2004

Memories of the Supreme Court in the 1961 Term

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Bob Hudec and I served as law clerks during the 1961 Term of the Supreme Court, most notable for its decision in *Baker v. Carr,* 369 U.S. 186 (1962) ("one man; one vote"). It was a heady experience for all of us.

Bob was one of Justice Potter Stewart's law clerks; I served as the "Senior Clerk" to the Chief Justice. I don't know how Bob was selected. My own story may be of interest: After finishing law school in 1957, I spent a year as a Motions Law Clerk to the U.S. Court of Appeals for the D.C. Circuit. Much of my time was devoted to the review of petitions by convicted criminal defendants for leave to appeal to our court *in forma pauperis.* Defendants with the funds had an automatic right of appeal upon the payment of appropriate docketing fees. During my clerkship I volunteered to become an Air Force JAG officer and, while on active duty, wrote an article then published in the *American Bar Association Journal* suggesting that the civilian courts take a leaf from the military justice system in which defendants convicted by courts martial had an automatic right of appeal to an appellate tribunal. I suggested that the "means test" applied by the civilian federal courts was unconstitutional. Towards the end of my three-year active duty tour, I asked the Columbia Law School clerkship committee whether it would be willing to recommend me to a Justice of the U.S. Supreme Court. I was introduced to Chief Justice Warren and I arrived for an interview at his office in my Air Force uniform; flown by military jet to Washington from Stewart Air Force Base in upstate New York where I was stationed. The genial Chief indicated that I was clearly "The man for the job" as the Court was then considering a petition for certiorari in *Coppedge v. United States,*[1] that

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1. The petition was granted in June 1961 and the decision, at 369 U.S. 438 (21962) rests on non-constitutional grounds. Justice Stewart's concurring opinion, *id.* at 455, notes that the existing practice "if accepted, would raise serious questions of due process." *Id.* at 457. Did Bob Hudec have a hand in sharpening the focus of

raised squarely the issue of the constitutionality of the two track appeal system my article had criticized. Moreover, the Chief had accepted an invitation of the New York University Law School to deliver some months hence a lecture on "The Bill of Rights and the Military." His principal aim in accepting the invitation was to reiterate his view that, considering the time, the available information and the horrific circumstances of the Pearl Harbor attack, his involvement in the internment of persons of Japanese nationality or ancestry living in California in 1941 was correct—even if, in hindsight, unfortunate. And thus it was that I came to the Supreme Court in August 1961 and, there, met Bob Hudec. Bob remained until his recent and untimely death the only clerk from that year with whom I shared professional interests in Bob's specialty of international trade law.

My involvement with the *in forma pauperis* docket continued at the Supreme Court. In those days all such petitions were routed to the office of the Chief Justice and deposited on the desks of his law clerks. He alone had three clerks; the other Justices had two each. The larger staff of the CJ was justified by the fact that we three reviewed the 1,500 *ifp* petitions received by the Court, a responsibility the Chief zealously guarded and would not delegate to a law clerk pool as later emerged under Chief Justice Burger. Such a system became necessary to cope with the tide of petitions that rises ever higher, last year reaching 7,209 petitions. Back then, our Secretary typed our memos to the Court on one of the few electric typewriters in the building, creating ten copies at a time on thin onionskin paper aptly called "flimsies." Any typo required arduous correction skills she perfected long before electronic spell checks or even photocopiers might have eased our tasks.

But for the *ifp* flimsies the Chief's clerks circulated to the entire Court, law clerks were entirely directed by the individual Justices for whom they worked. The Chief regarded our work on the flimsies as a very high priority, but clearly we owed our time and loyalty to him. A major task was the preparation of memoranda addressed solely to him with our recommendations concerning a possible disposition of all filed certiorari petitions, with three alternatives: "Grant," almost never suggested; "Discuss," more liberally suggested by us and often acted upon by him; or "X Deny" suggesting that the Chief should not even note

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the decision?

the case on a list he circulated to the entire Court suggesting petitions for consideration at the Justices' weekly conferences. Of course any Justice could request a discussion of any petition; our recommendations were hardly dispositive. Nevertheless, our routing of the great majority of petitions filed to the "X Deny" list was probably our most significant involvement in the work of the Court.

We also wrote memoranda for the Chief on all special motions made to him for single Justice action. For argued cases, we prepared extensive "bench memos" that highlighted the important issues raised in the briefs (or, in our view, overlooked) and suggested questions to ask of counsel. While many believe that the law clerks draft the opinions of the Court, this was rarely the case in Warren's chambers. The Chief generally prepared at least a first draft, outlining the way he saw the issues and how he proposed to dispose of them. On the other hand, he rarely wrote footnotes. Professor Milton Handler, (the venerable antitrust expert on the faculty of the Columbia Law School and one of my teachers at Columbia) noted that the Court's opinion by Warren in *Brown Shoe Co. v. United States,*[2] the first definitive application of Section 7 of the Clayton Act to a stock swap acquisition under the then recently-amended statute, seemed to have been written by one person, while the extensive footnotes were written by someone else. He was right! Nevertheless, there should be no doubt about the fact that the Chief took complete responsibility for the totality of the opinion—and its footnotes. His overarching creed and approach to his task as the Chief Justice of the Nation's highest court was to try to assure that the outcome of each case was "fair." Fairness was the lynch pin of his legal philosophy and he never allowed us to forget it.

The Chief was also a man with a notable political background. His ability to recall the names of people he met, no less the names of their wives and children, was prodigious and extended to his clerks. He enjoyed "politicking" at the Court and could regularly be observed visiting the chambers of the other Justices to sit down and discuss individual opinions—with sidebar conversations on football or family. Those informal walkarounds are not characteristic of today's Court, where in the aftermath of the publication of *The Brethren*, each Justice's chamber operates as a separate law firm, communicating only in

2. 370 U.S. 294 (1962).

writings the authors and recipients will not mind seeing some day in *The Washington Post.* Similarly, The Chief regarded his clerks as surrogate family. His own children were generally not close at hand while he lived in an apartment in the Wardman Towers Hotel in Cleveland Park. On Saturday afternoons he invited us to accompany him to Capitol Hill restaurants where he could be assured a corner table out of public sight, and nurse a beer and sandwich with us while we talked about politics and almost every other topic under the sun other than our Court work. Occasionally we retired to his apartment at the Hotel and watched college football on TV. He personally came to my suburban home to greet our first child a few weeks after her birth in early 1962. We were his family, working for and with him on a seven-day-a-week schedule.

Just as the Justices interacted with law clerks to a degree probably unknown today, so, too, did the law clerks operate as a small fraternity. As the Senior Clerk one of my tasks was to organize occasional luncheons of the law clerks with VIPs in government or law. To the clerks' private dining room on the ground floor of the Court, we invited former President Truman, Harvard professor Paul Freund, Court of Appeals Judge David Bazelon, Air Force Chief of Staff General Curtis LeMay, Secretary of State Rusk, and of course, each of the Justices individually.[3] Our session with President Truman extended through half of an afternoon filled with his wonderful tales. Justice Frankfurter's visit coincided with the oral argument in *Brown Shoe v. United States.* The petitioner had retained Arthur Dean, a senior partner of Sullivan & Cromwell in New York who at that time was also serving as a delegate for the United States at a disarmament conference in Switzerland. He arrived at the Court inadequately prepared on some of the legal issues although he seemed to have mastered the detailed differences between pumps and open-toed heels in claiming each constituted a separate "line of commerce" within the meaning of the Clayton Act. At lunch, Justice Frankfurter remarked that although the Supreme Court building was a marvelous monument, it lacked a facility common to opera houses everywhere: a trap door that, when opened, enabled Don Giovanni to disappear into hell. The Justice thought a similar device would be useful when counsel arguing to the Court became tiresome. The Justices could push

3. A full list of the luncheon guests during the 1961 Term and the modest costs of their meals is included in this Tribute.

a button to open the door to swallow the senior partner arguing and then enable them to ask his bag-carrying associate to enlighten the Court on what the case was really all about.

On one occasion, instead of our serving as hosts to a guest, the entire corps of law clerks trooped to the Justice Department for lunch in the cavernous office of the Attorney General, then Robert Kennedy. The AG had invited a number of the associate AGs, including Byron "Whizzer" White; later in the year President Kennedy's first appointee to the Court. Kennedy sat behind his large desk, occasionally with his feet on the blotter, engagingly discussing his relationship to his brother and his excitement with his present responsibilities. However, one of the law clerks began to needle him about his apparent hostility toward the labor movement during his prior congressional staff work. He was clearly upset and, surprisingly to all of us, then wrote an article published in *Esquire* that described the law clerks of the Supreme Court as a bunch of "arrogant cry babies."[4] The article was called to the attention of the Chief, who summoned me for an explanation of how it was that our entire group had left the building to visit the Attorney General. In no uncertain terms he reminded me that each law clerk works solely for the Justice that employed him, and that the group "did not exist" as such. Henceforth, the law clerks would never again leave the building as a group unless he had personally approved their joint activity. Of course we never again left the building for a group lunch!

One other lunch remains in my memory. The Court heard oral arguments on a case involving the power of a municipality to rezone a "gravel pit" that, thereby, deprived the owner of his continuing ability to extract the gravel.[5] The question was whether the re-zoning of the land constituted a taking without due process. Justice Black asked counsel for the landowner on which provision of the Constitution he relied in claiming that the municipality's act was "unconstitutional." The flustered lawyer replied, "Well, your Honor, the entire Constitution!" Following the argument the same attorney stood in line for his

4. Bob's wife reported that during the 1962 term, Kennedy came to the Supreme Court for his luncheon talk. Bob refused to attend because he was offended by the "cry babies" remark. As the luncheon began, Kennedy asked one of the clerks who among the group had attended his talk of the year before. One clerk replied that Bob Hudec was the only one who would have attended, then looked around the group to point him out. But, as noted, Bob wasn't there.

5. *See Goldbatt v. Town of Hempstead,* 369 U.S. 590 (1962).

lunch at the Court's cafeteria where the law clerks also picked up their food. I overheard his remark to a companion, "Can you imagine that? After all of his years on the Court, Justice Black was asking me about what provision of the Constitution we relied?"

I do not recall having worked closely with Bob Hudec at the Court.[6] However, as the accompanying two photographs show, he was a thin, earnest young man, attired in tie and jacket as we all were even while we worked in chambers. It was the era in which law school graduates had to wear hats to job interviews!

Following our tenure as law clerks, our paths crossed more frequently. In private practice I counseled European clients on transactions with American companies and American clients interested in foreign sales, joint ventures and acquisitions. A quintessential transaction involved an Italian client entering into a venture with a Japanese company setting up a manufacturing facility in Singapore using technology each party contributed; the products of which were to be sold to a Dutch entity controlling marketing companies throughout Europe through a headquarters and warehousing corporation established in Switzerland. No aspect of the deal involved the United States, although each party was represented by American lawyers. The voluminous documentation was in English—the language common to the Italians and Japanese participants—using texts drawn from U.S. practice and experience. It demonstrated emphatically how the "American style" of practice has swept the world.

American concepts of international trade law have similarly influenced today's economic scene. While I was at the Columbia Law School in 1957, I prepared a paper for a seminar in foreign economic policy discussing U.S. antidumping and countervailing duty laws. It was submitted to the *Columbia Law Review* and published in 1958[7]—the first article in an American law review on what were then obscure subjects. Oceans of ink have since

6. Another example of Justice Stewart's independence is provided by his sole dissent in the other most memorable decision of the Court in the 1961 Term: *Engel v. Vitale*, 370 U.S. 421 (1962), in which the remainder of the Court held that mandatory prayer in public schools was unconstitutional. Did Bob find the countless examples of official recognition of the Nation's respect for God on which the Justice's opinion relied? *Id.* at 444 *et seq.*

7. Peter D. Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Parties*, 58 COLUM. L. REV. 44 (1958).

been devoted to what remain, in my view, unfortunate irritants to the international trade environment. This early association with trade law was also the basis upon which, during the Carter Administration, I was appointed a Deputy Assistant Secretary of the Treasury and the administrator of the antidumping and countervailing duty laws. I served as one of the principal negotiators of the Antidumping and Subsidy Codes concluded in the Tokyo Round of the GATT. The Trade Agreements Act of 1979, reflecting those commitments and significantly amending and "judicializing" the statutes, was prepared in my office before the function was removed from the internationally-minded Treasury to the more domestically-oriented Department of Commerce in 1980.

During my years at the Treasury, Bob Hudec was already a well-known expert on international trade law. He invited me to visit him in Minnesota and discuss my views with his classes. In 1983, he was a guest lecturer at the University of Lyon in France and heard that I would be in the area during the summer. He again asked me to guest lecture on the foibles of antidumping law at that French University. I remember the occasion most vividly because our trip to Europe was prompted by the need to pick up our daughter after her college semester in Segovia, Spain. It also provided an opportunity to introduce her younger brothers to Europe. While I taught Bob's class, our nubile daughter and her thirteen-year-old brother visited the public swimming pool across the street from the Law School and both returned shocked by French topless bathing.

In subsequent years, Bob and I frequently exchanged manuscripts of articles and comments on trade law topics that each of us was prepared to publish or had published. We served together on the Council of the American Bar Association's Section of International Law and Practice. We exchanged annual Christmas letters reflecting our current concordance on many matters we both felt were important for a national trade policy. I was honored to participate in the conference organized by the University of Minnesota Law School marking Bob's retirement from its faculty. The conference brought together trade law experts from around the world, all of whom acknowledged the enormous contributions Bob made to understanding the true impact of the world's trade rules. His detailed research into the factual consequences of the WTO dispute resolution procedures was unique and revealing. His lucid expression and engaging speaking style enabled him to be remarkably persuasive. He

was an outstanding teacher to many more than the students in his classrooms. He left a legacy of insights that none of us will forget.