

HEINONLINE

Citation: 13 Minn. J. Global Trade 211 2004



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 19:02:36 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

Tribute to Professor Robert Hudec

Robert M. O'Neil*

From the moment we arrived at the Supreme Court in the summer of 1962, those of us who were about to begin our clerkships already knew that Bob Hudec was unique among us in one major respect. He alone had served through what was to be Justice Felix Frankfurter's final year on the Court, and would serve through Justice Arthur Goldberg's initial year. Because of Justice Potter Stewart's practice of offering—indeed, insisting upon—two-year clerkships (a practice distinctive to Stewart, though occasionally emulated by one of his colleagues), Bob Hudec was about to witness what the rest of us could hardly have anticipated would be a major constitutional revolution.

Although Earl Warren had been Chief Justice since 1954, the era of the "Warren Court" properly dates from a much later time. Indeed, the early years might more accurately be described as the flowering of the "Frankfurter Court," so tenuous were the majorities that supported constitutional principles for which the Warren era would later be acclaimed (or vilified). There were, to be sure, some major victories for Warren principles—desegregation of public schools, legislative reapportionment, and invalidation of disclaimer type loyalty paths, among others.

It was not, however, until Justice Frankfurter retired for health reasons in the summer of 1962, and Justice Goldberg quickly succeeded him, that the Warren era as we regard it could commence with predictable majorities on virtually every issue of importance to Justices Black, Douglas and Brennan. So complete was the metamorphosis of the Court that summer and fall that, at the close of the 1962 Term, Justice Brennan noted that he had been in dissent but four times among some 160 argued and decided cases (roughly twice the number for a typical current Term).

* Professor of Law, University of Virginia School of Law; Director, Thomas Jefferson Center for the Protection of Free Expression.

Although the newcomers who were about to join Bob Hudec (as the Court's sole veteran) could hardly have appreciated the magnitude of this watershed, we did sense that things would likely be quite different. Among those differences, clearly, would be subtle changes in the roles of those members of the Court who had been receptive to appeals from their more liberal colleagues, and several times each Term joined temporary majorities on transcendent issues. Pre-eminent in that group, of course, was Justice Stewart—a fact that immediately made Bob Hudec's role especially strategic.

My initial memories, as one of the last to arrive, were of Bob Hudec eagerly welcoming the newcomers, helping us to feel comfortable at that formidable institution, and finding our way around an imposing marble palace (where even in those innocent days security was fairly tight). It would have been quite easy and natural for the old-timer to treat the "new kids on the block" with condescension, even to the point of some highly sophisticated hazing. Indeed, I recall just such condescension on the part of at least one of my co-clerks, whose claim to seniority was no stronger than having beaten me to the Court by a few weeks—but who somehow never let the late-comers forget that he had a month's head start, that he knew the ropes while we were still wending our way across the country, and that in some incalculable sense he remained forever our superior. (When last April we gathered at the Court for a fortieth reunion, the aforementioned colleague was unable to attend—though had he done so, I have no doubt that four decades would not have erased the smug expression that greeted me in late summer, 1962.)

It was not only that Bob never claimed seniority. In fact, he never treated those of us in his second group of co-clerks any differently from the way we treated one another. The only "we had one of those last Term" references I can recall on Bob's part was genuinely helpful, substantive and institutional. His handling of his unique status was simply the reflection of his innate modesty. Though I knew he was a Yale Law School graduate—an inevitable counterpoint for the Harvard Law contingent—it was not until I began reflecting on this assignment that I knew he had been editor-in-chief of the *Law Journal*—an achievement that he repressed, while colleagues of lesser stature proclaimed lesser honors. That was, quite simply, Bob's nature. Thus it was hardly surprising that he was, at most, *primus inter pares*, and even that only in a chronological sense.

As the Term progressed, I recall numerous occasions on which Bob Hudec provided not only a wise and genial bridge between eras, but also between two Justices (Brennan and Stewart) who sometimes concurred on vital issues, but as often diverged. Such variance was singularly notable in the always contentious area of Church and State, for this was the Term during which the Court banned devotional prayer and scripture in the public schools, and declared sabbatarians who were available and willing to work except on their Sabbath eligible for unemployment compensation. In ways that I suspected must reflect Bob Hudec's sage and patient counsel, Justice Stewart expressed his differences, sometimes firmly, but always collegially and constructively.

Indeed, in the case of the jobless sabbatarian,¹ it was Stewart who highlighted what others sensed but would not say—that the Court had, within three short years, reversed itself and had effectively repudiated its irreconcilable Sunday Law rulings in the *Braunfeld* and *Crown Kosher* cases.² When I brought the Stewart draft to Justice Brennan, and told him that his candid colleague had pronounced *Braunfeld* effectively overruled, my Justice smiled broadly and replied, “Well, I guess if Potter says so, then I don't need to say it, do I?”

So it was on ever so many occasions throughout the 1962 Term. Though never purporting to speak for his Justice—and in that respect also differing from a few of our less modest colleagues—Bob Hudec was an invariably reliable emissary. There were occasions, as I recall, when he would have wished a different outcome than the one to which Justice Stewart was inclined. Yet he was the model of discretion and loyalty—quite willing to share with us his own views, but equally ready to defend and champion what were not always the fully congenial judgments of his mentor.

To my great regret, I had little contact with Bob Hudec after our last day together in the summer of 1963, when he headed off to serve the General Counsel of the U.S. Trade Representative, and I to start teaching at Berkeley. Thus I missed the myriad honors that came his way in the intervening years. Though I must have known that he was a Kenyon graduate, I missed the honorary degree by which his alma mater honored

1. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Mkt. Of Mass.*, 366 U.S. 617 (1961).

2. *Sherbert v. Verner*, 374 U.S. 398 (1963).

him. Since my own teaching and research have been almost exclusively domestic, I missed the immense influence that Bob had on the burgeoning field of international law and especially international trade. And though I was in Minneapolis from time to time, and even on the campus, only once did I get to the Law School, and then only for an early morning visit with a student editor.

Many years later, it looked as though our paths would indeed cross again. With the fortieth anniversary of our clerkship year approaching, several of us in the Washington area began to plan a reunion. We hoped it could take place at the Court in the spring of 2003, and happily Justice Ruth Bader Ginsburg offered to serve as our host and honored guest. When I sent out initial inquiries to my "classmates," nearly a year ahead, Bob Hudec was the first to respond, and his remained the most enthusiastic of confirmations. Any doubt we might have had about the wisdom or the feasibility of such a gathering were put at once to rest by Bob's genuine enthusiasm, and his appreciation to those of us who were closer to the scene and had thus taken on the organizational tasks.

As recently as three weeks before our scheduled reunion I received what, tragically, was to be my last e-mail message from Bob. He had a specific question—something about parking, as I recall, gently reminding me that we had failed to communicate all the details to our far-flung colleagues. But he took the occasion to tell me, once again, how much he and Marianne were looking forward to our gathering. In these final stages of our process, such reaffirmation was invaluable, and reminded me of the centrality of Bob's support for our undertaking.

When the evening of our reunion arrived, we began with a moment of silence. We had planned to honor John Niles, a Warren clerk who had died many years earlier. Adding Bob Hudec to the memories of the class of '62 was a most painful experience for us all. We were deeply privileged to have known and worked with him, and recognize a profound gratitude for the wisdom and guidance he shared with us. The 1962 Term was greatly the better for his presence among us.