Historical Essay

Forming the Historic Fifth Circuit: The Eisenhower Years

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In the decade after Brown v. Board of Education was decided, no court played a more critical role in effectuating its mandate than the United States Court of Appeals for the Fifth Circuit. Until 1981 when the Eleventh Circuit was created, the Fifth Circuit had jurisdiction over federal cases arising in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. Led from 1960 until 1967 by Chief Judge Elbert Tuttle, the historic Fifth forged a jurisprudence that broke the back of massive resistance in order to deliver on the promise of Brown.

This is a chapter from a forthcoming biography of Judge Tuttle. The previous chapter traces Tuttle's own path to the court. This essay delineates the two judges who were on the court when Tuttle was appointed and who continued to serve in the 1960s, and describes the nomination and confirmation of the other four Judges who were appointed by President Eisenhower.

INTRODUCTION

When Elbert Tuttle returned to Atlanta to assume his seat on the United States Court of Appeals for the Fifth Circuit, he expected to serve out his years in peace and quiet. The Fifth Circuit had long been one of the busiest federal circuits in the nation and the work of the judges was steady, but it was not heavy and it was carried out at the judge's pace in the isolation of his chambers. Tuttle joked to friends in D.C. that he was going home "to retire" to the Court.

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Tuttle moved into chambers in the federal courthouse in Atlanta, the old Post Office building. The six floor building, with massive stone walls, occupied an entire city block. On Monday, October 4, 1954, oral arguments were scheduled for 10 a.m. Just before ten, Tuttle joined the Chief Judge of the Circuit, Joseph C. Hutcheson, Jr., of Texas, and Judge Richard Rives in the robing room. Judge Hutcheson had been in Atlanta for arguments the week before, but he had confined his interaction with Tuttle to the briefest of introductions. In the robing room, Hutcheson had nothing to say to Tuttle, until, as they prepared to enter the courtroom, he tossed a curt direction over his shoulder. "Tuttle," he called back, "you go last."

I. CHIEF JUDGE JOSEPH HUTCHESON

Chief Judge Joseph C. Hutcheson, Jr. had first been appointed to the Federal District Court in 1918 by President Wilson, and then elevated to the Fifth Circuit in 1931 by President Hoover. He had become Chief Judge in 1948. A dyed-in-the-wool Texas Democrat, Hutcheson was proud of having been appointed by a Republican President, but that was the extent of his appreciation of the Republican party. He loved the court, and he was not particularly impressed by the new judge. Hutcheson had authored books and law review articles, had barely missed out on an appointment to the Supreme Court which went to Hugo Black, and was highly regarded as a legal scholar. From his perspective, Tuttle represented a political Republican appointment of a tax lawyer, a specialization which to Hutcheson did not indicate intellectual breadth or depth.

As Chief Judge, Hutcheson ran things his way. "He didn't pay all that much attention to formalities," Judge John Minor Wisdom recalled, "No one did." The Circuit was supposed to hold a judicial

¹ 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 38 (1981) [hereinafter BASS]. As Jack Bass notes, this was an oft told tale among the Judges of the historic Fifth Circuit. As a clerk to and later biographer of Judge Tuttle, the author heard it recounted several times, as is the case with a number of the anecdotes in this cssay. See also, Frank Read & Lucy McGough, Let Them Be Judged: The Judicial Integration of the Deep South 28-29 (1978) [hereinafter Read & McGough] (another excellent source for background on the historic Fifth).

² See generally Joseph C. Hutcheson, Jr., The Local Jail, 21 A.B.A. J. 67, 83 (1935); JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE (1938); Joseph C. Hutcheson, Jr., Law and the Lawyer—"Then" and "Now," 8 BAYLOR L. REV. 26 (1956); Joseph C. Hutcheson, Jr., In Praise of Lawyers and Lawyering, 21 INS. COUNS. J. 234 (1954); Joseph C. Hutcheson, Jr., This Thing Man Called Law, 2 U. CHI. L. REV. 1 (1934); JOSEPH C. HUTCHESON, JR., LAW AS LIBERATOR: THE PRINCIPLE OF DEMOCRACY IN AMERICA: THE SPIRIT OF ITS LAWS (1937); Joseph C. Hutcheson, Jr., Judging as Administration. Administration as Judging. 21 TEX. L. REV. 1 (1942).

Administration, Administration as Judging, 21 TEX. L. REV. 1 (1942).

³ Interview with Judge John Minor Wisdom, in New Orleans, Louisiana (June 4, 1994) [hereinafter Wisdom Interview].

council meeting twice a year. Hutcheson didn't think much of that idea so he simply ignored it. Once when the court had been sitting en banc in New Orleans, the judges adjourned to lunch together at "Mike's on the Avenue," a greasy spoon nearby. As they left the restaurant, Chief Judge Hutcheson said, "Well the law requires us to hold two meetings a year; that was one of them."

For his part, Wisdom found Hutcheson to be "an interesting judge, very bright, well read." Tuttle brushed aside Hutcheson's lack of warmth toward him, even after an incident, during the first week they sat together when he suggested to Hutcheson that he call him Elbert, or Tut. "I wouldn't think of it," Judge Hutcheson replied, "First thing I know, you'll be calling me Joe."

Remembering those early days, Sara Tuttle was less circumspect than her husband. "Judge Hutcheson was ugly to us when we came on the court," she remembered. "He thought the Eisenhower appointees were ruining his court and he didn't like anything about us. He wasn't even civil." Nor was Mrs. Hutcheson, Sara felt, welcoming. High spirited and outgoing, Sara thought good social relations were important to good working relations and she was determined to make her husband's job easier. When she attended a luncheon for the judges' wives, she enjoyed herself enormously, chatting and laughing and humorously recounting her experiences. "Mrs. Hutcheson," Sara recalled, "looked at me, very straight-faced, and she said, 'Well you certainly have had a good time since you came on this court.' I looked her in the eye and I said, 'Mrs. Hutcheson, I didn't wait until I came on this court to have a good time; I've been having a good time all of my life." After that, Sara Tuttle said, they became good friends.

While Elbert Tuttle and Joseph Hutcheson never became good friends, they became stalwart colleagues, with great respect for each other. After Judge Hutcheson had a stroke, in 1961, he still went to his office, but he was unable to travel to sit with the court. The Fifth Circuit had never held oral arguments in Houston; in Texas, they sat in Fort Worth. By then Tuttle was Chief Judge and he called Judge Hutcheson and suggested that the court sit in Houston. Judge Hutcheson's first reaction was hesitant. "Do you think the Court can sit here?" he asked. "Of course we can," Tuttle responded. "Well then I

⁴ Id.

⁵ Id

⁶ Bass, supra note 1, at 38.

⁷ Interview by Professor Alfred Aman with Sara Tuttle (May 16-18, 1988) (on file with Cornell Law Library).

⁸ Id.

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¹⁰ Charles L. Zelden, The Judge Intuitive: The Life and Judicial Philosophy of Joseph C. Hutcheson, Jr., 39 S. TEXAS L. REV. 905, 916 (1998).

would be happy to have you come to Houston and hold court here," Judge Hutcheson said. The court did sit in Houston, and Tuttle presided over the three judge panel, with Judge Hutcheson sitting to his right. Every day of that first week of oral arguments, some member of Judge Hutcheson's family attended court. Tuttle took almost as much pleasure as Hutcheson did in their presence.

Sara Tuttle was in Houston as well; she had kept her bargain to always travel with her husband. One evening the judges and their spouses gathered for some light socializing. She was chatting with Judge Hutcheson, who was by then in his 80s, when he gripped her arm. "Sara," he said, staring into her eyes, "Remember that Browning poem, 'Come grow old along with me, the best is yet to be'?" She remembered it, and she tossed off the first verse from memory. As she finished, he tightened his grip on her arm. "Sara," he said, "don't believe it; it's a damn lie." They shared a bittersweet laugh. In her own decline, in her 90s, recalling the story could always bring her laughter again.

II. JUDGE RICHARD RIVES

Of the six judges on the Fifth Circuit when Tuttle decided to join the court, with only one would he develop a significant relationship. A Truman appointee, Richard Rives of Alabama, would prove to be one of Tuttle's most steadfast allies, and one of his closest friends. Two of the judges would die within a year. Judge Louie Willard Strum, a Democrat from Florida, died on July 26, 1954, only weeks after Tuttle had accepted the nomination. Judge Richard Russell, a Democrat from Georgia and the brother of Senator Richard Russell, died on January 18, 1955, three months after Tuttle was sworn in. Two others took senior status within Tuttle's first two years. Judge Edwin Holmes, a Democrat from Mississippi, took senior status on November 30, 1954; he died on December 10, 1961. Judge Wayne Borah, a Democrat from Louisiana, took senior status on December 31, 1956; continued to sit only through 1958; and died on February 6, 1966.

With two judges dying, and two taking senior status, President Eisenhower suddenly had four appointments to make. Within two years, of seven active judges on the Fifth Circuit, five were Republicans, and of the five Republicans, only one had been raised in the South. Change was overtaking the Circuit, and the country.

¹¹ Interview by Professor Alfred Aman with Sara Tuttle (May 16-18, 1988) (on file with Cornell Law Library).

¹² Conversations with Sara Tuttle, 1991-1994, Atlanta, Georgia, passim.

Had Tuttle known what lay ahead for the Fifth Circuit as the civil rights revolution played out in the federal courts of the deep south, he might have been alarmed by Richard Rives' background. Unlike Tuttle, Rives was a southerner through and through. He was born in Montgomery in 1895; decades earlier his maternal great-great-grandfather had been the first Baptist minister in Montgomery County. Richard Rives' grandparents on both sides had been raised in Alabama. His father's family had been well-off plantation owners before the Civil War; after it, they were economically devastated. He won a tuition scholarship to Tulane, and spent one year there, with the help of a loan from one of his sisters. At the end of the year, he needed to borrow more to return. He decided instead to stay home and go to work to repay her. ¹⁴

Before Rives could find a position himself, his father, a deputy sheriff, found one for him. The senior Rives knew that his son, who had been valedictorian of his high school class, belonged in college. He couldn't afford to send him, but he did the next best thing. He called on Wiley Hill, a Montgomery lawyer whose family had, before the Civil War, been neighbors of the Rives' family. Their plantations had bordered each other. Wiley Hill agreed to let young Richard Rives study law in his office. Wiley Hill was a good teacher; in 1914, at the age of 19, Richard Rives passed the Alabama Bar examination. 15

Rives only practiced law for about a year before being sent to the Mexican border; from 1918-19, in World War I, he served as a first lieutenant in the Signal Corps of the American Expeditionary Forces. When he returned to Alabama, he began to steadily build a practice, and a reputation. He directed Hugo Black's successful campaign for the Senate; in 1939-40, he served as President of the State Bar, and many credited him with "guid[ing] Chauncy Sparks into the governor's chair in 1942." Many also thought he could have been governor himself, but in 1951, while arguing a case before the United States Supreme Court, Richard Rives was handed a note telling him that President Truman had nominated him to the Fifth Circuit. He won the case, and accepted the nomination. 17

The nomination had not entirely been a surprise to Rives. A few years earlier, Judge Leon McCord of the Fifth Circuit had encouraged Rives to consider going on the court. Rives had talked it over with his son, Richard Rives, Jr. "Dick thought that on the beliefs we had and things that mattered to us, I would have a much wider effect as a judge," Rives told an interviewer years later. What his son had thought was of

¹⁴ BASS, supra note 1, at 71.

¹⁵ Id.

¹⁶ R. Rives, 1895-1982, THE MONTGOMERY ADVERTISER, October 9, 1982, at 4.

¹⁷ BASS, *supra* note 1, at 70-71.

¹⁸ BASS, supra note 1, at 70.

critical importance to Richard Rives. A graduate of Exeter and Harvard, young Dick Rives had enjoyed the formal education his father never had. On active duty with the Navy in the Pacific during World War II, he fell seriously ill. In the weeks he spent recuperating in a military hospital, with black servicemen lying alongside him, he found himself reflecting on the injustice of segregation. After the war, as a law student at the University of Michigan, he read Gunnar Myrdal's 1944 treatise on race relations, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY. 19 He recommended it to his father, who carefully read both volumes, and who was mightily influenced by Myrdal's work and by the progressive views of his own son.²⁰ The two men, father and son, looked forward to practicing law together. Then came the great tragedy of Richard Rives' life. In the summer of 1949, his son, riding with a friend to his parent's beach home at Mary Esther, Florida, died in a crash.²¹

Two years after the fatal accident, Judge McCord announced his retirement. He may well have waited for Rives most intense grief to subside. At any rate, he encouraged Rives to talk to Senator Lister Hill. Lister Hill was an old friend who had relied on Rives for political support and advice; he assured Rives he was behind him, and sent him on to Senator John Sparkman. Rives knew Sparkman but was not close to him: still. Sparkman told Rives "he would make a fine judge, was well qualified, and he would give him 'every consideration." recounted Sparkman's remarks to Hill, who did not like what he heard. Had he ever walked a certain foot trail by the Alabama River, Hill asked Rives. Of course Rives had. "Well," McCord said, "I made that trail walking back from being sold down the river so many times. You go back to see Senator Sparkman." Rives took Senator Hill's advice, went back to Senator Sparkman, and told him what Hill had said. With more force and clarity, Senator Sparkman again assured Rives of his support.²² In short order, the nomination came through.

Richard Rives was very much a son of Alabama, and the way in which he dealt with racial issues early in his career reflected that. When black voters began a voting drive in Montgomery, the Board of Registrars sought his advice. A line of Negroes stretched around the park, they explained; they had all come to register to vote. "Well, the only thing to do is to go on and let them come in, take their application, let them sign up and you all pass on it after they leave," he recalled advising them. He didn't tell them how to pass on it; "they didn't need

 $^{^{19}}$ Gunnar Myrdal, An American Dilemma: the Negro Problem and Modern Democracy (1944).

²⁰ BASS, supra note 1, at 59-70.

²¹ Id. at 70.

²² BASS, supra note 1, at 70-71; READ & MCGOUGH, supra note 1, at 32.

any advice on that." His strategy worked and the voting drive campaign failed. Likewise, he recalled, when he was Judge Advocate of the Montgomery American Legion, Negroes tried to join. The rules provided that all applicants would be voted upon. They were. No Negro was ever told he could not apply, and no Negro ever received a positive vote, or an offer of membership.²³

But Richard Rives was a thoughtful, fair minded man, and his attitude toward segregation evolved as he matured. Rank injustice unsettled him. As a young attorney, he was retained by the family of a young Negro woman who had died in a "gruesome" elevator accident. He proved the liability of the company that had installed the elevator easily, and because the plaintiff has been a young, healthy woman, he expected a substantial verdict. But as the insurance adjuster who had tried to settle it with him had pointed out, no Negro death in Alabama had ever brought in a verdict over \$1000. True to form, the jury awarded \$1000. Rives was shocked. In his recollections, it marked a turning point in his awareness of the pervasive and corrosive effects of segregation.

By 1946, Richard Rives was openly splitting with the old guard. For decades, southern states had effectively denied suffrage to black voters by use of the white primary. In the deep south, the Democratic candidate always won the important statewide elections—the race for Governor, or for the state Supreme Court. In other words, whoever won the Democratic primary won the general election. Not all registered voters could vote in the Democratic Primary, only registered Democrats. Only, that is, members of the White Democratic Party. The Democratic Party itself was segregated, no blacks allowed. Black citizens could vote in the general election, but by then the contest had been decided.

In 1944, in Smith v. Allwright,²⁵ the United States Supreme Court upset that applecart. In a case that arose in Texas, the Court rejected the Democratic Party's argument that it was a private organization and the primary was a private function, and therefore the Equal Protection Clause of the Constitution did not apply. The primary, the Court noted, was provided for and operated pursuant to Texas statutes, and it was inextricably linked to the general election. Under those conditions, the right to vote in the primary could not be restricted to white voters.

The Alabama Democratic Executive Committee reacted with alacrity. With the support of the Committee, the Chairman recommended to the legislature "changes he deemed advisable in Alabama's election laws to meet the 'Texas case,' under which

²³ READ & McGough, supra note 1, at 32.

²⁴ Ic

^{25 321} U.S. 649 (1944).

Democratic primaries could no longer be limited to white voters."²⁶ The emblem of the party, the Chairman reminded his constituency, was a crowing rooster, with the words "White Supremacy" emblazoned above it, and the words "For the Right" below. 27 "[It] is entirely proper that the State Democratic Executive Committee should lead the fight to maintain the traditions of our Party in this state by adopting the proposed amendment to our Constitution and endeavoring, as far as it can legally be done, to make the Democratic Party in Alabama the 'White Man's Party."28

The proposed amendment was deceptively simple. It provided that only those persons who could "understand and explain" any article of the Federal Constitution could be registered to vote.22 amendment's mechanics were ruthless; registrars had complete discretion, pursuant to which they could choose to query only black voters, and could reject their answers out of hand.

It was too much for Richard Rives. He opposed the Amendment in a series of appearances, including a public debate, where his opponents were, as described by the MONTGOMERY ADVERTISER, "a prominent Birmingham lawyer who was Grand Cyclops of the Ku Klux Klan and the very conservative Gov. Frank Dixon."³⁰ Speaking to the public, in 1946 in Alabama, Richard Rives made a calculated appeal to his audience's better instincts.

> When we use arbitrary law as the basis for white supremacy, we are building on quicksand. But when we assert the white man's leadership in terms of intelligence, character and sense of justice, we are building upon a solid foundation of rock. . . .

> The chains we forge to shackle qualified Negroes can be used to keep white voters of Alabama from walking to the polls. These chains would not only breed resistance in the Negro, but, far worse, would rub a moral cancer on the character of the white man.³¹

Rives spoke against the Amendment over and over, but he did not take on the concept of white supremacy. In fact, he argued the Boswell

²⁶ Davis v. Schnell, 81 F. Supp. 872, 879 (S.D. Ala. 1949), aff'd, 336 U.S. 933 (1949).

²⁷ Id. at 881.

²⁸ *Id*.

²⁹ Id. at 874.

³⁰ R. Rives, 1895-1982, supra note 16, at 4.

Amendment was unnecessary because "The record does not show any immediate threat to white supremacy under the present Constitution." 32

Attacking the Amendment, Rives exposed its real purpose: "Let us be frank and honest with ourselves. You and I know that the people of our State are expected to adopt this Amendment in order to give the Registrars arbitrary power to exclude Negroes from voting." An opponent, a sitting judge, was no less direct: "I earnestly favor a law that will make it impossible for a Negro to qualify" It was necessary, he argued, "to keep this inferior, unreliable, irresponsible, easily corrupted race from destroying the highest civilization known to man." 35

Richard Rives lost the battle but won the war. The Boswell Amendment passed handily, but, as he had predicted over and over, it was immediately challenged and held unconstitutional.³⁶

In 1951, the year before Brown v. Board of Education³⁷ was docketed, Richard Rives's opposition to the Boswell Amendment did not become an issue that thwarted his chance to sit on the Fifth Circuit. Nominations were still relatively uncontroversial, and organized opposition on the basis of a nominee's political views was rare. When the note confirming his nomination by President Truman was passed to him, only one barrier remained: his own integrity. Richard Rives needed advice and support and the one person who could best provide both was at hand. After Rives left the courtroom, he went by the office of his old friend from Alabama, Hugo Black. Careful not to speak of the case he had argued, he reminded Justice Black of what Black already knew: Rives had "never seen the inside of a law school." He had a practice he enjoyed, and more than three decades of lawyering under his belt, but there were important areas of federal law of which he knew nothing. With Hugo Black he could be candid; he was not sure he was up to the job.

Black was reassuring. Cases that reached the Court of Appeals, like those that reached the Supreme Court, were often very close, he pointed out. They could legitimately go either way. Then he delivered his punch line, "You can't do any real harm," he told his old friend.³⁸

Richard Rives took his seat in 1951; he proved to be the first judge of the new guard. In 1959, when Judge Hutcheson stepped down as Chief Judge of the Circuit, it would be Rives, the next most senior,

³² Richard T. Rives, An Argument Against the Adoption of the Boswell Amendment, 7 ALA. LAWYER 291, 295 (July 1946).

³³ Id. at 294.

³⁴ Judge H. G. Wilkinson, Argument for the Adoption of the Boswell Amendment, 7 ALA. LAWYER 375 (October 1946).

³⁵ Id. at 382.

³⁶ Davis, 81 F. Supp. at 879.

³⁷ 347 U.S. 483 (1954).

³⁸ BASS, supra note 1, at 72.

who briefly assumed that position before stepping down in favor of Tuttle. Tuttle, Eisenhower's first appointment, joined the court in 1954.

III. JUDGE BEN F. CAMERON

In 1955, Eisenhower appointed Ben F. Cameron of Meridian, Mississippi to fill the seat vacated when Judge Edwin Holmes took senior status. Cameron's appointment was unremarkable at the time. Unlike Tuttle, and Eisenhower's later appointments, John Minor Wisdom of Louisiana and John Brown of Texas, Cameron had not been an active Republican, at least not since 1928 when he reacted to Al Smith's stand against Prohibition by campaigning for Herbert Hoover.³⁹ He was, however, officially designated as a Republican, and Republicans were as scarce as hen's teeth in Mississippi. Cameron had practiced law in Meridian since 1914, including four years, 1929-33, as U.S. Attorney for the Southern District of Mississippi.

Federal judicial nominations were not then subject to the scrutiny that accompanies them now. They were, however, vetted through the American Bar Association (ABA) and, in the case of southern judges, the National Association for the Advancement of Colored People (NAACP). Cameron was deemed acceptable by both. Nonetheless, Herbert Brownell was wary. 40 Senator Eastland warmly supported Cameron, and that raised red flags. On the other hand, John Minor Wisdom put in a call on Cameron's behalf because Blanc Monroe. Chief Counsel for the Southern Railroad, a friend of Wisdom's who lived in New Orleans, asked him to. From what Wisdom knew of Cameron, he was well-read, intelligent, and a highly respected trial attorney. "At Blanc Monroe's urging," he would recall, I gave a very strong recommendation of Cameron."41

Even with Wisdom's call and the NAACP's approval on the record, Brownell remained wary. Deputy Attorney General Bill Rogers called Cameron, but in an hour-long conversation he did not find out anything disqualifying. Cameron did not, for example, belong to the local Citizen's Council, a middle and upper class version of the Klan that enjoyed great popularity across the south. Cameron finally suggested to Rogers, "I think you will find I'm just a nice old gentleman." In many ways he was. Cameron neither drank nor smoked; he was "a somewhat scholarly man who shunned an active social life." Cameron was devoted to his two sons, and to his wife, who received a love letter from

³⁹ BASS, supra note 1, at 84; READ & MCGOUGH, supra note 1, at 44-45.

⁴⁰ See BASS, supra note 1, at 83.

⁴¹ Wisdom interview, supra note 3.

⁴² BASS, supra note 1, at 85.

⁴³ Id. at 86.

him each year on her birthday. He loved his community as well. As a young man, he volunteered to teach football at the local high school; later, he fearlessly led a struggle to shut down a red light district.⁴⁴

Unfortunately, as a member of the Court, Ben Cameron was an obstructionist, in one infamous instance entering four stays in an attempt to block James Meredith from enrolling at the University of Mississippi. His endorsement by the NAACP remains a mystery, although Cameron had once made a \$100 gift to Piney Woods College, a black college in Mississippi; he himself was said to have thought that accounted for the NAACP's position. It was one they would regret. Judge Cameron turned out to be the NAACP'S nemesis, and Tuttle's as well.

IV. JUDGE WARREN JONES

In 1955, Warren Jones of Florida would fill the seat that had been vacated by the death of Judge Strum. The Cameron appointment had moved quickly; Judge Holmes did not vacate his seat until Nov. 30, 1954, and Cameron was sworn in on March 16, 1955. Meanwhile, Judge Strum had died in July of 1954, and although Warren Jones' name surfaced almost immediately, he had not been nominated. Tuttle was frustrated by the delay. He didn't know Warren Jones well, but he liked his record. Born in Nebraska and a 1924 honors graduate of the University of Denver Law School, Jones had moved to Jacksonville, Florida, in 1926. Like Tuttle in Atlanta, he arrived with little besides his education and his ability; as with Tuttle, they served him well. Jones had enjoyed a successful practice, founded a prominent law firm, and served as President of the Chamber of Commerce and of the local and state Bar associations.

Gordon, Nebraska, where Jones was born and raised, lies in the Sand Hills, in the northwestern part of the state.⁴⁷ Pine Ridge Indian Reservation, home to the Ogala Sioux and site of the 1890 Massacre at Wounded Knee, lies just over the state line in southwestern South Dakota. As a child, Jones was highly aware of the nearby reservation; his own community would occasionally take precautions in fear of conflict with the Indians. He had positive associations as well. Buffalo Bill Cody used Pine Ridge Sioux in his Wild West Show, and Jones' father, an occasional physician, performed medical exams of the

⁴⁴ BASS, supra note 1, at 86-87.

⁴⁵ READ & McGough, supra note 1, at 223-24; See also Meredith v. Fair, 306 F.2d 374 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962) (order vacating the first stay).

⁴⁶ READ & MCGOUGH, supra note 1, at 45.

⁴⁷ Allison Herren Lee, William W. Shakely, and J. Robert Brown, Jr., Judge Warren L. Jones and the Supreme Court of Dixie, 59 La. L. REV. 209, 213 (1998) [hereinafter Lee, et al.].

performers. Jones could recall seeing Buffalo Bill consulting with Red Cloud, and watching the Sioux perform their traditional dances.⁴⁸

More history came his way through stories told by his grandfather, Marlow Jones. As a young man, Marlow worked in a livery stable in Springfield, Illinois, at a time when Abraham Lincoln was riding the circuit as an Illinois state judge. Marlow Jones sometimes drove Lincoln's buggy, and he could recount a number of conversations with the Great Emancipator. Warren Jones could remember his grandfather recounting his tales, but he couldn't recall the substance of them. Nonetheless, the stories contributed to Jones' lifelong interest in Lincoln. By his death, he had collected some 3200 pieces, including nearly 1900 books, of Lincoln memorabilia.⁴⁹

After serving stateside in World War I, Jones used his veteran's benefits to enroll in law school at the University of Denver. He graduated *cum laude* in 1924. Like Tuttle, by the time he graduated he had a wife and a child, a family to support. Lured by the "Florida Boom," he wrote to law firms in Jacksonville and received an offer from Fleming, Hamilton, Diver & Lichliter. The senior partner, Francis Fleming, was Chairman of the State Board of Bar Examiners and the son of a former Governor. Jones started in title work, but he soon moved to commercial and banking law and developed a specialty in trusts and estates. Sutherland and Tuttle handled a good deal of trust work; it may be in that connection that Tuttle met Jones.

Before Tuttle left Washington to assume his own seat on the Court, he had dinner with the Brownells and the Humphreys. Herbert Brownell, Eisenhower's Attorney General, has been instrumental in Tuttle's appointment; George Humphrey, the Secretary of the Treasury and Tuttle's boss in Washington, had enthusiastically endorsed him, and let him go. Brownell was sensitive to civil rights; many commentators credit him with being a good deal more sensitive than Eisenhower himself.⁵¹ As an attorney, he understood the importance of the federal judges in the South. It was Brownell who vetted the Eisenhower nominees, with an eye to nominating only men who could be expected to carry out the mandate of *Brown*.

Judge Louis Strum of Florida had died that July, creating another vacancy on the Fifth Circuit. At dinner, Brownell asked Tuttle if he knew Warren Jones well enough to appraise him. Tuttle had responded that he "had met Mr. Jones several times in a business way, was very

⁴⁸ Id. at 213.

⁴⁹ Id.

⁵⁰ Id. at 214-15.

⁵¹ See, e.g., MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 306 (1994).

favorably impressed with him and knew that he had a fine reputation among the lawyers of the bar."52

Tuttle did not let the matter rest there. Upon his return to Georgia, he made discreet inquiries of a few Jacksonville attorneys, and a few trusted personal friends who lived in Jacksonville. In early November he wrote Brownell to report the result of his inquiries. "The answer is uniformly to the effect that Warren would be an excellent choice for a judicial appointment. My own conclusion, based on all I have heard as well as on my personal observation, is that I would be very glad to sit with Warren as a member of this Court."53

Tuttle concluded the letter to Brownell with a personal note. "I can't tell you how appreciative I am of your thoughtfulness in the consideration you have given me in this appointment. I can only wish for you the same degree of relaxed and professional leisure for the next two years that I anticipate for myself."54 Brown I had been decided the previous May; Brown II, with its extemporizing formula of "all deliberate speed" would be handed down the next May. Judge Elbert Tuttle sat in the eye of the storm, but he did not yet realize it. He could not foresee-could not imagine-the outright defiance of the rule of law that so many of the south's political and civic leaders would engage in.

Brownell answered Tuttle's letter warmly and promptly. "Many thanks for your letter about Mr. Warren Jones, which will be most helpful. I am delighted to know that you are enjoying your new activities. We hope to see you here from time to time."55 Other than that, Tuttle heard nothing about Jones' proposed nomination. Sometime that spring, after Cameron joined the court, Tuttle called friends in Washington. "Why in the world don't you go ahead with Warren Jones' appointment" he asked. "You can't get a better lawyer in the state of Florida."⁵⁶ It was good that he called. It seemed that there was some concern about Jones being closely related to a national committeeman from Florida. Tuttle thought that was a non-issue, whether he was related or not. The matter moved forward; on March 4, 1955, the President nominated Jones for a seat on the Fifth Circuit. Warren Jones was sworn in on May 6, 1955.

In 1963, Judge Cameron provoked a fire storm by labeling Tuttle, Brown, Rives and Wisdom "The Four"-pointing out that they

⁵² Letter from Judge Elbert Tuttle to Attorney General Herbert Brownell, (Nov. 4, 1954) (on file with author).

⁵³ Id. ⁵⁴ Id.

⁵⁵ Letter from Attorney General Herbert Brownell to Judge Elbert Tuttle (Nov. 6, 1955) (on file with

⁵⁶ READ & McGough, supra note 1, at 48-49.

"have stood together consistently in decisions of civil rights cases," and accusing Tuttle of packing the panels so that two of The Four always sat on civil rights cases. Cameron selected those four judges in large part because they had voted that Governor Ross Barnett of Mississippi was not entitled to a jury trial "on criminal contempt charges growing out of his defiance of its orders to integrate Ole Miss."58 Cameron himself had done what he could to assist Barnett in that defiance.⁵⁹ Jones, on the other hand, had joined the majority in enjoining Barnett, 60 and as a general matter had a solid record on civil rights. understandably, being grouped with Judges Griffin Bell, Walter Gewin, and Cameron himself, who were considered "more conservative and less disposed (and in some cases hostile) toward plaintiffs in civil rights decisions."61

In August of 1963, Judge Jones recorded a conversation with Tuttle in his diary. Tuttle had "assured him that 'he has never regarded me as an anti-desegregationist." Moreover, Jones wrote, "Judge Tuttle paid me the compliment of saying I was the most dispassionate of the Judges with respect to race matters. It may be he is right. I hope so."62

V. JUDGE JOHN R. BROWN

In less than two years, President Eisenhower had put three judges on the United States Court of Appeals for the Fifth Circuit, and in short order there were more to come. Robert Russell, brother of Senator Richard Russell, had died an untimely death from cancer on January 18, Russell was from Georgia, and judges on the Circuit Courts of Appeal are ordinarily replaced by appointees from the same state. In 1955, there were six states in the Fifth Circuit: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. With Russell's death, there were six Judges in active service, one from each state. In 1954, Congress had created a seventh seat on the Fifth Circuit. Texas, the largest state in the Circuit, had felt entitled to the seat, but it had gone to Tuttle, giving Georgia, for a brief time, two judges of the seven. When Richard Russell died, Eisenhower acceded to his Texas supporters and agreed to replace Russell with a judge from Texas. As soon as it became apparent that the seat would go to Texas, John Brown got in line.⁶³

⁵⁷ Armstrong v. Board of Education, 323 F.2d 333 (5th Cir. 1963) (en banc) (Cameron, J., dissenting).

⁵⁸ Id. at 353

⁵⁹ See note 45, supra, and accompanying text.

⁶⁰ Meredith v. Fair, 328 F.2d 586 (1962) (en banc).

⁶¹ Lee, et al., supra note 47, at 221.

⁶² Id. at 223-24.

⁶³ BASS, supra note 1, at 102.

Brown had been a member of the contested Eisenhower delegation at the 1952 convention, but unlike Tuttle and Wisdom he had not played a pivotal role. Born in Nebraska in 1909, he was younger than Tuttle (1897) or Wisdom (1905); when Brown joined the Court in 1955, Tuttle, twelve years his senior, was the next youngest judge. John Brown had attended the University of Nebraska and then gone on to the University of Michigan for law school. He graduated with honors, drove to Texas, and, as he liked in later years to remind law clerks who were courted by firms, he pounded the pavement looking for a job. He found a job with a Houston firm, Royston and Rayzor, that specialized in admiralty work.

Brown mastered admiralty law, an unlikely specialty for a boy from Nebraska, but it was the Great Depression and bright young attorneys learned what they needed to know. He prospered at the firm. As he learned about admiralty law in the port city of Houston, he learned about racism in the American south. Only one black man had lived in Holdrege, Nebraska, where he grew up; he shined shoes at a barbershop, and Brown was casually friendly with him. Black Americans were not much in evidence at either the University of Nebraska or the University of Michigan. Those he did encounter seemed to blend into the society. Thus it came as a shock to John Brown to see the judge and jurors in a Houston trial visibly react when his partner addressed a Negro witness as "Mister."64

During World War II Brown served as a port administrator in the Philippines; at war's end he returned to Houston and to the firm. 65 In 1947, one of the largest disasters in American history occurred in Texas City, near Galveston, when two ships loaded with the fertilizer ammonium nitrate exploded at a dock. Much of Texas City was destroyed; 565 people were killed and more than 2,000 injured. As fallout, some 273 suits were filed against the United States, under the Federal Torts Claims Act, by the hundred or so attorneys involved. The parties agreed to consolidate the cases, and agreed on a Working Committee of Attorneys who would try the consolidated suit. John Brown was on the Working Committee.

The court tried the issue of liability first, and found for the plaintiffs. Brown and his colleagues had won a tremendous victory. Damages had not been ruled upon but claims totaled some \$70,000,000. The government appealed; now John Brown was one of only seven attorneys on the brief for the plaintiffs. They lost their verdict when the Fifth Circuit, sitting en banc, reversed the trial court's ruling on liability.66 Judge Rives wrote the opinion for the court; Chief Judge

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⁶⁴ BASS, supra note 1, at 101.

⁶⁵ Id.

⁶⁶ In re Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952) (en banc).

Hutcheson, the only judge from Texas, dissented. The case was settled when the government paid out \$16 million. Despite the loss on appeal, John Brown had burnished his reputation by emerging as a lead attorney in the complex Texas City litigation. It would, however, return to haunt him.

John Brown's confirmation hearing opened on May 25, 1955, before a special subcommittee of the Committee on the Judiciary; the chair, Senator O'Mahoney was absent due to illness, so Senator Butler presided. Senator Johnson of Texas indicated by blue slip, according to Committee rules, that he had no objection to the nomination. Letters from the Committees on the Federal Judiciary of the State Bar of Texas and of the American Bar Association recommending confirmation were introduced. The third member of the special subcommittee, Senator Daniel, a former Attorney General of Texas, presented Brown as "one of the outstanding attorneys of the State Bar of Texas." "Brown," Daniel continued, "has had wide experience in the federal courts, [is] a man of high character, of experience and ability, which I think will fit him to make an excellent member of the United States Circuit Court. I highly recommend him to the committee."

At that point, Senator Butler noted that he had a request from Senator Kefauver to hold the record open for a few days. The committee adjourned. Then the storm broke. The muckraking Washington columnist Drew Pearson published charges that Brown had altered bills of lading⁶⁹ in the Texas City disaster litigation. On June 4, 1955, Brown sent a wire to the members of the court:

I WANT TO ASSURE EACH OF YOU THAT THERE IS NO BASIS WHATSOEVER TO THE CHARGES BEING MADE AGAINST ME BY SOME UNIDENTIFIED SOURCE. I AM CONFIDENT THAT THESE BASELESS CHARGES WILL BE REJECTED.⁷⁰

Tuttle, who had never met Brown but knew him by reputation, immediately took Brown's side. He responded by letter:

⁶⁷ Nomination of John R. Brown of Texas to U.S. Circuit Judge, Fifth Circuit, Unpublished Hearings Before the Senate Judiciary Committee, 84th Cong. 3 (1955), microformed on CIS No. 84-SJ-T.66 (Congressional Info. Serv.) [hereinafter Brown May 25 Hearings].

⁶⁸ Id.

^{69 &}quot;A bill of lading is [a document that serves as] an acknowledgment by a carrier that it has received goods for shipment." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 93 (2d ed. 1975).

ADMIRALTY 93 (2d ed. 1975), ⁷⁰ Wire from Judge John R. Brown to Judge Elbert Tuttle (June 4, 1955) (on file with the TEXAS FORUM ON CIVIL LIBERTIES AND CIVIL RIGHTS).

Receipt of your telegram reminded me that I had failed to carry out an immediate impulse that came to me when I first saw this scurrilous matter. I intended then to write you a note of encouragement, but the rush of leaving for New Orleans for the last time this year caused me to overlook it.

Please know that we have almost all had our bouts with this type of yellow journalism, and my feelings are first sympathy for the victim, and second a feeling of outrage that such a thing is possible.

I hope you are not too greatly embarrassed by the delay inevitably caused by the throwing of this stink bomb.⁷¹

The special subcommittee reconvened on July 15th. The first witness, Charles E. Goodell, an Assistant Attorney General, explained that when John Brown was mentioned as a potential nominee for the Fifth Circuit, the Department of Justice had undertaken the customary background investigation. Questions about Brown's conduct in the Texas City disaster litigation had surfaced. After a thorough investigation, Goodell explained, "[w]e were . . . convinced that there was nothing in here which was in any way blameworthy of Mr. Brown and that convinced us that it should not be a smudge upon his record in any way."⁷²

The next witness, Joseph W. Cash, did not agree. Cash had come into the litigation some 15 months after the explosion. Appointed as a Special Assistant Attorney General, he joined George John on the trial team; in the Washington office, assistant attorney general Graham Morrison, Chief of the Claims Division, oversaw the litigation. Despite being the third man on the team, and despite being outranked by Morrison and coming in after John had already put several months in, Cash insisted he was in charge of the case. He was not officially put in charge, he explained, but he had stepped forward to fill a void. Cash made it clear that he was not impressed with the manner in which John was handling the litigation; he made it even more clear that he believed that John Brown had fraudulently manipulated the evidence

Cash had tried to get the trial court judge to hold a hearing to look into Brown's conduct. "I made a very serious effort to get to the bottom of the matter by oral motion and also by written motion," he told

⁷¹ Letter from Judge Elbert Tuttle to Judge John R. Brown (June 4, 1955) (on file with the TEXAS FORUM ON CIVIL LIBERTIES AND CIVIL RIGHTS).

⁷² Nomination of John R. Brown of Texas to U.S. Circuit Judge, Fifth Circuit, Unpublished Hearings Before the Senate Judiciary Committee, 84th Cong. 5 (1955), microformed on CIS No. 84-SJ-T.67 (Congressional Info. Serv.) [hereinafter Brown July 15 Hearings].

the committee.⁷³ He asked the trial court to call several witnesses and take testimony. But the judge, as Cash saw it, "as a practical effect, he sort of brushed things aside and he left the record with just the statement of Mr. Brown." ⁷⁴

Cash had been let go by the government after the verdict in the trial came in, but he had not been able to let go of his interest in the case. He tried to file an amicus brief in the Fifth Circuit. The government opposed his motion for permission to file and the Fifth Circuit denied it because he had, by then, no legally cognizable interest in the litigation; he was not a party, and he no longer represented a party. The brief, which Cash was not permitted to file, charged the Department of Justice—starting with Attorney General Tom Clark—with almost corrupt inattention to the case, and charged the district court judge, whom Cash characterized as "aged, ill and infirm" with having "early abdicated his functions and placed the full fate of the litigation in the hands of the trial committee"⁷⁵ Cash described himself as "the only person connected with the Government who understands both the factual and technical features of the case." ⁷⁶

After Cash testified, H. Graham Morrison appeared before the committee. Morrison was an Assistant Attorney General in the Claims Division of the Department of Justice, and he was the man who had assigned Cash to the case to give some help to the beleaguered George John, who was defending the United States against hundreds of claimants, represented by hundreds of attorneys. When Cash charged John Brown with "altering" bills of lading, and with claiming that he had done so at the direction of Commander Butler of the Coast Guard, Morrison called Butler to investigate. According to Morrison, Butler denied making any such direction; Butler then reiterated his denial in a telegram. Butler had died of a heart attack prior to the trial, and was never available to testify on this question. Senator Daniel of Texas, who supported Brown's nomination, asked Morrison if "he was under the impression that these bills of lading had been changed after they had been issued or delivered?" Morrison responded:

I don't recall now that there was any distinction in my mind at all. The only thing I can recall is this, that I was terribly exercised, Senator Daniel, by the fact that an attorney on the other side — mind you, sir, these attorneys [John and Cash] had been subjected by a

⁷³ Id. at 26.

⁷⁴ *Id.* at 26.

⁷⁵ Id. at 46-49.

⁷⁶ Id. at 48.

⁷⁷ Id. at 60.

committee of 200 lawyers to the most unreasonable harassment that I ever as a lawyer in 30 years of practice ever heard of. These men had been whipped like dogs. When this thing came up I was terribly aroused.⁷⁸

Morrison went on to explain that he was so aroused, he had referred the matter for investigation as to whether a criminal indictment should issue. According to him, that matter was dropped because the government feared charges that it was using the criminal processes to harass plaintiffs' attorneys. Senator Daniel again asked Morrison "whether you and Commander Butler were under the impression that the bills of lading had been changed after they had been delivered?" Morrison replied, "I do not recall any such situation."

Finally, John Brown addressed the committee. He explained that when he had heard about the disaster, he had gotten in his car and driven straight to Galveston; "I knew we lost two ships and many men had been killed and I knew I would be needed when I got down there." Two ships blew up, first a French vessel, the Grand Camp, and then the High Flyer. Brown represented the owners of the High Flyer.

The morning after the second explosion, the Coast Guard held a hurried investigatory hearing. At that meeting, according to Brown, he was stunned to learn that the material that had blown up—fertilizer compound, or ammonium nitrate fertilizer—had been produced in government ordnance plants and shipped by rail to Texas City. That meant the United States government might be the negligent party. While Brown was absorbing that information, and wondering if the government was even subject to suit, Commander Butler was reviewing the available evidence, including the bills of lading. According to Brown, "Commander Butler expressed the view right off, as soon as he saw the bills of lading issued by the government that the description used was an inaccurate one."

As an admiralty lawyer, Brown knew that the official bill of lading could not be issued until loading was complete, because it described what had actually been loaded. It was customary for the carrier who delivered the goods to prepare it prior to delivery, and then for the carrier who received the goods to issue it to confirm delivery. John Brown told his client, the Lykes Brothers Steamship Company, not to issue bills of lading until he could approve them. Before approving them he had the designations on the pre-prepared documents, "Ammonium Nitrate Fertilizer" and "Ammonium Nitrate" and, in one

⁷⁸ In

⁷⁹ Brown July 15 Hearings, supra note 72, at 61.

⁸⁰ Id. at 63.

⁸¹ Id. at 64.

instance "Fertilizer Compound" changed to the officially recognized designation, "Ammonium Nitrate-Oxidating Material." Brown claimed that he had done so because Butler had pointed out the correct designations.

One of the attorneys who had litigated the case for the government, Joseph Cash, thought that John Brown had "altered" the bills of lading to support an argument that the government had provided inadequate notice of the material being shipped and was liable for the disaster. When his accusation was picked up by Drew Pearson, Brown's reputation was besmirched to a national audience, as well as to the Senators presiding at his confirmation hearing. Brown maintained that he was simply making sure that his client issued a correct document. Moreover, he protested the use of the term "alter." Because he intervened before his client issued any bills of lading, he contended that he did not "alter" anything.

After Brown's testimony was concluded, one final witness appeared—George John, Cash's co-counsel at trial.⁸² John had sent a telegram to the committee in early June, when the scandal erupted.

AS A SPECIAL ASSISTANT TO THE ATTORNEY GENERAL I WAS ONE OF TWO ATTORNEYS PREPARED AND ACTUALLY THROUGH THE JUDGMENT IN THE DISTRICT COURT THE TEXAS CITY DISASTER CASE AGAINST THE GOVERNMENT. I CAN STATE POSITIVELY WITHOUT RESERVATION AND THAT WHILE THE CASE WAS HARD FOUGHT AND BROWN WAS AN ENERGETIC ADVERSARY, AT NO TIME DID HE ENGAGE IN COUNSEL OR PERMIT ANY ACTION WHICH WAS IMPROPER OR UNETHICAL. I AM AWARE OF THE BILL OF LADING MATTER AND I CAN ASSURE THE SENATE THAT NOT A THING WHICH BROWN DID WAS IMPROPER OR UNETHICAL. I HAVE KNOWN JOHN R. BROWN FOR NEARLY **YEARS** TWENTY-FIVE AND STRONGLY RECOMMEND HIS CONFIRMATION.83

⁸² Id. at 136. In his testimony, John harkened back to an earlier point. Acting on a referral from Assistant Attorney General Graham Morrison, the U.S. Attorney in Houston, Brian Odem, had investigated the matter, and concluded "that there had been no violation." Id. at 138. John concurred: "[I]n the light of subsequent events, in the light of my participation in the case[,] my lengthy friendship with Mr. Brown[,] my knowledge of his legal ability and his standing at the bar[,] I am inclined to agree with Mr. Odem that there was no violation. That is my opinion now." Id.

83 Brown July 15 Hearings, supra note 72 (Exhibit).

George John reiterated his support of Brown in a short statement. Only one matter remained before the hearing ended. Senator O'Mahoney, the chair of the subcommittee, introduced into the record the telegram which John Brown had sent to the members of the court after Drew Pearson printed his attack, and responses from the three judges who had been on the panel that heard the Texas City appeal, Chief Judge Hutcheson and Judges Borah and Rives. Judge Rives, who wrote the opinion, took the trouble to write Alabama Senators Hill and Sparkman as well. His endorsement was typical of that of his colleagues: "The baseless attacks have not altered my high opinion of you as a lawyer and as a man," he wrote Brown, "I am confident of your confirmation and will be proud to serve on the Court with you." "84"

The Senate was satisfied, and John Brown was confirmed on July 27, 1955. 85 He took his seat that September.

VI. JUDGE JOHN MINOR WISDOM

Another year would pass before the last vacancy President Eisenhower would fill occurred. On December 31, 1956, Judge Wayne Borah of Louisiana took senior status. John Minor Wisdom, who had deferred to Tuttle in 1954, was now ready to fulfill his long-held ambition and join the court. Wisdom's ability was unquestioned, and his political claim strong—he had played a critical role in garnering the nomination for Eisenhower in 1952, and in the intervening years he had continued to build the party as the Republican National Committeeman from Louisiana. Nonetheless, Wisdom ran into stormy weather, first in securing the nomination, then in obtaining confirmation.

Years earlier Wisdom had passed up a sure nomination, certain his time would come again. Now a Louisiana seat had opened, but former Governor Robert F. Kennon wanted it too. Kennon was a Democrat, but he had been the first southern Democratic Governor to endorse Eisenhower. One of the ironies of the situation was that Wisdom had worked with Kennon at that time. The two men, one the leader of the Louisiana Democrats and the other the leader of the Louisiana Republicans, had taken great care not to let their meetings become public; once, Wisdom recalled, they met behind a New Orleans cemetery. Kennon had other Republican allies; he was close to

⁸⁴ *Id*.

⁸⁵ BASS, supra note 1, at 102-03.

⁸⁶ Wisdom Interview, supra note 3.

Sherman Adams, Eisenhower's Chief of Staff.⁸⁷ Wisdom knew Adams too. "Adams was friendly with me," he recalled, "but he may have been more friendly with Kennon." In the end, according to Herbert Brownell, Eisenhower himself made the choice, "in part because of [Wisdom's] 'better record as a lawyer." Moreover, according to Brownell, appointing Wisdom "was especially significant in signaling the administration's commitment to enforcing desegregation." Kennon had supported Eisenhower for President, but he "remained a staunch segregationist."

Nomination in hand, Wisdom proceeded to his confirmation hearing before the Special Subcommittee on Nominations. The hearing opened on April 29, 1957, in Washington, with Senator James Eastland of Mississippi presiding. Eastland was Chair of the Special Subcommittee as well as of the Senate Judiciary Committee itself. Elected to the Senate in 1942, Eastland became Chair of the Judiciary Committee in 1956. He would hold that chairmanship an unprecedented 22 years, until his resignation from the Senate at the end of 1978.

Prior to Eastland's election to the Senate, he held for four months a seat vacated by the death of Senator Pat Harrison. In those few months, from June 30 to September 28, 1941, he rose to the senate floor more than once to complain about possible "mongrelization" of the races. Running for the Senate for the first time, in 1942, he promised to stop blacks and whites from eating together—in Washington. They did not eat together in Mississippi. If James Eastland had his way, they never would.

Wisdom's nomination unsettled Eastland. By 1956, it had become clear that the southern states would not comply with the mandate of *Brown v. Board of Education* voluntarily. All but three Southern Senators—Lyndon Johnson, Estes Kefauver, and Albert Gore—had signed the Southern Manifesto, which denounced *Brown*, denounced the Court for overstepping its bounds and issuing *Brown*, and approved resistance to integration by any lawful means. If desegregation occurred, it would be under court order—federal court order. Who sat on the Fifth Circuit had become critical.

Senator Allen J. Ellender's introductory remarks were not auspicious. He declared himself neutral. Attorneys, by and large, gave Wisdom high marks, Ellender reported. But he had received a number of

⁸⁷ Joel William Friedman, John Minor Wisdom: The Noblest Tulanian of Them All, 74 Tul. L. Rev. 1, 19-20 (1999).

⁸⁸ Wisdom Interview, supra note 3.

⁸⁹ BASS, supra note 1, at 44 (citing Interview with John Minor Wisdom, September 28, 1979).

⁹⁰ Herbert Brownell, Civil Rights in the 1950s, 69 Tul. L. REV. 781, 788 (1995).

⁹¹ *Id*.

^{92 102} CONG. REC. 4515-16 (1956)

letters from constituents who objected because of Wisdom's "contacts in Louisiana with the Urban League and participation in matters which they thought were below the dignity of the person aspiring for the position of Judge." Six witnesses showed up, four against Wisdom and two in favor. The two in favor were Harry McCall, a New Orleans attorney who was president elect of the Louisiana State Bar, and Payne Breazeale, a Baton Rouge attorney who was a past president of the Louisiana State Bar. The four opposed were Dr. Emmett Irwin, a New Orleans surgeon; Robert Chandler, a Shreveport attorney; Cecil Pettepher, a New Orleans businessman; and William Dane, a Taft Republican. Pettepher and Dane were political opponents from within the Republican Party. Chandler allowed that Wisdom had a good reputation as an attorney but argued that he had no judicial experience and that he was too political. Dr. Irwin leveled a plethora of charges, some quite serious, but all based on hearsay at best. On that first day, none of the opponents mentioned race.

Wisdom himself brought up his membership on the Board of the New Orleans Urban League.

Wisdom: There is only one other point I would like to make, and that is in regard to the Urban League. There may have been a good many—not a good many, but there may have been some objections to me because of my membership on the Board of the New Orleans League. I became interested in civic affairs, particularly Juvenile Court work and adoptions, and have served for a good many years on the Board of the Protestant Home for Babies, and was later Chairman and President of the Children's Bureau, and later of the Council of Social Agencies.

In that work I was drawn into work for the Urban League. The Urban League is an organization designed to procure better racial relations between the races, particularly in the field of employment, and particularly using the technique of moderation and conciliation and persuasion; it has never gone into court, never had a legislative lobby, never exerted any undue pressure.

I feel strongly that if conditions deteriorate between the two races, it is important to maintain channels of communication, and that an agency with a

⁹³ Nomination of John Minor Wisdom, of Louisiana, to be U.S. Circuit Judge of the Fifth Circuit, Unpublished Hearings Before Senate Judiciary Committee, 85th Cong. 6 (1957), microformed on CIS No. 85 SJ-T.43 (Congressional Info. Serv.) [hereinafter Wisdom April 29 Hearings].

proven experience of moderation and persuasion is performing a worthwhile function.

Senator Eastland: Moderate and persuade what? What is the object now?

Wisdom: The object is to—when a friction comes up, to seek to adjust the situation so that there will be not—so that you can overcome the friction, No. 1. [sic]

. . .

Senator Eastland: Is the Urban League in New Orleans interested in the segregation question, the school integration question?

Wisdom: Not the Urban League in New Orleans.94

The Committee adjourned but reconvened in New Orleans on May 11th and again on May 21st and 22nd. Dr. Irwin was back; on May 11, he was the first witness. This time he did raise the race issue. The Urban League, he told the committee, "works hand in hand with the NAACP, which, as they say, the NAACP is like the Army—the militant branch and the Urban League works like the State Department, quietly, underhandedly and smoothly...like termites."

The political opponents were back, with added force. New witnesses included Republican Party operatives who had been displaced by Wisdom when he took over as President of the Republican Club of Louisiana after the 1952 convention and supporters of John E. Jackson, the longtime head of the Louisiana Republican Party whom Wisdom had deposed. In their anger over Wisdom's control of the Louisiana Republican Party, they disparaged him personally with charges of cursing and drinking to excess, and one insinuation of an inappropriate overture to a young woman at a party.

The serious charges of inappropriate use of influence, of accepting kickbacks, and of insisting that any Post Office employee seeking a promotion change their party registration to Republican were based on hearsay and innuendo, and were, in the end, unconvincing.

⁹⁴ Id. at 72-73.

Nomination of John Minor Wisdom, of Louisiana, to be U.S. Circuit Judge of the Fifth Circuit, Unpublished Hearings Before Senate Judiciary Committee, 85th Cong. 6 (1957), microformed on CIS No. 85 SJ-T.44 (Congressional Info. Serv.) [hereinafter Wisdom May 11 Hearings].

Wisdom conceded his control of patronage, remarking that "there is precious little of it, I may say." One serious charge, that he had used political leverage to intercede with U.S. Customs on behalf of a client accused of smuggling cattle, had been published by Drew Pearson. Dr. Irwin had introduced that column. Wisdom pointed out that Dr. Irwin had not introduced the second column Pearson wrote, exonerating Wisdom. "I am very proud of the fact that I am one of the few people who got what is in the nature of a retraction by Mr. Pearson. . . . He said that there was no political pull and no political pressure."

At the end of the day, there were no serious, supported allegations that would derail a nomination. There was the matter of Wisdom's attitudes on race. Observers expected Senator Eastland to oppose his confirmation. There were too many red flags, from the Urban League to the fact that he had a Jewish law partner. The largest red flag—the fact that he had spend so much of his adult life building a viable Republican Party in order to challenge the strangle hold of the white Democratic Party of Louisiana—was the most provocative and the most telling. Yet Senator Eastland announced himself "satisfied" with the nomination, and on June 24, 1956, the Judiciary Committee voted unanimously in his favor.

Many tales are told to explain Eastland's action. One version has it that he simply made "one of his 'famous' arrangements" with Attorney General Bill Rogers.⁹⁸ As powerful as he was, Senator Eastland could not generate a nomination to the federal bench; that power lay with the President. If the administration "owed" him, he could arrange for a name to go forward that would not otherwise be deemed acceptable. Another version has it that Eastland felt indebted to John Wisdom for his help earlier with Judge Ben Cameron of Mississippi. Eisenhower had hesitated to nominate Cameron, in part because Eastland supported him. It had helped Cameron considerably that John Minor Wisdom had given Cameron a "very strong recommendation." A third version had Wisdom calling Cameron and asking him to tell Eastland that Wisdom "would go no further in his civil rights opinions than Cameron would." Wisdom denied making any call. "I didn't have to ask Cameron for any help, I knew he would help me without any request, and I never did ask him for any help, but I felt certain in my own mind that he would help me."101

⁹⁶ Wisdom April 29 Hearings, supra note 93, at 25.

⁹⁷ Id. at 62.

⁹⁸ J.W. Peltason, Fifty-eight lonely men: Southern Federal Judges and School Desegregation 28 (1961).

⁹⁹ Wisdom interview, supra note 3.

¹⁰⁰ READ & MCGOUGH, supra note 1, 55-56 n.6.

¹⁰¹ Wisdom interview, supra note 3.

Wisdom's own favorite explanation for Eastland's compliance in his confirmation reflected Wisdom's scholarly love of history and his wry sense of humor. Wisdom and his father had both attended Washington & Lee, the Virginia college where Robert E. Lee had served as president. Wisdom's father had marched in the funeral cortège for Robert E. Lee. Once he heard that, Senator James O. Eastland could harbor no doubts about which side Wisdom was on.

If Eastland did feel comfortable that Wisdom was a conservative southerner of the ilk of himself and Cameron, he was quickly disabused of that notion. Wisdom was sworn in on July 13, 1957. In September, he granted a stay of execution to Edgar Labat, a black man who had been convicted of aggravated rape of a white woman. Labat's attorneys argued that he had been denied a fair trial because black citizens were systematically excluded from grand and petit juries in Louisiana. It would be nine years before Wisdom would write an opinion that became a classic of civil rights jurisprudence, ruling for Labat, 102 but Eastland did not have to wait that long to realize that he had made a mistake. Granting the stay told the tale.

Eisenhower had two full years left on his second term, but Wisdom would prove to be his last appointment to the Fifth Circuit. It was enough. Of seven active judges, Eisenhower had appointed five: Tuttle, Cameron, Jones, Brown, and Wisdom. Cameron was the odd man out. None of the other four were held hostage by the southern myth of white supremacy or by ties to the Democratic Party that controlled the region. In an ironic twist of history, the federal court of appeals with jurisdiction over most of the deep south was dominated by men from the party of Lincoln.

CONCLUSION

Tuttle, Wisdom, Brown and Rives—"The Four" in the parlance of Judge Cameron's derisive epithet that came to be a badge of honor—almost always agreed on opinions and were most often joined by Judge Jones, Eisenhower's other appointee. Under the leadership of Tuttle as Chief Judge, they stood firm in their commitment to enforcing equality under the law and they gave life to the maxim that justice delayed is justice denied. In the segregated south, at a time when federal courts were the only avenue of relief from the oppression of state enforced segregation and state maintained discrimination only in

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (en banc), cert. denied, 386 U.S. 991 (1967).
 Speaking of those times, Burke Marshall, who as Assistant Attorney General in the Civil Rights Division handled and monitored significant litigation before the Historic Fifth, assessed the role of the court. "Those four judges, I think, have made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done on any court. . . . If it

education, but also in the voting booth, in employment opportunities, in all manner of public accommodations—the United States Court of Appeals for the Fifth Circuit became a beacon of hope and a bulwark of liberty.