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# Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.

David J. Garrow<sup>†</sup>

John Minor Wisdom and Frank M. Johnson, Jr., each served as Southern federal judges for over forty years, and each died in 1999.<sup>1</sup> Both were lifelong Republicans—Wisdom from New Orleans, Louisiana, and Johnson from Winston County, Alabama—whose appointments to the federal bench stemmed from their active support of Dwight D. Eisenhower in the presidential campaign of 1952.<sup>2</sup> Both eventually became justly famous for rulings that desegregated Southern voter registration rolls and previously all-white public schools.

Although their twin legacies share many resplendent parallels, history also reflects significant differences between them. Wisdom's historical reputation as an unusually gifted appellate judge rests upon the remarkably direct and muscular prose that graced his hundreds of opinions for the Fifth Circuit Court of Appeals.<sup>3</sup> Johnson's prestige as a district judge is grounded

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1. See Jack Bass, *John Minor Wisdom, Appeals Court Judge Who Helped To End Segregation, Dies at 93*, N.Y. TIMES, May 16, 1999, at 45; Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES, July 24, 1999, at A12; John Pope, *Judge John Minor Wisdom Dies; Decisions Helped Shape Civil Rights Movement*, TIMES-PICAYUNE (New Orleans), May 16, 1999, at A1.

2. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 80-81, 87-88 (1993); FRANK SIKORA, *THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR.* 8-9 (1992); Joel Wm. Friedman, *John Minor Wisdom's Battle Against the Political Bosses To Create a Two-Party System in Louisiana*, 69 TUL. L. REV. 1439 (1995); Joel William Friedman, *Judge Wisdom and the 1952 Republican National Convention: Ensuring Victory for Eisenhower and a Two-Party System for Louisiana*, 53 WASH. & LEE L. REV. 33 (1996); see also JOHN M. SPIVACK, *RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT* 59, 127-28, 206 n.17 (1990); Richard B. Stone, *Birth of a Party: How Louisiana's New Republicans Beat the Bosses*, 1 HARV. REV. 55 (1963); Scott Andrew Goidel, *Racism and the Rise of the Louisiana Republican Party: John Minor Wisdom's Biracial Coalition v. Goldwater's Southern Strategy* 16-27 (1984) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Library).

3. For a statistical review that predates the last three and a half years of Wisdom's service, see Henry T. Greely, *Quantitative Analysis of a Judicial Career: A Case Study of Judge John Minor Wisdom*, 53 WASH. & LEE L. REV. 99 (1996).

on the notable trials he conducted and the ensuing enforcement orders he issued rather than on the prose he employed in rendering them.

But notable complexities mark both men's judicial careers. Judge Wisdom's opinions and remembrances indicate that he underwent a significant ideological evolution over the course of his first nine years on the Fifth Circuit. Even more dramatically, a comprehensive look at Judge Johnson's years in the Middle District of Alabama reveals that rather than personifying liberal judicial activism as some observers have presumed, Johnson instead was an idealistic but resolutely nonideological judicial pragmatist. When occasions presented themselves, he could be just as tough on civil rights proponents as on white segregationists, and he readily applied the same hard ruler for measuring the constitutional misdeeds of racially discriminatory black executives that he previously had employed when analyzing the unconstitutional conduct of white registrars.

Wisdom and Johnson will both go down in history as exceptional jurists who played major roles in imposing the federal rule of law on a region where thousands of white public officials willfully defied or shirked their responsibilities for more than a decade. But neither Wisdom nor Johnson should be reduced to a more simplistic or partisan figure than he actually was.

John Minor Wisdom's fame as the Fifth Circuit's—and indeed, the entire federal judiciary's—foremost voice on behalf of civil rights rests predominantly on a trio of mid-1960s opinions concerning voting rights, the Ku Klux Klan, and school desegregation. On voting rights, a pair of trial-court decisions rendered by Frank Johnson in 1961 and 1962<sup>4</sup> paved the way for Wisdom's own landmark ruling in *United States v. Louisiana*<sup>5</sup> in November 1963. New federal provisions protecting black Southerners' constitutional rights to register and vote free of racial discrimination had been adopted as part of both the Civil Rights Act of 1957 and the Civil Rights Act of 1960, but as of late 1963, the U.S. Department of Justice and Southern federal courts had been largely unable to break up the logjam of discriminatory registration practices employed by local white registrars to keep the vast majority of voting-age black Southerners off the rolls.<sup>6</sup> Writing on behalf of the majority on a special three-judge district court in the Eastern District of Louisiana, Wisdom rejected the State of Louisiana's effort to institute a new, objective, and very difficult citizenship test for voter-registration applicants in place of the vague and standardless

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4. See *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962); *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961).

5. 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

6. See generally DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 6-30 (1978); CHARLES V. HAMILTON, *THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS* 88-227 (1973); STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 250-87 (1976).

constitutional "interpretation" test that Louisiana's white registrars had previously used with utterly devastating discretionary effect to disenfranchise tens of thousands of prospective black (but rarely, if ever, white) voters. "[T]he new test, or any other procedure more demanding than those previously applied to the white applicants, will have the effect of perpetuating the differences created by discriminatory practices of the past,"<sup>7</sup> he observed. "An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment."<sup>8</sup> Implementation of the tough new test would "freeze the results of past illegal practices" by keeping Louisiana's electorate predominantly white.<sup>9</sup> Thus, unregistered black voter applicants should now be "judged by the same standards used in qualifying those persons already registered" rather than by the far more demanding standards that Louisiana sought to impose.<sup>10</sup> Wisdom's articulation of what came to be called the "freezing principle" or "freezing doctrine"<sup>11</sup> was upheld by the U.S. Supreme Court in March 1965,<sup>12</sup> but congressional passage and executive-branch implementation of the Voting Rights Act of 1965 in midsummer of that year swept aside the evolving regime of case-by-case judicial enforcement.

Next to the Selma, Alabama protests that directly spurred adoption of the Voting Rights Act,<sup>13</sup> the most intense Southern civil rights "hot spot" of 1965 was Bogalusa, Louisiana, where militant black activists were confronted by Louisiana's largest and most energetic Ku Klux Klan klavern.<sup>14</sup> The U.S. Department of Justice moved for an injunction against the Bogalusa Klan, and a special three-judge district court headed by John Minor Wisdom issued the requested order. Wisdom's opinion began by forthrightly declaring that "[t]his is an action by the Nation against a klan."<sup>15</sup> Then, with what the foremost historian of the Louisiana movement has correctly called "historical insight, literary style, and moral principle,"<sup>16</sup> Wisdom proceeded to offer a *tour de force* treatment of the

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7. *United States v. Louisiana*, 225 F. Supp. at 393; *see also* *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964).

8. *United States v. Louisiana*, 225 F. Supp. at 393.

9. *Id.* at 394 (emphasis omitted).

10. *Id.* at 397.

11. *See* GARROW, *supra* note 6, at 26-27; Armand Derfner, *Racial Discrimination and the Right To Vote*, 26 VAND. L. REV. 523, 546-47 (1973); *see also* Local 189, *United Papermakers v. United States*, 416 F.2d 980, 990 (5th Cir. 1969) (Wisdom, J.) (discussing "the problem of dealing with change in [a] system that is apparently fair on its face but in fact freezes into the system advantages to whites and disadvantages to Negroes").

12. *See Louisiana v. United States*, 380 U.S. 145 (1965).

13. *See generally* GARROW, *supra* note 6, at 78-160.

14. *See* ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972*, at 344-80 (1995).

15. *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 334 (E.D. La. 1965).

16. FAIRCLOUGH, *supra* note 14, at 372.

Klan's heinous history of violence and intimidation. "The compulsion within the klan to engage in this unlawful conduct is inherent in the nature of the klan. This is its ineradicable evil."<sup>17</sup> Wisdom denounced the "absolute evil inherent in any secret order holding itself above the law" and asserted that "violence and crime follow as the night the day when masked men conspire against society itself."<sup>18</sup> The court not only enjoined the Klansmen from intimidation and threats, but it also required the Bogalusa Klan to file monthly reports detailing its meetings and membership. As Fairclough reports, the court-ordered publicity "punctured the Klan's mystique and eroded its power to intimidate" either black activists or white moderates.<sup>19</sup>

Without a doubt, however, far and away the most famous and substantively important of all of John Minor Wisdom's appellate opinions on civil rights was his lengthy analysis of school-desegregation law in *United States v. Jefferson County Board of Education*<sup>20</sup> in December 1966. In earlier years, he had been hesitant to push school desegregation too far too fast. "When a case involves the administration of a state's schools, as federal judges we try to sit on our hands," Wisdom wrote on behalf of one thoroughly liberal Fifth Circuit panel in 1962.<sup>21</sup> In mid-1965, however, ten years after the Supreme Court's second ruling in *Brown v. Board of Education* had ordered segregated school districts to move with "all deliberate speed" toward operating "racially nondiscriminatory" schools,<sup>22</sup> Wisdom declared in *Singleton v. Jackson Municipal Separate School*

17. *Original Knights of the Ku Klux Klan*, 250 F. Supp. at 334.

18. *Id.* at 335.

19. FAIRCLOUGH, *supra* note 14, at 373.

20. 372 F.2d 836 (5th Cir. 1966); see also Joel Wm. Friedman, *John Minor Wisdom: The Noblest Tullanian of Them All*, 74 TUL. L. REV. 1, 28 (1999) (terming *Jefferson County* "the opinion which, in Wisdom's own judgment, was the most important of his career"). On the length of Wisdom's opinions, see DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT AND THE POLITICS OF JUDICIAL REFORM* 108 (1988), which quotes Wisdom as writing to William J. Brennan, Jr., in a letter dated July 16, 1964, "This is a longer letter than I started out to write. My opinions always turn out that way too. I can't understand it." In his *Jefferson County* opinion, he also volunteered that he and his colleagues "for years have gone to bed and waked up with school segregation problems on their minds." *Jefferson County Bd. of Educ.*, 372 F.2d at 858.

21. *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 501 (5th Cir. 1962). Also on the panel were Circuit Judges Richard T. Rives and John R. Brown, who one year later, along with Wisdom and Chief Judge Elbert P. Tuttle, were publicly labeled as "The Four"—that is, the four consistent judicial proponents of civil rights enforcement—by one of their dissenting brethren. *Armstrong v. Board of Educ.*, 323 F.2d 333, 353 n.1 (5th Cir. 1963) (Cameron, J., dissenting); see also BARROW & WALKER, *supra* note 20, at 40-41, 55-61; JACK BASS, *UNLIKELY HEROES* 235-47 (1981); HARVEY C. COUCH, *A HISTORY OF THE FIFTH CIRCUIT, 1891-1981*, at 120-22 (1984); FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 266-76 (1978); Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 116 n.134a (1963). In particular, see Allison Herren Lee et al., *Judge Warren L. Jones and the Supreme Court of Dixie*, 59 LA. L. REV. 209, 242-51 (1998).

22. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (ruling on relief); see also *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954).

*District* that “[t]he time has come for footdragging public school boards to move with celerity toward desegregation.”<sup>23</sup> The most important judicial stimulus for such footdragging had come from the influential Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, John J. Parker. When *Briggs v. Elliott*, one of the cases that constituted *Brown*, had been remanded to a special three-judge district court, Parker composed a severely limiting analysis of *Brown* that became widely famous as the “*Briggs dictum*.”<sup>24</sup> Declaring that “it is important that we point out exactly what the Supreme Court has decided and what it has not decided” in the *Brown* cases, Parker explained that

[i]t has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This . . . the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.<sup>25</sup>

In *Singleton* in mid-1965, however, John Wisdom asserted that “the second *Brown* opinion clearly imposes on public school authorities the duty to provide an integrated school system” and declared that Parker’s dictum “should be laid to rest. It is inconsistent with *Brown*.”<sup>26</sup> Convinced that the

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23. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 729 (5th Cir. 1965); see also *Bynum v. Schiro*, 219 F. Supp. 204, 206 (E.D. La. 1963) (Wisdom, J.) (stating that “gradual desegregation in the name of ‘deliberate speed’ has no application to a municipal auditorium or to other publicly owned or operated facilities presenting none of the administrative problems inherent in remaking a public school system”); *The Department of Justice and the Civil Rights Act of 1964: A Symposium*, 26 PAC. L.J. 765, 775 (1995) (recording Wisdom’s remark during a panel discussion that “[a]ll deliberate speed” meant all deliberation and no speed”); Gregory Roberts, *Judge John Minor Wisdom*, TIMES-PICAYUNE (New Orleans), Aug. 21, 1983, *Dixie Magazine*, at 8 (quoting Wisdom’s statement that *Brown*’s use of “all deliberate speed . . . was just like issuing a license to school boards to take their time, and drag their heels, and that’s what they all did”).

24. See J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*—THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978, at 81-82, 113 (1979).

25. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

26. *Singleton*, 348 F.2d at 730 n.5; see also *Jackson Mun. Separate Sch. Dist. v. Evers*, 357 F.2d 653, 654 (5th Cir. 1966); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 355 F.2d 865, 869-70 (5th Cir. 1966).

lower federal courts' implementation of *Brown* "has not worked out well,"<sup>27</sup> in part because "there are so few Supreme Court decisions on school desegregation that inferior courts must improvise,"<sup>28</sup> Wisdom concluded that the Fifth Circuit had no choice but to be "forced into a policy-making position."<sup>29</sup> The *Jefferson County* case, involving the public schools in Birmingham, Alabama, and heard by a panel comprising Wisdom, fellow appellate judge Homer Thornberry of Texas, and ultra-conservative Mississippi U.S. District Judge William Harold Cox, became the means by which Wisdom chose to tackle the questions that the U.S. Supreme Court had so far left unresolved.<sup>30</sup>

Wisdom reiterated that *Brown's* reading of the Constitution "requires public school systems to integrate"<sup>31</sup> and volunteered that "racial mixing of students is a high priority educational goal."<sup>32</sup> Conceding that "[t]he courts acting alone have failed,"<sup>33</sup> he acknowledged that in part this failure was due to "the slow progress inherent in the judicial adversary process"<sup>34</sup> but that "a misplaced reliance on the *Briggs* dictum" and "a misunderstanding of the *Brown II* mandate" were also at fault.<sup>35</sup> "Case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation,"<sup>36</sup> and "[t]he lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions,"<sup>37</sup> thereby further magnifying the problem.

Early in his opinion, Wisdom announced that the court would "use the words 'integration' and 'desegregation' interchangeably."<sup>38</sup> What *Brown* required was the "complete disestablishment of segregation by converting

27. John Minor Wisdom, *A Southern Judge Looks at Civil Rights*, 42 F.R.D. 437, 457 (1966); see also John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L.J. 411, 420 (1967) [hereinafter Wisdom, *Role of Federal Courts*].

28. Wisdom, *Role of Federal Courts*, *supra* note 27, at 426.

29. *Id.*

30. In an interview given on March 26, 1984, Wisdom explained,

We held up that case for a long time and I gave a great deal of thought to that case. I did my best to bring Harold Cox along. Thornberry concurred in it, and we even got Cox over here [in New Orleans] one day to go over the opinion line by line, word by word and even softened it in a few occasions even though it doesn't read that way. I was hoping to bring him along and we would have a unanimous opinion, but after thinking about it for a long time he dissented.

Michael L. Armitage, *Judge John Minor Wisdom and the Constitutional and Judicial Approaches to Racial Desegregation 50-51* (1984) (unpublished B.A. thesis, Tulane University) (on file with the author) (quoting Wisdom).

31. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 846 (5th Cir. 1966).

32. *Id.* at 847 n.5.

33. *Id.* at 847.

34. *Id.* at 853.

35. *Id.* at 854.

36. *Id.* at 854-55.

37. *Id.* at 861. Wisdom added that "[w]hat Cicero said of an earlier Athens and an earlier Rome is equally applicable today: In Georgia, for example, there should not be one law for Athens and another law for Rome." *Id.*

38. *Id.* at 846 n.5.

the dual system to a nonracial unitary system”<sup>39</sup> that would reflect the “affirmative duty of the state to furnish equal educational opportunities” to children of all races.<sup>40</sup> Employing a phrase that would subsequently become famous, Wisdom said that districts would need to take “affirmative action to reorganize their school systems by integrating the students, faculties, facilities and activities.”<sup>41</sup> Using italics, he stressed that “*the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.*”<sup>42</sup>

In order to pursue “the organized undoing of the effects of past segregation,”<sup>43</sup> it had to be acknowledged that

[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.<sup>44</sup>

Color would have to be utilized in converting still-segregated schools to “a bona fide unitary system where schools are not white schools or Negro schools—just schools.”<sup>45</sup> Appended to Wisdom’s more-than-fifty-page

39. *Id.* at 847 n.5.

40. *Id.* at 848; *see also* Broussard v. Houston Indep. Sch. Dist., 395 F.2d 817, 828 (5th Cir. 1968) (Wisdom, J., dissenting) (“There is a bridge under construction, resting on the Constitution, connecting whites and Negroes and designed to lead the two races, starting with young children, to a harmonious, peaceful, civilized existence. That bridge is a plan for equal educational opportunities for all in an integrated, unitary public school system based on school administrators affirmatively finding ways to make the plan work.”).

41. *Jefferson County Bd. of Educ.*, 372 F.2d at 862. Wisdom added that “[d]enial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system.” *Id.* at 866; *see also* Bass, *supra* note 1 (quoting Wisdom as observing that his *Jefferson County* opinion “really started affirmative action”); Laughlin McDonald, *The Last of the Liberal Lions; Judge John Minor Wisdom Remembered for Pivotal Role in Desegregation*, FULTON COUNTY DAILY REP., June 8, 1999, at 6 (calling Wisdom “the father of affirmative action”).

42. *Jefferson County Bd. of Educ.*, 372 F.2d at 869; *see also* Roberts, *supra* note 23 (quoting Wisdom as saying that “*Jefferson* made it clear that . . . the cure had to be systemwide. The only way to make it systemwide was to assign the pupils on the basis of race to various schools . . . . The only proper remedy is to take affirmative action in favor of the group as a group rather than in favor of the certain individual.”).

43. *Jefferson County Bd. of Educ.*, 372 F.2d at 866.

44. *Id.* at 876; *see also* Board of Pub. Instruction v. Braxton, 402 F.2d 900, 906 (5th Cir. 1968) (Wisdom, J.) (“In some situations, there is no way of undoing the effects of past discrimination except by taking race into account.”).

45. *Jefferson County Bd. of Educ.*, 372 F.2d at 890; *see also* Armitage, *supra* note 30, at 65-66 (quoting Wisdom as stating in a 1984 interview that “when you have a vice inherent in an institution” such that “there is discrimination against the group as a group, . . . the only remedy is to restructure the institution. Now when . . . that restructure takes place it is bound to hurt some persons who are themselves innocent of any discrimination.”).



opinion was a detailed model decree showing Fifth Circuit school systems—and Fifth Circuit district judges—how to implement the new constitutional standards that *Jefferson County* articulated. After “twelve years of snail’s pace progress toward school desegregation,” the federal courts were embarking upon “a new era” in which each district would be required to take “affirmative action to bring about a unitary, non-racial system.”<sup>46</sup>

Three months later, the Fifth Circuit issued an en banc affirmance of Wisdom’s *Jefferson County* opinion and decree,<sup>47</sup> and one year later, the U.S. Supreme Court adopted some of Wisdom’s language verbatim—such as “just schools”—in finally making *Brown*’s mandate real in *Green v. County School Board of New Kent County*.<sup>48</sup> As J. Harvie Wilkinson has stated, “Wisdom’s critical premise . . . that school boards had a positive duty to integrate, not merely to stop segregating,” “transformed the face of school desegregation law.”<sup>49</sup> First *Green* and then *Swann v. Charlotte-Mecklenburg Board of Education*<sup>50</sup> did indeed vault the Supreme Court’s application of *Brown* into “a new era,” and no other judge or Justice in America had played a larger role than John Minor Wisdom in bringing about that new era.

Above and beyond the substance of Wisdom’s landmark rulings on voting rights, the Klan, and school integration, the remarkable and sometimes pungent expressiveness of Wisdom’s opinions cannot help but impress anyone who has the pleasure of reading them.<sup>51</sup> Concurring in a

46. *Jefferson County Bd. of Educ.*, 372 F.2d at 894-96; see also *United States v. Texas Educ. Agency*, 467 F.2d 848, 871, 874 (5th Cir. 1972) (Wisdom, J.) (“[S]chool authorities must convert to a unitary school system—the eradication by affirmative action of all vestiges of segregation. . . . Equal educational opportunity is constitutionally mandated; segregated education deprives the student of equal educational opportunity; segregated education must be ended.”).

47. See *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967) (per curiam) (reiterating the panel opinion’s command that districts have an “affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools”); see also Armitage, *supra* note 30, at 50; *The Department of Justice and the Civil Rights Act of 1964: A Symposium*, *supra* note 23, at 775 (reporting Wisdom’s remark during a panel discussion that “the *Jefferson County* opinion was a long time in the making because I tried hard to win over to our thinking some of the judges on our court who purported to be liberal and doing their duty by the Constitution, but were really fighting a rear-guard action a good part of the way. To them, the *Briggs* dictum was the law.”); John Minor Wisdom, *A Federal Judge in the Deep South: Random Observations*, 35 S.C. L. REV. 503, 509 (1984). Judges Walter Gewin, Griffin Bell, and John Godbold dissented from the eight-judge majority per curiam affirmance, see *Jefferson County Bd. of Educ.*, 380 F.2d at 397, 410, 420, and Judge James P. Coleman filed a “separate opinion,” see *id.* at 417.

48. 391 U.S. 430, 442 (1968); see also SPIVACK, *supra* note 2, at 136 (quoting Wisdom in an interview of July 29, 1977, as observing that “when some courts were undecided what to do about desegregation and were dragging their feet, I think we more or less led the way”).

49. WILKINSON, *supra* note 24, at 111-12; see also BASS, *supra* note 21, at 297-310.

50. 402 U.S. 1 (1971).

51. See Friedman, *supra* note 20, at 9 (noting Wisdom’s “pungent and sometimes caustic Louisiana-flavored rhetoric”); see also *id.* at 24 (observing that Wisdom opinions often featured a “combination of historical research, literary references, and a blunt evaluation of the realistic

1965 en banc decision in which three Fifth Circuit colleagues dissented from an order directed against obstreperous Mississippi U.S. District Judge William Harold Cox, Wisdom apologetically remarked that “[t]oo many opinion-writers are like too many cooks. I brave the danger of spoiling *our* broth only because the savory aroma of the competing dish the dissenters offer conceals its indigestible ingredients.”<sup>52</sup>

Similarly, when those same colleagues in order to “close a chapter” mustered a 1965 en banc majority to dismiss criminal-contempt charges against Mississippi Governor Ross Barnett stemming from the 1962 desegregation of the University of Mississippi, Wisdom responded in dissent that “I doubt whether we have reached the close of the chapter. But I know that we are a long, long way from the end of the book.”<sup>53</sup> And Wisdom’s piquancy did not decline with age. More than thirty years later, in 1998, in one of his last published opinions, he responded to a panel majority that dismissed a challenge to a segregative public school proposal on the grounds that it was “not ripe for review”<sup>54</sup> by insisting that “[t]his case is so bursting with over-ripeness that it emits an unpleasant odor.”<sup>55</sup>

John Minor Wisdom’s consistent impressiveness ought not to obscure the extent to which his political beliefs and judicial behavior evolved over the course of his first decade on the federal bench.<sup>56</sup> One of his most notable opinions in his first three years on the Fifth Circuit was a decisive concurrence in a panel decision affirming the dismissal by U.S. District Judge Frank M. Johnson, Jr. of the petitioners’ complaint in the subsequently well-known “political question” case of *Gomillion v. Lightfoot*.<sup>57</sup> To find the State of Alabama’s blatantly racial gerrymander of newly exclusive boundaries for the city of Tuskegee, Alabama, unconstitutional, Wisdom said, “would compel the Court to go beneath the

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impact of government action on the lives of minority individuals”). In *Labat v. Bennett*, 365 F.2d 698, 701 (5th Cir. 1966), Wisdom began by quoting from Shakespeare’s *Measure for Measure*, act II, scene 2: “The law hath not been dead, though it hath slept.”

52. *United States v. Cox*, 342 F.2d 167, 185 (5th Cir. 1965). Concerning Judge Cox, see Carol Caldwell, *Harold Cox: Still Racist After All These Years*, 1 AM. LAW., July 1979, at 1, 27-29.

53. *United States v. Barnett*, 346 F.2d 99, 105 (5th Cir. 1965).

54. *Valley v. Rapides Parish Sch. Bd.*, 145 F.3d 329, 330 (5th Cir. 1998), *vacated en banc*, 173 F.3d 944 (5th Cir. 1999).

55. *Id.* at 334; see also *Court Sets Aside School-District Formation Ruling*, ADVOCATE (Baton Rouge), Apr. 25, 1999, at B3; *Rapides Parish School Board Asks To Scrap Independent District*, ADVOCATE (Baton Rouge), Apr. 29, 1999, at B4 (reporting that the proposed creation of what Judge Wisdom had termed “the establishment of a school for whites in a public school system,” *Rapides Parish Sch. Bd.*, 145 F.3d at 335, had foundered upon political complexities).

56. See BARROW & WALKER, *supra* note 20, at 77 (quoting Wisdom’s letter to Elbert P. Tuttle, dated March 16, 1964, as noting that “[s]trive as we might to apply what Wechsler calls ‘neutral principles,’ in civil rights cases the personality of the judge is an ineradicable element in the judicial process”).

57. 167 F. Supp. 405 (M.D. Ala. 1958), *aff’d*, 270 F.2d 594 (5th Cir. 1959), *rev’d*, 364 U.S. 339 (1960); see also ROBERT J. NORRELL, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* 118-19, 123-24 (1985).

surface of the law and impute to the legislature an unprofessed subjective intention"<sup>58</sup> that nonetheless was readily visible to all. "Over the long pull, however, I believe that the interests of justice lie in the direction of testing a law in the light of what the law says, not in the light of what the legislature intends."<sup>59</sup> Wisdom added that "federal courts have no mission . . . to find a judicial solution for every political problem presented in a complaint that makes a strong appeal to the sympathies of the court."<sup>60</sup>

Years later, Wisdom willingly volunteered that his *Gomillion* concurrence was "probably my worst opinion"<sup>61</sup> and that "[a] year or two later, I would never have written that opinion."<sup>62</sup> A somewhat similar but even more rapid change took place following a 1962 opinion in which Wisdom referred dismissively to the U.S. Supreme Court's 1941 characterization of the Tenth Amendment as a "truism"<sup>63</sup>—"It may be a 'truism' to some. It is not to us."<sup>64</sup>—but then just eight months later in another opinion in the very same case, Wisdom cited the Court's "truism" characterization affirmatively.<sup>65</sup>

Looking back from the vantage point of the early 1980s, John Minor Wisdom readily acknowledged that "[w]hen I was first appointed to the court, I was much more moderate than I am now. It was a gradual progression in my philosophy. It started before I was on the court but was accelerated once I got on the court and realized what was happening."<sup>66</sup> The centerpiece of his accelerated progression, of course, was school-desegregation law, and by the 1965-1966 period,<sup>67</sup> and even more in the years thereafter, Wisdom came to question whether the federal judiciary's

58. *Gomillion*, 270 F.2d at 615.

59. *Id.*

60. *Id.* at 616.

61. John Minor Wisdom, *One of a Kind*, 71 TEX. L. REV. 913, 916 (1993) [hereinafter Wisdom, *One of a Kind*]; see also John Minor Wisdom, *Tribute to Judge John R. Brown*, 34 HOUS. L. REV. 1519, 1521 (1998). Judge Brown dissented in *Gomillion*, and the Supreme Court's reversal vindicated his position.

62. Roberts, *supra* note 23 (quoting Wisdom).

63. See *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered.")

64. *United States v. Manning*, 206 F. Supp. 623, 625 (W.D. La. 1962).

65. See *United States v. Manning*, 215 F. Supp. 272, 280 (W.D. La. 1963).

66. Roberts, *supra* note 23 (quoting Wisdom); see also SPIVACK, *supra* note 2, at 207 n.24 ("[O]ne source argued that Judge Wisdom did not start his involvement with the desegregation cases as a fire-eating liberal, and that his progressive views were slow to develop."). Spivack interviewed Fifth Circuit Judges Elbert P. Tuttle, Richard T. Rives, John R. Brown, Warren L. Jones, and James P. Coleman in 1977, but agreed not to attribute some particular comments to them by name. See SPIVACK, *supra* note 2, at 205 n.4, 323-24. Spivack adds that "[s]ome of the other judges on the Fifth Circuit Court chafe under the intellectual dominance of Wisdom." *Id.* at 209 n.69; see also Geoff O'Connell, *Wisdom & Courage*, 16 NEW ORLEANS MAG., June 1982, at 50, 58 (quoting Wisdom as saying that "I think I myself developed and changed my views to some extent as my exposure to the realities of the situation increased").

67. See *supra* notes 22-23, 28-30.

early approach to the implementation of *Brown I*<sup>68</sup> had been fundamentally flawed. In 1954, he later remarked in describing himself and fellow lawyer friends in New Orleans, “[a]ll of us expected the decision. And we anticipated no violent or stubborn opposition in the South.”<sup>69</sup> Even after he joined the Fifth Circuit in 1957, in the wake of *Brown II*, Wisdom added, he and other liberal judges like John Brown “[a]t first . . . thought, as many people did, that the Supreme Court’s mandate to desegregate schools with ‘all deliberate speed’ was a statesmanlike decision.”<sup>70</sup>

But with more experience and the passage of time, Wisdom’s views changed dramatically. In retrospect, he said in 1983, “I think all of us would have written our opinions so as to produce much quicker results than were produced” in Southern schools. “In light of history, I think we would have ordered desegregation now and not desegregation with deliberate speed. I don’t know what would have happened, but I think that if we were rewriting our opinions today, I for one would have ordered prompt desegregation, total desegregation.”<sup>71</sup> A year later Wisdom explained why he had come to believe that far more rapid desegregation would have been preferable:

I used to think that it would have been impossible because of the opposition . . . I don’t believe that now because I think that merely gave time for the opponents to get organized . . . [T]he effect of the mandate to desegregate with all deliberate speed . . . was to give time to the opponents of desegregation . . . to, in effect, defeat the mandate in *Brown*.<sup>72</sup>

Over the years, John Minor Wisdom indubitably came to see himself as a judicial champion and proponent of the civil rights revolution.<sup>73</sup> Prominent press portrayals to the contrary notwithstanding,<sup>74</sup> that was *not*

68. 347 U.S. 483 (1954).

69. Wisdom, *supra* note 47, at 505. Wisdom often noted that May 17, the date on which *Brown* was handed down, was his birthday. *See, e.g., id.*

70. Wisdom, *One of a Kind*, *supra* note 61, at 918.

71. Roberts, *supra* note 23 (quoting Wisdom).

72. Armitage, *supra* note 30, at 130 (quoting Wisdom); *see also id.* at 61 (“If I could have been the Supreme Court, I would not have thrown in all the language about ‘all deliberate speed.’ I think there would not have been as much white flight and we would not have had as much disruption if there had been prompt desegregation back in 1954 or ’55.”).

73. Referring to former U.S. Department of Justice Civil Rights Division attorneys John Doar, Burke Marshall, and Owen Fiss, Wisdom confessed that “[i]t was a great, great pleasure to work with them. In fact, I think I worked so closely with them then that if the ethics committee had been an active ethics committee in those days, they might have been after me.” *The Department of Justice and the Civil Rights Act of 1964: A Symposium*, *supra* note 23, at 793.

74. *See, e.g.,* Steven Brill, *The Real Governor of Alabama*, N.Y. MAG., Apr. 26, 1976, at 37; *Interpreter in the Front Line*, TIME, May 12, 1967, at 72 (featuring Judge Johnson on the cover); Lawrence Wright, *Here Comes the Judge*, NEW TIMES, Dec. 9, 1977, at 31; *Bill Moyers’ Journal: Judge: The Law & Frank Johnson* (WNET/Channel Thirteen television broadcasts, July 24 & 31, 1980); *see also* BASS, *supra* note 2; ROBERT FRANCIS KENNEDY, JR., JUDGE FRANK M. JOHNSON,

how Alabama's Frank Johnson viewed his far more visible role in the legal upheavals of the 1960s and 1970s. Praised by Wisdom as "without a doubt the outstanding district judge in the Fifth Circuit,"<sup>75</sup> Johnson nonetheless hewed to a judicial self-image that was decidedly different from the one held by both his defenders and his detractors. "I figure myself to be judicially independent," Johnson told one interviewer. "Not liberal. Not conservative. Not radical."<sup>76</sup> With reference to his many notable rulings, he insisted that "the decisions stand and speak for themselves. I have never thought of myself as a trailblazer or one who sets landmarks. I merely followed the law. I applied the facts to the law and made a decision."<sup>77</sup>

Just like John Minor Wisdom, Frank Johnson confronted a raft of cases involving voting rights, school desegregation, and the Ku Klux Klan. In the voting field, Johnson's very early efforts in the case of *United States v. State of Alabama*,<sup>78</sup> involving Macon County, opened the door to increased black voter registration in the very same locale where the state's efforts to disenfranchise black citizens from municipal voting in the city of Tuskegee had finally been invalidated by the Supreme Court's ruling in *Gomillion v. Lightfoot*.<sup>79</sup> In late 1962, in the Montgomery County voting case of *United States v. Penton*,<sup>80</sup> Johnson pioneered the application of the "freezing doctrine" approach to registration standards that John Minor Wisdom subsequently articulated and affirmed a year later in *United States v. Louisiana*.<sup>81</sup> As Johnson detailed in a subsequent opinion, in order to remedy "the effects of past discrimination against Negro applicants for registration,"<sup>82</sup> the Montgomery County registrars were barred "from using

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JR.: A BIOGRAPHY (1978); SIKORA, *supra* note 2; TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981). These last four titles are the existing biographies of Judge Johnson.

75. Wisdom, *One of a Kind*, *supra* note 61, at 916.

76. Stephen J. Rowe, *Questions & Answers with Judge Frank Johnson*, 52 ALA. LAW. 328, 329 (1991) (quoting Johnson). *But see* Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 901 (1979) ("[J]udicial activism in the defense of constitutional liberty is no threat."); Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 469 (1977) ("The role of the federal courts in deciding constitutional questions is and always has been an activist one.").

77. SIKORA, *supra* note 2, at 329 (quoting Johnson); *see also* Bryan A. Stevenson, *Frank Johnson and the Administration of Criminal Justice*, 52 ALA. LAW. 338, 339 (1991) (describing Johnson as "a jurist who rarely philosophized while making judicial pronouncements").

78. 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated*, 362 U.S. 602 (1960), *on remand*, 188 F. Supp. 759 (M.D. Ala. 1960), 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962) (per curiam); *see also* Alabama *ex rel.* Gallion v. Rogers, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd sub nom.* Dinkins v. Attorney General, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961).

79. *See supra* notes 55-61 and accompanying text; *see also* NORRELL, *supra* note 57, at 117-27, 136. Judge Johnson later noted that "Macon County was the case that began to give blacks the right to vote." SIKORA, *supra* note 2, at 96.

80. 212 F. Supp. 193 (M.D. Ala. 1962).

81. 225 F. Supp. 353 (E.D. La. 1963); *see also supra* notes 5-12 and accompanying text (discussing *United States v. Louisiana*).

82. *United States v. Parker*, 236 F. Supp. 511, 517 (M.D. Ala. 1964).

different and more stringent qualification requirements for registration than those requirements of State law [actually] used by the Board in registering white persons between 1956 and January, 1962.”<sup>83</sup> The registrars’ subsequent use of more demanding standards than those previously imposed would result in “discrimination against Negroes by ‘freezing’ the white voters in the permanent status [of registration] and ‘freezing’ the Negro applicants out.”<sup>84</sup>

Like Wisdom, Frank Johnson also spent a good portion of the mid- and late 1960s wrestling with school-desegregation questions.<sup>85</sup> For Johnson, almost all of the burden came from one exceptional case, *Lee v. Macon County Board of Education*,<sup>86</sup> which, contrary to the implication of its name, quickly came to concern not just one school system but Alabama’s entire array of local school districts. When Alabama Governor George Wallace, a prior adversary of Johnson’s,<sup>87</sup> made the enormous strategic error of trying to block Macon County school desegregation by means of direct state intervention, he allowed the special three-judge district court handling the case to expand its purview to the entire state.<sup>88</sup>

Like Wisdom too, Johnson repeatedly found himself handling what he once termed “another action by the Nation against a Klan.”<sup>89</sup> That 1968 case was far from the first in which Johnson enjoined Klan defendants from further acts of violent intimidation against black citizens seeking to exercise basic constitutional rights; as early as 1961, when Montgomery area Klansmen had conspired with Montgomery city police officials to unleash a violent assault on the first group of interstate “Freedom Riders,” Johnson had acted decisively to suppress racist terrorism.<sup>90</sup>

But in that 1961 Freedom Riders case, Johnson enjoined not only further Klan assaults; he also temporarily restrained Martin Luther King, Jr.

83. *Id.* at 514.

84. *Id.* at 517; *see also* *United States v. Cartwright*, 230 F. Supp. 873, 877 (M.D. Ala. 1964).

85. *See* Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157, 1164 (1970) (“During the past 18 months these cases have occupied approximately 50 percent of my time.”).

86. 221 F. Supp. 297 (M.D. Ala. 1963). Subsequent district court orders and opinions in the case appear at 231 F. Supp. 743 (1964), 253 F. Supp. 727 (1966), 267 F. Supp. 458 (1967), 270 F. Supp. 859 (1967), 283 F. Supp. 194 (1968), 292 F. Supp. 363 (1968), 317 F. Supp. 95 (1970), and 317 F. Supp. 103 (1970). All of the court’s orders were issued as unsigned “per curiam” opinions.

87. *See In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959); *see also* SIKORA, *supra* note 2, at 87-91 (quoting Johnson’s account of a previous conflict with Wallace).

88. *See* Johnson, *supra* note 85, at 1168-69 (“The massive intervention by the Governor and other State officials provided the means to shortcut in Alabama the slow district-by-district litigation which was taking so much time and effort all over the South.”); *see also* Ray Jenkins, *Alabama vs. the Courts*, NEW SOUTH, Summer 1968, at 24. The court was composed of District Judges Johnson and Harlan Hobart Grooms and Circuit Judge Richard T. Rives.

89. *United States v. Crenshaw County Unit of the United Klans of Am.*, 290 F. Supp. 181, 182 (M.D. Ala. 1968).

90. *See* *United States v. U.S. Klans, Knights of the Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961); *see also* *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961).

and other civil rights proponents from burdening interstate commerce with additional bus ridership protests until the immediate crisis had passed.<sup>91</sup> That action on Johnson's part was simply the earliest indication of an ostensibly even-handed approach to civil rights protests that at least some of the judge's many admirers may not fully or properly appreciate.

What is undoubtedly his single best-known decision,<sup>92</sup> in the 1965 Selma-to-Montgomery-march case of *Williams v. Wallace*,<sup>93</sup> likewise began with Johnson prohibiting any further march attempt by civil rights proponents until his court could conduct a full hearing into the events that had culminated in Alabama law enforcement officers' infamous attack on the proponents' first attempted march on March 7, 1965.<sup>94</sup> When Johnson issued his ruling on the merits on March 17, he provided a comprehensive account of how the March 7 procession had been "nothing more than a peaceful effort on the part of Negro citizens to exercise a classic constitutional right; that is, the right to assemble peaceably and to petition one's government for the redress of grievances."<sup>95</sup> The core of Johnson's holding also became his single best-known passage:

[I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.<sup>96</sup>

Ergo, Johnson approved the petitioners' detailed request for a fully protected, five-day, fifty-four-mile trek from Selma to the Alabama state capitol in Montgomery. "[T]he extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and 'living' document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against," Johnson reiterated.<sup>97</sup>

Frank Johnson thus served as the essential judicial midwife for what became the Southern black freedom struggle's most famous protest. But

91. See *U.S. Klans*, 194 F. Supp. at 907.

92. See generally Ronald J. Krotoszynski, *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995) (describing the events in Selma and their relation to Johnson's First Amendment decision).

93. 240 F. Supp. 100 (M.D. Ala. 1965).

94. See *id.* at 103. See generally DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 394-400 (1986) (describing the events surrounding the March 7 attack).

95. *Williams*, 240 F. Supp. at 105 (citations omitted).

96. *Id.* at 106.

97. *Williams*, 240 F. Supp. at 108.

Johnson should not be seen as any sort of “pro-protest” jurist, and his opinion in another case growing out of the Selma-to-Montgomery march makes that point explicitly. When some younger activists who had been arrested for obstructing traffic within the City of Montgomery sought to have their prosecutions removed to federal court, Johnson brusquely rebuffed them. Stressing that “the conduct of the petitioners was illegal,” he declared that

[t]here is no immunity conferred by our Constitution and laws of the United States to those individuals who insist upon practicing civil disobedience under the guise of demonstrating or protesting for “civil rights.” The philosophy that a person may—if his cause is labeled “civil rights” or “states rights”—determine for himself what laws and court decisions are morally right or wrong and either obey or refuse to obey them according to his own determination, is a philosophy that is foreign to our “rule-of-law” theory of government.<sup>98</sup>

Years later, in interviews with Alabama journalist Frank Sikora, Johnson explained that the multi-layered events of early 1965—particularly the complicated details concerning how Martin Luther King, Jr. had literally turned around a second Selma-to-Montgomery march on March 9 without informing his followers that he had secretly agreed in advance to do so<sup>99</sup>—had left him with negative feelings about both sides in the struggle. “Actually,” he told Sikora, “King and [George] Wallace were a lot alike and even worked in concert for that episode on March 9 . . . . [B]oth helped create an undue atmosphere in this part of the nation during those times. Both hoodwinked their followers and didn’t always tell the complete truth.”<sup>100</sup>

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98. *Forman v. City of Montgomery*, 245 F. Supp. 17, 24 (M.D. Ala. 1965); see also *Cottonreader v. Johnson*, 252 F. Supp. 492, 499 (M.D. Ala. 1966) (enjoining both civil rights plaintiffs and white local government defendants in the wake of tumultuous protests in Greenville, Alabama, and holding that “this Court specifically finds that the plaintiffs are equally at fault [with the defendants] in bringing about the chaos and violence which has taken place in Greenville”); *Johnson v. City of Montgomery*, 245 F. Supp. 25, 29 (M.D. Ala. 1965) (stating that the Constitution does not confer immunity upon illegal conduct).

99. See GARROW, *supra* note 94, at 400-06; GARROW, *supra* note 6, at 83-87, 95-96.

100. SIKORA, *supra* note 2, at 191 (quoting Johnson). Johnson’s insistence on truthfulness and professional integrity was unbending:

[T]he lawyer is often viewed by himself and by others as a trained specialist who serves others by finding a justification for their actions—whether right or wrong. This view makes the lawyer an amoral strategist who functions by manipulating the rules of law to serve his client or his own interest. Until this view is utterly and totally repudiated, our profession, and in turn our nation, is in trouble.

Frank M. Johnson, Jr., *Responsibility for Integrity in Government*, 35 ALA. LAW. 12, 17 (1974).



King had testified before Johnson—somewhat evasively, many observers thought—and the Judge privately had not been pleased with what he had heard.<sup>101</sup>

King got up there and said, in effect, that he believed his cause was just, and therefore it was all right for him to violate some laws to make his point. That bothered me because it was the same thing the other side was saying. Wallace and [Dallas County Sheriff] Jim Clark and [Birmingham Public Safety Director] Bull Connor all felt their cause was just . . . and they felt they could bend or break some laws, too. I didn't buy either argument.<sup>102</sup>

Johnson's evenhanded toughness extended far beyond the realm of demonstrative protests, however. A decade later, when white employees at historically black Alabama State University filed suit alleging that they were the victims of unconstitutional racial discrimination by Alabama State President Levi Watkins, Johnson issued a hard-hitting opinion finding that the plaintiffs' allegations were overwhelmingly supported by the evidence.<sup>103</sup> Not only had the college "engaged in a pattern and practice of racial discrimination against whites,"<sup>104</sup> but the evidence also demonstrated that it was President Watkins individually "who is responsible for many, if not all, of A.S.U.'s discriminatory employment practices."<sup>105</sup> Johnson added that "Watkins acted purely on the basis of his own arbitrary whim and caprice" and that "[t]he evidence reflects that Dr. Watkins runs A.S.U. like an administrative tyrant," maintaining "a nearly dictatorial grip over the internal life of the university."<sup>106</sup>

Undergirding Johnson's ruling, as he later explained to Sikora, was the same sort of perspective that had underpinned his protest-case opinions. "There is no such thing as reverse discrimination, just as there is no such thing as reverse murder, or reverse robbery . . . [T]here is just plain old discrimination. It can be carried out by whites, it can be carried out by blacks, or any other race or group."<sup>107</sup> When it came to administering justice, Frank Johnson never played favorites.

Almost as notable as Johnson's civil rights rulings regarding voting rights, school desegregation, and protest campaigns were his later opinions aimed at reforming Alabama's state mental hospitals<sup>108</sup> and prison

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101. See GARROW, *supra* note 94, at 406; GARROW, *supra* note 6, at 95-96.

102. SIKORA, *supra* note 2, at 323 (quoting Johnson).

103. See *Craig v. Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978).

104. *Id.* at 1208.

105. *Id.* at 1213.

106. *Id.*

107. SIKORA, *supra* note 2, at 271 (quoting Johnson).

108. See *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971).

system.<sup>109</sup> In the case of the mentally ill, Johnson held that involuntarily committed patients had a constitutional right to individual treatment, not merely basic custodial care. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."<sup>110</sup> Johnson's holding, and indeed his actual language, was subsequently invoked by none other than John Minor Wisdom when the Fifth Circuit Court of Appeals three years later in a similar case from Florida adopted exactly the same constitutional analysis.<sup>111</sup>

Johnson doggedly pursued improved conditions in the state's mental hospitals,<sup>112</sup> and then tried to do the same with Alabama's prisons after finding first that the absence of basic medical care represented "a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments"<sup>113</sup> and then that the presence of "facilities wholly unfit for human habitation"<sup>114</sup> likewise constituted cruel and unusual punishment.<sup>115</sup> "[W]here it can be shown that prison conditions are so bad as to constitute cruel and unusual punishment, the relief to be afforded may properly include an order compelling the provision of certain basic rehabilitative services and facilities," Johnson ruled.<sup>116</sup> Finding in 1976 that prison conditions remained "barbaric and inhumane,"<sup>117</sup> Johnson held that "constitutional deprivations of the magnitude presented here simply cannot be countenanced"<sup>118</sup> and issued a detailed remedial order. He admonished the defendants that "a state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget,"<sup>119</sup> and warned that "failure to comply with the minimum standards set forth . . . will necessitate the closing of those several prison facilities herein found to be unfit for human confinement."<sup>120</sup>

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109. See *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972); see also LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989).

110. *Wyatt*, 325 F. Supp. at 785.

111. See *Donaldson v. O'Connor*, 493 F.2d 507, 521 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975).

112. See *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972); see also Comment, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

113. *Newman*, 349 F. Supp. at 286.

114. *Pugh*, 406 F. Supp. at 323.

115. See *id.* at 329.

116. *James v. Wallace*, 382 F. Supp. 1177, 1181 (M.D. Ala. 1974).

117. *Pugh*, 406 F. Supp. at 331.

118. *Id.* at 328.

119. *Id.* at 330.

120. *Id.* at 331.

But Johnson found it frustratingly difficult to bring about meaningful, tangible improvements inside Alabama's prisons,<sup>121</sup> and in his final published ruling prior to assuming an appellate judgeship, he complained that "[t]ime does not stand still, but the Board of Corrections and the Alabama Prison System have for six years."<sup>122</sup> Ruing "[t]he lack of any significant progress since the original hearings in this case" in 1972, he noted how "[t]he history of federal litigation in Alabama is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing."<sup>123</sup>

Frank Johnson authored other notable opinions,<sup>124</sup> but his civil rights rulings indisputably lie at the core of his remarkable judicial reputation. While John Wisdom viewed Johnson as the Fifth Circuit's best district judge of his era,<sup>125</sup> others might justifiably call Johnson simply the best trial-court jurist of the post-1954 period, just as Wisdom himself might very well be termed the best appellate judge of that time. Both white, male, native Southern Republicans, John Minor Wisdom and Frank M. Johnson, Jr. will long be remembered for the judicial contributions they each made to constitutional liberties and civil rights. Their deaths cast their life achievements into bolder relief, and their rulings and their words will not soon be forgotten.

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121. See YACKLE, *supra* note 109, at 186.

122. *Newman v. Alabama*, 466 F. Supp. 628, 635 (M.D. Ala. 1979).

123. *Id.* at 635-36; see also Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, JUDGES' J., Spring 1979, at 4.

124. The three that most merit citation are *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985) (holding that consensual adult sexual activity outside of marriage "is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation"), *rev'd*, 478 U.S. 186 (1986); *Miles v. City Council of Augusta*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (*per curiam*) (affirming that the proprietors of "Blackie the Talking Cat" must obtain a municipal business license and noting that "[t]his Court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a 'person' and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii*. Blackie can clearly speak for himself."); and *Frontiero v. Laird*, 341 F. Supp. 201, 209 (M.D. Ala. 1972) (Johnson, J., dissenting), *rev'd*, 411 U.S. 677 (1973). See also SIKORA, *supra* note 2, at 307 (quoting Johnson as indicating that he wrote the *Miles* opinion).

125. See *supra* note 75 and accompanying text.