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Judge Warren L. Jones and the Supreme Court of Dixie

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*Did it ever occur to you
To wonder what the judges do?*¹
—Warren L. Jones

“We are putting Negroes in schools and governors in jail,”² quipped Judge Warren Jones³ of the Fifth Circuit Court of Appeals in 1963. During the turbulent era of the 1950’s and 1960’s, this court found itself in the eye of the civil rights storm. Although African Americans fought hard throughout the nation for their constitutional rights, they met some of their fiercest opponents in the southern states. The Fifth Circuit Court of Appeals, nicknamed the “Supreme Court of Dixie,”⁴ held constitutional sway over the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.⁵

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* B.S., University of Colorado, 1985, J.D., University of Denver College of Law, May, 1997. Law Clerk, Honorable Rebecca Love Kourlis, Colorado Supreme Court, 1997-1998. A number of people read drafts and provided comments that substantially improved the quality of the final product. In particular, Jack Bass, a noted author and historian of the Fifth Circuit during the civil rights era and Anne Emanuel, professor of law at Georgia State and the preeminent scholar on the life and activities of Judge Elbert Tuttle, provided extensive comments for which we are very grateful.

** Chief Counsel, Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, B.A., Wesleyan University, 1976; J.D., Georgetown University Law Center, 1979. The views expressed in this article do not necessarily reflect those of the Commonwealth of Pennsylvania or the Department of Conservation and Natural Resources. Mr. Shakely is the grandson of Judge Jones; he prepared the biographical section of this article.

*** Professor, University of Denver College of Law; Law Clerk, Honorable Frank M. Johnson, Jr., United States Court of Appeals, Fifth and Eleventh Circuit, 1981-82. I am indebted to Jack Bass, one of the chief legal historians of the Fifth Circuit, for his suggestion about the possible availability of the papers of Judge Jones as well as their potential significance.

1. This rhyme comes from a collection of short rhymes and prose written by Judge Jones and bound into a small book found among his personal papers. Professor Brown and Ms. Lee gratefully acknowledge the loan of Judge Jones’ papers, his “court-packing” diary, and letters and memoranda from his grandson, William Shakely. The diary referred to in part I of this paper is Jones’ personal diary, still in his grandson’s possession. Every other reference herein to Judge Jones’ diary is to a separate diary recorded over approximately two years which Judge Jones referred to as his “court-packing” diary.

2. Diary of Warren L. Jones, former Judge on the Fifth Circuit Court of Appeals (Aug. 19, 1963) (on file with William Shakely) [hereinafter Jones Diary].

3. Judge Jones was a 1924 alumnus of the University of Denver College of Law.

4. Ray Jenkins, *Rights’ Feud Puts Judgeships on Trial*, Christian Science Monitor, July 13, 1965, at 1.

5. During the civil rights era, the Fifth Circuit consisted of these six states. In 1980, Congress divided the circuit, creating a new Eleventh Circuit. Today, the Eleventh Circuit consists of

In the decades following the Supreme Court's decision in *Brown v. Board of Education*,⁶ the South came to grips with the fact that its way of life was coming to a close. The nation watched while many in the southern states waged war on the Supreme Court and its mandate.⁷ The Fifth Circuit, a house divided, found itself responsible for fulfilling *Brown's* promise and ending forced segregation in the south. Labeled by some as "the nation's greatest civil rights tribunal,"⁸ the Fifth Circuit issued landmark decisions and fashioned groundbreaking remedies that became all but synonymous with the struggle for civil rights in the South. These same rulings planted seeds of dissent on the court that yielded the harvest of an explosive public scandal.⁹ Profound philosophical differences among the Fifth Circuit judges threatened to splinter their court into irreconcilable pieces of an unstable whole.¹⁰

Alabama, Florida and Georgia; the Fifth Circuit of Louisiana, Mississippi and Texas. Fifth Circuit Court of Appeals Reorganization Act of 1980 (Pub. L. No. 96-452, 94 Stat. 1994).

6. 347 U.S. 483, 74 S. Ct. 686 (1954), *opinion supplemented by* 349 U.S. 294, 75 S. Ct. 753 (1955) (ordering the desegregation of public schools with "all deliberate speed").

7. Television brought Arkansas Governor Orval Faubus into living rooms across America as he used the threat of riots to keep blacks out of Little Rock schools. In Mississippi, hours before a deadly riot broke out on the campus of Ole Miss, Governor Ross Barnett proclaimed on television "I will never yield a single inch in my determination to win the fight we are all engaged in." Jack Bass, *Unlikely Heroes* 190 (1981). A combat mentality prevailed in the South and government officials made no secret of their intentions. Governor Barnett sermonized "[t]he Negro is different because God made him different to punish him. . . . We will not drink from the cup of genocide." Frank T. Read & Lucy S. McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* 208 (1978). In Louisiana, Governor Jimmie Davis, in league with the entire state legislature, passed a resolution authorizing the arrest of any federal marshal or judge attempting to enforce *Brown*. Bass, *supra*, at 128. These are just a few of the thousands of examples of the South's truculent defiance of the Supreme Court.

8. Read & McGough, *supra* note 7, at preface xii. In a 1980 speech made while signing the Fifth Circuit Court Reorganization Act into law, President Carter proclaimed: "As our Nation declared its intent to end all forms of legal discrimination based on race and color the Fifth Circuit bore the heavy burden of applying the principles laid down by the Supreme Court in a long series of landmark cases . . . holding us to the highest principles of justice on which our Nation was founded." Bass, *supra* note 7, at 330-31.

9. See *Armstrong v. Board of Educ.*, 323 F.2d 333, 358 (5th Cir. 1963) (Cameron, J. dissenting) (charging that "this court has one set of procedures covering racial cases and another set covering all other cases"). See also *U.S. Circuit Court Packing Charge Sets Off Probe*, *Houston Chronicle*, Aug. 2, 1963, at 1; *Judge Protests Court's Desegregation "Crusade," Fla. Times-Union*, Aug. 1, 1963; *Feud Over Racial Cases Flares in U.S. Appeals Court in South*, *N.Y. Times*, July 31, 1963, at 12.

10. In an interview with Griffin Bell, former United States Attorney General and a judge on the Fifth Circuit at the time of the scandal, he described the feelings among the judges at the time. "There was no collegiality. Everyone was going in their own direction. . . . After the [conference of judges convened to deal with the scandal] we each thought more of the court as an institution than before and we stopped thinking of ourselves as individual judges and more as a court." Interview by Allison Lee and Jay Brown with Griffin Bell, former United States Attorney General and judge on the Fifth Circuit Court of Appeals in Atlanta, Ga. (January 12, 1998).

One enigmatic judge, Warren L. Jones, managed to bridge the gap between liberal and conservative factions on the court. Neither an avowed segregationist nor a result-oriented activist, Judge Jones was a firm believer in the efficacy of the judicial process and the critical importance of *stare decisis*. These convictions landed him on both sides of the circuit's civil rights decisions. Much has been written about the role of the Fifth Circuit during the civil rights era;¹¹ but Judge Jones' record defies simple categorization, and many writers have overlooked his role in the Fifth Circuit's enforcement of the *Brown* mandate. He played a subtle but critical role in the struggle. He often lent his vote to the liberal wing on the court, but at the same time he determinedly steered the court toward careful adherence to precedent and observance of proper procedures.

The respect of his colleagues from opposing philosophical realms, along with a deeply founded belief in the integrity of the judicial process, led him to play a pivotal role in preserving the integrity of the court in the face of grave accusations. In 1963, Fifth Circuit Judge Ben Cameron published a bitter dissent in a civil rights case in which he accused then-Chief Judge Elbert Tuttle of rigging three-judge panels in civil rights cases to include at least two liberal judges.¹² This public indictment, coming from one of their brethren on the court, and at a time when civil rights hostilities were at a fever pitch, jeopardized the critical momentum and effectiveness of the Fifth Circuit in dealing with segregation in the south. Shortly after the story broke, the judges of the Fifth Circuit held a confidential, two-day meeting in Houston in order to address the situation. At the meeting, Judge Jones proved instrumental in helping the court get to the bottom of the charges, implement preventative procedures for the future and begin the process of restoring the court's image and internal cohesiveness.

Judge Jones' judicial philosophy as well as his previously unexamined contribution to the implementation of *Brown* is never more clearly illustrated than by the part he played in the panel-packing story. He kept one of only two insider's accounts of the Houston Conference and the events surrounding the scandal.¹³ This paper chronicles the life of a remarkable judge from an

11. Perhaps the most thorough legal history of the civil rights era in the south is Read & McGough, *supra* note 7. The best book focusing on the lives and personalities of the Fifth Circuit judges is Bass, *supra* note 7.

12. See *supra* note 9. See *Armstrong*, 323 F.2d at 358.

13. A few days after the court-packing story broke, Judge Jones began recording a separate diary of events and kept a separate file of letters, notes, memoranda and reports relating to the charges. He also took careful notes during the two-day conference. As mentioned in *supra* note 1, these, along with a few other of the Judge's personal papers, are currently on loan to the authors. Judge John Minor Wisdom, another participant at the Houston conference, also maintained copious notes of the two-day meeting and has provided a copy to the authors. Judge Wisdom, still on the bench in the Fifth Circuit, also consented to a personal interview. Because of the historical significance of the court-packing scandal, and the amount of new information these papers and interviews have provided, Professor Brown has written a separate and thorough account of what is now known about the events that occurred on this court in 1963. This paper provides an condensed version of the story tailored toward illuminating Judge Jones' character and contribution to the era.

interesting and unusual childhood through his later contribution to civil rights law and culminating with his account of the perilous events that might have spelled disaster for an important and extraordinary court.

I. JUDGE JONES: A BIOGRAPHICAL SKETCH

Among the many cases on the docket of the United States Supreme Court in the summer of 1895 was a controversy concerning the rights of African-American railway passengers. The state of Louisiana had recently adopted a statute forbidding members of "the colored race" from riding in the same cars as white travelers. Homer Plessy, a man of mixed ancestry, had unsuccessfully attempted to board a "whites only" coach on the East Louisiana Railway. He challenged the statute as a denial of his right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.¹⁴ This case, *Plessy v. Ferguson*,¹⁵ was a direct attack on the growing body of Jim Crow laws that legislatures in the South and North were employing to enforce segregation of the races in the wake of Reconstruction. It would culminate in a decision justifying the Jim Crow system with the infamous "separate but equal" rationale that was to dominate the civil rights landscape for over half a century.

Justice Harlan's eloquent condemnation of the result in *Plessy* would prove prophetic:

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . . [It] will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments to the Constitution.¹⁶

In time, the *Plessy* decision would also shape events that would have a profound effect on the life of a boy born that summer in a windblown prairie town, far from the statehouses of the old Confederacy.

Warren LeRoy Jones was born July 3, 1895, in Gordon, Nebraska, a small community in the Sand Hills, a cattle ranch area in the northwestern corner of the state. He was the second of three sons of Lauren and Katherine Ballengee Jones, each of whose families had moved to Nebraska from Iowa. Lauren Jones was a man of eclectic interests who, at various times, was a newspaper editor, a physician, a producer of stage plays, and a justice of the peace. His wife

14. *The Thin Disguise: Turning Point in Negro History* (Otto H. Olsen, ed., 1967).

15. 163 U.S. 537, 16 S. Ct. 1138 (1896).

16. *Id.* at 559-60, 16 S. Ct. 1146-47 (Harlan, J., dissenting).

Katherine, a dressmaker by training, was an intelligent and strong-willed woman whose determination was a major influence in her son's formative years.

Grover Cleveland was President, and the Sand Hills country was a part of a West that still had not lost its rough edges. To the north of Gordon, just across the South Dakota border, lay the newly established Pine Ridge Indian Reservation, home of the Oglala band of the Lakota or Sioux Tribe. Less than five years before, troops of the Seventh Cavalry had massacred some 200 Lakota on the reservation in the famous "battle" of Wounded Knee. When Jones was a small boy, as he remembered, the residents of Gordon would occasionally take defensive measures in fear of further conflict. Buffalo Bill Cody recruited the Lakota at Pine Ridge for his wildly popular Wild West Show, and Jones' father conducted the medical examinations of Pine Ridge Lakota who had signed up to perform. Some of Jones' earliest memories were of Buffalo Bill in consultation with the Oglala leader Red Cloud at the Pine Ridge Agency, and demonstrations of the traditional dances of the Lakota.

Jones also had fond childhood memories of the stories told by his grandfather, Marlow Jones, who related conversations that he had with Abraham Lincoln while Marlow was a young man in Illinois. Marlow worked in a livery stable near Springfield in the 1850's, and on occasion drove Lincoln in a buggy to nearby county seats for court appearances when Lincoln was riding the old Eighth Circuit of Illinois. "Abe, he sez to me, he sez, sez he," the older man would recount, "and I sez to Abe, I sez, sez I. . . ." Much to Warren's later chagrin, he was then too young to apprehend the historical significance of these tales, and was never able to remember just what it was that Abe had to say. It seemed to him, however, that his grandfather always reserved the best lines for himself.

These stories must have planted some seeds of interest in Jones' young mind, for he was to become a great admirer and student of Lincoln.¹⁷ He accumulated a formidable collection of published works about the Great Emancipator, eventually comprising over 3,200 volumes, which was regarded as one of the finest in the nation.¹⁸ Lincoln's character and sagacity helped to shape Jones' philosophy, and would serve as inspiration which guided Jones as he was thrust into the civil rights fray in the 1960's.

After graduation from public school in 1913, Jones moved to Van Tassel, Wyoming, the home of his older brother, Howell, and found employment as a store clerk.¹⁹ Two years later, he left Wyoming for Lincoln, Nebraska, where he worked as a clerk in a wholesale grocery concern. Van Tassel had been a

17. See Warren L. Jones, *Lincoln, the Lawyer*, 40 Fla. B.J. 74 (1966).

18. Loyce J. McIlhenny, *Profile of a Bibliophile: Judge Warren L. Jones*, *Lumières* (Louisiana State University, Baton Rouge, La.), April 1978; *Judge Jones Honored by Lincoln U.*, Fla. Times-Union, June 11, 1971, at D13; *Judge Jones Invited to Lunch by LBJ*, Fla. Times-Union, February 12, 1965. The collection is presently housed at the library of Louisiana State University in Baton Rouge.

19. James M. Finchman, *Niobrara County's "Other" U.S. Judge*, *Cheyenne Sunday Tribune-Eagle*, June 6, 1971, at 5.

fairly rustic community in those days having no electric lights. With characteristic wry humor, Jones recalled Van Tassel:

While I was in Lincoln, it was decided that Van Tassel needed electric lights. There was no cross-country transmission line. A municipality was essential. The absurd law of Wyoming required a population of one hundred. Within the widest of limits only 98 persons could be found. It was agreed that the pet monkey of Romie Cunningham, who operated one of the two pool halls, could qualify. It was taken for granted that I would have the good sense to return and so was put on the list as number 100. Van Tassel acquired a mayor, a light plant, a fire bell and some fire-fighting equipment. Town lots were sold to those who saw the town as a city.

After the entry of the United States into World War I, Jones served in the Army Medical Corps at stateside posts, eventually rising to the rank of Sergeant First Class. Following his discharge from military service in 1919, Jones returned to Van Tassel, where he worked as a bank cashier and staked out a homestead.²⁰ There he helped to found one of the first American Legion posts in the country.²¹ While in Van Tassel, he met his future bride, Edith LeProwse, a graduate of the Colorado State Teachers College, who was one of the town's two schoolteachers.

In 1921, Jones left Wyoming and, relying on his veteran's benefits, enrolled in the Law School at the University of Denver. One of the oldest law schools in the west and one of the first in the country to admit women, the University of Denver already had a progressive reputation.²² Calling the College of Law a "great school," he graduated *cum laude* in 1924.²³ Jones would retain a long and close relationship with his alma mater, serving as chairman of the alumni association and sitting on Tenth Circuit panels by designation so that he could regularly attend the meetings.

While at law school, Jones achieved some notoriety as the publisher of the *Colorado Bar Quizzer*, a homemade study guide for the state bar examination. This modest volume, derived from published questions from prior examinations, was thought to be unethical by one of Jones' professors who threatened him with permanent disqualification from admission to the bar. The crisis was averted after Dean George Manly commended Jones for his effort, and a relieved Jones was admitted to the Colorado Bar in 1924.

20. *Id.*

21. *Id.*

22. The Law School opened its doors in 1892. The first class included one woman, one African-American and one Asian. Philip E. Gauthier, *Lawyers from Denver 14-15* (1995).

23. Jones occasionally reminisced about his professors at the school. One of his stories concerned the time the number one student went to Professor Tralles, who taught torts, to complain about late grades. Tralles took out his paper, gave him a failing grade on the spot, and sent him away. When the paper was actually graded, the student received a faculty prize.

The same year he began at the University of Denver Jones married Edith, with their only child, Dorothy, born during his third year of Law School. With a family to support, Jones toiled briefly after graduation as a Deputy District Attorney for the City and County of Denver, where he handled misdemeanors and juvenile cases. An attempt at establishing a private practice with two law school classmates soon failed for lack of clientele.

Jones became interested in resettling in Florida, where his father had moved in 1913, and which was in the midst of the "Florida Boom" period of economic growth and land speculation. Jones wrote to the prominent law firms of Jacksonville and was hired, sight unseen, by the firm of Fleming, Hamilton, Diver & Lichliter, which was in need of young lawyers to do title work for large Florida land developers. This firm's senior partner was the formidable Francis P. Fleming, Chairman of the State Board of Law Examiners and the son of a former Governor.²⁴ Jones moved to Jacksonville with his wife and young daughter in 1925.

Jacksonville in 1925 was the leading city in Florida, having been largely rebuilt as the result of a devastating fire in 1901.²⁵ The area was riding the tide of economic expansion, and seemed a promising place for a young lawyer to make his way. Jones was put in charge of a squadron of new title lawyers at the Fleming firm. In a matter of months, however, the land boom began a decline that resulted in the dismissal of all lawyers in the title group with the exception of Jones. Fortunately, the firm was counsel to prestigious corporate clients such as the Barnett National Bank and the Seaboard Air Line Railroad, and Jones was able to turn his attention to the practice of commercial and banking law.

In the course of his work for Barnett Bank, Jones developed a proficiency in the areas of law relating to the banking business and served for several years in the 1930's as an instructor for the local chapter of the American Institute of Banking. Jones' principal specialty was the law of trusts and estates, and he soon won a statewide reputation as an outstanding practitioner in this field. He helped to establish Barnett's trust department and represented the estates of a number of prominent area citizens. His active participation in the evolution of Florida trust and probate laws included legislative drafting, contributions to journals,²⁶ and service as a founding member and Chairman of the Probate Committee of the state bar association.²⁷

In 1938, Jones became a partner in the Fleming firm, which was renamed Fleming, Hamilton, Diver & Jones. He was elected President of the Jacksonville Bar Association in 1939, as his position in the Florida legal community continued to rise. One notable accomplishment was his service as counsel for the Duval County Air Base Authority, which played a strategic role in persuading

24. Richard A. Martin, *Jacksonville's Silent Service in War and Peace* 20-21 (1992).

25. James R. Ward, *Old Hickory's Town* 186-88, 207-10 (1985).

26. See, e.g., Warren L. Jones, *The Southern Life Insurance and Trust Company*, 19 Fla. L.J. 46 (1945); Warren L. Jones, *Florida's New Trust Accounting Law*, 90 Tr. & Est. 546 (1951).

27. Warren L. Jones, *Report of Probate Committee*, 12 Fla. L. J. 23, 124 (1938).

the Navy to locate the Jacksonville Naval Air Station in the city in 1940.²⁸ The advent of World War II brought new challenges, and in 1942 Jones, with his law partners, founded the Jacksonville Blood Bank to provide a steady wartime supply of blood and plasma for military and civilian use.²⁹

Throughout the 1940's and early 1950's, Jones continued to play a prominent role in Florida's legal and business communities. Barnett Bank relied heavily on his services, and he became both general counsel and a member of the board of directors. In 1944, Jones was elected President of the Florida Bar Association, where he oversaw the efforts of the bar to provide legal services to the men and women serving in the armed forces.³⁰ With the death of Francis Fleming in 1948, Jones became the senior member of his law firm, with the name changed to Fleming, Jones, Scott & Botts. During this period he continued to apply his energies to service in local civic groups, Masonic organizations, and the Episcopal church to which he belonged. He also served as Florida's representative on the Uniform State Law Commission and as an instructor at FSU's School of Banking in the South.

It is safe to say that Jones truly loved the practice of law. For him, lawyering was unquestionably a noble profession, to be taken quite seriously. At the 1955 Commencement of Stetson University, at which Jones received an Honorary Doctor of Laws, he told the audience of law graduates, "[t]here is no higher estate to which you can aspire; no more honorable calling that can be yours; and no higher honor among your fellow men than to be a member of the Bar."³¹ Moreover, Jones found the intellectual challenge of legal work to be truly enjoyable. He not only subscribed to Chief Justice Story's characterization of the law as "a jealous mistress," but found her to be an enticing one as well. "Each problem is an intriguing one; each situation is a novel one," he said. "Each solution is an achievement; each achievement a victory; and each new day a challenge."³²

As fulfilled as Jones was in his professional and civic life, he was not without further ambitions. He had long been a Republican in a state that was

28. Martin, *supra* note 24, at 89; Ward, *supra* note 25, at 217.

29. Martin, *supra* note 24, at 88-90; Frank Young, *Blood Bank's Start Recalled*, Fla. Times-Union, October 28, 1967, at B1.

30. See Warren L. Jones, *Message of the President*, 18 Fla. L.J. 173 (1944).

31. Warren L. Jones, Commencement Address at the Stetson University College of Law (May 28, 1955) (on file with William W. Shakely).

32. *Id.* Guy Botts, a colleague and protégé at the Fleming firm, later remarked, [Jones] never looked upon [the law] as a profession from which he gained a living but one in which he really practiced and tried to understand. He thought elegant prose was the only way in which legal principles and documents could be stated, and he strove mightily to achieve that in all his writings and demanded it in those who worked for him. While Mr. Fleming believed that pencils were to be used only by bookkeepers, Jones often slowed his creative work on contracts, opinions and briefs by using the pencil to give him time to gain the elegance for which he strove.

Letter from Guy W. Botts to Judge Gerald B. Tjoflat (August 1, 1985).

part of the Democratic "Solid South," and he was an active supporter of Dwight D. Eisenhower's successful 1952 presidential campaign. Following Eisenhower's inauguration in 1953, Jones expressed an interest in being appointed to the federal bench. At this time, federal district and circuit court judges received salaries of \$15,000 and \$17,500, respectively,³³ and Jones' friends wondered at his desire to leave a prosperous law practice for such a modest stipend. Nevertheless, Jones made his availability known, while keeping an eye on pending proposals to increase judicial pay.

Jones was first under consideration for a position as District Judge for the Southern District of Florida, but the appointment went instead to a Miami lawyer. In 1954, Fifth Circuit Judge Louie W. Strum died, leaving a vacancy on the appellate bench. Judge Strum was the only member of the Fifth Circuit from Florida, and it was thought that a Floridian should replace him on the bench.³⁴ On March 4, 1955, President Eisenhower nominated the 59-year-old Jones for the Circuit Court of Appeals.³⁵ Following confirmation by the Senate, Jones was appointed to the bench on April 21, 1955, and took his seat on the Fifth Circuit on May 6. On the occasion of his nomination, Jones privately noted, with characteristic humility, "I am confident I have the ability and the capacity to make a good judge. I do not have any urge to shine."³⁶

Later, in reflecting upon the direction his life had taken, Jones wrote:

It was once said by Abraham Lincoln, "I claim not to have controlled events but confess plainly that events have controlled me." In many situations where I have been required to select between alternative courses, the choice has been dictated by things of seeming unimportance. Opportunities of modest favorable results have arisen from unexpected sources. It might be said that luck has loomed large with me, and that fortuitous events and accidental happenings have favored me more than the average.³⁷

33. See *The Financial Plight of the Federal Judiciary*, 38 J. Am. Judicature Soc'y 100 (1954).

34. At the time Jones was under consideration for the judgeship, some questioned his qualifications on the ground that he had never served on the bench and had little trial experience. See John B. McDermott, *Strum Post Seen Going to Florida*, Miami Herald, July 27, 1954, at 6A; *Jaxon May Be Judge Strum's Successor*, Miami Herald, August 8, 1954, at 4A. He readily admitted that he had only tried two cases in the Florida courts—one case that no one could have lost, which he won, and another that no one could have won, which he lost. Jones Diary, *supra* note 2, entry at March 4, 1955.

35. Read & McGough, *supra* note 7, at 48. After his nomination was inexplicably held up, Chief Judge Elbert Tuttle, who later became a good friend to Jones, phoned Washington to urge them to make the appointment. *Id.* "You can't get a better lawyer in the state of Florida," Tuttle told administration officials. *Id.*

36. Jones Diary, *supra* note 2, entry at March 4, 1955.

37. Warren L. Jones, *Sine Qua Non* (circa 1965) (unpublished manuscript, on file with William Shakely).

When fortune carried Jones to the federal bench in May 1955, less than a year had passed since the Supreme Court's decision in *Brown* which overruled *Plessy v. Ferguson* and found segregated schools to be a violation of the Fourteenth Amendment. Less than a month after Jones took his oath of office, the Supreme Court handed down its second decision in *Brown II*,³⁸ in which the Court placed responsibility for the implementation of *Brown* squarely in the hands of the lower federal courts. Barely noting this event in his diary, Jones remarked only that he understood that the lower courts were directed to invoke equitable principles, and quoted the English legal scholar John Selden: "Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, as is equity."³⁹ Few foresaw the magnitude of the firestorm in which the Fifth Circuit would soon find itself.

Jones commented more than once that he could imagine no better occupation than that of a federal judge. There is no doubt that the role suited him well. Throughout his life he was an avid reader, and he particularly enjoyed legal history and biographies of eminent jurists. He was a devotee of the common law who would sooner cite Blackstone than a modern commentator. For Jones, respect for the common law formed the very foundation of a democratic society, and was central to his conservative social outlook. At the same time, he maintained a Lincolnian respect for basic human rights, and believed that those rights would be protected by the proper application of laws.⁴⁰

In keeping with his traditionalist philosophy, Judge Jones was suspicious of legal activism. He was well known for his adherence to the principle of *stare decisis*, and believed his duty was to interpret and enforce the law rather than to look to "do justice."⁴¹ However, as he explained to a journalist shortly before his appointment, "law is justice," and "it is under the law of justice—under the reign of right; under the influence of liberty, safety, stability, and responsibility, that every person will attain his real worth and the true dignity of his being."⁴² His keen sense of history made him very conscious of the significance of the controversies before the court, and this reinforced his inclination to take a deliberate approach to cases.

Judge Jones' jurisprudence, like Jones himself, was dignified and scholarly. He did not believe that his opinions should be a blueprint for social engineering, or should expound on questions not necessary to the disposition of the matter *sub judice*. Rather, his firm conviction was that a judge should methodically discern the true effect of statutory and common law and apply that interpretation to the facts as they were presented. In one memorable labor case before the Fifth Circuit, Judge John R. Brown wrote a lengthy majority opinion describing the

38. 349 U.S. 294, 75 S. Ct. 753 (1955).

39. Jones Diary, *supra* note 2, entry at May 31, 1955.

40. See generally Caleb J. King, Sr., *Eisenhower Makes Wise Choice; Warren L. Jones Will Reflect Credit Upon Federal Judiciary*, Fla. Times-Union, March 10, 1955, at 4.

41. Bass, *supra* note 7, at 10; Read & McGough, *supra* note 7, at 49.

42. King, *supra* note 40.

facts in detail and delving extensively into the legislative history of the statute at issue. Evidently finding Judge Brown's discourse a bit long-winded, Jones penned a terse concurrence: "I concur in the result and in so much of the opinion as supports the result."⁴³

Jones was highly regarded by his colleagues for his intelligence and dry wit. His sense of humor was evident, for example, in the whimsical nicknames he concocted for his brethren on the bench, and in the droll bits of doggerel he was fond of composing. Although Jones was a serious jurist, his ability to find amusement in events of the day helped him to meet the difficult challenges facing the Fifth Circuit during the turbulent 1950's and 1960's.

In 1966, at the age of 70, Jones elected to assume the status of Senior Circuit Judge after over 10 years on the bench. This allowed him to limit his share of the increasing caseload of the Fifth Circuit. Two years later, he was afflicted with failing eyesight, a devastating development for someone who so treasured the written word. Nevertheless, he remained active, and continued to sit frequently on panels of the Fifth Circuit. He was also often designated to sit on the Tenth Circuit because of his continuing attachment to the western states. In his years as Senior Judge, he received further academic honors, including the Lincoln Diploma of Honor from Lincoln Memorial University in 1971, an Honorary Doctorate in Humane Letters from Louisiana State University in 1977, and an Honorary Doctorate in Civil Law from Jacksonville University in 1978. When the Fifth Circuit split in 1981, he became a Senior Judge of the Eleventh Circuit, and continued to sit on panels until 1984. In 1990, at the age of 95, Judge Jones was the oldest sitting federal judge in the country.⁴⁴

On Veteran's Day, 1993, Warren Jones succumbed to illness and died at the age of 98. Thus ended a long and rich life in the law, spanning nearly a century of profound change in American history. His colleagues remembered him with these words:

A rugged independence, devotion both to duty and to the rule of law, and an abiding conviction, like Lincoln's, that Providence fashioned our nation and holds it in the hollow of His hand, characterize the Warren Jones we came to know so well and, since his death on November 11, 1993, we sorely miss.⁴⁵

43. *Wirtz v. Fowler*, 372 F.2d 315, 335 (1966) (Jones, J., concurring).

44. Kathleen McCrocklin, *At 95, Judge Jones is Still at his Desk*, Fla. Times-Union, Dec. 5, 1990, at Westside Community News Section, 1. He died November 11, 1993, at the age of 98. *Warren L. Jones, 98, Federal Appeals Judge*, N.Y. Times, Nov. 14, 1993, at 46.

45. Judicial Conference of the Eleventh Circuit, Resolution Honoring Warren L. Jones (May 6, 1994).

II. JUDGE JONES' CIVIL RIGHTS DECISIONS

Before *Brown's* tremors began to reverberate throughout the Deep South, the Fifth Circuit was a relatively sleepy court, primarily occupied with an uneventful docket of admiralty, patents, insurance, and other civil claims.⁴⁶ Judge Jones' ten-year stint as an active judge saw the Fifth Circuit transformed from isolated and little known into a court of national prominence and the principal legal battlefield in the struggle for civil rights.

Jones served on this court which, for a time, was virtually defined by its dichotomy. Although civil rights cases comprised only about three percent of the court's docket,⁴⁷ the tremendous importance of this issue and the split of opinion on the court came to define and, some say, almost destroy the court.⁴⁸ Labeled "The Four," judges Elbert Tuttle, John Minor Wisdom, John R. Brown and Richard Rives, consistently handed down decisions favoring plaintiffs in school desegregation, voting rights, jury selection and reapportionment cases.⁴⁹

The Four also had a fairly consistent ally in Judge Joseph Hutcheson,⁵⁰ who stepped down as chief judge in 1959, and because of declining health sat on fewer and fewer cases. Nonetheless, when he did sit on race cases, he often voted in favor of the plaintiffs.⁵¹ Moreover, in the internal disputes within the court, Judge Hutcheson routinely supported The Four, even engaging in a spirited defense of Judges Tuttle and Brown at the 1963 Houston Conference.⁵²

Three others, Ben Cameron, Griffin Bell and Walter Gewin were more conservative and less disposed (and in some cases hostile) toward plaintiffs in civil rights decisions.⁵³ Judge Jones frequently provided the critical swing vote

46. When Judge Elbert Tuttle was appointed to the court in 1954, he remarked to a friend "I'm going home to retire on the Fifth Circuit Court of Appeals." Bass, *supra* note 7, at 15.

47. Bass, *supra* note 7, at 19.

48. See Read & McGough, *supra* note 7, at 266-80; Bass, *supra* note 7, at ch. 12; Letter from Judge Jones to all Fifth Circuit judges (Aug. 15, 1963), at 1 (quoting the Bible that "[i]f a house be divided against itself, that house cannot stand.").

49. These judges were acerbically referred to by their more conservative colleague, Judge Ben Cameron, as "The Four." *Armstrong*, 323 F.2d at 353 n.1 (Cameron, J. dissenting). The euphemism was also used internally within the court. See *infra* note 55. They were recognized in the media and by later scholars as staunch defenders of civil rights, determined to carry out the mandate of *Brown*. See, e.g., Bass, *supra* note 7, at 23; Read & McGough, *supra* note 7, at 38; Anthony Lewis, *Federal Judges in South Scored*, N.Y. Times, July 19, 1963, at 8; Saul Friedman, *Appeals Court Facing Revolt*, Houston Chronicle, Aug. 4, 1963, at 6.

50. Born in 1879, Judge Hutcheson served as chief judge of the Fifth Circuit from 1949 until 1959.

51. See, e.g., *Jackson v. Rawdon*, 235 F.2d 93 (5th Cir.), *cert. denied*, 352 U.S. 925 (1956); *Adams v. Terry*, 193 F.2d 600 (5th Cir. 1952). See also Read & McGough, *supra* note 7, at 28-29.

52. Although Judge Jones' notes from the Houston Conference make little mention of Judge Hutcheson's role at the conference, Judge Wisdom's notes, as well as his personal comments in an interview with Professor Brown, indicate that Judge Hutcheson actively participated in the discussions and vocally supported Judges Tuttle and Brown.

53. See Lewis, *supra* note 49, at 8; Friedman, *supra* note 49, at 6. Judge Cameron was viewed by many as a segregationist. Read & McGough, *supra* note 7, at 267 ("During [Judge Cameron's]

between the two groups, with commentators most often lumping him with the conservative wing of the court but occasionally recognizing that his record defied categorization.⁵⁴

Judge Jones himself deeply resented being labeled as an "anti-integrationist" or as a member of any ideological group.⁵⁵ He believed his solemn duty as a judge was to enforce the law rather than pursue an abstract concept of justice.⁵⁶ He prided himself on his dedication to the concept of *stare decisis*.⁵⁷ In a diary entry from August of 1963, he wrote "Judge Tuttle paid me the compliment of saying I was the most

entire tenure on the Court, he never failed to vote against the position advocated by every civil right claimant"); Bass, *supra* note 7, at 88-96; *infra* note 248.

54. Compare Henry T. Greely, *Quantitative Analysis of a Judicial Career: A Case Study of Judge John Minor Wisdom*, 53 Wash. & Lee L. Rev. 99, 122 (1996) (pegging Judge Jones as "politically opposite" from the liberal Judge Wisdom), William Peart, *Fifth Circuit Court of Appeals Vital Part of U.S. Judicial Setup*, Birmingham News (Aug. 21, 1966), at A-2 (grouping Jones with Judges Gewin and Bell as "conservative"), Jack Steele, *Trail-Blazing Dixie Court Threatened by Judges' Split*, N.Y. World-Telegram and Sun, (July 19, 1963) (describing Judge Jones as a "dissenter" from pro civil rights decisions) with Jenkins, *supra* note 4, at 4 (referring to Judge Jones' civil rights voting record as "erratic"); Read & McGough, *supra* note 7, at 49 ("Judge Jones was a "swing man," a gray horse on a court composed of extremes of judicial philosophy"). In his obituary in the New York Times, Judge Jones' entire career is summed up by reference to his pro-civil rights decisions. The article calls one of his opinions a "noted civil liberties decision." Warren L. Jones, 98, *Federal Appeals Judge*, N.Y. Times, Nov. 14, 1993, at 46.

55. In a letter to all the judges of the Fifth Circuit, Judge Jones noted that "The Four" had been lionized in a recent New York Times article as champions of civil rights. Quoting from the Bible that "[h]e who is not with me is against me," he noted with ill-concealed irritation that he was regarded as part of a group on the court working to block desegregation. Letter from Judge Jones to all Fifth Circuit judges, (Aug. 15, 1963), at 2. A diary entry from 1964 reveals his reaction to an article in the Christian Science Monitor: "I have resented, ever since the 4 to 4 division in the Barnett case, at being typed as an anti-integrationist—I was perhaps over sensitive in feeling a personal resentment in being called a 'conservative.'" Diary of Warren L. Jones, former Judge on the Fifth Circuit Court of Appeals (May 6, 1964) (on file with William W. Shakely) [hereinafter "Court-packing" Diary].

56. Bass, *supra* note 7, at 101.

57. Interview by Allison Shakely with William Shakely, Judge Jones' grandson in Harrisburg, Pa. (Sept. 21, 1996). "Judge Jones felt strongly that judges were the arbiters and not the architects of the law." *Id.* The Judge's beliefs were nicely summarized in his special concurrence in a 1970 case. The Fifth Circuit panel overturned the district court's ruling against a teacher who was fired allegedly for his civil rights activities. *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970). Judge Jones agreed with the decision, but not with some of the panel's reasoning. He wrote "[t]here are, I think, legal principles which require the vacating and remand of the judgment of the district court. I do not think that appeals should be decided on the grounds of practicability and common sense fairness." *Id.* at 948 (Jones, J. concurring). See also Read & McGough, *supra* note 7, at 49 (noting Judge Jones' allegiance to *stare decisis*). Nevertheless, Judge Jones may have seen himself as more closely aligned with the conservatives. According to author Jack Bass, Judge Jones purposely retired on the same day as the more liberal Judge Rives because he considered that they "balanced each other off." Bass, *supra* note 7, at 303.

dispassionate of the Judges with respect to race matters. It may be he is right. I hope so."⁵⁸

His reputation as a conservative arose primarily as a result of a single, albeit important and high-profile, case. In 1963, he voted along with the Fifth Circuit's conservative judges in favor of a jury trial in the famous contempt case against then-governor of Mississippi, Ross Barnett.⁵⁹ The case, *United States v. Barnett*,⁶⁰ essentially revolved around whether the Fifth Circuit must empanel a jury in order to bring criminal contempt proceedings against Barnett for repeatedly violating its orders to enroll James Meredith in the University of Mississippi. Although deciding the matter on dispassionate legal grounds, Jones provided the conservatives with the fourth crucial vote which split the court and caused the question to be certified to the Supreme Court.

Thereafter, much of his balanced civil rights record faded into the background, despite the fact that he had supported earlier efforts to enjoin the Governor,⁶¹ and despite the fact that his reasoning in *United States v. Barnett* was found persuasive by some of the most pro-civil rights justices on the Supreme Court.⁶² With equal parts irony and sarcasm, the judge penned a letter to his colleagues on the bench noting: "I do not think I was typed until Barnett. Then, it seems I became a conservative along with Justices Warren, Black, Douglas and Goldberg."⁶³ This is not to say that Judge Jones was embittered or alienated from the court. Quite the contrary, he maintained a wry sense of

58. "Court-packing" Diary, *supra* note 55, entry at Aug. 21, 1963. In the same day's entry he records that Judge Tuttle assured him that "he has never regarded me as an anti-desegregationist." However cautious Jones may have been in his handling of civil rights cases, his dispassionate approach to jurisprudence led him to be intolerant of those who launched personal attacks on judges perceived to be responsible for desegregation. In the late 1970's, Alabama proposed the construction of a library in honor of Justice Hugo Black. In a letter to a colleague, Jones noted with bitter irony "the long period of time when [Black] did not return to Birmingham because he knew he was not welcome there" and the belated forgiveness of Black "for what was once regarded as a repudiation of his homeland." Letter from Jones to Hon. Arthur Goldberg (Sept. 30, 1976).

59. See *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963).

60. *Id.*

61. On October 19, 1962, the Fifth Circuit issued a decision transforming the temporary restraining order against Barnett into a preliminary injunction and enjoining the State of Mississippi. The majority opinion included The Four (Tuttle, Rives, Brown and Wisdom) and Jones. Bell and Gewin concurred in part and dissented in part. *Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962).

62. Four dissenting Supreme Court Justices agreed with Judge Jones' reasoning. They were Chief Judge Warren and Justices Black, Douglas, and Goldberg. See *United States v. Barnett*, 376 U.S. 681, 84 S. Ct. 984 (1964).

63. Letter from Judge Jones to all Fifth Circuit judges (May 6, 1964). Jones was referring to the fact that these four, more liberal Supreme Court justices agreed with him that Governor Barnett was entitled to a jury trial. *United States v. Barnett*, 376 U.S. 681, 724, 728, 84 S. Ct. 984, 1007 (1964) (Warren, Black, Douglas and Goldberg, JJ. dissenting).

humor⁶⁴ and was well liked and respected by both conservative and liberal judges on the court.⁶⁵

In categorizing the results of Jones' civil rights decisions, his record, like the man himself, presents a mixed picture.⁶⁶ Judge Jones participated in decisions favorable to both plaintiffs and defendants. His decisions in general, however, had a unifying theme. Emphasizing not the result but the process, his decisions were very much in keeping with his fidelity to *stare decisis*, and his sense that the law is sacred and must not be stretched or abused by litigants or judges.

A. *Decisions Favorable to Plaintiffs in Civil Rights Cases*

Where the law was clear, Judge Jones resolutely enforced it. The Supreme Court's mandate in *Brown* required desegregation of public schools with all deliberate speed. Judge Jones never failed to enforce the decision and voted consistently for the plaintiffs, no matter what ruse or argument was used to avoid desegregation.⁶⁷ He had no patience for those who sought to avoid the integration of schools or colleges.

Similarly, he was not fooled by transparent attempts to thwart the Federal Civil Rights Act of 1960, nor by clever maneuvering designed to keep public facilities, such as pools and golf courses, segregated. In examining both laws and the actions of judges on his court, he carefully scrutinized precedent and statutes in arriving at his conclusions.

1. *School Desegregation*

Brown mandated desegregation. Many places in the South responded with defiance. A number of school districts devised obstructionist tactics designed to avoid integration of their schools. Overturning these efforts required lengthy litigation and an appellate court that resolutely insisted on an end to segregation.

64. Included among Judge Jones' rhymes, some capricious and others more somber, is the following verse: "It's too late now to rise to great heights,—By preaching the doctrine of Southern States' rights." See *supra* note 1. Jones found humor in many situations. When former Lieutenant Governor Paul Johnson, also charged along with Ross Barnett in the Ole Miss case, was elected governor of Mississippi, Jones drolly wondered to himself what would be done about "taking him from the governor's mansion to put him in jail." "Court-packing" Diary, *supra* note 55, entry at Aug. 28, 1963.

65. Although there was considerable acrimony between certain of the judges of the court, particularly Judges Cameron and Tuttle, Judge Jones maintained a friendship with Judges from both ideologies. His files contain letters from Judges Rives, Tuttle, Cameron, Gewin and Bell expressing friendship and high regard for him.

66. "He was a man of contradictions. Not an extrovert, but not modest either. He had an ego although he was reserved and soft spoken." Interview by Allison Lee with William Shakely, Judge Jones' grandson in Harrisburg, Pa. (Sept. 21, 1996).

67. He did, however, balk at what he considered a legally unwarranted extension of *Brown* to apply to faculty desegregation. See *infra* notes 185-194 and accompanying text.

In this environment and on this issue, Judge Jones consistently showed little tolerance with the efforts to circumvent the High Court's decision.

He sat on panels upholding the rights of plaintiffs in some of the most noted school desegregation cases of the era.⁶⁸ In the case of the Dallas public schools,⁶⁹ the matter first came to the Fifth Circuit following dismissal of the plaintiffs' complaint by the district court.⁷⁰ After the Fifth Circuit ordered reinstatement, the trial court held a hearing, concluded that the School District had made a reasonable start toward integration and again dismissed the complaint.⁷¹ Jones did not participate in the first decision but was a member of the panel in the three subsequent appeals.

The second time the case found its way to the Fifth Circuit, a panel of Jones, Rives and Brown emphatically rejected the approach approved below and held that the Dallas public schools must proceed to desegregate in accordance with *Brown's* mandate of "all deliberate speed."⁷² Without questioning the motives of the school district, the panel emphasized that "a prompt and reasonable start" toward ending segregation was inadequate where students continued to be excluded from schools "solely because of their race or color."⁷³ In admonishing

68. See *St. Helena Parish Sch. Bd. v. Hall*, 287 F.2d 376 (5th Cir. 1961) (upholding the district court's injunction requiring desegregation of St. Helena Parish, Louisiana public schools); *Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95 (5th Cir. 1960) (same for Houston public schools); *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957) (same for Dallas public schools); *Boson v. Rippey*, 285 F.2d 43 (5th Cir. 1960) (rejecting the district court's acceptance of a plan to allow continued segregation in schools if parents of both races agreed).

Much of the fight in the South focused on school desegregation. Subsequent history offers a disappointing legacy to these hard-won legal battles as de facto segregation persists today in schools throughout the country. See, e.g., Alan Gottlieb, *DPS Determined to Treat Students Equitably*, *Denver Post*, Aug. 25, 1996, at A-1 (stating that the Denver school system is "nearly as segregated today as it was when the court imposed busing"); James S. Kunen, *The End of Integration: A Four-Decade Effort is Being Abandoned, as Exhausted Courts and Frustrated Blacks Dust Off the Concept of "Separate But Equal,"* *Time*, Apr. 29, 1996, at 38 (noting that many in the African-American community have welcomed the end of integration because their children suffered most under these plans).

69. *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957). In a later case arising out of the same facts, a new plaintiff sued the Dallas school board and its superintendent, Dr. Rippey. *Boson v. Rippey*, 285 F.2d 43 (5th Cir. 1960). The district court in this case had approved a plan which would allow schools to remain segregated and only desegregate if parents of both white and black students wished integration. *Id.* at 45-46. A panel of Jones, Rives and Tuttle reversed the district court and quoted Justice Harlan's famous dissent in *Plessy v. Ferguson*: "There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 46.

70. The case was initially dismissed in September 1955. A Fifth Circuit panel, not including Jones, reversed. See *Bell v. Rippey*, 133 F. Supp. 811 (N.D. Tex. 1955), *rev'd sub nom.* *Brown v. Rippey*, 233 F.2d 796 (5th Cir.), *cert. denied*, 352 U.S. 878 (1956).

71. *Bell v. Rippey*, 146 F. Supp. 485 (N.D. Tex. 1956). The district judge in the case wrote "[i]t seems to me, in view of the facts, that the white schools are hardly sufficient to hold the present number of white students; that it would be unthinkable and unbearably wrong to require the white students to get out so that the colored students could come in." *Bell*, 146 F. Supp. at 487.

72. *Borders*, 247 F.2d at 272.

73. *Id.* at 271.

the state to desegregate, the panel brushed aside a host of legal and practical arguments by the Dallas school district.⁷⁴

The panel also was the first to confront arguments that desegregation would result in economic retaliation by the state.⁷⁵ Texas, like nine other southern states, had enacted a law that would cut off state funding to school systems which desegregated without prior voter approval.⁷⁶ In a per curiam portion of the opinion, the panel stated that the Texas law "cannot operate to relieve the members of this Court of their sworn duty to support the Constitution of the United States."⁷⁷

The decision, however, did not end the controversy. On remand, an obviously perturbed district court ordered system-wide desegregation to begin in mid-year, without further hearings, evidence or suggestions by the parties on how best to proceed. A panel of the same judges again reversed, ordering the district court to give the school board "reasonable further opportunity" to meet their responsibilities to desegregate.⁷⁸ When two desegregation plans were eventually developed and submitted, the Fifth Circuit panel, with Jones participating, rejected the plan approved by the district court.⁷⁹ The plan would have allowed the school district to create separate white, African-American, and mixed schools, then allow parents to decide which school they wished their children to attend.⁸⁰ The court concluded that the plan evidenced a "total misconception of the nature of the constitutional rights asserted by the plaintiffs."⁸¹

Jones also participated in school desegregation decisions in Louisiana. In St. Helena Parish, school officials tried in vain to overturn a motion for summary judgment against the school board, contending that the matter should be set for trial.⁸² The litigation was little more than a bald attempt to further delay desegregation. A panel of Jones, Tuttle and District Judge Stanley Mize⁸³ affirmed the summary judgment ruling and noted that defendants failed to "take the trouble to specify a single fact which they say is in dispute."⁸⁴ With Louisiana law still requiring segregation and no facts in the record indicating that the school district had "operated in violation of these provisions," the circuit affirmed the lower court decision.⁸⁵

74. The arguments made by the Dallas School District ranged from the failure of plaintiffs to exhaust state remedies to the desire to avoid overcrowding in classes. *See id.* at 270-72.

75. *Id.* *See also* Read & McGough, *supra* note 7, at 80-81.

76. Read & McGough, *supra* note 7, at 80-81.

77. *Borders*, 247 F.2d at 272.

78. *Rippy v. Borders*, 250 F.2d 690, 694 (5th Cir. 1957).

79. *Rippy v. Boson*, 285 F.2d 43 (5th Cir. 1960).

80. *Id.* at 45.

81. *Id.*

82. *See St. Helena Parish Sch. Bd. v. Hall*, 287 F.2d 376 (5th Cir. 1961).

83. A Mississippi district court judge sitting by designation. *Id.* at 376.

84. *Id.* at 378.

85. *Id.* at 378-79.

Jones participated in other school desegregation cases. The decisions were typically short, direct and blunt. One panel found that the efforts of the Houston public schools to desegregate did "not constitute a good faith attempt at compliance . . . but [were] a palpable sham and subterfuge designed only to accomplish further evasion and delay."⁸⁶ He also sat on a panel involving public schools in Florida which held, among other things, that students did not have to be denied admission to have standing to challenge segregation in public schools.⁸⁷

Likewise, Judge Jones showed little patience with efforts to maintain segregation in colleges and universities, as a pair of decisions illustrated.⁸⁸ Judge Tuttle and then-Chief Judge Hutcheson sat with Jones on the case of *Board of Supervisors of Louisiana State University v. Ludley*.⁸⁹ Louisiana had devised a system of laws that effectively denied black students admission to white colleges.⁹⁰ Applicants to state schools had to present a "certificate of eligibility" vouching for their good moral character from both the school superintendent in their county and their high school principal.⁹¹ The certificates had to be specifically addressed to the particular college they sought to enter.⁹² Another law denied tenure to teachers (including high school principals) who, by any means, advocated integration of public colleges in the state.⁹³ As a result, principals at black high schools could not sign certificates recommending their students for admission to white colleges without jeopardizing their jobs.⁹⁴

The district court held that the two laws working together were unconstitutional.⁹⁵ The panel, however, went even further. After adopting the trial judge's reasoning on the merits, the appellate court added that the certificate requirement alone was invalid.⁹⁶ Although not unconstitutional on its face, the law's only plausible basis for existence was to discriminate based on race.⁹⁷

In another significant case, *Woods v. Wright*, one that sharply divided the court, Judge Jones affirmed Judge Tuttle's unilateral decision to reverse a lower court's refusal to issue a temporary restraining order.⁹⁸ The Birmingham

86. *Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960).

87. *See Gibson v. Board of Pub. Instruction of Dade County*, 246 F.2d 913 (5th Cir. 1957) (Rives, Jones & Brown).

88. *See Board of Supervisors of Louisiana State Univ. v. Ludley*, 252 F.2d 372 (5th Cir.), *cert. denied*, 358 U.S. 819 (1958); *Dinkens v. Attorney Gen.*, 285 F.2d 430 (5th Cir.), *cert. denied*, 81 S. Ct. 1085 (1961).

89. 252 F.2d 372 (5th Cir.), *cert. denied*, 358 U.S. 819 (1958).

90. *See Id.*

91. *Id.* at 373.

92. *Id.*

93. *Id.* at 375.

94. *Id.* at 374-75 (reproducing a letter from a high school principal to his former student expressing his regret at not being able to sign a certificate for the student).

95. *Id.* at 374.

96. *Id.*

97. *Id.* (quoting *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957)).

98. *See Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964).

schools had suspended a large number of African American plaintiffs who were arrested for participating in demonstrations.⁹⁹ The students filed suit in federal court to enjoin the suspension on due process grounds.¹⁰⁰ The federal district court refused to issue a temporary restraining order against the school board.¹⁰¹

An attorney for the children, Constance Baker Motley,¹⁰² made an emergency application to Judge Tuttle to enjoin the school board claiming that the 1081 students would suffer irreparable harm because many would be prevented from graduating.¹⁰³ Although circuit judges rarely acted alone, Judge Tuttle nonetheless reversed the district court and enjoined enforcement of the suspension pending resolution of the issue on appeal.¹⁰⁴ Judge Tuttle felt quick action was necessary to ensure that the students would not be denied diplomas.¹⁰⁵

The school board, "[o]utraged at Judge Tuttle's intervention,"¹⁰⁶ moved to dismiss Judge Tuttle's order claiming that an order denying a temporary restraining order was not a final appealable order.¹⁰⁷ Judge Jones, writing for a panel of Rives and District Judge Bootle, upheld Judge Tuttle's ruling. He averred that orders denying a temporary restraining order were generally not appealable as a final decision.¹⁰⁸ Here, however, there was Supreme Court precedent that allowed appeals of orders not otherwise final where "rights might be irreparably lost."¹⁰⁹ Judge Jones had "no doubt as to the power of the court to lay a restraining hand upon the officer who issued the order."¹¹⁰

He carefully detailed the plight of the Birmingham school children to support the claim of irreparable injury.¹¹¹ Not content with a mere TRO, he went a step further in his admonition to the district court saying "if the facts recited in the [plaintiff's] affidavit . . . are established, the plaintiffs will be entitled to a preliminary injunction of substantially the same tenor."¹¹²

*Reed v. Pearson*¹¹³ may have been the case that most succinctly summed up his attitudes on desegregation of public schools. Judges Cameron and

99. *Id.* at 372-73.

100. *Id.*

101. *Id.*

102. *Read & McGough, supra note 7, passim.* Ms. Motley, a NAACP lawyer, was a ubiquitous presence in civil rights courtrooms throughout the south during the 1950's and 1960's. She later became a federal judge in New York.

103. *Woods*, 334 F.2d at 373.

104. *Read & McGough, supra note 7*, at 189; *Bass, supra note 7*, at 207.

105. *Id.*

106. *Read & McGough, supra note 7*, at 189.

107. *Woods*, 334 F.2d at 373.

108. *Woods*, 334 F.2d at 373.

109. *Id.* at 374 (quoting *United States v. Wood*, 295 F.2d 772 (5th Cir.), *cert. denied*, 369 U.S. 850, 82 S. Ct. 933 (1961)).

110. *Id.*

111. *Id.*

112. *Id.* at 375.

113. 306 F.2d 690, 692 (5th Cir. 1962) (Jones, J. dissenting).

DeVane upheld the denial of relief to a black child who alleged that he was denied admission to a school for "mixed blood" children because he was not of the same "mixed blood." The majority threw out the plaintiff's claim asserting that no Supreme Court case "authorizes colored people to litigate in Federal Courts controversies of this character among themselves."¹¹⁴

The odd facts of the case and the inarticulate complaint provided ample opportunity for Judge Jones to vote against the plaintiffs. Instead, however, he saw the case as a straightforward example of discrimination based upon race. In dissenting, he felt no compulsion to write a lengthy opinion or devise ground breaking analysis. After *Brown*, this type of discrimination could no longer be tolerated. Judge Jones wrote a succinct, three-sentence dissent acknowledging that while the complaint was "inartfully drawn," it did state a claim that plaintiff was denied admission to school on account of race.¹¹⁵ The Judge was proud of his position in this case and cited it in a letter to his colleagues defending his position on civil rights.¹¹⁶

2. Circumvention

In a series of other civil rights decisions, Judge Jones participated in or wrote opinions that involved relatively straightforward efforts to avoid civil rights obligations. With the law relatively clear and the precedent in place, Judge Jones had little difficulty affirming the position of the plaintiffs.

In *Dinkens v. Attorney General*,¹¹⁷ for example, he voted to uphold the constitutionality of the Federal Civil Rights Act of 1960.¹¹⁸ Providing access by federal officials to state voting registrar's records, the law was designed to aid federal investigators in determining whether registration procedures were used to deny voting rights based on race.¹¹⁹ Ever ready to promote delay, the State of Alabama challenged the constitutionality of the law. Then-District Judge Frank Johnson¹²⁰ admonished that the contentions of the State of Alabama were

114. *Reed*, 306 F.2d at 692.

115. *Id.*

116. Letter from Judge Jones to all Fifth Circuit judges, (Aug. 15, 1963) (quoting his dissent in its entirety and maintaining "[t]hat is hardly clear and convincing proof of an anti-desegregation prejudice").

117. 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913, 81 S. Ct. 1085 (1961).

118. *See State of Alabama v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd sub nom. Dinkens v. Attorney Gen.*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913, 81 S. Ct. 1085 (1961) (upholding the constitutionality of 42 U.S.C. §§ 1974 et seq.).

119. *Rogers*, 187 F. Supp. at 853.

120. Judge Johnson, later appointed to the Fifth Circuit Court of appeals, is a noted federal jurist, famous for his decisions protecting civil rights. *See, e.g.*, Jack Bass, *Taming the Storm* (1993) (a biography of Judge Frank Johnson); Frank Sikora, *The Judge: The Life and Cases of Alabama's Frank M. Johnson, Jr.* (1992); Robert F. Kennedy, Jr., *Judge Frank M. Johnson, Jr.: A Biography* (1978); T. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (1981); *Judges: A Lincoln Man*, *Time*, Feb. 21, 1964, at 76.

"clearly wrong" and dismissed a number of weak arguments advanced by the state.¹²¹ On appeal, the Jones panel issued a one sentence opinion upholding Judge Johnson's decision.¹²²

Similarly, clever attempts to avoid desegregation by transferring assets to private hands met little acceptance from Judge Jones, at least where the continued state involvement was clear. In a case involving Jones' hometown of Jacksonville, Florida, the city had sold its municipal golf courses to private individuals rather than face integration.¹²³ This was a common dodge used by local governments to circumvent the prohibition on segregation. Because the prohibition applied to actions by the state, not by private parties, transfer avoided the need to integrate. This time, however, the strategy contained a fatal flaw. The deed specified that in the event the land ceased to be used for a golf course it would revert back to the city.¹²⁴

With Judge Gewin dissenting, Judge Jones cast the deciding vote in finding that the segregated golf course was subject to the prohibitions on discrimination in the Fourteenth Amendment. Judge Tuttle wrote for the divided panel, holding that the reversion in the deed created sufficient present control by the city to establish state action.¹²⁵ Thus, the privately-held golf course remained subject to the dictates of the Fourteenth Amendment.¹²⁶

Judge Jones explained his view in a separate concurrence. The city had testified that the golf courses could not be operated at a profit on an integrated basis.¹²⁷ Since the deed required that the land continue to be used for golf courses, then logically, the city must have intended the private owners to operate segregated facilities.¹²⁸ This intent on the part of the City of Jacksonville produced state action.¹²⁹

121. See generally *Rogers*, 187 F. Supp. 848, 853-56 (detailing, among other arguments, that the state attacked Congress' authority to enact the law, claimed that it violated the ex post facto clause of the Constitution and asserted that the request for records was vague and uncertain). At the end of the opinion, Judge Johnson noted that the state had made a series of other assertions which did "not merit discussion." *Id.* at 855.

122. *Dinkens v. Attorney General*, 285 F.2d 430, 430 (5th Cir. 1961) ("The judgments of the trial court in these two cases, consolidated for hearing on the trial, are hereby affirmed on the basis of the well reasoned opinion by the trial court.").

123. *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962) (Jones, J. concurring).

124. *Id.* at 321.

125. *Id.* at 323.

126. *Id.*

127. *Id.* at 331 (Jones, J., concurring).

128. *Id.* ("it follows that the reverter clause was intended to insure the operation of the golf courses for the citizens of Jacksonville who are white to the exclusion of those who are colored").

129. *Id.* Judge Jones came out the other way in *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958) (Jones, J., dissenting in part). He voted with the majority to overturn the dismissal of a complaint concerning segregation in the Birmingham Railroad Terminal. He agreed that the case could be maintained against the Board of Commissioners of the City of Birmingham and the members of the Alabama Public Service Commission, but disagreed that it could be maintained against the Birmingham Terminal Company. With no allegations that the company did anything in

Finally, in a case involving the integrity of the judicial process, Judge Jones demonstrated uncompromising views, a quality that would become even clearer during the controversy over court packing the following year.¹³⁰ Judge William Harold Cox from Mississippi¹³¹ had pursued what appeared to be a personal vendetta against black Mississippi attorney, R. Jess Brown.¹³² Mr. Brown had served as local counsel in the Ole Miss desegregation case,¹³³ and later he brought suit to desegregate the schools of Leake County Mississippi.¹³⁴

In the Leake County case, one of the plaintiffs, Ms. Ruthie Nell McBeth, unexpectedly withdrew from the case at a hearing.¹³⁵ In her motion to withdraw, she submitted an affidavit stating that she had not authorized Mr. Brown, or any other attorney, to use her name as a plaintiff.¹³⁶ Mr. Brown, surprised by the motion and wondering if he had mistakenly included her name, consented to the withdrawal.¹³⁷ The district judge hearing the case, Stanley Mize, allowed the plaintiff to withdraw and took no further action.¹³⁸ The next day, however, Judge Cox, not connected to the case in any manner, cited Brown for contempt, later reducing his threats to disciplinary action.¹³⁹ Even after the plaintiff testified that she had indeed signed a retainer for Mr. Brown, Judge Cox pursued a costly investigation and subjected Mr. Brown to harassing and

concert with the state to impose or enforce segregation requirements, Jones contended that the suit could not be maintained directly against the terminal.

130. See *infra* Part III.

131. Judge Cox was well known among scholars, the press and even his peers as an notorious obstructor of civil rights. See, e.g., Bass, *supra* note 7, at 166 (relating that Cox once "referred to Negroes seeking to register to vote as 'acting like chimpanzees' and characterized litigation by black teachers trying to protect their jobs as 'colored people's antics'"); Read & McGough, *supra* note 7, at 408-18 (recording case after case of Judge Cox's abuse of civil rights plaintiffs and their counsel and quoting a letter he sent to Justice Department attorneys that "I spend most of my time fooling with lousy cases brought before me by your Department in the Civil Rights field"); Letter from Judge Richard T. Rives to district judge Samuel Whitaker, copy to Judge Jones (Mar. 3, 1965) (enclosing an article from a southern newspaper praising Judge Cox and stating "[i]f it were not Ash Wednesday, I would say that I dissent and consider him a pious hypocrite"); Lewis, *supra* note 49 (pointing out that Cox has been sharply criticized by civil rights advocates). A full three-fourths of Judge Cox's civil rights decisions were reversed. See Bass, *supra* note 7, at 166.

132. Judge Cox's actions against Jess Brown brought censure from Yale Law School Professor Alexander Bickel who publicly called for his impeachment. Read & McGough, *supra* note 7, at 412.

133. See *Meredith v. Fair*, 313 F.2d 532 (5th Cir. 1962).

134. Read & McGough, *supra* note 7, at 412.

135. This plaintiff was apparently intimidated into withdrawing from the case. See *In the Matter of R. Jess Brown*, 346 F.2d 903, 907 n.1 (5th Cir. 1965) (noting that someone had fired shots into the former plaintiff's home).

136. *Brown*, 346 F.2d at 905.

137. *Id.* at 905-06.

138. Read & McGough, *supra* note 7, at 412.

139. *Id.*

humiliating scrutiny.¹⁴⁰ Unable to find any professional misconduct, he nonetheless taxed Mr. Brown with the costs of the citation.¹⁴¹

Mr. Brown brought the matter to the Fifth Circuit. Judge Whitaker¹⁴² wrote the opinion overturning Cox's ruling.¹⁴³ The opinion was written in a very severe tone and was seen as a stern rebuke of Judge Cox.¹⁴⁴ Judge Jones concurred specially, writing that Judge Cox never had jurisdiction to begin with and should not have "inject[ed] himself into the case . . . or take[n] over any part of it."¹⁴⁵

3. *The Denouement: Civil Rights and Citizenship*

In 1964, just before assuming senior status, Judge Jones authored a landmark civil rights opinion in the area of immigration, an opinion described in his New York Times obituary as a "noted civil liberties decision."¹⁴⁶ The Times article referred to the case of *Worthy v. United States*.¹⁴⁷ Mr. Worthy, a African American news reporter and United States citizen, had traveled to Hungary and China despite restrictions stated in his passport. When he tried to have his passport renewed, the State Department refused. Notwithstanding the absence of a valid passport, Worthy left the country and visited Cuba. He was arrested upon return to the United States and charged with unlawful entry without a valid passport.¹⁴⁸ Ultimately convicted and sentenced to three months in jail, Worthy challenged the conviction on a number of grounds, including a violation of the Fourteenth Amendment.

After first rejecting several technical arguments, Judge Jones turned to the constitutional issue raised in the case. He declared the reentry provisions unconstitutional.¹⁴⁹ He all but conceded the government's right to impose restrictions on foreign travel and to punish violations. Reentry, however, was a different matter. In eloquent terms, he stated that "it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil."¹⁵⁰ Although reluctant to declare an act of Congress unconstitutional he recognized "a duty resting upon the judiciary to protect the citizen in the exercise of the fundamental rights which the fundamental law has conferred upon him."¹⁵¹ Citizens could

140. *Id.*

141. *See In the Matter of R. Jess Brown*, 346 F.2d 903, 905 (5th Cir. 1965).

142. Sitting by designation from the United States Court of Claims.

143. *Id.*

144. *Read & McGough*, *supra* note 7, at 412.

145. *Brown*, 346 F.2d at 910-11.

146. *Warren L. Jones*, 98, *Federal Appeals Judge*, N.Y. Times, Nov. 14, 1993, § 1 at 46.

147. 328 F.2d 386 (5th Cir. 1964).

148. *Worthy v. United States*, 328 F.2d 386, 388-89 (5th Cir. 1964).

149. *Id.*

150. *Id.* at 394.

151. *Id.*

not be forced into a Hobson's choice between expatriation and criminal punishment.¹⁵²

B. Decisions Favorable to Defendants in Civil Rights Cases

Judge Jones did not, however, always side with the plaintiffs in civil rights cases. In general, he voted against them when the law or procedures seemed to require that he do so. It was clear in a number of cases that, notwithstanding compelling facts, he felt bound by precedent and was unwilling to use his position on the bench to pursue a more activist approach. Moreover, his decisions often had the support of some of the most pro-civil rights judges in the judicial system. While some of his decisions were ultimately reversed by the Supreme Court, they typically involved a closely divided court, suggesting that his positions had considerable, although not always decisive, support.

1. The Political Thicket

One of the most pronounced examples of Judge Jones' approach occurred in *Gomillion v. Lightfoot*.¹⁵³ The case involved the redistricting of the town of Tuskegee, Alabama. The Alabama legislature had passed Act No. 140 realigning the city boundaries of Tuskegee so as to exclude all but four or five of the city's 400 registered black voters.¹⁵⁴ Judge Frank Johnson, the district court judge on the case, recognized the discriminatory effect but reluctantly held that the judiciary had no jurisdiction to review this inherently political decision of the legislature.¹⁵⁵ Supreme Court precedent seemed clearly to steer the courts away from what Justice Frankfurter had called the "political thicket."¹⁵⁶

Judge Jones, in an opinion joined by Judge Wisdom,¹⁵⁷ upheld the district court's interpretation of the applicable precedent.¹⁵⁸ His fairly brief decision simply reviewed a line of cases which set out the principle that states were free

152. *Id.*

153. See *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959)[hereinafter *Gomillion II*].

154. *Gomillion v. Lightfoot*, 167 F. Supp. 405, 407 (M.D. Ala. 1958) [hereinafter *Gomillion I*].

155. *Gomillion I*, 167 F. Supp. at 410 (stating that "this Court has no authority to declare [Act No. 140] invalid after measuring it by any yardstick made known by the Constitution of the United States").

156. See *Colgrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198 (1946).

157. Judge Wisdom wrote a special concurrence explaining his reasons for agreeing with Judge Johnson. *Gomillion II*, 270 F.2d at 599 (Wisdom, J., concurring). While Judge Jones' opinion characteristically relied solely on precedent, Judge Wisdom added his own policy discussion of the matter. *Id.* (explaining that even if he were not bound by controlling precedent, he "would favor withholding the exercise of our equity powers" because of the difficulty in interfering with a state's political function). Two decades later, Judge Wisdom recalled his opinion in *Gomillion* saying "It takes a judge a little time to get over the brainwashing he's had in law school." Bass, *supra* note 7, at 109.

158. *Gomillion II*, 270 F.2d at 596. Judge Brown wrote a vigorous dissent upon which the Supreme Court's reversal was later based. *Id.* at 599 (Brown, J., dissenting).

to create, alter and eliminate municipal corporations as they saw fit.¹⁵⁹ The federal judiciary had no power to review the policies underlying Act No. 140.¹⁶⁰ Although he did point out that exceptions to this general discretion existed,¹⁶¹ the facts of this case did not present a pertinent exception.¹⁶² The Supreme Court, through Justice Frankfurter, ultimately reversed the decision.¹⁶³

2. Proper Procedure

Judge Jones also played a peripheral role in a clash between the NAACP and the State of Alabama. In a mammoth court battle which spanned almost an entire decade, the state courts of Alabama proved remarkably resourceful in delaying and finally denying the NAACP's right to existence in that state.¹⁶⁴

In 1956, the Alabama attorney general filed suit in state court seeking to expel the NAACP, a New York corporation, from operating in Alabama due to its failure to properly register as a foreign corporation.¹⁶⁵ In an ex parte hearing, the state court immediately issued an order restraining the NAACP from further activities in the state pending a trial on the merits.¹⁶⁶ Prior to trial, the court issued a contempt citation against the NAACP for refusing to divulge the names of its members within the state.¹⁶⁷

This issue made its way to the Alabama Supreme Court, which refused to consider the merits of the contempt citation and dismissed the case on procedural grounds.¹⁶⁸ The Supreme Court granted certiorari, reversed the contempt order and remanded the case to the Alabama Supreme Court.¹⁶⁹ Undaunted, the Alabama Supreme Court reaffirmed the contempt order holding that the High Court's ruling was based on a "mistaken premise."¹⁷⁰ Once again, the Supreme Court overturned the Alabama court and remanded for prompt adjudication of the remaining issues.¹⁷¹

159. *Id.* at 595.

160. *Id.* (quoting Justice Jackson, he noted "a fundamental tenet of judicial review that not the wisdom or policy of legislation but only the power of the legislature, is a fit subject for consideration by the courts").

161. *Id.* (acknowledging that states could not redistrict cities where the result will be to impair the value of previously issued bonds because this conflicted with the Constitution's mandate against the impairment of contracts).

162. *Id.* at 597.

163. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960).

164. *See NAACP v. Alabama*, 377 U.S. 288, 84 S. Ct. 1302 (1964) (discussing the procedural history of the case which was now before the Court for the fourth time).

165. *Id.* at 289, 84 S. Ct. at 1304.

166. *Id.* at 290, 84 S. Ct. at 1305. Not until six years later did the NAACP finally have its day in court. *Id.* at 292, 84 S. Ct. at 1306.

167. *Id.* at 290, 84 S. Ct. at 1305.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 290-91, 84 S. Ct. at 1305.

One year after this last pronouncement from the Court, the NAACP still had not been afforded a trial on the state's underlying charge and the original restraining order remained in place.¹⁷² In 1960, four years after the *ex parte* order was entered, the NAACP sought relief in the federal courts. It requested that the federal court enjoin the state attorney general from enforcing the restraining order and grant the constitutional protections which it claimed the state courts denied by delay.¹⁷³

The federal district court, speaking through Judge Johnson, dismissed the case.¹⁷⁴ Judge Johnson noted that the Supreme Court had specifically refused to consider the merits of the underlying claim until first addressed by state courts.¹⁷⁵ The High Court had assumed that the State of Alabama would proceed with the proper adjudication of the matters left open by its ruling on the contempt order.¹⁷⁶ Judge Johnson was not willing to speculate otherwise and would not intervene in the state court's case under the assumption that it would fail to carry out its duty.¹⁷⁷ The NAACP appealed the federal dismissal.¹⁷⁸

Again upholding Judge Johnson, Judge Jones wrote the panel's opinion affirming the district court's refusal to hear the merits.¹⁷⁹ He pointed out that both the Supreme Court and the district court below had assumed that the state court would follow its constitutional duty.¹⁸⁰ Like the district court, the majority refused to entertain a contrary assumption.¹⁸¹ Judge Jones did, however, overturn Judge Johnson's dismissal and directed the federal court to retain jurisdiction in the event that the Alabama courts did not provide a prompt disposition of the case.¹⁸² Judge Tuttle dissented, pointing out that history had proven the fallacy of the Supreme Court's initial presumption of a prompt trial in Alabama.¹⁸³ His dissent ultimately carried the day in the Supreme Court.¹⁸⁴

172. *Id.* at 291, 84 S. Ct. at 1305.

173. *See* NAACP v. Gallion, D.C., 190 F. Supp. 583, 586 (M.D. Ala. 1960).

174. *Id.*

175. *Id.*

176. *Id.* at 585.

177. *Id.*

178. NAACP v. Gallion, 290 F.2d 337 (5th Cir. 1961).

179. *Id.* at 343. Judge Tuttle dissented from the panel.

180. *Id.* at 342.

181. *Id.*

182. *Id.* at 343.

183. *Id.* at 344 (Tuttle, J., dissenting).

184. NAACP v. Galhin, 368 U.S. 16, 82 S. Ct. 4 (1961). The United States Supreme Court reversed the panel and directed the federal district court to try the case unless the state court had done so by January 2, 1962. *See id.* The Alabama courts proved astonishingly defiant. Four days before the deadline, the state court heard the case and ruled against the NAACP, permanently enjoined it from operating in Alabama. *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 84 S. Ct. 1302 (1964). On appeal, the Alabama Supreme Court refused to review the merits. *See id.* The court implemented a rarely used procedural rule regarding the structure of briefs to dismiss the appeal. *See id.* In yet another appeal to the United States Supreme Court, the state argued that this

3. *The Importance of Precedent*

Judge Jones found himself in discord with both Judges Johnson and Tuttle in a 1964 case regarding the assignment of teachers to Jacksonville, Florida schools.¹⁸⁵ Jacksonville, the county seat for Duval County and Judge Jones' hometown, was under court order to desegregate. The trial court found that this school system had made no progress toward desegregation in the eight years since *Brown* and that a broad injunction was warranted.¹⁸⁶ The school board appealed the portion of the desegregation order that prohibited the assignment of teachers and other school personnel on the basis of race.¹⁸⁷ The board claimed that *Brown's* mandate did not extend to faculty, and thus the trial court's injunction was too broad.¹⁸⁸ The appellate court disagreed with this reasoning and upheld the order, with Judge Jones dissenting.¹⁸⁹

Judge Jones did not agree that *Brown* was sufficient precedent upon which to rule, as a matter of law, that assignment of teachers based on race violated the Fourteenth Amendment.¹⁹⁰ The court in *Brown* had made specific factual findings that pupil segregation in public schools was harmful to African American children.¹⁹¹ Jones contended that the plaintiffs in this case should similarly be required to provide proof of harm caused by faculty segregation.¹⁹² In his dissent he touched on a theme often espoused by conservative and

procedural error and subsequent ruling by the state's high court precluded the Supreme Court from reaching the merits of the claim. *See id.* In the alternative, the state contended that if the procedural grounds were held inadequate, the Court must remand to the Alabama Court for a decision on the merits of the appeal. *See id.* But the Supreme Court had no further patience for the tactics of the Alabama Court and reversed the decision on the merits, ordering the permanent injunction vacated. *See id.* In 1964, eight years after the court's *ex parte* restraining order, the NAACP finally prevailed.

185. *See* Board of Pub. Instruction of Duval County v. Braxton, 326 F.2d 616 (5th Cir. 1964) (Tuttle and Johnson, JJ., majority; Jones, J., dissenting).

186. *Id.* at 621.

187. *Id.* at 617.

188. *Id.*

189. *Id.* (stating without further explanation that the "contested provisions of the decree fall well within the permitted range of relief that can properly be granted as a part of such decree").

190. *Id.* at 622 (Jones, J., dissenting). His dissent in this case drew praise from his hometown paper which quoted him at length and called the majority's opinion an "innovation of federal law." *Judge Jones No Theorist*, Jacksonville Chronicle, Jan. 17, 1964, at 1.

191. *Id.* at 621. *See* *Brown v. Board of Educ.*, 347 U.S. 483, 494-95, 74 S. Ct. 686, 691-92 (1954).

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. . . . We conclude that in the field of public education the doctrine of "separate but equal" has no place.

192. *Braxton*, 326 F.2d at 622.

segregationist commentators: *Brown* did not create a blanket mandate for school desegregation because it was based on factual findings of harm to the specific plaintiffs in that case.¹⁹³ Judge Jones noted that *Brown's* factual predicate had been transformed by "judicial alchemy" into a rule of law for desegregation of children in schools.¹⁹⁴ Jones did not attempt to further develop this argument that school children should be required to prove harm in each pupil desegregation case. He did, however, believe that in this case, which extended beyond *Brown's* holding regarding students, there should be proof of injury to the children resulting from racially based teacher assignments.¹⁹⁵

4. *Ross Barnett and the Fifth Circuit*

Nothing captured the attention of the nation or divided the Fifth Circuit more starkly than the events surrounding the enrollment of James Meredith, an African-American, at the University of Mississippi. The two-part legal saga began with a series of suits aimed at allowing Meredith to attend the University of Mississippi or Ole Miss.¹⁹⁶ The second half of the story concerned the Fifth

193. See, e.g., *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425, 427-28 (5th Cir. 1963) (overturning the district court which had improperly considered factual evidence of harm to white students in Georgia in reaching its decision not to integrate the schools). In *Stell*, District Judge Scarlett used the inverse of the proposition that African Americans must prove harm in each school case by allowing white students to establish harm to block desegregation. In a letter to Judge Jones after his dissent in *Braxton*, Judge Cameron, praised Jones and restated the segregationist theory on *Brown*. Letter from Ben Cameron to Judge Jones (Jan. 16, 1964) ("You have put your finger on a point which has always been clear . . . *Brown* should not be followed unless somebody has found the compelling facts to be present."). The letter went on to decry the "wide departure" from *Brown* in *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). *Browder*, of course, is the famous Montgomery bus strike case prompted by the refusal of Ms. Rosa Parks to give up her bus seat to a white person. In *Browder*, Judges Rives and Johnson, for the first time extended the rationale of *Brown* into public transportation, striking down segregation on public buses. Judge Lynne dissented. According to Judge Cameron's letter to Jones, the dissent was a "masterpiece" and that Judge Lynne "took an indirect fling at the idea you have now clarified."

194. See *Braxton*, 326 F.2d at 621-22.

195. *Id.* This position, however, has a particularly ironic ring in light of more recent jurisprudence on the subject. In *Wygant v. Jackson Board of Education*, the Supreme Court invalidated an affirmative action plan designed to increase minority representation among teachers in the public schools. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84, 106 S. Ct. 1842, 1852 (1986). The school board asserted that the percentage of minority teachers was less than the percentage of minority students in the schools. *Id.* at 274, 106 S. Ct. at 1847. The "preference" for minority teachers was devised to provide needed role models for minority students. *Id.* The Court held that the role model theory did not justify discrimination on the basis of race. *Id.* In the 1960's plaintiffs fought for the right to have black teachers for white students and vice-versa. In the 1980's plaintiffs found themselves fighting for the right to have black teachers for black students. They lost both times.

196. See *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962) (ordering reversal of the district court and the enrollment of James Meredith at the University of Mississippi); *Meredith v. Fair*, 83 S. Ct. 10 (1962) (vacating stays issued by Judge Cameron of the Fifth Circuit's order to enroll Meredith).

Circuit's struggle to deal with an obdurate and defiant governor.¹⁹⁷ Judge Jones was tossed into the latter part of the fray.

In *Meredith v. Fair*,¹⁹⁸ Judges Wisdom and Brown (Judge DeVane dissenting) overturned the district court's refusal to grant Meredith an injunction requiring his admission to Ole Miss.¹⁹⁹ This opinion sparked an unprecedented conflict among the judges of the Fifth Circuit. Conservative Judge Ben Cameron, who was not even on the *Meredith* panel, acted alone to issue a stay of the panel's order.²⁰⁰ An astonished panel, including the former dissenter, vacated the stay.²⁰¹ Remarkably, Judge Cameron reinstated his stay three more times and twice more the panel vacated.²⁰² Finally, Meredith took his appeal to Justice Black, the designated Supreme Court Circuit Justice for the Fifth Circuit, who entered an order vacating Judge Cameron's stays.²⁰³

While the court was busy settling its internal difficulties, the governor of Mississippi, Ross Barnett, prepared to do battle. He publicly announced that he was "interposing the sovereignty" of the state to void the Fifth Circuit's order.²⁰⁴ He directed state officials to prevent Meredith's enrollment and commanded the arrest of any federal official who interfered with his order.²⁰⁵ When Mr. Meredith arrived on campus, accompanied by federal marshals, Governor Barnett physically prevented his registration.²⁰⁶

This flagrant challenge to the court's power called for an en banc resolution.²⁰⁷ After a series of hearings, orders and deliberations, the entire court eventually held Barnett in civil contempt of its orders.²⁰⁸ The court ordered the governor to cease interference with its orders and to ensure Meredith's enrollment.²⁰⁹ The court assessed a fine of \$10,000 per day until the governor fully complied with the orders.²¹⁰ Without explanation, Judges Jones, Gewin

197. See *Meredith v. Fair* 313 F.2d 532 (5th Cir. 1962) (issuing order to show cause why Governor Barnett should not be held in contempt of the court's orders); *United States v. Barnett*, 346 F.2d 99 (5th Cir. 1965) (certifying question of a jury trial for Governor Barnett to the Supreme Court).

198. 305 F.2d 343 (5th Cir. 1962).

199. *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).

200. *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962) (referring to Judge Cameron's stay and reversing same).

201. *Id.*

202. *Meredith v. Fair*, 83 S. Ct. 10 (1962) (explaining that Judge Cameron had entered three more stays, the first two of which were again reversed by the Fifth Circuit).

203. *Meredith v. Fair*, 83 S. Ct. 10 (1962).

204. See Bass, *supra* note 7, at 182.

205. *Id.* at 185.

206. *Id.* at 186.

207. Judge Cameron, due to illness, was the only Fifth Circuit judge who did not participate in these proceedings. *Id.* at 184.

208. *Meredith v. Fair*, 313 F.2d 532 (5th Cir. 1962).

209. *Id.* at 533.

210. *Id.*

and Bell, dissented from the holding only with respect to the fine.²¹¹ Weeks later, an en banc court refused to dissolve its injunction or dismiss the contempt proceedings.²¹² Although Gewin and Bell dissented from that portion of the order restraining the State of Mississippi, Judge Jones sided with the majority.²¹³

The greater battle was yet to come. After the civil contempt proceedings, a unanimous court issued an order to show cause why Governor Barnett should not be held in criminal contempt for willful violations of the court's orders.²¹⁴ Barnett's attorneys argued emphatically that he was entitled to a jury trial on the criminal charges.²¹⁵ The court split four to four over the issue, and certified the question to the Supreme Court.²¹⁶ Judges Tuttle, Wisdom, Rives and Brown issued an opinion meticulously recounting the Supreme Court precedent against, and the lack of statutory foundation for, a jury trial.²¹⁷ Judges Cameron, Jones, Gewin and Bell each wrote separately to express their opinion that Governor Barnett was entitled to a jury trial.²¹⁸

Judge Jones rather caustically noted that because the question was being certified to the Supreme Court no legitimate purpose was served by the writing of all these opinions.²¹⁹ Nonetheless, with a characteristically sharp wit he jumped into the fray writing "[s]ince opinions are being written, I will join the cavalcade lest there be a lurking suspicion that I am neglectful of a duty."²²⁰ He agreed that Supreme Court precedent did establish that there was no Constitutional right to a jury trial for criminal contempt.²²¹ The Clayton Act, however, statutorily provided for a jury trial on criminal charges stemming from willful disobedience of an order of "any district court of the United States."²²² Because of repeated delays by the district court in Mississippi, the Fifth Circuit found it necessary to take the unusual step of entering its own injunction rather than remanding for the district court to enter orders.²²³ Thus, according to Jones, it was pure chance that the contempt citation emanated from the appellate

211. *Id.* at 534.

212. *Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962).

213. *Id.*

214. *United States v. Barnett*, 330 F.2d 369, 381 (5th Cir. 1963) (noting that a unanimous court, Judges Hutcheson and Cameron not sitting, ordered criminal contempt proceedings). *See also* Bass, *supra* note 7, at 198.

215. Bass, *supra* note 7, at 198. Governor Barnett would have welcomed an opportunity to further martyr himself to the cause of segregation. Most observers agreed that a jury of his "peers" in Mississippi, where he was a hero to segregationists, would never convict their beloved governor. *Id.*

216. *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963).

217. *Id.* at 386-90.

218. *Id.* at 393-437.

219. *Id.* at 414.

220. *Id.*

221. *Id.* at 415-16.

222. *Id.* at 416 (quoting 18 U.S.C. §§ 402 and 3691 (1948)).

223. *Id.*

court.²²⁴ Congress could not have intended such an important right to depend upon such happenstance.²²⁵

Judge Jones took the argument even farther. He was skeptical as to whether the same Judges whose orders were violated would be appropriate triers of fact for this criminal case.²²⁶ This doubt concerning their qualification also militated in favor of a jury trial.²²⁷ The issue of disqualification had not previously been raised by the parties, but Judge Jones thought the court should consider it *sua sponte*.²²⁸ He carefully pointed out that he did not accuse his brethren of actual bias, but queried whether they might not be disqualified as a matter of law.²²⁹ He expressed his views in a dispassionate manner, meticulously basing them upon sound legal analysis and precedent. Read in isolation, the opinion hardly hinted at the maelstrom generated by Governor Barnett.

With the circuit evenly divided, the question was certified to the Supreme Court for resolution. The Court held, in a five to four decision,²³⁰ that Governor Barnett was not entitled to a jury trial.²³¹ It was, however, a hollow victory for The Four. In dicta, the Court opined that, in the absence of a jury trial, any penalty would be limited to that assessed for petty offenses.²³² The Fifth Circuit was faced with a choice between a Mississippi jury trial in which Barnett would likely go free or a bench trial with very little punishment at stake.

On remand, only seven judges remained to decide how best to dispose of the Barnett contempt proceedings. Judge Cameron had passed away just three days before the Supreme Court's decision, and Judge Hutcheson was ill and unable to participate.²³³ Still closely divided, the court voted 4-3 to dismiss the criminal charges. This time, Judge Rives provided the swing vote, siding with Judges

224. *Id.* at 418.

225. *Id.*

226. *Id.* at 418-19.

227. *Id.* at 419.

228. *Id.* at 421.

229. *Id.* Although he was the only judge to address the issue of bias, the approach would have continuing influence. Two years later, when a majority on the Fifth Circuit voted to dismiss the contempt charges against Barnett, the court referred to Judge Jones' discussion about disqualification. *United States v. Barnett*, 346 F.2d 99, 101 n.3 (5th Cir. 1965). The opinion acknowledged the possibility that some or all of the judges may "have formed a fixed opinion that the defendants are guilty." *Id.* at 101.

230. In a classic example of the adage "politics makes strange bedfellows," the four "liberal" members of the Supreme Court, Justices Warren, Black, Douglas and Goldberg, were aligned with the "conservative" members of the Fifth Circuit. The "liberal" judges of the Fifth Circuit, Tuttle, Wisdom, Rives and Brown, voted along with the more conservative wing on the Supreme Court against a jury trial.

231. *United States v. Barnett*, 376 U.S. 681 (1964).

232. *Id.* at 695 n.12.

233. *See Bass, supra* note 7, at 250.

Jones, Bell and Gewin.²³⁴ Judges Tuttle, Wisdom and Brown each wrote separate dissents with varying degrees of rancor.²³⁵

Because substantial compliance with the court's order had been achieved,²³⁶ the majority decided that no purpose would be served by further prosecution of the contempt charges.²³⁷ Moreover, the recently enacted Civil Rights Act of 1964 obviated the need to prosecute in order to deter others from similar actions.²³⁸ The court dismissed the criminal charges and reversed the fines imposed in connection with the civil charges. This final chapter of the Ole Miss ordeal brought an unsatisfying if not ignominious conclusion to this clash of the titans.

C. Conclusion

By conventional measures, Judge Jones had a difficult voting record to characterize. The traditional method has been to lump judges together based upon the outcome of the decisions. Those generally supporting plaintiffs were liberal; those that did not were conservative. Judge Jones often voted with The Four, but also found himself on the other side in a number of cases.

Judge Jones did not hesitate to side with civil rights plaintiffs and his liberal colleagues whenever he felt the law so dictated.²³⁹ His reasoning was always grounded in statutes and case law, and he refused to indulge his personal sentiments regarding policies or regarding the views and behavior of his associates. Even in the most controversial cases, his opinions typically reflected dispassionate draftsmanship that carried the development of the law to its inevitable conclusion.²⁴⁰

In ordinary times, an emphasis on precedent and dispassionate analysis represented perhaps the preferred judicial temperament. But these were not ordinary times. The extraordinary nature of the civil rights era arose both because of the task imposed on the courts and the fierce resistance by state authorities. The Four as well as a handful of district court judges such as Frank

234. *United States v. Barnett*, 346 F.2d 99, 101 (5th Cir. 1965).

235. *Id.* at 101-05.

236. *Id.* In addition to the years of litigation, the public conflict on the court and the spectacle of Governor Barnett's insolence, compliance had come at the cost of human lives. Mr. Meredith's registration was accomplished only after a night of rioting at Ole Miss that left two dead and hundreds, including 160 federal marshals, injured. See Read & McGough, *supra* note 7, at 246.

237. *Id.* at 100.

238. *Id.*

239. For example, in *Morrison v. Davis*, 252 F.2d 102 (5th Cir. 1958), he participated in a panel that struck down all laws in Louisiana requiring segregation in public transportation. In the short per curiam opinion, the panel simply noted that after the Supreme Court's action in the Montgomery bus strike case (*Browder v. Gayle*, 142 F. Supp. 707, *aff'd*, 352 U.S. 903 (1956)) the law was clear and would justify no other decision.

240. Judge Jones also participated in an early case striking down systematic exclusion of jurors based upon race. See *Goldsby v. Harpole*, 249 F.2d 417 (5th Cir. 1957).

Johnson and Skelly Wright generally recognized that extraordinary times required a more flexible judicial attitude and a willingness to blaze trails even where precedent did not light the path.²⁴¹

In the *Duval County* case, for example, Judge Jones' reasoning reflected a careful and deliberate parsing of the *Brown* ruling. He objected to the forced desegregation of faculties in public schools in the absence of proof that the practice caused harm to students.²⁴² For strict adherents to precedent, Jones' analysis presented compelling legal logic. The technical accuracy of the approach, however, belied the increasingly clear reality. By the time of the *Duval* decision in 1964, fully ten years after the decision in *Brown*, the Supreme Court's attitude toward state supported racial segregation of any kind had become clear, with or without specific proof of harm. Moreover, Jones had given voice, however cursorily, to the extremist argument that even school children should have been required to prove harm in each case. He alluded to this argument with apparent approval even while conceding that current law precluded it. His refusal to interpret *Brown* as applying to teachers squares with his careful fidelity to *stare decisis*. His implicit support for requiring findings of fact in each student case is more difficult to reconcile.²⁴³

The Alabama NAACP case²⁴⁴ was another glaring example of the woeful inadequacy of tradition and *stare decisis* in the administration of justice during the era. This long and remarkable tale underscored the resolve and ingenuity of even some courts in resisting the civil rights movement.²⁴⁵ Although Jones made little more than a cameo appearance in this drama, his decision hobbled an already painful and protracted fight for civil rights advocates.

It may be said that Judge Jones sometimes failed to fully comprehend the realities underlying the injustices faced by African-Americans in their battle over

241. In a letter to Professor Brown commenting on this paper, author Jack Bass eloquently explained,

The oath of a federal judge states that his or her job is to "administer justice"—not to apply the law—and what distinguishes Johnson, Wright, The Four, and a few others who operated in the Fifth Circuit, like Irving Goldberg and Wayne Justice, was that they took that provision literally and came to define justice as the absence of injustice. They applied existing legal authority to new circumstances in order to administer justice.

Letter from Jack Bass to Professor J. Robert Brown, Jr., dated July 21, 1997, at 3.

242. This entire conflict could be described as so much shadow-boxing between the parties. No one disputed the fact that the schools were legally required to desegregate. Once desegregated, there could no longer be "white" or "black" schools to which teachers of each race could be assigned. School boards across the South, however, persisted in seeking ways to delay and impede the mandate of *Brown*. No one understood the strategy behind these dilatory tactics better than Judge Tuttle who resolutely sought to thwart these attempts. See Bass, *supra* note 7, at 20.

243. The Supreme Court fairly clearly stated in *Brown* that its ruling was to have nationwide application. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." *Brown v. Board of Educ.*, 347 U.S. 483, 495, 74 S. Ct. 686, 692 (1954).

244. *NAACP v. Gallion*, 290 F.2d 337 (5th Cir.), *judgment vacated by* 368 U.S. 16, 82 S. Ct. 4 (1961).

245. See *supra* note 184 and accompanying text.

basic constitutional rights. His decisions, however, cannot be classified on the basis of his personal philosophies or beliefs but can only be explained by reference to his perception of a meticulous adherence to legal precedent. For Jones, an adjudicative result attained legitimacy only through obedience to established rules and practices of orderly jurisprudence. He had little tolerance for anyone—litigants, lawyers or judges—who sought to bypass those rules.

In addition to his reverence for the legal history of case precedent, Judge Jones possessed a strong sense of history in general and its valuable lessons. It is perhaps in this spirit that he carefully preserved and documented an account of events on his court in 1963 which turned judge against judge and friend against friend.²⁴⁶

III. CHRONICLE OF A SCANDAL

" . . . And I haven't sent the two Messengers, either. They're both gone to the town. Just look along the road and tell me if you see either of them." [said the White King to Alice].

"I see nobody on the road," said Alice.

"I only wish I had such eyes," the King remarked in a fretful tone. "To be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people, by this light!"

—Lewis Carroll, *Through the Looking-Glass*, ch. 7

What Ben Cameron thought he saw behind the confidential cloak of the judicial council, the rest of the nation strained to see too. One secret meeting and a Senate investigation later, nothing remained and nobody was to blame.

On July 30, 1963, Judge Ben Cameron wrote a lengthy dissent from the court's refusal of an en banc hearing in the Birmingham school desegregation case.²⁴⁷ Judge Cameron accused Chief Judge Tuttle of rigging the panels in race cases to include at least two of the circuit's four "liberal" judges—Tuttle, Wisdom, Rives, and Brown.²⁴⁸ He rather scornfully referred to these judges

246. Judge Jones, out of respect and friendship for Judge Tuttle, would not release these papers during Judge Tuttle's lifetime. When Judge Jones passed away in 1993, he left his "court-packing" diary and file to his grandson, William Shakely. His grandson followed the Judge's wishes and did not release these papers until after Judge Tuttle's passing in 1996.

247. *Armstrong v. Board of Educ.*, 323 F.2d 333, 352 (5th Cir. 1963) (Cameron, J. dissenting).

248. *Id.* at 358. He also complained that Judge Tuttle refused to follow normal circuit procedures in assigning three-judge district courts in Mississippi. *Id.* Whenever a case involved a constitutional challenge to a state law, the chief judge could appoint two additional judges to sit with the district judge on the case. *See Bass, supra* note 7, at 19. This panel usually consisted of two of the state's district judges and one appellate judge. In Mississippi, however, Judge Tuttle had adopted the practice of appointing two appellate judges to sit with a district judge. *Id.* at 233. He felt that certain Mississippi judges, particularly Judge Cameron, had disqualified themselves from hearing constitutional cases by refusing to enforce constitutional rights. *Id.* Judge Cameron had once written a dissent that essentially asserted the Fourteenth Amendment should not be enforced in the

as "The Four." These grave accusations²⁴⁹ made headlines across the country²⁵⁰ and touched off an investigation headed by the segregationist Senator James Eastland from Mississippi.²⁵¹

Cameron's dissent contained a survey of race cases brought over a two-year period spanning from June of 1961 through June of 1963.²⁵² He found twenty-five cases and reported that in twenty-two of them at least two of The Four sat on the panel.²⁵³ These statistics presented an incriminating two-year snapshot. Under the public spotlight, the Judges of the Fifth Circuit closed ranks. Except for one or two initial statements to the press,²⁵⁴ they refused to discuss the matter outside the court.²⁵⁵ A meeting of the entire judicial council was set in Houston for August 22 and 23.²⁵⁶ All but Judge Cameron, who was taken ill, attended.²⁵⁷ None of the judges have ever divulged what happened during those two days in Houston.²⁵⁸

South. See *Boman v. Birmingham Transit Co.*, 292 F.2d 4, 17 (5th Cir. 1961) (Cameron, J. dissenting) (declaring that the government derives power from the "governed" and that because integration was unacceptable to the "governed" in the South, they should be "left alone").

249. It is difficult to underestimate the seriousness of this charge. Commentators describe Cameron's charges as "extraordinarily serious" indictments of "outrageous and grossly inappropriate judicial behavior." Read & McGough, *supra* note 7, at 268. They constituted an "attack on the integrity of the court" concerning "serious judicial misbehavior." Bass, *supra* note 7, at 236-37.

250. See *U.S. Circuit Court Packing Charge Sets Off Probe*, Houston Chronicle, Aug. 2, 1963, at 1; *Judge Protests Court's Desegregation "Crusade"*, Fla. Times-Union, Aug. 1, 1963, at 3, *Feud Over Racial Cases Flares in U.S. Appeals Court in South*, N.Y. Times, July 31, 1963, at 12.

251. Senator Eastland, as head of the Senate's Judiciary Committee, wielded considerable power over judicial appointments and affairs. See Bass, *supra* note 7, at 17, 44-45. Senator Eastland made no secret about his feelings on integration. In a Mississippi speech before supporters he declared "On May 17, 1954 [date of the *Brown* decision] the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it." Look, April 3, 1956, at 24.

252. *Armstrong*, 323 F.2d at 358.

253. *Id.*

254. Judge Rives commented in a Houston Chronicle article that Judge Tuttle "has the responsibility to appoint judges who will follow the law honestly and fairly and without prejudice." Friedman, *supra* note 49. The New York Times quoted Judge Wisdom as stating that case assignments fell by "pure chance." *Feud Over Racial Cases Flares in U.S. Appeals Court in South*, N.Y. Times, July 31, 1963, at 12. In a recent interview, Judge Wisdom clarified that his "pure chance" remark had reference to the appellate panels, not three-judge district courts. Interview by J. Robert Brown, Jr. with Judge Wisdom, Judge of the Fifth Circuit Court of Appeals in New Orleans, La. (October 13, 1997).

255. The judges "steadfastly refuse to this day to discuss their internal communications at the time of Judge Cameron's charges." Read & McGough, *supra* note 7, at 269.

256. Letter from Judge Rives to all Fifth Circuit judges (Aug. 13, 1963) (on file with William W. Shakely).

257. "Court-packing" Diary, *supra* note 55, entry at Aug. 22, 1963; Read & McGough, *supra* note 7, at 270.

258. Read & McGough, *supra* note 7, at 270.

Judge Jones kept a personal diary and file of letters and memoranda covering the time just after the story broke and continuing for about two years.²⁵⁹ The diary contains his detailed, daily observations of the days before the meeting, the meeting itself and the weeks that followed. The rest of the file contains copies of correspondence among the several judges relating to the scandal and the Clerk of the Court's report prepared for the meeting.²⁶⁰

After the Houston meeting, the judges released this statement to the press:

The problems alleged to exist in this court have been considered by the court. The court believes that in no given case has there been a conscious assignment for the purpose of accomplishing a desired result. Action has been taken to avoid any appearance of inconsistency in the assignment of judges or the arrangement of the docket.²⁶¹

Historians present three possible theories relating to Cameron's charges.²⁶² The first theory submits that the charges are, for the most part, accurate.²⁶³ The second theory speculates that civil rights plaintiffs became adept at timing their appeals in order to secure favorable panel assignments.²⁶⁴ A final theory, considered most plausible by its authors, blames the lopsided assignments on scheduling difficulties.²⁶⁵ Judge Jones' papers indicate the theory that is, in fact, correct. The following account of events, unless otherwise noted, is taken directly from Judge Jones' handwritten diary.

Although Judge Tuttle bore the brunt of the attack from Cameron and in the media, it was Judge Brown who was in charge of panel assignments for the circuit. When the story broke, Judge Jones personally determined to uncover the truth or falsity of the accusations. He phoned the clerk of the court, Edward Wadsworth and asked him directly whether Judge Brown had given him directions to assign or exclude particular judges on race cases. The Clerk was very shaken by the ordeal²⁶⁶ and would not give a direct answer until had

259. The first diary entry is dated August 7, 1963 and the final entry dates July 20, 1965. Judge Jones referred to this diary and file as his "court packing" file. Diary entry dated May 8, 1964.

260. Court Clerk Edward Wadsworth, at Jones' insistence, prepared a detailed report of panel assignments in race cases along with copies of pertinent memoranda. Each judge had a copy of this report in hand when the meeting convened in Houston. "Court-packing" Diary, *supra* note 55, entry at Aug. 22, 1963.

261. See Read & McGough, *supra* note 7, at 271.

262. *Id.* at 272.

263. *Id.*

264. *Id.* at 272-73.

265. *Id.* at 273. The nine judges were spread over a six-state region and many, for various legitimate reasons, had restrictions imposed regarding which judges they could sit with or which cases they could hear.

266. According to Jones' diary, Mr. Wadsworth was apparently distressed to the point of illness. He told Judge Jones that he feared for his job. He remarked that the first clerk of the court had committed suicide. Jones had little patience for what he described as the "weakness of the Clerk." He did not appreciate Wadsworth's putting "security ahead of duty." In a phone call a few days

spoken with Judge Rives.²⁶⁷ Later that same day, Wadsworth phoned the Judge and answered his question. Yes, Judge Brown had given him instructions regarding race cases which he had followed.²⁶⁸

The following day, August 9, brought a six-page letter from Griffin Bell to his fellow judges.²⁶⁹ Judge Bell was incensed at an article published in the *Houston Chronicle*.²⁷⁰ The article talked about Cameron's charges, grouping Bell, Gewin and Jones together with Cameron. The focus of his ire was a quote from Judge Rives that "Chief Judge Tuttle has the responsibility to appoint judges who will follow the law honestly and fairly without prejudice."²⁷¹ He felt that this and other quotes from unnamed sources were a direct affront to his honor. He bitterly noted that the "code duello has been outlawed" leaving him without redress.²⁷² The second half of his letter took a more conciliatory tone and called upon his brethren to work together to restore the integrity of the court.²⁷³

The letter from Bell galvanized the court. Jones had asked the clerk to prepare a detailed report on judge assignments which Wadsworth was busy compiling. Initially, Judge Jones was very suspicious of Judge Brown's activities and even imagined that Brown might direct Wadsworth on how to draft his report. After receiving the report and talking to Wadsworth again, however, he was satisfied that Brown had not interfered in the drafting process. Before Wadsworth turned over the report, Judge Rives phoned to ask whether, as a personal favor to him, Judge Jones would forego seeing the report at least until

later, Wadsworth assured Jones that he was prepared to tell the whole truth. He regretted that he had allowed "Judge Brown to use him." Jones recounted that, according to Wadsworth, Judge Brown had intimated that he would be Chief Judge one day and Wadsworth had better accustom himself to following his orders. Judge Rives later reported to Jones that Wadsworth, ostensibly due to the strain from the scandal, was under the care of a psychiatrist.

A draft of this paper was also provided to Mr. Wadsworth. Wadsworth did not contact the authors, but did telephone Judge Wisdom with comments. Judge Wisdom related that in a phone conversation with Professor Brown on September 22, 1997, Wadsworth denied making the above comments that Jones attributed to him.

267. Chief Judge Tuttle was out of town at the time and could not be reached. Judge Rives was the next most senior judge on the circuit having served as chief judge just prior to Tuttle.

268. In his "Court-packing" Diary entry dated August 7, 1963, Judge Jones described his telephone conversation with clerk Wadsworth:

I thought he could give me a direct answer to the question, which I read to him, and which he copied; "Did Judge Brown direct or suggest that any segregation or other civil rights cases be assigned to or kept from any particular panels or judges, and if so had [clerk Wadsworth] followed the direction or suggestion?" He said he could answer that question and the answer was "yes."

269. Letter from Griffin Bell to all Fifth Circuit judges (Aug. 8, 1963) (on file with William W. Shakely).

270. See Friedman, *supra* note 49, at 1.

271. Letter from Griffin Bell (Aug. 8, 1963), at 2. Judge Rives was apparently referring to Judge Tuttle's unwillingness to appoint Judge Cameron to race cases in Mississippi. See *supra* note 248.

272. Letter from Griffin Bell (Aug. 8, 1963), at 2.

273. *Id.* at 4.

Rives could speak with Judge Tuttle. He admitted to Judge Jones that the report showed a "worse condition" than he had anticipated. Jones was annoyed but anxious to receive the information. He agreed to wait the weekend, but wrote in his diary "[i]f I do not get the information requested, I will consider whether to ask a member of Senator Eastland's staff to meet me in New Orleans."²⁷⁴

In the days following the media accounts of the accusations, Jones' papers reveal a considerable amount of correspondence among the judges by phone, note and letter. Their communications centered around three central themes. First, the "conservative" judges felt that the press and principally the Houston Chronicle had impugned their reputations as honest judges. The newspaper articles contained quotes from Judges Rives and Wisdom²⁷⁵ as well as an "unnamed source" and a "judge eager to talk but not to have his name used."²⁷⁶ These judges felt that no judge should be speaking with the press, particularly not anonymously. More importantly, they believed they had been slandered, not just by the press, but by their brothers.²⁷⁷ Second, the judges seemed concerned over the future of their fractured court and spoke sincerely about the need to overcome their personal conflicts in the interest of the greater good. Finally, there were many suggestions and proposals for changing court procedures on everything from case assignments to designation of the chief judge.²⁷⁸

274. Judge Jones was, by this time, convinced that there had been improper conduct. He was prone to write poetry and penned these lines in his diary:

The line is stretched on the courthouse square
 The linen of the court is hanging there
 It hangs up there soiled though we like it not
 Though we clamor loudly "Out damned spot"
 We called the press and now and then
 We named as "rebel" our Brother Ben
 Denied his charges when in truth and fact
 The record shows the court was packed
 * * * *

We ought, I think, admit our wrong
 Without delaying overlong
 Hoping with hope that light of day
 Will purge and wash our sins away
 Will bleach from robes the latent stain
 And lift from hearts the troubled pain

Jones Diary, *supra* note 2, August 8, 1963.

275. Judge Wisdom simply stated that the case assignments were made by "pure chance." See *supra* note 254.

276. In a letter to the Judges, Judge Jones dubbed these two gentlemen "Mr. Source" and "Judge Eager." Letter to all Fifth Circuit Judges (Aug. 15, 1963).

277. Judge Jones' August 15 letter began, "I was wounded in the house of my brothers." Protesting his classification in the press as a "dissenter" against "The Four," he claimed that he had not dissented except in *Reed v. Pearson*. See *supra* notes 113-116 and accompanying text. "Perhaps the 'Four' should be the 4¼ or even the 4½," he quipped.

278. Judge Bell spoke to Jones about the possibility of asking Congress to change the statute, which designated the chief judge by seniority, to provide for an election of the chief by the other

There was talk of calling a meeting. Judge Tuttle was in Colorado with his wife where he was vacationing after attending a conference. There had been much discussion among the judges about asking the Chief Judge to return home in this time of crisis. Jones phoned Cameron who seemed surprised that his dissent had opened such a Pandora's box. Cameron told Jones that he regretted setting off Eastland's investigation which was apparently making the judges more uncomfortable with each passing day.²⁷⁹ Judge Cameron had been ill, and Jones inquired after his health. He mentioned that they were considering convening the judges to discuss the matter and asked whether they should delay the meeting to allow Cameron to recuperate. Judge Cameron replied that they should not delay on his account; he feared that the stress from such a meeting might send him home "feet first."

On August 14, Judge Jones received a notice calling a conference of the judges for August 22 and 23 in Houston. The apparent purpose of the meeting was to resolve the allegations by allowing those accused of packing panels to explain their behavior. Presumably, it would also allow the judges to take steps designed to prevent a recurrence. Two days later, Judge Tuttle phoned Jones from Colorado to ask if he would meet him in Houston on the twenty-first to discuss the matter. Because Judge Jones had been the one to seek information on the charges from the clerk, he found himself cast in the role of prosecutor. He did not care for this role but agreed to meet with Judge Tuttle before the conference.

On the twenty-first, Judges Tuttle and Jones met at the Shamrock Hotel in Houston. By Judge Jones' account, Judge Tuttle felt that Cameron's charges were part of a personal vendetta against him. He believed that Judge Cameron was angry because Tuttle had thwarted his attempts to "isolate Mississippi from the impact of civil rights." He discussed with Jones the various occasions when he had made special assignments and explained his reasons. He also told Jones that Brown may have made some mistakes and that he hoped Brown could "talk himself out of what looks to be a rather damaging set of circumstances." In his notes from that day, Jones speculated to himself that Brown would claim that Wadsworth's recollections were inaccurate. He also believed that Wadsworth would admit to a faulty memory.²⁸⁰

judges. Because Judge Bell felt so strongly that Judge Brown should be relieved of his duties as assignments judge, it may be that he wanted this change to avoid Judge Brown's succeeding to the chief's position.

279. Evidently, Eastland's investigators were delving into the judges' personal affairs in hopes of uncovering information which would support impeachment. See Bass, *supra* note 7, at 241.

280. According to Jones' account of the meeting, this is precisely what occurred. Months later, after yet another disagreement among the judges about assignments, Jones mused "[i]n thinking back over our Houston meeting, I begin to become somewhat amazed that John Brown contented himself with a base statement that Ed Wadsworth did not accurately remember and that he, Brown, had not made the statements which Wadsworth had attributed to him. . . . If the Clerk was found to be a bearer of false witness he should be discharged." Jones Diary, *supra* note 2, November 8, 1963.

The conference on August 22 opened with a prayer offered by Judge Rives; on the twenty-third, Judge Gewin closed with a prayer. In between the praying came some tense moments, some startling proposals and a difficult accord. Judge Tuttle began by expressing his annoyance with Judge Cameron for plunging the court into public turmoil. He explained his own actions regarding case assignments. He referred mainly to three-judge district courts in Mississippi and defended his refusal to appoint Mississippi judges to cases where he felt certain the law would not be followed. He went on to discuss various scheduling difficulties such as Cameron's refusal to sit on panels with Tuttle, and Gewin and Bell's exclusion from race cases during their interim appointments.²⁸¹

The conversation turned to Judge Brown. Bell asked why he had not been assigned to his share of race cases and Brown could not answer. Judge Brown asserted that all the undocumented orders which Wadsworth attributed to him were in error. In Wadsworth's cover letter to his report, he said that Brown had given him advice and suggestions that Cameron, Gewin and Bell should not be placed on race case panels. He had never received instructions from either Tuttle or Brown to exclude Jones from any case. Jones describes Brown's response as "attempting to exculpate himself" regarding various cases. For himself, Jones was unconvinced. "He had a large burden and I don't think he carried it" wrote Jones.

But there was still the matter of the written memoranda. Handwritten notes on certain court papers showed that Brown was, at a minimum, choosing specific panels for race cases such as the Houston school desegregation case.²⁸² The most damaging piece of evidence, however, was a typed memorandum from Brown to Wadsworth dated February 9, 1962. This memo, on Brown's personalized judicial notepaper, reads:

Dear Ed:

For your confidential use, I suggest that none of the touchy cases be assigned for the week of June 4. They can easily be distributed through earlier weeks.

Sincerely,
J.R.B.²⁸³

281. Judge Tuttle had requested that these two judges not be assigned to controversial cases during their interim appointments, October 5, 1961 through February 9, 1962, to protect them from problems with their Senate confirmations. See Read & McGough, *supra* note 7, at 273. In a personal interview, Judge Bell stated that he had not known at the time about this attempt to protect him from controversial cases and found the situation embarrassing. Interview by Allison Lee and Jay Brown with Griffin Bell, former United States Attorney General and judge on the Fifth Circuit Court of Appeals in Atlanta, Ga. (January 12, 1998).

282. In a memo from Brown to Wadsworth dated July 31, 1962, Brown wrote "Ed, Before the Houston school segregation case is fixed on the calendar, let me know so I can give you some suggestions."

283. A copy of this memo is attached to Wadsworth's report and included in Jones' file.

Wadsworth confirmed in a letter to Judge Bell prior to the meeting that the June 4 panel consisted of Cameron, Gewin, and Bell.²⁸⁴ Brown explained that he was continuing to protect Gewin and Bell from controversial cases prior to their confirmations. But, Jones noted, they had actually been confirmed days earlier than the date of the memo, and in any event would have surely have been confirmed by June.²⁸⁵ Judge Brown offered no further explanation.

Evidently, the conversation among the judges became heated at times with Judge Bell suggesting that Judge Brown relinquish his assignment duties to Judge Tuttle. Judge Gewin complained that he and Judge Bell had been "under the guardianship" of The Four, but sought to soothe tempers by declaring his personal affection for all of the judges on the circuit. The judges proceeded to discuss whether and under what circumstances Judge Brown might be retained as assignments judge, a clear indication that his protestations of innocence were not believed. Judge Rives suggested that the duties be transferred to Jones or Bell. Judge Wisdom encouraged the council to continue with Brown. They could not reach consensus, and turned to various other issues.

Judge Rives expressed his opinion that Judge Tuttle had not abused his discretion in setting three-judge district courts in Mississippi. Judge Tuttle indicated that he would adopt normal procedures in Mississippi, but would not relinquish his discretion in particular cases. The judges did not seem overly concerned about the three-judge cases. Judge Gewin implored the other judges to show tolerance for "Mr. Ben."

The Judges knew that a statement would have to be made to the press. They also knew that it would be difficult to reach an accord on the content of the statement. Judge Rives suggested that Jones, Gewin and Bell work together that evening on a statement. Judge Jones did not wish to be pegged into a particular "faction," but agreed to help. That evening Jones, Gewin and Bell discussed both the form of the statement to the press and their opinions on how assignments should be made in the future to guard against any possible abuse of the system. Judge Jones did not retire until after midnight.

According to Jones' notes, Judge Tuttle opened the discussion the following morning saying that it was he who was charged by Cameron, Eastland, and the press with court-packing. If his colleagues desired it, he would step down as chief judge in favor of Judge Jones.²⁸⁶ In an emotional monologue, he spoke of his family and his reputation.²⁸⁷ None of the judges appeared to support replacing Judge Tuttle.

284. Letter from Edward Wadsworth to Griffin Bell (Aug. 20, 1963).

285. See *supra* note 282. Their interim appointments expired on Feb. 9. Jones described this memo from Brown as a "stupid blunder" for which no satisfactory explanation was forthcoming.

286. Jones was the next most senior judge on the court. Judge Rives, who been on the court longer than both Tuttle and Jones, had already served as chief judge.

287. Jones notes taken contemporaneously at the meeting as well as his diary written to summarize events at the end of each day mentions this discussion by Tuttle. Neither Judge Bell nor Judge Wisdom, however, recall Judge Tuttle offering to step down.

Like many meetings with several attendees and agendas, the issues seemed to bounce around in a desultory fashion. Throughout the proceeding, concern existed over the public characterization of the meeting. Judges Gewin and Bell continued to protest that they were not "unwilling to follow the constitution." Judge Rives requested that all of the judges return their copies of Wadsworth's report. Judge Jones objected. He was offended that the judges should not be trusted with reports prepared for them by their own clerk. It was agreed, however, that any extra copies, along with stencils, would be given to Judge Tuttle who would burn them in his backyard.²⁸⁸

The judges again debated whether or not Judge Brown should continue making assignments. Judges Jones and Bell felt he had violated an important trust. He again brought up the unexplained memo of February 9. According to Jones, Brown was "abject in his penitent apologies and profuse in his promises of good behavior."²⁸⁹ During lunch, Jones expressed to Gewin and Bell that Brown had the support of the other members of the court and in the interest of harmony he would support his retention. He was personally convinced that Judge Brown had no intention of engaging in further improper behavior. He encouraged the judges to join him in support of Judge Brown for the good of the court. When they reconvened, Judge Jones moved to retain Brown as assignments judge. To his surprise, Judge Bell seconded the motion. They all agreed to a set of procedures that would ensure that cases were assigned to calendars without knowledge of who the panel members were.

In this spirit of accord, the meeting progressed to the issue of a press statement. Judges Tuttle, Wisdom, and Rives all advocated a statement which made no admission of wrongdoing. Judge Jones thought this idea "absurd in view of the facts." In his words, they eventually agreed upon a "weasel worded" statement.²⁹⁰ The judges all agreed that they would make no further statements to the press or Eastland's investigators.²⁹¹ With tensions subsided and much relief, they shook hands all around and adjourned with a prayer from Judge Gewin.

288. Twice that day Jones referred to Judge Tuttle's intention to burn the papers. Each time he expressed his disapproval. "I think a federal judge is engaged in an unseemly occupation burning papers in his back yard or elsewhere in view of the multitudes." Jones Diary, *supra* note 2, August 23, 1963.

289. Judge Wisdom does not agree with Jones' characterization of Brown's attitude at the meeting. Judge Bell, when asked about Brown's response to the charges at the meeting, simply recalls that Judge Brown "did not deny" the charges.

290. See *supra* note 261 and accompanying text. Judge Jones wrote "I was surprised that a group of grown men would foist such a conglomerate of meaningless phrasing upon the public. But I suspect the interest of the press has waned, and I hope none of the few newspaper men of intelligence will ridicule us for our absurdities." Among Judge Jones' papers from the meeting he kept a cartoon: A portly boss looks across the desk at his subordinate and says "Well, if we made a blunder, Argyle, don't just stand there—label it 'Top Secret' and file it away!"

291. If a particular judge was asked a question by Eastland's investigator, they were to defer to the entire court for an answer.

The first order of business after the Houston conference was to deal with the Eastland investigation. According to Jones' notes, a "deal" had been struck between Cameron and the other judges that Cameron would replace Judge Wisdom on a particular Mississippi three-judge court²⁹² and, in exchange, Cameron would get his friend Eastland to stop the investigation. From interviews with Judges Wisdom and Bell, it appears that Judge Wisdom's resignation was not part of an explicit quid pro quo with Cameron relating to the Eastland investigation. Rather, it was more of a conciliatory gesture offered as an afterthought by Judge Wisdom to help ease Judge Tuttle's burden in restoring the collegiality of the court. Jones' notes covering the two-day conference do not mention anywhere a discussion about a "deal" with Cameron. His diary makes clear, however, that Jones, for whatever reason, did later come to view the resignation as part of a bargain with Cameron.²⁹³

In a telephone conversation with Jones, Cameron asked him to call Eastland for him. Because of his fragile health, Cameron feared that his conversation might cause a set back.²⁹⁴ Jones was not willing to risk the indiscretion of asking a Senator to halt a judicial investigation. Cameron decided to make the call himself. He reported back to Jones later that day Eastland would postpone the investigation and would probably allow it to simply die out. Once Judge Wisdom formally resigned from the panel and Cameron was appointed, Cameron sought to ensure the end of the investigation.²⁹⁵ He drafted a letter to Eastland and called Jones for his advice. Judge Jones "suggested that the things he proposed to write ought not to be put in a letter as it savored of quashing an investigation upon terms." Judge Cameron agreed and phoned Eastland instead, reading him the letter he had written.

Senator Eastland agreed to quash the investigation. According to Jones' notes, he unabashedly cautioned Cameron that because he had received letters urging an investigation from all fifty states, he would continue to lead the press to believe that the quest was on. For the time being Eastland had what he wanted, which was some vindication of Cameron in Mississippi, and he was satisfied. With this last issue resolved, the judges closed the book on a painful chapter in the history of their court.

292. *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965) (reversing Judges Cameron and Cox who dismissed this voter registration case brought by the Attorney General and following the reasoning in Judge Brown's dissent).

293. In his diary, Judge Jones, referring to Judge Tuttle's order approving Judge Wisdom's request to be removed from the three-judge court, wrote that it "carries out the deal with Cameron made to stop the investigation of panel packing by the Eastland Committee." "Court-packing" Diary, *supra* note 55, entry at Sept. 13, 1963.

294. It is not clear from Jones' description whether Judge Cameron was angry with Eastland and feared losing his temper or simply reluctant to cover such sensitive ground with the Senator.

295. Jones' papers indicate that Eastland's investigator in New Orleans had struck "pay dirt" and that the information was connected to "our Judge in Louisiana." This would, most likely, refer to Judge Wisdom. Nothing was said as to exactly what might have been uncovered.

IV. CONCLUSION

Judge Jones' records reflect that, over the next couple of years, the judges continued to have occasional disagreements over various court procedures.²⁹⁶ Nevertheless, for the most part, the judges of the Fifth Circuit had managed to mend their tattered court.²⁹⁷ Judge Jones, with his strong sense of judicial propriety, was perhaps the person most responsible for the Houston Conference and the efforts to get to the bottom of the court packing allegations. Much of the Fifth Circuit's success in the end arose out of the appearance that the court acted as dispassionate decision-maker, carrying out the mandate of the Supreme Court.²⁹⁸ Anything that threatened that reputation—as Cameron's allegations clearly did—would have caused a loss of credibility and greater difficulty in ensuring compliance with court orders. Judge Jones made certain that the propriety of the process was maintained, even if the short-term effect was hardship on some plaintiffs in particular cases. Ironically, getting to the truth and ending the practice of packing panels, without harming the image of his court, may have been his most pronounced contribution to the civil rights movement.

Given the deep ideological differences among these judges during this historic period, it's fair to say that their ability to find any common ground was far more remarkable than their highly publicized disputes. The southern way of life was dying out. A new progressive reform was moving in. The drama of the times was played out against this backdrop of divisive philosophies and fragile accords. The Fifth Circuit judges personified a microcosm of these two worlds, old and new, but Judge Jones did not squarely belong in either world. His singular role on the court landed him in a precarious position in precarious times. But through this he acquitted himself with grace and aplomb. Warren Jones was a man who, for better or for worse, spoke his mind, tried to follow the law, respected his colleagues and enjoyed life along the way.

296. In fact, at one point Jones became so exasperated with what he perceived as Brown's disregard for their "Houston Accord" that he told Cameron he should give his "court packing" file to Eastland for use in helping defeat the civil rights legislation currently before Congress. He most likely had reference to the Civil Rights Act of 1964. He, of course, did not follow through with this and there is no indication anywhere in his papers that he ever gave the idea serious consideration.

297. Both Judge Wisdom and Judge Bell, in interviews, emphasized that the Houston Conference brought closure and accord to the individual conflicts among the judges. *See supra* note 10.

298. In a personal interview, Judge Bell spoke of the "practice" of panel packing and that "it had to be stopped." Bell, however, said that he would have preferred to handle the problem internally, rather than through public accusations as Cameron had done. "Can you imagine how the people of the South would have reacted back then if they had known that panels were being packed on race cases? It was a difficult and volatile time for this issue and for our court." Interview by Allison Lee with Griffin Bell, former United States Attorney General and judge of the Fifth Circuit Court of Appeals in Atlanta, Ga. (January 12, 1998).