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SPECIAL COMMENT

Justice Reed and His Family of Law Clerks

BY BENNETT BOSKEY*

It is risky indeed to undertake to describe the personal attributes of a public figure whom one has known over an extensive period. For one thing, the writer may find it difficult to resist telling more about himself or herself than about the subject of the inquiry. For another, after the passage of years, recollection of events which have been in and out of focus may become distorted.

Nonetheless, it is Stanley Reed's law clerks who know most intimately about his associations with them severally and jointly, and it is from them that an account of this relationship best can come. In all, Justice Reed had 47 law clerks—some one at a time, some two at a time. They brim over with a sense of high affection and esteem for the Justice that has its derivation in the generosity and the warmth of his own character and personality.

I was Justice Reed’s fourth law clerk, serving during the October Term 1940. His three earlier law clerks were Harold Leventhal, John T. Sapienza and Philip L. Graham. Harold, an editor-in-chief of the Columbia Law Review, had been a law clerk of Justice Stone and was at work with Stanley Reed


1 The Justice had one law clerk per term until October Term 1947, when he took advantage of the new system permitting each Justice two law clerks concurrently. After he retired from the Supreme Court, he reverted to a single law clerk at a time. Then, as his sittings in the Court of Claims and the District of Columbia Circuit tended to decrease, he made his law clerk available to work also with other Justices of the Supreme Court in order to assure that the year's experience would be meaningful on a full-time basis.
in the Office of the Solicitor General at the time President Roosevelt sent the nomination to the Senate in January 1938. Asked to accompany the newly-inducted Justice for the remainder of the October Term 1937, Harold thus became the senior member of our ultimately rather sizeable group. His span included being present at the creation of the new Justice's separate concurring opinion in *Erie Railroad Co. v. Tompkins*, which was to be the first of many opinions that would arouse the interest of legal scholars in the Justice's work. Much later, and until his death in the fall of 1979, Harold was a bright star of the federal judiciary as a circuit judge in the District of Columbia Circuit. John Sapienza, the president of the Harvard Law Review in the class of 1937, was a law clerk in the Second Circuit to Judge Augustus N. Hand before coming to Justice Reed, and subsequently for many years has been a partner in Covington & Burling. The 17 Reed opinions (15 for the Court and 2 dissenting in part) during John's year began to show the great diversity of subject matter which was to characterize the Justice's output during his long service on the Bench. Phil Graham, the president of the Harvard Law Review in my Class of 1939, came to the Justice directly from law school; his year saw another 17 opinions (16 for the Court and 1 dissent) issue from the Justice, again in a tremendous variety of areas. Phil moved along the corridor to serve as Justice Frankfurter's law clerk for the 1940 Term, and later, after military service during the War, he was to become publisher of *The Washington Post*. Meanwhile, during my first year out of law school, I had likewise served in the Second Circuit, as law clerk to Augustus Hand's better-known cousin, Judge Learned Hand, and arrived in Washington to take up my duties during the summer of 1940.

The Court in those days seemed a somewhat smaller, though not necessarily more quiet, place than now. The

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2 *304 U.S. 64, 90 (1938)* (Reed, J., concurring).

3 In a much-quoted passage, Justice Holmes said of the Court in 1913: "We are very quiet there, but it is the quiet of a storm centre, as we all know." *Law and the Court, February 15, 1913, Speeches by Oliver Wendell Holmes* 98 (1934). Decade after decade this seems to continue unabated, though the nature of the storms may change markedly.
building was the same; the number of Justices was the same; the courtroom was the same (though with dubious acoustics because of the absence of its present amplifiers and recording system). But the volume of business was noticeably lighter, the need for computerization of the docket had not yet emerged and the number of supporting personnel required to get the Court's business accomplished efficiently was far lower. On this latter point, a central feature was that every Justice had only a single law clerk, instead of the two or three (or in some instances, even more) that subsequently became available in successive waves.4

Circumstances then as now imposed a substantial degree

4 B. Woodward & S. Armstrong, The Brethren (1979), a recent best-seller, deals with events during a portion of this later period (October Term 1969 through October Term 1975), long after Justice Reed had retired from the Court. The Brethren is a book with many shortcomings, some of which are summarized in reviews such as that by Frank, The Supreme Court: The Muckrakers Return, in 66 A.B.A.J. 60 (1980). Nevertheless, much interesting material will be found in the book, and certain of the problems it reflects seem possibly attributable in part to the latter-day proliferation in the number of law clerks at the Supreme Court.

Many persons (including myself) are somewhat dismayed by the number of clearly authentic, relatively-recent documents from and about the Court's inner workings which somehow or other found their way into The Brethren. Unquestionably this phenomenon is assisted by the invention of the xerox machine and its equivalents. Yet it is worth reflecting that it is a phenomenon not entirely without precedent. I am not referring to books such as C. Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890 (1939) or Fairman's various articles on Justice Bradley—which appeared about 50 years after those Justices' deaths—or even A.M. Bickel, The Unpublished Opinions of Justice Brandeis (1957)—which came out 18 years after Brandeis' retirement. But one authorized biography, A.T. Mason, Harlan Fiske Stone: Pillar of the Law (1956), which was published in the fall of 1956—that is, barely 10 years after Stone's death in April 1946—contains a storehouse of documented information concerning the inner workings of the Court during Stone's important service, including his Chief Justiceship; a preliminary version of one of its most fascinating chapters, dealing primarily with the Saboteurs' Case, Ex parte Quirin, 317 U.S. 1 (1942), offered a public display of internal materials in March 1956, at a time when four Justices (Black, Reed, Frankfurter and Douglas) who had participated in the decision were still sitting on the Court. Mason, Inter Arma Silent Leges: Chief Justice Stone's Views, 69 Harv. L. Rev. 806 (1956). Other recent examples worth considering in this connection are the second volume of Richard Kluger's extensive study of the School Desegregation Cases, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), R. Kluger, Simple Justice (1975), and the just-published The Court Years, 1939-1975: The Autobiography of William O. Douglas (1980). What all this suggests is that the claims of history, journalism and biography strongly press against principles of privacy, confidentiality and ethics. There is not always a simple answer to questions of how much should be published how soon.
of isolation upon a Supreme Court Justice, no matter how gregarious a person the Justice may previously have been and might still aspire to be after taking a seat on the Court. Perhaps such circumstances contribute to the sense of rapport and intimacy which seems so easily and so often to arise between the Justice and the law clerk. With Justice Reed I found that this process began early in the Term—and this seems to have similarly occurred with most of his prior and subsequent law clerks. As Solicitor General he had had the good fortune to be working with young lawyers of the highest quality and talent, and he had been able to bring out the best in them and to benefit from their contributions. This helped him to understand and appreciate the capabilities of young lawyers, and he possessed a capacity for effectively encouraging them.

The careful analysis and dissection of cases in his chambers was something the Justice genuinely enjoyed and took to be an essential part of his obligation. Over the long years of his judicial experience this process continued. He would plough through the statute books and the judicial precedents himself, just as he expected his law clerks to do. He would look to his clerks for ideas and suggestions, sometimes for memoranda on a troublesome point, and above all for candid discussion.

At the opinion-writing stage he would often—though by no means always—accept drafting suggestions. But anyone who observed at close range the hard work the Justice put into his opinions would understand that they were essentially his own. He was not a great stylist with the incomparable literary flair of Holmes or Cardozo or Learned Hand. He did not have the laconic eloquence that enriches Douglas' better opinions. But he put high value on clarity; he knew how to achieve it; and sometimes he would struggle to find what he felt was exactly the right word to convey a proper meaning or avoid an ambiguity. (Justice Reed was very pleased when, at one of our annual gatherings, the law clerks presented him with a set of the unabridged Oxford English Dictionary.)

My Term with the Justice developed into a full year for him and a most instructive and pleasurable one for me. He
delivered 21 opinions (18 for the Court; 1 concurring opinion; and 2 dissents)—a figure which he exceeded only twice in 16 subsequent Terms. As before, his opinions covered an impressively wide range of subject matter. It was evident that the Justice by then was feeling at home with nearly every aspect of the Court's many-sided business. At least a few of that Term's opinions have left a lasting impact on our federal system. One of these was United States v. Appalachian Electric Power Co. which, by reassessing (the Justice thought of this more as "clarifying") the standards of navigability to embrace the rocky and beleaguered New River in Virginia and West Virginia, had the effect of substantially extending the reach of federal control of damsites under the commerce clause and the Federal Water Power Act. Another was Klaxon Co. v. Stentor Electric Manufacturing Co. which, for diversity jurisdiction cases in the federal courts, extended the rule of Erie Railroad Co. v. Tompkins to the application of principles of

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6 He wrote 24 opinions (15 for the Court; 1 concurring opinion; 8 dissents) during October Term 1946, and 23 opinions (14 for the Court; 1 concurring; 8 dissents) during October Term 1948.

For those who are interested in or curious about comparative statistics, at the 1938 Term the number of opinions (including concurring opinions and dissents) written by Justices who were on the Court for the entire Term ranged from 19 each for Justices McReynolds (15 for the Court) and Reed to 28 (14 for the Court) for Justice Butler. See Hart, The Business of the Supreme Court at the October Terms, 1937 and 1938, 53 HARV. L. REV. 579, 596-97 (1940) (tabulation for the five-year period from the 1934 Term through the 1938 Term). By the 1948 Term, the range had become from 14 (10 for the Court) for Chief Justice Vinson to 46 (14 for the Court) for Justice Frankfurter. See Note, The Supreme Court, 1948 Term, 63 HARV. L. REV. 119, 125 (1949). Slight variations between different statistics-keepers will be found with respect to what is counted as an opinion, and also with respect to what is counted as an opinion for the Court when less than a majority of the Justices subscribe fully to any single opinion. For example, the last source cited above shows Justice Reed issuing 24 opinions (16 for the Court and 8 dissents) during the 1948 Term, which is slightly different from the numbers I have taken from an "official" list. In any event, such variations are of little consequence and do not alter the substance of the picture which emerges from the numbers. It is evident from the statistics, no matter how compiled, that Justice Reed was carrying at least his fair share of the Court's load, Term after Term. Of course, just how much significance should be extracted from the numbers themselves—without a detailed examination of the complexity of the issues dealt with in the opinions—is another question.

6 311 U.S. 377 (1940).
7 313 U.S. 487 (1941).
8 304 U.S. 64 (1938).
choice of law in conflict of laws situations.

When my year with Justice Reed was nearing its end, it was learned that President Roosevelt intended to nominate Justice Stone to succeed Chief Justice Hughes upon the latter's retirement at the end of the Term. Justice Stone came to the conclusion that as the new Chief Justice, particularly with the fresh administrative responsibilities this would bring, it would be appropriate for him to have two law clerks, the senior of whom should be a law clerk already familiar with the ways of the Court. Staying on with Chief Justice Stone in that capacity, for the next two years—during the October Terms 1941 and 1942—I continued to see Justice Reed frequently, sometimes on an almost daily basis. The range of the Justice's interests kept broadening; his usefulness to the Court was on an ascending scale; and above all, he was not only a kindly and generous man, but he also had an exceptionally high proportion of that quality so important in a judge—wisdom in judgment.

As time went on, the Justice's group of law clerks expanded considerably—particularly after the system of two concurrent law clerks was initiated at the 1947 Term. They came from many law schools and from many parts of the country. What is more, in due course a fair proportion of them went out to live and work in many parts of the country so that now—although there is a slightly heavy weighting in favor of Washington and New York—they will be found also in such diverse locales as Connecticut, California and Mississippi, as well as Philadelphia, Toledo, St. Louis, Louisville, Boston, Indianapolis and Baltimore. They have been in and out of pub-

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10 The Justice's law clerk during the 1941 Term was John H. Maclay, Jr., a fine case editor of the Harvard Law Review who served a clerkship with Judge Augustus N. Hand before coming to the Justice; unfortunately, what promised to be an outstanding career in the law was cut off by John's early death. The Justice's law clerk during the 1942 Term was a Harvard Law classmate of mine, David Schwartz, who in recent years has been rendering opinions of distinction as a Trial Judge (formerly called "Commissioner") of the United States Court of Claims and who, when entering on his duties at the Court of Claims, had the satisfaction of being sworn in by Justice Reed.
lic service, and sometimes in again, including positions of notable importance. They have been likewise prominent in private practice, in teaching and in public affairs. The Justice had a knack for finding highly promising young lawyers as his law clerks, and they had a knack for not disappointing his expectations as their professional careers unfolded.

The law clerks' esteem and affection for the Justice was manifested in many ways. It was reflected in the memorial proceedings held in the Supreme Court on December 15, 1980—both in the Resolutions of the Bar and in the warm and moving remarks of Roderick M. Hills and of David Schwartz, who were essentially speaking on behalf of all the law clerks. Rod Hills recounted how Justice Reed had decided that the University of Kentucky Law School should be the beneficiary of a Book Fund which the law clerks wanted to establish in the Justice's honor. Year after year the law clerks cheerfully contributed to this Book Fund, and a plaque installed at the Law School on January 27, 1977, recites:

To mark Justice Reed's integrity, capacity, and service to our nation, and the 39th anniversary of his appointment to the Court, his former law clerks have presented this plaque to the School of Law of the University of Kentucky. This plaque also marks the twenty-first consecutive year of our joint contribution through the Stanley F. Reed Book Fund established at this Law School as an expression of our affection and respect for the Justice.

In our annual gatherings with the Justice he overflowed with generosity toward his law clerks. In this he never wavered. His remarks at our dinners would always give us far more credit than was our due, and in our hearts each of us knew how much we owed him. A note which he sent to us on January 31, 1955, just after a dinner to celebrate his seventeenth anniversary on the Court, is typical. He wrote:

It is a fine group of men when one sees the old law

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11 For example, Edwin M. Zimmerman served as Assistant Attorney General, Antitrust Division; William D. Rogers served as Under Secretary of State for Economic Affairs; Roderick M. Hills served as Chairman of the Securities and Exchange Commission; and C. Boyden Gray is now Counsel to Vice President Bush.

12 As is customary, the memorial proceedings are being published in full.
clerks grouped around the table, young, poised, intelligent and prepossessing. I am proud that it has been my good fortune to work with them over the years.

As long as Fate leaves me on this good though troubled world, I hope that those who have done so much for me will let me be helpful toward them in any way that will advance their careers.

Again, when he retired from the Court early in 1957, he wrote to his law clerks:

Our group has reached its allotted number. You have steered me safely through the rapids and guarded my steps. I am grateful to each one for his able assistance and loyalty. Your help enabled me to accomplish my tasks. . . .

I am proud of my law clerks and their accomplishments. May we have many years to rejoice together over those successes that the future will bring.

We too were proud of the Justice and his accomplishments. We learned at first hand what a hard-working and gentlemanly person he was, and how much wisdom he contributed to the Court’s handling of its continuously difficult task of discharging its responsibilities under the Constitution and the Judicial Code. He took a keen personal interest in each of us, and we are grateful.