

A TRIBUTE TO THE LATE JUDGE FRANK M. JOHNSON JR.

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It is an honor and a privilege for me to write this article honoring the career of my late colleague, mentor, and friend, Judge Frank M. Johnson Jr. As a child growing up in Montgomery, Alabama, I had heard and read much about Judge Johnson, but it was not until 1973, while Joe Espy and I were clerking for United States District Judge Robert E. Varner, that I met Judge Johnson for the first time. That same year, Judge Johnson hired David Bagwell and Pat Sims as his law clerks. David and I grew up together in Montgomery, and when I visited David in Judge Johnson's chambers to discuss current legal issues, I would occasionally see Judge Johnson. During one of these visits, David introduced me to "the Judge." From the moment I first met the Judge, he seemed larger than life. His steely eyes bored into you from behind reading glasses that were perched precariously on his nose. It was so unnerving, and it was enough to make anyone with any sense tremble! Although years later I discovered that he had a warm side to him, when I was a young lawyer he scared me to death.

The Judge was so important to the rule of law and to justice and equality during the tumultuous 1950s and 1960s that there have been five books written about him.¹ As my colleague from Georgia, Judge R. Lanier Anderson III said about Judge Johnson at his funeral: "He was sho nuff famous!"

Three months after I finished my judicial clerkship, Judge Johnson appointed me in a criminal case to represent one of three Pakistani bank robbers who allegedly robbed the only bank at that time in Ozark, Alabama. The other two appointed lawyers were Truman Hobbs, who later became a United States District Judge for the Middle District of Alabama, and James W. Garrett of the Rushton, Stakely, Johnston and Garrett firm in Montgomery. That case, in and of itself, would be great material for a law review article or even a movie! However, suffice it to say all three defendants were convicted, sentenced to time served, and ordered deported. The important thing for me was that as a young

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1. JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993); JACK BASS, *UNLIKELY HEROES* (1981); ROBERT F. KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* (1978); FRANK SIKORA, *THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR.* (1992); TINSLEY E. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* (1981).

lawyer I had tried a jury trial three months after finishing my clerkship in front of one of the most famous federal district judges in the United States. The experience gave me confidence in my abilities as a trial lawyer.

For the next nine years, I tried many cases in front of Judge Johnson—criminal and civil. He would often appoint young lawyers like me to represent defendants in criminal cases and plaintiff prisoners who challenged conditions of confinement in state penitentiaries under 42 U.S.C. § 1983. Of course, a lawyer did not get paid unless he or she won those § 1983 cases, which rarely happened in prisoner-litigation lawsuits. Nevertheless, I gained valuable experience trying those cases in Judge Johnson's courtroom, and he got to know me better as a lawyer.

Although Judge Johnson will be remembered most for the cases he decided that dealt with civil and human rights, particularly the desegregation cases, prison cases, and mental health cases, those are not the main reasons I remember him. My most significant memory of Judge Johnson is his judicial demeanor. He was the finest trial judge before whom I ever tried a case. He treated all lawyers the same no matter whether you had practiced law for forty years or for three months. He just expected a lawyer to be prepared, and if not, you could expect his wrath. Over the years, several lawyers, overcome with fear after being “dressed down” by the Judge, fainted in open court.

In 1974, Judge Johnson authored the majority opinion in the three-judge court case of *Lynch v. Baxley*,² in which the panel ordered that all involuntarily committed mentally ill patients from all sixty-seven counties in the state of Alabama be given recommitment hearings before the probate judge from each patient's home county. At the time of the court's order, Bryce Hospital alone had more than 5,000 patients.³ After the conclusion of the recommitment hearings, the population of patients at Bryce Hospital dropped to 1,200 patients.⁴ Judge Johnson appointed many young lawyers, including me, as guardians *ad litem* to represent a number of the patients at their recommitment hearings. Many of the older patients I represented had been in Bryce Hospital since the early 1940s. It was sad and disturbing to see so many patients who were not mentally ill kept in mental institutions against their will for so many years.

In 1978, an amazing event occurred in Alabama politics. There were three favorite candidates for Governor of Alabama: Bill Baxley, Jere Beasley, and Albert Brewer, any one of whom was expected to win. An unknown candidate from Auburn, Alabama, Fob James, jumped into the race. James had almost no name recognition, yet when the election was over, he had been elected Governor of the State of Alabama. Charlie Graddick was elected attorney general, and George McMillan was elected Lieutenant Governor.

2. 386 F. Supp. 378 (M.D. Ala. 1974).

3. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 911 (1979).

4. See YARBROUGH, *supra* note 1, at 176–77.

Several months after the gubernatorial election, Governor James appointed me and my law partner Robert Sasser as special assistant attorneys general to represent him in the ongoing *Wyatt v. Stickney*⁵ litigation. All of the parties involved in the case were represented by excellent counsel. The plaintiff class was represented by Morris Dees, John Carroll, and Steve Ellmann of the Southern Poverty Law Center. The plaintiff intervenors were represented by Drew Redden and Bill Mills from Birmingham, Alabama, and the Department of Justice had a number of excellent lawyers in the case, including Bob Dinerstein and Andrew Barrack from Washington, D.C., and Barry Teague, who was the United States Attorney for the Middle District of Alabama. Robert and I represented Governor James along with other defense counsel Rick Trawick, Emmett Poundstone, Frank Ralph, and Wendall Morgan, who represented the Alabama Department of Mental Health. Byrd Latham and Mike Cole ably represented the finance director of the State of Alabama, Dr. Rex Rainer. The case had originally been brought in 1971 as a class action on behalf of patients involuntarily committed for mental-treatment purposes in Alabama's mental institutions.

In a landmark opinion, Judge Johnson found that these involuntarily committed patients “unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.”⁶ Before I was involved in the case, Judge Johnson conducted a hearing at which the foremost authorities on mental health in the United States appeared and testified as to the minimum medical and constitutional requisites for public institutions such as Bryce and Searcy Hospitals designed to treat the mentally ill. As a result of that hearing, Judge Johnson established thirty-four minimal constitutional standards and safeguards for adequate treatment of the mentally ill. These included, among other things, a humane psychological and physical environment, qualified staff, and numbers sufficient to administer adequate treatment, individualized treatment plans, and confinement of patients in the least restrictive environment.⁷

The first thing Governor James asked me and Robert to do was to visit every mental-health institution in the state and then give him a detailed report of the conditions of each institution. At that time, mental-health institutions existed from the North Alabama Regional Hospital in Decatur, Alabama, all the way to Searcy Hospital in Mount Vernon, Alabama, which is in the southern part of the state. The largest mental-health facility, Bryce Hospital, was in Tuscaloosa. Judge Johnson set a status conference to meet with new counsel and discuss how we should proceed to see if the State of Alabama was in compliance

5. 325 F. Supp. 781 (M.D. Ala. 1971), *supplemented by* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

6. *Wyatt*, 325 F. Supp. at 784 (citing *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969)).

7. *See Wyatt*, 344 F. Supp. 387.

with his order that set forth minimal constitutional standards by which the State should comply. Judge Johnson then ordered discovery to commence immediately and gave all parties one year to engage in discovery to see if the State was in compliance.

After touring all the facilities, I had a meeting in the Governor's office with Governor James, Lieutenant Governor McMillan, Attorney General Graddick, Speaker of the House Joe McCorquodale, and Governor James's first finance director, Dr. David Bronner. When the Governor asked about the conditions of the facilities, I said that they were worse than the plaintiffs stated. In fact, I even went so far as to say that no one would put a loved one in any of the facilities that I had visited.

To his credit, a week or so later, Governor James went unannounced at midnight to Bryce Hospital and entered the men's receiving building, which was the first visible building as one entered the Bryce campus. The Governor later told me that when he entered the bathroom and pulled back the shower curtain, thousands of roaches flew out and landed on him and his security guard! As a result of that visit, the Governor ordered that the men's receiving building be condemned and demolished immediately.

For the next year, the lawyers literally took thousands of pages of depositions all across the country. We deposed expert witnesses on everything from the administration of psychotropic medication, to the establishment of the least restrictive environment, to the establishment of proper nutritional standards, and to a determination of the minimum number of qualified staff sufficient to administer adequate treatment.

At the end of the year, it became clear to me that the State of Alabama was not in compliance with a number of Judge Johnson's minimal constitutional standards. Judge Johnson previously placed the Alabama penal system into receivership, and I suspected he would do the same thing with the mental-health system if we petitioned him. However, there was some risk in asking him to do that. My personal view was that Judge Johnson did not like the idea of federal courts taking over state institutions as long as state officials were making a good-faith effort to comply with his orders. It was also my impression that Judge Johnson thought highly of Governor James and believed the Governor had the best interests of the patients foremost in his mind. Consequently, I prepared a petition asking the court to appoint Governor James as receiver and took the petition to a hearing the Judge conducted in chambers.

When I admitted to Judge Johnson that the State was not in compliance with all of his minimal constitutional standards, he then asked me what I thought he should do. In response, I presented the petition asking the Judge to appoint Governor James receiver. Immediately opposing counsel vehemently objected. In fairness to them, Judge Johnson gave the Department of Justice lawyers and the plaintiff-class lawyers, as well as the plaintiff intervenors, an opportunity to submit names to him for appointment as receiver. After a couple

of months, we received an order from the Judge appointing Governor James as receiver of the Alabama Department of Mental Health.

By this point in time, Judge Johnson had been appointed by President Carter to the United States Court of Appeals for the Fifth Circuit. Notwithstanding the fact that he was now a federal appellate judge, he retained the *Wyatt* case until 1980, when United States District Judge Myron Thompson was appointed to the federal bench. Shortly after his appointment, Judge Thompson inherited the *Wyatt* case from Judge Johnson. In 1983, I was appointed to the federal bench and was no longer involved in what I thought was the most interesting and complex case of my career as a practicing lawyer. I was impressed that Judge Johnson handled the *Wyatt* case just like he handled all of his cases, with fairness, precision, and a tight schedule, all in an effort to discover the truth of what really happened. That is what a good judge is expected to do.

After my appointment to the bench in 1983, Judge Johnson began to invite me on some of his fishing trips. He loved to fish for speckled trout, and he particularly enjoyed fishing with his former law clerk, Pat Sims, a very fine lawyer who lives and practices law in Mobile. Over the years, I took numerous fishing trips with the Judge to places like Horseshoe, Steinhatchee, and Suwannee in Florida. Later, when Florida imposed strict limits on the number of fish we could catch, we went to the Chandeleur Islands and to Cutoff, Louisiana. It was on those trips that I became close to the Judge and found out what a warm and humorous human being he was. I have many memories and stories I could tell about some of those trips. I will share two.

At some point, Judge Johnson included our colleagues Judge Jerry Tjoflat and Judge Lanier Anderson on some of our trips. When we fished the Chandeleur Islands off the coast of Louisiana, we would get on a large boat at Bayou La Batre, Alabama, and ride all night to the islands. Once we arrived, we fished on skiffs, two men to a boat. On one of our trips, Judge Tjoflat and Judge Johnson, who were fishing together, got lost in the Gulf of Mexico. It may have been because they had “over-saluted” the Constitution that day. On these fishing trips, we had a ritual every day at noon of partaking in a miniature or two of Scotch or Jack Daniels to salute the Constitution. After some time, when the judges did not return, the rest of us became concerned. We were ready to radio the Coast Guard when we saw a boat in the distance with the judges coming our way. After they docked, the judges reluctantly admitted they had gotten lost, and even more frightening than getting lost, they told us that they encountered a drug boat with armed men aboard! Even worse, the judges realized they were almost out of gasoline when they had to reorient to return to our large boat. Fortunately, they made it back safely.

Several years later, on a trip to Suwannee, Florida, Judge Tjoflat and I roomed together at Bill’s Fish Camp, where the rate for a room was \$7 per night. You can imagine what the rooms looked like! They were clean rooms, however, and all the beds had maple headboards. The Judge’s wife, Ruth, was

a stickler about cleanliness and always made sure that the Judge had a can of Lysol whenever he went on a fishing trip. The Judge came into our room that first night and asked to spray our pillows, linens, and headboard. He had already sprayed his room. I politely declined the cleaning and disinfecting. A few minutes later, Judge Tjoflat and I went into Judge Johnson's room. I noticed the maple headboards were turning white. The Lysol had taken off the maple finish on the headboards. I informed the Judge that the headboards probably cost \$600 each. The Judge panicked! It was the only time I "got his goat." Fortunately, one of our companions knew how to bring back the finish on the headboards, so the Judge did not have to pay for their repair. Needless to say, it was the last time I saw the Judge with a can of Lysol!

Over the years, my wife and I also became close friends with Ruth Johnson and found out quickly what a supportive, tough lady she was. For all of the incredible things Judge Johnson did in his life, I do not believe Ruth Johnson received the credit she deserved in helping the Judge achieve his many accomplishments. Socially, the Judge and Ruth came to our home many times for dinner, especially when the Eleventh Circuit had a panel of judges sitting in Montgomery. In turn, they would invite us to their home for dinner and would often include Curtis Caver, the clerk of the district court at that time, and the Judge's law clerks.

Judge Johnson was not only warm and gracious to me and Beth, but he also loved our children. He was particularly fond of our son and youngest child, Mitchell. Before his death, Judge Johnson gave Mitchell his bronze Abraham Lincoln bookends which had been on his office credenza since he was first appointed as a United States district judge by President Eisenhower. Additionally, the Judge was fond of making furniture, and Beth and I have a coffee table made by him in our home today.

In 1989, a tragedy struck the judiciary when United States Circuit Judge Bob Vance was killed by a pipe bomb sent to his house in the mail shortly before Christmas. It was a sad and frightening time for the judiciary as a whole, but particularly for the Eleventh Circuit. I was a young United States district judge when Judge Johnson called to give me the news about Judge Vance's tragic death. It was a tense time for the court, the Federal Bureau of Investigation, and the United States Marshals Service because none of us knew who was responsible for the murder of Judge Vance. Judge Vance and Judge Johnson were particularly close, and it was extremely hard on him and Ruth to lose such a good friend. Additionally, they were close to Judge Vance's wife, Helen, who was seriously injured in the explosion.

Several months after Judge Vance's tragic death, Judge Johnson summoned me to his chambers on a Friday afternoon. It was there that I received the highest compliment I have received in my entire life: the Judge asked me if I would be interested in being appointed to the Eleventh Circuit Court of Appeals! He said that he and some of his colleagues wanted me on the court. I was taken

aback because I was forty-two years old and just starting to feel comfortable as a federal trial judge. The judge gave me the weekend to think about it and discuss it with my wife, and then I was to let him know if he could mention me as a potential candidate to fill Judge Vance's now-vacant seat on the Eleventh Circuit.

Previously, in 1987, I had sat by designation with the Eleventh Circuit as a young district judge on a panel with Judge James C. Hill and Judge Peter T. Fay, both of whom were district judges before they were appointed to the Fifth Circuit Court of Appeals, our predecessor court. That weekend, I called them and all of the other judges on the Eleventh Circuit who had first been district judges. I asked each one of them, knowing what they knew about both jobs, if they had any regrets about taking an appointment to the Eleventh Circuit. Not only did all of the judges tell me they had no regrets, but they also encouraged me to let Judge Johnson suggest me as a candidate. Judge Johnson obviously had powerful connections in the White House and the Justice Department because the rest of the story is history, as I was appointed by President George H. W. Bush to fill Judge Vance's judicial vacancy. During my first two years on the court, Judge Johnson was still an active judge, and he and I traveled to Atlanta together on many occasions, where our professional relationship and friendship continued to grow. At the end of two years, he took senior status, and our present chief judge, Ed Carnes, filled his vacancy.

After his death and funeral in Haleyville, Alabama, the judge's birthplace, Beth and I continued to visit Ruth Johnson every Sunday we were in town. She was a delightful lady and loved my wife as if she were the daughter Ruth always wanted but never had. Ruth shared the same love and affection for Helen Harris, one of the district court's very fine probation officers, and Laurie Weil, who was a close family friend of the Johnsons. I miss the Judge and Ruth a lot. He taught me many valuable lessons in life, like the best place to cast a line for speckled trout, but more importantly, he taught me what it means to be a good lawyer and a good judge and to adhere to your ethics and principles, no matter the circumstances. Because I knew him not only as a judge but also as a mentor, I most remember his courage in the face of adversity and his strong and independent will. He justly became known as the central defender of civil rights in America, and for his courage and reasoned decisions, the United States Courthouse in Montgomery is named in his honor. He was truly a legal giant, but most of all, he was my friend.