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An Interview with Judge D'Army Bailey

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In 1999, Shelby County's Circuit Court hosted a landmark tobacco trial, pitting three plaintiffs against the industry's giants. The trial lasted four months and was closely watched by both the legal and financial worlds. Although the jury ultimately denied relief to the plaintiffs, it sent a strong message to Big Tobacco. D'Army Bailey, who retired in 2009 after nineteen years on the bench, discussed the case with Law Review member Darrell Phillips. Fortunately, Judge Bailey took the time to reminisce about another notable topic, Justice Clarence Thomas's visit to Memphis in 1998.

UMLR: 1999 was in the middle of your time on the Circuit Court. What significant events regarding the Big Tobacco case from that year particularly stick out in your memory?

DB: Well, quite a lot actually because this was, of course, the time when the tobacco industry was being sued all over the country. There had been some big judgments against Big Tobacco, and there had been some big defense verdicts. When I got my cases, initially five, there were others which had been assigned to other Circuit Court divisions, and none of them had gone to trial. Now, my cases had been pending for about a year before they went to trial. The tougher and more complex a case is, the faster I'm going to set it for trial, because I just believe that it would make it easier on me as a judge to go ahead and tackle it early and get my hands around it, rather than to let it drag and let the lawyers control it with a revolving door of pre-trial disputes. So when I saw what I had—five different tobacco cases—I said, well, let's get all those cases in here and get all the lawyers on all five cases in here in the courtroom. So I did.

UMLR: Now, tobacco litigation was trendy at the time. I think one lawyer from Florida had been involved in these cases.

DB: He had done several of these cases, so he was very aggressive. And he knew the business of this litigation. In fact, I think that during the trial he had to go from our trial to some other place and come back. That's always problematic too, in terms of continuity and juror focus, I think, with a lawyer in that situation, especially if it happens more than once. He was very deep and dedicated to his case, but I don't think he really connected with the local concept of where he was and what he was doing. This was just another Big Tobacco case, I think, to him. He was there to take on Big Tobacco, and thank God for a guy like that because we needed those kinds of self-motivated, independently resourceful lawyers like he was, even though sometimes I had to set him straight. But that's all right. A good lawyer is going to push a judge sometimes.

UMLR: You had these plaintiffs before you?

DB: There were probably a dozen lawyers because each defendant was going to have two lawyers or more. The three tobacco companies, R.J. Reynolds, Philip Morris, and Brown & Williamson, each had local counsel and out-of-town counsel. They took a whole floor of the 100 North Main building and kept it for the four months during the trial as their war room. When I had them in there and saw that I had this case, I said, "Well, I'll tell you what I'm going to do, counselors. I've got five big cases, either one of which is going to last me four months," as this one did.

UMLR: So you knew they were going to take a long time?

DB: Yes, and I also knew I wasn't going to try five different cases for four months apiece. So, I told the lawyers I was going to consolidate the cases. The defense said, "Oh, judge, you can't do that judge. These are too complex. We've got different defenses on each one of these," which they did. They were very shrewd and very sophisticated. They had lots of money and used a lot of science in that case. And, they used different defenses. So they were saying, "Judge, each of these cases is different." And I said, "Well, smoke is smoke."

UMLR: How did the plaintiffs feel about it?

DB: The plaintiffs didn't seem to mind. It was probably to the plaintiffs' benefit because it doesn't require all that money and resources to come back with five different cases. And then the question was: how do we pick a jury? The defense wanted to have jury questionnaires. I did the jury selection in the county administration building, and I had them bring me a hundred or so jurors at a time. The defense lawyers wanted me to circulate these written questions to the jurors and have them do that once they'd been preliminarily selected and then come in with the questionnaires. And I said, "No, I'm not going to do that." I never liked juror questionnaires because I think it makes jurors who are not very comfortable with written words and maybe not that literate uncomfortable, but that doesn't mean they don't have good enough sense to hear the facts and decide a case. It may even make them say, "Well, if I have to deal with this, I don't even want to serve." As far as I'm concerned, the defense can get detailed information questioning the prospective jurors there in the court room. So they had to do it all there in the auditorium. And then, when we picked a jury, I think I had either four or six alternates. As I said, I knew it was going to be a long trial.

UMLR: Meanwhile, your calendar was basically on hold.

DB: No, it wasn't on hold. I'd go into court in the morning. I moved the Big Tobacco case to the Supreme Court room upstairs because we had so many lawyers. We had two tables of lawyers back-to-back in that Supreme Court room. Then, they couldn't all get in that area, so some were seated out in the gallery. Reporters were coming every day to monitor the trial to see how it was going because that was going to affect how Wall Street was going to react to stocks and tobacco.

UMLR: So it was a national event?

DB: Yes.

UMLR: So when were you hearing other cases?

DB: Well, in my regular courtroom. So I'd stop my regular court at, say, nine or ten o'clock. I had to delay some things. I ap-

pointed Bob Green, an attorney, as special master to hear some of the tobacco trial motions. These high-powered lawyers, the attorney from Florida, and Curtis Johnson wanted to fight and have motions in limine and all kinds of motions during the trial that hadn't been resolved beforehand. I just said, "Alright, I'm going to refer you to the master and you can resolve things." I think I had some masters' hearings going on in the evenings.

UMLR: Did you have a sense four months would be the time span?

DB: I knew it was going to be long. I didn't know how long.

UMLR: Surely you didn't preside over many four-month trials.

DB: That's the only one I've ever had. I mean, the longest trials before that, I think, were some medical malpractice cases, and they may have, at max, been three weeks to a month. I don't know that there have been many other trials in the county that have lasted that long.

UMLR: So you consolidated and got through jury selection. Five plaintiffs came down to three. How?

DB: That's right. And remember, these tobacco lawyers know how to fight at every angle. And with tobacco litigation, you've got some peculiar issues of statute of repose as well as statute of limitations. How do you take someone who smoked twenty years ago or even stopped smoking twenty years ago and still have a cause of action when they die? I'd have to go back and look at the pleadings for certain. I think that one of the cases that I had to throw out, which really would have been probably their best case, was Mr. Settle. Mr. Settle was a retired schoolteacher. He died of lung cancer. I don't remember all of the technical details of why I had to throw it out, but there was something about the statute of repose, not a statute of limitations, that cut him off. There was no way really that I saw—and I don't remember the details—that he could get around it. So that case got kicked out on a time technicality, while the other cases were able to filter around. I think the second one that I threw out of the five was a causation matter that

they couldn't connect. So that left me with three cases that went to trial.

Now, the tobacco industry won. The jury went out. I don't know how long they deliberated, but let's say it was for two or three days. Now, of course, the whole gist of these tobacco cases was that in 1954 a study—I think it was from Minnesota—linked cigarette smoking to cancer by looking at tar from tobacco. They painted it on the backs of mice, traced it, and they determined that the tar was causing cancer in these mice. That was when they first made a scientific linkage of cigarette smoke and cancer. Now, the tobacco industry created its own institutes and studies to fight that finding and continued to deny the link, even though there was that scientific evidence. They tried to sweep it under the rug and let people keep smoking. See, that's why people could exceed the statutes of limitations and things, because the tobacco industry conspired to conceal the connection. In fact, even up until the time when I tried this case, the tobacco industry would not admit that smoking causes lung cancer. They could also control the degree of nicotine in cigarettes. And so they could make a non-addictive cigarette, but they would have to include less nicotine. So they would put just enough nicotine in the cigarette to keep people addicted. They knew that. They manipulated the nicotine content.

UMLR: Surely they had experts at trial.

DB: Oh absolutely. But they couldn't dispute that the tobacco companies were manipulating—I mean they could control nicotine content. That's where the attorney from Florida came in. He had his own experts too, you see.

UMLR: But the tobacco companies prevailed?

DB: Well, yes, but the tobacco companies had three prongs of keeping people addicted. One prong was they concealed the causation of smoking and cancer. The second prong was manipulation of the nicotine content to deliberately get folks addicted. The third prong was the advertising campaign. This went back to the black and white film days when all of the stars and all of the actors and the doctors even would be on television smoking. This continued up to the time of the trial. The lawyer from Florida had a Joe Camel doll that he brought and pulled before the jury. I had to chas-

tise him because he kept wanting to keep it sitting on his table, which wasn't right. The doll was an exhibit; you put it away like others. The argument was that it's even targeted at children. And Salem Cigarettes, they marketed mint cigarettes in the Black communities. They put the advertising down low in the convenience stores so when kids walk in to the counter they could see it and read it.

Those were the three main things: concealment, nicotine manipulation, and marketing. Well, the tobacco industry couldn't really win on any of those. That's why they got hit so many times around the country just on those issues. So what did they do then? They took my three plaintiffs, and what did they say? They said that one woman's autopsy or medical records showed that she had a lump on her breast. Now, the lump was never biopsied. And they produced these high-paid scientists who came in, took the witness stand, and said that the lump was likely breast cancer. Then they brought in these colored slides, and they had all of the technology. You know, you would have thought you were in a movie theater with their technology. And the scientists sat there on the witness stand and said, "You see that cell there, and you compare this cell here, and this is what happens when you've got breast cancer, and this is the ordinary life or progression of breast cancer to the lung or to this organ, and so, therefore, I can say to a reasonable degree of scientific certainty that she had breast cancer that metastasized to her lung rather than lung cancer. Therefore, the tobacco industry is not liable."

Plaintiff two was a man who had kidney cancer. So in came very distinguished scientists with foreign-type names. Not all, but, I mean, you know, you'd have thought you were listening to Einstein on the witness stand with colored charts and graphs and slides. They're paid for that, you know, for Hollywood in the courtroom. And the jurors, they sat there attentive. So they said he had kidney cancer and then came a doctor-witness who testified about the progress of the kidney cancer. He went to his slides and showed this and showed the other cancer and showed the characteristics, and he showed the potential migratory route which was more likely to happen than the other. That was the argument with plaintiff two: that yes, he had lung cancer, but the tobacco industry is not liable because he had kidney cancer, which came first.

Now, the third plaintiff. No lump. No cancer. So what did they say about him? Now, mind you, they did not argue these cases on those essential three elements of concealment, manipulation, and marketing. So then, this man, he was a white man (they were all white I think, as I recall; Settle was black, of course), and he was a working class white man. He had been through a marriage or so and had a bankruptcy. Well, the defense brought all of that in. Now, of course, it may have been objected to, but I obviously let it in because I felt, whatever the legal rationale was, that it was relevant to the defense, just like I let them bring a lot of stuff in on the plaintiffs' side. Well the defense argued, "But this man, Judge," not to me, but to the jury, "this man, he's had about two or three other wives. He's been in bankruptcy. This man is a risk taker. He just is prone. Don't blame my tobacco company. Don't say that we manipulated our marketing and got him addicted. He was going to go and do it anyway, even if he knew about these studies. Look at his background. He's reckless."

UMLR: And it worked.

DB: But it barely worked. The jury found for the defendants, the tobacco industry, in the two cases where the industry had claimed that it wasn't lung cancer. Where the tobacco companies couldn't claim that it wasn't lung cancer, the jury found 50% liability in the risk-taker and 50% liability in Tobacco. So that was a 50/50 verdict.

UMLR: So the jury understood the significance of 50% as opposed to 51%.

DB: Absolutely.

UMLR: So, what the jury did was not accidental.

DB: No. See, that's the extraordinary thing about this whole process, and why I have such extraordinary appreciation for jurors. Jurors are smart. I would never send jury charges back. Some judges do. I fought against it when the Tennessee Bar Association was changing the court rules. And they had proposed model trial rules, but I disagreed with what they came up with. There ended up being some proposed rules changes that were enacted by the

Tennessee Supreme Court, but I, along with some other judges, argued against some of the changes in our judges' meetings. Because of our arguments, the Supreme Court made some instances discretionary. One area that they left discretionary was whether you send the jury charge back or not. Another area was whether you allow juror questioning; I never did that either.

UMLR: So did you say that you charged the jury to award the plaintiff damages only if he was less at fault than the defendant?

DB: I'd read the charge to them.

UMLR: But they didn't have it in front of them.

DB: No, because, well I tell them, and it's clear. They know that much. The reason I don't send it back is because a charge might take me two hours to read. And if I give that much writing back there, send that back into the jury room—again, you get somebody who is sitting there at the table, you get twelve of them sitting around the table—somebody reads this and says, "Look, it's right here." Then you create leverage that may be unfair back there in the deliberations. I tell them, "Look, I'm going to read it once. You're not going to get this charge back in the jury room. From here on out you've got to remember it and just use your common sense. So just listen carefully." And that's the approach I take. So I don't send the charge back.

UMLR: Maybe that kind of a verdict didn't send a message to Big Tobacco.

DB: Well, Big Tobacco took that case as a victory, and it was victory for them. Now, I don't want to be a Monday morning quarterback, but I think that case was potentially winnable. I think that when you get 50/50 against Big Tobacco, then in the right kind of circumstances you can make that 51. And they'd have been hit hard.

UMLR: Hypothetically, you're still Circuit Court Judge, and you have that litigation in front of you today. Is it a more winnable case today?

DB: I don't know about that. I'm viewed by people from wherever I've lived as being a nice guy, but some people think I'm uncompromising and crazy. I'm really both, but I can't imagine how you would have a better system. I would tell these jurors that, in every case, I am respectful of what they decide. I can't think of any better, more democratic way of resolving disputes between our citizens than to put twelve people in that box who have no stake in the outcome, set aside their personal affairs, and come down there and listen.

UMLR: So you're telling me that you have a couple of litigants in front of you who have suffered with cancer, a culture that has embraced, if not scientifically, than at least sort of emotionally, the conventional wisdom that smoking has a cancer-causing effect—you've got Wall Street watching, the world watching—underdog plaintiffs, Big Money Tobacco—and you can still look at the outcome and say this is justice?

DB: Yes, because I think that the lawyers had the skill. Curtis Johnson is a good lawyer, but, you know, this wasn't Curtis's forte. He was local counsel. But this guy was the tobacco David taking on Goliath. The attorney from Florida was so flighty, in and out, and I think he underplayed. He underestimated his jury and his court situation. Maybe he had done so much of this, he might not have seen that this case was really *the* case. I mean, in a way, I had a feeling that this guy had other cases where he was flying around the country fighting tobacco. That was the way he was making money.

UMLR: There had been big verdicts earlier in that year.

DB: I suspect that he had probably gotten some hits, but I don't know for certain. There were big verdicts. There was a multimillion-dollar verdict out in California right at the same time that I tried this case.

UMLR: Did Tennessee's fault rule, the fifty percent rule, work against the plaintiffs, do you think? Do you think it's a nuance?

DB: No, I think that the comparative fault rule is a good rule. I think that was a winnable case, but I'm not pointing the finger at

the lawyers because of that. They were both conscientious, and they did everything they could to win it. I'm simply saying that one performer may behave differently with a jury and get a different kind of result.

UMLR: I came here planning to ask, "Were you happy with the verdict?" And I expected you to say, "Not completely." To which I would then ask, "If you could get into a time machine would you have not consolidated the lawsuits, or, in a different climate, would the result have been different?"

DB: I didn't like the verdict. I mean, in my heart, I would rather have seen the plaintiffs win, but that wasn't my job.

UMLR: The news coming out of Memphis, Tennessee, would have been "Big Tobacco Loses," and I think everybody wants to hear about the underdog winning.

DB: Yeah, and I would have preferred that. But I couldn't put my finger on the scale, you know. I fought too hard over my lifetime on the view that the system ought to be fair. In terms of the judicial system, to me, fair means, "Judge, keep your hand off of it, except to make sure it is a fair fight and then let them fight it in that jury box. They're the ones that have to make that decision. Make sure that they get everything and don't even create any unfairness when they get back in that jury room. Put them back there as twelve equals."

And I'll tell you something about that trial too. I had one juror, a black man, served on that jury, and I came to court about a month, maybe six weeks, after we had begun trial. I got up there, upstairs, after the morning docket, and my deputy came to me and said, "Judge, we got a problem." And I said, "What is it?" He said, "Well, one of the jurors is not here." This juror had walked into the jury room, threw his jury badge on the table, said, "Fuck this shit," and turned around and left.

UMLR: You let him go?

DB: I asked the deputy to find out from the Jury Commissioner how to reach him before I went on because I wanted to find out what was going on. I got back in my chambers, I called his home,

and I talked to, I guess, his mother or somebody, and she said, "Well, I'll have him call you." I wasn't going to stop the trial. I went on with the trial because I had the alternates. When he called me back, he said, "Well, Judge, I'm sorry. I didn't mean you any disrespect, but I got problems at home. I can't pay my bills." Or something like that. So I said, "Well, I understand. I'm going to excuse you." I don't remember quite what I said to him, but my point in this was: here the man had come every day for a month, so it wasn't like he was a scofflaw that didn't want to try to do his duty. He was just broke, you know?

UMLR: So it was about the time commitment, not the subject matter?

DB: No, he had other things. It wasn't time. It was pressure of his life. You got to put your life on hold.

UMLR: I don't know how often that kind of drama happens when you're in the middle of trial.

DB: Well, that's the only time I've had that one. I did have a lawyer chew out some jurors in the hallway.

UMLR: So, just looking back, as a judge your reputation is defined by your oversight of cases, challenging cases like this one. What message did you send to other lawyers in town, to the local legal community? How did lawyers feel about D'Army Bailey, the judge? People certainly love the underdog story. And certainly there were people who were dissatisfied with the verdict. That's not your fault.

DB: I don't know who would have been dissatisfied except the plaintiffs. There wasn't any public outcry because it would have been more public if the plaintiffs had won. It was something to take on Big Tobacco and win.

I think it was tonight I saw a man and he said, "I was a juror in your court Judge." He said, "And you were just the fairest person." There really were only a handful of lawyers who were very negative towards me, but I've not heard a one say, "Judge Bailey was unfair in terms of his ruling or decision." I mean, there are some who want to attack me because they can't find anything

concretely, so they use personal attacks, like, "He's arrogant;" "He doesn't take his time;" "He cuts you off;" "He's rushing you." When the Bar Association would do their polls, that was when some of these lawyers would lick their chops, that they could get a chance to take anonymous shots at me and say that I wasn't knowledgeable in the law. Now, I sat on the Court of Appeals at the request of Judge Frank Crawford, and, of course, in later years I was twice screened and nominated for the Tennessee Supreme Court, but I had folks here saying, "He doesn't know the law," and then others that said, "He doesn't dispose of cases early enough." But, I had the quickest disposition rate of any of the nine courts. I had the smallest caseload, and yet the lawyers in the polls would say, "he's slow disposing cases" because they could do it anonymously. Only fifteen percent of lawyers would submit ballots because the rest of the lawyers wouldn't even return the ballots. Many of them don't even come to court anyway, so those who did return the ballots would be those that maybe were in my courtroom, and I straightened them out. Now, I don't mean that in a mean way. I wouldn't let them drag a case out. I wouldn't let them take a divorce case and stir up a bunch of contentiousness between the husband and the wife in order to hike the fee and have a lot of hearings. Just like I said with the tobacco folks, the more the lawyers want to come in my court and have hearings and a lot of in-court proceedings, the quicker they are going to get a trial in my courtroom. And, some lawyers, especially in those divorce cases, didn't want a trial that quick. They wanted to have time to milk it. Now I'm talking fewer than ten percent, but that's enough to skew a poll because most lawyers without an ax to grind don't even bother to vote.

Now, you asked, "What do people think about D'Army Bailey?" I think the jurors left the courthouse with the highest respect. The courthouse staff, the sheriffs, the clerks thought the same. I started with the best clerk in the courthouse, Thad Lee, over whom I fought with Clint Crabtree because Crabtree took Thad out and promoted him after I tried to keep him in the courtroom. After Thad, I got a lady who eventually went over to the federal courthouse because they paid her more money, but she was an excellent clerk. I had the best kind of staff. My deputy that was there when I came, Jerry Houston, is still there in Division VIII. Great deputy.

UMLR: But I suppose if you are a judge, and the lawyers all love you, then you're probably not doing something right.

DB: That's right. You've got to be willing not to be loved. And not just with the lawyers. I was willing not to be loved with the other judges. I mean, not in Memphis, but all over the state. You've got to have your own vision of what you think. I knew, whatever the lawyers said in their polls, that the people in the community were going to support me because I was building a broader base with every juror that came through the courtroom.

UMLR: Do you miss it?

DB: No, not really. I do have so many friends over there, and I'd end up talking and chewing the fat. Frankly, that would tie me up more than I would want to be tied up. So, I basically stay out of the courthouse unless I've got some reason to go over there.

UMLR: Before we wrap up, I have just a few questions about Clarence Thomas. In 1998, the National Bar Association [www.nationalbar.org "Founded in 1925, the NBA is the nation's oldest and largest national association of African American Lawyers and Judges."] invited Clarence Thomas to come speak in Memphis. In his book, *The Nine*, Jeffrey Toobin describes the appearance as one of the first times that Thomas gave a public appearance after his confirmation. But, at some point before Thomas is scheduled to speak, the NBA decided to disavow its invitation. Do you remember that?

DB: Do I? How can I forget it?

UMLR: What happened?

DB: Oh, a little D'Army Bailey mischief.

UMLR: Didn't you want him to come?

DB: I believe it was at the National Bar meeting in Minneapolis, and there was a black professor from Howard who said, "You know they're always attacking Clarence Thomas, but we ought to get him to come to one of these meetings." So, the next year, the National Bar was to meet in Memphis, and the president of the

judges' section, Bernette Johnson, who is a Supreme Court Justice in Louisiana, appointed me to chair the judicial convention section. I said that I wanted to invite Justice Thomas to be the lunch speaker.

UMLR: Did you have a relationship with him at the time?

DB: No.

UMLR: You had never met him?

DB: No, but I had met Jose Lopez, a black judge in Washington, D.C. I had met him here in Memphis for some occasion, and he told me that he was friends with Clarence Thomas. I asked Judge Lopez, "If I sent an invitation to Justice Thomas, would you get it to him?" He said, "Yes." Then I waited—for weeks. After two or three weeks I contacted Judge Lopez and asked if he had heard anything. He said, "Well, they're considering it, they have it, and they're looking at it." I decided to contact the professor from Howard, from the convention in Minneapolis, who knew Thomas, and I asked him if he would help. He said, "Well, I will contact the Justice's office too." So he contacted Justice Thomas's office. After a few more weeks, Judge Lopez said Justice Thomas would do it and wanted Damon Keith to introduce him. Judge Keith was a federal judge on the Circuit Court of Appeals out of Detroit. I called Judge Keith, and he said he'd do it. Then Justice Thomas committed. In the meantime, I also talked with John Crump, the Executive Director of the National Bar Association at the Washington office, and told him that I was inviting Justice Thomas. He said, "Well, go ahead." I talked to the president of the NBA, Randy Jones in San Diego. So, the president of the judge's section, the president of the NBA, and the executive director all agreed with my invitation. When Justice Thomas accepted, and we announced it to the organization, all hell broke loose. They were mad, particularly the women in the judicial section.

UMLR: What were the particular reasons for the opposition? Was it because of his position on affirmative action?

DB: Yes, it was affirmative action. None of us like what Justice Thomas has done to affirmative action. I think that he has set the

black community back. I cannot understand it. I was in Washington maybe ten years ago, and I went to Justice Thomas's chambers and met with him for almost two hours. He was just as nice as he can be. The first thing he said when I got in there was, "You know, I sprained my back when I was in Memphis." It's a longer story than I'm going to go into here, but after his speech I had a boat ride scheduled for the judges on the river. I had hired a good rhythm and blues band, so I went to get Justice Thomas at his hotel room and he had on a coat and tie. And of course it was summertime. I said, "Justice, you don't need that coat and tie on." I said, "This is casual." So, he took off his coat and tie, but he didn't have a belt because he was wearing suspenders. So I gave him my belt to put on his pants. So we went on down to the boat. We partied down the river and back. So, that is what he was saying then, because he was out on the floor dancing. Now, these were the judges, mind you, who were just ready to hang him high, some of them. In fact, one of them, a female judge from Boston, went up to him on the boat and asked him to help her get some kind of appointment on something. And she was one of the ones leading the opposition to him speaking.

Anyway, we talked about his philosophy. He told me in his chambers, "Well, the problem with civil rights lawyers is they're arguing equal protection when they ought to be arguing privileges and immunities—it goes back to the *Slaughter House* cases." And he got up from his desk, and he went and got this book out of his desk drawer, and he came back around because we were sitting. And he pulled this little pamphlet out and he said, "This is it." Then he turned to the Fourteenth Amendment. He said, "The privileges and immunities clause, that's what we ought to be arguing." I had him sign it for me.

UMLR: That's great.

DB: But, Justice Thomas told me that Equal Protection was not written on the basis of race. The Privileges and Immunities clause of the Fourteenth Amendment was, however, specifically to protect blacks, Thomas said. I was skeptical that, even with *Slaughter House* protections, Justice Thomas was unlikely to be more liberal on issues of black rights.

UMLR: Anyways, the purpose of inviting Justice Thomas was to engage him, right?

DB: Exactly. And maybe as brother to brother. I even had Al Green there to sing, and I took Al Green from his back holding room to Justice Thomas's room and introduced them and left them there reminiscing about music, which they had a very pleasant time doing.

UMLR: So then the NBA freaks out. Rescinds the invitation?

DB: The most indignant wanted Bernette Johnson to quit. Now this wasn't the NBA lawyers group overall. Remember, it was the judges' section that had invited Thomas. They had a meeting of their executive committee and decided to rescind the invitation, which Bernette Johnson refused to do as the chairwoman. Normally, the chair had the prerogative to pick luncheon speakers.

UMLR: She refused to do it?

DB: They were under pressure from lawyers and judges, particularly those who were outraged. Now a lot of them were women. I think they had lots of reasons. Anita Hill. Not all women, but I think some had worked themselves to believe that Justice Thomas had transformed the race issue into a woman's issue, which I really didn't see. But they had made it that because of the Anita Hill thing. My problem with Justice Thomas was the race thing. And they were hostile. The Memphis Police legal advisor, Gerald Thornton, came to their meeting and told them, "Look, I want to be respectful to y'all, but if y'all act up, we are going to have to call the police and put you in jail." And they got mad at that. Boy, they were so mad. They were almost rowdy in their opposition.

UMLR: And this was before it even happened?

DB: Before he spoke.

UMLR: So then he said, "I'm going to come in."

DB: That's right.

UMLR: And you saw that it was a good thing?

DB: Well, I mean, I wouldn't have asked him if I hadn't thought it was a good thing. And then of course the media, it was all over the country. I had reporters contacting me from all over the country. Someone from the *New York Times*, he said, "Judge, normally the ABA is meeting the same week and we'd be in Chicago at their meeting. But all the press is here. We took the whole press on legal matters and brought it to Memphis." The luncheon was a sell-out. We had an overflow room. The Memphis lawyers turned out, and I was pleased. We had a lot of Memphis attorneys that came, black and white, but I was glad to see the white lawyers from Memphis who came to that.

UMLR: You didn't have any trouble getting people into the room?

DB: Well, we had an overflow room. We had to do it on the video screen in the Continental Room. And the NBA made more money than they had made at any one of those luncheons. More publicity. Plus, Justice Thomas's speech was an excellent speech.

UMLR: Is there any truth to a story about you locking some doors?

DB: I knew about the opposition and their plan. They had been saying that they were going to have a walk out during the luncheon when Justice Thomas got up to speak. My speechwriter and I came up with a plan on how to handle it, but I had decided a strategic move in advance. Well, when I got to Justice Thomas's room at the Peabody to meet him, to take him to the luncheon, he pulled out a leaflet and handed it to me and said, "This was under my door." They were putting leaflets out under the hotel room doors that said, "When Justice Thomas gets up to speak, walk out." He wasn't deterred by it. In fact, he said, "They sent me a letter telling me that they were rescinding my invitation." He said, "Well, I don't know how they could rescind my invitation. They didn't invite me."

I didn't realize they were going to let us out in the lobby of the Peabody. I thought we were going to get out on the mezzanine. A woman was protesting in the lobby. She had a sign, and she followed us. Man, she was screaming at Justice Thomas, calling him everything. I mean, criticizing him. We just had to walk around. When we got to the banquet, the luncheon had already

started, and I already knew what I was going to do. I had it set up where I was going to introduce Damon Keith, who in turn would introduce Justice Thomas. When I got up to introduce Judge Keith, I said, "We're getting ready to bring on Justice Thomas. Judge Keith is going to introduce Justice Thomas, but I have to say this, for security reasons, once we proceed from here you are not going to be able to get up and leave. So, we will pause momentarily before I introduce Judge Keith, and anybody who wants to leave, you are free to get up and leave now, because after that, for security reasons, we are going to have to close the doors."

UMLR: How many of them left?

DB: Very few. You know, cause that threw them all off. They were looking around I guess to see what the other person was going to do. Maybe there were five, at most ten, people that got up.

UMLR: They were looking for the drama.

DB: Of course, they were. Once I gave them time before I called Judge Keith up, I signaled the staff to close the doors. I went ahead and introduced Damon Keith, and that killed the walk out. But Justice Thomas said to me, "I've already figured out what I was going to do. I was going to smell up under my arms and say, 'Did I forget my deodorant?'" That was what he told me that he was planning to do on the walk-out. But no one wanted to walk out really. I mean, why would you want to walk out on such a momentous occasion?

UMLR: The speech got a lot of favorable, critical response?

DB: Yes.

UMLR: It was obviously a little piece of history to have been in the audience.

DB: And Justice Thomas felt deeply about that. You could tell. This was a unique challenge for him to come out there in that hostile crowd.

UMLR: So, all in all, a successful event?

DB: Yes. When I was leaving Justice Thomas's office at our meeting in Washington, we were standing at the door. As we stood there at the doors, he said, "Look, if there is anything I can ever do to help you, let me know." So I remembered that when I was seeking my Supreme Court appointment—and the only reason I sought that was because Justice Birch had really encouraged me to do it; he and Ricky Wilkins, who had called me.

UMLR: For the benefit of anybody who doesn't understand, you are referring to Adolpho Birch, who is a Tennessee Supreme Court justice who retired. You were one of two nominees in the second round through the judicial selection committee.

DB: That's right.

UMLR: This was a news story in its own right.

DB: That's right.

UMLR: I believe he was the only African American on the court at the time, right?

DB: The only black out of five members.

UMLR: Right.

DB: Now, we have it all white because Governor Bredesen, instead of picking me as a black Democrat, picked a white Republican. Birch had asked me, encouraged me to apply for it. I wasn't anxious to be on the Tennessee Supreme Court because I was happier as a trial judge than going and listening to argument, reading briefs, and writing opinions. That wasn't my thing. But, I felt that submitting my name was the right thing to do because I was invited to do it by someone I respected. Justice Birch told me, "D'Army you're one of the two people who I think are best qualified to follow me." He never told me who the other one was, and I never asked.

When I applied, I called Justice Thomas's office and spoke to his secretary. I said, "Is the Justice in?" She said, "No, Judge Bailey." And I said, "Well, I'm applying for the job in Tennessee on the Supreme Court and I want to talk to him." She said, "Well, he's not in, but I'll take a message." I was out in the back yard on

Saturday, a few days later, and my wife said, “telephone.” I came to the kitchen, and I took the phone and he said, “This is Clarence Thomas.” Can you imagine?

UMLR: I can’t imagine.

DB: I told him I was applying for this job. He said, “Well, I know, let’s see, who’s the senator down there?” Lamar Alexander and Bill Frist. He said, “Well, let me see what I can do.” So, his secretary called me back and she said “Judge Bailey, will you send me some bio, some information on you?” I sent something to her, and that was the end of it. I didn’t hear anymore. Later, I saw Bill Frist at Governor Bredesen’s inauguration. Senator Frist told me that he was in his office in the Capitol and Clarence Thomas came down the hallway to his office and asked him to help me in any way he could. Now can you imagine? Asking, trying to help a guy who got thrown out of an office in Berkley, California for being a radical? And Justice Thomas? Going to Senator Frist, asking him to help me get on the Tennessee Supreme Court?

UMLR: That’s amazing.

DB: Complex. And, so that was the only other thing I was going to say about Justice Thomas. Later, I wrote him a letter after I saw him on television, speaking to one of these conservative groups. I said, “Look, these folks you were talking to aren’t the underdogs or victims. They’ve got all the money and the power.” It was respectful, but I was disagreeing with what I saw on television. Washington Post writer Mike Fletcher mentions that letter in his book on Thomas. It hurts me to criticize my friend, but my hopes are still going in terms of what I’m expecting from Justice Thomas. He returned a call recently because I called him to ask if there is anything he can do to help Judge Donald, who has been nominated to the Sixth Circuit. His office responded that he will.

UMLR: Again, we are now talking about Bernice Donald, having recently been nominated to the Sixth U.S. Circuit Court of Appeals by President Obama?

DB: Yes. So anyway, that’s it.