apparent when the above statement is contrasted with a statement of Justice William O. Douglas on the same subject. Justice Douglas is generally conceded to be the most liberal and activist member of the United States Supreme Court. He said, "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered."²

Judge Wright had advanced beyond prevailing constitutional interpretation regarding racial discrimination as he had in matters of criminal procedure. In dealing with

¹203 F.Supp. 855, 859.
criminal procedure, he attempted to influence opinion by openly criticizing prevailing policy from the bench. In dealing with voting rights, more efficacious action was open to him. Since equal access to the ballot was a value to which Wright assigned constitutional status, he rejected a decision by another court that would have obstructed the Government's ability to protect voting rights. His commitment to the value of racial equality in schools and public facilities grew with the law, but at a faster rate. He began by accepting the "separate but equal" doctrine uncritically, although always applying it in favor of complaining blacks. After the Supreme Court rejected "separate but equal," Wright gave state and local officials the opportunity to fulfill their constitutional responsibilities voluntarily but refused to accept defiance wrapped in the rhetoric of state sovereignty. To further the policy of desegregation, he went so far as to issue injunctions against the entire State legislature. When his role in the controversy came to an end, his interpretation of the equal protection requirements of the Fourteenth Amendment had advanced beyond that of the Supreme Court. The political support and political opposition which he generated directly affected the course of his judicial career.
CHAPTER IV

THE COURT OF APPEALS AND CONTROVERSIES
OVER RACIAL DISCRIMINATION

Because of the manner in which he exercised the discretion of his office to promote the value of racial equality during the desegregation controversy in Louisiana, J. Skelly Wright became a standard with which to compare other members or prospective members of the federal judiciary. The closer a judge approached the "Wright model," the easier became the work of Justice Department lawyers in the Civil Rights Division.¹ The further a nominee to the federal bench departed from the "Wright model," the more likely he was to win the approval of Senator James Eastland of Mississippi, Chairman of the Senate Judiciary Committee. Eastland asked Judge Frank Ellis, who succeeded to Wright's District Judgeship, whether he

intended to pattern himself after Wright. The same question had been put to Judge Robert Ainsworth at the hearing on his nomination.¹

Those who disapproved of the manner in which Wright discharged his duties during the desegregation controversy in Louisiana used all the political leverage at their disposal to prevent his elevation to the Court of Appeals for the Fifth Circuit. Because the Court of Appeals for the Fifth Circuit hears appeals from the District Courts in the states of the deep South, appointment to that court would have considerably broadened Wright's influence over desegregation policy. He was elevated instead to the Court of Appeals for the District of Columbia Circuit. In the District of Columbia, he continued to act against racial discrimination, although he did so as much through his off-the-bench activity as through his decisions. The blocked promotion to the Court of Appeals for the Fifth Circuit did not completely remove Wright from racial discrimination cases, but they were far less numerous in the District of Columbia Circuit than in the Fifth Circuit.

¹U.S. Senate, Subcommittee of the Committee on the Judiciary, "Hearing, Nomination of Frank B. Ellis to be U.S. District Judge for the Eastern District of Louisiana," (February 23, 1962), p. 7. (Stenographic transcript in files of Senate Judiciary Committee.)
The Politics of Promotion

The possibility that Wright's career would suffer from his conscientious application of the principles of the Brown decisions first became evident two years before he was actually appointed to a higher court. The occasion was a debate on voting rights in the United States Senate. During the course of debate, Senator Joseph Clark of Pennsylvania quoted from one of Wright's opinions, and Senator Paul Douglas of Illinois noted that it had been affirmed by the Supreme Court. Senator Eastland of Mississippi remarked that one could not win arguments by quoting candidates, and "Judge Wright wants to be a Supreme Court Justice."¹ Senator Douglas provoked laughter in the Senate chamber when he facetiously inquired whether that meant that the Senator from Louisiana (Russell Long) and the Senator from Mississippi (Eastland) had endorsed Wright. Eastland answered that his position on the Judiciary Committee prevented him from commenting further except to say that Wright would be treated fairly if nominated. Douglas retorted, "All I can say is that if he is appointed to the Supreme Bench, then, in view of the present composition of the Judiciary Committee, he is going to have a very rough time."²

²Ibid.
Senator Clark was not yet ready to let the matter drop. He wanted proof that Wright was secretly a candidate for a Supreme Court seat. Eastland told Clark that the proof would come if the nomination were made. Until then, he made the statement on his "word as a Senator." Eastland did not stop there, however, but said that some of Judge Wright's rulings were proof of his candidacy.¹

The Judge's political opponents were even more numerous in the Louisiana legislature. At one point, Representative W. K. Brown of Grant Parish said on the floor of the House, "You are no God, Skelly Wright. You are not even a competent judge, Skelly Wright. You are a traitor to this state."²

When rumors again circulated that Wright was in line for a promotion, this time to the Court of Appeals for the Fifth Circuit,³ members of the legislature attempted to retaliate against him by opposing any promotion.⁴ Representative Wellborn Jack of Caddo Parish, described as "a center of white supremacist opinion within the legislature,"⁵ led the attack against Wright. He blamed

¹Ibid., 5591.  
⁴State-Times, May 19, 1961, p. 9A.  
⁵Pinney and Friedman, p. 12.
the Judge for everything from disregarding state sovereignty to Shelby Jackson's asthma. Jack said of the resolution being debated in the House:

> When we pass this resolution, he won't have a snowball's chance in Hell of getting promoted. And I don't want our senators to say he should be promoted to get him out of the way of doing harm.

> He's the judge, the jury, the executioner—the people in Washington are his bosses. Federal Judges are supposed to be dignified.¹

Jack did not speak for all members of the legislature. Judge Wright's expressions of antipathy toward price-fixing had won a friend for him in the State House of Representatives. Representative John Schwegmann, Jr., of Jefferson Parish, who claimed to be as much a segregationist as anyone in the House, called attention to his numerous appearances in Wright's court. "I honestly believe the judge makes the decisions as he sees the law is written," he said. "I have no animosity against the judge."² But most members of the legislature did not share Schwegmann's attitude.

While opposition in the State legislature alone could not hurt Judge Wright's chances for advancement, the opposition of the United States Senators from Louisiana could be very damaging. Senator Russell Long, Wright's former student, was up for reelection in

¹*State-Times*, May 19, 1961, p. 9A.

1962 and so became accessible to the Judge's opponents. Long was said to have warned the Kennedy Administration that he would declare a Wright nomination to the Fifth Circuit Court of Appeals personally obnoxious. While the Senator did not explicitly confirm the rumor, he did say that he had worked had for the Administration and expected to be consulted on appointments affecting his state, and he unequivocally said, "I am not supporting Skelly Wright."1

Allen J. Ellender, the senior Senator from Louisiana, who was not then up for reelection, merely went through the motions of opposing Wright. He presented the Senate with a memorial from the State legislature urging "the U.S. Senators from Louisiana to oppose the confirmation by the U.S. Senate of the nomination of Judge J. Skelly Wright to fill any Federal office or position of trust, including that of judge of the U.S. Circuit Court of Appeals for the Fifth Circuit . . . ."2 Ellender did not call special attention to the petition. He presented it at the same time that he presented several others from the legislature.3

1New York Times, June 1, 1961, p. 22.
3Ibid. Other petitions called for imposition of a duty on shrimp, the investment of revenue from the tidelands off Louisiana's shores, and a commendation to the State of Alabama for its defense of states' rights.
While Louisiana's Senators opposed, with varying degrees of intensity, any promotion for Wright, the Judge was not without prestigious sources of support. Belying the myth that judges play only a passive role in the appointment process, it has been reported that Judges Tuttle and Wisdom advised Burke Marshall of the Justice Department that Wright would be an excellent choice to join them on the Court of Appeals for the Fifth Circuit and that to deny him the promotion would seem to be a punishment for his decisions.\(^1\) Although the Judges did not state the case publicly, the New York Times did when it editorialized that if Wright did not get the appointment, it would be "a clear case of a courageous judge being denied advancement for outrageous political reasons."\(^2\) Yale University awarded Wright an honorary Doctor of Laws degree at the same time that it bestowed a similar award on Supreme Court Justice Felix Frankfurter.\(^3\) The following day, fifteen Yale law professors expressed their support for Wright in the fight over his promotion. They said that they did not support Wright because he rendered decisions


\(^3\)Ibid., June 13, 1961, p. 38.
that they liked but because he had "a total aggregate of judicial achievement" during his eleven years on the bench.¹

But one intensely motivated United States Senator often carries more political weight than two circuit judges, fifteen Yale law professors, and the New York Times, especially when the Administration is not inclined to put up a fight. The Kennedy Administration studiously avoided alienating important Southern Senators over judicial appointments,² and the nomination of Wright to the Court of Appeals for the Fifth Circuit at a time when Senator Long faced an election would certainly have been displeasing to the Senator. It did not become necessary for Long to invoke the privilege of senatorial courtesy because Wright did not receive the nomination to the Fifth Circuit Court.

Although the Administration hoped to avoid antagonizing important Senators, capitulation to segregationist interests was no part of the Administration's plans. Denial of promotion to Wright would have been tantamount to capitulation. As a result, the seat on the Fifth Circuit remained vacant for a time,³ and, in early December

¹Ibid., June 14, 1961, p. 18.


³The liberally oriented New Republic had considered the nomination of anyone but Wright to the Fifth Circuit
of 1961, Deputy Attorney General Byron White approached Wright with the offer of a seat on the Court of Appeals for the District of Columbia Circuit. Senatorial courtesy could not be used to block appointment to that court, but it appeared that such an appointment would remove Wright from constitutional controversies involving racial discrimination. After a few days of hesitation, he informed White that he would accept, and on December 15, 1961, President Kennedy announced Wright's nomination. He would fill a vacancy created by the retirement of Judge E. Barrett Prettyman from the Court of Appeals for the District of Columbia Circuit.1

When the nomination was announced, there was some speculation that the Senate Judiciary Committee might make the hearings on the nomination difficult for Wright.2 The anticipated difficulties, however, did not materialize. Apparently Wright's political opponents were glad to get him out of Louisiana and the Fifth Circuit and decided against trying to obstruct this promotion.3

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3 Wright himself has referred to his having been "kicked upstairs" in "Federal Courts and the Nature and
A friendly subcommittee composed of Senators John A. Carroll of Colorado and Philip Hart of Michigan was assigned to conduct the hearing. Senator Carroll, who presided, noted that the Standing Committee on the Federal Judiciary of the American Bar Association had given Wright a rating of "exceptionally well qualified."¹ The Louisiana Bar Association and the New Orleans Bar Association did not take official positions on the nomination,² nor did Louisiana's Senators. Leander Perez, arch-segregationist from Plaquemines Parish, later criticized Senator Long for not trying to block Wright's elevation to the District of Columbia court.³ No one voiced opposition to the nomination, but members of the District of Columbia

²This led Judge Wright's younger brother to resign his membership in the New Orleans Bar Association. He could not resign from the Louisiana Bar Association because all Louisiana lawyers are members. Interview: James E. Wright, Jr.

³Times-Picayune, April 11, 1962, p. 11.

¹U.S. Senate, Subcommittee of the Committee on the Judiciary, "Hearing, Nomination of J. Skelly Wright to be United States Circuit Judge for the District of Columbia," (February 28, 1962), p. 2. (Stenographic transcript in files of Senate Judiciary Committee.) Although Wright received the highest rating given by the ABA, that organization has generally had a conservative influence on the judicial selection process. See Grossman, Lawyers and Judges. The role of the ABA has been criticized in Walter Dean Burnham, "Kennedy's Court Appointments," Commonweal, September 7, 1962, pp. 488-491.
bar did speak in support of it. None was more complimentary to Wright than the Subcommittee Chairman himself. He observed that Wright's "quiet courage" in carrying out his duties as District Judge had "won the respect of lawyers from all corners of this country." Senator Carroll indicated that he had read some of the Judge's opinions, as well as one of his articles on pretrial conferences, and he commended Wright's legal scholarship. Senate confirmation came on March 28, 1962. It was the same day that Wright rendered his decision in the Tulane University case.

Before taking up his new post, he received congratulations and praise from some quarters. At a testimonial in his honor held by the New Orleans chapter of the Federal Bar Association, Wright said, "I leave with no regrets. I wouldn't change a line of it." A few days

1Senate Judiciary Subcommittee, "Hearing, Wright Nomination to D. C. Circuit," pp. 4-10.

2Ibid., p. 16.


later, the Co-ordinating Council of Greater New Orleans, a civil rights group, presented the Judge with a plaque describing him as "a distinguished jurist" and a "champion of democracy."¹ One of the most eloquent testimonials to Wright's service as a District Judge appeared in the Negro press during Easter week. In the words of the editorial entitled "Judge Wright No Pontius Pilate":

The Christian world, significantly, can this week compare Judge Wright with a public official who lived some 1900 years ago but who in the most critical decision of his career bowed to shouting bloodthirsty mob. That official was the "fearless" Roman procurator, Pontius Pilate, whose "handwashing" episode is being related this week.

In modern times, numerous judges have used the "Pilate" approach (political expediency) in handling civil rights cases. But not so with Judge Wright.²

Recognition of his contribution to the cause of black civil rights continued in Washington. About a month after Wright's arrival in the District of Columbia, Clarence Clyde Ferguson, Jr. was sworn in as General Counsel to the United States Commission on Civil Rights, and it was Wright who administered the oath. According to Ferguson, "The reason for Judge Wright's presence was the fact that he had been the most imaginative and innovative Judge

¹Ibid., April 12, 1962, p. 20; Louisiana Weekly (New Orleans, La.), April 21, 1962, p. 3.
²Louisiana Weekly, April 21, 1962, Sec. 2, p. 6.
sitting in the South during the critical years following the decision in Brown vs. Board of Education. ¹

**Off-the-Bench Activity**

With the move to Washington, there was the possibility of an abatement in Wright's interest in civil rights. While he was a District Judge, he reacted against racial discrimination in his official capacity. During the New Orleans school desegregation crisis, it was suggested that perhaps his actions as District Judge did not represent his personal convictions at all, but that he was simply fulfilling the demands placed upon him by his office, as he understood it. ²

That the Judge's interest in black civil rights did not abate after his move to Washington indicates that he is personally committed to racial equality. When his role as judge did not involve him in racial discrimination cases, he focused his off-the-bench activity in that direction. Off-the-bench activity is, of course, assumed to be a better indicator of personal conviction than judicial opinions.

¹Hon. Clarence Clyde Ferguson, Jr., United States Ambassador to Uganda, Letter of February 24, 1971 to the author.

²See the biographical sketch of Judge Wright entitled "Jurist in Racial Dispute," in the *New York Times*, November 16, 1960, p. 23. The sketch contains factual errors.
After the move to Washington, Wright's off-the-bench activity turned from the more technical aspects of law, such as pretrial conferences and jurisdictional matters, to matters of broader public interest. He defended the Supreme Court's activist approach in various kinds of civil rights cases, including those involving race. He described the activist approach as one in which the Court attempts to act as the people's collective conscience, calling upon them to live up to the principles which they profess. He defended Supreme Court decisions in the field of racial equality as attempts by the Court to secure freedom for all Americans: freedom from experiencing discrimination for blacks and freedom for whites from having to live in a society in which discrimination exists. Wright denied that the Court's activism in regard to civil rights posed any danger to democratic government. "Even some thinking men," he said,

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3Ibid., p. 27.

men of good will whose roots in the fight for human freedom go very deep, deplore the leadership the current Supreme Court has given in the fight for social and political justice. They say they fear the role of judges. I say their fears are foolish fancies. In expanding human freedom, the judges have nothing to enforce their rule but the conscience of America. And as long as we are ruled by the informed and challenged conscience of America, we have nothing to fear.  

Wright believes that an important function of the courts is to influence the normative content of law, and he denied that the courts are obliged to be neutral in relation to competing values. He thinks the courts should foster the best inspiration of the time and help it to win general acceptance, with emphasis upon the highest ideals of the community rather than the ideals of the judges. He assumes that decisions which reflect only the values of the judges will fail to generate support. The pre-1937 Supreme Court performed badly not because it was activist, but because it was inaccurate in its identification of community values. Wright has identified political equality as the most important of contemporary community ideals. "The accuracy of this perception gives the Court's equal protection pronouncements their legitimacy," he has said.  

In his off-the-bench activity, Judge Wright extended the Supreme Court's equal protection pronouncements to  

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1Ibid.  
reach not merely de jure segregation but also de facto segregation. On February 17, 1965, he delivered the sixth annual James Madison Lecture at New York University Law School and was the first James Madison Lecturer who was not a Supreme Court Justice. His lecture, entitled "Public School Desegregation: Legal Remedies for De Facto Segregation," was published in the New York University Law Review,¹ and a similar article bearing the same title appeared in the Western Reserve Law Review.² In the lecture and articles, Wright argued for the end of segregation even when it was not directly imposed by law. He considered "the interdiction of all state statutes compelling racial segregation . . . but a short first step on the road to desegregation."³ In attacking de facto segregation, he made it clear that he considers segregation a national, not solely a Southern, problem.

It is appropriate to examine Wright's off-the-bench views on de facto segregation because he was soon faced with the problem in his official capacity. An important part of his approach to de facto segregation was the assumption that education is essentially a state function. He had first expressed this view in the Tulane University

¹XL (April, 1965), 285-309.
²XVI (May, 1965), 478-501.
case (see pp. 97-100), and he continued to hold that opinion. Wright expressed his agreement with a Federal District Judge in Massachusetts that

Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.¹

Wright contended that the states had a hand in creating most situations in which de facto segregation exists. The states' housing policies encouraged private discrimination and created segregated neighborhoods, or the states' permitting job discrimination depressed the socio-economic status of blacks, driving them into the ghettos. The neighborhood school and the historical gerrymandering of school attendance districts then resulted in de facto segregation.² "Thus," said Wright, "in most of the school cases arising from the metropolitan areas, it should not be necessary to reach the issue of whether adventitious de facto segregation, without more, is unconstitutional."³

²Ibid., 483-484.
³Ibid., 485; New York University Law Review, XL (April, 1965), 293.
According to Wright, the extent to which judges find unconstitutional state action behind de facto segregation usually depends upon whether the judge is satisfied with the status quo. If he is satisfied, he ascribes the de facto segregation to neutral causes. "As I read these de facto segregation cases from the North and West," commented Wright,

I must confess to a little amusement. After watching, from close range, some of my judicial brethren in the South twisting and turning and reaching for a result in race cases that will not upset the status quo or the local power structure, it seems that now I may be treated to what appear to be similar performances by my brethren in other parts of the country. ¹

Wright was himself capable of doing a bit of reaching in order to bring the Fourteenth Amendment into play. He indicated that a de facto segregated slum school coupled with a compulsory school attendance law was enough to constitute denial of equal protection of the laws. His reasoning was that the slum dweller is unable to afford a private school; therefore, the law which merely requires him to send his child to school, in reality requires him to send his child to a segregated slum school. ²

Wright's position was that whenever an otherwise legitimate state educational policy, such as neighborhood

²Ibid., 296; Western Reserve Law Review, XVI (May, 1965), 488.
schools and compulsory school attendance laws, results in segregated schools, the policy cannot be constitutionally justified as long as basically the same educational goals could have been accomplished by another method which would not result in segregation.\(^1\) He went so far as to suggest that the courts are not helpless to deal with de facto segregation even when political boundaries separating central cities from suburbs are involved. Said Wright, "The political thicket, having been pierced to protect the vote, can likewise be pierced to protect the education of children."\(^2\) While admitting that the final word on de facto segregation would have to come from the Supreme Court, he pointed out that the first words would come from lower courts. "Before the Supreme Court acts," he said, "some other federal courts no doubt will take a harder look at de facto segregation and will be less inclined to accept the suggestion that the state and its

\(^1\)New York University Law Review, XL (April, 1965), 297.


Some years later, Judge Robert J. Merhige, Jr., attempted to pierce the political thicket and ordered into effect a desegregation plan which merged the school systems of suburban Henrico and Chesterfield Counties with the school system of the City of Richmond, Virginia. Bradley v. School Board of the City of Richmond, 338 F.Supp. 67 (E.D. Va. 1972). Judge Merhige was reversed by the Court of Appeals for the Fourth Circuit, 462 F.2d 1058 (1972), and the reversal stood when the Supreme Court divided evenly (Justice Powell did not participate) on the issue, 412 U.S. 92 (1973).
agencies are not, in some degree at least, responsible for it and helpless to correct it."¹

De Facto Segregation in the District of Columbia

Through an unusual set of circumstances, only a year after the James Madison Lecture and the law review articles on de facto segregation, Judge Wright himself became one of the lower court judges to take a harder look at de facto segregation, this time in his official capacity. Suit was brought by Julius Hobson, a black civil rights activist, charging the District of Columbia Board of Education and Superintendent of Schools, Carl F. Hansen, with racial discrimination in the administration of District of Columbia public schools, including failure to comply with the requirements of Bolling v. Sharpe,² the case in which the Supreme Court banned legally imposed segregation in the District of Columbia. The alleged means of discrimination were the "track system" (to be discussed below), gerrymandering of school attendance districts, and preferential treatment for predominantly white schools in the use of funds. Hobson also charged discrimination against black teachers and administrative personnel.


²347 U.S. 497 (1954). The Court relied upon the due process clause of the Fifth Amendment. The Fourteenth
Under normal circumstances, a Federal District Judge would have presided. The District Judges, however, were involved in the suit, since it was they who, according to law, appointed the members of the Board of Education.\(^1\) Because of the involvement of the District Judges, Wright was designated to sit as a District Judge pursuant to federal law.\(^2\)

The law requiring the District Judges to appoint school board members was itself under constitutional challenge in a separate case. Wright decided that because neither side's arguments on the constitutionality of the law were frivolous, a three-judge court should be convened to decide the matter.\(^3\)

As a member of that three-judge court, Wright's initial action against the educational status quo in the District of Columbia was aimed at the method of selecting school board members. Unlike the majority, who saw no conflict with the separation of powers doctrine, Judge Wright considered the appointment of school board members

Amendment was inapplicable because it applies only to states.

\(^1\) 31 D.C. Code, Sec. 101 (a) (1961).

\(^2\) 28 U.S.C., Sec. 291 (c). The law provides that "The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit."

clearly an executive function. He noted that interest
groups made recommendations on appointees, and the
District Court had been commended and rebuked in the
press for its choices.¹ "If selection of the Board of
Education is to be a responsible act," he observed, "the
agency charged with appointment must inform itself of the
positions of the many candidates on the various questions
of educational policy and at least begin to make its own
decisions on where educational wisdom lies."² Ironically,
the Judge has himself been criticized for basing judicial
decisions on his conception of where educational wisdom
lies.³

It was not long, however, before Judge Wright's dis­
sent bore fruit, although not the constitutional variety.
His brethren apparently found some merit in his argument
that even when there is no denial of due process, it is
"incongruous with the integrity of the judicial process"
when judges decide controversies involving their own
appointees, since there should be the appearance of jus­
tice as well as the fact.⁴ In 1967 the Judicial Conference

¹Hobson v. Hansen, 265 F.Supp. 902, 923-924
²Ibid., 924.
³See comments of Senator Sam Ervin on February 10 and
March 25, 1970. U.S., Congressional Record, 91st Cong.,
2nd Sess., CXVI, 3107, 9284.
⁴265 F.Supp. 902, 931.
petitioned Congress to remove the appointing power from the District Court, and Congress responded by making the Board of Education elective.

Regardless of how the Board of Education was chosen, there were still the discrimination issues to be decided. Chief Judge David Bazelon denied Hobson's motion that the discrimination issues be decided by a three-judge court and left the matter to Wright sitting alone as a District Judge.

The trial to decide the discrimination issues was a lengthy one. It began in mid-July of 1966 and Wright did not render his decision until mid-June of the following year. In the intervening period, a tremendous amount of testimony and data became a part of the record. Much of it came from Carl Hansen, Superintendent of Schools in the District of Columbia, and one of the defendants in the suit. Hansen was called "the architect of the track system," the system of ability grouping used in the public schools of the District. He had once described the objectives of the track system as twofold: equality of education and quality education. Hansen explained:

1 See Appendix I of Judge Danaher's dissent in Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).
Equality of educational opportunity and quality education are relative rather than absolute concepts. They have meaning only in relation to the characteristics of the learner and the educational content he needs to become capable of quality performance at his level of ability.\(^1\)

While no one questioned the theoretical justification for ability grouping, Julius Hobson argued that the track system of Washington was in practice a device for insuring the physical separation of blacks and whites, since most of the children in the lower tracks were black. Elimination of the track system and optional zones, districts which provided students with alternative schools to attend,\(^2\) would be a way of eliminating de facto segregation. It might also result in an exodus of whites from the public schools of the District of Columbia, since Hansen expressed the belief that there is a tendency for whites to flee to the suburbs when black enrollment reaches forty or fifty per cent. Harold Howe, United States Commissioner of Education, testified that he believed Hansen correct.\(^3\) In the midst of the trial, the defense moved that Wright disqualify himself on grounds that his New York


University Law Review article was evidence of prejudice. He denied the motion, and the Court of Appeals sustained his decision.¹

The trial ended on October 25, 1966, and Wright took the discrimination issues under advisement.² Before he rendered his decision, even before the conclusion of the trial, Julius Hobson's suit had begun to bear political fruit. The Board of Education, with three new members, ordered school administrators to adopt different methods of classroom organization "with all possible speed." The Board called for innovative teaching methods, as well as the bussing of entire classes from overcrowded de facto segregated schools to underutilized schools, and the integration of the children into other classes at the destination schools. How expeditiously and effectively the new policy would be implemented depended to a considerable extent on the cooperation of Carl Hansen, who was not used to having the Board tell him what to do.³ Hansen later indicated that he considered the Board's resolution ambiguous, and that he had no intention of dismantling the track system until ordered to do so in clear, unmistakable [Footnotes]

In any case, Julius Hobson was unwilling to rely upon voluntary changes and indicated that he would not drop his suit. He wanted a legal ruling on the track system and other alleged discriminatory practices because of the effect that a decision in his favor might have on de facto segregation in other areas of the country.  

When the decision came on June 19, 1967, it was in Hobson's favor. If the trial was lengthy, so was Judge Wright's opinion. In it he concluded that the Superintendent of Schools and the Board of Education had deprived black children and poor children generally of equal educational opportunity with white and affluent children. The opinion was in many respects similar to his James Madison Lecture and law review articles.

Wright did not say that de facto segregation was, of itself, unconstitutional. But he did say, "Once nearly complete segregation is shown in a school system in which de jure segregation had formerly been the rule, when challenged the burden falls on the school board to show that the observed segregation stems from the application of

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racially neutral policies." Superintendent Hansen and the defendants in the suit attributed the existing segregation to the racially neutral neighborhood school policy, which had been adopted for its educational value. Although the plaintiffs asserted that it had been adopted for an unconstitutional purpose, Judge Wright noted that they had no proof of this and conceded that the neighborhood school policy had indeed been adopted in good faith for its assumed educational value. But he also found evidence of another policy: that whites should not be compelled to attend predominantly black schools. When this policy conflicted with the neighborhood school policy, the latter often, although not always, yielded.

Evidence of this second policy—that whites need not attend predominantly black neighborhood schools—was the existence of "optional zones." Students living in these optional zones were permitted to attend their neighborhood school or another specified school, often located far from their neighborhood. The avowed purpose of optional zones, to give all students in such zones the opportunity for an integrated education, left Wright completely unconvinced. "Since 1954 the administration has carved optional zones for race-oriented reasons," he observed, "only where significant islands of whites are found, never in

1Ibid., 417.
2Ibid., 417-419.
neighborhoods which lack white enclaves, never . . . in the almost exclusively Negro neighborhoods . . . ."\(^1\)

It was obvious that these optional zones were not instruments of integration as claimed, but rather were instruments of resegregation. The remedy was to abolish them.\(^2\) The neighborhood school policy itself, Wright left untouched. "Because of the 10 to one ratio of Negro to white children in the public schools of Washington and because the neighborhood school policy is accepted and is in general use throughout the United States, the court is not barring its use here at this time," said the Judge.\(^3\)

While accepting the neighborhood school policy, he did find that there was faculty segregation in the staffing of the neighborhood schools. Racially homogeneous schools had faculties that matched the racial composition of the student bodies. The burden of proving that this resulted from racially neutral policies was placed upon the defendants, but they were unable to furnish the requisite proof.\(^4\)

As for the allocation of resources among the schools, Wright found that schools attended by blacks, particularly poor blacks, usually received less. To reach this conclusion, he simply followed the approach used by the courts

\(^1\)Ibid., 416. \(^2\)See the Decree at Ibid., 517-518. \(^3\)Ibid., 515. \(^4\)Ibid., 422-431.
in pre-Brown segregation cases and considered the actual distribution of quantifiable things.\(^1\) In focusing specifically on the availability of kindergarten, he noted that it was dependent upon available space, and that there was space in underutilized white schools but not in overcrowded black schools. To remedy this, school authorities permitted a child to go to any school in the city with available space, but the parents had to provide transportation. As a result, many black children did not get to attend kindergarten at all or, if they did, went in two-hour shifts.\(^2\)

Wright might have excused the inequality on the grounds that there was no deliberate racial or economic discrimination, but he is no defender of the status quo and considers effect a more important factor than intent. In his words:

The causes of the inequalities are relatively objective and impersonal. School officials can be faulted, but for another reason: that in the face of these inequalities they have sometimes shown little concern. It is one thing, to be precise, when crowded residential conditions shut Negro children, and them alone, out of kindergarten in the nearby schools; it is something else when school authorities acquiesce in the situation once it arises by standing passively by, circulating promises of more adequate school buildings years hence.\(^3\)

The Judge's remedy was not the same as that of the school

\(^1\)Ibid., 432-439.  
\(^2\)Ibid., 439.  
\(^3\)Ibid., 441-442.
authorities. In order to alleviate overcrowding in black schools and provide integrated education for those who wanted it, he required the school system to provide bussing for those who chose to use it.¹

The most controversial part of Judge Wright's lengthy opinion concerned the "track system,"² the system devised by Carl Hansen for grouping students according to ability. Wright conceded that Superintendent Hansen had not devised the track system as a mere subterfuge for circumventing the requirements of the Bolling decision but had attempted to cope with the real problem of bringing numerous educationally retarded black children into a unitary school system.³ Nevertheless, Wright ordered the track system abolished⁴ and received strong criticism for that decision.⁵

¹Ibid., 514. ²Ibid., 442-492. ³Ibid., 442.
⁴See Decree at Ibid., 517-518.
⁵Professor Philip Kurland of the University of Chicago asserted that the decision would only "assure that the brighter students receive no better education within the system than the other students." "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," University of Chicago Law Review, XXXIV (1968), 583, quoted in Burger dissent, Smuck v. Hobson, 408 F.2d 175, 197 (1968). Similarly, Senator Sam Ervin of North Carolina criticized Wright for reading into the Constitution a prohibition on school boards offering to teach bright and diligent students more than they teach dull and lazy students. See U.S., Congressional Record, 91st Cong., 2nd Sess., CXVI, 3107, 9284.
The criticism would have been well taken had Judge Wright held all systems of ability grouping unconstitutional; however, he did not do so. He merely held unconstitutional systems of ability grouping which do not provide compensatory education to disadvantaged children and thus deny them equal educational opportunity.¹

He specifically attacked the track system of Washington because it was weighted against poor blacks. Placement tests were administered to children in the first grade, yet many poor blacks had never had an opportunity to attend kindergarten, which put them at a distinct disadvantage. Even if a black child scored high, many black elementary schools had no "honors track." As a result, the bright black child might be denied an education equal to that of the gifted white child.² "Consequently," said Wright, "the court is persuaded that the prevalence of disadvantaged Negroes in the lower tracks and the prevalence of the white and more affluent students in the upper tracks is to a significant extent linked to these disparities in course offerings."³ One of the Judge's major objections to the track system was that once children were placed in the lower tracks they ordinarily did not receive the remedial education that they should have received.⁴

¹269 F.Supp. 401, 514. ²Ibid., 469. ³Ibid., 469-470.
Judge Wright considered that the track system of Washington denied poor blacks equal protection of the laws, binding in the District of Columbia through the due process clause of the Fifth Amendment. In elucidating the requirements of equal protection, Wright said:

Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

A possible effect of Wright's equal protection interpretation was the flight of white students to private schools. The Judge did not overlook that possibility, but he denied that discriminatory treatment was an acceptable means of keeping them in the public school system. His position received some support from within the civil rights movement.

1Ibid., 497.  2Ibid., 501.

3Robert L. Carter, General Counsel of the NAACP, agreed that an exodus of whites did not justify refusal to apply the law. Carter said, "In practical terms, the presence of white students in the system in isolated enclaves of educational affluence does nothing to further the educational advantages of Negro children." "The Law and Racial Equality in Education," Journal of Negro Education, XXXVII (Summer, 1968), 208.
In addition to commentary on the abolition of the track system, Judge Wright was criticized in more general terms for treading beyond the bounds of judicial competence by usurping the function of school officials and making a decision which courts lacked the resources to enforce.¹ But as Justice Robert Jackson pointed out long before Hobson's case, judges act in these matters not by virtue of their educational competence but by virtue of their commissions.² Nor was it necessary for the court to have resources for implementing the decision alone. As one political scientist has observed, the courts are not alone as they once were. Other agencies of government have shown a willingness to cooperate with the courts in desegregation cases.³


While Judge Wright's decision was unquestionably controversial,\(^1\) he did not stand alone. Since the school board had begun to make changes even before he rendered his decision, he knew that he would not be facing a recalcitrant school board. Far from being recalcitrant, the Board of Education registered its acceptance of the decision by voting not to appeal and ordering Superintendent Hansen not to appeal in his official capacity.\(^2\)

Even though the school board did not appeal the controversial decision, Judge Wright made no attempt to avoid review, with the possibility of reversal. He permitted Carl Hansen, after his resignation as Superintendent of Schools, to intervene in the suit along with a dissenting member of the school board and a number of parents. He did this although he denied that either Hansen or the school board member as individuals had a strong enough interest in the decision to warrant intervention, and even the parents did not show how their interests were affected. He permitted them to intervene in order to give the Court of Appeals an opportunity for review.\(^3\) Subsequently, a

\(^1\) Besides being criticized for what he did, he was also criticized for what he did not do. One law review faulted him for failing to order the abolition of the neighborhood school policy. Comment, "Constitutional Law--Equal Protection--Discrimination in Public School Education," *Iowa Law Review*, LIII (August, 1968), 1184-1188.


\(^3\) Ibid.
closely divided Court of Appeals left Judge Wright's decree intact.\(^1\) By that time, Julius Hobson was an elected member of the Board of Education, and from that position he worked to correct deficiencies in the District of Columbia school system.\(^2\)

**The Gaston County Case**

As Judge Wright interpreted the Constitution to require equal educational opportunity, so he interpreted the Voting Rights Act of 1965\(^3\) as prohibiting literacy tests when equal educational opportunity had been denied. The occasion was a case entitled *Gaston County v. United States*.\(^4\) It arose when Gaston County, North Carolina, sought to have the Voting Rights Act's ban on literacy tests lifted by securing a declaratory judgment from the District Court for the District of Columbia that no "test or device" within the meaning of the Act had been used during the previous five years for the purpose or with the effect of denying the right to vote because of race.

The three-judge District Court refused to lift the ban, and Wright, for the majority, reasoned that blacks

\(^1\)Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). One of the dissenters was Judge Burger, later to become Chief Justice of the United States.


\(^3\)42 U.S.C., Secs. 1973 et seq.

in the county were educationally disadvantaged. Under the circumstances, even without discriminatory intent, the Judge considered that literacy tests would have a discriminatory effect. The legislative history of the Voting Rights Act revealed that Attorney General Nicholas Katzenbach had advocated suspension of literacy tests because to do otherwise "would produce a real constitutional irony—that years of violation of the 14th Amendment right to equal protection through equal education would become the excuse for continuing violation of the 15th Amendment right to vote."^2

Judge Gasch, in a concurring opinion, argued that the Government had merely shown the potentially discriminatory effect of unequal education and literacy tests but had not shown that the actual effect of the relatively simple literacy test of Gaston County would be discriminatory. Judge Wright's answer was that the Government had met its obligation by showing even a potentially discriminatory effect. The burden of proving that the potential effect was not actual rested on Gaston County, which did not meet its obligation.4

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1Ibid., 686-687.


3Ibid., 692.

4Ibid., 688, n. 16.
Although the Gaston County case did not receive as much notice as Hobson v. Hansen, it did not completely escape criticism. The Greensboro (North Carolina) Daily News criticized Wright's "far-fetched reasoning." He was also accused of being "result-oriented" and willing to bend the law to reach a desired result. Senator Sam Ervin had the Greensboro newspaper's editorial reprinted in the Congressional Record.¹

But to many judges, Supreme Court approval outweighs the disapproval of a newspaper or even of a United States Senator. The Supreme Court approved of Judge Wright's opinion and affirmed it by an eight to one vote.² That Justice Harlan, one of the leading proponents of judicial restraint, was spokesman for the Supreme Court majority attests to the persuasiveness of Wright's opinion. Harlan's reasons for affirmance were "substantially the reasons given by the majority of the District Court."³ He looked to the legislative history of the Voting Rights Act, quoting Katzenbach as Wright had done.⁴ Harlan also took notice of substantial evidence of the inequality of educational opportunity afforded blacks in Gaston County.⁵

³Ibid., 288.
⁴Ibid.
⁵Ibid., 291.
The language of Harlan's opinion was said to be "as sweeping as the Constitution itself." But his language was virtually a paraphrase of Wright's. In spite of the blocked promotion to the Court of Appeals for the Fifth Circuit, Judge Wright was still able to influence the direction of the law in regard to racial equality. He promoted equal access to the ballot and was in the vanguard of the judicial attack on de facto segregation. However, the bulk of his work in the District of Columbia pointed in other directions.

\[^{1}\text{Washington Post, June 3, 1969, p. A 1.}\]
CHAPTER V

COURT OF APPEALS: CRIMINAL PROCEDURE

After Judge Wright cleared the political hurdles obstructing his promotion, he found that the nature of his work was considerably changed. Besides assuming a new function— that of appeals court judge— he found the change reflected in the nature of the cases which required his attention. An increased amount of his time and energy had to be channeled in the direction of criminal procedure. He had had experience with criminal procedure as a District Judge, but after his promotion, it became the major part of his work.

One of the reasons for the heavy criminal case load of the Court of Appeals for the District of Columbia is that the court and the courts which it supervises are not located within a state. In other circuits, most criminal offenses are violations of state laws. Trials for those offenses take place within state judicial systems, and appeals are directly to the United States Supreme Court, thus bypassing the lower federal courts. In most circuits, criminal cases are confined to habeas corpus proceedings and violations of federal laws.
However, since the national government is responsible for governing the District of Columbia, all criminal trials in the District take place within the federal judicial system. Besides performing the normal functions of a Court of Appeals, the Court of Appeals for the District of Columbia also performs functions which in other circuits are performed by the highest court of a state. In this respect, Wright's position on the Court of Appeals for the District of Columbia Circuit may be compared with that of an associate justice on a state supreme court. It is a position which has required him to devote himself to criminal law and procedure to a greater extent than in the past.

In addition to the unusual jurisdiction of the court on which Judge Wright sits, the heavy criminal case load has also reflected the high crime rate. Judge Wright has viewed the high crime rate as a product of poverty compounded by discrimination—conditions which have bred disrespect for law. In his off-the-bench writing, he has exposed bias against the poor within the legal system which has contributed to this disrespect. Slumlords are usually permitted to take long periods to make repairs to their property but do not spend as much as a day in jail for violating building codes.¹ Yet the poor are arrested on such charges as public drunkenness and vagrancy and

experience the assembly-line justice of police courts, but
are denied adequate police protection for their neighbor-
hoods. "This is why the criminal law is perceived by the 
poor," says Judge Wright, "not as protection for life and 
property, but as the establishment's tool of oppres-
sion . . . ."\(^1\) He points out that even Supreme Court 
decisions securing the rights of indigents in criminal 
proceedings provide no help for individuals who are 
harassed by illegal searches and arrests unless actually 
tried for a crime and found guilty.\(^2\)

If the crime rate is to take a downward turn, Wright 
believes that wide-ranging social reforms are necessary. 
He calls for nothing less than the elimination of slums.\(^3\) 
That, of course, is beyond his power. In his role as 
appellate judge, however, he can and has attempted to pro-
tect the constitutional rights of all persons accused of 
crime. As he put it in another of his many off-the-bench 
writing:

The Bill of Rights protects all of us or 
none of us. There is no middle ground. And the 
sooner the "nice people" realize this, the sooner 
the police will also, since they merely reflect

\(^1\)Ibid., p. 100.

\(^2\)Ibid., p. 26.

\(^3\)Ibid. Also see his "Crime in the Streets and the 
New McCarthyism," New Republic, CLIII (October 9, 1965), 
10-11; "Poverty, Minorities, and Respect for Law," Duke 
the community consensus. When the community wants law enforcement according to law, it will have it.¹

The Fourth Amendment

Judge Wright believes that one of the functions of the appellate process is to curb official lawlessness;² therefore, it is hardly surprising that he has vigorously enforced the Fourth Amendment's guarantee against unreasonable search and seizure and has used the exclusionary rule to that end. The normal method for protecting against unconstitutional intrusions is for law enforcement officials to secure a search warrant by convincing a judicial officer that the contemplated search is reasonable. Under the terms of the Fourth Amendment, the warrant is to describe "the place to be searched, and the person or things to be seized." To Judge Wright, deviation from this procedure is not necessarily unconstitutional but is highly suspect.

Although Wright has participated in decisions sustaining the admission at trial of evidence obtained without a search warrant but incident to lawful arrests,³ he


at a different time and place than the arrest of its occupants was prohibited. In *Harris v. United States*,\(^1\) he relied on *Preston* to reject a government argument that a car used in a robbery was an instrument of the crime and could be treated like any other evidence seized at the time of the arrest; that is, it could be examined later.

Wright's counter argument was

> If an automobile used as an instrumentality of crime can be subjected to a general search without a warrant at the pleasure of the police, a home said to be so used could be subjected to the same treatment. The automobile, like the home, is a repository of the "papers and effects" of "the people" as contemplated in the Fourth Amendment. Both may be used as instrumentalties of crime, but both may be searched only after obtaining a search warrant or at the time and place of a lawful arrest of the occupant.\(^2\)

The *Harris* case represented one of the rare occasions when Wright was reversed. On rehearing, the Court of Appeals *en banc* avoided the government's instrumentality theory and merely decided that there had been no search, only an inventory.\(^3\) Since the rehearing had been granted

\(^1\)370 F.2d 477 (D.C. Cir. 1966).

\(^2\)Ibid., 483.

\(^3\)The situation was that the appellant's car was identified as the getaway car in a robbery. Some hours after the robbery, the car was found in front of the appellant's home, and he was arrested as he was getting into the car. He was taken to the police station, and his car was towed there. After its arrival at the station, the arresting officer, pursuant to a police regulation, went out to inventory the car for valuables and to roll up the windows because it had begun to rain. When he opened one of the doors, he found a registration card belonging to the robbery victim on the door jamb. It was later used in evidence.
because of the government's instrumentality theory, Wright protested the court's disposal of the case without taking it up. When the issue was not considered, he thought that the order granting the rehearing should have been vacated as improvidently granted and the panel opinion—his opinion—reinstated. Like other judges, he obviously dislikes being reversed, and to Wright, it does not happen often.

But reversal is an essential part of the judicial process, and Judge Wright's trenchant dissents were aimed at having his brethren reversed when he thought they failed to protect the privacy which the Fourth Amendment was intended to safeguard. While he objected to the search of an automobile without a warrant, he objected to the search of a home even with a warrant, if the warrant were issued without probable cause. When police deviated from the usual procedure of establishing the presence of narcotics and relied upon the unsubstantiated word of an informer, Wright took the position that the United States Commissioner had erred in issuing the warrant. Although his brethren would not "second-guess" the

1370 F.2d 477, 479.

2The procedure is outlined in Jones v. United States, 353 F.2d 908 (D.C. Cir. 1965) (per curiam). It consists of the police searching the cooperating informant for money or narcotics. After establishing that he has neither on his person, he is given money to make a purchase. When he returns with the narcotics, he is again searched to be sure that the money is not still on his person.
Commissioner, "For me," said Wright,

there is not here the kind of trustworthy showing which should be made before a home is invaded. The protective wall around the home erected by the Fourth Amendment may not so easily be breached. The temptation to relax constitutional safeguards when dealing with sordid dope offenders is great. But, in my judgment, it is a temptation that must be resisted lest the Fourth Amendment become a rubber yardstick in the hands of the police.¹

The Fourth Amendment relates to the seizure of persons as well as of things, and many arrests are made without warrants but with probable cause. On numerous occasions, Judge Wright has voted to affirm convictions following arrests without warrant either because the issue was not raised in the court below,²or because there had been probable cause for arrest.³

Although Wright has been willing to sanction arrests without a warrant, it is clear that he would prefer to have arresting officers secure an arrest warrant when it is practical for them to do so, even if the law does not require it. A warrant is necessary to search a building, but an arrest on probable cause may be made without a warrant, even if there is time to get one. In Ford v. United States, Wright expressed his disapproval of this

¹Irby v. United States, 314 F.2d 253, 256 (D.C. Cir. 1963) (dissent).
²Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962).
³Williams v. United States, 308 F.2d 327 (1962); Ford v. United States, 352 F.2d 927 (D.C. Cir. 1965); Hagan v. United States, 364 F.2d 669 (D.C. Cir. 1966); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967);
dichotomy between search and arrest. It was his view that the law was in flux and might very well change, thus discouraging a practice which he considers both disreputable and unconstitutional—making arrests simply for investigative and interrogative purposes. He was optimistic that "before too long personal liberty will be accorded the same protection under the Fourth Amendment as the ownership and possession of property now enjoy." The year after the Ford decision, Wright silently joined an opinion by Chief Judge Bazelon reaffirming the constitutionality of arrests without a warrant, but discouraging such arrests when there is opportunity to secure an arrest warrant.

While accepting the constitutionality of probable cause arrests without a warrant, Judge Wright, true to his liberal principles, has demanded that there actually be probable cause. After his appointment to the Court of

1352 F.2d 927, 934-935 (concurring).

Ibid., 936.


His insistence on a judicial determination of probable cause has extended to both adult and juvenile arrests. Jackson v. United States, 336 F.2d 579 (D.C. Cir. 1964) (per curiam); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969) (per curiam).
Appeals, it did not take him long to develop stringent standards.\(^1\) An investigative arrest made solely as a pretext for a search of the person fell far short of his standards, even if the search turned up evidence.\(^2\)

Wright's insistence that arrests be made only upon probable cause extended to arrests in extradition proceedings, and in that he was not alone.\(^3\) As spokesman for a unanimous panel, he explained that the Supreme Court had made the whole of the Fourth Amendment, including the federal standard of probable cause, binding on the states through the Fourteenth Amendment.\(^4\) In extradition proceedings, the jurisdiction in which an individual is apprehended is to make its own determination of probable cause. "For it would be highhanded," he thought to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given the

\(^1\)Cf. Tindie v. United States, 325 F.2d 223 (D.C. Cir. 1963), in which he participated in a unanimous decision that information gained from the unlawful arrest of another did provide probable cause for an arrest, and Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964), in which he took the opposite position in dissent.

\(^2\)See Jackson v. United States, 353 F.2d 862 (D.C. Cir. 1965).

\(^3\)Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967). In an earlier case he had been alone. See his dissent in Moncrief v. Anderson, 353 F.2d 460 (D.C. Cir. 1965).

\(^4\)385 F.2d 670, 674.
legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary.\(^1\)

If Judge Wright was loath to lend the legitimizing stamp of the judiciary to arrests without probable cause, he was equally resistant to legitimizing the use of damaging statements gained from accused persons in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure or the self incrimination clause of the Fifth Amendment on which it is based.

**The Fifth Amendment**

The judicial method for enforcing the constitutional guarantee against self-incrimination and Rule 5 (a)\(^2\) has been highly controversial within the judicial establishment. This controversy is dramatically reflected in the sharp disagreement between Judges Wright and Burger. While Wright actively promoted a liberal interpretation of the rights of the accused, Burger made it clear that his policy preferences were in opposition to the *Mallory Rule*\(^3\) as a means of enforcing Rule 5 (a).

\(^1\)Ibid., 677.

\(^2\)Rule 5 (a) requires that a person arrested for a federal offense be brought without unnecessary delay before the nearest committing magistrate. Rule 5 (b) requires the committing magistrate to advise the accused of his rights and inform him that anything he says can be used against him. See 18 U.S.C.A., Federal Rules of Criminal Procedure.

\(^3\)Mallory v. United States, 354 U.S. 449 (1957).
Wright, from his very first year on the Court of Appeals, showed that he would vigorously apply the Mallory Rule that evidence obtained in violation of Rule 5 (a) was inadmissible at trial. He wrote the majority opinion for a divided panel that held that a confession and weapon found with the help of the accused during a twenty-four hour period of unnecessary delay were inadmissible. \(^1\) But during the same year, both Burger and Wright agreed that Mallory did not exclude a confession given within thirty minutes after arrival at the police station. \(^2\)

Initially, Wright did not question the judicial rule that violation of Rule 5 (a) could not be raised on appeal if it had not been raised at trial. \(^3\) By 1964, however, Wright was suggesting a way to circumvent that rule. In the case of Leigh v. United States, \(^4\) a panel on which Burger and Wright both sat affirmed a conviction over claim of double jeopardy, with Wright concurring only in the result. In his concurring opinion, he noted that the police had violated Rule 5 (a) but that the Mallory Rule had not been invoked below. He agreed that under the

\(^1\)Jones v. United States, 307 F.2d 397 (D.C. Cir. 1962). Burger was not on the panel.


\(^3\)Williams v. United States, 308 F.2d 652 (D.C. Cir. 1962) (per curiam).

\(^4\)329 F.2d 883.
circumstances, the court was not required to consider application of the Mallory Rule. Then, however, Wright used the discretion of his office in a conscious attempt to influence the development of the law. He introduced the possibility that failure to raise the Mallory issue below could have been the result of ineffective assistance of counsel.\(^1\) While he admitted that the court could not consider the question of ineffective counsel because it had not been raised or briefed,\(^2\) his very introduction of the issue can only be read as an invitation. Judge Burger, on the other hand, was silent.

The Killough case\(^3\) afforded both Burger and Wright opportunity to explore the contours of the Mallory Rule and to exercise their own brands of activism. Because Wright has considered the Mallory Rule a way of eliminating the "unequal contest of oaths between policemen and a lonely defendant,"\(^4\) he joined the majority in holding a confession inadmissible. Burger wrote a dissent for himself and two other judges.

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\(^1\) He cited a case in which the California Supreme Court had held that failure to invoke the exclusionary rule amounted to ineffective counsel. The case was People v. Inbarra, 34 Cal.Reptr. 863, 386 P.2d 487 (1963).

\(^2\) 329 F.2d 883, 885.

\(^3\) Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962) (en banc).

\(^4\) Wright, "Criminal Law and the Bill of Rights," Reporter, (June 3, 1965), 24. He also refers to the unequal swearing contest in Leigh v. United States, 329 F.2d 883, 885, n. 3.
The source of the disagreement was the question of whether a second murder confession given after arraignment could be used against the appellant. The first confession had already been held inadmissible because of violation of Rule 5 (a). A simple majority of the court decided that the second confession, without a lawyer, came so soon after the inadmissible confession as to be "inadmissible as the fruit of the latter."\(^1\)

Judge Burger was not at all inclined to expand the Mallory Rule. He agreed that Rule 5 (a) had been violated and that the first confession was properly suppressed, but he did not agree on the suppression of the second confession. It came after the defendant had been taken before a commissioner pursuant to Federal Rules and could be suppressed, according to Burger, only if it was coerced. He did not believe that it was coerced but was completely voluntary.\(^2\) Apparently it is not only the avowed activists who go beyond the bounds of judicial competence, because Judge Burger, although lacking technical competence in psychiatry, based his judgment of voluntariness on psychological reactions to the killing "which would tend to induce a 'confessing' state of mind."\(^3\) He expressed the belief that the suppression doctrine has

\[^{1}\text{15 F.2d 241, 244.}\]
\[^{2}\text{Ibid., 254.}\]
\[^{3}\text{Ibid., 255.}\]
been a failure in checking police misconduct and, as an alternative, suggested that a copy of the trial transcript be sent to the superior of every officer whose conduct results in a motion to suppress evidence.\(^1\) He concluded by accusing the court of rewriting a statute rather than interpreting it. "But," said Burger, "if Congress permits judges to distort by 'interpretation' and to rewrite its statutes, it should not be heard to complain."\(^2\)

The majority did not let what it termed Judge Burger's "unusual dissenting opinion" go unanswered. The majority rebutted his arguments in nine points.\(^3\) The ninth point was a retort to Burger's plea for congressional action. According to the majority, Congress could reverse the decision only by taking matters of evidence away from the judiciary or by positively granting the police the power to isolate suspects and interrogate them until they get a confession. The latter, they said, would not meet Bill of Rights standards.\(^4\)

While Wright concurred in the majority's expanded interpretation of the Mallory Rule, he chose to deal more thoroughly with the problem of the voluntariness of confessions following suppressed confessions. He rejected what he considered the two extreme positions on second

\(^1\)Ibid., 257-258, n. 5.  
\(^2\)Ibid., 260.  
\(^3\)Ibid., 245-248.  
\(^4\)Ibid., 247.
confessions: (1) after a magistrate advises an accused of his rights, any confession is valid, or (2) once there has been one inadmissible confession, no subsequent confession may be untainted by it. ¹ "Thus," he said,

no one suggests that because a suspect has been illegally detained and has confessed, he must be let free, immune from all further prosecution for the offense. Doubtless, this would be a most effective deterrent to illegal interrogations, but the cost to the public is too great. ²

Wright suggested that after a confession is suppressed, the court presume that a second confession is involuntary. Judge Burger's position was that after presentation before a United States Commissioner, the statement of rights is fresh in a defendant's mind. ³ While indicating no attempt to belittle the Commissioner or his advice of rights, Wright took the position the presumption of involuntariness should remain because Rule 5 (a) assumes a freshly arrested defendant, not one whose mechanisms of resistance have been weakened by a prior confession.

¹Ibid., 248-249.

²Ibid., 249. In fashioning police deterrents, Wright has never been unmindful of cost to the public. In a later case, he suggested that the responsible administration of justice might require reversals when there had been police brutality at the time of arrest, but, in the case before him, there was overwhelming proof of guilt, and he considered it an inappropriate time to break new ground. See Gilliam v. United States, 323 F.2d 615, 616 (D.C. Cir. 1963), cert. denied 375 U.S. 850 (1963).

³315 F.2d 241, 254.
The Judge gave no rule for determining the kind of evidence necessary to rebut the presumption of involuntariness, but suggested that it might at least be necessary to show that the defendant had sufficient time, while free of police control, to absorb the information about his rights and to have the advice of counsel who knew about the first confession. Even if this should not be required by the Mallory Rule, Wright pointed out that the court had power to fashion rules of evidence for the District of Columbia.¹

One of the best examples of Wright's activism in support of the Mallory Rule came in a case, Veney v. United States,² in which he voted not to reverse but to affirm a conviction. His reason for affirmance was that the defendant had been identified by four witnesses. But Wright also noted that the defendant was alleged to have made a "spontaneous apology" to his robbery victim during an in-custody confrontation. The Judge admitted to some

¹Ibid., 249-251. The Killough case did not end there. In a later proceeding, the same defendant sought to suppress damaging statements made to a graduate student who was a part-time employee at the jail. The defendant did not have assistance of counsel, and the interview in which the statements were made took place before the first appeal, so Killough did not know that his first confession could not be used against him. In Judge Wright's opinion, these statements too were inadmissible as fruit of the first confession. See Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964).

²344 F.2d 542 (D.C. Cir. 1965).
curiosity about reports of spontaneous apologies, since he doubted that the word "apologize" was a part of the vocabulary of the poorly educated defendants or, if it was, that they would express contrition so soon.

His curiosity, and the research it stimulated, led him to *Frederickson v. United States*, a case decided some years earlier, in which an appeals panel unanimously held that a damaging statement was properly admitted over a *Mallory* objection because it was spontaneous and not elicited by police. After that, the "spontaneous apology" became a recurring phenomenon. Together, the *Frederickson* decision and the trial transcript of the case before Wright solved the mystery. The testimony of an identifying witness left no doubt that the "apologies" were the result of police "coaching." Wright used his concurring opinion to expose and condemn the practice, even while voting to affirm the conviction. He considered it time "for some soul searching in the prosecutor's office before it offers any more 'spontaneous' apologies in evidence."  


2. *344 F.2d 542, 543*. Wright does not, however, oppose the admission of damaging statements that are truly spontaneous. Although he wrote no opinion, he joined an opinion by Judge MacKinnon affirming the admissibility of a damaging statement made by a defendant immediately after police informed him that he was under arrest and the charge against him, but before they had a chance to give him the *Miranda* warning. *Bosley v. United States*, *426 F.2d 1957* (D.C. Cir. 1970).
The constitutional guarantee against self incrimination which the Mallory Rule supported was further strengthened by the Supreme Court decision in *Miranda v. Arizona*. According to Chief Justice Warren's opinion in that case, prior to any in-custody interrogation the police must advise the accused of his right to remain silent, of his right to have counsel (appointed, if necessary) present during interrogation should he choose to answer questions, and that anything he says may be used against him at trial. If the accused begins to answer questions, he may reassert his right to silence at any time. The individual may waive his *Miranda* rights, but he must waive voluntarily and intelligently. Wright considered that *Miranda*, like Mallory before it, attempted to insure that the real trial took place in the courtroom, not in a police interrogation room. Consequently, he applied *Miranda* as vigorously as he had the Mallory Rule.

Judge Wright did not simply apply *Miranda*, he extended it even to statements elicited by the police but not as a part of interrogation about the crime itself. When a

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2 The procedures required by *Miranda* are briefly summarized at Ibid., 444-445.


4 See Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968).
defendant testified at trial regarding his employment status, Wright considered that Miranda barred the arresting officer from testifying against him regarding contrary information given during the routine filling out of forms following arrest. Wright's rationale was that

Even innocent questions asked of a suspect in the inherently coercive atmosphere of the police station may create in him the impression that he must answer them. His answers then cannot be considered voluntary in the sense required by Miranda. Where such answers turn out to be damaging to the suspect, they cannot be used against him at trial, absent a valid waiver of the Miranda rights.¹

Wright's colleague, Judge Tamm, rightly objected that such an interpretation of Miranda would free the defendant from the threat of a perjury prosecution if he testified falsely, thus placing upon "an overburdened Providence the sole responsibility for insuring the credibility of a witness."² Judge Wright's answer was that Miranda explicitly states that no distinction could be made between inculpatory and exculpatory statements.³ He saw no reason for treating differently a statement which was intended to be neither inculpatory nor exculpatory.⁴ But there is reason for treating it differently. Miranda was intended to enforce the Fifth Amendment guarantee against self-incrimination. There is no way that a

¹Proctor v. United States, 404 F.2d 819, 821 (D.C. Cir. 1968).
²Ibid., 823 (dissent).
³384 U.S. 436, 477.
⁴404 F.2d 819, 821.
truthful answer to a question unrelated to the crime can incriminate one. Undoubtedly the real problem for Wright was that the defendant denied the police version of the form-filling episode, thus producing another "uneven swearing contest."

The problem of self-incrimination does not arise if the defendant is extended immunity from prosecution. That a congressional grant of immunity is not in conflict with the Fifth Amendment guarantee against self-incrimination has long been established by the Supreme Court.\(^1\) It also specifically upheld the constitutionality of the Immunity Act of 1954.\(^2\) That, however, has not prevented Judge Wright from disliking immunity statutes. He has referred to the Immunity Act of 1954\(^3\) as more properly called the "Compulsory Testimony Act."\(^4\) He dislikes immunity legislation because it protects solely against criminal prosecution while leaving the individual vulnerable to civil and economic disabilities.\(^5\) Consequently, in attacking the Immunity Act of 1954, Wright became a strict constructionist. Through his narrow interpretation of the

\(^3\)18 U.S.C., Sec. 3486.
\(^4\)In re Bart, 304 F.2d 631, 633 (D.C. Cir. 1962).
\(^5\)Ibid., 635.
statutory language, an order to testify and a contempt commitment for refusal to testify were both vacated.\(^1\)

Wright did not limit himself to a narrow construction of the statute as he might have done. He participated in the continuing dialogue between courts and suggested a way to protect individuals who are compelled to testify from some non-criminal sanctions, such as prohibitions on granting government employment to admitted Communists. He raised the question of whether the due process clause of the Fifth Amendment might insulate persons compelled to testify from such sanctions, even if the self-incrimination clause did not.\(^2\) Although he framed the issue in terms of an admission that it was premature for the court to consider that question, he had planted there a possible course of action for the future. One of the judges who joined the opinion was Judge Burger, who often disagreed with Wright in other kinds of cases.

His dislike of immunity statutes, without more, was not enough to induce Wright to vote for reversal of a judgment of contempt when an individual refused to testify in spite of a grant of immunity from prosecution.\(^3\) But when he had some flexibility, he made use of it. He participated in a decision by a divided panel holding that

\(^1\)Ibid., 636.  
\(^2\)Ibid., 634.  
\(^3\)In re Flanagan, 350 F.2d 746 (D.C. Cir. 1965) (per curiam).
when an individual was compelled to testify regarding a crime for which he was already convicted, but before his appeal was decided, the grant of immunity shielded him from the penalty if his conviction were affirmed. If the conviction were reversed, immunity prevented retrial.¹

Wright's dislike of compelled testimony led him to an extreme position in Ellis v. United States.² In that case, a witness waived his Fifth Amendment privilege against self-incrimination and voluntarily testified before a grand jury. At the trial, at which he was not a defendant, he attempted to reassert his Fifth Amendment privilege. The trial judge agreed that he had a right to do so, but granted immunity and compelled him to testify. At the conclusion of the trial, the defendants were convicted.

On appeal, each member of the court had a different view of the witness' rights, but a majority agreed that justice did not require a reversal of the convictions. Judge Wright, in dissent, argued that the witness' constitutional rights had been violated. "I believe the Fifth Amendment not only protects against the risk of prosecution on evidence extorted from the defendant," he asserted, "but also establishes a right to abstain from the

¹Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965)  
²416 F.2d 791 (D.C. Cir. 1969).
demeaning ritual of public self-accusation." There was, however, a glaring omission in his brief but spirited dissent. He failed to explain why the defendants were entitled to have their convictions reversed when it was a witness, not the defendants, who was forced to testify. He simply ignored the problem in his defense of Fifth Amendment rights.

The Sixth Amendment

The most effective way of safeguarding Fifth Amendment rights, or any other constitutional rights, particularly in the context of adversary criminal proceedings, is through the assistance of counsel guaranteed by the Sixth Amendment. To Judge Wright that has always meant more than just the right to have a lawyer present at a trial. The right to counsel exists before trial and means the right not to be secretly questioned during a continuance granted for the purpose of securing counsel. It also means the right to counsel at arraignment and preliminary hearing, although the absence of counsel at those proceedings results in reversal of conviction only if the trial is prejudicially affected.3

1Ibid., 808.

2Queen v. United States, 335 F.2d 297 (D.C. Cir. 1964) (per curiam).

3Shelton v. United States, 343 F.2d 347 (D.C. Cir. 1965) (per curiam); Anderson v. United States, 352 F.2d 945 (D.C. Cir. 1965).
To Wright, the Sixth Amendment's right to counsel extends even into the grand jury room. In *Jones v. United States*, the Court of Appeals, sitting *en banc*, reversed a criminal conviction because, among other things, the defendant, who had only a third grade education and could not read, did not have the assistance of counsel when he appeared before the grand jury and confirmed an earlier confession. But not all members of the majority agreed that there was a constitutional right to counsel before the grand jury. Judges Washington and McGowan would have disposed of the matter on the basis of the court's supervisory power. Since there could be no majority for reversal without Washington and McGowan, Wright and the other three who would have based the decision the the Constitution were forced to compromise and rely on the supervisory power. If one assumes, however, that Wright is a policy-oriented judge, then he was giving up little. Even if the decision had been based on the Constitution, it would not have been binding on other circuits absent a decision of the Supreme Court. By agreeing to base the decision on the supervisory power in spite of his belief that the Constitution required reversal, he got the desired result--the right to counsel at a critical stage in the proceedings--for the area under the court's jurisdiction.

To Judge Wright, it is extremely important that the defendant have the assistance of counsel as soon after arrest as possible. This is particularly true in the case of poor and uneducated defendants. In such cases, defense counsel can require the prosecution to prove probable cause and can seek out defense witnesses and run down leads while they are fresh. In Wright's opinion, defense counsel can also perform the therapeutic function of convincing the defendant that his side of the story is being heard and that he is being treated fairly. If legal defense is not likely to be successful, the defendant's lawyer can assist him in plea-bargaining. Wright sees no impropriety in this as long as it is voluntary. In fact, when an indigent has no adequate defense, Wright believes that defense counsel should try to keep him out of court. Even a fair trial often serves only to encourage false hopes and perjured defenses. Convictions result in sentences longer than if there had been a guilty plea, and the defendant becomes even more anti-social, whereas voluntary plea-bargaining is more likely to convince the

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1 See his concurring opinion in Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) in which he assigns the judge the role of overseeing the fairness and voluntariness of the process.
defendant that he is being treated fairly and induce him to cooperate with rehabilitative programs.¹

If the defendant chooses not to plead guilty, he unquestionably has the right to counsel at trial.² Of course, the Constitution is not satisfied unless there is effective representation of counsel, nor is Judge Wright satisfied with anything less.³ He has high regard for lawyers who conscientiously defend their clients' interest and has rejected claims of ineffective counsel when not supported by the record.⁴ But he has also suggested that an appellant raise the issue of ineffective counsel because the Mallory Rule had not been invoked although


²To Wright, this includes the right to have counsel present during the resolution of questions raised during a poll of the jury, since that is a critical stage in the proceedings. See United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970) (per curiam).

³He has expressed his regret that law schools devote such little time to teaching trial advocacy and has wholeheartedly endorsed legal internship programs that would give law students and recent graduates needed experience in trial advocacy. See his "Law School Training in Criminal Law: A Judge's Viewpoint," American Criminal Law Quarterly, III (Summer, 1966), 166-172.

⁴Smith v. United States, 304 F.2d 403 (D.C. Cir. 1962) (per curiam); Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967).
Rule 5 (a) of the Federal Rules of Criminal Procedure had been violated.¹

The problem of the effectiveness of counsel can arise when two defendants share a lawyer. It is the responsibility of the trial judge to see that the decision to proceed with one lawyer is an informed one.² To Judge Wright, the economic status of the defendants was irrelevant to the trial judge's responsibility. He said:

We see no reason why in assigned counsel cases the responsibility to advise defendants of their rights and the potential problems of joint representation should be any less than where counsel is retained. Not only does the Criminal Justice Act indicate otherwise, but the indigent is entitled to assume that the court, in actively aiding him in obtaining counsel, will advise him of all rights and matters relevant to appointment of counsel.³

Because of the seriousness of a criminal prosecution, Wright has insisted upon extending the indigent's right to counsel to its fullest extent.

A relatively new aspect of the right to counsel was engrafted onto the Constitution in 1967 by the Warren Court. At that time, the Court decided that the Sixth and Fourteenth Amendments guaranteed the right to counsel

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¹Leigh v. United States, 329 F.2d 883 (D.C. Cir. 1964) (concurring).

²Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

³Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967). See also Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967) in which Wright, under the court's supervisory power, announced guidelines for District
at confrontations, such as lineups, for the purpose of identification. Since Wright believes that the individual should have the assistance of counsel at the earliest possible time, he obviously approved of this interpretation of Sixth Amendment rights, and a unanimous panel on which he sat decided that effective assistance required that defense counsel be informed of the description of the suspect given to the police. As might be expected, convicted criminals, in the hope of having their convictions reversed, attempted to stretch the Wade decision to the ridiculous length of requiring a reversal because counsel had not been present at an identification at the scene of the crime. Judge Wright would not be led down that path.

Yet he did approve of the new development is the constitutional law of the Sixth Amendment, interpreted it liberally, and even displayed an inclination to go beyond Judges in regard to joint representation.


2Spriggs v. Wilson, 419 F.2d 759 (D.C. Cir. 1969) (per curiam).


4In United States v. York, 426 F.2d 1191 (D.C. Cir. 1969) (per curiam), Wright was a member of a panel majority that remanded the case for a hearing to determine whether an in-court identification was tainted by pre-trial identification techniques in violation of the Supreme Court's Wade decision. Judge Robb, the dissenter, accused the majority of stretching Wade too far.
it. In *Stovall v. Denno*, the Supreme Court decided that its holdings regarding the right to counsel at identifications would not be retroactive. When Rule 5 (a) of the Federal Rules of Criminal Procedure had been violated, Judge Wright would have circumvented the nonretroactivity holding in *Stovall* by using the Mallory Rule to suppress identifications at which counsel had not been present. But the majority of the Court of Appeals, sitting en banc, decided that it had never before applied the Mallory Rule to lineup identifications and, since the right to counsel at lineups was not retroactive, it would not use the Mallory Rule to make it so. Wright had to be content with writing a dissent for himself and two of his like-minded brethren.2

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1388 U.S. 293 (1967).

2*Williams v. United States*, 419 F.2d 740 (D.C. Cir. 1969). When pre-*Stovall* identifications were attacked on due process grounds, Wright was no more inclined than his colleagues to reverse convictions. He participated in many unanimous decisions rejecting claims that the circumstances surrounding identification required reversal. *Cunningham v. United States*, 391 F.2d 457 (D.C. Cir. 1967) (per curiam); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir. 1969); *Gregory v. United States*, 410 F.2d 1016 (D.C. Cir. 1969); *Jackson v. United States*, 412 F.2d 149 (1969); *Taylor v. United States*, 414 F.2d 1142 (D.C. Cir. 1969); *Stewart v. United States*, 418 F.2d 1110 (D.C. Cir. 1969); *United States v. Hamilton*, 420 F.2d 1292 (D.C. Cir. 1969); *United States v. Williams*, 421 F.2d 1166 (D.C. Cir. 1969). In two cases, *Mendoza-Acosta v. United States*, 408 F.2d 1294 (D.C. Cir. 1969) (per curiam), and *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir. 1968) (en banc), he would have required the lower court to conduct a hearing to determine whether circumstances surrounding identification were so suggestive as to require a new trial, but only in *Clemons* was he not with the majority.
Because of his expansive view of the right to counsel, one may speculate that Judge Wright will resist the Burger Court's interpretation of *Wade* and *Gilbert* as requiring counsel only at confrontations which take place after the indictment which initiates adversary proceedings.\(^1\) Before that case was decided, Wright considered that *Wade* extended the right to counsel to identification confrontations even when there had been no formal arrest.\(^2\) Since the Supreme Court has authoritatively interpreted *Wade* and *Gilbert* in a contrary manner, Wright is left with the alternatives of passive acquiescence or of attempting to convince his fellow members of the Court of Appeals to exercise their supervisory power to require more than the Burger Court's interpretation of the constitutional right to counsel. As a policy oriented judge, one might expect him to opt for the latter alternative.

The Sixth Amendment, of course, embraces more than the right to counsel. It also guarantees the accused a speedy trial. But how speedy must a trial be in order to comply with the constitutional demand? There is no

\(^1\text{Kirby v. Illinois, 406 U.S. 682 (1972).}\)

\(^2\text{United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970).\textbf{ Wright did not write an opinion of his own but joined the majority opinion. Attesting to the reasonableness of their interpretation of *Wade* is the fact that even Judge Robb, a conservative member of the court, wrote a separate opinion in which he reluctantly concurred in that interpretation.}\)
easy answer to the question, nor has Judge Wright attempted to provide one. Nevertheless, he has attempted to give some meaning to the constitutional guarantee—more meaning than some of his brethren would give it.

Only a month after the Senate confirmed Wright's nomination to the Court of Appeals, he was a member of the panel that heard arguments in the case of Mann v. United States. In the Mann case, Wright did not think that there had been a denial of speedy trial, but he gave a clear indication that he would not be unresponsive to such a claim in other circumstances. While admitting that there was some case law to the contrary, he used a footnote to express the opinion that even if formal trial should be held promptly after indictment, the Constitution could still be violated if there should be a purposeful and oppressive delay between the offense and the bringing of formal charges.

Judge Burger specifically rejected that position in Nickens v. United States. Wright, who was also on the panel, agreed that there had been no denial of the Sixth Amendment right to a speedy trial, but he concurred only in the result, not in Judge Burger's opinion. He wrote

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2 Ibid., 396-397, n. 4.
3 323 F.2d 808, 809 (D.C. Cir. 1963).
a separate concurrence in which he expanded on the view expressed in his *Mann* footnote. "Indeed," he said,

a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors.¹

Judge Wright has refused to break criminal prosecutions down into artificial segments. He considers that any unreasonable delay in governmental action which is prejudicial to the defendant or denies him his liberty constitutes a denial of constitutional rights. He has considered each case on its merits. In a complex mail fraud case, he conceded the possibility that a delay of four years between the original indictment and the trial might not have been unreasonable and remanded the case for further proceedings.² On another occasion, he dissented from the full Court of Appeals' affirmance of the

¹Ibid., 813. Judge David Bazelon, Chief Judge of the Circuit, agrees with Wright. He quoted from Wright's *Nickens* opinion when he dissented from the court's denial of a rehearing in *Wilson v. United States*, 335 F.2d 982 (D.C. Cir. 1964).

conviction of an individual who could not raise bail and spent six months in jail awaiting trial, with all of the delay at the Government's request. In justification of his dissent, Wright said:

Some may think the Sixth Amendment "right to a speedy and public trial" is a legal term of art which does not mean what it seems to say. I find no basis in either the terms or the history of the Sixth Amendment for any such conclusion. There is no indication that the Framers of the Amendment used the word "speedy" in other than its dictionary meaning.¹

Reasonably enough, he agrees with the other judges that there is no constitutional violation when the delay is at the defendant's request.² But when delay comes between offense and arrest and is due solely to lack of a diligent effort to make the arrest, the conviction must be reversed.³

Judge Wright concedes that the Government may sometimes have a valid reason for delaying an arrest when it is necessary to prevent the exposure of an undercover

¹Smith v. United States, 331 F.2d 784, 793 (D.C. Cir. 1964). The Judge was particularly irate because the defendant spent the period of delay in jail due to his inability to make bail. Elsewhere, he has referred to bail as "a barnacle on the back of the criminal law." Wright, "Renaissance of the Criminal Law: The Responsibility of the Trial Lawyer," Duquesne University Law Review, IV (Winter, 1965), 215.

²Hedgpeth v. United States, 364 F.2d 684 (D.C. Cir. 1966).

agent or informer. He has taken the position that when
the defendant has made no plausible claim that he was
prejudiced by the delay, the conviction must be affirmed.\(^1\)
He has not, however, been consistent in that position.
When a narcotics arrest was delayed five months to pro-
tect an undercover agent, the Judge noted that persons
from a slum subculture have no "desk pads and social cal-
endars" to remind them where they were several months
before. After a long delay, the police may make mistakes
and the "mistakes would very likely wind up in the Lorton
Reformatory serving five-, ten- or fifteen-year sentences.
This spectre apparently does not disturb the majority of
this panel. I find it frightening," he declared.\(^2\) Yet
the defendant himself made no plausible claim that his
trial was prejudiced by the delay. In fact, he attempted
to establish his whereabouts at the time of the offense
through the testimony of a defense witness whom the jury
apparently disbelieved.\(^3\)

\(^1\)Jackson v. United States, 351 F.2d 821
(D.C. Cir. 1965).

\(^2\)Powell v. United States, 352 F.2d 705, 711
(D.C. Cir. 1965).

\(^3\)Ibid., 709. Acting as a District Judge, Wright
presided over a trial in which the issue of delay in
prosecution was raised. The trial resulted in a convic-
tion, which was affirmed by the Court of Appeals. See
Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964),
cert. denied 380 U.S. 984 (1965). Also see Hardy v.
United States, 381 F.2d 941 (D.C. Cir. 1967).
Most trials, in fact, are by jury, and this too is a guarantee of the Sixth Amendment. Everett v. United States, a case which involved the right to trial by jury, gave Judges Burger and Wright another opportunity to exhibit their conflicting approaches to criminal justice. The crux of the dispute was whether Everett could withdraw a guilty plea and go to trial even though he continued to admit having performed the robbery for which he was charged. The District Judge would not permit him to withdraw his plea and imposed a nine-year sentence. Judge Burger, writing for the majority of the appeals panel, agreed with the District Judge and would "not encourage accused persons to 'play games'" with the already overburdened courts.2

Judge Burger appealed to the head; Judge Wright appealed to the heart—with supporting legal citations and historical material, to be sure. Wright found that the poverty of the accused provided a fair and just reason for permitting withdrawal of the guilty plea. As he put it:

On allocution, he stated that he stole because he was poor, in order to provide necessary medical care for his pregnant wife. The defendant is not articulate, but his claim seems to make him out as

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1. 1336 F.2d 979 (D.C. Cir. 1964).
2. Ibid., 984.
a modern Jean Valjean, who was convicted of burglary for stealing bread for his starving children.\textsuperscript{1}

Judge Wright did not even consider the problem of court congestion. He thought Everett ought to be permitted to take his case to a jury for a determination of culpability. "The mitigating circumstances the defendant here claims may not be enough to convince the jury that his crime is excusable, but to my mind his desire to raise the issue of culpability for jury decision may be sufficient cause to allow him to withdraw his plea of guilty and go to trial," said Wright.\textsuperscript{2}

The Eighth Amendment

If he was moved by the plight of an admitted robber, one might expect him to be similarly responsive to claims of cruel and unusual punishment prohibited by the Eighth Amendment, especially since Wright had himself advanced a cruel and unusual punishment argument in the first of his two appearances before the Supreme Court as a lawyer.\textsuperscript{3} He has indeed been responsive to such claims, as have his colleagues.\textsuperscript{4} In such cases, it was not unusual for Judges Burger and Wright to vote together, since most cruel and unusual punishment cases were decided by unanimous vote.

\textsuperscript{1}Ibid. \textsuperscript{2}Ibid., 987.
\textsuperscript{3}See Ch. 1, pp. 10-15 above.
\textsuperscript{4}See Smith v. Anderson, 317 F.2d 172 (1963), in which Burger wrote the opinion. For a similar case in which Wright, but not Burger, participated, see Hudson v. Hardy, 412 F.2d 1091 (1968) (per curiam).
But whenever there was more than one opinion written, Judge Wright was always less restrained than Judge Burger.¹

In Castle v. United States,² a panel on which they both participated unanimously affirmed a conviction for purchasing narcotics without a tax stamp. Assigned counsel for the indigent defendant argued that since Robinson v. California³ held it was cruel and unusual punishment to make the condition of drug addiction a crime, then it was also cruel and unusual punishment to make the addict's purchase, possession or concealment of his daily dosage a crime. Wright considered that the "argument, although neither remote nor insubstantial, is one which, in the light of the great weight of the cases which have imposed punishment, is more properly to be made to the Supreme Court."⁴ While Judge Burger concurred in the result, he objected to implications by the majority that addiction could be equated with insanity.⁵

¹This was true even when they themselves did not write opinions. See Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (en banc).


⁴347 F.2d 492, 495.

⁵Ibid.
But the criticism of another judge hardly deterred Wright in his approach to the Constitution. His liberal reading of Bill of Rights protections relating to criminal procedure did, of course, reflect his own values, but it was largely made possible by changes in the state of the law since he left the District bench. As a District Judge, he had regretted that a defendant had not received "all the constitutional protection a court sworn to uphold the Constitution would have liked him to have received," but he dismissed the petition for \textit{habeas corpus} because the defendant had had due process as it was then being interpreted. When the Supreme Court liberalized its interpretation of Bill of Rights protections relating to criminal procedure, it changed Judge Wright from a reluctant follower and sometime critic into an avid supporter of Supreme Court policy. Moreover, he attempted to influence the further liberalization of the law, either directly or by planting in his opinions suggestions for future action.
CHAPTER VI

COURT OF APPEALS: FIRST AND FIFTH AMENDMENT
AND THE LANDLORD-TENANT CONFLICT

Less numerous than his judicial ventures into the realm of criminal law and procedure, but no less important, are Wright's attempts at solving First Amendment problems. The First Amendment stakes out a number of spheres in which government is not free to roam at will. The Amendment guarantees that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

As its language clearly indicates, the First Amendment may be invoked in a wide variety of situations.

In some situations, the First Amendment provides an independent source of protection. In other situations, particularly (although not exclusively) those arising out of congressional investigations, First Amendment rights are often bolstered by strict enforcement of procedural rules. Failure by a congressional committee or subcommittee to adhere to proper procedure when inquiring
into a witness' group memberships may constitute a denial of due process of law guaranteed by the Fifth Amendment. Although the First and Fifth Amendments are often intertwined, the Fifth Amendment's guarantee of due process of law may also stand-independently. It is frequently the basis of constitutional attacks on administrative actions deemed by some to be arbitrary, unreasonable, or unfair. While Wright's approach to the due process clause has often been characterized by considerable deference to administrative agencies, he has shown less respect for them than for the rights of their employees.

This chapter examines Judge Wright's approach to the constitutional guarantees of freedom of religion, speech, press, and "association;" the extent of his deference to administrative agencies; and his approach to the legal relationship between landlord and tenant. The latter is treated separately because, although the Constitution plays only a minor role, this area of law provides an excellent illustration of Judge Wright's liberal ideological bent.

The First Amendment and Religion

The First Amendment assumes that religious practices are a matter of conscience and commands that Congress shall make no law prohibiting the individual's free
exercise of his religion. In spite of the absolute language of the First Amendment's denial of governmental power over religious practices, the courts have not interpreted the words to mean that in the name of religion anything goes. The problem for Judge Wright, and for courts in general, has been to give broad judicial protection to religious freedom without denying government the power to protect society from injuries that might result if the exercise of religion were absolutely unfettered.

A statement of the problem is not difficult, but the solution of cases often is. In a particularly difficult case, especially in view of his liberal values, Judge Wright issued an emergency order authorizing blood transfusions for a hospital patient who, on religious grounds, would not consent to the needed transfusions. Wright's order was intended to maintain the status quo and prevent legal questions from becoming moot through the patient's death. In explaining his decision, he said:

The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find later

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1Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (1964). The case was particularly difficult because Wright was the only Circuit Judge at court that evening and had to act alone.
that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.¹

When not faced with the specter of imminent death, Wright has required that government exercise extreme care in the application of even general legislation, when it has the effect of interfering with the free exercise of religion. He has taken the approach usually, but not always, followed by the Supreme Court. It is an approach that accords to freedom of religion, like freedom of speech, a preferred position. When general laws interfere with religious liberty, the former must yield, unless compelling considerations of public policy require their enforcement.²

In Wright's opinion, proper care had not been exercised in the condemnation of electrical devices called "E-Meters," which, according to the Founding Church of Scientology, could confer spiritual benefits, as well as cure a number of physical ills, some quite serious. In establishing a case of false labeling, the Government had relied upon a mass of Scientological literature without

¹Ibid., 1009-1010. The Court of Appeals, en banc, denied rehearing without giving reasons, but there were some dissents. 331 F.2d 1010 (1964), cert. denied 377 U.S. 978 (1964).

distinguishing the religious and the purely secular.
Wright found that much of the literature upon which the
government had relied was not labeling within the meaning
of the Food, Drug, and Cosmetic Act, when considered in
the light of the First Amendment. Consequently, a new
trial became necessary. At the subsequent trial, at which
the Government did distinguish false scientific claims
from religious teachings, the "E-Meters" were again con­
demned. Because the devices were not in themselves harm­
ful, the District Court authorized their return to the
Founding Church upon execution of a bond guaranteeing that
they would be properly and prominently labeled. Thus
religious liberty was protected to the extent that it was
not inconsistent with public health and safety.

The First Amendment and "Pure Speech"

To a liberal such as Wright, "pure speech," that is,
the spoken word when not linked with action, is beyond
the legislative pale. However, in the case of a Vietnam

1 21 U.S.C., Sec. 301 et seq. (1964).
2 Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).
4 Wright was a member of a Court of Appeals majority
that saved the constitutionality of a District of Columbia
ordinance prohibiting cursing and profane language in pub­
ic places by reading into it a requirement that the pro­
scribed language be linked to action in order to be punish­
able. Williams v. District of Columbia, 419 F.2d 638
(D.C. Cir. 1969).
war critic named Watts, it was not the constitutionality of a statute, but rather the application of a statute, that Wright attacked. Watts said, "If they ever make me carry a rifle, the first person I want in my sights is L.B.J." For making that statement, Watts was convicted of violating a 1917 statute prohibiting knowing and willful threats against the life of the President. The conviction was affirmed, with Judge Wright dissenting. He considered the application of the 1917 statute to Watts an unreasonable limitation on speech and inconsistent with congressional intent, since the statute was aimed at real threats and not crude rhetorical devices.\(^1\) Wright was vindicated when the Supreme Court, reversing the Court of Appeals, decided that the 1917 statute must be interpreted in the light of a national commitment to free speech.\(^2\)

The First Amendment and the Communications Media

While Judge Wright's approach to the First Amendment has been clearly libertarian in that he has promoted the free and open dissemination of controversial opinion, it has also been non-absolutist in that he has not interpreted the words "Congress shall make no law . . ." literally. For example, Congress has charged the Federal

\(^1\) Watts v. United States, 402 F.2d 676, 686-693 (D.C. Cir. 1968).

Communications Commission (F.C.C.) to regulate the airwaves in the "public interest, convenience, or necessity,"¹ and the judges, including Judge Wright, have generally given the Commission a free hand in the grant² and denial³ of licenses, even in the face of First Amendment challenges.

Wright's handling of challenged F.C.C. decisions could have been as much the result of judicial deference to an administrative agency engaged in technical regulation as to his approach to the First Amendment. His thoughts on defamation and related problems, however, clearly establish that he has taken a non-absolutist approach to the First Amendment's guarantee of freedom of speech and press. Far from interpreting the First Amendment as an absolute ban on congressional regulation of the media, Wright has argued that "we need a national law of defamation--a law that goes beyond establishing limitations on state actions for defamation and extends to the elements of the tort itself."⁴ Since newspapers and

¹The Supreme Court has held that the F.C.C.'s "public interest" standard is not unconstitutionally vague. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).


³Blumenthal v. F.C.C., 318 F.2d 276 (D.C. Cir. 1963).

magazines are constantly crossing state lines, he has no
doubt that Congress has adequate constitutional power to
enact such legislation. He finds this power in the com-
merce clause and thinks that congressional legislation
would be preferable to the case by case approach of the
courts.1

It was, however, the Supreme Court rather than
Congress that took the first step in the direction of a
national standard of defamation. That first step occurred
in 1964, when the Court held in New York times v.
Sullivan,2 that a public official could not collect damages
by showing that statements about his official conduct were
false, even if the publisher had been negligent in check-
ing the facts. He could not recover unless he could show
that the false statement was "made with 'actual malice'--
that is, with knowledge that it was false or with reckless
disregard of whether it was false or not."3

Although he has expressed some reservations about
the application of the New York Times rule in other kinds
of situations, Wright has been quite willing to apply it
to situations involving published criticisms of public
officials and their official conduct. In Washington
Post Co. v. Keogh,4 writing for the majority of a divided

1Ibid., 643-646.
2376 U.S. 254.
3Ibid., 279-280.
4365 F.2d 965 (D.C. Cir. 1966).
panel, he extended the New York Times rule to summary judgments. The case originated when the Washington Post published a Drew Pearson column containing allegations that a New York Congressman had accepted bribes. In the resulting libel suit, the District Judge denied the newspaper's motion for summary judgment, even though the Congressman was unable to make even a preliminary showing of malice. In reversing the lower court, Wright noted that summary judgments play an important part in preventing harassment by long and costly litigation where there is no real issue. He found it especially important when the First Amendment is involved because the ability to harass inhibits free debate. He explained:

The threat of being put to the defense of a lawsuit by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits.¹

But this application of the New York Times rule does not imply that the Judge would use it in other kinds of cases. In arguing for a national standard of defamation, he has suggested that such a standard should distinguish classes of cases based upon the subject matter of published statements and the person who is the plaintiff. Based upon subject matter, there could be three categories

¹Ibid., 968.
of statements: (1) political; that is, directly related to elections or government; (2) public interest, a broad category including anything that would contribute to the development of understanding and sensitivity; and (3) private matters; that is, matters affecting only one person or a small group and in which there is no general interest until the publication itself creates curiosity. Based upon the plaintiff in the defamation suit, there could also be a threefold categorization: (1) public officials; (2) public figures; that is, persons who are by choice in the public spotlight and have access to the media to rebut statements about them; and (3) private individuals who do not voluntarily attract publicity and lack access to the media. The news media's First Amendment protection would be greatest when publication concerns political matters and the plaintiff is a public official or a public figure.  

Although in real situations there may be disagreement as to which category is applicable, a case that would fit easily into the political matter-public figure 


2A case which illustrates this is Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966) (en banc). The case involved a white man who operated a drugstore in a black neighborhood. He sold the Afro in his store until he decided that the paper had become too inflammatory and cancelled his subscription. The editor of the Afro published an article on the cancellation, in which he called the druggist a bigot with
category did come before a panel on which Wright sat. The case involved a public relations man who had taken active part in the District of Columbia presidential primary. He filed a libel suit against the Evening Star newspaper for calling him the "chief local spokesman of Malcolm X and his Black Muslim Mosque" and for accusing him of appealing to racist prejudice. The District Court granted summary judgment for the newspaper on grounds that the plaintiff, a public figure, had failed to show any fact from which malice could be inferred. The appeals panel on which Judge Wright sat unanimously affirmed the lower court's decision.¹

Judge Wright has not had occasion to participate in a public figure-public interest case, but he has indicated that he would not favor applying the rule of New York Times v. Sullivan to such a case. He agrees with Justice Harlan's opinion in Curtis Publishing Co. v. Butts² that a low opinion of the intelligence of black people. The druggist won a libel and invasion of privacy suit, which the Court of Appeals affirmed. The court considered the druggist a private individual and the cancellation a private matter. But to Judge Bazelon, it was a matter of public interest—a white man determining how militant Negroes should be. Apparently Judge Wright's thoughts on the problem of defamation had not yet crystallized, for he expressed no opinion on the merits. He noted that the case had been tried before New York Times v. Sullivan and would have reversed and remanded for a new trial in the light of that decision.

²388 U.S. 130 (1967).
the plaintiff should be able to recover damages if he can show "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."¹ From the plaintiff's standpoint, this would be somewhat less stringent than the New York Times rule, since he would not have to prove malice, only extreme negligence.

Judge Wright's behavior on the bench, however, has not been entirely consistent with the preferences he has expressed off the bench in relation to defamation and to the right of privacy. He participated in a per curiam decision reversing and remanding a summary judgment in favor of Time magazine in a libel suit. The suit was brought by an attorney who appeared in a Time photograph, seated at a restaurant table with six other men. The accompanying article referred to them as having a delayed lunch due to an earlier interruption when the District Attorney attempted to bring them before a grand jury in connection with an investigation of organized crime. But the attorney was not one of the people called before the grand jury. Time admitted to that knowledge but made an editorial decision that the attorney's attendance at the luncheon put him in the same category with the others.

Based upon these facts, the Court of Appeals reversed the summary judgment and remanded the case for trial on the issue of malice.¹

Although Judge Wright has indicated a preference for Justice Harlan's position, which would permit a private individual to collect damages if a publisher printed false statements through extreme negligence, even without malice, he wrote a concurring opinion in which he set forth his view of the proper procedure for handling the malice issue under New York Times v. Sullivan. Since the Supreme Court had extended the New York Times rule to private individuals,² it might appear that Wright was simply applying the law as it then existed, even though it conflicted with his own preferences. But that explanation is not satisfactory because Wright not only applied the New York Times rule, he applied it with a vengeance. He indicated that he would institute a two-step procedure in which the trial judge would have to find actual malice before the issue could go to a jury. If the judge finds actual malice, the issue would then be decided by the jury, and the jury would not be informed of the judge's prior decision. "This two-step procedure in which both


the trial judge and the jury must find actual malice before there can be a judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern," said Wright.¹ He was speaking only for himself; therefore, the other two judges on the panel did not think *Times* required this two-step procedure. Since the two-step procedure would make it more difficult for the attorney to win a judgment, it is difficult to reconcile with Wright's stated preference for lowering the constitutional barriers somewhat where private individuals are concerned.²

The problem for Wright, or for anyone who values both freedom of the press and the right to privacy, is that the two often come into conflict. The Judge, of course, recognizes this. In dealing with the conflict of values in the abstract, he has recommended the balancing test. One should balance the society's right to know, not against the individual's interest in privacy, but against the society's interest in the privacy of its members.³ In concrete cases, however, Wright has usually found freedom of the press to weigh heavier on the scale.

¹424 F.2d 920, 923.

²It might be reconciled if Wright did not consider the attorney to be a private individual, but he did not discuss that issue.

This has been true not only when the substance of printed matter has been challenged, as in defamation cases, but also in cases involving the manner in which the press gained its information.

Neither Wright nor the judges with whom he sat were willing to inhibit columnist Drew Pearson, in spite of his questionable methods. When Liberty Lobby, an ultra-conservative group, sought to enjoin publication of material from its files, copied without the organization's consent, Judge Burger pronounced the words of the balancing test but added that "the balance is always in favor of free expression . . . ."¹ Judge Wright agreed and noted that lobbying, also a First Amendment right, usually promotes special interests. For that reason, it is "imperative that the freedom of speech and the press provisions of the First Amendment are not paralyzed while the right to petition by lobbying is being exercised."²

Except for being aware of how the material was obtained, Pearson apparently was not involved in the invasion of Liberty Lobby's files. However, in a similar case, two members of Pearson's staff secretly copied material in the private files of Senator Thomas Dodd. When Pearson used the material for articles on Dodd, the

¹Liberty Lobby v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968).
²Ibid.
Senator countered with a suit, not for libel, but for invasion of privacy. Again the court was reluctant to curb the press. According to Judge Wright's majority opinion, the published material "clearly bore on appellee's qualifications as a United States Senator, and as such amounted to a paradigm example of published speech not subject to suit for invasion of privacy."¹

Judge Tamm, one of Wright's colleagues on the panel, raised the very valid point that there should be some legal recourse against such invasions of privacy.² Judge Wright's opinion, however, does not foreclose the possibility of recourse. His opinion, in fact, approvingly recognizes development of the common law in some jurisdictions to protect citizen against citizen, just as the Fourth Amendment protects citizen against government.³ His opinion is completely devoid of any approbation of newsgathering techniques that include breaking into a person's home or office in order to gain access to papers. The First Amendment guarantee of freedom of the press guarantees the right to publish information, but it does not immunize against all sanctions the actions by which the information is gained.

²Ibid., 709.
³Ibid., 704-705.
Peace Demonstrations and the First
And Fifth Amendments

There is a clear distinction between what Drew
Pearson published and the actions which secured his
information. But peace demonstrators protesting United
States involvement in Vietnam often used their actions as
a means of communicating their message. They sometimes
attempted to blur the distinction between speech and
action. However, even First Amendment absolutists have
not said that the First Amendment protects all actions
associated with speech.

Judge Wright, who is not a First Amendment absolu-
tist, has participated in cases involving the prosecution
of peace demonstrators for breach of the peace. The dem-
onstrators engaged in such activities as singing and
speech-making, while blocking walkways on the Capitol
grounds and corridors in the Capitol itself. Since they
were never informed which of several possible breach of
the peace statutes they were supposed to have violated,
they could not properly make out their defense, and the
Court of Appeals would not permit the convictions to
stand.¹ Judge Wright subscribed to Judge Prettyman's
opinion that the demonstrators

¹Feeley v. District of Columbia, 387 F.2d 216 (1967);
Jalbert v. District of Columbia, 387 F.2d 233 (1967);
were entitled to a definite reference to the law which they allegedly violated. In view of the confusion apparent in the enforcement of these and related statutes, we commend to executive and legislative authorities a review of this entire area of law.¹

When peace demonstrators raised what was clearly a First Amendment issue, Judge Wright made no attempt to circumvent it and would have gone beyond the other members of the panel. He would have required the National Park Service immediately to permit an organization called Women Strike for Peace to erect a large visual display on the Ellipse, an area near the White House. While he would not compromise his opinion, the practicalities of the situation required him to compromise his vote.

All three members of the appeals panel would have disposed of the matter differently. At one extreme was Judge Robb, who simply denied that the First Amendment gave people the right to clutter public parks with billboards.² At the other extreme was Judge Wright, who would have ordered issuance of a permit immediately. Wright noted that government may enact regulations on conduct that incidentally restrict speech, but only if there is a


compelling government interest, and the burden of proving a compelling interest rests on the government. "In this case," he said, "the Park Service has not only failed to meet this burden, it has been unable to articulate any policy in support of its action beyond its general judgment that appellant's display is not 'appropriate.'"¹

Judge Leventhal took a position between the extremes, but closer to Judge Wright. Leventhal noted that a private group customarily erected a visual display on the Ellipse in conjunction with the annual Christmas pageant. In refusing to permit the anti-war display, the Park Service had not made it clear whether the refusal was due to the size of the display or its theme. While the former might pass constitutional muster, the latter was constitutionally forbidden. Leventhal thought the matter should be remanded, so the National Park Service could draft a clear set of guidelines.²

Had the judges voted as their opinions indicated they were inclined, the panel would have been deadlocked, and the National Park Service's order would have stood. That, to Judge Wright, would have been an unacceptable result. Although he did not think that the anti-war group should be subjected to a delay in expressing its views, ²

¹Ibid., 605.
²Ibid., 599-604.
he cast his vote with Judge Leventhal in order to get the least objectionable decision. The liberal rhetoric of Wright's opinion did not stand in the way of an opportunity to influence the result.

**Freedom of Association and Congressional Investigations**

Not everyone is as eager as the anti-war activists to publicize his political beliefs. This is particularly true if one's political beliefs induce him to join unpopular groups, such as the Communist Party or the Ku Klux Klan. In investigating organizations of this type, congressional committees have compelled persons to appear at hearings and have sought to compel testimony regarding their organizations and activities. The task of protecting the constitutional rights of such persons against violation by investigating committees has fallen to the courts.

As in controversies involving anti-war demonstrators, procedural irregularities have sometimes been more important than the application of the First Amendment in the disposition of appeals from the actions of congressional committees and subcommittees. Two cases involving different men named Robert Shelton indicate that Wright is willing to protect the right of freedom of association on either procedural or constitutional grounds. The first Robert Shelton, an employee of the New York Times, refused to answer certain questions put to him by a Senate
subcommittee investigating Communist infiltration of the press. In writing for the majority of a divided panel, Judge Wright observed that the court was being asked to balance the right of Congress to know against the rights of individuals to be let alone. "We shrink from this awesome task," he said, "and adopt a narrower disposition of this case which will not require resolution of the constitutional problem presented." The contempt conviction was reversed because of a procedural irregularity. Wright was quite willing to avoid a constitutional definition of the relationship between the First Amendment and Congress' investigatory power if he could reach the desired result on procedural grounds.  

In the case of the second Robert Shelton, who was the Imperial Wizard of the Ku Klux Klan, Wright did indicate that certain limitations on Congress' investigatory power emanate directly from the First Amendment. Since

1Shelton v. United States, 327 F.2d 601, 605 (D.C. Cir. 1963).

2For a similar case which Wright decided on procedural grounds, see Liveright v. United States, 347 F.2d 473 (D.C. Cir. 1965). Judge Burger, also on the panel, was much more the constitutional activist. He thought "it would make more sense to face the constitutional questions than to indulge in the strained rationalizations which underlie much of the law in this field." Ibid., 477. For a justification, from a libertarian viewpoint, of judicial activism in this field of law, see Martin Shapiro, Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence (New York: The Free Press of Glencoe, 1964), pp. 69-70.
Shelton denied the committee all cooperation whatsoever, Wright concurred in the court's affirmance of his contempt conviction. The Judge did, however, write a concurring opinion indicating that he was as willing to protect privacy in the association of Klansmen as he was to protect N.A.A.C.P. members' rights to privacy in their associations when he was a District Judge.¹ He explicitly disavowed any implication that the House Un-American Activities Committee had power to subpoena the membership lists of any political organization. Although congressional committees have legitimate authority to seek information on which to base legislation, "few objects of investigation are more useful for purposes of exposure and punishment, while having less relevance as a factual background for legislative deliberation, than membership lists of unpopular groups," he said.²

Thus has Judge Wright defended the exercise of freedom of speech and freedom of association. He has defended these rights through direct application of the First Amendment, as well as through insistence on procedural regularities. He has not said that the First Amendment exempts mass demonstrators from the consequences of illegal behavior, but he has supported their right to due

²404 F.2d 1292, 1307.
process of law. He has not denied that congressional com-
mittees and subcommittees have the power to subpoena
witnesses and records, other than membership lists, but
he has insisted that such committees comply with their own
rules.

Due Process and Administrative Agencies

In addition to its use as a buttress for First Amend-
ment rights, the Fifth Amendment's guarantee that no
person shall be deprived of life, liberty, or property
without due process of law has often been used in a non-
criminal context to challenge actions of administrative
agencies. When these actions have involved technological
regulation or the regulation of economic interests, Judge
Wright and the courts in general have shown reluctance to
second-guess the decisions of administrators who must
apply the law to situations in which statutory words
often provide no firm guidance.\(^1\) Judge Wright and his
brethren have not abdicated their power of judicial review
over administrative agencies and have sometimes cautioned
administrators while sustaining their decisions.

\(^1\)In some situations, the law is clear, yet adminis-
trators are blamed for enforcing it. A panel on which
Judge Wright sat had no difficulty supporting the Com-
missioner of Patents against a due process challenge by
an individual who was given proper notice but forfeited
a patent because, through a clerical error on his part,
he did not pay a fee on time. Brenner v. Ebbert,
398 F.2d 762 (D.C. Cir. 1968).
Exercising the restraint of a typical post-New Deal liberal in such matters, Wright has been unwilling to void administrative orders simply because they were not preceded by an administrative hearing. But he has warned that in some situations a hearing is required. In his words, "It is implicit in the concept of due process that where government action, which directly affects protected private interests, depends on findings of fact, the person whose interests are affected must be given an opportunity to disprove the evidence relied on by government."^1

In effect, he gave clear notice of procedure which the courts would not be likely to tolerate. Other warnings, however, have been so vague as to leave the administrative agency completely unfettered. In the anonymity of a per curiam opinion, Wright joined in sustaining a Federal Communications Commission decision, made without a hearing, that political candidates were only entitled to equal opportunity to answer other announced candidates. The court cautioned against a mechanical application of the rule that could result in constitutional difficulties, but it offered no guidelines as to what would constitute

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^1See Railway Express Agency v. Civil Aeronautics Board, 345 F.2d 445 (D.C. Cir. 1965); Lawrence Typographical Union v. McCulloch, 349 F.2d 704 (D.C. Cir. 1965).

^2349 F.2d 704, 709 (concurring).
"mechanical" application of the rule or what kind of constitutional difficulties might arise.1

Procedure is not the only grounds on which the due process clause is invoked in relation to administrative actions. While an agency's procedures may not be questioned, the substance of specific decisions are sometimes challenged on grounds that they are arbitrary and unreasonable, and thus in violation of the due process clause of the Fifth Amendment. It is a rare occasion when such a challenge results in the revocation of an administrative decision. When a bus company challenged the reasonableness of a Department of the Interior regulation, Judge Wright advised the company to "seek a political, rather than a judicial, solution to its problem."2

As a result of the Supreme Court's broadening of the concept of standing,3 administrative decisions have become increasingly subject to challenge in the courts. Following the Supreme Court, a panel on which Judge Wright participated unanimously reversed a District Court decision that poor people lacked standing to challenge a figure computed by the Department of Agriculture and which played

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1McCarthy v. F.C.C., 390 F.2d 471 (D.C. Cir. 1968).
an important part in the distribution of food stamps. The Court of Appeals noted that there was sufficient nexus between poor people and the claim the raised to give them standing. But this decision and the Supreme Court decision from which it flowed have only provided easier access to a judicial forum. While administrators may be required to justify publicly more of their decisions, courts will not reject administrative economic decisions as long as they can be shown to have some reasonable basis.

The Court of Appeals has been somewhat more demanding in its review of administrative decisions with civil rights overtones, but even then it has tread lightly. Judge Wright was spokesman for a unanimous panel which acknowledged that an alleged racketeer had a right to judicial review of his deportation by the Immigration and Naturalization Service. Shortly after taking office, Attorney General Kennedy announced a drive to convict or deport one hundred persons said to be underworld figures, and the appellant's name was on the list. Consequently, he argued that Immigration and Naturalization Service officials had not exercised any discretion in his case but had simply tried to please the Attorney General. Through Judge Wright, the court unanimously agreed that

there should be an opportunity to prove prejudgment, but it also observed that prejudgment would be difficult to prove.¹

In recent years, protesters of the Vietnam war have been instrumental in narrowing the administrative discretion of local draft boards. Through Judge Wright, a unanimous panel asserted that a local draft board had no power to deny a protester the fatherhood deferment to which he was entitled under a presidential regulation.² Even so, the court did not lightly abandon its customary role of restraint in relation to administrative agencies. It cautiously withheld decision pending Supreme Court disposition of a number of similar cases, and then simply followed the path of the Supreme Court.³

In defending the rights of civil servants, Judge Wright has remained a thoroughgoing libertarian. He has not always been alone in his libertarian stance and wrote

¹Bufalino v. Kennedy, 322 F.2d 1016 (D.C. Cir. 1963). While the decision acknowledged that some activity of the Attorney General might be within judicial reach, neither Wright nor the other judges have considered inactivity by the Attorney General to be within the purview of the courts. They acknowledged that whether or when to prosecute is solely within the discretion of the Attorney General. Powell v. Katzenbach, 359 F.2d 235 (D.C. Cir. 1965)


for a unanimous panel that the government could not base the discharge of a civilian Air Force employee on evidence gained through a general search conducted by Japanese officials but initiated by United States officials. Wright indicated that evidence submitted at discharge proceedings must be "evidence submitted without violating the Constitution of the United States." Judge Wright's opinion was later quoted by the Court of Claims when it awarded back pay to a civilian employee whose discharge had been based upon unlawfully seized evidence.

Wright has sometimes been more venturesome than his brethren in attacking the arbitrary discharge of civil servants from their jobs. In Dew v. Halaby, the majority of an appeals panel sustained the dismissal of a Civil Aeronautics Authority employee who had previously been employed by the Central Intelligence Agency. While with the C.I.A., he had taken a lie detector test during a security clearance and admitted to having performed homosexual acts while in his teens and to having smoked marijuana on at least five occasions prior to 1952. He was given an opportunity to resign and did so. Later, after working for the Civil Aeronautics Authority for

3317 F.2d 582 (D.C. Cir. 1963).
almost two years, he was discharged from that job because of the incidents he had admitted to the C.I.A. The Civil Service Commission upheld the action. When Dew appealed to the judiciary, the Court of Appeals deferred to the Civil Service Commission on grounds that the court lacked the background and experience to say that Dew's discharge would not contribute to the efficiency of the service.

Although the majority used the language of judicial restraint, Judge Wright accused it of improper activism. His point was that there had been no administrative finding of a connection between Dew's past conduct and his job performance. At one of the administrative hearings, a personnel officer had, in fact, admitted that there was no evidence of incompetence. In rejecting the majority's acceptance of the possibility that Dew's past conduct could affect the efficiency of the civil service, Wright said:

This court's rationalization on the subject can hardly serve in the absence of findings. Under the law, the court's responsibility is to review administrative findings, not to make them.¹

Several years later, in 1969, Wright had the satisfaction of participating in a decision that required administrative agencies to justify an employee's dismissal with more than evidence of homosexuality. Chief Judge David Bazelon required the agency to show that the

¹Ibid., 591
dismissal would contribute to the efficiency of the civil service. He specifically alluded to the Dew decision and noted that it was over strong dissent.¹ But this decision too was over strong dissent. Bazelon and Wright were accused of rushing out, "robes flying, into the forbidden area of administrative discretion to give kind assistance to the subjects of what it [the majority] feels to be highwayman tactics at the hands of the Civil Service Commission."²

But Wright would deny that he has entered a forbidden area. His opinions indicate that when the rights of civil servants are at issue, he considers federal administrative agencies as vulnerable to judicial intervention as local school boards or policemen.

¹Norton v. Macy, 417 F.2d 1161. In this case there were no security problems because of the nature of the work, the appellant's superior had testified to his competence, his fellow workers were unaware of his homosexuality, and his job did not bring him into contact with the public.

²Ibid., 1168. The acrimonious debate continued in Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969) cert. denied, 397 U.S. 1039 (1970). The facts were somewhat different in that the challenged action was the termination of a security clearance. The composition of the appeals panel was also different, which pushed Wright back into a dissenter's position, but he continued to argue that an individual is entitled to "a decision in which there is a rational nexus between the facts and the conclusions drawn therefrom."
Landlord-Tenant Relations

In lawsuits in which one of the adversaries is a lone individual facing a governmental agency or even the "United States" itself, the inequality of the contestants is magnified. However, lawsuits involving landlord-tenant relations have, for the most part, involved private litigants. This does not mean that the litigants have been economic or political equals. In the battle of conflicting interests between landlords and tenants waged in the courts of the District of Columbia, Wright's liberal ideology led him to espouse the tenants' cause. In doing so, he participated in the alteration of legal relationships. This venture in social engineering required a variety of legal tools: the Constitution, the District of Columbia Housing Code, the intent of the District of Columbia Commissioners, and judicial rules of contract law.

Wright entered the fray during his second year as an appellate judge, when he wrote a majority opinion denying claims by rooming house and apartment operators that the fire safety provisions of the housing code denied them due process of law.¹ But the existence of a housing code containing safety and sanitary provisions is no assurance that the code will be observed.

The First Amendment was injected into the landlord-tenant conflict when a tenant complained to the housing authority that the sanitary conditions in her rented house did not meet housing code requirements. The landlord attempted to evict her, and she argued that the eviction was in retaliation for having reported the housing code violations, although she had also withheld rent. At the preliminary hearing, Judge Harold Greene found that her allegations were substantiated, but a different judge presided at the trial. The trial judge accepted the landlord's contention that eviction was for non-payment of rent and did not let the tenant's defense go to the jury.

On appeal, the Court of Appeals for the District of Columbia issued a per curiam order staying the eviction until the tenant's allegations could be determined in court, provided the rent was paid. In addition to joining the per curiam stay order, Judge Wright wrote a separate opinion in which he expressed his agreement with Judge Greene that a landlord may evict for any legal reason, but cannot evict for the illegal reason of punishing

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1He had previously served in the Civil Rights Division of the Department of Justice and had appeared in Judge Wright's court during the desegregation controversy in Louisiana. See Times-Picayune, August 5, 1961, pp. 1, 3; Hall v. St. Helena Parish School Board, 197 F.Supp. 649 (E.D. La. 1961).

a tenant for exercising the constitutional right to report violations of law. If the tenant can prove that the eviction was in retaliation, "then a court may not participate with the landlord in the implementation of his illegal purpose." Wright also expressed the belief that the tenant would prevail on the merits and that the landlord would not be harmed by the stay, since it was conditioned upon payment of rent. Judge Danaher, in dissent, defended the landlord. He noted that the tenant admitted withholding rent and knew the condition of the house when she moved in. "It would seem that the landlord, too, has constitutional rights," protested Danaher, "for the Fifth Amendment provides that he shall not be deprived of his property without due process of law."

In the court below, Judge Danaher's position prevailed. The District of Columbia Court of Appeals (a part of the municipal court system and not to be confused with the Court of Appeals for the District of Columbia Circuit on which Judge Wright sits) decided that the tenant had a right to report violations of the housing code, but, since no specific legislation protected the right, the courts had no authority to intervene in the legal relationship between landlord and tenant. The decision, however, did not withstand appeal.

1Ibid., 630. 2Ibid. 3Ibid.
The same panel that granted the stay reversed the lower court and held that when the District of Columbia Commissioners, at the direction of Congress, promulgated the housing code, there was an implied change in the rights of landlords and tenants. As a matter of statutory construction, a majority of the panel decided that proof of a retaliatory motive on the part of the landlord was a defense against eviction, otherwise the purpose of the housing code would be defeated. Whether the landlord's motive was or was not retaliatory was to be decided by the court or the jury.¹

The majority opinion was only part of a longer opinion by Judge Wright. In parts I and II of the opinion, he spoke only for himself and discussed the question of retaliatory evictions in constitutional terms. He explored a number of constitutional paths, all leading to the same end—judicial protection for the tenant. Because the First Amendment limits government, not individuals such as landlords, Wright examined the concept of "state action." In Fourteenth Amendment cases, it was determined that the states could not act through their courts to give effect to private discrimination. He saw no reason for giving the concept of "state action" a more restricted meaning in relation to the First Amendment right to petition government. If the First Amendment alone was not

sufficient, the due process clause of the Fifth Amendment provided considerable flexibility. He noted that courts might also utilize the balancing test or the test of reasonableness. If the balancing test is used, the landlord's rights are balanced against the tenant's First Amendment rights, and the latter wins because of the First Amendment's preferred position. If the test of reasonableness is used, the tenant's First Amendment rights are protected because the purpose of the housing code is to protect tenants.¹

In the second part of the opinion, Wright considered Judge Greene's less orthodox approach to the question of retaliatory evictions and made a number of approving references to Greene's "thoughtful opinion." Rather than rely on specific constitutional provisions, Wright agreed that one can make a persuasive argument that "the right to petition government for redress of grievances and the right to inform the government of violations of law are rights of federal citizenship arising from our constitutional system as a whole, not just from the First Amendment or from any other particular constitutional clause or provision."² But he concluded that it was not

¹Ibid., 690-696.

necessary to decide any of these constitutional arguments, since a majority of the court was able to resolve the controversy by statutory construction.¹

Why, then, the lengthy opinion, if more than half of it was not necessary to decide the case? For a policy-oriented judge like Wright, it was more than an intellectual exercise in constitutional manipulation. He was apparently laying groundwork for the idea that irrespective of legislative intent, there were still ample constitutional grounds on which courts could protect tenants from retaliatory evictions. Moreover, judges in other jurisdictions could use his constitutional arguments should they be so inclined. A handbook for poverty lawyers has, in fact, urged that lawyers representing tenants in retaliatory eviction cases raise all of the theories and analysis contained in Judge Wright's Edwards opinion.²

The opinion has indeed been influential. One Federal District Court accepted the "state action" argument and denied that state courts could constitutionally aid a landlord in evicting a tenant for exercising his right to report housing code violations, even if state

¹397 F.2d 687, 698.

law rejected the retaliatory eviction defense. State courts in Florida, Michigan, and New York followed Edwards without deciding the constitutional questions raised. They considered that retaliatory evictions would defeat the public policy to be furthered by the housing code. Further indication of the influence of Judge Wright's Edwards opinion is that it is being included in casebooks and taught in the law schools.

Although less influential than his Edwards opinion, Judge Wright authored another opinion on landlord-tenant relations that was a model of creative jurisprudence. The case was Javins v. First National Realty Corporation, and it arose when some tenants in the District of Columbia withheld rent as a means of pressuring their landlord into correcting existing housing code violations. The landlord attempted to evict for non-payment of rent, and the tenants sought to defeat the landlord's action.

In deciding the controversy, Judge Wright turned not to the Constitution but to the law of leases and contracts. He observed that the rules governing leases originated during feudal times when society was

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2See Ibid., pp. L-T Ch.III-6-7.


predominantly agrarian. In those days, a lease conveyed an interest in land. In most instances, this was no longer true, and Wright considered that the courts had "a duty to reappraise old doctrines in the light of the facts and values of contemporary life--particularly old common law doctrines which the courts themselves created and developed."\(^1\) In our predominantly urban, industrial society, the land beneath an apartment building is not of prime concern to the apartment lesee. "When American city dwellers, both rich and poor, seek 'shelter' today," said Wright, "they seek a well known package of goods and services--a package which includes not merely walls and ceilings, but also adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."\(^2\)

Since the rules governing leases were not appropriate in this context, Wright would treat leases of urban dwelling units like other contracts. Into the contract, he read a warranty of habitability, just as courts have come to place responsibility in sellers that goods are fit for the purpose for which they are sold.\(^3\) In any event, he considered that the District of Columbia housing code required a warranty of habitability or the purpose of the code would be defeated. He assumed that a warranty of

\(^1\)Ibid., 1074. \(^2\)Ibid. \(^3\)Ibid., 1075-1076.
habitability was not explicitly included in the contract because both parties took it for granted.\(^1\)

Once it was established that the leases in question were to be treated like other contracts, it became possible to protect the tenant from eviction for non-payment of rent, since the landlord was entitled to collect rent only if he fulfilled his part of the contract. Wright concluded that the tenant must have an opportunity to show that the landlord did not live up to his contractual obligations. This could be done by proving housing code violations at trial. Only if the landlord wins the case can he evict for non-payment. If the trial result is that the tenants are only partly released from their rent, the landlord cannot evict as long as the tenant pays what is due.\(^2\) The Judge suggested that rent be paid to the court pending a decision.\(^3\) Although the landlord sought to have the matter reviewed by the Supreme Court, the Court denied certiorari.\(^4\)

Wright's \textit{Javins} opinion was influential in the District of Columbia. Other panels, on which he did not participate, carried the principles of the decision even

\(^1\)\textit{Ibid.}, 1080-1081. \(^2\)\textit{Ibid.}, 1082-1083.
\(^3\)\textit{Ibid.}, 1083, n. 67.
\(^4\)400 U.S. 925 (1971).
further. Outside the District of Columbia, however, a tenant's right to withhold rent because of housing code violations depends upon state law. Against a constitutional challenge on due process grounds, the Supreme Court has upheld an Oregon law which denies tenants the right to offer the landlord's failure to comply with the housing code as a defense for nonpayment of rent in eviction proceedings. According to the Court, "The Constitution has not federalized the substantive law of landlord-tenant relations . . . and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants." It was in Justice Douglas' dissenting opinion that Wright's ideas were most prominent. Douglas thought the problem began with Wright's statement in the Javins case regarding the expectations of American city dwellers when they seek shelter. He also approved of Wright's suggestion that withheld rent be paid to the

1Kline v. Massachusetts Ave. Apt. Corp., 439 F.2d 699 (1970) made the landlord, under certain circumstances, liable for damages resulting from criminal attacks on tenants in the common hallways of an apartment building. In Cooks v. Fowler, 437 F.2d 669 (1971), the court required a tenant to pay less than full rent to the court pending appeal after an initial decision that the landlord was in violation of the housing code.


3Ibid., 880.
court pending settlement of the dispute.\textsuperscript{1} Dissents, however, have no immediate effect on public policy; therefore, there is small satisfaction to be gained by winning the approval of a dissenter, and Judge Wright admits that he was unhappy with the \textit{Lindsay} decision.\textsuperscript{2}

Although the Supreme Court has not read the principles of Wright's \textit{Javins} opinion into the Fourteenth Amendment, the Court has not affected the validity of that decision in the District of Columbia because it did not rest on constitutional grounds. Neither was \textit{Edwards v. Habib} decided on constitutional grounds. In that case, however, Wright did provide an extensive discussion of the constitutional issues involved in retaliatory evictions. Should the proper case reach the Supreme Court, it may yet protect tenants from retaliatory evictions, even though the Court has not legitimized rent strikes.\textsuperscript{3} Certainly, Judge Wright has provided a choice of constitutional routes to that end.

\textsuperscript{1}Ibid., 882. \textsuperscript{2}Interview: Hon. J. Skelly Wright. \textsuperscript{3}There is some indication that the Chief Justice might be unsympathetic to a landlord's use of his power of eviction to penalize the tenant's exercise of the First Amendment right to petition government for a redress of grievances. While still a member of the Court of Appeals, Judge Burger, as well as Judge Wright, joined an opinion in which a panel denied that government could exercise even its lawful power government employees' organizations in a manner that clashed with constitutional rights. \textit{National Assoc. of Gov't Employees v. White}, 418 F.2d 1126 (D.C. Cir. 1969). There remains, of course, the possibility that Burger would not find a private individual's actions as restricted as government's.
In the landlord-tenant controversy, as in controversies involving the First and Fifth Amendments, Judge Wright has used the discretion of his office to further the values of political liberalism. This has meant defending individual liberty against governmental restraint and, in the case of private litigation, being in sympathy with the traditionally disadvantaged party or group. One significant deviation from this approach was his emergency order permitting blood transfusions over the religious objections of a critically ill hospital patient. His order, however, decided no constitutional questions; it merely maintained the status quo. In other circumstances, with time for the usual research and reflection, he might very well decide that the free exercise of religion clause permits a person to accept death rather than violate religious principles.
CHAPTER VII

JUDGE J. SKELLY WRIGHT: RETROSPECT--PROSPECT--EVALUATION

The public career of Judge J. Skelly Wright has spanned thirty-seven years, beginning in 1937 on the staff of the United States Attorney for the Eastern District of Louisiana, before even the most senior member of the present Supreme Court was appointed to that high tribunal. Although this study of Judge Wright's career and constitutional approach does not yield generalizations about lower federal judges as a whole, it does permit one to examine and evaluate one judge's approach to the Constitution and his place in the American constitutional scheme. Such a study also provides certain insights which may be useful to an understanding of the judicial process.

Although federal district judges usually come from the district in which they serve and have strong local ties, Judge Wright's case suggests that local values may be weaker in judges whose most significant pre-judicial career experiences took place outside the local political system than in an individual who has had an active role in the local political system. Wright unquestionably had
strong local ties. He was born, grew up, and was educated in the Eastern District of Louisiana, and his connection with the local political system, through his family, made his appointment as Assistant United States Attorney possible. At no time was he active in state and local politics, and after his appointment to the United States Attorney's staff, his position required him to represent the interests of the United States, as opposed to state or local interests.

Wright's appointment as Assistant United States Attorney was apparently the beginning of a growing attachment to the values of contemporary political liberalism. He entered the United States Attorney's office during the Great Depression, a time when most people were looking to Washington for help, as evidenced by the 1936 election returns. Only months before he joined Rene Viosca's staff, the Supreme Court had made its well known "switch in time"¹ and began to uphold New Deal legislation. The legal, political, and economic atmosphere was hardly conducive to sentiments of state sovereignty. Wright himself contributed to the decline of state sovereignty when he

¹The reference is, of course, to the change in voting position by Justice Roberts and Chief Justice Hughes, which resulted in upholding New Deal legislation and saving the Supreme Court from Roosevelt's "packing" plan. The first important decision reflecting the realignment was N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
assisted in the prosecution of the *Classic* case, which resulted in greater power for the national government in the regulation of congressional elections.

Wright's liberal tendencies were further stimulated when his experiences during the war years led him to question some of the values of the society in which he lived. After the war, his private law practice in Washington provided the opportunity to appear before the Supreme Court, a significant experience for any lawyer, and for Wright the experience was in defense of civil rights. As United States Attorney, he was made aware of attacks on the voting rights of blacks. All these experiences affected his political outlook.

Wright's liberal tendencies came to fruition when he put on the judicial robe and was freed from political pressures. He expressed his new sense of freedom by assuming the role of a liberal, policy-oriented judge. Like other post-New Deal liberals, he has not obstructed governmental economic regulation by either state or federal agencies, but even in economic matters, his policy orientation has been obvious. When he objected to economic policy adopted by state government, such as price-fixing, he upheld its constitutionality, but he used the discretion of his office to write an opinion that was highly critical of price-fixing and urged the Supreme Court to reconsider the issue. The unorganized consumer
bore the burden of price-fixing, so it was repugnant to his liberal policy preferences. Ordinarily, however, Wright has accepted economic regulation by all levels of government. When federal administrative agencies met opposition from Wright, it was not over their economic decisions, but over decisions with civil rights overtones, such as the arbitrary dismissal of civil servants.

It is, in fact, in the field of civil rights that liberal judges have most sought to influence public policy, and Judge Wright has clearly defined his role as that of protector of civil rights. During his years as a judge, he has responded favorably and with increasing force to demands for racial equality. He began modestly during the era of "separate but equal," applying that doctrine without hint of disapproval, but always finding that the facilities in question were separate but unequal and ordering a previously segregated facility to admit the complaining black. After the Brown decisions, Wright used all the powers of his office to enforce them in his District, criticizing segregation in moral, as well as legal, terms.

The resistance of state authorities to desegregation and Wright's response to their opposition attracted national attention and ultimately resulted in Wright's elevation to the United States Court of Appeals for the District of Columbia Circuit. Had he not been a policy
oriented judge, he might have enjoyed his "moment in the sun," picked up his honorary degrees--he received them from Yale, Notre Dame, and Howard Universities--and gradually lapsed into relative obscurity. Instead, Judge Wright grasped every opportunity to influence opinion of public policy and used his national reputation to increase his off-the-bench activity. In his first major effort after his promotion, he used his James Madison Lecture at New York University to attack de facto segregation. The unusual circumstances of the Hobson v. Hansen controversy gave him the opportunity to extend the law in the direction of the values he promoted off the bench, and he held that de facto segregation in the District of Columbia denied equal educational opportunity to poor blacks. The demographic characteristics of the District of Columbia prevented any real integration of the public schools, but Wright's order prodded school officials to make greater efforts at providing equal educational opportunity for the black children who comprise the majority of the public school population of the District. He brought this concept of equal educational opportunity even into the area of voting rights and refused to lift the literacy test ban of the 1965 Voting Rights Act when blacks were educationally disadvantaged.

Wright's tendency to use all the resources of his office to promote his liberal policy preferences has been
as evident in the area of criminal procedure as in the area of racial equality. As a District Judge, he complained that the Supreme Court had not gone far enough in protecting the rights of the accused. During the 1960's, however, the Court would give him little grounds for complaint, as it actively broadened the rights of persons accused of crime and handed down a number of landmark decisions. As a Circuit Judge, Wright was very much in agreement with the policies of the Warren Court, as was a sizeable bloc of judges of the court on which he sits. Because of this favorable legal environment during most of his years as a Circuit Judge, and because he is rule-oriented as well as policy-oriented, he has not been a frequent dissenter. Consequently, he has often relied on concurring opinions to influence policy. He has voted to affirm convictions on grounds that the


3 The Watts free speech case, however, indicates that he can be effective in that role. See pp. 183-184 above.
Mallory Rule may not be raised for the first time on appeal. Yet, he has used his concurring opinion to suggest that failure to invoke the Mallory Rule below may have been due to ineffective counsel, which would not satisfy the Sixth Amendment.\(^1\) For all practical purposes, he was inviting defense lawyers to test the theory. In the "spontaneous apology" case,\(^2\) he agreed that affirmance of the conviction was proper, but he used his concurring opinion to expose improper criminal procedure and warn against its continuance. The very frequency of his concurring opinions testifies to his efforts to influence the development of law even when he agrees that the court has decided correctly according to existing law.

Judge Wright's policy orientation toward liberal values is particularly evident in his willingness to compromise his vote in order to get the least objectionable result, without compromising his opinions. He voted to give the National Park Service opportunity to draw guidelines on permissible displays on national park land, but, at the same time, he aired his objections to requiring anti-war demonstrators to delay the exercise of their constitutional rights.\(^3\) When it boiled down to a choice

\(^{1}\)Leigh v. United States, 329 F.2d 883 (1964).
\(^{2}\)Venev v. United States, 344 F.2d 542 (1965).
between voting against a right to counsel in the grand jury room or voting to base the right on the court's supervisory power over the Circuit, he had no difficulty choosing the latter, although he would have preferred to base the right on the Constitution.¹

Judge Wright's liberal interpretation of constitutional rights often brought him in conflict with his colleague, Judge Burger, particularly in the area of criminal law and procedure. One of the major points of conflict was the application of the Mallory Rule, fashioned by the Supreme Court to enforce the Federal Rules of Criminal Procedure and the Fifth Amendment's guarantee against self-incrimination. In the Killough case,² the Court of Appeals, en banc, ratified Wright's preference for an expanded interpretation of the Mallory Rule and rejected Burger's attempt to confine it within narrow limits.

Burger now sits in the Chief Justice's chair, and, as a result of President Nixon's Supreme Court appointments, Burger's policy preferences are now ascendant. In a 5–4 decision, the Court extracted the teeth from the Warren Court's Miranda decision. The Chief Justice wrote the majority opinion holding that a confession obtained

¹Jones v. United States, 342 F.2d 863 (1964).
²315 F.2d 241 (1962).
in violation of the *Miranda* rules could be used to impeach the credibility of the defendant. Burger took the opportunity to insert a footnote rejecting extravagant extensions of the Constitution, specifically citing the *Killough* decision as just such an extravagant extension.¹

Criminal procedure has not been the only area of law to feel the impact of the Burger Court. In 1973, the Supreme Court sanctioned a system of public school finance whereby individual school districts might supplement the state's contribution through local taxation, thus resulting in greater educational expenditures in affluent districts than in poor districts. The Court held that the system was not in conflict with the equal protection clause of the Fourteenth Amendment.² In Judge Wright's judgment, it was "a very unfortunate result. From the standpoint of anyone who would be interested in equal educational opportunity, it was a terrific setback—a terrific setback when there was reason for great hope."³ The California Supreme Court had already granted relief in a similar situation,⁴ and the Federal District Court

³Interview: Hon. J. Skelly Wright.
in Texas had followed the decision.¹ Judge Wright considered the law ready for the next step, but he was disappointed when the step was in the wrong direction.

The changed legal environment obviously affects Wright as a judge. "Instead of trying to be creative in the development of the law," he explains, "the effect of present Supreme Court opinions is to make one look backward, to contract rather than to develop further the principles with which I have been associated in the past." And he admits that he finds the situation depressing.²

One suspects, however, that he will not be incapacitated by depression but will continue to make efforts, within the limits of his discretion, to influence public policy. He is not lacking in professional skills, and, as Walter Murphy has pointed out, professional skills are a valuable aid to a policy-oriented judge. They help him to reach Justices who are open to persuasion on the merits of a case.³ The logical targets for Wright's efforts at persuasion appear to be Justices Stewart and White, and Justice Powell, the most flexible of the Nixon appointees to the Supreme Court.⁴ If Wright can win over

²Interview: Hon. J. Skelly Wright.
³Elements of Judicial Strategy, p. 45.
two of the three, his policy preferences are likely to prevail, since three of the holdovers from the Warren Court are, like him, attuned to the values of political liberalism. Although he has already experienced some success in this regard, the legal environment of the 1970's is such that he must also expect failure, and, since the completion of research for this study, he has experienced that in the form of reversal by the Supreme Court.

Before bringing this study of Judge Wright's career and constitutional approach to a close, an evaluation of his more than twenty years of judicial service is in order. Has Wright been a good judge? This question

1He dissented from a Court of Appeals decision holding that the issuance of a public document printed under congressional authorization and containing the names of District of Columbia school children who were disciplinary problems, was protected from suit by the congressional immunity clause of the Constitution. Justices White and Powell were among the five Justices who voted to reverse in part. See Doe v. McWillan, 459 F.2d 1034 (D.C. Cir. 1972) rev'd in part, 412 U.S. 306 (1973).

2Radio and television stations were permitted by F.C.C. order to refuse to sell time for all "editorial commercials." Organizations which attempted to purchase time for anti-war statements and were refused challenged the F.C.C. order on First Amendment grounds. Business Executives Move for Peace v. F.C.C. and Democratic National Committee v. F.C.C. were consolidated and disposed of with a single opinion in which Judge Wright ordered the F.C.C. to set guidelines for the acceptance of paid, non-commercial messages by radio and television stations, 450 F.2d 642 (D.C. Cir. 1971). He was reversed by the Supreme Court sub nom. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).
can be approached from at least three directions: his technical competence, his interpretation of the judicial function, the values he has promoted.

In terms of technical competence, Wright must score high. One can find one of Wright's economic decisions from the Eastern District of Louisiana cited in Barron and Holtzoff's *Federal Practice and Procedure* as a very careful opinion.¹ When he was elevated to the Court of Appeals for the District of Columbia Circuit, the American Bar Association, generally considered a conservative organization, gave him its highest rating, "exceptionally well qualified." The ability of a judge's decisions to withstand appeals has also been considered a measure of technical competence.² By this criterion, Wright has indeed been a competent judge. Rarely have his opinions been reversed by a higher court. He had been on the bench for over twenty years before experiencing his first Supreme Court reversal, although his opinions had often been affirmed by that Court. The success of his decisions has not been entirely due to the fact that the legal

¹ The case was *Pan American Fire & Casualty Co. v. Revere*, 188 F.Supp. 474 (1960). See p. 36 above.

² Although more was involved, Judge G. Harrold Carswell's extremely high reversal rate was considered an indication of judicial incompetence and played an important part in the Senate's rejection of his nomination to the Supreme Court. See Richard Harris, *Decision* (New York: Ballantine Books, 1971), pp. 107-108.
environment was congenial to his values. His decisions include a number of reluctant ones, made because he interpreted the law as requiring them.

When Wright was dissatisfied with the state of the law, he used the discretion of his office to try to bring about change. If the constraints of his office limited him to criticism of existing practice or suggesting new approaches, his interpretation of the judicial function made such tactics acceptable. Wright believes that an important function of the courts is to influence the normative content of law. He believes that courts should foster the best inspiration of the time and help it win general acceptance, with emphasis always upon the highest ideals of the community rather than the ideals of the judges.¹

Is this a valid approach to the judicial function? Obviously, it is not without problems. Judges are always faced with competing values. Unless judges can identify the community's highest ideals, they cannot determine which of the available options best represent those ideals. The basic problem is that the judges' own values and beliefs will color their perception of community ideals.

One aspect of this problem is that the judges may perceive the community's highest ideals to be identical with their own, when in fact they may not be. Wright

¹See pp. 115-116 above.
recognizes the problem and leaves its solution to the
dynamics of the American political system. He assumes
that decisions which reflect merely the values of the
judges will fail to generate support, and the judges will
be forced to reverse themselves, just as the Supreme
Court did in 1937, when it was under attack. Because of
the dramatic circumstances of a major depression, Wright
perhaps overestimates the significance of the Court's
1937 "switch," since unpopular decisions ordinarily do
not evoke responses as strong as the "court-packing"
plan.

While Wright may perhaps overestimate the signifi­
cance of the Court's 1937 reversal, he does not over­
estimate the significance of the political process.
Judicial pronouncements are not automatically translated
into public policy, but usually experience modification
in the course of implementation, which minimizes the
threat of policy-oriented judges like Wright to democratic
government. Moreover, judicial rules and structure limit
the freedom of even the most active lower-court judges.
Wright's professional reputation is evidence that he has
generally remained within those limits. For him, fos­
tering the best inspiration of the time has, in reality,
amounted to doing what he thinks is right, within the
bounds of his office.
One may argue that the limited freedom of the judge and the difficulty of identifying the highest community values make Wright's approach a valid one. If he were to compromise his own values out of a belief that the community would reject them, he could quite possibly underestimate the community, and thus contribute to a deterioration in the normative content of the law at a time when the community might have responded favorably to a clear judicial pronouncement.

Finally, there is the matter of the values to which Wright has subscribed and read into the Constitution. Political equality, which he has identified as the most important of contemporary community values, is obviously central to his own values. It permeates his approach to the Bill of Rights and the Fourteenth and Fifteenth Amendments. Far from being a threat to democratic government, Wright's judicial activism has promoted democratic government by defending equal access to the ballot and the freedom to disseminate ideas and opinions, both by the press and by less conventional means. Democratic government depends upon the freedom of the citizenry to hear competing ideas, including the unorthodox, and to register their choice through equal access to the ballot.

Wright's commitment to equality is also evident in his liberal reading of Bill of Rights procedural guarantees. While his defense of the rights of the accused has
occasionally led him to untenable positions, disagreement with particular decisions does not invalidate the principle that persons accused of crime, persons who very often are poor and uneducated, may not be deprived of their liberty without being informed of what their rights are and having those rights fully respected. Wright does not underestimate the seriousness of the crime problem; he simply denies that the deprivation of constitutional rights is either a valid or an effective way to solve the problem.

Wright's defense of equal educational opportunity is perhaps more troublesome than defense of First Amendment rights or the procedural guarantees of the Bill of Rights. It is more difficult because neither judges nor educators are certain what it takes to overcome the cultural disadvantages of ghetto children and provide them with educational opportunity equal to that of their middle class peers. To reject the principle of equal educational opportunity, however, is to deny that the society has any obligation to seek solutions to this admittedly difficult problem. It is to Wright's credit that he has refused to take that course.

During his years on the bench, and particularly during his later years, Judge Wright has been an articulate spokesman for the interests of disadvantaged individuals and groups. By the ways in which they have
used the discretion of their offices and taken advantage of the public visibility conferred by their offices, J. Skelly Wright and judges like him have brought a humane quality to the law.
CASES

Cases in which Judge Wright participated but did not write a published opinion are designated by an asterisk (*). Cases in which he wrote a published opinion are designated by a double asterisk (**).


*Adams v. United States, 399 F.2d 574 (D.C. Cir. 1967).


**Austin v. United States, 414 F.2d 1155 (D.C. Cir. 1969).

**Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964).

**Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967).


*Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968).

*Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969).

**In re Bart, 304 F.2d 631 (D.C. Cir. 1962).

**Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968).

*Blumenthal v. F.C.C., 318 F.2d 276 (D.C. Cir. 1963).
Board of Supervisors v. Fleming, 265 F.2d 736
(5th Cir. 1959).


*Boorda v. Subversive Activities Control Board,
421 F.2d 1142 (D.C. Cir. 1969), cert. denied,

1959).


*Brenner v. Ebbert, 398 F.2d 762 (D.C. Cir. 1968), cert.
denied, 89 S.Ct. 259 (1968).


(E.D. La. 1956).


**Bush v. Orleans Parish School Board, 163 F.Supp. 701
(E.D. La. 1958).

*Bush v. Orleans Parish School Board, Civil No. 3630
(E.D. La. May 16, 1960). See Race Relations Law
Reporter, V (Summer, 1960), 379.

(E.D. La. 1960).

*Bush v. Orleans Parish School Board, 188 F.Supp. 916

*Bush v. Orleans Parish School Board, 190 F.Supp. 861


*Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).


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**Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968).


**Coleman v. United States, 334 F.2d 558 (D.C. Cir. 1963).

Cook v. Fowler, 437 F.2d 669 (D.C. Cir. 1971).


**Cooper v. United States, 337 F.2d 538 (D.C. Cir. 1964).

*Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968).

**Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963).

*Cunningham v. United States, 340 F.2d 787 (D.C. Cir. 1964).

*Cunningham v. United States, 391 F.2d 457 (D.C. Cir. 1967).


**Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964).


*In re Flanagan, 350 F.2d 746 (D.C. Cir. 1965).

**Ford v. United States, 352 F.2d 927 (D.C. Cir. 1965).

**Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967).

**Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).


Frederickson v. United States, 266 F.2d 463 (D.C. Cir. 1959).

**Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).


**Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963).

**Application of President and Directors of Georgetown College, 331 F.2d 1000 (1964), cert. denied, 84 S.Ct. 1883 (1964).

*Application of President and Directors of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964).


**Gilliam v. United States, 323 F.2d 615 (D.C. Cir 1963),


*Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962).

**Green v. United States, 383 F.2d 199 (D.C. Cir. 1967).


*Gross v. United States, 393 F.2d 667 (D.C. Cir. 1967).


**Hanrahan v. United States**, 348 F.2d 363 (D.C. Cir. 1965).


Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964),

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**Hatcher v. United States**, 352 F.2d 364 (D.C. Cir. 1965),


**Holmes v. United States.** 370 F.2d 209 (D.C. Cir. 1966).

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*Kane v. New Jersey,* 37 S. Ct. 30 (1916).

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**Lawrence Typographical Union v. McCulloch,** 349 F.2d 704 (D.C. Cir. 1965).


**Leigh v. United States,** 329 F.2d 883 (D.C. Cir. 1964).


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**Liveright v. United States,** 347 F.2d 473 (D.C. Cir. 1965).


**Lollar v. United States,** 376 F.2d 243 (D.C. Cir. 1967).


**McCarthy v. F.C.C.,** 390 F.2d 471 (D.C. Cir. 1968).


**Nickens v. United States**, 323 F.2d 808 (D.C. Cir. 1963).


**Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964).**

**Pan American Fire & Cas. Co. v. Revere, 188 F.Supp. 474 (E.D. La. 1960).**

*Pate v. Robinson, 383 U.S. 375 (1966).*


**Pelletier v. United States, 350 F.2d 727 (D.C. Cir. 1965).**

*Pennover v. Neff, 95 U.S. 714 (1878).*

*Peoples v. United States Dep't of Agriculture, 427 F.2d 561 (D.C. Cir. 1970).*

*Phillips v. United States Board of Parole, 352 F.2d 711 (D.C. Cir. 1965).*

*Powell v. Katzenbach, 359 F.2d 235 (D.C. Cir. 1965), cert. denied 86 S.Ct. 1341 (1966).*

**Powell v. United States, 352 F.2d 705 (D.C. Cir. 1965).**

**Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966).**

*Preston v. United States, 376 U.S. 364 (1964).*

**Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968).**


*Queen v. United States, 335 F.2d 297 (D.C. Cir. 1964).*

**Railway Express Agency, Inc. v. C.A.B., 345 F.2d 445 (D.C. Cir. 1965).**

*Reynolds v. Louisiana Board of Alcoholic Beverage Control, 185 So.2d 794 (1966).*

**Robertson v. United States, 364 F.2d 702 (D.C. Cir. 1966).**

*Robinson v. California, 370 U.S. 660 (1962).*

**Salzman v. United States, 405 F.2d 358 (D.C. Cir. 1968).
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1962).

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135 F.Supp. 342 (E.D. La. 1955), aff'd 263 F.2d 5
(5th Cir. 1958).


**Shelton v. United States, 327 F.2d 601 (D.C. Cir. 1963).

**Shelton v. United States, 343 F.2d 347 (D.C. Cir. 1965).

**Shelton v. United States, 404 F.2d 1292 (D.C. Cir.


*Smith v. District of Columbia, 387 F.2d 233
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Mr. James E. Wright, Jr., New Orleans, La., September 2, 1970.
VITA

Patricia A. Behlar was born January 16, 1939, in New Orleans, Louisiana, and was educated in parochial schools in that city. After graduating from high school in 1957, she was employed for five years doing general clerical work. In 1962, she entered Louisiana State University in New Orleans and graduated four years later with the degree of Bachelor of Arts in history. After graduation in 1966, she enrolled at Louisiana State University's main campus in Baton Rouge to do graduate work in the field of political science and was awarded an NDEA Fellowship, which she held for three years. She received the degree of Master of Arts in government in 1968. During the 1970-71 academic year, she held a Louisiana State University Dissertation Year Fellowship. The 1971-72 academic year was spent at Northwestern State University in Natchitoches, Louisiana, where Miss Behlar held the position of Instructor of Political Science. In August, 1974, she received the degree of Doctor of Philosophy from Louisiana State University.
EXAMINATION AND THESIS REPORT

Candidate: Patricia A. Behlar

Major Field: Political Science

Title of Thesis: J. Skelly Wright: The Career and Constitutional Approach of a Federal Judge

Approved:

[Signatures]

Major Professor and Chairman

Dean of the Graduate School

EXAMINING COMMITTEE:

[Signatures]

Date of Examination:

June 25, 1974