

Justice Sunday

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Metro Baptist Church
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Deuteronomy 16:20, Psalms 97:1-2, Micah 6:8, Amos 5:24, Matthew 23:23

It was almost midnight, on a Saturday night in May 1961. Frank Johnson, United States District Judge for the Middle District of Alabama, was sitting at his kitchen table in a small cabin on a lake in Alabama. On the other side of the kitchen table was John Doar, the lead attorney for civil rights for the United States Department of Justice.

A group of Freedom Riders had been assaulted by a mob led by the Ku Klux Klan that day in Montgomery, while the Montgomery police carefully stayed away. There were threats of violence throughout Alabama.

Doar was asking Judge Johnson for an unprecedented temporary restraining order against the Klan and the Montgomery police department, barring them from further violence. This order would provide the legal foundation for federal intervention. After carefully reading the papers, and questioning Doar, Judge Johnson granted the injunction.

At Doar's suggestion, two of the federal marshals who had accompanied Doar stayed with Judge Johnson. For the next 15 years of his life, Judge Johnson would be accompanied by one or more armed U.S. Marshals at all times. When Judge Johnson began hearings that Monday on the request for a permanent injunction against the Klan, federal marshals ringed the courthouse to protect the judge and the witnesses from a mob that was gathering in the front.

Judge Johnson was no stranger to controversy. In 1956, he joined with Circuit Judge Richard Rives in declaring segregated seating on Montgomery buses unconstitutional. During the next 20 years, Judge Johnson desegregated Alabama's schools, buses, bus terminals, parks, museums, mental institutions, jails and prisons, airports and libraries.

Judge Johnson ordered the Alabama legislature to reapportion itself and eliminate the gerrymandering that prevented black voters from having any power. Judge Johnson abolished the poll tax and all the various tests and tactics used to keep blacks from voting in Alabama.

Judge Johnson was the first judge in the South to put women on juries. When the State refused to spend any money on its prisons and mental institutions, Judge Johnson ordered the State to provide the minimum conditions required by the Constitution.

Judge Johnson paid a price for all of his actions. He was called the "most hated man in Alabama" by the Ku Klux Klan. A cross was burned on the front lawn of his house, a

bomb threat was phoned in to his wife, and he was forced to have an unlisted phone number. His mother's house was bombed, in an attack it was later discovered was aimed at Judge Johnson.

It was politically convenient to abuse Judge Johnson. George Wallace made a career out of attacking him. In 1967 with only one dissenting vote, the Alabama House of Representatives passed a resolution calling for Judge Johnson's impeachment, despite their complete lack of authority over him.

But Judge Johnson thought the price was worth defending the Constitution. Others agreed. When the federal courthouse in Montgomery was named for Judge Johnson, Alabama Senator Howell Heflin said:

Judge Johnson's courtroom has been a living symbol of decency and fairness to all who come before his bench. It is from this courthouse that the term rule of law came to have true meaning; it is from this courthouse that the term equal protection of the law became a reality; and it is from this courthouse that the phrase equal justice under law was dispensed despite threats to his personal life.

Martin Luther King said it more simply: Judge Johnson was "a man who gave true meaning to the word justice."

Why am I telling his story? First, because Judge Johnson is a personal hero, the man who above all others has always made me proud to be a lawyer. Second, because his story gives us a place to start when we try to answer the question, "What is the meaning of justice?"

Justice is mentioned often in the Bible, but rarely explained. We are constantly commanded to do justice, to see that justice is done. But what is justice?

Perhaps the easiest way to begin is to say that justice means fighting injustice. Justice means protecting the poor and the powerless; justice means not favoring the rich over the poor. When people talk about Old Testament-style justice, *this* is what they should be talking about:

Exodus 23:2 "Do not follow the crowd in doing wrong. When you give testimony in a lawsuit, do not pervert justice by siding with the crowd."

Exodus 23:6 "Do not deny justice to your poor people in their lawsuits."

Leviticus 19:15 "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly."

Proverbs 29:7 "The righteous care about justice for the poor, but the wicked have no such concern."

How has the modern church done in honoring God's command that we pursue and support justice? Not very well.

Look at the experience of Frank Johnson. When he and his family moved to Montgomery, they joined the First Baptist Church in Montgomery. He even taught a men's bible class. But his family quit going to church after the Freedom Riders came to Montgomery early in 1961. That Sunday morning the deacons and other men stood outside joining hands to make sure no unwelcome visitors would come into the church.

Years later, a deacon from First Baptist Montgomery came to Judge Johnson's house on visitation Day. The Deacon asked why he never came back to First Baptist. Judge Johnson told him: "The reason I left the Baptist church was that during all this time that my family and I were going through this, I looked around and I did not find one supporter in that church. Not one person supported my position." And the deacon agreed with him.

Think about that. Think about a man who was devoting his life to the classic pursuit of justice — protecting the poor and the powerless — and not one member of a very large Baptist Church was willing to support him. Apparently their teaching about respect for authority did not extend to a federal judge they disagreed with.

This behavior was not unique to Baptists. Judge Richard Rives was one of the leaders of the 5th Circuit's battles to enforce the law. Several times one of his law clerks accompanied the judge and his wife to their Presbyterian church in Montgomery. Whenever they sat down, all the people who had been sitting nearby would get up and go sit somewhere else. The law clerk joined the Episcopal Church.

And let's not get too smug about how much we have improved in the last 40 years. Recently the pastor of Calvary Baptist Church of Clearwater, Florida, wrote a letter to a member: the Florida State Court judge on the Schiavo matter. The minister asked the judge to leave the church, at the request of the membership.

Or, tell me when these comments were made:

Today	40 Years Ago
"We will look at an arrogant, out of control, unaccountable judiciary." "The time will come for the men responsible for this to answer for their behavior, but not today." <i>Rep. Tom Delay</i>	The judge's decision is a "judicial tantrum." He should be "impeached." He is "unstable and erratic, rash, headstrong, and vindictive, a liar." <i>Gov. George Wallace</i>
"I'm a radical. I'm a real extremist. I don't want to impeach judges. I want to impale them."	What that judge needs is a "barbed-wire enema."

And finally:

The [Supreme] [C]ourt has become increasingly hostile to Christianity, and it poses a greater threat to representative government -- more than anything, more than budget deficits, more than terrorist groups.

This last quote was from the Family Research Council, which is putting on a nationwide simulcast television event today, something they call Justice Sunday. It stars Bill Frist, Tom Delay, James Dobson, Al Mohler, and other legal luminaries. Their goal is "to engage values voters in the all-important issue of reining in our out-of-control courts."

This forced me to once again to realize that some words have very different meanings for me than for some other people. Words like justice. And so once again I am forced to try to answer the question: what is justice?

I always thought that Martin Luther King had it right: take a look at Judge Johnson if you want to know the meaning of justice. But that doesn't seem to be a common belief anymore. Judges who uphold the rule of law against the will of the majority are apparently against justice, not for it.

For example, we have another comment from House Majority Leader Tom Delay:

I blame Congress over the last 50 to 100 years for not standing up and taking its responsibility given to it by the Constitution. The reason the judiciary has been able to impose a separation of church and state that's nowhere in the Constitution is that Congress didn't stop them. The reason we had judicial review is because Congress didn't stop them. The reason we had a right to privacy is because Congress didn't stop them.

I am willing to bet that Rep. Delay does *not* think Judge Johnson defined the meaning of justice. In fact, it seems that many of our leaders believe that *any judge* who believes in judicial review of *their* actions is an unjust judge.

I can understand why they don't like having judges review their actions. But I cannot understand where they got the idea that judicial review is a creature of the last 50 to 100 years. As that dangerous legal radical to Chief Justice Warren Burger explained in delivering the *unanimous* decision of the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974):

Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* (1803) that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

In fact, the basic principle of judicial review goes back to Sir Edward Coke, who said that "when an Act of Parliament is against common right and reason, or repugnant, or

impossible to be performed, the common law will control it, and adjudge such Act to be void." These words came in *Dr. Bonham's Case*, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1610). So, it is not true that some people want us to return to the 18th century; they want us to go back to the 16th century.

But Delay and the rest do understand something that is very important: judicial review and justice are linked. As Alexander Hamilton wrote in Federalist Papers 79:

For I agree that there is no liberty if the power of judging be not separated from the legislative and executive powers.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

So, the men who wrote our Constitution understood the importance of judicial review in keeping the legislature within legal limits. But what does that have to do with justice? Can a judge uphold the "manifest tenor" of the Constitution and still do justice?

Some judges have managed to combine respect for the Constitution and respect for justice. Judge Johnson said that when he was interpreting the Constitution, he tried to remember one thing: "the Constitution holds all persons in its embrace." And *because* the Constitution holds everyone in its embrace, he struck down attempts to keep some people — unpopular people — from being able to exercise their full rights as citizens of the United States.

Judge Johnson's belief — that the Constitution embraces everyone — is in stark contrast to the view that shaped the greatest mistake in Supreme Court history: the *Dred Scott* case. In *Dred Scott v. Sandford*, 60 U.S. 393 (1856), the Supreme Court upheld slavery throughout the United States, overturned the Missouri compromise, and forced this country into a brutally destructive civil war.

There has been a recent revival of interest in the *Dred Scott* case. Oddly, people cite it as an example of activist judges imposing their own moral beliefs on the constitution. But the only people who can say this are people who have not read it. And I can assure you that at over 204 pages of bad 19th century legal prose, very few people have actually read it.

But you don't need to read the whole opinion to understand that *Dred Scott* was not an activist decision. It was a triumph of strict construction and original intent over morality. Two paragraphs are enough to tell you what that decision was about:

The question before us is whether [slaves and descendents of slaves] compose a portion of this people and a constituent member of this sovereignty. We think they are not and that they are not included and were not intended to be included under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

The Court justified its decision in words that should warm the heart of any strict constructionist:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. ... The duty of the court is, to interpret the instrument ... with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

Fortunately, we have judges today who see their job as more than finding ways to limit our Constitutional rights, judges who see their job as protecting the Constitution and the rights it gives to us all: judges like Frank Johnson. But our judges are once again being condemned for daring to challenge the perceived will of the people, for daring to say that the rule of law is different from majority rule.

Judge Johnson is not my only legal hero. Another hero of mine is a wonderful judge that Delay and Frist and Dobson and their friends would have found appalling. In fact, he was even accused of being *a liberal* in his day. He also had one of those wonderful legal names, the kind you could never dream up but that makes perfect sense: Judge Learned Hand.

Judge Hand is probably best known outside the legal profession for a famous speech, "The Spirit of Liberty." It was given in 1944 during the height of World War II. His speech ended with these words:

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right. The spirit of liberty is the spirit which weighs other interests alongside its own without bias. The spirit of liberty remembers that not even a sparrow falls to earth unheeded. The spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

That is what justice means to me. Justice means understanding that when we are judged, we will not be asked about doctrinal purity, political beliefs, or how much money we had in our private accounts. *Our* judge will ask us how we helped the poor, protected the

powerless, and fought against prejudice and favoritism. *Our* judge will ask what we did to pursue justice.

And what will we have to say for ourselves when we are judged? What will we say we did to pursue justice? Very few of us will ever become judges. But we can all follow the instructions in Paul's letters and in 1 Peter: we are to pray for and support those who *are* pursuing justice.

And we can vow that we will do our best to see that when the next Frank Johnson faces painful choices, when the next Frank Johnson tries to see that the Constitution embraces everyone, he will not look back and say, "during all this time that my family and I were going through this, I looked around and I did not find one supporter in that church. Not one person supported my position."

What will I do? Well, I think I will be guided by the words from the benediction given when Frank Johnson became a judge on the Fifth Circuit Court of Appeals. It was given by the Pastor of Dexter Avenue, King Memorial Church, Martin Luther King's church in Montgomery. In closing his prayer, he thanked the Lord:

For your servant, Frank M. Johnson, Jr., through whom you have caused righteousness to flow like a perennial stream.

I may not be able to *cause* righteousness to flow, but I can do my best to *keep it* flowing, to keep it from being blocked by people who find the waters of righteousness uncomfortable. And I can pray, in the words that begin each session of the Supreme Court:

MAY GOD SAVE THIS HONORABLE COURT.

AMEN.