Not every member of the Fifth Circuit shared the zeal with which John Wisdom and some of his colleagues strove to combat and overcome the unwavering obstructionist tactics employed by state officials and federal trial judges hell-bent on thwarting the U.S. Supreme Court’s will and preserving the segregationist status quo. To the contrary, the legal reasoning and procedural tactics employed by a majority of the court’s members in the early 1960’s to compel adherence to the Supreme Court’s 1954 constitutional decree in *Brown v. Board of Education of the City of Birmingham.* It, along with other strategies, was designed to thwart the techniques that many district court judges in the circuit’s six-state jurisdiction had devised and utilized solely to frustrate and delay compliance with the Supreme Court’s edict in *Brown* that school boards begin the process of dismantling racially segregated public schools “with all deliberate speed.”

Authority for invoking the procedural tool that the Fifth Circuit used in *Armstrong* to expedite the standard appellate time frame was predicated on the All Writs Act. This federal statute, dating back to the Judiciary Act of 1789, was designed, among other things, to provide federal appellate courts with authority to deviate from the general rule that review is only available from either “final” judgments or a finite category of interlocutory (mid-case) orders. The Fifth Circuit, under Chief Judge Tuttle’s leadership, construed the language of the All Writs Act (which authorized federal appellate courts with authority to deviate from the general rule that review is only available from either “final” judgments or a finite category of interlocutory (mid-case) orders) to permit it to issue a “temporary” order compelling certain action by the district court pending the circuit court’s final disposition of the appeal. The use of this “injunction pending appeal” enabled Tuttle and some of his colleagues quickly and efficiently to circumvent the attempts by recalcitrant district judges to adhere to the spirit of the Supreme Court’s ruling in *Brown.*

On June 17, 1960, Dwight Armstrong and other African-American students sued the Birmingham, Alabama Board of Education to enjoin it from continuing to operate its public school system on an admittedly racially segregated basis. District Judge Seybourne H. Lynne ruled in the school board’s favor, but his opinion was not released until May 23, 1963, barely three months before the opening of the fall school term. So any meaningful desegregation of the Birmingham schools prior to the beginning of the new academic year would require the nearly immediate intercession of the court of appeals. The appeal was assigned to a panel composed of Chief Judge Tuttle and Judges Rives and Gewin. Loathe to countenance Judge Lynne’s more-than-willing acquiescence to the school board’s inaction, Tuttle and Rives wanted to ensure, at a minimum, that the board would make a good faith start towards desegregating its schools. In an opinion authored by Rives, the majority issued an injunction pending the panel’s ruling on the merits of the appeal from Judge Lynne’s decision. The injunction required the school board to submit a desegregation plan directly to their court, rather than to Judge Lynne, by August 19.

Judge Gewin, the third member of the panel, wrote a withering dissent in
which he not only set forth his disagreement with the majority’s ruling, but also accused Tuttle and Rives of intentionally perverting the normal appellate process. By this time, another of Gewin’s colleagues, Judge Warren Jones, also had become concerned, if not perturbed, by the lengths to which some of his colleagues would go in civil rights cases. Known for his dry wit and good naturedly called “our poet laureate” by his colleagues, Gewin indulged his penchant for doggerel to defuse the brewing controversy over what he and others deemed an overly aggressive approach towards civil rights cases by some of their brethren. In a gentle attempt to voice his concerns to his ideological antagonists, Jones composed the following verse, which he dispatched to Rives, Brown, and Wisdom.

Quickly my brother
Gather you down
Assemble the panel
Of Rives, Wisdom and Brown.
The troops we will muster
And cancel all leaves
Report ye for duty
Brown, Wisdom and Rives.
There is a rebellion
In old Chatham Town
We quell it instanter
By Rives, Wisdom and Brown.
We’ll follow the pattern
That gave us renown
Remember the Meredith
Rives, Wisdom and Brown.
If this shall be treason
Upon it please frown
And may I be shriven
By Rives, Wisdom and Brown.  

John Minor Wisdom graduated from Tulane Law School in 1929 and practiced law for almost 30 years before being appointed to the United States Court of Appeals for the Fifth Circuit in 1957. He died in New Orleans in 1999 at the age of 93.
On July 22, ten days after the release of the panel opinion in Armstrong, the Fifth Circuit voted 5–4 to deny Walter Gewin’s request for rehearing. Ordinarily, that would have been the end of the matter, at least as far as the Fifth Circuit was concerned. But this was no ordinary situation. Like Walter Gewin, Judge Ben Cameron had been outraged by the deployment of what Cameron viewed as manipulative strategies by a group of his colleagues. The decision by Tuttle and Rives to issue an injunction pending appeal in Armstrong simply pushed Cameron over the edge. But unlike Gewin, who had restricted his objections to internal communications, Cameron chose to air his concerns publicly by taking the exceptional step of issuing a detailed dissenting opinion to the court’s decision denying the request for en banc rehearing. And though three other judges—Gewin, Jones, and Griffin Bell—had voted with Cameron to grant the request for rehearing, none of them signed on to his dissenting opinion.

Cameron released his dissent to the denial of en banc rehearing in Armstrong on July 30, 1963. He charged that the panel’s issuance of temporary injunctive relief reflected a disturbing pattern by a majority of his deeply divided court to misuse the judicial process by “inventing special procedures” in order to achieve preordained results in civil rights cases with which he and much of the public disagreed. In support of this general observation, Cameron inserted a footnote in which he quoted from a recent article in a Birmingham newspaper which had praised the Fifth Circuit for having blazed new trails in civil rights cases over the past decade. The article credited a “hard core” majority of four members—Tuttle, Rives, Wisdom, and Brown—with having “stood together consistently in decision on civil rights cases.”

Cameron took a significantly less appreciative view of the quartet, ending this footnote with what was destined to become his most famous judicial utterance. “These four Judges,” Cameron cynically added, “will hereafter sometimes be referred to as The Four.”

Cameron charged Chief Judge Tuttle with stacking the composition of the panels assigned to civil rights cases with members of the court’s liberal bloc in order to promote Tuttle’s desegregation agenda. And he also accused Tuttle of “gerrymandering” the composition of three-judge district courts in cases filed in Mississippi. The federal statute providing for the empanelling of three-judge district courts authorizes the Chief Judge of each circuit to designate the two other judges who will sit on the panel with the district judge that initially was assigned to hear the case. Until Tuttle became its Chief Judge, Cameron insisted, the practice in the Fifth (and every other) Circuit had been to appoint one circuit judge and one district judge who resided in the state in which the suit had been filed. Yet though Mississippi had one resident circuit judge (Cameron) and three active district judges, in each of the three Mississippi-filed cases involving three-judge district courts, Cameron reported, “a member of The Four was substituted for the resident Circuit Judge . . . and another member of The Four was substituted for the additional District Judge.”

Predictably, Cameron’s frontal and public assault on Chief Judge Tuttle’s integrity contained in his Armstrong dissent, as well as his allegations of acts of complicity by Rives, Brown, and Wisdom, sent shock waves through the court and mobilized the members of each of its two factions. Judges Griffin Bell and Warren Jones, along with Walter Gewin, emboldened by Cameron’s documentation, demanded an explanation if not some remedial response from Tuttle.

The unrest generated by Ben Cameron’s denunciation of “The Four” and his indictment of Tuttle’s alleged panel-rigging maneuvers had pushed an already disgruntled quartet of the court’s nine active members into a state of total exasperation, if not near rebellion. Chief Judge Tuttle felt compelled to convene a meeting of the entire court to respond to the discord that threatened to tear his court apart. The historic meeting was set for August 22 and 23, 1963, in Houston. Ironically, Ben Cameron, the person singularly responsible for igniting the controversy, was unable to attend because of his own poor health.

Although members of the news media uncovered the fact of the meeting, its precise location was a carefully guarded secret. The Houston Press reported that “[t]he judges were huddled somewhere in the new Federal Building. But officials would not say exactly...
where the judicial council was being held. Said one obviously nervous official of the court: “I don’t even want to be quoted as saying no comment.” And when queried as to the reason for the meeting, Circuit Clerk Ed Wadsworth responded: “I have no comment and that’s off the record.”

In keeping with tradition, Griffin Bell, the court’s junior member, served as Secretary of the Judicial Council and kept the official minutes. But Bell’s minutes are not the only source of information about what transpired during the secret conclave. John Wisdom kept a record of the meeting with his own extensive set of holographic notes. For the entirety of the two-day session, Wisdom produced a nearly verbatim account of the proceedings on one standard yellow legal pad. For the better part of the next four decades, Wisdom kept the original and only copy of this unique record of the historic occasion in a plain, unmarked manila folder locked in the top drawer of a wooden credenza located to the side of his desk in his judicial chambers. These detailed notes, however, provide a birds-eye view of what turned out to be an extremely confrontational and contentious gathering.

The Council met on Thursday, August 22 in chambers assigned to Judge Tuttle in Houston’s federal courthouse. The proceedings began innocently enough at 9:30 a.m. with a prayer offered, at Judge Tuttle’s request, by Dick Rives. Elbert Tuttle then opened the discussion, anticipating that Tuttle would offer this explanation at the Council meeting, explaining that he had decided upon that course solely as a well-intentioned attempt to protect the pair from being involved in decisions that might cause them to fall out of favor with ardent segregationist and Senate Judiciary Chairman James Eastland of Mississippi. But, he also emphasized, he reversed these instructions once the Senate confirmed the pair’s permanent appointment. Tuttle’s admission, however, enraged Griffin Bell. “You mean you could not trust us until we made a record?” he shouted at Tuttle. After a few moments of awkward silence, Tuttle replied, “What actuated [this] was consideration.” Bell, however, wasn’t placated by that reply. “Tuttle and Brown set themselves up as judges of the judges’ honesty,” Bell complained. “I object to a guardianship.”

With temps flaring, former Chief Judge Hutcheson sought to defuse the escalating conflagration. “I won’t say John Brown has sinned,” Hutcheson suggested, “but I say go in peace and sin no more.” However, the usually unflappable and stern Texan could not resist launching a couple of grenades of his own. “There is not a man on this court I do not have the highest respect for, except Ben Cameron.” And in response to Walter Gewin’s reference to Cameron’s participation in the cases involving James Meredith, Hutcheson blurted: “I can’t help it if a man’s a damn fool!” Finally, turning to Griffin Bell, an exasperated Hutcheson asked, “Would you piss on the whole court because you are mad with one judge? Ben disappointed me. Bad bird to befoul his own nest.”

Tuttle then offered a series of responses to Judge Cameron’s charge that Tuttle intentionally had shut Cameron out from sitting on three-judge court cases filed in Mississippi. First, Tuttle stated, “Cameron was trapped by what he has written.” The unambiguous text of Cameron’s dissenting opinion in the Birmingham bus and other comparable cases, while honestly reflecting his convictions, demonstrated, in Tuttle’s view, a manifest unwillingness to impartially consider and evaluate Fourteenth Amendment civil rights claims. Such an unyielding predisposition, Tuttle maintained, disqualified Cameron from sitting on other race discrimination cases. But anticipating that Tuttle would offer this explanation at the Council meeting, Cameron had sent a letter to his colleagues one week prior to the Houston conclave in which he tendered a very different perspective on his voting record.

Cameron denied that “I have disavowed neither the Fourteenth Amendment nor the decisions of the Supreme Court,” insisting that none of his dissents was “justly susceptible of such a conclusion.” These opinions, he maintained, “only pleaded for understanding of the
enormity of the undertaking with which Mississippi and other portions of the South are confronted; that patience and understanding are needed, and that gradualism is absolutely required in some instances. I have not sought to offend, and I have not taken any offense.”

Tuttle, however, did not limit his remarks to his concern over Cameron’s close-mindedness. He further explained to his colleagues that in staffing three-judge courts in Mississippi-filed cases, his hands also had been tied by a variety of other factors. First among them was Cameron’s own request not to sit on the same panel with Tuttle. Plus, Warren Jones had asked Tuttle not to pair him with Cameron on any cases because of the delays caused by Cameron’s demand for a lengthy siesta between morning arguments and afternoon conferences. And on top of all that, aging Judge Hutcheson’s frail condition prevented him from sitting anywhere outside of Houston, thereby several restricting his availability for assignment. With Bell and Gewin admittedly kept off of all civil rights cases pending Senate confirmation of their recess appointments, this left Tuttle with only four of the nine members—himself, Rives, Brown and Wisdom—available for unrestricted duty.

At 5:30 p.m., after hours of vigorous discussion on these and other matters, the meeting was adjourned. But the evening’s respite didn’t dampen either the emotions or the rhetoric that flowed freely at the following day’s meeting. Elbert Tuttle opened the Friday session at 9:30 a.m. with a blistering attack on his colleague from Mississippi. “It is a caricature of justice,” Tuttle professed, “to have Cameron sit on the civil rights cases. Judge Cameron is the thing that caused this turmoil. I have studied the facts and conclude that there has been no case assigned to a judge for a prejudiced decision.” Tuttle was deeply hurt and offended by Cameron and Senator Eastland’s challenge to his honor and integrity. According to notes taken during the meeting by Warren Jones, Tuttle offered, for the good of the court, to resign as Chief Judge in favor of the next most senior member, Judge Jones. His colleagues quickly and uniformly rejected that gesture.

Walter Gewin admitted that Ben Cameron’s thinking was “difficult,” but asked his colleagues to remember that Cameron was ill and characterized Cameron’s decisions as the product of “a lonesome and disappointed man.” Warren Jones then predicted that if Tuttle would agree to put Cameron back on the regular rotation for assignment to three-judge cases, Cameron would agree to “realign” with the Fourteenth Amendment. In that same vein, Judge Hutcheson proposed that “if I were Tuttle, I would go to Cameron and say, ‘You’ve been a s.o.b.; now if you’re sincere about changing [your refusal to adhere to and enforce the Supreme Court’s Fourteenth Amendment decisions], I’ll appoint you.’” Tuttle, however, refused to budge. “I read Cameron’s dissents,” he replied, “as meaning that he intends to make Mississippi an island of resistance.”

After prolonged discussion, Dick Rives recommended that the group issue a short press release, the first public statement concerning internal court matters in Fifth Circuit history. Wisdom, who had been noticeably silent throughout the two days session save for a few comments in support of Judges Tuttle and Brown, and Walter Gewin joined forces to confect language that the group eventually and unanimously approved just before adjourning.

The sparsely worded statement announced that “[t]he 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.”

This tepid pronouncement (Warren Jones called it “a conglomerate of meaningless phrasing”) intentionally omitted any reference to the details of the new assignment policy approved at the Houston meeting. Judges Gewin, Bell, and Jones, despite their outrage at what they repeatedly and emphatically characterized as John Brown’s abuse of authority as assignments judge, ultimately agreed to acquiesce to their colleagues’ readiness to retain Brown in that position. During a lunch break, Warren Jones had convinced Griffin Bell and Walter Gewin that for the good of the order it would be best to let bygones be bygones.

As a result of this conversation, the group voted to authorize Judge Tuttle to continue to allow John Brown to fashion the panel assignments, but subject to a distinct set of condition. Assignments could not be made until after Brown and Tuttle had determined the site of each sitting. In addition, Brown’s panel assignments could not be released to the Clerk’s office until after the Clerk had scheduled all the cases to be heard at each sitting. Finally, requests to be relieved from sitting with another member no longer would be honored. At 2:30 p.m., the Judicial Counsel meeting ended. The court had survived this threat to its ability to function in a reasonably civil, if not harmonious, fashion.

But the passage of more than forty years after this rancorous, tumultuous thirty-hour session, has not yielded a definitive resolution to the controversy over whether Elbert Tuttle, with or without John Brown, had stacked the panel assignments to ensure pro-integration results. Tuttle and Brown remained forever steadfast in their position that although Judges Gewin and Bell were sheltered from these controversial cases for the short period preceding their Senate
confirmation, no member of the court was banished from sitting on race cases on ideological grounds. John Wisdom consistently supported the actions of his Chief Judge; publicly declaring that panels generally had been assigned by “pure chance,” with the temporally limited exception carved out for Gewin and Bell, which he characterized as “benign distortion.” And although he acknowledged privately his concurrence in Tuttle’s judgment that Ben Cameron was irrevocably opposed to integration and therefore should be banished from cases involving this issue, he insisted that such a strategem did not rise to the level of panel-rigging. He explained that “it would have been a mockery of justice to have a three-judge court composed of Cameron, Mize, and Cox. That is just like deciding the case in advance against the plaintiffs in a civil rights case.” Wisdom believed that Tuttle had decided that replacing such a panel with a trio that included Wisdom and John Brown “would be in the interest of upholding the law.” Consequently, Wisdom “oppose[d] the use of the word ‘stacked’ to characterize what Tuttle did. I mean, when you say stacking or loading, you are implying that he wanted a particular result. But actually, I don’t think he wanted a particular result, but he thought that we would be much more objective than Cameron.”

On April 3, 1964, less than eight months after the Houston Council meeting, Ben Cameron passed away. The aged and fragile Mississippian had become an alienated, embittered, and ineffectual voice on the court; continually disposed to writing increasingly vituperative dissenting opinions. His degree of detachment was such that only two of his colleagues attended the funeral in Meridian. The presence of Walter Gewin, Cameron’s most ideologically compatible colleague, was to be expected. And though the identity of the other member of the court might have astonished some of the attendees, it came as no surprise to those who knew him. It was John Wisdom.

1. 323 F.2d 333 (5th Cir. 1963).
3. Judge Tuttle would have preferred to go even further and require the complete desegregation of at least one grade. But he acquiesced to Rivers’ proposal in order to constitute a majority to overturn Judge Lynne’s total denial of relief. 323 F.2d 339 (Tuttle, J., concurring specially). See also Burke Marshall, Southern Judges in The Desegregation Struggle, 95 Harvard L. Rev. 1509, 1512 (1982).
7. 323 F.2d 352, 354 (Cameron, J., dissenting).
9. 323 F.2d 352, 353a (Cameron, J., dissenting).
10. 323 F.2d 352, 359 (Cameron, J., dissenting).
11. Since Tuttle was still in Colorado at the time, he authorized acting Chief Judge Rivers to send out the call for the meeting in a letter to all judges under Rivers’ signature but on Tuttle’s stationery. J. Robert Brown, Jr. & Allison Herren Lee, Neutral Assignment of Judges At The Court Of Appeals, 78 Texas L. Rev. 1037, 1056a-109 (2000). The letter tersely announced that the Judicial Council would meet on August 22 at the Federal Courthouse in Houston “to consider rules of Court and any other appropriate matters.” Letter to All Active Fifth Circuit Judges from Richard T. Rivers, August 13, 1963.
14. Warren Jones also took contemporaneous notes of the conference. These notes, which are included in his diary, are significantly less detailed than those produced by Judge Wisdom and, on occasion, refer to matters not contained in Wisdom’s contemporaneous account. See e.g., note 26, infra.
15. Wisdom Minutes of the Meeting of En Banc Court, U.S. Court of Appeals For the Fifth Circuit, August 22 and 23, 1963, Houston, Texas, at 1 (hereinafter “Wisdom Minutes”).
17. Wisdom Minutes, at 1.
22. Wisdom Minutes, at 12.
24. See, e.g., United States v. Wood, 295 F.2d 772, 785 (5th Cir. 1961) (Cameron, J., dissenting), where Cameron refused to join Judges Rivers and Brown in a ruling that ordered District Judge Harold Cox of Mississippi to issue a temporary restraining order against a disturbing the peace prosecution that the Washington County authorities had brought against an African-American male for helping other African-Americans to register to vote.
25. Letter to All Active Judges of the Fifth Circuit from Ben F. Cameron, August 19, 1963, at 4.
27. Wisdom Minutes, at 15.
30. Wisdom Minutes, at 3.
33. Wisdom Minutes, at 3-8.