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PROCEED TO JUDGMENT:
ASPECTS OF JUDICIAL MANAGEMENT OF GROWTH, CHANGE, AND
CONFLICT IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, 1960-2000

by

STEVEN HARMON WILSON

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

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ABSTRACT


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This dissertation is an historical study of efforts, primarily by federal district judges, to manage growth, change, and conflict in the U.S. District Court for the Southern District of Texas during the second half of the twentieth century. Examples of judicial management as I use the phrase encompass a wide variety of activities the federal district judges in the Southern District have undertaken since the 1950s. The judges were required to cope with institutional growth, they felt obliged to foster social change, and they were called on to resolve political conflict.

This dissertation examines ways in which various modes of judicial management were manifested in federal trials concerned broadly with civil rights, economic issues, and criminal justice. These three legal topics exist within specific statutory and doctrinal frameworks that have evolved over the past half century. I will discuss relevant developments in the law pertaining to the major topics as necessary. However, this dissertation is neither a study of the statutory changes within these three legal categories,
nor primarily a study of changes in the theory and practice of judicial management of dockets, cases, or institutions. Rather, I employ these fundamental elements in combination in an attempt to portray a sense of the legal, social, and organizational changes which have transpired over several critical decades in the history of the Southern District of Texas.
Acknowledgments

I wish to thank my family and colleagues, both in the sciences and the humanities at Rice University, for their support. I am grateful to Dr. Harold Hyman and Ferne Hyman for care and feeding over many years. Special thanks are due to Cheryl Matherly, for exemplary service in both her personal and professional roles.
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Introduction: From “Neutral Umpires” to “Managerial Judges”: Growth, Change, and Conflict in the U.S. District Court for the Southern District of Texas

We, and the lower federal courts, are courts of limited jurisdiction. Our task is not to correct all social ills, however egregious they may seem to us as individuals. The keys to the Kingdom are not in our hands. . . .

Fifth Circuit Judge John R. Brown, Jr. (1986).¹

In this study, I consider three basic manifestations of judicial management. Two of these are complementary, and both are examples of judicial management in the specific sense of judicial administration. The first of these administrative concerns, “docket” management, seeks to maintain orderly and efficient “case flow.” In recent decades, federal district judges have proposed or experimented with procedural reforms to facilitate the disposition of the large numbers of cases that continually crowd both criminal and civil court dockets.²

¹ Concurring, Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir., 1986), 1231.
The second variety of administration concerns "case" management. This regards judicial efforts to shepherd complex litigation, such as antitrust cases, through the courts. Through both "docket" and "case" management, judges seek to fulfill the first goal of the district judges' trial precepts, the Federal Rules of Civil Procedure, which is "to secure the just, speedy, and inexpensive determination of every action."¹ A cornerstone of case management is the skillful use of pretrial conferences, during which the judge can either complete time-consuming proceedings such as the discovery of evidence, or even foster settlement of a suit before trial.² A perennial quest for administrative efficiency embraces both civil and criminal case management.³ As legal scholar and federal appellate judge,  

³ Professional concerns regarding complexity emerged earlier in the century, when American industry and population boomed. These worries increased as the government's obligations and regulations expanded in the 1930s, under the New Deal. A surge of complex antitrust litigation also worried leading figures of the bar and the judiciary in the 1950s. The
Richard Posner, noted, trial judges seek to "dispos[e] of cases by trial or settlement with fairness and with the optimum blend of prompt decision and rightness of result." In part, efficient administration serves judges' self-interest in keeping dockets current. However, according to Posner, federal district judges "also have the responsibility of demonstrating the quality of federal justice to ordinary citizens -- parties, witnesses and jurors." 6

The third manifestation of judicial management is the most complex and controversial of the three. Hence, it is the most important for this study. In an influential 1976 Harvard Law Review article, Professor Abram Chayes examined the role federal judges play in a class of cases he named "public law litigation." In what Chayes called the "traditional model" of adjudication, suits involve "private disputes about private rights." The judge was merely "a neutral umpire, charged with little or no

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responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial.” In public law litigation, “the object . . . is the vindication of constitutional or statutory policies.” Moreover, in Chayes’ conception, public law litigation is not only defined by its object, but by the role played by the trial judge, who is the “dominant figure in organizing and guiding the case.” Most important, the judge is “the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.”7 Chayes’ insight regarding the creative role played by federal district judges in organizing and guiding litigation suffuses this study.8

Federal judicial intervention in and monitoring of state institutions, which has been the most visible expression of the phenomenon Chayes described, frequently followed in the wake of litigation to vindicate civil rights, as in school desegregation, electoral reapportionment, and prison conditions cases.9 Professor Owen Fiss has called this extensive judicial

Harvard University Press, 1985), 224.
9 However, Chayes’ definition is not limited to civil rights issues. Plaintiffs
intervention for remedial goals "structural reform." Federal district judges seek to attain this goal through the extensive use of equitable instruments, especially injunctions. In a traditional case brought in equity, the judge issues an injunction either to repair a specific past injury or to prevent a future injury. However, in a structural reform case, federal district judges could not merely rule on the factual claims, decide whether to issue or to withhold the requested injunction, and move on to the next docketed case. Instead, the judges assumed continuing

also resort to the courts to advance goals concerning environmental protection. The federal government prosecutes to enforce civil or criminal statutes which condemn fraud or monopoly. These all "display in varying degrees" features of public law litigation. Chayes, "The Role of the Judge in Public Law Litigation," 1284.

10 Owen M. Fiss, "The Supreme Court 1978 Term; Foreword: The Forms of Justice," Harvard Law Review 93 (1979): 2 [hereafter cited as: Fiss, "The Forms of Justice"] . Also, see: Chayes, "The Role of the Judge in Public Law Litigation," 1292-1295. According to Article III, § 1, of the U.S. Constitution, federal courts may hear "all cases in law and equity." Since 1938, when the separate procedural regimes for law and equity were joined in the federal rules of civil procedure, federal district judges have been authorized to issue injunctions under Rule 65. The Rules also govern other aspects of a case: Rule 23 permits class actions; Rule 18 allows the joinder of claims and remedies; and, Rule 20 joins parties. As Prof. Roach noted: "[t]he core elements of equity are the breadth and flexibility of equitable remedial powers which allow a trial judge to order remedies without careful attention to the demands of causation and restoration . . . . Both the theory and practice of equity fit the demands of structural reform. Equitable doctrine and theory can certainly explain those cases where courts did much less than restore rights. Equity can also justify those more rare cases where courts went beyond what was demanded by the restoration of rights." Kent Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies," Arizona Law Review 33 (1991):
responsibility for implementing long-term remedies. To account for the
divergence from the standard practices, Fiss distinguished preventive or
reparative injunctions from "structural injunctions." A structural
injunction "initiat[es] a relationship between a court and a social
institution." It is "a declaration that henceforth the court will direct or
manage the reconstruction" of the institution, to bring it into compliance
developed to reform constitutionally-flawed institutions are related to administrative and procedural reforms that federal district judges developed to manage crowded dockets and complex cases.  

* * *

Many useful histories and social science investigations regard shifts in constitutional doctrine, examine the origins, progress, and legacies of landmark cases, and narrate the lives and careers of influential judges and lawyers. This last genre is particularly well-represented through biographies of famous justices of the U.S. Supreme Court. Studies of the administration of lower courts and the behavior of trial judges have, however, been rare. As Kermit Hall and Eric Rise noted, "legal


13 The classic exception is Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: MacMillan Company, 1927). Despite their title, Frankfurter and Landis considered the various levels of the judiciary in depth. But, this book is more than seventy years old. Another path finder was the late
historians have paid scant attention to the nation’s [lower] federal courts. . .

. . . for the most part federal judges have toiled in historical obscurity.  

In recent years, historians and social scientists have begun to
consider trial courts, especially federal district courts, in greater depth.

(Boston: Little, Brown and Company, 1950). Hurst inspired and guided a
generation of legal historians. His book is an exploration of judicial
activity as one element in "lawmaking," broadly considered. It set a
research agenda for professional, administrative, and cultural histories of
the district courts. Their are several recent studies of the federal judiciary,
but none focus exclusively on the lower courts. See: Posner, The Federal
Courts: Crisis and Reform; and: Erwin C. Surrency, History of the

14 Kermit L. Hall and Eric W. Rise, From Local Courts to National
Tribunals: The Federal District Courts of Florida, 1821-1990 (Brooklyn:

15 Recent histories of federal trial courts include the following: Charles L.
Zelden, Justice Lies in the District: The U.S. District Court, Southern
District of Texas, 1902-1960 (College Station: Texas A&M University
Press, 1993), [hereafter, cited as: Zelden, Justice Lies in the District];
Tony Freyer and Timothy Dixon, Democracy and Judicial Independence:
A History of the Federal Courts of Alabama, 1820-1994 (Brooklyn:
Carlson Publishing, 1995); Lawrence H. Larsen, Federal Justice in
Western Missouri: The Judges, the Cases, the Times (Columbia:
University of Missouri Press, 1994); Christian G. Fritz, Federal Justice in
California: The Court of Ogden Hoffman, 1851-1891 (Lincoln: University
of Nebraska Press, 1991); and: Mary K. Bonsteel Tachau, Federal Courts
in the Early Republic: Kentucky, 1789-1816 (Princeton: Princeton
University Press, 1978). For monographs by political scientists, see: C.K.
Rowland and Robert A. Carp, Politics and Judgment in Federal District
Courts (Lawrence: University Press of Kansas, 1996); and: Robert A. Carp
regarding, and some critiques of the social science approach to studying
trial courts, see: Joel B. Grossman and Austin Sarat, "Litigation in the
Federal Courts: A Comparative Perspective," Law and Society (Winter,
Most studies note the increase during the twentieth century of the administrative complexity of the federal courts. The Framers of the U.S. Constitution arranged for the creation of the federal judiciary as the third branch of the new national government in Article III, which provided that: "[t]he judicial Power of the United States . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."\textsuperscript{16} In the Judiciary Act of 1789, Congress created the U.S. District Courts and designated them as the trial courts in the federal system.\textsuperscript{17} Article III established the principle of judicial independence by providing that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be

\begin{enumerate}
\item \textsuperscript{16} U.S. Constitution, Article III, § 1.
\item \textsuperscript{17} Act of 24 September 1789, c. 20, Sec. 17, 1 Stat. 73, 83. This "First Judiciary Act" divided the country into thirteen judicial districts and established the practice of drawing the boundaries to correspond with state borders. The original thirteen districts conformed to the eleven states in the Union in 1789, and to those additional sections of Massachusetts and Virginia that were slated to become the states Maine and Kentucky. One judge presided in each district.
\end{enumerate}
diminished during their Continuance in Office." But the judiciary depends on the Congress and the President to set its budget and jurisdiction. The two “political” branches also influence the business of the courts through changes in federal regulations or criminal laws.19

The jurisdiction and administrative apparatus of the federal district courts grew slowly until the twentieth century. For many years after Congress established the Southern District of Texas in 1902, one judge administered federal justice in forty-four southeast Texas counties.20

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20 In 1845, Galveston became the seat of the first federal court in Texas by an Act of 29 December 1845 (9 U.S. Statutes [Stat.] 1). The current Southern District of Texas was created when President Theodore Roosevelt signed the Act of 4 March 1902 (32 Stat. 65) to divide the state into four federal districts. The geographic jurisdiction of the Southern District included Galveston, but the island city was still rebuilding from the hurricane which had devastated it the previous year. Therefore, Congress designated Houston as the headquarters division by an Act of 11 March 1902 (32 Stat. 68). Brownsville was already a federal district court division (Act of 21 February 1857, 11 Stat. 164), as was Laredo (Act of 2 March 1899, 30 Stat. 1002). Congress later designated new Southern District court divisions in Victoria (Act of 18 April 1906, 34 Stat. 122), and Corpus Christi (Act of 29 May 1912, 37 Stat. 120). Erwin C. Surrency, “Federal District Court Judges and the History of Their Courts,” 40 F.R.D. 139 (1967), 289. In 1984, Congress created another border division, in McAllen. Also see: Charles L. Zelden, Justice Lies in the
Congress did not authorize a second judgeship in the District until 1938. The lawmakers had created four judgeships by 1960. Since 1990, when Congress last expanded the court, eighteen federal district judgeships are authorized to sit in the Southern District. As the number Southern District judges increased, there has been an increase in the number of supporting personnel. In 1902, the first judge in the District, Waller T. Burns, enjoyed the support of one Clerk of the Court, Christopher Dart, who acted as the District's administrative officer to organize dockets, record judgments, and maintain files. Nearly a century later, there is still only one Clerk, Michael Milby, but he manages two hundred deputy clerks.

In addition to authorizing more federal district judges, in recent decades Congress created a variety of court officers to help process the large number of cases on both civil and criminal dockets. In 1968, Congress established the office of U.S. Magistrate, and granted magistrates the authority to arraign defendants and to schedule felony trials to be

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Zelden, Justice Lies in the District, 153, 210-214.

conducted by a district judge. A judge can assign a magistrate to preside
over pretrial conferences, conduct discovery hearings, and submit
recommendations to the court. The judges retained responsibility to make
final decisions, but magistrates acted as gatekeepers by sifting facts and
sharpening legal issues that ultimately came before a federal district judge.
Since the 1970s, Congress has steadily increased magistrates’ authority to
render final decisions in cases. There are currently thirteen U.S.
Magistrate Judges sitting in the Southern District.23

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for Newly Appointed United States District Judges, 13-18 September
office of U.S. Commissioner, which was supplanted by the office of U.S.
Magistrate, was formerly described at 28 U.S.C. § 636]. The 1968 Act was
not fully implemented until 30 June 1971. Statutory expansions of
magistrates’ authority in the late 1970s enabled judges to lean more heavily
on these proxies for docket management purposes. Magistrates also gained
more authority to conduct criminal trials in misdemeanor cases. In 1979,
to indicate the increased responsibility, the lawmakers designated U.S.
Magistrates as U.S. Magistrate Judges. See: the Federal Magistrate Act of
631-639). [Note: For convenience, I will continue to refer simply to
“magistrates” except when using an official title for a particular
individual.] Congress created the office of magistrates under the authority
of Article I of the Constitution. Therefore, although they exercise power
similar to that of federal district judges, magistrates do not enjoy tenure or
salary protections available under Article III. Magistrates are appointed
for limited terms by the federal district judges whom they serve. Full-time
magistrates are appointed for eight-year terms; part-time magistrates only
for four-year terms. A statute protects salaries from diminution during
their terms, but no provision in the Constitution prevents Congress from
eliminating this protection. Compare the description of magistrates in 28
For most of this century, bankruptcy cases were included as part of federal district courts’ civil dockets. In 1978, Congress created bankruptcy judges with the authority to hear cases in lieu of a federal district judge. After a period of transition, bankruptcy courts were in full operation by 1984. There are currently six bankruptcy judges authorized in the Southern District. Like the magistrates, however, bankruptcy judges have original jurisdiction in federal civil, criminal, and administrative law, in diversity cases, and in admiralty. See: 28 U.S.C. §§ 1331-1333. In addition, federal district judges have original jurisdiction, “exclusive of the courts of the states,” in all matters of bankruptcy. 28 U.S.C. § 1334. Article I, § 8 of the U.S. Constitution authorized Congress to enact a “uniform” law of bankruptcy. The earliest comprehensive federal bankruptcy statute was the Bankruptcy Act of 1898, which is currently codified as Title 11 of the United States Code (11 U.S.C.). Federal laws concerning “Banks and Banking” are in Title 12 (12 U.S.C.).

Act of 6 November 1978, Pub.L. 95-598, codified at 28 U.S.C. §§ 151-158. In the 1978 law, bankruptcy judges could hear case related to bankruptcy proceedings, such as a civil suit involving a company which had filed under Title 11, as well as cases actually brought under Title 11. The bankruptcy judge would be appointed by circuit judges to serve 14 year terms. They could be removed by the judicial council in that circuit. Moreover, their salaries could be reduced by an act of congress. In a four-person plurality decision, the Supreme Court upheld a Minnesota district judge’s ruling that the original 1978 Act was unconstitutional. The Justices held that Congress had vested the bankruptcy judges with the “power and prestige” of Article III federal judges, without giving them the necessary
judges are subordinate court officers. Their rulings are subject to appeal to a federal district judge.26

Finally, under the Federal Rules of Civil Procedure, federal district judges have the authority to appoint and to define the duties of temporary court adjuncts, known as special masters, to help manage complex and independence. The Court stayed its judgment until 4 October 1982, to enable lawmakers to amend the laws. Northern Pipeline Construction v. Marathon Pipeline, 102 S.Ct. 2858 (1982). It was a “badly fragmented” ruling, because the distinction between Article III “constitutional” courts and Article I “legislative” tribunals was as is controversial. Charles Alan Wright, The Law of Federal Courts, 4th Student Ed. (St. Paul: West Publishing Co., 1983), 50-52. In response to the Court’s ruling in Northern Pipeline, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Act of 10 July 1984, Pub.L. 98-353, 98 Stat. 338), which clarified that bankruptcy judges served fixed terms and paid fixed salaries (which were tied to the salaries of district judges). Bankruptcy judges are paid 92 percent of what life tenured district judges are paid. 28 U.S.C. § 153.

controversial litigation in a wide variety of fields. Vincent Nathan gained prominence as a special master in prison reform cases during the 1970s. At that time, he noted that the master’s role varies with the needs of the court.

The “needs of the court” for more personnel and more complex administrative mechanisms to use them effectively, as well as the requisite budget to fund them, grew steadily throughout this century. Fiss has attributed this increasing “bureaucratization of the judiciary” to the “growing size and complexity of American society.” As a result of these factors, the increase in the number of Southern District judgeships and supporting personnel has barely kept pace with the growth of the court’s caseload. Civil plaintiffs filed just over one thousand lawsuits in the District in 1960. In 1990, plaintiffs filed almost six thousand cases. The number of criminal cases filed more than tripled during the same period.

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Prosecutions increased from approximately nine hundred criminal cases in 1960 to nearly three thousand in 1990.\textsuperscript{30}

Heavy caseloads in both state and federal courts, has led many observers of the American legal system to decry a "litigation explosion" and to bemoan the "litigious society." But Professor Lawrence Friedman doubted that this large volume of litigation is a sign of trouble. Instead, he argued that Americans have well-developed sense of what he called "total justice." He defined this as "a general expectation of justice, and a general expectation of recompense for injury and loss." Friedman admitted that as a consequence of this still-rising demand for total justice there has been "a tremendous increase in certain uses of legal process" over the years. But he suggested that the "[c]ourts have not expanded their work quantitatively as much as their work has altered in a more qualitative sense."\textsuperscript{31} Friedman correctly characterized changes in judicial activities concerning the rise in

\textsuperscript{30} The following table summarizes growth in caseload in the Southern District of Texas:

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil Cases Filed</th>
<th>Criminal Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>1,111</td>
<td>906</td>
</tr>
<tr>
<td>1970</td>
<td>2,073</td>
<td>2,326</td>
</tr>
<tr>
<td>1980</td>
<td>3,734</td>
<td>1,138</td>
</tr>
<tr>
<td>1990</td>
<td>5,983</td>
<td>2,971</td>
</tr>
</tbody>
</table>


public law litigation in federal district courts. What follows introduces and
examines this qualitative evolution in court business in the Southern
District of Texas.

* * * * *

In their 1927 study of the federal judicial system, *The Business of
the Supreme Court*, Felix Frankfurter and James Landis declared that "the
business of the courts is determined by the nature and extent of the
predominant activities of contemporary life." 32 Charles Zelden identified
in *Justice Lies in the District*, his 1993 history of the Southern District of
Texas from its creation through 1960, confirmed this contention. The
District is bounded on the southern rim by 180 miles of the U.S.-Mexico
border at the Rio Grande. From there, it sweeps northeast several hundred
miles to include most of the crescent of Texas’s Gulf Coast. 33 Three of the
Southern District’s seven court divisions operate in major port cities on the
Gulf of Mexico, at Galveston, Houston, and Corpus Christi, and three sit on
the Texas-Mexican border, at Laredo, McAllen, and Brownsville (the last

32 The quoted passage referred to the Circuit Courts of Appeals, but the
point is also relevant to the business of federal district courts. Frankfurter
is also a busy port). Southeast Texas has experienced tremendous industrial and commercial expansion during the twentieth century. As a result of the economic growth in the District, the judges were and are absorbed in mercantile concerns.\footnote{The Southern District includes every Texas county which touches the Gulf of Mexico but one: Jefferson County is in the Eastern District of Texas, which is adjacent to Louisiana. See: 28 U.S.C. § 124.}

During the boom years, issues of private law dominated Southern District court dockets. Businessmen in Texas and elsewhere have traditionally relied on the federal courts to create a legal environment that minimized uncertainty in property and contract questions.\footnote{In large part, the regional boom resulted from the vigilance of shrewd leaders who sought to turn every contingent event, whether the discovery of oil locally or the outbreak of war internationally, to Texas' and therefore their own advantage. Their efforts brought Houston, the District's headquarters, such spectacular growth that it became known as the "golden buckle" of the nation's sunbelt. See: Barry J. Kaplan, "Houston: The Golden Buckle of the Sunbelt," in Richard M. Bernard and Bradley R. Rice, eds., \textit{Sunbelt Cities: Politics and Growth Since World War II} (Austin: University of Texas, 1983), 196-212; and: Robert Fisher, "The Urban Sunbelt in Comparative Perspective: Houston in Context," in Robert B. Fairbanks and Kathleen Underwood, eds., \textit{Essays on Sunbelt Cities and Recent Urban America} (College Station: Texas A&M University Press, 1990), 33-58.}

The federal
district judges therefore mediated disputes between private individuals or businesses in lawsuits concerned with contracts, mergers and acquisitions, antitrust, intellectual property, bankruptcy, admiralty, torts, insurance, and many other commercial matters. Moreover, the federal district judges who sat in the Southern District were from the elite circles of Texas politics and business, and they tended to share their progrowth attitudes. As a consequence, when the judges could use their authority instrumentally, to foster entrepreneurial ventures, they did so. According to Zelden, the Southern District judges “consistently applied a private agenda in setting their priorities and in making their judicial decisions,” and they kept at the top of that agenda “the promotion of Southeast Texas’ economic, social, and political development through private means.”

The Southern District judges’ attention to regional commerce and the private law agenda led them to defer resolution of public law questions which touched on rights and duties owing between governments and citizens. Zelden also found that where private and public agendas met and where their imperatives clashed, as, for example, in cases concerned with federal regulation of interstate commerce, “the court subordinated the public to the private, most often by minimizing its duties as the

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enforcement arm of the federal government to the benefit of private
development . . . [o]ccasionally, it simply ignored its public duties entirely
in the service of its private agenda."\textsuperscript{37}

However, Zelden noted that near the end of the period he studied, the
federal district judges in the Southern District had begun to grapple with
public law controversies. The judges' priorities did not change abruptly.
Instead, they could no longer focus on private lawsuits to the exclusion of
public law issues. The latter lawsuits, especially in the form of civil rights
litigation, appeared on dockets in numbers too great to ignore.\textsuperscript{38} Newer
social concerns emerged to rival traditional commercial preoccupation and,
as Frankfurter and Landis suggested would occur, the changing profile of
the Southern District court's dockets reflected these emergent concerns.

\* \* \* \*

\textsuperscript{36} Zelden, \textit{Justice Lies in the District}, 11.
\textsuperscript{37} Zelden concluded that there were three reasons for the "remarkable
continuity" of the court's priorities through six eventful decades: first,
local business leaders looked to federal judicial rulings to foster stability
during unsettled times; second, their near total reliance on the mechanisms
of private development allowed business leaders to boost regional economic
prospects without also confronting racial tensions exacerbated by
urbanization and industrialization; and, third, the federal district judges
sitting in the Southern District during this period shared the background
and hence the outlook of the business class. These three factors combined
to make the judges powerful allies of business. \textit{Ibid.}, 11-12.
After World War II, federal district judges in the South were forced to confront racial problems ignored for decades. Rising tensions climaxed when Heman Sweatt, an African-American mail carrier from Houston, sued to gain the right to attend the segregated school of law at the University of Texas. In 1950, the U.S. Supreme Court ruled in *Sweatt v. Painter* that the law school Texas state legislators had hastily established for Negroes in Houston in response to Sweatt’s lawsuit could never be equal to the UT law school, which was Texas’ premier graduate legal institution. The Court declared that, apart from obviously unequal resources the legislature had allocated between the two schools, UT enjoyed many “intangible” advantages. The reputation of UT’s prestigious faculty and the daily interaction of its students rendered the all-white school inherently superior to the black school.

Sweatt’s lawsuit was a critical element of the National Association for the Advancement of Colored People’s (NAACP) strategy of employing

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38 Ibid., 11.
litigation as a tool to knock down the walls of legal segregation. The NAACP's chief litigator Thurgood Marshall and his team of attorneys from the organization's litigation arm, the Legal Defense Fund (LDF, or the "Inc. Fund"), painstakingly attacked Jim Crow. Inc. Fund lawyers first undermined segregation by demanding that southerners spend the money necessary to make black and white facilities equal. Spendthrift legislators usually balked. Ultimately, through federal court victories such as Sweatt v. Painter, the Inc. Fund litigators established that separate could never be equal.\(^{41}\)

The ruling in Sweatt v. Painter proved to be a significant prelude to the Supreme Court's landmark public school desegregation opinion in Brown v. Board of Education of Topeka.\(^{42}\) But another federal judicial decision in an earlier school desegregation suit around the same time as Sweatt showed that the Inc. Fund's advance work, planning, and above all,


\(^{42}\) Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) [hereafter
continued litigation, would be necessary to the ultimate success of the long struggle. In April 1948, Julius Brown, an African-American Texan, sued on behalf of "all other persons of Negro blood and African descent" to desegregate the La Grange Independent School District (ISD). He claimed that the La Grange ISD board of trustees deprived African-American students of the equal protection of the laws guaranteed by the Fourteenth Amendment, because the black and white schools were unequal. In particular, Brown complained that his oldest daughter, Vivian, could not enroll in chemistry, a subject not offered at the black high school.

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Federal district judge Thomas Kennerly of the Southern District ruled from Houston in March 1950 that the separate schools in La Grange were substantially equal and refused to issue an injunction to desegregate them. After the *Sweatt v. Painter* decision, however, Brown appealed Kennerly’s decision to the U.S. Court of Appeals for the Fifth Circuit. In January 1951, in *Brown v. Board of Trustees of La Grange*, Fifth Circuit Chief Judge Joseph C. Hutcheson, Jr. demonstrated why, even after the landmark ruling in *Sweatt*, the NAACP Inc. Fund lawyers still had miles to go before they overturned southern school segregation. The appellate judges were not satisfied merely to affirm Kennerly. Instead, for the three-judge panel, Hutcheson remanded the decision to the District court with an order that Kennerly dismiss the case. Unlike Sweatt’s petition to be admitted to UT law school, Hutcheson characterized Brown’s goals in his suit as an attempt to have Judge Kennerly “supervise and control by injunction the general conduct of a political subdivision of the State.” As the Chief Judge noted, Brown’s lawsuit “has for its purpose not the mere according of a specific right that has been denied, but the establishment of a sort of general government by injunction over the school district in respect to its schools and school system.”  

Such an injunction, Hutcheson declared, would “requir[e] detailed and continuous supervision over the

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conduct of a political subdivision,” which “is not congenial to equitable principles and practices and will not usually be granted.”

Hutcheson is correct. Sweatt wanted a swift decree from the federal courts. His case was not an example of structural reform or public law litigation that Fiss or Chayes described. Rather, Sweatt was a traditional suit in equity, albeit one intended to serve larger goals. But the litigation goals Hutcheson refused to countenance in Brown v. Board of Trustees of La Grange, namely, federal judicial supervision over a state institution such as a school system, was a model for desegregation litigation that the Inc. Fund lawyers had already undertaken in Topeka and elsewhere.

As Chief Justice Earl Warren wrote for the unanimous Court, in its 1954 opinion in Brown v. Board of Education of Topeka (hereafter, Brown), state-mandated and race-based public school segregation denied African-American students the equal protection of the laws, because “[s]eparate

\[\text{i}d\text{.}, 24. \text{ Circuit Judge Hutcheson, a former district judge in the Southern District of Texas, was the second oldest federal judge active at the time. He served as the Fifth Circuit's Chief Judge until the summer of 1959, when the law forced him to step down from that position. He remained active for several more years. Hutcheson apparently believed in the propriety of segregation, and publicly criticized the Supreme Court and Brown. However, he consistently enforced rulings on school desegregation as the Court mandated. J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation, New Ed. (Urbana: University of Illinois Press/Illiini Books, 1971; originally: 1961), 25, 213 [hereafter: Peltason, Fifty-Eight Lonely Men].\]
educational facilities [we]re inherently unequal." This decision did not
effect an immediate end to public school or any other segregated entity in
the South. Equality would require the Montgomery bus boycott, sit-in
protests, and the Selma march. It required martyrdom, new legislation,
and more litigation.\footnote{Brown I, 347 U.S., at 495. Also see: Bolling v. Sharpe, 347 U.S. 497
(1954), declaring segregated schools in the District of Columbia to be
unconstitutional. The Brown decision joined various "School Segregation
Cases" from Kansas, South Carolina, Virginia, and Delaware. In 1952,
when a federal judge found that black schools in the segregated Topeka
district were substantially equal to the white schools, and therefore
permissible under the "separate but equal" doctrine established by Plessy v.
Ferguson, 163 U.S. 537 (1896), in which the U.S. Supreme Court had
upheld Louisiana's "Jim Crow" law for railroad cars. The African-
American plaintiffs appealed on the grounds that separation rendered
facilities unequal. The Justices heard arguments in the case twice. Inc.
Fund attorneys, specifically chief counsel (and future Associate Justice of
the Supreme Court) Thurgood Marshall, first argued the case on 9
December 1952. A reargument on 8 December 1953 was generally
concerned with the historical context of the passage and ratification of the
Fourteenth Amendment. See generally: Kluger, Simple Justice; and:
Greenberg, Crusaders in the Courts.
\footnote{The Brown decision was limited to schools, and therefore, the Supreme
Court did not overturn Plessy v. Ferguson, 163 U.S. 537 (1896). The
Court did not condemn Plessy-style segregation in public accommodations
until after the Montgomery, Alabama, bus boycott. Gayle v. Browder, 352
U.S. 903 (1956). Civil rights activists called on the federal government to
outlaw racial discrimination in public accommodations, voting,
employment, and housing. In the face of the repeated frustrations,
African-Americans transformed desires for public school desegregation
into demands that federal judges initiate positive steps to bring integratio.
Although African-Americans remained disappointed with the slow pace of
change in the schools, they gained political and judicial support for many
of their related goals. See: Baker v. Carr, 369 U.S. 186 (1962), in which
the Court mandated the re-mapping of federal and state legislative districts}
Nevertheless, the *Brown* school decisions removed the constitutional underpinnings from segregation. African-Americans rightly take it as a turning point in their long history of struggle. Scholars also see *Brown* as marking the dawn of a new era. In the estimation of Derrick Bell, the decision "triggered a revolution in civil rights law," because the court victory increased African-Americans' "leverage." Also, it raised blacks' expectations that the federal courts would enforce their constitutional claims.  

The Court encouraged high expectations in post-*Brown* decisions.

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49 Derrick A. Bell, Jr., "*Brown v. Board of Education* and the Interest-Convergence Dilemma," *Harvard Law Review* 93 (1980): 518. Historically, blacks in the South litigated in the federal courts because they often sought reinterpretations of the scope of federally protected rights, and state courts usually blocked that goal. This view emerged during the Civil War and Reconstruction era. For example, specific provisions of the 1863 Habeas Corpus Act, and also in U.S. Grant's "General Order 3" of 1866, authorized state-court defendants to remove their cases to federal court when a state litigation or prosecution appeared to be biased against them due to association with the federal government. These provisions sought to protect federal and Union army officials as well as private citizens exercising federally-protected rights from litigious and prosecutorial mischief of the Reconstruction-era southern states. Harold M. Hyman and William M. Wieck, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York: Harper and Row, 1982), 260-263, 323-325. The Civil Rights Act of 1875 gave federal judges, as chancellors in equity, the authority to issue injunctions to forestall future deprivations of rights. Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill:
After directing southern school administrators to desegregate with "all
deliberate speed," the Justices charged federal district judges with the
responsibility for divining the local details.50

University of North Carolina Press, 1990), 130-134 [Hoffer, The Law's
Conscience].
50 Brown v. Board of Education of Topeka, 349 U.S. 294 (1955), 301
[hereafter: Brown II]. Historians continue to debate whether the Court was
wise to distribute the burden of Brown to the district courts, and many
critics argue that the Court simply passed the buck. Peter Hoffer has
argued that Brown II was not, as is frequently contended, an instance of
cynical compromise of principle in a difficult case. Rather, the Brown II
order was an equitable solution, and appropriate to the case. It was
misinterpreted, often deliberately, by judges and local school boards who
chose to read "all deliberate speed" as permission to delay. But, Hoffer
concluded, the Justice's decision to remand to the district courts was not a
nod to federalism, a capitulation to state's rights, or a failure of nerve;
rather, Hoffer believes, the Court sought fairness, even for the
has recently argued that the Justices were concerned that a more "activist"
decision would threaten the Court's prestige, already at risk, and that they
decided that the federal district courts could take the heat of the ruling
without undermining faith in the system. Stephen C. Halpern, On the
Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights
Act (Baltimore: Johns Hopkins University Press, 1995), 74. For the
continuing role played by federal judges in the post-Brown civil rights era,
see: Peltason, Fifty-Eight Lonely Men; Harvey C. Couch, A History of the
Fifth Circuit, 1891-1981 (Washington, D.C.: Bicentennial Committee of
the Judicial Conference of the United States, 1984); John M. Spivack, Race,
Civil Rights and the United States Court of Appeals for the Fifth Judicial
Circuit (New York: Garland, 1990); Jack Bass, Unlikely Heroes: The
Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated
the Supreme Court's Brown Decision Into A Revolution For Equality (New
York: Simon and Schuster, 1981); and: Michal R. Belknap, Federal Law
and the Southern Order: Racial Violence and the Constitutional Conflict in
the Post-Brown South (Athens: University of Georgia Press, 1995).
Although African-Americans were disappointed with the subsequent slow pace of court-ordered school desegregation in thousands of individual lawsuits, the NAACP's success inspired imitations. Other groups followed the Brown model in requesting that the federal courts engage in societal reform.\textsuperscript{51} In subsequent opinions, which were bolstered by the civil rights laws enacted in the 1960s, the Supreme Court deputed to federal district judges many controversial tasks; including brokering settlements to end racial discrimination in public accommodations, voting, housing, and employment. Later, federal district judges administered reforms of prisons, mental hospitals, and other public institutions when jurists ruled

that state superintendents had been derelict in their observance of the constitutional rights of disfranchised or unpopular groups.\textsuperscript{52}

Over time, therefore, the Supreme Court, Congress, and rising public expectations for “total justice” extended federal judicial obligations far beyond supervising school desegregation. Accordingly, from the perspective of the federal district judges, the revolutionary legacy of \textit{Brown} is that the decision forced them to accommodate a wide variety of new social policy imperatives.\textsuperscript{53} This judicial revolution has been characterized


\textsuperscript{53} See: Phillip J. Cooper, \textit{Hard Judicial Choices: Federal District Court Judges and State and Local Officials} (New York: Oxford University Press, 1988), 12-44, 85-102, 136-158, 205-227, 328-350. Civil rights advocates tended to sue in federal courts because they thought that state judges would be “less likely to be receptive to vigorous enforcement of federal constitutional doctrine” than federal judges, who would have more familiarity with and a greater professional stake in the vindication of
by the emergence of public law or structural reform litigation. The new judicial commitments emerged over decades, did not displace the established duties of the federal district courts. For example, judges in the Southern District did not abandon their traditional interest in overseeing the development of the regional economy, in order to satisfy the emergent and competing demands of civil rights-oriented public law litigation. Rather, they continued to promote economic stability through rulings in many private lawsuits. In addition to facilitation of economic expansion through private law, the changing patterns of litigation required the judges to devote time and energy to the management of structural reform through public law.

Chayes' wrote that Brown and its progeny had committed federal district judges to overseeing litigation projects aimed at affecting a "profound social reconstruction." To Professor Robert Cover, however, constitutional rights. Some commentators argued the opposite, that federal and state judges enjoyed "parity," that they were equally capable of trying civil rights cases. Burt Neuborne thought such parity was a "myth," and concluded that by-passing state judges in civil rights litigation brought swifter and probably surer justice. Burt Neuborne, "The Myth of Parity," Harvard Law Review 90 (1977): 1105. Although conservative critics have long doubted the constitutionality of such wholesale federal intervention, some liberals have also been skeptical regarding the capacity of the courts to achieve a rights "revolution." See: Nathan Glazer, "Should Courts Administer Social Services?" Public Interest 50 (1981): 64; and, generally: Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991).

54 Chayes, "The Supreme Court, 1981 Term: Foreword: Public Law
it seemed that since *Brown*, the federal district courts had become "quasi-administrative bodies overseeing school desegregation and occasional other tasks."  What follows tests these propositions.

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Litigation and the Burger Court," 6.


In the long run, I don't know whether you are going to be able to accomplish a great deal by lawsuits or not.

U.S. District Judge James V. Allred, Jr. (1957).¹

After the U.S. Supreme Court condemned as unconstitutional state-mandated, race-based public school segregation in the unanimous 1954 opinion, Brown v. Board of Education (Brown I),² the Justices asked the litigants to suggest options for the remedial orders to desegregate school systems. The plaintiffs' attorneys, from the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund, Inc. (LDF the Inc. Fund), argued that the Court should order immediate

¹ Hernandez v. Driscoll Consolidated Independent School District [hereafter, cited as: Hernandez v. Driscoll CISD]; Civil Action (Civ.A.) 1384, U.S. District Court for the Southern District of Texas (S.D.Tex.), Corpus Christi Division; Hearing transcript, vol. III, p. 545 (1 November 1957). Case files for the Southern District, and other federal courts in Texas, are held at the National Archives and Records Administration-Southwest Regional Archives (NARA-SWA), in Fort Worth, Texas. This quote may be found in: Civil cases, S.D.Tex., Corpus Christi Division, 1938-1969, Record Group (RG) 21, Boxes 232-233, Several folders for C.A. 1384 [the hearing transcript for Hernandez v. Driscoll CISD is loose in Box 233]. All references to the case files in Hernandez v. Driscoll CISD will be to this NARA-SWA record group.

² Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) [hereafter
desegregation of "separate but equal" schools. Lawyers for the defendant school districts argued, ultimately unsuccessfully, that the Court should refrain from declaring a remedy or setting a timetable for compliance with Brown I.4

In May 1955, the Justices issued the second Brown opinion (Brown II), in which the Court declared that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving" the problems of public school desegregation. The decision also thrust federal district judges into the lead role for resolving racial and social tensions that had built up over decades and which took decades to untangle. The Justices directed

cited as: Brown I].
4 Texas was not a defendant, but its attorneys participated in this debate. They exhibited maps which illustrated the uneven distribution of the African-American population in Texas. The Texans argued that the Justices should allow individual federal judges to issue court orders which could be tailored to account for variations in local segregated conditions. Thurgood Marshall, the Inc. Fund director who acted as the lead plaintiffs’ attorney, insisted that federal constitutional rights should not be applied piecemeal. He scoffed: "I am sure that the state of Texas does not... administer their own constitution in varying [ways] in various sections of the country.” Marshall, quoted in: Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (New York: Vintage Books, 1975), 736.
district judges to use "equitable principles," and to "take into account the public interest" in order to bring "systematic and effective" compliance with the desegregation mandate. Within these vague boundaries, the Justices proclaimed that they expected local officials to desegregate their school systems with "all deliberate speed." The Court added that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."5

Some school districts did seek speedily to desegregate. But the plaintiffs' hopes for the rapid dismantling of most Jim Crow school systems soon collapsed under the weight of resistance. Many federal district judges spent years attempting to induce school board members either to accept the responsibility for developing plans for school desegregation, or to accept judicial authority for implementing Brown. According to J. Harvie Wilkinson, the district judges' task was made more difficult because the Supreme Court "abandoned the field" of public school desegregation between 1955 and 1968. During these critical years, when southern defiance receded and was replaced by stalling tactics and tokenism, the Court's school desegregation "pronouncements were few, given the proportions of the problem," and its "leadership was almost non-existent."

Fortunately, Texas's Southern District judges received some direction from

the U.S. Court of Appeals judges for the Fifth Circuit, which filled the leadership vacuum the Supreme Court left.\(^6\)

The desired ends of a suit and the means available to attain these ends dictated the plaintiff’s legal strategy. In turn, a litigant’s strategy, if successful, determined the character and extent of the judicial response. Limited legal claims brought limited judicial intervention to remedy complaints, and expansive claims brought expansive remedies. After Brown, African-American parents across the South, frequently advised by Inc. Fund-affiliated lawyers, sued in federal court to desegregate local schools. Most requested that the sitting federal district judge make a series of preliminary rulings or orders. First, they asked the judge to decree that the local segregated school system was unconstitutional. Next, they requested that the judge enjoin the enforcement of official policies, such as

race-based student assignment and enrollment rules, which created or threatened to maintain segregation. Finally, plaintiff parents sought to have the judge order the school district to adopt regulations that promised to desegregate the schools "with all deliberate speed." After the federal district judge issued these preliminary orders, however, the plaintiffs in desegregation lawsuits expected the judge to monitor the district's compliance with the desegregation order. The request for continuing judicial oversight of the enjoined institution was the main attribute of suits that scholar Abram Chayes characterized as "public law litigation." 7

Successful school desegregation litigation to enforce the Brown mandates obliged federal district judges to assume administrative oversight over the desegregating school districts, and many courts retained such oversight for decades. The combined effect of many individual post-Brown desegregation lawsuits demonstrated, as Chayes perceived, that the Justices

had committed the federal courts to lead "an enterprise of profound social
reconstruction."\(^8\)

But "public law litigation" which aimed at profound institutional
reform did not instantly supplant other forms of litigation on federal
district court dockets. Some civil rights plaintiffs sought less drastic
judicial intervention. Mexican-Americans, for example, even when they
filed public school desegregation lawsuits, did not take the _Brown_ decisions
to be significant constitutional milestones for their community. They
followed their own litigation tradition, which diverged from the African-
Americans, well before _Brown_. As a consequence, they avoided making
any civil rights claims under _Brown_.

Two public school desegregation suits filed in the U.S. District Court
for the Southern District of Texas demonstrate this phenomenon. Shortly
after _Brown_ was announced, Mexican-Americans sued to desegregate the
Driscoll Consolidated Independent School District (CISD), a small rural
system in the Lower Rio Grande Valley of South Texas. Concurrently,
African-Americans filed the second suit to desegregate the much larger
Houston Independent School District (HISD).\(^9\)

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These two suits cosmically resembled each other in that they were class actions filed by plaintiffs who sought judicial intervention to bring about public school desegregation in compliance with the Fourteenth Amendment. But the two suits also possessed fundamental differences. One difference was the relative sizes of the defendant school systems. The Driscoll CISD enrolled no more than three hundred students, a fact which allowed U.S. District Judge James V. Allred to invest a minimum of time and energy in the case. In effect, he heard the facts, considered the arguments, ruled for the plaintiffs, ordered Driscoll CISD to desegregate, and then closed the file. By contrast, Houston was already the largest city in the South, and HISD, with 170,000 students enrolled in 173 segregated schools, was the largest "Jim Crow" district in the United States. These facts forced Judge Ben C. Connally to formulate complex orders which proved difficult to enforce. Ultimately, the effort to desegregate HISD required the attention of a succession of judges, and the case remained active on the court's docket for nearly three decades. During those years,

Houston and the HISD experienced enormous growth. Major demographic shifts contributed to the desegregation case's complexity and protraction.\textsuperscript{10}

More than the disparate size and complexity of the defendant school systems, the particular aims of the plaintiffs in these two suits contributed to their different treatment by the respective trial judges. In Houston, the African-American plaintiffs filed suit precisely because the \textit{Brown} decision made available a new legal foundation to support their claims. The Mexican-Americans in rural South Texas relied on legal arguments and judicial rulings that predated and were unrelated to \textit{Brown}. The Mexican-American litigants did not sue the Driscoll CISD for continuing to enforce race-based school segregation laws of the type the \textit{Brown} decisions had declared unconstitutional. Rather, Mexican-Americans complained that the Driscoll system was not in compliance with Texas statutes which mandated the segregation of English-speaking children from children who could not speak and understand English. Like many rural school systems in Texas, Driscoll CISD enrolled a large number of Mexican-American children from families of migrant farm workers. The “Anglo” majority in Texas

and other states had long discriminated against this group. In Driscoll CISD, the discrimination was manifested by the fact that the administrators automatically placed all of the Mexican-American students, even those who spoke and understood only English, in classrooms intended for Spanish-speakers.

Once in court, it proved elementary for the plaintiffs’ attorneys to demonstrate to Judge Allred’s satisfaction that the administrators had been acting contrary to Texas statutes when grouping English-speakers with Spanish-speakers. Also, because the Driscoll CISD students were segregated according to their Mexican heritage, the attorneys cited previous federal judicial opinions declaring that specific practice to be

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11 Texas laws and society reflects regional prejudices from both the South and Southwest. See: Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (Berkeley: University of California Press, 1997), 1-12. Frank Vandiver, *The Southwest: South or West* (College Station: Texas A&M University Press, 1975). In 1970, the U.S. Civil Rights Commission noted that, as it was customarily employed in the Southwest, the term “Anglo” referred “to white persons who are not Mexican Americans or members of some other Spanish surnamed groups,” and that it carried “no derogatory connotations in the Southwest or in the Report or in this Summary.” United States Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest: Summary* (Washington, D.C.: U.S. Government Printing Office, 1970), 2, plus note. However, since “Anglo” literally refers to those of “English” descent, it is inadequate to account for descendants of the many Bohemians (Czechs), Germans, or other Europeans who settled in Texas. The problem of accounting for diversity and patterns or historical discrimination within European-descended mixed populations has necessitated the emergence of “whiteness” studies. See: David R. Roediger,
unconstitutional. Given the ready availability of legal arguments that led to the Fourteenth Amendment, the Mexican-Americans' attorneys did not see any benefit from citing *Brown*, and they specifically denied that they sought to have Judge Allred consider their clients' claims in light of the *Brown* decision.

Although the Mexican-Americans' strategy in the Driscoll CISD suit seems to have been out of step with the revolution in litigation that *Brown* sparked, facts argue against that interpretation. There were only two categories in a "Jim Crow" segregation system: "colored" and "white." Both federal and state judges had ruled that for the purposes of racial classifications, Mexican-Americans were "white."¹² As a result, African-Americans endured *de jure* ("in law") discrimination, which was supported by statutes and court decisions. Discrimination against Mexican-Americans was *de facto* ("in fact"), and continued through habit, custom, or misuse of legal categories, as in the Driscoll CISD. The bi-racial categories of "Jim Crow" survived *Brown*. Neither the litigants nor Judge Allred asserted that

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the Supreme Court's ruling on the claims of African-Americans in a race-based suit could apply in an attack on the heritage-based discrimination against Mexican-Americans. Nor was it obvious that adapting Brown to the Mexican-Americans' circumstances was even desirable.

The question remained unanswered for another decade. Advocates of Mexican-Americans' civil rights mostly abandoned litigation as an expensive, time-consuming, and ultimately unfruitful method of reform. They concentrated instead on winning influence through electoral politics, and continued to bank on their "white" status. They achieved some successes, but as a consequence of this strategic choice, Mexican-American civil rights efforts stalled as the African-American struggle entered its most dynamic period. The civil rights claims advanced by African-Americans and Mexican-Americans did not converge under Brown until the late 1960s.\(^\text{13}\)

Like other white southerners, Texans had enacted "Jim Crow" statutes which provided for separate, but "impartial," "public free schools" for "white and colored" children. These statutes defined as "colored . . . all persons of mixed blood descended from Negro ancestry."\(^{14}\) The racial laws were silent regarding other non-Anglo descent. There were, as noted earlier, only these two categories under the "Jim Crow" system: "colored" and "white." To account for Mexican-descended schoolchildren, whose ethnic heritage often was identifiable on class rosters only by Spanish surnames, Texans developed a system of "Mexican schools." A 1905 Texas

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statute provided that: "it shall be the duty of every teacher in the public
free schools . . . to use the English language exclusively, and to conduct all
recitations and school exercises exclusively in the English language."^15
Many school officials believed, or pretended to believe, that all Mexican-
Americans and especially children of migrant farm workers lacked English
proficiency. The provision resulted in classes containing few students with
Spanish surnames.^16

^15 Acts of 29th Legislature, ch. 124, § 102. Later, legislators amended the
law to prohibit the use of textbooks not printed in the English language.
However, the statutes did not prevent teaching or learning languages other
than English. For example, the English-only laws did not prevent the
"teaching of Latin, Greek, French, German, Spanish, Bohemian, or other
language as a branch of study in the high schools grades as outlined in the
state course of study." Acts of 1918, 4th Civil Statutes, ch. 80, § 1.
Codified in the General Provisions, ch. 19, Art. 2904(5a). The latter three
languages are included because many Texans or their ancestors originally
had emigrated from the regions of Bohemia (the present-day Czech
Republic), Germany, and, of course, Mexico, during the nineteenth
century, and linguistic enclaves persisted throughout the state. See, for
example: Walter Struve, Germans and Texans: Commerce, Migration, and
Culture in the Days of the Lone Star Republic (Austin: University of Texas
Press, 1996); Clinton Machann and James W. Mendl, Jr., trans. and eds.,
Czech Voices: Stories from Texas in Amerikán Národní Kalendár (College
Station: Texas A&M University Press, 1991); and: David Montejano,
Anglos and Mexicans in the Making of Texas, 1836-1986 (Austin:
University of Texas Press, 1987) [hereafter: Montejano, Anglos and
Mexicans in the Making of Texas]. In 1918, patriotic lawmakers
authorized criminal sanctions, to be initiated against school teachers who
 taught students in a language other than English. Convicted violators were
subject to fine and dismissal. Texas Penal Code, Arts. 1038(a)-1038(f).
See: Complete Texas Statutes, 492.
^16 Montejano, Anglos and Mexicans in the Making of Texas, 160.
Other discriminatory practices in Texas were sanctioned by long-standing customs even if not mandated by statute. Many Mexican-Americans endured discrimination at the hands of the Anglo-American majority because, even among presumptive "whites," social conventions favored paler over darker skin. Moreover, ethnic or religious restrictions in property covenants left Mexican-Americans facing discrimination in home ownership. Many Mexican-Americans even endured "Jim Crow"-style segregation in public accommodations, housing, restaurants, and parks. Therefore, Mexican-American Texans had long-standing grievances against the Anglo majority.

Like the more identifiable minority, African-Americans, Mexican-Americans often fought discrimination by litigation. Unlike African-Americans, Mexican-Americans could employ what has been called the "other white" strategy.\(^\text{17}\) It did not challenge segregation on the basis of its denial of equal protection guaranteed by the Fourteenth Amendment. Rather, the Mexican-American litigants stressed that in creating segregation for the "other white" race, authorities denied Mexican-Americans due process, a right also guaranteed by the Fourteenth Amendment, which in turn led to deprivations of equal protection. Mexican-Americans

successfully employed these due process-based “other white” arguments in a long line of state and federal suits.

A variety of Mexican-American civic groups emerged in the twentieth century, and some began organizing to end discriminatory practices in Texas. In 1929, to resist a wave of nativism, Corpus Christi Mexican-American business leaders created the League of United Latin-American Citizens (LULAC). They aimed to integrate their community into the social mainstream of the U.S., and among other acts of assimilation, they stressed the importance of learning English. Corpus Christi Physician and World War II veteran Hector P. Garcia founded the American G.I. Forum (AGIF) in 1948, to promote the interests of Mexican-American veterans. These groups, and other organizations which

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18 LULAC’s constitution called for its members to be true and loyal citizens. At a Conference on Americanization and Citizenship, called by the U.S. Commissioner of Education, Dr. P.P. Claxton noted the following: “Americanization is a process that makes for the harmony of differences that are good only in their blending. It recognizes national equality as it does individual equality, but does not make equality another word for identity.” Fredric P. Woellner, “The Teaching of American History as a Factor in Americanization,” 13 School and Society 13 (21 May 1921): 590. The Americanization movement was fed by World War I-era xenophobia of “hyphenated” Americans of divided and therefore questionable loyalty. It aimed to educate immigrants and transform the foreign-born into citizens who were both English-speaking and “100% American.” John F. McClymer, “The Americanization Movement and the Education of the Foreign-Born Adult, 1914-1925,” in Bernard J. Weiss, ed., American
emerged over the years, filled sometimes overlapping niches within the political culture in Texas. When their demonstrations of patriotism and political activity failed to lower the barriers to equality with Anglos, however, both groups resorted to litigation.

In 1930, when approximately ninety-percent of the public schools in South Texas were segregated according to the “Anglo” or “Mexican”

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enrollment, LULAC filed the first lawsuit to challenge the segregation of Mexican-Americans. Del Rio, a border town on the Rio Grande, operated an elementary school exclusively for Mexican-descended children, although no statute authorized the Del Rio Independent School District (ISD) to do so. LULAC-sponsored attorneys sought a state court injunction to end the segregation. The Del Rio ISD superintendent justified the segregation by noting that many of the Mexican-American children in question were from migrant families who worked on distant farms well into the school term. Because Anglo children, most of whom were not the children of migratory workers, would have several months advantage in class, the migrant students would suffer from low esteem if measured against their standard. Also, he claimed, migrant students’ persistently lower English language proficiency resulted in similar damage to their

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21 Montejano, Anglos and Mexicans in the Making of Texas, 191-196.
22 Inhabitants of Del Rio Independent School District v. Jesus Salvatierra, 33 S.W.2d 790 (Tex.Civ.App., 1930); dismissed for lack of jurisdiction, and cert. denied, 284 U.S. 580 (1931). [Note: some references cite the case as “Salvatierra v. Independent School District”; hereafter, I will refer only to “Salvatierra”]. The state judge in this case, apparently proud that he was the first to address the legality of segregating Mexican-Americans, began his opinion by acknowledging that: “It is to the credit of both races that, notwithstanding widely diverse racial characteristics, they dwell together in friendship, peace, and unity, and work amicably together for the common good and a common country.” He added the following: “[i]t is a matter of pride and gratification in our great public educational system . . . that the question of race segregation, as between Mexicans and other white races, has not heretofore found its way into the courts of the state . . .” Ibid., 794.
morale in school. The superintendent claimed that the segregation was not race-based, but offered “fair opportunity” to all children. Segregation, he argued, benefited students by meeting each group’s “peculiar needs.”

Despite the superintendent’s admission that the few Anglo migrant students who entered school late each term were not segregated, the state court refused to enjoin the Del Rio ISD. The LULAC lawyers appealed, and in *Del Rio ISD v. Salvatierra* the Texas Court of Civil Appeals held that public school officials could not “arbitrarily” segregate their Mexican-American students solely based on ethnic background. The segregation practiced by the Del Rio ISD was unacceptable because “the rules for the separation are arbitrary [and] applied indiscriminately to all Mexican pupils . . . without apparent regard to their individual aptitudes . . . while relieving children of other white races from the operation of the rule.” Moreover, the judges rejected LULAC’s request for an injunction, because “to the extent that the plan adopted is applied in good faith . . . with no intent . . . to discriminate against any of the races involved, it cannot be

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23 The superintendent testified that he did not send English-speaking children “who came in late over to the school where I sent the Mexican or Spanish speaking children . . . .” *Ibid.*, 792-793.
said that the plan is unlawful or violative even of the spirit of the constitution." 24

Notwithstanding the Salvatierra decision, schools continued to apply the separation criteria indiscriminately. 25 By the 1940s, segregation of Mexican-American children was deeply-rooted in Texas and in other southwestern states. 26 In 1946, Mexican-Americans in California filed another suit, but in a federal court. 27 Like Del Rio in Texas, the Westminster school district in California maintained segregated schools for

24 Emphasis added. Ibid., 794-795. The plaintiffs sought to bring this case before the U.S. Supreme Court, but the Court dismissed the appeal for lack of jurisdiction. 284 U.S. 580 (1931).
25 Because the system was motivated by an apparently "benign" distinction, namely the "fact" that Mexican-Americans were linguistically and culturally (including the culture of migrant farm work) incompatible with Anglos, the 1930 ruling "dealt a serious blow to the struggle." Martinez, "Legal Indeterminancy," 577-580. The ruling bedeviled Mexican-American civil rights litigants for decades. Forty years later, the federal courts decided that bilingual education might reduce the language and even culture problems better than segregation. In 1971's United States v. Texas, 342 F.Supp. 24 (E.D.Tex., 1971), U.S. District Judge William Wayne Justice ordered Texas school administrators to cease segregation of Mexican-Americans and to institute bilingual and bicultural education. Judge Justice ruled that segregation because of linguistic differences created a stigma of inferiority. On the state's appeal, the Fifth Circuit affirmed Justice. 466 F.2d 518 (5th Cir., 1972). For Judge Justice's continuing role in the evolution of U.S. v. Texas, see: Frank R. Kemerer, William Wayne Justice: A Judicial Biography (Austin: University of Texas Press, 1991), chapter five.
Mexican-descended children. A federal district judge held that the Westminster schools had violated the plaintiffs' rights under the Fourteenth Amendment. In a startling precursor to the Brown decision's condemnation of "separate but equal," the judge ruled that the equal protection requirements were not met merely by providing "separate schools [with] the same technical facilities." Because "[a] paramount requisite in the American system of public education is social equality," he stated, all classes "must be open to all children by unified school association regardless of lineage."28 He also suggested that the "commingling of the entire student body" was needed in the aftermath of the recent war, because "commingling . . . instills and develops a common cultural attitude among

28 Mendez, 64 F.Supp., 549. Regarding these Mexican-American desegregation cases, one commentator noted how "strikingly similar" this 1946 pronouncement is to statements made by the Supreme Court eight years later, in Brown. Guadalupe Salinas, "Comment: Mexican-Americans and the Desegregation of Schools in the Southwest," Houston Law Review 8 (1971): 940. In fact, the case offered an example of cooperation between LULAC and NAACP's Legal Defense Fund (LDF), in that Robert L. Carter, an LDF attorney, contributed an amicus brief. The case was a "useful dry run," which allowed LDF to test arguments it would later use in Brown, and without risking a reversal. Kluger, Simple Justice, 399-400. The civil rights litigators rarely coordinated suits with their counterparts, but organizations representing Mexican-Americans and African-Americans in civil rights litigation occasionally made common cause, either as intervenors in suits or as writers of amicus curiae ("friend of the court") briefs in support of one another's positions. However, tension between Mexican-Americans and African-American over legal strategies continued, since leaders of the various organizations were often jealous of their perceived turf, and reacted poorly to interference from other
the school children which is imperative for the perpetuation of American institutions and ideals."

On the state’s appeal, the U.S. Court of Appeals for the Ninth Circuit upheld the district judge’s decision for the plaintiffs. However, the Circuit judges were less critical of the doctrine of “separate but equal,” and less concerned with the supposed benefits of “commingling.” Instead, in *Westminster School District v. Mendez*, the appellate judges reasoned that because California’s “Jim Crow” statutes (like Texas laws), did not expressly mention Mexican-Americans, separation denied them due process and equal protection, and ruled against the school district only because the administrators had acted beyond statutory authority. The judges declared that they were “aware of no authority justifying any segregation fiat by an administrative or executive decree as every case cited to us is based upon a legislative act.”

Therefore the plaintiffs prevailed. But the Ninth Circuit court also suggested that the Mexican-American children could be segregated if the


29 *Mendez*, 64 F.Supp., 549.


31 *Westminster School District v. Mendez*, 161 F.2d 774 (9th Cir., 1947), 781.

32 *Mendez*, 161 F.2d, 780. See, also: *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), in which the Massachusetts courts ruled that in the
legislature authorized separate schools for them. The California situation was indistinguishable from the "Jim Crow" system the U.S. Supreme Court had upheld in *Plessy*. Finally, the Ninth Circuit judges echoed the Del Rio case by noting that language deficiencies in "children of Mexican ancestry . . . may justify differentiation by public school authorities in the exercise of their reasonable discretion as to the pedagogical methods of instruction . . . and foreign language handicaps may . . . require separate treatment in separate classrooms."\(^{33}\) After the Ninth Circuit's support for language segregation in *Mendez*, and its general endorsement of any segregation as long as it was rooted in the law, Mexican-American advocates developed litigation strategies which relied even more heavily on the alleged advantages derived from their "white" status.\(^{34}\)

Although Texas' version of "Jim Crow" was not directly affected by the Ninth Circuit court's ruling, Texas Attorney General Price Daniel, in an advisory opinion inspired by the Ninth Circuit's *dicta*, forbade ethnic segregation of its Mexican-descended students, but also justified the

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\(^{33}\) *Mendez*, 161 F.2d, 779 n.6.

\(^{34}\) State courts ruled against Mexican-American efforts to desegregate public accommodations until forced to abandon the position by federal courts. As to restrictive covenants, the Supreme Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), prevented the state courts ruling against Mexican-Americans. Martinez, "Legal Indeterminacy," 573.
maintenance of separate classes for "linguistically deficient" students.\textsuperscript{35} Daniels' advisory opinion became an issue in 1948's *Delgado v. Bastrop ISD*, the next lawsuit Mexican-Americans filed in Texas.\textsuperscript{36} U.S. District Judge Ben C. Rice of the Western District of Texas ruled that if a school provided for linguistic segregation, the separate facilities must be located on the same campus as other classrooms. More important, Rice decided that linguistic segregation in the Bastrop district, located near Austin, violated the Fourteenth Amendment because, as implemented, it was "arbitrary and discriminatory." Judge Rice did not criticize language segregation. But he declared that the Bastrop district could segregate any individual student only after school authorities had determined the students' English proficiency through "scientifically standardized" examinations. Moreover, all Bastrop students, Anglo- as well as Mexican-American, must be examined.\textsuperscript{37}

Later in 1948, the Texas State Superintendent of Public Instruction announced to all school officials that he was "glad to be able to tell you that arrangements have been made for the official tests to be used to comply"


with Judge Rice’s *Delgado* decision.\(^{38}\) Under these arrangements, the “Inter-American Test in Oral English” was to be administered to “[a]ll pupils in the white school, irrespective [sic] of their language ability.” Students in the same grade were to be given the same test at the same time, and “[t]here must be no discrimination at any time in the testing program.” The superintendent specified, for example, that even children of migrant farm workers entering school four months behind the rest of the grade were to be tested with all students who entered at that time. Anglo migrant children were therefore to be measured against Mexican-Americans from a similar background. This effort would preserve the objective basis of comparison, since “[t]he tests are ‘scientifically standardized’ as required by the court decision.”\(^{39}\)

The superintendent was not directing all district schools’ officials to administer the exams. Rather, testing should be undertaken “only in those schools desiring to divide first year children unable to follow instructions in English, from the children who are able to follow such instructions.”\(^{40}\) No district needed to spend its budget on tests: instead, the superintendent supplied addresses of the Austin publisher of exams, and informed local


officials that they may "[o]rder [a] supply of tests [for a] price [of] not more than $1.25 for the instructions and tests for 25 pupils."\textsuperscript{41} In the spirit of local control, school district administrators retained discretion to segregate or not to segregate, and the decision was contingent on their willingness to spend their budget for that purpose. In addition, the superintendent would allow local officials to set their own standards for competency, "[s]ince the situation which we face requires immediate action." He noted, however, that "[a]fter one year of experimentation and adjustment, then we may be ready to fix a state-wide standard."\textsuperscript{42}

After describing the plan to comply with the federal court order in \textit{Delgado}, the state's chief school officer concluded: "I trust that all superintendents, principals, and teachers will move forward courageously and harmoniously, without prejudice, and without bitterness, as we strive to work out for ourselves a more practical democracy."\textsuperscript{43} Given this lack of compulsion by the state, districts either ignored the mandate, or set standards that made it easy for school administrators to prevent Mexican-Americans from sharing public classrooms with Anglo-Americans.\textsuperscript{44}

\textsuperscript{40} Ibid., at § 1.
\textsuperscript{41} Ibid., at § 8.
\textsuperscript{42} Ibid., at § 9.
\textsuperscript{43} Ibid., at 3.
\textsuperscript{44} Salinas, "Comment: Mexican-Americans and the Desegregation of Schools in the Southwest," 941. As noted, \textit{Delgado v. Bastrop} was unpublished and so lacked much precedential weight outside Texas. But
The Delgado decision was another limited victory. But Mexican-American civil rights advocates continued honing their legal arguments.

The next reported federal case involving segregation of Mexican-Americans, in Arizona three years after Delgado, supported Judge Rice's essential findings. In Gonzalez v. Sheely, 96 F.Supp. 1004 (D.Ariz., 1951), the judge followed Mendez to find that a district that segregated Mexican-American children into one school attended solely by Mexican-Americans violated the children's Fourteenth Amendment rights. The court determined that the physical segregation harmed students' ability to learn English, and retarded development of a common culture, which the judge thought was essential to full participation in American civic life. Further, the court found that the segregation fostered antagonism and wrongly suggested to the Hispanic children that they were inferior to Anglos. Ibid., 1005-1007. The court enjoined discriminatory practices where the legislature had not specifically authorized segregation of students of Mexican descent. However, the Gonzales decision, once again following Mendez, did not forestall the probable result: continued separate classrooms for the language minority. The judge noted that "English language deficiencies of some of the children of Mexican ancestry . . . may exist to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms." Ibid., at 1009. According to Martinez, even given this shortcoming, the Gonzalez decision represented a significant advance over Salvatierra, because the Gonzalez court was sensitive to the notion that segregation placed a "stamp of inferiority" on Mexican-Americans, in anticipation of Brown I, in which the Supreme Court declared that segregation created feelings of inferiority "that may affect . . . hearts and minds in a way unlikely ever to be undone." 347 U.S. 483 (1896), 494. This rejected the reasoning in Plessy v. Ferguson, that if legally compelled segregation made minorities feel inferior, that result was not the fault of the law, but "solely because the colored race chooses to put that construction upon it." 163 U.S. 537 (1896), 551. According to Martinez, the Gonzalez decision was the first to recognize that segregation was inherently unequal and thus a violation of the Constitution.
They had gained valuable experience for a due process challenge to all-Anglo juries in Texas criminal trials. In 1954, with the joint support of LULAC and AGIF, attorneys Carlos C. Cadeña and Gus C. Garcia appealed *Hernandez v. Texas* to the U.S. Supreme Court, seeking to overturn Pete Hernandez's state conviction for murder.\(^{45}\)

In arguments before the Supreme Court, Cadeña and Garcia moved away from the "other white" strategy of the school cases. They attempted to demonstrate that the Anglos in Texas considered persons of Mexican descent to be a separate, subordinate group, "distinct from 'whites.'" This was the result of Anglo biases, not Texas laws, Cadeña and Garcia argued. They quoted "responsible officials and citizens" who admitted that Texans distinguished "white" from "Mexican." Cadeña and Garcia noted that, "until recently" children of Mexican descent were required to attend a segregated school for the first four grades. Finally, Cadeña and Garcia explained to the Justices how jury selection in Texas eliminated Mexican-Americans from jury consideration. They showed that when the county commissioners selected potential jurors, they worked from a list of property taxpayers. Although many Mexican-Americans were included on tax rolls as "citizens, householders, or freeholders," their names never

appeared on the jury selection pool. Therefore, qualified Mexican-
Americans must have been excluded on the basis of their Spanish-
surnames.\footnote{Ibid., 479-481.}

Attorneys arguing for Texas denied that reliance on a list of names
might facilitate the discrimination Cadeña and Garcia described. The
Texas counsel stated that "there are only two classes ---white and Negro---
within the contemplation of the Fourteenth Amendment." But Cadeña and
Garcia convinced the Justices that "just as persons of a different race are
distinguished by color, these Spanish names provide ready identification of
the members of this class." They noted that: "...[t]hroughout our history
differences in race and color have defined easily identifiable groups which
have at times required the aid of the courts in securing equal treatment
under the laws." And because "community prejudices are not static... from
time to time other differences from the community norm may define
other groups which need the same protection." When the existence of "a
distinct class" could be demonstrated, the Justices continued, and it can be
shown that the laws "as written and applied, single out that class for
different treatment not based on some reasonable classification, the
guarantees of the Constitution have been violated." On 3 May 1954, the
Court reversed Hernandez's conviction, because "systematic exclusion of
persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors,” had deprived him of due process and equal protection of the laws. The Justices condemned this obvious discrimination of “ancestry or national origin.”

Mexican-American litigators considered *Hernandez* the true landmark for their community, and discounted the utility of *Brown* for their civil rights litigation. Their preference was illustrated when Mexican-Americans sued the Driscoll CISD. At least since 1949, after Judge Rice’s *Delgado* ruling, the rural school district had no segregated restrooms, cafeteria, buses, or playgrounds. But Mexican-American first and second grade students were taught in separate classrooms. Mexican-Americans made up three-quarters of the enrollment in these grades, but attendance fluctuated with the seasonal demands of migrant farm work. Apparently, none of the migratory students spoke or understood English when they enrolled. However, despite *Delgado*, teachers assessed students’

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47 Furthermore, the Court held that even unintentional discrimination might constitute a denial of equal protection *Ibid.*, 475, 477-481. The Court’s *Hernandez* decision preceded *Brown* by two weeks (the Justices announced *Brown* on 17 May 1954). Although the cases are not explicitly linked, the Court’s reliance on the equal protection rationale in both *Hernandez* and *Brown* invited comparison. Moreover, *Hernandez* immediately precedes *Brown I* in the published decisions of the Supreme Court, *U.S. Reports*. 
English aptitude without administering standard exams. The school district required Mexican-American students to spend four years in the first grade before promotion to the second grade, where they were also segregated. LULAC threatened a suit in 1955, and Driscoll CISD “experimentally” reduced to three years the period of first grade “linguistic” segregation. When Mexican-American students did reach the third grade after four years, they shared a classroom with Anglo children who had been in school only two years.\footnote{Allred, “Opinion,” pp. 3-6. NARA-SWA. RG 21, Box 232, Folder 1: “1384 Herminio Hernandez v. Driscoll Consolidated ISD, et al.”}

Linda Perez, who spoke no Spanish, enrolled in the Driscoll district in September 1955, and was promptly placed in the Mexican class. The next day, James DeAnda, a Corpus Christi attorney who had assisted Cadeña and Garcia prepare their Hernandez appeal, accompanied Perez to the school and demanded that the superintendent shift her to the English-speaking class.\footnote{Hearing transcript of Hernandez v. Driscoll, vol. I, pp. 6, 63-64, 93-95; NARA-SWA. RG 21, Box 233. James DeAnda was born in Houston on 21 August 1925, earned the bachelor of arts in 1948 at Texas A&M University. He attended the segregated law school at the University of Texas at Austin, and graduated in 1950. “DeAnda,” in Judges of the United States, 2d Ed. (Washington, D.C.: Bicentennial Committee of the Judicial Conference of the United States, 1983) [hereafter, cited as: Judges of the United States]. That DeAnda had access to the best higher and graduate education Texas could offer, even during the height of the “Jim Crow” era prior to the Supreme Court’s decision in Sweatt v. Painter, illustrated the ambiguous status of Mexican-Americans in Texas. By mid-
Mexican-American student placed in an English-speaking first grade classroom during the twelve years that the superintendent ran Driscoll CISD. DeAnda discovered other English-speaking students in Driscoll's Mexican classes. He contacted their parents and sought assistance from Gus Garcia and the AGIF. In November, DeAnda filed *Hernandez v. Driscoll CISD* in the Corpus Christi division of the U.S. District Court for the Southern District of Texas. The *Driscoll* lawsuit was the first post-*Brown* desegregation case brought on behalf of Mexican-Americans.\(^5\)

\(^{\text{5}}\) *Hernandez v. Driscoll CISD*, 2 Race Rel. L. Rptr. 329 (S.D.Tex., 1957). *Hernandez v. Driscoll CISD* was the first post-*Brown* Mexican-American desegregation case to be decided by the federal courts, although it was not the first filed after *Brown*. The first such case to reach the federal courts was *Romero v. Weakly*, 131 F.Supp. 818 (S.D.Cal., 1955). In *Romero*, Mexican-Americans filed suit against California's El Centro School District. Attorneys for the defendant school district claimed that the state courts had yet to apply and construe applicable state laws, and argued the federal district judge should abstain. Under the *Pullman* abstention doctrine, federal courts seek to avoid premature interference with the state court's construction of state laws. See: *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), 501. The judge agreed with the school district, and dismissed the lawsuit. The judges of the U.S. Court of Appeals for the Ninth Circuit reversed. The appellate judges ruled that the plaintiff had raised no unadjudicated questions of California state law that justified *Pullman* abstention. The Ninth Circuit judges ordered the federal district court to hear the case. *Romero v. Weakly*, 226 F.2d 399 (9th Cir., 1955), 402. By the time *Romero* reached rehearing in the Southern District of California, however, *Driscoll CISD* was well underway in the
DeAnda filed the lawsuit, "in equity and at law," to enjoin the Driscoll school board from continuing segregation which he contended was maintained on ethnic rather than linguistic criteria. In his complaint, DeAnda claimed that Driscoll CISD officials acted "under color of custom, common design, usage or practice," to deprive children "of Mexican descent" of the privileges and immunities guaranteed under the Fourteenth Amendment, and of the civil rights secured by existing laws of the United States.\(^{51}\) The result, DeAnda argued, was that the Mexican-American Southern District of Texas. Significantly, the Ninth Circuit judges observed that the Mexican-American plaintiffs might have sought federal intervention after concluding that federal judges would be more open to their arguments than judges in the state courts, because the state judges are elected and federal judges are appointed for life. *Ibid.*, 401. Prof. Martinez believes this to be a key point, because Mexican-Americans had not enjoyed much success in the California state courts. See: Martinez, "Legal Indeterminacy," 581-582.

\(^{51}\) DeAnda, et al., "Complaint to Enjoin Violation of Federal Civil Rights and For Damages," pp. 1-2. NARA-SWA. RG 21, Box 232, Folder 3: "1384 Hernandez v. Driscoll." Specifically, the complaint referred to 42 U.S.C. §§ 1981-1983 (formerly, 8 U.S.C. § 43). These statutes were codifications of the Civil Rights Acts of 1870 and 1871, which provided as follows: "[a]ll persons within the jurisdiction of the United States shall have the same rights in every state . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . ." [Act of 1870, § 16, codified 42 U.S.C. § 1981]; and: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." [Act of 1871, § 1, codified 42 U.S.C. § 1983]. DeAnda also represented similarly situated plaintiffs in *Trinidad Villareal, et al. v. Mathis Independent School District of San Patricio City, et al.*, which he filed at the same time as *Hernandez v. Driscoll CISD*, and on the same grounds. Judge Allred granted the defendants' motion to dismiss the
students were deprived of the "educational, health, psychological and recreational benefits provided . . . for other school children." In December, Allan Davis of the Corpus Christi firm Boone, Davis, Cox & Hale, answered for Driscoll CISD. Davis denied that the school district discriminated on the basis of ancestry, and argued that the separation of the children who could not speak English was a long-accepted necessity.

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52 DeAnda, et al., "Complaint to Enjoin Violation of Federal Civil Rights and For Damages," p. 5. To make up for this deprivation, the plaintiffs also sought to obtain damages from the board. The requested damages, for each individual plaintiff, were as follows: $4000 in actual damages for the estimated wages lost after being unnecessarily held back in school for two years; and, another $4000 in punitive damages. *Ibid.*, pp. 7-8.

53 “Answer [of Driscoll Consolidated ISD, et al.]”, NARA-SWA. RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll.” The Cox of the firm’s title is Owen D. Cox, who is listed as the defendants’ co-counsel on the case. Cox, who also later became a judge in the Southern District, did not appear do take part in the suit, however. For biographical material, see: “Cox” in *Judges of the United States*. Also on 22 December, the Texas attorney general’s (AG) office moved to dismiss the case as it applied to J.W. Edgar, the state commissioner of education. The AG moved to dismiss, or (in the alternative) for a more definite statement, or for a summary judgment. John Ben Shepperd was still the AG of Texas; the motion for the state was filed by his assistant AG, Horace Wimberley. “Motion to Dismiss,” NARA-SWA. RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll.” Allred denied the motion on 21 February 1956, pending further hearings. Docket sheet, NARA-SWA. RG 21, Box 232, Folder 1: “1384 Herminio Hernandez v. Driscoll Consolidated ISD, et al.”

54 2 *Race Rel. L. Rptr.* 329, 331.
By the late 1950s, U.S. District Judge James V. Allred was a veteran politician, lawyer, and jurist. As Attorney General and then Governor of Texas during the Depression, he had been that rare specimen in Texas politics, an unwavering supporter of federal government-led economic reforms embodied in the New Deal, and he gained even greater distinction by receiving two lifetime appointments to as many federal judgeships in the Southern District of Texas, one each from Presidents Roosevelt and Truman. In 1938, President Roosevelt nominated Allred to a newly created second seat on the Southern District bench, but he resigned in May 1942 in order to challenge W. Lee “Pappy” O’Daniel in the Democratic primary for the upcoming election to the U.S. Senate. In 1943, Senator O’Daniel objected to President Roosevelt’s proposed nomination of Allred to the Fifth Circuit Court of Appeals. O’Daniel invoked “courtesy” to prevent Allred’s gaining as his consolation prize a “plum” as valuable as the circuit judgeship. Although Allred had been a New Deal stalwart, the president yielded to senatorial prerogative. Allred received his second chance for a lifetime sinecure six years later, in 1949. President Truman appointed Allred to the new temporary position in the Southern District of Texas, with the full support of O’Daniel’s successor, freshman U.S. Senator Lyndon B. Johnson. Congress made the position permanent in 1954. See, generally: Patricia A. Tidwell, “James V. Allred of Texas: A Judicial Biography” (M.A. Thesis, Rice University, 1991). Presidents presented with an opportunity to appoint a federal judge normally defer to individual senators of their own party, who either suggest or veto nominations to judicial vacancies in their home states. The “courtesy” is commonly asserted with respect to district and circuit seats, because senators presumably better understand how a proffered judgeship will either exacerbate or pacify local rivalries, such as that between Allred and O’Daniel. Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan (New Haven: Yale University Press, 1997), 42, 80-81 [hereafter: Goldman, Picking Federal Judges]. Allred’s second appointment conveniently removed a sometimes ally but potential political rival from Johnson’s “path to power.” See: Robert A. Caro, The Years of Lyndon Johnson, Volume I: The Path to Power (New York: Vintage Books, 1990), 682-683 [In Vol. I, Caro describes Allred as withdrawing from the 1942 race as early as 1941, prior to leaving the bench]; Robert A. Caro, The Years of Lyndon Johnson, Volume II: The
wanted no surprises which might waste time in court, he ordered DeAnda to file a clear and concise statement of the plaintiffs' claims by 26 March, and instructed Davis to file the defendants' reply by 23 April. DeAnda complied, and stated in more detail the same basic claims contained in his original complaint. These were that Driscoll CISD maintained separate classes consisting solely of children of Hispanic descent in the first and

Means of Ascent (New York: Vintage Books, 1991), 17, 28 [In Vol. II, Caro describes Allred as competing with Johnson for Roosevelt's endorsement well into 1942]; and, finally: Charles L. Zelden, Justice Lies In The District: The U.S. District Court, Southern District of Texas, 1902-1960 (College Station: Texas A&M University Press, 1993), 153, 177, and 271, n.8 [hereafter: Zelden, Justice Lies in the District]. Allred was born 29 March 1899, in Bowie, Texas, and attended Bowie Commercial College (1916-1917), and Rice Institute in Houston (Sept. 1917-1918). After serving in World War I as a Yeoman 2d Class in the U.S. Navy (1918-1919), Allred studied law at Cumberland University, in Lebanon, Tennessee (Sept. 1920-June 1921), where he earned the LL.B. He became an associate attorney in Wichita Falls at the firm Martin & O'Neal (1921-1923), and was made a name partner in Martin, O'Neal & Allred (1923-1925). Allred then entered politics, and was Wichita Falls' assistant district attorney (1922-1923), then its district attorney (1923-1925), before re-entering solo private practice (1926-1930), in the same city. He built support in the Democratic Party, and became Attorney General in 1931. After serving four years, he made the leap to the Governorship of Texas (1935-1939), and received an honorary LL.D. in 1936, from Texas Christian University (TCU), in Fort Worth. After resigning his first judgeship, and before obtaining his second, Allred re-entered solo practice in Houston (1943-1945), then associated with several other attorneys (William Z. Rozan [1946-1947], Jack K. Ayer [part-1948], then with Ayer and Levert J. Able [1948-1949]). "Allred," in Judges of the United States. 56 "Preliminary Pre-Trial Order," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." In the same order, Allred granted the defendant district's request to file a counter claim; see: "Counter-Claim by Defendant," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll."
second grade, and implemented an educational system requiring a majority of these same children to spend three years in the first grade before promotion to the second grade. This practice, DeAnda argued, denied the children the equal protection of the laws.\footnote{Also, the plaintiffs had claimed the state commissioner as a defendant because Edgar "[p]rovid[ed] state funds . . . while being fully cognizant of the practices . . ."; "Statement of Plaintiffs Claims," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." On 18 April, Wimberley argued that the commissioner of education had no discretion to withhold funds, whether he was cognizant of unlawful practices or not, because his certification of funding approved by the legislature was a purely ministerial and mandatory function (via Art. 2922-20, Texas Civil Statutes, Art. 2663, Revised Civil Statutes); "Statement of Defendant J.W. Edgar in Reply to Plaintiffs' Claims," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." On 7 September, Allred granted Edgar's motion to be removed from the list of defendants. "Order Dismissing J.W. Edgar, State Commissioner of Education From the Cause," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." The list of defendants was again refined on 25 September, when the court substituted Kenneth Harlan for original named defendant Ed. Pohlmeier, who on 22 December 1955 notified Allred that he had resigned from board of trustees of Driscoll CISD on 11 October. Harlan had been appointed to serve out Pohlmeier's unexpired term. "Answer of Defendant Ed. Pohlmeier," NARA-SWA. RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." Harlan filed his answer to the charges on 24 September, but merely adopted the previous defense. "Order of Dismissal as to Ed Pohlmeier and Substituting Kenneth Harlan as Party Defendant," NARA-SWA. RG 21, Box 232, Folder 1: "1384 Herminio Hernandez v. Driscoll Consolidated ISD, et al."}

Davis did not dispute the facts in his reply, only DeAnda's claim that the system denied equal protection. He reminded the judge of Texas statutes requiring schools to instruct in English and insisted that segregation was maintained for no other reason than the Mexican-American students
lacked English. Further, he blamed Mexican-American parents who failed to teach their children English before enrolling them in the school, refused to speak English in the home, and did not require their children to “associate only with those who speak English” during school breaks.  

DeAnda filed a pre-trial memorandum to describe the legal grounds for the lawsuit. He stated that, according to earlier judicial rulings, if “Mexicans, being members of the Caucasian or Caucasoid race,” were segregated in separate buildings or classes, they were being denied equal protection of the laws. This had been settled law “even before” the Supreme Court ruled, in Brown, that “segregation of children based on race pursuant to statutory or State constitutional authority violated the [Fourteenth] Amendment.” DeAnda referred to the Brown decision only to dismiss its relevance. Instead, he resorted to the Hernandez decision for support, noting that the Court “held untenable the argument of the State of Texas that discrimination within the white race did not violate the equal protection clause.” With Hernandez available, Brown was not necessary, since, as DeAnda argued, “the instant cases do not raise the problems

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58 “Reply to Plaintiffs’ Claims by [Driscoll Consolidated ISD, et al.],” p. 4; NARA-SWA. RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll.” Moreover, Davis charged, the suit was groundless, politically-motivated, and had “resulted solely from the insistence of certain G.I. Forum organizations.” Ibid., at p. 6.
present in the Negro cases. There is present in these cases no question of 
segregation because of race.'\textsuperscript{59}

DeAnda carefully distinguished between these two landmark equal 
protection decisions for two reasons. First, \textit{Brown} was about race 
segregation, which he considered inapplicable to the Mexican-American 
complaint, and \textit{Hernandez} specifically referred to national origin. Second, 
\textit{Brown} was concerned only with statutory segregation (i.e., \textit{de jure}), and 
\textit{Hernandez} was about discriminatory practices not authorized by statute (\textit{de 
facto}). Because he was not contending that segregation in Driscoll CISD 
was race-based, or that a Texas law authorized it, \textit{Brown} was not a useful 
precedent.

It was a well-considered strategy. If he relied too heavily on \textit{Brown}, 
DeAnda risked losing if the judge decided that the major differences 
between \textit{Brown} and the present case overrode the minor resemblance. 
However, after arguing for these distinctions, DeAnda indicated that he 
would happily accept support from \textit{Brown} if Judge Allred chose to view the 
case as favorable precedent. He concluded his plaintiffs' brief by stating 
that "cases which have dealt with segregation of Mexican school children 
control here even without the reinforcement given them by the Supreme
Court’s segregation decisions.” DeAnda would invoke *Brown*, as well as
the Supreme Court’s graduate school desegregation decisions, but only for
the general support those cases provided through their references to the
intangible benefits of contact between students of diverse backgrounds.60

DeAnda’s limited strategy fit his modest goals. On the first day of
the proceedings, Allred asked if DeAnda was seeking to enjoin all
segregation involving language proficiency. DeAnda answered no; he
agreed that there were often good reasons for keeping Spanish-speaking
children segregated until they could speak and understand English. He
objected to automatic and extended segregation of Mexican-American
children on the excuse that because they were Mexican-American or
belonged to migrant families, they could not be as familiar with English as
the Anglo students, who were automatically placed in English-speaking
classes.61 Davis retorted that language segregation was necessary for the
education of both classes of students.62

59 DeAnda, et al., “Plaintiffs’ Pre-Trial Memorandum,” p. 1; NARA-SWA.
RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll” [emphasis added;
the reference is to Mendez].
60 *Ibid.*, pp. 1-2. The graduate desegregation cases are: *Sweatt v. Painter*,
(1950).
61 Hearing transcript of *Hernandez v. Driscoll*, vol. I, pp. 11-12; NARA-
SWA. RG 21, Box 233 [no folder].
DeAnda examined several trustees and teachers of the Driscoll CISD to establish the extent of the district's segregation, which was undisputed: the segregation of Mexican-American students, without exception, required three years in the first grade.\textsuperscript{63} The issue for the judge to decide was whether Driscoll CISD's system was reasonable or arbitrary and therefore discriminatory. DeAnda mainly relied on the testimony of two varieties of expert witnesses: social scientists and schoolchildren. Dr. George I. Sanchez, a professor of Latin American Education at the University of Texas, had studied the effects of language segregation on children, and was a frequent consultant and expert witness in segregation litigation. He testified that the best way to address language disparities was to group children together, because segregation prevented the social interaction and conversation necessary for learning a language. Driscoll CISD's segregation during the early grades, he said, reduced the Mexican-American students' future ability to learn.\textsuperscript{64}

Davis feared that Allred would consider Sanchez an objective and credible witness, and would take Sanchez' books, which the plaintiffs' offered as exhibits, as authoritative. Well-prepared to undermine Sanchez's credibility, Davis elicited Sanchez' admission on cross-examination that his testimony did not mesh with his own opinions

\textsuperscript{63} \textit{Ibid.}, vol. I, pp. 50-65.
expressed in his own earlier scholarly publications. Sanchez replied that his thinking had changed, as had the opinions of other experts, but insisted that his previous analyses were still sound. Davis would argue in his concluding brief that Sanchez did not change his opinion as the result of unbiased scholarship, but because he was “an advocate, a crusader, and a zealot.” Sanchez’s monographs were briefs, Davis suggested, and his so-called expert views “should be given no more weight than the argument of an attorney in the case.” Davis cited diverse opinions from authorities whom even Sanchez admitted were worthy, and who contradicted Sanchez’s opinions. This so-called expert authority did not yield evidence sufficient to justify overruling an administrator’s judgments. To stress this point, Davis called as his own “experts” local officials, who denied that segregation damaged children.

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64 Ibid., vol. II, pp. 228-230.
67 Davis, et al., “Brief for Defendants,” pp. 25-40; NARA-SWA. RG 21, Box 233 [no folder]. Curiously, when Davis refers to Brown, it is to disparage the opposing attorneys’ imitation of the Supreme Court’s reliance in that decision on materials written by “experts,” which were cited in briefs but not entered as evidence, so they could be properly cross-examined. Ibid., p. 25.
The second group of plaintiffs' "experts" were first graders of Mexican descent enrolled in Driscoll CISD. Their testimony soon proved to Allred's satisfaction that claims made by Driscoll CISD officials were erroneous. These children could not understand English to the level of ability of any Anglo child of the same age. DeAnda invited the judge to ask them about their school, friends, and families. Occasionally, a child witness misapprehended a question, or stumbled in an answer. For example, the judge asked one boy, "what is your oldest brother's name?" He answered "I don't have just one."\footnote{Hearing transcript of \textit{Hernandez v. Driscoll}, vol. I, p. 118; NARA-SWA. RG 21, Box 233 [no folder].} Davis argued that such blunders indicated that the children did "not have the understanding of English and facility of use which the average English-speaking child would have."\footnote{Davis, et al., "Brief for Defendants," pp. 36-37; NARA-SWA. RG 21, Box 233 [no folder].} But the childrens' performance on the witness stand made this contention ludicrous. Allred noted that "these children appeared to be as bright as Anglo children of the same age . . . their mistakes were no more than those that might have been made by any other child under the excitement or other emotions of a first appearance in court."\footnote{Davis, et al., "Brief for Defendants," pp. 36-37; NARA-SWA. RG 21, Box 233 [no folder].}

At Allred's invitation, both parties waived their right to make closing statements. Instead, the judge asked them to submit briefs. But
before closing the proceedings, Allred gave, as he said, "some indication of my thinking at the present time." He recognized that there might be reasonable bases for maintaining separate classes for beginners, although Sanchez's opinion to the contrary was "entitled to a great deal of weight."73 But, although there were sound justifications to hold back non-English speakers "for the first year, or a portion of the year . . . I think any treatment of these students as a class beyond that is unreasonable and discriminatory, any treatment that does not take into consideration the ability of the individual student."74

But Judge Allred also had a warning for DeAnda and for future plaintiffs: "[i]n the long run, I don't know whether you are going to be able to accomplish a great deal by lawsuits or not. Considerable progress has been made, you say, as a result of lawsuits. I don't know." And, the judge continued, "I don't know whether the courts should undertake the monumental job of trying to determine the justice [or] injustice of the treatment of particular students. I don't want to dictate to a school the method they should follow. I don't think I have the right to do that."75

Revealing his sympathy for the plaintiffs, but also his reluctance to dictate a

74 Ibid., vol. III, p. 544.
drastic remedy, Allred was not yet prepared to end all separation. But, he added:

... this method is unreasonably discriminatory and violative of a particular plaintiff's or particular group of plaintiff's rights. I know that any treatment of these people, on the basis that they are of Latin extraction, as a group, or treating an individual that way because he happens to come from that group, is, on its face, discriminatory and based on an unreasonable basis.76

"It can't stand," Allred concluded, "... you can file briefs on it. I am just telling you what I am thinking off hand. It is not final. You can direct your arguments to those points if you want to."77 After extensions, requested by both attorney teams, Allred had the briefs in hand by mid-December.78

In his brief, DeAnda did not ask for a total and immediate end to language segregation. Rather, he requested that Judge Allred order the Driscoll CISD trustees to end the current system, to maintain no separate classrooms beyond the first grade, to separate first grade children only after proper scientific tests, and to move a separated student to the English-speaking class after he or she showed sufficient understanding.79 DeAnda

75 Ibid., pp. 545-546.
76 Ibid., pp. 545-546.
77 Ibid., p. 548.
78 Docket log, NARA-SWA. RG 21, Box 232, Folder 1: "1384 Herminio Hernandez v. Driscoll Consolidated ISD, et al."
79 DeAnda, et al., "Plaintiffs' Brief," p. 8; NARA-SWA. RG 21, Box 233 [no folder].
invoked *Brown* only once, in reply to Davis’ closing brief. Davis had argued that the judge should allow the district administrators to follow their own “good faith” judgment about what was best for the children. Davis cited testimony by Mexican-American children that they were happy with the present arrangement, and would only become more aware of their language deficiencies should they be placed in a class with native English speakers. In response, DeAnda suggested that Davis “cannot conjure a more emphatic method of emphasizing or creating differences than by the policy of segregation” at Driscoll CISD. DeAnda suggested that his limited plan was “more than justified under the evidence . . . and actually benign, in light of the holding in *Brown.*” Once more, he used *Brown* as a negative comparison, not a model argument. Finally, however, DeAnda

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81 DeAnda, et al., “Plaintiffs’ Brief,” p. 8; NARA-SWA. RG 21, Box 233 [no folder].
quoted *Brown* positively, to stress the Court’s decision that separate education was “inherently unequal.”

On 11 January 1957, Allred’s memorandum opinion condemned Driscoll CISD’s practices. Because the district had clearly violated existing rules and the plaintiffs’ were seeking only to force compliance with them, Allred limited himself to restatements of earlier rulings. Segregation of Mexican-Americans was permissible if the classification for separation was not arbitrary. Referring to the ruling in *Delgado*, that language handicaps might justify segregation, but only upon a credible examination, he found the Driscoll method of administering segregation was “not a line drawn in good faith.” Rather, the first and second grade segregation was “unreasonable race discrimination against all Mexican children as a group.” That the extant system “has this effect,” he said, “cannot be disputed.” “If scientific or good faith tests were given the result might not weigh so heavily,” Allred added, “[but] when considered along with the other facts and circumstances . . . it compels the conclusion that the grouping is purposeful, intentional and unreasonably discriminatory.”

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82 DeAnda, et al., “Plaintiffs’ Reply to Defendants’ Brief,” p. 6; NARA-SWA. RG 21, Box 233 [no folder].

On 15 March, Allred enjoined the Driscoll CISD as DeAnda had requested, and he ordered that a new system of assigning students to classrooms should begin operating by the next academic year, 1957-1958, giving "the school authorities ample time to formulate a program accordingly without undue interference with its current work."  

The ruling in Hernandez v. Driscoll CISD did not condemn public school segregation or other discriminations against Mexican-American Texans. For that reason, some scholars of the Mexican-American civil rights struggle have criticized Allred for allowing language discrimination to continue. George A. Martinez, for example, complained that the judge relied on stale reasoning and outmoded precedents to permit language segregation, despite the "clear evidence that school officials used the linguistic rationale as a pretext for segregating Mexican-Americans from Anglos," and that Allred could have relied on Brown to prohibit segregation altogether. 

letter, but firmly denied his entreaty. Letters, Dugger to Allred (3 January 1957), and Allred to Dugger (5 January 1957), both in NARA-SWA. RG 21, Box 232, Folder 3: "1384 Hernandez v. Driscoll."


85 George A. Martinez, "Legal Indeterminacy," 583-584. Among the stated goals of Martinez' article is his attempt "to demonstrate that courts' decisions either for or against Mexican-Americans were often not inevitable or compelled," and to expose the extent to which courts have
The criticism of Allred is untenable in light of the case record. By reiterating due process as equal protection arguments of many earlier Mexican-American school desegregation decisions as controlling, Allred supported the very reasoning DeAnda advanced during the proceedings. Only subsequent events would prove these arguments to be inadequate. More important, the substantial investment in time, energy, and legal costs only brought the enrollment of a few dozen Mexican-American children in the Anglo classrooms of Driscoll CISD. Litigation was not a certain or cost effective method of obtaining reform. For that reason, *Hernandez v. Driscoll CISD* was the last school desegregation suit Mexican-Americans filed for a full decade.

* * *

When in the late-1950s, Mexican-American advocates abandoned litigation to win reform and instead concentrated on winning power exercised discretion and “helped or failed to help establish the rights of Mexican-Americans.” *Ibid.*, 559. Martinez analyzes (mostly published) decisions concerning Mexican-American litigation of civil rights issues between 1930 and 1980. For the legal hurdles Mexican-Americans faced before and after the *Brown* decisions, specifically, and how they could or could not aid the Mexican-American’s parallel struggle, see *Ibid.*, at 613. In particular, Martinez cites *United States v. Texas Education Agency*, 467 F.2d 848 (5th Cir., 1972), in which the Fifth Circuit Court of Appeals
through mainstream politics, they achieved notable influence within the Democratic party. In 1960, to win his hard-fought presidential campaign against Vice-president Richard Nixon, John F. Kennedy depended on a massive "Viva Kennedy" project to deliver crucial Mexican-American votes in Texas. The ultimately successful effort left the new administration in debt to Mexican-Americans, and in part because of Vice-president Lyndon B. Johnson's earlier proficiencies as Senate majority leader, President Kennedy began to pay the debt in short order.

The death of Judge Allred on 24 July 1959 left vacant one of the Southern District's four federal district judgeships. Politicians coveted judgeships both for paying off political debts and for advancing agendas.\(^{86}\)

\(^{86}\) Acknowledged that *Brown* did not permit linguistic difficulties or other "benign" justifications for segregating Mexican-Americans. According to most commentators, the judicial appointment process is and has always been a blend of patronage and ideology. Judgeships are powerful bargaining chips in political battles. Robert A. Carp and C.K. Rowland, *Policymaking and Politics in the Federal District Courts* (Knoxville: University of Tennessee Press, 1983), 53-62. See, generally: Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System* (New York: Harper & Row, 1971); and, George F. Cole, *Politics and the Administration of Justice* (Beverly Hills: Sage, 1973). When controversial issues such as school desegregation (or later, access to abortion) dominate social, political, and constitutional discourse, partisan wrangling over the federal judiciary assumes deeper ideological dimensions. In the years since *Brown v. Board of Education*, and especially after the U.S. Supreme Court's 1973 decision in *Roe v. Wade*, which that prevented states from prohibiting abortion, the Senate increasingly scrutinized ideological commitments of judicial candidates. This trend reached a pinnacle in the battle over the nomination of conservative jurist Robert Bork to the Supreme Court. The nomination stalled as Bork's
In 1959, both senators from Texas were Democrats and custom did not oblige President Eisenhower to seek their approval before naming Allred's successor. Eisenhower considered nominating Houston lawyer Everton Kennerly, a former Republican candidate for the Senate and the son of the late federal judge Thomas Kennerly, who had sat in the same district. Eisenhower was not fully committed to Kennerly, however, and leading Republicans wanted to nominate their political friends. As a result, the vacant judgeship languished, and Eisenhower missed his opportunity to appoint a Republican.

Senate majority leader Johnson had publicly endorsed Kennerly's nomination, and was delighted when Republican in-fighting enveloped the quest for Allred's successor. Johnson was an old hand at delaying patronage appointments to achieve his goals. When Allred's seat opened, Johnson blocked thirteen unrelated judicial nominations until Eisenhower appointed Johnson's friend Joe J. Fisher to a judgeship in the Eastern District of Texas. Johnson held the Southern District judgeship open until


the 1960 elections.\textsuperscript{90} Which exacerbated ideological rifts among Texas Democrats. Johnson, the leader of the party’s conservative wing in Texas, had hoped to lead Democrats back into the White House himself in 1960, but had to settle instead for the second spot on the ticket. He did not diminish his ambitions for his personal supporters.

Senator Ralph W. Yarborough, who led the liberals in Texas, had been in the U.S. Senate only one year, but became Texas’ senior senator when Johnson became Vice-president.\textsuperscript{91} Yarborough considered it his prerogative to name Allred’s successor. Kennedy announced his intention to appoint a Mexican-American. But those Mexican-American leaders who supported Yarborough in his struggles with Johnson lobbied for Ezequiel D. Salinas, a liberal state district judge from Laredo. As an alternative, they suggested DeAnda, who, at thirty-five, was ultimately considered too young to be a serious nominee for a federal judgeship. Yarborough forwarded Salinas’ name to the President.\textsuperscript{92}

Johnson refused to yield. He pressed Kennedy to appoint his friend and longtime political supporter Reynaldo G. Garza of Brownsville, Texas.

\textsuperscript{90} Zelden, \textit{Justice Lies In The District}, 210.
\textsuperscript{92} But in 1978, President Jimmy Carter appointed DeAnda to replace Judge Garza in the Southern District of Texas. Oral History Interview (OHI) with James DeAnda by Steven Wilson (20 May 1998). Also: \textit{Judges of the
Garza, born on 7 July 1915, graduated from Brownsville Junior College in 1935, then two years later, won the B.A. degree from the University of Texas at Austin, and in 1939 the Bachelor of Laws from its Law School. While in Austin, Garza worked on young Johnson's early campaigns for successively higher offices, which gave Garza over Yarborough’s claims. In April 1961, less than three months after Kennedy’s inauguration, Garza became the first Mexican-American federal judge in American history.

Although his appointment pleased the Mexican-American community in principle, it was also a practical reminder that Johnson had overridden other preferences held by many Mexican-Americans.93

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93 Julie Leininger Pycior, *LBJ & Mexican Americans: The Paradox of Power* (Austin: University of Texas Press, 1997), 116-124 [hereafter: Pycior, *LBJ & Mexican Americans*]. See, also: Carl Allsup, *The American G.I. Forum: Origins and Evolution* (Austin: Center for Mexican American Studies, 1982), 133; and, San Miguel, Jr., *Let All of Them Take Heed*, 164-165 [Note: Both Allsup and San Miguel incorrectly identify Garza as a Republican, apparently because he had joined Texas Governor Allan Shivers in supporting the Republican Eisenhower against liberal Democrat Adlai Stevenson]. For a sympathetic view of Garza's career, but one that also notes the divisions his appointment created within the Mexican-American community in Texas, see: Louise Ann Fisch, *All Rise: Reynaldo G. Garza, The First Mexican American Federal Judge* (College Station: Texas A&M University Press, 1996), 70-77. Garza was not actually first, but he was the first federal judge to be recognized as a Mexican-American. In 1947, President Truman appointed Harold R. Medina, the son of a Mexican father and an Anglo mother, to the Southern District of New York. Medina was later promoted to the Second Circuit. But Medina was not regarded as Hispanic by Anglo politicians, apparently was not raised as a Hispanic, and as a consequence, Medina's appointment is generally not
The Mexican-Americans’ political strategy yielded other notable if mixed rewards during the 1960s. They welcomed the election of Henry B. Gonzalez of San Antonio, another Johnson man, to the U.S. House of Representatives in 1961. Two years later, the Political Association of Spanish Speaking Organizations (PASSO, or PASO), founded around 1960, orchestrated a brief Mexican-American domination of the municipal government in Crystal City, Texas.\(^{94}\) Notwithstanding such political

regarded as being as politically significant as Garza’s. *Ibid.*, p. 177, note 1; also: Goldman, *Picking Federal Judges*, 196, note *kk*. The fact of an earlier, unrecognized or unremarked Hispanic on the federal bench underscores the fluidity of racial and ethnic identity among Hispanics. As critical legal scholar Richard Delgado assessed Garza’s career, “Garza began - and even ended - with good social instincts and a love of justice.” But it was “difficult for him to think of himself or his group in effective legal terms - as a people with a history of conquest and brutal treatment in need of redress.” He ruled “against [his] people . . . and other minorities.” Delgado, “Book Review: Rodrigo’s Fifteenth Chronicle,” 1187. [Note: Delgado’s article is a review of Fisch’s biography of Garza.] In many ways, the new judge’s social and professional background was as significant a departure as his ethnicity. Garza was a small-town lawyer whose professional pedigree paled next to those of other judges in the Southern District: Allen B. Hannay had been a state district judge for twelve years; Ben C. Connally was a successful attorney as well as the son of a long-serving U.S. Senator; and, Joe Ingraham, the district’s first and only Republican, had practiced law with Houston’s distinguished firm Baker, Botts. Also, the late Judge Allred had been Texas’ Attorney General and Governor. See generally: *Judges of the United States*; and: Zelden, *Justice Lies In The District*, also generally. \(^{94}\) Armando Navarro, *The Cristal Experiment: A Chicano Struggle for Community Control* (Madison: University of Wisconsin Press, 1998), 17-51. For later political developments in the same city, in years after the Chicano movement emerged, see *Ibid.*, generally; Armando L. Trujillo, *Chicano Empowerment and Bilingual Education: Movimiento Politics in
rewards in the decade after *Brown*, their stubborn embrace of a "white" status prevented Mexican-Americans from grappling with the practical distinction between the *de jure* segregation of African-Americans that the Supreme Court had condemned in *Brown*, and the *de facto* segregation of Mexican-Americans which prevailed in the Texas public schools. Many Mexican-Americans continued to face social discriminations, persistent economic hardship, and inferior educations because of their ethnic heritage. These historic disabilities were not lifted by the personal and professional gains of political elites like Judge Garza and Congressman Gonzalez. As a consequence, community dissatisfaction simmered during the 1960s.

Mexican-Americans eventually resumed litigation, with DeAnda was in the vanguard. By 1968, he both adapted the equal protection rationale

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of Brown to fit Mexican-Americans' unique circumstances, and adopted the comprehensive goals and methods of public law litigation.96

II. Ross v. Houston ISD: "A Palpable Sham and Subterfuge"

The Mexican-Americans' complaints and the judicial remedy they obtained were limited in time and scope. DeAnda's desegregation lawsuit against the Driscoll CISD, like the Inc. Fund's suit against UT law school on behalf of Heman Sweatt, more closely resembled traditional private litigation than the structural reform litigation which many African-Americans undertook after Brown I and Brown II. By contrast with the quick decision in Hernandez v. Driscoll CISD, litigation to desegregate Houston public schools would require years of federal judicial oversight

and monitoring. African-American plaintiffs sued to force realignment of fundamental social and legal relationships.

The Mexican-American school cases reinforced the right of boards of trustees to enjoy limited discretion to create district policies relevant to local conditions. Trustees were bound by specific provisions, including the fact that the state fixed English as the language of instruction. But even after the Delgado decision, state authorities left in local hands the actual decision to administer examinations for purposes of language segregation. In the segregation of African-Americans before Brown, day-to-day management of state-supported education was decentralized, but school districts were subject to a web of Texas’ version of “Jim Crow” statutes. The state constitution commanded that separate, “impartial” schools be provided for “white and colored children.” According to the education laws, for example, a public school which integrated the races stood to lose state support. The specific legal strictures explain why African-

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98 Texas Constitution, Art. 7, § 7: “Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.”
99 The final “Jim Crow” school law was in the Revised Statutes (R.S.) of Texas, ch. 19, Art. 2900 [as previously noted, combining former Arts. 2897-2898], which provided: “All available public school funds of this state shall be appropriated in each county for the education alike of white and colored children, and impartial provision shall be made for both races. No white child shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms
Americans, but not Mexican-Americans, regarded the Brown decision as a milestone. It was the consummation of their long-standing efforts of “chipping away” at inequality.\(^{100}\)

‘colored race’ and ‘colored children’ as used in this title, include all persons of mixed blood descended from negro ancestry.” See: Jenkins, The Revised Civil Statutes, Vol. I, at 1036. The legislative history of public school segregation begins in the Act of 20 May 1893, 23rd Legislature; Gen. Laws of Tex., ch. 122, “Public Free Schools,” § 14: “The children of the white and colored races shall be taught in separate schools, and in no case shall any school consisting partly of white and of partly colored children receive any aid from the public school fund”; and, the legislature provided in § 94 that each child shall attend school in the district in which “it” resided, except that “white children shall not attend the schools supported for colored children, nor shall colored children attend the schools supported for white children.” See: Gammel, Laws of Texas, Vol. X, at 614, 616, 637-638. In § 58, the lawmakers provided for “impartial provision” within these separate schools, with three white trustees elected or appointed for the white school districts, and three colored trustees elected or appointed for the colored (upon written application by ten colored residents of the affected district). If there were not enough colored children in a district to justify this, two or more districts could be consolidated, to be governed by the trustees of the district in which classes actually met. Ibid., 628. This section was amended by the next legislature, meeting two years later in 1895, to define the power, authority, and responsibility of trustees for “the control and management” of the schools, and to provide specific guidance on the selection of trustees. For example, trustees, both white and colored, were to be elected “in all cases.” However, in polling as in other public intercourse, separate but equal was still the rule. The 1895 amendment stated that the “election for white and colored trustees shall be held at the same times and places, and the ballots cast for white trustees shall be deposited in a separate box from that used for the ballots cast for colored trustees.” The returns and official certification of the results were also recorded on a separate basis. Amendment by Act of 21 March 1895. 24th Legislature, Gen. Laws of Tex., ch. 24, “Public Free Schools,” § 1. Gammel, Laws of Texas, Vol. X, at 759.

\(^{100}\) See: Henry J. Abraham and Barbara A. Perry, Freedom and the Court: Civil Rights and Liberties in the United States, 7th Ed. (New York:
The ambiguous directive in *Brown II* initially seemed adequate to accomplish the Supreme Court's goals. Some civic leaders with sufficient power, wealth, or independence won changes without prodding from the courts. For example, Roy Hofheinz, a millionaire real estate developer and Houston's mayor from 1953 to 1956, ordered the desegregation of the city's new airport's restrooms, water fountains, and waiting areas, integrated the municipal golf course, and had removed "whites only" and "colored" signs from city hall restroom doors. Of these executive actions, only the golf course desegregation was a response to a court order. The mayor broke down the resistance by reminding the city council that it would be very expensive for the city to build a separate but equal "colored" golf course.¹⁰¹

This economic theme repeated in Houston, where business trumped race. During the African-American students' movement of 1960,

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Houston's political and business leaders conspired to keep the "sit-in" protests out of the news, and desegregated the downtown district during an orchestrated media "blackout." This was possible because the newspapers, television stations, and radio stations were owned by a few influential families or individuals who agreed that scenes of racial animus might harm the city's image.  

102 See: Thomas R. Cole, *No Color is My Kind: The Life of Eldrewey Stearns and the Integration of Houston* (Austin: University of Texas Press, 1997), 54-57; and: Martin Oppenheimer, *The Sit-In Movement of 1960* (Brooklyn: Carlson Publishing, 1989), 92-93. In 1963, the Board of Trustees of the Rice Institute, Houston's premier private institution of higher education, sought to desegregate the school voluntarily. The Board was less motivated by moral objections to segregation, than by their concern that in the post-*Brown* era, Rice would be unable to attract or to retain first-class faculty, or to win lucrative federal grants for research to be conducted under the auspices of the Manned Spacecraft Center (later renamed Johnson Space Center), which the National Aeronautics and Space Administration recently had established at Clear Lake, near Houston. This effort required state court intervention, because Rice's 1891 charter called for the Trustees to maintain it for the "white inhabitants" of Houston. Moreover, the Board faced legal challenges from segregationist-minded alumni. Ultimately, with the aid of Baker & Botts, one of Houston's top law firms, the Board of Trustees successfully argued that maintaining Rice as a segregated Southern university would never fulfill the founder's larger goal in endowing it, which was that Rice become a school of the "first rank." *Coffee v. Rice University*, 408 S.W.2d 269 (1966). During the same legal proceedings, and on the same grounds, the Trustees also convinced the courts to allow them to rename the Institute "Rice University," and to change the charter to allow them to charge tuition. Joseph A. Pratt and Christopher J. Castaneda, *Builders: Herman and George R. Brown* (College Station: Texas A&M University Press, 1999), 205-211. Harold M. Hyman, *Craftsmanship and Character: A History of*
Brown soon galvanized dedicated segregationists across the South to form local "white citizens' councils" and organize campaigns of "massive resistance." A few school districts in Texas, usually those with few African-American children to enroll, attempted to comply with the Brown opinion. The board of trustees of Big Spring ISD, in Howard County, voted to end segregation in the first through sixth grades. Some Big Spring residents sought to enjoin the board's action in the state district court, but only succeeded in inadvertently accelerating judicial repudiation of Jim Crow. The plaintiffs argued that the Big Spring ISD board violated the Texas constitution and state laws controlling disbursement of public funds. The state district judge in the case interpreted the Brown mandate

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103 Ladino, Desegregating Texas Schools, 28-33.

104 The provisions in question were part of the Foundation School Program, which like other state educational programs was limited to segregated schools. In 1949, the Texas legislature enacted the Gilmer-Aikin Act (Foundation School Program Act, 51st Legislature; ch. 334, Art. 2922 §§ 11-22). The purpose of Gilmer-Aikin was "to guarantee to each child of school age in Texas the availability of a minimum Foundation School Program for nine (9) full months of the year, and to establish the eligibility requirements applicable to Texas public school districts." Ibid., § 11. The Act also had provided that: "[t]he number of professional units [i.e., teachers] allotted for the purpose of this act to each school district, except as herein provided, shall be based upon and determined by the average daily attendance for the district for the next preceding school year,
broadly, voided all state constitutional and statutory provisions that supported racial segregation, and denied the requested injunction, a denial the Texas Supreme Court affirmed in October 1955.\(^{105}\)

Texas Governor Allan Shivers, a conservative Democrat who had supported Eisenhower's successful presidential bid in 1952, re-animated resistance. Shivers noted that: "...[n]either the Texas nor the United States Supreme Court has said that schools must desegregate immediately... In the light of these decisions, no school district should feel compelled to take hasty or unnecessary action."\(^{106}\) Notwithstanding, by the end of the 1956-1957 school year, approximately 145 of the 714 Texas school districts had implemented limited desegregation plans. Most were in the western and south-central areas of the state, and ninety percent of the Texas' African-American population lived in the northern and eastern portions. One in six students in Dallas, and one of five in Houston, was black. Trustees of these districts faced the prospect of desegregating much larger and more diverse student populations.\(^{107}\) And Shivers continued to provide segregationists with rhetorical support.

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\(^{106}\) Ladino, *Desegregating Texas Schools*, 42.

In 1956, twenty percent of the total student population of 1500 in Mansfield, Texas, was African-American. Students were segregated into two elementary schools, but there was only one high school. Before Brown, Mansfield High enrolled white students only, and African-American students provided their own transportation to a black high school in Fort Worth, twenty miles north. U.S. District Judge Joe Estes, of the Northern District of Texas, accepted the Mansfield school board’s proposal to implement Brown by purchasing a school bus to take black students to Fort Worth. African-American parents appealed Estes’ ruling to the U.S. Court of Appeals for the Fifth Circuit. A three-judge panel, Chief Circuit Judge Joseph C. Hutcheson, Jr., of Texas, Judge John R. Brown, also a Texan, and Judge Richard T. Rives of Alabama, reversed Estes and remanded the case to him in June 1956. Hutcheson, who wrote the opinion, noted that there were no administrative barriers to desegregation in Mansfield, only a “difficulty arising out of the local climate of opinion.” Estes thereafter ordered Mansfield High to admit all students, white or black. Segregationists demonstrated and threatened violence if school officials implemented the judge’s order. Shivers stationed Texas Rangers in Mansfield, authorized the transfer out of the district of students whose admission would create problems, and said that he hoped that the Supreme
Court would attend to the "effect of its desegregation decision on a typical law-abiding Texas community." 108

Had African-American students and their parents persevered in the effort, as Hutcheson indicated, it would have been difficult for school officials to use logistical problems to justify further delay. But intimidation by segregationists, and the unsympathetic attitude of the Governor, convinced the black students to resume their bus trip to Fort

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Worth. Mansfield was a small town. That desegregation had been defeated there was not an encouraging beginning, and the setback emboldened segregationists. ¹⁰⁹

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Subsequent school desegregation suits in Texas involved whole counties and thousands of students. The Houston ISD (HISD) initiated desegregation quietly, but reluctantly. Before Brown, HISD operated a traditional southern, dual school system, with both student bodies and faculties segregated by race.¹¹⁰ In June 1955, the HISD board of trustees established a twenty-five member commission, including ten African-

¹⁰⁹ See the Dallas County case Brown v. Rippy, 233 F. 2d 796 (5th Cir.), cert. denied, 352 U.S. 878 (1956), and Avery v. Wichita Falls Independent School District, 241 F.2d 230 (5th Cir.), cert. denied, 353 U.S. 938 (1957). For detailed background material on the cases, see Read and McGough, Let Them Be Judged, 64-91. In each of these cases, the U.S. Court of Appeals for the Fifth Circuit decided in favor of parties seeking to desegregate the local schools, but segregation continued de facto for some time. In the Wichita Falls case, for example, the Judges of the Fifth Circuit decided that integration was not demanded by Brown, just removal of existing segregation barriers. The effects of Brown on the efforts of the courts were not limited to schools. However, by and large, business continued as usual in the federal courts, despite the high profile and drama of desegregation cases. At the peak of the civil rights movement, the cases on appeal relying on Brown accounted for less than three percent of the Fifth Circuit’s caseload. Bass, Unlikely Heroes, 19.
American members, to study the desegregation issue. After two months' deliberation, the commission recommended that HISD immediately integrate its administration and prepare for full integration of the schools by September 1956.\(^{111}\)

The HISD board had not acted on this plan by January 1956, and its President, Verna Rogers, asked the public for continued patience.\(^{112}\) By then, Texas segregationists had revived the long-discredited notion that a state legislature could overturn federal laws or federal judicial rulings which the state lawmakers considered unconstitutional. In the 1956 Democratic primary, Harris County voters endorsed by a ratio of four to one a proposition in support of state "interposition" against federal court-ordered desegregation.\(^{113}\)

\(^{110}\) Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970), at 1142.
\(^{111}\) Davidson, "Negro Politics and the Rise of the Civil Rights Movement in Houston, Texas," 51-52. Because the bimonthly meetings appeared on local television, the interested public could follow the progress of the board's study. Read and McGough, Let Them Be Judged, 92-93. This early moderate response does not indicate that Houston was a color-blind city: segregationists objected in 1955 when HISD printed a directory of school teachers without race designations, and the district resumed printing the designations the next year. Peltason, Fifty-Eight Lonely Men, 33.
\(^{113}\) Davidson, "Negro Politics and the Rise of the Civil Rights Movement in Houston, Texas," 68. Bass, Unlikely Heroes, 117. For contemporary accounts by journalists who reported on the reaction to desegregation throughout the South, see the essays collected in: Don Shoemaker, ed., With All Deliberate Speed: Segregation-Desegregation in Southern Schools
The Houston chapter of the NAACP, impatient with HISD's delay, prepared to force the issue in the courts. In January 1956, George T. Nelson, a Houston barber and NAACP volunteer, convinced Mary Alice Benjamin to allow him to take her eight-year-old daughter, Delores Ross, to the all-white Sherman elementary school and attempt to enroll her. The Benjamins lived less than two blocks from Sherman, but nearly a dozen blocks from the all-black Crawford school. Nelson prepared Delores for the expected jeers and harassment by white students, and explained that he would accompany her to the school and keep her safe. Nelson also brought along two of Ross's school-age male cousins, for companionship and protection. As Nelson expected, a hostile crowd waited for them on Monday morning. He and the children suffered verbal abuse, and the school officials did not allow the little girl to register at Sherman.¹¹⁴

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¹¹⁴ To ensure the children's, and his own protection, Nelson carried a pistol in a paper bag. Read and McGough, Let Them Be Judged, 93. In 1994, the Houston branch of the NAACP honored Nelson, then 89 years old, as a life member. The group noted that their past vice president accompanied
Nelson had notified reporters of his planned attempt to enroll Delores, and the publicity forced the HISD Board to discuss the desegregation issue in its televised hearing on 27 February. According to a white citizen who watched the proceedings, viewers were impressed with Hattie Mae White, an African-American school teacher. White delivered a speech before the school board which was “lucid and compelling,” because:

... She had the facts --- statistics on Negro teachers’ heavier student loads, the lack of libraries and kindergartens in many Negro schools, and many other inequalities --- and she delivered them beautifully. ... [f]or many whites in Houston it was their first glimpse of an educated, intelligent, attractive Negro.\textsuperscript{115}

But White’s eloquence could not overcome the HISD Board’s inertia or whites’ prejudice. In March, the Board again postponed desegregation in Houston’s schools, claiming “severe overcrowding.” At the same time, the Board tied desegregation to voter approval of a $30 million bond issue for the construction of new facilities. The proposed expansions, proponents argued, would “largely resolv[e]” the desegregation question.\textsuperscript{116}


This initiative would also consume several months to arrange a special election on the bond issue, and if approved, construction would take several years. African-Americans in Houston had waited long enough. At the opening of the term in September, officials at the Sherman school once again refused to register Delores Ross, by then nine years old. Then Marion Williams attempted to register her 14 year-old daughter Beneva at an all-white junior high school, and was also rebuffed.\footnote{Susan Besze Wallace, “The Changing Complexion of HISD; As The Desegregation Legal Battle Wore On, Houston School Demographics Were Steadily Changing,” \textit{Houston Post}, 15 May 1994, p. A16.} On 26 December 1956, Williams and Benjamin filed a federal lawsuit on behalf of their daughters and the class of all other African-American schoolchildren in Houston, and requested a temporary injunction to force compliance with \textit{Brown}.\footnote{\textit{Ross v. HISD}, \textit{5 Race Rel. L. Rptr.} 703 (S.D.Tex., 1960). [Note: facets of this litigation were also styled in case reports as \textit{Ross v. Dyer} (because, for example, Dyer was president of the board of trustees of HISD in 1957), \textit{Ross v. Peterson}, and \textit{Ross v. Eckels}; these all refer to the same basic case, and I will cite them as appropriate.]} Meanwhile, in mid-January 1957, the HISD Board appointed another panel to study their options under \textit{Brown}.\footnote{Susan Besze Wallace, “The Changing Complexion of HISD; As The Desegregation Legal Battle Wore On, Houston School Demographics Were Steadily Changing,” \textit{Houston Post}, 15 May 1994, p. A16.}

U.S. District Judge Ben C. Connally,\footnote{Judge Joe Ingraham was originally slated to preside but docketing conflicts shifted the case to Connally’s court. Read and McGough, \textit{Let}} although not a former office-holder like Judge Allred, was politically experienced: his father, Tom
Connally, had been a long-serving, popular, and powerful U.S. Senator from Texas. His duty was to enforce the Supreme Court's *Brown* decision, Connally believed, but he was no enthusiast of school desegregation. Years later, Fifth Circuit Judge Brown recalled of his fellow Houstonian, that: "in his heart, Connally always felt that *Brown v.*

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*Them Be Judged*, 454 [Note: Read and McGough incorrectly identify both Connally and Ingraham as sitting in the Eastern District of Texas].

121 Sen. Connally served Texas for 33 years. Read and McGough, *Let Them Be Judged*, 99. Ben C. Connally was born 28 December 1909, in Marlin, Texas (he died 2 December 1975). Connally had been a top student, both as an undergraduate and as a law student, at the University of Texas at Austin, and went on to earn a master of laws at Harvard. He had been only thirty-nine years old in 1949, when President Truman appointed him to a new permanent judgeship, created along with Judge Allred's temporarily temporary seat in the Southern District. Because of his eleven years practicing law for Houston's top firms, Connally brought substantial litigating experience to the district bench. Connally earned his B.A. (1930), then the LL.B (1930-1933) at the University of Texas at Austin, before attending Harvard Law School to get the LL.M (1933-1934). He practiced at Sewell, Taylor, Morris & Garwood, and by 1942, he was made a name partner at Sewell, Taylor, Morris & Connally. From 1945 until his appointment, he was partner at the large Houston firm Butler, Binion, Rice & Cook. While on the bench, Connally served on several committees for the Judicial Conference of the United States Courts: Supporting Personnel (1950-1956); Court Administration (1955-1975); the Fifth Circuit Judicial Conference (1959-1962). Judge Connally was later Chair of the Subcommittee on Judicial Improvements (1971-1975). "Connally," in: *Judges of the United States*. Then-junior Senator Johnson was the man behind Connally's judicial nomination. Johnson suggested Connally for the judgeship, and therefore removed another attractive potential rival from Texas politics, this time a son of the popular senior Senator from Texas, who had been a top student, both as an undergraduate and as a law student, at the University of Texas at Austin, and who had earned a master of laws at Harvard. Zelden, *Justice Lies In The District*, 177, and 271, n.8.
Board of Education was wrong --- that it made bad law.”

Despite his reservations, Connally was not segregationist, a fact demonstrated by the order he issued in December 1955 to desegregate within ninety days the Harris County courthouse cafeteria.

When Connally took on the HISD desegregation case, he persuaded the plaintiffs to withdraw their motion for an injunction, and to delay taking further action until he could convene a hearing in the spring. In the interim, Connally called pretrial conferences to discuss the issues. Such conferences were characteristic of the emergent style of “managerial” judging. Many judges conducted “pretrials” in chambers, attended by neither the court reporter nor the public. Under these conditions, litigants can speak relatively freely and informally. Judge Connally sought to avoid publicity and to minimize personality clashes.

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122 Quoted in: Zelden, Justice Lies in the District, 206. See also: Read and McGough, Let Them Be Judged, 104.


Connally convened a court hearing in Houston in May 1957, and over several days he heard testimony from African-American parents and white HISD board members. The board’s new president, Dallas Dyer, explained that her staff had not yet developed a plan to desegregate. However, the board had considered “many plans to mitigate [desegregation’s] impact.” Connally tried to broker a compromise. Reportedly, he suggested that it was time for the board to present a desegregation plan the plaintiffs’ counsel “could sell to his people.” After four months of waiting in vain for a response, Connally issued a decision in November 1957. He formally voided the Texas segregation statutes, but then simply directed the HISD board to comply with Brown by developing a suitable plan to desegregate Houston’s schools. He entered a decree with no terminal date, but warned that “[a]ny delay will be warranted only if the board immediately comes to grips with its problems.” Judge Connally added that: “[a] court of equity will not countenance inordinate delay or evasion where the enjoyment of a constitutional right is involved, though its recognition and enforcement be difficult and unpopular.”

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125 Peltason, Fifty-Eight Lonely Men, 122-123.

granted extensions to the court order, the HISD board did not respond until June 1960.¹²⁷

In November 1958, Hattie Mae White, the teacher who had distinguished herself as a public speaker during the televised meetings, was elected to the HISD board. She was the first African-American elected to serve in public office in Houston since Reconstruction.¹²⁸ Soon after her election, she discovered a burning cross in her front yard. As a board member, White learned of the legal strategy undergirding HISD’s delaying tactics. While attending a meeting in Houston of the National Association of School Boards, for example, she heard an attorney advise administrators to “[k]eep them in the courts . . . because eventually their [NAACP] money will run out and we have the taxpayers’ money, and that supports . . . suits on our side.”¹²⁹

In Houston, as elsewhere, attorneys for school districts began to claim that desegregation suits were being “trumped up” by the NAACP.¹³⁰ These charges led the Texas Attorney General, John Ben Shepperd, to

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¹²⁷ HISD v. Ross, 282 F.2d 95 (5th Cir., 1960), 96.
¹²⁸ White was a graduate of Booker T. Washington high school. For a description of White’s campaign, see: Davidson, “Negro Politics and the Rise of the Civil Rights Movement in Houston, Texas,” 53-55.
¹²⁹ Erna Smith, “Participants Recall Events of Desegregation in HISD,” Houston Post, 17 May 1979, p. 4A.
¹³⁰ Peltason, Fifty-Eight Lonely Men, 106.
investigate the civil rights group.\textsuperscript{131} In fact, although the NAACP provided
guidance, local attorneys usually acted autonomously. Weldon Berry, a
young African-American lawyer just beginning practice in Houston,
managed the litigation against HISD after Connally’s initial hearing. The
NAACP worried that this important suit had stalled and pressured Berry to
produce quicker results, perhaps by appealing to the Fifth Circuit to
request a writ of mandamus, a rare order to compel a lower court judge to
execute a legal duty.\textsuperscript{132} When it became clear that the HISD board was not
obeying the court order, the plaintiffs resumed the original strategy and
asked Connally both to enjoin continued segregation, and to order
desegregation in September 1959.\textsuperscript{133}

\textsuperscript{131} Davidson, “Negro Politics and the Rise of the Civil Rights Movement in
Houston, Texas,” 107-108. Shepperd eventually filed charges of barratry,
that is, soliciting lawsuits, against the NAACP (Texas v. NAACP, 1957;
Smith County, 7th Judicial District), and supported state legislation to
constrain the national organization’s activities in Texas. See: Ladino,
Desegregating Texas Schools, 133-140.

\textsuperscript{132} Read and McGough, Let Them Be Judged, 103-104. Mandamus applied
to correct egregious abuses of power. For example, federal district courts
have original jurisdiction to compel an officer or employee of the United
States to perform a non-discretionary duty owed to a plaintiff. Under the
same principle, the U.S. Courts of Appeals can compel action in a District
Court. The statute giving U.S. District Courts this power is codified at 28
U.S.C. § 1361 (Compelling Performance). Technically, the \textit{writ} of
mandamus no longer exists in American law. Under the Federal Rules of
Civil Procedure, “extraordinary” writs have been abolished in favor of a
motion or complaint “in the nature of mandamus,” which accomplishes the

\textsuperscript{133} Peltason, Fifty-Eight Lonely Men, 122-123.
In August 1959, Connally ordered the Board’s representatives to report on the HISD’s progress. Henry Peterson, the board’s latest president, admitted that it was “not politically wise for us to desegregate until we are forced to by a court deadline.” Peterson also claimed that it would take the HISD “eight to ten years to prepare for desegregation.” Dyer, the board’s former president, claimed that the public would consider swifter action “a traitorous act.”\textsuperscript{134} Soon after, the board finally submitted to Connally a 100,000-word report which supported the board’s claim that, due to vast problems with housing, academics, and finances, HISD could not desegregate by 1959, the plaintiffs’ proposed schedule. The board’s argument for delay worked. Connally instructed the HISD board to file a desegregation plan with him by 1 June 1960. If the Board missed the deadline, he warned, he would be obliged to “grant the relief which the plaintiffs have sought” and immediately to order desegregation.\textsuperscript{135}

The desegregation issue appeared on the Democratic ballot for the 5 June primary election. Critics of the referendum noted that it was superfluous, since the school district was already under a court order. But others supported the latest ballot measure, including HISD board member Stone Wells, who announced that the results would help the board make

\textsuperscript{134} Read and McGough, \textit{Let Them Be Judged}, 103.
\textsuperscript{135} Quoted in: Read and McGough, \textit{Let Them Be Judged}, 104. See, also: Peltason, \textit{Fifty-Eight Lonely Men}, 122-123.
hard decisions: neighborhoods supporting desegregation on the referendum
would integrate first. In a rare public act, Connally rebuked Wells for
this provocative statement by releasing to the press his letter to HISD's
attorney, Joe H. Reynolds. In it, the judge wrote that: "[y]our clients must
recognize that this is not a popularity contest, but is the performance of a
duty which the law imposes." Connally added that he expected the district
to propose a plan shortly.

As the deadline approached, the board finally proposed to allow
voluntary integration in one elementary school, one junior high school, and
one high school, to commence during the 1961 term, and to allow parents
to choose to enroll their children either in a segregated or a desegregated
school. Based on the plan Dallas schools had developed at the specific
direction of a federal judge, this "salt-and-pepper" strategy would result in
three varieties of schools: white, black, and integrated. On 3 August,
Connally rejected the "salt-and-pepper" plan. It did not comply with his
previous orders, or even constitute "a good faith attempt at compliance."
Instead, Connally complained forcefully, the HISD proposal was "a

136 Davidson, "Negro Politics and the Rise of the Civil Rights Movement in
Houston, Texas," 67-68.
137 Quoted in: Peltason, Fifty-Eight Lonely Men, 124. Reynolds eventually
defended most of the embattled Houston area school districts in their
decades' long desegregation cases. Art Wiese, "Meet Joe Reynolds,
Schools' Counsel in Desegregation Cases," Houston Post, 7 September
palpable sham and subterfuge designed only to accomplish further evasion and delay."\textsuperscript{138}

By then, Connally had presided over efforts to dismantle Houston's segregated school system for three years, during which the board had continually frustrated his attempts to manage an orderly and mostly voluntary transition from a dual to a unitary school system. He devised his own desegregation plan. Connally ordered the HISD board to commence desegregation in September 1960, beginning with the first grade and adding one grade per year. Desegregation would occur also from voluntary student transfers.\textsuperscript{139} This was a so-called "stair-step," or "grade-a-year" plan, and it was a typically "deliberate" judicial solution to the conundrum of desegregation. Under it, school desegregation begun in 1960 would be completed by 1972. But even this was too rapid for the HISD board.

\textsuperscript{138} HISD v. Ross, 282 F.2d 95 (5th Cir., 1960), 96. By then, Texas state law required that voters approve a salt-and-pepper scheme, and a low-turnout of Houston voters approved the plan in a special referendum held on 5 June 1960. However, in the "Opinion of Attorney General," 5 Race Rel. L. Rptr. 711 (1960), Texas Attorney general Will Wilson concluded that school districts could not be deprived of funds merely because they desegregated without a favorable result in a local referendum. This finding may have persuaded Board that it really had no options for delay.\textsuperscript{139} After the board asked Connally to clarify this order, he submitted a detailed desegregation plan on 12 August. Ross v. HISD, 5 Race Rel. L. Rptr. 703 (S.D.Tex., 1960).
On 26 August, with less than a month remaining until Connally’s order would take effect, HISD attorneys applied for a stay of the judgment. Fifth Circuit Judges Rives, Warren Jones, and John Minor Wisdom refused to stay Connally’s order.\textsuperscript{140} Desperate, the HISD board sought relief from the U.S. Supreme Court. Justice Hugo Black, who supervised the Fifth Circuit, also refused to countermand Connally’s order.\textsuperscript{141}

Black’s denial exhausted the HISD board’s options. On 8 September 1960, HISD lost its dubious distinction as the nation’s largest segregated school system. Six-year-old Tyronne Day became the first African-American to enroll at Kashmere Gardens, a formerly all-white elementary school. Shortly, approximately one dozen black children attended desegregated HISD schools.\textsuperscript{142}

With the first phase of litigation ended and desegregation underway, although at a trickle, attorneys from both sides praised the judge’s handling of the case. Joe Reynolds, HISD’s lawyer, noted that Connally “stood between Houston and disaster.” Later commentators concluded that “desegregation of the Houston public school system was a responsibility recognized and shouldered by local school administrators, community

\textsuperscript{140} HISD v. Ross, 282 F.2d 95 (5th Cir., 1960).
\textsuperscript{141} HISD v. Ross, 364 U.S. 803 (1960).
\textsuperscript{142} Kellar, Make Haste Slowly, 136-138.
groups and the federal district court.”\footnote{Ibid., 92.} Connally himself observed that, if he had much to do with the success of school desegregation in Houston, it was that he kept negotiations behind closed doors in his chambers.\footnote{Read and McGough, Let Them Be Judged, 108.}

Praise and self-congratulations were note universal. J.W. Peltason, writing contemporaneously about the Houston Ross case, concluded that: “[f]or two years the Houston School Board-- one of the few large city boards which has more defiantly resisted desegregation than even the state legislatures or the governors --did nothing.” Peltason disparaged Connally’s rulings in the Ross litigation as “no more than tell[ing] the board it should desegregate with all deliberate speed.”\footnote{Peltason, Fifty-Eight Lonely Men, 123. For his discussion of Galveston, see: Ibid., 138.} Peltason’s assessment was on the mark. The HISD board did not fulfill its responsibility for seeing the court’s order enforced, and Connally was obliged to abandon the stair-step plan and to accelerate desegregation.\footnote{Kellar, Make Haste Slowly, 151-177.}

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Despite their awareness of the growing congestion of the federal dockets, congressional Democrats steadfastly refused to create judgeships
during Eisenhower’s last six years in office.\textsuperscript{147} During the first weeks of January 1961, just prior to Kennedy’s inauguration, Democratic members of the new Congress introduced legislation aimed at relieving congested courts by adding dozens of new federal judges.\textsuperscript{148} Their quick action in response to the election results enabled Kennedy to sign the 1961 Omnibus Judgeship Act on 19 May, just four months after assuming office.\textsuperscript{149}


\textsuperscript{148} This had become a familiar process during the previous seven years, as legislators typically cited statistics proving a growing caseload crisis back home, noted that in many cases it took several years to come to trial, and proposed bills authorizing judgeships in their own states or districts. The Texas delegation of both houses took part in this early scramble for spoils. Rep. Rogers introduced H.R. 150 to add one district judge in the Northern District of Texas. \textit{Congressional Record} (87th Congress, 1st Session), Vol. 107, 3 Jan 1961, p. 38. Sen. Ralph Yarborough introduced S. 494 to add three judges, one each in the Southern, Northern, and Western Districts. \textit{Ibid.}, p. 879. Rep. Kilday introduced H.R. 3774 to add one judge to the Western District. \textit{Ibid.}, p. 1705.

\textsuperscript{149} \textit{CR}, Vol. 107, 19 May 1961, p. 8492. The 1961 Omnibus Judgeship Act was Pub.L. 87-36. President Kennedy found that even with a friendly Congress to assist him, it took time to fill so many judgeships. By the time he finished the search, which had expanded due to deaths and retirements, four score Democratic judges had taken their seats on the federal bench. Kennedy also found eleven qualified Republican candidates. In \textit{CR}, 21 March 1966, Vol. 112, pt. 4, p. 4560. In general, Eisenhower’s judicial
The 1961 Act created seventy-three new federal judgeships at both
the district and circuit level. It authorized four new federal district judges
in Texas, one each for the Western and Southern Districts, and two for the
Northern District. In March 1962, the Senate confirmed without objection
four new federal district judges in Texas. James L. Noel, Jr., assumed the
fifth judgeship in the Southern District. Noel's patron was Senator
Yarborough. It was the liberal Democratic Senator's turn to choose a
district judge.150

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legacy has stood up better than Kennedy's. Commentators from across the
political spectrum tend to agree that many of the Eisenhower appointees
were solid, while Kennedy appointed many disappointments. Eisenhower
appointed Earl Warren to be Chief Justice of the U.S. Supreme Court,
while Kennedy clearly appealed segregationist Senators from the states in
the Fifth Circuit. Carp and Rowland, *Policymaking and Politics*, 54. For
another interesting look at the statistical background of Presidential
appointees, from the Johnson through the Reagan administrations, see:
and Stidham's general evaluation of Eisenhower's habit of making
"apolitical" appointments is compatible with the preceding discussion.
They also discuss the political tone of several other presidential
administrations' as reflected in lower court appointments in *Ibid.*, 100-
118.

150 James Latane Noel, Jr. (born 28 October 1909, in Pilot Point, Texas).
In 1932, Noel received a B.S. in Commerce from Southern Methodist
University. He served as the assistant budget officer of Dallas Co. from
1935-37, and after that one year as assistant district attorney. In 1938,
Noel earned the LL.B. from SMU. He was assistant attorney general of
Texas until 1942, served in the U.S. Navy during World War II, and
reached the rank of Lt. Commander. After the war, he returned to his
assistant attorney general position to serve another year. In 1946, Noel
joined a law firm in Houston, but entered private practice seven years later.
He was active in the local and state bar association, the social, service, and
III. Houston Desegregation, part II: "Discrimination with a Vengeance"

By 1962, Chief Judge Connally believed he had prevailed over Houston's recalcitrant segregationists.151 As he noted after the first and second grades were nominally desegregated, that "the transition has been accomplished thus far in an orderly manner, with no disruptions of the school curriculum, and with a minimum of friction and discontent." Connally suggested with obvious satisfaction that Houston "may well take pride" in the fact that desegregation had occurred without the public violence which attended similar actions in many other southern cities.152 But the judge offered these optimistic remarks in response to renewed complaints from African-Americans. As he discussed the new complaints, it became clear that Connally favored order over equal justice. He would

SMU alumni clubs, and became a prominent local Democrat. Speaker of the House Sam Rayburn of Texas suggested Noel as a member of the U.S. Commission on Government Security from 1956 to 1958. He was back in solo practice in Houston when President Kennedy appointed him to the new federal judgeship in the Southern District. Judge Noel retired from the bench in 1978. See: Judges of the United States, 453.

151 Judge Connally became Chief Judge of the Southern District in 1962. By statute, the Chief Judge is the most senior active judge serving in the district, who is also younger than seventy years of age (1958 amendment, Pub.L. 85-593); see: 28 U.S.C. §§ 136-137.

allow desegregation to proceed at a snail’s pace if it meant continued peace and quiet.

African-American parents were not as sanguine as Connally regarding the success of school desegregation in Houston. The HISD board had rescinded rules specifically requiring a segregated system, but administrative policies remained in place which prevented many black students from exercising their rights to enroll in white schools. In September 1961, for example, administrators for the Allen Elementary School had not enrolled an African-American child, Sheila Smith, in the first grade, claiming that the three first-grade classes were already full. Officials advised Sheila’s father, Norman E. Smith, to enroll her in another school in his neighborhood. The school they suggested hired only African-American faculty and enrolled only black students. Believing that Allen Elementary had refused to admit Sheila because of her race, Smith sued.\(^{153}\)

In his answer to Smith, Connally noted mitigating factors. Smith had sought to enroll Sheila at Allen on 14 September for the term which had

\(^{153}\) *Ibid.*, 125. Although it was brought on behalf of Sheila Smith, district court treated the new complaint as a continuance of Delores Ross’s case, because an alleged violation of Connally’s August 1960 order was the basis of Smith’s complaint. Principle counselors in both sides of this case are listed as in the original case: Weldon H. Berry of Houston for Ross, with Inc. Fund lawyers U. Simpson Tate of Dallas, and Thurgood Marshall of New York listed on the appeal (but it is likely that Marshall did not participate in person). Joe H. Reynolds represented HISD. James J. Hippard of Houston acted as Smith’s counsel in the intervening case.
begun on 7 September. School officials admitted that "it was not unusual to admit scholastics thereafter for late registration," and noted that they might have enrolled Sheila if there had been class space. James Hippard, Smith's counsel, did not dispute the officials' contentions that Allen had reached its limit of thirty-six children per class. He accepted as fact that both before and after 14 September, the administrators had also refused to enroll additional white children in Allen Elementary's first grade classes. Nonetheless, Hippard argued that because it was within the school principal's authority to permit oversized classes on a temporary basis, until transfers or other adjustments reduced the number of students, Sheila should have been enrolled. Connally believed that the administrators had acted properly within their discretion, and found no evidence of racial discrimination in Smith's case. Moreover, he declared the complaint to be moot, because the term had ended. He suggested to Smith that Sheila attend Allen Elementary during second grade. He said that "if the plaintiff makes timely application for enrollment, the question presented here will not arise again."154

Connally then answered additional plaintiffs who had joined the revived Ross case to attack other HISD policies. The first policy, the so-called "brother-sister rule," required all of the school-age children of a

single family to attend the same school. For example, a brother could not
transfer to a desegregated elementary school while his older sister attended
the still-segregated elementary school. The plaintiff parents argued that
many black first and second graders, who were entitled under the stair-step
plan to attend desegregated schools, were prevented by the rule from
enjoying the benefits of the 1960 court order. Connally reminded the
plaintiffs that the same rule had been in effect for "some 40 to 50 years."
The brother-sister rule was common to many school districts, and had been
promulgated both to maintain family coherence and to enhance HISD's
administrative efficiency. Connally decided that the rule was sound, and
noted that:

... While it is true that application of the rule will perhaps
prevent certain colored scholastics from attending the school
of their choice, it does not necessarily follow that the rule
thereby becomes invalid. Under the same circumstances, the
rule also prevents white children from attending the school of
their choice.155

Because both white and black children were equally deprived of choice,
Connally concluded that the brother-sister rule was a "valid administrative
measure." He found no evidence that the policy had been promulgated or
was being enforced to discriminate against African-American children.

155 Ibid., 126. During the course of hearing the arguments, Judge Connally
"expressed some uncertainty as to the validity of the rule when applied to a
peculiar situation." This record does not elaborate on this point, but
Connally acknowledged that the HISD board "voluntarily modified" the
The second disputed policy, known as the "transfer rule," required students who wanted to transfer to obtain written permission from the principals of both the old and the new school. As in the case of the Brother and Sister rule, Connally found that there was no evidence of discrimination in HISD's application of the long-standing policy. Connally noted that, despite the enforcement of these rules, HISD had enrolled twelve of the nineteen "colored" children who sought admittance to formerly all white schools during the 1960-1961 school year. During the second year of the stair-step schedule, HISD had accepted thirty-three of fifty applicants.\textsuperscript{156}

That is, during the first two terms under Connally's 1960 plan, forty-five black children were attending desegregated schools in Houston. In 1962, HISD enrolled approximately 190,000 students. African-Americans comprised around a third of the city's population. Despite these poor results, Connally announced that the numbers were "hardly indicative of any concerted scheme systematically to exclude the Negro applicant." Moreover, he declared that: "the colored plaintiffs do not seek the same treatment as is afforded white students, to which they are entitled." Instead, "they seek a different, and superior, treatment, by reason of their race [and the] law does not grant them this." Connally was satisfied that rule in question to eliminate any doubt in the Judge's mind.
desegregation was proceeding according to schedule. He accepted that HISD officials were acting in good faith by enforcing their administrative regulations in a color-blind fashion. Therefore, Connally he denied a plaintiff’s motion to declare the board in contempt for evading the 1960 order, and he refused enjoin the board from enforcing its rules.157

The plaintiff parents appealed Connally’s decision regarding the brother-sister rule. Fifth Circuit Judge Brown wrote the opinion for a three-judge appellate panel including Circuit Judges Tuttle and Hutcheson. Brown reviewed the history of the Houston school desegregation case and of HISD administrative policies. He noted that Connally seemed to be considering merely whether the brother-sister policy violated the letter of his order, rather than its spirit. That is, Connally had not considered whether the policy was “a discriminatory practice which should be forbidden in the light of existing conditions without regard to whether they were, or were not, within the compass of the 1960 order.” Brown declared that even though the order “prescribes a plan in specific detail, this is not the end of the matter.” He stated that “of necessity” the federal district court must retain “continuing jurisdiction over the cause.” This meant that the judge “must make such adaptations from time to time as the

156 Ibid., 126.
157 Ibid., 126.
existing developing situation reasonably requires to give final and effectual voice to the constitutional rights of Negro children.”

Although Judge Connally’s ruling regarding the brother-sister rule was “one of pure logic,” Judge Brown believed that “logic alone is insufficient to overcome the practical effect of this rule” on African-American families, which “perpetuates a segregated system despite the plain purpose of the stair-step plan to ameliorate it.” Brown realized that the Supreme Court’s order that school desegregation should be concluded at “all deliberate speed” rather than immediately, was sensible in light of practical administrative concerns. But he noted that Connally’s stair-step plan would not eliminate segregation in the elementary schools until 1966. This fact brought “into sharp focus the question whether an administrative practice such as this rule could be deemed reasonable,” because some African-American children would be denied the benefits of the Brown decision on a “purely accidental basis” of family composition. Brown thought that the brother-sister rule could “bring about the rankest sort of discrimination as between Negro children living side by side in the same neighborhood,” because the rule worked against African-American children with older siblings.

159 Ibid., 194.
160 Ibid., 195-196. Judge Brown noted that this biasing effect “is markedly
Judge Brown agreed with Connally that HISD officials had not intentionally disobeyed the 1960 court order. But because the brother-sister regulation created more discrimination problems than it averted, Brown thought that the rule must be rescinded. Therefore, in December 1962, the Circuit judges reversed the brother-sister ruling. They remanded the case to Judge Connally for "further and not inconsistent action."\textsuperscript{161}

Circuit Judge Hutcheson, the other Houstonian on the panel, declared in his separate but concurring opinion that he "prefer[red] to reach [the same conclusion] by a slightly different and certainly shorter road." His thinking had advanced significantly since he had rejected the principle of continuing judicial management of school districts in the 1951 La Grange case. Hutcheson now noted that the existence of brother-sister rules had not been among the issues typically raised by the litigants in the earliest desegregation litigation. As a consequence, federal circuit and district courts had approved stair-step plans for many school districts without ever considering the probable effect of such a rule. It was now clear that brother-sister rules fostered discrimination, Hutcheson said, and the emergence of this unfortunate and unforeseen twist "had the effect on the

\textsuperscript{161} \textit{Ibid.}, 197.
court’s ordered plan of setting aside . . . our mandate.” A federal district judge’s goals in monitoring a district’s compliance with a desegregation order was to allow appropriate adjustments to the plan. In school desegregation, judicial management was necessarily a hands-on activity.\textsuperscript{162}

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In the years after \textit{Brown}, southern school desegregation proceeded in fits and starts, but mostly stops, until the slow pace of court-ordered reform became an issue in the larger civil rights struggle.\textsuperscript{163} During the 1960s, initiatives from the political branches, and additional rulings by the federal appellate courts, expanded the type and number of personnel available to offer support to the federal district judges in superintending reform. In 1964, Congress passed a landmark Civil Rights Act (CRA) which banned discrimination in employment and public accommodations.\textsuperscript{164}

\textsuperscript{162} \textit{Ibid.}, 197-198. On 25 January 1963, the Fifth Circuit denied HISD’s request for a rehearing.


The CRA mandated that the federal Department of Health, Education, and Welfare (HEW) and other federal agencies take affirmative steps to attack discrimination. Under Title VI of the act, HEW administrators could either share or withhold housing or other grants to states. As the level of federal assistance to states increased in ensuing years, any threat to cut off finds to states which countenanced discrimination in schools became significant. State authorities faced the choice either of abandoning segregated schools or losing federal funds.\textsuperscript{165}

Further, HEW established guidelines for assessing the progress of desegregation, and the agency's examiners assisted federal distrust judges in

\textsuperscript{165} Hugh Davis Graham, \textit{The Civil Rights Era: Origins and Development of National Policy, 1960-1972} (New York: Oxford University Press, 1990), 262-267. Other significant initiatives against discrimination emerged from the executive and legislative branches. In 1962, President Kennedy issued Executive Order 11063, which prohibited racial, ethnic, and religious discrimination in federally-subsidized housing. Congress enacted fair housing provisions in the Civil Rights Act of 1968 (Pub. L. No. 90-284, 82 Stat. 73); codified as amended at: 42 U.S.C. §§ 3601-3619. This "Fair Housing Act" prohibited the use of race, color, religion, or national origin in the sale or rental of most housing. Judges were also active in enforcing these provisions. To strengthen the Act, Congress enacted legislation in 1988 to give the executive branch new authority to bring lawsuits when mediation efforts fail. By removing a $1000 limit on punitive damage awards in housing bias cases, the new law permits government to seek large monetary damages for victims of housing discrimination. Louis Fisher,
developing schedules for school district compliance with the guidelines. Some district judges resisted this intervention of an executive department into judicial business. But the Fifth Circuit judges declared in a 1965 decision, Singleton v. Jackson (usually known as Singleton I), that district judges should give "great weight" to HEW guidelines. However, in Singleton II, decided the next year, the Fifth Circuit judges made it clear that HEW guidelines were minimum standards, not final goals. The appellate court declared that the federal district judges should not "abdicate" their responsibilities by ordering only that school districts comply with the guidelines.  

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In July 1965, Connally entered a court order to accelerate the HISD desegregation schedule to two grades per year, which would meet the higher standards suggested by HEW and the Fifth Circuit. At the same time, the HISD board proposed to adopt a "freedom of choice" plan, which would shift the burden for school desegregation to parents. Under "freedom of choice," which many southern districts adopted after HEW suggested that stair-step plans were failing to desegregate the schools, parents were allowed to choose the school in which to enroll their children. Connally approved the plan. He noted that in Singleton I, in addition to accepting HEW guidelines as suitable minimum standards, the Fifth Circuit judges had declared that non-discriminatory "freedom of choice" plans were acceptable. By 1966, HISD declared all elementary and senior high schools desegregated under "freedom of choice." The ninth grade had remained segregated, but would be desegregated by September 1967. Therefore, it seemed that the HISD schools would be desegregated five years ahead of Connally's original schedule. Implementation was

imperfect, however. Many black parents were not notified that they had any choices.168

HISD administrators had already provided buses to formerly white schools, so that black parents had choices. But, the school district had also embarked on a massive construction program which promised to build modern schools in African-American neighborhoods. This led Onesephor Broussard, with his wife Queen Ethel Young, and other black parents to sue HISD. They asked U.S. District Judge Allen B. Hannay to enjoin HISD from proceeding with construction.169 The plaintiff parents believed that convenient new schools in African-American neighborhoods would entice

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169 Allen B. Hannay was born in Hempstead, Texas, on 14 February 1892. The son of a U.S. Attorney, Hannay attended Texas A & M University, received the LL.B. from University of Texas Law School in 1913, and served as a county judge in Waller County from 1915 to 1917. Hannay enlisted in the U.S. Army during World War I, and trained military pilots. After the war ended, he played professional baseball for the Houston Buffs. Hannay served twelve years as a state district judge in the 113th District, from 1930 to 1942. In 1942, President Franklin Roosevelt appointed Hannay to replace Judge Allred (who had resigned the seat) in the Southern District. Biographical material from: Judges of the United States, 239; and: Zelden, Justice Lies In The District, 153.
blacks to exercise their "freedom of choice" just far enough to resegregate themselves and their children. Broussard and the others charged, in fact, that the discriminatory effect was the impetus for commencing the project.\textsuperscript{170}

Hannay granted the plaintiffs a hearing, and visited some seventeen schools throughout HISD, before he ruled. He noted that Houston's black families were overcoming the effects of years of residential segregation. Formerly white neighborhoods were gradually becoming mixed. However, there was no similar phenomenon occurring in Houston's black neighborhoods. The judge stated that the "predominately Negro neighborhood of former times remains predominantly Negro in Houston today." Hannay reminded the parties that families received many benefits from neighborhood schools. He thought that it was probably the case that the black parents, like most parents, would prefer that their children attend neighborhood schools over schools which required a bus ride. Moreover, the parents would choose the nearby modern school if given the choice. But Hannay found "no instance in which the location of the new facility or improvement appears calculated to discriminate racially" against African-American students. He ruled that in initiating the construction, the HISD board had acted "in good faith . . . honestly, conscientiously, and with no

\textsuperscript{170}\textit{Broussard v. HISD}, 262 F.Supp. 266 (S.D.Tex., 1966), 266-268; Civ.
intention or purpose to maintain or perpetuate segregation." Therefore, on 13 July 1966, Hannay denied the plaintiff's request for an injunction.\footnote{262 F.Supp. 266 (S.D.Tex., 1966), 268-271. This was the first time that Judge Connally had not presided over a desegregation complaint in Houston. With one exception, the players in this particular twist of the desegregation tale had changed. Joe H. Reynolds continued to represent HISD. Arthur J. Mandell, William L. Wood, and Joseph L. Tita, all from Houston, represented Broussard.}

Broussard and the other plaintiffs appealed Judge Hannay's decision. In the meantime, in June 1967, the U.S. Department of Justice sought to join the \textsc{Ross} lawsuit as an intervenor. Since its creation in 1957, the Justice Department's Civil Rights Division had acted as the government's enforcer of civil rights laws. Initially, the Division's role in desegregation cases was limited either to ensuring that judicial decrees were followed or to participating in suits as \textit{amicus curiae}.\footnote{The Civil Rights Act of 1957 (Pub.L. No. 85-315, 71 Stat. 634). This was the first major federal civil rights legislation since Reconstruction. For executive branch enforcement of civil rights statutes and federal judicial decisions, see: Brian K. Landsberg, \textit{Enforcing Civil Rights: Race Discrimination and the Department of Justice} (Lawrence: University Press of Kansas, 1997). In 1958 the Division had 15 attorneys and a budget of $180,000, and in 1965 it had 105 attorneys and a budget of just under $2 million. By 1980, the Division's budget was approaching $17 million, and approximate 200 lawyers on staff. Drew S. Days, III, "In Honor of \textit{Brown v. Board of Education}: Vindicating Civil Rights in Changing Times," \textit{Yale Law Journal} 93 (1984): 991.} The government had little independent authority to bring suit until Congress expanded the Division's jurisdiction under the 1964 CRA. Thereafter, the Division began
aggressively to intervene in school litigation.\textsuperscript{173} In August 1967, the
government asked Connally to complete integration, and to order busing of
students if necessary. Although Connally granted the government's motion
to intervene on 5 September, he was unprepared to order busing.\textsuperscript{174}

In May 1968, Judge Connally, sitting temporarily by designation on
the Fifth Circuit, found himself in the interesting position of reviewing his
colleague Hannay's school desegregation decision. Connally continued to
believe that the members of the different races had the right to live
separately if they so chose. Speaking for the majority of a three-judge
panel, Connally declared that the plaintiff's position was "simply" that:

No new schools should be built or old schools improved, in
densely populated colored areas. The child resident in such
area, regardless of his wishes, of necessity must be required to
attend a school in some other section with a relatively high
ratio of colored-to-white students. Considerations of
convenience, of traffic hazards, or the wishes of the student
and his parents should be disregarded. Such child simply
would have to attend a high ratio colored-to-white school, and
would be required to do this only because he was a negro. The

\textsuperscript{173} The major exceptions were criminal prosecutions under 18 U.S.C. §§
241 and 242. Other federal agencies operated under similar constraints:
until 1972, the Equal Employment Opportunity Commission (EEOC) had
no power to sue employers that it felt had violated Title VII. Instead, the
EEOC referred matters to the Civil Rights Division. See: the Equal
Board of Education," 991-994.

Eckels, 434 F.2d 1140 (5th Cir., 1970), 1142.
Constitution does not require such a result, and we entertain serious doubt that it would permit it.\textsuperscript{175}

Judge Connally was exploiting an opportunity to restate his own ruling in 1962's \textit{Ross v. Dyer}, that the law does not grant blacks "a different, and superior, treatment, by reason of their race." The Fifth Circuit judges had reversed that decision. Now, Connally noted that the plaintiffs wished to restrict, rather than enhance, the options of black children.

Judge Connally reminded the plaintiffs that HISD's "freedom of choice" policy had to be administered fairly for all races, and stated that:

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\ldots \text{those negro children who wish to attend a school close to their homes have constitutional rights, too; and they well might assert such rights against a School Board which refused to construct a needed school in their area simply because it would be attended largely by negro students. This would be discrimination with a vengeance, based solely on account of race.}\textsuperscript{176}
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Connally concluded that "in their zeal to press for integration of the races at all levels and in all things \ldots \text{many persons, some of good will, completely lose sight of the rights of those who do not desire to be integrated at the moment.}" Connally, joined by Circuit Judge Rives, believed that the Constitution protected this right to choose, and they

\textsuperscript{175} Emphasis in original. \textit{Broussard v. HISD}, 395 F.2d 817 (5th Cir., 1968), 820.

\textsuperscript{176} \textit{Ibid.}, 820.
affirmed Judge Hannay’s decision to allow HISD to build new schools in black neighborhoods.¹⁷⁷

Fifth Circuit Judge John Minor Wisdom dissented. Wisdom reminded the majority that the Circuit had declared that the only legitimate goal of any “freedom of choice” plan was to encourage black parents to act affirmatively on their own behalf to eliminate segregation. Rather than leaving in place patterns of discrimination, school boards were to support this aim by fostering integration. Wisdom also considered it the appellate court’s duty to promote integration.¹⁷⁸

Connally answered Wisdom’s dissent in a supplemental opinion. He once more proudly noted that “most of the problems attendant upon desegregation of this largest school district in the south have been solved amicably.” He declared that “freedom of choice,” whatever its supposed affirmative purpose, was peripheral to the case. Before the Fifth Circuit ruled, Houston voters had approved $59 million in school bonds to cover the costs of the construction program. No one had described what would happen to the bonds if the plaintiffs prevailed and the construction ceased, but Connally suggested that Houston voters would be forced to pay interest on money they could not spend. Connally declared that as a judge in a

¹⁷⁷ Ibid., 821. For Judge Connally and construction, see: Read and McGough, Let Them Be Judged, 475.
¹⁷⁸ 395 F.2d 817 (5th Cir., 1968), 822-828. Judge Wisdom wrote the
court of equity, Hannay had “acted properly under all the facts and circumstances” in withholding his injunction.\textsuperscript{179}

IV. Conclusion: “Not By Judges Alone”

Between 1954 and 1968, federal district judges had the primary responsibility to implement the controversial civil rights decisions of the Supreme Court.\textsuperscript{180} Several contemporary observers worried that individual federal judges were not capable of fulfilling these expansive obligations. In 1957, Judge Allred doubted that plaintiffs could “accomplish a great deal by lawsuits.” In 1961, in \textit{Fifty-Eight Lonely Men}, his classic study of the role played by federal judges in southern school desegregation, J.W. Peltason maintained that the President, Congress, and the Supreme Court had too often abdicated responsibility for desegregation. They left circuit and district judges to meet the nation’s commitments under \textit{Brown}. Peltason concluded that desegregation could be completed in the South, but not if the country relied on “judges alone.”\textsuperscript{181} Subsequent events showed that both Allred and Peltason were generally

\textsuperscript{179} \textit{Broussard v. Houston ISD}, 395 F.2d 817 (5th Cir., 1968), 828-831. Subsequently, the Fifth Circuit dismissed the appeal as moot and denied rehearing; see: 403 F.2d 34 (5th Cir. 1968).

\textsuperscript{180} Hoffer, \textit{The Law’s Conscience}, 180-211.
correct. More than a decade had passed since Brown, and the federal
district judges had remained in the forefront of social reform. In 1966’s
United States v. Jefferson County Board of Education, the Fifth Circuit
court remarked that: “[a] national effort, bringing together Congress, the
executive, and the judiciary may be able to make meaningful the right of
Negro children to equal educational opportunities,” but so far, “[t]he courts
acting alone have failed.”

Finally, all three branches of the federal
government intervened, and began to push school official to achieve
desegregation with greater speed, and with less deliberation.

But events also showed that change not have occurred without the
efforts of federal district judges and dedicated attorneys willing to manage
the long life cycle of structural reform litigation. The burden was
unevenly distributed. The importance of the equal protection rationale in
Brown to the emergence of judicial management in public law litigation is
clear in the disparate levels of intervention the judges attempted in the
Southern District cases Driscoll CISD and Ross. Allred and Connally both
solicited suggestions from counsel, conducted pretrial hearings, and sought

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181 Peltason, Fifty-Eight Lonely Men, 244.
182 United States v. Jefferson County Board of Education, 372 F.2d 836
(5th Cir., 1966), at 847.
183 In 1966, the courts approved amendments to the Federal Rules of Civil
Procedure which eased qualification under the class action requirements.
See: Amendments to the Federal Rules of Civil Procedure (Rule 23), 383
to balance the interests of the litigating parties. The length of the proceedings, months versus years, may only be a factor of the complexity of the school district involved in each lawsuit. But another major difference in the litigation was that at DeAnda’s suggestion, Judge Allred avoided reliance on *Brown*, and as a consequence, Allred did not expect to maintain an ongoing relationship with the Driscoll CISD. By contrast, Judge Connally was forced to maintain a continuing presence in the HISD. That is, after he issued his initial decree, he was required to “manage” the case over years. But *Ross* was a wholly different form of lawsuit than *Driscoll CISD*. The *Ross* plaintiffs aimed specifically to transform HISD. The case was a classic example of public law litigation.

The irony is that neither the traditional approach to school desegregation nor the expansive structural reform approach succeeded during these years. In both cases, the recalcitrance of school administrators readily frustrated nominal legal victory. During the early stages of desegregation, Peltason suggested that an unequivocal mandate from the Supreme Court would have established a “hierarchy of scapegoats.” It would have allowed local school officials, and federal district judges, to blame higher authorities for the project, until the Justices themselves could “take the heat.” In the face Southern resistance, Peltason

argued, "[w]hat the district judges need --- and what most of them want --- is not the responsibility for making choices, but rigid mandates that compel them to act."184 This is presumably an accurate projection of Peltason's own notions of what the judges "needed," but it is unlikely many federal district judges were so dispirited by the pace of reform that they "wanted" to relinquish discretion. At the time, judicial reformers were seeking to entrust federal district judges with more management discretion, not less.185

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184 Peltason, Fifty-Eight Lonely Men, 245-246.

185 They encouraged judges to adapt existing trial procedures to fit the changed circumstances of protracted suits. Complex litigation had clogged federal district trial dockets before Brown led to the rise of public law litigation. The Judicial Conference of the United States adopted the "Prettyman Report" (a study of "Procedure in Antitrust and Other Protracted Cases") on 26 September 1951. See: Leon R. Yankwich, "'Short Cuts' in Long Cases," 13 F.R.D. 41 (1953).
Chapter Two: "The Never Ceasing Riddle": Labor Rights on Land and at Sea in the 1960s

To the never ceasing riddle of the ambiguous amphibious worker with its tri-cornered intramural controversy between state-federal compensation and the ubiquitous possibility of a pseudo-seaman's claim and the mutations in the vast body of law as it passed through the phases of maritime but local, the twilight zone, the first-come-first-served theory and as some might characterize the most recent development, the doctrine of the last chance, this case adds a further wrinkle.

Fifth Circuit Judge John R. Brown, Jr. (1963).¹

Each of the federal district judges in the Southern District of Texas exercise authority in law, equity, and admiralty.² This chapter analyzes judicial activity in lawsuits which arose in the 1960s under two areas of the judges' jurisdiction, admiralty law and labor law. Moreover, it will focus on aspects of the Southern District's admiralty jurisdiction which concerned labor law. That is, this chapter reviews cases which required the judges to preside over labor disputes concerning wages, other compensation, or working conditions which arose between aggrieved

¹ *Mike Hooks, Inc. v. Pena*, 313 F.2d 696 (1963), 697.
² In addition to extending federal judicial power to "all cases in law and equity," the Constitution granted federal jurisdiction in "all cases of admiralty." U.S. Constitution, Art. III, § 2. In the Judiciary Act of 1789, the first Congress established the federal judiciary and authorized federal district courts to exercise "exclusive original cognizance of all civil causes
workers, both sea-going and land-based, and their employers. Examination of these cases will further illuminate trends in judicial management in the District. Although these claimants sued to enforce traditional privileges or statutory protections, rather than to vindicate "constitutional or statutory policies," the judges played a part in labor-related lawsuits similar to their role in classic public law litigation.³

The usual distinction between public and private lawsuits, namely, the presence or absence of that state's direct interest in the outcome, fails to account for the fact that judicial behavior in private lawsuits is often informed by the court's perceptions of the public interest.⁴ If claimants convincingly portray their cases as touching on basic principles of public policy, the judge may grant extraordinary relief. As Professor Zelden showed, the federal district judges in the Southern District often

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³ As Prof. Chayes noted in his article on the subject: "it would be mistaken to suppose that [public law] is confined to [school desegregation, employment discrimination, and prisoners' rights cases]. . . . Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy, and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management --- cases in all these fields display in varying degrees the features of public law litigation." Abram Chayes, "The Role of the Judge in Public Law Litigation," Harvard Law Review 89 (1976): 1284.

approached wholly private litigation with an eye for the case’s implications for the regional or national economy.\(^5\)

The discovery and exploitation of oil and gas reserves in Texas early in the twentieth century contributed to the region’s prosperity, but the petrochemical refineries which grew up along the coastal areas supplied only one element to the state’s economy. The Gulf Coast was an artery of commerce and a reservoir of employment. Texas ports were and are conduits for a wide variety of goods. In addition, an enormous volume of fresh produce is harvested in South Texas’ Lower Rio Grande Valley. As a consequence of the commercial activity in Texas and on the Gulf, the newly-appointed Judges Garza and Noel quickly became enmeshed in private disputes. They and the veteran judges took a deep interest in Texas’ development. Both maritime and mainland disputes encompassed insurance, contract, tort, and other themes that were familiar to the judges.\(^6\)


\(^6\) This fact allowed Houston’s mainline corporate law firms to undertake some admiralty practice, usually in the area of maritime insurance, rather than leaving this lucrative business to the admiralty “boutique” firms. Because much of the maritime traffic on the Gulf Coast involved the transport of oil and petroleum products, this was a natural development. Baker & Botts, one of the larger firms in Houston, followed this route into admiralty, since it was already involved in Texas’ oil and gas industries. Kenneth J. Lipartito and Joseph A. Pratt, *Baker & Botts in the
Maritime litigation was a staple of judicial business in the Southern District.\(^7\) One-third of 1111 civil cases filed in the District in 1960 were on the admiralty dockets. That year, the District ranked as the nation's fourth busiest admiralty forum, if measured by the total number of maritime cases filed. It was the third busiest in terms of maritime cases per judge.\(^8\) But many of these cases were filed in admiralty merely

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\(^7\) Development of Modern Houston (Austin: University of Texas Press, 1991), 120-121. James Elkins, founder of Vinson & Elkins, another large Houston firm, long resisted creating a separate admiralty division or hiring admiralty lawyers. In part, this was because he considered it an arcane specialty, akin to patent or bankruptcy, and in part it was because admiralty seemed to be merely a variation of insurance law. Harold M. Hyman, *Craftsmanship & Character: The Vinson & Elkins Law Firm of Houston, 1917-1997* (Athens: University of Georgia Press, 1998), 120, 338-339, 482-495. Although weighted with a special vocabulary, admiralty trials were actually relatively simple and non-technical. They frequently employed depositions rather than live testimony, because actors and witnesses were often unavailable to appear due to the nature of their maritime professions. That the court was sitting in admiralty was often signaled by the fact that the judge was authorized to decide admiralty cases without a jury. In the unification of procedures, the courts created the availability of jury trials in some cases, but not all. For example, amended Rule 38(e) provided that "[t]hese rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim."


\(^8\) 1960 Annual Report of the Director of the Administrative Office of the U.S. Courts. In 1960, the District was authorized four judges, but only three were sitting. Whether total admiralty cases (361) are divided by authorized (4) or by sitting judges (3), the Southern District of Texas
because they involved disputes regarding ships, ship's owners, or ship's insurers. If cargo arrived damaged, ships collided with a dock or with another ship, or a maritime workers suffered debilitating injury or death on the job, then a resultant dispute over fault or damages became a matter for an admiralty judge. A large proportion of admiralty cases filed every year were worker compensation or personal injury suits initiated by maritime workers. Except for the fact that the plaintiffs, or, as plaintiffs are known in admiralty cases, "libellants," are seamen, longshoremen, or ranked third in cases per judge (90 vs. 120 per judge). The busiest district was the Southern District of New York (encompassing Manhattan and the Port Authority of New York), with 16 authorized judges and 2294 admiralty cases, followed by the Eastern District of Louisiana (New Orleans) was second busiest, with 2 judges and 434 cases. The Eastern District of Pennsylvania (Philadelphia) ranked third, with 485 cases heard by 8 judges. The fifth busiest admiralty jurisdiction was the Northern District of California (San Francisco), with 7 judges and 261 cases filed. For authorized judgements, see: 28 U.S.C. § 133. For admiralty filings, see: 1960 Annual Report, Dir. Admin. Office, U.S. Courts, Table C-3a, "Civil Cases Pending in the United States District Courts," pp. 240-247; cited in: Charles N. Fiddler, "The Admiralty Practice in Montana and All That: A Critique of the Proposal to Abolish the General Admiralty Rules by Amendments to the Federal Rules of Civil Procedure, and a Counterproposal," Maine Law Journal 17 (1965): 17.

9 Maritime torts were distinguished simply as those torts committed on navigable waters. This traditional definition was amended by the U.S. Congress to include cases where a waterborne vessel causes damage or injury on dry land. A ship may run aground to cause property damage, for example, and recovery for the tort is still available in admiralty. Admiralty Extension Act (62 Stat. 496 [1948], 46 U.S.C. § 740). Even in the nineteenth century, many of the peculiarities of admiralty were often "more a difference in style than in substance." Friedman noted "strong parallels between admiralty and tort law, despite their traditional differences." Friedman, A History of American Law, 553.
harbor workers, the suits are generally indistinguishable from other personal injury cases.\textsuperscript{10}

The relief available under statutory and judge-made admiralty rules turned on distinctions a particular federal district judge drew in a specific case between a claimants who could be classed as a seaman, and a wide variety of maritime workers who lacked that specific legal status.\textsuperscript{11} Similar


\textsuperscript{11} Maritime remedies differed according to the nature of the work being performed when the injury occurred. Custom guided practice; however, statutory relief was also well-established. Thackston, "Seamen's Remedies," 319-320. Although the U.S. Supreme Court had rulemaking power in admiralty since 1792, the Court did not promulgate admiralty rules until 1844. These were superseded by the Admiralty Rules of 1920, which as amended, remained in effect until 1966. Admiralty and civil procedures were unified on 1 July 1966. Thereafter, admiralty cases were brought within the Federal Rules for Civil Procedure, and treated as civil actions, with certain minor variations for admiralty and maritime claims identified by the designation under Rule 9(h). The variations relate to
to complaints regarding the federal judiciary’s role in school
desegregation, conservatives within the specialist’s world of admiralty
criticized judges who granted seamen’s relief to non-seamen. As example
of the convergence of criticism of judicial activism, the authors of a
leading admiralty law text were moved to comment, in 1957, that “the
perils of the sea, which mariners suffer and shipowners insure against,
have met their match in the perils of judicial review.”¹²

Judges in the Southern District occasionally extended seamen’s
remedies further than some critics would have endorsed. Some granted to
land-based personal injury plaintiffs judicial relief which either ancient
marine customs or a relatively recent Congresses had conferred exclusively
on the “true” or “blue water” seamen who were crew members of ocean-

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¹² Grant Gilmore and Charles L. Black, Jr., The Law of Admiralty
(Brooklyn: Foundation Press, 1957), 248.
going ships. But if judges rendered decisions in admiralty cases during the 1960s with a strong preference for certain results, they usually did so within the statutory and customary distinctions.¹³

After the discussion of seamen’s claims, cases that involved land-based workers in the District, that is, disputes concerning individuals employed in construction, manufacturing, and agriculture will receive attention. The cases demonstrate close parallels to the judicial activity in admiralty, namely, distinguishing one class of workers who were covered by laws granting relief, from workers not covered. In the Lower Rio Grande Valley as on the Gulf of Mexico, small distinctions potentially had disproportionate consequences. In both of these areas of labor law, federal district judges in the Southern District of Texas chose winners and losers in specific cases based on their interpretations of statutes and prior court decisions. However, these managerial judges frequently acted as legal instrumentalists. When deciding to grant or withhold remedies, the judges took into account social and economic considerations.

In the process of deciding the seaman’s injury cases, the judges blurred the line between law, equity, and admiralty procedures and substance. In 1966, Carl Bue, one of Houston’s most respected admiralty lawyers, commented that the explosive increase in seaman’s personal injury litigation “outstripped any other aspect of the maritime law.” Furthermore, the maritime personal injury field was undergoing constant rapid change, like the “volcano that continues in eruption.” This had the unfortunate result, Bue announced, that “no charts can be reliable, even until the next term of the court.”

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14 Carl O. Bue, Jr., “Admiralty Law in the Fifth Circuit --- A Compendium For Practitioners: I,” Houston Law Review 4 (1966): 350 [hereafter: Bue, “Admiralty Law in the Fifth Circuit”]. This is one of several influential law review articles by Bue. In it, he is primarily concerned with personal injury cases. Bue specialized in admiralty as a partner of the Houston firm Royston, Rayzor, and Cook. Proctors, as attorneys who practice admiralty law are known, have long considered the U.S. Court of Appeals for the Fifth Circuit to be the nation’s premier forum for their specialty. Until 1981, the Fifth Circuit included the entire American Gulf coast, from Brownsville, Texas, to Key West, Florida. Also: Jeffrey V. Brown, “NOTE: Penrod Drilling Corp. v. Williams: The Sinking of Another Maritime Anomaly,” Houston Law Review 31 (1994): 1318 [Note: the referenced case is Penrod Drilling Corp. v. Williams, 868 S.W.2d 294 (Tex., 1993) (per curiam)]. In 1981, Congress split the Fifth Circuit to create the Eleventh. Even after this division, the Fifth Circuit still encompasses several of the busiest ports in the United States, including New Orleans, the Circuit’s headquarters. Deborah J. Barrow and Thomas G. Walker, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform (New Haven: Yale University Press, 1988), 1-2; also: Harvey C. Couch, A History of the Fifth Circuit, 1891-1981 (Washington, D.C.: Judicial Conference of the United States, 1984). The reconstituted Fifth Circuit contains Texas, Louisiana, Mississippi, and the Panama Canal Zone. The Eleventh Circuit consists of Florida, Georgia, and Alabama.
textbook authors, who had concluded that "a revolution has taken place" in rules governing maritime workers' remedies. Although the authors noted that by the late 1950s "the main outlines of the new law [were] reasonably clear," they predicted that "the lower courts will be occupied for a generation in filling in the details."\(^{15}\) Bue lamented that until these details were fixed, proctors such as himself could no longer assume that the federal district judges would observe the substantive and procedural differences that had historically developed and formally still existed between admiralty and equity.\(^{16}\)


\(^{16}\) Admiralty was "left behind" in 1938, when judicial reformers attained a long-sought goal and unified the separate law and equity procedures under the new Federal Rules of Civil Procedure. The proponents of complete unification persisted in their efforts. See: Brainerd Currie, "Unification of the Civil and Admiralty Rules: Why and How," *Maine Law Journal* 17 (1965): 1. See the proposed amendments at 34 F.R.D. 325 (1964), and the Supreme Court's official notice of the new rules at 86 S.Ct. 1 (1966). Prior to procedural unification in 1966, American admiralty practice retained much of the traditional terminology and procedures from British practice, as supplemented by the Admiralty Rules occasionally promulgated by the Supreme Court. For example, an admiralty complaint was a "libel"; a plaintiff was a "libellant"; a defendant was a "respondent." Members of the admiralty bar (one of the oldest specialized bars) were traditionally called "proctors." On the unification in the Federal Rules of Civil Procedure, see: Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987), 150-151.
Regarding the increase in personal injury suits, Bue was troubled that the dramatic growth had been accompanied by "a noticeable increase in emphasis upon equitable considerations in the admiralty decisions, with less reliance being placed upon the application of stare decisis and the letter of the law." The intrusion of equity into admiralty paralleled "the trend of the law in various nonmaritime areas."\(^{17}\) Specifically, he had noticed an increase in admiralty suits filed in personam, against individuals, rather than brought in rem, which were liens against property such as ships. Bue recognized that admiralty's absorption of equity was incomplete. For example, he noted that the federal district courts still refused to issue injunctions, an equitable remedy, except in a few limitation of liability proceedings. Until 1966, when Bue wrote, admiralty was procedurally isolated from the other domains of federal jurisdiction. In that year, Congress formally merged admiralty procedure with the federal rules of civil procedure. Bue worried, that after unification, "admiralty actions will have access to all equitable remedies including injunctive relief."\(^{18}\)

Equitable considerations played a role in land-based labor law, as well. In some of their private law decisions, the Southern District judges sought to affect positive changes in economic relationships. In other

\(^{17}\) Bue, "Admiralty Law in the Fifth Circuit," 350.
decisions, they sought to prevent certain undesirable economic effects. As was also true with public law litigation aiming at desegregation, the equitable effect in private law was uneven. The judges were reluctant to intervene in labor disputes in the Lower Rio Grande Valley. Instead, judges tended to respect the divisions between workers that Congress established in the relevant labor relations statutes. Since many laborers in the Valley were Mexican-descended migrant workers, their economic predicament resembled the segregated conditions experienced by the Mexican-descended schoolchildren in South Texas. Judges either accepted the fact that a large number of individuals would remain outside the “covered” class, or else they ignored the fact that employers frequently violated laws regulating conditions, hours, wages, and benefits even when the employees were formally covered. Unlike the schoolchildren, however, the adult workers had few private advocates who were willing to litigate on their behalf. They depended on the federal Department of Labor to monitor the region, and to file suit to bring employers into compliance with applicable labor laws. The difficulty for agricultural workers was that few statutes applied to them.

18 Ibid., 360-362.
I. Seaman’s Personal Injury Litigation: The ‘‘Humane and Liberal Character of Admiralty’’

In one sense, the typical admiralty cases are no less examples of ‘‘public law’’ than are school desegregation suits. In both cases, the plaintiff or libellant enjoyed a special relationship with the court. The judges regard seamen as ‘‘poor and friendless’’ individuals who became special ‘‘wards’’ of admiralty courts when they sustained injury. As Supreme Court Justice Joseph Story observed when on circuit duty early in the nineteenth century, the customary guarantees of judicial protections for seamen served ‘‘the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation’’ by encouraging men to ‘‘engage in perilous voyages with more promptitude, and at lower wages.’’

19 Under traditional maritime law, an injured seaman

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19 In the same opinion, Story noted that seaman acquired ‘‘habits of gross indulgence, carelessness, and improvidence,’’ and therefore required a guardian. *Harden v. Gordon*, 11 Fed. Cas. 480 (C.C.D.Me., 1823), at 483. Justice Story expressed similar sentiments in other opinions; see: *Reed v. Canfield*, 20 Fed. Cas. 426 (C.C.D.Mass., 1832). It is apparent that the perceived necessity for a ward-guardian relationship is based on a stereotype (which is not to dispute its historical validity) of the sailor and his life aboard ship. Throughout the nineteenth century, it was believed that mariners were drunk, depressed, and violent, perhaps because they were away from home and family for years at a time, and lacked the education and the sense to save money for their return. Robert M. Jarvis, ‘‘Rethinking the Meaning of the Phrase ‘‘Surviving Widow’’ in the Jones Act: Has the Time Come for Admiralty Courts to Fashion a Federal Law of
was entitled to receive "maintenance and cure" from his employer, and could seek relief from a federal judge to gain it.\(^{20}\)

This tradition long preceded the development of workmen’s compensation remedies for land workers. In the early twentieth-century, however, Congress and state legislatures sought to improve economic conditions and workplace safety for industrial workers, and merchant sailors fell behind.\(^{21}\) Mainland workers were winning damage awards, but a seaman’s relief for work-related injuries was still limited to contracted


\(\text{This included a "maintenance" stipend, physician's bills until "maximum cure" is reached, and wages payable through the terms of the sailing contract. By the 1960s, this could be as much as $20 a day, but it was still $8 in some courts. Jarvis, "Rethinking the Meaning of the Phrase Surviving Widow," 469, n. 20.}\)

\(\text{Because of these special considerations, admiralty law provided remedies for injuries sustained at sea which seemed infinitely kinder to the sailor than the contemporary land-based tort law was to the brakeman, miner, and machinist. The law of industrial accidents lagged far behind the "guardian-ward" relationship established in admiralty law. Tort actions expanded tremendously during the nineteenth century, as larger, faster, and more dangerous machines were developed. Unlike the sailors subject to maritime practice, the industrial employees of America found little economic, medical, or moral support from employers or judges until the turn of the twentieth century. The most famous example of the high hurdles faced by workers during this period, the "fellow servant" doctrine as propounded by the U.S. Supreme Court, usually prevented an injured worker from gaining support or recovering damages from his employer whenever an accident had been caused by another employee. Eventually, a few states enacted workmen's compensation laws to rectify the perceived social injustices of the tort system of the era. Friedman, *A History of American Law*, 484-485. Also see: G. Edward White, *Tort Law In America: An Intellectual History* (New York: Oxford University Press,}
wages and "maintenance and cure." Under general maritime law, moreover, a seaman was entitled to an indemnity for future lost wages only if an injury was due to his vessel's unseaworthiness, not if another crew member was at fault.22

Congress had repealed a similar "fellow-servant" rule for railroad employees engaged in interstate commerce, and authorized monetary damage awards for an employer's negligence, with the Federal Employee's Liability Act (FELA) of 1908.23 To bring seaman to parity with industrial

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23 Occupations connected to the still expanding railroad system were among the most dangerous in the nation. FELA abrogated both that rule and the doctrine of "assumption of risk," and replaced the common law principle which held contributory negligence a complete defense in tort cases with a new rule of comparative negligence. The statute provided that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . ." 35 Stat. 65, Ch. 149 (now codified as: 45 U.S.C. §§ 51-60). See: Surrency, History of the Federal Courts, 149-151; Jarvis, "Rethinking the Meaning of the Phrase Surviving Widow," 472-474; and: John W. Sims, "The American Law of Maritime Personal Injury and Death: An Historical Review," Tulane Law Review 55 (1981): 987-989. Also, see: Henry J. Friendly, Federal Jurisdiction: A General View (New York: Columbia University Press, 1973), 129-131. At the time of his publication, Friendly was Chief Judge of the U.S. Court of Appeals for the Second Circuit. He was critical of the continued separation of railway workers' compensation law from remedies available to all other interstate transportation workers,
workers, Congress increased their statutory benefits through the La
Follette Seaman's Welfare Act of 1915 regulated seamen's wages,
treatment, and working conditions. Its Section 20 abolished the fellow-
servant (or, the fellow-sailor) rule for injuries occurring aboard ships.24
But the U.S. Supreme Court subsequently upheld a federal district court
decision overturning Section 20, ruling that a seaman's claims were
satisfied by maintenance and cure.25 Congress revisited the issue in 1920.

such as bus drivers, truckers, and airline crew, because he believes
compensation laws of the states are mature enough to be satisfactory in all
cases. This now-artificial distinction, he says, creates a disparity of
benefits and invites maneuvering to take advantage of the most favorable
law and venue available. Procedural delays and costs grow, due to this
forum shopping. The 1908 law was actually the second attempt to pass a
federal liability act. After an adverse Supreme Court decision, Congress
narrowed the scope of the Act to compensation for injuries suffered while
a railworker was actually engaged in interstate commerce. The first
FELA, passed 11 June 1906, as 34 Stat. 232, did not distinguish between
intrastate and interstate commerce. The case overturning the law was First
Federal Employers' Liability Cases, 207 U.S. 463 (1908). The second
liability act referred to "liability of common carriers by railroad, in
intrastate or foreign commerce, for injuries to employees from negligence
. . . ," and stated that "[e]very common carrier . . . shall be liable in
damages to any person suffering injury while he is employed by such
carrier . . . for such injury . . . resulting in whole or in part from the
negligence of any of the officers, agents, or employees of such carrier . . . ."
The Court subsequently sustained the second FELA. Passed 22 April
1908, it is now 45 U.S.C. § 51. This version of FELA was sustained in

24 38 Stat. 1164. One of the reasons for the revival in congressional
interest in maritime matters was the tragic sinking of the RMS Titanic in
1912, which left many widows of lost British crewmen uncompensated.
affirmed: 247 U.S. 372 (1918). Some scholars have interpreted this ruling
Section 33 of the "Jones Act" abolished contributory negligence under the fellow-sailor doctrine, and allowed recovery of damages for injury or death which resulted from the negligence of a ship's owner, master, or crew members. The Act further provided that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury."

Finally, it applied to injured seaman "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees . . . ."26

as part of the apparent "crusade" the U.S. Supreme Court had embarked on against state maritime legislation. The Court also seems to have intended the decision to "goad" the Congress to write a better piece of legislation. See: Jarvis, "Rethinking the Meaning of the Phrase Surviving Widow," 469-471.

26 Merchant Marine Act, 41 Stat. 1007, § 33, now codified at: 46 U.S.C. § 688. The most useful and most controversial innovations of the Act regard trial by jury, and the absorption of a wrongful death action into admiralty. This was by way of a piece of companion legislation, the Death on the High Seas Act (41 Stat. 537, currently 46 U.S.C. §§ 761-768). The Judiciary Act of 1789 also provided admiralty remedies in maritime matters, except, "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." Ch. 20, sec. 9, 1 Stat. 73-77; codified at: 28 U.S.C. § 1333(1). This "savings to suitors" clause contains an important distinction, because although admiralty jurisdiction was "exclusive" to the federal courts, Congress at least potentially undermined much of the court's authority with this language. The plaintiff could bring an in personam maritime action on the "law," rather than "admiralty," side of the federal courts, or even in state court. Federal courts have retained exclusive jurisdiction over in rem claims, that is, suits against the ship by maritime lien, and various other claims not covered by the "savings" clause. If some other basis for federal jurisdiction exists in addition to the maritime nature of the suit, such as diversity or a federal statute, a person
The Jones Act therefore incorporated negligence standards established under the FELA. However, it was not immediately clear what this meant for seaman. Judges subsequently had to adapt “a statute transplanted from the switchyard to navigable waters” to account for “the essential differences in conditions and circumstances of employment.”

Although the Jones Act allowed wrongful death suits for negligence, it did not allow wrongful death recovery for unseaworthiness. And the Jones Act did not define “seaman.”

could bring the suit in the federal courts without an admiralty designation. A maritime suitor who met the criteria of the savings clause could therefore “forum shop” based on an estimation of the chances of winning before a jury or a judge. The “saved” right to bring maritime cases in state court has become increasingly important in recent years. Harold K. Watson, “Modern Practice Considerations in Maritime Personal Injury Litigation: Procedural Weapons For Venue Battles,” Tulane Law Review 68 (1994): 474-477.


28 Recovery by a seaman for illness and injury is currently governed both by the Jones Act and by the general maritime law. Moreover, the Supreme Court has consistently held that the state and federal courts have concurrent jurisdiction under the Jones Act. Watson, “Modern Practice Considerations in Maritime Personal Injury Litigation,” 474-477. Healy, “Remedies for Maritime Personal Injury and Wrongful Death in American Law,” at 313, 359-360. The general maritime law did not provide remedies for wrongful death, because an action for injury dies with the person, as it does in the common law. Unseaworthiness was therefore a maritime cause for personal injury compensation, but not for wrongful death indemnity. Bue, “Admiralty Law in the Fifth Circuit,” 375. Also, a court may permit a plaintiff to amend a complaint to add or delete and transfer the case into or out of the admiralty venue, where jurisdiction at law is premised upon the Jones Act; this will allow a change from a bench to a jury trial. Frank L. Maraist, Admiralty in a Nutshell (St. Paul: West Publishing Co., 1996), 341-342.
Due to these perceived deficiencies, Congress passed the Longshoremen’s and Harbor Worker’s Compensation Act (LHWCA) in 1927. The seamen’s unions had lobbied successfully to maintain merchant mariners in a separate category from stevedores, and at the same time, denied to the members of a ship’s crew the right to sue under the LHWCA. The statute limited relief for injuries suffered by longshoremen and harbor workers to fixed compensation benefits, in contrast to maintenance and cure, which continued during the time of disability.\(^{29}\) Despite the LHWCA’s statutory distinctions, longshoremen and harbor workers remained “seamen” for some purposes, under the general maritime law.\(^{30}\)

One result of this legislative attention has been that maritime personal injury litigation became, as one admiralty lawyer put it: “one of the most dynamic, complex and rapidly changing areas of the law,” where “both the courts and the Congress have sought to fashion new remedies to

\(^{29}\) In 1922, through an amendment of the Federal Judicial Code, Congress had extended legal coverage to harbor workers which reserved “to claimants the rights and remedies under workmen’s compensation laws of any state.” The Supreme Court subsequently held that because working the docks was a maritime trade and hence a matter for admiralty law, it was unconstitutional to extend coverage of the act to a longshoreman. However, in its decision the Court hinted that the Congress could enact its own specific compensation rather than piggy-backing on the state laws. Congress responded by enacting the LHWCA. 44 Stat. 1424; currently, 33 U.S.C. §§ 901-950. In 1940, the Supreme Court declared the 1938 rules of civil procedure applied to suits brought under the LHWCA. See: 308 U.S. 642 (1940); and: Surrency, *History of the Federal Courts*, 192.
meet the social, economic and human needs resulting from ever-expanding maritime operations." 31 But another result of the multiplication of the customary and statutory protections afforded seamen and other maritime workers is that in lawsuits, injured workers seek to be defined in the terms that will maximize their potential relief under federal admiralty jurisdiction. As a consequence of these exercises in self-definition, Fifth Circuit Judge John R. Brown, who practiced admiralty law prior to his appointment to the appellate court, noted that sorting a seaman's legitimate claim for relief from "a pseudo-seaman's claim" was "the never ceasing riddle" for the federal courts. 32

31 Ibid., 973.
32 Mike Hooks, Inc. v. Pena, 313 F.2d 696 (1963), 697. Nevertheless, Judge Brown continued to profess the belief that whenever admiralty judges "declare the governing principles of admiralty and maritime law, they are doing more than carrying out their Constitutional duty. The admiralty law that they declare carries the authority of the . . . Constitution itself." Hon. John R. Brown, "Admiralty Judges: Flotsam on the Sea of Maritime Law?," Journal of Maritime Law and Commerce 24 (1993): 250-251 [note: Brown gave this address at the Inaugural Nicholas J. Healy Lecture on Admiralty Law, held at New York University School of Law, 5 November 1992]. The constitutional provision for admiralty jurisdiction in Article III is the only grant to the federal judiciary that specifically identifies an area of substantive law. Congress expected the federal courts to conform to the principles and procedures of admiralty law as it had developed over many centuries in England. But in addition, federal district judges necessarily assumed the historical leadership role in adapting English practices, or even older principles inherent in the international maritime law, to the conditions in the United States. Congress has a major role in developing admiralty law, as well. Although the Constitution does
One Southern District case involved longshoremen who were loading wheat in the hold of a ship, when they were overcome by fumes of a chemical insecticide. The case required the judge to decide questions of negligence on the part of the owner of the grain elevator, and also to rule on the seaworthiness of the ship.\textsuperscript{33} In another case, the issue was whether the libellant was working as a seaman or an offshore drilling employee at

the time he sustained an injury. Another suit involved a seaman who had injured his wrist when a ship's door closed on his arm. The case raised the question, could a swinging door make the ship unseaworthy? The absence of a jury in many of these cases empowered the federal judges with the sort of discretion they exercised while presiding over, for example, a civil rights plaintiff's motion for an equitable injunction.

Also similar to their role in civil rights litigation, judges in admiralty cases often took an active interest in the results and granted relief based on their sense of what was "fair." They often displayed a marked

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36 The absence of a jury was an admiralty practice retained for most instances when the admiralty and civil procedures were unified. When admiralty merged with civil procedure, substantive maritime law survived, but its special procedures and language were reduced to a handful of distinctive admiralty remedies (such as in rem actions, foreign attachments, and limitations of action), which were invoked if the plaintiff filed the claim as admiralty or maritime in nature, under Fed.R.Civ.P., Rule 9(h). Admiralty libels could be taken in personam (against a person, whether natural or corporate) or in rem (against goods and property, such as a named ship or a quantity of, say, cotton or tobacco). The suit in rem is rare outside the admiralty court, and when it does appear, it is clearly guided by admiralty practice. For example, the Federal Food, Drug, and Cosmetic Act of 1938 (52 Stat. 1044, Sec. 304) provides that forfeiture cases "shall conform, as nearly as may be, to the procedure in admiralty." This often resulted in curiously named cases such as (the hypothetical): U.S. v. 300 Bottles of Aspirin. See: Gilmore and Black, Law of Admiralty, 30-31; and: Jarvis, "Rethinking the Meaning of the Phrase Surviving Widow," 479, n. 58. For the procedure by which a libellant in rem resorts to the
preference for libellants. This harmonized with a long-standing attitude of
the federal judiciary, which considered that "it better becomes the humane
and liberal character of proceedings in admiralty to give than to withhold
the remedy." 37 Moreover, as in desegregation cases, the judges were
responsible for defining who was a member of a class entitled to
protection. The quest for "humane and liberal" outcomes sometimes led
the judges to stretch the definition of seamen. One admiralty lawyer
complained that judges applied the rules unevenly in the absence of proper
Supreme Court guidance, and as a result, he noted, "federal appellate
courts have created their own inconsistent definitions of the term
[seaman]." 38

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37 The Sea Gull, 21 Fed. Cas. 909 (C.C.D.Md., 1865), at 910. See:
Comment, "Admiralty: Conflict of Law on the High Seas --- The States and
1516.
38 Although the hierarchy of maritime workers was a central fact of
traditional admiralty jurisprudence, these distinctions were fluid in an era
of equitable jurisprudence. Some maritime workers, including
longshoremen and machinists on off-shore oil-drilling platforms anchored
in the Gulf of Mexico, also suffered job-related injuries and sought benefits
in court. Gus A. Schill, Jr., "The Unsolvable Puzzle of Maritime Personal
When around 1960 Judge Connally encountered difficult questions of legal definition and distinction in maritime case, however, he demonstrated no tendency to bend customary or statutory rules of admiralty in favor of equity. One case arose from an accident aboard the S.S. Grelmarion, which was berthed in Galveston, Texas, to receive a cargo of wheat from a pier-side grain elevator owned and operated by the city. The grain was poured directly from the elevator’s spout into the ship’s storage bins, and longshoremen then “trimmed” the resulting piles of wheat, that is, they used shovels to move the pile of grain from the center of the bin to the corners. Late on 14 March 1957, when bin No. 2 was approximately three-quarters full, the elevator operator released a last “shot” of grain, which filled the bin to the hatch opening. This hatch was the only passage for entering or exiting the storage bin, and the only source of ventilation. The grain in this last shot had been treated with a chemical insecticide, and noxious fumes were concentrated in the closely confined area. The longshoremen became disoriented, dizzy, and hysterical, effects apparently brought on by the fumes. But with the assistance of deck personnel, they dug themselves out. Eight were disabled for extended periods, but

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received medical treatment and compensation payments of between $500 and $1500 under the LHWCA.\textsuperscript{39}

The afflicted longshoremen sought additional damages for the injuries, however, and filed suit in admiralty in the Southern District. They charged the City of Galveston with negligence and the ship owners with maintaining an unseaworthy vessel. Under the maritime law, "negligence" connoted a breach of the duty imposed upon a "reasonably prudent" shipowner to use due care in selecting and keeping in order "reasonably suitable" equipment. The doctrine of "seaworthiness" imposed an absolute duty to insure that the ship and equipment were "reasonably suitable" for their intended purposes.\textsuperscript{40} Connally agreed that improperly treated grain had been the source of the fumes which brought on the longshoremen's difficulties, but the judge ruled that neither of the "respondents," as the defendants in admiralty proceedings were known, knew or else reasonably should have known that the grain had been improperly treated. Moreover, the judge found that the \textit{Grelmarion}'s cargo spaces were of "customary design and construction," although they lacked a "forced" ventilation system.\textsuperscript{41} Connally ruled that there was no negligence and that the vessel was not unseaworthy, and on 24 March 1959,

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\textsuperscript{40} The U.S. Supreme Court confirmed these principles in \textit{Mitchell} v. \textit{Trawler Racer, Inc.}, 362 U.S. 539 (1960).
\end{flushright}
he ruled in favor of the city and the shipowner. The longshoremen appealed. Judges from the Fifth Circuit affirmed Connally’s judgment. The U.S. Supreme Court granted certiorari, since the longshoremen’s complaint involved “a seemingly significant question of admiralty law.” On 11 June 1962, Justice Stewart, for five members of the Court, affirmed Connally’s major findings that neither Galveston nor the owner were negligent, and that even if unventilated the Grelmarion was seaworthy. Justice Douglas, joined by two fellow-Justices, dissented on the ground that because the ship lacked a ventilation system it became

42 Ibid., 208.
43 Morales v. City of Galveston, 275 F.2d 191 (1961). On certiorari, 364 U.S. 295 (1962), the U.S. Supreme Court vacated the judgment and remanded the case to the Court of Appeals, for consideration in the light of Mitchell v. Trawler Racer, which the Justices had decided in the interim. The Fifth Circuit court found that Mitchell was inapplicable to the case, and again affirmed District Judge Connally’s judgment. Morales v. City of Galveston, 291 F.2d 97 (1962). Circuit Judge Rives, in dissent, thought that the ship and its equipment were not “reasonably fit for their intended use,” since up to 10% of the grain loaded from the elevator was fumigated, and because the owners had knowledge of similar past accidents. Ibid., 99.
45 Morales v. City of Galveston, 370 U.S. 165 (1962), 171. Douglas wrote for himself and Justices Clark, Harlan, Brennan, and White; Justice Frankfurter did not participate in the case. Arthur J. Mandell of Houston’s Mandell and Wright had argued the cause and filed the brief for the longshoremen. Preston Shirley of Galveston argued the cause and filed briefs for the City of Galveston. Edward W. Watson, also from Galveston, argued the cause for the Cardigan Shipping Co., Ltd.; Clarence S. Eastham authored the briefs with Watson.
temporarily unseaworthy while fumigated grain was being loaded. What is more "seemingly significant" is the conclusion, as Connally and the Circuit judges had ruled and the Justices accepted without comment, that longshoremen belonged to the class of maritime workers owed the duty of seaworthiness.

Connally faced similar questions of distinction and definition in a case arising from the injury of Clarence D. Tipton, an oil drilling "roughneck." Tipton plied his trade for the Socony Mobil Oil Company, on one of the company's fixed off-shore platform in the Gulf of Mexico, but occasionally worked aboard the barge that tended the platform. He was injured while performing these secondary duties. Tipton accepted compensation benefits, approximately $1400, under the LHWCA, as it applied through the Outer Continental Shelf Lands Act (OCSLA). Then,

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47 Justice Stewart did discuss the issue in the Court's majority opinion, and he noted that this was the correct conclusion. Morales v. City of Galveston, 370 U.S. 165 (1962), 168. Stewart cited: Seas Shipping Co. v. Sieracki, 328 U.S. 85.
48 Outer Continental Shelf Lands Act (OCSLA); 43 U. S. C. § 1333. The complexity of this situation further increased in 1953, when proliferating oil-drilling rigs in the Gulf of Mexico and elsewhere inspired Congress to extend personal injury and wrongful death remedies to offshore oil-workers in the OCSLA. See: Sims, "The American Law of Maritime Personal Injury and Death," 1001. For the offshore oil industry, see: Joseph A. Pratt, Tyler Priest, and Christopher J. Castaneda, Offshore
Tipton sued in under the Jones Act, and he elected to have his case heard before a jury.

The principal issue for the jury was whether Tipton when injured was a seaman or an off-shore drilling employee. At the trial, Connally admitted evidence, over the objection of Tipton’s attorneys, that he had already accepted compensation under the OCSLA, which had extended the longshoremen’s compensation regime to off-shore workers. The OCSLA, as did the LHWCA, explicitly denied longshoremen’s benefits to a “member of a crew of any vessel.”49 Connally exercised his right to comment on the evidence when charging the jury. He declared that he thought it a fact that Tipton was undeniably a member of the drilling platform’s team, but not a member of the barge’s crew. The jury, concerned during its deliberations with the potential effect of its decision on Tipton’s future legal remedies, asked Connally whether a finding that Tipton was not a seaman left him with an option of further compensation under the OCSLA. The judge sent a handwritten note, instructing jurors that they should be concerned only with the question before them, whether Tipton was or was not a seaman at the time of the accident. The jury

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49 43 U. S. C. § 1333 (c)(1).
rejected Tipton's claim of seaman's status and denied him relief under the Jones Act.\textsuperscript{50}

On Tipton's appeal, the Fifth Circuit affirmed the result. For a two-judge majority, Circuit Judge Hutcheson held that Connally erred in admitting evidence of earlier LHWCA compensation benefits, but that this was a harmless error, since the jury decided against Tipton and had not reached the issue of damages.\textsuperscript{51} But Circuit Judge Brown, the only judge on that appellate panel who had practiced in admiralty prior to his appointment to the federal judiciary, dissented. He agreed with the majority that Connally had acted within his authority, to comment on the evidence of Tipton's employment status. However, the admission of LHWCA evidence was prejudicial. Brown thought that the case should have been reversed and remanded to Connally for a new trial.\textsuperscript{52}

On Tipton's further appeal, eight members of the Supreme Court agreed with Judge Brown, that admitting the LHWCA evidence was not a harmless error. In a per curiam opinion, the Justices declared that the only relevant aspect of the fact that Tipton had accepted compensation was that it indicated what he had considered his legal status to be. Connally should have framed a more cautionary charge to the jury indicating that the

\textsuperscript{50} Tipton v. Socony Mobil Oil Co., 315 F.2d 660 (1963), 661-662, esp. note 3.
\textsuperscript{51} Ibid., 662.
evidence was “not dispositive of the ultimate fact of whether he was a seaman.” Once the judge admitted the LHWCA evidence into the case, however, it had a prominent place during the proceedings, which led the jury “to place undue emphasis on the availability of compensation benefits.” The Justices vacated the jury’s judgment on 21 October 1963, and remanded the case to the District Court.

The cases Connally heard regarding maritime workers who were not “seaman” in the strict sense were modern variations on the ancient theme. A 1963 maritime personal injury case Judge Noel decided in the District’s Galveston division illuminated admiralty doctrines in practice when there were very few modern twists. Burl Haire was a utility mess-man, an assistant in a ship’s galley. On 29 August 1961, he signed standard ship’s articles for duty on aboard the S.S. Steel Seafarer, a ship owned by the Isthmian Lines company, for a general mercantile voyage. Under the

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52 Ibid., 663, esp. note 1.
54 Ibid., 37. Justice Harlan dissented, stating that “the admission of this evidence in the circumstances of this case did not prejudice the petitioner and was, therefore, harmless error.” Moreover, he did not believe the case was, as he wrote “certworthy.” Ibid., 38.
56 The “Articles of Agreement” is the seaman’s formal employment
articles, the *Steel Seafarer* would leave "from the Port of Houston, Texas, via one or more United States ports, if required; to one or more Mediterranean Ports, and/or Persian Gulf Ports, and/or Indian Ocean Ports, as required; and thence, to such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in the Continental United States . . .". The ship initially steamed to Galveston to load cargo and provisions for the long voyage. On the morning of 1 September, Haire reported to the ship’s officers that he had injured his left wrist during the previous night, when a heavy door of the ship’s vegetable "reefer" closed on his arm as he was coming out of the compartment. Haire signed off the ship and went to the U.S. Public Health Service (PHS) Hospital at Galveston, where doctors diagnosed fractures of the radius and ulna. The PHS doctors admitted Haire to the hospital, where he remained until 16 September. Then, he was released as an outpatient with a cast on

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contract, generally a standard form with blanks for specific dates and destinations. In the past, breaking articles (for example, by deserting the ship) was a serious crime. Under the various congressional Merchant Marine Acts, a seaman must sign and register his Articles before the U.S. Shipping Commissioner before each voyage. Healey, *Foc’s’le and Glory-Hole*, 13-15, 150-152. For an example: *Ibid.*, 193-198.

57 231 F. Supp., at 607.

58 In this context, a colloquialism for a refrigerated (i.e., "reefer . . .") storage compartment.

59 The U.S. Public Health Service (PHS) provides hospital care and outpatient service for sick and disabled seamen. The service is administered by the Surgeon General, and is an agency akin to the VA (Veteran’s Administration). Healey, *Foc’s’le and Glory-Hole*, 114, 120.
his wrist. Doctors certified that he reached "maximum recovery" (or cure) on 3 October. Thereafter, Haire received no further medical treatment.\textsuperscript{60}

Meanwhile, on 3 September, the \textit{Steel Seafarer} left Galveston. The Master noted in his official log that Haire had failed to report for duty, and left a voucher for $28.45 with the company agent to pay him for the three day's wages he had earned on the voyage through Galveston. In the next port, New Orleans, the Master registered that Haire "failed to join" the continuing journey.\textsuperscript{61} On 18 September, Haire went to the office of the Isthmian Lines agent in Galveston and requested his wages. Before paying him the $28.45 (less $3.06 for Social Security and withholding tax), the agent required Haire to sign a "certificate of mutual release" before the Shipping Commissioner. This was standard practice, but Haire, under advice from counsel, notified the Commissioner that he was signing the form "under protest."\textsuperscript{62} Haire sought his full wages, payable through the end of the voyage under the terms of the articles, which he considered due to him because he had been injured \textit{after} the voyage commenced. In addition, he sought damages through a personal injury suit he filed under

\textsuperscript{60} There was no medical evidence that Haire would suffer any permanent disability from the accident. 231 F.Supp., at 607. But Haire was evidently an extremely unlucky person: during this same period, he re-entered the hospital with a broken leg (apparently unrelated to his other injury).

\textsuperscript{61} 231 F. Supp., at 607. The \textit{Steel Seafarer} ended its voyage on 4 January 1962; \textit{Ibid.}, 608.

\textsuperscript{62} \textit{Ibid.}, 608.
general maritime law in the Southern District. He based his claim on the *Steel Seafarer's* seaworthiness rather than under the Jones Act.63

Judge Noel determined that because Haire was the only witness to his own injury, there was insufficient evidence to declare Isthmian Lines liable for negligence by creating a condition of seaworthiness aboard the *Steel Seafarer*.64 However, because Haire had unquestionably been injured aboard the ship, he was due the wages promised under the articles he signed.65 Haire had signed on at the rate of $284.52 per month, and Noel therefore declared that Isthmian Lines owed him $1166.63 (for wages excluding the money already paid, board and maintenance, and potential overtime). In addition, with maintenance and cure then a standard $8 per day, the judge held that Haire deserved $144 for maintenance between 16 September and 3 October. Further, Judge Noel awarded 6% interest on the total $1303.63, calculated from the date of judgment until Isthmian Lines

63 Again, by the 1960s this election was somewhat unimportant. The case was tried without a jury, at the close of the evidence and after the arguments of counsel Newton B. Schwartz of Houston’s Schwartz and Lapin, for Haire; and Edward W. Watson of Galveston’s Eastham, Watson, Dale, and Forney, for Isthmian Lines. *Ibid.*, 607.
64 231 F. Supp., at 607.
65 Under 46 U.S.C. § 594, if Haire had been discharged before embarking, he would be due just a month’s pay. The statute protects seamen against wrongful discharge, but not injury once articles signed and ship underway. The judge therefore found that the statute did not apply to Haire’s claim. 231 F.Supp., at 608. Moreover, Judge Noel found “good cause” for setting aside the release Haire had signed.
paid. Finally, Isthmian Lines was to pay Haire’s court costs. Judge Noel had decided a fairly straightforward admiralty case which required little more than a multiplication table.

Later, Judge Noel regarded the conditions for maintenance and cure in a more complicated case, but once he had sorted the facts, the amount of relief followed logically. On 10 April 1964, Charles Pyles, Jr., after having been pronounced fit for duty by his doctor, signed articles for a voyage on the S.S. Maryland Trader. During a cleaning operation on 16 July, Pyles injured his back as he attempted single-handedly to lift a “Butterworth” machine, a cleaning unit that employed two rotating nozzles to inject high-pressure steam and hot water into a ship’s storage tanks. The second mate treated him the next morning, but Pyles did no further work during the remainder of the voyage, which terminated 28 July at Portland, Oregon. Pyles returned to Houston and entered the PHS hospital at Galveston on 31 July, remaining there until 4 August. The staff certified that for another fourteen days Pyles would be “Not Fit for Duty.” After those two weeks, he would be “Fit for Duty.” On 20 August, Pyles sued

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66 231 F. Supp., at 608.
67 The decision was subsequently affirmed. Haire v. Isthmian Lines, Inc., 334 F.2d. 521 (5th Cir., 1963).
68 Pyles v. American Trading and Production Corp., 244 F.Supp. 685 (S.D.Tex., 1965); Galveston Division [Civ. A. No. 64-G-66, 10 August
American Trading, the owner of the *Maryland Trader*, for damages.\(^{69}\)

Pyles then resumed work and served on several vessels over the next few months. On 16 September, for example, a doctor for the ship *Aimee Lykes* again found him fit for duty and Pyles was hired the same day. He injured his back on 29 October and received maintenance payments from the *Aimee Lykes* from 30 November until 18 December.\(^{70}\)

According to the jury which decided the case against the *Maryland Trader* on 17 June 1965, Pyles’s back injury was entirely his own fault. But the same jury also found that he had not reached maximum cure. The jury essentially overturned the PHS doctor’s diagnosis of Pyles’s fitness. Based on this second finding, Pyles filed a motion asking for additional maintenance and cure, for a total of 305 days, as well as attorney’s fees.\(^{71}\) American Trader opposed the motion on the grounds that Pyles did not qualify for maintenance while employed, and that the maintenance obligation transferred to the last vessel which he served. Finally,

\(^{69}\) He added to this claim for maintenance and cure, as well as attorney’s fees, in an amended petition filed 10 May 1965. The company had only paid maintenance to Pyles for the twelve days from 5 August to 17 August. *Ibid.*, 686.


\(^{71}\) The case was tried before the court, and lawyers submitted briefs. Sidney Ravkind of Mandell & Wright of Houston, for plaintiff. Edward W. Watson of Houston, of Eastham, Watson, Dale, and Forney, for defendant). *Ibid.*, 686.
American Trader asserted that the case was not a proper one for allowing attorney’s fees.\textsuperscript{72} Judge Noel noted the Supreme Court’s recent statement that: “[m]aintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship’s service; and it extends during the period when he is incapacitated to do a seaman’s work and continues until he reaches maximum medical recovery.”\textsuperscript{73} Therefore, according to Noel, the fact that Pyles returned to regular employment did not bar his entitlement to maintenance and cure: the jury had just declared that he was actually “not fit” at the time. His right to recovery, moreover, was undiminished by periods of work between the certification as “fit” and the date of the jury verdict that he remained “unfit.”\textsuperscript{74} And as for the responsibility transferring to his last vessel, the Aimee Lykes, the judge noted that the case cited by American Trader involved asthma, a chronic condition, and as precedent was limited to cases involving that sort of recurring condition.\textsuperscript{75}

\textsuperscript{72} Ibid., 686.
\textsuperscript{73} Vaughan v. Atkinson, 369 U.S. 527 (1962), at 531.
\textsuperscript{74} 244 F. Supp., at 687. However, Pyles was not entitled to maintenance for periods he actually spent in hospitals. Judge Noel noted that the Court had held that maintenance could be claimed only for the period of convalescence until the maximum cure was obtained. Farrell v. the United States, 336 U.S. 511 (1949), 516.
\textsuperscript{75} 244 F. Supp., at 687.
Noel ordered Pyles to return all money received as maintenance and
cure from the owners of the *Aimee Lykes*, and decreed that American
Trader would be liable for 305 days at eight dollars per day, or $2440.
However, Noel found that American Trader acted in good faith when it
trusted the PHS prediction that Pyles was “Fit for Duty.” Therefore,
because attorney’s fees were allowed as damages only in cases of bad faith,
or when a company acted callously or unreasonably, the company was not
liable for Pyles’s fees.  

Judge Garza decided a pair of cases in summer 1963 which were far
more complicated than the claims before Noel. Each was brought in the
District’s Brownsville division by the widow of a shrimp boat captain who
had operated in the Gulf of Mexico. The cases illustrate the discretion a
federal district judges employed in Jones Act cases. Although they shared
surface resemblance to each other, the circumstances specific to each
captains’ death tinted Garza’s decision.

In the first case, Susana Ramirez Moore, the common-law widow of
Lindy Adams Moore, who had been master of a Gulf shrimper, brought
suit in rem against his boat, *O/S Fram*, and sued in personam its owner,

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Wilhelm Seafoods, Inc.\textsuperscript{77} The widowed Moore also filed suit under the Death on the High Seas Act (DOHSA), which Congress had passed in 1920 as a companion to the Jones Act. The DOHSA authorized a deceased person's spouse or a personal representative of the estate to file an action of wrongful death for a death occurring more than one marine league (i.e., 6075 yards, slightly less than three and one-half miles), from the coast of any state.\textsuperscript{78}

Lindy Moore drowned approximately twelve miles off the coast of Mexico on the early morning of 7 February 1962. The toilet facilities on the \textit{Fram} were not working, and Moore had slipped overboard while sitting on the shrimp boat's rail to relieve himself. The other two crew members immediately stopped the boat and located him with a searchlight, and cast rescue lines in his direction, but Moore drowned before they were able to reach him. The \textit{Fram} had life jackets on board, but the boat had recently been painted, and these items of safety equipment had been moved

\textsuperscript{78} 46 U.S.C. § 761. Many states had their own wrongful death statutes, but the federal DOHSA superseded them. Thackston, "Seamen's Remedies," 365-373. Also: Jarvis, "Rethinking the Meaning of the Phrase \textit{Surviving Widow}," 487, n. 92. Unfortunately, the DOHSA did not define "spouse" or "representative." The acceptance, regulation, and privileges of common law marriage varies by state, further clouding the issue of who is eligible to bring suit under the Jones Act. \textit{Ibid.}, 490-494, esp. nn. 104, 122. Jarvis finally raises the question of "domestic partnership" between homosexual sailors as a wrinkle to be ironed out by the courts. \textit{Ibid.}, 499, n. 132.
to the front part of the boat, where they were apparently inaccessible.

There was also a rescue ring on board, but at the time of Moore's accident, there was no line attached to it.\textsuperscript{79} Attorneys for Wilhelm Foods claimed that, according to the doctrine of comparative negligence supported by the Jones Act, Moore had contributed to his own death, and the judge should reduce the company's overall liability for the accident.\textsuperscript{80} Moore had contributed in three ways, they argued. First, he had been drinking on board, against the orders of his employers. Next, as master of the boat, he was the person responsible for seeing that the life-saving apparatus was available. Finally, he should not have been sitting on the rail; as an experienced shrimper, he must have known it was slick.\textsuperscript{81}

\textsuperscript{79} Texas recognized common-law marriages, but until very recently, no American state had even considered sanctioning homosexual marriage. 226 F.Supp., 817.

\textsuperscript{80} The Jones Act ensures that an employer can be held liable if his or her negligence plays the slightest part in bringing about an injury or death aboard the vessel. The Jones Act allows wrongful death suits for negligence, but not unseaworthiness. Bue, "Admiralty Law in the Fifth Circuit," 375. As a matter of law, a seaman cannot be contributorily negligent for following orders that result in his own injury even if he recognizes the possible danger of doing so. However, the "essence" of a Jones Act suit is negligence. Strictly speaking, a seaman bringing a Jones Act negligence suit, like his common law counterpart bears the burden of proving the essential elements of a negligence action: the existence of a duty, the negligent breach of that duty by the defendant, and some causal relationship between the breach and injury. Thackston, "Seamen's Remedies," 352-353, 349, esp. n. 140.

\textsuperscript{81} 226 F.Supp., 818.
However, although a seaman could forfeit his rights to relief through his own gross misconduct, insubordination, and disobedience to orders, which were actions that "even simple men of the calling" ought to recognize as wrong, a seaman could not be contributorily negligent merely by being a simpleton.\textsuperscript{82} With this customary indulgence in mind, Judge Garza rejected each of the company's points in turn. Instead, on 23 April 1963, Garza ruled that the \textit{Fram} had been rendered unseaworthy by the unavailability of life jackets and a secured ring, and Wilhelm Foods had been negligent in allowing these conditions to exist.\textsuperscript{83} He discussed the possibility of the inoperative toilet's being a proximate cause of the accident, but then dismissed that issue from consideration after concluding that it was irrelevant: the evidence presented during trial showed that shrimping crews were accustomed to relieving themselves over the side even when the toilets are functioning. Under the rules of admiralty law, Judge Garza took into consideration Moore's life expectancy, the ages of his surviving family members, especially any children, as well as pain and suffering, when he calculated a monetary damage award. Moore was

\textsuperscript{82} There were limits to this indulgence. Drunkenness was one thing, but recovery after illicit sexual activity (or injuries sustained escaping from a brothel window) is quite another. See: \textit{Farrell v. the United States}, 336 U.S. 511 (1949), 516. See more examples in: Thackston, "Seamen's Remedies," 363-364.

\textsuperscript{83} For a discussion of the legal meanings of "proximate cause" and "negligence," see: Thackston, "Seamen's Remedies," 349-353.
twenty-eight years old when he drowned. He was survived by two children by Susana, a daughter aged four and a baby son who was born after he had died, and two sons by a previous marriage, aged seven and eight.

Lindy Moore had also cared for his fifty-four year old mother. Under these circumstances, Garza awarded the Moore family a total $12,500, to be divided as follows: Moore’s two older sons would receive $1000 each, his mother $500, the two youngest children $3000 each, and Susana would receive $4000. In addition, Garza ordered Wilhelm Foods to reimburse Susana $1035.95 for funeral costs; these expenses were traditionally a part of a seaman’s “maintenance and cure.”

In the second case, a shrimp boat captain also died, but the facts of the second incident were more complex. Three boats, and three captains, were involved: John F. Farmer of the O/S Fluffy D; Calvin J. Hebert of the O/S Arlene; and, Dennis Touchet of the O/S June. On 31 May 1962, they were ten miles off the coast of Mexico. The shrimpers pulled alongside

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84 Garza also examined and approved the Moore’s deal with their “proctor,” Benjamin S. Hardy of Sharpe & Hardy of Brownsville. Hardy was to receive one-third of the award to each member of the family. Wilhelm foods was represented by Tom Clendenin, Jr., of Cox & Wilson, also of Brownsville. 226 F. Supp., 818.
85 Farmer v. O/S Fluffy D, 220 F.Supp. 917 (S.D.Tex., 1963). Not only did Garza preside again, the same attorneys repeated their roles, as well.
one another, so that the *Fluffy D* and *Arlene* could offload their catch into the *June*.\(^{86}\)

After the transfer, Captain Touchet invited Hebert and Farmer to his galley for drinks. Although drinking on board was against the rules of boat's proprietor, the captains consumed two bottles of liquor and some beer in short order. Touchet sent one of his crewmen to another boat to fetch more liquor. When they returned, the "talking, laughing, and horse-playing" continued, until Farmer, in reply to a remark from Touchet, referred to his host as a "coon ass," a derogatory name primarily reserved for French-descended Louisianans, or Cajuns. In what apparently began as a playful scuffle, Farmer hit Touchet on the shoulder. Touchet responded by punching Farmer in the face. Farmer began to bleed from his nose and mouth. He pulled out and opened his pocket knife, and asked, "so you want to see blood spill?"\(^{87}\)

Touchet retreated, by jumping to the deck of the *Fluffy D*. Hebert and one of Touchet's crew members tried unsuccessfully to restrain Farmer, and he wounded both of them in the struggle. In addition to his knife, Farmer armed himself with a chain, and began to swing it wildly around as he searched the boat for Touchet. Hebert armed himself with a

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\(^{86}\) When catches are good, a shrimp boat may stay out of port as long as a month. But because shrimp will not keep longer than a few weeks, captains may send their catch back with a returning boat. 220 F.Supp., 918-919.
twelve to fourteen inch butcher knife, and once more attempted to restrain Farmer. As he confronted Farmer, Farmer made a threatening move toward him. Hebert plunged his knife in Farmer’s back, killing him.\footnote{220 F.Supp., 919-920.}

Farmer’s widow Mary sued under both the Jones Act and the DOHSA. Judge Garza found that Captain Touchet had been negligent in several instances. He had encouraged heavy drinking on his boat, had incited Farmer to fight, and had abandoned his boat in a crisis. These factors rendered the June unseaworthy. Garza held that Touchet’s actions were a proximate cause for Farmer’s death. Therefore, Touchet, that is, his employer, the J.R. Hardee Shrimp Co., was liable for damages. However, the judge also considered that Farmer had contributed to his own death by drinking and “joining in an affray.” Garza declared him to be fifty percent responsible for the tragedy. Farmer had been forty-seven years old. The judge believed he might have lived another twenty-six years, with fifteen or sixteen of those years as a shrimp boat captain. His wife was forty-five, his daughter was sixteen, and his son was nine year

\footnote{Farmer’s body was sent to Brownsville, and later buried in Georgia. After receiving medical treatment in Mexico, Hebert returned to Brownsville. He was tried and acquitted for Farmer’s murder. The jury, in a criminal trial which took place in Garza’s court, apparently found that he had acted in self defense. 220 F.Supp., 920-921.}
old. Because Farmer was one-half responsible for their loss, Garza awarded $17,000 in damages to his survivors.\textsuperscript{89}

In the years since the Jones Act’s enactment, the federal courts had consistently ruled that negligence provisions were to be read “liberally.”\textsuperscript{90} Judge Garza followed this practice in these two shrimp boat cases. Although he demonstrated the range and nature of the maritime remedies under the Jones Act, Garza did not regard the Act as the source of unlimited largess. He was constrained by that statute’s provisions. But the Act was flexible enough to allow him to rule equitably. Garza considered the circumstances and actions leading to the suit and assessed the economic state of the survivors before granting remedies. However, he measured out

\textsuperscript{89} Of this sum, the widow received $9000, the daughter $2500, and the son $5500. Farmer was also survived by his parents, but they were independent of him and so were not considered in the damage award. 220 F.Supp., 921.

\textsuperscript{90} For example, a decade earlier, a circuit court of appeals had written that “while the gravamen of a Jones Act suit is negligence, it is not the relatively narrow common law concept of negligence, but a more liberal one commensurate with the broad purposes of the . . . Act.” Forgione v. United States, 202 F.2d 249 (3d Cir., 1953), 252, cert. denied, 345 U.S. 966 (1953), 640 [citations omitted]. This was in line with an earlier decision of the Supreme Court, which stated that the Jones Act was “not to be narrowed by refined reasoning or for the sake of giving ‘negligence’ a technically restricted reading. It is to be construed liberally to fulfill the purposes for which it was enacted.” Jamison v. Encarnacion, 281 U.S. 635 (1930), 640.
the relief carefully, because equity meant fairness not charity. In the case of Farmer’s death by stabbing, Garza took into account the needs of his widow and family, but was compelled to reduce their award because their provider so clearly shared the blame for the loss.

92 For more lurid tales of the shrimpers, see: Robert Lee Maril, Texas Shrimpers: Community, Capitalism, and the Sea (College Station: Texas A&I University Press, 1983), esp. Chapters 5 (“When the Frenchmen Came: A Social History of Shrimpers in Texas Ports”), and 6 (“At the Dock: Drinking and Deviance”). In another case featuring seaborne assault, Boudin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955), the Supreme Court determined that in the warranty of seaworthiness, there could be no distinction between defective ship’s equipment and defective ship’s personnel, including those with “a proclivity for assaulting people,” who after all could be more dangerous than a “rope with a weak strand.” However, the Court continued to assume the worst regarding the lifestyles of merchant seamen, to wit: “The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standard of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? If it is the former, it is one of the risks of the sea that every crew takes. If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might be a safer place than one with a homicidal maniac as a crew member.” Ibid., 339-340 [emphasis added]. See also: Thackston, “Seamen’s Remedies,” 339-340, nn. 32-37. Mere shipboard “horseplay” has not usually been construed as misconduct which forfeits a right to remedy. The behavior exhibited in this case was clearly outside of that line. The Supreme Court does recognize that, at least while on shore leave, a sailor forfeits rights to maintenance and cure by his own willful misconduct. As one Justice put it, “the traditional instances are venereal disease and injuries received as a result of intoxication, although on occasion the latter has been qualified in recognition of a classic disposition of sailors ashore.” Aguilar v. Standard Oil Co., 318 U.S. 724 (1943), 731. That is, a drunk sailor may not be capable of “willful” misconduct. Soldiers also have this reputation: in the Army, contracting a venereal disease is not misconduct, but failing to report it is. Gilmore and
The Southern District judges enjoyed a great deal of flexibility when granting relief under admiralty laws. But the variety of remedies could not match the variety of accidents. In 1965, for example, Judge Garza heard the case of another seaman’s widow, who sued the shipping company that had employed her husband. She claimed its negligence caused his fatal heart attack. John Fair worked as an oiler, that is, he was a seaman responsible for maintaining various machines in the engine room. He served aboard the cargo vessel *M/S Trans Gulf*, from 31 May through 11 June, and then from 26 July through 28 July 1964. On those two occasions, the *Trans Gulf* was discharging bauxite, the primary ore used in aluminum manufacture, at the pier the Reynolds Metals Company maintained near Corpus Christi. Hot air was discharged via a skylight at the top of the *Trans Gulf*’s engine room, but four forced-draft blowers provided most of the ventilation. All ship’s engine rooms are hot. That of the *Trans Gulf*, however, was especially oppressive when the ship was in port discharging bauxite, because, according to a promotional brochure provided by the ship’s owners, the vessel had been equipped for “a new and unusual shipping service.” They meant that the *Trans Gulf* employed

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cranes, hoppers, and a conveyor system that encircled the ship. But, bauxite was an extremely dusty cargo, and the system created a larger quantity of dust than the previous manner of loading. If this dust entered the engine room, it could damage the machinery. To avoid this, the ship’s officers closed the engine room hatches and the skylight, and shut off at least three of the four ventilators. While in port under these conditions, the temperature in the engine room was generally above 100 degrees.\footnote{239 F.Supp., at 159.}

On 11 June, Fair experienced chest pains and reported them to the captain, who released him from duty and recorded the circumstances in his log: “Reason for separation -- medical relief -- had a mild stroke about the heart just before the vessel sailed . . . .” Fair requested no assistance, and went shore to the PHS hospital in Corpus Christi. He was treated there and declared fit for duty on 26 July.\footnote{Ibid., 159.} Fair returned to the Trans Gulf, which had undertaken another voyage in the meantime but had returned to Corpus Christi to discharge a new load of bauxite. Fair worked in the engine room until 28 July, when he once again suffered chest pains. These were diagnosed (the record is unclear by whom) as angina pectoris. An engineering officer and a seaman’s union patrolman helped Fair negotiate the ship’s stairways to his quarters. Later, he met the captain and told him

\footnote{Corpus Christi Division (Civ. A. No. 63-C-14, 16 March 1965).}
he would have to leave the ship again. As before, Fair made his way to the
captain’s cabin to be formally signed off from the ship, and once more, he
went to the hospital without assistance. Fair was treated but died on 15
December, after suffering a heart attack.\textsuperscript{96}

Fair’s widow sued the owner of the \textit{Trans Gulf}, under the Jones
Act.\textsuperscript{97} Although Fair’s heart condition had probably deteriorated during a
very long period of time, Judge Garza held that there was an obvious
causal connection between the working conditions aboard the \textit{Trans Gulf}
and Fair’s heart attack. The widow testified that various activities
unconnected with his employment also caused Fair to experience chest
pains, but Garza found that this did not negate the connection between the
final heart attack and the exertion of climbing so many stairs and working
in an oppressively hot and poorly ventilated area of the engine room. The
judge ruled that conditions were unsafe as a result of the ship owner’s
negligence in not providing proper ventilation. He declared that the “great
efficiency provided by the equipment aboard this vessel in discharging a
cargo, was not matched by a ventilating system sufficient to maintain

\textsuperscript{96} \textit{Ibid.}, 160.
\textsuperscript{97} The widow sued under the Jones Act, but also under the Texas state
“survival statute” (V.A.C.S., Article 5525), which provided remedies
similar to those available under the Jones Act. The case was tried before
the judge, and lawyers submitted briefs. Sidney Ravkind and John N.
Barnhart, of Mandell & Wright, for plaintiff; R.W. Woolsey, of Kleberg,
Mobley, Lockett & Weil of Corpus Christi, for defendant). \textit{Ibid.}, 159.
minimal conditions for working safely within the engine room.\textsuperscript{98} Prior to the 11 June incident, Garza noted, Fair’s heart condition might have been unknown, but after Fair’s first episode, the ship’s master should have been aware of the health risk created by the working conditions in the engine room. In addition, Garza found that the shipowner was negligent because, in the interim between attacks, no one had attempted to solve the ventilation problem. Finally, the company’s employees had simply allowed Fair, a sick man, to climb stairs, leave the ship, and make his way to the hospital without assistance.\textsuperscript{99}

Judge Garza heard evidence regarding Fair’s lifetime earning potential based on recent earnings as well as his probable life and work expectancy as a person forty-six years old, with his existing heart condition. From this, the judge calculated the earnings Fair would have contributed to his wife had he lived. Garza decided that the pecuniary loss to the widow, including earnings attributable to the shipowner’s negligence, as $18,000. He added funeral expenses of $1737.\textsuperscript{100}

\textsuperscript{98} \textit{Ibid.}, 160.
\textsuperscript{99} \textit{Ibid.}, 160.
\textsuperscript{100} The judge also considered the time Fair spent in personal and “charitable pursuits”: Fair had been an alcoholic, but joined Alcoholics Anonymous and had been sober for seven years prior to his death. Garza noted that he devoted time to helping others with this problem. \textit{Id.}, at 160.
President Johnson signed a new Omnibus Judgeship Act on 18 March 1966. The Act created three federal district judgeships in Texas. The Western District gained a fourth judgeship. The Southern District gained two new federal district judgeships, for a total of seven.\textsuperscript{101} Johnson offered the sixth judgeship to an old friend and political ally, Houston attorney John V. Singleton, Jr.\textsuperscript{102} In another compromise with Senator Yarborough, Johnson nominated another Houstonian, Woodrow B. Seals, a Yarborough

\textsuperscript{101} Pub.L. 89-372.
\textsuperscript{102} John Virgil Singleton, Jr. (born in Kaufman, Texas, on 20 March 1918). Singleton attended the University of Texas as both an undergraduate and as a law student. Although he was admitted to the Texas Bar in 1942, Singleton accepted a commission in the U.S. Navy rather than a position in a law firm. Finally, in 1946, after four years in uniform, the last as a Lieutenant Commander, and four months of post-war service in the Veteran’s Administration, Singleton began to practice law. For the next seven years, he was an associate of the Houston firm Fulbright, Crocker, Freeman, and Bates, which evolved into the current firm Fulbright and Jaworski, but Singleton and several partners founded their own firm in 1953. He continued in corporate practice until President Lyndon B. Johnson appointed him to the Southern District. \textit{Judges of the United States}, 453. Singleton had long been active in the local bar association and Democratic Party politics, but he earned his appointment to the federal bench by rendering loyal service not just to the party in general, but to Lyndon Johnson in particular. He had been a delegate-at-large to the 1956 Democratic convention, and in 1960 had repeated that role, but with the additional duty of sharing co-chairmanship of the Harris County Johnson for President Committee. During the 1964 presidential election, Singleton served as regional coordinator of the successful Johnson-Humphrey campaign. See commentary in \textit{CR}, 22 July 1966, Vol. 112, pt. 13, p. 16723-7.
supporter and the District’s U.S. Attorney, to the seventh judgeship. 103

Singleton and Seals were confirmed by the Senate in July 1966. 104

Judge Singleton soon heard the case of Dallas F. Martin, an injured
longshoreman, who had been an employee of Strachan Shipping, a Houston
company. On 15 November 1961, Martin and other members of
Strachan’s stevedoring “gang” had loaded crates of oil field machinery into
the hold of the M/S Osiris. The crates weighed between 200 to 2800
pounds each, and the gang, using a pipe roller according to their usual
practice, levered the large crates into their final storage place. Martin
stumbled while shifting a crate that was approximately ten feet long, four
feet high, and three feet wide. He filed a claim, and received $1005.75
from Strachan Shipping’s insurance carrier, the Texas Employers’
Insurance Association, which established that sum after allowing $590 for

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103 Woodrow Bradley Seals (born 24 December 1917, Bogalusa,
Washington Parish, LA). Woodrow Seals attended the Pearl River Junior
College in Poplarville, MS, from 1938. He received the junior college
certificate in June 1941, and entered the U.S. Army Air Forces that
October. Seals was a pilot in the European theater. In 1946, Major Seals
left the service to attend the University of Texas School of Law. He earned
the LL.B. in 1949, and became a self-employed lawyer in Houston. Seals
was active in the local and State bar associations and also Democratic
politics, and served on many advisory commissions during the next decade.
In 1961, President Kennedy appointed Seals a U.S. Attorney for the
104 Johnson eventually appointed a total of 125 district judges, 41 circuit
judges, and 2 Justices of the U.S. Supreme Court. See: Neil D. McFeeley,
Appointment of Judges: The Johnson Presidency (Austin: University of
Texas Press, 1987), 133-139.
the injury and $415.75 to reimburse Martin for his medical expenses. Martin later sued the owners of the ship, whose negligence, he alleged, allowed unsafe conditions to prevail aboard the "unseaworthy" vessel. The insurance company joined Martin's suit, in hopes of recouping the money it had lost through his claim. The owners, N.V. Koninklyke Nederlandsche Stoomboot, subsequently filed a third-party suit against Strachan Shipping, because although the accident had occurred on their ship, Martin had been Strachan's employee.\textsuperscript{105} Singleton accepted the claims made by both companies that they had maintained a safe workplace, and therefore declared that neither N.V. Koninklyke nor Strachan Shipping were guilty of negligence. Nevertheless, he directed them to split the court costs. Martin walked away with his thousand dollars, less lawyer fees, but the insurance company received nothing for its trouble.\textsuperscript{106}

Singleton soon faced another, more typical admiralty case. It concerned an injured seaman and allegations of negligence against a ship's owners. In January 1964, Basilio Sambula, a seaman of twenty years experience, signed on as a mess-man aboard the \textit{S.S. Green Point}, which was owned and operated by Central Gulf Steamship Company. The ship

\textsuperscript{106} \textit{Ibid.}, 414-415. W. Jiles Roberts served as Martin's counsel.
was bound for Singapore, but stopped en route at Inchon, Korea, where Sambula took shore leave. While in the city, three “hoodlums” attacked and robbed Sambula. They left him in the street, bleeding and unconscious, with severe head injuries and a deep cut near his right eye. When Sambula regained consciousness and looked for help, he recognized Yung Keun Choi, who had recently been a guest of the officers aboard the *Green Point*.\(^{107}\)

Choi spoke no English, and Sambula spoke no Korean, but Choi realized the seriousness Sambula’s injuries, and took him to the hospital. Dr. Sung Hwi Lee, a general practitioner who also could speak no English, examined the seaman, found swelling and internal bleeding in the eye, but diagnosed “no dangerous symptoms.” Dr. Lee cleaned and bandaged Sambula’s eye, administered a tranquilizer and antibiotics, and discharged the seaman from the hospital. Rather than refer Sambula to an ophthalmologist in Inchon, or send him to the U.S. Army Evacuation Hospital, which was thirty minutes away and treated American seaman, Dr. Lee officially retained responsibility. He examined Sambula on each of the two days and found no significant change in his condition. Sambula apparently had normal vision both days, and Lee informed the captain of

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the *Green Point* that Sambula was fit to sail for Singapore, although he should continue resting in his bunk during the journey.\(^\text{108}\)

The *Green Point* left Inchon on 14 January. The ship was equipped with a hospital room, but Sambula stayed in his own cabin, which he shared with three other men. He ate and went to the toilet with the rest of the crew, but got little sleep due to the shift changes of his cabin mates. The captain or first mate visited him each day to check his condition and administer antibiotic eye drops, but within three days, Sambula suddenly began to suffer a great deal of pain and completely lost his vision in the injured eye. The ship arrived in Singapore on 21 January, and Dr. Wong Kin Yip, an ophthalmologist, diagnosed a ruptured globe, apparently the result of the robber's initial blow, as the cause of the seaman's blindness. He concluded that Sambula should have been under the care of an ophthalmologist at Inchon, although this care probably would not have saved his vision. Dr. Yip recommended surgery to remove the eye at the earliest opportunity. The Central Gulf company flew Sambula to the United States, and immediately checked him into Galveston’s PHS hospital. On 4 February, a surgeon removed Sambula's blind right eye.\(^\text{109}\)

After a post-operative examination, a pathologist confirmed that Dr. Yip's diagnosis had been correct. Sambula's eye cavity was filled with

clotted blood, and it was clear that blindness resulted from a ruptured
globe, which had allowed hemorrhaging blood to separate the retina from
the rear wall of the eye. A doctor subsequently fitted Sambula with an
artificial eye, and certified him for duty as a mess-man. However,
Sambula claimed that he continued to suffer pain as a result of the injury,
as well as “inconvenience in the conduct of his daily affairs.” Sambula
accused the owners of the Green Point of negligence leading to the loss of
his eye. He sued for damages under the Jones Act.\textsuperscript{100}

Dr. Sylvan Brandon, an ophthalmologist, testified as a medical
expert at the trial, in April 1967. Brandon stated that, given the undisputed
medical facts, Sambula’s blindness had been, “in all medical probability,”
caused by a secondary hemorrhage. Although the actual injury came from
the initial blow to the eye, the rupture in the globe had clotted over. With
proper care, he testified, the injury might have healed without causing
permanent loss of vision. According to Brandon, as long as the clot
remained in place, the retina would remain undamaged. A secondary
hemorrhage, which actually destroyed Sambula’s retina, had been caused
by the strain of getting up to eat and go to the toilet. The proper treatment
for a ruptured globe, Brandon claimed, was bed rest under hospital
conditions, which were not available aboard the Green Point He testified

\textsuperscript{109} Ibid., 3.
that blindness had not been inevitable. However, Lee’s misdiagnosis and incorrect prescription for treatment, which had been serious lapses, had rendered it all but inevitable. As a result of Lee’s negligence, especially his failure to recognize the symptoms of a ruptured globe or to seek an expert’s opinion, Sambula had been allowed to “engage in a course of conduct which was calculated to cause the secondary hemorrhage.”

In May 1967, Judge Singleton substantially accepted Brandon’s testimony regarding the medical causes of Sambula’s condition. He ruled that Sambula’s blindness had been caused by Lee’s negligent diagnosis and that his negligence had been compounded by his failure to consult a qualified eye specialist. However, Singleton declared that the legal question in Sambula’s lawsuit was not whether Lee had been negligent, but whether the doctor’s negligence could be imputed to the owners of the ship. He concluded that, because the Inchon agent Choi had selected Lee, and therefore had failed to provide a “proper doctor,” that the negligence did transfer to the company. Even so, Singleton hesitated to award damages, because despite Dr. Brandon’s strong testimony, he could not easily establish a causal relationship between the doctor’s negligence and the loss of the eye. The company’s attorneys contended that Sambula had the burden of proving that proper treatment would have prevented his

110 Ibid., 3-4.
blindness. Brandon had testified only regarding medical probabilities, they argued, not known facts.

Ultimately, Singleton concluded that "the absence of testimony to the effect that proper medical care would, in reasonable medical probability, have prevented blindness does not preclude the trier of fact, in this case the Court, from finding the necessary causal relationship." He decided that, because Sambula's eye had a chance of healing properly with proper medical care, the fact that such medical care was not provided could be taken as the proximate cause of blindness. The blow to the eye, Singleton noted, set in motion a chain of unfortunate circumstances, but that chain might have been broken. The ship owner and the seaman were in a "guardian-ward" relationship by virtue of Sambula's employment contract, and it was the owner's duty to break the chain before it led to tragedy. Since the owner had not accomplished this, Singleton awarded Sambula $32,500 as compensation for losing his right eye.\footnote{Ibid., 3-4.}

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The Southern District judges did not transgress the boundaries that Congress had set for seamen. As they concurrently managed a changing
economy and technological transformations in the maritime professions, the federal district judges and Congress retained the ancient custom of reserving special legal remedies for seamen. The Jones Act and the seaworthiness doctrine afford seamen redress unknown to mainland plaintiffs. However, the guardian-ward relationship of judges to seamen has not resulted in the granting of large awards in personal injury cases. The remedies make the injured seaman whole, but they do not make him rich.\footnote{113}

II. Fair Labor Litigation: “Distinctions So Nice As To Be Arbitrary”

In most admiralty and maritime personal injury suits, even in those featuring complex, and sometimes bizarre facts, the obligation for the presiding federal district judge was to distinguish between members of the classes covered by various compensation schemes from the individuals who were not covered. After making that initial determination, the judge’s remaining task was comparatively simple. The judge had to decide the

\footnote{112} Ibid., 5-7.
\footnote{113} The Jones Act does not explicitly limit damages, but the federal courts have ruled that recovery is limited exclusively to pecuniary damages. This is because the Jones Act links seamen’s’ remedies to FELA. The Supreme Court held that FELA provided damages for pecuniary loss only. 
level of relief due to the injured seaman according to statutory formulas and judicial precedents. Often, the judge estimated relief by resorting to rules of thumb, or, in the case of death, by considering the needs of the survivors. These activities had parallels in more mundane cases of labor law that came before the Southern District judges, including suits filed under federal statutes such as the FELA, or under states’ worker’s compensation laws if a plaintiff’s claims qualified under the federal district court’s diversity jurisdiction.

These kinds of cases were judges’ and lawyers’ mainstays in the Southern District of Texas. For example, James DeAnda, the plaintiffs’ attorney in the 1957 Driscoll CISD school desegregation lawsuit, could not have made a career by participating solely in occasional civil rights litigation. Instead, he represented clients involved in more homely disputes, including injured industrial workers suing employers under Texas’ workmen’s compensation laws. In addition to compensation for workplace injuries, under the federal Fair Labor Standards Act (FLSA) of 1938, many employees who were “engaged in commerce or in the production of goods for commerce,” specifically interstate commerce,


were guaranteed a minimum wage, a standard forty-hour work week, and overtime pay.\textsuperscript{115}

The FLSA authorized the U.S. Department of Labor to investigate workers' claims and to file suit on their behalf against employers, but the Department lacked authority administratively to determine judgment. Congress assigned responsibility for ascertaining the validity of workers' claims to the federal district judges. They could enjoin an employer's failure to pay wages "found by the court to be due to employees under this Act."\textsuperscript{116} This directive required a sitting judge to decide whether a specific employee's work was covered by the FLSA, which in practice demanded that a judge also determine the boundaries of "interstate commerce," "goods," and "production." The distinctions the judges made according to the FLSA were analogous to those they made under the Jones Act regarding "seamen," "negligence," and "unseaworthy." And, as in, maritime cases, disputes concerning wages properly due to construction, manufacturing, and agriculture workers demonstrated that small differences in the basis of litigation had large consequences on its outcome. Unfortunately, as Supreme Court Justice Felix Frankfurter observed in 1949: "Both in the employments which the Fair Labor Standards Act

\textsuperscript{116} 29 U.S.C. § 217.
covers and in the exemptions it makes Congress has cast upon the courts the
duty of making distinctions that often are bound to be so nice as to be
arbitrary in relation to each other."\textsuperscript{117}

Judge Allred contemplated the scope of the FLSA in a dispute
between the Labor Department and one of Texas' largest construction
firms. In 1958, the Lower Nueces River Water Supply District, which
provided water to Corpus Christi, contracted the H.B. Zachry Company to
build a large dam approximately 1500 feet downstream from an existing
dam, which would increase the reservoir's total capacity by an order of
magnitude and leave the old dam intact but submerged. Because Corpus
Christi's local industries consumed approximately half of the water
provided by the existing system, and the Supply District expected industrial
concerns to continue to use a substantial percentage of the whole after
Zachry completed the $6 million project, federal inspectors from the
Labor Department's Wage and Hour Division concluded that the FLSA
applied to the dam builders. They reasoned that the water was a "good"
produced "for commerce" because facilities that consumed a significant
volume of the water engaged in interstate commerce. Zachry had
considered the dam project to be local construction and had not been
paying these employees the one dollar per hour mandated under the most
recent provisions of the FLSA. The inspectors sought an injunction to restrain what they charged was Zachry's ongoing violation.\textsuperscript{118}

At a pretrial hearing, Judge Allred indicated that he tended to accept the labor inspectors' interpretations, but denied their motion for a preliminary injunction. He subsequently concluded that Congress had "intended to narrow the scope of coverage" through a 1949 amendment of the 1938 FLSA statute, when it changed the definition of "production of goods," from "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any \textit{process} or occupation \textit{necessary} to the production," to the sharper terms "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any \textit{closely related process} or occupation \textit{directly essential} to the production."\textsuperscript{119}

\textsuperscript{117} \textit{Farmers Reservoir \& Irrigation Co. v. McComb}, 337 U.S. 755 (1949); Frankfurter concurring, 770.

\textsuperscript{118} \textit{H.B. Zachry Co. v. Mitchell}, 262 F.2d 546 (5th Cir., 1959). Until 5 May 1962, the minimum wage specified by the FLSA was $1 per hour. From 6 May 1961 through 26 March 1963, the minimum wage was $1.15 per hour.

\textsuperscript{119} Both 29 U. S. C. § 203(j), with emphasis added. In more detail, the 1938 FLSA provided that: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." As amended, this section provided: "an employee shall be deemed to have been engaged in the production of goods
Notwithstanding this recent statutory limitation, the judge agreed with the federal government's contention that Zachry Co.'s workers were engaged in activities that were "closely related" and "directly essential" to the production of goods for commerce. Therefore, he concluded that their construction of the new dam remained within the coverage of the FLSA. Allred enjoined the company's wage structure that applied specifically and narrowly to the dam project.\(^\text{120}\)

The Zachry Company appealed Allred's ruling. Because the government sought a much broader injunction which would apply not only to the dam construction but to all of Zachry's activities, the Labor Department also appealed the decision. On 5 January 1959, a three judge panel from the Fifth Circuit unanimously reversed Allred's ruling. For the panel, Circuit Judge Elbert Tuttle wrote that the 1949 substitution of the words "directly essential" for the word "necessary," and the addition of the requirement that covered employment had to be "closely related" to production, had narrowed the statutory definition of "production of goods" more than Allred believed. In light of the FLSA's latest, restricted

\(^{120}\) If such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.” Therefore, in 1949, federal lawmakers amended the last clause of § 203(j). See: Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960), 312, note 2.

\(^{120}\) H.B. Zachry Co. v. Mitchell, 262 F.2d 546 (5th Cir., 1959), 548.
definition, the appellate judges held that the construction of the dam did not qualify as production of goods for interstate commerce, whatever use to which the water might eventually be put.\textsuperscript{121}

The Secretary of Labor appealed the ruling. On 4 April 1960, Justice Frankfurter, for five members of the U.S. Supreme Court, affirmed the Fifth Circuit’s decision, in\textit{ Mitchell v. H.B. Zachry Co.} In passing the FLSA, Frankfurter said, Congress had attempted to balance its concern for the well-being of all of the nation’s workers with a competing desire to avoid displacing the states’ power to regulate local activities. The majority Justices ruled that the combination of the construction’s remoteness from production, and the lack of the dam customers’ dedication either exclusively or primarily to production, indicated that the activities of Zachry Co.’s employees were not “closely related” or “directly essential” to the production of goods for interstate commerce.\textsuperscript{122}

By contemporary measures, the \textit{Zachry} majority did not hold narrow the view of interstate commerce. Only four years earlier, for example, the Justices had rejected a similar distinction between “construction” and “production,” to rule that the FLSA applied to the builders of a new canal lock on the Gulf’s Intracoastal Waterway. In that

\textsuperscript{121} \textit{Ibid.}, 552.
\textsuperscript{122} \textit{Mitchell v. H.B. Zachry Co.}, 362 U.S. 310 (1960), 321. Frankfurter was joined in the opinion by Justices Clark, Harlan, Whittaker, and Stewart.
earlier case, however, the Court declared that when federal district judges considered the boundaries of interstate commerce in FLSA wage and hour cases, they must rely on "practical considerations," rather than "technical conceptions."  

Justice William O. Douglas, joined by three Justices, including Chief Justice Earl Warren, dissented. They thought the activities of Zachry's builders clearly met the FLSA's "closely related" and "directly essential" measures of production of goods. The dam would not only supply water to local industries that produced goods in Corpus Christi, but it would also serve the needs of the local railroads, trucking firms, and airlines which would carry products into interstate commerce. With regard to the majority's narrowing of the categories of employment covered by the FLSA to exclude such necessary construction, Douglas wrote that: "I regret that today we give up territory that Congress has fairly claimed, that we take a backward step from the measures Congress designed to protect the lowest paid and weakest group of wage earners in the Nation." Douglas and the other dissenters declared that through its "retreat," the majority

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was inviting future "hostile constructions that will undermine the broad base which Congress gave the Act." If the law was to be narrowed, Douglas wrote, then congressional intent ought to be clearer than it had been through the 1949 amendment, because Congress was "far better suited than [the Court] to mark the farthest areas which the liberal policies of the Act were designed to cover."¹²⁵

Soon after the Zachry decision, the U.S. Court of Appeals for the Eighth Circuit followed its reasoning to declare that construction work on a series of dams was outside the boundaries of FLSA coverage, notwithstanding that the dams crossed the White River Basin in Missouri and Arkansas, and that the entire project was supervised by the U.S. Army Corps of Engineers. Circuit Judge Harry A. Blackmun, for a three-judge panel, observed that the decision "may be one of the 'hostile constructions' anticipated" by the Zachry dissenters, but judges concluded nonetheless that the work in question was "essentially collateral and local."¹²⁶

Despite the fact that Zachry allowed some narrowing of the FLSA, subsequent Fifth Circuit decisions indicated that Douglas' dire predictions were exaggerated. For example, the Labor Department sought an injunction against the P. & L. Equipment Company, a Houston construction

¹²⁵ Ibid., 325. Douglas was joined in his dissent by Justices Black and Brennan, and Chief Justice Warren.
firm that paid its night watchman, a man named Taylor, less than the FLSA minimum wage. The government argued that Taylor was involved in interstate commerce because he guarded a portion of a Houston street under construction which, when completed, would pass under a railroad bridge. Moreover, the street would lead into, but not be designated a segment of, a U.S. highway. Finally, the street would be used, on occasion, by trucks carrying the U.S. mail. These factors did not persuade Judge Connally, who concluded that Taylor’s work on a city street was an isolated and local activity. In December 1962, Fifth Circuit Chief Judge Hutcheson, for a two-to-one plurality of a three-judge panel, declared that “the case [was] a simple one,” that the Labor Department had “the right of it on the facts and the law,” and that Connally had erred. The Fifth Circuit panel reversed his decision in a very brief opinion. The third judge wrote a much longer dissenting opinion, which like Connally’s decision relied heavily on the *Zachry* rationale.\footnote{127}

Other Southern District judges also leaned on the *Zachry* precedent during the 1960s, and also faced reversal by the Fifth Circuit. For example, Judge Garza dismissed the Labor Department’s wage claims

\footnote{126} *Goldberg v. Wade Lahar Construction Co.*, 290 F.2d 408 (5th Cir., 1961), 420.
\footnote{127} The P. & L. Equipment Company requested a rehearing en banc; after the Fifth Circuit denied the request, the firm did not appeal the decision. *Goldberg v. P. & L. Equipment Co.*, 311 F.2d 88 (5th Cir., 1962), 89.
against a shoe retailer doing business in several states, since the administrative and clerical employees in question merely handled paperwork regarding sales at four stores in Texas. The Circuit reversed Garza, on the grounds that the employees worked with financial records that they later mailed to the home office in St. Louis. These actions, the unanimous three-judge panel concluded, drew the officer workers into interstate commerce. When they reversed Garza's decision in August 1967, the Circuit judges noted that, even at that late date, the federal courts had developed "no dependable touchstone or acceptable standard for ascertaining whether an employee is engaged in commerce." In place of hard and fast rules for deciding FLSA disputes, the appellate panel stated, the "enforcement of the Act and its application to particular fact situations require the courts to utilize an empirical process of drawing lines from case to case."128

Garza thereafter followed the Fifth Circuit's lead. The next year, he ruled in favor of the Labor Department's request to enjoin a small loan company in Brownsville, because it received funds from and mailed reports to another company in Nashville, Tennessee. When he issued the injunction, he referred explicitly to the Fifth Circuit's reversal of his

earlier decision regarding shoe stores. The loan company appealed. In a one-paragraph *per curiam* opinion, the Fifth Circuit judges declared that they agreed "in all material respects" with Garza’s opinion.

These and many similar FLSA decisions throughout the decade did not "undermine the broad base" of the Act, as Douglas had warned. Instead, many federal judges strove to distinguish the Supreme Court’s *Zachry* decision from many subsequent cases. This necessitated a swift about-face by the Fifth Circuit judges, because *Zachry* had affirmed their own 1959 ruling. But after narrowing the FLSA in *Zachry*, a majority of Fifth Circuit judges subsequently committed themselves to draw the circle of interstate commerce around as many workers as possible. The Southern District judges fell in line. They did not yield territory "fairly claimed" by Congress, as Douglas had feared, and they had not abandoned "the lowest paid and weakest group of wage earners in the Nation." But, judicial constructions which almost invariably distinguished *Zachry* from new cases, confounded the FLSA’s provisions, and blurred its critical distinctions.

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131 The apparently pro-business ruling the 1959 *Zachry* case is among the evidence recently marshaled to argue against the Fifth Circuit’s lingering reputation for liberality, which is based mostly on the Circuit judges’ action with regard to desegregation. See: Jerold Waltman, "How Liberal Was the Fifth Circuit Court of Appeals in the 1950s? A Look at Minimum
Agriculture further compounded the problem of distinctions under the FLSA, especially for the Southern District judges. Thousands of farm and ranch hands in the Lower Rio Grande Valley of South Texas cultivated diverse vegetables and citrus fruits, and tended cotton, grain, and livestock. During the 1960s the fertile fields in Cameron, Hidalgo, Starr, Zapata, and Webb counties, which adjoined the U.S.-Mexico border, yielded more than twenty-five million dollars' worth of citrus fruit and fifty million dollars' worth of vegetables every year. The Valley farmers shipped approximately sixty-five per cent of these crops to other states by rail or truck, or to foreign countries through the ports in Brownsville and Corpus Christi.\textsuperscript{132} These crops clearly entered interstate and international commerce, and many farm workers followed the jobs from state to state. Yet, Congress exempted agricultural workers from FLSA wages and hours provisions.\textsuperscript{133}

But the Act's exemptions were as open to judicial interpretation as its inclusions. For example, Judge Garza ruled in 1964 that a crop dusting pilot and the person who waved a flag to guide the pilot to the proper field

to be dusted, were agricultural workers and therefore were not covered by
the FLSA. But the mechanic who repaired and maintained the airplane was
engaged in commerce, not in agriculture, and was covered. The Fifth
Circuit affirmed this distinction.\textsuperscript{134}

The differences between agricultural work and employment covered
by the FLSA were also at issue in the complaint the Labor Department
filed against J.L. Beck, where circumstances were more convoluted than in
the crop dusting case. Beck was president, principal owner, and manager
of two manufacturing businesses in Beeville, Texas, the Fortuna Broom
Company and the South Texas Broom Corn Company. Beck had several
full-time, year-round employees, but hired extra workers each summer,
when area farmers harvested their broom corn and brought it to Beck’s
firms for processing. During this busy season, Beck hired minors as well
as adults, and all worked long hours. A substantial percentage of the
broom corn the two companies handled and processed, and most of the
brooms and mops they produced, were shipped and sold outside Texas.\textsuperscript{135}

Beck did not keep accurate records of his seasonal employees, their

\textsuperscript{133} The FLSA exempted agricultural wages at: 29 U.S.C. § 213(a)(6);
agricultural workers are exempted from the hours provisions at: §
213(b)(12).
\textsuperscript{134} \textit{Wirtz v. Boyls}, 230 F.Supp. 246 (S.D.Tex., 1964); affirmed: 352 F.2d
63 (5th Cir., 1965).
employment periods, the number of hours each worked per day or week, 
or, in many instances, the wages he paid them. FLSA regulations required 
all this information. Moreover, Beck often paid summer employees in 
cash, yet his corporations kept no consistent records of the payments.

Beck's bookkeeping habits confounded government inspectors. They 
could not establish which employees worked for Beck personally at any 
particular time or for which company they worked. Their inspectors had 
no doubts that Beck paid the majority of his employees less than the 
minimum wage, and he never paid them for overtime work. Also, Beck 
had violated the child labor prohibitions of the FLSA. The Labor 
Department filed a formal request for an injunction from Judge Garza, 
seeking both to force Beck to pay back wages and overtime compensation, 
and to forbid future violations. 136

At the trial, Beck's defense attorneys argued that, although the Labor 
Department had free access to the books and records of both companies and 
to Beck's personal financial records, the government could not provide 
Garza with the documentation necessary to determine the wages or 
overtime pay Beck allegedly owed to his employees. But Garza noted that

135 Wirtz v. Fortuna Broom Company; S.D.Tex., 1966; Corpus Christi 
Division; Civil No. 64-C-77); 1966 U.S. Dist. LEXIS 7136; 53 Lab. Cas. 
(CCH) P31,785; 1-2.
136 Under §§ 6, 7, 11(c), 12, and 15(a) of the FLSA; that is, 29 U. S. C. §§ 
206, 207, 211(c), 212, and 215(a). Wirtz v. Fortuna Broom Company; 5.
an investigator had compiled adequate information from the incomplete records, and made a transcription which Garza ruled to be "accurate and worthy of belief." Also, several of Beck's full-time employees at Fortuna and South Texas had kept their own records, on calendars or other personal papers, which showed their work patterns. Garza, impatient with Beck's argument that sloppy bookkeeping ought to exempt him from making good on his obligations to his employees, declared that "[t]o allow the Defendants here to shirk their duties under the Act because of their failure to keep proper records, would be placing a premium on their failure to conform with their statutory duty."\textsuperscript{137}

Beck's lawyers offered another, only slightly more substantial, defense against him having to pay back wages to at least a few employees. Most of Beck's workers had processed the broom corn after farmers harvested it from the fields. Therefore, the defense attorneys argued, those workers had handled agricultural commodities bound for the market, and were exempt from the FLSA's minimum wage and overtime pay provisions. Furthermore, Beck occasionally sent his broom company employees to perform tasks on farms he owned near Beeville. Beck's attorneys claimed that those employees were also exempt from the FLSA's provisions. Garza also gave little credence to these contentions. Of the

\textsuperscript{137} \textit{Wirtz v. Fortuna Broom Company}, 5.
latter excuse, the judge observed that “... [w]hile it is true that some of these employees did work for a few hours or a day or two on the farms belonging to Mr. Beck,” the employees primarily worked at his manufacturing concerns, and so they were subject to the FLSA.138

Judge Garza concluded that over the course of three years, Beck withheld the minimum wage and associated overtime pay from many employees who qualified for FLSA coverage. All had worked for Beck for different amounts of time, and received different pay for their hours worked, ranging from $50 to $70 per week for the adults, and between 30 and 50 cents per hour for the minors. Garza estimated how many hours each employee had worked over the years. At the applicable statutory rates, which for work accomplished prior to 3 September 1963 was $1.15

138 Wirtz v. Fortuna Broom Company; 6-7. Beck then pleaded poverty and personal hardship. He claimed that his corporations had been losing money for years, and presented evidence that the Fortuna Broom Company had an income of only $17,569 in 1962, that in 1963 it took a loss of $18.64, and that its 1964 income was only $533.05. The South Texas Broom Corn Company had seen even worse business. In 1962, it had a loss of $2,844.44, in 1963, it lost $288.75, and the company’s 1964 income was only $684.19. Beck’s personal income was only $1,084.89 in 1962, $1,489.43 in 1963, and $5,075.43 in 1964. Finally, Beck’s wife had died recently, and due to community property laws and laws of inheritance, descent, and distribution, other parties had legal claims against his assets. As a result of these misfortunes, the defense urged, Beck would be unable to discharge the liability for unpaid minimum wages and overtime compensation, should Garza grant that part of the Labor Department’s requested injunction. Again, Judge Garza was skeptical of the defense claims. He noted that the evidence showed that Beck, through his
per hour, and $1.25 per hour thereafter, Garza calculated that Beck owed
back ranges which ranged from $120.90 due to one teenager to $3,367.67
due to one adult employee. In round numbers, Garza reckoned that Beck
owed a total of approximately $14,000 in back wages. The judge ordered
Beck to pay each individual worker the amount owed, and enjoined him
from violating the FLSA in the future.¹³⁹ Beck appealed, but the Fifth
Circuit upheld Garza’s ruling.¹⁴⁰

Unlike Beck’s marginally agricultural corn broom makers, many
South Texans were unquestionably employed in agriculture. For them, the
most important labor statute, at least until the mid-1960s, was not the
FLSA but the federal Migratory Labor Act (MLA). It regulated wages,
benefits, and other employment relations between American growers and
Mexican nationals who came to the U.S. to work in agriculture.¹⁴¹ The
MLA established the regulatory framework for the “Mexican Labor
Program,” customarily known as the bracero system (the term translates
roughly as “strong arms,” from the Spanish brazo), which had provided

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¹³⁹ I have rounded the final figure. *Wirtz v. Fortuna Broom Company*; 13-14, 21.
U.S. employers with contracted "guest workers" since the 1940s. Under the MLA, the Congress authorized the Secretary of Labor to allow a specified number of Mexicans to establish temporary legal residence in the U.S., to work on farms and ranches according to standard contracts. The U.S. negotiated the initial bracero agreement with the Mexican government during World War II, to replace the large number of Americans serving in the armed forces. Promoters of the idea argued that unless Mexicans were admitted to pick crops, the fruit and vegetables necessary to feed troops would rot in the fields. After the war ended, the two governments renewed the program.\textsuperscript{142} The first bracero program lasted from August 1942 to December 1947, a second version from February 1948 to 1951, to supply labor during a wage dispute, and a third incarnation arose in 1951, to supply farm labor during the Korean conflict. The lawmakers reauthorized the program. It lasted until 1965.\textsuperscript{143}


The MLA authorized the Department of Labor to provide prospective *bracero* workers with transportation to and from Mexican recruitment centers, to establish "reception centers" in the U.S. for the workers, and to feed and house them until they were hired. The federal government helped *bracero* workers secure the "Standard Work Contract," which provided for transportation to and from job sites. A "standard" contract also provided that: "... employers shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher," and empowered the Secretary of Labor to determine the "prevailing wage rate." The Secretary could also forbid the *braceros* from accepting employment if the wages offered were "insufficient to cover the Mexican worker's normal living needs." These provisions for extensive Labor Department supervision of employment benefits served several disparate purposes. First, the oversight would fulfill the U.S. government's obligation to prevent American employers from exploiting their Mexican workers. Next, it allowed the Department to increase the labor supply during the peak harvesting seasons. Finally, the regulations enabled the government to monitor the *braceros* effects on the wages and discussion focuses on labor in Texas, the *bracero* program extended into
working conditions of domestic workers, that is, those who were U.S. citizens rather than "guests." The Labor Secretary's obligation to maintain parity between domestic workers' wages and bracero wages was implicit in the MLA's requirement that: "Mexican workers shall not be employed . . . in any jobs for which domestic workers can be reasonably obtained or where [the employment of bracero workers] . . . would adversely affect the wages and working conditions of domestic agricultural workers." In addition, the statute empowered the Secretary to curtail the supply of bracero workers unless Labor Department officials had certified that "able, willing, and qualified" domestic workers were not available in numbers sufficient to satisfy employers' labor needs, that the employment of bracero workers would not adversely affect domestic wages, and that the employers had undertaken reasonable efforts to attract and hire domestic workers.\footnote{7 U.S.C. § 1461. Johnson v. Kirkland, 290 F.2d 440 (5th Cir., 1961), 441-442, nn. 2-3.} \footnote{7 U.S.C. § 1463. Johnson v. Kirkland, 290 F.2d, 442, esp. n. 4. On 28 June 1960, for example, after the Texas Employment Security Agency reported that a "reasonable effort" had been made to fill open farm jobs with domestic workers, the Labor Department's Regional Director in Dallas announced that the July 1960 quota in the Rio Grande Valley would be 55,000 bracero workers. Under the MLA, the Director established the quota contingent upon the following: (1) growers' continued efforts to recruit domestic workers; (2) domestic workers replacing the guest workers wherever possible; (3) domestic workers' wages being equal to or better than wages of bracero workers; and (4) the public posting of the quota and its conditions at local employment offices. Ibid., 443.}
The MLA did not authorize the Labor Secretary to enforce a minimum wage for agricultural workers, in direct contradiction to exemptions in the FLSA. However, through manipulations of the estimated "prevailing wage," the terms of the "standard" contract, and the number of authorized \textit{bracero} workers, government officials could indirectly regulate farm wages. The resultant wages, especially piece-work rates for crops harvested by the bushel or crate, were invariably below the FLSA minimum wage. Even so, the "prevailing wage" was often higher than the wage employers wanted to pay, and Valley farm and ranch owners frequently supplemented the labor force with undocumented workers. Unlike legal and regulated \textit{braceros}, these illegal employees did not work under federal government oversight, except for occasional encounters with the Immigration and Nationalization Service (INS). From the employers' point of view, the potential for run-ins with INS added benefit. Undocumented workers were unlikely to complain about low wages and poor conditions when they could be threatened with arrest and deportation.\textsuperscript{146} But farm and ranch owners who supplemented the

\textsuperscript{146} Raul A. Fernandez, \textit{The Mexican-American Border Region: Issues and Trends} (Notre Dame: University of Notre Dame Press, 1989), 70. Because immigration to the U.S. was largely unrestricted until the twentieth century, \textit{illegal} immigration was a relatively new problem. Congress enacted the first federal immigration regulation, which barred entry by convicted and prostitutes, in 1875 (Act of 3 March 1875, ch. 141, § 5, 18 Stat. 477). An earlier law, defining human contraband related to labor
authorized braceros with undocumented workers did not fear arrest. The Immigration and Nationality Act of 1952 (the McCarran-Walter Act), provided that employers were not to be charged with the crime of "harboring" illegal immigrants. This immunity from prosecution was contained in the so-called "Texas Proviso," named for its major exploitation, had prohibited immigration or importation of Chinese and Japanese servants (Act of 19 February 1862, §§ 2158-64, 18 Stat. 379). The modern era of immigration legislation commenced when Congress passed the 1921 Quota Act (ch. 8, 42 Stat. 5; formerly codified at 8 U.S.C. §§ 229-231). In areas where Mexican immigrants formed a large part of the traditional labor force, such as the states in the American southwest, capitalism overcame nativism. To protect the economic interests of ranchers and farmers who depended Mexican labor, Congress exempted the Western Hemisphere from the quota formulas. However, although Mexicans were excluded from quotas, they were subject to fees, such as a ten dollar charge for a visa and an eight dollar head tax. David M. Heer, *Immigration in America's Future: Social Science Findings and the Policy Debate* (Boulder: Westview Press, 1996), 45-48. Widespread legal Mexican migration into the U.S. southwest occurred in three waves, which describe three major historical epochs: the era of railroad and industrial development (especially in the 1880s, after the Chinese were excluded); the era of agricultural development (1910-1930, which also was the era of the Mexican Revolution); and, the bracero period (1942-1964). In each case, social, political, or economic conditions in Mexico propelled working-class people north into the U.S. Richard C. Jones, "Changing Patterns of Undocumented Mexican Migration to South Texas," in Rodolfo O. De La Garza, Frank D. Bean, Charles M. Bonjean, Ricardo Romo, and Rodolfo Alvarez, eds., *The Mexican American Experience: An Interdisciplinary Anthology* (Austin: University of Texas Press, 1985), 103. Note: the term "illegal alien," has been criticized by the United Nations, which resolved in 1975 to employ instead the term "nondocumented migratory worker" whenever possible. See: Guadalupe Salinas and Isaias D. Torres, "The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis," *Houston Law Review* 13 (1976): 863, note 1; also, generally: Laura Oren, "Comment, The Legal Status of Undocumented Aliens: In Search of a Consistent Theory," *Houston Law Review* 16 (1979): 667.
proponents, U.S. Senator Lyndon B. Johnson and House Speaker Sam Rayburn.  

As a result of the FLSA’s agricultural exemptions, the long life of the *bracero* program, and the constant presence of illegal but tolerated undocumented workers, the labor market in the Valley operated in management’s favor. Individual employers did not always approve of specific Labor Department decisions, and in some instances, they drew the federal judiciary into disagreements.  

Factors dooming most attempts to organize the Valley’s farm workers included extensive reliance on piece-rates for harvesting crops, the

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148 In 1960, numerous growers asked U.S. District Judge Joe M. Ingraham to enjoin the Labor Department’s determinations that they were no longer eligible to employ *bracero* workers, because they allegedly had violated the record-keeping provisions of the MLA. In the first case, Ingraham found for the plaintiffs and issued the injunction. The Fifth Circuit court reversed the ruling, however, on the grounds that the growers had not named the Secretary of Labor as a defendant, when he was an indispensable party to the suit. *Johnson v. Kirkland*, 290 F.2d 440 (5th Cir., 1961). District Judge Ingraham subsequently dismissed two similar suits for not naming a different indispensable party, specifically, the Director of the Bureau of Employment Security at Washington. See: *McBride Farms Marketing Association v. Johnson*, 290 F.2d 474 (5 Cir., 1961); and: *Rio Hondo Harvesting Association v. Johnson*, 290 F.2d 471 (5 Cir., 1961).
seasonal nature of migrant agricultural work, and the ready availability of laborers, domestic, legal, and illegal, hirable through independent brokers, known as "crew leaders." Although Texas historically is an anti-union state vigorous local unions by industrial or maritime workers existed.

For varied reasons, its expiration did not immediately improve conditions for domestic fram workers. First, Congress did not repeal the FLSA's agricultural exemption. Second, U.S. workers still faced potential competition from Mexican laborers because private individuals, rather than the government, could legally recruit and hire resident aliens with INS "greencards" if the Labor Department declared a shortage of domestic workers. Third, undocumented immigration from Mexico increased


dramatically soon after the *bracero* program expired.\textsuperscript{151} Fourth, national unions were slow to capitalize on the program's demise. Rather than organizing the agricultural workers, they studied the issue.\textsuperscript{152}

But Congress amended the FLSA on 23 September 1966.\textsuperscript{153} Effective 1 February 1967, agricultural workers were covered under the minimum wage provisions of the FLSA. However, the nation's agricultural employees were still a special class under the amended law. The minimum wage for farm workers lagged behind the minimum established for other employees. Agricultural workers were still exempt from


from overtime provisions of the Act. Approximately three-quarters of the farm workers were still not covered by the FLSA’s provisions. As usual, the actual boundaries of the exemptions and the variations in practice became subject to judicial interpretation.\textsuperscript{154}

The FLSA case the Labor Department filed in 1969 against Barr Ewing, who operated a large farm in Hidalgo County, traced the transitions in the agricultural exemptions. From 1967 to 1969, Ewing contracted to level land for other farmers in the Lower Rio Grande Valley. He leased his tractors, trailers, and drivers to the Progresso Co-Op Gin, to haul cottonseed to producers of cottonseed oil. Federal inspectors concluded that while administering his several businesses, Ewing had violated the wage, overtime, and record-keeping requirements of the FLSA. The Labor Department sued to restrain Ewing from continuing these alleged violations. Ewing admitted his failure to comply with the FLSA’s provisions. Garza’s task was simply to determine whether Ewing should have complied. Specifically, he had to decide whether Ewing’s personal secretary, his truck drivers, and the mechanics and mechanics’ helpers who repaired and maintained his leveling equipment, were producing goods for commerce, as the government argued. If so, Ewing was to comply to the

\textsuperscript{153} 29 U.S.C. § 206(5). Subsection 5 was added by Pub.L. 89-601, § 302; 80 Stat. 830.
FLSA's various provisions. If his employees were subject to the agricultural exemption, as Ewing maintained, the FLSA was not relevant. 155

Wayne Jackel, Assistant Manager of the Valley Co-Op Oil Mill, testified that all of the cottonseed the mill purchased was commingled prior to processing, and that between twenty-five and fifty per cent of the cottonseed oil the mill manufactured was shipped outside Texas. Ewing's attorneys argued that there was no evidence that the cottonseed hauled by Ewing's drivers, approximately 2650 tons during 1968 and 1969, had been processed into cottonseed oil that was later shipped to another state. Garza ruled that the government was not required to trace the source of the cottonseed and cottonseed oil subsequently shipped in interstate commerce. Proof of commingling, in this case proved through testimony, was sufficient. The judge concluded that a "substantial amount" of the cottonseed hauled by Ewing's drivers was rendered into oil which was eventually shipped outside Texas. Moreover, whether or not a driver was an employee of an interstate manufacturer, it was a well-settled judicial rule that any driver who hauled goods which were used in the manufacture of goods for interstate commerce was engaged in the production of goods

for interstate commerce. Garza ruled that each of Ewing’s three regular
drivers were covered by the FLSA.\textsuperscript{156}

Garza then considered Ewing’s leveling business. Periodic leveling
allowed area farmers the better to irrigate their fields and to increase crop
production. After 1 February 1967, that is, since the agricultural
exemption had been amended, Ewing had entered into approximately one
hundred leveling contracts. His employees had leveled approximately 2600
acres of farmland, most of which produced citrus fruits, vegetables, grain,
or cotton. No one testified that the crops raised on any of this acreage had
been shipped outside Texas, but ruling similarly to his decision regarding
the commingling of cottonseed, Garza ruled the government was not
required to prove that specific crops were grown on a specific leveled acre.
It was sufficient for Garza to note the large volume of leveled land, the
diverse farming operations of the region, and the fact that a “substantial
amount” of the produce grown in the Valley was shipped outside Texas.
Logically, the judge assumed that some of the land produced some of the
interstate fruit and vegetables.\textsuperscript{157}

Questions regarding the remaining scope of the amended agricultural
exemption existed in the distinctions Garza made between Ewing’s

64 Lab. Cas. (CCH) P32,451; at 1-2.
\textsuperscript{156} Ibid., 4-5.
mechanics, who maintained the earth-moving equipment necessary for leveling, and employees who actually operated the leveling equipment. The government conceded that the operators were not covered by the FLSA. But the mechanics, the Labor Department argued, were covered. The essential difference was that the mechanics performed a job that facilitated the production of goods, and they performed it away from the field. The equipment operators, however, were engaged in the purely agricultural task of moving dirt. Judge Garza agreed with the government’s rationale, and noted that there was “no difference” between the mechanics and mechanics’ helpers in this case and the mechanic in the 1964 crop dusting case. Even under the 1966 amendments, employment requiring contact with cropland, that is, work done “on the farm,” was still subject to an agricultural exemption.\(^{158}\)

Moreover, the work done “on the farm” still had to be actual farm work to be agriculture that was exempt from the FLSA. Ewing maintained an office at his farm and employed a secretary there to perform general office work consisting of answering the telephone in connection with his business, including land leveling jobs, and the preparation payrolls for all of employees, including the mechanics. This secretarial work took place on the farm, but it was not purely agricultural, the way driving a tractor

was purely agricultural. Rather, the secretary’s job was involved with all aspects of Ewing’s business, which Garza had already ruled had various connections to interstate commerce. On 27 January 1971, he declared that Ewing had violated the wage, hour, and record provisions of the FLSA, and issued the injunction the government sought.\textsuperscript{159}

Inevitably, the outcome of labor relations cases turned on the crucial distinctions judges made between interstate and local commerce, as well as on the similarly key divisions of covered and exempted employment. Judge Garza’s sorting of Ewing’s business concerns demonstrated that legal differentiation remained a fundamental judicial duty after Congress enacted the 1966 amendments to the FLSA. Congress eliminated a statutory distinction, which eased the task of judging labor cases. The FLSA finally covered all but the most basic agricultural tasks, such as picking and planting, that is, to quote Justice Douglas, the nation’s “lowest paid and weakest group of wage earners.” However, the practical effect of the amendment was to shift but not eliminate the line separating covered and exempted categories.

Whether the disputes involved maritime, manufacturing, or agricultural employment, the Southern District judges’ task remained, as

\textsuperscript{158} Ibid., 8.
\textsuperscript{159} Ibid., 9-11.
Justice Frankfurter observed, a matter of identifying distinctions "so nice as to be arbitrary."\textsuperscript{160}

\textsuperscript{160} Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949); Frankfurter concurring, 770.
Chapter Three: Border Justice Meets the Counter-Culture: Criminal Docket Management in the Southern District of Texas in the 1960s

... I simply am not interested in what this gentleman considered his constitutional rights to be.

U.S. District Judge Ben C. Connally
*United States v. Timothy Leary* (1966).\(^1\)

When in April 1961 Reynaldo Garza replaced the late Judge Allred in the Southern District of Texas, he became one of only four federal district Judges responsible for trying federal civil and criminal cases in the six court divisions.\(^2\) To cover the expansive territory and fulfill court duties, the judges resorted to old-style circuit riding. For example, Judge Garza principally held court in Brownsville, his hometown on the U.S.-Mexican border, but he periodically trekked 150 miles north, to preside

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over cases in Corpus Christi. Similarly, veteran Judges Hannay and Ingraham divided their time between courthouses in Houston, Victoria, and Galveston, and Judge Connally shuttled between his home in Houston and the border court at Laredo. Judge Noel served in Houston and Galveston. The number of court divisions exceeded the number of judges until the summer of 1966, when the Senate confirmed Judges Singleton and Seals to new judgeships, the District's sixth and seventh. Seals shared some of Garza's duties in Corpus Christi, but Seals and Singleton both sat primarily in Houston.  

In 1962, Connally succeeded Hannay as Chief Judge. This was an administrative position reserved for the judge with the longest service in a district, subject to age restrictions. As the new Chief, Connally might have assigned one of the newer judges to sit in the border. Instead, he retained the responsibility for the Laredo "circuit." Perhaps Judge Connally enjoyed the variety; the cases in the border courts were typically different from those filling the dockets further north. Also, the duty allowed Connally to enjoy regular hunting dove-weekends in South Texas.  

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3 In the 1970s, Congress authorized six additional judgeships, a number sufficient to allow more permanent assignments. In 1984, when Congress created a seventh division in McAllen, there were thirteen authorized judgeships in the District. In 1990, Congress authorized five more seats, for a grand total of eighteen federal district judgeships in the Southern District of Texas.

4 The U.S. Congress created the position of "Chief Judge" in 1948, when only a single judge sat in half of the federal districts. In 1958, Congress
Brownsville, Laredo, and the smaller border points of entry were major conduits of trade with Mexico. Admiralty, contract, labor, and other private controversies generated a substantial share of the cases filed in the border region. However, because the Laredo and Brownsville court divisions served the mostly agricultural Lower Rio Grande Valley, the number of private disputes arising in the border courts was negligible compared to the number of civil lawsuits docketed in a commercial, industrial, and maritime boomtown like Houston. But the border courts were not judicial backwaters. Rather, they were the District's laboratories of criminal case management. Although the Valley generally did not share in the benefits from the rest of the state's economic growth, South Texas was the center of the region's perennial illicit economy.  

Consequently, the U.S. Attorney's office prosecuted more of the Southern District's criminal cases in either Laredo or Brownsville than in any of the much larger divisions in Houston, Galveston, and Corpus

mandated that a Chief serve only until the age of 70 (28 U.S.C. § 136). Connally, who had been appointed in 1949, became Chief Judge of the Southern District in 1962, the year Judge Allen B. Hannay was required to relinquish that position. Hannay remained on the court, however, and did not choose to assume "senior judge" (semi-retired) status until 1975. "Connally," and "Hannay," in Judicial Conference of the United States, Judges of the United States, 2d Ed. (Washington, D.C.: Government Printing Office, 1983) [hereafter: Judges]. Judge Hannay, born in 1892, was appointed by President Franklin D. Roosevelt on 12 August 1942.

Christi. In 1964, when the federal government prosecuted 1150 cases in the District, they filed 255 in Laredo (22.2% of the total). The same year, prosecutors filed only forty-one criminal cases in Corpus Christi (3.5%). In 1965, the government filed 280 of a total 1156 criminal cases in Laredo (24.2%). Since federal attorneys prosecuted a comparable number of cases every year in Brownsville, the border divisions collectively processed nearly one-half of the Southern District's criminal cases. When the number of prosecutions rose in subsequent years, the disproportion in the criminal caseloads grew as well, until by the end of the decade, the border divisions accounted for almost ninety percent of the total. In 1969, federal

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6 The office of U.S. Attorney is defined in Chapter 35 of Title 28 of the U.S. Code (Judiciary and Judicial Procedure). The President appoints one U.S. Attorney for each federal judicial district, subject to confirmation by the Senate (28 U.S.C. § 501), but only the President can remove the U.S. Attorney from office (28 U.S.C. § 504). Within his or her district, the U.S. Attorney has the power, discretion, or duty to: (1) prosecute offenses against the United States; (2) prosecute for or defend the federal government in all civil actions in which the United States is concerned; (3) appear in behalf of the government defendants in federal tax, customs, or other revenue-related civil actions; (4) institute collection proceedings and prosecute for violations of federal revenue laws; and (5) report as the U.S. Attorney General directs (28 U.S.C. §§ 541-550). For political challenges of the office, see, generally: James Eisenstein, Counsel For the United States: U.S. Attorneys in the Political and Legal Systems (Baltimore: Johns Hopkins University Press, 1978); and: Whitney North Seymour, Jr., United States Attorney: An Inside View of "Justice" in America Under the Nixon Administration (New York: William Morrow and Co., 1975).
prosecutors brought 819 of 1913 criminal cases in Laredo (42.8%), and filed 858 in Brownsville (44.85%).

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7 The total cases are available in the 1964 Annual Report of the Director of the Administrative Office of the U.S. Courts (Washington, D.C.: U.S. GPO, 1965). For local annual totals, I rely on the case numbers on the files at the National Archives and Records Administration-Southwest Regional Archives, in Fort Worth, Texas [hereafter: NARA-SWA], which keeps the files for the federal courts in Texas. In 1962, clerks in the Southern District of Texas adopted the following straightforward method of case number assignment, to reflect the year, division, and sequence in which a case was entered on the court docket: the first part of any case number represents the year, the second part is a letter which represents the city, and the final part records the actual order of filing. For example, the case number Crim. No. 65-L-1 represents the first criminal case filed in Laredo in 1965 (dates on the files generally, reflect the accuracy and reliability of the system). In more recent cases, the clerks have reversed the initial two fields, but the general filing system is as I have described. For totals claimed above: NARA-SWA: Record Group (RG) 21, S.D. Tex., Laredo Criminal Docket, 1964-1966, Box 713. Box 713 contains Crim. No. 64-L-255, the last case of 1964; it is followed by Crim. No. 65-L-1. [Note: this is also the system for civil dockets, where “Civ.” replaces “Crim.”] See: United States v. Hanna, et al., Crim. No. 64-C-41; Corpus Christi Criminal Docket, 1964-1969, Box 270. In this Corpus Christi case, filed 28 October 1964, Judge Garza examined three defendants charged on an information for two counts under the Federal Juvenile Delinquency Act (18 U.S.C. § 5031, et seq.). All three pleaded guilty; therefore, Garza found them to be Juvenile Delinquents and consigned them to the custody of the U.S. Attorney General during their minority, and recommended that be committed to separate facilities. However, all went to the Federal Correctional Institution at Englewood, Colorado. The last 1965 case in Laredo is Crim. No. 65-L-280; the next case in this box is Crim. No. 66-L-1; for both, see NARA-SWA: RG 21, S.D. Tex., Laredo Criminal Docket, 1964-1966, Box 722. For other cases, see: United States v. Sustaita, Crim. No. 69-L-819. NARA-SWA: RG 21, S.D. Tex., Laredo Criminal Docket, September through December, 1969, Box 804; and: United States v. Sanchez, Crim. No. 69-B-858. NARA-SWA: RG 21, S.D. Tex., Brownsville Criminal Docket, September through December, 1969 (there are no separate box numbers, but folders are arranged by case name and number).
The annual total of prosecutions in the District rose sixty-six percent over this five year period, 1964 to 1969, but Connally’s criminal caseload in the Laredo division more than tripled. Due to their assignments on the border, Judges Garza and Connally were the Southern District’s chief arbiters of federal criminal justice in the 1960s. This period saw the federal government’s mounting concern with violent crime, especially in cities, and widespread public (and Presidential) demands grew for a return to “law and order.” But the upsurge in prosecutions in the District’s border divisions was not the result of more aggressive law enforcement. Rather, the rising number of prosecutions accurately reflected the increase in the number of crimes committed on the border.

The U.S. Attorney’s office in the Southern District prosecuted the same wide variety of federal crimes which might also occur in other judicial districts. The crimes included interstate transportation of stolen vehicles, counterfeiting of federal securities, assault on federal officers, and robbery of federally-insured banks. But because Texas is separated from Mexico only by the Rio Grande, the state has always attracted would-

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be smugglers and immigrants. Prosecutions under federal immigration or customs statutes consistently dominated the dockets.  

During the 1960s, arrests and prosecutions of these two categories of crime rose to unprecedented levels. Employers’ demands for cheap,

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unskilled immigrant labor often outstripped the number of workers available through legal channels like the federal government’s Mexican “guest worker,” or bracero, program. This ready market ensured that undocumented aliens regularly attempted to cross the border from Mexico, although sustained efforts to prosecute them is relatively recent. After Congress stopped the flow of the legal braceros in mid-

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decade, the number of undocumented Mexican nationals arrested in the
U.S. increased significantly.\textsuperscript{12}

During the same years, a remarkable increase occurred in American
appetites for exotic intoxicants. Traffickers supplied much of the illicit
demand from Mexico. Mexican marijuana became a major cash crop, and
most of it entered the United States through Texas.\textsuperscript{13} As result, a rising

\textsuperscript{12} Congress allowed the bracero system to expire on New Year's Eve 1964
(see: Act of 4 August 1942, 56 Stat. 1759, as amended by the Act of 26
April 1943, 57 Stat. 1152; renewed by the Act of 12 July 1951, Pub. L.
No. 78, ch. 223, 65 Stat. 119, as amended by the Act of 13 December
1963, Pub. L. No. 88-203, 77 Stat. 363). Subsequently, the lawmakers also
abolished the national origins quota in the immigration system. Under the
provisions of the Immigration Act of 1965, every country outside of the
Western Hemisphere received unlimited visas for relatives of citizens and
20,000 visas for ordinary immigrants. For the first time, the 1965 Act set
quotas on immigration from nations in the Western Hemisphere (Act of 3

\textsuperscript{13} Mexico had long been a source of both marijuana and heroin, but the
country became a newly important trafficking, staging, and transit area in
the 1960s, and by the 1970s, as federal drug agents steadily closed off other
sources and routes for shipping drugs into the U.S., the U.S.-Mexico
border emerged as the most embattled front in the emerging federal "war
on drugs." Ultimately, the U.S. government attempted to stem the tide by
enacting a succession of laws to strengthen federal enforcement efforts in
the 1980s. For the emergence of the federal "war," see: Nancy E. Marion,
Praeger, 1994); Christina Jacqueline Johns, *Power, Ideology, and the War
On Drugs: Nothing Succeeds Like Failure* (New York: Praeger, 1992);
and, Eva Bertram, Morris Blachman, Kenneth Sharpe, and Peter Andreas,
*Drug War Politics: The Price of Denial* (Berkeley: University of California
Press, 1996). Also, see: Kevin B. Zeese, "Drug War Forever?," in Melvyn
B. Krauss and Edward P. Lazear, eds., *Searching for Alternatives: Drug-
Control Policy in the United States* (Stanford: Hoover Institution, 1991),
252. I will describe these developments in later chapters.
tide of narcotics prosecutions flooded the Southern District’s Laredo and Brownsville courts in the 1960s, much as bootleg liquor cases had swamped the same divisions during Prohibition.14

* * * *

To keep abreast of the drug cases multiplying on the Southern District’s docket and to facilitate plea bargains, federal prosecutors developed a template which could be applied, with occasional minor adaptations, to the majority of circumstances regardless of the quantity of drugs involved. The basic template was a “tripartite” indictment, consisting of the following charges: first, importing marijuana;15 second,

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14 The Prohibition experience (1919-1933) strained resources in the Southern District of Texas, which due to geographic conjoining to the international border, already handled a large number of smuggling cases. The addition of bootlegged liquor dramatically increased the criminal docket, which during the 1920s made up between one-half and two-thirds of the District’s business. Unlike the many overawed and overworked judges in some jurisdictions, the Southern District’s judge during the Prohibition era, Joseph C. Hutcheson, Jr., handled these routine cases efficiently. Also, Judge Hutcheson was generally lenient when Prohibition offenders came before him, because he recognized that they were “not people set apart, public enemies, but average, ordinary, underprivileged common men” who did not deserve long prison terms. Zelden, Justice Lies in the District, 67-69. The border continued to provide the District with the majority of its criminal cases well after the repeal of liquor Prohibition, because traffic in drugs, aliens, and other contraband remained illegal.

15 The relevant portions of the Narcotic Drugs Import and Export Act (70 Stat. 570), 21 U.S.C. § 176(a) stated: “Notwithstanding any other provision
transporting marijuana; and third, failing to pay the federal transfer tax on marijuana. The first two charges described violations of the narcotics statutes, which carried mandatory prison sentences. A judge could not suspend the sentence or grant probation upon conviction of either of these. However, a judge could grant probation for a conviction under the third charge, the so-called "tax count."

of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned." The possible penalty for violations was 5 to 20 years imprisonment and a possible $20,000.


The relevant part of the Marijuana Tax Act (26 U. S. C. § 4741 et seq.), is § 4744(a), which provided: "It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a) : (1) to acquire or otherwise obtain any marijuana without having paid such tax, or (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marijuana so acquired or obtained." The possible penalty for violations was 2 to 10 years imprisonment and/or $20,000.


The Marijuana Tax Act of 1937 (26 U.S.C. § 2593(a)), was the predecessor statute of the sixties-vintage "tax count." It had been originally targeted at Mexican immigrants, who were generally associated with marijuana use. Marion, A History of Federal Crime Control Initiatives, 24. According to the interpretation of the Supreme Court, the legislative history indicated that the Act was intended "merely to impose a very high tax on transfers to nonregistrants and not to prohibit such transfers entirely." See: Leary v. United States, 395 U.S. 6 (1969), at 22-25.
This "tax count," became the federal prosecutor's best bargaining chip. Under this model, a defendant appeared for arraignment to plead guilty on the tax count, the judge imposed a short sentence, suspended it, and granted probation, and the prosecutor dismissed the narcotics counts. Occasional variations in the model appeared, relating to the youth or prior criminal record of the defendant. But the disposition of the overwhelming majority of marijuana cases was very nearly automatic: three counts but two dismissals, in return for one guilty plea.

The federal prosecutors used a similar tripartite arrangement if heroin rather than marijuana had been smuggled. The model indictment in heroin cases included three charges: unlawful importation of heroin; conspiracy to transport and to facilitate transport and concealment of heroin; and unlawfully purchasing heroin "not in or from the original stamped package." In heroin prosecutions, the unlawful purchase count replaced to tax count as the favored bargaining chip. Otherwise the plea bargaining system was equivalent to the marijuana prosecutions.20

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20 Unlawful importation of heroin (21 U.S.C. § 174; possible penalty: 5 to 20 years imprisonment and a possible $20,000); conspiracy to transport heroin (21 U.S.C. § 174(a); possible penalty: 5 to 20 years imprisonment and a possible $20,000); and unlawfully purchasing heroin (26 U.S.C. § 4704; possible penalty: 2 to 10 years imprisonment and a possible $20,000). The statute proscribing importation and transportation and concealment of heroin, was the Narcotic Drugs Import and Export Act (21 U.S.C. § 174). This was subsequently repealed and its substance recodified (at 21 U.S.C. § 801, et seq.) by the "Controlled Substances Act" of 27 October 1970 (Pub.L. 91-513, 84 Stat. 1242). Purchase "not in or from
Southern District prosecutors also adapted the consecutive-cases model to narcotics smuggling. As a result, there were days in the border divisions when the court processed large numbers of consecutively-numbered narcotics indictments. Drug cases were more complex than the immigration cases, and more varied. For example, the general pattern might be disrupted by a defendant who refused to plead guilty to a tax count, or by a defendant who agreed to plead guilty only after filing a motion to suppress the evidence, which a judge almost inevitably denied. Defendants took risks by resisting the standard bargain, because expressions of a hostile attitude frequently resulted in a longer than usual sentence when a defendant sought re-arraignment to plead guilty to the tax count. However, judges ordinarily also suspended the longer sentences.21

the original stamped package” was prohibited to distinguish narcotics smuggling from the legal importation of legitimate medical narcotics derived from opium, such as morphine.

21 The prosecution’s management machine worked less well when the defendant faced charges which resulted from a vehicle search conducted by the Border Patrol, because there was less room for maneuver. Federal prosecutors charged these defendants under statutes proscribed unlawful importation of marihuana (18 U.S.C. §§ 952 and 960[a][1]), but there was no tax count associated. The pungency odor of marihuana often led to its discovery during these types of searches. In these cases, as we will see, the defendants often moved to suppress the evidence, and when that strategy failed, they usually requested a bench trial rather than a jury trial. The odor of marijuana was ordinarily sufficient to establish probable cause for a search of the vehicle. See: United States v. Perez, 364 F.Supp. 1217 (S.D.Tex., 1972), at 1218 [Corpus Christi Division; Crim. No. 72-C-31]; United States v. Wright, 476 F.2d 1027 (5th Cir., 1973), certiorari denied, 414 U.S. 821 (1973); and: United States v. Alderete, 546 F.2d 68 (5th Cir., 1977). Later, judges determined that the discernible odor of freshly-
Their willingness to assess probation in these cases indicates that federal judges and prosecutors in the Southern District considered marijuana smuggling to be a relatively minor and routine offense. For that reason, they regarded a vigorous defense filled with motions, especially if these included a call for a trial by jury, to be a waste of the court’s time.²²

The exceptional experience of Dr. Timothy Leary proved the rule. Arrested on a marijuana smuggling charge in late 1965, Leary refused to accept his expected role and plead guilty. Instead, in his 1966 trial in Laredo, he mounted vigorous defense. Unlike most defendants, commanded resources which allowed him to challenge the plea bargain system on more equal footing. Leary’s experience illustrated the risks defendants took when they resisted being “managed.” He disrupted the machinery by 1970, but in the long run, he gained little legal relief for

²² As late as 1963, President Kennedy’s Advisory Commission on Narcotic and Drug Abuse described this drug, the original illicit cash crop to come through Texas from Mexico, as relatively harmless. The report suggested, for example, that the lack of addiction associated with marihuana made it less harmful than opiates. Jerome L. Himmelstein, The Strange Career of Marihuana: Politics and Ideology of Drug Control in America (Westport: Greenwood Press, 1983), 90-91. Note: unlike the author of the book above, I have adopted the spelling “marijuana.” Because the spelling “marihuana” predominated in the official literature during the 1960s. My preference will necessitate changing spelling in some quotes, especially statutes, but I will not burden the reader with intrusive notices to this effect.
himself or any other drug defendants. But the spectacle of his legal exertions established Leary’s abiding image as the decade’s most celebrated and notorious proselytizer of psychedelic experiences.  

The publicity which accompanied Leary’s subsequent legal difficulties, including his arrest, conviction, and various appeals, thrust him into the national spotlight and kept him on-stage for years. Leary actively encouraged and ably exploited the fanfare as he attempted to convince the dubious federal judiciary to confirm his asserted right to “alter his own consciousness.”

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I. Prosecuting the Undocumented, Documenting the Prosecuted: Rubber-Stamp Justice?

Compared to civil proceedings, which are often protracted, criminal trials are typically short and straightforward.\textsuperscript{25} By reason of quantity rather than complexity of cases, however, Connally and Garza encountered challenges in Laredo and Brownsville which could be as daunting as any they faced when they administered the burgeoning civil dockets in their other court assignments. The large volume of criminal cases filed on the border forced the judges to become managers of the criminal dockets, as well as the civil. Criminal law a variety of public law, but a major difference existed between judicial management of civil "public law litigation" and criminal trials. Judges, who act as "gatekeepers" of the federal courts when they declare points of law, fact, and procedure in civil cases relative to attorneys assumed a secondary role in criminal matters.

Prosecutors, not judges, performed the primary gatekeeping function in the administration of criminal justice.\textsuperscript{26}

Judges enjoyed a large measure of discretion when they decided legal or procedural questions during the course of a criminal trial, but prosecutors determined to pursue the case in the first place. Similarly, district attorneys influenced the style and content of the prosecution when they decided what charges to file against a defendant. Among other factors, prosecutors weighed the risk that the defendant would win acquittal on a specific charge against the likelihood that the government would win conviction. These pragmatic calculations were necessary because trials were expensive and time-consuming. Before seeking an indictment, federal prosecutors had to conclude that the seriousness of the crime merited the expenditure necessary to conduct a trial.\textsuperscript{27}

To clear the Southern District's overburdened criminal dockets of the most common cases, immigration and narcotics, the Assistant U.S.

\textsuperscript{26} Kevin L. Lyles, \textit{The Gatekeepers: Federal District Courts in the Political Process} (Westport: Praeger, 1997).

Attorneys (AUSA) on the border employed methods which roughly corresponded to the pre-trial conferences judges used to manage "public law litigation." For example, because experience showed that the combination of charges influenced a defendant’s willingness to accept a plea bargain, the prosecutors frequently manipulated the catalogue of charges in the indictment. To induce a defendant to "settle" a criminal case before trial, the prosecutor might levy a multi-charge indictment but offer to dismiss the most serious charge if the defendant agreed to plead guilty to the less serious. A prosecutor could agree to recommend a light sentence or probation in return for the guilty plea, but could not promise a defendant either probation or a specific sentence. Sentencing remained a judicial prerogative, and federal criminal procedure prohibited the judge from participating in the negotiations. The rules directed judges to examine a defendant in order to make an independent determination that a plea was voluntary, that is, not the result of force, threats, or promises for a particular sentence. A judge was bound to quash a deal if a defendant pled guilty but continued to proclaim innocence.29

Nonetheless, for a plea bargaining system to have one of its most important intended effects, that is, for the system to reduce the burden of

28 AUSA’s are formally appointed by the President, but they are ordinarily subject to removal by the Attorney General (28 U.S.C. § 503). Eisenstein, Counsel For the United States, 35.
trying routine cases, judges had to play their assigned roles.\textsuperscript{30} The judges had consistently to reward the defendant's cooperation with a light sentence, or to impose a heavy sentence when the defendant refused to plead guilty and forced the government to stage a full trial in a routine case. Frequent judicial rebuffs of the prosecution, whether manifested as rejections of guilty pleas, imposition of heavy sentences in return for guilty pleas, or imposition of light sentences after trial, would reduce the efficacy of a useful tool of court administration. Knowledgeable defense attorneys would lose confidence, and advise their clients to decline any proposed deals.\textsuperscript{31}


\textsuperscript{31} Since their presence is believed to be "inherently coercive," trial judges are usually not participants in plea negotiations (depending on local or state rules). Although judges may review a proposed bargain prior to accepting a plea of guilty during the arraignment process, they effectively have no more than a veto, which may be further constrained by case pressure. Anne M. Heinz and Wayne A. Kerstetter, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining," \textit{Law & Society Review} 13 (1979): 350. Some commentators conclude that judges ought to play a larger and more positive role in pretrial proceedings. See: Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I," \textit{Columbia Law Review} 76 (1976): 1154; Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," \textit{Yale Law Journal} 84 (1975): 1179.
Connally and Garza rarely upset the course of the plea negotiations. An overwhelming number of defendants, particularly those charged with immigration and narcotics violations, agreed to plead guilty. When a defendant pled guilty to a charge allowing probation, the prosecutor typically dismissed remaining counts and the judge routinely suspended the associated prison sentence in order to set conditions for probation. Institutionalized plea bargaining was neither unique to the legal culture of the border divisions nor was the system of the 1960s unprecedented in the Southern District. Unless the practice was prohibited by statute, many prosecutors, defense attorneys, and judges negotiated. Early in the century, when smuggling usually involved livestock or small amounts of mescal (a Mexican liquor), it was common for a Southern District judge to reward a guilty plea with a light sentence or probation. During World War I, judges matched guilty pleas with light sentences in draft evasion cases, many of which involved recent refugees from the Mexican Revolution who were reluctant to submit to the U.S. military induction. In the 1950s, during the federal government’s "Operation Wetback" crackdown on illegal immigration, the Southern District judges and prosecutors dedicated whole days or weeks in the border divisions to the disposition of routinely plea-bargained undocumented alien cases.³²

³² Zelden, Justice Lies in the District, 50-53, 62-72, 98-100, 191-193. In 1954, the U.S. government conducted mass arrests and deportations in a
Precedents notwithstanding, plea bargains in the border divisions developed singular characteristics during the 1960s. Given the volume, the routine disposition of the systematically plea-bargained immigration and narcotics prosecutions approximated an assembly line.

Connally and Garza were particularly reliant on the success of plea agreements. Judicial acquiescence in plea bargaining is distinct from but nonetheless analogous to judicial intervention in the civil suits of "public law litigation." In both, the judges are obliged to consider the deeper implications or wider effects of their decisions in individual cases, rather than remaining neutral referees in a single proceeding. The viability of the court system itself was the larger issue at stake in the smooth operation of plea bargains and other management mechanisms in the Southern District's Laredo and Brownsville border divisions. And for that reason, Connally and Garza were especially concerned when defendants bucked the system,

for the court’s administrative machinery would halt if prosecutors attempted to try more than a small percentage of routine cases.33

This assembly line characteristics of the court’s disposition of routinely plea-bargained undocumented alien cases was enhanced by the routine practice of docketing together cases based on indictments brought under the same criminal statutes. Docketing procedure, which required that the clerk of the court participate in pre-trial management. The administrative benefit of this filing system was that a judge could call consecutively-numbered cases for trial, or more often for arraignment where the defendant would all enter guilty pleas, and could then could dispose of a large number in swift succession.34

33 The U.S. Department of Justice receives criminal referrals from other government agencies, and then applies discretion in the disposition of a case, ranging from decisions to plea bargain or to prosecute. In the fiscal year ending 30 June 1970, the Justice Department filed 38,079 criminal cases in the U.S. courts. The leading category was motor vehicle thefts (referred by the FBI), the second most frequent category was draft violations (from the Selective Service Administration), and the third was Immigration Act violations (referred by the Immigration and Naturalization Service). Most often, referrals were filed directly to the U.S. Attorney of the district where the offense allegedly occurred, and there was little bureaucratic review of local decisions, except with regard to decisions to dismiss a previous indictment, which is supposed to be with prior approval. Robert L. Rabin, “Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion,” Stanford Law Review 24 (1972): 1037-1038.

34 For further discussion of plea bargaining due to heavy caseloads, and for other comparisons to an assembly line, see: Norman Abrams, “Internal
As example, on 19 April 1965, AUSA Thomas Morrill sought indictments against more than two dozen undocumented aliens who had been apprehended within the previous month, usually by the officers of the U.S. Border Patrol, the enforcement branch of the Immigration and Naturalization Service (INS). Page 246

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35 Border Patrol officers act under supervision of the U.S. Attorney General (8 U.S.C. § 1103). The Congress created the Border Patrol with the INA of 1924 (currently codified at: 8 U.S.C. § 1357, et seq.). The Deportation Act of 4 March 1929 amended the 1924 Act to streamline the deportation process. The new law also made it a federal felony for a deported alien to reenter the U.S. (under 8 U.S.C. § 1326). The INS, the Border Patrol’s parent agency, was not originally within the Justice Department. On 10 June 1933, Congress merged the Bureau of Immigration with the Bureau of Naturalization to create the INS. Because the federal government expected immigrants to join the work force, lawmakers originally put the INS under the authority of Secretary of Labor Frances Perkins. By the end of the decade, however, high-ranking diplomats in the State Department were unhappy with Perkins’ efforts on behalf of refugees from war-torn Europe, and encouraged President Franklin D. Roosevelt to support the transfer of the INS to the Department of Justice, where it would operate under Attorney General Robert Jackson. The Congress enacted the transfer on 14 June 1940. Thereafter, an immigration service which was created to enforce domestic racial policy during a period of extreme nativism, was to be associated with national security, because the mission of the INS and its Border Patrol were linked to the FBI’s job of keeping out foreign spies and saboteurs. As a result of these wartime responsibilities, INS budgets increased, its personnel more than doubled (to 8500) by 1942, and the service was poised to respond when FDR signed an executive order authorizing the internment of Japanese-Americans. Fitzgerald, Face of the Nation, 164, 173, 184-185. Many Mexican-Americans considered the Border Patrol to be an historically abusive and racist organization. Armando B. Rendón, Chicano Manifesto: The History and Aspirations of the Second Largest Minority in America (Berkeley, CA: Ollin and Associates, 1996; twenty-fifth
these defendants than he might otherwise have faced, because Border Patrol
officers routinely performed their own gatekeeping to reduce their
administrative burden. The officers processed as many of the violators as
they could manage, but allowed most of the Mexican nationals they
apprehended to depart "voluntarily" from the U.S.36 Morrill sorted the

Patrol abuses include "breaking," the psychological or physical abuse by
officers to obtain information regarding immigration status. Texas
Advisory Committee to the U.S. Commission on Civil Rights. Sin Papeles:
For more sympathetic yet not wholly positive views of the Border Patrol, see:
and Nationalization Service, 11; and: Paul R. Ehrlich, Loy Bilderback,
and Anne H. Ehrlich, The Golden Door: International Migration, Mexico,
Note: the Border Patrol is principally concerned with crimes related to
immigration, but its officers wear "two hats," one as INS and another as
Customs officers. Hence, a sub-category of defendants in the Southern
District of Texas were drug offenders who were apprehended some
distance from the border, but within the authorized range of Border Patrol
officers. I will discuss this sub-category of crime in a later chapter.
36 Heer, Immigration in America's Future, 120-121. The apprehension
statistics compiled by the INS illustrate the phenomenon. In 1964, when
the INS arrested 86,597 undocumented aliens, 43,844 (51%) were Mexican
nationals. The service apprehended 283,557 aliens in 1969, including
201,636 (71%) Mexicans. U.S. Department of Justice, 1964 Annual Report
convictions for violations reflected the vastly lower number of detainees
formally prosecuted. In 1964, the courts convicted 2882 defendants. In
1969, the number was 4623. Moreover, there were 154 convictions for
illegal entry in fiscal year 1964, but the number of convictions only grew
to 5084 in 1971, and to 10,292 in 1972. According to one author who has
examined this practice, "over ninety percent of Mexican 'wets' arrested are
allowed to 'voluntarily' depart." William T. Toney, A Descriptive Study
of the Control of Illegal Mexican Migration in the Southwestern U.S. (San
remaining detainees into cohorts according to the applicable immigration statutes, and indicted them in that order. On 17 May, when Judge Connally arraigned the defendants in his Laredo courtroom, he maintained the order.\textsuperscript{37} According to long-standing legal doctrine, undocumented alien defendants were among the “persons” protected under the Fourteenth Amendment, and they enjoy the same legal rights in court as U.S. citizens, including the right to have a defense attorney provided at public expense, the right to a jury trial, and the right to appeal an unfavorable judgment to a higher court.\textsuperscript{38}

\textsuperscript{37} AUSA Morrill sought the indictments from a federal grand jury in Brownsville, but he sent the cases to be tried in Laredo. Morrill acted locally on behalf of U.S. Attorney Woodrow B. Seals, who officially directed the prosecutions from the Southern District’s Houston headquarters. AUSA Ronald J. Blask is listed as the prosecutor in a few of the cases.

\textsuperscript{38} In 1896, the U.S. Supreme Court declared that the Fourteenth Amendment did not limit its protection to U.S. citizens. \textit{Wong Wing v. United States}, 163 U.S. 228 (1896). The primary difference in alien defendants’ legal standing is that, if convicted, they will be deported after serving a criminal sentence. Heer, \textit{Immigration in America’s Future}, 122. However, throughout the twentieth century, aliens (like many other “persons,” including many American citizens) have been obliged to undertake litigation to establish the scope of these protections. Oren, “Comment, The Legal Status of Undocumented Aliens: In Search of a Consistent Theory,” 669-673. Oren dedicates much discussion of the right to an education, but her analysis is grounded in the idea that courts often illegitimately muddle the categories used in immigration law (for example, an aliens’ breach of the laws of illegal entry) with other legal rights. As a result, courts too often treat aliens as an “outlaw” class without any rights
Notwithstanding, the first defendant in the queue on 17 May, Benito Soto Cano, a 34 year-old Mexican national, waived counsel and pled guilty to a charge of falsely representing himself to be a U.S. citizen. Connally sentenced him to ninety days, but suspended the sentence for five years, on condition that Cano attempt no illegal return to the U.S. This established a pattern, one only rarely disrupted. Cano was followed by seven defendants who were charged with the identical crime. All mimicked Cano’s waiver and guilty plea, all received the same judgment.

The remaining defendants in this “run” of consecutively filed, indicted, and arraigned cases likewise waived counsel and pled guilty, whatever the specific violation charged. A few received the judge’s individual attention, however, usually because that defendant was a repeat offender. For example, members of a second cohort of defendants were charged with unlawful re-entry. The first in this line, 52 year-old Antonio Medina Delgado, waived counsel, pled guilty and received a

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40 8 U.S.C. § 1326 (possible penalty: 2 years imprisonment and/or $1000).
sentence of eighteen months, suspended for five years.\textsuperscript{41} Then Andres Juarez Gallegos, 27 years old, also pled guilty. The judge gave the younger man, as well as each of the next thirteen defendants indicted on this same charge, ninety days. As with the previous cohort, Connally suspended the sentences for five years conditioned on no illegal return. Whatever the judge’s motive (which he did not record on the case file) for giving Delgado a longer formal sentence, he gave all defendants the same conditions for probation.\textsuperscript{42} The next three defendants, beginning with 36 year-old Homero Delgado Salazar, each pled guilty to the charge of impersonating another person for the purpose of evading immigration laws, which implied that when challenged by the Border Patrol, the defendant presented a forged or altered “Non-Resident Alien Mexican Border Crossing Card.”\textsuperscript{43} Again, Connally imposed ninety day sentences which he suspended for five years on condition of no illegal return.\textsuperscript{44}

This “run” of alien arraignments concluded with Connally’s individual judgments of two defendants charged with more serious violations. Tomas Rojas Leal, 25, waived counsel and pled guilty to a single count of alien smuggling, that is, of “unlawfully importing, landing,


\textsuperscript{43} 18 U.S.C. § 1546 (possible penalty: 5 years imprisonment and/or $2000).
and transporting aliens” in the U.S.\textsuperscript{45} Originally, Leal had been indicted on four counts, indicating that he was guiding four other aliens when the Border Patrol arrested him. The government dismissed three counts after Leal agreed to plead guilty to one. Connally sentenced Leal to thirteen months, but, again, he suspended the penalty for five years.\textsuperscript{46} Finally, Socorro Castillo De Leyna, 42, pled guilty to violating his probation.\textsuperscript{47} The judge sentenced him to two years, to be served consecutively with a recent two-year sentence which Connally himself, ironically, had suspended. After betraying the judge’s trust by accepting probation and then returning to the U.S., De Leyna faced the prospect of actually serving a total of four years in federal prison prior to deportation.\textsuperscript{48}

Undocumented alien cases do not make good examples of plea bargaining procedures. It is unlikely that the prosecutors actually negotiated with the defendants, or that the defendants adequately

\textsuperscript{45} 8 U.S.C. § 1324 (a); possible penalty: 5 years imprisonment and/or $2000 for each alien. This was also an emerging problem. The INS reported 525 cases of alien smuggling in 1965, but found 4564 cases in 1972. The number of smuggling cases reached 8074 by 1974. \textit{1965 Annual Report}, 9; \textit{1972 Annual Report}, 9; and: \textit{1974 Annual Report}, 11.
\textsuperscript{46} Because Leal was a U.S. citizen, probation was conditional on continued good behavior. \textit{United States v. Leal}, Crim. No. 65-L-103. NARA-SWA: RG 21, S.D.Tex., Laredo Criminal Docket, 1964-1966, Box 716.
\textsuperscript{47} 18 U.S.C. § 751 (the “escape act”).
understood their rights. However, the Laredo court proceedings on 17 May 1965 illuminate the "assembly line" docket management style that emerged in the Southern District. Well before Garza or Connally sat on the bench, the Southern District judges and prosecutors facing similar institutional pressures in the same border courts used comparable techniques to dispose of their routine cases. By the mid-1960s, this administrative machinery worked smoothly; defendants seemed to know, if only from jailhouse gossip, how the system operated and what was expected of them. Like the judges and prosecutors, the defendants had to play their assigned roles.

As the rate of immigration violations rose steadily throughout the decade, the Southern District’s plea bargain and consecutive docketing regime kept pace. In complex cases, the docket sheet was a chronological record of motions, hearings, and judgments in a trial. In simpler alien cases, however, several handwritten lines or typed phrases, on an otherwise blank form, make up the complete written record. In 1965, the clerk usually typed a standard note, which indicated that on a certain date a defendant waived the right to counsel, pled guilty to a specified charge, and received a short, immediately suspended sentence. Frequently, the typist left a blank for the sentence to be filled in by the judge upon final

disposition. The consecutively-numbered runs of cases extended longer than ever by 1969, when, rather than typed notes, the docket sheets bear a rubber-stamped block that indicated the standard waivers, pleas, and sentence. There were still blank lines to be filled in by hand, but the stamps indicated that the Southern District's alien processing practices had advanced to the point (or else had grown so routine) that Connally and Garza literally rubber-stamped the plea agreements.

The delay between indictment and arraignment contracted, until in many instances, those key events apparently occurred on the same dates. On 4 August, for example, Judge Connally arraigned more than three dozen undocumented aliens defendants who, according to the court's records, the prosecutor had also indicted on 4 August. The first cohort was the largest. Connally arraigned twenty-four defendants charged with unlawful entry to the U.S., and each waived counsel, pled guilty, and received a ninety day sentence, which the judge suspended for five years on the condition not to return illegally.\footnote{Under statute: 8 U.S.C. § 1325; United States v. Gonzales, Crim. No. 69-L-484, NARA-SWA: RG 21, S.D.Tex., Laredo Criminal Docket, June through August, 1969, Box 795. Judge Connally presided over many day-long "docket calls" in 1969 which seemed to feature this marvel of efficient administration. Given the number of defendants involved in the system, it is unlikely that the Southern District's organization was as finely-tuned as the dates indicate, and it is difficult to determine three decades after the face whether they are accurate representations. There are instances during this period of docket}
defendants who pled guilty to unlawful re-entry. They received the same sentence as the preceding two dozen first-time entrants. Six defendants followed who pled guilty to false representation of U.S. citizenship. Rather than ninety days suspended, the judge sentenced all six to ten months, but suspended with five years condition. He assessed the same sentence and conditions on the next five defendants, who pled guilty to false "personation" to evade immigration. Their cases were the last in the 4 August "docket call." The next day, Connally arraigned a large group of undocumented aliens whom the prosecutor had indicted that day. The arraignment process repeated the earlier docket calls. When variations arose they usually went unexplained. For example, Belen Medina Flores, one of the defendants charged with unlawful entry on 5 August, did not waive counsel. Connally appointed attorney Mancisco Flores to represent the calls occurring one or two days after indictments, which is plausible. It is likely that the administrators simply prepared the documents simultaneously, or nearly so. Whatever the facts, they assembly-line had clearly been accelerated since 1965, when a month passed between indictment and arraignment.

defendant. But the outcome was the same as with any of the unrepresented aliens: the judge declared a ninety-day sentence, and suspended it for five years, in exchange for Flores’ guilty plea.\textsuperscript{53} Assistant U.S. Attorney Ron Blask had indicted Manuel Dario Monreal De La Cruz, the last alien Judge Connally arraigned on 5 August, on the charge of transporting aliens into U.S. Alien trafficking was a more serious matter than unlawful entry and its variants, and the judge typically treated those offenders more harshly. Perhaps realizing this, De La Cruz retained a defense attorney, Richard Morales. De La Cruz pled guilty. Connally sentenced him to three years; however, he ordered De La Cruz to serve only six months, and suspended the balance for five years, on the condition of no illegal or even legal return.\textsuperscript{54}

The Southern District administrators could not sustain the swift turnarounds of indictment and arraignment, but continued to schedule consecutive days to process undocumented alien cases. Connally arraigned a large group of alien defendants, a docket call of forty-four, on 23 September, for example. They had been indicted three weeks earlier, on


30 August. But, on the same day, the judge arraigned twenty-four aliens who had been indicted on 12 September. The next day, Judge Connally arraigned relatively few aliens, but those he did arraign were repeat offenders who had earned special judicial wrath by violating the conditions Connally had established for leniency. The judge afforded them more particular attention than was usually possible. In these instances, at least, Connally refrained from passing judgment with his rubber-stamp (literally and figuratively: the docket sheets in these case files seem to mark the first appearance of customized new form, with the violation pre-printed).

Despite this small measure of individualism, the cases were indicted together on 22 September, presumably to facilitate Judge Connally’s disposition of them in efficient, consecutive order. Each defendant waived counsel and pled guilty to unlawful re-entry to the U.S. The first, Mario Sepulveda Davila, received a suspended sentence for unlawful entry in the spring of 1967, but was re-apprehended on the U.S. side of the border in

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August 1969. Judge Connally sentenced him to nine months to be served.  

The next defendant, Luis Maldonado Flores, had been arrested in February 1969, processed and repatriated, and re-arrested in August. But the judge sentenced Flores to the standard ninety days suspended, conditioned on five years with no illegal return. Connally did not record his reasons for extending Flores but not Davila a second chance at a suspended sentence.  

It is clear why Jose Roberto Martinez Garcia received nine months to be served: he was arrested on 14 August, processed by the court and repatriated, and re-arrested in the U.S. less than one week later, on 20 August. The judge gave the remaining defendants sentences between ninety days suspended (the lightest), and two years to be served (the heaviest).  

Again, the thin case records do not explain his rationale.

These cases suggest the potential effects on individual alien defendants of more deliberation by the judge. The increased judicial

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attention resulted in more disparate sentences. But it is not obvious whether that outcome also indicates more justice in the sentencing. The assembly line arraignment in undocumented alien cases provided for a measure of judicial impartiality, despite the absence of individual consideration of the defendants’ circumstances, guilt, or innocence. The result of the pragmatic numerical filing scheme was a near-automated courtroom. The procedures were antiseptic and dehumanizing in their sameness. Nonetheless, Judge Connally’s rubber-stamping ensured judicial evenhandedness when considering defendants, in that he gave most of them the same sentences. Fortunately, the judge favored repatriation over incarceration.

In Brownsville, and occasionally in Corpus Christi, where he tried some overflow alien and drug cases, Judge Garza followed Judge Connally’s example. Approximately once every month, and then more frequently late in the decade, the local prosecutor indicted dozens of undocumented aliens who, when brought into the court in consecutive order, waived counsel, pled guilty, and received suspended sentences in a ritual that amounted to a collective trial. Whatever their failings as due process, Garza has maintained that these routine docket calls responded reasonably to conditions on the border. It was a foregone conclusion that

the alien defendants would have to be repatriated to Mexico, and the collective proceedings reduced the INS detainees’ misery by limiting the length of their confinement to the time they had served awaiting arraignment. Furthermore, the practice benefited the court system by clearing cells and dockets, thereby freeing physical space and judicial attention for more serious matters, such as narcotics trials.62

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The routine disposition of narcotics cases provide the best examples of systematic plea bargaining in the Southern District’s border divisions. Narcotics defendants in the Laredo and Brownsville courts were particularly motivated to plead guilty, because they often had no hope of prevailing in a trial. Significantly, most drug defendants had been arrested

62 More than thirty years later, Garza was still proud of the efficiency of this innovation. See: Oral History Interview (OHI) with Reynaldo G. Garza in Brownsville (30 March 1998), by S.Wilson (in the possession of the author). Also: Fisch, All Rise, 94-95. Garza has received some criticism for his complicity in these mass hearings in a book review of Fisch’s biography, which also does double-duty as a fictionalized musing on race and politics. But the author of the review, a prominent critical legal studies scholar and a law professor at University of Texas, concluded that “Judge Garza’s legal training did not equip him with a theory for understanding [the undocumented aliens’] predicament in any other terms,” and “[i]t would have taken a judicial genius to pioneer a new approach, especially back then.” Richard Delgado, “Book Review: Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary,” Texas Law Review 75 (1997): 1192.
after being stopped and searched at a border crossing by inspectors of the U.S. Customs Service. Under a long-standing “border search” exception to the Fourth Amendment’s probable cause and warrant requirements, Customs agents were authorized to conduct a peremptory warrantless search of any person, container, or vehicle which crossed a border.63

63 The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (U.S. Constitution, amend. 4). The Customs inspectors acted under the supervision of the Secretary of the Treasury (19 U.S.C. § 6). Nominally, they relied on their “mere suspicion” that contraband was being smuggled, but this vague standard often meant there was no suspicion at all. Gregory L. Waples, “Note: From Bags to Body Cavities: The Law of Border Search,” Columbia Law Review 74 (1974): 56. In July 1789, two months before they proposed a warrant requirement be added to the new Constitution and two years prior to the states’ ratification of the Fourth Amendment, members of the first federal Congress enacted a Customs statute to empower “specially appointed” collectors to search any ship or vessel for “goods, wares or merchandise subject to duty,” and did not require the officers to obtain warrants. The 1789 statute provided: “every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise . . . .” (Act of 31 July 1789, ch. 5, sec. 24, 1 Stat. 29). The language indicates the extent to which the Atlantic seaboard was the main “border” of consequence to the United States in 1789. When subsequent Congresses revised the statutes, they preserved the collectors’ unique authority to conduct warrantless border searches. Congress repealed the original statute in 1790, only to replace it with a similar law (Act of 4 August 1790, ch. 35, secs. 48-51, 1 Stat. 145, 170). In a subsequent session, the same lawmakers passed a similarly-worded act to authorize the warrantless entry and inspection of federally-licensed distilleries and liquor warehouses (Act of 3 March 1791, ch. 15, sec. 24, 1 Stat. 199). See: Act of 18 February
Furthermore, federal judges deemed the exception’s boundaries to be “elastic.” Rather than confining the effect of the exception solely to a physical barrier corresponding to a line on the map, judges determined it

1793, ch. 8, sec. 27, 1 Stat. 305, 315; and: Act of 2 March 1799, ch. 22, secs. 68-71, 1 Stat. 627, 677-78. The current enabling statute (19 U.S.C. sec. 482) is derived from an act of 18 July 1866 (14 Stat. 178, ch. 201 sec. 3, codified R.S. sec. 3061), which placed the U.S. Customs Bureau under the supervision of the Treasury Department. Federal judges consistently approved this feature of Customs law. But when endorsing the border search exception, the Supreme Court has usually invoked the historical context, and put great stock in the fact that the same Congress passed both the Customs law and the Fourth Amendment. See: Boyd v. United States, 116 U.S. 616 (1886), at 623. Some critics complain there is no historical evidence “that Congress ever measured the searches authorized by the Customs act against the standards set by the proposed fourth amendment.” Waples, “From Bags to Body Cavities,” 54, note 7. For similar criticism, see: “Note, Border Searches and the Fourth Amendment,” Yale Law Journal 77 (1968): 1001. For border searches at the beginning of the latest drug crisis, see: “Note, Search and Seizure at the Border---The Border Search,” Rutgers Law Review 21 (1967). For analysis of the passage of the Constitution and the Bill of Rights in the context of the Revolutionary era, including the memory of general warrants and writs of assistance, see: Harris J. Yale, “Note: Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception,” Hofstra Law Review 11 (1983): 739-752. Judges have attempted to limit potential abuse of the exception by confining its exercise to operations conducted on or near the border by Customs personnel. For example, the courts have held that border searches “are not limited to searches at an international boundary though they must have a relation to it.” Judith B. Ittig, “The Rites of Passage: Border Searches and the Fourth Amendment,” Tennessee Law Review 40 (1973): 329. Also: Harriet J. Sims, “Recent Development,” Georgetown Law Journal 65 (1977): 1647. Judges deferred to an enabling clause, under which the Customs statutes are to be given the broadest possible scope. See: 19 U.S.C. secs. 1581-1582.
was reasonable to allow "extended" border searches in a greater "border area." 64

Judge Connally strongly supported this broad interpretation in a case against one defendant, Gilbert Rodriguez, Jr., which only indirectly concerned drugs or other contraband, but which directly examined the scope of the border search exception. In January 1956, Connally had convicted Rodriguez in the District's Houston division for "unlawfully acquiring marijuana." 65 In 1959, after serving several years in prison, Rodriguez returned to Houston. Customs agents there doubted that confinement had rehabilitated Rodriguez, and they predicted that he would travel to Mexico for marijuana. In June 1959, the agents distributed a description of Rodriguez's car and alerted Customs personnel in Laredo. On 25 July, Rodriguez did visit Mexico, but the inspectors on duty at the border did not recognize him. When Rodriguez returned from Mexico on 1 August, he still attracted no attention. After the casual sort of Customs inspection most tourists experienced upon their return to the U.S., Rodriguez received a copy of his declaration form and continued his trip home. 66 A federal statute required persons previously convicted for narcotics violations to register with the Customs inspectors when either

64 Waples, "From Bags to Body Cavities," 56-57.
exiting or entering the country, but Rodriguez did not register. During a similar trip five weeks later, Rodriguez registered, but upon his return to the U.S., the inspectors allowed him to proceed without scrutiny. Only after he left Laredo for Houston did the inspectors realize that Rodriguez was the individual the Houston office had identified as a suspicious traveler. The Laredo agents alerted colleagues at a highway checkpoint twenty miles north of the border, where agents stopped Rodriguez and returned him to the border station. In Laredo, inspectors searched the vehicle but failed to discover narcotics. However, they found Rodriguez’s own copy of the declaration from his earlier journey. When one Customs agent telephoned call to determine if Rodriguez had registered in July, he volunteered that he had not. The agents arrested Rodriguez and charged him with two

67 The narcotics violator registration statute provided, in relevant part: “(a) . . . no citizen of the United States . . . who has been convicted of a violation of any of the narcotics or marihuana laws of the United States, . . . the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee at a point of entry or a border customs station . . . (b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1000 or imprisonment for not less than three years, or both.” (18 U.S.C. sec. 1407). For questions and critical analysis of registration statutes, see: James R. Suiter, “Comment, Self-Incrimination and Registration Statutes: A Case Against Constitutionality,” Houston Law Review 4 (1966): 507.
counts of violating the registration statute: one count for exiting the country without registering, and one for entering.  

On 1 April 1960, Rodriguez faced Judge Connally, this time in Laredo. Rodriguez did not dispute the charges. Instead, his defense attorney asserted that the case rested entirely on evidence from the "confession" Rodriguez offered regarding his failure to register at the border, and asked the judge to suppress the admission. Connally denied the motion because Rodriguez's admission was "voluntary in every respect [and had been] forthcoming from the defendant without his having been questioned, and before the officers had considered the defendant to be under arrest." Then Rodriguez's attorney moved to suppress the registration form itself, arguing that Customs agents lacked probable cause to initiate the warrantless search of a vehicle stopped twenty miles north of

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68 He spent the night in jail, and was arraigned before a municipal judge the next afternoon. The United States Commissioner in Laredo was unavailable for the arraignment. United States v. Rodriguez, 195 F.Supp. 513, 514-515.
69 Ibid., 516. In 1960, prior to the Warren Court's "due process revolution," the admissibility of confessions was controlled by the "McNabb-Mallory" rule, which was named for two cases: McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957). Under the "McNabb-Mallory" rule, law enforcement officials had no positive duty to inform suspects of their rights against self-incrimination, but a judge could scrutinize the "voluntariness" of an admission offered in police custody with an eye to the "totality of the circumstances," and might suppress evidence if it was obtained through intimidation or coercion. The rules for "voluntary" admission became problematic after the Supreme Court's decision in Miranda.
the border. Judge Connally declared that the standard of probable cause was relaxed at or near the border, and noted that no authority restricted Customs' power to search to the immediate proximity of the border. The judge announced that he doubted that the laws of search and seizure rendered a suspect immune from interrogation and examination by Customs agents after "momentarily escap[ing] detection and pass[ing] safely through" the first checkpoint at the physical border. Finally, Connally believed that the information Customs supervisors transmitted in June 1959 gave inspectors sufficient probable cause to detain Rodriguez, once they recognized him. Connally declared that this suspicion was adequate reason to heighten scrutiny, particularly in South Texas, where "it is common knowledge (at least to those of us who through duty or choice have considerable familiarity with the narcotic traffic) that the Mexican border immediately opposite the city of Laredo, Texas, is a prolific source of illegal narcotics, and that large quantities are smuggled through that port daily." 71 Judge Connally declared Rodriguez guilty. 72

Judge Connally's rationale for approving the sloppy Customs enforcement in Rodriguez's case typified the prevailing judicial attitude about the extended the boundaries in border searches. Judges would

71 Ibid., 516.
consistently defend the actions of Customs agents, and this “exception” became the rule. Some narcotics defendants who were arrested after warrantless searches questioned the Customs inspector’s power to conduct them, and attempted to undermine the force of the exception by moving to suppress the evidence. Judges rarely consented to these motions. The vitality of the exception for Customs searches at the border forestalled any realistic reliance, for example, on the due process protections that the U.S. Supreme Court advanced during the celebrated “criminal procedure revolution” of the 1960s.\textsuperscript{73}

\textsuperscript{72} Rodriguez appealed, but the Fifth Circuit Court of Appeals affirmed the conviction on 24 July 1961. \textit{Rodriguez v. United States}, 292 F.2d 709 (5th Cir., 1961).

\textsuperscript{73} During the 1960s, the revolution in police procedure respecting the civil rights of the criminally accused occurred in parallel with the race-oriented civil rights revolution, and it usually advanced by the same means, through civil litigation. Like school desegregation and other civil rights cases, Chief Justice Warren is credited (or, alternatively, excoriated) for fostering the criminal rights revolution symbolized by such landmarks as: \textit{Mapp v. Ohio}, 367 U.S. 643 (1961) concerning the exclusionary rule; \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963) affirming the right of the indigent to counsel in a criminal case; \textit{Escobedo v. Illinois}, 378 U.S. 438 (1964) establishing the right to have counsel present during police questioning; and \textit{Miranda v. Arizona}, 384 U.S. 436 (1966) confirming the right to have counsel and the right to withhold testimony that may self-incriminate. Lawrence M. Friedman, \textit{Crime and Punishment in American History} (New York: BasicBooks, 1993), 300-304. In the years since what some believe was the “failure” of the revolution, critics have complained that the Supreme Court draws exceptions less carefully than it should. According to one accounting, as of 1985, the Court had enumerated twenty-six exceptions to the Fourth Amendment. Craig M. Bradley, \textit{The Failure of the Criminal Procedure Revolution} (Philadelphia: University of Pennsylvania Press, 1993), 165-166. The list of legitimate warrantless
A heroin smuggling case from 1965 illustrated the consequences to the defendants of the judicial deference to border searches in the Southern District. Late on 18 November 1965, fifteen miles south of Falcon Heights, a small Texas community on the Rio Grande, an off-duty Customs agent named Galanos observed an unusually slow-moving car on U.S. Highway 83. The driver U-turned, proceeded a short distance, completed another U-turn, and then left the highway onto a road which led to a shallow spot of the Rio Grande directly across the border from Nueva Ciudad Guerro, a Mexican town Customs officials considered a haven of narcotics dealers. Galanos chose to wait on the highway. Fifteen minutes later the same car reappeared and resumed its progress along U.S. 83. Galanos followed for seventy miles, to Laredo, where he observed the occupants register at a motel.74


74 U.S. 83 enters Texas in the northern panhandle region, adjacent to neighboring Oklahoma, and runs generally north-south, approximately bisecting Texas until the highway reaches the U.S.-Mexico border at Laredo. From Laredo, the highway runs generally east-west along the border and the Rio Grande river for some 200 miles, until the road terminates near the Gulf of Mexico at Brownsville, Texas. The Falcon Heights area is sparsely populated. Judge Connally noted that the region contained “large ranches and few persons,” “the towns --- and even habitations --- are few and far apart,” and while there, “a visitor hears Spanish spoken as often as English.” United States v. Brett (Laredo Division; Cr. No. 65-L-275), 290 F.Supp. 929 (S.D.Tex., 1966), 931.
While shadowing the suspicious vehicle, Galanos radioed for assistance. In response, his fellow Customs agents learned that the car was registered to Robert Brett of Houston, who, as authorities in Houston confirmed by telephone, was connected to narcotics as either a user or a dealer. They also learned that Brett had been convicted on a narcotics charge. The Customs agents, suspecting that Brett had visited Fronton Road either to acquire or to arrange a purchase of narcotics, maintained surveillance until Brett’s party emerged from the motel the next afternoon. Because the suspects seemed to be preparing for departure, agents converged on the car and identified themselves. The agents confirmed Brett’s identity and learned that he was with his wife, their infant child, and his mother, Mary Garcia Cruz. They advised Brett of his Fifth Amendment rights against self-incrimination, but also informed him that they “knew what he was up to.” Finally, they warned Brett that they planned to make a thorough search for contraband. Brett replied that he “had what the officers were seeking,” but asked if he could speak with his mother before he cooperated further. Mother and son conversed briefly in Spanish, and Cruz then told the agents she desired to visit a bathroom. They gave their permission, but warned her that they would turn off the water, to make it impossible to flush any contraband. Faced with that prospect, Cruz declared that she was concealing drugs on her body. When Cruz revealed a fifty-gram package of heroin, the agents arrested Brett and
Cruz. Southern District prosecutors charged both under the standard three-count narcotics indictment.\(^{75}\)

In May 1966, Judge Connally conducted Brett and Cruz's trial in Laredo. Charles Tucker, the defendants' Houston attorney, moved to suppress the heroin, the federal government's only physical evidence. Tucker argued that the defendants had been under arrest from the moment the agents identified themselves and threatened to conduct a search. This occurred before they could know that Cruz was carrying heroin. Therefore, the arrest preceded the establishment of probable cause. The defense attorney also noted that the agents arrested Brett and Cruz without a warrant, and that they had not attempted to obtain a warrant during the many hours they sat and watched the motel room. To Tucker, this fact indicated the agents knew they had no "probable cause" to justify a warrant, and therefore, Judge Connally must suppress the heroin. The defendants' acquittals or convictions hung on whether or not the judge accepted this interpretation, because Brett and Cruz had waived their right to a jury trial. If Connally agreed that the agents' actions prior to seizing the heroin rendered that evidence inadmissible, then the defendants would be acquitted.\(^{76}\)

\(^{75}\) Agents "patted down" Brett; he was not carrying a weapon at the time, but investigators later found a pistol in the car. United States v. Brett, 290 F.Supp. 929, 931-932.

\(^{76}\) Ibid., 932.
On 31 May 1966, Judge Connally announced that he could not accept Tucker’s argument. Instead, he noted that the “highest authority” sustained the “well-recognized principle” that a law enforcement officer may temporarily detain citizens and question them without placing them under arrest. Moreover, any incriminating evidence which came to the officer’s attention while he was performing this duty might become the basis for a valid arrest. The detention and questioning of the defendants “took no more than a few minutes,” during which “the conduct of the officers was unexceptional.” The officers used no force to restrain the defendants. Connally concluded that Brett and Cruz were not under arrest until the agents formally arrested them. This occurred after Cruz produced the heroin. Therefore, Judge Connally denied the defense motion to suppress the heroin, and convicted Brett and Cruz.\footnote{\textit{Ibid.}, 932. However, he believed the evidence did not support convictions on all three counts. The judge decided that circumstances indicated that “in all probability,” the defendants purchased the heroin on the American side of the border, and he acquitted Brett and Cruz of the charge of importing it. But he found both to be guilty, “as undoubtedly they are,” of the remaining charges of transporting and concealing narcotics, and purchasing them out of the original package. \textit{United States v. Brett}, 290 F.Supp. 929, 933-934. The defendants appealed; on 8 May}
reaffirm in the broadest possible terms that under the border search
document, a Customs officer enjoyed specific authority to detain and search
a vehicle and its occupants at or near the border. Connally noted that the
authority to conduct warrantless border searches had been “extended to its
constitutional limits by statute.” The power to search and the validity of
subsequent seizures was in no way contingent on a Customs agent’s
authority to make arrests supported by probable cause, he said; rather,
searches and seizures were justified merely by the “reasonable cause” the
officer has for a belief that the contents of a vehicle offended the law.

Connally believed that the facts of the case supported the
“inescapable conclusion” that Galanos, an experienced Customs officer who
was “knowledgeable in the ways of the violator,” could know to a “moral
certainty” that the defendants’ curious behavior meant they had traveled to
the border area to purchase narcotics. Judge Connally heaped praise on
Galanos, who “showed ingenuity and dedication . . . [and] brought about

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1967, the Fifth Circuit affirmed Connally’s judgment. *Brett v. United
States*, 377 F.2d 520 (5th Cir., 1967).

78 *Ibid.*, 932. Again, Connally refers to the power of customs officers to
search a vehicle if there is “reasonable cause” to suspect there is
merchandise which was imported contrary to law (19 U.S.C. § 482).

cause” quote from the long-standing legal precedent in *Carroll v. United
States*, 267 U.S. 132, 158.
the seizure of a large commercial quantity of heroin, and did so without prejudice to the constitutional rights of these defendants.\textsuperscript{80}

Under this judicial protection, Customs inspectors discovered all manner of contraband, including various illicit narcotics, during the routine searches they conducted at traffic checkpoints on the border. Most often, the inspectors found marijuana, in widely varying quantities ranging from the single cigarette one careless 22 year-old American tourist carried back from Mexico in April 1965, to the dozens of one-kilogram “bricks,” which collectively totaled 938 pounds of the drug, which one trafficker concealed in his car and drove into the U.S. in November 1969.\textsuperscript{81}

Similarly fruitful searches and seizures required federal prosecutors in Laredo and Brownsville to seek hundreds of new drug indictment each year. Unlike the Rodriguez, Brett, or Cruz, the vast majority of the defendants eventually agreed to plead guilty, on the advice of their own attorneys, who usually realized they had no viable defense strategy to offer.

\textsuperscript{80} United States v. Brett, 290 F.Supp. 929, 933-934.
II. The United States v. Timothy Leary: Border Justice v. the Counter-Culture

As he later expressed it, Timothy Leary was "probably the first person ever caught trying to smuggle pot into Mexico." In December 1965, Leary drove a leased 1966 Ford station wagon from New York to South Texas, intending to spend the holidays on Mexico's Yucatan Peninsula. He planned to stay for six weeks to write a book. On the evening of 22 December 1965, he drove the party, which included his girlfriend, his eighteen year-old daughter Susan, and his sixteen-year old son Jack, across the international bridge spanning the Rio Grande between Laredo, Texas, and Nuevo Laredo, Mexico. A Mexican immigration official informed the group that their entry papers were not in order. Because it was too late to amend the documents, the official instructed the would-be tourists to return the next morning. Leary dutifully turned around and drove back to the U.S. side of the river, where the U.S.

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customs inspectors conducted a search and discovered a few ounces of marijuana residue, including three partially-smoked marijuana cigarettes.\footnote{This summary is reconstructed from testimony, judicial findings, and various court documents from the trial in the U.S. District Court for the Southern District of Texas: United States v. Leary, et al., Crim. No. 66-L-37 (S.D.Tex., 1966), Laredo Division. The files are preserved in the National Archives and Records Administration-Southwest Regional Archives (hereafter: NARA-SWA), Fort Worth, Texas. See: Record Group (RG) 21, Laredo Criminal Docket, 1964-1966, Boxes 724-725.}

Leary had achieved limited celebrity prior to 1965, through a combination of unquestioned professional achievement and unorthodox personal philosophy. In 1950, he had helped found the Kaiser Psychiatric Clinic in Oakland, California, where for eight years he studied mental illness, wrote several influential monographs, published more than a dozen well-received articles, and developed a series of widely-disseminated diagnostic tests used to assess and treat mental patients. On the strength of his impressive record at the Kaiser Clinic, Leary joined the psychology faculty at Harvard University, in 1959. But in 1960, while vacationing in Mexico, Leary consumed a handful of so-called “Sacred Mushrooms,” which contained a hallucinogenic compound called psilocybin. He had, he later testified, the “most intense religious experience” of his life.\footnote{Testimony of Timothy Leary, United States v. Leary, transcript, part I, section 2, p. 254. NARA-SWA: RG 21, Laredo Criminal Docket, 1964-1966, Box 725, “Appeal” folder.}

Upon returning to Harvard, Leary formed a religious research group, and began to experiment with a variety of naturally-occurring or
synthetic hallucinogens or "psychadelic" drugs, including mescaline, psilocybin, and LSD. As a result of his new enthusiasms, Leary became more prolific than ever: he wrote five new books in as many years, and published thirty-eight additional articles regarding the religious and scientific use of drugs for expanding human perception. During the early sixties, Leary's work was respected and even fashionable, and he delighted in the attention of many serious scholars, journalists, and celebrities. But Leary's academically-sanctioned articulations ceased after Harvard abruptly fired him in 1963.86

The dismissal diminished Leary's scientific credibility, but also removed any remaining constraints on subject matter and experimental

85 Note: "LSD" is the abbreviation for lysergic acid diethylamide, a powerful hallucinogen similar to that found in ergot (a type of cereal-grain fungus), psilocybin is the synthesized version of the active compound in the "sacred mushroom," and mescaline is derived from peyote cactus. Leary's instant enthusiasm appears to have been a common response to a psychedelic drug experience. LSD first gained prominence in the 1950s among a well-respected, well-educated elite of medical researchers and their close friends. Autumn Gray, "NOTE: Effects of The American Indian Religious Freedom Act Amendments on Criminal Law: Will Peyotism Eat Away at the Controlled Substances Act?," American Journal of Criminal Law 22 (1995): 795-796.

86 The judges of the U.S. Court of Appeals for the Fifth Circuit, basing their summary on Leary's own trial testimony, given in 1966, agreed that he possessed "an impressive academic background." Leary was born in 1920, briefly attended West Point and the University of Alabama (he was ejected from both), and then received a Ph.D. in Clinical Psychology from the University of California in 1950. During his eight years at the Kaiser Clinic, Leary received and administered nearly five hundred thousand dollars in federal grants to support his research on mental illness. From
method. Thereafter, he traveled widely in search of religious, scientific, philosophical, and pharmacological enlightenment, notably in Mexico and India, or retreated to his new headquarters on a borrowed estate in upstate Millbrook, New York, where he founded the Castalia Foundation and initiated research on drug-induced consciousness-expansion. Leary studied Hinduism in India, participated in religious rituals in which marijuana was used as a sacrament, and in 1964 became a member of the Brahmakrishna sect.87

Leary granted more interviews in popular magazines, occasionally entertained famous visitors, and no doubt launched a thousand trips during his Millbrook idyll, but he steadily drifted to the fringe rather than gravitating toward the center of an emerging counterculture. It is unlikely, even for an author with his prodigious capacity for self-promotion, that Leary could have attained his lasting personal fame from either his early diagnostic texts, or the increasingly mystical and quasi-religious writing he produced after leaving Harvard.88 At this critical juncture, the Laredo incident revived Leary's career as a celebrity radical.89

88 For Leary's own assessment of his academic career, his work at Harvard, and finally, events surrounding his dismissal, see: Timothy Leary, *Flashbacks: An Autobiography* (Los Angeles: J.P. Tarcher, 1983), 187-198, and generally (caution: the events depicted in the book are not arranged chronologically, and is not indexed; however, a selected
After making his fateful turn, Leary arrived at the U.S. side of the border just before seven o’clock in the evening, and told the U.S. customs inspector that, because he did not actually enter Mexico, he naturally had nothing to declare. But because Leary had crossed the border, whatever the actual duration of the stay, the inspector was entitled to undertake a customs search, and he asked Leary and his passengers to exit the vehicle.  

89 Leary realized that his U-turn on the border changed the course of his life. He sensed the significance of the bridge incident by recounting the arrest in a chapter entitled “Busted at Laredo,” and also by devoting many pages to the legal repercussions. Leary, Flashbacks, 232-243.

90 Leary argued later that there must have been a conspiracy to search his vehicle, that he had been set up for an arrest due to his notoriety. This is nonsense. Under the long-standing “border search” doctrine, agents of the U.S. Customs Service have traditionally exercised broad enforcement powers, and are empowered by statute to search persons and vehicles entering the country without a warrant and without showing cause. The customs statute states, in relevant part: “[a]ny of the officers . . . may stop, search, and examine . . . any vehicle, beast, or person, on which he or they shall suspect there is merchandise which is subject to duty, or which have been introduced into the United States in any manner contrary to law . . . and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law . . . .” (19 U.S.C. § 482, concerning “search of vehicles and persons”). This law is derived from an act of 18 July 1866 (14 Stat. 178, ch. 201 § 3, codified R.S. § 3061) and similar laws designed to protect the power of the United States to collect duties and prevent illicit traffic. Notice that the statute refers to “reasonable cause” rather than the “probable cause” required by the Fourth Amendment to the U.S. Constitution, which provides that “[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but
Noticing what appeared to be "vegetable matter" and seeds in the vehicle, the Customs officer initiated a thorough search which revealed traces of marijuana scattered on the floor and in the glove compartment. Other inspectors conducted personal searches of the troupe. A female inspector laid bare the partially-smoked marijuana cigarettes, which were in a small silver box that Susan Leary had been concealing in her panties. When the Customs officer asked who owned it, Susan refused to make any statement.

Leary was not as wise as his teenage daughter. The container belonged to another passenger (his girlfriend), who panicked and passed it to Susan to hide as they approached customs and a search seemed imminent, but when customs officers informed him that his daughter had been compromised, Leary foolishly, albeit gallantly, took responsibility for

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upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” By the 1960s it was settled by judicial construction that “within the bounds of decency, propriety, and due process” (concerning the manner but not the cause of the search), the custom agent’s authority to search at the border is “nearly unfettered.” See: *Lane v. United States*, 321 F.2d 573 (5th Cir., 1963).


the marijuana by claiming the box was his property. Further, he "took the whole thing as a joke" and wondered why the inspectors were concerned with "such a small amount" of marijuana.

Finally, Leary compounded the situation, but perhaps inadvertently revealed a key component of his future legal strategy, by informing the inspectors who questioned him that "he knew more about narcotics and marijuana than either one of [them]." This was probably true, but the inspectors knew much more than Leary about the narcotics and marijuana laws, and they immediately placed Leary and the rest of his party under arrest.

On 1 February 1966, U.S. Attorney, and soon to become federal district judge, Woodrow Seals indicted Leary and his daughter Susan under the tripartite model. By the standards of the Laredo division, where the prosecutors occasionally saw customs seizures cases involving several hundred pounds of marijuana, Leary's case was a paltry bust. In all

probability, despite his already notorious penchant for psychedelic drugs, it was possible that Leary could have gotten the routine bargain, because it was his first narcotics offense. Susan actually did plead guilty to the tax count when arraigned on 21 February, but two days later, she withdrew the plea and entered a new plea of not guilty to all counts. But part of the routine was for a defendant to act contrite, and to keep a low profile until the affair was concluded. Leary found that unacceptable, and entered a plea of not guilty to all counts.97

Judge Connally presided during Leary’s three-day criminal trial in Laredo.98 During the first day, on 9 March 1966, customs agents testified to the details of the seizure, and the AUSA Ronald Blask soon rested the government's case. After examining preliminary witnesses, Leary took the stand in his own defense. He commenced an unprecedented multi-pronged attack on the marijuana prohibitions. He continued testifying the next day. Leary’s central claim was that under the First Amendment, he had a right

97 Record of proceedings, United States v. Leary, transcript, part I, section 1, p. 3. NARA-SWA: RG 21, Laredo Criminal Docket, 1964-1966, Box 725, “Appeal” folder. In addition to the materials available in court documents and judicial opinions, Leary recounts the arrest and the legal advice he received in: Leary, Flashbacks, 234-239.
“as a scientist and as an initiated Hindu to use marijuana as a research tool and a sacrament.”

One curious development in the trial was that Judge Connally, who Leary later referred to as a notoriously tough “old tiger,” let him wander far afield, and to testify to the depth of his religious faith. Leary stressed the necessity of employing drugs, particularly marijuana, to achieve spiritual ends. Blask repeatedly objected, and Connally over-ruled him. But the judge prodded the defense attorney to move the questioning ahead to the actual arrest. Connally was very careful to see that the prosecutor did not ridicule Leary’s religious views.

He was less indulgent regarding legal points that had little to do with religion. When Leary’s attorney asked his client “whether or not you have a constitutional right to transport this marijuana?” Blask objected and Connally sustained. Susan Leary’s defense counsel asked for a clarification

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100 Leary, Flashbacks, 237-238. In fact, at fifty-six years of age, Judge Connally, who was born on 28 December 1909, was only eleven years senior to Leary.

of the ruling, and the judge answered: "I simply am not interested in what this gentleman considered his constitutional rights to be."\(^{102}\)

The jury quickly convicted, and Connally sentenced Leary to the maximum thirty years. Leary appealed, he remained free on an appeal bond.\(^{103}\) Leary's sustained rhetorical attack on the law while on bond, and his publicity efforts ensured that an otherwise routine and trivial marijuana arrest progressively mushroomed into an infamous confrontation. Leary spoke at political rallies and on campuses, appeared on television and on film, starred in an off-Broadway show, and had his name written into at least two popular songs. And of course, during this period, Leary famously advised American youth to "turn on, tune in, drop out."\(^{104}\)


\(^{103}\) Leary v. United States, 383 F.2d 851 (5th Cir., 1967), and Leary v. United States, 392 F.2d 220 (1968). Susan Leary was tried at the same time as her father, but she waived trial by jury and accepted Connally's judgment in a bench trial. Connally found her guilty on the tax count, and not guilty on the narcotics smuggling counts. He suspended imposition of sentence and placed her on unsupervised probation while she was a minor. Under the federal Youth Corrections Act, 18 U.S.C. § 5010(a). She then moved to dismiss her appeal. Record of proceedings, United States v. Leary, transcript, part I, section 1, pp. 4-5. NARA-SWA: RG 21, Laredo Criminal Docket, 1964-1966, Box 725, "Appeal" folder.

\(^{104}\) In his chapter chronicling the "Rise and Fall of the Counterculture," Matusow, writes that Leary lost credibility with the "heads" (members of the drug culture) when he went "Hollywood" during these years after the arrest, and few of the younger generation were old enough to remember that he "had ever been a serious man." Leary might have agreed with Matusow's judgment, rendered in Matusow's account of America's
In 1969, four years after his fateful encounter with the U.S. customs inspectors, the U.S. Supreme Court affirmed Leary's new argument, based on the Fifth Amendment, that the tax statute tended to require individuals to incriminate themselves by acquiring the forms to pay the marijuana tax. The Justices therefore called into question the "tax count," and all plea bargains based on it.\textsuperscript{105}

Leary reaped few lasting benefits from his victory: the Justices remanded his case to the District court. He was subsequently tried, convicted for transporting marijuana, and sentenced to ten years in prison by Connally in Laredo. Leary then continued his crusade,\textsuperscript{106} although during this phase, Leary understandably aimed more at staying out of prison than at attacking obnoxious laws. Then, rather than serving his


\textsuperscript{106} Leary v. United States, 431 F.2d 85 (5th Cir., 1970).
sentence, Leary escaped from prison with the assistance of the radical
domestic terrorist group known as the Weathermen.\textsuperscript{107}

Leary was recaptured after several years later, resumed the appeal,
but lost.\textsuperscript{108} These actions cemented his reputation in the popular
imagination: for the counterculture’s proponents, Leary truly was a
martyred saint; for that movement’s detractors, he was the arch villain.\textsuperscript{109}
By the late seventies, when he was finally free of legal entanglements,
Leary had served a total of forty-two months on the twelve year-old
marijuana arrest.\textsuperscript{110}

In a 1983 autobiography, Leary declared he began his crusade
because, as he sat in a Laredo jail the night of his arrest, he resolved: “to
fight this case in the courts of the land, to mobilize legal teams, to devise
courtroom tactics, to file appeals, motions, briefs, depositions, to speak in
defense of the right of American citizens to manage their own bodies and
brains.”\textsuperscript{111} Although his case cannot be listed among the landmarks of the

\textsuperscript{107} Or, the Weather Underground. Leary was a fugitive for several years
during the early seventies, but was eventually extradited to the United
Radicals, Then and Now: Candid Conversations With Those Who Shaped
\textsuperscript{108} \textit{Leary v. United States}, 544 F.2d 1266 (1977).
\textsuperscript{110} \textit{Leary v. United States}, 544 F.2d 1266 (5th Cir., 1977).
\textsuperscript{111} Leary, \textit{Flashbacks}, 239.
procedural rights revolution of the sixties, there is a measure of justice in Leary's claim.¹¹²

Leary's attempt to convince the federal judiciary to affirm a constitutional right of anyone to alter his or her own consciousness was probably doomed from the beginning, but his advocacy of drug-induced consciousness-expansion, during trial, after conviction, and through many appeals, established Leary's standing as an icon of sixties iconoclasm. However, the effect of his battle against the marijuana laws, which finally and successfully focused on the tax count, brought the institutional plea bargaining to an end in Laredo.

The first shudders came in 1969, when a wave of defendants who had plea bargained to receive lighter sentences, but were still in prison, filed civil litigation to apply the Fifth Amendment privilege retrospectively to their previous admissions. In each case, Connally decided that a guilty plea waived all defenses, including the privilege against self-incrimination.¹¹³ Other defendants coming before Judge Connally for


sentencing sought to be re-arraigned so that their tax count plea bargains could be voided, apparently believing that the Court decision would free them. Connally also rejected these attempts to break bargains, and the brief trend of appeals subsided.  

During the year after Leary's case overturned the tax count, the federal prosecutors and defense attorneys revived the standard plea bargaining through formal waivers. Now, defendants could plead guilty to the tax count only if they signed a statement to the effect that they understood they were relinquishing rights to appeal on the grounds that they were being asked to incriminate themselves. This waiver system creaked along until 1970, when the U.S. Congress repealed the marijuana tax act, and passed a new controlled substances act, which did not leave prosecutors with the same discretion on indictments, or judges the

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Moore v. United States, C.A. No. 69-L-22 (opinion: 10 September 1969); the same bargain on a 3 count indictment was upheld, on 20 February 1969: McClain v. United States, C.A. No. 69-L-24 (opinion: 3 December 1969); indicted 22 November 1967 (Crim. No. 67-L-365), same deal on 3 count for 7 pounds, on 8 March 1968: Patterson v. United States, C.A. No. 69-L-25 (opinion: 3 December 1969); "making the now familiar contention—which has been decided adversely . . . by the Court of
discretion in sentencing. The final result was that plea bargains for probation, once standard, became extremely rare. Marijuana defendants, under the new laws, had fewer reasons to accept the prosecutor’s offer. More took their chances on a jury trial than before. The habit of treating a drug case as a relatively minor matter ended.

During the thirty years which followed the Laredo arrest,\textsuperscript{115} Leary generated a succession of memoirs intended to burnish this image and to ensure that his tribulations secured his residence in the pantheon of counter-cultural pioneers. His efforts at self-justification largely succeeded. For example, two investigators who “revisited” the decade returned convinced that Leary could be ranked among the “seven who created the sixties counterculture that changed America.”\textsuperscript{116} Another

\textsuperscript{115} Until his death from prostate cancer in 1996. Leary’s cremated remains were launched into orbit in April 1997, along with those of Gene Roddenberry (creator of the 1960s television series \textit{Star Trek}), and 22 other space enthusiasts. “LSD Guru Takes Trip of His Dreams,” \textit{The Herald} (Glasgow), 12 May 1994, p. A2.

\textsuperscript{116} Peter O. Whitmer, with Bruce van Wyngarden, \textit{Aquarius Revisited: Seven Who Created the Sixties Counterculture That Changed America} (New York: MacMillan, 1987), 13-46. The authors also include such literary figures as William S. Burroughs, Allen Ginsberg, Ken Kesey, Norman Mailer, Tom Robbins, and Hunter S. Thompson, but the book begins with Leary. \textit{Ibid.}, acknowledgments, and 8-12.
author included Leary on a longer list, of eighteen influential “radicals” who “shaped the era.”

But from the legal record, Leary left an ironic legacy. But it is perhaps no more ironic than that fact that the self-styled “High Priest of LSD” was not able to claim fame primarily because of his ability to slip the bounds of consciousness through his use of exotic drugs. Instead, Leary achieved his notoriety for an abortive attempt to slip across the border in a leased station wagon.

III. Conclusion: Nothing to Do But Try a Wetback Now And Then . . . ?

On 6 November 1970, during the investiture in Houston of U.S. District Judge Carl O. Bue, Jr., Southern District Chief Judge Ben C. Connally invited each of the sitting judges to offer congratulations to their new colleague. Judge Reynaldo G. Garza observed that he already regarded Bue as a fine trial lawyer, knew he would also make a fine federal judge, and added that he would welcome Bue’s company in his own court in Brownsville, “anytime you feel that you have done your job here

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117 Chepesiuk, Sixties Radicals, 147-157. Chepesiuk, also accorded this distinction to MIT linguistics professor and longtime political gadfly Noam Chomsky. Ibid., 133-146.
[in Houston].” As Garza took his seat, Connally suggested to the audience that while in Brownsville, Garza had “Judge Garza sits in Brownsville and has nothing to do but try a wetback now and then.”\textsuperscript{119} With this off-color remark, Connally invoked what he believed were the prejudices of his overwhelmingly Anglo and mostly urban audience.\textsuperscript{120}

If accurate, of course, Connally’s description would also apply to his own activities in Laredo. But, the Chief Judge was acting as master of ceremonies, and his remark was more of a caricature than a characterization. The appraisal was on target, however, in that both


\textsuperscript{119} Transcript of the proceedings of Bue’s swearing in (no title), p. 24. This document is held by the Houston Metropolitan Research Center, in the HMRC’s collection of the papers of Carl O. Bue, Jr. In addition to the district judges, Chief Judge Connally solicited remarks from Fifth Circuit Chief Judge John R. Brown (a Houstonian, and also a longtime friend and professional benefactor of Bue). The president of the Houston bar association, the president of State Bar of Texas, and the 1970 president-elect of the American Bar Association, Houston attorney Leon Jaworski, also offered congratulatory speeches. Ibid., Transcript of the proceedings, generally.

\textsuperscript{120} In addition to recognition by the other judges present (district as well as circuit, such as Fifth Circuit Chief Judge John R. Brown, a Houstonian and longtime friend and professional benefactor of Judge Bue), friends, supporters, and various family members, the ceremony included remarks by the president of the Houston bar association, president of State Bar of Texas, and the 1970 president-elect of the American Bar Association, Houston attorney Leon Jaworski. Ibid., Transcript of the proceedings, generally.
Connally and Garza regularly presided over a large number of prosecutions of undocumented aliens.

And they tried many drug cases. Connally and Garza tried categories of cases in Laredo and Brownsville which represented the growth industries in federal crime, categories which appeared less often or not at all in other jurisdictions. By 1970, the top three most frequently prosecuted federal crimes were interstate automobile theft,\textsuperscript{121} illegal immigration,\textsuperscript{122} and narcotics violations,\textsuperscript{123} respectively.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{121}] Under the Dyer Act, 18 U.S.C. sec. 2312.
\item[\textsuperscript{122}] Under 8 U.S.C. sec. 1326.
\item[\textsuperscript{123}] Under various statutes; defendants indicted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective 1 May 1971, would not yet appear in this data.
\end{itemize}
\end{footnotesize}
I concur fully... I write only to record with a sense of relief and common sense that the Federal Courts are now out of the hair business... since by now the public, with growing thousands of entirely responsible adult members of the community wearing all sorts of hair and face trims, has come to its senses and does not see in such variations the seeds of violence and revolution. Now we can return to the vital matters which overwhelm the Federal Judiciary.


During the late 1960s, minority claimants’ goals expanded, grew diffuse, and became more controversial. Would-be “structural reform” litigants challenged federal district judges to intervene in and to reform the alleged constitutional deprivations in school discipline, criminal prosecutions, and other domains of public governance traditionally considered to be within the sole purview of state officials. Affected federal judges faced hard choices in the 1970s: first, to separate frivolous complaints from legitimate grievances; second, to determine if the latter cases could be remedied by federal judicial intervention; and, third, to decide whether to act on behalf of a meritorious plaintiff, or to abstain in a

1 *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir., 1975); Judge Brown concurring, 281-282.
legitimate case in the name of bedrock principles of comity and federalism.²

Comity is the courtesy a judge extends to another judge when their jurisdictions overlap or appear to be in conflict. Judicial references to comity usually imply the unwillingness of a federal judge to rule in a case concerning a state law, in the absence of a rule of decision on that issue by the appropriate state court. It is a gesture of respect, of deference in recognition of the obligation of the state courts to enforce the U.S. Constitution; however, comity is not obligatory. Under Chief Justice Earl Warren, the Supreme Court frequently placed perceived denials of due process and/or equal justice above the principle of comity or other features of dual federalism. Various Warren Court decisions concerning Fourteenth Amendment rights bolstered the claims of emergent or newly militant minority groups. After Brown, one of the most significant of these decisions was 1961’s Monroe v. Pape.³

In Monroe, the Court revitalized the Civil Rights Act of 1871, better known as the Ku Klux Klan (KKK) Act, which authorized citizens to file federal civil rights suits against state officials.⁴ Between the 1870s and the

⁴ Act of 20 April 1871 (ch. 22, sec. 1, 17 Stat. 13; formerly codified as
Great Depression of the 1930s, the Court gave wide latitude to states’
power to enforce state laws. As result, the KKK Act became moribund.
The Justices revived the 1871 statute in the 1939 case, *Hague v. CIO*, when
it affirmed a federal district judge’s order enjoining Jersey City, New
Jersey, officials from enforcing an ordinance to prevent a labor rally in a
public park.\(^5\) But until the Court ruled in *Monroe* that a search by Chicago
police had been conducted as official harassment, the Justices did not
resurrect the full potential of the statute (after recodification, this provision
is usually referred to as “section 1983”). The Justices declared that the
officers were personally liable to the plaintiffs for damages, and, doing so,

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R.S. Sect. 1979, then as: 8 U.S.C. § 43; currently codified as amended at 42
U.S.C. §§ 1981-1983). This first section of the bill merely added civil and
equitable remedies to the criminal penalties already established in the Civil
Rights Act of 1866, and so it was the least controversial part of the 1871
Act. This section was left intact, although it was narrowly interpreted,
when the Supreme Court stripped the original Act of much of its efficacy
in the 1883 *Civil Rights Cases*, by overturning provisions for the
freedmen’s equal access to the nation’s public accommodations,
entertainment, and transportation. 109 U.S. 3 (1883). See: William E.
Nelson, *The Fourteenth Amendment: From Political Principle to Judicial
Doctrine* (Cambridge: Harvard University Press, 1988), 194-197; also:
Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and
529. For the Supreme Court’s views on the legislative history of the Ku
Klux Klan Act, see: *Monroe v. Pape*, 365 U.S. 167 (1961), 171; and:
\(^5\) 307 U.S. 496 (1939). Previously, federal courts had issued injunctions
against labor organizers.
rescued this statute from "ninety years of obscurity." Despite its alleged abdication of leadership in enforcing Brown, the Monroe decision proved the Supreme Court's basic commitment to supporting the struggling civil rights movement. The Justices' willingness to protect citizens' exercise of constitutional rights encouraged supporters of civil rights to push harder for fundamental reform in the Jim Crow South. Their political efforts in the early 1960s led to legislative victories, and then to further progress through civil rights litigation in the federal courts.  

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7 Stanley H. Friedelbaum, "The Warren Court and American Federalism -- A Preliminary Appraisal," 28 University of Chicago Law Review 28 (1960): 68, especially n. 80. Less than a decade after Monroe, some critics claimed that the expansion had already gone too far, because federal court jurisdiction in civil rights claims had grown to include situations that were arguably never intended to be subjects for equitable relief. At the least, critics suggested, some of the cases were better suited for state courts. Note, "Limiting the Section 1983 Action in the Wake of Monroe v. Pape," Harvard Law Review 82 (1969): 1487. Others celebrated the trend, and called for more of the same, claiming that only federal judges, by dint of experience, temperament, and tenure could adequately serve to right society's moral wrongs by conscientiously attending to individual's civil rights. Paul Chevigny, "Section 1983 Jurisdiction: A Reply," Harvard Law Review 83 (1970): 1357. The Court overruled parts of Monroe, but only to find that cities could be held liable for civil damages. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).
Congress eventually responded to southern abuses by enacting the 1964 Civil Rights Act (CRA). It expanded the federal government’s authority to initiate lawsuits or to provide support to litigation private citizens filed to combat racial, ethnic, and in some cases, gender discriminations, in schools, accommodations, employment, and housing.\(^8\)

Further, the lawmakers recodified the language of the KKK Act, and provided that:

> Every person who, under any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .\(^9\)

Thereafter, the number of private and public requests filed in the federal courts for equitable injunctions of state action increased sharply.\(^10\)

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\(^8\) Prohibitions of discrimination in employment, housing, and education were extended through subsequent amendments to the CRA of 1964. See: 42 U.S.C. § 2000(a)-(h).


When the Supreme Court created exceptions to long-standing abstention doctrines in the 1960s, federal judges were more willing to hear federal civil rights lawsuits. In *Dombrowski v. Pfister*,\(^{11}\) a civil rights worker named Dombrowski sued to enjoin the enforcement of a Louisiana statute prohibiting participation in "subversive" activities, which state prosecutors and state judges interpreted as including organizing civil rights activities. According to comity principles, federal judges were not empowered to interfere in ongoing state prosecutions without evidence bad faith in the application of the state law or the possibility that the prosecution would cause the defendant "irreparable injury." A federal three-judge panel dismissed the complaint because civil rights workers had failed to demonstrate the necessary conditions for judicial intervention.\(^{12}\)

\(^{11}\) 380 U.S. 479 (1965).

\(^{12}\) Three-judge courts are empowered to enjoin allegedly unconstitutional state laws in 28 U.S.C §§ 2281-2284 (the "Three Judge Court Act"). This law was enacted by the Congress at the turn of the twentieth century, in an attempt to temper the perceived imprudence of district judges in issuing the unpopular injunctions in labor cases. The legislators apparently thought that a judicial panel would act more "reasonably" than a solo judge. With the rise of civil rights consciousness and federal willingness and authority to enforce civil rights during the 1960s, the number of cases heard by three-judge panels also increased dramatically; they doubled between 1963 and 1973. Under the statute, panel decisions could be appealed directly to the Supreme Court. In time, these panels became widely regarded as wasteful of time and manpower. During the Supreme Court's October 1969 term, approximately 22% of the docket concerned appeals from three-judge-courts. In 1976, Congress limited the jurisdiction of three-judge courts to cases concerning congressional districts and apportionment matters, or "when otherwise directed by Congress." Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987),
The Supreme Court reversed the three-judge panel's decision. An irreparable injury had occurred, the Court said, when individuals had to forego constitutionally-protected activities to avoid arrest or other sanction. The prospect of facing criminal charges for exercising the rights of free speech or association created a "chilling effect upon the exercise of First Amendment rights [which] may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."13

The *Dombrowski* and *Monroe* rulings expanded the range of state-initiated actions the Justices deemed appropriate for federal intervention.14 Editors of a leading casebook on the federal courts noted that the decisions loosed "an impressive flood of litigation against state officers in the federal

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14 Note, "The Federal Anti-Injunction Statute and Declaratory Judgments in
courts,” as civil rights activists brought section 1983 actions at an increasing rate. In 1960, one year before *Monroe*, plaintiffs brought only 280 cases under the provision. By 1971, the number of section 1983 complaints filed annually had risen to 4609.15 Reviewing this increase in litigation to enjoin state action, and federal courts’ willingness to hear such cases, professor Philip Kurland declared in 1970 that: “[i]n a Court as active as the Warren Court, it was not surprising that the abstention doctrine became moribund.”16

But in the early 1970s, under Chief Justice Warren Burger, a Nixon appointee, the Supreme Court’s opinions revived abstention and restraint. In 1971, in *Younger v. Harris*, the Justices announced that federal district judges should abstain from enjoining state laws if a criminal prosecution was underway, unless they found evidence of bad faith or official harassment. Harris had been distributing leaflets suggesting the elimination

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of private ownership of industry. He was indicted under California's
criminal syndicalism law, which proscribed activity advocating an illegal
overthrow of the government or private industry.\textsuperscript{17} Harris sought relief
from the state's prosecution under the Dombrowski doctrine. In the name
of restoring comity and shoring up what he referred to as "Our
Federalism," Associate Justice Hugo Black, for an eight to one majority of
the Supreme Court, announced a preference for abstention even concerning
alleged state limitations on First Amendment rights of free speech, unless
by abstaining, a federal judge would be allowing the defendant in a state
prosecution to "suffer irreparable damages." Black wrote that it was a
"basic doctrine of equity jurisprudence" that equitable relief should be
withheld if the parties had "an adequate remedy at law."\textsuperscript{18} In dismissing
the suit from the federal courts, however, the Justices did not consider
Harris' statutory right to proceed under section 1983.\textsuperscript{19}

\textsuperscript{17} The California statute prohibited circulating or publicly displaying any
written or printed matter containing advocacy for the commission of a
crime "as a means of accomplishing a change in industrial ownership or
control, or effecting any political change." Younger v. Harris, 401 U.S. 37
\textsuperscript{18} Younger v. Harris, 401 U.S. 37 (1971), 43-45
\textsuperscript{19} The federal district courts have jurisdiction in section 1983 cases under
28 U. S. C. § 1343. An indication of the importance to the principle of
"Our Federalism" was that the Court majority relied on it, rather than the
Anti-Injunction Act, the statutory bar to federal action that the state
lawyers had cited. Younger v. Harris, 401 U.S., at 40. See: Bryce M.
Baird, "Federal Court Abstention in Civil Rights Cases: Chief Justice
The *Younger* decision contained no new restrictions on a state defendant's right to seek relief in a federal court. Instead, it restated the traditional exceptions to federal equitable power. But *Younger* and related decisions represented the Burger Court's effort to reinvigorate principles of comity and federalism by curtailing the permissive resort to federal injunctive relief. Essentially, the Justices sought to resolve the legislative-political tensions that had developed during Warren's tenure, to restore a perceived lost balance of national-local governance, and to repair badly frayed federal-state relations. Further, the decision to leave many

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20 Under the long-standing *Pullman* abstention doctrine, for example, federal courts should seek to avoid premature interference with the state court's construction of state laws; see: *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), at 501.

21 The *Younger* decision became the leading case in a cohort of six similar cases. The other five cases, decided the same day as *Younger*, were: *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); and: *Byrne v. Karalexis*, 401 U.S. 216 (1971). Also on that day, the Justices relied on *Younger* to issue summary decisions in an additional sixteen cases. See: 401 U.S., 984-990. In *Samuels v. Mackell*, the Court refused to permit federal declaratory relief, which the Justices said had "virtually the same practical impact as a formal injunction." 401 U.S. 66 (1971), 72. See: Zagrans, "Under Color of What Law," 503-504. Prior to these decisions, Prof. Kurland noted that the Court under Chief Justice Burger had so far exhibited few significant differences from its immediate predecessor. He declared in 1970 that his impression after reading cases was that the Court had not changed with the appointment of a new Chief in 1969, and concluded the "Court's major theme remained equality and its major function continued to be the centralization of power in one branch or another of the national government." Accordingly,
emerging civil rights questions to be resolved by state courts indicated the Justices' efforts to reduce the federal trial and appellate court workload. That workload had risen sharply through the 1960s, as federal judges managed time- and resource-consuming "public law litigation."  

The profound cultural, political, and constitutional upheavals of the 1960s extended the significance of the civil rights revolution that had commenced in the 1950s with *Brown*, broadened the judicial protections available under the Fourteenth Amendment, and raised public expectations for additional judicially-managed "social reconstructions." The evolution of judicial attitudes in the 1970s had contracted significance, narrowed

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Kurland wrote that: "precedents were treated cavalierly; both new ones and old ones were readily overruled or distinguished to death." Kurland, "Enter the Burger Court," 91-92. These concerns paralleled commentators of a decade earlier. In 1960, Stanley Friedelbaum noted that "attacks upon the Supreme Court during the past half-decade have centered about judicial pronouncements which, critics contend, reflect an excessively narrow view of state powers." The critics usually focused on particularly obnoxious rulings, but Friedelbaum contended that the Warren Court had been fairly balanced with regard to federalism. The Court usually abstained from exercising diversity power, for example, whenever it would disrupt federal-state relations for no good reason. However, he admitted that federal courts had "not been inclined to apply the abstention doctrine consistently." Friedelbaum, "The Warren Court and American Federalism," 53, 86-87.

22 Stephen L. Wasby, *Continuity and Change: From the Warren Court to the Burger Court* (Pacific Palisades: Goodyear Publishing Company, 1976), 40-45. For support of the argument that the Court's decision was partly an effort "to contain the explosive growth of section 1983 litigation," see: Baird, "Federal Court Abstention in Civil Rights Cases," 520.
protections, and lowered expectations.\textsuperscript{23} The revival of abstention in the \textit{Younger} opinion was an early indication, in Kurland's estimate, of the "trend away from free and easy access to the federal courts for abstract declarations of constitutional invalidity."\textsuperscript{24} And the Court asserted a preference for judicial restraint throughout the decade.

I. The Challenge of \textit{Chicanismo}: Civil Rights Struggles in the Fields and Schools of Texas

Many farm workers in Texas were Mexican-descended. But the middle-class leaders of the Mexican-American political organizations such as the League of United Latin-American Citizens (LULAC) did little more for farm workers than support the end of the \textit{bracero} program.\textsuperscript{25} During the 1960s, younger leaders emerged. They exerted an enormous direct influence on Texas labor organizations. Less directly, the new generation

\textsuperscript{23} Wasby, \textit{Continuity and Change}, 7-8.
\textsuperscript{25} Lyndon B. Johnson remained a strong supporter of the \textit{bracero} system, often against the preferences of his Mexican-American constituents. See:
of Mexican-American leaders inspired a working-class-centered civil rights movement, sparked a revival in litigation by Mexican-Americans, and broadened the applications of section 1983.

César Chávez, the most prominent and charismatic of the new leaders, had been criticizing the bracero program since the 1950s. In 1962, prior to the repeal of the bracero system, Chávez founded in California the National Farm Workers Association (NFWA). The fledgling union gained national attention through its strikes and boycotts, most famously against table grapes. In 1966, Chávez led striking farm workers on a twenty-five-day, three-hundred-mile pilgrimage from California's San Joaquin Valley to Sacramento, the state capitol. Shortly, several struck growers recognized the NFWA and agreed to negotiate contracts with the union. In August 1966, Chávez's largely Mexican-American membership voted to merge with a Filipino-American union. The new union, the United Farm Workers Organizing Committee (UFWOC), affiliated with the AFL-CIO.

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27 Mooney and Majka, *Farmers' and Farm Workers' Movements*, 154-158; Laura Pulido, *Environmentalism and Economic Justice: Two Chicano*
Eugene Nelson, one of the NFWA’s organizers in California, helped to create the modern farm worker’s movement in South Texas. In May 1966, Nelson sought support in Houston for a boycott of products of a struck grape grower, but the parties came to contract terms. With the original purpose of the Texas trip mooted, he organized the Valley farm workers. After conferring with interested individuals, including church leaders, Nelson went to Starr County and formed the Independent Workers’ Association (IWA). On 1 June, during the peak of the 1966 melon and cantaloupe harvest, IWA members walked off their jobs at eight major farms, declared a strike, which they celebrated as *La Huelga*, and began picketing. The strikers sought a union contract which guaranteed farm wages of $1.25 per hour, equal to the federally-established minimum for non-agricultural workers but double the wage that melon pickers usually received.²⁸

The growers went to state court and won an injunction against the strikers from 79th District Court Judge Woodrow Laughlin. He issued a temporary restraining order (TRO) on 2 June, contending that some IWA strikers were not actually employees of the struck farms, and, therefore, lacked standing in any labor disputes at those farms. Since the judge’s

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order prohibited picketing the struck farms, the IWA continued
protests at other farms or picketed the packing sheds where fresh produce
was prepared for transport by truck or railroad. Judge Laughlin’s order
kept entrances to struck farms open but it did not get the ripe melons out of
the fields and to market. Growers therefore dispatched “crew leaders” to
the border to recruit Mexican “greencarders.” On 8 June, the IWA’s
leaders staged a rally at the international bridge at Roma, Texas, where
picketers attempted to persuade Mexican workers to refuse employment in
Texas. Starr County Deputy Sheriff Raul Peña halted the demonstration
and arrested Nelson, ostensibly for violating the judge’s order. Peña
brought Nelson to Rio Grande City, where County Attorney Randall Nye
detained him at the Courthouse for four hours, but filed no charges.29

Also on 8 June, the IWA voted to affiliate with Chávez’s NFWA.
But the next day, Judge Laughlin declared that the strikers were violating
Texas’ “mass picketing” statute, which required individuals protesters to be
separated by fifty feet.30 He issued a temporary injunction against the

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29 During the interview, Nye purportedly told Nelson that the FBI was in
town, to investigate an alleged threat to blow up the courthouse or to
destroy the buses used to transport Mexican laborers, and he warned
Nelson that they would be watching him. See: Francisco Medrano, et al. v.
Division; Civ. No. 67-B-36]. Also: Bailey, “The Starr County Strike,” 48.
30 Article 5154(s), Texas Revised Civil Statutes.
picketing, effectively ending the strike for the 1966 season. The
melons were either already harvested or could be left to rot with little
economic loss to the growers.

The strike failed. But although Nelson had started very late in the
season, with little time to build support, he had attained a key goal, namely,
publicity for the NFWA. Unwilling to lose the union’s momentum by
disbanding until now-departing migrant workers returned to the Valley for
the fall harvest, Nelson persuaded the remaining union members and their
sympathizers to emulate the NFWA’s recent Easter pilgrimage in
California. He suggested a four- to five-day march from Rio Grande City
to nearby San Juan to visit the local Shrine Church. Begun on 4 July, the
event attracted more participants, new destinations, and deeper symbolic
meanings with each additional mile. Eventually, the march was
transformed from a relatively brief striker’s march into a two-month, four
hundred-mile, meandering “people’s march” to the state capitol in Austin.
There on Labor Day, 5 September, the participants planned to call on
Governor John Connally and demand that he call a special session of the

31 Bailey, “The Starr County Strike,” 48-49. Ronnie Dugger, “‘A Long
Struggle With La Casita’,” Texas Observer, 24 June 1966, 1.
legislature dedicated to enacting a state minimum wage of $1.25. Connally ultimately refused to answer the demands and call a special session.\textsuperscript{32}

Although the march had grown so large and diverse that the union’s original demand for a contract and a fair wage was obscured, the marchers, many of them Starr County strikers, enabled Nelson to maintain his organization. IWA supporters soon became UFWOC affiliates. The union leaders entered the Valley’s fall harvest season fully committed to revitalizing the strike.\textsuperscript{33}

Officially, the strike had not ended. The UFWOC picketed, demonstrated, and canvassed farm workers’ neighborhoods every day, except Sundays, from June 1966 until July 1967. The union’s activities provoked further conflicts with growers and associated businesses, and attracted harassment from local authorities. Participants in the strike suffered repeated arrests, prosecutions, and violent confrontations at the hands of law enforcement officers.\textsuperscript{34} On 12 October 1966, for example, approximately twenty-five UFWOC members picketed on U.S. Highway 83, adjacent to fields belonging to the Rancho Grande Farms. One


organizer used a bull horn to appeal to laborers still in the field to join *La Huelga.* There was no evidence that these exhortations disrupted work, but they annoyed the Rancho Grande management. At a manager’s request, Starr County deputies ordered the picketers to disperse. UFWOC leader Raymond Chandler challenged Deputy Peña’s authority to issue this directive. Peña arrested Chandler for disturbing-the-peace when he “started talking to me, you know, in very loud and vociferous language.”

Other picketers obeyed the order to disperse, and none were arrested. The deputies took Chandler to Rio Grande City and filed the complaint against him at the Courthouse. The maximum punishment for the violation alleged was a $200 fine, but the sitting magistrate fixed Chandler’s personal bond at $500. When his associates came to post the bond for Chandler’s release, Peña told them that, since they were not lawyers they had no business in the courthouse and would be jailed if they did not leave. An attorney later returned to secure Chandler’s release.

Less than two weeks later, deputies arrested other protesters, including Domingo Arrendondo, the president of Starr County’s UFWOC

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35 Peña subsequently testified that Chandler and the other protesters employed abusive and vulgar language, but he ultimately recanted his charge, contained in his official complaint, that the union members had used “obscene language, vulgar language, indecent language, swearing and cursing, yelling and shrieking, exposing the person, and rudely displaying a weapon.” *Medrano v. Allee,* 347 F.Supp. 605 (S.D.Tex., 1972), 612.
36 The county filed this charge as a violation of Article 474 of the Texas Penal Code.
chapter. When the arrestees shouted their rallying cry, *viva la huelga* ("long live the strike"), a deputy struck Arrendondo in the face, pointed a gun at his forehead, and warned him not to repeat the union’s protest slogan. The courthouse, the deputy declared, was a "respectful place."  

Missouri-Pacific Railroad property and businesses were damaged during the strike. Authorities assumed that these were acts of vandalism carried out either by union members or their sympathizers. County Attorney Randall Nye requested assistance from Governor Connally after UFWOC picketed packing sheds outside Rio Grande City, near Missouri-Pacific tracks, when the green pepper and lettuce crops were ready for harvesting, packing, and shipping. Connally sent Texas Rangers to help local deputies arrest strikers in Starr, Hidalgo, and Cameron Counties.  

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After consulting with the state Attorney General's staffers, Nye charged ten UFWOC leaders with violating the state's secondary picketing statutes.\textsuperscript{40} One of the supporters arrested was Reynaldo De La Cruz. While he was in custody, Rangers advised him that they could get work for him for $1.25 per hour, the UFWOC-demanded wage, if he abandoned the strike. They suggested that farm workers could organize a "peaceful" union at a later date. The Rangers warned De La Cruz that they had come to the Valley to end the strike and would not leave until they succeeded.\textsuperscript{41}

Meanwhile, the UFWOC suffered more of what they claimed were spurious, selective, or harassing incidents of law enforcement by both state and county officials. On 28 December, for example, Deputy Peña filed charges against De La Cruz for impersonating a peace officer. Peña had learned that De La Cruz and Pedro Dimas, another union member, wore

\textsuperscript{40} Article 5154(f), Texas Revised Civil Statutes. A primary strike or boycott is aimed directly at the employer whose labor policies are being protested. A secondary strike or boycott aims to pressure another party to agree to cease doing business with the primary target. The National Labor Relations Act prohibited secondary strikes or boycotts, and under the so-called "hot cargo" provisions, the statute also prohibits businesses from agreeing not to deal with the products of an employer involved in a labor dispute. 29 U.S.C. § 158(e). The U.S. Supreme Court, relying on the rational basis test, has upheld the ban on secondary boycotts and sympathy strikes. See: Electrical Workers v. National Labor Relations Board, 341 U.S. 694 (1951), 705.

badges shaped like shields when directing traffic at the UFWOC headquarters. Deputies and Rangers all wore stars.\textsuperscript{42}

The day De La Cruz and Dimas were arrested, the union demonstrated at La Casita Farms. One picketer reached through the window of a truck and snatched at the coat of La Casita employee Manuel Balli. Balli shook him off and drove on. This was the most serious physical confrontation initiated by a union member reported during the entire strike. Nevertheless, Starr County deputies arrested and filed assault charges against the picketer who grabbed Balli.\textsuperscript{43}

Notwithstanding the UFWOC complaints of official harassment and selective enforcement of the laws, the growers convinced Judge Laughlin that the strikers had encouraged vandalism and incited violence. He issued another temporary injunction on 11 July 1967, proscribing further picketing on or near property of La Casita Farms. A panel of judges of the Texas Court of Civil Appeals concluded that Laughlin’s findings of fact that the union was responsible for vandalism were unsupported, but nevertheless upheld the injunction.\textsuperscript{44}

\textsuperscript{42} Ibid., 616-617.
\textsuperscript{43} Ibid., 616-617.
\textsuperscript{44} \textit{La Casita Farms, Inc. v. United Farm Workers Organizing Committee}; District Court of Starr County, Texas, No. 3809. \textit{United Farm Workers Organizing Committee v. La Casita Farms, Inc.}, 439 S.W.2d 398 (1967), at 403.
The union organizers responded to this legal setback by filing a section 1983 action in the Brownsville Division of the Southern District of Texas. In its complaint, the UFWOC requested that the federal court enjoin the future enforcement of the various state laws that the Starr County prosecutors had invoked to "chill" union members' rights guaranteed by the First and Fourteenth Amendments.\textsuperscript{45} In part because the civil docket in the Brownsville division was neglected in favor of the criminal docket, which was perennially choked with immigration and drug cases, and also because lawyers on both sides sought numerous delays, several years lapsed before a three-judge district court examined the case. Their decision will be reviewed later in this chapter.\textsuperscript{46}

As a result of the delayed federal court action, the union's attempt to organize Valley farm workers was delayed until the 1970s. Yet the Starr County strike had immediate consequences, unintended by the UFWOC leaders but eventually appreciated by advocates of Mexican-American civil rights. The rumblings from South Texas shook up the established organizations, such as LULAC, which attracted urban professional, middle-class, and liberal Mexican-Americans. These groups had abandoned civil rights litigation in favor of politics. Despite notable political wins and

patronage gains by some Mexican-Americans, most Mexican-Americans experienced continued discrimination, suffered persistent economic hardship, and received inferior education.

Chávez had not founded a working-class version of the middle-class LULAC. Neither Latin heritage nor American citizenship were conditions for UFWOC membership. And Chávez resisted being labeled an ethnic leader, noting that: "... [w]e look at workers as workers, not at their nationalities." Nevertheless, most of the union's prospective members, especially in Texas, were Mexican-descended. The heroic image of impoverished but selfless farm workers struggling against corporate growers and defying official repression appealed to many Mexican-Americans who came of age during the 1960s, a decade of cultural and political ferment. Civil rights marches were flowering in the South, the Black Power movement was emerging in the North, and antiwar activism were energizing campuses across the nation. But until farm workers in California and Texas marched against unfair wages, dangerous working conditions, and poor treatment, many young Mexican-Americans perceived

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that the struggle towards social, political, and legal equality had stalled. Both working-class *barrio*-bound youth and middle-class college-bound Mexican-Americans counted Chávez among a handful of cultural heroes and role models.⁴⁹

By the mid-1960s, continued discrimination against Mexican-Americans inspired students at St. Mary's University in San Antonio, A&I University in Kingsville, and other predominately Mexican-American campuses, to reject their parents' generation's liberalism and to embrace more radical political ideologies. Budding militants rejected aspirations to assimilate with a dominant white culture, and identified themselves as "Chicanos," a name which demonstrated pride in their *Mexicano* heritage. This loosely-defined movement spawned a variety of disparate organizations, but in general, Chicanos were politically progressive, sometimes radical, relative to established spokespersons for the Mexican-American community. They eschewed both the goals and tactics of the liberal middle-class. Instead of seeking to win elections or promising to exchange votes for patronage, Chicanos celebrated direct action, mass

protest, and self-reliance. Therefore, despite Chávez’s denials, they 
romanticized farm workers’ marches as demonstrations of Chicanismo.\textsuperscript{50}

Tension grew between generations, and the division was widened by 
the broader issues of the day. For example, after St. Mary’s University 
students founded the Mexican American Youth Organization (MAYO) in 
1967, they used it as a forum to criticize and to protest the Viet Nam 
conflict as evidence of the continued imperialism, violence, and racism they 
alleged was a major theme in U.S. history. U.S. Representative Henry B. 
Gonzalez of San Antonio, a longtime friend and ally of President Johnson, 
responded by denouncing Chicano’s militant rhetoric as “hate.” He 
repeatedly defended Mexican-Americans’ patriotism on the floor of the 
House. In 1969, Gonzalez rejected the label “Chicano,” and described 
himself as “an American of Spanish surname and of Mexican descent . . .

\textsuperscript{50} See: Quiñones, Chicanos, Politics, 118-119; Ignacio M. Garcia, 
Chicanismo: The Forging of a Militant Ethos Among Mexican-Americans 
(Tuscon: University of Arizona Press, 1997), 1-4; and: Armando B. 
Rendón, Chicano Manifesto: The History and Aspirations of the Second 
Largest Minority in America (Berkeley: Ollin and Associates, 1996; 
original: 1971), 200-202. For a discussion of the generational issues which 
led to the rise of the Chicano challenge to the “Mexican American 
Challenge to the American Ethos: ‘Chicanos’ and ‘Mexican Americans,’” in 
F. Chris Garcia, ed., La Causa Politica: A Chicano Politics Reader (Notre 
Dame: University of Notre Dame Press, 1974), 86-103; Mario T. Garcia, 
Mexican Americans: Leadership, Ideology, and Identity, 1930-1960 (New 
Haven: Yale University Press, 1989), 13-22; and: Carlos Munoz, Youth, 
generally.
what is commonly referred to as a Mexican American." 51 Such defense
of the status quo led Chicano youth to regard their elders as collaborators
in the Anglo's oppression of la Raza (the Chicano race). The Chicano
activists called them vendidos ("sellouts"). 52

These were unfair charges. Although the liberal middle-class
seemed complacent, the spirit of the decade also animated many members
in the older generation. In spring 1966, fifty Mexican-American leaders
exited from a conference hosted by the federal Equal Employment
Opportunity Commission, because the EEOC planners were preoccupied
with African-Americans and did not place Mexican-Americans concerns on
the agenda. The Mexican-Americans began to complain that President
Johnson took their political support for granted. 53 The early results of the

51 Navarro, Mexican American Youth Organization, 174, 198. Henry B.
Gonzalez, from the Congressional Record, 22 April 1969, 91st Congress,
Charles Van Doren, eds., A Documentary History of the Mexican
Americans (New York: Praeger, 1971), 358. Also, see: Rodney E. Hero,
Latinos and the U.S. Political System: Two-Tiered Pluralism (Philadelphia:

52 Manuel G. Gonzalez, Mexicanos: A History of Mexicans in the United
States (Bloomington: Indiana University Press, 1999), 219.

53 Manuel P. Servín, "The Post-World War II Mexican-American, 1945-
1965: A Non-Achieving Minority," in: Servín, ed., The Mexican-
Americans: An Awakening Minority, 144. See: "Latin Leaders Walk Out
on U.S.," Texas Observer, 15 April 1966, 5. Quiñones, Chicano Politics,
106-108. For the significance of this event, see: Carl Allsup, The
American GI Forum: Origins and Evolution (Austin: Center for Mexican
American Studies/University of Texas Press, 1982), 160-161. For tensions
and jealousies between Blacks and Mexican-Americans in the mid-1960s,
exodus were gratifying for those leaders who worried that by the 1960s Mexican-Americans had become the "Minority Nobody Knows." Johnson created an Inter-Agency Committee on Mexican-American Affairs, promised a White House conference to study ethnic discrimination in the Southwest, and appointed Mexican-Americans to several government panels. For example, the president appointed physician Hector Garcia, the founder of the American G.I. Forum (AGIF), to be the first Mexican-American member of the U.S. Commission on Civil Rights.55

Unfortunately, Johnson's new exercises in patronage brought few changes in his own priorities. He delayed and ultimately abandoned plans for hosting the White House conference. Instead, he authorized members of his cabinet to meet in El Paso during hearings of the new Inter-Agency Committee. Soon, he was distracted by criticisms and protests from other quarters. As a consequence, Mexican-Americans' frustrations increased.

Leaders like Dr. Garcia were impressed by the determination farm
workers demonstrated throughout their march and thirteen-month strike. Middle-class leaders also noticed when the farm workers’ plight attracted national attention. 56

Mexican-Americans soon resumed civil rights litigation. In 1967, San Antonio attorney Pete Tijerina obtained a $2.2 million, multi-year grant from the Ford Foundation. He used it to found the Mexican-American Legal Defense and Education Fund (originally abbreviated MALD, since, MALDEF). When the Civil Rights Commission held hearings in San Antonio in December 1968, Dr. Garcia invited Tijerina to describe why he organized MALDEF. Tijerina said that his experience defending Mexican-Americans before all-Anglo juries, a decade after the U.S. Supreme Court condemned discriminations in jury selection,

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56 In late September 1966, Congress had amended the Fair Labor Standards Act (FLSA), ending agricultural workers blanket exemption from the statute. 29 U.S.C. § 206(5). Subsection 5 was added by Pub.L. 89-601, § 302; 80 Stat. 830. But a Senate subcommittee, studying recommendations further to amend the FLSA, visited the Valley in July 1967 after the state judge’s injunction ended the strike. The senators took testimony from participants on both sides of the wage controversy. The panel’s investigation focused new attention on the patterns of discrimination the Anglo majority in Texas maintained against Mexican-Americans. The tone of the questions and the comments made by one of the panel’s leading members, Senator Edward M. Kennedy, made it clear that he favored the cause of the farm workers over that of the growers. See: “Little People’s Day,” *Texas Observer*, 21 July 1967, 5.
convinced him that a legal defense organization was needed.\textsuperscript{57} Under “freedom-of-choice” plans for school desegregation, Mexican-Americans were not allowed to transfer their children into Anglo-majority schools, but African-Americans children could transfer into white schools, because, according to existing interpretations of laws, all Mexican-American students were already enrolled in “white” schools.\textsuperscript{58} MALDEF lawyers had either filed or was contemplating lawsuits to attack these practices, but Tijerina depicted the great expense of private litigation and called on the U.S. Attorney General to fight discrimination against Mexican-Americans. He assured the commissioners that he did not intend to compete with black civil rights efforts, but sought only to broaden the scope of federal government efforts.\textsuperscript{59} As contrasted with

\textsuperscript{57} Hernández v. Texas, 347 U.S. 475 (1954).
\textsuperscript{59} See: “Testimony of Pete Tijerina,” 13 December 1968, in U.S. Commission on Civil Rights, Hearing Held in San Antonio, Texas, 9-14 December 1968 (Wash., D.C.: U.S. Commission on Civil Rights, 1968), 653-655. Richard L. Dockery, the Southwest regional director of the National Association for the Advancement of Colored Persons (NAACP), had also testified in support of similar proposals. He told the Commission, because his organization included had many Mexican-American members, and had recently established offices in San Antonio. See: “Testimony of Richard L. Dockery,” 9 December 1968, Ibid., 92-93. Richard Alatorre, a staff member of the NAACP’s Legal Defense Fund’s (LDF, Inc., or the “Inc. Fund”) Southwest office, followed Tijerina on the program in San Antonio. He testified that the two legal defense organizations were making
federal attorney’s recent support of African-Americans, Tijerina noted,

common cause to fight discrimination against all minority groups in the Southwest. See: “Testimony of Richard Alatorre,” 13 December 1968, *Ibid.*, 656-657. Tijerina consciously modeled MALDEF on the “Inc. Fund” after meeting and discussing the need for such an organization with Jack Greenberg, who was the LDF’s chief litigator during the 1960s. Tijerina sought funding from the Ford Foundation at Greenberg’s suggestion. See: Karen O’Connor and Lee Epstein, “A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Education Fund, 1968-82,” in Rodolfo O. De La Garza, Frank D. Bean, Charles M. Bonjean, Ricardo Romo, and Rodolfo Alvarez, eds., *The Mexican American Experience: An Interdisciplinary Anthology* (Austin: University of Texas Press, 1985), 284-285; San Miguel, Jr., *Let All of Them Take Heed*, 169-172; and: Quiñones, *Chicano Politics*, 110-112. African- and Mexican-American litigators had rarely coordinated strategies before the late 1960s, but by the time of MALDEF’s founding, they saw the wisdom in mutual legal support, either as intervenors in lawsuits or as writers of *amicus* briefs. There were lingering tensions between Mexican-Americans and African-American over legal strategies. Leaders were often jealous of their perceived turf, and reacted poorly to interference from other organizations. The LDF tried to accomplish through legal strategy what the Rev. Martin Luther King Jr.’s Southern Christian Leadership Council (SCLC) sought to accomplish through moral suasion, for example. They were occasionally allied, but not always aligned, and both late had difficulty exerting any influence with the radicalizing younger activists who came to dominate the Student Nonviolent Coordinating Committee (SNCC). And the NAACP also came into conflict with its own former legal wing, the LDF, after they had formally split for legal reasons. For the dynamics of coalitions the various organizations built to accomplish their goals (with each other and with other minorities), and of rivalries that occasionally prevented their accomplishing these goals (within and without their own group), see: Stephen L. Wasby, *Race Relations in an Age of Complexity* (Charlottesville: University Press of Virginia, 1995), 123-124.
the federal government had never intervened in a civil rights lawsuit involving Mexican-Americans or filed an *amicus curiae* ("friend of the court") brief to support them.\(^{60}\)

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Tijerina did not wait for legal assistance from Washington.\(^{61}\) But instead of suing to change desegregation rules, MALDEF initially undertook a number of cases that established the organization as an

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unofficial civil liberties bureau for militant Chicano high school students. The upheavals brought by the black civil rights struggle, the farm workers' movement, and antiwar protests led many Mexican-descended youths to adopt similar goals and direct action tactics to combat the inequities they encountered.\textsuperscript{62}

In the late 1960s, leaders of MAYO or similar college-based organizations began to encourage high school students to protest substandard facilities, regulations of clothing styles, hair styles, and other personal expression, and, most often, the Anglo-centered curricula. Beginning in 1968, students in San Antonio, El Paso, Houston, and elsewhere in Texas responded to their local school administrators' routine refusals to discuss their Chicano-inspired manifestos for school reform by "walking-out." The influence of the farm workers' strikes was revealed by the frequent display of the UFWOC's thunderbird flag during student protests.\textsuperscript{63} The walk-outs seriously disrupted most targeted campuses.\textsuperscript{64}

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More than any other Chicano organization, MAYO chapters on Texas' college campuses actively advised high school students on the predominately Mexican-American campuses to organize protests. MAYO had only an advisory role in most walk-outs until late 1968, when its Pan American University chapter played a key role in precipitating a mass exit of high school students in Hidalgo County's Edcouch-Elsa ISD. The Pan Am organizers had been instructing pupils regarding Chicano politics and protest tactics for several weeks when in October, two students were expelled for refusing to comply with district haircut rules. Student activists, accompanied by MAYO advisors, met with the Edcouch-Elsa superintendent to demand that he reinstate the two students. When the superintendent refused, the students resolved to walk-out. The school board, consisting of three Anglos and two Mexican-Americans, evidently expecting that response, met in early November to develop an official policy regarding the anticipated outbreak of student unrest, then mailed


64 The isolation and alienation of the Mexican-American community, which was subsumed in the cultural nationalism of the Chicano youth movement, left T.R. Fehrenbach, author of a noted history of Texas published in 1968, wondering whether South Texas was on the verge of becoming the Quebec of the United States. T.R. Fehrenbach, *Lone Star: A History of Texas and the Texans* (New York: Macmillan, 1968), 698-701. That separatist end was the announced goal of the most militant of the Chicanos, but most of the activists were willing to accept a symbolic homeland in the Southwest they called Aztlan. García, *Chicanismo*, 94-98.
notices to district parents threatening to expel students who engaged in any demonstrations, such as a walk-out, or who joined organizations that disrupted schools. The notices blamed "outside agitators" for making necessary new disciplinary rules.\(^{65}\)

A student rally publicly announced two recommendations and fifteen demands. They included proposals to add Chicano cultural and historical perspectives to the curriculum, and to eliminate the long-standing rule forbidding the speaking of Spanish on school grounds.\(^{66}\) The board refused to consider the demands, and more than 150 students walked-out on in mid-November. While students demonstrated across the street, a committee of student leaders met with the principal. He refused to seek an immediate meeting of the board. The contentious students pressed him, and he summarily expelled them. When protests resumed the next day, teachers recorded the name of every student they recognized. The principal had the


\(^{66}\) The typical demands testify to the restlessness and emerging self-conscious of students in general and attest to the *Chicanismo* informing Mexican-American youth in particular. For a "laundry list" of typical walk-out demands, see: Rendón, *Chicano Manifesto*, 177-179. For origins and ultimate abandonment in 1969 of "No Spanish" rules, see: Thomas P. Carter, *Mexican Americans in School: A History of Educational Neglect* (New York: College Entrance Examination Board, 1970), 97-98; and:
Hidalgo County Sheriff arrest five of the dozens students of who still demonstrated on the second day of the walk-out. The charge, loitering on school property.\footnote{Navarro, \textit{Mexican American Youth Organization}, 120-123.}

When the school board next met, four members upheld the mass expulsions but voted to schedule hearings where individual students could petition for re-admission. The fifth board member, a Mexican-American, abstained. Of seventy-eight students who sought re-admission during the first week of hearings, forty-seven were allowed to return to class on probation, and the remaining thirty-one were expelled for the balance of the semester. But ninety-four students did not request re-admission.\footnote{Ibid., 120-123.}

Once arrested or expelled, the Edcouch-Elsa student activists were represented by local attorney Bob Sanchez of McAllen, and by MALDEF volunteers lawyers. They sought a temporary restraining order from Judge Garza. Sanchez complained that the blanket expulsions deprived students of due process since they were confirmed \textit{prior} to individual hearings. Garza agreed, and he ordered the board to admit all ninety-four suspended students pending hearings. The legal team also filed a Section 1983 civil action against the school district, superintendent, board members, and principal, on behalf of three of the five students who had

\footnote{Rangel and Alcala, \textit{"Project Report, De Jure Segregation of Chicanos in Texas Schools,"} 310, note 20.}
been arrested for loitering, and two other students. The suit alleged that the school officials' prohibition of demonstrations and their methods of ending the walk-out eroded the students' civil rights. The plaintiffs requested a total of $50,000 in damages.\(^69\)

Garza convened a hearing in Brownsville, where the district superintendent admitted that there was no written criteria for deciding whether a particular student's expulsion was to be permanent. The student's attitude and actions during the walk-out were the major factors the panel considered. Incredulous, Garza sought clarification: "[i]n other words, if they kow-towed to you and said you were a nice principal, they got back in?"\(^70\)

On 19 December 1968, Garza ruled that the district's arbitrary expulsion procedure and blanket ban on demonstrations were unconstitutional. He ordered the school district to readmit the students, directed that all traces of the expulsions be expunged from the students' permanent files, and assessed a nominal damage award against the Edcouch-Elsa ISD.\(^71\)

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Almost all of the Edcouch-Elsa students returned to class. But beyond obtaining the satisfaction of seeing administrators scolded, they gained little from the walk-out. Nevertheless, the students raised the political profile of the MAYO leaders, and encouraged larger walk-outs in 1969, notably in Kingsville and Crystal City.\(^7\) The MALDEF lawyers dispensed legal advice, which perhaps accounts for the fact that many of the protests subsequent to Edcouch-Elsa's, although often tense, ended in negotiated settlements rather than in lawsuits.\(^3\)

One exception to this trend toward settlement concerned the official response to a protest by seventeen-year-old Lucinda Escalante. The controversy combined the Chicano rights movement in South Texas with the larger student protest about America's involvement in Viet Nam. Escalante attended high school in La Feria, a border city between Brownsville and McAllen. She distributed leaflets in school corridors, to announce a protest rally arranged by the MAYO-influenced La Feria Youth Organization. MAYO had wanted to call attention to the number of Chicanos serving in Viet Nam, which was high relative to their actual


percentage of the U.S. and Texas populations.\textsuperscript{74} The principal suspended Escalante and two students who had helped her pass out the leaflets for three days, because they had distributed literature without permission. Escalante pointed out that no announced policy barred passing out leaflets, and that other students distributed literature on school grounds, but the principal refused to reconsider.\textsuperscript{75}

Escalante then visited La Feria's superintendent, to request immediate reinstatement and a "timely" hearing regarding the suspension's legality. She was accompanied by Efrain Fernandez, the MAYO member who had given her the leaflets for distribution, and by Roger Dunwell, who

\textsuperscript{74} This was an issue that MAYO raised frequently in the late 1960s. The mimeographed leaflets announced the time, place, and reason of the rally on one side, in Spanish, and listed the relevant draft statistics in English on the reverse side. The information seems to be based on an article by Prof. Ralph Guzman of the University of California at Santa Cruz, which Representative Edward R. Roybal of California entered into the Congressional Record. See: "Mexican-American Casualties in Vietnam," from the Congressional Record, 91st Congress, 1st session, 8 October 1969, 91st Congress, 1st Session; Rep. Roybal's entry has been reprinted in Moquin and Van Doren, A Documentary History of the Mexican Americans, 371-373.

\textsuperscript{75} The two other students, Ortiz and Trevino, were also suspended for leafleting, but they do not play a large part in the subsequent case, because they declined to join Escalante's lawsuit. One effect of their brief participation in the protest is that their refusal to join the suit convinced Judge Garza to deny Escalante's request to expand the suit into a class action. See: Escalante v. La Feria Independent School District, unpublished (S.D.Tex., 1970) [hereafter, cited as: Escalante v. La Feria ISD]; Civil Action (Civ.A.) No. 69-B-163, U.S. District Court for the Southern District of Texas (S.D.Tex.), Brownsville Division. NARA-
identified himself only as a "civil rights worker," but who had written
the letter she presented to the superintendent. In it, Escalante suggested
that the principal had violated her constitutional right to free speech, and
had denied her the right without due process. She referred the
administrator to the recent U.S. Supreme Court decision in Tinker v. Des
Moines. In Tinker, the Court had declared that students "do not shed
their rights . . . at the schoolhouse door," and reversed the expulsions of
three who had protested the war by wearing black armbands to their
school.

Escalante had engaged in volunteer activities in the Valley, including
poverty relief and voter registration, but she was now explicitly identifying
her protest with the national struggle for students' rights. The La Feria
superintendent refused to discuss her suspension. He denied that Fernandez
and Dunwell's had the authority to represent Escalante, who was a minor.

SWA. RG 21, Box 491, Folder for Case No. 69-B-163. See: Memorandum
and Order, 1 August 1970, pp. 1-4.
76 She did not mention the possibility that she had been singled out by an
Anglo principal because she was a Chicana. See Escalante's letter, dated 14
November 1969, labeled "Defendants Exhibit No. 2," in: Escalante v. La
Feria ISD. NARA-SWA. RG 21, Box 492, Folder for Case No. 69-B-163.
77 Tinker v. Des Moines Independent Community School District, 393 U.S.
503 (1969), 506 [hereafter: Tinker].
78 In Tinker, announced 24 February 1969, the Justices supported the
students' claim that they were citizens under the Constitution and therefore
entitled by the Fourteenth Amendment to equal protection under the law.
See: John W. Johnson, The Struggle for Student Rights: Tinker v. Des
Moines and the 1960s (Lawrence: University Press of Kansas, 1997), ix-x,
Escalante later returned with a typed note signed by her father, but the superintendent still refused to intervene since only one day remained of the suspension.\footnote{Escalante v. La Feria ISD. NARA-SWA. RG 21, Box 492, Folder for Case No. 69-B-163. See Escalante's deposition, filed 20 May 1970, pp. 9-10, 15-16, 40-41. The date of the deposition session is not provided, but must have been 5 February 1970: during the proceedings, Escalante}.

After the suspension expired, the La Feria school board denied Escalante's written request for a hearing. In December 1969, Brownsville lawyer Filemon B. Vela filed a section 1983 action in Judge Garza's court. He was joined in the suit by MALDEF co-counsel Tijerina and two other volunteer attorneys. The federal complaint, filed one year to the day after Garza enjoined the Edcouch-Elsa board, alleged that Escalante had been deprived of rights of speech and association guaranteed by the First Amendment, and equal protection of the laws guaranteed by the Fourteenth Amendment. She had been singled out for punishment, the attorneys argued, because the principal disapproved of the message her leaflet contained, not because of an infraction of his unwritten rule. They also contended that the board's deference to an unwritten rule in denying Escalante a hearing deprived her of due process. The attorneys requested that Judge Garza enjoin this rule, order the removal of any trace of the suspension from Escalante's record, and declare the official's actions and generally.
unconstitutional. They also requested that he "[a]ward such other relief as is just and proper."  

Although the complaint did not employ the term "Chicano," as did many of the MALDEF-sponsored suits, the district's response to the lawsuit indicates that the authorities believed that the MAYO militants were manipulating Escalante in order to create a political issue that would advance the Chicano cause. Therefore, the district's lawyer, Orrin Johnson of Harlingen, seized on every opportunity to discredit MAYO and militant dissent in general. He disputed various points of fact in the complaint, but also noted various errors in spelling. Johnson took special exception to the lawyers' use of "Mexican-American citizen" to describe Escalante. He noted that: "... [a]ccording to her school record, Lucinda is a citizen of the United States and by law is not a hyphenated citizen of the United States." Finally, he claimed that the complaint had not correctly stated the issues in the case. According to Johnson, who posed them as questions, they were:

... (a) must the corridors of the public schools ---which belong to everyone--- be used as the forum for distribution of unauthorized leaflets which cater to race prejudice and bigotry

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80 The declaratory judgment was available under the Declaratory Judgment Act, 28 U.S.C. § 2201.
81 Escalante v. La Feria ISD. NARA-SWA. RG 21, Box 491, Folder for Case No. 69-B-163. See: Complaint, 19 December 1969, 1-4; Defendant’s Motion to Dismiss, 26 January 1970.
and which tend to demean or provoke other students purely on the basis of race or national origin?
(b) Does the right of free speech require that one always be allowed to use the corridors of a public school immediately before commencement of classes for leafleting [sic] designed to divide and excite the students on the basis of race or national origin and that also tends to disrupt order, discipline and neatness in the school?
(c) May such unauthorized literature be so distributed at school without, first, obtaining the permission of the principal in contravention with the long-standing rules and practices of the school? ⁸²

Throughout his answer, Johnson focused on the ethnic issues that Escalante allegedly sought to inflame. He explained at length how the La Feria officials, beginning with the principal, were angry and disappointed that she had brought “ethnically divisive” and provocative antiwar leaflets to school the day after a patriotic Veteran’s Day assembly. ⁸³

Few of the facts were disputed, and Garza requested that the lawyers summarize their positions on the relevant case law. Vela argued that Supreme Court decisions, including Board of Education v. Barnette, the World War II-era “flag salute” case, ⁸⁴ and Tinker, established that unless a student’s speech or action had “materially disrupted” the education of fellow students, it was protected by the First Amendment. He also noted

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⁸³ Ibid., see: Complaint, 19 December 1969, 1; Defendant’s Original Answer, 26 January 1970, pp. 3-9.
that La Feria’s principal applied “his” rule regarding announcements inconsistently, and had attempted to prevent specific subjects or opinions from being discussed in classrooms. This was the prior restraint that Garza had condemned in the Edcouch-Elsa district, Vela argued, and he must condemn it once again.\footnote{See: Escalante v. La Feria ISD. NARA-SWA. RG 21, Box 491, Folder for Case No. 69-B-163. See: Trial Brief, filed 15 May 1970, pp. 3-10.}

Johnson disputed Vela’s central argument that, since Escalante’s activities were not disruptive, \textit{Tinker} and other precedents applied. To the contrary, Johnson stated, leafleting had caused an “uneasy” feeling to pervade the school for the rest of the day. And he wrote: “[i]f an individual wanted to incite the emotions of the students of La Feria High School just as the day’s classes were to begin, she could not have picked a more volatile vehicle than an appeal to ethnic differences with the added force of the impact of the Viet Nam War.” But Johnson implied that the impact of Escalante’s leafleting on other students’ learning environment was the secondary concern. The primary one, he noted, was the maintenance of the La Feria officials’ ability to control the district’s schools, free of the fear of students’ lawsuits. Johnson appealed to Garza’s sense of proportion and his judicial management sensitivities: “[i]f there were a practical question to present to the [c]ourt, it would be this: How much time does a Federal Court have to spend on three-day suspensions of
seventeen year old students who do not first attempt to work out their complaints about disciplinary actions through the administrative channels of the school?"\textsuperscript{86}

Briefs from the attorneys merely restated their contentions: Vela and the MALDEF lawyers claimed Escalante’s rights were denied; Johnson argued that she was a pawn in a ploy to disrupt the peace at La Feria high school. On 1 August, Garza sustained the former position. He declared that “[t]here was no evidence that the leaflets disrupted the activities of the school in any manner, and this made the suspension unconstitutional.” The judge agreed with the school district that it could regulate the time, place, and manner of distributing literature on its campuses, as long as the rules were “reasonable and non-discriminatory,” and content-neutral. Administrators might require that all materials be subjected to review prior to distribution, but the regulations were permissible only if they did not act as “a cloak for censorship and selective enforcement.” The judge withheld the requested injunction against the principal’s “so-called

\textsuperscript{86} Ibid., see: Defendant’s Trial Memorandum, filed 20 June 1970, p. 7, 17-18. The school district sought to have the case dismissed because Escalante had not exhausted her administrative options before filing the federal case. Garza admitted that recent Fifth Circuit decisions suggested that he should have sent Escalante to negotiate further with the La Feria board of education. However, he decided that this would have been futile; the two other students suspended with Escalante, Ortiz and Trevino, used the administrative channels, but their suspensions remained in full effect. On this ground, Garza denied the district’s motion to dismiss the case. See: Ibid., Memorandum and Order, 1 August 1970, p. 5.
unwritten rule," however, and instead urged the La Feria district to
develop regulations that met the conditions he outlined. Finally, noting that
the three days Escalante had spent under suspension could not be replaced,
Garza ordered the school district to expunge its files of any record of the
"unconstitutional suspension." 87

Garza's firm support of the constitutional rights of Mexican-
American students in these two cases does not indicate that he supported the
goals of either Chicano militants or critics of American policies. He did
accept the substance of the critiques from both quarters, because in the late
1960s Garza had one son in college preparing for applications to law
school and another son in the U.S. Army training for possible duty Viet
Nam. The judge never denied administrators' duties to keep control in the
schools in order to provide an environment suitable for the education of
the younger generation. But Garza's rulings in the Edcouch-Elsa and La
Feria cases showed that he opposed the arbitrary application of otherwise
legitimate administrative authority. The rulings also indicate why liberal
Mexican-American leaders, who in 1961 had opposed his appointment to
the federal district bench in the Southern District of Texas, and even some
leaders associated with the Chicano movement, lobbied for Garza when
President Johnson was considering who to appoint to fill the seat on the
U.S. Supreme Court left vacant by Associate Justice Tom C. Clark resignation in 1967. But Clark’s seat eventually went to Thurgood Marshall.\footnote{Ibid., Memorandum and Order, 1 August 1970, p. 6.}

In the late 1960s, MALDEF’s lawsuits helped to re-establish litigation as a tool for vindicating Mexican-American civil rights. These efforts indicated that the new organization could contend viably in constitutional disputes.\footnote{Louise Ann Fisch, All Rise: Reynaldo G. Garza, the First Mexican American Federal Judge (College Station: Texas A&M University Press, 1996), 115-117.} But MALDEF’s early victories did not advance claims that Mexican-Americans were a group distinct from Anglos. Instead, these cases indicated that in an era of protests, Chicano students in Texas were subject to, and objected to, the same oppressive regulations as Anglo students, as illustrated by the attorneys’ strategies in the \textit{La Feria} case. Vela made few references to the ethnic aspects of Escalante’s complaint, and instead suggested that, in addition to \textit{Tinker}, Garza should follow his Southern District colleague Judge Seals’ reasoning in a recent

\footnote{Navarro, \textit{Mexican American Youth Organization}, 157-158. In its early years, MALDEF also accepted minor claims of the “legal aid” variety, concerning minor disputes, which did not actually require legal counsel. O’Connor and Epstein suggest that, despite some victories, MALDEF was not an effective constitutional litigator until at least 1973; moreover, even then, it lost more often than it won. O’Connor and Epstein, “A Legal Voice for the Chicano Community,” 285.}
decision involving an Anglo high school student’s suspension in the District’s Houston Division, *Sullivan v. Houston Independent School District*. But Johnson had repeatedly referred to ethnic politics, especially MAYO’s alleged efforts to turn Escalante’s case into a Chicano *cause celebre*. He argued that Garza should follow *Schwartz v. Galveston Independent School District*, which Judge Noel had recently decided in the District’s Galveston Division.

Garza’s ruling in *La Feria* followed *Sullivan* rather than *Schwartz*, but if he had taken the opposite course the result would have had the same significance for Chicanos as Chicanos, that is, none at all. An examination of the two precedent-setting cases follows.

II. Students and Free Speech: The Class of (Section) 1983 or the *Younger* Generation?

Escalante’s suit did not represent the struggle for Chicano civil rights. Instead, it was one of many student controversies that the Southern

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91 309 F.Supp. 1034 (S.D.Tex., 1970). Johnson cites the case number (Civ. No. 69-[H]-185), because the decision had not yet been published when he wrote the brief. See: *Escalante v. La Feria ISD*. NARA-SWA. RG 21,
District judges, among others, faced in the late 1960s. Like Escalante, the plaintiffs in the two cases Vela and Johnson cited in their respective briefs had filed section 1983 claims. The first case, *Sullivan*, concerned the suppression of the student’s “underground” newspaper. The second, *Schwartz*, involved the student’s haircut. Both suggest the varied claimants who in ever larger numbers were seeking to expand the scope of civil rights laws enacted to advance African-Americans. Both, especially the haircut case, epitomize the essentially local disputes that the U.S. Supreme Court, in *Younger*, ultimately sought to exclude.

The root controversy in the newspaper case was an effort by administrators of Houston’s new Sharpstown high school to suppress a student publication, the *Pflashlyte*. During the 1968-1969 school term, Sharpstown’s first in operation, seniors Dan Sullivan and Mike Fischer were “B” students with good disciplinary records. The students’ complaints emerged because of the absence of clear regulations governing student dress or conduct. Sullivan, for example, had once violated “school regulations” by wearing a neckerchief, but the principal was unable to cite which rule he had broken. Students’ frustrations led to the organization of

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Box 491, Folder for Case No. 69-B-163. Defendant’s Post-Trial Memorandum, filed 1 June 1970, p. 10.
an after-school rally near the campus, where students and some
teachers discussed the concerns. Sharpstown athletic coaches interrupted
the rally. They reportedly threw books, ripped notebooks, and accused
students of being "Communists and Fascists." Later incidents of
harassments by teachers, arbitrary discipline, and administrative hypocrisy
added to the students' dissatisfaction.  

Sullivan and Fischer learned that they could have a newspaper
expressing their criticisms printed at the University of Houston (UH), if an
official campus organization sponsored the work. Determining that the
Students for a Democratic Society (SDS) would accommodate them,
Sullivan and Fischer drafted an introductory issue and attended three SDS
meetings at UH, to insure that the paper would be printed. But they did not
join the SDS because, they later claimed, they disagreed with the
organization's radical politics. But when they received copies of the
premier issue of their paper, they discovered that "SDS" had been printed
at the bottom of each page. They removed the initials by cutting off the
bottom portion of each of the 125 sheets. The second issue bore the name
Pflashlyte on the front, and "Students for a Democratic Society" on the
back, the latter banner high enough on the page to prevent its being excised

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92 Sharpstown was actually a Junior/Senior High School; it maintained
seventh and eighth grades.
[Houston Division; Civ. A. No. 69-H-266].
without removing portions of text from the front. The letters SDS were printed in the middle of the reverse side in the third and final issue.\(^9\)

Sullivan and Fischer distributed the first issue on 27 February 1969. The second was ready the next day, and they distributed it as well. Most students apparently did not read or display the *Pflashlyte* while on school property. But Sharpstown officials discovered copies stacked in a boys’ restroom and others stuffed inside sewing machines in the girls’ homemaking classroom.\(^5\)

The Sharpstown principal and assistant principal called in Sullivan and Fischer separately. Both students admitted that they had printed and distributed the paper. The principals told them that their actions were serious violations of “school regulations,” which was compounded by their involvement in a “secret organization” (presumably the SDS). However, the principals neither informed the students what disciplinary action, if any, they faced, nor offered them an opportunity to cease printing the *Pflashlyte* in order to mitigate punishment. Instead, several days later, the principal expelled Sullivan and Fischer for the remainder of their senior year.\(^6\)

Represented by Houston attorney Chris Dixie, Sullivan and Fischer filed suit in the Southern District under section 1983, charging that the expulsions deprived them of free speech and due process. They requested an injunction from Judge Seals that would reinstate them at Sharpstown, sought a declaratory judgment that the rules under which they had been suspended were unconstitutionally vague and overbroad, and applied for recognition of their lawsuit as a class action.\textsuperscript{97} Joe Reynolds, who represented the Houston Independent School District (HISD) in its school desegregation litigation, responded to the students' complaint. Arguing that the principal's actions expelling Sullivan and Fischer had been justified because their paper's publication and distribution had resulted in "complete turmoil" at the school, Reynolds contended that the contents of the \textit{Pflashlyte} were "calculated to encourage insubordination to school authority." He asserted that the expulsions were also justified by "reports" that two "so-called radical organizations," the SDS and its secondary school affiliate, the Student Union for Democratic Schools, were attempting to "infiltrate" Houston high schools.\textsuperscript{98}

These rumors reflected contemporary mainstream fears, driven by the federal government's own obsession with student radicalism. Federal

prosecutors were then subpoenaing major national news magazines for information on SDS activities. Yet the SDS had unraveled by 1969.99

Neither the unsubstantiated rumors of radical "infiltration" nor the unsupported accusations of "insubordination" convinced Judge Seals that HISD was in imminent danger. After seeing their records and evaluating their behavior in court, the judge concluded that Sullivan and Fischer were "rather typical young American men of high moral character." He entered a temporary restraining order which required the school district to reinstate them until he could examine the circumstances which led to their expulsions.100

Seals opened a hearing on 9 April 1969. He heard testimony and arguments from the lawyers for five days, then entered his informal "findings of fact." It granted Dixie's motion for a preliminary injunction, which kept Sullivan and Fischer in school. Seals enjoined the Sharpstown authorities from disciplining the students for publishing or distributing any

other written materials off school property. As a result of Seals' orders both Sullivan and Fischer graduated in Spring 1969, before the judge's final ruling. The district contended that the graduation mooted the case. Seals disagreed for two reasons. First, the students wanted the district enjoined from maintaining any formal or informal record reflecting the disciplinary action against them. They deserved a final decision. Second, the students sued as a class action, with the designated plaintiff class composed of all HISD secondary students. The issue was not mooted for the rest of the class.  

The district claimed that the majority of Houston students did not sympathize with Sullivan and Fischer or share their views or methods; therefore, the mass of students were not "similarly situated" with them. To Seals, HISD's contention "missee[d] the point." All members of the proposed class were subject to the same allegedly unconstitutional application of the regulations. He ruled that it was "irrelevant to speculate how many students might need to invoke the first amendment as protection from official sanctions; the fact that each member is subject to the same

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specific sort of deprivation of constitutional rights as the representative parties is enough" to maintain the case as a class action.\textsuperscript{103}

On 17 November 1969, Seals issued his decision. He noted that in \textit{Tinker}, the Court had "clarified the constitutional principles governing the rights of school pupils to register dissenting opinions at school and the need for maintaining standards of discipline in public schools," and had declared: "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."\textsuperscript{104} Seals said \textit{Tinker} "very clearly applies the first amendment in its full force to the high school campus." However, free speech and assembly rights were always, "subject to reasonable restrictions as to time, place, manner and duration." The First Amendment did not require, and the \textit{Tinker} decision would not support, the notion that students could read newspapers during a class, or that school officials should tolerate loud speeches or discussions in the corridors during a class period. A reasonable regulation of "place," Seals suggested, might prohibit discussion in the school's library. But, subject to these reasonable limitations, a student had the right to express himself or herself in a non-disruptive manner while on school property. And clearly, the judge said,

\textsuperscript{104} \textit{Tinker}, 393 U.S. 503 (1969), 511.
the school administrators may not enforce rules regarding "time,
"place," "manner," or "duration" in a discriminatory fashion.\textsuperscript{105}

Seals concluded that there was no question that Sullivan and Fischer
were engaged in acts of expression protected by the First Amendment,
since, "excepting only oral expression . . . the publication of a 'newspaper'
is first amendment activity in its purest form." The remaining crucial issue
was whether Sullivan and Fischer did "materially and substantially
interfere" with operation of the Sharpstown high school. Seals concluded
that the distribution of the \textit{Pflashlyte} "... had no such effect." During
1969, so-called "underground" papers had "sprung up" in high schools all
over the United States, many employing harsh language and advocating
violence. The \textit{Pflashlyte}, the judge declared, was primarily intended as a
forum for the discussion of, and comment upon, legitimate problems
affecting students relations with administrators. Its writer-publishers, Seals
noted, were "generally critical of school policy but the criticism [was] on a
mature and intelligent level." The introductory issue editorialized that
students' poor relationship with administrators could be improved only
through the "sincere cooperation of all factions." Further, the writers
stated that "[c]onfrontation would result in regression rather than
progression." Seals found that these were "not the words of one who is
calculating to 'incite insubordination.'" As for HISD's attempt to justify
the expulsions by arguing that an organized student movement was attempting to "overthrow" the school system, and that the elimination of these two students and their newspaper was a necessary precaution to prevent further "infiltration," Seals said that he would "resist the temptation to comment" on that contention. Instead, he ruled that Sullivan and Fischer had been disciplined because school officials disliked the contents of the newspaper, and he declared that the Constitution "prohibits such action." All three issues of the *Plashlyte*, he concluded, were plainly the sort of speech protected by the First Amendment. 106

Seals' ruling in favor of Sullivan's and Fischer's First Amendment rights did not settle all outstanding issues. The students also contended that the Sharpstown principal's method in expelling them did not meet minimal standards of procedural due process. 107 Judge Seals agreed; parents or guardians, he said, had legal obligations to children of school age and "common sense dictates that they should be included in any disciplinary action . . . which could result in severe punishment." Because parents were

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107 As is obvious by this line of cases, the issue of due process for students was under much scrutiny at the time. See generally: Charles Alan Wright, "The Constitution on the Campus," 22 *Vanderbilt Law Review* 22 (1969): 1027. Some observers were unhappy with the "contemporary phenomenon of litigious libertarianism" that led to the multiplication of school-related lawsuits. See: Paul G. Haskell, "Judicial Review of School Discipline," *Case Western Reserve Law Review* 21 (1970): 211-213.
not informed that allegations were pending against Sullivan and Fischer prior to the principal's decision to expel them, and the school district afforded them no opportunity to challenge the allegations. Seals decided that due process had been denied.\footnote{Sullivan v. Houston ISD, 307 F.Supp., 1342-1345.}

The final point Sullivan and Fischer raised asked Seals to rule whether or not "certain regulations" of HISD were unconstitutional under the "void-for-vagueness" doctrine. He declared that "[b]asic notions of justice and fair play require that no person shall be made to suffer for a breach unless standards of behavior have first been announced, for who is to decide what has been breached?" The district had not been relying on a "clear, specific normative statement," Seals declared, and the rules which led to the expulsions were unconstitutionally vague and over-broad. The class members were entitled to a declaratory judgment to that effect.\footnote{Seals said that when a high school student was facing dire consequences, he or she had as much a right to expect "a clear, specific normative statement which does not infringe on free expression than does a university student or possibly even the accused in a criminal case." Seals ruled that school regulations "probably do not need to be as narrow as criminal statutes," but if school officials could threaten a severe punishment like expulsion, then they must do it under a rule which reasonably informed the students what specific conduct was prescribed. Sullivan v. Houston ISD, 307 F.Supp. 1328, 1342-1345.}

Seals considered next what equitable relief would protect the plaintiff class of all HISD secondary students. A regulation's overbreadth coupled with the threat of improper enforcement would "chill" the exercise of First
Amendment freedoms, and result in immediate and irreparable injury to the students.\textsuperscript{110} He ruled that they were entitled to a court order forestalling the future use of the voided rule. Seals issued a permanent injunction against HISD administrators imposing serious disciplinary sanctions upon any students who wrote, printed, distributed, or "otherwise engaged in the publication of newspapers either on or off of school premises during either school hours or non-school hours unless such activities materially and substantially disrupt the normal operations of the school," and unless administrators acted under "precise and narrowly drawn regulations." Finally, the judge permanently enjoined HISD officials from expelling or suspending any students for "a substantial period of time" without first providing them with minimal standards of procedural due process, including: (1) providing the student and the parents or guardian formal written notice of the charges and of the evidence; (2) giving both sides in the dispute opportunity to present witnesses or other evidence in a formal hearing; and (3) imposing sanctions only on the basis of substantial evidence.\textsuperscript{111} The school district initially

\begin{footnotesize}
\textsuperscript{110} Judge Seals derives for his "chill" language from \textit{Dombrowski v. Pfister}, 380 U.S. 479 (1965).
\end{footnotesize}
appealed this order, but reconsidered, and developed a new set of
written regulations. After the board adopted these new regulations in
Spring 1970, Judge Seals agreed to dismiss the appeal.\footnote{A committee of students, administrators, parents, attorneys, and others held hearings to discuss aspects of school discipline. The final version of the rules required prior submission to principals of all non-school publications which were to be distributed either on campus or off-campus in a manner that was "calculated" to result in presence on the campus. The principal enjoyed one working day to review the publication before distribution. If the principal and HISD attorneys believed that the publication contained "libelous or obscene language or advocate[d] illegal action or disobedience to published rules on student conduct," the principal could withhold approval and it could not be distributed. Beyond these libel, obscenity, and advocacy conditions, however, the rules provided that denials were to be content neutral: distribution could not be prohibited simply because the proposed publication "contained the expression of any idea, popular or unpopular." In addition, to conform with Judge Seals' order, the new regulations contained specific provisions governing suspension procedures. Upon violating the regulations, a student could be suspended for a "reasonable" time not exceeding three school days, and only upon written notice of the reasons for the suspension to parents or guardians. For longer suspensions or for indefinite suspensions, the student, parent, or guardian was entitled to written notice as well as a prompt hearing with the principal, if they wanted one. At the meeting, they could produce witnesses and be assisted by counsel. Also, a suspended student had the right to appeal, first to the assistant superintendent and then to the HISD Board. \textit{Sullivan v. Houston ISD}, 333 F.Supp. 1149 (S.D.Tex., 1971), 1154; also: 475 F.2d 1071 (5th Cir., 1973), 1073-1074.}
Judge Seals was the first federal district judge to apply a due process standard to overturn disciplinary sanctions against secondary school students. He recognized that he was engaged in judicial path-breaking. In June 1971, in a follow-up opinion to Sullivan, in which he referred to "the highly controversial area of student dress and hair style," Seals wrote: "... the advocates of judicial interference in this area ... have been obliged to invoke that ethereal 'right of privacy' which sprang fullblown from the head of Griswold v. Connecticut, the 'forgotten ninth amendment,' or, most often, the due process clause."

Seals saw no difficulty in accepting such "ethereal" sources of constitutional law.

By contrast, Judge Noel's decision in the Schwartz "haircut" case, which like Sullivan was a suit for injunctive relief of school disciplinary regulations, came to opposite conclusions about high school students'...

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113 In 1969, judges of the U.S. Court of Appeals for the Seventh Circuit overturned the suspensions of several SDS members at the University of Wisconsin at Madison, after deciding that University rules against "misconduct" were constitutionally defective. See: Soglin v. Kauffman, 418 F.2d 163 (7th Cir., 1969). See: Haskell, "Judicial Review of School Discipline," 215-218. The doctrine of "in loco parentis," which held that administrators acted in the place of parents to protect and instruct students, is rarely if ever mentioned in these cases. Ibid., at 235, note 63.

Dress and grooming codes had been commonplace for decades in American secondary schools and at some colleges. But many schools revised the codes during the 1960s. Long hair on men and unorthodox clothing worn by either men or women symbolized political opinions, or at least were so interpreted by many school administrators.

Galveston ISD’s regulations on student appearance included rules for hair and clothing. The district superintendent issued a general regulation on “Dress” in March 1967. A specific code at Galveston’s Ball High School had been drafted by a committee of students, faculty chosen by students, and Ball’s principal and associate principal. The superintendent approved the proposed code on 3 September 1969. The committee had deliberately left the regulation “somewhat vague” to permit students a measure of free expression and to allow flexibility in enforcement. The code provided that: “[b]oys must keep their hair clean, combed out of the eyes, and neatly cut.” Unlike other contemporary dress codes, the Ball High regulations allowed facial hair, requiring only that “[m]oustaches and sideburns must be kept

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clean and neatly trimmed.” Male students’ hair was required to be
above the collar, behind the ears, and out of the eyes.\textsuperscript{116}

Richard A. Schwartz, a student and the son of liberal state senator
A.R. “Babe” Schwartz, had hair that almost reached his shoulders.\textsuperscript{117} He
was warned by Ball High’s associate principal, principal, the district’s
assistant superintendent, and finally the superintendent, that this did not
comply with the regulation. Schwartz refused a haircut, and appealed the
ruling that he was violating the code to the Galveston ISD school board,
which declined to set aside the ruling. The board members threatened
Schwartz with suspension unless he complied with the dress code. In
response, state senator Schwartz contacted David H. Berg, a young Houston
attorney who frequently volunteered for cases through the American Civil
Liberties Union (ACLU), and asked him to represent his son. On 9
December 1969, Berg filed a section 1983 action to enjoin the Galveston
ISD administrators from enforcing the regulation of students’ hair, and to
force the district to expunge any mention of the threatened suspension from
the younger Schwartz’s school records. The complaint alleged that by
attempting to regulate his hair style, the school officials had violated

\textsuperscript{116} The Code also allowed black students to wear “Afros.” See: Schwartz \textit{v.}

\textsuperscript{117} For Senator “Babe” Schwartz’s liberal politics, see: Chandler Davidson,
\textit{Race and Class in Texas Politics} (Princeton: Princeton University Press,
1990), 54, 150.
Schwartz's constitutionally-protected rights of privacy, due process, equal protection, and freedom of expression.\textsuperscript{118}

Noel heard the case in Galveston and presided over a preliminary hearing on 12 December, where Richard Schwartz testified that he did not wear his hair long to express any idea, opinion, or point of view. Rather, he wore long hair as a matter of personal preference, but with the approval of his parents. At the hearing, the Galveston ISD's attorney, Ed Schwab III, countered that the regulations did not violate any right protected by the U.S. Constitution, and that three educational goals justified the dress code. First, the experience of administrators in Galveston and elsewhere showed that without restrictions on dress and hair style, teachers would lose control over their students, control needed for effective teaching. Second, they considered it their responsibility to train students in "the customs and

mores pertaining to dress, appearance, taste, and public etiquette considered to be acceptable by the predominant part of our society." The administrators believed that "liberal, but minimum," standards would best fulfill this duty. Third, permitting the students to participate in formulating the dress code was a valuable means of teaching citizenship and the working of the democratic system. In sum, the actual value of the dress code would be negligible if they allowed exceptions in cases like Richard Schwartz's. Schwab argued that in light of these three educational goals, even if Schwartz's "desire" to wear his hair longer than the code allowed was constitutionally-protected, the regulations were nevertheless a "reasonable and permissible" restriction of rights. Finally, Schwab insisted that Schwartz had not exhausted the available state administrative remedies to end the dispute. Schwab moved to dismiss the case.\textsuperscript{119}

After reviewing at length the background of section 1983, and then agreeing that Schwartz should have sought state administrative and judicial remedies prior to filing a federal lawsuit, Noel ruled in favor of the Galveston ISD. He declared that:

The manner in which students in public high schools should be educated is a subject for local determination. It is a subject foreign to the competence and expertise of the federal judiciary. Whether or not some measure of conformity is educationally sound, and if so to what degree, is not an appropriate question for resolution by federal judges. Such

decisions must be left to the public servants to whom our nation has entrusted its system of public education.\textsuperscript{120}

Noel declared that in Texas, the elected State Board of Education and local Boards of Trustees, and their appointed professional school administrators, were competent to set their educational policies. Schwartz could seek to influence the policy, including changing the Galveston dress code, through available administrative channels. And, "as in all such areas of governmental policy," he said that the student plaintiff could seek a remedy at the ballot box, or "in this instance through the vote of his parents." This route failing, state courts were available. Finally, Noel declared, "an erroneous decision by a state court on a federal constitutional issue is subject to correction in the Supreme Court of the United States." Without a "convincing showing of severe hardship," students must allow administrative and state judicial forums an opportunity to regulate local boards and officials. "In sum," Noel declared, "I am convinced that students with claims against local school officials in Texas are not entitled to haul them into federal court to review their actions." Because Schwartz had not sought to redress grievances through state channels, the judge dismissed his complaint.\textsuperscript{121}

\textsuperscript{120} Ibid., 1048.
\textsuperscript{121} Ibid., 1048-1050.
Given Judge Seals' approval of *Tinker* and his strong support for high school students' First and Fourteenth Amendment rights in *Sullivan*, it is little wonder that Johnson, the La Feria school district's lawyer, sought to persuade Garza to rely on Noel's ruling in *Schwartz*, a decision much more favorable to the school board. The decisions in these two suits were not actually in conflict, because neither *Sullivan* nor *Schwartz* denied that school boards enjoyed discretion. But by late 1969, these rulings represented clear alternatives. The U.S. Supreme Court had provided little guidance. In *Tinker*, the Justices had merely noted: "[t]he problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. . . . It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"  

The Justices therefore distinguished political symbolism represented by a black armband from personal expression represented by hair or skirt lengths. But the Court's distinction did not settle the question whether the latter were protected. The Justices had compared the Des Moines situation to a 1968 Fifth Circuit case, *Ferrell v. Dallas Independent School District*, in which the judges assumed, for the sake of argument, that for student

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musicians, “Beatle”-style haircuts was a constitutionally-protected mode of expression. Notwithstanding, the Fifth Circuit judges ruled that an administrator was justified in prohibiting the style because it had caused “material disruptions.” This reasoning was in line with the Court’s Tinker ruling: regulation of protected expression was permissible, but must be related to actual disruption rather than fear of potential disruption.\textsuperscript{123}

Individual Justices occasionally expressed opinions in subsequent decisions, but the whole Court never ruled on the hair issue. Because youthful dissent continued in Houston-area schools, and neither Sullivan nor Schwartz established the bounds of students’ civil liberties, high school students continued to sue in federal court.\textsuperscript{124} In October 1969, while the Schwartz and Sullivan cases were still active, the Bellaire high school principal suspended three students for distributing the Plain Brown Watermelon, an “anti-establishment” newspaper four pages of stories and

\textsuperscript{123} Fifth Circuit Judge Elbert Tuttle dissented, on the grounds that the disruptions were because other students disliked the Beatle-style and had disrupted classes with name-calling and threats. Judge Tuttle thought the regulations should have prevented the chilling, not the expression. Ferrell \textit{v. Dallas Independent School District}, 392 F.2d 697 (5th Cir., 1968) 704-705. The Supreme Court had denied certiorari; 393 U.S. 856 (1968). For more on the Ferrell case, see: Haskell, “Judicial Review of School Discipline,” 233-234.

cartoons written or drawn by approximately twenty students. The suspended students were told not to return to class until their “attitudes changed.” None of the three thought that this change would soon occur. They sought an injunction to overturn the suspensions. David Berg agreed to represent them, and once again he filed a section 1983 action in the Southern District.\textsuperscript{125}

But Judge Joe Ingraham did not consider indefinite suspensions to be as constitutionally suspect or as potentially chilling to speech as had Seals in the Sullivan case. Ingraham stated that he “would not be disposed to interfere with the proper exercise of discipline by those in authority.” He refused to order Bellaire to readmit the suspended students before he heard arguments.\textsuperscript{126}

Then the constitutional difference between high school students’ speech and their style became blurred. On 17 November, the day Seals issued his Sullivan ruling, the Bellaire principal suspended seventeen-year-old Ricky Crawford “until he got a haircut.” Crawford claimed that he was being punished because he had testified on behalf of his three classmates who had been suspended over the Plain Brown Watermelon. Berg agreed to be Crawford’s lawyer, as well. Sullivan and Fischer had

\textsuperscript{125} John Quigley, “3 Bellaire Students Ousted Over Paper,” Houston Post, 23 October 1969, Sec. 1, p. 23.
\textsuperscript{126} Ibid.
just prevailed, and Berg amended the students' complaint to claim that, because the *Pflashlyte* suit was a class action, Seals' *Sullivan* ruling applied to all Houston-area high schools. However, during a pre-trial in-chambers meeting with Judge Singleton, the school officials denied that Crawford had ever been formally suspended, and had already been allowed back into class. Singleton then canceled a scheduled court hearing. But the judge was apparently already convinced that Crawford's hair style was merely the school's cover story for punishing his testimony. Rather than dismiss the case, Singleton announced that he would keep Crawford's case on his docket, so that he could immediately take future action if necessary. Berg told reporters that Singleton had "made it perfectly clear that the minute [Crawford] is harassed, the school will find itself right back here in court."  

Federal judges across the country repeatedly wrestled with the issues represented by these Southern District cases, but no single decision definitively established the scope of a high school student's speech and expression rights. Whether the issue was press, speech, or style, Singleton, Garza, and Seals consistently protected the students' civil liberties. In the

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127 John Quigley, "Pupil Sues Over Haircut Order," *Houston Post*, 26 November 1969. Seventeen "long-haired" boys and three girls showed up at the courthouse to show support. They reportedly missed school with their parents' permission. John Quigley, "Judge Rules Schools Can Ban
same sort of secondary students’ expression cases, Noel and Ingraham consistently gave school administrators the benefit of the doubt. Because the clerk of the Southern District court assigned cases to judges, rather than plaintiffs or defendants choosing, a high school student plaintiffs’ chances of prevailing in the District was literally the luck of the draw. This was not the situation if the plaintiffs were college students. In college “hair” cases, the judges, even those who were favorably disposed toward administrators, were normally inclined to rule for the students, because officials bore a greater burden to prove the reasonability of any regulation of college students’ rights of expression.

Singleton, for one, decided that a year or two difference in age made no difference to the applicability of the First Amendment. When he had announced that he would retain oversight in Crawford’s case, Singleton had noted that he had “already ruled” on the question of student hair and grooming regulation, and had added that he did not “intend to change [his] mind until and unless the Fifth Circuit Court of Appeals overrules me.”¹²⁸ He was referring to a ruling in a college case, but Singleton saw no meaningful difference between college and high school.

In Spring 1967, officials at San Jacinto Junior College ("San Jac"), a small campus near Houston, noticed that a "few people called 'hippies'" had enrolled, and they heard that at least one female student "was heard to protest that their odor and appearance was distracting." The San Jac administrators had received a pamphlet issued by the FBI, which alleged that campus unrest was caused by militants who visited schools to stir up trouble.\footnote{Also, members of San Jac's Board of Regents visited California and saw for themselves what large numbers of "those people," did to the peaceful atmosphere of a college campus. The prevalence of a conspiracy theory of the origin of the antiwar protest explained the response to militant groups such as MAYO and SDS. See, for example: Ronald Faser, et al., \textit{1968: A Student Generation in Revolt} (London: Chatto & Windus, 1988), 51-54. \textit{Calbillo v. San Jacinto Junior College}, 305 F.Supp. 857 (S.D.Tex., 1969), 859.} The FBI advised officials to watch for these troublemakers. When the San Jac officials examined the new students, they discovered that some of the hippies had come from Berkeley. They easily deduced that long hair and a beard was the "badge of hippies." In order to forestall upheavals, the administrators adopted the rule, that: "Male students at San Jacinto College are required to wear reasonable hair styles and to have no beards or excessively long sideburns."\footnote{Also, members of San Jac's Board of Regents visited California and saw for themselves what large numbers of "those people," did to the peaceful atmosphere of a college campus. The prevalence of a conspiracy theory of the origin of the antiwar protest explained the response to militant groups such as MAYO and SDS. See, for example: Ronald Faser, et al., \textit{1968: A Student Generation in Revolt} (London: Chatto & Windus, 1988), 51-54. \textit{Calbillo v. San Jacinto Junior College}, 305 F.Supp. 857 (S.D.Tex., 1969), 859.}

The regulation had been in place two years when a journalism student, Carlos Calbillo, grew a beard. In mid-October 1969, after a hearing before the college administration, Calbillo was indefinitely suspended. Represented by David Berg, Calbillo filed a lawsuit under
section 1983. He sought a temporary injunction against the suspension, and a permanent injunction of the beard regulation. Calbillo did not claim that he had been denied due process. Instead, he claimed that the enforcement of grooming regulations violated his rights under the Fourteenth Amendment.

Before he met with Singleton, Calbillo admitted to reporters that the grooming issue was “absurd and disgusting . . . [b]ut if people aren’t willing to exercise their rights, they will be taken away.” Inside the courtroom, the president of San Jac, Thomas Spencer, informed the judge that unless he issued a court order against the school, the regulation and the suspension would remain in force. The judge quickly ordered the school to readmit Calbillo, issued a temporary injunction barring the college from enforcing the ban, and set the date for a second hearing regarding the requested permanent injunction.

At the hearing ten days later, Singleton established that, because he had been a student in good standing at San Jac at the time of the disciplinary action, there was no question that Calbillo had been suspended

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131 Berg filed a motion to have the Plain Brown Watermelon case consolidated with Calbillo’s. John Quigley, “3 Bellaire students ousted over paper,” Houston Post, 23 October 1969, Sec. 1, p. 23.
133 “SJC must readmit bearded student,” Houston Post, 21 October 1969, Sec. 1, p. 3.
solely on the strength of the grooming regulation. In light of this fact, Judge Singleton challenged San Jac’s attorney, Stanley Baskin, by asking: “... aren’t we dealing here with a form of McCarthyism . . . guilt by association or dress?” Baskin responded that he could bring witnesses to testify that they feared bearded students would disrupt the heretofore peaceful San Jac campus. The judge replied that “[u]nrealized fears do not constitute grounds. . . . I don’t want to hear that kind of testimony.” But then Academic Dean O.W. Marcom testified that Calbillo originally had come to his attention as a dissident, not because of his beard, but because he had written two letters to the school newspaper. Singleton responded: “in other words, [Calbillo] expressed a view contrary to yours . . . do you try to control your students’ thought by regulating their hair?” He asked why mustaches were permitted while beards were not, and the officials responded that mustaches were generally worn by all people. At this, the judge noted: “[c]ertainly, the democratization of American life has not

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134 Dr. Spencer, and the academic dean, Dr. O.W. Marcom, admitted that Calbillo had not previously been disciplined by college authorities. *Calbillo v. San Jacinto Junior College*, 305 F.Supp., 858. Dr. Spencer also acknowledged that he was present at a board meeting when a petition, signed by 1100 San Jac students, requesting that the ban be dropped was presented, but that he had recommended that it be retained. Fred Harper, “Judge Rules College Ban on Beards Illegal,” *Houston Chronicle*, 31 October 1969.

come to the point where every whim of the majority may be enacted into a mandate for all to follow. If so, then the Bill of Rights is for naught.\textsuperscript{136}

Judge Singleton then asked school officials whether they really thought that "beards make hippies." The San Jac administrators admitted that a beard may not be the most accurate indicator of potential troublemakers, but then, in what Singleton later noted was "apparent seriousness," one official testified that the wearing of beards and long hair represented an "attitude of rebellion" with regard to school authority, and to that extent, beards and long hair themselves disrupted the school. As proof, he testified that he had observed protests on other campuses and noted that "beards were in evidence among leaders of the protest." After listening to this reasoning, Judge Singleton said: "... [i]t is interesting to note that none of the reasons given in justification of the rule relate to any disruptions on the San Jacinto Junior College Campus. ... in fact, this record is completely devoid of evidence that any type of disruption has been occasioned by the wearing of beards. ..." But the officials maintained that the absence of campus disruptions was evidence of the efficacy of their rule. Singleton once more declared that: "[u]nrealized fears cannot justify such as arbitrary classification," and the "only evidence of any adverse campus reaction whatsoever was the testimony of a school
official that an unidentified girl had complained of the odor and appearance of several 'hippies.'” Moreover, Calbillo was not a “hippie.” Rather, the judge wrote, Calbillo’s “appearance in the courtroom was that of a well-groomed, although bearded, student.”  

Testifying, Calbillo denied that he was a member of the SDS, or other any militant group, and he claimed that he did not approve of SDS tactics. Baskin asked Calbillo if he had intended to defy the college regulations when he grew his beard. Calbillo replied that he had intentionally broken the rule, and claimed that his reason for doing so was that he “felt it was a violation of my civil rights to be kept from wearing it.” When Baskin asked where he had gotten the notion that his rights were being violated, Calbillo answered: “[i]t was taught to me in government class.”

At the conclusion of testimony, Singleton decided that, although an educational program required certain rules for the maintenance of an orderly classroom and school officials rightly have discretion in setting

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rules, officials must ensure that the regulations were reasonable. The judge declared that: "[i]t is not for this Court to consider whether such rules and regulations are wise or expedient," but only to decide whether the rules were a reasonable exercise of the administrators’ discretion. That is, regulations must be shown to be "essential to maintain discipline on school property." Officials had the burden of showing that the effort to regulate personal appearance was reasonable, and that the unregulated exercise of these "forbidden rights" would "materially and substantially" interfere with operations and discipline in the school.\(^{139}\) Judge Singleton was not persuaded that San Jac had demonstrated this reasonability.

Regarding the other justifications offered for the beard rule, "they can be resolved into the contention that beards and hair styles are a sufficient indicator of potential campus troublemakers. Not only is this contention not supported by the record, it is not supported by logic and common sense."\(^{140}\) Furthermore, he said:

In this court's chambers are portraits of six great jurists, starting with Moses and ending with Justice Holmes, one of the great justices of the Supreme Court . . . Also included among these portraits are those of Justinian, Solon, Coke, and Marshall. All of these men had distinctive hair styles, some had mustaches, and some had mustaches and beards. Many other examples of men who have and do wear distinctive hair styles, sideburns, beards, and mustaches could be given.

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\(^{139}\) *Calbillo v. San Jacinto Junior College*, 305 F.Supp., 858-859, 861.

Certainly, such are not a badge of a troublemaker or a malcontent.\textsuperscript{141}

Singleton concluded that the record revealed no reasonable connection between the beard ban and the functioning of San Jac college. It was clear to him that the beard rule was "basically enacted to implement the personal distaste of certain school officials for beards and certain hair styles and for the beliefs and attitudes which they thought these beards and hair styles represented." This was an unreasonable use of power and the regulations were therefore in violation of the equal protection clause of the Fourteenth Amendment. If San Jac officials continued to deny Calbillo an education through the enforcement of its "sweeping prohibition," the school would "cause him irreparable harm." Consequently, the judge granted Calbillo the injunctive relief he had requested.\textsuperscript{142}

\textsuperscript{141} Ibid., 861.
\textsuperscript{142} Ibid., 861-862. The Calbillo case made national news, although only in a short blurb. See: "Judge Backs Bearded Youth," New York Times, 2 November 1969. The San Jac administrators appealed, and on 5 November 1970, the Fifth Circuit vacated the Calbillo case as moot. Calbillo had convinced the Board of Regents to clear his record, and had withdrawn from San Jac to enroll elsewhere (reportedly after shaving his beard). Also, the Circuit judges remanded the case, and, although Calbillo had not filed the case as a class action, they directed Singleton to decide whether the injunction applied to all student at San Jac "both now and in the future." The Appeals Court also give the school the opportunity to revise its regulations so that they "are clearly related to the maintenance of reasonable discipline and decorum." Calbillo v. San Jacinto Junior College, 434 F.2d 609 (5th Cir., 1969), 610, esp. note 1. See also: "Student's hair case again up to court," Houston Post, 5 November 1970. Some citizens had complained that it was a waste of taxpayer’s money for the state-
Judge Singleton noted the reluctance of federal judges to conclude that "wearing one's hair at a certain length or wearing a beard falls within that category of 'expression' protected by the First Amendment." Curiously, Singleton was just as reluctant to close the issue by directly ruling on the First Amendment implications of the case. Instead, he noted that, because he had reached his decision on the basis of reasonability, it would "not be necessary" to reach the question of hair as free expression. In a footnote, however, he speculated that, "[i]f this Court were to accept defendant's position that a beard or a hair style represented an attitude of rebellion or protest, this would be a stronger case for First Amendment protection of a beard as 'symbolic speech' similar to an armband." And, although Calbillo had generally invoked his rights under the First Amendment, he actually "never claimed his beard represented any more than a personal preference."143

Despite relegating his speculations to a footnote, Singleton supported a broad reading of the First Amendment in matters of speech, press, and

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supported college to appeal, but at least one Houstonian disagreed, and wrote to the Houston Post that "I can't think of a better or more productive use for tax money than fighting federal nincompoopery . . . The people of this country are fast getting a bellyful of soft-hearted civil libertarians who are continually telling the majority of citizens to go to . . . because one individual gets his feelings hurt." Lee W. Thompson, letter to the editor, "A bellyful, says Lee W. Thompson," Houston Post, 17 November 1969.
expression. His attitude had heartened civil libertarians. In September 1970, James C. Calaway, chair of the local ACLU chapter, announced in an interview that he believed it was only a matter of time before federal judges voided all student grooming rules. He predicted that “within a year, I expect we will have prevailed.”

By October 1970, Singleton concluded that there were more important things for school administrators to worry about than hair, dress, and even race. One of the higher worries, the judge, was the “nitty-gritty” of providing students (presumably students of all races and with a variety of grooming habits) with a quality education. Commenting to the press on an unrelated case, Singleton suggested that if the schools concentrating on giving students a good education, “I imagine that many of the problems facing this country would work themselves out.”

145 Singleton made these remarks in declining to set an immediate hearing on a suit protesting the Cypress-Fairbanks school district’s closing its all-black school. Fred Harper, “Judge Urges Less Note of Race, Hair in Schools,” Houston Chronicle, 6 October 1970. One commentator suggested at the time that: “Someone ought to build a monument to US Judge John Singleton, who said school people ought to quit litigating over hair and short skirts, race and other nonessentials, and get on with educating. He said this in refusing to close an all-black school in view of the fact that the U.S. Supreme Court is expected to act on busing and neighborhood schools.” From the weekly newsletter Austin Report, Vol.
San Jac administrators apparently disagreed with the judge’s suggested priorities. Just before the Calbillo affair began, San Jac hired Lecil Hander as a full-time biology instructor. At the time, the school had an “unwritten” policy that faculty were to be clean shaven. Nonetheless, Hander grew a full beard over the summer, after Calbillo’s case ended.\textsuperscript{146} In December 1970, the San Jac Board of Regents issued the following rule: “\ldots [f]aculty members and all of the male employees of San Jacinto Junior College are required to be clean shaven, wear reasonable hair styles and have no excessively long sideburns.” The college notified Hander that he would be expected to comply with the regulation. He refused, and received a hearing before the Regents, whose members upheld the new rule. Hander kept his beard, the school discharged him and paid the balance of his salary for the year, and Hander sued to have the regulation enjoined.\textsuperscript{147}

Except for the fact he was faculty not a student, Hander argued as had Calbillo eighteen months earlier. He asserted that the regulation was enacted to implement the personal tastes of San Jac officials, and was an unreasonable application of administrative authority to manage the college. Hence, he alleged, the regulation violated the equal protection clause of the

\textsuperscript{146} As noted, the Regents were continuing their appeal to the Fifth Circuit. “San Jacinto drops hair, beard rule,” \textit{Houston Post}, 10 July 1970.

Fourteenth Amendment. Like Calbillo, Hander did not claim that the wearing of a beard was a protected activity under the First Amendment.\textsuperscript{148}

Attorneys for the Regents agreed that the wearing of a beard was merely an issue of style, not of maintaining campus order. However, they contended that the grooming regulations were enacted under authority Texas granted to public school officials. Therefore, the lawyers argued, federal courts ought to abstain and let a state court interpret the relevant state law.\textsuperscript{149}

Judge Bue presided in the case in Houston. He noted that the Texas legislature had neither delegated authority to regulate personal appearance of faculty members at public junior colleges nor authorized an employee’s discharge for violating such grooming regulations. However, Bue held that the state lawmakers had delegated to the San Jac Regents the power to manage and control the institution. The question was whether or not the Regents had exceeded their authority by issuing the beard regulation: “it is well established in Texas that if a rule, order, or regulation promulgated by an agency exceeds the authority conferred by the statute, conflicts with

\textsuperscript{148} Finally, Hander did not claim that he had been denied due process; like Calbillo, he had counsel during the administrative hearing regarding his dismissal. \textit{Hander v. San Jacinto Junior College}, 325 F.Supp., 1020.

\textsuperscript{149} \textit{Ibid.}, 1020.
the statute, or has no reasonable relation to the purpose of the statute, then it is not sustainable by the Texas courts."\textsuperscript{150}

Before Bue could rule on Hander’s case, the U.S. Supreme Court declared that federal district judges should generally avoid intervening in ongoing state prosecutions. For the majority in \textit{Younger v. Harris}, Justice Black affirmed several fundamental principles, among them: "... a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." These principles, collectively, made up the dual judicial system which Black called, "perhaps for lack of a better and clearer way to describe it," as "Our Federalism."\textsuperscript{151}

As he considered the beard controversy at San Jac, Judge Bue contemplated the \textit{Younger} decision's effect on the role of federal district judges in settling local controversies. \textit{Younger} had involved a state prosecution, not a civil case involving a local dispute over administrative authority in schools. Nonetheless, in \textit{Younger}, Black had strongly affirmed as a principle of federalism and comity that the federal courts should avoid "needless conflict with state administration." Bue then noted "recent

\textsuperscript{150} \textit{Ibid.}, 1021.
pronouncements to the effect that ‘hair cases’ should be tried in a state
court because that is a more proper forum.” He said that “a state court
decision interpreting these statutes and regulation will foreclose any need
for a decision by this Court of a federal question.” In view of these issues,
Bue declared that: “federal courts must acknowledge a sensitivity to the
legitimate interests of the state governments.” He dismissed the complaint,
although he noted that he did so in the “broad spirit of comity without
regard to other aspects of this case . . .”

Judge Bue’s suggestion that “hair cases” could best be settled in the
state courts referred to the Supreme Court’s continual refusal to review
any of the dozens of federal court rulings, many of them in conflict, on
student hair. The Court’s refusal disappointed many litigants, judges, and
even some Justices, who had come to rely on federal courts to resolve
social controversies. The Justices’ refusal to review this category of

151 Younger v. Harris, 401 U.S. 37 (1971), 44.
153 Associate Justice William O. Douglas dissented from the majority’s
refusal to review a case involving the length of a student’s hair in 1972,
and he noted the more than fifty “hair cases” on the books. Olff v. East
Side Union High School District, 404 U.S. 1042 (1972), certiorari denied;
but see dissent at 1045-1046, inc. note 5. Prof. Friedman estimate was
seventy-five federal cases on high school hair. He noted that this was an
issue that would have been inconceivable to the lawyers, judges, and
citizens in the nineteenth century. That it became such a pressing issue in
the late 1960s is an example of the demand for relief in the courts that
Friedman called the concern for “total justice.” Lawrence M. Friedman,
public school complaint reflected the Court's efforts to narrow the role of federal district judges in managing the details of state governments' relations with their citizens. Chief Justice Burger led the effort. In his 1970 address to the American Bar Association, on "the State of the Federal Judiciary," Burger declared, "[w]e should look more to state courts familiar with local conditions and local problems." Judge Noel foreshadowed judicial retreat in *Schwartz*. Judge Bue then declared it accomplished in *Hander*.

Noel echoed *Schwartz*, with the added support of the *Younger* decision, in a combination dress code-student protest suit that emerged from a dispute at a middle school. HISD eighth grader Sabrina Dale Press had been suspended from Jackson Intermediate School for wearing a pantsuit to school and for participating in a demonstration, both of which violated HISD dress regulations for eighth graders. Press's parents had requested an injunction based on section 1983. In March 1971, Noel relied heavily on *Younger* to rule that the case presented "an appropriate occasion

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for a federal district court, in its discretion as a court of equity, to abstain."\textsuperscript{155}

Noel noted that his fellow judges' sensitivity to equality, but lack of sensitivity to local conditions, might have resulted in a dress code for students in Alaska identical to that in Texas. Noel criticized the recent school decisions. They relied on what he considered were overly broad readings of "equal protection of the laws." He ridiculed that approach, by reference to Associate Justice Oliver Wendell Holmes' dissent in \textit{Lochner v. New York}.\textsuperscript{156} Holmes had noted that the Fourteenth Amendment did not enact Herbert Spencer's theories of social and economic evolution by survival of the fittest. With regard to school discipline, Noel noted that "it might be remarked with aptness that this Amendment does not enact the educational theories of Mr. John Dewey, nor those of any given federal judge."\textsuperscript{157}

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In 1972, Justice Black, the author of the \textit{Younger} majority opinion, seized the opportunity to apply his conception of "Our Federalism" to a

\textsuperscript{155} \textit{Ibid.}, 557-558.
\textsuperscript{156} 198 U.S. 45 (1905).
high school student suspended for wearing long hair. In part because of the *Younger* doctrine, the student found no relief in the federal district and Circuit courts, and he appealed to the Supreme Court.\(^{158}\) Black, the presiding Justice for the Fifth Circuit, denied the student’s motion to suspend the regulations pending the appeal. In doing so, Black indicated the Supreme Court majority’s new attitude. He declared:

\[\ldots\] Surely few policies can be thought of that States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States.\(^{159}\)

In denying the requested stay, Black concluded: “[p]erhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.”\(^{160}\) Many federal district judges who, like Noel, had

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\(^{160}\) *Ibid.*, 1203. In fact, as of the mid-1970s, four federal circuits had upheld the right of students to wear their hair as they chose (4th, 8th, 1st, 7th), one recognized the right by implication in a police grooming case (2nd), four upheld school grooming codes (3rd, 5th, 9th, 6th), and one refused to intervene, calling it a state matter (10th). In the order described, these cases were: *Massie v. Henry*, 455 F.2d 779 (4th Cir., 1972), *Bishop v. Colaw*, 450 F.2d. 1069 (8th Cir., 1971), *Richards v. Thurston*, 424 F.2d. 1281 (1st Cir., 1970), *Breen v. Kahl*, 419 F.2d. 1034 (7th Cir., 1969), *Dwen v. Barry*, 483 F.2d. 1126 (2nd Cir., 1973), *Zeller v.*
welcomed the *Younger* doctrine, also appreciated this further elaboration of the revived spirit of comity, federalism, and restraint.

But *Younger* had not mandated abstention. Rather, the decision reminded federal judges that they had the discretion to abstain from ongoing disputes over state issues, and should exercise this discretion generously to avoid being drawn into seemingly trivial local disputes. But

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*Donegal School Dist. Bd. of Educ.*, 517 F.2d. 600 (3rd Cir., 1975), *Karr v. Schmidt*, 460 F.2d. 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972), *King v. Saddleback Junior College*, 445 F.2d. 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971), *Jackson v. Dorrier*, 424 F.2d. 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970), and *Freeman v. Flake*, 448 F.2d. 258 (10th Cir., 1971), cert. denied, 405 U.S. 1032 (1972). A.E. Dick Howard, “State Courts and Constitutional Rights in the Day of the Burger Court,” *Virginia Law Review* 62 (1976): 927, note 293. After a few years of the “new federalism,” Professor Howard selected four areas (hair length, motorcycle helmet laws, sexual acts between consenting adults, and marijuana) through which to explore state courts’ responses to regulation of “lifestyles and autonomy.” He notes that although myriad state courts employed various federal constitutional arguments both to uphold and to overturn school appearance regulations, only one state court, in Alaska, struck down a school rule by relying solely on analysis of liberty protected by the Alaska state constitution (see *Breeze v. Smith*, 501 P.2d 159 [Alaska, 1972]). Howard further notes that state courts most often (with the exceptions such as Alaska’s court) follow the U.S. Supreme Court’s lead in “autonomy and lifestyle” cases, rather than exploiting the opportunity to “weigh values” under their own constitutions. Some state courts devolved the responsibility even further. At least one state court cited Justice Black’s notion that hair length cases should be left to the states, and refused to intervene on those grounds of what might be called “intrastate federalism.” The case was *Dunkerton v. Russell*, 502 S.W. 64 (Ky. App. 1973) 65 [the Kentucky court cited Justice Black’s opinion *Karr v. Schmidt*]. Howard calls this “false logic,” and notes that “[t]here may be good reasons for a state court not to decide hair length cases, but a mechanical use of Justice Black’s judgment, whose basis was federalism, is surely not one of them.” See:
federal district judges who were sympathetic to students' complaints, like Singleton and Seals, chose not to abstain in light of Younger, and continued to decide school discipline and grooming cases rather than defer to authoritarian administrators.

The distinction some courts had drawn between secondary schools and higher education proved to be the defining boundary for deference to state administrators. In October 1972, the Fifth Circuit judges affirmed the decision of a federal district judge from the Eastern District of Texas, who had ruled in favor of a long-haired student who hoped to attend the junior college in Tyler. The appellate judges' opinion upholding the district judge, in Lansdale v. Tyler Junior College, echoed Singleton's Calbillo decision. That is, the Fifth Circuit judges declared that, in the absence of a legitimate administrative reason for regulating the hair of college students, a policy regarding such was arbitrary by definition and impermissible under the Fourteenth Amendment. The Circuit judges were careful to note, however, that they had not therefore overruled their own recent holding regarding the permissibility of hair and dress codes in the high schools. The judges clearly distinguished the college student's rights

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from the secondary student’s rights, and judicial presumptions favored student autonomy in college, but favored high school administrators. \textsuperscript{161}

In November 1972, the Fifth Circuit judges vacated Bue’s San Jac decision, which Hander had appealed, and remanded it to the Southern District judge. The appellate judges directed Bue to reconsider the case in light of their decision regarding the Tyler Junior College. \textsuperscript{162} He did so and ordered the San Jac Regents to reinstate Hander and pay him back wages as damages. Moreover, Bue awarded Hander attorney’s fees. It was then the San Jac Regents’ turn to appeal. The Fifth Circuit judges reversed the ruling regarding fees, but affirmed the balance of Bue’s decision. Fifth Circuit Chief Judge John R. Brown filed a concurring opinion, in which he expressed relief that the federal courts were “now out of the hair business as Mr. Justice Black long ago said we should be . . . Now we can return to the vital matters which overwhelm the Federal Judiciary.” \textsuperscript{163}

\textsuperscript{162} \textit{Hander v. San Jacinto Junior College}, 468 F.2d 619 (5th Cir., 1972).
By the early 1970s, the federal district judges in the Southern District, with guidance from the appellate courts, settled and turned their attention away from questions of students’ rights. But among the “vital matters” overwhelming the federal judiciary were similarly contentious questions regarding the scope of First Amendment protections enjoyed by consenting adults who either produced or consumed a variety of adult entertainments. The judges now examined these issues.

III. Consenting Adults and First Amendment Under the Younger Doctrine

In the late 1960s and early 1970s, in addition to mediating disputes between students and administrators, the Southern District judges balanced the traditional prerogatives of state-centered morals enforcement against claims that the Federal Constitution, through the First and Fourteenth Amendments, protected adult citizens’ rights to enjoy free and frank discussion and depiction of human sexuality. Because most states criminalized “obscene” expression, and many individuals disputed the definition of obscenity offered at any given moment, the Younger decision held the potential, in the view of some scholars, “to effect a radical subordination of federal to state courts as guarantors of federal civil
liberties."\textsuperscript{164} The Supreme Court had established a legal standard for obscenity in the 1950s, but the Court was forced to revisit that standard periodically. Writers, artists, theatrical producers, and film makers continually sought to broaden the range of socially- and legally-acceptable sexual expression.\textsuperscript{165}

\textsuperscript{164} By the mid-1970s, the Court had developed the implications of Younger into “a doctrine of devolution of judicial power to state courts,” and the Justices apparently attached to the Younger abstention doctrine the “imperative dignity previously accorded substantive due process and the civil rights of blacks.” Aviam Soifer and H.C. Macgill, “The Younger Doctrine: Reconstructing Reconstruction,” Texas Law Review 55 (1977): 1141-1143.

\textsuperscript{165} In Roth v. United States (1957), a case concerned with a state prohibition on the advertisement of pornographic books through the mail, the Court majority reaffirmed that obscene material was “utterly without social importance,” and was not protected by the First Amendment. The Roth decision fixed the modern definition of obscenity as that which “deals with sex in a matter appealing to prurient interest,” where “prurient interest” meant “[h]aving a tendency to excite lustful thoughts” or exhibiting “shameful and morbid interest in sex.” Finally, the Court established the legal test of obscenity as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” See: Roth v. United States, 354 U.S. 476 (1957), 484, 487, 489. Although the Roth opinion clearly excluded obscenity from the First Amendment, it also declared that the definition of obscenity must be established on a First Amendment basis rather than the common law. Under the 1868 British case Regina v. Hicklin, which established a common law standard, prosecutions were allowed based on the tendency of a work to “deprave and corrupt” the most susceptible segments of an audience. This lowest common denominator standard of Regina was overturned by Roth. In another major case, Memoirs v. Massachusetts (1966), the Court augmented Roth with a three-pronged legal test. Under Memoirs, material could be judged obscene if its dominant theme was “prurient,” “patently offensive because it affronts contemporary community standards,” and “utterly without redeeming social value.” See: A Book Named “John Cleland’s Memoirs of
Local authorities prosecuted the creators or distributors of allegedly obscene works under state laws, and defendants increasingly challenged these laws in the federal courts. The federal plaintiffs frequently met with success, and as a result, sexually-explicit books, magazines, films, and stage performances proliferated in the late 1960s. However, rather than leading to fewer criminal prosecutions under state obscenity laws, the increased availability of "hard-core" material sparked renewed local efforts to suppress or censor allegedly obscene literature, pornographic films, and public lewdness. Local prosecutors, including many in Texas, launched an assault on the licentiousness which many conservatives believed had been encouraged by the permissive decisions of the Supreme Court under Chief Justice Earl Warren.¹⁶⁶

Many of the state criminal defendants subsequently filed federal suits under section 1983. They sought to enjoin enforcement of state obscenity statutes which they argued infringed on their constitutionally-protected

¹⁶⁶ Many conservatives blamed the coarseness of the 1960s on liberal legal organizations, such as the ACLU, which often defended the rights of artists to free sexual expression. Walker, In Defense of American Liberties, 231-236, 318-320.
expression or conduct. In the midst of this renewed controversy over obscenity, the Supreme Court revived abstention with its *Younger* decision. The *Younger* decision relieved the federal courts of the burden of overseeing many students' expression and hair cases. But it also frustrated federal judges willing and even eager to step in and examine state obscenity prosecutions. They were obliged by the Supreme Court's ideals of comity to abstain while state judges wrestled with this important public issue.

Judge Singleton was particularly frustrated by the strictures *Younger* placed on federal judicial intervention into ongoing state obscenity prosecutions. He and several other judges of the Southern District harbored strong, sometimes conflicting thoughts on the issue, and except for *Younger*, they might have had the opportunity to shape debate and change laws. Instead, they could merely offer *obiter dicta* in cases which most often they turned over to the state courts.

When the controversial and especially popular adult film *Deep Throat* reached Texas theaters, state prosecutors overreached their proper constitutional bounds. Singleton seized on the opportunity to rule on the issue, and ultimately, he rated that film, constitutionally-speaking, for the entire state.\(^{167}\)

\(^{167}\) See: *Universal Amusement Co. v. Vance*, 404 F.Supp. 33 (S.D.Tex.,
Individuals fought many small legal battles over the local regulation of sexually-oriented material before *Deep Throat* forced the question of adult entertainment into the national mainstream. On 9 October 1969, vice squad officers of the Houston Police Department (HPD) entered the Cinne Arts Theatre on Main Street, confiscated that week’s featured film, and arrested the theater’s manager and projectionist. The local prosecutor charged the men with exhibiting an obscene movie in violation of Texas statute.\(^{168}\) The defendants admitted that the movie in question “dealt with nudity in a frank and candid manner,” but they claimed that it was not legally “obscene.” They filed a section 1983 suit in the Southern District of Texas, they claiming that they had been denied due process, because the local authorities did not attempt to determine if the film was obscene prior to seizing it, and had not provided a hearing to assess the film after it was seized.\(^{169}\) After a preliminary hearing, Judge

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\(^{168}\) The state law was: Article 527 of the Texas Penal Code (“Obscene Matters”). The City of Houston, like other large cities across America, had a history of regulating moral turpitude, especially prostitution, which consisted of alternating periods of suppression and accommodation. A vice district existed in Houston after 1908, but in 1917, morals crusaders joined their cause to the patriotic concern with protecting soldiers from disease and degradation, and finally convinced city leaders to extinguish the “red-lights.” See: Thomas Clyde Mackey, “Red Lights Out: A Legal History of Prostitution, Disorderly Houses, and Vice Districts, 1870-1917” (Ph.D. Dissertation, Rice University, 1984).

\(^{169}\) The complaint claimed that, in all, the arrests and seizure violated no fewer than six amendments of the federal Constitution. The disputed state law was Article 527 of the Texas Penal Code.
Singleton decided that the complaint raised serious questions regarding the Texas law's constitutionality. He temporarily enjoined further police raids on adult theaters. Mel S. Friedman, the defendants' attorney, asked Singleton to convene a three-judge district court to hear the case. It would have the authority to overturn the state statute.

Before the panel could be convened, Singleton's injunction expired and the raids resumed in Houston and Harris County. The three-judge panel named to consider the constitutionality of the Texas obscenity statute included Southern District Judges Singleton and Seals, and Circuit Judge Ingraham, a recent Nixon appointee to the Fifth Circuit. They announced a decision in mid-November. Judge Seals wrote the majority opinion, in which Ingraham joined. The main issue to settle before considering enjoining a state law, Seals said, was the result of a "collision between the . . . principles of comity on the one hand, and, on the other, the historic decision of the Supreme Court in Dombrowski v. Pfister . . . and its confused progeny." He suggested that the Anti-Injunction Act, a federal law which in many instances barred federal judges from

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170 "Theatre Obscenity Raids Halted," Houston Post, 1 November 1969.
171 "Movie Men Granted Hearing in Effort to Kill Obscenity Law," Houston Post, 17 October 1969, Section 1, page 15.
172 The suit had been expanded to include the complaints of several owners and operators who were raided and arrested in previous weeks. "Adult Movie Raid Hearing To Continue," Houston Chronicle, 20 October 1970; "Panel: Adult Movie Arrests Needn't Stop," Houston Chronicle, 15
intervening in pending state criminal prosecutions, 173 represented
comity and federalism. But Seals then noted that Dombrowski "carved out
a limited exception," because the threat of a criminal prosecution might
have a "chilling effect" on "preferred" First Amendment expression. 174

Seals believed that a recent Fifth Circuit decision, which required
that two tests be satisfied before the federal district courts issued an
injunction, struck the proper balance between comity and constitutionality.
First, plaintiffs must show either that the state employed its legal
machinery in "bad faith," that is, with the purpose of inhibiting speech, or
that the statute was unconstitutional on its face. Second, the judge must
agree that there existed a "probability of irreparable injury" to the plaintiff
if an injunction was not forthcoming, such as "a significant chilling effect
on speech that cannot be avoided by state court adjudication." 175 The
judges assumed, but "without specifically so finding," that the plaintiffs
could show probability of irreparable injury. However, the panel
considered it unnecessary to discuss this, because the plaintiffs had failed to

November 1970.
173 The Anti-Injunction Act provided in part: "[a] court of the United States
may not grant an injunction to stay proceedings in a State court except as
expressly authorized by Act of Congress, or where necessary in aid of its
jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.
[Houston Division; Civ. A. No. 70-H-1115]. See: Dombrowski v. Pfister,
380 U.S. 479 (1965).
persuade them that that the police acted in bad faith, or that the state law was unconstitutional on its face. Seals denied the injunction, and scheduled the case to be heard on its merits by a single judge. 176

Judge Singleton dissented. Not only had the Dombrowski criteria been met, he believed, traditional comity considerations were inapplicable because the state criminal prosecutions had actually "'begun' only in a technical sense with the filing of an information or indictment, and this is not a case in which trial proceedings are underway." 177 He also insisted that because it was established that ticket-takers could not be held

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176 Judge Seals noted that the claim that the prosecution had been pursued in bad faith could be disregarded after examining the HPD's elaborate preparations for the raid. He declared that the vice squad's investigation and arrest procedures, planned by the police at the direction of the district attorney, testified to their good faith. Although the judge also noted that the Northern District of Texas had declared unconstitutional Section 9 of Article 527 of the Texas criminal code, which had allowed seizure of property without an adversarial hearing, he saw this as no reason to grant the requested injunctions. See: Newman v. Conover, 313 F. Supp. 623 (N.D.Tex., 1970). Seals further noted that the U.S. Supreme Court was preparing to hear an appeal from Massachusetts, Karalexis v. Byrne, 306 F.Supp. 1363 (D.Mass., 1969) which might clarify the murky constitutional boundaries of state obscenity law, and so refused to consider Texas Article 527's ultimate constitutionality. The very nature of the ongoing confusion, however, led Seals to believe that he could not declare the law unconstitutional "on its face." 320 F. Supp. 1357, at 1358-1359, 1362-63.

177 Moreover, Singleton considered that in light of the Newman decision regarding property seizure, the defendants/plaintiffs deserved an adversarial hearing before their arrests. Unless adversarial hearings established the fact of obscenity before arrests, Singleton believed that the state authorities would be illegally seizing a business, and therefore doing "by means of a back door the very thing a federal three-judge-court said they could not do by a constitutionally protected front door." 320 F.Supp.
accountable for a film’s purported obscene content, it was equally inappropriate to arrest projectionists. Finally, he was incensed at the reported claims by officials that they would “continue to arrest and prosecute until they ‘shut these places down.’” The judge considered these widely publicized comments to be threats, and that they “would seem harassingly excessive to any good faith prosecution.”178

1357, at 1363.
178 Ibid., 1365. Harris County District Attorney Carol Vance subsequently said the arrests were permitted “under ordinary criminal procedures,” and that the films in question were “so obscene, depraved and sick” that they were not the type of pornography that was constitutionally protected. “Panel: Adult Movie Arrests Needn’t Stop,” Houston Chronicle, 15 November 1970. Vance also noted that patrons could be arrested in the raids, although making an obscenity case against them might be difficult, since patrons go to movies assuming that the films are lawful. “Raidson Sex Movies to Resume,” Houston Post, 16 November 1970. Clearly, Judge Singleton was frustrated at the majority’s refusal to intervene immediately in the Cinne Arts case. Singleton did get a chance to voice his opinion on free expression. During the same year, the city council of Pasadena, under a public nuisance ordinance, wanted to prohibit “nudie movies” at the drive-in on Red Bluff Lane. Singleton guided them to a constitutionally acceptable licensing ordinance. The movies in question, including “Suburban Pagan” and “Hot Skin and Cold Cash,” were not found to be obscene, but drivers had risked being endangered by the unexpected sight of “bare female breasts and buttocks,” which were visible from the road. See: “Drive-in Theatre Sues for Damages, Return of Films,” Houston Post, 26 February 1970; “Nude Film Case Up in Bare Air,” Houston Post, 2 March 1970, Sec. 1, p. 8; “Trial Set in Drive-in Movie Quarrel,” Houston Post, 29 April 1970, Section 1, page 9; “Nudie Movie Law Voided By Judge,” Houston Chronicle, 3 June 1970, Section 1, page 1; “Pasadena Drivers’ Fun May End,” Houston Post, 3 June 1970; “Pasadena Must Try Again on Movie Law,” Houston Post, 4 June 1970; “Pasadena OKs Nudie Movie Ordinance,” Houston Chronicle, 9 June 1970, Section 1, page 12; and, “Pasadena Council OKs New Movie Law,” Houston Post, 10 June 1970.
State and local authorities also closed live adult entertainments.

Sandra Montgomery owned the Seven Veils theater on Houston's Montrose Boulevard. She had invested three thousand dollars in the business, which included the costs of costume and equipment rentals, licensing fees, building improvements, and at least one announcement in a local newspaper, which advertised the entertainment at the Seven Veils with the slogan: "live on stage the act of love." The first of two scheduled acts on opening night in February 1971 was a drama. It involved an actor dressed as a gorilla, who chased Montgomery and tore at her clothing. By curtain time, she was totally nude. The second act had less plot, but because of that fact, it offered more opportunities for improvisation. It required a nude couple, a man and a woman, to simulate various "acts of love," and this included the "vivid" depiction of sexual intercourse on a waterbed. Houston police arrested Montgomery and several employees during the maiden performance of this second act, and charged them variously with "vagrancy" and indecent exposure. The city did not close the theater pending the trial, although Montgomery later claimed that several officers warned her that the arrests would resume if the Seven Veils continued to offer the same show. She filed suit in the Southern District to challenge the state and local statutes on the grounds that they were vague and overbroad. Montgomery also sought a temporary restraining order against HPD, and a
temporary injunction against the enforcement of the statutes. Finally, she asked for a three-judge court.  

Judge Allen Hannay upheld the arrests. Montgomery had not shown that the police acted in bad faith, and he concluded that she had produced no evidence that her business would suffer "irreparable injury" during the normal disposition of the case in the local courts. Therefore, there were no grounds for the "extraordinary equitable relief" of an injunction, or for the appointment of a three-judge-court. He dismissed the case with a short explanatory opinion.

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179 Most of the firsthand knowledge of the "simulated" nature of the staged acts comes from Montgomery's occasionally graphic testimony. The court record does not identify the playwright, but it can be assumed that Montgomery, the owner and stage manager of the theater, and its female star, was obviously enough of a multi-talented auteur to write the scripts, as well. Montgomery v. Short, 327 F.Supp. 726 (S.D.Tex., 1971), 727 [Houston Division; Civ. A. No. 71-H-181]. The relevant Texas statutes were Article 607 of the Texas Penal Code, Secs. 16, 19, and 20, and Section 28-42 of the City Ordinance of Houston. Under Texas' Art. 607, "vagrants" included those engaged in prostitution, lewdness, or assignation, as well as those aiding and abetting such activities. The Penal Code's authors construed "lewdness" to "include any indecent or obscene act." Houston's Sec. 28-42 defined unlawful indecent exposure circularly, as "expos[ing]...the] person in an indecent manner," but also included "any obscene or indecent act in any street or other public place, or in the presence of any person." It was also indecent, according to this ordinance, to appear in public in a state of nudity, or "appear in public in the dress of the other sex." It is unclear from the record if this prohibition of transvestitism, a common provision in municipal ordinances, was to be construed to include cross-dressing as a gorilla. See: 327 F.Supp. 726; the statutes are discussed in Appendix A, at 729.

Hannay’s opinion was most significant in that, in his discussion of the absence of demonstrated cause for enjoining the state and local statutes, he drew on Younger v. Harris.\textsuperscript{181} Montgomery’s complaint was “precisely the type of case to which the Supreme Court was addressing itself,” and Hannay declared his support for the principle of comity. It demanded that “federal interference, even to the extent of granting preliminary restraining orders and convening three-judge-courts [become] by far the exception rather than the rule.”\textsuperscript{182}

Judge Hannay’s enthusiasm for Younger was not shared by all his Southern District colleagues. In abstaining from the suits brought by two proprietors of bars which featured topless, bottomless, or nude dancers, the three judges on the review panel, Circuit Judge Ingraham, and District Judges Singleton and Bue, responded to the implications of the new doctrine in completely different terms. In December 1970, Houston police, joined by state liquor authorities, had raided Roy Hearn’s Martinique Lounge. Police arrested several of Hearn’s employees, and later charged them with violating the state vagrancy and liquor control statutes as well as Houston’s city ordinances prohibiting “indecent dancing.”\textsuperscript{183} Hearn filed a

\textsuperscript{181} 401 U.S. 37 (1971).
\textsuperscript{182} 327 F. Supp., 728.
\textsuperscript{183} Specifically, Article 607 of the Texas Penal Code, Sec. 18 (vagrancy and prostitution, see discussion in note 3, supra.), Article 667-19B of the Penal Code (making criminal any lewd or obscene conduct at places licensed to serve liquor), and Section 36-43 of the City Ordinance of Houston
complaint, seeking an injunction and a three-judge panel. He challenged the statutes on the same grounds Montgomery would cite two months later, but because the raids had occurred prior to the disposition of *Younger*, the judge granted a temporary restraining order, which was extended several times until the three-judge court convened to hear the merits of Hearn’s case. On 1 January 1971, authorities raided the My-O-My Club, a bar that operated near the Martinique. Its owner also requested a temporary restraining order. The three-judge panel, newly-convened to hear Hearn’s complaint, denied that request, but allowed him to join Hearn’s suit as a joint plaintiff.¹⁸⁴

Judge Ingraham wrote the panel’s majority opinion. His dismissal of the case prominently cited *Younger*. In his short opinion, Ingraham wrote that with the *Younger* decision, the Supreme Court “has afforded the lower Federal Courts a polestar by which to guide the exercise of their equitable powers” when considering cases in which the “State’s criminal legal machinery has been set in operation prior to the plaintiff’s seeking redress in Federal Court.” The judge noted that in *Younger*, the Justices “made it abundantly clear that failing proof of bad faith prosecution, harassment or other unusual circumstances,” a federal court should, “on the basis of

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comity and the principles of federalism," abstain from interfering with the state's action. He was confident that the state's legal machinery could decide whether or not the dancing at the Martinique and the My-O-My was obscene or constitutionally-protected expression. Ingraham dismissed Hearn's case in the same terms Hannay used to dismiss Montgomery's.186

Judge Singleton offered a very brief, specially concurring opinion, which noted that he was "reluctantly compelled to follow" the Younger decision. If precedents had allowed it, he wrote, he would prefer to "meet the issues raised in the case head-on."187 Singleton suggested that as a matter of fact, the My-O-My case was not a pending criminal prosecution, and so the panel might have decided to hear it separately; however, because Younger compelled dismissal of the joined cases, he agreed with Ingraham's declaration that "no precedential value could be gained by further discussion of the substantive issues involved." Singleton concluded his concurrence with the admission that: "I do have strong feelings that the first amendment, and its proscription against censorship, applies to the legal issue of obscenity (if in fact there is any such legal concept)," and he

184 Ibid., 34.
185 Ibid., 35.
186 However, because consideration of the municipal ordinance was outside the purview of the three-judge panel, Ingraham remanded the plea for relief from the ordinance back to a single-judge federal court for disposition, which presumably would dismiss it along similar lines. Ibid., 36.
indicated which precedents he would have applied in deciding the case had the Supreme Court not cheated him of the opportunity. The decision to let a state court decide the issue rankled.

Judge Bue also felt that the Supreme Court had cheated him of an opportunity to speak to the obscenity issue. Although he fully agreed with reasoning and the result described by Ingraham in the main opinion, Bue, like Singleton, wrote a specially concurring opinion. It is clear that, had the panel not dismissed the case, Singleton and Bue would not have agreed on the result. Bue agreed that Younger removed the case from his judgment of the "bare legal issues," but he also declared that the dismissal "scarcely comes to grips with the malady which has spread at an ever-increasing rate in recent years --- the use and abuse of the First Amendment . . . as a vehicle for the commercial distribution of obscenity in its various forms." His frustration at the denial of an opportunity to examine the facts in Hearn's case, "compelled [him] to write . . . with a somewhat broader sweep, not to render an opinion where none is called for, but to draw together into some cohesive and orderly pattern for assessment the

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187 Ibid., 36.
189 Ibid., 36.
many and varied facets, both legal and philosophical, which have contributed to an endless confusion in this area of the law.”

Judge Bue clearly considered the kind of dancing at the two bars to be obscene, and he thought the published record should reflect that; he asserted that the difficulties of the obscenity issue were not “eased by some form of antiseptic resume of the circumstances of the case in order to make for more palatable reading.” Whether or not this was “unnecessary” (as Ingraham had claimed), or had any demonstrable “precedential value” (as Singleton had noted), Bue felt impelled to describe the “dancing” observed at the Martinique and My-O-My by “undercover” members of Houston’s vice squad. These lurid details warranted recitation in “proper context without regard for the sensitivities of the reader.” Bue included facsimiles of advertisements for the clubs. He was annoyed that Hearn had modified his print ads. These had called attention to the Martinique’s “BOTTOMLESS Continuous Revue.” After the panel placed the temporary restraining order on the HPD, Heard had added the words “Now An Additional 10 Days Granted By The Courts.”

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190 Ibid., 36.
191 Ibid., 36.
192 Finally, Judge Bue reproduced portions of the transcript of the hearing testimony as it had unfolded prior to the Younger announcement. Bue’s recounting of the “dancing” makes for interesting reading. Ibid., 37-41. Bue noted as well that the admission charge for the My-O-My was a steep $3.00, and that beer and wine cost $1.55.
Perhaps the judge wanted the public to know that, whatever a state court may ultimately decide, he had been on his way to declaring the nightclub dancing to be obscene on any of the several grounds the Supreme Court had fashioned after struggling with the issue.\textsuperscript{193} Bue concluded his long essay by stating his own standard. “In large measure,” he said, “it is perhaps not inappropriate to state that these issues reduce themselves to a determination of what we as a people want our society to be, since laws lose their viability without the affirmative support of the citizenry.”\textsuperscript{194} In

\textsuperscript{193} Bue felt compelled to write another angry thirty pages in an attempt to analyze federal obscenity precedents. Beginning with \textit{Roth}, and leading inexorably to the present case, he intended to demonstrate that the Supreme Court, by promulgating an unbroken series of splintered and confused decisions, had failed to establish a firm and unequivocal standard to guide lower federal judges. Essentially, Bue’s opinion indicted the higher Court for avoiding the issue head-on, until it finally gave up and closed the federal route in \textit{Younger}. Bue concluded that although “[i]t is unlikely after all of these years that there exists any historical or legal source which, by itself, would constitute a clear, unerring signal, heretofore unheard, as to the meaning of the First Amendment freedoms,” the facts of the cases before his were “not so difficult . . . that they conceivably would meet one professed test of obscenity and fail another.” Judge Bue’s comments throughout his detailed history of state and federal obscenity cases leaves no doubt regarding his frustration as the creeping tide of judicial timidity. \textit{Ibid.}, 41-71.

\textsuperscript{194} 327 F. Supp. 33, 71. The citizenry was divided on the rights of expression, but also on the rights of consenting adults to enjoy privacy. In 1965, the Court defined a right to privacy, specifically the right for a married couple to use contraceptives at home, which emanated from the “penumbras” of the Ninth Amendment. \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965). Finally, twelve years after \textit{Roth}, in 1969’s \textit{Stanley v. Georgia}, the Court overturned as unconstitutional a state criminal prohibition on possession of “obscene” home movies, as a matter of privacy. \textit{Stanley v. Georgia}, 394 U.S. 557 (1969). In these opinions, the Supreme Court had
the end, what mattered was that Bue agreed with his colleagues that
*Younger* applied to the case, and that therefore Hearn could no longer
make a federal case of his troubles. Although they had unanimously
concluded that *Younger* limited their discretion to act, the judges’ lack of
consensus on the rights of expression reflected the absence of consensus in
the nation.195

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Houston’s experience with *Deep Throat* began when HPD vice squad
Captain James Allbright “read of several other jurisdictions” that had ruled
the film to be obscene. Allbright resolved to make a “test case” of the
movie in Houston. He later proclaimed his intent “to make a case on every

variously mentioned “redeeming social importance,” “social value,” and
then “patent offensiveness,” in elaborating the legal test for obscenity.
These terms, as well as the original *Roth* formulas such as “taken as a
whole,” “appeal to the prurient interest,” and even the “average person,”
continued to cause problems of definition. For the Justice’s claims of
clarity in the presence of demonstrated ambiguity, see: Kenneth N. Vines,
“The Role of Courts of Appeals In the Federal Judicial Process,” in Walter
F. Murphy and C. Herman Pritchett, eds., *Courts, Judges, and Politics: An
Introduction to the Judicial Process*, 3d ed. (New York: Random House,
1979), 96-98.

195 The next day, the *Post* reported the dismissal in a 125 word blurb
(counting the headline), which noted only that “A Feb. 23 U.S. Supreme
Court decision in similar cases was involved in the order to dismiss.” See:
“U.S. Court Frees Police to Raid Nude Act Clubs,” *Houston Post*, 17 April
1971 (Courts/policing section).
one of the skin flick houses in town.” In April 1973, vice squad officers entered the Cinema West Theater and seized its print of *Deep Throat*. Harris County District Attorney Carol Vance indicted the exhibitor, Joseph Spiegel, under Texas criminal obscenity statutes and public nuisance civil laws.\(^{196}\)

Spiegel filed suit in the Southern District two weeks later. He accused Vance of enforcing the obscenity statute in bad faith, and asked Judge Singleton to issue a temporary restraining order against the county prosecutor and the vice squad. Spiegel believed that he could show *Deep Throat* to 60,000 customers in six weeks in his three small Houston theaters, and that thereafter the movie would fill a 2000-seat theater indefinitely; he requested that the judge order the movie returned to exhibition until its status as an obscene film was determined in court. At $5 per admission, this was Spiegel’s unprecedented financial opportunity, but Singleton did not believe that losing this revenue would cause “irreparable harm.” Therefore, he denied Spiegel’s motion for a restraining order. However, he approved the application for a three-judge panel.\(^{197}\)

\(^{196}\) Captain Allbright later cited as the impetus of his action a New York opinion provided by the Houston District Attorney’s office. “Sex Film Loses Fight in Court,” *Houston Post*, 3 May 1973.

In the interim, prosecutions proceeded in Houston and elsewhere. A Dallas theater owner was also prosecuted for showing *Deep Throat*, and when he filed suit to challenge the obscenity statute in the federal court in the Northern District of Texas, the Fifth Circuit’s Chief Judge Brown consolidated the case with Spiegel’s suit in the Southern District. Thereafter, prosecutions for alleged obscenity “mushroomed” all over Texas, and more defendants sought to enjoin the state laws in the federal courts, Brown added the new cases to the list to be examined by the three-judge panel that would hear Spiegel’s case.  

In mid-August 1973, Singleton held a pretrial conference with attorneys representing the parties in the consolidated cases. They involved varied of circumstances and disparate challenges to Texas statutes. As a consequence, the final complaint challenged not only the constitutionality of obscenity laws, but also the use of public nuisance and criminal instruments

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Texas statute that had been invoked against the Cinne Arts manager and projectionist in 1969: Article 527 of the Texas Penal Code (“Obscene Matters”). Spiegel also claimed that his hearing before a state district judge had been defective. In his suit, Spiegel requested $90,000 in damages and $25,000 in attorney’s fees. “Sex Film Loses Fight in Court,” *Houston Post*, 3 May 1973.  

198 Over the course of two years, he joined twenty cases to the Houston litigation. *Ibid.*, at 36-37. Only one of the additional suits was another case from the Southern District of Texas: *Hargrove v. Hill*, unpublished [Houston Division; Civ. A. No. 73-H-1114]. In the published opinion for *Universal Amusement Co. v. Vance*, Judge Singleton describes the circumstances in only the three representative cases.
laws, which were enacted for purposes other than closing businesses engaged in allegedly obscene commerce.\textsuperscript{199}

In November, Spiegel's prosecution in state district court ended in a mistrial, when only six of twelve jurors decided that by offering Deep Throat, he had conspired to exhibit an obscene film. Assistant District Attorney Mike Hinton filed a misdemeanor charge against Spiegel, for showing an obscene film. Singleton again refused Spiegel's request that he order prosecutors to return the film pending the second trial. The judge also refused to halt the new prosecution until the as yet unappointed three-judge panel ruled on the constitutionality of the relevant portions of the Texas obscenity laws. Judge Singleton justified this lack of action by mentioning the principles of several Supreme Court rulings restricting federal court interference in pending state criminal cases. He was obviously referring to Younger.\textsuperscript{200}

\textsuperscript{199} \textit{Universal Amusement Co. v. Vance}, 404 F.Supp., 37.
\textsuperscript{200} The judge declared that, although he believed that a Supreme Court ruling required the state court to return the film pending another trial, Spiegel must first seek relief in an appeal to the Texas Court of Civil Appeals before asking the federal courts to rule on the matter. Clyde Woody, Spiegel's attorney, said he would immediately make the request, but visiting state judge Stanley Kirk of Wichita Falls had already denied an earlier request to have the film returned. "Judge Refuses to Order Court To Return 'Deep Throat' Film," \textit{Houston Chronicle}, 17 December 1973, Section 1, page 10. [Note: the \textit{Chronicle} article neglected to cite the specific Supreme Court ruling to which Singleton might have been referring, but it was probably \textit{Younger}.]
The Texas statutes were apparently ripe for examination by the federal courts, because in June 1973, the U.S. Supreme Court had decided the quintet of obscenity cases led by *Miller v. California*. In *Miller*, the Justices offered a new and somewhat improved standard of evaluating obscenity statutes. Under it, material could be declared legally obscene if its predominant theme was prurient according to the sensibilities of the average person in the community, if it depicted sexual conduct in a patently offensive manner, or, when taken as a whole, it lacked "serious literary, artistic, political, or scientific value." The Texas legislature responded by repealing the state obscenity statute. It enacted a new statute, effective 1 January 1974, which replaced the term "sexual matters" with the formula "sex, nudity, or excretion" under the portion of the statute defining the formal criteria for declaring material "obscene."

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202 This is often referred to as the LAPS test. *Miller v. California*, 413 U.S. 15 (1973), at 24. In practice, the Court had still not made the job easier. The Justices soon clarified the new standard in several other important cases, including *Heller v. New York*, 413 U.S. 483 (1973) and *Roaden v. Kentucky*, 413 U.S. 496 (1973). These latter cases dealt not with substantive obscenity laws but with the procedures to bring into court those who are alleged purveyors of obscenity. *Universal Amusement Co. v. Vance*, 404 F.Supp., 37.

203 Texas Penal Code, Section 43.21, part (a) and (d). Much of this language was taken from the *Roth-Memoirs* line of cases, rather than *Miller*. Part 1 (b) refers to "community standards," but part 3 defined
Meanwhile, jurors in Spiegel’s misdemeanor trial deadlocked, three to three. District Attorney Vance gave up Harris County’s attempt to have *Deep Throat* declared obscene. He announced that thereafter, his office would only prosecute “extreme” films depicting pedophilia or bestiality. Presumably, it would be easier to convince a jury that those films were obscene. After Vance issued this policy, Spiegel dropped his suit.  

“prurient interests” as material defined for a “specially susceptible audience,” a contradictory anachronism from common law definitions. The new Section 43.21 retained the earlier Article 527 requirement that to be found obscene, material must be found to be “utterly without redeeming social value.” At the same time, Texas legislators repealed Article 513 of the Penal Code (“Disorderly House”), which defined a disorderly house as a “any house, building, theater or other structure where obscene motion pictures are displayed, exhibited or shown to person under twenty-one (21) years of age.” Article 513 had also defined “obscene motion picture” and “prurient interest” in language virtually identical to the old Article 527, that is to say, in the language of *Roth* and *Memoirs*. In addition, however, Article 513 had included a sentence defining “contemporary community standards.” The lawmakers replaced this with a revised version of Article 4667 of the Texas Civil Statutes (“Injunctions to abate public nuisances”). The old Article 4667 provided for the enjoining of “the habitual use, actual, threatened, or contemplated, of any premises, place or building or part thereof . . . [f]or keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, as those terms are defined in the Penal Code.” The new Article 4667 specifically provided for enjoining the “habitual use, actual, threatened, or contemplated, of any premises, place or building or part thereof . . . [f]or the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials . . .” Texas Civil Statutes, Article 4667, part (d), *Vernon’s Annotated Civil Statutes*. Statutes quoted in: *Universal Amusement Co. v. Vance*, 404 F.Supp., 37-40.

204 George Flynn, “Theater Owner ‘Upheld’,” *Houston Post*, 9 July 1975, page 1A.
Therefore, neither Vance nor Spiegel were involved when hearings for the consolidated cases finally commenced in Houston in November 1974. Of the members of the three-judge panel consisting of Singleton, Judge William Taylor of the Northern District of Texas, and Circuit Judge Ingraham, Singleton emerged as the dominant force, and ultimately, he wrote its opinion.

In an effort to simplify the proceedings, Singleton chose three suits which represented the collective issues and which presented the fewest jurisdictional complexities.\textsuperscript{205} In addition to challenging the constitutionality of the obscenity laws, the attorneys for the federal plaintiffs argued against further enforcement of the state laws on public nuisance and criminal instruments, which were used against owners of adult theaters. The Texas Attorney General’s office responded that all statutes were enforced according to both the state and federal constitutions, and that the Texas Court of Criminal Appeals was providing clear interpretations of the state laws. Therefore, federal judicial intervention was unnecessary.\textsuperscript{206}

\textsuperscript{205} Attorneys for these three plaintiffs submitted joint briefs. Two of the three cases had remaining factual disputes, but Judge Singleton considered these immaterial to the determination of the cases. \textit{Universal Amusement Co. v. Vance}, 404 F.Supp., 37.

The first case the panel considered represented the broader issues. King Arts Theater, Inc., operated an enclosed, adults-only theater in San Angelo. In October 1973, the landlord from whom King Arts rented the building notified his tenants that he would soon cancel their lease, because the district attorney for Tom Green County had expressed an opinion that the theater was a public nuisance, and had declared his intention to seek an injunction to prohibit future showings of sexually-explicit films. King Arts filed a federal lawsuit requesting both a declaratory judgment and injunctive relief. The plaintiffs challenged the constitutionality of the public nuisance statute, which specifically named as nuisances facilities used for commercial obscenity.207

Once the Fifth Circuit joined the case to Spiegel’s complaint, the San Angelo parties had agreed to maintain the status quo until the larger case was determined. This enabled Singleton to declare that Younger did not forestall federal intervention. He noted that the county attorney’s decision not “to actively pursue his threatened course of action would certainly lessen the court’s considerations of equity, comity, and federalism upon which Younger is based.”208 Because King Arts had requested an

207 Texas Penal Code, Article 4667.
208 At the same time, Singleton maintained that the threat of a future prosecution under the nuisance statute was enough to present the actual controversy required by Article III of the Constitution. The original case is captioned King Arts Theatre v. McCrea, CA-6-345 (N.D.Tex.), but it is
injunction to prevent the state from utilizing the nuisance statute, Singleton said that one issue remained to be settled before the panel could rule in the case, namely, whether the theater company would suffer irreparable injury without the injunction. The judge established that "traditional prerequisite" to injunctive relief by relying on Dombrowski, which warned of the "chilling effect upon the exercise of First Amendment rights [which] may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."209 The Younger decision had narrowed but not eliminated a "chilling effect" standard, and Singleton applied the standard. But, he withheld the injunction. The judge noted that the plaintiff was threatened under a civil statute, and did not face arrest. Therefore, an irreparable injury from a "chilling effect" would not occur. Singleton confined himself to the addressing the question of the declaratory judgment.210

The public nuisance statute did not contain a description of obscenity, Judge Singleton noted, and the "logical place" to find the state's definition was in the revised Texas Penal Code. Singleton compared the language in Miller to the new obscenity statute and to recent state court decisions

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regarding obscenity. The Miller definitions differed from the new statute in two ways. First, the Texas law retained the phrase "utterly without redeeming social value," which the Supreme Court had described as a virtually impossible standard to define, instead of the new language: "serious literary, artistic, political, or scientific value." Second, the new Texas statute did not specifically define "obscene matters," as the Supreme Court required in Miller. Despite these flaws, Singleton concluded that the "cases show that the courts of Texas have adhered rather closely to the ideas of the Supreme Court of what constitutes obscenity." He noted that the Court had intended to assist state lawmakers and judges in clarifying

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211 That is, at Section 43.21, which defined obscenity in virtually the same terms as the old Article 527. The original charges were brought under the old language, but King Arts continued its complaint against the revised statutes. Ibid., at 39. The original obscenity statute, with its "sexual matters" language intact had recently been challenged in the Texas Court of Criminal Appeals as West v. State of Texas, and upheld, only to be appealed to the U.S. Supreme Court, which vacated and remanded the case to the Court of Criminal Appeals for further consideration in light of Miller. See: Order for certiorari, granted, vacated and remanded in: West v. Texas, 414 U.S. 961 (1973). On 9 October 1974, in a post-Miller rehearing of West, the Court of Criminal Appeals held that although Article 527 was perhaps deficient, it had been authoritatively construed by Texas courts, and these constructions supplied any constitutional deficiencies. Therefore, the defendant in West case derived no benefit from Miller. See: West v. State of Texas, 514 S.W.2d 433 (Tex.Cr.App., 1974), at 448. Given these fresh tracks, Judge Singleton confidently believed that the Court of Criminal Appeals, although it had only glossed the original "sexual matters" construction, would apply the same gloss to the new words and thereby provide authoritative guidance on the interpretation of Texas law in light of the Miller standard. Universal Amusement Co. v. Vance, 404 F.Supp., 40.
their existing statutes, but did not mandate that federal judges overturn laws if they did not match the Miller language exactly. Therefore, the three-judge panel did not find that the statute unconstitutionally "vague, overbroad, or invalid because it fails to give adequate notice." The King Arts plaintiffs, and by implication all twenty consolidated plaintiffs, lost that seemingly critical point.  

With regard to the King Arts challenge to the public nuisance statute itself, however, Singleton examined the companion statutes, which Texas had not revised in 1974. These allowed "general reputation" of the premises, and "reliable information" that proscribed behavior occurred on the premises, to be the basis of a state injunction for nuisance abatement. The King Arts plaintiffs accepted that the state could enjoin the showing of a film which had been properly found to be obscene. But, they argued that the Texas nuisance statutes represented a "classic" example of prior restraint. Singleton agreed that the King Arts arguments raised a "serious consideration," because, "to prove that a motion picture theater has been

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212 Judge Singleton noted that a Federal obscenity statute, 18 U.S.C. Section 1461, which had been challenged as unconstitutionally vague in Miller, had repeatedly been upheld. Universal Amusement Co. v. Vance, 404 F.Supp., 40-42.

213 If the county attorney proved a nuisance in these terms, for example, the statutes allowed the premises to be enjoined for one year unless the owner, tenant, or lessee makes a bond of at least $1000, but not more than $5000, with the condition that "the acts prohibited in this law shall not be done in said house." See: Texas Penal Code, Articles 4665 ("Nuisance: evidence") and 4666 ("Nuisance: prosecution").
the scene of the showing of films that are obscene" was "not to prove
that every film shown in that theater, in the past, present, or future, was,
is, or will be obscene." The statute authorized a state judge to close a
theater on the strength of a single incident of "commercially
manufacturing, distributing, or exhibiting obscene material." Unless the
owner posted bond, the exhibition of any movie could constitute contempt
of court. If the owner posted bond, films could be shown, but, if at any
time the authorities proved that another film was obscene, the bond would
be forfeit.214

Judge Singleton decided that these regulations were "the essence of
censorship," because owners had to think twice about exhibiting any
controversial material. By forcing the closure of a theater, or by requiring
that a bond be posted to keep the theater open, the state effectively has
imposed a prior restraint. Because motion pictures that were not obscene
were clearly protected under the First Amendment, the state had the
burden of proof in establishing that a specific film was legally obscene.
Singleton found that the state made the fatal mistake by allowing the
prohibition of future conduct based on a finding of undesirable present
conduct. He declared that when potential future conduct may be protected

214 Universal Amusement Co. v. Vance, 404 F.Supp., 42-46. The classic
cases of prior restraint law are Near v. Minnesota, 283 U.S. 697 (1931),
under the First Amendment, the separation of protected expression from unprotected obscenity must accomplished using sensitive legal and judicial tools, and "not the heavy hand of the public nuisance statute." The three-judge court declared the Texas nuisance statute unconstitutional on its face. Having repudiated the plaintiffs regarding the state's definition of obscenity, the federal panel upheld them on the more practical question that allowed them to continue to operate their businesses.²¹⁵

The second case of the representative trio was a *Deep Throat* case, and it was somewhat more simple for the federal judicial panel to digest. On four occasions in 1974, a San Antonio police officer paid the $5 admission to the Fiesta Theatre, and after viewing *Deep Throat*, he wrote an official report, and also signed a "Motion for Adversary Hearing," presenting it to a magistrate. At the adversarial hearing, the magistrate would determine if probable cause existed to seize the theater's print of the movie and to charge Richard Dexter, the theater's operator, with violating state obscenity laws. The magistrate was responsible for informing Dexter

²¹⁵ Singleton accepted that the Supreme Court had allowed that some forms of prior restraint, operating under very special circumstance, might be acceptable, but only if the burden of proof remained with the censor and the statutes provided for a short, fixed interval to determine the obscenity of questionable material. *Universal Amusement Co. v. Vance*, 404 F.Supp., 42-46.
of the complaint, scheduling a hearing, and advising Dexter to contact an attorney.216

On each occasion, however, the hearing commenced less than one hour after the notification, usually in the theater itself. They proceeded along similar lines: first, the officer testified regarding the contents of the film; next, the magistrate attended a showing of the film; finally, the magistrate signed a warrant authorizing the officer to arrest Dexter or an employee, to seize the film as "probably obscene," and to impound the projector as a "criminal instrument." After each seizure, Dexter obtained a new print of Deep Throat, and a new projector, and continued to show the movie until the next round of arrests and seizures.217

Dexter was charged on two counts. The first was trading in commercial obscenity, a class B misdemeanor. He did not challenge the charge in his federal complaint, and the case was pending in a state court. But Dexter was also charged with unlawful use of a criminal instrument, a class III felony.218 The criminal instrument statute ordinarily applied to

216 The original case was captioned Dexter v. Butler [SA-74-CA-168 (W.D.Tex.)]. See: Universal Amusement Co. v. Vance, 404 F.Supp., 46-47. 217 Universal Amusement Co. v. Vance, 404 F.Supp., 46-47. 218 Texas Penal Code, Section 43.23 ("Commercial Obscenity"), carried a possible penalty of a fine not to exceed $1000, or confinement not to exceed 180 days, or both. But Section 16.01 ("Unlawful use of criminal instrument"), carried a penalty of a fine not to exceed $5000, and confinement not more than ten nor less than two years. Section 16.01, part (a), made it unlawful to possess, manufacture, or sell a criminal
gambling devices, and Dexter challenged its application to a film projector. The state defendants in Dexter's federal complaint, which were joined under Ted Butler, San Antonio's district attorney, chose not to justify the constitutionality of the criminal instruments statute, or its use against Dexter. Instead, the state's attorneys based their defense on the contention that, under the Younger rule, the three-judge panel lacked authority to examine the merits of the case. 219

Although none of the felony charges had yet been heard by a grand jury, the complaints had all been filed, and therefore, the state attorneys argued, the case was "pending." Moreover, they said, Dexter had not charged the police or magistrate with bad faith or harassment, or claimed imminent irreparable injury, the prerequisites for federal intervention under Younger. But Judge Singleton saw evidence of bad faith in the repeated seizures of the same film and the new projectors. Coupled with the fact that none of the seizures resulted in an indictment or judicial determination that Deep Throat was obscene, the judge found that "[i]t is obvious that San Antonio was engaged in an "all out" effort to suppress this

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instrument, and part (b) defined "criminal instrument" to mean "anything that is specially designed, made, or adapted for the commission of an offense."

film.” The fourth seizure was the last, he noted, only because Dexter filed the complaint and a federal court had enjoined further action.  

In order to “fully comprehend the innovative tactics San Antonio put into practice,” Singleton examined the criminal instruments statute. He determined that it was not a proscription against any item that had lawful uses. Furthermore, because it was essentially a possession, rather than a “use” statute, it was not aimed at overt criminal actions. The statute had been aimed at true criminal instruments, made specifically for criminal uses and with the intent to commit crime. An ordinary portable sixteen millimeter film projector could not reasonably be a criminal instrument, the judge said. District attorney Butler must have known that he could not obtain a conviction on the charge, but rather had calculated that “[s]uch a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony[,] was effective in requiring that bail for a felony offense be set, not once but several times.”

The San Antonio police’s repeated seizures of the same movie without adjudicating its obscene status, was gratuitous, Singleton declared; there was “no evidentiary reason why this film should have been seized more than one time.” He added that:

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220 Ibid., 48.
221 As a result of four arrests, Dexter was responsible for $55,000 in personal recognizance bonds. Ibid., 46-47.
When viewed objectively there is no logical reason why this film was seized four times except that the authorities were attempting to harass the theater and its employees and to eliminate the exhibition of this film --- prior to any final judicial determination of its obscenity. It is no answer that the authorities were unsuccessful at their chosen task. Resourcefulness in the face of official harassment should not inure to the benefit of the official harassers.\textsuperscript{222}

Therefore, when Singleton evaluated the state’s interpretation of the 

\textit{Younger} doctrine, he was convinced that San Antonio not only had acted in bad faith by prosecuting Dexter under an inapplicable criminal instruments statute, it had also engaged in official harassment by seizing the film on multiple occasions. The judicial panel maintained that federal intervention was proper, and the panel enjoined San Antonio from “in future . . . prosecuting any motion picture exhibitor for possession or use of equipment which can be used for any lawful purpose.”\textsuperscript{223} This decision presaged judicial condemnation of the tools used by authorities in many of the consolidated cases.

The third representative case was the prosecution of the owners of the Ellwest Stereo Theatre in Dallas. The Ellwest featured “peep shows” in private viewing booths, each containing a stool and a coin-operated

\textsuperscript{222} In addition, Judge Singleton said that the in-theater evaluations did not rise to the level of an adversarial hearing, particularly one aiming to assess the possible obscenity of \textit{Deep Throat}. He added: “[w]e assume that San Antonio is asking us to hold that their procedures are something more than an inquiry into the probable obscenity of the film . . . The court will not so hold.” \textit{See: Universal Amusement Co. v. Vance}, 404 F.Supp., 48-49.
projector. A Dallas police officer entered the theater in January 1974, with a search warrant, signed by a justice of the peace, which authorized him to seize “property specially designed, made, or adapted for or commonly used in the commission of an offense.”224 The officer seized three films and three projectors, then, using tools he had brought with him, he removed the three coin boxes and their contents. Two days later, the officer returned with a new warrant, and seized two more films, two additional projectors, and two stools. On the second visit, he also removed the wall separating two viewing booths. In February 1974, the theater owners filed suit for federal injunctive and declaratory relief.225

Like earlier defendants, the attorneys for Dallas contended that the federal panel lacked jurisdiction, but they based their argument on the fact that the Ellwest owners had abandoned their claim for injunctive relief. The theater’s attorneys had not mentioned an injunction in their pre-trial

223 Ibid., 50-51.
224 The Texas legislature had also amended the state’s Code of Criminal Procedure in January 1974. Article 18.02 (“Search and Seizure”), section 2, allowed a warrant to be issued for this purpose.
225 On 1 May, the Ellwest prosecution became one of the twenty cases consolidated under the original complaint in Houston. The original case was captioned Ellwest v. Byrd, CA-3-74-130-E (N.D. TX). [Note: The date of the first raid on the Ellwest is given as both 24 and 27 January in the opinion.] See: Universal Amusement Co. v. Vance, 404 F.Supp., 51-53.
brief. According to Dallas, the panel could not separately hear a claim for declaratory relief.\textsuperscript{226}

Once again, Judge Singleton established the federal court’s authority to examine the case. Although the plaintiff’s brief did not specifically seek to enjoin the police action, the judge said, it “addresse[d] itself fully to the question and all but invites the court to grant injunctive relief.” Moreover, Singleton declared, even if the plaintiff had not requested relief, he could find only one opinion, from New York, where judges decided that they lacked jurisdiction to hear a plea for declaratory judgment standing alone. Singleton examined Supreme Court and Fifth Circuit cases, which were ambiguous, and found that these supported the discretion of a judicial panel to decide its own jurisdiction. He declared: “[i]t would appear to this court that that question is still open and that this court is free to decide the issue, taking into consideration all of the circumstances surrounding the suit.” He held that the claim for relief and a declaratory judgment was “properly” before the federal three-judge court.\textsuperscript{227}

Singleton examined the Dallas attorneys’ second challenge. Although the seized property remained in police custody, the Ellwest proprietors had not been prosecuted for violations of Texas obscenity laws. Therefore, the attorneys maintained, no case or controversy existed for the panel to

\textsuperscript{226} Ibid., 51-53.
\textsuperscript{227} Ibid., 51-53.
adjudicate. Singleton dismissed the lack of formal prosecution as
irrelevant: the state had acted under a criminal search and seizure statute,
and whether or not Texas subsequently prosecuted the case, a controversy
existed. Further, the seized property had disseminated material that the
court must presume to be protected until it was declared to be obscene.
The Ellwest plaintiff’s predicament, the judge found, presented a valid and
serious constitutional question “which has substantial first and fourteenth
amendment overtones worthy of consideration.” It remained to be seen
only whether or not the plaintiff’s claim was “meritorious.” Because the
Dallas defendants had not claimed shelter from federal intervention under
Younger, Judge Singleton quickly dispensed with the issue. He declared
that there existed “no jurisdictional, equitable, comity, or federal bar to the
maintenance of this suit.”

Acknowledging the difficulty of establishing what was and was not
prior restraint, which he had accomplished in the King Arts case, Singleton
summarized the plaintiffs complaint as the following: under the guise of
searching for and seizing as evidence property which is “specially designed,
made, or adapted for or commonly used in the commission” of a crime, the
Dallas police effectively “shut down” the operations of an adult theater.
The judge then summarized the defense: after assuming that the films
shown in the Ellwest theater were obscene, and knowing that Texas had
laws against the commercial exhibition of obscenity, the Dallas
authorities further assumed as an "indisputable fact that the equipment
seized is equipment 'commonly used' in the commission of a crime.'" In
order to accept the state's argument, one must assume that the films were
obscene which, he said, the court "cannot assume." Because films are
presumed to be protected by the First Amendment, he reiterated, they must
be judged obscene under the latest Supreme Court guidelines, which set a
theater operator and projectors apart from a gambler and slot machines.
Beyond due process, an alleged gambler does not enjoy special
constitutional protection. But, "no matter how lewd his neighbors and the
police and the district attorney's office may think his business to be,"
Singleton said, an adult theater owner "has an added protection --- the
protection of the first amendment."229

Judge Singleton noted that the prosecutors claimed the projectors,
coin boxes, stools, and booth walls the police seized were evidence, but he
dismissed the claim, because legitimate proof of obscenity would "seem to
rise or fall with the material exhibited," and, in any case, photographs of
the booths would suffice in a courtroom. In short, said the judge, this was
a "raid accompanied by crowbars and screwdrivers," in which it was
apparent that the Dallas police department abused its authority in order to

228 Ibid., 53.
229 Ibid., 54.
cause the "maximum amount of disruption of the business."

Nonetheless, official abuse did not necessarily render the statute constitutionally flawed. Singleton declared that a good search and seizure statute "should be precise enough to guide officials acting in good faith," but the language of this statute, namely, "commonly used in the commission of an offense" was "superfluous and ambiguous."\(^{230}\) The First Amendment demanded more care and precision. "What disturbs this court," he wrote, was that the term "commonly used" was unconstitutionally "vague and overbroad." The federal panel directed Dallas authorities to cease action against the plaintiffs or any other individuals engaged in "first amendment activities."\(^{231}\)

On 3 July 1975, the federal three-judge panel released its official conclusions in the cases consolidated under the Vance and Spiegel dispute. Judge Singleton, for the panel, directed that the remaining cases be remanded to the individual federal judges from which they had come, and directed them to examine each prosecution for bad faith harassment or special circumstances, in order to determine whether or not the cases fit the *Younger* abstention criteria.\(^{232}\)


\(^{231}\) *Ibid.*, 56.

\(^{232}\) If the judges found bad faith, harassment, or special circumstances, they were to send the cases back to the three-judge panel to be disposed of according to the rules in the opinion. *Ibid.*, 57. The state appealed, but
After two years of litigation, the public response to the judicial panel's opinion was subdued. District Attorney Vance maintained that although the judicial panel's ruling was "subject to being overturned" on an appeal, the decision would have little impact in Harris County, because, due to the policy he announced in the wake of the two mistrials, "we're not actively prosecuting anyone on obscenity violations." Vance said that he had expended too much time, with too little result, in developing such prosecutions. He claimed that the problem was the Texas Penal Code and the Miller criteria regarding contemporary community standards. Vance noted that in Houston:

... the community, itself, is divided as to what is an affront to community standards. The liberals are saying that violent movies are really obscene and that explicit sex acts are not.

ultimately lost. A Fifth Circuit panel overturned Judge Singleton's opinion for the three-judge district court panel. One of the issues that the Fifth Circuit decided, which Singleton had not touched on in the district opinion, was the award of money damages. According to Singleton's opinion, damages would be the provenance of the original judges. Universal Amusement Co. v. Vance, 559 F.2d 1286 (5th Cir., 1978). On a rehearing en banc, the full Court of Appeals overturned the Circuit panel, and strongly upheld the district decision. Universal Amusement Co., Inc. v. Vance, 587 F.2d 159 (5th Cir., 1978). Finally, five years after Judge Singleton and the other two judges delivered their original opinion, the Supreme Court also upheld the panel's findings. Vance v. Universal Amusement Co., 445 U.S. 308 (1980). By 1980, the video cassette recorder had been introduced, and Deep Throat was available on home video tape.
The conservatives are saying that sex acts are obscene and that violence is not. There is no middle ground to all of this.\textsuperscript{233}

The result, claimed Vance, was that "[i]t's next to impossible to get a book off the shelves these days on the grounds of obscenity."\textsuperscript{234} Spiegel also maintained that the Houston community had accepted *Deep Throat*. He had been showing the film continuously since his second mistrial had derailed the Harris County prosecutor's policy. He considered himself vindicated. After all, he said: "[i]t is the longest playing movie in the history of the city \ldots now in its 74th week."\textsuperscript{235}

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\textsuperscript{233} Vance, quoted in "Ruling on Obscenity Law Has Little Effect Here," *Houston Chronicle*, 9 July 1975, Section 1, page 8.

\textsuperscript{234} Vance claimed that only movies or magazines that featured pedophilia or bestiality were apparently fit for prosecution. Vance, quoted in "Ruling on Obscenity Law Has Little Effect Here," *Houston Chronicle*, 9 July 1975, Section 1, page 8.

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IV. Conclusion: Older Cases and the Younger Doctrine: Farm Workers and Texas Rangers

In Younger, Justice Black declared the Supreme Court majority's support for what he described as a primary goal of Congress "since the beginning of this country's history." "Subject to few exceptions," Black wrote, Congress had "manifested a desire to permit state courts to try state cases free from interference by federal courts."\(^{236}\) The Justices sought to expand the umbrella of "Our Federalism" in many subsequent opinions. The Court ultimately foreclosed federal suits aiming to reform civil court and administrative practices, even when the plaintiffs did not seek to enjoin pending state proceedings. With ever rarer exceptions, such as the ongoing public school desegregation cases, state officials were liberated from federal judicial oversight initiated under the Fourteenth Amendment and section 1983.\(^{237}\) But the Court's decisions during the 1970s did not require

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\(^{236}\) *Younger v. Harris*, 401 U.S., at 43.

\(^{237}\) In the early 1970s, the Court extended the basic rationale of *Younger* to bar federal injunctions against civil proceedings that a state had initiated "in aid of and closely related to criminal statutes." They next discouraged federal intervention into any civil proceeding brought by a state. Donald H. Zeigler, "A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction," *Duke Law Journal* 1983(1983): 988. In addition to *Younger*, Judge Singleton noted the more recent, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *Huffman* established that
federal judges to abdicate its responsibility for protecting constitutional rights. In cases where state prosecutions had been brought in bad faith, or else had been filed or threatened merely to harass citizens and to keep them from exercising their civil rights, the federal courts abandoned the "judicially developed policy of self-restraint." 

The *Younger* doctrine of non-interference in state criminal prosecutions applied equally well to civil cases. Pursue, Ltd. owned an adult film theater. After conducting civil proceedings, an Ohio state judge had declared the movies to be obscene. The declaration authorized the closing of the theater and sale of personal property used in the theater's operation. Rather than appealing the state court decision, Pursue, Ltd. filed a section 1983 suit seeking a declaratory judgment against the state public nuisance law and injunctive relief from the state court order. Relying on the "Our Federalism" rationale of *Younger*, Justice Rehnquist wrote for the Court that civil proceedings that were "akin to a criminal prosecution" were subject to *Younger* restrictions, and therefore, the federal courts were required to abstain from interfering. This decision established what Rehnquist termed the "civil counterpart to *Younger*." 420 U.S. 592 (1975), 604. According to Bryce Baird, *Huffman* represented "a new direction in abstention doctrine that has developed almost exclusively through Rehnquist's opinions into the doctrine of civil rights abstention." He notes that the doctrine "encompasses, but is much broader than, *Younger* abstention." Baird, "Federal Court Abstention in Civil Rights Cases," 526-527.

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**238** Donald H. Zeigler, "An Accommodation of the *Younger* Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process," *University of Pennsylvania Law Review* 125 (1976): 269-270. In its 1967 opinion in *Zwickler v. Koota*, the Supreme Court reaffirmed the duty of the federal courts to hear civil rights cases. The Justices noted: "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota*, 389 U.S. 241 (1967), 248 (citations omitted). Even after *Younger* marked a change in direction, the Justices continued to support the basic right of a civil rights plaintiff to have access to the federal courts.

For example, in a 1972 case involving police officers who had closed down
The UFWOC's long-pending section 1983 suit apparently qualified for federal judicial intervention. The union plaintiffs had alleged that the conduct during the strike of Texas Rangers, Starr County deputies, and local officials, had "chill[ed] the willingness of people to exercise their First Amendment rights." According to their complaint, government officials conspired to deprive union members and supporters of their rights under the First and Fourteenth Amendments. Under color of law, deputies and Rangers had threatened, harassed, coerced, and physically assaulted the strikers, to prevent their exercising the rights of free speech and assembly, and had arrested, detained, and assaulted union members without due process. The UFWOC plaintiffs challenged as unconstitutional Texas statutes which they claimed were enforced against union organizers in a discriminatory and selective fashion. Therefore, they sued to enjoin enforcement of state laws which prohibited unlawful assembly, breach of the peace, and abusive language, and either regulated or proscribed mass picketing, secondary picketing, and boycotting.  


239 The plaintiffs, in addition to the UFWOC, AFL-CIO, included Francisco Medrano, Kathy Baker, David Lopez, Gilbert Padilla, Magdaleno Dimas,
Although the union sued in July 1967, when federal courts were relatively open to requests for injunctions against alleged state offenses, Southern District Judges Seals and Garza, and Fifth Circuit Chief Judge Brown, the panel that heard their case, did not announce a decision until late June 1972, more than a year after the Younger decision. The state challenged the federal judicial panel’s authority to examine the case, arguing also that it had become moot when the UFWOC abandoned its efforts to form a union after the state judge enjoined their picketing. The federal panel disagreed. After summarizing the officers’ behavior during the strike, Judge Seals declared that “the conclusion is inescapable.” Starr County officials had believed that “maintenance of law and order was inextricably bound to preventing the success of the strike.”

As a consequence of that opinion, “[w]hether or not they acted with premeditated intent, the net result was that law enforcement officials took sides in what was essentially a labor-management controversy.”

Benjamin Rodriguez. The defendants included Texas Ranger Captain A.Y. Allee, five of his Rangers, employees of the State of Texas and residents of Dimmitt County, Sheriff Solis of Starr County, Deputies Raul Peña and Roberto Peña, Justice of the Peace Lopez, and “Special Deputy” Rochester. Medrano v. Allee, 347 F.Supp. 605 (S.D.Tex., 1972), 611. The Texas statutes challenged were: Texas Penal Code, Art. 439 (prohibiting unlawful assembly), Art. 474 (breach of the peace), and Art. 482 (abusive language); and: Texas Revised Civil Statutes, Arts. 5154[d-f] (regulating mass picketing, secondary picketing, and boycotting).

state authorities had "exhibited their personal bias and opinions against
the strikers and their cause," Seals decided. He added that:

\ldots [t]his is not intended as a whitewash of the activities
carried on by the union and its sympathizers during this
period. In a controversy such as this, it is rare indeed if all
the blame can be laid to rest at one doorstep. However, the
issue that is presented to this court for determination is
whether the defendants stepped over the line of neutral law
enforcement and entered the controversy on one side or the
other. It is the judgment of this Court that such was the
case.\textsuperscript{241}

Seals declared that the Starr County and state officials' conduct obviously
put strike sympathizers in "fear of expressing their protected first
amendment rights with regard to free speech and lawful assembly." It was
obvious that the UFWOC "abandoned" organizing because of the
harassment, not the state judge's injunction, and, Seals declared, that
"[t]here can be no requirement that [union members] continue to subject
themselves to physical violence and unlawful restrictions upon their
liberties \ldots in order to preserve" their pending case as a "live
controversy." For these reasons, the judicial panel ruled that \textit{Younger} was
not a bar to federal court intervention.\textsuperscript{242}

\textsuperscript{241} \textit{Ibid.}, 618. For example, Starr County deputies reportedly assisted in
the distribution of \textit{La Verdad} ("the Truth"), an anti-union newspaper. As
Judges Seals noted, a typical headline was: "Only Mexican Subversive
Group Could Sympathize with Valley Farm Workers." \textit{Ibid.}, 617, plus
appendix. Also noted at: 416 U.S. 802 (1973), at 807, 826.
\textsuperscript{242} \textit{Medrano v. Allee}, 347 F.Supp., 618.
The federal panel declared five Texas statutes unconstitutional and enjoined their enforcement, and permanently enjoined the state, county, and local law enforcement officers or other officials from engaging in a variety of unlawful practices which intimidated the farm workers and interfered with their efforts to organize.\footnote{Ibid., 634.} Texas appealed the ruling. While it was pending, the legislature repealed the three criminal statutes which had outlawed unlawful assembly, breach of the peace, and abusive language.\footnote{Ibid., 618.}

Rulings of a three-judge district court are appealeable directly to the U.S. Supreme Court. Chris Dixie, the attorney for Sullivan and Fischer, had represented the UFWOC leaders since their unsuccessful appeal of state judge Laughlin's injunction, and would represent the union's position before the Supreme Court. MALDEF did not demonstrate an interest in the farm workers' plight until the case was certified for review by the Supreme Court, more evidence that despite its largely Mexican-American membership pool, the union was not a Mexican-American group. In 1973, the Justices denied MALDEF's "untimely" request to file an amicus brief on behalf of the UFWOC.\footnote{See the denial at: Allee v. Medrano, 414 U.S. 1020 (1973).}
On 20 May 1974, Justice Douglas, for a bare majority of his colleagues, decided that the controversy had not become moot either by the state injunction or by the union’s abandonment of their Valley efforts. Douglas ruled that, because the union had shown the danger of irreparable injury, the three-judge court’s injunction against police misconduct was an appropriate exercise of the panel’s equity powers.\(^\text{246}\) The Justices therefore affirmed the decree granting injunctive relief. However, the Court vacated that portion of the district panel’s declaratory judgment overturning the Texas statutes, and remanded it to the panel for further proceedings. The Justices noted that three of the statutes had since been repealed, and the remand was necessary for the panel to establish whether any prosecutions were still pending under any of the laws, including the two statutes that the state had not repealed. Douglas noted that the case would not be governed by *Younger v. Harris* if the UFWOC sought only declaratory relief, or if there were no pending prosecutions.\(^\text{247}\)

Chief Justice Burger, joined by Justices White and Rehnquist, concurred in the result of the majority’s order to remand the case, but also dissented in part. Burger expressed the view that the majority should have dealt further with the applicability of *Younger*. For example, he suggested that the majority opinion should have reviewed the three-judge panel’s

conclusion that *Younger* was satisfied. Also, the dissenters concluded that the Supreme Court had no jurisdiction to review on direct appeal an injunction against police misconduct. But assuming such jurisdiction, Burger said, that part of the panel’s decision should also have been remanded, since an injunction of police misconduct was not so related to relief against allegedly unconstitutional state laws that it required the attention of a three-judge court. Finally, Burger wrote for the dissenters, the three-judge panel abused its discretion in granting the injunction against police misconduct, because the alleged acts of misconduct were “few and scattered.”

Some of the judges in the Southern District of Texas, or in the Fifth Circuit Court of Appeals, might have taken the opportunity to unburden themselves by applying *Younger* to the case. But on remand, Seals and Garza, and Brown found no reason to change essential details of their original decision. Perhaps long-haired students and undressed dancers presented problems more suitable for state authorities to settle. But the members of this federal panel regarded their judicial duty to end discriminatory law enforcement and official abuse as more important than

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the political need to defer to the Supreme Court's model of "Our Federalism." 

Ultimately, the evolution of the standards for federal review and intervention in state matters, including the Younger doctrine's nominal restriction of discretion, did not significantly simplify a district judge's case management task. Conventional civil rights plaintiffs such as labor organizers sought protection under section 1983. But the high school students facing expulsion for wearing long hair and theater owners facing prosecution under obscenity statutes confounded judges. Separating significant civil rights complaints from apparently trivial disputes consumed court resources. These novel and controversial grievances emerged alongside more familiar problems, such as the ongoing project to desegregate the public schools, which in the 1970s required more judicial intervention than ever.

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249 For a discussion of the Allee v. Medrano case in terms of its relation to federalism and Younger, see: Cooper, Hard Judicial Choices, 287-288.


... [W]e think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws by separating them ethnically and racially in public schools. ... we discard the anodyne dichotomy of classical de facto and de jure segregation. We find no support for the view that the Constitution should be applied antithetically to children in the north and south, or to mexican-americans vis-à-vis anglos, simply because of the adventitious circumstances of their origin or the happenstance of locality.

Fifth Circuit Judge David Dyer
_Cisneros v. Corpus Christi ISD_ (1972).1

New federal civil rights statutes of the 1960s had authorized federal oversight of state policies on a scale not seen since the Reconstruction era. The U.S. Supreme Court supported them in landmark opinions.2

Advocates of federal protection of minorities feared that President Nixon's 1969 appointment of Warren Burger to replace Earl Warren as Chief Justice heralded the cessation of federal intervention in local affairs. But

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1 _Cisneros v. Corpus Christi Independent School District_, 467 F.2d 142 (5th Cir., 1972), 147.

no "constitutional counterrevolution" followed. In the field of public school desegregation, the Burger Court could surpass the Warren Court's boldness. Under Warren, the Court waited more than a dozen years to abandon its failed policy of allowing school desegregation to proceed with "all deliberate speed." In the 1968 decision in Green v. County School Board of New Kent County, the Justices declared that a school board had the "burden . . . to come forward with a plan that promises realistically to work, and promises realistically to work now."

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The *Green* decision forcefully condemned delay, but it nevertheless left the formulation of desegregation policy in the hands of local officials who had been subverting *Brown* for years. The Court took the next step in the first school desegregation decision in which Burger participated. In October 1969, in a short, sharply-worded *per curiam* opinion in *Alexander v. Holmes County Board of Education*, the Justices authorized federal district judges to employ their broad equitable powers to force school boards to begin operating desegregated "unitary" systems "immediately."\(^6\) Despite its subsequent resuscitation of abstention doctrine, the Burger Court did not intend to slam shut all gates the Warren Court had opened.\(^7\)

Although the Supreme Court reinforced the authority of federal district judges to develop remedies, these decisions did not resolve the


long-standing desegregation controversy. Various barriers to equal educational opportunity remained in place. They included the routine assignment of students to “neighborhood” schools where segregation had emerged from, and was perpetuated by, segregated residential patterns. Another barrier was the restriction to African-Americans of the equitable remedies made available by the original Brown decision. Combined, these obstacles kept Mexican-Americans in segregated schools. The federal courts did not consider them “identifiable” minorities who were subject to the equal protection clause of the Fourteenth Amendment, a result of the Mexican-Americans’ long reliance on the so-called “other white” legal strategy. In Texas “Jim Crow” laws, Mexican-Americans were members of the “white” race. Mexican-Americans had maintained that they were not subject to the same statutory segregation as African-Americans. Therefore, the discrimination they experienced in the schools and other public realms denied them due process rather than equal protection. Federal judges had accepted these arguments, and had enjoined various forms of segregation.  

9 In 1954, the Supreme Court had condemned the exclusion of Spanish-surnamed citizens from juries as a violation of a Mexican-American criminal defendant’s due process rights. The Justices had accepted arguments that the Anglos in Texas treated Mexican-Americans as a group that was distinct from “whites.” However, the Court maintained that the
Mexican-Americans maintained their hard-won "white" status as late as mid-1966, when James DeAnda, the longtime legal advisor to the civil rights organization American G.I. Forum (AGIF), resumed school desegregation litigation after nearly a decade's hiatus. In the new suit, he sought to enjoin "ability tracking" in the Odem Independent School District near Corpus Christi. Officials in the Odem ISD assigned students to classes according to past performance, measured aptitude, or a teacher's estimate of a student's potential. The district had established two separate "tracks," one for the college-bound and another for the "terminal" high school students. Students of Mexican descent dominated the latter category.

In his 1966 complaint, DeAnda relied on the precedents he had helped establish in the 1950s. The most recent of these was his successful 1957 lawsuit to enjoin the segregation of Mexican-American elementary students in the nearby Driscoll Consolidated ISD. DeAnda had argued in that case that the Driscoll CISD officials segregated Mexican-Americans on the basis of inaccurately administered tests purporting to assess English-language competence, or without administering any tests. He had

\[\text{mere existence of local prejudice did not make Mexican descent a protected status in constitutional terms. See: } Hernandez v. Texas, 347 U.S. 475 (1954) 478-479, esp. note 9.\]

convinced U.S. Judge James Allred that this was an arbitrary system which denied the due process guaranteed in the Fourteenth Amendment.\(^\text{11}\)

Now ten years after his victory over the Driscoll CISD, DeAnda faced essentially the same discrimination in different guise at the Odem ISD. He fought this familiar enemy with well-worn weapons. In June 1967, when DeAnda wrote the legal brief in support of his motion for summary judgment, his argument was stalled at the "other white" strategy that Mexican-Americans had relied on for decades. He charged that many assignments at Odem ISD were made without testing or else without testing Anglo as well as Mexican-American students. When aptitude tests actually were administered, he claimed, principals or teachers who lacked the expertise properly to evaluate the results made track assignments which perpetuated the Mexican-American segregation. DeAnda once again based his legal argument against segregated conditions on the due process clause.\(^\text{12}\)

If he had attempted to base his complaint on an equal protection rationale, and had been able to convince the judge to accept the claim,

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\(^{12}\) *Chapa v. Odem Independent School District* (S.D.Tex, 1967) [Corpus Christi Division, Civ. No. 66-C-72].
DeAnda could have sought the expansive court-ordered remedy sanctioned by *Brown*. But in his brief, DeAnda only mentioned, without explicitly invoking, *Brown*. As a consequence, when U.S. District Judge Woodrow B. Seals enjoined the Odem ISD ability tracking system on 28 July 1967, he did so solely on the basis of the due process violation. The judge’s holding implied that, if Odem ISD administrators chose to commence a regime of proper testing and evaluation, they could resume tracking.\(^{13}\)

Before Mexican-Americans could exploit remedies to race-based segregation that *Brown* made available through the equal protection clause, they had to abandon their "white" status.\(^ {14}\) A variety of employable tools to refashion an ethnic identity became available during the 1960s. For example, the 1964 Civil Rights Act (CRA) had authorized federal officials to withhold funds from states that allowed racial discrimination, and also

\(^{13}\) *Ibid.*. However, Judge Seals requested additional evidence to support the validity of the ability testing in general. See: Rangel and Alcalá, "Project Report, De Jure Segregation of Chicanos in Texas Schools," 347-348, including notes 241-245.

extended similar protections to "national origin" minorities.\textsuperscript{15} It authorized the Department of Health, Education, and Welfare (HEW) to issue goals and guidelines for school desegregation.\textsuperscript{16} In a key 1965 ruling, U.S. Court of Appeals judges for the Fifth Circuit declared that district judges should give "great weight" to such HEW standards.\textsuperscript{17} Despite this Fifth Circuit endorsement, the value of these for Mexican-Americans in Texas was impeded by HEW's Office of Civil Rights (OCR). It investigated allegations of discrimination, but initially collected statistics only about black and white racial categories. HEW examiners began to accumulate evidence of discrimination against Mexican-Americans only after physician Hector P. Garcia, the founder of AGIF and the first


\textsuperscript{17} \textit{Singleton v. Jackson Municipal Separate School District}, 348 F.2d 729 (5th Cir., 1965). The case is known as \textit{Singleton I}. In \textit{Singleton II}, which followed the next year, the Fifth Circuit Judges declared the HEW guidelines to be minimum standards, and made it clear that judges should not "abdicate" their responsibilities regarding desegregation merely by conforming to the guidelines. 355 F.2d 865 (5th Cir., 1966).
Mexican-American member of the U.S. Civil Rights Commission, rebuked OCR for failing to accommodate Mexican-Americans’ complaints.\(^8\)

To employ terminology that was then becoming more significant, evidence indicated that Mexican-Americans were a *de facto* minority. But changing legislative, administrative, and social opinions did not guarantee that federal district judges would overlook the established “other white” jurisprudence, recognize Mexican-Americans as a *de jure* minority, and grant them equitable relief under *Brown*. Moreover, because most Mexican-American segregation in Texas was the result of residential patterns, not illegitimate school tests, the redundant victories under the “other white” due process strategy had little overall impact. When many Chicano students in Texas protested Anglo cultural hegemony by walking-

out of classes in the late 1960s, for example, two-thirds of them were from Mexican-American majority schools. Forty percent were enrolled on campuses where the student body was at least eighty percent Mexican-American. Twenty percent attended schools which were at least ninety-five percent Mexican-American. Before Mexican-American civil rights advocates could attack the segregation created by "neighborhood" schools, they had to overcome Mexican-Americans' equivocal minority status. Ultimately, DeAnda led the retreat from the strategic ground that he had painstakingly conquered during the 1950s.

In a path-breaking suit against the Corpus Christi Independent School District (CCISD), DeAnda complained that the CCISD administrators, like those in many Texas school districts, had turned the "other white" strategy to their own illegitimate purposes. In order to delay the court-ordered

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desegregation of white schools, and also to obscure its slow pace, school district officials frequently assigned African- and Mexican-Americans to the same neighborhood schools, a practice often facilitated by the close proximity of ghettos to barrios. School administrators maintained that because Mexican-Americans were "white," these schools had been desegregated. Federal judges and HEW examiners had accepted this logic.  

In his CCISD complaint, although he hedged his bets by referring the "other white" strategy, DeAnda focused most on the novel contention that the Brown rationale should apply to, and condemn, segregation of Mexican-Americans. He marshaled much evidence from history, sociology, and demography to demonstrate that despite being "white," Mexican-American Texans suffered widespread discrimination at the hands of Anglo Texans. This argument persuaded Judge Seals. He declared that for the purposes of desegregating the public schools in Corpus Christi, Mexican-Americans formed an identifiable ethnic minority which deserved but had been denied the equal protection of the laws.  

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20 San Miguel, Jr., Let All of Them Take Heed, 175.
Americans, but it remained to be seen whether he could devise a suitable "tri-ethnic" remedy to desegregate a white, black, and brown student body.\textsuperscript{23}

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DeAnda sued the CCISD at a key moment in the history of the desegregation controversy. Federal district judges were receiving fresh guidance from the Supreme Court from the \textit{Green} and \textit{Alexander} decisions. As a consequence, Seals "managed" the CCISD case differently during two distinct phases of the litigation. During its first two years on the docket, that is, between DeAnda's filing and Seals' decree, the judge held pretrial meetings, conducted evidentiary hearings, and ruled on procedural questions the lawyers raised in various motions. Seals' management responsibilities consisted primarily in facilitating the case's

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progress towards disposition. Before 1968, many federal judges presiding in school desegregation cases limited their participation to formally neutral supervisory activities. Few seemed concerned with the actual content of the early plans; hence the judicial approval for token desegregation under grade-a-year and freedom-of-choice schemes.

But in Green and Alexander, the Supreme Court directed federal judges to assume an active role in developing remedies to segregation. These decisions informed Seals’ more forceful approach to case management during the next phase of the CCISD litigation. After ruling for the plaintiffs, the judge held additional consultations with the lawyers, litigants, and witnesses. As a result, Seals became intimately familiar with the school district’s finances, geography, and infrastructure. This knowledge enabled the judge to wield enormous influence during the year-long effort to formulate a plan to integrate the tri-ethnic student body.

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While Seals conferred with the CCISD parties during the remedial phase of the case, the Supreme Court was deliberating whether to support to court-ordered busing, which had emerged as the most controversial proposed remedy to residential segregation. In its 1971 Swann v. Charlotte-Mecklenburg Board of Education opinion, the Justices unanimously approved a federal district judge’s order to a school board to initiate busing of students.\textsuperscript{27} Thereafter, in the face of enormous resentment in and resistance from affected communities, other district judges sought to achieve racial balance in the schools by redrawing attendance zones, reassigning staff and faculty, and ordering the transportation of students.\textsuperscript{28} These expansive decrees led congressmen from northern as well as southern states to propose federal legislation to prohibit busing. The furor over “forced” busing moved presidents Nixon


and Ford to condemn the revival of judicial activism, although both also took credit for renewed progress towards integration.  

A few months after the Supreme Court's *Swann* decision, Seals announced an ambitious integration plan for CCISD. It would require busing 15,000 students. His novel tri-ethnic remedy made his busing plan more controversial than most. By 1971, Southern District of Texas Chief Judge Ben Connally had supervised the NAACP's (National Association for the Advancement of Colored People) school desegregation litigation against the Houston Independent School District (HISD) for fifteen years. He was unwilling to adjust his thinking to grant Mexican-Americans in Houston a new legal status. Other judges, some in the Southern District of Texas and others on the Fifth Circuit Court of Appeals, also resisted Seals' innovation. The judicial doubts encouraged continued opposition from local school boards. Consequently, after *Green, Alexander*, and *Swann*,

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Mexican-Americans still endured delays and reversals similar to those which had been frustrating African-Americans since *Brown*.

I. The Path From "Other White" to "An Identifiable Ethnic Minority": *Cisneros v. CCISD*

Advocates of Mexican-American civil rights had remained inactive in the courts during the 1960s because lawsuits, even against tiny rural school districts like those in the Driscoll and Odem cases, were costly to undertake.\(^\text{30}\) The limited benefits that "due process" victories brought to the Mexican-American community did not justify the expense. In October 1967, during the hearings in El Paso of the federal Inter-Agency Committee on Mexican American Affairs, DeAnda described the financial limitations. He testified that the lack of resources prevented the large-scale litigation necessary to fight the segregation of Mexican-Americans. He also proposed remedies. First, he noted that the 1964 CRA provided for the judicial award of plaintiffs' attorneys' fees in certain employment discrimination cases. A similar compensation scheme would be appropriate

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in voting, jury, and school suits. 31 Second, DeAnda challenged the U.S. Department of Justice to fight the discrimination against Mexican-Americans. 32


San Antonio attorney Pete Tijerina found a different path. In 1967, Tijerina obtained a $2.2 million Ford Foundation grant and used it to found the Mexican-American Legal Defense and Education Fund (MALDEF). He modeled the new organization on the NAACP’s incorporated litigation arm, the Legal Defense Fund (LDF, or the “Inc. Fund”), and intended to imitate LDF’s strategy of undertaking “planned” litigation. In time, MALDEF supported DeAnda’s suit against the CCISD as an amicus curiae. But the impetus and funding for that litigation came from a different and unexpected quarter.

Jose Cisneros was a member of the U.S. Steel Workers union in Corpus Christi. His children attended Mexican-American-majority schools in the CCISD, and they often complained to him regarding the dilapidated and dirty conditions of their schools. Cisneros tried to persuade the administrators to repair and improve the facilities. He met repeatedly with

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teachers, principals, and school board members over two years, but saw no changes. Moreover, Cisneros discovered many inequities in the curriculum and resources available to his children, as compared to the courses and programs offered to students in the Anglo-majority schools. Cisneros informed other parents and community leaders of his findings.

At the urging of Civil Rights Commissioner Garcia, who lived in Corpus Christi, HEW studied conditions at CCISD for a year, beginning in September 1967. They found that eighty-three percent of the Mexican-American and African-American children attended neighborhood schools which were identifiable as minority schools because they enrolled few if any Anglo students. In late 1968, after the Green decision, the HEW examiners advised the CCISD superintendent that the school board should redraw the attendance boundaries to break up the segregated schools.

HEW also suggested that the CCISD school board allow “majority-to-minority” transfers to enable students who were in the majority at a minority school voluntarily to shift to another school. Such students would be in the minority at the new school, but they would be taught in a desegregated environment.34

The CCISD board refused to institute the HEW's suggested improvements or to heed the parents' complaints. Cisneros turned to his union. The leadership of the local 5022 convinced the national office of the U.S. Steel Workers to approve expenditures. Cisneros and more than two-dozen fellow unionists, African-Americans as well as Mexican-Americans, retained DeAnda to sue CCISD for maintaining a dual school system. In late 1968, he paid the $15 filing fee to initiate the litigation.\textsuperscript{35} It was the first, and perhaps the only, public school desegregation case to be financed by a labor union.\textsuperscript{36}

Although DeAnda probably had the most experience in school desegregation litigation in Corpus Christi, the suit against the large, urban CCISD was more ambitious than any he had pursued against the Driscoll

\textsuperscript{35} Cisneros v. Corpus Christi Independent School District, Civil Action (Civ.A.) No. 68-C-95, U.S. District Court for the Southern District of Texas (S.D.Tex.), Corpus Christi Division [hereafter cited as: Cisneros v. CCISD]; Docket Sheet, p. 2. Case files for the federal courts in Texas are held at the National Archives and Records Administration-Southwest Regional Archives (NARA-SWA), in Fort Worth, Texas. This case may be found in: Civil cases, U.S.C.A., Fifth Circuit, Record Group (RG) 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2."

and Odem school districts. He therefore recruited other reform-minded attorneys to assist him, among them Houston's Chris Dixie. Dixie was representing the plaintiffs in a federal civil rights suit related to their abortive attempt to organize a farm workers' union in South Texas. With their help, DeAnda developed a strategy, gathered documentary evidence, and deposed witnesses. They had plenty of time. Judge Seals did not begin the pre-trial phase until 29 May 1969, when he issued a "Docket Control Order." In it, the judge scheduled the first pre-trial conference for 24 November, sixteen months after DeAnda filed the federal civil rights

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37 See: Francisco Medrano, et al. v. A.Y. Allee, et al., 347 F.Supp. 605 (S.D.Tex., 1972) [Brownsville Division; Civ. No. 67-B-36], and: Richard Bailey, "The Starr County Strike," Red River Valley Historical Review 4 (1979): 47-48. Also see chapter four of this dissertation. The intersection of the goals of organized labor with the cause of Mexican-American civil rights was a recurrent theme during the 1960s. The brief domination by Mexican-Americans of the Crystal City municipal council in the early 1960s, was another example. The electoral takeover was orchestrated by the Political Association of Spanish Speaking Organizations (PASSO, or PASO), but the group received key support from the Teamsters Union. David Montejano, Anglos and Mexicans in the Making of Texas, 1836-1986 (Austin: University of Texas Press, 1987), 282-284; and: Armando Navarro, The Cristal Experiment: A Chicano Struggle for Community Control (Madison: University of Wisconsin Press, 1998), 17-51. For later political developments in the same city, in years after the Chicano movement emerged, see Ibid., generally; and: Armando L. Trujillo, Chicano Empowerment and Bilingual Education: Movimiento Politics in Crystal City, Texas (New York: Garland Publishing, 1998), also generally.
complaint, and at a second pre-trial conference, in May 1970, Seals
denied the CCISD's motion to dismiss the case on summary judgment. 38

The court hearings commenced in mid-May 1970. A significant
portion of the plaintiffs' evidence came from the CCISD's records. From them, DeAnda described the percentages of each of the three major ethnic
groups, Anglo-, Mexican-, and African-American, that made up the
district's student population, and the number, ethnic heritage, and
assignment of each teacher in each school. DeAnda illustrated the location
of the past and present attendance boundaries, the location, date of
construction, and cost of newer schools and of renovating older schools.
Finally, he described the school children that the CCISD had bussed "in the
past and in the present, and who they were, and who they are." 39

Throughout, DeAnda sought to draw a picture of the CCISD as a
"dual" school system which segregated its Anglos on a few campuses and
placed non-Anglos, blacks and Mexican-Americans, on the others. He
offered the following breakdown for the 1969-1970 school year: 43% of
the elementary students enrolled in CCISD schools were Anglo, 51% were
Mexican-American; in the junior high schools, 48% of the students were
Anglo, 47% were Mexican-American; and, in the senior high schools, 56%

38 Docket Sheet, p. 2; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth
Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2."
39 Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 601-
602.
of the students were Anglo, 39% were Mexican-American. Furthermore, fifteen percent of the total high school enrollment of 9800 students, 1300 Mexican-Americans and 200 African-Americans, attended schools with greater than 90% non-Anglo enrollment. And another sixteen percent, 1600 Mexican-Americans but fewer than thirty blacks, attended schools with a 70 to 80% non-Anglo student body. Thirty-two percent of the Anglo students attended high schools with a 20 to 30% non-Anglo population (with fewer than 1000 Mexican-Americans enrolled on those campuses). Twenty percent of the Anglo high school population attended schools with a less than 10% non-Anglo enrollment. DeAnda argued that if the CCISD were integrated, then the percentage of each ethnic group in each school at each grade level would approximate each group's percentage of the total student population. Instead, the enrollment figures showed a substantial ethnic imbalance.

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40 In the junior highs, one-third of the Mexican-American and black students attended schools where the non-Anglo enrollment was greater than 90%. One-quarter of the Anglo students attended schools where the non-Anglo enrollment was less than 10% of the student body. Finally, in the CCISD elementary schools, forty-one percent of the Mexican-Americans and African-Americans attended schools where over 90% of the students were non-Anglo. Thirteen percent of the Anglo children attended elementary schools with less than 10% non-Anglo enrollment. Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 608. Note: All of the figures in the text are approximate in the case record, and I have further rounded the numbers.

DeAnda made a simple but compelling case with these numbers. In the CCISD, Mexican-Americans were lumped with African-Americans minority much more often than they were paired with the Anglo majority. But DeAnda had to prove that this statistical "imbalance" reflected the Mexican-Americans' minority status within an Anglo dominated, segregated system. To that end, he called Thomas P. Carter, a professor of education and sociology at the University of Texas at El Paso, to testify. Carter began by stating that blatant discrimination against the Mexican-Americans, such as the formerly common signs which proclaimed "Mexicans and Dogs Not Allowed . . .," were "rapidly disappearing" from Texas, but: "[w]e are moving into a period of very subtle kinds of discrimination."42 Seals asked Carter whether, in the context of the issues raised in the present lawsuit, Mexican-Americans should be considered "an identifiable group." Carter answered that he "[found] that a very peculiar question," because the federal census bureau, and the state of Texas, regarded them as a distinct minority. Moreover, Carter declared:

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\ldots \text{everyone considers [them] an ethnic minority or a cultural minority. In social science, a minority is a group of people who may be a physical majority, but \ldots [also] a group of people who are not full participants in the dominant society. In other words, there is discrimination. They don't fill their proportional number of doctors, lawyer, merchant, and chief}
\]

42 For the quoted passages, and other excerpts of Dr. Carter's testimony regarding the history of discrimination in social and economic areas, see: Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 612, note 38.
kind of slot in the society. . . . [P]articularly in Texas, it has been established that many laws were discriminatory against Mexican-Americans. So both from a legal point of view, a Government point of view, and a social-science point of view, they are a minority. . . . So, no matter how you cut it, [they] are going to come out as a minority, . . . from social science and from the legal . . . and from the cultural . . . and the racial point of view.\textsuperscript{33}

Seals asked Carter whether in his studies he had noted any differences in "Anglo-Saxon culture emanating from Western Europe and England, and the Mexican culture?" Carter replied: "... of course, a great body of literature exists that differentiates . . . the Mexicans or the Indian-Spanish tradition of the south of the border, and the Protestant-English tradition." They "represent two identifiably different cultural trends." True, differences were diminishing, but "there have been many studies that will identify cultural characteristics of both groups, or any other number of groups also."\textsuperscript{44}

Carter insisted that to overcome patterns of ethnic or racial discrimination and to create equal participation by ethnic or racial groups, children from these groups should attend integrated schools. Integration could play a significant role in fostering equality by stimulating social interaction between the groups. Integrated schools would provide an environment conducive to academic achievement by the disadvantaged

group. He emphasized, however, that increased minority achievement
would be a secondary effect compared to the broader educational interests
to be served by school integration. Among these interests, Carter said, was
the facilitation of understanding, acceptance, and equality.45

DeAnda needed to connect the enrollment imbalances at CCISD
schools to the widespread discrimination against Mexican-Americans. He
introduced into evidence a map of the locations of various Corpus Christi
residential subdivisions which originally had deed restrictions limiting the
right of home lot ownership to members of the "white" race. The
restricted neighborhoods were clustered along the southern and northern
rims of the city. DeAnda demonstrated statistically that very few Mexican-
Americans lived in the white enclaves. The location of the deed-restricted
areas around the edges of downtown left an unrestricted zone in the center

44 Ibid. Judge Seals quoted Prof. Carter from the hearing transcript, at pp.
52-54.
45 Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 603,
note 26. At the conclusion of this testimony, DeAnda offered as a
plaintiffs' exhibit and Seals took judicial notice of Carter's recently-
published book. See: Thomas P. Carter, Mexican Americans in School: A
History of Educational Neglect (New York: College Entrance Examination
Board, 1970). DeAnda also called Dr. Hector Garcia to testify as an
altogether different kind of expert witness. The AGIF founder, longtime
Corpus Christi resident, and outspoken former member of the Civil Rights
Commission vividly described his experiences with and personal
observations of the forms of discrimination and segregation Mexican-
Americans experienced in schools, jobs, homes, and hospitals. For
excerpts of Garcia’s testimony, see: Cisneros v. Corpus Christi ISD, 324
where very few Anglos lived, which DeAnda referred to as the “corridor.”

In this sharply defined Corpus Christi residential segregation, any scheme of neighborhood schooling would impede integration. DeAnda suggested that the perpetual segregation of Anglo-, African-, and Mexican-American students was such an obvious effect of the neighborhood schools concept, that it might have been instituted expressly to defeat efforts to integrate the schools.

This was the crux of DeAnda’s case. When the CCISD board drew attendance zones to match well-known segregated residential patterns, its members acted in their official capacity to perpetuate discrimination against the minority groups. Therefore, DeAnda submitted, they had transmuted de facto segregation into de jure segregation. Since the Supreme Court had condemned de jure discrimination, Judge Seals had the authority and the duty to apply the equal protection rationale of the Brown decision to Mexican-Americans.

Over five days of hearings, DeAnda went to great lengths to prove that Mexican-Americans were a de jure minority who deserved, but were denied, equal protection of the laws. But at the last moment, he resorted on the ancient attorney’s practice of arguing in the alternative. DeAnda

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Ibid., 602, note 11, 616-617, note 49.
reminded the judge of Chapa and Driscoll, the “other white” due process desegregation victories. Seals took judicial notice of them, and DeAnda prepared to rest the plaintiffs’ case.48

The district’s lead attorney, Richard Hall, did not dispute the statistics DeAnda had offered. He could not argue against the evidence of the unbalanced CCISD enrollments or debate the effects of the “corridor” on the residential patterns in Corpus Christi. Instead, Hall attempted to convince the judge that there were different interpretations, implications, and conclusions to be drawn from the facts, and that the benefits of neighborhood schooling outweighed the benefits of integration alleged by Carter. Hall called Lawrence D. Haskew, a professor of education and administration at the University of Texas at Austin, to testify. Haskew stated that neighborhood schools could eliminate ethnic and racial barriers even when residential segregation caused children to attend segregated schools. The quality of education, not the place where it was offered, was the important consideration. If the education in segregated neighborhood schools gave the students social mobility, motivated students would be able to escape from their disadvantaged environment. Little benefit resulted from transporting students from one area of the city to another, simply to place them in an integrated environment for a mere eight hours each day.

47 Ibid., 606.
Rather than busing students, Haskew declared that "education conducted for people in ghettos is the best route."\textsuperscript{49}

Although the \textit{Cisneros v. CCISD} hearings consumed eleven full days in court, Seals had run a tight ship. He had prepared for the efficient examination of the complex and voluminous data in the pretrial phase, and he gave the two legal teams credit for the smooth proceedings: "[o]ne great advantage and help to the court was the way and manner all the statistical evidence was worked and catalogued at the beginning of the trial, and which was offered and stipulated to early in the trial, and which was available to the court for study."\textsuperscript{50}

\textsuperscript{48} Docket Sheet, p. 3; \textit{Cisneros v. CCISD}. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2."
\textsuperscript{50} The hearings had continued daily after 14 May, except for 25 May through 29 May, when Judge Seals had attended the Fifth Circuit's Annual Judicial Conference in Miami, Florida. \textit{Cisneros v. Corpus Christi ISD}, 324 F.Supp. 599 (S.D.Tex., 1970), 600-601, esp. note 1. Before closing the proceedings, Seals heard and approved the application of an anti-busing group, "Concerned Neighbors, Inc.," to join the case as \textit{amicus curiae}. The organization's 6500 members complained that the destruction of neighborhood schools would harm students. See: "Motion to Intervene or in the Alternative for Leave to Appear as Amicus Curiae," p. 5, and "Intervenor's Complaint," p. 1, both for "Concerned Neighbors, Inc."; \textit{Cisneros v. CCISD}. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2." The "Concerned Neighbors" group also suggested that court-ordered busing would deny parents' and students' civil rights, which might be grounds for a countersuit under Section 1983. For background on the "Concerned Neighbors," see: Texas Advisory Committee to the U.S. Commission on
The orderly presentation of the case enabled Seals quickly to prepare and deliver his decision. He foreshadowed the content of his ruling by announcing that he had concluded that Cisneros and his fellow steel workers had properly filed their case as a class action. Although Congress recently had relaxed requirements for filing class actions, by amending the Federal Rules of Civil Procedure in 1966, this was a significant victory for the Mexican-American and black plaintiffs. Even under liberalized procedural rules, the Supreme Court regarded some labels to be inadequate for class actions. In 1969, the Court had rejected as

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*Cisneros v. Corpus Christi ISD*, 324 F.Supp. 599 (S.D.Tex., 1970), 600-601. Also: Docket Sheet, p. 4; *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 1 of 2.”

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51 *Cisneros v. Corpus Christi ISD*, 324 F.Supp. 599 (S.D.Tex., 1970), 600-601. Also: Docket Sheet, p. 4; *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 1 of 2.”

overbroad a proposed plaintiffs' class consisting of "Indo-Hispanos, also called Mexican-American and Spanish-American."\textsuperscript{53}

Seals then proceeded to examine what he called the "ultimate issues" of the case. He had reduced them to five questions. First, the judge asked, could Brown and its progeny cases be applied to Mexican-Americans, or, was Brown to be limited to African-Americans? Second, if Brown could be applied to Mexican-Americans in principle, did Brown apply to the specific facts in the present lawsuit against the CCISD's alleged dual school system? Third, with regard to the African-American students, was the CCISD a dual or unitary school district? Fourth, if the CCISD did maintain a dual school system, as defined by the Fifth Circuit cases, was it a \textit{de jure} or a \textit{de facto} segregated system? Finally, Seals asked, if the CCISD was a dual system, how should he, sitting as a judge in equity, remedy the situation? That is, "under what plans and programs" could he "disestablish a dual school system and establish and maintain a unitary school system?"\textsuperscript{54}


On the question of whether *Brown* applied to Mexican-Americans, Seals observed that *Brown* condemned segregation, "even though the physical facilities and other tangible factors may be equal," because it deprived children of the guarantees of the Fourteenth Amendment. Although the *Brown* cases had been specifically concerned with the segregation of blacks and whites, "it is clear . . . that these cases are not limited to race and color alone."

Seals rejected as "patently unsound" any interpretation of the *Brown* decision, or of the Fourteenth Amendment's equal protection clause, which held that "[a]ny other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools," should receive less effective constitutional protection than African-Americans.

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56 *Ibid.*, 605, esp. n. 28. Judge Seals noted that "[i]t was decided as early as 1886 that although the Fourteenth Amendment may have been primarily concerned with Negroes, its protection is certainly not limited to them." See: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Moreover, he quoted Justice Miller's opinion for the Supreme Court in *The Slaughter House Cases*, to the effect that "Mexican peonage or the Chinese coolie labor system" in U.S. territory evolved into a variety of slavery, then the Thirteenth Amendments would outlaw it. And, Miller had continued, "if other rights are assailed by the States which properly and necessarily fall within the protection of [the Reconstruction Amendments], that protection will apply, though the party interested may not be of African descent." See: *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), 72.
Seals accepted that the evidence indicated that in the CCISD, "no less protection should be fashioned for the district’s Mexican-Americans than for its Negroes," because Mexican-Americans "[had] experienced deprivations and discriminations similar to those suffered" by the blacks in the district.\textsuperscript{57} The "proof shows," he declared, that Mexican-American students in the CCISD "have been segregated and discriminated against in the schools in the manner that Brown prohibits," and that because of that segregation and discrimination, they were "certainly entitled to all the protection announced in Brown."\textsuperscript{58} Although the judge had fully accepted the plaintiffs' claims the Mexican-Americans were a minority worthy of Fourteenth Amendment protection, he realized that this was a novel contention. Seals therefore took great pains to argue against the conventional wisdom that they were "white." Nonetheless, he demonstrated that he was also still grappling with the notion. "It is clear to this court,"

Seals announced, that:

\begin{quote}
. . . Mexican-Americans, or Americans with Spanish surnames, or whatever they are called, or whatever they would like to be called, Latin-Americans, or several other new names of identification --- and parenthetically the court will take notice that this naming for identification phenomena is similar to that experienced in the Negro groups: black, Negro, colored, and now black again, with an occasional insulting epithet that is used less and less by white people in the South,
\end{quote}


\textsuperscript{58} \textit{Ibid.}, 606-607.
fortuitously. Occasionally you hear the word “Mexican” still spoken in a derogatory way in the Southwest---it is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest, in Texas and in Corpus Christi. 59

In addition, he said that he had taken judicial notice of “congressional enactments, governmental studies and commissions,” and court opinions which seemed either explicitly or implicitly to accept that Mexican-Americans endured discrimination. 60 Finally, Seals noted that the myriad

59 Ibid., 607.
60 Ibid., 608, note 34. Judge Seals also took “judicial notice” of the 1960 U.S. Census of Population and a special study by the Bureau of the Census, entitled “Persons of Spanish Surname,” was based on the 1960 Census. These documents indicated that with respect to the five Southwestern states, where the Mexican-American population (i.e., persons with Spanish surnames) was largest:

<table>
<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>128,580</td>
<td>1,302,161</td>
<td>194,356</td>
</tr>
<tr>
<td>California</td>
<td>758,400</td>
<td>15,717,204</td>
<td>1,426,538</td>
</tr>
<tr>
<td>Colorado</td>
<td>118,715</td>
<td>1,753,947</td>
<td>157,174</td>
</tr>
<tr>
<td>New Mex.</td>
<td>248,560</td>
<td>951,023</td>
<td>269,122</td>
</tr>
<tr>
<td>Texas</td>
<td>1,027,455</td>
<td>9,579,677</td>
<td>1,417,810</td>
</tr>
</tbody>
</table>

Also, see: Plaintiffs’ Exhibit 8, a copy of the 1960 Census of Corpus Christi, Texas. The Census shows the following with respect to Nueces County and Corpus Christi:
Mexican-American organizations, "such as LULAC and the G.I. Forum, and now MAYO, were called into being in response to this problem."\(^{61}\)

Seals found that "the objective manifestations" of ethnic discrimination were "gradually disappearing from our society."

Nevertheless, he declared, the "historical pattern of discrimination has contributed to the present substantial segregation of Mexican-Americans in our schools." The result was a segregated dual school system. Then the judge announced that he had concluded that the African-American students in the CCISD were "also segregated to a degree prohibited by law which causes this to be a dual rather than a unitary school system." Moreover, "based primarily upon the undisputed statistical evidence," Seals ruled that

<table>
<thead>
<tr>
<th>Nueces Co.</th>
<th>C. Christi</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>White (other than Spanish Surname):</td>
<td>126,794</td>
<td>98,504</td>
</tr>
<tr>
<td>Negro:</td>
<td>10,108</td>
<td>9,156</td>
</tr>
<tr>
<td>Other races:</td>
<td>285</td>
<td>171</td>
</tr>
<tr>
<td>White, with Spanish Surname:</td>
<td>84,386</td>
<td>59,859</td>
</tr>
<tr>
<td>Total Population:</td>
<td>221,573</td>
<td>167,690</td>
</tr>
</tbody>
</table>


\(^{61}\) Judge Seals further noted that: "young Mexican-Americans have recently begun to call themselves Chicanoes [sic], and their movement, La Roza [sic]. During the pendency of this suit, these Chicanoes [sic] have been trying to get La Roza [sic] on the Texas ballot as La Roza [sic] Unida Party." *Cisneros v. Corpus Christi ISD*, 324 F.Supp. 599 (S.D.Tex., 1970), 615, esp. note 39. For the creation of the *La Raza Unida Party*, see: Juan Gómez Quiñones, *Chicano Politics: Reality and Promise, 1940-1990* (Albuquerque: University of New Mexico Press, 1990), 158-159.
the segregated conditions also were manifested in the CCISD faculty assignments.\textsuperscript{62}

On the question whether CCISD segregation was \textit{de facto} or \textit{de jure}, Seals decided that the evidence was mixed. He noted that "some of the segregation was of a \textit{de facto} nature," the result of social and economic factors in Corpus Christi which caused the city's blacks and Mexican-Americans to continue to live in the "corridor." But the judge also declared that the segregated dual district in Corpus Christi had "its real roots in the minds of men; that is, the failure of the school system to anticipate and correct the imbalancing that was developing. . . ." And it was obvious, he said, that "placing Negroes and Mexican-Americans in the same school does not achieve a unitary system as contemplated by the law." Rather, a unitary school district could only be achieved "by substantial integration of the Negroes and Mexican-Americans with the remaining student population of the district."\textsuperscript{63}

In sum, Seals believed that through a host of administrative decisions, the CCISD board had created and perpetuated a dual system. Among the faulty decisions were "drawing boundaries, locating new schools, building new schools[,\] and renovating old schools" in the

\textsuperscript{63} \textit{Ibid.}, 616-617, esp. note 48.
predominantly black and Mexican-Americans parts of town. The CCISD board also provided "elastic and flexible subjective" transfer rules which allowed some Anglo children to avoid schools in the "ghetto, or 'corridor,'" but had not allowed the Mexican-American or black students to transfer into the Anglo schools. He declared that "regardless of all explanations and regardless of expressions of good intentions," these were official decisions which were "calculated to, and did, maintain and promote a dual school system." Therefore, he ruled that "as a matter of fact and law," the CCISD was "a de jure segregated school system ... Wholly so with respect to the district's Mexican-Americans and predominantly so with respect to the district's Negroes." Moreover, Seals ruled,

... the de jure nature of the existing patterns of segregation within [CCISD] has as its base state action of a non-statutory variety, that is, the school board's active pursuit of policies that not only do nothing to counteract the effects of the existing patterns of residential segregation in view of viable alternatives of significant integrative value, but, in fact, increase and exacerbate the district's racial and ethnic imbalance. There has been a history of official school board acts which have had such a segregative effect.

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64 Ibid., 617-620, see esp. notes 50-57. For this "calculated" segregation, see also: Rangel and Alcala, "Project Report, De Jure Segregation of Chicanos in Texas Schools," 326.
In light of this history of "official school board acts," Seals ruled in favor of the plaintiffs, and announced that he would grant them injunctive relief against the CCISD's dual school system.66

Seals next considered the remedy he would grant. In both the Driscoll and Chapa cases, the remedy had been a judicial decree that the practices contested in each case were unlawful, and an injunction against continuing them. Those cases concerned at most several hundred students. The CCISD schools enrolled thousands of students in each grade. Complicated administrative maneuvering would be required to disestablish the CCISD dual system, and to establish a unitary one. As a starting place, Seals noted that the CCISD's faculty and staff were even more segregated than its student body. He referred to the new test for school integration that the Fifth Circuit had established in Singleton v. Jackson Municipal Separate School District (Singleton III).67 In it, the appellate judges had mandated that student enrollments and faculty employment in each school must reflect the general population in the school district. Seals declared

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66 Ibid., 627.
67 The Fifth Circuit judges announced this decision on 1 December 1969, and set a deadline of 1 February 1970 for full desegregation in five key areas of school business. These were: student enrollment, faculty and staff, transportation, extracurricular activities, and facilities. Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir., 1969), 1217-1218 [Singleton III], cert. denied, 396 U.S. 1032 (1970). A subsequent en banc proceeding is usually styled Singleton IV, 425 F.2d 1211 (5th Cir., 1970).
that the CCISD must re-assign its minority teachers and staff, and it must hire more minorities, in order to create the so-called Singleton ratio in each school.\textsuperscript{68}

The greatest obstacle to a satisfactory remedy to the segregation at CCISD was the large number of Mexican-American students to be integrated with Anglos. Seals noted that there were "reasonable available methods to effect a unitary system . . . without significant administrative, educational, economic, or transportation costs."\textsuperscript{69} But the judge assumed that any remedial plan would involve student busing. The question was, busing on what scale, and in combination with what other measures? These questions required further study. Therefore, the plan for dismantling the dual system and erecting the unitary system would be developed in part by a "human relations committee." Seals would appoint its members and would charge them with the responsibility for "investigating, consulting, and advising" the CCISD board, "with respect to all matters tending to promote and to maintain the operation of a unitary school system which will satisfy the law."\textsuperscript{70}

\textsuperscript{68} Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 623, esp. note 65. For criteria similar to Singleton, see also: Ellis v. Board of Public Instruction of Orange County, Florida, 423 F.2d 203 (5th Cir., 1970).


\textsuperscript{70} Ibid., 627.
The judge invited both plaintiffs and defendants to propose their own plans to achieve "a unitary school system which will be educationally, administratively, and economically reasonable." He suggested few definite remedies at this early stage. However, Seals declared that an acceptable integration plan "shall include" a majority-to-minority transfer rule. The defendants could appeal the ruling, but he would not stay his order pending an appeal. A panel of judges from the Fifth Circuit subsequently denied the CCISD's request to stay Seals' court order. The time for dilatory deliberation had passed. Seals and the appellate judges wanted action.\footnote{Ibid., 628. Judge Seals suggested a majority-to-minority transfer along the lines described in Singleton v. Jackson School District, 426 F.2d 1364 (5th Cir., 1970) [Singleton IV].}

Seals left to the litigants the nomination of candidates for the human relations committee. But in curiously detailed instructions reflecting Seals determination to maintain a tight rein over the remedial proceedings, the judge did set forth the process through which the committee's members would be named. The plaintiffs and the defendants would each provide the court with fifteen cards marked with the name, address, and telephone number of a "patron" of the CCISD. Cards from each side were to be submitted in three stacks. One stack would include alphabetically-arranged

names, addresses, and telephone numbers of five African-Americans, another set would name five Mexican-Americans, and the third five Anglos. Seals' clerk would select two cards from the top of each stack. The resulting panel would boast four white, four black, and four brown members.\(^{73}\)

The judge and the parties immediately commenced the remedial phase of the litigation. At Seals' direction, in mid-July 1970 both DeAnda and Hall filed their preliminary proposed student reassignment plans. As Seals reviewed them, Corpus Christi was seriously damaged by Hurricane Celia, but even that the storm could not deflect the judge's resolve. In early August, soon after the emergency had passed, Seals required the lawyers to schedule a hearing to assess the hurricane's effect on the integration plans. In the interim, he ordered that no repairs were to be initiated except those necessary to prevent further damage, or to render classrooms safe and suitable for students. His further directed that contracts "shall not be let and construction shall not be commenced for extensive and permanent type restoration or expansion . . . without prior submission to the court and approval by the court." Representatives of the

\(^{73}\) Any individual who declined to serve would be replaced by the person named on the next card in the stack. Judge Seals did not define "patron." He probably expected the parties to choose citizens of Corpus Christi who were already active in the controversy over the desegregation of the CCISD. *Cisneros v. Corpus Christi ISD*, 324 F.Supp. 599 (S.D.Tex., 1970), 628.
CCISD board must attend a meeting in his Houston chambers on 12 August, to present him with a "complete, itemized inventory" of the storm damage, and to recommend repairs and renovations. Seals ordered the lawyers to meet again separately to discuss the impact of proposed repairs on the creation of a unitary system.74

In a telephone conference with Hall and DeAnda one day before Corpus Christi schools were scheduled to open for the new academic year, Seals informed the attorneys that the CCISD’s integration plan was unacceptable. Seals ordered the board to submit a new plan at once, because the CCISD opening day was imminent. His demand for an immediate response stemmed from his awareness that administrators of other districts in the process of court-ordered desegregation often sought extensions based on a fear of disrupting students’ education during the school term. In most school cases, major policy changes came during the summer break. Therefore, Seals also demanded that the board inform him whether the school year ought to be delayed. Finally, the CCISD representatives were to inform Seals whether a unitary system could be implemented after the semester’s start. Seals scheduled another Houston meeting to discuss these points, to be held in two days. But the meeting

was canceled. The schools opened on schedule, and implementation of integration was delayed, probably for at least nine months.  

The CCISD submitted a revised unitary plan on 31 August, and Seals scheduled hearings to discuss its merits. The hearings convened on 2 September, in the Southern District’s Victoria courthouse, approximately mid-way between Houston and still-hurricane-damaged Corpus Christi. Busing stayed at center of the debate. The judge heard testimony from district officials, education experts, the operator of a private bus company, and various interested citizens. On 15 September, one day before the hearings were scheduled to end, DeAnda sought the intervention of the federal Justice Department and HEW. Seals agreed to consider the motion, although he expressed concern that it was an untimely request.  

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NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 1 of 2.”  


76 Judge Seals was also concerned about being fair to “Concerned Neighbors, Inc.” On 24 July, the group once again had tried to intervene in the case. The plaintiffs filed a motion in opposition to the intervention on 3 August. The defendant CCISD responded on 11 August. Judge Seals ultimately rejected the “Concerned Neighbors” groups’ request to become intervenors. Docket Sheet, pp. 4-8; *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 1 of 2.” In the meantime, at DeAnda’s request, Judge Seals took judicial notice of a recently-released report of the Civil Rights Commission detailing the “ethnic isolation” of Mexican-Americans in education. *Cisneros v. CCISD*, 330 F.Supp. 1377 (S.D.Tex., 1971), 1379. See: U.S. Commission on Civil Rights, *Mexican-American Educational Study, Report I: Ethnic Isolation of Mexican-American in the Public*
day, the judge concluded the hearings. He requested that within ten
days the litigants' submit briefs to summarize their positions, address
factual and legal points, and answer the following: should high school
seniors should be exempted from any plan?; should HEW be invited to
intervene?; should the human relations committee submit its own plan?;
and, should the CCISD plan of 31 August should be implemented, wholly
or in part?\(^\text{77}\)

The following month, on 16 October, Seals agreed to invite the
Justice Department and the HEW to intervene in the suit. He had concluded
that their expertise in desegregation matters would be useful. The judge
ordered the CCISD to seek the government's opinion on its integration
plans. Thereafter, staff members of the local U.S. Attorney's office, as
well as representatives of the federal Office of Education, attended
hearings and meetings of the human relations committee.\(^\text{78}\)

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\(^\text{77}\) Docket Sheet, p. 8; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth
Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2."
\(^\text{78}\) Docket Sheet, pp. 9-10; Cisneros v. CCISD. NARA-SWA: Civil cases,
The Justice Department officially intervened, under Title IX of the 1964
CRA, on 15 January 1971. See: "Memorandum for the United States"
(August 1971), 2, note 3, in: Ibid. For executive branch participation in
the controversy, see: Stephen L. Wasby, Continuity and Change: From the
Warren Court to the Burger Court (Pacific Palisades: Goodyear Publishing
Company, 1976), 112-114.
The proponents of early integration by busing received a boost on 20 April 1971, when the Supreme Court decided Swann v. Charlotte-Mecklenburg Board of Education. This was the Court’s canonical statement of a federal judge’s broad discretion to develop remedial schemes in school desegregation cases. In it, the Justices ruled that student busing was a normal and accepted administrative and educational tool. Chief Justice Burger declared that:

When school authorities present a district court with a “loaded game board,” affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments.... [The] remedy... may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens one some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

Burger rejected “rigid guidelines,” including fixed racial quotas, to bring about school integration. Instead, he announced a “reasonableness” standard against which to measure a judge’s proposed remedy. As Abram Chayes noted, this was an “elastic standard” by which to define the equitable power of the federal district courts.

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80 Ibid., 28.
Just two days after the Supreme Court ruled in *Swann*, Seals gave the litigants and federal intervenors one week to prepare for a meeting in his chambers. The participants must discuss the impact of the busing decision on their own integration plans.\footnote{Docket Sheet, p. 10; *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2."} The parties met on 30 April. A few days later, Seals ordered HEW representatives to submit a plan for creating a unitary school system at CCISD, in compliance with *Swann*. HEW submitted the requested plan on 2 June. Seals gave the litigants another week to file objections. Both plaintiffs and defendants registered complaints. The human relations committee encouraged the CCISD to propose an alternative plan. The school board declined to submit one.\footnote{*Cisneros v. CCISD*, 330 F.Supp. 1377 (S.D.Tex., 1971), 1380-1386.} But the board objected on financial grounds to any contemplation of busing. It would be expensive and require increased taxes or fees. Rather than develop a plan, the board reargued the benefits of neighborhood schooling. Seals responded to the school board's resurgent defiance by declaring that the status quo was not an option. Citing *Swann*, he reiterated that "insisting that children in a segregated neighborhood attend a school in that neighborhood amounts to government sponsored segregation."\footnote{Citing *Swann*, he reiterated that "insisting that children in a segregated neighborhood attend a school in that neighborhood amounts to government sponsored segregation."}

The participants in the CCISD litigation filed their various plans, comments, criticisms, and changes throughout June 1971. The plaintiffs'
proposed what the judge referred to as the "floating zone" or "transportation island" busing plan. It would be flexible, but potentially very expensive to implement. The HEW's experts submitted a proposal to implement a system of "pairing" Anglo and minority schools. It was simple, but required busing large numbers of students. Ultimately, even the CCISD developed and submitted a plan. A "modified" neighborhood system.  

Judge Seals examined the submissions and announced his final judgment on 2 July. He decided to create his own solution, by combining and altering slightly the other plans. In his plan, the judge noted that, "it appears that no school at any level will be ethnically identifiable, although one group or another may be in a majority." Under his integration plan, there would be no schools without "a substantial number of students from the minority ethnic groups, nor is there any school which does not have a substantial number of Anglos." Seals admitted that: "'Substantial' may be a poor word since it cannot be defined with mathematical precision . . . . however, [he was not] seeking mathematical precision, but a system which opens all the schools in the district to attendance by students of all groups in significant numbers." He insisted that he had not attempted to achieve a quota or a "certain ratio" of races or ethnicities, either throughout the

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84 Ibid., 1386-1389.
85 Ibid., 1390-1392.
system or at any school. However, he then suggested that, in a district
in which nearly one-half of the student population was Mexican-Americans
or black, twenty percent was a reasonable upper and lower threshold. That
is, less than 20% attendance by Anglo students, or less than 20% Mexican-
American and/or black students at a single school was “probably . . .
insignificant.”

The judge estimated that under his plan, approximately 15,000
students at CCISD “might need or qualify” for transportation. He cited the
school board’s estimate from the Victoria hearings that a plan like his
would require the CCISD to acquire, operate, and maintain ninety-six
buses, at an estimated total cost of $1.718 million. Seals suggested that
the city of Corpus Christi had several viable options for financing the
busing plan. It could raise taxes or apply for grants from Texas or HEW.
The CCISD board might lease rather than purchase buses, vans, or the
occasional “Volkswagen bus.” The mere fact that the CCISD “might not be
able to obtain all of the maximum of buses needed should not . . . cause the
court to digress from implementing the most practical plan for achieving a
unitary system.”

86 Judge Seals hypothetically compared this to a school district in which
only 15% of the students were members of a minority group. In that
school district, attendance by minority students at a single school of from
3% to 5% “may not be regarded as insignificant.” Ibid., 1393.
87 Ibid., 1393-1395; for options, see note 7.
88 Ibid., 1396.
Seals implied that he believed his plan constituted the last word on the CCISD integration. He thanked the members of the human relations committee, the attorneys, certain of the district’s representatives, and “above all, the citizens of Corpus Christi for the interest, cooperation and patience they have exhibited throughout the course of this case. For many it has been an unsettling and traumatic experience.” Seals noted that no one would be satisfied completely with his “court-ordained” plan, but he also maintained that it was “not the result of a vendetta against Corpus Christi or of a policy of racism.” Rather, the busing plan he proposed was:

... the result of the denial of constitutionally guaranteed equal protection to Anglo, Mexican-American, and Negro parents and students. It is the result of a decision by the School Board to defend the status quo and abstain from fashioning a remedy. It is the result of decades of insensitivity to the rights of others and the courts’ obligations to secure those rights. ... The challenge facing Corpus Christi today is to implement this plan even though it may be unpopular, even though it is appealed. This is the highest test of a free people operating within the framework of a constitution. If we fail, these children will confront the same task tomorrow.  

Judge Seals then suggested, as before, that the CCISD board might appeal his ruling. However, also as before, he noted that the judgment would take effect immediately, and he would not stay it pending the defendants’ appeal. The integration plan, including busing, must begin in the Fall 1971 school

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89 Ibid., 1396-1397.
term. He intended to keep the case on his docket until he was satisfied
that a unitary school system had been put into effect in Corpus Christi.\textsuperscript{90}

According to the clerk's records, Seals had spent twenty days in trial
over the three years of the \textit{Cisneros v. CCISD} proceedings. He had been
obliged to live in Corpus Christi seven months of each year. He had made
a 400 mile round-trip from Houston each weekend during one busy
fourteen-month period, a significant investment of judicial time and
energy.\textsuperscript{91} With the integration plan in place, Seals embarked a long
vacation. When he returned several weeks later, his holding in the CCISD
case was in complete disarray. But by then, it was no longer his
responsibility.

Notwithstanding Seals' declaration that he would not grant a stay of
his order pending an appeal, on 13 July Hall filed a defendants' motion
requesting a stay. Next day, he called Seals' office in Houston to discuss
the request, and he learned that the judge was in Jerusalem, Israel, and the
telephones were unreliable in the Middle East. Seals was effectively
\textit{incommunicado} until he returned to the U.S. in late August. This news
prompted Hall to call Chief Judge Connally, who assigned temporary

\textsuperscript{90} \textit{Ibid.}, 1397. Also, Seals directed that, due to the heavy workload, the
human relations committee would be expanded in May 1972 from twelve
responsibility for the CCISD case to the Southern District's newest judge, Owen D. Cox of Corpus Christi, a Nixon appointee of December 1970. On 16 July, Hall told Cox that the board was prepared to reallocate funds to remodel buildings and transfer teachers as Seals had directed. But, Hall argued, if the board spent the money to purchase buses, their appeal of the plan would be mooted. Cox stayed Seals' "final" order for one year, i.e., until 1 July 1972. On 27 July, Connally assigned the CCISD case to Cox "for further handling." Therefore, when Seals returned from vacation, he was no longer involved in Corpus Christi's integration. 

Upon learning of this year-long delay, DeAnda immediately contacted Cox. The new judge refused to remove the stay. But the next

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91 Ibid., 1392, note 6.
92 This was an ironic turn of events. Cox's Corpus Christi law firm, Boone, Davis, Cox & Hale, had defended the Driscoll CISD against DeAnda's complaint. Allan Davis, another partner, had filed the answer on behalf of the school district, and Cox was listed as the defendants' co-counsel on the case. Cox apparently did not take part in the suit, however. See: "Answer [of Driscoll Consolidated ISD, et al.]" (22 December 1956); NARA-SWA: Civil cases, S.D.Tex., Corpus Christi Division, 1938-1969, RG 21, Box 232, Folder 2: "1384 Hernandez v. Driscoll." For more biographical material on Cox, see: Judges of the United States; and: The American Bench.
93 Docket Sheet, p. 12; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2." Also: "Affidavit of Richard A. Hall" (3 August 1971), Exhibits "A" and "B" of "School District's Reply to Motion for Expedited Hearing and Summary Reversal of Stay Order and Request for Additional Relief Pending Appeal," p. 33; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 2 of 2."
day, he issued a supplemental order to clarify the fact that the CCISD must continue to prepare for busing the small number of African-American students to Anglo schools. The judge's stay applied only to preparations necessary to transfer and transport the large numbers of Anglo and Mexican-American students. This clarification did not satisfy DeAnda. He sought a complete reversal of the stay. On 5 August, on a vote of two to one, a three-judge panel from the Fifth Circuit vacated Cox's partial stay, and reinstated Seals' order. Hall then asked for a reconsideration, which the Circuit judges denied on 10 August.94

The CCISD attorney appealed the panel's action to Associate Justice Hugo Black, who supervised the Fifth Circuit. At this juncture, the federal government added its support the school district's effort: the U.S. Solicitor General joined in requesting that Black reinstate the stay. The Justice answered on 19 August 1971. After noting that it was "apparent that this case is in an undesirable state of confusion," Black reinstated Cox's stay. His decision meant that Seals' plan would not go into effect until the Fifth Circuit had an opportunity to review the case on its merits.95

94 "Plaintiff-Appellees' Motion for Expedited Hearing and Summary Reversal of a Stay Order" (27 July 1971); Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2." Also: Cisneros v. CCISD, 448 F.2d 1392 (5th Cir., 1971), 1394.
95 See: "Memorandum for the United States" (August 1971), p. 3; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104,
Several days after Black's decision, a delegation from the CCISD human relations committee contacted Cox. The committee suggested that busing the one thousand black children in the CCISD, without also implementing the rest of Seals' comprehensive integration plan, would be expensive and yield little benefit. Cox agreed, and amending his "clarified" order, he broadened the stay explicitly to include African-Americans.  

With the pressure to begin integration lifted until at least summer 1972, the CCISD concentrated on preparing its appeal, which a panel of Fifth Circuit judges agreed to review. The school district expanded its legal team to include David Searls, a partner at Vinson, Elkins, Searls, and Smith, one of Houston's premier firms. But, before the panel had a

Folder for Case No. 71-2397, "... 1 of 2." When Justice Black reinstated the stay, he did so "without expressing any view as to the wisdom or propriety" of the Solicitor General's position. *Corpus Christi ISD v. Cisneros*, 404 U.S. 1211 (1971), 1211-1212. President Nixon made no secret of the fact that he was against busing. He directed members of his administration to resist attempts to speed the implementation of busing plans. He apparently pressured the HEW's OCR, in its role as expert advisor to courts and school district, to slow down the pace of integration through "forced" busing. See: Gary Orfield, "Congress, the President, and Anti-Busing Legislation, 1966-1974," *Journal of Law-Education* 4 (1975): 94-99; and: Leon A. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and the Civil Rights Retreat* (Philadelphia: J.B. Lippincott Company, 1971), 285-288.

96 See: "Order" (23 August 1971); *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, "... 1 of 2." *Cisneros v. CCISD*, 448 F.2d 1392 (5th Cir., 1971), 1394-1395.

chance to hear the case, the CCISD lawyers complicated the issues by moving for the case to be heard by the full Circuit. 98

DeAnda also recruited more advisors for the appeal. MALDEF and “Inc. Fund” attorneys filed a joint request to submit amicus briefs on behalf of the plaintiffs. The Fifth Circuit judges approved their petition. 99 The two civil rights organizations would be more useful to the plaintiffs’ case than the federal intervenors. In line with the Solicitor General’s brief for delay when before Justice Black, the Justice Department’s appellate brief asked the Circuit judges to remand the case. Although the

98 See: “Plaintiffs-Appellees Brief” (26 August 1971); and: “Appellants' Brief” (16 August 1971); Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 2 of 2.” The “Concerned Neighbors,” group also filed an amicus brief for the defendants. See: “Brief of Concerned Neighbors, Inc.” (31 August 1971); Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 2 of 2.” Cisneros v. CCISD, 448 F.2d 1392 (5th Cir., 1971), 1395.

government suggested the need for immediate relief for blacks, it
argued as well that more study was necessary regarding the discrimination
against Mexican-Americans. The federal lawyers wondered whether Seals
had ruled "correctly" on the issue of de jure segregation. 100

Seals' novel interpretation of Mexican-Americans' de jure minority
status remained his most controversial finding. DeAnda's co-counsel,
Chris Dixie, filed a motion in early September to have the Fifth Circuit
judges order the case returned to Seals, in the event that they vacated or
remanded the decision. He argued that it was "inconsistent with judicial
economy and a severe imposition" to require the plaintiffs to acquaint a
new judge with the complexities of the case. The records of the hearing
filled eighteen volumes and included 2783 pages of testimony.

The defendants moved to keep Cox on the case. In support, they
cited Seals' complaints regarding his workload and travel burdens, and also
complained of the need to travel to Houston to confer in person with Seals.

100 "Brief for the United States" (26 August 1971), pp. 10-12; Cisneros v.
CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104,
Folder for Case No. 71-2397, "... 2 of 2." The Justice Department was
rarely an effective intervenor for Chicanos during this period. See: Rangel
and Alcala, "Project Report, De Jure Segregation of Chicanos in Texas
Schools," 344, note 220, 357, 373-374.
The Fifth Circuit ultimately ruled that Connally had not abused his discretion in re-assigning the case. Cox kept it.\textsuperscript{101}

On 7 October, the Fifth Circuit denied the request that it hear the case \textit{en banc}. Circuit Judge Griffin Bell dissented. He believed the full Circuit Court ought to take the opportunity to speak authoritatively on the tri-ethnic case. He noted that "[t]his question is confused by the fetish to give names to legal doctrines --- here \textit{de jure-de facto}.” Seals was one of the judicial fetishists, Bell suggested. Seals “found some discrimination in a \textit{de facto} school situation (as to Mexican-Americans),” Bell said, and then Seals “leaped across the factual chasm to find \textit{de jure} status.” Bell believed that “in the interest of stability in the field of public education,” the Circuit should meet to hear \textit{Cisneros} and “resolve these questions now.”\textsuperscript{102}

The denial of an \textit{en banc} hearing left the responsibility for resolving the tri-ethnic question to Circuit Judges Walter Gewin, Irving Goldberg.

\textsuperscript{101} "Appellants’ Reply to Motion for Assignment of Case Upon Return of Mandate" (11 November 1971), pp. 3-4; \textit{Cisneros v. CCISD}. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “... 1 of 2.” Curiously, San Miguel misstates that Judge Cox, rather then Judge Seals, made the original finding that Mexican-Americans were an identifiable minority. San Miguel, Jr., \textit{Let All of Them Take Heed}, 178.

and David Dyer. But after the appellate judges heard oral arguments on 16 November, they also declined to settle the issues raised in *Cisneros v. CCISD*. On 10 February 1972, the panel announced that it would delay its ruling. The Circuit judges had decided to wait, and to let the Supreme Court declare whether a *de facto* minority like Mexican-Americans could suffer *de jure* discrimination.\(^{103}\)

II. From Desegregation to Integration in Houston: *Ross v. Eckels*

Although as a whole, the Fifth Circuit was unable or unwilling to reconcile Seals’ and Cox’s differing views in the *Cisneros* litigation, this left the question of Mexican-Americans’ status open to jurists’ individual interpretations. Few federal district judges, statisticians, academicians, or politicians still denied that Mexican-Americans were an ethnic “national origin” minority which had been subject to social discrimination and *de facto* segregation. Judges and other acknowledged experts had for years supervised, studied, or contested public school desegregation as a “bi-racial” problem, however. For them to accept the contention that Mexican-Americans were also a *de jure* minority within the framework of

\(^{103}\) See: Transcript of Hearing (16 November 1971); *Cisneros v. CCISD*. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for
desegregation would take a transformation of the conventional wisdom. At least, the unconventional notion demanded legal or judicial consensus.104

Consensus came slowly. Since December 1956, Connally had "managed" Ross v. HISD, the NAACP’s lawsuit to desegregate the school system in Houston, through many shifting phases. In 1960, after much delay and deliberation, he had approved a grade-per-year or “stair-step” transfer plan that promised to desegregate all HISD schools by 1972. At the HISD school board’s request, Connally had granted a significant exception to the stair-step plan. This was the “brother-sister” rule which required that elementary-age children attend the elementary school attended by their older siblings. He had repealed this exception after a remand from the Fifth Circuit. After the enactment of the 1964 CRA, Connally sought to follow both the Circuit’s changing mandates and HEW-

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104 For example, in his 1971 study of Houston’s politics, Prof. Davidson takes into account the Mexican-American community’s access or lack of access to political power. In general, however, he treats racial politics, especially school desegregation, in terms of a black-white binary. See: Chandler Davidson, Biracial Politics: Conflict and Coalition in the Metropolitan South (Baton Rouge: Louisiana State University Press, 1972), 130-132, see esp. “Table 5.4: Racial Integration in Houston Independent School District, 1960-1971.” Compare this approach to the same author’s chosen title and expanded emphasis on white-black-Hispanic minority politics in a more recent work. See: Chandler Davidson, Race and Class in Texas Politics (Princeton: Princeton University Press, 1990), 56-57, see esp. “Table 3.4: Relative Voter Turnout Among Texas Minorities, General Gubernatorial Elections, 1978 and 1982.”
developed guidelines. He had ordered the HISD board to accelerate
desegregation under a two-grade-per-year plan. In key decisions, the Fifth
Circuit had also required school districts to merge faculty and staff and
desegregate athletics and other extracurricular activities. Connally had
ordered HISD to comply with these new requirements. Next, the HISD
board had proposed and the judge had accepted a "freedom-of-choice"
plan. Finally, in 1967, the Justice Department had intervened in the Ross
case. The government suggested that some limited but mandatory busing
would be necessary to integrate HISD. Finally, the Supreme Court had
raised the bar in the Green and Alexander decisions. 105

Judge Connally had already devoted a dozen years to the task of
adapting his court decrees to match evolving goals of the litigants, the
federal appellate courts, Congress, and the executive branch. He was now

105 Ross v. Rogers, 2 Race Rel. L. Rptr. 114 (S.D.Tex., 1957); Ross v.
HISD, 5 Race Rel. L. Rptr. 703 (S.D.Tex., 1960); Ross v. Dyer, 203
F.Supp. 124 (S.D.Tex., 1962); Ross v. Dyer, 312 F.2d 191 (5th Cir.,
1963); Ross v. Eckels, 11 Race Rel. Law Rep. 216 (S.D.Tex., 1965); Ross
Henry Kellar, Make Haste Slowly: Moderates, Conservatives, and School
Desegregation in Houston (College Station: Texas A&M University Press,
1999), 151-155, and generally [hereafter cited as: Kellar, Make Haste
Slowly]. For Judge Connally and the development of "freedom of choice"
in Houston, see: Harvey C. Couch, A History of the Fifth Circuit, 1891-
Conference of the United States, 1984), 141. Also: United States v.
Jefferson County Board of Education, 380 F.2d 385 (5th Cir., 1967), en
banc, then certiorari denied, 389 U.S. 840; Green v. County School Board
disinclined to imitate Seals' leap "across the factual chasm" on the issue of Mexican-Americans' place in the HISD desegregation effort.  

No one had asked Connally to make this leap during the 1960s. One reason he had not earlier encountered the Mexican-American desegregation question was the relative size of the population. There was a large and growing Mexican-American community in Houston, but it still ranked well behind the Anglo and African-American groups. A more significant reason that he had not considered Mexican-Americans to be a factor in his 1960s desegregation decisions was that Mexican-Americans had not raised the issue. To be sure, Mexican-American students in Houston had begun to demand official recognition of and respect for their "Chicano" heritage. Many joined enthusiastically in the burst of Chicano-inspired "walk-outs" in the late 1960s. But such youth-led protest groups as ARMAS (Advocating Rights for Mexican American Students) complained of the

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107 As the population grew, the Mexican-American community was also transforming into an emerging "Hispanic" community. Some of the population increase came from Central and South America, rather than Mexico, especially after 1980. In the 1970s, however, the overwhelming majority of the Hispanic minority was still Mexican-American. Also, it is difficult to account for the number of undocumented Mexican/Hispanic residents of Houston. See: Beth Anne Shelton, Nestor P. Rodriguez, Joe R. Feagin, Robert D. Bullard, and Robert D. Thomas, Houston: Growth and
perceived inferior facilities, inadequate offerings and resources, and poor teaching and counseling at the HISD schools with Mexican-American majority enrollments. ARMAS and other Mexican-American organizations identified and sought to end various discrimination practiced by the Anglos who controlled HISD. Yet neither the Houston students nor their parents had campaigned for the special legal recognition the Cisneros plaintiffs were then seeking in Corpus Christi.

The goals of Houston’s Mexican-Americans evolved with astonishing rapidity. In February 1970 a new student organization, “Barrios Unidos,” presented the HISD board with a list of thirteen demands. This group’s terms were more comprehensive, sophisticated, and politically militant than those expressed several months earlier by ARMAS. Tenth on the Barrios Unidos bill of particulars was the unprecedented provision that: “[a] school should not be considered integrated where the majority of students are

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108 The five demands ARMAS submitted to the principal of Jefferson Davis high school on 16 September 1969, were: (1) add to the curriculum Chicano history and culture courses, to be taught by Chicano teachers; (2) eliminate the practice by counselors of encouraging students who were discipline problems to drop-out of school; (3) hire more Chicano counselors “who understand the special problems of Chicanos in high schools”; (4) end the practice of posting a list of the girls who left school due to pregnancy; and (5) extend the lunch period from twenty to thirty minutes, like they have at “[a]ll other schools.” Guadalupe San Miguel, Jr., “The Community is Beginning to Rumble’: The Origins of Chicano Educational Protest in Houston, 1965-1970,” *Houston Review* 13 (1991): 137-138.
Mexican-American and Negro. The statistical practice of labelling [sic] Mexican-American students white is misleading and serves as a technique to disguise minimum efforts in meeting federal integration guidelines."^{109}

There was no backlash in February 1970 when the HISD school board refused even to acknowledge the Barrios Unidos' catalogue of grievances, or when school officials ignored other students' demands. But Mexican-Americans reacted with uncommon passion a few months later, when Connally and a panel of Fifth Circuit judges managing the latest phase of the Ross v. HISD case officially rejected Barrios Unidos' basic thesis.^{110}

In 1969, Connally opened what he called "another chapter" in the Ross saga.^{111} Since he wrote the first chapter in the 1950s, Houston had become one of the nation's ten largest and fastest growing metropolitan areas.^{112} HISD had become the sixth largest school district in the country, and the largest in the south. The district encompassed more than three

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^{109} The full list is reproduced in: San Miguel, Jr., "The Community is Beginning to Rumble," 146.
^{110} Ibid., 147.
^{112} The city's population had increased by one-half million. Shelton, et al., Houston: Growth and Decline in a Sunbelt Boomtown, 10; also: Robert D. Thomas and Richard W. Murray, Progrowth Politics: Change and Governance Houston (Berkeley: Institute of Governmental Studies Press, 1991), 30-32.
hundred square miles, with one-half of these miles inside the city limits, and the rest in suburban or rural areas. HISD enrolled approximately 240,000 students, of which two-thirds were designated white and one-third black. HEW estimated that 36,000 of the students were "Spanish-surnamed Americans," fifteen percent of the total student population. The 9000 HISD teachers matched the two-to-one white-to-black racial ratio of the student body. According to standard practice, the HISD school board and Judge Connally included the Spanish-surnamed teachers and students within the "white" figures.\footnote{Ross v. Eckels, 317 F.Supp. 512 (S.D.Tex., 1970), 513-514; Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970), 1141.}

The HISD operated the court-approved "freedom-of-choice" plan through the 1969-1970 school term. Unsatisfied Ross plaintiffs moved for further equitable relief. Judge Connally held several hearings in June and July 1969. HISD enrollment records revealed that after five years under "freedom-of-choice," one-quarter of the African-American students were attending formerly all white schools. But ninety-five of the district's 170 elementary schools still enrolled 10% or fewer black students. Forty-four elementary schools had student bodies with 10% or fewer white students. Nineteen of the thirty-six junior high schools enrolled 10% or fewer blacks and eleven had student bodies with 10% or fewer whites. Finally, three of the twenty-four high school campuses were all-black. Four had fewer than
five white students. Seven enrolled fewer than fifty white students.
There were no all-white high schools, but six had fewer than fifty blacks
students. One-half of the high schools were 90% white campuses, and
seven were 90% black. In all, seventy-seven percent of African-American
students in the HISD attended schools where the enrollment was greater
than ninety percent black.114 After reviewing this evidence, Connally ruled
that it was obvious that “freedom-of-choice” had not resulted in the level of
integration required by the most recent Supreme Court and the Fifth
Circuit decisions. He directed the board to devise a new plan and to submit
it by 1 January 1970.115

Prior to this deadline, the HISD board of trustees was significantly
transformed. In a hard-fought election in November 1969, voters replaced
four of seven school board members. Unlike the outgoing members, the
incoming majority “favored taking good faith, affirmative steps to carry
out HISD’s desegregation duties.”116

434 F.2d 1140 (5th Cir., 1970), 1142-1143.
the case’s African-American namesake, Delores Ross, was approximately
twenty-two years old, and was no longer mentioned in the proceedings.
Robert Eckels was president of the board of trustees of the HISD. That
office had been occupied by Dallas Dyer in earlier proceedings (i.e., Ross
The new board members assumed office in January 1970. Joe H. Reynolds, the attorney who had represented the school district since the Ross litigation began, immediately withdrew from the case. Weldon Berry, who had represented the plaintiffs from the beginning, continued in that role. The HISD’s new attorney, W. James Kronzer, requested an extension of several weeks to familiarize himself with the case, which Connally granted. During this interim, Kronzer requested that HISD compile detailed “locator” maps listing the residence, race, and grade of each of its nearly quarter-million students.\textsuperscript{117}

Connally conducted additional hearings in early 1970 to examine the latest integration plans proposed by the parties. He announced his choice on 30 May. Before ruling, he reviewed the history of the Ross case, and declared that Houston “has . . . come a long way along the road. Substantial integration has been achieved in many areas . . . and, of almost equal importance, [it] has been achieved without incident or racial confrontation.”\textsuperscript{118} Continuing in this optimistic vein, the judge stated that with regard to the integration of transportation, services, facilities, athletics, and extracurricular activities, the HISD board had complied with legal requirements. Connally noted that the plaintiffs did not concede these

points; however, neither the plaintiffs nor the federal government (in its role as intervenor), had questioned the HISD board’s claims regarding facilities, sports, and the rest, or offered evidence to the contrary during the hearings. Moreover, the judge added, “[f]rom my own continuing familiarity with the problem, I am sure that such is the case.”\textsuperscript{119}

In addition, Connally granted that HISD’s faculty had been integrated, although “not as thoroughly as is now required by law.”\textsuperscript{120} The requirement to which he referred was the \textit{Singleton} ratio, which for HISD would be 2 to 1, i.e., approximately two-thirds white, and one-third black. Connally noted that although he had issued his order prior to \textit{Singleton III}, he had “anticipated that holding to some extent.”\textsuperscript{121} He directed the board to reassign its principals, teachers, teacher’s aides, and “other staff who work directly with children,” so that the ratio of the white and black staff

\textsuperscript{119} \textit{Ibid.}, 513-514, inc. note 6.
\textsuperscript{120} \textit{Ibid.}, 513, note 2.
\textsuperscript{121} \textit{Ibid.}, 514, note 4. On 23 July 1969, when Judge Connally directed the parties to submit the alternative desegregation plans, he had called for HISD to re-assign approximately 2500 black teachers to white schools. The so-called “cross-over” teachers were to be in place by the opening of the next school term, 1 September 1969. The outgoing HISD board apparently ignored this deadline. The new board first discussed the cross-over plan at its 5 February 1970 meeting. At a board meeting on 23 February, the HISD administrators admitted that this “cross-over” had not been accomplished. Finally, at the 25 May meeting, the school administrators presented to the school board a plan for the racial mixing of staff and faculty. See the discussion in: \textit{Wright v. HISD}, 393 F.Supp. 1149 (S.D.Tex, 1975), 1160-1161 [Houston Division, Civ. A. No. 72-H-1484].
and faculty in a school "shall vary no more than 5%, above or below"
the prevailing two-to-one ratio, and that the faculty and staff assignments
conform to the Singleton ratio "at no event later" than the beginning of the
September 1970 school term. The judge said he was gratified that the
board apparently "recognizes its obligation in this respect and does not
contest the issue."122

Connally next turned to the "only question which remains . . . that of
student integration," a question "not easily resolved," because the appellate
courts had established "[f]ew meaningful guidelines."123 In the "great
majority of cases," he claimed, appellate judges had not told district judges
what was required for integration, but "have simply said . . . 'This is not
enough.'"124 Accordingly, Connally set out his own standards for success.
He declared that he considered it his judicial duty adopt a plan for HISD
which "will serve realistically . . . to bring about a high degree of overall
student integration, . . . to assure that every student, if not receiving his
education in an integrated atmosphere today, soon will do so, and . . . to do

summer of 1970, the school board instituted the new desegregation plan for
the faculty. On 31 August 1970, the day the Houston schools opened for
the new term, the faculty of the HISD was integrated under the Singleton
ratio, which on a percentage basis was taken as 35:65 black to white.
this in a manner which is consistent with good education, good administration, and with sound economic practices." With this criteria in mind, Connally examined the proposals.

Connally was pleased with the HISD’s student locator map. With it, the judge declared, "now, for the first time, one may forecast accurately the effect of any new plan of integration which may be invoked." It proved indispensable, because he had to evaluate seven proposed integration schemes. These were: (1) the plaintiffs’ plan, which had been prepared for the Inc. Fund by a "Computer Center in Boston"; (2) the federal government’s plan, known as the "Stoole Plan" after its architect, Dr. Michael J. Stoole, director of the Florida School Desegregation Consulting Center; (3) the so-called "Ted-Tac" plan prepared for HISD by the HEW-funded Texas Educational Desegregation Technical Assistance Center of the University of Texas; (4) the existing "freedom-of-choice" plan, which the outgoing HISD school board had re-submitted in late 1969; (5) the "neighborhood zoning" plan, which the outgoing board also had submitted in 1969; (6) the new HISD board’s "equidistant zoning" plan;

\[124\] Judge Connally is quoting from the opinion of Fifth Circuit Judge James Coleman, dissenting in part, in *Singleton IV*, 425 F.2d 1211 (5th Cir., 1970).


and, (7) the "geographic capacity zoning" plan, which the new board also submitted. Connally quickly dismissed several of these alternatives.

The plaintiffs' plan, to achieve the exact same racial balance in every HISD school, would have required busing 34,000 white and 10,000 black students. The judge noted that the computer-generated plan was silent about how children to be bused should be chosen "no doubt against the will of many of them." Would the HISD draft them, Connally asked, and allow "deferments based on hardships or other valid considerations?" Could the names "be drawn in public from a goldfish bowl?" His more serious concern was whether "provision was to be made for a review procedure,

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127 The locator map had limitations. As Judge Connally noted, there were discrepancies in counting the students in the various proposals. The figures for the equidistant zoning plan and for the geographical capacity zoning plan are both projections based on an actual count of dots, each smaller than the head of a pin, which indicated the residence of each of almost 240,000 HISD students. The judge allowed that "[n]o two counts result in quite the same answer. For practical and comparative purposes, however, I think these inaccuracies may be disregarded." Judge Connally summarized these seven plans in more detail at: Ross v. Eckels, 317 F.Supp. 512 (S.D.Tex., 1970), 515-521, esp. note 13. Also, the judge appended charts showing the number of schools with the indicated ratio of white-to-black students under the preferred proposals. Ibid., 525-530. Also, see Kellar's discussion of the proposals and the basis for Connally's decision. Note, however, that rather than making reference to the Fifth Circuit's decision, Kellar mistakenly credits Connally's colleague in the Southern District, U.S. District Judge John V. Singleton, with establishing the Singleton ratio for faculty integration. Kellar states that Judge Singleton. Kellar, Make Haste Slowly, 155-158.
with ultimate appeals to the courts?” 128 "This suggestion is not as absurd as it sounds,” he noted:

... [t]his Court has been called upon in perhaps a dozen instances within the last few months to examine school procedures with respect to the right of a child to attend school with his hair too long; her skirts too short; charged, but not convicted, of possession of marihuana; the distribution of underground newspapers, etc. We well might be called upon to review a procedure, alleged to be discriminatory, which requires some black students to be bussed ten miles to school, while their black neighbors are permitted to attend schools within two blocks of their homes. 129

In sum, the Inc. Fund’s plan might generate as many legal and practical problems as it purported to solve. The judge wanted none of these complications. Moreover, he announced, the “inordinate expense,” at least $1 million annually, rendered the plan “completely inappropriate.” 130

Equally summarily, Connally rejected most of the remaining proposals. The Stolee plan combined zoning, pairing, and busing. First, attendance zones would be gerrymandered to reach a high level of integration. Second, a school still racially imbalanced after zoning would be matched to a school with an opposite imbalance, and the “pair” would exchange their students as necessary. Third, some children would be bused, but only as necessary to eliminate the segregation remaining after zoning and pairing, especially at many elementary schools. Connally

129 *Ibid.*, 516, note 8. For examples of these unusual cases, see chapter four of this dissertation.
criticized of the Stolee plan, first, because it had the youngest children carrying the largest burden of busing. This was to be avoided, he said, because “by reason of their tender years any extended travel is undesirable” for children. Second, the plan was an outline rather than a complete proposal. It analyzed only 78 of the 170 HISD elementary schools, and was therefore “too incomplete to be accepted in its present form . . . [when other more attractive proposals [we]re available.”

The Ted-Tac plan was not one of these “more attractive” proposals. Combining zoning, pairing and busing, the Ted-Tac plan paralleled the Stolee plan with attendant disadvantages that outweighed the benefits of the slight increase in integration the judge found. In some cases, the pairing proposed by the Ted-Tac plan would disrupt the existing grade structure of many affected schools and require HISD to create a new curriculum, and would “require the reassignment of many teachers and almost all students.” Finally, the Ted-Tac plan resorted to busing to integrate elementary schools. Connally repeated his concern regarding this recurring feature of integration proposals. “Cross-town busing is objectionable in any event,” he said, and “[c]ertainly that is true when applied entirely to children of elementary school age.”

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130 Ibid., 515, 521.
131 Ibid., 516-517, inc. note 10.
132 Ibid., 517-518, 521-522.
Connally exhibited unusual nostalgia for the failed freedom-of-choice plan. He recalled that it “has been administered fairly and completely without discrimination by the defendant District for several years.” Under it, he claimed, “[l]iterally, any child who was unhappy with his original school assignment could enroll in any school of his choice simply by appearing at the schoolhouse door on the enrollment date. Such a scheme has much to commend it in theory.” But since the freedom-of-choice scheme had failed to achieve sufficient integration, “it is condemned by recent authorities . . . [and] cannot be further considered here.”133 None of the active parties endorsed the 1969 “neighborhood zoning” advocated by the late, unlamented HISD board.134

Judicious elimination left Connally with the present board’s proposed “equidistant zoning” plan against the new board’s “geographic capacity zoning” plan.135 The latter was based on a plan approved by the Fifth Circuit in February 1970 for implementation by the school district in Bibb County, Georgia.136 Under it, the district’s planners drew an attendance zone around each school in a “non-discriminatory” manner, with the geographic size of the zone determined by the school’s capacity, natural

133 Ibid., 521-522.
134 Ibid., 522.
135 Judge Connally had not yet absolutely dismissed the Ted-Tac and Stolee plans, but they were clearly not his preference. Ibid., 522.
boundaries, and traffic hazards. Once a zone had been drawn for that year, every student within it attended the associated school, unless they made a legitimate majority-to-minority transfer.\textsuperscript{137} Connally stated that this plan offered "an attractive solution." It promised to integrate high schools, junior highs, and elementary schools. However, the school district's discretion in the drawing of zones to account for hazards and boundaries rendered the plan suspect. Connally declared that no matter how integrated a school was under any plan lacking strict guidelines, "...the contention can always be advanced that such lines might have been drawn differently, and with a better result." He was not charging the board with an illicit purpose in proposing the plan. But the judge noted that "...whenever a School Board draws its zone lines today in a discretionary fashion, it is subject to being charged with doing so to continue its dual system."\textsuperscript{138} For these reasons, Connally rejected the plan.

Which left the equidistant zoning plan. Patterned after a plan the Fifth Circuit approved, also in February 1970, for the Orange County, Florida school district,\textsuperscript{139} it required the district's planners to draw attendance zone boundaries exactly equidistant between schools. Each


\textsuperscript{139} \textit{Ellis v. Board of Public Instruction of Orange County, Florida}, 423 F.2d 203 (5th Cir., 1970).
student enrolled in the nearest school. If this resulted in student
enrollments in excess of school capacity, the geographic area served by that
school would be decreased and the area of adjacent attendance zones
increased. The new boundary would still parallel the original. Most
important, every boundary change would be made to increase the level of
integration.\footnote{The lines would necessarily be drawn separately for high schools, junior
1970), 519.}

Majority-to-minority transfers were exceptions. A transferring
student had two options. Under the first, if a student transferred to the
nearest school, he or she gained automatic admission and would receive
free transportation between home and school. If the chosen campus was at
full capacity, the transferee could “bump” a student of the “opposite” race
to new school. Under the second option, a student who wished to transfer
to any campus other than the nearest, attended on a “space available” basis
and must furnish his own transportation.\footnote{\textit{Ibid.}, 520.}

Judge Connally concluded that the equidistant zoning plan would
“best serve the needs of the student body, and will afford as uniformly a
fair and nondiscriminatory school assignment plan as well may be devised.”
This plan, he stated, would create a unitary school system and achieve a
high degree of integration, was both “economically and administratively
sound," allowed the HISD to make school assignments "as color-blind as it is possible to be," and, no child would be excluded from any school because of his or her race.\textsuperscript{142}

In the early stages of the program, 38\% of all African-American children in the district would attend schools with student bodies in excess of 90\% black, while 75\% of the white students would attend schools with student bodies in excess of 90\% white.\textsuperscript{143} The segregation was a result of Houston's racially identifiable residential patterns.\textsuperscript{144} But these children,

\textsuperscript{142} \textit{Ibid.}, 522-524.
\textsuperscript{143} The predicted results of the "equidistant zoning plan" were as follows:
At the high school level:

0 -- all-Negro student bodies
1 -- all-white student body
1 -- student body in excess of 90\% Negro
10 -- student bodies in excess of 90\% white

At the junior high school level:

0 -- all-Negro student bodies
2 -- all-white student bodies
3 -- student bodies in excess of 90\% Negro
14 -- student bodies in excess of 90\% white

At the elementary school level:

4 -- all-Negro student bodies
51 -- all-white student bodies
23 -- other student bodies in excess of 90\% Negro
41 -- other student bodies in excess of 90\% white

The overall result of the plan was to leave:

4 -- all-Negro student bodies
54 -- all-white student bodies
27 -- other student bodies in excess of 90\% Negro
65 -- other student bodies in excess of 90\% white.


\textsuperscript{144} See: Guadalupe Salinas, "Comment, Mexican-Americans and the Desegregation of Schools in the Southwest," \textit{Houston Law Review} 8
Connally said, were not permanently to suffer segregated education.

Any student could make a majority-to-minority transfer and be bused free of charge to the nearest integrated school. Moreover, the judge noted, all children, regardless of the level of integration in the school, would receive their education from a faculty integrated according to the Singleton ratio.\textsuperscript{145} He approved the equidistant plan with one stated reservation. Connally suggested that when the HISD board drew zones, it should allow for impassable objects, such as Buffalo Bayou: "a child is not required to swim or to fly to school."\textsuperscript{146}

Judge Connally directed the HISD board to prepare to institute equidistant zoning, with the few minor suggested modifications, for the September 1970 school term. He ordered the creation of a bi-racial committee of local citizens, whose ten members he would appoint. This committee would be responsible periodically to consult with, investigate, and advise the HISD school board, "with respect to all matters tending to


\textsuperscript{146} Furthermore, in addition to allowing transfers under the majority-to-minority rule, the HISD board had the authority to transfer students for other legitimate reasons. For example, physically handicapped, mentally retarded, or highly gifted children, or students seeking to enroll in vocational or other special courses, presumably would be permitted to attend schools with the appropriate facilities and courses. As Connally noted, "[i]t goes without saying that all such transfers will be on a non-discriminatory basis. \textit{Ibid.}, 524.
promote the operation of a unitary system.” And, Connally announced, he would retain jurisdiction of the Ross case for “a reasonable time to insure that the system is operated in a constitutional manner.”

Only a week after Connally announced his Ross decision in Houston, Seals issued his initial ruling in the Cisneros case in Corpus Christi. The close similarity of certain characteristics of the cases and decisions are as striking as the differences. Both judges conducted extensive hearings over the course of many months to review various complicated options for integrating schools. They sought to consider the local conditions while they assessed the relative risks and benefits of neighborhood schooling, freedom of choice, pairing, zoning, and busing. And, both examined the various plans that the plaintiffs, defendants, intervenors, and outside consultants proposed to them in light of rapidly evolving mandates and standards issued by the Fifth Circuit and Supreme Court. These were the familiar elements of federal judicial management of integration litigation in the 1970s.

Such parallels make divergences more telling. Connally and Seals each appointed local worthies, both to give voice to the concerns of their communities, and to act as the judges’ “eyes, ears and hands.” The court-

\footnote{Ibid., 524.}
appointed citizen's committee was another familiar tool. But where Seals specifically provided for a tri-ethnic committee, Connally created a bi-racial committee.

In part, this fact reflects specific characteristics of the plaintiffs and also indicates the relative sizes of the three ethnic groups in the two cities. But African-Americans comprised a significantly smaller percentage of the population in Corpus Christi than the Mexican-American community in Houston. Seals might therefore have created a bi-ethnic committee of Anglos and Mexican-Americans. The difference resulted from Seals' identification of de facto segregation as de jure. Connally never discussed these concepts.  

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The African-American plaintiffs appealed, because Judge Connally had rejected their plan for one that would achieve less integration. In their 25 August 1970 majority opinion, Fifth Circuit Judges Homer Thornberry

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148 Prof. Zelden offers an interesting interpretation of the "eyes, ears and hands" role. He notes that the reliance on judicial adjuncts in desegregation cases resembled of the federal courts' use of receivers in bankruptcies or trustees in equity cases. Zelden, "From Rights to Resources," 499-502.

and Lewis Morgan praised Connally’s “learned, thorough, detailed consideration” of the legal and practical issues in *Ross v. HISD*. They relied upon his analysis of the seven proposals. But the Circuit judges were not satisfied with the predicted results of the equidistant zoning plan. A general rule had developed in school cases: “...[i]n the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist.” The judges did not prefer the plaintiff-appellants’ computer-generated plan over the equidistant plan. Instead, they created another plan by combining one plan Connally had approved with aspects of several proposals he had rejected. Thornberry and Morgan noted that the district’s geographic capacity plan had been projected to eliminate every 100% black senior and junior high school, and also to eliminate senior and junior high schools which were more than 90% black. This would be a better result than that projected for the equidistant plan. Therefore the judges directed Connally to adopt the portion of the geographic plan which applied to the upper grade levels.

In HISD’s elementary schools, the appellate judges agreed that the expected results of the equidistant zoning plan would be better than those

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151 The circuit judges quoted from: *Allen v. Board of Public Instruction of Broward County, Florida*, 432 F.2d 362 (5th Cir., 1970).
projected for the geographic plan. The latter would leave 25,848 African-American students enrolled in twenty-nine all- or nearly all-black elementary schools. Under the equidistant plan, only 21,418 African-American students would attend twenty-seven segregated or nearly-segregated schools. Morgan and Thornberry declared that “[n]either plan is acceptable.”

The judges directed Connally to use the equidistant zoning plan as the basis for elementary school assignments, but with certain modifications. They listed more than two dozen elementary schools to be arranged into one dozen pairs. The result would leave 11,982 African-American students enrolled in fifteen virtually all-black elementary schools. Even if this might not the best solution for HISD, Thornberry and Morgan left Connally the discretion to adopt “any other plan submitted by the school board or other interested parties, provided . . . that such alternate plan achieves at least the same degree of desegregation as that reached by our modifications.” Finally, the judges modified the majority-to-minority transfer rule. They admitted that the rule Connally had already adopted was similar to the one the Fifth Circuit had accepted for Orange County. But in subsequent decisions the Circuit had strengthened the requirements for integration. The latest version of an acceptable majority-to-minority rule mandated free transportation for any transferring student who wanted
it. Also, the Circuit judges required that a district give enrollment priority at any school to which the student wished to transfer, not only the next nearest school. Morgan and Thornberry therefore affirmed Connally's ruling in part, reversed it in part, and remanded the case to him with these stipulations. 153

Judge Charles Clark, the third member of the panel, dissented. Nixon's first appointee to the Fifth Circuit, Clark harbored at least some of the president's reservations regarding the pace and direction of recent integration decisions. But Clark was a conservative judge who argued for caution, not a reactionary who called for the rollback of civil rights. 154 Clark suspected that the Fifth Circuit had gone too far in the quixotic attempt to integrate the public schools, and he worried that activists on the Circuit would press ahead until they had reduced federalism to tatters. In his Ross dissent, Clark's modest view of the function of the federal courts

152 Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970), 1147.
153 Ibid., 1148. See, for example: Allen v. Board of Public Instruction of Broward County, 432 F.2d 362 (5th Cir., 1970).
154 For example, he had also written a dissent in the latest en banc rehearing of the Singleton case. See: Singleton IV, 425 F.2d 1211 (5th Cir., 1970). Clark was already well-known to his new Fifth Circuit colleagues. And, despite having defended Gov. Ross Barnett before the Fifth Circuit during the 1962 desegregation showdown over James Meredith's registration for classes at "Ole Miss," he was well-respected. See: Meredith v. Fair, 305 F.2d 345 (5th Cir., 1962), cert. denied, 371 U.S. 828 (1962). Frank T. Read and Lucy S. McGough, Let Them Be Judged: The Judicial Integration of the Deep South (Metuchen: The
decried minute fiddling with students' assignments. This was not the
courts' proper role. He had concluded that appellate judges "... err when
we substitute our judgment, based upon documents and maps, for that of
the district courts whose decision is based upon flesh and blood contact
with the real people and the real problems of the district."\(^{155}\)

Clark charged that Thornberry and Morgan were inconsistent and
disingenuous in their opinion. The Orange County plan had never been
overturned, and the majority did not say why Connally was wrong to rely
on it. So, why did that recent ruling "still exist as the law of this circuit
applicable to that county, to Tuscaloosa and Anniston, Alabama ... but not
in Houston, Texas?"\(^{156}\) Of the Circuit's vigorous but erratic efforts to
integrate the schools, Clark declared:

\(^{155}\) *Ross v. Eckels*, 434 F.2d 1140 (5th Cir., 1970), 1149.
\(^{156}\) *Ibid.*, 1149. Further, Clark declared, the Fifth Circuit's rulings that
tightened the integration tolerances for some districts merely widened the
distance between the school districts under court order and those that were
not. There were nearly two dozen separate school districts in Harris
County. As he suggested, there were some areas within Houston's city
limits, which were not part of the HISD, and not subject to ever-climbing
but mysterious numerical standards. Judge Clark wondered why the
Circuit allowed such disparities to exist. He inquired, "[i]s the equal
protection clause of the Constitution too impotent to reach the all-white
'cut-glass' set in Spring Branch and the predominantly Negro area in
Northeast Houston?" Moreover, he, "why would a document as all-
pervasive as our Constitution allow the imaginary boundary lines of
Pasadena or Galena Park (or even the contiguous all-white Alief or Katy
districts) to thwart racial balance if that balance be constitutionally
It is rapidly becoming apparent that despite express disclaimers . . . the special school case panels of this circuit are now out ahead of the requirements laid down by the Supreme Court and have adopted sub silento some unmentionable standard of numerical pupil racial balance to govern the affirmance or reversal of school case decisions.\textsuperscript{157}

He suggested that the "true principle that underlies the reversal of the district court here is that the neighborhood school system ordered for Houston did not achieve that degree of racial balance some judges of this circuit have declared is 'enough.'" If his colleagues sought to meet a quota, Clark confessed that he did not understand why "the 'magic figures' must remain a mystery."\textsuperscript{158}

The Orange County plan which Connally had adapted to HISD in \emph{Ross} had complied with the legal standard in force when he ruled, Clark asserted. It was unfair to the district judges and the school districts for the Fifth Circuit to keep moving the target. "Unless someone would be boldly foolish enough to assert that courts can deprive school district patrons of their freedom," he said, "then it follows as the night follows the day that

\textsuperscript{157} \textit{Ross v. Eckels}, 434 F.2d 1140 (5th Cir., 1970), 1149. For these "disclaimers," see: \textit{Allen v. Board of Public Instruction of Broward County}, 432 F.2d 362 (5th Cir., 1970).

\textsuperscript{158} \textit{Ross v. Eckels}, 434 F.2d 1140 (5th Cir., 1970), 1149.
the courts will never finish litigating such 'numbers game' cases.” If HISD was still not in compliance with constitutional mandates after more than a decade of continuous court oversight, then federal judges were at fault, not the HISD officials. The continual evolution in judicial policies simply proved that “the courts are totally inadequate . . . to deal with such numerous and complex interrelationships of rights . . . by remote control.” But if the courts were to continue experimenting with new methods of introducing and evaluating integration of the schools, Clark declared, then it should follow what he called a “basic rule” of empirical procedure, to introduce new ingredients “singly, not in groups or bunches, lest the experiment fail because one new departure canceled out the benefits that came from another.” School districts were still in the process of implementing the Singleton ratio, majority-to-minority transfers, and bi-racial committees. Cities and citizens were grappling with new prohibitions on racial discrimination in housing and employment. Clark declared that the Circuit judges ought to allow the strong medicine they had already prescribed a fair chance to work before they applied a remedy as drastic as “student racial balancing.”

In one key area, however, Clark was the least conservative judge on the panel. He alone voiced concern that the Mexican-American students were ignored in the integration plans. The panel majority had
acknowledged that roughly 36,000 Spanish-surnamed students were enrolled in the HISD schools, that they were counted as white, and that most lived in neighborhoods adjacent to traditionally African-American neighborhoods. But Morgan and Thornberry did not indicate that only one of the elementary schools they proposed to pair was mostly Anglo. Of the remaining schools, two-thirds were mostly black, and one-third were predominantly Mexican-American. Clark was disturbed by the fact that this meant that with the Circuit’s approval, Mexican-American schools were to be paired with black schools in order to “integrate” them. The majority’s tinkering with Connally’s plan had not repaired this common flaw in Texas school desegregation cases.

Referring to Seals’ Cisneros ruling, Clark asserted that “it is mock justice when we ‘force’ the numbers by pairing disadvantaged Negro students into schools with members of this equally disadvantaged ethnic group.” He declared:

... I would be greatly surprised if a single school teacher could be found in the entire Houston Independent School District who would testify that the educational needs of either of these groups is advanced by such pairings. We seem to have forgotten that the equal protection right enforced is a right to

159 Ibid., 1150-1151.
160 Ibid., 1141.
161 Arnoldo De León, Ethnicity in the Sunbelt: A History of Mexican Americans in Houston (Houston: Mexican American Studies/University of Houston, 1989), 186.
162 Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970), 1150.
education, not statistical integration. Why, on this kind of a theory, we could end our problems by the simple expedient of requiring that in compiling statistics every student in every school be alternately labeled white and Negro! Then, you see, everything would come out 50-50 and could get our seal of approval once and for all.\textsuperscript{163}

After this pointed ridicule, Judge Clark "respectfully" dissented.\textsuperscript{164}

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African-Americans and Mexican-Americans considered the Fifth Circuit's modified zoning and pairing plan worse than Judge Connally's equidistant zoning plan, since both were essentially modified neighborhood schooling arrangements. In Houston as in Corpus Christi, the attendance zones and majority-to-minority transfer rules would lead to the integration of black with "white" students by assigning the Mexican-American and African-American students to the same schools. By accepting that result, Connally, the Fifth Circuit majority, and the HISD board showed that they had not recognized the role the Mexican-Americans' emerging ethnic consciousness was beginning to play in integration politics. Seals and Clark recognized the difference between bi-racial and tri-ethnic desegregation.

\textsuperscript{163} Ibid., 1150.
\textsuperscript{164} Ibid., 1151. For comments on Judge Clark's dissent, see: Guadalupe Salinas, "Comment, Mexican-Americans and the Desegregation of Schools in the Southwest," \textit{Houston Law Review} 8 (1971): 943, 949-950.
Soon after the *Ross* decision, more Mexican-Americans in Houston demanded this recognition. 165

No one in Houston was happy with the *Ross* plan. In late August 1970, the HISD board reluctantly prepared to implement the zoning and pairing ordered by the Fifth Circuit. The African-American plaintiffs contemplated appealing to the Supreme Court. Several Mexican-American civic, political, and religious groups formed an umbrella organization, the Mexican-American Education Council (MAEC), to coordinate responses to *Ross*, including a school boycott. The group encouraged parents to keep students out of class on opening-day of the new term. More than 3500 Mexican-American students stayed home. MAEC also roused the Mexican-American parents to picket elementary schools, bus stops, and the HISD administration building. Finally, MAEC organized more than two dozen *huelga* ("strike") schools staffed by volunteer teachers. 166

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165 San Miguel, Jr., "The Community is Beginning to Rumble," 147.
166 Leonel Castillo, the community relations director for the Roman Catholic diocese of Galveston and Houston, was a MAEC leader. In 1971, Castillo entered mainstream politics and was elected Houston's city controller. During the Carter administration, he was the director of the federal Immigration and Naturalization Service (INS). De León, *Ethnicity in the Sunbelt*, 186-187, 192-193. San Miguel, Jr., *Let All of Them Take Heed*, 179. Kellar, *Make Haste Slowly*, 158. At a school board meeting during this period, fourteen people were arrested for inciting a riot. Most of those arrested were not members of MAEC, but members of two militant groups, the Mexican-American Youth Organization and the Chicano Student Committee. Guadalupe San Miguel, Jr., "A Struggle In Vain; Ignoring Ethnicity is a Slap in the Face Of All Colors by HISD,"
In mid-September, the HISD board voted unanimously to seek a stay and to appeal the Fifth Circuit ruling to the Supreme Court. The vote apparently had more to do with the board’s unease with the elaborate pairing than with the boycott, but the decision nevertheless opened the door for dialogue. MAEC suspended the boycott and encouraged students to return to their HISD schools by 21 September. The board agreed in principle to count Mexican-Americans an ethnic group separate from whites. HISD would hire more Mexican-American teachers and counselors, bring Chicano perspectives into the curriculum, and appoint proportionate numbers of Mexican-Americans to school committees. MAEC stayed active. It monitored HISD’s adherence with the deal, and turned huelga schools into after-school tutorial centers for Mexican-American children.\textsuperscript{167}

The board, the black plaintiffs, and the MAEC activists agreed that the Ross plan was not a suitable solution to segregation in HISD, and resolved to delay court-ordered pairing. The three-way bargain to delay

\textit{Houston Chronicle}, 28 September 1997, section “Outlook,” p. 1. As originally published this article indicated that 1400 people were arrested at the board meeting. The editors printed a correction to 14 arrested protesters two days later. See: \textit{Houston Chronicle}, 30 September 1997.\textsuperscript{167} De León, \textit{Ethnicity in the Sunbelt}, 187-188. In Cotulla, Texas, Mexican-American parents resorted to similar mass protest exercises in September 1970, and they forced their local school district to initiate the pairing they demanded. Rangel and Alcala, “Project Report, De Jure Segregation of Chicanos in Texas Schools,” 327-329.
was insupportable after the Fifth Circuit refused to grant a stay while the case was on appeal. At a meeting on 15 December, the HISD board approved a compromise plan to pair twenty-one elementary, and assign students to them through a lottery. Mexican-Americans declared the compromise solution to be as unacceptable as earlier plans. In January 1971, MAEC adopted a non-cooperation policy, and Mexican-Americans resumed boycotting and picketing.\^168

Despite the parents' continued resistance and the board members' reluctance, court-ordered pairing began in February. HISD bused children to their new schools. In March, the Supreme Court declined to stay the *Ross* ruling. In April, the Court supported busing in *Swann*. The HISD board declared these questions closed.\^169


\^169 See: *Ross v. Eckels*, 434 F.2d 1140 (5th Cir., 1970); and: 91 S.Ct. 924. Susan Besze Wallace, "The Changing Complexion of HISD; As The Desegregation Legal Battle Wore On, Houston School Demographics Were Steadily Changing," *Houston Post*, 15 May 1994, p. A16. There were few violent confrontations between the proponents and opponents of busing in Houston. This was unfortunately not true elsewhere in the state. In Longview, within the Eastern District of Texas, several white men were convicted for conspiring to "booby trap" with dynamite the buses to be used in transporting black children to white schools. See: *United States v. Hayes and McMaster*, 444 F.2d 472 (5th Cir., 1971), *cert. denied*, 404 U.S. 882 (1971); *Hayes and McMaster v. United States*, 464 F.2d 1252
Mexican-Americans attempted to keep the questions open. In early 1971, MALDEF sought Connally's permission to intervene in *Ross*. He denied their motion on 24 May 1971. In a short memorandum opinion, the judge noted that HISD and other school districts have "always treated Latin-Americans as of the Anglo or White race." In a reference to MALDEF's reliance on Seals' *Cisneros* ruling, Connally declared that even if Mexican-Americans were an identifiable minority group, that fact did not entitle them "to escape the effects of integration" with African-Americans. He contended that Mexican-Americans had never been subjected to "state-imposed segregation."  

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170 See: "Memorandum on motion to intervene," quoted in: Rangel and Alcala, "Project Report, De Jure Segregation of Chicanos in Texas Schools," 349, note 254. The bi-racial committee's statistics from June 1971 revealed that the fifteen schools which the Fifth Circuit accepted would be all or nearly all black were all black. The figures for the other elementary schools, however, showed that nineteen additional schools still had fewer than ten percent white students. *Wright v. HISD*, 393 F.Supp. 1149 (S.D.Tex, 1975), 1163, note 2 [Houston Division, Civ. A. No. 72-H-1484].
III. From Bi-Racial Desegregation to Tri-Ethnic Integration: *Cisneros*

and *Ross* Revisited

In late April 1972, DeAnda informed the Fifth Circuit judges that Corpus Christi voters had recently approved bonds to fund school construction and renovation. DeAnda argued that CCISD should not be allowed the opportunity to reinforce a segregated system. The Circuit judges agreed, and in a short per curiam enjoined the CCISD board from undertaking renovation and expansion projects until an appellate court decided *Cisneros*. The Circuit judges assumed for the moment that Seals’ evaluation of the CCISD’s attitude toward integrating Mexican-Americans was accurate: “[p]romoting integration of the Negro and Mexican-American students clearly was not considered by the [board] as a factor” in previous decisions regarding the location of new schools or which old schools should be renovated. The CCISD board did not consider, and “consequently did not pursue, viable alternative locations for schools which, even using a form of neighborhood plan, would have resulted in a much more favorable ethnic and racial balance.” However, the Circuit judges stated that in issuing the injunction, they were not deciding Mexican-Americans’ status.171

171 *Cisneros v. CCISD*, 459 F.2d 13 (5th Cir., 1971), 14.
But resolution of the critical question of the role to be played by "national origin" minorities in "racial" school desegregation cases could not be delayed forever. Since Seals had ruled in June 1970, other federal judges had heard similar cases. U.S. District Judge William Wayne Justice of Tyler, in the Eastern District of Texas, had examined school segregation there, and had also heard cases involving the San Felipe and Del Rio schools in the Western District. In United States v. Texas, a ruling with statewide implications, Justice had lined up with Seals and declared that Mexican-Americans were an identifiable ethnic minority who had been denied equal protection.\(^{172}\)

The U.S. Justice Department had also sued the Austin Independent School District (AISD), alleging that AISD maintained a dual school system. The government's major contention was that on Austin's East side, most schools exclusively enrolled Mexican-American and African-American students. U.S. District Judge Jack Roberts' ruling in United

States v. Texas Education Agency paralleled Connally’s in Ross v. HISD. Roberts had ruled that although Mexican-Americans did “constitute a separate ethnic group,” the government had failed to prove that AISD had imposed de jure segregation upon them.\footnote{United States v. Texas Education Agency, 467 F.2d 848 (5th Cir., 1972), 853-854. The Texas Education Agency (TEA) was a defendant in the federal government’s suit because it had allegedly allowed school boards to adopt policies which perpetuated segregation. This was another consolidated case. In the Southern District of Texas, Judge James Noel heard the portion regarding the Katy Independent School District. See: United States v. Katy Independent School District, et al., 333 F.Supp. 1325 (S.D.Tex., 1971); and: United States v. Texas Education Agency, 443 F.2d 1372 (5th Cir., 1971).}

Since the Texas federal district courts had not conveniently settled the bi-racial versus tri-ethnic, \textit{de facto} versus \textit{de jure} question among themselves, the Fifth Circuit judges had finally to confront the problem. In July 1972, the Fifth Circuit judges announced that they had decided on their own motion to hear the Cisneros appeal \textit{en banc}. They did not grant a rehearing. Instead, the Circuit court would reconsider the case based on the existing hearing records, previous briefs, and transcripts of the earlier appellate arguments.\footnote{of \textit{U.S. v. Texas}, see: Frank R. Kemerer, \textit{William Wayne Justice: A Judicial Biography} (Austin: University of Texas Press, 1991), chapter five.}

Circuit Judge Dyer spoke for the Fifth Circuit majority on 2 August. The \textit{Cisneros} case had raised a novel question, namely, whether the non-
statutory segregation of Mexican-Americans was constitutionally
permissible. The Fifth Circuit judges had decided that it was
impermissible. Dyer said that, although the Brown decision dealt with
statutory segregation, the definition of unlawful segregation included racial
or ethnic isolation created or perpetuated by school boards’ decisions,
actions, and policies. Brown required only that a judge determine two facts
to declare segregation unlawful. First, a judge must find that segregation,
whether racial or ethnic, denied equal educational opportunity. Second, a
judge must find that the segregation was the result of state action.
Therefore: “[w]e need not define the quantity of state action or the severity
of the segregation necessary to sustain a constitution violation.” 175

The appellate judges would not declare that a dual school system was
more tolerable because it had developed without legislative “insistence.”
The state’s endorsement of segregation was “nonetheless apparent.” Dyer
denounced CCISD’s continued effort to characterize the Corpus Christi
situation as de facto segregation which was the result of housing patterns
beyond school board control, and therefore beyond the federal courts’

174 Memo (12 July 1972); Cisneros v. CCISD. NARA-SWA: Civil cases,
Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71-2397, “. . . 1 of
2.”
175 CCISD v. Cisneros, 467 F.2d 142 (5th Cir., 1972), 148.
remedial authority. That contention, Dyer said, was "no longer entitled to serious consideration."\textsuperscript{176}

Continuing, the Circuit majority affirmed Seals' "explicit holding" that school board policies had created and maintained racial and ethnic segregation in Corpus Christi. Like Seals, they viewed reliance on neighborhood schools as the "direct and effective cause of segregation," and referred to the same evidence Seals had used in his ruling, that is, the minority "corridor" running through the central city. The fact that obvious state action was involved in creating the segregated housing patterns was not significant, Dyer said. By its "rigid superimposition" of a neighborhood school concept on the historic pattern, the school board had "equated the residential homogeneity to ethnic and racial homogeneity" and had produced "inevitable segregation . . . [w]e need find nothing more."\textsuperscript{177} Discriminatory motives might have reinforced the segregated patterns, but such motives were "not necessary ingredients of constitutional violations in the field of public education." The Circuit judges held that "the racial and ethnic segregation that exists in the [CCISD] is unconstitutional --- not \textit{de facto}, not \textit{de jure}, but unconstitutional."\textsuperscript{178}

\textsuperscript{176} \textit{Ibid.}, 147-148.
\textsuperscript{177} \textit{Ibid.}, 149.
\textsuperscript{178} \textit{Ibid.}, 148-149.
Not one of the fourteen Fifth Circuit judges who participated disagreed with Dyer’s erasure of the distinction between *de facto* and *de jure* segregation. After affirming Seals’ rulings in almost every detail, however, the Circuit majority remanded the *Cisneros* case to Cox for more analysis. They directed him to develop an integration plan for CCISD that “minimized” busing.\textsuperscript{179}

The Fifth Circuit majority’s decision to remand the case fractured the opinion into varied concurrences and dissents. A majority of the Circuit judges including Brown, Wisdom, Gewin, Thornberry, Goldberg, Simpson, and Ingraham, concurred with the portion of Dyer’s opinion which upheld Seals’ main point that Mexican-Americans were entitled to *Brown* remedies. A smaller majority, including Judges Thornberry, Coleman, Ainsworth, Godbold, Morgan, Clark, Ingraham, and Roney, joined Judge Bell’s concurrence in that part of Dyer’s majority opinion which charged the district court to minimize the use of busing in desegregation.\textsuperscript{180}

Judge Coleman concurred in the decision to remand, but also dissented from the majority’s initial decision to examine *Cisneros* at all


\textsuperscript{180} Judge Bell, joined by Ainsworth, Morgan, and Roney, also specially concurred in that result. *CCISD v. Cisneros*, 467 F.2d 142 (5th Cir.,
until the Supreme Court ruled in a tri-ethnic school case from Denver that the Justices had already certified for review, *Keyes v. School District Number One*. The *Keyes* case, like *Ross* and *Cisneros*, involved attempts by a school board to "integrate" schools by enrolling blacks and Hispanics (as Mexican-Americans were called in Colorado).\(^{181}\)

Judge Godbold, joined by Coleman, Morgan, and Clark, would have declined to consider the case, but directed by eight judges to seven to consider it, they concurred only in the remand.\(^{182}\)

Judge Goldberg, joined by Brown, Wisdom, Gewin, and Simpson, dissented from the decision to require the district court to modify the remedy. They argued that such a review would produce no substantial modifications, and merely delay integration.\(^{183}\)

Judge Gewin, with Brown, Wisdom, Goldberg, and Simpson, dissented from what they called the "modification-by-deletion" of the district court's remedy. Gewin believed that the Fifth Circuit had already settled every possible issue to be raised in the new district court review, either in the present opinion or in the majority's opinion in the *Texas

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\(^{182}\) *CCISD v. Cisneros*, 467 F.2d 142 (5th Cir., 1972), 160.

Education Agency case, which the Circuit decided the same day. The remand would only delay implementation of the remedy.\textsuperscript{184}

Despite the multiple opinions, the Fifth Circuit’s essential holding was that for the purposes of remedying public school segregation under Brown, Mexican-Americans were to be considered separately from Anglos. On 16 August, DeAnda requested that Judge Cox approve a majority-to-minority transfer rule applicable to Mexican-Americans. Cox convened a hearing the next week, where he approved DeAnda’s motion. Cox ordered the CCISD board to provide transportation for students who had sought transfers by 21 August, a cohort of 383 Mexican-Americans, twenty-five blacks, and ten Anglos. He did not order the board to institute a permanent majority-to-minority transfer rule. But Cox directed CCISD to “speed up” its student-assignment plan: “[t]he collective activity of those in charge cannot now continue at what the Court considers to have been a dilatory pace.” Cox commanded the board to prepare a plan, “in good faith,” by 15 September.\textsuperscript{185}

\textsuperscript{185} This is “Plaintiffs’ Post Appeal Motion No. 1.” Noted in: CCISD v. Cisneros, 350 F.Supp. 1241 (S.D.Tex., 1972), 1243.
Several weeks after the Fifth Circuit ruled in Cisneros, an appellate panel resolved at least one element of the integration controversy in Houston. On 6 September, the same panel which had heard the earlier Ross appeal, Circuit Judges Thornberry, Morgan, and Clark vacated Connally’s denial of MALDEF’s motion to intervene. They directed Connally to reconsider his Ross rulings in light on the basic findings in Cisneros and the Texas Education Agency case.\textsuperscript{186} Thereafter, the integration plans developed for HISD accounted separately for Anglo-, African-, and Mexican-American students. Moreover, a tri-ethnic committee became the court’s eyes and ears.\textsuperscript{187}

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In June 1973, the Supreme Court refused to review Cisneros.\textsuperscript{188} Instead, the Justices took up equivalent questions in the Keyes case from Denver. They declared that African-Americans and Mexican-Americans could suffer “identical discrimination.”\textsuperscript{189} Unfortunately, the resolution of

\textsuperscript{186} Ross v. Eckels, 468 F.2d 649 (5th Cir., 1972).
\textsuperscript{187} The Supreme Court’s subsequent ruling in Keyes was also a factor, see: Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 221, note 5.
\textsuperscript{188} See: 413 U.S. 920 (1973).
the question of Mexican-Americans' status within a tri-ethnic setting did not herald the end of the school integration controversy in either Corpus Christi or Houston.  

In September 1972, the CCISD board proposed to reassign 3665 students and to close one majority black school. Cox rejected this plan and ordered another. In October, Dr. Hector Garcia, the former Civil Rights Commissioner, was arrested along with seventeen students for conducting a sit-in protest against the CCISD board's continued refusal to allow Mexican-Americans the right to transfer under a majority-to-minority rule. In May 1973, Cox rejected the latest integration plan. The board responded in June with minor changes. This see-saw pattern continued until mid-1975, when Cox ordered the board to use a computer to develop integration plans.  

In 1976, the U.S. Commission on Civil Rights held hearings in Corpus Christi, with the announced intent "to influence in a positive

190 Jorjanna Price, “June Hearing Another Step In Long Hunt For Solution,” Houston Post, 13 May 1979, p. 2A.
manner a future course of the school desegregation,” to promote the
responsiveness of the school administrators to the “the total community,”
“to assist in informing the community” about the need for effective
bilingual and bicultural programs,” and to promote awareness of the
“unique problems” affecting Corpus Christi’s integration.\footnote{193} By the late
1970s, the Texas Advisory Committee to the Civil Rights Commission still
complained of the slow pace of school integration in Corpus Christi.\footnote{194} So
did resident Mexican-Americans.\footnote{195}

IV. Conclusion: The Integration of the Southern District, and the End of
\textit{Ross v. HISD}

Patterns of growth and demographic change around many American
cities created practical difficulties in implementing the multi-ethnic school
integration plans. Suburbanization occurred for varied reasons. Many

\footnote{193} See Statement of Milton Tobian, in: U.S. Commission on Civil Rights,
\footnote{194} See: Texas Advisory Committee to the U.S. Commission on Civil
\footnote{195} In September 1977, Judge Cox rejected new effort of another parents’
group to intervene, and the Fifth Circuit affirmed. See: \textit{CCISD v. Cisneros}, 560 F.2d 190 (5th Cir., 1977). Also: San Miguel, Jr., \textit{Let All of Them Take Heed}, 185-186. For a short discussion and partial chronology
middle-class families, especially white families, abandoned cities and moved to newly-developed or rejuvenating older communities to escape the perceived moral and physical dangers of the urban environment. This migration had been going on for decades and was related to rising prosperity and improving transportation technologies. But the growth of suburbs became known as “white flight” during the 1970s, when federal judges demonstrated that they would no longer suffer the delay of integration because of opposition from parents and school boards. As a consequence of middle-class migration, whites became the minority in many large, urban school districts and the majority in the many small districts that ringed cities. 196

This pattern of suburbanization emerged around Houston. The dozens of municipalities outside the city limits were often enmeshed in bitter contests with each other and with Houston over annexation plans, public services, resources, and tax bases. Now the local school districts became rivals as well. 197 Portions of the predominantly white suburban

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197 Robert D. Thomas and Richard W. Murray, Progrowth Politics: Change and Governance Houston (Berkeley: Institute of Governmental Studies
school districts in Harris County, including the Alief, Katy, Aldine, Galena Park, Spring Branch, Pasadena, and Cypress-Fairbanks (Cy-Fair) districts, overlapped Houston's city limits. But the boundaries of the city and school district were not coincident, and these districts were all beyond the jurisdiction of HISD.  

These communities were not immune from school desegregation lawsuits. During the many years Connally oversaw HISD, other Southern District judges presided in similar litigation filed against the suburban and rural districts. The problems associated with court-ordered school desegregation in HISD were repeated, albeit usually much later on a smaller scale, and over fewer years, in most of these surrounding school districts. Joe Reynolds, HISD's longtime defense attorney, had warned in

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There were more than twenty separate school districts in Harris County. Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970), at 1142.  

the late 1960s that white exodus would follow court-ordered
integration. Reynolds knew better than most that this migration would not
solve the legal problems: he also represented most of these smaller districts
in their desegregation cases.200

During the 1970s, white retreat also erupted inside Houston and
HISD. There are separately incorporated municipalities, including
Bellaire, Southside Place, and West University, which had survived
annexation battles and continued to exist as island communities within the
city of Houston. However, their schools are within the jurisdiction of
HISD. Soon after Houston voters ousted the conservative bloc from the
school board in 1970, some residents of these mostly white enclaves sought
to create the Westheimer Independent School District (WISD). The so-
called “breakaway” district presumably would not be subject to court
orders concerning integration of HISD. The latter-day secessionists failed.
Ironically, the attempt to create the WISD brought the HISD board and the
Ross plaintiffs into the ongoing school litigation on the same side. The
HISD board argued that the WISD’s breakaway must be quashed because it

in Galveston in 1959, and it was also reactivated in the late 1970s, after
several dormant years. See: Smiley v. Vollert, 453 F.Supp. 463 (S.D.Tex.,
“Desegregation Plan: U.S. Judge Hears Galveston Proposal,” Houston Post,
22 March 1978, p. 4A.
200 Art Wiese, “Meet Joe Reynolds, Schools’ Counsel in Desegregation
would complicate and potentially doom HISD’s integration. With the majority of the white students in Harris County already beyond the reach of the HISD, the secession of WISD would have reduced the remaining white population further. In 1973, Connally enjoined the WISD organizers from proceeding with the effort for three years, to give the HISD administrators time to comply with the pairing, transfer, and busing rulings he had issued during the latest round of *Ross*. The proponents of the WISD revived the plan in the late 1970s, once Connally was dead. Lawsuits, countersuits, and appeals followed until Connally’s successors in the Southern District buried the would-be breakaway.\(^{201}\)

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The federal appellate courts had declared that fear of white flight was no excuse to avoid integration. But once white flight had occurred, integration plans had to be reformulated. By late 1974, it was clear to the HISD's new superintendent, Billy Reagan, that pairing and transfers had failed to bring integration. He recommended to the school board that HISD create a formal panel to review the situation and offer new ideas. The board authorized the creation of a tri-ethnic Task Force for Quality Integrated Education in November 1974.

In December 1974, Judge Connally turned sixty-five years old and entered semi-retirement. He accepted "senior judge" status, which allowed him to retain his life-tenured judgeship but carry a reduced docket. President Gerald Ford appointed Laredo-based criminal defense attorney Robert O'Connor to replace Judge Connally in the Laredo division of the Southern District.

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203 Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 222.
204 Senior Judges were retired, but continued to draw salary, and could be called back to assist the court if the judge wished to serve temporarily. Judges were eligible at 70 years of age (after ten years service), or 65 years of age (after fifteen). 28 U.S.C. § 371. Judge Connally died at age 65 on 2 December 1975. "Judge Ben Connally Dies of Heart Attack," Houston Post, 3 December 1975, 1A, 19A; "Judge Ben C. Connally, Who Presided Over Houston's School Integration Battles," New York Times, 4 December 1975, 44.
Connally's Southern District colleague in Houston, Judge James L. Noel, Jr. succeeded him as the supervisor of the HISD integration. In May 1975, the HISD Task Force recommended that the board create a system of "magnet schools." An update of freedom-of-choice, the magnet schools concept was predicated on the idea that if HISD offered high quality education in various special subjects, such as performing arts or math and science, the district could attract Anglos into integrated schools. Judge Noel conducted hearings, then approved the plan in July 1975.²⁰⁵

The school district implemented the plan over three years. In the meantime, Judge Noel also accepted senior judge status, after sixteen years on the bench in the Southern District. On 14 June 1977, President Jimmy Carter appointed Houston lawyer Finis Cowan to fill Noel's federal district judgeship. Cowan assumed oversight of the twenty year old Ross case. In June 1978, he reviewed the progress of integration under the magnet schools plan. Judge Cowan concluded that the HISD board "ha[d] no definite, high priority, well conceived plan to chart this district to the accomplishment of unitary status." Cowan ordered the board to develop a

²⁰⁵ Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 222. See also: Jim Craig, "Court Tentatively OKs Magnet Schools Plan," Houston Post, 11 July 1975, p. 1A; Jim Craig, "Magnet School Plan Ordered Implemented," Houston Post, 12 July 1975, p. 3A; Jim Craig, "Will People Buy Plan?," Houston Post, 13 July 1975, p. 1A; Jim Craig, "HISD Predicts 13-Year Enrollment Low," Houston Post, 16 July 1975, p. 1A; and: Jim Craig,
new integration plan. Among other subjects, he specifically directed the school board to address the question whether the magnet program had been overemphasized.\textsuperscript{206}

Cowan also suggested that the HISD board explore some form of collaboration with the predominantly white suburban districts to bus Anglo students into the Houston schools.\textsuperscript{207} An inter-district solution would probably have to be voluntary. In 1974, the U.S. Supreme Court struck down a multi-district desegregation decree in \textit{Milliken v. Bradley}.\textsuperscript{208} Such cooperation between the central city and its suburbs on school desegregation was unlikely, especially if the solution required busing.

\begin{footnotes}
\footnotetext[206]{Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 222.}
\end{footnotes}
students across district lines. That idea had already been suggested as a method of reversing white flight, and had been unpopular.  

By the 1978-1979 school year, the district boasted sixty-two magnet schools. But it did not boast many integrated schools. White flight to Houston's suburbs was accompanied by an influx of minorities, especially Mexican-Americans and other Hispanics. The combination of growth and demographic changes created more difficulties in school assignments. During the 1969-1970 term, the ethnic composition of the HISD was approximately fifty-three percent Anglo, thirty-three percent African-American, and thirteen percent Mexican-American. By the 1978-1979 school year, the HISD student population was thirty percent Anglo, forty-five percent black, and twenty-four percent Hispanic. Moreover, since 1970, sixteen schools that were more than ninety percent Anglo had become more than ninety percent African-American.

In August 1978, the HISD board filed a preliminary report with Judge Cowan. As the decade ended, the school district was spending

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211 In 1980, the population of Houston was fourteen percent Hispanic. Mexican-Americans counted for eighty-eight percent of this group. Most of the rest were immigrants from Central and South America. Thomas and Murray, Progrowth Politics, 70-71.
millions annually on magnet schools which had failed to attract whites in numbers sufficient to satisfy the plaintiffs, the federal government, and the federal district judges. Despite questions regarding the effectiveness of the magnet school program, however, it had remained the centerpiece of HISD's integration strategy. In early 1979, the parties on both sides of the Ross litigation prepared to return to court to review the options.²¹³

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In 1979, the Southern District of Texas was finally integrated. Minority activists were disappointed that during two years in office President Carter had not fulfilled his campaign promise to name women and minorities to the federal judiciary. Some of the president's supporters blamed this on the lifetime tenure enjoyed by the sitting judges. But when Noel stepped down and made a judicial appointment possible in the Southern District, Carter had named a white male, Cowan. The president's opportunities increased when the Congress resolved to increase substantially the number of federal judgeships. In 1978, the House

²¹² Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 220.
²¹³ Ibid., 220. See: "HISD Plans Magnet Recruiting Program," Houston Post, 2 April 1978, p. 24C; "HISD '78-'79 Integration Costs in Tens of Millions," Houston Post, 13 May 1979, p. 2A; and: Jorjanna Price, "June
judiciary committee approved four additional judges for the Southern District of Texas. However, when the proposed judgeship bill emerged from conference, the District had gained a total of five new seats.\textsuperscript{214}

The resulting Omnibus Judgeship Act of 1978, which took effect on 20 October, instantly opened 150 seats on the federal bench. Section 8 of the Act was Congress' explicit invitation for the president to accomplish a revolution in the federal judiciary. This provision announced that:

\begin{quote}
[Congress:] \ldots (1) takes notice of the fact that only 1 percent of Federal judges are women and only 4 percent are blacks; and (2) suggests that the President, in selecting individuals for nomination to the Federal judgeships created by this Act, give due consideration to qualified individuals regardless of race, color, sex, religion, or national origin.\textsuperscript{215}
\end{quote}

The Act also increased the number of judges sitting on U.S. Courts of Appeals. The Fifth Circuit nearly doubled, from fifteen to twenty-six judges.\textsuperscript{216}

The significant expansion enabled Carter to affect the character of the whole judiciary, but the changes were especially evident on Southern District, which under the 1978 Act increased from eight to thirteen judges.

\textsuperscript{214} "House OKs More Courts, 12 in Texas," \textit{Houston Post}, 8 February 1978, p. 7A.


\textsuperscript{216} Pub. L. 95-486 (revising number of judgeships allocated in 28 U.S.C. §}
judgeships. On the advice of Texas Democratic Senator Lloyd Bentsen, and the consent of the rest of the Senate, Carter appointed five new federal district judges in the Southern District. After thirty years of litigating in the federal courts, James DeAnda became the district’s second Mexican-American judge. Gabrielle K. McDonald of Houston, who had worked for the NAACP Inc. Fund and enjoyed a reputation as a prominent civil rights attorney specializing in employment discrimination cases, became only the third woman and the first African-American to serve on a federal district court in Texas. She was also the first woman ever to sit in the Southern District. The Southern District’s own magistrate judge, Norman W. Black, became the District’s first Jewish judge. The remaining judicial appointees were white males, but both had impeccable Democratic credentials. Laredo attorney George P. Kazen was the nephew of U.S. Rep. Abraham Kazen. Finally, Carter appointed state associate justice George E. Cire of Houston. The Senate confirmed all five nominations on 11 May 1979. Southern District Chief Judge Garza presided at their swearing-in ceremony in Houston in June.218

President Carter's opportunities to remake the Southern District were not exhausted by these five appointments. On 30 June, Judge Cowan resigned and resumed a lucrative partnership at Baker & Botts, one of Houston's premier corporate law firms. Carter appointed Hugh Gibson of Galveston, who assumed Cowan's vacant seat on 5 October 1979.219

President Carter had offered the cabinet-level position of Attorney General to Judge Garza. Garza declined the top job at the Department of Justice. When a seat opened on the Fifth Circuit, however, Garza accepted the nomination to fill it. Carter elevated Garza to the appellate court in July 1979. Judge Singleton assumed the position of Chief Judge on 1 August 1979, a few months after the five new federal district judges donned their robes.220 Carter named Filemon B. Vela to replace Garza in Brownsville. Vela was Carter's this final appointment in the Southern

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219 In 1981, Cowan took command of the legal team representing the owners of a proposed nuclear powerplant, the controversial South Texas Project (STP). The STP owners wished to replace the project's contractors, Brown & Root, which was defended in the massive litigation by Baker & Botts' longtime rival, Vinson & Elkins. After four years, during which the STP case became Cowan's "entire occupation," the litigation ended in favor of the owners, who received a $750 million cash settlement, possibly the largest cash settlement ever in a construction-related lawsuit. Kenneth J. Lipartito and Joseph A. Pratt, *Baker & Botts in the Development of Modern Houston* (Austin: University of Texas Press, 1991), 209.

District. When Vela took office on 18 June 1980, there were seven new faces on the Southern District bench, more than half the total.221 During Carter’s term as president, more than fifteen percent of his federal judicial appointees were female, and more than one-fifth were minorities.222

221 By 1980, it was clear the increase to twenty-six judgeships in 1978, which had been necessary to match the growth in the number of cases appealed to the Fifth Circuit, had also resulted in a sprawling, unwieldy administration. It also led to inconsistent, unpredictable decisions. In an unusual direct petition to Congress, the active judges of the Fifth Circuit unanimously requested that the circuit be split, citing this step as necessary to the delivery of “consistent, fair, and expeditious justice.” Five months later, Congress passed a bill to effect the realignment. President Carter, in his public comments after signing the bill, commended the Congress for promptly acting in response to the needs of the federal courts. This executive, congressional, and judicial solidarity came after eighteen years of bitter political controversy. Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven: Yale University Press, 1988), 1-2. On 15 October 1980, President Carter signed the congressional measure, which took effect on 1 October 1981. The law divided the old Circuit into a reconstituted Fifth Circuit, containing the District of the Panama Canal Zone and the states of Texas, Louisiana, and Mississippi, and a newly constituted Eleventh Circuit consisting of Florida, Georgia, and Alabama. Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; revising 28 U.S.C. § 41). For a general treatment of the creation, development, and personnel of the Fifth Circuit, see: Couch, *A History of the Fifth Circuit, 1891-1981*.

Judge O’Conor who had transferred to the Southern District’s Houston division, and with Cowan’s departure, he inherited the HISD litigation. In June 1979, O’Conor presided in hearings to assess the school district’s progress. Superintendent Reagan testified that the board had already done everything possible to achieve racial balance in the schools, but with Anglos becoming the overall minority in the student population, HISD schools could never be fully integrated.223

O’Conor ordered the HISD board to continue its efforts. The district created another study panel, the Magnet School Task Force. Meanwhile, in May 1980, the federal government moved to amend its complaint against

HISD. The Justice Department lawyers, having also concluded that inter-district remedies were necessary to accomplish integration, sought O’Conor’s approval to add twenty-two suburban districts and several state education agencies as defendants to the lawsuit. In essence, the latest motion sought to erase the myriad school district boundaries for the purposes of integration. The plaintiffs soon copied the government’s example. O’Conor took the opportunity to review the status of the entire case against HISD. In June 1981, he denied the motions to add the suburban districts as defendants. He declared that the addition of twenty-six new defendants “would inject as many more issues into an already complex case . . . thus further extending what has already been an over-extended case.”

O’Conor announced his conclusion that the HISD board had already eliminated all vestiges of segregation, and was operating a unitary system. What racial imbalance remained in the schools was not the HISD board’s creation and was beyond its power to eradicate. The judge announced that he was placing the twenty-four year old lawsuit on his inactive docket. O’Conor would retain jurisdiction for three years, during which the HISD board must report student enrollments by race and ethnicity every six months. After three years of passive judicial monitoring, he would hold

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224 Ross v. HISD, 699 F.2d 218 (5th Cir., 1983), 223, quoting Judge O’Conor’s memorandum order.
another hearing to decide whether finally to dismiss the *Ross* case.\(^{225}\)

The plaintiff parents and the government intervenors appealed, but on 16 February 1983, the Fifth Circuit judges agreed with O’Conor that nothing remained of HISD’s dual school system. He could review the case and dismiss it if he thought there was no purpose in continuing court oversight of the district.\(^{226}\)

In September 1984, as O’Conor’s three-year monitoring period ended, Superintendent Reagan announced a negotiated settlement of the *Ross* case, which averted the trial O’Conor had scheduled for October. The NAACP Inc. Fund and MALDEF attorneys had signed off on a five-year agreement which among other conditions required the HISD to develop remedial programs to reduce minority dropout rates to the percentage of minority students in the district. Another key provision in

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\(^{226}\) *Ross v. HISD*, 699 F.2d 218 (5th Cir., 1983), 230.
the nineteen-page agreement allowed an increased percentage of black
and Hispanic students allowed to attend magnet schools.\textsuperscript{227}

In November 1984, in a two-page order, Chief Judge Singleton
announced his approval of the "out-of-court" settlement of the twenty-eight
year-old desegregation lawsuit against the HISD. Under the final
agreement, an independent committee, which would be comprised of the
governor of Texas, Houston's mayor, and the presidents of Rice
University, Texas Southern University, the University of Houston, Houston
Baptist University and the University of St. Thomas, would monitor the
educational achievement in the district for five more years.\textsuperscript{228}

In August 1989, African-Americans were more than ninety percent
of the student body in forty-two of 232 schools, and Hispanics were more
than ninety percent of the student population in twenty-five more. Anglos
were approximately sixteen percent of the total student population. The
litigants agreed that HISD was powerless to accomplish anything more, and
asked that the \textit{Ross} case be dismissed. Ruben Rendon, a Houston attorney

\textsuperscript{227} Betty Luman, "Another Settlement Reached in HISD," U.P.I. wire
service, 10 September 1984. 
\textsuperscript{228} "Desegregation Suit Settled in Houston," \textit{Washington Post}, 28
U.P.I. wire service, 27 November 1984. "Judge Approves Settlement,
Dismisses 28-Year-Old Lawsuit," Associated Press wire service, 27
November 1984.
representing the Hispanic intervenors admitted, "[HISD's] not integrated . . . but you can't do it." 229

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Chapter Six: Two Hats and a Second River: The Southern District Judges and the Management of Criminal Justice in the 1970s

We better make up our minds . . . to spend millions of dollars to assure that those who are prone to violate our immigration and smuggling laws are caught at the river’s edge . . . .

U.S. District Judge Reynaldo G. Garza, 1973.1

President Richard Nixon’s “Special Presidential Task Force Relating to Narcotics, Marijuana, and Dangerous Drugs” launched “Operation Intercept” on 21 September 1969, with the announcement that U.S. Customs inspectors would search every vehicle crossing the southwestern border from Mexico into the United States. The ensuing round-the-clock examinations impeded legitimate international commerce, annoyed tourists, and alienated an erstwhile “good neighbor.”2 Critics of the administration’s heavy-handed tactics noted that the “ill-conceived” three-week border crackdown had cost $30 million but had not yielded proportionately larger caches of smuggled narcotics.3 But the detractors

3 William O. Walker, Drug Control in the Americas (Albuquerque:
could not charge, as they could with other notorious episodes devised by the President's assistants, that it was unlawful. Federal statutes empowered Customs inspectors to conduct peremptory, warrantless searches of any person, vehicle, or freight container entering U.S. territory, despite the procedural guarantees embodied in the U.S. Constitution.\footnote{In 1969, G. Gordon Liddy was a key member of the "Special Presidential Task Force" that conceived and planned Operation Intercept. But his activities in subsequent posts, first, as one of the White House "plumbers," and then, as one of Nixon's domestic dirty tricksters in the 1972 reelection campaign, made Liddy one of the most notorious figures in the Watergate scandal. G. Gordon Liddy, \textit{Will: The Autobiography of G. Gordon Liddy} (New York: Dell, 1980), 201-213, 251-338.}

Operation Intercept was unprecedented in federal law enforcement only because the President's Task Force directed a Customs inspection of every entering vehicle rather than a selected few. It was a maximum resort to the long-standing "border search" exception to the Fourth Amendment's probable cause and warrant requirements.\footnote{The relevant statute provides, in part: "[a]ny of the officers . . . may stop, search, and examine . . . any vehicle, beast, or person, on which or on whom he or they shall suspect there is merchandise which is subject to duty, or which have been introduced into the United States in any manner contrary to law . . . and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law . . . ." (19 U.S.C. [U.S. Code] sec. 482).} This had a history of

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legislative and judicial support. In July 1789, two months before they proposed a warrant requirement be added to the new Constitution and two years prior to the states’ ratification of the Fourth Amendment, members of the first federal Congress enacted a Customs statute to empower "specially appointed" collectors to search any ship or vessel for "goods, wares or merchandise subject to duty," and did not require the officers to obtain warrants. The 1789 statute provided: "every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise . . . ." (Act of 31 July 1789, ch. 5, sec. 24, 1 Stat. 29). The language indicates the extent to which the Atlantic seaboard was the main "border" of consequence to the United States in 1789.

Congress repealed the original statute in 1790, only to replace it with a similar law (Act of 4 August 1790, ch. 35, secs. 48-51, 1 Stat. 145, 170). In a subsequent session, the same lawmakers passed a similarly-worded act to authorize the warrantless entry and inspection of federally-licensed distilleries and liquor warehouses (Act of 3 March 1791, ch. 15, sec. 24, 1 Stat. 199). See: Act of 18 February 1793, ch. 8, sec. 27, 1 Stat. 305, 315; and: Act of 2 March 1799, ch. 22, secs. 68-71, 1 Stat. 627, 677-78. The current enabling statute (19 U.S.C. sec. 482) is derived from an act of 18
law, 9 but attempted to limit potential abuse of the exception by confining its exercise to operations conducted on or near the border by Customs personnel. 10

During the 1970s, federal judges had to consider whether Congress could extend this border search authority to additional law enforcement personnel. In 1971, Congress authorized the U.S. Border Patrol, a branch of the Immigration and Naturalization Service (INS), to enforce Customs statutes. This increased federal defenses against narcotics but obscured the

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9 When endorsing the border search exception, the Supreme Court has usually invoked the historical context, and put great stock in the fact that the same Congress passed both the Customs law and the Fourth Amendment. See: Boyd v. United States, 116 U.S. 616 (1886), at 623. Some critics complain there is no historical evidence "that Congress ever measured the searches authorized by the Customs act against the standards set by the proposed fourth amendment." Waples, "From Bags to Body Cavities," 54, note 7. For similar criticism, see: "Note, Border Searches and the Fourth Amendment," Yale Law Journal 77 (1968): 1001. For border searches at the beginning of the latest drug crisis, see: "Note, Search and Seizure at the Border---The Border Search," Rutgers Law Review 21 (1967). For analysis of the passage of the Constitution and the Bill of Rights in the context of the Revolutionary era, including the memory of general warrants and writs of assistance, see: Harris J. Yale, "Note: Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception," Hofstra Law Review 11 (1983): 739-752.

10 The courts have held that border searches "are not limited to searches at an international boundary though they must have a relation to it." Judith B. Ittig, "The Rites of Passage: Border Searches and the Fourth Amendment," Tennessee Law Review 40 (1973): 329. Also: Harriet J. Sims, "Recent Development," Georgetown Law Journal 65 (1977): 1647.
division of duties between the Treasury Department's Customs inspectors, who searched for smuggled merchandise,11 and the Justice Department's Border Patrol officers,12 who hunted undocumented persons.13 Because some Border Patrol officers were already deputized to

Judges deferred to an enabling clause, under which the Customs statutes are to be given the broadest possible scope. See: 19 U.S.C. secs. 1581-1582. 11 The Customs Bureau is under the authority of the Treasury Secretary. 19 U.S.C. sec. 6. 12 The Border Patrol acts under authority of the U.S. Attorney General. 8 U.S.C. sec. 1103. Congress created the Border Patrol with the Immigration and Naturalization Act (Act of 26 May 1924, Ch. 190, 43 Stat. 153; formerly at: 8 U.S.C. secs. 201-204; currently codified at: 8 U.S.C. sec. 1357, et seq.). For the context of passage, and implications for race politics, see: Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," Journal of American History 86 (1999): 71-75. The INS, the Border Patrol's parent agency, was not originally within the Justice Department. On 10 June 1933, Congress merged the Bureau of Immigration with the Bureau of Naturalization to create the INS. Because the expected immigrants to join the workforce, lawmakers originally placed the INS under the authority of Secretary of Labor Frances Perkins. By the end of the decade, however, high-ranking diplomats in the State Department were unhappy with Perkins' efforts on behalf of refugees from Europe, and encouraged President Franklin D. Roosevelt to support the transfer of the INS to the Department of Justice, where it would operate under Attorney General Robert Jackson. The Congress enacted the transfer on 14 June 1940. Thereafter, an immigration service which was created to enforce domestic racial policy during a period of extreme nativism, was to be associated with national security, because the mission of the INS and its Border Patrol were linked to the FBI's job of keeping out foreign spies and saboteurs. As a result of these wartime responsibilities, INS budgets increased, its personnel more than doubled (to 8500) by 1942, and the service was poised to respond when FDR signed an executive order authorizing the internment of Japanese-Americans. Keith Fitzgerald, Face of the Nation: Immigration, the State, and the National Identity (Palo Alto, CA: Stanford University Press, 1996), 164, 173, 184-185. 13 I will use the term "undocumented" interchangeably with "illegal" except in direct quotes. "Illegal alien," a nominally objective term, is also
act as "Customs Patrol Inspectors," this seemed to be a minor
extension of responsibility. But, the 1971 change mandated Customs
deputation. It was the first of several so-called cross-designations with
which Congress committed the Border Patrol to prosecute simultaneously
politically objectionable in some contexts. For example, it has been
suspended in discussions of immigration by the United Nations, which
resolved in 1975 to employ instead the more clinical "nondocumented
migratory worker." Despite the U.N.'s resolution, the shorter "alien"
remains too useful to abandon completely. See: Guadalupe Salinas and
Isaias D. Torres, "The Undocumented Mexican Alien: A Legal, Social, and
Economic Analysis," Houston Law Review 13 (1976): 863, note 1; also:
David M. Heer, Immigration in America's Future: Social Science Findings
examination of Agent Aker, in trial transcript, pp. 8-9, in United States v.
McDaniel. The files (and other case files from federal courts in Texas) are
preserved in the National Archives and Records Administration-Southwest
Regional Archives (hereafter: NARA-SWA), in Fort Worth, Texas.
15 According to the relevant statute, "any officer of the Bureau of Customs
of the Treasury Department . . . or any commissioned, warrant, or petty
officer of the Coast Guard, or any agent or other person authorized by law
or designated by the Secretary of the Treasury to perform any duties of an
officer of Customs Service" serves as a Customs agent. 19 U.S.C. sec.
1401(i). The Treasury Secretary issued a Departmental directive (see: 19
Fed. Reg. 7241), to empower the Commissioner of Customs to act on his
behalf, and delegated to special agents of the Bureau of Customs the
authority to designate border patrol officers as "acting Customs Patrol
July 1971, the Assistant Commissioner of the Customs Bureau required all
Customs agents to designate all Border Patrol officers as acting Customs
patrol officers. See: United States v. Thompson, 475 F.2d 1359 (5th Cir.,
1973), at 1362.
two protracted wars, one against aliens and the other against drugs, on a single embattled front.\footnote{Timothy J. Dunn, \textit{The Militarization of the U.S.-Mexico Border, 1978-1992: Low Intensity Conflict Doctrine Comes Home} (Austin: Center for Mexican American Studies, 1995), 80-83. Dunn investigates the impact of cross-designation in this important work on the militarization of the border, but incorrectly stated that prior to 1986, the Border Patrol was “concerned almost exclusively with immigration enforcement.” He wrote that the shift to narcotics interdiction “reportedly had already been under way in some areas for several years,” but implies the shift occurred no earlier than the early 1980s. \textit{Ibid.}, 52-53, and 221, note 93. In a related vein, Dunn noted that during Prohibition, the newly-created Border Patrol “concentrated chiefly” on interdicting liquor smugglers, but thereafter focused on immigration. \textit{Ibid.}, 12. Criminal cases presented in the present article illustrate that in South Texas, the Border Patrol was heavily interested in drug law enforcement as soon as the government announced the war on drugs in the 1960s.}

From federal judges’ perspective, cross-designation raised troubling questions. How far could Congress expand the previously narrow border search doctrine? Did it vest “acting” Customs inspectors with full authority to make warrantless border searches? What follows examines the extension of Customs jurisdiction to the Border Patrol in the context of related developments in federal drug enforcement, traces the impact of cross-designation on the Border Patrol’s subsequent activities, and analyzes the extraordinary efforts of Judges Ben C. Connally and Reynaldo G. Garza of the Southern District of Texas to defend a broad interpretation of the extension in the many trials each conducted in their respective courts in Laredo and Brownsville.
Many undocumented workers in Texas either crossed the Rio Grande at a remote point in the Texas or relied on concealment or forged credentials to cross at a port of entry. The Border Patrol policed the international bridges and the riverbanks as well as it could. Recognizing that large numbers of aliens would nevertheless successfully enter the U.S., the Border Patrol also monitored the state’s sparsely populated interior. Before the 1971 cross-designation drafted them into the drug war, federal immigration statutes authorized Border Patrol officers to detain vehicles to verify the U.S. citizenship or the legal residency of the occupants.\(^{17}\) If officers stopped a vehicle a “reasonable distance” from the border, they were empowered to conduct a warrantless search, although only of the spaces large enough to conceal a person.\(^{18}\) As designated proxies of Customs agents, Border Patrol officers began literally to sniff-out Customs violators, especially large-volume marijuana smugglers, during

\(^{17}\) According to the relevant statute: “(a) Any officer or employee of the Service defined under regulations prescribed by the Attorney General shall have power without warrant --- (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. . . .” 8 U.S.C. sec. 1357(a)(1).

\(^{18}\) 8 U.S.C. sec. 1357(a)(3). To implement this statute, the Attorney General issued a federal regulation which defined “reasonable distance” as within one hundred miles of the border. 8 C.F.R. sec. 287.1 (a)(2).
immigration interrogations. Subsequently, the U.S. Supreme Court reversed several convictions based on Border Patrol traffic stops as breaches of the Fourth Amendment, and announced guidelines for future cases.\(^{19}\)

The guidelines had the potential to force federal trial judges to set free defendants arrested, in some cases, with several hundred pounds of marijuana. Judges Connally and Garza refused to accept that outcome lightly. They favored an expansive, flexible “Border Patrol exception,” and the implications of the Supreme Court’s Border Patrol decisions violated their conceptions of reasonable law enforcement standards for their always hard-pressed, at times lawless jurisdiction. Consequently, through trial opinions they issued in similar cases in which they carefully distinguished details,\(^{20}\) Connally and Garza attempted to instruct the Supreme Court in South Texas realities. The Southern District judges also grappled with their immediate superiors, the judges of the U.S. Court of Appeals for the Fifth Circuit. As trial judges, Garza and Connally were

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\(^{19}\) The most significant was *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

legally bound by appellate rulings. But, blessed with life tenure, they risked reversals rather than discipline. 21

A pivotal judicial controversy concerned the status of immigration checkpoints in the Lower Rio Grande Valley, the Border Patrol’s primary theater of operations within the Southern District. The roughly triangular area is outlined by three highways. Highway 83 follows the Rio Grande from Brownsville to Laredo. Highway 77 also originates in Brownsville, but heads north through Kingsville to the outskirts of Corpus Christi. Texas 44 travels west from Corpus Christi and intersects Highway 83 north of Laredo. As Connally noted in 1974, it was the Border Patrol’s duty, "with its limited manpower, to protect and monitor these several infrequently traveled highways." 22

21 Insisting on fine distinctions did not violate standards of "good behavior." The constitutional clause relating to life tenure provides: "... Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Constitution, art. 3, sec. 1.
22 United States v. Thompson, 390 F.Supp. 337 (S.D.Tex., 1974), at 339-340. The 1971 cross-designation is did not represent the federal government’s intentional shift of focus in the war on drugs. It is significant that Congress designated the Border Patrol officers as uncompensated "acting Customs Patrol officers." See: 36 C.F.R. 13,410 (1971). The Border Patrol’s strength in the Southwest, approximately 1400 officers, remained fairly constant during the 1970s. William T. Toney, A Descriptive Study of the Control of Illegal Mexican Migration in the Southwestern U.S. (San Francisco, CA: R & E Research Associates, 1977), 41-42. Although the INS budget grew in these years, it grew less rapidly than that of the budgets for narcotics enforcement. For example the INS
It was the duty of federal judges to evaluate the checkpoints. In Texas, the INS maintained at least twenty permanent checkpoints, as well as many others the Border Patrol considered temporary because officers periodically shifted them along a particular highway. In addition, Border Patrol officers regularly monitored several key intersections in the web of county and farm-to-market (FM) roads that crisscrossed the region. The fine distinction between temporary, permanent, and such intermediate

budget for fiscal year 1971 was $121.3 million, for 1972, $127.8 million, and for 1973, $137.5 million (rounded to nearest $100,000), from "Table 2: Immigration and Naturalization Service Appropriations," in: *Ibid.*, p. 25. During fiscal year 1974, the President's requested budget for the INS was $139.7 million, but for narcotics control (across all agencies involved) some $785 million. *Ibid.*, p. 24. Moreover, the 1974 increase was not for more personnel but for modernizing INS vehicles and communications systems, and also for the installation of an "expensive" and "sophisticated" sensor system along the Mexican border. *Ibid.*, pp. 41-42. The "sensors" were probably "seismic detectors." See: *United States v. Garza*, 531 F.2d 309 (5th Cir., 1976). The congressional sleight of hand added personnel at no additional cost, because experienced Border Patrol officers were already serving in the border region, paid, trained, and equipped with previously allocated Justice Department funds. A contemporary analyst blamed Nixon for the INS's relatively low budget priority, and noted he "may have been influenced in the apportionment of funds by his high preoccupation with drugs." According to this same critic, Nixon's comparatively lack of interest in immigration enforcement was blatantly indicated when he appointed Romana Banuelos to be Treasurer of the United States, even after it was discovered that a food processing plant she owned had been a "flagrant employer of illegal aliens." Toney, *A Descriptive Study of the Control of Illegal Mexican Migration in the Southwestern U.S.*, 24. Compare this Nixon-era event to the crisis sparked in the 1990s when the press discovered that Zoë Baird, President William Clinton's first nominee to be U.S. Attorney General, employed an undocumented Peruvian couple as servants. Heer, *Immigration in America's Future*, 65-66.
categories as "fixed," mattered to the resolution of individual cases.

Unfortunately, by the time a judge issued his or her opinion regarding a specific checkpoint, the Border Patrol may have already responded to an earlier ruling from the same or a different judge, and changed either the checkpoint's location or its rules of engagement. With the expanded Border Patrol involvement in drug arrests, the timing of one arrest, trial, and appeal overlapped with other arrests and trials. This made judicial precedents fast-moving targets in federal courtrooms from South Texas in the Fifth Circuit to Southern California in the Ninth, as the trial and appellate judges wrote dozens of closely-argued opinions to distinguish the cases and to justify their own decisions. The resultant painstaking case-

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23 After they had confronting these recurring questions for several years, for example, the judges of the Fifth Circuit compiled a list of "so-called Texas border search cases" they had heard on appeal, a total of fifty-three as of 15 January 1975; they compiled the list to assist them in deciding a fifty-fourth case. United States v. Hart, 506 F.2d 887 (5th Cir., 1975), at 889-891, note 1; vacated and remanded, 422 U.S. 1053, and reaffirmed on remand, 525 F.2d 1199 (5th Cir., 1976). Because as a rule only a fraction of all cases are appealed, it can be assumed that the district judges presided over trials in many times this total of cases. Some of these cases arose prior to the extension of Customs power in 1971, but seemed relevant to the Fifth Circuit in 1975, and they seem so to the above discussion of the contested issues. For example, the judges count Marsh v. United States, 344 F.2d 317 (5th Cir., 1965), among the so-called "Texas border search cases." They also count a 1969 case which concerned an arrest by a Border Patrol officer at a bus depot in McAllen, a small town abutting the border. The Fifth Circuit upheld the conviction. Stassi v. United States, 410 F.2d 945 (5th Cir., 1969).

24 In the 1970s the majority of border search cases arose in the Fifth and Ninth Circuits. Consequently, other federal courts looked to appellate
by-case jurisprudence was unavoidable because no general rules of
decision for checkpoint cases existed until the judges created them. For
that reason, the judicial opinions to be described, which might appear to be
discreet legal monologues, are more profitably read as elements in an
extended conversation between robed colleagues.

Judge Garza’s contribution was to imagine that the Border Patrol’s
line of interior checkpoints formed a “second river” in South Texas, which
he argued was as important to regional immigration and narcotics law
enforcement as the first river, the easily crossed Rio Grande. Relying on
this legal fiction, Garza concluded that Border Patrol officers needed
exceptional authority to conduct warrantless searches at most checkpoints,
and he defended the point against all challengers. By charting a “second
river,” Garza hoped to ensure that the Border Patrol’s effectiveness in the
Lower Rio Grande Valley was not compromised by what he believed were
intolerable constraints imposed by distant appellate judges harboring
impractical conceptions of border reality.

However, Garza’s arguments risked weakening procedural
constraints legitimately imposed by the Constitution. Fourth Amendment
jurisprudence is characterized by judicial regulation of law enforcement
activities that inevitably intrude on citizens’ rights. Federal trial judges

decisions in these Circuits for guidance on border search issues. Waples,
“From Bags to Body Cavities,” at 55, note 10.
have entrusted themselves, as disinterested and independent public
officials, with the responsibility to decide "[w]hen the right of privacy must
reasonably yield to the right of search."25 But, as revealed through his
frequent references to direct experience of the border region, Garza was
never disinterested in the twin struggles against drugs and aliens. Rather,
he had personal concerns informed by lifelong residence in Texas.26 In
various checkpoint opinions and especially when describing the "second
river," Garza was an unabashed advocate for the Border Patrol, not a
neutral mediator between the federal government’s perceived needs and the
public’s declared rights. His "second river" model was too easy to translate
into uncritical acceptance of any expedient to interdict illicit traffic.

Moreover, in his ardent defense of the Border Patrol’s prerogatives,
Judge Garza was out of step with Mexican-American civil rights leaders,

commentator argued recently that juries should play a larger role in these
assessments. Ronald J. Bacigal, "Putting the People Back into the Fourth
Law Professor Akhil Amar counters the conventional view of the Bill of
Rights as a collection of unrelated rights to be protected by the judiciary.
Instead, he has examined the Bill of Rights as a structure of government,
and analyzed the jury’s vital role in regulating the exercise of government
power. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction
(New Haven, CN: Yale University Press, 1998), 68-73. Also: Mark
Tushnet, Taking the Constitution Away from the Courts (Princeton, NJ:
Princeton University Press, 1999), 164-165.
26 Garza was born in Brownsville, Texas, on 7 July 1915. "Garza," in
Judicial Conference of the United States, Judges of the United States, 2d
who were also very interested in the law enforcement problems in the southwest.\textsuperscript{27} Notwithstanding his status as the first Mexican-American federal judge, Garza was often estranged from civil rights activists who considered him unresponsive to the plight of Mexican-Americans.\textsuperscript{28} Although Mexican-Americans' attitudes toward undocumented Mexicans in Texas varied,\textsuperscript{29} many considered the Border Patrol to be an abusive and discriminatory organization.\textsuperscript{30} As a result, Garza was subject to criticism by certain border residents that he was the one unaware of reality.


\textsuperscript{29} Mexican-Americans and Mexicans shared a heritage, but also frequently competed for jobs and services. Lawrence W. Miller, Jerry L. Polinard, and Robert D. Wrinkle, "Attitudes Toward Undocumented Workers: The Mexican American Perspective," in Rodolfo O. De La Garza, et al., \textit{The Mexican American Experience}, 228-240, at 203. The Chicano movement, a more radical and nationalist outgrowth of the Mexican-American civil rights movement, was also a more consistent defender of the rights of immigrants. For Chicanos, Mexican immigration has been among its paramount issues. The issue combined three themes dear to the movement, namely, ethnic solidarity, civil rights, and workers rights. Juan Gomez Quiñones, \textit{Chicano Politics: Reality & Promise, 1940-1990} (Albuquerque: University of New Mexico Press, 1990), 197. Also: David Montejano, \textit{Anglos and Mexicans in the Making of Texas, 1836-1986} (Austin: University of Texas Press, 1987), 262-287.

II. The Border Search from Prohibition through the Procedural Revolution

The U.S. Supreme Court has usually defined a "reasonable" search as one accompanied by a warrant and probable cause, but until the early twentieth century, the border search exception was less anomalous than the name suggests. To facilitate effective law enforcement, federal trial judges occasionally allowed other exemptions, although none as general as the border search for Customs agents. Gradually and unevenly, however, the federal courts expanded defendants' procedural rights. The process culminated in 1914, when the Supreme Court's Weeks v. United States


Akhil Amar has argued that a "reasonable" search does not necessarily require a warrant. Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles (New Haven, CN: Yale University Press, 1997), 4-6.

State judges were not bound by the requirements of the Fourth Amendment. However, in general they were bound by state constitutions and bills of rights, and throughout the nineteenth century state legislators regulated the issuance of search warrants by statute. John J. Dinan, Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights (Lawrence: University Press of Kansas, 1998), 51-53.
opinion declared that federal trial judges must "exclude" from consideration evidence seized without a warrant or probable cause.\textsuperscript{33}

Although a milestone in the evolution of procedural rights, *Weeks* had limited impact on federal law enforcement agencies. Until Prohibition, the latter were small and specialized relative to state police organizations. And the federal "exclusionary rule" did not eliminate border searches.

Conversely, the exception became more basic for Customs inspectors in 1914, the same year the Supreme Court established the *Weeks* rule. That year, Congress enacted the first major legislation against narcotics traffic, the Harrison Narcotic Drug Act. It regulated manufacture, import, and possession of opium and its derivatives.\textsuperscript{34}

Then, in 1919, Congress passed the National Prohibition Act, better known as the Volstead Act,\textsuperscript{35} to implement the Eighteenth Amendment.\textsuperscript{36}

A clause of the Act authorized Prohibition officers to make warrantless

\textsuperscript{33} *Weeks v. United States*, 232 U.S. 383 (1914).

\textsuperscript{34} Ch. 1, 38 Stat. 785 (1914). For the genesis of the Harrison Act, see: David F. Musto, M.D., *The American Disease: Origins of Narcotic Control*, 3rd Ed. (New York: Oxford University Press, 1999), 59-65. The Harrison Act was only the first act in a long, ongoing drama; the federal government began to regulate, tax, and prohibit an ever growing list of narcotics and "dangerous drugs." See: Walker, *Drug Control in the Americas*, 29-30.


\textsuperscript{36} The Eighteenth Amendment provided that "the manufacture, sale, or transportation of intoxicating liquors within . . . The United States . . . is hereby prohibited." U.S. Constitution, amend. 18 (1919).
searches of vehicles on roads that were "known" to be arteries for liquor traffic. In the 1925 *Carroll v. United States* decision, the Supreme Court accepted the federal government's argument that any delay to obtain a search warrant was "not practicable ... because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." In part, *Carroll* just affirmed a central principle of the border search doctrine, that Customs agents required flexibility to perform their legitimate enforcement duties. But *Carroll* also stretched the traditional boundaries of the exception to include Prohibition agents, a species of Customs agent concerned with the illicit importation of a particular species of goods but operating at some distance from the border. When in 1933 the Twenty-first Amendment ended the nation's experiment with liquor Prohibition, the Court returned to a traditional narrow view. As the Justices noted in 1958, exemptions to the Fourth Amendment were to be "jealously and carefully drawn."  

In the 1960s, the Warren Court commenced a "criminal procedure revolution" with a landmark Fourth Amendment decision. In 1961's *Mapp*

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v. Ohio, the Justices held that the exclusionary rule operative in the federal courts for 47 years should be applied to state trial proceedings. Other landmark criminal procedural cases followed, yet, despite the revolution in the heartland, the border search exception endured in the hinterlands. It did evolve, however; the exception was neither a static theory nor a fossilized ritual. Judicial interpretation grew to meet the changing nation's demands and the reality of policing the border. Federal

40 Dinan, Keeping the People's Liberties, 159-160.
41 During the 1960s, the revolution in police procedure respecting the civil rights of the criminally accused occurred in parallel with the race-oriented civil rights revolution, and it usually advanced by the same means, through civil litigation. Like school desegregation and other civil rights cases, Chief Justice Warren is credited (or, alternatively, excoriated) for fostering the criminal rights revolution symbolized by such landmarks as Mapp v. Ohio, 367 U.S. 643 (1961) concerning the exclusionary rule (see text above), Gideon v. Wainwright, 372 U.S. 335 (1963) affirming the right of the indigent to counsel in a criminal case, Escobedo v. Illinois, 378 U.S. 438 (1964) establishing the right to have counsel present during police questioning, and Miranda v. Arizona, 384 U.S. 436 (1966) confirming the right to have counsel and the right to withhold information that may self-incriminate. Lawrence M. Friedman, Crime and Punishment in American History (New York: BasicBooks, 1993), 300-304. In the years since what some believe was the "failure" of the revolution, critics have complained that the Supreme Court draws these exceptions less carefully than it should. According to one accounting, as of 1985, the Court had enumerated twenty-six exceptions to the Fourth Amendment. Craig M. Bradley, The Failure of the Criminal Procedure Revolution (Philadelphia: University of Pennsylvania Press, 1993), 165-166. The list of legitimate warrantless searches includes inventory searches, searches incident to arrest (including "frisking" a suspect), "plain-view" searches, "hot-pursuit" searches, and "consent" searches. Cynthia R. Mabry, "The Supreme Court Opens a Pandora's Box in the Law of Warrantless Automobile Searches and Seizures--United States v. Ross," Howard Law Journal 26 (1983): 1245.
judges determined, for example, that it was reasonable to allow
"extended" border searches in a “border area” rather than at the physical
barrier corresponding to a line on a map. They recognized an “elastic
border,” which judges would define “by dynamic parameters dependent
upon the facts of each case, instead of by a static, linear front.”42

Judge Connally’s reasoning in the case against defendant Gilbert
Rodriguez, Jr., illustrates the prevailing judicial attitude toward border
searches by Customs personnel. In January 1956, Connally convicted
Rodriguez in the Southern District’s Houston division for “unlawfully
acquiring marijuana.”43 Rodriguez returned to Houston after his release
from prison in 1959. Customs agents doubted confinement had
rehabilitated Rodriguez, and they predicted he would eventually travel to
Mexico for marijuana. In June 1959, they distributed a description of his
car and alerted Customs personnel in Laredo. On 25 July, Rodriguez did
visit Mexico, but the inspectors on duty at the border did not recognize
him. When Rodriguez returned from Mexico on 1 August, he still
attracted no official attention. During the casual inspection afforded most

42 Waples, “From Bags to Body Cavities,” 56-57.
43 United States v. Rodriguez (S.D.Tex., 1956; Houston Division, Crim.
No. 12772).
returning tourists, Rodriguez received a copy of his Customs declaration form and passed without incident over the international bridge.\footnote{United States v. Rodriguez, 195 F.Supp. 513 (S.D.Tex., 1960; Laredo; Crim. No. 17857), at 514.}

Although a federal statute required persons previously convicted for narcotics violations to register at the border when either exiting or entering the U.S., Rodriguez did not notify the Customs inspectors of his legal status.\footnote{The narcotics violator registration statute provided, in relevant part: 
"(a) . . . no citizen of the United States . . . who has been convicted of a violation of any of the narcotics or marihuana laws of the United States, . . . the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee at a point of entry or a border customs station . . . (b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1000 or imprisonment for not less than three years, or both." 18 U.S.C. sec. 1407.} During a similar trip to Mexico five weeks later, Rodriguez did register as required but inspectors again allowed him to proceed without scrutiny. The Customs agents realized only after Rodriguez left Laredo that he was the individual their supervisor had described in June. They alerted colleagues at a highway checkpoint twenty miles north of the border, where Customs agents stopped Rodriguez and returned him to the Laredo station. In Laredo, inspectors searched the vehicle but failed to discover concealed narcotics. However, they did find Rodriguez’s copy of
the declaration from his July trip (the Customs office possessed the original form, but had not yet searched their files). As an agent placed a telephone call to determine if Rodriguez had registered in July, Rodriguez volunteered that he had not. The agents arrested Rodriguez and charged him with two counts of violating the statute.46

On 1 April 1960, Rodriguez again faced Judge Connally, this time in Laredo. Rodriguez did not dispute the charges. Instead, his defense attorney asserted that the case against rested entirely on the evidence of the "confession" Rodriguez made regarding his failure to register, and asked the judge to suppress this admission.47 Connally viewed the admission as redundant, because it had merely forestalled an inevitable records search, but denied the motion on the more substantive grounds that Rodriguez’s admission had been "voluntary in every respect [and] forthcoming from the

46 The first count was for leaving the country, the second was for entering, both without registering. Rodriguez spent the night in jail, and was arraigned before a municipal judge the next afternoon (the United States Commissioner in Laredo was unavailable for the arraignment). United States v. Rodriguez, 195 F.Supp. 513, at 514-515.
47 Ibid., at 516. In 1960, prior to the Warren Court’s “due process revolution,” the admissibility of confessions was controlled by the “McNabb-Mallory” rule, which was named for two cases: McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957). Under the “McNabb-Mallory” rule, law enforcement officials had no positive duty to inform suspects of their rights against self-incrimination, but a judge could scrutinize the “voluntariness” of an admission offered in police custody with an eye to the “totality of the circumstances,” and might suppress evidence if it was obtained through
defendant without his having been questioned, and before the officers had considered the defendant to be under arrest."

Rodriguez’s attorney also moved to suppress the evidence of the registration form itself, arguing that Customs agents lacked probable cause to initiate the warrantless search of a vehicle they stopped twenty miles north of the border. Connally responded that the standard of probable cause was relaxed at or near the border, and noted that no authority restricted this power to the immediate proximity of the border. The judge doubted that the law of search and seizure rendered a suspect immune from interrogation and examination by Customs agents after “momentarily escap[ing] detection and pass[ing] safely through” the first checkpoint at the physical border. But even without extending the border search exception to reach twenty miles north, Connally believed the information transmitted to the border in June 1959 gave Customs inspectors sufficient probable cause to detain him (once they recognized him). Connally declared that this was particularly the case in South Texas, where, “it is common knowledge (at least to those of us who through duty or choice have considerable familiarity with the narcotic traffic) that the Mexican border immediately opposite the city of Laredo, Texas, is a prolific source of illegal narcotics, and that large quantities are smuggled through that port

intimidation or coercion. The rules for “voluntary” admission became problematic after the Supreme Court’s decision in *Miranda.*
Connally convicted Rodriguez, who appealed. The Fifth Circuit Court of Appeals affirmed the conviction on 24 July 1961.\textsuperscript{50}

The Rodriguez case illuminated the fact that constitutional standards were relaxed near the "elastic" border, and "reasonable suspicion," less than "probable cause," was the proper standard for an "extended" border search. Such decisions led the Fifth Circuit to observe in 1963 that a Customs inspector's authority to conduct warrantless searches at the border was "nearly unfettered."\textsuperscript{51} Nearly, not wholly. Federal judges forged substantive "fetters" for use when they concluded that the practices of individual Customs agents were wanting. In 1965, in \textit{Marsh v. United States}, Fifth Circuit judges reversed the conviction of a defendant whose car was searched by a Texas constable sixty-three miles north of the U.S.-Mexico border, after a Customs agent told the constable to be "on the lookout" for a certain vehicle. The enforcement personnel involved in the search, rather than the greater distance from the border, distinguished the \textit{Marsh} case from Rodriguez's. The constable was not empowered to conduct a border search, and so needed probable cause to search the

\textsuperscript{49} \textit{Ibid.}, at 516.
\textsuperscript{50} \textit{Rodriguez v. United States}, 292 F.2d 709 (5th Cir., 1961).
\textsuperscript{51} \textit{Lane v. United States}, 321 F.2d 573 (5th Cir., 1963).
vehicle. The Customs agent’s communication was insufficient to establish it.\textsuperscript{52}

In \textit{Marsh}, the Fifth Circuit judges scrutinized law enforcement practices through the new lens of \textit{Mapp} and other like decisions, but they did not abandon the \textit{Carroll} doctrine or overrule any other decision. Instead, the appeal judges reaffirmed one of the border search exception’s historical limitations, which was that Customs agents whose responsibilities bound them to the extended or elastic border could not delegate their powers to search to law officers who operated away from the border.\textsuperscript{53} The Circuit judges did not yet consider whether Congress possessed the power to delegate border search authority to non-Customs personnel, since that question was not raised by the circumstances in \textit{Marsh}. But federal judges at both the trial and appellate levels had ample opportunity to

\textsuperscript{52} \textit{Marsh v. United States}, 344 F.2d 317 (5th Cir., 1965).

\textsuperscript{53} The 1789 Customs law restricted the exercise of the exception to the agents monitoring ports of entry. The Congress required, for example, that Customs officers obtain warrants before searching homes or businesses for contraband. For example, the 1789 Customs statute provided: “\ldots and if [officers] shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.” (Act of 31 July 1789, ch. 5, sec. 24, 1 Stat. 29).
examine that issue in the 1970s, when Congress designated Border
Patrol officers as surrogate Customs agents.

III. The Border War on Drugs and the Border Search Exception

No federal agencies were prepared for the emergence of the drug
culture in the 1960s, but the narcotics law enforcement bureaucracy
remained especially fragmented and inefficient until the end of the
decade. As late as 1968, the Federal Bureau of Narcotics (FBN), a
Treasury Department unit, enforced federal laws relative to heroin,

\[54\] Jill Jonnes, *Hep-Cats, Narcs, and Pipe Dreams: A History of America’s
Romance with Illegal Drugs* (New York: Scribner, 1996), 255-270; Elaine
B. Sharp, *The Dilemma of Drug Policy in the United States* (New York:
seemed somehow bound up with the other social and political upheavals of
the decade, such as the civil rights and antiwar movements, the older
generation of political leaders associated drug use with the erosion of
respect for lawful government. See, for example, Sen. James Eastland’s
curious statement that the “[drug] epidemic began at Berkeley University
[sic] at the time of the famous 1965 ‘Berkeley Uprising.’” At the time, Sen.
Eastland was Chair of the Senate Subcommittee on Internal Security, and
was writing in the introduction to: Congress, Senate, Committee on the
Security: Hearings Before the Subcommittee to Investigate the
Administration of the Internal Security Act and Other Internal Security

\[55\] In the Harrison Act, Congress vested enforcement authority in a
narcotics division of the “Prohibition unit” of the Treasury Department’s
Bureau of Internal Revenue, but the lawmakers folded that division into the
Department’s new Prohibition Bureau after passing the Volstead Act. In
1930, at the direction of Congress, the Treasury Secretary transferred
cocaine,\textsuperscript{57} and marijuana.\textsuperscript{58} But the Department of Health, Education, and Welfare (HEW), through its Bureau of Drug Abuse Control,\textsuperscript{59} had responsibility for narcotics enforcement to a new entity within his Department, the FBN. Musto, \textit{The American Disease}, 210-214. The Treasury Department ceded responsibility for monitoring the border, but the status of the FBN’s authority to undertake Customs-style border searches, in light of \textit{Carroll}, was as yet untested when Prohibition ended in 1933.

\textsuperscript{56} Harry J. Anslinger, the first (and for three decades only) Commissioner of the FBN (Anslinger served in this position until 1962) became the government’s greatest advocate for maintaining narcotics prohibitions when liquor Prohibition lapsed. Walker, \textit{Drug Control in the Americas}, 192. Anslinger also played an important role in the lobbying efforts to encourage Congress to criminalize marijuana and to place the responsibility for enforcement in his Bureau. The efforts bore fruit as Congress prohibited illicit importation, transportation, or concealment of marijuana. The Narcotic Drugs Import and Export Act (70 Stat. 570), later recodified at 21 U.S.C. sec. 176(a). The relevant portions of the law stated: “Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned.” The possible penalty for violations was five to twenty years imprisonment and a possible $20,000 fine. Moreover, the statute did not permit judges to give suspended sentences, probation, or parole following conviction. See: 26 U. S. C. sec. 7237(d).

\textsuperscript{57} The Narcotic Drugs Import and Export Act of 1922, which followed the Harrison Act, added cocaine to the list of prohibited drugs. Ch. 202, 42 Stat. 596 (1922).

\textsuperscript{58} Under the earlier Narcotic Drugs Import and Export Act, 21 U. S. C. sec. 176 (a) sec. 2 (h). Anslinger and his allies succeeded in getting marijuana criminalized in the 1930s in part by spreading two spurious beliefs among lawmakers: first, that marijuana’s narcotic effects, and hence its potential dangers as an “assassin of youth,” were on par with opiates, such as heroin, that were already under FBN authority; and, second, by identifying the evils of marijuana addiction with Mexican migrant workers,
responsibility for curbing abuse of "psychedelic" drugs, including the increasingly popular lysergic acid diethylamide (LSD). President Lyndon Johnson, on 7 February 1968, called the arrangement "a crazy quilt of inconsistent approaches and widely disparate criminal sanctions." In a related message the same day, Johnson recommended tougher laws, proposed hiring more narcotics agents, and called on Congress to create "a new and powerful" integrated federal enforcement organization.


62 Johnson noted that his reorganization plan "moves in the direction" of the "distinguished groups" that came before: the 1949 Hoover Commission
Congress subsequently abolished the Treasury Department's FBN and established the Bureau of Narcotics and Dangerous Drugs (BNDD) within the Justice Department.  


65 "Special Message to Congress on Control of Narcotics and Dangerous Drugs, 14 July 1969," Public Papers of the Presidents, Richard Nixon,
1969, 514. Nixon soon earned a reputation for unmatched antagonism to drugs. Musto, *The American Disease*, 247-257. Nixon opposed any recommendation for reform that appeared to soften his administration’s hard line. For example, the National Commission on Reform of Federal Criminal Laws, which Congress had created in 1966 (Pub. L. 89-801), recommended in 1970 (“over the objections of a substantial body of opinion”), that the federal government treat marijuana possession as a minor offense meriting a fine but no imprisonment. But, by the time the commission issued its report, the Nixon-inspired comprehensive statute was on the books. Congress, Senate, Committee on the Judiciary, 92nd Cong., 1st sess., *Reform of the Federal Criminal Laws, Part I: Report of the National Commission on Reform of Federal Criminal Laws* (Washington, D.C.: U.S. GPO, 1971), 40. And Nixon’s own “Commission on Marihuana and Drug Abuse” recommended that possession of marijuana in the home be decriminalized. Nixon publicly opposed such “legalization.” See: “The President’s News Conference, 24 March 1972,” *Public Papers of the Presidents*, Richard Nixon, 1972, 495. The National Commission’s suggested reductions in the seriousness of the crime of possession of marijuana (e.g., prosecution for “usable” amounts only, because traces left too much doubt with respect to the person who left the residue) were based on the following committee views: (1) that available evidence did not demonstrate deleterious effects from quantities ordinarily consumed; (2) that the risks appeared to be significantly lower than those associated with alcoholic beverages; (3) that jail penalties for marijuana use undermined the credibility and deterrent value of the laws against the use of demonstrably harmful drugs; and, (4) that “criminalizing a substantial segment of otherwise law abiding citizenry is not justified.” The committee minority held the alternative view, that the misdemeanor status of small possession (as in the new 1970 act, see below) was correct, because studies indicated harmful effects from long-term use, and also that “the credibility of community disapproval of marijuana is undermined by too precipitate reduction of penalties.” See the Final Report, “Proposed New Federal Criminal Code,” reprinted in: *Reform of the Federal Criminal Laws, Part I*, 407-408. As the reports indicate, by the early 1970s, medical research seemed to contradict the long-standing image of marijuana as harmful and dangerous, and a “policy window opened” for those who argued that the government should relax the hard-line against the drug. Albert DiChiara and John F. Galliher, “Dissonance and Contradiction in the Origins of Marihuana Decriminalization,” *Law & Society Review* 28 (1994): 47-48, 62. The window never opened more than a crack, and soon slammed shut. For the conservative reaction to the perceived (that is,
Abuse Prevention and Control Act. Among other changes, it repealed previous narcotics laws and replaced them with the Controlled Substances Act. Its provisions prohibited the manufacture, distribution, and possession of a lengthy catalogue of chemical compounds and natural extracts. The statute reclassified a variety of substances previously lumped into the general family of “narcotics and dangerous drugs” and separated them into five new categories, called schedules. Penalties for criminal violations were assessed according to a graduated scale based on estimated potential for abuse and extant medically-accepted uses.

The 1970 Act also authorized federal prosecutors to distinguish the consumer’s possession of a small amount of a prohibited substance from the supplier’s possession on an amount large enough to indicate “intent to feared) gains of the decriminalization movement, see: Senate, Marihuana-Hashish Epidemic and Its Impact On National Security, v-xi, 1-5.


67. Regarding heroin, this meant repealing the proscriptions against unlawful importation, unlawful transportation and concealment, and unlawful purchase of narcotics “not in or from the original stamped package” (21 U.S.C. sec. 174). Purchase “not in or from the original stamped package” was prohibited to distinguish the act of smuggling drugs like heroin from the act of legal importation of medical narcotics derived from opium, such as morphine (see: 26 U.S.C. sec. 4704). The statute regarding unlawful importation, unlawful transportation and concealment of marijuana was 21 U. S. C. sec. 176.

68. Also Pub. L. 91-513, as for the Comprehensive Act, but the Controlled Substances Act was 84 Stat. 1242 (27 October 1970); see 21 U.S.C. 812 (1988).
distribute.\textsuperscript{69} This acknowledged the extent of the domestic demand and international supply, as reflected in the larger-scale smuggling that emerged in the 1970s. The market shift to high-volume traffic was due in part to the U.S. government’s continuing efforts to maintain pressure on the border after Operation Intercept. It’s architects deliberately created a "world-class traffic jam," and courted the political backlash, in order to "bend Mexico to [American] will," and their "exercise in international extortion" largely succeeded.\textsuperscript{70} The Mexican government had protested, but within three weeks agreed that if the U.S. lifted the quasi-embargo, Mexico would attempt to eradicate its domestic marijuana and opium crops, and cooperate with U.S. efforts to curb narcotics traffic across their shared border.\textsuperscript{71} President Nixon subsequently defended the "shock treatment" on the grounds that "Operation Intercept was . . . believed necessary and it did accomplish a great deal."\textsuperscript{72}

\textsuperscript{69} The Controlled Substances Act provided, in part: "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." (21 U.S.C. sec. 841[a][1]).

\textsuperscript{70} Liddy, \textit{Will}, 185-186.

\textsuperscript{71} On 10 October, the administration replaced "Intercept" with "a less economically severe plan" dubbed "Operation Cooperation." See: "Remarks at a Bipartisan Leadership Meeting on Narcotics and Dangerous Drugs, 23 October 1969," in \textit{Public Papers of the Presidents}, Richard Nixon, 1969, 831.

\textsuperscript{72} \textit{Ibid.}, p. 838. Nixon was unhappy with the domestic performance of the BNDD, and in 1972, he established a White House-based Office of Drug Abuse to concentrate on urban drug problems, where the BNDD was still
According to BNDD Director John E. Ingersoll, one of the accomplishments was that "the flow of narcotics and marijuana from Mexico into this country was substantially curtailed." He noted that the effect of the shortage was that "in most places where it is available, at least the Mexican form, the prices have doubled and in some cases tripled."\(^\text{73}\)

But the dearth of Mexican-grown marijuana was short-lived, and the federal government's subsequent interdiction sustained the price hike. It encouraged smugglers to bring larger and more profitable loads across the border. If the majority of marijuana dealers had ever resembled the

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focused on international trafficking. Walker, *Drug Control in the Americas*, 191-192. In 1973, Nixon issued Reorganization Plan No. 2, which called for the BNDD and Office of Drug Abuse to merge and form the Drug Enforcement Agency (DEA) (5 U.S.C. sec. 906 [App. II]; also: 28 U.S.C. sec. 509 [note]). See: *U.S. Code Cong. & Admin. News* (28 March 1973), 912. Congress established the DEA to be the principal federal agency concerned with narcotics interdiction, but its agents coordinated with other law enforcement personnel such as Customs agents and Border Patrol officers. Brickey, "Criminal Mischief," 1149. The DEA's mission of rationalization was not accomplished in one fell swoop. On 4 January 1974, for example, U.S. District Judge James L. Noel, Jr., dismissed a charge against one criminal defendant, because the Congress had not made it a criminal offense to impede or assault a DEA agent. The federal statute the prosecutors had relied on (18 U.S.C. sec. 111) prohibited forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering of or with any person employed by the agencies named in the statute (in sec. 1114, such as "any officer or employee ... of the Bureau of Narcotics and Dangerous Drugs"), but neither the statute nor its legislative history indicated to Noel that Congress intended to provide coverage for successor organizations to BNDD. *United States v. Irick*, 369 F.Supp. 594 (S.D.Tex., 1974).

\(^73\) "Remarks at a Bipartisan Leadership Meeting on Narcotics and Dangerous Drugs, 23 October 1969," in *Public Papers of the Presidents*,
freelancers some chroniclers of the drug culture described, they were put out of business during the 1970s, when the risks and the rewards of trafficking increased. The prices Americans were willing to pay attracted the attention of professional criminals. As a result, drug smuggling on the southwestern border, including traffic in both marijuana and heroin, was soon dominated by violent Mexican gangsters.


74 Dr. Timothy Leary, the drug culture’s leading spokesperson during the 1960s, recalled that in the early days “[m]ost of the pot traffic was conducted by amateurs and semi-pros,” by “kids, who would pool their money and head for Mexico, and smuggle back a few kilos for personal use back home, or for sale to cover expenses.” Marijuana was just “too bulky and too cheap to interest the organized criminals much.” Timothy Leary, Flashbacks: An Autobiography, Enlarged, with a foreword by William S. Burroughs (New York: G.P. Putnam’s Sons, 1990), 265. Leary’s assessment of the era’s amateurish smuggling accords with the impressions of contemporary analysts of Houston’s marijuana supply, circa 1969, who also determined that many marijuana importers were young people whose first and perhaps sole experience with crime entailed a road trip to Mexico. John W. Sayer and Daniel L. Rotenberg, “Marijuana in the Houston High Schools --- A First Report,” Houston Law Review 6 (1969): 760.


76 Another factor which increased the participation of organized crime in large-volume marijuana smuggling was the concurrent boom in the American demand for Mexican heroin. John Moore and Reed Holland, “The Laredo-San Antonio Heroin Wars,” Texas Monthly (August, 1973): 46-51; Moore and Holland “Carrasco Revisited,” Texas Monthly (September, 1973): 41-42; and: David Harris, “The Dark and Violent World of the Mexican Connection,” New York Times Magazine (18 December 1977). Also, see: Walker, Drug Control in the Americas, 193. Mexico had long been a minor source of heroin, but it became America’s largest source during the 1970s, as federal narcotics agents steadily closed off other sources and routes. See: Kevin B. Zeese, “Drug War Forever?,” in Melvyn B. Krauss and Edward P. Lazear, eds., Searching for
These disturbing trends were already apparent by 22 September 1972, just after Intercept's third anniversary, when Nixon made a whirlwind campaign tour through South Texas. He inspected the Customs facility in Laredo but did not celebrate the operation's claimed achievements. Instead, Nixon revived the "law-and-order" rhetoric he perfected during his 1968 campaign and denounced judges who allegedly were obstructing the war on drugs. The nation's prosecutors, he claimed, were frustrated because progress against narcotics was being thwarted by "lenient" judges who would convict a heroin dealer, but then "would let

him out, [so] he went right back to what he had been doing before.”

He praised the Laredo inspectors for their efforts, but said that “others farther up the chain of our criminal justice system must do their part,” because “we simply cannot tolerate a weak link anywhere in that chain . . . and this is why I am distressed by some indications that some judges may now have become such a weak link.” Nixon promised to “do whatever is necessary to halt this dangerous, permissive trend.”

The President did not identify the judges he had in mind. But certainly, his scapegoating was not directed at Judges Ben Connally and Reynaldo Garza. Both were appointed by Democratic Presidents, Connally by Harry Truman in 1949, and Garza by John Kennedy in 1961, but neither could be considered “lenient” in Nixon’s terms. Instead, during

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78 “Remarks to Customs Agents and Inspectors After a Tour of the Laredo Customs Facility, 22 September 1972,” in Public Papers of the Presidents, Richard Nixon, 1972, 886.
82 See, for example, Judge Connally’s thirty-year sentence of Timothy Leary. Leary had been arrested for possession of a small amount of marijuana in December 1965, after a Customs border search in Laredo. He stood trial in March 1966, and Judge Connally sentenced Leary to thirty years in prison. Leary appealed, and won a partial victory. Leary v. United States, 395 U.S. 6 (1969). The Supreme Court remanded the case, and after a second trial in 1970, Connally sentenced Leary to ten years.
the 1970s, both Connally and Garza criticized what they considered to be a "permissive" trend in the U.S. Supreme Court, which Nixon had already begun to shape "in his own image" with his 1969 appointment of Chief Justice Warren Burger.\textsuperscript{83}

IV. The Southern District of Texas and the Border Patrol: Two Judges, "Two Hats"

Connally and Garza tried categories of cases in Laredo and Brownsville which represented growth industries in federal crime. By 1970, the top three most frequently prosecuted federal crimes were interstate automobile theft,\textsuperscript{84} illegal immigration,\textsuperscript{85} and narcotics violations,\textsuperscript{86} respectively.\textsuperscript{87} Since the end of Prohibition, each of these categories which rounded out in the "Top 10" were: (4) Selective service violations, 50 U.S.C. App. 462; (5) Failure to pay excise taxes on illicit liquor, that is "moonshining," 26 U.S.C. sec. 5601; (6) "Postal

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\textsuperscript{83} James F. Simon, \textit{In His Own Image: The Supreme Court in Richard Nixon's America} (New York: David McKay, 1973).

\textsuperscript{84} Under Under the Dyer Act, 18 U.S.C. sec. 2312.

\textsuperscript{85} Under Under 8 U.S.C. sec. 1326.

\textsuperscript{86} Under various statutes; defendants indicted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective 1 May 1971, would not yet appear in this data.

crimes had been characterized as a national epidemic, but interstate auto theft reached the number one position because, unlike immigration and narcotics crimes, it could occur and be prosecuted in almost any federal district. But even with this interstate “advantage,” auto theft lost its top rank by 1973, when narcotics crimes became the leading category.\textsuperscript{88}

Connally’s and Garza’s divisions constantly dominated the Southern District’s criminal statistics because immigration and narcotics cases continually dominated their criminal dockets.\textsuperscript{89} Moreover, prior to the 1960s surge in illicit drug use, South Texas was already afflicted by widespread narcotics trafficking and a robust market for undocumented immigrants to harvest the fields in the Lower Rio Grande Valley.\textsuperscript{90}


\textsuperscript{88} Brickey, “Criminal Mischief,” 1162.

\textsuperscript{89} Fisch, All Rise, 119. Ironically, as interstate auto theft waned in national importance, it continued to plague the Southern District of Texas, because car thieves often took their prizes south across the border.

\textsuperscript{90} With a southern boundary contiguous with several hundred miles of the U.S. border with Mexico, the Southern District is appropriate for narcotics smuggling as well as the surreptitious entry of undocumented workers. Consequently, immigration and smuggling violations (including liquor violations during Prohibition) have long been among the most common criminal cases in the District. Zelden, Justice Lies in the District, 50-53. The alien apprehension data from INS annual statistical compilations
Federal judges in the Fifth Circuit considered the Border Patrol's changed status during a case arising from an arrest at an INS checkpoint approximately eight miles north of Laredo on Interstate Highway 35. The Border Patrol considered this a "permanent" checkpoint, because it was well-marked with signs declaring "slow," "stop ahead," and "stop," and featured a line of cones to direct the flow of traffic. On 27 January 1971, the two officers on duty from midnight to 8:00 a.m. had previously determined to stop and inspect every vehicle that passed during their shift. They stopped Richard McDaniel and Herman Canada, and verified that they were both U.S. citizens by checking driver's licenses and vehicle registration. One of the officers, Gordon Aker, later testified that he became suspicious when "[t]heir reactions were a bit abnormal to what the

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average person would be.” The driver, McDaniel, appeared to be
nervous although “very cooperative,” which contrasted with the response
of his passenger, Canada, who “acted almost frozen.” Aker asked
McDaniel to open his car’s trunk for inspection, and McDaniel complied.
Aker asked about the trunk’s contents --- four burlap sacks, imperfectly
wrapped in Guadalajara newspapers--- and McDaniel answered that they
were bags of alfalfa. Aker, a ten-year veteran of the Border Patrol, was
skeptical. He told McDaniel he had never seen alfalfa packaged and
transported in such a manner, opened a sack, and decided that the vegetable
substance inside looked, felt, and smelled enough like marijuana to justify
arresting McDaniel and Canada. Aker led them to the nearby holding van,
and advised them of their *Miranda* rights. McDaniel claimed that he
understood his rights, but refused to sign a waiver saying so. Next,
according to standard procedure under the marijuana tax law, Aker asked

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93 Under the Marijuana Tax Act of 1937. This had levied a hefty transfer tax under 26 U.S.C. sec. 2593(a) Ch. 553, 50 Stat. 551, later codified at: 26 U.S.C. sec. 4741, *et seq*. The acts described in the text were violations of 26 U.S.C. sec. 4744(a)(2), and carried a potential maximum penalty of ten years in prison, and a $20,000 fine. The Act levied a transfer tax on all
McDaniel if he had declared the “contents” of his trunk to Customs at the international bridge which linked Laredo to its Mexican sister city, Nuevo Laredo. McDaniel said “the marijuana” had been brought from Mexico by another person.  

Federal prosecutors indicted McDaniel and Canada for concealing 181 pounds of marijuana, transporting it, and for failure to declare the

| who “deal in” the drug of $1 per ounce for a registered transferee and $100 per ounce for an unregistered transferee, and provided that the taxpayer register with the Internal Revenue Service and obtain a written order form (essentially a tax receipt). The form required the name and address of the transferor, and the amount of marijuana transferred. It was preserved by the IRS and could be made available to law enforcement. In 1969, when reviewing Timothy Leary’s conviction in the Southern District of Texas, the Supreme Court called into question the Marijuana Tax Act’s rules of disclosure, as potential violations of the Fifth Amendment right against self-incrimination. The Court overturned those portions of the Tax Act. Leary v. United States, 395 U.S. 6 (1969). McDaniel’s arrest occurred prior to the effective date of the 1970 Controlled Substances Act, which repealed the Tax Act, but after the Supreme Court’s decision in Leary. The question was valid, because declaration was still required.

94 The officers drove the men to the border patrol’s headquarters at Laredo, where another officer informed them again of their Miranda rights. McDaniel continued to affirm his understanding, but also continued to decline to sign the waiver. The border patrol officers asked McDaniel whether he was interested in “cooperating,” and described a scheme in which McDaniel would be allowed to deliver the contents of his trunk to its “ultimate destination, wherever it was.” After discussing this option with Canada, McDaniel declined to continue his journey. United States v. McDaniel, 463 F.2d 129 (5th Cir., 1972), at 131. The agents learned that the car McDaniel had been driving was owned by Carlos F. Limones, who was then indicted along with McDaniel and Canada for conspiracy to smuggle and transport the marijuana. United States v. Canada, 459 F.2d 687 (5th Cir., 1972).

95 Under the earlier Narcotic Drugs Import and Export Act, 21 U. S. C. sec. 176 (a) sec. 2 (h).
marijuana and pay the transfer tax; however, the government subsequently dropped this last charge. Judge Connally, in hearings in Laredo in the spring of 1971, considered the pre-trial motions filed by McDaniel’s defense attorneys, who sought to have the evidence suppressed as the product of an unconstitutional search. Connally denied this motion on 15 June, then presided during McDaniel’s one-day trial in Laredo on 20 July. During it, Officer Aker confirmed that he had become suspicious when the defendant was “nervous” but also “a little bit too glib [and] too cooperative,” but also testified that he and his partner searched the car as a function of their predetermined routine. When cross-examining the

96 The practical effect of the Supreme Court’s decision in Timothy Leary’s case, United States v. Leary, was that defendants could challenge an indictment under the Marijuana Tax Act by stating that the declaration requirement of the Tax Act violated his or her Fifth Amendment rights; the prosecutor usually suspended or dismissed that charge as soon as the Fifth Amendment was invoked, which is what occurred in the McDaniel case. United States v. McDaniel, Crim. No. 71-L-329 (S.D.Tex, 1971), docket sheet, p. 2 (entry under 20 July 1971), in United States v. McDaniel, NARA-SWA, RG 276, U.S.C.A., 5th Circuit, case/folder 71-2810. Prior to the Leary decision in 1969, the Tax Act was the basis of a popular plea bargain system in the Southern District of Texas, because a conviction for failure to pay the tax allowed probation, while conviction for marijuana possession carried mandatory jail time, that is, with no probation available. Prosecutors ordinarily rewarded a guilty plea to the “tax count” with a dismissal of the possession charges. This system kept the wheels moving in the border divisions, because without the plea bargains, each of the hundreds of cases filed each year would require a trial. The Leary decision changed this system but did not end it: prior to pleading guilty, and having the possession charges dismissed in return, a defendant would sign a waiver, citing Leary, to the effect that he or she was waiving
Border Patrol officer, one of McDaniel’s attorneys, Donald Scoggins, suggested that the suspicion was somehow related to the way McDaniel and Canada looked, implying that the officers were acting on prejudice rather than plan. If Scoggins hoped to elicit sympathy from the jury, the effort fell flat. Scoggins asked Aker whether the defendants were “what has been previously referred to as hippie types?” Aker testified no, “[t]hey were both blond, fair complected, very personable-looking young men.” They wore their hair “somewhat” long, but “not in [the] extreme.” The jury, confronted with a fair, personable-looking defendant, but also with 181 pounds of evidence, convicted McDaniel after brief deliberation. Judge Connally sentenced him to five years in federal prison.

McDaniel’s lawyers appealed the case, but on 11 May 1972, the Fifth Circuit affirmed his conviction. Delivering the unanimous opinion of the

Fifth Amendment rights. This route to settlement closed when the Tax Act was replaced by the Controlled Substances Act.


three-judge-panel, Judge Irving Goldberg acknowledged novel aspects of the case, noting that Congress had only recently assigned the Border Patrol to enforce the nation’s Customs laws. McDaniel’s prosecution, he noted, had been “allegedly” brought under “aegis of the ‘border search’ doctrine, whose borders have never been geodetically defined and whose legal undulations are manifold.” These “legal undulations” allowed the appellate judges to agree that the checkpoint was “reasonably situated” on a highway which led from Laredo to several major cities. Goldberg declared that although McDaniel’s “unusual hour of travel” did not by itself establish probable cause to search the car, the timing might “properly arouse a ‘reasonable suspicion.’” In sum, the circumstances justified a “reasonable stretch” of the Fourth Amendment. Goldberg stated that under the “precedential latitude and constitutional longitude” granted to the courts, the search came “within the legal confines of a border search and within the constitutional confines of the Fourth Amendment.” The judges concluded “[a]lthough McDaniel’s conviction treads perilously close in some respects to the borders of both the Fourth Amendment and the Fifth Amendment-cum-Miranda,” the Border Patrol had not crossed “that

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100 Ibid., at 131.
101 Ibid., at 131-132.
sometimes uncertain but always potent constitutional line which encircles the Government’s relationships to its individual citizens."  

*McDaniel* laid the foundation for later Border Patrol cases in the Fifth Circuit. Judge Goldberg’s colorfully-worded opinion gave trial judges the language they needed to justify future decisions. The most significant phrase in *McDaniel* concerned the “two-hat” rule, which as Goldberg expressed it, was the rule that Border Patrol officers “wear two hats, one as an immigration officer and the other as a customs officer.”  

Although Border Patrol officers could not search compartments too small to conceal a person during an immigration stop, they could search the small compartment if a “reasonable suspicion” justified “donning their customs hats.”

Goldberg’s “two-hat” rule signaled the Fifth Circuit judiciary’s acceptance of the Border Patrol’s expanded role in the war on drugs. Many federal judges subsequently incorporated this analogy into the standard justifications for admitting narcotics evidence collected by Border Patrol officers. For example, on 26 April 1972, near the intersection of IH-35 and State Highway 16 at Hebbronville, fifty-five miles east of

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102 *Ibid.*, at 135-136. On 15 June, the Fifth Circuit denied a rehearing *en banc*.


104 In *McDaniel*, this small compartment was the burlap bags, rather than the trunk itself. *United States v. McDaniel*, 463 F.2d 129, at 133-134.
Laredo, Border Patrol officers arrested an individual with fifty pounds of marijuana. Although they had not detained the defendant at a checkpoint, other circumstances made the arrest similar to that in the McDaniel case. The main difference was that the defendant agreed to a "bench trial," that is, rather than charging a jury to decide guilt or innocence, Judge Connally ruled on his own. This essentially transformed pre-trial hearings into the trial. Connally denied the defense motion to suppress the marijuana, and convicted the defendant.\(^{105}\) On appeal, the defendant's attorney argued that the Treasury Department directive that Border Patrol officers act as Customs agents ---the foundation of Judge Goldberg's "two-hat" ruling in the McDaniel decision--- was unconstitutional, since only Congress was empowered to "vest the Appointment of such inferior Officers."\(^{106}\) According to this attorney's interpretation, the Treasury Secretary could not delegate power to the Border Patrol, a division of the Justice Department.\(^{107}\)

On 29 March 1973, another panel of three Fifth Circuit judges ruled that these arguments "misconceive[d] the situation," and that "[t]here was no mere delegation of authority to border patrol officers, as such," but,

\(^{105}\) *United States v. Thompson*, 475 F.2d 1359 (5th Cir., 1973), at 1361.

\(^{106}\) U.S. Constitution, Article II, Section 2, Clause 2.

\(^{107}\) *United States v. Thompson*, 475 F.2d 1359, at 1361.
rather, "a series of proper delegations." Because the Circuit had already appraised and accepted the legitimacy of the "two-hat" rule in *McDaniel*, meaning that the officers were properly authorized to conduct a border search, the question before Connally had been whether the facts of the case justified the "minimum amount of reasonable suspicion necessary" to warrant the search. Connally had thought so, and the Circuit judges agreed; they ruled that the marijuana had been discovered during a valid border search and affirmed the conviction.

The Fifth Circuit was not merely rubber-stamping Connally’s decisions. When the appellate judges decided that anti-drug policies crossed a forbidden line, they interceded. On 9 March 1972, for example, an individual claiming to be a state narcotics officer, with the Texas Department of Public Safety (DPS), telephoned the Hebbronville Border Patrol station. He asked the supervisor on duty to "take the heat off" the next morning for a white 1972 Chevrolet pick-up truck with a camper. The supervisor relayed the message to the Customs Bureau, because it concerned a narcotics rather than immigration matter. But, he instructed his officers to maintain their normal routine. Apparently suspicious about the source of this "tip," the Customs Bureau detailed an agent to Hebbronville, who requested that the Patrol notify him if the truck passed.

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About 3:30 a.m., two Border Patrol officers observed a truck which fit the description driving north on Highway 16. They notified their Customs colleague, and stopped the driver, Mary Storm, for an immigration check. Storm was riding with her two-year-old daughter, and claimed to be returning from a camping trip near the border in a friend’s borrowed vehicle. After verifying that Storm was a citizen, the officers requested that she open the camper so that they could search for aliens. When Storm opened the door, a pungent odor of marijuana led the officers to change their enforcement “hats.”\textsuperscript{110} They discovered 643 pounds of the drug stashed throughout the camper in cellophane-wrapped bricks. The officers

\textsuperscript{109} Ibid., at 1363-1364.

\textsuperscript{110} Judge Connally convicted many others who had been arrested when Border Patrol agents smelled marijuana during a border search for aliens. In one arrest, made eleven miles from the border, Border Patrol officials became suspicious when they saw a spare tire laying in the back seat of a station wagon. Because they knew smugglers sometimes used tire wells to conceal aliens, the officers initiated a search. A rear compartment designed to hold a folding seat contained plastic-wrapped bundles. Although these were too small to be holding illegal aliens, they exuded the odor of marijuana. The resulting search yielded 319 pounds of marijuana, and led to conviction when Connally ruled it a reasonable search. The Fifth Circuit affirmed his decision on the defendant’s appeal. The Circuit reiterated the fact that although immigration officers may not search bags too small to conceal aliens, as customs officials the officers may search packages which they have reasonable suspicion to believe contains contraband merchandise. \textit{United States v. Wright}, 476 F.2d 1027 (5th Cir., 1973), \textit{certiorari denied}, 414 U.S. 821 (1973).
arrested Storm, and prosecutors charged her with possession with the intent to distribute.\textsuperscript{111}

Judge Connally denied a pre-trial motion to suppress the evidence, and presided in the jury trial in July 1972 in Laredo. At the trial, to support her claim that she was unaware of the contraband in the camper, Storm claimed that the owner of the truck was a “casual friend” who had invited her to his camp near the Mexican border. She said he had taken the truck away from the campsite for several hours, but she did not know or ask where he went. When her daughter became ill, she had borrowed the truck and dropped its owner near Hebbronville. Connally thought it unlikely that a mother with an infant daughter would agree to make an impromptu trip to the Mexican border with a “casual friend.” During Storm’s testimony, he asked many questions concerning the genesis of the trip. Like Connally, the jury found it unbelievable that a “casual friend” would let Storm drive off with his 643-pound load of marijuana, and found her guilty.\textsuperscript{112} Connally sentenced Storm to serve five years in prison, to be followed by a special three-year parole term.\textsuperscript{113}

\textsuperscript{111} United States v. Storm, 480 F.2d 701 (5th Cir., 1973), at 702-703.
Storm's attorney appealed on three grounds. First, that the warrantless search of the truck and camper was unconstitutional because the officers apparently singled it out for the immigration check without even the minimal "reasonable suspicion" required by a "border search." Second, that Connally departed from "his role of detached neutrality" by questioning Storm himself, an alleged violation of due process. And third, that Judge Connally erred by failing during voir dire to ask prospective jurors if they would credit the testimony of a police officer over another witness. On 22 June 1973, John R. Brown, the Chief Judge of the Fifth Circuit overturned her conviction on the strength of the first claim alone. In an opinion which drew heavily on the reasoning in the 1965 Marsh ruling regarding the "tipped-off" constable, Brown wrote that the

114 The officers gave conflicting testimony during the trial: one maintained the reputed DPS request they received had no bearing on the decision to stop and search the camper; the other claimed the suspicious call piqued his curiosity. In any event, the caller requested the "heat" be taken off between 5:00 and 7:00 a.m., and the patrolmen stopped the vehicle at 3:30 a.m. United States v. Storm, 480 F.2d 701 (5th Cir., 1973), at 703, note 4. 115 The Fifth Circuit did not consider these latter two points, because the judges reversed the conviction on the basis of the first argument. United States v. Storm, 480 F.2d 701, at 702. 116 Marsh v. United States, 344 F.2d 317 (5 Cir., 1965). Chief Judge Brown's immediate precedent was Marsh, but he also noted that as far back as the Carroll decision, there were implied limits beyond which the courts would not allow customs agent to go, despite the presumed necessity to control the borders. The perimeters of a "border search" (and also the looser standards of suspicion) could not be extended infinitely: Brown quoted a passage from Carroll, in which the Justices stated that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to
643 pounds of marijuana were "the fruits ---or, more precisely, the weeds--- of an unlawful search."\(^{117}\)

Brown made clear, however, through repeated invocations of *McDaniel*, that the appellate panel's reversal was "in no way a denigration" of the Border Patrol's lawful powers to initiate warrantless searches under existing border search doctrine. But in this instance, the government's attempt "to bring the search [of the camper] within the broad and liberal ambit of the term 'border search' [and] to envelop the actions of the arresting officers . . . with the extensive panoply of statutorily-created, judicially-recognized powers to search without a warrant," was misguided. The officers' mere curiosity, which had stemmed from the "disturbing" call about a white Chevrolet truck with a camper, could not justify the search without their observation of other facts supporting a reasonable suspicion that Storm had recently crossed the border, or had ever been nearer to the border than fifty-five miles. The officers who stopped

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stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." And, persons "lawfully within the country . . . [were] entitled to use the public highways, [and] have a right to free passage without interruption or search." *Carroll v. United States*, 267 U.S. 132 (1925), at 154. For Judge Brown's discussion of these precedents, see: *United States v. Storm*, 480 F.2d 701, at 704.

\(^{117}\) *United States v. Storm*, 480 F.2d 701, at 702. Circuit Judges Dyer and Simpson completed the three-judge panel. Chief Judge Brown, like Chief Judge Connally, was a permanent resident of Houston, and the two knew
Storm's camper at Hebbronville were not engaged in a border search, and therefore, they should have established probable cause and obtained a warrant before undertaking the search. 118

In his "extended" border search opinions in _McDaniel_ and _Storm_, Connally, like other federal trial judges, imagined an "elastic" border and bent the Fourth Amendment to accommodate the government's concerns. 119 The Fifth Circuit reinforced this conception when its judges argued that the circumstances of the _McDaniel_ case justified a "reasonable stretch" of the Amendment. 120 But Judge Brown's _Storm_ opinion put trial judges on notice that even in cases concerning illicitly-imported narcotics and undocumented immigrants, they were expected to guard the perimeters of the Constitution at least as conscientiously as they did the boundaries of the nation. As Brown wrote in _Storm_: "a badge and a hat are not impregnable talismans merely because of the elasticity of our Nation's perimeter." 121

V. The Border Patrol Checkpoints as the "Functional Equivalent of the Border"

one another through their long associations in Texas politics, as well as through the law.

118 United States v. Storm, 480 F.2d 701, at 705.
The U.S. Supreme Court also retracted the elastic standard and restricted the Border Patrol's discretion. In *Almeida-Sanchez v. United States*, announced 21 June 1973, the Court reversed a Ninth Circuit affirmation of a conviction based on a Border Patrol search conducted on California Highway 78, an east-west road twenty-five miles north of the Mexican border. The Justices implicitly rejected the notion that the border was "elastic," and declared instead that the border search exception articulated in 1925, in *Carroll*, "[did] not declare a field day for the police in searching automobiles," and said "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." Although the Justices agreed with the district and circuit judges that Congress could authorize the Border Patrol to search for either aliens or drugs, because the United States had a right to protect itself from the illegal importation of both, they concluded that "no Act of Congress can

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121 United States v. Storm, 480 F.2d 701, at 703.
123 Ibid., 267-268. The Ninth Circuit upheld the search by relying on the same statutes and regulations cited by the Fifth Circuit. See: United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir., 1971), at 461.
124 Almeida-Sanchez v. United States, 413 U.S. 266, at 269.
authorize a violation of the Constitution."126 Instead, the Court suggested that the constitutional boundary for border searches was either the border or the "functional equivalent" of the border. The Justices offered two examples of the latter: first, an "established station near the border, at a point marking the confluence of two or more roads that extend from the border"; second, the "St. Louis airport after a nonstop flight from Mexico City."127 Unfortunately, most Border Patrol practices were less stark than these examples. The Supreme Court therefore denied the trial judges' power arbitrarily to define the "elastic" border to accommodate the federal government's interests, but substituted a similarly subjective standard of "functional equivalence." Although the Almeida-Sanchez ruling consolidated decisions regarding the "two hat" rule, it also encouraged future appeals by defendants seeking the new limits.128

In subsequent Border Patrol cases, the judges in the various federal circuits charted the limits differently; divergent interpretations of the

126 Almeida-Sanchez v. United States, 413 U.S. 266, at 272. In a concurring opinion, Justice Powell summarized Almeida-Sanchez by noting that "one who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite." Ibid., at 281.
127 Almeida-Sanchez v. United States, 413 U.S. 266, at 273.
Supreme Court’s decision resulted.\textsuperscript{129} For example, the judges in the
Ninth Circuit interpreted \textit{Almeida-Sanchez} broadly, that is, they sought to
narrow the Border Patrol’s authority to conduct warrantless searches.\textsuperscript{130}
Conversely, the Fifth Circuit judges applied a narrow interpretation of
\textit{Almeida-Sanchez}, and defended expansions of the Border Patrol’s
activities.\textsuperscript{131} One reason for the disparity in the two most important border

\textsuperscript{129} As the Fifth Circuit noted nearly fifteen years after \textit{Almeida-Sanchez},
for example, the Supreme Court had “not otherwise explained the meaning
of this . . . concept, nor has the Court since elaborated its understanding of
what types of checkpoints qualify as functionally equivalent to the border.
The circuit courts, however, have examined in some detail the notion of
functionally equivalent borders.” Ultimately, the Fifth Circuit developed
three criteria for identifying functional border equivalents. \textit{United States
v. Jackson}, 825 F.2d 853 (5th Cir., 1987), at 855, \textit{certiorari denied}, 484

\textsuperscript{130} According to the Ninth Circuit, the Fifth Circuit’s rulings in cases such as \textit{McDaniel} and \textit{Marsh} created an expandable border concept that had
only a “tangential relationship to the law emerging from the Ninth and
Tenth Circuits.” \textit{United States v. Bowen}, 500 F.2d 960 (9th Cir., 1974), at
984, Part II, note 5. According to the Supreme Court is its review of the
Ninth Circuit decision in \textit{Bowen}, there was “some ground for confusion
about the state of the law in the Fifth Circuit at the time \textit{Almeida-Sanchez}
was decided.” Early cases affirmed immigration officers’ authority to
search for aliens at traffic checkpoints, although the \textit{McDaniel} opinion
“seemed to hold” that authority to search at checkpoints was qualified by a
requirement that the location and operation of the checkpoint be
reasonable. Then, the decisions by other panels of the court ambiguously
suggested that a search at a checkpoint must be supported by “reasonable
suspicion.” But a later opinion, said the Justices, \textit{Thompson}, seemed to
adopt the Ninth Circuit’s distinction between searches for aliens and
searches for contraband. \textit{Bowen v. United States}, 422 U.S. 916 (1975), at
918, note 1.

\textsuperscript{131} Because the Supreme Court’s decisions left the criteria for establishing
the boundaries of the border search exception “largely unexplained,” the
Fifth and Ninth Circuits have employed different approaches. Paul S.
Circuits, those of California and Texas, respectively, was that in addition to typical judicial business such as distinguishing the facts in a specific case from the precedents, and clarifying crucial terms such as "established," "reasonable," and "probable,"\textsuperscript{132} the Almeida-Sanchez ruling required the judges to consider what attributes, beyond geography, which distinguished a "border" from any other point or region. The Supreme Court's Almeida-Sanchez ruling was an invitation for federal judges to speculate as well as to adjudicate. The rights of residents of the southwest border region therefore depended more than ever on the discretion of judges when interpreting not just law, but language, in the sharpest instance the meaning of "functional equivalent."\textsuperscript{133}

\textsuperscript{132} In the landmark Prohibition-era decision, the Supreme Court defined "probable cause" as the belief, reasonably arising out of circumstances known to a law enforcement officer, that a person has committed, is in the process of committing, or is about to commit a crime. See: Carroll v. United States, 267 U.S. 132, at 149, 161.

Additional case decisions will illustrate the difficulty of interpretation and demonstrate how the Southern District trial judges resisted narrowing the scope of Border Patrol activities. After midnight on 9 May 1972, two Border Patrol officers on “roving” patrol for smugglers of illegal aliens. They stopped Richard Glenn Byrd forty-five miles from Laredo, as Byrd was driving northeast on Highway 59 toward Freer. After confirming that Byrd was a U.S. citizen, one of the officers leaned into the car to inspect the rear seat. It was unoccupied, but the officer detected a lingering odor he recognized. He took the key from Byrd, and discovered some 300 pounds of marijuana in the trunk. The officers arrested Byrd, and prosecutors charged him on two related counts.\(^{134}\)

In Byrd’s trial before Judge Connally in Laredo, a narcotics defendant’s fate once again rested on his lawyer’s motion to suppress evidence on the grounds that the officers discovered the contraband as the

\(^{134}\) The first count was for possession of the marijuana with intent to distribute. The second concerned possession of a firearm during the commission of a felony. After the INS officers advised him of his *Miranda* rights, Byrd informed them that he kept a loaded pistol under the front seat. They immediately recovered the weapon. *United States v. Byrd*, 483 F.2d 1196 (5th Cir., 1973), at 1197. The statute proscribing possession of marijuana with intent to distribute was the same as in earlier cases (21
result of an unauthorized search. At the hearing on this motion, the arresting officer testified that he detained Byrd for an immigration inspection simply because "many cases [were made] at that time of the morning . . . out there on that particular road." Officers on "roving" patrol were habitually suspicious of any vehicle driving in the early morning. The officer admitted that only the fact that Byrd was on the road at an hour when few travelers commuted from Laredo to Freer prompted his suspicion that Byrd might be an alien smuggler. Connally upheld the search, for two reasons. First, he believed that the initial stop was justified under the Border Patrol's primary mandate. Second, Connally reasoned that once the car had been properly stopped and searched for aliens, any fact which led the officer to believe some other violation had occurred justified continuing the search. The odor of marijuana was good enough; it gave probable cause for an immigration officer to change "hats" and act as a Customs officer.135 On 28 August 1972, Connally held that the marijuana could be entered as evidence. Since Byrd had opted for a bench trial, the judge immediately convicted him and subsequently sentenced Byrd to a five year prison term and five more years of parole.136

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135 United States v. Byrd, 483 F.2d 1196, at 1198.
Byrd's lawyers appealed the conviction to the Fifth Circuit. On 7 September 1973, Circuit Judge Joe M. Ingraham, for the majority, noted that the facts in Byrd's case were both "typical and undisputed," but declared that the starting point of Connally's analysis had been blunted by Almeida-Sanchez. The crux of the matter, Ingraham said, was the propriety of the "roving" search. He declared that, the "facts [in Almeida-Sanchez] are very similar" to Byrd's case, and although "the holding of Almeida-Sanchez is narrow," the decision made "it clear that lower courts must assess the constitutionality of searches in border areas under standards heretofore thought inapplicable to searches of this nature." Ingraham concluded that, except in those searches conducted at the border or its functional equivalent, "the touchstone is probable cause." Applying these principles to the search of Byrd's vehicle forty-five miles from the border, during which the officers admitted no other justification than the hour and the location to suspect Byrd was transporting aliens, Ingraham found no probable cause. In the absence of the "touchstone," the Fifth Circuit was compelled to reverse Byrd's conviction. However, Ingraham specifically endorsed Connally's use of the "two hats" rule, which was small comfort

\[137\] United States v. Byrd, 483 F.2d 1196 (5th Cir., 1973), at 1201. Judge Ingraham also reassured the narcotics enforcement establishment that the sense of smell was still a lawful investigative tool, noting that "the odor of marijuana often leads to its discovery." Ibid., at 1197-1198, note 3. The case had a curious postscript, because the prosecutors refused to accept
for the Southern District trial judges. They still had to apply the new legal standard so it would not compromise the effectiveness of Border Patrol officers.

Soon after *Almeida-Sanchez*, Judge Garza had developed his response to the Supreme Court's tightening of the elastic border. On 19 July 1973, just before midnight, Border Patrol officers W.G. Luckey and R.K. Fox were on duty near a levee one-half mile north of the Rio Grande. The officers observed two vehicles on the levee, the first a car, which made a U-turn in front of them, and the second a van, which drove away on a feeder road to FM 494. As Luckey later testified, this was suspicious because the residents of the small nearby village of Granjeno "roll up their sidewalks, if they had any," and were rarely abroad from their homes at that hour. The officers stopped the van north of FM 494's intersection defeat, and the Circuit granted an "extraordinary" government petition for a rehearing. At the government's urging, the judges abandoned their earlier reliance on *Almeida-Sanchez*, but sustained the decision to reverse, on the basis of other authorities. *United States v. Byrd*, 494 F.2d 1284 (5th Cir., 1975). The government then petitioned for rehearing *en banc*; the Circuit denied that petition on 8 October 1975. *United States v. Byrd*, 520 F.2d 1101 (5th Cir., 1975). That was still not the end: the government filed yet another petition for rehearing and a supplemental petition for rehearing *en banc*. Circuit Judges Godbold and Ingraham, with Circuit Judge Bell dissenting, denied these petitions, "[a]ssuming in the peculiar circumstance of this case, that the government has a right to file . . ." *United States v. Byrd*, 528 F.2d 549 (5th Cir., 1976), at 550. The final act, coming late in 1976, had little effect on the proceedings discussed in the rest of this article. For that reason, for the sake of the argument, the original decision stands.
with FM 1016, two miles from the river. As they interviewed the
driver, Gary Duane Conner, through his open door, the officers noticed his
pants and shoes were muddy. The officers also looked beyond the driver’s
cab to check for hidden passengers in the cargo space, and saw several
large bundles similar to those they had seen containing marijuana. Officer
Luckey advised Conner of his rights, cut open a bundle, and decided that it
contained marijuana. Prosecutors subsequently charged Conner with
importing and possessing with intent to distribute, 675 pounds of
marijuana.138

In an oral hearing before Judge Garza, on 20 September 1973 in
Brownsville, Conner’s attorney relied on Almeida-Sanchez, and moved to
suppress the evidence by alleging that the officers had acted without
probable cause after a roving search. After considering the issue for two
weeks, Garza announced that the facts of Conner’s arrest were
“distinguishable” from Almeida-Sanchez. The sight of two cars on the
levee engaged in what appeared to be a clandestine meeting, he reasoned,
gave the officers “more than probable cause” to stop and search the van for
smuggled aliens. Moreover, Conner’s muddied clothes and his possession
of what appeared to be bundles of marijuana also gave the officers “more

Brownsville Division; Crim. No. 73-B-247).
than probable cause” to search the van.\textsuperscript{139} The judge warned that, if the actions of the Border Patrol officers in Conner’s case could not be sustained, and “only those stopped at the regular points of entry or their equivalent, such as the check points . . . can be stopped and searched,” then:

... we better make up our minds that if we are to protect our vast borders against the entrance of illegal aliens and contraband into this country, we be prepared to spend millions of dollars to assure that those who are prone to violate our immigration and smuggling laws are caught at the river’s edge when they land.\textsuperscript{140}

Garza declared that he “cannot believe that this was the intended holding of \textit{Almeida-Sanchez}.” He denied Conner’s motion to suppress the evidence.\textsuperscript{141}

Judge Garza drew on this opinion in a later, similar case. On 23 July 1973, while patrolling a stretch of Highway 83 after midnight, two Border Patrol officers stopped Joel Arturo Zamora, a college student, after observing him drive north on FM 2360, apparently from La Grulla, a

\textsuperscript{139} Judge Garza noted Judge Ingraham’s opinion that the “the holding of \textit{Almeida-Sanchez} is narrow . . . .” Moreover, the Ninth Circuit had held that a stop by agents of the Border Patrol might be based on a “founded suspicion,” which may be less than probable cause (\textit{United States v. Bugarin-Casas}, 484 F.2d 853 [9th Cir., 1973]). Garza concluded that in the given circumstances (“[t]he proximity to the river, the time of the night, an automobile making U-turns on the river levee . . . .”) the Border Patrol had “founded suspicion” upon which to base their initial stop of Conner’s van. After that valid stop, the probable cause to search for contraband also arose. \textit{United States v. Conner}, 364 F.Supp. 1168, at 1169.

village located near the Rio Grande, and turn east onto U.S. 83. The officers noticed that Zamora’s Texas license plates were from a distant county rather than locally issued, and that the car was riding low despite the fact that it carried only one male occupant. The area was a notorious transit point for aliens, so they stopped the vehicle to look for concealed passengers. When they asked his home and his destination, one of the officers later testified, Zamora grew “very nervous” before answering that he lived in Edinburgh, and had come from Rio Grande City. If that was true, Zamora had taken a circuitous route, because Rio Grande City was located on U.S. 83, not FM 2360. Then, the officers detected the pungent odor of marijuana. They asked Zamora to open the trunk. It contained four burlap sacks containing brick-sized packages of what appeared to be marijuana. Federal prosecutors indicted him for possession of 304 pounds of marijuana, with intent to distribute.\textsuperscript{142}

On 20 September, Garza heard Zamora’s attorney’s motion to suppress the evidence. He based his motion, as had Conner’s attorney, on \textit{Almeida-Sanchez}, claiming that the Border Patrol had stopped his client without probable cause, and therefore they had made an illegal search. Garza stated flatly that the case was nothing like \textit{Almeida-Sanchez}. The

\textsuperscript{141} \textit{Ibid.}, at 1169-1170.
Border Patrol officers, Garza said, was not engaged in “roving,” but stopped Zamora only a few miles from the border, after observing him driving by himself in an overloaded vehicle. Moreover, Garza noted, federal courts had previously determined that in extended border search cases the odor of marijuana was sufficient to establish probable cause for a search. On 5 October, Garza declared that because the initial stop was legal, the ensuing search was justified because of the odor of the concealed marijuana and by Zamora’s nervousness. Garza quoted his recent conviction of Gary Conner on the need to “make up our minds” about protecting the border. Garza denied the Zamora’s motion to suppress, and because Zamora had waived a jury trial, convicted him.

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143 For example, at approximately the same time as the Conner and Zamora cases, a Customs inspector detected the pungent odor of marijuana in a vehicle attempting to cross the border from Mexico, but discovered that the windows of the vehicle would not roll down. He suspected that the driver was smuggling contraband in the door panels, then smelled the odor, which inspired the agent to initiate a full search of the vehicle and to discover concealed marijuana. United States v. Perez, 364 F.Supp. 1217 (S.D.Tex., 1972; Corpus Christi Division; Crim. No. 72-C-31), at 1218. Also: United States v. Wright, 476 F.2d 1027 (5th Cir., 1973), certiorari denied, 414 U.S. 821 (1973); and, see: United States v. Alderete, 546 F.2d 68 (5th Cir., 1977), in which the Fifth Circuit judges declared that the search would have been valid anyway, since the checkpoint in question had already been determined to be a functional equivalent of border, at which probable cause (via odor of marijuana) was not required.
The Fifth Circuit trial judges endeavored to adapt to the changing rules governing vehicle stops by the Border Patrol, and found their task complicated by new technology. Around 1970, the INS installed in the surfaces of several key highways electro-magnetic sensors, called "Chekars." When a vehicle passed one of the devices, it caused a radio signal to be relayed to the Border Patrol. The nearest officers intercepted the vehicle and made the standard inquiries. The Immigration Service embedded Chekars in several roads linking interior towns such as Hebbronville to the border, including State Highway 1017.\textsuperscript{145} In May 1974, Judge Connally presided over a joint hearing and combined bench trial concerning two defendants who had been arrested three weeks apart but under similar circumstances. Both were caught with a large quantity of marijuana in the fall of 1973, after the Chekar on Highway 1017 prompted Border Patrol officers to stop their vehicles. Both were charged with possession and intent to distribute, and, both moved to suppress the physical evidence. Since many details were common to the cases, and because the only significant question presented by both defense teams concerned the

\textsuperscript{144} United States v. Zamora, 364 F.Supp. 1170, at 1172.

\textsuperscript{145} In the two years prior to spring 1974, the Border Patrol had taken into custody 312 aliens at that intersection, and had arrested 87 individuals later
admissibility of the marijuana, the parties agreed to have Connally consider the motions together.146

As the judge noted, the Almeida-Sanchez decision had called into question "certain practices followed for many years by the Border Patrol officers in making their arrests of illegal aliens and seizures of narcotics,"147 but he did not say that the decision had called into question any of his own long-standing assumptions. Instead, Connally declared that he did not accept the defense contention that the Chekar-inspired stops were controlled by Almeida-Sanchez, and that the fruits of the searches should therefore be suppressed; he noted that the present cases "bear a superficial resemblance [to Almeida-Sanchez, but] the likeness is only skin deep." The Supreme Court had not condemned all border searches conducted away from the border, but only condemned the roving Border Patrol officers' specific actions in making a warrantless search without probable cause under circumstances which did not qualify as a border search. Connally then referred to the majority opinion in Almeida-Sanchez, where the Supreme Court noted that "searches at an established station near the border, at a point marking the confluence of two or more roads that extend

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146 For the instances where the details of the cases diverged, both the government and defense lawyers reserved their right to offer additional evidence. United States v. Thompson, 390 F.Supp. 337, at 340.

from the border, might be functional equivalents of border searches." He quoted from the concurring opinion, in which Justice Powell had stated that the case did not "involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional [equivalents]." Finally, Connally noted that Justice White had written for three dissenting Justices that no one "disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border."

In light of these distinctions made by the Justices themselves, Connally declared that the ultimate "teaching" of the Almeida-Sanchez decision was that immigration stops of vehicles "selected at random or capriciously by officers . . . roving the highways [was] not constitutionally acceptable, despite the fact that the highway may be close to an international border, and known to be frequented by illegal aliens or smugglers." He ruled Border Patrol officers could continue to make warrantless stops at "a permanent (or possibly at a temporary) checkpoint . . . in close proximity to the border . . . at a spot which, from the circumstances, may be considered the functional equivalent of the border."

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147 Ibid.
148 Almeida-Sanchez, 413 U.S. 266, at 273.
149 Ibid., at 276.
150 Ibid., at 288.
If officers acted within these boundaries, then "a reasonable suspicion -- as distinguished from the concept of probable cause--- will suffice." In practice, Connally concluded, this meant that the question of whether a specific stop and ensuing search at a particular traffic checkpoint was constitutional would still necessarily be judicially determined on a case-by-case basis.  

Connally ruled that the practices followed by the Border Patrol officers involved in the two Chekar cases before him conformed to the Supreme Court's guidelines, because their immigration stops were not random or capricious: the sole criterion for selection was the tripping of the Chekar, and the Patrol stopped every car their limited numbers allowed. Moreover, the Chekar's sensors had been embedded in a concrete road at the same location for four years, which argued for the permanence of the operation. Finally, Connally did not believe that the Border Patrol's use "of scientific devices, nor its need to conserve manpower by having the same officers monitor more than one highway," would taint searches which otherwise would pass muster. Therefore, Connally ruled that the Chekar on Highway 1017 was a "permanent checkpoint," and "constitute[d] a functional equivalent of the border," and noted that: "[i]n addition to the geographical considerations, I consider it of significance that the road is

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152 Ibid., at 342-343.
153 Ibid., at 344.
sparsely traveled, yet yields a high incidence of violators both of the immigration and narcotics laws.\textsuperscript{154}

The judicial designation of the Chekar as a functional equivalent of the border was only the prelude to Connally’s decisions on the motions to suppress, which he denied on 13 May 1974. In the first case, the smell of marijuana had tipped the officer. The judge noted that upon detecting the odor, an officer could know “to a moral certainty that the vehicle was carrying contraband,” since reliance on odor was “no more than an application of the ‘plain view’ doctrine, where the presence of contraband is established by the use of the nose rather than the eyes.”\textsuperscript{155} In the second

\textsuperscript{154} Ibid., at 343.

\textsuperscript{155} The first defendant had been arrested after nightfall on 13 October 1973. After two Border Patrol officers received a Chekar radio signal, they let the defendant’s automobile pass, then pulled it over to determine the citizenship or immigration status of the occupants. The driver climbed out of the vehicle, walked towards the Border Patrol car, and identified himself to the officers as a United States citizen. Because they observed at least two other persons in the vehicle, one of the officers went to the car to verify their citizenship. As the officer approached, he smelled marijuana through an open window. He directed a passenger, who was the owner of the vehicle, to open the trunk, which contained 67 pounds of marijuana. Connally denied the motion to suppress this evidence, because under the border search exception and his designation of the Chekar as a “functional equivalent,” the officer was authorized to move from the immigration check to a Customs search, once the odor of marijuana presented him with a probable cause. Ibid., at 342. Judge Connally also relied on a distinction between “interrogation” (still viable under Almeida-Sanchez, even without a finding of the checkpoint’s functional equivalent status) and “search” (which was no longer viable). Specifically, although Almeida-Sanchez rendered unconstitutional the Border Patrol’s statutory authorization to search [under 8 U.S.C. sec. 1357(a)(3)], Connally held that the authority to
case, the arresting Border Patrol officer testified that he suspected the presence of contraband because he detected the odor of air freshener inside the car, which he knew from experience was often used to disguise the odor of marijuana.\textsuperscript{156} Connally convicted both defendants. The Fifth Circuit subsequently reversed a set of convictions concerning Chekars, interrogate [under sec. 1357(a)(1)] was unaffected by the ruling. See: \textit{Ibid.}, at 341, note 2.

\textsuperscript{156} The second defendant had been arrested on 23 September, under almost identical circumstances. \textit{United States v. Boecker}, 390 F.Supp. 337 (S.D.Tex., 1974; Laredo Division; Crim. No. 74-L-27). [Note: Boecker is cross-listed with the Thompson decision, but I will hereafter cite Thompson, since it is the first named case and it is also the super-title in the Federal Supplement.] Border Patrol officers stopped a vehicle that was apparently occupied only by the driver, although they noticed that the car appeared to be heavily loaded. The driver met the officers at the rear of the car, but when the officers asked him to open the trunk he stated that the lock was broken. One of the officers removed the keys from the ignition, and easily opened the trunk, which contained 183 pounds of marijuana. \textit{United States v. Thompson}, 390 F.Supp. 337, at 341. As in the first case, the only question for Connally was whether the evidence was admissible. In Connally's judgment, at the time of the officer's search there was not sufficient evidence to show probable cause, and so the issue once more devolved into the question of whether the search was valid under the border search doctrine. \textit{Ibid.}, at 342. The circumstances ---the heavily laden car, the smell of air freshener, and the defendant's claim about a broken lock--- also included out-of-county license plates and the driver's unlikely tale of being on his way to participate in a rodeo (despite an apparent lack of equipment). In total, Connally ruled these facts seemed odd enough to raise a "reasonable suspicion." Finally, because all the roads which joined Highway 1017 either crossed or passed near the Rio Grande, the officers could assume that any vehicle the Chekar detected had been in the vicinity of the border. Therefore, the border search exception applied, the stop was legal, and so was the subsequent search. \textit{Ibid.}, at 342-344.
including these two by Connally. The appellate judges disagreed with his conclusion that the permanent installation of a sensor transformed an empty stretch of highway into a permanent checkpoint.

VI. Judge Garza, the Functional Equivalent of the Border, and the “Second River” Doctrine

Judge Garza approached the question of “functional border equivalence” from a new perspective in a case he decided on 13 June 1974. Garza transformed the Supreme Court’s idea of functional equivalence into a model of Border Patrol procedures which he labeled as the “second river” theory. Nominally descended from the Almeida-Sanchez standard of a “functional equivalent,” the “second river” standard enabled Garza to decide in most subsequent cases that almost any search by a Border Patrol officer, but especially searches conducted at checkpoints, fell within the border search criteria.

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157 United States v. Thompson, reversed without opinion. See: United States v. Olivarez, 527 F.2d 1174 (5th Cir., 1976), at 1175. Later, however, the Fifth Circuit determined that the discernible odor of freshly-applied air freshener might also establish probable cause to search a vehicle. United States v. Reyna, 546 F.2d 103 (5th Cir., 1977). The same was true for mothballs. United States v. Mireles, 570 F.2d 1287 (5th Cir., 1978), at 1291, note 4.
159 Ibid., at 1149.
The judge first employed the phrase "second river" to describe the Border Patrol checkpoint on Highway 1017, nine miles northwest of La Gloria, and some forty miles from the port of entry at Rio Grande City. He noted that the La Gloria checkpoint was strategically located "in an area and along a route commonly used for the smuggling of aliens and contraband into the interior of the country." Garza further commented that two other checkpoints in the Southern District, at Falfurrias and Sarita, were located at similarly strategic sites, and therefore his reasoning also applied to them.

On 13 February 1974, a Border Patrol officer at the La Gloria checkpoint stopped a car and he noticed was riding low. As he spoke to the occupants, Rodolfo T. Fuentes and son, the officer detected the odor of marijuana. He then requested that Fuentes open the trunk, but Fuentes claimed that he did not have a key. The officer noticed the key to the trunk hanging on the ring with the ignition key, opened the trunk himself, and discovered 660 pounds of marijuana. On 10 May, Judge Garza conducted a hearing in Brownsville to consider the defendant's motion to suppress the

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160 Ibid., at 1151.
161 Ibid., at 1147. In fact, other judges of the Southern District subsequently declared (although without explicit reference to a "second river") these Border Patrol checkpoints were permanent, and therefore functional equivalents of the border: Falfurrias, in United States v. Leal, 547 F.2d 1222 (5th Cir., 1977); and Sarita, in United States v. Reyna, 572
evidence. The government called two witnesses, the officer who made
the search and arrest, and the Assistant Chief of the U.S. Border Patrol
Station at McAllen. The latter testified that the checkpoint was ordinarily
open only during one eight-hour shift per day, but it was a standing policy
to stop every car for an immigration check. He admitted that the Border
Patrol did not always establish the checkpoint in the same location, but
moved it along Highway 1017.162 Responsively, the defense attorney
contended that the testimony proved that the La Gloria site was not a
permanent checkpoint or a "functional equivalent" of the border, and
therefore, the warrantless search of his client's car was not a border search
under Almeida-Sanchez.163

F.2d 515 (5th Cir., 1978), rehearing denied, 575 F.2d 881 (5th Cir.,

163 Ibid., at 1146-1147. In addition, he cited the Southern District trial
decisions recently reversed by the Fifth Circuit. One was United States v.
Byrd, 483 F.2d 1196 (5th Cir., 1973), previously described. The second
was United States v. Speed and Rainer, in which Border Patrol agents
stopped a driver at a temporary, that is, part-time checkpoint at Falfurrias,
65 miles north of the border. The officers arrested Speed after a search
for aliens revealed that he was transporting some forty pounds of
marijuana in the trunk of his car. Southern District Judge Owen D. Cox of
the Corpus Christi Division (whom President Nixon appointed in 1970),
noted that the checkpoint was "non-permanent," in that it was not staffed at
all hours of the day and was shifted up and down the same stretch of the
highway. United States v. Speed and Rainer (S.D.Tex., 1973; Corpus
Christi division; Crim. No. 72-C-70). The Fifth Circuit applied the
Almeida-Sanchez standards, seized upon the characterization, and reversed
the conviction, ruling that the temporary checkpoint could not be
Judge Garza declared that the odor of marijuana established probable cause for the search. He might have concluded his decision with that single observation. But Garza went further because he believed that *Almeida-Sanchez* had left open the significant question of "what is and what is not an 'established,' 'fixed,' or 'permanent' checkpoint." Garza stated that ---like Judge Connally--- it was his belief that the Supreme Court had reacted to the "capricious and whimsical search" the Justices considered in *Almeida-Sanchez*; that is, criticized its manner, but not its location. Garza declared that he "simply cannot believe" the Court "meant to say that the Fourth Amendment rights . . . rise and fall with the presence or absence of 'permanent' electrical outlets, large steel signs and concrete buildings." A movable checkpoint, he said, relocatable within a small strategic section of the highway, administered regularly and routinely requiring all travelers to stop, was not arbitrary. Realities of illegal immigration and illicit narcotics importation demanded the fluid arrangements the Border Patrol employed at La Gloria. By "virtue of handling the Brownsville Division of the Southern District of Texas for over thirteen years and having lived in the Rio Grande Valley all my life," he declared, "I have become intimately acquainted with immigration methods and problems peculiar to border areas . . . [and] a more complete

comprehension of them is necessary to understand why the La Gloria checkpoint and those similarly situated are border equivalents and why searches carried out at such operations are reasonable."  

Judge Garza enumerated the "three types of aliens passing through the Rio Grande Valley." First, non-citizens who were authorized by law to travel or to work in the U.S. Second, temporarily admitted aliens whose mobility was restricted according to the terms of border-crossing cards (officially, "I-186" forms), which allowed the bearer to travel freely in an area within twenty-five miles from the border, normally for a seventy-two hour period. But the third class of alien, Garza noted, consisted of "the legendary mojados, who literally swim the river, often under the cover of night." A significant number from this third category, Garza stressed,


were caught at the Border Patrol’s traffic checkpoints, which acted as a “second river” for these would-be immigrants to cross before they could “vanish into the Latin communities in the north.” He believed that “because of its strategic location” the checkpoint was the first place this third class of immigrant came under the scrutiny of the INS. Therefore, a traffic checkpoint “serves the same function as the several international bridges that span the Rio Grande”

As Judge Garza interpreted Almeida-Sanchez, the La Gloria checkpoint was permanent, strategically located, and non-arbitrary (because is was a barrier to all). These facts were sufficient to define a “functional equivalent” of the border. Judge Garza noted that the Fifth

John R. Brown, a Texan and an “Unlikely Hero” of the civil rights movement, in a labor case in 1961. Brown explains that “migrant Mexican workers [are] referred to traditionally as ‘wetbacks.’” Brown is not promoting the term, but does not condemn “tradition,” either. Johnson v. Kirkland, 290 F.2d 440 (5th Cir., 1961), at 441. Also: Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court’s Brown Decision Into A Revolution For Equality (New York: Simon and Schuster, 1981). On 6 November 1970, during the investiture in Houston of U.S. District Judge Carl O. Bue, Jr., Chief Judge Connally suggested that, if Bue were to visit Brownsville, he could help Judge Garza, who had “nothing to do but try a wetback now and then.” Transcript of the proceedings of Bue’s swearing in (no title), 24; held by the Houston Metropolitan Research Center, in the papers of Carl O. Bue, Jr. In addition to the district judges, Connally solicited remarks from Fifth Circuit Chief Judge Brown (a longtime friend and professional benefactor of Bue), and Houston lawyer Leon Jaworski, the 1970 president-elect of the American Bar Association. Ibid.


Ibid., at 1150.
Circuit judges agreed with him that *Almeida-Sanchez* holding was narrow,\(^{168}\) as had his colleague Connally, who was as "widely versed in subject of alien control in border areas" as Garza himself, due to his own long service in the border divisions. Familiarity with border realities, Garza implied, not just knowledge of the law, was required to come to a proper conclusion in Border Patrol cases.\(^{169}\) The guiding principle, he said, was "reasonableness [but] in determining reasonableness, the needs of society must be balanced with the rights of individuals vital to our concept


\(^{169}\) *United States v. Fuentes*, 379 F.Supp. 1145, at 1152. With respect to the Fifth Circuit's reversal of Cox's conviction of the defendant in *Speed*, Garza noted the fact that the reversing appellate opinion was written by Circuit Judge Lewis R. Morgan; yet Morgan participated in an opinion concerning the Sarita checkpoint, and approved it as a permanent "functional equivalent." *United States v. Merla*, 493 F.2d 910 (5th Cir. 1974). Another case, from the Ninth Circuit, presented a larger problem. The Ninth Circuit had affirmed a conviction arising out of a checkpoint search, in *United States v. Bowen*, 462 F.2d 347 (9th Cir., 1972), and then granted an *en banc* rehearing. *United States v. Bowen*, 485 F.2d 1388 (9th Cir., 1973). The circuit judges ultimately affirmed the original conviction, because they ruled *Almeida-Sanchez* was not retrospective; however, they also ruled that in the future the decision would apply to checkpoints. *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974). The Supreme Court affirmed the decision with regard to retrospection, but not with regard to *Almeida-Sanchez* extension to checkpoints. *Bowen v. United States*, 422 U.S. 916 (1975). Judge Garza declared that even though the Ninth Circuit decision was not controlling in the Fifth Circuit, he still found that it was "interesting to note that out of the thirteen judges who participated in the Bowen decision, only Chief Judge Richard H. Chambers and Judge Wallace lived on or near the Mexican border and both dissented in the Bowen opinion. *United States v. Fuentes*, 379 F.Supp. 1145, at 1153. For the dissents, see: *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), at 968.
of liberty.” It was unfortunately true, Garza complained, that “it does not appear to be widely held knowledge among either the citizenry or the judiciary that the American crossing the river steps into a zone to which are also admitted tens of thousands of aliens daily who, unlike their American counterparts, do not have the same right to travel anywhere in our nation.” The only way to catch violators was to check everyone soon after they leave the area of the border. “Viewed in this posture,” he concluded, “checkpoints bear a rational relationship to a legitimate governmental interest.”

Judge Garza believed that a checkpoint’s “very minor intrusion” onto Fourth Amendment rights was balanced by the “all but impossible” task that would be required of the Border Patrol if it had to dispense with it. The judge again invoked his opinions in the Conner and Zamora cases, and concluded that if the Supreme Court’s Almeida-Sanchez decision required the Border Patrol to eliminate checkpoints, “then we had better be prepared to spend tens of millions of dollars annually to assure that those who are prone to violate our immigration laws are caught at the river’s edge when they land.” And Garza once more declared that he “cannot believe” this was what the Supreme Court intended. On 31 May 1974, Fuentes appeared with his attorney, waived a jury, and submitted to a

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bench trial. Unsurprisingly, Garza immediately convicted Fuentes.\footnote{Ibid.}

The Fifth Circuit upheld the conviction on appeal, but did so without
publishing an opinion. As a result, the question whether or not the "second
river" was a viable model for functional equivalency went unanswered.\footnote{Ibid., at 1153.}

Garza returned to the "second river" theory, which the Fifth Circuit
had neither accepted nor repudiated in \textit{Fuentes}, in another 1974 case.\footnote{\textit{United States v. Fuentes}, 517 F.2d 1401 (5th Cir., 1975).} It
also concerned a search conducted at the La Gloria checkpoint. Again, the
Border Patrol officer on duty noticed that the automobile he had stopped
was riding low. The driver, Enrique Alvarez-Gonzalez, an American
citizen, told the officer he was returning home to Kingsville from Zapata.
If true, then he was driving a more roundabout route than necessary.
According to the officer's subsequent testimony, Alvarez-Gonzalez
willingly opened the trunk when he was asked, even though it contained
152 pounds of marijuana.\footnote{\textit{Alvarez-Gonzalez} was indicted for possession
with intent to distribute, filed a motion to suppress the marijuana. Like so
many others caught in the Border Patrol's net, Alvarez-Gonzalez was
willing to bet everything on the admissibility of the marijuana. He waived

Brownsville division; Crim. No. 74-B-277).
his right to a jury trial and submitted his case to Garza for a bench
decision. The judge denied the motion and found Alvarez-Gonzalez guilty
on 10 January 1975, but because a series of cases then pending before the
Supreme Court were concerned with the legality of Border Patrol searches
at fixed checkpoints, Garza offered to delay sentencing until the Supreme
Court ruled on the question. Alvarez-Gonzalez elected to wait.\textsuperscript{176}

On 30 June 1975, the Supreme Court decided three cases related to
Border Patrol checkpoints. Of the three cases, Judge Garza considered

\textit{United States v. Ortiz},\textsuperscript{177} which had concerned a search at a fixed

\textsuperscript{175} \textit{United States v. Gonzalez- Alvarez} [sic], No. 75-3537. [Note: the
original written opinion of the appeal was previously reported at 528 F.2d
1056 (5th Cir., 1976), but it was withdrawn by the Fifth Circuit.]
\textsuperscript{176} Alvarez-Gonzalez then formally waived his right to be sentenced within
sixty days of the date of his conviction. This limit was established under
\textsuperscript{177} \textit{United States v. Ortiz}, 422 U.S. 891 (1975). The Fifth Circuit
subsequently held that \textit{Ortiz} applied retroactively. See: \textit{United States v.
Martinez}, 526 F.2d 954, 955 (5th Cir. 1976). The remaining two Supreme
Court cases, which according to Garza did not affect his decision, were:
\textit{Bowen v. United States}, 422 U.S. 916 (1975), discussed earlier; and:
\textit{United States v. Brignoni-Ponce}, 422 U.S. 873 (1975). In \textit{Brignoni-Ponce},
issued 30 June 1975, the Court offered further clarification of the Fourth
Amendment’s status in “roving” border patrol operations. The Justices
declared that an individual’s apparent Mexican ancestry did not justify
suspicion that the individual was an alien in the country illegally. The
Court ruled that a border patrol agent could not stop persons for
questioning about their citizenship on “less than a reasonable suspicion that
they may be aliens.” As in \textit{Almeida-Sanchez}, the Justices in \textit{Brignoni-
Ponce} did not prohibit roving patrols. Rather, the decision permitted
agents on roving patrols to detain occupants of a vehicle for a brief
interrogation when the agents became “aware of specific articulable facts,
checkpoint, to be most relevant to *Alvarez-Gonzalez*. The definition of functional equivalent was not a question in *Ortiz*, but in Garza's view it
together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the
country." *Ibid.*, at 884. The Court offered examples of factors which may
be taken into account when judging the appropriateness of a stop under the
"reasonable suspicion" standard. The list of permissible "articulable"
factors included previous experiences with alien traffic, close proximity to
Although the specific ruling disallowed reliance on the appearance of
Mexican ancestry as cause for a stop, the Justices accepted the government's
claim that "trained officers can recognize the characteristic appearance of
persons who live in Mexico, relying on such factors as the mode of dress
Amendment and the INS: An Update on Locating the Undocumented and a
Discussion on Judicial Avoidance of Race-Based Investigative Targeting in
by law enforcement personnel of these sorts of "clues" of criminal
behavior has become controversial as "racial profiling." See: S.K.
Bardwell and Lori Rodriguez, "HPD to Collect Profiling Data: Police
Chief, Mayor Want to Find Out If Minorities Unfairly Targeted," *Houston
Chronicle*, 12 August 1999, 1A, 15A. The contemporary national
controversy over similarly race-based profiling and the suspected use by
local and state police of "pretexts" for stopping and searching the vehicles
of suspected drug dealers and couriers is also discussed in Jeffrey
1999). The DEA has developed and distributed a "Drug Courier Profile,"
which many critics of the drug war question as an infringement of the
Fourth Amendment; however, most critics do not examine the practice of
profiling in the context of border search doctrine. But, the recent
profiling controversy has led the Customs service to change its search
policies at airports. Public pressure from real and threatened lawsuits, but
not yet judicial decisions, have mandated these changes. See: Robert L.
Jackson, "Customs Adopts New Rules for Airport Drug Searches," *Houston Chronicle*, 12 August 1999, 15A. The Border Patrol has
similarly responded to negative public perceptions, most notably by casting
its officers as life-savers during the hot Texas summers. See: "Fewer
Immigrants Dying This Year While Trying to Cross South Texas," *Houston Chronicle*, 6 July 1999, 17A.
supported his *Fuentes* holding because *Ortiz* did “not cast any doubt
upon the Supreme Court’s earlier suggestion that a checkpoint may be the
functional equivalent of the border.” Most importantly, the Court’s *Ortiz*
opinion did not call into question the “separate and independent ground
asserted in *Fuentes*” under the theory of the “second river,” a phrase
Garza now explicitly equated to the Supreme Court’s “functional equivalent
of the border.” ¹⁷⁹ Accordingly, Garza declared, the “second river theory
remains a viable basis for upholding searches at the La Gloria checkpoint
without any reference to the presence or absence of probable cause or
reasonable suspicion.”¹⁸⁰ He took pains to construct *Ortiz* as a support for
his theory, but did not need to invoke it to reaffirm the conviction.
Instead, he declared the search of Alvarez-Gonzalez’s car was legal on its
face.¹⁸¹

Deciding Alvarez-Gonzalez’s appeal, the Fifth Circuit judges neither
formally adopted nor rejected Garza’s analogy of a “second river.”

Rather, on 27 October 1976, the Circuit judges noted that permanence

¹⁸¹ As Garza noted, this conclusion was “buttressed” by the Fifth Circuit’s
opinion (post-*Ortiz*) in *United States v. Santibanez*, 517 F.2d 922 (5th
Cir., 1975), where the Circuit affirmed Garza’s denial of a motion to
suppress evidence that resulted from a search ---made on probable cause
gained during an immigration check--- at the La Gloria checkpoint, which
alone did not equal functional equivalence. Border Patrol officers could conduct border searches, that is, searches without probable cause, "only at the border or its functional equivalent."\textsuperscript{182} The appellate judges declared that their earlier unpublished opinion in \textit{Fuentes} had affirmed only the probable cause justification for that search, not Garza's secondary holding that the La Gloria checkpoint was a functional equivalent of the border.\textsuperscript{183}

To settle La Gloria's status, the Circuit remanded the \textit{Alvarez-Gonzalez} case, with instructions that Garza consider several explicit factors in making his amended decision. In determining whether an individual Border Patrol checkpoint was a functional equivalent of the border, a trial judge must find that the site exhibited three characteristics.\textsuperscript{184} First, the INS must operate the La Gloria site as if it was a permanent checkpoint, rather than a roving patrol or a "radically shifting" roadblock. Second, the ratio of international to domestic traffic passing through the checkpoint

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\textsuperscript{182} \textit{United States v. Alvarez-Gonzalez}, 542 F.2d 226 (5th Cir., 1976), at 227. [Note: the original written opinion, \textit{United States v. Gonzalez-Alvarez}, No. 75-3537, was previously reported at 528 F.2d 1056 (5th Cir., 1976), but it was withdrawn by the court.]

\textsuperscript{183} \textit{Ibid.}, at 228.

\textsuperscript{184} \textit{Ibid.}, at 229. The Fifth Circuit had previously considered these factors, in another case, but wished to make the criteria more explicit. See: \textit{United States v. Hart}, 506 F.2d 887 (5th Cir., 1975), vacated and remanded, 422 U.S. 1053, and reaffirmed on remand, 525 F.2d 1199 (5th Cir., 1976).
must indicate its connection to the border. The Circuit judges noted, for example, that the presence of “continuing and significant percentage of domestic traffic” argued against treating the checkpoint as a “functional equivalent.” If international traffic outstripped domestic, however, then all travelers could be reasonably treated as though they had recently crossed the border. Third, the judge must evaluate the degree to which a checkpoint regulated traffic coming from the border, that is, was the checkpoint also a chokepoint? The judges summarized these factors as “relative permanence, relatively minimal interdiction of domestic traffic, [and] a capability to monitor portions of international traffic not otherwise practically controllable.” The appellate judges did not intend their list to be exclusive, so Garza “should feel free on remand to consider whatever else [he] deem[ed] appropriate.”

Judge Garza then heard testimony that prior to 1973, the Border Patrol had shifted the checkpoint along Highway 1017, but after that date had established the La Gloria checkpoint at a single, fixed location. True, there were no permanent buildings at La Gloria. But the checkpoint featured “permanent road signs, a light pole, an electric power drop,

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telephone lines and a paved apron for secondary inspections.\footnote{186}  Moreover, although personnel limitations prevented the Border Patrol from operating the checkpoint continuously, the INS classified the La Gloria site as one of its permanent checkpoints. Garza examined evidence offered by the INS regarding traffic patterns at the checkpoint and concluded that "the interdiction of domestic traffic at the La Gloria checkpoint is relatively minimal."\footnote{187} Therefore, on the basis of the Fifth Circuit’s three positive factors, Garza ruled that the La Gloria checkpoint was operating as a "functional equivalent" at the time the Border Patrol stopped Alvarez-Gonzalez. The Fifth Circuit appellate judges affirmed Alvarez-Gonzalez’s conviction on 25 October 1977.\footnote{188}

\footnote{186} Alvarez-Gonzalez’s attorney attempted to prove that these permanent fixtures were not yet erected when the search took place in 1974, but Garza found that they were; the circuit concluded that "his factfinding [was] not clearly erroneous." United States v. Alvarez-Gonzalez, 561 F.2d 620 (5th Cir., 1977), at 622, note 4.

\footnote{187} Ibid., at 622.

\footnote{188} The circuit judges added to their three-pronged test the observation that a permanent checkpoint provided "fair notice" of its existence, and limited an officer’s discretion to choose which travelers to stop and search. Ibid., at 622-623. With this decision, the Fifth Circuit diverged from the Ninth Circuit’s decisions regarding functional equivalence. In Alvarez-Gonzalez, the Fifth Circuit encouraged trial judges to weight decisions in favor of finding equivalence, by making the threshold a majority of international traffic. However, one of the trilogy of Supreme Court cases Garza had discounted in Fuentes, United States v. Bowen, 500 F.2d 960 (9th Cir., 1974), was later affirmed by the Supreme Court, although on other grounds, 422 U.S. 916 (1975). Bowen featured the Ninth Circuit’s limitation of the “functional equivalence” label to checkpoints where all but an insignificant percentage of traffic was international. The Fifth Circuit
In affirming Judge Garza’s decision, the Fifth Circuit judges only once mentioned his “second river” theory, and only in a footnote. Moreover, they misrepresented Garza’s theory by stating he initially approved the placement of the La Gloria checkpoint because it acted as a “second river” to the second category of aliens, the temporarily- but legally-admitted Mexican nationals, those individuals who carried border-transit forms. The Circuit understood that the “second river” operated to prevent these aliens from traveling beyond the twenty-five mile limit. This mis-characterization led the appellate judges to note that the express purpose of a “functional equivalent” was to prevent illegal entry, not “overextended” entry to the nation’s interior. The Circuit judges felt that La Gloria’s alleged status as a “second river” had not advanced it’s status as a functional equivalent of the border, although they said “second river” status was “a factor deserving attention.”

It is likely that the Fifth Circuit would have explicitly approved the “second river” theory if the judges had interpreted that theory as Garza actually formulated it, that is, as a secondary barrier to the third category of alien, the “legendary mojados.” The Fifth Circuit agreed with Garza, agreed with Garza and refused to find, as the Ninth Circuit had in Bowen, that the ratio of international to domestic traffic was dispositive when standing alone. United States v. Alvarez-Gonzalez, 561 F.2d 620, at 621, note 3. Also: Rosenzweig, “Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment,” 1119. 189 United States v. Alvarez-Gonzalez, 561 F.2d 620, at 624, note 8.
for example, that the many permutations of alien smuggling the Border Patrol encountered along the U.S.-Mexican border, had two elements: “almost invariably to be found in every scheme: a rendezvous on the Texas shore of the Rio Grande, with the aliens being responsible for fording the river on foot and presenting themselves there for departure inland.” That is, the judges admitted that it was more likely for the Border Patrol to encounter aliens who had already made it to the Texas side of the international boundary, and not would-be travelers still in Mexico.\(^{190}\) Therefore, the Border Patrol officers staffing checkpoints were most concerned with people who had successfully crossed the \textit{first} river, which Judge Gee, the author of the majority opinion, admitted was “inappropriately named Rio Grande[,] in that aliens can swim, wade, and in some places walk across it easily.”\(^{191}\)

Circuit Judge Goldberg dissented. The author of the “two hat” formula in \textit{McDaniel}, Goldberg had also written in that opinion that “proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements.”\(^{192}\) He feared that the Fifth Circuit had abandoned that principle for the sake of convenience. The majority

\(^{190}\) \textit{Ibid.}, at 623.
\(^{191}\) \textit{Ibid.}, at 625.
\(^{192}\) \textit{United States v. McDaniel}, 463 F.2d 129, at 132-133.
opinion in *Alvarez-Gonzalez*, he said, was “inconsistent with the standards we announced in our earlier opinion in this very case,” which he had only joined “in the hope that it charted the moderate course adumbrated by the Supreme Court in *Almeida-Sanchez.*”\(^{193}\) As evidence of inconsistency, Goldberg offered the fact that the Fifth Circuit recently refused to extend functional border equivalent status to a traffic checkpoint near Freer, on the grounds that “the functional equivalency label is one not lightly to be bestowed.”\(^{194}\) But now the Fifth Circuit judges were assigning that label to “a garden variety permanent checkpoint.”\(^{195}\)

Goldberg declared that he was “not insensitive to the law enforcement interests,” and admitted that the majority of the panel “may well be correct that allowing searches at La Gloria without probable cause would increase the detection of aliens illegally entering the country.” But many aliens might also be discovered, he suggested, if the Border Patrol operated the site “simply as a permanent checkpoint,” where officers were “free to stop all cars, to question all occupants, and to search whenever after the questioning there was probable cause under the none-too-stringent standards that have emerged in this context.” Goldberg argued that the Supreme Court had established this latter procedure to balance competing

\(^{193}\) *Ibid.*, at 626.
\(^{194}\) See: *United States v. Calvillo*, 537 F.2d 158 (5th Cir. 1976), at 160.
public and private interests, and to maintain that balance, he believed that Alvarez-Gonzalez’s conviction should have been reversed.\textsuperscript{196}

VII. Conclusion: Flirting With Decriminalization, Committing to Militarization

Like the border itself, the “functional equivalent” proved to be an inhospitable environment for cultivating strict judicial standards.\textsuperscript{197} All of the judicial tests or models were subjective, and were predicated on the trial judge’s exercise of discretion. However, although the Fifth Circuit’s three-pronged test in Alvarez-Gonzalez was more precise than the Supreme Court’s two examples in Almeida-Sanchez, the prongs were less evocative than Judge Garza’s idiosyncratic theory of the “second river.” The “second

\textsuperscript{195} United States v. Alvarez-Gonzalez, 561 F.2d 620 (5th Cir., 1977), at 629-630.
\textsuperscript{196} Ibid. The decision was not reversed, and in 1978, the Fifth Circuit referred to the La Gloria Border Patrol checkpoint as both “permanent” and the “functional equivalent of border.” United States v. Robinson, 567 F.2d 637 (5th Cir., 1978), rehearing denied, 570 F.2d 949 (5th Cir., 1978), certiorari denied, 439 U.S. 819 (1978). Moreover, without a demonstration of changed circumstances, the Circuit declined to reevaluate a checkpoint location once a judicial determination had been made that it met the criteria to be a functional border equivalent. See: United States v. Dreyfus-de Campos, 698 F.2d 227 (5th Cir., 1983), certiorari denied, 461 U.S. 947 (1983).
\textsuperscript{197} For attempts by other courts in the Fifth Circuit to define “functional equivalent,” see: “Note, Border Zone Search Law: The Search for a
“second river” theory had practical advantages over both the Supreme Court and the Fifth Circuit models. From Judge Garza’s perspective and those of other Southern District trial judges serving on the border during the early phase of the war on drugs, the “second river” gave a concrete expression to an abstraction, the “functional equivalent of the border.”

Garza’s rule was a “common sense” justification of the broadest exercises of judicial discretion. A trial judge could apply this model to explain and justify decisions to prosecutors, defendants, and other judges on the federal bench. This was not the case with many of the Supreme Court’s “extended border search” mandates. In January 1976, U.S. District Judge Robert O’Conor, Jr., Connally’s successor in the Southern District’s Laredo division,198 both employed the Fifth Circuit’s “three-prong” test, and invoked Garza’s “second river” theory in an “extended” border search case, in order to declare that the Border Patrol traffic checkpoint near the intersection of Highway 649 and Highway 16, one mile east of Randado,

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met the Supreme Court's criterion to be considered a "functional equivalent" of the border.\textsuperscript{199}

During the 1970s, as Garza, Connally, and other federal judges were developing "hawkish" rules of engagement for the war on drugs, many Americans, including President Jimmy Carter, were attracted to the "dovish" notion of decriminalization.\textsuperscript{200} It was a brief flirtation.\textsuperscript{201} Garza's warning that the U.S. must "be prepared to spend millions of dollars" to defend the border against "aliens and contraband" proved very conservative. The federal campaigns to end the traffic in drugs and immigrants continues, has cost billions of dollars, and remains a heavy burden on federal courts.\textsuperscript{202} The two problems Garza conflated in his "second river" theory have been unified as well in the public imagination,

\textsuperscript{199} United States v. Wilson, 432 F.Supp. 223 (S.D.Tex., 1976; Laredo Division; Crim. No. 75-L-44).


political rhetoric, and law enforcement policy. As a result, the Border Patrol labored continuously under its dual congressional mandates. By the end of the decade, the federal government was mired in twin wars on drugs and aliens, and over the years both have taken on truly martial aspects. And as a result of its central role in the


204 By the 1990s, the Border Patrol was a major player in the management of the border war on drugs, especially after the government declared the Southwestern border a “High Intensity Drug Trafficking Area” (HIDTA). This designation implied an increased focus of interdiction, more coordination of military, law enforcement, and intelligence agencies, and higher federal funding. Office of National Drug Control Policy, National Drug Control Strategy: A Nation Responds to Drug Use (Washington, D.C.: U.S. GPO, 1992), App. A, 131-136. Since 1992, the INS’s annual budget has tripled, to nearly $4 billion. The INS in 1999 has nearly 15,000 more employees than it had when President Clinton took office, and employs more officers authorized to carry guns than any other federal law enforcement agency. Daniel W. Sutherland, “Reinventing the Border: Will Congress Finally Reform the INS?,” Reason 30 (1 April 1999).

"militarization" of the southwest border, the Border Patrol has been charged with violating the civil and human rights of aliens.\textsuperscript{206} Legal scholars, civil libertarians, and some federal judges have complained that judicial acceptance of warrantless searches removed from the border, in some cases far removed, has "watered down" the Fourth Amendment.\textsuperscript{207} Certainly, this result not Garza's goal in originating the "second river." In retrospect, however, his model often seemed directly to counter the Burger Court's attempt to maintain the Fourth Amendment as a bulwark against law enforcement's creeping assault on procedural rights. But Connally's and Garza's decisions were not isolated. In 1977, then-Associate Justice and current Chief Justice William Rehnquist declared for the majority of the Supreme Court that the border search exception was "as old as the Fourth Amendment itself," and therefore, "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at

\begin{footnotes}
\footnotetext[206]{Dunn, The Militarization of the U.S.-Mexico Border, 83-90.}
\footnotetext[207]{Vallance, Prohibition's Second Failure, 40-41. Also: Joseph D. Davey, "The Death of the Fourth Amendment Under the Rehnquist Court: Where is Original Intent When We Need It?," Journal of Crime and Justice 17 (1994): 133-138.}
\end{footnotes}
the border.” In some other context, Rehnquist’s qualifying phrase, “at the border,” might be the definitive judicial expression. With regard to the boundaries of the “border search exception” to the Fourth Amendment, however, it is not absolute. The line separating a lawful from an unconstitutional search has rarely been as neat as a line found on a map.

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Chapter Seven: "An Arm of the Court": Judicial Delegation of Case Management in Prison Reform Litigation in the 1980s

We, and the lower federal courts, are courts of limited jurisdiction. Our task is not to correct all social ills, however egregious they may seem to us as individuals. The keys to the Kingdom are not in our hands. . . . Here, to his credit, the district judge never strayed from his very limited role; in this case, I believe that we have done likewise.

Fifth Circuit Judge John R. Brown, Jr. (1986).¹

In the 1980s, school desegregation faded in importance as federal district judges passed responsibility for monitoring settlements to multi-ethnic citizens’ committees and Task Forces.² By that decade, lawsuits to reform prisons and jails through federal court interventions had created a major new responsibilities in judicial management. Perhaps more so than in school litigation, the federal district judges overseeing jail litigation

² Citizens’ committees were important tools of judicial management of school integration in the 1970s. During the 1980s, judges vested more oversight responsibility in school cases to lay committees. Their members consulted with school boards, monitored progress or lack of it toward the establishment of a unitary system, and reported to the judge regarding compliance with court orders. The fact-gathering functions could have been undertaken by the plaintiffs or government intervenors. Federal district judges delegated monitoring responsibilities to the lay panels instead, in part because judges learned that resolution of the school desegregation controversy ultimately depended on gaining community support for court orders. See: “Desegregation Suit Settled in Houston,” Washington Post, 28 November 1984, A12; and: “HISD Freed From
were “managerial”: they took on the “additional functions of local legislator and executive.”

Although the 1960s had brought the flowering of both the civil rights movement and the revolution in criminal procedure, the issue of prisoners’ civil rights was slow in coming to the federal judicial attention. The U.S. Supreme Court had declared in 1958 that the Eighth Amendment’s ambiguous proscription of “cruel and unusual” criminal punishments “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Under this unhelpful criterion, federal district judges had simply adopted a “hands off” policy regarding prisons and jails. Throughout the 1960s, federal judges withheld judgment and deferred to the professional administrators in matters of discipline and punishment.

Desegregation Suit,” U.P.I. wire service, 31 August 1989. Also, see chapter five of this dissertation.


Late in the decade, however, "evolving standards of decency" and the rising number of prisoner's complaints inspired federal district judges to abandon the "hands off" policy. In a 1968 opinion, Fifth Circuit Judge Frank Hooper noted "phenomenal" growth in the number of federal civil rights suits filed by, or on behalf of, inmates. He had identified the trend in its early stages. In 1966, when the federal courts first reported the statistic, prisoners filed 218 civil rights claims under section 1983. Twelve years later, inmates filed 9730 section 1983 complaints. The increase in prisoner's civil rights litigation aggravated the already serious congestion

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8 Turner, "When Prisoners Sue," 611.
of federal court dockets. Fortunately, many inmate complaints were uncomplicated and required only that the federal courts order prison administrators either to cease or to initiate specific practices.

For example, in a 1967 decision the Fifth Circuit established that it was inherently unfair to try a defendant wearing a prison uniform, because this could bias a jury and interfere with a defendant's right to a presumption of innocence. In 1969, the Supreme Court invalidated a regulation which banned prisoners from assisting one another in the preparation of petitions. The Court held that the rule denied indigent and illiterate inmates' right to seek to redress grievances in court. In the Southern District in 1972, on First Amendment grounds Judge Singleton condemned prison and jail officials' censorship and withholding of inmate mail, including correspondence with attorneys. But even simple cases

added up. During the mid-1970s, the Southern District was among the top five federal districts hearing prisoners’ cases. The Southern District judges saw between two hundred fifty and four hundred section 1983 actions annually.\textsuperscript{13}

During one four-month period in summer 1972, plaintiffs of all kinds filed 548 new civil actions in the Houston Division of the Southern District. Fifty-four were section 1983 complaints by inmates. Twenty-nine of these suits alleged that the plaintiff was a victim of unconstitutionally harsh conditions or arbitrary discipline. After noting these figures, Judge Bue understated the matter: “[i]t is clear that public and legal scrutiny of the prison systems is now underway in this country.”\textsuperscript{14} It was also clear that federal judges were no longer honoring the “hands-off” tradition.

Judge Bue was then scrutinizing conditions in the Harris County jails. In 1972, Lawrence Alberti and other county prisoners filed a section 1983 prisoner complaints of discipline, court access, and abridged speech through censored mail. \textit{Wolff v. McDonnell}, 418 U.S. 539 (1974), 574-578.

\textsuperscript{13} Turner, “When Prisoners Sue,” 658, see appendix A.

\textsuperscript{14} \textit{Dreyer v. Jalet}, 349 F.Supp. 452 (S.D.Tex., 1972), 488. Prisoners did not only file civil rights suits. Many sought \textit{habeas corpus} review in the federal courts. But the majority of inmate-initiated lawsuits were civil rights complaints. Their complaints comprised eighteen percent of all new civil actions filed nationwide in fiscal year 1970, when approximately 16,000 individual prisoners petitioned for some form of relief. \textit{Ibid.}, 485, esp. note 15.
complaint in the Southern District, as a class action on behalf of past, present, and future Harris County inmates. Alberti alleged that crowding and poor conditions in the jails amounted to the cruel and unusual punishment. The lawsuit named as defendants members of the County Commissioners Court and the Sheriff's Department, which administered county detention facilities. Bue conducted extensive hearings and visited the jails. In 1975, in Alberti v. Sheriff of Harris County, the judge ruled for the plaintiffs. Bue declared that approximately 2500 county inmates, some who had not yet been tried and others who were only awaiting transfer to a state prison, had seriously and unconstitutionally overcrowded the jail, which was designed to accommodate 1150 inmates.¹⁵

Inmate overcrowding was at the root of many complaints about Texas state prisons. In 1971, Dr. George J. Beto, the director of the Texas Department of Corrections (TDC), admitted to an assembly of state and federal judges visiting a Huntsville prison that there was a "degree of preposterousness" in the fact that TDC housed 14,700 prisoners, a figure which was second only to California’s inmate population. Many of the inmates, Beto argued, should have received probation rather than being

sentenced to prison time.\textsuperscript{16} When Beto retired the next year, TDC held
more than 16,500 inmates in fourteen separate prison units located in the
southern and eastern regions of the state.\textsuperscript{17} There were 25,000 prisoners
behind TDC bars in Texas in 1978. That year, U.S. District Judge William
Wayne Justice of the Eastern District of Texas began hearings in \textit{Ruiz v. Estelle}, one of the largest and most controversial prison cases ever. The
Ruiz case was filed in the Eastern District, but the witnesses were most
frequently housed in prison units in the Southern District. Therefore,
Justice tried the case in the federal courthouse in Houston. Two years
later, when the inmate population stood at more than 30,000, Judge Justice
ruled that Texas' prisons were unconstitutionally overcrowded.\textsuperscript{18}

The \textit{Alberti} county jail and \textit{Ruiz} state prison suits developed
independently. But in part because of the similar issues in the cases, they
became linked during proceedings. The cases intersected as state and local
officials sought to resolve overcrowding by shipping inmates to the others'
facility. Unlike comparatively simple judicial decrees that could resolve controversies concerning prisoners' clothing, freedom of association, and free speech rights, both Bue in *Alberti* and Justice in *Ruiz* placed the defendant institutions under court control, ordered their reorganization, and directed administrators to spend millions of tax dollars to correct overcrowded conditions. Both judges retained oversight for years as they sought to meliorate the overcrowding. To assist them, both Bue and Justice relied on court-appointed adjuncts to act as their advisor, mediator, and enforcer.

Judge Bue established an Office of the Ombudsman in December 1975. He named the plaintiffs' lead attorney, James Oitzinger, to be the *Alberti* ombudsman, and charged him with the duty "to monitor [the] defendants' efforts in complying with this order and in fulfilling the mandate and requirement of the consent judgment."19 Judge Justice established an Office of the Special Master with an equivalent mandate. He chose Vincent Nathan, a transplanted Texan, former professor at the

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University of Toledo, and experienced master in prison cases, to be the

*Ruiz* special master.\(^{20}\)

The appointment of judicial adjuncts, whether called a master or an
ombudsman, was not new in complex and controversial cases. The Federal
Rules of Civil Procedure authorized federal district judges to appoint and
to define the duties of masters.\(^{21}\) As Nathan wrote in 1979 before his
involvement in *Ruiz*, a master’s role varies with the needs of the court.\(^{22}\)
An adjunct was “an arm of the court” who, with the judge’s approval,
might exercise “quasi-judicial” powers.\(^{23}\)

A master might convene separate evidentiary hearings, mediate
disputes between parties to a suit, broker settlements and consent decrees,
and then monitor a defendant’s compliance with court orders. In prison


\(^{21}\) Fed.R.Civ.P., Rule 53. I choose in the text to refer to master and
ombudsman interchangeably. A judge might appoint a master rather than a
lay panel in desegregation cases, as well, but the judge usually empowered
the master to act far beyond the fact-finding tasks of committees in school
cases. See: David Kirp and Gary Babcock, “Judge and Company: Court-
Appointed Masters, School Desegregation, and Institutional Reform,”
*Alabama Law Review* 32 (1981): 313. As Charles Zelden has noted,
dependence on community observers in school cases was similar to the
judiciary’s long-standing reliance on trustees or receivers in cases of
Federal District Courts and the Transformation of Civil Rights in

\(^{22}\) Vincent Nathan, “The Use of Masters in Institutional Reform Litigation,”

reform litigation, this last function might entail inspecting facilities
under injunction, construction, or renovation, or interviewing guards and
prisoners. Special masters acted as "surrogate judges," and they could be
as controversial as the real thing.

By the 1980s, prison reform supplanted school desegregation as the
primary exemple of public law litigation. Like the federal district judges
who supervised school districts for decades, Bue, Justice, and their
successors in prisoners' cases returned to the problem again and again as
officials appealed, delayed, and then reluctantly submitted. Federal
interventions in prisons and jails proved to be as controversial and as long-
lived as judicial intervention in the public schools. The TDC prisons and
Harris County jails were under federal court supervision until the 1990s.

I. A Tale of Two Aduncts: Alberti v. Sheriff of Harris County and Ruiz v.

Estelle

1068, 1084-1085; Michael Ware, "Federal Intervention in State Prisons:
943. In the 1980s, Fiss argued that the "bureaucratizing" courts should
curb their use of special masters for monitoring and enforcing judicial
decisions in institutional litigation. Owen Fiss, "The Bureaucratization of
25 Margaret G. Farrell, "The Function and Legitimacy of Special Masters,"
Widener Law Symposium Journal 2 (1997): 237. See also: Margaret G.
Farrell, "Coping with Scientific Evidence, The Role of Special Masters,"
Judge Bue’s introduction to problems brewing in the Texas prison system came through a strange 1972 lawsuit, which led him to review the extraordinary career of Frances Freeman Jalet, one of the single-minded individuals who were ultimately responsible for the reversal of the federal judicial “hands off” policy in the 1960s. Jalet had earned liberal arts degrees at both Radcliffe College and Columbia Teachers College. She continued her studies as she raised a family and earned law degrees from both Columbia University and Georgetown University. Jalet was on the New York State Law Revision Commission from 1959 to 1967. Then, at age fifty-seven, she was admitted to the Reginald Heber Smith Foundation’s program for training attorneys in poverty law, landlord-tenant law, juvenile courts, and administrative law. After she completed the Foundation’s six-week course at the University of Pennsylvania Law School, Jalet was sent to Austin, Texas, to work with the Legal Aid and Defender Society (LADS), which received its main funding from the federal Office of Economic Opportunity (OEO), an agency created in the 1960s to fight President Johnson’s war on poverty.26

Fred Arispe Cruz, a TDC prisoner in Huntsville, wrote to Jalet following a September 1967 newspaper story in Austin which labeled her the “Portia for the Poor.” Cruz was then twenty-eight years old, but he
had a long criminal record and substantial residence in the TDC. He had first been jailed in the TDC at age eighteen, following his conviction for marijuana possession in 1957. When Cruz wrote Jalet, he was serving a fifteen-year sentence for robbery by assault. He had acquired some expertise in drafting legal documents for himself and other inmates, and had become one of the more talented of the so-called "writ writers" in the TDC. This advocacy earned Cruz a reputation among admiring inmates as the "Ralph Nader in the prison system." After learning that Cruz shared her interest in social justice, Jalet began to correspond with and then to visit him in the Huntsville prison.

Although not licensed to practice law in Texas until March 1968, Jalet began to advise Cruz and other TDC prisoners in legal matters. After TDC Director Beto wrote to complain about her prison activities, the Austin LADS supervisor admonished Jalet for no concentrating her efforts on the poor. He then transferred her to the Dallas Legal Aid Clinic, another OEO project. Beto removed Jalet's name from the approved visitor list at the Huntsville prison in October 1968. On 24 December, Jalet's supervisor fired her.

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27 For writ writers and "jailhouse lawyers," see: Turner, "When Prisoners Sue," 635.
29 Ibid., 469.
Beto apparently had a hand in Jalet’s dismissal. He had suggested to her Dallas superiors that her advocacy was causing unrest in TDC prisons. Jalet sued Beto and the Dallas Clinic’s director in state district court, alleging a conspiracy to deprive her of access to her inmate clients. The suit was dismissed, and she joined the Legal Aid Clinic at Texas Southern University (TSU) in Houston. In January 1969, Jalet became a party to another lawsuit making similar allegations, but filed in federal court against Beto and a TDC warden. As a consequence, Beto barred Jalet from seeing TDC inmates until March 1969, when the federal suit was also dismissed. 30

Beto complained to the Dean of the TSU Law School about her continued work with prisoners, but the Dean defended Jalet’s actions and interests. He retained her at the TSU legal clinic. In February 1970, Jalet’s Smith Foundation Fellowship ended. Lacking this support, she moved to New York City to work for the Queens Legal Services. 31

Jalet periodically returned to Texas to maintain her contact with her prisoner clientele. In March 1971, she obtained a position in Houston with VISTA (Volunteers in Service to America), another federal agency created in the 1960s to aid the poor. The VISTA job allowed her to resume her work with prisoners. Between October 1967 and March 1972, when her

30 Ibid., 470.
31 Ibid., 471.
VISTA position was terminated, Jalet made 583 visits to see inmates. Seventy visits were to see Cruz, but she gave legal assistance to more than one hundred inmates. Many of the prisoners filed *habeas corpus* petitions, others section 1983 civil rights complaints attacking prison conditions and procedures. And Beto continued to search for a way to end her career. In November 1971, allegedly because of her many visits and her large clientele, Beto prohibited Jalet from seeing any TDC inmates except those who were already her clients.\(^{32}\)

Fred Cruz was discharged from prison in early 1972. He and Jalet immediately married.\(^{33}\) Jalet began working for Harris County Legal Assistance, Inc. Cruz found volunteer work with the NAACP Legal Defense and Educational Fund (the "Inc. Fund"). They continued advocating prisoners' rights. Shortly thereafter, the U.S. Supreme Court ruled in *Cruz v. Beto*, that the TDC could not interfere with the efforts by "writ writers" to reform the prisons through litigation. The Justices agreed with Cruz that prisoners retained their right as citizens to petition the courts.\(^{34}\)

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\(^{34}\) *Cruz v. Beto*, 405 U.S. 319 (1972).
The honeymoon ended in spring 1972. Three inmates filed separate but strikingly similar federal class action lawsuits, under section 1983, in the Southern District. The plaintiffs alleged that Jalet had attempted to organize an inmate uprising aimed at the violent overthrow of the TDC. With the “unwitting acquiescence” of TDC officials who had permitted her to make more than five hundred prison visits, Jalet had supposedly succeeded in establishing “numerous ostensible attorney-client relationships in furtherance of her conspiratorial goals.” Her activities led to the plaintiffs being threatened and beaten because “they would not yield to such plans to promote unrest and violence.” They claimed to have suffered “irreparable injury” as a consequence of the conspiracy. The plaintiffs had been deprived of their rights under the Eighth and Fourteenth Amendments “to be free from harassment, intimidation, personal injury, threats of death, and cruel and unusual punishment.”

According to the complaint, the prisoners sought to enjoin Jalet’s access to the TDC, because “as the plaintiffs profess to see it, the system can successfully operate only when its code of strict rules and regulations is rigidly enforced without interference, thereby permitting an inmate to serve his sentence without incident in the minimum time permitted under such rules.”

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36 Ibid., 472.
Jalet contended that the complaints were instigated by the plaintiffs as the result of either promises of benefits, including early paroles, or threats of reprisal by TDC officials. She charged that the lawsuits were part of Beto’s ongoing efforts to deprive her of her right to practice law and to consult with clients who happened to be confined in the TDC. Jalet argued that Beto was using the prisoner plaintiffs as “mere unknowing conduits” in his own “unlawful conspiracy.” She argued that the judge should dismiss the case.\(^\text{37}\)

Sixty witnesses testified during the six-week trial. Forty-seven were inmates or ex-inmates of the TDC. Thirteen testified for the plaintiffs and thirty-four for Jalet. On 18 September 1972, Judge Bue announced that only one fact was undisputed, that Jalet and TDC officials were “bitter antagonists.” But “apart from serious problems in determining credibility of the inmate witnesses on both sides,” Bue found no convincing proof of illegal activity on Jalet’s part and “certainly none that can satisfy the legal requisites of a conspiracy.”\(^\text{38}\) Therefore, Bue ruled for Jalet and dismissed the lawsuit.\(^\text{39}\) The judge noted that, having found that Jalet had not engaged in a conspiracy, he could end his opinion. Instead, Bue offered, “at the risk

\(^{37}\) Ibid., 458-460.

\(^{38}\) Ibid., 474.

\(^{39}\) Ibid., 460, 491.
of prolonging” his opinion and admittedly in *dicta*, his reflections on the testimony at the lengthy trial.\textsuperscript{40}

Bue admitted that the testimony and documentary evidence had exposed to him the details of “a way of life little known to the ‘free world.’” Although he still accepted the basic proposition that individuals who violated the law should serve time in prison, Bue noted that “the fact remains that our prisons are full.” With large numbers of inmates housed in a limited number of facilities, there must be a system of rules as well as prescribed punishment to be properly administered when the rules were violated. The rules must be clear and must be enforced fairly. The evidence in the Jalet case was too muddled for Bue to judge whether the rules were being fairly applied.\textsuperscript{41} Bue suggested that by providing an administrative mechanism to dispose of prisoner grievances short of legal action, a “satisfactory solution should be much more readily achieved.”\textsuperscript{42}

Bue proposed that TDC provide for investigation of prisoners’ complaints by “an outside person or agency as well as by the institution.” This was a version of the “ombudsman” concept which he noted was in the testing stages in some states. The ombudsman would be “a third force, neither allied with the inmates nor the prison administration,” who would

\textsuperscript{40} Ibid., 475.
\textsuperscript{41} Ibid., 487.
\textsuperscript{42} Ibid., 491.
independently investigate allegations of administrative malpractice,
with a view toward correcting abuses. The office of the ombudsman, Bue
suggested, “thus becomes the mechanism whereby fair and objective review
of alleged prison abuses is thoroughly undertaken.” Bue noted that the
ombudsman concept had its detractors, including Beto. But, the judge
continued, the “absolute independence of the ombudsman from a prison
administration can be the guarantee which insures that the inmate
grievances will be heard and accorded an objective review and, where
meritorious, that something will be done about them.” If properly
constituted, Bue declared,

. . . . . The very presence of the ombudsman can serve to
eliminate or, at least, reduce the polarization of views of
witnesses representing the prison administration vis-a-vis the
inmates at court proceedings which, as this extended litigation
has amply proven, may resolve nothing, either in ascertaining
the truth of an individual incident or in identifying the root
evil, if any, to be corrected. Instead, when instances arise in
which hearings are ultimately required to air prisoner
grievances, there would be another potential source of
information, presumably highly reliable, which would be of
assistance in the determination of the truth of the matter . . .

Moreover, a successful administrative mechanism like the one Bue
suggested, one to be available through the ombudsman’s office, would help
to alleviate the recurrence of these types of prisoners’ complaints on the
crowded federal court dockets. If nothing else, Bue concluded, this

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alternative to federal suits would "diminish the multitude of charges so frequently voiced that the courts are taking over and are bent on dictating the administrative procedures to be followed in the prisons."  

* * * *

Through the extensive and graphic testimony of the Jalet trial, Bue had glimpsed some of the hidden world of the criminal detention system in Texas. He boldly suggested the adoption of an ombudsman who could act as an independent "third force" to mediate conflicts between inmates and administration. It is ironic that so soon after, in the Harris County jail case, *Alberti*, that Bue retained the title of ombudsman, but kept none of the attributes he had enumerated in the Jalet *dicta*.

In August 1972, Lawrence Alberti filed his section 1983 action against the Harris County Commissioners Court and the Sheriff's Department. Bue conducted extensive hearings, during which the expert witnesses on both sides of the case painted a grim picture. A plaintiffs' witness estimated that over 1200 acts of violence were reported by inmates every year in the jail. Another of the plaintiffs' experts testified that the true number of sexual assaults may be "five to six times greater" than the
number reported. This depiction was predictable. But rather than
deny the truth of these assertions, an expert for the defense testified that,
based on his experience with similar institutions, "sexual abuse and threats
of sexual abuse are high."\textsuperscript{45} Such testimony led Bue to conclude that
"inmate beatings and homosexual rapes and attacks are prevalent."\textsuperscript{46} The
result, he said, was "a continuous pattern of deprivations which clearly
reach constitutional dimensions."\textsuperscript{47}

When the testimony illustrated that the prisoners had genuine
complaints and would likely prevail, the county entered into a consent
decree, which generally accepted the plaintiffs complaints that the detention
facilities were inadequate. The parties signed, and Bue approved the
decree on 4 February 1975. The decree called for renovations of existing
facilities, the development of a new central jail, and improvements in staff
and security. The Commissioners Court and the Sheriff's Office agreed to
provide enough guards and other professional staff so that the
administrators did not rely on inmates for assistance in keeping order.
Judge Bue retained jurisdiction in the case so that he could amend the
judgment or issue interim orders as necessary. However, he defined his

\textsuperscript{44} Ibid., 491. In a July 1973 \textit{per curiam} opinion, the Fifth Circuit affirmed
\textsuperscript{45} \textit{Alberti v. Klevenhagen}, 790 F.2d 1220 (5th Cir., 1986), 1225-1226.
\textsuperscript{46} \textit{Alberti v. Heard}, 600 F.Supp. 443 (S.D.Tex., 1984), 457.
\textsuperscript{47} Ibid., 457.
role in the litigation as limited. The parties were to work together to devise the detailed proposals for implementing the rather broad consent agreement.⁴⁸

On 1 May, the county submitted a preliminary plan. The plan contained descriptions of the proposed renovations of the old detention center and a discussion of the architectural feature of the jail to be built. The plan also included a proposal to schedule a bond election to raise fifteen million dollars, the sum the county suggested was necessary for the project. But in August, the plaintiffs' attorneys, Gerald Birnberg and James Oitzinger, contacted Bue and expressed doubts about the 1 May plan. They moved for supplemental relief, asking Bue to play a more active role in the case.⁴⁹

Bue recognized that he needed better information regarding the state of the present jail and the adequacy of the county's proposal to fulfill the provisions of the consent decree. Therefore, he held another six days of hearings, and then personally toured several of the county jail facilities on 24 September. These consisted of a central jail in downtown Houston which had been designed to hold 1150, and a detention center in Humble,

Texas, designed to hold 810 inmates.\textsuperscript{50} Both of the facilities were holding more than twice the intended number of prisoners. Because time was short, since the bond election was only days away, and because he quickly learned what he needed to know, Bue issued his decision one day after the tour. He ruled that the plaintiffs were correct to doubt the plan the county had submitted. The proposed renovations, new construction, and bond election of $15 million were completely inadequate for comporting with the consent decree in the future, since the plan would not even solve the problems of the present. It would take more money than the county had estimated to bring the jails into compliance with the constitutional standards.\textsuperscript{51}

After more consultation with the parties, Bue issued a new, broad remedial order on 16 December 1975. Among other findings, the judge determined that guards and staff in the jails were insufficient in number and inadequately trained. He ordered the county to begin adequate training, to increase the pay of jail personnel, and to increase the staffing sufficient to provide one jailer for every twenty inmates. He also established the Office of the Ombudsman “to monitor defendants’ efforts in complying with this order and in fulfilling the mandate and requirement of the consent judgment.” Specifically, it was the ombudsman’s duty to make

\textsuperscript{50} Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir., 1991), 987.
sure that the county observed the federal district judge’s orders to create a pretrial release program that would allow most detainees to make bail quickly, to eliminate jail overcrowding, and to improve “deplorable,” “inhumane,” and deteriorating jail conditions. The ombudsman was to submit periodic reports directly to the court on pretrial release, report to the court “at any time” on overcrowding, make recommendations for improvements, and “similarly monitor and report upon defendants’ efforts” to improve jail conditions in general.\(^{52}\)

These duties were rather typical for a court adjunct such as a master. But, Judge Bue then appointed Oitzinger and Birnberg to be the ombudsman. Moreover, Bue specified that they could continue to represent the plaintiffs.\(^{53}\) This was not a decision calculated to meet the criteria he had set out in the Jalet case, namely, that the ombudsman should be “a third force, neither allied with the inmates nor the prison administration.” But, the county did not appeal the order creating the ombudsman’s office or the appointment of the two of the plaintiffs’ attorneys to lead it.\(^{54}\)

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\(^{52}\) *Ibid.*, 656, 678.

There is no evidence that Oitzinger and Birnberg abused the power or access that the ombudsman’s office gave them. They did not receive everything they asked for in the litigation. In 1978, for example, Bue reluctantly approved the Commissioners Court’s plans for the new downtown jail. These plans provided for four-person cells to be arranged into twenty-four person dormitories. The plaintiffs had called for the creation of single inmate cells. Bue ruled that the four-to-a-cell jail design did not itself violate the minimum constitutional standards. He warned, however, that the new jail might not be safely occupied without providing additional staff. Bue conditionally approved the plan, contingent upon the defendants’ fulfilling their continuing obligations to provide adequate staffing and to comply with other constitutional requisites.\textsuperscript{55}

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In 1982, spurred by the consent decree and later remedial orders, the county completed a new downtown jail, with a design capacity of 3505 inmates, and closed the old jail. Later, the county also authorized the

\textsuperscript{54} Ibid., 1229.
\textsuperscript{55} Ibid., 1222.
construction of a third jail facility, with a capacity of 4000, and the
renovation of the old central jail, to house 400.\textsuperscript{56}

May 1982. Bue set a 1 June hearing to consider proposals by Harris
County officials to ease jail overcrowding. Harris County's jail situation
worsened when the TDC began limiting its intake of inmates in an effort to
meet prison cell space requirements mandated by Judge Justice.\textsuperscript{57}

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In December 1984, Judge Bue set a 15 Feb. deadline for the county
to hire 300 more jailers to staff its new jail. March 1985. Oitzinger asked
Bue to force Harris County to pay its prisoners $46,846 per day until it
hires more guards. Oitzinger said the $46,846 per day figure in his
contempt request is twice what it would cost the county to hire the new
guards.\textsuperscript{58}

Appeal: June 1986:; John R. Brown, Thomas M. ReavLEY, and Robert
M. Hill, Circuit Judges. John R. Brown, Circuit Judge, concurring. Hill,

\textsuperscript{56} Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir., 1991), 987.
\textsuperscript{57} United Press International, 22 May 1982.
Circuit Judge: "We conclude, as a matter of law, that the level of violence and sexual assault found to be existing in the Harris County jails constitutes a violation of the Eighth Amendment." Therefore:

It is regrettable that a federal court is still deeply involved in oversight of the Harris County jails after these thirteen years of litigation. It is more regrettable that after thirteen years conditions in the jails are still in contravention of constitutional standards. Despite the efforts of the parties and the court, inmates continue to be beaten, raped, abused, and assaulted.\(^{59}\)

The district court has acted properly in fashioning new relief for an old malady. Accordingly, we AFFIRM the order of the district court in all respects.\(^{60}\)

June 1986; CONCUR: JOHN R. BROWN, Circuit Judge, concurring:

I concur fully in the Court's opinion. I write separately to address two issues in this case which, I believe, may prove to be snares for the unwary in future cases. The first issue concerns the scope of remedial orders entered under the Eighth Amendment. I believe care must be exercised lest we resort too easily to remedies for the ephemeral "totality of the conditions" in our haste, as judges, to do the right thing as people. The second issue concerns the District Court's decision to appoint counsel for the plaintiffs as its Ombudsman:


\(^{59}\) *Alberti v. Klevenhagen*, 790 F.2d 1220 (5th Cir., 1986), 1230.
As a member of the panel, I raised serious questions regarding the propriety of the District Court’s appointment of counsel for the plaintiffs as its Ombudsman. While I agree with the Court that, on consideration of the whole record, this has not resulted in a miscarriage of justice, I would strongly discourage such an appointment in the future. The roles of counsel and ombudsman are simply antithetical; to combine them in the person of a single attorney creates an appearance of unfairness that ill behooves a system premised upon the notion that ‘justice must satisfy the appearance of justice.’ ...  

June 1986; The function of an ombudsman is to “observe conditions at the jail and report his observations to the trial court, to assure compliance with the trial court’s orders.”  

As “an arm of the court, the ombudsman has an obligation to behave impartially and to report objectively, for a court ‘must not assume the role of prosecutor or defender.’”  

June 1986: Judge Brown: “I recognize that we have previously endorsed the appointment of an ombudsman as the kind of procedural innovation necessary to relieve overcrowded federal dockets.” But when the Fifth Circuit approved, the federal district judge “had the good judgment to appoint a magistrate as Ombudsman.”

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60 Ibid., 1230.
61 Ibid., 1231.
62 Miller v. Carson, 563 F.2d 741 (5th Cir. 1977), 753.
64 Miller v. Carson, 563 F.2d, 752.
A magistrate is a judicial officer who has "no interest in or relationship to the parties."\textsuperscript{65}

The "same disinterested objectivity cannot be attributed to an ombudsman who occupies that post and, nonetheless, continues to serve as an attorney for a principal party. In my view, such inherently conflicting roles should never be combined in the person of a single attorney."\textsuperscript{66}

Judge Brown:

I believe that the appointment of a party’s attorney to a judicial office casts grave doubt upon the appearance of detached impartiality that is so essential to the functioning of our judicial system. More than that, it subjects employees and agents of the governmental defendants to great uncertainty as the attorney-ombudsman makes his post-judgment rounds in the jail: is he simply the lawyer ferreting out evidence, or is he the Judge’s representative, checking to see if the orders are being carried out? Thus, while it has resulted in no actual prejudice in this case, I would strongly discourage such an appointment in the future.\textsuperscript{67}

September 1986: Circuit Judges Brown, Thomas M. Reavley and Robert M. Hill write to clarify the majority opinion which dealt with the appointment of the plaintiffs’ attorney as ombudsman.\textsuperscript{68}

There was no reversible error. However, the appellate judges did not approve the appointment. It raised a serious question of the appearance

\textsuperscript{65} Lister v. Commissioners Court, Navarro County, 566 F.2d 490 (5th Cir. 1978), 493.
\textsuperscript{66} United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976).
\textsuperscript{67} Alberti v. Klevenhagen, 790 F.2d, 1232, inc. note 3.
of judicial propriety. Accordingly, the panel analyzed the issue to determine whether an actual conflict of interest existed, and concluded that the record did not support the finding of such a conflict.69

Further: "We, and the lower federal courts, are courts of limited jurisdiction. Our task is not to correct all social ills, however egregious they may seem to us as individuals. The keys to the Kingdom are not in our hands. . . . Here, to his credit, the district judge never strayed from his very limited role; in this case, I believe that we have done likewise."70

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February 1987. Another jail later opened downtown, and Harris County jails were only five percent above capacity. The county tried to end the case, asking the court for a final judgment and dismissal. The county moved for final judgment and permanent injunction on 20 February.71

April 1987. To replace resigned ombudsman, Bue appointed three new judicial adjuncts: a special master, a medical monitor-assessor, and a

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70 Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir., 1986), 1231.
jail monitor-assessor, to inspect the jails and to assess their conditions, to make findings on the county’s compliance with his orders, and to determine maximum capacities of the jails.\textsuperscript{72}

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March 1993. Judge Norman Black, chief judge in the Southern District of Texas, affirmed an order setting a $50 per day fine for every inmate above the 9800 prisoner ceiling kept in the county’s four jail facilities. The order gave the state until April 1 to bring the county jail population under the cap. The county had 12,500 inmates that week, which means the state would be fined $135,000 each day beginning April 1.\textsuperscript{73}

In August 1995, Judge Black ended twenty-three years of federal control over the Harris County jails. In putting to rest the jail overcrowding lawsuit, Black also ended the federal-imposed special master and jail monitors.\textsuperscript{74}

The order continues the court's protection of jail inmates for two years by using as an incentive promises that $11 million would be reimbursed to the state in installments.\textsuperscript{75}

Black ordered that more than $6.5 million be used for a computer system to be used for both medical records and classification purposes; dental equipment and supplies; on-site dialysis equipment; equipment and staff for the TB control program and funding of a joint program between Harris County Mental Health and Mental Retardation Authority and Pretrial Services to separate pretrial detainees charged with nonviolent misdemeanor and felony offenses.\textsuperscript{76}

In August 1995, Oitzinger said \textit{Alberti} did much more than relieve jail overcrowding. "Before this," he said "a mother couldn't visit her son, a wife couldn't visit her husband more than once a week. Now, any day you can go over there and see hundreds of visitors waiting in line. I think that had the most dramatic effect on the day-to-day lives of the inmates."\textsuperscript{77}

\textsuperscript{75} \textit{Ibid.}
\textsuperscript{76} \textit{Ibid.}
\textsuperscript{77} \textit{Ibid.}
Chapter Eight: "A Cross Between a Poker Game and the Battle of the Somme": Judicial Management of Financial Disaster Since 1980

This "proceeding" has become a spectacle of expensive litigation. Errors in judgment were made by honest bankers trying to build a complex business in the midst of mistaken fiscal and regulatory policy. The bankers' ability to work their way out of the potential losses was destroyed by a sudden regional economic decline. The existing losses and consequent disruptions were compounded by an arrogant and inept intrusion of the government. Into the debris rushed litigious rascals, whose idea of the public administration of civil justice is a cross between a poker game and the battle of the Somme. As is usually the case, the quiet, competent, cooperative actions of the great many are obscured by those few others.

U.S. District Judge Lynn N. Hughes, In re MCorp (1993).¹

The United States had emerged from a brief recession which lasted from 1980 to 1982, but economically, Texans were out of step with other Americans in the 1980s. Earlier, Texas' energy-based economy had greatly expanded in response to rising petroleum prices during the 1970s, but the economy contracted as prices plummeted during a worldwide oil glut in the 1980s. By mid-decade, not only battered oil and gas companies, but also real estate, construction, and financial firms that shared the benefits of earlier expansion, remained mired in a deep regional recession.

Bank-related litigation swamped the federal court system during the late decade.²

Many Texans spent a large portion of the decade in court, either attacking debtors or defending themselves against creditors. On joining the Southern District in December 1985, former Texas state judge Lynn N. Hughes assumed responsibility for managing his share of the many bankruptcy-related cases that were finding their way onto the Southern District’s already crowded civil docket.³ Prior to 1978, he would have either presided in these actions or employed a “referee,” but the Bankruptcy Reform Act of that year created a system of separate bankruptcy courts in each district and authorized bankruptcy judges to hear cases. After a period of transition (and an amendment in response to an adverse U.S. Supreme Court decision), the new bankruptcy tribunals were

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² Texans sought to overcome their troubles in the oldest investment, real estate, or the newest, high technology, but few of these schemes bore enough fruit to bring about general economic recovery. Still, in the face of adversity, some Texans were ever-optimistic. M. Ray Perryman, Survive and Conquer---Texas in the 80’s: Power--Money--Tragedy . . . Hope! (Dallas: Taylor Publishing Co., 1990), 76-77.

³ Judge Hughes replaced the late U.S. District Judge George E. Cire on 17 December 1985. The U.S. District Courts have original jurisdiction, “exclusive of the courts of the states,” in all matters of bankruptcy. 28 U.S.C. § 1334. This exclusive character of the federal statutes are founded on Article I, § 8 of the U.S. Constitution, which authorized the U.S. Congress to enact a “uniform” law of bankruptcy. The earliest comprehensive federal bankruptcy statute, was the Bankruptcy Act of 1898, which is currently codified as Title 11 of the United States Code (11 U.S.C. § 1, et seq.), while federal laws concerning the subject “Banks and Banking” are contained in Title 12 (12 U.S.C.).
in full operation by 1984.\textsuperscript{4} They were subordinate to district judges in that their rulings could be appealed to a district judge. However, in most cases a district judge merely approved the reorganization plans brokered by a bankruptcy judge.\textsuperscript{5} In “average” economic times, that is, when

\textsuperscript{4} Pub.L. 95-598, of 6 November 1978, codified at 28 U.S.C. §§ 151-158. In the original 1978 version of the law, bankruptcy judges could hear cases related to bankruptcy proceedings, such as a civil suit involving a company which had filed under Title 11, as well as cases actually brought under Title 11. Bankruptcy judges were appointed by the circuit judges to serve 14 year terms, they could be removed by the judicial council in that circuit. Moreover, their salaries could be reduced by an act of congress. In a four-person plurality decision, the Supreme Court upheld a Minnesota district judge’s ruling that the original 1978 Act was unconstitutional. The Justices held that Congress had vested the bankruptcy judges with the “power and prestige” of Article III federal judges, without giving them the necessary independence. The Court stayed its judgment until 4 October 1982, to enable lawmakers to amend the laws. \textit{Northern Pipeline Construction v. Marathon Pipeline}, 102 S.Ct. 2858 (1982). It was a “badly fragmented” ruling, because the distinction between Article III “constitutional” courts and Article I “legislative” tribunals was as is controversial. Charles Alan Wright, \textit{The Law of Federal Courts}, 4th Student Ed. (St. Paul: West Publishing Co., 1983), 50-52. In response to the Court’s ruling in \textit{Marathon}, the Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub.L. 98-353, 10 July 1984, 98 Stat. 338), which clarified that bankruptcy judges served fixed terms and paid fixed salaries (which were tied to the salaries of district judges). The Southern District of Texas was authorized to have six bankruptcy judges, which the appellate judges in the Fifth Circuit appoint for terms of 14 years. 28 U.S.C. § 152. Bankruptcy judges are paid 92 percent of what life tenured district judges are paid. 28 U.S.C. § 153.

\textsuperscript{5} Richard Neely, \textit{Judicial Jeopardy: When Business Collides with the Courts} (Reading: Addison-Wesley Publishing Co., 1986), pp. 35-37. In addition to trial duties, bankruptcy judges may serve on bankruptcy appellate panels ("BAPs"), to review decisions by individual bankruptcy judges. 28 U.S.C. § 158. The response to the creation of these courts has not been overwhelmingly positive, and is often ambivalent at best. See, generally: Carroll Seron, \textit{Judicial Reorganization: The Politics of Reform
businesses failed at a more or less steady rate, for familiar reasons of hard luck or bad judgment, most bankruptcy cases are routine. The "final judgment" by a bankruptcy judge could be truly final, because they were usually uncontested. Most disputes were negotiated between voluntary bankrupts and claimant creditors.  

During the years of extraordinary economic distress in Texas, however, the stakes were high and claimants were usually desperate. Bankruptcy judges heard many more forced or involuntary cases, that is,  

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Bankruptcy judges may issue final decisions in "core proceedings" in bankruptcy but not in other cases. 28 U.S.C. § 157(b) (1994). Their function is distinct, but their role is similar to U.S. Magistrates. Formerly called U.S. magistrates, the title from their creation in 1968, these officials were raised to higher power, recognition via the current title, and arguably more prestige, by the Judicial Improvements Act of 1990. The U.S. District Judges in each district appoint full-time magistrate judges for terms of 8 years. 28 U.S.C. § 631(e) (1994). Magistrate judges hear some pretrial matters as designated by a district judge, make rulings with an opportunity for objection to the district judge, and preside at civil trials with the consent of the parties. 28 U.S.C. § 636(b)(c) (1994). Magistrate judges also are paid 92 percent of what life tenured district judges are paid. See _28 U.S.C. § 634 (1994)._ See: Christopher E. Smith, "From U.S. Magistrates to U.S. Magistrate Judges: Developments Affecting the Federal
bankruptcies filed by creditors rather than debtors. In parallel, the
district judges were called on to preside in an array of civil suits spawned
by widespread insolvency. Many cases transpired over several years and
metamorphosed into varieties of courtroom incarnations managed by
district and bankruptcy judges alike. For the first time since the bank
failures of the Great Depression, a large share of the cases involved banks
and "thrift" institutions, such as savings and loan (S&L) associations. 7

Among the most contentious of these bankruptcy-related cases was
the complex litigation arising from the collapse of MCorp, a national bank
holding company, which operated twenty-five branches in Texas. The
MCorp failure merited mention as one of three "most significant failures"
in the federal government's self-study of the crisis. 8 Starting in 1989,

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District Courts' Lower Tier of Judicial Officers," 75 Judicature
7 The regulatory reforms enacted during the New Deal had long-lasting
effects. Institutions continued to fail throughout the 1930s, but at a
reduced pace, and by the end of Depression era, the number of bank
failures was negligible. The failure rate increased in the 1970s, but then
reached an unprecedented level. Federal Deposit Insurance Corporation,
History of the Eighties---Lessons for the Future: An Examination of the
Banking Crises of the 1980s and Early 1990s, Vol. 1 (Washington, D.C.:
FDIC, 1997), 3, Fig. 1.1.
8 A group of three that included the First City Bancorporation and
RepublicBank Corporation failures. The southwestern region (including
Texas, Oklahoma, Louisiana, New Mexico, and Arkansas) suffered the
worst failures. Federal Deposit Insurance Corporation, History of the
Eighties---Lessons for the Future: An Examination of the Banking Crises
in 1987, the First City Bancorporation, the holding company for a family
Judge Hughes presided in a number of civil actions related to the MCorp bankruptcy, in which the failing financial empire not only found itself pitted against its debtors and creditors, but also opposed to its erstwhile rescuer, the federal government.9

The MCorp bankruptcy suggested that Texas was not falling behind the rest of the country, but leading the way. Ill-considered, and, often, allegedly fraudulent lendings forced both the commercial banks and also the traditionally stable, but newly deregulated S&Ls, to fail, at unprecedented rates.10 Some observers had identified troubling signs of banks which included Houston's First City National Bank (FCNB), sought FDIC protection. After an infusion of federal cash and a change of management, the company survived the early crisis, but failed and revived in 1991 and then failed for the last time in 1992. The RepublicBank Corporation merged with InterFirst Corporation in early 1986, to create the largest holding company in Texas, the First Republic Corporation. By early 1987, First Republic sought FDIC assistance. Regulators forced an even more radical restructuring, and sold the company to the North Carolina National Bank (NCNB), which eventually became the Nations Bank system. See: L. William Seidman, Full Faith and Credit: The Great S&L Debacle and Other Washington Sagas (New York: Times Books, 1993), 142-155.

9 MCorp v. Board of Governors of the Federal Reserve System, 101 Bankr. 483, at 486 (S.D.Tex., 1989); Houston Division, Case No. 89-02312-H3-11, Civil Action No. 89-1677, Adversary No. 89-0298. Banks cannot file for bankruptcy; instead, they must either reorganize or liquidate under the nations banking laws. Bank holding companies, however, are not prohibited from entering bankruptcy. Also, although they are regulated by banking agencies, they cannot be reorganized or liquidated under the laws for banks. Congress amended both the banking and the bankruptcy laws several times, but has not resolved this inconsistency.

10 The highest rate of failures was nonetheless in Texas. Between 1980 and 1994, 599 banks failed in Texas, for a combined loss of $60.2 Billion in assets. The next highest rate was in Oklahoma (also an oil-dependent state),
earlier in the decade, but few expected the widespread problems that occurred.\textsuperscript{11} When the crisis came, the Congress, courts, and claimants reacted each in its own way, to a rapidly deteriorating situation. But by the end of the 1980s, it was probably too late to save many of the victims of the "tragedy."\textsuperscript{12} Federal regulatory agencies were under pressure to stem which experienced 122 failures, for a loss of $5.8 Billion. Federal Deposit Insurance Corporation, \textit{History of the Eighties---Lessons for the Future: An Examination of the Banking Crises of the 1980s and Early 1990s} (Washington, D.C.: FDIC, 1997), 291, esp. n.1. Regarding the Texas situation; see: M. Manfred Fabritius and William Borges, \textit{Saving the Savings and Loan: The U.S. Thrift Industry and the Texas Experience, 1950-1988} (New York: Praeger, 1989). Also, to learn why Texas earned its reputation as a free-wheeling environment for S&L insolvency. See, generally: James O'Shea, \textit{The Daisy Chain: How Borrowed Billions Sank a Texas S&L} (New York: Pocket Books, 1991).

\textsuperscript{11} The literature warning of possible regulatory contradictions began to proliferate early in the decade, prior to the worst of the crisis. Usually, authors focused on the storm clouds forming over the thrift industry, but some were optimistic, if cautious, regarding the effects of deregulation. This was to be expected, as the thrifts had been experiencing the most changes in regard to federal regulation and supervision. One observer, Andrew S. Carron, for example, raised the alarm one year, then declared deregulation a possible success. See, generally: Andrew S. Carron, \textit{The Plight of the Thrift Institutions} (Washington, D.C.: Brookings Institution, 1982); Andrew S. Carron, \textit{The Rescue of the Thrift Industry} (Washington, D.C.: Brookings Institution, 1983). See, also generally: Walter J. Woerheide, \textit{The Savings & Loan Industry: Current Problems and Possible Solutions} (Westport: Quorum Books, 1984); Frederick E. Balderston, \textit{Thrifts in Crisis: Structural Transformation of the Savings and Loan Industry} (Cambridge: Ballinger Publishing Co., 1985); and, George J. Benston, \textit{An Analysis of the Causes of Savings and Loan Association Failures} (New York: Salomon Brothers Center for the Study of Financial Institutions, 1986).

\textsuperscript{12} The awesome public spectacle of the collapses spawned a genre of literature which chronicled the cautionary tale. See: Mark Carl Rom, \textit{Public Spirit in the Thrift Tragedy} (Pittsburgh: University of Pittsburgh
the tide of failures and to assign blame and to punish those institutions
and individuals deemed responsible for what was being called a "bailout,"
"scandal," or, most often, "the debacle."\textsuperscript{13}

As a result of the legal flux, federal judges grappled with elements of
law and fact which were far more fluid than usual. Although judges
engage in potentially controversial but necessary acts whenever they

Press, 1996); and, Paul Zane Pilzer with Robert Deitz, \textit{Other People's
Money: The Inside Story of the S&L Mess} (New York: Simon and
Schuster, 1989). Even those authors calling the situation a mere "crisis"
could regard it a "crime." See: Kitty Calavita, Henry N. Pontell, and
Robert H. Tillman, \textit{Big Money Crime: Fraud and Politics in the Savings and
Loan Crisis} (Berkeley: University of California Press, 1997); and, Martin
Mayer, \textit{The Greatest-Ever Bank Robbery: The Collapse of the Savings and
Loan Industry} (New York: Charles Scribner's Sons, 1990);

\textsuperscript{13} The most scathingly critical literature often tied the disaster to political
corruption. See: James Ring Adams, \textit{The Big Fix---Inside the S&L
Scandal: How an Unholy Alliance of Politics and Money Destroyed
America's Banking System} (New York: John Wiley & Sons, 1990);
& Loan Scandal} (New York: Random House, 1990); Kathleen Day, \textit{S&L
Hell: The People and the Politics Behind the $1 Trillion Savings and Loan
Scandal} (New York: W.W. Norton, 1993); L. William Seidman, \textit{Full Faith
and Credit: The Great S&L Debacle and Other Washington Sagas} (New
York: Times Books, 1993); Ned Eichler, \textit{The Thrift Debacle} (Berkeley:
University of California Press, 1989); Lawrence J. White, \textit{The S&L
Debacle: Public Policy Lessons for Bank and Thrift Regulation} (New
York: Oxford University Press, 1991); James R. Barth, \textit{The Great Savings
and Loan Debacle} (Washington, D.C.: The AEI Press, 1991); Martin
Lowy, \textit{High Rollers: Inside the Savings and Loan Debacle} (New York:
Praeger, 1991); and, Davita Silfen Glasberg and Dan Skidmore, \textit{Corporate
Welfare Policy and the Welfare State: Bank Deregulation and the Savings
and Loan Bailout} (New York: Aldine de Gruyter, 1997). Reading this
flurry of accounts, with their differing perspectives and agendas, only one
thing is absolutely clear about the affair: writing a book about the banking
and especially the S&L collapse was a good way to get your name in print.
mediate disputes between national and local interests, they can usually rely on the stability of either law or facts, and often both, to maintain the delicate balance the federally-organized American legal and political systems require. This stability is relative: controlling legislation is subject to repeal; judicial precedent is subject to reversal; and, settlements reached between litigating parties are subject to changed conditions. These very shifts are often grounds for further litigation even in ordinary times. But during the bankruptcy crisis of the 1980s, the law’s unsettled quality likely prolonged the agony of insolvent institutions.

The federal regulatory agencies responsible for managing the mess contributed to the litigative confusion, and garnered their share of blame and criticism. During the four years that Judge Hughes managed the judicial autopsy of MCorp, its corporate dismemberment became apparently an end in itself for “arrogant and inept” regulators. He grew disgusted by “a spectacle of expensive litigation.”¹⁴ To the judge, the regulators’ search for scapegoats rather than solutions fed the debacle.

I. Federal Banking Regulation, 1830s-1930s: Nothing to Fear But Fear Itself

“Shame being lost, all virtue is lost.” Bank suspensions and bank failures are not looked upon any longer as disgraceful

¹⁴ In re MCorp, 160 Bankr. 941, at 964.
events, how much soever the public may be enraged against their perpetration. They have become things of everyday occurrence, and the wealthiest and most consequential members of society often are stockholders or directors in some of these insolvent institutions. But since these speculators have saved some money for themselves, they have acquired respect and consequence in society. They feel themselves above reproach, and entitled to receive that respect that money always demands.

Charles Duncombe, 1841.\textsuperscript{15}

Legal historians have documented how federal judges have played critical roles in shaping America’s history, particularly during the nineteenth century. Judges promoted the “release of energy” by entrepreneurs, allowed innovators to pass along social cost of industrial progress to the lowest classes of society, and reduced the risks associated with the growth of a national market via their diversity jurisdiction.\textsuperscript{16}


\textsuperscript{16} These are the respective themes and theses of: James Willard Hurst, \textit{Law and the Conditions of Freedom in the Nineteenth Century United States} (Madison, WI: University of Wisconsin Press, 1956); Morton J. Horwitz, \textit{The Transformation of American Law, 1780-1860} (Cambridge: Harvard University Press, 1977); and, Tony Allan Freyer, \textit{Forums of Order: The Federal Courts and Business in American History} (Greenwich: JAI Press, 1979). A classic study of a turning point in economic and legal history, devoted to a specific instance of judicial allocation of economic favor, is Stanley I. Kutler’s \textit{Privilege and Creative Destruction: The Charles River Bridge Case} (Baltimore: The Johns Hopkins University Press, 1971). These scholars (particularly Hurst and Horwitz) frequently disagree about the ends of judicial action, but generally are in accord regarding its means; their work exposed the “myth of laissez-faire” which previously dominated
However, no judge exercised jurisdiction over spasmodic credit
contractions which were at the root of many of the financial "panics,"
recessions, and depressions which shaped the nation’s economics and
distorted its politics well into the twentieth century. Indeed, without
centralized banking, no federal official could hope to impose order on the
often chaotic state-based financial system, and none could end the cycle of
booms and busts.¹⁷

As with many modernizing trends in American history, the crisis of
the Civil War provided conditions which made change possible. In 1864,

¹⁷ The antebellum history of American national banking is long, and
tortured. In brief, the first Bank of the United States was established by
Alexander Hamilton, then lapsed after its charter expired. In 1819, Chief
Justice John Marshall, for the U.S. Supreme Court, confirmed Hamilton’s
initially interpretations, and held that the U.S. Congress had power to
establish national banks under the Constitution, by way of the provision
Maryland, 4 Wheat. (17 U.S.) 316 (1819). After the 1836 lapse of the
charter of the second Bank of the United States, no federal official could
intervene effectively in the economy, a result which was the stated intent of
President Andrew Jackson’s veto of the charter’s renewal in 1832. See:
“Veto of the Bank Renewal Bill,” in Richard D. Heffner, ed., A
Documentary History of the United States, 5th Ed. (New York: Penguin
Books, 1991), 94. The ensuing “whirlwind” of financial speculation is
chiefly credited for causing, or at least extending and deepening, the
national depression of 1837-43, which clouded the administration of
Jackson’s successor, President Martin Van Buren. Marvin Meyers, The
Jacksonian Persuasion: Politics and Belief (Stanford: Stanford University
the U.S. Congress overcame lingering Jacksonian fears. Bypassing states-rights obstructions, Congress established a system for regulation of national banks through a National Bank Act. But the national banking system then created was strong only in comparison to the vacuum of authority it filled. The Treasury’s Comptroller of the Currency was titular regulator and supervisor of national banking, but had to rely on persuasion rather than coercion to bring members into the voluntary system. State banking systems survived into the twentieth century and retained a powerful, often disruptive influence on the national economy. When financier and private banker J. Pierpont Morgan, an unlikely and, some thought, embarrassing white knight called on to rescue the economy from a financial panic in 1907, some reformers challenged the remaining American taboo against vigorous central banking.

In 1913, Congress created the Federal Reserve System, and charged its governing board of money experts with rationalizing the nation’s

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banking system through studied manipulations of interest rate.21 But
the first World War initiated a new cycle of boom and bust. The war not
only crippled European political and financial systems, but also delayed
effective federal management of the American economy for a generation.

The next major change in the banking system was a reaction to a
another crisis. Between 1930 and 1933, more than nine thousand banks
failed, thirty percent of those doing business in 1929. The mass failure,
begun with a “run” on deposits in February 1933, ended when, in early
March 1933, newly-inaugurated President Franklin Roosevelt ordered
remaining institutions to close for a four-day, national “bank holiday.”22
By then each of the forty-eight state governors already had declared

21 The Federal Reserve, or “Fed,” is the so-called “lender of last resort,”
and lends funds to member banks at the short term “prime rate” set by the
governing board. The rise or fall of the prime rate influences the
availability of credit to the buying, building, or investing public.
Therefore, the Fed also affects the growth or contraction of the national,
and often global, economy. See, generally: William Greider, Secrets of
the Temple: How the Federal Reserve Runs the Country (New York:
22 Elmus Wicker, The Banking Panics of the Great Depression (New York:
Cambridge University Press, 1996), xv. Roosevelt acted under the
enabling provision of the “Trading-With-the-Enemy Act,” which stated:
“the President may investigate, regulate, or prohibit, under such rules and
regulations as he may prescribe, by means of licenses or otherwise, any
transactions in foreign exchange, and the export, hoarding, melting, or
earmarking of gold or silver coin or bullion or currency.” This was a
dubious use of the act, but one that officers at the Treasury Department had
already considered and urged, unsuccessfully, upon outgoing President
Herbert Hoover. Susan Estabrook Kennedy, The Banking Crisis of 1933
moratoria on withdrawals. Nonetheless, Roosevelt’s act seemed bold, vigorous, and imaginative, contrasted to the public’s perception of the conservative efforts of the departed Hoover administration. When some banks reopened on 13 March, enough confidence had been restored that customers, who had been withdrawing and hoarding money against the expected total collapse of the banking system, fed a “massive return flow” of cash into banks.\textsuperscript{23}

The new president’s conviction that the national financial crisis was sustained by “fear itself,” contrasted sharply with the lack of focus demonstrated by the federal officials formally charged with overseeing the banking system. Neither the regulators of the Federal Reserve nor the voluntary business association of the National Credit Corporation, for example, were able to calm the economy through the manipulation of credit availability. Neither body possessed the prestige, power, or resources to do so, and could not agree on the division of responsibility for managing aspects of the rapidly multiplying crises. Both reacted too conservatively to do much good.

A new federal agency, the Reconstruction Finance Corporation (RFC), replaced the NCC in February 1932. Although the RFC was more

liberal than its predecessor in its lending policies, it also engaged in mostly "stopgap measures."\(^{24}\)

As Roosevelt alloyed economics and politics in the crucible of his New Deal, he and his supporters in Congress sought to give federal officials both the power needed to end the Great Depression and the tools necessary to prevent another such disaster.\(^{25}\) The federal government at last exercised extensive, although still not exclusive, authority in the national and, increasingly, global economy, especially the credit economy. The Office of the Comptroller of the Currency (OCC), for example,

\(^{24}\) Kennedy, *The Banking Crisis of 1933*, 227. See, also: Wicker, *The Banking Panics of the Great Depression*, 148-149. Federal regulation of the thrift industry, separate but related to the banking industry, also began in earnest during the Great Depression. Faced with the failure of more than 1700 thrifts, building & loan associations, mutual savings banks, and savings & loan associations, the Congress passed the Federal Home Loan Bank Act of 1932, at the request of President Herbert Hoover. This Act created the Reconstruction Finance Corporation (RFC), which was authorized to provide emergency funding to thrifts. The RFC, initially chaired by Charles G. Dawes, RFC replaced the short-lived NCC, but fulfilled many of the same functions of facilitating credit. The RFC provided over $100 million in aid to thrifts in its 15 years of existence. The Act also authorized the creation of twelve district banks to loan money to financial institutions and created the Federal Home Loan Bank Board (FHLBB) to manage the district banks. The following year, Congress enacted the Home Owners’ Loan Act (HOLA), which authorized the FHLBB to grant federal charters to S&L associations.

\(^{25}\) The holiday’s success gained for Roosevelt critical early momentum and allowed his administration to consolidate Americans’ resurgent confidence. Under what became the New Deal, Congress extended federal regulation of financial institutions. It enacted along with the additional oversight structural changes intended to prevent similar national crises of credit and
already entrusted with general supervision, gained more regulatory power to create but also to close nationally-chartered banks. If, upon examination, the comptroller determined that a bank is insolvent, he or she placed it in receivership in order to preserve any remaining assets.\textsuperscript{26}

Congress carried the nation farther along the path of bank reform than Roosevelt had been prepared to travel. For example, in one of the most significant provisions in the sweeping Banking Act of 1933, also known as the Glass-Steagall Act, Congress created federal deposit insurance despite the president’s own stated resistance.\textsuperscript{27} The Federal Deposit

currency. William E. Leuchtenburg, \textit{Franklin D. Roosevelt and the New Deal, 1932-1940} (New York: Harper & Row Torchbooks, 1963), 158-161.\textsuperscript{26} 12 U.S.C. § 191. A legal or equitable proceeding, “receivership” is the status of being in the care of a “receiver” appointed by a court or agency to administer business, or protect assets, during a legal dispute. The receiver is responsible for preserving the assets and value of the property owned by the insolvent business, usually to enable sale of assets or property to recompense creditors.\textsuperscript{27} Glass-Steagall was not part of the New Deal; it was the final act in a drama that had been playing since the October 1929 crash. Congressional reformers took aim at the speculators they blamed for the nation’s crisis, including not only the bankers but especially the stock and securities dealers of Wall Street. For example, the Act erected a wall between deposit banks and securities dealers, forcing Wall Street’s venerable J.P. Morgan & Co. to separate its investment banking business, which arranged financing for speculative ventures (through stock and bond issues), from its commercial banking, which took in deposits and extended loans (for purchasing such issues). Ron Chernow, \textit{The House of Morgan: An American Banking Dynasty and the Rise of Modern Finance} (New York: Simon & Schuster, 1990), 349-353, 374-377.
Insurance Corporation (FDIC) would be the limited insurer of deposits.\textsuperscript{28} The idea of insurance, regulators hoped would attract depositors to the national banking system, keep the banks stable, and prevent more panic-driven runs.\textsuperscript{29} The FDIC had a second role in regulation: under the Federal Reserve Act of 1933, the FDIC was to be the receiver for insolvent national banks.\textsuperscript{30} When this "stepchild" of the New Deal proved both to be more successful and more popular than some of its legislative siblings, Roosevelt adopted the idea as if it were his own. Wisely so; in the estimation of one prominent historian of the New Deal, writing thirty years after the orphan's birth, federal deposit insurance was a "brilliant achievement."\textsuperscript{31}

\textsuperscript{28} The FDIC currently insures the accounts of qualified depositors up to $100,000 (12 U.S.C. §1821).


\textsuperscript{30} Act of June 16, 1933, ch. 89, 8, 48 Stat. 168 (codified at 12 U.S.C. 1811). In 1934, Congress also attempted to increase the public confidence in the thrift industry. The National Housing Act created the Federal Savings and Loan Insurance Corporation (FSLIC, as a counterpart to the commercial banking sector's FDIC), to provide insurance to small thrift depositors. The Act also created the Federal Housing Administration, which provided insurance to mortgage lenders.

\textsuperscript{31} Leuchtenburg, \textit{Franklin D. Roosevelt and the New Deal}, 60. The New Deal became the training ground for a generation of "bright young men" eager to serve the cause of reform, but the president also needed experienced men in his administration. Soon after taking office, Roosevelt appointed Houstonian Jesse H. Jones, a prominent banker and real estate
In Texas, resulting banking stability since World War II enabled the state's steady rise to prosperity. No Texas bank failed during the nearly four decades following the creation of the FDIC.32 Ironically, when developer, and already a member of the board of the RFC during the Hoover years, to be its chairman. Jones exhibited the vigorous qualities Roosevelt appreciated: in 1931, Jones orchestrated an unprecedented cooperative effort among politicians, lawyers, and businessmen which had been credited with preventing the collapse of Houston's banks, including Jones' own National Bank of Commerce. He remained chairman of the RFC until 1945, even as he served as Roosevelt's Secretary of Commerce during World War II. Commentators estimated that during his years of service, Jones exercised powers second only to the president. Walter L. Buenger and Joseph A. Pratt, But Also Good Business: Texas Commerce Banks and the Financing of Houston and Texas, 1886-1986 (College Station: Texas A&M University Press, 1986), 1, 107, 77. Once the bank holiday stabilized the situation, Jones was among those in the president's inner circle who suggested that "restoration of public confidence in the banks" might be accomplished by the federally-sponsored deposit insurance. After so publicly placing the crisis of confidence, that is, "fear itself," high on the list of national maladies, the new president opposed deposit insurance. But, after the idea proved its merit, Roosevelt cited it as among his administration's significant achievements. In his memoir, Jones describes the president's initial reluctance to support deposit insurance. Jesse H. Jones with Edward Angly, Fifty Billion Dollars: My Thirteen Years with the RFC (1932-1945) (New York: MacMillan, 1951), 45-46. Many observers rank deposit insurance among the successful legacies of the New Deal. Banking regulations have been updated and extended in the years since the New Deal. The Board of Governors of the Federal Reserve System has generally been the body entrusted with the greatest power. For example, the Financial Institutions Supervisory Act of 1966 (FISA; 12 U.S.C. §1818), the Bank Holding Company Act of 1956 (BHCA; 12 U.S.C. § 1841), and the International Lending Supervision Act of 1983 (ILSA; 12 U.S.C. § 3901) gave the Fed substantial additional regulatory authority over banks and bank holding companies. However, the laws also established judicial review of Board actions.

32 Some of this is Jesse H. Jones' personal legacy, no doubt. Even the first banking collapse in 38 years, that of the Sharpstown State Bank in Houston in the early 1970, took place amidst political scandal and a fraud
the worst national financial crisis since the Great Depression developed during the 1980s, with lingering effects into the 1990s, Texas suffered more institutional failures than any other state. Many factors fueled the statewide crisis, but "public confidence" to the point of foolhardiness, bolstered by federal deposit insurance, increased the devastation, an effect observers have labeled the "moral hazard."\(^{33}\)

The institutions which had underwritten the economic expansion during the oil-boom, were among the insolvent businesses after the oil-bust. In general, the Texas credit failures conformed to the pattern of over-extension that doomed its other industries. Many business owners, made dizzy by the spiraling rise and decline of oil profits, accepted risks they might have avoided in a more stable era, in the hope that potential gains could offset mounting losses. Bankers loaned desperate or deluded businessmen the money they needed to undertake these gambles.\(^ {34}\)


\(^{34}\) The banks were also gambling that the oil industry would rebound. FDIC chairman Seidman referred to First City National Bank as "virtually
the ministry of finance for the petroleum industry.” Because FCNB was founded by Judge J.A. Elkins and was run the judge’s son, Seidman referred to Vinson & Elkins (V&E), one of Houston’s largest law firms (also founded by Judge Elkins) as the industry’s “attorney general.” See: Seidman, Full Faith and Credit, 143. Under Judge Elkins’ guidance, FCNB and V&E were tied by financial interdependence as well as corporate kinship; Elkins invested law firm profits in the bank rather than distributing them to V&E partners, and the firm provided legal services to the bank at below market rates. Harold M. Hyman, Craftsmanship and Character: A History of the Vinson & Elkins Law Firm of Houston, 1917-1997 (Athens: University of Georgia Press, 1998), 299. Given the geology of oil-rich Texas and the Port of Houston’s place in its geography, V&E’s long-association with the oil business was natural. The firm’s legal services included litigation, but also energy-related regulatory lobbying (state and national). Some law firms with strong regional ties to the oil business suffered during the slack economy. Others grew during the boom and were able to consolidate gains during the bust, because lawsuits continued when other business ended. But even these fortunate few recognized the value of broadening their scope. Houston’s largest law firms, like many institutions including the City of Houston and the State of Texas, were tempered by the ordeal of the 1980s, learned from the experience to diversify their economic bases, and worked to limit future dependence on the oil industry. V&E had diversified its business and adapted to new opportunities and changing markets for legal services ad hoc. Over several decades, V&E added related patent, tax, insurance, and admiralty expertise as necessary, a random process which resulted in inefficiencies as the firm grew to include hundreds of attorneys. In 1979, prior to national economic recession but during a period of rapid growth and generational flux within, V&E’s managing partners sponsored an internal “study group” charged with identifying opportunities for positive change in firm governance. Over the next few years, V&E implemented many of the recommendations for organizational reform. For example, an informal “oil group” became part of a larger designated “Energy Group” and the “banking law group” was redesignated as the “Banking/Business Finance Section.” The results were more than cosmetic; the more formal bureaucratic structure clarified the firm’s missions and strategies while at the same time individuals retained the flexibility necessary to respond to volatility. The success of the reform is demonstrated by V&E’s continued profits, which rose from some $28 million to $98 million annually between 1981 and 1988, when other firms suffered “red ink and drastic downsizings.” Ibid., 441-447, 487-493, quoted at 489. The even older
Managers of some banks and thrifts were further intoxicated, and the depth of the future distress compounded, when regional economic reversal combined with apparent national legislative advances.

As the economy slumped in 1980, federal legislators, acting in the name of market reform, lifted some long-standing regulatory burdens. For example, thrifts traditionally were limited to lending to home owners, who undertook long-term, low-interest rate mortgages. This limitation prevented S&Ls from competing for new depositors on equal terms with commercial banks. The latter loaned to a wider variety of investors, and charged higher interest rates on shorter term loans. In 1980, lawmakers relaxed restrictions on thrifts, which could then make higher interest

Houston law firm Baker & Botts (B&B), one of Vinson & Elkins’ traditional rivals, is similarly identified with the energy industry, and B&B also weathered the 1980s by seizing new opportunities and through “controlled expansion.” Kenneth J. Lipartito and Joseph A. Pratt, Baker & Botts in the Development of Modern Houston (Austin: University of Texas Press, 1991), 203-215, quoted at 212. In 1986, the “biographers” of another of Houston’s major institutions, the Texas Commerce Banks, concluded that “[a]lthough [sharp fluctuations in the oil-related sectors of the Texas economy] have not yet abated, it seems safe to assert that on balance this era [1971-1986] brought much more good than harm to Texas Commerce.” Buenger and Pratt, But Also Good Business, 335. However, the authors also note that when they wrote in February 1986, oil prices dropped “precipitously” in the first two months of the year, and chose “to avoid the role of seers into the future,” and instead concentrated on summarizing the past. Ibid., 303, note.
consumer loans.\textsuperscript{35} Deregulation of the lending industry resulted in lower interest rates for consumers' loans and sparked a recovery, as lawmakers intended, but the increased competition for customers within the financial industry also drove lenders to support even riskier investments, especially in high-dollar commercial construction.\textsuperscript{36} Many of these speculative ventures failed in the still-depressed Texas real estate market. Lenders gained little for shareholders when they foreclosed on empty office towers or deserted suburban shopping malls, and the losses sustained from this gambling triggered the bankruptcies of many of the lending institutions' themselves.

Unfortunately, temptations to folly were not unique to such "sunbelt" boomtowns as Houston.\textsuperscript{37} Elsewhere, bankers succumbed, even in thrifty New England.\textsuperscript{38} By 1989, bank and S&L failures were a national scandal. It was increasingly clear that Congress had contributed to the crisis through its earlier deregulation. The lawmakers had not retracted federal deposit

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\textsuperscript{36} The Depository Institutions Act of 1982 (usually known for its congressional sponsors as the Garn-St. Germain Act) expanded the ability of thrifts to invest in commercial loans and loans secured by nonresidential real estate loans. Pub. L. No. 97-320, 96 Stat. 1469, codified as amended in various sections of 12 U.S.C.


\textsuperscript{38} Seidman, \textit{Full Faith and Credit}, 160-167.
insurance, the carrot extended to bankers during the New Deal, in exchange for the stick of oversight. Instead, Congress had raised the dollar figure of the maximum account insured. The government was obligated to assume responsibility for bad debts and worthless properties owned by hundreds of insolvent banks and thrifts. As the scale of the crisis swelled, lawmakers reasserted control, both to stabilize the lending industry, especially wayward S&Ls, and to limit political damage to themselves.

In August 1989, President George Bush signed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), which formally separated federal regulatory and insurance functions and imposed new regulations to be administered by the Federal Reserve, the OCC, and the FDIC.\textsuperscript{39} Newly empowered by FIRREA, and pressed by the anxious

\textsuperscript{39} Pub.L. No. 101-73, 103 Stat. 183, codified at 12 U.S.C. §1437. The Act abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB). The insurance previously administered by the FSLIC was transferred to the FDIC, while the regulatory functions of the FHLBB were transferred to the new Office of Thrift Supervision (OTS). See: “Transfer and Recodification of Regulations Pursuant to Financial Institutions Reform, Recovery and Enforcement Act,” 54 Fed.Reg. 49411 (1989). The OTS was effectively a regulatory descendant of the New Deal agency, the RFC, because the stated purposes of the new organization were: (1) to provide affordable home mortgages; (2) to establish procedures to resolve failed thrifts; (3) to improve regulation and ensure a well-capitalized independent thrift insurance fund; (4) to establish stronger capital asset requirements for thrifts; and (5) to enhance enforcement powers of federal regulators to protect against “fraud, waste and insider abuse.” 1989 U.S. Code Cong. & Admin. News, at pp. 103-104. After FIRREA, the FDIC administered two insurance funds: the Bank Insurance Fund (BIF) to insure commercial
lawmakers, the FDIC became more aggressive in its attacks on what it
deemed poor management practices. Seeking vigorously to enforce
banking laws new and old, regulators offered the carrot less often, and
applied the stick earlier, than ever before.

II. Federal Banking Regulation, 1980s: In 1989, Do You Know Who Your
Friends Are?

Okay, then why does the next sentence say, ‘We believe that it
is in our interest to explore open bank assistance.’ Because
we’re exploring all kinds of assistance: open and closed. That
sounds to me to be kind of affirmatively misleading . . . . [and]
We’re not going to fool these people in my opinion . . . .

FDIC Board Chairman L. William Seidman, 1988.\textsuperscript{40}

MCorp Financial, Inc., evolved from a Dallas establishment, the
Mercantile Bank, into a national bank holding company which did business
across Texas through eighty-five branches. MCorp helped to fund Texas’
economic boom through twenty-five subsidiary MBanks.\textsuperscript{41} When oil prices
collapsed at the end of 1985, the value of real estate, normally a hedge

\textsuperscript{40} FDIC board minutes of 2 November 1988, reconvened 3 November, at
(N.D.Tex., 1991), esp. n.27.

\textsuperscript{41} MCorp was a Dallas-based bank holding company, although it was a
against recession, eroded as well. These twin calamities undermined
the finances of many Texas banks. Approximately one-third failed during
the 1980s. In the midst of these upheavals, MCorp purchased and absorbed
Southwest Bancshares, a rival bank holding company that was near
insolvency.\footnote{In re MCorp, 160 Bankr. 941, at 944-945 (S.D.Tex., 1993); Houston
Division, Civil Action No. H-93-395.}

As economic reversals ended the boom, business partners became
adversaries. In 1985, five plaintiffs sued MBank Abilene, complaining of
promissory estoppel, fraud, tortious interference with business relations,
defamation, and violation of the Texas Deceptive Trade Practices Act
(DTPA). A central claim was that the bank’s director had breached an oral
promise to lend $3 million to a distressed oil and gas company. After a
five week trial, a jury returned a 10-1 verdict for the five plaintiffs, and
assessed total damages of more than $100 million. The state trial judge
entered a revised judgment against MBank Abilene for approximately $69
million, and granted the bank’s motion to stay the judgment, pending
exhaustion of appeals, but then withdrew the order.\footnote{The damages represent the total of the individual claims. The suit began
as separate actions by several plaintiffs, but was consolidated for all
purposes on 30 August 1985. The claims followed news reports that the
bank was near failure (the reports may have contributed to the troubles by
sparking a run on assets). Around the same time, the former president and
vice-president of MBank Abilene (actually its predecessor, Abilene
National Bank) were indicted for violating numerous banking statutes,
including embezzlement, falsifying a loan application, and filing a false}
MBank sought to reinstate the stay by petitioning for a writ of mandamus both in the Texas Court of Appeals and the Texas Supreme Court. It also sought protection from its status as a national banking association, and based its motion for mandamus on a century-old clause in the “Banks and Banking” portion of the United States Code, known as “section 91.” It provided: “[N]o attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court.”

income tax return. See: United States v. Kington and Earney, 801 F.2d 733 (5th Cir. 1986), cert. denied, 107 S. Ct. 1888 (1987). On 15 April 1988, the former bank president was convicted on 37 counts and sentenced to 12 years in prison. See: MBank Abilene v. LeMaire, 1989 Tex. App. LEXIS 801, at 806, n.3 (Court of Appeals of Texas, 14th District, Houston; No. C14-86-00834-CV). Because of local publicity, MBank requested a change of venue for the civil suit, and the civil trial had been transferred to Fort Bend County. LeMaire v. MBank Abilene (240th District Court Fort Bend County, Texas, Trial Court Cause No. 52,567). MBank Abilene appealed, alleging one hundred fifty-three points of error. MBank Abilene v. LeMaire, 1989 Tex. App. LEXIS 801 (Court of Appeals of Texas, 14th District, Houston; No. C14-86-00834-CV).

44 United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592 (N.D.Tex., 1986); Civil Action No. 1-86-143K.

45 12 U.S.C. §91. In its entirety, §91 provides: “All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or
The judicial interpretation of this clause, the meaning of "final judgment," and several other, more affirmative federal banking laws played a large role in litigation arising from the 1980s banking crisis. This was rarely trodden ground; although the provision was enacted in 1873, the U.S. Supreme Court had considered the practical meaning of section 91 only three times in the next one hundred years, in 1887, 1900, and 1905.46 In 1977, the Court considered the clause a fourth time, and held that it did not apply to an action by a debtor "seeking a preliminary injunction to

execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." (Revised Statutes of 1873-74, Title LXII, Ch. 4 §5242). An 1873 amendment to the National Bank Act added the anti-injunction, etc., provision to the original Section 5242, which previously dealt only with preferential transfers of funds. United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592, at 18600 (N.D.Tex., 1986); Civil Action No. 1-86-143K.

46 In Pacific National Bank v. Mixter, 124 U.S. 721 (1887), the Justices considered "whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States," and concluded that none could issue before judgment in a state or federal suit Id. at 724-727. The next time the Court studied 12 U.S.C. §91, in Earle v. Pennsylvania, 178 U.S. 449 (1900), garnishment of a depositor's property, not the bank's property, was at issue. In Earle, the Justices held that "an attachment sued out against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section." Id. at 454. Finally, in Van Reed v. Peoples' National Bank, 198 U.S. 554 (1905) the Court affirmed the Mixter interpretation, applying 12 U.S.C. §91 "to all conditions of national banks, whether solvent or insolvent." Id. at 559.
protect its own property from wrongful foreclosure," but did prevent
the "prejudgment seizure of bank property by creditors of the bank."47

These few interpretations did not unequivocally support MBank.
Both Texas appellate courts refused the bank’s petitions. The state trial
court denied MBank’s motion for a new trial, and the victors filed writs of
garnishment against MBank Dallas, MBank Fort Worth, a subsidiary of
MBank Abilene named Anbore, Inc., and the Federal Reserve Bank of
Dallas.48 In the Abilene division of the U.S. District Court for the
Northern District of Texas, federal attorneys sought a temporary
restraining order (TRO) and preliminary injunctions both against execution
of the state court judgment and against claims by the plaintiff victors in the
state action.49 The court granted the TRO, then twice extended it, until the

48 United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592
(N.D.Tex., 1986); Civil Action No. 1-86-143K.
49 The defendants responded with a motion to dismiss, on grounds of
inappropriate venue and lack of court jurisdiction. On the venue issue, the
court found sufficient cause to hear the case in the Northern District,
because that was where the bank did the majority of its business. The
defendants all resided in the Southern District of Texas, where the original
state trial was held. Regarding jurisdiction, the defendants alleged that the
court lacked both in personam and subject matter jurisdiction. A federal
court must show that it has both subject matter and personal jurisdiction
over defendants before it may issue a preliminary injunction. The judge
decided that he did have both, and denied their motion. In addition, the
defendants argued that the U.S. lacked standing to pursue a claim on behalf
of MBank; but the district court declared that according to the Supreme
Court’s decision in In re Debs, 158 U.S. 564 (1895), the U.S. had standing
to sue in its own courts to prevent interference with its powers and
judge heard oral arguments on the government’s motion for declaratory relief.\(^{50}\)

In addition to the United States’ general interest in ensuring that federal laws such as section 91 were properly understood and enforced, the government had a substantial pecuniary interest in the outcome of the case. The federal Comptroller of the Currency regulated and supervised national banks, and the FDIC insured their deposits. If MBank Abilene became insolvent, a situation which an immediate payment of $69 million might be precipitated, the FDIC would be obliged to compensate depositors for a sum greater than $218 million.\(^{51}\) To forestall those consequences, the government, as had MBank Abilene, sought a construction of section 91 precluding payment until the bank exhausted its appeals.\(^{52}\)

\(^{50}\) United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592, at 18593 (N.D.Tex., 1986); Civil Action No. 1-86-143K.

\(^{51}\) MBank Abilene not only held some $169 Million in insured deposits, it also held the FDIC’s own $50 Million Certificate of Deposit (which, after deducting the $100,000 insured by law, added $49.9 Million to the losses). If no other financial institution assumed the bank’s liabilities, the FDIC, the largest unsecured creditor, would be liable for the total $218.7 Million. United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592, at 18609-18611 (N.D.Tex., 1986); Civil Action No. 1-86-143K.

\(^{52}\) United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592, at 18596-18599 (N.D.Tex., 1986); Civil Action No. 1-86-143K.
The federal district judge noted that United States sought the injunction after the completion of a state trial on the merits, which the government contended was not a “final judgment” because it was subject to appeal. The defendants countered that “final judgment” meant a self-contained final decision by a particular judge, even though an appeal could follow. None of the previous four Supreme Court decisions had touched the “precise question raised here, that is the meaning of the term ‘final judgment.’” Therefore, the federal district court had the responsibility to interpret the meaning of the statute. The judge believed that Congress intended the law to prohibit premature claims on assets by one creditor to the detriment of others, and decided that “final judgment” meant a ruling from which no further appeal can be taken, because that construction promoted the intent. The defendants’ preferred interpretation “could

53 According to the judge, there had been only one case dealing with the “precise issue,” and he was persuaded by the ruling in that case, Loews’ Incorporated v. Superior Court of the State of California, 301 P.2d 64 (Cal. 1956). A state court interpreted "final judgment" to mean one "from which no appeal can be taken." Id. at 72. United States v. MBank Abilene, 1986 U.S. Dist. LEXIS 18592, at 18602, 18605 (N.D.Tex., 1986); Civil Action No. 1-86-143K.

54 The district court did remark that, although not construing the meaning of the language, the Court noted in all three of the early that the precursor statute to §91 was “deliberately placed at the end of the preferential transfer section” of the Banking Code. Mixter at 726-727; Earle at 453; Impac at 322-24. In Mixter, the Court took Congress’ intent to be equality among creditors in the division of assets upon insolvency. Also, the Court noted the fact that there was a depression in 1873, the year the original act was amended, in Impac. Impac at 317. See: United States v. MBank
cause havoc,” said the court, because even though an appellate court might later overturn the judgment, the national bank might have little recourse in regaining the assets. The government’s argument prevailed; if MBank Abilene paid the judgment immediately it might become insolvent and be unable ever to recover.\textsuperscript{55}

The federal district court granted the government the declaratory relief it sought, finding section 91 to preclude attachment of MBank Abilene’s assets until it had exhausted all routes of appeal.\textsuperscript{56} In order to grant a preliminary injunction, however, the court also had to establish four factors in the government’s favor: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction did not issue; (3) that the threatened injury outweighed danger the injunction might cause to the defendant; and, (4) that the injunction would not “disserve the public interest.”\textsuperscript{57}

Conceding the first factor, the district judge decided that the U.S. would prevail. On the remaining points, the government introduced evidence that MBank Abilene lacked sufficient funds from which to pay the judgment, and would probably become insolvent, harming the bank’s

\textit{Abilene}, 1986 U.S. Dist. LEXIS 18592, at 18603 (N.D.Tex., 1986); Civil Action No. 1-86-143K.
\textsuperscript{55} \textit{Ibid.}, 18604.
\textsuperscript{56} \textit{Ibid.}, 18607.
\textsuperscript{57} \textit{Ibid.}, 18607.
depositors. Even if the state judgment was overturned or modified, the defendants might not repay to the FDIC the money expended to pay secured deposits. More important perhaps, the court thought the bank’s failure would also affect the community, causing the public “to lose confidence in the national banking system.”\textsuperscript{58} The judge wrote: “No amount of money could restore the public’s confidence in MBank Abilene. . . no amount of money could rebuild MBank Abilene into the viable financial institution it presently is . . . As a practical matter, it would be impossible to reconstitute and reopen the bank.”\textsuperscript{59} Federal regulators had testified that 109 banks had already failed in 1986, and further insolvency would certainly be a disservice to the public interest.\textsuperscript{60} The potential harms, the court ruled, far outweighed the defendants’ stated concern that after the appeals process were exhausted, MBank Abilene would have no money left to pay their judgment. In late October 1986, the district judge issued the preliminary injunction.\textsuperscript{61}

Two and one-half years later, the federal regulators substantially repeated this performance on behalf of another MCorp subsidiary, MBank

\textsuperscript{58} Ibid., 18608-18609.
\textsuperscript{59} Ibid., 18610.
\textsuperscript{60} Ibid., 18613.
\textsuperscript{61} Ibid., 18612-18613. On 6 April 1989, the Texas Court of Appeals upheld the damages for two of the plaintiffs, but overturned the remaining three, for a total final judgment against MBank Abilene of $18.5 Million.
Greens Parkway of Harris County, Texas. The bank sued in state court
to recover on two promissory notes executed by Susan E. Taylor, the
owner of an oil-related business, Exploration Services. She filed
counterclaims, alleging damages under the Texas Deceptive Trade Practices
Act. In late February 1989, after the jury trial, the state trial judge
entered in Taylor’s favor a “final judgment” of $9.6 million. The court
denied MBank’s requests for an order prohibiting Taylor from filing an
abstract of the judgment prior to exhausting the appellate process.63

On 1 March, Taylor recorded her abstract with the Harris County
Clerk. The same day, the United States, again on behalf of the OCC, filed
an action in the federal district court for the Southern District of Texas,
seeking a TRO and a preliminary injunction.64 The government argued on
the same grounds as in the MBank Abilene case, but now had the victory’s
precedential support, both through comparison with the Northern District,
but within the Fifth Circuit.65

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MBank Abilene v. LeMaire, 1989 Tex. App. LEXIS 801, at 892 (Court of
Appeals of Texas, 14th District, Houston; No. C14-86-00834-CV).
62 Federal Deposit Insurance Corporation v. Taylor, 727 F.Supp. 326, at
327 (S.D.Tex., 1989); Houston Division, Civil Action No. H-89-1463.
63 Under Texas law, the recorded abstract of judgment created a lien on all
real property of MBank located in Harris County. Tex. Prop. Code Ann. §
(5th Circ., 1989).
65 The defendants appealed on the decision regarding the federal
government’s standing, and the U.S. Court of Appeals for the Fifth Circuit
In late March 1989, U.S. District Judge James DeAnda granted
the preliminary injunction and ordered Taylor to withdraw her abstract of
judgment.\textsuperscript{66} In response, Taylor filed notice in the Harris County property
records announcing her \textit{involuntary} withdrawal of the abstract of
judgment, subject to appeal. In April, Judge DeAnda ordered Taylor
either to release the abstract \textit{completely}, or to be held in contempt.\textsuperscript{67}
Taylor appealed to the Fifth Circuit, arguing, as had the Abilene
defendants, that the United States lacked legal standing to bring the case
because no sufficient governmental interest was at stake. The U.S.
asserted once more that its interest stemmed from the OCC's obligation to
ensure the safety and soundness of the national banking. The only fresh
argument was Taylor's contention that her abstract of judgment was not
specifically described in the language of §91. The government answered
by stressing that the effect of the abstract was the same as injunction, in that
it prevented free transfer of property. The Fifth Circuit agreed with the

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regulators on this second issue. Relying heavily on the reasoning in the Abilene case, the circuit judges affirmed Judge DeAnda’s judgment and order.68

One factor which made the Taylor case more than as a repeat of Abilene, was that the federal government, in particular the FDIC, was less abstractly involved in the general financial health of MBank Greens Parkway. One week after Judge DeAnda granted the preliminary injunction, federal regulators had declared the insolvency of MBank Greens Parkway’s parent company, MCorp. The FDIC then intervened in the Taylor cases (state and federal), in support of the existing pleadings, but in its own name, following its appointment as the bank’s receiver. These continuing controversies included the MBank’s original motion for a new state trial and a motion to modify, correct, or reform the state judgment, actions which the FDIC successfully removed to the Southern District of Texas shortly before the state court ruled on the pending motions.69

68 Taylor did not argue that the judgment was “final,” but the Circuit invoked LeMaire (826 F.2d at 390), just to remind the parties that it was not. United States v. Taylor, 881 F.2d 207, at 209 (5th Circ., 1989).
The leaders of the MCorp financial empire continued to litigate claims for several more years, until all of the MBanks were absorbed through the mergers and buy-outs that complicated the already complex roster of claimants in the banking crisis. Further to confuse the issue, as the decade waned MCorp no longer considered government regulators as allies: the company’s managers resisted coming under FDIC receivership, claiming it was an unnecessary expedient, and the Federal Reserve Board (Fed), as official superiors to the FDIC, became targets of MCorp’s most important and long-running lawsuit. This reversal of fortune occurred because, in a calculated recanting of the arguments made in the Abilene some thirty months earlier, the board of the FDIC decided that it had become in the public’s interest for many MBanks to fail. MCorp later argued persuasively that the FDIC had conspired to hasten insolvencies. By 1989, the banking crisis entered a critical phase.

The seeds of the transformation in the federal regulator’s attitudes toward MCorp were rooted in earlier policy developments. In 1984, the Federal Reserve Board revised its regulations to add the “source of strength” rule, which required a member holding company to “serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner.”

its policy, the Fed published in the *Federal Register* a statement effective 24 April 1987, which provided:

... that in serving as a source of strength to its subsidiary banks, a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks. ... [The] company's failure to meet its obligation to serve as a source of strength to its subsidiary bank(s), including an unwillingness to provide appropriate assistance to a troubled or failing bank, will generally be considered an unsafe and unsound banking practice. ...  

The Fed solicited comments on this definition of terms, apparently willing to revise the statement, but in fact published no revisions in subsequent editions of the *Register*.  

These amendments became a live issue for MCorp (the parent corporation as well as two wholly-owned subsidiaries, MCorp Financial, Inc., and MCorp Management) during the summer of 1988. Gene H. Bishop, chairman and chief executive officer of MCorp, began requesting “open-bank” assistance for distressed MBanks in Dallas, Houston, and

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71 Policy Statement, 52 Fed.Reg. 15707, at 15708 (1987). Therefore, “unsafe” or “unsound” practices are not only potential violations of the “source of strength” rule, but of 52 Fed. Reg. 15707-15708, or both. The Fed had authority to issue the regulation and the subsequent policy statement through the broad language of the Bank Holding Company Act of 1956 (BHCA), 12 U. S. C. § 1841 et seq. (1988 ed. and Supp. II). The BHCA’s § 1844(b), Section 5(b), stated: “[t]he Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.”
Abilene.\textsuperscript{73} As a condition for its aid, FDIC regulators demanded that MCorp agree to a so-called "Standstill Agreement." Under it the company would maintain the funding of its banks at levels consistent with those existing at the time MCorp first sought assistance.\textsuperscript{74} This meant that healthy MBanks which had been lending millions of dollars in federal funds to MBanks Dallas and Houston would continue shoring up those troubled sibling banks. Meanwhile, the FDIC would seek a buyer for the faltering MBanks.\textsuperscript{75}

According to Chairman Bishop, a timely infusion of cash would have stabilized the banks. But he believed this arrangement was designed instead to cause even more MBanks to become insolvent, which would allow the FDIC to seize control of the entire network. Bishop noted that the FDIC had earlier refused even to negotiate a bailout for the MBanks unless MCorp "downstreamed" funds, meaning that any dividends and profits due to the owners of shares in the holding company would be diverted into distressed MBanks rather than distributed to the shareholders. But upon

\textsuperscript{72}MCorp v. Board of Governors of the Federal Reserve System, 900 F.2d 852, at 860 (5th. Circ., 1990); No. 89-2816.

\textsuperscript{73}An example of "open-bank" aid is an infusion of cash to a still solvent but faltering bank in order to keep it open; "closed-bank" aid indicated closing the bank, declaring it insolvent, and rendering aid through the protection of bankruptcy receivership.

hearing rumors of this plan, representatives from Shearson Lehman Hutton, one of MCorp's largest creditors and also one of its major stockholders, told MCorp's Board of Directors that they believed downstreaming the holding company assets would violate MCorp's fiduciary duties to the shareholders.\textsuperscript{76}

William Seidman, chairman of the FDIC's board during this phase of the banking crisis, actually agreed that the proposed downstreaming of MCorp assets to the MBanks would create the conflict of interest described by Shearson. The directors of bank holding companies could accumulate enormous profits from the healthy banks. But not only were they not obliged to use that money to save sick banks, they risked sanctions for attempting to do so. Seidman considered this to be a "basic defect" in the American banking system: under the source of strength doctrine, duties to shareholders conflicted with obligations. Under the banking laws, the directors risked lawsuits by stockholders on the one hand and regulators on the other, whatever they decided. Nevertheless, as chairman, Seidman

\textsuperscript{75} \textit{MCorp} \textit{v. Clarke}, 755 F.Supp. 1402, at 1405 (N.D.Tex., 1991), esp. n.5. \textsuperscript{76} \textit{Ibid}. Another company filed suit against MCorp in Delaware seeking an injunction that would prohibit the holding company from downstreaming assets, charging such a move would amount to a fraudulent conveyance under Texas law. This suit was stayed pending the outcome of the MCorp litigation before U.S. District Judge Hughes of the Southern District of Texas. \textit{Charlifco and Charter National Life Insurance Co. v. MCorp}, Del. Chancery Court C.A. No. 10426, filed November 9, 1988.
acted on his perceived duty to the stockholders in the FDIC insurance fund, that is, the American taxpayers, and opted to sue MCorp.\textsuperscript{77}

Seidman's explanation of the dilemma MCorp faced does not address Bishop's charge that the FDIC schemed to force his banks into bankruptcy. However, MCorp's conspiracy theory is apparently substantiated by the minutes of an FDIC director's meeting which contain statements indicating that FDIC officials believed the entire network of MBanks would be more attractive to prospective buyers than would a handful of individual banks. That the bank's chairman was not paranoid is attested by the fact that a federal judge later agreed that the evidence of the board minutes seemed to support the inference. Subsequent actions by the FDIC were consistent with these statements. It is possible to infer that regulators actually planned to render insolvent as many MBanks as possible by forcing the company to "downstream" its funds.\textsuperscript{78}

The seeds of the "scheme" apparently were planted in October 1988. The FDIC's senior national bank examiner for the southwestern region reported to the Office of the Comptroller of the Currency (OCC) that twenty of twenty-five MBanks both did not meet statutory minimum capital levels for member banks, and had failed to maintain the lower capital

\textsuperscript{77} Seidman, \textit{Full Faith and Credit}, 155-158. Seidman was the head of the FDIC, until he was removed in February 1990. The book is both his memoir of the crisis and his defense against his many critics.

requirement MCorp had negotiated with the FDIC.\textsuperscript{79} After receiving this report, the Fed’s Board of Governors notified MCorp that the company was being investigated for possible violations of the “source of strength” regulation. The Board was concerned that the company’s business practices were “likely to cause substantial dissipation of the assets” that MCorp needed to serve as a source of strength for its subsidiary MBanks. The Board quickly issued an amended notice of its charges, and ordered the company to implement “an acceptable capital plan” that promised that all of MCorp’s assets were to be used to recapitalize the MBanks “suffering capital deficiencies,” that is, the large banks that were taking heavy losses from real estate and energy-related loans.\textsuperscript{80}

The amended notice also instituted three temporary orders. The first forbade MCorp to pay any dividends, and the second forbade MCorp “to dissipate” any assets without prior Board approval, and the third reiterated the regulator’s command that MCorp use “all of its assets” to support subsidiary banks in need of capital.\textsuperscript{81} MCorp challenged these orders in


\textsuperscript{80} \textit{MCorp v. Board of Governors of the Federal Reserve System}, 900 F.2d 852, at 853 (5th. Circ., 1990); No. 89-2816.

\textsuperscript{81} \textit{Board of Governors of the Federal Reserve System v. MCorp}, 502 U.S. 32, at 35 (1991), esp. n.5. The Financial Institutions Supervisory Act (FISA) authorized the Fed’s Board to institute the administrative proceedings, and empowered the Fed to issue cease-and-desist orders to banks and also to holding companies if “in the opinion of the appropriate Federal banking agency, any insured depository institution . . . is engaged
federal court in the Northern District of Texas. The Fed agreed to suspend the third order, pending the outcome of the ongoing negotiations between MCorp and the FDIC regarding efforts to aid the several distressed MBanks.82

While these negotiations continued, MBanks in Dallas and in Houston would have failed outright if they were not allowed to borrow the funds at the Federal Reserve discount rate and if regular cash infusions they received from sister MBanks were unavailable. MBank Abilene did become insolvent, and several other MBanks failed by the end of the year. With the failures looming, the FDIC contacted several companies interested in buying MBanks.83

In a meeting of the FDIC Board of Directors in late October, member William Roelle distributed reports on both MCorp and another distressed bank holding company, Texas American Bancshares (TAB). Roelle noted that if the federal funds loaned among the MBanks were valued at 70 percent of their actual amount, an accounting item the FDIC

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could control, the result would be the failure of many of the MBanks, enabling the FDIC to “grab a great number . . . We would end up with a great number of the subsidiary banks in both TAB and MBank.”\textsuperscript{84} In November 1988, Director of Bank Supervision and member Paul Fritts, explained at another board meeting how the FDIC board might resolve the MCorp matter. He noted that:

\dots if they had a liquidity squeeze \dots we would capture 16 of the banks as of October 31 and control 75 percent of the total assets \dots if we look for the first time individually at . . . MBanks Fort Worth and MBank Austin . . . if we analyzed and found them to be insolvent \dots you get 18 of the 25 banks, and you get 82 percent plus of the total assets. And the remaining seven banks are not really significant in the big picture. \dots [A] pretty good package, and all you really need to do to get that much -- and I hate to say it this way but -- [is] to have a liquidity insolvency at Dallas and Houston, and I don’t think that’s a very far-fetched thing, as long as the other banks aren’t allowed to pull their money out.\textsuperscript{85}

Fritts then suggested that it would be possible to ensure that the “other” MBanks did not withdraw their funds from the Dallas and Houston MBanks, if “you stepped right in and said, you know, ‘The Fed’s not going to fund you anymore.

\textsuperscript{83} \textit{Ibid.}, 1405.
\textsuperscript{84} FDIC board minutes of 25 October 1988, at 021285, quoted in: \textit{Ibid.}, 1414.
You're up to 'X' dollars.' Those two banks [would] close."86 The other board members, including FDIC Chairman Seidman, indicated that they were amenable to this method of achieving the MBanks' insolvency.87

At this meeting, the FDIC board decided to demand that MCorp enter into the previously mentioned "Standstill Agreement," as a condition for the government providing open-bank assistance to the troubled MBanks. Some board members harbored doubts about the fairness of that agreement. Also, they wondered whether MCorp would interpret the plan as a predatory scheme, because in the summer of 1988, a similar arrangement between the FDIC and the Dallas bank of First RepublicBank Corporation had led to the closure of the Dallas bank and to the insolvency of all forty of First RepublicBank's Texas subsidiaries. One board member wondered if the proposed agreement would "be a red flag to MCorp . . . because they know how it was used in the First Republic situation." The board spent a significant portion of that meeting on phrasing the letter to MCorp outlining the aid agreement. For example, Seidman asked, "Okay, then why does the next sentence say, 'We believe that it is in our interest to explore open bank assistance.' Because we're exploring all kinds of assistance: open and closed. That sounds to me to be kind of affirmatively misleading. . . ." A member responded: "That was just a little sugar

86 FDIC board minutes of 2 November 1988, reconvened 3 November, at 022236, quoted in: Ibid., 1414-1415.
coating . . . it's not essential.” Seidman concluded, “we’re not going to fool these people in my opinion . . .”

Seidman was correct that MCorp was not “fooled,” because these discussions outlined the essential elements of Bishop’s alleged conspiracy. However, the FDIC board, which included the Comptroller of the Currency, with the cooperation of the Federal Reserve Board, put aside doubts and enacted the plan to require the standstill agreement.

If the regulators’ intent was to bring MCorp to crisis, then the scheme bore fruit on 21 March 1989, when three creditors filed an involuntary bankruptcy proceeding against MCorp in the U.S. Bankruptcy Court for the Southern District of New York. One week later, on 27 March, MCorp informed managers of individual MBanks about the litigation and issued a press release announcing its intention to convert the suit to a voluntary bankruptcy and to reorganize the holding company under Chapter 11. The same day, the smaller MBanks began to demand

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87 Ibid., 1415.
88 FDIC board minutes of 2 November 1988, reconvened 3 November, at 022299, 022302, quoted in Ibid., 1415, esp. n.27. In a preliminary ruling in another case, U.S. District Judge Fitzwater stated that the FDIC also “manufactured” the insolvency of First RepublicBank Delaware. Senior Unsecured Creditors' Committee of First RepublicBank Corp. v. FDIC, 749 F. Supp. 758 (N.D. Tex., 1990).
90 The plaintiffs brought the initial suit under Chapter 7. Ibid., 1405. On March 31, bankruptcy judge Cornelius Blackshear granted an MCorp motion to convert the Chapter 7 proceeding to Chapter 11, which would
the return of federal funds they had loaned to MBank Dallas,
amounting to more than $502 million. The Dallas bank honored the $46.9
million request of the first affiliate to call in its loan, MBank New
Braunfels; but, as similar demands mounted throughout the day, the
president of MBank Dallas advised employees to withhold payment.91

Since November 1988, the government's scrutiny included
monitoring MCorp's finances on a daily basis. Just before 7 p.m. on 27
March 1989, an OCC employee who had been assigned to monitor MBank
Dallas' liquidity reported electronically to his supervisor in Washington,
D.C., that several MBanks had made unsatisfied demands on Dallas, and
that some banks, including MBank New Braunfels, refused to sell overnight
federal funds to MBank Dallas.92 Next morning, the directors of both
MBank Dallas and MBank Houston, through counsel informing Chairman
Seidman officially of the crisis, and requested assistance. The same day,
the Senior Deputy Comptroller of the Currency advised the Federal
Reserve Bank in Dallas that the OCC believed MBank Dallas "no longer

allow the company to continue to operate, protected from its creditors.
while it reorganized. Five days later, judge Blackshear authorized the
transfer of the proceedings to the Houston bankruptcy court, where two
MCorp subsidiaries had already filed Chapter 11 petitions. Meanwhile,
five MCorp creditors, including Shearson Lehman Hutton, formed an
informal creditors' committee. Susan Beck, "BIG SUITS: South," The
92 Ibid., 1406.
viable from either a capital or liquidity standpoint.” That is, that failure was imminent. The letter added that the FDIC had decided against providing open-bank assistance, and concluded that, without aid from the FDIC or the Fed, MBank Dallas would become “liquidity insolvent.” The Federal Reserve Bank in Dallas immediately closed MBank Dallas’ line of credit and demanded immediate repayment of all outstanding loans, which totaled approximately $1.425 Billion.93 Next day, FDIC personnel entered the twenty-five MBanks to assess the solvency of each. By the next morning, the FDIC regulators declared twenty of the MBanks to be insolvent.94

The regulators placed the insolvent banks’ remaining assets in receivership, to be managed by a new specially-chartered statewide national bank association, owned by the FDIC, known as the Deposit Insurance Bridge Bank (DIBB).95 The DIBB soon changed its name to Bank One, Texas, when the BancOne Corporation of Ohio began to manage the DIBB for the FDIC. Bank One subsequently purchased the assets and assumed the

93 Ibid., 1406.
94 The twenty MBanks declared insolvent were: MBank Abilene; MBank Alamo (San Antonio); MBank Austin; MBank Brenham; MBank Corsicana; MBank Dallas; MBank Denton County (Lewisville); MBank Fort Worth; MBank Greenville; MBank Houston; MBank Jefferson County (Port Arthur); MBank Longview; MBank Marshall; MBank Mid-Cities (Arlington); MBank Odessa; MBank Orange; MBank Round Rock; MBank Sherman; MBank Wichita Falls; and MBank The Woodlands. Ibid., 1406, n. 7.
95 Ibid., 1407.
The only MBanks survivors were those in Brownsville, Corpus Christi, El Paso, and Waco. They had traded federal funds among themselves, but not to the MBanks in Dallas or Houston. The lucky MBank New Braunfels had been quick enough off the mark to recover its $46.9 million from MBank Dallas before that bank suspended payments. Prior to the FDIC actions, MCorp and all its subsidiary MBanks had assets of more than $17 billion. Although the closure left the five remaining MBanks with

96 Bank One and the FDIC subsequently disagreed over exactly which assets Bank One had purchased from the FDIC, but reached a settlement between themselves. But, according to Judge Hughes, in his opinion in a later case related to the MCorp matter, Bank One simply spent the next three years "on the sideline while the debtors, the FDIC, and a host of creditors, real and imagined . . . fought, regrouped, and refought in court." United States v. Bank One, 170 Bankr. 899, at 900 (S.D.Tex., 1994); Houston Division, Civil Action No. H-90-2929. In another proceeding, related to the DIBB's failure to continue administering a benefits plan for its new employees, Southern District Judge Samuel Kent noted that between March 28, 1989, and May 5, 1989, there was a "complete vacuum of authority," regarding a benefits plan. But Judge Kent commended one employee, Stephanie Burks, who "stepped up to the plate, in a remarkable fashion, bringing order to chaos, and ensuring, throughout the period of transition, as smooth and orderly a flow of benefits as possible to those in critical need." The judge remarked that "[t]his Court is genuinely honored to have observed, through her testimony, her actions during this time. If ordinary citizens were entitled to the receipt of some sort of medal, for heroism in ordinary affairs, [Burks] would surely be a most worthy recipient." Taylor v. Bank One, 137 Bankr. 624, at 637 (S.D.Tex., 1992); Houston Division, Civil Action No. H-90-3815.
deposits totaling some $2.3 billion, the disaster was so complete that on 31 March, MCorp's two subsidiaries, MCorp Financial, Inc., and MCorp Management, filed voluntary Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of Texas.\(^97\) The involuntary bankruptcy proceeding filed against MCorp in New York was subsequently transferred and consolidated with the related cases in Texas.\(^98\)

To complete its housecleaning, the Fed commenced a second proceeding against MCorp, alleging that the company violated the Federal Reserve Act when it required subsidiaries MBank Houston and MBank Preston to extend to the holding company an unsecured credit line of more than $63 Million.\(^99\) Maintaining that the regulators closed twelve of the

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\(^{97}\) *MCorp v. Board of Governors of the Federal Reserve System*, 101 Bankr. 483 at 485 (S.D.Tex., 1989); Houston Division, Civil Action No. 89-1677.

\(^{98}\) *MCorp v. Board of Governors of the Federal Reserve System*, 900 F.2d 852, at 853-854 (5th. Circ., 1990); No. 89-2816. The actions were assigned the following case numbers: the involuntary petition filed in New York was Case Number 89-02848-H2-11; the voluntary petition filed in the Texas by MCorp Management was Case Number 89-02324-H5-11; and, the voluntary petition filed in Texas by MCorp Financial, Inc., was Case Number 89-02312-H3-11. *MCorp v. Board of Governors of the Federal Reserve System*, 101 Bankr. 483 at 485 (S.D.Tex., 1989); Houston Division, Civil Action No. 89-1677.

\(^{99}\) Federal Reserve Act, 48 Stat. 183 (1933). Section 23 (§23) sets forth restrictions on member bank holding companies' corporate practices, including restrictions on "self-dealing," that is, transactions between subsidiary banks and nonbank affiliates. Section 23A prohibited a bank from extending credit to a nonbank affiliate unless the loan was secured by collateral having a market value of at least 100 percent of the loan. 12 U.
twenty MBanks "illegally or improvidently," MCorp went on the
offensive in May 1989, and filed an adversarial bankruptcy proceeding
against the Federal Reserve's Board of Governors, again in the Southern
District of Texas.¹⁰⁰ MCorp sought a TRO, and preliminary injunction, to
stay the Fed's two administrative proceedings, that is, the latest statutory
charge, and the original source of strength action. The company also
sought to prevent the Fed from taking further actions against it without
prior approval of the bankruptcy court. MCorp argued that the
proceedings should have been stayed automatically under the federal
Bankruptcy Code.¹⁰¹ But a bankruptcy judge denied the company's
requests. The Fed then filed a successful motion to have the case removed
from the bankruptcy court and transferred to the District's civil docket.¹⁰²

Southern District Judge Hughes drew the duty to preside in the civil
controversy between MCorp and the Fed. The issue for him to decide,
Hughes concluded, could be narrowed to the single question. Should a
"nonbank corporation," specifically a holding company that owns banks but

¹⁰⁰ MCorp v. Board of Governors of the Federal Reserve System, 101
Bankr. 483 at 485 (S.D.Tex., 1989); Houston Division, Civil Action No. 89-1677.
also other non-bank subsidiaries, be required to have its bankruptcies administered by a banking agency such as the FDIC, or be entitled to the protections afforded by the presence of a federal bankruptcy judge? Any decision, noted Judge Hughes, would have broader impact than a "normal" preliminary injunction, which maintained the legal status between litigants until their claims could be heard on the merits. Instead, his decision would be analogous to a declaratory judgment, because, in effect, he would be assigning an authority, either judicial or administrative, to supervise MCorp's restructuring.

The judge had to choose from among several apparently conflicting federal statutes. MCorp asserted that federal bankruptcy judges had been given exclusive jurisdiction over all property in the bankrupt's estate, under the bankruptcy code. Also, the Fed's attempt to gain control of MCorp assets prior to bankruptcy proceedings violated the automatic stay provisions of that code. Even if the Fed was exempt from observing the automatic stay, MCorp argued, the bankruptcy code still authorized

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103 MCorp v. Board of Governors of the Federal Reserve System, 101 Bankr. 483, at 484 (S.D.Tex., 1989); Houston Division, Case No. 89-02312-H3-11, Civil Action No. 89-1677, Adversary No. 89-0298.
104 Ibid., 485.
105 The relevant portion of the bankruptcy code provides: "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the
injunctions to protect debtors from interference from third-parties.\textsuperscript{106} The Federal Reserve countered MCorp's arguments by noting that the Congress eliminated federal court jurisdiction over the Fed by enacting the Financial Institutions Supervisory Act (FISA). It provided that: "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order."\textsuperscript{107} According to the Fed's interpretation, the automatic stay that would have been imposed under the bankruptcy code was superseded by FISA.\textsuperscript{108}

In making his decision, Judge Hughes estimated the probable effects of giving priority to either statute. If he issued the injunction, Hughes would effectively be allowing MCorp to reorganize under the protection afforded by a bankruptcy judge. If, on the other hand, the district judge withheld the injunction, the FDIC would administer the bankruptcy. He gave more weight to the bankruptcy laws. Their primary object was to maintain the viability of the nation's businesses, "so that they may make a contribution to the economic vitality of the country."\textsuperscript{109} Hughes noted that

\textsuperscript{106} 28 U.S.C. § 1334(d).
\textsuperscript{107} 11 U.S.C. § 105.
\textsuperscript{108} 12 U.S.C. § 1818(i).
bankruptcy jurisdiction had been granted by Congress "for the
restricted purpose of facilitating the reorganization of the debtor." If the
FISA provisions apparently trumped that jurisdiction, the importance of
the bankruptcy court's task was cause enough to supersede the conflicting
statute.\textsuperscript{110} To continue the Fed's proceedings would only delay or derail
the company's reorganization, as it would "oblige[s] MCorp to respond in
multiple forums to multiple agencies, each with its own internal and
external priorities." This lagging could prove fatal. If MCorp was "to
survive to the benefit of the creditors and the government, it must act
quickly, for a lingering Chapter 11 case inevitably becomes a
liquidation."\textsuperscript{111}

On 19 June 1989, after weighing the effects of ruling in favor of
either party, Judge Hughes determined that the risk of harm to MCorp "in
both probability and magnitude" exceeded the danger to the government,

\textsuperscript{110} Judge Hughes noted previous cases in which similar limitations had been
"overridden through control of the debtor's estate having been entrusted to
the authority of the bankruptcy court," and recalled other cases in which
conflicts had been resolved in favor of the application of the bankruptcy
code in matters affecting the Court of Claims and the Tax Court (which are
administrative courts rather than judicial courts), both of which exercised
jurisdictional grants parallel to the Fed's. Even \textit{in rem} proceedings in
admiralty, which were "particular liquidation actions," might yield to the
bankruptcy code, although "maritime jurisdiction is directly a judicial
power of international significance." \textit{MCorp v. Board of Governors of the
Federal Reserve System}, 101 Bankr. 483, at 487 (S.D.Tex., 1989);
Houston Division, Case No. 89-02312-H3-11, Civil Action No. 89-1677,
Adversary No. 89-0298.
whose “interests . . . can adequately be represented in the bankruptcy proceedings.”\textsuperscript{112} The judge enjoined the Fed from pursuing its goals for MCorp except under the aegis of the bankruptcy court.\textsuperscript{113} Under the injunction, the Fed was prevented from using either its regulatory or supervisory authority “to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring.” The order embraced the governors of the Federal Reserve System, its employees and agents, and “those acting in concert with them.”\textsuperscript{114}

Ultimately, Judge Hughes’ decision in favor of MCorp may have been most influenced by his perception that the Fed’s only plan for reorganization consisted of selling MCorp’s dead or dying members to the highest bidder, rather than attempting to revive the company. Throughout his opinion, Hughes was unsympathetic to the federal regulators. For example, in addition to its statutory arguments, the Fed claimed that in

\textsuperscript{111} Ibid., 486.
\textsuperscript{112} Ibid., 486.
\textsuperscript{113} With regard to weighing costs and benefits, Judge Hughes stated that “[n]either an interest of the public nor an interest of a group of nonparties will be harmed by this injunctive solution to the regulatory conflict.” Ibid., 491.
\textsuperscript{114} However, the injunction did not apply to “parallel” agencies such as the OCC or the FDIC, which could still “independently pursue their regulatory mandates.” Ibid., 491.
proceeding against MCorp it was merely performing its normal regulatory and supervisory functions, which were not in the class of third-party actions that the Congress intended to be automatically enjoined.\textsuperscript{115} In his response to this self-characterization as a disinterested party, the judge noted that "[b]oth the Board's generalized, diffuse interest in the holding company as well as [its] duplicative, distracting hearings militate for its being not exempt from the stay."\textsuperscript{116}

By contrast, Judge Hughes was apparently sympathetic to MCorp's theory that it was the victim of a government conspiracy, which he characterized as the claim that "the current state of regulatory orders issuing from the Board is effectively an attempt by the Board to control the estate . . . for the purpose of dictating MCorp's future structure." In his written opinion, the judge referred to the administrative proceedings under the label: "Reorganization by Subterfuge." However, Hughes noted that "[w]hile this appears plausible, it is unnecessary to address it in detail because the stay applies to most of the regulation and because the Board is subject to the anti-interference prohibition." In the end, Judge Hughes left it to a bankruptcy judge to scrutinize the "potential for undisclosed

\textsuperscript{115} \textit{Ibid.}, 485.
\textsuperscript{116} \textit{Ibid.}, 489.
motivations," when the Fed presented its inevitable arguments to lift the stay.\textsuperscript{117}

When Hughes issued his opinion in favor of MCorp, he made it clear that he remained not only unmoved by the regulators' concerns, both stated and allegedly unstated, but that he was also disdainful of their methods. Hughes noted that he was aware that the precedent held the potential to tempt other companies to abuse the bankruptcy code, a point that the Fed had argued. But the judge then declared that "[t]he court is also mindful of who was paid to prevent the bank practices that resulted in the collapse of the system in the Southwest." Judge Hughes concluded that, given the facts of the case, "[n]either side has an occasion for self-righteousness."\textsuperscript{118}

III. Federal Banking Regulation, 1990s, Part I: Nothing to Fear But FIRREA Itself

Considering the experience and sophistication of the Defendants' attorneys in this case, the sparseness of this potentially damaging evidence and counsel's failure to set forth a coherent argument detailing the conspiracy scenario, is puzzling.


\textsuperscript{117} \textit{Ibid.}, 489.
\textsuperscript{118} \textit{Ibid.}, 491.
District Judge Hughes' preliminary injunction effectively authorized MCorp to reorganize in the Southern District of Texas. Bankruptcy proceedings soon commenced there before U.S. Bankruptcy Judge Letitia Z. Clark.\textsuperscript{120} But MCorp had also already begun to pursue its complaint that the federal regulators acted unlawfully in closing a dozen of the twenty allegedly "insolvent" MBanks, by filing a civil action in the Northern District of Texas in March 1990.\textsuperscript{121} And the Federal Reserve, still contending that Hughes had lacked jurisdiction to issue his injunction, immediately appealed to the Fifth Circuit.\textsuperscript{122} Although channeled into separate legal forums, these tributary currents of the MCorp affair continued to ebb and flow in parallel with the bankruptcy case.\textsuperscript{123}

\textsuperscript{120} On 30 April 1990, MCorp lost its claim in the first major proceeding in the bankruptcy. MCorp had moved to cancel a lease with the owner of its former offices, Tower Center, in order to avoid a past-due rent payment of $49 Million. The owner naturally opposed, claiming the occupancy agreement was not subject to rejection. After considering the evidence, briefs, and arguments, Judge Clark concluded the Tower Center landlord was correct, and found MCorp liable for the rent. In re MCorp, 122 Bankr. 49 (S.D.Tex., 1990); Bankruptcy Court, Houston Division, Case Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11, 89-02312-H3-11.


\textsuperscript{122} MCorp v. Board of Governors of the Federal Reserve System, 900 F.2d 852, at 854 (5th. Circ., 1990); No. 89-2816.

\textsuperscript{123} Beyond the bankruptcy proceedings, litigation arising from the government's seizure of the MBanks and related regulatory acts included: MCorp v. Clarke, CA3-89-831-F; MBank New Braunfels, N.A. v. FDIC, CA3-89-1064-F; MCorp v. United States of America, H-92-959; FDIC, as Receiver for MBank Abilene, N.A. v. The North River Ins. Co., CA3-89-
After they emerged from their headwaters of the MCorp insolvency, the divergent courses of each of these three litigation streams can be mapped independently. Regarding the appeal of Judge Hughes' injunction, a panel of judges from the Fifth Circuit supported one of the federal government's contentions, but frustrated the other. The Circuit judges agreed with regulators that under the Administrative Procedure Act (APA), a bank holding company was not "ordinarily entitled" to judicial review until the Fed's Board issued a final order.\textsuperscript{124} MCorp had continued to argue that the district courts had exclusive jurisdiction of its bankruptcy under the judicial code, but the appeals panel held that the code was intended to grant district courts concurrent jurisdiction with administrative agencies.\textsuperscript{125} The Circuit judges declared that Judge Hughes did not actually "harmonize" the conflict with FISA, but effectively repealed it. As a


\textsuperscript{125} According to the Fifth Circuit, the relevant portion of this code was the provision that stated: "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). See: \textit{MCorp v. Board of Governors of the...
result, his decision invested the district court with an “equitable power withheld from every other court by the language [of the statute].”\footnote{\textit{Ibid.}, 855.}

In addition, MCorp argued that because the district court enjoyed exclusive jurisdiction over its assets, the Fed’s administrative proceeding should be stayed while the bankruptcy proceeded.\footnote{\textit{Ibid.}, 855.} But the Circuit judges noted that the Fed “ha[d] not sought control over the property of MCorp’s estate.” It sought permission to proceed with its own action. And, alluding to the company’s conspiracy theory, they added: “Nor at this early stage do we find the Board’s enforcement actions to be \textit{sham proceedings}, brought as a means of controlling the debtor’s assets.” Unlike Judge Hughes, the appellate judges were not fully persuaded that the action was “simply an attempt to assist the FDIC to obtain MCorp’s property \textit{under the guise of} remedying a violation” of the Federal Reserve Act. Indeed, the Circuit noted the Fed was “well within its authority” to pursue the “self-dealing” allegations (that is, the “section 23” action), and ruled that the

\footnote{\textit{Federal Reserve System}, 900 F.2d 852, at 855 (5th. Circ., 1990); No. 89-2816.}

\footnote{\textit{Ibid.}, 855.} Again, the relevant statute provided: “[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” 28 U.S.C. § 1334(d).
government's notice of charges was "not on its face a sham proceeding." In sum, by filing for bankruptcy, MCorp obtained protection from its creditors, but not from the regulators.

However, the Fifth Circuit judges believed that regulators faced similar constraints, and concluded that the district court had jurisdiction to review the Fed's actions. When the Fed asserted that it had been granted broad authority under FISA to order a holding company to cease any practice regulators judged "unsafe or unsound," such as failure to provide capital to troubled subsidiary banks, the appellate judges ruled that the order to downstream funds would have required MCorp's directors "to disregard [their] own corporation's separate status; it would amount to a wasting of the holding company's assets in violation of its duty to its shareholders." This had been MCorp's argument, and the appellate panel agreed that downstreaming holding company funds "could hardly be considered a 'generally accepted standard of prudent operation.'" The Fed

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relied on an "unreasonable and impermissible interpretation" of the term "unsafe or unsound."\textsuperscript{129}

Finally, because a "fundamental" aim of the Bank Holding Company Act (BHCA) was "to separate banking from commercial enterprises," the panel reasoned that Congress' purpose was "obviously not served if the Board is permitted to treat a holding company as merely an extension of its subsidiary bank." Although the BHCA had granted substantial authority, it did not allow regulators to reconsider financial and managerial soundness of subsidiary banks \textit{after} approving a holding company's application to join the Federal Reserve System.\textsuperscript{130}

On 15 May 1990, the Fifth Circuit judges remanded the case, with instructions to continue to enjoin the "source of strength" proceedings, but to vacate the injunction related to "self-dealing."\textsuperscript{131} This "split" decision

\textsuperscript{129} The panel acknowledged that Congress had not explicitly defined "unsafe or unsound," which left the regulatory agencies some discretion. But the judges also observed that lawmakers adopted an "authoritative definition" when they passed the Act, which [quoting from 112 Cong. Rec. 26474 (1966)]: "embrace[d] any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." \textit{MCorp v. Board of Governors of the Federal Reserve System}, 900 F.2d 852, at 861-863 (5th. Circ., 1990); No. 89-2816.

\textsuperscript{130} \textit{Ibid.}, 864.

\textsuperscript{131} Again, this refers to § 23 of the Federal Reserve Act, which restricted transactions between subsidiary banks and affiliates. 12 U. S. C. §371(c). See: \textit{MCorp v. Board of Governors of the Federal Reserve System}, 900 F.2d 852, at 853 (5th. Circ., 1990); No. 89-2816. See, also: Stan Soocher,
satisfied no one: both parties appealed, and the U.S. Supreme Court
granted certiorari to review the entire action.\textsuperscript{132}

Meanwhile, MCorp pressed its civil suit against the government in
the Northern District of Texas. As a bellwether case in the emerging
banking crisis, this second stream in the MCorp litigation forced judges
there to grapple, as had Judge Hughes, with competing interpretations of
the banking and bankruptcy statutes. In August 1989, Congress further
complicated the judges' tasks by passing FIRREA.\textsuperscript{133}

Enacted primarily to rationalize the financial industry's
restructuring, FIRREA authorized the federal "bailout" of failed
institutions and consolidated previously disparate regulatory authority
under the FDIC. However, the actual extent of the new and apparently
sweeping grant of authority was not immediately obvious. To allow the

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\textsuperscript{132} On 6 August 1990, the Fifth Circuit denied the government's request for
a rehearing \textit{en banc}. \textit{MCorp v. Board of Governors of the Federal Reserve
System}, 911 F.2d 730 (5th. Cir., 1990); No. 89-2816. The Supreme
Court subsequently granted certiorari, 499 U.S. 904 (1991). Meanwhile,
the related litigation continued. On 16 November 1990, Judge Hughes
decided MBank Houston owed Robert Ontiveros money which was owed to
him under a lease. The FDIC, as MBank's receiver, bore the liability of
$125,000 plus interest. \textit{Ontiveros v. MBank}, 751 F.Supp. 128 (S.D.Tex.,
1990); Houston Division, C.A. No. H-89-1402.
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FDIC to become accustomed to its new role, for example, the Act authorized a ninety-day stay in any judicial proceeding in which an institution in FDIC receivership "is or becomes a party."\textsuperscript{134} The lingering legal ambiguity was demonstrated when regulators requested a stay in Suzan Taylor’s suit against MCorp, which was then on remand to the Southern District of Texas.\textsuperscript{135}

On 19 December 1989, U.S. District Judge David Hittner entered what amounted to a split decision on FIRREA. On the one hand, the judge ruled that the because the FDIC had been appointed the receiver of MBank Greens Parkway on 28 March 1989, six months prior to the date of its request, the government was not entitled to stay the proceedings.\textsuperscript{136} On the other hand, when Hittner addressed Taylor’s objections to the methods by which the FDIC originally removed the case from state court, the judge

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\textsuperscript{134} 12 U.S.C. 1821(d)(12), as amended by FIRREA. § 212(a).
\textsuperscript{135} United States v. Taylor, 881 F.2d 207 (5th Circ., 1989).
\textsuperscript{136} Federal Deposit Insurance Corporation v. Taylor, 727 F.Supp. 326, at 327 (S.D.Tex., 1989); Houston Division, Civil Action No. H-89-1463. According to Judge Hittner, the legislative history of FIRREA indicated that the 90-day stay provision was intended to give the FDIC "breathing room" immediately upon appointment, but did not allow the FDIC to stay proceedings at any point, regardless of the length of its involvement. The judge noted that the House report on FIRREA, said that "the appointment of a conservator or receiver can often change the character of litigation; the stay gives the FDIC a chance to analyze pending matters and decide how best to proceed." H.R.Rep. No. 54(I), 101st Cong., 1st Sess. 331
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ruled that her arguments were mooted by FIRREA, which provided
that "in the event of any appealable judgment, the [FDIC] as . . . receiver
shall have all the rights and remedies available to . . . [FDIC] in its
corporate capacity," including removal to federal court. In concluding
that under the "presently applicable statutes," the FDIC was authorized to
remove the case after the state court judgment had been entered, but was
not entitled to stay old proceedings, the judge seemed to imply that
FIRREA was at least semi-retrospective.

The ruling did not greatly clarify FIRREA. Basic questions,
precisely what powers the Congress intended to confer upon the FDIC and
exactly whose authority the lawmakers intended to override, continued to
arise in the many lawsuits in which the FDIC became enmeshed.139

127. See: Ibid., at 328.
138 Federal Deposit Insurance Corporation v. Taylor, 727 F.Supp. 326. at
328 (S.D.Tex., 1989); Houston Division, Civil Action No. H-89-1463.
Taylor made two additional arguments against the FDIC’s authority to
remove the case to federal court: first, that by removing a case in which a
motion for new trial or a corrected state court judgment was pending, the
federal district court was unlawfully vested with appellate jurisdiction (an
alleged violation of 28 U.S.C. §§ 1330-1366); second, that the Seventh
Amendment of the U.S. Constitution prevented removal, because it
subjected state jury findings to an unconstitutional reexamination by a
federal district court. Judge Hittner decided that FIRREA did not moot
these issues, but he ruled against Taylor on other grounds. Ibid., at 331.
139 Because FIRREA abolished the FSLIC and designated the FDIC as its
inheritor, these questions became especially pertinent in similar litigation
surrounding the savings and loan industry. [Note: This will be the subject
of a later paper.]
U.S. District Judge Robert W. Porter confronted FIRREA as he
presided in MCorp’s litigation in the Northern District of Texas. In
addition to its claims that the Fed exceeded its statutory authority by
interfering with subsidiary relationships, the holding company argued that,
by seizing the MBanks, regulators violated not only federal banking laws,
but also the takings clause of the Fifth Amendment and the equal protection
clauses of the Fifth and Fourteenth Amendments. MCorp claimed that
twelve of the twenty subsidiary banks were effectively solvent when the
government forced them to close, and because the banks’ assets allegedly
represented a net worth of more than $70 Million, the directors sought to
compel the government to compensate the company for the losses.

The Fed contended that FIRREA merely “clarified” the laws on the
books in March 1989. Therefore, the court should apply the Act

141 When the Fed seized the twenty MBanks on March 29 and 30, the
combined closings constituted the third largest bank failure in U.S. history.
Or, it might have been the second largest failure. “MCorp Plan Rejected,”
named were the Brenham, Corsicana, Denton County, Jefferson County,
Longview, Marshall, Mid-Cities, Odessa, Orange, Sherman, Wichita Falls,
(N.D.Tex., 1991). In addition to the named defendant, Robert Clarke, who
was the comptroller of the currency, the defendants included the FDIC and
the Deposit Insurance Bridge Bank. Shahram Victory, “BIG SUITS:
retrospectively to its actions which closed the MBanks.\textsuperscript{142}

Retrospection would benefit the government's defense, because FIRREA granted the FDIC discretion to limit recovery by the creditors of a failed national bank to the assets they would recoup in a straight liquidation.\textsuperscript{143} For example, the FDIC valued claims by subsidiary MBanks against MBank Dallas at 80 percent of par, and claims on MBank Houston to 78 percent. Given the sums the smaller MBanks loaned to the larger banks, this left a significant shortfall. Moreover, the FDIC promised depositors and non-MBank creditors compensation in full.\textsuperscript{144} MCorp maintained that the MBanks could have remained solvent had the FDIC agreed to reimburse them as well; in addition, the company argued that the pledge to satisfy the

\textsuperscript{143} FIRREA, § 212(a).
\textsuperscript{144} In a study it issued on 4 January 1989, the FDIC stated that when a holding company was involved, the FDIC was justified in withholding full payment to non-deposit creditors, even as it covers the entire loss for uninsured depositors. The authors wrote that: "[t]he legal basis supporting this approach has not been codified . . . but arises from established common law." [quoted from the FDIC's "Deposit Insurance for the Nineties: Meeting the Challenge."] The judge believed the evidence indicated that, notwithstanding this report, the FDIC was "fully aware it was operating according to an untested -- and shaky -- legal theory." See: \textit{MCorp v. Clarke}, 755 F.Supp. 1402, at 1419 (N.D.Tex., 1991). These valuations of a recovery against the FDIC, whether discounted or not, would be in the form of receiver's certificates as a claim against the final net assets of a failed bank. \textit{In re MCorp}, 160 Bankr. 941, at 951 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395.
claims of some creditors, but MBanks, violated the National Bank Act’s mandate that “all creditors are to be treated alike.”

As before, the government questioned the federal court’s jurisdiction in the matter, adding the contention that MCorp was barred from proceeding by the Federal Tort Claims Act (FTCA). However, the Fifth Circuit had held similar actions by analogous agencies to be beyond the

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145 National Bank Act, 12 U.S.C. §§ 91; made applicable to the FDIC by 12 U.S.C. § 1821(d). Since it had been “plainly construed” to mandate equal treatment for all creditors of a failed institution, Judge Porter agreed that the FDIC’s policy of showing preferences violated the Act’s express provisions. *MCorp v. Clarke*, 755 F.Supp. 1402, at 1422 (N.D.Tex., 1991). These arguments, regarding the possibility of full compensation saving the MBanks, were highly speculative; after the FDIC declared the insolvency of the Dallas and Houston MBanks, the regulators immediately declared the creditor banks to be insolvent, as well. *MCorp v. Clarke*, 755 F.Supp. 1402, at 1407-1408 (N.D.Tex., 1991), esp. nn. 10, 11. The exception was MBank New Braunfels, which sued the FDIC in a separate action. See: *MBank New Braunfels v. FDIC*, 721 F.Supp. 120 (N.D.Tex., 1989), and 772 F.Supp. 313 (N.D.Tex., 1991). In a similar recent case, the Northern District’s Chief Judge Barefoot Sanders held that a bank holding company and ten of its subsidiary banks were entitled to be paid in full by the FDIC, as were other creditors, rather than the 67 percent of par the regulators offered. Judge Sanders ruled that the agency could not discriminate among claims under the bank act, and said that this unequal treatment triggered the failure of 12 otherwise healthy TAB institutions, out of 22 TAB banks closed. *Texas American Bancshares, Inc. v. Clarke*, 740 F.Supp. 1243, at 1248 (N.D.Tex., 1990). Judge Porter took note of the precedent in making his own decision. See: *MCorp v. Clarke*, 755 F.Supp. 1402, at 1412 (N.D.Tex., 1991).

146 28 U.S.C. §§ 1346(b), 2671, et seq. Under FTCA, MCorp would first have to present its claim to the proper administrative body, and would not be allowed to maintain the suit until the federal agency it was suing (in this case, the Federal Reserve Board) had made a final disposition of the claim. But, MCorp was suing for damages under alleged violations of the National
protection of the FTCA.\textsuperscript{147} Also, MCorp sought to persuade the judge to allow the suit by producing transcripts of FDIC board meetings. Porter agreed that they showed the FDIC apparently seeking to craft "an internal policy -- not to be disclosed to the national banks under its control -- of planning and timing declarations of insolvency so as to lasso as many banks [or] holding companies as possible, in order to create a more attractive package for resale." Concluding that the scheme was not the sort of regulatory action contemplated by the FTCA, Judge Porter ruled that the lawsuit could continue.\textsuperscript{148} Finally, the government contended that FIRREA precluded judicial review by its provision that: "no court may take any action, except at the request of the [FDIC] Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver."\textsuperscript{149} This potentially serious challenge to MCorp's ability to pursue its claims faded when Judge Porter declined to apply FIRREA retroactively.\textsuperscript{150}

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Bank Act, which granted the district court's jurisdiction. 28 U.S.C. § 1348.
\textsuperscript{148} \textit{Ibid.}, 1408.
\textsuperscript{149} FIRREA, § 212(j).
\textsuperscript{150} The judge ruled that "[f]undamental fairness demands that banks and their creditors be able to know what laws will be applied to them at the time insolvency is declared, so they can best plan for the future, rather than being surprised months later." \textit{MCorp v. Clarke}, 755 F.Supp. 1402, at 1419 (N.D.Tex., 1991). In the face of all of the charges, the government had attempted to invoke the doctrine of sovereign immunity, that is, the
Ultimately, Judge Porter concluded that none of the federal regulators' arguments merited keeping the proceeding out of the district court.\textsuperscript{151} Having assumed jurisdiction, the judge finally considered the actual claims. Despite their extended wrangling over the proper forum and jurisdiction, the parties disputed no "genuine issue" of fact that would warrant undertaking the expense and delay of a trial. Instead, the plaintiffs and defendants had placed six motions and cross-motions before the judge, each of which sought either summary judgment, or dismissal.\textsuperscript{152} Judge Porter decided, as had Judge Hughes before him, that the available evidence substantiated MCorp's allegation that the regulators had "plotted to close as many MBanks as possible."\textsuperscript{153}

The Fed countered that the MCorp directors were the real conspirators, who had illegitimately acted in concert with the separate MBanks like an illegal unitary network, and were now attempting to gain understanding that the government was exempt from defending itself against a lawsuit, unless it consents to be sued. For reasons stated in the text, Judge Porter ruled the suit was authorized. \textit{Ibid.}, 1407-1408. \textcolor{red}{Also, Chief Judge Sanders defined the FDIC as a "quasi-private" governmental entity, and ruled that "[t]he FDIC has . . . the same broad 'sue and be sued' language in its governing statute, [but] . . . is not entitled to claim sovereign immunity." \textit{Texas American Bancshares, Inc. v. Clarke}, 740 F. Supp. 1243, at 1249 (N.D.Tex., 1990).}

\textsuperscript{152} \textit{Ibid.}, 1404. Under the Federal Rules of Civil Procedure, summary judgment is only proper where the judge finds "no genuine issue as to any material fact." \textit{Fed.R.Civ.P.}, Rule 56(c).  
preferential treatment for MBank creditors. The judge scoffed at the allegation and declared that: "[c]onsidering the experience and sophistication of the Defendants' attorneys in this case, the sparseness of this potentially damaging evidence and counsel's failure to set forth a coherent argument detailing the conspiracy scenario, is puzzling."

Regarding the cooperation between the MBanks, including habits of lending funds to one another, Porter added: "[i]nferences can be drawn, to be sure, that would cast a taint upon MCorp's actions . . . [however,] the package of inference upon inference that the Defendants need to support their allegations is weak and tenuous at best."154 Discriminating between creditors, the judge declared, "flouted" the National Bank Act.155 Judge Porter granted summary judgment in favor MCorp, on 1 February 1991.156

155 MCorp v. Clarke, 755 F.Supp. 1402, at 1422 (N.D.Tex., 1991). Having reached his decision on other grounds, Judge Porter declined to address MCorp's constitutional claims, such as the company's contention that seizure of the MBanks had been in violation of the Fifth Amendment's due process and just compensation clauses. Ibid., 1423.
156 Judge Porter ordered MCorp to submit a brief and affidavits to justify the compensatory relief the company sought. Ibid., 1423. The judge gave MCorp 30 days to file the claim. On 4 March, the company proposed three alternatives: (1) $70 Million (the net worth of the solvent MBanks the FDIC forced into insolvency); (2) $122 Million (the capital of the banks); or, (3) returned control over the seized banks and $327 Million (the sum of loans owed to them). Shahram Victory, "BIG SUITS: South," The American Lawyer, April 1991, p. 31. The federal regulators filed a motion to reconsider on 15 February. Rich Reece, Brenda Sapino and Mary Hull, "MCorp and MCorp Financial Inc. v. Robert Logan Clarke,
The FDIC had entered the third stream of the litigation, the
bankruptcy proceedings in the Southern District of Texas, in September
1989, when it filed fourteen claims against MCorp, totaling $847 million.
Because the total claim was large and its constituent parts complex, MCorp
successfully moved in September 1990 to bring the government’s claims
before District Judge Hughes rather than Bankruptcy Judge Clark. Judge
Hughes eventually dismissed the bulk of the case, because the statute of
limitations had run out on questioned actions.157 For example, with regard
to the government’s claim that MCorp had forced member banks to sell
their credit-card operations at an unfair price, the FDIC argued that the
“limitations clock” had started when the agency seized the MBanks in
March 1989, but the judge ruled that the regulators bore responsibility for
actions occurring before the takeover. In a ruling in late May 1991,
Hughes determined that since the FDIC had been “[c]harged with

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overseeing the very transactions of which it now complains, [it] cannot maintain these claims as an ignorant third-party successor."\textsuperscript{158}

By June 1991, Judge Hughes' rulings and the FDIC's withdrawal of many of its claims, reduced the contested sums to $305 million and then $262 million.\textsuperscript{159} Meanwhile, Hughes refused to grant the FDIC's motion for summary judgment or to dismiss MCorp's counterclaims against the government, which also had been reduced to several hundreds of millions from a high of some $1 billion.\textsuperscript{160} Then, in an oral ruling from the bench in mid-November 1991, Judge Hughes dismissed most of the remaining $262 million the FDIC sought, leaving just $2.2 million intact from the government's initial claims. And that amount, if it prevailed, was offset by Hughes' additional judgment that the FDIC owed MCorp approximately


\textsuperscript{159} \textit{In re MCorp}, 160 Bankr. 941, at 945 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395.

$84 Million.\textsuperscript{161} The judge’s decision allowed MCorp’s case to resume its progress in Bankruptcy Judge Clark’s court.\textsuperscript{162}

Six weeks before Judge Hughes’ rulings enabled MCorp’s bankruptcy to proceed, attorneys finally argued the merits of Hughes’ original injunctions before the Justices of the U.S. Supreme Court.\textsuperscript{163} On 3

\textsuperscript{161} \textit{In re MCorp}, 160 Bankr. 941, at 946 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395.


\textsuperscript{163} These oral presentations before the Supreme Court included extensive briefs prepared and released by then-U.S. Solicitor General Kenneth Starr. \textit{Board of Governors of the Federal Reserve System v. MCorp}, 502 U.S. 32 (1991). One legal commentator noted that in addressing the Fed’s “source of strength” regulation, the Court would have to decide “whether it prefers good policy or good law,” because from the perspective of corporate finance, the rule made “eminent sense.” But, the commentator noted that there may be constitutional problems with “imposing liability after the fact on shareholders who had no reason to expect that they might be assessed at the time they purchased stock.” See: Geoffrey Miller, “Dealing Down; Whether the Fed Can Compel Banks to be the 'Source of Strength' for Troubled Subsidiaries is a Top Draw for the Supreme Court,” \textit{The Recorder}, 9 October 1991, p. 8; Geoffrey Miller, “Source-of-Strength Doctrine a Source of Trouble; Policy Forces Holding Company to Throw Good Money After Bad,” \textit{The Connecticut Law Tribune}, 30 September 1991, p. 18; and, Geoffrey Miller, “Source of Strength; A Source of Trouble,” \textit{Legal Times}, 30 September 1991, p. 22.
December, Justice John Paul Stevens delivered the Court's 8-0 opinion that District Judge Hughes had lacked jurisdiction to enjoin either of the Fed's regulatory proceedings. The Justices unanimously ruled that FISA's "plain, preclusive language," that "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order." FISA was not qualified or superseded, as MCorp had argued, by the general provisions governing bankruptcy proceedings. The Court therefore found no merit in MCorp's arguments, that the district court's injunction was either authorized by the automatic stay provision in the Bankruptcy Code, or by the provision of the Judicial Code authorizing district courts to exercise concurrent jurisdiction over certain civil suits, such as bankruptcy proceedings.

Rather than "harmonizing" apparently conflicting provisions, the Justices concluded that the Fed's oversight actions fell "squarely" within the Bankruptcy Code, which expressly precluded an automatic stay from

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enforcing a "governmental unit's police or regulatory power."\textsuperscript{166}

Moreover, the Fifth Circuit had erred in authorizing judicial review of the Fed's source of strength regulation, because FISA's language "expressly provide[d]" MCorp with a "meaningful and adequate opportunity" to review the regulations and "clearly and directly demonstrate[d] a congressional intent to preclude review." The district courts lacked jurisdiction to review or enjoin the Fed's ongoing administrative proceedings; it was as simple as that. The appellate court had been mistaken to decide that the district court had jurisdiction to consider the merits of MCorp's challenge to the source of strength doctrine. Therefore, the Supreme Court reversed the Fifth Circuit's remand. At the same time, the Justices affirmed the vacating of Hughes' injunction of the section 23 proceeding.\textsuperscript{167} The Supreme Court remanded the case, and in April 1992, the Circuit judges vacated Judge Hughes' injunction and dismissed the entire action for lack of jurisdiction.\textsuperscript{168}

\textsuperscript{166} 11 U. S. C. § 362(b)(4) provided: "[t]he filing of a petition . . . or of an application . . . does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . ." \textit{Board of Governors of the Federal Reserve System v. MCorp}, 502 U.S. 32, at 40 (1991), esp. n. 10.

IV. Federal Banking Regulation, 1990s, Part II: As Reasonable a Solution As is Plausible

There is one certainty about the prospect of continuing the litigation, and that is it will take a long time . . . . Given that the FDIC is not constrained by the ordinary economic forces that affect private parties, that it has resourceful counsel, that it has statutory exemptions, . . . and that courts tend to accommodate governmental power, its policy of litigating to the death must be taken as a substantial factor that obliterates illusions of quick, cheap resolution.

U.S. District Judge Lynn N. Hughes, In re MCorp, 1993.\textsuperscript{169}

After participating in the MCorp bankruptcy proceedings for more than two years, the federal government could not have regarded the Supreme Court’s ruling as anything but a Pyrrhic legal victory. The Federal Reserve would hardly seek to resume administrative hearings to investigate the holding company, both because MCorp was effectively defunct, and because the Fed had sparred with it so long that it knew all it needed to about MCorp. The Court’s decision settled the issues for the future, and there would be no purpose to reopening the past. Instead, the regulators continued to engage themselves in the two remaining tributaries of the MCorp litigation: the civil case in the Northern District, where the

\textsuperscript{168} MCorp v. Board of Governors of the Federal Reserve System, 958 F.2d 615 (5th. Circ., 1992); No. 89-2816.
\textsuperscript{169} In re MCorp, 160 Bankr. 941, at 957 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395.
regulators' were considering filing an appeal; and the MCorp bankruptcy in the Southern District, over which Bankruptcy Judge Clark presided. 170

MCorp's progress through bankruptcy in the Southern District of Texas had been neither swift nor smooth. By early 1992, the MCorp debtors continued to own one bank, but remained liable for an outstanding indebtedness of approximately $470 million. They had yet to develop a

170 In April 1991, the Fifth Circuit heard oral arguments in an appeal of Chief Judge Sanders' Texas American Bancshares (or, "TAB") decision. On 27 February 1992, a Fifth Circuit panel reversed Northern District Chief Judge Barefoot Sanders' ruling that the FDIC violated the National Bank Act by paying less for the claims of subsidiary banks of the Texas American Bancshares (TAB) holding company than it paid to outside creditors. See: Texas American Bancshares, Inc. v. Clarke, 954 F.2d 329 (5th Cir., 1992), No. 90-1674. According to the appellate judges, although the law had been enacted five months after the TAB (and MCorp) banks closed, FIRREA nonetheless authorized the FDIC to treat some of those banks' creditors more favorably than others, without violating (or, in Judge Porter's words "flouting") the National Bank Act. Lawyers for MCorp, who were preparing similar claims against the FDIC for an April trial before Judge Hughes, scrambled to distinguish their case from the appellate ruling. On 3 March, MCorp lawyers hand-delivered a five-page letter to Hughes, requesting postponement of a hearing regarding cross-motions for partial summary judgment. The TAB decision may have derailed MCorp's attempt to translate the Dallas triumph before Judge Porter into a victory at the upcoming Houston trial. In light of the TAB decision, moreover, the FDIC moved for a reconsideration on Porter's ruling. The late Judge Porter's successor, Judge Jorge A. Solis, has been waiting for the Fifth Circuit's decision in TAB before he makes a move on the damages issue. Finally, although the Circuit judges reached their decision in TAB without "setting foot into the legal quagmire of whether FIRREA applies retroactively," they also recognized that the result would be the same under the 1989 statute. Karen Donovan, "5th Circuit Ruling Throws Major Fly In MCorp Ointment," The National Law Journal, 16 March 1992, p. 21.
reorganization plan acceptable to Bankruptcy Judge Clark. The latest proposal was three plans combined in a single document entitled the “Revised Third Proposed Chapter 11 Plan.” These reorganization plans required, among other actions, that outstanding claims against MCorp, in excess of $2 billion, be reduced to $120 million by 31 December 1991. It was an ambitious schedule, considering that the debtors submitted the proposal to the judge on 30 September 1991.¹⁷¹ Before commenting on the plans, Judge Clark noted how previous proceedings “ha[d] been marred by broken edges and failed burdens of proof.”¹⁷² And after reviewing the proposal, Clark decided the plans were not “fair and equitable” to the parties. In January 1992, Clark refused to confirm the proposed reorganization plan.¹⁷³ MCorp must discover a more acceptable method to restructure its nearly one-half billion dollar debt.¹⁷⁴

¹⁷¹ The MCorp debtors filed their original proposed plans on 11 March 1991, a second set on 7 June, and a third on 11 September 1991. The debtors revised the third plans on 30 September 1991, and these were the plans presented for Judge Clark’s review. In re MCorp, 137 Bankr. 219, at 221-223 (S.D.Tex., 1992); Bankruptcy Court, Houston Division, Case Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Jointly Administered Under Case No. 89-02312-H3-11).

¹⁷² In re MCorp, 137 Bankr. 219, at 221 (S.D.Tex., 1992); Bankruptcy Court, Houston Division, Case Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Jointly Administered Under Case No. 89-02312-H3-11).

¹⁷³ Judge Clark was authorized to rule on reorganization plans under 28 U.S.C. §§ 1334 and 157, as well as a standing order in the Southern District of Texas (dated 9 August 1984). In re MCorp, 137 Bankr. 219, at 236 (S.D.Tex., 1992); Bankruptcy Court, Houston Division, Case Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Jointly Administered Under Case No. 89-02312-H3-11). The bankruptcy judge concluded that
Instead, the MCorp debtors, and a committee of unsecured creditors, appealed Bankruptcy Judge Clark's denial of confirmation to District Judge Hughes. However, three of the creditors, Principal Mutual Life Insurance Company, Shearson Lehman Hutton, and the FDIC, moved to dismiss the appeal, which they considered improperly pursued the debtors failed to establish that their plan was in the best interest of the creditors. Among the other grounds for her denial were: (a) the requisite classes, such as outside debtors, had not accepted the plan; (b) the debtors failed to prove the value of their assets; and (c) a number of the proposed provisions violated the bankruptcy code. See: In re MCorp, 139 Bankr. 820, at 821-824 (S.D.Tex., 1992); Houston Division, Civil Action No. H-92-199. The same day, Clark rejected the motion of one of MCorp's creditors to change his negative vote on the proposed recovery plan. This creditor had filed a $ 207,196 claim against the holding company on 5 September 1989, but had not reached a settlement agreement with the company by 15 October 1991, when he voted to reject plan. Later, the creditor came to an agreement and wanted to vote to accept the plan. Judge Clark noted that the timing of the change was "highly suspect, and the evidence does not overcome the possibility of improper motivation." Therefore, she denied the motion, pursuant to Bankruptcy Rule 3018(a). In re MCorp, 137 Bankr. 237, at 239 (S.D.Tex., 1992); Bankruptcy Court, Houston Division, Case Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Jointly Administered Under Case No. 89-02312-H3-11). 174 "MCorp Plan Rejected," The National Law Journal, 20 January 1992, p. 19.

175 A district court has jurisdiction to hear appeals from the "final judgments, orders, and decrees, and with the leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges . . . ." 28 U.S.C. §158(a). See: In re MCorp, 139 Bankr. 820, at 821 (S.D.Tex., 1992); Houston Division, Civil Action No. H-92-199. The creditors included: employees; Senior Bondholders (these bondholders had a claim of approximately $ 354 million); Other Seniors (claimants with senior status seeking under $1 Million); Junior Bondholders (bondholders with a claim of approximately $ 134 million, whose notes were issued earlier than the senior bonds); and,
under the federal bankruptcy code. Hughes agreed, and ruled that  
the appeal of the bankruptcy court’s denial did not meet standards for  
permissive review. In April 1992, Hughes granted the motion of the  
second group of creditors; that is, he dismissed the appeal and remanded  
the case to Clark.

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insurers. *In re MCorp*, 160 Bankr. 941, at 946 (S.D.Tex., 1993); Houston  
Division, Civil Action No. H-93-395.  
176 *In re MCorp*, 139 Bankr. 820, at 821 (S.D.Tex., 1992); Houston  
Division, Civil Action No. H-92-199. Principal Mutual (PM) was an Iowa  
insurance company which became a mortgage lender to MCorp’s now  
defunct landlord. PM became the landlord of the Mercantile Center, the  
complex of buildings that served as MCorp’s Dallas headquarters. PM  
asserted claims of some $53 Million. Shearson Lehman Hutton (Shearson)  
was the largest holder of MCorp money market preferred shares, the most  
senior class of equity. Shearson was entitled to a distribution from the  
estates after the junior bonds were paid. Shearson’s claim is for $117.5  
Million. *In re MCorp*, 160 Bankr. 941, at 946 (S.D.Tex., 1993); Houston  
Division, Civil Action No. H-93-395.  
178 *In re MCorp*, 139 Bankr. 820, at 824 (S.D.Tex., 1992); Houston  
Division, Civil Action No. H-92-199. Judge Hughes continued to hear  
cases related to the MCorp insolvency, but occasionally, cases came before  
Hughes in which MCorp was creditor rather than the debtor. For example,  
on 4 August 1993, Judge Hughes ruled that a debtor cannot later litigate a  
claim that it should have raised in bankruptcy proceedings. In May 1987,  
Westland Oil Developing Corporation, an exploration company, owed  
MBank Houston over $17 Million on two promissory notes. After  
defaulting on the notes, Westland met with three MBank officers to try to  
restructure the debt. Westland contended that they reached an oral  
agreement on 2 October 1987, but that MBank officers changed the terms of  
the agreement on 6 October, repudiating the earlier agreement. On 6  
October, Westland filed for bankruptcy under Chapter 11. Westland then  
sued MCorp Management Solutions, Inc., (MSI) for fraud and breach of  
contract based on the alleged repudiation of the oral agreement. But  
because Westland had not adequately disclosed its claim as an asset in its  
bankruptcy, Hughes barred the claim. *Westland Oil Development v.*
After more negotiations, wrangling, and squabbles, the creditors agreed on a reorganization strategy that provided for distribution of more than $400 million in assets, and for the settlement of more than $300 million in bank regulators' claims. Judge Clark therefore confirmed a revised third version of the proposed plans. The plans next went before Judge Hughes, who noted that "[a]fter four years of complex bankruptcy litigation, the prospect of a vitalizing reorganization disappeared long ago." As long as the plan served the interests of the creditors, followed the law, and maximized the value of the estates' assets, Hughes was willing to confirm any stable, rational reorganization.

On 1 October 1993, as Judge Hughes approved the MCorp bankruptcy settlement, he also summarized the affair. The judge noted that MCorp and associated debtors had faced approximately two thousand claims totaling over $4 billion, in which MCorp successfully objected to more than $3.5 billion. In settling at least some of the claims, Hughes stressed, the parties settled for "all of the normal reasons people choose contract over trial . . . Not all claims could be compromised, and the

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MCorp, 157 Bankr. 100, at 104 (S.D.Tex., 1993); Houston Division, Civil Action No. H-91-1608.  
180 In re MCorp, 160 Bankr. 941, at 948 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395.  
181 Ibid., 944.
debtors have initiated or responded to numerous adversary proceedings."\textsuperscript{182} Regarding a specific adversary, the judge restated his conclusion that the litigation began when the government "engineered" MCorp's probably avoidable insolvency. The lesson Judge Hughes learned from the legal proceedings was that the FDIC was "a political institution that is subject to different rules, including after-the-fact assistance from congress . . . Although that kind of differential has no place in a republic, it is an operative fact in the real world."\textsuperscript{183}

In the end, Judge Hughes considered that the MCorp case had become nothing so much as "a spectacle of expensive litigation." After honest business people faced the consequences of poor judgment and the bad luck of economic decline, he continued:

The existing losses and consequent disruptions were compounded by an arrogant and inept intrusion of the government. Into the debris rushed litigious rascals, whose idea of the public administration of civil justice is a cross between a poker game and the battle of the Somme. As is usually the case, the quiet, competent, cooperative actions of the great many are obscured by those few others.\textsuperscript{184}

However, now that MCorp's former possessions had been "seized, partitioned, valued, claimed, analyzed, and marshalled," Judge Hughes

\textsuperscript{182} Ibid., 945.
\textsuperscript{183} Ibid., 951.
\textsuperscript{184} Ibid., 964.
believed that the plans for ending the litigation were "as reasonable a solution to this historic problem as is plausible."\textsuperscript{185}

\textsuperscript{185} Ibid., 964. MCorp's wrangling with the Fed, unprecedented when originally filed and unique in several of its more complicated and conspiratorial characteristics, nevertheless became an exemplar for the troubled banking industry in Texas. This proved to be a boon to the legal profession, as "boutique" law firms specializing in bankruptcy litigation emerged to compete with established firms, and all attempted to ride the wave of insolvencies to prosperity. For example, when the FDIC indicated in Spring 1992 that it was contemplating legal action against the former outside directors MBank Dallas, the directors devised a list firms to consider for the defense work, many with FDIC defense experience. The "Big League" list of finalists included Dallas' Strasburger & Price; Houston's Vinson & Elkins; and the Dallas office of New York's 634-lawyer Weil, Gotshal & Manges. The directors then held a "beauty contest" by inviting the finalists to pitch their services. McKool Smith, a 17-lawyer Dallas litigation boutique formed in August 1991, won the "hotly contested" event. Miriam Rozen, "MCorp Contest Win Sweet for McKool Smith" Texas Lawyer, 13 April 1992, p. 1. See, also: "Corrections," Texas Lawyer, 20 April 1992, p. 1. And: Miriam Rozen, "MBank's Beauty Contest: Who Won?" The American Lawyer, May 1992, p. 26. Despite the difficulty of winning management malpractice cases, the former directors' insurers paid in excess of $39 Million to settle potential claims against MBank Dallas' officials by the FDIC. In re MCorp, 160 Bankr. 941, at 951 (S.D.Tex., 1993); Houston Division, Civil Action No. H-93-395. Under terms of the agreement, three insurance companies paid the FDIC a total of $ 39.92 Million to extinguish any potential claims against the former officers and directors arising from the 1989 failure of MBank Dallas. The FDIC had maintained that the 26 former officers and directors were liable for damages suffered by MBank Dallas, although no suit had been filed against them. The former officials included former Dallas Cowboys quarterback Roger Staubach, who had been an outside director of MBank Dallas. The officers and directors admitted no liability or wrongdoing, and the settlement agreement states that they settled "to avoid the uncertainty, trouble and expense of litigation." The agreement also releases from liability all other present or former officers and directors of the 19 other MBanks in Texas that were closed by federal regulators in March 1989. Rich Reecer, "MBank-Dallas/FDIC Settlement," Texas Lawyer, 16 August 1993, p. 20. The settlement was similar to the
one the FDIC reached with officials of the former First Republic Bank that resulted in the payment of $23 Million. "Executives of Former Bank Reach Settlement," The Legal Intelligencer, 9 August 1993, p. 5.
Conclusion: "It's Like A Traffic Jam": Federalization, Criminalization, and Bureaucratization of the Southern District Court Since 1980

It's like a traffic jam . . . There are too many cars and too little cement.

Jesse E. Clark, Clerk of the Court
Southern District of Texas (1979-1992).1

In his 1982 examination of "the origins of judicial activism in the protection of minorities," Robert Cover quipped that ever since the Supreme Court decided Brown v. Board of Education, it seemed that the federal district courts had become "quasi-administrative bodies overseeing school desegregation and occasional other tasks."2 This was an intentionally unbalanced picture of federal judicial business since the 1950s, but Cover accurately depicted the attention academics had paid to school desegregation and other court-ordered institutional reform.3 Certainly,

that subject did and does deserve scholarly attention. The recognition after Brown that federal district judges could be agents of profound social, political, and institutional transformation raised public expectations of judicial commitment to fostering change. But as this dissertation has attempted to illustrate through varied examples of judicial management activities in the Southern District of Texas, federal district judges also performed a "quasi-administrative" role in accomplishing "other tasks." The judges successfully shepherded varied private cases through their civil dockets and efficiently processed large numbers of repetitive prosecutions on their criminal dockets.⁴

When Cover wrote his article in the early 1980s, the era of "quasi-administrative" federal judicial oversight of school districts was drawing to

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⁴ Even at the peak of civil rights activity in the 1960s, when celebrated landmark decisions vindicated varied constitutional claims, federal district judges had continued to hear traditional civil suits and criminal cases. By and large, business continued as usual in the federal courts, despite the drama of the school desegregation cases. At the height of the civil rights movement, the cases related to Brown accounted for less than three percent of the Fifth Circuit's total appellate caseload. Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who


Brown mandates had not and would not result in “government by judiciary.”

Concurrent activity on other fronts by the two political branches amply demonstrated that the federal judiciary remained the third and lesser branch of government. Although made formally independent by the provisions of Article III of the U.S. Constitution, the federal judiciary relied on Congress to fix its size, budget, and jurisdiction. Congress also added to or subtracted from court business by enacting, amending, or repealing federal civil and criminal statutes. Finally, federal district judges relied on the President to set executive branch priorities for federal law enforcement. As a consequence of this judicial dependence on the policies of the two political branches, both the conduct and content of federal court business are influenced by political considerations. Changes in federal criminal laws have been among the obvious indicators of shifts in the political wind.

In recent decades, amendments to federal criminal statutes, especially laws concerning narcotics, have given the political branches extraordinary if negative control over the activity of federal district judges. Presidents

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from both major political parties have announced intentions to increase the number of criminal prosecutions. Congresses have responded by readily endorsing these law enforcement goals, enacting tougher laws, and authorizing additional prosecutors, some of them specifically designated to bring federal cases against drug offenders. The result of these actions since 1980 has been a steady treadmill of criminal trials, especially in the border divisions of the Southern District, which resembled the assembly line plea bargaining of the 1960s.

The difference between trial practices across the decades was that Congress had given greater control of the administrative machinery to the increasingly numerous federal prosecutors. This was neither accidental nor the result of a coherent plan by the leaders of the executive and legislative branches. Individual enactments and varied policy choices made over the years resulted in a shift in the balance of power from judges to

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10 See chapter three of this dissertation.
prosecutors. With the Speedy Trial Act of 1974, which allowed the federal district courts a maximum of sixty days to begin trying a criminal case, Congress diminished judges' authority over dockets, by pushing criminal trials to the head of the line.\textsuperscript{11} Next, through the 1984 Comprehensive Crime Control Act, which set mandatory minimum sentences for many federal crimes, Congress decreased judicial discretion in sentencing.\textsuperscript{12}

These developments in federal criminal justice inspired Southern District Judge Hughes to warn against the dangers of government by prosecutor. Writing in 1997 on the problems created by the "nationalization of crime," he named prosecutorial discretion the "most


forceful, unchecked power in America."\textsuperscript{13} This was an ironic opinion for a federal district judge to assert. During the Brown era similar criticism had been directed against judicial activists, who had often been charged with abuse of discretion.\textsuperscript{14} Notwithstanding the irony, it was a fair appraisal of the circumstances faced by federal district judges. During the war on drugs, prosecutorial discretion had supplanted judicial discretion as the major motive force in the federal district courts.

Some power and discretion had accrued to federal prosecutors as a result of more vigorous enforcement of the law. By itself, this functional expansion of prosecutorial power and discretion probably would not have caused judicial indignation. However, statutory reductions in discretion in the areas of docketing and sentencing, accompanied by the perceived lack of adequate resources allocated for the judiciary, created conflict between the prosecutors and federal district judges in the Southern District of Texas. What follows briefly examines these issues as they developed in the District through the 1990s. The examination will conclude this dissertation.


Minorities did not quit public law litigation because federal district judges had satisfied their aims for, in Abram Chayes’ phrase, "profound social reconstruction."  Although minority groups had gained much through litigation, room for improvement remained. However, structural reform litigation had reached a point of diminishing returns. Fortunately, plaintiffs’ lawyers were able to argue cases within a framework of civil rights statutes, such as those which defined rights in terms of the regulations of affirmative action, rather than being forced to build up lawsuits from bedrock constitutional claims derived from Brown. This shift to statute was a consequence of the success of earlier litigation. It was also a sign of maturation in civil rights law. But the retreat from public law litigation as a primary strategy also reflected the civil rights litigants’ response to a conservative turn in national politics. Rather than pressing forward in the 1980s, minorities, especially African-Americans, found that

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16 Of course, Brown was always available for invocation, but it became more a talisman than a model for litigation. Peter Charles Hoffer, The Law's Conscience: Equitable Constitutionalism in America (Chapel Hill: University of North Carolina Press, 1990), 199-211. J. Harvie Wilkinson
they had to fight in court to hold onto the gains of the previous generation. 17

Under President Ronald Reagan, the executive branch actively sought to get the federal government out of the social and institutional reform business. The Justice Department's Office of Legal Policy issued guidelines instructing federal attorneys involved in constitutional litigation to brief and argue their cases narrowly in terms of the founders' original intent. 18 These guidelines referred explicitly but disparagingly to the role judges played in public law litigation, as Chayes had described that role in his 1976 article. The authors of the guidelines also criticized the judicial "micro-managing" of schools, hospitals, and prisons, and specifically instructed federal lawyers engaged in institutional litigation to "urge courts to use equitable relief sparingly." 19

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But this resurgent concern with federal government restraint did not translate into reduced dependence on federal government intervention and management of social problems. Concurrent with his administration's abdication of federal responsibility in civil rights cases, Reagan presided over an enormous expansion in the federal role in criminal justice. The number of criminal cases tried in all federal districts increased ten percent during the 1980s. At the end of the decade, forty percent of federal trials were criminal prosecutions. The increases were distributed unevenly. In 1985, only five of ninety-six federal district courts had dockets where criminal filings were in the majority. By 1989, when Reagan left office, criminal cases were more than fifty percent of the docket in twenty-five federal districts. The Reagan administration's activity was far greater in the area of narcotics law enforcement. While Reagan was president, the number of drug-related cases filed in federal district courts increased by more than two hundred percent.\textsuperscript{20}

\textsuperscript{20} Between 1974 and 1990, when the total number of federal criminal defendants rose slightly less than seventeen percent, the number of drug defendants increased more than seventy-five percent. During that same time the total number of federal criminal convictions rose nearly twenty-nine percent, while the number of drug convictions increased more than ninety-six percent. Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," \textit{Hastings Law Journal} 46 (1995): 1153.
Reagan sought to fill available federal district judgeships with conservative jurists who supported his views on judicial restraint. But to fight the war on drugs, the president sought out activist prosecutors. He found one in Henry K. Oncken, a former assistant prosecutor for Harris County and state criminal district judge, whom U.S. Senator Phil Gramm recommended in 1985 that Reagan appoint U.S. Attorney for the Southern District. Oncken became the nation’s busiest federal prosecutor. By 1990, when he left office, Oncken had increased his staff of assistant U.S. attorneys from 52 to 110. They in turn more than doubled the number of criminal prosecutions in the District, from 828 to 2072 cases.

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22 The office of the U.S. Attorney is defined in Chapter 35 of Title 28 of the U.S. Code (Judiciary and Judicial Procedure). Within his or her federal district, the U.S. Attorney has the duty to: (1) prosecute all offenses against the United States; (2) prosecute or defend for the government in all civil actions in which the United States is concerned; (3) appear in behalf of the government defendants in federal tax, customs, or other revenue-related civil actions; (4) institute collection proceedings and prosecute for violations of federal revenue laws; and (5) report as the U.S. Attorney General directs (28 U.S.C. §§ 541-550). For the political challenges of the office, see, generally: James Eisenstein, *Counsel For the United States: U.S. Attorneys in the Political and Legal Systems* (Baltimore: Johns Hopkins University Press, 1978); and: Whitney North Seymour, Jr., *United States Attorney: An Inside View of “Justice” in America Under the Nixon Administration* (New York: William Morrow and Co., 1975). Assistant U.S. Attorneys are formally appointed by the Attorney General (28 U.S.C. § 542).
Oncken's emphasis on prosecuting federal narcotics violations greatly affected the Southern District, which was the only district which contained two points, namely, Laredo and Brownsville, which the federal government had designated as High Intensity Drug Trafficking Areas (HIDTA). Between June 1988 and September 1989, Oncken's prosecutors filed 1481 narcotics cases. This was twice as many as the prosecutors filed in the runner-up, the Western District of Texas, where they filed 721 drug cases. In June 1989, each of the Southern District's thirteen judges managed a combined civil and criminal docket of slightly more than 600 cases. By June 1990, each of them managed approximately 800 cases. This figure for combined caseload obscured the reality that the judges in the border divisions, like their predecessor judges had throughout the century, focused on federal criminal law. A better indication of the division of labor among the judges, therefore, is the fact that in 1989, federal district judges in Laredo, McAllen, Corpus Christi, and Brownsville, heard more than eleven percent of all federal narcotics cases tried nationwide.²⁴

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Oncken’s aggressiveness came at a cost. Both the overworked federal district judges and the underworked civil lawyers with cases pending in the Southern District complained that Oncken demonstrated little discretion. These critics could refer to published statistics on judicial efficiency to show that the Southern District courts had become so clogged with his minor drug prosecutions in the late 1980s, that important civil litigation languished.\textsuperscript{25} But Oncken’s mania for drug cases, the critics said, also forced his federal prosecutors to overlook the epidemic in white-collar crime, especially the wholesale bank fraud many suspected played a major role in the failures of more than 400 Texas financial institutions during the 1980s. Oncken answered his critics by arguing that he made a priority of narcotics cases because the Southern District had more of a problem with drug trafficking than with bank fraud. The choice was well within his prosecutorial discretion.\textsuperscript{26}

The Southern District judges who heard the cases claimed that the high rate of prosecution indicated Oncken’s lack of discrimination and evaluation. They complained that Oncken’s staff of eager prosecutors accepted almost every case, no matter how important or trivial, referred to

\textsuperscript{25} As a result of the Speedy Trial Act of 1974.

them by federal law enforcement agencies. This was a fair charge. By 1990, Oncken’s prosecutors in the Southern District were twice as likely to file charges on a case a federal agency sent them than they had been in 1985. In 1988, for example, the Southern District’s assistant prosecutors opened cases on sixty-six percent of all criminal matters presented to them. By comparison, the Southern District staff’s closest rivals in these terms, the federal prosecutors in Miami, filed charges in only forty-four percent of referred cases. The national average for prosecuting criminal referrals was approximately thirty-six percent.\(^{27}\)

Judge Hughes, who Reagan appointed to the Southern District bench just before Oncken was appointed U.S. Attorney, emerged as the leading judicial critic. In 1990, Hughes stated that Oncken’s policies lacked the “thoughtful prioritization that is the essence of government.” He did not question the federal prosecutor’s integrity or his motives, but Hughes said that “running twice as fast in the wrong direction is not a solution in criminal justice.” There is no law mandating that the prosecutors and the judges agree on priorities. But they do work closely together, and the fact was, Oncken had started his tenure under a cloud. In 1985, soon after he was appointed, Oncken reportedly complained that his assistant prosecutors were too inexperienced and that the Southern District judges were too

\(^{27}\) Ballard, “Oncken’s Stormy Tenure Enters Final Chapter.”
lenient. The judges interpreted this comment, Hughes later said, to mean they ought to "work harder."\(^\text{28}\) Federal prosecutors lack even the formal independence of Article III. Amid a growing chorus of criticism, Sen. Gramm to begin interviewing potential replacements for Oncken in May 1990, well before the U.S. Attorney's term was due to expire. Oncken resigned the prosecutor's post in June. Gramm soon recommended as Oncken's replacements Houston attorney Ronald G. Woods, a former FBI special agent who had been the chief of the U.S. Attorney's fraud, narcotics and public integrity sections in the late 1970s and early 1980s. By 1990, he was a solo practitioner with extensive experience both prosecuting and defending white-collar criminals, and Woods had been among Oncken's critics concerning the lack of bank fraud prosecutions. Accordingly, when Woods swore the oath as the U.S. Attorney for the District in November, he announced that his first task in the new job was to fill the dozen vacancies on the then 111-lawyer staff of assistant prosecutors. Woods said that he needed to hire the new personnel quickly so that he could focus on his top priority, namely, bank fraud.\(^\text{29}\) Although he could not abandon

\(^{28}\) Ibid.

\(^{29}\) Judge Hughes was presumably not a fan of this particular development. He later noted that "[a]fter the bankers had followed government rules in their reckless expansion, the government decided to blame the bankers, endlessly prosecuting officers criminally for bad judgment, wasting judicial
narcotics prosecutions, Woods proved more selective in his prosecutions than his predecessor, and he soon reduced the backlog of criminal cases in the Southern District.  

The Civil Justice Reform Advisory Group, a study panel which was formed with the 1990 Civil Justice Reform Act (CJRA), a congressional initiative to identify the causes and remedies for delay in the federal district courts, recognized Woods' achievements. The group's official report, issued after Woods had been U.S. Attorney for one year, noted that under his discriminating prosecution philosophy, criminal filings were down by one-third. As a result, Southern District judges could focus more of their attention on clearing the civil dockets, which the report said had reduced the civil case backlog. The CJRA panel also critiqued the judges' management. The group recommended that the Southern District judges should refer more civil cases for alternative dispute resolution (ADR) and delegate more of their pre-trial criminal and civil matters to magistrates.

resources, destroying lives in a cruel, ugly gesture.” Hughes, “Don’t Make a Federal Case Out of It,” 156. Also, see chapter eight of this dissertation.  

The report suggested assigning five to ten percent of the cases to magistrates. And the CJRA panel called for additional support personnel.\textsuperscript{31} But the CJRA group’s report also declared Congress guilty of causing delay in the federal courts. In order to cut costs and backlogs, committee members said, Congress should authorize more money for the courts. It should stop “federalizing” crimes, such as minor drug offenses, that could be handled in state courts. Congress should stop authorizing new federal prosecutors to the U.S. Attorney’s offices without also adding court personnel to balance the increased workload. Finally, the CJRA panelists complained about the effect of federal sentencing guidelines.\textsuperscript{32}

Another congressionally-created panel, the Federal Courts Study Committee, submitted its report around the same time. Its members also blamed mandatory minimum sentencing guidelines for contributing to trial backlogs and delays, along with the rising number of drug cases, and the impact of the Speedy Trial Act. The primary reason given that sentencing guidelines affected the disposition of trials was that defendants facing the same punishment for a crime whether they face trial or accept a plea bargain had no incentive to plead guilty. This was especially true, the panel reported, in drug cases, where “draconian” penalties were mandated.

The effect on dockets was dramatic. Even small reductions in the number of plea settlements created problems for the federal courts. The Committee estimated that a five percent drop in guilty pleas translated into at least a thirty-three percent increase in the number of criminal trials.  

However, neither of the study panels addressed the effect the mandatory minimums had on prosecutorial power and discretion. Federal prosecutors could still enhance or reduce the length of "mandatory" prison sentences by manipulating the many variables, such as the weight of the drugs seized or the use of a gun in the crime, that go into the mathematical formula judges applied to set a sentence. As in the days before the guidelines, prosecutors and defense lawyers could cooperate to arrive at a mutually agreeable solution. But the judges now lacked any discretion in the matter.

As various court studies were underway, Congress finally had to address the problem that leaders of the federal judiciary had long considered to be an obvious cause of delay. Congress had authorized the hiring of many new federal prosecutors during the 1980s, but during those years it had authorized very few federal district judgeships. The

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32 Elder, "Congress Catches Heat for Federal Court Woes."
33 Moore, "Courting Disaster."
lawmakers had last expanded the federal judiciary in 1984. Chief Justice William Rehnquist complained in 1990 that congressional policies had created an "hourglass-shaped" federal criminal justice system. At one end were large staffs of prosecutors who filed many federal criminal cases. At the other end, the government had devoted abundant resources to build prisons to house the convicted offenders. But between the two, there had been no corresponding expansion in federal "judge power" to handle the increased workload. Rehnquist suggested that the result of this congressional neglect would be a "bottleneck" in the system which would substantially reduce the nation's capacity to win the war on drugs.  

The effects on delay and caseload caused by congressional neglect in creating new judgeships was compounded by the fact that the Congress and President had been remiss in filling existing but vacant judgeships. In early 1990, there were fifty-seven judicial vacancies, including eight the judiciary classed as emergencies because the seats had been empty for more than eighteen months. Jesse E. Clark, the Southern District's longtime court clerk, did not see the problem as an hourglass. He chose a metaphor that, to him, more aptly described the effect of mixing longtime judicial

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35 Rehnquist, quoted from his annual report on the federal judiciary (issued on 1 January 1990), in: Moore, "Courting Disaster."
vacancies with overburdened court dockets. "It's like a traffic jam," he said. "There are too many cars and too little cement."36

At the time Clark offered this image, Congress was contemplating adding several federal district judges to the Southern District, which along with the Western District, Southern California, Southern Florida, and Arizona, had been targeted as areas having acute drug-trafficking problems. The executive branch had recently authorized an increase in the number of federal law enforcement agents in these trouble spots. Clark wondered if the addition of three federal district judges, the number being considered, might not simply aggravate the problems of the Southern District. The new judges would immediately begin hearing cases drawn the increased cohort of criminal filings. This would not address the backlogged cases, he said. Instead: "It's like trying to kill a bear with rock salt: You're only going to get under its skin and irritate it."37

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In 1990, Congress authorized five additional federal district judgeships for the Southern District of Texas, bringing the total to

36 Ibid.
37 Mark Ballard, "Bill to Add U.S. Judges Shortchanges Texas by 6; Legislation Would Add 3 New Courts in Southern District, 1 In Western," Texas Lawyer, 18 June 1990, Pg. 4.
eighteen. The President and Congress filled these slowly, and with various deaths or retirements, the District remained at less than full strength until 1999.

Meanwhile, the criminal justice system continued along the path of "federalization." Early in the decade, with the end of the banking crisis, the problem of high numbers of federal narcotics prosecutions returned to bedevil the judges. In October 1994, the U.S. Attorneys from the federal districts along the U.S.-Mexican border joined with DEA, FBI, INS Border Patrol, the U.S. Coast Guard, and the Criminal Division of the Justice Department to form the Southwest Border Council, with responsibility for the development and the implementation of the Southwest Border Initiative (SWBI). The SWBI was charged to coordinate regional interdiction and prosecution narcotics smugglers operating in many district along the two-thousand-mile Southwest border.  

As had judicial management of institutional litigation, the increase in federal criminal prosecutions during the 1980s sparked academic and political debate. The debate continues and is beyond the scope of this historical examination of the Southern District of Texas. However, I will

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engage in brief review of the controversy. Discussion has focused on
the cumulative effects of a large number of prosecutions on the institution
of the federal judiciary as much as debate focused on the effects of
prosecutions on society. Academic analysts and judges alike remain
concerned worried about dire effects on the operation of the judiciary of
the "federalization" of criminal law. This is a term with varied meanings,
most with negative connotations. One common use of the word describes
the unprecedented increase in personnel and budget that has been
committed to federal law enforcement agencies. Federalization also refers
to the increase in the number of federal criminal statutes. And both of
these uses indicate the steady expansion of federal law enforcement
authority at the expense of state authority.

For the federal judiciary, the primary meaning of federalization is
the extent to which the actions of the executive and legislative branches
have unbalanced the business of the federal courts by preventing civil cases
from being heard by the federal district judges. Chief Justice Rehnquist
voiced this concern in an address to the American Bar Association in 1992.
He warned that efforts to "get tough" on drug offenders threatened to
transform the federal district courts into "national narcotics courts."39 A

39 Rory K. Little, "Myths and Principles of Federalization," *Hastings Law
Considered*, Robert Siegel, host; Nina Totenberg reporting; "Rehnquist
few years later, Sara Sun Beale, a professor at Duke University Law School who had been an advisor to the Federal Courts Study Committee, wrote that the campaigns against traffic in illicit drugs and illegal immigrants had already cost billions of dollars and had threatened to overwhelm the resources of the federal courts, but had not appreciably reduced crime.  

Writing in 1997 of his concerns regarding the "nationalization of crime," Judge Hughes simply noted that it was no wonder that the expression "don't make a federal case out of it" had fallen from fashion with the "man in the street." By the late 1990s, Hughes suggested with regret, the phrase no longer meant that a simple issue had been blown out of proportion because every criminal act, no matter how trivial, could be made into a federal case.

To paraphrase Cover, Hughes and others interested in the business of the judiciary worried whether the federalization of crime would ultimately

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transform the federal courts into quasi-judicial bodies overseeing narcotics prosecutions and occasional other tasks. This remains to be seen.

41 Hughes, “Don’t Make a Federal Case Out of It,” 154.
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The papers of U.S. Circuit Judge John R. Brown are held by the University of Houston Law Center, John O'Quinn Law Library.

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