TRIBUTE

OPINIONS AND PERSONALITY: BROWN ON THE LAW

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Explanatory preface: Law clerks gain a lot in many ways from their year or more with a judge—including a real affection and appreciation for their mentor.[1] That has certainly been the experience of most, and probably all, of Judge John R. Brown's clerks.

Judge Brown lived from 1909 to 1993.[2] He grew up in Holdrege, Nebraska, earned his A.B. from the University of Nebraska, 1930, and J.D. from the University of Michigan, 1932.[3] A leading admiralty lawyer in Houston for the law firm Royston & Rayzor, where he worked from 1932 to 1955,[4] he was appointed to the Fifth Circuit by President Dwight D. Eisenhower in 1955.[5] He served as chief judge from 1967 to 1979 and eventually took senior status, which he held from 1984 until his death.[6]

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1. *See* Nicholas Johnson, *What Do Law Clerks Do?*, 22 TEX. B.J. 229 (1959), *available at* http://www.uiowa.edu/~cyberlaw/LRevArt/22TBJ229.html.

2. Clyde Willis, *John R. Brown (1909–1993)*, *in* 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 131, 132 (John R. Vile ed., 2003).

3. *Id.*

4. DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 21 (1988).

5. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891–1981, at 92 (1984).

6. *Judge John R. Brown Dies at Age 83*, HOUSTON CHRON., Jan. 24, 1993, at 23A.

Seventeen years later, on March 1, 2010,[7] as evidence of his impact on his former clerks—the first of whom clerked fifty-five years earlier—they came together informally for a celebration of what would have been Judge Brown's 100th birthday (December 10, 2009). It involved a lecture and dinner at the University of Houston Law Center, where his papers are archived.[8] The manuscript that is now this Article was uncovered in the Author's archives, and was his contribution of memories to that occasion. It was written shortly after the Author's clerkship (1958–1959), but never fully footnoted or published until now. It is reproduced here in the form in which it was originally written (including references such as "last year" or "this last term"), along with footnotes to sources.

The Fifth Circuit was created in 1891, with jurisdiction over the six southern states from Texas through Florida.[9] During the 1958–1959 term, each state had one judge on the court—with the exception of Texas, the comparative size and all-around worthiness of which was appropriately recognized with two, including Judge Brown.[10] In 1981, the Fifth Circuit was split, with Alabama, Georgia, and Florida being assigned to the new Eleventh Circuit.[11] Thus, what seven Fifth Circuit judges were able to do during the 1958–1959 term now requires sixteen Fifth Circuit judges (plus five in senior status), and eleven Eleventh Circuit judges (plus five in senior status), for a total of thirty-seven.[12]

The 1958–1959 term was one of the years that the Fifth Circuit's contribution to civil rights in the South gave rise to the designation of Judges John R. Brown, Richard T. Rives, Elbert Tuttle, and John Minor Wisdom as "The Fifth Circuit Four."[13]

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7. Invitation to Samuel Issacharoff's Special Lecture to Mark the 100th Anniversary of the Birth of Judge John R. Brown, "Judging in Extraordinary Times," *available at* http://www.law.uh.edu/news/evites/spring2010/alumni-040110-lecture.html.

8. *See* Craig Joyce, Introduction, *Dedication: The Judge John R. Brown Papers*, 34 HOUS. L. REV. 1489, 1490 (1998) (describing the "dedication of the Judge John R. Brown Papers Archive at the Law Center's O'Quinn Library").

9. COUCH, *supra* note 5, at 18–19.

10. *See id.* at 199 (listing all judges and their terms on the Fifth Circuit).

11. *Id.* at 191–92.

12. Fifth Circuit Clerk's Office & Judges, http://www.ca5.uscourts.gov/clerk/docs/listing.pdf (last visited on Sept. 1, 2010); Eleventh Circuit Judges, http://www.ca11.uscourts.gov/about/judges.php (last visited on Sept. 1, 2010).

13. JACK BASS, UNLIKELY HEROES 23 (University of Alabama Press 1990) (1981); *see* Burton M. Atkins & William Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701, 706 (1974) (finding seventeen civil rights cases decided during the 1958–1959 term).

Finally, a word about the title. For a litigant and his or her lawyer to invest the time and money in a trip to a U.S. court of appeals, normally the legal issues are not a slam dunk for either side. When Judge Brown found little precedent directly on point, or believed the case was distinguishable from that which existed, or felt compelled to dissent from the view of his colleagues, he would acknowledge his role as a judge. With a smile as he finally completed his opinion, he would look up and say, "Well, here's some more 'Brown on the law.'"

What follows is one clerk's assessment of Judge Brown as the wordsmith who created "Brown on the law."—N.J.

> *[T]he performance or nonperformance of this duty is not to be measured by the presence or absence of any particular, peculiar ritualistic form. Judging is more than that.*[14]

What does this expression reveal about the man who wrote it?

It occurs in an opinion concerning the process by which a Federal District Judge decided to continue a criminal trial with only eleven jurors.[15] And substantively, the quoted passage merely serves to affirm the thoughts and actions of the trial judge.

But it can be much more—if the reader will let it. Like most verbalizations, it tells as much about its judicial author as its subject matter. The writer obviously likes to put words together in pleasing ways. He is apparently one who is able to see the underlying significance in a mass of trivia, and having seen it can express the result clearly. Moreover, it shows a judge thinking about his own role in an inspiring way in the conclusion, "Judging is more than that."

There are many reasons why a lawyer might think about opinions in this way; it is fun. It is more entertaining to try to find humans in opinions than holdings. Furthermore, knowing that judges have feelings, philosophies, and personalities is itself valuable—even if the judges-are-only-human lesson is a little old at this date. And it may even be professionally helpful to know a little more about each of the individuals who decide the questions

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14. Horne v. United States, 264 F.2d 40, 43 (5th Cir. 1959).

> Adjudicating is not the mechanical advocation of mechanical rules. To find certainty either to sustain or attack service of process, in the name or title or tag given to a person or an activity is an unreal goal. For as Justice Holmes tells us "certainty generally is illusion, and repose is not the destiny of man."

Stanga v. McCormick Shipping Corp., 268 F.2d 544, 554 (5th Cir. 1959).

15. *Horne*, 264 F.2d at 41.

of such great importance to clients (and their contingent-fee counsel).

To illustrate this thesis, this Article consists of quotations from the opinions of one judge: United States Circuit Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit. To demonstrate the feasibility of others doing this, and to keep this Article manageable, the selections have been made from one year's opinions—the 1958–1959 term just ended.[16]

It is not the purpose of this Article to analyze Judge Brown's substantive contributions to the law during the year, such as his tax or admiralty decisions, or oil and gas dissents—significant as they were. Nor is this Article an attempt to merely count his votes and report them in order that a lawyer may predict that Judge Brown will "always" vote for the injured workman or the insurance company in tort cases, or for the Commissioner or taxpayer in tax cases. Few judges are that predictable; and even if they were, few issues would be that clearly posed.

Many if not most judges view their task as one of stating the facts and law before them in a cold, dry, "dignified" way. This is a point of view that cannot be scoffed at. But it is also one that tends to further alienate laymen, and put student, practitioner and judge alike into the depths of slumber. Judge Brown is one of the very few judges in this country with the inclination—and ability—to say, "Judging is more than that."

Throughout his opinions the reader gets the feeling that here is a man who is not afraid to entertain (when seemly); to always have fun at his work; to show each legal controversy in all its full-color, social, contextual significance; to single out the crucial issue and strike at it hard; and to thereby educate the Bar a bit when necessary. Such a judge is so rare that it is worthwhile looking a little closer when one appears. Such a judge is Judge Brown.

It is too late to observe for the first time that appellate courts have been tending toward taking an increasing amount of

16. This is a total of 71 opinions: 46 majority, 7 dissents, 16 per curiam, one special concurrence and one that was both a majority and a dissenting opinion. (The per curiam count is unofficial, of course, as the authors of these opinions are never made known.) Judge Brown's dissents in the Natural Gas Act cases are treated as one opinion for this tabulation. *See* Sun Oil Co. v. Fed. Power Comm'n, 266 F.2d 222, 227–32 (5th Cir. 1959) (Brown, J., dissenting), *aff'd*, 364 U.S. 170 (1960); Hunt Oil Co. v. Fed. Power Comm'n, 266 F.2d 232, 233 (5th Cir. 1959) (Brown, J., dissenting); Richardson v. Fed. Power Comm'n, 266 F.2d 233, 234 (5th Cir. 1959) (Brown, J., dissenting); Magnolia Petroleum Co. v. Fed. Power Comm'n, 266 F.2d 234, 235 (5th Cir. 1959) (Brown, J., dissenting); Humble Oil & Ref. Co. v. Fed. Power Comm'n, 266 F.2d 235, 236 (5th Cir. 1959) (Brown, J., dissenting).

power and discretion from trial courts and juries in recent years. But here is what Judge Brown had to say about the controversial problems in this area last year. He modestly recognizes the limited specialized technical expertise of appellate judges as compared with administrative agencies:

> In my judgment the Court by this opinion engages in impermissible fact finding for which it has neither statutory warrant nor technical competence.
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> . . . .
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> We are not the Federal Power Commission. We are not equipped to be the Federal Power Commission and we have not been commissioned to be the Federal Power Commission. We are not to find facts respecting matters committed to the Federal Power Commission.
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> . . . .
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> Unless we have record facts or claim an omniscience which my modest Brothers would disavow, I am at a loss to understand where the Court gets the wisdom or the experience or the information upon which to make this critical fact finding. Indeed, the statements are, in my view, not only bad law, they are bad engineering.[17]

Here is the way he summarizes the extent of appellate review: "Whether as a Court, or as three Judges sitting in District Courts, we would have arrived at this same result is quite beside the point. Trials are for trial courts. Barring legal error, there they should end."[18] And this is what he had to say, by way of dissent, about the scope of arbitration:

> I think in the final analysis that what they do is the same old effort to sugar-coat what, to the judiciary, has long been a bitter pill—the idea that someone other than a court can properly adjudicate disputes; that in the field of human disputes lawyers and ex-lawyers as judges [may not] alone have the Keys to the Kingdom.[19]

But abstention can be taken too far. When Judge Brown thought the Court was a little short-sighted in failing to provide relief to the disenfranchised Negro citizens of Tuskegee, Alabama, he spoke out:

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17. Cont'l Oil Co. v. Fed. Power Comm'n, 266 F.2d 208, 213, 216, 218 (5th Cir. 1959) (Brown, J., dissenting) (citation omitted).

18. Beit v. United States, 260 F.2d 386, 387 (5th Cir. 1958). "Trials are committed to trial courts. Our function is limited and circumscribed." Carter v. Campbell, 264 F.2d 930, 941 (5th Cir. 1959).

19. Refinery Employees Union v. Cont'l Oil Co., 268 F.2d 447, 460 (5th Cir. 1959) (Brown, J., dissenting).

> We need not be that "blind" Court that Mr. Chief Justice Taft described as unable to see what "all others can see and understand . . . ." "[T]here is no reason why [we] should pretend to be more ignorant or unobserving than the rest of mankind." How it can be suggested that we should, for some reason, not make inquiry in this case is a mystery to me.[20]

And his appreciation and respect for administrative agencies and the judgments of lower courts is coupled with great regard for the verdicts of juries. Nevertheless, he takes a progressive and realistic attitude toward the capabilities of laymen involved in their first contact with the law. It is seldom that counsel want to use a jury in a complicated patent case. In one case this last year they did use one.[21] The trial had lasted several weeks as the experts tried to explain to the jury the operation of an automatic automobile transmission.[22] One of the lawyers complained that the trial judge refused to summarize the claims and evidence at the end.[23] To this Judge Brown responded:

> If at that late date in the trial the jury had to be told again what each side claimed about each element of each claim of each patent, we would have to acknowledge realistically that any such charge, written or oral, would simply be beyond the intelligent comprehension and assimilation of any jury of lay persons.[24]

And most court "instructions" to the jury, when they are given, are simply too complicated for the jurors to understand. Nevertheless, judges continue to "instruct" in terms of broad generalizations and complicated legal principles. Aware of this, Judge Brown noted at one point, "Illustrative explanations may certainly be proper and helpful."[25] But communication is not a one-way street, and sometimes the jury "talks back" to the judge in the form of requests for further instructions. When they do, it often only serves to illustrate further their shy and awkward approach to the law. One case specifically involved a

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20. Gomillion v. Lightfoot, 270 F.2d 594, 608 (5th Cir. 1959) (Brown, J., dissenting) (alterations in original) (citations omitted) (quoting Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*), 259 U.S. 20, 37 (1922) and Affiliated Enters. v. Waller, 5 A.2d 257, 261 (Del. Super. Ct. 1939)), *rev'd*, 364 U.S. 339 (1960).

21. Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841, 843 (5th Cir. 1959).

22. *Id.* at 849.

23. *Id.* at 850.

24. *Id.* at 852.

25. Bush v. Louisville & Nashville R.R. Co., 260 F.2d 854, 860 (5th Cir. 1958). In this particular case, however, the Court found that the trial judge had not abused his discretion in *refusing* to give illustrative instructions. *Id.* In light of this holding, Judge Brown added, "Nothing we say is intended to forbid or discourage their use." *Id.*

determination of the jury's intention on such an occasion.[26] Judge Brown wrote:

> As is so often the case, the colloquy between members of the jury and the Court was not illuminating. The jury's unfamiliarity with legal terms, the reticence to speak out, a feeling of incompetence even to phrase an intelligent question frequently [led], as was perhaps likely here, to uncertainty as to what was really troubling the jurors.[27]

All too often, however, judges talk about what parties have done, what juries have done, and what other judges have done, but never mention the other group of people who are so concerned with the outcome of cases: the lawyers. Judge Brown remembers his own long practice at the Bar and does not forget to give the lawyers an occasional kind word. He referred to H. Alva Brumfield of Baton Rouge, Louisiana, as an "able and widely-experienced advocate" with a "skilled mind"—although by the end of the paragraph containing those kind words he had found against him.[28] In separate cases, he described both William F. Walsh of Houston, Texas, and Peter T. Fay of Nichols, Gaither, Green, Frates & Beckham of Miami, Florida, as having a "great earnestness and . . . skill."[29] But he can be critical, too. In a wage and hour case, he quoted a bit of the brief, and said it was "a case which Employer's counsel, in his strong advocacy, describes as 'another example of the [Secretary's] persistent effort to bring all the local businesses of the nation under the Fair Labor Standards Act.'"[30] And after struggling for weeks with a poorly prepared bankruptcy case he began his nineteen-page opinion with this description:

> After filing enough pleadings to consume 360 pages of the printed record, the trial's tone was set by a ten-page opening introductory colloquy of confusion in which all participants demonstrated with the candor born of impromptu their general lack of comprehension and agreement as to just what issues were about to be tried. And, days later, the trial ended with the last pages of testimony intertwined with the continued and concluding

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26. *Id.* at 859.

27. *Id*.

28. Clegg v. Hardware Mut. Cas. Co., 264 F.2d 152, 154, 156, 158 (5th Cir. 1959).

29. Gilmore v. United States, 264 F.2d 44, 44–45 (5th Cir. 1959) (observing that William F. Walsh approached the argument "[w]ith great earnestness and a skill which presses out the very last drop of merit in the materials at hand"); *Bush*, 260 F.2d at 855–56 (noting that Peter T. Fay had a "great earnestness and a skill which wrings from [his materials] every drop of possible merit").

30. Mitchell v. Jaffe, 261 F.2d 883, 884 (5th Cir. 1958) (alteration in original).

> dispute between counsel as to just what the trial had been about.[31]

Judge Brown believes that lawyers' writing is often more verbose and complex than it needs to be. He remarked as to the length of the record in at least two opinions: one 616 pages plus 175 pages of briefs and the other 900 pages long.[32] The language of patent claims came under attack in another case:

> There is no question but [that] the claims are complex and drafted with language and in a style that makes them difficult if not impossible for laymen—and indeed, for most lawyers and judges—to understand. As an example of that with which the jury was confronted, we have set forth in the margin the 334-word sentence which is claim 45 of the 549 patent. This is living proof of the patent truism that a "patentee may be his own lexicographer and . . . his own grammarian."[33]

And in one case a statute was just too much for him: "If the statute is grammatically reconstructed to eliminate the cumbersome awkwardness which has been the genesis of so much of the difficulty in its application, it is clear that the Claimant did not meet its conditions."[34] This was followed by his rephrasing of the act.[35]

But when it comes to the interpretation of a clear statute, Judge Brown is hesitant to engage in what some refer to as judicial legislation. In his more colorful words:

> I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon.[36]

And if a lawyer suggests a long complicated journey into the legislative history of an act, Judge Brown will follow, but always with at least one eye on the words of the act itself. "But no matter how purposeful Congress was we should not become so transfixed by the nature and extent of these objectives that we

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31. Blackford v. Commercial Credit Corp., 263 F.2d 97, 100 (5th Cir. 1959).

32. *Id.*; *Bush*, 260 F.2d at 854, 855 (5th Cir. 1958).

33. Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841, 850 (5th Cir. 1959) (alteration in original) (footnote omitted) (quoting Inglett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 347 (5th Cir. 1958)).

34. United States v. One 1955 Model Ford 2-Door Coach, 261 F.2d 125, 127 (5th Cir. 1958).

35. *Id.*

36. Sun Oil Co. v. Fed. Power Comm'n, 266 F.2d 222, 227–28 (5th Cir. 1959) (Brown, J., dissenting), *aff'd*, 364 U.S. 170 (1960).

are mesmerized into ignoring the plain terms of the Act which were not affected by the Amendments."[37] Yet he can hardly be criticized as a super-literalist. He realizes that words can have a "meaning" only in some context, and when he thought his fellow judges had misapplied this principle he dissented:

> Apparently from the demands of administrative necessity [the majority] reads the word "production" of natural gas as entirely removed from the technical context of the oil and gas business, as though Congress were using it in the colloquial or everyday sense concerning the production of wheat, or corn, or cattle or shirts.[38]

And in a tax case he took the view that "Congress did not mean to write into this objective formula any legal casuistry. It was dealing with the very practical matter of taxes in practical day-to-day business operations."[39]

Actually, Judge Brown made quite a few observations about taxation generally during the last year. He felt no hesitation in acknowledging that taxation is complicated. He twice quoted Mertens' observation that "the Korean Excess Profits Tax Statute . . . 'probably represented the most intricate and baffling enactment ever to receive Congressional approval,'"[40] but he never failed to see the real issue:

> So far as we are able to grasp the metaphysical dialectic which the Government's brief advances, it is the contention that conversion of property under Section 117(j) arises only when full *title* is acquired or taken.
>
> When we bear in mind that "the tax law deals in economic realities, not legal abstractions," we think there can be no basis for these gossamer distinctions.[41]

Nor was he above deriving a little humor from what was otherwise a burdensome responsibility. Contrary to his usual policy of clearly spelling out issue and answer early in the opinion, he began one tax opinion with this Internal Revenue Code-like sentence:

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37. Mitchell v. Jaffe, 261 F.2d 883, 886 (5th Cir. 1958).

38. Cont'l Oil Co. v. Fed. Power Comm'n, 266 F.2d 208, 213 (5th Cir. 1959) (Brown, J., dissenting).

39. Burford-Toothaker Tractor Co. v. United States, 262 F.2d 891, 893 (5th Cir. 1959).

40. *Id*. at 891 (quoting 7A JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION iii (Philip Zimet & Tobias Weiss eds., 1955)); Phinney v. Tuboscope Co., 268 F.2d 233, 234 (5th Cir. 1959) (quoting *Burford*, 262 F.2d at 891).

41. Gillette Motor Transp., Inc. v. Comm'r, 265 F.2d 648, 651–52 (5th Cir. 1959) (footnotes omitted) (citation omitted) (quoting Comm'r v. Sw. Exploration Co., 350 U.S. 308, 315 (1956)), *rev'd*, 364 U.S. 130 (1960).

> As we struggle through this intricate web of definitions, exclusions, provisions, exceptions, cross references, limitations, provisos and a general but unavoidable obscurity, it is our conclusion that § 430(e)(2)(B)(i), expressly incorporating § 445(g)(2)(B), impliedly carries with it § 445(g)(3), though not necessarily that portion of § 461 impliedly incorporated by the reference to § 462(g) in § 445(g)(1), so that the attribution rules of § 503(a)(1)(2)(5) makes ownership of the corporate stock by the minor beneficiaries of a trust the ownership of the father, and thus pushes the stock ownership beyond the critical 50 per cent to make thereby a new corporation an old one.[42]

To this he added one dry five-word paragraph before beginning his explanation: "Perhaps this needs some elaboration."[43]

He expressed full awareness of the occasional harshness inherent in taxation—"the heavy, but unavoidable, hand of the tax gatherer."[44] Describing tax liens he said that:

> With an all-inclusiveness and an administrative swiftness that ofttimes brings harsh results, the pattern of Federal tax enforcement statutes sweeps all save wearing apparel, school books, $500 worth of fuel, victuals, poultry and livestock and $250 worth of books and tools of the trade under the Collector's levy.
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> . . . .
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> Like any other citizen, whether maltreated or ignored by public officers, Field's fortune must bear to the point of exhaustion his full tax burden.[45]

He philosophically noted that "so often the situation with tax matters, is hardly one of contemporary history,"[46] commented on "the general amorality of tax legislation,"[47] and observed that "in this day and time . . . the tax collector is a necessary constant companion in all that one does or says or thinks."[48]

But his philosophy of life encompasses more than tax alone, and one has other companions than the tax collector in "this complex life":

> [This transaction's] hybrid character is but one of the unique consequences which occur in this complex life as tax

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42. *Phinney*, 268 F.2d at 234 (footnote omitted).
43. *Id*.
44. Carter v. Campbell, 264 F.2d 930, 937 (5th Cir. 1959).
45. Field v. United States, 263 F.2d 758, 762–64 (5th Cir. 1959).
46. *Gillette*, 265 F.2d at 650.
47. *Phinney*, 268 F.2d at 237.
48. Bishop v. United States, 266 F.2d 657, 664 (5th Cir. 1959).

> law, the Commissioner of Internal Revenue, the FHA and its administrative practices, the separate entity of the wholly owned corporation of nominal capitalization and the Taxpayer all converge in this apartment building enterprise.[49]

He referred to "this world of vicissitudes, accidents, epidemics and disabling diseases,"[50] our "world of pre-canned, pre-packaged goods,"[51] and "the obvious fact that amongst American consumers, ice, if not a food in the sense of a nutritive item, must at least be regarded as a commodity for human consumption."[52]

One case filed under the Federal Tort Claims Act involved a sedan and a postal truck that had apparently both entered an intersection on the green light—a somewhat unusual occurrence—and one the district court had described as an "unavoidable accident."[53] Commenting upon this unfortunate possibility, Judge Brown said:

> For this may well have been the case in fact. And if it was, it was but another one in which man's intricate efforts to protect himself against the vicissitudes of this complex machine life may, like radar in fog on the high seas, be the cause of damage, not the savior from harm.[54]

His treatment of tort problems was generally penetrating and progressive, even though in the end, the judgment often came as a great disappointment to plaintiff's counsel. For example, many courts are unwilling—as a matter of law—to allow recovery for psychological injuries unaccompanied by physical harm.[55] In one case this last year, Judge Brown expressed the view that this is simply a matter of proof of facts: "So for our purposes here we may assume that on a proper showing of facts . . . the law may accommodate Blackstone and Freud to allow recovery for real psychic or psychosomatic

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49. Rittenberg v. United States, 267 F.2d 605, 609 (5th Cir. 1959).

50. *Id*. at 608.

51. Gladiola Biscuit Co. v. S. Ice Co., 267 F.2d 138, 140 (5th Cir. 1959).

52. *Id*. at 141.

53. Beit v. United States, 260 F.2d 386, 386–87 (5th Cir. 1958); *see generally* 28 U.S.C. § 1346(b) (1952) (granting district courts exclusive jurisdiction over tort claims "against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment").

54. *Beit*, 260 F.2d at 387.

55. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 216 (1941) (noting the general reluctance of courts to allow a plaintiff to recover for mental disturbance alone because "temporary emotion of fright, with no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial").

harm."[56] Nevertheless, in that case, he ended up affirming a jury verdict and judgment for the defendant.[57]

And he analyzed Texas's standard of absolute liability for injurious food products in these words, casting aside the possibility that the law's purpose was simply to provide a defendant who could pay a judgment:

> But the judgment and its payment would not eradicate the pain or suffering or the disability flowing from it. Nor would, for example, a large recovery take the place of the life lost by such an occurrence. The public policy behind this doctrine is then the protection of Texas citizens from the injurious consequences of deleterious foods and beverages.[58]

Earlier in the year his uncommon good sense burst forth in this straightforward explanation why trains have the right of way at railroad crossings:

> In the first place, the use of the term "right of way" . . . is not meant as a grant of a peremptory privilege. It is but a recognition of the physical nature of a railroad. Trains and railway motorcars can run only on tracks. They cannot turn or swerve or duck or dodge save as the track permits . . . . Trains also must, for the public benefit and welfare, adhere generally to schedules without which there would be chaos on the rails and public censure for nonperformance of public duty.[59]

Probably one of Judge Brown's greatest talents is his ability to instantaneously perceive the really important feature of any case before him and his accompanying impatience with legalistic, conceptualistic superstructures. Often this takes the form of defining a crucial term as these four passages illustrate:

> To be told that it could come in to share in a surplus which could never exist after distribution of prior claims which it could never question is to close the door after it had been opened but a crack. Intervenor was actually and inextricably then in the cold exterior looking in on a warmer hearth. So long as that order stood, it could never get in, or getting in, could get nothing else. If that is not final, then the word has little meaning.[60]

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56. Clegg v. Hardware Mut. Cas. Co., 264 F.2d 152, 155 (5th Cir. 1959).

57. *Id.* at 154, 158.

58. Gladiola Biscuit Co. v. S. Ice Co., 267 F.2d 138, 140 (5th Cir. 1959).

59. Bush v. Louisville & Nashville R.R. Co., 260 F.2d 854, 857 (5th Cir. 1958).

60. Point Landing, Inc. v. Ala. Dry Dock & Shipbuilding Co., 261 F.2d 861, 863–64 (5th Cir. 1958) (illustrating that district court's order was appealable as final order because it denied appellant right to intervene as maritime lienor but granted collection as nonmaritime lienor from "any surplus remaining after maritime liens and court costs were satisfied" even though no surplus was expected).

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> [The use of] "*before* and *at* the beginning" of the voyage, as though blending these two prepositions expands a "beginning" from some precise moment to a sort of continuing transitional state . . . does not make the commencement of the voyage—whenever it is—any less a beginning. When the voyage begins, it is the voyage, and not the beginning of it, which continues.[61]

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> What the Government took then was something more than the "use" of these vehicles. . . . If, for example, the useful economic life of a specific vehicle was three years, and the Government's possession had continued for that time, what the Government "took" on the day of seizure was a truck, what it returned would have been a piece of junk.[62]

* * *

> The citizen had an interest in a leasehold. . . . What he has left is a claim. If this is not conversion of one thing into another, then the word has little meaning.[63]

He criticized "the overemphasis of but a single facet [as] an unrealistic disregard of the practical nature of the transaction" and an "approach [that] is both highly unrealistic in the frame of this record and is an impermissible inoculation of the administrative process with the metaphysical subjective imponderables . . . which Congress rejected as unworkable and unfair."[64]

In part, this approach represents his long background as a successful admiralty lawyer. He referred to the liberality of admiralty as to pleadings and intervention, and "admiralty's approach to do justice with slight regard to formal matters."[65] He concluded another admiralty opinion regarding the extent to which security replaces the in rem vessel, "Even to the most ardent admiralty purist, the result presents no real or conceptual difficulties. . . . Traditional notions are not affected if

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61. Miss. Shipping Co. v. Zander & Co., 270 F.2d 345, 349 (5th Cir. 1959) (considering when before voyage cargo carrier must exercise due diligence in making ship seaworthy), *vacated as moot sub nom.* J. Aron & Co. v. Miss. Shipping Co., 361 U.S. 115 (1959) (per curiam).

62. Gillette Motor Transp., Inc. v. Comm'r, 265 F.2d 648, 653 (5th Cir. 1959) (finding that governmental seizure of truck-tractors, cargo trailers, and pickup trucks required payment of just compensation to vehicles' owner), *rev'd*, 364 U.S. 130 (1960).

63. *Id.* at 653–54 (explaining that governmental seizure of vehicles was similar to taking a leasehold and required similar payment of just compensation) (footnote omitted).

64. Burford-Toothaker Tractor Co. v. United States, 262 F.2d 891, 892–94 (5th Cir. 1959).

65. *Point Landing, Inc*., 261 F.2d at 863, 866 (5th Cir. 1958).

that security floats with the cause wherever the law navigates it."[66]

Because he starts with this approach, he is less critical of nonlawyers' lack of understanding of legal matters than he might be. In one case this last year, the Government was attempting to base a case of tax fraud on the failure of a farmer–taxpayer to run a grain check through his checking account.[67] He had simply given the check itself to the bank in payment on a loan.[68] Judge Brown dryly observed, "Laymen untutored in the niceties of income tax law, accounting or banking might think it quite unnecessary to endorse and deposit one check in the bank and draw and deliver a new check drawn on that very bank in like amount and payable to that very bank."[69]

He is somewhat less patient with his fellow judges when he feels they have been overly technical. *O'Neal v. United States* was such a case this last term.[70] The court held that an appeal was not timely because the formal "notice of appeal" was never filed—although its contents were well known to all concerned.[71] This did not make sense to Judge Brown, and he wrote:

> That such a result could occur in this age of judicial enlightenment amazes me.
>
> . . . .
>
> Here . . . [counsel's open-court notice] was timely. . . . It told all what Form 26 "Notice of Appeal" would have conveyed.
>
> All that was absent was one small, little piece of paper.
>
> . . . .
>
> . . . Its message was unilluminating. Its rustle makes but a tiny noise. But it penetrates and persists. Harkening to it, I hear a reformer's skeleton rattle. And I see scurrying about with their manifolds and foolscaps of exemplications, bails, vouchers, replications, recordats, demurrers, and mittimus scriveners and clerks glorying that once again things legal must be done in due and proper order.[72]

Much of Judge Brown's opinion personality comes through his choice of words and is really unrelated to the subject matter.

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66. Cont'l Grain Co. v. Fed. Barge Lines, Inc., 268 F.2d 240, 244 (5th Cir. 1959), *aff'd sub nom.* Cont'l Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960).

67. Carter v. Campbell, 264 F.2d 930, 933–34 (5th Cir. 1959).

68. *Id.* at 934 n.8.

69. *Id.* at 940.

70. O'Neal v. United States, 264 F.2d 809, 813–15 (5th Cir. 1959) (Brown, J., dissenting).

71. *Id.* at 811–12 (majority opinion).

72. *Id.* at 813–15 (Brown, J., dissenting).

Sometimes it takes the form of phrases like "cyclonic case by case development,"[73] "the scandal of delay,"[74] "the remarkable rear view mirror of the resulting event,"[75] and "[the] irrepressible journey [of natural gas] from the bowels of the earth to a Brooklyn burner tip."[76] At other times it takes the form of longer descriptive passages.

For example, the hills of Alabama and Georgia produce more than their share of non-tax-paid whiskey[77]—otherwise known as "moonshine"—and Judge Brown had his share of fun with such cases last year. In one case, although the Fifth Circuit remanded it to the district court for a redetermination, Judge Brown's description of the facts demonstrates his awareness that the Government had a fairly good case against the defendants:

> [T]he mere possession of seven and one-half tons of rye—a quantity which the Agricultural Agent testified would supply the agricultural needs of the whole county for a year or more—is a circumstance which may be considered. More particularly is this so when it is carried on a truck along with 1,364 empty gallon jugs and 3,700 pounds of sugar—a combination which, as the Government's brief notes, "lacked only fire and water to constitute the entire ingredients necessary for the manufacture of moonshine whiskey."[78]

In another, Judge Brown playfully observed that "[e]xamination of the [bread] truck disclosed that instead of carrying the staff of life, it was loaded with 60 five-gallon glass jugs of shine."[79] When one case's facts revealed that a truck left the site of a possible liquor still at 2:30 a.m., Judge Brown was not above referring to the time of the truck's exit as "the still of the night."[80]

Distinguishing cases can be a lengthy process. However, when concerned with the possibility of a manufacturer's liability for glass in biscuits, he dismissed comparison to an insecticide case with these brief remarks: "[That] was not the case of food for man or beast. It was insecticide designed to kill. Eaten by a cow it did just that, and the Court holds that there was no liability."[81]

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73. Sun Oil Co. v. Fed. Power Comm'n, 266 F.2d 222, 228 (5th Cir. 1959) (Brown, J., dissenting), *aff'd*, 364 U.S. 170 (1960).

74. *O'Neal*, 264 F.2d at 813 (Brown, J., dissenting).

75. Beit v. United States, 260 F.2d 386, 388 (5th Cir. 1958).

76. *Sun Oil Co.*, 266 F.2d at 229 (Brown, J., dissenting).

77. *See* 1948 IRS ANN. REP. 222 (calculating number of enforcement actions in each state undertaken by Alcohol Tax Unit and determining that Alabama ranked third for seizure of illegal stills while Kentucky tied for eighth).

78. Patenotte v. United States, 266 F.2d 647, 651–52 (5th Cir. 1959).

79. Slade v. United States, 267 F.2d 834, 835 (5th Cir. 1959).

80. *Patenotte*, 266 F.2d at 652–53.

81. Gladiola Biscuit Co. v. S. Ice Co., 267 F.2d 138, 139–40 (5th Cir. 1959).

When it helps to illustrate his point he can call upon the Bible: "Until nature shuts off the gas the Commission is the perpetual regulator from whose power the Commission's own brief says, '. . . there is no . . . hiding place.' Congress did not mean to invest its creature with these scriptural powers."[82] Or he can borrow inspiration from literature:

> [T]hese . . . vehicles traveled . . . over 3,450,000 miles. In that operation the Government got something more than *use*, i.e., carrying capacity of the vehicles. Unlike "the wonderful one-hoss shay . . . that . . . ran a hundred years to a day" and "went to pieces all at once—all at once, and nothing first, just as bubbles . . . when they burst," each mile operated used up a part of the economic life of the vehicle. The part thus "consumed" could not be returned. It was lost and gone forever.[83]

Occasionally there is an abundance of metaphors:

> [I]t would take extraordinary, if not Goldbergish, improvisations to use [the rubber hose drill in question] in connection with a traditional rotary rig drilling setup. . . .
>
> It is now a matter of established history that the pudding's proof was in its inedibility. Despite its availability to the oil industry, no one else ever sought the use of this patent. . . . That fact stands out like an oil derrick . . . .[84]

And sometimes there is a return to an old one:

> Here, three years later, we are back where we were in Lincoln Mills. There I stated that this court had concluded "that the court with power is yet powerless to proceed—it has power but no tools—in short, the door is open[ed] but the hall is empty." Perhaps today the hall is filled. But what takes place is mere stage acting since the players are engaged in a mere academic exercise, debating fiercely and resolving decisively, but actually delivering nothing further than the outline of tomorrow's controversy. The fight begins, then, after leaving the hall.[85]

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82. Cont'l Oil Co. v. Fed. Power Comm'n, 266 F.2d 208, 222 (5th Cir. 1959) (Brown, J., dissenting) (alterations in original) (quoting *Psalms* 139:7–8).

83. Gillette Motor Transp., Inc. v. Comm'r, 265 F.2d 648, 655 (5th Cir. 1959) (alterations in original (quoting OLIVER WENDELL HOLMES, THE WONDERFUL "ONE-HOSS-SHAY" AND OTHER POEMS 11, 42 (1897)).

84. Bannister v. United States, 262 F.2d 175, 179–80 (5th Cir. 1958) (Brown, J., specially concurring).

85. Refinery Employees Union v. Cont'l Oil Co., 268 F.2d 447, 461 (5th Cir. 1959) (Brown, J., dissenting) (citation omitted) (quoting Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81, 89 (5th Cir. 1956) (Brown, J., dissenting), *rev'd*, 353 U.S. 448 (1957)).

Human controversies, and the litigation they create, are full of the humor, the pathos, the drama, and the variety of life itself. A sensitive and skillful judge has an eye and ear for this element of "the law," and occasionally a little of it creeps into his opinions. Here are a few passages from Judge Brown's opinions last year that reflect this awareness:

> Days or months later it is perhaps easy to see that had Barsky kept on in his right lane without pulling onto the shoulder the passing would have been made without difficulty. But Barsky, with but 3 seconds for decision could only react instinctively. Four to five hundred feet—with the interval closing at 160 feet per second—separated him and the two oncoming vehicles which monopolized the highway. Would the sportscar succeed in passing Brown? Would Brown give way? Would the sportscar drop back? Barsky did not know the answers. He could not find them out. In the twinkling of an eye, it seemed best for him to give way onto the shoulder. The Court was eminently justified in concluding that, if that were a mistake, the emergency created by Campbell's persistence brought it on.[86]
>
> * * *
>
> [A]ppellant directed White to back his car towards the supply.
>
> Unknown to appellant, however, White's trunk was already full—with Inspector Corbin of the Federal Alcohol and Tobacco Tax Division and Police Officer Gibby of the Atlanta Police Department.[87]
>
> * * *
>
> As it might have appeared to the jury of lay persons, the medical theory was that the accident had made Clegg see himself as he really was, not as Clegg had thought himself to be. In short, the accident had destroyed the myth. No longer was he the brave invincible man. Now, as any other, he was a mere human, with defects and limitations and a faint heart. It was, so the Insurer argued with plausibility to the jury, the strange case of a defendant being asked to pay for having helped Clegg by bringing him back to reality—helping him, as it were, to leave Mount Olympus to rejoin the other mortals in Baton Rouge.
>
> To this elusive excursion into the id of Clegg, there were added many irrefutable earth-bound events that made it sound all the more strange.[88]

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86. Campbell v. Barsky, 265 F.2d 463, 465–66 (5th Cir. 1959).

87. Bryant v. United States, 263 F.2d 833, 833 (5th Cir. 1959) (per curiam).

88. Clegg v. Hardware Mut. Cas. Co., 264 F.2d 152, 154 (5th Cir. 1959).

* * *

> This man, to whom "everything furnished" had meant "a garden, truck patch and some groceries," was offered $25 a week and a place to live. To him this became his home as well as his place of work. He was given a "little yellow school bus" on the storage yard. Although he first had to find wood to heat and cook with, he was later given an old, operating gas stove, a bathroom heater, and the bus was wired for one electric light. . . . He grew onions and six rows of Irish potatoes in his garden behind the bus, and raised "seventy-five head" of chickens.[89]

* * *

> The caravan got underway with the [Plymouth] Fury in the van, the wrecker and its disabled tow in the middle with Slade in his Dodge bringing up the rear. As the convoy proceeded, the vanguard got cut off from the main column by a passing railroad train at a crossing. . . . About the time the convoy reformed and got underway, the officers, hovering near at hand, threw up a roadblock, stopped the procession and took cars, wrecker, bread truck, their cargo and occupants to the jail.[90]

Whenever possible Judge Brown would refer to the make or model of the car involved, and it is surprising how often he was able to match up a colorful automobile with a colorful character. A "1957 red Cadillac Coupe deVille,"[91] a "pink and white Oldsmobile,"[92] a "Triumph sportscar,"[93] a "flamingo and charcoal Chevrolet Bel-Aire sedan,"[94] and a Thunderbird[95] (usually belonging to fast drivers and fast operators). And he accepted the fact that Alcohol Tax agents might have recognized a "truck trailer . . . 32 feet long and somewhat distinctive . . . [with] the little red sign on the back, 'We stop at shacks and railroad crossings.'"[96]

Another aspect of Judge Brown that really cannot be overlooked is the fact that he is a Texan—at least by choice if not birth.[97] Although in one opinion he acknowledged that some of his knowledge of oil and gas law he had simply "absorbed in the

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89. Sams v. Beckworth, 261 F.2d 889, 890 (5th Cir. 1958).
90. Slade v. United States, 267 F.2d 834, 835–36 (5th Cir. 1959).
91. Wingo v. United States, 266 F.2d 421, 422 (5th Cir. 1959).
92. *Id.* at 423.
93. Campbell v. Barsky, 265 F.2d 463, 464 (5th Cir. 1959).
94. Field v. United States, 263 F.2d 758, 759 (5th Cir. 1959).
95. Bush v. Louisville & Nashville R.R. Co., 260 F.2d 854, 855 (5th Cir. 1958).
96. Patenotte v. United States, 266 F.2d 647, 651 (5th Cir. 1959).
97. *John R. Brown*, 18 TEX. B.J. 623, 624 (1955).

midst of an oil and gas economy,"[98] he was not above poking a little well-intentioned fun at Texans either. When discussing Texas's policy of absolute liability on manufacturers of deleterious food products, he said, "Texas cannot be assured *food fit for Texans* unless those who package it, and those who furnish its essential ingredients, supply the items fit for consumption."[99] And in an automobile accident case in which the Texas highway patrolman pursued a suspicious Pontiac, Judge Brown mentioned the factors considered by the officer in arriving at this "suspicious" evaluation and concluded, "Moreover, he had out-of-state license plates—a circumstance of itself sufficient to arouse some suspicion in the mind of this Texas patrolman."[100]

These have been examples from the results of studying the opinions of one judge from one year. It has been entertaining—and informative—because, of course, Judge Brown is an unusually perceptive and colorful individual. But any judge could be studied in this way. The result of doing so should almost always produce a greater understanding, and appreciation, for the mind and personality of the judge involved. And any lawyer who reads opinions in this way—whether systematically or merely in the course of his research—will not only be a better informed and more able lawyer, but will probably derive a great deal more fun out of his or her work as well.

98. Cont'l Oil Co. v. Fed. Power Comm'n, 266 F.2d 208, 219 n.9 (5th Cir. 1959) (Brown, J., dissenting).

99. Gladiola Biscuit Co. v. S. Ice Co., 267 F.2d 138, 141 (5th Cir. 1959) (emphasis added).

100. Warren Petroleum Co. v. Thomasson, 268 F.2d 5, 6–7 (5th Cir. 1959).