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## GENERAL STATEMENT

The Society, a private non-profit organization, is dedicated to the collection and preservation of the history of the Supreme Court of the United States. Incorporated in the District of Columbia in 1974, it was founded by Chief Justice Warren E. Burger, who served as its first honorary chairman.

The Society accomplishes its mission by conducting educational programs, supporting historical research, publishing books, journals, and electronic materials, and by collecting antiques and artifacts related to the Court's history. These activities and others increase the public's awareness of the Court's contributions to our nation's rich constitutional heritage.

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution and the judicial branch. The Society cosponsors Street Law Inc.'s summer institute, which trains secondary school teachers to educate their students about the Court and the Constitution. It also sponsors an annual lecture series at the Supreme Court as well as occasional public lectures around the country. The Society maintains its own educational website and cosponsors Landmarkcases.org, a website that provides curriculum support to teachers about important Supreme Court cases.

In terms of publications, the Society distributes a *Quarterly* newsletter to its members containing short historical pieces on the Court and articles describing the Society's programs and activities. It also publishes the *Journal of Supreme Court History*, a scholarly collection of articles and book reviews, which appears in March, July and November. The Society awards cash prizes to students and established scholars to promote scholarship.

The Society initiated the *Documentary History of the Supreme Court of the United States, 1789-1800* in 1977 with a matching grant from the National Historical Publications and Records Commission (NHPRC). The project seeks to reconstruct an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800 because records from this period are often fragmentary, incomplete, or missing. The Supreme Court became a cosponsor in 1979; since then the project has completed seven out of the eight volumes. An oral history program in which former Solicitors General, former Attorneys General, and retired Justices are interviewed is another research project sponsored by the Society.

The Society maintains a publications program that has developed several general interest books: *The Supreme Court Justices: Illustrated Biographies 1789-1995* (1995), short illustrated biographies of the 108 Justices; *Supreme Court Decisions and Women's Rights: Milestones to Equality* (2000), a guide to gender law cases; *We the Students: Supreme Court Cases for and About High School Students* (2000), a high school textbook written by Jamin B. Raskin; and *Black White and Brown: The Landmark School Desegregation Case in Retrospect* (2004), a collection of essays to mark the 50th anniversary of the *Brown* case.

The Society is also conducting an active acquisitions program, which has substantially contributed to the completion of the Court's permanent collection of busts and portraits, as well as period furnishings, private papers, and other artifacts and memorabilia relating to the Court's history. These materials are incorporated into exhibitions prepared by the Court Curator's Office for the benefit of the Court's one million annual visitors.

The Society has approximately 6,400 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 224 East Capitol Street, N.E., Washington, D.C. 20003, telephone (202) 543-0400, or to the Society's website at [www.supremecourthistory.org](http://www.supremecourthistory.org).

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# Introduction

Melvin I. Urofsky

Longtime readers of the *Journal* know that I often get very enthusiastic about the wide range of topics that we now include regularly under the rubric of Supreme Court history. When I first began studying constitutional history in graduate school, one read cases and little more. The art of judicial biography was in its infancy and essentially limited to a few books by Alpheus Mason. Scholars had not yet begun to plumb the riches that could be found in court records and papers, nor had they begun to explore the relationships among the men (at that time only men) who sat on the nation's highest court. All that has changed, of course, and while we still study cases—because, as Judge Richard Posner says, that's the bottom line—we now know that there is a great deal beyond the bottom line.

The first article this month, by Brendan Doherty, shows us how scholarship has developed in the oldest portion of our scholarship, the examination of cases. *Barron v. Baltimore* (1833) is, of course, a staple in ConLaw I courses, as the case that held that the Bill of Rights did not apply to the states. Usually it was taught as a prelude to the doctrine of

incorporation, but rarely did law-school teachers spend the time to examine the historical and political context surrounding the case. As Professor Doherty shows, to do so is to find layers of meaning.

Law clerks are such a staple part of the Court these days that many people assume there were always clerks. In fact, Justice Horace Gray began the practice of hiring bright young graduates from his alma mater, the Harvard Law School, when he served as chief judge of the Massachusetts high court. (One of these bright young men, Louis D. Brandeis, had a rather extraordinary career ahead of him.) Gray continued the practice in Washington; it was picked up by his successor, Oliver Wendell Holmes, Jr., and it spread until formalized and funded by Congress. Todd Peppers has long been fascinated by the role of clerks, and his research led him to look into who these "first clerks" were.

As editor, I am of course always on the lookout for articles, and the Civil War memoirs of the first John Harlan resulted from a research trip I made to Louisville. While working on Brandeis, I took a break to chat with

one of the law librarians, Scott Campbell, who had been arranging some materials in the Harlan Papers. He asked if I might be interested in a memoir of the Civil War that Harlan had written, and the answer was clearly yes. Scott's work is part of an ever-growing corpus of work on Harlan I, who for many years remained buried in a totally undeserved obscurity.

Felix Frankfurter once tried to rebut Hugo Black's assertion that the First Amendment enjoyed a "preferred" position in our constitutional hierarchy. Frankfurter wondered how that could be, since if one part is preferred, than another must be inferior. Well, yes, but as most scholars and judges recognize, some parts of the Constitution are less important than others—until you get a case involving these unremarkable clauses. That happened in the 1920s, when Congress adjusted judicial salaries at the same time it imposed an income tax under the new Sixteenth Amendment. As Barry Price shows, this created a personal as well as a jurisprudential question for the Justices, and how much they earned would depend on the answer. My guess is that at the time that last sentence in Article III, Section 1, did not seem "inferior."

When Justice Stephen Breyer finally relinquished his title of junior Justice after nearly a dozen years, our managing editor, Clare Cushman, decided to ask him about that unique position. From Breyer's appointment in 1994 until the appointment of Chief Justice Roberts and Justice Alito, we had one of the longest "natural courts" in the nation's history: that is, a court in which the members remained the same Term after Term. One of the effects of such a long-standing natural court is that the junior Justice at the beginning is the junior Justice for a long time. Aside from opening the door when there is a message during the Conference, what does the junior Justice do? Ms. Cushman gives us the answer.

Over fifteen years ago, I interviewed Marshall Small and about a dozen other former clerks of Justice William O. Douglas for an article I was preparing as part of a celebration

to mark the fiftieth anniversary of Douglas's appointment to the Supreme Court. My conclusion was that while Douglas worked his clerks hard, and certainly was not the warm and cuddly boss that Felix Frankfurter tried to be, for the most part his clerks recalled their year with Douglas as one of hard work, learning a great deal, and high regard—if not always great affection—for their boss. In his 2003 biography of Douglas, **Wild Bill**, Bruce Allen Murphy painted a very unflattering portrait of his subject, alleging that Douglas treated his clerks badly and that many of them disliked him intensely. After that book came out, some of Douglas's clerks held a reunion, and they agreed that their memories of the Justice differed considerably from those depicted in the book. They decided to set the record straight, and Marshall Small, remembering our conversation of many years ago, contacted me to see if the *Journal* would be interested. Of course we were, and this "collective memory" by some of his clerks offers us an interesting insight into how one Justice and his clerks interacted.

In recent years there have been a number of books and articles on the role of the Solicitor General, the lawyer who represents the government before the Supreme Court. It has long been known that the Justices show a great deal of deference to the SG's views, because he does speak for the Executive Branch—and when defending a law, for Congress as well. One scholar has called the Solicitor General the "tenth Justice." But the Solicitor General does not work in a vacuum. While he has great discretion in deciding how to defend laws and when the government should submit a brief, certain matters are policy-making by their nature, and then the decision about what the government's posture shall be is in the hands of the President or the Attorney General. A policy debate about one of the most important group of cases decided in the early 1960s saw Attorney General Robert F. Kennedy and Solicitor General Archibald Cox (Kennedy's former teacher at Harvard) adopting different views

of the federal government's stance on reapportionment. In our last issue, we published an article by Helen Knowles examining the subject (see "May It Please the Court . . .," vol. 32, number 2). Bruce J. Terris, who worked in the Office of the Solicitor General during that time, has written a behind-the-scenes ac-

count that further explores that conflict and its resolution.

Last, but never least, Grier Stephenson's "Judicial Bookshelf" reviews some recent books on the Court and, as ever, shows us the breadth of current scholarship on the subject.

As always, enjoy!





# Interpreting the Bill of Rights and the Nature of Federalism: *Barron v. City of Baltimore*

BRENDAN J. DOHERTY\*

In 1833, a mere forty-five years after the Constitution of the United States took effect, the young republic was striving to establish the form its constitutional government would take. For while the Constitution and its first ten amendments had set forth many principles regarding the rights of individual citizens with respect to the actions of their government, the precise nature of these relations would be determined in large part by U.S. Supreme Court Chief Justice John Marshall.

Central to this relationship was the extent to which individual rights, as articulated in the Constitution, would constrain the actions of both federal and state governments. The decision of the Supreme Court in a case originating fewer than forty miles away, in Baltimore, Maryland, would play a key role in determining the course of this complex and developing relationship. This case, *Barron v. City of Baltimore*, marked the first time that the Supreme Court faced the issue of whether the government of a state was subject to the restraints set forth in the Bill of Rights.<sup>1</sup> The questions in the case centered on the very nature of the federal compact on which the United States had been founded.

Charles Warren declared *Barron v. Baltimore* "the last of a series of vital decisions on constitutional law which had made the Chief Justiceship of John Marshall so memorable an era in American history."<sup>2</sup> David P. Currie described it as having "enormous significance,"<sup>3</sup> and Robert F. Cushman claimed that the case has made "an indelible impression on the development of civil rights in this country."<sup>4</sup> G. Edward White hailed it as "perhaps the one Marshall Court decision that seems of immediate contemporary significance."<sup>5</sup> Despite this abundance of effusive proclamations of its significance and frequent references in legal texts, however, little is known about the case of *Barron v. Baltimore*. This case, which marked the



The 1833 case of *Barron v. City of Baltimore* marked the first time the Supreme Court faced the issue of whether the government of a state was subject to the restraints set forth in the Bill of Rights. It originated in the city of Baltimore, Maryland, shown here in 1831, fewer than forty miles away from the Court.

final constitutional decision of John Marshall's tenure on the court,<sup>6</sup> has been remarkably unstudied. Through a better understanding of *Barron v. Baltimore*, we can more fully appreciate the impact of this landmark case upon the evolution of individual rights and American federalism.

### Baltimore in the Early 1800s

The dispute in *Barron v. Baltimore* centered on a wharf in that thriving port city. Trade fueled the prosperity of the growing metropolis of Baltimore in the early 1800s. Its westward position on the expansive Chesapeake Bay made it the principal gateway of trade to the Midwest until the advent of steam navigation on the Ohio and Mississippi Rivers in 1813 threatened to benefit New Orleans at the expense of Baltimore. A decline in trade with Europe following the War of 1812 also menaced the city's commercial prospects, but Baltimore countered with an aggressive road- and

canal-building program to the Midwest and maintained its mercantile prominence by expanding its trade to include new markets in the western hemisphere.<sup>7</sup>

Baltimore was a center of both international and domestic trade. Maryland flour proved particularly suited to keeping fresh in Brazil's tropical climate, sparking trade with South America that would make Baltimore a crucial center of the coffee trade. In addition, ships brought guano from Chile and Peru, which was then converted into fertilizer.<sup>8</sup> These products were much in demand along the eastern seaboard of the United States. Cotton and tobacco flowed to the city from the south, and ice and manufactured goods, especially shoes, came from New England, as Baltimore served as a hub of coastal commerce.<sup>9</sup> The census of 1830 found Baltimore to be the second most populous city in the United States, trailing only New York City; much of the city's populace depended on trade for their way of life.<sup>10</sup>

### Craig and Barron's Wharf

John Barron was a Baltimore merchant, wealthy enough to be co-owner of a prosperous wharf in the eastern part of the harbor, yet obscure enough that little can be found about him in the historical record. While many other figures in this case were mentioned at least tangentially in the books describing Baltimore at the time, Barron's name was nowhere to be found.<sup>11</sup> There is even some confusion about the date of his death. The Maryland Historical Society has a record of the death in 1828 of a John Barron who lived and ran a rope store near the site of the wharf in question.<sup>12</sup> In the Census Indices of 1810 and 1820, a John Barron is cited as living in Baltimore. In the 1830 index, no John Barron is to be found in Baltimore, but one is listed as living in nearby Harford County.<sup>13</sup> Court records indicate that John Barron was alive when the U.S. Supreme Court issued its 1833 ruling in the case, which creates a bit of confusion in the effort to sort out who he was, where he lived, and when he died.

Only slightly more is known about Barron's co-owner, John Craig, though the dates of his life can be more definitively established. While he also managed to avoid mention in numerous books about Baltimore during his lifetime, records about his life were found at the Maryland Historical Society. Born in 1770, he lived at #37 Thames Street, mere blocks from the site of the wharf. As the wharf was known as Craig and Barron's wharf, he may have been the senior partner in their venture. His death in 1827 deprived him of a place in history, as the 1833 Supreme Court decision ultimately bore the name of his business partner.<sup>14</sup>

Craig and Barron purchased their wharf in 1815 for the sizable sum of \$25,000. One of thirty-four wharves in Baltimore harbor at the time,<sup>15</sup> it was located on the eastern side of Fell's Point in Baltimore Harbor, between Thames Street and Lancaster Street (see Plan of the City of Baltimore in 1836 on page 217).

In the trial record, numerous witnesses described it as being one of the best and most valuable wharves in the city due to its location and the depth of the water surrounding it, which enabled it to serve vessels bearing up to 500 tons of cargo.<sup>16</sup> Yet, in discussing its size, a historian at the Maryland Historical Society observed, "I have no idea of its dimensions, but I have to warn you I've never encountered a wharf which wasn't 'one of the largest wharves in Baltimore,' according to its owners."<sup>17</sup>

While case records indicate that the wharf was quite profitable at the time Craig and Barron purchased it, their business declined precipitously thereafter. Beginning in 1815, the city of Baltimore took steps that dramatically affected the accessibility of Barron and Craig's wharf. In accordance with the power accorded by its charter "over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore," the city redirected the courses of several streams originating in the hills around the city. The water from these streams was diverted to the harbor directly in front of the merchants' bustling wharf. Throughout the ensuing seven years, periodic heavy rains sent rising waters downstream loaded with sediment, filling in the harbor by the wharf. Eventually, the water was left so shallow as to be useless for service as a wharf for large vessels.<sup>18</sup>

### The Case before the County Court

In early 1822, Craig and Barron sued the mayor and city council of Baltimore for damages to compensate for a decline in the value of their wharf due to the actions of the city (see Appendix I for a detailed chronology of the case). On March 21, 1822, Craig and Barron, represented by Charles F. Mayer, headed to the County Court of the Sixth Judicial District of Maryland.<sup>19</sup> While both sides would make changes to their legal teams throughout the twelve-year course of the case, the common denominator would be excellence. At different



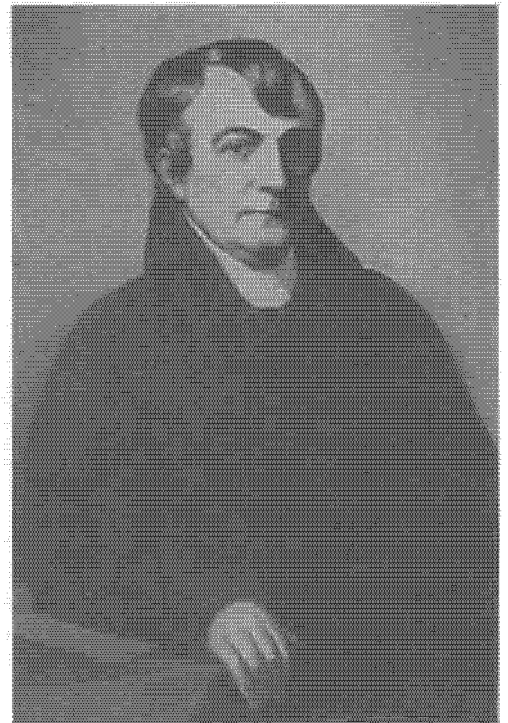
points in the proceedings, both sides employed some of the most respected attorneys in Maryland.

Mayer, a Baltimore native and an 1812 graduate of Dickinson College, was a successful attorney who in 1819 bested famed counsel William Wirt in his first case. He would later serve in the Maryland Senate from 1830 to 1835 and would become president of the Whig convention of Baltimore. In 1844, he would help found the Maryland Historical Society, the organization that proved so helpful in the researching of this case.<sup>20</sup> Mayer represented Craig and Barron from their first court appearance in 1822 through the Supreme Court decision in 1833.

Mayer's opposing counsel, John Scott, was also a permanent fixture in the case. While he represented the mayor and city council of Baltimore from the initial court date in 1822 through the final resolution of the case in 1833, little information on Scott's career is available. The mayor he represented is equally elusive: Mayor Edward Johnson was mentioned only once in the proceedings in the lower court, and, unlike several members of the city council, was not called to testify. While he was the nominal object of the lawsuit, it does not appear that he was involved in the case.<sup>21</sup>

Delay was the hallmark of the case at the county court level. It took three full years from that initial court date in 1822 for the substantive issues of the case to be addressed. At the court appearance in March 1822, Mayer requested "leave of the court here to imparl until the third Monday of September next."<sup>22</sup> "Imparl" was a British term, referring to a motion to adjourn for the purpose of negotiating a settlement.<sup>23</sup> Opposing counsel consented, and the parties were ordered to return in September 1822.

For the next three years, the case followed what became a familiar pattern. In September 1822, the parties returned to court, whereupon Mayer again requested leave to imparl. Opposing counsel consented, and the parties reconvened in March 1823. Again, Mayer requested



Mayor Edward Johnson (pictured) was mentioned only once in the *Barron* proceedings in the lower court, and, unlike several members of the city council, was not called to testify. While he was the nominal object of the lawsuit, it does not appear that he was involved in the case.

and was granted leave to imparl. In September 1823, March 1824, and September 1824, the parties met in court and by mutual consent adjourned for three successive six-month intervals. While there is no record of what attempts were made to settle the case during these recesses, it is evident that no settlement was reached. The two parties returned to court in March 1825.<sup>24</sup>

In March 1825, Mayer was joined in court by two other attorneys for Craig and Barron. The first, Peter H. Cruse, appears to have played only a minor role in the case, as he remained involved only until September 1826—a mere blip on the screen in the context of the twelve-year duration of the case. The other attorney, David Hoffman, represented Craig and Barron through December 1830, when the case had almost reached the U.S. Supreme Court.



Hoffman was a renowned legal educator who was one of the first professors at the University of Maryland. He published *A Course of Legal Study*,<sup>25</sup> which was declared by U.S. Supreme Court Justice Joseph Story to be "by far the most perfect system for the study of law which has ever been offered to the publick [sic]." Hoffman was the son-in-law of Pennsylvania Governor Thomas McKean, and, by all accounts, brought a sharp legal mind to bear on behalf of Craig and Barron.<sup>26</sup>

On that day in March 1825, three years after first bringing suit, Mayer, Cruse, and Hoffman filed a declaration before the county court, outlining their grievances against the mayor and city council of Baltimore. After describing the property in question and detailing the former profitability of the wharf, they concluded with the following summary of the actions of the city and the damages they had allegedly sustained:

[The mayor and city council of Baltimore] wrongfully and injuriously turned and diverted certain streams of water, and graded and paved certain streets, and cut down certain grounds, and erected and made certain dams and ditches and embankments, by means and in consequence whereof, the waters whereon and whereat the said pieces of ground and wharves . . . were, at the times aforesaid, and continually up to the time of the impetrating [sic] the writ aforesaid, obstructed and filled up with sand, and dirt, and clay, and otherwise, and the depth of said waters lessened, and the said Craig and Barron disturbed in the use, and deprived of the benefits and advantages aforesaid of said pieces of ground, and wharves, and wharf, and of said buildings and appurtenances; and the said mayor and city council of Baltimore kept up and continued to the time aforesaid, and yet keep up and continue the obstructions and in-

juries aforesaid on those several days and times, and during all the time aforesaid, and ever since have, by the mayor and city council of Baltimore, been greatly injured and disturbed in the use, enjoyment, value, profit, and advantage, as aforesaid . . . and could not nor can have and enjoy the same in so large, ample, and beneficial a manner as they otherwise, during all the time aforesaid, and thereafter, and henceforward, might, would, and ought to have had and enjoyed, and to have and enjoy the same, to wit, at the city of Baltimore, at the county aforesaid.

Wherefore the said Craig and Barron say that they are injured, and have sustained damage to the value of twenty thousand dollars; and therefore they bring suit, &c.<sup>27</sup>

The court ordered that the mayor and city council of Baltimore respond and directed the parties to return in September 1825. The ensuing three years followed a pattern similar to the past three. Every six months, the parties met in court and were instructed to return six months later. At each meeting, it is recorded that "the mayor and city council of Baltimore and their attorney as before, defend the force and injury, when, and so forth." The trial was then recessed by the consent of all parties until the following meeting six months hence. In September 1827, attorneys for the mayor and City of Baltimore did "defend the force and injury, when, and so forth, and say that they are not guilty of the premises in the declaration aforesaid mentioned."

During these three years, two other developments of particular significance took place. First, Roger B. Taney joined John Scott as counsel for the mayor and city council of Baltimore at the hearing in March 1827.<sup>28</sup> When Taney became involved in the case, he had already achieved notable prestige, though his greatest fame lay before him. The second

son of a Maryland tobacco plantation owner, he studied the law and became a successful attorney and politician. Living in Frederick, in western Maryland, from 1801 until 1823, he married Anne C. Key, sister of the famed Francis Scott Key, and was elected to the Maryland senate as a Federalist. After moving to Baltimore in 1823, Taney was named Attorney General of Maryland in 1827. He was by that time a strong supporter of Andrew Jackson, and would go on to serve as U.S. Attorney General, acting Secretary of the Treasury, and Chief Justice of the U.S. Supreme Court. He would be most remembered for his opinion in the *Dred Scott* case,<sup>29</sup> in which he held that slaves were not citizens and could not sue in federal courts, and that Congress did not have the authority to forbid slavery in the territories of the United States.<sup>30</sup>

The other change of great significance between 1825 and 1828 was reported by attorneys for Craig and Barron when the parties again convened in March of 1828, six years after the suit had been originally filed. They informed the Court that Craig had recently died, and offered no explanation for his death. Though Craig did not live to see the conclusion of the trial, Barron pressed on in search of compensation for the damages they had suffered.<sup>31</sup>

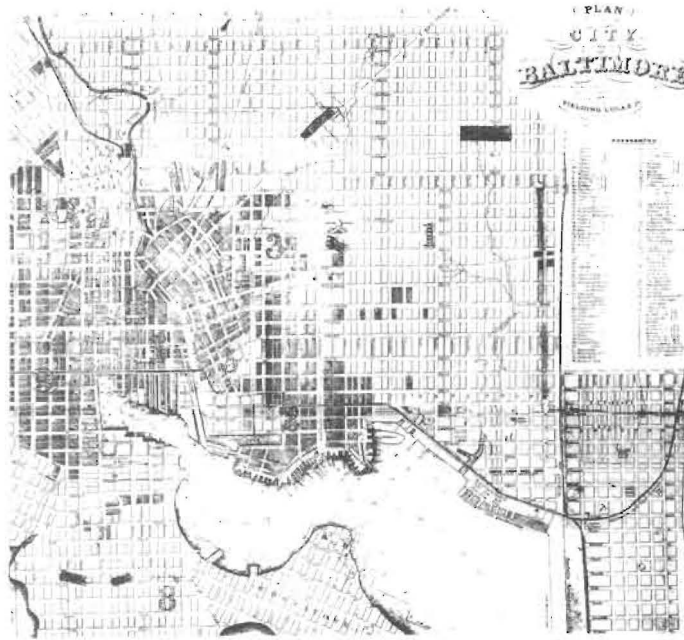
Three judges sat on the county court that would hear Barron's case. In 1824, Stevenson Archer had been appointed chief judge of the Sixth Judicial District, which consisted of Baltimore and Harford counties. An 1805 graduate of Princeton, Archer entered politics as an Independent and then became a Democrat, serving in Congress from 1811 until 1817 and again from 1819 until 1821. In 1845, he would become chief judge of the Maryland Court of Appeals.<sup>32</sup> Charles Wallace Hanson joined Archer on the bench of the county court, where he served from 1817 to 1832. While little is known about Hanson, records indicate that he was politically connected, as he was married to Rebecca Ridgely, daughter of Governor Charles Ridgely, and was the brother of

Alexander Contee Hanson, an ardent Federalist who served in both the U.S. House of Representatives and the Senate.<sup>33</sup> The third judge on the county court was Thomas Kell, who served from 1827 until 1833. Kell was a native of Baltimore and a former Attorney General of Maryland.<sup>34</sup>

At the hearing in March 1828, the court moved swiftly. A panel of twenty jurors was drawn by ballot. Each side struck four persons from the list, and the remaining twelve jurors were empanelled. According to the record, the jury then rendered a verdict in favor of Barron, awarding him \$4,500 in damages. In the record of the proceedings, there is no mention of when testimony was given, though extensive testimony is later referenced in the records of the county court.<sup>35</sup>

On May 5, 1828, the attorneys for the mayor and city council of Baltimore moved the court to arrest the judgment in favor of Barron. While they did not deny that the waters around Barron's wharf had been filled in as a result of actions of the city, they maintained that Barron had not shown that ships were thereby prevented from reaching Barron's wharf. Furthermore, they argued that because the obstructed waters around Barron's wharf were part of a public river, he had not suffered "special damage" that would entitle him to sue the city. The county court rejected the motion and rendered judgment in favor of Barron. Counsel for the city then filed three bills of exceptions that detailed the proceedings before the county court for use in a future appeal of the case.<sup>36</sup>

It is both interesting and important to note that there is no record that any constitutional questions were raised in the county court proceedings. Barron offered extensive testimony as to the former value of his wharf and the actions of the city that caused the wharf to be unreachable by the large vessels that used to do business with him. He called numerous witnesses who described alternative courses of action that the city could have taken. They went



This 1836 map shows Barron's wharf jutting out along the northern edge of the harbor (it is circled here). An 1831 directory described the location of the wharf as lying between Thames and Lancaster streets in Fells Point.

so far as to describe specific plans for rerouting the waters, which supposedly would have resulted in harm to none and benefit to all. Barron requested a judgment in his favor to compensate for the injuries he had suffered. But not once was the Constitution of the United States mentioned in the record of the county court. It appears that the constitutional grounds on which Barron later would appeal to the U.S. Supreme Court were not an issue in the case until the appellate stage.<sup>37</sup>

In response to the testimony in favor of the plaintiff's case, attorneys for the mayor and city council of Baltimore argued that they had acted under the obligation of their public duty and that Barron had no individual grievance against them. They offered evidence that their authority to act was granted both by the charter of the city and through various acts of the Maryland legislature. They summoned numerous witnesses, including several city commissioners, who testified that the city

undertook its campaign to pave and grade streets and divert waterways with regard to the interests and prosperity of the city as a whole. Explaining that they had considered all available alternatives, various witnesses contended that they had chosen the path that would result in the fewest negative consequences. Furthermore, counsel contended that Baltimore's actions constituted a public nuisance and that Barron had no right to claim damages for any individual injury he had suffered. Significantly, counsel for the defendants also did not raise constitutional issues before the county court.<sup>38</sup>

Instructions given to the jury made it appear that the judges favored Barron's case. Counsel for the defendants urged the court to instruct the jury to hold the mayor and city council faultless if it found that they had acted in good faith using their best judgment within authority granted to them by law. Rejecting this argument, the court instead instructed the

jury that if it believed that Barron's property had been injured as a result of the actions of the mayor and city council, then it should award him damages commensurate to the loss in value of the wharf. The court went on to order that even if the jury believed the defendants to be acting in the interests of the city as a whole, the plaintiff would still be entitled to damages for the injury to his property.<sup>39</sup>

Thus Barron was awarded \$4,500 in damages by the county court as compensation for the injuries to his wharf. While far less than the \$20,000 that Craig and Barron had originally demanded, the judgment nonetheless represented a significant victory. The question, however, was far from settled. Constitutional issues would soon be invoked to determine whether Barron was entitled to damages for injury to his wharf.

### The Case before the Maryland Court of Appeals

The mayor and city council of Baltimore were not content to let the judgment against them stand. On July 31, 1828, their attorneys requested and were granted a hearing before the Maryland court of appeals. In December of that year, Scott for Baltimore and Mayer for Barron pleaded the cases of their clients.

No elaborate arguments are described in the records of the proceedings. Scott advanced his case first, declaring that there was "manifest error" in the judgment of the county court and that it should be overturned. While no explicit mention of the Constitution was recorded, the heart of his argument was simply that "*by the law of the land*, that judgment ought to have been given for the said mayor and city council aforesaid."<sup>40</sup> In response, Mayer contended that there was no error in the proceedings before the county court, and that the judgment should be affirmed. The court then announced that it would adjourn until the following June, at which point it would rule on the case.<sup>41</sup>

The Maryland court of appeals that heard the case was headed by Chief Judge John Buchanan, who served on that court as an associate judge from 1806 to 1824 and as chief judge from 1824 until his death in 1844.<sup>42</sup> Joining Buchanan on the court were five associate judges: Richard Tilghman Earle, William Bond Martin, John Stephen, Stevenson Archer, and Thomas Beale Dorsey.<sup>43</sup> Archer was an associate judge of the court of appeals by virtue of his position as chief judge of the Sixth Judicial District.<sup>44</sup> As he was listed as present at the hearing in December 1828, it appears that Archer had a role in the appeal of the judgment he had rendered in the county court. What that role was and whether he agreed with the ruling of the court of appeals are not known.

The parties gathered in the court of appeals in June 1829, only to learn that the court had not yet reached a decision. They were ordered to return in December 1829. When they did so, the court was still not ready to issue a verdict. Again, in June 1830, the court announced that it was not yet ready to rule. The parties returned in December 1830, two years after the appeal had been argued, to hear the ruling.<sup>45</sup>

Mayer and Hoffman came to court on the behalf of Barron that day; Scott and Taney were the representatives of the mayor and city council of Baltimore. The court of appeals issued a short ruling, saying that the county court had "manifestly erred" in its decision and ordering that the ruling "be reversed, annulled, and held entirely as void." The award to Barron was overturned and Barron was ordered to pay the court costs for the mayor and city council. The case was not remanded to the county court for retrial.<sup>46</sup>

Barron's appeal to the Supreme Court of the United States, filed eight and a half years after he first filed suit against Baltimore, was acted upon rapidly. The following month, in January 1831, the Supreme Court issued a writ of error to Chief Judge Buchanan, ordering him to send the records of the case to the Supreme Court for a hearing to be



held the following August. Barron's case was about to be heard by the highest court in the land.<sup>47</sup>

### The Case before the Supreme Court of the United States

#### The Court at the Time

The case of *Barron v. City of Baltimore* would be the last constitutional decision of Chief Justice John Marshall, who led the Court from 1801 until 1835. The strength of the Marshall court was its unity, and by most accounts John Marshall was the source of that unity. Disagreements were addressed behind closed doors, with the goal of presenting a united front in the interpretation of the Constitution. Marshall emphasized consensus, and he is credited with using his powers of persuasion to achieve it frequently.<sup>48</sup> When the court spoke, it was often with Marshall's voice; he himself delivered most of the Court's constitutional decisions.<sup>49</sup>

Low turnover and personal familiarity were other hallmarks of the Marshall court. Only fifteen men sat beside Marshall in his thirty-five years on the Court. The Court remained intact, composed of the same seven Justices, from 1811 until 1823. Four of those seven Justices continued to serve together until 1834.<sup>50</sup> As the Justices did not bring their wives to Washington, D.C. and all lived together in the same boarding house,<sup>51</sup> they ate and spent leisure time together. In the words of Justice Joseph Story, the Justices were "[p]erfectly familiar and unconstrained."<sup>52</sup> Working and living side by side for many years presumably contributed to the Justices' ability to achieve consensus on complex issues and to unite behind an opinion.<sup>53</sup>

Of course, whether that unanimity was for good or ill depended on one's point of view. Thomas Jefferson, a frequent critic of Marshall, once proclaimed that in the Court, "[a]n opinion is huddled up in conclave, perhaps by a majority of one, delivered as if

unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind."<sup>54</sup> The accuracy of this scathing assessment is difficult to gauge, as the contributions of the other Justices are far less known than those of Marshall due to the infrequency with which they authored opinions.<sup>55</sup>

#### John Marshall

John Marshall has been described as extremely well qualified to interpret the intentions of the framers of the Constitution. Having fought in the Revolutionary War, been a delegate to the Virginia convention that ratified the Constitution, served in Congress, and served as Secretary of State, he was deeply involving in the founding years of the republic.<sup>56</sup> While Marshall's opinions drew both high praise and harsh criticism, the experiences he brought to bear in his interpretation of the Constitution are undeniably impressive.

If there was one principle that guided Marshall on the Bench, it was his commitment to the federal union that the Constitution had established.<sup>57</sup> Though he was accused by many of favoring the national government at the expense of the states—R. Kent Newmeyer labeled this "constitutional nationalism"<sup>58</sup>—he also demonstrated that in certain cases he would rule in favor of the prerogatives of states. G. Edward White argued that while Marshall did impinge upon state sovereignty at times, he paid heed to the rights of states when he felt it was in the best interests of the union.<sup>59</sup> David Currie described Marshall as guiding the Court on a course that both affirmed and limited federal power.<sup>60</sup>

Often closely tied to the issue of state sovereignty was the question of property rights. Marshall was widely viewed as favoring the rights of property owners. To him, "[p]roperty was identified with liberty."<sup>61</sup> In the words of Francis Stites, "The right to property was, in Marshall's view, almost as important as life itself." Marshall was not the only Justice to espouse such strong views.



*Barron* was the last constitutional decision made by Chief Justice John Marshall before he retired in 1835. Pictured is Capitol Hill in the 1830s, when the Justices heard cases in a room in the Capitol basement.

Justice William Johnson declared that a person's property "becomes intimately blended with his existence, as essentially as the blood that circulates through his system."<sup>62</sup> *Barron v. Baltimore* would bring questions about both property rights and state and federal sovereignty before the Court.

#### **Barron's Case**

While the questions before the Supreme Court in *Barron v. Baltimore* centered on the issue of whether the actions of the city of Baltimore, authorized by the state of Maryland, were contrary to the Fifth Amendment of the Constitution of the United States, the task of Charles F. Mayer, attorney for Barron, was multilayered. Not only did he need to convince the Court of the merits of his case, but he also had to demonstrate that it fell within the appropriate jurisdiction. To do so, he divided his argument into five points. He maintained that:

1. The municipal corporation of the city of Baltimore, headed by the mayor and the city council, was liable for the tort of depriving a citizen of property without compensation;

2. The state of Maryland, acting through its legislature, had granted authority to the city of Baltimore to act as it did;
3. The Fifth Amendment of the Constitution applied to the state of Maryland; therefore, the city of Baltimore, acting under the authority of the state of Maryland, had violated a right granted by the Fifth Amendment. The relevant section of the Fifth Amendment, commonly known as the Takings Clause, reads: "[N]or shall private property be taken for public use without just compensation";
4. The facts of this case showed that the city, operating under the authority of the state, had acted in a manner contrary to the Constitution, and that the U.S. Supreme Court had jurisdiction over this case;
5. The U.S. Supreme Court should rule not only on the principle at stake but also on the facts of the case; namely whether the plaintiff had shown special damage to his interests that would distinguish this case from damage resulting from a public nuisance on the part of the city.

No evidence exists in the record of what response to these points the city of Baltimore

made, nor of what transpired in the courtroom on the day of the hearing. In an inauspicious sign for Barron's case, the Supreme Court indicated in the record a request that counsel for the plaintiff restrict his argument to the question of whether the case fell under the court's jurisdiction. This was the only issue considered in the court's ruling.<sup>63</sup>

### The Court's Decision

The Supreme Court announced its decision in *Barron v. Baltimore* during its January Term of 1833. John Marshall delivered the opinion of the unanimous court. Marshall's opinions were often lengthy, filled with rhetorical flourishes and complex reasoning that connected grand principles before he rendered judgment on the issue at hand in a way that had great implications for future cases.<sup>64</sup> While *Barron v. Baltimore* certainly set a precedent that would affect future cases, the opinion itself was brief and straightforward.<sup>65</sup>

Marshall summarized Barron's argument regarding the Fifth Amendment as insisting that, "this amendment being in favour of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States." Stating that this issue was key to whether the Court could take jurisdiction of the case, he declared, "The question thus presented is, we think, of great importance, but not of much difficulty."<sup>66</sup>

Marshall divided his opinion into three sections. The first addressed the legislative intent behind the Bill of Rights. The Constitution, he wrote, was created to shape the government of the United States, not the governments of pre-existing individual states. Prior to the creation of the federal government, each state had formed its own constitution to guide its respective government according to its needs and desires. Just as the U.S. Constitution set forth the outlines of the federal government, so did its restrictions naturally apply to this same government. Thus, reasoned Marshall, the Fifth Amendment was correctly interpreted

as a restraint on the actions of the federal government, but not on the actions of individual states.<sup>67</sup>

This reasoning is supported by the wording of Alexander Hamilton's *Federalist* no. 83, in which he declared that "[t]he United States, in their collective capacity, are the OBJECT [sic] to which all general provisions in the Constitution must be understood to refer."<sup>68</sup> Not content to let this general principle stand alone, Marshall turned to the text of the Constitution and the Bill of Rights to support his argument.

The Chief Justice then directly addressed a specific point in the argument of the plaintiff. Counsel for Barron had asserted that the instructions directed to the states in Article I, Section 10 of the U.S. Constitution, setting forth limitations on the activities of the states, served as proof that the Constitution should apply to both federal and state governments. In the view of the Court, Marshall asserted, this section supported the opposite conclusion. According to the Chief Justice, Article I, Section 10 of the Constitution must be examined in tandem with the ninth section of the same article, which lays out restrictions on the actions of the government, to resolve this question. While Article I, Section 9 does not explicitly state to which level of government its restraints should apply, in the judgment of the court, they were clearly directed to the federal government of the United States.<sup>69</sup>

In contrast, the tenth section of the first article of the Constitution expressly sets forth limitations that apply to state governments. The Court's opinion pointed out that the restrictions on states outlined in the tenth section deal with areas that are usually the domain of the federal government—entrance into treaties, coinage of money, grants of letters of marque and reprisal, and so on. Thus, reasoned Marshall, "in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms,



the restrictions contained in the tenth section are in direct words so applied to the states."<sup>70</sup>

Marshall's argument is supported by the general prohibition in Article 9 that "[n]o Bill of Attainder or ex post facto Law shall be passed" and the specific restriction in Article 10 that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law." If the general prohibitions in Article 9 could be construed as limiting the actions of the states, there would be no need for a specific prohibition applying to the states in Article 10.

Having assessed the wording of and distinctions between Sections 9 and 10 of Article I, Marshall asserted that the same logic must apply to interpreting the Bill of Rights. As the Constitution was created to constrain the federal government, only those sections that include specific indication of their applicability to the states could be construed to limit the governments of the several states. Thus, the Fifth Amendment's prohibition of the taking of private property for public use without just compensation should apply only to the federal government and not to actions of the states.<sup>71</sup>

The Chief Justice argued that the history behind the Constitution and Bill of Rights did not support the interpretation that the Bill of Rights would apply to the states. He declared that it was "universally understood" that the adoption of the Constitution hinged upon the subsequent adoption of amendments specifically designed to protect against the much-feared possibility of an overreaching federal government; that these amendments were to apply to the federal government and not to the states; and that the court could not apply them in such a manner as requested by the plaintiff.<sup>72</sup>

Scholars have agreed that it was, as Marshall said, "universally understood" that the Bill of Rights would not apply to the states. Joseph P. Cotton, Jr. declared that

it was a fact of history beyond discussion that the first eleven amendments to the federal Constitution were a

bill of rights to the States intended to secure them a greater measure of sovereignty and to limit the federal power; and it is alike clear that the adoption of the Constitution by some of the States was conditioned on the adoption of these amendments.<sup>73</sup>

G. Edward White asserted that the Bill of Rights was

originally going to be inserted as an additional set of limitations included in Article I, Section 9, all of whose limitations are either general or specifically directed against Congress. Limitations on the States were also proposed, and they were to be inserted in Article I, Section 10. The eventual insertion of the Bill of Rights as amendments was done as a matter of convenience and intelligibility rather than because of substantive considerations.<sup>74</sup>

Robert F. Cushman described the Bill of Rights in the following way:

One of the bitter criticisms urged against our federal Constitution as it came from the hands of the Convention was that it contained no bill of rights. It was feared that without specific guarantees the civil rights and liberties of the people and the states would be at the mercy of the proposed national government. Ratification was secured, but with a tacit understanding that a bill of rights should promptly be added which should restrict the national government in behalf of individual liberty.<sup>75</sup>

Having established that the Fifth Amendment to the Constitution was directed toward the federal government and not toward the governments of the states, Marshall declared that the Supreme Court had no jurisdiction in the matter and dismissed the case of *Barron v. City of Baltimore*.<sup>76</sup> Twelve years after he first filed

suit, John Barron was denied damages for the injuries his wharf had suffered.

### The Legacy of *Barron v. Baltimore*

The attempt of a merchant from Baltimore to recover damages for injuries to his wharf had significant ramifications. In case after case for years to come, the Supreme Court would reaffirm its decision that the individual protections promised by the Bill of Rights did not apply to the actions of state governments.<sup>77</sup> The right of each state to determine the nature of the relationship between individual liberties and the actions of city and state governments had been affirmed by the highest court in the young republic.

Thus stood the law of the land until the ratification of the Fourteenth Amendment to the Constitution on July 9, 1868. The section therein that reads "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" would reopen the question of the applicability of the Bill of Rights to the states.

This controversy, known as the incorporation debate, centers on the question of the extent to which the Fourteenth Amendment opened the door for certain provisions of the Bill of Rights to apply to the states. Through the years, certain rights have been incorporated incrementally via the Fourteenth Amendment, as case after case has come before the Supreme Court. Although its blanket declaration of the inapplicability of the Bill of Rights to the states no longer holds, *Barron v. Baltimore* has never been overruled,<sup>78</sup> and is still a ringing declaration that the intent of the framers was that the Constitution was principally designed to limit the actions of the federal government, and not the states.

An understanding of the principles underlying the decision in *Barron v. Baltimore* is crucial to comprehending the nature of the federalist compact in the founding days of the republic. Only through familiarity with these

origins can we better understand the relationship between the federal government and the states and the radical changes in that relationship that were brought on by the ratification of the Fourteenth Amendment.

Examination of *Barron v. Baltimore* also makes a valuable contribution to a balanced assessment of the career of John Marshall. While he did greatly expand the authority of the federal government, often at the expense of the states, he also upheld the rights of the states in certain circumstances. Though he has been characterized as a nationalist, *Barron* demonstrates that he might be even more aptly described as a federalist, for he upheld the rights of states as well as the prerogatives of the federal government under the guidelines of the federal compact.

Though many of the details of *Barron v. City of Baltimore* have been lost to history, maps subsequent to 1841 show Barron's wharf as belonging to Robb and Cox.<sup>79</sup> While Barron's name has been inscribed in the annals of constitutional law, it is not known what became of him after he lost a twelve-year fight in the courts to be compensated for damage to his precious wharf. In the words of Francis P. O'Neill of the Maryland Historical Society, "Having your name attached to a Supreme Court case is certainly no guarantee of undying fame, at least not in Baltimore."<sup>80</sup>

### Appendix I: *Barron v. Baltimore* Chronology of Legal Events

- |                   |  |
|-------------------|--|
| January 1, 1815   | In their suit, Barron and Craig cited this date as "the time of committing the grievance hereinafter mentioned"; that is, they alleged that the injury to their property commenced on this date. |
| February 19, 1822 | The mayor and city council of Baltimore were summoned before the County Court of the   |

- March 21, 1822 Sixth Judicial District of Maryland to answer John Barron and John Craig's plea of trespass. Charles F. Mayer, attorney for John Barron and John Craig, and John Scott, attorney for the mayor and city council of Baltimore appeared before the county court. Mayer requested leave to imparle; hearing set for September 1822.
- September 1822 Mayer again requested leave to imparle; hearing set for March 1823.
- March 1823 Mayer again requested leave to imparle; hearing set for September 1823.
- September 1823 Both parties met in court. By the consent of all concerned, the proceedings were postponed until March 1824.
- March 1824 Both parties met in court. By the consent of all concerned, the proceedings were postponed until September 1824.
- September 1824 Both parties met in court. By the consent of all concerned, the proceedings were postponed until March 1825.
- March 1825 David Hoffman, Charles F. Mayer, and Peter H. Cruse, attorneys for Barron and Craig, filed a declaration against the mayor and city council of Baltimore, outlining the causes of their suit and valuing \$20,000 in injuries incurred. The court ordered the mayor and city council to respond, and set the next day in court for September 1825.
- September 1825 Both parties met in court. In court records, it is written that the attorneys for the mayor and city council of Baltimore did "defend the force and injury, when, and so forth." By the consent of all concerned, the proceedings were postponed until March 1826.
- March 1826 Both parties met in court. In court records, it is written that the attorneys for the mayor and city council of Baltimore did "defend the force and injury, when, and so forth." By the consent of all concerned, the proceedings were postponed until September 1826.
- September 1826 Both parties met in court. In court records, it is written that the attorneys for the mayor and city council of Baltimore did "defend the force and injury, when, and so forth." By the consent of all concerned, the proceedings were postponed until March 1827.
- March 1827 Both parties met in court. Charles F. Mayer, David Hoffman, Upton S. Heath, and Hugh D. Evans were recorded as the attorneys for Craig and Barron; John Scott and Roger B. Taney were recorded as the attorneys for the mayor and city council of Baltimore. In



- court records, it is written that the attorneys for the mayor and city council of Baltimore did "defend the force and injury, when, and so forth." By the consent of all concerned, the proceedings were postponed until September 1827.
- September 1827 Both parties met in court. In court records, it is written that the attorneys for the mayor and city council of Baltimore did "defend the force and injury, when, and so forth, and say that they are not guilty of the premises in the declaration aforesaid mentioned." By the consent of all concerned, the proceedings were postponed until March 1828.
- March 1828 Both parties met in court. It was announced that John Craig, co-owner of the wharf, had died. A jury of twenty persons was drawn by ballot. After each party struck four people from the list, a jury of twelve was empanelled. The jury rendered a verdict awarding \$4,500 dollars to John Barron. Attorneys for the mayor and city council of Baltimore offered a motion in arrest of judgment.
- May 5, 1828 The county court overruled the motion in arrest of judgment and rendered a judgment of \$4,500.
- May 14, 1828 Attorneys for the mayor and city council of Baltimore filed three bills of exceptions.
- July 31, 1828 Attorneys for the mayor and City of Baltimore requested and were granted a hearing before the Maryland Court of Appeals.
- December 1, 1828 Record of proceedings before the county court sent to the Maryland Court of Appeals.
- December, 1828 John Scott, attorney for the mayor and city council of Baltimore, argued that the county court had ruled in error. Charles F. Mayer, attorney for John Barron, argued that the judgment of the county court be affirmed. The parties were instructed to return on June 8, 1829 to hear the judgment of the court of appeals.
- June 8, 1829 Both parties met in court and were informed that the court of appeals was not ready to render a judgment. The parties were instructed to return on December 7, 1829.
- December 7, 1829 Both parties met in court and were informed that the court of appeals was not ready to render a judgment. The parties were instructed to return on June 14, 1830.
- June 14, 1830 Both parties met in court and were informed that the court of appeals was not ready to render a judgment. The parties

- were instructed to return on December 6, 1830.
- December 6, 1830 Both parties met in court. Charles F. Mayer and David Hoffman were present as attorneys for John Barron. John Scott and Roger B. Taney were present as attorneys for the mayor and city council of Baltimore. The Maryland Court of Appeals ruled that the judgment of the county court was "manifestly erred" and ordered it to be "reversed, annulled, and held entirely as void." Additionally, John Barron was ordered to pay \$374.88 and one-third cents to the mayor and city council of Baltimore to cover their expenses.
- January 1831 Writ of Error issued by the U.S. Supreme Court to John Buchanan, Chief Judge of the Court of Appeals for the Western Shore of Maryland. Supreme Court hearing set for August 1831
- June 15, 1831 Luke Tiernan, Charles Tiernan, and D. Williamson, attorneys for John Barron, posted a bond of \$500 at the Court of Appeals for the Western Shore of Maryland to cover the costs incurred by the mayor and city council of Baltimore if Barron should lose the suit.
- June 22, 1831 A citation was served upon John Scott, attorney for the mayor and city council of Baltimore, by John Buchanan, Chief Judge of the Court of Appeals for the Western Shore of Maryland. The court of appeals was ordered to send the records and proceedings of the case to the U.S. Supreme Court.
- July 1, 1831 Records and proceedings of the case were sent to the U.S. Supreme Court.
- August 1831 The hearing before the U.S. Supreme Court was scheduled to be held during this month. No evidence in the case records indicates when it actually took place.
- January Term 1833 U.S. Supreme Court issued its unanimous decision in *Barron v. City of Baltimore*.

## ENDNOTES

\*The author would like to thank Francis P. O'Neill of the Maryland Historical Society, William K. Muir, Melissa Cully Anderson, Stephen Wasby, Donna Schuele, Matthew Holden, and Robyn Altman for their assistance with and comments on this article.

<sup>1</sup>Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 *Yale Law Journal* 1193-284, 1198 (1992).

<sup>2</sup>Charles Warren, quoted in Charles Grove Haines, *The Role of the Supreme Court in American Government and Politics: 1789-1835* (Berkeley: University of California Press, 1944), p. 608.

<sup>3</sup>David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago: University of Chicago Press, 1985), p. 189.

<sup>4</sup>Robert F. Cushman, *Leading Constitutional Decisions*, 14<sup>th</sup> ed. (New York: Appleton-Century-Crofts, 1971), p. 181.

- <sup>5</sup>G. Edward White, *The Marshall Court and Cultural Change*, vols. III–IV (New York: Macmillan Publishing Co., 1988), p. 589.
- <sup>6</sup>Lawrence B. Evans and Charles G. Fenwick, *Cases on American Constitutional Law*, 5<sup>th</sup> ed. (Chicago: Callaghan and Co., 1942), p. 27.
- <sup>7</sup>Raphael Semmes, *Baltimore as Seen by Visitors: 1783–1860* (Baltimore: Maryland Historical Society, 1953), pp. 33–34, 62.
- <sup>8</sup>Hamilton Owens, *Baltimore on the Chesapeake* (Garden City, NY: Doubleday, Doran, and Co., Inc., 1941), pp. 250–55.
- <sup>9</sup>Interview with Francis P. O'Neill, Reference Librarian, Maryland Historical Society. November 21, 2001.
- <sup>10</sup>Owens, *Baltimore on the Chesapeake*, p. 244.
- <sup>11</sup>All works on Baltimore's history cited in this paper were scoured for references to *Barron*. None could be found.
- <sup>12</sup>O'Neill interview, November 21, 2001.
- <sup>13</sup>Ronald Verne Jackson, et al., eds., *Maryland 1810 Census Index* (Bountiful, UT: Accelerated Indexing Systems, Inc., 1976), p. 5; Ronald Verne Jackson, et al., eds., *Maryland 1820 Census Index* (Bountiful, UT: Accelerated Indexing Systems, Inc., 1977), p. 5; Ronald Verne Jackson, ed., *Maryland 1830 Census Index* (Bountiful, UT: Accelerated Indexing Systems, Inc., 1977), p. 6.
- <sup>14</sup>O'Neill interview, November 21, 2001.
- <sup>15</sup>*Ibid.*
- <sup>16</sup>Lower court records for *Barron v. Baltimore*, in *The Records and Briefs of the Supreme Court of the United States*, part 1, 1832–1860 (Wilmington, DE: Scholarly Resources, Inc.).
- <sup>17</sup>O'Neill interview, November 21, 2001.
- <sup>18</sup>*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).
- <sup>19</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, p. 4.
- <sup>20</sup>Conway W. Sams and Elihu S. Riley, *The Bench and Bar of Maryland: A History 1634–1901* (Chicago: The Lewis Publishing Co., 1901), pp. 318–20.
- <sup>21</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*.
- <sup>22</sup>*Ibid.*, p. 5.
- <sup>23</sup>Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2d ed. (New York: Oxford University Press), p. 420.
- <sup>24</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, pp. 4–6.
- <sup>25</sup>David Hoffman, *A Course of Legal Study, Addressed to Students and the Profession Generally* (Baltimore, MD: Joseph Neal, 1836).
- <sup>26</sup>Robert J. Brugger, *Maryland: A Middle Temperament, 1634–1980* (Baltimore, MD: The Johns Hopkins University Press, 1988), pp. 195–196; Dumas Malone, ed., *Dictionary of American Biography*, vol. IX (New York: Charles Scribner's Sons, 1932), pp. 111–12.
- <sup>27</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, p. 8.
- <sup>28</sup>*Ibid.*, pp. 8–9.
- <sup>29</sup>*Dred Scott v. Sandford*, 60 U.S. 393 (1856).
- <sup>30</sup>Dumas Malone, ed., *Dictionary of American Biography*, vol. XVIII (New York: Charles Scribner's Sons, 1936), pp. 289–94; Morris Radoff, ed., *The Old Line State: A History of Maryland* (Annapolis, MD: Hall of Records Commission, 1971), p. 62; Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill: University of North Carolina Press, 1936), pp. 4–21; Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan Co., 1935), pp. 101–23; Richard Walsh and William Lloyd Fox, eds., *Maryland: A History 1632–1974* (Baltimore, MD: Maryland Historical Society, 1974), pp. 265–69.
- <sup>31</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, p. 9.
- <sup>32</sup>Allen Johnson, ed., *Dictionary of American Biography*, vol. I (New York: Charles Scribner's Sons, 1928), p. 342; Sams and Riley, *The Bench and Bar of Maryland*, pp. 291–92.
- <sup>33</sup>Archival records of the Maryland Historical Society, provided by Reference Librarian Francis P. O'Neill; Dumas Malone, ed., *Dictionary of American Biography*, vol. VIII (New York: Charles Scribner's Sons, 1932), p. 231.
- <sup>34</sup>Archival records of the Maryland Historical Society.
- <sup>35</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, pp. 9–11.
- <sup>36</sup>*Ibid.*, pp. 10–28.
- <sup>37</sup>*Ibid.*, pp. 11–19.
- <sup>38</sup>*Ibid.*, pp. 19–26.
- <sup>39</sup>*Ibid.*, pp. 25–27.
- <sup>40</sup>Emphasis added.
- <sup>41</sup>*Ibid.*, pp. 28–29.
- <sup>42</sup>Allen Johnson, ed., *Dictionary of American Biography*, vol. III (New York: Charles Scribner's Sons, 1929), pp. 214–15.
- <sup>43</sup>*Ibid.*, p. 3.
- <sup>44</sup>Johnson, *Dictionary of American Biography*, vol. I, p. 342.
- <sup>45</sup>*Barron* lower court records, *Records and Briefs of the Supreme Court of the United States*, pp. 29–30.
- <sup>46</sup>*Ibid.*, p. 30.
- <sup>47</sup>*Ibid.*, pp. 1–2.
- <sup>48</sup>Francis N. Stites, *John Marshall: Defender of the Constitution* (Boston, MA: Little Brown & Co, 1981), pp. 117–18.
- <sup>49</sup>Currie, *The Constitution in the Supreme Court*, p. 63.
- <sup>50</sup>*Ibid.*
- <sup>51</sup>Charles Warren, "The Story-Marshall Correspondence," 21 *William and Mary College Quarterly Historical Magazine* 1–26, 22 (1941).
- <sup>52</sup>Stites, *John Marshall*, p. 118.
- <sup>53</sup>At the time of *Barron v. Baltimore*, the Court was composed of these Justices:

Justice	Years on the Court	Appointed by:
John Marshall	1801–1835	John Adams
William Johnson	1804–1834	Thomas Jefferson
Joseph Story	1811–1845	James Madison
Gabriel Duval	1811–1835	James Madison
Smith Thompson	1823–1843	James Monroe
John McLean	1829–1861	Andrew Jackson
Henry Baldwin	1830–1844	Andrew Jackson

Source: R. Kent Newmeyer, *The Supreme Court Under Marshall and Taney* (Arlington Heights, IL: Harland Davidson Inc., 1968), pp. 170–71.

<sup>54</sup>Stites, *John Marshall*, p. 118.

<sup>55</sup>Currie, *The Constitution in the Supreme Court*, pp. 194–95.

<sup>56</sup>Charles Beard, *The Supreme Court and the Constitution* (New York: The Paisley Press, Inc., 1938), pp. 113–15.

<sup>57</sup>G. Edward White, *The American Judicial Tradition* (New York: Oxford University Press, 1976), p. 18.

<sup>58</sup>Newmeyer, *The Supreme Court Under Marshall and Taney*, p. 53.

<sup>59</sup>White, *The Marshall Court and Cultural Change*, pp. 589, 592–93.

<sup>60</sup>Currie, *The Constitution in the Supreme Court*, p. 194.

<sup>61</sup>Newmeyer, *The Supreme Court Under Marshall and Taney*, p. 149.

<sup>62</sup>Stites, *John Marshall*, pp. 113–14.

<sup>63</sup>*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 251 (1833).

<sup>64</sup>White, *The American Judicial Tradition*, p. 33–34.

<sup>65</sup>White, *The Marshall Court and Cultural Change*, p. 592.

<sup>66</sup>*Barron*, 32 U.S. at 247.

<sup>67</sup>*Barron*, 32 U.S. at 247.

<sup>68</sup>Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. Robert Scigliano (New York: Random House, Inc., 2000), no. 83, p. 538.

<sup>69</sup>*Barron*, 32 U.S. at 248.

<sup>70</sup>*Barron*, 32 U.S. at 248–49.

<sup>71</sup>*Barron*, 32 U.S. at 250–51.

<sup>72</sup>*Barron*, 32 U.S. at 250–51.

<sup>73</sup>Joseph P. Cotton, Jr., *The Constitutional Decisions of John Marshall* (New York: G. P. Putnam and Sons, 1905), p. 378.

<sup>74</sup>White, *The Marshall Court and Cultural Change*, p. 591.

<sup>75</sup>Cushman, *Leading Constitutional Decisions*, p. 180.

<sup>76</sup>*Ibid.*

<sup>77</sup>Amar, "The Bill of Rights and the Fourteenth Amendment," p. 1203.

<sup>78</sup>Evans, *Cases on American Constitutional Law*, p. 27.

<sup>79</sup>O'Neill interview, November 21, 2001.

<sup>80</sup>*Ibid.*



# Birth of an Institution: Horace Gray and the Lost Law Clerks

TODD C. PEPPERS

## Introduction

In a vault hidden away in a downtown Boston bank rests a large silver loving cup. The cup was presented to Associate Justice Horace Gray on March 22, 1902 by his law clerks, and engraved on its tarnished surface are the names of the nineteen Harvard Law School graduates who served as Justice Gray's law clerks.<sup>1</sup> While the details surrounding the presentation of the cup have been lost to history, the gift was likely prompted by the failing health of Justice Gray and his future departure from the Supreme Court. The loving cup is still held by the Gray family, passing to the heirs of Professor John Chipman Gray, the famous Harvard Law School professor and half-brother of Horace Gray, upon the death of the childless Horace Gray.

The loving cup, however, is more than a mere historical curiosity, for it contains information previously unknown to students of Supreme Court history, namely, a complete list of the men who clerked for Justice Gray. While government records contain the names of Gray's later law clerks, the identity of Gray's first three clerks—Thomas Russell, William Schofield, and Henry Eldridge Warner—are not contained in Supreme Court records. The reason why Russell, Schofield, and Warner have not been previously acknowledged for their role in the creation of the clerkship institution is not due to conspir-

acy and cover-up. Since Horace Gray personally paid the salaries of the three men, they did not receive a paycheck from the federal government and their names were not recorded on government rolls. When the Justices were authorized in 1886 to hire stenographic clerks, governmental bureaucrats began recording the names of these new judicial assistants—and thereby created the false impression that law clerks had not arrived at the Supreme Court until 1886. Given this historical confusion about the identities of the first law clerks, this loving cup is arguably the "holy grail" for Supreme Court historians

who study the origins of the clerkship institution.

The primary purpose of this article is to acknowledge Horace Gray's important role in the creation of an enduring institution at the U.S. Supreme Court and to restore Thomas Russell, William Schofield, and Henry Eldridge Warner to their rightful place as the first law clerks. I will conclude by briefly discussing the other Harvard Law School graduates who clerked for Justice Gray, an impressive collection of young men who went on to careers in the law, the legal academy, and politics.<sup>2</sup>

#### **A Brief History of the Supreme Court and Support Staff**

Supreme Court Justices have not always had the services of law clerks. Throughout most

of the nineteenth century, the Justices were assisted only by a small handful of support personnel. Besides the Justices themselves, the Court's original support staff consisted of the clerk of the Supreme Court, the official Court reporter, and the marshal of the Court. In subsequent decades, the staff of the Supreme Court was supplemented with what Chief Justice Roger Taney called "servants about the Court," to wit, messengers.<sup>3</sup> Political scientist Chester A. Newland writes that although Congress first appropriated funds for the hiring of messengers in 1867, individual Justices employed messengers before that date.<sup>4</sup> Newland states that messengers were given a number of different job responsibilities, including serving as barbers, waiters, and chauffeurs.



This silver cup was presented to Associate Justice Horace Gray in 1902 by his law clerks and shows the names of the nineteen Harvard Law School graduates who clerked for him during his Supreme Court tenure. The names of Gray's first three clerks appear on it, making the cup a more reliable document than Supreme Court records.



In the years following the Civil War, the Supreme Court's workload increased sharply and the Justices began to publicly call for reform and assistance. Attorney General Augustus H. Garland provided the Justices with some relief, recommending in the **Annual Report of the Attorney General of the United States for the Year 1885** that each Justice be provided "by law with a secretary or law clerk, to be a stenographer . . . whose duties shall be to assist in such clerical work as might be assigned to him." In support of the recommendation, Attorney General Garland argued that the "immense" work of the Justices demanded additional staff support, noting that "while the heads of Departments and Senators have this assistance, I do not think there is any good reason that the judges of this court should not also have it."<sup>5</sup> Congress swiftly acted upon Garland's recommendation, and in 1886 it authorized funds for the hiring of a "stenographic clerk for the Chief Justice and for each associate Justice of the Supreme Court, at not [sic] exceeding one thousand six hundred dollars each."<sup>6</sup> While the Justices initially differed in who they hired to serve as their stenographic clerk—some Justices hired lawyers or law students, while a few hired professionally trained stenographers—within fifty years the position had evolved into what we recognize as the modern law clerk.<sup>7</sup>

### Horace Gray and the Creation of the Supreme Court Clerkship

When Horace Gray was appointed to the U.S. Supreme Court in 1882, he began hiring Harvard Law School graduates to serve one- or two-year appointments as his assistants. Gray had previously been the chief judge of the Massachusetts Supreme Judicial Court from 1873 to 1882, and it was in that capacity that he first started employing clerks. The clerks were selected by Judge Gray's half-brother, the aforementioned Professor John Chipman Gray. From the very beginning, Professor Gray evidenced a keen eye for legal talent, and

the clerks that he sent to Chief Justice Gray included future U.S. Supreme Court Justice Louis Brandeis.

Justice Gray never publicly discussed his motivation for hiring law clerks, but the most likely explanation for the decision to employ assistants was related to workload considerations. As a jurist, Gray "delighted to go to the fountains of the law and trace its growth from the beginning," for he "believed that an exhaustive collection of authorities should be the foundation of every judicial opinion on an important question."<sup>8</sup> Gray's indefatigability in legal research might well explain his motivation in seeking out legal assistance.

So who was this creator of the Supreme Court law clerk? He was a large, balding man with "mutton chop" whiskers and a stern countenance. Former Gray law clerk Samuel Williston vividly describes Justice Gray as follows:

In appearance Judge Gray was one of the most striking men of his time. He was six feet and four inches tall in his stockings. Unlike most very tall men, all the proportions of his



Horace Gray personally paid the salaries of his first three clerks, so they did not receive a paycheck from the federal government and their names were not recorded on government rolls. When the Justices were authorized in 1886 to hire stenographic clerks, governmental bureaucrats began recording the names of these new judicial assistants, thereby creating the false impression that law clerks had not arrived at the Supreme Court until 1886.

body were on the same large scale. His massive head, his large but finely shaped hands, and the great bulk of his frame, all seemed to mark him as one of a larger race than his fellows.<sup>9</sup>

Gray's contemporaries viewed him as a man "possessed of great physical as well as great mental vigor," an individual blessed with "abounding vitality and a delightful flow of animal spirits," and a jurist endowed with an "extraordinary" memory, a strong work ethic, and heightened awareness of "the dignity of the court and the position of judge."<sup>10</sup> Attorney Jack B. Warner painted a picture of a man who was more deity than mortal. "His great stature and commanding figure heightened the impression of a presence never to be trifled with, and suggested the classic demi-god walking on the earth with his head reaching among the clouds."<sup>11</sup> On the Bench, Gray displayed a grim, cold demeanor, and his judicial energies extended not only to cases before the court but "to the color of the clothes worn by some members of the bar in court."<sup>12</sup> Given Gray's status as the creator of the modern law clerk, perhaps it is only fitting to describe him in biblical terms.

Once on the Supreme Court, Gray treated his young assistants as more than mere scribes. Former clerk Williston writes that "[t]he secretary was asked to do the highest work demanded of a member of the legal profession—that is, the same work which a judge of the Supreme Court is called upon to perform." After oral argument, Gray would give his young clerks the applicable briefs and legal pleadings and ask them to review the "novelettes" and report back to the Justice with their independent thoughts. Gray did not share his own opinion of the case with his secretary, but "[i]t was then the duty of the secretary to study the papers submitted to him and to form such opinion as he could." Since Gray "liked best to do his thinking aloud and to develop his own views by discussion," Gray and his secretary would then sit down before the Court's Satur-

day conference and discuss the pending cases. First Gray would ask his secretary to "state the points of the case as best he could," with Gray closely examining and challenging the secretary's "conclusions."<sup>13</sup> "When I made [the reports]," Williston writes, "the Judge would question me to bring out the essential points, and I rarely learned what he thought of a case until I had been thoroughly cross-examined."<sup>14</sup>

Former law clerk Langdon Parker Marvin also recalled these oral examinations by Justice Gray, and he provides a vivid description of these sessions:

After he had settled himself in front of the fire with his black skullcap on his head and a five-cent Virginia cheroot in his mouth, he would say to me, "Well, Mr. Marvin, what have you got for me today?" So then I would tell him, having fortified myself with a little bluebook in which I had made notes of the various cases. Of course, I couldn't read all of the records, or even all of the briefs, but I made an analysis of the cases and I would tell him what the facts in each case were, where it started, how it had been decided in the lower courts, how it got to the Supreme Court of the United States, and what the arguments on either side were.<sup>15</sup>

Through his tenure on the Supreme Court, Gray permitted his clerks to offer opinions as well as case recitations. Williston writes that Gray "invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views,"<sup>16</sup> while Marvin confesses that "he rather astonished me early in the year by saying 'How do you think it ought to be decided[?]'.<sup>17</sup> Former Supreme Court law clerk Ezra Thayer echoes Williston and Marvin's comments about the intellectual give-and-take between Gray and his young charges. Thayer writes that Gray "liked best to do his thinking aloud, and develop his own views by discussion." During



these discussions Gray "would patiently and courteously listen to the crudest deliverances of youth fresh from the Law School."<sup>18</sup> In his memoirs, Williston is careful not to create the appearance of undue influence. "I do not wish, however, to give the impression that my work served for more than a stimulus for the judge's mind . . . my work served only as a suggestion."<sup>19</sup>

Gray then adjourned to the Saturday conference. Williston writes:

When . . . the Judge returned, he would tell the conclusions reached and what cases had been assigned to him for opinions. *Often he would ask his secretary to write opinions in these cases*, and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavor.<sup>20</sup>

Marvin also recalls assisting with the drafting of opinions, but only to a limited extent. "When the Court went into recess, Mr. Justice Gray would begin his work on the opinions allotted to him. I would help him on that, looking up law, and sometimes preparing statements of fact which appeared in the Court records—but, of course, he wrote the opinions himself—in long-hand, with a stub pencil."<sup>21</sup>

In short, the secretaries took part in all aspects of the decision-making process. They not only culled through the records and briefs in order to distill the relevant facts and legal arguments for Justice Gray, but they also then debated and argued their conclusions and suggested holding with the Justice. Once Gray was assigned an opinion, the secretaries often prepared the first draft of an opinion. While that draft may have landed in the trash can, it provided the secretaries with a critical chance to frame the issues and shape the legal analysis necessary to reach the Court's position.

Finally, the free rein extended to the clerk's opinions of the work product of other Justices. For example, Gray asked Williston to review the opinions written by the other Chambers. Williston recalls that "I tried to induce Justice Gray to dissent [from a majority opinion written by Chief Justice Fuller], but while he did not much combat my arguments, he was prevented from complying with my wish, if by nothing else, by the indisposition, that he and other members of the Court then had, to express dissent except on extremely vital questions, lest they should weaken the influence and credit of the Court."<sup>22</sup> Interestingly, neither Gray, Marvin, nor Thayer mentions reviewing cert petitions or preparing Bench memoranda—duties that have become the staple of the modern law clerk's existence.

It is unclear whether the law clerks shouldered more responsibilities in Gray's final years on the Court, when age and poor health began to affect the Justice. Marvin recalls that "my job with Judge Gray was an extremely busy one, because he was getting rather old and he expected me to do a good deal of the spade work and to educate him so that he could take his part in the deliberations of the court."<sup>23</sup> Marvin's description of his job duties, however, tracks the descriptions provided by earlier clerks Williston and Thayer.

Gray and his clerks worked in the library of Gray's home on the corner of 16<sup>th</sup> and I Streets in Washington, beginning their one-year terms in the early summer before the next Term of Court. Williston describes the second-floor library as composed of two rooms. "The walls of the library rooms were entirely covered with law books, except the spaces for windows and those over the mantel pieces. In the larger room, a portrait of [Chief Justice John] Marshall by Jarvis had the place of honor, surrounded by quite small portraits of all the other Chief-Justices of the United States. In the connecting room, the portrait over the mantel was a replica of Stuart's well-known representation of [George] Washington."<sup>24</sup> A desk for the law clerk was

placed in the larger of the two library rooms, a spot from which the law clerks observed social calls by the other Justices. Williston adds that Gray's bedroom was on the third floor of the home. He wryly observes that Gray "was unmarried at the time, and the house seemed designed for a bachelor. He had some antipathy to closets."<sup>25</sup>

As for Justice Gray's personal relationships with his law clerks, Marvin commented that Gray was a "delightful person" who regaled his law clerks with stories of hunting buffalo in his youth. Marvin would often have lunch or coffee with Gray, and in the afternoon he took drives with Gray in his brougham ("I had to huddle in the corner, as he took up most of the seat") to the local zoo.<sup>26</sup>

Justice Gray shared with his clerks not only stories of big-game hunting, but also his observations on the Court and his love life. Williston recalls that Gray freely discussed his impressions of his fellow Justices with the young man, such as referring to Justice Samuel Miller as the "little tycoon" for his empathetic but misplaced belief in the correctness of his legal positions.<sup>27</sup> Gray's closest friend on the Court was Justice Stanley Matthews, whose daughter, Jane, Gray was courting. Williston recounts:

One morning Gray approached me with a rather sheepish smile and exhibited a beautiful ring—a sapphire with a diamond on each side of it. He said "You being, if I may say so, *in consimili casu* can perhaps tell me whether this would be likely to please a young lady." I assured him that the probabilities were great that it would afford pleasure. Thus, I saw the engagement ring before the recipient of it.<sup>28</sup>

Horace Gray died in his summer home in Nahant, Massachusetts on the morning of September 15, 1902. His funeral was held on September 18, 1902 at Emmanuel Church in

Boston. While Gray did not have pallbearers at the funeral service, former law clerks Roland Gray, Joseph Warren, Ezra Thayer, and Jeremiah Smith, Jr. served as ushers.<sup>29</sup>

Justice Gray's clerkship model would serve as a template for future Justices on the Supreme Court. While some Justices employed stenographic clerks for extended periods of time, a core group of Justices—including Oliver Wendell Holmes, Jr. and Louis Brandeis—followed Gray's lead of selecting Harvard Law school graduates to serve as their law clerks for a single Term of Court. The Justices mirrored Gray's practice of having the assistants perform substantive legal work, and they also adopted Gray's habit of serving as mentors to their young charges. Over the next fifty years, Gray's clerkship model would be adopted by all the Justices on the Court; while the Justices varied in the types of job duties assigned to their clerks, by the 1940s all Justices were hiring recent law school graduates—most from Harvard, but others from Yale—as their assistants.

### A Collective Portrait of the Gray Law Clerks

From 1882 to 1902, Horace Gray hired nineteen Harvard Law School graduates to serve as his law clerks at the U.S. Supreme Court. The early Gray law clerks were plucked from a Harvard Law School that was just becoming a modern institution of legal education, a school at which Christopher Columbus Langdell presided as dean, giants like John Chipman Gray, James Bradley Thayer, and James Barr Ames lectured, and the *Harvard Law Review* was in its infancy. Like modern clerkships, the clerks began working at the Court shortly after graduation and—with two unusual exceptions—remained with the Justice for a single Term of Court.<sup>30</sup>

In terms of background, the law clerks themselves were a fairly homogenous group.

Fourteen of the nineteen were born in Massachusetts, and all but one—Blewett Lee—hailed from well north of the Mason-Dixon line. With the exception of the aforementioned Lee, all of the clerks attended Harvard College prior to enrolling in law school. Most of the clerks first attended prestigious preparatory institutions, such as the Boston Latin School and Roxbury Latin School.

As with modern law clerks, membership on law review appeared to be an important credential. While the *Harvard Law Review* was not founded until 1887, thirteen of Gray's fourteen law clerks hired after the founding served on the *Law Review's* editorial board. Finally, the high quality of Gray's law clerks is reflected in the fact that five of the clerks—Francis Richard Jones, Moses Day Kimball, John Gorham Palfrey, William Schofield, and Samuel Williston—were accorded the honor of serving as commencement speakers at the Harvard Law School's graduation ceremonies. Ezra Ripley Thayer, another Gray law clerk, managed the impressive feat of being the first in his class at both Harvard College and Harvard Law School.

### The First Three Law Clerks at the U.S. Supreme Court<sup>31</sup>

Thomas Russell was born in Boston, Massachusetts on June 17, 1858. His father, William Goodwin Russell, was a descendent of Mayflower passengers John Alden and Miles Standish. William Russell also attended both Harvard College and Harvard Law School and later served as an overseer of Harvard College.<sup>32</sup> William Goodwin Russell became a prominent member of the Suffolk Bar, first as a member of the law firm Whiting & Russell and then as a member of the firm Russell & Putnam. His biographer claims that "avoidance of all public office was a marked feature in Mr. Russell," and that his "love for private practice and a singular distaste for public station" caused Russell to turn down offered ap-

pointments to both federal circuit court and the state supreme court.<sup>33</sup> Thomas Russell's namesake was his grandfather, a Plymouth merchant, and his uncle, a prominent state court judge and a classmate of Horace Gray's at Harvard College.

While in law school, Russell was a member of both the Ames and Gray law clubs. He graduated from Harvard Law School in 1882, and he spent the winter of 1882 and the spring of 1883 clerking for Justice Gray. Regrettably, I have not discovered any information about either Russell's experiences as the first Supreme Court law clerk or the reaction of the other Justices to Justice Gray's bold decision to hire a law clerk. Russell himself never publicly wrote of the clerkship, Justice Gray's meager personal papers at the Library of Congress contain no mention of Russell, and the few biographies of Gray's contemporaries do not reference Gray's unusual experiment.

Unlike many of Gray's later clerks, Russell did not climb to the top of his profession. From 1883 to 1896 Russell worked at his father's law firm, Russell & Putnam, and from approximately 1896 to 1900 he worked as a solo practitioner. Russell briefly flirted with



Very little is known about Thomas Russell (pictured here in his youth), the first law clerk. Unlike other clerks, he did not go on to an illustrious legal career.



state politics as a young man—serving for two terms in the Massachusetts House of Representatives in 1893 and 1894 while simultaneously holding the position of treasurer of the Republican City Committee of Boston—and he remained active in the Massachusetts Republican party.

I have been unable to uncover any evidence that Russell was a prominent member of the bar during his short career. Russell himself wrote little of his own legal career, observing in 1900 that “[m]y summers are spent in a small place in Plymouth, Massachusetts, where I am philanthropically engaged in feeding a large number of bugs of various kinds in my attempt to cultivate a small garden.” Russell added that his only civic responsibility was serving as a trustee of the Worcester Insane Hospital. Russell had the financial resources to retire from the practice of law in 1909 at the relatively young age of 51.

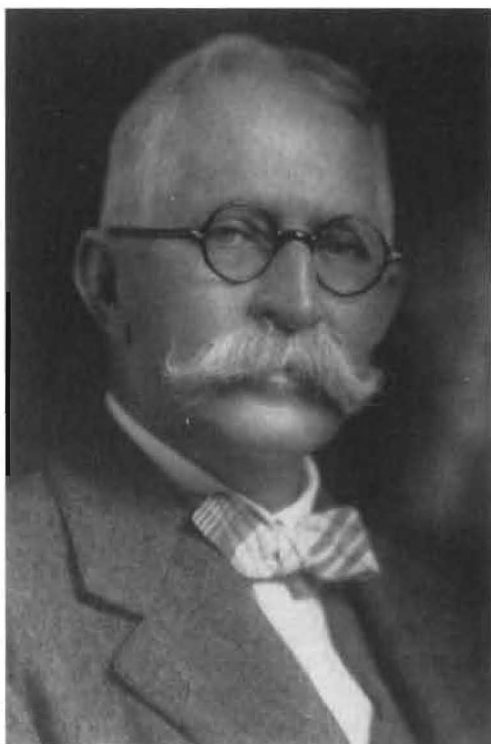
According to his granddaughter, Star Myles, Russell spent most of his post-retirement days at the Brookline Country Club or the Union Club in Boston, golfing and—when a heart condition caused him to stop golfing—curling, lawn bowling, and playing “cowboy pool.” Perhaps Russell himself felt reticent about his early retirement, commenting in 1929 that “I retired from the law some twenty years ago and, have, I am sorry to say, done nothing of interest to anyone since.” Curling was the post-retirement activity that Russell took the most seriously. In 1927, the *Boston Herald* ran a picture of Russell and his curling teammates, an image bearing the headline “A Veteran Quartet of County Club Curlers” and the caption “Although none of these four curlers is young any more, each can furnish plenty of entertainment for his more youthful opponents.”<sup>34</sup>

Russell is remembered by his granddaughter as a “gentleman of the old school,” a tall and distinguished man who was devoted to his wife, never touched alcohol or liquor, threw elegant dinner parties, had a practiced eye for finding good antiques and oriental rugs,

believed that President Franklin Delano Roosevelt was a “traitor to his class,” and shared his granddaughter’s love of movies involving “historical adventure tales.”<sup>35</sup> Russell died in his Boston home on April 8, 1938.

Justice Gray’s second law clerk was William Schofield, who was born on February 14, 1857 in Dudley, Massachusetts. The historical record suggests that, unlike many of his fellow clerks, Schofield came from a more modest socioeconomic background. Schofield was forced to balance his college studies with work as a printer, and a former classmate wrote that Schofield “came from a small town [and] was prepared for college in one of the less known academies, which so often bring forward boys of unusual character and promise who would otherwise never go to college.” While the classmate reported that Schofield arrived at Harvard College with an “inadequate” education which limited his early academic success, “his persistence and unremitting industry and his great natural ability made him a leader.” This work ethic, however, came at a price. “He was always a man of serious and earnest purpose, with perhaps too little thought or care for the lighter side of life.”

Schofield graduated from Harvard College with a Phi Beta Kappa key, gave a commencement address entitled “The Commercial Agitation in England,” and spent a year pursuing the study of Roman law in graduate school before enrolling at Harvard Law School in the fall of 1880. After his graduation in 1883, which saw him give a commencement address on “The Codification of the Common Law,” Schofield spent two years clerking for Justice Gray. After his clerkship, Schofield returned to Cambridge, practiced law, and taught at both Harvard Law School from 1886 to 1889 (torts) and Harvard College from 1890 to 1892 (Roman law). Schofield managed to supplement his teaching (which he referred to as “only incidental work”) and law practice with the publication of several articles in the *Harvard Law Review*.<sup>36</sup> Schofield himself expressed disappointment at what he perceived to be only



Russell is remembered by his granddaughter as a "gentleman of the old school," a tall and distinguished man who was devoted to his wife, never touched alcohol or liquor, threw elegant dinner parties, had a practiced eye for finding good antiques and oriental rugs, believed that President Franklin Delano Roosevelt was a "traitor to his class," and shared his granddaughter's love of movies involving "historical adventure tales."

a modest academic output, explaining to his classmates that "[t]he briefs which we lawyers write do not seem to count either as literary or as legal work, but they cost hard labor none the less."

Like Russell, Schofield served several years in the Massachusetts legislature. As a legislator, Schofield held key committee assignments and "won fame as an impassionate orator, a resourceful debater, a keen parliamentarian and a rapid thinker"<sup>37</sup> whose speeches "commanded the entire attention of the House."<sup>38</sup> He was noted by the local press to be a loyal supporter and friend of Republican Massachusetts Governor Winthrop Murray Crane, support that was repaid when Crane ap-

pointed Schofield to the Massachusetts Superior Court in 1902. The *Boston Evening Journal* remarked that Schofield was "one of the best known attorneys in the State" and that "[h]is nomination is met with favor by all who know him,"<sup>39</sup> while the *Springfield Republican* concluded that Schofield's "personal qualities are so attractive and reliable that men have forecast for him a successful career in politics, where his adaptation for useful public service has been well proved."<sup>40</sup>

I have been unable to find any information on Schofield's tenure on the Superior Court. Approximately eight years later, Crane again served as Schofield's political mentor, submitting his name to President William Howard Taft for a vacancy on the First Circuit Court of Appeals. Schofield originally declined to be nominated for the position, but was "at last . . . persuaded to change his mind by Senator Crane, who appointed him to the superior court."<sup>41</sup> While Schofield was subsequently confirmed as a federal appeals court judge, his federal judicial career was short-lived. The March 23, 1912 edition of the *Boston Daily Globe* reported that Schofield was slowly recovering from a "nervous breakdown" suffered earlier in the year, and within three months he was dead of "spinal trouble in the form of paralysis."<sup>42</sup> His death was viewed as "an irreparable loss to the community" by the *Boston Herald*, and over one thousand judges, attorneys, politicians, and family members attended his funeral on June 12, 1912.

With regard to Gray's first three law clerks, the historical record is the most sparse when we come to the third clerk, Henry Eldridge Warner. He was born in Cambridge, Massachusetts on October 27, 1860, graduating from Harvard College in 1882 and Harvard Law School in 1885 before clerking for Justice Gray during October Term 1885. In an 1899 newspaper article, Warner was described as "an aristocratic appearing young man and . . . very democratic. He is tall and has a straight, athletic figure. His hair and moustache are black."<sup>43</sup>

Warner immediately entered private practice upon the conclusion of his clerkship with Justice Gray, ultimately becoming senior partner in the Boston law firm Warner, Stackpole, Bradlee & Cabot. His foray into politics was more modest than either Russell's or Schofield's. He served for one year on both the Cambridge Board of Health and the Cambridge City Council. Warner also served as a bankruptcy referee in Middlesex County, Massachusetts in approximately 1899.<sup>44</sup>

In his later years, Warner moved to Lincoln, Massachusetts to a property that he humorously referred to as "his farm." At the age of forty-five, he wrote to his Harvard College classmates: "I seem to have no unusual experiences to relate, and I fancy that my case is like that of the rest of the class, a continued endeavor to 'lead the simple life' and keep up with the procession." Like Russell, Warner was a member of both the Brookline County Club and the Union Club of Boston, and one cannot resist wondering whether the two men exchanged gossip stories about Justice Gray and the Supreme Court over drinks. Warner died on June 22, 1954 at the age of 93. His death merited several newspaper articles, not because of his legal accomplishments, but due to his advanced age: at the time of his death, Warner was the oldest living graduate of Harvard Law School.<sup>45</sup>

Warner would be the last Supreme Court law clerk to lead a solitary and unique existence. With Congress's authorization of stenographic clerks, the other Justices quickly moved to hire their own assistants. Not all Justices immediately adopted the clerkship model created by Horace Gray—namely, hiring a newly graduated law student for a one-year clerkship and assigning him substantive legal work—but the die was cast. Before retiring from the Bench, Justice Gray himself hired sixteen additional law clerks. While the historical record is sparse for some of these men, the accomplishments and personalities of a few Gray clerks have survived the passage of time and deserve a brief mention.

### Horace Gray's Subsequent Law Clerks

Today a Supreme Court clerkship is practically a prerequisite to securing a teaching position at an elite law school. The origins of this hiring norm may well be traced to Justice Gray and the alumni of his nascent internship program. Three of Gray's former law clerks—Ezra Thayer, Joseph Warren, and Samuel Williston—all returned to Harvard Law School and became full-time members of the faculty, while former clerks Roland Gray, William Schofield, and Jeremiah Smith, Jr. occasionally lectured at the law school. Another Gray law clerk, Blewett Lee, served on the law faculty of both Northwestern University and the University of Chicago.

Of the three Gray law clerks who were permanent members of the Harvard Law School faculty, Williston achieved the most enduring fame. Born on September 24, 1861 in Cambridge, Massachusetts, Williston graduated from Harvard College in 1882 and taught at a boarding school before attending Harvard Law School. Williston served on the editorial board of the *Harvard Law Review* during its first year of existence, and was awarded a prize by the Harvard Law School Association for an essay entitled "History of the Law of Business Corporations Before 1800." After his clerkship, Williston practiced at the Boston law firm of Hyde, Dickinson & Howe and accepted an appointment to teach at Harvard Law School.

As his class notes obliquely observe, "[t]he strain of the double work proved to be too much, and in 1895, soon after being appointed to full professor, he was forced to take a three years' vacation." Ultimately, Williston's absence from Harvard Law School would stretch over much of the next five years and would turn out to be more than physical fatigue. Writes Hofstra Law School Professor Mark Movsesian:

It soon became apparent that he needed more than a vacation. Neurasthenia, or nervous exhaustion, was a



common diagnosis during the Gilded Age, particularly for "brain toilers" like Williston who were thought to be particularly susceptible to the strains that modernity placed on the nervous system. The catchall term covered various mental disturbances, including what we would call depression and anxiety disorder. People understood the condition to be chronic, debilitating, and potentially incurable.<sup>46</sup>

Williston ultimately sought help at a sanitarium in Bethel, Maine<sup>47</sup> and was treated with a combination of sedatives and talk therapy.

Movsesian writes that the treatment appeared successful, and Williston resumed teaching at Harvard law School in 1900. "Although he suffered periodic relapses that sent him back to Bethel and sanitariums over the years, and never weaned himself entirely off sedatives, he was able to work steadily . . . teaching into his eighties and doing research into his nineties."<sup>48</sup> Williston had the courage to frankly discuss the events surrounding his periodic breakdowns, and Movsesian notes that Williston "hoped his recovery might show those with similar problems that 'some achievement may still be possible after years of incapacity.'" Writes Movsesian: "Williston himself liked to tell people that his own career had been like the path of a wobbling planet: he was proof that, however far off course one went, one could 'wobble back.'" <sup>49</sup>

One can only speculate whether fellow faculty member Thayer took any comfort in Williston's recovery as Thayer himself battled severe depression. Thayer was born on February 21, 1866 to James Bradley Thayer (who himself began a teaching career at Harvard Law School in 1873) and Sophia Bradford Ripley Thayer. Thayer's college preparation included a year studying classical texts in Athens, and in 1888 he graduated first in his class at Harvard College. While in law school Thayer was a member of the *Harvard Law Review* and received the highest grades of any

law student in the previous thirty-five years. Of Thayer, his classmates observed that his success "did not come from the laborious toil of one striving merely for high rank. He had extraordinary intellectual powers and capacity, a brain that absorbed easily, and a tenacious memory."

Upon Thayer's graduation, Harvard Law School promptly offered him a teaching position. Thayer declined and clerked for Justice Gray during October Term 1891. Thayer subsequently spent eighteen years in private practice, first at the law firm Brandeis, Dunbar, and Nutter and later at Storey, Thorndike, Palmer and Thayer. Thayer was described as "a good trial lawyer, but was even better known for his ability to deal with questions of law and had taken his place in the foremost rank of those who argued cases before the full court."<sup>50</sup> Thayer's native intelligence could be intimidating to lawyers who matched wits with him; attorney and long-time friend Charles E. Shattuck once confessed that "Thayer's mental processes were so thorough and at the same time so swift that often those of us less gifted were almost appalled by them."<sup>51</sup> While in private practice, Thayer also lectured at both Harvard Law School and Harvard Medical School.

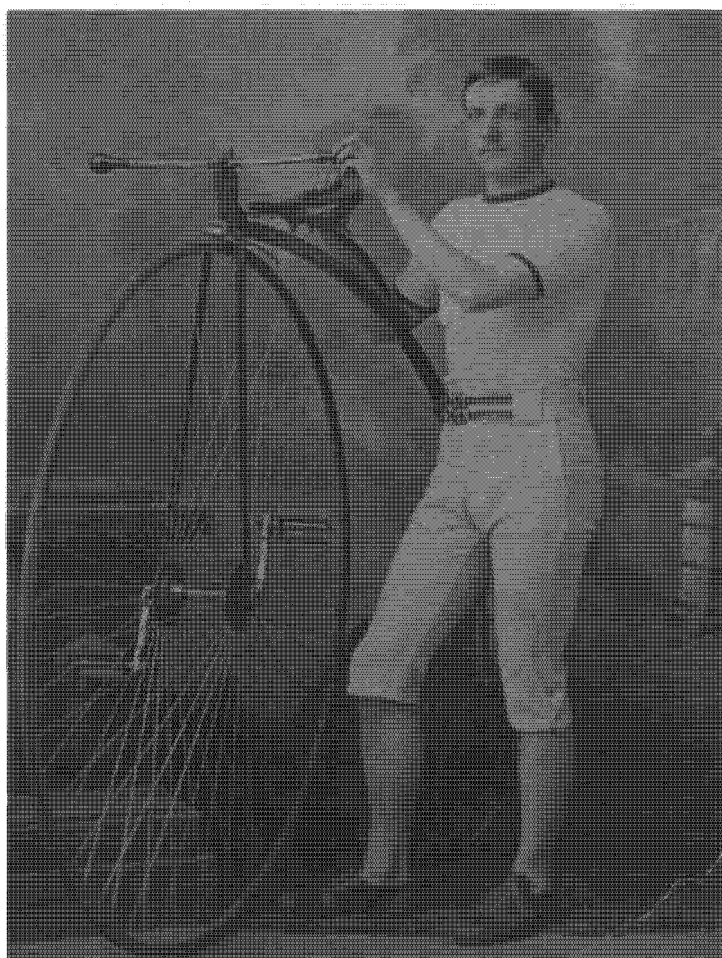
Thayer was appointed dean of the Harvard Law School in 1910, after initially and repeatedly expressing disinterest in the position. While biographer John Sheesley writes that Thayer did not have the time to stamp his own unique mark upon the law school, Thayer made a number of important decisions—including appointing Felix Frankfurter and Roscoe Pound to the faculty, raising the applicant admission standards, increasing course-load requirements, encouraging stricter grading, and tweaking the curriculum—while initially struggling in the classroom.<sup>52</sup> As dean of Harvard Law School, Thayer made one other minor contribution—not to the law, but to popular culture. During Cole Porter's first year at Harvard Law School, Thayer gave the young man the following advice:

I want to tell you something that may injure your self-esteem . . . but I think it is best for you. Frankly, Cole, your marks are abominable. You will never be a lawyer. But your music is very good, indeed. I suggest that you switch over to the excellent music school we have here . . . they will be gaining a talented student and we will be losing a wretched one.<sup>53</sup>

A mediocre law student, Porter did indeed leave the school, a decision he "never regretted."<sup>54</sup>

As with Williston, Thayer's colleagues described his fatal struggles with mental illness in terms of strain and overwork.

"Though athletic, simple and abstemious in his habits . . . the high standard which he had set for himself made too great draughts on his physical and nervous resources." Sheesley states that Thayer was originally stricken with "bladder disease" in approximately March 1915, a painful condition which came and went throughout the summer of 1915. The illness pushed Thayer farther behind in his law school work, and Sheesley hypothesizes that the pain of the medical condition, combined with the work load, led to severe depression and anxiety. "A newspaper account at the time of Thayer's death stated that he was 'despondent' over this pain, and that he 'sometimes said he did not find life worth the living and would be glad when it all ended.'"<sup>55</sup> Thayer committed



Samuel Williston (pictured) has written that Gray "invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views." Like several Gray clerks, Williston went on to become a member of the faculty at Harvard Law School.



suicide in the Charles River on September 15, 1915.

"Ezra Ripley Thayer is one of the least celebrated of the men who have served as Dean of the Harvard Law School," writes Sheesley. "No building bears his name. His portrait is tucked away in a far corner of the Library reading room."<sup>56</sup> While Sheesley offers a number of explanations for this, including Thayer's short tenure as dean (five years) and his lack of legal scholarship, he suggests that "there may also be an element of shame that adds to Thayer's invisibility; the Law School may be embarrassed to recall that it was guided by a mentally unstable man, or even worse, that it contributed to his death."<sup>57</sup> Regardless of the reasons for "the invisibility of the Thayer period" at Harvard Law School, he must be considered one of Horace Gray's most accomplished law clerks—and his story one of the most tragic.<sup>58</sup>

Joseph Warren was the second-to-last Harvard Law School graduate to clerk for Ho-



After clerking for Gray in 1891–92, Ezra Ripley Thayer went on to serve briefly as Dean of Harvard Law School. Unfortunately, he suffered from mental illness, and he committed suicide in 1915.

race Gray. After his clerkship during October Term 1900, Warren returned to Boston, briefly worked at Brandeis, Dunbar and Nutter, spent both a year as counsel for the Boston Police Department and one as secretary to the United States Ambassador to Rome, and then worked two years as a patent law attorney at the firm of Richardson, Herrick & Neave. In 1907, Warren returned to Harvard. After a stint in the President's Office and as a part-time lecturer, Warren joined the Harvard Law School faculty in 1913. Warren was appointed the Bussey Professor of Law in 1919 and the Weld Professor of Law in 1929. Warren also served as acting dean of the Law School on two different occasions, and he published two influential legal treatises (*Cases on Wills and Administration* (1917) and *Cases on Conveyances* (1922)) as well as a half-dozen articles in the *Harvard Law Review*.

To the faculty and students of Harvard Law School, Warren was "Gentleman Joe." Harvard Law School Professor Edmund M. Morgan, Jr. explained: "[T]his term has always been applied with genuine affection and respect. It has had no reference to manner or outward trappings; it has expressed appreciation of inward qualities, the character of the man."<sup>59</sup> Morgan recounted an incident at the end of the final class Warren taught at Harvard Law School, where a representative of the class stood up, thanked Warren for his service, and then said to his fellow students "[s]o rise and start your cheering: a gentleman departs."<sup>60</sup>

Several of Justice Gray's former law clerks—including Charles Lowell Barlow, William Harrison Dunbar, Roland Gray, Robert Homans, Gordon T. Hughes, Landgon Parker Marvin, James Montgomery Newell, John Gorham Palfrey, and Jeremiah Smith, Jr.—achieved varying degrees of professional success as attorneys in Boston and New York. Dunbar became a named partner in the law firm of Brandeis, Dunbar and Nutter, while Marvin practiced with future President Franklin D. Roosevelt. Roland Gray, the son

of John Chipman Gray, followed his clerkship by serving as the personal secretary to Chief Justice Melville Fuller (who was attending the Anglo-Venezuelan Arbitration Tribunal) before joining his father's firm of Ropes, Gray and Gorham. Roland Gray also devoted much time to revising his father's famous textbook, **The Rule Against Perpetuities**. Palfrey balanced his law practice with his duties as Justice Oliver Wendell Holmes, Jr.'s literary executor and watching tennis matches (he was the father of Sarah Palfrey Fayban Cooke Danzig, an international tennis star who won 18 Grand Slam titles, as well as four other daughters who also won national tennis championships<sup>61</sup>).

Of all these attorneys, Jeremiah Smith, Jr. would have the most lasting impact on international affairs. Smith was born in Dover, New Hampshire on January 14, 1870 to Jeremiah and Hannah Webster Smith. Like many law clerks, his ancestral roots ran deep into the early history of America. His grandfather attended Harvard College, was wounded while fighting in the American Revolution, knew George Washington, and served in the United States House of Representatives, as the chief justice of the New Hampshire Supreme Court, and as Governor of New Hampshire. His father, also named Jeremiah Smith, was on the Harvard Law School faculty for over three decades.

Jeremiah Smith, Jr. attended Phillips Exeter Academy before enrolling in Harvard College in 1888 and Harvard Law School in 1892. Smith served as editor-in-chief of the *Harvard Law Review* and clerked for Horace Gray during October Term 1895. After his clerkship, Smith spent the next twenty years in private practice in Boston before serving as a captain in the United States Army during World War I. At the end of hostilities, Smith was appointed by President Woodrow Wilson to the American Commission to Negotiate Peace. Despite the rarified air of Paris and his role at the negotiation table, Smith remained unaffected. A former classmate writes:

Let me set down an example of the way in which he [Smith] hated sham or anything that savored of it: When the time came for the signing of the Versailles Treaty it was evidently going to be a great spectacle at the Palace, with everybody within miles of Paris anxious to attend. Jerry's official position entitled him to a seat; but he shook his head and declined to go. "No," said he, "it is a poor treaty. I don't want any part of it. Nobody will ever know whether I attend or not, but I shall know and I can't justify my presence there."

"Jerry was no prig," concludes the classmate, "but he had clear-cut conceptions of right and wrong." The same classmate described Smith as a man of "extraordinary integrity and straightforwardness" who possessed "a quaint, infectious humor in which the shrewdest knowledge of men and their foibles . . . mingled and was one with a pervasive joy in human nature and life as we all live it."

Smith subsequently returned to Boston and his legal practice, only to be again tapped for government service. In 1924, the League of Nations appointed Smith to supervise the distribution of a fifty-million-dollar loan to Hungary. According to Smith's obituary in the *New York Times*, his role was much more than that of a mere financial advisor. "Rather than 'advisor,' Mr. Smith was for a time virtually dictator of Hungary, as he controlled all governmental expenditures. His task was made doubly hard as besides being a foreigner in a foreign country, he was also dealing with the proudest race in Europe."<sup>62</sup> During his time in Hungary, Smith gained international admiration, not only for his financial skill in completing in twenty-four months a job predicted to take thirty years, but for his refusal either to live in a Hungarian palace or to accept a \$100,000 bonus.



Joseph Warren clerked for Gray during the 1900 Term and eventually went on to a distinguished teaching career at Harvard Law School.

Upon the discharge of his advising duties in 1926, Smith spent the next ten years practicing law, serving as a director of AT&T and a member of the Harvard Corporation, and sitting on the boards of various international political organizations. Despite his wide range of duties, the *Washington Post* claimed, Smith had "turned down more offers than most men receive, including the post of Treasury Secretary, offered him by President Roosevelt in 1933."<sup>63</sup> Smith died on March 13, 1935 in Cambridge, Massachusetts.

Two of Justice Gray's law clerks were denied the opportunity to leave their mark on the legal profession, dying at a young age. Moses Day Kimball was born in Boston, Massachusetts on February 16, 1868 and graduated from Harvard College in 1889. Although Kimball evidenced an early interest in becoming a minister, he began Harvard Law School in the fall of 1889. A classmate implied that it was Kimball's will and work habits that resulted in his early death. "This devotion to his profession blinded him . . . to the proper mea-

sure of his physical strength, and deprived the State of his most promising life and service." Kimball died of pneumonia during his clerkship in Washington, D.C. on March 31, 1893. Little information exists regarding Kimball's clerkship and fatal illness, and we can only speculate as to the impact that Kimball's death had on Justice Gray.

Edward Twisleton Cabot also fell victim to a premature death. Cabot was born in Brookline, Massachusetts on September 13, 1861, graduated from Harvard Law School in 1887, and clerked for Horace Gray during October Term 1887. Fellow Harvard College student James F. Moors wrote a moving tribute to Cabot after his death, extolling his intellectual and athletic virtues. "When Ted Cabot entered college, he was best known as the most indomitable football player of the Class. 'Lay for Cabot,' had been a well-known cry from opposing school elevens." Cabot was the senior captain of both the Harvard College football and crew teams. Described as sometimes studious, moody, and disposed to "austerity towards frivolity and meanness and truth deformed," Cabot was described by Moors as possessing "an impressive moral force" that caused another classmate to remark that "[n]o true friend of his [Cabot's] can ever consciously do wrong." Cabot must have suffered from a long decline in health, for Moor writes that "all his life after graduation was passed in the shadow of approaching death" yet adds that even though "inexorable death was pressing upon him," Cabot "was living among us so calm and fearless that very little of the conflict between young life and inevitable dissolution was apparent even to his friends." Cabot practiced law in Boston until his death on November 10, 1893.

Finally, we come to Blewett Lee—the law clerk with perhaps the most unique family history of all Horace Gray's young assistants. Born on March 1, 1867 in Moxubee County, Mississippi to Stephen Dill Lee and Regina Lily Harrison Lee, Lee was a member of the first graduating class of Mississippi



Agricultural and Mechanical College (later Mississippi State University). Thus, Lee was the only Gray law clerk to not attend Harvard College. Lee subsequently enrolled in classes at the University of Virginia before attending Harvard Law School. Harvard Law School classmate Samuel Williston wrote of Lee: "His brilliant mind, geniality, simplicity, and an outlook somewhat colored by his Southern training made him an attractive companion."<sup>64</sup> Upon Lee's graduation, he traveled to Germany and studied at the University of Leipzig and the University of Freiburg before taking a clerkship with Horace Gray.

After his Supreme Court clerkship, Lee moved to Atlanta, Georgia and struggled to find work as a lawyer. In an unpublished history of the Lee family, the following story is recounted:

One day a man came into the office and asked BL to establish a company for him. He said he wanted to manufacture a nonintoxicating drink. He said also that he didn't have very much money so he could only offer BL a block of stock in the new company or \$25.00. BL took a drink of the stuff, thought it was awful, and took the \$25.00. The man's name was [Asa Griggs] Candler and the company he started was the Coca Cola Company.<sup>65</sup>

Lee eventually moved to Chicago in 1893, enticed there by a professorship at Northwestern University and a salary that Lee claimed was "more than the Chief Justice of the State of Georgia was making at the time."<sup>66</sup> It was in Chicago that Lee met and married Francis Glessner, the daughter of International Harvester founder John J. Glessner. The marriage produced three children, but ended in divorce in 1914. Described by a biographer as a "brilliant, witty, shy, intimidating, and, by some accounts, impossible woman,"<sup>67</sup> Francis Glessner later achieved an unusual fame by



Mississippi-born Blewett Lee was the only Gray clerk who hailed from south of the Mason-Dixon line and who did not attend Harvard College prior to attending its law school.

parlaying the art of creating miniatures of murder scenes into becoming a leading expert in crime scene investigation.

Lee is one of two law clerks to have a famous Civil War general as a father.<sup>68</sup> Stephen Dill Lee was born in Charleston, South Carolina and attended West Point during Robert E. Lee's tenure there as superintendent. At the start of the Civil War, Stephen D. Lee resigned his commission in the United States Army and enlisted in the Confederate Army, and it was Captain Lee—as a member of General P.G.T. Beauregard's staff—who delivered a written note of surrender to Major Robert Anderson at Fort Sumter. Upon Major Anderson's refusal to hand over the fort, Captain Lee ordered the artillery to fire upon Fort Sumter, thus firing the first shot in the Civil War. Lee survived both injury and capture during the Civil War, rose to the rank of lieutenant general, and later became the first



president of Mississippi A&M and the president of the United Confederate Veterans. A life-sized statue of General Stephen Dill Lee, resplendent in full military uniform and his saber at the ready, resides at the Vicksburg National Military Park.<sup>69</sup>

After teaching at both Northwestern University Law School from 1893 to 1902 and the University of Chicago Law School in 1902 (as one of the first faculty members hired by the new law school), Blewett Lee left the legal academy in 1902 and eventually became the general counsel for the Illinois Central Railroad. Despite the fact that he was no longer a law professor, Lee remained intellectually curious and continued to write articles that appeared in the *Columbia Law Review*,<sup>70</sup> the *Harvard Law Review*,<sup>71</sup> and the *Virginia Law Review*.<sup>72</sup> Lee's family describes him as a "courtly southern gentlemen in every sense of the word. He was deeply and sentimentally attached to his southern inheritance and had all the graces and charm which came from such a background . . . A more cultivated, intellectually gifted man it would be hard to find."<sup>73</sup>

Lee died on April 18, 1951 in Atlanta, Georgia and was buried with his parents in the family plot at the Friendship Cemetery in Columbus, Mississippi.

### Conclusion

Many aspects of the clerkship model created by Horace Gray remain intact today. Other

important changes, however, have occurred over time. Although Harvard Law School continues to be well represented in the law-clerk corps, other top law schools—such as Yale, University of Chicago, Stanford, Columbia, New York University, University of Michigan, and University of Virginia—routinely send their graduates on to Supreme Court clerkships. Since the late 1960s, however, the Justices have preferred applicants who have prior federal appellate court clerkship experience—a dramatic change from the selection practices in earlier times. Finally, modern law clerks have been given many more job responsibilities than their predecessors, a change that has triggered concern for some Supreme Court watchers.

No major biography has been written about Horace Gray, and law professors have mixed opinions as to his place in the hierarchy of great Justices. Nevertheless, Justice Gray deserves to be given his due as the creator of a new institution at the Supreme Court—the law clerk—that has helped generations of jurists efficiently and skillfully wade through stacks of petitions for writs of certiorari, prepare for oral argument, and draft legal opinions that have reshaped our political and legal landscape. And after 125 years of anonymity, Thomas Russell, William Schofield, and Henry Eldridge Warner merit at least a footnote in the history of the U.S. Supreme Court as the first law clerks.

## Appendix 1: The Law Clerks of Justice Horace Gray

Name of Clerk	Clerkship	Birthplace	Undergrad.	Law School	Subsequent legal career*
Thomas Russell	1882-1883	Boston, MA	Harvard	Harvard	State legislature; private practice
William Schofield	1883-1885	Dudley, MA	Harvard	Harvard	Private practice; state legislature; law professor; state and federal judge
Henry Eldridge Warner	1885-1886	Cambridge, MA	Harvard	Harvard	Private practice
William Harrison Dunbar	1886-1887	Roxbury, MA	Harvard	Harvard	Private practice
Edward Twisleton Cabot	1887-1888	Brookline, MA	Harvard	Harvard	Private practice
Samuel Williston	1888-1889	Cambridge, MA	Harvard	Harvard	Private practice; law professor
Blewett H. Lee	1889-1890	Columbus, MS	Miss. A&M	Harvard	Private practice; law professor; in-house counsel
Francis Richard Jones	1890-1891	Boston, MA	Harvard	Harvard	Private practice
Ezra Ripley Thayer	1891-1892	Milton, MA	Harvard	Harvard	Private practice; law school dean
Moses Day Kimball	1892-1893	Boston, MA	Harvard	Harvard	None
James Montgomery Newell	1893-1894	Roxbury, MA	Harvard	Harvard	Private practice
Gordon Taylor Hughes	1894-1895	Hamilton, OH	Harvard	Harvard	Private practice
Jeremiah Smith, Jr.	1895-1896	Dover, NH	Harvard	Harvard	Private practice; federal government
Charles Lowell Barlow	1896-1897	New York, NY	Harvard	Harvard	Private practice
Robert Homans	1897-1898	Boston, MA	Harvard	Harvard	Private practice
Roland Gray	1898-1899	Boston, MA	Harvard	Harvard	Private practice
John Gorham Palfrey	1899-1900	Belmont, MA	Harvard	Harvard	Private practice
Joseph Warren	1900-1901	Boston, MA	Harvard	Harvard	Private practice; law school professor
Langdon Parker Marvin	1901-1902	Albany, NY	Harvard	Harvard	Private practice

\*Includes only significant and sustained professional accomplishments.

## ENDNOTES

<sup>1</sup>Throughout the article, I will refer to Gray's young charges as law clerks, despite the fact that in the late nineteenth and early twentieth centuries, Supreme Court law clerks were also referred to as stenographic clerks, private secretaries, or legal secretaries.

<sup>2</sup>For accounts of other nineteenth-century Justices and their law clerks, see the following sources: Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," *Oregon Law Review* 40 (4): 299-317; Artemus Ward and David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: University Press, 2006).

<sup>3</sup>Carl B. Swisher, *History of the Supreme Court of the United States*, vol. 5, *The Taney Period, 1836-1864* (New York: Macmillan Publishing Company, 1974): 296.

<sup>4</sup>Newland, "Personal Assistants," 300.

<sup>5</sup>Augustus H. Garland, *Annual Report of the Attorney General of the United States for the Year 1885* (Washington, D.C.: Government Printing Office, 1885): 43.

<sup>6</sup>24 *Stat.* 254 (1886).

<sup>7</sup>Not all scholars believe that workload pressures alone account for the creation of the law-clerk position. Political scientists Artemus Ward and David L. Weiden, authors of *Sorcerers' Apprentices*, argue that the apprentice model of legal education explains why some Justices first em-

ployed law clerks: not to help process the work of the Court, but to help train future lawyers.

<sup>8</sup>Elbridge B. Davis and Harold A. Davis, "Mr. Justice Horace Gray: Some Aspects of His Judicial Career," *American Bar Association Journal* 41 (May 1955): 11.

<sup>9</sup>Samuel Williston, *Life and Law: An Autobiography* (Boston: Little, Brown and Company, 1940): 92.

<sup>10</sup>*Proceedings of the Bar and of the Supreme Judicial Court of Massachusetts in Memory of Horace Gray* (Jan. 17, 1903): 12, 50.

<sup>11</sup>*Ibid.*, 30.

<sup>12</sup>George F. Hoar, "Mr. Justice Horace Gray," *Massachusetts Historical Society Proceedings* (Boston: Massachusetts Historical Society, 1904): 21.

<sup>13</sup>Samuel Williston, "Horace Gray," in *Great American Lawyers: A History of the Legal Profession in America*, ed. William Draper Lewis (Philadelphia: J.C. Vinson, 1909): 158-59.

<sup>14</sup>Williston, *Life and Law*, 92.

<sup>15</sup>"Oral History Project: The Reminiscences of Mary V. and Langdon P. Marvin," Columbia University.

<sup>16</sup>Williston, *Life and Law*, 93.

<sup>17</sup>"Reminiscences of Mary V. and Langdon P. Marvin."

<sup>18</sup>Hoar, "Mr. Justice Horace Gray," 36, 38.

<sup>19</sup>Williston, *Life and Law*, 92.

<sup>20</sup>Williston, "Horace Gray," 159 (emphasis added).

<sup>21</sup>"Reminiscences of Mary V. and Langdon P. Marvin."

<sup>22</sup>Williston, *Life and Law*, 257.

- <sup>23</sup>"Reminiscences of Mary V. and Langdon P. Marvin."
- <sup>24</sup>Williston, *Life and Law*, 91.
- <sup>25</sup>*Ibid.*
- <sup>26</sup>"Reminiscences of Mary V. and Langdon P. Marvin."
- <sup>27</sup>Williston, *Life and Law*, p. 95.
- <sup>28</sup>*Ibid.*, 97.
- <sup>29</sup>"Of Simplest Character: Funeral of Judge Horace Gray, Formerly of the U.S. Supreme Court, At Emmanuel Church," *Boston Daily Globe*, September 19, 1902.
- <sup>30</sup>For unknown reasons, future federal judge William Schofield clerked for Gray for two years, while Moses Day Kimball died of pneumonia approximately nine months into his clerkship.
- <sup>31</sup>The majority of the information that I present on the lives and careers of Gray's law clerks comes from Harvard College class reports. In order to keep footnotes to a minimum, I will only cite to other sources of information, such as law review articles, newspaper stories, and obituaries.
- <sup>32</sup>Winslow Warren, *Memoir of William G. Russell, LL.D.* (Cambridge: John Wilson and Son, 1900).
- <sup>33</sup>*Ibid.*, 7.
- <sup>34</sup>"A Veteran Quartet of Country Club Curlers," *Boston Herald*, January 9, 1927.
- <sup>35</sup>Author's correspondence with Star Myles.
- <sup>36</sup>William Schofield, "The Principle of *Lumley v. Gye*, and Its Application," *Harvard Law Review* 2 (April 1888): 19–27; William Schofield, "Davies v. Mann: Theory of Contributory Negligence," *Harvard Law Review* 3 (January 1890): 263–77; William Schofield, "Hamlyn & Co. v. Talisker Distillery: A Study in the Conflict of Laws," *Harvard Law Review* 9 (January 1896): 371–85; William Schofield, "Uniformity of Law in the Several States as an American Ideal. I. Case Law," *Harvard Law Review* 21 (April 1908): 416–30; William Schofield, "Uniformity of Law in the Several States as an American Ideal," *Harvard Law Review* 21 (May 1908): 510–26; William Schofield, "Uniformity of Law in the Several States as an American Ideal. IV. State Courts versus Federal Courts," *Harvard Law Review* 21 (June 1908): 583–94.
- <sup>37</sup>"Judge Schofield Was Close to Crane," *Pittsfield Journal*, May 26, 1912.
- <sup>38</sup>*Sandwich Independent*, April 25, 1902.
- <sup>39</sup>"Appointment as Superior Court Justice Pleases Especially Members of General Court Associated With Him for Four Years," *Boston Evening Journal*, December 25, 1902.
- <sup>40</sup>"Two Judicial Appointments," *Springfield Republican*, December 23, 1902.
- <sup>41</sup>John Lorange, "Crane Persuaded Schofield to Accept," *Boston Record*, May 23, 1911.
- <sup>42</sup>"Judge William Schofield Dies in Malden Home," *Boston Herald*, June 11, 1912.
- <sup>43</sup>"To Succeed Manchester: Henry E. Warner Has Been Appointed Referee in Bankruptcy for Middlesex County," *Boston Journal*, December 5, 1899.
- <sup>44</sup>*Ibid.*
- <sup>45</sup>"H.E. Warner, Oldest Harvard Law Alumnus," *Boston Herald*, June 24, 1954; "Henry E. Warner," *Boston Traveler*, June 24, 1954.
- <sup>46</sup>Mark L. Movsesian, "Samuel Williston: Brief Life of a Resilient Legal Scholar: 1861–1963," *Harvard Magazine* (January–February 2006), available at <http://www.harvardmagazine.com/on-line/010683.html> (last visited October 25, 2007).
- <sup>47</sup>Movsesian observes that "[s]o many of Harvard's faculty were among the patients that the sanitarium was known as the University's 'resting place.'" *Ibid.*
- <sup>48</sup>*Ibid.*
- <sup>49</sup>*Ibid.*
- <sup>50</sup>Moorfield Storey, et al., *Proceedings at the Meeting of the Bar in the Supreme Judicial Court of Massachusetts in Memory of Ezra Ripley Thayer* (July 7, 1916): 3.
- <sup>51</sup>Charles E. Shattuck, *Proceedings at the Meeting of the Bar in the Supreme Judicial Court of Massachusetts in Memory of Ezra Ripley Thayer* (July 7, 1916): 23.
- <sup>52</sup>John P. Sheesley, "Ezra Ripley Thayer: Dean of the Harvard Law School 1910–1915. Paper written to satisfy Harvard Law School third year writing requirement.
- <sup>53</sup>Richard G. Hulber, *The Cole Porter Story* (New York: The World Publishing Company, 1965): 12.
- <sup>54</sup>*Ibid.* See also William McBrien, *Cole Porter: A Biography* (New York: Alfred A. Knopf, 1998): 50–51.
- <sup>55</sup>Sheesley, "Ezra Ripley Thayer."
- <sup>56</sup>*Ibid.*
- <sup>57</sup>*Ibid.*
- <sup>58</sup>*Ibid.*
- <sup>59</sup>E. M. Morgan, "Joseph Warren: A Gentleman Departs," *Harvard Law Review* 56 (October 1942): 171.
- <sup>60</sup>*Ibid.*, 172.
- <sup>61</sup>Robin Finn, "Sarah Palfrey Danzig, Stylish Tennis Champion, Dies at 83," *The New York Times*, February 28, 1996.
- <sup>62</sup>"Jeremiah Smith, Financier, Dead: Lawyer and Banker was Called Financial 'Savior' of Post-War Hungary," *The New York Times*, March 13, 1935.
- <sup>63</sup>"Jeremiah Smith: International 'Refuser,'" *The Washington Post*, March 17, 1935.
- <sup>64</sup>Williston, *Life and Law*, 80.
- <sup>65</sup>Percy Maxim Lee and John Glessner Lee, *Family Reunion: An Incomplete Account of the Maxim-Lee Family* (privately printed, 1971): 255.
- <sup>66</sup>*Ibid.*
- <sup>67</sup>Corinne May Botz, *The Nutshell Studies of Unexplained Death* (Monacelli, 2004): 17.
- <sup>68</sup>The other was Charles Lowell Barlow, son of "the boy general," Francis Channing Barlow.
- <sup>69</sup>Harold Cross, *They Sleep Beneath the Mockingbird: Mississippi Burial Sites and Biographies of Confederate Generals* (Southern Heritage Press, 1994); Herman

Hattaway, **General Stephen D. Lee** (Jackson: University Press of Mississippi, 1976).

<sup>70</sup>Blewett Lee, "Spiritualism and Crime," *Columbia Law Review* 22 (May 1922): 439-49.

<sup>71</sup>Blewett Lee, "Railroad War Bonds," *Harvard Law Review* 32 (April 1919): 709-11; Blewett Lee, "Psychic Phenomena and the Law," *Harvard Law Review* 34 (April 1921): 625-38.

<sup>72</sup>Blewett Lee, "The Thirteenth Amendment and the General Railway Strike," *Virginia Law Review* 4 (March 1917): 437-56; Blewett Lee, "The Conjuror," *Virginia Law Re-*

*view* 7 (February 1921): 370-77; Blewett Lee, "The Rule Against Perpetuities in Mississippi," *Virginia Law Review* 10 (May 1924): 533-45; Blewett Lee, "An Establishment of Religion," *Virginia Law Review* 14 (December 1927): 100-111; Blewett Lee, "Copyright of Automatic Writing," *Virginia Law Review* 13 (November 1926): 22-26; Blewett Lee, "What Cannot be Sold Cannot be Mortgaged," *Virginia Law Review* 15 (January 1929): 234-37; Blewett Lee, "Abolishing the Senate by Amendment," *Virginia Law Review* 16 (February 1930): 364-69.

<sup>73</sup>*Ibid.*, 261.



# The Civil War Reminiscences of John Marshall Harlan

PETER SCOTT CAMPBELL, EDITOR

Towards the end of his life, John Marshall Harlan wrote a series of essays about various events of his life. Collected together, the documents form the closest thing to an autobiography Harlan was to write. Most of the documents concern Harlan's experiences in the Civil War, and some of them repeat the same stories. Cited often in biographies and articles about Harlan, they have never been published before. The three printed here were chosen not only for their individual interest, but also because, taken together, they form a nearly complete account of Harlan's wartime experiences.

The first selection, a letter written to his son Richard near the end of Harlan's life, is from the collection of Harlan's papers housed at the University of Louisville. Not only does it constitute a lengthy account of Harlan's activities during the war, but it also provides a unique glimpse of pre-war Kentucky political life. Harlan describes the friendship of his father and Henry Clay, the pre-eminent Kentucky politician who was an influence on Harlan throughout his life. Clay's death and the subsequent dissolution of the Whig party threw many Kentuckians, particularly Harlan, into a state of political rootlessness, which was exacerbated by the Civil War. Accordingly, the letter next describes Kentucky's divided responses to the 1860 election and the resulting war, which led first to a policy of neutrality and then to a conflict that pitted not only neighbor against neighbor but

also—as shown in the letter—family member against family member. Harlan's decision to join the Unionists, when as a slaveholder and an avid anti-abolitionist he could have been expected to join the Secessionists, is shown here to be the direct result of Clay's early influence on his thinking. Harlan devotes the rest of the letter to his battle experiences and behind-the-scenes observations of his fellow officers.

The two other essays are from the Harlan collection at the Library of Congress. The first describes several incidents from the early days of the war during which Harlan met and became friends with General Williams Tecumseh Sherman. The last essay describes a war incident that occurred after Harlan had retired from the Army, when he joined the defense of the state capitol from a raid by John Morgan's men.



In a letter written near the end of his life to his son, Richard, John Marshall Harlan described his father's admiration for the great Chief Justice after whom he was named. At left is a photograph taken in 1906 of Justice and Mrs. Harlan (both left) visiting Richard and his wife, Margaret (both right), five years before that letter was written.

Harlan's experiences led to acquaintances with many men who were famous in their day. His writings assume familiarity with these men. As a result, endnotes have been added whenever possible to identify the men and to place them in the context of the events being described.

#### The Civil War Letter

Pointe au Pic, Province  
of Quebec, Canada,  
July 4<sup>th</sup>, 1911.

Dear Richard:<sup>1</sup>

I have promised many times to commit to paper, for preservation by my family, numerous things that have been told them by me as to the relations between my father<sup>2</sup> and Henry Clay,<sup>3</sup> prior to the Civil War, and some things that would explain my connection with events

that had more or less bearing upon the position of Kentucky during the Civil War, at the outset of which it became a vital question in that Commonwealth whether its people should adhere to the cause of the Union as against the Rebellion organized in the States where the institution of Slavery existed. I now comply, in part, with that promise.

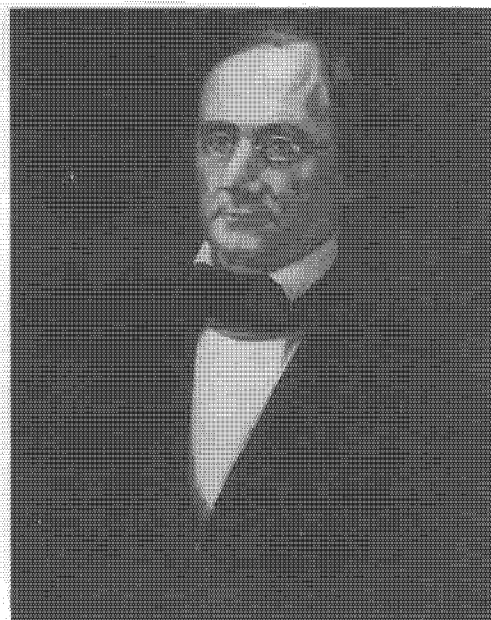
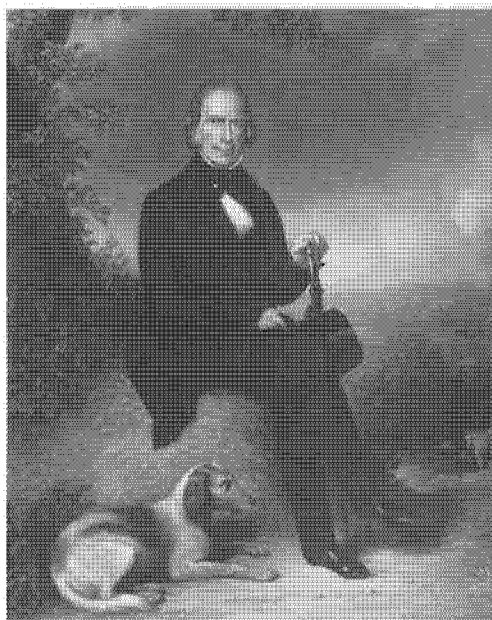
My father was an ardent admirer of John Marshall, and held to the views of constitutional construction which that great jurist embodied in the opinions delivered by him as Chief Justice of the Supreme Court of the United States. He was equally ardent in his opposition to the views of constitutional law which were supposed to be, and doubtless were, entertained by Thomas Jefferson. Marshall, my father always contended, held to views which, all concede, would give to the

country a government that would be supreme and paramount in respect to all matters entrusted to the General Government, its powers, however, to be so exerted as not to infringe upon the rights which remained with the People of the several States, which had never been surrendered or granted, expressly or impliedly, to the National Government. My father adhered firmly to these views and opposed to those maintained by Jefferson, because he believed that Jefferson's views were based upon a narrow, literal construction of the words of the Federal constitution which, in its time, would so minimize the functions of the Government intended to be established by that instrument as to place the National Government so completely at the mercy of the States that it could not accomplish the objects of its creation. He regarded "Jeffersonianism," speaking generally, as an evil that needed to be watched and overcome. He so thought during his entire life, and hence he became a follower of Webster and Clay. He gloried, so to speak, in being a Whig, and an opponent to the Democratic Party, the leading statesmen of which organization always seemed to take pride in saying that that party had been founded by Jefferson. They avowed their purpose to engraft "Jeffersonianism" upon our constitutional system of government. My father was bitterly opposed to the accomplishment of any such purpose.

I have said that my father was a follower of Henry Clay, and we may take some pride in the fact that he was regarded by Mr. Clay as his warm personal and political friend. In . . . , Mr. Clay delivered in the Market Place at Lexington, Kentucky, what was called his Mexican War speech, in which he charged the Democratic Party with having unnecessarily and unjustly brought on that war.<sup>4</sup> My father heard that speech, upon invitation by Mr. Clay, and he took me with him. I was a mere boy at the time and did not know what the occasion meant. But I remember that during the whole time of Clay's speech I sat at his feet, and was charmed with his magnificent, bugle voice. Let me say for your information that in the small tin box,

usually kept in my office at Washington, there are about forty original letters written to my father by Clay. If you have ever read those letters you will recall one which, although not in itself of any particular importance, yet it suggests that there was a possibility of our family becoming citizens of California.<sup>5</sup> After the death of President Taylor, and the accession of Fillmore to the Presidency, Mr. Clay, who was close to Fillmore, wrote to my father, expressing the belief that if he would accept the position of Land Commissioner of California (then deemed an important office) he, Clay, believed that he would be appointed. My father took the matter under consideration and informed Mr. Clay that he was unwilling to leave Kentucky on any account and become a permanent resident of any other State. Another fact in connection with this California matter may interest you. Among the friends whom my father consulted as to the offer, transmitted by Mr. Clay, was the late Joshua F. Speed,<sup>6</sup> who became an early and potent friend of Lincoln, when the latter first went to Springfield, Illinois, to practice the law. Speed was a Kentuckian, but at the time referred to was engaged in business at Springfield. My father was, from the outset, opposed to leaving Kentucky. But as he had no estate, beyond, the avails of his profession—a fact well known to all of his friends—Speed earnestly advised him to take the position of Land Commissioner of California, giving as a reason, that he could surrender the office, after a few years of service, return to the practice of his profession and, with his knowledge of land law, he could make a large fortune. So confident was Speed of this, that he said to my father, that if he went to the practice in California, he, Speed, would give bond to pay him \$15,000 a year for five years, if he (Harlan) would keep a book of receipts and expenses, and give Speed all in excess of \$15,000 that he made in any one year for the five years. But my father was not moved by these views. He determined to stay in Kentucky, let come what would, work hard there, and die poor, if need be, rather than take his





After hearing Henry Clay (pictured, left) speak at a rally in opposition to the Mexican War, Harlan remembers he was "charmed with [Clay's] magnificent, bugle voice." Harlan kept about forty original letters written by Clay to his father, James (pictured, right), in a small tin box in his office. When Clay died in 1852, he left James Harlan his black cane.

family to distant California, among a strange people.

If he had accepted the offer of Land Commissioner of California the whole family would, of course, have become residents of that State. In that event, I would not, perhaps, have become a Justice of the Supreme Court of the United States.

One other fact about Mr. Clay. One of the last speeches he made was before the Kentucky Legislature.<sup>7</sup> The old statesman was fresh from the great contest in Congress over the passage of the Compromise Measures of [1850-1851.] He looked "full of fight," ready to meet all comers of whatever party. He was in full dress on that occasion, except that his cravat was black. Standing on the aisle of the House, as he spoke, he strode backwards and forwards, traversing the whole aisle, and looked as if he felt himself to be master of the situation. His manner was that of a great general, ready to join issue with any one who was opposed to the Compromise Measures of [1850-1851,]

or who questioned his motives. He referred to the charge that he was endeavoring, by honied words, to secure the support of his old political opponents, and that he really was seeking the Presidency, and indignantly denied that he had such an object in view or had any selfish or unpatriotic purpose to subserve by his course. Catching the lapels of his coat, and pressing them across each other, over his chest, and walking up and down the aisle, he said, in defiant tones, "If there be any man on this broad earth who feels himself perfectly independent, I am that man." These few, simple words, coming from that great orator, with bugle voice, had a wonderful effect upon his hearers. Everybody applauded, and for a time there did not seem to be a dry eye in the audience. When he concluded, Democrats and Whigs gathered around the old statesman to thank him for his patriotic words. It was apparently with great difficulty that Mr. Clay restrained his feelings of thanks and gratitude. He seemed almost overwhelmed by his reception.



Let me go back a little in point of time and tell you about certain incidents in the associations of Mr. Clay and my father. The defeat of Mr. Clay in 1844 as the Whig candidate for the Presidency caused widespread grief among his political and personal friends. Though a mere boy in years, I took some interest in the political movements of the day. I remember that many of Mr. Clay's friends talked of his defeat by Polk as meaning the ruin of the country by the Democrats. By the way, Clay was defeated by the electoral vote of New York, and that state was lost to the Whigs by the candidacy of James G. Birney,<sup>8</sup> a Kentucky abolitionist, as an independent candidate for the Presidency. He knew that every vote cast for him was a loss to Clay, but he remained in the race, under the belief that, so far as slavery was concerned, its abolition was no more likely to occur under Clay, as President, than under his Democratic opponent, James K. Polk of Tennessee. He believed that the toleration which slavery would receive at the hands of Clay would tend to perpetuate and fasten it upon the country; whereas, as he thought, the Democrats, if successful, would so disgust the people with schemes for the spread of slavery that there would come such a revulsion of popular feeling as would force the destruction of the institution. Well, the result, as already stated, was the election of Polk. During his Administration the Mexican War occurred, and out of that contest came Zachary Taylor.<sup>9</sup> He commanded the American troops at the battle of Buena Vista, and won a famous victory. In that battle we had several kinsmen. My oldest brother, Richard Davenport Harlan, was a Lieutenant in the Kentucky Cavalry Regiment, commanded by Humphrey Marshall,<sup>10</sup> in which regiment was a company of which the celebrated orator, Thomas F. Marshall,<sup>11</sup> was Captain. In the same regiment Cassius M. Clay,<sup>12</sup> the noted Kentucky Abolitionist, had a company, or was Lieutenant of a company. Of McKee's<sup>13</sup> Kentucky Infantry Regiment, a son of Henry Clay—Henry Clay, Jr.<sup>14</sup>—was Lieutenant-Colonel. In that regiment (I think

as privates) were my two maternal uncles, Richard Davenport, Charles F. Davenport, and my cousin, James L. Harlan, known in Boyle County, where he resided, as "Big Jim." He weighed about 285, was six feet 4 inches tall, and had no surplus flesh. I may say here that my uncle, Charles F. Davenport, was celebrated as a "rifle-shot." He had a rifle that was made specially for him and as he directed. I remember to have heard, when a boy, that he joined the American Army as a volunteer only on condition that he would be allowed to take his rifle with him. His request was granted and he joined the army. His colonel knew of his skill with the rifle, and during the battle of Buena Vista, he took a position, under the orders of his commanding officer, on one side of the American Army and, from the place selected, "looked out" for such officers in the Mexican Army, as could be seen with the naked eye and came within range of his long rifle. After the war I often talked with Uncle Charles about the battle, but he was unable to say what effect his rifle-shot had upon the enemy's officers during the battle.

McKee and Clay were both killed in the battle. Young Clay was the hope of his great father, and his death caused the latter such grief as could not be expressed in words.

The time was near at hand when the country was to have another Presidential contest. Who would be put forward by the Whigs or by those who stood by Clay in 1844? This was the question of the hour. It was generally believed that while Clay did not seek a nomination, he was willing to lead the forces that sustained Whig principles, if those with whom he acted politically expressed cordially their desire that he should run again. Just then a movement was inaugurated to bring Gen. Taylor forward as the candidate against the Democratic Party. Taylor had become renowned as the victor at Buena Vista, and was so plain and simple in his manners and in his intercourse with others as to have become known as "Old Rough and Ready." He seemed to have become, in popular estimation, the real hero of

that battle and of the war, notwithstanding the great campaign of Winfield Scott and his soldiers from Vera Cruz to the City of Mexico, and notwithstanding the magnificent services in the battle of the 2<sup>nd</sup> Kentucky Infantry under McKee and Clay, and of the Mississippi Infantry Regiment commanded by Col. Jefferson Davis, afterwards the Confederate President, and of the Battery of Artillery commanded by Captain Braxton Bragg, afterwards, the General Commanding the Confederate forces.<sup>15</sup> At the crisis in that battle, when Bragg's Battery was doing splendid work upon the Mexican troops, Taylor sent him this message: "A little more grape, Capt. Bragg." These words went throughout the army, and were often heard, when "Old Rough and Ready" was talked of for a Presidential nomination. "There's the man," the friends of Taylor would say, who would give the Democrats all the "grape" they needed.



Harlan's father was a Whig delegate from his district to the National Anti-Democratic Convention when it met in Philadelphia. On the second or third ballot, to the surprise of the country, all of the Whig delegates from Kentucky except Harlan's father abandoned Clay and voted for the nomination of war hero Zachary Taylor (pictured). To withhold unanimity, Harlan stuck by his friend Clay until Taylor was nominated. He then backed Taylor in opposition to the Democrats.

The preliminary contest between the friends of Clay and Taylor having ended, the National Anti-Democratic Convention met in Philadelphia. My father was a Whig delegate to that Convention from the (Ky.) Ashland District. On the second or third ballot, to the surprise of the country, all of the Whig Delegates from Kentucky, except one, abandoned Clay, and voted for the nomination of Taylor. That exception was my father. He stuck to Clay until Taylor was nominated, and then refused to make that nomination unanimous. Clay was (to put it mildly) disgusted with what had occurred. He avowed that he had not been a candidate for the nomination, and that all he expected or required was that the Convention should nominate a real Whig who would avow his purpose to maintain Whig principles. Taylor, he said, had refused to avow any such purpose, and was willing to take the nomination from any party that would nominate him and would express its determination to maintain the integrity of the country. Clay said he was under no obligation, as a Whig, to accept such a candidate, and would feel himself at liberty, when the election came off, to vote as his conscience directed. Whether he voted for Taylor or not was never certainly known, but it was thought at the time that he did. My father, I know, voted for Taylor, as the nominee of the party opposed to the Democrats. Mr. Clay expressed these views in a letter to my father, the original of which is among those above referred to as being in my tin box in Washington.

It will interest you to learn that upon the return of my father from the Philadelphia Convention, he was received by the Whigs of the Ashland District in the most flattering way. They insisted that he should receive some substantial evidence of their affection, and their gratitude for the fidelity he had shown to their great leader. My father said that he did not desire any such thing to be done, and that he was not entitled to any special thanks for doing what he deemed his duty, or for carrying out the wishes of those who had sent him as a Delegate to the Philadelphia Convention. But the

Whigs of the Ashland District did not view the matter in that way, and without the knowledge of my father, they raised among themselves funds sufficient to buy and present to him a silver pitcher upon which was expressed the admiration and affection which the Ashland Whigs had for him. I was present when that pitcher was brought to my father by a committee of Whigs. He hesitated to accept it but finally concluded that it was his duty to do it. After his death, in 1863, that pitcher was in my possession or, rather, in the possession of my mother. But its whereabouts have not been known for forty years and more. What ultimately became of it no one can certainly say.

After Mr. Clay's death (which occurred in 1852), a beautiful cane, which years before had been presented to Mr. Clay by some New Orleans Whigs, was sent to my father, by James B. Clay with the statement that *his* father had charged him to deliver this cane to my father with his compliments, and as some evidence of Mr. Clay's love and confidence. We have that cane, and it is a pleasant thought that it was once used by the Great Commoner.

I have written more than was intended by me about matters that preceded the Civil War. But what has been said will serve to inform you of the exact situation as it existed in 1860-1, when the country was in imminent danger, as was then thought, of an armed conflict with those who subsequently organized a government under the name of the Confederate States.

Lincoln's candidacy for the Presidency in 1860 aroused bitter hostility among the people of the Slaveholding States, particularly in the States south of what was known as the Border States. Many public men in that part of the country, and some further North, publicly declared that Lincoln's assumption of the office of President would be resisted, if need be, by force. But the supporters of Lincoln, indeed, substantially all the people in the non-Slaveholding States, stood their ground and insisted upon the right of the people to have their own choice, when expressed in a legal

mode. They discovered, as Mr. Lincoln himself did, that there was no purpose whatever to harm the "South," or to do anything that was not authorized by the law of the land. But the rebel leaders would not accept these disavowals and proceeded to get the public mind in such a condition of frenzy that the application of force to prevent Lincoln's acting as President would not be disapproved. When the election of Lincoln was settled, by popular vote, the work of secession was begun. State after State "seceded," and those who were on that side organized the Southern Confederate Government and forbade the exercise within its limits of any authority not in harmony with the secession scheme. The country literally *trembled* at the possibility of war between the Unionists and Disunionists. Good men tried to keep the peace and forbore to say anything that would serve as an excuse to resist the authority of the Union. At last, the actual crisis came, when the Flag of the United States, floating over a Fort of the United States in the harbor of Charleston, was fired upon, without cause, and the authority of the Union defied. The purpose of the extreme men of the South was to provoke a war that would ultimately disrupt the Union. Hence the firing upon our Flag. *Then* the people in the non-slaveholding States and the Union men in the Border States felt that any more efforts in keeping the peace and prevent the bloodshed was useless. They felt that the time had come when further forbearance was out of the question. They rose, as one man, and resolutely determined that the rightful authority of the Union should be maintained over every foot of American soil, cost what it would in men and money. The troops offered to the Government for the support of the Union cause were vastly in excess of the number that could be accepted at the outset. My father, as might have been expected, publicly declared at the outset that he adhered to the Union, and favored the punishment of every man who resisted its lawful authority. No amount of persuasion could carry him into the ranks of seceders, although he was surrounded

in Kentucky with men who sympathized with secession, and opposed the application of force to maintain the Union. The then Governor of Kentucky<sup>16</sup> was an open, avowed sympathizer with the cause of the "South" and disapproved the raising or use of troops to suppress the rebellion. But the "Southern Sympathizers" were, in fact, a minority in Kentucky. The majority of its people held always the same general views that my father expressed. I agreed with my father thoroughly, and although I did not vote for Lincoln, my position was well known. I was an elector for the Bell and Everett party,<sup>17</sup> which stood on the platform of "The Union, the Constitution, and the Enforcement of the Laws." I was regarded by the rebel leaders as a "traitor to the Union," because of my opposition to secession, and because I had announced that the Government was under a solemn duty to save the Union, if need be, by armed force. Kentucky was at that time in a peculiarly embarrassing position. Her business interests were immediately with the South, and her people were widely connected with the people of the South by the ties of kinship. Many families were divided on the Union question, and the idea that a man should go into battle with near kin in the ranks of the other side, to be shot at, was not an agreeable thought. Many persons, for these reasons, hesitated as to what to do, and the number who thus felt and acted were so large that the country came to speak of Kentucky as "neutral" between its Government and those who sought to destroy it. This was the situation in the spring of 1861. Some of us thought that positive action should be taken at Louisville, by those who were Union men. A private meeting was brought about at which James Speed,<sup>18</sup> myself, and others were present. We concluded that the people needed to be educated as to the value of the Union, in itself, as well as to the danger which would come to Kentucky, a Border State, from armed conflicts between great armies occupying its territory. We raised a little money and with it hired a few bands of music. During the months of May, June and July, 1861, there was hardly an after-

noon I did not, while standing on a store box, on the pavement, address a public audience in the line just suggested. The crowds were brought together by the music of the bands that we had employed. During that period an armed volunteer company was formed by Union men in Louisville mainly for our self-protection. We intended to let the violent men of the Confederate side know that we were not to be imposed upon or intimidated. The Company was named the Crittenden Union Zouaves and became a part of the home Guard of Louisville. I have before me my original commission, issued in 1861, as Captain of the Zouaves. It is signed by Major Delph,<sup>19</sup> and the blanks for my name and the name of my company are filled in by the late John W. Barr,<sup>20</sup> afterwards the able U.S. District Judge at Louisville. I recognize his handwriting. He was an earnest, devoted friend of the Union, as was Major Delph. Here it may be stated, in vindication of the Union sentiment of Kentucky, that [at] a special



"I earnestly desired to go into the army and do my part in saving the Union," wrote Harlan to his son, "but I had a young wife and two small children (Edith and yourself), and at times felt that I ought not, on any account, to leave my family and join the army. But 'Mamma' [his wife, Malvina, pictured] came to my rescue and urged me 'to go to the front,' saying that she would care for our little ones."



election held in July, 1861, for Representative in the Congress, the Union men carried every Congressional district of Kentucky. It is only fair, however, to state that the Kentucky Unionists, as a general rule, did not approve of all the methods suggested by the Union men of the Northern States for the prosecution of the war, particularly those relating to the institution of slavery. But they made their fight in 1861 distinctly upon the basis of the preservation of the Union "at all hazards," without regard to the cost in men or money. And they won on that issue.

The time now came in my own life when I must determine finally whether I should join the Volunteer Union forces and become something more than a speaker for the Union cause in public halls or on the stump. The question was soon decided by me. I earnestly desired to go into the army and do my part in saving the Union, but I had a young wife and two small children (Edith and yourself), and at times felt that I ought not, on any account, to leave my family and join the army. But "Mamma" [wife Malvina] came to my rescue and urged me "to go to the front," saying that she would care for our little ones. This relieved my anxiety somewhat, and I issued an address or proclamation, stating my purpose to raise and command a regiment of infantry, and inviting young men of the State to join me. A copy of the Proclamation issued by me was published in the Louisville Journal, then edited by the celebrated George D. Prentice.<sup>21</sup> It was as follows:

To the People of Kentucky:

I have been authorized to raise a regiment of infantry to be mustered into the service of the United States, and to form a part of the force under the command of General Robert Anderson.<sup>22</sup> Companies will be received from any part of the State.

Each company will be composed of not less than eighty-four nor more than one hundred and one men, rank

and file, and will elect their own officers.

The cost of transportation to the place of rendezvous (which will be hereafter designated) as well as the cost of subsisting the troops previous to their being mustered into the service, will be paid by the Government. Lieutenant-Colonel, Major, and other regimental officers will be selected in due time. The regiment will be supplied with good arms.

No written authority is necessary to raise companies. Let individuals organize them as rapidly as possible and report to me the names of the officers selected by the respective companies. Address me at Louisville, Kentucky.

And now I appeal to my fellow-Kentuckians to come forward and enroll themselves for service. Their invaded State appeals to them. Their foully-wronged and deeply-imperiled country appeals to them. The cause of human liberty and Republican institutions everywhere appeals to them. All that is most glorious in human government is now at stake, and every true man should come to the rescue.

The time, fellow-citizens, has come, and even the unpatriotic and the selfish should hasten to take up arms for the common defense of their State and country. Every consideration of enlightened self-interest calls us to the field. If our enemies triumph, all our trades, all our professions, all our avocations of whatever character, all our possessions of every description, become value-less. To save ourselves and our families from ruin, not less than to save our State and our country from degradation and shame, we must rally now where the National flag invites us. Come, then, let us gird

up the whole strength of our bodies and souls for the conflict, and may the God of Battles guide home every blow we strike. For one, I am unwilling to see the people of my native State overrun and conquered by men claiming to be citizens of a foreign government. I cannot be indifferent to the issue which an unnatural enemy has forced upon Kentuckians.

John M. Harlan.

Well, the regiment was raised, and was mustered into the service of the State in October 1861. During the succeeding month (November 21<sup>st</sup> 1861), three days before James was born, my regiment was mustered into the service of the United States at Lebanon, Kentucky, as the 10<sup>th</sup> Kentucky Volunteer Infantry. I had been elected its Colonel shortly before, although I was then but 28 years of age. The regiment became a part of the original Division of Gen. George H. Thomas,<sup>23</sup> for whom I had great affection, and who was fairly to be regarded as the Washington of the Civil War on the Union side. The "boys" of his Division spoke of him, when not present, as "Old Pap Thomas." They dearly loved him; for they knew that he would never put them in a hard place, if it could be avoided, or fail to have them as well cared for in every way as it was possible to be done.

In the latter part of 1861 (I think it was on the last day of December 1861) Thomas' division took up its line of march for Mills Springs on the Cumberland River, where the rebels had an army and fortifications, and were watching for a good opportunity to reach central Kentucky, which was the most beautiful and richest part of our State. Their commander, when they entered Kentucky from East Tennessee, was Gen. Felix K. Zollicoffer,<sup>24</sup> a distinguished Tennessee statesman, but he was subsequently superseded by Major-Gen. George B. Crittenden.<sup>25</sup> Despite the earnest entreaties of his father, John J. Crittenden,<sup>26</sup> and all of the male members of his family, he



At age twenty-eight, Harlan joined the 10<sup>th</sup> Kentucky Volunteer Infantry under the direction of General George H. Thomas (pictured). Called "Old Pap Thomas," he was dearly loved by his men, "for they knew that he would never put them in a hard place, if it could be avoided, or fail to have them as well cared for in every way as it was possible to be done."

took sides with the Rebellion, although when the Civil War commenced he was an officer of our Regular Army. He was commissioned by the Confederate Government a Major General in the Confederate service. He was the superior officer of Zollicoffer, and for that reason, took command of the rebel troops at Mills Springs. The route of Thomas' Division was through Campbellsville, Taylor County, Kentucky, and Columbia, Adair County, thence through Pultaski County towards Mills Springs, where the rebels then were. The Brigade to which my regiment was attached constituted the rear part of Thomas' Division. Thomas (with a part of his command), in the afternoon or evening of the second day preceding the battle of Mills Springs, had reached a point a few miles from the place where the battle took place. The 14<sup>th</sup> Ohio Infantry Regiment (of which Steedman<sup>27</sup>

of Ohio was Colonel) and my regiment were ordered to go into camp just where we were (ten miles in the rear of Gen. Thomas' Headquarters) and to go early the next morning squarely off to the right, and capture a rebel forage train which Thomas learned would be there. We performed that duty; that is, we went far to the right, through the woods in order to take the rebel forage train which was expected to be found there. With our commands we lay concealed in the woods for the entire day. But no rebel forage train was to be seen or heard of, and we returned to our camp, on the main county road, which we had left in the morning of the same day. The morning after we got back to that camp, the 14<sup>th</sup> Ohio and 10<sup>th</sup> Kentucky were about to move forward and join the rest of Thomas' Division that were ten miles ahead of us towards the rebel camp at Mills Springs, a cavalry-man from Thomas' advance came dashing in with an order from Thomas to hurry forward to meet the rebel force then advancing on our troops from the Mills Springs fortifications. The order was obeyed, but Steedman and myself did not reach the battlefield with our regiments until after the rebels had been defeated and were retreating to their fortifications on the Cumberland River. We joined the other troops of Thomas in pursuit of the retreating rebels. We marched over the late battlefield, and passed the dead body of Zollicoffer who had been killed, during the battle, by Col. Speed S. Fry, Colonel of the 4<sup>th</sup> Kentucky Volunteer Infantry. There was at one time a dispute as to who shot Zollicoffer, but ultimately Fry's statement that he had done so was adopted beyond question.<sup>28</sup>

When Thomas' troops reached the rebel fortifications on Cumberland River, it was getting dark, and was too late in the day to attempt to make an assault upon the rebel forces concealed behind their fortifications, and superior in point of numbers to our troops. But it was determined to move upon the rebels the next morning at daylight. To that end, Thomas' troops were put into line, within a few hundred yards of the fortifications. As the regiments of

Steedman and myself were sore and grievously disappointed at not being in the battle near Mills Springs, by reason of their being sent off to one side to execute what turned out to be a fruitless order, I asked Gen. Thomas to put my regiment and Steedman's in the front line of the force that was, the next morning, to attack the rebels behind the fortifications. The request was acceded to and the 14<sup>th</sup> Ohio and 10<sup>th</sup> Kentucky were put in the front line. When daylight came, we were in line for action and marched forward, towards the enemy's works, expecting every moment to be welcomed by rebel musketry from behind the fortifications. But when we got to the fortifications we found that the rebel forces had, during the night, quietly crossed the Cumberland River and were beyond the possibility of being reached. This was a great disappointment to the Union troops. But there was no help for it.

I have spoken of the battle at Mills Springs. In fact, the battle was on Logan's Field, a few miles from the actual Mills Springs, on the Cumberland River. But every one knows what battle is referred to when we speak of the battle of Mills Springs. Up to the time it was fought, the Union army had been uniformly defeated. We were all greatly discouraged by the rebel victory at the First Bull Run. Mills Springs was the first decisive victory of the war and made Thomas the hero of the hour. After Mills Springs, Thomas' Division was ordered to join Buell's<sup>29</sup> Army at Nashville, Tennessee. We marched from Cumberland River Louisville and from that place went by boat to Nashville, and camped there for some weeks. Before we got to Nashville our army, under Grant, had won great victories at Fort Henry and Fort Donelson, and had gone with his troops by boat, up the Tennessee and into camp at Pittsburg Landing, Tennessee, which was less than 50 miles, I think, from Corinth, Mississippi, at which place it was believed the rebel army was to be, or was being, concentrated, under Gen. Albert Sydney Johnston,<sup>30</sup> who was said at the time to be regarded by Jefferson Davis as the coming man





The day after the Battle of Shiloh (depicted here) Harlan ran into General Tecumseh Sherman, who remembered him from when he led the Kentucky army. Sherman took Harlan and introduced him to General Ulysses Grant, who was savoring a victory over the rebels.

on the Confederate side. Grant did not remain long at Pittsburg Landing, and was determined that the Tennessee River should not separate his troops from the enemy. So, he took his troops by boat up to what was then and is now known as Shiloh Landing in Mississippi, and there went into camp, only about thirty miles from the rebel forces. Grant, when his mind was made up, was a "dare devil." Of course, he knew that the entire rebel army could be concentrated, by rail, in a few days, at Corinth, and that being only a short distance from that city, and with a deep river in his rear, he was in imminent danger of being overwhelmed by a force vastly superior in number to his little army. But he risked the danger that was before him.

While Grant was in this perilous position at Shiloh, Thomas' troops were in camp on the turnpike road between Nashville and Columbia, Tennessee. It was supposed that Buell's Army, of which our Division formed a part, would ultimately be joined to Grant's,

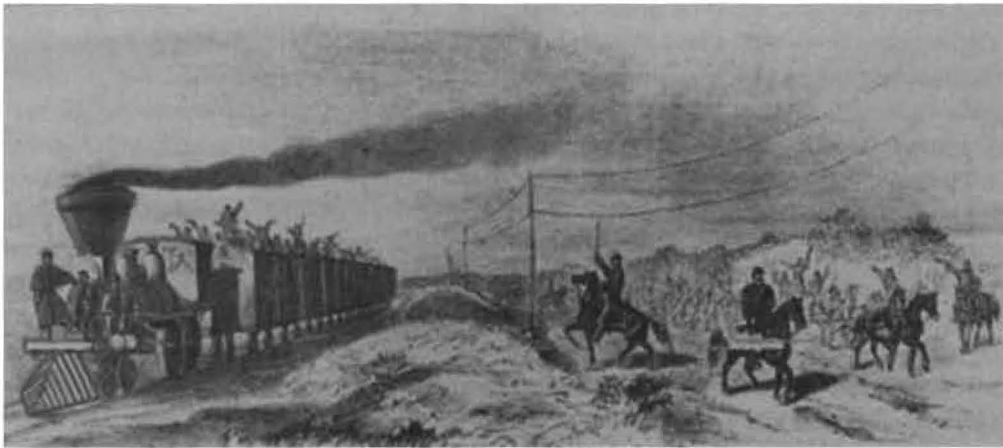
and that this would occur before any battle should take place with the Confederate troops stationed and gathering day by day at Corinth. It was said at the time that Buell's Army was delayed in its movements by reason of the destruction of the bridge which spanned Duck River at Columbia. A new one was being built at Columbia by a regiment of Michigan Voltiguers and it was believed that as soon as it was completed, Buell's Army would cross Duck River and go forward rapidly to join Grant. While the work on the new bridge was being prosecuted, this story was heard on all sides, namely, that Gen. William Nelson<sup>31</sup> of Kentucky, commanding a Division of Buell's Army, rode horseback to the place where the Michigan Voltiguers were working; that he was curious to know how deep the water was there; and that after riding across on his horse without difficulty he came to the conclusion that it was a waste of valuable time to remain in camp until the Michigan men got through with their work. He immediately rode to Buell's Headquarters



and proposed that he should be allowed to cross Duck River the morning at daylight, and join Grant with all possible speed. Buell consented to Nelson's making the trial. Whether this story was, in all respects accurate, I do not know nor had I, at the time, any way to ascertain the exact truth. This much I do know—Nelson and his men were at the river at daylight, put bayonets on their guns, stripped themselves of clothing, put their clothing on the bayonets, and waded Duck River. No lives were lost. As soon as Nelson could re-form his Division and get it in marching order, his men "struck out" towards Grant's camp, wherever it was. The distance, if I remember correctly, was 80 to 100 miles. While Nelson was en route with his soldiers to join Grant, the Confederates, under the immediate command of Beauregard,<sup>32</sup> with Johnston in superior command, attacked Grant at Shiloh, and there was a furious battle most of the day between the two armies. Grant's troops had been driven back to the River and were seemingly defeated. But in the afternoon of the same day Nelson appeared with his Division on the opposite side of the river, and, with the aid of a few gun boats, crossed with his men to Grant's camp. Nelson's Division was followed from Duck River by the Division of Major-General Thomas J. Wood<sup>33</sup> of Kentucky

and the Division of Major-General Thomas L. Crittenden,<sup>34</sup> also of Kentucky. These latter Divisions also crossed the River and joined Grant. The Divisions of Nelson and Wood engaged in the battle in the afternoon, and, on the next day, Crittenden's men got into the fight. The result was the defeat of the rebel forces. They retired to Corinth, and thence to different points.

When the battle of Shiloh opened, Thomas' Division was many miles away, but after Nelson, Wood, and Crittenden were on the march to join Grant, Thomas was ordered to go forward with his men. He did so with all possible speed, but it rained more or less all the time and the men were compelled, time and again, to wade creeks. We reached Pittsburgh Landing late in the second day of battle, after the battle had ended, and were transported by boat up the river to Shiloh Landing, where Grant's Headquarters then were. We arrived there about 9 o'clock and were immediately ordered to leave the boat and go into camp, as the boat was to go back to Pittsburgh Landing for other troops. We thought at the time that it was a cruel order, as Thomas' troops had no wagons or tents with them and had nothing for their protection against bad weather, except the ordinary army blanket. But the order had to be obeyed, and the men were ordered to go



This sketch was made by an artist with Major General Don Carlos Buell's command. It depicts Union troops advancing on the Louisville and Nashville turnpike being overtaken by a train carrying equipment for the troops. Harlan's division joined Buell's command at the turnpike.

out on the hillside, and make such provision for their comfort as they could. Upon the dismissal of my men for the night, some of them went to the Government Supply quarters, and cut open for their use many bales of hay. They brought the hay to their camp and spread it out over the ground so as to protect their bodies from dampness. In a few moments they were all asleep. But a rain came up about two o'clock in the morning and soon their earth-and-hay beds were so drenched with rain that they were compelled to get up. There they were, on a dark night, in a drizzling rain, and apparently chilled from head to foot. I determined that the situation should be changed, whatever might be the consequences to me. Right before my eyes was a large steamboat, brilliantly lighted, with no one occupying it except a few officers and subordinates. It did not have even a private soldier, except a few to *guard* it. I called my regiment into a line and marched down to the boat, but my men were stopped at the plankway leading to the boat. I said, "Who dares to stop my men or to interfere with my orders?" The guard replied that the boat belonged to Headquarters, and they were ordered to prevent its being used by others. I said to him that I only desired that my men should go on the lower deck of the boat and around its boilers so as to dry their clothes. The guard was obdurate, and rightly so because he was only obeying his orders. But I had much concern for my soldiers, and called up one of my best captains, and told him to bring his company with him. I ordered him to move ahead to the boat, and said that if any one attempted to prevent him from going on the boat with men of the regiment, "to pitch them into the river." The order was given to Capt. Frank Hill of Washington County, Kentucky. He replied, "All right, Colonel." He started on the boat gang-way with the men, but was stopped by the guard. Hill made his squad fix bayonets, and said to the guard, "Now, young men, I am going on that boat, and if you put yourself across my path, you will go into the river." Turning to the soldiers, he gave the order "Forward." The guard stood to one side, and

the men of my regiment went onto the boat, and in a little time they were all asleep with their clothes on, lying on the deck of the vessel around the boilers. When daylight came, and all those constituting Headquarters, were asleep, I had the men quietly aroused, and we went to the Shore. After reaching the Shore, I began to turn over in my mind what had taken place, and learned that the boat was the Headquarters of Gen. Grant and that he was actually in his room. All at once it occurred to me that I was in great peril, and that as I had the night before willfully broken a guard, I was subject, perhaps, to be *shot*. But luckily the soldiers on guard did not report us to Gen. Grant. At least, I have always thought that Grant knew nothing of our lawless conduct in forcing our way onto the boat in violation of his orders. But if he was informed of the facts, he had the courage to recognize the extraordinary circumstances of the case and to overlook our lawless acts.

On the next day after our arrival at Shiloh, I walked out to see the battlefield over which the contending armies of Grant and Johnston, respectively, on the day previously, had engaged in a battle which was momentous in its consequences.

During this walk I happened to meet Gen. Sherman<sup>35</sup> who had been in command of the Department of Kentucky for a time. He remembered me and invited me to accompany him to see Gen. Grant. I gladly accepted the invitation, and we found the latter in his office on the boat at the River Landing. He was then under a cloud because of the belief that he failed to accomplish some things in the Battle of Shiloh which it was supposed he might have done and which would have enabled us to capture the great body of the rebel soldiers engaged in that battle. But great injustice was done Grant in this matter. Subsequent events in his life showed great capacity as a military commander. He overcame the opposition of his enemies and it was not long before he was recognized as the greatest of all the Union officers.



The utter defeat of the rebel army at Shiloh meant a great deal for our Government. The result encouraged the Union men everywhere, and strengthened the conviction that, in the end, the rebellion would prove disastrous to those who organized it, and would put our Government upon a firmer basis. In this connection, I recall a conversation after the war with Gen. Wm. Preston of Kentucky.<sup>36</sup> He was of kin to Gen. Johnston and served upon the staff of that able officer in the battle of Shiloh. He, Preston, told me that it was Johnston's purpose, if the rebels had won the victory at Shiloh which they expected to win, to cross the Ohio River at Cairo and march his army through to Illinois to Chicago. I ventured to say to Gen. Preston, that if Johnston had got as far North as Springfield, Illinois, it would have been utterly destroyed, and the last rebel soldier under his command would have been captured. Few, if any, of them would have gotten back to the South.

After the battle the Union army, at Shiloh, was re-enforced by large accessions from the Army which had operated on the Mississippi River under the command of Major-General John Pope.<sup>37</sup> Later on, Major-General Halleck<sup>38</sup> came to Shiloh under orders, and took command of all the Union troops there. The army under his command was a magnificent one. It was said at the time to number nearly one hundred thousand tried soldiers who had been in battle and were thoroughly "seasoned." Why Halleck did not move upon Corinth, which was just ahead of his troops, no one knew. Corinth was near enough to Halleck's army to enable us to hear the "rebel yell" in and around that place as if the rebels were receiving re-enforcements; whereas, in point of fact, the rebels were steadily sending their troops away from Corinth, and intended to evacuate that place before any serious advance was made by the Union troops. Their purpose was carried out successfully; for, when our Army finally moved upon Corinth, it met with no opposition whatever. Every rebel soldier was gone, and whatever provisions were

in Corinth were taken away by them, and we captured a place completely empty of rebel soldiers. Not even a barrel of crackers was found for the use of our soldiers.

After the dispersion of the rebel soldiers at and about Corinth, the Union Army was separated into numerous detachments for the purpose of occupying different places on the line north of the Cotton States. My regiment was stationed at Eastport, Mississippi. We were there when a rebel army went through Eastern Tennessee towards Kentucky. Buell was ordered to concentrate his army for the purpose of preventing the entrance into Kentucky of the rebel army under Bragg. He fixed upon Deckard, Tennessee, as a point where his scattered troops could best get together. I was ordered to march my regiment to Deckard and report for further orders. This took me through hostile country, and if attacked, I could not have expected aid from other Union troops. What made my position peculiarly embarrassing was that sickness had reduced the number of active soldiers in my regiment by several hundred. At least seventy-five men were sick or were so weak from sickness that they could not carry a gun. But we set out from Eastport for Decard. Our route was through Shelbyville, Tennessee. When we got within a few miles of that place we saw, much to our regret and horror, two negroes, wearing the Union uniform, hung up by the roadside, dead. This caused me to be very uneasy for the fate of my sick men who were trudging along the road and endeavoring to keep up with their regiment. I feared that they would be killed by rebel guerillas and determined to use every exertion for their safety. We reached Shelbyville about 11 o'clock, and as I was passing through the town I discovered about 30 or 40 well-dressed men in citizens' clothes, sitting quietly under the shade trees. It occurred to me, all at once, that here was a chance to protect my sick soldiers from rebel guerillas. I halted my regiment in the main street and sent one of my captains, with a squad of soldiers to where the crowd was, with orders to arrest about a half dozen of them and

bring them to me. My orders were to select well-dressed, young men who appeared to be influential and well to do. This was done and the arrested citizens were put into line with my men. Some of them wore pumps and white socks and seemed to be contented with their lot and the situation. I then rode up, alone, to the crowd of citizens and said to them in substance: "It is proper to inform you as to what all this means. As we came along this morning we saw near here two negroes, hung up at the roadside and dead. They had on the uniform of the Union Army and were hanged, no doubt, for that reason. They were, of course, murdered by rebel guerillas, who were prowling about in that country. You know who they are, or could find out all about them. Now, I warn you that for every soldier absent from my camp this evening, two of these arrested citizens will be shot by my orders." Of course, I did not really intend that this order should be executed literally.

But I suppose the rebel citizens deemed me to be in dead earnest. I then rode off, and moved ahead with my regiment, taking the arrested citizens with me and having them walk with my men in the dust. I adopted this plan at every town through which I passed on my way to Deckard. I heard no more of rebel guerillas after leaving Shelbyville and none of my sick soldiers disappeared or were killed.

In order that Bragg's army might be intercepted on their march to Kentucky and prevented from occupying that State, Buell's Army was concentrated and sent into Kentucky by the way of Nashville. It moved along the line of the Louisville and Nashville Railroad. Buell's object, as it seemed at the time, was to reach Louisville with the body of his troops before Bragg got there. In this he succeeded.

While our army was en route for Louisville there occurred an incident which was well calculated to disturb any one who desired the success of the Union troops. Somewhere on the line, South of and not very far from Munfordsville, our army was halted for some reason, and thus an opportunity was

given for officers to confer with each other as to the possibility of an encounter by the Union army with Bragg's forces. Some of the officers thought it was a great mistake not to hunt for and attack Bragg; for, it was well known that he was not far to the East, and was steadily moving in the direction of Louisville and Central Kentucky. A few others predicted that Buell would not attack Bragg until after he had received the re-enforcements then being gathered at Louisville. Others intimated, and, indeed, some said that Buell was untrue to his country and to his army, and would ultimately so manage his forces that Bragg would escape from the State and go back into Tennessee. I expressed no opinion on the subject, being a young colonel, only a little over 28 years of age. But I did say to Col. Sill<sup>39</sup> of Ohio, another young colonel, that it was distressing to think that we might, at any time, get into battle, under a commander, some of whose subordinate officers distrusted his fidelity; that if they really believed Buell to be untrue or unsafe as a commander, they should take active measures to have him put out of command. Buell's army finally reached Louisville, where he received such re-enforcements as would enable him to go into any battle with seventy-five to one hundred thousand men. When Buell reached Louisville, Bragg was in Central Kentucky. While we were at that city, Gen. Wm. Nelson, Major-General commanding one of our corps and Col. Jefferson C. Davis<sup>40</sup> of Indiana had a quarrel which resulted in Davis shooting and killing Nelson at the Galt House. I never knew what were the facts which led to that quarrel. I only know that Davis was not indicted or tried by the civil authorities. Whether the case was looked into by the military authorities, I do not know. Strenuous efforts were made by Gov. Morton<sup>41</sup> of Indiana for his protection. Nelson, I always suspected, was of a very imperious nature, very ugly and intolerant to those he disliked. But he had fine ability and gave promise of great distinction as an officer. I remember to have heard Gen. Thomas L. Crittenden say that Nelson was misunderstood by those he came



into contact and that no man was more lovely or more considerate of those whom he liked than Nelson. Whatever were the facts, all felt that in his death the country and the army had sustained a great loss.

I may say that while our army was at Louisville, Mama came from her parents' home in Evansville, Indiana, to see me, bringing with her our baby James. If I remember correctly she and James stayed in camp with me while I was at Louisville.

Finally, Buell's army was organized for the purpose of hunting up Bragg in Central Kentucky and giving him "fight." It was divided into three corps, Crittenden commanding the right corps, McCook<sup>42</sup> the left corps, and Gilbert<sup>43</sup> the centre or middle corps. The latter was at the time only a Captain in the Regular Army, but Buell—without full authority it was supposed, and without the express sanction of the President or of the



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Secretary of War—issued to Gilbert a commission as Major-General and put him in charge of the middle corps, which no doubt would have been commanded by Nelson if he had not been killed. After this organization, our army moved towards Central Kentucky. McCook went with his corps through Taylorsville, Spencer County, Kentucky; Gilbert, with his corps, took the direct road leading towards Danville, Kentucky, and Crittenden took the extreme right. Thomas, who had been appointed by Buell second in command of the whole army, went with Crittenden. The three corps got together south of Perryville, Kentucky, about ten miles from Danville, on a line running substantially through the farm or plantation of several acres which was once owned by my grandfather, James Harlan, and near by the house erected by him as a residence. Gilbert's force was immediately on the right of McCook's. Such was the situation on a particular afternoon, and it was Buell's purpose to drive his entire force against Bragg *the next morning*. But, in some way or other—I could never learn the facts—a battle arose in the afternoon between the rebel army and McCook's troops. This was the battle of Perryville. It was said at the time that Gilbert was aware of the fight going on, but, for lack of orders, he did not put his men into it. If Nelson had lived, and been in command of the middle corps, he would not have waited for orders, but would have regarded the actual fight going on between McCook and Bragg as a sufficient order that he should "go in" and assist in defeating the enemy. It was a terrific battle and left both sides practically exhausted for the time. In the battle of Perryville was an Indiana regiment under the command of Mama's oldest brother, James Shanklin. He was struck on the head with a spent ball, and was completely disabled for a time. He was thought at the time to have been killed.

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into contact and that no man was more lovely or more considerate of those whom he liked than Nelson. Whatever were the facts, all felt that in his death the country and the army had sustained a great loss.

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whole engagement, and still he *did not know that any battle was going on until after it was all over*. Had he known of it the result might have been different. It was not strange that he did not know of the battle. He anticipated that a meeting might possibly occur that day. But he had given orders to the effect that the direct attack on the enemy should not be made until the next morning, when all would certainly be ready. His headquarters during the afternoon were behind the centre of his army—about five miles in the rear. This was, perhaps, too far to the rear. Why did not Buell know of the fighting at Perryville while it was going on? Why did he not order troops to be sent to McCook's aid? I am able to say with perfect confidence that he did not know of the fighting at Perryville until the battle was ended, and that he was not to be blamed for his want of knowledge on the subject, looking at all the circumstances. The battle took place in a small valley, and at the time of the fighting the wind was blowing heavily from the locality of Buell's Headquarters, towards the battle of Perryville. This accounts for Buell's not being able to hear the sound of musketry or cannon. If he had known what was going on, it cannot be supposed that he would have failed to rush to McCook's assistance. I speak of these things without any doubt as to the correctness of what I say, because I was within one hundred yards of Buell's Headquarters during the whole time of the battle. At that time I was in command of a Brigade, and being about to march with my men for the purpose of joining the main body of our corps, Buell sent me an order to stay where I was until further orders, but holding my command ready for action, if any occasion therefore should arise. Later in the afternoon a soldier came from the direction of McCook's corps and gave notice that a great battle had been fought in the early afternoon of that day several miles distant. This was the first intimation that I had of any battle having been fought. I heard no firing from the direction of the battlefield, and if I did not hear

it, Buell could not have done so. If I had heard any firing Buell should have also heard it, for we were not more than a hundred yards apart at any time during the battle. Buell was of opinion and so said in his report, that McCook ought not to have risked a battle with only his corps, and he should not have taken it for granted that he could whip the rebels without the aid of his commander. McCook always said that he had no alternative but to fight or to make a retreat as would have endangered the safety of Buell's army. What the facts were, beyond those above stated, I do not know. But it is certain from all that was said at the time that on the night after the battle, a conference between Buell and his chief subordinate officers, including Gen. Thomas, was held at Buell's Headquarters and the conclusion was reached, that our army had been injured too severely to attack the rebel force the next morning—that it was best to await an attack by the rebel army, if it was so minded. But when the next morning came, no rebels were to be found in our front. They had retired and were making for the mountains in the direction of East Tennessee. We went in pursuit, but it soon became evident that they were too far ahead to be caught. Our army then returned and went into camp, our Division making their camp on the rolling Fork of Salt River about 10 miles from Lebanon, Kentucky. The next day after we went into camp, message came that a meeting of the field officers of our corps, Gilbert's, would be held at the little schoolhouse up the creek, and that my presence there was desired. The object of the meeting was not stated, but in view of the ugly feeling that Bragg had been permitted to escape with all his troops, I suspected that the proposed meeting had some mischievous or dangerous purpose in contemplation. But I desired to know what was going on, feeling that whatever was said or done at the meeting, I knew my duty and could take care of myself. So I went at the appointed time, and then found about twenty officers there—what for I had not then ascertained. Gen. Speed S. Fry, whom I



had known from my earliest boyhood, and in whom I had every confidence, was called to the chair. Soon the talking commenced, all that was said for some time being directed against Gilbert, our corps commander. He was pronounced as incompetent for his position and it was said that his removal was vital to the army. It was suggested that a telegram on the subject should be sent directly and at once to President Lincoln. Finally, a Lieutenant-Colonel or Major of an Illinois Regiment—whose name, I think, was McClellan or McLellan—rose and said with impassioned voice: "Mr. Chairman, I rise to say that, in my opinion, we are a pack of cowards." "What do you mean?" said Col. Fry. He replied: "I mean that we have spent all this evening talking about Gen. Gilbert, when our real objection is to Buell as our commander. In my opinion, Buell is a traitor, is untrue to the army and untrue to the country." When he sat down, I arose, feeling that, although not expecting to say anything, I could not pass in silence what the Illinois officer had said, without expressing my own views. So I said, in substance: "Mr. Chairman, I do not concur in what has been said about Gen. Buell. He no doubt has made mistakes, and may have some views that I do not share. But I do not believe that he is untrue to the army or that he purposely or treacherously allowed Bragg's army to escape. Nor will I sign any telegram to the President which would question Buell's integrity or his fidelity to his troops." "What sort of a telegram," broke in the Illinois officer, "will you sign? Put down on paper what you are willing to say." Thereupon I sat down at the table, and wrote a telegram such as I would consent to be sent to the President. It ran about in this wise: "Gen. Buell having lost the confidence of the Army of the Ohio, we think that the public interests would be subserved by a change of commanders." "That," the Illinois officer said, "is satisfactory." We all (including Gen. Steedman and Gen. Fry) signed it and, much to my surprise, the telegram was committed to me to be sent to Washington. The next day I started for Lebanon,

where a telegram office was located, intending to send the proposed telegram. On my way, it occurred to me that the telegram would go through Buell's headquarters, and that all of those who had signed it would get into trouble. But I made up my mind to do what my brother officers desired, and which I had agreed to. Luckily for us, upon my arrival at Lebanon, the Louisville papers of that day announced that by order of the President, Buell had been superseded by Gen. Rosecrans<sup>44</sup> in command of the army of the Ohio and Buell temporarily deprived of authority. I took the responsibility of withholding the telegram, the original of which is no doubt somewhere among my papers. It could not have been destroyed by me.

Later on, I was put in charge of the Union troops stationed at Castalian Springs, in Tennessee, which was about ten miles from Hartsville, in that State. At the latter place, we also had some troops, but they were under the command of an officer who, it was said, had no experience, nor any idea of discipline. He allowed his men "to prowl around the country" and depredate upon the property of private citizens. He did not seem to know the necessity of having pickets out constantly in different directions, so as to inform him of the advance of the enemy. The result was, what might have been expected—a surprise of our troops by the enemy. Early in the morning John H. Morgan<sup>45</sup> burst out of the woods and attacked the Union troops when the latter were quietly eating breakfast. After a short contest he captured the whole of our troops, about 2,100 in number, and took them across the Cumberland River. As soon as I could hear from my camp at Castalian Springs, the firing of musketry and cannon in the direction of Hartsville started and I rushed to the aid of our troops at Hartsville. The march made by my troops to Hartsville was extraordinary in its swiftness. But when we reached the battlefield at Hartsville we saw only the dead and wounded lying around while Morgan's men were a long way off going up the hill on the



opposite side of the river, each rebel horseman having on his horse behind him a Union soldier as a prisoner. The rebels were too far ahead to be reached by the light cannon we had for use. When we got to Hartsville, I observed a two-horse wagon crossing the river. As it was evidently under Morgan's control and was being taken to his camp, I ordered the wagon party to be fired upon, and the order was promptly obeyed. Along with the wagon was a rebel soldier recently ascertained to be Horace H. Lurton of Morgan's command, and now a colleague of mine in the Supreme Court of the United States.<sup>46</sup>

After Hartsville, my command was on duty at Laverne, Tennessee, and while they were there, with no enemy near, I made a visit to my parents at Frankfort, Kentucky, and found my father ill from a congestive chill which came upon him the previous summer or fall and hung to him, more or less violently, during the entire winter. But it did not appear that he was in actual danger, and I returned to my troops in Tennessee. But I was mistaken as to the severity of my father's illness. He succumbed to the chill with which he was afflicted, and died February 23<sup>rd</sup> 1863. This was, on every account, an unspeakable calamity to the family, even if looked at only from the standpoint of business. At the time he died my father had the largest practice of any lawyer in Kentucky and the support of my mother and the family depended upon the right handling of the business left by him. My three oldest brothers were dead and my only remaining brother had become incompetent for business. I was connected with my father in business and alone knew of what was necessary to be done in order to preserve from loss or waste what he had fairly earned by hard work in his profession. So, in every just sense, I was compelled to return to civil life. This was the view of all of my brother officers, including Gen. Rosecrans and his Chief of Staff, Gen. James A. Garfield.<sup>47</sup> My letter of resignation, addressed to Brig. Gen. Garfield, Chief of Staff, was as follows:

Laverne, Tenn.,  
March 2, 1863.

Brig. Genl. Garfield,  
Chief of Staff Army  
of the Cumberland,  
Murfreesboro, Tenn.

General:

I hereby tender my resignation as colonel of the 10<sup>th</sup> Kentucky Volunteer Infantry.

I am not indebted to the Government of the United States, nor have I any Government property in my possession. I have not been absent any time without leave nor are there any charges against me which can affect my pay. I have been paid to January 1, 1863.

It is due to my Superior officers—to those with whom I originally entered the service, and to the cause in which we have alike labored for nearly sixteen months that I should state explicitly the reasons which have induced me to take this step.

The recent sudden death of my father has devolved upon me duties of a private nature which the exigencies of the public service do not require that I shall neglect. Those duties relate to his unsettled business which demands my immediate personal attention.

I deeply regret that I am compelled, at this time, to return to civil life. It was my fixed purpose to remain in the Federal army until it had effectually suppressed the existing armed rebellion, and restored the authority of the National Government over every part of the Union. No ordinary considerations would have induced me to depart from this purpose. Even the private interests to which

I have alluded would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would, to any material extent, affect the great struggle through which the country is now passing.

If, therefore, I am permitted to retire from the army, I beg the Commanding General to feel assured that it is from no want of confidence either in the justice or ultimate triumph of the Union cause. That cause will always have the warmest sympathies of my heart, for there are no conditions upon which I will consent to a dissolution of the Union. Nor are there any concessions, consistent with a republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union."

I have the honor to be, General,  
Very Respectfully,  
Yr. Obt. Servt.,  
John M. Harlan,  
Col. Comdg. 2d Brig.  
3d Div.  
14<sup>th</sup> Army Corps.<sup>48</sup>

Before my resignation was put into the hands of Gen. Rosencrans, and without its being generally or publicly known that I intended to return to civil life, President Lincoln sent my name to the senate for Brigadier General. As soon as I became aware of this fact, I wrote to Senator Crittenden informing him that I had or would soon resign, and requested my nomination as Brigadier General to be withdrawn. He complied with my wishes, and, hence, there was no confirmation.

This closed my career in the Union Army. But immediately upon my return to Kentucky the suggestion was made that I should be nominated for Attorney General at the Union Convention, then soon to assemble to make nominations for State officers to be selected at the approaching State election, in August. The

suggestion was not disapproved by me, principally because if elected I would be required to remove to the capital of the State where my father lived at the time of his death, and where I was compelled to be in order to wind up his business and estate. I was elected Attorney General by more than 50,000 majority, and went to Frankfort. It may be here stated that I was little over thirty years of age when elected. I performed the duties of the office of Attorney General for the full term of four years, and then went back to Louisville, in November, 1867. After ten years of practice at that city, I was offered and accepted the position of an Associate Justice of the Supreme Court of the United States, tendered by President Hayes. How long I will remain in that office, it is impossible for me now to say. I can retire upon full pay, but the subject has never been taken up by me for final consideration. There are some circumstances which seem to require that I should remain where I am, so long as I can adequately perform the duties of my office. There are other reasons why I would like to retire after more than thirty-three years of public service. But I pass this subject.<sup>49</sup>

#### Some Experiences as a Captain of the Home Guards

As stated in another paper, I was the Captain of the Crittenden Union Zouaves—an independent, volunteer infantry company organized at Louisville, Kentucky, in the summer of 1861, to aid the Union cause in that State. The rebels had similar military organizations at Louisville. For some time after Sumter was fired on, Kentucky was practically "neutral" in the then contest, that is, the State had not then officially raised any troops for the Union army, nor declared its purpose to adhere to the Union. On the contrary, the rebel Governor of Kentucky expressly refused to respond favorably to the call of President Lincoln for troops. Lincoln forbore for a time to send Union troops into the State, because he wished to avoid even the appearing of

coercing or forcing the State to declare for the Union. But the situation changed in August 1861. Rebel troops came into Southwestern Kentucky under General Leonard [sic] Polk<sup>50</sup> and also under Buckner<sup>51</sup> and occupied Bowling Green. Thereupon Union troops—all from the Western States—were sent by the Government into Kentucky in large numbers. Gen. Robert Anderson was in the command of the Department, and Gen. W. T. Sherman, under orders of the War Department, reported to Anderson for duty.

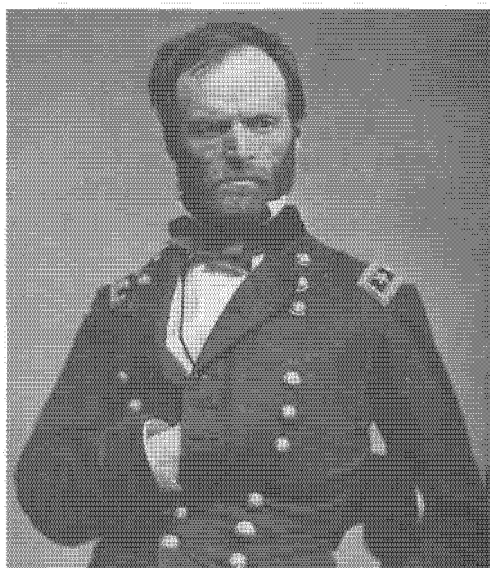
I met Sherman when he arrived at Louisville, and the impression made by him on everybody was excellent. He was full of life and aggressiveness, and seemed anxious to meet the enemy. As soon as he arrived, he conceived the plan of moving towards Bowling Green, at which place a rebel army under Gen. S. B. Buckner had assembled, and, it was supposed, intended soon to advance upon Louisville. Sherman fixed his first camp at Lebanon Junction on the Louisville and Nashville Railroad, about 60 miles from Louisville. That road extended from Louisville, through Bowling Green to Nashville and further South. Several companies of Home Guards were ordered to report to Sherman at the Junction, my company, the Crittenden Union Zouaves, being among the number. That company was detailed by Sherman to guard his headquarters, which were established at the Lebanon Junction Hotel. It camped in the yard of that Hotel; I slept on the floor in the same room at the Hotel with Sherman. He remained with such troops as he had at Lebanon Junction for a week or ten days. He was not at all informed as to the physical geography, or roads, or the sentiments of the people in particular localities of the State. He found that I was, the result being that he had me up all hours of the night in order that he might obtain information from me about roads, people, etc. He was a diligent student of all the county maps that he could lay his hands on. His energy was extraordinary, and he seemed to sleep but little.

Finally, he determined to move his troops to Muldraugh's Hill about 15 miles further south, towards Bowling Green, and establish himself in a good position for resisting any advance of Buckner's rebel troops towards Louisville. No troops or Home Guards remained at Lebanon Junction except my company, and that post was left in command of Brig. Gen. Richard W. Johnson.<sup>52</sup>

As soon as Sherman established his camp on Muldraugh's Hill, he sent an order back to General Johnson for 5000 rounds of ammunition. Johnson directed me to execute the order. As the railroad bridge near by, over the Rolling Fork of Salt River, on the road to Muldraugh's Hill, had been destroyed by rebels, and as Rolling Fork was quite broad and too deep for ordinary wading at that point, it seemed at first impossible for me to get the ammunition across the Fork and up Muldraugh's Hill to Sherman. But a plan to do so was finally hit upon. I sent all around the county, to farm houses, in order to obtain a wagon with a strong body over and across which we could place an ordinary railroad hand car, then at the Junction, and into which hand car, we could put the ammunition. At last, we found such a wagon about 2 o'clock in the morning at a distant farmhouse and made the owner hitch up his team of four horses and bring it to our camp at the Junction Hotel. The soldiers, all uniting to lift the hand car, placed it across the wagon body, and into the car was put the ammunition. We then drove the wagon to the river crossing, and went over the Fork, (I riding without saddle one of the fore horses and guiding the team) and placed the car on the railroad track on the other side. It was literally pushed through the Tunnel (I think a mile long) by hand to the top of the Hill and I delivered the 5000 rounds of ammunition to Sherman. We returned the same day to our camp, at the Junction Hill, and just as we were about entering the tunnel, on the return trip, Basil W. Duke<sup>53</sup> came out of it on his way to join his new wife, then at St. Louis or within the rebel lines. I knew and recognized Duke at the time, and knew his wife.<sup>54</sup> I knew her, when

a girl, while I attended law school at Transylvania University. She was a sister of Gen. John H. Morgan, the noted rebel cavalry leader. Some of my men, believing that Duke was on his way to join the rebel army, insisted that I should stop the hand car and arrest him. But I declined to do so and he went on South, and afterwards, became the second in command of Morgan's cavalry. It was generally believed, during the war, that he conceived most of the plans of campaign which made Morgan a famous raider and commander. But this view of Morgan did him injustice; for he had considerable ability and had all the elements of a leader in whatever he undertook. I knew him quite well.<sup>55</sup>

As part of my experience as a Captain of Home Guards, I state an incident occurring during my association with General Sherman at the Lebanon Junction Hotel. He indulged in smoking as I did. He seemed to have a cigar in his mouth half the time, unlighted. He would say, "Harlan, let me have the light of your cigar—mine is out." "Certainly General" would be my reply. He would then take my cigar, light his own from it, and *then throw mine away*. It never occurred to him that he threw my cigar away, but went on talking. No man ever lived who had a kinder heart than Sherman possessed. I became very fond of him, and he always expressed a strong affection for me. He was a most remarkable man—had more *genius* for war than any soldier of his day. While he was in Kentucky, the Secretary of War, Simon Cameron,<sup>56</sup> came to Louisville. Being asked how many troops were needed Sherman told him that it behooved the Government, at the earliest possible moment, to open the Mississippi River to its mouth, and that 250,000 or 300,000, if not more, troops would be required for that purpose. Cameron, it was said, at the time, thought Sherman to be unbalanced in his mind and wild in his calculations. Subsequent events proved that Sherman's estimate of troops needed was very moderate. The fact is that he appreciated the difficulties in the way of suppressing the rebellion more distinctly than anyone else around him or at Washing-



"No man ever lived who had a kinder heart than Sherman (pictured) possessed," wrote Harlan. "I became very fond of him, and he always expressed a strong affection for me. He was a most remarkable man—had more *genius* for war than any soldier of his day."

ton. Shortly after Cameron was at Louisville, Sherman was ordered to report for duty at St. Louis, and it was thought that Cameron did this in the belief that Sherman was "off" in his mind and not a safe commander. Sherman's subsequent career proved that Cameron was "off" in his calculations and unfit for his place. To get rid of him, he was sent as a Minister abroad.

When I was appointed an Associate Justice of the Supreme Court, Sherman was stationed at Washington. Soon after my arrival at that city, I called to see him, and received at his hands a most cordial greeting. He also spoke of me to others as one of his "boys," observing, jocularly, that the country was safe when controlled by his "boys."

#### Raid by Morgan's Men on Frankfort, Kentucky, in the Fall of 1864

In March 1863, I resigned my position as Colonel of the 10<sup>th</sup> Kentucky Volunteer Infantry and returned to civil life. Shortly after returning to Louisville—which was my home



at the beginning of the Civil War—the Union men of Kentucky held a convention in that city to make nominations for Governor and other State officers. Although not yet thirty years of age, I was nominated for Attorney General of the State—a position my father had held for, I think, two terms of four years each. I was elected by more than 50,000 majority. This compelled me to live at Frankfort, the capital of the State, and I resumed my residence there in the fall of 1863.

In the fall of 1864,<sup>57</sup> word was sent to me by Gov. Bramlette<sup>58</sup> that rebel guerillas were advancing upon the capital, and that every loyal man should at once go to the "Fort" and resist any attack made upon the city. The "Fort," as it was called, consisted of a few lines of earth breastworks thrown up on the hill in the rear of the capitol building and overlooking the city, which was in a valley on the Kentucky River and surrounded by hills. On one of those hills, on the opposite side of the river from the "Fort" (the river runs through the city), was the summer residence which my father had occupied. It was still in the family, and at the time I am now referring to, it was occupied by my mother.

Although my wife was not well, I determined—having been in the army—to set a good example to the people, and therefore promptly complied with the request of Gov. Bramlette and went to the "Fort" on the hill, carrying with me a Henry rifle. As I went up the hill, I came across the pastor of the Presbyterian Church, of which I was a member—Rev. John S. Hayes. He was full of fight, and carried his gun, ready to do such execution with it as might fall to his lot. He and I went into the fort together, and found there one or two small cannon in charge of Capt. Sam Goins' Home Guards Artillery Company, a uniformed Volunteer company. Goins knew very little of military matters and was an uneducated man. But he had courage and was ready to fight all who stood in his way. Immediately after my arrival at the fort, I observed, a few hundred yards away, coming up towards the fort, a small squad of men carrying guns. They were taken to be

rebel soldiers, and it turned out that they were. We fired at them, and they returned the fire and then retired. They hoped to surprise the little squad of Home Guards in the fort. But that did not occur. Looking over the city and across to the house in which my mother was residing, we could see a large number of horsemen in the yard and around the house. Immediately upon their being seen by Goins, he turned his cannon to fire upon them. I happened to observe that his little cannon was pointed directly at the house in which my mother was staying. Goins did not know that she was there. This induced me to take charge of the cannon, and I saw to it that it was not so aimed as to hit my mother's house. Whether any cannon balls reached the spot where the mounted cavalymen were, or not, I never ascertained. But after a little time they went off and were no more seen. The men there constituted a company, or part of a company, commanded by Capt. Bart. Jenkins, of Morgan's Confederate Cavalry.<sup>59</sup> The whole affair was a mere incident in the war; but it is quite certain that prompt action by a few unorganized men in Frankfort prevented the rebels from entering the city and doing a good deal of mischief.

Two circumstances in connection with this little affair may be alluded to.

1. It occurred shortly before, say within sixty days prior to, John's birth.<sup>60</sup>

2. In Goins' company was a man by the name of Thomas Glore, as a "rammer," whom I now recall with perfect distinctness. Goins and Glore were brothers-in-law. The former was a bold, outspoken Union man, while Glore, who was a stone-mason by trade, was known to everybody, at least to me, as a rebel sympathizer. Nevertheless Glore remained in Goins' company, which had been, in fact, organized before the war commenced. While the firing of small arms between the men in the fort and the rebel soldiers coming up from the rear was going on, some of the rebel balls came very near hitting those who were inside of the fort. I recall the fact that one ball passed near my head, and I observed that Glore, while ramming the

cannon was very uneasy. Goins took up the notion that Glore was not "ramming fair" and that he really wished the rebels to drive us, including the company, out of the fort. In my presence Goins said to Glore: "You d—d rascal, stand up there and ram that gun right, or I'll shoot you." Glore trembled with fear and said (he stuttered badly): "Captain, w-w-when you see my w-i-fe, t-t-tell her to take c-c-care of my crowbars, a-and t-t-tell her I'll m-m-meet her in heav-heaven."

After Morgan's men went off, I organized about thirty young men and boys and went off in pursuit of the rebels, but we did not come up with them. Perhaps it was well that we did not, for they were better armed than we were, and outnumbered us.<sup>61</sup>

## ENDNOTES

<sup>1</sup>Richard Davenport Harlan (1859–1931) was Harlan's oldest son.

<sup>2</sup>James Harlan (1800–1863) was considered one of the top lawyers of Kentucky. He was so enamored of the law that he insisted that all four of his sons be trained as lawyers. He was an ardent admirer and supporter of Henry Clay, a stance that served him well politically. He served as a U.S. Congressman for two terms and was later named a U.S. District Attorney by President Abraham Lincoln.

<sup>3</sup>Known as "The Great Compromiser," Henry Clay (1777–1852) was the first nationally prominent politician to come from Kentucky. He was so beloved by Kentuckians that they elected him as their Senator and Congressman numerous times. He also served as Secretary of State under John Quincy Adams, which was the closest he got to being President.

<sup>4</sup>The speech was given on November 13, 1847. For the full text of the speech, see *The Papers of Henry Clay*, v. 10, Melba Porter Hay, ed. (The University Press of Kentucky, Lexington, KY, 1991), pp. 361–77.

<sup>5</sup>The letter was written on February 8, 1851. See Hay, *Papers*, v. 10, p. 853. The position ended up going to William Easby.

<sup>6</sup>Joshua F. Speed (1814–1882) was a civic leader of Louisville and one of Lincoln's closest friends.

<sup>7</sup>The speech was given on November 15, 1850. See Hay, *Papers*, v. 10, p. 828.

<sup>8</sup>James G. Birney (1792–1857) was a noted Kentucky abolitionist. He ran for President as a candidate of the Liberty party in 1840 and 1844. His two sons were generals in the Union Army during the Civil War.

<sup>9</sup>Like so many people Harlan mentions here, Taylor (1784–1850) was a Kentuckian of divided loyalties. He was a

slaveholder who opposed extending slaveries to newly acquired territories. He was also at one time Jefferson Davis's father-in-law.

<sup>10</sup>Humphrey Marshall (1812–1872) was a lawyer, former Congressman, and veteran of the Mexican War. He advocated neutrality for Kentucky at the beginning of the Civil War but ended up serving in the Confederate Army.

<sup>11</sup>Thomas F. Marshall (1801–1864) was a Kentucky lawyer, state legislator, and nephew of Chief Justice John Marshall. His one year in the Mexican War was his only military service.

<sup>12</sup>Cassius M. Clay (1810–1903) was a noted abolitionist, Kentucky state representative, and cousin to Henry Clay. He was a vocal critic of the Mexican War at the outset but still volunteered to serve. Harlan's memory is correct: Clay was the leader of an outfit called "The Old Infantry Calvary."

<sup>13</sup>Colonel William R. McKee (1808–1847) was a Kentucky lawyer and West Point graduate. He was the leader of the 2d Kentucky Infantry Regiment, which sustained heavy casualties in the Battle of Buena Vista.

<sup>14</sup>Henry Clay, Jr. (1811–1847) was the third son of Henry Clay and had already made a name for himself as a lawyer and state representative. He was also a close friend of Jefferson Davis.

<sup>15</sup>As Harlan relates, Braxton Bragg (1817–1876) would later invade Kentucky as a general of the Confederate Army.

<sup>16</sup>Beriah Magoffin (1815–1885) was the Democratic Governor of Kentucky from 1859 to 1862. A sweeping majority of Unionists in the state legislature forced him to resign from office.

<sup>17</sup>The Bell and Everett party was formally known as the Constitutional Union party. Made up of members of the Whig and Know-Nothing parties, it dissolved after the 1860 election. John Bell was its presidential candidate, and Edward Everett was the vice presidential candidate.

<sup>18</sup>The brother of Joshua Speed, James Speed (1812–1887) was a lawyer, state representative, and abolitionist. Lincoln rewarded him for his efforts to keep Kentucky loyal to the Union by making him U.S. Attorney General in 1864.

<sup>19</sup>John Millbank Delph (1805–1891) was the pro-Union mayor of Louisville during 1861–1862.

<sup>20</sup>John W. Barr (1826–1907) served in various Kentucky regiments during the Civil War and then served as judge on the U.S. District Court, Kentucky District, between 1880 and 1899.

<sup>21</sup>George D. Prentice (1802–1870) was the first editor of the *Louisville Journal*, which was founded in 1830 as an organ to promote Henry Clay's presidential candidacy. His witty writing made the *Journal* the most widely circulated newspaper west of the Appalachians. During the Civil War, the *Journal* was staunchly pro-Union, despite the fact that Prentice's two sons joined the Confederate Army. In 1868, the *Journal* merged with the pro-Confederacy *Louisville*

*Courier* to become the *Courier-Journal*, which is still published today.

<sup>22</sup>Kentuckian Robert Anderson (1805–1871) was the commander of Fort Sumter when it was fired upon at the beginning of the war. Poor health forced him to retire from the army in 1861.

<sup>23</sup>George H. Thomas (1816–1870) was a pro-Union Southerner who was a West Point graduate and instructor and veteran of the Mexican War. He stayed in the Army until his death in San Francisco.

<sup>24</sup>Felix K. Zollicoffer (1812–1862) was a former Tennessee Congressman and veteran of the Seminole Wars. It has been posited by historians that the Confederates lost the Battle of Mills Springs in part because Zollicoffer disobeyed orders and camped his troops alongside of the Cumberland River.

<sup>25</sup>George B. Crittenden (1812–1880) was a veteran of the Blackhawk and Mexican wars. After the battle of Mills Springs, he was arrested for drunkenness and resigned from his commission. He later became State Librarian for Kentucky.

<sup>26</sup>At the time, John J. Crittenden (1787–1863) was one of the most important politicians in Kentucky, having been a Congressman, Senator, U.S. Attorney General, and Governor.

<sup>27</sup>James B. Steedman (1817–1883) would eventually be made a major general and would be part of Sherman's march to the sea.

<sup>28</sup>Speed S. Fry (1817–1892) was a Kentucky lawyer and judge. He was eventually promoted to brigadier general. According to some accounts, the near-sighted Zollicoffer wandered into the Union camp and actually engaged Fry in conversation, believing him to be a Confederate officer, before he was shot. Fry was brevetted to brigadier general after the Battle of Mills Springs.

<sup>29</sup>Major General Don Carlos Buell (1818–1898) was the head of the Army of the Ohio. He never saw any more action after the Battle of Perryville and eventually resigned.

<sup>30</sup>Albert Sydney Johnston (1803–1862) was a veteran of the Blackhawk and Mexican wars. Although he opposed secession, he volunteered his services to the Confederacy. His death was the turning point of the battle of the Shiloh.

<sup>31</sup>William "Bull" Nelson (1824–1862) was a veteran of the Mexican War and a graduate of the U.S. Naval Academy. Shortly before his death, he had been given command of the Army of Kentucky.

<sup>32</sup>Pierre Gustave Toutant de Beauregard (1818–1893) was one of the few full generals on the Confederate side and the one that fired on Fort Sumter at the beginning of the war.

<sup>33</sup>Thomas J. Wood (1823–1906), a graduate of the West Point, would serve throughout the Civil War despite receiving a leg-shattering wound at one point.

<sup>34</sup>Thomas L. Crittenden (1819–1893) was the son of John J. Crittenden and the brother of Confederate Gen-

eral George Crittenden. He was promoted steadily until the Battle of Chickamauga. He resigned from the Army shortly thereafter.

<sup>35</sup>William Tecumseh Sherman (1820–1891) was Grant's second-in-command during the Battle of Shiloh.

<sup>36</sup>William Preston (1816–1887) was a Harvard law graduate, Congressman, and ambassador to Spain. Besides being a general, he also acted as Confederate ambassador to Mexico. After the war, he returned to Kentucky and served as a state representative.

<sup>37</sup>John Pope (1822–1892) was a West Point graduate and Mexican War veteran. He was blamed for the Union's defeat at the Second Battle at Bull Run and sat out the rest of the war.

<sup>38</sup>Henry Halleck (1815–1872) was a lawyer, West Point graduate, and veteran of the Mexican War. Halleck served as Lincoln's military advisor before being replaced by Grant in 1864.

<sup>39</sup>Joshua Woodrow Sill (1831–1862) was a West Point graduate and instructor. He was killed during the battle at Stones River, three months after Perryville.

<sup>40</sup>Jefferson C. Davis (1828–1879) was a veteran of the Mexican War. He served in the Army all of his adult life, but his career never recovered from his murder of Nelson.

<sup>41</sup>Oliver Hazard Perry Throck Morton (1823–1877) was the Governor of Indiana from 1861 to 1867 and later a U.S. Senator. He was a power player in the Republican party, and he and Harlan would often cross paths—usually at cross-purposes—during the 1870s.

<sup>42</sup>Alexander McDowell McCook (1831–1903) was a West Point graduate and instructor. He was brevetted to brigadier general for his actions at Perryville.

<sup>43</sup>Charles Champion Gilbert (1822–1903) was a West Point graduate and instructor and Mexican War veteran. After Perryville, Gilbert was never officially made a general.

<sup>44</sup>William S. Rosecrans (1819–1898) would quickly earn similar criticism for not aggressively chasing after the Confederates.

<sup>45</sup>John Hunt Morgan (1825–1864) initially supported neutrality for Kentucky but joined the Confederate Army when the state sided with the Union. Six days after the Hartsville raid, he was promoted to Brigadier General. Harlan had this to say about Morgan in one of his other reminiscences:

I may say in this connection that I personally knew Gen. Morgan prior to the Civil War. Indeed, I knew his mother, sisters and brother "Cal" Morgan. He had considerable ability in certain directions. He could organize and execute. Those qualities were displayed by him in connection with politics at Lexington when John C. Breckinridge in 1851 commenced his political career. He was an enthusiastic supporter of Breckinridge. Before the

war he was somewhat noted as a man who would appear when you did not expect him, and in a way to surprise you. This feature of his "make-up" was illustrated by many things he did during the war. He moved with such secrecy and rapidity that it was difficult to guess when he could be found at any particular place.

"The Battle of Hartsville," John Marshall Harlan Papers, Library of Congress, Manuscript Division, Washington, D.C.

<sup>46</sup>Horace H. Lurton (1844–1914) enlisted in the Confederate Army early in the war. He joined Morgan's raiders after escaping from a prisoner-of-war camp. While serving under Morgan, Lurton was captured and became a prisoner of war for a second time. After the war, Lurton became a lawyer in Tennessee and eventually a Justice on the Supreme Court. Lurton and Harlan became close friends years before Lurton arrived on the Court. For an account of how Harlan and Lurton pieced together their Civil War encounter, see Malvina Shanklin Harlan, "Some Memories of a Long Life, 1854–1911," 26 *Journal of Supreme Court History* (2001): 189.

<sup>47</sup>James Abram Garfield (1831–1881) left the Army himself later in 1863 to become a Congressman, which he remained until elected President in 1880.

<sup>48</sup>This resignation letter had special significance for Harlan. He had this to say about it in another of his reminiscences:

It may be here stated that upon my dissenting from the opinion of the Supreme Court in what are known as the *Civil Rights Cases*, in which the Civil Rights Act, as it was called, was declared unconstitutional, some partisan newspapers in the Southern States charged that I had resigned my position as Colonel in the Union Army because of Lincoln's Proclamation of Emancipation. It was sought by the charge to convey the idea that my defense of the legal rights of the colored people, as shown by my dissent in the Civil Rights case, was not sincere. To disprove that charge and to show that I was for the maintenance of the Union, at all hazards and independently of any question of race, the above letter was published.

"Civil War—1864," John Marshall Harlan Papers, Library of Congress, Manuscript Division, Washington D.C.

<sup>49</sup>Harlan died on October 14, 1911, a little more than four months after this letter was written.

<sup>50</sup>Leonidas Polk (1806–1864) was a graduate of West Point, where he was Jefferson Davis's roommate, and an Episcopalian bishop. His capture of Columbus, Kentucky

ended that state's neutrality. He was later killed by Union artillery while scouting enemy positions in Georgia.

<sup>51</sup>Simon Bolivar Buckner (1823–1914) was a West Point graduate and instructor and Mexican War veteran. After the war, he became the editor of the *Louisville Journal* and then Governor of Kentucky in 1887.

<sup>52</sup>Richard W. Johnson (1827–1897) was a West Point graduate who served in the Army from 1849–1867. He started the war as a captain and was major general by the end. After the war, he became a professor of military science in Missouri and Minnesota.

<sup>53</sup>Basil W. Duke (1838–1916) was a Kentucky lawyer who joined the Confederacy in Missouri. Despite having no military background, Duke quickly rose through the ranks, eventually becoming a brigadier general. After the war, Duke settled in Louisville, where, ironically, he became a lawyer for the Louisville and Nashville Railroad, whose railway lines he had spent so much of the Civil War destroying.

<sup>54</sup>Henrietta "Tommie" Morgan Duke (1840–1909).

<sup>55</sup>Both Harlan and his men were correct. Duke was trying to make it to Lexington to see his pregnant wife, but he had been sent to Kentucky to try to raise a cavalry unit. After his close encounter with Harlan, Duke gave up both objectives and drifted down to the Confederate lines where he joined Morgan's unit. Duke had a successful career with the Confederate Army, both with Morgan and at the end of the war. It is interesting to speculate about how differently the war would have gone if Harlan had arrested Duke when he had the chance. For Duke's version of this story, see Basil W. Duke, *Reminiscences of General Basil W. Duke* (Garden City, NY: Doubleday, 1911.)

<sup>56</sup>In 1862, Cameron (1799–1889) was forced to resign as Secretary of War due to charges of corruption.

<sup>57</sup>The skirmish at Frankfort actually took place on June 10 and 11, 1864. For a detailed account of this obscure raid, see Nicky Hughes, "Fort Boone and the Civil War Defense of Frankfort," 88 (2) *The Register of the Kentucky Historical Society* (Spring 1990): 148–62.

<sup>58</sup>Thomas Elliott Bramlette (1817–1875) was the pro-Union and anti-abolitionist Governor of Kentucky between 1863 and 1867. During his tenure, he worked hard to keep Kentucky in the Union. Harlan does not mention it, but Bramlette was behind the barricades with Harlan during the skirmish.

<sup>59</sup>The Confederate skirmish on Frankfort was actually led by Captain John Cooper of Company L, Second Kentucky Cavalry.

<sup>60</sup>John Maynard Harlan, the father of the second Justice John Marshall Harlan, was actually born on December 21, 1863, over six months after the Frankfort raid.

<sup>61</sup>Morgan was chased out of Kentucky by superior Union forces on June 12. He was killed in action in Greeneville, Tennessee three months later on September 3.



# The Question of Diminution of Income for Justices and Judges of the Supreme Court and the Inferior Courts of the United States

BARRY A. PRICE

Selected from a small committee to compose a first draft of a declaration of independence of the American colonies from Great Britain, Thomas Jefferson set pen to paper and began what would be a litany of offenses committed by the Crown against the people of the soon-to-be United States of America. Included in that world-changing document was a passage dealing with the colonial judiciary and its past subjugation to the wishes of George III:

The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states. To prove this, let facts be submitted to a candid world . . . He has made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.<sup>1</sup>

Eleven years later, writing under the pseudonym Publius in *The Federalist* number 78, Alexander Hamilton addressed the question of the relations of the three branches of government under the recently proposed and

then-debated Constitution. Said he of the place of the judiciary within the proposed framework of the country:

The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said

to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. This simple view of the matter suggests several important consequences. It proves, incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that *all possible care is requisite to enable it to defend itself against their attacks* . . . Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will.<sup>2</sup>

Within the Constitution was to be found, in simple language, the best judgment of the Framers: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."<sup>3</sup> Clearly, the Founding Fathers understood that for a judiciary to be independent from and coequal in import to the executive and the legislative branches, those judges exercising powers of office could not be subject to the whims or irritations of those whose wrath they might draw. Within the several aspects of absolute impartiality, considering the necessarily insular quality of judicial work, the principal actors of the day subscribed to the conviction that a judge's salary should not be a possible target for retribution. As Chief Justice John Marshall would comment in *McCullough v. Maryland*, "The power to tax is the power to destroy."<sup>4</sup>

Commenting some years afterward on the same subject, the Chief Justice embroidered upon that sentiment:

Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . *I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.*<sup>5</sup>

Until 1862, the question of making a judge's compensation subject to reduction by any means rested within the realm of the hypothetical, as no diminution was threatened or attempted. Then a statute was passed which subjected federal officers, including the President and officers of the court, to a three-percent tax on income. Responding to the exaction, cognizant of the historical context in which financial control against a judiciary had been defended against, Chief Justice Roger Taney addressed the question in a letter to Secretary of the Treasury Salmon P. Chase:

The act in question, as you interpret it, diminishes the compensation of every judge three percent, and *if it can be diminished to that extent in the name of a tax, it may in the same way be reduced from time to time at the pleasure of the Legislature.*

The judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the other two departments, and *in order to place it beyond the reach and above even the*

*suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.*

Language could not be plainer than that used in the Constitution. It is moreover one of its most important and essential provisions. For *the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.*

Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void.<sup>6</sup>



The question of making a Justice's compensation subject to reduction through taxation was put before Attorney General Ebenezer George Hoar (pictured) in 1869.

The issue was in limbo until 1869, when the question was put before Attorney General Ebenezer Hoar by Secretary of the Treasury George S. Boutwell. Boutwell agreed with Taney in principle, and all funds that had been thus collected were returned and the practice discontinued. Some years later, when the matter of the constitutionality of the Income Tax Act of 1894 appeared on the docket of the High Court, that law was declared unacceptable, in part, said Justice Stephen J. Field, because no specific exclusion was made for the remuneration of judges. Subsequent tax laws over the next twenty-five years steered a wide course away from the question of taxing judges. The acts of 1913, 1916, and 1917 excluded such exactions on the salaries of the Chief Executive and the judiciary as well.<sup>7</sup>

In 1920, the issue was raised yet again. By then the nation was, of course, under the more progressive laws of the nation as well as its great and amended charter, the Constitution, including the Sixteenth Amendment allowing income tax to be applied, according to the wording of the amendment, "from whatever source derived." Speaking for the high Court in the case of *Evans v. Gore*, Justice Willis Van Devanter recalled the words put forth in *Knowlton v. Moore*:

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to correctly interpret its meaning.<sup>8</sup>

He next followed with words of his own: "This sound rule is as applicable to the amendments as to the provisions of the original Constitution." Continuing later in the majority opinion, he wrote:

[F]or the common good—to render him, in the words of John

Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.<sup>9</sup>

Countering the long-standing defenses against the exaction of levies of any kind against judicial incomes was Justice Oliver Wendell Holmes, Jr., dissenting, with Justice Louis D. Brandeis concurring in the dissent. Asserting that an income tax on judges was constitutional so long as its exaction was made against a judge as a citizen among other citizens and not specifically applied to judges, Holmes wrote:

In the first place I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the *Federalist* (No. 79) that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but it seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the costs of the institutions upon which their well-being if not their life depends... A second and independent reason why this tax appears to me valid is that,

even if I am wrong as to the scope of the original document, the Sixteenth Amendment justifies the tax, whatever would have been the law before it was applied. By that amendment Congress is given power to "collect taxes on income from whatever source derived."<sup>10</sup>

An interesting sidelight to this matter exists in a private letter touching on the *Evans* case, wherein Holmes wrote of the case and its effect on him personally:

As a result of decision from which I dissented it turned out that I, in common with other U.S. judges, had paid considerably too large an income tax. The U.S. now actually has refunded it and I celebrated the fact by buying a few prints out of an odd "hundreds of dollars received..." So I am aesthete for the moment." That must be set down as the only social gain on the credit side of the Court in *Evans v. Gore*.<sup>11</sup>

As we shall see, in time *Evans v. Gore* was overturned by subsequent decisions of the high Court. In rendering the majority opinion, however, Justice Van Devanter addressed the difficult issue of the propriety of the Supreme Court deciding the case at hand that day. "Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us." Recounting that the members of the highest court were each paying the tax voluntarily and regularly, he continued, "The jurisdiction of the present case cannot be declined or renounced... [because] there was no other appellate tribunal to which under the law he (the judge bringing the action) could go."<sup>12</sup>

Writing in **Judicial Process and Judicial Policymaking**, G. Alan Tarr notes that "the responsibility to 'say what the law is' frequently requires the judge to determine the meaning of legislative enactments and how they apply in specific cases."<sup>13</sup> Within that function



Justice Oliver Wendell Holmes, Jr. (left) and Justice Louis D. Brandeis (right) countered long-standing defenses against the exaction of levies of any kind on judicial incomes by asserting that an income tax on judges was constitutional, so long as its exaction was made against a judge as a citizen among other citizens and not specifically applied to judges.



of the Court is the responsibility to interpret the law that has come to its attention by both unanticipated challenges and intended action on the part of the legislature to define the scope and limits of legislation. Said Justice Van Devanter,

it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this.<sup>14</sup>

In 1925, the Court ruled again, taking on the question of newly appointed judges and their relation to the taxation question, coming as they were to their respective positions after imposition of the then-current income tax laws. In *Miles v. Graham*, the Court ruled that newer judges were protected as their more senior brethren were. At the conclusion of

a much shorter opinion than that written for *Evans*, Justice McReynolds said, "The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that *there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.*" Justice Brandeis dissented, while Justice Holmes did not.<sup>15</sup>

In 1939, the Court addressed the taxation of judges in light of congressional efforts to bring judges in line with the common citizen and spoke of both *Evans v. Gore* and *Miles v. Graham*, overturning them both. Composed largely of new Justices making up a near-majority, the Court in 1939 was staffed by several recent Roosevelt appointees and was not hesitant to break new ground. Writing for a near-unanimous Court, with Justice McReynolds not present and only Justice

Butler dissenting, Justice Felix Frankfurter recited precedent, recounted more recent legislation, then spoke with the authority that still applies today:

[T]he question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected . . . To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.<sup>16</sup>

Thus was settled the issue of taxation of the salary of Justices and judges of the United States. While those Justices who had held their own salaries to be beyond the reach of the tax collector could be, and were, subjected to criticism for what might have appeared to have been self-serving justice, the record shows that the twentieth-century cases cited here were clearly open to interpretation and were not decided arbitrarily. As recounted above, the issue reached the Court through no initiative of the Justices, and a decision at that juncture of the Court's history was not to be denied. Although it may seem speculative to suggest, it might be reasonable to assert that these "hands off the income" decisions were of but little benefit to any Justice financially and of much embarrassment to most of them personally. Holmes and Brandeis, the two great dissenters for the time between the two world wars, ultimately prevailed after exiting, when more progressive souls came to the Bench and affirmed their earlier judgments. However, this matter

serves well to showcase the function of the Court as the ultimate interpreter of what the law is, coupled as it is with the realization, articulated in the span of decades, that Justices come to the Court armed with their own inclinations as to what direction the Court should follow and their own predispositions of where along the continuum the Court should finally place itself, as larger society evolves over time and changes to meet new challenges and new opportunities.

## ENDNOTES

<sup>1</sup>The Declaration of Independence, USHistory.org, available at <http://www.ushistory.org/declaration> (last visited October 24, 2007).

<sup>2</sup>The Federalist, no. 78, available at <http://www.yale.edu/lawweb/avalon/federal/fed78.htm> (last visited October 24, 2007) (emphasis added).

<sup>3</sup>U.S. Constitution, Art. III, Sec. 1.

<sup>4</sup>McCullough v. Maryland, 17 U.S. 316 (1819).

<sup>5</sup>Francis Wayland, "Celebration of John Marshall Day in Connecticut," *Yale Law Journal* 10 (March 1901): 201-2.

<sup>6</sup>Quoted in *Evans v. Gore*, 253 U.S. 245, 257-58 (1920).

<sup>7</sup>See also Thomas James Norton, *The Constitution of the United States: Its Sources and Its Application* (New York: The Committee for Constitutional Government, 1965), 135-36.

<sup>8</sup>*Evans*, 253 U.S. at 259-60 (quoting *Knowlton v. Moore*, 178 U.S. 41, 95 (1900)).

<sup>9</sup>*Evans*, 253 U.S. at 260, 263.

<sup>10</sup>*Evans*, 253 U.S. at 265, 267 (Holms, J., dissenting).

<sup>11</sup>Max Lerner, ed. *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (New York: The Modern Library, 1943), 265-66.

<sup>12</sup>*Evans*, 253 U.S. at 247-48.

<sup>13</sup>G. Alan Tarr, *Judicial Process and Judicial Policy-making* (Belmont, CA: Thomson/Wadsworth Publishers, 2006), 284.

<sup>14</sup>*Evans*, 253 U.S. at 248.

<sup>15</sup>*Miles v. Graham*, 268 U.S. 501, 509 (1925). The reason for Holmes' unwillingness to dissent is unclear. Perhaps he was unwilling to overturn precedent that was only five years old.

<sup>16</sup>*O'Malley v. Woodrough*, 307 U.S. 277, 281-82 (1939). See also Percival E. Jackson, *Dissent in the Supreme Court* (Norman, OK: University of Oklahoma Press, 1969), 138.

# Rookie on the Bench: The Role of the Junior Justice

CLARE CUSHMAN

When Samuel Alito took his seat on January 31, 2006, Stephen G. Breyer finally moved up a rung in seniority, ending the longest reign as a junior Justice in modern Supreme Court history. Breyer served as the rookie Justice for eleven years and 181 days, just twenty-nine days short of breaking the record achieved by Joseph Story in 1823. It was not until the appointment of Smith Thompson to replace Brockholst Livingston that the Marshall Court accommodated a new Justice, altering the cosy boarding-house living arrangement that had existed for nearly twelve years (see Table 1).

Courtwatchers speculated that Breyer had been secretly hoping Alito's confirmation hearings would draw out as long as possible so he could overtake Story's record. Yet others thought he was frustrated at being the perpetual rookie and could not wait to move up the ladder of seniority.<sup>1</sup> But Breyer dismisses any notion that he felt "stuck" as the junior Justice for all those years. Sure, he would have enjoyed breaking Story's record: "I missed by 29 days becoming immortal as the answer to a trivia question! It's amusing, it's not serious . . . couldn't matter less."<sup>2</sup> But, he says, "the truth of the matter is it is not enormously significant in the life of a person on the Court whether you are junior or next to junior . . . I didn't think of myself particularly as junior."

Breyer shares many other traits with Story. Both were Harvard Law professors appointed to the same seat, the "scholar's seat" (so named because it was also held by legal educators Horace Gray, Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter in succession). Far from any rivalry, Breyer instead feels kinship with Story. He is a great admirer of his predecessor, and cites Story's advice to John Marshall in the *Cherokee Cases*, his opinion in the *Amistad* case, his expertise in admiralty law, and his extrajudicial writings on the history of the constitutional convention and early Supreme Court cases as proof that he was a "great justice."<sup>3</sup> Breyer is happy to let Story round out his considerable accomplishments by retaining the distinction of holding the title of longest-serving junior Justice.

TABLE 1 Longest-Serving Junior Justices

Name	Dates as Junior Justice*	Time Served	Days
Joseph Story	February 3, 1812 to September 1, 1823	11 years, 6 months, 29 days	4,228
Stephen G. Breyer	August 3, 1994 to January 31, 2006	11 years, 5 months, 28 days	4,199
Stephen J. Field	May 20, 1863 to March 14, 1870	6 years, 9 months, 25 days	
Samuel Blatchford	April 3, 1882 to January 18, 1888	5 years, 9 months, 15 days	
John Paul Stevens	December 19, 1975 to September 25, 1981	5 years, 9 months, 6 days	

\*Defined as the period between when one Associate Justice took the judicial oath and when the next Associate Justice took the judicial oath. The exact date of Story's judicial oath is not known. Source: Office of the Curator, Supreme Court of the United States.

### Extreme Left and Last in Line

Most Supreme Court procedures are guided by the longstanding tradition of seniority that is the organizing principle of the entire judiciary. The junior Justice, the lowest in seniority, plays a unique role in all the rituals that make the Court work smoothly as an institution.

Most visible to the public, in the Courtroom the Chief Justice occupies the center chair with the senior Associate Justice to the immediate right and the second most senior Associate to the immediate left. This alternating pattern continues down the line of seniority, with the junior Justice seated at far left. When asked if there were disadvantages to "playing left field," Justice Breyer reflected that he prefers the left side to his new position on the extreme right because "the lighting is . . . slightly more cheerful." More importantly, on both extremes at the Bench there is "an extra shelf to put your briefs on." Breyer anticipates it "will be slightly less comfortable" to move toward the center chair and lose this accoutrement.<sup>4</sup> After hearing oral argument, the Justices file out in order of seniority. On his first day on the high Bench, junior Justice Samuel Alito reportedly committed a minor rookie faux pas by bounding out of the Courtroom before Justice Ruth Bader Ginsburg, his more senior colleague.<sup>5</sup>

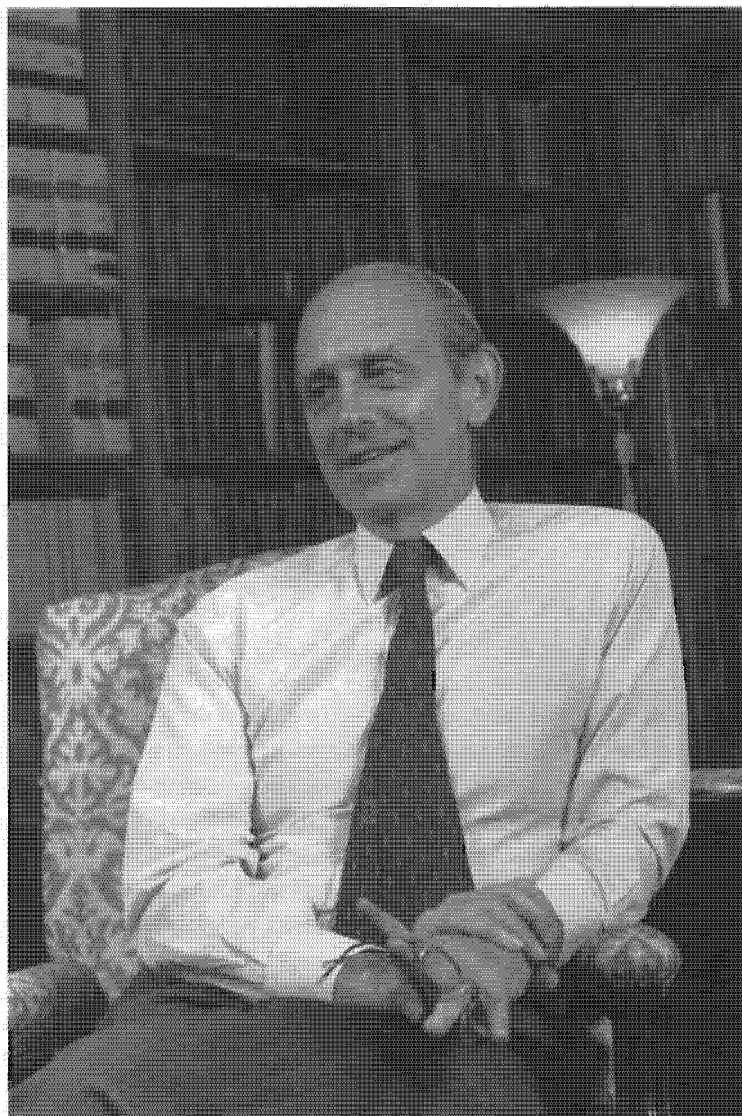
Another spatial demonstration of seniority is the official group Court photograph. The junior Justice appears at extreme right: He or she stands in the second row, while the more senior Justices are seated in the first row. At official functions where the Court is represented

as a group, the Justices line up by seniority. For example, the junior Justice is last in line in paying respects at funerals (although at Chief Justice William H. Rehnquist's funeral Breyer and a grieving Ginsburg moved in lockstep as he gently helped her down the marble steps). The junior Justice also parades last in line into the President's annual State of the Union address and at presidential inaugurations.<sup>6</sup> "There is an order of precedence for anything," says Breyer, but again, he downplays its significance beyond mere ritual. "If you are walking into the State of the Union or doing some other thing of an official nature I will be at the end of the queue . . . That's fine."<sup>7</sup>

Inside the Supreme Court building, office space has traditionally been parceled out according to seniority. Before the 1970s, only six Justices' Chambers lay inside the "golden gates"—the ornate and heavy bronze doors that divide the public from the working arenas. The three most junior Justices had to content themselves with offices in the corridor just outside. William O. Douglas broke with this protocol when he insisted on keeping the office assigned to him when he came on the Court in 1939, allowing twelve subsequent junior Justices to claim suites inside the gates. It was not until 1962 that Douglas decided to move into Felix Frankfurter's former Chambers on the other side. The whole arrangement changed in the 1970s when the first floor was reconfigured to accommodate all the Justices.<sup>8</sup>

Invisible to the public, in the oak-paneled room where the Justices' biweekly secret Conferences take place, seniority again dictates





Justice Breyer served as junior Justice for eleven years and 181 days, the longest stretch by far in modern history. Only Joseph Story served longer as junior—and only by 29 days.

placement. The Chief Justice sits at one end of a long mahogany table, with the senior Associate at the other end. The three next most senior Justices sit on one side and the four most junior on the other. Chief Justice Rehnquist revealed that this arrangement translated into a hierarchy of elbow room, with three different levels ranging from “excellent” (Chief Justice and Senior Associate Justice) through “good” (Justices 3, 4, and 5), to “fair to middling” (Justices 6, 7, 8, 9).<sup>9</sup> But Justice Breyer disagrees with this assessment: “I preferred being junior . . . because you were at the corner and there-

fore I wasn’t blocked as much by the carts with the briefs, and it’s a little less comfortable sitting in the middle of the table. As junior there is plenty of room. The only difficulty I would say would be if you were 4, 7, or 8 . . . because there you are in the middle with the carts in back of you and two people on either side.”<sup>10</sup>

#### Doorkeeping

The junior Justice’s role is more than a question of knowing where to stand or sit—a matter of placement in space. There are also some



The Bench, seen from the perspective of the junior Justice. Breyer liked sitting on the far left because the lighting was better and there was an extra shelf for his briefs.

specific duties required. To maintain secrecy and prevent leaks, no one except the nine Justices may enter the Conference room when the Justices are convened. Accordingly, someone must be the link to the outside world. That responsibility falls to the junior Justice, who sits near the door and answers it if there is a knock or delivers outgoing messages to an attendant stationed outside the door. Much has been made about the doorkeeping function; The notion that a powerful Supreme Court Justice routinely performs a menial task clearly strikes a chord. Tom C. Clark, who was a junior Justice in the 1950s, once wryly referred to himself as "the highest-paid doorkeeper in the world."<sup>11</sup> When O'Connor was appointed, her Brethren discussed exempting her from doorkeeping duty because they did not want the first woman on the Court to be seen as a secretary. But outgoing junior Justice John Paul Stevens objected, believing O'Connor would oppose any preferential treatment. Besides, "everyone should have a turn," Stevens insisted.<sup>12</sup>

According to Breyer, the job is neither onerous nor humiliating. The door gets knocked on "once in Conference, maybe twice in three Conferences. Not very often. It's usually somebody has forgotten some document that they want, and so their law clerk comes down and gives it to the staff person who is outside the door, and he knocks on the door and gives it to me and I open the door and he says 'This is for Justice Ginsburg or Justice Thomas' . . . and I give them the document."<sup>13</sup> A few years ago, Breyer answered the door and found himself retrieving not a crucial legal document but . . . a fresh cup of Starbucks coffee. He dutifully delivered the hot beverage and placed it before its grateful intended recipient, Justice Scalia. "Well you have been doing this for some time," remarked Scalia. "Yes and I have gotten very good at it," replied Breyer. "No you haven't, actually," his colleague teased.<sup>14</sup>

The doorkeeping habit becomes so automatic that it can be hard for a junior Justice



The Justices line up by seniority at formal occasions, with the Chief at one end and the Junior at the other. This photograph was taken at Earl Warren's funeral on July 11, 1974 when John Paul Stevens was the junior Justice.

to break when he or she moves up in seniority. Samuel Alito was slow to get up and answer the door at his first Conference, and Breyer instinctively jumped up to answer it until Chief Justice John G. Roberts, Jr. reminded him to stay seated. "I had been used to it like a Pavlovian dog . . . Still, when there is a knock at the door I suddenly react and start to get up . . . I guess that will wear off. If you do something force of habit over twelve years I guess you get used to it."<sup>15</sup> According to Chief Justice Roberts, "it took several Conferences before Justice Breyer learned not to answer the door and Justice Alito learned to do it."<sup>16</sup>

If Breyer ever felt disheartened by the job, he could take comfort in his solidarity with Joseph Story, his intellectual forbear. One of the earliest examples of a junior Justice being assigned a doorkeeper-type task occurred when the Justices of the Marshall Court lived together in a boarding house in the 1820s and 1830s. They deliberated, not in a closed, win-

dowless chamber but around the dining room table in the evening, aided by a nice meal and bottles of Madeira wine. The story goes that despite the Chief Justice's fondness for spirits, the Justices did try to show restraint in their imbibing. According to a letter Story wrote to his wife in 1823, "We are great ascetics, and even deny ourselves wine except in wet weather." He further clarified that "What I say about the wine gives you our rule; but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply, 'All the better, for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.'"<sup>17</sup> This junior "windowkeeping" task apparently did not bother Story, although it should be noted that because of a weak stomach he was a teetotaler before arriving at the Court at age 32.<sup>18</sup>

### Speaking in Turn

Seniority controls more substantial procedural matters at the Conference as well. When cases are discussed, the Justices speak in order of seniority, with the Chief going first and the junior Justice last. Historically, the voting would then proceed in reverse order back up to the Chief.<sup>19</sup> "[I]t is the junior justice who votes first," noted Associate Justice James F. Byrnes in his 1958 memoirs. "It has been said that this arrangement was adopted to avoid any question of senior members influencing their juniors. This explanation did not impress me, for surely any Justice, having already expressed his views, would ordinarily vote in harmony with them."<sup>20</sup>

This two-step practice ended by the early 1970s, and now Justices explain their position and their vote together. According to William H. Rehnquist, who joined the Court in 1972:

For many years there has circulated a tale that although the discussion in conference proceeds in order from the Chief Justice to the junior Justice, the voting actually begins with the junior Justice and proceed back to the Chief Justice in order of seniority. I can testify that, at least on my fifteen years on the Court, this tale is very much of a myth; I don't believe I have ever seen it happen at any of the conferences that I have attended.<sup>21</sup>

Being the last to speak, the junior Justice is able to listen to other perspectives and has more time to formulate his or her views or incorporate others' ideas into his or her thinking. But being ninth can also mean there is not much left to say: The issues have been skillfully framed and all the vital points have been made. If the Justices are split in their votes, however, there is enormous interest in the views of the last to weigh in. "And the junior-most Justice, they've always said it's an unusual position," notes Chief Justice Roberts. "[M]ost times, things are pretty much settled and decided by the time you get to the ninth justice

and people are kind of moving on to the next case, which is a little disappointing to them. But there are those times when it's four to four and then people are very much interested in what the junior justice has to say."<sup>22</sup>

Rehnquist felt that it was a great disadvantage to speak last because it was harder to influence the more senior Justices:

When I first went on the Court, I was both surprised and disappointed at how little interplay there was between the various justices during the process of conferring on a case. Each would state his views, and a junior justice could express agreement or disagreement with views expressed by a justice senior to him earlier in the discussion, but the converse did not apply; a junior justice's views were seldom commented upon, because votes had already been cast up the line. Like most junior justices before me must have felt, I thought I had some very significant contributions to make, and was disappointed that they hardly ever seemed to influence anyone because people did not change their votes in response to their contrary views. I thought it would be desirable to have more of a round-table discussion of the matter after each of us had expressed our views.<sup>23</sup>

But, according to Breyer, it is not necessarily a drawback: "Some feel it is a slight advantage to go first because others will hear what he says earlier in the Conference so it may have a greater impact before the others make up their minds. On the other hand, you can say it is an advantage to go later because if you go later you hear what the others have said and therefore can work out what you might think in light of the other comments. So you can argue that one back and forth."<sup>24</sup> Presumably Rehnquist struggled more as junior Justice to persuade others than Breyer because he was often in the minority on the Burger Court and wrote



many lone dissents. When he became Chief Justice, Rehnquist came to accept the system and recognized its practicality: "Having now sat in conferences for fifteen years, and risen from ninth to seventh to first in seniority, I now realize—with newfound clarity—that while my idea [of roundtable discussions] is fine in the abstract it probably would not contribute much in practice, and at any rate is doomed by the seniority system to which the senior justices naturally adhere."<sup>25</sup>

The second part of the Conference is devoted to reviewing petitions for certiorari and deciding to which cases to grant review. Since 1925, the custom has been to accept for review a case if four of the nine Justices vote to do so at Conference. Cases are discussed in the order in which they are numbered by the Clerk's office. The Justice who requested the case be put on the discuss list leads off the discussion, and then it continues with Justices voting in descending order of seniority whether to grant or deny review. Because the discussion of petitions is less "elaborate"<sup>26</sup> than that of argued cases, speaking last is even less consequential.<sup>27</sup>

### Assignment of Opinion-Writing

Seniority plays a vital role in deciding which Justice is assigned to write the Court's majority opinion. The rule is that the Chief Justice assigns the majority opinion if he is in the majority; if not, the task of assigning the opinion falls to the most senior Justice in the majority. Similarly, whoever is senior on the dissenting side assigns the dissent-writing function. This would seemingly be a great disadvantage to the junior Justice who, logically, can never assign a majority opinion. (If the only one on the dissenting side, the junior Justice does technically have the authority to assign the dissent, but the only Justice he can assign it to is himself!)

The assignment function is a powerful one, but the assigner must balance a complex interplay of politics, expertise, and administrative concerns that go into matching a Justice

to a case. And the power to assign cases has diminished in modern times, as the Court has adopted an informal load-sharing system that makes the assignments more evenly distributed and ensures that work can be completed by the end of the Term. As Breyer describes it, "[t]he rule basically is that everyone writes one majority [opinion], and then everyone writes two and then everyone writes three, so the need to have the same number of majorities across the year is a constraint on how they are assigned."<sup>28</sup> The lack of possessing that extra authority to assign cases is thus less of a disadvantage to the junior Justice than it may have been in the past.

Traditionally, a new Justice is assigned to write a maiden opinion in a case that is both relatively minor and unanimous. When Justice William O. Douglas came on the Court in 1939, his preference for his first opinion was between two interesting cases that would have drawn on his experience in government as a regulator. But Chief Justice Charles Evans Hughes counseled him otherwise: "I think that the best thing for you to do is to take a case you may think is a nondescript case." Douglas felt he had to oblige.<sup>29</sup> A Court observer writing in the 1950s elaborated on this practice: "The assignment may also be used as a reward, the new members of the Court receiving the gentle hazing of the duller cases, such as those dealing with tax or fair labor standards, while the plums are often saved for seniors."<sup>30</sup> But there have been exceptions. When Justice Ginsburg joined the Court in 1993 she naturally had low expectations for her first opinion assignment: "I eagerly awaited my first opinion assignment, expecting—as the legend goes—that the brand-new Justice would be slated for the uncontroversial, unanimous opinion. When the list came round, I was dismayed. The Chief [Rehnquist] had given me the intricate, not at all easy, ERISA case, on which the Court had divided six to three."<sup>31</sup> Seasoned colleague Sandra Day O'Connor offered this advice: "Just do it . . . and, if you can, circulate your draft before he makes the next

set of assignments. Otherwise you will risk receiving another tedious case."<sup>32</sup>

Once the opinions are written, they are announced from the Bench by the Justices in reverse order of seniority. Those in the Courtroom on days when opinions are handed down can expect the junior Justice to speak first if he or she has written an opinion.

### Giving Orders to the Clerk's Office

According to Breyer, most junior Justice duties "require no talent,"<sup>33</sup> but there is one unique function that does require skill and care—a function that was handed to the junior Justice relatively recently. This new responsibility can be viewed, like doorkeeping, as mundane or even a nuisance. But the task is so vital that it surely gives the position of junior Justice added heft.

When the Conference adjourns, the Justices immediately need to inform the Clerk of the Court which cases have been accepted to be briefed and argued, a process called "giving orders." The Clerk then writes up the order list and the Chief Justice officially releases it for all the world to behold. With the Court now reviewing only a fraction of the thousands of appeals submitted for review, decisions about which cases get picked up—usually because there is a weighty constitutional issue at stake or because there is a conflict among lower court judgments—have huge ramifications. It is imperative, of course, that the votes be recorded correctly in the Justices' secret Conference as a small error of one incorrect vote tally could have enormous magnitude. There is no support staff present to take notes, and no audiotapes recorded against which to doublecheck.

Historically, the job of giving orders to the Clerk was done by the Chief Justice, who would not only run the Conference but also keep track of the votes on petitions for certiorari and other items on the Conference list. Following the Justices' Conference, the Chief and his secretary would meet with the Clerk of Court, Deputy Clerk, and (more recently)

Legal Officers in the Conference room to review the votes and make up the orders list. When Warren Burger was Chief Justice, he would also ask Associate Justice Harry A. Blackmun, a stickler for detail, to remain in the room, so his notes could be consulted.<sup>34</sup> Eventually, Burger decided to turn over the Conference scribe duties to the junior Justice, and William H. Rehnquist began giving the orders.<sup>35</sup> When John Paul Stevens joined the Court in 1975, he and Chief Justice Burger's secretary, Mary Burns, would meet with the Clerk's staff and reconcile Stevens' notes with Burger's. Stevens was the rookie Justice for nearly six years, the fifth-longest span in history.

The process of giving orders was streamlined in 1981 after Sandra Day O'Connor became the junior Justice. She persuaded her Brethren that it would be more efficient to circulate the "discuss list"—the list of cases that individual Justices have requested be discussed at Conference—to the Clerk's office the day before.<sup>36</sup> She saw no point in giving results for every case. This new method saved a lot of time, but it also meant that the Clerk's office knew which Justices had requested which cases be put on the list, something that had previously been secret.<sup>37</sup>

The job of Conference scribe is tricky, because it requires great attention to detail and there is a lot going on in Conference. "It goes quite quickly," notes Breyer; "you have to be very accurate." But the junior Justice can get help from the other eight Justices, who all write down how the votes go as well. "Oh, they are all keeping track" Breyer emphasizes, "because everyone wants to know what everyone else did in every matter. If, for example, I were . . . assigned [to write an] opinion I would certainly want to know what the others thought [when they voted to review a case]. And I don't want to just trust my memory [for] that, so I write it down in Conference." If Breyer was ever uncertain about the voting after looking back on his notes, he would simply query one of the eight other Justices.<sup>38</sup>

Ultimately, though, it is the junior Justice who bears the final responsibility. Explains Breyer:

But since I am the junior I know I will be the one to report the decision to the Clerk's office and so I have to be particularly careful to get it exactly right. And sometimes it's not an ordinary thing; sometimes there is [another Justice] who doesn't want the decision to go out right away until he has checked something . . . He will check it quickly, but then we have to be sure I report that to the Clerk's office and follow up on it. And there I meet with the staff—with General Suter [Clerk of the Court], and the Chief's secretary, and the others from the general Court staff after the meeting—and I go down the list and report to them what we decided.

To get it right, Breyer prepared fully before going into Conference: "[We] have a long, long list and we will go through several fail-safe things before the Conference. We will go through [the list] with my secretary and law clerks because I have to decide how I am going to vote in all likelihood, so . . . on every discuss matter I have written down my likely vote. What I have to remember to do is, if the Conference goes my way I circle it, and if the conference doesn't go my way, I erase what I put there and I circle that." And when the Clerk of the Court and the other Court staff met with him after the Conference, Breyer "would read to them from the list. And I [would] have next to me the Conference book, so if I was uncertain about what I wrote there, I would refer back to my book and see more precisely how people voted, so I know how it comes out."<sup>39</sup>

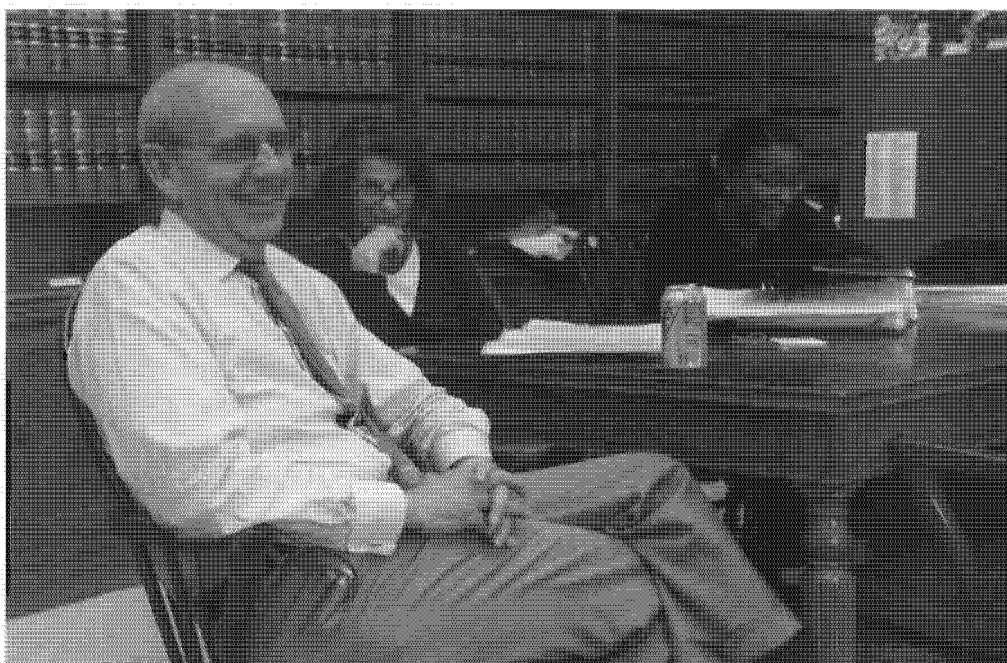
Former Chief Deputy Clerk of the Court Frank Lorson remembers that some junior Justices are initially very anxious about getting it right. With no formal pre-Conference training, it is up to the Court staff to help them. "The staff is very good," says Breyer. "I don't

think the staff ever made a mistake [during my tenure]. And that is remarkable. They are very conscientious. And if, for example, they got something from me that they didn't fully understand, they would call the office and we would work it out before anything became public." His staff in Chambers was equally helpful. "A lot of the duties fell on my secretary, Marsha Bishop, who had to be absolutely careful because . . . no mistake can be made because any mistake is very harmful to the people involved, and the decisions have to get made in an orderly way."<sup>40</sup> Lorson recalls that on a few occasions he did feel compelled to question a Justice's notes. If there was ever any uncertainty about the votes, the case would be relisted.

### Freshman Year

How is the baton passed from the outgoing junior Justice to the incoming one? A small, tight-knit community, the Court has no formal arrangement for indoctrinating rookies, but the support staff at the Court have traditionally pulled together to make things work.<sup>41</sup> "People are helpful. Everyone . . . answered my questions," recalls Breyer of his debut.

The main new thing when you first get to the Court for the office is to work out how to deal with the cert list . . . The most important transmission belt is at the level of the secretaries . . . Justice Ginsburg [the outgoing junior Justice] had a very competent person who had been organizing the Conference for her, and she showed my secretary how to organize the books and how they had done it. And so you immediately can start. It probably took her a few weeks over the summer to figure out how to do it . . . [It] was lucky for me that we began in August and there wasn't a Conference until the end of September. So Marsha [Bishop] learned how to do that, and then I could come in and she could



Justice Breyer shared a light moment with Marsha Bishop (middle), his secretary, and his law clerk Danielle Gray (right). Bishop helped Breyer with the weighty job of "giving orders" to the Clerk of Court, which entailed reporting on which cases the Justices had accepted to be briefed and argued.

show me what she had been doing and what Justice Ginsburg had been doing, and Justice Ginsburg was very helpful in explaining to me how she did it.<sup>42</sup>

Justice O'Connor was not as lucky as Breyer with the timing of her confirmation: She arrived on the Court in September with only three days to prepare for the Court's first Conference. Faced with piles of petitions that had come in over the summer, she and her husband John O'Connor and her clerk Ruth McGregor carefully sifted through the appeals and scrambled to number them in chronological order. "But that's not the way they do it," recalls McGregor. "[S]o that the whole first Conference, [O'Connor] had to be flipping back and forth through her notes."<sup>43</sup> No one had briefed O'Connor that the Conference list is organized by type of case: appeals, petitions, extraordinary writs, and so on. But O'Connor was quickly offered the courtly guidance of Lewis F. Powell, Jr. "No one did more than Lewis

Powell to help me get settled as a new Justice," she has written. "He found us a place to live. He allowed me to hire one of his two secretaries as my chamber's secretary. Most important, he was willing to talk about cases and the issues. His door was always open."<sup>44</sup>

When Ruth Bader Ginsburg joined the Court in 1993, O'Connor, in turn, went out of her way to give her a helping hand. According to Ginsburg, "Justice O'Connor's welcome when I became junior Justice is characteristic [of her personality]. The Court has customs and habits one cannot find in the official Rules or in *Stern & Gressman*. Justice O'Connor knew what it was like to learn the ropes on one's own. She told me what I needed to know when I came on board for the Court's 1993 Term—not in an intimidating dose, just enough to enable me to navigate safely for my first days and weeks."<sup>45</sup> When Ginsburg read her first Bench announcement summarizing the Court's decision, a Marshal's Office attendant slipped her a kind note from O'Connor (who dissented in the case) that read: "This is your first opinion



for the Court, it is a fine one, I look forward to many more."<sup>46</sup>

More recently, Breyer, in turn, briefed Samuel Alito when he arrived in 2006. "My secretary spent considerable time with his," says Breyer, "and he has picked this up very well. And the work of reporting the Conference . . . I showed him how I would do it."<sup>47</sup> But Alito still found that just being new was a challenge, the way it is with any job. He confessed that he got lost in the building his first few days. "I didn't know where anything was, how to get in or how to get out," Alito told his hometown newspaper. Of course, with the Court under renovation and many staff in trailers, Alito wasn't the only one having a hard time finding his way around. Alito also had trouble learning to use the microphones that Justices must turn on so they can question advocates during oral argument. "You have to be very quick on the draw. I like to let a lawyer

at least finish a sentence. So I am waiting for a period to ask a question; but if you do that, there's more of a chance that everybody else is going to come in."<sup>48</sup>

Beyond figuring out the nuts and bolts of the job, adapting to the workload of the Court can be even more daunting. Rookie Justices used to the rough and tumble of government work have had a particularly hard time adapting. Former New Dealer William O. Douglas called it "the monastery" and was unhappy at first with the nature of the Court's work.<sup>49</sup> Similarly, when Justice Clark came on the Court in 1949, he had a difficult transition from the action-packed Attorney General's office to the cloistered, deliberative Court.<sup>50</sup> But even for an appellate judge, it is still a big adjustment. After only a few short days on the high Bench, Harry A. Blackmun, who had served as a federal circuit judge for more than a decade, was so overwhelmed that he confessed to a friend,

Sandra Day O'Connor helped show Ruth Bader Ginsburg the ropes when she joined the Court in 1993. O'Connor herself had benefited from the courtly advice of Lewis F. Powell when she was a rookie Justice in 1981.



"[I]t is very apparent that the technique and the pace and the attitudes are different. I don't know if I shall be able to survive."<sup>51</sup> Justice Scalia found the "biggest surprise" on becoming a Justice to be "the enormity of the workload. I don't think I worked as hard in my life," he recalls, "including first year law school, as I did on my first year on the Court."<sup>52</sup>

Breyer, who served as an appeals court judge before coming on the Court, also found the jump stressful:

I think psychologically it is a different world from the Court of Appeals, because I know, as does everyone, that we are making a final decision on a matter that is . . . very important . . . to people. That is true of the Court of Appeals to a degree, but at least there is another place they can go, and it's not true here. And moreover, it's, in a sense, a fishbowl: it is not secret, people follow very closely what goes on, the press follows very closely what goes on, and the part that the press is not aware of, namely what goes on in the Conference room, is really discussing the cases, and eventually the press learns what happened because we write it down. So it is very, very transparent as well as being a publicly more visible position . . . people are interested in who I am as a person. Well, all that combines to put pressure on me or anyone else to do as good a job as they can do. And of course that's somewhat stressful, because you hope that you can do a good job. And no matter who you are, you are not certain whether you can or not. And so you learn over time what can be done and what can't be done, what it's like.<sup>53</sup>

How much time does it take to learn the ropes? When Justice Clark was a rookie, he asked Justice Robert H. Jackson how long it had taken him to get acclimated. The senior

Justice replied that he had asked Chief Justice Charles Evans Hughes the same question when he was a freshman Justice,<sup>54</sup> and that Hughes had said three years. But Jackson told Clark he thought the truth was closer to five.<sup>55</sup> Justice Harold H. Burton received a similar message from Hughes:

Chief Justice Hughes once said to me, in substance, "I will never forget the first three years I spent catching up with the Court. As you go on the Court, nearly every line of decision with which you come into contact is one in which you would have not personally participated. When you have been there three, five, ten or 15 years, more and more of the decisions in the cases that come before you are in the precise fields of the law which you have helped to develop."<sup>56</sup>

Hughes outlined this freshmen disadvantage in his autobiography:

A new Justice is not at ease in his seat until he has made a thorough study of lines of cases, so that when a case is argued he at once recognizes, or by looking at a key case brings back to his memory, the jurisprudence of the Court upon the general subject and can address his mind to the particular variant now presented. That is the explanation of the ability of experienced Justices to dispose rapidly of their work, and also of the difficulties the new Justice encounters in going over ground which is more familiar to his seniors on the bench.<sup>57</sup>

Breyer agrees that it takes several years to feel comfortable. "I think Justice Douglas used to say it takes three to five years before cases of a kind begin to repeat so you begin to see it's one of these kind, this kind, the other kind. You begin to develop an approach to the Constitution. It becomes somewhat easier then but it is still a very strong responsibility."<sup>58</sup> The fact that Breyer did not move up in seniority

for so many years played no part in his comfort level. Time and reviewing lots of cases, he says, are the only remedy for feeling like a rookie.<sup>59</sup>

### Other Duties

Historically, the junior Justice has been called upon by the Chief to perform minor tasks such as meeting with groups or visiting dignitaries or hosting receptions for incoming clerks. But more senior Justices are also asked to perform such duties.<sup>60</sup> In the past, the junior Justice organized the Court's annual Christmas Recess party for staff and their families, which was paid for by contributions from individual Justices.<sup>61</sup> Now it is Court staff that plans the holiday festivity, and funding comes from the cafeteria budget.<sup>62</sup> In a 1977 interview, Rehnquist, then recently upgraded from junior Justice, explained that he "really didn't mind doorkeeping, or being in charge of the reception for new clerks in October and the Court's Christmas Party for the staff, but 'I was glad to see John Stevens take over.'"<sup>63</sup>

There has been speculation that the junior Justice must attend the State of the Union address and represent the Court if other Justices do not attend. There is also a theory that if the whole Court is present, then the junior Justice must stay away for security reasons: Someone must be left to rebuild the Court in case of a terrorist attack or other doomsday scenario. "There is no such rule," says Breyer. "No one is either not allowed to attend or forced to attend. People attend if they wish to attend. I do wish to attend, so I go."<sup>64</sup>

### An Equal Vote

In sum, aside from doorkeeping and giving orders to the Clerk's Office, the duties of the junior Justice are not particularly distinctive. Yes, the junior Justice stands last in line, is on the periphery in photos and on the Bench, and speaks last in Conference. But the system is not

intended to be humiliating: There is no hazing at the Court. The seniority system is simply a practical way of ordering the business of the Court and keeping it running effectively. "Each of us has one vote," says Breyer, "and I think each person listens to the other precisely the same way whether you are junior or next to junior or you are the Chief . . . I don't see a disadvantage or an advantage, frankly."<sup>65</sup> And yet the public remains fascinated by the junior Justice, perhaps because he or she is seen as having one foot in the marble palace and one foot still in the outside world. Having been riveted by the "tryouts," or confirmation hearings, everyone wants to see how the rookie plays in his or her first season and what happens when the other players have to slide down the Bench and make room.

While it may take years to become comfortable as one of the final arbiters of the Constitution, the rituals become habit quickly. "I have got [doorkeeping] down, now, I answer the door," boasted Justice Alito after only six months on the Court.<sup>66</sup> But he also told his local newspaper that he periodically had to pinch himself and say, "Yeah, you're really here. You're on the Supreme Court. This is really happening."<sup>67</sup>

### ENDNOTES

<sup>1</sup>See, for example, "Poor Justice Breyer," <http://prawfsblawg.blogs.com/prawfsblawg/2006/01/poor-justice-br.html> (last visited on October 24, 2007); Linda Greenhouse, "With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change," *The New York Times*, January 26, 2006, Sec. A, Column 1.

<sup>2</sup>Author interview with Justice Stephen G. Breyer, January 11, 2007. All subsequent quotations by Breyer are from this interview unless otherwise noted.

<sup>3</sup>Author interview with Breyer.

<sup>4</sup>*Ibid.*

<sup>5</sup>Kate Coscarelli, "Alito: The Life and Times of a Justice in the Making," *New Jersey Star Ledger*, Sunday, August 27, 2006.

<sup>6</sup>Until the 1960s, members of the Court made a brief visit to the White House to pay their respects to the President after adjourning the first session of the Term. According to the Supreme Court Reporter who served from 1902 to 1916, they would pair up by seniority: "We went down

Pennsylvania Avenue two by two, in silk hats and frock coats, and as was the custom, the Reporter was in the carriage with the Junior Justice, then Mr. Justice [Rufus] Day." Charles Henry Butler, *A Half-Century Before the Supreme Court* (1942), 72.

<sup>7</sup>Author interview with Breyer.

<sup>8</sup>When Ruth Bader Ginsburg joined the Court in 1993, however, she chose to ensconce herself in a second floor suite that was roomier and sunnier and that allowed her closer proximity to her clerks.

<sup>9</sup>William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (1987), 288.

<sup>10</sup>Author interview with Breyer.

<sup>11</sup>Richard L. Williams, "Justices Run 'Nine Little Law Firms' at Supreme Court," *Smithsonian* 84-92 (February 1977). "For five years I was the highest-paid doorkeeper in the world" is the full quotation (p. 88). Given the stagnant state of judicial salaries and the boom in pay for corporate executives, who also have closed board meetings, this label is no longer valid if, indeed, it ever was.

<sup>12</sup>Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (2006), 105. Not all Associate Justices have had a turn serving as a junior Justice because of the timing of their appointments. Four of the Associate Justices appointed to the original Jay Court, of course, were never junior. Willis Van Devanter did not serve as junior because Joseph R. Lamar was sworn in the same day in 1911. Nor did James F. Byrnes, who took the oath of office three days ahead of Robert H. Jackson in 1941. In 1972, Lewis F. Powell, Jr., was appointed to fill one of two empty seats and was assigned the number 8 position while William H. Rehnquist, who took his oath of office the same day, became number 9. John McLean and William Strong served as juniors for only a week before a newer Justice joined the Bench. Although most Chief Justices did not serve as juniors because they were appointed directly to the center chair, three of them did arrive in ninth position and rise to first: Edward Douglass White, Harlan Fiske Stone, and William H. Rehnquist.

<sup>13</sup>Author interview with Breyer.

<sup>14</sup>Quoted from an interview with Justice Breyer, available at [http://www.law.virginia.edu/html/news/2004\\_spr/breyer.htm](http://www.law.virginia.edu/html/news/2004_spr/breyer.htm). Similarly recounted in author interview with Breyer.

<sup>15</sup>Author interview with Breyer.

<sup>16</sup>Abcnews.go.com/Nightline interview with Chief Justice Roberts by ABC News legal correspondent Jan Crawford Greenburg, available at <http://abcnews.go.com/Nightline/print?id=2661589> (last visited October 24, 2007).

<sup>17</sup>Quoted in Albert J. Beveridge, *The Life of John Marshall*, vol. 4 (1916), 88. This charming anecdote has had many variations. Thanks to Ross E. Davies for pointing out the junior-Justice angle to it.

<sup>18</sup>William W. Story, ed., *The Life and Letters of Joseph Story*, 2 vols. (1851), vol. 2, 104-5.

<sup>19</sup>See, for example, David J. Danelski and Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* (1973), 302: "When the [Conference] discussion has reached the point where the Justices are ready to vote, the Chief Justice calls the roll in the inverse order of seniority and thus casts the last vote."

<sup>20</sup>James F. Byrnes, *All in One Lifetime* (1958), 138.

<sup>21</sup>William H. Rehnquist, *The Supreme Court: How It Was How It Is* (1987), 289-290.

<sup>22</sup>Abcnews.go.com/Nightline Interview with Chief Justice Roberts.

<sup>23</sup>Rehnquist, *The Supreme Court*, 290-91.

<sup>24</sup>Author interview with Breyer.

<sup>25</sup>Rehnquist, *The Supreme Court*, 291.

<sup>26</sup>*Ibid.*, 289.

<sup>27</sup>Being ninth did have its drawbacks in the pre-photocopy era when reading IFP petitions—those submitted by individuals too poor to print and pay the filing fee. The Chief Justice's clerks would type up memos about each petition and then use carbon copies to circulate them to each Justice, with a few extra for the files. These "flimsies" were increasingly difficult to read by the last copies—which went to the more junior Justices—despite efforts to use very thin paper. Bernard Schwartz with Stephen Leshner, *Inside the Warren Court* (1983), 39.

<sup>28</sup>Author interview with Breyer.

<sup>29</sup>Bruce Allen Murphy, *Wild Bill: The Life and Legend of William O. Douglas* (2003), 182.

<sup>30</sup>John P. Frank, *Marble Palace: The Supreme Court in American Life* (1958), 77. Frank clerked for Justice Hugo L. Black during the 1942 Term.

<sup>31</sup>*John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993).

<sup>32</sup>Ruth Bader Ginsburg, "A Tribute to Justice Sandra Day O'Connor," 119 *Harvard Law Review* 1240 (March 2006).

<sup>33</sup>Charles Lane, interview with Stephen G. Breyer, *Washington Post*, February 1, 2006, A21.

<sup>34</sup>Author interview with Francis J. Lorton (who served in the Clerk's office beginning in 1972 and as Chief Deputy Clerk of the Court from 1981 to 2002), May 5, 2007.

<sup>35</sup>This change probably occurred in the 1973 Term.

<sup>36</sup>Cases deemed not worthy of discussion are put on the "dead list" and rejected without further deliberation.

<sup>37</sup>Author interview with Lorton.

<sup>38</sup>Author interview with Breyer.

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*

<sup>41</sup>For example, when John Paul Stevens became the junior Justice in 1975, Linda Blandford, a former assistant clerk in the Clerk's Office who was returning from maternity leave, was temporarily assigned to work for him. Her knowledge of how the Clerk's Office operated may have been helpful to Stevens. Author interview with Lorton.



<sup>42</sup>*Ibid.*

<sup>43</sup>Quoted in Biskupic, **Sandra Day O'Connor**, 104.

<sup>44</sup>Sandra Day O'Connor, **The Majesty of the Law; Reflections of a Supreme Court Justice**, ed. Craig Joyce (2003), 150.

<sup>45</sup>Ginsburg, "A Tribute to Justice Sandra Day O'Connor," 1239–40.

<sup>46</sup>*Ibid.*

<sup>47</sup>Author interview with Breyer.

<sup>48</sup>Coscarelli, "Alito: The Life and Times of a Justice in the Making."

<sup>49</sup>Murphy, **Wild Bill**, 184.

<sup>50</sup>Justice Byrnes, a former member of the Senate, even found the decibel level to be an adjustment. When the Marshal, Thomas E. Waggaman, came by to offer his assistance the first day, he "spoke in the subdued tones generally adopted by attendants at a funeral, in contrast to the tone of the voice of the justices and particularly members of the Senate, where talk was frequently loud and long. I found myself changing to a lower key whenever I talked with Waggaman." Byrnes, **All in One Lifetime**, 139.

<sup>51</sup>Linda Greenhouse, **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** (2005), 54.

<sup>52</sup>David M. O'Brien, **Storm Center: The Supreme Court in American Politics**, 5<sup>th</sup> ed. (2000), 264–65.

<sup>53</sup>Author interview with Breyer.

<sup>54</sup>Interestingly, although Hughes served as a junior Justice, he never sat in the far left seat on the Bench. Because Chief Justice Melville Fuller had just died and Justice William Moody was incapacitated (and soon to retire), there were only seven members of the Court in 1910 when he joined. Hughes thus sat on the extreme right, next to the seat left vacant for Moody. Hughes also recalls: "The very first day I sat, Justice Holmes leaned over and beckoned me to move up and take Justice Moody's place. I knew enough of the traditions not to make such a *faux pas*, and I tremble to think what might have happened if I had been innocent enough to follow Justice Holmes's kindly but rather thoughtless suggestion. The other Justices would have regarded me as a fresh and bumptious newcomer, and even the Chief Justices in their marble busts might have raised their eyebrows." David J. Danelski and Joseph S. Tulchin, editors, **The Autobiographical Notes of Charles Evans Hughes** (1973), 164.

<sup>55</sup>Tom C. Clark, "Reminiscences of an Attorney General Turned Associate Justice," 6 *Houston Law Review* 626 (1969).

<sup>56</sup>Harold H. Burton, "The United States Supreme Court," xxxiv *Women Lawyers Journal* 43 (Summer 1948). Burton also claimed he was "the most Junior Associate Jus-

tice on the most Junior Supreme Court in the history of the country since about 1800" because the senior Associate Justice was only serving in his ninth year (as opposed to his twentieth year, which had been about the average until then). "This is something for which there is no cure except staying on the Court," Burton concluded.

<sup>57</sup>Danelski and Tulchin, **The Autobiographical Notes of Charles Evans Hughes**, 165.

<sup>58</sup>Author interview with Breyer.

<sup>59</sup>*Ibid.*

<sup>60</sup>For example, a former member of the Clerk's Office recalls that staff would often just impose on whichever Justice happened to be in Chambers when a celebrity visitor turned up. Author interview with Edward Schade, who retired as Assistant Clerk of the Court in 1988. May 5, 2007. He also recalls that it was particularly tough to find a Justice in residence in the summer and that he drove visiting dignitaries over to Hugo L. Black's house to meet him because he was often the only Justice in town.

<sup>61</sup>The first formal Christmas party for the whole staff took place in December 1959, making the Court one of the last institutions to implement the tradition. See Bernard Schwartz with Stephan Leshner **Inside the Warren Court** (1983), 69. A Christmas tree, about twelve feet tall, adorned the Great Hall for the first time in 1962, according to Bob Higbie, who started as a page in 1943 and retired as Assistant Librarian for Circulation in the 1980s and who photographed the tree. Higbie also recalls seeing memoranda from the Chief Justice asking Justices to pitch in five or ten dollars for the Christmas party. Author interview with Bob Higbie, May 5, 2007.

<sup>62</sup>This change occurred in the mid-1990s. A 1994 *Washington Post* article reporting on some law clerks' objections to the sectarian nature of the Christmas party assumed that the junior Justice still hosted it: "Breyer, who as the Junior Justice is the official host of the party, declined to comment on the festivities." Joan Biskupic, "Decked Halls Of Court Bring Mixed Verdict," *The Washington Post*, December 16, 1994 A16.

<sup>63</sup>Williams, "Justices Run 'Nine Little Law Firms' at Supreme Court," 89.

<sup>64</sup>Author interview with Breyer.

<sup>65</sup>*Ibid.*

<sup>66</sup>Coscarelli, "Alito: The Life and Times of a Justice in the Making."

<sup>67</sup>*Ibid.*

# William O. Douglas Remembered: A Collective Memory by WOD's Law Clerks

MARSHALL L. SMALL

William O. Douglas (WOD), who was the longest-serving Justice on the U.S. Supreme Court, was an Associate Justice from April 17, 1939 to November 19, 1975, and thereafter was a retired Justice until his death on January 19, 1980. During this period he employed fifty-four law clerks, one for each Term of the Court except for the 1950, 1967, and 1970 Terms, when he employed two clerks, and starting in the 1971 Term, when he had three clerks until his retirement. Forty-one of his law clerks are still alive, including his first law clerk, David Ginsburg, who at the age of 95 remains mentally and physically active and only recently "retired" from his law practice.

As might be expected in a career on the Supreme Court Bench spanning more than forty years as an active and retired Justice, the Justice's relationships with his clerks could not be expected to be the same in every Term—and some clerks found the experience to be less satisfying than others. This may be due to a variety of factors, some personal to the Justice—including the Justice's health, marital status, and advancing age and the changing composition of the Court—and some, perhaps, personal to the expectations of individual clerks. Incoming clerks were often warned in advance, by the former clerks who screened applicants for the Justice or by the clerks they were

replacing, that the Justice's public persona as a laid-back Western outdoorsman did not accord with the no-nonsense attitude that he conveyed while using his clerks to do the Court's work. Prospective clerks were told that they would work hard.

Several attempts have been made over the years to interview the Douglas clerks, in an effort to understand and publish a description of the Justice's complicated relationship with his clerks. Professor Melvin Urofsky interviewed nineteen of WOD's clerks, including at least three of those now deceased (Vern Countryman, Walt Chaffee, and Stanley Sparrowe) as well as several of the clerks who participated



David Danielski (pictured) has been interviewing former William O. Douglas clerks and is preparing a full-length biography of the Justice.

in preparation of this article. The results of these interviews are summarized in two articles: "William O. Douglas and His Clerks," published in *Western Legal History*, and "Getting the Job Done: William O. Douglas and Collegiality in the Supreme Court," published as part of a collection edited by Stephen Wasby under the title **He Shall Not Pass This Way Again**.<sup>1</sup> Professor Urofsky's interviews generally describe the nature of the law clerks' relationships with the Justice while doing the Court's work, but provide few details on the Justice's relationships with his clerks when they were not so engaged. Professor Urofsky has also published a selected collection of the Justice's papers deposited in the Library of Congress, which include letters touching on his relationship with his law clerks.<sup>2</sup>

Professor David Danielski has interviewed eighteen of the Justice's law clerks and talked with another dozen, both living and now deceased, including Lucile Lomen (1944 Term, the first female law clerk hired at the Supreme

Court). Professor Danielski published an article about Lomen in the *Journal of the Supreme Court History*.<sup>3</sup> His interview of Lomen disclosed the same dichotomy noted below by other Douglas clerks between the "all-business" way in which Douglas dealt with his clerks in Chambers, and the "relaxed, warm, and jovial" manner he exhibited when one was a guest at his home. The results of Professor Danielski's interviews will at some point be included in a new biography of Justice Douglas on which he has been working for over ten years, and when completed should be the definitive work on the life of Justice Douglas.

More recently, a book by Bruce Allen Murphy, entitled **Wild Bill**, appeared in print in 2002.<sup>4</sup> Murphy's book presents an unflattering portrait of the Justice, including the manner in which he allegedly treated his law clerks. In his book, Murphy asserts that either he or Walter Lowe interviewed twenty-five of the Justice's law clerks<sup>5</sup> and concluded—presumably based

on their interviews—that, among other things: the Justice called all his law clerks by the same name, “the law clerk”; “because of their crushing workload, Douglas’s clerks never had time to eat lunch with the other clerks and exchange views about the Court and its work”; and the Justice told Justice Blackmun that “law clerks are the lowest form of human life” and Murphy concluded that Douglas treated his clerks that way. Many of the law clerks interviewed by Murphy or Lowe contributed to the preparation of this article. As included in Appendix A and some previously published resources,<sup>6</sup> which Murphy refers to as among his sources of information,<sup>7</sup> their responses portray a different and more varied picture of the Justice’s relations with his law clerks.

In 2006, Stanford University Press published a book by Todd Peppers, who is on the faculty of Roanoke College, entitled

**Courtiers of the Marble Palace.**<sup>8</sup> In this volume, Professor Peppers undertook a serious scholarly effort to document the history and significance of law clerks at the U.S. Supreme Court and their relationships with their Justices. In attempting to understand the relationship between Justice Douglas and his law clerks, Peppers interviewed only three Douglas clerks and exchanged correspondence with a fourth clerk. Based on a variety of published sources, including Murphy’s biography of the Justice and previously published articles by Douglas clerks, Peppers also concluded that Justice Douglas generally treated his law clerks rather badly.<sup>9</sup>

As a result of the Murphy and Peppers characterizations of the relationship between Justice Douglas and his law clerks, which with repetition run the risk of becoming accepted fact,<sup>10</sup> several of Douglas’s law clerks



On August 6, 2003, twenty-three of Justice Douglas’s surviving law clerks gathered for a reunion in San Francisco to discuss a recent unflattering biography of Douglas and refute some of its criticisms. Pictured are Marshall Small (right), who sent out a questionnaire to fellow clerks asking them to describe their relationship with the Justice and Warren Christopher (left). Christopher recounted that when he asked Douglas what he should do with his life, Douglas’s advice was, “Get out into the stream of history and swim as fast as you can.”



concluded that it was time to publish their own previously memorialized recollections of their relationships with Justice Douglas.<sup>11</sup> These recollections had their genesis in a reunion of the Douglas law clerks held in August 2003, in San Francisco, California.

On August 6, 2003, twenty-three of Justice Douglas's surviving law clerks gathered for a reunion in San Francisco. There had been eight prior reunions of the Douglas clerks—in 1949, 1954, 1959, 1964, and 1972 with the Justice, and (following his death) in 1980, 1989, and 1998 (the last held at the U.S. Supreme Court to commemorate the 100<sup>th</sup> anniversary of WOD's birth). The 2003 reunion was prompted by the recent publication of Murphy's unflattering biography of the Justice.

The events of August 6, 2003 commenced with a public meeting in the Ceremonial Courtroom in the Federal Courthouse in San Francisco sponsored by the Federal Bar Association, Northern District of California Chapter, and the U.S. District Court for the Northern District of California Historical Society. At that meeting, Judge William Alsup and Jerome Falk, two of the Justice's law clerks during the 1971 and 1965 Terms, shared memories of the Justice and sought to correct some of the inaccuracies in the Murphy biography. Judge Alsup's remarks were later amplified and memorialized in *The Federal Lawyer*.<sup>12</sup>

Following the meeting at the Courthouse, the clerks and the spouses and significant others who accompanied them adjourned to a private dinner, where they shared memories of the Justice with Cathy Douglas Stone, the Justice's widow, Mercedes Eichholz, the Justice's former wife, with whom former clerk Chuck Rickershauser had kept in contact in Santa Barbara, and biographer David Danelski.

During the dinner, a series of questions were posed by the author of this article, intended both to inject some levity into the proceedings and to gain a rough sense of how far Murphy's description of the Justice's relationship with his clerks was off the mark. A show of hands in response to these questions,

combined with the clerks' individual recollections at dinner that evening, gave some sense of the clerks' collective experiences with the Justice. However, no written record was kept of the proceedings. Subsequently, several of the clerks who attended the dinner decided that it would be helpful to memorialize the shared recollections of the clerks. Accordingly, a written questionnaire was sent to all clerks, whether or not they had attended the dinner, with a follow-up questionnaire prior to preparation of this article. Written responses were received from thirty-six of the Justice's forty-two surviving clerks. The responses covered a wide cross-section of the clerks, from the Justice's first clerk, David Ginsburg, to his last clerk, Montana Podva. The only significant gap came between 1939 and 1947, as all of the Justice's clerks from that time period are deceased. Appendix A of this article records the clerks' descriptions of their relationships with the Justice.<sup>13</sup>

In addition to the shared recollections of the clerks set forth in Appendix A, the author of this article offers the following observations concerning certain matters not directly dealt with in Appendix A, based on his own experiences and the experiences of other clerks. The author has discussed certain of these matters with his former partners William Alsup and Kim Seneker, and also with Warren Christopher, Bill Cohen, David Ginsburg, and Tom Klitgaard.

### 1. The Justice's Clerks Worked Very Hard, Due to a Combination of Factors

First, except for the 1950 Term and 1967 Term and until he began hiring two clerks in the 1970 Term, the Justice kept only one clerk. In 1947, after the Court's budget apparently permitted the hiring of more than one clerk, and some other Justices had begun to do so, the Justice did consider hiring a second law clerk. He discussed the subject with Stanley Sparrowe, who was then his clerk and who advised him that he

would prefer to be in a one-clerk office where he would have a part in everything rather than in only some parts.<sup>14</sup> The Justice did experiment with a second clerk in the 1950 Term, but he returned to one clerk in the 1951 Term and hired an additional secretary, a practice he continued for many years thereafter. The addition of a second clerk in the 1967 Term was caused by Kim Seneker's consecutive bouts with an illness and surgery just prior to the start of the October Term, which made it advisable to bring an additional clerk on board. The reason for keeping only one clerk appeared to be due to the Justice's belief that he could not keep two clerks fully occupied and that his budgeted staff allowance could be better spent by hiring two secretaries and one law clerk. The Justice confirmed this to Kim Seneker during the 1967 Term. He did begin hiring two clerks in the 1970 Term, when other Justices were already hiring three clerks, and in the 1971 Term he began hiring three clerks, as he did not want to be too out of step with the rest of the Court.<sup>15</sup> The Justice apparently felt that clerks for other Justices had too much time on their hands when he saw them attending oral arguments, which may have contributed to the story about the "Douglas pillar" noted in endnote 13.

Second, in the 1970s, when the tradition developed of law clerks for several Justices participating in a "certiorari pool," spreading the responsibility for writing cert memos on the growing number of cert petitions among several offices, the Douglas clerks did not participate in the pool. The Justice felt that one reason for a multijudge court was to obtain a breadth of individual viewpoints, and that this would be stifled by a practice of having one cert memo prepared for several Justices. On the other hand, he did not ask his clerks to prepare Bench memos on cases set down for oral argument, as some Justices required of their clerks, which relieved the Douglas clerks of some burden.

Third, the Justice felt that every petition filed with the Court deserved his scrutiny, so he asked his clerks to review all *in forma pau-*

*peris* petitions and, where there was potential merit, to read the record as well. These petitions were normally only reviewed by the Chief Justice's clerks and usually placed on a "dead list," the contents of which were never scheduled for review and discussion by the Court at Conference.

Why did the Justice work his clerks so hard? At the August 2003 reunion dinner, Cathy Douglas Stone offered the explanation that the Justice was simply trying to toughen up his clerks for the life they would face after clerkship. Whether that was the Justice's sole motivation must be left to conjecture. Perhaps, as he confirmed to Kim Seneker, he felt that his office budget could be better spent on two secretaries, and that it would not hurt his law clerk to work harder for the limited time the clerk was at the Court. Whatever the explanation, his clerks did work very hard. But contrary to the impression created in the Murphy book—as the responses in endnote 13 and Appendix A make clear—many clerks had sufficient opportunity to lunch with clerks from other offices and otherwise engage in extracurricular activities, including several activities with the Justice.

## 2. Besides Expecting His Clerks to Work Hard, How Did Justice Douglas Really View His Law Clerks?

Some clerks observed the phenomenon of starting off poorly and then having the relationship improve as the year wore on and the Justice gained confidence in the clerk's abilities. Bernie Jacob's response reflects this sort of experience, when he noted that one question left out of the questionnaire was whether the Justice ever fired a clerk—or suggested that he or she should quit or be asked if the clerk had gone to law school—during the first week of employment. Bernie said the answer for him was yes, and that it meant a bad weekend. However, he added that, in the end, he thought he had an amiable relationship with the Justice. The suggestions in Urofsky's article that clerks

were regularly put through an initial month of boot camp and that the Justice's rages at his clerks were legendary seem to assume incorrectly that particular incidents with individual clerks reflected an experience shared by all clerks.<sup>16</sup> The author of this article does not feel that he was alone in avoiding an initial month of boot camp or not encountering displays of anger by the Justice. The nearest exposure to temper occurred when he mildly suggested to the Justice that he might consider more fully explaining his reasoning in a case involving state taxation of commerce, as an aid to practicing lawyers, and was rebuffed with the retort that the Justice was in the business of writing opinions for the Court, not in writing law review articles.<sup>17</sup> Warren Christopher recalls that after he had mis-cited a case, the Justice caught the error and simply replied "Christopher, I rely on you to an extent you may not realize." However, as the responses in Appendix A indicate, Douglas clerks did not always experience such gentle treatment.

In assessing the Justice's relationships with his clerks, it should be remembered that the Justice did not, as a matter of practice, meet or interview his clerks prior to their joining his Chambers at the Court. The Justice's first opportunity to appraise a clerk's work would usually be through reading cert memos prepared by the clerks, which were to be short (preferably no more than one page) and clearly analyzed and to provide a thoughtful recommendation on whether and why to grant or deny cert (or grant or dismiss an appeal).<sup>18</sup> We do not know how many clerks hit the ground running or learned by practice on the job writing cert memos, and how that may have affected their initial relationships with the Justice. Another potential source of friction may have been an individual clerk's inability, even with the help of the Justice's secretary, to decipher the Justice's cryptic and sometimes illegible handwritten notes to his clerks. The Justice often communicated with his clerks in this fashion. Similarly, we do not know how to account for the marked difference that clerks experienced

between their working relationships with the Justice across the desk—which could be stiff and "all business"—and the relationships both during and after the clerkship that did not involve the Court's work, but which, as many of the responses in Appendix A indicate, disclosed a more relaxed or even amiable social relationship.

In any event, contrary to the quotation attributed by Justice Blackmun to Justice Douglas in the Murphy book that law clerks are the lowest form of human life, the clerks' own accounts of their experiences with the Justice do not support the view that the Justice considered his law clerks "the lowest form of human life," or that, while he did work them very hard, he viewed them in that fashion. In fact, the responses in Appendix A disclose that the Justice's inclination with his clerks, while varying from year to year and clerk to clerk, was generally to treat them in a friendly, supportive manner when they were not doing the Court's work.

### 3. What About the Infamous Buzzer?

According to David Ginsberg, the Justice did not use a buzzer to summon him when David worked for him at the SEC, nor did he do so when they moved to the U.S. Supreme Court. Ginsburg recalled that the Justice would buzz his secretary, but that "WOD would generally walk into my office with a request [for] an assignment, or occasionally just for talk. On other occasions, his secretary would buzz me to say that the Justice wants to see me. In my day WOD expressed concern about lack of exercise; knowing him, I suspect that he enjoyed that short, quick race across the office. When I needed to talk with him I'd call his secretary to arrange a time." The practice of using a buzzer to summon the secretary was presumably followed by most of the other Justices as well. Gary Torre (1948 Term) recalled that the Justice did use a buzzer during that Term to summon the law clerk. We do not know when or why the Justice began using a buzzer to

summon his clerks, and there is no surviving clerk between Ginsburg and Torre who might shed light on that question. Kim Seneker recalled that when there were two clerks, as during the 1967 Term, the Justice occasionally tried to use a one-buzz, two-buzzes system, but generally did not differentiate between clerks when he rang for them with the buzzer. Dick Jacobson recalled that during the 1971 Term, when the number of law clerks increased to three:

WOD always buzzed once for us, no matter who he wanted, and if the wrong clerk answered the buzz, he might say "send in Reed," but usually he simply said something like "tell Alsup..." and then he would have us convey a message which hopefully we repeated correctly. One problem we had is that Ken Reed, who flew helicopters in combat during Vietnam, had such quick reflexes that he would have answered every buzz before either Bill or I had gotten halfway out of our chairs—if we let him. So, to maximize our face time with the Justice, we cut a deal, and set up a rotation system. WOD never remarked on the fact that he never got the same clerk twice in a row.

Don Kelley recalled that in the 1974 Term, the Justice would summon clerks by assigning a number of buzzes to each clerk—one, two, or three—and that the clerks might have been best known by the number of buzzes used to summon them, with their names being an afterthought, although the Justice generally called them by their last names.

It is possible that the Justice was the only member of the Court who used that method of summoning his clerks. In 2003, the author of this article put that question in writing to then-Chief Justice William Rehnquist, who clerked for Robert Jackson during the 1951–52 Term during the author's clerkship and whom the author had previously known at Stanford Law School. He advised by return letter that Justice

Jackson did not use a buzzer to summon his law clerks, and that he did not know of any other Justice who did so. He then added, unprompted, the following anecdote about Justice Douglas that may be of interest:

He and Cathy hosted me and Nan at their place on Goose Prairie in the summer of either 1973 or 1974, and were most gracious and hospitable hosts. I do remember asking Bill one evening if I might take one of the books on his shelves to read after I went to bed; he pointed to a shelf and told me to take any book I wanted from it. Surprise! All of them were by his favorite author.

#### 4. Was Justice Douglas Careless in the Preparation of His Opinions?

In his 2007 book entitled *The Supreme Court*, Professor Jeffrey Rosen asserts that Justice Douglas often scribbled drafts of opinions while on travel, which his clerks called "plane-trip specials" and which Rosen considered slapdash efforts.<sup>19</sup> There is no question that the Justice worked quickly in drafting opinions, and one clerk, Tom Klitgaard, remembers his practice of drafting while on travel, though not the phrase "plane-trip specials."<sup>20</sup> However, the general recollection of the clerks with whom I have discussed this subject, as well as my own recollection, is that the Justice had a regular practice of carefully going over all opinion drafts with his law clerks to ensure that they were error-free, and that in many cases he spent time considering a case before starting to write. Warren Christopher recalled that his impression of Douglas's preparing opinions was seeing him working furiously in his Chambers with copies of the *U.S. Reports* strewn throughout. Although Douglas may have made clear to his clerks that he was responsible for his opinions, he nevertheless permitted his law clerks to prepare an occasional first draft of what was usually a concurring or dissenting opinion,<sup>21</sup> and as the



years went by that practice may have increased, so that by the 1965 Term, Jerry Falk did the first draft of every per curiam, concurring, and dissenting opinion issued by the Justice and by the 1971 Term William Alsup could report that he and his two co-clerks each prepared approximately one-third of the Justice's ninety-five concurring, dissenting, and circuit opinions that Term. However, all drafts were carefully reviewed with the Justice before being issued.

One final observation that may stir memories—each of us has our own recollection of the Justice (hopefully undimmed by the passing years), with mine being refreshed by notes I have kept that the Justice sent me about various matters, some related to pending cases on which we were working and some on the broader world outside the Court. Those memos—which were usually simply signed with the initials “WOD”—revealed a man who was intensely interested in the work of the

Court and in making certain that the opinions for which he was responsible were properly written. That was a burden we all shared as clerks and about which we knew he cared deeply: that what finally appeared in the **U.S. Reports** would be accurate and would not contain mistakes that would embarrass either him or us. It was a reflection of an attitude that belied any characterization of Justice Douglas as “slap-dash” in his opinion-writing or, as in a review by Judge Richard Posner of Murphy's book **Wild Bill**, as a “bored,” “disinterested,” and “irresponsible” member of the Court.<sup>22</sup>

#### Appendix A: Summary of the Law Clerks' Descriptions of Their Relationships with WOD

William Alsup (1971 Term) noted that he occasionally had lunch with WOD on Saturdays, and went on the C&O hike reunion and socialized on other occasions. He commented that:



Cathy Douglas Stone, the Justice's widow, shared a light moment with William Alsup, a former clerk. “It pains me to see in print unflattering caricatures of the man by authors who did not know him,” wrote Alsup.

The opportunity to clerk for Justice Douglas was a great honor in my life. We were the first year to have three clerks. Douglas was charming to the three of us on Friday afternoons in front of the fire with the Scotch cart handy, recounting to us the events of the conference. He entertained us with stories that wound up in his autobiography. He gave us huge responsibility in drafting separate opinions and recommending actions on petitions. Yes, he was tough once or twice, and usually for good reason, but many more times he had us to dinner, lunch, or breakfast. He and Cathy were most gracious as hosts. After I left, WOD recommended me for jobs in the government, unsolicited. I think he had genuine affection for his clerks, at least when they gave him their best, even though he rarely said it in so many words. Douglas spent his entire career, save a few early years in teaching and a short law practice, in serving his country in Washington service. He was dedicated to the betterment of the country. It pains me to see in print unflattering caricatures of the man by authors who did not know him.

Charles Ares (1952 Term) commented:

After asking me if I was caught up with my work (to which I lied) he took me on a hike along the Appalachian Trail. I got him to reminisce about FDR and the New Deal. Jean and I were invited to dinner with Mercedes, WOD and some of their friends. After the clerkship, we would see him during the February recess which he frequently spent at the guest ranch where he convalesced after the horse rolled on him. We also attended a 9<sup>th</sup> Circuit Conference with Cathy and WOD in Pasadena. The clerkship

was a tough experience but a life-changing one. In addition to a lightning quick mind and lawyering at a high level, I probably would never have gone into teaching without being pushed by WOD. He probably was not pleased when I visited at Harvard, though he never said so. Maybe the fact that Vern Countryman was there helped. To cap it all off, I had the privilege of representing the Justice. He came to my office in Tucson during February, pulled out a speeding ticket he got from a Highway Patrolman outside Yuma, Arizona, on the way back from California. All he said was, "He can't prove it. He was stopped, heading in the other direction giving a ticket to another driver. He flagged me down and when challenged on my speed, said that he knew I was speeding from the high whine my car was making." I said I would talk to the JP. Here ensued a lengthy correspondence during which WOD's position on the Court was never mentioned. Finally, the JP agreed if I would admonish my client that henceforth when he was in Arizona, he must obey all the traffic laws. I reported to the Justice that he was duly admonished. His total reply was a \$50 check.

Alan Austin (1974 Term) commented:

He invited us to his house for dinner, and we had lunch with him at the University Club a couple of times. Just a few days before his stroke, WOD and Cathy came to a holiday party at Don Kelley's apartment, which was a pretty modest third floor walk up on Capital Hill. It was a great scene, with the big black court car pulling up at this humble address and the Great Man walking up the stairs to hang out with his law clerks. I think he had mellowed a lot by the time we knew

him, partly due to age and partly due to Cathy's influence. Of course, for the second half of our clerkship he was ill and often in the hospital. My favorite memory was the time—early in the Term—when he gave me a draft majority opinion and asked me to fill in the citations and footnotes and then send it to the printer. I worked feverishly for several days and completely reorganized the opinion. I was really proud of it because I felt that, without changing the substance, I had done an excellent editing job in addition to adding the authorities. I sent it to the printer, and before it came back a clerk from the prior year, Ira Ellman, stopped by to see how we were doing. I told him about my efforts, and he said, "Boy, are you in trouble." I sweated it out for a few days, and then the Justice buzzed me in one day. He was holding the printed opinion, and he said, "Mr. Austin, I can see that you did a great deal of work on this." "Yes sir," I replied. "Well," he went on, "if and when you are ever appointed to the Supreme Court then you can write the opinions. But in the meantime, I will write the opinions." He wasn't angry at all. Actually he was very kind about it, but of course I had to start over and do what he had asked me to do in the first place. I still think my version was better!

Dennis Brown (1970 Term) commented:

We were invited to his home on two occasions during the clerkship, on New Years Eve and for dinner with the ambassador from Yugoslavia. He spoke to our wives during those events, but not to me. During the 72 Term (I believe) there was a clerk's reunion which included a brunch at his house on Sunday. During that event, we spoke casually for about 10 min-

utes which, I believe, exceeded the total time of all our conversations during my clerkship. It was not a personally rewarding time, but who says great men have to be nice. His impact was enormous and needed.

Carol Bruch (1972 Term): In the 1972 Term, WOD returned to a two-clerk arrangement, having had three clerks the previous year. For roughly the first half of the Term, Carol Bruch and Janet Wright clerked alone, often working eighty hours a week or more. Because the Justice did not trust the cert pool, the two had to spend the vast majority of their time preparing cert memos. Bruch reports that the Justice voted in accord with Bruch's recommendations at a much higher rate than previous clerks had said was necessary to remain in his good graces. Early in the Term, when WOD sent Bruch a note from conference saying, "I will dissent in 72-xxx," she thought it was nice of him to tell her of his plans, but had no idea that this was a signal that she should prepare a draft opinion. So, there was none when the Justice later asked for it, to their mutual consternation. Nevertheless, not long thereafter, WOD asked her to prepare a per curiam opinion that he used as drafted. Bruch also did some drafting of dissents. As to the workings of the office, she notes:

Janet [Wright] was a wonderful co-clerk. For example, we had been told that the Judge (who said the rule was that the person who wrote the cert memo was the person who would stay with that case to conclusion) would sometimes begin to discuss a case with a clerk who had not written the memo. We decided to correct the Judge if he ever tried this with us (I think Janet should take credit for the thought). Indeed, Janet, to her credit, when called in (by buzzer) on one of "my" cases, said, "That's Carol's case, Mr. Justice. Would you like me to call her?" As I recall, that response

wasn't needed again—we worked on the cases according to the “rule” until Peter Kreindler, who joined us as a third clerk late in the fall, arrived and went his own way.

Bruch also noted that “[t]he judge [asked] me to pay attention to the FELA cases, because he suspected the Court was inappropriately deep-sixing them.”

Discussing what had been described to her by former clerks as the Judge's pattern of coming down particularly hard on married clerks, she said, “When I arrived as the Court's first single parent, I was his target. Or maybe he just picked the person he thought would be strong enough to take it.” The Justice attempted some sort of apology to her for his conduct at one point, stating: “I gather you think I am not civil. There is nothing personal in what I say or do—this is the rough and tumble of the law as it is practiced in courthouses across the nation.” Although Nan Burgess advised the clerks to simply work in the upstairs office for a while if they were ever “fired,” none of them suffered this fate, and Bruch later learned that the Justice had written a favorable reference when she applied for a teaching position. She also noted that she had a lovely relationship with Douglas's wife, Cathy, whom Bruch considered intelligent, gracious, kind, and thoughtful.

Although Justice Douglas invited each of her co-clerks to an individual event during the 1972 Term—a New Year's party for Peter Kreindler and a concert for Janet Wright—and invited them both to a joint dinner at his home while Cathy was out of town, Bruch was not invited to any event outside the Court with the Justice other than a large garden party at the end of Term, which she did not attend, although her co-clerks did. Douglas did have a drink once or twice with his clerks in Chambers on a Friday afternoon and responded at one of these occasions, when asked about his increasingly large number of dissents, “Lately I seem to have a lot to say.”

Bruch concluded her comments by stating: “I have benefited all my professional life from this clerkship, but I have an abiding sadness that the year was so unnecessarily marred by the Judge's unkindness.” She took many of the pictures of the 2003 Law Clerks' Reunion that appear with this article.

James Campbell (1964 Term) noted that he was invited to WOD's home for dinner and on the C&O hike. He commented “I never at any time saw any signs of the Justice's heavy drinking noted by Judge Posner in his *New Republic* book review.”

Jared Carter (1962 Term) commented:

I had a very good relation with Douglas. We had a drink after work many, many evenings—while my poor wife and kids waited in the Beetle outside the court. We had lunch together many Saturdays. We went out to dinner and hiked. He never fired me or even chewed me out. The closest he ever came to that was when he threw about 10 pages I had written into the trash basket, saying, “I sign these opinions, I'll write them.” I forget the case, but it was one of those typical Douglas opinions that skipped large blocks of explanation necessary to explain its reasoning in a way that would be helpful to lower courts and lawyers. We talked about other judges' appointments—every one was made for a “political” purpose of the President, not to make the court a better court. In short, I had a great time—worked my ass off, as one clerk, over 4000 certs, etc., fifty-four opinions, one book, three speeches.

We didn't have many earth-shaking issues my year—fleshing out race cases, some cases applying the Bill of Rights to the states, a couple of school motions—so there were not very many reasons to talk about the



role of the court and judicial philosophy. But it was clear to me that the court work was low on his list of interests. One day at lunch I recounted to him a conversation I had overheard between Harlan and a couple of other Justices after they returned from summer recess. Harlan said, "I've been back only three days and it seems like I've been here for years." Douglas said words to the effect, "The first five years were great; all the great issues came before the court and I had to decide how I felt about them and how I would vote. The second five years were also great, because the issues came around again, and I got to reconsider my views and decide what I really thought. After that it was boring as hell. After fifteen years it was just great tedium." I asked him why he didn't resign and do anything else while he was still young enough to do it. He said, and I will never forget it, even though I forget the retired Justice's name—former Solicitor General who had an office upstairs in the court—"No one ever invites Justice Reed to diplomatic dinners."

Warren Christopher (1949 Term) noted that he was invited to WOD's home for dinner after the Justice returned to the Court from his convalescence, and commented:

As you probably recall, my own time as a clerk for Justice Douglas in the 1949 Term was unusual. On October 1, on the eve of his return to the Court, he was severely injured in a riding accident and was unable to return to the Court until after the winter recess. During the time he was away, I continued to write memoranda on the certs and other petitions, about twenty-five each week as I recall, and sent them to him wherever he was convalescing.

In addition to the certs, Justice Douglas gave me an intriguing assignment during his absence. He was beginning to work on his book, *Almanac of Liberty*. He asked me to try to write episodes for several days and then after I had done a few, he asked me, as I recall, to try to write an episode for each day in the month of July. I would send him drafts of four or five days at a time and they would come back to me with very extensive green ink revisions all over the drafts. His revisions were not only fascinating but contained valuable lessons in good writing. When the book finally came out, four years later, the Justice commented in the forward: "The result is that I have preserved only a fraction of the extensive research which Mercedes H. Davidson headed, and to which Warren M. Christopher, James F. Crafts, Jr., William O. Douglas, Jr., and Rowland F. Kirks made important contributions."

Although my relationship with the Justice was far from avuncular, I did not have any of the bad experiences that other clerks are said to have had. I was very young and green, and made more than my share of mistakes. I recall on one occasion that when I had mis-cited a FTC case in some work I was doing for him on a Sherman Act opinion, he caught the error and looked up at me with those clear blue eyes and said, "Christopher, I rely on you to an extent that you may not realize." That was all.

At the end of my year's clerkship, it took me several days to screw up my courage to go into his office and ask his advice about my future. He looked right through me, then responded, "Get out into the stream of history and swim as fast as you can."

After I left the clerkship, Justice Douglas was exceedingly kind and generous to me. When I visited Washington, he invited me on several occasions to take lunch with him in his Chambers. He also wrote generous letters on my behalf without any prompting from me (see for example, the letter at page 257 of Melvin I. Urofsky, *The Douglas Letters* [1987]).

Michael Clutter (1973 Term) commented: "We ate dinner with WOD once in a Georgetown restaurant and once at his home during the clerkship year. I visited his Chambers once the next year with my girlfriend and we had tea with the Justice."

William Cohen (1956 Term) commented that he "had lunch with WOD, most Saturdays across the street from the Court in the Methodist Building, and my wife and I were invited to the Justice's 58<sup>th</sup> birthday party soon after his return to Washington." He also noted that "I was fired once. The secretaries assured me that I should ignore it, and the Justice would forget it. He did. I viewed the first month or so as a rigorous trial period which, thank God, I passed."

James F. Crafts, Jr. (1953 Term) commented: "There was a fair amount of socialization with Mercedes and the Justice during the October Term 1953, but they were both aware that Pat and I had a very young son and that our socializing was somewhat limited. It was a fairly quiet Term except for the segregation cases, but I was kept in the dark about those, as were most of the clerks."

Steven Duke (1959 Term) noted that he socialized frequently with WOD, including dinners at the Justice's house, Redskins games, lunch most Saturdays at the Methodist Club, and a hike on the C&O Canal. In later years, they had lunch a few times in Washington, once in New Haven, and attended several overnight C&O hikes. He commented:

I guess I had a pretty close relationship with WOD in comparison to that of many other clerks, but the only thing that might pass for warmth occurred away from the Court. When he was at Court, he treated me like a machine. He did try to get me some juicy jobs, graduate fellowships and the like, and was largely responsible for my getting my teaching job at Yale. Still, he never expressed any interest in me or my family and never told me I did a good job on anything. I knew I was doing well when he didn't fire me. When my wife met him on social occasions at his home, he was utterly charming to her. She was very skeptical of the stories I told about his aloofness. Mercedes was very warm and supportive of both of us.

Ira Ellman (1973 Term) commented:

We [three law clerks] all arrived at the beginning of the summer, and began the ritual of sending cert petitions with our accompanying memos to him every week in Goose Prairie. We would package them up with great care, warned by the secretaries that he would be upset if there was a single untaped edge anywhere on the box. They would come back to us stuffed helter-skelter in a large mail sack. We would extract our memos, which would rarely contain much comment by WOD, except that every week there would be some marked "dissent from denial." We took this to mean that he wanted us to draft an opinion dissenting from the anticipated denial of certiorari, and so we began drafting. As the summer wore on the number of draft dissents began to mount. I don't recall now exactly, but I'm sure it was well more than 100 of them, perhaps closer to 200 that, by the end

of the summer, we thought he meant us to draft. It felt like 2000. It was an extraordinarily busy summer and as WOD's anticipated fall return drew close we became nearly frantic in our drafting efforts.

I think it was the huge pile of draft opinions dissenting from denial that got us off to a good start. We will never know whether he hadn't realized how many he had asked us to write, or whether we had misunderstood, that he was just scribbling down a note of what he intended to do, and hadn't really meant us to draft an opinion. I do think he issued more opinions dissenting from denial of cert that fall than he ever had before, but not nearly as many as we had written. During the first week, he would call each of us to his office from time to time to tell us that, with respect to some particular draft dissent, he didn't disagree with anything we had written, but he thought it would probably be adequate for him to just note his dissent. The rest of the year was certainly exhausting—I've felt on vacation ever since—and often tense. But for the most part he seemed to have some confidence in us.

I was fired once. There was a Saturday on which I desperately needed to get some time to do an errand with my wife that couldn't be done on Sunday. WOD often left midday on Saturday, and once he left, we all could. So I had told my wife I could probably meet up with her during the afternoon. But the day continued on and he wasn't leaving. I conferred with Dick and Mike and finally decided to take my chances. Of course, not long after I left, he buzzed for me. I was, if I recall, one-buzz, but our joint hope was that it would be fine if Dick or Mike answered the one-buzz

call instead. No such luck. For whatever reason, at that moment it was me he wanted, I no longer remember why, and I wasn't there. Oddly, I also no longer remember just how my firing was communicated to me, but it was. I wrote a humble apology and explanation, and assured him it would not happen again. As I recall, my note was never acknowledged, but after a bit my presence once again was, and the worst was over. I probably earned some slack with WOD over Christmas. He planned to work December 24, and it was clear to us that he would, as usual, expect others to work when he did. I was the only Jewish clerk that year, and Christmas had no special importance to me, so I volunteered to cover while Dick and Mike took time. We thought this had all been cleared with WOD ahead of time, but apparently there was some confusion. He seemed surprised when I was there on the 24th to help him with a request. "I thought," he said, "you were all going to take a Merry Christmas." I explained our arrangement and its rationale. Perhaps he was impressed.

We almost never went to oral argument because we knew the legend of his objections to clerks wasting their time that way; if we did, we made use of the Douglas pillar. We ate lunch with the other clerks in the clerks' lunch room all the time, and I have no idea how anyone got the idea that he didn't allow that. Those lunches with my fellow clerks [were] one of the things I loved about that year.

We did not much socialize with him outside of Chambers. He did invite us to lunch on a very occasional Saturday, and he once had us to dinner at his house, but it seemed a very formal occasion. None of us, to my

knowledge, ever had the boldness to invite him. But I do remember one social occasion very fondly. I remained in Washington for the year following my clerkship, working on the Hill. I had taken the California bar in summer after the clerkship, and was officially admitted in the late fall. I asked WOD if he would swear me into the California bar and he agreed. That December, my parents came down to Washington from New York, and we gathered, with my wife, in his office. WOD was at his gracious best and my parents were of course thrilled. He cooperated in posing for pictures my wife took of him with my parents and myself. It was a very nice occasion and whatever I might ever have said, my parents were forever persuaded he was a very nice man indeed. Those shots of him, which I still have on my wall at home and in my office, were the last photos of him before his stroke, which he had just a few days later in December while on vacation in, if I recall correctly, the Caribbean. I brought one of them with me when I visited him at the Rusk Institute in New York where he was receiving rehabilitation months later, and he signed it for me then, with some encouragement from Cathy.

Jerry Falk (1965 Term) noted that he had quite a few lunches on Saturdays, dinners Friday nights sometimes, dinner once at the Justice's home, and a hike (and camping the night before) on the C&O Canal. After the clerkship, he saw WOD and Cathy quite often—whenever he was in Washington and a few times in San Francisco.

David Ginsburg (1938 Term) noted that he didn't socialize with WOD during the Term. Afterwards, he spent most of the summer with him and his family at a summer home on a St. Lawrence River island. Years later, after Office

of Price Administration and the Army, he saw him often and walked with him frequently, and occasionally they spoke by telephone. Those hikes were Ginsburg's first since Scouting.

Harvey Grossman (1954 Term) noted that he socialized with WOD both during and after his clerkship. While a law clerk, he was invited to dinner parties at WOD's apartment and had lunch with him at his club. Near the end of his clerkship, the Justice invited him to have some photos taken. "We went out to the lawn adjoining the Court building, and he took some photos of me with the Court in the background. I kept at least one as a memento of my clerkship." After his clerkship, he saw the Justice from time to time when he was in the L.A. area. For example, he recalls WOD visiting him and his family at their home and WOD joining him and others for a hike in a forest near L.A.

Bernard Jacob (1960 Term) noted that he went on the canal hikes, several other hikes, and to WOD's house both for a couple of small dinners and for at least two parties. Jacob commented: "One question left out was whether WOD ever fired a clerk (or suggested that he or she should quit or ask if the clerk had gone to law school) during the first week of employment." Bernie said the answer for him was yes, and it meant a bad weekend. However, he added that in the end, he thought he had an amiable relationship with WOD.<sup>23</sup>

Richard Jacobson (1971 Term) noted that

after a "hazing period" that lasted a couple of months at most, he took us to lunch at Jimmy's on Saturday quite a few times, and invited us to dinner at his house on a number of occasions. He also invited us to join him and Cathy on the C&O canal hike, and even gave the three of us a single pint of Scotch to share as we camped out the night before. After the clerkship, I saw him and Cathy a few times prior to his stroke, but I was practicing law in LA between '73 and '77 (when I



returned to DC to work at the SEC), and thus did not see him often. After the stroke, Cathy invited me to the house a number of times, and I was with Cathy and WOD in the hospital when he died.

Jacobson commented: "I think my year was one of the best, in terms of the clerks' relationship with WOD, but I was still terrified, virtually every minute of every day, that I would make a fatal mistake and be fired. I wasn't afraid of WOD's gruff demeanor—I took it with a grain of salt, and actually it amused me. But I was not confident that my work product would be up to his standards, and slaved over everything I did for him. Clearly, none of his clerks ever had a tougher boss, no matter what they did in later life, and that was certainly true of me." Jacobson's account of "The Shower" follows as Appendix B.

Donald E. Kelley (1974 Term) noted that there were several very nice social occasions during the clerkship (and might have been more had WOD not suffered his stroke in mid-Term). He remembers at least one lovely dinner at the house, perhaps when Jerry Falk was in town to argue the *Faretta* case, and one lovely dinner at a French restaurant with Cathy, WOD, clerks and staff around the time of WOD's birthday. He thought the Justice also took his clerks to lunch at his "club" at least once, probably on a Saturday. They may have had a walk or two along the Potomac or the Canal, but it was certainly not a regular occurrence. He believes WOD and Cathy also put in a brief appearance at a "cookies & punch" Christmas party at his very spartan law-clerk's apartment in an old brownstone on Capitol Hill SE (his roommate was *very* impressed). On these social occasions, he recalls WOD reminiscing at great length about his early days in Washington in the '30s, the early years on the Court, favorite trips he had made (including a summer or two with Kurdish tribes in Turkey or Iraq), international relations, and sundry other topics. The Justice could be quite charming

and relaxed on such occasions, in contrast to the rather formal atmosphere that prevailed in Chambers during work hours. Since WOD's stroke occurred mid-Term and his retirement not long thereafter, there were unfortunately very few opportunities for socializing after the clerkship.

Kelley also commented:

I think each of us came in for a few sharp notes or comments during the Term (I recall one note informing me that Hugo Black would be rolling over in his grave if he could see one piece of legal analysis that WOD regarded as particularly outrageous on my part), but I think it's also possible WOD had mellowed a bit by 1974 since there were occasions when he certainly could have come down on us harder than he did. For example, I recall scrambling to get an overnight package sent out to Goose Prairie while WOD was there during the break between the end of the 1973 Term and the special argument session for the Nixon Tapes case; air courier service was in its infancy, at best, and it was neither easy nor cheap to accomplish this, but I knew WOD was in a hurry to get something and I was sure the consequences would be dire if he didn't get it. I later heard that he quietly asked the secretaries, afterwards, not to let me send him any more overnight packages because it cost far too much when I did, but he never took me to task directly on the subject. We did occasionally see the twinkle that Tom Klitgaard mentioned, even in the office setting. By 1974, the clerks' office in Chambers was basically lined floor to ceiling with bookshelves and volumes of case reports. I recall once having climbed on my desk to reach a volume on the top shelf, whereupon

I remained standing on the desk to review whatever case I was seeking (seemed more convenient than climbing down again to read and back up again to replace the volume). My colleagues told me, with great delight, that WOD wandered in the door, found himself staring at a pair of knees or shins, did a very slow pan up to the head (buried in a volume of **U.S. Reports**), cocked an eyebrow and walked out, having apparently decided that the sight of a clerk standing on top of his desk to read was perhaps unusual but not sufficiently so to warrant a comment or reprimand.

Thomas Klitgaard (1961 Term) noted that during the clerkship, WOD took him to Washington Redskins football games—WOD could pick Klitgaard up at the Court, go to the game, have a few hot dogs, and come back to the Court. He had 50-yard-line seats next to the Army Chief of Staff. WOD invited Klitgaard to his home during Christmas time with Klitgaard's wife, and they hiked along the Potomac. After the clerkship, he saw WOD on various occasions when WOD came to the Bay Area, had WOD to his home, and had dinner out with WOD in Oakland and San Francisco, sometimes with Klitgaard's wife and sometimes alone. Klitgaard also saw WOD on a number of occasions in Washington, and WOD invited Klitgaard and his wife to Goose Prairie shortly after the Justice married Cathy. For a number of years, WOD would call and ask Klitgaard and his son to come back to Washington to see the Washington Redskins/Dallas Cowboys football game, and they would then visit at WOD's home. Klitgaard also commented: "I saw a person who was kind in a quiet way and never took advantage of anyone. I saw someone who was generous to others with his time and particularly with tickets to events and who had a twinkle in his eye. I also saw someone who gave me some great comments, such as 'beaten paths for beaten men'

and that 'anyone's biggest problem is fear.' I like him because he was, in my view, a real man's man and because he knew what it was like to be under someone's heel, economically or otherwise. I saw a great deal of compassion which he showed in many ways. He never used his intellect as a bludgeon, but rather as a scalpel, and was kind to people who were honest and working hard."

Peter Kreindler (1972 Term) commented:

I had an invigorating and challenging year clerking for the Justice, and gained experience that has served me well for the thirty-three years that I have practiced law since the clerkship. While the Justice was all business in Chambers, I had an excellent relationship with him on a professional level, in large part because I invariably completed my work on time and always remembered that he, not I, was the Justice. The Justice never failed to hear or understand comments or suggestions of his clerks, and I never made the mistake of coming back a second time on an issue. Unlike other Chambers, all of the majority opinions penned (literally) by the Justice were his, with one exception. I drafted the final majority opinion of the year in a complex administrative law case with multiple issues arising from the Drug Efficacy Act. I also drafted a number of dissenting opinions. The majority of my time, though, was spent drafting memos to him on cert petitions. Thank God Cathy, who had just completed law school, much to the dismay of the Justice, helped with the final crush the night before Conference. I marveled at his encyclopedic knowledge of Supreme Court precedent and the alacrity with which he wrote opinions. He never suffered from writer's block, and was able to express himself

clearly and succinctly, always maintaining his belief that the Court had a role to play in shaping critical policy relating to constitutional values and individual rights. A "strict constructionist" he was not. He truly was an intellectual giant. Unlike in Chambers, he was charming, gracious, and gregarious socially, and had a great sense of humor. My wife, Alice, and I spent several evenings at his home or elsewhere with the Justice and Cathy and friends or dignitaries. The most memorable occasion was brunch at the Fortas's home on New Year's Day, 1974. I maintained a relationship with him after my clerkship. Jay Wright (who practiced law with me) and I regularly had lunch with him, while on the Court and after he retired, including after his stroke. In short, clerking for the Justice was one of the most valued experiences of my life, and I was proud to serve as one of his pallbearers along with David Ginsburg.

Hans Linde (1950 Term) noted that he never had lunch with or hiked with the Justice, but that after his clerkship, he and his wife Helen did see the Justice on maybe three occasions in Oregon.

Lewis Merrifield (1966 Term) (deceased, 2007) commented:

It was a dream year for me, probably attributable to the Justice's new marriage to Cathy Douglas, which was a blessing for both of them. I had heard terrible stories and my courage was screwed up to take it no matter what he could throw at me. The 1966 Term was the Term that Justice Brennan let Mike Tiger go after it "came out" that he had been active in anti-war affairs at Berkeley.

So there was already a gloom over the clerks, or at least me. (Bren-

nan's Chambers were next door.) During the summer, as was usual, the cert memos were shipped off to him by Nan and Fay. I was in the second adjoining office with Datcher, his driver. (He would rather have a driver than a second law clerk—quite practical, I thought, and good for me in a peculiar way). When I got the word from Nan that the Justice would be coming in the next day, I got little sleep that night.

The next afternoon he breezed with Mrs. Cathy Douglas, both all smiles and positive energy. It was that way for the rest of the Term. The only time he jumped me is when I knew I should be jumped. I was citing a case and thought I knew it cold, kind of. I thought a moment about whether it was a "See" or "cf," thought about reading the case and, without reading the case, went for the stronger form. He called me into the office and in a voice I had not heard before, and would not hear again, told me how sloppy that was. I told him I agreed. Of course he had been there when it was decided many years ago so he had a bit of an advantage. But I should have read the case, rather than counting on what was obviously my defective recollection. That was the end of it. And I learned a powerful lesson. Now that is not to say it was a party. It was all business, all business, with complete focus and concentration in Chambers and work. He was pretty formal during the work hours. Not prone to small talk. Professional. Like a large New York law firm, old style.

I quickly learned his writing style, which was unique, I thought, and quite useful. Very conversational, like a person talking intimately to another person. Not just for opinions, but also for articles, speeches,

and books. Very fast, very thorough, plowing through a lot of resources as he went. Fast, but the speed only increased the care and precision. I learned that you did not have to dawdle to be precise. I tried to duplicate the methodology and the style.

He did allow me to write quite a few first drafts. More than I had been told he would. When writing them the object was to write the way he did, in substance, and in form. And to get them out quickly, while I had the chance. He was a very fast writer. His influence taught me not to dawdle, and [to] get a credible first draft out fast. He was clearly the Justice, the boss. On one or two occasions, regarding capital punishment, I tried to gently push to go farther, with the full knowledge that my function was not really to aid him in developing his judicial philosophy, but to aid him in executing his firmly held beliefs, and maybe testing them just a mite. I also wrote a couple of speeches, including one that unfortunately is still applicable today, "The Two Faces of the Law."

Once or twice a week we would go out to lunch, to the Methodist cafeteria next door or a place over on E street, I think Jimmy's, that had great subs. In the afternoons, after five, we would sometimes have a rum and coke, and he would talk about the Court years, the FDR years, some of his favorites like Justice Frankfurter (ho ho), his Wall Street years, including the SEC stint, foreign affairs, like Israel becoming a nation (when I asked him why "there" he asked me where I thought the new/old or old/new nation should be), and a variety of other topics over which he could quickly skim and then go in for the jugular at incredible depth. I was free to lunch with the other clerks but

really did not have the time to do so. In a way I regret that now. Nor did I see an argument before the Court until 1976 when I went to DC with my six-year-old son for the Bicentennial.

The layperson remembers the Justice for his fearless defense of the individual against any untoward governmental intrusion. They usually associate that with his civil liberties positions. But he was also deeply steeped in business. Because of his Yale teaching experience, his chairmanship of the SEC, authorship of a text book on business associations, and general involvement in, and study of, important social areas, he knew a surprising amount about business. I did not fully comprehend it then because of my inexperience. But I did sense it. After a full legal and business career, now I do. And, he sure knew a lot more about federal taxation than I did. His career and his influence pointed me in the direction of business, first teaching corporations, then practicing corporate and finance law, and finally CEOing a large publicly held corporation.

I remember once starting to discuss an antitrust case with him. I had been an econ major undergrad, and in law school continued to steep myself in economics and business, continuing to read a lot in those areas. So I thought I was . . . knowledgeable and "up to date." I started off with the economic theory of advertising, and WOD started to ask questions and then hold forth as if he were back at law school lecturing. It was clear that, even though he had not been in academia for some time, he had a wellspring of knowledge and was pretty current.

What was it like to discuss [c]onstitutional law with him? Really unique. By the time I clerked for him



he had been on the Court for twenty-seven years. He knew the cases cold. With a lot of the cases coming up, he had helped "make" the then applicable law, and was now deciding how, if at all, it would be changed. The case would not be before the Court if all was well as is. That was a unique perspective. It gave me a huge amount of freedom later on I learned not to approach all things as "givens," but to question and probe to see if there was a better answer. Yes, precedent and stability are important, but a lack of change can lead to huge instability as the pressure on the tectonic plates increases, a pressure that is then suddenly unleashed in chaotic and uncontrollable change. Justice Douglas had the wisdom, intellect, experience, and the temperament to always be questioning whether things were right. And the prudence to know when the time for change was not ripe. My interchanges with him over the death penalty were typical. (Our only source of disagreement; although my opinion was not really important. And he listened.)

We, of course, went on the C&O canal hike (I had been told to bring hiking shoes for me and my wife), and one or two warm-ups, and went to the Justice's house for dinner a couple times. We also had he and Mrs. Douglas to our small, walk-down apartment right near the Court, and Linda cooked. It was fun and not nearly as uptight as one might expect. He called me "Merrifield." I called him "Mr. Justice" or "Justice Douglas." And Mrs. Douglas "Mrs. Douglas." My wife went on the large peace march with Mrs. Douglas, if I recall, on Cyrus Eaton's plane, which was quite a thrill for her, and for me who had been vehemently opposed to the war.

I noted that he did not go. I respected whatever his reasons were. The Justice's comments on the war were interesting and very fully formed, well balanced, and firmly held, as usual. And he was also aware of the uncertainties that any future might hold.

I learned a tremendous amount from this man. How far the human intellect can go if tested; the breadth and depth of subjects that can be fathomed. I learned about writing so that people can understand—not just lawyers, but real people. This was summed up to me one afternoon when I treated myself to a shoeshine in the Court. The proprietor of the shoeshine stand had been there for many years and had seen many Justices come and go. While we were passing the time, he asked me "Do you know the difference between your judge and the others?" I responded "No." He said "I can understand his opinions."

Our Justice was frequently criticized for not being scholarly enough, for not writing opinions filled with enough cites and the like. But his opinions had a cadence, a beat, and a meter that made some of them almost like poetry that touched the heart and the soul—of people whose lives were affected. They frequently cried for justice. And they were well reasoned and well supported. They were written by a man who had an incredible range of human experiences to draw upon, experiences from his extensive travels, experiences from his wide range of associates and friends, and experience from his inveterate reading over a huge range of subject matters. WOD had a rare combination of deep intellectual ability, searching curiosity, immense energy, fully formed core values and beliefs,

and the ability to bravely step out in defense of what he thought the Constitution required, frequently willing to suffer the harsh winds of popular opinion.

It seems to me that that is what you want in an Associate Justice of the U.S. Supreme Court, as much as a deep understanding of the "law." An exposure to that gift is clearly what I needed at that time in my business and legal career. I will always be thankful to him for it.

Charles Miller (1958 Term) commented:

During the Term I lunched regularly with the Justice (and sometimes Justice Stewart) on Saturdays, usually but not always at the Methodist Building cafeteria. He invited me to his home on holidays, and I came to know his wife Mercedes reasonably well, as she was frequently at the Court. I did not expect more, and certainly did not feel that I was being ignored. After leaving the Court (and no doubt because I remained in Washington) I saw the Justice socially from time to time, and he was invariably cordial (though never entirely easy to converse with).

In general, I found the Justice somewhat distant most of the time and not easy to talk to. At the same time, I was able to establish a good working relationship with him. He was intensely interested in what was going on in the other Chambers and what the other Justices thought about pending matters, but was loath to engage in the kind of lobbying that Frankfurter did. By spending time with the other clerks and relaying to the Justice what I learned about their doings and thinking, I was able to establish a rapport with him that he seemed to think was worthwhile.

While the Justice did not invite reactions on the substance of his draft opinions, on those occasions when I offered them he listened without undue exasperation. I learned quickly, however, that when he responded to a point by saying "that's the argument on the other side" that it was time to shut up. Later in the Term I was asked to draft one majority opinion (in a case that had dropped through the cracks and that the Justice offered to write to help the Court clean up the docket) and one or two dissents. Needless to say, they were thoroughly revised by the Justice before being released.

I was never fired by the Justice. The most distressing moment came in connection with an assignment to draft a dissent in a case involving a civil search of private home (by a city rat inspector) without a warrant. I was finding the assignment hard going, and had made little progress in several days after receiving the assignment (though I had succeeded in gathering a number of old precedents). The Justice was obviously impatient with my lack of progress, and directed me with some asperity to bring to him the materials I had gathered. In less than two days, working with the kind of intensity that he was capable of generating, he produced one of the more brilliant dissents I have ever read. That is not just my assessment. The initial vote in the case was 8-1, but after the dissent was circulated three other Justices sent around notes saying that they were switching their votes to join the dissent, and a fourth Justice announced he was reconsidering his vote. The latter move sent the author of the majority opinion (Frankfurter) into a frenzy of lobbying that went on for some time and

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which drove the wavering Justice to distraction. In the end, he decided to concur in the Frankfurter opinion, though a few years later the Court revisited the issue and adopted the Douglas dissent as the majority position. As for my failure to produce anything useful, the Justice never mentioned the matter again.

I was assigned a ridiculous research project—to review and categorize every case decided under the 14th Amendment. My predecessor, Chuck Rickershauser, had the duty of giving me the assignment, and he counseled me that I ought not take the request literally. In fact, though I took a brief pass at trying to organize the project I never got very far on it, and the Justice never mentioned it during the entire Term.

William Norris (1955 Term) commented:

I did not expect my year clerking for Douglas to be an easy one, and it wasn't. There was little time for anything but work, which was particularly hard on my wife and three young children. That said, it was a very good year, both personally and professionally. My relationship with the Justice was much closer and warmer than I was led to believe it would be. I recall only one barbed exchange. Once while he was on the Bench drafting a dissent and I was in my office working (I don't remember ever being in the courtroom during argument), I received a note instructing me to check out a point of law. In my reply note, I cautiously tried to persuade him that he was wrong by citing a treatise on evidence. His reply: "I don't take my law from Wigmore." Game over.

Otherwise, I was never discouraged from telling him what I thought. I soon learned that it was not his style

to talk through problems, as I always liked to do with my own law clerks. I noticed that he liked to edit his draft opinions by attaching what he called "riders." I said to myself, why don't I prepare riders and offer them to him one at a time. He seemed to be receptive to the idea. Either he tossed them into the waste basket without comment, stapled them to the draft opinion without comment, or, on occasion, talk about them. Once when I had what I feared was an excessive number of riders, he noticed that I began to hold back in offering them. He looked me straight in the eye and said, "You are never to hold back. I always want to hear what you have to say." That was very comforting for a still-terrified young law clerk.

Stan Sparrow and other former clerks told me not to have any expectations about writing first drafts of opinions. Cert memos, yes, one for every single solitary cert petition. But never an opinion. Stan proved to be wrong, but only once that I can recall. The Justice usually lingered at my desk to give me a brief report on what happened at conference. On one occasion, he asked me to draft a dissent in a case he knew I had struggled with in writing the cert memo. I can still remember that unexpected moment. I felt that I was levitating.

The most unusual assignment he gave me was to talk to Scotty Reston, then the Washington bureau chief of the *New York Times*. The Justice explained that even though he knew Reston and trusted him, he did not grant interviews to any journalist. He told me to speak freely, but to use discretion and not breach any confidences. During the interview, which took place in Chambers, Reston told me that the *Times'* coverage of the



Court was inadequate because, as non-lawyers, the reporters often had difficulty penetrating the procedural and jurisdictional fog that the merits were sometimes shrouded in. Having been a paid stringer for the *Times* while in college, I had the temerity to suggest that he send one of his [writers] to law school for a semester. He thanked me for the idea and soon thereafter Tony Lewis was a short-term student at Harvard Law School.

After my clerkship, the Justice would occasionally invite me to join him for lunch in Chambers when I was in Washington on business. He always was warm and gracious and seemed interested in what I was up to in Los Angeles—especially when I ran for Attorney General of California (unsuccessfully). When the Clerk of the Court called me one day and asked if I would represent the defendant in one of the five companion *Miranda* cases, I had no doubt who was responsible for the appointment: the one Justice who, as usual, was busy writing something during an otherwise lively argument and the only one who did not ask me a single question.

The last time I saw Bill Douglas was in 1980, when I was in Washington for my Ninth Circuit confirmation hearing before the Senate Judiciary Committee. He was bedridden at home, but Cathy encouraged me to stop by for a visit. I went accompanied by my wife and Harrison Brown, a prominent Cal Tech scientist and friend of mine who was also an old friend of the Justice's. Cathy instructed us to go into the bedroom one at a time. When my wife went in, Harrison turned to me with a grin and said, "I'll bet she'll be in there longer than either of us." She was.

Montana Podva (1977–1980 Terms) noted that on social occasions the Justice would introduce Monty to others as "Monty Podva, my law clerk extraordinaire." Monty escorted him to lunches at the University Club with Ernest Cuneo, Sidney Davis, and Tommy "the Cork" Corcoran, and to Trader Vic's or Jenkin's Hill restaurants. They often ate together in his Chambers or went out to lunch with his secretary, then Monty's wife, Rebecca Judge. And at public gatherings he would wave to Monty with his hand and whisper in Monty's ear some witty quip he had floating through his stream-of-consciousness that was not intended for the ears of others. Monty would laugh at his clever jokes, and a big "cat-that-ate-the-canary" boyish grin would spread across his rugged face. Podva also commented: "As I was told would happen by his secretary and former clerks, the Justice did 'fire' me on several occasions. However, he would always buzz me back into his Chambers within an hour asking for something else that I should have anticipated he would want. After several months having passed his 'pledge' period, the Justice asked me to stay on another Term. From that point on our relationship changed from my being his subordinate to him being my mentor. We engaged in many personal, political, and philosophical discussions and I was privileged to be his last law clerk and pallbearer."

Scott Powe (1970 Term) noted that they had dinner about three times at WOD's and in addition were there for his New Year's Eve Party (lots of snow); he and Cathy were also at a dinner with them at Fay's. "About a month into the clerkship, I got a letter suggesting that I was not up to it and I should think about quitting. That hurt, but Nan and Fay told me to just keep working. On top of the certs that summer I had a make-work project that had nothing to do with any pending case. Our Term was probably unique because the first half was spent with impeachment and the second half with three pacemaker operations."

William A. Reppy, Jr. (1967 Term) concurred in the comments of his co-clerk, Carl "Kim" Seneker, and referred me to his book review of Bob Woodward & Scott Armstrong's **The Brethren** in 12 *North Carolina Central Law Journal* 412 (1981) for his own views of his relations with WOD. These included the following:

Not long after I had been on the job, I responded to a buzz from Chambers and was handed Justice Douglas' draft opinion for the Court in a loyalty oath case, *Whitehill v. Elkins*. I knew that I was expected to check the statement of facts against the record on appeal for accuracy, to citecheck all authorities for accuracy, and to add a case citation to support a proposition of law where Justice Douglas had not indicated the authority on which he relied. In addition to the technical review of Justice Douglas' *Whitehill* opinion, I prepared a redraft of, as best as I can recall, two paragraphs, with the thought that the wording could be made more specific. I made no substantive changes, however. Also, I prepared a paragraph dealing with a Maryland loyalty oath case on which state officials had relied in part in their briefs but which the Justice's first draft had not discussed. On my own I thought of an alternative ground for resolving one point and I prepared a footnote laying out this theory. To me it was clear that the proposed additions were merely some ideas for Justice Douglas to consider. He could use them if he liked them, discard them if he did not. The package of work was placed in his "in" tray on his desk. A couple of hours later I responded to a buzzer summoning a law clerk and received a furious verbal thrashing from the Justice. I remember parts

of it: It was "impertinent" of me to tamper with his opinion in *Whitehill*. Only someone who had been nominated by the President and confirmed by the Senate as a Justice could write Supreme Court opinions. I said only one thing: "I'll just throw this in the trash then," and I did. The conversation ended with my being told to "get out" and not to come back. Thus, after a week on the job, I thought I was fired. Although the Justice did not really intend a final discharge, I did not know that when I left his Chambers in shock. "I've been fired," I moaned to the secretaries. "Oh, don't worry," said Nan Burgess. "We get fired all the time. Just go home now and come back tomorrow." [The next day, t]he Justice gave me another opinion draft (of a different case) to work on and said: "Keep giving me your ideas." My own "firing" resulted not only in what apparently were words of encouragement, but in Justice Douglas's use of some of my ideas about the loyalty oath case. Apparently he had retrieved from the wastebasket my suggestions for changes in his *Whitehill* opinion, because a few of them appeared in his second draft.

During my clerkship, my then-wife and I had the Justice and Cathy over for dinner along with the Senekers, and the dinner was a huge success. Justice Douglas opened up and recounted story after fascinating story relating to his experiences or goings-on about the Court. I was twice invited to a party at the Douglas's home. Most memorable, however, was the invitation to both the clerks and their wives to join the Justice and Cathy for the annual C&O hike. The hike along the Potomac River on the Chesapeake & Ohio Canal was designed to direct attention

to this scenic and historic strip of land and was part of the campaign to obtain its preservation as a national park. There was nothing gruff and crusty about Justice Douglas on any of these occasions.

Even on the job, there were occasions when the Justice was cordial. Frequently, he would invite Seneker and me to join him for a drink in Chambers late Friday afternoon. These gatherings sometimes turned into discussions of the Court's work. More frequently, however, we listened while Justice Douglas reminisced about the work habits of various Justices he had known over the years, or while he compared the Court of the early 1940s to the Court of the late 1960s.

Charles Rickershauser (1957 Term) noted that during the clerkship, he regularly had lunch with WOD on Saturday. Chuck also hiked with him and others from Great Falls back to WOD's house, having been driven by Merci. Charlie Reich was usually along. Chuck also went on the C&O Canal reunion hike, and also went to three or four Redskins games. On several occasions he was invited to cocktail parties after work where WOD was an honored guest. Chuck was usually grilled as to who he was, as several were high-powered. He doesn't remember any other details. He and his wife had dinner at WOD's house at least once during the Christmas season and perhaps one or two more times. After clerkship, he was asked several times to purchase specific Christmas gifts for WOD's son, who was living in Los Angeles at the time. Because he was frequently in Washington on business, he went on a few C&O Canal hikes and reunions. Once he went on a several-day trip with WOD on the Appalachian Trail under the auspices of the Forest Service, arranged by them to rebut some of his published criticisms. Later WOD, UCLA law deans, and former clerks hiked down the Ar-

royo Seco from the highway to the Jet Propulsion Lab

George Rutherglen (1975 Term) commented that "unfortunately, during the 1975 Term, Justice Douglas was in extremely poor health, so that his interactions with us necessarily were limited. At some considerable personal sacrifice, he invited us out to lunch and dinner on several different occasions, and we also went to his home on one occasion. Through his travails, which eventually led to his retirement from the Court early in the Term, he acted with the greatest fortitude and perseverance."

Evan Schwab (1963 Term) commented:

I clerked in the 1963 Term. Three major events that year shaped the experience: WOD's marriage to Joan Martin in the summer of 1963 just before or after I started working, President Kennedy's assassination in November, and the 25<sup>th</sup> anniversary celebration of WOD's tenure on the Court in April 1964.

I found WOD preoccupied with personal issues much of the year, which probably made my job easier. There was virtually no work on outside writings. Nan and Faye said he was not working as many hours as had been his custom. There were few late nights, and most Saturdays were only half days. I did, however, work at home most nights and several hours at home most Sundays.

The 25<sup>th</sup> anniversary celebration was a nice time for WOD. In addition to the law-clerk reunion at David Ginsburg's lovely home in April 1964, David arranged another dinner in May 1964, attended by the President, the Chief Justice, Martin Agronsky, Abe Fortas, and about forty other friends from around the country. Vern Countryman, who clerked in 1943 and was then a

Harvard Law professor, wrote a funny mock opinion which was given to WOD at the law clerk reunion: *Young v. Magnolia*. We had it printed in the basement just like a regular court opinion. Then we asked WOD to read it out loud at the reunion. He did and really enjoyed it. WOD shared the opinion with the court. In fact, during oral arguments the following week, the opinion was making its way from Justice to Justice along the Bench.

WOD worked hard on his opinions. They were carefully done. WOD said he drafted the opinions himself because he liked to write, and one clerk could not handle the workload otherwise. I was also spared Bench memos, which all the other clerks had to prepare. WOD just used the original cert memo when the case was argued.

I was asked to draft one dissent that year. WOD told me to draft it without saying why. His conference notes were of little help. After reading the briefs, the conference notes and the draft majority opinion I gave WOD a memo arguing that the majority opinion was correct. A few days later WOD buzzed me in, holding up my memo. WOD said, "I asked for a dissent, not this." "I don't want an argument from you." "You are not on the Court yet." WOD said that as a budding lawyer I needed to pay more attention to my instructions. When I pointed out that he had given me no clue about the basis for a dissent, he mumbled a few thoughts and reasons, and sent me on my way. So I did the best I could. He accepted most of what I wrote and sent it to the printer. I still think the dissent was wrong. But Justice Black joined it.

One of my interesting pieces of research was WOD's request to lo-

cate an income tax case written years earlier by Justice Whittaker. That produced a "memo to the file" (for historians) pointing out that WOD drafted the majority opinion (still bearing Whittaker's name) because Whittaker was having trouble writing it. Then WOD dissented. He wanted history to know he had written both sides of the case.

I was always called by my last name, even in letters in later years.

I regularly lunched in the law clerk's dining room. It was one of the highlights of the year. It was custom to invite each Justice to one lunch with all the clerks during the Term. Most accepted. I was warned by Nan or Fay that WOD rarely attended those lunches, and would probably decline. To my surprise and theirs, he accepted. The lunch was a treat. He was charming and animated. Generally, the other clerks felt that WOD was perhaps the smartest judge on the Court.

My wife and I were invited to WOD's home once or twice, and taken to a concert. WOD and I went to several Saturday lunches at Jimmies (if I recall the name correctly). The lunches were a highlight. I went on the fifteen-mile C&O Canal hike, after sleeping on the ground. WOD was a different person on the hike: around his friends, outgoing, having fun, acting like a tour leader, making jokes, and talking to the press about the C&O Canal history.

I had a special seat in the courtroom, behind a pillar where WOD could not see me. I tested this once by sitting out in the open. Within minutes a page brought me a note with an obscure research assignment. But due to workloads I rarely attended oral arguments.



WOD was generally stern, business-like, cool, and aloof around me but always charming with visitors, although at times he appeared ill at ease with strangers. He was always courteous. He could be abrupt. One would never say he was fun to be around. Maybe around a campfire or on Friday afternoon, but nowhere else.

Occasionally I was invited in on a Friday afternoon for a drink or two at his desk. He had a massive drawer in his desk stuffed with several bottles of whiskey. The drawer was actually hard to open because so many bottles were in it. This casual time with him was a treat. I always had difficulty accepting that I was sitting having a drink with William O. Douglas. I was always struck by the size of his hands, and the way he moved them. And the way he brushed the side of his head with one hand.

It was hard to maintain much of a relationship with WOD after the clerkship. I was practicing in Seattle. But we did have a few lunches and dinners when he came through Seattle.

Bottom line: it was a wonderful experience.

Carl J. (Kim) Seneker II (1967 Term) commented that

Julie and I were invited to WOD's home two or three times to attend dinner parties—not just for us, but usually there were about 10–15 people there, many of whom were quite interesting (e.g., Eric Sevareid; Drew Pearson; etc.). In addition, we accompanied WOD on the annual C&O Canal hike. He also typically would call Bill Reppy and me into his office in the late afternoons on Fridays to share a drink and talk about the

disposition of cases and the likely assignment of opinion responsibilities to the various Justices. Bill Reppy and I would then usually go ahead and allocate the WOD opinion work between us, although at times WOD simply assigned a particular opinion or research issue individually to one of us. Occasionally, WOD would take Bill and me out to lunch—I think that probably occurred about four or five times during our clerkship, but it could have been less often. Finally, Bill Reppy and his wife (at the time, Susan Westerberg Prager) hosted WOD and Cathy, and Julie and me, in a small dinner party at their home on Capitol Hill. I always found WOD to be engaging and friendly in these smaller social gatherings and get-togethers, and it was quite a contrast given the somewhat tyrannical and intolerant demands, and sometimes rather thoughtless comments, that he made relatively frequently during working hours. Cathy also once gave Julie a ticket to attend a Joint Session of Congress honoring the President of Mexico, I believe, and she ended up sitting next to Stuart Symington's wife and just down the row from Lady Bird Johnson, so that was quite a thrill for her.

Seneker also commented:

A general observation I would make is that the Judge actually could be a very sensitive person and exhibit concern about his clerks when it came to health issues. I had both a relatively difficult recovery from my Achilles tendon surgery to deal with during the first couple of months of the Court's Term as well as, at times during the Term, some halfway debilitating tension/migraine headaches. He

recognized certain limits that these conditions placed on my ability to work long hours, and he tried, on occasion at least, to rework assignments to accommodate those limitations. He told me that he had suffered from very bad migraine headaches in his younger days, and was well aware of what that condition could do to a person's ability to work at a consistently torrid and pressure-filled pace. The only other halfway different memory I have about WOD was the time that he assigned me to attend a showing of one of the pornographic movies that the Court had under consideration one of the First Amendment obscenity cases. He did not want to attend himself, but wanted to know if I thought that you really do "know it when you see it," as Justice Stewart had "opined" in 1964. He wanted me to write him a memo after I saw the movie telling him whether I thought there was any standard that could rationally be applied to determine whether something is obscene. As it turned out, I can remember starting to write him such a memo until he chuckled, in his rather guarded way but with eyes twinkling, that he didn't want to see any such memo; rather, he just wanted me to know what it was like to be asked to judge whether something does or does not fit into a particular moral view of the world. In any event, the most interesting part of the showing was not the movie itself, but the running commentary, much of it hilarious, that Justice Thurgood Marshall had to offer throughout the film.

In most cases, I found that his opinions, particularly his dissents, were prepared very quickly and focused on rather broad general propositions rather than narrow resolutions of the issues in dispute. In fact, he

did tell me on more than one occasion that he preferred to write his opinions in that fashion because he believed that, at least in certain areas of law, Supreme Court decisions should offer broad guidance and not lend themselves too readily to being distinguished out of existence because of an overly narrow treatment of the issue in dispute. Finally, I think that although Justice Douglas wrote his opinions quite rapidly (as well as expansively), that should not be viewed as a negative—he was very talented and industrious, highly intelligent, and knew what he wanted to say and how he wanted to say it.

Marshall Small (1951 Term) noted that during the clerkship social occasions were rare—once when Helen Linde "retired" as WOD's second secretary, and to celebrate his 13<sup>th</sup> anniversary on the Court, he had a small cocktail party in Chambers for his two secretaries, his messenger, and Small, and served martinis the way he made them for FDR (5 parts gin, 1 part dry vermouth, and lemon rubbed around the lip of the glass). Small was invited to dinner and an art gallery visit on one occasion (after which the Justice went to his Persian language lessons) and he received tickets to chamber music concerts at the Library of Congress. WOD also gave him tickets to attend the joint session of Congress to consider legislation sponsored by President Truman following the *Steel Seizure* case, which Small made available to his two younger brothers, who were visiting, and they were thrilled to sit near Bess Truman. At the end of his clerkship, WOD took him to lunch at his club. After the clerkship, they corresponded when Small remembered his birthday, and WOD exhibited a particular interest in whether Small might pursue a teaching career. Small visited him at the Court when in Washington. The last time Small saw him was after his stroke when, at his secretary's suggestion, Small invited him to lunch at the Madison Hotel.

Small also commented:

My general recollection of my experience during the 1951 Term was that when handling the Court's work, in dealing with the Justice it was all business, and there was no time for relaxed conversations. On the few occasions when I did have an opportunity to visit with him when not working on Court business, either during or after work, or during visits after my clerkship year, he was relaxed and talkative. My memory of those occasions was refreshed when I recently re-read letters I had written to my parents during my clerkship, which were saved and returned to me years later. On one occasion, the Justice, his secretary Edith Allen, and I discussed when the cherry trees in the Tidal Basin were likely to be in bloom, as my parents were planning a visit to Washington and wanted to come at cherry-blossom time. The Justice recalled that the first week in April was the best time, although it could snow even in April. My parents did come, the cherry trees were in bloom (as I recall) and the Justice made time in his busy schedule for a pleasant visit with them in his Chambers. On another occasion, when the Court was in recess and the Justice was going to be out of town, before leaving he told me to take it easy and try to take some time off—he had no compulsion to see that I was always working hard, although I also remember that he did look in on me working at my desk on one Sunday morning when he came in before going on a hike, so that he knew I was keeping busy. (I was not invited to go on the hike.) When relaxed, he could tell amusing stories, including one story he told at the small party he hosted for his secretary, his mes-

senger and me in his Chambers to celebrate the 13<sup>th</sup> anniversary of his joining the Court. He was aware that I had grown up in Kansas City, and he recalled a speaking engagement he had in Kansas City, where he was booked to stay at the Hotel Muelbach, the best hotel in town at that time. Because he had his dog Frosty with him, the hotel refused to give him a room, and so he and Frosty stayed at a motel. When the local Chamber of Commerce learned of the incident, they sent Frosty a case of dog food. According to the Justice, Frosty liked that brand of dog food so much that he would never eat any other brand of dog food thereafter.

Overall, I did not consider that I developed the close personal relationship with the Justice that some of his other law clerks enjoyed. However, I have always assumed that when he gave me an autographed picture of himself at the end of the Term, with the inscription in his bright blue-green ink that never fades with time "For Marshall Small, who helped me greatly in the 1951 Term—with admiration and affection," that he was in his own way thanking me for the assistance that I had rendered as his law clerk.

Alan Sternstein (1975 Term) noted that he socialized with WOD twice outside the work context.

In contrast to his demanding style in that context, he was on both occasions very engaging, despite his stroke, which led me to believe that perhaps part of his style at work was to teach his clerks about the legal work world, Washington, and its ways. I do not remember the sequence of the two occasions, but once he took my two co-clerks and me

to lunch at, I believe, the University Club. On the second occasion, his two secretaries (Marty and Sandra), my two co-clerks, and I took WOD out for dinner for his birthday. Cathy did not join us; I think she was out of town. I believe it was his 76<sup>th</sup>.

WOD never got as far as Christmas 1975 on the Court. Indeed, I nearly never got as far as Christmas 1975 as a clerk. Shortly after WOD retired, in November 1975, my co-clerks and I visited the Chief Justice (Burger) in his Chambers. He informed us that clerks were line items on the Court's budget and that there was only one line for clerks for retired Justices. Two of us, we were informed, would have to go. What had been a dream for this young man from Tucson seemed in danger of quickly ending, but better heads prevailed in the conference. I was asked to become Justice Brennan's fourth clerk.

Sternstein also commented:

I have ambivalent feelings about WOD. He was a tough taskmaster, for most of the short time that I worked with him. WOD and Brennan were interesting studies in contrast. I sensed a very private and somewhat insecure side to WOD, and I believe it was something of a need to establish a zone of protection about himself, if you will, that also motivated much of his jurisprudence protecting the individual against the state. This was, in part, if not in predominant measure, I suspect the source of his liberalism. Brennan, on the other hand, was one of the more centered individuals I have known. He was comfortable with himself and, therefore, comfortable with, accepting of, and tolerant of nearly all comers . . . or so he would make it seem. It was this

capacity for fearlessly embracing humanity (black, white, yellow or red; holy and profane; criminal and law-abiding) that I believe was a significant source of his liberalism. The state and its citizens had less to fear than they believed they did.

It is ironic, and then again not, that one Justice, something of a recluse, and the other, truly a hale fellow well met, were each pillars of liberalism in the history of the Court.

Gary Torre (1948 Term) commented: "Yes, on two occasions I had dinner at his apartment with other guests. The first occasion I was not yet married but on the second my wife was also invited. When the Judge returned from his Middle Eastern trip in the summer I gave him two auto lifts before he went West. I also attended a formal dinner party that Abe Fortas and his wife gave for Douglas's daughter in 1948."

Jay Kelly Wright (1974) commented:

I had a rewarding year as one of the Justice's law clerks during the 1974–1975 Term. I reported in June 1974. My co-clerks, Don Kelley and Alan Austin, were already there. Although the new set of law clerks had arrived, the work of the court for the 1973–1974 Term was not quite over. The *Nixon Tapes* case, *United States v. Nixon*, had been argued but not yet decided. The Justice was in Goose Prairie the day I first started work. But he had been at the Court the preceding week, and my co-clerks Don and Alan had already met him. A few days after I started work, the Justice returned to Washington for what became the final conferences before the unanimous decision in *United States v. Nixon* was announced.

After the final conference the day before the decision was announced, the Justice called (buzzed)



all three of us into his office. Harry Datcher brought in a fairly beaten-up cardboard box containing clinking bottles, and the Justice poured drinks for all of us and told us what had happened at the conference and what would happen the following day. More about this incident is recounted in the remembrance I wrote that was published in the *1990 Yearbook of the Supreme Court Historical Society*.

(By the way, I never found the buzzer system to be inappropriate or offensive. Each law clerk had a separate buzzer signal. It seemed to me a logical and efficient way of getting us to come to his office, which was separated from the law clerks' office by the office for the two secretaries.)

After the announcement of the *Nixon* decision, the Justice went back to Goose Prairie, where he stayed the rest of the summer. The work of the law clerks was much like what others have described—we sent him the *cert* petitions and our memos, and he sent us back instructions. In several cases in which he was interested, he predicted (accurately) that the Court would not grant *cert* and therefore wrote that I should draft a dissent from denial of *cert*. I drafted these, sent them back, and he made revisions.

After all the Justices returned for the conferences that precede the first Court day in October, the Justice returned from a conference one day and told me he wanted me to draft an opinion on a case where I had written the memo over the summer. WOD told me to draft a *per curiam* opinion summarily reversing the decision below. I did a draft, which he reviewed and did not find strong. "The Court is divided on this," he told me, "and this draft is not strong enough to be persuasive."

He told me of cases I had not cited that I should read, and sent me back for another try. My second draft was much more to his liking, and after reviewing it and making his own revisions, it ultimately became a unanimous *per curiam* decision: *United States v. Michigan National Bank*, 419 U. 1 (1974).

This process was characteristic of all the other writing I did during my clerkship. He would tell me generally what he wanted, review my draft, and then edit it, usually also asking me to do more work and produce another draft. There was never any doubt about who was deciding the case (him, not me) and whatever I wrote got carefully reviewed. He was not rubber-stamping my work. Other significant opinions from the Term where he gave me a lot of drafting responsibility included the opinion for the Court in *Bowman Transportation Inc. v. Arkansas-Best Freight System Inc.*, 419 U.S. 281 (1974) and his dissents in [the] *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) and *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

On the personal side, there were times when the Justice invited us to join him at lunch on Saturdays, and we and our spouses or significant others attended a dinner for him around his birthday at the restaurant Chez Francois in Washington.

One of the most memorable and enjoyable occasions happened fairly early in the Term, when Jerry Falk came to Washington to argue the *Faretta v. California* case (involving a defendant's right of self-representation). The Justice invited Jerry and his wife to the house on Hutchins Place for dinner, and the law clerks and spouses (or significant



Cathy Douglas Stone and Mercedes Eicholz, the Justice's second wife, both attended the reunion. Many clerks remember being invited to the Justice's home for dinner or otherwise socializing with the Justice and Cathy or Mercedes.

others) were also invited. I remember the evening particularly because my wife, Meredith, and I were the first to arrive. The Justice answered the door himself. I gulped. We were not well acquainted at that point, and my wife had never met him. Meredith, however, immediately admired one of the many treasures in the house he had brought back from his travels. The Justice immediately took her by the arm to show her the piece and explain its origin. The entire evening was delightful.

My clerkship was marred only by the stroke the Justice suffered over the holiday period at the end of 1974. Except for a relatively brief period of hospitalization, he continued to work on Court business. But his medical treatment and rehabilitation drained

some of his energy. He wrote fewer opinions, we saw him less often, and as a result I was less busy.

I would not have traded that year for anything. I never considered any part of the clerkship to be "boot camp." The hours were somewhat longer than my clerkship the preceding year with Judge Harold Leventhal on the District of Columbia circuit, but not a great deal longer. Our hours as Supreme Court law clerks were about the same as law clerks for other Justices.

#### Appendix B: The Shower

Richard L. Jacobson

There are many stories about WOD's relationships with his law clerks. It is common knowledge that clerking for him could be like

fifty-two weeks of boot camp. It is difficult to convey, unless you went through it, the absolute terror that a Douglas clerk felt at the thought of making a mistake. My year, October Term 1971, supposedly was a "good" one. There were three of us—me, Bill Alsup, and Ken Reed. It was the first year WOD had three clerks. We turned out a lot of work, which seemed to please him. And we were deathly afraid of displeasing WOD. He was a larger than life figure to us, and we were completely in awe of him. We would have done anything to earn his respect—or at least to show him that we weren't totally incompetent.

Despite his seeming indifference to our efforts, WOD knew exactly what effect he had on us, and loved every moment. He also wasn't above stretching the truth just a trifle if it would help him keep us terrified. My favorite story from the year I spent with WOD underscores both the spell I was under and the terror that was never far from my thoughts. It does not involve law, though. It is about basketball.

Some say that the "highest court in the land" is not the beautiful marble courtroom on the first floor of the Supreme Court building in Washington, but rather the basketball court on the fourth floor, directly overhead. While the ceiling is somewhat low, and the caliber of play often not much higher, the enthusiasm for the game among law clerks, at least in my day, was immense. We usually played three on three, and there were almost always enough players on Saturday to play five on five. We even had a couple of tough cookies who could give Justice White a battle under the boards.

After the game, physically exhausted but mentally refreshed, we all would return to Chambers to shower and change. Each Justice, of course, had a full bathroom adjacent to his private office, which the clerks had the privilege of using for this purpose.

Well, to be absolutely precise, I should say that most of the clerks had the permission of their Justice to shower after games. WOD was a somewhat different story. We decided early on to assume we had his permission, but not

formally to ask for it. Our reasoning, even now, eighteen years later, strikes me as unassailable: What if he had said "no"?

Our assumption was particularly reasonable during the first summer of our clerkship. When we first came on board in July 1971, WOD was in Goose Prairie. We talked to him on the phone from time to time, but had never met him. We sent him packages of cert petitions; he sent us notes. His office remained empty, his shower unused. What could possibly be the harm in employing these underutilized facilities for the purpose for which they had been designed?

When WOD returned to Washington for the beginning of O.T. 1971, we decided—since we never had the time nor the guts to play ball while he was in the office—that there really was no reason to raise the issue. We would not begin a game until he left for home, and we would meticulously clean the bathroom after we used it. Since WOD would never know, why risk a good thing?

Hah! To think that we thought of ourselves as the best and the brightest. Idiots—that's what we were. Our grand deception crumbled one fateful weekend in November. On Friday, WOD went home early. He was leaving town virtually at the break of dawn Saturday to give a speech at Emory University. As soon as his car pulled out of the garage, we high-tailed it to the basketball court.

Later, after showering and changing, I noticed that my clothes were getting more than a bit grubby. Since WOD would soon be safely on the way to Atlanta, I rinsed all my stuff out and left my shirt, shorts, jockstrap and socks hanging in the bathroom to dry.

A law clerk's day begins early. WOD wanted at least one clerk in the office by 7:30 a.m. In my year, he didn't care which one of us it was, so we rotated the "honor." That Saturday, I did not have to be in early. Thus it was that at 7:00 a.m., I was roused from a sound sleep by the insistent ringing of the phone. [It was] Jerry Murphy, a second-year law student at Georgetown who worked part-time in the

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Marshal's office and who WOD used almost exclusively as his driver (because Jerry could get him from Hutchins Place to the Court in less than ten minutes, even if he had to drive on the sidewalk to do it).

Jerry was calling me from the airport—and he was calling about my gym clothes. Apparently, WOD had stopped by the Court on the way to the airport and used the bathroom. When he saw my stuff drying on the rack, he asked Jerry to call the F.B.I. to find out who had “broken into” his Chambers and left gym clothes all over the place. Knowing exactly who the culprit must be, Jerry called me instead.

Well, I was scared to death. I had no idea what to do other than to get down to the Court as quickly as possible and remove my stuff from the bathroom. When I arrived I asked Nan and Fay, WOD's long-time secretaries, for their advice. They suggested I write a short note, explaining what happened and apologizing for it.



Did Justice Douglas (pictured) really stop by the Court just to take a shower before going to a Saturday evening dinner? Or was he merely trying to embarrass his clerk, who had used the shower without permission?

So I did. I composed a brief paragraph, admitting the gym clothes were mine, apologizing for leaving them in the bathroom, and promising that “it would never happen again.” Exactly what “it” was, however, I left ambiguous. My intent was only to promise never to get caught again. Despite this brush with disaster, I felt that with just a little more discretion, life—and basketball—could go on as before.

My apology was apparently accepted, for I was not fired, nor did WOD even mention the incident. No F.B.I. agent knocked on my door. My folded note was simply returned to me without comment. We continued to play ball, and to shower in WOD's bathroom. We were just more careful about his whereabouts when we did so.

Then came February. It was on a Saturday. WOD again left early. There was a hot and heavy five-on-five game, in which all three of us from WOD's Chambers played. After the game, I showered last. Ken and Bill were both married and wanted to get home as soon as possible, since we were all taking a rare Saturday night off. I agreed to hang around and clean up, as I was single and had no date.

I finished my shower about 6:15 p.m. My co-clerks were long gone. I decided, before getting dressed and cleaning the bathroom, to call the girl I had been dating. With nothing but a towel wrapped around me, I sat at my desk and made my call. Candy was at work, and I was well on my way to convincing her to go out with me that same night despite the appalling lack of prior notice, when the roof dropped in.

Or should I say, when WOD, in a suit and tie, sauntered through the door and went into his office. My god! It was 6:30 p.m. on Saturday. What the hell was he doing here? I quickly hung up, pulled on my pants and shirt, and pretended to work. He was in his office for about half an hour. I couldn't tell what he was doing and was afraid to go in after him to find out.

If only he doesn't go into the bathroom, I prayed silently to myself. As they say in the pulp novels, the seconds crawled by. Finally, about 7 p.m., he came out through the

secretary's office (where I was feigning interest in some files), smiled at me, said "good night," and left.

I made myself wait a few minutes to make sure he was really gone. Then I slowly walked into his office. The door to the bathroom was open, as I left it. That was a good sign. But the bathroom light, which I had left on, was now off. That was bad.

Screwing up my courage, I walked to the bathroom door, flipped on the light and looked inside. I expected to see evidence of the three showers that we had recently taken. You know, water on the floor, dirty towels on the sink, that sort of thing.

I was not prepared, however, for the sight that met my eyes. The bathroom was spotless! All the dirty towels were neatly stowed; there was not a drop of water anywhere. Clearly, WOD had gotten down on his hands and knees, in his suit, and mopped up the whole bloody room. No wonder he had been in there so long. No wonder I felt sick to my stomach.

I knew this was really the end. What could I conceivably say or do to get out of this mess? Whatever "it" was that I had promised in November would never happen again had just happened. It seems funny now, but I was terrified. I didn't know what WOD would do. Maybe he really would fire me, for breaking my "promise." Maybe he would just ignore me for the rest of the Term—a fate which had been known to befall clerks who displeased him greatly enough.

I truly thought that my year, if not my entire career, was at stake. So, I spent the next day and a half composing yet another apology. This had to be an apology to end all apologies. Each word was carefully crafted. I solicited input from Marshall's and Stewart's clerks as well as WOD's secretaries and my co-clerks. When I finally got done, very late Sunday night, my magnum opus was about three-quarters of a page, double-spaced. It was the very best work I could do.

I got in Monday morning about 7:15 and put the note on WOD's desk. He showed up

right on time, at 7:30, and went into his office. There was an oral argument scheduled that morning, so I figured that something would happen before 10, when he had to go on the Bench. I was wrong; nothing did. He didn't buzz us, and he didn't send for a secretary. I was slowly going crazy, anticipating the worst.

Finally, the buzzer rang for oral argument, and WOD left without a word. I rushed into his office to see if he had written me a memo and put it in his out-box. There was nothing anywhere. Nothing in any desk drawer; nothing in the waste paper basket; nothing in the secretaries' tray. I couldn't even find my original note.

I returned to the law clerks' office feeling very nervous. I sat at my desk, unable to work, commiserating with Ken and Bill. About half an hour later, a page came in with a note for me from WOD. He would often send us notes from the Bench, as a point in an oral argument would lead him to think of a research project, or a case he wanted to look at.

This note, however, had nothing to do with any case pending before the court. It was, in fact, my apology, folded in two and addressed to me. WOD had taken it with him and had annotated it while listening to oral argument.

Each one of my carefully worded points of explanation had been shredded in an angry hand. I had started off by saying it was customary for the clerks to use their Justice's shower after basketball. He noted in the margin: "without permission?" Score one for WOD.

I had also explained that the excess water was due to the fact that all three of us had played and showered (safety in numbers!), and that I intended to clean up as soon as I finished dressing, an intent which was interrupted by his arrival. He responded: "Maybe I need new, housebroken law clerks."

I also explained that my previous apology was intended to be taken as a promise to be more careful in cleaning up rather than a commitment not to use the shower at all. I concluded by stating that, since difficulties had arisen despite our best efforts, we would not

use the shower again. WOD didn't directly respond to this. He just commented at the bottom as follows: "I came down to take a shower as our water heater had broken down at home. What do I find? Dirt and water everywhere. Where the hell do you expect me to go? Rent a hotel room?"

I immediately showed the note to Nan and Fay to get their interpretation. I was personally encouraged by the fact that WOD had responded to most of my points "on the merits," had not accused me of breaking a prior promise, and had not said that he "definitely" needed new law clerks. Could this be a second—or rather, a third—chance? Their consensus was that I had weathered the storm, but that if it happened again, I should consider changing professions, assuming I was still alive.

WOD, of course, never once mentioned either incident—nor did I. Some time later, I asked Cathy, as nonchalantly as I could, whether their water heater really had broken. As those who know WOD should already suspect, she told me it had been working just fine. I never did find out what brought him back to the Court that Saturday night.

Did I ever use WOD's shower again? What do you think?

## ENDNOTES

<sup>1</sup>Melvin I. Urofsky, "William O. Douglas and His Clerks," 3 *Western Legal History* 6–20 (Winter/Spring 1990); Stephen L. Wasby, ed., *He Shall Not Pass This Way Again: The Legacy of Justice William O. Douglas* (1990).

<sup>2</sup>Melvin I. Urofsky, ed., *The Douglas Letters, Selections from the Private Papers of Justice William O. Douglas* (1987), pp. 45–54.

<sup>3</sup>David J. Danelski, "Lucile Lomen: The First Woman to Clerk at the Supreme Court," 23 *Journal of Supreme Court History* 43–49 (1999).

<sup>4</sup>Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (2002).

<sup>5</sup>Murphy, *supra* note 4, at 677–80. The following law clerks are listed as having been interviewed by Murphy or an associate: Alsup, Ares, Armitage, Austin, Bruch, Carter, Chaffee, Christopher, Cohen, Countryman, Duke, Ginsburg, Kelley, King, Linde, Lomen, Norris, Podva,

Powe, Reppy, Rickershauser, Schwab, Small, Soderland, Sparrowe, and Weston.

<sup>6</sup>Personal recollections of Justice Douglas by fourteen of his former law clerks (Alsup, Ares, Falk, Jacob, Jacobson, Klitgaard, Miller, Norris, Powe, Reppy, Rutherglen, Small, Sparrowe, and Wright) appear in "Remembrances of William O. Douglas by his Friends and Associates," a special anniversary booklet prepared in celebration of the fiftieth anniversary of WOD's appointment as Associate Justice of the Supreme Court of the United States (1939–1989). Personal recollections of former law clerks Benka, Klitgaard, Reppy, Small, and Wright also appear in "Remembrances of William O. Douglas," 1990 *Journal of Supreme Court History* 104–24. See also Ares, "Mr. Justice Douglas," 11 *Harvard Civil Rights-Civil Liberties L. Rev.* 229 (1976); Cohen, "Justice Douglas: A Law Clerk's View," 26 *U. of Chicago L. Rev.* 6 (1958); Ginsburg, "Reflections of Justice Douglas' First Law Clerk," 93 *Harvard L. Rev.* 1403 (1980); Powe, "Mr. Justice Douglas," 55 *Wash. L. Rev.* 285 (1980); Reppy, "Justice Douglas and His Brethren: A Personal Recollection," 12 *North Carolina Central Law Journal* 412 (1981).

<sup>7</sup>See Murphy, *supra* note 5, pp. 691–92.

<sup>8</sup>Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (2006).

<sup>9</sup>In 2006, New York University Press published a book entitled *Sorcerers' Apprentices* by Artemus Ward and David Weiden, in which the authors also undertook a scholarly effort to analyze the role of U.S. Supreme Court law clerks. Unlike the Peppers book, the Ward/Weiden book did not attempt to characterize the manner in which Justice Douglas treated his law clerks. In addition, in 2006, volume 12 of the Oliver Wendell Holmes Devise History of the U.S. Supreme Court, covering the period 1941–1953, was published. In this volume, the author, William Wiecek, in providing a brief biographical history of Justice Douglas, noted his reliance on Murphy's *Wild Bill* and concluded, without qualification, that Justice Douglas was harsh and inconsiderate to his clerks. William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953* (2006), p. 93.

<sup>10</sup>A case in point is the inaccuracy of the Justice's alleged preparation of "plane-trip specials." See note 19, *infra*, and accompanying text.

<sup>11</sup>These recollections had been memorialized by me in 2004 for use by Professor Danelski in his biography of Justice Douglas.

<sup>12</sup>William Alsup, "Accurately Remembering Justice Douglas: A Reply to *Wild Bill* and Recent Critics," 50 *Federal Lawyer* 20–28 (November/December 2003).

<sup>13</sup>In addition to the responses in Appendix A, the law clerks also responded to the questions posed at the 2003 reunion dinner. Contrary to Murphy's assertions in *Wild Bill*, most of the clerks were called by their last names by the Justice,

and some by their initials in written memos from him. Only two clerks indicated that they were ever addressed as "law clerk." Bernie Jacob recalled that the Justice once spent half an hour explaining his style of calling friends by their last name. Most of the clerks ate lunch with the clerks from other Chambers in the clerks' dining room, some frequently and others occasionally. Eleven clerks indicated that they were able to persuade the Justice to come to lunch in the clerks' dining room with clerks from other Chambers. Fifteen clerks recalled hiding behind the "Douglas Pillar," but many did not. Klitgaard and Seneker recalled receiving notes from the Justice from the Bench asking why they were attending oral argument, and Klitgaard recalls the Justice asking him in a note from the Bench to determine the annual outflow of the Orinoco River in cubic feet, which Klitgaard promptly did through help from the Court's library. On the other hand, Alan Austin recalled that when *U.S. v. Nixon* was argued, the Justice stopped by the clerks' chambers on the way to the Bench and asked if they were going to hear the argument.

<sup>14</sup>See Urofsky's interview with Stanley Sparrowe, described in Urofsky, *supra* note 1, at 3.

<sup>15</sup>During the 1972 Term, the Justice initially decided to return to the two-clerk staff that he had used in the 1970 Term and hired two female law clerks, at a time when clerks were traditionally male. See Peppers, *supra* note 8, at 20–21, 157. However, he later hired a third clerk, and he continued that practice until his retirement. Although Justice Douglas sometimes expressed the view that the Court's business could be handled with fewer (or no) law clerks, the increased volume of certiorari petitions over the years WOD was on the Bench no doubt accounted for the need for additional law clerks in all Chambers, rising from 934 petitions in 1940 to 4,747 in 1975, the year WOD retired. See Ward and Weiden, *supra* note 9, figs. 1.4 and 3.1 and tables 3.3 and 3.4 at 39, 117, 138, and 142. See also Gerhard Casper and Richard Posner, "A Study of the Supreme Court's Caseload," 3 *Journal of Legal Studies* at 339, 340 (1974).

<sup>16</sup>Urofsky, *supra* note 1, at 5 n.17. Tom Klitgaard, Bill Cohen, Chuck Ares, and Jerry Falk, who screened applicants for Justice Douglas, all deny the statement in this article that they would deliberately behave offensively to see how the applicants could handle themselves, and also to alert them to the type of experience they would have with Douglas.

<sup>17</sup>Dick Jacobson related to me a similar exchange he had with the Justice.

<sup>18</sup>For Justice Douglas's own view of what he expected in a cert memo, see Urofsky, *supra* note 2, at 53 n.34.

<sup>19</sup>Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (2007), p. 130. In response to my inquiry, Professor Rosen indicated that he relied for his information on "plane-trip specials" on Murphy's *Wild Bill*, which relied on Bob

Woodward & Scott Armstrong's *The Brethren*. Murphy, *supra* note 5, at 469; Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979), p. 63. No citations were given in *The Brethren* supporting this statement, and none of the Douglas clerks with whom I consulted or corresponded in preparing this article indicated knowledge of the term "plane-trip specials".

<sup>20</sup>With respect to the Justice's practice in preparing opinions, Klitgaard had the following comments:

In my experiences with him during the 1961 Term, I found that he was meticulous on the facts and the law. He put great care into writing his opinions. If he traveled out of town, he would occasionally take with him the briefs on a case that had been assigned to him or on which he was thinking about writing a concurrence or dissent. He would come back with a well-drafted opinion. It was handwritten and sometimes hard to read. My job was to check every fact against the record, with a citation to the record. If the Justice was drawing an inference from a fact or facts in the record, he wanted me to be sure that the record clearly supported the inference. He told me that if a petition for rehearing was filed, I had to justify every statement in the opinion and in a nice way suggested that it would be my job if there were any errors or arguable points on the facts. I got the point and meticulously checked the facts in every opinion before it was circulated to the other Justices and again before it went to the printer for the final printing.

With respect to the care with which opinions were prepared in the Justice's Chambers, Jerome Falk, Jr., noted:

I never heard the phrase "plane trip specials," but there were occasions when I learned (I think from WOD) that he had written a draft opinion on an airplane trip. But the impression that this draft then went straight to the U.S. Supreme Court Reports—or at least was circulated to the Conference—is nonsense; the draft went to me, and as in the case of every opinion he drafted, it was my job to make sure it was complete, accurate, and as persuasive as possible.

<sup>21</sup>Justice Douglas himself acknowledged this practice. See William O. Douglas, *The Court Years: The Autobiography of William O. Douglas* (1980), p. 173. Occasionally, WOD did ask a law clerk to prepare the first draft of a majority opinion. Ira Ellman (1973 Term) advised me as follows:

Chief Justice Burger assigned WOD the majority in one 5–4 decision with an unusual



alignment, and WOD began sending notes to me about the case, asking oddly obscure questions I did my best to answer despite my puzzlement. He finally called me in to say that he saw I wasn't doing anything on it. He wasn't happy. I meekly offered my apology, suggesting that perhaps I didn't understand what he had meant for me to do. He managed to get out, despite his obvious difficulty in saying the words, that he wanted me to draft the opinion, a request he never made for his opinions for the Court and which I had therefore never imagined he meant. WOD had received the assignment about a week before, and I knew that from his perspective the draft was embarrassingly late. We had this conversation on Friday in the early afternoon. Saturday was always a work day in WOD's Chambers, and it was clear to me that I had to have a draft to him before we went home the next day. WOD's problem with the case, *Kahn v. Shevin*, was clear. He had only recently joined Brennan in the 4–3 plurality for the short-handed Court in *Frontiero* holding gender classifications should receive strict scrutiny under the Equal Protection Clause, and now he was voting with conser-

vatives to deny the Equal Protection claim of a Florida man who objected to the state law allowing widows, but not widowers, a break on their property taxes. Perhaps he wasn't sure how to square the two, although he told me that, unlike Brennan, he was not so concerned with doctrine. In any event, I now had about 24 hours to draft the opinion for the Court. What I gave him on Saturday was short if not sweet, a gender discrimination claim turned into a tax case, and he took it. This is probably an example of his not being as careful with opinions as he should be, although I'm not sure that more time would have helped much. He remembered his mother's experiences as widow and didn't want to endanger the tax break that Florida gave them. That concern was more important to him than fidelity to *Frontiero*.

<sup>22</sup>Richard A. Posner, "The Anti-Hero," review of Bruce Murphy, *Wild Bill*, *New Republic*, Feb. 24, 2003, p. 27.

<sup>23</sup>In Urofsky's article in *Western Legal History*, he indicated that of the nineteen clerks he interviewed, not one had personally been fired, but all assured him that Douglas had fired—and then rehired—clerks who displeased him. Urofsky, *supra* note 1, at 7 fn. 27.

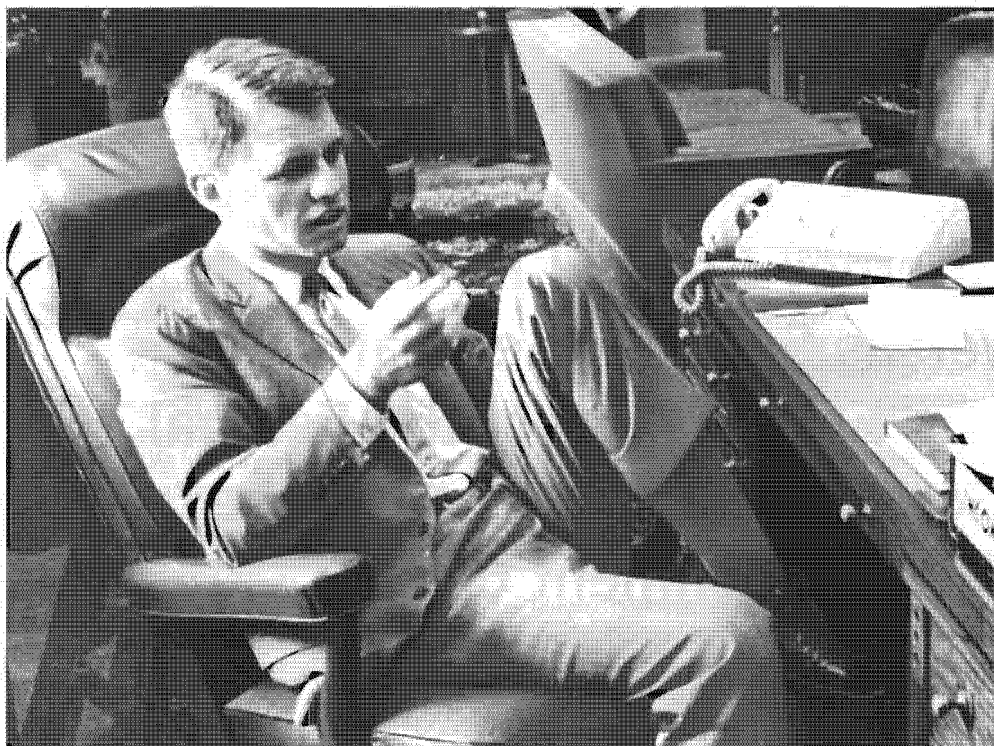
# Attorney General Kennedy versus Solicitor General Cox: The Formulation of the Federal Government's Position in the Reapportionment Cases

BRUCE J. TERRIS\*

In a recent article in this journal, "May It Please the Court? The Solicitor General's Not-So-'Special' Relationship: Archibald Cox and the 1963-1964 Reapportionment Cases,"<sup>1</sup> Helen J. Knowles shows how the Supreme Court went beyond the arguments of the Solicitor General, Archibald Cox, in establishing "one man, one vote" as the governing principle for the election of state legislators. In making this demonstration, Ms. Knowles also shows how Attorney General Robert Kennedy prevailed on Cox to support the plaintiffs in six reapportionment cases despite Cox's serious doubts about this position.<sup>2</sup> In doing so, Ms. Knowles was more than generous in describing my small part in this story.

Ms. Knowles' article is largely based on the memoranda prepared in the Department of Justice and White House concerning the federal government's position in these cases. The purpose of this paper is to provide further information concerning the respective positions of the Attorney General and Solicitor General on reapportionment and the manner in which the differences between them were resolved based on the author's personal participation in these events.

The place to start is neither with the Attorney General nor with the Solicitor General. In 1946, in *Colegrove v. Green*,<sup>3</sup> the Supreme Court considered a challenge to the discriminatory apportionment of congressional districts in Illinois, which had not been redrawn since 1901 despite census figures establishing substantial demographic changes. In a 4-3 vote, the Court upheld the dismissal of the action and held that the case was not justiciable. The holding is usually summarized as



As Attorney General, Robert Kennedy chose to argue *Gray v. Sanders*, the 1963 malapportionment case, which gave birth to the "one man, one vote" requirement.

being based on the political-question doctrine. However, of the four majority votes, only two joined the opinion of Justice Frankfurter that found that apportionment was not justiciable because it presented a political question. Justice Rutledge, the fourth vote, wrote a separate concurrence in which he argued that the matter was in fact justiciable, but that the Court should nevertheless exercise its equitable discretion to refuse relief to the plaintiffs because of the particular circumstances of the case, and not because it presented a political question.<sup>4</sup>

Subsequently, in 1958, then Senator John Kennedy wrote an article for the *New York Times Magazine* entitled "Shame of the States."<sup>5</sup> Senator Kennedy argued that, as a result of malapportionment, "rarely in electing state legislatures, does an urban vote, in effect, count for as much as a rural vote." He detailed numerous examples of state legislatures across the country that either engaged in

deliberate malapportionment or refused to redistrict as populations shifted from country to city. He argued that this was the "most fundamental and the most blatant" form of discrimination against urban areas, and he advocated the elimination of these electoral imbalances.<sup>6</sup>

In 1959, in *Baker v. Carr*,<sup>7</sup> the District Court for the Middle District of Tennessee ruled, *per curiam*, that it could not intervene in a challenge to the apportionment of the Tennessee legislature and therefore dismissed the complaint on the ground that the issue raised a political question, relying on Justice Frankfurter's opinion in *Colegrove v. Green*. After the Supreme Court noted probable jurisdiction on November 21, 1960,<sup>8</sup> the federal government, through President Eisenhower's Solicitor General, J. Lee Rankin, decided to file an amicus brief in support of the plaintiffs.<sup>9</sup>

Shortly thereafter, John Kennedy became President, Robert Kennedy Attorney General,

and Archibald Cox Solicitor General. The logical assumption was that the new administration would eagerly support the plaintiffs in the Supreme Court. After all, President Kennedy had previously expressed his position, and it was generally assumed that judicially ordered reapportionment would greatly help the Democratic party by shifting seats in state legislatures from rural to urban areas.

The federal government filed an amicus brief in support of the plaintiffs. The brief—which, by chance, I was assigned to review in the Solicitor General's Office—argued that, contrary to *Colegrove*, the challenge to malapportionment of state legislatures does not present a political question.<sup>10</sup> It contended that the position in *Colegrove* was contained in a plurality opinion, endorsed by only three Justices, and that, in any event, that position had been “undermined by subsequent developments.”<sup>11</sup> The brief further argued that malapportionment of state legislatures greatly exceeds the malapportionment of congressional districts, creating voting disparities that “at some point become so gross and discriminatory as to violate the Fourteenth Amendment.”<sup>12</sup>

Despite the position taken by the government in its brief, the new Solicitor General had serious doubts about the role of the federal courts on this issue. Victor Navasky reports that Cox at first suggested that Oscar Davis, the First Assistant to the Solicitor General, argue the case, despite its enormous importance.<sup>13</sup> Ultimately, Cox was convinced to argue it. The government asked for an unusually large amount of time for oral argument by an amicus—forty-five minutes—which request was granted.<sup>14</sup> The argument occurred on April 19, 1961.

Two weeks later, without explanation, the Supreme Court set the case for reargument at the start of the fall Term.<sup>15</sup> The government submitted a new amicus brief that strengthened its prior arguments. It argued forcefully that legislative malapportionment was not a political question and that the plural-

ity position in *Colegrove* was no longer relevant or applicable, particularly in the case of malapportionment of state legislatures.<sup>16</sup> The brief further argued that the “need for constitutional protection [was] urgent” because state malapportionment was “subverting responsible state and local government” and was markedly “more severe than Congressional malapportionment,” and that electoral disparities were worsening.<sup>17</sup> The brief argued, as President Kennedy had done several years earlier in his article in the *New York Times Magazine*, that “the most glaring consequence of malapportionment of state legislatures is the gross underrepresentation of urban interests” and “discriminat[ion] against urban areas.”<sup>18</sup> The brief advocated that the “starting point” for a constitutional apportionment system was “numerical equality” and “per capita equality of representation”<sup>19</sup> and that “equal representation” based on population “is ingrained in our constitutional system.”<sup>20</sup>

Cox again delivered the argument for the government in *Baker v. Carr*. After being harshly questioned by Justice Frankfurter during the argument, as Cox and I walked out of the courtroom, he whispered that “Felix Frankfurter is right.” It is of course extremely rare for an advocate in the Supreme Court or in any court even to think, let alone admit, that his position is wrong. The investment of time and, even more important, psychic energy virtually always induces advocates to think that their position is right or, at least, not wrong. Cox's statement undoubtedly reflected both his honesty and his deep-seated doubt about the use of the courts to remedy the malapportionment problem.

Whether or not Justice Frankfurter was right in the abstract, he was not right in terms of the subsequent jurisprudence of the Supreme Court. The Court in *Baker v. Carr* held that the plaintiffs' equal protection challenge to Tennessee's legislative apportionment system was not a political question and presented a “justiciable constitutional cause of action” under the Fourteenth Amendment.<sup>21</sup> The Court



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Bruce J. Terris (above), the author of this article, helped Robert F. Kennedy prepare for his only Supreme Court argument. Terris argued seventeen cases while serving in the office of the Solicitor General.

emphasized that the opinion of Justice Frankfurter in *Colegrove*, upon which the majority below had relied to dismiss the case for lack of subject-matter jurisdiction, was approved by only three of the seven Justices in the case, that this plurality was in tension with other precedent establishing that there was subject-matter jurisdiction, and that the challenge was justiciable. Thus, the federal courts were now open to cases challenging legislative malapportionment.

The first case flowing from *Baker v. Carr* turned out not to be a legislative malapportionment case. Rather, it concerned statewide elections. *Gray v. Sanders*<sup>22</sup> involved use of Georgia's county-unit system in Democratic primaries for the nomination of United States Senators, the Governor, and other statewide officials. In those bygone days, the Democratic primary in Georgia was the equivalent

of election. Each county was given a specified number of unit votes, ranging from two unit votes for the least populated counties to only six unit votes for the most populated counties. The majority of the county-unit vote determined the nomination. Because of the wide disparity in population among counties, the value of a vote was as much as ninety-nine times greater in rural, less populous counties than in populous counties.

Again, the federal government submitted an amicus brief supporting the plaintiffs.<sup>23</sup> The brief argued that the Georgia county-unit system was unconstitutional because the arrangement grossly and systematically discriminated against voters in populous counties in favor of voters in rural counties. The brief argued that the Fourteenth Amendment requires, "at the very least, . . . [that] the point of departure must be equal or substantially equal treatment of all voters."<sup>24</sup> The brief further argued that "once it appears that persons similarly circumstanced have been denied equality of voting rights," then such scheme is unconstitutional unless any "differentiation has a relevant and substantial justification."<sup>25</sup>

It was customary, at least at that time, for Attorneys General to argue one case during their tenure in office. Kennedy wanted to argue *Gray v. Sanders*. Navasky describes a meeting, attended by Deputy Attorney General Nicholas Katzenbach and Assistant Attorney General for Civil Rights Burke Marshall, in which they maneuvered Cox into suggesting that Kennedy make the argument.<sup>26</sup> Cox's ready acquiescence to giving up a case of this importance, without making any effort to argue the case himself, is only understandable based on his attitude toward reapportionment. In contrast, Kennedy's interest in arguing the case foreshadowed his support for "one man, one vote" in the subsequent legislative cases.

Kennedy argued that the county-unit system in Georgia violated the Fourteenth Amendment. In his prepared remarks, he did not go all the way to support "one man, one

vote," stating that "We are not saying that under all circumstances every vote must be given equal weight."<sup>27</sup> But under questioning by the Court, he said that he could not "conceive" of a county-unit system making "sense."<sup>28</sup>

In affirming the district court's decision to enjoin the county-unit system, the Court in *Gray v. Sanders* explicitly embraced the "one man, one vote" standard, stating that the "the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."<sup>29</sup> In doing so, the Court explained that it had long been recognized that all qualified voters have the constitutional right "to have their vote counted once" and that the only weighting of votes that was constitutionally permitted concerned allocation of Senators and the use of the electoral college in the choice of the President.<sup>30</sup> Thus, at least with respect to statewide elections, the Court made clear that one person's vote must be counted equally with those of all other voters in a state.

The first case to come to the Supreme Court on the merits concerning reapportionment of a legislature was *Wesberry v. Sanders*,<sup>31</sup> which involved the malapportionment of seats in the federal House of Representatives among the then ten districts in Georgia. While the Constitution prescribed the method of allocating seats to the various states in Article I, Section 2, it did not specifically deal with the allocation of seats within a state having more than one district. The result was that there were extreme disparities in the number of residents among districts in numerous states. Under the challenged apportionment system in Georgia, a single Congressman from the Fifth District represented two to three times as many voters as were represented by each of the Congressmen from the other Georgia congressional districts.<sup>32</sup> The three-judge district court dismissed the complaint, citing Justice Frank-

furter's opinion in *Colegrove*.<sup>33</sup> The Supreme Court noted probable jurisdiction on June 10, 1963.<sup>34</sup>

The federal government filed an amicus brief in support of the plaintiffs. The brief was not subject to dispute within the Department of Justice. The brief argued that federal courts have the power to consider the constitutionality of congressional districting, that such challenges are justiciable, and that, while the merits of the case should be remanded to the district court, the applicable standard should be that congressional districts must be as equal in population as possible.<sup>35</sup> Cox did not have any trouble with the brief, and it was submitted.

However, the choice of the lawyer in the Solicitor General's Office to argue the case on behalf of the United States was distinctly unusual. Cox, a true glutton for work, normally argued two cases in each two-week session of the Court. Since there were usually not two cases in each session of great importance—the federal government did not participate in as large a proportion of Supreme Court cases as it does now—Cox often argued cases of considerably less magnitude. Nevertheless, he chose not to argue *Wesberry v. Sanders*, despite its obvious major effect on the composition of the House of Representatives.

Instead, I was assigned *Wesberry v. Sanders*. I was never told why, and I never asked. I was then thirty years old and had been arguing Supreme Court cases for only three years. This assignment could not have been by chance. While, as we will see, Cox argued four state reapportionment cases in that session, they all involved essentially the same issues and similar facts. Cox's decision not to argue *Wesberry*—or at least to assign it to his First or Second Assistants—must have reflected his reluctance to argue in favor of "one man, one vote."

I argued, consistent with the government's amicus brief, that the Supreme Court need not decide the substantive standard. However, if the Court did choose to determine the

standard, I strongly urged that this standard should be "congressional districting based directly on population, without any substantial deviation."<sup>36</sup>

The Supreme Court not only held that the Georgia apportionment grossly discriminates against voters in the Fifth District, but also decided to determine the standard to apply in congressional elections. The Court held unequivocally that "the command of Art I, s 2 . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>37</sup> *Wesberry* therefore firmly established that "one person, one vote" applies to congressional elections.

On June 10, 1963, less than three months following its initial enunciation of the "one man, one vote" principle in *Gray v. Sanders*, the Court noted probable jurisdiction in four of the six state legislative apportionment cases discussed by Ms. Knowles, including *Reynolds v. Sims*.<sup>38</sup> Later that same year, the Court noted probable jurisdiction in the other two cases decided with *Reynolds v. Sims*.<sup>39</sup> Together, these six cases involved challenges to the malapportionment of state legislatures in Alabama, Colorado, Delaware, Maryland, New York, and Virginia. The Court was asked to consider whether the "one person, one vote" standard, adopted in *Gray v. Sanders* for statewide elections and in *Wesberry v. Sanders* for congressional elections, also applied to the apportionment of both houses of state legislatures.

The most difficult of the state apportionment cases for Cox was *WMCA v. Simon*.<sup>40</sup> It involved a challenge brought by five of the six most populous New York counties to the apportionment scheme of both houses of the state legislature. However, the voting disparity in New York was not nearly as egregious as that of the other state apportionment cases.

Ms. Knowles describes the series of memoranda written for Attorney General Kennedy by the Solicitor General, Deputy Attorney General Katzenbach, Theodore Sorenson, President Kennedy's Special Counsel,

John Douglas, the Assistant Attorney General for the Civil Division, various lawyers in the Civil Rights Division of the Department of Justice, and myself. All the memoranda, even that of the Solicitor General, recognized that legislatures ought to be apportioned according to the principles of "one man, one vote" as a matter of public policy.<sup>41</sup> The dispute concerned whether to advocate in the Supreme Court that the Fourteenth Amendment compelled this result, particularly in both houses of the legislature.<sup>42</sup> All the memoranda, except for those of the Civil Rights Division and myself, urged that the federal government not support a "one man, one vote" principle in both houses. Katzenbach, Sorenson, and Douglas all would have supported all of the plaintiffs but would not have asked the Court to hold that the Fourteenth Amendment required adoption of a "one person, one vote" standard. Cox's memorandum argued that the government should not advocate a "one man, one vote" standard because, in the unlikely event the Court adopted this strict standard, it would precipitate a "major constitutional crisis" that would cause "an enormous drop in public support for the Court." He emphasized that the standard would render forty-six out of fifty state legislatures unconstitutional, causing "great damage both to the country and to [the Court]," and openly "doubt[ed]" whether the decision could be made to stick.<sup>43</sup>

During this time, Anthony Lewis, the *New York Times* correspondent covering the Department of Justice, was lobbying all the players in support of the government adopting a "one man, one vote" standard.<sup>44</sup> He had written an article for the *Harvard Law Review* on malapportionment while a Nieman Fellow at Harvard Law School in which he argued that the Fourteenth Amendment required "equitable representation." He gave as an example of inequitable representation district disparities of 4 to 1. Whether or not Lewis's efforts were fully consistent with journalistic ethics, he had staked out a position independent of being a



reporter. He closely followed the internal debate and probably knew more than even the direct participants about what was happening within the Department of Justice.

After the numerous memoranda had been circulated, Attorney General Kennedy held a meeting in the large antechamber of his office. The meeting was attended by Cox, Sorensen, Special Assistants to the President Kenneth O'Donnell and Lawrence O'Brien, President Kennedy's brothers-in-law, Stephen Smith (who had run his presidential campaign in 1960) and Sargent Shriver, then the director of the Peace Corps, Assistant Attorney General Marshall, the Chief of the Appeals and Research Section of the Civil Rights Division, Harold Greene (later the chief judge of the federal district court in Washington, D.C.), and myself. This meeting was extraordinary not only because of the importance of the participants, but because several had no obvious connection to the topic under discussion.

In retrospect, it was clear that the meeting was not intended to decide the position of the federal government in the reapportionment cases then before the Supreme Court. That decision had already been made. The Attorney General had decided to support the plaintiffs in all the cases and to attempt to induce the Supreme Court to adopt the "one man, one vote" standard.

The meeting was designed for another purpose: to persuade Archibald Cox to sign a brief supporting the plaintiffs. It is extremely likely that the position of Cox and the federal government had greatly influenced the Court in its crucial decision in *Baker v. Carr*. At least, this was the prevailing view at that time in the Department of Justice. Kennedy realized that if Cox did not sign the brief in *Reynolds v. Sims* and argue the case, it would be obvious to the Court that the Solicitor General did not support the federal government's position. The Court had great respect for Cox, not merely because of his office as the Solicitor General but also because of his great intellect and his deep

feeling for the role both of the Court and of his office. On the other hand, Kennedy understood that he could not just order Cox to support "one man, one vote."

At the meeting, Kennedy started by asking Cox to explain the issues in the pending cases. Cox described the issues in his usual brilliant manner, in detail and at length. Most important, he emphasized that there was no sound basis for the federal government to argue for "one man, one vote" in both houses of state legislatures and therefore to support the plaintiffs in all of the pending cases. He concluded that the Supreme Court would not go this far and the Administration would be hurt in taking so extreme a position. During Cox's presentation, Kennedy briefly left the room to get some orange juice and returned to the continuation of Cox's talk.

O'Brien and O'Donnell then discussed the politics of the issue. They stated that, contrary to popular belief, reapportionment would not help the Democratic party because reapportionment would largely add to the number of suburban seats. Kennedy quickly dismissed the discussion of politics. He said that it did not matter which party would gain; malapportionment was simply wrong. After some more discussion, Cox repeated his contention that the Court would never approve "one man, one vote" and it would hurt the government even to ask for it. He said that he did not know how a brief in favor of strictly equal representation could be drafted. Kennedy then ended the meeting by saying: "Archie, I know you will find a way."

Interestingly, no one, not Kennedy or anyone else, had formulated what substantive standard the federal government should present in its brief. Such a clear decision would probably have resulted in a confrontation with Cox. Instead, it was just assumed that the government's brief would support the plaintiffs in all the cases and that Cox would somehow figure out how to do this and follow his conscience at the same time.

Cox and I walked together down the fifth-floor corridor between the Attorney General's Office and the Solicitor General's Office. On the way, Cox said to me, "He doesn't understand." While I diplomatically did not reply, I thought about how much Kennedy did understand. He not only understood the fundamental legal-political issue but he understood his man, Archibald Cox.

Cox did just what Kennedy challenged him to do. Instead of the government's brief being drafted in the relevant division of the Department of Justice—in this case, the Civil Rights Division—and then edited by an Assistant to the Solicitor General such as myself and then the First or Second Assistant to the Solicitor General, Cox wrote the brief himself. It may have been the only brief during my tenure of seven years in the Solicitor General's Office written personally by the Solicitor General. And Cox did what Kennedy expected; he figured out a way to support the plaintiffs in all the cases.

Cox's brief, which was filed in the first of the state apportionment cases, *Maryland Committee for Fair Representation v. Tawes*, was the principal brief for all the cases. It did not argue for the strict "one man, one vote" standard. Instead, he argued that the "basic standard of comparison is the representation accorded qualified voters per capita."<sup>45</sup> The brief argued that state apportionment violates the Equal Protection Clause if any one of three tests is met: (1) the apportionment creates "gross inequalities in per capita representation without any rhyme or reason"; (2) the apportionment is based on criteria that are "contrary to express constitutional limitations or otherwise invidious," such as race or sex, or is based on criteria that are "whimsical" or "irrelevant," such as a county's geographic location; or (3) the apportionment subordinates popular representation as a whole "to the representation of political subdivisions to such a degree as to create gross inequalities among voters," giving control of the legislature to small minorities of people. However, Cox's brief did hold

open the possibility that the Equal Protection Clause might establish a stricter standard, including the "one man, one vote" principle. In the briefs filed in each of the cases, Cox argued that all the state legislatures before the Court violated one or more of these tests.<sup>46</sup>

Subsequently, before the Supreme Court decided the state reapportionment case, it noted probable jurisdiction in *Lucas v. Colorado General Assembly*.<sup>47</sup> This case, which involved the Colorado legislature, presented an even more difficult factual situation for Cox than the previous five state cases. One house was apportioned almost exactly according to population. The other departed from a population basis only to the extent that 36 percent of the people could elect a majority of the state senators.<sup>48</sup> Moreover, in a recent referendum, every county in the State had approved the apportionment, including the populous areas against which the apportionment was most discriminatory.

Once again, Kennedy was concerned about Cox's position. Deputy Attorney General Katzenbach met with me confidentially to discuss whether any problems were likely in formulating the government's position. I did not know of any, and none developed. Cox had apparently convinced himself that the government could support the plaintiffs in virtually any case involving substantial malapportionment.

The brief acknowledged that "the present case is admittedly closer than those which preceded it."<sup>49</sup> Nevertheless, it argued that the per capita inequalities in the state senate, which were growing because of population trends, were sufficient to make a prima facie case of invidious discrimination. The brief further argued that this discrimination in per capita representation resulting from the gross malapportionment of the senate had no rational relation to permissible objectives of legislative apportionment.

To Cox's great surprise, the Supreme Court's decisions in all six of the state apportionment cases went further than the federal



In states that had resisted reapportionment, rural areas that had lost population to the cities still enjoyed disproportionate representation. This 1961 cartoon criticizes the unfairness of the situation.

government and Cox's position and embraced the principle of *Gray* and *Wesberry* that votes must be treated equally. In *Reynolds v. Sims*, which contained the main holding in the six cases, the Court held that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses . . . must be apportioned on a population basis."<sup>50</sup> The Court held that an individual's right to vote for state legislators is unconstitutionally impaired when its weight is diluted substantially when compared with votes of citizens living in other parts of the state.

Navasky reports that when Chief Justice Warren was reading the opinion, Anthony Lewis gave Cox a note asking: "How does it feel to be present at the second American Constitutional Convention?" Cox wrote back: "It feels awful."<sup>51</sup> It is safe to say that few advocates who win a case of this importance have such feelings in their moment of victory.

The result of *Reynolds v. Sims* and the accompanying state apportionment cases was to end malapportionment. Of course, new problems have arisen, most particularly

increasingly sophisticated and extreme gerrymandering.<sup>52</sup> Nonetheless, there are few people today who would disagree with the proposition that Attorney General Kennedy and the Supreme Court were right that the Equal Protection Clause of the Fourteenth Amendment prohibits the malapportionment of state legislatures.

Finally, I want to emphasize that this article is not intended to denigrate Archibald Cox in any way. He was certainly one of the great Solicitors General in American history. He was a brilliant lawyer and outstanding oral advocate. Few lawyers have come close to his commanding presence before the Supreme Court, when he virtually lectured the Justices on the law. Nonetheless, in the formulation of the government's position in these enormously important cases, which significantly affected the American system of government, Robert Kennedy's political acumen outmatched Archibald Cox's legal brilliance. It may be worthwhile for lawyers to ponder this lesson.

## ENDNOTES

\*Shina Majeed of Terris, Pravlik & Millian, LLP made major contributions to this article.

<sup>1</sup>Helen J. Knowles, "May It Please the Court? The Solicitor General's Not-So-'Special' Relationship: Archibald Cox and the 1963-1964 Reapportionment Cases," 31 *Journal of Supreme Court History* 279-97 (2006).

<sup>2</sup>Some of this material had been previously discussed in: Victor Navasky, *Kennedy Justice* (New York: Atheneum 1971); Arthur M. Schlesinger, Jr., *Robert Kennedy and His Times* (Boston: Houghton Mifflin Co., 1978); Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Alfred A. Knopf, 1987); and Ken Gormley, *Archibald Cox: Conscience of a Nation* (Reading, MA: Addison-Wesley, 1997). However, those authors did not have access to many of the memoranda relied upon by Ms. Knowles.

<sup>3</sup>328 U.S. 549 (1946).

<sup>4</sup>*Id.* at 565. See also *Cook v. Fortson*, 329 U.S. 675, 678 (1946).

<sup>5</sup>John F. Kennedy, "Shame of the States," *The New York Times Magazine*, May 18, 1958.

<sup>6</sup>*Id.*, p. 40.

<sup>7</sup>*Baker v. Carr*, 179 F. Supp. 824, 826-828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962).

<sup>8</sup>364 U.S. 898 (1960).

<sup>9</sup>Navasky, pp. 299-301.

<sup>10</sup>See Brief for the United States as Amicus Curiae in *Baker v. Carr*, No. 6, filed March 14, 1961, available at 1961 WL 64791.

<sup>11</sup>*Id.*, pp. 9-10.

<sup>12</sup>*Id.*, p. 16.

<sup>13</sup>Navasky, p. 302.

<sup>14</sup>*Baker v. Carr*, 365 U.S. 864 (1961).

<sup>15</sup>*Baker v. Carr*, 366 U.S. 907 (1961).

<sup>16</sup>See Brief for the United States as Amicus Curiae on Reargument in *Baker v. Carr*, No. 6, filed September 14, 1961, available at 1961 WL 64796, at \*9.

<sup>17</sup>*Id.*, p. 36.

<sup>18</sup>*Id.*, p. 40.

<sup>19</sup>*Id.*, p. 26.

<sup>20</sup>*Id.*, p. 27.

<sup>21</sup>*Baker v. Carr*, 369 U.S. 186, 237 (1962).

<sup>22</sup>372 U.S. 368 (1963).

<sup>23</sup>See Brief for the United States as Amicus Curiae in *Gray v. Sanders*, No. 112, filed December 27, 1962, in U.S. Supreme Court, *Records and Briefs*, Vol. 372.

<sup>24</sup>*Id.*, p. 35.

<sup>25</sup>*Ibid.*

<sup>26</sup>Navasky, pp. 305.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Id.*, pp. 305-06.

<sup>29</sup>372 U.S. at 380-81.

<sup>30</sup>*Id.* at 380-81.

<sup>31</sup>376 U.S. 1 (1964).

<sup>32</sup>*Wesberry v. Sanders*, 376 U.S. at 1, 7 (1864).

<sup>33</sup>*Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962).

<sup>34</sup>374 U.S. 802 (1963).

<sup>35</sup>See Brief for the United States as Amicus Curiae in *Wesberry v. Sanders*, No. 22, filed September 23, 1963, pp. 11-13, available at 1963 WL 105668.

<sup>36</sup>See Oral Argument by Bruce J. Terris, in *Wesberry v. Sanders*, No. 22, November 18, 1963, p. 18, in Philip Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. 58 (1964), p. 237.

<sup>37</sup>*Wesberry v. Sanders*, 376 U.S. at 8.

<sup>38</sup>*Reynolds v. Sims*, 374 U.S. 802 (1963); *WMCA v. Simon*, 374 U.S. 802 (1963); *Davis v. Mann*, 374 U.S. 803 (1963); *Maryland Committee for Fair Representation v. Tawes*, 374 U.S. 804 (1963).

<sup>39</sup>*Roman v. Sincock*, 377 U.S. 695 (1963); *Lucas v. Colorado General Assembly* 377 U.S. 713 (1964).

<sup>40</sup>377 U.S. 633 (1964).

<sup>41</sup>Knowles, p. 284. See also "Memorandum re: Reapportionment Cases in Supreme Court," Archibald Cox to Attorney General, August 21, 1963; "Memorandum re: Reapportionment Cases in Supreme Court," Archibald Cox to Attorney General, August 19, 1963, JFK Library.



<sup>42</sup>See Knowles, pp. 284–85, 288–89.

<sup>43</sup>Memorandum, Archibald Cox to Attorney General, August 19, 1963, p. 18.

<sup>44</sup>Navasky, p. 302.

<sup>45</sup>See Brief of the United States as Amicus Curiae in *Maryland Committee for Fair Representation v. Tawes*, No. 29, filed September 25, 1963, available at 1963 WL 105885, at 16–22.

<sup>46</sup>See Brief of the United States as Amicus Curiae in *Reynolds v. M.O. Sims*, Nos. 23, 27, 41, filed October 18, 1963, available at 1963 WL 105883 (Alabama); Brief of the United States as Amicus Curiae in *WMCA v. Simon*, No. 20, filed September 30, 1963, available at 1963 WL 105658 (New York); Brief of the United States as Amicus Curiae in *Davis v. Mann*, No. 69, filed October 17, 1963, available at 1963 WL 106063 (Virginia); Brief of the United States as Amicus Curiae in *Roman v. Sincock*, No. 307, filed December 4, 1963, available at 1963 WL 105849 (Delaware).

<sup>47</sup>377 U.S. 713 (1964).

<sup>48</sup>*Ibid.* See also Memorandum, Archibald Cox to Attorney General, February 4, 1964, p. 1.

<sup>49</sup>See Brief for the United States as Amicus, *Lucas v. Colorado General Assembly*, No. 508, filed March 17, 1964, p. 19, in **U.S. Supreme Court, Records and Briefs**, Vol. 377.

<sup>50</sup>377 U.S. 533, 568 (1964).

<sup>51</sup>Navasky, p. 321.

<sup>52</sup>See, e.g., *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006) (state legislature's decision to override a valid, court-drawn redistricting plan mid-decade was not sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders); *Bush v. Vera*, 517 U.S. 952 (1996) (Texas redistricting plan unconstitutional because of racial gerrymandering); *Davis v. Bandemer*, 478 U.S. 109 (1986) (political gerrymandering case challenging Indiana's state apportionment scheme diluting Democratic votes was justiciable under Equal Protection Clause).

# The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Two decades ago, in the summer of 1987, celebrations of the bicentennial of the United States Constitution were in high gear under the watchful eye of then recently retired Chief Justice Warren E. Burger, who chaired the Commission on the Bicentennial of the United States Constitution between 1985 and 1991.<sup>1</sup> Numerous lectures, seminars, and conferences across the land made clear not only the role and value of what Chief Justice William Howard Taft once called "the ark of our covenant"<sup>2</sup> in the life of the nation but also the central place the judiciary had long occupied in the political system, as state and national courts confronted vital questions of public policy perplexing and dividing the people. As that astute French aristocrat Alexis de Tocqueville first noted in 1835, the "American judge is dragged in spite of himself onto the political field . . . . There is hardly a political question in the United States which does not sooner or later turn into a judicial one."<sup>3</sup> With the "right to declare laws unconstitutional," he explained, the judge "cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and to remain in harmony with themselves."<sup>4</sup>

De Tocqueville's observations remain true today. The number of issues taxing the executive and legislative branches of both state and federal governments seems ever-expanding, and it is rare indeed when judges do not have at least some part in their attempted resolution. Pre-eminent among American courts of course is the Supreme Court of the United States. Yet its distinction springs from more than its location on an organizational flow chart as the final point of appeal for many litigants. Rather, in establishing the meaning of the national Constitution and statutes in the context of deciding cases, the Justices have had much to do with shaping the kind of society that defines

American life. The Court has served as the "balance wheel"<sup>5</sup> of the Republic. As Justice Robert H. Jackson wrote more than a half century ago,

In a society in which rapid changes tend to upset all equilibrium, the Court, without exceeding its own limited powers, must strive to maintain the great system of balances upon which our *free government* is based. Whether these balances and checks are essential to liberty elsewhere in the world is beside the point; they are indispensable to the society we know.

Chief of these balances are: first, between the Executive and Congress; second, between the central government and the states; third, between state and state; fourth, between authority, be it state or national, and the liberty of the citizen, or between the rule of the majority and the rights of the individual.<sup>6</sup>

Understandably, therefore, in de Tocqueville's words, "the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies."<sup>7</sup> Justice Jackson's reference to "free government" echoed a term spoken and written often by those in the Founding generation.<sup>8</sup> In most contexts it referred to the intricate complexus of restraints consisting of federalism and separation of powers that the Constitution erected.<sup>9</sup> Recent books about the Supreme Court relate to these several dimensions of constitutional balance that Jackson highlighted.

Anyone familiar with the history of the Court realizes that the recognizable "Marble Palace"<sup>10</sup> of today is a far different institution from the one established by the First Congress in 1789 in advance of the Court's first session in 1790. Increased appreciation of both the Court and the judicial process in the 1790s has been facilitated immensely by a vast research and editorial effort that has occupied the larger part of three decades and manifested itself as **The Documentary History of the Supreme Court of the United States, 1789–1800**. The happy result is that much of what is known about the federal judiciary in this period is or will be attributable directly or indirectly to the **Documentary History's** first seven volumes.<sup>11</sup> Students of the Court who have followed the progress of the series thus far will therefore be pleased to know that the concluding installment, volume eight, under the general editorship of George Washington University historian and legal scholar Maeva

Marcus, has recently appeared.<sup>12</sup> The contents of this latest installment relate almost entirely to the cases the Court decided during 1798, 1799, and 1800.

From the outset, the primary objective of the **Documentary History** project has been to rescue the Court of the pre-Marshall era from the obscurity it has long endured. Those years are surely the least understood and appreciated in all of Supreme Court history, so much so that, until lately at least, this period has been treated by writers as more of a prelude to a play, with the first act commencing only upon Marshall's arrival in 1801. Or as one scholar of this period has opined, when asked what they think of the early Court, "most people with an interest in the law and legal history respond that they do not think about the early Court."<sup>13</sup> Little wonder that a popular misconception persists: that Marshall was the first Chief Justice. Even the massive first volume of the **Holmes Devise History** reserved only three chapters for the Supreme Court as such.<sup>14</sup> That those eleven years remain *terra incognita* even among those who should know more than they do is the deficiency the **Documentary History** project has sought to rectify. Sponsored from the beginning by the Supreme Court History Society, with encouragement in its inception by then-Chief Justice Burger and others on the Court, and with additional support from various foundations, the project has amply demonstrated that the years 1789–1800 merit study on their own. Much life has been found stirring beneath what hitherto had been a skimpy published record. When the author of this review essay examined the first volume of the **Documentary History** two decades ago,<sup>15</sup> he noted a promise made by editors Marcus and James R. Perry: that the set "will constitute a collection of materials that no individual scholar could hope to duplicate."<sup>16</sup> With the final volume now in hand, it is easy to conclude that their pledge has been more than fulfilled. What was true of volumes one through seven remains true for volume eight. Many valuable materials—such as letters, official documents,



The eighth and final volume of the Documentary History project, which covers cases the Court decided during 1798, 1799, and 1800, was presented to the Court last spring. Justice Souter and Chief Justice Roberts attended the reception and received the book on behalf of the Court.

and extracts from newspaper articles—are in print for the first time, and for the first time these materials are gathered together and published in one place. To draw an analogy from astronomy, examining the **Documentary History** is somewhat like having a look at photographs of an object several galaxies away. One is literally gazing far back into time.

The period covered by volume eight is noteworthy in several ways. First, the years 1798–1800 were highly contentious, thanks to the newly emerged party system that formed partly over what amounted to an undeclared war with France that was in progress, and the recently enacted Alien and Sedition acts that attempted to squelch dissent. Still, in sharp contrast to the Court with which Americans are familiar today, most of the “war-related and red-hot issues of the day” did not come before the Justices.<sup>17</sup> For example, despite the involvement of members of the Court sitting as circuit judges in trials and convictions under

the Sedition Act of 1798, the Court never ruled on a case involving the Sedition Act itself, for the simple reason that the Supreme Court’s appellate jurisdiction did not encompass appeals in *criminal* cases from the circuit courts, one of the two kinds of federal trial courts established by the Judiciary Act of 1789.<sup>18</sup> From the perspective of Democratic Republicans—Vice President Thomas Jefferson’s followers, who were the principal targets of the legislation—that might have been just as well, as much as they insisted that the law was unconstitutional. What they assuredly did not want was a ruling by the Supreme Court validating the Sedition Act’s constitutionality against their protestations to the contrary. That was a valid concern. After all, Justices such as Samuel Chase had enthusiastically presided over Sedition Act trials. Moreover, with partisan rhetoric running high, the Court—all of the members of which by 1800 had been appointed by either President Washington or President Adams—was viewed



by Jeffersonians as a bastion of the Federalist party, or at least as an arm of the executive branch.

However, enough of the Court's business had a political dimension to demonstrate that the newly established national judicial power would not be able to escape political involvement, as seen in *Baas v. Tingey*.<sup>19</sup> In contention was the salvage amount to be awarded to the officers and crew of an American naval vessel that had recaptured a merchant ship previously seized by a French privateer. Under an act of Congress, one half of the value of a captured vessel and its cargo could be claimed, provided the prize was retaken from an "enemy" of the United States. Thus the Court had to decide whether France constituted such an "enemy." Concluding that at least a limited war was under way, the Justices held that the term "enemy" could aptly be applied to France. The reaction in the Jeffersonian (and pro-French) press was sharply negative, as illustrated by the *Aurora* of Philadelphia, which took the Bench to task. "If this report and the opinions of the Judges, therefore, be faithfully given, in our opinion every Judge who asserted that we were in a state of war contrary to the rights of Congress to declare it, OUGHT TO BE IMPEACHED."<sup>20</sup>

Second, as concern among Jeffersonians over the constitutionality of the Sedition Act reflected, the Court during this time "continued the practice of judicial review by passing on the constitutionality of legislative measures."<sup>21</sup> The Court had first engaged in constitutional interpretation in 1793 in *Chisholm v. Georgia*,<sup>22</sup> a decision so unpopular that it promptly led to ratification of the Eleventh Amendment, which attempted to withdraw from the federal judicial power suits against states by a citizen of another state or foreign country. But it was in *Hylton v. United States*,<sup>23</sup> a case discussed in volume seven of the **Documentary History**, that the Court decided its first case challenging the constitutional validity of an act of Congress. The statute survived the attack, but the clear message from the arguments and the

decision was that the judicial power encompassed the authority to disregard a statute that the judges concluded was in conflict with the Constitution. The Court would not make that decisive move until 1803, in *Marbury v. Madison*,<sup>24</sup> although one suspects that, had *Marbury* not occurred when it did, it would have been only a matter of time until the Bench formally negated a legislative enactment. That seems probable, given the groundwork that was being laid and the expectations that were being established during the 1790s.

*Calder v. Bull*,<sup>25</sup> which came down two years after *Hylton*, found the Court reviewing the constitutionality of a state statute by way of section 25 of the Judiciary Act of 1789, which allowed Supreme Court review of a decision of the highest court of a state—in this instance, the Supreme Court of Connecticut—if the litigation implicated the Constitution, a federal statute, or a treaty, and if the court below had held against the federal claim. The case involved a family squabble between the Calders and the Bulls over an inheritance.<sup>26</sup>

The legislature of Connecticut passed a law granting a new hearing to Bull and his wife after their right to appeal a probate court decree had expired. At the second hearing, the Bulls were successful. The Calders, the other claimants, then appealed unsuccessfully to the highest Connecticut court, before bringing their case to the Supreme Court on a writ of error. Their federal question was the contention that the legislative action allowing a new probate hearing constituted an "ex post facto law" in violation of section 10 of Article I of the Constitution, the provision that Chief Justice John Marshall would later deem "a bill of rights for the people of each State."<sup>27</sup>

When the case was decided on August 9, 1798, however, the statute was not found to be contrary to the ban in section 10 because, in the views of participating Justices Chase, Cushing, Iredell, and Patterson,<sup>28</sup> the ex post facto laws contemplated by the Constitution included only certain retrospective criminal, not civil, actions. According to the opinion filed

by Jeffersonians as a bastion of the Federalist party, or at least as an arm of the executive branch.

However, enough of the Court's business had a political dimension to demonstrate that the newly established national judicial power would not be able to escape political involvement, as seen in *Baas v. Tingey*.<sup>19</sup> In contention was the salvage amount to be awarded to the officers and crew of an American naval vessel that had recaptured a merchant ship previously seized by a French privateer. Under an act of Congress, one half of the value of a captured vessel and its cargo could be claimed, provided the prize was retaken from an "enemy" of the United States. Thus the Court had to decide whether France constituted such an "enemy." Concluding that at least a limited war was under way, the Justices held that the term "enemy" could aptly be applied to France. The reaction in the Jeffersonian (and pro-French) press was sharply negative, as illustrated by the *Aurora* of Philadelphia, which took the Bench to task. "If this report and the opinions of the Judges, therefore, be faithfully given, in our opinion every Judge who asserted that we were in a state of war contrary to the rights of Congress to declare it, OUGHT TO BE IMPEACHED."<sup>20</sup>

Second, as concern among Jeffersonians over the constitutionality of the Sedition Act reflected, the Court during this time "continued the practice of judicial review by passing on the constitutionality of legislative measures."<sup>21</sup> The Court had first engaged in constitutional interpretation in 1793 in *Chisholm v. Georgia*,<sup>22</sup> a decision so unpopular that it promptly led to ratification of the Eleventh Amendment, which attempted to withdraw from the federal judicial power suits against states by a citizen of another state or foreign country. But it was in *Hylton v. United States*,<sup>23</sup> a case discussed in volume seven of the **Documentary History**, that the Court decided its first case challenging the constitutional validity of an act of Congress. The statute survived the attack, but the clear message from the arguments and the

decision was that the judicial power encompassed the authority to disregard a statute that the judges concluded was in conflict with the Constitution. The Court would not make that decisive move until 1803, in *Marbury v. Madison*,<sup>24</sup> although one suspects that, had *Marbury* not occurred when it did, it would have been only a matter of time until the Bench formally negated a legislative enactment. That seems probable, given the groundwork that was being laid and the expectations that were being established during the 1790s.

*Calder v. Bull*,<sup>25</sup> which came down two years after *Hylton*, found the Court reviewing the constitutionality of a state statute by way of section 25 of the Judiciary Act of 1789, which allowed Supreme Court review of a decision of the highest court of a state—in this instance, the Supreme Court of Connecticut—if the litigation implicated the Constitution, a federal statute, or a treaty, and if the court below had held against the federal claim. The case involved a family squabble between the Calders and the Bulls over an inheritance.<sup>26</sup>

The legislature of Connecticut passed a law granting a new hearing to Bull and his wife after their right to appeal a probate court decree had expired. At the second hearing, the Bulls were successful. The Calders, the other claimants, then appealed unsuccessfully to the highest Connecticut court, before bringing their case to the Supreme Court on a writ of error. Their federal question was the contention that the legislative action allowing a new probate hearing constituted an "ex post facto law" in violation of section 10 of Article I of the Constitution, the provision that Chief Justice John Marshall would later deem "a bill of rights for the people of each State."<sup>27</sup>

When the case was decided on August 9, 1798, however, the statute was not found to be contrary to the ban in section 10 because, in the views of participating Justices Chase, Cushing, Iredell, and Patterson,<sup>28</sup> the ex post facto laws contemplated by the Constitution included only certain retrospective criminal, not civil, actions. According to the opinion filed

by Justice Chase, the ban would disallow only criminal laws that worked a hardship on someone, as would happen if a law made an action criminal that was innocent at the time it was committed, or assessed a greater punishment than would have been imposed for an act at the time it was committed. In short, while all ex post facto laws might be retroactive, not all retroactive laws were ex post facto laws within the meaning of the Constitution. Perhaps accounting for this narrower construction was the realization offered by Justice Iredell that application of the clause to civil laws would unduly constrict the governing power in that private rights must sometimes yield to public exigencies<sup>29</sup> in order for both government and society to survive. Thus, the decision disappointed those who hoped this part of the Constitution, which contained some of the few express prohibitions on state power, might be applied to limit overbearing majorities that threatened vested rights.

*Calder v. Bull* has had considerable staying power. The Court's limiting construction of the ex post facto clause still stands, although the editors of volume eight note that one Justice has recently suggested that "'Calder and its progeny . . . be reconsidered.'"<sup>30</sup>

What has also maintained currency is the relevance of an exchange between Justices Chase and Iredell over whether judges should invalidate a statute because it was in conflict with extraconstitutional values. In finding no constitutional deficiency in the Connecticut statute, Justice Chase seemed nearly apologetic, suggesting that legislation adversely affecting vested rights might be set aside as violation of natural law. "There are certain vital principles," he observed, "in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power. An act of the legislature (for I cannot call it a law) contrary to the great principles of the social compact cannot be considered a rightful exercise of the legislative authority."<sup>31</sup>

Justice Iredell, however, felt compelled to respond to Chase's provocative claim. For Iredell, such talk was the plaything of "some speculative jurists" and he suggested that if the Constitution itself imposed no checks on legislative power, "whatever the legislature chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void." "The ideas of natural justice are regulated by no fixed standard," he continued. "The ablest and purest of men have differed upon the subject, and all that the Court could properly say in such an event would be that the legislature . . . had passed an act which, in the opinion of the judges, was inconsistent with abstract principles of justice."<sup>32</sup> Recognizing that power might nonetheless be abused, he concluded by insisting that "[w]e must be content to limit power, where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation, that there never existed a government, in ancient or modern times, more free from danger in this respect, than the governments of America."<sup>33</sup>

Third, aside from laying the foundations of judicial power through occasional reference to the principles of judicial review, the Court of 1798–1800 helped to shape a judicial system still very much in its infancy by delineating in concrete terms how the system would operate with respect to the relations between the Supreme Court, the lower federal courts, and the state courts. In passing the Judiciary Act of 1789, Congress defined federal court jurisdiction to encompass suits between citizens of different states, presumably to provide a federal forum that might be free from the discrimination of local judges and juries. As James Wilson inquired at the Pennsylvania ratifying convention, "is it not necessary, if we mean to restore either public or private credit, that foreigners as well as ourselves, have a just and impartial tribunal to which they may resort? I must ask how a merchant must feel to have his property lay at the mercy of the

laws of Rhode Island?"<sup>34</sup> However, the act required that the amount in dispute had to exceed \$2,000.<sup>35</sup> *Wilson v. Daniel*<sup>36</sup> queried how the threshold requirement would be applied. Did the rule apply to the \$200,000 for which Thomas Daniell<sup>37</sup> had sued William Wilson, or the \$1,800 that the circuit court in Virginia had awarded Daniell?<sup>38</sup> The answer would determine whether the Supreme Court had jurisdiction. For the majority, the sum originally demanded by Daniell—not the circuit court's award—constituted the amount in controversy. Otherwise, reasoned Chief Justice Oliver Ellsworth, a plaintiff would always maintain an edge over a defendant. As long as a plaintiff sued for a sum exceeding \$2,000 he would always be able to retain review in the Supreme Court, whereas a defendant would be blocked from doing the same if the judgment came in for a sum less than \$2,000. "It is not to be presumed that the Legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided."<sup>39</sup>

Delineation decisions like *Wilson* were important because many details of operation for the federal court system were not spelled out in any statute. There was no model at hand for easy analogy, in that there was nothing parallel to the federal courts within any of the states, and there had been no national court system under the Articles of Confederation. As de Tocqueville would later write from an outside perspective, "The judicial organization of the United States is the hardest thing there for a foreigner to understand."<sup>40</sup> Moreover, "[i]t was, in fact, almost entirely through their contact with the judges sitting in these Circuit Courts that the people of the country became acquainted with this new institution, the Federal Judiciary."<sup>41</sup>

Fourth, in addition to clarifying jurisdictional boundaries, the Court was establishing its own internal operating procedures in significant ways during these years. Perhaps underemphasized in volume eight is further evidence that the Court under Chief Justice Oliver Ellsworth "had developed a practice of deliv-

ering an opinion of the Court rather than seriatim opinions."<sup>42</sup> This method of presenting the Court's decision became sufficiently routine—at least in important cases—that on one occasion when it was not used and the Justices reverted to seriatim expression, Justice Chase seemed genuinely surprised. "I presumed that the sense of the Court would have been delivered by the president; and therefore I have not prepared a formal argument on the occasion."<sup>43</sup> According to one study, toward the end of Ellsworth's time in office, the "Justices would try to achieve consensus and present a single opinion through their chief or the senior Justice. The percentage of opinions delivered seriatim declined, while the percentage of majority opinions by the Chief Justice increased."<sup>44</sup> Indeed, Ellsworth specifically used the phrase "opinion of the court" on at least one occasion.<sup>45</sup> The use of a single opinion became the norm after Marshall's appointment as Chief Justice in 1801, probably as a defensive measure to present a unified front whenever possible as a result of the heightened partisan tension within the government after the Court experienced divided government for the first time following the elections of 1800 that left the Bench in the position of a political minority.

Fifth, cases such as *Calder v. Bull* and *Wilson v. Daniel* were a glimpse of the future, suggesting that the docket for the foreseeable future would be dominated by the sorts of disputes that "inevitably arose in a burgeoning, commercially vibrant nation—disputes over land ownership, customs duties, bills of exchange, and bankruptcy law."<sup>46</sup>

Finally, the years 1798–1800 demonstrated the strategic importance of judicial selection as vacancies opened on the Bench. In August 1798, Justice Wilson died. One of President Washington's original appointees to the Court, his departure hardly created the first vacancy, for in the decade of the 1790s, judicial vacancies seemed more the rule than the exception, but his departure marked the first death of a Justice in harness, with the demise of



Justice Iredell following barely a year later. To fill Wilson's seat, President Adams offered the seat to John Marshall of Virginia, who had recently returned to the United States from a diplomatic mission to France and the XYZ Affair, which had only worsened relations with France. Marshall, however, was reluctant to abandon his lucrative law practice in Richmond, and declined. Adams then turned to Washington's nephew Bushrod Washington of Virginia, who accepted.<sup>47</sup> With a tenure lasting until 1829, Justice Washington became known as one of Marshall's staunchest allies after the latter's designation as Chief Justice. Indeed, Jefferson appointee William Johnson would later refer to Marshall and Washington together as "one judge."<sup>48</sup> However, had Marshall accepted the nomination for Wilson's seat, it certainly seems arguable that he might never have become Chief Justice.

That possibility presented itself after President Adams received word from Ellsworth—then in France on a diplomatic mission—in early December that he was resigning as Chief Justice. By January 1801, filling this vacancy became urgent. Because the electoral college yielded a tie vote between Jefferson and Aaron Burr, which would not be resolved by the House of Representatives until February, Adams did not know who the next President would be, only that he would not be President after March 4. Moreover, the Judiciary Act of 1801, which became law on February 13<sup>49</sup> and which the next administration repealed in 1802, would reduce the size of the Bench from six to five Justices at the next vacancy. Both electoral and statutory circumstances thus counseled against any delay. On December 18, the President picked former Chief Justice John Jay for the post, and the Federalist-controlled Senate confirmed the appointment on December 19. However, Jay, who had left the Chief Justiceship in 1795, declined to accept, citing deficiencies in the judicial system (principally the onerous circuit-riding duties that, ironically, the Judiciary Act was about to address, if only temporarily).<sup>50</sup> Party leaders

then urged that the nod go to a staunch Federalist such as William Paterson, who was the most senior Associate Justice, or to C. C. Pinckney. Instead, on January 20 and with minimal consultation, Adams turned to his forty-five-year-old Secretary of State, John Marshall, one of Jefferson's distant cousins and someone to whom Adams's successor would sometimes refer as "that gloomy malignity."<sup>51</sup> The national government had moved to Washington in the fall of 1800, so Marshall was Chief Justice when the Court met for the first time in the new capital in February 1801. Marshall's appointment thus owes much not only to Jay's refusal to return to his former post, but to the outcome of the sometimes-forgotten election of 1796, the nation's first truly contested presidential contest. In that event, Adams received seventy-one electoral votes to Jefferson's sixty-eight. Had the voting been the other way around, with Adams thus serving as Jefferson's Vice President in that pre-Twelfth Amendment era, it is inconceivable that a President Jefferson would have chosen Marshall as Ellsworth's successor.

The volumes of the **Documentary History** project stand as both monuments to the past and valuable resources for the future. One is led to ponder a project of similar scope and depth that might be an equally worthy successor to the decades-long handiwork of Dr. Marcus and her able colleagues, or to consider the form such a project might take in an age of digitalization.

Nicely complementing the **Documentary History** is publication of the **Selected Letters of John Jay and Sarah Livingston Jay**, compiled and edited by independent researchers Landa M. Freeman and Louise V. North of Westchester County, New York, and English composition scholar Janet M. Wedge of Manhattanville College.<sup>52</sup>

Among leaders in the Founding generation of the American nation, John Jay seems safely to repose among the lesser-known figures. Students of the Court rightly remember him as the first Chief Justice. But that he was President Washington's choice to head the

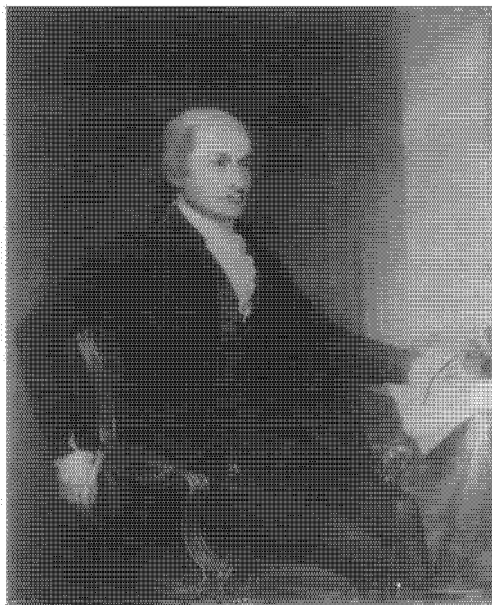
Supreme Court was itself testimony to an impressive list of accomplishments before that appointment in 1789.<sup>53</sup> A member of both the First and Second Continental Congresses and a successful attorney, he helped draft New York's first constitution, served as the state's chief justice, undertook several diplomatic missions for the young national government, served as Secretary of Foreign Affairs for the Congress under the Articles of Confederation, and was a junior collaborator with Alexander Hamilton and James Madison in the writing of the eighty-five newspaper essays (Jay authored no more than five because of illness<sup>54</sup>) that became known as *The Federalist*. While Chief Justice, he accepted Washington's designation as *envoy extraordinaire* to defuse tensions with Great Britain and negotiated a treaty that still bears his name that the Senate ratified in 1795. He resigned as Chief in the same year after his election in absentia as Governor of New York.

In an age when communication between two people out of earshot would almost invari-

ably be by letter, if it was to occur at all, so variegated a career yielded much correspondence. While the bulk of **Selected Letters** consists of letters between Jay and his wife Sarah,<sup>55</sup> correspondence with other members of the family is included, as are a few letters to and from notables such as Washington and Jefferson. Those in the former category provide some insight into aspects of daily living as well as relations among members of the family. For example, on April 7, 1786, John and Sarah's son Peter Augustus Jay explained several important matters to William Livingston, his grandfather: "Dr Grndpa—I would have wrote to you before now, but papa expected to go to Elizabeth Town & take me with him last Saturday, the weather being bad prevented . . . We have this day begun our house again. Our Stable is quite finished, but the other night two of the Tiles were blown off the roof. Two or three nights ago one of the willows which papa has lately procured was stolen out of the Garden, & the Cow has eat off the tops of those which he had before; but he says that next spring you may take your choice either to have the old one which will sprout again from the roots or some which he had lately set out."<sup>56</sup>

Letters in the latter category did not necessarily concern matters of state, as illustrated by a letter Washington wrote Jay in 1789 noting that "the Harness of the President's Carriage was so much injured in coming from New Jersey that he will not be able to use it today. If Mr. Jay should propose going to Church this Mornng. the President would be obliged to him for a Seat in his Carriage Sunday mornng."<sup>57</sup> The large part of Jay's published correspondence, however, is available elsewhere, principally in two volumes edited by the late Richard Morris.<sup>58</sup> Those interested in letters and other writings by Jay that have not yet appeared in print should access the massive "Papers of John Jay," an online archive consisting of some 13,000 documents that is maintained by Columbia University.<sup>59</sup>

**Selected Letters** is also enriched by a series of short essays that explore various



The editors of a new compilation, *Selected Letters of John Jay and Sarah Livingston Jay*, focus on correspondence between John Jay (pictured) and his wife, Sarah, but a few letters to and from George Washington, Thomas Jefferson, and family members are included as well.

aspects of life in Jay's time, including health and medicine, education, religion, and slavery (Jay was a devout Episcopalian and active in antislavery causes).<sup>60</sup> Moreover, the Introduction provides pertinent information on such essential matters as operation of the mail system in the late eighteenth century, including details on postage rates and probable delivery times. One learns that envelopes were rarely used because postage was based on the number of sheets in a letter (as well as the distance to its destination), and an envelope counted as a sheet.<sup>61</sup> Throughout, the reader is impressed both with the uncertainties and risks associated with letter-writing in that era and with the unavoidable time such communication entailed—between the actual writing of a letter and its posting, its delivery, and eventually, if matters proceeded as hoped, the arrival of a reply from the intended recipient. It was truly an age in which news, whether of political successes or family misfortunes, rarely traveled at more than four or five miles per hour on average.

Aside from impressions the collection of letters conveys about the Jay family and their times, the reader also finds glimpses of Jay's political thought. For example, there is Jay's lengthy letter to Washington on January 7, 1787, offering perspective on how a new government might be proposed to replace the system under the Articles:

A Convention is in contemplation, and I am glad to find your name among those of its intended Members. . . . Perhaps it is intended that this Convention shall not ordain, but only recommend. If so, there is Danger that their Recommendations will produce endless Discussions perhaps Jealousies and party Heats.

Would it not be better for Congress plainly & in strong Terms to declare that the present federal Government is inadequate . . . but that in their opinion it would be expedient

for the people of the States without Delay to appoint State Conventions (in the way they chuse their general assemblies) with the sole and express power of appointing Deputies to a general Convention . . . No alterations in the Government should I think be made, nor if attempted will easily take place, unless deduceable from the only source of just authority *The People*.<sup>62</sup>

This thinking was echoed in the opinion Jay authored in *Chisholm v. Georgia* some six years later, when, as noted earlier in connection with the **Documentary History**, the Court found that Georgia was subject to suit in federal court by a citizen of another state: "From the crown of Great Britain, the sovereignty of their country passed to the people of it . . . afterwards, in the hurry of the war . . . they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country."<sup>63</sup>

A decade before Jay's death in 1829, the Supreme Court decided *McCulloch v. Maryland*.<sup>64</sup> Probably no single decision, *Marbury v. Madison* included, has had a greater long-term impact on the development of political institutions and public policy in the United States. Anyone familiar with American constitutional development should therefore not be surprised to discover that this decision is the subject of one of the latest volumes to appear in the Landmark Law Cases & American Society series: *McCulloch v. Maryland*, by Mark R. Killenbeck of the University of Arkansas



The latest volume to appear in the Landmark Law Cases & American Society series published by the University Press of Kansas is *McCulloch v. Maryland*, by Mark R. Killenbeck of the University of Arkansas School of Law. Pictured is a branch of the Second Bank of the United States, for which James McCulloch refused to pay a tax, thereby precipitating that landmark suit.

School of Law.<sup>65</sup> Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N. E. H. Hull, the series now claims more than thirty titles, almost all of them treating decisions by the U.S. Supreme Court. Additional entries are in preparation.<sup>66</sup>

For at least the past several decades, the case study has been a venerable part of the literature on the judicial process, predating even the Landmark Law Cases series.<sup>67</sup> By probing the details of litigation from inception through decision, one is able to learn much about how judges and courts operate. The point is not that a particular case study demonstrates how judges and courts function in every instance. No case, after all, will be exactly like any other in all its details. Rather, from a series of such studies, one is fruitfully able to make generalizations and draw conclusions about how the process ordinarily or typically unfolds, and about how judges and other actors in the process conduct themselves.

The case that Killenbeck superbly recounts involved James McCulloch and his refusal to pay a tax imposed by the state of Maryland on the Second Bank of the United States. The litigation that ensued has assured Mr. McCulloch a place of immortality in con-

stitutional law as arguably the most famous, if not notorious, bank cashier in nineteenth-century American history.

As the editors of the Landmark series observe, "The lives of landmark cases are never short. They have their origins in long-standing quarrels."<sup>68</sup> Certainly *McCulloch* is no exception. Its roots lie in one of the first disputes over the meaning of the Constitution to arise in President Washington's first term: whether Congress could and should charter a bank. In 1791, Congress followed Hamilton's views, rejected Jefferson's, and chartered the Bank of the United States. After the Madison administration allowed the Bank to expire in 1811, Congress created the Second Bank in 1816. It was this institution that by 1818 had become the target of considerable anti-bank sentiment in Maryland and elsewhere. Accordingly, under the guise of a revenue measure a Maryland statute stipulated that the Bank buy special stamped paper from the state on which to print its notes or pay a fee of \$15,000 per year. Alternatively, the Bank could close its Maryland branch in Baltimore, where McCulloch was cashier. The state's objective was clear. Maryland wanted to make the Bank's cost of doing business in the state prohibitive, and to drive the U.S. Bank notes out of circulation in



preference to notes issued by Maryland banks. When *McCulloch* refused to comply with the law, the state brought suit to compel obedience. Following defeats in two Maryland courts, the Bank appealed to the United States Supreme Court. The questions the case presented were simply stated but profound in their implications: Did Congress possess the authority to charter the Bank? If so, could Maryland tax the Bank?

Oral argument in the able hands of William Wirt and Daniel Webster (for the Bank) and Luther Martin (for Maryland) began on February 22, 1819—barely more than a year after Maryland had passed the prohibitory law. Decision by the Supreme Court followed on March 6. The pace was certainly remarkable by nineteenth-century—and later—standards of practice and procedure: attempted enforcement of the measure, rulings by two state courts, plus docketing, argument, and decision in the Supreme Court all took place within about fifty-seven weeks.

The Bank won and Maryland lost on both questions. But the significance of the decision went well beyond an affirmation of congressional authority to create a bank and a denial of Maryland's authority to tax it. Chief Justice Marshall rested Congress's authority on an exceedingly expansive reading of national powers, echoing Hamilton's own argument to Washington in support of a bank twenty-eight years before. In Marshall's view, not only did the Necessary and Proper Clause of Article I, section 8<sup>69</sup> give Congress a choice of means in carrying out the powers that the Constitution expressly granted, but by "necessary" Marshall reasoned that these implied powers need be merely convenient and appropriate, not essential. Thus, Congress possessed not only those powers *granted* by the Constitution but an indefinite number of others as well unless *prohibited* by the Constitution. Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide.

As for Maryland's tax on the Bank, Marshall's reply practically assumed that the state had taxed a department of the national government, not merely a corporation chartered by Congress in which the national government held a minority interest. A part of the union could not be allowed to cripple the whole.

For defenders of state prerogatives, Marshall's opinion was a double dose of bad news. First, the ordinary remedy for unacceptable *national* legislation lay not with the Court but with Congress; second, the judiciary would be attentive to alleged victims of *state* policies. *McCulloch* therefore stood for the proposition that the Supreme Court was to be less a forum to judge the limits of national power and more a forum to protect national from local interests. Once Congress acted, the Bank (and, inferentially, any other national instrumentality) enjoyed constitutional immunity from hostile state actions. "[A] state of things has now grown up in some of the states," Justice Johnson would write in another case, "which renders all the protection necessary, that the general government can give to this bank."<sup>70</sup> A good measure of the significance of the decision, from the perspective of the twenty-first century, is to ponder the consequences had the case been decided against the Bank on both questions.

As for cashier McCulloch, his career with the Bank, if not with banking, ended in May 1819, when he was dismissed after it was revealed, according to one source, that he had engaged in frauds involving well over one million dollars.<sup>71</sup> Little wonder the Bank seemed short of friends among the populace. Later indicted on fraud charges in Maryland, McCulloch was acquitted in 1823. Soon the former cashier was elected to the state legislature and in 1826 named speaker of the state house of representatives. In 1842 he was confirmed by the United States Senate as First Comptroller of the Treasury,<sup>72</sup> having been nominated to that post by President John Tyler. Presumably enough Senators concluded that he was by then a reformed man, although, because

the Senate in those days conducted such business in executive session, no record of the floor deliberations survives. Still, for Senators with good memories, McCulloch's nomination must surely have provoked an awkward discussion.

The Bank did not fare as well. In July 1832, President Andrew Jackson vetoed a bill renewing and extending the Bank's charter, which expired on its own terms in March 1836, just days before the Senate confirmed Roger B. Taney as John Marshall's successor following the death of the Great Chief Justice in July 1835. Ironically, as Jackson's Secretary of the Treasury, Taney had a hand in drafting Jackson's veto message for the Bank bill,<sup>73</sup> a message that rejected the constitutional finality of Marshall's opinion in *McCulloch*:

The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>74</sup>

Wholly apart from the policy issue of the desirability of a national bank, Marshall's opinion failed to persuade others as well, particularly those who resisted the far-reaching implications of his jurisprudential conclusions, which touched even the slavery issue, as did almost every other political dispute in the pre-Civil War era.<sup>75</sup> Indeed, the decision ignited the nineteenth century's equivalent of talk radio and the blogosphere: a pamphlet war. The criticism of Marshall was so intense—particularly in Virginia and in other places where critical essays by opponents such as William Brockenbrough, Amos Kendall, and Spencer Roane were reprinted—that the Chief Justice, given the importance of what was at stake, felt com-

pelled to author a series of essays in his own defense under the pen name "Friend of the Constitution" that were published in the *Alexandria Gazette*.<sup>76</sup>

Amazingly, despite Jacksonian ascendancy, which largely dominated American politics until the Civil War, *McCulloch*, as a pillar of American constitutionalism, remained standing. In part, this was because its opponents and the opponents of the Bank were too successful. First, when Congress tried to revive the Bank or something very much like it in the 1840s, President Tyler vetoed the legislation.<sup>77</sup> There was thus no bank to bring before a Bench that, without Marshall's presence, might have felt less wedded to his doctrines of national supremacy. Second, with Jacksonian values driving national policy for much of the pre-Civil War period, there was a dearth of other legislation passed that might have prompted a reexamination of this part of the constitutional foundation Marshall put into place.

The confrontation over the Bank and national power between the Court and Jacksonian Democracy was among the first but hardly the last bouts of Court-directed animus in the political system. As Charles Gardner Geyh of Indiana University School of Law at Bloomington skillfully describes in *When Courts & Congress Collide*,<sup>78</sup> such episodes, suggestive of galactic encounters, have come at "generational intervals since the founding of the nation"<sup>79</sup>—or at least, one might add, since it became apparent that the *legal* role of the judiciary would be a *governing* role as well. The Marshall Court, for example, encountered opposition from President Jefferson as well as President Jackson. There was tension between the Taney Court and President Lincoln after 1860,<sup>80</sup> and further tensions between Congress and the Court over various particulars of Reconstruction. Populists and Progressives railed against the judiciary during the decades on either side of the turn of the twentieth century, and President Franklin Roosevelt undertook an audacious assault on the Court some thirty years later. As if a latter generation of

critics was not to be outdone, attacks on the Court during the 1950s and 1960s included persistent calls for Chief Justice Warren's impeachment. Much more recently, the Court has been the target of both conservatives and liberals for decisions that supposedly have forsaken the rule of law and written the personal predilections of the Justices into the law of the land. As Geyh illustrates, the language receives high marks for its vituperativeness. For one commentator on the right, the Court is "arrogantly authoritarian" and "a band of outlaws" that has promoted "anarchy and license in the moral order." From the left, the Court seems to be the "felonious five," the "transparent shills for the right wing of the Republican party," and "judicial sociopaths" who "belong behind bars."<sup>81</sup> Clearly, Court-bashing has not gone out of style.

Geyh's study follows others that have examined this part of the political dimension of the judicial process.<sup>82</sup> Moreover, recurring attacks on the judiciary seem nearly inevitable in the American political system for at least two fundamental reasons. On the one hand, there is the ideal of constitutionalism itself and limited government, represented by the Constitution. On the other hand, there is the principle of popular sovereignty. The first is institutionalized in the Supreme Court and the rest of the federal judiciary, where judges are deliberately shielded from the usual political accountability. The second is institutionalized in representative government and a system of elections that encourage the same accountability that the first attempts to discourage.

Yet the hurling of verbal brickbats only rarely yields substantive changes in judicial decisions. "Whereas threats to diminish and control judges are commonplace, making good on those threats is not."<sup>83</sup> For example, no federal judge has ever been removed for making unpopular decisions, and there is no modern instance where Congress has totally deprived the courts of all authority to hear certain kinds of cases. Why, then, has the congressional

sword almost always remained within its scabbard? Geyh explains this puzzle as the result of the rise of a zone of autonomy, or a zone of "customary independence,"<sup>84</sup> for the courts. Over time, Congress came to appreciate the merits of an independent judiciary. While Congress experimented with a variety of means to control court decision-making, it eventually jettisoned them as antithetical to judicial independence. In other words, having gradually recognized the benefits of an independent system of courts, Congress concluded that those values were incompatible with direct control. Thus, the independent judiciary, as it is known today, "derives less from the text of the Constitution or from judicial divinations of that text than from institutional norms that have emerged over the course of the relationship between the courts and Congress and that are now an entrenched part of our constitutional culture."<sup>85</sup> As a result, despite the harsh rhetoric about the courts that continues to be heard from time to time, a serious breach of the wall of independence by Congress today is probably as improbable as it would be politically unsettling and costly.

The one obvious deviation "from this tradition of congressional comity and deference has been in the area of judicial appointments which has been intensely partisan and politicized"<sup>86</sup> since Washington's administration, when the Senate rejected the nomination of former Justice John Rutledge to succeed John Jay as Chief Justice. This development that has persisted since the 1790s thus presents a question: What "explains the emergence of judicial appointments as the battlefield of choice for control of the courts, given the rejection of alternate sites?"<sup>87</sup> According to Geyh, "As customary independence became increasingly entrenched toward the end of the nineteenth century and as Congress gradually rejected other means at its disposal to curb the courts, the appointment process . . . emerged as the one remaining viable mechanism that would allow Congress to influence judicial

decision making."<sup>88</sup> In short, the legislative branch has come to rely upon the same means that were in the hands of the executive branch at the outset.

Geyh characterizes the product of this development as "dynamic equilibrium,"<sup>89</sup> a term and concept he borrows from disciplines as varied as art, botany, and economics. It refers to a condition or balance resulting from the interaction of opposing forces. These forces consist of (1) the interplay between Congress and the courts, (2) the tension between the principles of independence and accountability, (3) the collision between constitutional text and social and political priorities, and (4) the competition between two large and relatively permanent political parties. For Geyh, the stakes in comprehending both this ongoing dynamic and judicial decision-making are high. "If ultimately we conclude that judges employ law as a skill to conceal nakedly political decision making of a sort best reserved for Congress or the people, then insulating such decision[s] . . . becomes largely indefensible . . . . If, however, we conclude that judges continue to play an important role in preserving the rule of law, then judicial independence retains its status as a vital instrumental value, and the constitutional norms that have protected the judiciary's independence for over two centuries deserve our continuing support."<sup>90</sup>

The interaction between legal and political factors to which Geyh refers figures prominently in *The Great Justices 1941-1954*<sup>91</sup> by California attorney William Domnarski, where emphasis on the beginning definite article is not only part of the title but reflects the contents of this compact and eminently readable book.

At one level, the volume is a collection of four nearly free-standing essays about four remarkable individuals—Hugo Black, Felix Frankfurter, William O. Douglas, and Robert H. Jackson—who served on the Court during the years demarcated by the title.<sup>92</sup> All appointed by Franklin Roosevelt, this quartet "for

a brief time proceeded to vote and write in ways consistent with a simultaneous commitment to reviewing civil rights legislation expansively and economic legislation narrowly, thereby freeing themselves from the misdirections of their predecessors."<sup>93</sup>

At a second level, *The Great Justices* explores a question: "How could it happen that these justices, sharing core jurisprudential beliefs and ambitions before appointment, divided as they did into competing liberal and conservative factions?"<sup>94</sup> The author's answer to the question he poses is "personality," broadly conceived.<sup>95</sup> "When the characters are large and the jurisprudential stakes high, an approach favoring personal profiles over full-blown biography or constitutional history does its best work."<sup>96</sup> For Domnarski, it is "the personal side of a justice that informs a justice's interactions with the other justices on the Court and helps to shape the arc of a justice's career. Personality is the active ingredient that justices take to the Court,"<sup>97</sup> a point that Justice Frankfurter himself emphasized: "The true face even of a public man is his private face."<sup>98</sup> The emphasis on personality is enriched by the author's research in a variety of sources, including the transcripts at Princeton University of the Douglas Conversations,<sup>99</sup> and in turn reveals three stories that unfolded during this period.

One of these stories is the evolving jurisprudence on civil liberties and civil rights, and the role that each Justice played, especially in terms of the differences among them that are conveniently displayed statistically in the nine tables that comprise the Appendix and highlight voting patterns and alignments of the four Justices.<sup>100</sup> The second story is "about the justices themselves and the capacity of each of them to let bitterness, resentment, and intransigence prompt self-destructive contrariness."<sup>101</sup> That pigheadedness could characterize these individuals, Domnarski adds, "means that it could happen to any of the current justices"<sup>102</sup>; the



impact of personality is not time-locked to any particular judicial era. The third story is "about the Court as an institution and its relation to the American public, a public that can find in the Court the paradox of inscrutability just beyond its public face. Knowing how the Court works is as important today as it was then."<sup>103</sup>

At still a third level, Domnarski notes significant differences between the Court on which Black, Douglas, and Frankfurter sat and the Court of today. Most prominent, perhaps, is that the Court of today "is distinguished by an institutional anonymity, fashioned in part through justices who keep a low public profile and in part through the bland, homogeneous, and voiceless prose of law clerks."<sup>104</sup> In contrast, "not only did the individual justices of the group of four have their individual voices, which they expressed with their unsurpassed writing ability, the Court as well had a voice that shunned the institutional."<sup>105</sup> In particular, Domnarski highlights Justice Potter Stewart's estimate of Jackson that because of his "extraordinary gift to express what he had to say with such clarity and force, there shines through the pages of his writing not just his intellect, but the whole force of his personality."<sup>106</sup> Missing today, Domnarski believes, are the "brief, public-oriented opinions that distinguished some of the most important cases of the 1941-54 era."<sup>107</sup> Additionally, "the justices of that era were public figures of a sort unknown by today's standards,"<sup>108</sup> a point that probably reveals more about the appointing presidents than the appointees themselves.<sup>109</sup> Such differences matter, he believes, in our "judicially tinged democracy."<sup>110</sup> Yet one recalls the assessment offered posthumously in 1954 by Justice Jackson: that the Court, "whatever its defects," "is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional demands."<sup>111</sup>

#### THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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#### ENDNOTES

<sup>1</sup>Burger was appointed the fifteenth Chief Justice of the United States by President Richard Nixon in 1969; he retired in 1986. The 200<sup>th</sup> anniversary of the signing of the Constitution appropriately fell on his eightieth birthday, September 27, 1987.

<sup>2</sup>*Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

<sup>3</sup>Alexis de Tocqueville, *Democracy in America*, J. P. Mayer and Max Lerner eds., George Lawrence trans. (1966) 93, 248 (hereafter cited as de Tocqueville).

<sup>4</sup>*Id.*, 247.

<sup>5</sup>Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885) 84. See Alpheus Thomas Mason, "Free Government's Balance Wheel," 1 *Wilson Quarterly* 93 (1977).

<sup>6</sup>Robert H. Jackson, *The Supreme Court in the American System of Government* (1955) 61 (emphasis added).

<sup>7</sup>de Tocqueville at 93.

<sup>8</sup>For example, according to Alexander Hamilton's notes accompanying the debates for June 6, 1787, at the Philadelphia Convention, "A free government is to be preferred to an absolute monarchy not because of the occasional violations of *liberty* or *property* but because of the tendency of Free Government to interest the passions of the community in its favour beget public spirit and confidence." Max Farrand, *The Records of the Federal Convention* (1966) vol. 1, 145 (emphasis in the original).

<sup>9</sup>Oddly, though free government was frequently mentioned, its proponents rarely defined the term. One exception is delegate (and future Justice) James Wilson's statement at the Pennsylvania Ratifying Convention in December 1787.

A free government has often been compared to a pyramid. This allusion is made with peculiar propriety in the system before you; it is laid on the broad basis of the people; its powers gradually rise, while they are confined, in proportion as they ascend, until they end in that most permanent of all forms. When you examine all its parts, they will invariably be found to preserve that essential mark of free governments—a chain of connection with the people.

Quoted in Alpheus T. Mason, *The Supreme Court: Paladium of Freedom* (1962) 11, n.

<sup>10</sup>The phrase refers to the Supreme Court, at least since it occupied its present building in 1935. The phrase was also the title of a book about the Court. See John P. Frank, *Marble Palace: The Supreme Court in American Life* (1958).

<sup>11</sup>In two parts, volume one of the *Documentary History* dealt with appointments and proceedings, volume two with the Justices on circuit between 1790 and 1794, volume three with the Justices on circuit between 1795 and 1800, volume four with legislation and commentaries on organization of the federal judiciary, volume five with suits against states, volume six with cases between 1790 and 1795, and volume seven with cases between 1796 and 1797. The new volume eight continues the subject undertaken in volume seven and deals with cases between 1798 and 1800.

<sup>12</sup>Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800, Volume 8, Cases: 1798–1800* (2007) (hereafter cited as Marcus). Marcus's scholarly interests include not only the early Court but the more modern Court as well. See her *Truman and the Steel Seizure Case* (1977).

<sup>13</sup>William R. Casto, *The Supreme Court in the Early Republic* (1995) 249.

<sup>14</sup>Julius Goebel, Jr., *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (1971).

<sup>15</sup>D. Grier Stephenson, "The Judicial Bookshelf," *Supreme Court Historical Society Yearbook* (1987), 108, 116.

<sup>16</sup>Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 1 (1985) xliii.

<sup>17</sup>Marcus, 1.

<sup>18</sup>Final judgments in civil suits and actions in equity from the circuit courts could be reviewed by the Supreme Court if the amount-in-controversy requirement was met.

<sup>19</sup>4 Dallas (4 U.S.) 37 (1800). A summary of the case and documents relating to it appear in Marcus, 407–40. The editors note that Dallas's *Reports* renders the spelling incorrectly as "Bas." See Marcus, 407, n.1.

<sup>20</sup>*Aurora*, August 22, 1800, in Marcus, 337.

<sup>21</sup>Marcus, 9.

<sup>22</sup>2 U.S. (2 Dallas) 419 (1793).

<sup>23</sup>3 U.S. (3 Dallas) 171 (1796).

<sup>24</sup>5 U.S. (1 Cranch) 147 (1803).

<sup>25</sup>3 U.S. (3 Dallas) 386 (1798).

<sup>26</sup>The case, with supporting documents, is covered in Marcus, 89–115.

<sup>27</sup>*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

<sup>28</sup>Chief Justice Ellsworth was absent, and Justice Wilson was near death in Edenton, North Carolina, the home of Justice Iredell. Wilson's death came on August 21.

<sup>29</sup>3 U.S. at 400.

<sup>30</sup>Marcus, 99, n. 64. The reference is to Justice Thomas's opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538–39 (1998).

<sup>31</sup>3 U.S. at 388.

<sup>32</sup>3 U.S. at 399.

<sup>33</sup>3 U.S. at 400.

<sup>34</sup>Quoted in Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928) 9.

<sup>35</sup>Marcus, 7.

<sup>36</sup>3 Dallas (3 U.S.) 401 (1798).

<sup>37</sup>In American court documents, the editors find the spelling as "Daniel," but because "Daniel!" appears in pertinent British bankruptcy papers, the editors used the latter spelling in commenting on the case. Marcus, 58, n.

<sup>38</sup>In the early operation of the federal courts, diversity cases were the province of the circuit courts, while the district courts functioned mainly as admiralty courts. Frankfurter and Landis, *Business of the Supreme Court*, 12.

<sup>39</sup>3 U.S. at 404–5.

<sup>40</sup>de Tocqueville, 89.

<sup>41</sup>Charles Warren, *The Supreme Court in United States History*, vol. 1, rev. ed. (1926) 58.

<sup>42</sup>Marcus, 413. The developing practice is covered more fully in the introduction to volume seven of the *Documentary History*.

<sup>43</sup>Marcus, 413.

<sup>44</sup>Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *Journal of Supreme*

*Court History* (1991), 63, 65. This article originally appeared in 36 *University of Pittsburgh Law Review*, 785 (1975).

<sup>45</sup>"I will repeat and explain one expression, which was used in delivering the opinion of the court, and which seems to have been misunderstood." 3 U.S. at 407 (emphasis added).

<sup>46</sup>Marcus, 1.

<sup>47</sup>Iredell's seat was filled by North Carolinian Alfred Moore.

<sup>48</sup>Writing Thomas Jefferson in 1822, Justice Johnson gave Marshall much of the credit for leadership of the Court. Speaking of the Bench he found in the first decade of the century, Johnson explained: "While I was on our state-bench I was accustomed to delivering seriatim opinions in our appellate court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge." Johnson to Jefferson, December 10, 1822, in Donald G. Morgan, *Justice William Johnson: The First Dissenter* (1954) 181–82 (emphasis added).

<sup>49</sup>See Frankfurter and Landis, *The Business of the Supreme Court*, 24–25.

<sup>50</sup>As one of the first actions of the new Jefferson administration, the Judiciary Act of 1802 repealed the Judiciary Act of 1801.

<sup>51</sup>Quoted in Henry J. Abraham, *The Judicial Process*, 6th ed. (1993) 305–6.

<sup>52</sup>Landa M. Freeman, Louise V. North, and Janet M. Wedge, eds., *Selected Letters of John Jay and Sarah Livingston Jay* (2005) (hereafter cited as Freeman).

<sup>53</sup>Jay's appointment also suggests something about Washington's perception of the importance of the Chief Justiceship. See Patrick Godfrey, "What Makes a Justice Chief?" unpublished undergraduate honors thesis, Department of Government, Franklin & Marshall College (2006), 89–90.

<sup>54</sup>Freeman, 179.

<sup>55</sup>Jay, himself the grandson of a successful Huguenot émigré merchant, unmistakably married well. Sarah's father William Livingston was Governor of New Jersey. Her brother Brockholst, with whom Jay did not have an entirely cordial relationship, was named to the U.S. Supreme Court by President Jefferson in 1807.

<sup>56</sup>*Id.*, 173. The capitalization, spelling, punctuation, and word use in this extract and others from Freeman adhere to the original.

<sup>57</sup>*Id.*, 189.

<sup>58</sup>Richard Morris, ed., *John Jay: The Making of a Revolutionary, Unpublished Papers, 1745–1780* (1975), and Richard Morris, ed., *John Jay: The Winning of the Peace, Unpublished Papers, 1780–1784* (1980).

<sup>59</sup>The Papers of John Jay, Columbia University Library, available at <http://www.columbia.edu/cu/lweb/digital/jay/> (last visited on October 24, 2007).

<sup>60</sup>Freeman, 289–99.

<sup>61</sup>*Id.*, 16.

<sup>62</sup>*Id.*, 177 (emphasis in the original).

<sup>63</sup>2 U.S. 419, 470–71.

<sup>64</sup>17 U.S. (4 Wheaton) 316 (1819).

<sup>65</sup>Mark R. Killenbeck, *M'Culloch v. Maryland* (2006) (hereafter cited as Killenbeck). At the outset, the reader discovers some possible confusion over spelling. In referring to the case name itself, Professor Killenbeck prefers "M'Culloch" to "McCulloch," the latter spelling appearing frequently in the literature but the former spelling appearing in the official reporting of the case. In his account of the litigation, Killenbeck also prefers the last name spelling of "M'Culloh" since, as he explains, that was the spelling James William M'Culloh employed for his own name. Killenbeck, xi.

<sup>66</sup>A current list of titles in print is available at the website for the University Press of Kansas at <http://www.kansaspress.ku.edu/newbyseries.html> (last accessed on October 24, 2007).

<sup>67</sup>For example, see Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (1959), and C. Herman Pritchett and Alan F. Westin, *The Third Branch of Government: Cases in Constitutional Politics* (1963) 8.

<sup>68</sup>Killenbeck, ix.

<sup>69</sup>"The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis added). The addition of this "elastic clause" was a major difference between the Constitution and the Articles of Confederation. The latter lacked anything like this provision in Section 8. Indeed, the Articles made a point of denying implied powers to the Congress: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, Article I (emphasis added).

<sup>70</sup>*Osborn v. Bank*, 22 U.S. (9 Wheaton) 738, 871–872 (1824). *Osborn* involved yet another attack on the Bank of the United States, this time in Ohio. Despite *McCulloch*, Ohio pushed ahead with enforcement of an anti-bank statute of its own. The result was a spirited seizure of specie, notes, and securities from the Chillicothe branch,

their delivery into the hands of the state treasurer, and, eventually, their forcible recovery by federal agents from the state vault in Columbus. Rejecting the state's argument that *McCulloch* had been wrongly decided, the Supreme Court sided with the bank on all issues in the case.

<sup>71</sup>Killenbeck, 161.

<sup>72</sup>"First Comptroller" was the title of the position. *Id.*, 187.  
<sup>73</sup>*Id.*, 170–71.

<sup>74</sup>James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (1908) vol. 2, pp. 581–82.

<sup>75</sup>Killenbeck, 72, 157–58.

<sup>76</sup>See Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (1969).

<sup>77</sup>Killenbeck, 178.

<sup>78</sup>Charles Gardner Geyh, *When Courts & Congress Collide* (2006) (hereafter cited as Geyh).

<sup>79</sup>*Id.*, 2.

<sup>80</sup>See James Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers* (2006).

<sup>81</sup>Geyh, 3.

<sup>82</sup>For example, see, C. Herman Pritchett, *Congress Versus the Supreme Court 1957–1960* (1961), Walter F. Murphy, *Congress and the Court* (1962), and William Lasser, *The Limits of Judicial Power* (1998).

<sup>83</sup>Geyh, 5.

<sup>84</sup>*Id.*, 11.

<sup>85</sup>*Id.*, 250.

<sup>86</sup>*Id.*, 5.

<sup>87</sup>*Id.*, 11.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*, 250.

<sup>90</sup>*Id.*, 281.

<sup>91</sup>William Domnarski, *The Great Justices 1941–54* (2006) (hereafter cited as Domnarski).

<sup>92</sup>Domnarski's focus is reminiscent of Jeffrey D. Hockett's study, *New Deal Justice* (1996), which examined Justices

Black, Frankfurter, and Jackson, a book that Domnarski acknowledges. Domnarski, 197.

<sup>93</sup>Domnarski, xi. There being little civil-rights legislation that reached the Court during these years, one suspects that the author has in mind various guarantees of civil rights and civil liberties in the Constitution, as opposed to statutory protections enacted by Congress.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*, xii.

<sup>96</sup>*Id.*, 1.

<sup>97</sup>*Id.*, xii.

<sup>98</sup>Felix Frankfurter, "The Impact of Charles Evans Hughes," in Philip B. Kurland, ed., *Felix Frankfurter on the Supreme Court* (1970) 465, quoted in Domnarski, xii.

<sup>99</sup>These transcripts are available online at the Seeley G. Mudd Manuscript Library's website [http://www.princeton.edu/~mudd/finding\\_aids/douglas/](http://www.princeton.edu/~mudd/finding_aids/douglas/) (last visited on November 10, 2007).

<sup>100</sup>Domnarski, 169–74.

<sup>101</sup>*Id.*, 165.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>Potter Stewart, "Robert H. Jackson's Influence on Federal-State Relationships," in *Mr. Justice Jackson: Four Lectures in His Honor* (1969) 63, quoted in Domnarski, xiii.

<sup>107</sup>Domnarski, 165–66.

<sup>108</sup>*Id.*, 166.

<sup>109</sup>For example, compare the professional pedigrees, in terms of pre-Court experience, of the Bench of 2007, with, say, the Bench of 1962.

<sup>110</sup>*Id.*, 168.

<sup>111</sup>Robert H. Jackson, *The Supreme Court in the American System of Government* (1955), 23.



## Contributors

**Peter Scott Campbell** is a technical services librarian at the Louis D. Brandeis School of Law and manages the library's collection of the Brandeis papers.

**Clare Cushman** is Director of Publications at the Supreme Court Historical Society.

**Brendan J. Doherty** is an assistant professor of political science at the United States Naval Academy.

**Todd C. Peppers** is an assistant professor for public affairs at Roanoke College and the author of *Courtiers of the Marble Palace: The Rise and Influence of Supreme Court Law Clerks* (2006).

**Barry A. Price** teaches history at Coastal Carolina University.

**Marshall L. Small** was law clerk to Justice Douglas in the 1951 Term. He has been engaged in the private practice of law in San Francisco, California since 1954, with the firm now known as Morrison & Foerster LLP.

**D. Grier Stephenson, Jr.** is the Charles A. Dana Professor of Government at Franklin and Marshall College.

**Bruce J. Terris** argued seventeen cases while serving in the Office of Solicitor General, in addition to helping Robert F. Kennedy prepare for his only oral argument. He later founded his own firm, Terris, Pravlik & Wagner, based in Washington, D.C.

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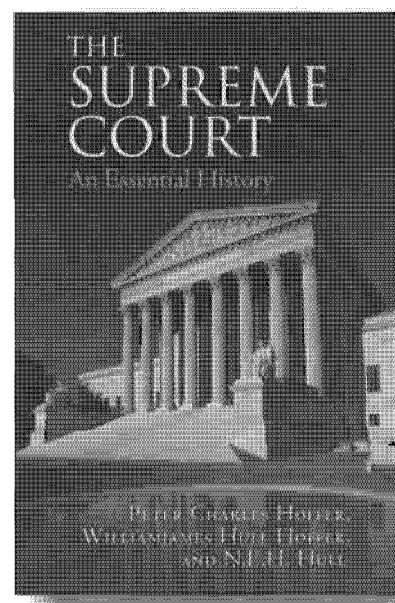
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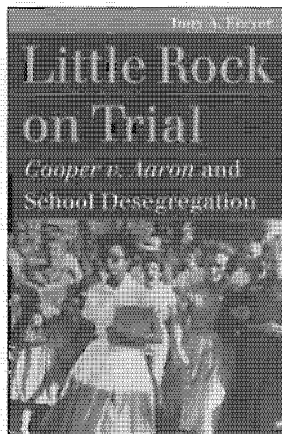
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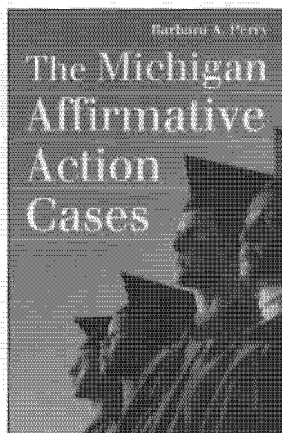
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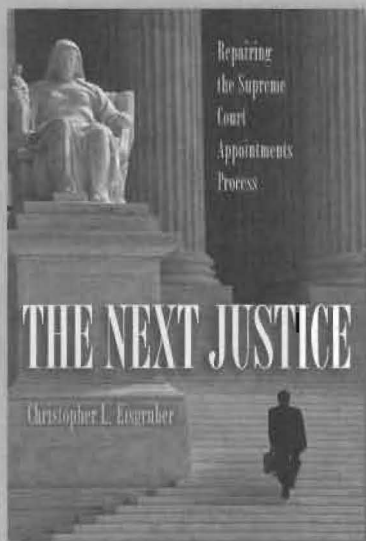
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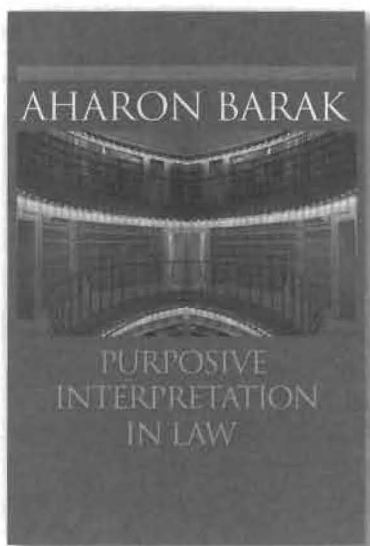
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