Program Submission Form

AMERICAN INNS of COURT®

Program Title: The Role of the U.S. Fifth Circuit Court of Appeals in Dismantling Racial Segregation in the South

Date Presented: February 8, 2018 Inn Year: 2018

Presenting Inn: C.H. Ferguson - M.E. White Inn of Court Inn Number: 280165

Inn City: Tampa Inn State: Florida

Contact Person: Joseph T. King, Esq. Phone: (813) 221-2626

E-mail Address: jking@burr.com

Please consider this program for the Program Awards: ☑ Yes ☐ No This program is being submitted for Achieving Excellence: ☑ Yes ☐ No
(Submit within 60 days of presentation.)

Program Summary:

Be concise and detailed in summarizing the content, structure, and legal focus of your program. Please attach additional sheets if necessary.

The program examined the role of the former Fifth Circuit Court of Appeals in the implementation of the Brown v. Board decision primarily through the interaction of two of its judges: Chief Judge Elbert P. Tuttle and Judge Benjamin F. Cameron. Chief Judge Tuttle, along with his fellow Fifth Circuit Judges John Minor Wisdom, John R. Brown, and Richard T. Rives, played critical roles in most of the landmark decisions of that court which mandated desegregation in schools and public facilities in the 1950's and 1960's throughout the South. Judge Ben Cameron was an ardent states-rights advocate who vigorously opposed what he considered to be intrusions by federal courts in state institutions, public facilities, and social relations. (cont. on attached sheet)

Program Materials:

The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office. ***Please check all that apply and include a copy of any of the existing materials with your program submission:***

☑ Script ☐ Articles ☑ Citations of Law ☐ Legal Documents ☐ Fact Pattern ☐ List of Questions ☑ Handouts

☐ PowerPoint Presentation ☐ CD ☐ DVD ☑ Other Media *(Please specify)* Photographs of Judges

Specific Information Regarding the Program:

Number of participants required for the program: 9 Has this program been approved for CLE? ☐ Yes ☑ No

Which state's CLE? Florida How many hours? 1 Hour ☑ Pending ☐ Approved

Recommended Physical Setup and Special Equipment:

i.e., DVD and TV, black board with chalk, easel for diagrams, etc.

Computer and projector, podium, long table for panel discussion, three or more microphones.

Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.

The program began with an introduction reminding the audience about the holdings of the U.S. Court in Brown I and Brown II and the role of the Fifth Circuit Court of Appeals in carrying out those decisions. Next, a member of the group gave a testimonial about her recollections of the events involving the registration and admission of James Meredith in 1962 as a student pursuant to injunctions issued by the Fifth Circuit. (cont. on attached sheet)

Program Submission Form

Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

Role	Membership Category
Introduction of prgogram	Master of the Bench
Historical Background presentation of Judges Tuttle and Cameron	1 Barristter and 1 Associate
Acting roles of Judges Tuttle and Cameron	2 Masters of the Bench
Moderator	Barrister
Panel Discussion	Master of the Bench, Associate, 2 Barristers

Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each item took; *i.e.*, "Introduction by judge (10 minutes)."

Item	Time
Introduction of program	5 mintues
Historical background of Judges Tuttle and Cameron	10 minutes
Skit between Judges Tuttle and Cameron	15 minutes
Panel Discussion	20 minutes
Group Discussion	10 minutes

Program Awards: *Please complete this section **only** if the program is being submitted for consideration in the Program Awards.*

Describe how your program fits the Program Awards Criteria:

Relevance: How did the program promote or incorporate elements of our mission? *(To Foster Excellence in Professionalism, Ethics, Civility, and Legal Skills)*

The program centered on professionalism, ethics, legal skills and civility by our judges for dismantling racial segregation.

Entertaining: How was the program captivating or fun?

The program proved thought provoking for Inn members as evidenced by the amount of participation during the questions portion at the end of the program.

Creative and Innovative: How did the program present legal issues in a unique way?

The skit provided a behind the scenes, fictitious look into what might have occurred between the judges.

Educational: How was the program interesting and challenging to all members?

The program reminded us of the call to include diversity in our thoughts on a routine basis for equality among all.

Easily Replicated: Can the program be replicated easily by another Inn? ☑ Yes ☐ No This program is: ☑ Original ☐ Replicated

Questions:

Please contact Bry'an Azuekwu at **(571) 319-4713** or by e-mail at **programlibrary@innsofcourt.org**.

Please include ALL program materials. The committee will not evaluate incomplete program submissions.

Program Summary (cont.)

The group presented a skit portraying a fictitious "conversation" between Tuttle and Cameron just after the release of Cameron's dissent in *Armstrong v. Board of Education of City of Birmingham*, 323 F.2d 333 (5th Cir. 1963), in which he attacked not only the merits of the Court's desegregation opinions, but the manner in which the appellate panels in those cases had been put together, contending that they had been rigged to achieve a particular outcome. In addition, one of the members of the group gave a firsthand account of her experiences as a student at the University of Mississippi during the tumultuous times when James Meredith registered and began attending classes as a student pursuant to injunctions entered by the Fifth Circuit that were enforced by federal troops. The program concluded with a panel discussion, including extensive interaction with the audience, of issues relating to judicial activism vs. judicial restraint and the role and place of judicial assignments in furtherance of a particular result.

Comments (cont.)

Then, two members of the group, playing the roles of Chief Judge Tuttle and Judge Cameron, had a "conversation" about Cameron's famous and caustic dissent in the *Birmingham schools* case, followed by a panel discussion about judicial activism vs. judicial restraint and appropriateness of assignment of judges to achieve particular results. There was extensive interaction by the audience during the panel discussion.

A Conversation Between Chief Judge Elbert P. Tuttle and Judge Benjamin F. Cameron

August 5, 1963

United States Court of Appeals for the Fifth Circuit Courthouse, New Orleans, Louisiana

Tuttle: Good afternoon, Ben.

Cameron: Chief Judge Tuttle, this is a surprise. What brings you to here to the Big Easy this Monday afternoon? I thought you were on vacation in Colorado, and we don't have oral arguments scheduled here 'til next month.

Tuttle: Your recent dissent in the *Birmingham Schools* case, Ben, has created quite a stir. I felt like I needed to talk with you about it right away. I caught a plane this morning from Denver.

Cameron: Right. I was expecting I'd be hearing from ya.

Tuttle: Ben, what in the world has come over you? You've personally and publicly attacked the integrity not only of me but of three other fellow judges on this Court. For God's sake, man, this has become a frontpage stories in the *New York Times,* the *Atlanta Constitution* and the *Houston Chronicle*. I got a call over the weekend from your friend, Senator Jim Eastland of Mississippi. As you know, he's Chair of the Senate Judiciary Committee. He says they're going to start an investigation of our Court. He told me that the House of Representatives may even be looking at impeachment proceedings. The Clerk of Court also called me yesterday and told me that Judge Warren Jones of our Court over in Jacksonville is irate over your allegations that he too was excluded from hearing civil rights cases. He is demanding to see the files regarding the assignments and threatening to call Senator Eastland. Judge Griffin Bell is also very upset.

Cameron: Chief, I thought long and hard before I decided to write that dissent. I felt it was my duty. As I pointed out, I made a survey of the cases involving racial problems before this Court. By my count, 22 of the 25 racial cases before this Court during the last two years have been decided by appellate panels

of three judges composed of at least two among you, Judge Rives, Judge Wisdom and Judge Brown. In short, your group of like-minded "activist" judges, who I've referred to as "the Four," has controlled the outcome almost 90% of the racial cases before this Court. And, you know, I have been angry for some time about your refusal to appoint me and the district judges in Mississippi to any of the three-judge district court panels that have heard constitutional challenges by Negro plaintiffs, or their supporters, to state laws in Mississippi. As you know, the universal practice followed by all federal circuit courts has been to appoint a circuit judge and a district judge from the state where the cases are pending to sit on all three-judge district court panels in that state. *I* am the judge from Mississippi who sits on this Court. Yet, in the three Mississippi racial cases where three-judge district panels have been appointed, you did not appoint me or any of the district judges from Mississippi to sit on any of them. Excluding me and the Mississippi district judges from these cases seems to me to be part of the "crusading spirit" that has unfortunately been adopted by you and other members of "The Four" in these cases.

Tuttle: Ben, I disagree with your statistics and your conclusions, but you know damn well why I stopped appointing you and the other Mississippi judges to civil rights cases. Tell me, just what *is* your view about *Brown v. Board*?

Cameron: My personal view is, it's true, one that I have not been reluctant to share publicly. I believe that the Supreme Court in *Brown* did *not* properly interpret the Constitution or the law, but, in fact, acted as a "constitutional convention" or "super legislature." It "changed the law of the land" to repudiate principles by which the people of this country, and especially the South, had relied upon and been guided by generations. And, this decision wasn't supported by *legal* authority, but was based solely on highly controversial treatises on psychology and social sciences.

Tuttle: That is precisely why I refused to assign you to civil rights cases in Mississippi. The opposition of the Mississippi district judges, like Judge Cox and Judge Mize, to integration and to the *Brown* decision

are also well known. At a minimum, your impartiality can reasonably be questioned. We've simply got to have honest judges who will fairly and fully apply the law in deciding these important cases.

Cameron: Now it appears to be *my* good faith and integrity and that my colleagues from the great and sovereign state of Mississippi that are being attacked. Like most judges, we can and have set aside any personal opinions, and follow the law. But, as I've also said before, the Supreme Court specifically held in *Brown II* that it is the *local* school authorities that have the primary responsibility for assessing and solving problems of segregation, and it is the *district courts* that are best able to determine the appropriate course of action. The Supreme Court itself said that any action taken must take into consideration the local conditions that pertain to the plaintiff and his rights, the schools and its problems, *and* the public and its welfare. The *Brown II* mandate was consistent with the 10th Amendment to the Constitution, as well as fundamental principles of comity underlying the doctrines of abstention, exhaustion of administrative remedies, and the Anti-Injunction Act, Section 2283. Unfortunately, this Court has far too often usurped the role of the local school boards and has disregarded the reasoned judgments of the district courts in these cases. And, more than that, *you* have fashioned out of whole cloth remedies previously unrecognized by any court to further your activist agenda. For example, on your own as a single judge of this Court you have issued final mandatory injunctions compelling drastic and precipitous action by state authorities without proceeding through the normal appellate processes. It is significant that most of the provisions of our Bill of Rights deal with matters of procedure. My differences with you, Chief, and the others of "the Four", although profound, have not been about whether *Brown is* the law and must be followed, but have been about the proper implementation of *Brown* in light of these core principles that underlie the proper relation between the federal government and the sovereign states.

Tuttle: Well, the proof the correctness of the Fifth Circuit's decisions is in the pudding. In the school segregation cases, voting rights cases, the cases involving the integration of public parks, swimming

pools, and other public facilities, and in the other cases involving the civil rights of Negro Americans that we've decided, I take comfort that the Supreme Court has routinely declined to accept certiorari or has affirmed our decisions. Why the Supreme Court in the *City of Memphis* case just three months ago put every school board and federal district and appellate court on notice that in light of the widespread utter lack of compliance by state and local authorities with the *Brown* cases in the eight or nine years since they were decided, the "all deliberate speed" language the Court used in Brown II must be viewed more strictly today than in 1954 or 1955. And, as far as your charge of usurpation or judicial activism is concerned, I think it is ironic that the dissent you published last week in the *Birmingham Schools* desegregation case, which created all this uproar, was from a denial of a request for rehearing *in banc*. *You* were not even a member of the panel that decided that case. And I know you well remember two years ago the four successive stays you entered of the injunctions issued by this Court in the case that would have required the admission of James Meredith to the University of Mississippi. You were also not on the panel that decided that case. Yet, over and over you issued those stays whenever the lawyers for the State of Mississippi, after being informed your stay had been overturned, came back to you for a sympathetic ear. To my knowledge, no action like this has *ever* been taken before by *any* other judge on *any* federal appellate court. Talk about judicial activism?

Cameron: Sometimes, Chief, one simply must fight fire with fire.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), was a landmark United States Supreme Court case in which the Court declared state laws establishing separate public schools for black and white students to be unconstitutional. The decision effectively overturned the Plessy v. Ferguson decision of 1896 (Separate but equal), which allowed state-sponsored segregation, insofar as it applied to public education. Handed down on May 17, 1954, the Warren Court's unanimous (9–0) decision stated that "separate educational facilities are inherently unequal." As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This ruling paved the way for integration and was a major victory of the Civil Rights Movement,[1] and a model for many future impact litigation cases.[2] However, the decision's fourteen pages did not spell out any sort of method for ending racial segregation in schools, and the Court's second decision in Brown II (349 U.S. 294 (1955)) only ordered states to desegregate "with all deliberate speed".

1) Is judicial activism a current issue and does it have a role in the current political landscape? I.e., is it “alive and well” in this day and age? [We can discuss some examples of more recent cases.]

2) Is judicial activism really that big of an issue? Has too much emphasis been placed on judges’ political leanings in the judicial appointment/selection process? [Discuss public perception of judicial leanings and importance; discuss massive judicial vacancies; Merrick Garland; importance of trial judges and vacancies, low opportunity to impart political leanings on proceedings; e.g., Roberts decision in ACA case—don’t always come out on party lines]

3) How does judicial activism affect the perception of integrity of the courts? Is it in the eye of the beholder?

4) Separation of powers question—like the legislator, Senator Eastland, in the skit, can public pressure from other branches of government have a negative impact the independence of the judiciary? [I.e., current regime’s comments on judiciary]

5) Was the Senate’s decision to remove the filibuster for U.S. Supreme Court nominations a good thing or a bad thing?

6) In Florida in 2017, a 9th Circuit State Attorney was removed from the prosecution of a case by Governor Rick Scott because she refused to seek the death penalty, which she believed to be unconstitutional. Should a Chief Judge be allowed to remove a judge from a case if the judge has expressed similar personal views about a law?

7) In the arena of judicial activism and politics, there will always be a tug-of-war between states’ rights and federal power, such as the battle that we heard about tonight involving the civil rights issue of school desegregation. What will be the next big battle as states continue to pass laws in conflict with either federal statutes/U.S. Supreme Court opinions?

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The Role of the U.S. Fifth Circuit Court of Appeals

in Dismantling Racial Segregation in the South

Ferguson-White American Inn of Court Program

February 8, 2018

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