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IN MEMORIAM: FRANK M. JOHNSON, JR.

*The Editors of the Alabama Law Review respectfully dedicate  
this issue to Judge Frank M. Johnson, Jr.*

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JUDGE FRANK JOHNSON IN THE LONG RUN

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Law clerks arriving in Montgomery, Alabama to work for Judge Frank Johnson received an orientation, a tour that seemed prosaic at first. The Judge would introduce some of the office routines. His secretary, Mrs. Perry, would elaborate on schedules, the formatting of bench memos, the operation of the coffee pot. She also pointed out a set of scrap books, always under construction, collecting many of the newspaper stories about the Judge over the years. Walking tours of the area near the courthouse would include the Greyhound Station out back (the site of Freedom Rider violence), the Dexter Avenue Baptist Church, and the Alabama State Capitol (the site of many fa-

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mous public denunciations of the Judge). A short drive to Selma appeared on the agenda early. Dinner with the Judge and Mrs. Johnson introduced the newcomers to the joys of roses and woodworking, and to the perils of Doberman Pinschers.

After a while, this orientation began to do its work. Historical landmarks mixed together with unremarkable people and places. The scrapbooks were stored next to the coffee cups. The Judge was the same persistent craftsman, whether at work on an appellate opinion or a corner cabinet. In this world, history is not a set of events played out on some Olympian field. History is something we all do, including dazed law school graduates learning a new job. We do this history simply by doing our ordinary work, but doing it in a distinctive way.

Now we have lost Judge Johnson. As former law clerks, we struggle with the private dimensions of this loss; as law professors, we wrestle with its public dimensions. What does it mean to lose the Judge's keen and exacting intelligence at a time when many of the substantive entitlements and procedural innovations he worked to establish are under attack? Is it possible to capture something about the Judge's way of working that will help us, as lawyers and advocates, to make our history at this present moment? What might the Judge have said about making the most of our work in these challenging times?

In an important sense, that last phrase captures what the Judge himself did: he made the most of a supple and incompletely defined judicial role, in response to the particular challenges of his times. Thus, we began the search for guidance in his opinions themselves, the opinions that recreate those particular moments. Re-reading them, for us, was bracing. Judge Johnson's work has been so thoroughly studied and described that it is startling to realize how his distinctive contributions have eluded even some avid students of his work.

Judge Johnson did not consider himself a "high theorist." His most frequent admonition, as he dispatched us to begin drafting sections of an opinion, was "don't write a doggone *law review article*." When he confronted a case, he did not see the unfolding of a movement or the creation of a corpus of rights. He certainly did not contemplate a transformation in the role of the court (neither of us, for example, can ever recall hearing him say "structural injunction"). When he confronted a case, he saw

human beings—particular human beings, with distinctive fears and plans and aspirations—locked in controversy with each other.

Resolving these controversies was often the job of other public officials, perhaps legislators or a governor; but when elected officials abdicated their responsibility to resolve these conflicts, the Judge understood the task before him. His goal was to identify relatively clean legal principles that would resolve the case. He waded into the messy world of human and institutional behavior mainly to refine the means to his end. And despite the elaborate care of his fact-finding, or the comprehensiveness of his decrees, there was often a touch of impatience: he simply wanted to eliminate the immediate roadblock and to return the cases to the responsible public authorities. His long-range goal was to win the assent of these officials, and their constituents, to the new boundaries he was obliged to set.

Judge Johnson was concerned with the "rightness" of his opinions. He kept, under a paperweight on his desk, a quote from Abraham Lincoln that said:

I intend to do right, or I have done right. I've done what I consider to be right, and I intend to keep doing so until the end. If the end brings me out all right, what's said against me will amount to nothing. If the end brings me out wrong, ten angels swearing I was right would make no difference.<sup>1</sup>

But what was "right" to Judge Johnson was not always what his admirers would decide, in retrospect. What was right was not to give a victory to the Congress of Racial Equality or the Southern Christian Leadership Conference out of respect for their moral or political goals. Nor was it to place a defiant state institution under the control of the federal courts, in order to reconfigure the relationship between those branches of government. What was right was to identify the legal principle(s) that spoke most succinctly to a particular controversy; to think, in institutional and human terms, about the best way to secure compliance with

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1. This quote is cited in F.B. CARPENTER, *SIX MONTHS AT THE WHITE HOUSE WITH LINCOLN* 54 (John Crosby Freeman ed., Century House 1961) (1866) (quoting President Lincoln).

those principles; and to secure public support for those principles over the long run. Doing right required not the unfolding of an epic vision, but a keen sensitivity to the interplay between particular facts and available legal precedents. It required an imaginative, pragmatic sense about what motivated particular officials at particular times, and a supple intuition about how hard a reluctant public could be pushed without turning reluctance into frank resistance or corrosive distrust.

### THE JUDGE AT WORK IN THE DESEGREGATION CASES

Both the innovative character and the pragmatic, context-based quality of Judge Johnson's decisionmaking can be seen in two cases arising from the Montgomery assault on the Freedom Riders: *United States v. U.S. Klans*,<sup>2</sup> and *Lewis v. Greyhound Corp.*<sup>3</sup> In *U.S. Klans*, the Justice Department sought an injunction against those Klan groups who had threatened or assaulted the Freedom Riders, to prevent interference with the free flow of interstate commerce and with the exercise of the United States' power over such commerce. The decision granting this injunction bears many of the hallmarks of Judge Johnson's decrees. It is notable for its breadth: it finds not just the Klan groups, but the Montgomery Commissioner of Public Affairs and Chief of Police responsible for the violent attack on the Freedom Riders. It is also notable for its blunt willingness to cut through pretext, and the distinction between omission and commission, in assigning responsibility: it carefully assembles the evidence to demonstrate that the Montgomery Police "willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons."<sup>4</sup> It is notable for its bold protection of rights beyond those specifically enumerated in the constitutional text: it finds that the Police Department's failure to protect the students violated not only their right to equal protection but "the right of a passenger to travel in commerce . . . a right of citizenship which cannot be deprived without due process of law under the Fifth

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2. *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961).

3. *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961).

4. *U.S. Klans*, 194 F. Supp. at 900.



Amendment. . . .<sup>5</sup> But it is notable, finally, for its willingness to resist the powerful political valence of the event to focus on the legal and factual dimensions of this particular controversy: in this decision, Judge Johnson enjoined not only the Klan groups and the Montgomery Police, but the Freedom Riders themselves from undertaking further "non-bona fide travel" under the present volatile circumstances.<sup>6</sup>

This last portion of the decision startled many observers (and delighted some of the Judge's usual detractors), because the Freedom Riders had not been named as defendants in the action, and because most observers had assumed that the Judge would be sympathetic to their desegregation efforts. But the political merits—indeed, even the legality—of the Freedom Riders' effort was not the issue, as Judge Johnson saw it.<sup>7</sup> This was a case about interference with interstate commerce, and at that particular moment the Freedom Riders (whose ultimate goal was not to travel from one city to another, but to challenge the racial segregation of public accommodations along the way) threatened the free flow of people and goods in commerce as clearly as did their adversaries. The Judge held that the activities of the Freedom Riders constitute

an undue burden upon the free flow of interstate commerce at this particular time and under the circumstances that exist in this State and district; for instance, the making of unnecessary additional facilities and buses available for these non-bona fide interstate trips, requiring the carriers to run extra schedules, and coordinating these schedules with armed escorts. [Although] this

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5. *Id.* at 903.

6. *Id.* at 907-08.

7. Interestingly, in the case involving the Selma-to-Montgomery march, where the plaintiffs sought to enjoin governmental interference with a protected march which had been planned to proceed along a public highway, the Judge saw matters differently. Perhaps because the issue implicated in that case was not the free flow of goods in commerce but the First Amendment right to petition the government for redress of grievances, the Judge was willing to reach the now famous conclusion that "the extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be . . . found and held to be commensurate with the enormity of the wrongs being protested and petitioned against. . . ." *Williams v. Wallace*, 240 F. Supp. 100, 108 (M.D. Ala. 1965).

agitation on the part of the members and representatives of the Congress of Racial Equality, the Southern Christian Leadership Conference, and the others named, is within the law of the United States and is activity that may be one of the legal rights belonging to these individuals as citizens of the United States, the right of the public to be protected from the evils of their conduct is a greater and more important right.<sup>8</sup>

The Judge added that although the sponsors of the Freedom Rides had not been named as defendants in the case, "this Court is under a duty, in granting the relief sought by the United States, to go further in this particular case and grant the public complete relief insofar as possible."<sup>9</sup>

This framing of the case, and the surprisingly symmetrical injunctive decree, did not reflect any lack of judicial solicitude for the Freedom Riders' ultimate goals. Five months later, in *Lewis v. Greyhound*,<sup>10</sup> the Judge held unequivocally that Greyhound and a range of public officials were liable for enforcing the segregation of bus stations and other travel-related facilities, working his way through a maze of denials, pretexts, and equivocations to reach his conclusion. But in the context of a dispute over violent interference with interstate commercial travel, neither the entrenched patterns of segregation nor the legitimacy of objection to it had controlling legal significance.

The desegregation of the Montgomery school system, which the Judge considered among his most important accomplishments,<sup>11</sup> was another example of his context-based practicality in fashioning remedial decrees. What has become best known about *Carr v. Montgomery County Board of Education*<sup>12</sup> are the

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8. *U.S. Klans*, 194 F. Supp. at 904.

9. *Id.*

10. 199 F. Supp. at 216.

11. Others have concurred in this judgment. In upholding the Judge's ruling in this case, Justice Hugo Black mentioned Judge Johnson by name, noting that his "patience and wisdom are written for all to see and read on the pages of the five-year record before us." *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225, 236 (1969). Howard Mandell, a former clerk who worked for the Judge during the course of this litigation also stated, "[s]ometimes I wondered if he was fallible, but that was before the Montgomery County desegregation case." JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 269 (1993).

12. *Carr v. Montgomery County Bd. of Educ.*, 289 F. Supp. 647 (M.D. Ala. 1968).

features that make it a prime early example of a structural remedy. Judge Johnson maintained jurisdiction over the case—and over many features of the practical administration of the public schools—for more than a decade. He created an elaborate adjudicative process in which the United States was invited to participate as an intervener, in which all parties employed experts to help formulate competing remedial plans, and in which a range of meetings and public hearings elicited citizens' responses to the alternatives being considered.

Even in these now-familiar features of the remedial process, Judge Johnson's object was not to transform the judicial role. Two more concrete considerations guided his decisionmaking. First, the Judge recognized that he was faced with an unprecedented task—the alleviation of unconstitutional conditions in an institution whose day-to-day workings were not within the usual competence of the judiciary—and he perceived the need for guidance from participants with greater knowledge. Perhaps more importantly, he saw the need to cultivate among Montgomery officials and their constituents a sense of ownership of the remedial initiatives in the case. Far from being an effort to transform judicial power, the new and mind-boggling configurations of the adjudicative process<sup>13</sup> were meant to involve public actors in shaping the remedy, so as to foster a feeling of responsibility for the ultimate outcomes. Framed on a wall of the Judge's chambers was an editorial cartoon that appeared in one of the local papers in the early 1970s: it showed Judge Johnson officiating as a timekeeper in a footrace to desegregate the schools. As he carefully checked a stopwatch, a runner wearing the banner of

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13. For example, former law clerk Howard Mandell described the scene on Fridays, when proceedings relating to the earlier Macon County school desegregation case were customarily held:

There would be a lawyer or two for the Justice Department, and you would have literally hundreds of lawyers and school board members sitting out in the lobby on Fridays. The entire day would be devoted to reviewing proposed plans for desegregation of these myriad school districts. Judge Johnson was just as familiar with every one of these plans as the Justice Department lawyers. It was incredible. He would try to cajole. He understood their sentiments. He did a masterful job.

JACK BASS, TAMING THE STORM, *supra* note 11, at 268.

the Montgomery Board of Education crossed the finish line ahead of a runner wearing the banner of the United States. The sense conveyed by that depiction—that the Judge was simply overseeing a process for which Montgomery officials ultimately took proud responsibility—was precisely what the Judge had aimed for in constructing the injunction process.

What is less well known about the *Carr* case are those features of the remedial orders that reflected not just a desegregative goal but a situation-specific judgment about how to motivate, or protect, a specific group of actors. About some aspects of desegregation, the Judge was unyielding and resolute: he ruled early on, in a decision that came to be embodied in Supreme Court precedent, that "in each school the ratio of white to Negro faculty members [must be] substantially the same as it is throughout the system."<sup>14</sup> As to pupil assignment, however, Judge Johnson perceived a more ambivalent situation. A supporter of the principle of neighborhood schools, the Judge worried that thoroughgoing racial balance would be achieved at the cost of disrupting and disorienting younger students, who would be obliged to travel to unfamiliar schools distant from their homes. He also voiced concerns about the phenomenon of white flight, which had begun in Montgomery<sup>15</sup> and had reached stark proportions in other districts undergoing court-ordered desegregation. Consequently, he approved a plan that implemented more complete desegregation at the high school level and left intact a sizeable number of racially identifiable elementary schools.<sup>16</sup> The approved plan relied less on busing and pairing of schools in the primary grades than on the modest adjustment of school boundaries and a system of voluntary majority-minority transfers. Although this decision triggered controversy, and was rejected by several of the Judge's habitual Fifth Circuit allies,<sup>17</sup> it was far from the empty freedom-of-choice ap-

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14. *Carr*, 289 F. Supp. at 654.

15. At the time the Montgomery County law suit was filed, approximately 62.5% of the enrollment in the district was white. Ten years later, by the time the Judge entered his decree relating to the desegregation of the student population of the Montgomery schools, see *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123 (M.D. Ala. 1974), that figure had dropped 10 percentage points. See JACK BASS, *TAMING THE STORM*, *supra* note 11, at 265-66.

16. *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123 (M.D. Ala. 1974).

17. Judge Irving Goldberg, frequently a Johnson ally, commented sharply in his



proach that had proved so unavailing in many jurisdictions. Displaying an intensely practical sense of parental motivation, Judge Johnson created some of the earliest examples of magnet school strategies: in one case, for example, he moved the most acclaimed football coach to a formerly-Black school that he hoped to desegregate—an effective move he still chuckled about years later. .

#### THE JUDGE AT WORK IN THE MENTAL HEALTH INSTITUTION CASES

Judge Johnson's involvement in the system of mental hospitals in Alabama took him further than any other litigation in the direction of the "structural injunction," the active and long-term efforts of a judge to make profound changes in an institution. Triggered by terminations of ninety-nine staffers at Bryce Hospital due to budget cuts, guardians of the patients filed the lawsuit known as *Wyatt v. Stickney*.<sup>18</sup> In March 1971,<sup>19</sup> the Judge declared that the state had violated the due process rights of patients who were involuntarily committed to Bryce for treatment, because the state's level of staffing completely failed to provide any treatment. The order, however, also gave state officials six months to create and implement "proper standards" for treatment. In December 1971, the Judge issued a second opinion, this time stating in general terms the fundamental "condi-

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dissent from the Fifth Circuit decision upholding the Judge's order in this aspect of the case: "Much progress has been made in the Montgomery School desegregation, but medals earned for past performance cannot justify contemporary failure." *Carr v. Montgomery County Bd. of Educ.*, 511 F.2d 1374, 1387 (5th Cir. 1975) (Goldberg, J., dissenting). When the Supreme Court denied certiorari in this matter, however, Justice Thurgood Marshall is reported to have told his fellow Justices: "If Judge Frank Johnson did this, there's got to be a reason." See JACK BASS, *TAMING THE STORM*, *supra* note 11, at 272.

18. 325 F. Supp. 781 (M.D. Ala. 1971). For a full account and evaluation of the related prison system litigation, see LARRY YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1994).

19. *Wyatt*, 325 F. Supp. at 781 (granting plaintiffs' motion for a preliminary injunction; failure by defendants to implement fully within six months an adequate treatment program would require court's appointment of panel of experts to determine what standards will be required).



tions" of the adequate and effective treatment that the constitution required.<sup>20</sup> Only after the parties agreed in January 1972 to many specific standards implementing these general principles did the Judge issue his now-famous (or infamous) list of institutional obligations, including regulations of haircuts and water temperature.<sup>21</sup> The April 1972 orders created "human rights committees" to monitor progress at the hospitals. From that point on, the Judge's most visible involvement was the decision in 1975 to reopen the evidence to determine the extent of the state's compliance and his ruling in October 1979 (shortly before he left the District Court to join the Fifth Circuit) restricting the scope of the original order.

Throughout this legal saga, the Judge was not trying to create a national trend in health care. Nor did he set out to legitimize judicial restructuring of state institutions. He was not—to use a concept favored among legal academics—trying to create a dialogue. The Judge was instead reacting decisively to an injustice, hoping to remove the injustice as quickly as possible. Notice the two threads of this work. First, his aim was negative rather than positive. He knew, based on the detailed marshaling of facts from the plaintiffs' attorneys within the first few months of the case, that he was seeing an injustice. The injustice derived from state restrictions on liberty and was enormous enough to violate the constitution. His objective was to remove the injustice rather than to create, in a more positive sense, a system of ideally effective treatment for the mentally impaired.

The second thread running through this litigation is the Judge's impatience. This may be an odd claim to make about litigation that lasted well over a decade, but it does capture something about the Judge's approach. He believed that the court's involvement was necessary, but that the entire issue should return to the ordinary political and administrative process as soon as possible. The original declaration of liability came four months after the complaint was filed. An interim statement of principles to guide the remedy came nine months later, and the more detailed remedy (based largely on an agree-

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20. *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971).

21. *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972) (issuing separate orders for Bryce, Searcy, and Partlow facilities).

ment between the parties) arrived four months after that. Compare this progress with any reasonably complex civil litigation in federal court today.

Throughout the active phase of the litigation, the Judge wanted to set new boundaries but then hoped to see the parties respect those new boundaries without judicial oversight. The continuing jurisdiction of the court through the less active periods was, he hoped, only necessary for occasional reinforcement of the new boundaries. By the time we worked for the Judge in 1984-85, he was no longer responsible for managing the case. But he paid close attention to events and often worried out loud that the case had progressed too slowly over the years.

#### THE JUDGE AT WORK IN CASES FROM 1984-85

We see the same decisiveness and urgency in a trio of cases from 1984-85, the year we worked for the judge. The first of these, *McCleskey v. Kemp*,<sup>22</sup> involved a challenge to a death penalty in Georgia. Warren McCleskey, an African-American defendant who had murdered a white police officer during the robbery of a furniture store, challenged his sentence based on a statistical study showing that killers of white victims in Georgia were more likely than killers of black victims to receive a death sentence. The Eleventh Circuit affirmed the sentence, and Judge Johnson dissented. Instead of relying on the well-developed (and doctrinally unpromising) line of cases involving racial discrimination under the Equal Protection Clause, the Judge founded his dissent on the Cruel and Unusual Punishment Clause of the Eighth Amendment. This constitutional starting point allowed the Judge to propose constitutional boundaries that were easier to monitor, because they depended more on effects (the pattern of death sentences imposed) than on the intentions of the prosecutors, judges and juries making the decisions. His Eighth Amendment reasoning also made it possible to limit the ruling to capital punishment cases. This was an area where a court

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22. 753 F.2d 877 (11th Cir. 1985).

could enter, shift the boundaries quickly, and make a prompt exit. The problems of race in criminal justice more generally presented a quagmire he wanted to avoid if he could.

A second case, *Hardwick v. Bowers*,<sup>23</sup> involved a constitutional challenge to a state statute that was the basis for a criminal prosecution for sodomy. A police officer hoped to speak to Hardwick about a citation for a minor infraction. He knocked on the door of Hardwick's home; another resident invited the officer inside and told him that he could find Hardwick in the bedroom. When the officer opened the bedroom door, Hardwick was engaged in consensual sexual activity with another man. Judge Johnson's opinion for the court did not dodge the merits of the constitutional issue, nor did it reach for a broader conceptualization of the injury in the case. For example, the court ruled that the Does, a heterosexual couple who originally joined Hardwick as plaintiffs, did not have standing: thus the possibility of an "alliance of sodomites, both heterosexual and homosexual"<sup>24</sup>—a possibility which might have averted the Supreme Court's narrow framing of the case—was simply never an issue in Judge Johnson's framing of the case. The court only addressed the constitutional right to the extent that it bore on criminal prosecutions that were politically feasible: at that point, this meant only the prosecutions of gays or lesbians. Even then, by emphasizing the privacy of the home as a basis for the right, the opinion made it likely that the number of conflicts between the Constitution and actual state criminal prosecutions would be small.<sup>25</sup>

In the third case, *In re Application of the President's Commission on Organized Crime (Scaduto)*,<sup>26</sup> a commission issued a subpoena during its investigation of organized crime. The recipient, Scaduto, challenged the subpoena because the presence of judicial members on the Commission constituted a separation of powers violation. The Judge voted with another panel member to declare that the appointment of federal judges to the Commis-

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23. 760 F.2d 1202 (11th Cir. 1985).

24. The term comes from Janet Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1771 (1993).

25. *Hardwick*, 760 F.2d at 1211 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969) (state could not criminalize the private possession of obscene material in a home)).

26. 763 F.2d 1191 (11th Cir. 1985).

sion was unconstitutional. But unlike the other panel members, the Judge opted for the quickest resolution of the case: invalidating all prior actions of the Commission. The other panel members were willing to "sever" the improper membership of the Commission from its decision to issue the subpoena in this case. This effort to save the subpoena would have left the courts with a messy, entangling effort to determine which of the Commission's actions were and were not affected by the improper membership. Judge Johnson's rejection of this alternative left him dissenting, in part, from his own majority opinion.<sup>27</sup> A straightforward resolution, which would promptly return the matter to the legislature, seemed to him to be the soundest path.

#### THE JUDGE'S WORK AS CASE WORK

These snapshots of the Judge at work do not give us a single, simple message. They do not tell us to find the narrowest possible legal principle and the narrowest possible remedy for the case at hand. That surely was not what the Judge did in *Scaduto* or *Wyatt* or *U.S. Klans*. Nor do they tell us to declare the law and to enforce it without compromise, even if the heavens fall. This was the subtle, and sometimes painful, lesson of the Montgomery school desegregation decisions. Both in declaring the law and (even more clearly) in creating remedies, the Judge kept one eye on political and social reality.

Perhaps the common element among these cases is that the Judge treated them as *cases*, not as manifestations of historical movements or the unfolding of a principle. They were rooted in a place and time. If the case dealt with a true injustice, the responsibility of a judge was to remove the injustice as quickly as possible, using the familiar legal materials at hand if practicable. The longer-term consequences of the case would take care of themselves, or perhaps they would not, but that was not the Judge's responsibility. Thus, Judge Johnson might have been

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27. *Scaduto*, 763 F.2d at 1206.



perplexed by the observation of some admirers about the sad coincidence of his demise with that of many of his procedural innovations. Procedural innovations, he might have answered, are tools suited to particular problems and particular times. Even substantive guarantees are given meaning by their application in particular factual contexts. What is important is not protecting the legacy of a particular innovation, or even a particular line of cases, but rather effecting the soundest possible resolution of a specific controversy.

This present-oriented approach stands as a counterpoint to a much-heralded alternative: the litigation strategy of the NAACP and Thurgood Marshall to desegregate schools and other public institutions. The NAACP saw a distant goal and planned a series of cases to achieve the goal one step at a time. Desegregation of graduate programs took place first, under the existing "separate but equal" doctrine.<sup>28</sup> It was several steps later before it was possible to win *Brown v. Board of Education*.<sup>29</sup> This model of long-range litigation strategy has many adherents today, across many different subjects and all across the political spectrum. It has proven its effectiveness.

The contrast between these two models of adjudicative change can be easily overplayed. Even the long-term strategy relied for its implementation on decisions by Judge Johnson, and others of his district court colleagues, that were more contextual and presentist in their orientation. Moreover, as Judge Johnson might remind us, any particular strategy—including the long-term strategy of the NAACP—must first and foremost be suited to the contexts to which it is applied.

Yet, there are some real differences between a long-term strategy and the Judge's focus on single cases and single sets of parties. Not only does the Judge's approach generate a wider and less predictable set of outcomes; it may also be a model that is workable for a larger number of us as legal practitioners. What of the lawyer who does not plan to work full time on an issue, or to devote years to a "cause"? What of the lawyer who is

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28. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998). Mark Tushnet has argued that the strategy was long range even at the time it was created, and not simply as a matter of hindsight. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

29. 347 U.S. 483 (1954).



not confident about the proper point on the distant horizon to choose as an objective? Judge Johnson might have something to say to those among us who find themselves in the middle of an extraordinary case only once in a great while. He might say not to flinch from the needs of justice, but not to overcomplicate or overextend the case either. Frame the case in terms of the most straightforwardly applicable legal principle, work for an immediate remedy that is realistic about people and institutions, and then move on. This is a plan within the reach of any lawyer.

The Judge made history many times over. He did it persistently, more out of decency and professionalism and situation sense than out of heroism or long-range political goals. Perhaps only a few can do the work as well as he did. But Judge Johnson offers an example that the work of history is within reach of us all.

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## HONORABLE FRANK M. JOHNSON, JR.

### *Judge Ira DeMent\**

In the 1960 book *Felix Frankfurter Reminisces*, the late U.S. Supreme Court justice evoked the language of a Harvard Law School dean who described the federal judiciary as an institution that enjoyed "a great and stately jurisdiction"—to which Justice Frankfurter appended the jaunty remark, "Lovely touch!"<sup>30</sup>

I know of no judge on the planet who more ably exemplified that premise than Frank M. Johnson, Jr., late of the Eleventh Circuit Court of Appeals and before that chief judge of the United States District Court for the Middle District of Alabama, whom I was fortunate to know, appear before and work with for more than forty years.

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\* The Honorable Ira DeMent is a U.S. District Judge in the Middle District of Alabama.

30. FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 301 (Dr. Harlan Phillips ed., 1960).

Soon after graduating from law school in 1958, I was introduced to Judge Johnson (scarcely anyone except Mrs. Johnson called him Frank) prior to his administering the oath that allowed me to practice in his district. We shared in common our family origins rooted deeply in Winston County.

Judge Johnson asked if I were named after my grandfather, who served as a justice of the peace. He volunteered with a wry grin that my grandfather had fined a young Frank Johnson five dollars and costs in 1937 for fighting to defend his father's honor against a political opponent.

The folksy beginning of our relationship earned me no special consideration in his courtroom. As an assistant U.S. attorney, I argued my first case before Judge Johnson in Opelika. When he overruled an objection of mine, I continued to argue the point, whereupon he announced that he was going to put me in jail if I didn't desist. That was when I learned a valuable lesson: Never argue *with* a court but always *to* a court.

In his jurisdiction—and beyond—Judge Johnson changed the contours of law in civil rights, prison and mental health practices, in myriad cases that erupted across the political and social spectrums. He did so in the early days with only negligible support, standing conspicuously apart even from many U.S. judges in enforcement of the U.S. Supreme Court's mandates to desegregate public facilities.

Springing from the Winston County hills, Judge Johnson was the apotheosis of a mountain man, in bearing presence and sharply chiseled features. His strong visage did not invite familiarity, which is not to say that he was unbending.

Off the bench, his manner softened. His fishing companions, of whom occasionally I was one, were charmed by his bonhomie. He laughed and joked with them and on occasion raised a toddy with them, preferring Jack Daniels black until the distillery was sold to Canadians and then switching to George Dickel.

But his reserve on the bench was legendary. Lawyers who came to court with well-prepared cases had no difficulty; unprepared or ill-prepared lawyers relearned the meaning of "lowering the boom." Lawyers trembled when subjected to his icy remonstrances.

As his decisions led to the dismantling of institutional, segregated facilities in the state capital, the estrangement—more

precisely, the alienation—between Judge Johnson and the Montgomery community grew to be almost total.

Judge Johnson never shrank from what he construed to be his duty: diligently apply the law as written. In the span of a few years, he on his own or as one of a panel ordered the desegregation of the city's parks, the library system, interstate and intrastate buses, bus stations and the Montgomery airport. He pronounced the Selma-to-Montgomery march constitutional, rid the Highway Patrol of its discriminatory hiring practices and, of course, desegregated the public schools.

As important as these actions were, two other cases in which I played a part as U.S. attorney rank with the most enlightened of his decisions. In these cases, he forced settlements that led to the riddance of unspeakable, barbaric conditions at Bryce and Searcy mental hospitals and Partlow School for the Retarded and inhumane conditions in the prison system. Overcrowding, medical neglect, incredibly unsanitary conditions, violence and poor food reduced the inmates in both the mental health facilities and in the prisons to the status of laboratory animals. Called hospitals, the mental health warehouses bore a ghastly resemblance to concentration camps.

Reflecting on his career, I think his greatest personality trait was strength of character both in the judiciary and on World War II battlegrounds where, as an Infantry captain commanding a machinegun company, he won the Bronze Star, two Purple Hearts and the Combat Infantryman's Badge.

It can be said affirmatively—I hope, of almost anyone—but there was never another like United States District and Circuit Judge Frank M. Johnson, Jr.

A lesser person could not have dealt as Judge Johnson did with his rejection by the community. But Judge Johnson, by his nature self-assured and somewhat reclusive, had the last word: "Had I been socially inclined, it would have been bad. But you can't ostracize a person who does his own ostracizing, and that's just the way we are." As Mr. Justice Frankfurter said, "Lovely touch!"

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JUDGE FRANK M. JOHNSON'S CONSTITUTIONAL IDEALS  
IN ACTION*Tony A. Freyer\**

Judge Frank M. Johnson's legacy both reflected and transcended the times in which he lived. In his federal court, from the 1950s to the 1980s, those seeking fair and equal treatment under the Constitution found justice. He received international recognition for effective resolution of many historic civil rights cases, upholding the African American struggle for equal citizenship against the resistance of southern leaders. Yet Johnson's opinions affirmed not only the constitutional rights of African Americans; some of his most important decisions extended the rights of women, white urban voters, college and secondary school students, criminal defendants, prisoners, and the mentally ill. Over the years, Johnson confronted criticism that by addressing the social conflicts arising in their courts, he and other federal judges had usurped the authority of the peoples' democratically elected representatives. As he repeatedly faced protracted resistance from authorities, he accepted invitations from law schools, professional law organizations, and interviewers to present his views regarding the role of law, lawyers, and the Constitution in the American constitutional order. The ideas Johnson expressed on these occasions reveal the mind of a great judge grappling with issues fundamental to maintaining the rule of law. Taken together, these presentations set forth constitutional ideals which add to Johnson's enduring legacy.

Johnson's guiding principle was that the Constitution conferred upon federal judges a unique authority. The Founding Fathers gave the federal judiciary, led by the Supreme Court, a degree of institutional independence that was unmatched anywhere else in the American system of government. Congress could at any time limit the federal judiciary's jurisdiction. Indeed, just three years after Johnson became a federal district judge, a coalition of southern Democratic and conservative Re-

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publican Senators narrowly missed passing the most far reaching reduction of federal appellate jurisdiction—including especially individual rights cases—since Reconstruction.<sup>31</sup> Nevertheless, Johnson believed, the judge's decisional obligations which resulted from linking jurisdiction to rights was essentially "not activism at all."<sup>32</sup> Given his own profound struggles with southern leaders, as well as threats to Johnson's family such as the bombing of his mother's house, Johnson could say with authority that judges "do not relish making such hard decisions and certainly do not encourage litigation on social or political problems."<sup>33</sup> The difference between the critics' demand for judicial passivity and Johnson's ideal was that the exercise of judicial discretion was "measured not by the end result, but how and under what circumstances the result is achieved." Thus for Johnson, the "basic strength of the federal judiciary" was "its independence from political and social pressures, its ability to rise above the influence of popular clamor." Ultimately, he believed this removal from immediate popular influences gave the American people the basis for a sufficiently detached judgement "that decisions of the federal judiciary. . . [became] accepted and revered as monuments memorializing the strength and stability of this nation."<sup>34</sup>

Judicial independence established an obligation to resolve all cases according to strict legal and constitutional principles. Thus Johnson often said: "I don't find them [cases] complex societal issues. I don't regard them as societal issues. I regard them as legal issues."<sup>35</sup> A keen observer of the judge emphasized that "Johnson didn't begin where he wound up. I think it was a kind of education that he got sitting on the bench trying to do his job, being confronted with outright and open defiance

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31. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 64-65 (1998).

32. Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 474 (1977).

33. *Id.*

34. *Id.* at 474-75.

35. JACK BASS, *TAMING THE STORM, THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 90 (1993).



time and time again." He did not start with a large social theory; rather, he was

creative under the force of circumstance—he was understanding, he was responding to the necessities of the situation, and improvised and innovated. He didn't have a map of what he was doing." His creativity was "a creativity that comes from a man of great integrity, of great courage, determined to do a difficult job. Just going back and doing the job sometimes forces you to sort of shatter old forms of law and create new ones. Every step that Johnson took was pushed by historic circumstances."<sup>36</sup>

Even so, total objectivity was, Johnson believed, neither possible nor desirable. The constitutional and legal questions which came before federal judges demanded "an openness of mind and a willingness to decide the issues solely on the particular facts and circumstances involved, not with any preconceived notion or philosophy regarding the outcome of the case." In constitutional cases especially, "[w]hile a refusal to show proper deference to and respect for the acts and decisions of the coordinate branches of government is judicial intrusion and is, therefore, improper, a blind and unyielding deference to legislative and executive action is judicial abdication and is equally to be condemned."<sup>37</sup> The "duty" to uphold law meant that a court was not free to "shirk its sworn responsibility to uphold the Constitution and laws of the United States. The courts are bound to take jurisdiction and decide the issues—even though those decisions result in criticism."<sup>38</sup> This role was not "usurped by the judiciary" but was "one . . . inextricably intertwined with its duty to interpret the Constitution" and laws generally. According to Johnson, moreover, the federal courts "have never acted directly on the states or assumed jurisdiction of mere political issues, but in cases involving individual rights and liberties, these courts are compelled to construe the law in order to determine such rights and liabilities."<sup>39</sup>

The federal court's unique role also gave the legal profession a central place in Johnson's constitutional ideals. Individuals

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36. *Id.*

37. Johnson, *supra* note 32, at 468-69.

38. *Id.* at 474.

39. *Id.* at 469.

and groups brought cases affirming constitutional rights in federal court largely because local and state officials refused to address those issues. Johnson believed that the legal profession's code of ethics mandated that lawyers represent their clients effectively. Thus if someone sought enforcement of rights the Constitution guaranteed, it was necessary and proper for the attorney to seek redress in the most suitable forum, which, because of its institutional independence, was often the federal court. Still, Johnson's overriding deference to the supremacy of law required that "[l]awyers must . . . be vigilant in keeping our institutions responsive to claims of injustice and voices of dissent." American lawyers were "not only legal technicians, but also . . . social generalists." Especially with regard to "combating emotionalism and demagoguery, lawyers have an educational function with respect to laymen. They must clarify and illuminate the distinction between the constitutionally-protected rights of expression and violation of the law."<sup>40</sup> The "most fundamental of social virtues" was "[r]espect for law," the alternative to which was "violence and anarchy." And it was the lawyer's duty to

proclaim that the heart of our American system rests in obedience to the laws which protect the individual rights of our citizenry. No system can endure if each citizen is free to choose which laws he will obey. Obedience to the laws we like and defiance of those we dislike is the route to chaos.<sup>41</sup>

Johnson had neither sympathy nor respect for lawyers who abdicated what he believed was a solemn duty.

In times of riot and disrespect for judicial decisions, the lawyer must speak. To remain silent is not only a violation of his oath but is tantamount to cowardice and is a grievous injustice to the free society which men of law by conscience and sworn duty, are bound to maintain.

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40. Frank M. Johnson, Jr., *Supremacy of the Law*, 30 ALA. LAW. 287, 295 (1969).

41. Frank M. Johnson, Jr., *The Attorney and the Supremacy of Law*, 1 GA. L. REV. 41, 42 (1966).

It was essential that the "voice of moderation" prevail over the "cries of the far left and far right." Both extremists favored "social and political freedoms, individual liberties and states' rights, [but] they were driven by fanaticism. They invariably espouse democracy, but do not begin to understand its very heart: supremacy of and respect for the law—whether we like it or not."<sup>42</sup>

At least initially, Johnson's position toward professional obligations placed lawyers in a difficult position. He knew that most lawyers had little incentive to take controversial public interest cases: fees were low and most middle class clients did not want to be represented by a lawyer identified with challenging the social status quo. Accordingly, Johnson was an early advocate of government-funded legal aid for the poor and various cost-shifting court procedures which provided a minimum fee structure to sustain adequate representation in suits asserting constitutional rights claims. Ultimately, Johnson's views prevailed because, rather than in spite, of market considerations. The growth of public law litigation which changed the federal judiciary's relationship to societal issues was rooted in the social and institutional conflicts which dominated the half-century following the Second World War. Though far reaching, these conflicts did not generate a client market to rival the scale of the more traditional one; but the market which did emerge was grounded on such basic tensions that it was more likely to grow than diminish. As federal judges and Congress enlarged access through procedures, fee structures and legal aid funding, there were sufficient market incentives to encourage even smaller firms to develop this class of suits as part of their wider practice. Thus, by the 1980s, there were a moderate number of firms throughout Alabama which had beaten the odds and achieved the goals Johnson and others had for so long advocated. Also, in conjunction with these changes, Alabama's state law and judicial establishment were increasingly more supportive of "public interest" litigation, enhancing further what nevertheless remained a secondary client market.<sup>43</sup>

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42. *Id.*

43. TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: FEDERAL COURTS IN ALABAMA, 1820-1994, at 136-214 (1995).

Johnson also believed that democratic default engendered serious threats to social order, but open access to federal courts channelled social discontent into legal issues which lawyers could defend as claims of constitutional rights. These claims were most likely to arise, moreover, where electoral incentives favored official defiance. John Patterson, a former Alabama governor who resisted civil rights during the 1950s and sixties, stated bluntly that without the constitutional accountability imposed by Judge Johnson, the state's leaders lacked the political will to question the segregationist status quo. Johnson was, Patterson said, "about the best valve for bringing about change that couldn't be done politically, I've ever seen. . . . If I'd said that we couldn't win [the clash between civil rights and states' rights], I'd have been dead as a doornail politically. . . . Judge Johnson just happened to be in the right place to do the job, and he did it without hesitation, fearlessly, courageously."<sup>44</sup>

These rationales did not pursue Johnson. He condemned the "conduct of those leaders, both political and social, who are busily engaged in the frustration of the law for personal gain."<sup>45</sup> Johnson's criticism extended not only to the self-serving obstructionism of certain elected public leaders such as George Wallace; it also included the corruption of public authority identified with the Watergate crisis in which so many lawyers were found to have committed extensive violations of the law. "[W]hen persons with public responsibility make a mockery of law by prostituting legal process and stultifying the forms of law in defiance of their sworn duty to uphold the Constitution and the laws of the land," Johnson said, "the attorney of integrity has a positive duty to intercede."<sup>46</sup> Wallace and Watergate represented a "brutal attack . . . launched against such fundamentals of a democratic society as the administration of justice by impartial courts and the consensus of acceptance and respect for judicial decision." It was the legal profession's "sacred and unique responsibility . . .

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44. TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 223 (1981).

45. Johnson, *supra* note 41, at 41.

46. *Id.* at 42.



to quietly illuminate the path of reason and to loudly proclaim the supremacy of law."<sup>47</sup>

Civil disobedience raised more complex challenges. If lawyers provided dispossessed and exploited groups adequate access to legal institutions, the "condition for justifiable civil disobedience [would] rarely, if ever, exist," Johnson believed.<sup>48</sup> He thus distinguished between legitimate civil disobedience and revolution. Advocates of both broke the law, but proponents of civil disobedience strove to change the established legal order, whereas the revolutionary worked for the "total eradication of the existing legal system."<sup>49</sup> The latter was fundamentally inconsistent with the supremacy of law. Under certain circumstances and to a point, however, civil disobedience and the legal order were reconcilable. The only legitimate form of civil disobedience was "an open, intentional violation of a law concededly valid, under a banner of morality or justice by one willing to accept punishment for the violation."<sup>50</sup>

In an address delivered to the Montgomery County Bar Association in 1990, Johnson stated his fundamental beliefs. He was sure that, despite innumerable problems and injustices, a distinctive commitment to basic rights characterized America. This singular regard for rights recognized that the "welfare of the individual is the final goal of group life," embodying "a basic moral principle: all persons are created equal as well as free." This established the "obligation to build social institutions designed to guarantee equality of opportunity to all citizens. Without this equality, freedom becomes an illusion. Thus, the only aristocracy that is consistent with our way of life in America is an aristocracy of talent and achievement."<sup>51</sup>

The "American heritage" of equality rejected the "totalitarian arrogance" which imposed "human uniformity or regimentation." Thus, Johnson said: "In our land, citizens are equal, but

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47. *Id.*

48. Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 12 (1969).

49. *Id.* at 6.

50. *Id.* at 8.

51. Judge Frank M. Johnson, Jr., *What is Right America*, Address at the Montgomery County Bar Association's 1990 Celebration of Law Day (May 2, 1990), at 2-3 (on file with the author, used with Judge Johnson's permission).



they are free to be different. From these very differences . . . has come the great human and national strength of America."<sup>52</sup> Consistent with the Declaration of Independence, the Constitution, and the Bill of Rights, government was "denied . . . power to abridge or interfere with certain personal rights and freedoms."<sup>53</sup> This same government nonetheless "must referee the clashes which arise among the freedoms of citizens and protect each citizen in the enjoyment of the maximum freedom to which he or she is entitled."<sup>54</sup> From the nation's heritage, institutions, and formal pronouncements of rights flowed the fundamental right to safety and security of the person, right to citizenship and its privileges, rights to freedom of conscience and expression, and right of equality of opportunity. The persistent gap between the articulation and fulfillment of these rights did not diminish Johnson's conviction that they were what was "right with America."<sup>55</sup>

Thus, Johnson's constitutional ideals were fundamentally conservative. His expression of core values emphasized a patriotic vision of Americanism resting not upon pervasive social or class amalgamation or individualistic libertarianism, but basic equality under law and fair opportunity. Johnson defined rights guarantees enshrined in the Constitution and Bill of Rights as being contrary to the mass social and political conformity imposed by "totalitarian arrogance," the opposite of which was a brand of individual liberty characterized by the fundamental right to personal security, opportunity, citizenship, and freedom of expression and conscience. Americans achieved this vision of equal rights through legal institutions, particularly an independent judiciary and access to the adversarial process depending on fair and effective representation by lawyers. Fundamental fairness secured through institutional autonomy protected individual rights and deflected social and political struggle. Johnson's constitutional ideals were vital to the nation's present

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52. *Id.* at 3.

53. *Id.*

54. *Id.* at 4.

55. *Id.* at 2.

and future.

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## MEMORIAL TO HONORABLE FRANK M. JOHNSON, JR.

*M. Roland Nachman, Jr.\**

During his more than forty years on the federal district and appellate bench, Judge Frank M. Johnson, Jr. achieved recognition as one of the foremost judges of this land. Indeed, he has been aptly termed the Chief Justice John Marshall of the general federal judiciary.

Judge Johnson has been a constant hero of mine. His every judicial endeavor embodied the concept and practice of elemental fairness, which is, after all, the essence of due process of law. No litigant, weak or powerful; no lawyer, whether a stumbling novice or a graceful and accomplished practitioner, could leave his courtroom without the sure conviction that he or she had seen due process in action; had seen an uncompromising, fearless, and unflinching insistence on fairness; and had seen a judge thoroughly prepared on the facts and law of the case at hand.

Judge Johnson's career is graphic proof that the legal process is still the most effective means of accommodating the needs of all who want to live peacefully in a just and civilized society. His every decision—regardless of the particular area of the law, and regardless of personal difficulties, invective, isolation and even attempted violence—has adhered uncompromisingly to Lord Coke's rejoinder to King James—"Not under man, but under God and the law."<sup>56</sup>

Judge Johnson did more. He engaged in a constant quest to improve the administration of justice and to better the peaceful solution of conflict through reason. He understood that our great legal tradition is not a treasure to be hoarded and counted periodically. As one directly responsible for its conduct and stewardship, Judge Johnson used the law as a source of dynamic

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56. See generally 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 429-31 (2d ed. 1937).

energy to ensure that social change and the solution of society's problems are accomplished with integrity, conscientiousness and with fidelity to that noble tradition.

Judge Johnson's decisions have become landmark examples of a necessary and pervasive use of a court's traditional equity powers to assure protection of constitutional rights. He understood that a failure of a judge to resolve a claim of constitutional violation is not judicial abstention; it is a decision not to enforce constitutional rights by the very agency established under the Constitution to do so.

Judges have a constitutional obligation to intervene whenever constitutionally protected rights of our citizens are affected. And they have an especial obligation when, as with the Alabama schools and prisons and mental hospitals, other problem-solving agencies in our state were so preoccupied with other affairs that they abdicated their responsibility. Judge Johnson did not usurp power, or exercise a long suppressed desire to run state schools or prisons or mental hospitals. Quite simply, he responded to a constitutional duty.

I have noted that Judge Johnson has been correctly labeled the John Marshall of the general federal judiciary—a leader, as was Chief Justice Marshall. Because of Judge Johnson's courageous decisions, and the decisions of others which followed, and implementing legislation, this century, and our lifetime, have seen the end of legalized segregation and racial discrimination. That is not to say that *de facto* discrimination and segregation have vanished. It is to say that Judge Johnson took the lead in seeing to it that a constitution written and adopted in the Eighteenth Century, and amended in only three relevant instances in the Nineteenth Century, mandated and undergirded those essential changes and guaranties. For this, Judge Johnson will be an eternal source of pride.

It is particularly apt to recall the topic and credo of Judge Johnson's commencement speech at the University of Alabama on May 15, 1977, when he was awarded an honorary doctorate. His topic was, "What Is Right with America." His concluding credo was that our most cherished birthright is "the right to share in the freedoms which our government was established to

secure and protect." And, quoting from Senator Sam Ervin, he reminded all who heard or read his words:

These freedoms are exercisable by fools as well as by wise men, by agnostics as well as by the devout, by those who defy our Constitution and laws as well as those who conform to them, by those who hate our country as well as by those who love it.<sup>57</sup>

Judge Johnson has honored all who have practiced or litigated—and countless other Americans who have not—by over a third of a century of dedication to the proposition that, in America, law is supreme. His court was a model of fairness and of expedition. Judge Johnson's performance has been a sample of our best, of the finest that the law can produce in a civilized society.

Judge Johnson's hero was Abraham Lincoln, whom he termed "one of the greatest Americans who ever lived." Judge Johnson, too, was one of the greatest Americans who ever lived—the Abraham Lincoln of the federal judiciary.

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### JUDGE FRANK M. JOHNSON, JR.

*Frank Sikora\**

By the middle of that August morning in 1976, the streets of Montgomery were already baking. Ahead of me was the U.S. Courthouse, the U.S. flag drooping in the heat, much the same as the limbs on the magnolia trees on the front and side lawns.

I was in Montgomery on assignment for *The Birmingham News*, but with time to spare, I had decided on impulse to walk into the court building to try to meet U.S. District Judge Frank

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57. Judge Frank M. Johnson, Jr., Address at The University of Alabama Commencement Ceremony (May 15, 1977).

\* Mr. Frank Sikora is a former staff writer for *The Birmingham News* and biographer of Judge Johnson.



M. Johnson, Jr. Judge Johnson was already a figure of legendary proportion: his frosty bearing from the bench caused attorneys to tremble, to stutter, to lose their train of thought, even to faint.

There was a book to be written about the man who had been in the vortex of the civil rights storm a decade earlier, a man whose decisions had led the way in crumbling segregation in Alabama and the South. I wanted to write it, or at least try. His law clerks had turned me away during telephone requests. He didn't discuss cases with reporters, I was told.

In the outer halls of his chambers there was a feeling of history flowing about me; the plaintive calls of the poor and disenfranchised seemed to echo through the place. The walls held awards from universities, notes and pictures from presidents, and, in one room, a photo of a mule.

"Do you have an appointment?" asked his secretary Dot Perry, glancing at her calendar. She knew I didn't.

No, I said, I just wanted to meet the judge.

"Well, I don't know if he'll have time," she said. "But you can have a seat and wait if you want to."

At that point I almost chickened out and started to say I'd come back some other time. But at that moment the door of his office opened and Johnson stood there. He was a trim man who appeared taller than he actually was; his face was craggy; his hair was thick and brown; his eyes were narrow and bright. He handed the papers to Mrs. Perry, made a brief comment about them, then suddenly turned to me.

"Can I help you with something?" The voice had a hillbilly twang to it. There was authority there, but it was not unkind.

Mrs. Perry quietly injected, "He's a newspaper reporter." *That* information probably would end the meeting, I figured. But Johnson nodded slightly as though to say he'd dealt with worse people before.

"You can come in for a minute," he said. "I don't know that I can help you much."

"I would like to write a book about you," I said, "especially the civil rights cases." He nodded. Then, in a casual tone, he said, "You could take any of those cases and probably write a

book about each one. They were all full of dramatic testimony: The Montgomery Bus Boycott, the freedom riders, voting rights, Selma-to-Montgomery, any of them could make a book."

To tell the truth, I thought he would decline. Instead, he volunteered, "I'll make my files open to you. And I'll set some time aside when you need to talk."

Over the next fourteen years or so, I would make appointments to see him each time I was in or near Montgomery. He always signaled the end of the interview by asking, "Family all right?" While he talked about the civil rights cases and the great personalities of that era, including the Rev. Martin Luther King Jr., and Gov. George C. Wallace, my favorite memories are of his stories about growing up in Winston County and fishing. My great regret is that I never went fishing with him.

He liked to take a chew of Levi Garrett tobacco, sit back and reflect. When he told me about courting Ruth Jenkins when they were teenagers in Winston County, he would pause and look up at the picture of Clear Creek Falls, one of their favorite spots. (Mrs. Johnson later said that the first time she had actually paid any attention to him was one day in the early 1930s when there was an air show at a place called Tuggle's Pasture. "He was riding a horse," she said. "He looked so high and mighty." But several years later a flame began to flicker and soon he was carrying her books after school). On January 16, 1938, they drove to Birmingham to get married. A minister they had known in Winston County performed the ceremony.

Johnson soon lost his job as a bookkeeper, and the two of them later enrolled at The University of Alabama, getting some help from his parents. She became a teacher; he graduated from the The University of Alabama School of Law. After World War II Johnson entered private practice in Jasper, then was appointed the U.S. Attorney for Northern Alabama.

In 1955 President Eisenhower nominated him as the U.S. District Judge in Montgomery. From that post Johnson became a part of American history, hearing cases that helped bring civil rights for blacks in the South. He took the oath November 7, 1955. On December 5, a black woman, Rosa Parks, was arrested on a city bus for refusing to stand for a white man. It started the Montgomery Bus Boycott and the civil rights movement.

For the next decade, Johnson would issue rulings that de-

segregated buses, schools, state parks, swimming pools and libraries. He ordered the state to begin hiring blacks; enjoined the Ku Klux Klan from attacking "freedom riders" in 1961, and ordered state police to protect passengers. He wrote opinions that allowed blacks to be registered to vote in Black Belt counties. His order allowed the historic Selma-to-Montgomery march.

They were brave years, for many white Alabamians resisted efforts to desegregate. The judge was threatened numerous times, and hate mail poured in. At one point the FBI wanted to move Johnson and his wife and adopted son, Johnny, to Maxwell AFB where tighter security could be maintained. The Johnsons refused. Those cases and those times led some of the judge's supporters to refer to him as "the Abraham Lincoln of the 20th Century."

All my visits to Judge Johnson's office were scheduled, usually at 9 a.m. But one day I was in Lowndes County and on the way back I decided to stop by. I wasn't even sure he was in. When I walked in Mrs. Perry looked up with a trace of alarm.

"Were you supposed to be here today?" she asked. "I don't know if he'll have time to see you. He's really busy. There's a hearing tomorrow."

"I'll only stay a minute," I said.

So she knocked on his door and announced that I was there.

"Come on in," he said.

Under her breath Mrs. Perry said, "Just stay a minute."

But Johnson took off his reading glasses, got a chew of tobacco, and started talking about fishing on the Tennessee River with his old friend, Lecil Gray. "The Tennessee River is the coldest place in the world in winter," he said. "That wind cuts right through you." After the trip, they were heading home with Gray driving. Suddenly there was an impact, and Johnson was thrown forward. Gray had hit a mule that was running across the road. His account of that night went on for some time—far beyond my allotted minute. As it concluded I arose and said something to the effect, "The Tennessee River flows north."

Johnson's head snapped quickly toward me as through he had heard a revelation.

"That's right," he said. "It does flow north." He thought

about it for a moment, then: "Where does it flow to? Where does it meet the Ohio?"

"I don't know," I said.

The judge chewed thoughtfully for a while, staring out the window of his office. I started for the door.

"Wait a minute," he said, standing. "Where are you going?"

"I think my time is up," I said.

"Well, now just hold on," he replied. "You can't leave until we find out where that river ends." He walked by me and out the door. As we passed Mrs. Perry's desk he explained. "We gotta check the map in here." I avoided looking at her. In another office there was a big map on the wall and Johnson closely examined it. Then, tapping the map several times for emphasis, he said, "There it is. Paducah, Kentucky. Un-huh. That's where she meets the Ohio." I nodded. "See that?" he went on. "You learn something every day." Then, after gazing at the map a little longer, the judge turned and went back to his office. Over his shoulder he called, "Family doing all right?"

What Frank Johnson stood for was forged in his Winston County heritage, the way he was raised, and what his parents and grandparents believed in. From way back, they were what he called "Lincoln Republicans." One day he told me a story that I thought summed it all up.

In my early years, when I was ten, and eleven, and twelve, I would spend some summers with my grandparents, William Rufus and Bessie Johnson, who lived near Carbon Hill in Walker County. That was in the late 1920s. Grandfather was a carpenter and one summer he and I built a barn. It was the sort of thing every boy should do. During those summers Grandmother Bessie would get up early and fix breakfast for us. As she would knead the dough for biscuits, she'd hum or sing. And sometimes she'd sing the words from "Battle Hymn of the Republic." I never even heard the song "Dixie" until I was twenty-one years old, enrolled at the University of Alabama.

He was viewed by many as a liberal, and that's true when it came to human rights. But on other matters, including finances, he was a tough conservative. A few times over the years, he sent me brief notes, usually a thank-you for attending some function. He always had Mrs. Perry use a stamp he had bought, never with government postage.



Ruth Johnson laughs about the time in the late 1940s when they still lived in Jasper. She wrote a check at the grocery store and it bounced. "Frank was furious," she said. "He got a separate checking account." It wasn't until 1977 that he put her name back on his account.

By the middle 1990s Johnson's health began to deteriorate, and he retired from the United States Eleventh Circuit. There were fewer visits. He would go to the office for an hour or two, then go home. Mrs. Johnson hired off-duty paramedics to drive him to and from the office, and they would remain there with him.

His secretary in the final years was Diane Stone. "I think he feels he has to come here and be ready in case he's needed," she said one day in 1997. She was only the third secretary; Helen Cospers and Dot Perry had been with him most of his career, attesting to the loyalty the judge earned. His law clerks over the years have remained a faithful corps who maintained their ties to the judge and his wife.

On one of my last visits at the home, the judge had little to say, but smiled as Mrs. Johnson talked about their dog, Winston. Then later we walked out back where he put liberal amounts of feed out for the birds. For a long time we stood watching them fly in for a feast. He nodded in approval. He enjoyed watching the birds.

When it was time to leave, he nodded at me, shook hands, then slapped me on the shoulder a couple of times.

I missed hearing him ask, "Family all right?"

The judge died on July 23, 1999. A memorial service was held at the federal building that bears his name. They played "Battle Hymn of the Republic." After the service, Montgomery Mayor Emory Folmar stood outside the building. "This is history," he said. "This is history."

The judge was buried in Haleyville, in Winston County.

Johnson had once stood in a storm alone, a storm that was a legal and social revolution, the biggest domestic story in America since the Civil War. He once said that the issues that brought about the civil rights movement were the same ones that had caused the war: states rights, federal authority, and

the standing of black people in the South.

The change that came after the Civil War was written in soldiers' blood. In the civil rights movement of the 1950s and 1960s, change came about in large measure by orders issued by a battery of Southern federal judges. Frank Johnson of Alabama was foremost among them.

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## FRANK MINIS JOHNSON, JR., AS A COLLEAGUE

*Judge Gerald Bard Tjoflat\**

When I came to the federal bench in October 1970, as a United States District Judge for the Middle District of Florida, Frank Johnson was already a full-blown legend—not only in Alabama and the South, but throughout the nation. Most of the landmark rulings cited in this memorial issue of the *Alabama Law Review* were already history, and the Civil Rights Era was proceeding full steam ahead.

I was fortunate to become acquainted with this larger-than-life legend a few short months after being appointed to the bench. After the Supreme Court decided *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>58</sup> the "busing case," which required district judges to bus students extensively if necessary to dismantle a dual school system "root and branch," I inherited all of the school desegregation cases in northeast Florida, including the Jacksonville case. In that case, little had been done to desegregate the Jacksonville public school system, which had over 130,000 students (70% white, 30% black) and covered an area two-thirds the size of Rhode Island. The prospect of busing thousands of students across the county had Jacksonville residents up in arms. In response to threats of violence, the Department of Justice assigned a cadre of U.S. Deputy Marshals to protect me and my family around the clock. Most of the deputies came from the Middle District of Alabama; at one time or another, their duties had involved protecting Judge Johnson and his family.

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\* The Honorable Gerald Bard Tjoflat was a colleague of Judge Johnson and currently sits on the Eleventh Circuit Court of Appeals.

58. 402 U.S. 1 (1971).

Not knowing what lay in store, and needing some sound advice, I called Judge Johnson. He told me to expect rough waters ahead. He firmly believed, however, that the people of the South were inherently law-abiding, and that if my decrees were expressed in language that the man-in-the-street could understand, rather than in the legalese lawyers and judges were wont to employ, the people would obey them. I found that to be true, and reassuring. Judge Johnson gave me another piece of advice, which I have passed on to trial judges ever since. That is, never enter an injunction that cannot, as a practical matter, be enforced through the court's civil contempt power. To enter such an injunction invites disobedience (because those enjoined are quick to learn that the court has overstepped its bounds) and breeds disrespect for the rule of law.

When Judge Johnson joined the Court of Appeals, our professional relationship grew into a warm and enduring friendship. Little by little, the shell he had built around himself during his difficult days on the district bench disappeared, revealing an extremely warm and caring human being with a passion for justice. In conference following oral argument, for instance, he saw a human face on every legal issue, and his unwavering devotion to the rule of law came front and center. A sense of justice—inborn in Judge Johnson—permeated everything he did.

At the end of the day, both his good-nature and Alabama hill country upbringing would emerge. Whether "saluting the Constitution" with a bit of Jack Daniels or enjoying a chew of Levi Garrett while fishing, Judge Johnson could be counted on for a story. He was the quintessential storyteller. As one might expect, most of his stories were set in the hill country. The characters were Dickensian, true originals like Frank. Some of the stories involved him, so he changed the names to protect the innocent.

A current topic of public debate is whether character matters. As a former chief judge of the Eleventh Circuit Court of Appeals, I can say that character does matter; in fact it is vital. During Judge Johnson's time on the bench, the Eleventh Circuit and the Circuit's Judicial Council conducted several highly sensitive investigations of an administrative nature. On practically

every occasion, Judge Johnson was asked to participate in these investigations. He was asked because of his character, wisdom, and integrity.

Frank Johnson was one of a kind. If I were a law school dean, I would require every first year law student to study his life—assured that once they did, they would adopt him as a role model. If I were counseling aspirants for political office, I would cite Frank Johnson's decisions in the heat of battle as lessons in courage. And if asked why Frank Johnson carried himself as he did, I would say that he was simply doing what the prophet Micah instructed: "And what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God."<sup>59</sup>

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59. *Micah* 6:8.