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Oral History of Distinguished American Judges

HON. PATRICK E. HIGGINBOTHAM
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

with
Judge Christopher G. Bradley
Thomas “T.L.” Cubbage

April 30, 2024

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Institute of Judicial Administration Oral History of Judge
Patrick E. Higginbotham. **Interview Part I: Interviewer: Thomas
"T.L." Cabbage¹:**[START RECORDING]

CUBBAGE: Judge Higginbotham, you've sat on the federal bench
00:00:20 since December 1975, mostly in chambers here in Texas. But the
road to the bench did not begin in Texas. Where did the road to
the bench for you begin?

JUDGE HIGGINBOTHAM: Well, it began in Alabama, rural Alabama.
I was born December 16th, 1938 in McCalla, not a place on the
map, but really a rural route for delivery. I was born in a
small house at home that was built for my father by my
grandfather for each of the boys when they came of age, because
they were running a large dairy operation. So I grew up in the
rural South.

CUBBAGE: How did you go from the rural South to college?

00:01:18 JUDGE HIGGINBOTHAM: My mother was a teacher and writer, a
poet. And in our home we had books. It was a small place. We
didn't have much. There was no indoor heating or anything like
that sort of thing, no plumbing of that type. But we had the
latest edition of the Encyclopedia Britannica, and we had
classics because my mother was a student of them. And so we
grew up in that environment out in the country for some period
of time until we moved into, my mother and father separated and
I went with my mother into the, quote, "city" of Bessemer,

¹ Thomas (T.L.) Cabbage III has been President of The Center for American and International Law since 2021. Before practicing law with Covington & Burling LLP, he clerked for Judge Higginbotham from 1992 to 1993. He has also served in the U.S. Department of Energy as Deputy Under Secretary for Science, has taught programs on international arbitration, and is a member of the American Law Institute.

25 Alabama. So that is just a take of something from that period
26 of time. My mother continued to teach school. And then my
27 brother started college, but there was no money. So he joined
28 the Navy to get the GI Bill and went away to the service. And
29 so it was just my mother and sister, and we lived then about a
30 block from high school and about a block from the tennis courts
31 and about three blocks from the church. We had no car, but my
32 00:02:43 mother would hitch a ride with the other schoolteachers. So
33 that was the environment at Bessemer High School.

34 CUBBAGE: You mentioned that your brother used the military to
35 find finances for his education. How did you find a way to
36 finance your college education?

37 JUDGE HIGGINBOTHAM: My mother spent her summers in Montevallo,
38 Alabama at its college for women. And she would take me with
39 her to Montevallo for the summers. And there I found tennis
40 courts and became interested in playing tennis. I continued
41 with that from the time I was 11 or 12. And then eventually
42 00:03:36 became a tennis player. It took me a while. I had no racket,
43 but I traded a hunting knife for a racket. It was not strung
44 so then I taught myself how to string rackets and started a
45 racket-stringing business to support my gear purchases. I
46 continued to play tennis through high school. I became the top
47 ranked player in the 18 and under rankings in the state and
48 received a scholarship, athletic scholarship, to the University
49 of Alabama at that time.

50 CUBBAGE: Can you tell us about being an athlete at the
51 University of Alabama in the late 1950s?

52 00:04:31 JUDGE HIGGINBOTHAM: Well, that was quite a journey. Actually,

53 what happened is that I went down to enroll in the university.
54 They had made provision for me to have all my fees paid. But
55 there was not much else in the program. So at the end of the
56 00:04:57 first semester there, I went to Texas. My mother had married a
57 Texan and gone to Texas. I hitchhiked to Texas and then
58 continued to play tennis. I took my tennis down to UT. I went
59 down and called on Wilmer Allison, the former great
60 international player in Austin. Walked up and knocked on his
61 door here on 15th Street in Austin, Texas and told him my name
62 and told him I was a tennis player and I'd come to play for
63 him. And he asked me, "did you bring your gear?" And I said,
64 "yes." He said, "meet me at the courts in 30 minutes." I did.
65 He watched me hit and signed me up, but I was ineligible. So I
66 went for two semesters to UT. And by then, then Coach Bryant
67 00:05:47 had come back.² They called and said, "you've got eligibility,
68 come home." And so I went back to Alabama. And my brother,
69 meantime, had gotten out of the Navy, had been a very good
70 undergraduate student and he was starting law school. When
71 they would agree to pay tuition for me, I took that to mean
72 that it was unlimited and that as long as I was taking a
73 course. So I signed up for 23, 22, 23 hours a semester,
74 because I knew that the clock was going to run out on my
75 eligibility. So I managed to continue to play on scholarship
76 through law school.
77 CUBBAGE: At that time, was the Bachelors of Law the path that
78 you took?

² Paul "Bear" Bryant was the Athletic Director (and head football coach) at the University of Alabama from 1957 to 1983.

79 00:06:32 JUDGE HIGGINBOTHAM: The only thing I hadn't completed in
80 undergraduate school was the basic ROTC program. You were
81 required to go back and to complete the basic two years of
82 ROTC, as I had been there and transferred out. So I was in law
83 school taking ROTC in undergraduate school. That meant

84 00:06:55 I ended up taking a Bachelor's degree in 1960 and an LLB in
85 1961. But that was five years out of high school.

86 CUBBAGE: Why did you choose the law as your degree path?

87 JUDGE HIGGINBOTHAM: That's a fascinating question because I
88 never thought I would do anything else. I think that has to do
89 in no small part with my mother, whose father was a lawyer.
90 And that's another whole story itself. But he had also been in
91 Alabama. And he left the state and he came to Texas. I was
92 left there and the choices of where to go. So my brother and I
93 roomed together in law school, and we graduated the same time.

94 00:07:51 He remained there in private practice. And I had a military
95 obligation. And for the military obligation, I went with the
96 JAG Corps.

97 CUBBAGE: Which branch of the service?

98 JUDGE HIGGINBOTHAM: The Air Force. Yes, my professors had
99 decided that I ought to be a law professor. And I was quite
100 young. I was not 21 yet. So I applied at their encouragement
101 to the Harvard Law School to get an LLM, to get my ticket
102 punched, as they said. And I was accepted. But then they
103 wanted \$1,200 in tuition. It might as well have been \$12,000.
104 But the dean said not to worry. "I'll send you down to the

105 00:08:38 Attorney General of Alabama.³ He needs somebody to help
106 develop a program for him, and you can do that over the summer
107 for him." And I said, "what is that?" He said, "well, the
108 difficulty of what their position should be with regard to the
109 civil rights difficulties they're having. But they'll pay you
110 00:09:00 for the summer. And you live on very little and it will get
111 you the 1,200 bucks." And so the Attorney General interviewed
112 me and it did not go well. The Freedom Riders hit Birmingham
113 the day before. And the next day were coming to Montgomery.
114 He strode in while I was sitting there waiting to be
115 interviewed and sat down and picked up my resume and thumbed
116 through it. And he looked at me and he said, he asked me in
117 his Alabama voice, "son, what would you have me tell these
118 outsider agitators coming in here to tell us how to run our
119 lives?" And the naive young lad that I was, I undertook to
120 answer him. And I told him that this is a peaceful protest.
121 00:09:55 They just want attention, and the best advice I could give you,
122 and it's just Gandhian philosophy. And I knew by the moment I
123 said that, I shouldn't have. He said, "it's what?" I said,
124 "Gandhian philosophy. Dr. King's dissertation was written on
125 Gandhian philosophy." He said, "what does that mean?" "well,"
126 I said, "it means that it's a peaceful protest. They just want
127 the attention and to bring their cause to light." "So what do
128 I do?" And I said, "well, my advice, sir, would be to meet the
129 bus when it comes in and to tell them 'welcome to Montgomery.
130 We have a lot of historical sites here. You'll be welcome

³ MacDonald Gallion was the Attorney General of Alabama in 1961.

131 here. And I assure you, you'll be safe' and give them police
132 protection." I thought that was good advice. But he got up
133 and walked out. And so I came back to Tuscaloosa and called my
134 girlfriend, fiancée, we had planned to get married and she had
135 already accepted a job in Cambridge. I said, "well, there's a
136 00:11:07 problem." I would have been immediately drafted. The Air
137 Force always wanted me. I wanted to go. So I joined the Air
138 Force. We spent the next three years in the Air Force.
139 CUBBAGE: Tell me about life as a young JAG officer, lawyer in
140 the Air Force.
141 JUDGE HIGGINBOTHAM: Well, it was an amazing experience for me.
142 I was naive and spoiled in so many ways. And only years later
143 did I realize the quality, fully appreciate the quality of the
144 people, my supervisors and the people I worked for at the time.
145 They were amazing. And they immediately put me into trying one
146 case after the other. That's all I did for three years. And
147 00:11:52 they had general court martials, special court martials, and
148 review boards. So I was in the courtroom daily. It was a
149 natural for me. Trying cases is an extension of the tennis
150 game. I'm competitive by nature. And I like to play. I like
151 tennis because when I won, I won, and when I lost, I lost. And
152 so my sense was that representing these people gave me a lot of
153 satisfaction, and I represented their cause as best I could.
154 And I like to win. So I got a lot of experience and tutelage
155 from very fine troops that I worked for. I consider that a
156 great turning point in my life, the values that I took away
157 from that.
158 00:12:57 CUBBAGE: Did the Air Force have a formal training course for

159 young lawyers or it was just watch and learn?

160 JUDGE HIGGINBOTHAM: It was 30 days orientation at Lackland Air
161 Force Base in Texas. So I hitchhiked down there and showed up
162 and got 30 days of training. And then I hitched a ride with
163 00:13:17 one of my fellow students to Atlanta, Georgia, to marry my
164 sweetheart. We got married, the next day our honeymoon
165 consisted of driving from Atlanta, Georgia, all day and night
166 because I reported for active duty on Monday morning to the Air
167 Defense Command.

168 CUBBAGE: As a JAG lawyer, did you prosecute or solely do
169 defense work?

170 JUDGE HIGGINBOTHAM: You do both. They start you off as a
171 prosecutor. And then once you've gained considerable
172 experience, then you take on some defense. I was successful at
173 it. And the troops that got in trouble began to ask for me,
174 00:13:55 which flattered me. We were blessed with the OSI,⁴ the FBI
175 preparation, so we had the best of investigators. They
176 developed the cases. And all the people involved were highly
177 trained. So I tell people that if I were innocent, I would
178 rather be tried in a court-martial than a civilian court. If I
179 were guilty, that's the last place I'd want to go. That was my
180 sense about it at the time, and it hasn't changed very much.

181 CUBBAGE: How did your service in the Air Force come to an end?

182 JUDGE HIGGINBOTHAM: Well, I did my three-year tour. In my
183 last year, I began to focus on what I was going to do. And my
184 00:14:37 wife was from Atlanta. She wanted me to come back to Atlanta,

⁴ The Office of Special Investigations is an investigative service of the U.S. Air Force.

185 and her family did, of course. And then my mother was in
186 Dallas, and I'd always wanted to go to Dallas. And so I was
187 iffy about what I was going to do. But I had applied to clerk
188 for Justice Black, and he was very receptive because he knew
189 00:15:01 where I came from and my background. He wanted to hire people
190 from Alabama. An incumbent clerk opted for another year so I
191 passed and went on to private practice in Dallas, Texas. But I
192 maintained a relationship with the Black family. Hugo Black
193 III went to Stanford Law School, the spitting image of his
194 granddaddy, clerked for me. And he was very, very successful.
195 I'm very proud of him. But unfortunately, we lost him to an
196 illness early in his career. He was just his grandfather. And
197 of course, Justice Black knew where I came from. It was in
198 mining country, coal mines, ore mines, steel country.
199 Bessemer, as you know, that's Henry Bessemer, the inventor of
200 00:15:56 the open-hearth furnace. Birmingham is Pittsburgh of the South.
201 So I saw a lot of labor union strife, that whole operation of
202 the tenant housing, company-owned housing and all of that, all
203 those things that Justice Black wrote about. I teach
204 constitutional law. I talk about Black opinions. And we're
205 talking about some of those conditions in response to federal
206 legislation. I'll tell them little stories about the justice,
207 that he knows what of he speaks in this opinion. So yeah,
208 those were formative years.

209 CUBBAGE: When you didn't have the opportunity to go to
210 Washington, you had a choice, Atlanta or Dallas. How did that
211 00:16:42 work out?

212 JUDGE HIGGINBOTHAM: I applied to the oldest firm in the city,

213 and they offered me a job, and I took it. And I practiced
214 there, became a partner in that firm. And I was trying cases
215 at that point and continued to try cases until I was appointed
216 00:17:04 to the district court.

217 CUBBAGE: I'd like to ask you a little more about your
218 experience at Coke & Coke in Dallas. How old were you when you
219 started private practice in Dallas?

220 JUDGE HIGGINBOTHAM: Well, let's see. I would have been 25.
221 Yeah, by that time, yes, 25.

222 CUBBAGE: Do you know what about your record impressed those
223 lawyers in Dallas?

224 JUDGE HIGGINBOTHAM: I really don't. I was very fortunate,
225 very lucky, and that's been the story of my life. It's
226 happenstance. But one thing that really has helped me along, I
227 00:17:48 think, too, was that when I arrived there, the major client of
228 the firm was the First National in Dallas, the largest bank in
229 the South, and they had just built a 52-story office building.
230 And they were in litigation over the validity of the title to
231 the city block that was underneath it.⁵ A prominent trial firm
232 from New York had brought this lawsuit, and it was high-stakes
233 litigation. The bank was represented by several lawyers,
234 including the head trial lawyer at Coke & Coke, and they also
235 brought in Henry Strasburger. And I was very fortunate to have
236 this relationship with him, because I had worked with him a
237 00:18:35 little bit on some minor things in the background in
238 preparation for trial. And then they were ready to go to

⁵ Grey v. First Nat'l Bank, 393 F.2d 371 (5th Cir. 1968).

239 trial. The morning of trial, they all gathered in the offices
240 of Coke & Coke, and they were just going to get a send-off and
241 walk two blocks to the courthouse, five lawyers. And so I was
242 00:18:54 standing there, not part of that. And you wear your jacket
243 when you left your office at Coke & Coke, but I walked down
244 there with a shirt sleeve just to say, good luck, guys. And
245 Mr. Strasburger looked around at me, and he said, "Pat, get
246 your jacket." I said, "sir?" He said, "get your jacket." And
247 he turned around to my senior partner, and he said, "I want Pat
248 sitting beside me in the courtroom." And they said, "oh, of
249 course, of course." And I was stunned. I grabbed my jacket in
250 a hurry. And so for four weeks, I sat just beside him, between
251 him and the jury box. And he gave me a list of questions.
252 "When I ask this question, you reach up, and there's a large
253 00:19:50 document on there, if there was an issue I'd turn to that page
254 in the document for the jury." And so I did that. And what I
255 realized was this very casual cross-examination of Henry
256 Strasburger was brilliant, the level of preparation that was
257 behind that, because I would look at my little cheat sheet, and
258 the question would suddenly come down, and I would turn the
259 sheet. And then it would go on and on, and here would come the
260 question. So he had so well prepared that he did that. He won
261 that case in cross-examination. Beautiful exercise. Well, I
262 was impressed with that. And that was a valuable experience.
263 00:20:42 We had a relationship after that as well. Sometimes I run into
264 some Strasburger lawyers, and they don't know the Strasburger
265 that I knew, and why that name was so famous at the time. And
266 it was. He was considered the most prominent civil defense

267 lawyer, although he had defended a capital case too, in the
268 00:21:07 state, I think, at the time. So I had that very good fortune
269 of spending that time with him. And Judge Sarah Hughes.⁶ I
270 volunteered to take a case court-appointed, and I did the usual
271 work on that. And she wrote me a letter saying that she
272 appreciated what I had done, and thanked me for it, and hoped
273 that I would volunteer to do more. And then I began to try
274 cases in the local courts there in Dallas. And eventually
275 then, what happened was that I had tried a couple of very large
276 cases, and then they grew larger and larger, and we were
277 successful. And so the practice continued until I had the
278 opportunity to go on the federal bench, which hadn't occurred
279 to me, which I took.

280 00:22:14 CUBBAGE: Had you considered the state court as an alternative
281 to the federal bench?

282 JUDGE HIGGINBOTHAM: No, the state court would not have been
283 attractive to me. It's the old parity debate, but the reality
284 is the judges are very good judges, but they don't have
285 resources. At that time, the civil district judge in Dallas
286 County had no secretary. They had a court reporter, and so
287 they couldn't do any writing as a practical matter. It was a
288 seat-of-the-pants kind of thing sometimes. They did a
289 remarkable job considering the resources they had, but I didn't
290 want to be part of that. We frankly removed everything we
291 00:23:03 could from the state courts to federal courts, largely because
292 we were representing large corporations, and we wanted the

⁶ Judge Sarah Hughes served on the United States District Court for the Northern District of Texas from 1975 to 1985.

293 advantages of diversity and being in the federal system. So
294 about everything we did -- unless we were forced to, we did not
295 try cases in the state court. We still did, of course, many
296 00:23:22 of them we had to try, but if we had a choice, we went to the
297 federal courts where they had resources.

298 CUBBAGE: Was there any particular area of law that you focused
299 your private practice on?

300 JUDGE HIGGINBOTHAM: Well, not initially. It happened that a
301 senior partner handed me a complaint in an antitrust case
302 saying, "you need to take care of this," and it turned into a
303 huge case. It was a New York Stock Exchange-listed company,
304 and there was an awful lot at stake, zillions of dollars, so to
305 speak. We then -- the general counsel and I -- talked, and I
306 said, "I need more resources. I don't but have one or two
307 00:24:16 associates." They said, "well, where do we go?" -- we ended up
308 at Covington & Burling. And that started a long-term
309 relationship with Covington, as you know from your practice
310 there. I was awed by Covington, the quality of the practice
311 and the fact that the man -- the brainchild of Truman and the
312 architect of NATO was right down the hall.⁷ And I had the
313 opportunity then to work with Harvey Applebaum, who was my
314 campaign manager in high school in Bessemer. Harvey went
315 directly from my high school to Yale. The Koikos, the Greek
316 family that ran the prominent restaurant there for several
317 00:25:14 generations, their children went to Ivy League schools, Yale
318 and Harvard, directly from Bessemer High School. And what

⁷ Dean Acheson was the U.S. Secretary of State from 1949 to 1953. After leaving that position, he returned to the practice of law with Covington & Burling from 1953 until his death in 1971.

319 happened then was when I sat down with the people at Covington
320 & Burling and we saw that they could take the case, it was able
321 to take it on, and join me, I told them that, "you know," I
322 said, "I read a piece on the Anti-Dumping Act by one of your
323 00:25:43 young lawyers I was most taken with, and I sure would like to
324 have him on my team." And they said, "oh, who is that?" And I
325 said, "Harvey Applebaum." And the partner reached inside his
326 jacket, looking down the list of associates. He said, "oh, Mr.
327 Applebaum." I said, "yes." He said, "well, sure." So he
328 marched in five associates and we took a break to get
329 "acquainted," quote unquote. Harvey never missed a beat. He
330 looked at me. I looked at his eyes and I just said, "shh." And
331 he said, "what are you up to?" I said, "I'm going to make you a
332 partner," as if he needed it. But I got a chance to work with
333 00:26:32 Harvey again. That went on for several years to a multi-week
334 trial, which we were successful in also working with Jim McKay,
335 famous lawyer from Covington. I loved Covington and came close
336 to going, at one point, to going back to practice there, but I
337 didn't. Anyway, that was a warm relationship. Of course,
338 Harvey, again, that's going back to Bessemer, became a force.
339 Harvey is the father of Anne Applebaum, Pulitzer Prize winner
340 and staff writer at The Atlantic e.g. Twilight of Democracy. I
341 looked at the TV and I said, "gee whiz, there's little Anne,
342 Anne Applebaum, now an international commentary." She married
343 an official of the Polish government, as I recall. Her
344 writings on the transitions to authoritarian governments has
345 been well received. And her insights, she's now a thoughtful

346 00:27:36 commenter on these large difficulties we're facing.⁸ Her book
347 Twilight of Democracy is stunning.

348 CUBBAGE: I've heard you describe Dallas, where you came after
349 the Air Force, as a law town. What do you mean by that?

350 JUDGE HIGGINBOTHAM: Well, it was an ideal place to practice
351 because it was a financial center. And they, so much spins
352 00:27:53 around that, it had an entrepreneurial spirit about it. So a
353 lot of fortunes were made in Dallas. Some of my kin from the
354 Higginbotham side had ended up in Dallas, although I didn't
355 even know them at the time. So it was just a place that would
356 accept a young guy that really had no family connections of any
357 kind, and I can only offer what I do. I like that spirit. It
358 was a matter of practical necessity -- as that's where I was.
359 And I think that attitude still obtains. I watched the mayor of
360 Dallas, who was also a prominent businessman, and the mayor of
361 00:28:55 Fort Worth just decide we're going to have an airport, the
362 Dallas airport, DFW. These people were getting it done. They
363 had a rail system long before the other cities got around to
364 it. And I was impressed that the first leg of it was to south
365 Dallas, the lower-income, Chicano, Black neighborhoods. We had
366 the public transportation there first. The joke was it was to
367 bring the maids in. But the reality was that it was an effort
368 to provide the services to the people that needed it. Dallas
369 was a very open city in that regard. It was seen as a bastion
370 00:29:46 of conservatism, and in many ways that's true. But at the same

⁸ Anne Applebaum is a journalist and historian. Her books include *Iron Curtain: The Crushing of Eastern Europe 1944-56*, *Twilight of Democracy: The Seductive Lure of Authoritarianism*, and *Gulag: A History*, which received the Pulitzer Prize for General Non-Fiction in 2004. She is married to Radek Sikorski, who has served as Poland's Minister of Foreign Affairs from 2007 to 2014 and again since 2023.

371 time, for the legal profession, there was a lot of outreach,
372 the Dallas Legal Services Project, which supported legal
373 services to the people. So you had this, some would say a
374 Janus-faced mindset, but it was just simply more complex than
375 00:30:08 one might suppose. Dallas was just a very attractive place for
376 me. My mother was there too and she continued to teach there
377 until she died.

378 CUBBAGE: So we come to 1975, you're 36 years old, you're a
379 partner at the oldest firm in the city, and the idea of a
380 federal judgeship comes up. Tell me about that.

381 JUDGE HIGGINBOTHAM: Well, because I loved to practice in the
382 federal courts, the thought that I would ever be a federal
383 judge just wasn't there. It wasn't something I set out to do.
384 But I represented some people who had a lot to say about that,
385 00:31:00 -- happenstance and things. And so one day, as I was finishing
386 my conference with my client, he picked up the phone to answer
387 a call and the substance of which was made clear to me that he
388 knew where these federal judges came from. And so I told him,
389 I said, "you know," I picked up and packed my satchel, "you
390 know, I think I'd like to be a federal judge." And it stopped
391 him cold. He said, "you what?" And I said, "I would like to
392 be, why not?" I said, "I try cases, and I can do it all, I'd
393 get to do that every day." I also saw their work, and the
394 things that the federal courts could do. And so he said,

395 00:31:57 "well," he said, "sit down. Are you a Republican or a
396 Democrat?" I said, "well, I don't, I don't know." He said,
397 "let me ask you a question." He says, "did you, what primary
398 did you vote in?" I said, "I didn't vote in a primary; I was

399 in trial." And he said, "well you can go down there and
400 00:32:17 register as a Republican." And so I did. And eventually one
401 came along, and Judge Sarah Hughes was supportive of it, from
402 the other side of the political spectrum. As did other judges
403 such as Judge Bob Hill.⁹ In the meantime, I had been appointed
404 as a special prosecutor in the Cowan case¹⁰ which involved Judge
405 Hill's refusal to dismiss as a part of a plea agreement to gain
406 testimony of a witness for the Department of Justice to utilize
407 against John Connally, former governor then in the cabinet, in
408 a trial in Washington. And they, he refused to, and of course,
409 00:33:17 leave of court was required, and Judge Hill refused to grant
410 that. And I got a call one day, and he said, "come over," --
411 his secretary said, "come over, judge wants to see you." And
412 he came in, and he handed me an order. And he said, "I'm going
413 to appoint you to be a special prosecutor in this case, will
414 you do it?" And I said, I looked at it, and I said, "yes, of
415 course." I said, "we'll be in New Orleans pretty fast." He
416 said, "I know." So he did, and he had added a prosecutor from
417 the Locke [Lord LLP] firm. I mean, a lawyer, Wayne Woodruff.
418 And so we went to court and fought that in the Fifth Circuit.
419 And that's where I think I first met Mike Tigar because Mike
420 00:34:05 was working for Edward Williams, who was representing John
421 Connally. That began a long-term relationship I had with Mike.
422 I was a great admirer of his talents. And so that's
423 happenstance again.

⁹ Robert Madden Hill was a judge for the United States District Court for the Northern District of Texas from 1970 to 1984 and the United States Court of Appeals for the Fifth Circuit from 1984 to 1987.

¹⁰ United States v. Cowan, 524 F.2d 504 (1975).

424 CUBBAGE: How did you find the adjustment from being an
425 advocate in the courtroom to sitting on the bench?

426 00:34:26 JUDGE HIGGINBOTHAM: Well, I guess initially, I was a little
427 restless when I'd see lawyers do things that I didn't think was
428 helpful to their cause. But for me, it was just a very natural
429 and easy thing to do. I enjoyed it very much. I enjoyed the
430 interaction with the lawyers. The district court is a much
431 more pleasant place to be, because you're engaging with lawyers
432 all the time. You just go into the conference room, pretrial
433 conferences, and I'd sit down with them. And I'd say, "hey,
434 Pete, hey, Tom, okay, what do you got here?" And we'd talk.
435 So you have contact then. Judge Homer Thornberry,¹¹ wonderful
436 man that he is -- he was, and the man for whom this building is
437 00:35:21 named, told me that he was appointed by Lyndon Johnson to the
438 district court. And then one day he got a call and LBJ said,
439 "I just appointed you to the court of appeals." And he said,
440 "Mr. President, Lyndon, I don't really want to do that. I like
441 the job I got. I have able people here, you know. And you know
442 me." And he said, "shut up. Shut up, Homer. I need your seat."
443 So he would, Judge Thornberry became a member of the Fifth
444 Circuit and a very wonderful man. Rightfully this building is
445 named for him. He was a deputy sheriff in Travis County. He
446 didn't speak, couldn't speak until he was three years old
447 because his parents were deaf. And out of that came a
448 00:36:21 compassion and a sense of feeling about him that made him, I
449 think, a wonderful judge. There are many stories about him.

¹¹ Homer Thornberry was a judge for the United States District Court for the Western District of Texas from 1963 to 1965 and for the United States Court of Appeals for the Fifth Circuit from 1965 to 1978.

450 And since we're in the Homer Thornberry building, I will share
451 one with you. We were hearing a case involving excessive force
452 of a Travis County deputy sheriff. And the lawyer representing
453 00:36:47 him was complaining to the panel, which I was on with Judge
454 Thornberry who was presiding. And the young lawyer was saying,
455 "Judge, they beat my client unmercifully. They beat him." He
456 said, "pardon me, Your Honors, but they just beat the hell out
457 of my client." And Judge Thornberry with his easy manner said,
458 "son," he said, "listen, I feel obligated to tell you that I
459 was once a deputy sheriff in Travis County myself." At which
460 point, the lawyer said, "oh, and yes, there are some that are
461 really, really fine." But that was Homer. And so I have the
462 opportunity to give a shout-out to a really splendid man. He
463 was so close to Lyndon Johnson, President Johnson, I should
464 00:37:47 say. You look at that picture on Air Force One with Judge
465 Sarah Hughes and the swearing in, the famous one on Air Force
466 One. And there beside him is Homer. And what people don't
467 know is that he turned to Homer and said, "I want you to stay
468 with me. Stay with me." He said, "get this plane on the
469 road." And he stayed with him in the White House 24/7 for
470 about two weeks when they were going through the difficulties
471 at that time. So that's a man and I have a picture in my
472 office of the two of them. So that's Homer. And so I was
473 fortunate to sit with him and the other distinguished members
474 of the court I've argued before. And as a lawyer, such as
475 00:38:54 Judge Wisdom.¹² But you think about it, people like Elbert

¹² John Minor Wisdom was a judge for the United States Court of Appeals for the Fifth Circuit from 1957 to 1977.

476 Tuttle,¹³ the people of that ilk, Frank Johnson,¹⁴ extraordinary
477 people. Frank Johnson sitting there in Montgomery through the
478 heat of the civil rights fights, remarkable man. We lost one
479 of my classmates, Bob Vance,¹⁵ who was a judge on the Fifth
480 00:39:30 Circuit. That's before he was, he was assassinated. And I
481 went back for Bob's funeral. And I thought through all that
482 period of time the danger Judge Johnson had been under, as I
483 walked with him back from the service to go to the courthouse.
484 And I commented, "judge, life is crazy in so many ways." And
485 he just nodded, "yes." And what the craziness of it is that
486 Bob Vance now in times of reflective peace, so to speak,
487 relative safety, was killed by a bomber. And here you escaped
488 for all those years. Amazing, remarkable story. It is a story
489 of courage, and it's a great tribute to the Fifth Circuit and
490 to the federal judiciary. And I think for me, a great
491 00:40:43 opportunity to know them and to work with them. That's one of
492 the pleasures of the job, to know that you walk down the same
493 hall and you know your responsibility.

494 CUBBAGE: Before you became an appellate judge, you spent a
495 number of years on the trial court bench. Did you try and
496 preside over a lot of trials during that period, late 70s,
497 early 80s?

¹³ Elbert Parr Tuttle was a judge for the United States Court of Appeals for the Fifth Circuit from 1954 to 1968.

¹⁴ Frank Minis Johnson Jr. was a judge for the United States District Court for the Middle District of Alabama from 1955 to 1979, for the United States Court of Appeals for the Fifth Circuit from 1979 to 1981, and for the United States Court of Appeals for the Eleventh Circuit from 1981 to 1991.

¹⁵ Robert Smith Vance was a judge for the United States Court of Appeals for the Fifth Circuit from 1977 to 1981 and for the United States Court of Appeals for the Eleventh Circuit from 1981 to 1989. Judge Vance was killed by a bomb delivered to his home in 1989.

498 JUDGE HIGGINBOTHAM: Oh, yeah. We tried a lot of cases, civil
499 cases, criminal cases, large cases, small cases. It was just a
500 very active docket. There was a range of cases. It was
501 00:41:35 extraordinary -- slip-and-fall to major catastrophe cases back-
502 to-back. Fascinating stories, amazing stories of things that
503 happened in the courtroom themselves, the verdicts that come
504 in. I should accent that in the course of my practice, I
505 became very much a fan of the jury system. I was a great
506 believer in the jury system. And when I was trying
507 00:42:12 antitrust cases, I spent a fair amount of time talking to
508 senior officers who engaged me to defend them to persuade them
509 that they need to try this case to a jury. And their usual
510 response was, "a jury, they're going to kill us." "No, they
511 won't." "Why is that?" "Because a jury can understand the
512 difference between an injury to a competitor and injury to
513 competition." And so we did, successfully, try antitrust cases
514 to juries, and Covington went right with that. But that
515 confidence in juries just comes from watching and seeing and
516 believing that there's a lot of good folks there and they're
517 00:43:12 going to try to do the right thing -- and collectively. They're
518 very important. In my years as a chair of the Civil Rules
519 Committee, one of the battles I lost was to try to overdo a
520 Supreme Court decision which allowed fewer than 12 jurors,
521 civil jurors. I wanted 12-person juries. And I got it all the
522 way up through the Rules Committee process to Chief Justice
523 Rehnquist, unfortunately, the only person who was opposed to it
524 and he made the decision. I always had high regard for Justice
525 Rehnquist. He was a tremendous lawyer. So we lost that in the

526 conference. And afterward, he put his arm over my shoulder and
527 said, "well," he said, "I'm just fearful of hung juries." He
528 said, "I can't go with that." So I accepted the defeat.

529 00:44:10 But that was a battle. We lost it. We hope it's not lost
530 forever. I don't think it is. But as I have observed
531 Rehnquist was a very impressive lawyer. And he asked me to do
532 a number of things for him involving habeas corpus and
533 testifying on the Hill. So I came to appreciate his qualities
534 00:44:43 as a lawyer. And then Justice O'Connor, I had the same
535 opportunity. She was just tremendous. And I sent several law
536 clerks up there. I would go further than that to say that it's
537 just my great honor to work with them. But the Rehnquist and
538 the O'Connor thing was always a fun relationship, and they were
539 such fun people to work with. It's sort of like going back to
540 Justice Black. They have their feet on the ground. They know
541 the real world. And that's the background that I think judges
542 hopefully would have, if I were appointing authority, I would
543 look for judges that had rich backgrounds, to put it that way.

544 CUBBAGE: How did your engagement with the Civil Rules Advisory
545 00:45:52 Committee begin?

546 JUDGE HIGGINBOTHAM: Justice Rehnquist had asked me to work
547 with Justice Powell. Let me back up. Justice Rehnquist, when
548 Justice Powell left the bench, he retired, asked him to head up
549 a committee to take to the Congress legislation to address the
550 role of habeas corpus, driven in no small part by, indeed in
551 large part by capital punishment. And so he asked me if I
552 would do that. And I did. And I went to the Hill to testify at
553 length. But we lost the legislative battle. And I reported

554 back to the Chief that we had lost the Congress who responded
555 to what we were trying to do but went in the opposite
556 00:46:56 direction. And so he thanked me and said, "we'll take care of
557 it." And he did. Justice O'Connor, they knew each other and
558 had a good relationship. I'm sure that helped. But they were
559 both well engaged, particularly in the fight over habeas. But
560 00:47:21 the thing that one must understand is that in those years,
561 capital punishment was the driver of habeas. It was the
562 difficulties; it goes back to the end of the Warren period.
563 And you had so many federal question cases that are being
564 created because you criminalized a lot of rules. And every
565 little village around the country, they've got local courts
566 that violate a federal law. And so you had this incredible
567 backlog of habeas cases. And that's the story of habeas. And
568 I won't digress to that, except to point out that Justice
569 Rehnquist and others, Justice Stevens too, were very active in
570 pushing those things. So it was my privilege to also know
571 Justice Stevens well. He was an antitrust lawyer and a very
572 00:48:18 good one in Chicago before he came in. He went to the Supreme
573 Court in December of that year of '75 that I went to district
574 court. So these are observations about a couple of the
575 justices that I have great respect for. I have respect for
576 them all, but those I had more contact with, I think. So
577 looking at the high Court, I got to know Chief Justice Roberts
578 and came away also very, very impressed with him. Now, that's
579 a tough seat. And I say to him without hesitation that I can't
580 think of anybody I'd rather have in that center seat in the
581 perilous times that we're in than John Roberts. Solid man.

582 00:49:35 Remember the headlines of his confirmation, Senate, New York
583 Times, Roberts 99, Senate 0. It sums up the opposition. So
584 he's got a very difficult task, these are troubled times.
585 Well, I'm very confident of the Court we have and the
586 leadership.

587 CUBBAGE: How was the transition from being on the bench in the
588 trial court almost daily to being on the Court of Appeals?

589 00:50:12 JUDGE HIGGINBOTHAM: Well, it made me think of Homer's
590 plaintive pleas with President Johnson -- ...¹⁶. I miss the
591 interaction with the lawyers. I miss talking to them about the
592 cases and working with them to get the cases to trial and so
593 forth. On the other hand, I think that having the experience
594 of a trial judge and a trial lawyer is very, very important to
595 the appellate judiciary. I think that judges who have not had
596 the good fortune of arguing cases or trying cases or sitting as
597 a district judge, will see things in a different way. There's
598 a recent article that just came out of Duke addressing the
599 00:51:13 question of that issue¹⁷ I thought it was right on. And what it
600 says and what I would hasten to accent is that it makes you
601 much more tolerant of the district court's work. I already had
602 a pretty good idea of what the district court's work was 'cause
603 I had been there. But it makes you, when you look at a record,
604 you are much more forgiving. You understand what's going on.
605 You're hesitant to be very critical because you know the

¹⁶ Judge Homer Thornberry pleaded with President Johnson, his close friend who had nominated him to the federal circuit court that he preferred the district court seat.

¹⁷ Douglas M. Fasciale, *Invaluable Knowledge: How Trial Judge Experience Shapes Intermediate Appellate Review*, 107 *Judicature* 3 (2024), <https://judicature.duke.edu/articles/invaluable-knowledge-how-trial-judge-experience-shapes-intermediate-appellate-review/>.

606 pressures that they're under. You also tend to be, I think,
607 better prepared to not write so much affirming a case. So if
608 the district judge has gotten it right and it's not going to
609 contribute to the jurisprudence of much of anything. Let's get
610 00:52:18 rid of it and decide the case. In other words, you have
611 confidence and you can look at what the district court's done,
612 I think. And so I think the experience of the district judge
613 is very valuable to those fortunate enough to have it when they
614 go to court. I've said if I were the Ayatollah or whatever, I
615 00:52:39 would promote the British system and bring the judges up
616 through the ranks. I guess we wouldn't take cloth how they
617 take silk but judges would come up that way. I certainly would
618 applaud that. So I think it's valuable, and it does affect its
619 daily work. I can pick up the case and look critically. And I
620 know where I want to look to and what I'm looking for and what
621 didn't happen. I know what happens at the charge conference
622 and what doesn't, what the reasonable expectations are. It's
623 good training, I think. I'm not sure the reverse of that would
624 work. If an appellate judge did go into trial court, I think
625 00:53:37 our district judges have a much more difficult job to get it
626 right. By the time it gets to us, it's probably been polished
627 and shaped and formed. And we've got brilliant law clerks in
628 there to tell you what the latest wrinkle is and whatever. So
629 it's an easier job in that sense than the district judge has.
630 They're aided now by the magistrate system. I was skeptical of
631 it at the outset, but I've become convinced that it's been a
632 wonderful addition to the court structure by itself. I still
633 write. I'm still the editor of Rule 26, Moore's Federal

634 Practice.¹⁸ And with Professor Janet Graham¹⁹ out at Stanford,
635 wonderful. She does all the work, I must say. So I'm looking
636 00:54:41 at opinions of district courts a lot. And that tends to be
637 magistrate judges. So I see that magistrate judges now are
638 creating a sort of a jurisprudence of trial practice that's
639 right at hand, a body of law that's right there, because they
640 have some time and they write opinions. So I think that system
641 00:55:06 has worked out very, very well. And I applaud it. And we've
642 appointed some district judges from and some court of appeals
643 judges from the magistrate system. So that was one that I was
644 cautious about and concerned about, but I was wrong.

645 CUBBAGE: You mentioned that you, moving from the trial bench
646 to the appellate bench, thought you might miss the engagement
647 with lawyers. But you have found some ways to remain engaged
648 with the bar in general, including, for example, the American
649 Inns of Court Organization. Would you tell me about that?

650 JUDGE HIGGINBOTHAM: Lawyers are responsible for their brothers
651 and sister lawyers. And that we're all in, I preach that
652 00:55:58 sermon all the time, that we're in this together. We take the
653 same oath to uphold the law and enforce the law. That, I think
654 to the extent that we should promote that brotherhood,
655 sisterhood, the collegial response of lawyers themselves as
656 professionals. And I've done a lot of work over the years to
657 try to promote that. When the Inns of Court²⁰ first came, the
658 Chief Justice Burger was interested in those. He was

¹⁸ 6 Patrick E. Higginbotham, *Moore's Federal Practice - Civil* § 26 (2024).

¹⁹ Janet Capurro Graham is a member of the California Bar.

²⁰ [The American Inns of Court](#) is an association of lawyers, judges, and other legal professionals dedicated to building relationships, discussing concerns about the law, and developing lawyers. It is modeled after Inns of Court in Great Britain.

659 fascinated by the Brits, understandably so, and the Inns. And
660 there had been talk of that and so forth, and doing that. And,
661 going through that history, basically he created a committee of
662 the judicial conference to try to get it started. And
663 00:57:00 finally, at some point, they were trying to get it started.
664 And several people there worked hard to get the thing going.
665 Then he asked Ken Starr²¹ and myself to come and see what we
666 could do with that committee. And so we did. We gradually got
667 00:57:33 things in an orderly way. I don't mean myself. Other people
668 were critical to this, I was just a part of it. And what we
669 did, we got the office. But one of the great things that
670 happened in the Inns of Court movement was that, -- this goes
671 back to the value of my JAG experience, we had the opportunity
672 to hire the TJAG of the Navy as the executive assistant that
673 runs the place, Don Stumbaugh.²² When Don was the admiral, the
674 head of TJAG of the Navy, his boss was the chairman of the
675 Joint Chiefs, Admiral Crowe.²³ When Admiral Crowe stepped down,
676 00:58:35 and Admiral Crowe was appointed ambassador to the Court of St.
677 James.²⁴ And so then, so we had to persuade my committee,
678 concerned that we need practicing lawyers. I said, listen, no,
679 no, no. You can grab this guy. And so we did. And he was
680 wonderful. Well, I told Don we don't have a real connection to
681 the British Inns, and we need that, and the chief justice

²¹ [Ken Starr](#) was a judge on the United States Court of Appeals for the District of Columbia Circuit, solicitor general of the United States, and independent counsel for the Whitewater investigation into then-President Bill Clinton.

²² [Everett Don Stumbaugh](#) was Judge Advocate General of the Navy from 1988 to 1990. He became Executive Director of the American Inns of Court Foundation in 1993.

²³ [William James Crowe](#) was Chairman of the Joint Chiefs of Staff from 1985 to 1989 and U.S. Ambassador to the Court of St. James from 1994 to 1997.

²⁴ [The Court of St. James's](#) is the official royal court of the United Kingdom, located at St James's Palace.

682 wanted that. At the chief justice level we do, but we don't
683 really have it at the street level, so to speak. And he said
684 -- I wish it was my idea, but it wasn't -- it was his, and it
685 was brilliant. He said, listen, an invitation to the Court of
686 St. James in England is very valuable. And he said, I think I
687 00:59:45 can persuade Admiral Crowe to send an invitation to the law
688 lords and the treasurers of the Inns to have a wing ding there.
689 So he did. And so Admiral Crowe sent it out, and we gathered
690 on the lawn at the Court of St. James, followed by a dinner
691 that night with the law lords and the treasurers of the Inns, a
692 01:00:14 formal dinner. We got it. The Lord Woolf²⁵ then was such a
693 wonderful man. We hit it off and became friends. He was very
694 interested in the civil processes in England and was asking me
695 about class actions, aware that I was chair of the Civil Rules
696 Committee, and in turn I was talking to him about the Inns of
697 Court. But out of that came the blessing of the Inns, if you
698 will. And we have just grown from that. We then created a
699 program where law clerks -- the courts of appeals, the Supreme
700 Court -- following their clerkship, spend a month with the
701 British Inns, full ride. It's a very valuable thing. And
702 01:01:16 we're glad to have it. In a week or so, we're going to have to
703 pick those, I'm on the committee that does that now. So we
704 send these over to work directly with them. And that's been
705 going on for years now, every year. And then they come back as
706 ambassadors to their Inns.²⁶ So that was a jump start from the

²⁵ The Right Honorable Lord Woolf, Master of the Rolls. He presented his Final Report to the Lord Chancellor on the civil justice system in England and Wales July 1996.

²⁶ The Pegasus Scholarship is an exchange program wherein young American Inn of

707 beginning that took hold. Don Stumbaugh was key to that.

708 Woolf was really special. I must share this with you, one of

709 my law clerks had the good fortune of receiving one of those

710 scholarships for the month. And so at their first gathering,

711 Woolf walked in and said, "Which one of you folks have clerked

712 for Judge Higginbotham?" And then he says to my clerk, "I

713 01:02:19 want you to come work with me, write me some of those benches."

714 So he worked with him. I got a call from him. "How's it

715 going?" And he said, "You're not going to believe this." I

716 said, "What?" And he said, well, he said, "You know that in

717 01:02:38 the second week we're here, Parliament is opened. So Lord

718 Woolf looks around, and he said, "my heavens, I have forgotten

719 my suspenders. I can't find them anywhere and we've got to get

720 going here" -- he goes in a Bentley to follow the Queen to the

721 Parliament. My clerk offered his suspenders, and he said, "no,

722 no I, no I couldn't do that." Finally said, "okay, give them

723 to me." And so he did. And he put them on. And then he

724 turned around and said, "well, come on." He said, "you're

725 going with me." And so my clerk rode in the Bentley to the

726 opening of Parliament. And at the time, I said, "Man, we have

727 01:03:29 ruined you for the practice of law." So that's the light side

728 of it. It is a rich, warm relationship. And it has grown. It

729 was my honor to be president of the American Inn for some time

730 and to travel around the country to present these awards and

731 bring news from national. We created some awards and made up

732 some "traditions." I said we've got to have some traditions,

733 'cause the Brits got them.' How do you make up a tradition? I
734 said, well, one thing, we open the meeting, they always open
735 with a salute to the queen, toast to the queen. And so we
736 can't do that, but we can toast to the Constitution. And so we
737 created that tradition. And that's the way a lot of it, we've
738 01:04:44 translated that as best we could. I credit the Chief Justice
739 with the idea of the American Inn and the push of it at the
740 outset. And many people believed in it. Sherman Christensen²⁷
741 of Georgetown worked so hard for that for so long. So it's
742 been, it is a success and hopefully will continue to be. It
743 01:05:15 pulls together the things you want. You want to pull together
744 the lawyers, the judges themselves, and you also want the
745 younger lawyers, so we created the pupillage. So you put those
746 elements in. Some of those rules are ironclad. One, that you
747 debated, debate fiercely all topics. You don't make decisions
748 on any -- no resolutions, no nothing, no political positions,
749 period. So we have some ironclad rules 'cause we think that
750 they are essential. So that's the Inns movement. And I'm
751 pleased that it's gone as well as it has. But it's the
752 lawyers, it's the lawyers, I think the lawyers, are hungry for
753 that fraternity, that fraternal spirit of shared values.
754 01:06:17 You're experiencing the same difficulties, troubles, et cetera
755 that transcends the various firms. It's a collegial body. You
756 are the bar itself. And I think that's a very powerful

²⁷ [Sherman Christensen](#) was a U.S. District Court judge for the District of Utah who [ran a pilot program](#) of the American Inns of Court and shaped it into a workable concept. He attended National University School of Law before it merged with George Washington University, not Georgetown. Prof. Sherman Cohn of Georgetown University Law Center was a pioneering and longtime leader of the American Inns of Court and preceded Judge Higginbotham as its President from 1994 to 1996.

757 principle. It has a cohesive force that bleeds into the
758 system. And that, in turn, reinforces, makes my job easier as
759 a judge, and it makes the legal system operate. It's more
760 trustworthy.

761 CUBBAGE: Another way in which you've been engaged outside the
762 courthouse with the legal profession is as a leader of the
763 Center for American and International Law, which began as
764 Southwestern Legal Foundation in 1947.²⁸ How has that
765 experience and engagement been part of your profession?

766 01:07:12 JUDGE HIGGINBOTHAM: I was associated with it for some period
767 of time. But then eventually we made some changes and changed
768 the name to the Center to deal with the reality of the
769 institute structure of that foundation. The thing that is
770 intriguing about it is that it also has an international
771 01:07:38 outreach and it has a powerful story behind it. The story of
772 Dean Storey,²⁹ a Dallas lawyer, young lawyer, who managed to
773 join Justice Jackson at Nuremberg on the staff. And then
774 Justice Jackson -- took leave from the Court -- when he came
775 back -- and actually tried the first case, you remember, a
776 large case. Then, Storey stayed and prosecuted the later cases
777 himself, returned to Dallas, then became eventually the dean of
778 SMU Law School. But he had this experience back, and so he
779 started the Legal Foundation at the time. And that grew to be
780 the, we changed the name, The Center. And its primary focus

²⁸ [The Center for American and International Law](#) is a nonprofit institution based in Plano, Texas that aims to advance justice and promote the rule of law through global professional development.

²⁹ [Robert G. Storey](#) was a Texas lawyer who served in both World Wars, worked as executive trial counsel to Justice Jackson at the Nuremberg trials, became dean of Southern Methodist University's Law School, and founded the Southwestern Legal Foundation (now The Center for American and International Law).

781 was on education -- institutes and so forth. But it has a law
782 01:08:43 enforcement element to it, with police chiefs, et cetera --
783 it's critical. Then you have all these other wonderful
784 programs training lawyers to do things. And it gave us an
785 opportunity to target specific deficiencies in the bar out
786 there in capital cases, the want of competent counsel, the want
787 of lawyers who understand how to try these cases. For example,
788 I had worked with Mike Tigar³⁰ over the years, and our paths had
789 crossed in many ways. And so I reached out to Mike, and as you
790 know, he's a gifted person, to say the least. And so Mike came
791 down and agreed to teach these lawyers how to try capital
792 01:09:44 cases. We created these capital punishment programs, and we
793 trained like 600 lawyers over a period of years there to give
794 them the needed training with the difficulty in these cases.
795 The capital cases are the driver of habeas corpus, they're the
796 driver of so much, and so consequential in terms of its impact
797 01:10:08 on the structure of our legal system. And it begins right with
798 the trial itself. If you get a solid trial, then so many of
799 the problems go away. But too often the case is a botched
800 trial, and then it spends 20 years in the system. So I think
801 that was a wonderful program. I credit Mike with it. He's a
802 talented teacher. I've seen him take lawyers over and say,
803 okay, I'm your co-counsel. So what you tell me is privileged,
804 if you've got a case you're working on, give me the first 15
805 minutes of the closing argument you'd like to make, whatever.
806 And he teaches them the difference between a mitigation and

³⁰ [Michael E. Tigar](#) is a lawyer, human rights activist, and academic who has taught at Duke Law School, Washington College of Law, and Columbia Law school.

807 guilt phase, a binary system. It's a special area. So in some
808 01:11:11 small way, and maybe in some, a great way, these programs will
809 enable the system to work properly. That was one of the many
810 areas of the Center that you now head. And its outreach, the
811 foreign reach continues in transnational arbitration. The
812 Center has been a primary architect of transnational
813 arbitration, and that is so vital. I came back from Albania,
814 working with them and their government, and a friend of mine an
815 oil man, and I had dinner, and he was quizzing me about
816 Albania, and I said, I looked at him, I said, "You've been
817 there?" And then he said, "Yeah." I said, "You didn't go?"
818 It's very mineral-rich, you know, they're 40 miles from Rome
819 01:12:11 across the Adriatic. And he said, "Because there's no
820 structure there, we can't go in there. It's mineral-rich but
821 we can't go in there." This exchange points out the real
822 problem that we have. You have to construct a legal system for
823 business to go in to develop it. They got to go in with an
824 arbitral forum with a trial level and appellate rights. As I
825 01:12:45 have urged, this is not rocket science. Why do you think Hong
826 Kong is the marketplace of the world? I went to Hong Kong for
827 our government and worked with their judges and their lawyers
828 on a matter. And they're all Brits. Every one of them are
829 British barristers. They're wonderful advocates. It's a
830 British court! And because it has integrity, world business,
831 whatever their fights at home are, when it comes to their money
832 and transnational arbitration, they'll trust that court. And
833 so that's the engine that drives that flame of Hong Kong. And
834 it's that British court right at the heart of it. That's a

835 01:13:41 powerful lesson. But it points out the necessity of the
836 transnational arbitration program. The Center, to circle back
837 to that, has been in that game early on in promoting the
838 development of those agreements, that interlaced network for
839 arbitral relationships. So it's your baby now.

840 CUBBAGE: For international business, transnational
841 relationships, arbitration is an important way to give a
842 neutral forum, neutral decision-maker. Do you have any
843 observations about arbitration within the domestic US legal
844 industry?

845 JUDGE HIGGINBOTHAM: Well, as you might suppose, my instinctive
846 01:14:33 reaction is that I don't like arbitrations because they take
847 away from trials. And one thing they dispense with, of course,
848 is juries. Of course, what's happened is that the Supreme
849 Court interpreted early on a rule that was, a law that was
850 intended to just facilitate some transactions among local
851 01:15:00 merchants to an alternative forum for the entire system. And
852 that comes with a host of problems and difficulties. First
853 off, the disparities in power, you have a large company or
854 whatever, and they sell their product, and you agree to an
855 arbitration clause, and you don't have a choice or bargaining
856 power. But it takes it outside the courts. Some say, well,
857 they applaud that, the courts are crowded. Well, yeah. So I
858 come to it not hostile, but well, wary. Arbitration has its
859 place because I think that where parties truly at arm's length
860 elect to resolve disputes that way, that's healthy. The
861 01:15:58 difficulty is that so often these things they're taking up,
862 they're not arm's-length transactions. It's not two people

863 agreeing to resolve this dispute. It's somebody dragging
864 somebody else into this, because there is an outstanding
865 agreement out there, but nobody thought about to have jumped
866 it. So there you have an ongoing competitor of the legal
867 system. At a distant level, who can quarrel with the fact that
868 people agree to resolve their disputes? Yes, as far as that
869 goes. But I'm wary of it. And to me, we just have to be
870 careful with it and keep it cabined to where it -- it's not
871 that it's not helpful. It is very helpful. It has a vital
872 role, but it easily jumps out of its traces and becomes
873 01:17:03 difficult. And so you have to be very careful with the rules
874 of engagement and getting in, getting out, and so forth. And
875 the court is. I think the court's response to that has been
876 caution and struggling with that phenomenon.

877 CUBBAGE: Judge, having been on the bench for many decades,
878 01:17:30 having been engaged with the profession through various
879 organizations with the bar, how do you feel about the health of
880 the legal profession?

881 JUDGE HIGGINBOTHAM: I'm positive about it. I think, I would
882 say color me wary about certain phenomena. I'm having this
883 instinctive reaction to big law. And by that, I mean the law
884 firms ought to be run as a business, of course. But at some
885 point, the object becomes solely maximizing profits in a
886 corporate mindset. It's the corporate mindset of profit-
887 seeking that is a suit that doesn't quite fit the model of the
888 American bar. So the people who favor that say, well, it's
889 01:18:43 just big law, it's more efficient, it does a better job and so
890 forth. Well, probably because I've not been part of it, I

891 don't fully understand it. I understand that they make a lot
892 of money. But I'm also not sure I would want to practice in
893 that kind of an environment. And so perhaps I'm just defending
894 my reluctance itself. But I am wary of that. That said, I
895 think the bar is still vital, to say the least. And it's doing
896 its job, standing up and fighting for the right thing, right
897 result. And I think the courts are doing the same. Yeah,
898 there are difficulties of their own all the time. We come
899 back. One of the things that I've enjoyed, the reason I enjoy
900 01:19:49 teaching, is that it keeps me reminded of the long arc of time
901 itself and the movement of these cases. So that I can say that
902 along the road, there are a lot of fights. But we're still on
903 the road. And so the courts themselves and the, quote, "rule
904 01:20:23 of law" are dependent upon it. If you stop and think about it,
905 you can have situations where the decision of a judge can have
906 incredible consequences, not just resolving the dispute between
907 the plaintiff and the defendant, but deciding how they were
908 received in that cause has consequences elsewhere. And so you
909 have to have a barrister, if you will. You have to have a
910 lawyer that remembers his oath and is committed to it. And
911 there are the Inns of Court and institutions like the
912 Southwest, The Center for American and International Law play
913 this vital role in providing the cement, the opportunity to
914 bring lawyers together at the most basic level outside the
915 01:21:38 immediate effort to resolve cases and send bills. So I'm
916 upbeat about it. I swore my oldest granddaughter into the bar
917 upstairs a year ago. I've sworn in a lot of lawyers over the
918 years. That one was tough for me to get through. But she's

919 wonderful, if I say so. So I've been very, very fortunate
920 myself. Very, very fortunate. As I tell my law clerks,
921 though, they talk to me about their career plans. And I tell
922 them, look, the Beatles had it right. Life is what happens to
923 you when you're busy making plans. And that's pretty much me.
924 I am where I am because that's where I am. But darned if I
925 know how I got here, so to speak. But blessing the good Lord,
926 it's been a real privilege to me, a great ride, and it's not
927 01:23:04 over. But I take a lot of pride in my, in the law clerks I
928 work with. No credit -- they wouldn't be there if they weren't
929 already gifted. But they're just a remarkable group of young
930 people. Some of them are not so old. I'm proud of all of
931 them. I think of Chris,³¹ he clerked for Justice Stevens, and,
932 we shared clerks, . . .

933 01:23:41 CUBBAGE: Chris Eisgruber?

934 JUDGE HIGGINBOTHAM: Yeah, Chris Eisgruber. When Chris became
935 the 20th president of Princeton, Justice Stevens down in
936 Florida, I thought he was going to get up, but he couldn't make
937 it, 'cause he would have been equally proud of him. You see
938 this kind of talent, this extraordinary talent. And it's being
939 deployed in the right ways. It gives you, it's reassuring, to
940 say the least. I just saw Chris and his wife, who's a
941 tremendous lawyer.³² They were in town for this Austin show. I
942 got the chance to visit with them again. But look at those,
943 these kinds of talents -- yourself, T.L., judges, federal

³¹ [Christopher L. Eisgruber](#) is a constitutional scholar who has served as Princeton University's president since 2013.

³² Pres. Eisgruber's wife is Lori A. Martin, at partner at WilmerHale in New York City.

944 01:24:37 judges, and leading lawyers. I'm reassured by that, because I
945 see, I see what can be. And so why do I do this? I'm involved
946 in some of these other things. That's because of that. One of
947 the other participations I should mention, that I think is so
948 influential and I really enjoy, my work with RAND³³ for several
949 years, their work in so many areas is just profound. The
950 organization itself is an extraordinary structure. It started
951 as a war games thing many years ago. And it's now just a very,
952 very powerful institution in terms of pure research. Their
953 ability to provide government leaders uncompromised data. This
954 is what the facts are. You make your policy choice. It's
955 01:25:44 unique. I'm honored to serve as a member of the Advisory
956 Committee of RAND's National Collaborative on Gun Policy
957 Research project. Through five rounds of grantmaking it has
958 allocated more than \$24 million to fund 57 research projects.
959 They received a gift of \$30 million. So five of us were asked
960 to administer that, and we did. An interesting group of
961 people, most of them far better trained than I am in
962 01:26:16 statistics, complex data-training. We sent out invitations to
963 bid, et cetera, went through the process of laying out this
964 money for research, funding research at Harvard, the Ivies,
965 whatever. A lot of money going out directed toward the
966 problems of guns with no political agenda. Red flag laws, an
967 example. We funded a study of "red flag laws" -- clear what
968 the implications are. Now we have a case before the United
969 States Supreme Court involving red flag laws. You want to know

³³ [RAND](#) is a nonprofit public policy research institution.

970 what the effects of them are? You want the background? Well,
971 there's the data. There you are. So a lot's going on, a lot
972 going on. By contrast, I'm more than wary, I use that term
973 01:27:25 sometimes, about the embracing of, by the Court, of originalism
974 with such a fulsome force. I hope that that goes well. But I
975 would simply say that it is fraught with difficulty. If you
976 thought it through, there are a number of difficulties that are
977 out there. But I take comfort in the fact that, I taught Con
978 law and fed courts for many years, I see the rise of the
979 difficulties and their resolution as a long arc of work.
980 Originalism has the potential of being difficult to contain.
981 I'll leave it at that for now.

982 CUBBAGE: Judge, we're going to take a break now. I thank you
983 for this time, and I'm going to look forward to listening to
984 you continue the conversation with Judge Bradley.

985 01:28:31 JUDGE HIGGINBOTHAM: Well, I apologize. It's been a rambling
986 discussion, but that's the nature of it.

987 ****INTERVIEW PART II- Interviewer: Judge Christopher Bradley³⁴****

988 JUDGE BRADLEY: Good afternoon, I'm Chris Bradley. I'm a
989 bankruptcy judge here in Austin, and I clerked for Judge
990 Higginbotham in 2008 to 2009. I'd like to start by talking
991 01:28:48 about judicial decision-making. It's kind of a big topic, and
992 I've got some aspects of it that I would like to hear you

³⁴ The Hon. Christopher G. Bradley is a U.S. Bankruptcy Court judge for the Western District of Texas. He clerked for Judge Higginbotham on the U.S. Court of Appeals for the Fifth Circuit as well as with Judge Tony M. Davis of the U.S. Bankruptcy Court for the Western District of Texas. Bradley was previously in private practice with large and boutique firms; he also taught law at the University of Kentucky Rosenberg College of Law from 2016-23 and briefly at the University of Florida Levin College of Law before his appointment to the bench in 2023.

993 explore. I think one place to start is with the Testbank³⁵
994 decision, which is a 1985 decision that you wrote when you were
995 fairly new to the Fifth Circuit Court, and you wrote on behalf
996 of the majority of the en banc court. This was a maritime
997 case. It's a tort case. It's about the extent of tort damages
998 or tort claims. But the debate that I thought that might be
999 worth you commenting on, kind of starting this discussion with,
1000 is a debate between you and the dissenting judges about
1001 managerial judging versus adjudicative judging. What did you
1002 01:29:33 mean by those terms when they were under debate there?
1003 JUDGE HIGGINBOTHAM: Well, it depends on the context.
1004 Managerial judging is very much taking hold of the facts and
1005 pushing them in different directions, and that pretty well
1006 distinguishes it from anything else.
1007 JUDGE BRADLEY: Versus adjudicative meaning what?
1008 JUDGE HIGGINBOTHAM: Well, managerial judging is that you can
1009 divide your work efforts into the managing of a case itself and
1010 positioning it through the hoops to get all the bases touched,
1011 the briefs filed, all of those kinds of things. Adjudicative
1012 01:30:27 judges are dispatching the case, finally applying those
1013 principles. In Testbank, the difficulties were simply posed by
1014 this reality: Put in perspective, we had two motor vessels and
1015 they collided at the 41-mile mark, as I recall, outside of New
1016 Orleans. One of the vessels was unfortunately loaded with a
1017 01:31:03 PCE, which immediately emitted a white cloud, causing great
1018 difficulty, and a payload that was dangerous in many ways,

³⁵ [Louisiana ex rel. Guste v. M/V Testbank](#), 752 F.2d 1019 (5th Cir. 1985) (en banc)

1019 resulting in a closure of the outlet. The outgrowth of that,
1020 of course, is that when you clog the Mississippi River, you
1021 really have backed up an incredible amount of commerce. We
1022 don't think so much about it in today's world, but it's still
1023 such a large artery. The damages caused by that closure
1024 reverberate straight up the river, from those that are
1025 immediately impacted down to where there's some sort of
1026 consequential damage, if you will. That is, you have people
1027 who have shipped goods and they're to a dock at some point up
1028 01:32:07 the river where they now sit, those goods sit on the side of
1029 the dock and there's no downstream way for them to go. And
1030 they spoil, so damages. And so you see all these measures of
1031 damages that go up. And this maritime case ultimately spins on
1032 a classic basic inquiry of tort liability, which obtains, of
1033 course, in admiralty in certain contexts. And what happens
1034 here is that the doctrine of foreseeability has always been a
1035 practical limitation of liability. That is, what are the
1036 foreseeable consequences of an outcome? So in a very practical
1037 way, this kind of injury is foreseeable and the consequences of
1038 it are foreseeable in one respect and in other ways they're
1039 01:33:11 not. If you apply it in very literal terms, you would say,
1040 yes, it's foreseeable that these things could happen. But at
1041 the same time, you have an independent doctrine that limits
1042 your liability for consequences where the consequences are
1043 simply that it frustrates the performance of a contract that
1044 01:33:35 someone has with someone else. And so what was striking to me
1045 about this case was that enormous liabilities flowed from this

1046 collision, an allision, as it would be in maritime law.³⁶ And
1047 we ask, how far upstream in a sense, in a practical sense, did
1048 it go? I took the position, which ultimately prevailed, that
1049 here we should insist upon an actual impact, if you will, in
1050 order for these people to recover that in its absence could not
1051 recover under the doctrine of tort. And that circumscribed
1052 liability enormously. Now there's a different view of that
1053 point. Judge Wisdom³⁷ so ably put forward the counter view to
1054 01:34:42 that. As he would have it, these were resolvable, without that
1055 foreseeability stricture of impact. And it would be in a
1056 series, just give it to the juries and let them sort out what
1057 it was, et cetera. That was, reduced to the most basic terms,
1058 that's what it was about. Judge Wisdom wrote at length, and,
1059 as did I, and we were really exploring the very basics of the
1060 whole tort doctrine itself. It came to prominence because by
1061 happenstance, not too long after that, the Exxon Valdez spill,
1062 out off the West Coast. And so suddenly the consequences of
1063 that spill had large consequences that could turn on the
1064 choices made in Testbank. I immediately got phone calls from a
1065 friend on the bench out there, about, thank you, that sort of
1066 01:35:52 thing, because it controlled that litigation as well. So I
1067 think what we had was simply an issue that divided our court.
1068 There are certainly powerful arguments on both sides of it. In
1069 one sense, it's a pragmatic limitation, an element of
1070 pragmatism. The concept where the tort doctrine of
1071 01:36:23 foreseeability is tested by these two cases. I would say yes,

³⁶ Allision refers to when a moving vessel hits a stationary one.

³⁷ [Judge John Minor Wisdom](#), a Fifth Circuit judge famous for desegregationist rulings, dissented in Testbank.

but if that injury is a contract of another, then there must be some reasonable limitation to that liability. One could say you have a wild animal here that does very good things, but if it gets out of its pen, it's going to destroy everything. So it has that element of pragmatism and realism. But that's also based upon the industry realities that the persons or companies that could not demonstrate the actual hit, if you will, would be protected from loss from, it would be first-party insurance. So it's a recognition of the reality of the marketplace that that risk is better absorbed by insurance responding to those suppliers. So it has that very practical touch to the economic consequences of that loss.

JUDGE BRADLEY: Anybody who's ever interacted with you has heard you talk about the importance of facts. And I think in a way you just demonstrated your commitment to that by almost 40 years later now, discussing the facts of that case quite closely and helpfully. I think, I guess the way, and maybe you've already answered this question implicitly by the way you just discussed those facts, but the question is what role, why is it important? You're an appellate judge. You issue these broad rulings, especially an en banc ruling like that. There's an important principle of law. You wouldn't take an en banc in all likelihood unless there was some important principle. And yet rather than a brief, high-level, word-from-on-high kind of approach, your approach in that decision and in many decisions is very factual, is very grounded. And I guess if you can opine, what is, why is that important? Why are the facts important, even when you're an appellate judge?

1100 JUDGE HIGGINBOTHAM: Well, I think that you have to know what
1101 the problem is and you have to fully understand that before you
1102 pass on the consequences of where you allocate responsibilities
1103 for it. You have to know what really happened. So facts are
1104 facts. And so frequently the tendency is to jump past the
1105 fact, you see A happened and B happened and then C happened.
1106 So there may be a whole lot of other things you need to know,
1107 but you cut it off at that point. It's just without facts, you
1108 do not know what the problem genuinely is. And sometimes
1109 01:39:34 finding what the facts are is not always -- it may be the major
1110 task. I mean, that's the premise of much of our discovery
1111 processes, and Rule 26, is that learning what the facts are
1112 will allow the case to get to a point that people can assess
1113 their liabilities. But the facts are, you have to find out the
1114 narrative. Stated another way, as a trial lawyer, what do you
1115 want to tell the jury? What's the story you want to present to
1116 the jury? And then once you have it, then your job as you go
1117 through the discovery, you seek the facts that support that
1118 theory that you want to argue. And as you go along, you find
1119 that this doesn't work, that isn't what happened. So you
1120 01:40:31 adjust the narrative. You adjust your narrative, but what
1121 you're looking for as a trial lawyer is the winning narrative.
1122 In other words, you're trying to get the shape, the facts.
1123 Facts determine the liability in the very real sense that
1124 [they] affect it enormously. It's not a legal principle. It
1125 01:40:57 is what really happened here. The sequence of events that were
1126 there. And so I teach law clerks to do what I learned to do
1127 many years ago, to do very simple things. First off, one of

1128 the most powerful things that you can do as a judge or an
1129 advocate is a timeline. People just skip past that, a
1130 timeline. You say, well I know that. Well, you do, but put it
1131 in a timeline because what you're going to see frequently is
1132 that there are relationships there that you didn't see before.
1133 Yes, that happened, this happened. But gosh, I didn't know
1134 that it was that close or whatever. But yeah, something else
1135 happened here too. You can't reconstruct the events
1136 01:41:57 frequently. Not that you can't, but they're so often enabled
1137 by a simple timeline. Why the timeline? Because the facts.
1138 Facts determine lawsuits. And facts determine appeals because
1139 they say, well, that's an interesting proposition of law, but
1140 what happened here? What are we dealing here with? And so the
1141 supposition and concept is that the facts have been resolved at
1142 the district court level, and now they get to the appellate
1143 court level. Yes, but you also then have the interpretation of
1144 those facts. Frequently, they don't come with the proper
1145 timeline. They get jumbled. And so when the appellate
1146 function is getting the facts back into the, that's not quite
1147 01:42:49 what happened here. This is what happened. Did that happen?
1148 So sequencing, the simple task of the timeline, is a start for
1149 a trial lawyer who's working backwards. And that's what I was
1150 taught as a young lawyer to do. What's the summation you want
1151 to make? How do you get there? And then as a judge, you're
1152 01:43:14 looking at, this is what I think. Does this hold water? What
1153 are the facts?
1154 JUDGE BRADLEY: On that same topic, one of the surprises that I
1155 had when I began clerking on the Fifth Circuit was that the

1156 docket is overwhelmingly criminal. I mean, so every circuit
1157 except for the DC Circuit has a docket that involves just
1158 hundreds and hundreds and thousands and thousands of criminal
1159 appeals. And the story I remember of you is we were working on
1160 a case involving a massive prescription drug conspiracy in the
1161 Houston area involving many thousands of prescriptions that
1162 were wrongfully obtained and then large cash payments for
1163 01:44:01 pills, essentially. And I remember walking in one morning
1164 early and you were on the floor of my office where all the
1165 evidence from the district court was on the ground, and you
1166 were just going through all these prescriptions. And I think
1167 that the lesson that I saw in that was that there's something,
1168 you get a feel for the case when you're actually looking in
1169 detail at the evidence and you're not just having, you have in
1170 your head what thousands of identical prescriptions might look
1171 like, but there's a reality to actually seeing those
1172 prescriptions that kind of makes it more vivid to you. The
1173 question I have is, you took this approach in death penalty
1174 01:44:36 cases when you had those come up. Can you talk about why you
1175 did that? Why those cases received, deserved, so much attention
1176 from you?

1177 JUDGE HIGGINBOTHAM: Because there's a death penalty. To me,
1178 it's the ultimate issue to take a person's life. And the, I
1179 01:45:01 mean, life is a, let's start from that. So the law that would
1180 sanction the taking of death must be applied with clarity to
1181 ensure that what we have said is an apt punishment for a crime
1182 is met here, and that we've touched all those bases, because
1183 there is no further appeal, and not in this life. And so it's

1184 the very concept of taking the life by the government that we
1185 cross our T's and dot our I's to ensure that we know the facts
1186 of what did happen or didn't happen, so that they can fit into
1187 the limited mold that justify the taking of the life. So in
1188 other words, death penalty cases are just high-level scrutiny.
1189 But truthfully, I think all we need in death penalty cases is
1190 01:46:15 the same scrutiny we'd get if they had millions of dollars at
1191 stake or lots of money at stake. In other words, when you
1192 really want to get it right, you've just got to go through
1193 that. With capital punishment, part of the large difficulty
1194 has been historically the fact that it engages some of the
1195 fundamental federalism problems and principles we struggle with
1196 daily. So often it's just the question of which route from the
1197 state court to the Supreme Court does this case follow? Does
1198 it go straight up from the state Supreme Court to the United
1199 States Supreme Court? Or does it come from the state court to
1200 01:47:16 the United States District Court and then to the Court of
1201 Appeals and then to -- the routing of those cases means a great
1202 deal. There are powerful lessons in following the history of
1203 the Court's struggle with capital punishment. I came on the
1204 district court in 1975 and promptly thereafter the Supreme
1205 Court decided that capital punishment wasn't unconstitutional
1206 01:47:45 it's now being returned.³⁸ It had been in moratorium. And so
1207 my legal career began with it and it still struggles with it.
1208 From that point forward, the Court has struggled with the
1209 various problems attending it. At its core, it's a question of

³⁸ [Gregg v. Georgia](#), 428 U.S. 153 (1976), ended the death penalty moratorium announced in [Furman v. Georgia](#), 408 U.S. 238 (1972).

1210 federalism and who decides and who decides what. That's there.
1211 Our difficulties with capital punishment loomed large because
1212 following the Warren years, Chief Justice Warren's tenure, the
1213 Court had found itself with a lot of state court rules that are
1214 now federal rules, as the Warren Court imposed restraints upon
1215 states in administering their criminal laws. So you have out
1216 01:48:50 in small towns, all over the country, cases being tried daily,
1217 they're state criminal cases, but now they have a federal issue
1218 in them. And the result of that was an enormous flood of
1219 habeas cases. There were no constraints upon habeas. Habeas
1220 by its common-law nature is non-preclusive. You can just keep
1221 filing them. And so the Court was struggling with this massive
1222 load at the same time it was struggling with capital
1223 punishment. And then what happens, of course, is that a law
1224 professor wrote a foreword to the Harvard Law Review, sort of a
1225 dream, I guess, of an academic, that -- he said to the Court,
1226 this is your problem. Your problem is with habeas. Because
1227 01:49:33 what the Court, you remember, had done was to say, well, we're
1228 going to make our rulings prospective only.³⁹ And they were
1229 immediately criticized in this article⁴⁰ as creating a Serbonian
1230 bog. Conceptually, it won't hold up. It defies the basic
1231 01:49:57 principles of limitations of you as a court. You're speaking
1232 as a legislature now. And the Court then quickly found that it
1233 was difficult to administer; they then retreated from the
1234 prospective only analysis. The article also argued that your
1235 problem is with habeas and the fact that it's not limited. You

³⁹ Linkletter v. Walker, 381 U.S. 618 (1965).

⁴⁰ Paul Mishkin, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965).

1236 can be in the penitentiary, having been tried and convicted and
1237 everything upheld, serving your term, and then the Supreme
1238 Court comes out with a new decision, you get to jump on that.
1239 So you had those kinds of issues. The Court then backed off
1240 and came forward with a different approach to look to habeas,
1241 to constrain habeas itself. And then that's when Justice
1242 01:50:56 Powell left the Court and Chief Justice Rehnquist appointed the
1243 Powell Commission⁴¹ to look at these issues. And one of the
1244 things that came out of that were recommendations: first to get
1245 relief from the Congress, and then failing there, the Court
1246 itself came with a series of decisions to resolve these
1247 questions. It decided that if you're serving time for a crime
1248 and you've exhausted all your remedies and everything's final
1249 and we come out with a new decision, you don't get the benefit
1250 of that new rule. You have to rely on the law, a snapshot in
1251 time, when your conviction becomes final. So all these people
1252 01:51:54 in federal penitentiary, state penitentiaries out there, can't
1253 start filing habeas petitions when they hand down a new rule of
1254 constitutional law. The Court then qualified that: except in
1255 cases where the new constitutional rule would have meant that
1256 the crime that you committed would not now be a crime, et
1257 01:52:16 cetera. And then the Court, in Justice O'Connor's opinion,
1258 Teague versus Lane,⁴² and this came right after the Congress
1259 failed to act, we circle back to the question of habeas and
1260 facts and their role.

⁴¹ The [Powell Committee](#) was an ad hoc committee formed by Chief Justice Rehnquist to analyze "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases."

⁴² [Teague v. Lane](#), 489 U.S. 288 (1989).

1261 JUDGE BRADLEY: Yeah, the Supreme Court has gradually reached
1262 at least a procedural kind of, or they've put in place a
1263 framework for understanding the procedural mechanisms by which
1264 you can review. And then I guess the question is, how do you
1265 actually go about that review?

1266 01:53:13 JUDGE HIGGINBOTHAM: Well, so often the problems really stem
1267 from ineffective assistance of counsel. Few people have the
1268 resources to defend themselves in a capital case. If they had
1269 any resources, they've been exhausted. So we're talking about
1270 then a public defender system, or court-appointed lawyers.
1271 Many lawyers accept these cases and court appointments, but
1272 then they're understaffed. They don't have the background,
1273 know how to try a case, because one of the things that the
1274 Court did in 1975 forward as they re-instituted capital
1275 punishment, was to require a binary trial, drawing on its
1276 01:54:10 experience with the civil rules. You try first liability, so
1277 then you have a sentencing phase. Your guilt phase and then
1278 your mitigation case. That, in turn, created a whole new
1279 terrain for what a mitigation case is. Lawyers weren't trained
1280 01:54:41 to try these binary cases, that's why a lot of training that
1281 has been going on. It's one of the things that the Center of
1282 American and International Law is working on, to train these
1283 lawyers how to try a mitigation case and so forth.

1284 JUDGE BRADLEY: One of the aspects of lower court judging,
1285 trial court judging, that I think is interesting is there's a
1286 strategic dimension to it. You get a case, and this is
1287 somewhat managerial, in a sense, you could say. You think,
1288 what is this case likely to look like? How can I best sequence

1289 it so that it's handled efficiently? You're not wasting
1290 everybody's money. You're not wasting the court's time.
1291 01:55:29 You're kind of handling it. And that can really mean different
1292 things for different cases. I was trying to think, and I think
1293 of you as a very strategic-minded person, somebody who thinks
1294 ahead, somebody who looks for angles. I think of it as a
1295 tennis attribute of yours. But I'm wondering how that works in
1296 the appellate level. And I guess one way to ask the question
1297 is to say, when you're thinking about an opinion, and maybe
1298 Testbank, you gave this example of Testbank, which then, when
1299 the Exxon Valdez accident happened, then that jurisprudence
1300 kind of activated and became even more important. It was
1301 already important, but it became even more important. How
1302 01:56:04 often when you're deciding, maybe not just what the decision is
1303 going to be, but how you're going to decide a case, how broadly
1304 you're going to state the principle, how much you're going to
1305 get into it, whatever it is, the decisions you have to make,
1306 how often do those kind of strategic factors, or kind of where
1307 01:56:21 is this going to resound down the line, how often do those
1308 factors play into your decision-making?
1309 JUDGE HIGGINBOTHAM: Well, they kind of play in a lot of
1310 different ways, and in managerial judging, principally at the
1311 trial court level, certainly. And it's not separable from
1312 liability. Take the LTV cases.⁴³ The LTV Corporation had found
1313 itself on five or six exchanges with financial statements with

⁴³ In 1978, LTV restated earnings for the prior four years due to questionable accounting procedures, spawning multidistrict litigation. Judge Higginbotham's opinion in [In re LTV Securities Litigation](#), 88 F.R.D. 134 (N.D. Tex. 1980), helped develop the fraud-on-the market doctrine.

1314 a material misstatement in them. It starts from that. Now,
1315 how do you deal with that? I had those cases, and I had
1316 excellent counsel. The counsel were one of the most prominent
1317 in their field, securities practice and sanctions. And
1318 01:57:34 there were several ways that we looked at that. One of the
1319 things that, out of that same period of time in managing those
1320 cases, we also looked at the nature of the misstatements
1321 themselves. Eventually, we developed a fraud-on-the-market
1322 doctrine, which was really an aspect of managerial judging,
1323 which the Court adopted, which facilitated a resolution of
1324 those cases.⁴⁴ When talking to the lawyers in conference, I
1325 suggested to them that, in concept, we ought to be able to see
1326 the taint, you have a market out there, and you have some
1327 conceded misstatements of fact that are feeding into that
1328 market. And if one could separately see those as an
1329 01:59:00 element of that full stream, isolated, then you would be able
1330 to get to the damages in that way. And he was intrigued by
1331 that. But then he came back in about two or three months, and
1332 he said, Judge, I hired a famous economist to explore that.
1333 01:59:25 And he said it wasn't doable. And I said, well, I accept that,
1334 of course, that was just an effort, an example of managerial
1335 judging, trying to get to a situation using the tools at hand
1336 to get the case into a position that can be tried and resolved.
1337 The fraud in the market was sort of, in a sense, a distant
1338 cousin of the strictures that we impose in maritime field on

⁴⁴ The [fraud-on-the-market doctrine](#) reasons that material fraudulent statements are incorporated into stock prices, allowing plaintiffs to establish reliance in efficient markets if they traded the stock at the time. The Supreme Court adopted this doctrine in [Basic, Inc. v. Levinson](#), 485 U.S. 224, 244 (1988), quoting Judge Higginbotham's decision in *In re LTV Securities Litigation* approvingly.

1339 foreseeable cause, although people may not see that connection.

1340 JUDGE BRADLEY: This is still very controversial, these event

1341 studies that folks will do, and it's still highly controversial

1342 whether that should . . .

1343 JUDGE HIGGINBOTHAM: Yeah.

1344 02:00:20 JUDGE BRADLEY: Whether it fits within the statute is one

1345 problem.

1346 JUDGE HIGGINBOTHAM: Yeah, yeah. Oh yes, it doesn't resolve

1347 the issues at all, but it's just an effort to get it to a place

1348 where it's resolvable.

1349 JUDGE BRADLEY: So these were LTV cases when you were district

1350 judge, and I can see how, I can imagine you in that scenario,

1351 and it's easy for me to see that. Then how does it work on the

1352 appellate level when you've already got a record? There's

1353 briefing out there. How do you exercise the discretion? How

1354 much discretion do you feel like you have in terms of how you

1355 02:00:59 craft the product that comes out and what effect it's going to

1356 have down the road?

1357 JUDGE HIGGINBOTHAM: There are obviously juncture points in a

1358 lot of major cases where you can turn one way or another. For

1359 the most part, they are largely matters of presentment rather

1360 02:01:21 than determinative outcomes. How do you best explain this

1361 result? You frequently have different ways of doing that. And

1362 I try to get the one that provides the most clarity, trying to

1363 get as much of the relevant facts with the opinion describing

1364 what happened, unencumbered by the extraneous facts. In other

1365 words, you need only to say that this occurred and there may be

1366 a lot of other things going on, but they're not material. You

1367 don't digress. You keep it down to describe exactly what did
1368 happen. So that goes to the writing of the opinion.

1369 JUDGE BRADLEY: It reminds me of a case that I worked on where
1370 02:02:22 your panel affirmed Judge Rosenthal.⁴⁵ It was an issue
1371 regarding one of these structured settlement companies that
1372 will pay, so if somebody gets one of these tort settlements
1373 where they get payments every year, every month for the rest of
1374 their life. And these companies will try to turn that into a
1375 lump-sum payment, which is contrary to what the spirit, anyway,
1376 of the court's award is in those cases. There was some kind of
1377 action where they were undoing one of these. And Judge
1378 Rosenthal had written this extensive, as she does, it was a
1379 very extensive, very thorough opinion, very convincing. And I
1380 remember we briefed it up, and then we were talking about what
1381 to do. You kind of said, why don't we just write a one-
1382 sentence opinion that says the district judge got it right and
1383 just attach her opinion to this opinion? And that's what I
1384 think the court ended up doing.

1385 JUDGE HIGGINBOTHAM: Yeah, yeah. Well, that's answerable in
1386 02:03:14 two words, Lee Rosenthal. She's one of my favorites, and she's
1387 just a wonderful judge.

1388 JUDGE BRADLEY: But it brought me back to this point of—

1389 JUDGE HIGGINBOTHAM: Everybody loves Lee.

1390 JUDGE BRADLEY: It brought me back to this point of you are
1391 known as a scholarly judge. I think people will describe your
1392 writing in those kind of terms. But I guess, and I understand

⁴⁵ [Lee Rosenthal](#) has served as U.S. District Judge for the Southern District of Texas since 1992.

1393 what they mean, but I would resist it in some ways because I
1394 think that, I do agree with your characterization that you
1395 don't, you try not to write too much either. So it's you want
1396 to write the things that are important. You don't start every
1397 02:03:54 opinion with a lengthy digression on something that's only
1398 tangentially relevant that goes back to the 1500s. I mean, if
1399 it's necessary, it's necessary, but if not, you're not going to
1400 include it. That was an example of where it had already been
1401 said well enough by somebody else, so there was no need to
1402 repeat all that effort. But there are plenty of opinions where
1403 you have spent significant time, say some of the redistricting
1404 cases from the 80s and 90s where you had to at length engage
1405 with statistical analyses,⁴⁶ and actually the Fisher cases
1406 too,⁴⁷ which you got two bites of the apple on thanks to the
1407 Supreme Court bouncing it back to you. And those are cases
1408 02:04:38 where you delve very deeply into the expert testimony that had
1409 been given below the, how to characterize that, how to
1410 understand what it meant with respect to the legal theories and
1411 legal arguments.

1412 JUDGE HIGGINBOTHAM: I think that to frame the case, at the
1413 02:04:55 outset I want to tell the reader that this is what's going on
1414 out there in the legal world. This is where the thing has been
1415 going, da-da-da-da. And then this case fits into that larger
1416 matrix. I did that most recently in a case involving the
1417 validity of a Texas effort to regulate distribution of porn in

⁴⁶ See, e.g., *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 854 (5th Cir.1993) (en banc).

⁴⁷ *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *rev'd* 570 U.S. 297 (2013), *on remand* [Fisher v. Univ. of Tex.](#), 758 F.3d 633 (5th Cir. 2014), *aff'd* [579 U.S. 365 \(2016\)](#)

1418 the media and so forth.⁴⁸ It's a complicated, difficult case
1419 with its First Amendment issues. I've taught the First
1420 Amendment for years, and so I may be guilty of the lamp problem
1421 to a point. But the frame of the opinion was to talk about
1422 the, that one can say that, although scholars would differ with
1423 02:06:08 this and understandably so, that in the framing of the Bill of
1424 Rights that Madison, it's no accident that what comes first.
1425 And however one sees that, and its long history aside, the
1426 First Amendment remains a powerful and a strategic part of the
1427 courts. But the sinews and grasp of the First Amendment are
1428 sufficient to deal with the changing technologies that are out
1429 there. And it's being adapted to it. And in fact, whatever
1430 major scientific advance or release, you have a separate
1431 history that flows from it. The railroads, you have large
1432 changes. Consequences: people forget about the telegraph the
1433 had at the Battle of New Orleans. You know, you've got all of
1434 02:07:16 these real histories. But the First Amendment, I basically
1435 said to frame it, the large picture here, you're talking here
1436 about pornography, yes. And you're talking about the newest,
1437 most complex subject in technology. It's a large frame that we
1438 look at. In other words, once you look at the history of the
1439 02:07:49 First Amendment, its power and its reach and its ability to
1440 conform to changes in technology, et cetera, then now that
1441 you've got that back in your mind, let's talk about what
1442 happens here. And so I think that the lens broaden, if you
1443 will, the frame. So in that context, I see, one could say

⁴⁸ Free Speech Coalition v. Paxton, 95 F.4th 263(2024).

1444 that's more managerial, too. I'm not sure.

1445 JUDGE BRADLEY: Well, one aspect of your writing, I appreciate
1446 that about framing and starting with a broader lens, and that
1447 makes a lot of sense to me, I think another aspect of your
1448 writing, and it's been evident in hearing you talk about cases
1449 today when we talked about Testbank, and you went out of your
1450 02:08:46 way to mention how Judge Wisdom's very educated, very
1451 compelling opinion, which you disagreed with, which was the
1452 opposite view in that case, in which I will say, having reread
1453 it yesterday, is quite sharply worded with respect to your
1454 majority opinion, and yet you have gone out of your way to be
1455 gracious to it. I think you do tend, in my experience, to give
1456 full voice to your own doubts or to the other perspectives that
1457 are at issue in a case. You don't have, you don't come across
1458 as kind of overly, I mean, you don't come across as overly
1459 confident in your opinions, usually.

1460 JUDGE HIGGINBOTHAM: Well, that's because I'm not, I guess. I
1461 02:09:32 think that part of that has to do with my fundamental view
1462 about lawyers and the relationship among lawyers and judges and
1463 all that they help. We're all lawyers, as I have said, sitting
1464 in the courtroom, there's at least three lawyers, and they're
1465 all, in one sense, discharging, a common duty, common
1466 02:10:01 following. Sometimes we speak too harshly and use words that
1467 confuse harsh language with persuasive language.

1468 JUDGE BRADLEY: Well, I wanted to ask you about a quote that I
1469 pulled from an interview you gave to the Texas Lawbook a few
1470 years ago, and the quote is, "I'm actually not as confident as
1471 I used to be that I'm right, and that's because I am sensitive

1472 to my own faults and limits." And it reminded me a little bit
1473 of Learned Hand's⁴⁹ famous quote of "the spirit of liberty is
1474 the spirit which is not too sure that it is right." So you're
1475 in good company, I guess, in feeling that way, but I wanted to
1476 know, what does it mean to become more aware of your faults and
1477 02:10:47 limits? Kind of how has that, how does that happen, and how
1478 has that affected your profession?

1479 JUDGE HIGGINBOTHAM: In everything I do, I ought to be doing
1480 that. I gotta work harder. Sometimes I have to coach myself.

1481 JUDGE BRADLEY: You have to coach yourself to be more aware of
1482 your own failings?

1483 JUDGE HIGGINBOTHAM: Yeah, sure. I think that, to me, you want
1484 to look at the cases with a, quote, open mind. I don't mean
1485 you don't face cases which quite obviously don't have any
1486 merit, but you're open to other considerations, and I think
1487 02:11:38 that the litigants are entitled to that. You know, I remember
1488 the, like in the old Wilson, Southwest Airlines case,⁵⁰ a
1489 wonderful lawyer, Jack Hauer, was representing Southwest, and I
1490 remember vividly him saying, saying, Judge, this is a, this is
1491 02:12:07 a BFOQ.⁵¹ I know, we know that. I told him, and this is in
1492 chambers, I said, I told the guys, I said, you know, I don't
1493 see it. I'm going to tell you that they said, well, let us try
1494 to persuade you. I said, well, sure. I want to hear your
1495 story, but I'll just tell you up front. It just didn't strike
1496 me as a BFOQ, so they did, and they, they came up with a very

⁴⁹ [Learned Hand](#) was a judge on the United States Court of Appeals for the Second Circuit from 1924-1961.

⁵⁰ [Wilson v. Southwest Airlines Co.](#), 517 F. Supp. 292 (N.D. Tex. 1981)

⁵¹ Bona fide occupational qualification.

1497 powerful story, it's an incredible story of American enterprise
1498 and success. It's a great success story but ultimately did not
1499 persuade me.

1500 JUDGE BRADLEY: So this is the Southwest Airlines case. . .

1501 JUDGE HIGGINBOTHAM: Yeah.

1502 02:12:48 JUDGE BRADLEY: When you were a district judge.

1503 JUDGE HIGGINBOTHAM: Yeah.

1504 JUDGE BRADLEY: Where they wanted you to find that being a
1505 woman was a bona fide occupational qualification for working,
1506 being a flight attendant or working in these roles with
1507 Southwest Airlines, because that was part of their branding.

1508 JUDGE HIGGINBOTHAM: Yeah, yeah, well, what had happened was
1509 that a San Antonio lawyer and an investor had gotten this idea
1510 to create an airline, an intrastate airline connecting San
1511 Antonio, Dallas, and Houston. And they had this grand concept.

1512 Of course, they were fighting a very powerful entrenched
1513 02:13:26 interest competitor in Braniff Airlines, and the idea was to
1514 use not the international airport, but the Love Field and Hobby
1515 and so forth. And they were trying to finance it. At one

1516 point, they were, I think they faced many millions of dollars
1517 of debt and \$100 in the bank, literally. And so it was

1518 02:13:49 quite a struggle. But Southwest consulted with Bloom,⁵² I think
1519 was the name of the outfit. It told them that you need to try,
1520 you've got to do something different, and that we think that
1521 given the people who are using these airlines, they're young
1522 males, you ought to present yourself as the "love airlines."

⁵² The Bloom Agency was a Dallas-based advertising firm.

1523 It's not something Southwest dreamed up, but an advertising
1524 agency told them what to do, created that whole enterprise.
1525 And they went with it. It became, ultimately, a success story.
1526 But then eventually the lawsuit came that challenged its use of
1527 only young female attendants. And so I listened to it, and
1528 ultimately found against them. But anyway, I think that to me,
1529 02:14:54 this is Title VII of the Civil Rights Act, which prohibits the
1530 use of race or sex, except in circumstances where you can
1531 demonstrate that it is a bona fide job qualification. And we
1532 had a series of cases that debated the limits and strengths of
1533 how you meet that. And they were good lawyers, and they were
1534 doing a whole lot with a lot of little. But nonetheless, that
1535 was the statutory issue and...
1536 JUDGE BRADLEY: And it was a case you decided, and it was a
1537 bench trial, so you did not decide it at a preliminary stage...
1538 JUDGE HIGGINBOTHAM: No, no.
1539 JUDGE BRADLEY: Either a motion to dismiss stage or summary
1540 02:15:50 judgment.
1541 JUDGE HIGGINBOTHAM: No, I told them, no. I just told them
1542 honestly, I looked at this, and I'm having trouble with it.
1543 And Jack Hauer said, that judge, we would like you to hear the
1544 evidence, and I said, of course, of course, no problem. Bring
1545 02:16:08 your evidence. And we tried it for several days. And they did
1546 a remarkable job with not a whole lot.
1547 JUDGE BRADLEY: The opinion is interesting, because you do
1548 acknowledge the business kind of aspects. You mentioned that
1549 Southwest was listening to this professional advice they had
1550 gotten from a branding agency. But then I mean, it's clear

1551 that you have a strong view and that your view is very well
1552 supported in the case. But I could see judges writing an
1553 opinion that was more dismissive or flippant about the
1554 argument, or maybe had disposed of it earlier. I think maybe
1555 some people wouldn't have given them a bench trial, and that
1556 02:16:46 would have just decided, no, this is summary judgment, I'm just
1557 going to decide this is a matter of law.

1558 JUDGE HIGGINBOTHAM: Well, I think that, to me, it was not so
1559 simple. The question was the necessity of excluding, of using
1560 males only to the business itself.

1561 JUDGE BRADLEY: Using females only. So excluding males from
1562 these roles.

1563 JUDGE HIGGINBOTHAM: Yeah, yeah. I mean, the fact of the
1564 matter is it succeeded, whether that was the reason. In the
1565 sense that the market was proving them right in the assessment
1566 about it, they offered a counter product to the incumbent that
1567 02:17:41 sold in a very powerful way. But when you examine it in close

1568 detail, what you find is that in the surveys, it's much more
1569 complex. And it seems the surveys are there, you break those

1570 surveys down, and I got to look at the full survey. They had
1571 the surveys of, well, the people say they wanted, and they'd

1572 02:18:12 done these surveys, and actually what the people were saying
1573 was, and if you read the opinion, it tells what they actually
1574 said. What they actually said was that they liked the on-time
1575 departures. They liked the courteous treatment of attendants.

1576 They did not, what they were not picking up on was the choices
1577 that were given, which was the attractiveness of the pretty
1578 girls. I think they were aware of them, but the ratings, their

1579 own ratings didn't really, didn't demonstrate the kind of
1580 necessity that they were pitching was essential to this job.
1581 So there were facts underlining what was moving the market and
1582 not moving the market that not just a judgment of mine that
1583 02:19:12 it's unfair to women. The question was not that, it's a
1584 question of, the law is that they're entitled to equal
1585 treatment. Now, unless it's a situation where it's necessary
1586 to the job, and that's a fairly defined category. You needed a
1587 male to play a male role in a movie.

1588 JUDGE BRADLEY: I want to ask about hypotheticals and legal
1589 argument. So you are known, I think this is part of being
1590 known as kind of scholarly or more academic in your approach,
1591 and there are other judges, I think Judge Sutton⁵³ on the Sixth
1592 Circuit, for instance, is known to ask a lot of hypotheticals,
1593 they make lawyers uncomfortable sometimes because maybe they
1594 02:20:04 don't want to take a position.

1595 JUDGE HIGGINBOTHAM: You have to think.

1596 JUDGE BRADLEY: Right. Well, there's that. There's that, but
1597 there are other reasons, too.

1598 JUDGE HIGGINBOTHAM: Yeah, yeah.

1599 02:20:10 JUDGE BRADLEY: If they represent the United States, they may
1600 be uncomfortable taking positions that they're not sure--

1601 JUDGE HIGGINBOTHAM: Yeah, yeah, yeah, sure.

1602 JUDGE BRADLEY: Or it's some large company, or just have not
1603 talked to their client about it. What is useful about
1604 hypotheticals and arguments? Why is it important?

⁵³ [Jeffrey Sutton](#) has served as a judge on the United States Court of Appeals for the Sixth Circuit since 2003.

1605 JUDGE HIGGINBOTHAM: What I would say, I think the Chief
1606 Justice just said about his own Court, they certainly not--like
1607 our decisional process, it's not theirs for sure. But in a
1608 way, it is, as he pointed out, that the conversation is not
1609 just a straightforward bench to lawyer talking to each other.
1610 02:20:52 And of course, he was saying at the high Court, of course, that
1611 what's really going on there, in part, is that that's the first
1612 time that each chambers is going to learn where the other
1613 justices are, and so there is this bilateral communication.
1614 Well in a sense, and he just made this observation recently, so
1615 to answer your question, I think there's a little of that going
1616 on here, too. When you, it's about getting people on the same
1617 page, your colleagues have got to deal with the hypothetical,
1618 too, so you're talking to other people, too. In many ways, I'm
1619 trying to, I'm not going to persuade the lawyer, so who am I
1620 02:21:41 trying to persuade? I'm talking to my colleague. My colleague
1621 thinks that it's X, and then I'm saying to him, well, if it's
1622 X, what about the da, da, da, da, this, and then my colleague's
1623 going to say, well, I don't know. So it is, I think, to answer
1624 your question, I would just say that the communication there is
1625 02:22:03 running to my right, to my left, and not all straightforward to
1626 the podium.

1627 JUDGE BRADLEY: That makes sense. That's very interesting. So
1628 I guess, we're talking about working with your colleagues. The
1629 other matter that we were interested in that I haven't really
1630 heard judges talk about very much is being a judge on a three-
1631 judge fact-finding panel. So you've served on cases where, and
1632 there's particular kinds of cases, they're unusual in our

1633 system. . .

1634 JUDGE HIGGINBOTHAM: Yeah.

1635 JUDGE BRADLEY: But what is it like to be one part of a three-

1636 02:22:38 judge brain, finding facts in a case like that?

1637 JUDGE HIGGINBOTHAM: I didn't find that to be that different

1638 than being a district judge, except that we were three of us

1639 being a district judge, and we had to come to a decision. But

1640 all of those, for that period of time, I had wonderful

1641 colleagues, a judge from East Texas, John Ward and Lee

1642 [Rosenthal], and so we were close in terms of mindset and so

1643 forth, and there's a lot of work, and so we were working pretty

1644 very hard on it.⁵⁴ Writing it, it's very data-driven. To

1645 explain that, with the first decennial, you recall that when we

1646 have a decennial census come down, immediately everything's

1647 02:23:48 unconstitutional, and then there's a race to the courthouse to

1648 say, to file first so you can get to pick your, at least one of

1649 the district judges, so they filed in Marshall⁵⁵ in those cases.

1650 So immediately when I went to Marshall to try to get everybody

1651 together, and I said, well, okay, we've come to Marshall now,

1652 02:24:10 all the data's in Austin,⁵⁶ and if we hear an objection, we're

1653 going to move this case to Austin. Oh, objection, back to

1654 Austin. Okay. So that's the way, that's the way you work. Of

1655 course, most of this is history now, ancient history. But I

⁵⁴ Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court), vac'd and remanded, 543 U.S. 941 (2004), on remand, Henderson v. Perry, 399 F. Supp. 2d 756 (E.D. Tex. 2005) (three-judge court), aff'd in part and rev'd in part sub nom. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

⁵⁵ The Marshall Division of the United States District Court for the Eastern District of Texas.

⁵⁶ The Austin Division of the United States District Court for the Western District of Texas.

1656 think that, I found it to be, I enjoyed the work, frankly,
1657 because I found it helpful to talk about the collection of
1658 facts, and here it's not, it's really almost history and a
1659 sweep of facts, and it's not just a small set of determinable
1660 facts. It's a lot of things. We draw a map here, we don't
1661 want to cross a precinct level, we don't want to do this, but
1662 we might draw it there, et cetera. So there's a lot of
1663 02:25:21 judgment calls that were involved in that process. And of
1664 course, to jump ahead of you, this became a vestigial piece of
1665 work with the Supreme Court's decision that these are political
1666 decisions, a decision with which I respectfully disagree,
1667 notwithstanding my admiration of the Chief Justice. And I may
1668 say this, what we did was an attempt to create balanced
1669 districts. And so we would come up with as evenly balanced as
1670 we could, drawing the lines. That meant then that the primary
1671 did not necessarily determine things. In other words, a
1672 congressman under those districts has a constituency that is
1673 divided. And without that, a congressman has a district where
1674 02:26:38 the people who show up at the primary are the red-hots, the
1675 people that are really enthusiastic participants and so forth.
1676 And those are the only people that he or she is answerable to.
1677 So you get a situation where recent polls show that 80% of the
1678 people want X and Y, and you'd say, how in the world then can a
1679 02:27:00 congressman vote against that? And the answer is, he or she is
1680 not interested in that 80%. He's interested in his primary
1681 cause that's who's going to elect him. And that's to the left
1682 or to the right. So you have this. Now, if you draw a line
1683 from the decision of the Supreme Court to date, that

1684 redistricting was a political decision, the divisiveness, I'm
1685 describing a consequence of the decision. I said a right
1686 decision or a wrong decision is not the issue. That was not an
1687 "improper" decision. I understand the argument that it's a
1688 political decision, that they saw this as belonging to that
1689 arena. I also understand it's a principle of federalism. But
1690 what I'm saying is, though, that the consequence is so large
1691 that, and I don't suggest the Court's not unaware of what was
1692 02:27:50 going to happen, but divisiveness was a high price to pay. But
1693 you've got to pay it if that's the constitutional order. So
1694 the real comment about congressional redistricting is, the
1695 three-judge court says is that, for now, it's history. The
1696 functioning of the three-judge court, you still have those
1697 occasionally. I have reservation, I don't see the real
1698 necessity for it, outside of redistricting and those things.
1699 The basic idea of it was, of course, the necessity of needing a
1700 decision made, but more to the point you want to get the
1701 benefit of the three-judge court for which the appeal goes
1702 directly to the Supreme Court. And that's really the key of
1703 02:28:51 the districts. A single-district judge can do the same thing,
1704 but redistricting is so consequential. So they really are, the
1705 court of appeals and the district court, because your appeal
1706 goes directly to the Supreme Court. So I think that if you
1707 02:29:13 look at three-judge courts, you can't ignore the fact that the
1708 appeal from three-judge courts goes to the Supreme Court. And
1709 under the old system, I think that's where it should have been.
1710 JUDGE BRADLEY: I'm glad we spent a lot of time talking about
1711 your method and about cases that are not all particularly

1712 prominent now, but that I think show you have a long career in
1713 the judiciary. I guess, unless you're on the Supreme Court,
1714 most of what you do is deciding cases on a day-by-day, year-by-
1715 year basis. And those cases have immense impact, both on the
1716 litigants in those cases and then as jurisprudence going
1717 forward. But they're not all headline cases. But I do think
1718 02:30:03 that the ones we've talked about show your methodology or
1719 approach to decision-making in really good ways. And I think
1720 you've illuminated that very well. There are a few prominent
1721 cases that we could talk about. I mean, Fisher, the
1722 affirmative action cases at University of Texas, just down the
1723 street. And the Van Orden,⁵⁷ the Ten Commandments case, also
1724 just down the street.

1725 JUDGE HIGGINBOTHAM: Yeah.

1726 JUDGE BRADLEY: Matter of fact, even closer than just down the
1727 street.

1728 JUDGE HIGGINBOTHAM: Yeah, yeah. Well, think of Van Orden.

1729 02:30:31 It's a fascinating case in so many ways. And it is local. I
1730 got that case, it came in, and it was questioning the placement
1731 of the Decalogue in the grounds of the Capitol. Well, that's a
1732 five-minute walk. So I walked over there. And I walked over
1733 02:31:04 to the Capitol. And I went around to see it. And I looked at
1734 it, and I looked at that, and I looked at where it was in
1735 relation to the others. As I walked around I got a feel for
1736 the whole thing. And the clerks, I said, okay, look at this.
1737 And I was puzzled by something I hadn't realized, that the

⁵⁷ [Van Orden v. Perry](#), 351 F.3d 173 (5th Cir. 2003), *aff'd* [545 U.S. 677 \(2005\)](#)

1738 Capitol, a beautiful building, of course, but to preserve the
1739 integrity of that old building, it had to serve of the growing
1740 support staff, et cetera, I asked where is that? I learned
1741 they dug down deep, it's underground.⁵⁸ Well, I didn't know
1742 that. And nobody said anything about that. And I thought,
1743 02:32:05 okay, yeah. And so where was all this statuary and all these
1744 things out there when they were excavating beneath the Capitol
1745 building? And so I went over and started asking. And they
1746 said, oh, well, they put all the statuary to one side and then
1747 put it back. I said, who put it back? Oh, those are museum
1748 curators. I'm looking at a brief, I'll just get background
1749 information, I'll just ask questions. And then I came back and
1750 put them to the parties. So they all knew that, I guess. But
1751 so it's not an issue of fact. It's just the reality of what's
1752 on the ground, its placement. And nothing was contested about
1753 any of this. It just wasn't in the record. So anyway, its
1754 location and why goes a long way given the fact that the
1755 Decalogue, obviously, has both a secular law-giving and
1756 02:33:04 religious message is in part a charge of the law. I mean,
1757 basic do-not-dos are also violations of the law. And it is no
1758 accident that when it was placed back in there, it's placed on
1759 an axis directly from the legislative hall to the Supreme
1760 Court. And it was there without a single exception for 10 or
1761 02:33:29 20 years or whatever it was. I don't remember, except many
1762 years. And the individual who actually filed the claim did
1763 walk by it every day, but then decided that it offended him.

⁵⁸ During the 1990s, the landscape of the Texas Capitol was temporarily disrupted by the construction of a large underground extension.

1764 So in any event, that was the record. My sense was that
1765 there's no way that I can offer more to the religion clause or
1766 to the establishment jurisprudence, which has its own set of
1767 problems and difficulties. And I can't answer those. I knew
1768 that. The only thing I can do, though, is to say, this is what
1769 these facts are. So it's largely just, that's what it is. And
1770 02:34:37 to me, that answered the case. And I got several notes from
1771 academic friends of mine that said, you're going to get
1772 reversed. I said, okay, get in line. But the Court saw it
1773 that way, too.

1774 JUDGE BRADLEY: It's an interesting opinion from the Court
1775 because they really don't, in fact, you said, well, I'm going
1776 to analyze this under *Lemon v. Kurtzman*,⁵⁹ which was then the
1777 test for that. And even though it was a strain to get it under
1778 that test, the test doesn't quite fit, but you at least did
1779 that then. I think it was Chief Justice Rehnquist who wrote
1780 that, as I remember. And he says, actually, this doesn't fit
1781 *Lemon* and doesn't really introduce any framework. There's
1782 02:35:19 really no test that I could find in the opinion for it. It
1783 kind of just is fact-bound, it's tradition, and it's not, and
1784 that was that. And you can see in the concurrences from Scalia
1785 and others where they are trying to introduce more of a
1786 framework and kind of, but obviously not convincing the
1787 02:35:42 majority of the Court at that time.

1788 JUDGE HIGGINBOTHAM: Yeah, yeah, absolutely. Yeah, it's just
1789 one of those difficult cases. And my sense was that the high

⁵⁹ [Lemon v. Kurtzman, 403 U.S. 602 \(1971\).](#)

1790 courts are going to have to resolve this. They haven't yet
1791 worked out a, to my mind, a cohesive doctrine here. I mean,
1792 critically, it's a very awkward area of the law. And
1793 sometimes, the least said, the best, I suppose. But
1794 nonetheless, that's what it was about. What's missing in my
1795 opinion is any real effort to resolve that. I don't think you
1796 see that. I think you just see the, I didn't say much about
1797 02:36:41 that other than that it has a, it speaks to more than the voice
1798 of religion. It speaks in the voice of the law, too.
1799 JUDGE BRADLEY: I wanted to ask what you read. So you've been
1800 doing this job for about 50 years. What do you read? What do
1801 you put in your brain, aside from a lot of briefs, which I know
1802 you have to read professionally, what else do you take in?
1803 JUDGE HIGGINBOTHAM: I probably don't read as much as I used
1804 to, but I read a lot of biography and history. I most recently
1805 was reading this incredible autobiography of Jim Baker.⁶⁰ It's
1806 just an incredible book. It's highly acclaimed, *The Man Who*
1807 *Ran the Government*.⁶¹ I didn't know him well, but I knew
1808 02:37:29 him, and I had no idea about that. But it's, it was written by
1809 six people, and it's an acclaimed book of biography and his
1810 career, because he was in so many places. And I just found it
1811 fascinating, because it was such a window to so many things
1812 that were going on, and things that he did, and you name
1813 02:37:58 it. And so it was very informative from that standpoint, and
1814 also addresses an individual that I had some connection with,

⁶⁰ [James A. Baker III](#) served as the 10th and 16th White House Chief of Staff, 61st United States Secretary of State, and 67th Secretary of the Treasury.

⁶¹ Peter Baker & Susan Glasser, *The Man Who Ran Washington: The Life and Times of James A. Baker III* (N.Y.: Doubleday 2020).

but I frankly did not realize the full scope of what he was doing. I had a high regard for him, and I found that book very interesting. And that's an example of the kinds of things I'll pick up and read. I read, I read legal-related things. I read a lot of, not too much of purely legal stuff, but mostly history and biographical, some fiction, not as much fiction as I used to. I read a lot of, I read a lot of classic literature, Dostoevsky. They, these writers are timeless. That's what's striking about it. In one sense, they come from another world, and in another way, it's the same world. So I found that, my mother introduced me to classics when I was a very little guy, and then I've maintained that kind of general interest, for a long time.

JUDGE BRADLEY: So you've taught law for, in many different capacities. I think the list we came up with was the University of Alabama, the University of Texas, Texas Tech, St. Mary's University, and SMU. What do you get out of teaching law school classes? Why do you do it?

JUDGE HIGGINBOTHAM: A lot more than the students. I think that it requires me to look at the law in a different way. It requires me to think through exactly what's going on and how to present it. And if I master that -- so it's a selfish thing in part. It keeps me current. And the other is just a general sense of obligation to young lawyers. I found throughout my career that lawyers, to the young lawyer, were always there to help me, and I appreciate that. And I took that to be an obligation. That's one of the things at the Inns of the Court we try to teach, that you're brothers and sisters in the law.

1843 You took the same oath, and the other judges here, they're
1844 lawyers. And that's your common bond. You're lawyers, and
1845 that means something. It means a great deal. That's to me,
1846 that's what I, that's the bottom line.

1847 JUDGE BRADLEY: Well, that brings us to the topic of clerks,
1848 because I think you frequently hit on similar messages with
1849 your clerks. I was wondering if you could talk, maybe start by
1850 just talking about how you interact with your clerks. What is
1851 02:41:07 their role and your role in chambers?⁶²

1852 JUDGE HIGGINBOTHAM: Yeah. Well, it's changed a little bit
1853 over the years. I would tend to just pick up files and write
1854 opinions and get them out sometimes. But I depend on them more
1855 to do more for me, to check things and do this, that, and the
1856 other. But they, primarily, it gives me somebody to talk to
1857 and to think through problems. They're bright and relatively
1858 unencumbered in that sense. And they have their own views, and
1859 I encourage them to express them and defend them. And I really
1860 take them as being, they're very helpful to me, but I also take
1861 it as a responsibility, as a charge to take these kids that are
1862 02:42:11 really gifted and smart and able and make any parent proud and
1863 to help to send them on the way to do more. Because the
1864 clerkship today is a, it's really an entree and very important
1865 to these kids. And so, I look at it that way, that I'm helping

⁶² Judge Higginbotham's former clerks who became judges include his interviewer Judge Bradley of the Bankruptcy Court of the Western District of Texas, as well as Judge Stephanos Bibas of the United States Court of Appeals for the Third Circuit, Judge James Wesley Hendrix of the United States District Court for the Northern District of Texas, Magistrate Judge David Horan of the United States District Court for the Northern District of Texas, Justice Edward M. Mansfield of the Supreme Court of Iowa, and former Judge Bill Rhea of the 162nd District Court of Dallas County, Texas.

1866 a lawyer come to maturity. Listen, when I, I wrote letters
1867 02:42:45 cold to the Dallas Bar Association when I was getting out of
1868 the JAG Corps, they answered my letters. And when I got out
1869 here, and I interviewed lawyers more than once, they said, gee
1870 whiz, you know, I don't have anything now. I just hired a guy
1871 who's a trial lawyer, da-da-da-da. And he'd say, but we'd talk
1872 a little bit, and they'd say, wait a minute. And he'd pick up
1873 the phone and call, hey Pete, and he'd call a law firm and say,
1874 I got a young man you ought to look at. I came over to Dallas
1875 with one, only one interview scheduled. And I got five. And
1876 there was no reason for them to do it, other than they just
1877 happened to have been a young lawyer once.

1878 02:43:37 JUDGE BRADLEY: When I was working with students when I was a
1879 professor, I frequently would tell them that the power of kind
1880 of an informational interview is what you can call it, or just
1881 having coffee with somebody, I said, you'll be surprised how
1882 often people will answer your cold email and be willing to at
1883 least meet up for a short chat or even a phone call, and that
1884 that can lead to all kinds of things. And that's a fascinating
1885 story for that.

1886 JUDGE HIGGINBOTHAM: Well, they were, they were just as helpful
1887 as you could be. I was looking at Atlanta because my wife
1888 02:44:14 wanted to go there. I interviewed there, and one of the
1889 lawyers that I really was impressed with, because I knew his
1890 family from tennis, and his son was a very good tennis player,
1891 as he was; and he was outstanding. One of the outstanding
1892 trial lawyers in Georgia, a small trial firm specialist. And
1893 that's something I'd like to do. And we talked, and he said

1894 he'd get back to me, and then time went by, and he didn't get
1895 back to me. In the meanwhile, I got this other offer, and I
1896 took it. And he called, apologized for not getting back to me.
1897 He said, I got caught in this long trial. And he said, where
1898 are you? And I told him. He said, oh, [expletive deleted].
1899 And he said he wished me well, and so on and so forth. But you
1900 know, but I appreciate that. That's been my response from the
1901 bar. And so anyway, so I began with the fact that being a
1902 lawyer means something. And it comes with obligations and
1903 02:45:32 benefit. And most of the things I've done, I've tried to act
1904 on that, through the Center, through these various things. The
1905 other things I do are like RAND, are things that I'm interested
1906 in. Gee whiz, I get the briefings on many things. They
1907 briefed me on AI some years ago, and it scared me to death. So
1908 there, you know, there's just an opportunity to, I know when it
1909 really benefits me, so that's what I do.

1910 JUDGE BRADLEY: In terms of clerks then, what role do you, have
1911 you played in folks' lives after they've finished clerking for
1912 you? How often do you keep in touch? What kind of contact do
1913 you have with folks?

1914 02:46:21 JUDGE HIGGINBOTHAM: Well, it varies. You know, sometimes they
1915 call for advice. And you know, we remain in contact. They've
1916 got an opportunity to do this, do that, the other, and they
1917 want somebody to talk it out. I never tell them what they
1918 02:46:45 ought to do. I just talk about, we talk about it and I hold
1919 their hand while they make a decision. And so it's just a
1920 friendship of trust, or they're having a problem. And so I'm
1921 happy to listen.

1922 JUDGE BRADLEY: I wanted to ask about academia, your
1923 relationship to academics. You, and actually you told a story
1924 that I don't, I didn't remember hearing, or I had forgotten
1925 about, that you had considered going to Harvard to get an LL.M.
1926 and kind of maybe taking a route into teaching. It makes a lot
1927 of sense. But the road you actually took was into legal
1928 practice fairly young, onto the bench fairly young. So you
1929 didn't, but you've maintained in contact with a lot of
1930 02:47:30 academics. You've got a lot of clerks who are academics.⁶³
1931 What do you view the role of academia in the law as being?
1932 What, what are, what do good academics do? What is the good
1933 role of academia?
1934 JUDGE HIGGINBOTHAM: When I was a young law review student, one
1935 of the senior members of the faculty handed me a piece that I
1936 was supposed to edit, and he was publishing. So I read it and,
1937 of course, left it untouched and thanked him for it. But I
1938 asked him a question about it and, he said that it was really a
1939 piece to the academic world. He said that the judiciary and
1940 02:48:25 the bar should sue us for non-support. And that intrigued me.
1941 I asked what do you mean by, that this phrase. And he told me,
1942 but I, I didn't come to appreciate it until later. And it
1943 flashed back in my mind that, that we are so dependent upon
1944 their constant synthesis and churn of the ideas and

⁶³ In addition to Pres. Chris Eisgruber of Princeton, and several former law professors now on the bench, Judge Higginbotham's former clerks include Prof. (and Interim Dean) Kyle Logue of the University of Michigan Law School, Prof. William Hubbard of the University of Chicago Law School, Prof. Jim Greiner of Harvard Law School, Prof. Roderick M. Hills Jr. of the NYU School of Law, Prof. Nelson Lund of the Antonin Scalia Law School at George Mason University, Prof. Hannah Wiseman of the Pennsylvania State University College of Law, Prof. Emeritus Matthew Doré of the Drake University Law School.

1945 02:48:58 intellectual exchanges, et cetera. That's because they have
1946 the time to reflect and, and they also have the intellectual
1947 honesty to speak. It may be an advocacy piece, but it's not
1948 for a client. And so they present articles, analysis, of
1949 relative disinterest, self-disinterest, and, and representing a
1950 lot of time and thought and experience in the area that
1951 otherwise you wouldn't have access to. And they then, and as
1952 the professor then taught me a little bit later, I really
1953 realized the lesson that we are so dependent upon their
1954 02:49:58 synthesis and developments of the articles. They collect the
1955 cases that they're, they've seen the relationships there among
1956 the cases. You can evaluate, you can disagree with them, but
1957 there is a lot of work that's been done for you, so it's an
1958 enormous contribution. And it's not just a contribution in the
1959 sense of, it's gratuitous, it is reflective of the interlaced
1960 character of our legal system. And I don't see the academics
1961 as a sideler. I think they are, they are a part of the whole
1962 rule of laws establishment, if you will. They are training the
1963 lawyers. They are, they are admonishing the graduates, judges,
1964 02:50:56 whatever. They're part of the monolithic structure that is the
1965 rule of law. So I don't see them as a distant whatever. I see
1966 them as partners in doing their thing, so to speak. And
1967 they're incredibly, incredibly important. You need, you need
1968 that quality of disinterest. And people would say, oh, yeah,
1969 02:51:25 well, he-got-a, he's got a leftist bent, he's got a rightist
1970 bent. So? But it's his view, or her view, and her work. So I
1971 think that you didn't escape the legal establishment, you're
1972 part of it.

1973 JUDGE BRADLEY: Well, I want to ask about bankruptcy now. So
1974 my own self-interest plays into this. So you, you started, I
1975 guess, and I did not really put this piece together, but you
1976 started as a district judge before the modern bankruptcy system
1977 was in place. Its predecessor was in place, and it has a lot
1978 of resemblances. So you've seen the, the modern bankruptcy
1979 code for its entire life.

1980 02:52:07 JUDGE HIGGINBOTHAM: That's a struggle.

1981 JUDGE BRADLEY: Yeah, I was wondering if you had any general
1982 thoughts about the bankruptcy system or about bankruptcy
1983 judges, what makes good bankruptcy judges?

1984 JUDGE HIGGINBOTHAM: Where we are today is where we would hope
1985 to have been throughout that struggle, during the periods of
1986 time when we were just operating under some abstract rule that
1987 we made up. But today, the, the beauty of it is that they
1988 created a, a court under the power of Article III that is a
1989 pure merit selection by a district body. And I joke about it,
1990 02:52:59 teasingly, for your bankruptcy judges. I tell them, what am I
1991 doing here? I'm the, I'm a political hack. The rest of you
1992 folks are merit selectees. Joke about that, but that's the
1993 reality. So I think the quality of, of our bankruptcy judges,
1994 I don't mean to be unfair to the old referees or anything else,
1995 02:53:19 there were awfully good ones, but the uniformity, I put it this
1996 way, the uniformity of, of quality standards are high. Because
1997 I know what the selection process is by the judges. It's not
1998 perfect either. Nothing is, but, and you always have
1999 personalities and da-da-da. But at base, it's a great tribute
2000 to, the merit selection does work.

2001 JUDGE BRADLEY: Do you, do you think that the qualities that
2002 make a good or bad bankruptcy judge largely overlap with those
2003 that make a good or bad district judge? Largely the same kind
2004 of job in your perspective?

2005 JUDGE HIGGINBOTHAM: I don't think there's a lot of difference.
2006 I think they both have gone through, the district judges and,
2007 02:54:15 the other judges have gone through a political process, but
2008 it's a pretty severe vetting process itself. And I think
2009 you're going to have, in that political process, you would say
2010 it's probably more variability and range of abilities. I found
2011 that the bankruptcy judges appointed there, in my experience,
2012 have been of uniform high quality. They, well, if they can
2013 capture people of your ability, that tells you a lot.

2014 JUDGE BRADLEY: Well, Judge, thank you very much. Is there
2015 anything else you'd like to add before we finish up today?

2016 JUDGE HIGGINBOTHAM: No, I appreciate your time. I'm sorry we
2017 02:54:58 sort of rambled around, but that's a, that's just the way it
2018 is. You know, I can impress my grandkids that I was in the
2019 movies.

2020 JUDGE BRADLEY: Thank you, Judge.