Oral History of
DAVID B. ISBELL
FOURTH SESSION - SEPTEMBER 4, 2008

Sinclair: This is the fourth session of David Isbell's oral history. We are beginning today with the discussion of Mr. Isbell's time on the Civil Rights Commission. So, let's get some background. What is or was the Civil Rights Commission? Tell us a little bit about that.

Isbell: The United States Commission on Civil Rights was created by the Civil Rights Act of 1957 as a bipartisan agency to study civil rights problems and to report on them to the President and Congress. Originally created for a two-year term, it issued its first comprehensive report in a single volume in September 1959. A week after that report was issued, Congress renewed the Commission's life for another two years, at the end of which the Commission issued a five-volume report on the status of civil rights in the United States. That two-year period was the one during which I was on the staff of the Commission, and I had a major hand in the resulting report. The Commission's life was subsequently extended for several further two-year terms and the Commission eventually was, I believe, turned into a permanent agency; at any rate, it is still in existence.

The Commission was not a law-enforcement agency; its functions were purely investigative. It conducted fact-finding, it reported its findings, and it made recommendations for remedying the problems that it identified.

Sinclair: How did you get involved in the Commission's work?

Isbell: Sometime in the fall of 1959, not long after the Commission had been reauthorized for a second two-year term, I was asked if I'd be interested in doing a pilot study for the Commission. The Commission had undertaken to study race discrimination in the fields of voting, education, and housing and the purpose of the pilot study was to determine whether

there was sufficient indication of race discrimination in the field of administration of justice to warrant the Commission's taking on that subject as a fourth major area of investigation. It was estimated that the pilot study could be satisfactorily completed in a period of either six weeks or three months—I simply don't remember which of those it was—but whichever it was, that was the period for which I was hired.

Sinclair: How did it happen that you were invited to do that pilot study?

Isbell: Well, the person who extended that invitation to me was Berl Bernhard, whom I'd known in law school, where he was two years ahead of me. Berl was at the time the Deputy Director of the Commission, and by the time the 1961 report was issued, he had become the director.

Sinclair: Did he seek you out, or was it you who initiated the contact?

Isbell: Berl was the initiator. I wasn't looking for a new *pro bono* project, though I was receptive to the idea of doing this pilot study because I was interested in civil rights as well as civil liberties. Moreover, the fact that it was a discrete project, limited in time and scope, seemed to me more likely to make it acceptable to the firm. I'd only been at Covington for two and a half years, and I didn't want so soon to request leave of absence for any longer-term *pro bono* commitment.

Sinclair: What was the firm's attitude about your taking on that project?

Isbell: It was very supportive. They gave me a leave of absence for whatever the period was—without pay, of course, since I'd be paid for the pilot study.

Sinclair: How did you set about conducting the pilot study?

Isbell: I don't remember much about that, beyond the fact that I reviewed pertinent statutes and case law and I interviewed a number of people who were likely to have information

and insights on the subject, including Thurgood Marshall, then Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (generally referred to as the Inc. Fund);[11] Roy Wilkins, who headed the NAACP; and Patrick Malin Murphy, at that time the director of the National ACLU. I presume I would have talked to academic types as well.

Sinclair: Did the study have a particular geographical focus?

Isbell: No, its focus wasn't limited to any particular state or region, although the Southern states with a history of legally enforced segregation understandably may have gotten more attention than others.

Sinclair: So, what was the result of the pilot study, and what did you do when it was completed?

Isbell: Well, as I'm sure you'll have guessed, the pilot study, which was completed on schedule, made clear that race discrimination in the administration of justice was definitely a problem in at least some locations, and that the subject deserved to be included in the Commission's studies.

Before that pilot study was completed, though, there was a more dramatic development affecting my status at the Commission. One of the three assistant directors of the Commission

[11] As the name suggests, the Inc. Fund was created by the long-established NAACP (the National Association for the Advancement of Colored People) as an organization falling under §501(c)(3) of the Internal Revenue Code (IRC), meaning that charitable contributions to it were tax-deductible to the donors, unlike the NAACP itself, which was ineligible for such treatment because it devoted a substantial part of its resources to legislative lobbying, and therefore came under § 501(c)(4) of the IRC. It was still itself tax-exempt, but not capable of benefiting from tax-deductibility as well.

The basic idea was that litigation in support of the NAACP's activities would be done by its offspring organization. However, the Inc. Fund was set up with a corporate structure that made it entirely independent of its parent organization. The ACLU and other organizations that copied NAACP in setting up such § 503(c)(3) offspring to conduct their litigation learned from this to make sure that the offspring organization was created in such a corporate form that its activities were fully coordinated with the policies of the parent entity.

resigned, and I was offered the position he had left. Specifically, the division that assistant director supervised was titled Laws, Plans and Research—in effect, the substantive part of the Commission's activities, including the conduct of hearings, legal research, and report-writing. The other Assistant Directors dealt respectively with State Advisory Committees and with supervising a team of investigators. So, when in the fall of 1961 the Commission issued its five-volume report on the status of civil rights in the United States, I was both the author of some of the report's chapters and a principal editor of the whole report.

I hardly hesitated a minute before accepting that offer. Of course my taking on that commitment for a substantially longer period than my contemplated leave of absence from the firm required severance of all my formal connections to the firm. That separation was friendly enough, and it left open the possibility of my rejoining the firm after I'd finished working for the Commission, but there was no assurance that the firm would take me back—or that I would seek to return to the firm, although that was my inclination at that time.

The Commission's assistant directors were at the G-16 level, so the promotion, in addition to giving me much broader substantive responsibility, also involved a substantial rise in pay. As a result, despite the fact that I was in government service, my salary was somewhat above what I would have been earning at the firm at that time. Two years later, however, when I left the Commission and was accepted back at the firm without loss of seniority, associate pay had pulled ahead of level of my government salary, so I happened to have the unusual good fortune of getting a raise in salary both when I moved from private practice to government service and again when I returned to the private sector.

Sinclair: What was your day-to-day role at the Commission, as Assistant Director for Laws, Plans and Research?

Isbell: Well, I supervised 23 lawyers, and prodded or coaxed their work along, as needed; I also edited their work product, and from time to time undertook to draft portions of whatever report they were working on. I also designed a study of something that was called the Black Belt, and wrote the Commission's report on that, and I assisted in the preparation and conduct of hearings—most notably, one in New Orleans, which I'll have more to say about.

Sinclair: What was your most interesting experience while you were at the Commission?

Isbell: My most interesting experience during my two years at the Commission involved the hearing by the Commission in New Orleans that I just referred to, looking into discrimination in registration of voters. I think a principal focus was on Plaquemines Parish (a Parish being Louisiana's equivalent of a county); in any event, what I remember best about it concerned that Parish, which is close to New Orleans. The boss of the Parish was a man named Leander Perez. Have you ever heard of him?

Sinclair: No.

Isbell: Well, Perez was a fairly prominent political figure in Louisiana politics, and particularly in the effort to resist desegregation of the races.[12] He had designed a number of schemes for disqualifying blacks from voting—all intended to present an appearance of perfect propriety although actually serving as means of disqualifying blacks while allowing whites to register. Perez had made it known that he had invented these devices and would share them with any other Parish that was interested in making use of them. Two of Perez's devices were

[12] I had first learned of Leander Perez and his role in massive resistance to civil rights in Louisiana in a *New Yorker* article by A.J. Liebling about Earl Long, who had been a relatively liberal (in a somewhat surreptitious way) governor of Louisiana. Long was also, more famously, the lover of the striptease artist Blaze Starr, as told in the Movie *Blaze*, where he was portrayed by Paul Newman. The Liebling article recounted an incident in which Long had said to Perez, "What are you going to do, Leander? The Feds have got the A-Bomb."

employed in Plaquemines Parish, and the portion of the Commission hearing in New Orleans in which I had a particular interest and role involved exposing those two devices.

One of those devices was a 5x7 inch registration card, with questions to be answered on both sides of the card, a number of them susceptible to quibbling about the answer. One in particular that stood out as a potential trap required that the applicant state his or her age in years, months, and days. More prominently, there were also a number of questions clearly intended to embarrass, and possibly disqualify, registrants, addressing, among other things, criminal record, living in "common law marriage" with another person within the five previous years, and giving birth to or fathering an illegitimate child.

There was a Registrar of Voters in Plaquemines Parish whose name was Mary Ethel Fox, who administered the process of registering, obviously under Perez's close supervision. She had been subpoenaed to testify at the hearing, and she was to be the first witness at the hearing. Robert Storey, the Commission's Vice-Chairman, presided over the hearing in place of Chairman John Hannah, presumably because he was a lawyer and Hannah was not, and perhaps also because he was a Southerner. He was also the head of the Southwestern Legal Center and a former Dean of Southern Methodist University Law School. Storey asked Fox a few preliminary questions, and allowed her to read into the record a prepared statement (obviously written by Perez), and then he turned the proceedings over to me. I conducted the questioning in a low-key, non-adversarial manner, occasionally interrupted by objections from Perez.

I had had that elaborate registration card blown up onto a poster board about 3x5 feet in size, the two sides reflecting exactly the two sides of the card, and I had mounted that on an easel, with a sheet of clear plastic over it, on which I could write Ms. Fox's answer to each question on the application form as I read them to her, as if she was an applicant for registration

as a voter. I had Ms. Fox authenticate the exhibit as a true and correct copy of the registration form, asked a number of questions about what was expected as a correct answer to each question and the pertinent margin of error, and then asked her to give me her own answer to each question on the form as if she was herself registering. As she answered, I wrote her responses in the appropriate spot on the plastic sheet. The key question in this examination turned out to be, as I had hoped, the item requiring the applicant to state his or her exact age in years, months, and days. I first asked Fox whether that calculation required including or excluding the current day, and how much of a discrepancy it took to be disqualifying. Her reply was two days. I then asked her what her age was in years, months, and days, and after recording her answer in the appropriate spots on the blown-up form, went on to the remaining questions on the application, without taking the time to see whether the trap I had laid had caught her. I did notice with pleasure, though, that some of the Commissioners were making that calculation. I then had Miss Fox provide a brief description of the other of Perez's disqualifying devices that she applied to applicants in the registration process, which I will describe in a moment.

Shortly after I'd completed the questioning of Miss Fox on both of Perez's disqualification devices, Berl Bernhard said, "Miss Fox, I believe you've made an error in the calculation of your age." It turned out she had indeed erred, and not by one or two days but by almost a month. She had said her age was 37 years, 8 months, and 2 days, whereas it was actually 37 years, 7 months, and 6 or 7 days (depending on whether the current day was counted). So she had flunked her own exam pretty badly. Her erroneous calculation was doubtless due, at least in part, to nervousness from being on the witness stand and to the focus of so much presumably hostile attention; but the typical black would-be voter trying to register to vote in Plaquemines Parish would likely have been at least equally nervous, albeit for somewhat different reasons.

When this dramatic exchange occurred, Perez, who was sitting as near her as he could get without being on the level of the witness's seat, took up a pencil and paper, made the calculation himself, and threw up the paper and pencil and stalked out of the hearing room, muttering about, among other things, "a bunch of Commies."

We had a grizzled veteran of the Department of Justice's Civil Rights Division with us to protect us in case we got sued in a Louisiana court. He told me, after the testimony of Ms. Fox, "Dave, you can practice law for another 50 years, and you'll never have that happen again." His prediction has certainly proven to be the case.

Incidentally, those hearings were recorded by a local TV station, and I had visions of my examination of Ms. Fox appearing on national television that evening. Unfortunately, however, that day happened to be the one on which Alan Shepard became the first American in space, and that just pushed news of the hearing in Louisiana off the TV screens. Some twenty years later, I had the thought that maybe the TV station's film of the hearing was archived somewhere and that I might get a copy of it. I spent a while, ultimately futilely, trying to track down that possibility. I found out where the TV station had sent its old tapes—one of the universities in New Orleans. I called there and talked to the librarian, who said that yes, they had all the station's tapes, but they had never been catalogued, so there was no way they could identify the one I wanted without wading through the collection, and they were not about to do that. So I never did get that tape.

Sinclair: What was the other device of Perez's that was employed in preventing blacks from registering to vote?

Isbell: That was an arrangement under which each applicant would have to demonstrate his or her understanding of fundamental law by providing a correct interpretation of two out of three provisions of either the Louisiana or the Federal Constitution, printed out on a card the size

of a playing card. There were 25 cards, each of which had on its face three such provisions; these would be spread out, face down, before the applicant, who would choose a card, sight unseen, and attempt to provide explanations of two of the three constitutional provisions shown on that card. Perez had provided the Registrar with what he considered the correct explanation of each of the constitutional provisions on the cards.

Perez was quite proud of his invention, and had seen to it that his Registrar kept meticulous records of how his system operated; and as it turned out, he had thereby laid his own trap. The records that the Registrar kept regarding this knowledge-of-the-law device showed which card was chosen by each would-be registrant, in addition to the name and race of the applicant. We had sent two of the Commission's staff lawyers to examine those meticulously kept records in the Registrar's office to see if there was a race-related pattern to the card selections. The study those lawyers conducted was done under the watchful eye of Perez himself, who jollied them up and presumably sought to distract them with offers of she-crab soup and the like.

The staff lawyers' study of the records showed a very clear racial pattern, and an unmistakably wrongful one. They had examined the test cards of 2,384 applicants, together with the race of the applicant who had picked each card and whether the applicant had succeeded or failed to interpret two of the constitutional provisions on that card. This study disclosed that the cards chosen by black applicants manifested a normal random distribution in their selections of cards; on the other hand, 86% of the white applicants had somehow chosen one or the other of two cards, numbers 2 and 8, both of which—surprise, surprise!—just happened to share two of the same constitutional provisions, one dealing with freedom of speech and the other with freedom of religion. It was self-evident that most if not all of the white applicants had been

somehow pointed to one of those two cards. Fifty-nine black applicants had taken the constitutional card test. Two had passed and been registered; the rest had flunked and been rejected. Only two of the fifty-seven rejected black applicants had received either of those two cards so overwhelmingly chosen by the whites.

Sinclair: What brought about the New Orleans hearings?

Isbell: I think that hearing had been probably scheduled and roughly blocked out before I took office as an Assistant Director. The Commission had a lot of investigators. Although it took no effort to turn up the fact that Louisiana was one of the States where there was organized resistance to desegregation and to allowing blacks to vote, it did take some investigation to turn up witnesses and information that would deserve exploration at a public hearing.

Sinclair: Were these like Congressional hearings?

Isbell: They were much like Congressional hearings. The Commission had subpoena power, and of course that was exercised in the Louisiana hearings. Testimony was taken under oath, and was recorded by a court reporter. The proceedings also had the look of a Congressional hearing: you had the five Commissioners on a dais. Staff lawyers would call witnesses, conduct questioning, sometimes provide testimony as to what they had found, as in the case of the constitutional law test for voting in Plaquemines Parish, as I've recounted, and so forth. A transcript of the whole proceeding was published by the Government Printing Office and submitted to Congress and the President along with our reports. The Commission was an independent agency, however, not part of either the Executive or the Legislative branch. And it had no law enforcement responsibilities or authority.

Sinclair: What was the feel when you were in New Orleans at the hearings. Other than Perez's calling you a Communist, was there a tension in the atmosphere that you could feel?

Isbell: In New Orleans itself, we didn't feel any tension. I'm pretty sure New Orleans hadn't adopted any of Perez's mischievous devices; I think the phenomenon of organized resistance was found elsewhere in the state, and in rural areas in particular. I remember interviewing some of the blacks who were going to testify at the hearing, all of whom came from Parishes other than New Orleans, where the atmosphere was very oppressive for blacks. I felt that it took them some courage to go public in this way.

Sinclair: You've said you were involved in something called the Black Belt study. What was that?

Isbell: The title of that study, which constituted a separate part of the volume of the 1961 report dealing with the right to vote, was *Civil Rights in Black Belt Counties*. It was a systematic survey of the status of civil rights in a swath of 153 counties in Southern States in which the 1950 census had shown that a majority of the population were black, but in which the Commission's first Report, in 1959, had found that the proportions of blacks registered to vote were generally even smaller than was the case in counties where the racial balance tipped to the whites. The introduction to that part of the 1961 report described this group of counties as follows:

> Extending from Tidewater Virginia down the coast of the Carolinas, and westward across Central Georgia and Alabama to the Mississippi Delta, the Black Belt stretches up through Mississippi and Louisiana into Tennessee and Arkansas. It also touches Florida and Texas.

The term Back Belt could be understood as referring to the black majority populations involved, but I think it was used mainly to refer to the nature of the soil—a black loam, especially welcoming to cotton as an agricultural crop, and cotton proved in the study to be a major fact in the socio-economic dynamic of the counties under study.

The study showed that in a few of the black-majority counties, a substantial portion of the blacks were registered to vote; in a much larger number of those counties, however, fewer than three percent were registered. The study undertook an in-depth examination of seventeen of the "non-voting" counties and four of the "voting" ones, considering economic and other statistical factors, anecdotal information regarding attitudes among both the white and the black segments of the population, the particular histories of the individual counties studied, and the general state of civil rights in other areas in both sets of counties studied. The purpose of the study was to discern what factors, aside from sheer numerical predominance in a county's population, determined whether the majority racial group in a county had effective access to the ballot.

The Commission concluded that in the Black Belt counties, "[t]he facts of economic life have a significant bearing on civil rights generally, and the right to vote in particular." The dominant fact was that almost all of the non-voting counties continued in the economic pattern of the plantation days, with one-crop agricultural economies, and the black populations, while no longer slaves, nonetheless remaining in an economically dependent position, as tenants or sharecroppers, or farmers of small farms, whereas in three of the four "voting" counties, the economies were diversified, and the blacks were not in the same dependent position. As the Report put it, "where the Negroes do not vote, they are for the most part subservient to crop, land and landlord."

The black residents of the "non-voting" counties, the Report found, feared retaliation in the event that they attempted to vote; their economic dependence made them vulnerable to reprisals not rising to the level of violence. Another factor was indifference, or "apathy," which the Report attributed principally to the overall history of the treatment of blacks in the South.

A surprising finding of the Report was that there was only a slight difference between the "voting" and the "non-voting" counties with respect to such other civil rights-sensitive areas as quality of education, housing, access to publicly supported libraries and public accommodations, and participation in the administration of justice. The one area in which the Report found a significant correlation between blacks' access to the right to vote and their exercise of broader rights was in the area of participation in the political process generally—that is, having white candidates solicit the votes of blacks, and blacks run for, and sometimes attain, public office.

The foregoing summary does scant justice to this particular part of the Commission's 1961 Report, but it is the part I am proudest of, for while the idea of a study of this kind had been suggested by the Commission's 1959 Report, it fell to me to implement that recommendation, and I had principal responsibility for its design, its implementation, and the writing of the resulting report. So I took particular pleasure in *The New Republic*'s calling the Black Belt study, in that magazine's review of the 1961 Report as a whole, "brilliant."

Sinclair: Did the Department of Justice follow-up on the 1959 and 1961 Reports?

Isbell: That's a good question. I don't know whether there was any specific follow-up by the Department of Justice on either the Commission's hearings or its reports. I am sure that the Department of Justice did not allow the discriminatory voter registration practices in Plaquemines Parish and other Louisiana parishes to continue, but how and when that was accomplished I don't know.

Sinclair: You also participated in the preparation of a report on the civil rights of American Indians?

Isbell: Yes, there was an occasion when the Commission was holding a hearing in California about discrimination in schools and workplaces, and one of the witnesses turned out

to be an American Indian—Native American, as political correctness has it now—who lived on a reservation fairly nearby and had a complaint about discriminatory treatment he'd received on some matter off the reservation. Anyhow, he complained about the same sorts of discrimination as black witnesses were complaining about. The Commissioners, after hearing him, agreed that they should pay some attention to civil rights problems of American Indians, rather than focusing exclusively on discrimination against blacks. So they authorized a pilot study somewhat similar to the pilot study I'd done on the administration of justice.

I supervised, and presumably edited, though I did not conduct or write, that American Indian pilot study. The lawyer who researched and wrote that study, and whom we had hired specifically for that purpose, knew nothing at the outset about Indian rights; I don't think any of us did. But he looked into the field and soon realized that it's a whole different subject from the customary one of discrimination on the basis of race, religion, or national origin. It has to do with Indian rights to land—tribal rights, resulting from treaties between tribes and the United States, generally when Indians were uprooted from their traditional homelands and moved to newly formed reservations—and including rights of self-government within the reservation. It was a good thing that the pilot study was conducted because if we'd just gone into the subject blindly we really would have had our hands full with a whole new and quite different area. So when the report on that pilot study was completed, it provided a summary of the kinds of problems that the Native Americans deal with by reason of their identity as a separate part of the fifth and final volume of the Commission's 1961 Report.

That report on the pilot study is quite a good summary of the history of the relationship of American Indians to the successive waves of white invaders of their historic tribal territories, starting with the French and the English and then with what had become the Americans; their

ever-evolving legal status; and their many resulting problems. The complexity of all this is aptly summarized in the following passage from that report:

> In the course of time there have accumulated 389 treaties, more than 5,000 statutes, some 2,000 federal court decisions, a raft of Attorney General opinions, numerous administrative rulings, 141 tribal constitutions, 112 tribal charters, a gigantic set of regulations, and an encyclopedic manual—all especially applicable to Indians, all bearing witness to their complex and unique legal character.
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> An Indian is three things: a tribal member, with cultural, social, economic, religious, and political ties to tribal life; a "ward" of the Federal Government; and a citizen with most of the same rights and privileges possessed by other citizens. His tripartite status has been recognized, but not clarified, by the courts.

Sinclair: Who were some of the memorable personalities from the Civil Rights Commission?

Isbell: The most memorable for me was Father Theodore Hesburgh, a Catholic Priest and a longtime President of Notre Dame. Father Hesburgh was during his long career involved in all sorts of public good works, serving as a member of a great variety of commissions, including the six-member Civil Rights Commission. He was a marvelous man. He was also very informal in his dealings with staff, asking us to address him as Father Ted.

Another memorable Commissioner was the Chair, John Hannah, who was the President of Michigan State University and later the director of the U.S. foreign aid program. A very forceful figure, clearly the sort of man who inspired the feeling that he could run an organization of just about any size, without having to raise his voice or pound any tables.

A third member of the Commission when I joined the staff was named George Johnson, then the Dean of Howard University Law School. He was succeeded both as Dean and as a Commission member by Spottswood Robinson, who was subsequently a judge and then Chief Judge of the U.S. Court of Appeals for the D.C. Circuit. He seemed a somewhat shy man, a little uncomfortable with social intercourse, but determined to overcome it nonetheless. He

encouraged people, including Commission staff lawyers, to address him as "Spotts," which always struck me as a somewhat absurd nickname, but he was a good man and a good and extremely careful lawyer and judge.

The Vice-Chairman, as I've mentioned, was Robert G. Storey, a former Dean of Southern Methodist University Law School, who struck me as the most dependably conservative member of the Commission, and with whom I most often found myself in disagreement. I don't doubt he had something of a reciprocal distaste for me.

There were several other distinguished Southerners who served brief stints as Commissioners during my time on the staff, but I have no particular recollections of any of them.

A Commissioner who replaced one of them, served throughout my remaining time at the Commission, and made a considerable impression on me as well as on the Commission generally was Erwin Griswold, at that time the longstanding Dean of Harvard Law School (and subsequently appointed as Solicitor General in the Justice Department). I found Dean Griswold to be quite a breath of fresh air. He said exactly what he thought of things, without hesitation or doubt; the other Commissioners—with the exception of Father Ted—tended to be more cautious in the way they expressed their views.

There's a wonderful anecdote involving Griswold that concerned an event that occurred shortly after I left the Commission. The Commission—which is to say, one of the Commissioners—would be summoned to a Congressional Committee from time to time to report on what the Commission was doing, and one of the Senators who had to be dealt with was the then-Chairman of the Senate Judiciary Committee, Sam Ervin (who later became widely known on television in connection with the investigation of the Watergate scandal).

Sinclair: Senator from North Carolina?

Isbell: Yes, and Senator Ervin was quite a showman. He had a way of sending a clerk off to get some volume of law like *Corpus Juris Secundum* and he'd read a sentence from that and add a sentence from something else and wind up articulating a legal proposition of some kind, and he'd ask the witness, "What do you think of that?" This true story goes that he did that once when Griswold was testifying and Griswold answered his question by saying, "C plus."

I later got to know Griswold in a quite different connection, as a fellow delegate to the ABA House of Delegates. One day when we were sharing a meal at an ABA meeting, I asked him about the Ervin story, and he said that it was true. He also explained that Ervin had been a student of his at Harvard Law School.

Sinclair: Let's discuss what happened at the end of your two-year period at the Commission.

Isbell: Although I had greatly enjoyed my time at the Commission, I had to decide at that point whether to stay on in government or go back to practice, most likely to Covington, if the firm would have me back.

Sinclair: This was during the Kennedy Administration?

Isbell: Yes, it was in the first year of the Kennedy Administration. The opportunities for someone interested in doing something for their country, as suggested in Kennedy's inauguration address, really were glorious. There were all sorts.

Sinclair: What were the opportunities?

Isbell: Well, if I had stayed on with the Commission, which I could easily have done, I would probably have succeeded Bernhard as Staff Director. If I hadn't stayed at the Commission, and even if I had stayed at the Commission for another two years, there would

have been other opportunities to go on to. A number of my friends spent time at the headquarters of the Peace Corps. And after Johnson succeeded Kennedy as President, there were the Civil Rights Act of 1964 and the Civil Rights Act of 1965, and the War on Poverty. Those years were a very heady time to be in government.

So the completion of the Civil Rights Commission's 1961 Report left me at a decision point, and if I was going to go back into practice and develop a position from which I might go back and forth between government and the private sector, the best possibility for doing that would be to go back to Covington at that point, for when I talked to my contacts at the firm, they told me I could probably come back without loss of seniority, but not if I stayed in government any longer. So I really had to fish or cut bait about rejoining Covington.

Sinclair: You had maintained relationships with people there?

Isbell: Yes, but mainly just socially; I had kept no continuing formal connection with the firm. I knew that if I stayed away longer than two years I would not be welcomed back, at least without loss of seniority. Moreover, I was later told that there had been some partners who were opposed to taking me back at all, just on the general basis that I had shown a certain disloyalty by leaving in the first place. Anyhow, I had to choose what to do and I decided the thing to do was take the long view, and in that perspective it seemed more sensible to go back into private practice—to get a base to which I could return if I chose later to go back into government for a while.

Sinclair: Did you have to broach that with the firm or was there an assumption on their part that you would return?

Isbell: I was very much in a position of asking, not of considering an outstanding offer to rejoin Covington. Maybe some partners had such an assumption, but I'm pretty sure it was not generally held.

Sinclair: Did you wind up pleased with the decision to go back to Covington rather than staying in government?

Isbell: Well, I've been very happy with my career at Covington, which has been varied, interesting and fulfilling, though one of the expectations that had been a factor in my decision to go back to the firm when I did was that there would be opportunities later on in my career to go back into government service for a few years, and that expectation was not fulfilled, because of a turn of events that I hadn't anticipated, although I clearly should have—namely, a change in the political character of the Administration. I did eventually get to the anticipated point in my career where I had a base in practice that I might leave for a couple of years in government and then return to, but by then the political climate had changed. The Republicans were back in power and, of course, they stayed there for quite a while. There was no chance of my getting a job at a level of responsibility comparable to the one that I had had in the Commission, let alone something at a higher level. There would be a political aspect in the choice of people to appoint to positions at that level in the government.

Sinclair: The Democrats of course eventually regained the White House, in 1976. Did you consider then a return to government service?

Isbell: I did, very briefly. By that point in my life, however, family obligations made it necessary for me to remain in the private sector.

Sinclair: So what was it like coming back to the firm? Did it feel like going home?

Isbell: I must confess that it was a bit like a cold shower—not because I didn't feel welcomed, or comfortable, or that I didn't enjoy the practice of law; in fact, I have enjoyed almost everything I've done in practice—but that the substance of what I was doing in practice didn't provide the same sense of advancing the public interest as I'd felt at the Commission; nor did it afford the level of responsibility that I had shouldered at the Commission. As I've mentioned, when I was an Assistant Director at the Commission, I'd been in charge of 23 lawyers—significantly more than I've supervised at any time since. On both of these counts, coming back to the firm as a mere mid-level associate was necessarily something of a comedown. I did, however, manage to engage in a fair number of outside activities while also practicing law, including work with the ACLU, which did provide an opportunity to work in the public interest.

Sinclair: Let's talk next about the period from when you came back to the firm until you made partner. You mentioned the ACLU. When did you first become involved with the ACLU?

Isbell: Actually, I'd done a little bit of *pro bono* work for the National ACLU before I went to the Commission. There was a representative of the ACLU in Washington and I got in touch with him and did some small things. It was after I got back to the firm, though, that an official ACLU affiliate was established here in D.C., and Charlie Horsky, a major figure at Covington, became the first Chair of the affiliate's Board. When that affiliate came into being, I started taking on some of the affiliate's cases as a volunteer attorney.

Before long, a splendid lawyer and civic activist named David Carliner, who succeeded Horsky as Chair of the affiliate, asked me to take on the task of screening cases—that is, evaluating possible cases to see whether they seemed worthwhile for presentation to the board for a decision as to whether the affiliate should take them on—and in addition, when the board

approved a case, finding a volunteer lawyer to handle it. In effect I was a part-time legal director. While I was in that position, my name would appear on all the briefs the volunteer lawyers filed—not because I had necessarily had a significant role in writing the briefs (and I generally didn't), but simply to provide a way to get the ACLU's name onto the court papers. So the volunteer lawyers' briefs would show me as David B. Isbell, of counsel, and under that, ACLU of the National Capital Area, and then its address.

An amusing consequence of the way my name appeared as of counsel on all the ACLU affiliate's briefs was that when I first met Judge David Bazelon, then the Chief Judge of the D.C. Circuit, he recognized my name because it had appeared on so many ACLU briefs on cases that got to his court, and he commented he didn't understand how I could manage to spend all that time on the affiliate's cases while I was also practicing law for the firm. Unfortunately, I had to deflate his assessment of me by explaining that I didn't generally have much to do with the briefs beyond finding volunteer lawyers to write them; that my name appeared on the briefs as of counsel, followed by the name and address of the affiliate, solely for the purpose of indicating that it was an ACLU case.

Anyhow, since I appeared before the affiliate board frequently in the role of screener of cases, I soon got elected to the board and I served on it for 27 years. During my time on the affiliate Board, I was almost always a member of the Executive Committee and the Nominating Committee, and I served a term as Chair and several as treasurer. There ultimately came a time, though, when I was starting to feel that I was something of a dead hand of the past, looming over the discussions of the Board, with my opinions given undue weight simply because of my seniority. I felt it was not healthy for the board to have me dominating it and perhaps inhibiting the development of other leadership, so I resigned from the Board—or, more precisely, declined

to run again for reelection. The only connections I retained with the affiliate were as a significant financial donor (with my wife, Florence) and so a member of the "President's Committee;" as a faithful attendee (also with Florence) of the affiliate's annual dinners (now lunches); and, until early 2009, as a member of the Litigation Screening Committee, which meets more or less monthly to consider possible new cases to recommend to the affiliate board. I'd been on that committee ever since it was established, around 1965, except for the two years I served as affiliate Chair. My withdrawal from the Screening Committee, as you will have guessed, was one more withdrawal prompted by my ever-diminishing hearing acuity.

Sinclair: Did your ACLU activities involve the national organization as well as the affiliate?

Isbell: Yes. Each affiliate was allowed to appoint one member of the National Board of Directors. In 1964, I was chosen by the affiliate's board to be the affiliate's representative on the Board of Directors of the National ACLU. I continued for a few years as the affiliate's representative on the national board, but then decided to run for re-election to that board as an at-large member.

Sinclair: How large a body was that board?

Isbell: There were (and are) two categories of members: some 30 at-large members and, in my time, roughly 40 representatives of affiliates—the latter number being one that grows as new affiliates are established. The affiliate representatives, of course, are chosen by their affiliate boards; the at-large members are chosen by an electorate consisting of both the incumbent at-large board members and the board members of all the affiliates. I won that first at-large election and thereafter I continued to run for and win re-election each time my three-year term was about to expire. I remained an at-large board member until 1992, when I decided

it was time for me to step down. As with the affiliate board, I didn't resign, but simply chose not to run again, for several reasons. One was that Norman Dorsen, who had been a wonderfully effective President of the ACLU for most of my time on the board, was stepping down, and I had worked closely with him. Another was that it was becoming increasingly unlikely that I could get re-elected as an at-large member of the board, not because of any failing on my part, but because the ACLU had adopted a number of affirmative action policies, generally accompanied by quotas, and I do mean quotas. Being a lawyer was a negative, as were being white, being male, and being straight, so I'm not sure that I could have gotten re-elected one more time. Since then, most of the other old-timers like me who hung on eventually got shed in the same way as would probably have happened to me.

Sinclair: What are or were the Biennial Conferences? Were they an activity of the ACLU?

Isbell: Yes. As the name indicates, there would be a large gathering every two years, generally over a long weekend, in some location other than New York City, where the national headquarters were, which would include the members of the national board but also representatives from the affiliates. It was the closest thing the National ACLU had to a grass roots gathering of its members. The main utility of the conferences, in my view, was the workshops, in which accomplished staff members of both the national organization and the affiliates could teach new staff and affiliate board members the nuts and bolts of how to run an affiliate. There would be a big dinner with some distinguished speaker, and sometimes distinguished speakers at other points in the conference. There would also be papers and discussion sessions on new issues that might be of concern to the ACLU, and the most interesting events were plenary meetings, where there would be debates about proposed new

ACLU policies, which would require approval of the national board before they were put into effect.

I have two principal memories of those conferences. One of them is of the two distinguished speakers, each an icon of sorts, with a long record of involvement with civil liberties, who spoke at a sort of welcoming event for the first Biennial Conference I attended after I got elected to the national board. That one was in 1966. The first speaker was Norman Thomas. Do you know who he was?

Sinclair: No.

Isbell: Well, he was, for many years, a leader of the Socialist Party of America, which was not socialist in the Marxist sense but in fact anti-Communist. Starting in 1928, Thomas ran six times for President as the Party's candidate. The Socialist Party was not very radical, though it was surely well left of center. I have read at some point that every provision of the Republican Party's Platform in 1940 had been included in the Platform of the Socialist Party twenty years before. Thomas had also been among the founders of the National Civil Liberties Bureau, a precursor of the ACLU. My mother told me that she had voted for him once, although in general, both of my parents were pretty reliably Republican.

At the time Thomas spoke at this Biennial Conference, he was 82, and was totally blind, so he had to be guided to the lectern. He was a tall man, quite handsome, and a very impressive speaker. He had a wonderful voice, really a voice like a trumpet that could carry to a large crowd without the need for amplification. He spoke, of course, without notes, and he didn't need them. He was a very eloquent speaker. I found him quite inspiring.

At the same conference, another speaker who had an even more intimate history with the ACLU was Roger Baldwin, the founder and the first director of the ACLU. Baldwin was 80 at

that time; although Thomas died two year later, Baldwin lived to be 97. For a long time after the founding of he ACLU, he dominated it, but sometime before my first exposure to him, at the 1966 Biennial Conference, the board of distinguished directors that he recruited exercised the power of a corporate board to replace him as Executive Director. The board members hoped to change the direction of the organization, to orient it more toward increasing membership and the establishment of semi-autonomous affiliates. Despite the mutiny by the board, Baldwin was still around and following closely the progress of the organization he'd created for a good many years after that, and over time I became quite friendly with him. Anyhow, at that same biennial conference, Roger Baldwin spoke right after Norman Thomas, and he was another speaker from another age. He wasn't blind, but he had no notes, and he never *needed* any notes. He spoke very eloquently and he also had a wonderful voice, much like Thomas's, that didn't need amplification when he was addressing a large audience.

Sinclair: What is the other memory of those Biennial Conferences that you mentioned?

Isbell: It was a debate about what position the ACLU should take about the draft. Should the country's armed forces, when they are involved in a war—this being at the time of the Vietnam War—consist solely of volunteers, or should they also be raised by conscription? The lead speakers in that debate were a lawyer and national board member named Marvin Karpatkin, against the draft on general civil liberties grounds, and me, supporting it, also on civil liberties grounds. Marvin's argument was that conscription involved a serious deprivation of rights on the part of those drafted, and in consequence the ACLU ought to oppose it in all cases. My argument was that military service involves the same core deprivations of liberty, once the servicemen were enrolled, whether they were volunteers or conscripts; they are in either case subjected to an involuntary servitude that would be prohibited by the Thirteenth Amendment if it

were not understood to have no application to members of the armed forces. The key civil liberties issue, I argued, is how this burden should be spread among the young men who are suitable for armed combat when the country is at war and someone has to make the sacrifice of personal liberty and possibly life or health, in order to defend the country. That burden, I argued, should be shared at every level of society, and not fall disproportionately upon those who are economically vulnerable and therefore likely to have chosen military service as a livelihood. In addition, I argued that, as the resistance to the Vietnam War was demonstrating, making the middle class share the burden, and not merely the poor, provides something of an assurance that the country will not engage in wars that are not supported by the American citizenry at large.

I lost that argument, quite resoundingly. I did get some comfort from the fact that Senator Ted Kennedy was taking the same position at that time.

Sinclair: While we're discussing your connections with the ACLU, I'd like to turn to Pat Harris. Who was or is Pat Harris?

Isbell: Patricia Roberts Harris was an active member of the Democratic National Committee and a good friend of ours. She was an African-American woman, the daughter of a waiter on a railroad dining car. She was bright and very handsome, with a sharp mind and a great deal of charisma. President Johnson appointed her as Ambassador to Luxembourg, and President Carter later appointed her as Secretary of the Department of Housing and Urban Development, making her the first African-American woman to hold a cabinet position. After two years in that position, she was appointed, again by Carter, as Secretary of what was then the Department of Health, Education and Welfare (a department whose name was changed during her tenure to Health and Human Welfare, because Education had become a separate, cabinet-

level federal agency). Pat was also, at various times, the Dean of Howard Law School, a professor at the George Washington National Law Center and, in 1982, a candidate (unfortunately unsuccessful) for Mayor of the District of Columbia. She was also, before any of these roles, on the board of the local ACLU affiliate, and it was there that Florence and I came to know her. Florence and I became quite good friends with Pat and her husband, Bill Harris.

Each ACLU affiliate was entitled to appoint a representative to sit on the national board, and the National Capital Area affiliate chose her as the affiliate's first such representative. When she was appointed to be Ambassador to Luxembourg, however, she had to withdraw from both the affiliate board and the national one, and I was elected as her replacement in the latter capacity.

The reason Pat's name occurs in my notes and so occasions your question is that there was an amusing incident involving Pat and me during the time she was Secretary of HUD. This occurred in late summer, a time when a lot of the lawyers in the firm were likely to be on vacation. One of the firm's clients, a trade association having something to do with real estate, was seeking a regulation or a ruling of some kind from HUD, and representatives of the client had arranged to meet with the Secretary to discuss the matter. The client wanted someone from the firm to accompany its delegation to the meeting—not to rattle any swords but as a sort of symbolic presence, suggesting an implicit threat that, if HUD didn't shape up, there would be litigation, and Covington would be handling it. The Covington representative was not expected to say or do anything, just be present and identified as a Covington lawyer and, presumably, to look stern and capable. I happened to be back from my summer vacation and available and willing to go along with the group. The client delegation not only didn't expect me to do anything, they didn't even bother to explain to me in any detail just what they were seeking to

accomplish. They just were happy to have a warm-bodied, presumably capable lawyer with them. So along I went, in this very passive capacity. We were ushered into a very large conference room in the new HUD building on Constitution Avenue, and after a short wait, Pat swept in with her retinue in an almost royal way—a handsome woman, as I've mentioned, exquisitely well dressed, and overflowing with charisma. She was introduced all around, one by one, to each of the members of the delegation. When she came to me, at the end of the line she looked up, and cried "David!" and flung herself into my arms saying, "How are you? How is Florence?" Our clients there, I'm sure, were deeply impressed by what a well-connected young man they had with them.

That was for me, surely a moment to prize.

Sinclair: Did you do any work for her, or it was just a—just a connection?

Isbell: No. We were just friends. There was a time, when she was running for mayor, that she called me to ask if I had any suggestions to offer regarding the conduct of her campaign, but I wasn't following the election closely enough to have any useful thoughts on that subject. I may have contributed some money to her campaign, but I have no recollection one way or the other about that.

Pat did not get elected as mayor, which I think was a shame, because she surely would have been a good one. Not long after losing that election, she developed cancer and died of it in 1985, at the much too young age of 61. That was, I think, a sad loss to her friends but also to our larger polity.

Sinclair: What impact, if any, did your membership with the ACLU have on your career at Covington?

Isbell: I don't think it had any impact on the career; that is, it didn't advance me, and I don't think it retarded my progress in the firm. On the other hand, my presence on the board of the affiliate and the presence of some other firm lawyers on that board (one of whom, John Vanderstar, also served a term as Chair of the affiliate board) tended to give the firm as a whole a connection with the ACLU that resulted in our becoming a favorite resource for the affiliate, and then later the National ACLU, for finding volunteer lawyers. So that was something of an indirect effect of my being on the boards of the ACLU entities. I might note that the affiliate's Litigation Screening Committee has long held all its monthly meetings in one of the firm's conference rooms.

There was just one occasion that I recall when the national board had to decide a matter of ACLU policy that was of great interest to clients of the firm who were involved in the radio and television business. By that time, I'd developed a fairly influential voice on that board, and might have pushed the board in a direction favorable to the firm's clients, but of course I simply declined to participate in the discussion of that issue.

Sinclair: Let's turn now to your connection to the University of Virginia. How did you come to teach at UVA's law school?

Isbell: I have mentioned Charlie Horsky, a highly esteemed senior partner in the firm. Horsky managed to have a regular paying practice but also to engage in all kinds of public service activities. In 1956, the University of Virginia invited him to teach, as an adjunct professor, a seminar on civil rights. He agreed, but since he also had a number of other extracurricular commitments (and was in a position to dictate his own terms of the arrangement), he said he'd do it provided he wouldn't have to require either papers or an exam from the students; he'd grade solely on class participation. That's an unusual thing in law schools—it

was at that time and probably is even more so now. The Law School agreed, however, and the seminar was born.

In 1962, Charlie was asked to go to the White House as Presidential Advisor for National Capital Area Affairs. In taking up his new position, he dropped all of his outside activities, which included being Chair of the recently-established ACLU affiliate; Chair of the National Bankruptcy Conference; President of the Washington Planning and Housing Association; Chair of the D.C. Commissioners'[13] Planning Advisory Council; Chair of the United Negro College Fund for D.C.; and Chair of the D.C. Commissioners' Committee on Police Arrests for Investigation. Two further organizations that he chaired but apparently did not similarly resign from, presumably because he perceived no possible conflict between them and his possible responsibilities in the White House, were the presidency of the Parent-Teachers Association at his daughter's school and of the annual Washington Horse Show.

Sinclair: Quite an accomplished man.

Isbell: Yes, and with a very wide array of interests. The list of things he resigned from when he went to the White House merely begins to suggest the full range of public interest-related activities that bejewel Charlie Horsky's *curriculum vitae*.

Anyhow, after I'd returned to the firm from my stint at the Civil Rights Commission, Charlie invited me to come down to Charlottesville with him as a guest lecturer several times, so he knew I enjoyed both the subject matter and the teaching. When he went to the White House, he asked me if I'd be interested in taking his place teaching the seminar, and I leapt at the chance, though I also checked with the-then Managing Partner of the firm, Newell Ellison, who

[13] The Commissioners were a small group of presidentially-appointed governors of the District of Columbia before the days of an elected Mayor and City Council.

told me that in his opinion teaching was one of the sorts of things that firm lawyers should do. I was uncertain whether the Law School would be willing to take me on as Charlie's replacement, even as a temporary fill-in (though he wound up staying at the White House for five years). I was not a partner yet, and had few mentionable accomplishments, whereas Charlie was a man and lawyer of great distinction and wide recognition. Happily, though, the Law School accepted me nonetheless, and with the tacit understanding that the grading system would be the same as it had been under Charlie. The question of how the seminar would be graded, and whether any written papers would be required, was never even discussed; I simply continued doing the seminar the way he'd done it.

I've taught some or all of the seminar ever since then; when I teach it again this fall (in 2009), it will be for the 48th time. I should confess that it's been some years since I did the whole fourteen—now down to twelve—two-hour classes of the seminar. The pattern has always been that pairs of classes are taught on alternate weeks, one class Friday afternoon, and the other Saturday morning, with each pair devoted to one particular subject within the broad subject of civil liberties. For some years, one pair of those sessions has been taught by Peter Hutt, now a fellow senior counsel in the firm, and another by Peter Byrne, a former firm associate and now a professor at Georgetown. Moreover, some years ago I brought in as a co-adjunct a truly brilliant young partner, Christopher Sipes, to share my class load and to make sure that when I'm no longer able to teach the seminar it will still be in the hands of Covington & Burling.

Sinclair: Has your teaching had an effect on your career at Covington?

Isbell: I don't think so. Teaching at a law school continues to be, as Newell Ellison had told me in 1962, one of the things the firm thinks appropriate for its lawyers to do, so long as the

lawyers can also carry a normal workload. There are quite a few firm lawyers who have taught or are still teaching as adjuncts at one or another of the local law schools.

Sinclair: When Horsky returned from the White House to the firm, did he resume any role in teaching the UVA seminar?

Isbell: He did. When he came back from the White House, in 1967, I offered him the seminar back and we sort of Alphonsed and Gastoned and he said no, you keep it, and we wound up dividing the classes, with my taking four pairs of classes and his taking the other three. Over time he handed two of his pairs of classes to Peter Hutt and Peter Byrne, mentioned above, and then the infirmities of advancing age required him to withdraw from the other pair of classes he'd been teaching, so I took them over and wound up with five of the seven.

Sinclair: Have the aspects of civil liberties addressed in your seminar changed over the years?

Isbell: Yes. The only one of the particular civil liberties topics addressed in the seminar in recent years that has been the same as any taught in at least the first twenty years of the seminar (though the case law on that topic keeps developing) is Freedom of Religion. All the other topics have changed over time as new areas of constitutional law have developed, and others have ceased or slowed development (an example of that is legislative malapportionment), or else development of the law has become mainly a matter of legislative rather than constitutional change (for example, regarding the legal status of women). The pairs of classes Messrs. Hutt and Byrne teach—civil liberties aspects of governments' dealings with the problems of alcohol and drug abuse, and academic freedom, respectively—stay the same, though developing case law in the latter changes the reading material from time to time. As to the classes Chris Sipes and I have been leading, other than religious freedom, two address quite

recent legal and other developments: civil liberties problems relating to sexual orientation, and to our government's response to the threat of terrorism.

Sinclair: It seems that you've enjoyed your experiences with teaching.

Isbell: I've always loved teaching. As far back as I can remember, at least after college, any experience I had that involved teaching was enjoyable and challenging.

Sinclair: Did you ever think about becoming a law school professor full-time?

Isbell: I've thought about it a little bit from time to time. I think I might have been able to stay on at Yale Law School after graduation, as one of the more prominent professors approached me to ask whether I'd be interested in doing so. But I don't find the idea of full-time academia anywhere near as pleasurable as just plain teaching. The scholarship aspect of it does not attract me. I've done it, but it isn't as interesting or enjoyable to me as teaching. And I'm not sure I'd like to live in the academic environment. It seems to me somewhat closed. Moreover, I've always enjoyed the practice of law too; so I've been glad of the opportunity to make a career that included both of the two activities. But anyhow, the question of a full-time career in academia has never really come up as a serious one.