

BEHIND THE SCENES IN IOWA'S GREATEST CASE: WHAT IS NOT IN THE OFFICIAL RECORD OF *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

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I. INTRODUCTION¹

I am very pleased to be here this morning to say a few words about *Tinker v. Des Moines Independent Community School District*² which, even after thirty years, is still the United States Supreme Court's leading decision on student rights. As many of you know, the *Tinker* case is studied in law schools, in colleges of education, in a variety of courses at universities, high schools, and even elementary schools. It is frequently alluded to in the Iowa press and is even brought up occasionally in casual conversations. No less an authority than "the nation's newspaper," *USA Today*, has bestowed the sobriquet of "Iowa's greatest

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1. This Article was adapted from an address at the Belin Lamson McCormick Zumbach & Flynn Constitutional Law Symposium held at Drake University Law School on October 9, 1999. Portions of the text of that address appeared previously in published form. See JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S* (1997); John W. Johnson, "Dear Mr. Justice": *Public Correspondence with Members of the Supreme Court*, J. S. CT. HIST. 2, 101-12 (1997). Permission to draw from these publications for this Article has been granted by the University Press of Kansas and the *Journal of Supreme Court History*.

2. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

case" upon the polite demonstration of a handful of Des Moines young people in the 1960s that brought constitutional protections to the nation's students.³

Iowans' fascination with *Tinker* goes beyond familiarity. There is, I believe, an almost proprietary relationship that residents of the Hawkeye State have with *Tinker*. While performing the research for my book, *The Struggle for Student Rights*,⁴ and in talking to readers since the book's publication, I have been impressed by how many Iowans remember the case, know something about the litigants or their attorneys, or just recall what the Des Moines schools were like in the 1960s. *Tinker* is not only Iowa's greatest case; it is Iowa's favorite case. Last year, when Governor Tom Vilsack was soliciting suggestions for a new state motto, I considered proposing the following: "Iowa: Home of Corn, Hogs, and *Tinker v. Des Moines*."

Over this past summer, after accepting the kind invitation to deliver this address, I pondered what aspects of *Tinker* to share with you. I decided not to say much about the facts in the dispute—the story of the armband episode is, after all, fairly well-known—especially to this audience. I have also elected not to assess the place of *Tinker* in American law—that is the focus of other sessions at this symposium, in which individuals more knowledgeable than I regarding education law will comment upon where *Tinker* fits in the state and country's legal tapestry. Rather, I have decided to tell some stories—three of them to be exact—about what I believe are intriguing dimensions of the black armband case that did not make it into the official legal record. Historians, I believe, tender some of their best contributions to public discourse when they unearth nuggets of novel detail or insight about topics previously thought to be well-mined.

II. THE OVERLOOKED LITIGANT

Quite appropriately, most accounts of the armband case that have appeared in the press or in law journals have focused attention upon John or Mary Beth Tinker.⁵ However, there was a third named plaintiff, a very interesting young man named Christopher Eckhardt. Because there were two Tinkers and only one Eckhardt among the named plaintiffs, the short title of the case, as determined by the Clerk of the District Court for the Southern District of Iowa, became *Tinker v. Des Moines*—not *Eckhardt v. Des Moines*.⁶

3. Wayne Beissert & Tony Mauro, *Cases Across USA Help Shape Law*, USA TODAY, May 22, 1987, at 9F.

4. See JOHNSON, *supra* note 1.

5. See *id.* at 182-85, 189.

6. Dan Johnston, the attorney who represented the Tinkers and Christopher Eckhardt, also played a role in selecting the short title for the case. He listed the names of John and Mary Beth Tinker before that of Christopher Eckhardt on the Complaint. Interview with Dan Johnston,

Once the armband dispute officially became the "*Tinker* case," attention flowed toward John and Mary Beth rather than Christopher. The name Tinker was easier to pronounce and spell than Eckhardt, and it lent itself easily to various plays on words such as "Tinkering with *Tinker*." Moreover, the Tinker brother and sister combination made this a warm-hearted family story further enhanced by the fact John and Mary Beth's younger siblings, Hope and Paul (elementary school students in 1965), also wore armbands to school.⁷ In addition, Mary Beth was the most photographed of the three plaintiffs.

Because the Tinker last name was the one that most people familiar with the case recognized, it was John and Mary Beth who, in later years, were asked to make appearances, accept awards, and talk about the case to sympathetic audiences, not Chris Eckhardt. These considerations reinforced the name "Tinker" in the public mind and obscured the name "Eckhardt." Even the cover of my own book carries the familiar UPI photograph of John and Mary Beth Tinker; the editor and I simply could not locate a good picture of the Tinkers and Chris Eckhardt. To redress the balance, I want to tell you some things about Chris Eckhardt this morning that do not derive from the official record of the case. Thus, the first story I wish to "submit for your approval"—as Rod Serling used to say on his popular mid-1960s television show "*The Twilight Zone*"—can be titled "*The Overlooked Litigant*."⁸

Chris Eckhardt was fifteen and a sophomore at Des Moines's Theodore Roosevelt High School in late 1965.⁹ At the time of the armband case, Chris's father was a clinical psychologist and a faculty member at the College of Osteopathic Medicine and Surgery in Des Moines.¹⁰ His mother was the Des Moines chapter president of the Women's International League for Peace and

Attorney for *Tinker* plaintiffs in Des Moines, Iowa (May 17, 1994) [*hereinafter* Johnston Interview].

7. See JOHNSON, *supra* note 1, at 26.

8. A longer account of the role of Christopher Eckhardt in the black armband case will appear in John W. Johnson, *The Overlooked Litigant in Tinker v. Des Moines Independent Community School District*, in *TIME TO RECLAIM* (Sandra Van Burkleo et al., forthcoming 2000). Unless otherwise noted, the portrait of Chris Eckhardt in this paper is drawn from the following: Telephone Interview with Christopher Eckhardt, *Tinker* plaintiff (May 4, 1994) [*hereinafter* Christopher Eckhardt Interview]; Telephone Interview with Margaret Eckhardt, mother of *Tinker* plaintiff (May 4, 1994) [*hereinafter* Margaret Eckhardt Interview]; and from clippings and mementos of Christopher Eckhardt provided to the author.

9. JOHNSON, *supra* note 1, at 9.

10. *Id.* at 9-10.

Freedom.¹¹ His parents were active in the 1960s in the same small Des Moines "peace community" that included the Reverend and Mrs. Tinker.¹²

As was the case with the Tinker children, Chris was exposed to liberal politics throughout his formative years.¹³ His mother recalls Chris as a young boy joining her for speeches and meetings with various civil rights advocates who came to Des Moines.¹⁴ Included among these visitors were black Georgia politician Julian Bond and John Howard Griffin, the author of *Black Like Me*.¹⁵ Chris had also accompanied his parents on a number of civil rights marches in the middle 1960s.¹⁶ At the November 1965 anti-Vietnam War March on Washington that provided the inspiration for the Des Moines armband demonstration the following month, Chris carried a sign that read "Follow the Geneva Accords of 1954."¹⁷ At Roosevelt he helped form what he describes as a "political action discussion group" which brought public figures to school to talk with interested students.¹⁸ Chris and his parents were members of Des Moines's First Unitarian Church,¹⁹ and Chris was later vice president of the Unitarian Youth League.²⁰

As a high school student, Chris was a busy young man. He maintained about a B+ academic average and was an elected representative to student government.²¹ He was a member of the track team, had won fishing and weight lifting trophies, and would later be voted "most likely to succeed" in his class.²² He also was voted the student with the cleanest locker.²³ Outside of school he was a Boy Scout, a youth leader at church, had a paper route, and a lawn-mowing and snow-shoveling business.²⁴ Dan Johnston, the attorney for the armband wearing students, characterized young Chris as a "regular kid."²⁵

There was, however, a puckish side to Chris.²⁶ During his Roosevelt High years he was a member of what he describes as a group of about thirty male

11. *Id.* at 10.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 10-11.

25. Johnston Interview, *supra* note 6.

26. JOHNSON, *supra* note 1, at 11.

students who called themselves the "All Center Burns."²⁷ They hung out together after school and on weekends in an apartment they rented in downtown Des Moines.²⁸ At school assemblies they sat in their own section of the auditorium and refused to cheer for the Roosevelt athletic teams or to rise for the National Anthem.²⁹

On the day before the December 1965 armband demonstration, word circulated in various Des Moines schools that a protest of some sort was imminent.³⁰ Chris recalls that gym teachers and coaches at Roosevelt were upset at the possibility of a protest against the Vietnam War.³¹ Instead of conducting calisthenics to the chant of "Beat East High"—as was usually the case—he recalled that the gym teachers on that day encouraged students to substitute the phrase "Beat the Vietcong."³² The coaches at Roosevelt also made it known that students wearing armbands to class were communist sympathizers and that they, as coaches and teachers, could not be held responsible for what might happen to students who demonstrated such a lack of patriotism.³³ Confirmation of this indirect threat took place after gym class on Wednesday when Chris and a friend were confronted by a group of angry male students who screamed at them: "If you [wear armbands tomorrow] . . . you'll find our fists in your face and our foot up your ass."³⁴

On Thursday, December 16, 1965, Chris Eckhardt and a friend were driven to school by Chris's father.³⁵ Under his winter coat Chris was wearing a cocoa-

27. *Id.*

28. *Id.*

29. *Id.*

30. Christopher Eckhardt Interview, *supra* note 8.

31. *Id.* Although the media generally portrayed the demonstration as an "antiwar protest," the Tinkers, Christopher Eckhardt, and the other participating students were not necessarily against the Vietnam War. JOHNSON, *supra* note 1, at 4, 19. They maintained that they wore their armbands for two reasons: to mourn the casualties in the Vietnam War—American and Vietnamese—and to promote an extension of the anticipated "Christmas truce" in the War so as to encourage peace talks between the belligerents. *Id.* at 68.

32. Christopher Eckhardt Interview, *supra* note 8. The Roosevelt High football coach, Donald Prior, stated the chant "Beat the Vietcong" sprang from the students themselves as a form of "spontaneous combustion." Stephen Seplow, *Dispute over High School Chant of 'Beat Vietcong'*, DES MOINES REG., Dec. 20, 1965, at 1. Prior indicated that he saw no reason to stop the chanting because the boys were just "proving their Americanism." *Id.*

33. JOHNSON, *supra* note 1, at 8.

34. *Id.*

35. Unless otherwise indicated, the events of December 16, 1965, related here were drawn either from the Christopher Eckhardt Interview and the Margaret Eckhardt Interview, or from the federal district court testimony of Chris Eckhardt in the Transcript of *Tinker v. Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa 1966) (No. 7-1810-C-1) (located in the office of the Iowa Civil Liberties Union, Des Moines, Iowa).

colored sports jacket with a black armband of about one and one-fourth inches in width pinned to one of his sleeves.³⁶ Chris went immediately to his locker, removed his winter coat to reveal the armband, and then he proceeded to the principal's office to turn himself in.³⁷ As he saw it, he was engaging in an act of peaceful civil disobedience, that is, intentionally breaking a rule that he believed to be unjust and submitting to punishment so as to test the legality of the rule.³⁸ On his way to the principal's office Chris was confronted by the captain of the football team who attempted to rip the armband off his jacket.³⁹ After a brief scuffle, the football player left Eckhardt with words to the effect that he had better take the armband off in the principal's office or he would come looking for him.⁴⁰

Shortly after this tense encounter, Chris arrived in the school's administrative office suite and proceeded to cool his heels for about forty-five minutes during which time various students filed by the glass enclosed office and taunted him with caustic remarks like "you're dead."⁴¹ Eventually, Don Blackman, the Vice-Principal of Roosevelt, summoned Chris to an inner office.⁴² Blackmun informed Chris that wearing a black armband violated school policy and asked him to remove it.⁴³ Chris refused, explaining that he was engaging in an act of civil disobedience by intentionally violating what he felt was an illegal policy.⁴⁴ Chris and Blackman talked for several more minutes; Chris persisted in his refusal to remove the armband.⁴⁵ At some point in the conversation, Velma Cross, the "girls' advisor" at Roosevelt joined Blackmun and Eckhardt.⁴⁶ She proceeded to tell Chris that he was "too young to have opinions."⁴⁷ She also told him that, if he was suspended, he could look for another high school to attend because they did not want him back at Roosevelt.⁴⁸

Once it became clear that Chris was not going to follow the order to remove the armband, Blackman called his mother.⁴⁹ Mrs. Eckhardt said that she was aware that Chris had worn the armband that morning and that she felt he had

36. JOHNSON, *supra* note 1, at 16.

37. *Id.*

38. *Id.*

39. *Id.* at 16-17.

40. *Id.*

41. *Id.* at 17.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 18.

the right to wear it at school.⁵⁰ Blackman informed her that Christopher would be suspended if he did not remove the offending piece of cloth.⁵¹ She responded by saying, "So be it," and Chris was suspended and sent home.⁵² A few weeks later the suspensions of Chris, Mary Beth, and John Tinker, and two other students were upheld by the Des Moines School Board after two very contentious meetings.⁵³

Chris's memories of what transpired in the aftermath of his suspension are illustrative of the risks and rewards that accrue to someone who takes an unpopular stand. He recalls occasions on which he was harassed by being called a "communist" or a "peace boy."⁵⁴ The Eckhardt family also kept a file of the letters and postcards on the armband affair that they received in the late 1960s.⁵⁵ For example, one letter addressed to Chris's parents contained a typed statement on the danger of communist subversion of America's youth allegedly perpetrated by leftist educators.⁵⁶ At points in this letter where "educators" or "professors" were mentioned, the anonymous sender had added the phrase "& parents."⁵⁷ Another postcard addressed to the Eckhardts read in part: "It seems that someone needs to psychoanalysis [sic] you two parents for what you are putting your children thru. . . . I'd do a lot of thinking about this . . . because it looks like your [sic] going to have a Harvey Lee Oswald [sic] on your hands Also, if your wife doesn't like this country then she can always go back to England and Germany"⁵⁸

Not all of the mail Chris Eckhardt received was condemnatory. In January 1966 he received a letter from a Princeton, New Jersey rabbi who identified himself as a former student in the Des Moines public schools.⁵⁹ The rabbi's letter read in part: "I was filled with admiration for your sensitivity. It . . . requires a great deal to identify . . . with the suffering of one's 'enemies'. . . . I was [also] inspired by your courage. It is not easy, in these times, to affirm basic human values."⁶⁰

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* at 31-47.

54. *Id.* at 57.

55. The letters and postcards mentioned in these paragraphs are from the clippings and mementos of Christopher Eckhardt provided to the author from his family.

56. JOHNSON, *supra* note 1, at 57.

57. *Id.*

58. *Id.*

59. *Id.* at 58.

60. *Id.*

Chris Eckhardt has led a varied and interesting life since he wore his arm band to school in December 1965. He was elected to the Roosevelt High student council during his junior year in school, but he also continued as a member of the All Center Bums.⁶¹ During the remainder of his high school years he had occasional disagreements with authorities. For example, he was arrested on a Des Moines sidewalk in March 1968 for throwing a snowball at a policeman.⁶² When Eckhardt gave his name to the arresting officer, the reaction was: "Oh yeah, we know about you. We talk about you down at the office sometimes. You're that armband kid, you're that troublemaker."⁶³

Eckhardt took his first college courses at Mankato State University in 1968.⁶⁴ Since then he has attended a number of other colleges—including Drake University—and held a variety of jobs. His employment résumé includes: selling life insurance, producing cable television programs, publishing a peace-oriented newspaper, and working for state governments in corrections and social services.⁶⁵ In 1978 he ran unsuccessfully for the Des Moines School Board—the same body that had upheld his school suspension thirteen years earlier.⁶⁶ In 1994, his persistence in college finally paid off with his receipt of a baccalaureate degree in political science from the University of South Florida.⁶⁷ Eckhardt says that his future portends more education, either in law school or graduate study in history. When I last checked, Chris was still living in Florida.

III. THE RELUCTANT JUSTICE

The second story I want to relate concerns the curious route that *Tinker* followed to get to the United States Supreme Court and finally to emerge from the pen of Justice Abe Fortas. I call it "The Reluctant Justice."

Shortly after their suspensions, the affected students and their parents filed a complaint in the United States District Court for the Southern District of Iowa.⁶⁸ After a hearing in the summer of 1966, Judge Roy Stephenson found in

61. *Id.* at 204.

62. *Id.*

63. *Id.*

64. *Id.* On September 18, 1998, Mankato State University underwent a name change and is now Minnesota State University, Mankato. *Minnesota State University, Mankato—A Brief History & Profile* (last modified Sept. 14, 1998) <<http://www.mankato.msus.edu/dept/univops/history/>>.

65. JOHNSON, *supra* note 1, at 204.

66. *Id.*

67. *Id.*

68. Complaint, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966) (No. 7-1810-C-1) (located in the office of the Iowa Civil Liberties Union, Des Moines, Iowa).

favor of the Des Moines School District.⁶⁹ The Tinkers and Chris Eckhardt appealed Judge Stephenson's ruling.⁷⁰ In 1967, the case was argued twice before the Court of Appeals for the Eighth Circuit.⁷¹ The second hearing before an en banc panel of the appeals court in the circuit resulted in a 4-4 split.⁷² Supreme Court rules dictate that a tie vote does not disturb a lower federal court ruling.⁷³ In late 1967, Dan Johnston and the litigants decided to seek United States Supreme Court review of the armband prohibition.⁷⁴ Johnston and joint counsel for the American Civil Liberties Union petitioned for a writ of certiorari.⁷⁵ In early 1968, the nation's highest court, without explanation, granted the writ of certiorari thus enabling the case to come before the United States Supreme Court in oral argument in the following October Term.⁷⁶

Published orders of certiorari never indicate which Justices vote for a petition. Occasionally one or two strong-minded Justices will file a written dissent to a granting of certiorari, thus revealing their own preferences. There were no written dissents to the granting of certiorari in the *Tinker* case, so at the time the votes on the petition for certiorari were unknown. However, years after the fact, the private papers of several of the *Tinker* Court Justices were made available to scholars,⁷⁷ revealing the breakdown of certiorari votes in the *Tinker* case was five in favor of hearing the case: William Brennan, William O.

69. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 258 F. Supp. at 973, *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

70. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967).

71. *Id.* at 988.

72. *See id.*

73. *See generally* Laird v. Tatum, 409 U.S. 824, 837-38 (1972) ("The disqualification of one Justice raises the possibility of an affirmance of a judgment below by an equally divided court. The consequence attending such a result is of course, that the principal of law presented by the case is left unsettled."); *see also* Arizona v. United States Dist. Court, 459 U.S. 1191, 1191 (1983) (citing 28 U.S.C. § 2109).

74. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *petition for writ filed*, 36 U.S.L.W. 3323 (U.S. Jan. 17, 1968) (No. 1034).

75. *See id.*

76. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 383 F.2d 988 (1967), *cert. granted*, 390 U.S. 942 (1968).

77. I have reviewed the private Supreme Court Papers on *Tinker* in the collections of Hugo L. Black (Box 409), William Brennan (Box 416), Thurgood Marshall (Box 532), William O. Douglas (Box 1430), and Earl Warren (Box 385)—all in the Manuscript Division, Library of Congress, Washington, D.C. *See generally* JOHNSON, *supra* note 1, at 165-69, 190-94 (discussing personal notes of the Justices, as well as letters received by Justices regarding the *Tinker* case). For Abe Fortas's thoughts on *Tinker*, I have relied principally on LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 186-290 (1990). Kalman's account is drawn mainly from the Abe Fortas Supreme Court Papers in the Yale University Archives.

Douglas, Thurgood Marshall, Potter Stewart, and Earl Warren; and four against: Hugo Black, Abe Fortas, John Marshall Harlan, and Byron White.⁷⁸

Given their well-known positions on civil liberties issues, the certiorari alignment of the nine members of the Warren Court in *Tinker* was predictable but with two exceptions. As consistent supporters of civil liberties in past constitutional decisions, the negative votes on certiorari of Justices Black and Fortas are puzzling. Justice Black would later dissent in the *Tinker* case, thus explaining in cold print why he was against the students' appeal from the start.⁷⁹ But Justice Fortas would end up writing the majority opinion in favor of Christopher Eckhardt and the Tinkers.⁸⁰

How could Justice Fortas vote against hearing the case, thus affirming the previous verdict for the school district, and then later write the landmark opinion to overturn the school district's position? That is a very interesting question that the record of the case does not answer. Had Fortas's position on certiorari prevailed in March 1968, the Supreme Court would have refused to hear the *Tinker* appeal, Fortas would not have written his majority opinion in the case, and the lower federal court rulings against the student litigants would have persisted.

Some background on Justice Fortas might be instructive at this point.⁸¹ Abe Fortas had been an outstanding law student at Yale University in the early 1930s.⁸² There, he had come under the crusading influence of law professor and later Supreme Court colleague, William O. Douglas.⁸³ In the 1930s, Fortas served in two of Franklin Roosevelt's New Deal agencies.⁸⁴ From 1940 until his 1965 appointment to the Supreme Court, Fortas operated as a high-powered Washington lawyer.⁸⁵ In 1948, Fortas's legal brilliance and political savvy helped Lyndon Johnson prevail in a disputed election to the United States Senate.⁸⁶ Thereafter, LBJ regarded Fortas as a close friend and adviser. Fortas was a strong supporter of individual rights. As a lawyer, he successfully defended a small-time crook in the leading right to counsel case, *Gideon v.*

78. Certiorari Tally Sheet for *Tinker v. Des Moines Indep. Community Sch. Dist.*, (Mar. 1, 1968) (Box 384) Supreme Court Papers of Earl Warren, Manuscript Division, Library of Congress, Washington, D.C. See generally JOHNSON, *supra* note 1, at 165 (discussing tally sheets found in the Justices' papers).

79. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 515-26 (1969) (Black, J., dissenting).

80. See *id.* at 504-14.

81. See generally KALMAN, *supra* note 77 (providing the profile of Justice Fortas).

82. *Id.* at 15.

83. *Id.* at 18.

84. *Id.* at 29-30.

85. *Id.* at 186-87.

86. *Id.* at 200-02.

Wainwright.⁸⁷ On the Supreme Court, Justice Fortas's best known decision was probably *In re Gault*,⁸⁸ the case which established that juveniles have rights in courts of law.⁸⁹ In short, on the record, Justice Fortas should have been a clear vote in favor of granting certiorari in *Tinker* and over-turning the district court ruling against the students. But the actual story is more complicated.

At the time of the vote on the certiorari petition, Justice Fortas was not convinced that the First Amendment entitled members of the judiciary to second guess the discipline imposed by school administrators unless the record of a case showed "clear discrimination or clear abuse."⁹⁰ Fortas expressed his uncertainty by writing "this is a tough case" on one of his clerk's memoranda.⁹¹

The best explanation for Fortas's shift from the certiorari vote to the vote on the merits of the case stems from the Justice's friendship with President Johnson and a simple matter of timing.⁹² When the certiorari vote was taken in March 1968, Fortas's friend and patron was in the White House and under siege by antiwar protesters.⁹³ However, when the case was ready for decision in February 1969, Johnson was no longer president.⁹⁴ So Fortas's vote defending the rights of protesters was not politically embarrassing to his old friend.⁹⁵

The appeal in *Tinker* was argued before the Supreme Court on November 12, 1968, just a few days after the 1968 presidential election that would bring Richard Nixon to the White House and help free Abe Fortas to follow his natural judicial instincts. Nevertheless, Fortas's close questioning of Dan Johnston at the Oral Argument caused the young lawyer for the students to wonder about Fortas's inclinations.⁹⁶

Johnston began his presentation to the United States Supreme Court with a reference to the evolution case, *Epperson v. Arkansas*,⁹⁷ decided earlier that day.⁹⁸ He noted that the case he was arguing and *Epperson* both dealt with the rights of individuals in the nation's public schools.⁹⁹ The difference was that

87. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

88. *In re Gault*, 387 U.S. 1 (1967).

89. *Id.* at 55-59.

90. KALMAN, *supra* note 77, at 287-88.

91. *Id.* at 287.

92. JOHNSON, *supra* note 1, at 128.

93. *Id.*

94. *Id.* at 129.

95. *Id.*

96. Johnston Interview, *supra* note 6.

97. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

98. Transcript of Oral Argument at 3, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (No. 1034).

99. *Id.*

Epperson concerned academic freedom for public school faculty, while the *Tinker* case dealt with the rights of students to express their political concerns symbolically.¹⁰⁰ Justice Fortas interrupted to make sure that Johnston was not saying that *Tinker* was a First Amendment Establishment Clause case.¹⁰¹ Johnston quickly acquiesced to this clarification, indicating that *Tinker* was a First Amendment case "in the sense of expression of view," not a dispute involving religious worship.¹⁰² Johnston later recalled that, given Fortas's quibble, he sensed he "was in trouble right away, right out of the box."¹⁰³ "According to Johnston's surmise, several Justices had not yet decided how they would vote on the armband case and, therefore, Fortas was [anxious] to emphasize that *Epperson* and *Tinker* were different kinds of cases—the former involving freedom of religion and the later being a free-speech case."¹⁰⁴ Following this exchange, Fortas did not have much to say for the remainder of the oral argument.

The conference at which the Justices discuss a case just argued is a highly secret affair. However, once again the papers of the Justices, later available to scholars, can reveal much about judicial thinking on key past decisions. The conference at which *Tinker* was discussed was held on Friday, November 15, 1968, three days after the oral argument.¹⁰⁵ Various Justices' notes indicate that Byron White dominated the discussion.¹⁰⁶ A phrase in Thurgood Marshall's notes of the conference's deliberations summarized White's position: "[The school district has] not done a good job [of demonstrating that the armbands were disruptive] and therefore [should] loose [sic]."¹⁰⁷ "White was also troubled that the Des Moines School District's prohibition order, by banning armbands from entire school campuses and not just classrooms, was too broad."¹⁰⁸

Justices Abe Fortas and Thurgood Marshall "both indicated in the conference that they 'could go with Byron'—that is, favor reversal on the narrow

100. *Id.*

101. *Id.*

102. *Id.* at 3-4.

103. Johnston Interview, *supra* note 6.

104. JOHNSON, *supra* note 1, at 152.

105. This account of the conference on *Tinker* is drawn from the Supreme Court Papers of William Brennan (Box 416), William O. Douglas (Box 1430), Thurgood Marshall (Box 532), and Earl Warren (Box 385)—all in the Manuscript Division, Library of Congress, Washington, D.C. See JOHNSON, *supra* note 1, at 163-69 (detailing *Tinker* conference proceedings); KALMAN, *supra* note 77, at 287-88 (highlighting Fortas's role in opposing certiorari to *Tinker* and then writing the opinion).

106. JOHNSON, *supra* note 1, at 167-68.

107. *Id.*

108. *Id.*

ground suggested by White."¹⁰⁹ "Marshall, after mentioning his inclination, said little. Fortas was more voluble: he stated that school authorities must control their schools, but they must also have a compelling justification for restricting the free expression of students [at] school functions."¹¹⁰ For Justice Fortas, there was insufficient justification shown in the record for the restrictions instituted by the school district.¹¹¹ To Justice Fortas, any disruption caused by the armband wearing students was minimal and did not warrant the preemptive ban on armbands decreed by the school district.¹¹²

Because Justice White dominated the conference discussion on *Tinker*, why did he not write the opinion? Given the absence of clear evidence in the papers of the Justices, and given the fact, as far as I know, that Chief Justice Warren—the assigner of the opinion—never commented on this issue, no definite answer can be advanced. However, some speculation is in order.¹¹³

In the assignment of opinions, one consideration of the assigning Justice is to distribute as evenly as possible the writing of the Court's majority opinions.¹¹⁴ As the Court's second most junior Justice, Justice Fortas was due a few more opinions in the 1968-1969 term.¹¹⁵ Also, the Chief Justice may have felt that Justice Fortas, an able negotiator, could do a better job of holding together the majority than the more strong-willed White.¹¹⁶ In addition, Justice Fortas's judicial philosophy was more consonant with the dominant pro-civil liberties tenor of the Warren Court than was White's judicial philosophy.¹¹⁷ Finally, it is possible Chief Justice Warren selected Justice Fortas for this opinion because he had already established himself as the Court's "expert" on children's rights with his opinion two terms earlier in *In re Gault*.¹¹⁸

At the time *Tinker* was being reviewed by the Supreme Court, the man who would ultimately write the majority opinion was undergoing serious personal difficulties.¹¹⁹ Abe Fortas had been nominated by LBJ in June 1968 to

109. *Id.*

110. *Id.*

111. *Id.*

112. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

113. JOHNSON, *supra* note 1, at 168.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; see *In re Gault*, 387 U.S. 1 (1967).

119. See generally BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND FALL OF A SUPREME COURT JUSTICE* 477-526 (1988) (discussing Fortas's ethical problems and ensuing resignation); KALMAN, *supra* note 77, at 319-58 (discussing Fortas's defensive stance against personal attacks made on him).

replace the retiring Earl Warren as Chief Justice.¹²⁰ It turned out to be an ill-starred nomination. As a lame duck president, Johnson did not possess the political clout to get his old friend's appointment through the Senate confirmation hearings.¹²¹ The hearings, when they did take place, became a battleground for republican criticisms of the Great Society. In addition, Fortas's financial relationship with a wealthy businessman brought his ethics as a Justice into question, thus further undermining his prospects for confirmation as Chief Justice.¹²² A month before the *Tinker* appeal was argued, intense political pressure forced LBJ to withdraw Fortas's nomination for the Chief Justiceship.¹²³ Attacks on Fortas's ethics would continue during the time the *Tinker* case was under review. Just over two months after the announcement of the *Tinker* opinion, the unrelenting criticism would force Fortas to resign from the Court thus cutting short a promising judicial career.

IV. THANK YOU, JUSTICE BLACK

The third and final story I submit to you is titled, with just a little bit of tongue-in-cheek, "Thank you, Justice Black."¹²⁴ The legal papers of Supreme Court Justices occasionally contain some fascinating examples of the views of Americans in the form of letters addressed to the Justices. These letters offer an unsystematic but vivid measure of the public's concerns about sensitive national issues. Normally the letters on a particular case are addressed to the Justice writing the majority opinion. However, an impassioned dissent may also precipitate substantial correspondence.

By far the greatest number of letters to the Supreme Court in the aftermath of *Tinker* were addressed to Justice Hugo Black,¹²⁵ the Court's senior member in 1969 who wrote a stinging dissent in *Tinker*.¹²⁶ Justice Black was one of the Court's most liberal members from the 1930s through the mid-1960s. As he passed into the twilight of his judicial career, however, he became increasingly intolerant of certain forms of expression.¹²⁷ It was Black, after all, who

120. MURPHY, *supra* note 119, at 273.

121. *Id.* at 287.

122. *See generally id.* at 502-06 (discussing Fortas's involvement with this businessman).

123. *See id.* at 525.

124. A more extensive discussion of the letters to Justice Black in the aftermath of *Tinker* is in *Johnson*, *supra* note 1, at 101-12. *See also* JOHNSON, *supra* note 1, at 190-94 (discussing some of the 260 letters in Justice Black's legal papers).

125. JOHNSON, *supra* note 1, at 191.

126. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 515-26 (1969) (Black, J., dissenting).

127. Basically, Black did not believe that "symbolic speech" deserved the same First Amendment protection as "pure speech." *See Cohen v. California*, 403 U.S. 15, 27 (1971) (Black,

complained in *Tinker* that the dictum "children are to be seen not heard" had sadly gone out of fashion in the 1960s.¹²⁸

The legal papers of Justice Black in the Library of Congress include 260 letters relating to the *Tinker* case.¹²⁹ All but eight of these letters expressed agreement with Black's views.¹³⁰ A fair assumption is that Black's impassioned defense of order and traditional values struck a chord among many Americans troubled by what they perceived as the turmoil in the nation's schools—and perhaps American society generally—in the late 1960s. A majority of the letters praised Justice Black for his opinion in *Tinker*.¹³¹ A California lawyer, for instance, wrote: "Your dissent . . . in the Des Moines, Iowa, High School case was one bright ray of sunshine that brought hope and encouragement to the hearts of millions of Americans. I salute you and encourage you to continue your battle for righteousness and sanity."¹³² A woman from a small town in Kentucky conveyed similar sentiments: "Thank you and let me again say you are a man among men and a true and loyal American. Oh! Lord, how I wish there were more like you, we would have a much better world to live in."¹³³

A number of letters to Justice Black came from appreciative secondary school personnel.¹³⁴ For example, a school counselor from Augusta, Georgia wrote: "As a counselor in a junior high school, I appreciate and admire your stand angrily dissenting in the Iowa Students' case."¹³⁵ She later stated that more discipline is necessary in the schools, not less.¹³⁶ Then she continued: "Maybe if your fellow Justices could sit where I sit for one day, a reversal of the present decision would be made."¹³⁷ In a similar vein, a superintendent from Glasgow, Missouri wrote:

J., dissenting); *Adderley v. Florida*, 385 U.S. 39, 44-48 (1966); *Cox v. Louisiana*, 379 U.S. 536, 577-78 (1965) (Black, J., dissenting).

128. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 522 (Black, J., dissenting).

129. JOHNSON, *supra* note 1, at 191.

130. *Id.*

131. *Id.*

132. Letter from Paul J. Henry to Hugo L. Black (Feb. 25, 1969) (Box 409); see JOHNSON, *supra* note 1, at 191. A copy of this letter was also found in the Papers of William O. Douglas, Manuscript Division, Library of Congress, Washington, D.C. (Box 1430); see JOHNSON, *supra* note 1, at 191.

133. Letter from L.H. Henderson to Hugo L. Black (Mar. 14, 1969) (Box 409); see JOHNSON, *supra* note 1, at 191.

134. JOHNSON, *supra* note 1, at 192.

135. *Id.*

136. *Id.* at 197.

137. Letter from Mrs. Marian C. Bentley to Hugo L. Black (Feb. 27, 1969) (Box 409); see JOHNSON, *supra* note 1, at 197.

We wish to applaud you on your recent dissent Every day we witness this very obvious lack of respect for authority exercised by the young people we come in contact with in our school system Again we thank you for taking a stand and want you to know there are other people who agree with you and support you.¹³⁸

The superintendent's letter was signed by twenty-two members of his school system, including principals, teachers, counselors, secretaries, and even the "cafeteria manager."¹³⁹

Justice Black's dissent had suggested that many of the problems in American schools—at both the secondary and college levels—stemmed from weaknesses in the American family and in society in general. Most of those writing him favorable letters shared this conviction.¹⁴⁰ Like Black, they blamed an all too pervasive "permissiveness."¹⁴¹ A man from Catonsville, Maryland wrote:

Far too many youths today are, to quote an old popular song, "Runnin' Wild." Permissiveness seems to be the name of the game One hears quite a bit about lack of communication between parent and child. I say Hogwash! When I was a youngster, my mother had a very good means of communication. It was called "Hairbrush." And I seldom failed to get the message.¹⁴²

A Springfield, Illinois physician also commended Black for his battle against permissiveness: "[Y]ou speak eloquently my feelings and those of so many of my countrymen whose responsibility it is to keep our cities, counties, and states strong and effective against this new sweeping plague of permissiveness over the entire United States."¹⁴³ He continued: "I'm sick and intolerant of permissive parents, permissive teachers, permissive law enforcement agencies, permissive legislators, and permissive courts. And I am particularly disappointed and ashamed of the many permissive Supreme Court decisions which have been coming down in recent years."¹⁴⁴

138. See JOHNSON, *supra* note 1, at 197.

139. Letter from Jesse E. Walters, et al. to Hugo L. Black (Feb. 27, 1969) (Box 409); see JOHNSON, *supra* note 1, at 197.

140. See JOHNSON, *supra* note 1, at 197.

141. *Id.*

142. Letter from Arthur V. Watkins to Hugo L. Black (Feb. 28, 1969) (Box 409); see JOHNSON, *supra* note 1, at 197.

143. Letter from Jack R. Baldwin to Hugo L. Black (Feb. 24, 1969) (Box 409); see JOHNSON, *supra* note 1, at 197.

144. See JOHNSON, *supra* note 1, at 197.

All of the Justices receive unsigned letters from time to time.¹⁴⁵ Most of these are probably from harmless cranks, but some threaten injury.¹⁴⁶ Justice Black received a handful of anonymous letters shortly after the *Tinker* decision was announced.¹⁴⁷ One that appeared to support his position is still disturbing—especially when read thirty years later in the aftermath of the 1999 killings at Columbine High in Littleton, Colorado. It stated in part: “You don’t have to worry about the laws breaking down. We are organizing a secret club to bring criminals to justise [sic]. We won’t dress any different but will FIX all trouble makers in our school. Everyone says we are helpless but we know different.”¹⁴⁸ The postscript read: “There are 8 of us.”¹⁴⁹

Of the handful of letters in the Black Papers critical of the Alabama Justice’s dissent in *Tinker*, a common theme was that, if free expression was in fact constitutionally protected in a democracy, there should be free expression in the institutions primarily responsible for democratic education, that is, the nation’s public schools. For example, a man from California wrote to ask “How are we to prepare our young people to become full and responsible citizens if they are not allowed to experience the opportunity to exercise, peacefully, the rights of citizenship?”¹⁵⁰ Another correspondent, identifying himself as a high school teacher with a special interest in constitutional law, submitted two similar queries:

How are we to expect our young to assume responsibility and participate in our society constructively and meaningfully if we condemn and restrict them by standards we do not condone for ourselves? If they are to be prohibited from expressing their concerns within the institutions in which they spend a great portion of their productive hours, institutions which purport to prepare them to think and to function effectively in the rest of society, where and when then are they to learn responsibility and constructive effectiveness?¹⁵¹

Of the eight letters critical of Justice Black’s *Tinker* dissent available in the Library of Congress’s collection of judicial papers, Black’s hand-scrawled notes

145. *Id.* at 193.

146. *Id.*

147. *Id.*

148. *Id.*

149. Letter from Anonymous to Hugo L. Black (no date) (Box 410); see JOHNSON, *supra* note 1, at 193.

150. Letter from David M. Peterson to Hugo L. Black (Feb. 26, 1969) (Box 410); see JOHNSON, *supra* note 1, at 194.

151. Letter from Joseph E. Andrews to Hugo L. Black (Feb. 25, 1969) (Box 410); see JOHNSON, *supra* note 1, at 194.

indicated that only one should receive a reply.¹⁵² Perhaps Justice Black found it easier to thank his supporters than to respond directly to his critics.

V. CONCLUSION

In conclusion, let me address the question that has no doubt occurred to many of you, "What do these three stories, concerning what is not in the official record of *Tinker*, tell us about constitutional law?" At the risk of oversimplifying, let me suggest the following answers. My first story, "The Overlooked Litigant," provides a good example of the homily that great Supreme Court cases can, and frequently do, emerge from the activities of average people—in this instance a person routinely omitted from discussions of "his own" case. The second story, "The Reluctant Justice," tells us that no matter how much we feel we know about Supreme Court decision-making, behind-the-scenes activities of the Justices, once revealed, can present us with some surprises. And the third story, "Thank you, Justice Black," tells us that the American public occasionally engages in a hidden but very stirring dialogue with members of the nation's highest judicial body.

Over the remainder of this symposium we will be hearing a great deal about the importance of *Tinker*. I look forward to the insights and analysis offered by the legal experts. But I also look forward to hearing some more good stories.

152. Letter from Hugo L. Black to Joseph E. Andrews (Mar. 4, 1969) (Box 410); see JOHNSON, *supra* note 1, at 194.