

YEARBOOK 1982

UPREME COURT HISTORICAL SOCIETY

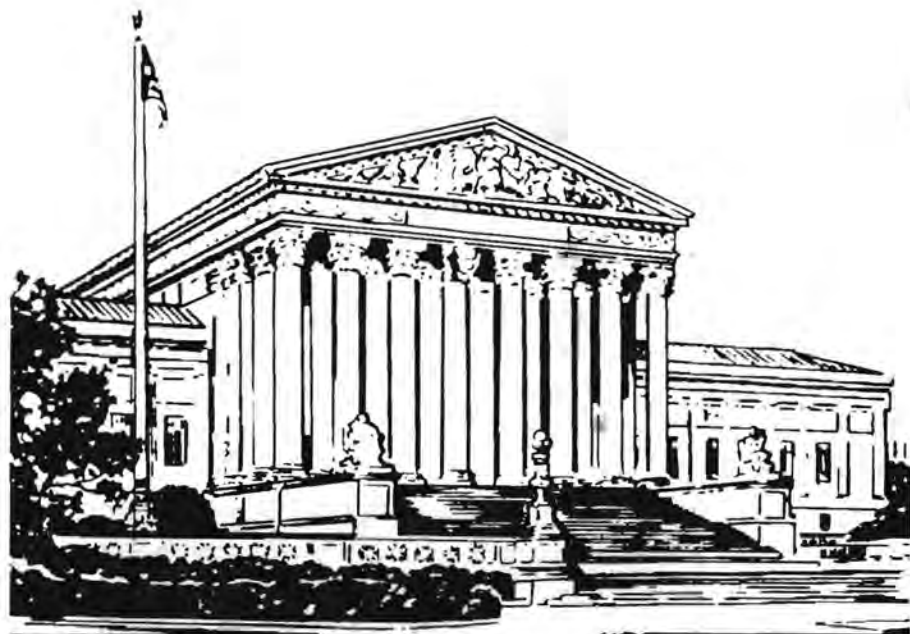


EDWARD DOUGLASS WHITE
NINTH CHIEF JUSTICE, 1910-1921



YEARBOOK 1982

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ACKNOWLEDGEMENT

The Officers and Trustees of the Supreme Court Historical Society would like to thank the Charles Evans Hughes Memorial Foundation for their generous support of the publication of this *Yearbook*.

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In Memoriam

ELIZABETH HUGHES GOSSETT 1907-1981

This volume is dedicated to the memory of Elizabeth Hughes Gossett, a founding member of the Society, its first President, and later, a Chairman of its Board of Trustees. Her article on Chief Justice Charles Evans Hughes published in the 1976 *Yearbook* revealed not only her deep love and respect for her distinguished father, but also her reverence for the Supreme Court and a keen understanding of its place in American life and history. Her special qualities of intellect, wisdom, and quiet yet irresistible leadership; her example of caring, of grace, and humanity, all combined to render her a dominant force for good and a noble inspiration for everyone whose life she touched.

My Father the Chief Justice

Earl Warren, Jr.

(Editor's Note: Chief Justice Earl Warren presided over the Supreme Court in what was probably the most critical era of twentieth century American history. His own Memoirs give hints of some of the stresses of the times, and Mrs. Fry's summary of the taped interviews with some of his contemporaries, in the progress of his career toward the Court, which follows, captures the flavor of some of the issues in which Warren the prosecutor, attorney general and governor participated. In the present article one of his children—Judge Earl Warren, Jr. of the Municipal Court of Sacramento—balances this with a warm family portrait.)

As a preface to what follows, I must state that I am simply one of the six children of my father and am only expressing my own viewpoints. However, I feel comfortable in doing so because we are a very close family and am sure that most of my observations and comments would be concurred in by the others. Nevertheless, I would not feel the least bit offended if I were to be contradicted in any respect by any of the others, for each naturally has his or her own viewpoints which are entitled to equal weight.

As it is, I was asked to write this piece, and, for reasons of my own (and I believe my father's) I have chosen to write it without any of the rest of the family's concurrence or revisions, or even their knowledge that I was doing so.

Also, I was assigned to discuss only personal aspects of my father and the family, which I find to be a difficult task since all of us were relegated to living lives which were inextricably woven into his public service. It is also a difficult task because we were so close and because at times we individually lived thousands of tribulations and elations which he probably felt even more deeply.

As a beginning, I am certain that all of us

would agree that no one could have finer parents. And that to include my mother in the context of this article is absolutely essential, for why else would my father have said in the dedication of his memoirs: "To Nina, the best thing that ever happened to me."

From the early days of our lives, my father was a prominent public figure—the most effective crime-busting District Attorney in the history of the Nation, and Attorney General of the same vein, a superb Governor of one of the largest states in the Union, a candidate for Vice-President, a seeker of the Presidency itself, then finally the Chief Justice of the United States. Yet, we were largely insulated from the effects of his career by both him and my mother, who ran a household just as though he was engaged in an occupation which was totally unpolitical and uncontroversial.

Ours were normal childhoods in the formative years, with no inkling of being "different," other than the knowledge that Dad held "important" jobs. And even as to that, our knowledge of their importance came almost entirely from others. Fortunately, the realization of his trials, disappointments, and successes became evident only after we had become teenagers—and then only to a limited extent.

I still cannot fully understand how my father and mother achieved this, except through the fact that we were treated the same as any non-political family by them and, in retrospect, the fact that they somehow otherwise managed to keep our family life insulated from my father's professional life. I have immense difficulty in trying to determine how they did this, because of all the public notoriety which accompanied his achievements, yet they did, and we are all extremely grateful.

Each of us was allowed, in fact encouraged, to live an independent life, with friends of our own



Bancroft Library

A jubilant Warren enjoys breakfast with his family after learning of his sizeable lead in the 1938 California Attorney General's race. Pictured with the future Attorney General and his wife are five of their six children: (from left to right) Virginia, Earl, Jr., Nina, Elizabeth and Bobby.

choosing, and to follow the patterns of development which naturally ensued. There was absolutely no urging to confine ourselves in any way, nor even the slightest hint that we should conform to certain standards commensurate with his public positions. As children, we therefore were free to do anything we desired, as long as it was a morally acceptable course of conduct. Hence each of us led a separate life — chose our own friends and pursued our own inclinations completely unfettered. We grew up with associates of all races and backgrounds such as with Oklahomans escaping the Dust Bowl, with blacks seeking a better life than their sharecropping environs, with hoboes in their search for a place in society, with Asians and Hispanics in their desperate desire for legitimacy, with Jews escaping from the iron boot of the Nazis and with a myriad of other cultures also seeking to achieve acceptance and success. All such activities were enthusiastically encouraged by our parents, for aside from their inherently humanitarian instincts, each had grown up under modest circumstances and my mother had come to the United States as a baby from Sweden.

Oakland, California, our home, was a tremendous melting pot in this regard, for it was one

of the "poor man's" major points of entry into a new life — particularly during the Depression and the advent of World War II. And since we always attended public schools, the exposure to diverse cultures was intense indeed.

This "separate life" aspect pertained to religious activities as well. Each of us was free to question and explore and then affiliate according to our individual consciences and preferences. We all started out in the Baptist Church which my mother regularly attended, but as we grew older we wound up in sub-families which adhered to various Protestant, Catholic and Jewish persuasions. And, in between, most of us had strong exposure to other religious faiths.

Mother was inclined to the traditional church concept, and had close relatives who were missionaries by profession. On the other hand, my father attended church infrequently, yet was a dedicated student of nearly all religions. And he found special comfort in the basic religious tenets of the Masonic Order. There was absolutely no disparity in this regard as to the end result, for both are the most inherently moral and basically religious people I have ever known, and their teachings left no doubt in any of our minds as to what was morally right and what was

morally wrong or questionable.

Upon my father's election to the governorship in the early forties we moved to Sacramento, and for the first time realized that we *were* somehow classified as "different." Yet, again, our parents minimized the move in our minds and continued their attitudes the same as if we had simply moved across the street in Oakland.

I was becoming a teenager then, but nevertheless accepted it as just another adjustment, as did my younger brothers and sisters. However, within a short time at least the older ones of us began to realize from the circumstances and the attitudes of some of our peers that we were part of a public trust which should in no way be compromised. Accordingly, we took greater note of my father's public image and tried to conduct ourselves in a reasonably decent fashion from the public standpoint.

That is not to say that our parents' attitudes changed in the slightest. It was simply a case of us growing up and recognizing that we too had certain responsibilities in our daily conduct. Yet, aside from the fact that we realized we were now "in the public eye," we pretty much did as we had done before—just that we tempered our actions so that we were a bit more discrete in masking our natural teenage recklessness. Nevertheless, we maintained the same spectrum of associates and activities and managed to be well within the mainstream of what others of our age were doing and experiencing. In fact, many of our associates can relate episodes that we all now cherish, but which would have been considered a bit "wild" in those times, and even today.

It is perfectly logical at this point to question why I dwell upon our development as children when the story is meant to focus on my father. To this, I respond that others have discussed my father's professional life and other aspects of his personal life and that my assignment is to talk about him as a father. And, as I have previously mentioned, this requires talking about my mother, myself and my brothers and sisters. For we were and are a "family" in classical terms, and he and my mother were a "team" in the grandest sense.

Perhaps it is peculiar, even unbelievable to most, to perceive the possibility of a truly *great* relationship between parents and their children, that there would be no feeling or actuality of rebellion between them, that everyone was "on

his honor," that there was no corporal punishment, that each child was treated equally according to his or her desires, needs, strengths and deficiencies, that each child recognized this, and that no serious dispute ever arose which was not readily resolved by frank discussion between the parents and the child involved. Yet that is exactly the way our family operated.

There was no pressure to do anything in particular, except your best, and there was no undue pressure even in that regard. But because of this we did try hard and successfully ended up in a wide variety of endeavors.

From my own standpoint, I leaned toward the sciences and eventually chose agriculture, majoring on it in college and working in it for about five years thereafter. However, when it came time to question whether I should broaden my horizons by further study in that or a related field, I went into law—something I had always vowed never to do because it was not my inclination and because I wanted no part in something where it could be said I was attempting to follow in my father's career. Yet that is exactly why I made the election—because I had a gnawing feeling that I was running away from the law because of his prominence in it. One of Dad's cardinal principles was that it was self-defeating to run away from an honorable endeavor and I couldn't get this out of my mind. So I went to law school, and even deliberately to the same one he had gone to—and in later years accepted a judgeship, even though I knew that was something I would *never* do. And none of these moves had ever been even remotely suggested by my parents. Such were the principles we children were guided by, and I am sure that each of the others can recount similar personal experiences based upon what we learned from our parents.

How, one can logically ask, could these parents with the onerous demands of public life, such as meetings, travel and campaigning possibly spend an adequate amount of time with so large a family? Frankly, I don't know—but they surely did. In fact, I don't think any one of us, at any time, felt that both parents were not always right there. That was true even after they moved across the country to live in Washington, D.C.

While we were young, my mother was always physically present, for she and my father gave the family number one priority in this respect. And as to my father, it seemed like he was always

there too, although, naturally, he physically wasn't. Somehow they both were always physically present in our minds—which tends to give real credence to the theory that it is the quality not the quantity of contact between parent and child which counts.

Then came my father's appointment to the Supreme Court, which was a turning point in all our lives. We were basically adults at the time, so only our parents moved to the District of Columbia.

Now we were separated geographically. Now we were no longer politically naive, but acutely aware of what my father had been, what he had done, what he was, and what he believed in. But none of us envisioned the controversy which would follow his appointment, nor the impact on our individual lives which would result.

We were then, and subsequently, politically divided; some Republicans, some Democrats, some Independents, some decidedly liberal, others ultra-conservative, and some middle-of-the-roaders. In this respect, I am including an "expanded family" which includes spouses and their families, for our family has always been deemed to include all involved in it. It should be emphasized that my mother was always apolitical and that my father never tried to impress any particular political philosophy on any family member.

Whereas we had previously felt some focusing of the political spotlight upon us, this was show-down time, a period of about 20 years when we would be forced to defend or refute what the Supreme Court was doing. And it was terribly difficult—for regardless of political persuasion or personal feelings, we, as individuals, had to take stands. There was a stigma to being in the

family and it took many strange turns. Friends became enemies. Enemies became friends. And, in most cases, both became skeptics. We had to explain, disavow or support, for the Court was one of the major issues of our time. And this affected our personal lives immensely. Yet through all of this, my father and mother remained the same as always—stoic, serene, totally understanding, and one-hundred-percent parents. And because of this, they became the greatest sources of earthly strength that we had, as well as symbols of what we should strive to be.

What else can be said? Certainly a great deal. But I think these few words and broad observations are the best I can do within the context of the assignment. It would take volumes to describe more, let alone know where to start and where to end. Have I been overly laudatory? Is it a fairy tale? Aren't there negative aspects I could point to? No. These are my total views—and I have never been accused of restraining myself in matters where my father was concerned. In fact, the closeness of the relationship between the two of us rested to a great extent upon my questioning and challenging demeanor.

Those with a psychological bent have often asked if our relationship with our parents has been a "love-hate affair." The answer has always been that we love our parents while hating the "goldfish bowl" problems imposed on us—although our parents did everything they could to keep these problems from us, and did effectively insulate us during our formative years.

I have also been asked if we have always had a "love-affair" with our parents. That is an easy question. The answer is: *"Absolutely!"*

The Warren Tapes: Oral History and the Supreme Court

Amelia Roberts Fry

(Editor's note: *Oral history is a branch of scholarship and documentation which is comparatively new, and particularly new in the area of judicial history. But a major step forward in the latter field has been the comprehensive project on the pre-Court career of the fourteenth Chief Justice of the United States, which is described here by the person who directed the project from 1969 to the present. Although much of the material on the California years of the later Chief Justice may at first appear to have limited usefulness for the legal historian of the Supreme Court, Mrs. Fry's demonstration of the interrelationships which become more evident with the increasing range of interviews in a project of this importance is in itself an indication of the potential which oral history has for future research by scholars on both Earl Warren and the Supreme Court.*)

In the early sixties Daniel Boorstin, now Librarian of Congress, drew a bead on lawyers and judges and handed down a non-judicious opinion. "Future historians will marvel that our society could have put the custody of our legal institutions into the hands of a profession with so little historical perspective."¹ About the same time Dr. Boorstin was passing sentence on the judiciary, Chief Justice Earl Warren was mulling over a request from his alma mater, the University of California at Berkeley, which also dealt with the historic void. The staff of the Regional Oral History Office (ROHO) had asked Warren if he would consent to be interviewed in a project to document his era in California for the Bancroft Library archives.

Two months later, after further urging by his classmates and others, he sent a typically deliberate reply to ROHO which opened the way for oral history to make its own documentation of the history of the "third branch." He noted that "I have never intended to make an intentional record of my activities in public life," but was

willing to listen to argument. "Some day when I am at the University, I will be happy to talk to you about your own method of doing things and how it might fit in with my position on the Court."²

The "method of doing things" was oral history, but at that time neither the lexicons of historians nor the public's conventional wisdom had settled on a name for it. Today the technique is described by the Oral History Association as "a method of gathering and preserving historical information in spoken form." It is usually intended as a time capsule of sorts, to be deposited with related collections of papers in archives where future historians, biographers, and (perhaps now) legal historians can find the raw material and primary sources they need to recreate or enrich the record of events.

The Chief Justice agreed to participate in the project after an exchange of predictable assurances: on his part (voluntarily), he gave the University complete independence in its research and operation. On ROHO's part, the project agreed to focus on only his California years because he was still on the bench at the time. That Warren was protective about certain areas of inquiry into Supreme Court cases did not mean he was unaware of problems historians were having with increased reliance on press accounts; in fact, he comments on that source's reliability in his published *Memoirs*:

The media [do] not consider the Court's work newsworthy until it makes a decision which stirs emotion on the part of great numbers of people on the losing side. Then the media give a superficial judgment which is often wide of the mark, and leave the matter to the public in that unsatisfactory condition. This is largely because news gatherers are not deeply concerned with the proceedings before the Court until decision day; their homework is thus generally inadequate.³

John P. MacKenzie explained the view from the *Washington Post* in 1968: "Secrecy at several

levels both protects and obscures the Court and its work. The process of marshalling a Court, of compromise, of submerging dissents and concurrences, or of bringing them about, can only be imagined or deduced. . . .” He cites the process of handling petitions for certiorari as “a process which . . . eludes the attempts of newsmen to fathom, much less to communicate to the general public, a sense of what the Court is doing.”⁴

Warren sidestepped the dilemma between what ROHO saw as the historical mandate to provide as full a record as possible, and the judicial imperative to maintain confidentiality about specific decisions reached in past litigation; he simply requested that ROHO’s study not delve into his experience on the bench. Today however, federal justices and historians working together have evolved a workable approach that respects both judicial and archival mandates. In a series of interviews that ROHO is conducting with federal district justices of the Ninth District, Justice Albert C. Wollenberg sent the interviewer, Dr. Sarah Sharp, a list of cases he had selected for their discussion of sentencing:

Wollenberg: The point I wanted to make with you now is that these things are confidential and you can see the reason We shouldn’t be referring to them I don’t think by the case name and individual.

Sharp: Sure, most questions are just real general.

Wollenberg: Yes, I appreciate that. I just mean, let’s not be specific about who we are talking about. We’ll just simply talk about Mr. B, or something like that.

Sharp: I wondered, first of all, why you picked *these* cases?

Wollenberg: Well, I didn’t “pick” them . . . only to this extent: they’re a good cross-section; they’re all different cases. There’s tax fraud; there’s bank robbery; there’s receiving stolen property; use of a telephone or interstate wire for fraudulent use. [Reading] “importation of heroin . . . possession and passing of counterfeit money . . . possession of cocaine with intent to distribute;” and tax evasion. . . . These cases are all the result of trials. They’re not pleas of guilty.

That’s why they were picked.⁵

Wollenberg then proceeds to discuss each case separately. But Warren’s interviews of a decade earlier do not touch upon such subjects.

Oral History’s Unique Contribution

The Chief Justice probably was aware that for a century oral histories had been an intrinsic part of his alma mater’s extensive collection of manuscripts in the Bancroft Library. Old Hubert Howe

Bancroft himself, ranging from Alaska to Mexico, had filled several shelves with “Dictations” of Mexican grandees and Yankee pioneers that he, his agents, and sometimes his wife and daughter took down in notebooks. Today the thirty-nine volumes are major sources for anyone writing on the history of the nation’s nineteenth century westward movement. Bancroft stopped his work in the 1880’s, and the faculty at Berkeley resumed the oral history program in 1953 as tape recorders began appearing on the market. At Columbia University, historian Alan Nevins had already experimented with the new electronic gadgetry to obtain “from the lips and papers of living Americans who have led significant lives a fuller record of their participation in the political, economic, and cultural life of the last sixty years.”⁶

The fact that two large universities, one on each coast, were developing oral history offices almost simultaneously was a sign of a mutual discontent with a sort of nationwide amnesia caused by twentieth century technologies. Once our society had plugged into a telephone system, important pieces of the historic record self-destructed the moment a receiver was hung up. Easy plane travel encouraged person-to-person discussions which likewise remained unrecorded. Gone was the practice, perhaps the luxury, of painstaking explanatory letters and memos which for centuries had created documentary material for archives of the future. Diary writing, once commonplace, became rare.

Paradoxically, the nation’s bureaucracies were simultaneously intent on producing a rising tide of paper. (The San Francisco *Chronicle* noted in 1973 that the National Archives accessioned seven million cubic feet of new records each year, and this was only three percent of what the government produced.) But most of the information in papers today consists of records of routine transactions, self-serving reports to the boss, cautious memos justifying decisions already made, and tons of public pronouncements designed with an audience in mind. More and more, historians are having to look to newspapers in a gloom exceeded only by their skepticism: news stories may be excellent as quick reportage in the first blush of an event, but they were never intended to be carefully probed evidence or first-hand, first-person source material.

Clearly, the records preserved in archives

across the land needs supplementary material. Now, as technology discouraged production of much treasure in conventional sources, it finally provided access to new riches through new electronic capabilities. The invention of the tape recorder made oral history a practical means of counteracting the growing anemia in important written sources.

The Earl Warren Oral History Project did not get under way until 1969—evidence that part of the problem that Boorstin described lay with funding agencies' priorities. Finally, a small grant came from the National Endowment for the Humanities, matched by donations from Warren's previous law clerks, from small local foundations, and from friends of the Bancroft Library.

Thirteen years and 121 memorists later, the oral history project can now announce its final volume, the oral record from the Chief Justice himself, on the shelf alongside the other fifty-three bound volumes of transcripts. Altogether they form more than the biography of the Chief Justice; it is a biography of the state and nation from 1925 to 1953—give or take a few years. The set is in the California State Archives and in the law library of the College of William and Mary, as well as at UCLA and, of course, Berkeley's Bancroft Library. Selected volumes may be found in research collections all over the country.⁷

For the narrator, producing an oral history requires less time than writing memoirs; it is usually more enjoyable, and it is easier because the interviewer does most of the research. But it does require a commitment of time segments that the interviewee has to schedule. As for interviewees, initial selections were based upon: (1) the person's proximity to a political or governmental inner circle, or to the life of the central figure in the project—in this case, Warren; (2) the angle of the point of observation, such as that of the legislature, the lobbies, the press, and so on; and (3) the individual's health and ability to articulate and conceptualize, as well as his memory. (Oliver Wendell Holmes—a Justice who was too early for oral history—correctly anticipated the wariness of oral historians when he wrote, "Oh, this terrible gift of second-sight that comes to some of us when we begin to look through silvered rings of arcus senilis!") Finally, (4) there was the balance needed for all sides of the pro-

verbial blind man's historical elephant. The latter criterion required spokesmen not only for each political view but also for specific subdivisions of the time frame.

An oral historian, who is *creating* archives, can be delighted one day with a historical "scoop" on tape, and the next day he may face the challenge of effectively using his 90-minute appointment with an interviewee who is either too taciturn or too discursive. Processing costs per tape mean that such problems, if not handled adroitly, can either bankrupt a project or alienate an interviewee. When a research project's sources are a variety of living personalities, the human variables often defy the best efforts to keep the process efficient and on a predictable schedule. To cut down on the chances of delays and surprises, a project's staff at the outset needs to explore judiciously the criteria for screening interviewees, choosing research topics, seeking advice from knowledgeable experts, and building basic themes for questions.

History While It's Hot

The Warren Project was fortunate in that two biographies of Warren himself had just appeared—respectively, by John Weaver and Leo Katcher⁸—which were indispensable as starting points for discussion with the authors for advice on priorities of interview themes, and links between personalities and issues. From their own experience in interviewing some of the same characters, they knew to which topics a particular interviewee could best address himself.

The first round was with persons who were in more peripheral positions in the power structure. This provided not only more information for project files but a more subtle sense of definition of attitudinal patterns. The result was that subsequent interviews with people closer to the center of events could at least be more empathetic and usually more knowledgeable. The following is an example of a question raised by an earlier interview which was followed up in a subsequent interview with someone closer to the event:

Listen to that master observer, Carey McWilliams, for years an editor of *The Nation*, and critic-at-large of California's society and government. Then hear a follow-up recorded by Ford Chatters, who had worked closely with Warren as his publicity chief for the same cam-

paigned that McWilliams describes. First, McWilliams, on November 12, 1969:

Warren, I always thought, was always thinking of where he wanted to go next, politically speaking. My impression of him as a California politician was that he was very cautious. He was pretty much the law enforcement type. No reason why he shouldn't be because that had been his career. He was pretty grim . . . until he retained public relations specialists Whitaker and Baxter when he first ran for governor. Then I was amazed at what they were able to do with Warren. I think it was one of the first professional image-changing jobs, and a very good one. I remember still the shock, after Warren announced his candidacy for governor, at seeing in the Southern California papers big photographs of Warren at a grunion hunt on the beaches . . . Here was our candidate for governor in a bathing suit, laughing and running up and down the beach, et cetera et cetera. Now I had never seen a photograph of Warren like this. Never . . . I said to myself, "That is the hand of Whitaker and Baxter . . ." ⁹

Carey McWilliams had known only the exterior of the story, but his perceptions instigated new questions for the project's question bank. Two years later Ford Chatters gave history a closer look at that episode. He was showing the interviewer one of the family pictures used in the campaign.

Fry: Warren liked that picture?

Chatters: Well, at first he didn't want it used.

Fry: Why?

Chatters: Oh, just the desire to keep the family out of it [the campaign]. Especially when we talked in

terms of using hundreds of thousands of them, all we could afford to distribute.

Fry: Who talked Warren into O.K.'ing it I wonder.

Chatters: Oh, Clem and Leon Baxter probably. ¹⁰

One of the most difficult tasks for a biographer is not the tracing of a person's chronology, but the collecting of the human events and social attitudes *around* him in order to identify those *which seemed pertinent to him* at any given time. Oral histories are probably richer with clues for this process than letters and written records. Take, for instance, the circumstances around Warren, as state attorney general, when World War II broke out in Hawaii. He was already in a war himself—with a governor over the control of civil defense, in a state with a thousand-mile coastline exposed to Hawaii, and beyond that, Japan. Several of the project's interviewees recalled their perceptions, among them Helen MacGregor, Earl Warren's executive secretary and deputy attorney general:

. . . All law enforcement people and fire department people looked to him, as attorney general, for guidance on all civil defense matters. I remember the day of Pearl Harbor. Mr. Warren called us around two o'clock in the afternoon. Phone calls were coming in—some of them sounded hysterical. There was some sabotage as I recall, but no major sabotage. The sheriffs and the chiefs of police were calling in wanting to know what to do and how to do it. . . There was a great deal of fear throughout the state. . . At an early point, this West Coast was declared a combat zone. . . There were raids on some of the Japanese places by local police, I think. I remember one in the Sacramento Valley, where a substantial cache of weapons was found. We didn't know, from one day to the next, when there would be a major Japanese attack. The coast was defenseless. The Air Force had *all* been sent over to Pearl Harbor, but the second or third night of the war there were planes overhead in considerable number. I felt at the time that they were Japanese planes, a roar of planes, around 8:00 or 9:00. I believe it was just their reconnaissance flight. If Japan had followed up on Pearl Harbor with an attack on this coast, we would have had a terrible time. . . But we were blessed by the fact that Japan didn't try. ¹¹

Earl Warren recalled something which does not appear in any newspaper of the time but which was verified in Coast Guard records: two sinkings in San Luis Obispo harbor, and one in San Diego.

Shortly after Pearl Harbor, I had a phone call from Abe Brazil down in San Luis Obispo. He was the district attorney there, and he told me that



Earl Warren campaigning for the Governorship of California in 1942.

that morning (he called me early in the morning) there was an explosion off the coast there that had awakened the whole town, and that they [the town's residents] got up and they went down to the shore—the seashore—and they learned when they got down there that a submarine had sunk a tanker of ours. The crowd stayed down there talking about the thing, you know, and when it got light, along came another tanker and up came a submarine in front of the whole town and sunk it right there.

Brazil said to me, "Gee, I don't know who to call, but," he said, "we immediately phoned the Air Force"—they had an air base there just three miles from town—"and we waited for hours. They never showed up!" So, he called me. He said, "I don't know who to call, so I just called you."¹²

Warren also called the military and discovered that the entire coastline was virtually defenseless. Another example of the pertinent historic context comes from Oscar Jahnsen, Chief Special Agent for Attorney General Warren. His perception also was that invasion was imminent:

"When Pearl Harbor came along and they started sinking ships off San Luis Obispo and so forth, it became apparent that we ought to find out where the Japs were, if there was an invasion. Warren wanted to know if they were around anywhere that could do us any danger. I went to the Division of Highways for their maps, and sent a copy of each county map to each of the 58 district attorneys. We asked them to send us those maps back, giving us in detail as much information as they could as to where the Japanese were, the amount of land they had. When all these maps came in, we had a master chart on which we marked all of these things, and all of these [Japanese] places appeared to be strategically located. It looked as though pressing one button they could go to work and they'd take over the whole state of California..."

Warren showed these to Commanding General DeWitt, and DeWitt just realized that if he waited too long, many things could blow up along the Pacific Coast...¹³

The decision to evacuate the Japanese-Americans along with the Japanese was a complex one, emanating from the White House. Most historians agree that it was urged by the army, with pressure from California congressmen. Warren's speeches and his testimony before the Tolan committee can be considered within not only the context of West Coast panic, but also as set against the backdrop of the early resistance of the Justice Department to the removal (a resistance which ultimately crumbled) and the competing urgencies of the conduct of the war that faced Roosevelt. James Rowe, U.S.

Deputy Attorney General at the time, summed up in his interview:

I don't think Roosevelt paid much attention to the thing at all [when he decided to sign the order]. I think he said "well, it's war," and after all you had a couple of British ships just sunk at Singapore. The Japanese evacuation question must have been a fringe matter for him those weeks just following Pearl Harbor... I think FDR told Attorney General Biddle to move the Japanese, and he followed presidential orders. We [the Department of Justice] should have made sure we were heard at the White House [in opposition to the removal]. Our fight should have been at the White House level. We made a lot of mistakes.¹⁴

Finally, the question asked of many interviewees was, Where was *your* voice of opposition at the time? Person after person looked back unable to explain their inaction. Ruth Kingman, who later led a concerted effort on behalf of the Japanese Americans, describes a sort of paralysis of incredulity. "As time went on, it was evident that evacuation was to be indiscriminate—far-reaching—total... Most of the 'goodwill people' just didn't believe that it could happen. 'It can't happen here' I think was the major reason that there was no immediate opposition."¹⁵

Even though the former internees themselves were not interviewed, the backward look thirty years later was painful as the scenario unfolded again. Often both interviewee and interviewer talked doggedly through tears. The Chief Justice was not exempt. In a preparatory session with Earl Warren, which was recorded not on tape but in notes taken by all staff members, the Chief Justice's eyes brimmed over as he said, "Now that society in general is so much more aware of civil rights, interning them (the Japanese Americans) seems like a terribly cruel thing to do, and it was a cruel thing, especially uprooting the children from their schools, their communities and friends, and having whole families transferred out to a strange environment and a less desirable environment..."¹⁶ Later he was to write much the same sentiment in his *Memoirs*.

Earl Warren's Own Oral History

The tape-recorded sessions with Earl Warren bring up another point. In several aspects it ran counter to the methods that ROHO had developed over the years. The optimum length for a session was considered to be between an hour



Office of the Curator, Supreme Court

President and Mrs. Dwight D. Eisenhower greet Chief Justice and Mrs. Warren at the White House.

and an hour and a half; Warren's sessions began in the morning and lasted all day. A one-to-one interview generally promotes better understanding between interviewer and interviewee and allows better organization of the narration; Warren requested the presence of his assistants Warren Olney III and Helen MacGregor, a format which led to all six interviewers—each with a different expertise—sitting around the table too, and Doubleday editor Luther Nichols sitting in because Warren was also working on his *Memoirs*.

Nonetheless, the marathon sessions proved exceptionally valuable. Two tape recorders were used at all times, and the give-and-take even in such a large group comes across on the transcript. But after three all-day sessions with Warren (each several months apart) negotiations were attempted to do it the "right" way—i.e., tape record his memoirs a piece at a time, with one interviewer at a time, going through his papers file by file for questions and an "agenda" of topics to explain and compliment the papers. It was an enormous request to make of a man who was

busily engaged in a half dozen other demanding projects, albeit no less than the nation's history deserved. Time dragged on, and nothing more was done before his death.

Also contrary to usual procedures, the transcript is completely unamended, graced only with bracketed additions of phrases and names here and there to keep the conversation understandable to readers, who of course are not privy to the background work-ups, the chronologies, and the question lists that were present on the table. The transcript was also audited three times with the tapes from both tape recorders to promote as much accuracy as possible. Many of the questions were spin-offs prompted by advance drafts of his *Memoirs*, which he and Doubleday sent to ROHO's staff. Material that is appropriate in a manuscript being published for the general public usually raises a number of additional questions for oral history, where the objective is to preserve the past in research archives for scholars from several fields; the questions must be more multi-disciplinarian.

Many of the questions came from news files, which sometimes offered Warren an opportunity to correct the media's instant history. For instance, he was asked about a story during his campaign for attorney general in 1938 which says the then district attorney was "rabidly" opposed to horse racing and pari-mutuel betting, and if elected he would see that the entire state be cleaned up. Warren said the story was spurious.

Fry: Why do you say it was spurious?

Warren: Well, because I had never put it out, I had never said it. Pari-mutuel betting was legal in California . . . That was the opposition trying to get all of the people who were interested in horse racing to be against me. My headquarters never put out anything of that kind.

MacGregor: I remember that very, very well. The Chief was down in L.A. . . . This was either Wes Robbins or the one from the *Post Inquirer* who called.

Warren: Frank Piazza

MacGregor: Frank Piazza — read me this purported statement and said "That doesn't sound like Earl." I said, "It doesn't, and I don't think he said that." Then I got on the phone and reached you somehow and then you said, "Just say it's a forgery. [laughter]. I never said it."

Warren: Yes, yes, I know I never said that. I never have been enamored with pari-mutuel betting, but I have never used it as an issue in a campaign, as the constitution provided that it was legal.

Fry: And they were able to print the statement that this was a spurious press release?

MacGregor: The papers that did carry it. . . they were able to print a retraction.¹⁷

As happens in using newspapers as sources, researchers had found the original statement but the retraction was not seen because no one knew to look for one. The story had a premise that made it sound possibly credible; that he would be against all gambling in whatever form did not require much of a stretch of the imagination.

Law Enforcement

Warren was known as a tough district attorney who had made his reputation raiding gambling establishments in the county, throwing out bootleggers, and even prosecuting a corrupt sheriff. The crooks were brought to trial quickly. Just how this was done Warren Olney III explains in his own memoir (corroborated by other deputy D.A.'s as well as by Warren himself):

"We had a policy — and this was Earl Warren's doing entirely, and he imbued the whole office with it, and insisted on it — a policy of moving the cases as rapidly as it was possible to move them. . . . But the pressure was always kept on us — he

kept it on us. . . . Now this required an awful lot of work. . . . We had to be down at nine in the office, and we were expected to stay at least until 5:30, and to work at night if we needed to. We worked every Saturday — expected to do that too. If we didn't have inspectors enough to run around and interview our witnesses to get it ready, we were supposed to do that ourselves and we did."¹⁸

Earl Warren put it this way in one of his sessions:

Warren: Well, I don't know what it [the delay on cases] was, but I know that it was too long when we started, and we ran it down so that everybody got a trial in thirty days, not because of his insistence that he be tried speedily, but we just insisted that the cases be tried . . . within that length of time. We used to try our important murder cases in thirty days from the day of the murder.

Fry: While Helen MacGregor is here and Warren Olney, I'll ask . . . how did the staff manage to get all of the research done so that a person who had a case could keep it moving along that fast?

Warren: Well, he didn't have any forty-hour week. [laughter].

MacGregor: He just keep plugging.

Warren: We kept their feet to the fire almost. Well now, there's just an awful lot of truth in that too. We *didn't* have any forty-hour week, we just worked all hours of the day and night if it was necessary to do it, and that's the only way you can keep up with these things.

Warren views the present practice of plea-bargaining:

Warren: There might be some plea-bargaining today as in a great many times where the judge has the option of punishing by imprisonment in the state penitentiary or by imprisonment in the county jail. Maybe they go to the extent of bargaining with a fellow and saying, "I won't plead guilty unless you assure me that I'm not going to the penitentiary but I'll only go to the county jail." That could be done, and I don't doubt but what it is done a good bit, but —

Feingold: But that wasn't done back in your day as District Attorney?

Warren: No, we didn't do that. They were tried for a major offense. Very rarely we did the other.

But Warren contrasts the larger pressures of criminal justice and law enforcement of the early Seventies with his era:

Law enforcement officers today and the courts have problems we never had. We had, in spite of that we were in a rough riding and hi-jacking era and a time when all of these rackets that they had in Chicago and New York and so forth were trying to come out and get established here, we had a pretty rugged time. But the era was so that we had good will on the part of the general public. We just didn't have the problems of bitterness that everybody has today — the spirit of bitterness that makes life almost unbearable for law enforcement officers and for the trial courts. . . .¹⁹



The new Chief Justice shortly after his appointment to the Supreme Court in 1953.

Warren's active fight against gambling continued in his attorney general period with a spectacular victory in quasi-naval battles to arrest the purported "captain" of a gambling ship moored just outside—he thought—the jurisdiction of the state. Even after Warren became governor, he was appalled at the obvious corruption of the attorney general (who, in California, is also elected by the people); concerned over organized crime getting a foothold in the state, Warren called on his trusted friend Warren Olney, who helped him organize a crime commission that could circumvent the recalcitrant attorney general. The commission's reports (exposés actually) worked as the governor had hoped. The attorney general was not re-elected, and his successor was Edmund G. "Pat" Brown. (Later, in 1958, Brown brought the Democrats into power by winning the governorship.)

In Brown's interview, he tells of how in 1951 he assured the governor that although they belonged to different political parties, he would be loyal, he would always be the "governor's lawyer," and there would be no need for the crime commission henceforth. But an interesting thing happened.

Brown: Earl Warren called me up in San Francisco. . . and he said, "I've decided that I am going to keep the crime commission for another year," and I said to him,

"Governor Warren, I am the new attorney general, and my responsibility is to enforce all of the law, and I wish you would give me the chance to enforce the law without the aid of any extra-curricular body. . . ." And I said, "I want all the credit or all the blame. I don't want to share it with anybody if I do a good job as attorney general."

And he said, "Pat, I already have it in my message to the legislature. Will you come up and talk with me?"

So I took my chief assistant, Bert Levit, with me and we went up to Sacramento. The press were outside waiting to see the new attorney general meet the old attorney general now elected governor for a third term at that time. . . .

Earl Warren said to me, "I hope you'll go along with me on this. I know how you feel, but I really feel they [the crime commission] haven't completed their work yet."

And I pounded on his desk (not hard) and I said, "Governor, I want the right to do this job that I have taken a solemn oath to perform."

He . . . was very conciliatory, but didn't retreat in the slightest degree, and finally he said to me, "Now let me just tell you something. I've been around here for a long time and you're new up here. Do you want to walk outside here at the beginning of your career, and have the press say—in headlines talking to ten million people in this state—say 'ATTORNEY GENERAL BREAKS WITH GOVERNOR'?"

And I said, "Governor, we shall have a crime commission."²⁰

That is not quite the end of the story, however. Pat Brown needed experienced investigators for his new job. And where better a pool of experience than—

Brown: I brought Art Arthur Sherry with me. He was a special prosecutor for the crime commission. I made Art Sherry my chief assistant general. That was one of the reasons why I didn't feel that we needed any crime commission. And a man named Harold Robinson, who was chief investigator for the crime commission, became my chief investigator. So I really took his crime commission and used them.

The Governor and Politics

This episode proved to be typical of the relations between Warren and Brown. A rich friendship grew between the Republican and the Democratic leaders of the state, one which resulted in regular hunting expeditions together when the Chief Justice returned to California.

Party lines became strong and clear during presidential years, however, and once Warren became governor he was a presidential or vice

presidential candidate at Republican conventions. Although he turned down the vice presidential nomination in 1944, he had headed the Republican party in California in the Thirties and he was not ignoring the White House siren song that persisted through the 1952 convention.

What goes on at political conventions is a topic in which oral history competes very well with the understandably sparse written records. One example of many spread throughout the political volumes is travelling Secretary Merrell F. Small's portrayal of Earl Warren after the 1948 vote at the Republican convention. For Warren, it had been hopes for the presidency or nothing; but at the convention he finally did agree to run with Dewey, quite against his own desires. The scene is Warren's private hotel room, and Warren is watching the convention on television with Small, affectionately called "Pop" by nearly everyone.

Small: I was alone with him. There was nobody else. Mrs. Warren was at the convention and the girls were at the convention. . . . Warren had just been nominated vice president. He turned to me, and he said, "Pop, I had to do it." He apologized! . . . "I had to do it. If I hadn't taken it this time, they'd never consider me for anything again." . . . Because he was looking ahead — maybe another chance, you see.²²

That campaign was not a happy one for Warren, for reasons that vary with the narrators; probably they are all correct. There was a lack of communication in the campaign between Warren and Dewey; there was a personality gulf between the western forthrightness of Warren and the sense of propriety of Dewey; and there was a profound difference of opinion on the basic strategy of the campaign, which is encapsulated in a tiny vignette, again by Pop Small:

Small: Dewey's campaign strategy was, "Let's not commit ourselves. We've got this thing in the bag." . . . Warren argued against the strategy to an extent. "We've got to take *some* positions." But Dewey was the boss man . . . I walked in this particular morning, and he [Warren] was in his shirt-sleeves with one leg up over the arm of a big overstuffed chair, with the telephone up to his ear, and I quote, "But Tom, we gotta say somep'n about somep'n *some* of the time."

"The campaign ended and we went to San Francisco for election night. About ten o'clock the governor announced he was going to bed. He had told us two weeks before the election that Truman had won. He said, "He has reached the people and we haven't."²³



Chief Justice Earl Warren (1953-1969).

Bipartisanship was a major strength of Earl Warren's campaigns, a necessary strategy for a Republican to win in a state in which, after 1936, Democrats increasingly outnumbered Republicans. Permissive election laws that allowed cross-filing in primaries was all to Warren's advantage, as most interviews with his campaign workers gleefully explain. For the Democrats, there is Warren's 1950 opponent, James Roosevelt:

Fry: How was Warren's strength assessed by you and the other Democrats?

Roosevelt: We all knew that he was a master politician and he had succeeded in building what might be called a "Warren party," which included enough of the Republican party (who were not always united behind him as I'm sure would be evident from newspapers . . .) but I think that he attracted liberal elements of the Democratic party. He convinced the conservative elements of the Democratic party that certainly he was preferable over any other Democrat they could think of, and he really built a Warren party straight across the board.

And of course he was helped at that time by the fact that we had . . . cross-filing in the state so that . . . you could pose as both a Democrat and a Republican and how you had a foot in both camps and that you were the best of both. And he did it in a masterful way. He had a good public record . . . All in all, he was an effective governor without any question of it.

. . . Let me put it this way: effective opposition to Warren was destroyed because of this tactic, which failed to bring to the attention of the great

population of California the basic things which were not getting done and not being faced, which would become very serious problems later on.²⁴

In addition to gathering as much enlightenment on Earl Warren's personality as possible, other overarching themes dictated avenues of questions to be applied to all interviews. What were Warren's basic contributions as governor? How did he handle the legislature? How did he select state appointees? And that question that everyone wonders about—was Warren as governor different from Warren the Chief Justice, less "liberal," less the reformer? The basic constancy in his personality may have made change a difficult phenomenon for those around him to perceive.

Earl Warren himself explains his approach to any change, any reform—and it is illuminating:

... no matter how strongly you feel on a subject, I think you have to start very often with small beginnings and work forward from one step to another... a growth from nothing up to meeting conditions as they come along, don't you see, depending on what problems developed, and so forth. That's the way most social institutions develop, anyway. They don't come in full-blown, and if they do, they're usually disasters.²⁵

Warren and Religious Law

The project followed any clues to the on-going development of Earl Warren's system of values. Early in the planning stages nearly every advisor mentioned how close William Sweigert had been to Earl Warren. From his position as assistant and administrative organizer in all of Warren's offices from district attorney to governor, (where he was personal secretary to Warren) Sweigert enjoyed constant access to him. He was a man with a thoroughly Jesuit training, a fact his own interview integrates with narrations of the walks and conversation on philosophy of government that he and Earl Warren used to have, and with a memorandum that Sweigert prepared when Warren was governor-elect. It is a basic statement of the progressive view of government: responsible for the social, economic, and physical well-being of its people, a use of bureaucratic power to improve society.

What did not come to light until later was another factor: Earl Warren's personal investigation into Talmudic Law. Ben Swig, a close personal friend of the Warren family, had said, "I'm going to be frank with you. He knows a lot more

about it [the Talmud] than I do... I'll have him teach me something about it one of these days." Off tape, Swig mentioned that he thought Warren had studied it under Rabbi Louis Finkelstein, now Chancellor Emeritus of the Jewish Theological Seminary of America. This was an intriguing lead, and later Finkelstein taped a short session but one with long ramifications. The two men had met in 1951 when Governor Warren gave a commencement speech at the University of Judaism in Los Angeles, and their friendship continued. As Chancellor Finkelstein recalls, "when he came east to the Court, I saw him more frequently."²⁷

Finkelstein: He and I often discussed the ethics of the Talmud, which is the greatest Jewish commentary on the Bible, containing discussion of most of its laws. He was very impressed with that. And he said that he would like to spend a little time with us here (at the Seminary). I said, well, if he came here for a weekend, I would arrange to have our professor of Talmud, who is the greatest living authority on the subject, lecture on Friday night. And I'd ask another professor to lecture on Saturday at lunch.

He agreed to that, and he came and spent the weekend here. [September 13, 1957] On Friday evening, our Talmud professor, Professor Saul Lieberman, discussed the passage in the Talmud which forbids acceptance of any confession in any way in a criminal case. This is the only system of law of ancient or medieval times which did prohibit it... The Talmud also has ruled against double jeopardy. A person who has been tried



President Lyndon Johnson confers with Chief Justice Warren and Congressman Gerald Ford, two members of the commission appointed by Johnson, and chaired by the Chief Justice to investigate the assassination of President John F. Kennedy.

once cannot be tried a second time. . . . After the lecture the Chief Justice said to me, "I think I would like to say a few words." And what he said was, "This lecture in has been so interesting, so instructive, that I can't understand how it is nobody knows about it, that this is kept almost as a secret among you specialists in the field."

Fry: Then his chief interest in it was its relation to our Bill of Rights, do you think?

Finkelstein: No. I think he became interested because of this great concern of the relationship of ethics to law. Curiously enough, in the Talmud we have a situation very similar to what you have here. . . . That is to say, the five books of Moses are an immutable constitution. They are the law. But of course they go back thirty-five hundred years. . . . So that the role of the Jewish rabbi over the centuries has been in some respects similar to the role of the judge in the court in trying to interpret a written document so as to make it fit the needs of life, and how *would* the author of the document approach a situation when it is entirely novel.²⁸

Later in the session an attempt is made to establish the extent of this pursuit. Finkelstein had said that the seminary had given Warren a copy of the whole Talmud, but that Warren confessed once, "I don't spend too much time on it," as indeed he couldn't, being a very busy man. Studying the Talmud is like studying higher mathematics."

Fry: Did you continue your discussion of the Talmud here (in Washington)?

Finkelstein: Yes. . . . We often sat around and discussed these questions. He *liked* to do that.

Fry: About how often?

Finkelstein: Well, I would say that I used to come to Washington about three times a year. . . . Always a lunch, and lasting an hour or so after lunch.

Fry: And he would question you?

Finkelstein: He would question me, or I would make some comments. But very often he questioned me. It was very fascinating. He was a profound man. Of course he was popular, and didn't put on any airs. One often was deceived into thinking that he was simple. He wasn't simple. He was a very profound gentleman. A very profound thinker.

Fry: Well, it's interesting that you found that this man did have a profound mind, because we do get testimony that he was simplistic.

Finkelstein: He gave the impression of being simplistic.

Fry: But that was because he had distilled things?

Finkelstein: That was because he *wanted* to give that impression. He was direct and didn't like letting technicalities interfere with justice. . . . He was a man of *deep* understanding and saw through a good deal that he didn't talk about, in public, and which I don't think I'm free to talk about here either. . . . but he certainly was a person who had a profound grasp of the situations in which we live and a determination to deal with them.²⁹

The Chancellor did not know anything about

Earl Warren's attitude toward black minorities because most of their conversations occurred after the desegregation case, *Brown v. Board of Education*. But it was a question often asked in interviews, and one of the most interesting discussions occurred with Edgar James "Pat" Patterson, now retired as counselor-psychologist at Vacaville prison. As a young black, he was a guard at the governor's mansion but much more than that; he had been chauffeur-companion to the Warren's six children as well as to Warren himself. The two men took long drives alone into the fertile California countryside to lessen the stress of the governor's duties. Several times Warren questioned "Pat" about the difference he had experienced between his segregated school experience in Louisiana—a far cry from Warren's hometown of unsegregated Bakersfield—and how it differed from Pat's subsequent schooling in Sacramento, which was integrated. Patterson recorded the following:

Warren and I would discuss things like this, that there is no such thing as being separate, from different schools, and being equal, because so much is left out. . . . How you feel—your terms, your language, your way of thinking is different from when you go to a school that is mixed [racially]. When you go to a ghetto school, where it is all black, you feel like you just can't get across the railroad tracks. You can see the progress on the other side, but you can't reach it.³⁰

After the *Brown v. Board of Education* decision, a vivid picture is painted by Warren's friend Ben Swig, with whom the Warrens frequently spent December holidays and took summer vacations:

"I've seen blacks come up to him and say, 'How wonderful you are,' and 'We don't know where we'd be without you.' I've heard them say that to him, on the street. I've seen so many of them. They worship him. We've all got to be more understanding."³¹

The question of whether or how much Warren's beliefs changed is one that will require some careful picking through the interviews. One person in a good position to judge was Lowell Jensen because as a young up-coming attorney in what, decades before, had been Earl Warren's district attorney's office, Lowell studied with fascination how Warren had run it. He taped when he himself was in the same district attorney chair:

I'm sure Warren has changed his mind about



Bancroft Library

By an 8-0 majority, with one abstention, the Court affirms the humor of the moment. Seated (left to right) are: Associate Justices Tom C. Clark and Hugo L. Black, Chief Justice Earl Warren, and Associate Justice William O. Douglas. Standing (left to right) are: Associate Justices Byron R. White, William J. Brennan, Jr., Potter Stewart and Arthur J. Goldberg.

some of the things that have been part of his existence at the time he was DA. There was a totally different scene at the time he was DA than when he was Chief Justice. The social kind of world you live in has changed. The structure of government has changed. The kind of county you live in has changed. Things are totally different. And there was a period of time when there became an increasing recognition that the criminal justice system as it was in the Twenties and Thirties really didn't provide levels of protection to people who are charged with crime like it should have.³²

Summation

The new "method of doing things" today has pretty well proven itself. There are oral history projects covering many subjects and in every state in the Union. But its distinction rests on more than its oral virtue. It returns the history of human events to the human level. The sources created are the perceptions of the men and women who actually made the history happen or who were there as qualified witnesses. Put together, the story develops only as far as the

recollections have been preserved from individuals who have occupied varying angles of perception. Even with conscientious attention to that sort of balance, illness and death conspire to prevent a perfectly-rounded story, but it is much more complete than one drawn from collections of papers alone. The finished transcripts are human recall sharpened by questions that are based on whatever multifarious sources are available.

The reminiscences reflect a reality that is not neat and well-ordered. Truth is rarely a symmetrical story. With oral history recorded as a series of interviews, the glitches in causation are visible: the accidental coincidences, the serendipities, the misunderstandings combine to pass a budget bill, to elect an official, or to make a decision. Causes are illuminated that lie quite outside structured ideology or the brilliance of organized campaign strategy. As the picture develops from one memoir to the next, so do the people, and so does their larger historical context.

Footnotes

¹ Daniel Boorstin, *The Americans: The National Experience* (New York, 19), 444. Cf. also Harold M. Hyman, "No Cheers for the American Law School? A Legal Historian's Complaint, Plea and Modest Proposal," 71 *Law Lib. J.* 227 (19).

² Earl Warren to Amelia Fry, Sept. 10, 1962.

³ *The Memoirs of Earl Warren* (New York, 1977), 343-44.

⁴ John P. MacKenzie, "The Warren Court and the Press," *The Warren Court, A Critical Analysis* (New York: Chelsea House, 1968), p. 113-114.

⁵ Albert C. Wollenberg, *Two Generations of Public Service* (interview with Amelia R. Fry, James Leiby and Sarah Sharp; Regional Oral History Office [hereinafter cited as ROHO], Bancroft Library, University of California, Berkeley, CA, 1981), p. 340.

⁶ Charles Wollenberg, "History on Tape: The Regional Oral History Office at the Bancroft Library," 54 *Calif. Hist. Q.*, 77 (Spring 1975).

⁷ Other libraries where several volumes are deposited include Florida State University, Tallahassee; Harvard College Library; California State Library, Hayward, New York University Law Library (complete set); Wilson Library, Univ of North Carolina; Stanislaus State College; Los Angeles Public Library.

⁸ John Weaver, *Warren: The Man, The Court, the Era* (Boston, 1967); Leo Katcher, *Earl Warren: A Political Biography* (New York, 1967).

⁹ Carey McWilliams, *Earl Warren: Views and Episodes* (interview with Amelia R. Fry and Willa Baum, ROHO, Berkeley, CA, 1976).

¹⁰ Ford A. Chatters, *View from the Central Valley: The California Legislature, Water, Politics and the State Personnel Board* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1976), p. 74.

¹¹ Helen R. MacGregor, *A Career in Public Service With Earl Warren* (interview with Gabrielle Morris, June Hogan and Amelia Fry), ROHO, Berkeley, CA, 1976).

¹² Earl Warren, *Conversations with Earl Warren on California Government* (interview with Amelia R. Fry et al., ROHO, Berkeley, CA 1981), p. 1.

¹³ Oscar J. Jahnsen, *Enforcing the Law against Gambling, Bootlegging, Graft, Fraud, and Subversion, 1922-1942* (interview with Miriam Stein and Alice King, ROHO, Berkeley, CA, 1976), pp. 123-25.

¹⁴ James Rowe, "The Japanese Evacuation Deci-

sion," in *Japanese-American Evacuation Revisited* (interview with Amelia R. Fry, ROHO, Berkeley, CA 1976), Vol. I, p. 3.

¹⁵ Ruth W. Kingman, "The Fair Play Act and Citizen Participation," in *Japanese-American Evacuation Revisited* (interview with Rosemary Levenson, ROHO, Berkeley, CA, 1976), Vol. II, p. 26.

¹⁶ *Op. cit.* n. 12 *supra*, p. 31.

¹⁷ *Ibid.*

¹⁸ Warren Olney, III, *Law Enforcement and Judicial Administration in the Earl Warren Era* (interview with Amelia R. Fry and Miriam Stein, ROHO, Berkeley, CA, 1981), p. 94.

¹⁹ *Op. cit.*, n. 12 *supra*, p. 51.

²⁰ Edmund G. "Pat" Brown, Sr., *Earl Warren: Fellow Constitutional Officers* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1979), p. 5.

²¹ *Ibid.*, p. 6.

²² Merrell Farnham Small, *The Office of Governor under Earl Warren* (interview with Amelia R. Fry and Gabrielle Morris, ROHO, Berkeley, CA, 1972), pp. 84, 90-91, 93.

²³ *Ibid.*

²⁴ James Roosevelt, "Campaigning for Governor against Earl Warren," in *California Democrats in the Earl Warren Era* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1976), p. 7.

²⁵ *Ibid.*, p. 10.

²⁶ Benjamin H. Swig, "Shared Social Concerns," in *The Warrens: Four Personal Views* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1976), p. 6.

²⁷ Louis Finkelstein, "Earl Warren's Inquiry into Talmudic Law," in *Earl Warren: The Chief Justiceship* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1977), p. 10.

²⁸ *Ibid.*, p. 4.

²⁹ *Ibid.*, p. 12.

³⁰ Edgar James Patterson, *Governor's Mansion Aide to Prison Counselor* (interview with Amelia R. Fry, ROHO, Berkeley, CA, 1975).

³¹ Swig, *op. cit.* n. 25 *supra*, p. 15.

³² Lowell Jensen, "Reflections of the Alameda County District Attorney," in *Perspectives on the Alameda County District Attorney's Office* (interview with Miriam Felbgold, ROHO, Berkeley, CA, 1974), Vol. III, p. 15.

Of Politics and the Court

Lewis F. Powell, Jr.

(Editor's Note: The following was an address delivered by Justice Powell at the banquet of the American College of Trial Lawyers, New Orleans, August 8, 1981.)

The news at the Supreme Court, of special interest to every lawyer, is the retirement of Justice Stewart and the appointment of Sandra Day O'Connor as his successor. Potter Stewart was on the Court for 23 years, during a period of vast changes in our society and the world. During his service, decisions were made that profoundly affected and — in some instances — accelerated these changes.

Potter Stewart, when interviewed by the press, identified the qualifications of a good judge: a high degree of legal competency, a judicial temperament, and — of course — character and diligence. He personified these characteristics. He was a gifted lawyer, had a unique capacity for detachment, and certainly possessed the character and diligence of the ideal judge. He also was a thoughtful and generous colleague, with a high sense of institutional responsibility. He will be greatly missed.

A change in the composition of the Court prompts one to wonder how a particular lawyer happens to be chosen. Apart from "luck," what does history teach?

Professor Alpheus Mason — distinguished scholar and Supreme Court historian — has written:

The Supreme Court has always consisted largely of politicians, appointed by politicians and confirmed by politicians, in furtherance of controversial political objectives.¹

Two of Dr. Mason's statements are historical facts. The nomination and confirmation of Justices are in the hands of elected politicians. The Constitution so provides. It also is true that "controversial political objectives" often have moti-

vated the nomination by a President, as well as the action of the Senate.

But has the Supreme Court, as Dr. Mason states, "always consisted largely of politicians"? The statement can be read in different ways. Were Justices chosen primarily because they were successful politicians? If so, did their political views persist and influence their decisions?

The answer to the last question is clear. The Justices with the most impeccable political credentials rarely have remained loyal supporters of the political goals of the Presidents who appointed them. This fact is a tribute to the institutional independence of the Court, and largely accounts for the public respect and support that the Court has enjoyed for most of its nearly two centuries of existence.

It is less clear, however, that Justices have been chosen *primarily* because of political prominence. As this audience is composed of eminent practicing lawyers, I thought it might be of interest to explore this question.

I could talk about the present Court. But this would be a one sentence speech. None of us could claim any fame or skill as a politician—not even in influencing each other.

I turn, therefore, to history and take as a Gallup Poll sample the 14 Chief Justices who preceded the present Chief. Were they, as Dr. Mason suggests, primarily politicians, and chosen for this reason? I necessarily characterize their careers briefly.

The first three Chief Justices—Jay, Rutledge and Ellsworth — hold prominent places in our history, not because of their brief services as Chief Justice, but because each was a lawyer and also a political leader of great prestige during the Revolutionary Era.

John Marshall, on the other hand, was too young to play a comparable role in achieving



A porthole gallery of the first ten justices of the Supreme Court of the United States.

independence and establishing our country. He came to the Bar in my City of Richmond in 1783, and soon established a reputation as a litigation lawyer.

Like most Virginia lawyers at the time, Marshall also was active in politics. Yet, he declined positions as Attorney General of the United States, Minister to France, Supreme Court Associate Justice, and Secretary of War. He remained primarily a practicing lawyer until he became Secretary of State under President Adams.

His leadership at the Virginia Bar is documented in our records. In the decade of the 1790's, he argued 113 cases before the Virginia Court of Appeals. Although Marshall dressed slovenly, and was not eloquent, the power of his knowledge and force of his personality won him great respect. Beveridge, in his famed biography, states that Marshall was on one side or the other in almost every important case in Richmond.²

Roger Taney, who succeeded Marshall in 1836, also made his reputation initially as a successful lawyer in Maryland, enjoying an exten-

sive practice in both state and federal courts. He argued several cases in the Supreme Court, and was co-counsel with Daniel Webster in at least one case.³ He was on the losing side in *Brown v. Maryland*, a major Commerce Clause case.⁴ Active support for President Jackson led this prominent lawyer to his appointment as Attorney General of the United States and later as Chief Justice.⁵

Salmon P. Chase was named by Lincoln in 1864 to succeed Taney. Little need be said about Chase. He made his career in politics, and can be classified neither as a prominent lawyer nor as an admired Chief Justice.

The next two Chief Justices were distinguished private practitioners: Morrison Waite and Melville Fuller. Waite made his reputation as a litigation lawyer in Ohio. It is said that at the time (middle of the 19th century), Waite—like other western lawyers—spent much of his time riding circuit, usually on horseback and sometimes in wagons. Frequently the entire Ohio court, including lawyers and judges, traveled in a body, going from county to county.

Waite argued a great many cases in the Ohio

Supreme Court, and his fame as an advocate spread well beyond the state. Apparently his performance as counsel in the Geneva Arbitration, following the War Between the States, attracted the favorable attention of President Grant, who appointed him Chief Justice in 1874.⁶

Melville Fuller succeeded Waite in 1888. He was an eminent Chicago lawyer, and argued at least one case in the Supreme Court during each term over a period of sixteen years. Fuller was the role model of a trial lawyer. Physically vigorous, with a flowing moustache and hair falling to his shoulders. He also was a powerful and well-read orator who often used quotations from classical and biblical literature.

Although never interested in holding public office himself, Fuller was active in Democratic politics, attending four National Democratic Conventions. This political activity, together with his fame as a lawyer, prompted President Cleveland to appoint him Chief Justice. Despite Fuller's eminence as a lawyer, he is not viewed as a great Chief Justice.

Edward Douglass White (Chief Justice 1910-1921) was another Chief Justice who first established a reputation as a talented and successful lawyer. He later served three years in the Senate, where he quickly became a leader. He was appointed an Associate Justice in 1894 by President Cleveland, apparently to serve the short-term political purposes of the President. Taft elevated White to the Chief Justiceship upon Fuller's death in 1910.

Historians seem divided as to why White, then aged 65, was chosen as Chief Justice over his colleague on the Court, Charles Evans Hughes, then aged 48. It is speculated, perhaps unfairly, that Taft preferred the older man in view of his own ambition to become Chief Justice following his Presidency. In any event, it probably is fair to say that White was named Chief Justice primarily for political reasons, although he would have merited the appointment as a scholarly and successful lawyer.

Taft himself was named Chief Justice in 1921. In many ways, he was an ideal choice: magisterial in appearance (all 300 pounds!), and uniquely experienced in government. He could be viewed as a professional office holder, as he practiced law privately for less than two years.

His various offices did focus, for the most part, on the law, and seven years after admission

to the Bar he became a Judge of the Superior Court of Cincinnati. He later served as Solicitor General of the United States, Judge of the U. S. Circuit Court of Appeals for the Sixth Circuit, Governor General of the Philippines, Secretary of War, and finally as President. Yet, his greatest ambition was realized when he became Chief Justice.

By contrast, if Charles Evans Hughes had held no public positions at all, he still would be remembered as one of this country's most gifted lawyers. He was a skilled litigator with an astonishing ability to master facts in new areas of the law. It is said that in one case he "learned the German language and the beet sugar industry from the ground up" to enable him to cross-examine German engineers appearing as expert witnesses.⁷

It was Hughes' awesome litigation ability that led to his appointment to several investigative positions, and by this route to the public offices which he graced with genuine distinction. It was Felix Frankfurter who once said: that to see Hughes "preside was like witnessing Toscanini lead an orchestra."⁸

Hughes will be remembered also for his critical role in defeating Roosevelt's "Court Packing Plan." As Hughes' opinions during the early thirties indicate, he could sympathize to some extent with Roosevelt's impatience with the Court, but wholly disagreed with a plan that could have undermined the independence of the Federal Judiciary. Hughes' letter to the Senate Judiciary Committee revealed the pretextual basis of the Court Packing Plan: the claim that efficiency required more Justices.

I will refer to only one of Hughes' memorable opinions: his decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. (1937). It was said by some at the time that the Court had reacted to political pressure. But even if this was partially true, Hughes, the consummate lawyer, offered a rationale that explained the consistency of the opinion with prior decisions. Above all, his opinion maintained the principle of judicial supremacy in constitutional adjudication. It therefore preserved, in a time of potential crisis, the Court's key role in our society.

I mention only briefly three of Hughes' successors. Each enjoyed a distinguished career. Yet none of them attained wide recognition as a private lawyer. Stone was an eminent professor

and law school dean. Vinson became a national figure as an influential congressman and important public official, including service as Secretary of the Treasury. Earl Warren's record as State Attorney General and three-term Governor of California—not his undistinguished career as a lawyer⁹—propelled him to the level of a serious presidential candidate.

The purpose of this thumbnail sketch of our first fourteen Chief Justices¹⁰ was to consider—however roughly—whether success at the Bar or success in politics led *primarily* to their appointments. Most of them attained success both as lawyers and politicians. In view of the diversity in the careers of all of these fine Americans, any classification of them as primarily great lawyers or primarily successful politicians is, to a large extent, a speculative personal judgment. Nevertheless, I venture the following conclusions.

The first three Chief Justices were conspicuous leaders in both fields at a time when the ablest lawyers also dominated the Government. Stone, the scholar, also was unique.

Among the other Chief Justices, I think it fair to say that Chase, Taft, Vinson, Warren and possibly White attained distinction—and the Chief Justiceship—primarily through political office. In my view, Marshall, Taney, Waite, Fuller and Hughes, despite political activity and service,

attained prominence initially as lawyers of wide reputation. They were not primarily politicians.

On the basis of my "sample" of the 14 Chief Justices, I would qualify Dr. Mason's generalization that the Court has "always consisted largely of politicians."¹¹ None was a stranger to politics. Yet, the paths that led to the Court were sufficiently different to foreclose such a broad generalization.

Nor can greatness on the Court be predicted by the path to its Bench. Compare, for example, a Marshall with a Warren, or a Brandeis with a Black.

I return, in conclusion, to another response made by Justice Stewart to questions from a reporter. When asked, in effect, whether his personal philosophy was conservative, Potter Stewart replied:

[t]he first duty of a Justice [is] to remove [from his judicial work] his own moral, philosophical, political and religious beliefs.

However one happens to become a Justice or Chief Justice of the Supreme Court, the institution itself, its unique responsibility under our system, and its tradition of independence, cause members of the Court to agree with Justice Stewart as to their first duty. Once one is sworn in, he or she has a new allegiance that transcends all else: the Constitution of the United States.

Footnotes

¹ A. Mason, *The Sup. Ct. from Taft to Burger* 283 (3d Enlarged Ed. 1979).

² Marshall argued only one case before the Supreme Court: *Ware v. Hylton*, 3 Dall. 199 (1796).

³ *Etting v. United States*, 11 Wheat. 59 (1826).

⁴ 12 Wheat. 419 (1827).

⁵ Taney is best known, of course, for his decision in the *Dred Scott* case. Despite the contemporary bitterness and tragic consequences generated by that decision, Charles Evans Hughes—with the perspective of history—described Taney as "a great Chief Justice."

⁶ Despite Waite's widespread fame as a successful lawyer, he never argued a case in the Supreme Court. He was not a politician in the ordinary sense of the term, although he served one brief term in the Ohio legislature, and chaired a Constitutional Convention

that wrote a new Constitution for Ohio.

⁷ McElwain, "The Business of the Supreme Court as Conducted by Chief Justice Hughes," 63 *Harv. L. Rev.* 5, 8-9 (1949).

⁸ 3 Friedman & Israel, *The Justices of the Supreme Court* 1913 (1980).

⁹ See Schwartz, "The Judicial Lives of Earl Warren," XV *Suffolk University Law Review* 1, 2 (1981) ("There was no hint of greatness in the first phase of Warren's career.").

¹⁰ I do not mention my friend and colleague Chief Justice Warren E. Burger, as my story ends with *former* Chief Justices.

¹¹ In fairness to Dr. Mason, I have quoted only one sentence from his scholarly book, and thus do not fairly present his thesis.

Chief Justice Edward Douglass White and President Taft's Court

Jeffrey B. Morris*

Edward Douglass White was the first Associate Justice to be "promoted" to the center seat.** His appointment in 1910, after sixteen years on the Supreme Court, was very well-received both within and outside the Court. During the first half of White's decade-long tenure (1910-21), the Court, which had been largely reconstituted by President William Howard Taft between 1909 and 1912, was both harmonious and productive. Yet, by White's death in 1921, new fissures had opened which the aging Chief Justice was unable to bridge. Reforms instituted in the early years of White's Chief Justiceship were no longer adequate to deal with the caseload. Major changes were necessary in the Court's jurisdiction, changes which required a more politically aggressive Chief Justice to become a reality. The Supreme Court was by 1921 once again ripe for renewal, this time with the man as Chief Justice who had appointed White, William Howard Taft. Edward Douglass White became Chief Justice with unusual advantages — extensive judicial experience, familiarity with the workings of the Supreme Court, good personal relations with the members of the Court, popularity and prestige outside the Court, and an unusually warm personality. Weaknesses as a manager, the infirmities of age, and too traditional a view of the role of a Chief Justice would greatly hamper his effectiveness. In order to comprehend White's work as Chief Justice, it will be necessary first to describe William Howard Taft's unusual impress upon the Court of this era, White's colleagues, and the Court's jurisprudence. The story begins at the end of the Fuller era, the difficult 1909 term of the Court, which corresponded with Taft's early years in the White House.

An Enfeebled Court

In certain respects the 1909 term was the most

dismal in the Court's history. Perhaps at no other time had the Court paid such a price for life tenure. Even before the term, President William Howard Taft, a close and informed (if somewhat hyperbolic) observer, was moved to write:

The condition of the Supreme Court is pitiable and yet those old fools hold on with a tenacity that is most discouraging. Really, the Chief Justice is almost senile; Harlan does no work; Brewer is so deaf that he cannot and has got beyond the point of the commonest accuracy in writing his opinions; Brewer and Harlan sleep almost through all the arguments. I don't know what can be done. It is most discouraging to the active men on the bench.

To be sure, there were "active men on the bench." The three Justices in their sixties — Holmes (67), McKenna (65), and White (63) — were vigorous and would continue to serve for an average of seventeen more years. Day at fifty-nine would remain a vital force for over a dozen years. However, the youngest Justice, William Henry Moody, fifty-five, would leave the bench for a rest after May 7, 1909, never to return, afflicted by a deteriorating, disabling rheumatic condition.*** If Fuller (76) was not senile, and

*I acknowledge with great appreciation research assistance from Greg Hensel, presently a student at Harvard College, and Francis McElhill, a first year student at the Villanova University School of Law.

**John Rutledge served briefly as Associate Justice (1790-91) and, even more briefly as Chief Justice (1795) until the Senate rejected his nomination. Associate Justice William Cushing was confirmed as Chief Justice in 1796, but declined to serve. Charles Evans Hughes would return to the Supreme Court as Chief Justice (1930-41), fourteen years after he had resigned his seat as Associate Justice. Harlan Fiske Stone was appointed Chief Justice (1941) after sixteen years service as Associate Justice. Abe Fortas' promotion in 1968 failed of confirmation.

***Congress responded on June 23, 1910 to Taft's request with a law enabling Moody to retire with those benefits which would have been available to him had he had ten years service or attained age seventy.

Harlan (75) had passionate dissents left, all four of the Justices in their seventies* had been greatly slowed.

The Court struggled through that 1909 term. Peckham, Brewer and Fuller died prior to the first public session of the succeeding term. With Moody's retirement imminent (November 20, 1910), Taft would make a precedent-shattering five** appointments in one year — between January 3, 1910 and January 3, 1911. Within eighteen more months a sixth Taft appointee would take the oath of office. Not since Andrew Jackson had a President appointed a majority of the Justices.***

President Taft's Court

Perhaps no one person has influenced the selection of members of the Supreme Court over such a sustained period of time as William Howard Taft. As judge and Solicitor General in the 1890's, he aspired to the Court. As cabinet officer and imperial governor of the Philippines, he declined appointment to the Court, advising Theodore Roosevelt on his selections. After his Presidency, he was among those conservatives closely scrutinizing Wilson's appointees and a leader of

the opposition to Brandeis' appointment. With his ambition to be Chief Justice satisfied, he advised Harding, Coolidge and Hoover on the choice of judges and justices, even influencing the selection of his successor, Charles Evans Hughes.

Surely, no President approached the task of judicial selection with as remarkable a blending of informed judgment, concern and envy for the position, as Taft did. Consulting widely, Taft did his own canvassing and weighing of candidates. As he said on the eve of the appointments of White, Van Devanter and Lamar, "I am sure that I shall not suit everybody, but I shall at least suit myself."² In that process, Taft not unlike Presidents who came before and after him, was sensitive to political realities.**** He certainly wanted men on the Court who shared his views — men who were "sound," men of balance, men of moderation, but also men who could adapt the Constitution to changing political needs. *Chief Justice Taft*, over a decade later, would hold far more conservative jurisprudential views than *President Taft*. The right political party did not much concern Taft. He appointed three southern democrats (Lurton, Lamar and White). But, along with "soundness," President Taft was deeply concerned with institutional factors. He looked for men with judicial experience and proven technical competence; men who were young and energetic. Hughes, Van Devanter, Lamar and Pitney, were 48, 51, 53 and 54 years old respectively. Youth would tend to increase efficiency and to increase the likelihood of perpetuating the President's jurisprudential philosophy. On his last day as President, Taft told the press that "[a]bove all other things he was proudest of the fact that six of the nine members of the Supreme Court, including the Chief Justice bore his Commission." He continued with a chuckle, "And I have said to them, 'Damn you,



Edward Douglass White: Associate Justice, 1894-1910; Chief Justice, 1910-1921.

*Brewer and Peckham were seventy-one.

**By appointing White Chief Justice, Taft was able to appoint a new Associate Justice in his place.

***Lincoln appointed five Justices of the Court which then had ten members.

****A rueful and wry Taft remarked of his selection of three Southerners to Josephus Daniels in 1921, "Yes, I am sure the Southern people like me. They would do anything except vote for me." Daniel S. McHargue, "President Taft's Appointments to the Supreme Court," 12 *J. of Pol.* 478 at 509 (1950).

if any of you die, I'll disown you."³ Ironically, only Van Devanter of his six appointees, would still be serving on the Court by the time Taft commemorated his second anniversary as Chief Justice—July 11, 1923.

Friendship and respect overcame the criteria of age and party when Taft made his first appointment in 1909—the sixty-five year old Tennessee Democrat, Horace Lurton. Lurton's twenty-six years of judicial experience included seven as Taft's colleague on the U.S. Court of Appeals for the Sixth Circuit.*

Lurton was one of those Confederate soldiers who owed his life to Abraham Lincoln's mercy. He had been taken prisoner while riding with Morgan's irregular cavalry and became seriously ill with a lung ailment. Lurton's mother rode through "enemy" territory to intervene personally and successfully with the President.

The oldest Associate Justice ever appointed, chunky, gray-haired, Lurton, whose face was marked by "a thin unbroken line of grey-flecked eyebrows" and a "massive walrus mustache," would be a gentle, courteous and generous colleague. During a tenure lasting less than five years, he joined with his colleagues "in sanctioning a modest increase in the police powers of the federal government."⁵ He was "less inclined to read the silence of Congress as a bar to state regulatory action" and more stingy in determining the scope of the commerce power as an inroad on the state's police power.⁶

Choosing the Court in 1910 over the then hypothetical possibility of the Republican Presidential nomination, Charles Evans Hughes left it in 1916 when the possibility became a reality. In those few short years he had established himself as a productive and powerful figure. In five terms he wrote more opinions for the Court (115) and more dissents (32) than any of his colleagues, authoring such opinions as those in the *Minnesota Rate Cases*⁷ and the *Shreveport Rate Case*.⁸ His judicial sympathies for the claims of individuals in cases involving civil rights and civil liberties, major characteristics of his tenure as Chief Justice, were already evident.⁹ Hughes brought to the Court energy, integrity, brains, good humor, and physical presence.

On December 12, 1910, Taft submitted a "package" of appointments to the Congress. Edward Douglass White was named to succeed Chief Justice Fuller. Willis Van Devanter was

named to fill White's spot as Associate Justice. Joseph Rucker Lamar was to succeed Moody.

The protege of Wyoming Senator Francis E. Warren,¹⁰ Van Devanter had been active in Wyoming politics, serving briefly as Chief Justice of the Territorial Court at the age of thirty; as Solicitor in the Interior Department; and by appointment of Theodore Roosevelt, Judge of the U.S. Court of Appeals for the Eighth Circuit (1903-11). Even on that Court, his relatively low rate of productivity troubled observers. Although concerned, Taft believed that the problem was due to Van Devanter's illness and that of his wife, and that the dilatory habit "could be corrected by close association with a court that sits all the time in the same city."¹¹ Taft was mistaken. The problem worsened appreciably on the Supreme Court, where the average number of total Van Devanter opinions annually was the lowest—14.15—of any Justice appointed between 1853 and 1943.** Nonetheless, during his tenure of twenty-six years, some of what Van Devanter could not supply with his pen, he made up through other manifestations of intellect and personality. Colleagues, forced to write more opinions because of Van Devanter's "writing block" would appreciate his ability to get along, his willingness to give his time and effort to them unstintingly, and his intellectual strength—demonstrated by careful and elaborate statements in conference and by his knowledge of such difficult fields of law as public lands, water rights, admiralty and procedure.¹² Deeply committed to a jurisprudential philosophy emphasizing the protection of private property, Van Devanter would join James C. McReynolds, Pierce Butler and George Sutherland in a powerful conservative bloc which would plague Franklin Delano

*Taft was Chief Judge of that Court (1892-1900). Lurton would serve from 1893 to 1909. William Rufus [later Justice] Day was their colleague for a short time serving from 1899 to 1903 on that noted court.

**Van Devanter wrote only four dissenting and one concurring opinion in twenty-six years. His average of 13.85 opinions for the Court can be compared with such contemporaries as Holmes (30.10), Pitney (24.90), McReynolds (18.77), Brandeis (25.60), Taft (31.88), Butler (20.31), and Stone (24.00). Of course, the average number of opinions may conceal variations in the length and complexity of opinions, but there is little to suggest that Van Devanter did more than his share of the more difficult opinions. See Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices* (Hamden, Ct.: Archon Books, 1978), pp. 142-149.

In 1914, a contemporary journal, *World's Work*, described Joseph Rucker Lamar's "pink and white cheeks, his snowy hair, and his pleasant, clear voice," terming him "one of the delightful personalities of the Court."¹³ Not known for sentimentality, Oliver Wendell Holmes wrote after Lamar's death, "We all loved him."¹⁴ A lawyer and legal historian whose judicial experience had been confined to several years on the Georgia Supreme Court, Lamar would, as a U. S. Supreme Court Justice, support moderate state and federal regulation of private economic activities, as well as an enlarged use of federal administrative powers. In other cases, he resorted to traditional formulae such as "liberty of contract" and businesses "affected with a public interest."¹⁵

Taft's final appointment, Mahlon Pitney, took his seat on March 18, 1912, replacing Harlan, who had died six months before. Pitney had served as a member of the New Jersey Supreme Court (1901-08) and Chancellor of New Jersey (1908-12), where he had presided over both the law and equity branches of the appellate court. Six foot three and white-haired, the fifty-four year old Pitney served for little more than a decade. He would be found generally with the middle "bloc" (with Day and McKenna). Remembered for opinions hostile to labor, such as *Coppage v. Kansas*,¹⁶ Pitney fervently supported antitrust regulation, and was open to the exercise of state regulatory power.¹⁷ A recent observer has written that his:

meticulously researched opinions, although often repetitious and quite heavy in style, reveal a troubled man's attempt to deal with complex legal and social problems in what seemed to him a logical and consistent manner.¹⁸

The Holdover Justices

When William Howard Taft chose White to be Chief Justice in 1910, experience within the Court was an important criterion. Five Justices, appointed by four different Presidents, had over two years experience on the Supreme Court at the time of White's selection: John Marshall Harlan, Edward Douglass White, Joseph McKenna, Oliver Wendell Holmes and William Rufus Day.*

Harlan was nearing the end of an extraordinary thirty-three year career on the Supreme

Court. Although he was denied fulfillment of his ambition to be Chief Justice, there would be time for two more mighty dissents to complete a (then) record total of 119.**

After Harlan's death, Joseph McKenna, appointed by President McKinley in 1898, became senior associate Justice. From 1911 to 1921, for the only time in the history of the Supreme Court, the two senior positions were held by Roman Catholics. A "spare, rather stiff little man" wearing a "closely-cropped gray beard,"¹⁹ McKenna was a moderate figure on the Court during the years White was Chief Justice. Recent observers have differed in their assessments of McKenna. He has been criticized for "a series of frequently conflicting opinions and votes" or "erratic empiricism."²⁰ But, he has been praised for his intellectual growth in office, his ability at times to cut through abstractions to reach the facts of the situation, his sensitivity for the underdog, and his eloquent expression of "the need to interpret the rights guaranteed the individual by the Constitution liberally and with sensitivity to present conditions."²¹

Next in line of seniority was Oliver Wendell Holmes, "a striking looking man, tall, thin, blond, with a long cavalry mustache."²² Sixty-nine years old in 1910, Holmes remained an intellectually powerful force throughout a tenure that lasted into his ninety-first year. Perhaps only Cardozo and Frankfurter of the 102 Justices have approached Holmes in the richness of intellectual background or in the continuing zest for learning in order to deepen and broaden the channels for the great forces that lie behind every detail, and to "open as many windows" as possible on what ultimately determines court decisions — "philosophy, sociology, economics and the like."²³ Skeptical of reform and reformers, Holmes would nonetheless defer to Congress and the state legislatures far more often than most of his colleagues. He was heard to re-

*Taft's own appointees, Lurton and Hughes, had been on the Court a short time.

***Standard Oil Co. v. United States*, 221 U.S. 1, 82 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 189 (1911). The day after the *Standard Oil* decision was announced, Justice McKenna asked Secretary of State Philander Knox, "What do you think of the Court now?" Knox replied, "Well, I should hate to use any such language about the Court as it said about itself yesterday." Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* (New York: G. P. Putnam's Sons, 1942), p. 169.



Office of the Curator, Supreme Court

The White Court in 1911: Seated (left to right) are: Associate Justices Oliver Wendell Holmes, Jr. and John M. Harlan, Chief Justice Edward Douglass White, and Associate Justices Joseph McKenna and William Rufus Day. Standing (left to right) are: Associate Justices Willis Van Devanter, Horace H. Lurton, Charles Evans Hughes and Joseph R. Lamar.

mark that there was nothing he enjoyed so much as enforcing a law of which he thoroughly disapproved.²⁴ For nearly three decades his colleagues would depend upon his extraordinary writing speed and admire his special zest for life. Holmes and his close friend, the very different Brandeis, would prove to be the strongest influences upon the craft of later twentieth century judges.

William Rufus Day was physically the smallest and lightest member of the White Court. When his burly son, William L. Day, was appearing as counsel before the Court one day, the irrepressible Holmes remarked, "He's a block off the old chip." With a partially greyed mustache drooping ever-so-slightly, Day resembled a gentle, bookish, old-fashioned professor. Distrustful of the concentration of political power in the national government and of extreme concentrations of economic power in business combinations, he was a strong supporter of enforcement of the antitrust laws, but took a narrow view of federal power under the commerce clause. During the White years (as in the Fuller years) Day was generally to be found in the middle of the Court, a balance wheel whose tact and

legal knowledge helped to prevent polarization.²⁵

Edward Douglass White*

Edward Douglass White "looked like a Chief Justice," a phrase that over the years has been employed to describe Hughes, Stone, Warren and Burger. It is helpful for the Chief Justice to look the part of a living personification of "justice"—well-seasoned, sturdy, authoritative, but kindly. White was a massive man, less than six feet tall, but weighing 250 pounds, with a small face in the center of a great head. In his later years he had heavy jowls. Elbert F. Baldwin wrote in *Outlook* that in "physical appearance no

*Since White's death, countless hours have been spent considering the question as to whether his middle name ended with one or two 's'. The formal invitation to 1959 ceremonies commemorating the placing of a statue of White in front of the building housing the Louisiana Supreme Court handled the matter in this manner: "The Edward Douglas White Commission cordially invites you to the rededication of the statue of Edward Douglass White" [italics author]. See *Dixie*, December 17, 1961, and letter from Mrs. Lillian Selcer to Miss Helen Newman, December 11, 1961 (Supreme Court Library).

man in public life better deserves the adjective 'ponderous.'"²⁶ Another observer reported that "his bulky presence broods over the whole courtroom."²⁷ Still another journal wrote that White was "large of physique and large of brain and heart."²⁸

Born on a Louisiana sugar plantation, White was the son of a Governor of Louisiana.* Educated at Catholic schools and colleges, he left Georgetown College at fifteen to serve in the Confederate army. Taken prisoner after the capture of Fort Hudson in 1863, ill and emaciated, White was paroled. He studied law in the office of Edward Bermudez, later Chief Justice of Louisiana, and at the School of Law of the University of Louisiana. Admitted to the bar in 1868, he became a leading attorney in New Orleans. Entering politics, he was elected to the Louisiana Senate in 1874. Appointed to the State Supreme Court in 1879, serving for fifteen months until the court was reorganized under a new constitution, White penned eighty-three opinions. White himself later said that the work of that court during the period 1879-80 was probably the heaviest ever done by a court of last resort of that size. To some Louisiana observers the court ranked as "among the best in their history."²⁹

Elected to the United States Senate in 1890, White fought against government interference with business while advocating a continued high tariff on sugar and federal bounty payments to sugar growers. Generally supportive of President Grover Cleveland, his opposition to Cleveland's tariff policies was such that his nomination to the Supreme Court came as a surprise. History has not clarified Cleveland's motivation for the appointment. He may have been attempting to weaken the opposition on the tariff issue** or to have his appointee to the court be assured of confirmation, since his previous two nominations to the seat vacated by the death of Samuel Blatchford had been rejected. Cleveland may have appreciated White's opposition to annexation of Hawaii and the relative lack of pressure from him on matters of patronage. There may even be some truth to the legend of the visit paid by both Cleveland and White to the home of Delaware's Senator, James A. Bayard. Supposedly, Cleveland overheard White inquire as to whether there was a Catholic Church in the neighborhood where he could attend early mass.

It was at that time, according to the story, that Cleveland made up his mind that "there was a man who was going to do what he thought was right; and when a vacancy came, I put him on the Supreme Court."³⁰ Whatever may have influenced Cleveland, it does not seem to have been public opinion, which reacted to White's appointment with disinterest.³¹

Associate Justice for sixteen years, White's jurisprudential philosophy permitted the states and federal government considerable latitude in economic regulation. He gained notice for his dissent in the *Income Tax Case*,³² and was among the dissenters in *Lochner v. New York*.³³ From 1901 to 1905 he brought the Court over to his view that the United States Constitution applied to territories of the United States, if the Congress had chosen to incorporate them, or if the territories had been incorporated by treaty.³⁴ His view that the Sherman Anti-Trust Act did not apply to "reasonable" restraints of trade, first put in 1897 in a 10,000 word dissent,³⁵ appealed to Taft. White would bring a majority over to this position soon after he became Chief Justice.³⁶

Taft's selection of White as Chief Justice was unexpected to many because White was a Roman Catholic, an attorney trained in the nation's one civil law state, a Southerner and ex-Confederate soldier, a Democrat, and an Associate Justice. Closer scrutiny of each of these characteristics suggests how they might have appealed to Taft and shed light on White the man.

Edward Douglass White was a religious Catholic. For his twenty-six years on the Court he regularly attended St. Matthew's Church. His formal institutional education had taken place in a series of sectarian institutions—beginning as a boy at the College of the Immaculate Conception, where he served Mass, took breakfast, and was exposed to the moral training of the Jesuits. White would later attend Mount St. Mary's College in Emmitsburg, Maryland and Georgetown College. He would maintain his ties with the Jesuits of New Orleans and would serve as President of the Georgetown Alumni. White also

*His mother, Catherine Ringgold, was the daughter of Tench Ringgold, Marshall of the District of Columbia, and owner of the home near the White House at which Chief Justices Marshall and Taney would board and in which Chief Justice Fuller would live.

**If so, he did not succeed, because White remained in the Senate for three weeks after his unanimous confirmation, leading the opposition and winning the fight.

maintained close ties with the Catholic hierarchy. The politically influential James Cardinal Gibbons of Baltimore performed White's wedding ceremony in 1894; influential prelates and Catholic laity wrote to Taft supporting his elevation as Chief Justice.

The Supreme Court during White's years rarely dealt with "Catholic" issues. It has been argued that "the rule of reason . . . revealed a sensible and humane understanding of law continuous with the tradition of Catholic judges of Medieval Europe but not distinctively Catholic in the Twentieth Century."³⁷ Some saw in White's convoluted opinion writing style "a scholar trained in the precise methods of scholastic philosophy."³⁸ White was no closer personally or jurisprudentially to Joseph McKenna than to several of the non-Catholic Justices he served with. Most probably, as the distinguished Catholic Professor of law at Boldt Hall, John T. Noonan, recently concluded, White's judicial career, like that of Pierce Butler, was little affected by his Catholicism, but would serve as a role model for American Catholics:

Each proved to protestants that they did not need to fear Catholics in high positions in the federal government. They disarmed and confused bigots. . . . They showed to every Catholic boy . . . that he could aspire to great office in the judiciary.³⁹

White's mastery of civil law hardly proved a barrier to his service as the chief judicial officer of a common law judiciary. Having studied under the master 'civilian,' Edward Bermudez, and fluent in French, Spanish, Italian and Latin [also reading German], White was viewed by some as "not merely a learned civilian but a veritable jurisconsult."⁴⁰ During his years on the Supreme Court, White made few references to authorities in the civil law.⁴¹ What was important was that as a Louisiana attorney, White had also mastered the common law.

While White had seen active service in the Confederate Army, he found different lessons in that experience than did many of his cohorts. Perhaps there is truth to the legend that, after White's parole — seventeen years old, ill, and emaciated — he walked to his home clothed in a coat given to him by a concerned Yankee soldier.⁴² He became a passionate nationalist in time. "My God!", he would later say. "My God, if we had succeeded."⁴³ As Justice of the

Supreme Court, White stressed that the United States was a nation possessing all the powers necessary to its national existence.⁴⁴ In the *Selective Draft Law Cases* of 1918, he wrote of the "Supreme and Noble duty of contributing to the defense of the rights and honor of the nation."⁴⁵ Speaking years later of the decision in *Rasmussen v. United States*,⁴⁶ which had held that the guarantees of the Bill of Rights were in force in Alaska because it had been incorporated into the United States by the 1868 treaty with Russia, White said, "Why sir, if we had not decided as we did, this country would have been less than a nation."⁴⁷

There are reasonable grounds for suspicion — but not clear proof — that during Louisiana's complex Reconstruction politics, White belonged to an organization similar to the Ku Klux Klan.⁴⁸ This would not have proven to be a political liability in 1910. As Chief Justice, White joined in such early pro-civil rights decisions as *Bailey v. Alabama*,⁴⁹ *Buchanan v. Warley*,⁵⁰ and authored the Court's opinion in the case holding the grandfather's clause unconstitutional.⁵¹

The Appointment of White as Chief Justice

Melville Weston Fuller died on the Fourth of July, 1910. Considering his awareness of the Court's difficulties, Taft took what appears to be an extremely long time to fill the vacancy — five months. Undoubtedly, some of the delay was due to the fact that the President was putting together a "package" of judicial appointments. The new term began on October 10 with the seventy-seven year old Senior Associate Justice, John Marshall Harlan, presiding. There was widespread interest and concern over the appointments, especially because major cases had been held over. The journal, *World's Work* commented:

. . . the nation understands to-day, as it has not understood before, how completely the future lies in the hands of the Supreme Court. The business of a Continent now waits.⁵²

Sadness over Fuller's death shortly gave way to personal ambition and gossip about the future as it began to appear that Taft might select from within the Court. Less than a week after Fuller's death, Harlan made the case for appointment from within in a letter to Taft in which he appeared to be strongly endorsing Justice Day:

His experience as a judge would enable him to

take up the work of the Court where the late Chief Justice left it, and go right ahead without any delay or any friction whatever. He would not be under the necessity of becoming trained in details, upon the 'handling' of which with ease and promptness so much depends. He is already fully informed as to the manner in which the business of the Court is transacted.

Indeed I have always thought that an Associate Justice ought, as a general rule, succeed a Chief Justice, who had died or resigned, unless, in the judgment of the President, he was disqualified for the position by advanced years, or by ill health; *provided, always*, he was in character, soundness of judgment, sagacity, and legal attainments *equal* to the place.⁵³

If these words were applicable to Day's 'promotion,' so were they to that of others, possibly including that of their author. Disingenuousness characterized the correspondence among the Justices during those months of waiting, while they were apart from each other on vacation. For example, as late as September 12, Harlan wrote Lurton stating that "the mention of my name in connection with the place has been without my knowledge or procurement."⁵⁴ Lurton had received such a letter from White, written as early as July 12:

No aspiration on the subject has taken possession of me... the very gravest doubts exist in my mind as to whether the new responsibility, if it were tendered, would be beneficial either to the country or to the Court.⁵⁵

White wrote to Day on August 29, saying that, "If only you or Lurton would take the place of Chief what a blessing it would be for the country."⁵⁶ Nonetheless, there is extrinsic evidence to suggest that Harlan hungered for the position and that friends of White were gathering support.⁵⁷

It does not appear that McKenna sought or expected the job. Holmes told him that the two of them were the only ones of the sitting Justices "who didn't have booms going for us."⁵⁸ McKenna was not, however, immune from speculating. On September 5 he wrote Day to say:

I repeat your question, who will share them [work and responsibility] with us? Quien sabe? I have assumed Hughes for C. J. because speculation sometime ago assigned it to him and there is no contrary prediction.⁵⁹

Holmes admitted to Canon Patrick Augustus Sheehan, "Of course I should like the place," but "I never have thought of it as a possibility."

Holmes added, "place doesn't make a man's work any better," and that his only ambition was "to do the best work that can be done."⁶⁰ To Sir Frederic Pollack, Holmes argued that he:

really didn't care much who is appointed if only he is a man who can dispose of the daily questions with promptitude and decision. Apart from that and the honor being figurehead, the Chief Justice like the rest of us must depend on his intellectual power.⁶¹

To this observer, Holmes appears to be protesting too much. But, whether or not he was deeply interested in the position, Holmes' clear preference among the other sitting judges was White—"the ablest man likely to be thought of." Holmes believed that he "should be a better administrator than White, but he [White] would be more politic."⁶²

Taft considered Harlan too old. There is no indication that Taft considered Day, Lurton or Holmes seriously, or that they truly considered themselves serious candidates. On the other hand, speculation within* and outside the Court focused upon Hughes. Expectations would have been greater had the correspondence between Taft and Hughes which occurred on April 10, three weeks after Brewer's death (and a month after Taft had visited Hughes' in Albany) offering Hughes the vacant position, been leaked to the press. Those letters are crucial to an understanding of the President's position. In the body of his letter of April 22, Taft wrote:

The Chief Justiceship is soon likely to be vacant and I should never regard the practice of never promoting Associate Justices as one to be followed. Though, of course, this suggestion is only that by accepting the present position you do not bar yourself from the other, should it fall vacant in my term.⁶³

But Taft added a postscript:

Don't misunderstand me as to the Chief Jus-

*McKenna, Day and Lurton all expected Hughes to be appointed. There is evidence to suggest Lurton preferred White. Alexander M. Bickel, "Mr. Taft Rehabilitates the Court," 79 *Yale L.J.* 1, 15 (1969). There is no evidence to prove Felix Frankfurter's account in 1954, probably based upon a conversation with Holmes twenty to forty years earlier—that all the Justices but Holmes and Hughes had drawn up a roundrobin letter to inform Taft of their opposition to so new a Judge as Hughes. Felix Frankfurter, *Of Law and Men* (ed. Philip Elman), (Hamden, Ct.: Archon, 1956), p. 121.



Office of the Curator, Supreme Court

The White Court in 1916: Seated (left to right) are: Associate Justices William Rufus Day and Joseph McKenna, Chief Justice Edward Douglass White, and Associate Justices Oliver Wendell Holmes, Jr. and Willis Van Devanter. Standing (left to right) are: Associate Justices Louis D. Brandeis, Mahlon Pitney, James C. McReynolds and John H. Clarke.

ticeship. I mean if that office were now open, I should offer it to you and it is probable that if it were to become vacant during my term, I should promote you to it; but, of course, conditions change so that it would not be right for me to say by way of promise what I would do in the future. Nor, on the other hand, would I have you think that your declination now would prevent my offering you the higher post, should conditions remain as they are.⁶⁴

Accepting the position, Hughes stated:

Your expressions regarding the Chief Justiceship are understood and most warmly appreciated. You properly reserve entire freedom with respect to this and I accept the offer you now make without wishing you to feel committed in the slightest degree. Should the vacancy occur during your term, I, in common with all our citizens would desire you to act freely and without embarrassment in accordance with your best judgment at that time.⁶⁵

Had Hughes turned down the Associate Justiceship, he probably would have been named Chief Justice. By accepting the position of Associate Justice, Hughes removed himself as rival to Taft

for the 1912 Presidential nomination and made himself White's junior on the Court.

These months fueled with gossip and ambition could not have made for easy relations among the Justices. During this period the six Justices had also to adapt to Moody's formal retirement, Harlan's style of presiding over conferences, Hughes' arrival, and to anticipate the effect of three new Justices on the decision-making process. Years later Hughes would recall that although he had hoped "to find himself in an atmosphere of great serenity with men of marked powers," that there was something in the atmosphere that was not at all harmonious.⁶⁶ Hughes found White out of sorts, silent and reserved as well as unwilling to take a position on cases in conference. The difficulty, Hughes discovered, was the conflicting ambitions for the Chief Justiceship. According to Hughes, things changed totally after White was made Chief Justice.⁶⁷

Taft met with his cabinet for the entire day of December 11. At one point Hughes was tele-

phoned and asked to come to the White House. But, one-half hour later the appointment was cancelled. The next day, Taft sent to the Senate the nominations of Van Devanter and Lamar as Associate Justices, five nominations to the newly created Commerce Court, two nominations for the Interstate Commerce Commission, and the name of White to be Chief Justice.

As best as can be discerned, Taft narrowed his choice to White and Hughes relatively early. Taft was in agreement with the basic thrust of Harlan's letter—that the Court should be guided by someone familiar with its traditions and its manner of operation; someone who could help the newcomers, rather than someone who might add to the strain of absorbing so much new blood.⁶⁸ This meant an insider and presumably White, Holmes or Day, since Harlan was too old, Lurton and Hughes too new,* and McKenna not strong enough intellectually. Hughes would admit years later that White "thought he had natural claims to the position, as indeed he did!"⁶⁹ Taft saw the need for a hard-working Chief Justice, attentive to detail, who could cope with the constant flow of jurisdictional and procedural questions whose resolution by an able Chief Justice conserves time for his colleagues. As to these criteria, White, Holmes and Day were all possibilities. In retrospect, of course, we know that Hughes would have been superb at this, although not necessarily from the outset.

Taft was also looking for a strong administrator who could take the lead in pressing for overdue reforms in the operation of the federal judiciary. In that regard, the forty-eight year old Hughes, coming from his vigorous tenure as Governor of New York, would have appeared to be a better choice than White, Holmes or Day.

There were other considerations. While Taft knew and liked both men, Hughes had a reputation for austerity, while White was an especially lovable personality. Taft admired White's jurisprudential views, especially his work in the *Insular* cases and in the antitrust area. While the Democrat appeared to some Republicans to be more reliable on jurisprudential issues than Hughes of their own party.⁷⁰

The politics of the situation probably assisted White. Hughes' appointment as Associate Justice in April had been extraordinarily well re-

ceived throughout the nation. There was probably little extra mileage to be gained by his further advancement. The giant figure of Theodore Roosevelt, who liked White and disliked Hughes, needed to be placated. The appointment of White would be expected to appeal to Southern and to Roman Catholic voters.

Thus, there were a number of factors that Taft weighed. His own ambitions were far from irrelevant, although they may have been overemphasized in some accounts of this appointment. Taft at fifty-three desperately wanted to be Chief Justice. White at sixty-five was seventeen years older than Hughes. In addition to age, the appointment of a Democrat of national standing might lead a later Democratic President to see that crossing party lines might prove good politics. As Taft signed White's commission, he commented:

There is nothing I would have loved more than being chief justice of the United States . . . I cannot help seeing the irony in the fact that I, who desired that office so much, should now be signing the commission of another man.⁷¹

In retrospect, the vigorous Hughes, a brilliant administrator during his term as Chief Justice, might appear to have been the stronger figure as leader of both the Supreme Court and of the federal judiciary. But, returning to 1910, it is far less clear that Hughes, the freshman jurist, admittedly under considerable nervous strain and preoccupied with learning the ropes of his new job,⁷² would have been as effective as White, since he would have been promoted not only over White, but over Harlan, McKenna, Holmes, Day and even Lurton. The sixty-seven year old Hughes, who finally became Chief Justice in 1930, would two decades later bring to that office and to his brethren far greater national standing, as well as greater experience in government, and at the bar, along with greater personal peace.

The national acclaim given White's appointment surprised even Taft. The influential legal journal, *Green Bag*, editorialized, "we confess to a wholly unpretended and ineradicable admiration for the largeness of mind, heart, character and learning of the new head of the American judiciary."⁷³ Elbert F. Baldwin wrote in *The Outlook* of "a man whose name, as a synonym of intellectual integrity and impartiality, may rank with the first dozen names of members of the Su-

*Hughes had never argued a case before the Supreme Court.

preme Court since its creation."⁷⁴ Theodore Roosevelt stated:

It seems to me that nothing could be a better augury of the future of the country than that a Republican President should appoint a former Confederate Chief Justice of the United States, and receive the unanimous applause of his countrymen.⁷⁵

There was satisfaction within the Court as well. Holmes wrote that "it was the best thing that could be done."⁷⁶ Hughes took it well. Only Harlan, who as temporary presiding officer announced the appointment and administered White the oath, then exchanging seats with him, appeared — at least to Holmes — "sad and aged."⁷⁷

The Wilson Appointees

Three of Taft's appointees lasted on the Court for only a few years. Horace Lurton died of a heart attack on July 12, 1914. One day before the fifth anniversary of his joining the Court — on January 2, 1916 — Joseph Rucker Lamar, died of complications resulting from a stroke. Charles Evans Hughes resigned from the Court on June 7, 1916, three days after receiving a nomination he had not sought for the Presidency from the Republican Party. Thus, Woodrow Wilson made three Supreme Court appointments — James Clark McReynolds, Louis Dembitz Brandeis, and Joseph Hessin Clarke — appointments which disturbed the intellectual and personal harmony of the previous few years.

Having made his reputation as a trust-buster in the Roosevelt and Taft administrations, McReynolds was appointed Attorney General by Wilson. Soon wearying of an abrasive curmudgeon, who alienated Cabinet members and Congressmen alike, Wilson seized upon the opportunity presented by Lurton's death to elevate McReynolds to the High Court. In but a few years the fifty-two year old bachelor with piercing eyes and an eagle nose would join Van Devanter and an increasingly conservative White as the Court's conservative wing. A misogynist, anti-black, anti-semitic and anti-social, McReynolds would torment counsel appearing before the court, help drive Clarke from the bench, and be a major source of disharmony for all of his twenty-six years service. Even the affable Taft found working with McReynolds difficult.

Harold Laski suggested that "McReynolds and the theory of a beneficent deity are quite incompatible."⁷⁸

Louis Dembitz Brandeis brought to the High Court that which his enemies had feared — compassion for the underprivileged and mastery of sociological jurisprudence, perfecting the "means for sustaining the case for legislative action by a convincing demonstration of the social situation which induced it."⁷⁹ His knowledge of business and the economics of labor, public utilities and railroads proved important resources for his colleagues. With Holmes he produced the underpinnings of modern First and Fourth Amendment jurisprudence.⁸⁰ A master judicial craftsman, Brandeis helped to define the modern meaning of judicial self-restraint. On the one hand, his arrival (and that of Clarke) produced cleavage within the Court, as Holmes joined them in a bloc opposing that of McReynolds, Van Devanter and White. Still, this passionate man surprised by turning out to be a "team player," who worked easily with men like Taft and Van Devanter, forgot differences, and suppressed his own dissenting opinions.⁸¹

John Hessin Clarke's progressive sympathies were manifested in a more reflexive and less craftsmanlike jurisprudence than that of Brandeis. Anticipating the judicial career of Frank Murphy a generation later, Clarke would give less weight to precedent, custom or logic than either Holmes or Brandeis, and prove far more willing to appeal to natural law to sustain his sympathies for the underprivileged — especially the laboring man, blacks, Indians and children.

Appointed to the Supreme Court at the age of fifty-nine, Clarke had made his reputation through his involvement with reform politics in Ohio, as owner of the *Youngstown Indicator*, a Progressive newspaper, and as a corporate lawyer. Appointed a District Judge, largely because of the efforts of Attorney General McReynolds, Clarke, as a Justice would become a prize victim of McReynold's sarcasm and ill-humor, possibly because of resentment that a protégé would not follow his lead.

As Associate Justice, Clarke voted to sustain broad federal powers under the commerce clause, anti-trust prosecutions, and construed the Fourth and Fifth Amendments liberally. His views on the First Amendment, however, were far more traditional than those of Holmes and

Brandeis.⁸² Clarke was never entirely happy on the Supreme Court, reacting critically to many of its procedures, not adjusting easily to its ways, and resigning at age sixty-five, after serving less than six years. He lived on another twenty-two years.⁸³

White Court Jurisprudence

During the first five years White was Chief Justice a largely unified court read the rule of reason into the Sherman Act, demonstrated sympathy for moderate exertions of the federal police and taxing powers, and broadly construed powers under the Commerce Clause. White's greatest triumphs came early in his tenure. In the much anticipated cases involving anti-trust prosecutions of Standard Oil and American Tobacco, the Chief Justice marshalled eight votes for his approach. With White writing the opinions, the Court ordered the dissolution of both monopolies, but stated in dicta that the Sherman Act only applied to "unreasonable" restraints of trade.⁸⁴ Although White stated that the doctrine was consistent with previous decisions, it had appeared first in a dissent of his in 1896. White carried the three new Justices with him and all of his senior colleagues other than Harlan. Over sixty years later these opinions remain controversial, although the prevailing view would seem to be that they did not in the long run hamper anti-trust enforcement, and may have prevented the destruction of efficient corporations, the existence of which might benefit the consumer.

In other significant decisions during the first few White years, the Court, in opinions by Justice Lamar, sustained legislative delegation of administrative functions to the Executive,⁸⁵ and sanctioned a material enlargement of executive power.⁸⁶ In opinions by Justice McKenna, the Court sustained the Pure Food and Drug Act⁸⁷ and the Mann Act.⁸⁸ In opinions by Justice Hughes, the Court held that Congress had the authority to regulate even intrastate railroad traffic, so that intrastate trade would not be destroyed by the rivalries of local governments.⁸⁹ The Supreme Court also upheld state laws limiting the hours of work for women,⁹⁰ but struck down the law of Kansas which had outlawed "yellow-dog" contracts.⁹¹

With the European War in the background, the

Court sustained broad exertion of national powers. Dividing five to four, the Court upheld a federal law limiting to eight hours the amount of time railroad employees could work, with the Chief Justice writing the opinion.⁹² In another White opinion, a unanimous court upheld the World War I Conscription Act as incident to sovereignty and the war power.⁹³ Holmes' opinion in the "Migratory Bird" case was the occasion for another powerful statement of national supremacy.⁹⁴ The Court also upheld wartime prohibition and the seizure and operation of railroads in wartime.⁹⁵ But it broke with the broad construction of national powers to hold in an opinion by Justice Day (with Holmes, Brandeis, Clarke and McKenna dissenting) that Congress did not have the power to regulate child labor.⁹⁶

During the White years the Supreme Court demonstrated some sympathy for the claims of blacks. The "grandfather clause," which was used to discriminate against the exercise of the franchise by black Americans, was held unconstitutional; so was a municipal ordinance fostering residential segregation.⁹⁷ The Court began to deal with First Amendment problems regularly for the first time in its history. It sustained a conviction under Espionage Act of 1917 for distribution of a pamphlet allegedly containing false statements;⁹⁸ gave full scope to the doctrine of criminal conspiracy;⁹⁹ upheld suppression of pro-German sentiments;¹⁰⁰ and, sustained the conviction of Eugene V. Debs for obstructing recruiting.¹⁰¹ Under the influence of Brandeis, Learned Hand and Zechariah Chafee, Holmes, in a relatively few months, moved away from employment of the clear and present danger as a negative or restraining device, to interpreting it as a libertarian rule.¹⁰² He could not carry the Court with him.

White as Chief Justice

Edward Douglass White was not one of the more successful Chief Justices. By criteria which could be used to judge the efficacy of a Chief Justice—marked personal influence upon the jurisprudence of his own or later eras; securing by management of the Court's business an environment considerably easing burdens upon colleagues; assisting the decision-making process by taking an active role in influencing the Congress to pass legislation either altering the

Court's jurisdiction or improving its working conditions; employing the visibility and leverage of the office to influence Congress to make the changes necessary for efficient operation of the federal court system—White's contributions do not compare with those of his immediate predecessors, Waite and Fuller, or with his immediate successors, Taft and Hughes.

If White was not as successful as chairman of the committee of nine as Waite or Fuller, he maintained warm relations with his colleagues, the Court's officers and its bar. Within the Court this was a period of civility and relatively high productivity. If White's jurisprudential contribution does not loom as large today as that of Marshall, Hughes or Warren, that is due more to the type of cases decided in that era than to his grandiloquent style of writing. Not ready to take the lead in seeking reform in the structure of the federal court system, White concentrated his energy upon deciding cases and managing the Court's business, keeping himself, his office, and the Court free of controversy. White would not need to lead a heroic battle against efforts to cripple the courts, in part because he led his Court prudently, defusing progressive hostility to the federal courts.

The failure of White as Chief Justice was that he did not fully capitalize upon his many sources of influence. At the time of his appointment, his prestige as a judge was unrivalled. He was familiar with the methods of operation, customs and traditions of the Supreme Court. He had maintained close relations with the holdover Justices, who—with the exception of Harlan—were pleased by his appointment. He would have the opportunity to "break in" four new Justices, appointed by the same President who appointed him. He was on very friendly terms with some of the most powerful figures in the nation, including Taft, Theodore Roosevelt, and Woodrow Wilson.

To be sure, the potential of the Chief Justice to influence eight independent-minded colleagues has been exaggerated, although such expectations have persisted since Marshall's death. The *Green Bag*, for example, thought White's appointment gratifying to those who believe "that the Chief Justice should not merely direct its business but should dominate its opinions and mould its policy."¹⁰³ A Chief Justice can not dominate, but an able intellect and good leader of

men should be able to draw upon the prestige of his office and the deference accorded him by some of the customs of the Court to wield significant, if intermittent influence.

Early in White's tenure, he produced overwhelming majorities in the important "rule of reason" cases. Coming to office stating that he was "going to stop the dissenting business,"¹⁰⁴ White was successful in limiting dissenting opinions in his first three full terms to a total of twenty-four (compared with an average of 16.1 for the last ten terms of the Fuller era). To be sure, the death of Harlan and the large number of appointments made by Presidents of an apparently similar ideological persuasion were factors, in addition to White's leadership. But in those first few years, the institution was not only in basic jurisprudential accord, but also was collegial and serene, presided over by its warm-hearted Chief Justice.

Even the arrival of the unpleasant McReynolds did not disturb the atmosphere in the early years of White's tenure. But the addition of Brandeis and Clarke brought to the bench men whose approach to judging differed sharply from that of all of their colleagues other than Holmes. Due to the First World War and Prohibition, new and complex issues arose, dividing the Court. Distinct blocs emerged: Holmes, Brandeis and Clarke on one side; McReynolds, Van Devanter, and White on the other; McKenna, Day and Pitney in the center.

No doubt the difficulties within the Court during the latter part of White's tenure were compounded by his aging. Rumors of his retirement began to circulate as early as 1916, when he was in his seventy-first year. In those last years, White's hearing was bad, and, due to cataracts, his eyesight deteriorated so much that he had great difficulty recognizing those at the counsel table. Along with these real ailments, White may have been a hypochondriac about his heart.¹⁰⁵ Although the Chief Justice never complained and continued to work conscientiously, his infirmities did add to the burdens of his colleagues. Some sense of how difficult the last years may have been can be seen by comparison with life at the Court during the early years of his successor, William Howard Taft, whose:

... most notable contribution to the court was a fresh vigor lacking during the last years of White's tenure when the old Chief Justice suf-

fered from deafness and other infirmities. Taft's executive ability, ready laugh, and good humor helped to brighten and speed the Saturday afternoon conference at which the Justices orally stated their decisions on the cases argued during the week.¹⁰⁶

While White's health undoubtedly hampered his capacity to lead, the problem was deeper and emerged earlier. This man, so well-liked, indeed loved, by his colleagues, was just not an effective manager of men.

That White was lovable does not seem open to doubt. There are just too many accounts of his modesty, courtesy, patience and sweetness. White seems to have had the emotional openness and uncalculating warmth of a child. Indeed, that metaphor was used by Attorney Generals Harry M. Daugherty and George W. Wickersham in their memorial tributes to White.¹⁰⁷ Childless himself, White's love for children was pronounced. He carried candy in his pocket to comfort children in distress. He "was often seen escorting children across a street through crowded traffic."¹⁰⁸ At least once the enormous Chief Justice was seen playing drop-the-handkerchief with some young girls.¹⁰⁹

William Howard Taft would on White's death speak of his "unfailing courtesy and sweetness of manner which endeared him to all with whom he was associated."¹¹⁰ There are stories of White helping pages carry heavy bundles around the Capital¹¹¹ and surrendering his place in a street car to a black woman carrying a large market basket.¹¹² Indeed, the only instance of White's not adhering to the canons of propriety seem to be his tradition of inviting attorneys from New Orleans home to dinner, even when they were arguing cases before the Court.¹¹³

It is also clear that this very lovable, very human man cared deeply for his colleagues and was cared for in return. It is reported that often on his daily walks he would stop at the homes of his brethren to leave cigars for the justices and roses for their wives. Justice Lamar's wife, Clarinda Pendleton Lamar, recalled that:

Nothing could have been kinder than the elder-brotherly attitude of the Chief Justice. He was interested in every detail that concerned the welfare or the happiness of each member of the Court. Was it the renting of a house, the engaging of a servant, or one of the more puzzling questions concerning the ethics of the position, he was both competent and willing to advise.¹¹⁴

Brandeis related that when he came to the Court after a bitter fight over his confirmation, he sought White's advice as to whether he should accede to President Wilson's request that he head a mission to Mexico. White insisted that Brandeis should look on him not as a Chief Justice but as a father. From then on internal memoranda from Brandeis to White were addressed "Father Chief Justice." In return, White would write to Brandeis calling him "Grandfather Justice Brandeis."¹¹⁵

Years later, Hughes, once White's rival for the office, told Felix Frankfurter:

White was a very dear man—one of the dearest I have ever known. He was very warm-hearted and most solicitous that the brethren should be as happy as possible.¹¹⁶

Hughes had two pictures of judges on the walls of his home—one of an English judge; the other of White.¹¹⁷

Lovable and approachable, White still was unable to capitalize on the personal good will he generated to promote more efficient management of the Court's conference. Not only was he unable to maximize his influence, it appears that his handling of conference was so inadequate as to detract from the Court's work product.* While devoted to White personally, Hughes consciously employed his experiences under White as the model *not* to emulate in managing the Court's business. He thought White underprepared for discussion in difficult cases. Hughes recounts that White did not *guide* discussion. He might open discussion about a case with an extended speech, or throw up his hands and say, "Here is a baffling case. I don't know what to do with it. God help us!"¹¹⁸ Hughes concluded:

Whatever little success I may have achieved when I became Chief Justice, I think it was largely due to the lessons I learned in watching White during the years when I was an Associate Justice and seeing how it ought not to be done. . . . And so if I had any virtues as Chief Justice they were due to my determination to avoid White's faults.¹¹⁹

* The reader should be aware that information about the Supreme Court during White years is limited. The analysis of this section is based upon remarks made by Charles Evans Hughes thirty years later, the published correspondence of Oliver Wendell Holmes, and upon the apparent delight with which Taft was received by his colleagues during his first few years.

Thus, even while personal relations were good during these years — tensions between Holmes and Harlan, Holmes and Clarke, and Clarke and McReynolds being the exceptions — the work of the Court does not seem to have flowed as easily as it had during much of the Fuller years, even though statistics show that productivity was relatively high. After Taft replaced White, Brandeis reported:

The judges go home less tired emotionally and less weary physically than in White's day. . . . When we differ we agree to differ without any ill-feeling; It's all very friendly.¹²⁰

It appears that too often White permitted rambling debate, generating unnecessary controversy, and irritating the more efficient Justices.

Some of this must have led to Holmes' pronounced change of opinion of White. At the outset of White's tenure, Holmes wrote of the appointment that "it was the best thing that could be done."¹²¹ But Holmes' view of White became increasingly critical. Twenty years later he wrote to Laski, "If Hughes could have been appointed then as was expected I think the history of the Court's doings would have been better than it is."¹²² Whatever other factors affected relations between the two men, some of Holmes' feelings must have been the result of frustration with the conference, expressed, for example, in Holmes' comment to Laski soon after Taft became Chief Justice that he thought that

the executive details . . . will be turned off with less feel of friction and more rapidly . . . than with his predecessor.¹²³

White was unwilling to take the lead in asking Congress to modify significantly the Court's working environment in either of two major respects — the creation of a largely discretionary jurisdiction and the authorization of funds for construction of a building to house the Court. During White's tenure the benefits of the Evarts Act of 1891 began to wear off. Once again the number of cases demanding resolution was becoming too great for the capacity of the Court. Under White the Court dealt with the overload in several ways. Some cases of minor significance were disposed of without argument. When White became Chief Justice, he instituted a rule under which certain cases were placed on a summary docket and permitted just thirty minutes per side

of oral argument. Generally, the time permitted for oral argument declined. Some cases were dismissed with costs, discouraging some writs of error and appeal.¹²⁴ Many cases were decided *per curiam* to conserve time during argument. White would state at the beginning which questions he wished answered; attempted to avoid interrupting counsel; permitted counsel to respond to a question at any time if interrupted; and attempted to encourage his colleagues to follow suit.¹²⁵

The Supreme Court avoided the merits of many cases by deciding them on jurisdictional or procedural grounds.¹²⁶ If White would not move dramatically to overhaul internal operating procedures, he would become a master at finding reasons why the Court should avoid dealing with substantive law. Kenneth Bernard Umbreit writes of White that:

He confined himself to refusing to hear any cases which were not clearly within the Court's jurisdiction—to dispensing of those cases which were within that jurisdiction as expeditiously as possible.¹²⁷

White wrote the opinions in most of these cases because of his expertise and because:

Procedure has always been the peculiar province of the Chief Justice. Due to his position as the presiding officer he is called upon frequently to rule on procedural points which never reach the stage of being deliberated upon by the whole court. . . . These problems of procedure and of jurisdiction are not trifling.¹²⁸

But while the new Chief Justice in 1910 would push successfully to speed the work up,¹²⁹ over the long haul White's reverence for tradition — like Fuller's and his colleagues — limited the scope of reforms. Briefs and records remained prolix.¹³⁰ Full days were consumed reading opinions in open court. Thus, when all was said and done, the most important method of disposing of cases was (and always has been) hard work. John Hessin Clarke, critical of many of the Court's internal procedures, would admit that he:

never saw a group of lawyers anywhere who work with the intensity of application that the judges of the Supreme Court of the United States work.¹³¹

But sometimes hard work is not enough. The quickening pace of the twentieth century and the role the Court was performing in national

life required a major change in the Court's jurisdiction. White was not a major force influencing passage of the four pieces of legislation that became law during this period which altered the Court's jurisdiction. None of these changes made a sizable impression in reducing the number of cases on the Court's docket: (1) the abolition of the Circuit Courts;¹³² (2) an increase in the Court's jurisdiction by permitting it to take cases via the route of certiorari when a state had upheld a federal right by striking down a state law;¹³³ (3) the creation of certiorari jurisdiction for bankruptcy cases;¹³⁴ (4) the extension of certiorari to limit litigation from state, federal and territorial courts.¹³⁵ It would take the commitment of time and the prestige of the office by Chief Justice Taft to secure passage in 1925 of the Judges' Bill, which established the Court's contemporary certiorari jurisdiction.

The working conditions of the Court were not adequate either. The Justices did not have offices in the Capitol. What the Court did have in the Capitol Building was a courtroom and twelve other rooms—mostly small and arranged inconveniently—for their library, clerk's office and other needs. The problem of storage was critical.¹³⁶ The Justices and their secretaries* worked at home, where attorneys seeking writs had to call upon them. President Taft was eager to press for construction of a new building, but White, like Fuller before him, opposed such a move. There is nothing, however, to suggest support for such a move from the other justices. The new building would be secured as another result of the efforts of Chief Justice Taft.

Nor did White take the lead in dealing with the problems of the lower federal courts, awash in litigation arising from World War I, the post-war red scare, and prohibition. Among the most serious problems which could have yielded to a simple solution were the limited and cumbersome procedures for assigning judges from underutilized districts to those whose dockets were swollen. While there was extraordinary interest in and momentum for judicial reform during the second decade of the twentieth century, White did not seize upon it to secure a comprehensive plan to cure the gross inequalities between the districts. He preferred the status quo to the risks of change.¹³⁷

Conclusions

As Chief Justice, Edward Douglass White was unable to capitalize on his popularity within and outside the Court to maximize the working environment of his colleagues or to reform the structure of the federal courts. Limited managerial abilities, too much deference to tradition, and ill-health hampered his leadership. White's reputation during his lifetime and at his death was far, far higher than it is today. While he did not deserve the eulogistic panegyrics occasioned by his death, his judicial career and his work as Chief Justice do not deserve their current obscurity.

White was, in effect, the last of the nineteenth century Chief Justices, who viewed their role largely in terms of deciding cases, smoothing the ruffled feathers of colleagues and officers of the Court, and preserving the honor of the office. William Howard Taft would be the first Chief Justice to commit the prestige of his office and a large amount of time to attempting to gain the attention of the other branches of the federal government, so that they would consider the problems and needs of the Supreme Court and the lower federal courts. White would also be the last Chief Justice to carry the heavy burden throughout his tenure of having to write jurisdictional and procedural opinions. The certiorari jurisdiction created in 1925 would largely free the Chief Justice from his very large share of this work.

Still, White's accomplishments are not negligible. Among twentieth century Chief Justices, his jurisprudential contributions stand near the top. He guided his Court through some of its most tranquil years, internally and externally, of this century, and left it with his personal popularity intact, and the esteem in which the Court was held greater than when he had taken office.

One might speak of White in the terms in which he memorialized Fuller. Then, he had spoken of his predecessor's untiring attention to judicial duty, kindness, gentleness associated with courage, and faith in the wisdom of those who fathered our institutions.¹³⁸ It is appropriate to leave the summing-up to William Howard Taft, his friend, the man who appointed and succeeded him, the man whose appointments set the tone for the Court during these years:

* the term used for law clerks.

He regarded his office as a sacred trust—as a

Holy Grail — which awakened an intense scrutiny of his own conduct and that of every member of the Court.¹³⁹

For Further Reading

Only Fred Vinson rivals Edward Douglass White as the Chief Justice whose career is least chronicled. Robert B. Highsaw's *Edward Douglass White, Defender of the Conservative Faith* (Baton Rouge, La.: Louisiana State University Press, 1981), published last year, is actually a slightly revised version of a doctoral dissertation written more than thirty-five years ago. Sister Carolyn Klinkhamer's published dissertation, *Edward Douglass White, Chief Justice* (Washington, D.C.: Catholic University, 1943), essentially contemporary to Highsaw's book, is more interesting on the jurisprudence, less so as a biography.

Three of the twelve Associate Justices who served when White was Chief Justice have been especially well-served by biographers. See Merlo Pusey's two-volume, *Charles Evans Hughes* (New York: Columbia University Press, 1963), and Alpheus T. Mason, *Brandeis, A Free Man's Life* (New York: Viking Press, 1946). The enormous Holmes literature is catalogued in

Harry C. Shriver, "What Justice Holmes Wrote; and What Has Been Written About Him" (Potomac, Md: Fox Hills Press, 1978). For the period under consideration in this article, the reader will find occasional nuggets in Holmes' published correspondence with Lewis Einstein, Sir Frederic Pollock, Harold Laski, and Canon Patrick Augustine Sheehan. John Hessin Clarke, William R. Day and Joseph McKenna are reasonably well-served by the biographies written by Hoyt Landon Warner, Joseph E. McLean and Brother Matthew McDewitt. The best single source for the remaining Justices is (eds.) Leon Friedman and Fred L. Israel, *The Justices of the United States Supreme Court, Their Lives and Major Opinions* (New York: R. R. Bowker, 1969). See especially Leonard Dinnerstein's fine portrait of Joseph Rucker Lamar in volume III.

A rapid but helpful overview of White Court jurisprudence can be found in Alfred H. Kelly and Winfred A. Harbison *The American Constitution, Its Origin and Development* (New York: W. W. Norton & Co., 4th ed. 1970). The best lengthy treatment is by John E. Semonche, *Charting the Future, The Supreme Court Responds to a Changing Society 1890-1920* (Westport, Ct.: Greenwood Press, 1978).

Footnotes

¹ Leonard Dinnerstein, "Joseph Rucker Lamar," in (eds.) Leon Friedman and Fred L. Israel, *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions* (New York: R. R. Bowker, 1969), III, 1973 at p. 1980.

² William Howard Taft to Charles P. Taft, Dec. 11, 1910, quoted in Daniel S. McHargue, "President Taft's Appointments to the Supreme Court," 12 *J. of Pol.* 478, at p. 502.

³ *Ibid.* p. 507.

⁴ James F. Watts, Jr., "Horace H. Lurton," in Friedman and Israel, *The Justices of the United States Supreme Court*, supra n. 1, III, 1845 at p. 1848.

⁵ *Ibid.* p. 1860.

⁶ John E. Semonche, *Charting the Future, The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, Ct.: Greenwood Press, 1978), p. 293.

⁷ 230 U.S. 352 (1913).

⁸ *Houston, East & West Texas R. R. v. United States*, 234 U.S. 342 (1914).

⁹ See, e.g., *Bailey v. Alabama*, 219 U.S. 219 (1911); *Truax v. Raich*, 239 U.S. 33 (1915).

¹⁰ See M. Paul Holsinger, "The Appointment of Supreme Court Justice Van Devanter: A Story of Political Preferment," 12 *AJLH* 324 (1968).

¹¹ William Howard Taft to W. H. Sanborn, Dec. 15, 1910, quoted in Alexander M. Bickel, "Mr. Taft Rehabilitates the Court," 79 *Yale L. J.* 1, at p. 39 (1969).

¹² See, e.g., David Burner, "Willis Van Devanter," in Friedman and Israel, *The Justices of the United States Supreme Court*, supra n. 1, III, 1943.

¹³ Edward Lowry, "The Men of the Supreme Court," 27 *World's Work* 629 at p. 632 (April 1914).

¹⁴ Leonard Dinnerstein, "Joseph Rucker Lamar," in Friedman and Israel, *The Justices of the United States Supreme Court*, supra n. 1, III, at p. 1973.

¹⁵ *Ibid.* pp. 1973-74.

¹⁶ 236 U.S. 1 (1915).

¹⁷ Semonche, *Charting the Future*, supra n. 6, at p. 433.

¹⁸ Fred L. Israel, "Mahlon Pitney," in Friedman and Israel, *The Justices of the United States Supreme Court*, supra n. 1, III, 1999 at p. 2009.

¹⁹ Edward Lowry, "The Men of the Supreme Court," supra n. 13, at p. 651.

²⁰ James F. Watts, Jr., "Joseph McKenna," in Friedman and Israel, *The Justices of the Supreme Court of the United States*, supra n. 1, III, 1717 at p. 1727.

²¹ See John E. Semonche, *Charting the Future*, supra n. 6, at pp. 217, 243, 372.

²² Edward Lowry, "The Men of the Supreme Court," supra n. 13 at p. 631.

²³ Oliver Wendell Holmes to Lewis Einstein, June 24, 1911, in (ed.) James Bishop Peabody, *The Holmes-Einstein Letters* (New York: St. Martin's Press, 1964), p. 59.

²⁴ *Ibid.* p. xxv.

²⁵ On Day, see Joseph E. McLean, *William Rufus Day, Supreme Court Justice from Ohio* (Baltimore: Johns Hopkins Press, 1946), p. 151; John E. Semonche, *Charting the Future*, supra n. 6 at p. 51.

²⁶ *The Outlook* (January 1911), p. 156.

²⁷ Marcossou, "The New Supreme Court," 44 *Munsey's Magazine* No. 6 (March 1911), quoted in Alexander M. Bickel, "Mr. Taft Rehabilitates the

Court," supra n. 11 at p. 21.

²⁸ "The Progress of the World," 43 *American Review of Reviews* No. 1 (Jan. 1911), p. 3.

²⁹ "Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Edward Douglass White," December 17, 1921 (Washington, 1921), p. 92.

³⁰ Compare Lewis C. Cassidy, "An Evaluation of Chief Justice White," 10 *Miss. L. J.* 136, 144-45 with Kenneth Bernard Umbreit, *Our Eleven Chief Justices* (New York & London: Harper & Brothers, 1938), 380ff, and Allan Nevins, *Grover Cleveland: A Study in Courage* (New York: Dodd, Mead, 1932), 571.

³¹ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 382.

³² *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 608 (1895).

³³ 198 U.S. 45 (1905).

³⁴ Compare White's concurring opinion in *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) with his majority opinion in *Rasmussen v. United States*, 197 U.S. 516 (1905).

³⁵ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 343 (1897). See also *United States v. Joint Traffic Association*, 171 U.S. 505 (1895).

³⁶ See *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Company*, 221 U.S. 106 (1911).

³⁷ John T. Noonan, Jr., "The Catholic Justices of the United States Supreme Court," 67 *Catholic Hist. R.* No. 3 (July 1981) 369, 379.

³⁸ John B. Murphy, "Amazing Phases of Justice White's Career," 7 *Loyola L.J.* 88, 90, (1926).

³⁹ John T. Noonan, Jr., "The Catholic Justices of the United States Supreme Court," supra n. 37 at p. 378.

⁴⁰ Umbreit, *Our Eleven Chief Justices*, supra n. 30, at p. 382.

⁴¹ c.f. *Greer v. Connecticut*, 161 U.S. 519, 522, 526 (1895).

⁴² Lewis C. Cassidy, "An Evaluation of Chief Justice White," supra n. 30, p. 141.

⁴³ John W. Davis, "Edward Douglass White," 7 *ABA J.* 377, 382 (1921).

⁴⁴ *Ibid.*, p. 382.

⁴⁵ 245 U.S. 366 (1918).

⁴⁶ 197 U.S. 516 (1905).

⁴⁷ John W. Davis, "Edward Douglass White," supra n. 43, p. 379.

⁴⁸ See Eric Goldman, *Rendezvous with Destiny* (N.Y.: Vintage Books, 1960) 43, 176-77 and Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 373.

⁴⁹ 219 U.S. 219 (1911).

⁵⁰ 245 U.S. 60 (1917).

⁵¹ *Guinn v. United States*, 237 U.S. 347 (1915); c.f. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Cummings v. Board of Education*, 175 U.S. 528 (1899); *Berea College v. Kentucky*, 211 U.S. 45 (1908).

⁵² "Remaking the Supreme Court," 20 *The World's Work* No. 5 (Sept. 1910), 13347.

⁵³ John M. Harlan to William Howard Taft, July 11, 1910, quoted in Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11 at pp. 18, 19.

⁵⁴ See Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, p. 17.

⁵⁵ *Ibid.*, p. 15.

⁵⁶ *Ibid.*, p. 16.

⁵⁷ Sister Marie Klinkhamer, *Edward Douglass White, Chief Justice of the United States* (Washington, D.C.: Catholic University Press, 1943), p. 52.

⁵⁸ Quoted in Bickel, "Mr. Taft Rehabilitates the

Court," supra n. 11, at p. 19.

⁵⁹ Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, at p. 15.

⁶⁰ Oliver Wendell Holmes to Canon Patrick Augustine Sheehan, Aug. 14, 1910, in (ed.) David H. Burton, *Holmes-Sheehan Correspondence* (Port Washington, N.Y.: Kennikat Press, 1976), p. 32.

⁶¹ Sept. 24, 1910. (ed.) Mark DeWolfe Howe, *Holmes-Pollock Letters* (Cambridge, Mass: Harvard University Press, 1941), I, 170.

⁶² *Id.*

⁶³ Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, pp. 10-11.

⁶⁴ *Ibid.*, p. 11.

⁶⁵ C. E. Hughes to Taft, April 24, 1910, in Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, pp. 11 at 12.

⁶⁶ (ed.) Joseph P. Lash, *From the Diaries of Felix Frankfurter* (New York: W. W. Norton & Co., 1975), April 25, 1947, p. 313.

⁶⁷ *Id.* See also Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, p. 15.

⁶⁸ George W. Wickersham, "Address on the Unveiling of a Statue of Edward Douglass White," New Orleans, April 8, 1926, p. 18.

⁶⁹ Lash, *From the Diaries of Felix Frankfurter*, supra n. 66, p. 414.

⁷⁰ See, e.g., letter from Francis E. Warren to Willis Van Devanter, Dec. 13, 1910, quoted in Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, p. 41.

⁷¹ Daniel S. McHargue, "President Taft's Appointments to the Supreme Court," 12 *J. of Pol.* 478, 478-79 (1950).

⁷² (eds.) David J. Danelski and Joseph S. Tulchin, *The Autobiographical Notes of Charles Evans Hughes* (Cambridge, Mass.: Harvard University Press, 1973), p. 176.

⁷³ "The Editor's Bag," 23 *Green Bag* 102 (1911).

⁷⁴ Elbert F. Baldwin, "The Supreme Court Justices," *The Outlook* (January 28, 1911), 156, 157.

⁷⁵ Bickel, "Mr. Taft Rehabilitates the Court," supra n. 11, p. 43.

⁷⁶ Oliver Wendell Holmes to Lewis Einstein, Dec. 19, 1910, in Peabody, *The Holmes-Einstein Letters*, supra n. 23, p. 57.

⁷⁷ *Id.*

⁷⁸ David Burner, "James C. McReynolds," in Friedman and Israel, *The Justices of the Supreme Court*, supra n. 1, III, 2021 at 2024. On McReynolds see also R. V. Fletcher, "Mr. Justice McReynolds—An Appreciation," 2 *Vand. L. R.* 35 (1948).

⁷⁹ Samuel J. Konefsky, *The Legacy of Holmes and Brandeis* (New York: Macmillan, 1956), p. 143.

⁸⁰ See, e.g., Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927) and his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 471 (1928).

⁸¹ See Alpheus T. Mason, *Brandeis: A Freeman's Life* (New York: Viking Press, 1946); Alexander M. Bickel, *The Unpublished Opinions of Louis D. Brandeis* (Chicago: University of Chicago Press, 1957); Jeffrey B. Morris, "The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial," 38 *Jewish Social Studies* 195 (Summer-Fall 1976).

⁸² See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919).

⁸³ Hoyt Landon Warner, *The Life of Mr. Justice Clarke* (Cleveland: Western Reserve University Press, 1959) 75. See also David Burner, "John H. Clarke," in Friedman and Israel, *The Justices of the Supreme Court*, supra n. 1, III, 2075; Semonche,

Charting the Future, supra n. 6, 322-23, 421-423 and *in passim*.

⁸⁴ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁸⁵ *United States v. Grimaud*, 220 U.S. 506 (1911).

⁸⁶ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

⁸⁷ *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911).

⁸⁸ *Hoke v. United States*, 227 U.S. 308 (1913).

⁸⁹ *Minnesota Rate Cases*, 230 U.S. 352 (1913); *Houston East & West Railway Co. v. United States [Shreveport Case]*, 234 U.S. 342 (1914).

⁹⁰ *Miller v. Oregon*, 208 U.S. 412 (1916).

⁹¹ *Coppage v. Kansas*, 236 U.S. 1 (1915).

⁹² *Wilson v. New*, 243 U.S. 332 (1916).

⁹³ *Arver v. United States [Selective Draft Law Cases]* 245 U.S. 366 (1918).

⁹⁴ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁹⁵ *War Prohibition Cases*, 251 U.S. 146 (1919); *Northern Pacific Railroad Co. v. North Dakota ex. rel. Langer*, 250 U.S. 135 (1919).

⁹⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁹⁷ *Guinn v. United States*, 238 U.S. 347 (1915); *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁹⁸ *Pierce v. United States*, 252 U.S. 466 (1920).

⁹⁹ *Goldman v. United States*, 245 U.S. 474 (1918).

¹⁰⁰ *Schaeffer v. United States*, 251 U.S. 466 (1920).

¹⁰¹ *Debs v. United States*, 249 U.S. 211 (1919).

¹⁰² Compare *Schenck v. United States*, 279 U.S. 47 (1919) with the dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 624 (1919). See Fred D. Rogan, "Justice Oliver Wendell Holmes, Jr., 'Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Years, 1919,'" 58 *J. Am. Hist.* No. 1 (June) 1971) 24.

¹⁰³ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 385.

¹⁰⁴ Klinkhamer, *Edward Douglass White*, supra n. 57, quoting from *Georgetown College J.* (June 1911) 488.

¹⁰⁵ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 342; David Burner, "John H. Clarke" in Friedman and Israel, *The Justices of the Supreme Court*, supra n. 1, III, 2085.

¹⁰⁶ Warner, *The Life of Mr. Justice Clarke*, supra n. 83, p. 65.

¹⁰⁷ "Proceedings on the Death of Chief Justice White," before the Bar of the Supreme Court of the United States," Dec. 17, 1921, 257 U.S. v at xxii; George W. Wickersham, "Address on the Unveiling of a Statue of Edward Douglass White," supra n. 68, p. 30.

¹⁰⁸ Wickersham, "Address on the Unveiling of a Statue of Edward Douglass White," supra n. 68, p. 30.

¹⁰⁹ Klinkhamer, *Edward Douglass White*, supra n. 57, p. 241.

¹¹⁰ "Proceedings on the Death of Chief Justice White," supra n. 107, xxiv, xxviii-iv.

¹¹¹ Joseph E. Ramsdell, "Reminiscences of Edward Douglass White," 7 *Loyola L.J.* 69 at p. 72 (1926).

¹¹² Klinkhamer, *Edward Douglass White*, supra n. 57, p. 241.

¹¹³ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 383.

¹¹⁴ Clarinda Pendleton Lamar, *The Life of Joseph Rucker Lamar 1857-1916* (New York: G. P. Putnam's Sons, 1926). See also George Hagemann, *The Man on the Bench* (Notre Dame, Ind.: Dujarie Press, c. 1962).

¹¹⁵ Peter F. Fitzpatrick, "Edward Douglass White," 7 *Law School Record* No. 2, pp. i, 34 (1958); Paul Freund, "Mr. Justice Brandeis," in (eds.) Allison Dunham and Philip Kurland, *Mr. Justice* (Chicago: University of Chicago Press, 1956), 177, 186-87.

¹¹⁶ Lash, *From the Diaries of Felix Frankfurter*, supra n. 66, p. 313.

¹¹⁷ Merlo Pusey, *Charles Evans Hughes* (New York: Columbia University Press, 1963), II, 667.

¹¹⁸ Merlo Pusey, "Mr. Chief Justice Hughes" in Dunham and Kurland, *Mr. Justice*, supra n. 115, 147 at p. 154.

¹¹⁹ Lash, *From the Diaries of Felix Frankfurter*, supra n. 66, pp. 313-14.

¹²⁰ Alpheus T. Mason, *The Supreme Court from Taft to Warren* (New York: W. W. Norton & Co., 1964), p. 58.

¹²¹ Oliver Wendell Holmes to Lewis Einstein, Dec. 19, 1910, in Peabody, *The Holmes-Brandeis Letters*, supra n. 23, p. 57, 127.

¹²² Oliver Wendell Holmes to Harold J. Laski, Feb. 27, 1930, in (ed.) Mark DeWolfe Howe, *Holmes-Laski Letters* (Cambridge, Mass: Harvard University Press, 1953), pp. 127-28. Compare with Oliver Wendell Holmes to Sir Frederic Pollock, Dec. 18, 1910, in Howe, *Holmes-Pollock Letters*, supra n. 61, I, 172; Holmes to Canon Sheehan, Jan. 31, 1913, in Burton, *Holmes-Sheehan Correspondence*, supra n. 60, p. 58; Holmes to Harold Laski, Nov. 26, 1920, *Holmes-Laski Letters*, p. 294; Holmes to Lewis Einstein, May 20, 1921, in Peabody, *Holmes-Einstein Letters*, supra n. 23, pp. 195-96.

¹²³ Oliver Wendell Holmes to Harold J. Laski, Oct. 9, 1921, in Howe, *Holmes-Laski Letters*, supra n. 122, p. 290.

¹²⁴ Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* (N.Y.: G. P. Putnam's Sons, 1942), 87.

¹²⁵ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 385.

¹²⁶ Fitzpatrick, "Edward Douglass White," supra n. 115, p. 43.

¹²⁷ Umbreit, *Our Eleven Chief Justices*, supra n. 30, p. 384.

¹²⁸ *Ibid.*, p. 384.

¹²⁹ H.L.M. [McBain], "White, Edward Douglass," in (ed.) Dumas Malone, *Dictionary of American Biography*. XX, 96, at p. 98. Samuel Spring, "Two Chief Justices, Edward Douglass White and William Howard Taft," *American Review of Reviews* (Aug. 1921) 161 at 166.

¹³⁰ Edward Lowry, "The Men of the Supreme Court," supra n. 13, at p. 632.

¹³¹ John E. Clarke, "How the Supreme Court Works," 9 *ABA J* 80, 81 (1923).

¹³² Act of March 3, 1911; 36 Stat. 1087, 1167.

¹³³ Act of December 23, 1914; 38 Stat. 790.

¹³⁴ Act of January 28, 1915; 38 Stat. 803.

¹³⁵ Act of September 6, 1916; 39 Stat. 726.

¹³⁶ Edward Lowry, "The Men of the Supreme Court," supra n. 13 at p. 637; Elbert F. Baldwin, "The Supreme Court Justices," supra n. 74 at p. 160.

¹³⁷ See Edward D. White to Arthur C. Denison, Feb. 9, 1920, quoted in Peter Fish, *The Politics of Federal Judicial Administration* (Princeton, N.J.: Princeton University Press), p. 16.

¹³⁸ "Proceedings on the Death of Mr. Chief Justice Fuller," 219 U.S. vii at xvii.

¹³⁹ William Howard Taft, "An Appreciation of Edward Douglass White," 7 *Loyola L.J.* 61 at p. 65 (1926).

Justice Harlan and the Equal Protection Clause

Sally Jo Vasicko

Introduction

Under the United States Constitution, states are prohibited by the Fourteenth Amendment from denying any citizen equal protection of the laws. A troublesome aspect of this clause has been its definition and implementation in specific circumstances. While the Supreme Court has ruled that states may devise legislative schemes for purposes of classifying citizens as to eligibility for certain government services and/or benefits, e.g., drivers license, welfare payments, unemployment compensation, etc., it initially decreed that these classification schemes must have a "rational relationship" to the objective sought. Under the "rational" relationship or "reasonableness" doctrine, the Court assumed a limited role in evaluating state legislative schemes, e.g., *Railway Express Agency v. New York*.¹

Later, during the Warren Court era, 1953-1969, the "compelling" state interest test was added as a means of judging state action. This test included concern about the effects of the classification as well as its purpose. Legislative activity must be sanctioned by a "compelling" state interest in that field. This approach, dubbed the "newer" equal protection by one court watcher² assured greater involvement by the Court in areas of substantive policy, e.g., welfare benefits. In *Shapiro v. Thompson*,³ the Court determined that specified residency stipulations regarding the receipt of welfare benefits were unconstitutional. A stricter test than the rational test had to be applied, "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause."

The justices who were part of the Warren Court continually faced and resolved issues surrounding constitutionally-allowable state legis-



John Marshall Harlan on the morning of his Senate confirmation hearing, February 24, 1955.

lative classification schemes. It was during this period that states were told by the High Court that certain classification schemes were "suspect" and deserved "a close judicial scrutiny." This standard of measurement determined whether an evil or invidious purpose motivated the state's action. State legislative classifications based upon race and wealth affecting a fundamental right were deemed "suspect." As a result, citizen rights were redefined and extended through an expanded interpretation of the meaning of equal protection of the laws.

But what constituted a fundamental right? Was such a right spelled out explicitly in the Constitution? Or, was such a right one which could be inferred within the parameters of Constitutional wording? The Court solved this dilemma by "describing" not "discovering" certain rights as fundamental. The right to vote was determined to be a fundamental right: therefore, a poll tax could not be assessed in state elections. The right to marry was deemed a fundamental right: therefore, interracial unions could not be prohibited.⁴ This expansion of rights took place through the

application of the equal protection clause to specific circumstances before the Court.

But during the period, the Court did not speak with a single voice regarding these crucial issues. Strong voices of dissent rang out protesting the action taken by the Court. One of the most articulate dissenters was John Marshall Harlan, an Associate Justice from 1955-1971. His opinions expressed concern over judicial abuse of the equal protection clause. According to Harlan, expansion of civil rights by the judiciary through the equal protection clause violated constitutional guidelines in two respects: first, the Court was exceeding its authority under the Constitution; second, the delicate balance between state and federal jurisdiction would be upset by such judicial maneuvers.

It must be made clear at the outset that Harlan was not against minority groups achieving full legal or political parity. Nor was Harlan willing to give states a complete free hand in areas involving fundamental rights.⁵ But Harlan espoused a consistent belief in defining substantive rights within constitutional guidelines. These guidelines were found within the due process of law clause, separation of powers doctrine, or judicial restraint, not in applying a broad sweep of the equal protection of the laws clause. But if this catch-all clause was to be invoked, then the reasonableness or rational test should be employed.

Throughout Harlan's tenure on the high bench, the reasonableness or rational test was his reference point when evaluating state legislative classification schemes. Harlan always asked if the statute had a reasonable purpose behind it. In other words, what were the motivating factors behind the legislative classification scheme? Did the state possess a legitimate interest in the subject matter? Inherent in this approach was a concern about the power relationship between the national and state governments. That is, how were these power relationships to be defined and what was the proper judicial role within that definition. Harlan was concerned that the equal protection clause would be abused and that the Court would become, in the words of Learned Hand, "platonic guardians," supplanting its will for that of the state legislatures. He consistently warned the Court to be prudent in its interpretations of state action and continuously admonished his judicial brethren to remember the

Court's proper role within a constitutional framework.⁶

Because Harlan's opinions bring to bear an invaluable analysis of the meaning of equal protection of the laws, they are an important legacy to the evolution of American Constitutional federalism. This article discusses Harlan's equal protection opinions in the following areas: reapportionment, voting rights, race relations, criminal defendant rights, and welfare rights. Harlan's opinions offer a rational alternative to the Court's approach to the definition and application of this ambiguous constitutional phrase by emphasizing judicial restraint, precedent and constitutional guidelines as a source for judicial decision-making.

Reapportionment

The Fourteenth Amendment does not specifically mention the franchise, but it performs a more powerful function in securing the vote than the other four amendments (15, 19, 24, and 26) combined. Whereas all five Amendments grant enforcement power to the national government, not the states, it was the U.S. Supreme Court which selected Fourteenth Amendment's clause of "equal protection of the laws," as the means for securing the vote as a fundamental right for each citizen. Whereas the other four amendments merely prohibited states from denying the franchise to a particular group of citizens, it was the Court's interpretation of the Fourteenth Amendment that committed the national government to the active pursuit of securing the franchise for all citizens. Our Constitution, as amended, failed to mention the "fundamental right to vote." Yet, the U.S. Supreme Court has declared it is ours.

Interpretation of the equal protection of the laws regarding legislative apportionment was a hotly debated issue before the Warren Court and *Baker v. Carr*,⁷ was one of the most celebrated decisions regarding the right to vote. After all, in this decision the Court broke precedent and ruled that it had jurisdiction over legislative apportionment under the equal protection clause. In the *Baker* case, Harlan wrote a separate dissenting opinion but also joined in Frankfurter's dissent.

In his dissent, Harlan developed themes that will be used in subsequent dissenting opinions. First of all, no federal question was shown:



Office of the Curator, Supreme Court

The new junior Justice—John Marshall Harlan in 1955.

Hence, we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise between competing political philosophies. The federal courts have not been empowered by the Equal Protection of the Laws Clause to judge whether this resolution of the State's internal political conflict is undesirable, wise or unwise. . . . Furthermore, a States' choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income. Both are legislative judgments entitled to equal respect from this Court.⁸

Second, while it was easy to comprehend the Court's anxiety over lack of redress in the political arena, it was not necessary that the Court fill the vacuum. In doing so, the Court went beyond its boundaries. Harlan stated:

The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other 'malapportioning' states will quickly respond with appropriate political action, so that this Court need not be greatly concerned about federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not

fulfilled. Thus, what the court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication.⁹

Third, Harlan warned the Court in an appendix what this "adventure in judicial experimentation" could produce: "The fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula used, but in the failure to take account of the fact that a multitude of legitimate policies; along with circumstances of geography and demography, could account for the seeming electoral disparities among counties."¹⁰ Thus, Harlan reprimanded and forewarned his judicial brethren of what lay ahead if the Court continued to inflate the meaning of the equal protection clause.

Harlan joined Frankfurter's dissenting opinion. Frankfurter, too, was concerned with the Court overstepping its jurisdictional boundaries. Harlan's subsequent opinions developed and refined Frankfurter's, as well as his sense of solid constitutional adjudication. The proper role of the Court was repeatedly emphasized. Harlan cried out against continued "judicial experimentation" in policy and procedure areas which clearly belonged to the states. In each dissenting opinion, he expressed alarm with the Court's expanded definition of the equal protection clause regarding legislative reapportionment. Let's now turn to this series of opinions in which Harlan spelled out his fears over the Court's expansiveness and its eventual impact upon federal-state relationships.¹¹

Baker v. Carr dealt with the failure of the Tennessee State Legislature to reapportion. During the same term, the Court went one step further. In *Gray v. Sanders*,¹² the Court ruled on the constitutionality of Georgia's county-unit system as a basis for counting votes in Democratic primary elections for the nomination of United States Senator and statewide offices. The majority held that the system violated the equal protection clause of the Fourteenth Amendment.

Harlan's dissent pointed out that there was not enough evidence to support the Court's findings. He emphasized themes present in his dissent in *Baker v. Carr*:

On the existing record, this leaves the question of 'irrationality' in this case to be judged on the basis of pure arithmetic. The Court by its 'One person, one vote' theory in effect avoids facing up to that problem, but the District Court did face it, holding that the disparities in voting strength

between the largest county (Fulton) and the four smallest counties (Webster, Glascock, Quitman and Echols) running respectively 8 to 1, 10 to 1, 11 to 1, and 14 to 1 in favor of the latter, were invidiously discriminatory. But it did not tell us why. *I do not understand how, on the basis of these mere numbers, unilluminated as they are by any of the complex and subtle political factors involved, a court of law can say, except by judicial fiat, that these disparities are in themselves constitutionally invidious.*¹³

Through "judicial fiat," the Court had cut for itself a wide swath of constitutional power using improper logic and unsubstantiated evidence. In order to register his protest with this approach, Harlan would often vote to vacate and remand a decision for further consideration.

Harlan's adherence to the doctrine of separation of powers and the proper role of the judiciary was spelled out succinctly in his dissent in *Webster v. Sanders*.¹⁴ In this decision, the majority set forth the theory of "one man, one vote." The case dealt with apportionment of Congressional legislative districts. According to the majority, under Article I, Section 2, Representatives chosen 'by the People of the several States' meant that as nearly as was practicable one person's vote in a congressional election was to be worth as much as another's.¹⁵

Harlan attacked the Court's logic, reasoning, and data. He maintained that no support for the Court's decision could be found in the historical records of United States, Federalist Papers or case law. Furthermore, the complaint failed to reveal a valid constitutional claim. Harlan charged that the phrase "as nearly as practicable" did not define the issue at hand.¹⁶ In a footnote (no. 4) he asked, "How great a difference between the population of various districts within a State is tolerable? Does the number of districts within a State have any relevance?"¹⁷

There is an obvious lack of criteria for answering questions as these, which points up the impropriety of the Court's whole-hearted but heavy-footed entrance into the political arena. . . . The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process

is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government.¹⁸

Again Harlan forcefully expressed his distress over the Court's choice of criteria and the impact of these decisions upon the political system. Harlan did not want the American government to become a government by the judiciary. Questions of a political nature must be settled by the electorate, not the judiciary.

A subsequent ruling, *Reynolds v. Sims*,¹⁹ was one of the most significant of the reapportionment decisions. The Court ruled that the seats in both houses of a bicameral legislature must be apportioned substantially on a population basis to be in compliance with the equal protection of the laws clause.

Harlan's dissent²⁰ charged that the language of the Fourteenth Amendment did not empower the Court to hand down any of the reapportionment decisions. He discussed the history of the amendment, emphasizing its proposal and ratification. Harlan accused the Court of "Amending" the Constitution with these decisions:

The Court's elaboration of its new 'Constitutional' doctrine indicates how far and how unwisely it has strayed from the appropriate bounds of its authority. The consequences of today's decision is that in all but the handful of states which may already satisfy the new requirements the local District Court or, it may be, the State Courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the State.²¹

Harlan then discussed the impact of the decision upon federal-state relationships: "It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States."²²

For Harlan, the Court was not specific enough in its criteria for determining a properly proportioned legislative assembly. As a result, the Court's opinions excluded a list of ten crucial factors. These factors encompassed 1) history; 2) economic or other sorts of group interests; 3) area; 4) geographical considerations; 5) a desire to insure effective representation for sparsely set-

tled areas; 6) availability of access of citizens to the representatives; 7) theories of bicameralism (except those approved by the Court); 8) occupation; 9) an attempt to balance urban and rural power; 10) the preference of a majority of voters in the state.²³ Harlan complained that under the Court's opinions the only two factors a state could properly use were numbers and political subdivisions.

He agreed with the majority that "legislators represent people, not trees or acres;" that "citizens, not history or economic interests, cast votes;" that "people, not land or trees or pastures, vote."²⁴ Harlan's concluding remarks set forth a refinement of his basic concerns regarding the definition of equal protection of the laws:

The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so in the amending process.²⁵

Such was the essence of the Harlan approach to the adjudication of constitutional concepts. The Court was always limited in its interpretative actions of Constitutional principles. That document, as the instrument of our government, could not be amended or its meaning expanded by the Court. The principle laid out in the *Reynolds* dissent will be raised again in subsequent dissents covering a variety of subject matters. Harlan's adherence to the sound adjudication of constitutional concepts was rooted in a deep concern for the preservation of the Constitution as an instrument of government and a deep conviction regarding the proper role of the Court.

In subsequent reapportionment decisions, Harlan, whether in a majority, concurring, or dissenting opinion, reminded the Court of its previously announced principles. In *Fortson v. Dorsey*,²⁶ the Court ruled that the equal protec-

tion clause did not necessarily require formation of all single-member districts in a state's legislative apportionment scheme. Harlan joined the majority but professed a reservation, "There is a language in today's opinion, unnecessary to the Court's resolution of this case, that might be taken to mean that the constitutionality of state legislative reapportionments must, in the last analysis, always be judged in terms of simple arithmetic."²⁷

A later decision, *Swann v. Adams*,²⁸ did not squarely present such a case for Harlan. The Court reversed a district court plan under which the Florida reapportionment proposal was allowed deviations from equality of population between legislative districts. The Court held that such deviations were only allowed which "are based on legitimate considerations incident to the effectuation of a rational state policy."²⁹ Harlan's dissent firmly clung to previously discussed constitutional concepts.

In 1968, the Court extended the concept of one man, one vote to local government units.³⁰ Harlan dissented on the basis of jurisdiction and merits. The Court lacked jurisdiction because the finality question was not met. The case could be resolved by adhering to the Texas Constitution and its statutes.

He then analyzed the merits of the case, primarily because of the Court's opinion. Harlan was worried about the Court's lack of attention to the impact of the decision upon local government. Restructuring local governmental units should be left up to the political process, not the judiciary.³¹ In addition, Harlan expressed alarm over the potential number of cases which could find their way to the doorstep of the Court.³²

A dissenting opinion handed down in 1969, *Wells v. Rockefeller*,³³ captured the essence of Harlan's objections to the Court's application of the equal protection of the laws clause to legislative reapportionment. The majority held that the State of New York's reapportionment plan did not meet the constitutional standard of equal representation. Harlan's dissenting voice cried out in disgust:

Whatever room remained under this Court's prior decisions for the free play of the political process in matters of reapportionment is now all but eliminated by today's Draconian judgments. Marching to the nonexistent command of Art. I, 2 of the constitution, the Court now transforms a political slogan into a constitutional absolute. Straight in-

deed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history and economics, so as to achieve the magic formula, one man, one vote.³⁴

In Harlan's view, "mathematical niceties" did not always square with political realities or constitutional concepts and he repeatedly warned the Court of the dangerous path it was taking.

Voting Rights Cases

During Harlan's tenure on the Court, the equal protection clause was applied to other kinds of voting cases. In *Carrington v. Rash*,³⁵ the Court ruled that while a state may impose reasonable residence requirements for voting, it could not, under the equal protection of the laws clause, deny the ballot to a bonafide resident merely because he was a member of the armed forces. Harlan dissented and viewed the Texas classification schemes as rational. Coming to Texas as part of the military can be distinguished from a change in job by a civilian. Harlan concluded, "Such a Policy on Texas' part may seem to many unduly provincial in light of modern conditions, but it cannot, in my view, be said to be unconstitutional."³⁶

Two years later, the Warren Court handed down a decision critical to the ideals of representative democracy, *Harper v. Virginia State Board of Elections*.³⁷ The majority ruled that Virginia's conditioning the right to vote with a poll tax violated the equal protection of the laws. Harlan again dissented.

Harlan quoted from the majority opinion in *Harper* which described the franchise as "precious" and fundamental. While these words had a "captivating" ring to them, they did not satisfy the standards needed to measure the equal protection issue. One could ask, "Is there a rational basis for Virginia's poll tax as a voting qualifications?"³⁸ Harlan said "yes." Look to our history, property qualifications and poll taxes were part of our early experience. But today:

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of

choice by reasonably minded people acting through the political process.³⁹

Harlan, once again, protested the interpretative license used by the Court regarding the application of the equal protection clause. Such interpretations were blots upon sound principles of constitutional adjudication.

In 1965 Congress passed the Voting Rights Act outlawing literacy tests. Two decisions, *Katzbach v. Morgan*⁴⁰ and *Cardona v. Power*,⁴¹ ruled on the validity of Congressional action. In both cases, the Court struck down a New York literacy test as violative of the Civil Rights Act of 1965.

In the *Cardona* decision, Harlan dissented on the grounds that the case presented a straight forward equal protection problem. Again Harlan took issue with federal intervention into state matters, such as the franchise.

Harlan asserted that there was a rational purpose behind the classification scheme. The appellant claimed fluency in Spanish, that she listened to Spanish-speaking radio broadcasts which provided much political views:

New York may justifiably want its readers to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, attesting to the national view of its importance into the American political community. Relevant too is the fact that the New York English test is not complex, that it is fairly administered, and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend.⁴²

Thus Harlan pointed out a legitimate interest by New York in the "promotion and safeguarding the intelligent use of the ballot."

Harlan then turned to the *Katzbach* decision and the application of the federal statute to determine the constitutionality of literacy tests. Harlan maintained that the Court had gone too far in its support of Congressional enforcement power and complained that not enough factual data supported the legislative action taken. The Court assumed the validity of Congressional action until proven otherwise. But Harlan maintained caution in the exercise of judicial power when such judgment can adversely affect the delicate balance between state and federal power. Mere Congressional pronouncement must not be allowed to supercede state authority.

In a subsequent ruling, *Gaston County v. U.S.*⁴³ Harlan wrote the majority opinion. The Court refused to allow the county to reinstate a literacy test. Harlan's approach was consistent in that he looked to the established record, "the sad truth is that throughout the years, *Gaston County* systematically deprived its black citizens of the educational opportunities it granted to its white citizens. Impartial administration of the literacy test today would serve only to perpetuate these inequities of the literacy form."⁴⁴ Thus, reestablishment of the literacy test in North Carolina had a different purpose and effect than the legitimate reason and administration to the New York literacy test. Harlan's opinions, whether majority or dissenting, looked to the rationality and purpose of a statute in light of constitutional considerations. When these dual requisites were met, the statute should be allowed to stand.

Race Relations

The Court's business, according to Harlan, was to use prudent standards when interpreting state action in light of constitutional guidelines. A case in point, *Burton v. Wilmington Park Authority*,⁴⁵ *Burton* involved the leasing of space in a government parking garage by a privately owned restaurant. The restaurant refused to serve blacks. The Court was asked to determine how much state action was involved and whether equal protection of the laws had been violated. The Court ruled there was a relationship between the State and the operator of the restaurant by considering such factors as location, use by state employees and rental monies; thus, a combination of factors established a working relationship and as a result, such state involvement could not be allowed to sanction racial discrimination. Harlan's dissent pointed out the Court's illogical approach:

The Court's opinion, by a process of first indiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of state action.⁴⁶

In a 1965 decision *Evans v. Newton*⁴⁷ the Court again confronted the issue of what constitutes state action under the equal protection of the law clause. At issue was the role played by State officials as a trustee of private property,



Associate Justice Harlan (1955-1971).

Office of the Curator, Supreme Court

municipal in nature, which did not allow access to blacks. The Court ruled such a practice was a denial of equal protection of the laws.

Harlan's dissent stated that the writ of certiorari had been "improvidently granted" and should be dismissed.⁴⁸ The record revealed no substantial federal question and no state action. Harlan chided the majority, "This decision, in my opinion, is more the product of human impulses, which I fully share, than of solid constitutional thinking. It is made at the sacrifice of long-established and still wise procedural and substantive constitutional principle."⁴⁹ Human impulses were worthy but not at the expense of sound legal reasoning. This opinion carried with it "seeds of transferring to federal authority vast areas of concern whose regulation has been wisely left by the Constitution to the States."⁵⁰ For Harlan, these areas of concern encompassed privately-owned orphanages, libraries, garbage collection companies but especially schools. Did Harlan anticipate the subsequent developments of the 1970's when he wrote:

For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adopt their admission policies to its requirements, but that such matters are left to the States acting within Constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts,

and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.⁵¹

Harlan was concerned about the Court's assuming too active a role in state matters. A humane person, Harlan was likewise trying to maintain that delicate balance between "human impulses" and constitutional concepts. He advised the Court to root their decisions in the latter, not the former. Only then would the Court be able to maintain its position of credibility among the three branches of government and the populace.

In a 1967 decision, *Reitman v. Mulkey*,⁵² the Court declared null and void an amendment to the California State Constitution which repealed open housing legislation and forbade future passage of similar legislation. Harlan dissented and scolded the Court for advancing "ill-founded" arguments as the basis of their contentions.

Harlan was convinced that the proposition adopted by the California voters was neutral on its face and not a call to arms to discriminate.⁵³ Harlan did not dispute the fact that (section) "26 was meant to nullify California's fair-housing legislation and thus to remove from private residential property transactions the state-created impediment upon freedom of choice."⁵⁴ Harlan looked to the California Court record regarding rental of property to blacks in 1963. No indication was present as to the general effect of Section 26.

Harlan said, "A State enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the judiciary without *persuasive* evidence of an *invidious purpose* or effect."⁵⁵ He did acknowledge the circumstances leading up to the adoption of the referendum, i.e., the passage of several strong antidiscrimination acts and the opposition to those acts by those who led the referendum movement. The California Supreme Court used these circumstances to declare Section 26 unlawful. Harlan stated, "This, of course, is nothing but a legal conclusion as to federal constitutional law, the California Supreme Court not having relied in any way upon the State Constitution."⁵⁶ Again, Harlan cried, look to the State Constitution, "It seems to me manifest that the State Courts decision rested entirely on what that

court conceived to be the compulsion of the Fourteenth Amendment, not on any factfinding by the state Courts."⁵⁷ Again, human impulses were the basis of a decision, not constitutional concepts. To Harlan, State action must be rooted in something more than "encouragement." "I believe the State action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, *actively* fostering discrimination."⁵⁸ Harlan advised the Court to think about what it had done. Harlan's dissent warned the Court not to stray from its constitutional duty of interpreting State laws in light of constitutional concepts. The Court should not become a "super-legislature." In matters where State classification schemes were reasonable, judicial restraint should be exercised: "By refusing to accept the decision of the people of California, and by contriving a new ill-defined constitutional concept to allow federal judicial interference, I think the Court has taken to itself powers and responsibilities left elsewhere by the Constitution."⁵⁹

Criminal Defendant Rights

An early illustration of Harlan's concern about the use of the equal protection of the laws clause came in 1965. In the celebrated case of *Griffin v. Illinois*,⁶⁰ the Court held that an appeal from a conviction could not be conditioned by economic status. An indigent defendant claimed his right of appeal was adversely affected because he could not financially provide the necessary transcript. The Court held that Illinois must provide the transcript for an indigent defendant on the first appeal. Harlan dissented. In this dissent, he accused the Court of painting an overly broad stroke of constitutional rights with the brush of the equal protection of the laws clause.

In Harlan's view, Illinois *procedural* requirements were not shocking to a sense of fundamental fairness or justice; he accused the Court of using the equal protection of the laws clause in order to accomplish its predetermined goal of expanding the meaning of the equal protection clause. The Court did not think through the impact of its decision. Such a decision was detrimental to a healthy federal system. After all:

As I view this case, it contains none of the elements hitherto regarded as essential to justify action by this Court under the Fourteenth Amendment. In truth what we have here is but the failure

of Illinois to adopt as promptly as other States a desirable reform in its criminal procedure. Whatever might be said for our system of federalism requires that matters such as this be left to the States. However strong may be one's inclination to hasten the day when *in forma pauperis* criminal procedures will be universal among the states. I think it is beyond the province of this Court to tell Illinois that it must provide such procedures.⁶¹

In a 1962 decision, *Douglas v. California*⁶² Harlan's dissent reemphasized his concerns for reasonableness in the establishment of classification schemes and the constitutional boundaries of Supreme Court rulings. The case again involved the right of appeal as defined by a state statute. Under the state procedure, criminal appeals were screened to determine whether or not counsel should be appointed for indigent defendants. The Court struck down the provision on the basis that the procedure established a classification based upon wealth which adversely affected the right to appeal. Harlan asserted that, "This case should be judged solely under the Due Process Clause, and I do not believe that the California procedure violates that provision."⁶³ Harlan cited his dissent in *Griffin* (he would follow this practice in subsequent dissents, always pointing out to the Court the error of its way and the consistency of his own arguments) and elaborated further on his earlier objections:

The Equal Protection Clause does not impose upon the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances' . . . The State may have a moral obligation to eliminate the evil of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.⁶⁴

The state appellate courts have the power to appoint counsel on appeal for indigent defendants. If counsel was not appointed, the record is present and could be evaluated as to any injustice.⁶⁵ According to Harlan, appellate review was not automatically required by the Fourteenth Amendment. The Court was charged with examining the procedures of particular states as to their reasonableness. The California procedure gave the indigent defendant's trial record a full appraisal based on the merits of the case. As a result, California had taken reasonable steps to ensure the defendant's rights and guarantee need-less expense. Harlan emphasized that the California appellate procedure was more fair

than that used by the United States Supreme Court.⁶⁶ So, in the *Douglas* dissent, Harlan reminded his judicial brethren to tread carefully in the two separate areas of equal protection of the laws and due process of law. The Court was again admonished for its lack of adherence to constitutional principles and sensitivity to the federal structure. The states had the authority to determine the ground rules of the appellate process. As long as those rules were reasonable and just, they should stand.

During Harlan's final term on the bench, the Court used the equal protection clause to apply to time served in jail as a means of working off fines.⁶⁷ By this time, the Warren Court had become the Burger Court but Harlan remained true to his belief in adjudication within constitutional guidelines. Harlan concurred in the Court's judgment but disassociated himself from its rationale. In a tersely-worded opinion, Harlan pointed out:

The 'equal protection' analysis of the Court is, I submit, a 'wolf in sheep's clothing,' for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what State legislation offends notions of 'fundamental fairness.' Under the rubric of 'equal protection' this Court has in recent times effectively substituted its own 'enlightened' social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of substantive due process.⁶⁸

In Harlan's view, this case should be decided upon due process grounds. He cited previous decisions in which the equal protection clause was wrongly applied. He had tried to warn the Court then but it did not heed his advice. Harlan maintained that the Court was preoccupied with "equalizing rather than analyzing the rationality of the legislative purpose."⁶⁹ Harlan emphasized that the question before the Court should be decided on the basis of the due process clause. The results sought in the *Williams* case were just but the means chosen were wrong. Invoking the equal protection clause raised more issues than it resolved.

Welfare Rights

In Harlan's dissent in the case involving Aid to Families with Dependent Children (AFDC), *Shapiro v. Thompson*⁷⁰ his concern for the proper use of the equal protection clause was

once again underscored. The question before the Court was whether or not the state of Connecticut and the District of Columbia could attach a residency requirement to receipt of AFDC benefits. The majority ruled that such a requirement affected adversely the "fundamental" right to travel and struck down the requirement.

Harlan's dissent emphasized the compelling state interest doctrine and viewed the Court's declaration of a right to interstate travel as fundamentally unwise. His conclusion was rooted in the proper application of the equal protection clause. *Shapiro* was a case for the due process clause. Harlan again expressed doubt regarding the Court's wisdom in deeming certain rights as fundamental:

But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as fundamental and give them added protection under an unusually stringent equal protection test.⁷¹

Harlan then examined whether or not this one-year residency requirement amounted to an undue burden upon the right of interstate travel. He analyzed Congressional action, the extent of the interference, State government interests served by welfare residence requirement and concluded, "This resurgence of the expansive view of 'equal protection' carries the seeds of more judicial interference with the State and federal legislative process. . . ."⁷² According to Harlan, the Court once again went beyond its constitutional province.

Conclusion

John Marshall Harlan served on the Supreme Court during a period of its history when extraordinary interpretations of the equal protection clause were handed down, e.g., review of state legislative reapportionment plans were declared to be within the jurisdiction of federal courts, the franchise was declared a fundamental right, and interstate travel was deemed to be an inherent right due all citizens. Throughout Harlan's tenure on the Court, he cautioned his judicial brethren against too expansive an interpretation and application of the equal protection clause. His warnings were rooted in a deep commitment to maintaining the delicate balance between states and the national government within a federal system and sustaining a proper role for the judiciary.

Harlan's majority, concurring and dissenting opinions reflected an awareness of the striving of groups for political and economic parity. Although his opinions evinced a sympathy with humanistic values brought before the Court, he was deeply concerned over the route taken by the Court to describe fundamental rights existing in the Constitution. Harlan was fearful that the path chosen by the Court would lead to a government by the judiciary. The Court should use prudence not emotion when evaluating state legislative schemes. Such an approach would keep federalism intact and the role of the judiciary secure. Harlan's crisp, thoughtful analysis of constitutional questions brought a sense of balance to the Court's deliberations and opinions. His smooth, clear, logical stance is as needed today as it was during his tenure on the bench.

Footnotes

¹ 336 U.S. 106, 110 (1949). Emphasis added.

² See Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harvard L. Rev.* 1 (1972).

³ 394 U.S. 618, 638 (1969).

⁴ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵ Witness his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961). Although this decision centered around a due process question, Harlan's concern over state interference in basic human rights is forcefully expressed.

⁶ See the following: *Avery v. Midland County*, 390 U.S. 474 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Harper v. Virginia State Board of Elections*,

383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷ 369 U.S. 186 (1962).

⁸ *Ibid.*, p. 333-334. See C. H. Pritchett, "Equal Protection and the Urban Majority," *American Political Science Review*, LVII (Dec. 1964) p. 869-875 for a critical assessment of Harlan's stand on equal protection and apportionment.

⁹ *Ibid.*, p. 339. Emphasis added.

¹⁰ *Ibid.*, p. 345.

¹¹ Two decisions *Scholle v. Hare* (369 U.S. 429, 1962), *W.M.C.A. Inc. v. Simon* (370 U.S. 190, 1962), which followed *Baker* were remanded to the lower courts for further hearings. Harlan dissented, "It is unfortunate that the Court, now for the second time

(*Scholle*, the first, *W.M.C.A. Inc.*, the second), has remanded a case of this kind without first coming to grips itself with this basic constitutional issue; or even indicating any guidelines for decision in the lower courts. *Baker v. Carr*, *supra*, of course did neither. (*W.M.C.A., Inc.*, p. 194) If the Supreme Court was not clear in its decision, how could lower courts be expected to rule with credibility and accuracy?"

¹² 372 U.S. 368 (1962).

¹³ *Ibid.*, p. 387. Emphasis added.

¹⁴ 376 U.S. 120 (1964).

¹⁵ *Ibid.*, p. 120.

¹⁶ *Ibid.*, p. 121.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 48.

¹⁹ 377 U.S. 533 (1964).

²⁰ His dissent in *Reynolds* also applied to the following decisions regarding legislative reapportionment: *Maryland Committee for Fair Trade v. Fawes*, 377 U.S. 659 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *W.M.C.A. v. Lomanzo*, 377 U.S. 633 (1964); *Lucas v. 44th General Assembly of Colorado*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964).

²¹ *Ibid.*, p. 615.

²² *Ibid.*, p. 622.

²³ *Ibid.*, p. 622-623.

²⁴ *Ibid.*, p. 623.

²⁵ *Ibid.*, p. 625-626. Emphasis added.

²⁶ 379 U.S. 439 (1964).

²⁷ *Ibid.*, p. 439-440.

²⁸ 385 U.S. 440 (1965).

²⁹ *Ibid.*, p. 440.

³⁰ *Avery v. Midland County*, 390 U.S. 474 (1966).

³¹ *Ibid.*, p. 494.

³² Such an example came to the Court in 1970, *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). Citing *Avery v. Midland County*, *supra*, the Court ruled that whenever a state or local government selects anyone to perform public functions, the equal protection of the laws clause required that each qualified voter have an equal opportunity to participate in the election. The Court also held that when members of an elected body are chosen from separate districts, each district must be established on a basis that as far as practicable will insure that equal

numbers of voters can vote for proportionally equal numbers of officials. Harlan dissented.

³³ 399 U.S. 542 also applied to *Kirkpatrick v. Preister*, 394 U.S. 526 (1969).

³⁴ *Ibid.*, p. 550.

³⁵ 380 U.S. 89 (1964).

³⁶ *Ibid.*, p. 101.

³⁷ 383 U.S. 663 (1966).

³⁸ *Ibid.*, p. 683.

³⁹ *Ibid.*, p. 686. Emphasis added.

⁴⁰ 384 U.S. 641 (1966).

⁴¹ 384 U.S. 672 (1966).

⁴² *Ibid.*, p. 663-664.

⁴³ 395 U.S. 285 (1969).

⁴⁴ *Ibid.*, p. 521.

⁴⁵ 365 U.S. 715 (1961).

⁴⁶ *Ibid.*, p. 728.

⁴⁷ 382 U.S. 296 (1965).

⁴⁸ *Ibid.*, p. 316.

⁴⁹ *Ibid.*, p. 315.

⁵⁰ *Ibid.*, p. 322.

⁵¹ *Ibid.*, p. 322.

⁵² 387 U.S. 369.

⁵³ *Ibid.*, p. 389.

⁵⁴ *Ibid.*, p. 390.

⁵⁵ *Ibid.* Emphasis added, p. 390-391. In Harlan's view, no such "persuasive evidence" of an evil intent was present.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 395. Emphasis added.

⁵⁹ *Ibid.*, p. 396.

⁶⁰ 351 U.S. 12 (1956).

⁶¹ *Ibid.*, p. 39.

⁶² 372 U.S. 353.

⁶³ *Ibid.*, p. 361.

⁶⁴ *Ibid.*, p. 362.

⁶⁵ *Ibid.*, p. 363.

⁶⁶ *Ibid.*, p. 367.

⁶⁷ *Williams v. Illinois*, 399 U.S. 235 (1970).

⁶⁸ *Ibid.*, p. 259. Harlan's emphasis.

⁶⁹ *Ibid.*, p. 260.

⁷⁰ 394 U.S. 618 (1969).

⁷¹ *Ibid.*, p. 622.

⁷² *Ibid.*, p. 677.

Justice Frank Murphy: A Reexamination

Margaret H. Potts

Frank Murphy served as an Associate Justice of the Supreme Court of the United States from February 5, 1940, until his death on July 19, 1949. During those nine years he wrote 219 opinions while serving with three Chief Justices. He made speeches supporting Roosevelt and the War, and joined the Army Reserve as a Lt. Colonel. To those who disapproved of his jurisprudence, Murphy became known as a soft-hearted libertarian. To those who admired him, Murphy became the "conscience of the Court."¹ One of the few men whose public reputation was damaged rather than enhanced through his elevation to the high court, Justice Murphy died nearly penniless, and leaving a total estate worth less than \$2,000 and a bill to the residential hotel in Washington where he lived of nearly \$1,000.²

Although commentary on Murphy's perform-

ance as a justice has not been extensive, it has been contradictory.³ Almost every justice has his critics, but even Murphy's supporters and admirers felt called upon to justify Justice Murphy's approach to his work on the Court. Was Murphy a judge so lacking in intellectual capacity that he became virtually dependent upon his young law clerks for the production of his opinions?⁴ Was he a justice whose "jurisprudence took for its guide less the cases, legislative histories, and statutory refinements which are usually the lawyer's tools, and more the Constitution itself and the social principles of President Roosevelt?"⁵ Was the criticism levelled against him accurate, that he "mounted the wild horse of natural law and mercilessly rode down those institutions, traditions, legal precedents, which stood between him and his destination—a democratic utopia?"⁶

One observer, John P. Frank, found that the "evidence rejects the suggestion that (Murphy) could not have been a conventional lawyer if he had chosen. His opinions were generally well-written, and some achieve greatness whether measured in terms of legal skill displayed or in terms of any other values."⁷ Yet even Frank accepted the conclusion that Justice Murphy was an unconventional jurist. Rejecting the charge that Murphy "knew no law" and merely read his own personal predilections into his decisions, and that Murphy "seemed to reach fairly happy results even though he lacked proper concern for legal techniques," Frank concluded that although Murphy's decisions might not always have reflected the prevailing conventional wisdom, they were based upon a well-considered philosophical position and not merely on personal whim: "the application of that philosophy may on occasion have been defective . . . but



Murphy, a veteran of the American Expeditionary Force in France during the First World War, served as a Lt. Colonel in the Army Reserve during World War Two.

these episodes are rare, for his philosophy guided him in a remarkably consistent course."⁸ Frank, at least, was convinced that Murphy's jurisprudence reflected a philosophy "sufficiently deeply worked out to Murphy's own satisfaction to withstand criticism."⁹

If Justice Murphy's apparent disregard for the traditional niceties of legal craftsmanship can be explained as the result of a personal but entirely conscious decision to use a different judicial approach, why has his reputation as something of a renegade persisted? Is that reputation the consequence of his legal approach and emotional language of his opinions, or is there more to the complaint that he was "unconventional?"

Several factors may have contributed to the image of Murphy as an unorthodox jurist. His tendency to employ in his opinions a direct style uncommon to judicial decision writing certainly furthered this judgment about Murphy. That such a style may not have been considered standard or appropriate for a Supreme Court justice is illustrated by the following excerpt from an article published in the *Harvard Law Review* shortly after Murphy's death:

In connection with Justice Murphy's skill as a legal craftsman, I recall being interviewed by a layman, a writer of national prominence, who was preparing an article on the Court. He had already seen a number of legal experts who had informed him that Justice Murphy was an accident that happened to the Court. The judgment of the experts found the Justice wanting as a legal craftsman. I told him to read Murphy's opinions for himself. He came back astonished. He said that he had discovered that Murphy's writing was better than most judicial writing. It did not have the fault common to judicial opinions of spinning like a pinwheel, shooting off observations and formulas in all directions, and then slowly dying away to a conclusion. He told me that Murphy's opinions had a beginning and a middle and an end; that they were informed with a distinctive and personal style born of sincerity and conviction. He thought that as a writer Murphy made an outstanding contribution to the Court; that he had an instinct for going to the substance of a controversy and that his conclusions were usually right.¹⁰

Another perceived shortcoming may have been Murphy's insistence on dealing directly with what he considered the central issue facing the Court, and his reluctance to avoid delicate problems by following circuitous legal arguments even when such tactful trails led to the "right" results. His tendency to focus upon a single controlling issue was frequently attributed

to a lack of intellectual capacity.¹¹ At least one writer saw Murphy's habit of going directly to the larger constitutional issue as a natural consequence of his view of the Holmesian tradition. Holmes, though a great advocate of judicial restraint, incorporated in his philosophy a seemingly inconsistent principle which demanded careful inspection of any statute which impinged upon individual liberties.¹² This principle was strongly supported by Murphy.

Additionally, his "forthright concern over the humanistic aspects of a case led inevitably to the charge that he deliberately championed the cause of the underdog, the unpopular and the accused."^{12a} From 1946 to 1948, Murphy voted against claims of constitutionally protected individual liberties only three times in 56 non-unanimous cases.¹³ It would be unfair, however, to judge the merit of Murphy's judicial method simply on the basis of the results he reached. The consistent application of a well-considered judicial philosophy should not necessarily be taken as an indictment of a Supreme Court justice. Any legitimate charge levelled against Murphy's jurisprudence must stand or fall upon a detailed examination of the process Murphy employed in reaching his conclusions.

If Justice Murphy's critics are correct, if he did in fact look "upon hallowed judicial traditions as a drunk views a lamppost: as a means of support rather than a source of light,"¹⁴ a close examination of several of his more emotional concurring opinions should certainly verify the charge, for there is less incentive or necessity for restraint in a concurrence than any other type of opinion. When writing for the majority, a justice is to some extent confined by the views of the other justices who will join in it. A dissenter is also under a certain pressure from his brethren, for the act of opposing the judgment of a majority of his peers creates an obligation to reply to their arguments and their reasoning. Such restraints, even if subtle ones, do not confront a justice when he writes a concurrence. He speaks alone and for himself only. Although he may attempt to stretch the majority's holding to cover additional ground, a concurring opinion is of little precedential value. Consequently, a justice is at liberty to express himself freely in these opinions, and one would expect to find the clearest support for the critics' argument in Justice Murphy's concurring opinions.

But such is not the case. An extended analysis of three of Murphy's more significant concurring opinions reveals the care with which he constructed his legal arguments. Of the twenty-one concurring opinions Justice Murphy wrote during his nine years on the Court, his most vehement concerned cases in which he felt the Court had not dealt squarely with alleged violations of protected First Amendment liberties, or cases which involved alleged racial discrimination. Even in these cases, however, Justice Murphy's concern that justice be done did not cause him to abandon established and traditional forms of legal analysis.

*Duncan v. Kahanamuka*¹⁵ involved habeas corpus petitions brought by two Hawaiians who had been convicted by military tribunals in 1942 and 1944, during which time Hawaii had been under martial law. Imposed by the Governor of Hawaii immediately after the Japanese attack on Pearl Harbor on December 7, 1941, martial law had been approved by President Roosevelt shortly thereafter. The Hawaii Organic Act authorized such action whenever the Islands were faced with rebellion or invasion, or when required to ensure public safety. Both petitioners claimed that even under martial law, they were entitled to be tried by the civil courts rather than a military tribunal. Writing for the majority, Justice Black upheld the petitioners' claim, stating that there was no authority under the Act justifying the usurpation of the civil courts' jurisdiction by military tribunals. Neither the language of the Act nor its legislative history convinced Justice Black that the scope of martial law included the power to replace civilian courts. The phrase "martial law" as used in the Act authorized the military to act to maintain an orderly civil government, and to defend the Islands against invasion or rebellion, but it could not be construed as authorizing the military to supplant the civil courts.

Justice Murphy joined the opinion of the Court, but felt obliged to point out that it was obvious "that these trials were equally forbidden by the Bill of Rights of the Constitution of the United States," and as such, deserved the Court's "complete and outright repudiation."¹⁶ His concurring opinion contained numerous examples of the emotional language for which he was so frequently criticized; but it also presented a carefully constructed argument supporting his

contention that the "open court" rule laid down in *ex parte Milligan*¹⁷ was controlling. The opinion's colorful language served only to embellish essentially sound and sensible legal analysis, and to emphasize Murphy's adamant rejection of the government's case.



Associate Justice Murphy shortly after he joined the Court in 1940.

Office of the Curator, Supreme Court

The major proposition presented by the government in defense of its action was that the "open court" rule was outdated and unsuited to the conditions of modern warfare. Murphy replied unequivocally:

The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.¹⁸

He then carefully considers and rejects the arguments offered by the government to support that proposition, clearly focusing on the fatal flaw in each. To the assertion that the continued danger of invasion to the Islands necessitated and justified removing jurisdiction from civilian courts

to military tribunals, Murphy pointed to the lack of any evidence demonstrating how the continued operation of civilian courts could possibly have increased the danger of such an invasion, adding that "from time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights."¹⁹ The government's next two arguments were rejected for similar defects: the failure to present any evidence which could support their contentions. The government alleged that the military's efforts to defend the Islands could have been jeopardized by the slowness of the civil courts. With wry sarcasm, Justice Murphy observed that the protection of civil liberties and the concern for military expediency might indeed be irreconcilable, but such a conclusion need not necessarily result in a decision supporting the government's position. Acknowledging that civil court procedures might in fact take somewhat longer to dispose of cases than military proceedings, Murphy argued that

experience has demonstrated that such time is well spent . . . The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give effect to constitutional rights to be used as the very reason for taking away those rights.²⁰

Inherent in the government's next argument was an insult to the civilian judiciary which led Murphy to characterize it as "the ultimate and most vicious of the arguments used to justify military trials."²¹ The government alleged that the failure of the civil courts to convict persons charged with violating military orders would diminish the authority and ability of the military to discharge their responsibilities. Murphy countered by pointing to the absence of any proof that the Hawaiian civil courts were either less competent or more prone to release the guilty than military tribunals. He also noted that this particular argument clearly confused the military's legitimate authority to promulgate orders applicable to the civilian population with the lawful authority to try civilians for violations of those orders. He reminded the government of the fundamental constitutional principle of separation of powers, and the important distinctions between legislation and adjudication. Murphy quickly dismissed the government's claim that civilian courts lacked jurisdiction over civilian violators

of military orders by citing the appropriate act of Congress vesting authority in the federal courts to enforce military orders with criminal penalties. Murphy then added a slightly sarcastic comment: "That the military refrained from using the statutory framework which Congress erected affords no constitutional justification for the creation of military tribunals to try such violators."²² He dealt as directly with the government's final arguments: that it was inconceivable that a military commander, responsible for guaranteeing the defense and safety of Hawaii, should be required to rely upon civilian courts to enforce his orders; that the use of civilian juries might disrupt the "vital work" of the military in protecting the Islands against possible invasion; and finally, that the military could not rely upon the loyalty of civilian jurors. In reply to the first contention, Murphy stated that it was "merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority."²³ To the suggestion that civilian juries might place a strain on the work force, thereby jeopardizing the success of the war effort, Murphy responded by pointing out that workers engaged in war-related activities could certainly have been exempted from jury service. But it was the government's argument concerning the threat of possible jury subversion which elicited Murphy's full fury. The lower court had accepted the military's position that jurors of Japanese descent might seek to disrupt the peace of the Islands if provided the opportunity; because citizens of Japanese extraction could not constitutionally be excluded from juries on the basis of their national origin, the lower court had upheld the military trials. Justice Murphy was outraged at such court-sanctioned action, and reacted accordingly:

The implication apparently is that persons of Japanese descent, including those of American background and training, are of such doubtful loyalty as a group as to constitute a menace justifying the denial of the procedural rights of all accused persons in Hawaii. It is also implied that persons of Japanese descent are unfit for jury duty in Hawaii and that the problems arising when they do serve on juries are so great as to warrant dispensing with the entire jury system in Hawaii if the military so desires.²⁴

Noting the total lack of any factual basis for such a claim and the total absence of any recorded acts of sabotage or espionage by persons of Japanese

descent in the Hawaiian Islands, Justice Murphy continued:

Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims the use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding.²⁵

The complete failure of the government to present any evidence whatsoever to support its claim that Japanese jurors might be less loyal than native American jurors convinced Justice Murphy that racism, and not the national defense, actually provided the true rationale for the military's actions. He does not hesitate to make that conclusion known.

Undoubtedly, Justice Murphy's style rather than his reasoning leaves the greater impression on the reader. Immediately aware of the blunt, expressive language of Justice Murphy's denunciation of the government's position, he may lose sight of the traditional legal arguments underlying the emotion-filled rhetoric. Without doubt, the opinion is an unrelenting assault on the government's defense of what Murphy considered a simple case of blatant racism, but it is also a carefully reasoned argument based on clear legal precedents and established constitutional doctrines.

Two other cases involving racial discrimination against the Japanese on the West Coast reveal a similar style, and support the conclusion that Justice Murphy relied on more than personal predilections in arriving at his conclusions. Both deal with California statutes challenged by persons of Japanese ancestry as discriminatory and unconstitutional. In both, the majority opinion failed to confront squarely the constitutional question of racial discrimination, resulting in several scathing dissents, and two important concurring opinions from Justice Murphy.

*Oyama v. California*²⁶ involved a challenge to the constitutionality of California's Alien Land Law, which provided that aliens ineligible for American citizenship were forbidden to acquire, own, lease, or transfer agricultural property in

the state. The Act also created a presumption against the validity of any transfer of agricultural land for which the price of the transfer was paid by an ineligible alien. The penalty for violation of the Act was escheat of the property to the state as of the date of the attempted transfer. Petitioners Fred Oyama and his father, Kajiro Oyama, challenged the statute as a violation of their constitutionally protected guarantee to equal protection of the law. In 1934, when his son was six years of age, the senior Oyama had purchased six acres of agricultural land in southern California which he had deeded to his son. A second parcel was purchased in 1937 by Fred Oyama with the purchase price provided by his father. In 1942, both Oyamas were removed from California as part of the Japanese relocation plan approved by President Roosevelt to assure the safety of the Pacific coast states. In 1944, California petitioned the state court to declare the Oyamas in violation of the Alien Land Law, thereby vesting title to the property in the state as provided by the escheat provision of the Act. The California trial court held that both purchases had been made with intent to violate the Act, and held that the property had escheated to the state as of the dates of the respective transfers.

In an opinion written by Chief Justice Vinson, the Supreme Court invalidated that portion of the Alien Land Law which created a presumption against the validity of certain transfers of agricultural land. In the opinion of the majority, such a presumption violated the equal protection guarantee of the Fourteenth Amendment, as well as a federal statute establishing the right of all citizens to own and hold real property. By choosing to reverse the California decision on this ground, the majority avoided the more unpleasant task of passing on the validity of the Alien Land Law itself as applied to ineligible aliens. Two dissenting opinions were filed in *Oyama*.²⁷ Each expressed doubt as to the soundness of the majority's reasoning; both questioned the majority's decision to reach a result in the specific case without addressing and resolving the larger underlying constitutional issue. The dissents called the attention of the entire Court and the nation to the evasive nature of the majority opinion, and the importance of the issue which it avoided.

Justice Black and Justice Murphy wrote concurring opinions which expressed their uncomfortable acquiescence in the decision of the

Court. Their opinions reveal their need to confront the question of racial discrimination directly. Justice Black's opinion stated that he would have preferred the Court to have invalidated the California judgment on the broader ground that the Alien Land Law itself violated the equal protection clause of the Fourteenth Amendment.²⁸ Justice Murphy essentially concurred with Black's position, but expressed his sentiments in more extreme language. In his opinion, the California statute was "nothing more than an outright racial discrimination."²⁹ Yet, Murphy's opinion was more than an angry denunciation of the California legislation and lower court decision. Using a traditional tool of legal analysis, he undertook to trace the Land Law's history from its original enactment in 1913 through its re-enactment in 1920 to its application in the 1940's. He found that the California Alien Land Law had been "spawned of the great anti-Oriental virus," which the Justice concluded, had "infected many persons in that state."³⁰ In outlining the history of Oriental immigration to the West Coast from the mid-1800's to the 1940's, Murphy highlighted the social, economic and political antagonisms which fed the flames of racism:

The intention of those responsible for the 1913 law was plain. The "Japanese menace" was to be dealt with on a racial basis. The immediate purpose, of course, was to restrict Japanese farm competition . . . The more basic purpose of the statute was to irritate the Japanese, to make economic life in California as uncomfortable and unprofitable for them as legally possible. It was thus but a step in the long campaign to discourage the Japanese from entering California and to drive out those already there.³¹

His examination of public discussion concerning the law prior to its re-enactment in 1920 provided considerable support for his contention that the law primarily reflected racial hatred. The California media had universally depicted the Japanese as "degenerate mongrels" and had urged voters to save California, the "White Man's Paradise," from the "yellow peril." Certain papers even went so far as to claim that the Japanese birth rate was so high that the white majority would be eroded and eventually replaced in the state. Other articles called attention to the meager standard of living of the Japanese, and cautioned voters not to allow these immigrants to endanger the social health of the community.³²

Having effectively established the political environment which supported passage of the Alien Land Law in 1920, Justice Murphy concluded his historical review with the following observation:

The Alien Land Law, in short, was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien. It is rooted deeply in racial, economic and social antagonisms. The question confronting us is whether such a statute, viewed against the background of racism, can mount the hurdle of the equal protection clause of the Fourteenth Amendment. Can a state disregard in this manner the historic ideal that those within the borders of this nation are not to be denied rights and privileges because they are of a particular race?³³

As in *Duncan*, Murphy dealt with each of the numerous arguments presented in support of the Law's constitutionality, rejecting emphatically the notion that they were anything but an obvious attempt to disguise the Law's patent unconstitutionality. In a straightforward manner, he considered and disposed of each claim that the Law created a reasonable classification which could be upheld as valid by the Court. Murphy rejected the argument that all the state had done was to incorporate the language of a federal law establishing who might become a naturalized citizen, stating that California's decision to borrow the federal classification did not exempt it from the



Associate Justice Frank Murphy (1940-1949) shortly before his death on July 19, 1949 at the age of 59.

obligation of justifying the constitutionality of its use in the California statute. Demonstrating less patience with the claim that eligibility for American citizenship was inherently related to loyal allegiance and the desire to work for the success and welfare of the state, Justice Murphy asserted that loyalty and the desire to work for the welfare of the state were individual rather than group characteristics:

An ineligible alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of an alien or a natural born citizen. It is the essence of naïveté to insist that these desirable characteristics are always to be lacking in a racially ineligible alien, whose ineligibility may be remedied tomorrow by Congress.³⁴

To the assertion that ineligible aliens might acquire every foot of land in California fit for agriculture, Murphy convincingly relied on statistical data to refute the claim, and to demonstrate the absence of any factual foundation for such an assertion. He cited the fact that less than 0.7 percent of California's agricultural land was held by Japanese-Americans in 1940, making highly unlikely the possibility that a majority of such land would ever be controlled by ineligible aliens. Murphy also relied on statistical evidence to demolish the argument that Japanese aliens might someday "take over" California if not actively discouraged. After presenting a statistically generated profile of the Japanese population in California, which very effectively destroyed any legitimate basis for concern, Murphy concluded:

Such is the nature of the group to whom California would deny the right to own and occupy agricultural land. These elderly individuals, who have resided in this country for at least twenty-three years and who are constantly shrinking in number, are said to constitute a menace, a "yellow peril," to the welfare of California. They are said to be encroaching on the agricultural interests of American citizens. They are said to threaten to take over all the rich farm land in California. They are said to be so efficient that Americans cannot compete with them. They are said to be so disloyal and so undesirous of working for the welfare of the state that they must be denied the right to earn a living by farming. The mere statement of these contentions in the context of the actual situation is enough to demonstrate their shallowness and unreality. The existence of a few thousand aging residents, possessing no racial characteristic dangerous to the legitimate interests of California, can hardly justify a racial discrimination of the type here involved.³⁵

Murphy's ironic tone continued as he expressed his incredulity that California could actually attempt to justify the Law on the grounds that it was necessary to protect native American farmers:

It would indeed be strange if efficiency in agricultural production were to be considered a rational basis for denying one the right to engage in that production. Certainly from a constitutional standpoint, superiority in efficiency and productivity has never been thought to justify discrimination.³⁶

Having disposed of the major contentions offered in support of the Law's constitutionality, Justice Murphy summed up his opposition to the host of racially motivated innuendos and slurs which characterized California's defense of its discriminatory legislation:

Closely knit with the foregoing are a host of other contentions which make no pretense at concealing racial bigotry and which have been used so successfully by proponents and supporters of the Alien Land Law. These relate to the alleged disloyalty, clannishness, inability to assimilate, racial inferiority and racial undesirability of the Japanese, whether citizen or aliens. The misrepresentations, half-truths and distortions which mark such contentions have been exposed many times and need not be repeated here.³⁷

Justice Murphy referred the reader to his dissenting opinion in *Korematsu v. United States*³⁸ for a fuller summary of his rejection of the racially motivated charges levelled against the Japanese by residents of the West Coast.

Another case decided during the same term as *Oyama* presented an issue of racially motivated discrimination. *Takahashi v. Fish & Game Commission*³⁹ involved a California statute which forbade the issuance of commercial fishing licenses to aliens ineligible for naturalization. Takahashi, a Japanese alien who had resided in California for nearly forty years, applied for a license in 1945; his application was denied solely on the grounds that he did not qualify for naturalization. He brought suit against the Commission challenging the statute's constitutionality. The decision of the Superior Court of Los Angeles holding the statute violative of the equal protection clause of the Fourteenth Amendment was reversed by the California Supreme Court on the theory that the State enjoyed a proprietary interest in ocean fish sufficient to justify such regulation.

The Supreme Court of the United States, in an opinion by Justice Black, held that the statute denied aliens the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution. Relying upon the Court's holding in *Trautz v. Raich*,⁴⁰ Justice Black argued that classifications which discriminated could be upheld as constitutionally valid only if shown to be reasonably related to some special state interest. He rejected California's attempt to distinguish its discriminatory classification from the Arizona employment law which had been held unconstitutional in *Traux*. The Court found it unnecessary to respond to Takahashi's allegation that the California law had been enacted, not to conserve fish, but to antagonize the Japanese aliens who earned their livelihoods as fishermen; the Court refused to pass on the motives which might have prompted the California state legislature, concluding that concern over fish conservation or regulation of commercial fishing activities could have provided sufficient motivation for the legislation under review.

Justice Murphy took a different view, which he expressed characteristically in his concurring opinion. Since "even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against"^{40a} Japanese aliens, Murphy was enraged that the issue of racial discrimination could be ignored in the majority's opinion. As in his *Oyama* concurrence, Justice Murphy pierced the thin facade of legal argument presented in defense of the legislation, exposing to close scrutiny once again the noxious motive of racial hatred lurking just under the surface. Although his method was careful and considered, his language revealed his simmering anger. He pointed to the obvious charade attempted by California in trying to cloak repugnant and unlawful racial discrimination through a legislative act which appeared benign on its face. He called attention to the fact that the legislation under review had originally denied licenses only to Japanese aliens, but had been amended by a committee of the California legislature organized to deal with the Japanese resettlement which was concerned that the statute might be held unconstitutional. The committee's report forthrightly stated that potential legal problems could be eliminated by amending the statute to include all ineligible aliens. Murphy further documented that the re-

vised statute was enacted even though there was an acknowledged need to increase rather than diminish the annual fish catch. Taken together, the facts established convincingly that fish conservation had very little to do with the discriminatory legislation. For Justice Murphy, at least, the evidence was overwhelming and the conclusion clear. The California law denied aliens commercial fishing rights not because they threatened any conservation program, or because their fishing activities presented any danger to the welfare of either state or nation. As Murphy concluded, they had been discriminated against solely because they were of "Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests."⁴¹

Conclusion

In the cases discussed above in which Justice Murphy felt it necessary to write a separate concurring opinion, sufficient proof is provided to call into question the allegation that he knew nothing of legal analysis, or did not care. Although the language of his opinions carried unconcealed emotion, the underlying reasoning was generally quite solid. He relied on legal precedent, and looked to legislative history for clarification of legislative purpose.

In *Duncan*, Murphy employed the principle which lies at the heart of the common law system of jurisprudence: a prior decision controls where the facts of the present case are legally indistinguishable from those of that prior case. He applies that principle with thoroughness, considering with care each factual difference offered by the party seeking to escape application of the prior rule, evaluating each difference in the light of realistic common sense to see if it can be said to be legally significant and distinguishing. That others might reach different conclusions on the significance of those facts in no way undermines the precision of Murphy's analysis. In both *Oyama* and *Takahashi*, Justice Murphy used accepted legal techniques to follow the Holmesian mandate of careful consideration of statutes challenged as infringing upon individual liberties.

Given what cannot be considered an unreasonable judicial method, why was Murphy so harshly criticized for his performance as a justice? Without question, Murphy frequently re-

fused to be constrained by the conventional wisdom that the Court should avoid constitutional issues if other grounds existed for disposing of the case. Perhaps his failure to acknowledge his deviation from that principle, his flair for language which appealed to emotion as well as

logic, his penchant for common-sense arguments, and his frank refusal to countenance slight-of-hand legal analysis combined to lead many observers to overlook the careful craftsmanship and thorough analysis which Justice Murphy applied to his work on the Court.

Footnotes

¹ Gressman, Eugene, "The Controversial Image of Mr. Justice Murphy," 47 *Geo. L. J.* 631, 633-36 (1959); See also J. Woodford Howard, *Mr. Justice Murphy* (1968) at page 231.

² Atkinson, D., "Retirement and Death in the United States Supreme Court—from Van Devanter to Douglas," 45 *U. M.K.C. L. Rev.* 1, 13 n. 66 (1976); See Also Howard, "Justice Murphy: The Freshman Years," 18 *Vand. L. Rev.* 473 (1965).

³ Additional literature on Justice Murphy includes Sidney Fine's *Frank Murphy, The Detroit Years* (1975), Harold Norris' *Mr. Justice Murphy and the Bill of Rights* (1965), C. Herman Prichett's *Civil Liberties and the Vinson Court* (1954).

⁴ Kurland, Philip P., "Book Review," 22 *U. Chi. L. Rev.* 297, 299 (1954).

⁵ Frank, John P., "Justice Murphy: The Goals Attempted," 59 *Yale L. J.* 1, 25 (1949).

⁶ Roche, John, "The Utopian Pilgrimage of Mr. Justice Murphy," 10 *Vand. L. R.* 396, 394 (1957).

⁷ Rank, *supra* note 5, pp. 3-4.

⁸ *Ibid.*, p. 1.

⁹ *Ibid.*, p. 4.

¹⁰ Arnold, Thurman, "Mr. Justice Murphy," 63 *Harv. L. Rev.* 289, 293 (1949).

¹¹ "Murphy was not a deep or original social thinker. He was inclined to platitudinize. . . . His clarity definitely outran his depth." Jolly, "The Social Philosophy of Frank Murphy," 42 *U. Det. L. J.* 585, 586 (1965).

¹² Barnett, "Mr. Justice Murphy, Civil Liberties and the Holmes Tradition," 32 *Cornell L. Q.* 177, 317-21 (1946).

^{12a} Gressman, *supra* note 1, pp. 641-42.

¹³ Man, "Mr. Justice Murphy and the Supreme Court," 36 *Va. L. Rev.* 889, 916 (1950).

¹⁴ Roche, *supra* note 6, p. 396.

¹⁵ 327 U.S. 304 (1946).

¹⁶ 327 U.S. 304 (1946) Justice Murphy concurring, p. 325.

¹⁷ 71 U.S. (4 Wall.) 2 (1866).

¹⁸ 327 U.S. 324, 329.

¹⁹ *Ibid.*, p. 330.

²⁰ *Ibid.*, p. 331.

²¹ *Ibid.*

²² *Ibid.*, p. 332.

²³ *Ibid.*

²⁴ *Ibid.*, p. 334.

²⁵ *Ibid.*

²⁶ 332 U.S. 633 (1948).

²⁷ The first was written by Justice Reed, who was joined by Justice Burton. The second was written by Justice Jackson.

²⁸ 332 U.S. 633 (1948), Justice Black concurring, p. 647.

²⁹ 332 U.S. 633 (1948), Justice Murphy concurring, p. 650. Justice Murphy was joined in his opinion by Justice Rutledge.

³⁰ *Ibid.*, p. 651.

³¹ *Ibid.*, pp. 656-57.

³² *Ibid.*, pp. 658-59.

³³ *Ibid.*, p. 662.

³⁴ *Ibid.*, p. 666.

³⁵ *Ibid.*, pp. 668-69.

³⁶ *Ibid.*, pp. 670-71.

³⁷ *Ibid.*, p. 671.

³⁸ 323 U.S. 214 (1944) Justice Murphy dissenting, p. 233.

³⁹ 334 U.S. 410 (1948).

⁴⁰ 239 U.S. 33 (1915).

^{40a} 334 U.S. 410 (1948), p. 422.

⁴¹ 334 U.S. 410 (1948), p. 427.

Frankfurter and the Nazi Saboteurs

Michal Belknap

War tests soldiers, and sometimes courts and judges too. Although most judicial work has little to do with the business of warring, occasionally, in the midst of a military conflict, a jurist does confront a case spawned by the combat beyond the courtroom. In theory he should decide such a case as he would any other raising similar legal issues. But because he is human, a judge cannot avoid considering how his decision might affect the military struggle, and because judging offers so few chances to contribute anything to a war effort, he may seize upon such litigation as an opportunity to do something for the cause. If the matter before him is a criminal one, the price of judicial patriotism may be reduced security for the rights of the accused. Nothing better illustrated this than "F. F.'s Soliloquy," a document written during World War II by Justice Felix Frankfurter of the United States Supreme Court. Its few pages reveal a hawkish author determined to prevent the reduction of national morale which he feared might result from any decision giving legal and constitutional protection to criminal defendants who were also captured German agents.

The Frankfurter of "F. F.'s Soliloquy" was a judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards. He cared far more that these enemies be punished quickly than that they be tried fairly. The attitudes which this document reflects are a far cry from the "preoccupation with fairness of procedure" which Joseph Lash sees as characteristic of Justice Frankfurter.¹ With respect to most cases Lash's assessment is correct, but not for those touching upon the World War II military effort.

Frankfurter was normally quite concerned about the rights of criminal defendants. If this was not always readily apparent, it was because his notions about the limited authority which the



Justice Felix Frankfurter (1939-1962).

Due Process Clause of the Fourteenth Amendment gave the Supreme Court to reverse state convictions tended to obscure his true position. Thus, in the infamous Willie Francis case, Justice Frankfurter cast the crucial fifth vote which allowed Louisiana to send back to the electric chair a man who, because of an equipment malfunction, had survived its first attempt to execute him. Frankfurter's reason was that unless the conduct involved offended a principle of justice 'rooted in the traditions and conscience of our people,' "this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh."² His stand in this case was a matter of constitutional

principle rather than mere callous disregard for the plight of the defendant, as he demonstrated by persuading a Harvard Law School classmate who was practicing law in New Orleans to seek executive clemency for Francis.³ Frankfurter's views concerning the limited role of the Supreme Court in state criminal cases also explain his willingness to permit the use in them of illegally obtained evidence which, as a strong proponent of the Fourth Amendment, he insisted upon excluding from federal trials.⁴

When not restrained by his conception of the scope of Fourteenth Amendment Due Process, Justice Frankfurter frequently did display the "high and fastidious regard for the administration of criminal justice" which he had acquired early in his career while serving on the staff of Henry L. Stimson, then U.S. Attorney for the Southern District of New York. When reviewing federal rather than state convictions, Frankfurter felt no compulsion to uphold them just because they were constitutional. As far as he was concerned, in exercising its supervisory authority over criminal justice in the lower federal courts, the Supreme Court could establish and maintain standards of procedure and evidence considerably higher than those which would satisfy mere due process.⁶ Not only could the Court do so, it should, for "The history of liberty has largely been the history of the observance of procedural safeguards."⁷ In cases involving the failure of federal officers to bring arrested suspects promptly before a magistrate, Frankfurter wrote opinions reversing the convictions, and when a majority of his colleagues declined to upset a contempt of Congress verdict against a Communist defendant returned by a Washington jury that included federal employees subject to the government's anti-Communist loyalty-security program, he entered a vigorous dissent.⁸ Frankfurter did read narrowly some criminal justice provisions of the Bill of Rights—such as the double jeopardy and self-incrimination clauses of the Fifth Amendment—and he did resist the extension of these provisions beyond what appeared to him to be their historic meaning.⁹ But, as Lash says, "Frankfurter's concern with the integrity of the judicial process cannot be overstressed. . . ."¹⁰

This concern accounts for his readiness, in the years before he joined the Court, to intervene in controversial cases involving unpopular defend-

ants, many of them political radicals. Frankfurter sought justice for Tom Mooney and published an article and a book branding the trial of Sacco and Vanzetti a judicial lynching. With Harvard's famed civil libertarian, Zechariah Chafee, Jr., he appeared as *amicus curiae* in a hearing for aliens arrested during the Palmer raids. After convincing the federal district court in Boston that the rights of those prisoners had been trampled upon, Frankfurter and his associate joined with ten other prominent lawyers to publish in the scathing *Report on the Illegal Practices of the United States Department of Justice* the damning evidence of abuses they had uncovered. Later as a judge, Frankfurter continued to stress the importance of safeguarding the rights of defendants who belonged to unpopular minorities, remarking, in a case involving a member of the Communist Party, "The boast of our criminal procedure is that it protects an accused, so far as legal procedure can, from a bias operating against such a group to which he belongs."¹² "It is a fair summary of history to say," he once observed, "that the safeguards of liberty have frequently been forged in controversies involving not very nice people."¹³

Although Frankfurter's attachment to such views was strong, it was not powerful enough to withstand the winds of war. During the early 1940s he subordinated his concern for fair criminal procedure to a burning desire for successful prosecution of World War II. This is not to say Justice Frankfurter was a jingo. Although a reserve officer who held several important civilian posts in the War and Labor Departments during World War I, he seems to have regarded that conflict as at best a regrettable necessity. In April 1917 Frankfurter wrote to his future wife, Marion Denman, that when he saw and talked with the Harvard students who were donning military uniforms, "the sense of all the dislocating force of war rushes in on me, the vast tragic irrelevance of it to all that should be life, and I have no patience at all with those who see in a war a great moral purgative."¹⁴ But the global conflict of the 1940s awakened different emotions. To Frankfurter, a European-born Jew, Hitlerism seemed particularly menacing. He viewed it as a threat to the American democratic fellowship and to all civilized values.¹⁵ The fight against the Axis was for him "a war to save civilization itself from submergence."¹⁶

This burning commitment to the crusade against Hitler and his allies affected Frankfurter's judicial decision making. The best known and most controversial product of his heightened wartime patriotism was the majority opinion in *Minersville School District v. Gobitis*, a case in which the Supreme Court upheld the right of school officials to compel Jehovah's Witnesses children to salute the flag, despite the conflict between that practice and their religious beliefs.¹⁷ This opinion relied heavily upon the rationale of judicial restraint, as did another that Frankfurter wrote accepting the right of the executive, under the war power and a statute operative only during a declared war, to expel a German alien from the country several months after the fighting ended.¹⁸ But more than his conviction that judges should not substitute their policy views for those of the people's elected representatives determined Frankfurter's position in World War II cases. He considered what was at stake in *Gobitis* "an interest inferior to none in the hierarchy of legal values." Local school officials could make children salute the flag because "National unity is the basis of national security."¹⁹

A judge who could allow his enthusiasm for a war to carry him to such a conclusion was likely to applaud even more loudly a legal action by a coordinate branch of the national government directed not at infant nonconformists but at actual agents of the Nazi enemy. During the summer of 1942 a case arising out of such a prosecution came before Frankfurter and his colleagues. The defendants were eight German agents, all former residents of the United States, who had returned to this country on a sabotage mission. Two of them soon betrayed the others, and the FBI quickly rounded up the entire group. Determined to see these would-be saboteurs executed, President Franklin Roosevelt created a special military commission to try them. But their army lawyers, convinced that under the Supreme Court's 1866 decision in *Ex parte Milligan* they were entitled to a civilian trial, sought writs of habeas corpus from the Court.²⁰ Assembling for a dramatic special session on 30-31 July 1942, the Court heard oral arguments in the case, then quickly rejected the saboteurs' petitions.²¹

Not until October, however, did it publish an opinion explaining its decision. In the meantime the justices exchanged ideas about how to justify

the ruling they had already made. It was during this period that Frankfurter drafted the fanciful exchange between himself and the saboteurs which he entitled "F.F.'s Soliloquy." In it he expressed views more reflective of his feelings about the war than his normal concern with ensuring procedural fairness for even the most unpopular defendants.

Much of his fictional dialogue with the Nazis concerns the applicability to their case of articles 46 and 50½ of the Articles of War, statutory provisions laying down procedures for review of the proceedings of military commissions. These proved a particularly thorny problem for the Court, as counsel for the saboteurs had a more persuasive argument on this issue than did the government. The order creating the body that tried the German agents rather clearly did not comply with the requirements of these articles. If they applied to the saboteur case, then those six of the eight defendants who were already dead when Frankfurter wrote had been executed illegally. For this reason he and his colleagues, in the letters and memoranda which they exchanged, devoted substantial attention to articles 46 and 50½.

Exactly how many of the other justices read Frankfurter's fictional exchange with the saboteurs on this and other issues is not entirely certain. But copies of "F.F.'s Soliloquy" are preserved in both the Hugo Black Papers at the Manuscript Division of the Library of Congress and the Frank Murphy Collection of the Bentley Historical Library at the University of Michigan. Accompanying the Murphy copy is a typed memo which reads: "Brethren: I give this to you with affection and respect. F.F." Apparently then, even if some of them never saw it, Frankfurter at least intended the document below to be read by all of his colleagues.²²

"F. F.'s Soliloquy"

After listening as hard as I could to the views expressed by the Chief Justice and Jackson about the Saboteur case problems at the last Conference, and thinking over what they said as intelligently as I could, I could not for the life of me find enough room in the legal differences between them to insert a razor blade. And now comes Jackson's memorandum expressing what he believes to be views other than those contained in the Chief Justice's opinion.²³ I have now studied a:

hard as I could the printed formulations of their views—and I still can't discover what divides them so far as legal significance is concerned. And so I say to myself that words must be poor and treacherous means of putting out what goes on inside our heads. Being puzzled by what seem to me to be merely verbal differences in expressing intrinsically identic views about the governing legal principles, I thought I would state in my own way what have been my views on the issues in the Saboteur cases ever since my mind came to rest upon them. And perhaps I can do it with least misunderstanding if I put it in the form of a dialogue—a dialogue between the saboteurs and myself as to what I, as a judge, should do in acting upon their claims:

Saboteurs: Your Honor, we are here to get a writ of habeas corpus from you.

F. F.: What entitles you to it?

Saboteurs: We are being tried by a Military Commission set up by the President although we were arrested in places where, and at a time when, the civil courts were open and functioning with full authority and before which, therefore, under the Constitution of the United States we were entitled to be tried with all the safeguards for criminal prosecutions in the federal courts.²⁴

F. F.: What is the answer of the Provost Marshal to your petition?

Saboteurs: The facts in the case are agreed to in a stipulation before Your Honor.

F. F. (after reading the stipulation): You damned scoundrels have a helluvacheek to ask for a writ that would take you out of the hands of the Military Commission and give you the right to be tried, if at all, in a federal district court. You are just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion.²⁵ Instead you were humanely ordered to be tried by a military tribunal convoked by the Commander-in-Chief himself, and the verdict of that tribunal is returnable to the Commander-in-Chief himself to be acted upon by himself. To utilize a military commission to establish your guilt or innocence was plainly within the authority of the Commander-in-Chief. I do not have to say more than that Congress specifically has authorized the President to establish such a Commission in the circumstances of your case and the President himself has purported to act under this authority of Congress as expressed by the Articles of War.²⁶ So I will deny your writ and leave you to your just deserts with the military.

Saboteurs: But, Your Honor, since as you say the President himself professed to act under the Articles of War, we appeal to those Articles of War as the governing procedure, even bowing to your ruling that we are not entitled to be tried by civil courts and may have our lives declared forfeit by this Military Commission. Specifically, we say that since the President has set up this Commis-



Office of the Curator, Supreme Court

Justice Frankfurter off the bench.

sion under the Articles of War he must conform to them. He has certainly not done so in that the requirements of Articles 46-50½ have been and are being disregarded by the McCoy tribunal.²⁷

F. F.: There is nothing to that point either. The Articles to which you appeal do not restrict the President in relation to a Military Commission set up for the purposes of and in the circumstances of this case. That amply disposes of your point. In lawyer's language, a proper construction of Articles 46-50½ does not cover this case and therefore on the merits you have no rights under it. So I don't have to consider whether, assuming Congress had specifically required the President in establishing such a Commission to give you the procedural safeguards of Articles 46-50½, Congress would have gone beyond its job and taken over the business of the President as Commander-in-Chief in the actual conduct of a war. You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime. It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows. I therefore do not propose to be seduced into inquiring what powers the President has or has not got, what limits the Congress may or may not put upon the Commander-in-Chief in time of war, when, as a matter of fact, the ground on which you claim to stand—namely, the proper construction of these Articles of War—exists only in your foolish fancy. That disposes of you scoundrels. Doubtless other judges may spell this out with appropriate documentation and learning. Some judges would certainly express their views much more politely and charmingly than I have done, some would take a lot of words to say it, and some would take not so many, but it all comes



Major General Myron C. Cramer, Judge Advocate General, presents evidence at the military trial of the eight Nazi saboteurs.

down to what I have told you. In a nutshell, the President has the power, as he said he had, to set up the tribunal which he has set up to try you as invading German belligerents for the offenses for which you are being tried. And for you there are no procedural rights such as you claim because the statute to which you appeal—the Articles of War—don't apply to you. And so you will remain in your present custody and be damned.

Some of the very best lawyers I know are now in the Solomon Island battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men, very, very intimately. I think I know what they would deem to

be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commission doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions. Do we have to have another Lincoln-Taney row

when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the in-

roads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime."

Footnotes

¹ Joseph P. Lash, *From the Diaries of Felix Frankfurter* (New York: W.W. Norton, 1975), p. 81.

² *Francis v. Resweber*, 329 U.S. 459, 469-70 (1947). The extent to which Frankfurter's votes on cases were determined by his alleged devotion to such restraintist principles has been questioned by both Joel Grossman and Harold J. Spaeth. But the latter deals only with cases involving labor unions and business regulation, while the former shows that Frankfurter did decide some civil liberties cases on this basis. See Grossman, "Role Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter" *Journal of Public Law* 11 (1962): 285-309 and Spaeth, "The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality," *Midwest Journal of Political Science* 8 (February 1964): 22-38.

³ Liva Baker, *Felix Frankfurter* (New York: Coward-McCann, 1969), pp. 283-86.

⁴ Helen Shirley Thomas, *Felix Frankfurter: Scholar on the Bench* (Baltimore: The Johns Hopkins Press, 1960), p. 164.

⁵ *Ibid.*, p. 8.

⁶ *McNabb v. United States*, 318 U.S. 332, 340-41 (1943).

⁷ *Ibid.* at 347.

⁸ *McNabb v. United States*; *Mallory v. United States*, 354 U.S. 449 (1957); *Dennis v. United States*, 339 U.S. 162 (1950).

⁹ Thomas, *Felix Frankfurter*, pp. 139-41.

¹⁰ Lash, *From the Diaries*, p. 80.

¹¹ *Ibid.*

¹² *Dennis v. United States*, 339 U.S. at 185.

¹³ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

¹⁴ Quoted in Lash, *From the Diaries*, p. 20.

¹⁵ *Ibid.*, p. 68.

¹⁶ "Address by Associate Justice Frankfurter at the Inauguration of Dr. Harry N. Wright, Sixth President of the City College of New York on Wednesday September 30, 1942," Box 198, Felix Frankfurter MSS, Manuscript Division, Library of Congress.

¹⁷ 310 U.S. 586 (1940).

¹⁸ *Ludecke v. Watkins*, 335 U.S. 160 (1948).

¹⁹ *Minersville School District v. Gobitis*, 310 U.S. at 595.

²⁰ For Roosevelt's views see Memorandum for the Attorney General, Secret and Confidential, June 30, 1942, Box 72, FDR Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, New York. For the arguments of defense counsel see Brief in Support of Petitions for Writ of Habeas Corpus, *Burger v. Cox*, 317 U.S. 1 (1942).

²¹ *Ex parte Quirin*, 317 U.S. 1 (1942).

²² The Black Papers copy is located in Box 269. The Murphy Collection one may be found in Box 67, folder 5.

²³ Harlan Fiske Stone was Chief Justice at the time. The Jackson referred to is Associate Justice Robert Jackson.

²⁴ What is paraphrased here is the "open court" rule of *Ex parte Milligan*, upon which the saboteurs grounded their constitutional argument.

²⁵ The saboteurs entered the United States in military attire, then changed into civilian clothes on the beach. So long as they remained in uniform they were entitled to be treated as prisoners of war and could legally be neither tried nor executed.

²⁶ That Congress had specifically authorized this procedure was not at all clear. Indeed, whether or not it had done so was one of the issues debated in oral argument before the Court.

²⁷ Chief Justice Stone, who wrote the opinion of the Court, did not consider the "material" supporting Frankfurter's interpretation of Article 46 conclusive or even very persuasive. Although he made use of his colleague's construction of that provision, he observed of this portion of his draft opinion, "About all I can say for what I have done is that I think it will present the Court with all tenable and pseudotenable bases for decision." (Stone to Frankfurter, September 16, 1942, Box 69, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress.)

Hugo Black: A Memorial Portrait

Elizabeth S. Black*

I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.

—Oliver Wendell Holmes, Jr., At the unveiling of Memorial Tablets at Ipswich, 1902.[†]

Introduction

Alan Westin's book *An Autobiography of the Supreme Court*¹ gives its reader an informal picture of the growth and development of the Supreme Court through the words of the justices themselves. We are allowed to listen in to a collection of select out-of-court commentary: various speeches, letters, memoirs, and the like—chance utterances tracing the history of the Court from 1790 to 1961. The canvas is rich. It includes John Marshall's newspaper defense of *M'Culloch v. Maryland*,² published under the Great Chief's pen name "A Friend to the Union." Holmes is in the book; and Hughes; and Warren—giants all. So is Felix Frankfurter; represented by his address on *The Process of Judging in Constitutional Cases*,³ delivered before the American Philosophical Society in 1954. Justice Douglas follows Frankfurter—they are back to back in the book—with a few thoughts of his own on *Judicial Review and the Protection of Liberty*.⁴ And Mr. Justice Black makes a double appearance on the pages of this book. His James Madison Lecture, *The Bill of Rights* (1960),⁵ is included. So is his public interview with Edmond Cahn. This latter occasion was a rare event in the life of the Court. Never before had a justice opened himself so widely to questioning in public. The interview was unrehearsed and later published, without prior submission of the transcript for approval, under the title *Justice Black and*

First Amendment "Absolutes": A Public Interview (1962).⁶

Hugo Black, it appears, could be persuaded to talk in public about his views and his work on the Court. But it took time, lots of time. If a family member favored the idea, especially his wife—first Josephine,⁷ then Elizabeth—the chances were good that Justice Black would eventually give in.

It is recorded elsewhere that Elizabeth "conspired to get him to break his long-standing rule of not speaking out on constitutional issues" en route to the Carpentier Lectures at Columbia in 1968.⁸ Hugo Lafayette Black's *A Constitutional Faith* saves these lectures in imperishable form, between the covers of a book.

But the idea of a television interview, unrehearsed and to be shown to millions of Americans, struck Hugo Black cold. "Judges should stay off television,"⁹ was his immediate reaction. It took years to talk him into it. According to Frances Lamb, Justice Black's secretary during September 1968 when the film was made, "Martin Agronsky, Elizabeth, and I twisted the Judge's arm for five years—maybe longer."¹⁰

According to Hugo Black himself: "Elizabeth is entitled to much of whatever credit is due for my granting the interview. She began urging that I do a television program very shortly after she arrived in Washington thirteen years ago. Finally I reached the conclusion that there was no way to escape her constant importunities except to yield—therefore the program. One further statement should be made and that is that it became more difficult to deny her any request with each passing day and year."¹¹

Here is the story of the CBS interview from the pen of a co-conspirator in the plot. It is offered by one who cares for the Court and for its history and by one who loved Hugo Black.

Elizabeth Black was first Justice Black's secretary, from March 1956 to September 1957,¹² and then his wife for fourteen years. She added gold to the sunset.

It was said of Boswell that he was curator of Johnson's memory.¹³ So let it be said of Elizabeth Black, who for some twenty-five years now has sought to preserve Hugo Black's memory. What follows is one chapter of Elizabeth's memoir, to be published in due course.¹⁴ This latest installment includes material never before made public. Here are excerpts from the sound recordings of the interview not used on the television broadcast.¹⁵ Here too are excerpts from Hugo Black's letters¹⁶ to friends and strangers alike about the talk they heard that eventful evening in December 1968.

Elizabeth Black's account throws new light upon the mind and personality of Hugo Black. It invites you to see this man for yourself.

Whether we shall see another interview like Justice Black's is uncertain.¹⁷ Speaking as a teacher, I am glad to have Hugo Black come to class.¹⁸ Legal education, it seems to me, also has its claims.

"Who could resist the inspiration of the magic by which light and sound were converted into some other essence, instantaneously transported, and made permanent upon a tiny celluloid strip?"¹⁹ Who could resist the humanity of Hugo Black? His is a heritage worth remembering.

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I

Martin Agronsky sowed the seeds for the interview *Hugo Black and the Bill of Rights* back in 1957 when I was working for Hugo as his secretary. He and Eric Severeid finally completed it for Columbia Broadcasting System in 1968. Periodically, Martin would call Hugo on the telephone to boost the idea. Later, Martin came to the office, and while waiting for Hugo to see him, enlisted my help in getting Hugo to consent. After I married Hugo in 1957, Martin asked Frances Lamb, my successor as secretary, to speak a good word to Hugo now and then on behalf of the project. It didn't take much to get my help, nor Frances', because we were both



Associate Justice Hugo L. Black (1937-1971).

Office of the Curator, Supreme Court

enthusiastic about having Hugo do the program. Hugo always shied away from television, yet I thought it would be a shame for future law students and citizens not to have the opportunity to see and to hear the eloquence and sincerity of Hugo, whose opinions had made such an impact on the law of the land.

In November of 1964, through Martin's continuing persistence, Hugo agreed that he and I would go to dinner with the Agronskys and the Fred Friendlys, the latter being Executive Producer of CBS Reports at that time. Accordingly, the Friendlys flew down from New York to talk about the project. They and the Agronskys took us to dinner at the Hay Adams Hotel. At the end of the meal, Friendly asked Hugo about doing a conversational interview with Agronsky for CBS, to be used according to Hugo's desire, either immediately, or at Hugo's retirement, or at some other time in the future — whatever Hugo decided. He and Martin urged that it would have been so fine had John Marshall, Abraham Lincoln, and other historic figures been interviewed on video tape. How instructive to students of this age to have such tapes. If Hugo would agree to do

it, they said, his tape would be invaluable to future generations of law students and legal scholars.

Friendly told Hugo that the conversations with Agronsky could be about the Constitution, the Bill of Rights, his reminiscences about Alabama, campaigning for the Senate, or whatever he chose to talk about. I put in an argument that few people, especially the young in Alabama, knew anything about Hugo's personality. Still, Hugo held fast to his view that a sitting justice of the Court would do better to stay off television. By tradition, the Justices speak only through their written opinions, although public appearances are not unheard of.

At any rate, Hugo resisted Friendly and Agronsky quite well. While he didn't say no, he didn't say yes either. He left them hanging.

Several years passed. Martin's calls, although periodic, were getting nowhere with Hugo. Now and then Martin would call me at home. "Work on him a little bit," he'd say. I would try my best. Eventually, Hugo became annoyed at this and told me it would do Martin no good to try to get around him through Frances Lamb or me.

In July of 1968, the seeds took sprout and started to grow. Imagine my surprise, on coming home from a morning of tennis, to have Hugo tell me Martin Agronsky was coming out to lunch. In a nonchalant way, Hugo said that Martin had called and asked him once more about the interview. Hugo replied that *if* he did it, it should be done before the opening of Court in October. I was astonished but said nothing.

Hugo went on to tell me that Martin had asked if he could come to lunch and bring a man from New York with him. Hugo replied, "No, Martin. You come on out today, but come alone. You're a married man, and you know better than that." Martin came alone. After I joined them, Martin received my permission for him to come the next day with three men from New York.

Agronsky stayed until about 5:00 p.m., talking about the possible subjects to discuss in the interview. Hugo told him he wanted to do the interview spontaneously and unrehearsed, without questions being submitted in advance. He also told him he wanted the program filmed in the study at home. I had my misgivings.

The following day, September 14th, Martin and three associates came to the house: Burton Benjamin, a producer for CBS News; Bill Small,

Washington Bureau chief; and Eric Sevareid, who was to conduct the interview jointly with Martin Agronsky.

After lunch they looked over the study. They liked the setting, but said it was a bit small for three film cameras. However, they believed they could do it. Mr. Benjamin walked about, sized up the situation, and discussed what furniture had to be moved. They wanted to send a crew to the house on September 19th to do outside shots and to get everything set up for the interview, and on September 20th, to walk in promptly at 10:00 a.m. and start shooting. That meant I had to give the study a thorough cleaning. After all, I would hate for the world to see cobwebs hanging from my ceiling.

Meanwhile Martin and Eric talked to Hugo about his philosophy. It was a little warm-up session to get Hugo in the mood.

A few days later, the electricians from CBS came out. They said we had plenty of juice in the basement but they would have to run heavy electric cables from there to the study, because considerable current would be required to provide adequate lighting for the cameras.

The house was disrupted from then on. Bright spotlights were taped on the walls of the study close to the ceiling, to give light for the camera, yet were strategically placed so as not to shine in Hugo's eyes. After two cataract operations, his eyes were very sensitive to light.

Hugo, Jr., arrived in Washington on business during this hectic period. His dad told him about the verbal agreement he had with CBS allowing him to correct any misstatements or to withhold the program entirely. Hugo, Jr., advised him to get it in writing.

On the day of the filming, the first order of business for me was, naturally, the beauty parlor. In my rush to get out of the house I had the bad luck to drop a potted plant on my foot. At the time it didn't do much damage except to my temper. I returned home at 11:30 a.m. and found men swarming all over the place. CBS trucks were in great evidence on the street. All the neighbors were consumed with curiosity, and I told one of them what was happening so she could pass the word along. There were about fifteen men in the study, and most of its furniture had been moved to our bedroom or placed in the hall, making room for all the necessary equipment. Three cameras were set up. The sound

men were jammed into our upstairs bathroom, sitting around going over their tape machines. Cigarette smoke was everywhere.

I found Hugo sitting disconsolately downstairs, fully dressed, with coat and tie, trying to read *certiorari* notes. I felt so helpless that I went down and joined him, and we just watched the goings-on.

Mr. Benjamin asked me if I could induce Hugo to play a little tennis for the camera. Hugo had steadfastly refused to let anyone take movies or pictures of him while playing tennis, but because he wanted me to get into the act, he agreed. Both of us went out to our tennis court at 3:00 p.m. They asked for 2:30 p.m., but Hugo perversely decided to take a nap first. After they had enough pictures, Hugo decided to continue playing for about an hour. By the time we quit, my injured foot was giving me fits, so I had to treat it and lie down.

While I was resting, Hugo followed Hugo, Jr.'s, advice and called Martin Agronsky, telling him he wanted his right to review the film for accuracy put in writing.²⁰ Martin said he would try, but in a few minutes called back and told Hugo it was not the policy of CBS to put such things in writing. Whereupon, Hugo said it was not his policy to give an interview without such an agreement. It was nip and tuck for a while as to whether the interview would proceed at all. Meanwhile I was dismayed because all that equipment was stacked up against the walls and I could not even open a closet door or get into the bathroom. In about twenty minutes, though, Martin called back and said CBS had agreed to put it in writing. At least this crisis was over.

I woke up at 3:30 a.m. on Friday, the day of the interview, and for the life of me I couldn't go back to sleep. One might have thought I was the one to be interviewed. Hugo slept peacefully on. When it was time to get up, my foot was miraculously better, and we dressed. I glanced out the window at 7:00 a.m. to see a group of men milling around our front door waiting to get in. We closed the dining room door to give us privacy while eating breakfast and sent Lizzie Mae, our maid, to let them in.

At 9:30 a.m. we went up to the study. The make-up lady patted a little cake powder onto Hugo's face and balding head, and darkened his eyebrows a smidgeon. At 10 o'clock Mr. Benjamin asked Hugo, Jr., and me to sit on the sofa

across the room from Hugo's desk and out of range of the camera. Hugo took his seat behind his desk and Martin and Eric sat to the side of him, as though they were law clerks.

Mr. Benjamin from his producer's chair gave the order to start. The lights went on, and a camera man ran over in front of Hugo's desk shouting "sticks" as he closed them together to indicate when a section was beginning for editing purposes. This performance with the sticks amused Hugo and he laughed, which gave him a pleasant look during the interview.

The conversation opened with talk about Hugo's age—he was then 82—and his health, and then quickly turned to tennis and to reading, two of Hugo's favorite subjects.

II

What follows was not used in the interview broadcast on television, but it may be of interest to Court-watchers and to legal scholars.²¹

Sevareid: Justice Black, you have now reached a very great age and you are as young in body and in mind as you ever were. What's the secret of all that?

Black: Your premise might not be 100 percent right. I might not have all I ever had; but I've done pretty well.

Sevareid: How have you done it?



Justice Black at work.



Justice Black (right foreground) and Elizabeth Black (center) chat with interviewers Eric Sevareid (far left) and Martin Agronsky (second from left) prior to filming, while members of the production crew complete their preparations.

Elizabeth S. Black

Black: Well, I've done it largely by just trying to live a natural, normal life. I take plenty of exercise; I've always taken plenty of exercise. That was necessary because members of my family thought I was the weakest one and that I'd die first. For that reason they always said they spoiled me a little as a baby.

Sevareid: Did they tell you that, when you were young?

Black: Oh yes, they thought I might.

Sevareid: I should think that would give you a complex to begin with.

Black: Didn't give me a bit. I just decided not to be that way and to go on and live a long life. I began to take exercise.

Agronsky: Mr. Justice, we have watched you play tennis. What role does that play?

Black: It's played a lot. It's good exercise. It's the kind of exercise I've taken since I was twenty, in the main. I've taken exercises on the floor, taken exercises in a room, gym, everywhere. I've always taken exercises. And I've tried not to eat too much.

That last line, "I've tried never to eat too much," was stated with emphasis. I heard it over and over again during our marriage, particularly at dinner time. Hugo never let me touch gravy!

Sevareid: Mr. Justice, as I read your life story, you didn't have a formal college education particu-

larly; you had a two-year law school, I think. [Hugo also went to one year of medical school.] How did you go about educating yourself?

Black: Reading. Reading history, mainly.

Sevareid: Why history?

Black: Because that's part of life. The history of the world gives you the habits of various times. I always like to read the histories written current with times when I can, to back up the histories written later by what historians of that day wrote; that's the reason I've read a lot of Livy and a lot of Tacitus—Greek history.

Agronsky: Mr. Justice, you are continually recommending to your law clerks that they read Livy and Tacitus about the Greeks and about the Romans. Why do you—

Black: Edith Hamilton's *Greek Way*. That's what I've given to all my children. It's a great book. The Greeks were a great people; and I find sometimes people that read it can be impressed by the Greek motto of "Never too much."

Martin did not quite understand the motto and asked Hugo how he interpreted it. Hugo answered, "Moderation in life, on everything. Don't go to wild extremes." Hugo's answer allowed Martin to break the legal ice. A question about Hugo's judicial philosophy followed:

Agronsky: Would you describe yourself as a moderate?

Black: Yes.

Agronsky: In judicial philosophy? In politics?

Black: Yes I would, that's what I would do.

Agronsky then turned to Hugo's absolutist view of the First Amendment. Was there any inconsistency in Hugo calling himself a moderate and his view that the First Amendment was an absolute? Hugo didn't think so. He believed it was not a judge's place to deviate from the letter of the law, but to follow it. "And if we'd follow it," he told his interviewers, "we'd be all right."

During his *James Madison Lecture*,²² Hugo made a statement that sparked an uproar of commentary among the scholars. His words, even his italics, were examined under a microscope in the academic literature. Agronsky had done his homework for the interview; he was familiar with Hugo's earlier declarations and he asked Hugo what he meant when he said: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be 'absolutes.'"²³ Hearing Martin's question prompted a smile from Hugo, and he reached for the Constitution he always carried in his pocket, opened it, and began to instruct his listeners on how to read the Constitution:

Black: Well, I'll read you the part of the First Amendment that caused me to say there are "absolutes" in our Bill of Rights. I did not say that our entire Bill of Rights is an absolute. [A point often overlooked by scholars.²⁴] I said there are absolutes in our Bill of Rights. Now, if a man were to say this to me out on the street, "Congress shall make no law respecting any establishment of religion" — that's the First Amendment — I would think: Amen, Congress should pass no law. Unless they just didn't know the meaning of words. That's what they mean to me. Certainly they mean that literally. And I see no reason to attribute any less meaning than they would have had then, or would have now. They might not have that meaning now because of the general idea that there can be no absolute anywhere. I don't agree to that.

Constitutional scholars are, of course, quite familiar with Justice Black's view that the First Amendment, while protecting speech, does not give people the right to assemble on other people's property, including the government's, without permission for purposes of protest. Severeid challenged Hugo on this point, asking him whether he wasn't infringing on the right of protest itself: "How can they do it? Where can they do it?" Severeid wanted to know.

Black: Well, that assumes that the only way to protest anything is to go out and do it on the streets. That is not true. That is just simply not true in life. It has never been true. . . . I've never said that freedom of speech gives people the right to tramp up and down the streets by the thousands, either saying things that threaten others, with real literal language, or that threaten them because of the circumstances under which they do it. I've never said that. Bill Douglas and I both expressed our view on that point about twenty-five years ago, in which we said that the First Amendment protects speech, and it protects writing. But it doesn't have anything that protects a man's right to walk around and around my house, if he wants to, fasten my people, my family up into the house, make them afraid to go out of doors, afraid that something will happen. It just doesn't do that. That's conduct.

"Is there a way to define the line between action and speech?" Severeid asked. Hugo's answer got the whole group to laughing:

Black: The only way they have ever been able to define it as to this Amendment, where they said with reference to the Mormons. The Mormons had a perfectly logical argument, if conduct is the same as speech. They said, "But this expresses our religious views. We're protesting because the federal government is passing a law suppressing our right to have a dozen wives." Well, the Court said, "That won't do, that's conduct, that's not speech."²⁵ Of course it involves speech — partially. Before you get to it, before you get a dozen wives, you've got to do some talking. But that doesn't mean the Constitution protects their right to have a dozen wives. The two are separate. Of course there are places where you cannot sharply draw a boundary.

Hugo concluded his argument on this issue by asking his interrogators a question of his own:

Black: Now, the Constitution doesn't say that any man shall have the right to say anything he wishes anywhere he wants to. That's agreed, isn't it? Nothing in there says that.

At this point Hugo leaned back in his chair, confident of his position, and added: "All right." Then he wound up by saying: "They've got a right to talk where they have a right to be, under valid laws." This line caught the attention of the press and of the reviewers and there was much talk about it in next morning's papers.³⁰

A highlight of the program for me was Hugo's reading from his opinion in *Chambers v. Florida*.³¹ He regarded the closing part of his *Chambers* opinion as his best writing and he often read it to his clerks and to others with great conviction. The passage captured ideals that Hugo cared for dearly.

Today, as in the ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to death.

Black: The accused there were four tenant farmers— young fellows, who had been questioned for three nights on the seventh floor of the County Courthouse."

No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.³²

Black: That was my idea then, it's my idea now, of "due process of law." Not a natural law. And they knew about those things and they wanted to stop them. And there it is. And I think if it's enforced that way, this can be, and was bound to be, the best Constitution in the world.

Throughout the interview Hugo answered the questions with a firm and forceful voice. Close-ups of Hugo's hands sparked the visual imagery of the film. Anyone familiar with Douglas Chandler's remarkable portrait of Franklin Roosevelt³³ knows the drama of the human hand in action. Hugo's were galvanic.

At one point Martin asked Hugo why he always carried "that little book of the Constitution" in his pocket. "I would think you would know the Constitution by heart at this time." The question lighted up Hugo's face with another of those smiles that endeared him to just about everyone. Hugo had a little confession to make, and he didn't mind making it before millions: "Because I don't know it by heart. I can't—my memory is not that good. When I say something about it, I want to quote it precisely. And so I usually carry it in my pocket."

Time and time again during the interview, Hugo reached for his Constitution. He read from it, folded it in half, tossed it on the table. So dog-eared and tattered was the little book that it made a dramatic sight lying there on the desk. The cameras zeroed in on it; it appeared to be about two inches thick.

Hugo loved that little book of the Constitution

and the camera knew it. So did the country.

Later, Burton Benjamin conceived the idea of giving away copies of the same type of Constitution that Hugo always carried with him. Hugo bought his from the Government Printing Office for a dime. An announcement was added at the end of the program saying that CBS would give a free copy of the Constitution to anyone who would write in and request it. The idea proved to be popular, though costly, for CBS.

To Hugo, having the law written down—positive law, "not a natural law,"—was a good thing. The governed and the governors both knew where they stood under the written law; they both knew the limitations upon the other, be they restrictions upon government or upon the people themselves. "You see, you have laws written out; that's the object in law, to have it written out," said Hugo. "Our Constitution—I would follow exactly what I thought it said at the time. And I wouldn't try to amend it. Because I thoroughly believe in the division of the three powers—branches of government."

"You don't feel the judges should judge according to what fits the time?" Martin asked Hugo. "No, how would they know? Jefferson asked why couldn't you trust the people?—says the others want to trust just one man—and one man can certainly not sense what's right and just any better than the whole public."

Every once in a while during the interview the camera would catch the four portraits, including Thomas Jefferson's, that hung above the mantel in Hugo's study. Jefferson was one of Hugo's favorite minds; he read everything Jefferson wrote surviving in print. Obviously Hugo was influenced by his ideas.

These question-and-answer sessions went on for thirty minutes; then the group would break for five-minute intervals. There were six thirty-minute sessions in all, lasting from 10 a.m. to 1:30 p.m. The program was planned for one hour on the air.

Sevareid renewed the interview with a question about the inner workings of the Court, which to most Americans are a complete mystery. The man on the street has no idea how the Court works. To him the *certiorari* mean nothing. To a Supreme Court justice the petitions for *certiorari*—the "petes for cert." as Holmes used to call them—are like keys to the Court's front door—some fit, some don't. And the *certiorari*

are everywhere—upstairs and down, in the office, in the home—even on the road. Hugo did his best to explain how the Court picks its cases and the voting order at Conference, technical matters mainly. The Conference is confidential, but Hugo spilled no secrets in talking about Conference procedures, which have been public knowledge for years.²⁵ Martin's next question put the eye of the viewer right back at the keyhole.

Agronsky: What are those discussions like? Are they really free? Do the justices ever lose their tempers? What happens in those discussions?

Now here is a line of questioning that would interest the crowd. Hugo answered candidly, and without hesitation. His response should come as no surprise to anyone familiar with human nature.

Black: Well, I guess you could never get nine men together where the Justices wouldn't sometimes lose their temper. I have no doubt about that. Of course, they should not and it is not frequent . . . and people who've lost out on something that they just know in their hearts is bound to be right, because it's their view, they don't feel like they've been properly treated sometimes.

Justice Frankfurter's Conference *Diaries*²⁶

bear bleak witness to the anger Felix sometimes felt toward his colleagues, including Hugo. Any time a man's life hangs on a vote, flare-ups are likely. Eric Severeid reminded Hugo that the Greeks "enshrined reason and I suppose a judge must go back to that." Hugo responded: "Of course you must be reasonable, and they talked about the reason, but they had emotions, a lot of them." All strong men do, and Supreme Court justices are no exception. But let there be no mistake about it: after many battles fought as intellectual foes, Felix and Hugo were friends at the finish. That is what I know to be the truth of the matter.

Hugo also revealed how he used his little black book at Conference and told of his way of voting cases up or down on *certiorari*.

Black: Now I have for myself, and I don't know how the others have it, I have a notebook. I have two law clerks and they write those cases up: what are the issues? I put them in the notebook, take them in there, and I cast my vote. Frequently I'll mark the top, "Denied—not of sufficient importance," "No dispute among the circuits," or something else. And I'll go in and vote to deny it.

Historians of the Court know that Hugo insisted on burning his cert. notes before retiring



Elizabeth S. Black

Justice Black talks with (left to right) Martin Agronsky, Eric Severeid and program coordinator Bill Small in a warmup session before the interview.

from the Court; they literally went up in smoke in September 1971. Hugo, Jr., tells the story in his *Remembrance*.²⁷ Fortunately, a few of the cert. notes survived the flames. They were found in an envelope marked "Sample Certs" in Hugo's bold hand. The envelope had been filed away somewhere and forgotten. These few remaining cert. notes illuminate Hugo's mind and his methods to the American people. They satisfy the claims of history, not the tittle-tattle of gossip, and show a heritage worth remembering.²⁸

Students of the Court often wonder whether the Conference is a place where fixed views are vented and then the votes are counted, or is it more a forum for discussion and determination of joint views? "Have you ever gone into a judicial conference with one point of view and come out with another?" Martin wanted to know. Hugo's answer casts light on the nature of the Conference for those who care to see it: "Certainly, certainly," Hugo answered emphatically.

Students of the Court also wonder whether the Chief Justice's power to assign the writing of opinions affects the voting. Hugo was quite firm on this point: "It certainly would not have with my vote. *My vote's mine*. I'm going to vote it according to *my* conscience every time it comes up, not according to what somebody could or had done for me before."

At the conclusion of the filming everyone felt a sense of relief that the great effort was over. About a week later after listening to the sound recordings of the interview, Hugo decided to ask CBS to eliminate Eric's questions about the Ku Klux Klan. While Hugo's answers were innocuous enough, he recalled that at the end of his 1937 radio address concerning his joining the Klan, he had said the subject was closed and he would never again discuss it publicly.³⁴ Hugo explained his decision to me saying, "That is the subject I do not intend to revive. The newspapers do enough of that." Hugo wanted the interview to focus on the Court, not the Klan. Hugo's request proved academic, however, because Mr. Benjamin had already decided to eliminate this part of the program. As a result of the deletion,³⁵ the television audience heard nothing about the Klan during the interview, with the exception of Sevaireid's reference to it in his opening statement.³⁶ Other than the Klan discussion, the rest of the interview needed only minor editing.

A little while later Hugo began worrying anew about the propriety of a sitting Justice doing such

a program. "Perhaps," mused Hugo, "they should postpone showing it until my birthday in February, somewhat like a special they did on Carl Sandburg's birthday, or they should use it when I retire. There ought to be some special reason for it being shown." The agonies of uncertainty that Hugo and I went through night after sleepless night were unbelievable, looking back on it now.

What we went through, however, was nothing compared to the agony Martin Agronsky felt when Hugo told him he wanted to postpone the program. Poor Martin! He had just recovered from an emergency appendectomy and was on assignment in Boston when Hugo's proposal hit him. Martin called from Boston, very upset, and told Hugo that CBS had already spent \$100,000 on publicity for the December 3rd showing. They had taken full-page ads in *The New York Times* and *The Washington Post* showing a huge picture of Hugo and advertising the program. Hugo was unimpressed. "They haven't taken out any \$100,000 ad, Martin. That's ridiculous." Although Hugo seemed adamant about a postponement, he agreed to talk to Martin further about it next day. When Hugo hung up the telephone he turned to me and said, "Now I don't want you or Frances to be talking to Martin and conniving about it behind my back." When he found out I told a friend about the interview, Hugo reacted emphatically: "Don't tell *anybody*, about it! I may never let them televise it."

By this time, I just wished the whole thing would go away. I knew that Hugo was disturbed and I was distraught, and we were both sleeping poorly. I wished I had never heard of CBS or the program.

The next day Frances Lamb called me from Hugo's office. She said Martin had flown down from Boston to talk with Hugo. Since Hugo was on the bench until noon, Martin had not come until the lunch hour. Frances was afraid to speak a word to Martin, after Hugo's admonition. Martin had gone into Hugo's office and through the open door she could hear him offering earnestly one reason after another for broadcasting the program as planned on December 3rd. Each time Hugo demurred. Finally, after Martin exhausted every reason he could think of and the bell rang for Hugo to return to the bench, Hugo announced: "Well, Martin, there is one reason have thought of, if CBS will accept it."

"Oh, sure, Judge, I know they will accept it

What is it?" Martin asked.

"Well, Martin," Hugo told him, "you know I have just recently given the Carpentier Lectures at Columbia, and they are about to be published. If the broadcast could somehow be tied in with the lectures, I think that might be an acceptable reason to show the program." With a big sigh of relief, Martin left.

A week or so later CBS asked another favor. Would Hugo agree to walk across the plaza in front of the Court in his robe for the camera? Hugo thought it was a pretty corny thing to do, but they insisted and he complied. He had fought with them on so many things along the way that his resistance was low.

On Tuesday, December 3rd, 1968, full-page ads appeared in *The New York Times*³⁷ and *The Washington Post*³⁸ announcing the interview. A large picture of Hugo appeared on the page under the caption, "Hugo L. Black, Senior Justice, U.S. Supreme Court, speaks his mind." The picture of Hugo was as striking as it was huge. Someone once called Hugo a "beautiful old man." The picture captured this quality in Hugo. The ad continued:

In 1937, his appointment to the Court touched off a national uproar. But during the next 31 years, Hugo Black became one of the High Court's most influential members.

Tonight, Justice Black speaks: on school desegregation; on obscenity and pornography; on laws that help criminals, sometimes; on police, war, and violence in the streets; on presidential influence over the Court; on his opinion of the president who appointed him; and on the Constitution, "the best document ever written to control a government."

Justice Black agreed to this interview with CBS News Correspondents, Eric Sevareid and Martin Agronsky, after having become the second Supreme Court Justice in history to deliver the Carpentier Lectures at Columbia University earlier this year.

Having spoken to the legal community, Justice Black now speaks his views to the whole country, through television.

So much for Hugo's reason for the program. This statement in the press seemed to satisfy him.

All was set now except the plans for the party to be held on broadcast night at the Agronsky home. Martin suggested it would be nice to invite all the justices of the Court and their wives. Hugo thought this over carefully and decided against inviting any member of the Court. He felt some of the other justices might not approve of

the interview, and he did not want to put them on the spot by inviting them to the party.

"Most of them would come," he told Martin, "just to show their regard for me, but I don't want to put them under that kind of pressure."

Hugo and I sat in front of a big color television set when the program began. In trying to adjust it perfectly, someone accidentally pulled the electric plug. By the time it could be reconnected, my tennis scene had come and gone.

"I didn't get to see me," I wailed.

Hugo found this amusing, and then he tried to console me. "Mr. Benjamin has promised to send you the film of the program, and then we'll get to see you," he told me.

III

As soon as the broadcast was over, the reactions started pouring in, first by phone, then by wire. The next day all manner of mail began arriving at Hugo's office. Letters and cards and notes by the hundreds swarmed in from all over the country. Hugo was astonished.

"The response really has been a tremendous surprise to me from every section of the United States,"³⁹ Hugo wrote to his old stand-bys, Virginia and Clifford Durr. And three days after the showing, Hugo wrote to Mr. Benjamin, the producer: "At the present time we are flooded with mail and I am doing my best to keep up with it but it looks like it will be impossible. Many people are suggesting re-runs; many others are suggesting that it be run in the schools or at a time when the children could see it. At any rate, you created more excitement than I had anticipated."⁴⁰

Hugo also inquired of Mr. Benjamin about our receiving a copy of the film. "My wife insists that I write you and tell you that she is anxious to get her film. She would not add the reason but I think it is because we missed the first few minutes of the show."⁴¹

I lived to regret wanting to see myself on television, however. Sometime later, when the film was being shown to White House Fellows at a dinner at the State Department, Hugo arranged to have my split-second tennis shot re-run about five times, back and forth, to the crowd's amusement and to my dismay. Not only did I look fat, a cardinal sin in Hugo's book, but my tennis serve was in bad form. So much for my movie debut.

Hugo heard from old friends, including

Clarence Dill, his fellow-freshman in the Senate back in 1927. Over forty years had passed and thousands of miles now separated them. Receiving Dill's note, and hundreds like it, pleased Hugo. Hugo loved people and the interview put him among the people again.

Hugo answered Dill: "I am very happy to have the report you gave me about its reception among the people. I had some doubts about giving the interview, but my communications have convinced me that it was a good thing for the Court and the country."⁴²

Hugo's comment echoed a note he had from Potter Stewart the day after the broadcast. "Dear Hugo," Justice Stewart wrote, "I thought the television performance was just fine. You did a great deal of good for the Court, the Constitution, and for the Country. Congratulations and thanks."⁴³ Obviously, Potter Stewart's reaction touched Hugo deeply.

Bill Douglas got his return in the next day. Justice Douglas was kind to Hugo, as one might expect, but he couldn't resist teasing him a bit: "Cathy and I saw your TV show last night and we thought it was excellent. Maybe you will make Cary Grant move over!"⁴⁴

Other comments were just about what one would expect from friends. "You were magnifi-

cent,"⁴⁵ one of his friends told Hugo. "You were doubly at ease during the interview, smart but after the fashion of a television actor."⁴⁶ Hugo said that Senator Dirksen is so confident in his own laurels, or you might say that Senator Dirksen is so confident in his own television personality that he expects for Hugo to take his place. Dirksen is so confident in his own hope to get work in television that he expects TV personalities to take his place.

Dick Rivers, a Circuit Court judge, wrote to Hugo, "You did a great deal of good — for the Court, for the Constitution, for the Country — by doing a better concept of the Court than I know that Justice Stewart did. A great humanistic performance against rowdyism and against rowdy speech."⁴⁹ Hugo's response was to know that he was right. I personally received letters, telegrams, and phone calls from the Court and from friends. It was."⁵⁰

it"

THE NEW YORK TIMES

,492

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—NEW YORK, WEDNESDAY

Black Feels Warren's Phrase Slowly

**Criticizes Call in '55
for 'All Deliberate
Speed' in Schools**

By HOMER BIGART

Justice Hugo L. Black of the Supreme Court said last night on a television program that



The law clerks wrote in, and there was love and teasing in their letters. Dan Meador, whose book *Mr. Justice Black and His Books*,⁵¹ is a guide to Hugo's mind, wrote the Judge: "You have a good television personality, and we had the impression that you were right in the room talking to us. You also stated extremely well the essence of many of your important views."⁵²

Bob Basseches, after congratulating Hugo "on the launching of your television career," added: "I know you will be troubled if I must, in all candor, advise you that you are not quite as pretty as Brigitte Bardot, with whom you were in direct competition."⁵³ It seems that NBC in its wisdom ran the French beauty against Hugo coast to coast, which put quite a dent in Hugo's Nielsen ratings. In New York City, for example, a mere nine percent of the audience chose to watch Hugo, whereas 44 percent preferred to ogle Miss Bardot. That's show business, as they say. "For Black to beat Bardot in the attention game is hardly natural law,"⁵⁴ noted the *Saturday Review*. The NBC crowd had been promised a fifteen-second glimpse of Miss Bardot wearing nothing but a pair of trousers. As things turned out, NBC deleted the fleshy part of the program, undoubtedly disappointing the 44 percent who tuned in to Brigitte.⁵⁵

Hugo reacted calmly to Bob's news about the ratings and wrote him: "Louis Oberdorfer, one of my former clerks, has already sent me a *New York Times* containing the comparative number who heard my television interview, in comparison with those who listened in on Brigitte Bardot. I am compelled to admit that she beat me—considerably."⁵⁶

Other clerks wrote in and their letters warmed Hugo's heart. He loved his clerks. Next to his children they were his favorite students.

Army officers wrote, housewives wrote; lawyers, judges, and law students wrote; teachers from all over the country piled mail on Hugo's desk. "I was particularly and professionally pleased that you explained *Adamson v. California* and referred to the sequence of Fifth Amendment decisions which properly put strictures on the police. What you said convinced my students where I am sure I have not been able to get across the essential meaning of the Amendment as quickly or as succinctly."⁵⁷—that from a law professor in Tucson, Arizona. From North Dakota came thanks for Hugo's explanation of

such complex-sounding concepts as "due process," "obscenity," "with all deliberate speed," and "freedom of assembly." The net result of his talk, Hugo was told, "was to clarify in my mind some of the intentions of the constitution-writers and to understand the job of the Supreme Court in interpreting the law."⁵⁸

Some viewers were so impressed by Hugo's habit of carrying "that little book of the Constitution in his pocket that they wanted it for their own. 'To have a copy of the Constitution you have personally used would be a great inspiration,'"⁵⁹ said one convert to the practice. Hugo instructed his secretary, Frances Lamb, to turn this request down: "He asked me to write you for him that he has received numerous letters from people asking that he give them his personal copy of the pocket-sized Constitution which he has been carrying for years. Under the circumstances he has not felt it fair to give it to anyone."⁶⁰

Six days after the interview Hugo was swamped with mail. "I should judge that by this time I have somewhere between 500 and 1000 communications,"⁶¹ Hugo told a friend. By January 8th the count had risen to 1500.⁶²

"Your discussion on the United States Constitution and the Bill of Rights has made them revitalized in my mind and heart,"⁶³ one lawyer wrote Hugo. Another said, "I was proud to be a lawyer again."⁶⁴ I suppose these are only words to the average reader. They mean nothing unless you happen to be a lawyer. Anyone familiar with Hugo's *Anastaplo*⁶⁵ dissent knows how deeply he cared for lawyers. How these letters from the field pleased him.

Fan mail, of course, was the farthest thing from Hugo's mind when he agreed to do the interview. He had no idea how much mail he would have to answer; and he answered it all, in his own hand, or by dictation for Frances Lamb to type.

"I have been answering about 75 pieces of mail a day," Frances Lamb told a law clerk, "and still more to go. I am working Friday nights (last night until 1 a.m.) today — Sat., and if I don't finish tonight, tomorrow. Meanwhile he is dictating some on the machine over the weekend. Now all I need is for the 5,000 people who are to get free copies of the pocket-sized Constitution to write in for autographs in it — and that'll do it!"⁶⁶

Contrary to what some have suggested,⁶⁷ Hugo had no motives in agreeing to do the interview. He just plain got talked into it. "Even after I was persuaded against my will to give the television interview, there remained a doubt in my mind as to whether the wise choice had been made,"⁶⁸ Hugo wrote a housewife in Illinois. "Nice letters like yours have removed that doubt and I thank you for writing."⁶⁹ This woman, an attorney's wife, had asked for a list of books about Hugo because she wanted to learn more about him. "As an under-30 housewife with three small children, I know how easy it is to confine oneself to diapers, the very best detergent, and running noses. I hope I never get that way. So your suggesting some titles would help me. My Mr. Justice Black project is no mere whim to be shelved and never studied."⁷⁰ Hugo answered her letter and recommended several books and articles for her to read.

Other comments were equally glowing. A director of the Corporation of Public Broadcasting wrote to Hugo saying that the interview "illustrates what I mean when I urge my fellow Board members to provide programming on the Constitution. I think it is important for people to understand the Court—why it is, what it is—and as a consequence, they ought to understand the actions of the Court better."⁷¹

From Carmichael, California, a stranger commented: "For me it was profound, enlightening, entertaining, and altogether the best TV program of the decade. You have certainly given me new insight and appreciation of the Court, its functions, and some of its more recent rulings which have certainly not been universally popular."⁷²

Perhaps this man exaggerated a bit when he said that Hugo's hour was the best TV of the decade. But it is a fact that the producer of the program, Mr. Benjamin, was awarded an Emmy for "the best cultural documentary of the year." And the American Bar Association presented its Gavel Award for an "unprecedented and informative interview" that "served to acquaint the public with the basic values of our legal and judicial system."⁷³

Hugo heard from people in Alabama, and their letters gave him special pleasure. Some Alabamians hated Hugo because he had voted to declare segregation unconstitutional. It was a curious paradox: people hating a man who loved

people. Fourteen years after enforcing the plain meaning of the Fourteenth Amendment⁷⁴ ("And, of course, I knew what it was. I didn't need any changing times to convince me that that was a denial of equal protection of the law."), Hugo still suffered the slings and arrows of outrageous enmity. But there were exceptions. A history professor who was born and educated in Tallahassee, Alabama, wrote to thank Hugo "for being a spokesman for what I am sure is a great number of natives of Alabama. All too often, we all get branded as being backward segregationists."⁷⁵

Hugo was proud of his Clay County heritage. He had his own vision of great Alabama and he remained loyal to it. He wrote back: "Among the hundreds of letters that have come to me about my television interview, I particularly appreciate yours, since you were born and reared in Alabama. I agree with you that we have many wonderful people in Alabama and that they do not deserve the censure which some people try to give all of Alabama."⁷⁶

But in Birmingham things were different. My friend Mary Tortorici, Chief Deputy Clerk of the Federal Court in Birmingham, stayed up late to watch the interview, which had been scheduled for broadcast on a delayed basis, but when the time came all she got was football. "I nearly died when 11:30 came, and they showed another rehash of the Alabama-Auburn game," she wrote. "I had seen four re-hashes of it on Sunday, and had had enough of it. I was so mad that I called the station the next morning, and they told me they didn't get to tape it—that all the taping machines were in use when the interview came on."⁷⁷ Hugo, it seems, was not top billing with the local CBS affiliate in Birmingham.

IV

Of course, Hugo also received a handful of mail critical of the views he aired on the program, particularly his enthusiasm for the protections accorded the accused by the Bill of Rights. During the interview Hugo insisted that popular criticism of the Court ignored the Bill of Rights. The Constitution, said Hugo, must be enforced. "And of course, I don't see how anybody could deny that the Constitution says absolutely and in words that nobody can deny, in the Fifth Amendment, that 'no person shall be compelled in a criminal case to be a witness against him-

self." And so, when they say the Court did it, that's just a little off. The Constitution did it."

Martin's next question repeated the charge that the Court had made it more difficult to combat crime. Hugo's answer, in plain English, taught the ordinary man an important lesson:

Agronsky: Mr. Justice, do you think that those decisions have made it more difficult for the police to combat crime?

Black: Certainly. Why shouldn't they? What were they written for? Why did they write the Bill of Rights? They practically all relate to the way cases should be tried. And practically all of them make it more difficult to convict people of crime. What about guaranteeing a man a right to a lawyer? Of course that makes it more difficult to convict him. What about saying he shall not be compelled to be a witness against himself? That makes it more difficult to convict him. What about no unreasonable search or seizure shall be made? That makes it more difficult. They were written to make it more difficult. And what the Court does is to try to follow what they wrote, and say you've got to try people in this way. Why did they want a jury? They wanted it so they wouldn't be subjected to one judge that might hang them or convict them for a political crime, or something of that kind. And so they had juries. And they said the same thing about an indictment. That's what they put it in for. They were, every one, intended to make it more difficult before the doors of a prison closed on a man because of his trial.

But these comments apparently meant nothing to one man who accused the Court of encouraging violence by its interpretations of the Constitution. Earl Warren alone was not to blame; every member of the Court was equally responsible and the entire Court should be impeached, wrote one critic. Hugo responded a week after the interview with a word of optimism: "Judging from the number of communications I have received from every part of the Nation in the past few days, I would say that you are in a minority in wanting to see all the members of the Supreme Court impeached. Maybe you will improve with time."⁷⁸

An odd assortment of the usual hate mail arrived, some of it really quite grotesque with drawings of Hugo burning in hot hell attached. The public has no idea of the bizarre letters a Supreme Court justice receives, and the interview prompted a note from a religious figure of sorts, who told Hugo that he saw the demons of hell coming and going from his face during the program. All Hugo could say to this fellow was to suggest that "if you have a copy of the Bible in

your place, you read the 13th Chapter of First Corinthians,"⁷⁹ which has Hugo's favorite passage in the Bible. Another letter of this sort was full of fury over the Court's desegregation ruling: nowhere in the Constitution, Hugo was told, is non-segregation of the races justified. That was only the opinion of nine foolish old men in Washington, and not the will of the great majority of Americans. Although Hugo loved people and rarely gave up on anybody, he had enough sense to note at the top of this particular letter: "No need to write him. He is hopeless." And on another confused blast Hugo noted in pencil, "Not intelligent enough to answer at all."

But refusals to answer mail critical of the program, even hate mail, were rare with Hugo. And his letters reinforce what is apparent from his opinions: Hugo Black was a man who lived by the First Amendment in his relations with others. And, as one might expect, he would often quote it to his correspondents: "I have your post card about the television interview I gave in connection with the Bill of Rights. The First Amendment to the Federal Constitution, which is generally considered the most important of all, reads as follows: [whereupon Hugo set it out word for word]. That Amendment has been made applicable to the States. I took an oath to support it as an Associate Justice, and that obligation is responsible for your disagreement with me."⁸⁰

Hugo's views on pornography caused a flurry of mail to roll into the office. One viewer who apparently missed the distinction Hugo drew between conduct and speech complained bitterly that Hugo was in favor of prostitution. That was not true at all. Obscenity laws outlaw speech, not conduct, and in doing so they violate the First Amendment. I'd better let Hugo do the talking on this delicate point:

Black: Of course, I understand that pornography sounds bad. It really sounds bad. But I never have seen anybody who could say what it is. Nobody. Now some people think it's way over there, and some people say it's way over here. If the idea is to keep people from learning about the facts of life, as between the sexes, that's a vain task. It's a vain task. How in the world can you keep people from learning, who mix with others out on the street and around in various places? They're going to learn. But that's not the reason I take that view. The reason I take the view is that it's an expression of opinion. It refers to one of the strongest urges in the human race. Something that people have not failed to talk about, and they will not fail to talk about it. There's no possibility

of that. Of course they're going to talk about it. People go have organizations and write in letters and say, "You're letting my children suffer." Well I think there's argument, I don't say it's the truth—I don't know what's the truth—there's plenty of argument for the idea that they ought to take care of their children and warn them against things themselves rather than to try to pass a law. And I just—it's an ambiguous statement. Obscenity is wholly ambiguous. It means one thing to you, and another thing to you, and another thing to these people, and another thing to me. I don't like it. I don't use it. I never have. I've always detested it. But that's no reason, I think, that it's not speech on an important subject. Let them talk.

Many people found these views offensive, but Hugo didn't mind. People were free to think him foolish if they wanted to. That was their business. It was Hugo's business to interpret the First Amendment as he saw it, without any apologies to those who disagreed with him. But Hugo was wholly in favor of wide-open criticism of public officials, including himself.

One telegram from Memphis told Hugo he should retire. "You have lost all contact with those things that have made America great."⁸¹ Hugo wrote back: "Thanks for sending me the telegram you did today. While it is not favorable to me personally, it does show that you have an interest on public affairs, which, of course, all people in the country should have."⁸²

Another critic admonished Hugo: "*Think what you are doing!*"⁸³ Hugo penciled at the top of his letter: "Thanks for your letter. Maybe you could come nearer to accomplish your desire by starting a movement to repeal the First Amendment designed to provide a country without censors by guaranteeing freedom of religion, speech and press." Apparently Frances Lamb thought Hugo's comment too sharp. An annotation at the bottom of this letter, in Frances' handwriting, indicates that no such response was sent out.

One particular exchange carried back and forth four times and the dialogue in these letters reveals Hugo's faith in the First Amendment for

ingness to listen to a reasonable reply from the public. Her credit, was not in Hugo's signature. He came back with a note. At least you are not angry. We are true to our country on earth.

Chief Justice Warren paid a high tribute to Hugo's becoming disgraced. He lived from Hixon.

Hugo's answer to a woman, is important comment on his First Amendment. Both of Hugo's children. First, Hugo on course, no reason to disagree with a should develop. That was pure H.

Next, Hugo's in one fleeting universe: "As a man can know in the utterly right?"⁸⁸

Some viewers wrote to him asking for a number of problems, death. One woman filed an information letter to Hugo. He expected: "I am so any legal advice case. The justice they come before channels."⁸⁹

One man wanted Associated Press words that passed during the

search time for him to answer one simple question: "Is the (AP) within their rights to print whatever is written without regard to the rights of the public?" —that was all this fellow wanted to know.

Hugo's reply was short. It was also what one might expect from Hugo: "I regret that I cannot give any more information about 'obscenity' than the views that were expressed in that interview."⁹⁰

VI

The newspaper columnists and editorials gave Hugo's interview high marks and almost all the commentary was favorable. Many papers reported that the ideas expressed in the interview had already been expressed in Hugo's opinions for the Court or in his dissents.⁹¹ But for most Americans the interview was their first chance to see and hear Hugo stating his views. "Scarcely anyone reads what the Supreme Court justices actually say in their opinions,"⁹² one columnist noted. And the papers were agreed that the projection of Hugo's personality and his views into innumerable American homes via TV served an invaluable educational purpose, particularly in light of the homely idiom Hugo used in expressing himself. "What came through most clearly of all," said *The Washington Post's* editorial, was Hugo's intense devotion to the Constitution, his pride in it as the charter of a great community, his abiding faith in and love for America."⁹³ *The New York Times* gave the interview a four-column, page one spread, complete with photograph,⁹⁴ and *Variety* heralded the interview as a model of TV journalism.⁹⁵

Further north, in Boston, *The Sunday Globe* reported that Hugo "had lost none of his capacity for forthright outrage at violations of constitutional freedom and individual dignity. . . [the interview] should be shown again and again. By any standard, it is a landmark in the field of journalism."⁹⁶

In *The New York Daily News* Ted Lewis took note of Hugo's television competition the night of the interview. Lewis' "Capitol Stuff" column featured photographs of Hugo and his French rival, Brigitte Bardot. "What a contrast!" he exclaimed. In addition to the obvious differences, Mr. Lewis spotted subtler distinctions between the two shows: "Fortunately, what Justice Black said on the air is even more effective in print,

while Bardot has to be in motion to be enjoyed and appreciated."⁹⁷

Some reviewers saw a tendency in Hugo's comments to oversimplify the difficulty of constitutional interpretation. "It is not quite so simple,"⁹⁸ said *The Washington Post*. James Kilpatrick in his column in *The Sunday Star* thought Hugo's views "absolute hokum" to the extent they attributed to the Constitution, and not to the Court, the difficulties of convicting criminals. That was an absurd myth, according to Mr. Kilpatrick, who wanted to blame the judiciary, not the Constitution, for handcuffing the police.⁹⁹ Whether Hugo Black's or James Kilpatrick's views are more sound is obviously not for me to decide. I must leave that to the reader.

Robert Shayon's article in the *Saturday Review* spoke highly of the interview, but he saw a faint hue of anachronism in Hugo's image: "Here was the glow of a great legal mind, expressing the noblest ideals of a free society; but there was a faint hue of anachronism in his mellow image, as if the nation that gave birth to the Bill of Rights and Hugo Black was slowly disappearing into the TV sunset. A great lethargy possesses us; the days of great debate in the Black style are passed."¹⁰⁰

Perhaps Mr. Shayon was right. We are all obliged, however, to do what little we can to rekindle the flame.

Max Lerner's review was my favorite. "The Gentle Giant from Alabama" is what he called his piece. That pretty well sums up Hugo.

One paragraph of Max's column touched Hugo and me deeply: "Count this as my homage to Black. I watched him for an hour the other night on a CBS special — this gnarled, timeless and ageless man of 82, with a soft voice but with a spine in every word, with flashing, humorous eyes, with bony eloquent fingers that held tightly to a dog-eared copy of the U. S. Constitution as he spoke. When we say that our time has fallen on little men, and that most men are carbon copies of each other, we had better not forget the handful of men like Black — how many does an age have to possess? — who are copies of no one, but irreducible originals?"¹⁰¹ Loving words from a good friend always.

VII

Six months after the interview was broadcast, Hugo wanted to know how many copies of the

Constitution CBS had given away. The final figure indicates a lively interest in the Constitution — at least in free copies of it. "We finally sent out over 128,000 copies of the Constitution, believe it or not,"¹⁰² Mr. Benjamin reported. And the requests for free copies came mostly, according to Eric Sevareid, "from people who didn't know the Constitution was actually down on paper, who thought it was written in the skies or on a bronze tablet somewhere."¹⁰³

CBS's bountiful distribution plan did little, however, to improve the standing of the Bill of Rights with the American people. Two years after Hugo's appearance on TV — a period which would strain any speaker's staying power with his audience, even Hugo's—a CBS NEWS poll ("Do we believe in the Bill of Rights?") showed a majority of Americans were willing to restrict some of the basic rights guaranteed by the Bill of Rights. This gave Mr. Benjamin the idea to invite Hugo to appear on CBS's 60 MINUTES program in April, 1970, when the survey results were scheduled for release. "We feel that the findings need a little interpretation as well as presentation of the raw figures."¹⁰⁴ But once was enough for Hugo. He had no desire for a repeat television appearance: "With reference to your suggestion as to whether I could participate in the program, the reception of my former television program was a great pleasure to me but I believe it would be wise not to repeat anything like it in the future."¹⁰⁵

Hugo also declined an invitation to join Lawrence Spivak and company on television: "I appreciate the fact that you want me to appear on 'Meet the Press' and although I agree with you that the public has too little understanding of the Constitution or the Supreme Court, I do not think it would be wise for me to give a second interview in the near future."¹⁰⁶

To Hugo's astonishment, one viewer asked whether quarterly interviews on the Constitution and the Court would be possible. "I am afraid it will not be possible for me to appear for quarterly interviews," Hugo answered, "but I am hopeful that CBS will follow up on this program with some more of them."¹⁰⁷

VIII

Some people who missed the interview, and some who saw it, wrote in requesting a transcript of the interview. Hugo explained the need for a

printed text in a letter to Mr. Benjamin the day after the broadcast: "We need a printed copy to answer questions that have been presented to us by people who seemed to miss a word or two for some reason or another, and we would like to send copies to those who ask for them."¹⁰⁸

Legal scholars are like sponges: they absorb every word a Supreme Court justice utters, and Hugo's interview gave them plenty to think about. This was new material worth having in the file.

Professor William Harbaugh, for example, wanted to know exactly what Hugo said about John W. Davis as an appellate advocate. Harbaugh was then wrapped up in the final stages of his biography.¹⁰⁹ Unfortunately, he missed the interview and *The New York Times* did not print what Hugo said about Davis, in response to a request that he name the ablest lawyers who had appeared before him during his long tenure on the Court. Hugo's answer was an extraordinary combination of diplomacy and candor:

Black: Well, there have been so many good lawyers. You're kind of putting me on the spot, to tell them that they are not the best. I would say, just off hand, that two lawyers who've argued before us were excellent, as others are excellent, but these come right straight to mind. John W. Davis, who was a great speaker, and a great man to discuss the law. Just a great advocate. And Bob Jackson, who argued cases before us as Solicitor General. He was always magnificent. His language was fluent. His knowledge of the law was good, and he never objected to your asking him a question which most people would think was too hard to answer. I do not recall that Bob ever declined when some Judge would say: "Do you mean to say this?" I don't recall an instance when Bob didn't say, "That's exactly what I mean."

Hugo's comment on Bob Jackson caught one viewer's ear and he wrote in to applaud Hugo for it: "It was magnanimous of you to speak as you did of the late Judge Jackson. I know something about the controversy between Judge Jackson and yourself . . . Mr. Jackson had been in Europe at the Nuremberg Trials and when he came back to this country he said some things about you that should not have been said and I am sure he regretted it."¹¹⁰ Hugo's answer shows that he was not one to hold a grudge: "What I said about Bob Jackson was correct in every respect. He was one of the greatest advocates that ever appeared before our Court. I recall very well what happened when he was coming back from Europe but that episode, I hope, was completely for-

gotten by him before his death. At any rate, we never discussed it after he returned. . . ." ¹¹¹

Another student of the Constitution accused Hugo of trying to fool the public by misquoting — of all things — the First Amendment. When Hugo read it during the interview he recited the Establishment Clause, "Congress shall make no law respecting an establishment of religion," and then he interrupted himself, saying — "that's the First Amendment." Not so at all, complained this critic, who censured Hugo for quoting only a part of the Amendment and then lectured him on how to parse compound sentences correctly. Hugo, who cared about good grammar, was not impressed: "I presume that most people, unlike you, will not think it is a misstatement to quote only a part of a constitutional amendment. As a matter of fact, you were not fooled so why should anybody else be? While your views do not agree with mine, I am glad to have your letter." ¹¹²

Hugo did not hesitate to say, however, that most Americans do not understand the Constitution, either in part or read as a whole. Nor did he flinch from telling the world that good letters are hard to come by these days:

Agronsky: Do you think, Mr. Justice, that most Americans understand the Constitution?

Black: No, I think most of them do not. I think most of them are sure they do — better than the Court. People don't know it. I get letters all the time; I get many letters. People who don't have a good idea of grammar; they're certainly not good letter writers, and they're telling me that "You ought to get off the Court and —." Some of them tell me to go to Russia. "Go back to Russia." Well, that's too far for me to go back since I've never been there. But they think they know it. And their idea is all the same. You can trace it to the same thing, doesn't make a difference what it is, what their experience is, or why they're mad at the Court. It's all because each one of them believes that the Constitution prohibits that which they think should be prohibited, and it permits that which they think should be permitted.

Hugo's comment about getting letters full of bad grammar caused a graduate assistant in history at the University of Oklahoma to write: "May I have the privilege of writing a letter that is different from the type you mention in the interview?" ¹¹³ The letter was quite complimentary and must have given Hugo second thoughts about discussing good grammar on national television. Another letter melted his heart: "Please forgive my grammatical errors in this letter. I

have little formal education but why should that stop an expression of love." ¹¹⁴

IX

Fifty years ago when they unveiled Holmes' portrait at Harvard, Learned Hand was the speaker. ¹¹⁵ In his address Hand quoted Carlyle as saying he would give more for a single picture of a man, whatever it was, than for all the books that might be written of him. ¹¹⁶ Judge Hand went on to say: "We are fortunate in having a painting which justifies that opinion: it will in part at least preserve the fleeting essence for others who have not had a direct acquaintance with the racy speech, the light and shade, the simplicity, the tenderness, the reserve, the dignity, that must some day perish and leave so much the losers such of us who remain. Books and speeches cannot hold these, and we are much the debtors to Mr. Hopkinson [the painter of Holmes' portrait] that his brush has been cunning enough to catch so large a part. We piously commend his work to those who shall come after us, whom time will rob of the richness of our possession." ¹¹⁷

Learned Hand had a way with words, but he knew their limitations. What he said at the unveiling of Holmes' portrait puts into words far better than mine the thoughts that come to me each time I see Hugo on the screen. I am much the debtor to Martin Agronsky, to Eric Sevareid, and to other co-conspirators, "named and unnamed," who were cunning enough to convince Hugo to do his film.

Hugo Black was a good teacher and good teachers are worth sharing. It is important, I think, that Hugo Black remain a mentor, not merely a memory. Hugo's film does that. ¹¹⁸ By it we share this man, the expression of his views, the depth of his convictions, and the warmth of his smile with others. By it we keep our memories, our reverence, and our love alive and hand them on to new generations all too ready to forget.

*Elizabeth Seay Black was the wife of Justice Hugo Black for fourteen years, from 1957 until 1971 when Justice Black died. From 1975 to 1981 she served as Secretary of the Supreme Court Historical Society, Washington, D.C., and she is currently a member of its Executive Committee.

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preme Court of the United States. Judicial Fellow, United States Supreme Court, 1975-1976. Producer of *Court Reports*, a National Archives film history of the Supreme Court of the United States.

[†]Ipswich, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* (M. D. Howe ed. 1962) 136.

Footnotes

¹ *An Autobiography of the Supreme Court* (A. F. Westin ed. 1963). Hereafter cited as *Autobiography*.

² 4 Wheat. 316 (1819). Marshall had second thoughts about assuming a pen name and defending his opinion in the newspapers. He told Story he did not want his letters reprinted in New England; nor did he want the letters traced back to him. Marshall refused to allow Henry Wheaton, the Reporter of Decisions, to publish them as an Appendix to the official volume of the year's opinions. *Autobiography* 77-78. For the full story and a complete collection of the letters, including Spencer Roane's "Hampden" and "Amphyctyon" letters attacking the *McCulloch* opinion see *John Marshall's Defense of McCulloch v. Maryland* (G. Gunther ed. 1969).

³ 98 *American Philosophical Society Proceedings* 233 (1954). The title in the text is Westin's, in *Autobiography* 267; Frankfurter's title was "Some Observations on the Nature of the Judicial Process in the Supreme Court Litigation." According to Professor Westin's Appendix, "A Selected Bibliography of Speeches and Extrajudicial Writings by United States Supreme Court Justices, 1790-1962," in *Autobiography* 35, Justice Frankfurter talked quite a lot while off the bench (18 titles in all are listed in the bibliography), although he was quite sensitive to the inhibitions circumscribing a member of the Court.

⁴ Westin's title, in *Autobiography* 279, an excerpt from W.O. Douglas, *We The Judges: Studies In American And Indian Constitutional Law From Marshall To Mukherjee* (1956). Justice Douglas tops Professor Westin's "Selected Bibliography" [Appendix A, *Autobiography* 39-40] with 25 titles, exceeding Hughes by 5 and Frankfurter by 7.

⁵ 35 *New York University Law Review* 865 (1960), in *Autobiography* 381.

⁶ 37 *N.Y.U. Law Review* 549 (1962), in *Autobiography* 401. The interview was conducted after dinner, on April 14, 1962, before the biennial convention of the American Jewish Congress in New York City. Professor Westin in his book notes that Edmond Cahn, a Professor of Law at New York University Law School, was in thorough going agreement with Justice Black on civil liberties issues. As a result, we are told "the interview was thus a wholly friendly one with critics unrepresented." *Autobiography* 402.

In addition to Justice Black's *James Madison Lecture* and his interview with Edmond Cahn, Westin's bibliography lists 6 other addresses and speeches by Hugo Black, which is about average for the fifty-six justices in *Autobiography*.

⁷ In a revealing speech before the Tennessee Bar Association in 1950 ["The Lawyer and Individual Freedom," 21 *Tennessee Law Review* 461 (1950)] Hugo Black first won over his audience with wit ("I know, of course, that the first thing in a speech is to always say: 'What a great place this is' — I agree to that fact. The next thing is: 'What a wonderful Bar Association you have' — I agree with Judge Neil on that statement. The next thing is: 'How beautiful the

women are' — (Applause). Of course, Tennessee women are the most beautiful in the world." *Id.* at 461-462.); and then he told his listeners who the boss was. Of his first wife, Josephine Foster Black, Justice Black said: "I took the most beautiful woman that was born in Tennessee, and she has been ruling me for thirty years." *Id.*

⁸ In Dean William C. Warren's *Foreword to Justice Black's A Constitutional Faith* (1968) x-xi.

⁹ *Ex rel.* Elizabeth Black.

¹⁰ Letter from Francis Lamb to John G. Kester, Dec. 7, 1968, *Hugo Black Papers*, Library of Congress [hereafter cited as *HBP*], Box 492. Mrs. Lamb was Elizabeth Black's successor as Justice Black's secretary; she was with the Judge for fourteen years until he died in 1971. Mr. Kester was Justice Black's law clerk for the October Terms 1963 and 1964 [a list of the law clerks and staff is contained in D. Meador, *Mr. Justice Black And His Books* (1974) 193-200] and was on the law faculty of the University of Michigan at the time of the television broadcast. He wrote Mrs. Lamb asking, "How much arm-twisting did CBS have to do? How much editing was there? Did the Judge check out the final version?" John G. Kester to Frances Lamb, Dec. 4, 1968, *HBP*, Box 492.

¹¹ Hugo Black to Dr. Otus Theron West, Jan. 14, 1969. Dr. West was Elizabeth Black's personal physician in Birmingham before she came to Washington. A copy of Justice Black's letter to Dr. West is in Elizabeth Black's papers, and not in the Hugo Black Collection at the Library of Congress, because Justice Black gave his copy to Elizabeth.

¹² 350 U.S. to 354 U.S. as the lawyers say.

¹³ In Christopher Morley's Preface to *Boswell's London Journal, 1762-1763* (F. A. Pottle ed. 1950) xi.

¹⁴ For an earlier sampling of her memoir see E. Black, "Hugo Black, The Magnificent Rebel," 9 *S.W.U. Law Review* 889 (1977), which was one piece in a symposium issue of the *Southwestern University Law Review* honoring Justice Black ["Justice Hugo L. Black: A Symposium," 9 *S.W.U. Law Review* no. 4 (1977)].

¹⁵ A comparison of the excerpts herein with the transcript of the interview as broadcast [published in 9 *S.W.U. Law Review* 933 (1977)] shows there is much new material in Elizabeth Black's account of the interview.

¹⁶ One can, of course, infer much of Hugo Black's outlook on law and life from his opinions and published writings. But, as Frankfurter said of Holmes, "how much greater our opportunity for knowing him by reason of his voluminous correspondence and that awing list of books covering his reading of half a century." Felix Frankfurter to Charles Fairman, Dec. 27, 1948, quoted in C. Fairman, "The Writing of Judicial Biography — A Symposium," 24 *Indiana Law Journal* 363, 368 (1949).

I am sure Justice Frankfurter would take no offense at my comparison. He had his heroes and he wanted others to have theirs. And how endearing Hugo Black's letters are, to scholars and students alike. The letters on the CBS interview alone fill three boxes in the *Hugo Black Papers* at the Library of Congress; they total some thirteen linear inches and fill fifteen folders. They are a window to the mind and spirit of Hugo Black.

¹⁷ Justice William O. Douglas followed Hugo Black's precedent with a CBS television interview of his own, in September 1972, with Eric Sevareid again

asking questions of a sitting justice about the Court, the Constitution, and the country. Other progress has also been made in this field. "A Conversation with Earl Warren" [Brandeis Television Recollections, WGBH-TV, Boston (1972)] was filmed after Chief Justice Warren retired from the Court. And "Supreme Court" [a film production of WCVE-TV, Richmond, Va., under the sponsorship of the Young Lawyers Sections of the American and Virginia Bar Associations] brings Chief Justice Burger, and Justices Tom Clark and Lewis Powell to class. "Supreme Court" was made in 1976 and it takes its viewer inside the Court, including the secret conference room, for the first time. For details, see A. Byrne & J. Jones, III, "The Making of a Movie," 2 *Virginia Bar Association Journal* 30 (1976).

It should be noted, by way of completing the record, that the first instance of a sitting justice allowing himself to be filmed occurred on the morning of October 24, 1961 in the chambers of Mr. Justice Felix Frankfurter, whose reflections on "The Lawyer's Place in Our Society" were captured on film at the urging of his friend Paul Freund and the National Council of Legal Clinics of the American Bar Association. See *Frankfurter Papers*, Library of Congress, Box 157 [National Council on Legal Clinics, 1961-62, Freund, P. A. & Sacks, Howard].

¹⁸ It is still true today that portraits of eminent men are "an object of considerable interest" — to quote John Marshall himself on the subject. Letter to Joseph Delapaine, March 22, 1818, quoted in H. Gray, "An Address on the Life, Character and Influence of Chief Justice Marshall," in *John Marshall* (J. F. Dillon ed. 1903) 47, 92.

Every constitutional law teacher deals, in one fashion or another, with Justice Black's First Amendment absolutism ("No law means no law."). The usual approach is via ink on paper: the professor adds another note to the fine print of his casebook and then the matter is tossed out to the waiting class via the standard socratic machine. My students prefer a different sort of machine: the Bell & Howell 1592, which is what educational media specialists recognize as a motion picture projector. This miraculous contraption and the right piece of film break the chains of time and place that cabin learning to the small world of the classroom. Instead of listening to me talk, my students get to see and hear Justice Black himself conducting a class in constitutional law. No one sleeps. No mind wanders. I can think of no better way of presenting Hugo Black's side of the question of First Amendment absolutes than to have the Justice himself in class for what is a delightful appearance, regardless of where one stands on the issue, followed by the usual questions and critical analysis.

I should add that law students in the second and third years of law school want a change of pace ("At the end of the second year men 'are sick' of reading cases merely as a method of training or as a means of finding out what cases hold, what the doctrines are." Felix Frankfurter to the Committee on Curriculum, Harvard Law School, May 12, 1932 [*Some Observations on Third Year Work*], in *Survey Of The Harvard Law Curriculum 1934-35*, p. 254 [copy in *Frankfurter Papers*, Library of Congress, Box 143]. And they could use a boost of enthusiasm. After viewing the CBS interview, one third-year man at Creighton Law School wrote Justice Black that "I was never more proud to be a law student than after listening to that

dialogue." Larry Forman to Hugo Black, Dec. 3, 1968, *HBP*, Box 491.

Based on my own experience using the Black film in the second-year individual rights offering at LSU Law School, I am quite convinced of the power of the Black interview as an instructional resource in constitutional law. It adds life to our learning.

In using the film in class, I am only following the example of Felix Frankfurter, who also wanted the Justices to "come alive":

"But beyond this was a broad instruction not only to the Supreme Court as an institution but also to many of its Justices as persons. Marshall, Story, Taney, Field, Bradley, Waite, Miller, Moody — all of these and others of the past came alive and took their places in the stream of thought which is the business of the Supreme Court. And the contemporary Justices — Taft, Holmes, Brandeis, Butler, Stone and the rest, became real personalities — intellectual personalities — with whom one might agree or differ, but for whom one acquired some measure of understanding and respect."

E. Griswold, "Felix Frankfurter, Teacher of the Law," 76 *Harvard Law Review* 7, 8-9 (1962).

A color film of the interview, 32 minutes in length, can be rented or purchased from BFA Educational Media, 2211 Michigan Ave., P.O. Box 1795, Santa Monica, Cal. 90406.

¹⁹ L. Hand, "To the Harvard Alumni Association" (1936), in *The Spirit Of Liberty* (I. Dilliard ed. 3d ed. 1960) 111, 113.

²⁰ Hugo's main concern in securing written authorization to withhold the program appears in the following passage in CBS's letter of agreement: "You can be certain that we will do everything possible to make this conversation reflect accurately your thoughts and philosophy." Burton Benjamin to Hugo Black, Sept. 19, 1968, *HBP*, Box 491.

²¹ All of the material from the interview quoted herein has been verified for accuracy against the sound recordings of the interview, which are in the possession of Elizabeth Black.

²² H. Black, "The Bill of Rights," 35 *N.Y.U. Law Review* 865 (1960).

²³ *Id.* at 867.

²⁴ See, e.g., V. V. Hamilton, "Preface" to *Hugo Black And The Bill Of Rights: Proceedings Of The First Hugo Black Symposium In American History On "The Bill Of Rights And American Democracy"* (1976) xiii ("In thirty-five years on the high court, from the Great Depression through the tumultuous 1960s, Justice Black maintained his personal vigil over the Bill of Rights, always insisting that the guarantees of the first ten amendments were absolute. . ."). And the latest scholarship on Justice Black, J. J. Magee, *Mr. Justice Black: Absolutist On The Court* (1980) 8 ("All of the provisions of the Bill of Rights, not just the First Amendment, he [Black] said, contain absolute rights. . .") also gets it wrong. It's interesting that Professor Magee's bibliography makes no mention of the CBS interview, nor is it cited in text.

²⁵ For a telling look inside the conference room see Mr. Justice Clark's account, *The Supreme Court Conference* 37 *Texas Law Review* 273 (1959).

²⁶ *From The Diaries Of Felix Frankfurter* (J. P. Lash ed. 1975).

²⁷ H. Black, Jr., *My Father: A Remembrance* (1975) 250-256. Hugo wanted his cert. notes burned

because he thought publishing the notes of conversations between justices inhibited the free exchange of ideas. He also thought the reports by one justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect what actually happened. In insisting on burning his cert. notes Hugo was following the example of Holmes. See Holmes' comment, in a letter to Frederick Pollock [quoted in J. P. Lash, *From The Diaries Of Felix Frankfurter* (1975) 51]: "I have done my best to destroy illuminating documents."

²⁸ Compare Alexander Bickel's comment, in his *Preface to A. Bickel, The Unpublished Opinions Of Mr. Justice Brandeis* (1957) viii-ix, "There are no trivia preserved here, no casual gossip or malice; only that is here which is relevant to a fair appraisal of the performance of public men." And, to borrow from Paul Freund's *Introduction* to the same volume, *id.* at xvi, "the intimacies here described are not aimless or malicious disclosures; they are relevant to understanding, and so, to use a favorite word of Justice Brandeis, they are instructive." Felix Frankfurter also struggled with the problem of disclosure of confidential court documents, and his solution is instructive: "Disclosure of Court happenings not made public by the Court itself, in its opinions and orders, presents a ticklish problem. . . . But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations. The more so is justification for thus lifting the veil of secrecy if thereby the conduct of a Justice whose intellectual morality has been impugned is vindicated." F. Frankfurter, "Mr. Justice Roberts" (1955), in *Felix Frankfurter On The Supreme Court* (P. Kurland ed. 1970) 516, 519.

²⁹ *Reynolds v. United States*, 98 U.S. 145 (1878).

³⁰ See, e.g., David Lawrence's column in the *Washington Evening Star*, Dec. 5, 1968, p. A-17 ("Black Clarifies the Right of Protest"); and Richard L. Tobin's article, "How Far Does Free Speech Go?" in the *Saturday Review*, Jan. 11, 1969, p. 113.

³¹ 309 U.S. 227 (1940).

³² *Id.* at 241.

³³ On display at the National Portrait Gallery, Washington, D.C. The portrait is a preliminary sketch, with several studies of Roosevelt's hands, for Chandler's later "The Big Three at Malta."

³⁴ "When this statement is ended my discussion of the question is closed." C. Williams, *Hugo L. Black: A Study In The Judicial Process* (1950) 29.

³⁵ Hugo explained his decision to cut out the Klan in a letter to Burton Benjamin on Sept. 30, 1968, *HBP*, Box 491: "[W]hen I came from Europe, after I was appointed to the Court, I made a nationwide radio speech. At that time I discussed the question about the Klan and stated what I had said disposed of the subject so far as I was concerned, and I would never make another statement about it. However there [in the in-

matter publicly. In Severeid's question view, but they were

³⁷ *New York Times*.

³⁸ *Washington Post*.

³⁹ Hugo Black to *HBP*, Box 491.

⁴⁰ Hugo Black to *HBP*, Box 491.

⁴¹ *Id.*

⁴² Hugo Black to *HBP*, Box 491.

⁴³ Potter Stewart.

HBP, Box 493.

⁴⁴ William O. Douglas.

1968, *HBP*, Box 491.

⁴⁵ Telegram from widow, to Hugo Black.

⁴⁶ Louise Caffery.

4, 1968, *HBP*, Box 491.

⁴⁷ George M. B. .

1968, *HBP*, Box 491.

⁴⁸ Hugo Black.

1968, *HBP*, Box 491.

⁴⁹ Richard T. R.

HBP, Box 492.

⁵⁰ Hugo Black.

HBP, Box 492.

⁵¹ D. Meador,

(1974). Hugo's biographer, Lafayette Black.

United States.

⁵² Daniel J. Mc.

of Alabama Law School.

Black, Dec. 6, 1968.

⁵³ Robert T. B.

1968, *HBP*, Box 491.

⁵⁴ R. L. Shayon.

view, Jan. 4, 1969.

⁵⁵ *Id.*

⁵⁶ Hugo Black.

1968, *HBP*, Box 491.

⁵⁷ Robert Emm.

1968, *HBP*, Box 491.

⁵⁸ Mrs. Leonar.

HBP, Box 492.

⁵⁹ Robert W. D.

HBP, Box 491.

⁶⁰ Frances Lam.

HBP, Box 491.

⁶¹ Hugo Black.

clerk], Dec. 9, 1968.

⁶² Hugo Black.

HBP, Box 491.

⁶³ Henry M. B.

HBP, Box 491.

⁶⁴ *Ex rel.* Marx.

the 1940 Term and

⁶⁵ Frances Lamb to John G. Kester, Dec. 7, 1968, *HBP*, Box 492.

⁶⁷ "Motives were not hard to find," says Professor Dunne, who viewed Hugo's interview as a sort of public relations campaign to lift the Court's popularity in the Gallop Poll. G. T. Dunne, *Hugo Black And The Judicial Revolution* (1977) 33-34. Nothing could be further from the truth.

⁶⁸ Hugo Black to Mrs. Martin Wittner Imber, Jan. 13, 1969, *HBP*, Box 491.

⁶⁹ *Id.*

⁷⁰ Mrs. Martin Wittner Imber to Hugo Black, Jan. 6, 1969, *HBP*, Box 491.

⁷¹ Saul Hess to Hugo Black, Dec. 6, 1968, *HBP*, Box 491.

⁷² John E. Browning, Jr., to Hugo Black, Dec. 4, 1968, *HBP*, Box 491.

⁷³ Burton Benjamin to Hugo Black, May 26, 1969, *HBP*, Box 491.

⁷⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954). "In 1954 Justice Black participated in the Court's historic, unanimous decision outlawing segregated education. Many fellow Alabamians angrily called him Judas. Although Justice Black is, in the opinion of many, the most distinguished national figure to emerge from Alabama origins, the shadow of Savage Ideal still obscures his greatness in his native state." V. V. Hamilton, *Alabama* (1977) 176.

⁷⁵ Drew Harrington to Hugo Black, Dec. 4, 1968, *HBP*, Box 491.

⁷⁶ Hugo Black to Drew Harrington, Dec. 6, 1968, *HBP*, Box 491.

⁷⁷ Mary Tortorici to Elizabeth Black, Dec. 5, 1968.

⁷⁸ Hugo Black to G. A. Estes, Dec. 10, 1968, *HBP*, Box 491.

⁷⁹ The 13th Chapter of First Corinthians reads: "And now abideth faith, hope, charity, these three; but the greatest of these is charity." Hugo always substituted the word "love" for the word "charity" in this passage.

⁸⁰ Hugo Black to Ellis C. Breedlove, Dec. 6, 1968, *HBP*, Box 491.

⁸¹ Telegram from Ralph H. Brown to Hugo Black, Dec. 3, 1968, *HBP*, Box 491.

⁸² Hugo Black to Ralph H. Brown, Dec. 4, 1968, *HBP*, Box 491.

⁸³ Newton C. Estes to Hugo Black, Dec. 20, 1968, *HBP*, Box 491.

⁸⁴ Hugo Black to Mrs. R. E. Bohannon, Dec. 10, 1968, *HBP*, Box 491.

⁸⁵ Mrs. R. E. Bohannon to Hugo Black, undated, *HBP*, Box 491.

⁸⁶ W. E. Burger, "Dedicatory Address" (1976), in *Hugo Black And The Bill Of Rights: Proceedings Of The First Hugo Black Symposium In American History On "The Bill Of Rights And American Democracy"* (V. V. Hamilton ed. 1978) 1, 5 ("Once he [Black] said something to the effect that, as men who had spent many days in courtrooms and in controversy, we had become professional in our capacity to disagree without becoming disagreeable about it.")

⁸⁷ Hugo Black to Mrs. R. E. Bohannon, Dec. 17, 1968, *HBP*, Box 491.

⁸⁸ *Id.* Compare Chief Justice Burger's remarks, in his touching tribute to Hugo during the Court's Memorial Proceedings, April 18, 1972 [405 U.S. IX, LVI]:

"On one occasion, Hugo Black and I talked for several hours on a point that could move him to

great eloquence. He could see that I was not fully persuaded, and, as we separated, that wonderful, warm smile flooded his countenance, his eyes sparkled and he said something like this: 'Do you know something? You might be right about that, so stick to your guns. I don't think you are right, but it might turn out that you are.'"

⁸⁹ Hugo Black to Mrs. Christine Jenkins, Dec. 17, 1968, *HBP*, Box 492.

⁹⁰ Hugo Black to T. Spurgeon Bell, Dec. 16, 1968, *HBP*, Box 491.

⁹¹ See, e.g., *Washington Post*, Dec. 5, 1968, p. A-20 ("But Supreme Court opinions, unfortunately, are not widely read.")

⁹² *Des Moines Register*, Dec. 7, 1968, p. 22 (copy of the editorial in *HBP*, Box 491, end folder).

⁹³ *Washington Post*, Dec. 5, 1968, p. A-20.

⁹⁴ *New York Times*, Dec. 4, 1968, p. 1; story by Homer Bigart.

⁹⁵ *Variety*, Dec. 11, 1968, p. 28.

⁹⁶ *Boston Sunday Globe*, Dec. 1968 (Editorial "Mr. Justice Black Goes on Camera") (copy in *HBP*, Box 491, end folder).

⁹⁷ T. Lewis, "Hugo Black Gives Lift To a Troubled Nation," *New York Daily News*, Dec. 4, 1968, p. 4.

⁹⁸ *Washington Post*, Dec. 5, 1968, p. A-20.

⁹⁹ James J. Kilpatrick, "For the Reconfirmation of Judges," *Washington Sunday Star*, Dec. 8, 1968, p. C-4.

¹⁰⁰ R. L. Shayon, "The TV Sunset," *Saturday Review*, Jan. 4, 1969, p. 98.

¹⁰¹ *Washington Star*, Dec. 7, 1968, p. A-5.

¹⁰² Burton Benjamin to Hugo Black, June 2, 1969, *HBP*, Box 491.

¹⁰³ E. Severeid, "What's Right with Sight-and-Sound Journalism," *Saturday Review*, Oct. 2, 1976, p. 19.

¹⁰⁴ Burton Benjamin to Hugo Black, April 2, 1970, *HBP*, Box 491.

¹⁰⁵ Hugo Black to Burton Benjamin, April 16, 1970. Hugo and I watched the CBS program "Do We Believe in the Bill of Rights," which was broadcast on April 17th, with great interest.

¹⁰⁶ Hugo Black to Lawrence E. Spivak, Dec. 6, 1968, *HBP*, Box 493.

¹⁰⁷ Hugo Black to Ed Kranch, Dec. 9, 1968, *HBP*, Box 492.

¹⁰⁸ Hugo Black to Burton Benjamin, Dec. 4, 1968, *HBP*, Box 491.

¹⁰⁹ W. H. Harbaugh, *Lawyer's Lawyer* (1973). In chapter 24 of his book on Davis ("Leader of the Appellate Bar") Professor Harbaugh quotes what Hugo said about Davis during the television interview. And in his notes to that chapter he quotes a letter he received from Hugo, which added about Davis that "I could have said much more about him because he was one of the ablest advocates that ever appeared before our Court." *Id.* at 604-605 note 17.

¹¹⁰ Max F. Goldstein to Hugo Black, Dec. 9, 1968, *HBP*, Box 491.

¹¹¹ Hugo Black to Max F. Goldstein, Dec. 11, 1968, *HBP*, Box 491.

¹¹² Hugo Black to Peter Carter, Dec. 13, 1968, *HBP*, Box 491.

¹¹³ Barry M. Burrows to Hugo Black, Dec. 3, 1968, *HBP*, Box 491.

¹¹⁴ Jean Jones to Hugo Black, Dec. 4, 1968, *HBP*, Box 491.

¹¹⁵ The lead article in the *Harvard Alumni Bulletin* for Tuesday, March 27, 1930 [vol. 32, p. 741], "A Portrait of Mr. Justice Holmes," reported the event and quoted Learned Hand's remarks in full. Later, Hand's address, together with a facing photograph of Hopkinson's Holmes, was published in the *Harvard Law Review* [vol. 43, p. 857 and facing].

¹¹⁶ In Carlyle's essay on portraiture, "Exhibition of Scottish Portraits" (1854), in *XVI The Works Of Thomas Carlyle: Critical And Miscellaneous Essays* (Collier ed. 1897) 514, 515. Inasmuch as the published versions of Hand's speech at the Holmes unveiling do not give the Carlyle cite, I looked it up myself and found words that express the essence of Hugo's film perfectly:

"Often I have found a Portrait superior in real instruction to half a dozen written 'Biographies,' as Biographies are written;—or rather, let me say, I have found that the portrait was as a small lighted candle by which the Biographies could for the first time be read, and some human interpretation be made of them; the *Biographied* Personage no longer an empty impossible Phantasm, or distracting Aggregate of inconsistent rumors—(in which state, alas his usual one, he is *worth* nothing to anybody, except it be as a dried thistle for Pedants to thrash, and for men to fly out of the way of),—but yielding at last some features

which one could admit to be human."

¹¹⁷ L. Hand, "Mr. Justice Holmes," 43 *Harvard Law Review* 857 (1930).

¹¹⁸ I want to leave the last words in these notes to the Chief Justice of the United States and to an American who happened across Hugo for the first time some ten years ago.

First Warren E. Burger, what he said about Hugo during the Memorial Proceedings held in open Court in 1972 [405 U.S. LIII, LIV]. The Chief's words were loving:

"There is always a risk of having our admiration for uncommon men and women create an image that becomes, in time, more legend than flesh and blood. Hugo Black would not like that. . . . He would not mind a dash of legend but he was so vital in his humanity, so firm in his basic views, that he would also want to be seen and remembered as his intimates saw him. . . ."

Next what a citizen of California said to Hugo after watching him on television:

"Most of us have never heard a Justice's voice, and have never seen other than a still photograph of one. This is all wrong. Written opinions will never replace flesh and blood when it comes to understanding."

Marshall W. Rissman to Hugo Black, Dec. 4, 1968, HBP, Box 492.

The Nomination of Charles Evans Hughes as Chief Justice

Merlo J. Pusey

Since the hardy myth regarding the nomination of Charles Evans Hughes as Chief Justice in 1930 has been dignified by extensive reiteration in the Supreme Court Historical Society Yearbook, a dispassionate review of the facts seems to be in order. The allegation is that President Herbert Hoover offered Hughes the position as a political gesture, expecting him to decline, and that Hoover's real intention was to name his closer friend, Justice Harlan F. Stone. If that version could be sustained, a vital era in the history of the Supreme Court would have to be attributed to a presidential miscalculation.

The source of this myth is a story told by Under Secretary of State Joseph P. Cotton, who is said to have been with President Hoover when word reached him that Chief Justice William Howard Taft was about to resign because of his critical illness. Cotton is said to have remarked that this would give the President a great opportunity to make his friend Stone Chief Justice and then to appoint Judge Learned Hand to the Supreme Court vacancy thus created. Hoover is said to have replied that he felt an obligation to offer the place first to Hughes, but Cotton insisted that Hughes would not accept such an offer because it would necessitate the resignation of his son, Charles Evans Hughes, Jr., as Solicitor General.

Relying upon that assumption, Hoover is said to have made the offer to Hughes by telephone and to have been embarrassed when Hughes snatched up the prize immediately without thinking about his son. Cotton told this version to a number of friends, including Felix Frankfurter, and it ultimately found its way into various publications. As facts have come to light from various different sources, however, the tale has suf-

fered repeated amputations until there is not much left of it except the grim determination of a few die-hards to cling to the shreds.

When the Cotton story came to the attention of Hoover in 1937, he flatly denied its substance in a letter to Chief Justice Hughes: "I scarcely need to say that no such conversation ever took place, and your recollection will confirm mine that I never had any telephone conversation with you at all on the subject."¹ Hughes thanked the



Charles Evans Hughes prior to his appointment as Chief Justice by President Herbert Hoover in 1930.

Office of the Curator, Supreme Court

former President for his comment and asked permission to quote it to Henry F. Pringle, who was writing the Taft biography, because Pringle was one of those who had publicized the Cotton story. Hoover then wrote Hughes a more extensive letter (after checking his presidential files) in which he said that he had discussed the appointment of a successor to Taft with Attorney General William D. Mitchell and one other person but not with Cotton. "Mr. Cotton was Under Secretary of State," Hoover wrote, "and had nothing to do with judicial appointments."²

This direct conflict between the memories of Hoover and Cotton can scarcely be resolved by testimonials regarding the veracity of the two men or by buttressing the unquestioned reputation of Justice Frankfurter for telling the truth. It is quite conceivable that Hoover did talk with Cotton about the approaching vacancy in the chief justiceship and then forgot about it because he was looking to Mitchell for an official recommendation on the subject. But Cotton's assertion that Hoover offered Hughes the chief justiceship by telephone and got an immediate acceptance cannot be reconciled with the known facts.

Of course there was a telephone call from the White House to Hughes in New York. Hughes answered the call while one of his legal associates, Ernest L. Wilkinson, was in the office. Wilkinson heard nothing that could be interpreted as an acceptance of the chief justiceship. But Hughes did accept an invitation to meet with the President, and he apparently surmised what Hoover wanted to talk about. As Hughes put down the telephone receiver he told Wilkinson, "Hold up that opinion. It may not go out."³ An invitation to the White House while the chief justiceship was known to be under consideration because of Taft's grave illness was sufficient to put Hughes' legal advice beyond the reach of any private client.

Beyond this persuasive evidence that there was no offer or acceptance by telephone are the statements and conduct of Hughes himself. When he ate breakfast with the President on January 31, 1930, he had not made up his mind whether he would accept the onerous task of presiding over the Supreme Court if it should be offered to him.⁴ Hoover began the consultation by saying that Taft's resignation had not yet come in but it would undoubtedly be forthcoming.

Robert A. Taft, son of the Chief Justice and later Senator, had gone to the White House to report on his father's condition, and members of the Court had informed the Attorney General that Taft would resign as soon as the President was ready to nominate a successor. Hoover explained that he wished to be ready with a nomination as soon as the resignation came in "and thus prevent all the political pulling and hauling that takes place over an open vacancy."⁵

Instead of jumping at the bait, Hughes protested that he was too old to take on the responsibilities of the chief justiceship. Within three months he would be sixty-eight. It was highly desirable for the new chief justice to be younger so that he could expect a substantial period of service. A second reason why he should not accept the position, Hughes said, was that his son would have to resign as Solicitor General.⁶ His third argument was that he had "earned the right to finish his life in peace."

Hoover swept away these arguments, saying he was eager to keep Charles Junior in the government and would find him another position of equal importance. The main thrust of his argument was that the country would expect the position to go to Hughes and that it was Hughes' duty to accept it. Finally, he noted that Taft would more readily resign if he could be assured that Hughes would succeed him. Taft was known to be opposed to the elevation of Justice Stone to the seat under the eagle because he feared that Stone would have difficulty in "massing the court,"⁷ a fear that proved to be well founded when Stone ultimately succeeded Hughes.

At the end of a prolonged discussion, Hughes told the President that he would accept the position if there were reasonable assurance that his nomination would not provoke a fight in the Senate over his confirmation. Having been active in Hoover's 1928 campaign, Hughes feared a political Donnybrook of the type that did later break loose, but Hoover was reassuring on this point. It is unmistakably plain that there was no acceptance of the President's necessarily tentative offer until the end of the January 31 conference at the White House.

Promoters of the Cotton story make much of Hughes' failure to mention his reluctance to displace his son in his Biographical Notes, but there are many gaps in these notes, which were never intended for publication. Hughes emphat-



Chief Justice Charles Evans Hughes.

ically rejected all proposals that he write an autobiography on the ground that "autobiography almost invariably becomes apologia,"⁸ which he wished to avoid. His Notes were prepared for the benefit of his authorized biographer, who turned out to be myself. One of the first things he said to me, as he released a segment of his Notes into my hands, was that they should never be published. They later turned up in book form only because the Library of Congress carelessly permitted the copy which I entrusted to it for safe-keeping to be transcribed for publication despite an explicit reservation forbidding any such use. To supplement his incomplete Notes in the preparation of his biography Hughes made himself available for interviews, usually weekly, over a period of two and a half years. In those interviews he talked about his appointment as Chief Justice in great detail on several occasions in terms that riddled the Cotton story.

No one who knew Charles Evans Hughes intimately, moreover, would accuse him of failure to remember the interests of his son. Hughes was primarily a family man, who was deeply in love with his wife, Antoinette Carter Hughes, and ultra-sensitive to the welfare of his children. Charles Junior had been his partner in the prac-

tice of law, and Hughes was highly gratified by the naming of his son as Solicitor General, despite the resulting contraction of his (the elder Hughes') legal practice as a result, because most of the cases he had been arguing were against the government. When the question of the chief justiceship arose, Hughes allowed himself to be persuaded by Mrs. Hughes and the President in spite of the repercussions upon his son. It was a case of putting first things first regardless of unfortunate side effects. Half-baked journalistic reports and snide gossip cannot stand against the overwhelming evidence that Hughes did not forget his son's welfare in those crucial hours of decision.

In gathering data for my biography of Chief Justice Hughes I necessarily put the Cotton story under close scrutiny. When I brought to his attention the reports that he had accepted the chief justiceship on the telephone, he snorted with irritation. "How ridiculous," he said, "to suppose that the President would make an offer of this kind over the telephone."⁹ He went on to say that in the telephone conversation asking him to come to the White House there was no mention whatever as to the purpose of the requested visit.

My publication of facts that watered down the Cotton story led to a rather extended controversy with Justice Frankfurter. On November 14, 1956, he wrote me a letter saying that he continued to believe the Cotton story. I replied citing what seemed to me positive proof that Hoover could not have expected Hughes to decline when the offer was made. The Justice replied at length, and I did likewise. The exchange ran on through several more additions. It is worthy of mention here because Justice Frankfurter made several important concessions while clinging to what, for him, was the central point—that Cotton did discuss the nomination of a successor to Taft with the President. But the Justice withdrew from the contention of other purveyors of the Cotton tale that the chief justiceship was offered and accepted by telephone. On December 10, 1956, he wrote me: "I dare say there was nothing in that talk that could with precision be called an offer, and correspondingly there was nothing said by Hughes at the other end that could be called an acceptance."¹⁰

This obviously upsets the spite-laden conclusion that Hughes snatched the prize impulsively without so much as a thought about the conse-

quences for his son. About the only thing Justice Frankfurter clung to after being confronted by all the evidence available was a belief that Hoover did talk to Cotton about selecting a successor to Taft and that Cotton did suggest the nomination of Stone after a first offer to Hughes, which he would decline. Frankfurter wrote me on November 27, 1956:

The short of it for me is — considering Cotton's character, the contemporaneity of his account, the intrinsically verifying details in that account — that such a conversation between Cotton and the President (carefully timed during Secretary Stimson's absence from Washington) did in fact take place, that there was a telephone call and that as a result of it Hughes came down from New York and had the breakfast to which you refer. My guess is that Hughes did not accept unequivocally over the phone but that the shrewd Cotton rightly inferred that when he came down to see the President — as he doubtless was asked to have that breakfast to which you refer — he would allow himself to be persuaded by the President to accept. The last statement is, as I have indicated, an inference.¹¹

That inference is rather spongy in the face of the fact that Hughes was not told what the President wished to see him about. But there is very little historic interest in Mr. Cotton's thought processes. If he did recommend a tongue-in-cheek offer of the chief justiceship to Hughes, and if he did interpret the invitation to Hughes to come to the White House as an acceptance on his part of an office that had not been mentioned, his reckless comments and assumptions apparently made no impression on Hoover, who didn't even remember talking to Cotton on the subject.

One other aspect of the 1930 appointment demands substantial weight in the scales of history. The key presidential adviser in regard to judicial nominations was not Cotton but Attorney General Mitchell. When members of the Supreme Court informed Mitchell that Taft would resign as soon as the President was ready to name a successor, Mitchell reminded Hoover that he "would be confronted soon with the most important appointment that he would have to make as President, the appointment of a new Chief Justice."¹² Is it conceivable that Hoover would ignore the Attorney General in filling that position?

There was no doubt in Mitchell's mind as to who the new Chief Justice should be. Hughes was unquestionably the nation's leading judicial statesman, but Mitchell did not wish to make an

official recommendation without some indication as to what Hughes' response would be. He persuaded Justices Willis Van Devanter and Pierce Butler to sound out Hughes, which they did at a dinner in his New York apartment on January 28. While no details of this conference are on record, it is reasonable to assume that the two justices conveyed to Hughes the hope of Taft that Hughes would be his successor. What is known is that they reported to Mitchell an impression that Hughes was favorably disposed toward the offer if it should come.

With this green light for his objective, Mitchell went to the White House and recommended Hughes for the place. Since Hoover discussed no other potential nominees with the Attorney General, he concluded that the President's thinking paralleled his own. Hoover asked if Mitchell thought Hughes would acquiesce, and Mitchell replied that he felt sure of it.¹³ Mitchell left the conference with the understanding that Hoover would accept his recommendation and make an offer to Hughes.

Mitchell's account of those events is wholly consistent with that of Hoover. In his letter to Hughes on the subject the President wrote:

I at once discussed the question of his (Taft's) possible successor with the Attorney General. To my great satisfaction, Mr. Mitchell urged your appointment. The question required no consultation with others. It was the obvious appointment.¹⁴

In the course of his discussion with the President, Mitchell made some reference to the rumors that Taft's mantle might fall on Justice Stone. "The President expressed surprise," Mitchell writes, "and I realized that he had not been considering Justice Stone or anyone else but Mr. Hughes."¹⁵

Unless one is willing to assume that Mitchell lied or had an appalling distortion of memory, it is clear that Hoover could not have offered the chief justiceship to Hughes expecting him to decline. What, then, is left of the Cotton story?

The evidence is conclusive that the offer to Hughes was not made on the telephone. The assumption that Hughes acted precipitously without thinking about the consequences to his son's career is contradicted by the established facts in addition to being inconsistent with everything that is known about Hughes. Both Hoover and Mitchell have swept away Cotton's presumption

that the President expected Hughes to decline his offer. These well documented facts cannot be dissolved by the argument that Hoover did sometimes make offers by telephone or by claims that the Cotton story "has as a psychological matter the ring of truth." History cannot be made by dancing on a lily pad of fiction, however skillful the performer may be.

The point of this reiteration of data that have long been on record is not to pass judgment on Joseph Cotton. The conflict between the statements of Hoover and Cotton cannot be wholly resolved on the basis of available facts. What is apparent, however, is that Cotton's advice to Hoover — if indeed they did discuss the naming of a successor to Taft — was out on the fringe and had no bearing on the choice that was made. Cotton obviously did not know what was

going on in the minds of those who made the decision, and his crude attempt to read the mind of Hughes tends to undermine the credibility of the entire story.

A preponderance of facts indicates that Hughes was Hoover's first choice for the chief justiceship despite his closer personal friendship with Justice Stone. Hoover acted logically and responsibly in the national interest without being swayed by friends who had axes to grind. His high-minded decision brought to the leadership of the Supreme Court one of the ablest legal minds this country has produced at a time of crisis for constitutional government. To demean that performance as an insincere gesture, in the face of conclusive evidence to the contrary, is a grave disservice to the Court and to history.

Footnotes

¹ Hoover to Hughes, February 19, 1937, in the Hughes Papers, Library of Congress; also 3 *Memoirs of Herbert Hoover, The Great Depression, 1929-1941*, pp. 375-76.

² Hughes' *Biographical Notes*, pp. 293-94.

³ Author's interview with Ernest L. Wilkinson, February, 1949.

⁴ This is clear from Hughes' *Biographical Notes*, from Hoover's letters to Hughes, and from several Hughes interviews with the author from 1945 to 1947. The subject is covered in substantial detail in my two-volume authorized biography, *Charles Evans Hughes* (Macmillan, New York, 1951).

⁵ Hoover to Hughes, February 25, 1937.

⁶ Author's interview with Chief Justice Hughes, April 24, 1947.

⁷ Henry F. Pringle, *The Life and Times of William Howard Taft*, II, p. 1044.

⁸ Author's interview with Chief Justice Hughes, Nov. 19, 1945.

⁹ M.J.P. to Felix Frankfurter, Dec. 5, 1956, Frankfurter Papers, Box 147, Library of Congress.

¹⁰ Felix Frankfurter to M.J.P., Dec. 10, 1956.

¹¹ Felix Frankfurter to M.J.P., Nov. 27, 1956.

¹² William D. Mitchell to author, Nov. 7, 1949.

¹³ *Id.*

¹⁴ Hoover to Hughes, Feb. 25, 1937.

¹⁵ William D. Mitchell to author, Nov. 7, 1949.

JUDICIAL POTPOURRI

or,

"De Minimis,"



Toward 1987: Between War and Peace in 1782

William F. Swindler

(Editor's Note: *This continues the series of sketches leading up to the Bicentennial of the Constitution in 1987-89, with a review of the events of two hundred years earlier, in the unsettled year following the victory at Yorktown in 1781 and before the final peace treaty of 1783.*)

Although the surrender of Cornwallis at Yorktown in October 1781 made it clear to leaders on both sides of the Atlantic that the War of American Independence had been decided, it would be sixteen more months before the final peace settlement. The defeat of the principal British field army in America meant the end of Lord North's ministry in England; he resigned on March 20, 1782 and was succeeded two days later by Lord Rockingham, the minister who in 1766 had negotiated the repeal of the Stamp Act. This might have been a particularly auspicious preliminary to the settling of affairs between Great Britain and the newly-established United States; but Rockingham died a few months later and was succeeded July 1 by the Earl of Sherrburne.

Early in April, Rockingham had appointed Richard Oswald to represent the government in opening talks with Benjamin Franklin in Paris, but the change in ministries that summer, compounded by the insistence of the erstwhile French allies of America to participate (which, as it turned out, largely meant to obstruct), delayed any substantive discussions until late December. As for the other American members of the peace commission, their fortunes varied — John Jay did not arrive from Madrid until late June, and John Adams did not come from The Netherlands (where he had managed to secure an important loan of Dutch money for the new nation) until October. Of the remaining two, Henry Laurens had been captured on the high seas by the British Navy and not released until after the

preliminary articles were agreed to in November; and Thomas Jefferson, although named to the commission, never served at all.

There were several deals being negotiated behind the scenes of the peace talks between the former colonists and the mother country. Spain, which had managed to make a show of supporting the Americans without getting significantly involved in the hostilities, got a piece of the action in the form of a cession of "the Floridas" from Great Britain. Franklin, whether or not he seriously believed the British would consider it, made an early proposal that Canada be transferred to the United States as part of the settlement. The British, through Oswald, proposed to retain temporarily the military outposts around Detroit until satisfied that the treaty terms (e.g., recognition of debts owing British subjects, etc.) were being complied with; it would be some years before all British influence, commercial and otherwise, had been overcome in the Great Lakes and Upper Mississippi regions.

Meantime, back on the home front, the "perpetual union" proclaimed by the Articles of Confederation was beginning to lose some of its cohesiveness as the wartime necessities of cooperation dissolved. The individual states — several of which unselfconsciously called themselves "countries" — were setting about the business of both political and economic reorganization. If the main westward movement of population had not yet begun, the growing numbers within many of the states were shifting toward the undeveloped parts within their own boundaries. Settlers in Vermont were increasingly insistent upon converting the former "Hampshire grants" into a separate state; already, early in the Revolution, a proprietary state of "Transylvania" had been tentatively set up in the region west of the Potomac; and the so-called "State of Franklin," complete with a constitu-

tion and government under Col. John Sevier ("Nolachucky Jack") had been carved out of western North Carolina.

As for the Congress of the Confederation (a more accurate name for the Continental Con-

gress after March 1781), it was for the present being carried along by the momentum of the events of the previous year. But the problems confronting it as peace began to become a reality, were in many respects even more daunting than



Nearly one hundred years later the nation prepares to celebrate the bicentennial of the Constitution.

those of war. The protracted delay in peace negotiations meant that the Continental Army had to be continued on a wartime footing; but there were growing signs of discontent in that army, as the question of how the government could pay off its veterans remained glaringly unresolved. Part of the plan for ceding the "western lands" to the national government—a condition of final ratification of the Articles of Confederation—had been to discharge a major part of the soldiers' claims by land warrants and bounties. But with the lingering British presence in the Ohio and Upper Mississippi regions, and the conflicting claims of Spanish and American authorities on the Gulf Coast, the practicality of that scheme was cast in doubt.

Nor were hostilities entirely ended, by any means. In April a serious incident arose in New Jersey, where a band of Loyalists, whether or not acting under British military authority, captured and hanged a number of Continental Army soldiers. In retaliation, a British prisoner of war, Captain Charles Asgill, was selected to be executed in reprisal. General Washington and the British commander-in-chief, General Tarleton, held protracted discussions on the matter, and it was not until November that Asgill was finally relieved and released.

Meantime, the lack of a public treasury hamstrung the government's efforts. Money, or the lack of it, would prove to be the Achilles heel in the new body politic, when the Philadelphia Convention was called five years later; the quota system of financial support from the states was a totally ineffective paper plan—the states argued endlessly over the basis for the quotas, and seldom ended up paying anything. The Dutch loan was a brief stopgap, but other foreign loans were slow in coming, and France, which had advanced so much in the course of the war, declined to continue sending good money after bad. Men like Robert Morris and Alexander Hamilton wrestled mightily with the financial problem, but it would take the powers under a new Constitu-

tion to provide any practical means of solution.

Yet a government was taking shape. Charles Thomson, the "perpetual secretary" of Congress, now was head of a separate office which amounted to a state department—although foreign affairs was the business of another department under Robert R. Livingston of New York. A limited judicial system had begun in 1780 with the formal creation of the Court of Appeals to review maritime prize cases from the state courts of admiralty; and a counterpart of this system was the procedure for appointing courts of arbitration in interstate land disputes, which would have its most (and only) effective moment in the "Wyoming Valley" issue between Connecticut and Pennsylvania. A reorganized post office was now authorized by statute, whatever that might mean in practice.

But the problems were multiplying. The New England states demanded protection of their fishing rights off the Newfoundland Banks, while the westward-moving inland river commerce demanded a free port at the mouth of the Mississippi, at New Orleans. The "western lands" themselves needed to be organized with a view toward ultimate statehood, but it would be the last great action of the old Congress—the Northwest Ordinance—that would create a procedure for such organization. Although the states had all finally agreed to turn over their lands to the national government, they were very slow about doing it, and Georgia was busy with settlements beyond the Indian tribes on the lower Mississippi, where the Natchez government and the Yazoo land frauds would create constitutional litigation for a yet unborn Supreme Court.

Thus the year 1782 drifted on, between war and peace, both at home and abroad. The ringing rhetoric of 1776 had been followed by a five-year struggle for military survival, until the armies of the mother country were finally exhausted. For the next five years, a struggle for political and economic survival was in store.

Slogans to Fit the Occasion

Barrett McGurn

Few legal phrases are better known than the four words engraved above the front portico of the Supreme Court Building, yet years of correspondence flowing in and out of that edifice have reflected some humor and some controversy.

The polemics were best reflected in a letter Herbert Bayard Swope, the one-time executive editor of the *New York World*, wrote on January 25, 1935, to Chief Justice Charles Evans Hughes. Both were New Yorkers; the Chief Justice had been governor of that state. Evidently, from the ensuing exchange of correspondence, the two had a cordial knowledge of one another. But what Mr. Swope laid on the Chief Justice, with regard to the front inscription, was the grave grammatical charge of nothing short of tautology. Isn't "equal justice" redundant? Doesn't justice imply equality? But let Mr. Swope, in line with records in the Court Library, state his case in his own words. He wrote:

Dear Mr. Chief Justice,

May I presume upon the admiration and friendship I have felt for many years, to attempt an indictment of you and your interesting associates? For my purpose, I shall assume the right of the Napoleonic Code, and, regarding you as guilty until you prove your innocence, I return the following presentment:

I accuse the Great Court, of which you are Chief, of having violated an important canon of English.

I accuse the said Court of having permitted tautology, verbosity and redundancy, each of which is an abomination in good usage.

I submit, your Honor, that the adjective 'equal' has no place in the sentence. It is a distorting qualification which robs the thought of its true meaning. At best, it is supererogatory. . . .

I ask for immediate judgment and the excision of the offending word, so that the house of the

United States Supreme Court may continue to be the temple of *Astraea*¹, where there shall always be 'a well of English undefiled'

With high regard, . . .

The Architects' Suggestions

Mr. Swope had the right addressee for it was Chief Justice Hughes who had signed off on the now famous phrase. On May 2, 1932, the Chief Justice received a letter from David Lynn, the Architect of the Capitol who was the Executive Officer of the Supreme Court Building Commission. The Chief Justice was Chairman of that commission and Justice Willis Van Devanter served as another member. Mr. Lynn said in his letter that the two architects of the new structure, Cass Gilbert Jr. and John R. Rockart, had come up with proposed mottos for the architraves: "Equal Justice Under Law" for the West front and "Equal Justice Is the Foundation of Liberty" for the East. Mr. Lynn concluded, "If not satisfactory, the architects state that they will be pleased to have suggestions from you."

The note from Mr. Lynn commanded Hughes' prompt attention. The word was around that the architects had quite a few other inscriptions in mind both for the inside and the outside of the edifice. While it was evident that the designers of the building meant to get clearance for the two main writings on the structure, what about others due to be displayed less prominently? Ought the architects have a free hand in something so likely to leave an enduring mark on American law and justice? Chief Justice Hughes responded to Mr. Lynn on the very next day:

"When will it be necessary to pass upon the suggestions or to propose substitutes in order not



The Court's West Facade bearing the famous "Equal Justice Under Law."

to delay the progress of the work?"

Mr. Lynn, the files show, wasted no time in passing the inquiry to Messrs. Gilbert and Rockart. His brief missive is dated May 4, and on May 7 he had John Rockart's response. Concerning "the inscription to be cut in the exterior marble," he wrote, "we would state that the contractors have been repeatedly requesting information and instructions regarding the approval of these inscriptions, and, in view of this, action to that end should be taken as soon as possible."

On May 10 Mr. Lynn passed Mr. Rockart's comments to Chief Justice Hughes and, on May 16, 1932, on a 4-by-5-inch Supreme Court memorandum pad, of a type still in use at the Court, the following was written in the Hughes and Van Devanter hands:

"I rather prefer 'Justice the Guardian of Liberty,' CEH."

"Good, (W. V.)"

On May 21, the answer went back to Mr. Lynn from the desk of the Chief Justice:

"I have consulted with Justice Van Devanter, and we approve the inscription of the West Portico, to wit: 'EQUAL JUSTICE UNDER LAW.' We think that the inscription of the East Portico can be improved, and we favor the following: 'JUSTICE THE GUARDIAN OF LIBERTY.'"

Those, of course, are the building's two great engravings as they are today. As for any other sayings to be carved into the building, inside or out, Chief Justice Hughes added, "we do not desire any arrangement to be made for any of these inscriptions until they have been submitted

for approval." The present wordlessness of the rest of the building suggests that the Chief Justice's remark put a quick end to any lingering thought for further maxims.

Indictment Quashed

The Library files make plain the origin of the East side inscription (with its omission of a comma after Justice) but it leaves unanswered where Gilbert and Rockart came up with the Western words and their alleged tautology. Regardless of whence the words came the Chief Justice had sanctioned them. Thus challenged, Mr. Hughes fired off a reply to Mr. Swope, headed in underlined capital letters, "PERSONAL":²

"Immediate judgment. Indictment quashed."

So much for the journalist's demand that "Equal" be chipped from the West architrave. The Chief Justice went on:

The distress which led to your complaint may be somewhat alleviated if for a moment you free yourself from the tyranny of the blue pencil and consider the history of the law. 'Equal Justice' is a time-honored phrase placing a strong emphasis upon impartiality—an emphasis which it is well to retain.

Dictionaries use the expression in defining 'equity': 'Standard'—'equal justice'; 'Century'—'equal or impartial justice.' Glance at the first inaugural of Thomas Jefferson—is he not still your favorite author?—one who had much to say about 'Justice.' But he was not content to say simply 'Justice.' Even when he wished to bring his expression of political ideals within the 'narrowest compass' he spoke of 'equal and exact justice to all men.'

The reference was to Jefferson's March 4,



The Court's East Facade engraved with "Justice the Guardian of Liberty."

1801, address, in which he told his "fellow-citizens" that it was proper for them to understand "what I deem the essential principles of our Government" at a moment when he was entering upon "the exercise of duties which comprehend everything dear and valuable to you." What were those principles? Jefferson spelled them out:

I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. *Equal and exact justice* to all men, of whatever state or persuasion, religious or political. . . . (Emphasis mine).

But if the Court's main inscription and Jefferson's inaugural were prolix, they were not the only offenders. Mr. Hughes next cited a sentence from Justice Stanley Matthews' decision for the Court in *Yick Wo v. Sheriff Hopkins*, which was decided on May 10, 1886. The Justice spoke of the "equal protection of the law which is secured to . . . all . . . persons by the broad and beneficent provisions of the Fourteenth Amendment to the Constitution of the United States." He added:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of *equal justice* is still within the prohibition of the Constitution.

Justice Matthews cited precedents for the ideas he was expressing (if not for the precise phrase "equal justice"): *Henderson v. the Mayor of New York*, and *Chy Lung v. Freeman* (both from the 1875 October term), *Ex Parte Virginia*

(1879 term), *Neal v. Delaware* (1880 term), and *Soon Hing v. Police Chief Crowley*, a San Francisco all-night Chinese laundry case, decided in the Supreme Court on March 16, 1885. The *Ex Parte Virginia* case spoke of "equal rights (secured) to all persons. The *Soon Hing* decision spoke of "the equal rights which all can claim to the enforcement of the laws."

Emphasizing the *Yo Wick v. Hopkins* decision with its reference to "equal justice," Chief Justice Hughes assured his newsman correspondent that "probably no sentence in our Reports is more frequently quoted." Mr. Hughes added:

If I had time I could give you a host of illustrations of the use of the phrase 'equal justice.' There is a long history in that phrase. Try to bear with it. Very sincerely yours. . . .

Precedents

Perhaps the "long history" the Chief Justice had in mind were the five precedents (all minus the phrase "equal justice") which Justice Matthews had cited. In any case, Mr. Hughes had one further support for the maxim he and Justice Van Devanter had approved. He inserted it into his letter to Mr. Swope. As for whether "equal justice" is one of the high aspirations of American jurisprudence, "our oath drives the point home." The Chief Justice quoted the words from the first Judiciary Act of 1789 which every federal judge pronounces as he ascends the bench: "I . . . do solemnly swear . . . that I will administer justice without respect to persons, and do *equal right* to the poor and rich. . . ."

Far from squelching Mr. Swope the response only sharpened the editor's taste for more. On

February 14, 1935, he wrote again to Chief Justice Hughes to tell him that he was "flattered by the friendliness of your letter and impressed by its dialectical quality." Nonetheless, he said, "if I may be pardoned, (I) am not completely convinced. . . ." Mr. Swope took note that the Court's important gold clause decision was about to come down. He said that he would delay further polemics until after a decision so likely to call upon all the Court's intellectual energies. He added, however, that he did want to go on record as "impervious to the dictum of T. Jefferson, who would, as you point out, have asked for more. . . . (Jefferson had not sought mere equal justice but rather *"equal and exact justice"*).

Two days later, the Chief Justice in a two-sentence reply, put his emphasis where Mr. Swope earlier had lodged it. The Court was indeed busy. The Chief Justice begged: "Please consider the matter closed."

The file shows no further words from the voluble Swope, but there is an October 23, 1933, missive from Carl W. Ackerman, dean of the Columbia School of Journalism. Dean Ackerman's interest was in the rear portico inscription: "Justice The Guardian Of Liberty," a phrase the Chief Justice had devised and Justice Van Devanter had seconded.

Who recommended that phrase to the architects, the dean wished to know? Who chose the words? Who assumed the responsibility to approve?

Next day a note headed "My dear Justice Van Devanter" went from Chief Justice Hughes to his brother Justice. One may detect between the lines a hint of uncertainty. He wrote: "I cannot gather from Dean Ackerman's letter whether or not he likes the inscription." But, Mr. Hughes, added: "I still think it is appropriate."

Appended was a draft reply on which Mr. Hughes solicited comments. In brief it mentioned to the New York academic that the words had come from the Cass Gilbert firm in a somewhat different version, and that they had been adapted "to . . . (the) present form by me and in consultation with Mr. Justice Van Devanter."

Justice Van Devanter responded, "I still think the inscription appropriate, and your draft of proposed reply is entirely satisfactory to me."

Were the by now famous inscriptions thus the work of Chief Justice Hughes, Justice Van Devanter and the architects with a degree of inspira-



Office of the Curator, Supreme Court

Associate Justice Willis Van Devanter and Chief Justice Charles Evans Hughes – the Court's representatives on the Supreme Court Building Commission.

tion—tautological or not—from Thomas Jefferson and Justice Matthews? Chief Justice Hughes' letter to Mr. Swope had suggested that there was a good deal more to it than that, and a Burlington, Vermont, lawyer, Clarence P. Cowles of Cowles & Cowles, put himself to work hunting for such precedents. Mr. Cowles had been a Sunday School pupil of Mr. Hughes and was eager to vindicate him in all respects.

In volume 103 of the United States Reports, Mr. Cowles found one item. Justice Swayne had retired and Attorney General Devens, speaking at farewell exercises, saluted the old Justice fulsomely. He recalled the Book of Samuel in the Old Testament, how the departing ruler had challenged the Israelites to say whether he had ever wronged anyone.

"Sure I am," said the Attorney General, "that should the distinguished magistrate who retires from the bench ask 'who is there that has stood before me to whom I have not striven to do *equal and exact justice*?' the answer would be like that of the Hebrew people to the royal judge of Israel: 'there's no such man.'"

As Mr. Cowles searched further he produced a 24-page monograph which he donated to the Supreme Court Library.³ In the document Mr.

Cowles contended that the thoughts in the allegedly verbose front portico phrase were concepts which could be traced back to earliest legal thought, if not in precisely the same language, at least in parallel phrasings. Mr. Cowles cited these precedents (sometimes heaping fuel on Mr. Swope's fire):

- Hammurabi (circa 2130 to 2088 B.C.). In his Code he called upon the strong to deal justly with "the weak, the orphan and the widow."
- Pericles' Funeral Oration (circa 404 B.C.), quoted by Thucydides, and translated by Richard Crawley: "If we look to the laws, they afford *equal justice* to all in their private differences."
- God's voice in Ezechiel, chapters 18 and 33 (King James Revised Standard edition): "Is not My way equal?", thus equating equality and justice (a Swope contention).
- St. Paul to the Colossians (same edition), chapter 4: "Masters, give unto your servants that which is *just and equal*."
- Aristotle (340-321 B.C.) in Book 5 of the Nicomachean Ethics: "the *equitable* is *just*" (support again for redundancy?)
- The judicial oath prescribed by King Saint Louis (1226-1270), requiring all magistrates to swear that "*without regard* to persons they will do *Justice* according to the *laws* of this Kingdom."
- Blackstone's Commentaries on the Laws of England (1768), Volume III, chapter 27: "*Equity* is synonymous with *Justice*." (Another argument for the blue-penciller?)
- Sir Frederick Pollock's volume, "A First Book of Jurisprudence" with its comment that "Justice administered *according to the law* . . . seems capable of being reduced to Generality, *Equality* and *Certainty*."
- Justice Pliny Merrick's decision during the March 1859 Term of the Supreme Judicial Court of Massachusetts in *Fitchburg Railroad Company v. Addison Gage* (quoted in 12 Gray 393-

1866): "The principle derived from (common law) is very plain and simple. It requires *equal justice* to all."

- As a proud Vermonter Mr. Cowles cited one other precedent from his own Green Mountain state. The Vermont Constitutional oath, required of all judges, is a pledge to do "*equal* right and *justice* to all men . . . according to *law*."

Bottom Line

What then was the bottom line? Where did the Courthouse phrase originate? Justice Burton who joined the Court in 1945, some years after the retirement of the two members of the Building Commission, wrote his views in the *American Bar Association Journal* in 1951. He said that it could be taken as fact that neither of the building's great inscriptions "is a direct quotation from any identified source."

Even Mr. Cowles who had labored diligently to establish that the front portico phrase, excellent in each of its four words, was traceable to the distant past, conceded in a 1955 letter to Court Librarian Helen Newman: "These inscriptions are American Standard Revisions of old principles, written by Chief Justice Charles Evans Hughes, not exact quotations from any identified source."

Given that the correspondence in the Court files makes clear that the Building Commission members merely signed off on a front architrave motto sent over by the building architects, even that grudging concession from Chief Justice Hughes' old Sunday School pupil would seem to be too limited.

Footnotes

¹ Mr. Swope, in his exchange among the erudite, felt no need to spell out that Astraea in Greek mythology the daughter of Zeus and Themis (the goddess of Divine Justice) was, par excellence, the symbol of law and order.

² The Hughes letter is in the manuscript division of the Library of Congress.

³ The Harvard Law School Library in 1955 requested and obtained a copy of the Cowles monograph.



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