

LESSONS FROM THE MASTER—THE LEGACY OF JUDGE JOHN R. BROWN

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On my desk at home, I keep a copy of Judge John R. Brown's portrait, along with framed snapshots of Ann Richards, Geraldine Ferraro, and my law school friend, the late Mike Morisi. Although I am not sure the Judge, a lifelong Republican, would appreciate the company of such stalwart Democrats, he will just have to forgive me. He, like all of them, is a continuing source of inspiration for me. Besides, I like to think that, once in heaven, the Judge switched parties.

That belief is only partially the result of wishful thinking. Of all the things the Judge said, the one statement I remember most was his repeated insistence that we *are* our brothers' keepers, a stereotypically Democratic notion. The Judge, however, would always add that our brothers and sisters had no right to demand to be kept. Instead, he believed that each of us has a moral obligation to others that is as absolute and binding as any actionable contract.

As a judge, John Brown practiced this credo. Not surprisingly, he was often accused of judicial activism, the unpardonable sin of judges who vote against you. He never saw himself that way. Instead, he understood what it meant to be a judge and simply refused to embrace the myth of judicial "strict constructionism" to justify inaction in the face of real injustice. He knew that, particularly in the Fifties and Sixties, the federal courts, and the Court of Appeals for the Fifth Circuit in particular, were truly the courts of last resort—the only place where his disadvantaged or dispossessed brethren could seek redress of legitimate grievances and have any hope of obtaining it.

He once told me of a voting rights case on which he sat during the Civil Rights era. The court had before it a Southern county with almost 20,000 eligible voters in it, most of whom

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were African-American, but only four of whom were registered to vote. Whether you were a Republican, Democrat, or even a “none of the above,” the Judge said, you knew something was wrong. Under these circumstances, inaction was an unaffordable luxury and would have required aggressive ignorance of the facts before the court. It is hard to imagine how respect for the courts and for the rule of law in this country would have suffered or what the South would be like today if Judge Brown or his fellow Fifth Circuit Judges Tuttle, Wisdom and Rives had simply demurred under such circumstances.

The Judge’s philosophy also applied to his law clerks. A surprising number later became federal district judges; one even made it to the Fifth Circuit. Others founded or lead major law firms, served in the President’s Cabinet, or are considered among the best attorneys in the country. All of us are better lawyers because we spent a year under his tutelage.

While we clerked, Judge Brown made sure we learned how to practice law, including acquiring basic office skills. We were allowed only three drafts of opinions to learn careful editing, and if he caught us reading a draft opinion into the Dictaphone, he confiscated the “crib” sheet so we would learn the now-dying art of dictation. He shared with us, as much as possible, the inner workings of the court to demystify both the institution and the judges who were part of it. And he taught us that, as lawyers, we had obligations, not simply to practice our craft with integrity and a high degree of skill, but also to serve the public and our profession through *pro bono* activities, continuing education, public service, and politics if we could do so.

This is not to say that Judge Brown was just some kindly father figure to beloved law clerks, Santa Claus with a presidential appointment. My very first Fifth Circuit argument was before Judge Brown. It had been a little over three years since I had finished my clerkship, and it was a case we clearly should win. Nonetheless, from the moment I stood up to argue, the Judge simply gave me fits and let loose with a flurry of questions, apparently designed to determine if I had done my homework. At the time, I thought I detected an ever-so-slight smile every time I gave the “right” answer. Years later, when I complained of my treatment, he informed me that he had

noticed my mother in the audience and had decided to see if he could get her to stand up and tell him to stop abusing her daughter. Gratefully, she did not take the bait, nor did I.

Despite this experience, I have always regarded Judge Brown as a judicial archetype. He loved being a judge, particularly chief judge, and was very well-suited to the task. As his clerk, I learned that there were at least two kinds of judges: Those who could find the heart of a case—the pivotal issue on which it turned—and boldly decide the case on that issue, and those who sort of piled up the issues and found for the party with the larger stack on his or her side. Judge Brown was most definitely in the former category. He could find the critical issue in a highly complex case the way a compass points to true north. Of all the skills I learned from the Judge, I have found that one—finding the key to a case and having the confidence to use it—the most valuable.

In retrospect, however, it seems odd that anybody would remember Judge Brown for such laser-like focus given his sense of humor. Judicial focus implies intense seriousness and grim scholarship. Yet, Judge Brown took himself less seriously than almost any person I have ever met. He would always tell his fellow judges, “Remember, you were appointed, not anointed.” For this reason, Judge Brown is sometimes dismissed as merely the court jester of the Fifth Circuit. And that is a big mistake.

Don’t get me wrong: the Judge knew how to provide comic relief. Judge Brown was the only man I ever knew who owned an opera cape with red satin lining or who wore it on occasions other than Halloween. And I must admit that some of his sport coats bore an unsettling resemblance to the linoleum floor tile at a Mexican restaurant he frequented. And, yes, his green patent leather shoes have been memorialized in both legal opinion¹ and song. Then there was that Santa suit . . .

Judge Brown’s legal opinions are equally legendary. Judge Brown very much believed that the law and its language need not be dull and lifeless. Legal writing was his passion and

1. United States v. Colbert, 474 F.2d 174, 189 (5th Cir. 1973) (Goldberg, J., dissenting).

ultimately, his legacy.² As a result, he and his clerks made every effort to make his opinions entertaining as well as illuminating. In fact, when I began clerking for the Judge, I was told that the funnier the draft (in appropriate cases, of course) the more likely he was to accept it without changes. That proved to be pretty good advice. As a result, “Pac-Man” starred in one of our opinions,³ and even Dickens was employed as the voice of garbage to describe its landfill destination as the “far, far better rest I go to than I have ever known.”⁴

There was a method to the Judge’s apparent madness. Judge Brown instinctively knew that humor—perhaps more than any other language tool—has the ability to make an idea memorable and concrete and to explain a complex concept in terms that people can understand. Twenty years of my own practice has proved him right.

The Judge’s humor also masked his solid legal scholarship, passion for the law, and boundless facility for it. When we received a case on which we were to write an opinion—either as a member of a screening panel or after an oral argument—the Judge would call a law clerk into his chambers and talk to him or her about how the opinion was to be drafted. In every case in which I was involved, the Judge would describe applicable case law in great detail. He never faltered. At the age of 73, he could remember the precise holding in a case so that it would take only a few minutes to locate it, even in the days when there was no Lexis or Westlaw. In many instances, the case had been decided almost twenty years before.

When I clerked for Judge Brown, we had a death penalty case on which there was to be an emergency hearing. The man was scheduled to die three days later. The day before the hearing, I spent almost all day with the Judge, both of us trying to make sure we did everything right, that nothing at all was

2. The Judge John R. Brown Foundation sponsors one of the most prestigious and generous legal writing prizes awarded today.

3. *TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta*, 696 F.2d 1135 (5th Cir. 1983) (Judge Brown makes the pun that stevedores are “pack-men.”).

4. *United States v. 50 Acres of Land*, 706 F.2d 1356, 1362 (5th Cir. 1983) (“In this particular tale of two landfills, Duncanville’s garbage might well be heard to say, ‘It is a far, far better rest I go to, than I have ever known.’”).

missed. I remember being very glad that it was his responsibility, and not mine, to make the decision on whether to stay the execution, and we talked at length about whether it was right that the State should have the ability to take a life and whether mere mortals should have the power to make that decision.

I received a call the next morning at 5:30 a.m. The Judge had suffered a serious heart attack the night before. I am convinced that his enormous concern for and devotion to the important task that faced him directly contributed to that event.

Judge Brown's use of the language and sartorial flair should not diminish his stature as a judge. To the contrary, I think the Judge's apparent eccentricities provide the best insight as to what made Judge Brown, in my estimation, a very great man.

Had the Judge been merely the Fifth Circuit's class clown, he would be remembered. Had he simply been a civil rights pioneer, his legacy would be vast. Had he been just the dean of the American admiralty bar, he could have considered his professional life a great success. Had he been only the man who brought court administration into the modern age, he would be considered a giant. That he was all of these seemingly contradictory things *all at once* renders him utterly unforgettable. It was a balancing feat worthy of the *Cirque du Soleil* and almost as much fun to watch.

When I finished my clerkship, I gave the Judge a poem I had written for and about him. When he died, his widow Vera asked me to write and deliver another one as a eulogy. I entitled it "Mark on the Mountain," and it focused on this very duality: Judge Brown's ability to be both the life of the party and a courageous champion of civil rights; to have a reverence for the awesome power and responsibility he had been given, and yet to be irreverent in his treatment of himself. Then, as now, I am fascinated and inspired by the enormous contributions he made and by the unique way in which he made them: as a vibrant part of a very human world and his brothers' keeper to the end.