

## Justice Hugo L. Black: A Former Law Clerk Remembers

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Thank you Judge Bacharach<sup>1</sup> for the invitation to meet with you and the other members of the Oklahoma City Chapter of the Federal Bar Association<sup>2</sup> to explore together Justice Hugo L. Black's relationships with his law clerks. Among other things, you have provided me an incentive to dust off some very precious memories of my year with the Justice over a half-century ago.<sup>3</sup>

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<sup>1</sup> Judge Robert E. Bacharach was nominated for his position on the Tenth Circuit U.S. Court of Appeals by President Barack Obama, January 4, 2013, confirmed by the U.S. Senate February 25, and received his commission, February 28, 2013. He attended the University of Oklahoma (B.A., 1981) and Washington University School of Law (J.D., 1985), clerked for Tenth Circuit Judge William J. Holloway, Jr. (1985-1987), was in private practice in Oklahoma City (1987-1999), and served as a U.S. Magistrate Judge in the U.S. District Court for the Western District of Oklahoma (1999-2013). <https://www.ca10.uscourts.gov/judges/judge-robert-e-bacharach> (last visited April 2, 2014).

<sup>2</sup> <http://www.fedbar.org/chapters/oklahoma-city-chapter.aspx> (last visited April 2, 2014).

<sup>3</sup> Justice Hugo Lafayette Black (February 27, 1886 – September 25, 1971) served on the U.S. Supreme Court from August 19, 1937, to September 17, 1971 (the fifth longest serving justice in history). He was the first of what would be President Franklin Roosevelt's nine appointments to the Supreme Court.

Justice Black's Court years included five chief justices (Hughes, 1930-41; Stone, 1941-46; Vinson, 1946-53; Warren, 1953-69; and Burger, 1969-86). Thirty in all, the other justices, by seat, were: (1) Justices McReynolds, 1914-41; Byrnes, 1941-42; Rutledge, 1942-49; Minton, 1949-56; Brennan, 1956-90. (2) Justices Cardozo, 1932-38; Frankfurter, 1939-62; Goldberg, 1962-65; Fortas, 1965-69; Blackman, 1970-94. (3) Justices Brandeis, 1916-39; Douglas, 1939-75. (4) Justice Black, 1937-71. (6) Justices Sutherland, 1922-38; Reed, 1938-57; Whittaker, 1957-62; White, 1962-93. (8) Justices Roberts, 1930-45; Burton, 1945-58; Stewart, 1958-81. (9) Justices Stone, 1925-41 (CJ, 1941-46); Jackson, 1941-54; Harlan, 1955-71. (10) Justices Butler, 1922-39; Murphy, 1940-49; Clark, 1949-67; Marshall, 1967-91. "List of Justices of the Supreme Court of the United States," Wikipedia.org, [http://en.wikipedia.org/wiki/List\\_of\\_Justices\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/List_of_Justices_of_the_Supreme_Court_of_the_United_States) (last visited April 2, 2014). Numbering of seats from, "Graphic Timeline," *Id.*

During Justice Black's 34 years on the Court he had over 50 law clerks. His first clerk, Jerome A. Cooper, served from 1937 to 1940. From the 1941 Term through the 1949 Term he had one clerk each year, after which he had two each year. The author's clerkship was for the October 1959 Term of Court; roughly a 12-month employment beginning August 1959. His "co-clerk" was John K. McNulty (later, like the author, a law professor at the University of California, Berkeley, law school). That year the justices each had two law clerks, except for Justice Douglas, who had one, Steve Duke (later a Yale law professor). Beginning in the 1970s, the number expanded to four. Most clerkship appointments were for only one year, although two of Justice Black's clerks served during two Terms. "List of law clerks of the Supreme Court of the United States (Seat 4)," Wikipedia.org, [http://en.wikipedia.org/wiki/List\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States\\_%28Seat\\_4%29](http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_%28Seat_4%29) (last visited April 2, 2014). This list of 33 law clerks is incomplete. It omits 14 who served during the 1937-1962 Terms, and (on the assumption Justice Black continued to have two each Term from 1963-1971) an additional seven. See *infra*, note 20.

As such, my account represents the experience and faded memories of only one of his many clerks during only one of Justice Black's many Terms of Court. What little we now know of his clerks' experiences suggests that while they report many similar joys, there have been differences as well.

Justice Black seems to have preferred clerks who grew up and received their education in Alabama, or other states in the South. Those who shared his southern culture undoubtedly had a different relationship than the rest of us.

One difference in his clerks' experiences is that, over the years, the Court expanded the number of law clerks for each justice from one, to two, to three (during Justice Black's time), and now four. Those changes necessarily alter somewhat the dynamic between a justice and his clerks (and among those clerks).

Few of Justice Black's law clerks could match either his skill or addiction when it came to tennis. His judgment regarding their utility on his tennis court did not appear to affect his judgment of their utility at the Supreme Court, or his personal affection and interaction with them and their families off both courts. However, it did create a difference in their experiences.

The membership of the Court changes over time, affecting each justice's relationships with the other eight, and in some measure the relationships between those justices' clerks as well. When Justice Black joined the Court, with his first law clerk, Jerome (Buddy) Cooper, the eight were: Chief Justice Hughes, and Justices McReynolds, Brandeis, Sutherland, Butler, Stone (later Chief Justice), Roberts, and Cardozo. Twenty-two years later, when Jack McNulty and I were his clerks during the 1959 Term, of those nine only Justice Black remained. Those then serving with Justice Black were Chief Justice Warren, and Justices Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, and Stewart. Those are very different Courts.<sup>4</sup>

Other differences were the consequence of changes in Justice Black – his age, health and accumulated wealth of Supreme Court experience. Most dramatic are the differences occasioned by the Justice's marital status. His first wife, Josephine, died December 7, 1951. He did not remarry (Elizabeth DeMeritte) until September 11, 1957.<sup>5</sup> During some of those intervening years the clerks literally lived in Justice Black's otherwise empty house, and shared meals with him.<sup>6</sup> My experience, two years after his marriage to Elizabeth, was with a much more contented Justice Black than the one those earlier clerks had enjoyed.

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<sup>4</sup> *Supra*, note 3.

<sup>5</sup> Roger K. Newman, *Hugo Black* 406, 466 (2d ed. 1997) [hereinafter Newman].

<sup>6</sup> Charles Reich is one of those clerks. Much of Reich's account of his clerkship experience is consistent with this one. Charles A. Reich, *A Passion for Justice: Living With and Clerking for Justice Hugo Black*, in *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* 111 (Todd C. Peppers & Artemus Ward eds., 2012) [hereinafter Reich]. In 1953 Justice Black also suffered an attack of shingles and underwent a hernia operation. Newman *supra*, at 420, 421, 422.

Nonetheless, to the extent reports from other Justice Black clerks exist, similar tales are told: the feeling they were a part of Justice Black's family, the interest he took in theirs, time at his home, his near-addiction to tennis, the books he insisted they read,<sup>7</sup> the sensation they were clerking for Thomas Jefferson,<sup>8</sup> Justice Black's work habits and passion for justice, and their role with regard to cert petitions and discussing (but never writing) his opinions.<sup>9</sup>

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Reich and David J. Vann clerked during the 1953 Term (two years after Josephine's death), when Justice Black had become the senior justice, and Chief Justice Warren joined the Court. In addition to our both having clerked for Justice Black, we also shared, unbeknownst to each other at the time, an almost simultaneous coming to what was either a similar craziness or creative insight (depending on our critics' and admirers' perceptions). His took the form of *The Greening of America* (1970). Mine was originally presented in 1970 as a lecture in the Pauly Ballroom at the University of California, Berkeley, as the annual Barbara Weinstock Lecture on the Morals of Trade, subsequently published by the University of California as *Life Before Death in the Corporate State* (1971). It was published in its final form by Bantam, as *Test Pattern for Living* (1972), and reissued under that title by Lulu Press in 2013, <http://www.lulu.com/shop/nicholas-johnson/test-pattern-for-living/paperback/product-21037947.html> (last visited April 2, 2014).

<sup>7</sup> "The books revealed a great deal about the Judge's concept of what it meant to be a Supreme Court justice. To him, it was a position that went far beyond merely voting on cases. To begin with, the job required a scholar, one who had studied history all the way back to the Greeks and the Romans, with particular emphasis on the history of liberty and tyranny and the rise of the rule of law. The framers of the Constitution were well represented, as was the history of English law going back to the Magna Carta. . . . [T]he Judge gave us some insight into how he viewed the job of being a Supreme Court justice and how he prepared for that job. A justice must have a judicial philosophy. He saw his role as a defender of the Constitution, and as a protector of the individual, to whom the Constitution belonged. Essential to this role was knowledge of history, in particular the intentions of the framers of the Constitution and the fears of power that concerned them. This led back to English history, to the injustices that the framers knew about and sought to prevent, and further back to the long struggle between tyranny and the rule of law." *Id.* At 114-115.

<sup>8</sup> "He [Justice Black] was necessarily selective in his reading . . . as he felt he could more fruitfully spend his thinking time on books from which he could gain knowledge, perspective or understanding [than from novels]. No modern figure supplied any more of those qualities than Thomas Jefferson. He was Black's 'number one, number two and number three' historical hero, noted Hugo, Jr. – and had been since law school." Newman, *supra* note 5, at 448. (Jefferson was also my number one, two and three choice – since before law school.)

<sup>9</sup> Although Justice Black's grief over Josephine's death undoubtedly contributed to how he spent his time during Reich's clerkship, other clerks have also reported his seriousness about, and commitment to, his responsibilities. This excerpt captures much of the man: "David and I sat in his office and watched him open his mail, heavy with invitations to official functions, embassy receptions, and offers of honorary degrees from universities. On each he wrote one word: 'regret.' He was home seven nights a week, and he insisted on doing all of his own work. He wrote his own opinions, did his own legal research, make his own decisions on petitions for certiorari, read the lengthy printed record of cases when necessary, and made his own preparations for hearing cases on the bench and for the justices' weekly conferences. . . . We read certiorari petitions and discussed his choices . . . . We discussed his opinions line by line as well as the opinions of other justices when they were circulated. . . . In fact, we were busy all day long, but never did we do *his* work." (emphasis in original) *Id.* at 112-113. Although Jack and I never wrote an opinion for the Judge, we did do some research, and may have offered a phrase or two here and there – though I have no current memory of any such details. What is certain is that the Judge's opinions were definitely his own. As Reich also reports, "David [Vann, his co-clerk] showed me how far the Judge would go in granting equality to his law clerks so they could challenge him with full vigor. Of course, the Judge made clear that

We will skip over the basic biographical information about Justice Black.<sup>10</sup> My spoken remarks, although drawn from this text, were brief. This text, with its footnotes, is available online from my Web site<sup>11</sup> for any who may be interested in more details. It includes more biographical and other information about Justice Black, citations and links to sources, two appendices, and additional stories.

You have asked for my personal comments regarding Justice Black as a result of my year as his clerk. Given our limited time, I will get right to that. If there's still time I'll also address some of the questions Judge Bacharach sent me earlier this year. In any event, after about 25 minutes we'll have time for both his comments and questions and yours.

Growing up, there were no judges or lawyers in my family – nor within our family's acquaintance. Thus, as a teenager, I was unaware that the path I walked was heading straight to a law school.<sup>12</sup> In fact, the summer before I became a 1-L at Texas, a career as a Foreign Service officer was still a very real possibility.

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he would not readily change his own long-held views. But he was a great believer in hearing the other side, and he clearly considered that kind of openness to be an essential part of being a judge." *Id.* at 117.

<sup>10</sup> For a summary overview see, "Hugo Black," Wikipedia.org, [http://en.wikipedia.org/wiki/Hugo\\_Black](http://en.wikipedia.org/wiki/Hugo_Black) (last visited April 2, 2014) and "Justice Black Dies at 85; Served on Court 34 Years," United Press Int'l, New York Times, September 25, 1971, <https://www.nytimes.com/learning/general/onthisday/bday/0227.html> (last visited April 2, 2014) [hereinafter Obituary].

<sup>11</sup> <http://www.nicholasjohnson.org>.

<sup>12</sup> My grandfather, M.F. Bockwoldt, served eight years in the Iowa Legislature during the 1930s and '40s. He presented me with an autographed copy of the 1939 *Code of Iowa*, which I dutifully read (scanning over the building code portions). That inspired me to use paper route money to buy a copy of the *Municipal Code of Iowa City* – the source of the legal research that enabled me to win my first legal case, on behalf of a friend confronting a fine for alley parking. (The oral argument involved my newly-fashioned "doctrine of constructive loading.")

The local sheriff, police chief, and postmaster provided the old "wanted posters" that served as the study materials for my first "book," titled *How to Classify Fingerprints*. A letter to J. Edgar Hoover, informing him of our creation of the Johnson County Junior Bureau of Investigation, produced a stack of materials by return mail. A neighbor who was a former FBI agent provided instruction, and the director of the University-sponsored Iowa Peace Officers Short Course permitted us to attend. Lincoln Steffens' autobiographical description of how to find corruption in one's community should never have been shared with a young boy, but led to the relocation of a proposed local swimming pool.

An Iowa "youth in government" program produced the opportunity to draft my own legislation (a regulation of mud flaps on semi-trucks), and sit in the legislative hall where my grandfather had served. A comparable national Hi-Y program provided a trip to Washington where I met my first U.S. President at the White House, Harry Truman. Sometime around my junior or senior year in high school I was an Iowa Bar Association Citizenship Awardee. Meanwhile, my reading included Hearndon's *Life of Lincoln* (Hearndon had been Abraham Lincoln's law partner), Clarence Darrow's *Autobiography*, and Judge Learned Hand's *The Spirit of Liberty*, among others.

The point of all this is simply that I was really obtuse not to see the inevitability of my going to law school.

Given my almost total ignorance of the law and lawyers, naturally I had never heard of judicial clerkships.

One of my professors at Texas was the brilliant and super-productive Charles Alan Wright, for whom I worked and from whom I learned a great deal. He had clerked for Judge Charles E. Clark, who served on the Second Circuit, U.S. Court of Appeals. Professor Wright encouraged me to consider a clerkship after graduation.

President Lyndon Johnson used to say, "They call me 'Lucky Lyndon,' but I've always found the harder I work the luckier I get." There's some truth in that. Hard work can produce rewards.

But luck, or fortuitousness has its major role to play as well.

It was fortuitous that I ended up in Austin, at the University of Texas, that my torts professor, Page Keeton, was also Dean of the law school, and that his was a course in which I would end up with the highest grade on his final exam.<sup>13</sup> Why fortuitous? Because, as it happened, Fifth Circuit Judge John R. Brown had pretty much delegated to Dean Keeton the task of recommending his law clerks.

And what was fortuitous about Judge Brown being a judge on the Fifth Circuit? There are many factors. Each Justice is assigned to a Circuit, and Justice Black's Circuit was the Fifth Circuit – which then extended from Texas to Florida, through all the southern tier of states including Justice Black's Alabama. Judge Brown was one of four Fifth Circuit judges referred to as "The Fifth Circuit Four."<sup>14</sup>

As Black's biographer, Roger Newman reports, "Were it not for them ["The Fifth Circuit Four"] . . . *Brown v. Board of Education*, 347 U.S. 483 (1954)] would have failed in the end"<sup>15</sup> – a contribution not lost on Justice Black. There was no way I could have then known that Newman

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<sup>13</sup> The grade was not a fluke. I "did well" in law school. But making the top grade in every course was certainly not a part of my experience.

<sup>14</sup> "During the late 1950s, Chief Judge Elbert Tuttle and his three colleagues John Minor Wisdom, John Brown, and Richard Rives became known as the 'Fifth Circuit Four,' or simply 'The Four,' for decisions crucial in advancing the civil rights of African-Americans. In this they were usually opposed by their fellow Fifth Circuit Judge Benjamin F. Cameron of Mississippi, until Cameron's death in 1964." "United States Court of Appeals for the Fifth Circuit," Wikipedia.org, [http://en.wikipedia.org/wiki/United\\_States\\_Court\\_of\\_Appeals\\_for\\_the\\_Fifth\\_Circuit](http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fifth_Circuit) (last visited April 1, 2014). See, Jack Bass, *Unlikely Heroes* 101-106 (1981). And see, Nicholas Johnson, "What Do Law Clerks Do?" 22 Tex. B. J. 229 (May 22, 1959), <http://www.uiowa.edu/~cyberlaw/LRevArt/22TBJ229.html>; and Nicholas Johnson, "Opinions and Personality: Brown on the Law," 47 Hous. L. Rev. 553 (2010), <http://www.nicholasjohnson.org/writing/BrownOnLaw-HLR-2010.pdf> (both last visited April 2, 2014).

<sup>15</sup> Newman, *supra* note 5, at 442.

would report, 35 years after my clerkship had ended, “Black got to admire and like them [“The Fifth Circuit Four”], especially John Brown.”<sup>16</sup>

“Sitting circuit” away from Judge Brown’s home of Houston, or the Court’s headquarters in New Orleans provided the opportunity to get to know Richard Rives through conversation as well as his opinions. Just as I did not know of Justice Black’s feelings about Judge Brown, neither did I know of his lengthy and positive history with Judge Rives.<sup>17</sup> Indeed, Justice Black’s son, Hugo, Jr., wrote of Judge Rives in 1983, “Justice Black repeatedly said that perhaps his most important gift to his country was his input on [the] appointment of Dick Rives to the Fifth Circuit.”<sup>18</sup>

Thus, it was also fortuitous that my two letters of recommendation to Justice Black came from Judges Brown and Rives.

And so it was that I found myself in the Supreme Court Building, escorted beyond the high gates separating the justices’ chambers from the Court’s public areas, ushered into Justice Black’s chambers, and invited to sit across the desk from him. I was meeting one of my boyhood idols face-to-face. It might as well have been a meeting with Thomas Jefferson – as I would later discover it very nearly was.<sup>19</sup> Needless to say, I have very little recall of our exchange – when it was, how long it lasted, what he asked and said, and what, if anything, I was able to respond.

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<sup>16</sup> *Id.*

<sup>17</sup> In addition to both being Alabama lawyers, Rives was a part of Black’s life as a Senator. *Id.* at 189, 221, 243. “Their [Black and Rives] fondness began when they fought together in Alabama political wars. . . . Black revered Rives as he did few other people, especially after Rives’s opinion in June 1956 striking down Alabama’s bus segregation law and ending the Montgomery bus boycott.” *Id.* at 442. There are more interrelationships that may have had some impact on my post-clerkship career. Justice Black’s first wife, Josephine Foster DeMeritte was the sister of Virginia Foster Durr. *Id.* at 169, 235. Her husband, Clifford Durr, Rhodes Scholar and liberal Alabama lawyer, was brought to Washington by Justice Black and appointed by President Roosevelt as FCC commissioner, serving from 1941 to 1948. FCC, Commissioners from 1934 to Present, <http://www.fcc.gov/leadership/commissioners-1934-present> (last visited April 2, 2014). He paid me a visit at the FCC. He later represented Rosa Parks and other civil rights causes, Clifford Durr, Wikipedia.org, [http://en.wikipedia.org/wiki/Clifford\\_Durr](http://en.wikipedia.org/wiki/Clifford_Durr) (last visited April 2, 2014). Virginia was good friends with Lady Bird Johnson, and had raised money for Congressman Lyndon Johnson’s 1948 senate race. It was a close, contested primary in which both Governor Coke Stevenson and Johnson were alleged to have manufactured votes – with Johnson gaining 87 more than Stevenson, along with the nickname “Landslide Lyndon” and the Texas Democratic Party’s certification of him as its candidate for the fall election in then-heavily Democratic Texas. Eventually the dispute reached Justice Black, who applied a principle that federal courts should stay out of states’ primary elections, beginning a Senate career for Lyndon Johnson that would ultimately lead to the White House 15 years later. As President Johnson acknowledged at a small, private White House party for Justice Black’s 80th birthday, “If it weren’t for Mr. Justice Black at one time, we might well be having this party. But one thing I know for sure, we wouldn’t be having it here.” *Id.* at 373-376.

<sup>18</sup> Hugo L. Black, Jr., “Richard Taylor Rives 1895-1982,” 44 Ala. Lawyer 59 (1983), quoted in Newman, *supra* note 5, at 443, 690, n.14.

<sup>19</sup> *Supra* note 8.

I do remember his asking about my grades,<sup>20</sup> and whether I played tennis. My memory is that I simply said, “Yes” to the latter question. I was 24 years old. How difficult could it be to bat a few balls around with a 73-year-old man, I thought. After all, I owned a tennis racket, had held it on occasion, often hit the ball I aimed at, and took a few lessons on a couple of occasions. But I’d never played competitively, hadn’t played in college, nor was I a natural athlete.<sup>21</sup>

On the side yard of his home, at 619 South Lee Street in Alexandria, Virginia, Justice Black had his own clay tennis court. We played one game. To save both of us embarrassment, he never asked me again.

What I had not known was that Black was competitive in all things and a committed – one might say addicted – tennis player of considerable skill. He had been playing since his late teens at the University of Alabama in Tuscaloosa,<sup>22</sup> although he loved to say that when his doctor told

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<sup>20</sup> I did well in law school. *Supra* note 13. But Justice Black wanted to know why I had not made straight As. I explained that I was married, with a daughter, holding two part time jobs, serving as articles editor of the Law Review, taking the bar exam before graduating without a bar review course, and managing the apartment house where we lived. That seemed to satisfy him.

I had no notion at the time of how heavily the statistical odds were stacked against his choosing me as his clerk. One analysis of 36 clerks reveals that 12, one-third, claimed Alabama as their home state. Another seven were from what could be considered “southern” states (North Carolina, 3; Florida, 2; Mississippi and Virginia, one each) – a total over 50%. (Meador erroneously listed me as a Texan rather than an Iowan.) Because some attended more than one law school (including advanced degrees) “law schools attended” totaled 43. Of those, 24 (over half) were Yale (15) and Harvard (9). An additional six were southern schools: Alabama (3), Mississippi, Virginia and Washington & Lee, one each. Thus, roughly 70% had attended preferred law schools that I had not. I was just an Iowa boy who had studied law at the University of Texas. The study was done by Dan J. Meador, a former Justice Black law clerk (1954 Term) who claimed Alabama as home, attended both the University of Alabama law school and Harvard (for his LL.M.), and was a Professor of Law at the University of Alabama. Daniel J. Meador, Justice Black and His Law Clerks, 15 Ala. L. Rev. 57 (1962-63), at 57-58, 63.

I do not now have a definitive list, or even number, of Justice Black’s clerks. Meador’s discussion and charts refer to 36, *id.*, from the 1937 Term through the 1962 Term. (His appended list of “Justice Black’s Law Clerks” for the same period has 38 entries, but that is because two of those clerks served during two Terms each. *Id.* at 63.) The Wikipedia list is incomplete, although accurate as far as it goes. It omits 14 clerks from Meador’s list for the 1937-1962 Terms, and on the assumption Justice Black continued to appoint two clerks each year from the 1963-1971 Terms, an additional 7 for those years. “List of law clerks of the Supreme Court of the United States (Seat 4),” Wikipedia.org, [http://en.wikipedia.org/wiki/List\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States\\_%28Seat\\_4%29](http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_%28Seat_4%29) (last visited April 2, 2014).

<sup>21</sup> My high school basketball coach had once described watching me on a basketball court as somewhat similar to observing an elephant on ice. One of the advantages of going to a small high school was that he had no other option than to put one of the few six-foot-four kids into the game. One of the advantages of his candor was my subsequent decision to reject the potential offer of a football scholarship at the University of Texas.

<sup>22</sup> “Tuscaloosa offered Hugo his first glimpse of a more refined life-style. He enjoyed the amenities. . . . He smoked cigars some. And he started to play tennis.” Newman, *supra* note 5, at 19-20.

him a man in his forties shouldn't be playing tennis, he quit until he turned 50 and once again took up the game.<sup>23</sup>

"The Judge," as his wife, Elizabeth, and his clerks called him, had a finely reasoned analysis of the traffic patterns between Capitol Hill and his Alexandria home, a distance of about nine miles. On days when the weather was bad, or for other reasons he wanted all of us to continue working at the Court, he would remind us that the rush hour traffic was so bad that there was really no point in leaving before 6:30. On the other hand, on warm, sunny days he would announce that there was a break in the traffic about 2:30, and that he should probably leave then in order to get home at a reasonable hour.<sup>24</sup>

Nor was this limited to warm, sunny days, for he also had a finely reasoned, analytical approach to the weather.

Justice Black kept an informal, personal and productive relationship with his clerks. We were free to walk into his chambers at any time, or call him at home if we had questions when he was not there. One afternoon, in search of guidance on something or other, I found him away from his desk. I asked Frances Lamb, his secretary, where he was, and she told me he was at the house.

I called. Justice Black's wife, Elizabeth answered. "Elizabeth," I said, "I need to talk to the Judge."

"You can't talk to the Judge now," she informed me. "He's out playing tennis."

"Elizabeth," I replied, "he can't be playing tennis. It's pouring rain."

"Nick," she explained, "you know it's raining, and I know it's raining, but the Judge says it's not raining, and he's out playing tennis."<sup>25</sup>

For many years the Supreme Court met in the Capitol Building, beginning in 1810 when it moved into what is called the Old Supreme Court Chamber, sometimes included in public tours

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<sup>23</sup> *Id.* at 302 ("The Senate doctor had told him that no man in his forties should play singles, he liked to say, so he waited until his was fifty.").

<sup>24</sup> Reich, who was living in the Justice's home, recalls the time as 3:50 p.m.: "At precisely 3:50 p.m., just ahead of the afternoon rush hour, we departed for Alexandria. Dinner was served at about 6:00 p.m. by Lizzie Mae Campbell, the Judge's longtime cook and housekeeper." Reich, *supra* note 6, at 114. Justice Black came to be called "The Judge" by his own choice when initially asked by his first secretary and law clerk how he wished to be addressed. Newman, *supra* note 5, at 269.

<sup>25</sup> All of which illustrates that Justice Jackson's insight regarding judicial decision making, in the 1953 case of *Brown v. Allen*, 344 U.S. 443, 540 (1953), "We are not final because we are infallible, but we are infallible only because we are final," is equally applicable when justices are setting working hours and appraising the weather.

of the Capitol. From 1860 until the current building was ready for the Court in 1935, it met in what is called the Old Senate Chamber. So when Justice Black took his seat the \$10 million building was only two years old.<sup>26</sup>

The structure makes heavy use of a varieties of marble throughout, marble from Alabama, Georgia, Vermont – even Spain and Italy (the quality of the latter guaranteed by none other than Benito Mussolini). The main hall is lined with marble busts of each of the Court’s Chief Justices. The Courtroom has friezes of historic lawgivers, such as Hammurabi, Moses (holding the Ten Commandments,<sup>27</sup> with only six through ten visible), Solomon, Confucius, Justinian, Hugo Grotius, Sir William Blackstone, John Marshall, and Napoleon.

Even the exterior of the Supreme Court Building is intimidating – and intentionally so – as you know if you’ve ever visited it or even seen pictures. I was told that one of the 1930s justices said the only proper way for them to arrive at work would be on the back of a very large white elephant.<sup>28</sup>

My first day at work, there being no available elephants, my wife drove me. Our five-year-old daughter, Julie, was in the car, asked where we were going, and was told, “Mommy is taking Daddy to work.” When my wife pulled up in front of the Court, on 1st Street, Northeast, Julie took one look at the Supreme Court Building and asked incredulously, “Daddy, do you work in *there*?!”<sup>29</sup>

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<sup>26</sup> See generally, e.g., “United States Supreme Court Building,” wikipedia.org, [http://en.wikipedia.org/wiki/United\\_States\\_Supreme\\_Court\\_Building](http://en.wikipedia.org/wiki/United_States_Supreme_Court_Building) (last visited April 2, 2014).

<sup>27</sup> See, e.g., “Aseret ha-Dibrot: The “Ten Commandments; List of the Aseret ha-Dibrot,” Judaism 101, <http://www.jewfaq.org/10.htm> (last visited April 2, 2014).

<sup>28</sup> See *supra* note 26.

<sup>29</sup> Six-year-old Julie and the Judge were quite fond of each other, and she still has memories of his attention and kindness on the occasions when she was playing in his garden next to the house on Lee Street. Julie also enjoyed her own encounter with President Lyndon Johnson. President Johnson, whom I had not known, nominated me to the position of U.S. Maritime Administrator – in what must have been one of his first appointments (in February 1964) following the assassination of President Kennedy November 22, 1963. He was effusive and generous in his statement regarding my swearing in on March 2. Remarks at the Swearing In of Nicholas Johnson as Maritime Administrator, no. 203, March 2, 1964, I Public Papers of the Presidents, Lyndon B. Johnson, 1963-64 329 (1965) <http://www.presidency.ucsb.edu/ws/?pid=26092> (last visited April 2, 2014). The President held the swearing in at the White House, in the Cabinet Room, and invited my family. Family members in attendance included my father and mother, then-wife Karen (since deceased, carrying son Gregory, born three weeks later), then-ten-year-old daughter Julie and two-year-old son Sherman. Sherman went running through the halls of the White House. Once retrieved, he and Julie were sent to the porch between the Oval Office and the Rose Garden. Sherman was soon peeking through the windows and Julie followed. Neither knew what they were looking at. When the ceremony began they were brought back in, and as the President entered the room he looked down at them and said, “So you were the two folks looking at me in my office.” My father died in August 1965. So when it came time for my swearing in as FCC commissioner in 1966, my relationship with Justice Black was such that neither of us thought it unusual that I would ask him to be there and officiate.

My co-clerk, Jack McNulty, and I shared an office on the second floor adjoining Justice Black's chambers, in which we each had a desk, chair, typewriter, phone, and some shelf space. Charles Reich describes this area behind the gates, where the justices had their chambers as "a small self-contained village where the clerks wandered freely, carts loaded with cert petitions were rolled along, and a relaxed atmosphere prevailed."<sup>30</sup> In later years we would occasionally return to one of the large conference rooms on that floor, when Justice Black's former clerks would be permitted to hold a reunion there for dinner with the permission of the Chief Justice and the attendance of some of the justices. There was also a barbershop near the west entrance where we could get a haircut for 50 cents.

There were many other amenities in the building. Most significant for anyone doing legal research was the Supreme Court Library on the fourth floor, considered "one of the most extensive in the world."<sup>31</sup> One of our most delightful discoveries about that Library was not just the breadth and depth of its collection, but the fact it had researchers who could do some of the basic research we needed and then bring us a cart with the relevant volumes appropriately bookmarked.

The first floor had a cafeteria, and a room where the law clerks could eat and talk without risking being overheard by reporters or lawyers. We would occasionally have speakers join us – a Justice, or other prominent person. On one occasion I remember Dean Acheson, a Covington & Burling partner and former Secretary of State, was there. And I recall one evening when I was included in a dinner party Justice Frankfurter held for what was perhaps a half-dozen of the justices' clerks.

Jack and I lived with our wives in apartments in the same general area of Arlington, Virginia, and had parking permits that enabled us to car pool and put our cars in the Court's basement garage. Jack's memory is that I lived furthest from the Court and was therefore most often the designated driver.<sup>32</sup> My memory is that we alternated driving.

On the fifth floor of the Court was a gym, including a basketball court, where the clerks' team would sometimes play a game with the Supreme Court's police officers. That basketball court was referred to as "the highest court in the land," as it was the only court above the Supreme Court's courtroom. Indeed, it was that architectural detail that led to the abandonment, or at

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<sup>30</sup> Reich, *supra* note 6, at 113.

<sup>31</sup> "Law Library," Wikipedia.org, [http://en.wikipedia.org/wiki/Law\\_library](http://en.wikipedia.org/wiki/Law_library) (last visited April 2, 2014). Lack of modesty prompts me to note in passing that "The [University of Iowa College of Law] law library has the second largest collection of volumes and volume equivalents and the second or third largest number of unique individual cataloged volume and volume equivalent titles among all law school libraries." "University of Iowa College of Law," [http://en.wikipedia.org/wiki/University\\_of\\_Iowa\\_College\\_of\\_Law](http://en.wikipedia.org/wiki/University_of_Iowa_College_of_Law) (last visited April 2, 2014).

<sup>32</sup> My family's home was in Virginia suburban apartment development called Shirlington.

least the rescheduling, of our basketball games. Chief Justice Warren informed us he found it distracting to hear the “bounce-bounce, pause, bounce-bounce-bounce” of a basketball overhead during oral arguments. He did not have to ask us twice.

When we couldn't use the basketball court there were always the large catchment-like structures under the overhead pendant lights. In the days before computers there were no “delete” keys on the typewriters. When, upon reflection, it was obvious that nothing one had just typed on a piece of paper was going to be useful, the roller was turned manually until the paper came out, was wadded up and thrown away. If a measure of stress was associated with the writing project, it could be relieved by taking a break with light fixture basketball. The goal was to see who could get the most wadded up balls of paper into the light. There must be something in the DNA of Supreme Court law clerks (or the lack of proper upbringing they have in common) that causes them, on their own, with no urging or instruction, to come up with this game – year after year.<sup>33</sup> Although the game has been played during many Terms of Court, there is apparently no instance of the paper balls being set afire by a hot light bulb.

There was a sense of camaraderie and fun among the clerks as well as a lot of long hours and hard work.<sup>34</sup> Jack and I came up with what is believed to be a unique practical joke of our own.

There were two other clerks, Murray Bring and Jerry Libin,<sup>35</sup> each of whom was with different justices at work, but who lived as roommates at home and therefore knew each other, and their voices, very well. Jack and I each had a typical 1950s style desk phone, with a handset connected by a cord to the base. Our desks were close enough together that our handsets could touch. We knew that Murray and Jerry were both generally at their desks, in separate justices' chambers, about 3:00 p.m. each day. For about ten days, at precisely 3:00 p.m. we would call them – Jack calling one, I calling the other – and then have our handsets face each

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<sup>33</sup> A law school colleague of mine, who served as a Supreme Court clerk decades after my Term, and who will be accorded the ability to remain nameless, confessed that the game was still in full swing during her years.

<sup>34</sup> Todd Peppers reports that Justice Black told his October 1956 Term clerks – George Freeman and Bob Girard – that he “picked you and Bob because you are opposites and I thought that the two of you had something to teach each other. Bob's . . . the kind of fellow who just works all the time. Your problem is you've never worked hard in your life. And I figured if I put the two of you together, he'd speed you up and you'd slow him down. And that would be good for both of you.” Todd C. Peppers, “Justice Hugo Black and His Law Clerks: Match-Making and Match Point,” 36 J. Sup. Ct. History 48, 52 (2011), <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-5818.2011.01257.x/full> (last visited April 2, 2014). Perhaps it was George's fatigue from trying to keep up with Bob that prompted the event he told ten years later. “I will never forget waking up from an after-lunch nap on the sofa in the clerks' office just in time to see the Judge tiptoeing in to close the connecting door to his chambers.’ Rather than admonishing the mortified Freeman, the Justice quietly said, ‘Go right ahead, George. The only reason I am closing the door is that the Chief and I can't hear each other over your snoring.’” *Id.*

<sup>35</sup> Murray Bring clerked for Chief Justice Warren, and was later vice president and general counsel of Philip Morris. See “Ringling College of Art + Design,” <http://www.ringling.edu/learn/community-education/community/smoa/meet-the-smoa-board/murray-bring/> (last visited April 2, 2014). Jerry Libin clerked for Justice Whittaker, and is currently a partner in the Washington law firm, Sutherland Asbill & Brennan, <http://www.sutherland.com/People/Jerome-B-Libin> (last visited April 2, 2014).

other, turned in opposite directions. Murray and Jerry would both pick up their phones at the same time, we would say nothing, and their conversations would go something like this:

“Hello.”

“Hello.”

“Murray, is that you?”

“Yes; is that you, Jerry?”

“Yes. Did you call me?”

“No. Did you call me?”

“No.”

There would then be a silence and they would both hang up.

Like a couple of junior high school boys, Jack and I found this very amusing – as did the other clerks who heard of it, and ultimately Murray and Jerry themselves once they figured it out.

But not all was silliness around the Court. One of my most professionally satisfying experiences began with a dissenting opinion of Judge Brown’s that ended up as a majority, precedent-shattering opinion of the U.S. Supreme Court.

In 1956, Fred Gray, a young African-American lawyer who had returned to his home state of Alabama, successfully argued the Montgomery bus segregated seating case before Federal District Judge Frank M. Johnson, Jr., who was himself only 37 when appointed. Not long after, Gray would be appearing before the same judge on behalf of disenfranchised African-American former residents of Tuskegee.

On July 15, 1957, the Alabama Legislature passed Act No. 140. The law redrew the boundaries of Tuskegee, the county seat of Macon County. As Justice Frankfurter would later describe the new line drawing, “the statute . . . alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure” with the “inevitable effect . . . to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident.”<sup>36</sup>

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<sup>36</sup> Gomillion v. Lightfoot, 364 U.S. 339, 340, 341 (1960). Jack Bass quotes former Tuskegee resident and taxi driver James Cropper’s reaction to the change: “I was born in the city of Tuskegee, right here on this street, and I learned to tell time by the courthouse clock. I still live here . . . and I still tell time by the same clock – but I’m not in Tuskegee anymore, they say. Whenever I look over there now to get the time of day, I also get reminded how much foolishness there is in the world.” Bass, *Unlikely Heroes* 97 (1981), quoting from Bernard Taper, *Gomillion v. Lightfoot: The Tuskegee Gerrymander Case* 24-25 (1962).

Gray sought a declaratory judgment that Act 140 was an unconstitutional violation of the 14th (equal protection; due process)<sup>37</sup> and 15<sup>th</sup> (right to vote)<sup>38</sup> Amendments, and an injunction preventing local officials from enforcing it. The defendants responded with a motion to dismiss for want of federal jurisdiction and failure to state a claim, arguing that whatever a state does with regard to municipal boundaries cannot be reviewed or modified by the federal courts.

District Judge Johnson agreed with the defendants,<sup>39</sup> as did two of the three Fifth Circuit judges<sup>40</sup> that heard the case on appeal.

These were skilled lawyers and judges, who based the rationale for their decisions on prior Supreme Court districting opinions, such as the one Justice Frankfurter wrote for the Court in *Colegrove v. Green*<sup>41</sup> -- a case which also involved what was alleged to be an unconstitutional, adverse impact on voters' rights as a result of how Illinois had initially drawn the boundaries of its congressional districts and then failed to update them.

The *Colegrove* petitioners were complaining of the dilution of their vote as a result of the widely disparate numbers of voters among Illinois' congressional districts.<sup>42</sup> Justice Frankfurter wrote that "the petitioners ask of this Court what is beyond its competence to grant" and that "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."<sup>43</sup>

He noted that the Constitution says "Elections for . . . Representative, shall be prescribed in each State by the Legislature thereof; but the Congress may . . . make or alter such Regulations . . ."<sup>44</sup> Following which, he concludes, "the Constitution has conferred upon Congress *exclusive*

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<sup>37</sup> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]he right to vote at any election for . . . Representatives in Congress . . . [shall not be] denied to any of the . . . inhabitants of such state . . . or in any way abridged . . ." *Id.* § 2.

<sup>38</sup> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

<sup>39</sup> *Gomillion v. Lightfoot*, 167 F.Supp. 405 (M.D. Ala. 1958).

<sup>40</sup> Judge Jones wrote the majority opinion, *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959); Judge Wisdom wrote a four-page concurring opinion. *Id.* at 611.

<sup>41</sup> *Colegrove v. Green*, 328 U.S. 549 (1946).

<sup>42</sup> The populations of the congressional districts ranged from 112,000 to 900,000. *Id.* at 569.

<sup>43</sup> *Id.* at 552.

<sup>44</sup> U.S. Const. art. I, § 4.

*authority to secure fair representation by the States . . . and left to that House [of Representatives] determination whether States have fulfilled their responsibility.*"<sup>45</sup>

In short, this is a matter for the people of Illinois and their legislature to decide, not the U.S. Supreme Court. Politics and line drawing is for legislative bodies, not courts. And to the extent there may be disputes, the Constitution has expressly addressed the issue and delegated its resolution to Congress, not Supreme Court justices. Moreover, there are no judicial tools to right whatever wrongs there may be. These are not matters for which the Court's expertise is applicable, and proper respect for other governments, and branches of the federal government, suggest these are matters as to which the Court should exercise judicial restraint.

When teaching media law (a course that decades ago evolved into "law of electronic media" and then "cyberlaw") I used Justice Brennan's opinion in *New York Times v. Sullivan*<sup>46</sup> to, among many other things, illustrate for the students what I characterize as the distinction between \$100-an-hour law practice and \$500-an-hour law practice.

In 1960, Sullivan, the Police Commissioner in Montgomery, Alabama, sued the New York Times for publishing an ad for some northern civil rights advocates. Sullivan charged it contained factual errors and was therefore libelous (even though the errors were relatively insignificant). Notwithstanding some weaknesses in his case, even under the old common law of the time, an Alabama jury awarded Sullivan \$500,000, which was upheld on appeal in the Alabama state courts.

The Supreme Court had long held that defamation, like advertising, obscenity and "fighting words" shy of "imminent lawless action," was simply not "speech," or if thought to be speech was otherwise outside the protections of the First Amendment.<sup>47</sup> Viewed as a defamation case, there was not much reason for the Supreme Court to even hear the Times' complaints, let alone reverse an Alabama court's interpretation of that state's law of defamation.

But Justice Brennan was not constrained by the imagination of a \$100-an-hour lawyer. He brought the creative thinking of a \$500-an-hour lawyer to the case. He noted that the speech in question, involving citizens' critique of public officials, was something that lay at the heart of the kind of speech the First Amendment was designed to protect. Permitting public officials to intimidate the media with threats of heavy financial penalties for insignificant factual errors – which seemed to be an element of what was going on in the 1960s south – would not only restrict the media, but prevent the public from access to the information needed by a self-governing people.

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<sup>45</sup> Colegrove, *supra* note 41, at 554 (emphasis supplied).

<sup>46</sup> *New York Times v. Sullivan*, 376 U.S. 354 (1964).

<sup>47</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I.

And thus was born the concept of “actual malice.” Public officials should have a heavier burden to bear than ordinary citizens when suing a media company for defamation. The public official must prove “that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>48</sup>

What Judge Brown set out to do in *Gomillion* is analogous to what Justice Brennan had done in *New York Times* – write a \$500-an-hour opinion, “a dissent that he would later consider the most significant opinion he ever wrote.”<sup>49</sup>

He questions the notion that there would be no federal constitutional restraints upon the states’ districting decisions,<sup>50</sup> and begins with the 15th Amendment’s<sup>51</sup> unambiguous guarantee of a “right to vote.”<sup>52</sup>

He then quotes the District Court’s findings of fact. Prior to Act No. 140, the boundaries of Tuskegee included 5,397 African-Americans, 400 of whom were qualified voters, and 1310 whites of whom 600 were voters. The new boundaries created a Tuskegee that “resembles a ‘sea dragon’” that removed “all but four or five of the qualified [African-American] voters and none of the qualified white voters.”<sup>53</sup>

He distinguishes *Colegrove v. Green* and *South v. Peters*<sup>54</sup> as devoid of “racial issues,” involving primarily rural-urban or political party conflicts.<sup>55</sup> He continues, “A case of disenfranchisement of [African-Americans] by redistricting has apparently never before arisen. . . . When a racial discrimination voting issue is clearly posed the Court has evidenced little concern for judicial

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<sup>48</sup> *New York Times*, *supra* note 46, at 279-280.

<sup>49</sup> Jack Bass, *Unlikely Heroes* 100 (1981).

<sup>50</sup> *Gomillion*, *supra* note 40, at 599, 602. “It is axiomatic that in a federal system the laws of the individual states cannot be supreme. . . . The Constitution so prescribes.” This is followed with a listing of cases in some 15 categories in which state action was found to violate the Constitution. *Id.* at 603-605.

<sup>51</sup> *Supra*, note 38.

<sup>52</sup> *Gomillion*, *supra* note 40, at 600.

<sup>53</sup> *Id.* at 600, 601.

<sup>54</sup> 339 U.S. 276 (1950).

<sup>55</sup> *Gomillion*, *supra* note 40, at 605-606.

abstention in ‘cases posing political issues.’<sup>56</sup> . . . Congress . . . has for nearly 100 years specifically provided for judicial enforcement of civil rights . . .”<sup>57</sup>

The Fifth Circuit majority had made much of the lack of any evidence, on the *face* of Act No. 140, of a discriminatory purpose and intent. Judge Brown dismissed that distinction out of hand.<sup>58</sup> Quoting the District Court opinion, he noted that “‘the effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified [African-American] voters and none of the white voters.’ . . . [T]he sheer statistics alleged may demonstrate a *prima facie* purpose of discrimination.”<sup>59</sup>

He made similar short shrift of the majority’s assertion that “legislative motive cannot be inquired into.”<sup>60</sup> Judge Brown wrote, “What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary.”<sup>61</sup> He continues, quoting *Munn v. Illinois*, “The suggestion, implicit if not expressed, that ‘for protection against abuses by Legislators the people must resort to the polls, not to the Court’ . . . is here unavailing. For there can be no relief at the polls for those who cannot register and vote.”<sup>62</sup>

As it happened, through another fortuitous bit of luck in my law clerking career, my year with Justice Black happened to be the year when the Supreme Court granted cert, heard and decided *Gomillion v. Lightfoot*. Needless to say, it was a matter of considerable excitement for me (and I imagine for Judge Brown as well). I had been reading all the Supreme Court’s opinions

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<sup>56</sup> Citing and discussing *Nixon v. Herndon*, 273 U.S. 536 (1927), *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953) (striking down the Jaybird Association).

<sup>57</sup> *Gomillion*, *supra* note 40, at 606 (listing numerous congressional enactments).

<sup>58</sup> “It is of little significance that the [Act] does not, as this Court so greatly emphasizes, demonstrate on its face that it is directed at the [African-American] citizens of that community. If the act is discriminatory in purpose and effect, ‘whether accomplished ingeniously or ingenuously [it] cannot stand’” (citing *Smith v. Texas*, 311 U.S. 128, 132 (1940)). *Id.* at 607.

<sup>59</sup> *Id.* 608; citing and discussing cases involving voter registration and the makeup of juries.

<sup>60</sup> *Id.* at 609.

<sup>61</sup> *Id.* at 610. “[O]nce this unconstitutional purpose is ascertained, and it is determined that the act is unconstitutional and beyond the power of a state legislature to enact, then it is unnecessary and unwise to try to find *why* the legislature harbored this purpose, to psychoanalyze them individually or collectively, and to try and verbalize the *motive* which prompted them to action.” And, at 611, “If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has – and must have – the same power to pierce the veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.”

<sup>62</sup> *Id.* 611. The quotation is from *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

for the prior years, and Judge Brown's dissent was focused on picking up enough of the justices' votes to overturn the Fifth Circuit opinion and essentially take our dissenting view of the matter.

My greatest concern involved Justice Frankfurter. He was, after all, the author of *Colegrove v. Green*, the preeminent Supreme Court opinion relied upon by the defendant, District Judge and Fifth Circuit majority.<sup>63</sup> When Justice Black came back from conference and told Jack and me that the Chief had assigned the case to Justice Frankfurter, my heart sank. "Why, with nine justices to choose from, did he have to pick Justice Frankfurter?" I bemoaned – and then, realizing that all was lost, turned to the other cert petitions and circulating opinions on my desk.

When the *Gomillion* opinion was circulated, I couldn't believe it. Justice Frankfurter had written, "If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing [African-American] citizens out of town so as to deprive them of their pre-existing municipal vote. . . . [A] correct reading of the [prior] cases is not that the State has plenary power to manipulate . . . the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. . . . In no case involving unequal weight in voting distribution that has come before this Court did the decision sanction a differentiation on racial lines . . . [T]hese considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation. . . . When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."<sup>64</sup>

Although the dissenting opinion of Judge Brown, putting forth that analysis, went unmentioned in Justice Frankfurter's footnotes, it was then, and remains, a highlight of my two years as a law clerk.

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<sup>63</sup> Jack Bass, *Unlikely Heroes*, Ch. 6, "*Gomillion v. Lightfoot*," 97-111 (1981). "At the Supreme Court, Brown's former law clerk, Nicholas Johnson, had become clerk to Justice Hugo Black, which put him in a position to see that clerks to the other Justices became familiar with Brown's dissent. As [Fifth Circuit John] Wisdom had predicted, the Supreme Court basically followed the reasoning of Brown's dissent. . . . Significantly, . . . *Gomillion* moved the Supreme Court for the first time ever to determine that the federal courts should rule on a case involving political districting, thus opening the door to reapportionment." *Id.* at 109 "Two years later, a Supreme Court majority cited *Gomillion* when they decreed in *Baker v. Carr* . . . that the federal courts had the power and duty to consider the constitutionality of state legislative apportionments." *Id.* at 110.

<sup>64</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, [plus more cites] ( 1960).

## Appendix

**Note:** Given the history of this “former Supreme Court law clerks” series, I thought it wise to ask Judge Bacharach what kinds of subjects the group might want to hear about. What follows are a couple of the questions he posed, and my written responses.

**Question:** Do you think he was a good jurist? Why or why not?

Not surprisingly, I do think he was a good jurist. The hours he put in to his study of the classics, and his belief in the necessity of a judicial philosophy, are evidence of the seriousness and sense of purpose and responsibility he brought to the job – as well as the substantive knowledge he brought to the task. The inter-personal and leadership skills developed in his years of trial practice and politics gave him both an understanding of and empathy for ordinary people as well as an above average ability to work constructively within a collegial body. Although I do not necessarily share all of his absolutist, original intent, literalist interpretation of the Constitution, I believe these were positions he came to honorably and held even when they led him to support outcomes as a Supreme Court justice that he never would have supported as a politician. He did not give one the impression that he had a hidden agenda, or was deciding cases to favor Democrats over Republicans, liberals over conservatives, or to reach other ideological positions – as some critics suggest the present Court sometimes appears to be doing. Whether his votes on President Roosevelt’s New Deal legislation were affected to any degree by political considerations is impossible to know.

**Question:** Was your clerkship demanding? Was it work around the clock or was it more leisurely? What was the Justice’s worth-ethic?

Charles Reich describes something close to a 24/7 work schedule for the Judge, albeit during the Judge’s time of grieving over the death of his first wife, Josephine.<sup>65</sup> Although nothing I would describe as “leisurely,” it was certainly not that level of “work around the clock.” His life was pretty much work, tennis, Elizabeth, steak for dinner, and sleep, near as Jack and I could figure out. We put in regular work days and weeks. Time with the Judge was such a delight that it was always a highlight of the experience, whether a lunch or dinner, sitting in the garden, discussing an opinion in his Supreme Court office, or going over his Bill of Rights lecture draft in his library on Lee Street. Everything was simultaneously fun and work. Much of our drive as clerks was internal. We very much wanted to please the Judge, had a sense of our obligations to honesty and accuracy as a result of the responsibility we had been handed, and quite prepared to put in whatever time the job required.

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<sup>65</sup> *Supra* note 9.