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# SUPREME COURT HISTORY



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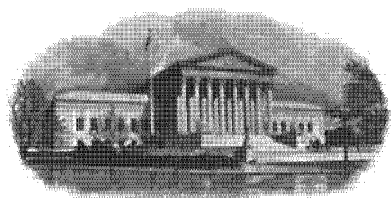
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The Society, a private non-profit organization, is dedicated to the collection and preservation of the history of the Supreme Court of the United States. Incorporated in the District of Columbia in 1974, it was founded by Chief Justice Warren E. Burger, 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 6,000 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.

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# Introduction

Melvin I. Urofsky

Before talking about this issue, let me congratulate Elizabeth Brand Monroe, who was awarded the 2008 Hughes-Gossett Award for the best article in the *Journal* in the preceding year. Professor Monroe's "The Influence of the *Dartmouth College Case* on the American Law of Educational Charities" appeared in early 2007 (vol. 32, no. 1), and the judges believed its importance lay in shedding light on how a case normally associated with contract law actually had great impact in other areas as well.

This issue, like many of its predecessors, covers a wide area of Supreme Court history. Some of the material will be familiar to many of our readers, while other material will introduce them to relatively new ideas about the Court's history. While we all know that the Court consisted solely of white men until the appointment of Thurgood Marshall by Lyndon Johnson and of Sandra Day O'Connor by Ronald Reagan, Todd Peppers reminds us that during the first several decades that the Court employed clerks, nearly all of them were white males as well. William O. Douglas hired the first woman clerk, Lucille Lomen (OT 1944)

and did so reluctantly: During World War II, the men joined the armed forces, so Douglas had to take either Ms. Lomen or no one. But the first African-American clerk, William Coleman, was welcomed by Felix Frankfurter, and went on after his year with the Court to have a distinguished career as a lawyer.

One of the joys of editing the *Journal* is that not only can I badger my friends into writing for it, but also, when I come across something unexpected, we can move quickly and get it for our readers. I was down in Louisville doing research when one of the law librarians told me about some relatively unknown materials in the John Marshall Harlan Papers there. We talked about them for a while, and last year we published Harlan's Civil War memoirs, edited by Peter Scott Campbell. In this issue, Peter has edited another of Harlan's reminiscences, which seemed to have been written late in his life at the request of his children.

Edward Carter, of Brigham Young University, and his collaborator James Phillips provide us with some new research on the formative years of George Sutherland, one of the most important Justices of the early twentieth

century, who grew up as a non-Mormon in Utah. Galen Thorp's piece focuses on William Wirt, a man who, although he is relatively unknown today, argued literally dozens of cases before the Supreme Court as Attorney General as well as in private practice, including the Burr treason trial, *Gibbons v. Ogden* (1824), and *Cherokee Nation v. Georgia* (1831). Thorp wrote this exhaustive study while a student of Professor Richard J. Lazarus at Georgetown University Law Center. With younger historians turning out such good work, the profession can look to the future with optimism.

Bruce Altschuler takes a new look at a classic case, *Youngstown Sheet & Tube Co. v. Sawyer* (1952), the famous *Steel Seizure Case*. This decision is often cited as evidence that the judiciary—"the least dangerous branch"—can, when necessary, rein in the efforts of a

President to overreach his constitutional authority. In his article, Altschuler asks whether, after more than a half-century, the case still retains the vitality attributed to it.

Normally we do not publish the type of long articles that frequently appear in law reviews. But when Theodore Vestal sent us his piece on how the Warren Court got caught up in Cold War diplomacy, we knew we should have it, and with Vestal's agreement, we decided to run it in two issues. Part One appears here, and Part Two will appear in the first issue of 2009. This is not a side of the Court that is often seen, but a great deal of recent scholarship points to the influence that the Cold War had on the Warren Court in the 1950s and early 1960s.

As always, enjoy!

# William Wirt

GALEN N. THORP

If a mind stored with all the learning appropriate to the profession of the law, and decorated with all the elegance of classical literature—if a spirit imbued with the sensibilities of a lofty patriotism, and chastened by the meditations of a profound philosophy—if a brilliant imagination, a discerning intellect, a sound judgment, an indefatigable capacity, and vigorous energy of application, vivified with an ease and rapidity of elocution, copious without redundancy and select without affectation—if all these, united with a sportive vein of humor, an inoffensive temper, and an angelic purity of heart—if all these in their combination are the qualities suitable for an Attorney General of the United States—in him they were all eminently combined.

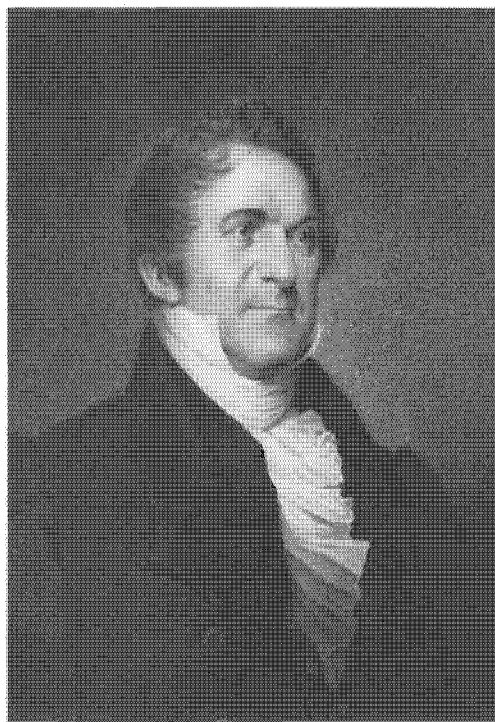
—Former President John Quincy Adams<sup>1</sup>

The Supreme Court has long attracted prominent and colorful lawyers. But the Court in the mid-nineteenth century may be unmatched for the uniqueness and stature of the advocates who appeared before it. Names such as Daniel Webster, Roger Taney, and Henry Clay continue to be recognizable, thanks to the wide impact of their forceful characters. Others, such as Francis Scott Key, are remembered solely for activities far removed from law. Yet among all these distinguished figures, one man was hailed as “the most beloved of American advocates.”<sup>2</sup> Who was he? An author of literature and biography, a renowned trial lawyer, the longest-serving Attorney General of the United States, a sought-after orator, a third-

party presidential candidate, and a Supreme Court advocate. Among his 170 appearances before the Court are such momentous cases as *McCulloch v. Maryland*,<sup>3</sup> *Gibbons v. Ogden*,<sup>4</sup> and *Worcester v. Georgia*.<sup>5</sup> But today his primary memorials are a county bearing his name in West Virginia<sup>6</sup> and a pillar in a neglected cemetery near the Anacostia River.<sup>7</sup> It has been suggested that “the gap between the man’s prestige during his lifetime and now is greater than for any other public figure in American history.”<sup>8</sup>

William Wirt has attracted little scholarship over the years. He has been viewed as one of those figures who passes through life more influenced by events and precedents than

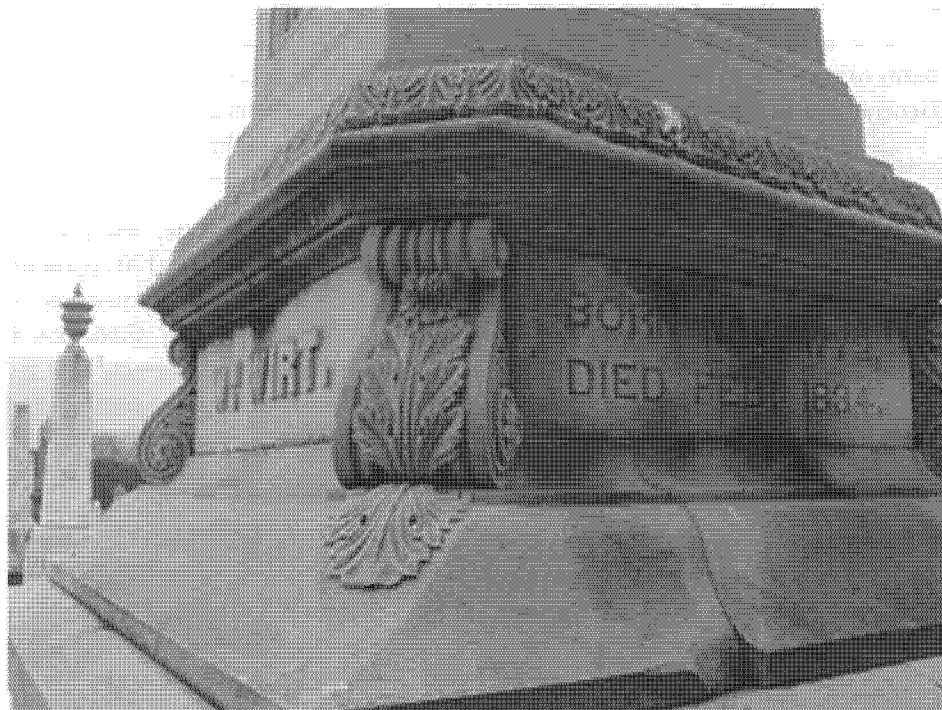




As Attorney General from 1817 to 1829, William Wirt argued forty-one cases for the government. He was said to have worked feverishly preparing for oral arguments, staying up late into the night to work.

changing the flow of history.<sup>9</sup> The only full-length biography to be published is now more than 150 years old,<sup>10</sup> and the few articles that address Wirt's life provide but limited augmentation of that work.<sup>11</sup> Hopefully that deficit will soon be remedied.<sup>12</sup> While his direct impact on the course of events may have been limited, Wirt's life is illuminating, not least because he left behind a voluminous correspondence that provides a colorful portrait of practical life in his time.<sup>13</sup>

This brief exploration of the life of William Wirt seeks to recover his identity and use it to place early nineteenth-century advocacy in its human setting. First is a biographical sketch describing his rise from orphaned boyhood to Virginia lawyer and ultimately to national esteem. Part II briefly sets out his most significant cases before the Court, along with the jury trials that launched him into the public eye. Part III describes the Supreme Court in this era with as much circumstantial detail as could be gathered. Part IV illustrates Wirt's advocacy style through portions of some of



Wirt died at the age of sixty-one while in Washington preparing a case for argument. Both the Senate and the Supreme Court adjourned in his honor. He was buried in this vault at the Congressional Cemetery (erected in 1853).

his most famous arguments. The appendices round out the picture with a full list of cases and illustrations of his correspondence.

### I. Biographical Sketch

William Wirt's life was bound up in the destiny of his young country's. He was born on November 8, 1772, in the village of Bladensburg, Maryland,<sup>14</sup> while war was brewing with Britain and nothing but a swamp occupied the nearby ground that would later become Washington, D.C. Sixty-one years later, his death in the new national capital while preparing for a Supreme Court argument led both houses of Congress and the Supreme Court to adjourn so their members could pay him respect.<sup>15</sup>

Wirt's beginning was humble. His parents were Swiss and German immigrants who both died before he turned eight. A tavern-keeper, his father had little to pass on to him in terms of an estate. However, he was blessed with kind benefactors. Peter Carnes, who became acquainted with the boy while staying at the Wirts' tavern, funded his early education.<sup>16</sup> Wirt experienced several schools in succession, classical and grammar schools in Georgetown, Charles County, and Montgomery County.<sup>17</sup> His schoolmaster from 1783 to 1787, the Reverend James Hunt, spurred his intellectual curiosity and excited his interest in law by leading field trips down to the county courthouse.<sup>18</sup> After Hunt's school closed, Benjamin Edwards, the father of one of Wirt's classmates, hired the fifteen-year-old boy as a tutor to his son, becoming almost a surrogate father to Wirt.<sup>19</sup>

Upon deciding to study law in the spring of 1790, at the age of eighteen, Wirt entered the office of William Hunt, the son of his old schoolmaster.<sup>20</sup> Within a year, he had moved on, hearing "of a very advantageous station for a lawyer in the state of Virginia."<sup>21</sup> After five months as an apprentice to Thomas Swann in Leesburg,<sup>22</sup> he managed to maneuver around Virginia's one-year residency requirement and open his own practice in Culpeper County,<sup>23</sup>

armed only with "a copy of Blackstone, two volumes of Don Quixote and a volume of Tristram Shandy."<sup>24</sup> His early cases were insignificant, but his gregarious nature led him to make friends easily. He became an acquaintance of Dr. George Gilmer, a member of the Virginia establishment, and married Gilmer's daughter, Mildred, in 1795.<sup>25</sup> Mildred's brother Francis became one of his closest friends, and other associates from that time included James Barbour and Dabney Carr, each of whom remained in regular correspondence with Wirt for the rest of their lives.<sup>26</sup> The proximity of Gilmer's estate to those of Thomas Jefferson, James Madison, and James Monroe allowed Wirt to enter their acquaintance and their approval.<sup>27</sup> Having access to his father-in-law's fine library, he expanded his knowledge of literature and became known as a letter-writer.<sup>28</sup> On the downside, he found he enjoyed fine living, and certain excesses are discreetly mentioned by his biographer.<sup>29</sup> However, this whole lifestyle came crashing down suddenly in 1799, when Mildred died.<sup>30</sup>

Grief-stricken, Wirt moved to Richmond, intending to renew his law practice.<sup>31</sup> He won election as clerk of the Virginia House of Delegates, in which capacity he served until 1802.<sup>32</sup> The post occupied his winter months, leaving him free to practice law during the rest of the year. In 1800, he entered his first case to receive significant public attention. More to challenge the unpopular Sedition Act than from approval of the defendant, he joined the defense of James Callender, a notorious pamphleteer who had attacked President John Adams in print.<sup>33</sup> Although the irascible judge, Samuel Chase, preempted the efforts of the defense and their client was convicted, Callender was pardoned the following year by Jefferson, and the whole incident brought public ire on the enforcers of the dubious statute.<sup>34</sup>

Wirt's tenure as clerk ended with a surprise, as he found himself appointed by the House to serve as Chancellor of the Tidewater District, a newly created post tasked with adjudicating civil and property disputes for the

This example of Wirt's characteristic signature dates to 1823, the year before he argued *Gibbons v. Ogden*.

entire region southeast of Richmond.<sup>35</sup> Doubting his own abilities to handle such a duty, he sought advice from Monroe, then the Governor, who told him that the House "knew very well what it was doing, and that it was not probable he would disappoint either it, or the suitors of the court."<sup>36</sup>

Wirt's acceptance of the post stemmed, at least in part, from his need for improved circumstances.<sup>37</sup> Soon after his departure for Williamsburg, he returned briefly to marry Elizabeth Gamble, the daughter of a wealthy Richmond merchant. Their wedding on September 7, 1802, began a lifelong "love affair"<sup>38</sup> that has since served as a case study of the marriage ideal in that era.<sup>39</sup> However, the burden of providing for a family left him quite unsatisfied with his meager post:

This honor of being a Chancellor is a very empty thing, stomachically speaking; that is although a man be full of honor, his stomach may be empty; or in other words, honor will not go to market and buy a peck of potatoes. On fifteen hundred dollars a year, I can live, but if death comes how will my wife and family live?<sup>40</sup>

He came very close to moving to Kentucky, having heard of their apparent need for lawyers:

In Virginia, the most popular lawyer in the State merely makes the ends of the year meet. . . . The federal city is

not to my taste or interest. It would require too much time there to take root. In the soil of Kentucky every thing flourishes with rapidity.<sup>41</sup>

But in the end, although he decided to resign and return to private practice, he turned to Norfolk instead of the frontier, at the suggestion of his friend Littleton Tazewell.<sup>42</sup> Pleased to discover that his decision was not frowned upon, he nevertheless expressed frustration at the price of public service:

To be sure, in a republic, public economy is an important thing; but public justice is still more important; and there is certainly very little justice in expecting the labor and waste of a citizen's life for one-third of the emoluments which he could derive from devoting himself to the service of individuals. . . . It is really humiliating to think, that although these plain truths will be acknowledged by any member of the Legislature to whom you address them in private, yet there is scarcely one man in the House bold enough to vote his sentiments on the subject, after a call of the yeas and nays—he will not dare to jeopardy his reelection by such a vote.<sup>43</sup>

Elizabeth stayed with her family in Richmond for the first few months, giving birth to their first child, Laura, on September 3, 1803.<sup>44</sup> Wirt's undisguised delight in his family, which



Wirt was born in 1772 in Bladensburg, Maryland, to parents of Swiss and German descent. This profile of Wirt by Charles de Saint-Menin dates to 1808.

eventually included twelve children, is a frequent topic of his letters:

How rugged would the path even of duty appear; how fruitless, how solitary, how disconsolate would even prosperity be, if I alone were to taste it! It is the thought that my wife and children are to share it with me . . . [that] are the fond ideas which possess my soul, which never fail to smooth my brow in the midst of tumult, to speak peace to my heart, and to scatter roses over my path of life.<sup>45</sup>

Norfolk was a bustling seaport with new fields of law to master and plenty of work to keep Wirt busy.<sup>46</sup> He rose in prominence as a criminal lawyer, but the need for frequent absences from his family made him restless,<sup>47</sup> so when he found an opportunity to return to Richmond in August 1806, he took it.<sup>48</sup> He turned his local practice over to Tazewell, with whom he would later spar at the Supreme Court.<sup>49</sup>

After his return to Richmond, two cases quickly launched him to a new height. First, he gained some notice for defending the suspected murderer of the venerable George Wythe,<sup>50</sup> despite his distaste for such

projects.<sup>51</sup> Much more significant publicity came when President Jefferson asked him to join the legal team that would prosecute Vice President Aaron Burr for treason. The trial in the spring and summer of 1807 was an extraordinary public spectacle. Richmond's population doubled virtually overnight.<sup>52</sup> "Young, handsome, imaginative, Wirt was the darling of Richmond society and the loiterers who crowded the courts of that city. His efforts as a writer, lawyer, and orator had earned him a local reputation and promised him a brilliant future."<sup>53</sup> After months of legal maneuvering, and the presentations of many other advocates, Wirt's four-hour argument on August 25 gripped the audience's imagination: "Wirt's speech failed to convince the Court, but it captivated the crowd. A New York newspaper compared it with the finest orations in history, and even the followers of Burr praised it."<sup>54</sup> However, Chief Justice Marshall, sitting as a trial judge, curtailed most of the prosecution's case, and Burr was acquitted.<sup>55</sup> Wirt was the "only member of the prosecution who increased his reputation during the trial," and having "joined the prosecution for the 'glory and the cash,' . . . the Burr case became his stepping stone to fame and fortune."<sup>56</sup>

With his identity as an advocate now established in papers across the country, Wirt found people suggesting he pursue various positions of public honor. But his own ambitions were different. A recurring theme in Wirt's letters is his longing for the life of the gentleman, the certainty of resources, and the opportunity to write:

In the course of ten years . . . I have reason to hope that I shall be worth near upon or quite one hundred thousand dollars in cash, besides having an elegant and well-furnished establishment in [Richmond]. I propose to vest twenty-five thousand dollars in the purchase, improvement and stocking of a farm somewhere on James River, in as healthy a county

as I can find, having also the advantage of fertility. There I will have my books, and with my family spend three seasons of the year—spring, summer and fall. Three months I shall devote to the improvement of my children, the amusement of my wife, and perhaps the endeavor to raise by my pen a monument to my name. The winter we will spend in Richmond.<sup>57</sup>

In part, he wanted to ensure that his children were provided for.<sup>58</sup> But equally, this vision flowed from his resistance to the invitation to public life.<sup>59</sup> Writing had already placed him the public eye, perhaps to a greater extent than his oratory, and he hoped to make something more of it. In the fall of 1803, while awaiting the birth of his first child,<sup>60</sup> he and a few friends had submitted a series of anonymous essays to the Richmond *Virginia Argus*. They became an instant success and were soon compiled and published as **The Letters of the British**

**Spy**.<sup>61</sup> Under the pretense of being a British visitor's observations of Virginia life, the vignettes described simple scenes and poked fun at public figures, a reinvention of the "familiar essay" style.<sup>62</sup> Wirt's "frolicksome & sprightly"<sup>63</sup> essays were somewhat unkind to certain prominent individuals, including Edmund Randolph and John Wickham, but neither man ultimately held it against him. Later efforts in a similar vein were less acclaimed, but still reasonably successful.<sup>64</sup> Wirt's most ambitious project, however, was becoming the first biographer of Patrick Henry. The eventual result, **Sketches of the Life and Character of Patrick Henry**, appeared in 1817, after having proven a much more difficult task than Wirt expected.<sup>65</sup> His choice to focus on the heroic aspects of the man generated criticism from its publication down through today.<sup>66</sup> And while such obstacles convinced Wirt to give up the idea of doing a series of biographies,<sup>67</sup> history has benefited from his effort to compile memories of Henry before they faded.<sup>68</sup>



Wirt rose to prominence as an attorney in Richmond, Virginia. Pictured is the home he built in 1815–16.

Wirt's Richmond years were repeatedly shaped by the prospect of war. The British boarding of the *Chesapeake*, an American ship near Norfolk in 1807, raised a public outcry.<sup>69</sup> War was briefly averted, only to return with full force in 1812. In the meantime, Wirt declined Jefferson's invitation to run for Congress, but then reluctantly served two terms in the Virginia House of Delegates.<sup>70</sup> When war returned, Wirt, who had previously been eager to join the military, declined a commission.<sup>71</sup> He did, however, serve in the Virginia militia, without seeing action. Continuing ordinary responsibilities in the face of the uncertainty was not easy:

You see, then, how well inclined I was, to have done my duty promptly towards you [by writing you a letter]; but . . . the necessity of my hurrying down to Richmond, where the Federal Court, and the Court of Appeals were sitting together,—the manner in which I have been kept under the lash, by the Court of Appeals, until about ten days ago,—the circumstance of my being in the nineteenth regiment, which has been called on duty and placed on the war establishment,—not having been discharged until last Saturday,—and the anxieties generated by the vicinity of the British; the uncertainty of their plans, and the defenceless condition of the State have, in succession, held me “in du-rance vile,” unharmonising me for that sweet correspondence with you which I so much enjoy, in peace and ease.<sup>72</sup>

When peace came it was a welcome relief, but the young nation had been scarred.<sup>73</sup>

In 1816, Wirt had his first opportunity to appear before the Supreme Court, after the disappointment of an 1815 case not working out.<sup>74</sup> However, he was “most dissatisfied” with his own performance.<sup>75</sup> His frank letter to a close friend describes the event:

Having once argued the cause here [in Richmond], to my satisfaction, I relied upon my notes for recalling every topic to my mind; and this the more especially, as the Court of Appeals held me under the lash to the very moment of my departure. But behold, when I was about to set out, my notes were nowhere to be found. My only hope then was that I should be able to recall the arguments by meditation in the stage; and I determined to be very sour, sulky, and silent to my fellow passengers, that I might abstract myself from them and have an opportunity of study; but this you know is not my nature—and so I reached Alexandria without one idea upon the subject.

My consolation then was that I should have one day in Washington before the cause came on,—and to effect this, I left Alexandria when the stage arrived, at about ten o'clock on Tuesday night, and went on to Washington that night. I got to McQueen's about eleven. . . . [However, a friend arrived and kept him in conversation until two o'clock in the morning.] Immediately after breakfast I retired to my room, borrowed the acts of Congress, on which my cause arose, and had just seated myself to study, when several of my warm-hearted friends rushed into my room and held me engaged 'till court hour. So it was again in the evening; and so, on Thursday morning. In this hopeless situation I went to court to try the tug of war with the renowned Pinkney. When I thought of my situation,—of the theatre on which I was now to appear for the first time,—the expectation which I was told was excited, and saw the assembled multitude of ladies and gentlemen from every quarter of the Union, you may guess my



feelings. Had I been prepared, how should I have gloried in that theatre, that concourse, and that adversary! ... [W]hat is mere brute resolution with a totally denuded intellect? I gave, indeed, some hits which produced a visible and animating effect; but my courage sank, and I suppose my manner fell under the conscious imbecility of my argument. I was comforted, however, by finding that Pinkney mended the matter very little, if at all.

Had the cause been to argue over again on the next day, I could have shivered him; for his discussion revived all my forgotten topics, and as I lay in my bed on the following morning, arguments poured themselves out before me as from a cornucopia. I should have wept at the consideration of what I had lost, if I had not prevented it by leaping out of bed and beginning to sing and dance like a maniac,—to the great diversion of F.,

who little suspected what was passing in my mind. ...

I must somehow or other contrive to get another cause in that court, that I may shew them I can do better. I should like to practice there. For although you say, you believe I do not know my own strength, you will change that opinion when I tell you I am not afraid of any man on that arena,—not even of the Chevalier Pinkney, whom I would at any time rather encounter than Tazewell. ...

As to myself, I know that I have no pretensions to oratory. My manner, never carefully formed, has become too unalterably fixed to be improved at my time of life. Besides, I have not the off-hand fertility of thought, the prompt fecundity of invention, and the extemporaneous bloom of imagination, which are all essential to the orator. But I say again that, with full preparation, I should not be afraid of a comparison with Pinkney, at any



Wirt argued his first case before the Supreme Court in 1816. He would go on to argue 170 cases in his lifetime. For most of that time the Court was lodged in the Capital building (pictured here in an ink drawing that dates to 1839).

point, before genuine judges of correct debate.<sup>76</sup>

The next Term he argued again and received greater consolation:

I have been to Washington, and I made a speech, sir, in the Supreme Court *four hours and a half long!* Does this not alarm you? And will you not be still more alarmed when you are told that the court-room was thronged—fifteen or twenty ladies [and] many members of Congress. . . .

But the subject was not to my taste. It was a prize case—an appeal from North Carolina—a mere question of fact, i.e., whether the captured ship and her cargo were neutral or hostile property. As counsel for the captured privateer, I was bound to contend that they were British; my adversaries on the contrary, . . . insisted they were Russian; and this issue of fact was to be decided by the analysis and synthesis of about five hundred dry, deranged ship documents, which were to be read and commented on.

You perceive the utter impossibility of clothing such a subject either with ornament or interest; and when you are further told, that there was not one principle of dubious law involved in the case, you will as readily see that there was no opportunity for the display of any cogency of argument. It was, therefore, a matter of surprise to me, that the ladies stuck to us till dinner time. . . .

You cannot conceive . . . what a rejuvenescence this change of theatre and audiences gives to a man's emulation. It makes me feel young again, and touches nerves that have been asleep ever since 1807.<sup>77</sup>

Wirt's eagerness to take more Supreme Court cases was dampened by the difficulty of making time for visits to

*Constant Freeman*, late a colonel in the army of the United States, is appointed, by the president and senate, to be accountant of the navy department, vice Thomas Turner, deceased.

*William Wirt* is appointed by the same authority, to be attorney of the United States for the district of Virginia, vice George Hay, resigned.

*Miles King* is appointed, by the same authority, to be navy agent at the port of Norfolk.

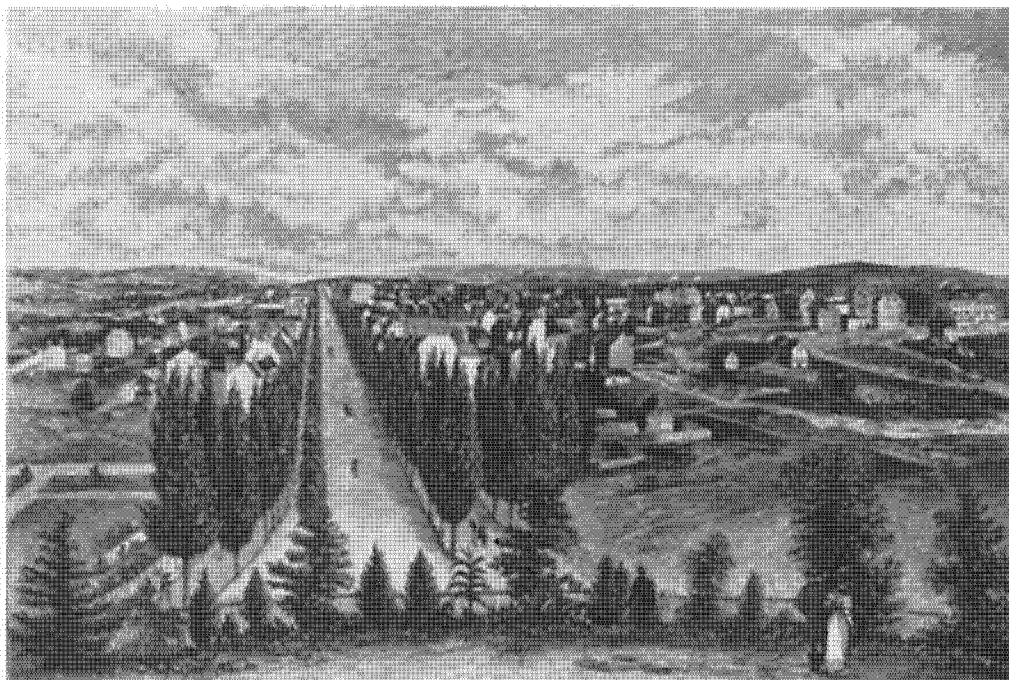
The *Supreme Court* of the United States, on Friday the 22d inst. adjourned, after a session of nearly seven weeks. Of the cases on the docket, 70 were finally disposed of, and ten continued on orders to adduce further proof. The records of no court of appeals in the United States exhibit such an instance of dispatch of business where the questions are so momentous.—*Nat. Int.*

In early 1816, Wirt wrote to President James Madison, recommending a young lawyer and former student for the post of U.S. district attorney for Virginia, only to discover that Madison had already decided to offer the post to Wirt. Wirt considered himself obliged to accept. Pictured is the announcement of his new post in *Niles' Weekly Register*.

Washington between his other court obligations. He had unexpectedly become the U.S. District Attorney for Virginia. In early 1816, Wirt had written to President Madison recommending a young lawyer and former student for the post,<sup>78</sup> only to discover that Madison had already decided to offer the post to Wirt. He considered himself obliged to accept.<sup>79</sup>

The situation changed dramatically when President Monroe asked Wirt to become his Attorney General. Having been considered for the position before, Wirt could not have found this an entire surprise.<sup>80</sup> But he remained uncertain about whether he could provide for his family in this context. Thus, before accepting the position, he "won assurances from President James Monroe that his duties would not interfere with the practice of law."<sup>81</sup> His concerns were voiced in this letter, written a couple months after his appointment:

Excuse all this levity, my dear [friend], for I am really laughing to keep myself from crying, as cowards whistle in the dark. Whether I shall find the practice of the law profitable here I do not know, as yet. The salary, you know, is very low, only three thousand dollars. There is



In addition to his duties as Attorney General, Wirt also maintained a lucrative private practice in the nation's capital. Pictured is the city of Washington in 1810, from a view down Pennsylvania Avenue, looking west from the Capitol.

a talk of raising it. I wish it may not end in talk. As to the other business in the Supreme Court, I have as yet only eight or ten causes; but I have a prospect of more in the course of the approaching court, and the fees are good.<sup>82</sup>

While it seems ludicrous now that the Attorney General of the United States would spend much of his time in private practice, that would remain the pattern until the pay was made commensurate with that of other Cabinet officers in 1853.<sup>83</sup>

When Wirt arrived in Washington, the position of Attorney General remained "an officer without an office, an administrator without a clerk, a legal adviser without control of the district attorneys, and a private lawyer with the Federal government as one of his clients."<sup>84</sup> By the end of his tenure, he had altered the position so substantially that he has been called "the first great Attorney General."<sup>85</sup> The first problem that faced him was the utter lack

of records from any of the previous occupants of the office.<sup>86</sup> With no knowledge of previous advice on constitutional and other legal matters, there was no means of consistency, not to mention the redundancy of investigating some of the same issues over again. Wirt convinced Congress to provide him with a minimal office and one staffer.<sup>87</sup> Even before that, he instituted a rudimentary records system to document each formal opinion he issued.<sup>88</sup> He once commented that if his opinions were ever published "they would do me more honour than anything else I have ever done."<sup>89</sup>

Another change was Wirt's insistence, "with some success," that his official opinions could only be requested by the President or the heads of departments, not by members of Congress.<sup>90</sup> While apparently motivated by an effort to curtail his workload, this position had textual support in the Judiciary Act of 1789, and the stance is credited with elevating the office from an ambiguous public servant to a full member of the President's Cabinet.<sup>91</sup>

Wirt's close reading of his responsibilities further led him to claim that the Judiciary Act "did not require him to argue government cases in the lower federal courts and state courts."<sup>92</sup> Following the pattern of his predecessors, he would only argue non-Supreme Court cases if the government paid him an additional fee.<sup>93</sup> When one of these cases took him to Baltimore,<sup>94</sup> it opened up a new world of litigation opportunity. Before, he had been precluded by Maryland's strict residency requirement, but once the state decided to admit him because of his office, he made use of the privilege in his personal capacity as well.<sup>95</sup>

With his small salary and much greater expenses,<sup>96</sup> Wirt put much effort into his private practice. This created inevitable tensions with his public responsibilities. He spent so much time away that he jokingly feared his absences would provoke a congressional investigation.<sup>97</sup> An actual investigation followed a complaint from one of his Supreme Court opponents accusing Wirt of using his position to influence the outcome of a case. The House Judiciary Committee decided against any wrongdoing, but at the very least, Wirt was close to the line of impropriety.<sup>98</sup>

The pace of Wirt's schedule during this time was grueling. "He was always a man of labour; occasionally of the most intense and unremitting labor."<sup>99</sup> It placed "extraordinary stress" on his family.<sup>100</sup> Burke describes his schedule:

Wirt's life had settled into a pattern by the early 1820s. He was overworked from September through most of July. The sessions of Congress and the term of the Supreme Court kept him occupied from December through April with writing opinions, cabinet meetings, and preparing and arguing cases before the Supreme Court. He could seldom be found in Washington except from January to March during the sessions of the Supreme Court. He devoted the rest of his year to his

private practice, primarily in Baltimore and Annapolis. In April he practiced before the Federal District court at Baltimore and in May before the Federal Circuit in that city. June and July found him at the summer session of the Maryland Court of Appeals at Annapolis. August was a holiday month [due to the sickly season in the Washington swamp]. . . . He spent September and part of October at the Fall term of the District Court at Baltimore and November at the Federal Circuit Court in that City. December was divided between the Maryland Court of Appeals and the Winter term of the Federal District Court at Baltimore.<sup>101</sup>

The Supreme Court Term was the worst. Wirt's friends spoke of his "annual supreme court sickness" and feared that it would be the death of him.<sup>102</sup> In one of his letters he described the extremity to which he pushed himself.

During the last Supreme Court I was very much engaged. I was forced to lose my wonted sleep, and had not a moment for exercise. The Court kept me constantly engaged till four o'clock: I had then to hasten home to dinner, and, immediately afterwards, to sit down to my papers till ten, eleven, and twelve at night—then up again at three or four in the morning, and with merely time enough to take breakfast, off, as rapidly as my carriage could drive me, to the Capitol, at eleven. This, I bore very well for six weeks—when I was required to decide a question of usage, in the department of State, in settling the accounts of foreign ministers, without any previous knowledge on the subject, and with no other guide than huge accounts, of which not one item in a hundred applied to the case. I always disliked accounts. It is a

dray-horse business, in which even the triumph of acuteness, in discovery has never compensated me for the nauseous labor of the research: it was a case, too which required a speedy answer—and this, after the exhaustion of past toils in court, and during the labor of others still pressing me. As I hate to say “I can’t,” even worse than I hate accounts, I determined to see it out; and, dispatching my wife and daughter to De Neuville’s, and the children to bed, I set into my task. . . .

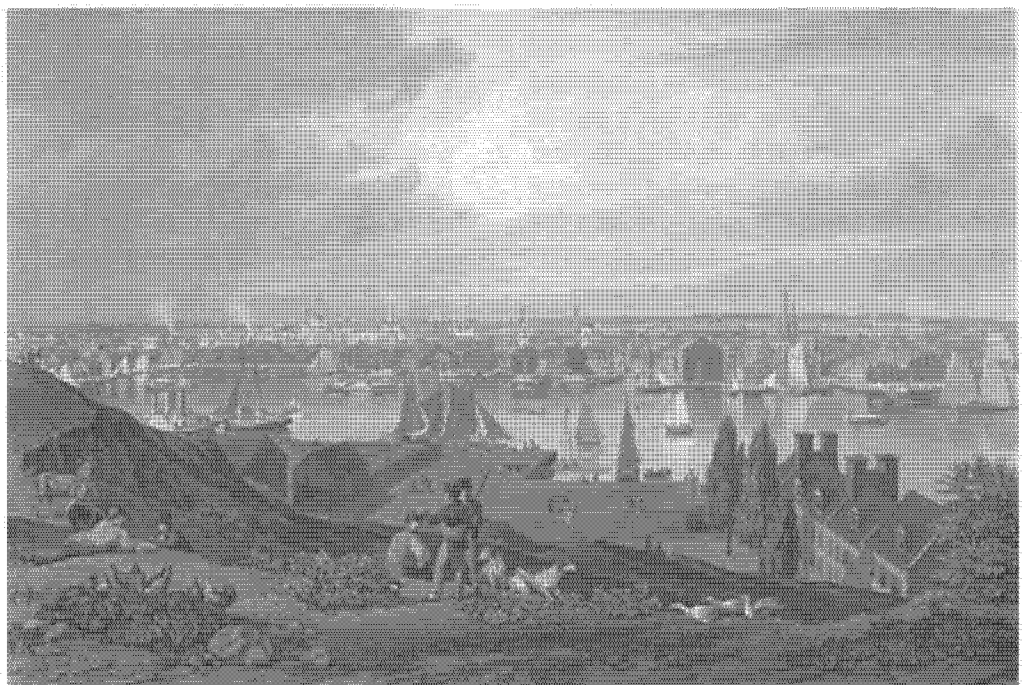
It was, while pursuing this, exhausted by past toils and want of sleep, that the symptoms of vertigo returned; not with half the violence I had before experienced—but enough so to require me to undress and go to bed. I did so, and sent for a physician, was bled, &c.<sup>103</sup>

The following Supreme Court Term he only argued one case, because his health had so weak-

ened under the strain.<sup>104</sup> But he recovered and continued a similar pace until 1834.

When Wirt resigned as Attorney General in 1829 after Andrew Jackson won the presidency, he moved to Baltimore and continued his legal practice. This was a natural step, since, during his Cabinet service, his Maryland practice had become “so large that he engaged a Baltimore lawyer as an associate, maintained an office in that city, and considered hiring a clerk to handle his affairs there.”<sup>105</sup>

Wirt’s political evolution is worth noting. His early career was shaped in large measure by Jeffersonian republicanism. His first wife’s family and his Richmond acquaintances had placed him very close to the leadership of that movement. However, time slowly changed him. Two individuals played key roles. John Marshall’s tireless logic of nationalism in precedent after precedent changed Wirt’s vision.<sup>106</sup> Although the two men had clashed at the Burr trial, Wirt never lost his respect for Marshall. “In this conversion of a rampant Jeffersonian to at least a mild variety of



Wirt resigned as Attorney General in 1829, when Andrew Jackson was elected President. He moved to Baltimore (pictured here), where he already had a thriving private practice.

Marshall-like federalism, reinforcement came from Wirt's wife Betsy Gamble and her family, devoted friends of John Marshall.<sup>107</sup> He was thus well positioned for the role he was given in 1826: delivering the congressional eulogy "after the strangely coincidental deaths of John Adams and Thomas Jefferson on July 4,"<sup>108</sup> remembering the two men who had come to symbolize these competing perspectives.<sup>109</sup> His ability to stand between the factions is evidenced in his letter to President Monroe, a Republican, recommending the appointment of James Kent, a renowned Federalist, to the Supreme Court.<sup>110</sup>

While Wirt may have been able to reconcile both of those viewpoints, he found another quite threatening: the populism of Andrew Jackson.<sup>111</sup> Wirt's career ended in two direct clashes with the flamboyant general-turned-President. First, contrary to all his previous protestation against elected office, Wirt accepted the Anti-Masonic party's invitation to be their nominee for President of the United States.<sup>112</sup> He apparently hoped this would provide an opportunity to unite the country against Jackson, but nothing of the sort occurred, and Wirt soon stopped making any pretense of campaigning.<sup>113</sup>

The second clash with Jackson came in the form of two Supreme Court arguments. They proved to be Wirt's last major cases: *Cherokee Nation v. Georgia*<sup>114</sup> and *Worcester v. Georgia*.<sup>115</sup> He had been asked to represent the Cherokee Indians against Georgia's efforts to displace them from their lands. Although the Supreme Court denied jurisdiction in the first case, it is considered one of Wirt's finest arguments. *Worcester* provided the Court with the opportunity to rule in favor of the Indians, but with Georgia's recalcitrance and Jackson's lack of interest, the Court's gesture proved merely symbolic, and the Trail of Tears ensued. Wirt's summation was so powerful that Chief Justice Marshall had tears in his eyes.<sup>116</sup>

Wirt's death came rather suddenly. He suffered a serious blow when his youngest daughter,

Agnes, died in January 1831 at the age of sixteen.<sup>117</sup> After that, he wrote, "I have no taste now for worldly business. I go to it reluctantly. I would keep company only with my Saviour and his holy book. I dread the world—the strife and contention and emulation of the bar—yet I will do my duty—this is part of my religion."<sup>118</sup> He carried on until early in the Supreme Court's 1834 Term. On February 9, having been in Washington for a couple of weeks, he took ill while walking the mile from his boarding house to the Capitol for Sunday services.<sup>119</sup> His health deteriorated rapidly despite medical attention, and a week later, with his family gathered round him, he faded away on the morning of February 18, 1834.<sup>120</sup> Upon receiving word, the Supreme Court adjourned, and the members of the bar gathered in the Courtroom, where Daniel Webster spoke briefly in honor of Wirt.<sup>121</sup> They formed a committee to oversee his funeral, selecting Samuel Southard to speak and requesting burial in Congressional Cemetery. At the opening of the Supreme Court session the next day, Chief Justice Marshall spoke briefly about Wirt's passing:

I am sure I utter the sentiment of all my brethren when I say we participate sincerely in the feelings expressed from the Bar. We, too, gentlemen, have sustained a loss it will be difficult, if not impossible to repair. In performing the arduous duties assigned to us, we have long been aided by the diligent research and lucid reasoning of him whose loss we unite with you in deploring. We too, gentlemen, in common with you, have lost the estimable friend in the powerful advocate.<sup>122</sup>

On February 20, both houses of Congress adjourned for the funeral, which was widely attended.<sup>123</sup> Southard's eulogy was later printed.<sup>124</sup> Today, the Wirt Vault marks Wirt's burial spot in Congressional Cemetery.<sup>125</sup>



*My*  
*dearest*

*My dearest father*

*Attorney General of the United*  
*States.*

*Baltimore*

Wirt's daughter, Agnes, died suddenly in 1831 at the age of sixteen, leaving him devastated. Above is a letter addressed in her handwriting.

## II. Significant Cases

Intriguing as the story of Wirt's personal life is, the cases he litigated may be even more so. They involve many of the same cast of characters, more national and local politics, and legal uncertainty. From portentous constitutional litigation to public trials, Wirt participated in almost every significant case of his day. He did little to shape the law ideologically, but his diligence aided both courts and litigants in the quest for justice.<sup>126</sup> The cases set out briefly in this section have often been considered worthy of their own lengthy treatments; they thus receive less than their due here.

### Trial of James Callender (1800)

Callender, a vicious pamphleteer, was brought to trial under the Alien and Sedition acts for an attack on the Adams administration. Wirt, then twenty-eight years old, joined George Hay in defending him. The presiding judge, Samuel Chase, repeatedly interrupted the lawyers and made them objects of mirth.<sup>127</sup> He ordered Wirt to sit down,<sup>128</sup> and later spoke derisively of "the young gentleman," leading to Wirt's withdrawal from the case in protest.<sup>129</sup> Hay also withdrew, and Callender was summar-

ily convicted. Jefferson pardoned him soon after taking office. The significance of the case came from the fact that its proceedings were widely published and excited public indignation against the judiciary.<sup>130</sup> It was used as a prime example during Chase's failed impeachment trial.<sup>131</sup>

### George Wythe Murder Trial (1806)

George Wythe, a venerable Virginian and signer of the Declaration of Independence, died under suspicious circumstances at eighty years of age. His teenage grandson, George Wythe Swinney, was suspected of hastening his demise by putting arsenic in his coffee. Wirt joined Edmund Randolph in defending Swinney. Although "[v]ery little accurate information survives on the murder trial,"<sup>132</sup> it is clear that it took place on September 1, 1806, and that it depended largely on circumstantial evidence and conflicting doctors' reports. The cook who alleged that Swinney placed something in the coffee pot was apparently prevented from testifying by a "statute limiting the admissibility of a black's testimony against a white defendant."<sup>133</sup> In consequence, after a day of "able and eloquent discussion, the jury retired, and in a few minutes, brought in a

verdict of not guilty."<sup>134</sup> Wirt's "eloquent and ingenious speech"<sup>135</sup> increased his standing in Richmond, making way for his next big case.

#### **Trial of Aaron Burr (1807)**

This case was high drama for the young republic. Jefferson's vice president and rival, Aaron Burr, had lost popularity when he killed Alexander Hamilton in a duel. He traveled to the frontier and began preparing for an expedition, the details of which are still uncertain. "[H]e arranged, but did not attend, the gathering of a small force of armed men on Blennerhassett's Island in the Ohio River."<sup>136</sup> One of his conspirators wrote letters to Jefferson, who had Burr arrested for treason. Burr was brought to Richmond to stand trial before Chief Justice Marshall, sitting as the judge of the U.S. Circuit Court for Virginia. Jefferson organized the prosecution himself and asked Wirt to participate. Already presumed guilty by the public, Burr hired the best lawyers in the region. "Arguing a case against Randolph, Wickham, Burr, Botts, Baker, Lee, and Martin should have frightened a lawyer of greater experience than Wirt, especially one with [inferior] colleagues like Hay and MacRae."<sup>137</sup> The case and related matters dragged on for months, beginning on March 30 and not ending until October 20.<sup>138</sup> The central conflict in the case soon became Marshall's unwillingness to admit the prosecution's key evidence.<sup>139</sup> Jefferson was furious and considered it potential grounds for Marshall's impeachment.<sup>140</sup> Despite the prosecution's best efforts, including a four-hour speech by Wirt that won substantial public favor,<sup>141</sup> Marshall was immovable, and the jury was forced to acquit Burr for lack of evidence. Although Wirt lost the case, he had become a nationally recognized attorney.

#### ***Trustees of Dartmouth College v. Woodward* (1818–1819)**

Wirt's first Supreme Court case with lasting significance was not one of his better appear-

ances. It came during his first term as Attorney General, and he had many other matters before the Court, not to mention his new duties as a Cabinet member.<sup>142</sup> One could even say that he was unprepared.<sup>143</sup> The underlying controversy arose when New Hampshire's legislature passed a law changing Dartmouth College's name to Dartmouth University, increasing the number of trustees, and giving state officials review authority over the school.<sup>144</sup> The College resisted, claiming that this was a violation of its initial royal charter and thus a violation of the Contract Clause of the Constitution. The state supreme court ruled unanimously against it. The College then retained Daniel Webster, one of their alumni, who was already recognized as a skilled practitioner. Expecting an easy win, the University officials failed to submit detailed facts to Wirt, leaving him little basis for argument.<sup>145</sup> The Supreme Court heard argument in March 1818 but held the case over until the next Term.<sup>146</sup> On February 2, 1819, when the lawyers appeared for re-argument, Marshall read an opinion reversing the state judgment and situating the Contract Clause as an important restraint on state action.<sup>147</sup> Wirt received positive press for his efforts, but he had reason to be unsatisfied. "Lacking preparation, he relied on oratory. The speech came off well enough to the unpracticed ear of the layman but poorly to the trained lawyer."<sup>148</sup> Webster commented graciously on Wirt's efforts:

It is the universal opinion in this quarter, amongst all who have inquired or heard about the cause, that that argument was a full, able, and most eloquent exposition of the rights of the defendant. I will add that, in my opinion, no future discussion of the questions involved in the cause, either at the bar or on the bench, will bring forth, on the part of the defendant, any important idea which was not argued, expanded, and pressed in the argument alluded to.<sup>149</sup>

United States  
 v.  
 Aaron Burr  
 Indictment  
 for  
 Treason  
 a true bill  
 John Randolph  
 We of the Jury find that  
 Aaron Burr is <sup>proven</sup> not guilty  
 under this Indictment  
 by any evidence submitted  
 to us and we therefore  
 find him not guilty  
 E. Livingston  
 foreman  
 1807

Although Wirt's team lost the Aaron Burr trial, his performance for the defense brought him a national reputation. At left is the Burr trial verdict sheet (1807), which the jury carefully worded to highlight that it was the exclusion of evidence that tied their hands. It reads, "We of the jury find that Aaron Burr is not found to be guilty under this indictment under any evidence submitted to us."

Nevertheless, "[f]or the rest of his life, [Wirt] struggled against a reputation as a declaimer rather than a reasoner at the bar."<sup>150</sup>

### *McCulloch v. Maryland* (1819)

The next major case, argued only a few weeks after *Dartmouth College* was decided, was anticipated to be the most important case of the Term. This is evident from the lawyers retained by both sides. Webster joined Wirt this time, along with the "legendary Pinkney," all in support of the Bank of the United States. On the other side, Luther Martin, Joseph Hopkinson, and Walter Jones represented Maryland in its effort to tax Congress's creation.<sup>151</sup> It appears that Wirt represented both the United States and the Bank, because the latter ultimately paid him a handsome fee.<sup>152</sup> The Bank was already an object of public ire due to its mismanagement and fraud, and its dramatic contraction of credit impacted many, including Wirt.<sup>153</sup>

The arguments before the Court focused on the meaning of the Necessary and Proper Clause, since no provision directly granted

Congress the power to create the Bank.<sup>154</sup> Additionally, Wirt—following Webster's line of reasoning—argued that the power to tax included the power to destroy.<sup>155</sup> The lawyers on the other side presented strong reasons to leave power with the states.<sup>156</sup> But Pinkney's three-day speech "has become a legal legend."<sup>157</sup> Much of its language was incorporated into Marshall's opinion, which was delivered only three days after Pinkney finished. The Court's ruling established more firmly than any prior ruling that Congress had wide federal power at its disposal.

### *Cohens v. Virginia* (1821)

By implication, extensive federal legislative authority meant limitations on the states. In 1821, Virginia came to the Court in what it believed to be an infraction of state sovereignty. Cohens was convicted for selling lottery tickets in Virginia, contrary to state law. He had defended on the ground that the tickets were authorized by Congress in the District of Columbia. His appeal to the Supreme Court

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**SUPREME COURT.**—Feb. 23. Mr Hopkinson concluded his argument, which he commenced on the 22d inst. in defence of the State right to tax the United States Bank. Mr Wirt, it is understood, will address the Court to day, on the other side of the question.

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Wirt argued *McCulloch v. Maryland*, along with Daniel Webster and William Pinkney, in support of the Bank of the United States. On the opposing side, Luther Martin, Joseph Hopkinson, and Walter Jones represented Maryland in its effort to tax Congress's creation. Above is the announcement of the oral argument in *City of Washington Gazette*, February 24, 1819.



raised the issue of whether the Court could intervene in a state criminal proceeding. With great indignation, the Virginia legislature ordered its attorneys to argue only the absence of jurisdiction and nothing more.<sup>158</sup> Marshall's

opinion firmly rejected Virginia's claims: The Court's jurisdiction extended over every federal question. Because Virginia had refused to argue the merits, the Court asked for further argument, which Webster supplied because he



## City of Washington Gazette.

"Where there is no National Education, there can be no durable Legislation."—*Saint Pierre.*

MONDAY FEBRUARY 5, 1821.

### SENATORS in CONGRESS from ILLINOIS.

A resolution has been introduced into the House of Representatives of the General Assembly of the state of Illinois, requesting their Senators in Congress, Messrs. Edwards and Thomas, to resign their seats, in consequence of their votes at the last session against the restriction of slavery in Missouri, and, at the present, for her admission, with the objectionable clause, which has been so much contested. The Resolutions had not been acted upon at our latest dates from that state.

### UNITED STATES SUPREME COURT.

This being the day appointed for the commencement of the February term of the U. S. Supreme Court, two judges only appearing on the bench, the court adjourned until to morrow.

This announcement notes that the beginning of the Supreme Court Term was delayed a day in 1821 because two Justices were absent. Travel conditions and illness often made it difficult for Justices to attend sessions.

had been retained by New York in a similar case.<sup>159</sup> Wirt and Ogden countered on behalf of Cohens. The Court ruled that it did not have to decide the reach of congressional power because there was no reason to conclude Congress had intended to act so broadly with the lottery statute, a maneuver that helped preserve the Court's authority against Virginia's outrage.<sup>160</sup>

### *Gibbons v. Ogden (1824)*

When this case arose the scope of the Commerce Clause had never been addressed. The Livingston-Fulton steamboat monopoly had been in place for twenty-four years.<sup>161</sup> New York was reported to be in an uproar over the conflict. The advocates in the case would make some of the best presentations in the history of the Court. Wirt was by this point fifty-two years old and "at the height of his fame as an orator and a lawyer."<sup>162</sup> His own description of his fellow attorneys is colorful:

Tomorrow week will come on the great steamboat question from New York. . . . Come on and hear it. Emmet's whole soul is in the case and he will stretch all his powers. Oakley is said to be one of the first logicians of the age, . . . and Webster is as ambitious as Caesar. He will not be outdone by any man, if it is within the compass of his power to avoid it. It will be a combat worth witnessing.<sup>163</sup>

Webster argued for two and a half hours, focusing on the dormant Commerce Clause and only briefly addressing preemption.<sup>164</sup> Ogden's lawyers then spent almost three days presenting their case.<sup>165</sup> Oakley countered by arguing for concurrent jurisdiction, analogizing to the patent power, also addressing preemption as an afterthought.<sup>166</sup> Emmet focused on the federal coasting license, concluding with a long treatment of the dormant patent power.<sup>167</sup> After Emmet had finished, Wirt "rose at two o'clock on Saturday, Feb. 7 to un-

ravel the arguments of his opponents."<sup>168</sup> He spoke for two hours, followed by four more on the following Monday. His most notable point was an "analytical compromise."<sup>169</sup> His argument earned high praise:

His presence is peculiarly imposing and all his manners graceful. . . . His voice is powerful, his tones harmonious and his enunciations clear and distinct. He never speaks without evincing ardor and feeling, and his fluency is peculiar and never interrupted. . . . His arguments are constantly enlivened by classical allusion and flashes of wit. Many a dry cause, calculated to fatigue and weary, is thus rendered interesting to the spectator as well as to the Court.<sup>170</sup>

The finest effort of human genius ever exhibited in a Court of justice . . . powerful and splendid effusion, grand, tender, picturesque, and pathetic. The manner was lofty and touching, and the fall of his voice toward the conclusion was truly thrilling and affecting, and I never witnessed such an effect from any burst of eloquence; every face was filled with fine transport and prophetic fury of the orator, and all united in applauding the peroration, as affording from matter, diction, manner, and happy application and striking effect the most powerful display of real oratory they ever witnessed.<sup>171</sup>

While little of Wirt's argument found direct application in Marshall's opinion,<sup>172</sup> undoubtedly one reason for the public praise was Wirt's artful reversal of his opponent's classical allusion.<sup>173</sup>

### *The Antelope (1827)*

This case brought the African slave trade into the Court for the first time. A slave ship flying the Venezuelan flag was captured by a



revenue cutter near the coast of the United States. The question before the Court concerned what to do with the 281 Africans found on board, who were claimed by Spanish and Portuguese slavers. Francis Scott Key and Wirt argued on behalf of the United States that it was a conflict between "a claim to freedom [and] a claim to property."<sup>174</sup> John Berrien represented Spain and Charles Ingersoll, Portugal. The case was argued for five days and "attracted overflow audiences each day."<sup>175</sup> Wirt argued an almost abolitionist approach, asserting that the slave trade violated international law and thus "[b]y the law applicable to this case, these persons are free; they cannot, therefore, be considered as merchandise or effects within the treaty."<sup>176</sup> Marshall ruled that the slave trade was contrary to nature, but that, however noxious, it could be upheld by positive law.<sup>177</sup> The Spanish slaves were returned, but the ostensible Portuguese slaves were repatriated because there was no evidence that they were actually anyone's property.<sup>178</sup> In the North, it was declared that "Wirt's argument [is] worthy of all praise; his talents are an honor not only to the profession of which he is a member, but to our country and to its executive."<sup>179</sup>

#### *New Jersey v. New York (1830-32)*

The boundary dispute between the two states stemmed from an ambiguity in the colonial charters that left both states claiming Staten Island.<sup>180</sup> New York occupied the disputed territory and treated the surrounding waterways as its own.<sup>181</sup> When negotiations over the boundary went nowhere, New Jersey came to the Supreme Court, and the state attorney general, Samuel Southard, asked Wirt to lead the case.<sup>182</sup> When New York refused to appear and denied the Court's jurisdiction, Marshall issued a subpoena.<sup>183</sup> When New York refused to appear the next year, Marshall granted Wirt's request for an ex parte proceeding.<sup>184</sup> However, a confluence of pressures seems to have changed Marshall's course.

By the time the case came to be argued in 1832, Georgia was declaring its disregard for *Worcester* and Jackson was responding to South Carolina's nullification efforts. Marshall postponed the case to 1833.<sup>185</sup> When an opportunity for settlement occurred a few months later, Wirt wrote Southard a long confidential letter advising New Jersey to take what they could get because "every probability is in favor of a state's rights chief justice, ere long."<sup>186</sup> The suit was suspended, and a settlement was reached in the summer of 1833.

#### *Willson v. Black-Bird Creek Marsh Co. (1829)*

Continuing the development of Commerce Clause jurisprudence, the Court examined a Delaware statute authorizing a dam to be built across a navigable creek. A sloop with a license similar to the one in *Gibbons* claimed that the dam "unconstitutionally impeded" the use of the federal license.<sup>187</sup> Wirt argued that the issue was properly one of state police powers, rather than of interfering with the navigable waterways of the United States. He described the creek as "one of those sluggish reptile streams, that do not run but creep, and which, wherever it possess, spreads its venom, and destroys the health of all those who inhabit its marshes."<sup>188</sup> Marshall's acceptance of the distinction from *Gibbons* is seen as an indication that the national power perspective was changing; and indeed, the Taney Court later used this case to revive a theory of concurrent powers.<sup>189</sup>

#### *Trial of James Peck (1831)*

This was very different from the constitutional law cases previously described. Judge James H. Peck was impeached by the House of Representatives for the "high misdemeanor" of holding a lawyer in contempt for ridiculing the judge's adverse opinion in a newspaper.<sup>190</sup> After the lawyer received twenty-four hours in jail and an eighteen-month suspension, he brought his case to Congress. Wirt,

together with Jonathan Meredith, defended Peck at his trial before the Senate, which lasted from December 20, 1830 to January 31, 1831. While public sentiment was largely against his client initially, Wirt's efforts resulted in a 22-21 vote against conviction.<sup>191</sup> In the process, Wirt's speeches "contained a full discussion of the liberty of the press in America, and the rights of judges to maintain the dignity of their office by punishing contempts of their authority."<sup>192</sup>

### *Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832)*

These suits arose because Georgia refused to tolerate a separate nation with a distinct constitution within its own borders. The passage of the Indian Removal Act at Jackson's insistence, authorizing the President to exchange western land for the Indians' land previously secured by treaty, caused the Cherokee to retain Wirt and seek to bring a case to the Court.<sup>193</sup> Doubting whether he should take the case, Wirt sought advice from various advisers before accepting:

The suit seemed likely to produce the very controversies he had tried so hard to avert as Attorney General: a political conflict with the President, a dispute with Georgia over states' rights, and a clash between the President and the Supreme Court. Only his faith in the men who recommended the suit and his belief in the justice of the Cherokee cause led him to accept, though possibly the opportunity to embarrass Jackson contributed to this decision.<sup>194</sup>

After Georgia prosecuted a Cherokee for murder, Wirt brought suit, arguing for the Cherokee's original jurisdiction before the Court as a foreign nation. Before the case came to argument, Wirt fought an aggressive publicity campaign, submitting open letters to the Governor and publishing a legal opinion in the newspapers.<sup>195</sup> Georgia, however, refused to appear, claiming the Court had no

jurisdiction—which is exactly what the Court grudgingly decided.<sup>196</sup> Wirt's argument was powerful, nonetheless.<sup>197</sup>

A second opportunity came the next year, when a missionary from Vermont was arrested for violating Georgia law regarding the Cherokee. Being a U.S. citizen, he ensured jurisdiction. The case came before the Court with the same dangers of the previous one: President Jackson could not be relied upon to enforce any decision, so the Court would risk its own stature. Wirt and John Sergeant presented their case boldly, drawing a significant crowd and attracting so many congressmen from the floor that Congress had to adjourn its sessions for the day.<sup>198</sup> Wirt closed the presentation:

Sergeant's argument was equally creditable to the soundness of his head and the goodness of his heart. The belief was, when he had resumed his seat, that he had left little or no ground for Mr. Wirt to occupy. Were I to judge from Mr. Wirt's speech today, I should say that the subject is inexhaustible. He spoke until after three o'clock, and was obliged, from fatigue, to ask the Court to adjourn.<sup>199</sup>

Wirt's conclusion was so evocative that Chief Justice Marshall himself shed tears.<sup>200</sup> The Court's opinion confirmed all that Wirt had looked for. But Georgia refused to free the missionaries.<sup>201</sup> Only when the plaintiffs agreed to cease legal action against Georgia were they released. Many of the Cherokees' friends concluded that there was no alternative but westward migration. Thus, the Trail of Tears became a sordid part of American history.<sup>202</sup>

### III. The Supreme Court during Wirt's Career

When one thinks of the Supreme Court, the inevitable picture is of the marble palace on First Street across from the Capitol, and of nine robed figures firing questions at the

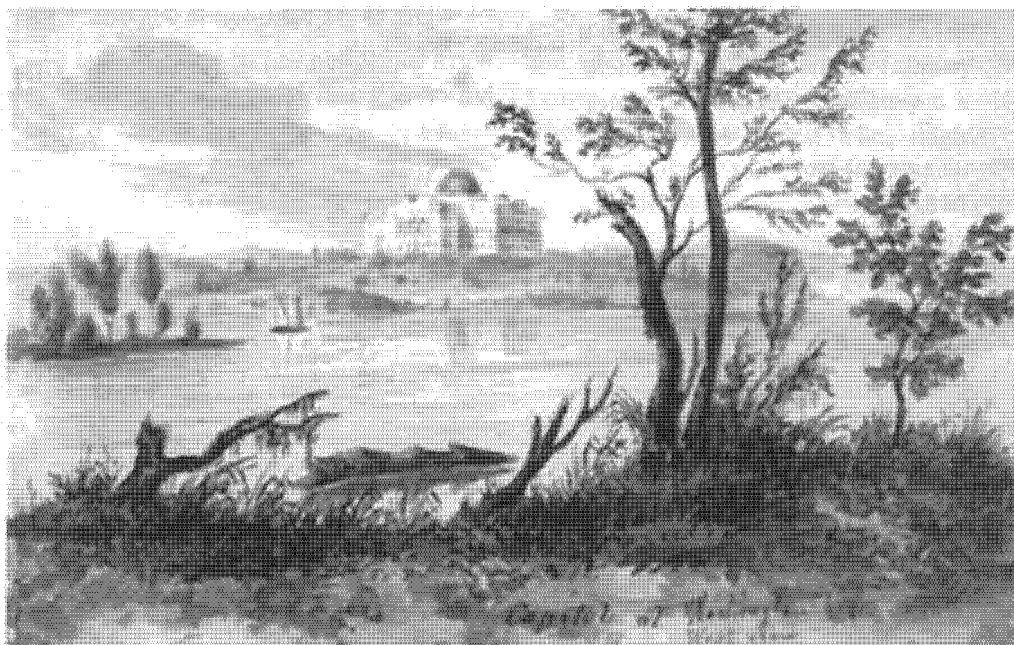
attorneys, all situated in the midst of a grand city known as one of the power centers of the world. While a moment's reflection makes clear that such mental pictures are misplaced, it is more difficult to identify the images with which to replace them.

The District of Columbia in Wirt's day was far different. While Alexandria and Georgetown had been established for some time, Washington was in the early stages of its evolution. Terrible roads isolated it from nearby towns, a swamp separated Capitol Hill from the White House, and the population was rather small.<sup>203</sup> Early nineteenth-century visitors who spoke well of cities such as New York, Boston, and Baltimore had few compliments for Washington. A British visitor in February 1831 describes his arrival in the city:

I was looking from the window of the coach . . . at fields covered with snow, when one of my fellow-passengers enquired how I liked Washington. "I will tell you when I see it," was my reply. "Why, you have been in Washington for the last quarter-of-an-

hour," rejoined my fellow-traveller. And so it was; yet nothing could I discern but a miserable cottage or two occasionally skirting the road at wide intervals. Presently, however, we came on the Capitol, and winding round the eminence on which it stands, rattled gaily down Pennsylvania Avenue, the principal street of the city. Houses now began to appear at somewhat closer distances, and every here and there was what is called in the vernacular of the country "a block of building," or, in other words, a connected range of shops and dwelling-houses. The coach at length stopped at Gadsby's hotel, where—though with some difficulty—I succeeded in procuring apartments.<sup>204</sup>

He goes on to explain that "[t]here are few families that make Washington their permanent residence, and the city, therefore, has rather the aspect of a watering-place [for horses] than the metropolis of a great nation. The members of Congress generally



Washington, D.C. was not a desirable place to live during Wirt's tenure as Attorney General. It was still swampy and underdeveloped.



The Justices stayed in boardinghouses such as this one when they came to town for the Supreme Court's brief Term.

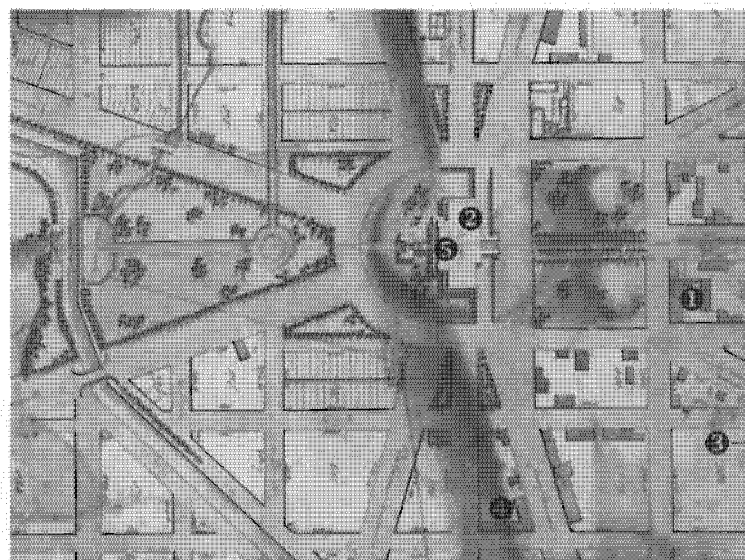
live together in small boardinghouses, which, from all I saw of them, are shabby and uncomfortable."<sup>205</sup> The Justices of the Court adopted the same practice, sharing a boardinghouse for their brief annual stay in the city.<sup>206</sup> Both the limited number of cases and the nature of the city led the Justices to hold court for only six to eight weeks each year. Until 1827, they met from the first Monday in February until the second or third week in March. From 1827 until 1835, they began earlier, commencing the second Monday in January.<sup>207</sup> The rest of the year they lived in their home cities, at least when they were not occupied with the arduous responsibility of riding through the countryside to staff their respective circuit courts.<sup>208</sup>

When Wirt appeared for his first Supreme Court case in 1816, the Court's official space at the Capitol had not yet been restored.<sup>209</sup> After meeting for the 1815 Term "in a large double house"<sup>210</sup> described as "uncomfortable and unfit for the purposes for which it was used,"<sup>211</sup> the Court had moved to a location on New Jersey Avenue, a "four-story brick dwelling,"<sup>212</sup> which would become Bell Tavern the following year.<sup>213</sup> When Wirt returned for his second case in 1817, the Justices had returned to the Capitol to "a room temporarily filled up

for this occupation,"<sup>214</sup> which was "little better than a dungeon."<sup>215</sup> Here Wirt argued four cases on behalf of the United States during his first year as Attorney General. Before the beginning of the 1819 Term, the Court returned to its basement chamber, which it would occupy until moving into the Old Senate Chamber in 1860.<sup>216</sup> Anyone visiting the Capitol today can see this chamber restored to resemble its appearance around 1860,<sup>217</sup> much the same as in Wirt's day. In the depreciative view of a British visitor in 1831:

It is by no means a large or handsome apartment; and the lowness of the ceiling, and the circumstance of its being under ground, give it a certain cellar-like aspect, which is not pleasant. This is perhaps unfortunate, because it tends to create in the spectator the impression of justice being done in a corner; and, that while the business of legislation is carried on with all the pride, pomp, and circumstance of glorious debate, in halls adorned with all the skill of the architect, the administration of men's





This figure shows relevant locations of the Supreme Court during Wirt's legal career: 1) Long's Tavern (1809) 2) Basement Courtroom at Capitol (1810-1814, 1819-1860) 3) Caldwell's House (1815) 4) Bell's Tavern (1816) 5) Temporary Room at Capitol (1817-1818).

rights is considered an affair of secondary importance.<sup>218</sup>

Charles Ingersoll, who himself frequently argued before the Court, described the scene somewhat more positively soon after the courtroom's construction in 1810:

Under the senate chamber is the hall of justice, the ceiling of which is not unfancifully formed by the arches that support the former. The judges, in their robes of solemn black, are raised on seats of grave mahogany; and below them is the bar, surrounded by a Doric colonnade, somewhat elevated above the bar, and behind that an arcade, still higher, so contrived as to afford auditors double rows of terrace seats, thrown in segments round the transverse arch, under which the judges sit.<sup>219</sup>

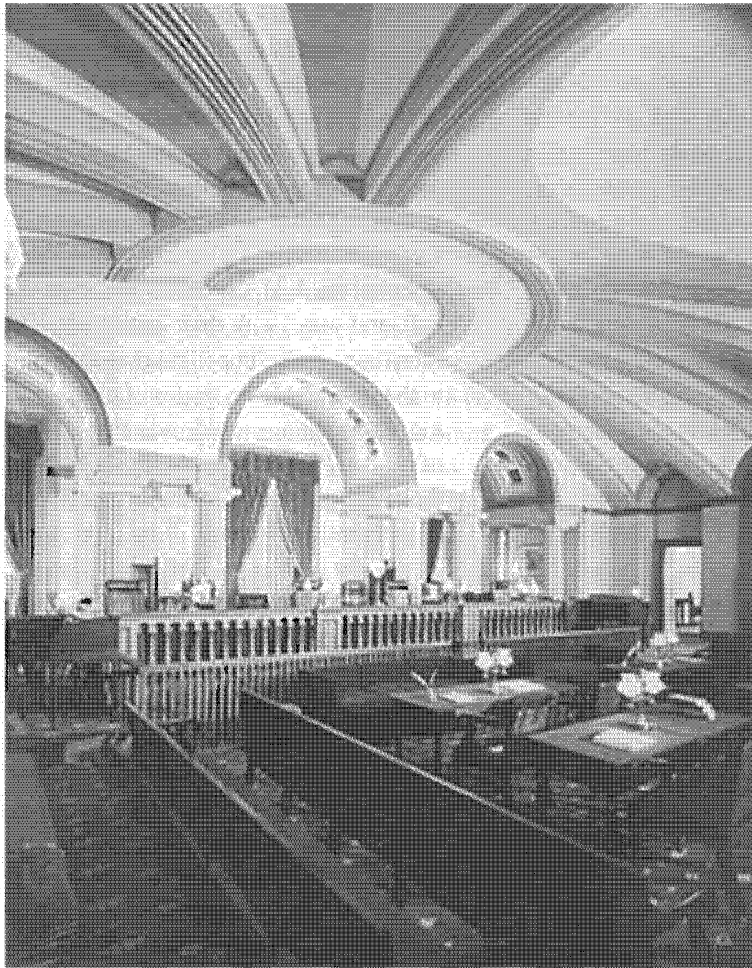
The size of the room provided certain challenges. According to one newspaper, "the Judges are compelled to put on their robes in the presence of the spectators, which is an awkward ceremony, and destroys the effect intended to be produced by assuming the gown."<sup>220</sup> When cases such as *Gibbons v. Og-*

*den* aroused great public interest, the chamber quickly proved too small:

[I]n size it is wholly insufficient for the accommodation of the Bar, and the spectators who wish to attend. Many of the members [of Congress] were obliged to leave their seats to make room for the ladies, some of whom were sworn in, and with much difficulty found places within the Bar.<sup>221</sup>

The arrival of the Court each year marked the beginning of Washington's social calendar.<sup>222</sup> The Justices received so many invitations that, Charles Ingersoll attests, they began "a day's session . . . after robing & taking their places, by receiving from the Marshal their cards of invitation and taking up their pens to answer them before the list of cases [was] called for hearing."<sup>223</sup> There was little of the formal distance now expected between the advocates and the Justices, or between the Justices and members of the political branches. John Quincy Adams, while Secretary of State, wrote:

We had the Judiciary company to dine with us, this day. Chief Justice



Society ladies flocked to hear oral arguments at the Supreme Court. The room set aside for arguments in the Capitol building was cramped, however, and there was often not enough space to accommodate all the spectators at high-profile cases.

Marshall, the Judges Johnson, Story, and Todd, the Attorney-General Wirt, and late District Attorney Walter Jones; also Messrs. Harper, Hopkinson, D.B. Ogden, J. Sergeant, Webster, Wheaton, and Winder, all counselors of the Court. . . . We had a very pleasant and convivial party, and I had occasion to repeat a remark made in former years, that there is more social ease and enjoyment in these companies, when all the guests are familiarly acquainted with one another, than at our usual dinners during the session of Congress, when we have from fifteen to twenty members assembled from various parts of

the Union, and scarcely acquainted together.<sup>224</sup>

Thus, it was not unheard of for a Justice to comment on the likely result of a case that could come back before the Court,<sup>225</sup> or for a judge to have social interaction with the lawyers during the weekend interlude of a trial.<sup>226</sup>

Arguments at the Court were themselves objects of curiosity, even social occasions. After his first argument, Wirt described the scene to a friend, noting the presence of an "assembled multitude of ladies and gentlemen from every quarter of the Union."<sup>227</sup> His opposing attorney that day was also acutely aware of the audience, for Wirt describes in a letter how Pinkney "[got] into his tragical

tone in discussing the construction of an act of Congress" and "[c]losing his speech in this solemn tone, he took his seat, saying to me, with a smile—'that will do for the ladies.'"<sup>228</sup> Justice Joseph Story noted in an earlier letter that "scarcely a day passes in the Court, in which parties of ladies do not occasionally come in and hear, for a while, the argument of learned counsel. On two occasions, our room has been crowded with ladies to hear Mr. Pinkney, the present Attorney-General."<sup>229</sup>

Why did the Court attract such interest? America in the nineteenth century placed a great premium on skilled oral presentation.<sup>230</sup> Many of its public figures are remembered as some of the greatest orators in the history of the United States. As excerpts from Wirt's presentations illustrate,<sup>231</sup> the style of the era involved grand rhetoric and classical allusion.<sup>232</sup> Unlike today, the lawyers who appeared before the Court were widely recognized outside the legal field. Many of them were simultaneously Senators, Congressmen, or prominent individuals in their own states.<sup>233</sup> The emphasis on oratory led to a very different pattern for oral argument:

The Courts sits from eleven o'clock in the morning until four in the afternoon. It is not only one of the most dignified and enlightened tribunals in the world, but one of the most patient. Counsel are heard in silence for hours, without being stopped or interrupted. If a man talks nonsense, he is soon graduated and passes for what he is worth. If he talks to the point, he will be properly measured, and his talents, discrimination, and industry reflected in the opinion of the Court. The Judges of the Court say nothing, but when they are fatigued and worried by a long and pointless argument, displaying a want of logic, a want of acuteness, and a destitution of authorities, their feelings and

wishes are sufficiently manifested by their countenances.<sup>234</sup>

Ingersoll provides an interesting vignette: When I went into the court of justice yesterday, one side of the fine forensic colonnade was occupied by a party of ladies, who, after loitering some time in the gallery of the representatives, had sauntered into this hall, and were, with their attendants, sacrificing some impatient moments to the inscrutable mysteries of pleading. On the opposite side was a group of Indians, who are here on a visit to the president, (papa of the savages,) in their native costume. . . .

In the center of the peristyle, stood a superannuated officer of the American revolution, who passes his few remaining winters in Washington, vainly petitioning congress for "that which should accompany old age;" his habit of the "olden time," edged with tarnished lace; his hair as white as snow; his face furrowed, but full of dignity, resting with one hand on a cane, and with the other supporting himself against a column.

Before this audience was the bench of reverend judges, listening with constrained patience to a ruby-faced spokesman; who, with his hair in full powder, but without any robe, which, like charity, might have covered a multitude of improprieties, was chopping law-logic, in a voice so loud as to be almost lost in its own reverberations. This was the third day of his speech; of which I heard nothing more than the peroration. But that was enough; for though, as well as I could catch the subject, there was a pervading strength of argument, and some coruscations of rhetoric, his gestures were so vehement, countenance so angry, and his continual digressions so entirely extra flammantia moenia



mundi, that it was impossible to keep in view both the speaker and his cause; and indeed before he concluded, I suffered all the torments of restlessness, and a jaded attention, bewildered with vain efforts to sit still and understand.<sup>235</sup>

While the Court permitted only two lawyers per side during Wirt's era except in extraordinary circumstances,<sup>236</sup> there was no formal limit on the length of argument until 1849, when the Court capped argument at two hours per side.<sup>237</sup> Wirt sometimes spoke as many as four hours at a stretch,<sup>238</sup> in oral cases that lasted up to eight days.<sup>239</sup>

Wirt's tenure covered the second half of the Marshall Court. There was very little turnover among the Justices. During the nineteen Terms in which he appeared before the Court, only four Justices were replaced. Only during the Rehnquist Court did all the Justices serve together for a comparable length of time.<sup>240</sup> This provided a level of predictability and familiarity between the Justices and

the bar. In some ways, it was an odd relationship. The Justices' salaries were low, and their hours were long (particularly when you include the circuit riding), somewhat in contrast to the advocates. After a raise in 1819, the Chief Justice received \$5,000 a year and the Associate Justices received \$4,500.<sup>241</sup> Advocates such as Pinkney and Webster "earned as much as \$17,000–\$20,000 a year in the same time period."<sup>242</sup> Wirt himself kept up a busy practice and earned at least \$10,000 a year during his peak years.<sup>243</sup>

The Court's rules were largely borrowed from English courts.<sup>244</sup> There were four procedural devices by which a case could come to the Supreme Court: a writ of error from federal circuit court or the highest-level court of a state; an appeal from the federal circuit court; certification of division between the federal circuit judge and district judge; and a miscellaneous category (including mandamus, prohibition, habeas corpus, certiorari, and procedendo).<sup>245</sup> Both the writ of error and the certificate of division allowed the Justices to have some effect on their own docket.<sup>246</sup>

1800	1802	1804	1806	1808	1810	1812	1814	1816	1818	1820	1822	1824	1826	1828	1830	1832	1834	1836	1838		
John Marshall (1801–1835)																					
Bushrod Washington (1799–1829)															Henry Baldwin (1830–1844)						
			William Johnson (1804–1834)																		
				Brockholst Livingston (1807–1823)								Smith Thompson (1823–1843)									
					Thomas Todd (1807–1826)								Robert Trimble (1826–1828)			John McLean (1830–1861)					
						Gabriel Duvall (1811–1835)															
							Joseph Story (1812–1845)														
J. Adams		Jefferson			Madison			Monroe			J.Q. Adams			Jackson			Van Buren				

This figure, with Wirt's years of Supreme Court practice shaded, illustrates the stability of the Supreme Court's membership and the presidents he served or (in Jackson's case) opposed.

Once the case came to the Court, the emphasis was on oral advocacy. While briefing had long been permitted, and the Court began to encourage it in 1833,<sup>247</sup> it did not become common until long after Wirt's death.<sup>248</sup> Wirt himself disliked briefing and avoided it where possible.<sup>249</sup> Occasional references to written submissions do appear, however. Justice Story remembered a lengthy brief during his first Term on the Court:

One great cause of the Holland Land Company, of which I had a printed brief of two hundred and thirty pages, lasted five days in argument, and has now been happily decided. It was my first cause, and though excessively complex, I had the pleasure to find that my own views were those which ultimately obtained the sanction of the whole Court.<sup>250</sup>

During Wirt's tenure as Attorney General, there are a number of instances where it is recorded that the case was "submitted to the Court without argument."<sup>251</sup> It is not clear whether written briefs accompanied this procedure, but it seems likely that they did. One clear instance of a written brief is the unique case of *New Jersey v. New York*.<sup>252</sup> Because New York refused to appear but wanted to present its reasons for the Court's lack of jurisdiction, it attempted to circumvent presence by having an unaffiliated lawyer present a written argument, in an effort to distinguish between legal presence and actual presence.<sup>253</sup>

Other aspects of paper records provide interesting light on the Court of this era. An important step in a case was acquiring the record of the case below to submit to the Supreme Court. Failure to do so would prevent the case from being heard.<sup>254</sup> More daunting, however, was the fact that prior opinions of the Court itself were difficult to obtain. "Except so far as the opinions were published in the newspapers,<sup>255</sup> little was known about them by the general public or even by the Bar."<sup>256</sup> The Court contracted with a private party to

create a record of oral argument and its opinions, with varying degrees of success. During Wirt's time in Washington, he experienced two reporters, Henry Wheaton and Richard Peters, Jr. Wheaton's reports are known for their excellent notes and careful renderings.<sup>257</sup> Peters was a far less competent lawyer and his reports are weaker for it.<sup>258</sup> The editing process was rather fluid, even to the point where the reporter might allow a lawyer to amend his recorded argument after the fact.<sup>259</sup> There is an unsubstantiated accusation that Wirt amended one of his arguments after hearing one of the Justice's dissents.<sup>260</sup> The reporter also presented the lawyers' arguments with varying levels of detail.<sup>261</sup> And the Justices had no recourse if the publication of the reports was delayed, as it often was. For example, when Wirt requested the Court to certify copies of one of its published opinions for a friend's use in England, Marshall replied:

[T]he Reporter of the court is the proper person to give copies of the opinions delivered by the court. The opinions were delivered to him after they were read, and not to the Clerk, and they were not therefore in his office to be copied. Not being filed in the clerk's office, he could not certify

REPORTS OF CASES argued and adjudged in the Supreme Court of the United States. February Term, 1816.  
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GERALDINE FAUCONBERG. A Novel in 2 v. By Miss BURNEY, Author of "Traills of Nature," "Tales of Fancy," &c. &c.  
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Henry Wheaton was the Reporter of Decisions when Wirt began his career as an advocate. This 1817 advertisement in *City of Washington Gazette* announces that Wheaton's reports are available for sale.

copies of the opinions under the seal of the court. If an authenticated copy of the opinion of the court is desired, the Reporter only could furnish it, certified; and the Clerk of the court may certify, under the seal of the court, that he is the Reporter; if this should also be required.<sup>262</sup>

#### IV. Examples of Wirt's Advocacy

Oral advocacy before the Court in the nineteenth century was stylistically distinct. While references to precedent occur frequently enough, the balance leans toward extended exercises in logic mixed with classical allusions and emotive pleas. Wirt was considered among the best of his time, though more through his studious effort than through his natural manner. Each of the following examples highlights a different capacity. In the Burr trial, Wirt paints a story of contrasts, arguing to the public as much as to the judge and jury. In *Gibbons*, logic is at the fore, belying those who suggest that there was no substance beneath his rhetoric. And his *Cherokee Nation* summation is relentless in its combination of emotional power and forceful argument. The three cases are a fitting summary of his legal career, capturing the beginning of his prominence, his crowning Supreme Court case, and one of his last contributions to the public discourse.

##### The Burr Trial (Aug. 25, 1807)

*As discussed in Parts I and II, the Burr Trial was a monumental clash between Chief Justice John Marshall, presiding as a circuit judge over the trial of Aaron Burr, and President Jefferson, who was inasterminding the trial from a distance. Richmond overflowed with onlookers, and Wirt, then thirty-five years old, agreed to participate in order to increase his public recognition. Although he was the least experienced member of the prosecution team, he gained public acclaim for his four-hour speech near the end of the trial. At issue was Burr's*

*motion to exclude most of the prosecution's evidence. When Marshall granted the motion, the case went immediately to the jury, which had no choice but to acquit. It is Wirt's speech that ensured Burr's guilty verdict in that other court, the one of public opinion.*

*This first excerpt sets up a point-by-point reply to John Wickham's defense, attacking the motion to exclude the conspiracy evidence:*

This motion is a bold and original stroke in the noble science of defence. It marks the genius and hand of a master. For it gives to the prisoner every possible advantage, while it gives him the full benefit of his legal defence: the sole defence which he would be able to make to the jury, if the evidence were all introduced before them. It cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of the assemblage, and to stamp beyond controversy the character of treason upon it.

Connect this motion with that which was made the other day to compel us to begin with the proof of the overt act, in which from their zeal gentlemen were equally sanguine, and observe what would have been the effect of success in both motions. We should have been reduced to the single fact, the individual fact, of the assemblage on the island, without any of the evidence which explains the intention and object of that assemblage. Thus gentlemen would have cut off all the evidence which carries up the plot almost to its conception, which at all events describes the first motion which quickened it into life and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation. Thus of the world of evidence which we have, we should have been reduced to the speck, the atom which relates to Blennerhassett's Island. General Eaton's deposition, (hitherto so much and so justly revered as to its subject,) standing by itself, would have been without the powerful fortification derived from the corroborative evidence of Commodore Truxton, and the still stronger and most

extraordinary coincidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit as they have heretofore done; not declaring that what General Eaton had sworn was not the truth, but that it was a most marvelous story! a most wonderful tale! and thus would they have continued to seek in the bold and wild extravagance of the project itself an argument against its existence, and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt. But I ask what inference is to be drawn from these repeated attempts to stifle the prosecution and smother the evidence? If the views of the prisoner were, as they have been so often represented by one of his counsel, highly honorable to himself and glorious to his country, why not permit the evidence to disclose these views? Accused as he is of high treason, he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in showing us by evidence all this honor and this glory which his scheme contained. No, sir, it is not squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is alarm; it is fear; or rather it is the certainty that the evidence, whenever it shall come forward, will fix the charge; and if such shall appear to the court to be the motive of this motion, your honors, I well know, will not be disposed to sacrifice public justice committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no further than the rigor of legal rules shall imperiously constrain you.

I shall proceed now to examine the merits of the motion itself, and to answer the argument of the gentleman who opened it. I will treat that gentleman with candor. If I misrepresent him it will not be intentionally. I will not follow the example which he has set me on a very recent occasion. I will not complain of flowers and graces where none exist. I will not, like him, in reply to an argument as naked as a

sleeping Venus, but certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce and then that furbelow before I can reach the wished for point of attack. I keep no flounces or furbelows ready manufactured, or hung up for use in the millinery of my fancy, and if I did I think I should not be so indiscreetly impatient to get rid of my wares as to put them off on improper occasions. I cannot promise to interest you by any classical and elegant allusions to the pure pages of *Tristram Shandy*. I cannot give you a squib or a rocket in every period. For my own part, I have always thought these flashes of wit, (if they deserve that name,) I have always thought these meteors of the brain which spring up with such exuberant abundance in the speeches of that gentleman, which play on each side of the path of reason, or, sporting across it with fantastic motion, decoy the mind from the true point in debate, no better evidence of the soundness of the argument with which they are connected, nor, give me leave to add, the vigor of the brain from which they spring, than those vapors which start from our marshes and blaze with a momentary combustion, and which, floating on the undulations of the atmosphere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed. I will endeavor to meet the gentleman's propositions in their full force, and to answer them fairly. I will not, as I am advancing towards them with my mind's eye, measure the height, breadth, and power of the proposition; if I find it beyond my strength, halve it; if still beyond my strength, quarter it; if still necessary, subdivide it into eighths; and when, by this process, I have reduced it to the proper standard, take one of these sections and toss it with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion as the proposition itself which I am going to encounter.<sup>263</sup>

*The following passage hammers away at the defense's avoidance of Ex parte Bollman, the Supreme Court decision that touched on the key question at issue (perhaps only in dicta):*

Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it, under the action of his genius, appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point for which he was laboring. Hence it was that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States. The inquiry is whether the presence at the overt act be necessary to make a man a traitor. The gentlemen say that it is necessary—that he cannot be a principal in the treason without actual presence. What says the supreme court in the Case of Bollman and Swartwout? “It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all

those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.” He insisted that this decision of the supreme court had settled the principle that actual presence was not necessary, and that the passage upon which he relied was not a mere obiter dictum, and not extra judicial; that in the Case of Bollman and Swartwout the question whether actual presence at the place where the overt act was committed was necessary to constitute the crime of treason was a material question to be considered by the court.<sup>264</sup>

*This last excerpt is the most famous, later appearing in grade-school textbooks<sup>265</sup> and otherwise used as an example of American oratory:*

A plain man, who knew nothing of the curious transmutations which the wit of man can work, would be very apt to wonder by what kind of legerdemain Aaron Burr had contrived to shuffle himself down to the bottom of the pack, as an accessory, and turn up poor Blennerhassett as principal, in this treason. Who, then, is Aaron Burr, and what the part which he has borne in this transaction? He is its author, its projector, its active executer. Bold, ardent, restless, and aspiring, his brain conceived it, his hand brought it into action.

Who is Blennerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country, to find quiet in ours. On his arrival in America, he retired, even from the population of the Atlantic States, and sought quiet and solitude in the bosom of our western forests. But he brought with him taste, and science, and wealth: and “lo, the desert smiled!” Possessing himself of a beautiful island in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery that Shenstone might have envied, blooms around him. Music that might have charmed Calypso and her nymphs, is his. An extensive library spreads its treasures before him. A philosophical apparatus offers to him all the secrets and mysteries of nature. Peace,



tranquillity, and innocence, shed their mingled delights around him. And, to crown the enchantment of the scene, a wife, who is said to be lovely even beyond her sex, and graced with every accomplishment that can render it irresistible, had blessed him with her love, and made him the father of several children.

The evidence would convince you, Sir, that this is but a faint picture of the real life. In the midst of all this peace, this innocence, and this tranquillity,—this feast of the mind, this pure banquet of the heart,—the destroyer comes. He comes to turn this paradise into a hell. Yet the flowers do not wither at his approach, and no monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon him. A stranger presents himself. It is Aaron Burr. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts, by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address.

The conquest was not difficult. Innocence is ever simple and credulous. Conscious of no designs itself, it suspects none in others. It wears no guards before its breast. Every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden when the serpent entered its bowers! The prisoner, in a more engaging form, winding himself into the open and unpractised heart of the unfortunate Blennerhassett, found but little difficulty in changing the native character of that heart, and the objects of its affections. By degrees he infuses into it the poison of his own ambition. He breathes into it the fire of his own courage:—a daring and desperate thirst for glory; and ardor, panting for all the storm, and bustle, and hurricane of life.

In a short time, the whole man is changed, and every object of his former delight relinquished. No more he enjoys the tranquil scene; it has become flat and insipid to his taste. His books are abandoned. His retort and crucible

are thrown aside. His shrubby blooms and breathes its fragrance upon the air in vain—he likes it not. His ear no longer drinks the rich melody of music; it longs for the trumpet's clangor, and the cannon's roar. Even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unfelt and unseen. Greater objects have taken possession of his soul. His imagination has been dazzled by visions of diadems, and stars, and garters, and titles of nobility. He has been taught to burn with restless emulation at the names of great heroes and conquerors,—of Cromwell, and Caesar, and Bonaparte. His enchanted island is destined soon to relapse into a wilderness; and, in a few months, we find the tender and beautiful partner of his bosom, whom he lately "permitted not the winds of" summer "to visit her too roughly,"—we find her shivering, at midnight, on the wintry banks of the Ohio, and mingling her tears with the torrents that froze as they fell.

Yet this unfortunate man, thus deluded from his interest and his happiness—thus seduced from the paths of innocence and peace—thus confounded in the toils which were deliberately spread for him, and overwhelmed by the mastering spirit and genius of another,—this man, thus ruined and undone, and made to play a subordinate part in the grand drama of guilt and treason—this man is to be called the principal offender; while he, by whom he was thus plunged in misery, is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd; so shocking to the soul; so revolting to reason! Let Aaron Burr, then, not shrink from the high destination which he has courted, and having already ruined Blennerhassett in fortune, character, and happiness forever, let him not attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.<sup>266</sup>

*Gibbons v. Ogden* (Feb. 7 & 9, 1824)<sup>267</sup>

*Gibbons was one of the few cases in which Wirt and Webster were on the same side. They faced off against Thomas Oakley and Thomas Addis Emmet, both eminent in their own right. As discussed above, no case garnered more media attention. Wirt's legal argument is preserved in the U.S. Reports by Wheaton in condensed form. Nevertheless, it provides a sufficient sense of Wirt's logical power and rhetorical reach. After the introduction, four excerpts are included here.*

The Attorney-General, for the appellant, in reply, insisted, that the laws of New-York were unconstitutional and void:

1. Because they are in conflict with powers exclusively vested in Congress, which powers Congress has fully exercised, by laws now subsisting and in full force.
2. Because, if the powers be concurrent, the legislation of the State is in conflict with that of Congress, and is, therefore, void.

He stated, that the powers with which the laws of New-York conflict, are the power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions," and the power "to regulate commerce with foreign nations, and among the several States." If these powers were exclusive in Congress, and it had exercised them by subsisting laws; and if the laws of New-York interfere with the laws of Congress, by obstructing, impeding, retarding, burdening, or in any other manner controlling their operation, the laws of New-York are void, and the judgment of the State Court, founded on the assumption of their validity, must be reversed.<sup>268</sup>

*Making use of his position as the last speaker, Wirt tried to turn the concessions of Ogden's lawyers against them:*

[T]he counsel for the respondent themselves admitted, that Congress, nevertheless, has some exclusive powers; and, in conformity with the decisions of the Court, they admit that

those exclusive powers exist under three heads. (1.) When the power is given to Congress in express terms of exclusion. (2.) When a power is given to Congress, and a like power is expressly prohibited to the States. (3.) Where a power given to Congress, is of such a nature, that the exercise of the same power by the States would be repugnant.

With regard to the degree of repugnancy, it was insisted, that the repugnancy must be manifest, necessary, unavoidable, total, and direct. Certainly if the powers be repugnant at all, they must be so with all these qualifications. If Congress, in the lawful exercise of its power, says that a thing shall be done, and the State says it shall not; or, which is the same thing, if Congress says that a thing shall be done, on certain terms, and the State says it shall not be done, except on certain other terms, the repugnancy has all the epithets which can be lavished upon it, and the State law must be void for this repugnancy.

A new test for the application of this third head of exclusive power, had been proposed. It was said, that "no power can be exclusive from its own nature, except where it formed no part of State authority previous to the constitution, but was first created by the constitution itself." But why were these national powers thus created by the constitution? Because they look to the whole United States as their theatre of action. And are not all the powers given to Congress of the same character? Under the power to regulate commerce, the commerce to be regulated is that of the *United States* with foreign nations, among the several States, and with the Indian tribes. No State had any previous power of regulating these. The same thing might be affirmed of all the other powers enumerated in the constitution. They were all created by the constitution, because they are to be wielded by the whole Union over the whole Union, which no State could previously do. If any one power, created by the constitution, may be exclusive for that reason, then all may be exclusive, because all are originally created. If, on the other hand, we are to consider the powers



enumerated in the constitution, not with reference to the greater arm that wields them, and the more extended territory over which they operate, but merely in reference to the nature of the particular power in itself considered; then, according to this new test, all the powers given to Congress are *concurrent*; because there is no one power given to it, which, considered in this light, might not have been previously exercised by the States within their respective sovereignties. But this argument proved too much: for, it has been conceded, that some of the powers are exclusive from their nature; whereas, if the argument were true, none of them could be exclusive. On this argument, the entire class or head of exclusive powers, arising from the nature of the power, must be abolished. But this Court had repeatedly determined, that there is such a class of exclusive powers. The power of establishing a uniform rule of naturalization, is one of the instances. Its exclusive character is rested on the constitutional requisition, that the rule established under it should be uniform.<sup>269</sup>

*In the process of handling objections, Wirt shaped an innovation which would find its way into Marshall's opinion:*<sup>270</sup>

It was also said, that to constitute the power an exclusive one in Congress; the repugnance must be such, that the State can pass no law on the subject, which will not be repugnant to the power given to Congress.

This required qualification before it could be admitted. Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute, and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress, (and the power is exclusive only so far as it is granted,) yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious, and indefinite, that it would be extremely difficult, if not impracticable, to make a digest of all the operations which belong to it. One or more

branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.

So Congress has the power to promote the progress of science and the useful arts; but only in one mode, viz. by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. This might be an exclusive power, and was contended to be so. Yet, there are a thousand other modes in which the progress of science and the useful arts may be promoted, as, by establishing and endowing literary and philosophical societies, and many others which might be mentioned. Hence, notwithstanding this particular exclusive grant to Congress, of one mode of promoting the progress of science and the useful arts, the States may rightfully make many enactments on the general subject, without any repugnance with the peculiar grant to Congress.<sup>271</sup>

*Nearing the end of his speech, Wirt turned only briefly (as had the other lawyers) to the preemption issue that Marshall would find dispositive:*

This proposition was, not that all the commercial powers are exclusive, but that those powers being separated, there are some which are exclusive in their nature; and among them, is that power which concerns navigation, and which prescribes the vehicles in which commerce shall be carried on. It was, however, immaterial, so far as this case was concerned, whether the power of Congress to regulate commerce be exclusive or concurrent. Supposing it to be concurrent, it could not be denied, that where Congress has legislated concerning a subject, on which it is authorized to act, all State legislation which interferes with it, is absolutely void. It was not denied, that Congress has power to regulate the coasting trade. It was not denied that Congress had regulated it. If the vessel now in question, was sailing under the authority of these regulations, and has been arrested by a law of New-York forbidding

her sailing, the State law must, of necessity, be void. The coasting trade did, indeed, exist before the constitution was adopted; it might safely be admitted, that it existed by the *jus commune* of nations; that it existed by an imperfect right; and that the States might prohibit or permit it at their pleasure, imposing upon it any regulations they thought fit, within the limits of their respective territorial jurisdictions. But those regulations were as various as the States; continually conflicting, and the source of perpetual discord and confusion. In this condition, the constitution found the coasting trade. It was not a thing which required to be created, for it already existed. But it was a thing which demanded regulation, and the power of regulating it was given to Congress. They acted upon it as an existing subject, and regulated it in a uniform manner throughout the Union.

After this regulation, it was no longer an imperfect right, subject to the future control of the States. It became a perfect right, protected by the laws of Congress, with which the States had no authority to interfere. It was for the very purpose of putting an end to this interference, that the power was given to Congress; and if they still have a right to act upon the subject, the power was given in vain. To say that Congress shall regulate it, and yet to say that the States shall alter these regulations at pleasure, or disregard them altogether, would be to say, in the same breath, that Congress shall regulate it, and shall not regulate it; to give the power with one hand, and to take it back with the other. By the acts for regulating the coasting trade, Congress had defined what should be required to authorize a vessel to trade from port to port; and in this definition, not one word is said as to whether it is moved by sails or by fire; whether it carries passengers or merchandise. The license gives the authority to sail, without any of those qualifications. That the regulation of commerce and navigation, includes the authority of regulating passenger vessels as well as others, would appear from the most approved definitions of the

term *commerce*. It always implies intercommunication and intercourse. This is the sense in which the constitution uses it; and the great national object was, to regulate the terms on which intercourse between foreigners and this country, and between the different States of the Union, should be carried on. If freight be the test of commerce, this vessel was earning freight; for what is freight, but the compensation paid for the use of a ship? The compensation for the carrying of passengers may be insured as freight. The whole subject is regulated by the general commercial law; and Congress has superadded special regulations applicable to vessels employed in transporting passengers from Europe. In none of the acts regulating the navigation of the country, whether employed in the foreign or coasting trade, had any allusion been made to the kind of vehicles employed, further than the general description of ships or vessels, nor to the means or agents by which they were propelled.<sup>272</sup>

*Finally, Wirt came to his peroration, masterfully reversing Emmet's concluding flourish from the previous Saturday morning:*

In conclusion, the *Attorney-General* observed, that his learned friend (Mr. Emmett) had eloquently personified the State of New-York, casting her eyes over the ocean, witnessing every where this triumph of her genius, and exclaiming, in the language of Aeneas,

"Quae regio in terris, nostri non  
plena laboris?"

Sir, it was not in the moment of triumph, nor with feelings of triumph, that Aeneas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the works of art with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes—the loss and desolation of his friends—the fall of his beloved country, rush upon his recollection.

"Constitit, et *lachrymans*; Quis jam locus, inquit, Achate, Quae regio in terris nostri non plena laboris?"

Sir, the passage may, hereafter, have a closer application to the cause than my eloquent and classical friend intended. For, if the state of things which has already commenced is to go on; if the spirit of hostility, which already exists in three of our States, is to catch by contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests, it will too surely do, what are we to expect? Civil wars have often arisen from far inferior causes, and have desolated some of the fairest provinces of the earth. History is full of the afflicting narratives of such wars, from causes far inferior; and it will continue to be her mournful office to record them, till time shall be no more. It is a momentous decision which this Court is called on to make. Here are three States almost on the eve of war. It is the high province of this Court to interpose its benign and mediatorial influence. The framers of our admirable constitution would have deserved the wreath of immortality which they have acquired, had they done nothing else than to establish this guardian tribunal, to harmonize the jarring elements in our system. But, sir, if you do not interpose your friendly hand, and extirpate the seeds of anarchy which New-York has sown, you *will* have civil war. The war of legislation, which has already commenced, will, according to its usual course, become a war of blows. Your country will be shaken with civil strife. Your republican institutions will perish in the conflict. Your constitution will fall. The last hope of nations will be gone. And, what will be the effect upon the rest of the world? Look abroad at the scenes which are now passing on our globe, and judge of that effect. The friends of free government throughout the earth, who have been heretofore animated by our example, and have held it up before them as their polar star, to guide them through the stormy seas

of revolution, will witness our fall *with dismay and despair*. The arm that is every where lifted in the cause of liberty, will drop, unnerved, by the warrior's side. Despotism will have its day of triumph, and will accomplish the purpose at which it too certainly aims. It will cover the earth with the mantle of mourning. Then, sir, when New-York shall look upon this scene of ruin, if she have the generous feelings which I believe her to have, it will not be with her head aloft, in the pride of conscious triumph—"her rapt soul sitting in her eyes"; no, sir, no: dejected, with shame and confusion—drooping under the weight of her sorrow, with a voice suffocated with despair, *well may she then exclaim,*

"Quis jam locus, Quae regio in terris nostri non plena laboris!"<sup>273</sup>

***Cherokee Nation v. Georgia* (Mar. 14, 1831)<sup>274</sup>**

*This case, coming at the end of Wirt's career, also attracted the public eye. Not only did it involve a state defying the Court and the fate of the Cherokee Indians, it also potentially entailed a clash between the President and the Court. Wirt was very uncertain about participating, but after much advice, he decided to accept the challenge. He sought to influence public opinion through an open letter to the Governor of Georgia.<sup>275</sup> He even tried to find out what Marshall thought of the case.<sup>276</sup> His presentation is consistently considered one of his finest arguments. Because Peters included none of the argument in the reported version of the case, however, one must turn to newspaper accounts that include summaries of it.<sup>277</sup> Kennedy notes that Wirt's three hour speech filled "nearly one hundred pages in the report."<sup>278</sup>*

*One observer described the scene with melodramatic flare:*

*He seemed, as he arose to address the court, more than usually solemn. He*

*commenced slowly, and in a subdued tone, partly from previous indisposition, and partly as if conscious of his responsible situation—the most able pleader of the justest cause, before the highest tribunal on earth. He felt what was expected of him, perhaps, too forcibly at first; but as the dauntless conviction of what he had done and could do, gained ascendancy in his mind, his eye lighted up—his form became erect—his action free—his language bold and energetic—his style magnificent—his reasoning irresistible. . . . The audience, including the court, hung upon his words with an attention so breathless, that during a momentary suspension of his voice, the foot of an insect might have broken the silence. Accustomed to regard his gigantic intellect as having risen to the highest pinnacle of his fame—I now saw it pursuing its unfinished ascent, and lighting upon an eminence far above all that he had yet accomplished.*<sup>279</sup>

*After finishing the substance of his argument, Wirt vigorously attacked the notion that the Court should take into account Georgia's noncompliance, and even issued a veiled impeachment threat against Jackson:*

Shall we be asked (the question has been asked elsewhere) how this court will enforce its injunction, in case it shall be awarded? I answer, it will be time enough to meet that question when it shall arise. At present, the question is whether the court, by its constitution, possesses the jurisdiction to which we appeal: and it is beginning at the wrong end of the inquiry to ask how the jurisdiction, if possessed, is to be enforced. No court takes this course in deciding such a question. They examine the question of jurisdiction by the law which creates the tribunal and marks out its powers and duties[. If they find the jurisdiction there, they exercise it, and leave to future

consideration the mode of enforcing it in case it shall be resisted. In a land of laws, the presumption is that the decisions of courts will be respected; and, in case they should not, it is a poor government indeed, in which there does not exist power to enforce respect. In the great case of Penn and Lord Baltimore, in which the boundaries of States in North America were in question, Lord Hardwicke did not ask himself how he was to enforce his decree. Although the tribunal was parted by the Atlantic ocean from the territory in question; he felt no embarrassment on that point. He took it for granted, as he had a right to do, that the parties would respect his decision. Had the idea, even, crossed his mind of their proving contumacious, he would have relied, for the support of his authority, on the general coercive powers inherent in all courts, and, these failing, on the strong arm of that branch of the government whose duty it is to see that the laws be executed. Nor would his reliance have been in vain.

Sir, what is the value of that government in which the decrees of its courts can be mocked at and defied with impunity? Of that government did I say? It is no government at all, or, at best a flimsy web of form, capable of holding only the feeblest insects, while the more powerful of wing break through at pleasure.

If a strong State in this Union assert a claim against a weak one, which the latter denies, where is the arbiter between them? Our Constitution says that this court shall be the arbiter. But, if the strong State refuses to submit to your arbitrament,—what then? Are you to consider whether you can of yourselves, and, by the mere power inherent in the court, enforce your jurisdiction, before you will exercise it? Will you decline a jurisdiction clearly committed to you by the Constitution, from the fear that you cannot, by your own powers, give it effect, and thus test the extent of your jurisdiction, not by the Constitution, but by your own physical capacity to enforce it? Then, why have you taken jurisdiction in the case of New Jersey and New York? The latter State has refused obedience to your summons.

She refuses to appear. You have determined, nevertheless, and rightfully determined, to proceed with the cause. But, suppose the question we are now considering to have been put to you in that case:—how will you enforce your decree against New York? You tell her, for example, that the boundary between the two states is that which New Jersey asserts, and that she is not to exercise jurisdiction beyond that boundary. New York laughs at your decree and sets it at defiance. Her marshal refuses to execute it, and the State upholds and protects him, by force of arms, in his disobedience. She will not permit him to be attached for his contempt, and defies all your process of execution. New Jersey is too weak to enforce it. If the possibility of difficulty in enforcing your decree is to drive you to a surrender of your jurisdiction, the argument applies as forcibly to the case of New Jersey and New York, as to the Cherokee Nation against the State of Georgia.

But, if we have a government at all, there is no difficulty in either case. In pronouncing your decree you will have declared the law; and it is part of the sworn duty of the President of the United States to “take care that the laws be faithfully executed.” It is not for him, nor for the party defendant, to sit in appeal on your decision. The Constitution confers no such power. He is authorized to call out the military power of the country to enforce the execution of the laws. It is your function to say what the law is. It is his to cause it to be executed. If he refuses to perform his duty, the Constitution has provided a remedy.

But is this court to anticipate that the President will not do his duty, and to decline a given jurisdiction in that anticipation? Nay, are we to anticipate that a defendant State will not do her duty in submitting to the decree of this court? As to menaces of disobedience, the contumacy of a State to the authority of this court is not a new occurrence. It occurred in *Olmstead’s* case. Pennsylvania there took this menacing attitude. Nay, she went further, and drew up an armed force in show of practical resistance. But was this court deterred by this menacing

attitude? On the contrary, they did not even notice it, but moved on with the calm and constant dignity which alone becomes them, and Pennsylvania gave way without striking a blow. Georgia, heretofore, assumed this same menacing attitude towards the Cherokees and the executive branch of the government; but former Presidents gave her to understand that the United States would not permit the violation of subsisting treaties, and Georgia submitted to the decision.

Sir, unless the Government be false to the trust which the people have confided to it, your authority will be sustained. I believe that if the injunction shall be awarded, there is a moral force in the public sentiment of the American community, which will, alone, sustain it and constrain obedience. At all events, let us do our duty, and the people of the United States will take care that others do theirs. If they do not, there is an end of the Government, and the Union is dissolved. For, if the judiciary be struck from the system, what is there, of any value, that will remain? Sir, the Government cannot subsist without it. It would be as rational to talk of a solar system without a sun. No sir, the people of the United States know the value of this institution too well to suffer it to be put down, or trammelled in its action by the dictates of others. It will be sustained in whatever cause its own wisdom, patriotism, and virtues shall direct, by the respect, the affections, the suffrage and, if necessary, by the arms of the country. It has been an object of reverence to the best and wisest men of our country, from the first movements of our Constitution to the present day. It has been considered by them all as the keystone of our political arch, the crown of its beauty and the bond of its strength. Nor will the people suffer it to be touched by rash and unskilful hands for the worst of purposes, in the worst of times, even if there are any among us so hardy as to meditate it. If then I am asked how the injunction of this court, if granted, is to be enforced, I answer fearlessly, by the majesty of the people of the United States, before which canting anarchy

(under the prostituted name of patriotism) and presuming ignorance, if they exist, will hide their heads.<sup>280</sup>

*Finally came the conclusion, with its impassioned plea for justice:*

Sir, I have done.

I have presented to you all the views that have occurred to me as bearing materially on this question. I have endeavored to satisfy you that, according to the supreme law of the land, you have before you proper parties and a proper case to found your original jurisdiction; that the case is one which warrants and most imperiously demands an injunction; and unless its aspect be altered by an answer and evidence,—which I confidently believe it cannot be—that if ever there was a case which called for a decree of perpetual peace, this is the case.

It is with no ordinary feelings that I am about to take leave of this cause. The existence of this remnant of a once great and mighty nation is at stake; and it is for your honors to say whether they shall be blotted out from the creation, in utter disregard of all our treaties. They are here in the last extremity, and with them must perish forever the honor of the American name. the faith of our nation is fatally linked with their existence, and the blow which destroys them quenches forever our own glory: for what glory can there be, of which a patriot can be proud, after the good name of his country shall have departed? We may gather laurels on the field and trophies on the ocean, but they will never hide this foul blot upon our escutcheon. "Remember the Cherokee Nation;" will be answer enough to cover with confusion the face and the heart of every man among us, in whose bosom the last spark of grace has not been extinguished. Such, it is possible, there may be who are willing to glory in their own shame and to triumph in the disgrace which they are permitted to heap upon this nation. But, thank Heaven! They are comparatively few. The great majority of the American people see this subject in its true light. They have hearts of flesh in their bosoms, instead of hearts

of stone; and every rising and setting sun witnesses the smoke of the incense from the thousands and tens of thousands of domestic altars ascending to the throne of grace to invoke its guidance and blessing on your councils. The most undoubting confidence is reposed in this tribunal.

We know that whatever can be properly done for this unfortunate people will be done by this honorable court. Their cause is one that must come to every honest and feeling heart. They have been true and faithful to us, and have a right to expect a corresponding fidelity on our part. Through a long course of years, they have followed our counsel with the docility of children. Our wish has been their law. We asked them to become civilized, and they became so. They assumed our dress, copied our names, pursued our course of education, adopted our form of government, embraced our religion, and have been proud to imitate us in every thing in their power. They have watched the progress of our prosperity with the strongest interest, and have marked the rising grandeur of our nation with as much interest as if they had belonged to us. They have even adopted our resentments, and in our war with the Seminole tribes, they voluntarily joined our arms and gave effectual aid in driving back those barbarians from the very State that now oppresses them. They threw upon the field in that war, a body of men who proved, by their martial bearing, their descent from the noble race that were once the lords of these extensive forests—men worthy to associate with the "lion," who in their own language, "walks upon the mountain tops." They fought, side by side, with our present Chief Magistrate, and received his repeated thanks for their gallantry and conduct.

May it please your honors, they have refused to us no gratification which it has been in their power to grant. We asked them for a portion of their lands, and they ceded it. We asked again and again, and they continued to cede, until they have now reduced themselves within the narrowest compass that their own subsistence will permit. What return are we

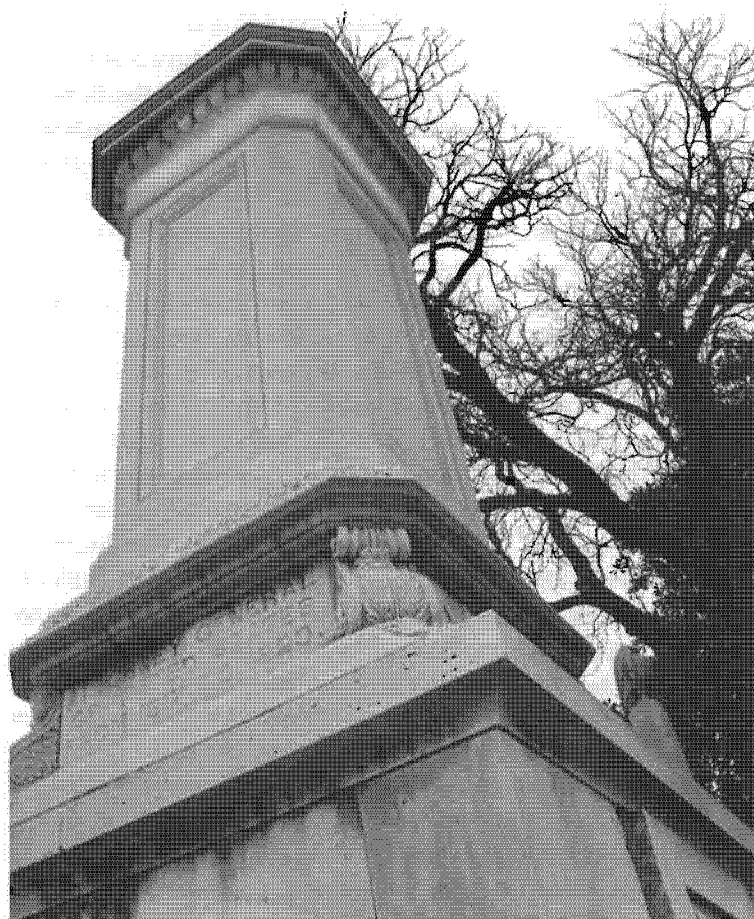


about to make to them for all this kindness? We have pledged for their protection, and for the guarantee of the remainder of their lands, the faith and honor of the nation; a faith and honor never sullied, nor even drawn into question till now. We promised them, and they trusted us. They have trusted us: Shall they be deceived? They would as soon expect to see their rivers run upwards on their sources, or the sun roll back in his career, as that the United States would prove false to them, and false to the word so solemnly pledged by their Washington, and renewed and perpetuated by his illustrious successors.

Is this the high mark to which the American nation has been so strenuously and successfully pressing forward? Shall we sell the

mighty meed of our high honor at so worthless a price, and, in two short years, cancel all the glory which we have been gaining before the world, for the last half century? Forbid it, Heaven!

I will hope for better things. There is a spirit that will yet save us. I trust that we shall find it here, in this sacred court, where no foul and malignant demon of party enters to darken the understanding or to deaden the heart, but where all is clear, clam, pure, vital and firm. I cannot believe that this honorable court, possessing the power of preservation, will stand by and see these people stripped of their property and extirpated from the earth, while they are holding up to us their treaties and claiming the fulfillment of our engagements. If truth



Wirt died in 1834 (at left is his vault at the Congressional Cemetery). He is remembered as one of the most brilliant advocates of his day, more for the thoroughness of his preparation than for his natural performance style.



and faith and honor and justice have fled from every other part of our country, we shall find them here. If not—our sun has gone down, in treachery, blood, and crime, in the face of the world; and, instead of being proud of our country, as heretofore, we may well call upon the rocks and mountains to hide our shame from earth and heaven.<sup>281</sup>

## V. Conclusion

As detailed as this overview of Wirt's life has been, it hardly scratches the surface of the material to be explored. His favorite role, that of husband and father, has been slighted. His willingness to advise budding lawyers and guide their studies has been entirely ignored.<sup>282</sup> His eagerness for literary attention has received very light treatment, and the nuances of his political identity as a man standing between the two major ideologies merit closer attention.

Nevertheless, Wirt's character shines through. Here was a man who, though shadowed by a desire for material wealth and public praise, resisted excess and applied himself with diligent effort and self-deprecating humor to the task of serving his clients and his country.<sup>283</sup> Living among men who longed to shape the future or rule the present, his loyalty to the law is the most defining feature of his career.<sup>284</sup> And by the testimony of the men and women around him, he lived and died "the scholar, the orator, the profound jurist, the able statesman and honest man"<sup>285</sup> and "the most tender, devoted, and enlightened of husbands and fathers."<sup>286</sup>

### Appendix A: Appearances by William Wirt before Supreme Court (as mentioned in the U.S. Reports)

Scholarship differs over how many cases Wirt argued before the Supreme Court. David Frederick claims that Wirt argued thirty-nine cases for the United States as Attorney General and ninety-nine cases in private practice.<sup>287</sup> G. Edward White asserts that he argued 170 cases.<sup>288</sup>

And Joseph Burke, in his doctoral dissertation, asserts that Wirt argued 180 cases, of which 39 were for the government as Attorney General.<sup>289</sup>

The existence of different counts is unsurprising. Counting one's way through the U.S. Reports is not easy. Most of the reports identify Wirt only as "the Attorney General," and the date of the case must be compared with his tenure in that post. Some cases are not reported until a year or more after they were argued, adding to the potential confusion. And multiple appearances in the same case or multiple cases argued together provide an opportunity for different counting treatment. Appearance on behalf of the United States is not always noted as such.

This author suggests the following treatment of the statistics: 170 appearances before the Court, only 41 of which were on behalf of the United States while serving as Attorney General. This number derives from the data most easily available, listing separately each appearance which resulted in a separate heading in the U.S. Reports. While potentially subject to a charge of inconsistency, because it excludes re-arguments (which could reasonably be considered separate appearances; see, e.g., #72, *Danforth v. Ware*) but treats as distinct multiple appearances in the same general case (which is not dissimilar to re-argument; see, e.g., #140, 149, 159, *New Jersey v. New York*, with appearances in 1830, 1831, and 1832), the method benefits from simplicity and verifiability.

The intimacy of the Supreme Court bar is evident from a perusal of this appendix, where the most apparent trend is the frequent repetition of the same lawyers' names. Wirt shared the courtroom with only eighty-two men, all told, and saw more than half of them join him before the Court more than once. The most frequent co-participants were Daniel Webster (41), Walter Jones (30), David Ogden (26), Thomas Swann (15), Roger Taney (14), Henry Wheaton (13), and Ogden Hoffman (13).

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
1	<i>Jones v. Shore's Executor</i> , 14 U.S. (1 Wheat.) 462 (1816)			Executor		Swann Pinkney	
2	<i>The Fortuna</i> , 15 U.S. (2 Wheat.) 161 (1817)	Feb. 15	Mar. 17	Appellee		Gaston	
Appointed as Attorney General, November 13, 1817							
3	<i>Lanusse v. Barker</i> , 16 U.S. (3 Wheat.) 101 (1818)	Feb. 3	Feb. 17	Defendant	Jones	Pendleton	
4	<i>Dugan v. United States</i> , 16 U.S. (3 Wheat.) 172 (1818)	Feb. 12	Feb. 19	United States as AG		Winder Ogden	
5	<i>Robinson v. Campbell</i> , 16 U.S. (3 Wheat.) 212 (1818)	Feb. 24	Feb. 24	Defendant		Law	
6	<i>United States v. 150 Crates of Earthen-Ware</i> , 16 U.S. (3 Wheat.) 232 (1818)	Feb. 19	Feb. 24	United States as AG		Ogden	
7	<i>United States v. Bevans</i> , 16 U.S. (3 Wheat.) 336, 363-75 (1818)	Feb. 26	Feb. 27 (?)	United States as AG	Wheaton	Webster	
8	<i>The Aeolus</i> , 16 U.S. (3 Wheat.) 392 (1818)	Feb. 18	Feb. 27	Appellee	Preble	Ogden Wheaton	
9	<i>The Atlanta</i> , 16 U.S. (3 Wheat.) 409 (1818)		Mar. 4	Appellants	Berrien	Sergeant	
10	<i>The Neptune</i> , 16 U.S. (3 Wheat.) 601 (1818)	Feb. 26		United States as AG		Ogden Ingersoll	"This cause came on to be heard on the transcript of the record, and was argued by counsel."

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
11	<i>Trustees of Philadelphia Baptist Ass'n v. Hart's Executors</i> , 17 U.S. (4 Wheat.) 1, 3-6, 14-27 (1819)		Feb. 2	Plaintiffs		Leigh	
12	<i>The Experiment</i> , 17 U.S. (4 Wheat.) 84 (1819)		Feb. 8				Certified question from circuit court: whether depositions from one case could be used in another
13	<i>The Caledonian</i> , 17 U.S. (4 Wheat.) 100 (1819)	Feb. 3	Feb. 16	United States as AG		Ogden	
14	<i>The Langdon Cheves</i> , 17 U.S. (4 Wheat.) 103 (1819)		Feb. 16	United States as AG		Hunter Wheaton	
15	<i>United States v. Howland</i> , 17 U.S. (4 Wheat.) 108 (1819)	Feb. 4	Feb. 17	United States as AG		Jones	
—	<i>Sturges v. Crowninshield</i> , 17 U.S. (4 Wheat.) 122 (1819)	Feb. 8	Feb. 17		Hunter	Daggett	Although some scholars list this as one of Wirt's cases, no reference to his involvement appears in Wheaton's report. <sup>290</sup>
16	<i>United States v. Rice</i> , 17 U.S. (4 Wheat.) 246 (1819)	Feb. 19	Feb. 22	United States as AG		Webster	
17	<i>Brown v. Gilman</i> , 17 U.S. (4 Wheat.) 255 (1819)	Feb. 13	Feb. 24	Appellees	Armory	Jones Webster	
18	<i>Miller v. Nichols</i> , 17 U.S. (4 Wheat.) 311 (1819)	Mar. 9	Mar. 9	United States as AG		Sergeant	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
19	<b>McCulloch v. Maryland</b> , 17 U.S. (4 Wheat.) 316, 352–62 (1819)	Feb. 22–27 and Mar. 1–3	Mar. 7	Plaintiff	Webster Pinkney	Hopkinson Jones Martin	Appeared for United States, but also received \$2,000 fee from Bank
20	<i>McArthur v. Browder</i> , 17 U.S. (4 Wheat.) 488 (1819)	Mar. 10	Mar. 12	Respondent	Doddridge	Scott Brush	
21	<b>Trustees of Dartmouth College v. Woodward</b> , 17 U.S. (4 Wheat.) 518, 606–15 (1819)	Mar. 10–11, 1818	Feb. 2, 1819	Defendant	Holmes	Webster Hopkinson	
22	<i>United States v. Wiltberger</i> , 18 U.S. (5 Wheat.) 76 (1820)	Feb. 14	Feb. 18	United States as AG	Ingersoll	Sergeant	
23	<i>McClung v. Ross</i> , 18 U.S. (5 Wheat.) 116 (1820)	Feb. 10	Feb. 14	Defendant	Jones	Williams	
24	<i>The Venus</i> , 18 U.S. (5 Wheat.) 127 (1820)	Feb. 11	Feb. 21	Against claimant		Harper Ogden	
25	<i>United States v. Klintock</i> , 18 U.S. (5 Wheat.) 144 (1820)	Feb. 14	Feb. 25	United States as AG		Winder	
26	<i>United States v. Smith</i> , 18 U.S. (5 Wheat.) 153 (1820)	Feb. 21	Feb. 25	United States as AG		Webster	
27	<i>United States v. Furlong</i> , 18 U.S. (5 Wheat.) 184 (1820)	Feb. 21	Mar. 1	United States as AG		Webster Winder	
28	<i>Stevenson's Heirs v. Sullivant</i> , 18 U.S. (5 Wheat.) 207, 230–43 (1820)	Feb. 18	Mar. 4	Respondent	Doddridge	Brush Hammond	
29	<i>Wallace v. Anderson</i> , 18 U.S. (5 Wheat.) 291 (1820)	Mar. 6	Mar. 8	Defendant	Scott	Hardin	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
30	<i>Polk's Lessee v. Wendell</i> , 18 U.S. (5 Wheat.) 293 (1820)	Mar. 1	Mar. 9	Respondent	Williams	Harper Gaston	
31	<i>Marshall v. Beverley</i> , 18 U.S. (5 Wheat.) 313 (1820)	Mar. 4	Mar. 9	Appellant		Jones Taylor	
32	<i>Loughborough v. Blake</i> , 18 U.S. (5 Wheat.) 317 (1820)	Mar. 7	Mar. 10	Defendants	Kelly	Swann Jones	
33	<i>The Josefa Secunda</i> , 18 U.S. (5 Wheat.) 338 (1820)	Mar. 9	Mar. 14	United States as AG		Ingersoll	
34	<i>Blake v. Doherty</i> , 18 U.S. (5 Wheat.) 359 (1820)	Mar. 2	Mar. 13	Defendants	Kelly	Swann Jones	
35	<i>Handly's Lessee v. Anthony</i> , 18 U.S. (5 Wheat.) 374 (1820)	Mar. 4	Mar. 14	Plaintiff		Hardin	
36	<i>La Amistad de Rues</i> , 18 U.S. (5 Wheat.) 385 (1820)	Mar. 8	Mar. 14	For original owners (paid by Spanish consul)		Ingersoll	
37	<i>United States v. Holmes</i> , 18 U.S. (5 Wheat.) 412 (1820)	Feb. 14	Mar. 15	United States as AG		Webster	
38	<i>Connecticut v. Pennsylvania</i> , 18 U.S. (5 Wheat.) 424 (1820)	Mar. 14	Mar. 16	Respondent	Sergeant	Pinkney Jones	
39	<i>The Amiable Isabella</i> , 19 U.S. (6 Wheat.) 1 (1821)	Feb. 22, Mar. 4, Mar. 15, 1820	Feb. 22, 1821	For privateer	Wheaton Pinkney	Gaston Harper	Argued for privateer, but when Court appeared likely to rule against him, requested appearance for United States by Pinkney

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
40	<i>United States v. Wilkins</i> , 19 U.S. (6 Wheat.) 135 (1821)	Feb. 14	Feb. 14	United States as AG		Jones Hardin	
41	<i>The Bello Corrunes</i> , 19 U.S. (6 Wheat.) 152 (1821)	Feb. 8	Feb. 26	United States as AG	Winder (for claimant)	Wheaton Webster	In this case, Wirt officially argued against the same Spanish consul who paid him in <i>La Conception</i> and <i>La Amistad de Rues</i> !
42	<i>The Robert Edwards</i> , 19 U.S. (6 Wheat.) 187 (1821)	Feb. 17	Feb. 26	United States as AG		Winder Raymond	
43	<i>Anderson v. Dunn</i> , 19 U.S. (6 Wheat.) 204 (1821)	Feb. 20	Mar. 2	Defendant	Jones	Hall	Represented the Sergeant-at-Arms of the House of Representatives in private practice, paid by government
44	<i>The La Conception</i> , 19 U.S. (6 Wheat.) 235 (1821)		Mar. 8	For original owners (paid by Spanish consul)	Hopkinson	Winder	
45	<b><i>Cohens v. Virginia</i></b> , 19 U.S. (6 Wheat.) 264 (1821)	Feb. 18	Mar. 3	Plaintiffs	Ogden	Webster	
46	<i>United States v. Six Packages of Goods</i> , 19 U.S. (6 Wheat.) 520 (1821)	Mar. 12	Mar. 14	United States as AG	Pinkney	Ogden Wheaton	
47	<i>United States v. Daniel</i> , 19 U.S. (6 Wheat.) 542 (1821)	Mar. 6	Mar. 15	United States as AG		Hunt	



## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
48	<i>Kerr v. Watts</i> , 19 U.S. (6 Wheat.) 550 (1821)	Feb. 15	Mar. 16	Appellants	Scott	Doddridge Hardin	
49	<i>Leeds v. Marine Ins. Co.</i> , 19 U.S. (6 Wheat.) 565 (1821)	Mar. 9	Mar. 16	Respondent	Lee	Swann Jones	
50	<i>Otis v. Walter</i> , 19 U.S. (6 Wheat.) 583 (1821)	Mar. 12	Mar. 16	Plaintiff		Webster Wheaton	
51	<i>Marbury v. Brooks</i> , 20 U.S. (7 Wheat.) 556 (1822)	Mar. 19	Mar. 21	Plaintiff	Key	Jones	
52	<i>United States v. Wilson</i> , 21 U.S. (8 Wheat.) 253 (1823)	Feb. 14		United States as AG		Wheaton	
53	<i>Buel v. Van Ness</i> , 21 U.S. (8 Wheat.) 312 (1823)	Feb. 12	Feb. 18	Respondent		Sergeant	
54	<i>The Mary Ann</i> , 21 U.S. (8 Wheat.) 380 (1823)	Feb. 10	Mar. 1	Respondent		Ogden	
55	<i>The Sarah</i> , 21 U.S. (8 Wheat.) 391 (1823)	Mar. 1	Mar. 4	Respondent		Ogden	
56	<i>The Frances and Eliza</i> , 21 U.S. (8 Wheat.) 398 (1823)	Feb. 24	Mar. 5	Respondent		Ogden Harper	
57	<i>The Luminary</i> , 21 U.S. (8 Wheat.) 407 (1823)	Feb. 24	Mar. 5	Respondent		Ogden	
58	<i>Wormley v. Wormley</i> , 21 U.S. (8 Wheat.) 421 (1823)	Feb. 21	Mar. 12	Respondent		Jones	
59	<i>City of Washington v. Pratt</i> , 21 U.S. (8 Wheat.) 681 (1823)	Mar. 13	Mar. 14	Appellants	Key	Jones	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
60	<b>Gibbons v. Ogden</b> , 22 U.S. (9 Wheat.) 1, 159-86 (1824)	Feb. 4-7, 9	Mar. 2		Webster	Emmet Oakley	
61	<i>Kirk v. Smith ex dem. Pennsylvania</i> , 22 U.S. (9 Wheat.) 241 (1824)	Mar. 14, 1823	Feb. 5, 1824	Defendants	Sergeant	Clay Webster	
62	<i>Taylor v. Mason</i> , 22 U.S. (9 Wheat.) 325 (1824)	Mar. 3, 1823	Feb. 3, 1824	Respondents	Emmet	Jones Harper	
63	<i>The Apollon</i> , 22 U.S. (9 Wheat.) 362 (1824)	Mar. 13	Mar. 17	Respondent		Harper Clay	
64	<i>The Emily and the Caroline</i> , 22 U.S. (9 Wheat.) 381 (1824)	Feb. 7	Feb. 24	Respondent	McDuffie	Harper	
65	<i>The Merino</i> , 22 U.S. (9 Wheat.) 391 (1824)	Feb. 20	Mar. 5	United States as AG	Kelly	Ingersoll	Case involved slave ships that had been captured by Jackson's troops while they were occupying Florida
66	<i>The St. Jago de Cuba</i> , 22 U.S. (9 Wheat.) 409 (1824)	Feb. 20	Mar. 15	Appellants		Winder	
67	<i>The Margaret</i> , 22 U.S. (9 Wheat.) 421 (1824)	Feb. 11	Feb. 15	Appellant (against claimant)		Ogden	
68	<i>Mason v. Muncaster</i> , 22 U.S. (9 Wheat.) 445 (1824)	Feb. 5	Feb. 20	Appellant	Key	Swann Lee	
69	<i>Doddridge v. Thompson</i> , 22 U.S. (9 Wheat.) 469 (1824)	Mar. 6	Mar. 16	Defendants		Clay	
70	<i>The Monte Allegre</i> , 22 U.S. (9 Wheat.) 616 (1824)	Mar. 3	Mar. 16	Appellants	Meredith	Hoffman	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
71	<i>Walton v. United States</i> , 22 U.S. (9 Wheat.) 651 (1824)	Mar. 1	Mar. 17	United States as AG		Clay	
72	<i>Danforth v. Ware</i> , 22 U.S. (9 Wheat.) 673 (1824)	Feb. 15	Mar. 1	Plaintiff	Swann	Williams	Re-argument of case from previous Term
73	<i>United States v. Kirkpatrick</i> , 22 U.S. (9 Wheat.) 720 (1824)	Mar. 17	Mar. 20	Plaintiffs		Alexander Foster	
74	<b><i>The Antelope</i>, 23 U.S. (10 Wheat.) 66 (1825)</b>	Feb. 26, 28, 29	Mar. 18	United States as AG	Key	Berrien Ingersoll	Wirt sought to convince the Court that the law of nations outlawed the African slave trade
75	<i>The Plattsburgh</i> , 23 U.S. (10 Wheat.) 133 (1825)	Mar. 15	Mar. 18	Respondents		Jones Mayer	
76	<i>The Dos Hermanos</i> , 23 U.S. (10 Wheat.) 306 (1825)	Mar. 5	Mar. 7	Against claimants		Ingersoll	
77	<i>The Josefa Secunda</i> , 23 U.S. (10 Wheat.) 312 (1825)	Mar. 15	Mar. 18	Respondents		Livingston Key	
78	<i>Keplinger v. De Young</i> , 23 U.S. (10 Wheat.) 358 (1825)	Mar. 15	Mar. 17	Defendant		Webster Sergeant	
79	<i>The Santa Maria</i> , 23 U.S. (10 Wheat.) 431 (1825)	Feb. 10	Feb. 26	Appellant		Hoffman	
80	<i>The Gran Para</i> , 23 U.S. (10 Wheat.) 497 (1825)	Feb. 24	Mar. 1	Respondent	Taney	Hoffman	
81	<i>The Palmyra</i> , 23 U.S. (10 Wheat.) 502 (1825)	Feb. 19	Feb. 20	Appellants	Hayne	Tazewell	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
82	<i>Ettings v. Bank of the United States</i> , 24 U.S. (11 Wheat.) 59 (1826)	Mar. 9, 10	Mar. 16	Defendants	Emmet	Webster Taney	
83	<i>Brooks v. Marbury</i> , 24 U.S. (11 Wheat.) 78 (1826)		Feb. 10	Defendant	Key	Jones Coxe	This matter came back to the Court after jury refused to follow previous decision
84	<i>Cassell v. Carroll</i> , 24 U.S. (11 Wheat.) 134 (1826)	Mar. 13, 14	Mar. 17	Defendant	Taney	Webster Raymond	
85	<i>United States v. Vanzandt</i> , 24 U.S. (11 Wheat.) 184 (1826)	Feb. 8	Feb. 16	Plaintiffs	Swann	Jones Key	
86	<i>Otis v. Walter</i> , 24 U.S. (11 Wheat.) 192 (1826)	Feb. 9	Feb. 13	Plaintiff	Blake	Webster Read	
87	<i>Shelby v. Guy</i> , 24 U.S. (11 Wheat.) 361 (1826)	Feb. 28	Mar. 10	Defendant	White	Jones	
88	<i>United States v. Amedy</i> , 24 U.S. (11 Wheat.) 392 (1826)	Mar. 13	Mar. 16	United States as AG		Worthington Coxe	
89	<i>United States v. Kelly</i> , 24 U.S. (11 Wheat.) 417 (1826)	Mar. 9	Mar. 10	United States as AG		(none)	Wirt submitted the case without argument; no appearance on behalf of prisoners
90	<i>United States v. Tappan</i> , 24 U.S. (11 Wheat.) 419 (1826)	Mar. 7	Mar. 13	Plaintiff	Blake	Webster	
91	<i>The Palmyra</i> , 25 U.S. (12 Wheat.) 1 (1827)	Jan. 9	Jan. 15	Appellants	Hayne	Tazewell	
92	<i>Martin v. Mott</i> , 25 U.S. (12 Wheat.) 19 (1827)	Jan. 17	Feb. 2	Plaintiff	Coxe	Ogden	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
93	<i>Clark v. City of Washington</i> , 25 U.S. (12 Wheat.) 40 (1827)	Jan. 26	Feb. 7	Plaintiff	Webster	Jones	
94	<i>Bank of the United States v. Dandridge</i> , 25 U.S. (12 Wheat.) 64 (1827)	Feb. 6, 7	Feb. 28	Plaintiffs	Webster	Tazewell	
95	<i>Postmaster-General of the United States v. Early</i> , 25 U.S. (12 Wheat.) 136 (1827)	Mar. 9	Mar. 15	Plaintiff	Wheaton	Webster Berrien	
96	<i>Jackson ex dem. St. John v. Chew</i> , 25 U.S. (12 Wheat.) 153 (1827)	Jan. 25	Feb. 8	Plaintiff	Ogden	Webster Wheaton	
97	<i>Armstrong v. Lear</i> , 25 U.S. (12 Wheat.) 169 (1827)	Feb. 6	Feb. 21	Respondent	Lear	Livingston Wheaton	
98	<i>United States v. Tillotson</i> , 25 U.S. (12 Wheat.) 180 (1827)	Feb. 24	Mar. 2	Plaintiffs	Coxe	Webster Wheaton	
99	<b><i>Ogden v. Saunders</i>, 25 U.S. (12 Wheat.) 213 (1827)</b>	Jan. 18–20, 1827 Feb. 19–22, 1824	Feb. 19, Mar. 6, 13	Plaintiff	Livingston Ogden Jones Sampson (previously argued by Clay, Ogden, and Haines)	Webster Wheaton (previously argued by Webster and Wheaton)	Re-argument happened while Congress debated bill to reform bankruptcy law in the chamber above the Court
100	<i>Columbian Ins. Co. v. Catlett</i> , 25 U.S. (12 Wheat.) 383 (1827)	Mar. 3	Mar. 9	Defendant	Swann	Webster Taylor	
101	<b><i>Brown v. Maryland</i>, 25 U.S. (12 Wheat.) 419 (1827)</b>	Feb. 28, Mar. 1	Mar. 12	Plaintiffs	Meredith	Taney Johnson	
102	<i>United States v. Goodling</i> , 25 U.S. (12 Wheat.) 460 (1827)	Mar. 12, 13	Mar. 16	United States as AG	Coxe	Taney Mitchell	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
103	<i>United States v. 350 Chests of Tea</i> , 25 U.S. (12 Wheat.) 486 (1827)	Mar. 8	Mar. 15	United States as AG		Webster Coxe	
104	<i>Potter v. Gardner</i> , 25 U.S. (12 Wheat.) 498 (1827)	Feb. 2	Feb. 9	Appellant	Potter	Webster Ogden	
105	<i>United States v. Nicholl</i> , 25 U.S. (12 Wheat.) 505 (1827)	Feb. 26	Mar. 5	Plaintiffs	Sampson	Ogden	
106	<i>Drummond v. Pressman's Executors</i> , 25 U.S. (12 Wheat.) 515 (1827)	Feb. 21	Mar. 9	Plaintiff	Meredith	Taney Donaldson	
107	<b><i>The Antelope</i>, 25 U.S. (12 Wheat.) 546 (1827)</b>	Mar. 6	Mar. 15	Appellants	Key	Berrien Ingersoll Wilde	
108	<i>United States v. Baker</i> , 25 U.S. (12 Wheat.) 559 (1827)		Feb. 16	United States as AG		Webster	Both Wirt and Webster submitted the case without argument.
109	<i>Parker v. Judges of Circuit Court of Maryland</i> , 25 U.S. (12 Wheat.) 561 (1827)	Feb. 9	Feb. 19	Respondents		Raymond	
110	<i>Chotard v. Pope</i> , 25 U.S. (12 Wheat.) 586 (1827)	Feb. 7	Feb. 10	Defendants	Sampson	Livingston Webster	
111	<i>Ramsey v. Allegre</i> , 25 U.S. (12 Wheat.) 611 (1827)	Feb. 19	Mar. 2	Appellant	Meredith	Hoffman Mayer	
112	<i>Hunt v. Rhodes</i> , 26 U.S. (1 Pet.) 1 (1828)			Appellees	Robbins	Webster Kimball	
113	<i>Minor v. Mechanics' Bank of Alexandria</i> , 26 U.S. (1 Pet.) 46 (1828)			Defendants	Swann	Taylor Jones	
114	<i>United States v. Saline Bank of Virginia</i> , 26 U.S. (1 Pet.) 100 (1828)			United States as AG		Webster Doddridge	All parties submitted the case without argument



## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
115	<i>Buck v. Chesapeake Ins. Co.</i> , 26 U.S. (1 Pet.) 151 (1828)			Defendants	Meredith	Hoffman Mayer	
116	<i>McLanahan v. Universal Ins. Co.</i> , 26 U.S. (1 Pet.) 170 (1828)			Defendants	Ogden	Taney Meredith	
117	<i>Karthus v. Yllasy Ferrer</i> , 26 U.S. (1 Pet.) 222 (1828)			Defendants		Hoffman Mayer	
118	<i>Parker v. United States</i> , 26 U.S. (1 Pet.) 293 (1828)			United States as AG		Jones	Both Wirt and Jones submitted the case without argument
119	<i>Mechanics' Bank v. Seton</i> , 26 U.S. (1 Pet.) 299 (1828)			Appellants	Swann	Jones Taylor	
120	<i>Dox v. Postmaster-General</i> , 26 U.S. (1 Pet.) 318 (1828)			United States as AG		Foot	
121	<i>Elliot v. Peirsol's Lessee</i> , 26 U.S. (1 Pet.) 328 (1828)			Plaintiffs		Wickliffe	
122	<i>Mechanics' Bank v. Lynn</i> , 26 U.S. (1 Pet.) 376 (1828)			Appellants	Swann	Jones Taylor	
123	<i>Conard v. Atlantic Ins. Co. of New York</i> , 26 U.S. (1 Pet.) 386 (1828)			Plaintiff	Ingersoll	Binney Webster	
124	<i>United States v. 422 Casks of Wine</i> , 26 U.S. (1 Pet.) 547 (1828)			United States as AG		Ogden Hall	Wirt "submitted the case, on the errors assigned by the District Attorney," but appears to have seen no need to argue before the Court, even though Ogden and Hall made oral presentations

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
125	<i>Bank of Columbia v. Sweeny</i> , 26 U.S. (1 Pet.) 567 (1828)			Defendant	Swann	Jones Key	
126	<i>United States v. Stansbury</i> , 26 U.S. (1 Pet.) 573 (1828)			United States as AG		(none)	
127	<i>Ross v. Doe ex dem. Barland</i> , 26 U.S. (1 Pet.) 655 (1828)			Plaintiff		Coxe	
128	<i>Columbian Ins. Co. of Alexandria v. Lawrence</i> , 27 U.S. (2 Pet.) 25 (1829)	Jan. 19, 20, 21	Jan. 28	Defendant	Swann	Jones C.C. Lee	
129	<b><i>Willson v. Black-Bird Creek Marsh Co.</i>, 27 U.S. (2 Pet.) 245 (1829)</b>			Defendant		Coxe	
130	<i>American Fur Co. v. United States</i> , 27 U.S. (2 Pet.) 358 (1829)			United States as AG		Ogden	
—	<i>Reynolds v. McArthur</i> , 27 U.S. (2 Pet.) 417 (1829)	Jan. 23, 24, 26, 27					Wirt intended to argue this case on behalf of the United States, but was "prevented by indisposition," 27 U.S. at 423.
131	<i>Southwick v. Postmaster General</i> , 27 U.S. (2 Pet.) 442 (1829)			United States as AG		Taylor	
132	<i>Mandeville v. Riggs</i> , 27 U.S. (2 Pet.) 482 (1829)			Appellee	Coxe	Jones E.J. Lee	
133	<i>Conolly v. Taylor</i> , 27 U.S. (2 Pet.) 556 (1829)			Plaintiffs	Wickliffe Peters	Sergeant Nicholas	
134	<i>Chirac v. Reinecker</i> , 27 U.S. (2 Pet.) 613 (1829)			Defendant		Hoffman Mayer	
135	<i>Wilkinson v. Leland</i> , 27 U.S. (2 Pet.) 627, 648–53 (1829)			Plaintiff	Whipple	Webster Hubbard	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
Resigned as Attorney General, Mar. 4, 1829							
—	<i>Bank of United States v. Swan</i> , 28 U.S. (3 Pet.) 68 (1830)			Appellee			Appellant failed to meet deadline for submitting record, and the case was dismissed without prejudice. <sup>291</sup>
136	<i>Inglis v. Trustees of Sailor's Snug Harbor</i> , 28 U.S. (3 Pet.) 99 (1830)			Tenants	Talcott	Webster Ogden	
137	<i>Patapsco Ins. Co. v. Coulter</i> , 28 U.S. (3 Pet.) 222 (1830)			Defendant		Mayer	
138	<i>Shanks v. Dupont</i> , 28 U.S. (3 Pet.) 242 (1830)			Plaintiffs	Cruger	Legare	
139	<i>New Jersey v. New York</i> , 28 U.S. (3 Pet.) 461 (1830) (no counsel appeared for New York)			New Jersey	Southard	(none)	
140	<i>Carver v. Jackson ex dem. Astor</i> , 29 U.S. (4 Pet.) 1 (1830)			Defendant	Ogden	Webster Bronson	
141	<i>Wilcox v. Plummer's Executors</i> , 29 U.S. (4 Pet.) 172 (1830)			Plaintiff		Webster	
142	<i>Caldwell v. Taggart</i> , 29 U.S. (4 Pet.) 190 (1830)			Appellant		Sheffy	
143	<i>Van Ness v. City of Washington</i> , 29 U.S. (4 Pet.) 232 (1830)			Washington	Jones Webster	Coxe Taney Berrien	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
144	<i>Soulard v. United States</i> , 29 U.S. (4 Pet.) 511 (1830)			United States		Benton	Apparently not argued as Attorney General. Held in advisement and not finally decided until 1836. See <i>Soulard's Heirs v. United States</i> , 35 U.S. (10 Pet.) 100 (1836), and <i>Smith v. United States</i> , 35 U.S. (10 Pet.) 326 (1836)
145	<b><i>Cherokee Nation v. Georgia</i></b> , 30 U.S. (5 Pet.) 1 (1831)	Mar. 5, 12, 14	Mar. 18	Complainants	Sergeant	(none)	Georgia refused to appear
146	<i>Henderson v. Griffin</i> , 30 U.S. (5 Pet.) 151 (1831)			Plaintiff	McDuffie	Davis	
147	Ex parte <i>Crane</i> , 30 U.S. (5 Pet.) 190 (1831)				Ogden	Webster Hoffman	Submitted without argument, mandamus request to circuit court
148	<i>New Jersey v. New York</i> , 30 U.S. (5 Pet.) 284 (1831)			New Jersey		(none)	New York refused to appear
149	<i>Page v. Lloyd</i> , 30 U.S. (5 Pet.) 304 (1831)			Complainants	Key	Patton "read a written argument prepared by Mr. Johnston"	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
150	<i>Shankland v. Mayor, Alderman, and Common Council of Washington</i> , 30 U.S. (5 Pet.) 390 (1831)			Plaintiff	Swann	Jones Key	
151	<i>Menard v. Aspasia</i> , 30 U.S. (5 Pet.) 505 (1831)			Plaintiff		(none)	
152	<i>Tiernan v. Jackson</i> , 30 U.S. (5 Pet.) 580 (1831)			Defendant		Scott Taney	
153	<i>Patapsco Ins. Co. v. Southgate</i> , 30 U.S. (5 Pet.) 604 (1831)			Plaintiffs	Mayer	Steward Taney	
154	<i>Sheppard v. Taylor</i> , 30 U.S. (5 Pet.) 675 (1831)			Appellees	Taney	Mayer Hoffman	
155	<i>Levy's Lessee v. McCartee</i> , 31 U.S. (6 Pet.) 102 (1832)			Defendants		Hoffman	
156	<i>Oliver v. Alexander</i> , 31 U.S. (6 Pet.) 143 (1832)			Appellants	Taney	Hoffman	
157	<i>Leland v. Wilkinson</i> , 31 U.S. (6 Pet.) 317 (1832)			Defendant	Whipple	Dutton Webster	
158	<i>New Jersey v. New York</i> , 31 U.S. (6 Pet.) 323 (1832)			New Jersey	Frelinghuysen	Beardsley	"Mr. Frelinghuysen, with whom was Mr. Wirt, argued . . ."; thus, unclear whether Wirt argued
159	<i>United States v. Quincy</i> , 31 U.S. (6 Pet.) 445, 456-61 (1832)			Defendant		Williams	
160	<b><i>Worcester v. Georgia</i></b> , 31 U.S. (6 Pet.) 515 (1832)	Feb. 20	Mar. 3	Plaintiffs	Sergeant Chester	(none)	

## APPENDIX CONTINUED

#	Case (key cases in bold)	Argued	Decided	For Party	Co-counsel	Opponents	Notes
161	<i>Crane v. Morris's Lessee</i> , 31 U.S. (6 Pet.) 598 (1832)			Defendant	Ogden	Beardsley Hoffman	
162	<i>Kelly v. Jackson ex dem. Morris</i> , 31 U.S. (6 Pet.) 622 (1832)			Defendant	Ogden	Beardsley Hoffman	
163	<i>Boyle v. Zacharie</i> , 31 U.S. (6 Pet.) 635 (1832)			Appellant		Scott	Before the case came up for argument, Wirt submitted an interesting query to the Court. <sup>292</sup>
164	<i>Boyle v. Zacharie</i> , 31 U.S. (6 Pet.) 648 (1832)			Appellant		Scott	
165	<i>United States v. Arrendondo</i> , 31 U.S. (6 Pet.) 691 (1832)			Appellant	Call Taney (AG)	White Berrien Webster	
166	<i>Strother v. Lucas</i> , 31 U.S. (6 Pet.) 763 (1832)			Defendant		Benton Taney	
167	<i>Estho v. Lear</i> , 32 U.S. (7 Pet.) 130 (1833)			Appellee	Dandridge	Swann Sampson	
168	<i>Stratton v. Jarvis</i> , 33 U.S. (8 Pet.) 4 (1834)			Appellant		Mayer	
169	<i>Armstrong v. Lear</i> , 33 U.S. (8 Pet.) 52 (1834)			Appellee	Z.C. Lee	Key	
170	<b><i>Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge</i></b> , 36 U.S. (11 Pet.) 420 (1837)	Mar. 7–11, 1831; Jan. 19, 1837	Feb. 14, 1837		(Greenleaf and Davis reargued)	Dutton Webster	Court reached no decision in 1831, but Taney's majority opinion in 1837 followed Wirt's argument very closely



## Appendix B: Letters

Nov. 23, 1817 - Letter from Wirt to his wife Elizabeth

Having just been appointed Attorney General, Wirt arrived in Washington and started looking for a house.

Washington - Nov. 18. 1817.

My beloved wife,

I have only one moment to thank you & my dear Laura for your joint letter. I am now installed in my new office - and have been for two or three days traversing the town in quest of a house for you - a thing much more difficult to effect than I had apprehended. A very snug establishment, a house with ten rooms, an office adjoining, all necessary out houses, beautiful & spacious ground (half a square) are offered at \$14,000 cash - it is near the President's house - with a <sup>level</sup> ~~well~~ <sup>level</sup> street before it, finely gravelled an excellent garden in high cultivation - & every thing to my mind, except that the rooms are too small - Commodore Rogers has this morning offered to make an addition to it comprising two spacious & splendid rooms, with three

Wm. H. Hunt

Your affectionate son

Wm. H. Hunt

He may - and the dearer the better - the more

likely to be - the more likely to be - the more likely to be

in our way every day & will help to arrange it

He is soon in hospital - John will be in New York

Write him you can come on - I shall write you

and he to do so - I shall try to do it

Thank you for the money - I shall try to do it

*May 5, 1823 – Letter from Wirt to President James Monroe*

This letter shows Wirt at his most diplomatic and persuasive. James Kent was a respected judge, but he was also a Federalist. By recommending his appointment under a Republican (Jeffersonian) administration, Wirt was walking a fine political line. However, it also demonstrates Wirt's understanding of the importance of the Court. Only the first two pages are reproduced here.<sup>1</sup>

*To President W. S.  
 Baltimore 5<sup>th</sup> May 1823.  
 Dear Sir  
 I received on the day before yesterday the  
 enclosed address from the New York bar which  
 was intended to pass through my hands to you, as  
 also the enclosed letter from Mr. Wally, one of them  
 explanatory of a certificate which he had signed  
 approving of Judge Warrnett. Private letters  
 from that bar mark extreme solicitude on  
 the subject of filling Mr. Livingston's place.  
 I sincerely wish Judge Thompson could see  
 his interest in relieving you from this em-  
 barrassment by accepting the appointment. But  
 if he will not, can you make an appointment  
 more acceptable to the Nation at large than  
 that of Judge Hunt? I know that one of the  
 factions of New York would take it in high  
 dudgeon at first. I doubt too much of the*

<sup>1</sup> The bulk of Wirt's letter has been reproduced in 2 WARREN, *supra* note 117, at 49–51, which is more readily accessible than 2 KENNEDY, *supra* note 10, at 153–56.

Jackson of New York would take it as highly  
 dangerous at first - probably for some of the  
 same old reasons and interests radically  
 who gave every handle for such a move in every  
 quarter of the Union, but a little for a time  
 on this point. But I don't hold it likely to  
 stand every where for almost nothing. I think  
 in Kentucky, as well as for other parts of the  
 high mountain States and Kentucky, that I fear  
 before the nation at large would approve and  
 support the experiment. It would require  
 they could never put down the pretty country  
 might at first resist it.

The experiment of a part of the Government  
 based on a national and not a local concern

The importance of that Court in the administration of the federal government begins to be generally understood, ~~xxx~~ and acknowledged. The local irritations at some of their decisions in particular quarters (as in Virginia and Kentucky for instance) are greatly overbalanced by the general approbation with which those same decisions have been received throughout the Union. If there are a few <sup>Ratifiers</sup> ~~apart from~~ <sup>persons who</sup> ~~disapprove~~ <sup>who</sup> ~~which~~ would be for narrowing the sphere of action of that court and quelling its energies to gratify popular clamors, there is a far greater <sup>number</sup> of our countrymen who would wish to see it in the free and independent exercise of its constitutional powers as the best means of preserving the constitution itself. The constitution is the public property of the United States. They <sup>people</sup> have a right to assert, the best means will be adapted to preserve it entire; which can be no otherwise ensured but by assent. P.S. &

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*December 10, 1825 - Letter to William Wirt from his daughter Elizabeth*

Of Wirt's twelve children, only seven would survive him. Two died near birth. His oldest son, Robert, died unexpectedly in 1824 at nineteen. As mentioned above, his special treasure Agnes died in 1831. And his first child, Laura, died in 1833. This letter from his then seventeen-year-old daughter, Elizabeth, provides a glimpse of family life and the strain that his travel and long hours placed upon those closest to him.

Washington, December 10<sup>th</sup> 1825.  
 My dear Father -

Ma opened your letter just now just as Mr. Lear was rising to leave, but he lingered to hear how you were. He says he is afraid that your annual supreme court sickness will seize you again this Winter. I hope he is a false prophet and that you will disappoint him. We have not seen you for so long a time that we should be apt to quarrel with any sickness which would mar our pleasure and deprive us of your society by confining you to your room. The only antidote would be the pleasure of nursing you and making you well again. Will you not be with us at Christmas? Our mince pie and egg now would be rather insipid unless all the family are assembled. So you and sister Laura must make haste home. Catherine is gone to spend the evening with Pamela Brown, in company with Miss Bernard. The course

- reason is, because with these girls with  
 them in their facility in learning to speak  
 French though they cannot expect to hear an  
 equal advantage in return of language as  
 a sort of manner. They are for education  
 and outside for us well before French and they  
 seem never to have difference and no doubt to  
 suit on their natural & every necessity -  
 "Mr. says 'come along' come to supper. Now  
 after supper, which is what we are indebted to Mr.  
 McFadden who has sent us his historical notes  
 from a number of copies. The boys have been  
 leaving me to read and for 2 or 3 hours in the  
 and as I know them to do so before I began  
 to read of all have to quiet them little by little  
 after supper. They are very much interested in  
 the story of the first lunch to their car  
 - lastly conversation with which the children  
 were absent. Mr. Gorman says that he was  
 at once every year of his life from very good  
 or one must lose to you the lesson that  
 they again to day or week would. He says the  
 is really that you are only talking with the  
 children. But that you have lost time.  
 They from Henry's Wilson's letter to me.

This evening much to the surprise of their friends  
 they are well. Mr. Wilson says, I believe that  
 he saw you in Baltimore. - Win your  
 candle my dear Father or "lose every thing  
 but your honour". - as the battle is not al-  
 ways to the strong. - Again Adieu.

Your very affectionate child

Elizabeth G. Wirt

Mom sends her hottest love! -

Henry is sitting in mama's ca.  
 snuffling he nose and reading of his  
 own accord (with a candle in one hand  
 this book in the other) reading some of the  
 stories in the Baltimore Spelling Book

*June 21, 1830 - Letter from Wirt to Judge Dabney Carr*

When Wirt began to examine the Cherokees' legal position, he was very uncertain about how to view the Court's jurisdiction. He sought out advice from various friends, and even stretched to the limits of propriety by asking his life-long friend Dabney Carr to test out Justice Marshall on the matter. It seems that Wirt was not seeking inside information for his client as much as trying to avoid embarrassment for the Court in the face of a complicated political situation. This excerpt comes after numerous pages about the relevant cases. For Marshall's reply, see the next entry.

therefore regard them as a foreign state. Will you read  
the case in 21<sup>st</sup> Johnson? and tell me, since I have  
shown you how deeply the Supreme Court may be  
interested in this subject, <sup>whether you</sup> would ~~there~~ be any improp-  
riety in your conversing with the Chief Justice on  
this subject, as a brother Judge, and giving me his  
impressions of the political character of this people  
in the respect I have mentioned. I would not have  
you to conceal from him that the question may proba-  
bly come before the Supreme Court. The subject will  
not be new to him. He has had occasion to consider  
several times the character and rights of these people.  
~~see and read, of your friends, his opinion in the case~~  
of Johnson and McIntosh (3 Wheaton 571 to page 593)  
He seems to me to maintain the right of the Indians  
to govern themselves exclusively by their own laws, within  
their own territory, although their right to that territory  
be a mere right of possession. If the individuals of the

June 26, 1830 – Chief Justice Marshall to Judge Dabney Carr

As the previous excerpt indicates, Wirt asked Dabney Carr to test out Marshall on the Court's likely jurisdiction over the Cherokee cases. Carr did as requested, and here is Marshall's response, graciously declining to comment.

Chief Justice Marshall  
To  
Dabney Carr Esq.

Ind. 11.11.30  
Dabney Carr Esq.

June 26<sup>th</sup> 1830.

My dear Sir.

I shall not attempt to conceal the gratification I feel, at the assurance, contained in your letter, that the degree of neighborly intercourse which has taken place between us, has made on your bosom the impression it had on mine, nor shall I hesitate to express my <sup>entire</sup> conviction, that neither yourself, nor Mr. Wirt, would feel the slightest inclination, to tempt me into a path in which I ought not to walk, or to draw from me opinions which I ought not to give. It is for the purpose of making these declarations, explicitly, that I accompany

"It is for the purpose of further  
 these declarations, explicitly, that I am  
 the latter, which you regard me to be  
 with this assurance. Now, while my mind  
 of duty, without me from indicating any  
 opinion on the delicate, and, I will add, very  
 interesting questions suggested by all these  
 I am not at all reminded of the facts and  
 open application which has been made.  
 I have followed the debate in  
 the House of Congress with profound  
 attention, and with deep interest; and have  
 wished, most sincerely, that both the Executive  
 and legislative departments had brought  
 differently on the subject. Humanly speaking,  
 I wish the course which is pursued, whether  
 may be the decision of policy.  
 I wish you a pleasant journey, and am,  
 dear Sir, with great and respectful wishes,  
 Yours truly, Wm. Marshall."



## ENDNOTES

<sup>1</sup>10 *Reg. Deb.* 2758–59 (Feb. 21, 1834) (statement of Rep. John Quincy Adams before the House of Representatives seeking to add to the Journal of the House an explanation of previous day's adjournment for Wirt's funeral).

<sup>2</sup>Joseph C. Robert, "The Many-Sided Attorney General," 1976 *Sup. Ct. Hist. Soc'y Yearbook* 51.

<sup>3</sup>17 U.S. (4 Wheat.) 316 (1819).

<sup>4</sup>22 U.S. (9 Wheat.) 1 (1824).

<sup>5</sup>31 U.S. (6 Pet.) 515 (1832).

<sup>6</sup>See Gregory K. Glassner, *Adopted Son: The Life, Wit & Wisdom of William Wirt, 1772–1834* 148 (1997) (noting that Wirt County, Virginia was created in 1848 in honor of the late Attorney General, in what is now West Virginia). See also County Commissioners' Association of West Virginia, "Early History of Wirt County," available at <http://www.polsci.wvu.edu/wv/Wirt/wirhistory.html> (last visited August 4, 2008).

<sup>7</sup>See Historic Congressional Cemetery, available at <http://www.congressionalcemetery.org> (last visited August 4, 2008; follow "Genealogy" hyperlink, then "Interment/Obituaries" hyperlink) (identifying William Wirt's burial spot as Range 50, S-169).

<sup>8</sup>Joseph C. Robert, "William Wirt, Virginian," 80 *Va. Mag. Hist. & Biography* 387 (1972). A University of Richmond professor who died in 2003, Robert put significant effort into researching Wirt's life. See Robert, *supra* note 2, at 60 ("Joseph C. Robert . . . has spent a number of years gathering data on the life and career of William Wirt.").

<sup>9</sup>Joseph C. Burke, "William Wirt: Attorney General and Constitutional Lawyer" 268 (June 1965) (unpublished Ph.D. dissertation, Indiana University):

Some men influence events; others are influenced by them. Some lawyers alter the course of the law; others are content to follow precedents. Both events and precedents altered William Wirt. He came to Washington in 1818, a Virginian whose political creed rested on states' rights and strict construction of the Constitution. A lawyer who thought more of rhetoric than reason. A man who loved literature more than law; an office holder with a distaste for politics. For eleven years he breathed the national atmosphere of the Nation's Capitol. For fifteen terms of the Supreme Court he listened to John Marshall expound the principles of nationalism. He came to Washington a sectionalist and died a nationalist. He came a Virginian and died an American.

<sup>10</sup>See Joseph P. Kennedy, *Memoirs of the Life of William Wirt, Attorney General of the United States*, 2 vols. (1849). A short self-published biography appeared recently, but it is heavily dependent on the prior work and breaks little of its own ground. See Glassner, *supra* note 6.

<sup>11</sup>A few brief first-hand accounts were written. See Francis W. Gilmer, *Sketches of American Orators* (1816); Peter Hoffman Cruse, "Biographical Sketch," in William Wirt, *Letters of the British Spy* (10<sup>th</sup> ed. 1832); Frederick W. Thomas, *John Randolph of Roanoke and Other Sketches of Character, including William Wirt* 33–56 (1853); Samuel L. Southard, *A Discourse on the Professional Character and Virtues of the Late William Wirt* (1834) (published version of funeral eulogy). Other biographical sketches began to appear in the mid-nineteenth century. See, e.g., L.C. Tuthill, *Success in Life. The Lawyer* 68–128 (1850); J.F.B., "William Wirt," 16 *Am. L. Reg.* 65 (1867); Henry M. Dowling, "William Wirt," 10 *Green Bag* 453 (1898) (reprinted in 4 *Green Bag* 2d 303 (2001)); Horace Hagan, *Eight Great American Lawyers* 57–84 (1923). A number of scholarly articles specifically narrowly address aspects of his legal career or his political significance. See H. Jefferson Powell, "William Wirt & the Invention of the Public Lawyer," 4 *Green Bag* 2d 297 (2001); G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–1835* (1988) (including a brief biography of Wirt in a section discussing Court advocates); E. Lee Shephard, "Breaking into the Profession: Establishing a Law Practice in Antebellum Virginia," 48 *J. S. Hist.* 393 (1982); Joseph C. Robert, "The Many-Sided Attorney General," 1976 *Sup. Ct. Hist. Soc'y Yearbook* 51; Marvin R. Cain, "William Wirt Against Andrew Jackson: Reflection on an Era," 47 *Mid-America Hist. Q.* 113 (1965); Kenneth W. Treacy, "Another View on Wirt in *Cherokee Nation*," 5 *Am. J. of Legal Hist.* 385 (1961); Henry Barrett Learned, "The Attorney General and the Cabinet," 24 *Pol. Sci. Q.* 444 (1909). Others discuss his literary efforts. See, e.g., William Robert Taylor, "William Wirt and the Legend of the Old South," 14 *Wm. & Mary Q.* 477 (1957); Jay B. Hubbell, "William Wirt and the Familiar Essay in Virginia," 23 *Wm. & Mary Q. Hist. Mag.* 136 (1943); Frank P. Cauble, "William Wirt and His Friends: A Study in Southern Culture, 1772–1834" (1933) (unpublished Ph.D. dissertation, University of North Carolina). But there has been no comprehensive scholarship.

<sup>12</sup>See Powell, *supra* note 11, at 302 ("I am currently engaged in preparing a biography of Wirt.").

<sup>13</sup>Pieces of this correspondence appear in numerous places, but the two largest collections are the William Wirt Papers (on file with the Maryland Historical Society, Baltimore, MD) [hereinafter "Wirt Papers, Md. Hist. Soc'y"] and the William Wirt Papers (on file with the Library of Congress, Washington, D.C.) [hereinafter "Wirt Papers, Lib. Cong."]. Wirt's correspondence has provided at least one scholar with significant ground for studies of social phenomena in the era. See Anya Jabour, *Marriage in the Early Republic: Elizabeth and William Wirt and the Compassionate Ideal* (1998); Anya Jabour, "Male Friendship and Masculinity in the Early National South:

William Wirt and His Friends," 20 *J. Early Republic* 83 (2000); Anya Jabour, "'Grown Girls, Highly Cultivated': Female Education in an Antebellum Southern Family," 64 *J. S. Hist.* 23 (1998).

<sup>141</sup>*Id.* Kennedy, *supra* note 10, at 16.

<sup>152</sup>Kennedy, *supra* note 10, at 427–28; see also text accompanying note 125, *infra*.

<sup>161</sup>Kennedy, *supra* note 10, at 49–50.

<sup>17</sup>See Cruse, *supra* note 11, at 15–20.

<sup>18</sup>*Id.* at 27 ("Mr. Hunt was in the habit of giving his boys one day in the court week at Montgomery court-house, to go and hear the lawyers plead."). See also 1 Kennedy, *supra* note 10, at 42, 48.

<sup>19</sup>Cruse, *supra* note 11, at 29–34; 1 Kennedy, *supra* note 10, at 49–50. See also Letter from Wirt to Benjamin Edwards (Mar. 17, 1805) (quoted in 1 Kennedy, *supra* note 10, at 132) ("You taught me to love you like a parent."); Dowling, *supra* note 11, at 304 ("Before his general education could be considered complete, he was installed as private tutor in the house of a cultivated and hospitable gentleman of Maryland.").

<sup>201</sup>Kennedy, *supra* note 10, at 54–55.

<sup>21</sup>Letter from Wirt to Peter Carnes (Nov. 1792) (quoted in 1 Kennedy, *supra* note 10, at 55).

<sup>22</sup>Swann would later become one of his colleagues at the Supreme Court Bar. Kennedy reports that they had a cordial friendship. See 1 Kennedy, *supra* note 10, at 55. And this author's count indicates that they appeared on the same side of Supreme Court cases nine times and served as opposing course on six occasions.

<sup>231</sup>Kennedy, *supra* note 10, at 55–56.

<sup>24</sup>*Id.* at 57.

<sup>25</sup>*Id.* at 63–64.

<sup>26</sup>*Id.* at 71.

<sup>27</sup>Dowling, *supra* note 11, at 304 ("It was Mr. Wirt's good fortune, at the beginning of his career, to form the acquaintance of some of the foremost men in public life. He enjoyed a personal friendship with James Madison, James Monroe, and Thomas Jefferson, and their sagacious advice and illustrious examples often supplied a powerful stimulus to the young barrister in his professional life.").

<sup>281</sup>Kennedy, *supra* note 10, at 64–65.

<sup>29</sup>Kennedy refers to "occasional irregularities of conduct." *Id.* at 66. As Glassner notes, this leaves one wondering whether Wirt "was merely a heavy social imbibor or a drunken sot." Glassner, *supra* note 6, at 22.

<sup>301</sup>Kennedy, *supra* note 10, at 76.

<sup>31</sup>*Id.*

<sup>32</sup>Glassner, *supra* note 6, at 24.

<sup>331</sup>Kennedy, *supra* note 10, at 80.

<sup>34</sup>See *infra* Part II, text accompanying notes 127–131.

<sup>351</sup>Kennedy, *supra* note 10, at 87.

<sup>36</sup>Letter from James Monroe to Wirt (Feb. 1802) (quoted in 1 Kennedy, *supra* note 10, at 88–89).

<sup>37</sup>See Letter from Wirt to Dabney Carr (Feb. 12, 1802) (quoted in 1 Kennedy, *supra* note 10, at 89) ("I [had] dropped into a circle dear to me for the amiable and brilliant traits which belonged to it, but in which I had found, that during several months, I was dissipating my health, my time, my money, and my reputation.").

<sup>38</sup>See 1 Kennedy, *supra* note 10, at 90 ("Of all the fortunate incidents in the life of William Wirt, his marriage to this lady, may be accounted the most auspicious."); Robert, *supra* note 2, at 58 ("The marriage of Betsy Gamble and William Wirt was one long love affair. Wirt went to Betsy for advice in all major decisions. Betsy had a bright mind, an animated personality, a manner considered a bit lofty by some, and a streak of authoritarianism in her management of domestic affairs.").

<sup>39</sup>See Jabour, *Marriage*, *supra* note 13.

<sup>40</sup>Letter from Wirt to Dabney Carr (Feb. 13, 1803) (quoted in 1 Kennedy, *supra* note 10, at 94–95).

<sup>41</sup>*Id.*

<sup>42</sup>Turning from judge back to lawyer was humbling. See Letter from Wirt to Dabney Carr (June 6, 1803) (quoted in 1 Kennedy, *supra* note 10, at 99) ("[T]here was some awkwardness in coming down to conflict with men, to whom, a few days before, my dictum was the law. The pride was a false one, and I revenged myself on it.").

<sup>43</sup>Letter from Wirt to William Pope (Aug. 5, 1803) (quoted in 1 Kennedy, *supra* note 10, at 102–4).

<sup>441</sup>Kennedy, *supra* note 10, at 104.

<sup>45</sup>Letter from Wirt to Elizabeth Wirt (undated) (quoted in 1 Kennedy, *supra* note 10, at 105).

<sup>461</sup>Kennedy, *supra* note 10, at 118, 123–24.

<sup>47</sup>Letter from Wirt to Elizabeth Wirt (May 10, 1805) (quoted in 1 Kennedy, *supra* note 10, at 142) ("We will go to Richmond to live as soon as prudence will permit. But Norfolk is the ladder by which we are to climb the hills of Richmond advantageously.—Norfolk is the cradle of our fortune.").

<sup>48</sup>Glassner, *supra* note 6, at 35.

<sup>49</sup>See *Norfolk Public Ledger*, Aug. 8, 1806 ("Apprehensions for the health of his family, having induced the subscriber, very reluctantly, to remove from the Borough of Norfolk . . . His clients in the County and Borough Courts of Norfolk, are referred to Messrs. Littleton W. Tazewell and Robert B. Taylor, who have obligingly undertaken to finish his business there.") (quoted in Glassner, *supra* note 6, at 35).

<sup>50</sup>See *infra* Part II, text accompanying notes 132–135.

<sup>51</sup>Letter from Wirt to Elizabeth Wirt (undated) (quoted in 1 Kennedy, *supra* note 10, at 140), describing such employment as "uncongenial with my spirit":

[T]his indiscriminate defense of right and wrong—this zealous advocacy of causes at which my soul revolts—this playing of the nurse to villains, and occupying myself

continually in cleansing them—it is sickening, even to death. But the time will come when I hope it will be unnecessary.

<sup>52</sup>Burke, *supra* note 9, at 1.

<sup>53</sup>*Id.* at 3.

<sup>54</sup>*Id.* at 42 (citing *New York Evening Post*, Oct. 3, 1807).

<sup>55</sup>See *infra* Part II, text accompanying notes 136–141.

<sup>56</sup>Burke, *supra* note 9, at 50.

<sup>57</sup>Letter from Wirt to Benjamin Edwards (June 23, 1809) (quoted in 1 Kennedy, *supra* note 10, at 265).

<sup>58</sup>*Id.* (“The remainder of my cash I will invest in some stable and productive fund, to raise portions for my children.”). See also Letter from Wirt to Benjamin Edwards (May 6, 1806), quoted in *id.* at 147 (“When I have placed my wife and children beyond the reach of this world’s cold and reluctant charity, unfeeling insolence, or more insulting pity, then my country shall have all the little service which I am capable of rendering.”).

<sup>59</sup>Letter from Wirt to Benjamin Edwards (June 23, 1809) (quoted in *id.* at 265) (“It is true I love distinction, but I can only enjoy it in tranquility and innocence. My soul sickens at the idea of political intrigue and faction.”).

<sup>60</sup>Letter to Wirt to Benjamin Edwards (Mar. 17, 1805) (quoted in Hubbell, *supra* note 11, at 137) (declaring that he wrote them “to while away six anxious weeks which preceded the birth of my daughter.”).

<sup>61</sup>See Hubbell, *supra* note 11, at 137 (noting as one of the reasons for the book’s success that “Wirt had few able competitors in the field of American literature.”).

<sup>62</sup>See *id.*

<sup>63</sup>Letter from Wirt to Dabney Carr (Jan. 16, 1804) (quoted in 1 Kennedy, *supra* note 10, at 116).

<sup>64</sup>Wirt was a significant contributor to *The Rainbow; First Series*, which appeared in 1804, and *The Old Bachelor*, which appeared in 1814.

<sup>65</sup>See Taylor, *supra* note 11, at 481–82 (“More than almost any man whom Wirt could have chosen to study, Patrick Henry existed as a memory. He left behind him almost no written documents of any significance.”).

<sup>66</sup>See Taylor, *supra* note 11, at 477–78 (describing Jefferson’s and Adams’ frustrations with the book).

<sup>67</sup>See Letter from Wirt to Dabney Carr (June 8, 1804) (quoted in 1 Kennedy, *supra* note 10, at 122) (“Virginia has lost some great men, whose names ought not to perish. If I were a Plutarch, I would collect their lives for the honor of the State and the advantage of posterity.”).

<sup>68</sup>For example, we owe the memorable version of Henry’s “Give me liberty or give me death” speech to Wirt’s efforts. While some suggest that the speech was Wirt’s creation, “one may safely conclude that the key phrases are authentic and that, building on the recollections of Tyler, Randolph, and especially Tucker, Wirt simply acted out the play as he thought it might have been.” Robert, *supra* note 2, at 53.

<sup>69</sup>1 Kennedy, *supra* note 10, at 207–8.

<sup>70</sup>*Id.* at 227–29, 249.

<sup>71</sup>*Id.* at 335.

<sup>72</sup>Letter from Wirt to Dabney Carr (Mar. 31, 1813) (quoted in 1 Kennedy, *supra* note 10, at 342).

<sup>73</sup>See Letter from Wirt to Elizabeth Wirt (Oct. 14, 1814) (quoted in 1 Kennedy, *supra* note 10, at 380–81) (describing the “ruins and desolation of Washington” after its burning, “this mournful monument of American imbecility and improvidence and of British atrocity”).

<sup>74</sup>1 Kennedy, *supra* note 10, at 382, 384.

<sup>75</sup>Letter from Wirt to Dabney Carr (Apr. 7, 1816) (quoted in 1 Kennedy, *supra* note 10, at 404).

<sup>76</sup>*Id.*

<sup>77</sup>Letter from Wirt to Dabney Carr (Feb. 27, 1817) (quoted in 2 Kennedy, *supra* note 10, at 15).

<sup>78</sup>Letter from Wirt to James Madison (Mar. 10, 1816) (quoted in 1 Kennedy, *supra* note 10, at 399).

<sup>79</sup>1 Kennedy, *supra* note 10, at 399.

<sup>80</sup>See *id.* at 319, 323 (describing the rumors in 1811, which dissipated when Pinkney was selected). When the appointment occurred in 1817, the public was not disappointed. One newspaper reported:

Of Mr. Wirt, it is scarcely necessary to add any thing to what we have already said of him. He is so well known as a profound lawyer, a fine speaker, and a classical and elegant writer, that to say more in his praise, would be a work of supererogation. It may only be observed that he has risen to the situation of attorney general of the United States, from obscurity and indigence, by the superiority of his mind, and by his own unaided and individual exertions.

*City of Washington Gazette*, Nov. 21, 1817.

<sup>81</sup>Burke, *supra* note 9, at 52 (citing Letter from Wirt to Elizabeth Wirt (Nov. 13, 1817), Wirt Papers, Md. Hist. Soc’y).

<sup>82</sup>Letter from Wirt to William Pope (Jan. 18, 1818) (quoted in 2 Kennedy, *supra* note 10, at 70). The Attorney General’s salary was initially \$1,500, and although it was later raised to \$3,500 at Wirt’s insistence, the presumption remained “that the Attorney General had to make his living in the private practice of law.” Burke, *supra* note 9, at 53.

<sup>83</sup>Rex E. Lee, “Lawyer in the Supreme Court: The Role of the Solicitor General,” 1985 *Sup. Ct. Hist. Soc’y Yearbook* 15, 16 (“[I]t was not until 1853 that Congress finally established a salary for the Attorney General equivalent to that of the other cabinet officers, thereby bringing to an end the tradition of part-time attorneys general who kept up a private law practice.”). Edmund Randolph, the Attorney General in 1790, declared himself “a sort of mongrel between the State and U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former.” *Id.* & n.6 (citing Henry B. Learned, *The President’s Cabinet: Studies in the Origin*,

**Formation, and Structure of an American Institution**  
159 (1912)).

<sup>84</sup>Burke, *supra* note 9, at 52.

<sup>85</sup>Robert, *supra* note 2, at 52.

<sup>86</sup>Letter from Wirt to Hugh Nelson (Mar. 27, 1818) (quoted in 2 Kennedy, *supra* note 10, at 61):

I asked for the documents belonging to the office . . . but my inquiries resulted in the discovery that there was not to be found . . . any trace of a pen indicating, in the slightest manner, any one act of advice or opinion which had been given by any one of my predecessors, from the first foundation of the federal government to the moment of my inquiry.

<sup>87</sup>See Burke, *supra* note 9, at 57:

In April, 1818, Congress authorized office space in the Treasury Building and a clerk with a salary of \$1,000, and in May of the following year it added a contingency fund of \$500 for office expenses. The list of his needs sent by Wirt to the Treasury included: two book presses, a map stand, a writing desk and chair for the clerk, six extra chairs, two wash stands, a water pitcher and glasses, and a small table. He concluded this modest request with the comment, "as they will be attached to the Attorney General's office as long as they shall last, they ought, I think, to be strongly made, and neat enough not to be discreditable to the nation."

*Id.* at 57 (citing Letter from Wirt to Joseph Nourse (June 9, 1818) (Attorney General Letter Book, Nat'l Archives, Washington, D.C.)).

<sup>88</sup>Powell, *supra* note 11, at 299 ("Wirt found himself essentially creating from whole cloth the office of Attorney General as an ongoing branch of the government.").

<sup>89</sup>Letter from Wirt to Dabney Carr (Feb. 1, 1824) (quoted in 2 Kennedy, *supra* note 10, at 143). His more than 370 opinions have indeed left a respectable imprint. They are still cited in Office of Legal Counsel memoranda and Supreme Court cases. See Burke, *supra* note 9, at 55; Powell, *supra* note 11, at 297-98.

<sup>90</sup>Robert, *supra* note 2, at 56.

<sup>91</sup>*Id.*

<sup>92</sup>Burke, *supra* note 9, at 77.

<sup>93</sup>See *id.* at 81 ("Wirt had received from the government five fees between 1818 and 1822, totaling \$3,350."). A congressional investigation into the practice turned up no wrong-doing. See *Niles' Weekly Register*, Oct. 5, 1822 (quoting House Judiciary Committee conclusion: "[W]here compensation has been allowed to the distinguished citizen who now fills the office, services have been faithfully rendered, well deserving what has been paid to him, and it certainly has not been greater than must have been paid to any other eminent lawyer.").

<sup>94</sup>See Burke, *supra* note 9, at 77 ("[I]n 1818, when President Monroe asked him to prosecute several mail robbers in the Federal Circuit Court at Baltimore [,] Wirt objected that this was beyond his official duty, and the government employed him as a private lawyer with a \$1,500 fee.").

<sup>95</sup>Letter from Wirt to Francis Gilmer (June 1, 1818) (quoted in 2 Kennedy, *supra* note 10, at 78):

I have been to Baltimore, and, maugré the aforesaid rule, was enrolled at the State bar, on the ground, that, as the United States had a right to appear as a suitor in court, the Attorney General had, of course, a right to be admitted. Here is a specimen of accurate thinking! They did not perceive that the reason went no farther than to permit me to appear for the United States. But it was their own reason, and I am obliged to them for their obtuseness. Whether I shall make anything of it remains to be seen. There is a mighty harvest there, and their reapers are many; but their sickles are Lilliputian. There is but one Brobdingnag scythe in the field,—and that is Pinkney's.

<sup>96</sup>His Washington home alone cost him \$13,500. See Burke, *supra* note 9, at 169 (citing Letter from Wirt to Thomas Tucker (July 18, 1817) (Wirt Papers, Lib. Cong.) and Letter from Wirt to Elizabeth Wirt (Nov. 13 and 23, 1817) (Wirt Papers, Md. Hist. Soc'y)). This was perhaps the same house he occupied at the end of his time in Washington, located near the White House "on the south side of G Street between 17th and 18th streets." 2 Wilhemus Bogart Bryan, *A History of the National Capital* 192 (1916). "His residence, like that of [other neighbors], was of no special architectural merit, but it had large rooms, and made a comfortable home. Always from these houses there was the pleasant outlook on gardens. For ground was not only abundant but cheap, and the houses of the day were not cramped for building space." *Id.* at 192-93.

<sup>97</sup>See Letter from Wirt to Elizabeth Wirt (July 7, 1825) (Wirt Papers, Md. Hist. Soc'y) (cited in Burke, *supra* note 9, at 80).

<sup>98</sup>The case was *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821). Burke describes the situation:

[The House Judiciary Committee] was investigating a charge that Wirt had used his official position to get the Supreme Court to change a decision already agreed upon in conference but not yet read publicly. The charge maintained that Wirt, realizing he had lost the case as a private lawyer, had obtained a reargument by using his influence as Attorney General. Wirt denied that he, or anyone, could know a decision of the Supreme Court until it was read in Court. He justified his action by claiming that the national interest demanded the

reargument. But a letter written to his client suggested that he did know the Court was going to decide against him. [Yet] the Judiciary Committee reported that his conduct was marked with "singular delicacy" and "perfect candor."

Burke, *supra* note 9, at 82–83.

<sup>99</sup>Cruse, *supra* note 11, at 65–66 (quoting an unidentified friend of Wirt's, who went on to say: "He was the most improving man, also, I ever knew; for I can truly say that I never heard him speak after any length of time, without being surprised and delighted at his improvement both in manner and substance.").

<sup>100</sup>Powell, *supra* note 11, at 300 (noting that "the five years he lived after leaving office were largely devoted to what was in effect a reconciliation with Elizabeth").

<sup>101</sup>Burke, *supra* note 9, at 79.

<sup>102</sup>Letter from Elizabeth Wirt to Wirt (Dec. 10, 1825) (Wirt Papers, Lib. Cong.). See Appendix B, *infra*, for a reproduction of the letter.

<sup>103</sup>Letter from Wirt to Dabney Carr (May 14, 1821) (quoted in 2 Kennedy, *supra* note 10, at 120–21).

<sup>104</sup>The lone case referencing Wirt in 1822 is *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556 (1822).

<sup>105</sup>Burke, *supra* note 9, at 78 (citing Letters from Wirt to Elizabeth Wirt (Apr. 25, 1824 and July 7, 1825) (Wirt Papers, Md. Hist. Soc'y) and Letter from Wirt to Francis Gilmer (Apr. 2, 1825) (quoted in 2 Kennedy, *supra* note 10, at 171)).

<sup>106</sup>Robert, *supra* note 2, at 58.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 52.

<sup>109</sup>Wirt had long been in demand as an orator. He gave a speech on the anniversary of the Declaration of Independence in Richmond on July 4, 1800. Glassner, *supra* note 6, at 26. He also gave a widely published address at Rutgers in 1830, lamenting the passing of old nobility. Also in 1830, he spoke in Baltimore on the anniversary of the French Revolution. See Cruse, *supra* note 11, at 66.

<sup>110</sup>See Letter from Wirt to James Monroe (May 5, 1823) (quoted in 2 Kennedy, *supra* note 11, at 152–56). See Appendix B, *infra*, for a reproduction of the letter.

<sup>111</sup>See Glassner, *supra* note 6, at 128.

<sup>112</sup>See Letter from Wirt to National Anti-Masonic Convention (Sept. 28, 1831) (quoted in 2 Kennedy, *supra* note 10, at 350).

<sup>113</sup>Glassner, *supra* note 6, at 133.

<sup>114</sup>30 U.S. (5 Pet.) 1 (1831).

<sup>115</sup>31 U.S. (6 Pet.) 515 (1832).

<sup>116</sup>Charles Warren, *The Supreme Court in United States History* 216 (1922).

<sup>117</sup>See White, *supra* note 11, at 263. Wirt's description of her is heart-wrenching:

Young as she was, she seemed to be the seal and connecting bond of the whole family. Her voice, her smile, her animated graceful movements, her countless little acts and expressions of kindness and love . . . had made her necessary to the individual happiness of every member of the household. When she was lost to us, it was as if the keystone of the arch had been removed. . . . To me she was not only the companion of my studies, but the sweetener of my toils. . . . My mind, in its hours of deepest fatigue, required no other refreshment than one glance at my beloved child as she sat beside me.

2 Kennedy, *supra* note 10, at 332.

<sup>118</sup>Letter from Wirt (1831) (quoted in 2 Kennedy *supra* note 10, at 331).

<sup>119</sup>2 Kennedy, *supra* note 10, at 424.

<sup>120</sup>*Id.* at 425.

<sup>121</sup>*Id.* at 425–26.

<sup>122</sup>*Id.* at 427.

<sup>123</sup>*Id.* at 427–28 ("Such a proceeding had never yet been accorded by the National Legislature, except to deceased members of one or the other House. . . . Adams, Jackson, Calhoun, Van Buren, Marshall, Story, Clay, Webster, Southard, Taney, Binney, Sergeant, Woodbury, Everett, Cass, Generals Scott, Macomb, Rogers and Chauncey, and many others . . . were the witnesses to the laying down of the remains of William Wirt in their last resting place.").

<sup>124</sup>See Southard, *supra* note 11.

<sup>125</sup>See Historic Congressional Cemetery, *supra* note 7. Wirt first occupied the public vault, reserved as a temporary holding place for dignitaries, then was moved to R57/S148 on January 20, 1835. Years later, a newspaper complained that "in the humble grave where it now reposes . . . [n]o stone marks the spot where his remains are now mouldering into and blending with their kindred elements." *National Intelligencer*, Feb. 11, 1851. In response, the vault was erected and the body placed inside on Dec. 19, 1853. At some point after the erection of the vault, however, the grave was vandalized and a skull—perhaps Wirt's—was removed, and only recently has it been returned. See Peter Carlson, "Tale from the Crypt," *Washington Post*, Oct. 22, 2005, at C1 (detailing an odd story involving an estate sale, a D.C. council member, and a Smithsonian anthropologist).

<sup>126</sup>See Burke, *supra* note 9, at 266 ("While [lawyers such as Pinkney and Webster] boasted of persuading the Courts to adopt new legal principles, Wirt seemed to glory only in oratorical triumphs. He was a businessman's lawyer, not a legal statesman. His clients, not his principles, dictated his arguments.").

<sup>127</sup>3 Albert J. Beveridge, *The Life of John Marshall* 39 (1919) ("[Chase] was as witty as he was fearless, and

throughout the trial brought down on Hay and Wirt the laughter of the spectators").

<sup>128</sup>*Id.* at 39 ("William Wirt, in addressing the jury, was arguing that if the jury believed the Sedition Act to be unconstitutional, and yet found Callender guilty, they 'would violate their oath.' Chase ordered him to sit down. The jury had no right to pass upon the constitutionality of the law—'such a power would be extremely dangerous. Hear my words, I wish the world to know them.'").

<sup>129</sup>*Id.* at 40 ("After another interruption, in which Chase referred to Wirt as 'the young gentleman' in a manner that vastly amused the audience, the discomfited lawyer, covered with confusion, abandoned the case."). See also Burke, *supra* note 9, at 47 ("Chase had so browbeaten Wirt and Hay in the trial of James Callender, a Republican newspaper editor, that the two lawyers had resigned from the case.") (citing Hay's testimony during impeachment trial of Chase, 14 *Annals of Cong.* 3, 3–40 (1804)).

<sup>130</sup>*Id.* at 40–41.

<sup>131</sup>Burke, *supra* note 9, at 47.

<sup>132</sup>Glassner, *supra* note 6, at 45.

<sup>133</sup>*Id.* at 46.

<sup>134</sup>*Richmond Enquirer*, Sept. 2, 1806 (quoted in *id.* at 46).

<sup>135</sup>*Virginia Gazette & General Advertiser*, Sept. 1806 (quoted in *id.* at 47).

<sup>136</sup>Burke, *supra* note 9, at 2.

<sup>137</sup>*Id.* at 7.

<sup>138</sup>*Id.* at 2, 49.

<sup>139</sup>The prosecution's case relied on the Blennerhassett Island gathering as the overt act of the conspiracy. Because Burr was not present, Marshall would not permit this evidence to establish the conspiracy.

<sup>140</sup>See Glassner, *supra* note 6, at 54.

<sup>141</sup>See Part IV, text accompanying notes 263–266.

<sup>142</sup>See Robert, *supra* note 2, at 57 (observing that Wirt "probably should never have entered [*Dartmouth College*]; only recently had he moved his family to Washington, and he was absorbed in a multitude of new official duties").

<sup>143</sup>Some go quite far in describing his lack of preparation. See, e.g., Ernest Sutherland Bates, *The Story of the Supreme Court* 116 (1936) (suggesting he "did not even trouble to prepare his speech beforehand" and that his co-counsel, John Holmes, was "a cheap and mediocre lawyer").

<sup>144</sup>See White, *supra* note 11, at 175.

<sup>145</sup>See Burke, *supra* note 9, at 129.

<sup>146</sup>White, *supra* note 11, at 176.

<sup>147</sup>17 U.S. (4 Wheat.) 518, 624 (1819).

<sup>148</sup>Burke, *supra* note 9, at 138.

<sup>149</sup>Letter from Daniel Webster to Wirt (undated) (quoted in 2 Kennedy, *supra* note 10, at 90–91).

<sup>150</sup>Burke, *supra* note 9, at 138 (citing Letters from Wirt to Elizabeth Wirt (June 15, 21, 24, and 28, 1829) (Wirt Papers, Md. Hist. Soc'y)).

<sup>151</sup>Although a standing rule permitted only two counsel per side, see *infra* note 236 "[a] note in the Court Report explained that the judges waived this rule, because President Monroe, realizing the interest of the Federal Government in the case, had directed the Attorney General to join in the argument." Burke, *supra* note 9, at 172.

<sup>152</sup>See *id.* at 172 ("Actually, the Bank had retained Wirt in June of 1818 and eventually paid him a fee of \$2000.") (citing *Niles' Weekly Register*, Feb. 27, 1819). Wirt would represent the Bank in two more Supreme Court cases and numerous suits in lower courts, in addition to serving as a branch director. *Id.* at 169.

<sup>153</sup>See *id.* at 170 ("Wirt defaulted on a note for \$12,000 to the Farmers' Bank of Richmond, and [an unsuccessful business venture] remained a drag on his resources until . . . 1825.") (citing Letters from Wirt to Elizabeth Wirt (Nov. 24, 1819, May 2, 1824, Apr. 26, 1825, May 16, 1825) (Wirt Papers, Md. Hist. Soc'y)).

<sup>154</sup>17 U.S. (4 Wheat.) 316, 322–26 (1819).

<sup>155</sup>Burke, *supra* note 9, at 176; *McCulloch*, 17 U.S. at 360–62.

<sup>156</sup>See, e.g., Luther Martin's argument, *McCulloch*, 17 U.S. at 372–77.

<sup>157</sup>Burke, *supra* note 9, at 179.

<sup>158</sup>2 Warren, *supra* note 116, at 8 (citing *Niles' Weekly Register*, Dec. 2, 1820, Feb. 24, 1821).

<sup>159</sup>*Id.* at 11 (citing *National Intelligencer*, Mar. 23, 1821).

<sup>160</sup>See *Richmond Enquirer*, Mar. 23, 1821 (describing the opinion as "so important in its consequences and so obnoxious in its doctrines" that "the very title of the case is enough to stir one's blood").

<sup>161</sup>2 Warren, *supra* note 116, at 57.

<sup>162</sup>2 Warren, *supra* note 116, at 60.

<sup>163</sup>Letter to Dabney Carr (Feb. 1, 1824) (quoted in 2 Kennedy, *supra* note 10, at 164).

<sup>164</sup>Norman R. Williams, "Gibbons," 79 *N.Y.U. L. Rev.* 1398, 1412 (2004).

<sup>165</sup>*Id.* at 1414.

<sup>166</sup>*Id.* at 1412–13.

<sup>167</sup>*Id.* at 1413.

<sup>168</sup>Burke, *supra* note 9, at 219 (citing *New York Statesman*, Feb. 13, 1824).

<sup>169</sup>Williams, *supra* note 165, at 1414 ("Acknowledging that interstate commerce has many facets and that the states have often adopted commercial regulations affecting interstate commerce, such as inspection and pilotage laws, he proposed the notion of selective exclusivity, according to which some commercial matters were exclusively entrusted to Congress, while others were subject to legislation by either Congress or the states.").

<sup>170</sup>*New York Statesman*, Feb. 24, 1824 (quoted in 2 Warren, *supra* note 116, at 60).

<sup>171</sup>*Richmond Enquirer*, Mar. 2, 1824 (quoted in Burke, *supra* note 9, at 223).



<sup>172</sup>However, one scholar suggests that Marshall adopted the core of Wirt's reasoning "in a reconstructed form." See Williams, *supra* note 164, at 1443:

Marshall agreed with Wirt that the states retained significant authority to adopt measures that would significantly affect commerce, such as inspection and other health laws. The difference between Marshall and Wirt was formalistic rather than substantive: . . . Marshall rejected Wirt's proffered notion of concurrent state authority over certain subjects only to re-import that very notion into his framework under the guise that such regulations were acceptable as state police regulations. This was not a rejection of Wirt's proposal; rather, it was a conscious translation of Wirt's proposed compromise in a way that described more accurately (at least in Marshall's eyes) the respective spheres of sovereignty over commercial activities and the basis for retained state authority over some commercial matters.

<sup>173</sup>See Part IV *infra*, text accompanying notes 267–273.  
<sup>174</sup>23 U.S. (10 Wheat.) 66, 81 (1827).

<sup>175</sup>Jean Edward Smith, *John Marshall: Definer of a Nation* 487 (1996).

<sup>176</sup>23 U.S. at 114.

<sup>177</sup>*Id.* at 120–21.

<sup>178</sup>*Id.* at 131–33. See also White, *supra* note 11, at 701.

<sup>179</sup>*The Boston Patriot*, quoted in *Niles' Weekly Register*, Mar. 26, 1825 (quoted in Burke, *supra* note 9, at 188).

<sup>180</sup>See Michael J. Birkner, "The New York-New Jersey Boundary Controversy: John Marshall and the Nullification Crisis," 12 *J. Early Republic* 195, 198 (1992).

<sup>181</sup>This in turn, provided the background for *Gibbons v. Ogden*: New Jersey was trying to challenge New York's steamboat monopoly on the Hudson River. See *id.* at 199.  
<sup>182</sup>*Id.* at 201.

<sup>183</sup>28 U.S. (3 Pet.) 461 (1830).

<sup>184</sup>30 U.S. (5 Pet.) 284 (1831).

<sup>185</sup>After scheduling argument for early March, see 31 U.S. (6 Pet.) 323 (1832), on March 14, Marshall preempted Wirt's argument by announcing that "the court saw that the cause could not be decided this term, if the argument was completed, & that they had therefore come to the conclusion that the argument should be postponed" until February 1833. Birkner, *supra* note 180, at 203. Marshall had come to fear that the Constitution "cannot last," and that "[t]he Union has been prolonged thus far by miracles. I fear they cannot continue." Letter from Marshall to Joseph Story (Sept. 22, 1832) (quoted in 1 Warren, *supra* note 116, at 769).

<sup>186</sup>Birkner, *supra* note 180, at 209–11.

<sup>187</sup>27 U.S. (2 Pet.) 245, 248 (1829).

<sup>188</sup>*Id.* at 249.

<sup>189</sup>White, *supra* note 11, at 584–85.

<sup>190</sup>2 Kennedy, *supra* note 10, at 309.

<sup>191</sup>*Id.* at 312.

<sup>192</sup>Dowling, *supra* note 11, at 307.

<sup>193</sup>Rennard J. Strickland & William M. Strickland, "The Court and the Trail of Tears," 1979 *Sup. Ct. Hist. Soc'y Yearbook* 20, 20–21.

<sup>194</sup>Burke, *supra* note 9, at 244 (citing Letter from Wirt to Dabney Carr (June 21, 1830) (quoted in 2 Kennedy, *supra* note 10, at 253)).

<sup>195</sup>See *infra* note 277 and accompanying text.

<sup>196</sup>See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>197</sup>See Part IV *infra*, text accompanying notes 274–281.

<sup>198</sup>*New York Daily Advertiser*, Feb. 27, 1832 (quoted in Strickland, *supra* note 195, at 26) ("So interesting was the subject, so ably did he present it to the Court, that in addition to the number of gentlemen and ladies, who attended from curiosity, so many of the members of the House reported to the Courtroom that an adjournment was moved.").

<sup>199</sup>*Id.*

<sup>200</sup>Burke, *supra* note 9, at 261.

<sup>201</sup>See Strickland & Strickland, *supra* note 193, at 27.

<sup>202</sup>See *id.*

<sup>203</sup>White, *supra* note 11, at 160.

<sup>204</sup>2 Thomas Hamilton, *Of Men and Manners in America* 23 (Augustus M. Kelly pub. 1968) (1833).

<sup>205</sup>*Id.* at 37.

<sup>206</sup>White, *supra* note 11, at 160.

<sup>207</sup>*Id.* at 159 n.7.

<sup>208</sup>*Id.* at 162–63. See also Joshua Glick, "Comment, On the Road: The Supreme Court and the History of Circuit Riding," 24 *Cardozo L. Rev.* 1753 (2003).

<sup>209</sup>British troops burned the Capitol on August 24, 1814. 1 Warren, *supra* note 116, at 459. The Capitol architect, Benjamin Latrobe, described the state of the courtroom in his 1816 report to Congress: "Great efforts were made to destroy the Court-room, which was built with uncommon solidity, by collecting into it and setting fire to the furniture of the adjacent rooms." In consequence, "the columns [of the courtroom] were cracked exceedingly" and its "condition [rendered] dangerous." Report from Benjamin Latrobe to Congress, Nov. 28, 1816 (quoted in *id.* at 459).

<sup>210</sup>*Id.* at 459 ("on the site of 204–206 Pennsylvania Avenue, S.E."). The house was still standing in 1933, but was scheduled to be torn down to make way for the Adams Building of the Library of Congress. David C. Mearns & Verner W. Clapp, "The Chambers of the Supreme Court in Washington (1801–1867)" 8–9 (1933) (unpublished manuscript on file with the Library of Congress).

<sup>211</sup>Catherine Hetos Skefos, "The Supreme Court Gets a Home," 1976 *Sup. Ct. Hist. Soc'y Yearbook* 25, 29 (quoting 1 George Ticknor, *Life, Letters, and Journals of George Ticknor* 38 (1876)).

<sup>212</sup>"The Supreme Court—Its Homes Past and Present," 26 *A.B.A. J.* 283, 288 (1941) ("a four-story brick dwelling,

located on New Jersey Avenue on the west side"). Research by the Library of Congress confirms that the location was across from the Bank of Washington, which was "located on the east side of New Jersey Avenue, between B and C streets, southeast." Mearns & Clapp, *supra* note 210, at 10.

<sup>213</sup>Letter from Jeremiah Mason to Rufus King (Dec. 15, 1816) ("Bailey, a reformed gambler from Virginia, has taken and fitted up for a tavern the house south of the Old Capitol, where the Supreme Court held its session last winter, together with the house adjoining.") (quoted in 1 Warren, *supra* note 116, at 459). An advertisement for the tavern gives some sense of what the Court's accommodations must have been like the year before:

Bell's Tavern will be opened on Monday the 18th inst. by Robert Bailey, from Berkley Springs, Va., on Capitol Hill, in the city of Washington, at the sign of the Bell, in that large and commodious four story house, together with other houses, on the [New Jersey] Avenue, opposite the Washington Bank, within about 150 yards south of the Capitol. . . . It is a high and healthy situation—the water is good. Wood will be burnt altogether, and everything kept neat and clean. The best accommodation the country affords will be provided for the reception of Members of Congress, and ladies and gentlemen of the first respectability.

Mearns and Clapp, *supra* note 210, at 9–10 (quoting *National Intelligencer*, Nov. 12, 1816).

<sup>214</sup>Henry Wheaton, Notebook Entry for Feb. 1817, Henry Wheaton Papers (quoted in White, *supra* note 11, at 158).

<sup>215</sup>Bryan, *supra* note 96, at 38 (quoting *National Intelligencer*, Feb. 6, 1818). See also 1 *Works of Rufus Choate* 515 (1862) ("a mean apartment of moderate size").

<sup>216</sup>Skefos, *supra* note 211, at 29.

<sup>217</sup>The Architect of the Capitol, "The Old Supreme Court Chamber," available at <http://www.aoc.gov/cc/capitol/oscc.cfm> (last visited August 5, 2008).

<sup>218</sup>Hamilton, *supra* note 204, at 127.

<sup>219</sup>Charles Ingersoll, *Inchiquin, The Jesuit Letter* 52 (1810).

<sup>220</sup>*New York Statesman*, Feb. 7, 24, 1824 (quoted in 1 Warren, *supra* note 116, at 461).

<sup>221</sup>*Id.*

<sup>222</sup>"In 1818, a New York newspaper noted that Washington's 'season of greatest festivity' began 'after the Supreme Court commenced its session' and that 'there are now tea and dining parties daily.'" White, *supra* note 11, at 161 (quoting *New York Commercial Advertiser*, Feb. 7, 1818).

<sup>223</sup>W. Meigs, *The Life of Charles Jared Ingersoll* 123, 137 (1900) (diary entries for Feb. 14 and 20, 1823) (quoted in White, *supra* note 11, at 161).

<sup>224</sup>J.Q. Adams, entry for Mar. 8, 1821 (quoted in 1 Warren, *supra* note 116, at 471–72).

<sup>225</sup>See Letter from Wirt to Dabney Carr (Mar. 24, 1817) (quoted in 2 Kennedy, *supra* note 10, at 19) ("The Court thought the cause with me on the evidence, on which the argument turned; but being an admiralty case, they have, according to the practice of that court, indulged the opposite party with farther proof. So that it is possible we shall have another heat at it next winter. Judge Johnson, of the Supreme Court, told me here the other day, that my client would certainly recover the cargo.").

<sup>226</sup>Although Marshall came under heavy criticism for his behavior in the Burr trial, the fact that he was playing chess with Burr's counsel does not seem to have been considered exceptional. See Burke, *supra* note 9, at 37 ("During the weekend . . . [a] remark dropped by Marshall over a game of chess with John Wickham stirred the hopes of Burr's lawyers. 'Don't you think you will be able to checkmate these fellows,' asked the Chief Justice, 'and relieve us from being here three weeks more?'" (citing William H. Safford, ed., *The Blennerhassett Papers* 354–55 (1861))).

<sup>227</sup>Letter from Wirt to Judge Dabney Carr (Apr. 7, 1816) (quoted in 1 Kennedy, *supra* note 10, at 405).

<sup>228</sup>Letter from Wirt to Francis Gilmer (Apr. 1, 1816) (quoted in 1 Kennedy, *supra* note 10, at 404).

<sup>229</sup>Letter from Justice Joseph Story (Mar. 8, 1812) (quoted in 1 Warren, *supra* note 116, at 473).

<sup>230</sup>Thomas Hamilton, the British visitor already alluded to, suggested that

[i]n America . . . the influence of the pen, though admitting of vast extension, is only secondary, as an instrument of political ambition, to that of the tongue. . . . A convincing proof of this almost uniform preference may be found in the fact, that of the whole federal legislature *nineteen-twentieths* are lawyers, men professionally accustomed to public speaking.

2 Hamilton, *supra* note 204, at 76. Hamilton went on, perhaps hyperbolically, to declare that this priority shaped education itself:

The acquisition of a faculty so important [is] one of the primary objects of Transatlantic education. . . . An American boy, from the very first year of his going to school, is accustomed to spout. At college he makes public orations. On emerging into life he frequents debating societies, numerous everywhere. . . . He then commences practice as a lawyer, and in that capacity reaps some advantage from his previous notoriety."

*Id.* at 77.

<sup>231</sup>See *infra* Part IV. Wirt's own style was the product of significant effort:

My pronunciation and gestures [during his early years of practice] were terribly vehement. I used, sometimes, to find myself literally stopped, by too great rapidity of utterance. And if any poor mortal was ever forced to struggle against a difficulty, it was I, in that matter. But my stammering became at last a martyr to perseverance, and, except when I get some of my youthful fires lighted, I can manage to be pretty intelligible now.

<sup>1</sup> Kennedy, *supra* note 10, at 86.

<sup>232</sup>Hamilton notes that "It may appear strange, under such circumstances, but I have no doubt of the fact, that in the course of a session [of Congress], more Latin—such as it is—is quoted in the House of Representatives, than in both Houses of the British Parliament." 2 Hamilton, *supra* note 204, at 98. Although he treated such displays with disdain, finding it "ludicrous enough to observe the solicitude of men, evidently illiterate, to trick out their speeches with such hackneyed extracts from classical authors, as they may have picked up in the course of a superficial reading," *id.*, Americans took oratory very seriously.

<sup>233</sup>Examples include Henry Clay, Representative and Senator from Kentucky; Edward Livingston, Representative and Senator from Louisiana and drafter of that state's civil code; Littleton Tazewell, Senator from Virginia; and Daniel Webster, Senator from Massachusetts.

<sup>234</sup>*New York Statesman*, Feb. 7, 1824 (quoted in 1 Warren, *supra* note 116, at 467). See also 2 Hamilton, *supra* note 204, at 128 ("The judges of the Supreme Court wear black Geneva gowns; and the proceedings of this tribunal are conducted with a degree of propriety, both judicial and forensic, which leaves nothing to be desired. . . . There was no lounging either at the bar or on the bench.").

<sup>235</sup>Ingersoll, *supra* note 219, at 54–55.

<sup>236</sup>David C. Frederick, "Supreme Court Advocacy in the Early Nineteenth Century," 30 *J. Sup. Ct. Hist.* 1, 4 (2005) ("During the Marshall Court years, the Court began a steady retrenchment away from unlimited oral arguments that stemmed from adoption of the rule in 1792 incorporating King's Bench Practice. In 1812, the Court issued a rule limiting oral argument to only two counsel per side.") (citing Rule XXIII, issued February Term 1812, 14 U.S. (1 Wheat.) xviii (1816)).

<sup>237</sup>Stephen M. Shapiro, "Oral Argument in the Supreme Court: The Felt Necessities of Time," 1985 *Sup. Ct. Hist. Soc'y Yearbook* 22, 25–26 (citing Rule 53, 62 U.S. (21 How.) xii (1849)).

<sup>238</sup>See, e.g., *The Fortuna*, 15 U.S. (2 Wheat.) 161 (1817) (of which Wirt wrote "I have been to Washington, and I made a speech, sir, in the Supreme Court *four hours and a half long!*") (see *supra* note 77 and accompanying text).

<sup>239</sup>See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The upper limit seems to have been a ten-day argument. See J.W. Davis, "The Argument of an Appeal," 26 *A.B.A.J.* 895 (1940) ("[I]n the Girard will case Webster, Horace Binney, and others for ten whole days assailed the listening ears of the Court.").

<sup>240</sup>There were no replacements from 1812 to 1823. See Thomas W. Merrill, "The Making of the Second Rehnquist Court: A Preliminary Analysis," 47 *St. Louis U.L.J.* 569, 577 (2003) ("Not since the 1820s has a single group of Justices sat together for such a long unbroken period of time, and the Court of the 1820s contained only seven Justices.").

<sup>241</sup>Act of Feb. 20, 1819, ch. 27, 3 Stat. 484.

<sup>242</sup>White, *supra* note 11, at 163.

<sup>243</sup>See Burke, *supra* note 9, at 85 ("While the evidence is far from conclusive, Wirt's earnings from the private practice of law must have reached at least \$10,000 a year.").

<sup>244</sup>Frederick, *supra* note 236, at 2.

<sup>245</sup>White, *supra* note 11, at 164–65.

<sup>246</sup>*Id.* at 165.

<sup>247</sup>See Frederick, *supra* note 236, at 12; see also Rule XL, issued January Term 1833: "[I]t would in many cases accommodate Counsel, and save expense to parties, to submit causes upon printed arguments"; thus, "in all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, if the Counsel on either or both sides shall choose so to submit the same." 42 U.S. (1 How.) at xxxv.

<sup>248</sup>See Frederick, *supra* note 236, at 14 ("[B]y the time of the Civil War, the emphasis placed on written briefs marked a great change from just decades before").

<sup>249</sup>He did, however, take the unusual step in the Cherokee cases of drafting a lengthy legal opinion months before arguing the case, which he sent to "President Jackson, the ex-presidents, the state governors, and other distinguished persons." Burke, *supra* note 9, at 245. It was eventually published in the newspaper. See *Niles' Weekly Register*, Sept. 25, 1830.

<sup>250</sup>Letter from Joseph Story to Samuel Fay (Feb. 24, 1812) (quoted in 1 W. Story, *The Life and Letters of Joseph Story* 215–16 (1851), speaking of *United States v. Crosby*, 7 Cranch 115 (1812)) (quoted in White, *supra* note 11, at 185).

<sup>251</sup>See *United States v. Kelly*, 24 U.S. (11 Wheat.) 417 (1826); *United States v. Baker*, 25 U.S. (12 Wheat.) 559 (1827); *United States v. Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100 (1828); *Parker v. United States*, 26 U.S. (1 Pet.) 293 (1828); *United States v. 422 Casks of Wine*, 26 U.S. (1 Pet.) 547 (1828) (although opposing counsel presented arguments, notations seem to indicate that Wirt did not argue the case; instead he "submitted the case, on the assigned by the District Attorney").

<sup>252</sup>31 U.S. (6 Pet.) 323 (1832).

<sup>253</sup>See 31 U.S. at 322 ("Instead of appearing, the state of New York has demurred; and this mode of proceeding is resisted in a written argument, which is now handed to the court."). New York asked Beardsley to file their demurrer with the clerk of the court:

Mr. Beardsley stated, that he had filed and served the demurrer for the attorney-general of New York. He was not counsel in this cause for New York, nor was any counsel, to his knowledge, in the city who represented that state. . . . As he had filed the demurrer as agent for the attorney-general, he would, with the permission of the court, make a few suggestions.

*Id.* at 323. After argument by Beardsley and Frelinghuysen, Marshall ruled that the document was "an appearance by the state." *Id.* at 327.

<sup>254</sup>See *Bank of United States v. Swan*, 28 U.S. (3 Pet.) 68, 67-68 (1830):

On consideration of the motion made by Mr. Wirt, of counsel for the appellee, for leave to take from the office of the clerk of this court, before the adjournment of the present term of this court, an official certificate of the dismissal of this appeal, dismissed last Saturday, being the 30th of January, of the present term of this court:

Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term, and move to have the appeal reinstated. To allow such a certificate would be to prejudge such a motion.

<sup>255</sup>The newspaper that earned the best reputation was *Niles' Weekly Register*, published in Baltimore. See Jeffrey B. Morris, "Niles Register and the Supreme Court," 1978 *Sup. Ct. Hist. Soc'y Yearbook* 51, 51 (observing that Hezekiah Niles "provided the Supreme Court with its first sustained accurate coverage").

<sup>256</sup>1 Warren, *supra* note 116, at 455 ("Many years elapsed before the Supreme Court Reports obtained any wide sale or circulation among lawyers. Even as late as 1830, the Reporter, Richard Peters, stated that 'few copies were found in many large districts of the country. In some of the districts, not a single copy of the reports are in the possession of anyone.'").

<sup>257</sup>See White, *supra* note 11, at 403 ("In general, there seems to have been a professional consensus that Wheaton's reports were timely, accurate, and impressive scholarship."). Wirt's comfort with Wheaton is evidenced in a letter to him suggesting that "on points of law . . . I

am safer in your hands than in my own." *Id.* at 403 (quoting Letter from Wirt to Henry Wheaton, June 3, 1813, in Wheaton Papers).

<sup>258</sup>*Id.* at 408.

<sup>259</sup>See Robert, *supra* note 2, at 57 ("Wirt's vanity was wounded when his sensational peroration, a rebuttal of Thomas Addis Emmet's Latin quotation, lost all its point by virtue of the reporter's permitting Emmet to revise his own statement.").

<sup>260</sup>See Robert, *supra* note 2, at 57 (noting that "the special report of the *Dartmouth College v. Woodward* case did not salvage all that could have been salvaged from Wirt's argument, maybe because of Wirt's own failure to cooperate with the reporter. He also suffered from inadequate reporting in *Ogden v. Saunders*, and in other cases.").

<sup>261</sup>White, *supra* note 11, at 409 ("[Baldwin] charged that Peters had allowed William Wirt, who had argued *Cherokee Nation v. Georgia*, to amend his argument after having had access to Baldwin's dissent in that case."). Peters responded with a letter to the Chief Justice, contradicting the erratic Baldwin, and the matter was dropped. *Id.* at 409-10.

<sup>262</sup>28 U.S. (3 Pet.) 397 (1830).

<sup>263</sup>Excerpt from *United States v. Burr* (Case No. 14,693), 25 Fed. Cas. 122-24, drawn from the reports of J.J. Coombs (1864).

<sup>264</sup>25 Fed. Cas., at 124.

<sup>265</sup>See, e.g., Richard G. Parker and J. Madison Watson, *National Fifth Reader: Containing a Complete and Practical Treatise on Elocution; Select and Classified Exercises in Reading and Declamation; with Biographical Sketches, and Copious Notes: Adapted to the Use of Students in Literature* (1868). See also Robert, *supra* note 2, at 52 (reporting that this passage "was learned by a whole generation of little boys in knee breeches to recite at Friday afternoon school exercises").

<sup>266</sup>25 Fed. Cas., at 131-32.

<sup>267</sup>22 U.S. (9 Wheat.) 1, 159-86 (1824).

<sup>268</sup>*Id.* at 159-60.

<sup>269</sup>*Id.* at 161-63.

<sup>270</sup>See *supra* note 172 and accompanying text.

<sup>271</sup>22 U.S. at 165-66.

<sup>272</sup>*Id.* at 181-83.

<sup>273</sup>*Id.* at 183-86.

<sup>274</sup>30 U.S. (5 Pet.) 1 (1831).

<sup>275</sup>Burke, *supra* note 9, at 245 (describing document which was later printed in *Niles' Weekly Register*, Sept. 25, 1830):

[Wirt] drafted a lengthy legal opinion, which supported the treaty rights of the Cherokees to self-government and to the possession of their lands until they agreed to cede them to the United States. It drew heavily on his opinions as Attorney General and on the debate on the Indian Removal Bill. He published the opinion

on June 20 and sent copies to President Jackson, the ex-presidents, the state governors, and other distinguished persons.

<sup>276</sup>In a letter to Dabney Carr, Wirt asked, "[w]ould Carr ask Marshall's opinion on the national status of the Cherokees?" Marshall politely declined to comment. See Burke, *supra* note 9, at 247 (citing Letter from Wirt to Dabney Carr (June 21, 1830) (quoted in 2 Kennedy, *supra* note 10, at 256–58)). For Marshall's reply, see Letter from John Marshall to Dabney Carr (June 26, 1830) (Wirt Papers, Md. Hist. Soc'y). See also Appendix B for excerpts from Wirt's letter and Marshall's reply.

<sup>277</sup>See, e.g., *Niles' Weekly Register*, Mar. 26, 1831. See also *American Spectator* and *Washington City Chronicle*, Mar. 12, 19, 1831; *National Journal*, Mar. 15, 1831; *Boston Patriot and Mercantile Advertiser*, Mar. 22, 1831 (all cited in Burke, *supra* note 9, at 255).

<sup>278</sup>2 Kennedy, *supra* note 10, 335.

<sup>279</sup>*Liberator*, July 16, 1831 (reprinting "Speech of Mr. Wirt in the Cherokee Case" from the *Cincinnati American*).

<sup>280</sup>2 Kennedy, *supra* note 10, at 336–42.

<sup>281</sup>*Id.* at 336–42.

<sup>282</sup>See, e.g., Letter from Wirt to Francis Gilmer (Nov. 16, 1813 (quoted in 1 Kennedy, *supra* note 10, at 362–64)); Letter from Wirt to Law Student (July 22, 1822) (reproduced in "Advice to a Law Student," 2 *Am. J. of Legal Hist.* (1958)); Letter from Wirt to S. Teakle Wallis (Aug. 25, 1833) (quoted in 2 Kennedy, *supra* note 10, at 409).

<sup>283</sup>Dowling, *supra* note 11, at 309–10 ("Much as Mr. Wirt depreciated his own efforts to attain eminence, it is easy to discover the painstaking and laborious student beneath the brilliant and successful lawyer.").

<sup>284</sup>Powell, *supra* note 11, at 302 (noting that Wirt's "concern for the law as a means of expressing and safeguarding political community pervades Wirt's legal opinions as Attorney General as well and distinguishes his understanding of public law from the more adversarial views that seem predominant today.").

<sup>285</sup>*Niles' Weekly Register*, Feb. 22, 1834.

<sup>286</sup>*National Intelligencer*, Feb. 19, 1834.

<sup>287</sup>Frederick, *supra* note 236, at 7.

<sup>288</sup>White, *supra* note 11, at 264 ("In the period covered by this study Wirt appeared before the Court more frequently than any other lawyer, arguing 170 cases between 1815 and 1835.").

<sup>289</sup>Burke, *supra* note 9, at 75 (focusing on "174 cases in fourteen full years of practice" for statistical purposes but excluding the six other cases argued in 1816, 1817, 1822, 1833, and 1834).

<sup>290</sup>Edward White lists this as one of Wirt's cases, and David Frederick follows him. See White, *supra* note 11, at 264; Frederick, *supra* note 236, at 7. But there appears to be no evidence for doing so, and neither Burke nor Robert includes it in their treatments of Wirt's legal career. See Burke, *supra* note 9, at 75; Robert, *supra* note 2, at 52.

<sup>291</sup>See *supra* note 254.

<sup>292</sup>The Court's method of delivering cases sometimes left it unclear how many Justices favored any given opinion:

Before this case came on for argument, Mr. Wirt, in behalf of the plaintiff (the original defendant), inquired of the court, whether the opinion of Mr. Justice Johnson, delivered in the case of *Ogden v. Saunders*, 12 Wheat. Rep. 213, was adopted by the other judges who concurred in the judgment in that case. The judges of this court, who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Mr. Justice Johnson, in the case of *Ogden v. Saunders*, 12 Wheaton, 213. That opinion is therefore to be deemed the opinion of the other judges, who assented to that judgment. Whatever principles are established in that opinion, are to be considered no longer open for controversy, but the settled law of the court.

*Boyle v. Zacharie*, 31 U.S. (6 Pet.) 348, 348 (1832).

# John Marshall Harlan's Political Memoir

PETER SCOTT CAMPBELL

Near the end of his life, John Marshall Harlan wrote a number of biographical essays, presumably at the request of his children. Most of the essays relate to his experiences in the Civil War. The essay reprinted here instead recounts Harlan's political career before he joined the Supreme Court. Although he rarely won any elections and only held a couple of offices, Harlan's political odyssey is significant in that it shows how his social views were formed. Harlan's transformation from a staunch anti-abolitionist to a civil-rights advocate can be viewed as a series of reactions against various opponents as he struggled to find his political identity after the collapse of the Whig party in the 1850s.

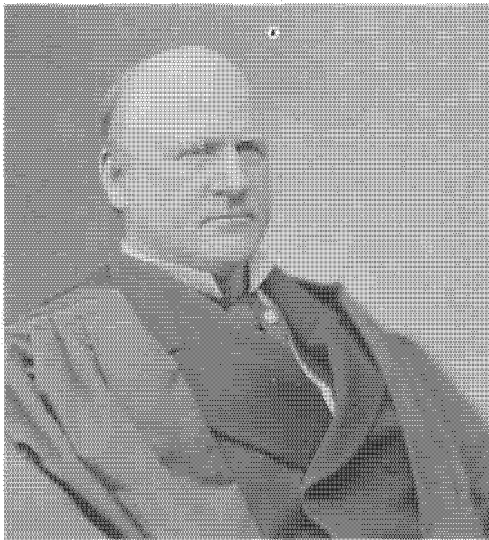
Harlan's efforts to find a political party with which to align is indicative of what many early Americans went through before the beginning of the modern two-party system. The years just before the Civil War were particularly tumultuous. As the party that supported both states' rights and slavery, the Democratic party could count on a stable base of supporters from all parts of the country. People like Harlan, who believed in a strong federal government yet did not want that same government to be able to outlaw slavery, had a hard time finding a party that could draw enough votes from across the country to be a serious competitor to the Democratic party.

There were many reasons for the demise of the Whig party and its successors, but one

of the biggest factors was undoubtedly the cause of abolition. As soon as any party began to attract Northern voters, people indifferent or inimical to slavery would inevitably join as well. The antagonism between abolitionists and anti-abolitionists would eventually rend the party apart and Harlan's search for a new party would begin anew. The antagonism grew so severe that it led eventually to the four-party presidential election of 1860 that resulted in the election of Abraham Lincoln, the candidate from the relatively antislavery Republican party.

Harlan tells this story in his memoir, but he fills it with personal details. He relates his unease as he follows his father and other Whig mentors into the xenophobic Know-Nothing





Before the Civil War, John Marshall Harlan crisscrossed the state stumping either for himself or for whatever political party he could find that fit his views that the country needed a strong national government that also supported slavery.

party, and then, in turn, into the Opposition and Constitutional Union parties. This period marked not only his political progress, but his professional progress as well. Only 22 years old at the time of the beginning of the memoir, Harlan was anxious to make his mark both as a lawyer and as a man of public affairs. As he relates, he threw himself wholeheartedly into public speaking. He enthusiastically expounded the tenets of each party he joined as he stumped across Kentucky for himself or any other candidate who was running in his party. The result was that Harlan did indeed become well known across the state, and if he rarely won any elected offices, he was able to establish a prestigious and flourishing legal practice. However, his relentless pursuit of office and his near constant changing of parties earned him a reputation as a political chameleon, and the Democrat newspapers delighted in printing contradictory quotes from his previous campaigns.

Harlan glides over his Civil War years, but even then he was politically active. His reticence on the subject might be due to the fact that he came very close to joining the Demo-

cratic party during this time. In 1863, shortly after he had resigned from the Union Army, Harlan joined another new party called the Union Democratic party. As their candidate for state attorney general, he was overwhelmingly elected to office. As this was one of his father's former offices, this win must have been a particularly gratifying one, so it is odd that he does not mention it here.

During the 1864 campaign, Harlan supported and campaigned for the Democratic candidates for President and Governor of Indiana. Harlan then joined the Conservative Union Democratic party (which Harlan identifies vaguely as "the Third Party"), which worked with the Democratic party in opposing the Thirteenth Amendment. This political marriage between the two parties proved to be short-lived. After the war, the Democratic party increasingly pandered to the pro-Confederacy feelings of Kentucky voters, as ex-Confederate soldiers became repatriated and other residents reacted to the heavy-handed Union military occupancy of the state and Reconstruction of the South. Pro-Union men like Harlan in the Conservative Union Democratic party felt increasingly unwelcome in the Democratic party, and the alliance was broken. Before the 1867 election, the Conservative Union Democratic party tried to get the national Democratic party to recognize them as the sole legitimate Democratic party in Kentucky. This effort failed, and in the election all of the Conservative Union Democratic party candidates—including Harlan, who was running for re-election as attorney general—were resoundingly defeated in the polls. The party disbanded and was formally merged with the Democratic party. Once again, Harlan was left without a political party.

As Harlan relates, by the 1868 election, he was forced to choose between the Democrats and the Republicans. Years of antipathy towards abolition had made him opposed to the Republican party, but now, as the Democratic party began again to emphasize states' rights and turned a blind eye to violence by groups

such as the Klu Klux Klan, he chose what he felt was the lesser of two evils and joined the Republican party. As before, once Harlan joined the party, he enthusiastically embraced all of its platforms. Whereas he had previously railed against abolition and Reconstruction, he now became a vocal advocate of these policies. He energized the state Republican party by running in two close races for Governor and by stumping for state and national candidates.

All of this effort paid off. For his efforts to secure the presidential nomination for Rutherford B. Hayes, Harlan was rewarded with a nomination to the Supreme Court. Years of jumping between parties and making incendiary speeches ensured that there would be plenty of political enemies opposed to his nomination. However, despite a lengthy delay, he was confirmed without too much trouble. Interestingly, his nomination was warmly received by Kentucky Democrats, many of whom exerted influence on the Senate to ensure his confirmation.

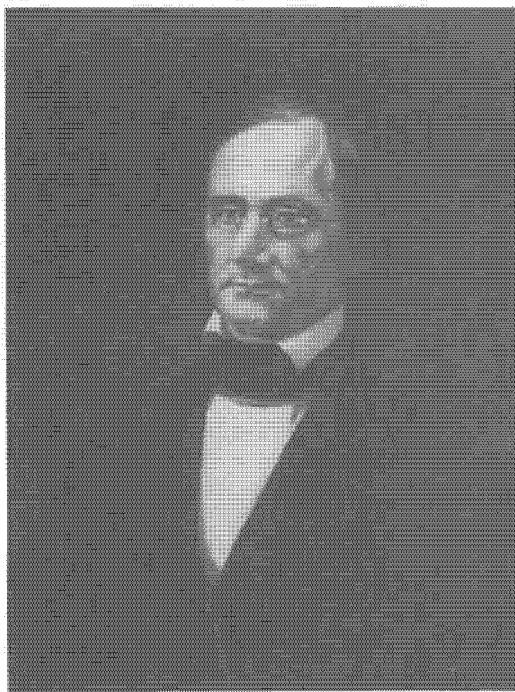
Once on the Court, Harlan had the chance to put his beliefs on the nature of federal government and personal rights into action—or at least to outline them in his dissents. It is interesting to speculate how different those opinions would have been had he somehow been appointed to the Court before he joined the Republican party. The disparity between the beliefs of Justice Harlan and those of the younger, slave-owning Harlan may forever be a mystery, but this memoir provides at least some clues to that evolution.

This article is a transcription of a typewritten manuscript stored with the John Marshall Harlan collection in the Library of Congress. Endnotes have been added whenever possible to identify people and political parties and to correct a couple of minor matters where Harlan gets the details wrong.

**THE KNOW-NOTHING ORGANIZATION. MY FIRST APPEARANCE AS A PUBLIC SPEAKER AND PARTICIPATION IN THE PRESIDENTIAL**

**CAMPAIGN OF 1856. ELECTION AS COUNTY JUDGE IN 1858, AND CONTEST FOR REPRESENTATIVE IN CONGRESS IN 1859. RACE FOR GOVERNOR IN 1871 AND IN 1875. RECOMMENDED FOR VICE-PRESIDENT IN 1872. ARREST OF DR. MITCHELL.**

The Know-Nothing Society<sup>1</sup> was a secret organization, having for its object to restrict and destroy the influence of foreigners and Catholic priests in our political affairs. Its motto was, "Put none but Americans on Guard." In 1854, just after reaching twenty-one years of age, I was asked by a friend to join the Know-Nothings, my friend observing that all the old Whigs in the city were members of it. Well, I agreed to join, and did join the society. I was initiated in the upper, or grand jury, room in the court house in Frankfort. On the evening of my initiation an oath (of course no statute authorized it or gave it legal sanction) was administered to me which bound me to vote only for native Americans, and, in effect, only for Protestants. I was very uncomfortable when the oath was administered to me. My conscience, for a time, rebelled against it. For a moment I had the thought of retiring; for while I was intense, as I am still, in my Protestantism, I did not relish the idea of proscribing anyone on account of his religion. But looking around the room in which the initiation occurred, I observed that the old Whig leaders of the city, including my father,<sup>2</sup> were present, and I had not the boldness to repudiate the organization. So I remained in it, upon the idea that, all things considered, it was best for any organization to control public affairs rather than to have the Democratic party in power. That was the kind of political meat upon which my father fed me as I grew up. He hated Democracy<sup>3</sup> and its leaders, Jefferson, Jackson and Van Buren. Often I heard him say that John C. Calhoun<sup>4</sup> ought to have been hung for treason. I quite agree, even now, that a man may say, if he can do so honestly, that notwithstanding the errors or misdoings



Harlan on why he joined the Know-Nothing party in Kentucky: "So I remained in it, upon the idea that, all things considered, it was best for any organization to control public affairs rather than to have the Democratic party in power. That was the kind of political meat upon which my father fed me as I grew up." Above is his father, James Harlan, a longtime Whig supporter until that party finally died out in Kentucky. Below is a piece of sheet music showing raccoons, pumpkins, and cornstalks, all indigenous to North America and symbolizing the Know-Nothing party's xenophobia.

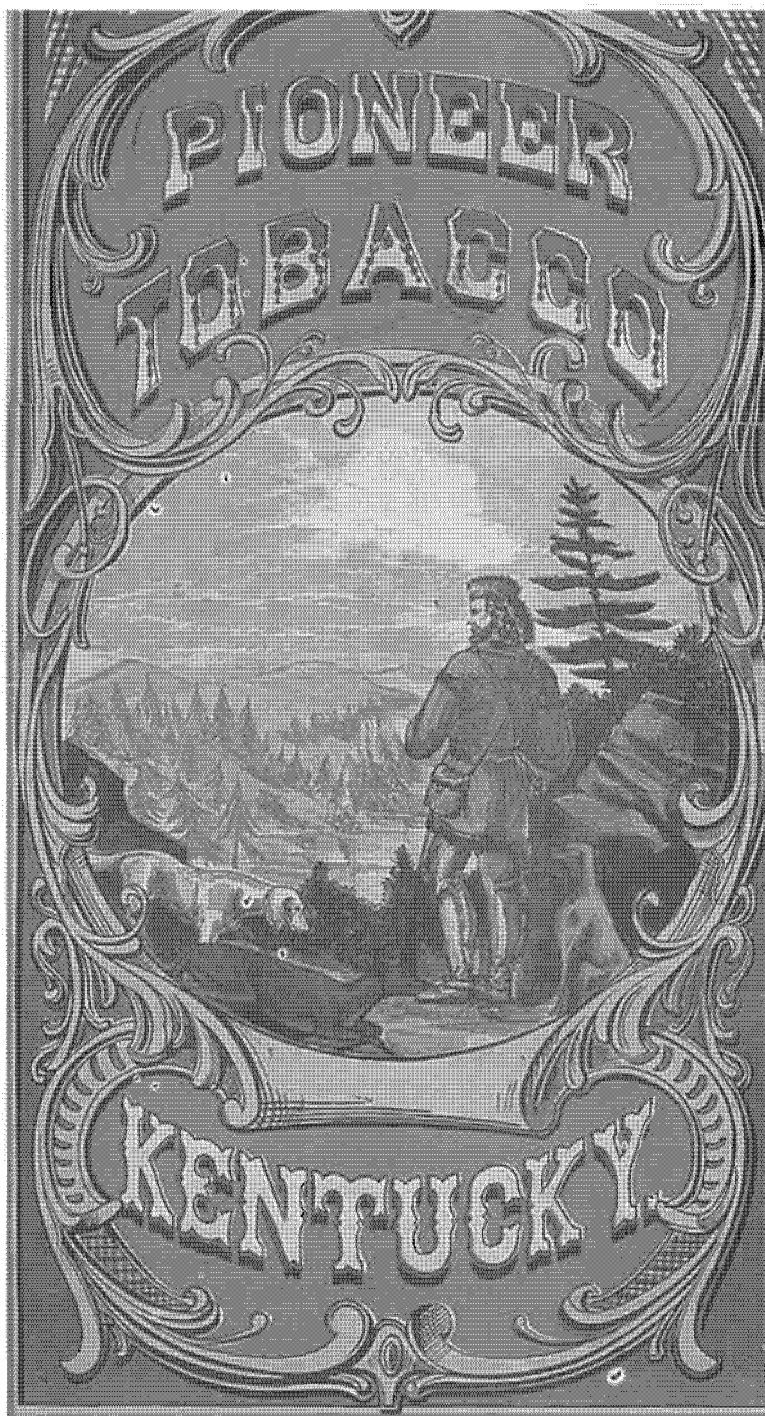


of his party in reference to particular political questions, it is safest, on the whole, for the country, that his party should remain in power rather than that the other party should control. I know at that time that the Democratic party in fact pandered to and courted foreign influence, in order to get the votes of foreigners, and that in many parts of the country the leaders of that party were in league with Catholic priests—the latter, by their machinations with Democratic leaders, obtaining favors for their church (as in New York City), which were not accorded to Protestant churches. So I became reconciled to remaining in the Know-Nothing Society, notwithstanding its direct attack on the Catholic Church.

In 1855 the Know-Nothings of Kentucky nominated Charles S. Morehead<sup>5</sup> for Governor. My father was on the ticket, as the candidate for Attorney General. During that campaign Thomas L. Crittenden<sup>6</sup> spoke here and there for the Know-Nothing ticket. He had an appointment to speak at Bridgeport, near Frankfort, and asked to me to ride out with him. I agreed to do so, and went with him. He spoke in a country school-house which would not hold more than an hundred people, and spoke only about three-quarters of an hour. He seemed to have run dry in that time. When he concluded, it was raining very hard, and the people could not go out. Immediately some one cried out, "Let's hear from John Harlan." This surprised me, but I said nothing. The demand for me to speak became general and persistent. I said that I was only twenty-two years of age and had never made a political speech of any kind. They replied, all over the house, "That don't matter; tell us what you think." "Well," I said, "If I must, I must, seeing that the rain keeps you fast in the house." So I commenced, and without notes, or previous preparation, spoke for about three-quarters of an hour. The crowd seemed to be much interested in what I said, and applauded me generously. It seemed to me that a new career was then opened up before me, and I felt that I had some gifts for talking to a miscellaneous crowd. When I went

home that afternoon (it was Saturday) and told my father what had taken place at the Bridgeport meeting, he seemed to be pleased, and said that I had acted rightly. Turning the matter over in my mind, the next day, I concluded that as my profession would require me to talk, I must go farther, and speak in the city. So, on Monday morning, without consulting anyone, I went to a printing office and had handbills struck off, announcing that I would address the people of Frankfort at the court house that evening on the political subjects of the day. The handbills were stuck up all around the city, and when I saw one of them, fear came upon me for the consequences; but I could not well retreat. So when I went to the court house in the evening (Monday) and saw a crowd of men and women that filled every seat in the room, I "trembled in my knees." But I went ahead, and my success on the occasion was very flattering, in that I was able to talk for an hour and a half without notes, and never halted for a word, although the words chosen may not have been the best. When the meeting closed, I was congratulated on all hands, and I went to bed that night feeling that a "big thing" had been accomplished. The next morning's paper contained an account of the meeting, and some handsome things were said of me by the editors. There was at least one young man, of twenty-two years of age, who at that time thought himself "large" and began (to use a common phrase) to "feel his oats." I so felt, not because I imagined myself as possessing any particular power of oratory, in the true sense of that word, but because I had become conscious of a capacity to say what I desired to say, and to make myself understood by those who heard me. By the next morning I had become quite confident and said to my father that, as my living depended upon speaking, I would make a speaking tour of the state if he would provide me a horse and give me a silver watch. He said, "All right," and I ordered handbills to be printed announcing appointments for about twenty different counties in the mountainous parts of Kentucky. Those handbills were sent to postmasters with request





Harlan's family members were tobacco growers and slaveholders, and he continued to support slavery until he finally joined the Republican party in 1867.

to have them put up. I took it for granted that if crowds came to hear me, it would be because they thought it was my father who was to speak.

In about ten days I left Frankfort on horseback, carrying no clothes except such as could be put in a pair of saddle bags thrown across my saddle. My first speech was at Danville,

and from there I went into various counties, Pulaski, Lincoln, Laurel, Whitley, Knox, Clay, Owsley, and others. Large crowds came to hear me. It so happened that at every appointment some Democrat asked for a division of time—a debate—and I complied with his request. At some of the meetings my adversary would be a man of fifty years of age and a practiced debater. The result was many joint debates, in which I did not always suffer, in the estimation of my side. Those debates were of great value to me as a speaker. They destroyed whatever bashfulness I had, and gave me readiness of speech and a steadiness of manner that served a good purpose when addressing juries. My father was evidently delighted, although he did not in words express his gratification.

In 1856 the party in Kentucky which supported Fillmore and Donelson<sup>7</sup> held a convention, and I was made an Assistant Elector (or rather canvasser) for the State at large. So I made another canvass and appeared in about forty counties, having on every occasion a crowd of such size as to encourage me. If what the newspapers said was true, my speeches were well received, and I became generally known throughout the State.

In 1858 my political party in Franklin County<sup>8</sup> insisted that I should become its candidate for County Judge. It was an office of some responsibility, though it had only civil jurisdiction. I acceded to the request of my party, and in the course of the campaign visited every house and shook hands (as was the fashion) with nearly every man, woman and child in the county, and spoke nearly every day. It was a close county politically, but I was elected by about 127 majority, a larger majority than any of my associates on the same ticket received. Thenceforward I was given the additional title of "Judge."

In 1859 there was an election for Representatives in Congress. The Ashland District, in which I lived, had been carried by the Democrats at the previous election by more than five hundred majority—James B. Clay,<sup>9</sup> a son of Henry Clay, having been the Democratic

candidate at that election. A District Convention was held at Lexington by the Know-Nothings, or Americans, as that party was then called, and there was a warm contest between Roger W. Hanson,<sup>10</sup> of Fayette County, George Shanklin<sup>11</sup> of Jessamine County, and others. I was a delegate in the convention from Franklin. In the progress of the balloting, Thomas T. Vimont,<sup>12</sup> of Bourbon, to my great surprise, rose and said, with great vehemence of voice and manner, that the party needed a young man as its candidate, and he placed me in nomination. I was sitting at the time in the rear of the hall; greatly agitated by the fact that I was to be voted for by some of the delegates, I started to jump up and say that I was not a candidate and could not think of being one. But a member of the Franklin County delegation, who was delighted at the suggestion of my name to the Convention, pulled the skirt of my alpaca frock coat so strongly as to tear it nearly off. The balloting proceeded before I could say anything, and to my amazement I was nominated. Immediately a cry arose that I should take the stand. I did so, and when I turned to address the delegates, the condition of the skirt of my coat was so manifest that I referred to it as proof of my efforts to prevent my being nominated. I commenced my talk, intending to decline. But the crowd said, "No, no," and I concluded by accepting. All this occurred on Wednesday, and when I returned home the next morning and told my father what had occurred, he was greatly surprised, if not annoyed. Nevertheless, he was somewhat moved by this expression of confidence in me by the political party to which we belonged. The chances of a successful outcome of the election for me were not encouraging. But I determined to make the most of my candidacy, and telegraphed, or wrote to my opponent, Capt. William E. Simms,<sup>13</sup> of Bourbon County, that I would open the canvass at Georgetown the following Saturday, and did so. John C. Breckinridge,<sup>14</sup> the leader of the Kentucky Democrats, was in the audience. He had ambition to be President, and had the success of the Democratic candidate for



Congress greatly at heart; for my election in 1859 to Congress from his District would have hurt his prospects for the Democratic nomination in 1860 for President. The speaking at Georgetown was in the last of May, and from that [day] on until the election in August I spoke every day, except Sunday, to considerable crowds. It was apparent that my political friends were pleased with my conduct of the canvass. At the end of ten days, the general impression was that I had my opponent "on the run."

Just then an incident occurred in the canvass which resulted in a great advantage to my opponent. In the *Paris Citizen* appeared an anonymous communication which was severe and scorching in its criticism of my opponent. The day after it appeared Simms and I had a joint debate at Rudole Mills,<sup>15</sup> Bourbon County. At the close of his speech Simms alluded to that communication, and said that the author, whoever he was, was an infernal scoundrel and liar. Garrett Davis,<sup>16</sup> later a Senator from Kentucky, was in the audience. He was believed to have written the anonymous communication referred to. He arose in the audience, avowed himself the author, and denounced Simms in merciless terms. Simms replied that Davis could not in that way meet what he (Simms) had said about him. This was on Saturday. On the following Monday morning I reached Cynthiana, where Simms and I had an appointment to speak. Upon registering at the hotel, I observed that Davis had previously registered. This annoyed me, for a personal difficulty between my opponent and one of my prominent supporters was well calculated to arouse the sympathy of the Democrats who, in fact, were not pleased with Simms' nomination and were quite lukewarm in his support. But Davis kept away from me, evidently intending not to connect me with his difficulty. When we went to the court-house that day, what was my surprise when, right on the front bench of the court-room, I saw Mr. Davis. Simms made no reference to his difficulty with Davis. No doubt there would have

been bloodshed had he done so; for Davis did not know what fear was and would not have submitted to any personal abuse of himself. When the debate was over, Davis sent a note to Simms, which the latter interpreted as a challenge to fight a duel, although Davis said he did not intend that it should be so regarded. At any rate, it was said publicly that both had left Kentucky to fight a duel in another State or in Canada. Simms did not appear at our next appointment. I said to the crowd assembled (and it was a large one) that according to popular rumor my opponent and one of my supporters had gone off to fight a duel, and that under such circumstances I would not speak. This course was kept up for about ten appointments. Charles S. Morehead, a friend of Davis and then Governor of Kentucky, and James B. Beck,<sup>17</sup> a friend of Simms—both leading men—followed Davis and Simms. They came up with them at Cincinnati and took charge of the quarrel, with the consent of both parties. They settled it by requiring each party to withdraw simultaneously all offensive epithets either had used. This was accepted as satisfactory, and Simms returned to meet his appointments with me. I recall with distinctness the occasion when he joined me. He had a warm welcome from his political friends. The Democratic leaders who, up to that time, were lukewarm and indifferent, were aroused at what they regarded as the attempt of one of my supporters to "bully" their candidate. It was manifest thenceforward that my canvass was to be a very hard and spirited one and that the quarrel of Davis with Simms had done me great harm. I gave my opponent no rest; for I spoke every day, during the last month of the canvass at least twice a day, and during the last two weeks three times a day. Nevertheless, I came out of the canvass in splendid condition and with a debt on me of about nine thousand dollars and without any money to pay it off. I was, in fact, elected by a majority of more than five hundred of the legal voters, although my opponent was returned as elected by sixty-seven majority, and received the certificate of election. So strongly did my

friends feel about the matter that they immediately raised ten thousand dollars and put it in bank to enable me to contest the election. The frauds against me were committed in Harrison and Nicholas counties, where all the officers of election were Democrats, although the statute required that each party should be represented on the election boards. I determined to investigate the matter, and to that end went to Harrison county first, where three or four friends from each precinct met me. Those men knew every voter in their respective precincts. According to the system then prevailing in Kentucky, the voting was *viva voce*,<sup>18</sup> and the name of each voter was recorded in the poll-book. We got the polling-book of each precinct, and every name was scanned. The result was that nearly three hundred names were found upon the poll-books of Harrison County, of persons whom no one knew and of whom no one in the county had ever heard. We obtained evidence that many men were seen on the day of election to get off the railroad train at different stations and go to the polls. The same men went back on the train in the afternoon and never were seen again in the county. They were believed to be Irishmen, imported into the county from Cincinnati and Covington, to vote the Democratic ticket.

The same frauds were perpetrated in Nicholas County, and we found on the poll-books about two hundred and fifty names of persons of whom no one in that county knew anything whatever.

So, but for those frauds, I would have been returned when just past twenty-six years of age, as a Representative in Congress from the Ashland (Kentucky) District.

The question then arose whether the election should be contested. At that time there were only two great political parties in the country—the Democratic Party and the Republican Party—the latter being spoken of in Kentucky as the Abolition Party. I was not then a Republican, but belonged to a local political party known as the Opposition Party.<sup>19</sup> Its members were all old Whigs by training

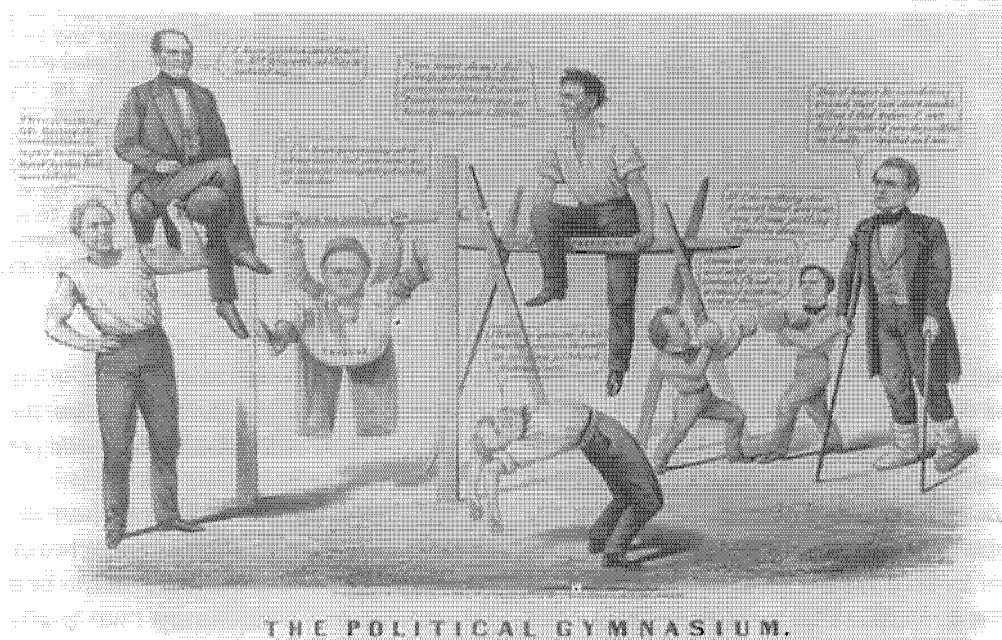
and by association. We had, however, no national political alliances. If I had been given the seat in Congress it would have been by the votes of the Republican or Free Soil party, and that fact alone would have sufficed to destroy our party in Kentucky and would have ruined me politically—so bitter was the feeling in Kentucky, at that time, against the Republican or Abolition Party. Besides—and this consideration was at the time deemed by me controlling—a contest meant the taking of several hundred depositions, the loss of more than a year's time, and a practical abandonment of my profession while preparing the case. Under all the circumstances, although the expenses of the contest would have been borne by my party, and although it was quite certain that I could have ousted Simms, I concluded that it was wise not to contest. The money that was raised to meet the expense of a contest was consequently turned back to the subscribers.

I have often considered what might have been the effect upon my life if I had been returned as elected to Congress in 1859. Most probably one session of Congress in Washington, at my then age, would have given me such a taste for political life as would not have been consistent with professional success. On the whole, the men who conceived and carried out the frauds which gave my opponent a certificate of election did me a great service. After the election I went diligently to work in the practice of the law, and managed to pay off the debt contracted on account of my campaign.

Here I may mention an incident of some interest. When Sumter was fired upon, or shortly thereafter, Simms went into the Confederate military lines and openly allied himself with the rebel movement. He was one of the little band of Kentuckians, not twenty-five in number, who met in a hotel room in Bowling Green and declared the withdrawal of Kentucky from the Union. They went through the farce of electing a Provisional Governor of the State, Geo. W. Johnson,<sup>20</sup> and two Senators to represent Kentucky in the Confederate Senate. One of the Senators so elected was my former

opponent, Capt. Simms. He actually sat in the Confederate Senate as a Senator from Kentucky, although our State had never voted to withdraw from the Union, but, on the contrary, had formally and officially declared its adherence to the Union. After the war ended, Simms returned to the State a sorely disappointed man. In some way he made a good deal of money while in the South, and was therefore able to take care of himself notwithstanding the waste created by the War. In 1878 I held a session of the United States Court in Chicago, stopping at the Grand Pacific Hotel. One morning, at breakfast, I met Simms and immediately recognized him, although I had not seen him for eighteen years. Our meeting was very friendly, and he seemed pleased at the fact that I bore no malice against him on account of the way in which he had been "counted" into Congress, or because he and I were on opposite sides in the war. Some years afterwards I received a letter from him stating that a bill had passed the

House of Representatives relieving him from the disabilities incurred by reason of his connection with the secession movement. He disclaimed any purpose ever again to be a candidate for office. What disturbed him was the thought that if he died (he had become an old man) while laboring under the disabilities created by the Fourteenth Amendment, it would be a great load for his sons, just then entering upon active life, to carry through their lives. He asked me to intervene in his behalf with Senators and bring about the passage of the House bill. I wrote immediately to Senator Hoar,<sup>21</sup> stating the facts and requesting him to have the bill passed. The Senator promptly took the matter in hand and procured the passage of the bill. Within a day or so the bill, being signed by the presiding officers of both Houses, was sent to President Cleveland. I followed it there and called to see the President. As soon as I had stated the case, the President sent for the bill and approved it. Thus I was directly



In the 1860 presidential election, Harlan stumped for the Constitutional Union party, which was made up of members of the Whig and Know-Nothing parties. John Bell was the presidential candidate, and Edward Everett was the vice-presidential candidate. Everett is depicted in this political cartoon at far left as a muscle man holding a barbell aloft on which rests his running mate, a reference to the fact that Everett, a former Massachusetts senator, was more popular in the Northeast than was the presidential candidate, Bell, a Tennessean.



In 1868, when Ulysses Grant and Schuyler Colfax were the candidates of the Republican party for President and Vice President, Harlan voted for that party for the first time. "There was nothing else to do; for there were no organized parties of any consequence in the country except the Democratic and Republican parties" he wrote.

instrumental in bringing about the removal of the disabilities under which my former adversary labored in consequence of his adherence to the rebel cause. He expressed his profound gratitude for my assistance in securing his release.

In 1860 I was the Elector on the Bell and Everett<sup>22</sup> ticket—their platform being "The Union, the Constitution, and the Enforcement of the Laws." I canvassed the entire District—having joint debates with the other electors, George W. Johnson being the elector for Breckinridge and Lane, and Dr. John J. Jackson be-

ing the elector for Douglas and Johnson. While we carried Kentucky for Bell and Everett, the Republican Party succeeded by the election of Lincoln and Hamlin.

As soon as Lincoln and Hamlin were declared elected, the secession movement began, and it became evident that there was to be a very serious time in the country. I was greatly troubled as to what I should do. My party was determined that I should again be a candidate for Congress. There was no dissenting view among them on that question. If I remained at Frankfort, my unanimous nomination was



inevitable, and it would have been very embarrassing for me to decline. Besides, my means were very limited, and I thought that another canvass for Congress—particularly with the certainty of election—would have been ruinous to my professional future. I saw no way out of the difficulty except to remove out of the District in which I was residing, and thus prevent my nomination for Congress. So, in February 1861 I removed to Louisville, formed a partnership with Hon. W. F. Bullock,<sup>23</sup> and determined to give my time exclusively to the practice of the law.

But my plans were all upset. The entire country was stirred by the firing on Sumter in April 1861. It seemed at that time that everything was going to ruin and that chaos would reign. The excitement had the effect of practically closing the courts, and it looked as if I would have little chance by my profession to make a living. Then followed the contest in Kentucky to save that State to the Union. My entering the army, my service in the war, my election to the office of Attorney General in 1863 and my return to Louisville in 1867, are elsewhere narrated.<sup>24</sup>

In 1867 there was a contest in Kentucky for Governor and other State officers. Those holding similar views with myself were organized separately and nominated a full ticket. That little party was known in my State as the Third Party.<sup>25</sup> The men composing it were all Union men and nearly all old Whigs by inheritance and on principle. But they were not ready to espouse the Republican cause, and hence nominated their own ticket. I was its candidate for Attorney General. Our ticket was defeated, and that of the Democrats successful. The canvass made it certain that the continued separate organization of our party could not accomplish anything, in political matters, of a practical nature, or exert any influence upon the conduct of public affairs.

In 1868, when Grant and Colfax were the candidates of the Republican Party for President and Vice-President, I voted for that party for the first time. There was nothing else to

do; for there were no organized parties of any consequence in the country except the Democratic and Republican parties. I was then of [the] opinion that the general tendencies and purposes of the Democratic Party were mischievous while those of the Republicans were the better calculated to preserve the results of the War and to maintain the just rights of the National Government. I was an intense Nationalist, as well as an intense believer in State Rights, as they were left or defined by the Constitution. At the time referred to, the great majority of the Democrats in Kentucky believed that their first allegiance was to the State, and that it was their duty to do what the State required, without reference to the rights of the General Government. I believed then, as I believe now, that within the limits of the powers granted to the General Government, its action was supreme and binding upon all, whatever any State or any number of States might direct. Holding these views, I deemed it to be my duty to cast my fortunes in with the Republican Party in 1868. I have ever since been a supporter of its general policies, though sometimes strongly disapproving of particular things that party proposed and carried out. In the campaign of 1868 I took part in the fight both in Kentucky and Indiana. I received more invitations from Indiana to speak than it was possible for me to comply with. My speeches in that State seemed to be well received, particularly by Senator Oliver P. Morton,<sup>26</sup> who expressed his gratification to me by letter.

In 1871 the Kentucky Republicans held a State convention to make nominations for Governor and other State officers. It was very largely attended. To my great surprise I was nominated for Governor. I did not seek the nomination; had no thought of it; for my purpose was to stick closely to the practice of my profession and make an estate for my young family. But that nomination seemed to be a call to duty, and I accepted it, knowing that I could not be elected. I did this the more readily because the canvass would occur during the summer months when the courts were closed

for vacation, so that absence from my office was not of great consequence. My opponent was Preston H. Leslie<sup>27</sup> of Barren County, who was more than fifty years old and had had large experience in public stations of different kinds. Determining to do all I could to organize the Republican Party of Kentucky, and to make the best fight possible, I started in the campaign in the latter part of May and went into every county in the eastern part of the State and most of the other counties, the journey being made on horseback. Leslie and myself had about forty joint debates before we separated. It was to me a most interesting campaign. My friends were entirely satisfied with my speeches, and many thought I would be elected. But I knew that was impossible. I only sought to consolidate into a compact organization the men in Kentucky who preferred the Republican Party to the Democratic Party. There was great enthusiasm among the members of my party. The contest attracted attention throughout the whole country. The result was my defeat by over 30,000 majority. In the Congressional election of the previous year, the aggregate Republican vote was about 55,000 in the State, while I polled nearly 80,000 votes. My canvass seemed to give me great prestige in the State, and I became the recognized leader of my party there.

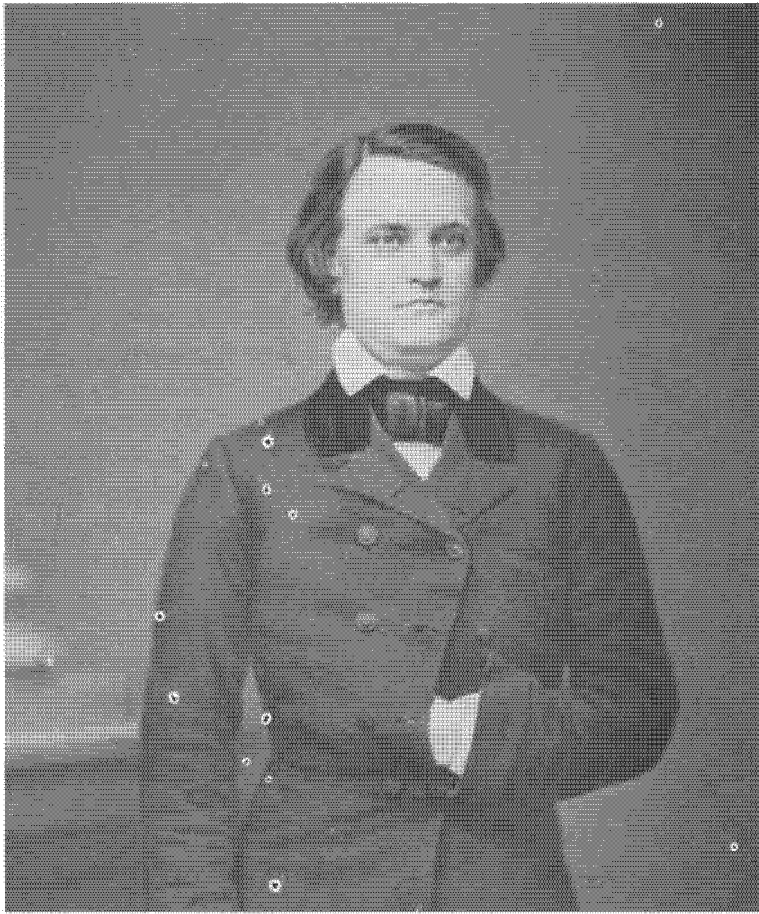
In 1872, at the Republican State Convention called to elect delegates for the National Republican Convention to nominate candidates for President and Vice-President, I was unanimously recommended as the candidate for Vice-President. I appreciated this compliment very highly; for it tended to show that my canvass the previous year for Governor was thought well of by my party.

During the Presidential campaign of 1872, James G. Blaine<sup>28</sup> invited me by telegraph to give two weeks to the campaign in Maine. I agreed to do so, and accordingly went to that State. Fifteen or twenty speakers from different States were also invited. Blaine's plan was to cover the entire State in two weeks by a "whirlwind" campaign. Before the speakers started

through the State they all dined with Blaine at his residence in Augusta. I was assigned to a seat between Frederick Douglass<sup>29</sup> and Benjamin F. Butler.<sup>30</sup> No two men were more cordially hated by the Southern Democracy than were Douglass and Butler, the latter especially. Of course, I made no objection to the place of my assignment at Blaine's table. In fact, I rather liked it, for Douglass and Butler were both very remarkable, interesting men. Douglass and I spoke together several times during my Maine campaign. In my judgment, he had no superior as a public speaker. He would have made a great Senator. At the other places in Maine at which I spoke, my colleague was Henry Wilson,<sup>31</sup> the Republican candidate for Vice-President. He was a most delightful companion. In 1873, I think it was, Wilson came West and came to Louisville to see me. I gave him a large reception. While there he referred to John C. Breckinridge, who was then quite ill at Lexington, his home. Wilson said that if agreeable to Breckinridge he would go to Lexington and call upon him. He spoke in the kindest terms of Breckinridge personally. I arranged by telegraph for Wilson to see Breckinridge. He went to Lexington and saw Breckinridge in his sick bed. The latter—then under a cloud by reason of his connection with the rebellion—was deeply touched by Wilson's visit. Breckinridge died not a great while after that. I was glad to have been instrumental in bringing those two distinguished men together.

In 1875 the Republicans of Kentucky met in convention to nominate candidates for Governor and other State officers. Against my earnest protest I was again unanimously nominated for Governor. I was disinclined to accept the nomination; but under all the circumstances it would have been ungracious for me to do so. The party seemed to look to me as their leader and claim, of right, that I should serve it in another campaign. So I accepted, and entered upon another canvass, my opponent being James B. McCreary,<sup>32</sup> now a Senator from Kentucky. We had forty or fifty joint





Harlan got to know Henry Wilson, the Republican candidate for Vice President, when he was stumping for the Grant-Wilson ticket in Maine. When Wilson came to Kentucky, Harlan threw him a reception and arranged for him to see John C. Breckenridge (pictured), who was then quite ill at Lexington, his home. Harlan was pleased to have been the intermediary between the two men.

debates and covered nearly all the State during the campaign. As was expected, he defeated me, but his majority was not as great as that given to Leslie in 1871.

Two incidents of that campaign are worth mentioning.

Upon one occasion, as I entered the court house for the purpose of speaking, a friend said that he had learned of the purpose of a Democrat to put to me some ugly questions while speaking. I replied that he might put any questions he chose and I would answer them. When I got well along in my speech and paused to take a sip of water, a man in the audience arose and said, with much apparent kindness of manner (though I could see with sinister motives): "Gen. Harlan, there is a matter which troubles some of us here and we would like

to have you explain it." I replied: "Go ahead, my friend. I have no concealments upon any question. As you know, my people are Kentuckians. My grandfather settled in Kentucky before the Declaration of Independence.<sup>33</sup> My father was born here, and you knew him. I was born here, and I wish you all to know me. There is nothing that I would conceal from my fellow-Kentuckians, and I would not obtain their support in this canvass by withholding anything they are entitled to know. So, my friend, what is your question?" He said "It is rumored among the people here that you sat by the side of a negro at a dinner table in Maine a few years ago. How is that?" There was no applause, and I could read in the countenances of the people (and the crowd was composed largely of Democrats) that the interruption of

my speech by that question was not deemed fair; and a desire for fair-play is a strong trait in the Kentucky character. I assumed an air of deep seriousness, and in a tone of solemnity said: "Fellow-Kentuckians: I entered this contest in the belief that it involved matters of great importance to our country. It seemed to me that the issues were momentous in their character and required the utmost deliberation upon the part of voters. But I am taken aback by the great issue now unexpectedly thrown at me by the question propounded. The contest for the high office of Governor of Kentucky is to depend, it seems, in part upon the question whether I ate dinner at the same table with a man of the negro race. Well, well, let me tell you the facts." I then referred to Mr. Blaine's invitation to dinner without any notice to me as to who would be his guests, and stated that my sitting between Douglass and Butler was wholly the result of Mr. Blaine's arrangement at his own private table. I then said: "Would you, Kentuckians, have expected me to rise from my seat and lecture Mr. Blaine at his own table? Would you have expected me to rise from the table and leave the house? I ate my dinner in entire comfort, eating neither more nor less because of Douglass' presence near me. Why, fellow-citizens, I not only ate by the side of Douglass at Blaine's house, but during the campaign sat at the same table with him in public hotels and spoke from the same platform with him. And here let me say that there is no man of any party in Kentucky who can make an abler address before a public audience than can Frederick Douglass. And now, fellow-citizens, you know all the facts. I not only do not apologize for what I did, but frankly say that I would rather eat dinner any day by the side of Douglass than to eat with the fellow across the way who sought to entrap me by a question that has nothing to do with this contest." The audience felt that the interruption was needless and unmannerly, and they rapturously applauded what I said.

The other incident relates to something that occurred during the Civil War. In the

summer of 1862, Gen. Thomas' Division was camped at Florence, Alabama. On the first Sunday morning after we arrived there, I suggested to Lieut.-Col. Hayes that we attend divine service at the Presbyterian Church, of which I learned Dr. Mitchell<sup>34</sup> was pastor. He approved the suggestion, and we "fixed up" and went to that church. Not having shaved for several months, I had a long, heavy, red and sandy colored beard. The church building was crowded. We sat in the back pew, next to the door of the church. The minister was an up-headed, stately looking man, with a very high white stock on around his neck. It was gratifying to observe that at least three-fourths of his audience were officers and soldiers of our army. The privates had evidently "spruced up" for the occasion. They looked their best, and evidently were in the habit when at home of attending religious services. Dr. Mitchell made the usual short prayer, and then a hymn was sung in which all the soldiers joined most heartily. Then he read a chapter from the New Testament with great solemnity. Then came the long prayer, in the course of which he referred to the war and to the efforts of the cruel foes of the South to oppress the people of the South and deprive them of their dearest rights. He prayed in terms for the Confederate President, Congress and Cabinet, and asked that God would smite to the earth their remorseless invaders. This was extraordinary language from a minister officiating within the military lines of a Division of the Union Army. The soldiers stood still during Dr. Mitchell's prayer; but when he closed, all of them, as of one accord, and without consultation with each other, took up their hats and stalked out of the church, treading heavily and angrily as they went out. Lieut.-Col. Hayes and I kept our places to see what else would occur. The soldiers who went out remained near the door and discussed among themselves, in rather loud voices, the outrageous conduct of Dr. Mitchell. Fearing that something unseemly might occur, I went out of the church and went among the soldiers. One of the soldiers suggested that

they go into the church, stop further proceedings there, and arrest the preacher. I was the oldest officer in commission present, and forbade any such course being adopted, or any disturbance of the congregation. I reminded them that Gen. Thomas<sup>35</sup> tent was near by and promised to go to him and state the case, and then take such steps as he ordered to be taken, provided they would keep quiet and not go into the church during my absence. They assented to this course, and agreed to await my return.

I went to Gen. Thomas' tent, explained the whole matter, and said that I was prepared to execute any order he would give. He promptly said: "Go back and arrest the old scoundrel; no rebel preacher shall behave in that way in my lines." I said to him that Dr. Mitchell would be preaching when I got to the church. "No matter," said he, "arrest him at once and deliver him to the 1<sup>st</sup> Ohio Cavalry with my order to send him at once to the north, not to return until the war is over." I bowed myself out of the tent and went back to the church. Charging the soldiers not to make any demonstration, I went into the church, being in full uniform, and walked down the aisle while Dr. Mitchell was preaching. I halted in front of the pulpit. Dr. Mitchell immediately stopped and asked me what were my wishes. I said, in the presence of the whole congregation, so that all heard me: "Dr. Mitchell, I am here by the order of Gen. Thomas to place you under arrest. You must have observed that a large majority of the congregation to-day were officers and soldiers of the Union Army. They came here in good faith to join with you and your people in religious services. You are within the lines of Gen. Thomas. There is enough in religion about which a minister could pray and preach that would have been agreeable to all who heard you. Yet you prayed, in effect, that God would blast them and the Government which they represented. Gen. Thomas regards your conduct as utterly inexcusable. He directs me to arrest you and deliver you to the Colonel of the 1<sup>st</sup> Ohio Cavalry." Dr. Mitchell closed his

bible and took up his manuscript sermon, saying: "Very well, Sir; I submit to your authority." He came down from the pulpit and placed himself at my side. His congregation arose, some going out of the room, while a lot of women gathered around me and pleaded feelingly for the Doctor's release from arrest, saying that the old gentleman meant no harm. I said that while that might be true, it was not in my power to release him, as I was simply executing Gen. Thomas' orders; that they must go to him. One of the women was a most beautiful girl. She got mad and called me a red-whiskered Yankee. I disclaimed being a Yankee, saying that I was a Kentuckian. I said to her that I could not quarrel with so handsome a woman as she was. This did not satisfy her. She stamped her feet on the floor in rage and went off. The preacher then took my arm, and we walked down the street to the camp of the 1<sup>st</sup> Ohio Cavalry, and delivered Dr. Mitchell to its Colonel, informing him of Gen. Thomas' orders. In less than an hour Dr. Mitchell was en route to Memphis, and from there came within our lines at St. Louis. He remained there and did not get back to his home in Alabama until after the close of the war in 1865.

Now, in 1875, Dr. Mitchell was still alive.<sup>36</sup> He came to Kentucky in that year to tell about my having arrested him in the pulpit. He thought that my conduct in that affair would arouse great indignation against me and lose me many votes. In that he was mistaken. The whole affair having been aired in the Democratic papers, it was given out that at my next meeting, which was in Louisville, I would tell about the matter. A great crowd attended, and I explained fully what was done by me. Having done this, I said, "Fellow citizens, I admit that Gen. Thomas erred—that instead of simply arresting Dr. Mitchell and sending him north, he should have ordered him to be put in prison." I did not really mean that such should have been his treatment.<sup>37</sup> But nevertheless, the crowd applauded what I said, and I lost no votes that otherwise would have been cast for me. How singular it was that a Presbyterian

minister should have been arrested, while in the pulpit, by a Presbyterian Colonel. Yet I was not to blame. All the trouble experienced by the Doctor was brought upon himself by his own folly and imprudence. He showed that he was lacking in discretion. He forgot that when in Florence, within our lines, his duty was to be subject "to the powers that be." If I should meet the Doctor in the other world, and if it be permitted to those who see each other there to recall the incidents of this life, I will express my regret that it became my duty, acting under the orders of my superior officer, to arrest him and cause him so much discomfort.

### ENDNOTES

<sup>1</sup>The Know-Nothing Society was also known as the American party and the Supreme Order of the Star-Spangled Banner. It existed from 1852 to 1860, although it lost most of its momentum after Millard Fillmore's defeat in the 1856 election.

<sup>2</sup>James Harlan (1800–1863) was a former Whig state representative and Congressman whose close association with Henry Clay would influence the political beliefs of both him and his son for all of their lives. It was Clay's strong belief in the pre-eminence of the federal government over the rights of the individual states that led Harlan to support the Union during the Civil War and to his eventually joining the Republican party.

<sup>3</sup>In the 1800s, "Democracy" was often used as a synonym for the Democratic party.

<sup>4</sup>John Caldwell Calhoun (1782–1850), South Carolina Congressman, Senator, Vice President, and Secretary of State, was an early ally of Henry Clay and a strong nationalist. As his political career progressed, however, his views changed and he became a vocal advocate for states' rights. Harlan's objection to Calhoun is probably due to his role in the Nullification Crisis of 1832, in which South Carolina nearly seceded from the Union.

<sup>5</sup>Charles Slaughter Morehead (1802–1868) was a former Whig who had been a state representative and a Congressman. He won the election and served one term as Governor. During the Civil War, he was forced to flee the state because of his pro-Southern sentiments and he never moved back.

<sup>6</sup>Thomas L. Crittenden (1819–1893) was not a politician himself, but as the son of former Governor and Senator John J. Crittenden, he was likely a very popular speaker.

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<sup>12</sup>Little is known about Thomas T. Vimont other than that he was killed by a fellow Union officer during a quarrel in the war.

<sup>13</sup>William Elliott Simms (1822–1898) was a former state representative and a veteran of the Mexican War. As Harlan relates later in this memoir, Simms' subsequent alliance with the Confederacy killed his political career.

<sup>14</sup>John Cabell Breckinridge (1821–1875) was one of the pre-eminent Kentucky politicians of the nineteenth century. He won Henry Clay's old congressional seat as a Democrat in a heavily Whig district. At the time about which Harlan was writing, Breckinridge was the youngest Vice President in American history. After losing the 1860 election to Lincoln, he became a Senator for Kentucky. When the war started, he resigned his seat to join the Confederacy, of which he eventually became Secretary of War.

<sup>15</sup>Harlan is actually referring to the town of Ruddells Mills.

<sup>16</sup>Garrett Davis (1801–1872) was another former Whig Congressman who joined the Know-Nothings. He turned down the party's offers to nominate him for Governor and President. He was later selected by the state legislature to fill Breckinridge's Senate seat when Breckinridge resigned to join the Confederacy.

<sup>17</sup>James Burnie Beck (1822–1890) was another former Whig who became a Democrat. He was repeatedly elected as Congressman and Senator after the war. Despite their party differences, Beck became a vigorous supporter in the Senate of Harlan's nomination to the Supreme Court.

<sup>18</sup>At the time, Kentucky voters voiced their choices aloud and an official wrote their name and choices in a polling book.

<sup>19</sup>The Opposition party rose from the implosion of the Know-Nothing party in 1859. Numerous states had Opposition parties around the same time, but there does not appear to have been any connection between them and Kentucky.

<sup>20</sup>George W. Johnson (1811–1862) was a lawyer and former state representative who initially opposed secession. Despite his age and position as "Confederate Governor" of Kentucky, he still served with the Confederate Army and was killed during the Battle of Shiloh.

<sup>21</sup>George Frisbie Hoar (1826–1904) was a five-term Senator from Massachusetts. As a known confidante of

President Hayes, Hoar was often contacted by people who had matters on which they wanted the President to act.

<sup>22</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 the presidential candidate and Edward Everett was the vice-presidential candidate.

<sup>23</sup>William Fontaine Bullock (1807–1889) was a former judge and state representative. At the time of which Harlan is writing, Bullock was one of the most prestigious lawyers in Louisville. He became a Democrat after the war, but despite the party difference, he wrote a warm letter to Hayes in support of Harlan's nomination to the Supreme Court.

<sup>24</sup>See John Marshall Harlan, "The Civil War Reminiscences of John Marshall Harlan," 32 *Journal of Supreme Court History* (2008): 249–75.

<sup>25</sup>The Third party was actually known as the Conservative Union Democrats. Harlan's use of a euphemism may be due to the fact that in 1868, that party merged with the Democratic party.

<sup>26</sup>Oliver Hazard Perry Throck Morton (1823–1877) was the Governor of Indiana between 1861 and 1867 and later a U.S. Senator. Morton and Harlan had a complicated relationship. During the war, Harlan campaigned in Indiana for Morton's Democratic opponent. Upon becoming a Republican, Harlan campaigned for Morton's re-election as Governor. They corresponded often and maintained cordial relations, but Morton proved to be a political enemy. President Hayes nearly appointed Harlan to his Cabinet, but was stopped due to political pressure exerted by Morton.

<sup>27</sup>Preston Hopkins Leslie (1819–1907) was another former Whig turned Democrat who served numerous terms in the Kentucky legislature.

<sup>28</sup>James Gillespie Blaine (1830–1893) was Speaker of the House during the 1872 campaign. Blaine was an influential man in the Republican party and a perennial presidential candidate who never managed to reach the office.

<sup>29</sup>The esteem between Frederick Douglass and Harlan was long-lived and mutual. Douglass had this to say about Harlan when the latter's dissent in the *Civil Rights Cases* came out: "The marvel is that, born in a slave State, as he was, and accustomed to see the colored man degraded, and the

white man exalted; surrounded by the peculiar moral vapor inseparable from the slave system, he should so clearly comprehend the lessons of the late war and the principles of reconstruction, and, above all, that in these easy-going days he should find himself possessed of the courage to resist the temptation to go with the multitude. He has chosen to discharge a difficult and delicate duty and he has done it with great fidelity, skill, and effect." *The American Reformer* (December 8, 1883): 388.

<sup>30</sup>Benjamin Franklin Butler (1818–1893) was a major general in the Union Army and later a Congressman from Massachusetts. He was particularly unpopular in the South because of his advocacy for civil rights and Reconstruction and his conduct during his tenure as commander of the occupation of New Orleans during the war.

<sup>31</sup>Henry Wilson (1812–1875) was Ulysses Grant's running mate in 1872. He died in office in 1875, six months after Breckinridge's death.

<sup>32</sup>James Bennett McCreary (1838–1918) was a former Confederate soldier who had a full political career. After stepping down as Governor in 1879, he became both a Congressman and a Senator before becoming Governor again in 1911.

<sup>33</sup>Silas (1753–1782) and James (1755–1816) Harlan were brothers who moved to Kentucky from Virginia in 1774 and founded a fort called Harlan's Station. Silas was killed in the Battle of Blue Licks shortly after the Revolutionary War officially ended. Harlan County, Kentucky is named after him. James married Silas's fiancée and became John Marshall Harlan's grandfather.

<sup>34</sup>William Henry Mitchell (1812–1872) was pastor of the First Presbyterian Church in Florence. His arrest was interpreted by the townspeople as an attempt by the Union army to intimidate them.

<sup>35</sup>This would have been July 27, 1862. At the time, George Henry Thomas (1816–1870) was second-in-command of the Army of the Ohio.

<sup>36</sup>Harlan's memory is faulty here. Dr. Mitchell died in 1872. The controversy over Dr. Mitchell actually occurred during Harlan's first gubernatorial campaign.

<sup>37</sup>Harlan is being a bit disingenuous here. Mitchell was in fact sent to a Union penitentiary in Alton, Illinois, where he stayed until October 1862, at which point he returned to Florence.



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<sup>12</sup>Little is known about Thomas T. Vimont other than that he was killed by a fellow Union officer during a quarrel in the war.

<sup>13</sup>William Elliott Simms (1822–1898) was a former state representative and a veteran of the Mexican War. As Harlan relates later in this memoir, Simms' subsequent alliance with the Confederacy killed his political career.

<sup>14</sup>John Cabell Breckinridge (1821–1875) was one of the pre-eminent Kentucky politicians of the nineteenth century. He won Henry Clay's old congressional seat as a Democrat in a heavily Whig district. At the time about which Harlan was writing, Breckinridge was the youngest Vice President in American history. After losing the 1860 election to Lincoln, he became a Senator for Kentucky. When the war started, he resigned his seat to join the Confederacy, of which he eventually became Secretary of War.

<sup>15</sup>Harlan is actually referring to the town of Ruddells Mills.

<sup>16</sup>Garrett Davis (1801–1872) was another former Whig Congressman who joined the Know-Nothings. He turned down the party's offers to nominate him for Governor and President. He was later selected by the state legislature to fill Breckinridge's Senate seat when Breckinridge resigned to join the Confederacy.

<sup>17</sup>James Burnie Beck (1822–1890) was another former Whig who became a Democrat. He was repeatedly elected as Congressman and Senator after the war. Despite their party differences, Beck became a vigorous supporter in the Senate of Harlan's nomination to the Supreme Court.

<sup>18</sup>At the time, Kentucky voters voiced their choices aloud and an official wrote their name and choices in a polling book.

<sup>19</sup>The Opposition party rose from the implosion of the Know-Nothing party in 1859. Numerous states had Opposition parties around the same time, but there does not appear to have been any connection between them and Kentucky.

<sup>20</sup>George W. Johnson (1811–1862) was a lawyer and former state representative who initially opposed secession. Despite his age and position as "Confederate Governor" of Kentucky, he still served with the Confederate Army and was killed during the Battle of Shiloh.

<sup>21</sup>George Frisbie Hoar (1826–1904) was a five-term Senator from Massachusetts. As a known confidante of



President Hayes, Hoar was often contacted by people who had matters on which they wanted the President to act.

<sup>22</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 the presidential candidate and Edward Everett was the vice-presidential candidate.

<sup>23</sup>William Fontaine Bullock (1807–1889) was a former judge and state representative. At the time of which Harlan is writing, Bullock was one of the most prestigious lawyers in Louisville. He became a Democrat after the war, but despite the party difference, he wrote a warm letter to Hayes in support of Harlan's nomination to the Supreme Court.

<sup>24</sup>See John Marshall Harlan, "The Civil War Reminiscences of John Marshall Harlan," 32 *Journal of Supreme Court History* (2008): 249–75.

<sup>25</sup>The Third party was actually known as the Conservative Union Democrats. Harlan's use of a euphemism may be due to the fact that in 1868, that party merged with the Democratic party.

<sup>26</sup>Oliver Hazard Perry Throck Morton (1823–1877) was the Governor of Indiana between 1861 and 1867 and later a U.S. Senator. Morton and Harlan had a complicated relationship. During the war, Harlan campaigned in Indiana for Morton's Democratic opponent. Upon becoming a Republican, Harlan campaigned for Morton's re-election as Governor. They corresponded often and maintained cordial relations, but Morton proved to be a political enemy. President Hayes nearly appointed Harlan to his Cabinet, but was stopped due to political pressure exerted by Morton.

<sup>27</sup>Preston Hopkins Leslie (1819–1907) was another former Whig turned Democrat who served numerous terms in the Kentucky legislature.

<sup>28</sup>James Gillespie Blaine (1830–1893) was Speaker of the House during the 1872 campaign. Blaine was an influential man in the Republican party and a perennial presidential candidate who never managed to reach the office.

<sup>29</sup>The esteem between Frederick Douglass and Harlan was long-lived and mutual. Douglass had this to say about Harlan when the latter's dissent in the *Civil Rights Cases* came out: "The marvel is that, born in a slave State, as he was, and accustomed to see the colored man degraded, and the

white man exalted; surrounded by the peculiar moral vapor inseparable from the slave system, he should so clearly comprehend the lessons of the late war and the principles of reconstruction, and, above all, that in these easy-going days he should find himself possessed of the courage to resist the temptation to go with the multitude. He has chosen to discharge a difficult and delicate duty and he has done it with great fidelity, skill, and effect." *The American Reformer* (December 8, 1883): 388.

<sup>30</sup>Benjamin Franklin Butler (1818–1893) was a major general in the Union Army and later a Congressman from Massachusetts. He was particularly unpopular in the South because of his advocacy for civil rights and Reconstruction and his conduct during his tenure as commander of the occupation of New Orleans during the war.

<sup>31</sup>Henry Wilson (1812–1875) was Ulysses Grant's running mate in 1872. He died in office in 1875, six months after Breckinridge's death.

<sup>32</sup>James Bennett McCreary (1838–1918) was a former Confederate soldier who had a full political career. After stepping down as Governor in 1879, he became both a Congressman and a Senator before becoming Governor again in 1911.

<sup>33</sup>Silas (1753–1782) and James (1755–1816) Harlan were brothers who moved to Kentucky from Virginia in 1774 and founded a fort called Harlan's Station. Silas was killed in the Battle of Blue Licks shortly after the Revolutionary War officially ended. Harlan County, Kentucky is named after him. James married Silas's fiancée and became John Marshall Harlan's grandfather.

<sup>34</sup>William Henry Mitchell (1812–1872) was pastor of the First Presbyterian Church in Florence. His arrest was interpreted by the townspeople as an attempt by the Union army to intimidate them.

<sup>35</sup>This would have been July 27, 1862. At the time, George Henry Thomas (1816–1870) was second-in-command of the Army of the Ohio.

<sup>36</sup>Harlan's memory is faulty here. Dr. Mitchell died in 1872. The controversy over Dr. Mitchell actually occurred during Harlan's first gubernatorial campaign.

<sup>37</sup>Harlan is being a bit disingenuous here. Mitchell was in fact sent to a Union penitentiary in Alton, Illinois, where he stayed until October 1862, at which point he returned to Florence.

# The Mormon Education of a Gentile<sup>1</sup> Justice: George Sutherland and Brigham Young Academy

EDWARD L. CARTER AND JAMES C. PHILLIPS

To the man of determination there is no such word as Fate or Chance.<sup>2</sup>

—George Sutherland to Daniel Harrington, 1881

Even within the eclectic group of men and women who have sat on the U.S. Supreme Court, Associate Justice George Sutherland (1922–1938) was truly one of a kind. The only Justice ever to come from the state of Utah, he grew up as a non-Mormon in a cloistered nineteenth-century Mormon society—and yet he rose to become one of the community's most popular and even beloved political figures. As a lawyer, Sutherland defended Mormon men charged with “unlawful cohabitation” for polygamous lifestyles—and yet as a U.S. Senator he championed women's rights, including suffrage. As one of the “Four Horsemen of the Apocalypse,” along with Justices James McReynolds, Willis Van Devanter, and Pierce Butler, Justice Sutherland has been pilloried for striking down portions of the New Deal<sup>3</sup>—and yet some scholars in recent years have reappraised his role in achieving progressive judicial outcomes.<sup>4</sup>

Virtually no aspect of Sutherland's life, however, could have been more unique than his education. He received only three years of formal schooling after age twelve. The English-born Sutherland, brought to Utah as a toddler by his Mormon convert parents, spent two of those formal school years at a four-year-old, barely surviving Mormon frontier academy. Subsequently he attended just one year of law school at the University of Michigan. Notwithstanding his unlikely academic record, however, Justice Sutherland was a brilliant thinker and polished orator who had strong command of philosophy and an uncanny understanding of politics. His own scant education and virtually non-existent experience as an academic did not stop Sutherland, in his later years, from becoming a sought-after informal advisor to deans and university presidents.

Perhaps most remarkable of all, Justice Sutherland maintained throughout his life that

no institution had so profound an influence on him as the little school in Provo, Utah, then known as Brigham Young Academy (now Brigham Young University). And no individual at the Academy had a greater impact on Sutherland than Karl G. Maeser, a Mormon immigrant from Germany who was the Academy's principal. Along with Sutherland's own father, also a Mormon convert and himself a prominent Utah frontier lawyer, Maeser helped shape the Justice's lifelong views of the law and the U.S. Constitution. And Maeser's impact on Sutherland's outlook on life and on his very character may have been even more significant.<sup>5</sup>

For this article, the authors reviewed primary historical documents on Sutherland in the U.S. Supreme Court Library, the Library of Congress, the L. Tom Perry Special Collections at Brigham Young University's Harold B. Lee Library, and the Church History Library and Archives of The Church of Jesus Christ of Latter-day Saints. Although there are at least two fine published biographies of Sutherland, these and other accounts do not include extensive information about the future Justice's educational activities at Brigham Young Academy from 1879 to 1881. Thus, this article focuses on the formative experiences of Sutherland, then between the ages of seventeen and nineteen, at the Academy. Clearly, his relationships with classmates and faculty left a lasting impression that affected the rest of his life, including his work on the Court. The article also details for the first time the Sutherland family's close relationship to the Mormon Church from 1849 to approximately 1870; although Sutherland himself never joined the Church, he maintained strong relationships with Mormons and Brigham Young University throughout his life.

### Mormonism and the Sutherlands

When famed British author Charles Dickens arrived at the Liverpool shipyard "on a hot morning in early June"<sup>6</sup> of 1863 to survey the emigrant ship *Amazon* bound for the United



George Sutherland was born in England, but his parents brought him to Utah as a toddler. Although his parents were Mormon converts, Justice Sutherland never formally joined the Church of Jesus Christ of Latter-day Saints.

States, he found a "people . . . so strikingly different from all other people in like circumstances whom I have ever seen."<sup>7</sup> To his marvel, a survey of the ship's decks found that "nobody is in an ill temper, nobody is the worse for drink, nobody swears an oath or uses a coarse word, nobody appears depressed, [and] nobody is weeping."<sup>8</sup> He praised the "universal cheerfulness"<sup>9</sup> and expressed amazement at the lack of "disorder, hurry, or difficulty"<sup>10</sup> among the more than 800 passengers. Dickens summed up his observations of this peculiar people with the declaration that they were "the pick and flower of England."<sup>11</sup>

Dickens was surprised to learn that the *Amazon* was full of Latter-day Saints, or Mormons, "bound for the Great Salt Lake."<sup>12</sup> Dickens' assessment turned prophetic with regard to at least one of the emigrants—a fourteen-month-old toddler who would later be described as "the ablest man in the United States Senate"<sup>13</sup> and "the greatest Constitutional

lawyer in Congress"<sup>14</sup> and who would serve fifteen years on the U.S. Supreme Court: Alexander George Sutherland, Jr. Sutherland, named for his father, was born at Stoney Stratford, Buckinghamshire, England, on March 25, 1862. His father, Alexander George Sutherland, was of Scottish descent, whereas the ancestors of his mother, Frances Slater Sutherland, came from England.<sup>15</sup>

Though historians previously have brushed over Sutherland's ties to The Church of Jesus Christ of Latter-day Saints,<sup>16</sup> the reality is that the Sutherland family as a whole did not merely undergo momentary religious rapture before returning to reason and leaving the Church. Instead, for two decades the Sutherlands were intricately tied to the faith founded by Joseph Smith, Jr., at Palmyra, New York, on April 6, 1830. From the beginning, the Mormons zealously conducted missionary efforts: Mormon emissaries seeking converts first traveled to Great Britain in 1837.<sup>17</sup> The first of Sutherland's family, his paternal grandmother and an aunt and uncle, joined the LDS Church in England in November 1848.<sup>18</sup> Months later, on March 6, 1849, Sutherland's father—then age ten—joined the Mormon Church through baptism, along with another aunt. Six years later, Sutherland's mother, then twenty, also aligned herself with the ranks of British Latter-day Saints, as did Sutherland's paternal grandfather.<sup>19</sup>

Sutherland's family apparently was not idle in their new denomination. From her baptism until her emigration to Utah a decade and a half later, Sutherland's grandmother, Mary Ann Timmings Sutherland, was known as "Mother Sutherland" to Mormon missionaries because of her willingness to open her house to them.<sup>20</sup> In 1857, Sutherland's father was re-baptized, a then-common practice that showed one's rededication to the cause; meanwhile, an 1859 record of Church leaders in England lists the elder Sutherland as a "Traveling Elder" in the "Norwich Pastorate."<sup>21</sup>

Even as Mormon converts in the United States suffered persecution that forced them to

move from upstate New York to, in succession, Ohio, Missouri, Illinois and then Utah, Mormon converts outside the United States numbering in the thousands heeded the Church's call to gather to their "Zion" by joining the main body of the Saints. To this end, the Church instituted a program called the Perpetual Emigration Fund to help poor members join them in Utah. The program essentially functioned as a revolving loan fund, with members encouraged to pay back their loans as they could so others might use the proceeds for travel as well, enabling more than 85,000 new converts to leave England and Northern Europe in the last half of the nineteenth century and travel to Utah.<sup>22</sup> The *Amazon's* passenger list noted Sutherland's father's occupation as "labourer,"<sup>23</sup> a profession that hardly speaks of wealth sufficient for ocean passage. The voyage would have been out of economic reach for the Sutherlands but for something akin to the Perpetual Emigration Fund, of which they were likely beneficiaries. Thus, the LDS Church provided both the motivation and means for the future Justice and his family to arrive in the United States.

After disembarking on American soil, the Sutherlands traveled by rail to Florence, Nebraska, before joining an oxen-pulled wagon company of about 200 Mormons bound for Utah Territory. An eight-week overland journey culminated in their arrival in Salt Lake City in early October 1863.<sup>24</sup> The Sutherlands appear to have had an easier journey than many Mormon pioneers, as they were privileged to ride in a new coach being transported to Utah for Brigham Young, the successor to Joseph Smith as prophet and president of the LDS Church.<sup>25</sup> Referring to this cross-country trip, Sutherland would later jokingly reminisce:

I might be tempted to call myself a pioneer if that designation had not already been specifically bestowed upon the faithful and courageous band of exiles who came in 1847, and

whose exclusive right to it should not suffer encroachment. Since, then, I can not claim to be a pioneer, perhaps I may call myself a "pio-nearly."<sup>26</sup>

After their arrival in Salt Lake City, the Sutherlands headed fifty miles south to Springville, Utah, a little frontier town where Sutherland's grandparents operated a confectionary and bakery shop, the same profession they had pursued in England.<sup>27</sup> Five years after settling in Utah, Sutherland's parents demonstrated the continued sincerity of their conversion by traveling to the Endowment House in Salt Lake City to be married for eternity after the Latter-day Saint fashion.<sup>28</sup> Records from the Springville congregation document that Sutherland's father performed an infant blessing ceremony for one of his sons, Henry Edward, on May 7, 1868.<sup>29</sup> Alexander Sutherland would occasionally perform such ceremonies for other children, with the last one recorded in February 1870.

After the spring of 1870, when "Alex Sutherland" was listed as a member of the newly organized Springville ward choir, a congregational singing group, no more notations document Sutherland family Church involvement in Springville, although they may have continued to attend services for a few more years.<sup>30</sup> In any case, Sutherland's nuclear family's divorce from Mormonism was complete by 1880, when local ecclesiastical leaders noted in a census that Sutherland's parents were apostates and the children—including the future Supreme Court Justice—were Gentiles, meaning they were never baptized into the Church.<sup>31</sup>

### Business and Civic Pursuits

In 1864, soon after arriving in Springville, Sutherland's father began working as an agent for a Springville businessman named William Dallin, shipping goods to Utah from the East.<sup>32</sup> The elder Sutherland eventually rose to become Dallin's business partner.<sup>33</sup>

Sutherland's father also fully involved himself in civic life, providing a pattern his son would follow. In July 1867, the citizens of Springville celebrated the twentieth anniversary of the first LDS pioneers entering Utah, and the Church-owned newspaper *Deseret News* recorded that "[a]fter the opening ceremonies, the Orator of the Day, Alexander Sutherland, delivered an oration."<sup>34</sup> In the fall of that year, a debating society was organized in Springville, with Alexander as president.<sup>35</sup> The elder Sutherland submitted several letters to the editor that were eventually published in the *Deseret News* on topics such as the community's educational endeavors, prospects for a good harvest, healthy attendance of 400 at the community's Sunday School, and the beginnings of a "Co-operative Society for the manufacture of cotton cloth and yarn."<sup>36</sup> That same month, the newspaper listed officers in the Utah militia, including "Alex. Sutherland, Sergeant Major."<sup>37</sup>

By 1872, the Sutherlands had moved from Springville, in Utah County, to neighboring Juab County. The move appears to have been economically motivated. Dallin & Sutherland petitioned for bankruptcy, and the judgment was issued in October 1868.<sup>38</sup> Bankruptcy proceedings appear to have been concluded by the end of 1869,<sup>39</sup> but the experience undoubtedly had a psychological impact on the Sutherland family. The bankruptcy coincided approximately with the Sutherlands' estrangement from the LDS Church and their move from the first American community they called home, although the precise motivations for those changes are not clearly known. The 1870 census listed Alexander Sutherland as a blacksmith in Springville with assets of \$200 in real estate and \$100 in "personal estate," placing the Sutherlands on the lower end of the local economic spectrum, but not at the bottom.<sup>40</sup>

Near the end of his life Sutherland reflected on conditions in Utah Territory (statehood was not achieved until 1896) during his childhood:

It was a period when life was very simple, but, as I can bear testimony, very hard as measured by present-day standards. . . . Nobody worried about child labor. The average boy of ten worked—and often worked very hard—along with the older members to support the family. . . . There was never any surplus of food. Too often there was a scarcity. . . . Society was not divided into the idle rich and the worthy poor. There were no rich, idle or otherwise. Everybody was poor and everybody worked.<sup>41</sup>

The year 1869 witnessed the discovery of silver in the Tintic Mountains of Juab County, and the mining boom that followed appears to have lured the Sutherlands southward.<sup>42</sup> By 1872, the future Justice's father was listed as one of three Juab County delegates to the territorial constitutional convention, as the residents of Utah attempted to gain statehood.<sup>43</sup>

For six years, the Sutherlands resided in Silver City (sometimes referred to as Tintic) as Alexander, naturalized an American citizen in 1871, became involved in mining operations and served as a notary public,<sup>44</sup> "recorder of the mining district, postmaster, and justice of the peace."<sup>45</sup> Described by one contemporary as having "had a sad life, but a brilliant man"<sup>46</sup> and in another source as "a restless soul content with few comforts,"<sup>47</sup> Alexander seemed to struggle to support his family.

Young George Sutherland left home in 1874, at age twelve, to work in the O'Reilly Brothers clothing store in Salt Lake City, the O'Reillys being family friends.<sup>48</sup> Two years later George returned to his family in Silver City, but he continued to work, this time "in the mining recorder's office, and as agent for Wells-Fargo & Company."<sup>49</sup> In 1878, the Sutherlands moved to Provo, the county seat, and George took advantage of the only viable local educational opportunity. At the age of seventeen, he enrolled in the Mormon Church's Brigham Young Academy, which was started

in 1875 as part of a system of local primary and secondary schools in Mormon frontier communities.

### George at the Academy

When Sutherland arrived at the Academy in the fall of 1879, he found "a grim, nondescript structure without beauty or grace or any other aesthetic feature calculated to invite a second look."<sup>50</sup> At that point, the Academy consisted of a single two-story edifice, called the Lewis Building, on Provo's Center Street.<sup>51</sup> The first floor housed four classrooms, while the second floor had been remodeled into a theater so "utterly bare and gloomy as to make inappropriate any form of entertainment except tragedy."<sup>52</sup> Although not intimately familiar with elaborate educational institutions, Sutherland nevertheless found himself full of "doubt and disappointment" at the school's condition. But that lasted only until he got to know Karl G. Maeser, the school's principal.

Maeser was born in Meissen, Germany, in 1828. Although initially educated in what were considered the world's best schools at the time, he chose to enroll in a progressive teacher's preparation program, rather than a German university. He became trained "in Pestalozzian freedom, democratic thinking, and a belief in self-directed learning."<sup>53</sup> Originally agnostic due to his dissatisfaction with the state-sponsored Lutheran religion, Maeser became interested in Mormonism due, ironically, to an anti-Mormon pamphlet. With no Mormon missionaries then allowed in Germany, Maeser wrote to the nearest Church office in Denmark requesting additional information. He was baptized into the Mormon Church in October 1855 under cover of darkness, to avoid detection from local authorities.<sup>54</sup> Expelled from his homeland because of his religious conversion, Maeser and his young family lived in England before decamping to Salt Lake City in 1860.<sup>55</sup>

When he succeeded Warren Dusenberry, the first principal of Brigham Young Academy



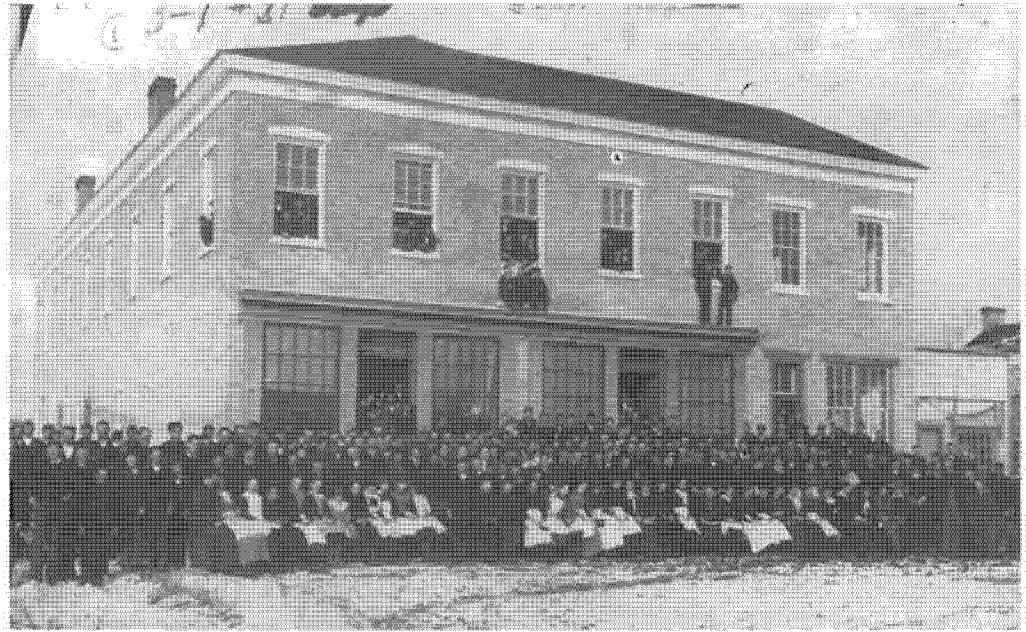
Names		Occupation	Age	Country
Richard Chapman	do		7	U. S. & W.
Elizabeth	do		4	
Susan Moulton	Spindler		26	
Elizab. Latham	Father		26	
Frank	do	Wife	26	
Geo. W.	do		16	
James E.	do		11	
Mary W. Magstaff	Spindler		23	
John Watts			42	
Frederick	do		26	
John Cox			24	
Charles Richmond	Wife		21	
Martha Latham	Spindler		41	
Susan Pelgrim			27	
Wm. Reed	Clark		18	
Ormond Clayton	Spindler		25	
John	do	Barman	21	
Geo. Sutherland	Labourer		24	
Frances	do	Wife	26	
A. C.	do	Wife	26	
Margaret W.	do	Wife	25	
Geo. West	Labourer		24	
Eliza	do	Wife	26	
Samuel	do		7	

George Alexander Sutherland, the Justice's father, is listed on the passenger log of the *Amazon* as a twenty-four-year-old labourer (see seventh name from bottom). Accompanying him on the 1863 voyage were his wife, Frances; their infant son, the future Justice; and the elder George Sutherland's mother, Mary Ann Timmings Sutherland.

(who lasted just one term), Maeser learned in no uncertain terms that he was to lead a Church school. When Maeser visited Mormon prophet Brigham Young in the latter's office to receive instruction prior to Maeser's taking over leadership of the Academy, Young stated simply: "Brother Maeser, I want you to remember that you ought not to teach even the alphabet or the multiplication tables without the Spirit of God. That is all. God bless you. Good-bye."<sup>56</sup>

Recalling his first days as Maeser's student, Sutherland contrasted the Academy's homely edifice with its majestic leader:

Fortunately, the building was not the school, but only the house in which the school lived; and the discovery of the school itself was as though I had opened a rough shell and found a pearl. The soul of the school was Karl G. Maeser; and when I came, as I soon did, to realize the tremendous import of that fact, the ugly structure ceased to trouble my eyes, my doubts vanished, and were replaced by the comfort of certainty and a feeling of deep content.<sup>57</sup>



Brigham Young Academy students were photographed in front of the Lewis Building at Third West and Center Street in Provo. When Sutherland arrived here to begin school at age seventeen he expressed disappointment in the school's appearance.



When German-born Karl G. Maeser converted to Mormonism in 1855, he was expelled from his homeland. Sutherland saw Maeser, who led the Academy, as "the soul of the school."

Besides Maeser, Sutherland developed personal relationships with several others while at the Academy that would remain important throughout his life. Among his Academy classmates were Daniel Harrington, who would become a Utah judge, and William H. King, who later became—like Sutherland himself—a U.S. Senator from Utah. Unlike Sutherland, however, Harrington, King, and most of the student body were Mormons. In fact, Sutherland also attended the Academy with James E. Talmage and Richard Lyman, both of whom later became Mormon apostles. By necessity, Mormons became Sutherland's best friends. Near the end of his life, Sutherland would recall these Academy students as "diligent workers...earnest, sincere, serious-minded, well-behaved, clean of thought, comradely, and anxious to know and do the right thing."<sup>58</sup> Their families, many of them in distant pioneer communities, sacrificed greatly to provide the students with \$15 a month on which to live while at the Academy.<sup>59</sup>

One of Sutherland's friends, Harrington, shared a lifelong interest—manifest in both boys at an early age—in the law. Within two weeks of Sutherland's arrival at the Academy, he had taken Harrington, his senior by two years, to see his father's library. By that time, approximately a decade after his company's bankruptcy and his estrangement from the Mormon Church, the elder Sutherland was practicing law in Provo and Salt Lake City, and was considered by the local newspaper to be "one of our most popular barristers."<sup>60</sup>

The senior Sutherland's law library was "quite a large one for those days," Harrington later recalled, "consisting of several tiers of text books, reports, statutes, and works on pleadings, etc."<sup>61</sup> Although the books "looked very formidable" to Harrington, "they must have been a challenge to George's ambition."<sup>62</sup> While Sutherland himself went on to become one of the select few lawyers in the United States privileged to argue before—and ultimately sit on—the nation's High Court, Harrington, too, assumed the Bench: He served eight years as presiding judge of the city court in Salt Lake City.<sup>63</sup>

As young Academy students, however, Sutherland and Harrington were not too seriously focused on their futures in the law to engage in a bit of good, clean humor. While arguing a case in the Academy's Moot Court, Sutherland found an opportunity for a laugh at the expense of Harrington. Arguing for the defense, Harrington at one point appealed to the logic of public opinion: "Why, your Honor, even the spectators can see that the Defendant ought to win this case."<sup>64</sup> When his turn came for rebuttal, Sutherland argued for the plaintiff with his characteristic dry wit: "The gentleman on the other side has referred to speckle potatoes. I don't see any potatoes of that kind here at all."<sup>65</sup>

During his first year at the Academy, 1879–1880, Sutherland's academic load included courses in theology, reading, orthography, grammar, arithmetic, Latin, physical geography, phonography, bookkeeping and

commercial lectures, history of civilization, rhetoric, and physiology.<sup>66</sup> Sutherland was one of a half dozen students in 1879 who jumped grades after the first term (or quarter), advancing from the level of Academic B to Academic A.<sup>67</sup> Despite the handicap of not participating in formal schooling for at least five years prior to entering the Academy, Sutherland quickly became proficient in his studies. His average grade for the first term was 93%, and then 96% for every term thereafter except for the last term, when he averaged 99%.<sup>68</sup> During his second year, Sutherland carried a significantly lighter load than he had in the first year, possibly due to his concurrent part-time work as a bookkeeper for several stores in Provo and one in Springville six miles to the south.<sup>69</sup> Additionally, Sutherland worked as the enumerator for Provo in the 1880 census.<sup>70</sup>

In the 1880–1881 academic year, Sutherland took courses in rhetoric, Latin, philosophy, and logic.<sup>71</sup> Displaying a hunger for knowledge, Sutherland also participated in additional classes not officially listed on his transcript, which might explain why the word "special" appears by his name in school records.<sup>72</sup> Among those study topics, which Sutherland and a few others undertook directly under the personal tutelage of Maeser, were Greek and a reading of Aristotle.<sup>73</sup> The Greek class was held before school and included future Mormon theologian and scientist Talmage, who was both a student and a teacher during Sutherland's two years at the Academy.<sup>74</sup>

Not surprisingly, Sutherland and Harrington spent a good portion of discretionary time thinking and talking about the young women with whom they were, or hoped to be, acquainted. The year after Sutherland left the Academy, he worked in his father's law office and prepared to attend law school at the University of Michigan. Harrington, meanwhile, had moved to the central Utah town of Richfield, where he received humorous dispatches from the nineteen-year-old Sutherland. "By the way," Sutherland wrote Harrington on February 18, 1882, "there is a young lady over in



Sutherland took courses in theology, reading, orthography, grammar, arithmetic, Latin, physical geography, phonography, bookkeeping and commercial lectures, history of civilization, rhetoric, and physiology at the Academy. He is pictured here (to the right and slightly above the boy on crutches) with his classmates at Brigham Young Academy circa 1880.

Springville named Miss Pancake."<sup>75</sup> Whether fictional or not, Miss Pancake clearly tickled Sutherland's funny bone:

Now if she is a sorghum eater she wouldn't be bad to take, would she? How would you like to taste her? If she should get married and settle down in the High Islands, the cannibals might have little pancakes for breakfast some morning. Suppose she should marry a Mr. Syrup, what a strange combination would be in the little Syrupses! There is room for a great deal of thought in this matter.<sup>76</sup>

Sutherland's musings about young women were sometimes more serious. Although just twenty years old, he had already begun to feel some pressure to settle down with a companion. After referencing in another letter to Harrington the prospect of marriage by a son of Maeser, Sutherland ruminated:

By the way, Dan, you and the undersigned had better be making strenuous efforts in that direction or we shall be left. There are, at present, of course, several if not more mar-

riagable [sic] young ladies on deck but in the course of a few more years they will all have gone where the woodbine (and other spring vegetables) twineth; hence it behooveth the youths of a hymeneal twist of character to make a move in the right direction. Don't you think so?<sup>77</sup>

Sutherland, though, did not have to search far and wide to find the object of his romantic longings. At the Academy, he met an "attractive young friend"<sup>78</sup> named Rosamond Lee of Beaver, Utah. Rose had been born into a Mormon family on July 16, 1865. Although, like George, she never joined the Church through baptism, an acquaintance of the Sutherlands and daughter of Maeser years later referred to her as "really a Mormon girl."<sup>79</sup> In the fall of 1880, Rose was just fifteen years old, but she began serving at the Academy as secretary of the Scientific Section of the school's Polysophical Society, a group of inquisitive and motivated students who held weeknight meetings and activities under the direction of Academy faculty members.<sup>80</sup> Sutherland served as chairman of the Scientific Section,<sup>81</sup> thus allowing

him to work closely with the woman he would marry on June 18, 1883. The pair remained lifelong companions, achieving a marriage of more than fifty years and having three children together.

Perhaps more pertinent to Sutherland's future endeavors than this involvement in the Scientific Section was his participation in the Polysophical Society's Civil Government Section. Here George was appointed "Prosecut-

ing Attorney" of the section's moot court.<sup>82</sup> In this capacity, he argued cases involving such offenses as fraudulent voting, a stolen note, murder, assault and battery, and "breaking the peace by loud and unusual noises." The record notes that he won more cases than he lost.<sup>83</sup> Additionally, the Civil Government Section spent two sessions in May 1881 discussing the relative merits of national political party platforms.<sup>84</sup> Coincidentally, at about this time



Sutherland met his future wife, Rosamond Lee, as a fellow student at the Academy. Their marriage lasted more than fifty years and produced three children.



Sutherland began his involvement in local politics, an endeavor that would culminate years later with his representation of Utah in the U.S. House of Representatives and U.S. Senate.

Along with Harrington and other classmates, George and Rose finally exhausted the resources of the Academy to instruct them and hence prepared for graduation in June 1881. In April of that year, the would-be graduates were subjected to a public examination, which also included an address by George Sutherland.<sup>85</sup> George apparently succeeded in the examinations, because in May the name "A. G. Sutherland Jr." appeared on the school's official "List of Certificates issued for Special Examinations." George's final grades foreshadowed the talents that would prove vital for his future work as a lawyer and judge: He earned 96% in natural philosophy, 98% in logic, and 100% in rhetoric.<sup>86</sup>

Sutherland earned particular praise from Maeser for his writing. Maeser once commented that George's essays at the Academy were "invariably models of excellence."<sup>87</sup> Even the *Deseret News* took notice: "Dr. Maeser was often heard to say that Sutherland in his youth was one of the best writers in the English language he had ever known. He considered every essay this young man handed in for class recitation a model of classic literature."<sup>88</sup> Although the Academy lacked first-rate facilities, Sutherland received there a remarkably high-quality education. For her part, the future Rose Sutherland remembered the rigors to which students at the Academy were subjected:

We certainly worked hard, long hours at school then as we were required to take notes of all lesson[s] and lectures and write them up in full every night. For weeks at a time, I did not get to bed before 3 a.m. But that was the spirit of the school.<sup>89</sup>

Not long after he left the Academy and took up residence in Ann Arbor, Michigan, for his legal studies, Sutherland penned a poem

that reflected his early awareness of his destiny but that also embodied a remarkably mature view of the role good character would play throughout his life. In this vein, Sutherland clearly had learned life lessons from Maeser. The poem was scribbled in Sutherland's diary and dated Christmas Day 1882:

Upon your footsteps fame and honor wait,—

Rewards of diligence, not rules of fate.

Bend every energy of heart and mind  
And obstacles surmount and chains unbind

Now curb now spur Ambitions [illegible]

The immortal two to gain let naught impede

But in the struggle let your motto be,  
(Come sore defeat or glorious victory);—

My *honor* first my *fame* depends on thee.

Original  
Ann Arbor, Mich.  
Dec. 25, 1882.<sup>90</sup>

### Sutherland and Maeser

When he first met Maeser, Sutherland admitted later, he felt respect but also "some apprehension."<sup>91</sup> By the time he assumed his seat on the Supreme Court, however, Sutherland had written of Maeser: "His teaching, example and character have constituted an influence for good upon my whole life that cannot be exaggerated."<sup>92</sup> Sutherland was not alone in his approbation for the German-born educator. As one historian explained, numerous former students "admired him to the point of idolatry. They admired him as a teacher; they admired him as a person; they admired him as a saint; they were very much aware of his weaknesses, but it was the way in which he was a living example of his ideas that carried with them



years later.<sup>93</sup> Maeser himself considered the affection of his pupils "a gift from God," and he solemnly declared that "I would rather lose my life than the love of my students."<sup>94</sup>

While completely embracing the beliefs of the Church from his conversion until his death, Maeser preached and practiced religious tolerance, possibly because of his own experiences in Germany. Sutherland later wrote of his beloved principal:

He was, of course, an ardent believer in the doctrines of his Church, but with great tolerance for the views of those who differed with him in religious faith. I came to the old Academy with religious opinions frankly at variance with those he entertained, but I was never made to feel that it made the slightest difference in his regard or attention.<sup>95</sup>

Although Sutherland also credited his classmates with treating him well, the non-Mormon suffered teasing by some of his fellow students at one point because he was not enrolled in a class studying the Book of Mormon, a Church scripture. In frustration George swore at his tormentors, and under the Academy's rules such a profane outburst required expulsion. The next morning at the school-wide devotional Sutherland expected to hear his name read as having been expelled from the Academy. However, instead of announcing Sutherland's expulsion,

Maeser got up and quoted the [LDS] Article of Faith, "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." And he gave a lecture to those boys who had been heckling me, and said: "What is the good of your coming to this school if you cannot even learn to live up to the Articles of Faith?" He further said: "If I hear again of your heckling

this young man, somebody will be expelled from school." . . . I rushed up immediately after the adjournment of that meeting, and I said, "Dr. Maeser, I shall take Book of Mormon, and I shall pass as good an examination in it as any student you have." And I think I did very well.<sup>96</sup>

Indeed, despite starting the theology class halfway through the term, Sutherland still managed to achieve 83%. In future terms his theology grades were 100%, 90%, and 96%, respectively.<sup>97</sup> The theology class consisted not only of Book of Mormon study but also of study of the Bible, as well as hymn singing, prayers, sermons, and student readings of poetry, prose, and essays.<sup>98</sup> Class minutes show that Sutherland was an active participant, performing readings, writing essays, and answering questions. Possibly because of his non-member status, Sutherland was never called on to pray, nor did he ever serve as class chairman.<sup>99</sup>

On more than one occasion, Sutherland told acquaintances that he felt, while an Academy student, that there was no question Maeser could not answer and no subject he could not teach. In fact, Sutherland said, "I think there were days when I would have taken my oath that if the Rosetta Stone had never been found, nevertheless he could have easily revealed the meaning of the Egyptian hieroglyphics."<sup>100</sup> One lesson Sutherland—the man whom the *New York Times* would describe as "the living voice of the Constitution"<sup>101</sup>—carried with him from Maeser's classroom to the Supreme Court concerned the origins of the U.S. Constitution: "I can recall, as far back as 1879 and 1880, the words of Professor Maeser, who declared that [the Constitution] was a divinely inspired instrument—as I truly think it is."<sup>102</sup>

In 1887, after Sutherland had returned from the University of Michigan to practice law in Utah, Maeser—like many Mormon men at the time—was arrested for unlawful

cohabitation. In 1888, Maeser appeared in court and was found guilty of the offense of having more than one wife.<sup>103</sup> Though not Maeser's lawyer, Sutherland became informally involved in the case, according to one account:

Sutherland went to the Judge and said, "Dr. Maeser has been convicted, you have to sentence him. . . . I am not a member of the LDS Church, nor is my family, but this man was my tutor in school. I know he is a good man and he has done much for the community here in Provo and the adjoining section. Judge, I know you have to give him some kind of punishment, but I am pleading with you, don't send him to jail. If you do he will die of humiliation. He is a good man and he has done what he believes to be right, but the law says he has violated [it] and you will have to punish him. Give him as much of a fine as you want to, but don't send him to the penitentiary, I am pleading with you."<sup>104</sup>

The following day, Maeser appeared before the court to be sentenced, and the judge announced that due to his great service to the community he would not be sent to prison but would be fined the maximum amount under the law, \$300.<sup>105</sup> When the judge returned to his chambers, he was met by Sutherland, who, reaching out his hand, said, "Judge, I thank you with all my heart for what you have done. Here is my check to pay Dr. Maeser's fine."<sup>106</sup>

### Sutherland After BYA

While still an Academy student and just eighteen years old, Sutherland attended on September 18, 1880 the county convention of the Liberal party, organized specifically to combat the LDS Church-backed People's party. The Liberal party platform consisted of the two-fold aim of outlawing plural marriage, or polygamy, and reducing the Church's influence

in local economics. Although "no county ticket was put in the field" by the Liberal party for that year's elections, Sutherland himself became actively involved in politics for the first time when he was appointed party secretary.<sup>107</sup> While it may seem odd for George to have taken an active part in a political party virulently opposed to and universally despised by many of his Mormon classmates, George's involvement seems to have stemmed from his sincere dislike of polygamy and Mormon collectivist economic practices. Additionally, his father may have had some influence on the young Sutherland, as Alexander was eventually a Liberal party candidate for office in both Utah and Juab counties.<sup>108</sup>

Following his return to Utah in 1883 after a year in law school at the University of Michigan, Sutherland immediately dove back into local politics, specifically with the Liberal party. He ran for mayor of Provo in 1890 on that party's ticket and lost. But his intelligence, leadership, and communication skills enabled him to gain support of non-Mormons as well as Mormons. After the Mormon Church disavowed polygamy in 1890 with an official proclamation known as the Manifesto, the Liberal party dissolved, and Sutherland thereafter aligned himself with the Republican party.<sup>109</sup>

After taking up the legal profession, first with his father and then with a couple of Mormon partners including his old Academy classmate, William H. King, Sutherland continued to maintain popularity with both Mormons and non-Mormons in Utah, which no doubt helped his political aspirations. The 1880s witnessed intense persecution and prosecution of polygamists, and Sutherland often represented Mormon men who were charged with unlawful cohabitation, including the president of the Academy's Board of Education, Abraham O. Smoot, who was the father of Reed Smoot, Sutherland's fellow Academy graduate and later his congressional colleague.<sup>110</sup>

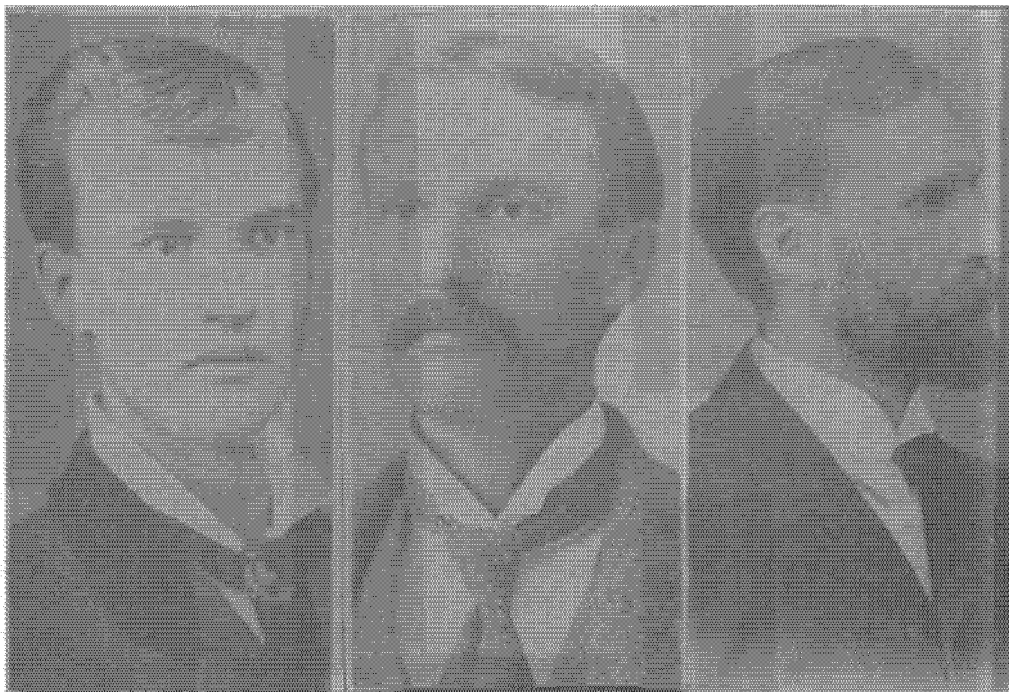
Sutherland served in the first Utah Legislature, after statehood in 1896, and from 1901 to 1903 he represented Utah as its lone

Congressman in the U.S. House of Representatives. Interestingly, in the election of 1900 for Congress he defeated his former Academy classmate and law partner King.<sup>111</sup> In 1904, Sutherland was elected to the U.S. Senate, where he served two terms. In 1907, he delivered a powerful address advocating the right of Reed Smoot, who had been duly elected, to take his seat in the Senate notwithstanding opposition because of his ties to Mormonism. In 1900, Smoot became a Mormon Apostle, one of the highest positions of authority in the Church. Although Sutherland thought it unwise for Utah to send a Mormon Church official to the Senate, his support for Smoot, once elected, helped persuade fellow Senators to allow Smoot to be seated.<sup>112</sup>

As a Senator, Sutherland achieved several notable accomplishments. He was instrumental in drafting the criminal and judicial portions of the U.S. Code, and his service in that capacity earned him a position on the

Senate Judiciary Committee.<sup>113</sup> Sutherland introduced and spoke forcibly in favor of the Susan B. Anthony Suffrage Amendment in the Senate in 1916, and he was known as a great friend to the women's suffragist movement.<sup>114</sup> In the election of 1916, he once again crossed paths with his old friend King, who defeated him and took his seat in the Senate in 1917.

After leaving the Senate, Sutherland delivered a series of eight lectures, titled "Constitutional Power and World Affairs," at Columbia University in 1918.<sup>115</sup> In 1916 and 1917, Sutherland served as president of the American Bar Association, and speculation began immediately that he would be appointed to the Supreme Court. By that time, Sutherland had returned to private law practice in Washington, D.C. and Salt Lake City, and he appeared before the U.S. Supreme Court to argue a total of six cases during the October 1919, October 1920, and October 1921 Terms.<sup>116</sup> He also became a key campaign advisor to



After Sutherland retired from the Supreme Court, the *Salt Lake Tribune* ran an article looking back on his many accomplishments. These photos show him (at left) as a youth at eighteen, (center) in 1883, the year he married, and (right) in 1905, the year he was elected seated in the U.S. Senate.

Warren G. Harding in the election of 1920, and when Harding assumed the presidency in 1921, he relied on Sutherland's expertise in a variety of administration posts. In July and August 1922, Sutherland represented the United States in arbitration with Norway before the Permanent Court of Arbitration at the Hague.<sup>117</sup>

On September 5, 1922, Harding appointed Sutherland to the High Court to replace Justice Clarke; the Senate confirmed Sutherland the same day, without even referring the appointment to the Judiciary Committee.<sup>118</sup> Sutherland himself was in Europe at the time and may not have immediately known of the happenings concerning him in Washington, D.C. A simple note from Harding, dated September 13, 1922 and now in Sutherland's papers at the Library of Congress, reveals the relative simplicity of that time's confirmation politics compared to today:

Since your departure for Europe you have been nominated and confirmed as a Justice of the United States Supreme Court. I suppose you know all about this without me having taken the time to communicate with you. What pleases me more than anything else is that your nomination was received with unanimous satisfaction throughout the country.

Very sincerely yours,

Warren G. Harding

Once on the Supreme Court, Sutherland was known as an eloquent opinion writer. During his service on the Court from September 5, 1922 to January 18, 1938, he wrote 320 opinions, including 295 majority opinions, 1 concurrence, and 24 dissents.<sup>119</sup> Among his important opinions were: *Euclid v. Ambler Co.*,<sup>120</sup> holding a zoning ordinance to be constitutional; *Powell v. Alabama*,<sup>121</sup> holding that the Fourteenth Amendment mandated the right to legal representation in state criminal court; *Humphrey's Executor v. United States*,<sup>122</sup> holding that the President could not remove an individual from an independent administra-

tive agency; and *Grosjean v. American Press Co.*,<sup>123</sup> holding a state newspaper tax to be an unconstitutional prior restraint.

While on the Court, Sutherland—a teetotaler who ascribed his health, in part, to following the Mormon custom of abstinence<sup>124</sup>—gained notice in the popular press for his refusal to attend a non-dry dinner during Prohibition. In March 1923, the *Chicago Tribune* reported:

A dinner which was to have been given tonight in honor of Justice Sutherland of the Supreme Court by the Phi Delta Phi fraternity had to be called off, because the honor guest refused to attend.

The reason for his refusal was that the invitations were facetiously framed in ridicule of the Volstead prohibition enforcement act. Invited guests were asked if they possessed any liquor and how much of their supply they intended bringing to the dinner. . . .

Justice Sutherland was indignant and declined to be present.<sup>125</sup>

During his time on the Court, Sutherland maintained a long and colorful correspondence with Mormon prophet Heber J. Grant, president of the Church of Jesus Christ of Latter-day Saints in Salt Lake City and president of the Board of Trustees of Brigham Young University in Provo. Grant clearly saw in Sutherland a political leader who understood the Mormons without being beholden to them. Just weeks after Sutherland's confirmation to the Supreme Court, Grant wrote Sutherland a lengthy congratulatory letter from Los Angeles, where the Church leader had gone to dedicate a meetinghouse:

I, as the head of a very much misunderstood and misrepresented people, rejoice in your appointment because at home and abroad you have at *all times* been absolutely fair to the "Mormon" people, and, therefore, it

is but natural that I should feel that you are just the kind of a man who is entitled to the great honor which has come to you.

Justice having been the main-spring of your treatment of the "Mormons" I know it will be the main-spring of your administration of your high office as a member of the Supreme Court of the United States.<sup>126</sup>

During his tenure on the Court, Sutherland also maintained regular correspondence with various deans and university presidents, primarily those at the University of Michigan. While these academic leaders cultivated Sutherland's support and sought his advice, the letters from Grant stand out for their personal nature and frankness. Among other things, Grant shared details of the economic struggles and activities of the normally reserved Church.<sup>127</sup> Additionally, on January 21, 1924 Grant wrote to Sutherland and detailed his own personal economic difficulties: Having invested in a large irrigation project in 1923, Grant had lost \$50,000 and been forced to liquidate his securities holdings in order to pay debts.<sup>128</sup> Although Sutherland's letters to Grant were not as forthcoming, he did provide Grant with advice at one point about which Washington, D.C. bank the Mormon Church should use.<sup>129</sup>

The Grant-Sutherland relationship also apparently included personal visits. In a 1941 letter, Grant referred to "the many pleasant visits we have had together in Washington."<sup>130</sup> Coincidentally, Grant's tenure as the Mormon Church president (1918–1945) corresponded roughly with the period from Sutherland's appointment to the Supreme Court (1922) until his death (1942). Grant himself left formal schooling at age fifteen and never returned, and he confessed in a letter to Sutherland that he had proofreaders correct all his letters before they were sent. Nevertheless, the sparsely educated Mormon leader and the decorated

non-Mormon Supreme Court Justice seemed to get along well, and much of their relationship stemmed from their mutual interest in Brigham Young University.<sup>131</sup>

Sutherland was awarded honorary degrees from Columbia University, George Washington University, and the University of Michigan. But the degree that left the largest trail, by far, in Sutherland's papers was the honorary Doctor of Laws degree given him in June 1941 by his first alma mater, Brigham Young. By that time, Brigham Young University had grown to 2,343 students<sup>132</sup>; after World War II, the school eventually grew to its present-day enrollment of approximately 30,000.

Sutherland did not deliver his speech at this event in person due to the insistence of his doctor, but the writing of his remarks—"his last public article"—was not taken lightly; Rose later wrote that "he put his heart into it."<sup>133</sup> Sutherland admitted in a letter to an old schoolmate that the honorary degree "made me very happy."<sup>134</sup> When the degree was conferred on June 5, 1941, it was the first time in Brigham Young University's history that an honorary degree was awarded *in absentia*. Sutherland's remarks were read by a local judge and BYU alumnus, George S. Bailiff. Thirteen months later, on July 18, 1942, Sutherland died at the age of eighty.

In his commencement speech, Sutherland recounted the early days at Brigham Young Academy and his association with fellow students. He particularly focused on the impact Maeser had on him. He also discoursed at length on morality and character. The commencement address seemed to serve as recognition of the accomplishment of the life plan—honor first, then fame—that Sutherland had laid out for himself in the poem he wrote in his diary on Christmas Day 1882. While Sutherland's speech focused on Maeser's qualities and goodness, the greatest legacy left by the Brigham Young Academy principal may well have been the sober and moral life led by Sutherland, Maeser's star pupil. Of his first mentor and teacher Sutherland said:



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Dr. Maeser's ability to teach... covered the entire field of learning...; but far more important than anything else, he was a teacher of goodness and a builder of character. He believed that scholastic attainments were better than riches, but that better than either were faith, love, charity, clean living, clean thinking, loyalty, tolerance, and all the other attributes that combine to constitute that most precious of all possessions, good character.<sup>135</sup>

### ENDNOTES

<sup>1</sup>Throughout this article, the Church of Jesus Christ of Latter-day Saints is referred to as the LDS Church, the Mormon Church, or simply the Church. Historically, Latter-day Saints (also called LDS, Saints, or Mormons) often referred to individuals who were not members of the Church as "Gentiles," though currently the common term is "non-members."

<sup>2</sup>Daniel Harrington, "Early Steps in the Career of Justice George Sutherland," *Improvement Era*, March 1938, 132.

<sup>3</sup>See Richard A. Maidment, *The Judicial Response to the New Deal: The United States Supreme Court and Economic Regulation, 1934-1936* (New York: St. Martin's Press, 2001); Arthur Schlesinger, Jr., *The Politics of Upheaval* (Boston: Houghton Mifflin, 1960), 457.

<sup>4</sup>Samuel R. Olken, "The Business of Expression: Economic Liberty, Political Factions, and the Forgotten First Amendment Legacy of Justice George Sutherland," *William & Mary Bill of Rights Journal* 10 (2002): 249. See also Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton, NJ: Princeton University Press, 1994); Hadley Arkes, "A Return to the Four Horsemen," *Journal of Supreme Court History* 1 (1997): 33-54.

<sup>5</sup>Joel Paschal wrote an article on Sutherland's education and its impact on his later career, though he focused on Sutherland's term at law school rather than his two years at Brigham Young Academy. See Joel Paschal, "The Education of a Justice," *Journal of Legal Education* 1 (Spring 1949): 333-60.

<sup>6</sup>Charles Dickens, *The Uncommercial Traveller* (New York: E.P. Dutton & Co., 1909), 218.

<sup>7</sup>*Ibid.*, 221.

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*, 222.

<sup>10</sup>*Ibid.*, 226.

<sup>11</sup>*Ibid.*, 222.

<sup>12</sup>*Ibid.*, 218.

<sup>13</sup>*Ogden (Utah) Examiner*, August 30, 1915, quoted in Joel Paschal, *Mr. Justice Sutherland: A Man Against the State* (Princeton, NJ: Princeton University Press, 1951), 100.

<sup>14</sup>Glen Miller, "George Sutherland, Senator of the United States from Utah," *Salt Lake (Utah) Herald-Republican*, July 9, 1916, 16.

<sup>15</sup>Alan Gray, untitled and unpublished biography of George Sutherland, U.S. Supreme Court Library, 1. Gray was Justice Sutherland's law clerk in the 1920s, and the biography presumably received Sutherland's approval.

<sup>16</sup>Paschal, *Mr. Justice Sutherland*, 3.

<sup>17</sup>Gustave O. Larson, "The Story of the Perpetual Emigration Fund," *The Mississippi Valley Historical Review* 18 (Sept. 1931): 188.

<sup>18</sup>Church of Jesus Christ of Latter-day Saints, *International Genealogical Index (IGI)*, "Sutherland, Thomas Henry," batch 7412102, sheet 23, source call 934232; *IGI*, "Sutherland, Mary Ann," batch 7412102, sheet 23, source call 934232; *IGI*, "Timnings, Mary Ann," batch 5005759, sheet 3, source call 1553276.

<sup>19</sup>*IGI*, "Sutherland, Alexander George," batch 7412102, sheet 24, source call 934232; *IGI*, "Sutherland, Eliza," batch 6940601, sheet 0, source call 087021; *IGI*, "Slater, Frances," batch F514635, sheet 18, source call 1553751; *IGI*, "Sutherland, Thomas," batch 8984303, sheet 4, source call 1553680.

<sup>20</sup>Daughters of Utah Pioneers, *Pioneer Women of Faith and Fortitude*, vol. 4 (Utah: Publishers Press, 1998), 2998.

<sup>21</sup>*Deseret News (Salt Lake City, UT)*, March 30, 1859, 3.

<sup>22</sup>Larson, "The Story of the Perpetual Emigration Fund," 185.

<sup>23</sup>Folder 3, MSS 843, The Perpetual Immigration Fund Company, Western and Mormon Americana, L. Tom Perry Special Collections (LTPSC), Harold B. Lee Library, Brigham Young University, Provo, UT.

<sup>24</sup>Church History Library and Archives, "Mormon Pioneer Overland Travel, 1847-1868: Horton D. Haight Company (1863)," Church of Jesus Christ of Latter-day Saints, available at <http://www.lds.org/churchhistory/library/pioneercompanysources/0,16272,4019-1-135,00.html> (last visited July 30, 2008); Mary Ellen Clark Okey, "Reminiscences," in Daughters of Utah Pioneers, Mountainville Camp (Alpine Utah), *Mountainville Camp DUP, 1922-1990*, 126. Church History Library and Archives, Church of Jesus Christ of Latter-day Saints. Available at <http://www.lds.org/churchhistory/library/pioneerdetails/0,15791,4018-1-40180,00.html>

<sup>25</sup>Daughters of the Utah Pioneers, *Pioneer Women of Faith and Fortitude*, vol. 4, 2998.

<sup>26</sup>George Sutherland, "A Message to the 1941 Graduating Class of Brigham Young University from Mr. Justice George Sutherland," 3, UA 497, Manuscript Collection, LTPSC.

- <sup>27</sup>Daughters of Utah Pioneers, *Pioneer Women of Faith and Fortitude*, vol. 4, 2998.
- <sup>28</sup>*GI*, "Sutherland, Alexander George," batch 7412102, sheet 24, source call 934232.
- <sup>29</sup>Church of Jesus Christ of Latter-day Saints, Springville Ward, "Springville Ward Historical Record, 1851-1875," Manuscript Collection, LTPSC.
- <sup>30</sup>Mary J. Chase Finley, *A History of Springville* (Springville, UT: Art City Publishing), 60.
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# A Look Back at the *Steel Seizure Case*

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During every national emergency, the system of checks and balances designed, as James Madison wrote in *Federalist 51*, to prevent a power grab by any of the three branches by giving each "the necessary constitutional means and personal motives to resist encroachments of the others," comes under great pressure.<sup>1</sup> After the September 11, 2001 terrorist attacks upon the World Trade Center and the Pentagon, the public looked to the President to take extraordinary measures. Congress quickly moved to expand executive powers to meet the emergency, confirming the view of a leading textbook on the presidency that "it has become the dominant institution in a system designed for balanced government."<sup>2</sup>

With Congress largely acquiescing to increased presidential power, critics of its expansion looked to the courts. However, the judiciary is generally considered the weakest of the three branches, lacking, as Alexander Hamilton put it in *Federalist 78*, "influence over either the sword or the purse . . . 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."<sup>3</sup>

Those who look to so weak an institution to effectively check the growth of presidential power often cite the *Steel Seizure Case*<sup>4</sup> to illustrate the possibilities. We can see the continuing relevance of this case by noting its prominence in the confirmation hearings of

Chief Justice John G. Roberts, Jr.<sup>5</sup> Responding to a question from Senator Patrick Leahy about the limits of executive authority, nominee Roberts stated that "the framework for analyzing that is in the *Youngstown Sheet and Tube* case, the famous case coming out of President Truman's seizure of the steel mills." If any case demonstrates the effectiveness of the Supreme Court as a check on executive power, this is it.

Therefore, this seems an ideal time to re-examine that case to see how effective that framework remains after more than half a century. Prior to the *Youngstown* ruling, the conventional wisdom had been that—especially when it came to foreign policy—the judiciary had done little to check the President. Even writing after the decision, Joseph Tanenhaus



argued that the few challenges to presidential prerogative that reached the Supreme Court "almost always result in victories for the president."<sup>6</sup> He pointed out that prior to the *Steel Seizure Case*, only *Ex parte Milligan*<sup>7</sup> provided such a presidential rebuff. And because it was decided after Lincoln's assassination and the end of the Civil War, it came too late to have much effect.

The main basis for this conclusion was Justice Sutherland's majority opinion in *United States v. Curtiss-Wright Export Corporation*.<sup>8</sup> Although the case concerned the constitutionality of a 1934 congressional joint resolution allowing the President to ban arms sales to certain countries in South America, the opinion went further, claiming that even in the absence of legislative authorization, "as the sole organ of the federal government in the field of international relations," the executive has power "which does not require as a basis for its exercise an act of Congress." Despite much criticism for going well beyond the issues presented in the case as well as for its historical inaccuracies,<sup>9</sup> this opinion has never been overruled. According to one commentator, "it remains good law today" as the most cited case concerning presidential national security powers.<sup>10</sup> As we shall see, one of the lasting contributions of the *Steel Seizure Case* is that, while it does not overrule *Curtiss-Wright*, it provides a precedential counterweight against extreme claims of executive power.

The key event in the case was the threat of a steel strike during the Korean War, which, in 1952, entered its third year. The manufacturers were willing to grant some of the wage increase demanded by the United Steelworkers of America, but only if the government's Office of Price Stabilization (OPS) allowed them a significant price increase. President Harry Truman, who later wrote in his memoirs that "the demands of the steelworkers did not seem out of line to me,"<sup>11</sup> submitted the dispute to the Wage Stabilization Board (WSB), which, on March 20, 1952 recommended a 17.5-cent wage increase over eighteen months while re-

jecting the companies' proposed \$12 per ton price increase. The WSB majority pointed to large industry profits, a claim the companies disputed, and the need for the steelworkers to catch up with wages in the auto and coal industries. Industry members of the WSB issued a minority report arguing that the recommended wage increases would exceed the board's own guidelines and that the additional recommendation of a union shop should not have been included. On April 1, Ellis Arnall of the OPS informed the steel companies that his agency would approve a price increase no greater than \$3 per ton, but two days later he privately offered \$4.50.<sup>12</sup> Instead, the companies countered with a proposal for a lower wage increase. Rejecting that offer on April 3, the union announced its intention to strike beginning six days later.

Heeding a unanimous Cabinet, which believed that a strike would seriously damage the war effort, Truman began with two possible methods of preventing a work stoppage. He could invoke the Taft-Hartley Act's provisions calling for an eighty-day injunction. This method was politically unpalatable, not only because Truman had staunchly opposed the passage of the Act, but also because he believed that an injunction would unfairly penalize the union, a political ally of his, which had already agreed to four postponements totaling ninety-nine days. Nor was there any guarantee that the eighty days would make a settlement any more likely. The Defense Production Act, designed primarily for defense-related work disputes, seemed more suitable. However, the WSB's recommendations under that law were not mandatory. The administration's private offer of a \$4.50-per-ton price increase would be accepted only if the union would agree to a lower increase, a condition the steelworkers declined.<sup>13</sup> Truman would not agree to a greater price increase due to its inflationary impact, the extra cost to the government, and the industry's already large profits.<sup>14</sup>

Thus, Truman felt compelled to examine a temporary seizure of the steel plants as a

last resort. But on what legal basis could he justify so drastic a step? Attorney General J. Howard McGrath's resignation hampered the decision-making process, as his successor was not confirmed until after the controversy, leaving Solicitor General Philip Perlman to serve as Acting Attorney General. The two statutes authorizing seizure presented conditions making each an unsatisfactory basis. At first, the Justice Department favored using the Selective Service Act's provision allowing the government to "take immediate possession of any plant, mine, or other facility" that failed to deliver orders to the government. However, the government rarely bought steel directly from the industry. If new orders were placed, a reasonable amount of time would have to be given for delivery prior to a seizure. In addition, after a strike began, it would take some time to use up existing inventories before any failure to deliver would take place. The Defense Production Act was no better, due to its high cost and lengthy condemnation procedures. Requesting new legislation from Congress would take even longer, with no guarantee that any such legislation would even pass.

Lacking a statutory basis for seizure, the administration fell back upon the President's "inherent powers" under the Constitution, relying on a 1949 memorandum from then-Attorney General Tom Clark, who was appointed to the Supreme Court later that year. It claimed that these inherent powers could be used "if crises arising from labor disputes in peacetime necessitate unusual steps, such as seizure, to prevent paralysis of the National economy."<sup>15</sup> Truman had also been secretly advised by Chief Justice Fred Vinson that a majority of the Supreme Court would be likely to uphold such a rationale.<sup>16</sup> In previous cases, the Court had agreed that either the general Article II executive power or other constitutional clauses, such as the duty to "take care that the laws be faithfully executed," gave Presidents implied powers in addition to those specifically granted by the Constitution.<sup>17</sup> Whether these inherent powers authorized Truman to

seize the steel mills during an undeclared war would be the main issue when the case ultimately reached the Supreme Court. Indeed, the difficulty of determining exactly which powers are implied and how to limit them continues to bedevil the Court.<sup>18</sup>

On April 8, 1952, the President addressed the nation to announce an Executive Order seizing the steel mills, based on "the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces." He went on to attack the companies' price demands as "about the most outrageous thing I ever heard of." Although Secretary of Commerce Charles Sawyer was designated as custodian of the plants, their management would continue as before. Truman's ensuing message to Congress both justified the seizure and promised to abide by any relevant legislation it decided to pass. Although the Senate approved a bill banning any spending for seizures not authorized by Congress, the House adjourned for the next two weeks. Shortly after the speech, two of the companies went to court seeking a temporary restraining order (TRO) blocking the seizure. The next morning, several companies filed suit for a permanent injunction.

In order to gain a TRO, the steel companies not only had to show that the seizure was illegal, they also had to demonstrate that it would harm them irreparably. In other words, if a monetary payment later on would fully compensate them for their losses, there would be no need for the court to enjoin the government's action while a trial took place to determine the legality of the seizure. It was not surprising that district court Judge Alexander Holtzoff denied the TRO because the plants would continue normal operations while the company sued to regain any financial loss under the Tort Claims Act.

Unfortunately for the government, during the court hearing, Assistant Attorney General Holmes Baldridge took the inherent-powers argument to an extreme, claiming that the

"magnitude of the emergency itself is sufficient to create the power to seize." These claims of apparently limitless emergency power would prove to be both a public-relations and a legal nightmare for the administration. When a reporter asked at a press conference whether the President could similarly seize newspapers, Truman's impolitic reply that "under similar circumstances, the President of the United States has to act for whatever is best for the country" hardly helped.<sup>19</sup>

Although Secretary Sawyer at first hoped that a strike could be prevented through collective bargaining, he soon decided otherwise, issuing a statement that he would "consider the terms and conditions of employment," after which he told a television interviewer that there would be pay increases. The head of Inland Steel replied that a court decision upholding that would be "the end of the road for free

enterprise." According to Maeva Marcus, "the extreme reaction of the industry was paralleled in the press," while the public split evenly, primarily along party lines.<sup>20</sup>

The suit for a permanent injunction was heard by district court judge Andrew Pine, who denied the government's request for additional time to prepare an answer to the industry's claim that there was no adequate monetary remedy when Baldridge was unable to promise that the government would maintain the status quo for the terms and conditions of employment. Baldridge further irritated the judge by continuing to argue that the President's emergency powers had no constitutional limit. When asked by Pine whether he was claiming that despite the Constitution's limits on congressional and judicial power, "it did not limit the powers of the executive," Baldridge agreed.<sup>21</sup> Even though the Justice Department



Lacking a statutory basis for seizing the steel mills, President Harry S. Truman fell back upon the President's "inherent powers" under the Constitution, relying on a 1949 memorandum from then-Attorney General Tom Clark.

filed a supplemental memo backing away from this view, Pine granted the injunction on April 29. He based this decision primarily on the lack of statutory or constitutional authority for the seizure, but he provided little justification for his conclusion that monetary damages could not repair the harm to the steel companies. A strike, he wrote, "would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction."<sup>22</sup> In essence, Pine believed that the importance of striking a blow against excessive claims of presidential power was too great to permit the legal technicalities concerning irreparable harm to prevent him from deciding the case. A similar assessment would soon push a majority of the Supreme Court in the same direction.

The importance of the case persuaded the U. S. Court of Appeals for Washington, D.C. to hear the case *en banc*. Acting Attorney General Perlman took over the case, arguing that there would be no irreparable harm to the steel companies, as the government had agreed to pay damages should the courts hold its actions legally unjustified. When asked by the judges to commit the government not to increase wages, he agreed to do so until a petition to the Supreme Court for a writ of certiorari was filed. The stay was granted without conditions up to the time the Supreme Court decided whether to hear the case. On May 3, Truman met with industry and union negotiators to press for a settlement, utilizing the threat of imposing one if they failed to settle within a week. Just as the two sides appeared near agreement, however, the Supreme Court granted certiorari 7-2 (dissenters Burton and Frankfurter preferred that the case first be heard by the Court of Appeals), altering the stay to bar any changes in the terms and conditions of employment. With the threat of an imposed settlement removed, the companies backed away from a tentative contract agreement.

The Court moved quickly, setting five hours of oral argument (compared to the one or two that were then the common practice) for May 12. Most observers expected the seizure to be upheld, in light of the Court's past reluctance to rule against executive power and the fact that all of its members had been selected by Democratic Presidents Franklin D. Roosevelt and Truman. Truman himself had nominated Chief Justice Vinson, as well as Associate Justices Harold Burton, Sherman Minton, and Clark. During oral argument, the government pointed to statements made by Justice Robert Jackson when he had been Attorney General in support of claims of inherent power comparable to those made in support of Truman's seizure.

On June 2, the Court announced a 6-3 decision against seizure. Hugo Black wrote the majority opinion, joined by Felix Frankfurter, William O. Douglas, Jackson, and Burton, each of whom also wrote concurring opinions. Rather than joining Black's opinion, Clark wrote a separate concurrence, while Justice Stanley Reed and Minton signed on to Vinson's dissent.

Despite the apparent significance of the issue of irreparable damage, very little of the hundred pages of opinions was devoted to it. When the Justices met in private conference prior to deciding the case, Frankfurter told his colleagues that his preference was to return it to Judge Pine's trial court "to pass on the injunction and to forget about the big questions until the case is tried on the merits."<sup>23</sup> Nevertheless, when he eventually voted against the President, not a word of his concurring opinion was devoted to explaining his change of opinion.

In the majority opinion, Black began with a statement that the case presented two major issues: whether there should be a decision at the preliminary injunction stage, and whether seizure was within the President's constitutional powers. Despite the seeming equality of importance of these issues, it took him only a single paragraph, with little citing of authoritative precedent, to reject the government's claim



that the case should be dismissed because of a lack of irreparable harm and the availability of adequate compensation for any possible damage. Black simply asserted that past cases "have cast doubt on the right to recover in the Court of Claims" for property unlawfully taken for public use by government officials. He also suggested that it would be difficult, if not impossible, to determine the exact extent of damage.

Writing soon after the case, Paul Freund argued that it had been decided prematurely, not only because the steel industry had failed to demonstrate it would be irreparably harmed, but also because, in the absence of wage and price increases that would surely occur, the facts of the case had not been fully developed. Freund suggested that instead of a final decision, the Court should have issued an order

"to permit governmental retention of possession pending final hearing, with an opportunity to contest any proposed involuntary wage increase when official action on steel price increases had been taken."<sup>24</sup>

The need to show that damages will not suffice to compensate a plaintiff before a court will issue an injunction is such a basic principle of law<sup>25</sup> that the Court's summary dismissal of the question it had just declared one of the case's two main issues requires some explanation. According to Marcus, had the Court used an apparent legal technicality to avoid a decision, "the country might have thought that the Court was evading its responsibility." The majority also felt it needed to demonstrate its own power to limit excessive claims of presidential authority.<sup>26</sup> William Rehnquist, who in 1952 was a clerk to Justice Jackson, believed that



This cartoon shows approval for Truman's intervention in the steel strike in April 1952. In June of that year, the Supreme Court declared the President's action unconstitutional.



public opinion had a "considerable influence on the Court."<sup>27</sup> It would seem that, like Judge Pine, the majority had concluded that the importance of the case necessitated an authoritative decision on the merits. Perhaps Baldridge's extreme statement of executive power was too much for the Court to ignore. Anyone who doubts that the Supreme Court is a political institution should pay careful attention to this case.

The rest of Black's opinion was based on a strict view of the Constitution's principle of separation of powers. Without a statute authorizing this seizure, the President's power could only come from the Constitution. Cases cited by the government under the Commander-in-Chief power were irrelevant, because the power "to take possession of private property in order to keep labor disputes from stopping production" is legislative rather than military in nature. By granting "all legislative powers" to the Congress, Article I limited the President's lawmaking functions to those specifically granted—recommending and vetoing bills. Past practice during national emergencies was also irrelevant, as "the Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

The four Justices who joined this opinion wrote concurrences adding a more nuanced view of separation of powers. Frankfurter preceded his with a statement that "separation of powers seem[s] to me more complicated and flexible" than Black had suggested. His opinion pointed out that past seizures had been authorized by Congress, thereby limiting the time covered by the emergency, setting out particular conditions to define what constitutes an emergency, and providing compensation for the seized property. By passing the Taft-Hartley Act, Congress had declared its unwillingness to grant the President seizure power "as though it had said so in so many words." Unlike Black, Frankfurter believed that past practice could supply meaning to otherwise vague constitutional provisions—but only if it was "a systematic, unbroken, executive prac-

tice, long pursued to the knowledge of the Congress and never before questioned." Such rare conditions had not nearly been met by the administration in this case.

Arguing that an emergency alone does not create presidential power, Douglas wrote that the constitutional requirement of compensation for seized property placed such seizures squarely within Congress's legislative powers. The President's power to execute the laws "starts and ends with the laws Congress has enacted."

For reasons that will be explained, Jackson's concurrence is worth the most attention of all. The Constitution, he believed, must be viewed in its entirety, rather than as a series of "isolated clauses, or even single Articles torn from context." This meant that presidential power could vary, depending upon its relationship to that of Congress. Jackson suggested three main possibilities:

1. Maximum presidential power occurs when the executive is acting pursuant to explicit or implied congressional authority. Such actions must be upheld by the courts unless the federal government as a whole lacks relevant power.
2. Without congressional authorization, Presidents can only rely on their own constitutional powers. In what is often "a zone of twilight" in which both branches have powers, the judiciary must rely "on the imperatives of events and contemporary imponderables rather than abstract theories of law."
3. When the President acts in opposition to Congress, "his power is at its lowest ebb." Courts can uphold his actions "only by disabling the Congress from acting upon the subject."

Because Truman had refused to utilize the methods of settling industrial disputes provided by Congress, his actions belonged in the third category. Although Jackson accepted the concept of inherent powers, he felt that neither the general executive nor the

Commander-in-Chief powers provided authority for the seizure. The latter power should be given wide latitude, but only "when turned against the outside world for the security of our society," not when used domestically in an economic dispute. Nor did past practice support the President, as those emergencies had been dealt with by congressional grants of power, which provided the safeguard of limits. Jackson saw no danger "if the Court refuses to further aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress." One wonders what he would think of today's even more potent executive.

As for his own statements as Attorney General that were used by the government to support its arguments, Jackson wryly replied that "a judge cannot accept self-serving statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."

For Burton, the key to the case was that Congress had responded to this type of emergency with the Taft-Hartley Act and the WSB, neither of which permitted the seizure of private industries. Despite his belief in inherent powers, he argued that they would only justify such a seizure in cases involving an imminent threat of attack upon the United States.

Clark was the only member of the majority not to join Black's opinion. For him, even though "the Constitution does grant to the President extensive authority in time of grave and imperative national emergency," it does so only when Congress fails to specify procedures for him to follow. Despite the administration's invoking of the Defense Production Act, it had failed to use that law's required condemnation procedures. Nor had the President chosen to use either Taft-Hartley or the Selective Service Act.

For Vinson, joined by Reed and Minton, the emergency was more serious than the majority believed. "Those who suggest that this is a case involving extraordinary powers

should be mindful that these are extraordinary times." They cited the Korean War, the Marshall Plan, and the North Atlantic Treaty Organization (NATO) as having been either directly approved or indirectly supported by congressional actions, including \$130 billion in military spending since the beginning of the Korean conflict. In this case, a Senate committee had noted that civilian and military needs for steel were not being met even with mills operating at capacity, threatening "grave danger of disastrous inflation." Uncontested affidavits by leading administration officials demonstrated that a strike would endanger national defense. For the dissenters, numerous past examples supported the use of the executive power to "take care that the laws be faithfully executed" to seize property during a national emergency either to enforce legislative programs or preserve them until Congress was able to act. In this case, immediately after his seizure, Truman had sent a message to Congress promising to obey its decision, even if that meant reversing his action. Rather than executing a specific law, the dissenters argued, the President must have the flexibility to execute the "mass of legislation."

While the majority noted that no statute authorized the President's action, the dissenters interpreted this silence in the exact opposite manner, pointing out that no law forbade it. Because some laws even provided for seizures unrelated to defense, it was unreasonable to state flatly that Congress intended to prohibit seizures essential to national security. Congress had provided two methods of solving industrial disputes: Taft-Hartley for peacetime situations, and the WSB for those involving national defense. Only after exhausting the latter did Truman temporarily use seizure to prevent "imminent national peril through stoppage in steel production" and the destruction of the statutory-wage and price-stabilization programs. He had no real alternative.

The varying rationales of the majority's opinions, their inability to cite authoritative precedents, and their ignoring of the

seriousness of the emergency proved to Vinson "how far afield one must go to affirm the order of the District Court." By limiting the President to requesting congressional action during an emergency, the majority had established a "messenger-boy" presidency.

Despite the hullabaloo over the case, the immediate impact of the decision was surprisingly limited. Because of the weakness of the steel market, which had a ninety-day supply of most types on hand, the union's fifty-three-day strike had no significant effect on either the war or the economy. When reserves began to run out, Truman summoned the participants to the White House, resulting in a settlement on July 24. The steelworkers received wage increases of 16 cents per hour, an additional 5.4 cents in fringe benefits, and a modified union shop. The industry's price increase was \$5.20 per ton, equal to the government's April offer of \$4.50 plus 70 cents for freight increases. Although Secretary of Defense Robert Lovett claimed that "no enemy nation could have so crippled our production as has this work stoppage," Alonzo Hamby's assessment that the strike had no appreciable impact on the Korean fighting" seems far more accurate.<sup>28</sup> A government study concluded that the large inventories "permitted steel-using industries to operate substantially at full levels" during the strike.<sup>29</sup>

Truman was so angry at the Supreme Court that he drafted (but never sent) a letter to Douglas during the strike about "that crazy decision that has tied up the country." Taking the ruling personally, he continued that "I don't see how a Court made up of so-called 'Liberals' could do what the Court did to me."<sup>30</sup> Fortunately, Black threw a reconciliation party at which the President remarked, "Hugo, I don't much care for your law, but, by golly, this bourbon is good."<sup>31</sup>

Today, most commentators find Black's opinion overly rigid in its view of separation of powers and rejection of historical practice. For example, Sanford Levinson thinks it too reliant "on an abstract civic-book approach to

separation of powers," while Michael Glennon concludes that it "has not withstood the test of time."<sup>32</sup> Simply marking off legislative powers for Congress ignores the overlapping of powers so necessary to the constitutional system of checks and balances, as well as the realities of increased legislative involvement by modern-day Presidents.

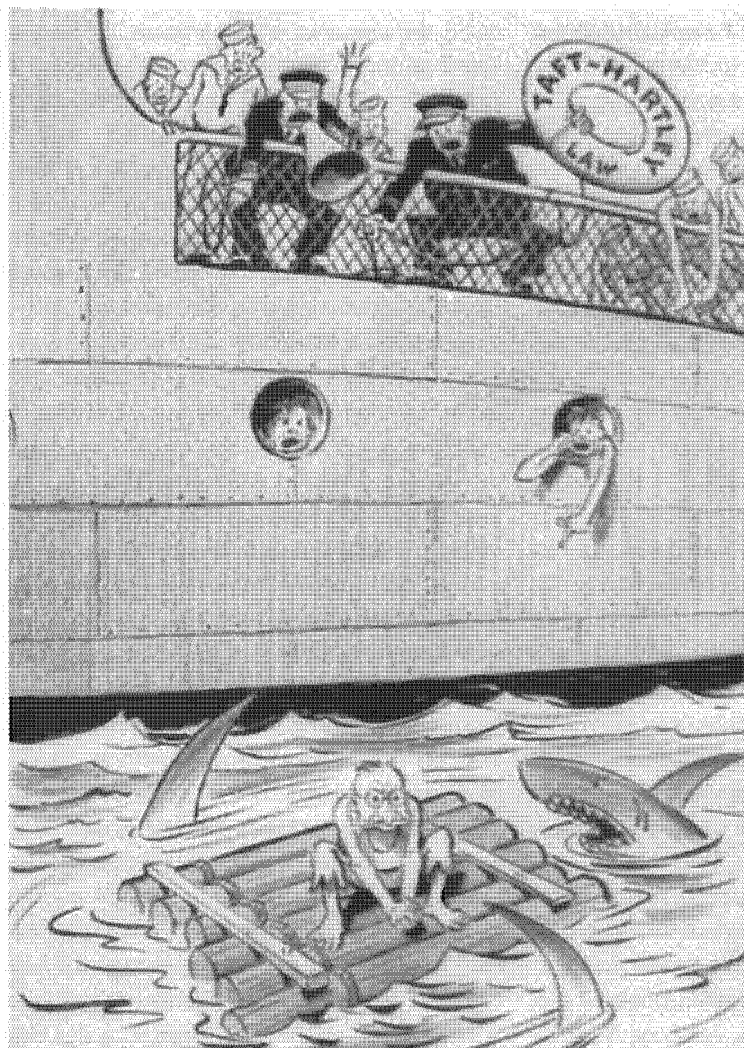
Writing soon after the decision, John Roche lamented that Jackson's concurrence, "it is to be regretted, was not the 'opinion of the court.'"<sup>33</sup> It appears that Roche's wish has come true, for, as Del Dickson has put it, "this was one of the rare instances where a concurring opinion—Justice Robert Jackson's—in time became the authoritative opinion of the case."<sup>34</sup> Similarly, Louis Fisher believes that of all the opinions in *Youngstown*, Jackson's "has had the greatest impact on contemporary constitutional analysis."<sup>35</sup> In the hearings that confirmed his appointment as Chief Justice of the Supreme Court, John Roberts stated that Jackson's opinion "has sort of set the stage for subsequent cases,"<sup>36</sup> citing the case of *Dames & Moore v. Regan*<sup>37</sup> as particularly important.

Jackson's opinion, however, is not without its critics. Glennon believes the tripartite framework to be somewhat simplistic. In its first and third categories, the Court must perform the difficult task of determining congressional intent, even when—as is usually the case—that intent is not explicitly stated. Although judges have used laws on comparable subjects, legislative history (including committee reports, comments of the sponsoring legislators or rejection of other measures), and custom to determine such intent, there has been considerable controversy over the logic behind each, as well as a lack of agreement about the relative weights to give them.<sup>38</sup> In addition, because the *Steel Seizure Case* itself was a domestic action, albeit one with major foreign policy consequences, Jackson is not totally clear about whether his three categories apply to both foreign and domestic policy or only to the latter. As noted earlier, Jackson rejected using the

Commander-in-Chief power as a justification for the seizure because this was a domestic industrial dispute, rather than an action against an external foe. Erwin Chemerinsky similarly criticizes Jackson's framework, because its claim that the judiciary must judge inherent powers based "on the imperatives of events and contemporary imponderables" "provides no guidance as to how these cases should be decided," leaving too much to the individual preferences of each Justice.<sup>39</sup>

The *Dames & Moore* case cited by Chief Justice Roberts provides considerable ammunition for these critics. In upholding execu-

tive power to terminate cases brought against the Iranian government and transfer them to arbitration instead, Justice Rehnquist's analysis began by pointing out that "much relevant analysis is contained in *Youngstown*." Yet he upheld the President's action even though he found that the relevant law, the International Emergency Economic Powers Act (IEEPA), does "not authorize the President to suspend claims in American courts." His decision was based on the belief that a variety of legislation "has implicitly approved the practice of claim settlement by executive agreement," even though such agreements are never



Truman refused to invoke the Taft-Hartley Act, which would have delayed the strike for eighty days, even though it could have "rescued" him, as this cartoon implies. Democrats strongly disliked the provisions of the Act.

submitted to Congress for its approval. One could argue that Congress's failure to pass legislation disapproving Truman's steel seizure was similar silent acquiescence. Sarah Cleveland makes this point in arguing that "Jackson's analysis was badly abused" in *Dames & Moore*.<sup>40</sup> Keith Blue suggests that, much like Taft-Hartley in the *Steel Seizure Case*, "the legislative history of the IEEPA . . . clearly states that the Act did not authorize the President to take title to foreign property."<sup>41</sup>

Although Jackson's concurrence is frequently cited, it appears to provide enough wiggle room to allow judges to use it to justify their decisions no matter what the outcome. As noted, it provides little guidance to determine the boundaries of inherent powers in the "zone of twilight" in which there is no congressional action supporting or opposing presidential action. When statutes are ambiguous about the specific action taken by the President, judges have the flexibility to interpret them as either supporting or opposing the President's actions. For example, in the *Hamdi* case,<sup>42</sup> President Bush claimed that the law authorizing him "to use all necessary force" to counter the acts of 9/11 and their perpetrators allowed him to detain even citizens as enemy combatants, despite another law forbidding the imprisonment of citizens "except pursuant to an Act of Congress." Justices on both sides of this argument used Jackson's opinion to justify their opinion.<sup>43</sup>

Even though the *Youngstown* decision fails to set out specific guidelines for judging the limits of presidential power, it is of great significance for demonstrating the Supreme Court's willingness, at least occasionally, to act as a check upon excessive claims of presidential power. Yet, while rejecting this particular claim of inherent power, most of the Justices agreed that emergency situations could justify such claims in the future. The majority also suggested that the most effective check upon presidential power is an assertive Congress. The multiplicity of opinions and the unique circumstances of the case make its symbolic

significance—especially with Jackson's opinion continuing to be cited so frequently—greater than its specific legal points. With both this ruling and the *Curtiss-Wright* decision remaining in force, each has provided a counterweight to the other. That this tension is likely to continue without final resolution indefinitely is a tribute to the lasting impact of the constitutional design of checks and balances, even if at times it seems to many to be out of balance.

## ENDNOTES

<sup>1</sup>Jacob Cooke (editor), *The Federalist*. (Middletown, CT: Wesleyan University Press, 1961): 349.

<sup>2</sup>George C. Edwards III and Stephen J. Wayne, *Presidential Leadership: Politics and Policy Making*, 5<sup>th</sup> ed. (New York: St. Martin's/Worth, 1999): 1. Not surprisingly, this wording has been carried into the current seventh edition, published in 2006.

<sup>3</sup>Cooke, 523.

<sup>4</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>5</sup>"Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States," Hearing before the Committee on the Judiciary, United States Senate, 109<sup>th</sup> Congress, First Session (Washington, DC: U.S. Government Printing Office, 2005) (Serial J-109-37).

<sup>6</sup>Joseph Tanenhaus, "The Supreme Court and Presidential Power," *The Annals of the American Academy of Political and Social Science* 307 (Sept. 1956): 110-11.

<sup>7</sup>Wall. 218 (1866).

<sup>8</sup>299 U.S. 304 (1936).

<sup>9</sup>Examples of such critiques include: Louis Fisher, *Presidential War Power* (Lawrence, KS: University Press of Kansas, 1995): 57-61; and Michael J. Glennon, *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press, 1990): 18-34.

<sup>10</sup>Roy E. Brownell II, "The Coexistence of *United States v. Curtiss-Wright* and *Youngstown Sheet & Tube v. Sawyer* in National Security Jurisprudence," *The Journal of Law and Politics* 16 (Winter 2000): 1-111.

<sup>11</sup>Harry S. Truman, *Memoirs*, vol. 2, *Years of Trial and Hope* (Garden City, NY: Doubleday and Co., 1956): 465.

<sup>12</sup>Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Durham, NC: Duke University Press, 1994): 73-74. Much of the discussion of the background to this case is based on this book and Alan F. Westin, *Anatomy of a Constitutional Law Case: Youngstown Sheet & Tube v. Sawyer* (New York: Macmillan, 1958).



- <sup>13</sup>Alonzo L. Hamby, *Man of the People: A Life of Harry S. Truman* (New York: Oxford University Press, 1994): 594.
- <sup>14</sup>Truman, 468.
- <sup>15</sup>Robert J. Donovan, *Tumultuous Years: The Presidency of Harry S. Truman, 1949–1953* (New York: W.W. Norton, 1982): 386.
- <sup>16</sup>Hamby, 595; Donovan, 386; and David McCulloch, *Truman* (New York: Touchstone, 1992): 897.
- <sup>17</sup>For example, see *In re Neagle*, 135 U.S. 1 (1890), upholding the inherent power to assign marshals to protect federal judges (despite the obvious self-interest, two of the Justices dissented).
- <sup>18</sup>A recent example is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) in which no single opinion commanded a majority of the Justices.
- <sup>19</sup>McCulloch, 900.
- <sup>20</sup>Marcus, 89–93. The earlier quotes are on pages 85–89.
- <sup>21</sup>Westin, 64.
- <sup>22</sup>*Youngstown Sheet & Tube v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952).
- <sup>23</sup>Del. Dickson, *The Supreme Court in Conference (1940–1985)* (New York: Oxford University Press, 2001): 171.
- <sup>24</sup>Paul A. Freund, "The Year of the Steel Case," *Harvard Law Review* 66 (Nov. 1952): 90.
- <sup>25</sup>See, e.g., Bruce E. Altschuler, Celia A. Sgroi, & Margaret R. Ryniker, *Understanding Law in a Changing Society*, 3d ed. (Boulder, CO: Paradigm Publishers, 2005): ch. 10.
- <sup>26</sup>Marcus, 223.
- <sup>27</sup>William H. Rehnquist, *The Supreme Court*, new ed. (New York: Alfred Knopf, 2001): 189. Rehnquist went into more detail in "Constitutional Law and Public Opinion," *Suffolk University Law Review* 20 (Winter 1986): 751–69.
- <sup>28</sup>McCulloch, 902; Hamby, 597. See also Mary K. Hammond, "The Steel Strike of 1952," *Current History* 23 (Nov. 1952): 285–90.
- <sup>29</sup>Marcus, 252.
- <sup>30</sup>White House Central Files: President's Secretary's Files, Box 118, Harry S. Truman Library, Independence, MO.
- <sup>31</sup>McCulloch, 901.
- <sup>32</sup>Sanford Levinson, "Introduction: Why Select a Favorite Case?," *Texas Law Review* 74 (May 1996): 1197; Glennon, 10.
- <sup>33</sup>John P. Roche, "Executive Power and Domestic Emergency: The Quest for Prerogative," *Western Political Quarterly* 5 (Dec. 1952): 615.
- <sup>34</sup>Dickson, 181.
- <sup>35</sup>Louis Fisher, Foreword to Marcus, xii.
- <sup>36</sup>Cooke, 523.
- <sup>37</sup>453 U.S. 654 (1981).
- <sup>38</sup>Glennon, 14–15.
- <sup>39</sup>Erwin Chemerinsky, "Controlling Inherent Presidential Power: Providing a Framework for Judicial Review," *Southern California Law Review* 56 (May 1983): 870.
- <sup>40</sup>Sarah Cleveland, "Wartime Security and Constitutional Liberty: *Hamdi* Meets *Youngstown*," *Albany Law Review* 68 (2005): 1138.
- <sup>41</sup>Keith F. Blue, "Constitutional Law—Presidential Power—Suspension of Claims Against Foreign Countries," *Tennessee Law Review* 49 (July 1984): 431.
- <sup>42</sup>*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- <sup>43</sup>Cleveland discusses this in detail at 1127–43.

# William Thaddeus Coleman, Jr.: Breaking the Color Barrier at the U.S. Supreme Court

TODD C. PEPPERS

## Introduction

On April 15, 2007, baseball fans celebrated the sixtieth anniversary of Jackie Robinson's debut with the Brooklyn Dodgers—an event that broke the color barrier and integrated major league baseball. In stadiums across America, professional baseball teams honored the memory and accomplishments of Robinson, as managers and players donned Robinson's retired jersey number, Hall of Famers threw out ceremonial first pitches, and tributes boomed from video displays. The tributes to Robinson, however, like his legacy, went far beyond the ballparks, as newspaper and television journalists debated Robinson's role as a civil-rights pioneer while lamenting the dwindling number of minorities playing baseball and elementary school children read stories of Robinson's stirring feats.

On September 1, 2008, the U.S. Supreme Court perhaps should celebrate a similar anniversary: the sixtieth anniversary of the arrival of the first black law clerk at the Court. His name is William Thaddeus Coleman, Jr.,<sup>1</sup> and on September 1, 1948, Coleman began clerking in the Chambers of Associate Supreme Court Justice Felix Frankfurter. A graduate of Harvard Law School, Coleman used his Supreme Court clerkship as a stepping stone to a remarkable legal and political career, highlights of which include working as the

first black lawyer in both major Philadelphia and New York law firms, volunteering his time and expertise for the desegregation cases collectively referred to as *Brown v. Board of Education*, being president and then chairman of the NAACP Legal Defense and Educational Fund of the National Association for the Advancement of Colored People (NAACP), serving as the Secretary of Transportation in the Ford administration, and receiving the Presidential Medal of Freedom from President Clinton.

The purpose of this essay is twofold: It will endeavor to succinctly summarize the important events of Coleman's life and professional career, while making the argument that these achievements were as groundbreaking in the legal community as Robinson's were to baseball. Admittedly, looking to our national pastime is hardly an original literary maneuver; The myriad similarities and links between baseball and the law have offered rich material for many legal writers.<sup>2</sup> Moreover, this article does not wish to diminish Coleman's accomplishments by comparing them to a mere "game." By drawing upon the sixtieth anniversary of Robinson's debut, my hope is to give Coleman his due and place his laudable achievements in the proper perspective. Not only did the two men do much to dispel the pernicious stereotype that they belonged to a race that was doomed to second-class citizenship, but their efforts to integrate their respective professions and to use their talents to effect change reverberated throughout society.

### The Early Life of William T. Coleman, Jr.

William Thaddeus Coleman, Jr. was born on July 7, 1920, in Germantown, Pennsylvania to parents William Thaddeus Coleman, Sr. and Laura Beatrice Coleman. One of three children, Coleman grew up in a middle-class home where education and hard work were encouraged. Social activism and public service were practices engrained into Coleman's family. His father was a graduate of the Hampton Institute who balanced his work as the executive director of the Wissahickon Boys Club—an organization originally founded to provide educational and recreational opportunities for minorities and poor whites—with his duties as a field secretary for the Boys Club of America and as a director of a local summer camp. William Coleman, Sr. was given the middle name "Thaddeus" in honor of Thaddeus Stevens, a Pennsylvania lawyer and congressman who tirelessly worked for the ratification of the Fourteenth Amendment to the United

States Constitution. William Coleman, Jr.'s maternal great-great-grandfather was an Episcopal minister who operated the underground railroad in St. Louis, Missouri.

Coleman's mother was a former German teacher who also greatly influenced her son. "My mother always said what would redeem her living in a world where blacks and women were second place [was] that when she got to heaven, God would be a black woman."<sup>3</sup> One pattern of Coleman's childhood was exposure to "a great many worldly people," including civil rights pioneer W.E.B. DuBois—a friend of Coleman's maternal aunt who occasionally joined the Coleman family for dinner—and poet Langston Hughes. As a result of this exposure to the world, "I knew we were as good as anybody. I never felt inferior."<sup>4</sup>

The lessons learned around the dinner table proved to be important as Coleman began moving into a segregated world that did not push young black students to fulfill their potential. Recalling his time at Theodore Roosevelt Junior High School, Coleman recounted the following incident.

I finished tops in my class at Roosevelt. I made what I thought was a good speech and my teacher said, "You'll make somebody a good chauffeur." I won't tell you what I told her, but I was suspended for saying it. My mother and father had to tell her, "You don't talk to a Coleman kid that way."<sup>5</sup>

Coleman subsequently enrolled in the predominantly white Germantown High School, where he was one of fewer than ten black students. An outstanding student, he was nevertheless suspended when he demanded to become a member of the all-white swim team. When Coleman's suspension was lifted, the swimming team disbanded rather than be forced to integrate and accept Coleman. Remarks Coleman: "The day I graduated, they posted a note saying they were starting up the swimming team again. But the coach wrote me the best

recommendation [letter] for the University of Pennsylvania."<sup>6</sup> When asked why he decided to become an attorney, Coleman pointed to his experiences of sitting in Philadelphia courtrooms as an adolescent and being impressed that the lawyers got "paid to argue," as well as a visit as a high-school student to an operating ward at a local hospital, where he watched a stomach cancer operation and quickly decided "that wasn't for me."<sup>7</sup> It was as a teenager that Coleman learned of the efforts of attorney Charles Hamilton Houston and the NAACP to attack and defeat segregation, a fight that appealed to Coleman's own sense of justice and equality.

Coleman enrolled at the University of Pennsylvania, originally majoring only in political science but adding an economics major after a lawyer told his father that economics was a good field of study for future lawyers. Coleman describes his time at the University of Pennsylvania as "'sort of a blur,'" adding "'[w]e studied, and we were all glad when Friday came. If we didn't have a theme due by ten o'clock Monday morning, we loved to spend the weekend taking the ladies out.'"<sup>8</sup> He graduated *summa cum laude* from the University of Pennsylvania in 1941.

Coleman arrived at Harvard Law School in the fall of 1941, one of only four minority law students in the first-year class.<sup>9</sup> Although Harvard Law School had admitted its first black law student—George Lewis Ruffin—shortly after the Civil War, minority students had a minimal presence there in the following decades. Approximately nine black students attended the school throughout the decade of the 1920s, and in the 1930s and 1940s no entering class had more than five black students. As the first half of the twentieth century drew to a close, Harvard Law School graduated a class of 520 students, of whom only two were black.<sup>10</sup>

Coleman quickly immersed himself in his legal studies, going so far as to attend extra classes just to hear lectures by some of Harvard Law School's legendary professors. His

hard work paid off in the spring of 1941, when his high grades (he was second in his first-year class) propelled him onto the staff of the *Harvard Law Review*. He was only the third black man to serve on the *Law Review*, following in the footsteps of previous graduates Charles Hamilton Houston and William Henry Hastie. While Coleman does not recall feeling any trepidation from being one of the first minorities to serve on the *Law Review*, he surely, like his predecessors, felt the historic weight of his selection and the consequences if he stumbled. Only twenty years earlier, Houston wrote his parents: "The editors on the *Review* didn't want me on this fall; now all is one grand harmony. But I still go on my way alone. They know I am just as independent and a little more so than they. My stock is pretty high around these parts. God help me against a false move."<sup>11</sup> And when Hastie, a cousin of Charles Houston, became the second black selected to the *Law Review*, in 1928, the editor-in-chief declined to invite Hastie to the traditional dinner held to welcome the new members—a decision that was reversed when then-Harvard



William Thaddeus Coleman, Jr. grew up in Philadelphia and was exposed to "a great many worldly people," including civil rights pioneer W.E.B. DuBois—a friend of Coleman's maternal aunt who occasionally joined the Coleman family for dinner—and poet Langston Hughes (pictured).

law student Paul Freund organized a boycott of the dinner.<sup>12</sup> Neither Coleman nor his contemporaries on the *Law Review*, however, recall Coleman receiving similar treatment.<sup>13</sup> States fellow member Jerome E. Hyman: "Bill was a well-regarded member of the *Review*. If anything, I think there was a great deal of satisfaction that the *Review* was becoming more diverse in its membership." While subsequent minority members followed the path laid by Houston, Hastie, and Coleman, it would not be until 1990 that the *Law Review* selected its first black president—Harvard Law School student Barack Obama.<sup>14</sup>

Coleman worked on the *Law Review* during the summer and fall semesters, typically attending classes until 1:00 p.m. and then walking to the *Law Review* offices at the historic Gannett House and working from 1:00 p.m. until 8:00 p.m. His studies at Harvard Law School, and his work on the *Law Review*, were interrupted by the entry of the United States into World War II. Coleman was originally conflicted about serving in the military, and he sought counsel from then—Howard Law School Dean Charles H. Houston. Recounts Coleman:

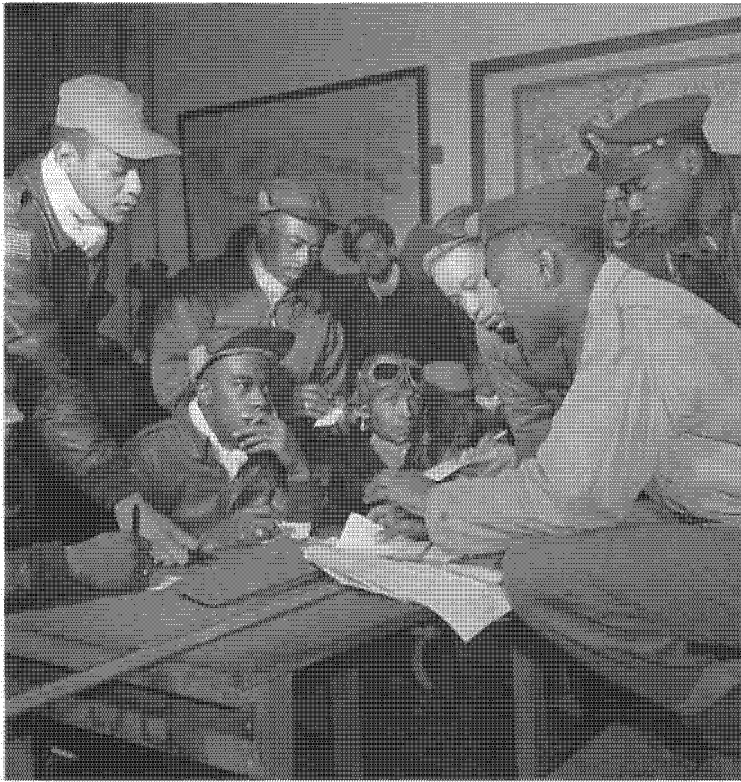
Like ten percent of the American population, I struggled with the idea whether it made sense to fight for freedom and liberty in Europe and Asia when racial segregation was still so rampant in the United States. I got an appointment to see Mr. Houston in Washington, D.C. . . . [He] gave me sound advice. He said that with all its faults, the United States is still the best country in the world. Through the use of training, knowledge, and commitment by dedicated lawyers, businessmen, and those members of other disciplines, someday the United States would be free of the scourge of racial segregation. In the meantime, if persons wanted to demand full citizenship in their country, they had to risk their lives and fortunes when the very security and being of their coun-

try was being seriously challenged by a formidable foreign force.<sup>15</sup>

Coleman subsequently enlisted in the Army Air Corps, and in 1942 he travelled to Biloxi, Mississippi for basic training before going to Tuskegee, Alabama to train with a group of black aviators who would gain fame as the Tuskegee Airmen. When Coleman stepped off the train platform in Biloxi, however, he was quickly reminded that his country's struggle against fascism had not wiped away its own racist propensities. At the train station, Coleman was greeted by a belligerent white sergeant who called out "Hey, nigger, where are you going?" Coleman would not respond to the hated racial epithet, and he walked away from the train station until the sergeant called out "Hey, boy." Coleman "settled" for the slightly less offensive term (a decision about which he professes "shame" sixty years later), turned around, and learned that the sergeant was assigned to transport Coleman to a nearby military base. During the dusty ride to the base, the army truck picked up several white soldiers returning from a week-end of leave. After spying Coleman, one of the soldiers turned to his compatriot and said wonderingly, "Why do I see all these well-dressed niggers in town—what are they doing here?" Responded his buddy: "You know, that Mrs. Roosevelt—she taught that dumb President that those black people could fly." Concludes Coleman, with a smile: "So that was my introduction to the U.S. Army."<sup>16</sup>

After basic training, Coleman trained to be an aviator at the Tuskegee Army Air Field in Tuskegee, Alabama. Describing his fellow airmen as "very good people who were good at everything," Coleman completed his basic training before "washing out in advanced training" and deciding that "I better do something else."<sup>17</sup> A month later the Air Corps sent Coleman to Officer Training School in San Antonio, Texas and a month thereafter transferred him to Harvard Business School to train and be commissioned as a Second Lieutenant, with a specialty in statistical control





Perhaps Coleman's only professional failure came when he unsuccessfully trained to be a fighter pilot at Tuskegee Army Air Field in Alabama. But in 1945 he did help defend a group of Tuskegee airmen who were arrested for challenging the segregation at an officers' club in Indiana. At left are Tuskegee fighter pilots in Ramitelli, Italy in 1945.

matters. Coleman's failure to become a fighter pilot is arguably the only professional accomplishment that he would ever fail to achieve. However, he found another way to serve as a wing man to the Tuskegee pilots: In 1945 he helped defend a group of black airmen who were arrested for challenging the segregation of an officers' club at Freeman Field in Seymour, Indiana.<sup>18</sup> Coleman spent the remainder of his military service defending soldiers during court-martial proceedings, and by his own count won sixteen out of eighteen acquittals (with one of the two convictions reserved on appeal).

The end of the war saw Coleman's return to Harvard Law School and his final year of studies. Despite Coleman's strong academic record, he fully appreciated the institutionalized prejudices that raised hurdles in the path of any young black lawyer. His sober assessment of these barriers is reflected in a handwritten letter to Associate Supreme Court Justice Hugo Black, in which Coleman applied

to be Black's law clerk: "Despite my training due to the fact that I am a negro I have encountered considerable difficulty in getting a suitable position. Your efforts and expressions in your judicial utterances led me to inquire if you would consider me for the position as your legal clerk."<sup>19</sup> Recalling his motivation for writing the letter, Coleman commented: "I was married and had one kid and I had to do something. I figured if I made enough ruckuses something would open up to me."<sup>20</sup> In his reply, Black congratulated Coleman on his "excellent" record, but stated that his law clerk for the coming Term "was selected some months ago."<sup>21</sup> When Coleman arrived at the Supreme Court in the fall of 1948, he would become friends with both Justice Black and his law clerk, Truman M. Hobbes.<sup>22</sup>

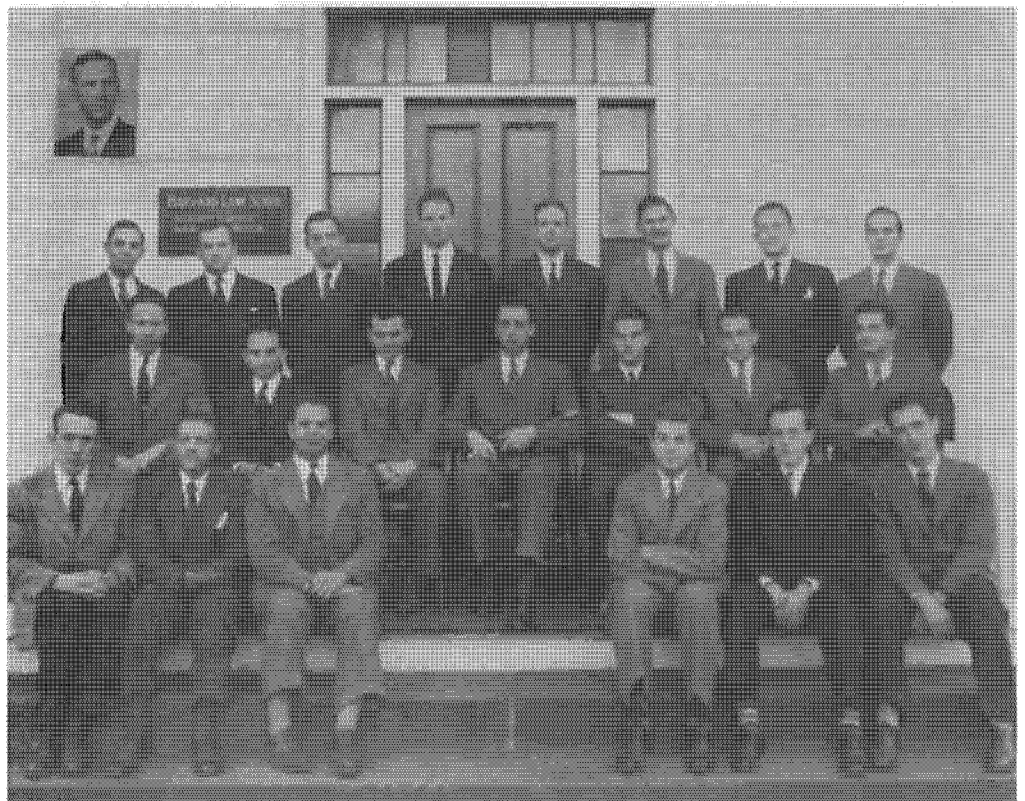
When Coleman graduated *magna cum laude* from Harvard Law School in the fall of 1946, he faced the bitter reality that graduating first in his class, serving on the *Law Review*,

and winning the John H. Beale Prize (awarded to the Harvard Law Student with the highest grade in Conflicts of Law) did not guarantee legal employment. His first break came in his hometown of Philadelphia, when Judge Herbert Goodrich of the U.S. Third Circuit Court of Appeals offered Coleman a clerkship position for the spring of 1947. Coleman was able to secure a Langdell Fellowship at Harvard Law School to cover the interim period between graduation and the start of the clerkship, and he returned to Philadelphia in 1948 and began serving as Judge Goodrich's sole law clerk.

#### Clerking on the U.S. Supreme Court

Of all the colorful and dominant personalities that have sat on the Supreme Court

Bench, Associate Justice Felix Frankfurter must be placed alongside Louis Brandeis, Oliver Wendell Holmes, Jr., and William O. Douglas. As a Harvard Law School professor, Frankfurter had the honor of selecting law clerks for both Holmes and Brandeis—all former Harvard Law School students, all men, and all conduits through whom Frankfurter monitored the business of the Court. Once he himself joined the Supreme Court in 1939, Frankfurter relied upon his own set of Harvard Law School professors to select clerks—primarily Henry M. Hart, Jr. (himself a former Brandeis law clerk) and, in later years, Albert M. Sacks.<sup>23</sup> Former law clerk Andrew Kaufman writes that Frankfurter gave the professors “carte blanche” to select law clerks,<sup>24</sup> an assessment echoed in Frankfurter's letters to Hart.<sup>25</sup>



In 1941, Coleman's high grades (he was second in his first-year class) propelled him onto the staff of the *Harvard Law Review*. Coleman was only the third black man to serve on the *Law Review*, following in the footsteps of previous Harvard Law School graduates Charles Hamilton Houston and William Henry Hastie. He is second from left in the front row, surrounded by his peers on the 1941-42 *Law Review*.

In December 1947, Harvard Law School Professor Paul Freund wrote Frankfurter and recommended that Coleman serve as one of his two law clerks. Frankfurter quickly responded to the letter. After noting that "I have heard a good deal about him [Coleman] on the occasion of the Sixtieth Anniversary Dinner of the Law Review, and I am not surprised at the weighty commendation that you give me," Frankfurter clearly dispelled any concerns that race might disqualify Coleman: "I don't have to tell you that I don't care what color a man has, any more than I care what religion he professes or doesn't."<sup>26</sup> Frankfurter's pronouncement had historical precedent: As a Harvard Law School professor, he had mentored both Charles H. Houston and William Hastie.

With Frankfurter's declaration in hand, Professor Hart placed the telephone call that arguably changed the course of Coleman's career:

One day I got a call from Professor Hart, asking me if I wanted to clerk next year for Justice Frankfurter. I, of course, said yes. Then he hung up. I never got any call on when I should report to Justice Frankfurter. So a month and a half later I called Paul Freund, who was my best friend at law school, who said "I'll check." So Freund went and talked to Hart, who said "Oh, gee, that Coleman must not be as bright as everybody says he is if he doesn't think he has the job." So that is how I got the job."<sup>27</sup>

Although Coleman had previously met Justice Frankfurter at the aforementioned *Law Review* dinner, he did not know the Justice and had never interviewed with him prior to receiving the clerkship offer.

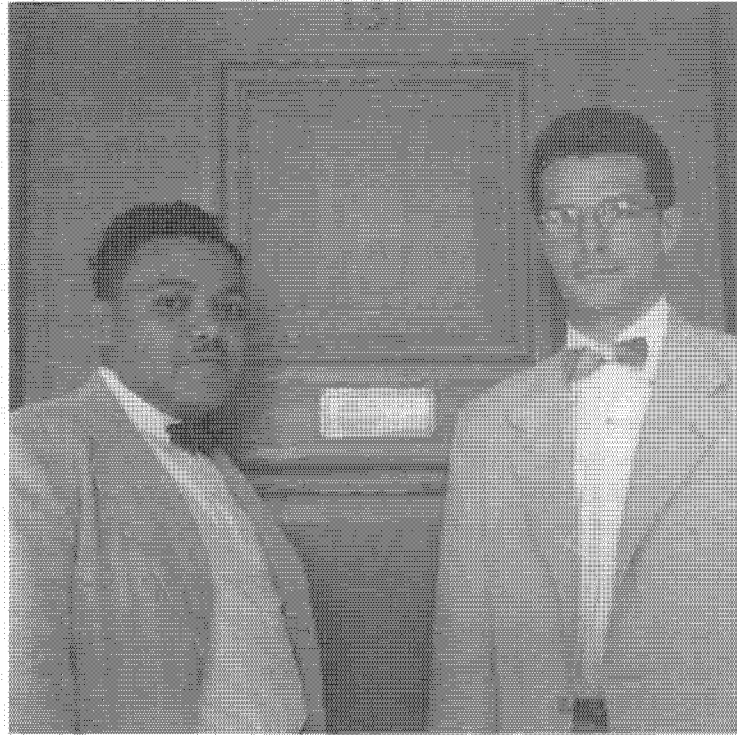
While Coleman appreciated the historic nature of his clerkship with Justice Frankfurter, he modestly points to changing social conditions, not his own abilities, as the main explanation for his selection: "I knew that I was

the first . . . but I knew that under different circumstances Charlie Houston and Bill Hastie would have been the first because they were brighter, more able people . . . but they lived in a different time and didn't have the same opportunities."<sup>28</sup> Coleman's hiring was sufficiently noteworthy to merit mention in the *New York Times*<sup>29</sup> and the *Washington Post*,<sup>30</sup> and Frankfurter's personal papers contain congratulatory letters from the General Alliance of Unitarian and Other Liberal Christian Women, the Race Relations Committee of the American Friends Service Committee, the Christian Friends for Racial Equality, and Congressman John W. McCormack. In response to the letters, Frankfurter penned a simple reply:

Mr. William T. Coleman was named as one of my law clerks for next year precisely for the same reason that others have been named in the past, namely high professional competence and character. You are kind to write me, but I do not think a man deserves any praise for doing what is right and abstaining from the wrong.<sup>31</sup>

The extended members of the "Frankfurter family" also praised the selection. In a March 29, 1948 letter from former law clerk Harry Mansfield to Justice Frankfurter, Mansfield applauded the hiring decision. "He is a first rate choice in every respect. His mind is brilliant and with brilliance he combined judgment. And his winning personality—full of confident ease and good humor—enabled him to overcome readily whatever obstacles were raised because of his color . . . [I]t is gratifying to me that you can be the first to give someone like Bill his opportunity without relaxing in any measure the standards ordinarily applied."<sup>32</sup>

During October Term 1948, Coleman shared his clerking duties with fellow Harvard Law School graduate Elliot Richardson.<sup>33</sup> A graduate of Harvard College who served as a medic during the invasion of Normandy,



During October Term 1948, Coleman shared his clerking duties with fellow Harvard Law School graduate Elliot Richardson (right). Richardson and Coleman quickly established a daily practice that has become unique in the lore of Supreme Court law clerks: Each day, they spent one hour reading Shakespeare or poetry.

Richardson and Coleman quickly established a daily practice that has become unique in the lore of Supreme Court law clerks: Each day, they spent one hour reading Shakespeare or poetry. "Elliot went to private schools before college, and I had gone to public schools," explains Coleman. "I felt like my education was lacking, which led to reading Shakespeare and such during our lunch breaks."<sup>34</sup> For the modern Supreme Court law clerk, buried in a mountain of certiorari petitions and opinion drafts, the notion that an earlier generation of Supreme Court law clerks spent an hour each day reading literature must undoubtedly seem bizarre.

Such a practice, however, was in keeping with the Frankfurter clerkship tradition of challenging his clerks to broaden their intellectual horizons. "He often tested his clerks' intellectual mettle by goading them into long arguments over legal history, current events, constitutional doctrine, and music: Name ten milestones in Anglo-American law and defend your choices. Who was Home Secretary in the Atlee

government? Who was the greater composer, Bartok or Bruch?"<sup>35</sup> Nor were Frankfurter's interests focused solely on cases pending before the Supreme Court. "He was interested in everything," states Coleman. "By eight in the morning he had read five newspapers. He'd already have discussed foreign affairs with the Australian Prime Minister and taken a stroll with [Secretary of State] Dean Acheson. By the time we law clerks arrived at the office at nine, he'd be ready to give us a seminar on government until ten or eleven."<sup>36</sup>

Frankfurter strove to remain in the middle of the action at the Supreme Court, a fact symbolically represented by his decision to place his office in the middle of the three rooms that made up his Chambers. This arrangement meant that the law clerks shared the office normally reserved for the Justice, an office that featured a private bathroom. Any trepidation that Coleman felt in working for a larger-than-life figure such as Frankfurter was dispelled during Coleman's first day at the Court, when Frankfurter crossed through the clerk's office

to use the bathroom. For Coleman, it was a reassuring sign that the legendary Justice was a mere mortal.

Richardson himself lived at the "House of Truth," named in honor of an earlier Washington home the residents and guests of which had represented a dizzying array of artists, journalists, politicians, and judges—including a young Felix Frankfurter. The second "House of Truth" had been established by Frankfurter law clerks Philip Graham, Adrian Fisher, and Edward F. Pritchard Jr., and it was subsequently occupied by a series of Frankfurter law clerks and future Washington insiders.<sup>37</sup> Coleman and Richardson remained linked throughout their professional and personal lives: Richardson was godfather to Coleman's daughter, both men served together in President Gerald Ford's Cabinet, and Harvard Law School established the Cox-Richardson-Coleman Public Service Award in recognition of the contributions made by Archibald Cox, Richardson, and Coleman. Richardson would later describe his friend as "a man of very clear practical judgment in grasping the essentials of any situation, with clarity of mind, strength of judgment, tenacity, and resourcefulness."<sup>38</sup>

When Coleman arrived at his clerkship in the fall of 1948, he found himself working with a dynamic personality who expected his law clerks to work in tandem with him. Frankfurter once described the relationship between Justice and law clerk as a partnership:

They are, as it were, my junior partners—junior only in years. In the realm of the mind there is no hierarchy. I take them fully into my confidence so that the relation is free and easy. However, I am, they will tell you, a very exacting task-master; no nonsense, intellectually speaking, is tolerated, no short-cuts, no deference to position is permitted, no yes-sing, however much some of them in the beginning may be awed.<sup>39</sup>

In fact, the relationship between Frankfurter and his law clerks was the intellectual equivalent of a rugby match between teams of unequal ability. Former Frankfurter law clerk Alexander Bickel describes debates during which Frankfurter "gave it to you with both barrels . . . [T]here were no holds barred."<sup>40</sup> The law clerks returned Frankfurter's honesty and tenacity in kind. Former law clerk Harry Wellington observes that the mainstay of the relationship between law clerk and Justice was that "one argued about everything."<sup>41</sup> The candor between Justice and law clerk, however, was always tempered with awareness of status and position. "You were careful [with your comments]," Andrew Kaufman says, "but you were encouraged to speak up." The exchanges were "entirely professional and intellectual,"<sup>42</sup> but could also be rather loud: "The shouts of the Justice and his law clerks could often be heard through closed doors in the hallways of the Supreme Court."<sup>43</sup> Frankfurter's powers of persuasion were not focused solely on his law clerks. Coleman states: "Frankfurter, above all, was a good lawyer. He could be very persuasive. Sometimes he even called my wife to get her to change my mind."<sup>44</sup>

The most unique aspect of a Frankfurter clerkship: It was a lifetime appointment. Of the relationship, Coleman comments that "from the day we came to the day he died, Felix Frankfurter was the nearest thing to a father or a brother that I had outside of my own family."<sup>45</sup> Kaufman echoes Coleman's observations:

[Frankfurter] was loyal to his friends. Once he admitted you to that circle—and the circle was very large—you were his friend for life. There was one group that was admitted en masse: his law clerks. Frankfurter treated us like colleagues; he was interested in our lives; he included our families in his interest; and he kept his clerks as his friends and as his colleagues forever. It is hard not to reciprocate the



affection of someone who cares passionately for you.<sup>46</sup>

Kaufman adds that the law clerks uniformly returned this love, although the affection was tempered with "a current of tolerant criticism about his personal foibles and professional missteps."<sup>47</sup>

As with most Frankfurter law clerks, Coleman attended meals at the Frankfurter home and became close to Marion Frankfurter, to whom he referred as a "second mother." In the early months of Coleman's clerkship, Mrs. Frankfurter took on the role of writing tutor. Justice Frankfurter originally felt that Coleman's writing skills were not on par with Richardson's, so Coleman started getting up at six o'clock in the morning to meet with Mrs. Frankfurter for writing tutorials prior to

the start of his twelve-hour workday. Comments Coleman: "That lasted about two weeks, until she called Justice Frankfurter and told him 'he writes better than you.'"<sup>48</sup>

While Coleman found a welcoming home within Justice Frankfurter's Chambers, it is instructive to remember the political and social climate in which he clerked. Not only was Coleman the first black law clerk at the Supreme Court (and most likely the first minority law clerk in the entire federal and state court system), but he was a member of a federal judiciary that had never had a minority as an Article III judge<sup>49</sup> and of a profession that firmly closed its doors to minority lawyers.<sup>50</sup>

Moreover, the marble walls of the Supreme Court could not shelter Coleman from the forces of bigotry and segregation that



Felix Frankfurter (pictured with his wife, Marion) selected Coleman to be his law clerk in 1948 on the recommendation of Harvard Law School Professor Paul Freund. Coleman became close to Mrs. Frankfurter, who briefly took on the role of his writing tutor.

still held sway over the District of Columbia. In the 1940s, almost 200,000 blacks lived in the District, but they were carefully segregated from the approximately 500,000 white citizens in every aspect of daily life. The two races lived in separate neighborhoods, attended separate schools, played in separate parks, and swam in separate pools. The vast majority of restaurants, theaters, hotels, dance halls, skating rinks, and bowling alleys completely denied blacks entry, and even some hospitals refused treatment to blacks. The only places where blacks and whites freely mixed were on the District's buses and trolleys, in its federal buildings and their cafeterias, and at Union Station.<sup>51</sup>

Coleman recounts one instance of the racism that he endured during his clerkship at the Supreme Court. It was during a day when the Supreme Court was open, but the court cafeteria was closed. Coleman was working in Frankfurter's Chambers on an antitrust opinion when Richardson announced that the law clerks were going to lunch at the Mayflower Hotel and wanted Coleman to join them. Richardson subsequently called ahead to the hotel and discovered that its restaurant would not serve Coleman. Richardson did not share this information with Coleman. Instead, he nonchalantly announced that the late hour made dining at Union Station a better choice. Coleman remembers that after lunch a distraught Richardson told Justice Frankfurter what had happened, and that both men were "near tears" over the incident.<sup>52</sup>

There is an interesting footnote to this story. In recent years, scholars have written much about the influence that law clerks do or do not wield over their Justices,<sup>53</sup> with some authors suggesting that law clerks influence their Justices through a variety of means—from educating the Justices as to the dispositive facts in the record to making novel new legal arguments. Influence, however, can be more indirect and diffuse. In Coleman's case, one wonders if his experiences as a black man living in a segregated city affected Frankfurter

when the NAACP mounted its frontal assault against segregation in the early 1950s. A tantalizing hint of such benign influence can be found in an article by Harvard Law School professor Mark Tushnet. Tushnet writes that during the Supreme Court's conference discussions on the case *Bolling v. Sharpe*,<sup>54</sup> a case that challenged segregationist practices in the District of Columbia, Justice Douglas's conference notes record that Frankfurter discussed "the experiences of colored people here especially [William T.] Coleman, one of his old law clerks."<sup>55</sup> While Frankfurter's main attack on segregation in the District of Columbia turned on legal, not factual, grounds, one might suggest that the passion underlying his argument that segregationist practices violated the Due Process Clause of the Fifth Amendment was fueled by seeing a former law clerk struggle to live in a segregated community.

Coleman's clerkship with Justice Frankfurter ended in the summer of 1949, and Coleman—like the law clerks before him—became a lifetime member of the Frankfurter family. He faithfully attended the reunions of Justice Frankfurter and his former clerks, and he occasionally travelled from Philadelphia to Washington, D.C. to visit his former employer and exchange the latest news and gossip. Written evidence of Frankfurter's affection and respect for Coleman is found in two historical artifacts: (1) in the traditional, leather-bound volume of opinions that Frankfurter presented to Coleman, with an inscription reading "I know never will you pursue false gods let alone false men. It was a joy to have worked with you for a year and I shall watch your future with confident great hopes"<sup>56</sup>; and (2) in a post-clerkship letter in which Frankfurter drew upon the words of his own hero to further praise his former clerk: "What I can say of you with great confidence is what was Justice Holmes' ultimate praise of a man: 'I bet on him.' I bet on you, whatever choice you may make, and whatever the Fates may have in store for you."<sup>57</sup>

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### Subsequent Professional Career: Being "Counsel for the Situation"

Charles Houston is commonly quoted as remarking that an attorney is "either a social engineer or he's a parasite on society."<sup>58</sup> While Coleman's career has embodied Houston's challenge to all lawyers—especially minority lawyers—to use their legal training to improve their communities and the lives of the politically dispossessed, Coleman has moved back and forth between private practice and public service. "It is a tragedy in the [civil-rights] movement that you have got a mind like Bill Hastie or Charlie Houston . . . that had to spend all their time on one thing and not just being a lawyer," observes Coleman. "As [Justice] Brandeis once said, 'a good lawyer is counsel for the situation.'"<sup>59</sup> In short, Coleman's wish is to be remembered first and foremost as an attorney, not a civil rights activist.

Despite his Supreme Court clerkship and impressive academic credentials, Coleman's hopes of becoming a lawyer at a top law firm were not immediately realized. For today's modern law clerk, a clerkship at the U.S. Court opens up a world of professional opportunities, including teaching at the elite law schools or working in the country's most prestigious law firms (the latter coming with \$200,000 signing bonuses<sup>60</sup>). It was a very different story for a minority law clerk in the late 1940s. Armed with letters of recommendation from Justice Frankfurter, Coleman returned to his hometown of Philadelphia and quickly discovered that prospective employers were not color-blind. "I tried like hell to get a job in Philadelphia and no local law firm would hire me."<sup>61</sup> Most of Philadelphia's law firms refused to give Coleman an interview. When Coleman personally visited the firms with résumé in hand, receptionists stonewalled him and hiring partners were simply too busy to see him. And if Coleman managed to secure an interview, the outcome was always the same: a suggestion that he consider the local black law firms that specialized in run-of-the-mill tort

cases.<sup>62</sup> When asked how he reacted to the rejection, Coleman simply remarked, "You just knew that life would change and things would get better . . . I'm pretty sure at that time I got indignant."<sup>63</sup>

Giving up on Philadelphia, and with only one week remaining before he left the government payroll as a law clerk, Coleman turned his attention to New York and the law firm of Paul, Weiss, Rifkin, Wharton & Garrison—the one firm that had extended an employment offer when he was clerking for Judge Goodrich. Having already purchased a Philadelphia home for his young and growing family, Coleman would spend the next three years commuting early each morning by train between Philadelphia and New York.

After three years, he was approached by attorney Richardson Dilworth and offered a position at the all-white law Philadelphia firm of Dilworth, Paxson, Kalish and Levy. "When I came back to Philadelphia, all the secretaries threatened to walk out. Mr. Dilworth told them, 'You ought to stay; he's a nice guy.'" Coleman's hiring at Dilworth Paxson found one important supporter: client and media mogul Walter Annenberg. "Annenberg said, 'If you don't keep Coleman, I will take my business wherever he goes.' I had never met Mr. Annenberg," remarks Coleman, "but that was one of the great moments of my life."<sup>64</sup> Coleman stayed and flourished. And he enjoyed a small measure of revenge. "Coleman betrays no bitterness about his early rejections by Philadelphia law firms. But he relished the times when Dilworth, in an effort to needle competitors, sent him to the offices of competitors to collect files of clients that had chosen to switch to Dilworth's firm."<sup>65</sup> Coleman would remain with the Philadelphia law firm until 1975, when he was nominated to be Secretary of Transportation by President Gerald Ford. When Coleman was sworn in as Secretary of Transportation on March 7, 1975, long-time friend—and now Associate Supreme Court Justice—Thurgood Marshall administered the oath at Coleman's





Coleman (right) was asked by Thurgood Marshall to serve on the team preparing arguments in *Brown v. Board of Education*. Civil-rights work represented less than one-fifth of Coleman's professional career, but he always kept a hand in it. He is pictured here with Justice Marshall in 1975 before being sworn in as Secretary of Transportation.

request. After Ford's defeat in the 1980 presidential election, Coleman joined the Washington office of the law firm O'Melveny & Myers, where he still practices law.

During his almost sixty years as a lawyer, Coleman has represented such clients as Chase Manhattan, Ford Motor Company, Goldman Sachs, and United Airlines. He has argued nineteen cases before the Supreme Court, including four cases dealing with regulation of natural gas as sold to the local distributor, Security Pacific, a leading national bank case, and when the Court appointed Coleman *amicus curiae* in the cases of *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States*.<sup>66</sup> "It was the first time in history the Supreme Court had called on someone to represent the judges below," explains Coleman. "[W]e spent the whole summer on it, running up about 780,000 billable hours, and it was all pro bono."<sup>67</sup> The brief and

oral arguments made by Coleman produced an 8-1 decision in his side's favor.

While Coleman has characterized his civil rights work as representing less than one-fifth of his professional career, it is in his willingness to donate his time and energy in this area that he has arguably made the greatest impact on society. In approximately 1950, Coleman received a telephone call from Thurgood Marshall, who headed the NAACP's Legal Defense Fund and asked Coleman to join an elite group of lawyers in formulating legal strategy and drafting the legal briefs in the five cases commonly referred to as *Brown v. Board of Education*. For the next four years, Coleman maintained a grueling schedule of work: spending a full day in his law office and devoting his evening to legal research and writing for the NAACP. Coleman proved to be a critical member of the team of lawyers and advisors that Marshall had assembled, and he sat



When Gerald Ford (pictured) appointed Coleman as his Secretary of Transportation, Coleman became only the second black man to serve in a presidential Cabinet.

by Marshall's side when *Brown* was reargued before the Supreme Court in December 1953. Nor did Coleman's civil rights work end with *Brown*. He subsequently represented a group of minorities seeking admission to Philadelphia's all-white Girard College, and from 1977 to 1997 he served as Chairman of the Board of the NAACP Legal Defense and Educational Fund.

Coleman has also responded to the call for government service. He proudly points to the fact that he has served as an advisor to seven American Presidents, starting with Dwight Eisenhower. A brief (and incomplete) list of Coleman's service includes being a member of the Presidential Commission on Employment Policy (1959–1961), a senior consultant and senior counsel to the President's Commission on the Assassination of President Kennedy (1964), a member of the United States Delegation to the 24<sup>th</sup> Session of the United Nations General Assembly (1969), a consultant to the United States Arms Control and Disarmament Agency (1963–1975), a member of the National Commission on Productivity (1971–

1972), and co-chairman of the Secretary of State's Advisory Committee on South Africa (1985–1987). As Secretary of Transportation in the Ford administration, Coleman became only the second black man to serve in a presidential Cabinet.<sup>68</sup> The list could be longer: Secretary of State Dean Acheson wanted Coleman to be an assistant secretary of state, President Lyndon wanted to nominate Coleman to the federal appeals court, and then–Attorney General Elliot Richardson asked Coleman to take the position of special prosecutor in the Watergate scandal. Coleman declined all of these offers.<sup>69</sup>

### Conclusion: Just Be in the Room

Now eighty-seven years old, Coleman has received an endless list of awards from a wide range of organizations: the Presidential Medal of Freedom; the Thurgood Marshall Lifetime Achievement Award from the NAACP Legal Defense and Education Fund; the Chief Justice John Marshall Award from the American Bar

Association Justice Center; the Judge Henry J. Friendly Medal from the American Law Institute; the Marshall-Wythe Medallion from the College of William & Mary, Marshall-Wythe Law School; the Thaddeus Stevens Award from the Public Interest Law Center of Philadelphia; the Lamplighter Award from the Black Leadership Forum; the "We the People" award from the National Constitution Center; the Fordham-Stein Prize from the Fordham University School of Law; the David A. Clarke School of Equal Justice Award from the University of the District of Columbia Law School; and honorary degrees from twenty-one U.S. colleges and universities.<sup>70</sup>

Moreover, Coleman has been present when some of America's most prominent political figures have come into power and when such figures have stepped away from the political arena and into the pages of history. Coleman was present when Thurgood Marshall was sworn in as a Supreme Court Justice in 1967,<sup>71</sup> and Coleman was at the Supreme Court's east conference room twenty-four years later when an aging Justice Marshall announced his retirement from the Court. He completed the journey with Marshall in January 1993, when he stood before an assembled crowd of dignitaries at the Washington National Cathedral and eulogized his departed friend.<sup>72</sup> Coleman served in a similar capacity in 2007, when he joined former Secretary of State James Baker III, Vice President Dick Cheney, former Senator Robert Dole, former Federal Reserve Chairman Alan Greenspan, former Secretary of State Henry Kissinger, former Secretary of Defense Donald H. Rumsfeld, and former National Security Advisor Brent Scowcroft as honorary pallbearers at the funeral of former President Ford.

The honors and awards are arguably validation for Coleman's philosophy that the key to breaking down racial barriers is for members of minorities to be "in the room" when important decisions are made and deals are brokered. Coleman rejects the idea that the solution to racial problems are practices that separate the races, and he cringes at labels such as "African-

American" and "affirmative action." Speaking of race relations today, Coleman states that he is "disturbed when black kids go to these great universities. They spent most of their time on African-American studies or something. They don't get involved in traditional studies. You have to be a good scholar to be a good lawyer. They can do [African-American studies,] but that shouldn't be your major focus."<sup>73</sup>

Jackie Robinson got on the field. The result was a Hall of Fame career that saw Robinson break into major league baseball as a twenty-eight-year-old rookie, compile a lifetime batting average of .311, steal home plate nineteen times, appear in six World Series, and win the National League's Most Valuable Player award in 1949. While Robinson's accomplishments alone are impressive, they do not do justice to Robinson unless they are placed within the social and racial context of America in the late 1940s.

William T. Coleman, Jr. got on the field—and to the Supreme Court. Like Robinson, Coleman's accomplishments take on a deeper meaning when placed in the context of a segregated society. Refusing to accept the barriers placed within his path by the forces of racial animus, Coleman used his intellect and willpower to generate lifetime statistics that rival Jackie Robinson's. On April 15, 2007, baseball fans across America celebrated the sixtieth anniversary of Robinson taking the field as a Brooklyn Dodger. This fall, the legal community should hold a similar celebration for the sixtieth anniversary of the day that Coleman walked up the stairs of the Marble Palace and broke the color barrier of the Supreme Court law-clerk corps.

## ENDNOTES

<sup>1</sup>Coleman's grandfather in naming Coleman's father William Thaddeus took the middle name Thaddeus from Thaddeus Stevens, an outstanding congressman who had been so active in getting the Fourteenth Amendment and the Civil Act of 1866 passed.

<sup>2</sup>See generally Roger I. Abrams, *Legal Bases: Baseball and the Law* (1998); Spencer Weber Waller, *et al.* (eds.),

**Baseball and the American Legal Mind** (1995); Eldon Ham, "Aside the *Aside*: The True Precedent of Baseball in Law; Law, the Residue of Luck—or, Who's *Not* on First?," 13 *Marquette Sports L. Rev.* 213 (2003); Paul Finkelman, "Baseball and the Rule of Law Revisited," 25 *T. Jefferson L. Rev.* 17 (2002); Michael Herz, "Symposium: Votes and Voices: Reevaluations in the Aftermath of the 2000 Presidential Election: How the Electoral College Imitates the World Series," 23 *Cardozo L. Rev.* 1191 (March 2002); Thomas V. Silvia, "Baseball as a Source of Judicial Thought and Construction," 78 *Mich. B.J.* 1296 (Nov. 1999); Paul Finkelman, "Baseball and the Rule of Law," 46 *Clev. St. L. Rev.* 239 (1998); 39 authors, "The Jurisprudence of Yogi Berra," 46 *Emory L.J.* 697 (1997); Michael J. Yelnoksy, "If You Write It, (S)he Will Come; Judicial Opinions, Metaphors, Baseball, and the Sex Stuff," 28 *Conn. L. Rev.* 913 (1996); Margaret Robb, "Running Bases, Winning Cases: Why the Grand Old Game of Baseball Is Much Like the Legal Profession," 82 *A.B.A. J.* 140 (August 1996); Robert M. Jarvis, "Babe Ruth as Legal Hero," 22 *Fla. St. U. L. Rev.* 885 (1995); Chad M. Oldfather, "The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions," 27 *Conn. L. Rev.* 17 (1994); Charles Yablon, "On the Contribution of Baseball to American Legal Theory," 104 *Yale L.J.* 227 (1994); Pamela Karlan, "Throwing Out the First Pitch," 15 *Ya. L. School Rep.* 23 (1991); Richard Lempert, "Error Behind the Plate and in the Law," 59 *S. Cal. L. Rev.* 407 (1986).

<sup>3</sup>National Visionary Leadership Project, "William T. Coleman, Jr.," available at <http://www.visionaryproject.org/nvlpmembertier/visionariest1/VisionaryPages/2003visionaries/ColemanWilliam/index.asp> (last visited August 8, 2008).

<sup>4</sup>Annette John-Hall, "William T. Coleman, Jr.—Lawyer, Social Activist," *Philadelphia Inquirer*, May 16, 2004, at page.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>National Visionary Leadership Project, *supra* note 2.

<sup>8</sup>Party Dornbusch, "Flashback: William T. Coleman, Jr.," *Columns* 27 (Spring 1980).

<sup>9</sup>The other minority students entering Harvard in the fall of 1941 included Wade H. McCree, Jr., who later served as a judge in the Court of Appeals for the Sixth Circuit and as the United States Solicitor General, and George N. Leighton, who subsequently became a federal district court judge in Illinois. The fourth, William Edwards, had a successful career as a New York lawyer.

<sup>10</sup>"Harvard Law School Celebrates Its Black Alumni," *J. Blacks in Higher Ed.* 85–87 (2001).

<sup>11</sup>"Many of the Nation's Most Prestigious Law Reviews Have Lily-White Editorial Boards," *J. Blacks in Higher Ed.* 55 (Spring 1998).

<sup>12</sup>Karen Hastie Williams, "William Hastie: Facing Challenges in the Ivory Tower," *J. Blacks in Higher Ed.*, 122–

23 (1999). While the prejudices of the times undoubtedly denied William H. Hastie a chance to clerk at the U.S. Supreme Court, his daughter, Karen Hastie Williams, became the first black female to clerk at the Court.

<sup>13</sup>Interviews with William T. Coleman, Jr.; author's correspondence with former *Harvard Law Review* members Phil C. Neal and Jerome E. Hyman.

<sup>14</sup>Anthony Flint, "First Black Chosen Head of Harvard Law Journal," *Boston Globe*, February 6, 1990, at page.

<sup>15</sup>William T. Coleman, Jr., "In Tribute: Charles Hamilton Houston," 111 *Harv. L. Rev.* 2148, 2156–57 (June 1999).

<sup>16</sup>National Visionary Leadership Project, *supra* note 2; interviews with William T. Coleman, Jr., *supra* note 2.

<sup>17</sup>National Visionary Leadership Project, *supra* note 2.

<sup>18</sup>Charles E. Francis, *The Tuskegee Airmen: The Men Who Changed a Nation* (4th ed. 1997).

<sup>19</sup>Letter from William T. Coleman, Jr. to Hugo Black, June 20, 1946, Box 442, Personal Papers of Hugo Black (hereafter Hugo Black Papers), Library of Congress, Washington, D.C.

<sup>20</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>21</sup>Letter from Hugo Black, Justice, U.S. Supreme Court, to William Coleman, June 24, 1946, Hugo Black Papers.

<sup>22</sup>As with Justice Frankfurter, Coleman was not afraid to disagree with Justice Black. On one occasion, Justice Black called Coleman into his Chambers to argue about a particular point of law. Coleman politely listened to Justice Black before telling him, "[I]f you listen to what you are saying, you will see that you are wrong." Black later told Frankfurter that he had a "very relaxed" law clerk. See Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>23</sup>See Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* (1984); *id.* at 415; interviews with William T. Coleman, Jr., *supra* note 12; interview with Louis Henkin; off-the-record interview with former Frankfurter law clerk.

<sup>24</sup>Interview with Andrew Kaufman.

<sup>25</sup>See Letter from Felix Frankfurter, Justice, U.S. Supreme Court, to Henry M. Hart, Jr., April 14, 1952, Box 4, Personal Papers of Henry M. Hart, Jr., Harvard Law School, Cambridge, MA ("I think I ought to add that not only have I given you an unqualified power of appointment, but my experience with your exercise of it is such that I am quite happy to put that power into your hands.")

<sup>26</sup>Reel 9, Personal Papers of Felix Frankfurter, Harvard Law School, Cambridge, MA (hereafter Felix Frankfurter Papers). In fact, Frankfurter embraced qualified, diverse candidates. Kaufman remarks: "I remember how pleased he [Frankfurter] was when Al Sacks appointed John Mansfield. He was happy to have a Catholic law clerk at last and said so." See interview with Andrew Kaufman, *supra* note 23. According to Supreme Court reporter Tony Mauro, Frankfurter was more reluctant to consider female applicants and declined to follow the recommendation of Harvard Law School and select Ruth Bader Ginsburg.

Summarizing the comments that Mauro made at a reunion of the October Term 1962 law clerks, he writes: "In recounting the sex discrimination she faced earlier in her career, Justice Ruth Bader Ginsburg has hinted that, but for her gender, she might have been a Supreme Court law clerk some 40 years ago. While she was clerking for a federal district judge in New York, a Harvard Law School professor recommended her to then-Justice Felix Frankfurter. But when Frankfurter learned that she had a 5-year-old daughter at home, he decided not to 'take a chance' by hiring her as a clerk, according to Ginsburg." Tony Mauro, "Supreme Court Renovations Set to Start," *Am. Law. Media*, Apr. 21, 2003.

<sup>27</sup>National Visionary Leadership Project, *supra* note 2; interviews with William T. Coleman, Jr., *supra* note 12.

<sup>28</sup>National Visionary Leadership Project, *supra* note 2.

<sup>29</sup>"Supreme Court Justice to Have a Negro Clerk," *N.Y. Times*, Apr. 27, 1948, at 22.

<sup>30</sup>"Frankfurter's Negro Clerk to be First in Court History," *Wash. Post*, Apr. 27, 1948, at 1.

<sup>31</sup>Reel 9, Felix Frankfurter Papers.

<sup>32</sup>*Id.*

<sup>33</sup>Richardson went on to serve as Secretary of Health, Education, and Welfare, Secretary of Defense, U.S. Attorney General, and Secretary of Commerce. Of course, many Americans know Richardson for his role in the Watergate scandal, when then-Attorney General Richardson refused President Richard M. Nixon's order to fire Watergate special prosecutor Archibald Cox. Like Coleman, Richardson would be awarded the Presidential Medal of Freedom by President William J. Clinton.

<sup>34</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>35</sup>Michael E. Parrish, "Justice Frankfurter and the Supreme Court," in *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas* 67 (Jennifer M. Lowe, ed. 1994).

<sup>36</sup>Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 292-93 (1976).

<sup>37</sup>Jeffrey O'Connell & Nancy Dart, "History: The House of Truth: Home of Young Frankfurter and Lippman," 35 *Cath. U.L. Rev.* 79 (1985).

<sup>38</sup>Stuart Taylor, Jr., "Man in the News; No Stranger to the High Court," *N.Y. Times*, Apr. 20, 1982.

<sup>39</sup>Baker, *supra* note 22, at 415.

<sup>40</sup>*Id.*

<sup>41</sup>Interview with Harry Wellington.

<sup>42</sup>Interview with Andrew Kaufman, *supra* note 23.

<sup>43</sup>Andrew Kaufman, "The Justice and His Law Clerks," in *Felix Frankfurter, the Judge* (Wallace Mendelson ed. 1964).

<sup>44</sup>"Quirks and Clerks: A Short History," *Juris Dr.* 41 (1972).

<sup>45</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>46</sup>Andrew L. Kaufman, "Constitutional Law and the Supreme Court: Frankfurter and Wellington," 45 *N.Y.L.Rev.* 141 (2001).

<sup>47</sup>*Id.* at 142.

<sup>48</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>49</sup>It would not be until 1949 that President Truman became the first President to nominate a member of a minority to an Article III judgeship. His nominee: the aforementioned William Hastie.

<sup>50</sup>Professor Walter Gellhorn writes that in the 1930s and 1940s, "[w]hite law firms, government, business, and bar associations were closed to the Negro. The Negro lawyer had to operate on the fringe of the profession." Walter Gellhorn, "The Law Schools and the Negro," 1968 *Duke L.J.* 1069-70 (1969).

<sup>51</sup>See Constance McLaughlin Green, *The Secret City: A History of Race Relations in the Nation's Capital* (1967); Flora Bryant Brown, "NAACP Sponsored Sit-Ins by Howard University Students in Washington, D.C., 1943-1944," 85 *J. Negro Hist.* 274-86 (2000); Irene Osborne, "Toward Racial Integration in the District of Columbia," 23 *J. Negro Ed.* 273-81 (1954).

<sup>52</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>53</sup>See generally Todd C. Peppers, *Courtiers of the Marble Palace* (2006); Artemus Ward & David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (2006); Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (1998).

<sup>54</sup>344 U.S. 873 (1952).

<sup>55</sup>Mark Tushnet, "What Really Happened in *Brown v. Board of Education*," 91 *Col. L. Rev.* 1867 (1991).

<sup>56</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>57</sup>Steve Neal, "Coleman was Better Top Court Choice," *Chi.-Sun Times*, Oct. 18, 1991.

<sup>58</sup>Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 218 (1983).

<sup>59</sup>National Visionary Leadership Project, *supra* note 2.

<sup>60</sup>Linda Greenhouse, "Women Suddenly Scarce Among Justices' Law Clerks," *N.Y. Times*, Aug. 30, 2006.

<sup>61</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

<sup>62</sup>Chris Mondics, "Tenacity & Power," *Philadelphia Inquirer*, Apr. 8, 2007.

<sup>63</sup>National Visionary Leadership Project, *supra* note 2.

<sup>64</sup>John-Hall, *supra* note 3.

<sup>65</sup>Mondics, *supra* note 61.

<sup>66</sup>461 U.S. 574 (1983).

<sup>67</sup>Jay Horning, "A Passion for Law That Never Waned," *St. Petersburg Times*, Sept. 8, 1996.

<sup>68</sup>The first black man to serve in a Cabinet-level position was Robert C. Weaver, Secretary of Housing and Urban Development from 1966 to 1968.

<sup>69</sup>Steve Neal, "Private, Powerful Bill Coleman Goes Public," *Philadelphia Inquirer*, January 26, 1975.



<sup>70</sup>Coleman received honorary degrees from the following colleges and universities: Amherst College, Bard College, Bates College, Central Michigan University, the College of William & Mary, Columbia University, Drexel University, Georgetown University, Harvard University, Howard University, Lincoln University, Marymount University, St. Joseph's College, Saint Michael's College, Swarthmore College, Syracuse University, Tulane University, the

University of the District of Columbia, the University of Pennsylvania, Williams College, and Yale University.

<sup>71</sup>Joe Burris, "One Supreme Day: Recalling the Swearing-In of Thurgood Marshall 40 Years Ago," *Baltimore Sun*, Oct. 2, 2007.

<sup>72</sup>Joan Biskupic, "One 'Whose Career Made Us Dream Large Dreams,'" *Wash. Post*, Jan. 29, 1993, at page.

<sup>73</sup>Interviews with William T. Coleman, Jr., *supra* note 12.

# Public Diplomacy in the U.S. Supreme Court: The Warren Years—Part I

THEODORE M. VESTAL\*

The Prime Minister of the Republic of India, Jawaharlal Nehru, and his daughter, Mrs. Indira Gandhi, wandered down the hallway adorned with portraits of Justices in the U.S. Supreme Court building before entering the East Conference Room. There, they were warmly greeted by Chief Justice Earl Warren and his wife, Nina, who had been the Prime Minister's guests in New Delhi only four months earlier. In Washington, Nehru was the special guest of the Warrens, the first ruling head of state to be honored with a formal dinner at the Supreme Court. In attendance were a small but powerful delegation of Indian diplomats and most of the Justices and their wives. In the crisp evening of December 16, 1956, the temperature had dropped to 39 degrees, and the Prime Minister wore a black *achkan*, the South Asian coat that Americans came to call "a Nehru jacket," adorned with his trademark red rose in the breast pocket and a white Congress cap. The Indian ladies dressed in striking saris, while the Western women wore long formal gowns.

The occasion was a groundbreaking affirmation of a new role for the Supreme Court in American government. The Court was to be involved in U.S. foreign policy as a site to honor visiting heads of state with the blessing of, and cooperation from, the Executive Branch. The Chief Justice also was to expand his role in "public diplomacy." He would now serve as host for foreign rulers in the Court's Marble Palace, in addition to being a quasi-official goodwill ambassador attending White House state dinners and traveling

abroad on official visits as head of the federal judiciary. Chief Justice Warren was especially adept in these diplomatic roles and seemed to enjoy the assignments. What the Department of State and the Executive Branch derived from the Supreme Court's new role—other than goodwill—is not documented, but the volume of activities by the Court and the Justices was impressive.

Although there have been studies of extrajudicial activities of Supreme Court Justices,<sup>1</sup> their main focus has not been on the role of



Chief Justice Earl Warren and Nina Warren greeted Prime Minister of India Jawaharlal Nehru at a dinner held in his honor on Sunday December 16, 1956. The Warrens had been Nehru's guests in India only a few months earlier.

the Court in diplomacy. Biographies of Warren touch upon his overseas travel but do not provide a thorough record of his many actions in the international field for the benefit of his country.<sup>2</sup> Likewise, the admiring analyses of the influence of Warren and the Warren Court on foreign law and legal systems fail to document the Chief Justice's informal impact on foreign leaders and the common people with whom he interacted in so many nations.<sup>3</sup> Nor has there been a systematic look at the Court's receiving and entertaining of foreign heads of state in the nation's "Temple of Justice," which architect Cass Gilbert called "the greatest tribunal in the world."<sup>4</sup>

The history of public diplomacy in the Supreme Court will be described in two consecutive articles in *The Journal*. This article, Part I, describes the uses of the Court—the

building and the Justices—in public diplomacy. Part II, scheduled to be published in the March 2009 issue, will provide a more complete portrait of Chief Justice Warren's role as one of the greatest practitioners of informal diplomacy. The years covered in both articles, from 1953 through 1973, account for what can be called "The Golden Age of the Supreme Court in Public Diplomacy."

### The Precedent-Setting Nehru Dinner

The State Department was anxious for the Supreme Court dinner to go well. Nehru's first official visit in October 1949 had been termed a disaster. The Prime Minister, who had been in office for only two years at the time, was received with all the pomp reserved for an important head of state. President Harry S Truman

even went so far as to break protocol and greet Nehru at the airport. Nehru addressed separate meetings of the House and Senate and was applauded for his assurance that India would not stay on the sidelines in the event of aggression anywhere.<sup>5</sup> But the Indian leader was dismayed by what he perceived as Americans' flaunting of their material wealth and by a lack of culture and good taste. Nehru, the patrician British-trained lawyer, did not get along with Secretary of State Dean Acheson and could not relate to Truman's down-home disposition. He was somewhat nonplussed by the President's White House dinner conversation with Vice President Alben Barkley about the merits of Kentucky bourbon whiskey. The Prime Minister wrote the Vice President of India, philosopher Sarvepalli Radhakrishnan, about his visit: "They had gone all out to welcome me and I am very grateful to them for it and expressed so myself. But they expected something more than gratitude and goodwill and that more I could not supply them."<sup>6</sup>

Nehru did succeed as a goodwill ambassador, however. As one of the best-known and most distinguished Asian leaders, he made a favorable impression on the American public by not asking for economic or other help from the United States and by showing a very human side to his personality by playing with the children of embassy officials in the Indian Embassy garden and paying visits to the National Gallery of Art and the Library of Congress to see specific exhibits. In New York, Nehru was awarded a Doctor of Laws degree bestowed by Dwight Eisenhower, then the president of Columbia University.

A few years later, when Eisenhower was U.S. President, attempts to bring Nehru to the United States for an official visit were thwarted. In the summer of 1955, preliminary discussions between Washington and New Delhi to arrange a meeting of the leaders fell through when Eisenhower was stricken with a heart attack. In early 1956, arrangements were concluded for Nehru to visit the United States for lengthy talks with the Pres-

ident about the eroding state of relations between the United States and India, but that project was cancelled because of Eisenhower's abdominal operation in June.<sup>7</sup> Finally, arrangements were made for a six-day visit by Nehru in December.

The enlisting of the Supreme Court's help in playing host to the Prime Minister and his entourage began with a telephone call from the State Department to T. Perry Lippitt, the Marshal of the Court on November 21, 1956. The Department requested that the Marshal inform the Chief Justice that "His Excellency Nehru will visit this country in December. The Department wishes the Prime Minister to visit with you and the other members of the Court on Wednesday, December 19, 1956, between 4:00 and 4:30 pm. It would be appropriate if tea were served."<sup>8</sup>

In suggesting only tea, the State Department representative may have underestimated the appropriate hospitality for the Supreme Court to extend to Nehru. Only four months before, the Warrens had paid an astoundingly triumphal visit to India and had developed strong bonds of friendship with the Prime Minister and his daughter.

### Warren's Trip to India

At the conclusion of the Court's Term in July 1956, the Chief Justice and Mrs. Warren had traveled to Denmark and Switzerland with Santa Barbara newspaper publisher Thomas Storke and his wife Marion.<sup>9</sup> The *New York Times* reported that the Warrens planned to spend about a month in a resort hotel at Burgenstock near Lucerne.<sup>10</sup> The Chief and his wife broke off their vacation, however, at the request of Secretary of State John Foster Dulles to accept an unexpected invitation from the government of India to visit that country in August.

Warren was to travel in his official capacity as Chief Justice to observe India's judicial system in action, and he understood that he would not comment on any political issues,

national or international. In reality, however, as Russell Baker observed, the trip was "bound to have diplomatic significance far overshadowing Warren's education in Indian law."<sup>11</sup> The Chief's trip was seen as a counterbalance to some of the effects of the triumphant tour of India the previous November by Soviet Union leaders Nikita Khrushchev and Nikolai Bulganin, when millions of persons greeted the Russians in several cities.<sup>12</sup>

The diplomatic importance of Warren's trip was attested to by the fact that it had been the subject of considerable deliberation between the White House and the State Department. The President and Dulles discussed it at Eisenhower's farm in Gettysburg in early July. The official administrative attitude was that the President was "delighted at the opportunity for creating goodwill between the two countries."<sup>13</sup> The Chief Justice was widely regarded in Washington as the best possible goodwill envoy, other than Eisenhower himself, whom the United States could send to India because he had written the opinion for the Court in the historic *Brown v. Board of Education* case.<sup>14</sup> The Court's *Brown* decision, declaring racial segregation in schools as a violation of the Constitution's Equal Protection Clause, was regarded abroad—especially in Third World countries—as a milestone of modern American jurisprudence. The Voice of America had broadcast news of *Brown* within an hour of the decision in 1954. That evening, reports of *Brown* in thirty-four languages proclaimed the ruling a victory in the diplomatic war between East and West for the allegiance of unaligned nations. A *San Francisco Chronicle* editorial stated: "To the vast majority of the peoples of the world who have colored skins, it will come as a blinding flash of light and hope."<sup>15</sup> As Chief Justice of the unanimous Court that rendered the decision, Warren was internationally identified with American libertarianism on racial matters. Thus, he was regarded as an ideal envoy for a friendship mission to India at a time when confusing and frequently harsh Washington criticism of un-

aligned nations and neutralism had put fresh strains on relations with New Delhi. During this awkward period in United States-Indian relations, many Americans, including Dulles, were openly unhappy about Nehru's steadfastness in clinging to his neutralist policies.<sup>16</sup>

The Warrens arrived in Bombay on August 17 on a Pan American Airlines Super Constellation (with sleeping berths!) to begin an eighteen-day tour. The start was not auspicious. The Chief "received a mild but quite correct reception."<sup>17</sup> There were no Bombay state ministers, no judges, and only minor Indian civil servants present to welcome him. Although the Indian officials who showed up satisfied the demands of protocol, U.S. officials in Bombay were disappointed at the reception given to the highest-ranking American official to visit India since Vice President Richard M. Nixon's trip in 1953. The Indians explained that because Bombay was not the capital of India, major receptions there were reserved for heads of state. There were not even traditional garlands of flowers presented to the dignitaries, the apologia being that Indians might have thought it undignified for a member of the judiciary. There was apparently an essential difference between the way Indians saw the Warren visit and the way Washington perceived it. The Chief Justice, however, had not expected a major reception and "would have been embarrassed had that occurred."<sup>18</sup>

Nevertheless, the Chief received warm applause from students when he spoke at the government law college in Bombay on August 20. The head of the college, K.R. Mehta, told Warren, "We admire most your famous judgment of May 1954, outlawing racial segregation in public schools."<sup>19</sup> Warren was questioned about trial and appellate court procedures in the United States and "the manner in which we protect individual freedoms and accommodate those rights to the stability of government and the protection of society."<sup>20</sup> Realizing the unusualness of the Chief Justice being feted in the subcontinent, the American



press took advantage of frequent photo ops, and early in the tour, a picture of the Warrens with Chief Minister of Bombay Morarji Desai and Mrs. Desai was published in the *New York Times*.<sup>21</sup>

From Bombay, the Warrens traveled to other provincial capitals, Madras and Calcutta, and took time to enjoy well-known tourist attractions throughout the country. They visited the Ajanta and Ellora caves, with their celebrated works of art, were awed by the Taj Mahal in Agra, dined on vegetarian delicacies at Woodlands Restaurant in Madras, and were breakfast guests of the Maharaja of Banaras in his palace. Everywhere the Chief Justice traveled, he was acclaimed as an international celebrity, and he was "amazed at the interest of both Bench and Bar in American jurisprudence and particularly American constitutional law."<sup>22</sup>

In a speech at Calcutta University's law college, Warren said that law schools were producing "infinitely better equipped" attorneys than thirty years earlier because they had better education in social sciences before they reached law school. "Economics and history are prerequisite courses for the study of law," he said. "If our profession is to mean what it should, we of the bar must have the broadest education," the Chief declared. "Unless we know about economics and sciences which are now developing, we will not be in a position to make law serve the needs of our people." Warren noted that India was "passing through the identical phase the United States experienced 150 years" earlier "when the need arose for her Constitution to be shaped." He praised Chief Justice John Marshall, who "breathed life into our Constitution and covered its bare bones with flesh and sinews."<sup>23</sup>

When Prime Minister Nehru read a dispatch from a U.S. newspaper about the Warrens' low-key reception in Bombay, he determined to make it clear that India was not being cool to the distinguished American jurist. He ordered the government's top brass out to the New Delhi airport to give the Chief Justice

a top-level official welcome. When the Warrens' plane from Benares arrived on a sweltering Thursday, the Chief Justice was welcomed by Indira Gandhi; Chief Justice Sudhi Ranjan Das of the Indian Supreme Court and seven associate justices; the ministers of Law, Health, Defense, and Works, Housing, and Supply; the President of India's military secretary; and a platoon of lesser officials headed by the Chief of Protocol. There were six bouquets of flowers and arrays of garlands for the Warrens. Most members of the U.S. Embassy turned out, along with the Boy Scout and Girl Scout troops of New Delhi's American community.<sup>24</sup> The Warrens also were welcomed by a cordial editorial in the *Hindustan Times* praising a statement made by the Chief in Bombay that the world had to decide whether it was going to live by "force of law, or law of force."<sup>25</sup>

Some Indian officials said the Warrens' reception was warmer than any given to any other guest from the United States.<sup>26</sup> The elaborate official reception in Delhi contradicted the mild welcome earlier given the Chief Justice and was but a harbinger of the popular acclaim that was to follow him during the remainder of his time in India. *Life* magazine reported cheering crowds that paid tribute to "the man who had pronounced the momentous decision banning racial segregation in U.S. public schools."<sup>27</sup> The throngs were so fervid that Warren's party required a police escort to prevent him from being mobbed by admirers.<sup>28</sup> Warren's triumphal tour made what A.M. Rosenthal of the *New York Times* called a "deep impression on the Indian people."<sup>29</sup> Gerald T. Dunne was to write that "in terms of attitude and determination, the trip's decisive influence . . . could be compared only with Woodrow Wilson's tumultuous European reception of 1919."<sup>30</sup> The Chief Justice described it as "one of the most moving experiences of my life." Added Warren, "My embarrassment was complete when I realized how little not only I but most Americans know about this great land and its importance to the world."<sup>31</sup>

In a special convocation at the University of Delhi, a turbaned Dr. Radhakrishnan, India's Vice President, who was also the Chancellor of the University, conferred the honorary degree of Doctor of Laws (LL.D. *honoris causa*) on Warren. The Chief Justice, garbed in red doctorate cap and gown, received a thunderous ovation from a large audience of students, Cabinet members, diplomats, and members of Parliament. G.S. Mahajani, the University Vice Chancellor, read a long citation frequently interrupted by repeated and prolonged cheers and applause at any mention of Warren or the *Brown* decision.<sup>32</sup> Said Mahajani:

Our visitor rose to fame in 28 minutes on that Monday afternoon as he read out his momentous decision outlawing racial segregation in American public schools. The word "Warren" went echoing round the world and has entered securely into history books . . . And a fair guess places the secret of this achievement in his warm personality and persuasive powers.<sup>33</sup>

In a brief reply, the Chief Justice appealed to the young Indians to help in creating a better understanding among the peoples of the world.

In his memoirs, Warren noted that he had sat on the opposite side of the aisle from Nehru when they were both delegates of their respective nations attending the coronation of Queen Elizabeth II of England at Westminster Abbey on June 2, 1953, but there is no mention of the two men meeting at that time.<sup>34</sup> Thus, Warren apparently met Nehru for the first time at a reception in New Delhi given by Chief Justice Das of the Indian Supreme Court. On that occasion, Warren presented Das with an autographed photograph of the U.S. Supreme Court and a boxed copy of the U.S. Constitution. On the evening of August 29, Prime Minister Nehru held a dinner at his home in honor of the Warrens. There, he presented them with gifts including a leather box containing a length of maroon brocade and a copy of his book,

**Discovering India**, inscribed to the Chief Justice with regards.

The Chief Justice met with the Indian Supreme Court and sat on the bench of the high courts of Bombay, Madras, and Calcutta, the equivalent of American state supreme courts. In addition to law students, Warren spoke to bar associations and had discussions with top Indian government officials, including Prime Minister Nehru (whom he met on six different occasions during the tour) and two future Prime Ministers, Indira Gandhi and Morarji Desai—all without violating the agreement to avoid political matters.

The Chief's most widely heard talk was a broadcast over All-India Radio. Warren said while "there are obvious differences in procedure between your courts and ours," these "differences are of no consequences when compared with the important similarities between our two legal systems." He expressed admiration for the "almost superhuman effort" of the Indian government to raise living standards for 400 million people," and noted "it is a mistake to expect all to practice democracy as we do. There are as many democratic ways of getting things done as there are uses of the imagination and vision. Free government is not so much a question of the form of the institution as it is a way of life of the people . . . All democracies have like objectives but of necessity different approaches."<sup>35</sup>

Warren observed that the Indian courts (that conducted oral argument in English) shared with American courts the same background of English common law, the basis of the "kinship" between "the world's two largest democracies." Both nations had federal systems: At that time, India had twenty-six states and the United States forty-eight. The Indian Constitution, Warren said, took what the Indians considered the best from the written Canadian, Australian, and American constitutions. The Indian constitution, he added, paralleled the U.S. model "particularly so far as individual freedom and equality under the law are concerned." The Chief Justice noted that Indian

judges were "intensely interested in the administration of justice in the United States." According to Warren, Indian jurists knew "our great jurists of the past such as Marshall, Holmes, Hughes, and others, and it is a matter of daily occurrence in their courts to cite decisions of the United States Supreme Court and other federal and state courts with approval and as persuasive." In building a body of constitutional law, the Chief said, India looked "largely to the opinions of British and American courts for guidance." Warren recognized that India's freedom rested on an independent judiciary, an independent bar, and a constitution "which compels recognition by everyone of the dignity of the individual and of equality before the law, without regard to race, color, creed or economic status."<sup>36</sup>

On his last day in India, Warren went to New Delhi's diplomatic enclave to lay the cornerstone of a splendid new American Embassy building designed by architect Edward Durrell Stone. The building represented Stone's combining the best architecture of the Orient with modern Western concepts. The result was what architect Frank Lloyd Wright called one of the finest buildings in the last hundred years. In his dedicatory comments before an audience of 3,000 people, including Indian officials, the Chief Justice expressed the hope that the building would be a new "temple of peace."<sup>37</sup>

Warren charmed India with his genuine, unaffected smile, and friendly, open manner. The trip was a public-relations triumph, and most of it was filmed by the United States Information Service, which made a 16-mm motion picture, "Chief Justice Warren Visits India," for use in India. The film was widely shown in theaters in India.<sup>38</sup>

The Warrens returned to the United States by way of Hong Kong and Manila on September 4. Back in Washington, the Chief Justice was interviewed in his Supreme Court chambers about his eighteen-day visit. His remarks were couched in judicial rhetoric. "I feel," he said, "that as far as the law is concerned, [Indian] institutions not only parallel ours but

there is a great desire on the part of the Indian bench and bar to administer justice in very much the same way we do." Added the Chief, "I believe they are trying their best both to give stability to their free institutions, to which India is committed, and at the same time to protect the freedom of the individual."<sup>39</sup>

Although Warren bent over backwards to avoid discussing "political" aspects of his trip, he doubtlessly had been made aware of the mingling of the U.S. Supreme Court's civil-rights and civil-liberties decisions with the aspirations of people everywhere and with global politics. The Chief Justice had observed firsthand the work of the Court in a comparative context. Bernard Schwartz observed that Warren had "returned with a broadened perspective, aware that the judicial protection of human rights was supported by a constituency that stretched far beyond American boundaries. The global image of the United States was directly related to the Supreme Court's role in enforcing constitutional guaranties against governmental infringements."<sup>40</sup> The genie was out of the bottle: Because of his representing the spirit of the law in the *Brown* decision and because of his persona and gravitas, the Chief Justice was an international superstar. And he apparently thrived in the role, as seen in his later goodwill tours abroad.

The political nature of the Chief's trip was of some concern to some of the Associate Justices. Before Warren left for India, Justice John Marshall Harlan wrote in a letter to Justice Felix Frankfurter, "I can see why the President would want him to go—and no one could do a better job than he—but I do wish the Court could be left alone on these essentially political activities."<sup>41</sup> Frankfurter replied:

I share the thought behind the anxiety which you express. I think it was quite right for him to accept the Indian invitation during the summer recess, but it should have been accepted without asking either the President or the Secretary of State whether it was

agreeable to them. Thereby occasion was given for publicity which they naturally would want to exploit, or at least to give it a political innuendo, which it ought not to have.<sup>42</sup>

Justice William O. Douglas, whom the press had named the "globe-trotting Justice" because of his book-publishing trips abroad, had himself traveled to India in 1950. In a note to Justice Hugo Black, he wrote supportively of Warren's trip: "I was glad the Chief went to India. He'll make a lot of friends for us there."<sup>43</sup>

U.S. officials in India echoed Douglas's opinion. Graham Hall, Counselor for Special Affairs in the Embassy in New Delhi, wrote Warren: "As I feel sure you are aware from the reaction in India during your visit, you made a very large contribution to further understanding and friendship between India and the United States." Added the U.S. Consul General in Madras: "What a success I believe your visit to India was."<sup>44</sup>

Chief Justice Das gave an Indian perspective of the trip in a letter to Warren: "Your visit to our country . . . certainly served to bring our two countries nearer, for Mrs. Warren and you endeared yourselves to us by your urbanity, the catholicity of your ideas, and the breadth of your outlook and vision."<sup>45</sup>

The Chief Justice's accolades in India were in sharp contrast to the criticism he was receiving in the United States at that time from Southerners, states-rights advocates, and super-patriots. On the same day that Warren was being interviewed in chambers by the press, the *Washington Post* published a seething column by George Sokolsky blasting Warren and the Court for decisions setting back "racial relations in the South several decades" and giving "the Communist cause . . . a new lease on life."<sup>46</sup> Senator Joseph McCarthy (R-WI) added fuel to the accusatory fire by asserting: "I will not say that Earl Warren is a Communist, but I will say he is the best friend the Communists have in America." Such criticism of the Chief Justice and the de-

cisions of the Court would continue throughout Warren's tenure on the Bench, but at this time a crescendo of censure of the judiciary was under way that would culminate in Congress's 1958 attempt to curb the Court in the Jenner-Butler Bill, the high-water mark of congressional hostility to the Court—and one from which the Court barely escaped.<sup>47</sup> The Chief's widely reported international summer travels, coupled with a congressional recess, may have provided a welcome respite from the clamor of such detractors of the Court at home.

Warren's successful goodwill tour so impressed John J. McCloy, Chairman of the Council on Foreign Relations, that he invited the Chief to give his "impressions of India" to an afternoon meeting of the members in New York City.<sup>48</sup> Similar meetings with distinguished statesmen during 1955 and 1956 had included Dulles, British Prime Minister Harold Macmillan, and German Chancellor Konrad Adenauer. The Chief Justice's trip to India had earned him a place in the pantheon of world politics of the 1950s.

Warren's connections to India continued in the autumn of 1956. On October 2, in a ceremony in the Supreme Court Chamber the day after the opening of the 1956 Term of the Court, Warren accepted an eight-volume biography of Mahatma Gandhi from Indian Ambassador to the United States G.L. Mehta and a delegation of Indian jurists. Six Associate Justices were present as the Chief described the United States and India as two nations "trying to travel the same highway through the use of free institutions." Warren expressed the hope that the books that would be housed in the Supreme Court Library "would long serve as an inspiration to the Justices and lawyers through the years."<sup>49</sup> In November, the Chief wrote Dean Rusk, president of the Rockefeller Foundation, asking for his help in sending books on American law to Indian legal libraries and law schools and having them dispersed there to bench and bar.<sup>50</sup>

When Warren learned of Nehru's official visit to the United States in 1956, he wrote the

Prime Minister "that our two countries, understanding each other's problems and purposes, could be forces for great good in transforming hatred and armed conflict into world peace based on justice . . . We only need to know more about each other. That is one reason I am so happy you are to visit us. Our people want to know you better and I am sure you will find them warm-hearted toward you."<sup>51</sup>

In reply, Nehru wrote on December 6:

I entirely agree with you that in spite of many superficial differences, there is much that is common in the basic approach of our two countries. Unfortunately, not much is said about this and a great deal is said about the superficial differences. I think the time has come when we can look at each other in truer perspective and understand each other better. To the United States of America it is given to play a vital and leading part in world affairs. We do not presume to interfere in the affairs of the rest of the world, nor have we the desire or capacity to do so. But, inevitably, no country can isolate itself from these currents and conflicts of the world, and so we have to play our part to some extent. I see no reason why that part should not lead us to an ever greater measure of cooperation with the United States.<sup>52</sup>

In preparing for the Nehru dinner, the U.S. Department of State had provided Warren with classified documents about the Indian visitors and their nation; a pronunciation guide and biographical data about each dignitary; a summary of U.S. policy towards India; and "talking points," topics that probably might be raised by the foreign guests and subjects to steer away from should they be raised in conversation. The Department had advised the Court's Marshal that the group accompanying Nehru would be "much smaller . . . than the normal one" and that the visit therefore should be "considered to be of a more personal and intimate nature."<sup>53</sup>

In addition to the Prime Minister and his daughter, who served as his chief of staff, Indian dinner guests included V.K. Krishna Menon, the unapologetically anti-American chair of India's delegation to the United Nations, and Ambassador Mehta. Attorney General Herbert Brownell, who had played a significant role in the Court nominations of Warren, Harlan, and William J. Brennan (all of whom were sitting on the Court at the time), represented the U.S. Department of Justice, and the State Department's Chief of Protocol, John Simons, was also present. Justices Sherman Minton and Black were ill and unable to attend, although the latter was represented by his son and daughter, Hugo L. Black, Jr., and Josephine Black. Justice Frankfurter renewed his acquaintance with Nehru, having honored him with a tea at his home during the Prime Minister's first visit to the United States in 1949. The entire dinner party of thirty was seated around one long table, with fourteen guests on either side and two at the ends. Following protocol, the Chief Justice was flanked by the Ambassador's wife and Mrs. Gandhi, while Mrs. Warren was seated between the Ambassador and the Prime Minister. All of the Indian guests spoke excellent English, so there was no need for translators.<sup>54</sup>

The caterers for the dinner carefully followed the Department of State's menu recommendations. Two kinds of punch were prepared—neither with liquor—and orange and tomato juices were served. Canapés were all open-faced, with no beef or pork. The *New York Times* noted that the dinner had an unusual alternative for the main course, a rice pilaf ring for the vegetarians in Nehru's party—even though the Prime Minister and his daughter were not vegetarians. The Court's dinner was more politically correct than had been President Eisenhower's hearty White House luncheon served the Nehru party earlier in the day, which had included roast leg of lamb.<sup>55</sup>

Apparently the Warrens' dinner was a pleasant, relaxed evening. The Chief Justice got along well with Nehru and his protégé



Krishna Menon, two Indian leaders with whom successive U.S. Secretaries of State Acheson and Dulles had trouble dealing. The Prime Minister preferred smaller, less formal gatherings, rather than the "medieval splendor" heaped on him during most state visits.

The next day, Justice Frankfurter sent a "Dear Chief" note proclaiming that "last night's dinner may well be deemed an historic occasion." Justice Harold Burton, a former Senator and no stranger to state dinners, wrote Warren that he hoped the evening, "in addition to being delightful and interesting," might "be internationally helpful." Upon her return to India, Mrs. Gandhi sent Mrs. Warren a warm letter of thanks for a most enjoyable dinner.<sup>56</sup>

The dinner for Nehru at the Supreme Court was part of what could only be described as a successful official visit. President Eisenhower and Nehru related well at a personal level. They even spent fourteen hours together, without aides, at Eisenhower's farm in Gettysburg, Pennsylvania, where they discussed "many things in the international field" and had an opportunity to gain an appreciation of each other's positions and compulsions. Nehru found the President "sincerely interested in India, its history, its aspiration and developmental efforts."<sup>57</sup>

Three years later, Eisenhower made the first U.S. presidential visit to India, spending four days there during a nineteen-day, eleven-nation peace tour, at that time the longest trip ever made by an American President. Eisenhower's memorable visit, following in many ways in the footsteps of Chief Justice Warren's tour, established the foundation for a close and valuable friendship between the two nations in the decades that followed. Warren had pointed out the basis of that friendship during his visit to the subcontinent in 1956 by explaining the joint commitments of the United States and India to democracy, human rights, and the rule of law. Only the popular Eisenhower, on an official state visit, could receive more public acclaim in India than had the Chief Justice.

Warren, representing the law of equality with a gentle certitude of behavior and presenting the persona of a diplomat in the best sense of the word, had paved the way for the President.<sup>58</sup>

### Visits of Foreign Heads of State to the Supreme Court

Although the dinner at the Supreme Court honoring Prime Minister Nehru in 1956 was deftly planned and carried out as though the Chief and the Justices were in the habit of frequently entertaining state visitors, only a small number of foreign heads of state are documented as having visited the Supreme Court. Prior to the Court's moving to its own building in 1935, visits might have occurred as a part of a foreign head of state's tour of the Capitol, but there are no records of this in the Supreme Court Curator's offices.

One of the first visits by distinguished guests to be photographed at the Court was that of a future head of state, Princess Elizabeth of England, accompanied by her husband, Prince Philip. They came to the Court for a brief tour on November 2, 1951. The royal couple was met at the curb on First Street at 11:30 a.m., walked through the Great Hall and Courtroom, and met the Justices of the Vinson Court in the Conference Room. They left the Court at 11:55, with the Princess being escorted to her automobile by the then-Marshal of the Court, Thomas E. Waggaman, who was dressed in morning coat for the occasion.<sup>59</sup> The photogenic Princess, then twenty-five years old, had been met at the airport by President Harry Truman two days earlier. Princess Elizabeth may have had a special interest in the Court. After her father, King George VI, succeeded to the throne in 1936, Elizabeth studied constitutional history and law as part of her home schooling.<sup>60</sup> At the time of her 1951 visit, there was great concern for Elizabeth's father, who was very ill. He died the following year, and Elizabeth was proclaimed Queen.

The first recorded visit to the Court by a reigning foreign head of state was on

October 20, 1954, when President William V.S. Tubman of Liberia met the Court, in robes, in the Justices' Conference Room.<sup>61</sup> Tubman, a lawyer who had served on the Liberian Supreme Court, was on a state visit to the United States from October 16 to November 12.<sup>62</sup> He urged the extension of the expiring five-year agreement to finance Liberia's development plan.<sup>63</sup> An American-Liberian descendant of former American slaves, Tubman had been the guest of President Franklin Roosevelt in Washington as President-elect of his country during his first visit to the United States, in 1943, when Liberia provided the Allies with a vital link to Africa during World War II. It was most fitting, although probably serendipitous, that the Court's first head-of-state guest came to call during the year of the historic *Brown* decision providing equal protection for other descendants of American slaves. The Tubman visit to the Court received extensive press coverage in African nations. The year after his visit to the Court, Tubman survived an assassination attempt, and he went on to rule until his death in 1971.

On December 8, 1955, President Batlle Berres of Uruguay became the first foreign head of state to be present at a Court session. After meeting the robed Court in the Conference Room at 11:45 a.m., the President and his entourage were taken to seats in the Courtroom. After the session opened, Chief Justice Warren announced the presence of President Berres and his party. After the lawyers for the case before the Court were admitted, the Marshal banged the gavel, the Court and audience rose, and the President and his party departed. After their exit, "the Crier banged again and court resumed."<sup>64</sup>

Three months later, on February 29, 1956, President Giovanni Gronchi of Italy and Signora Gronchi came to the Court and were "given the same treatment as the Uruguay party."<sup>65</sup> By a memorandum, the Chief Justice informed the Associates that "[t]he Court will meet the President of Italy and his wife in the Conference Room in robes at 11:45." Be-

cause the Justices were supposed to be robed at that time anyway and ready to take their seats in the Courtroom for oral argument a few minutes later, the Chief's memo was more informative than imperative. Later in the day, Gronchi, the second President of the Italian Republic, who was on a state visit from February 27-March 2, 1956, addressed the U.S. Congress.

On May 18, 1956, President Achmad Sukarno of Indonesia, one of the charismatic leaders of Afro-Asian nationalism, met the Court in the Conference Room during the last day of a three-day state visit.<sup>66</sup> The first President of the Republic of Indonesia, Sukarno held that position from August 17, 1945, the day he proclaimed Indonesia's independence, until he was deposed in 1968. To help bolster his tenure, Sukarno proclaimed himself President for life in 1963, although his critics contend that he remained in office only during good behavior.

As noted above, in December 1956, Prime Minister Nehru of India attended the first dinner for a foreign ruler at the Supreme Court, an event that received the most press coverage of any of the Court's honoring of international dignitaries.<sup>67</sup>

In the following year, on May 9, 1957, President Ngo Dinh Diem of the Republic of Vietnam met with Chief Justice Warren and Justices Douglas, Burton, and Stanley Reed for tea and a tour of the building led by Douglas. At that time, Diem had been engaged in a campaign of arresting political opponents in South Vietnam, and it may have been in protest against such activity that several of the Justices chose not to attend the tea. Later in the day, as part of a state visit, Diem addressed the U.S. Congress.<sup>68</sup>

Sultan Mohamed V, King of Morocco, was the guest of the Chief Justice at a luncheon at Court on November 26, 1957 with eight Justices in attendance. Justice Minton was ill and unable to attend.<sup>69</sup> The King was in Washington on a four-day state visit to the United States, during which he met with President Eisenhower. The King had requested specifically



The first recorded visit to the Court by a reigning foreign head of state was on October 20, 1954, when President William V.S. Tubman of Liberia came to Washington. A lawyer who had served on the Liberian Supreme Court, Tubman was on a state visit and is pictured here shaking hands with Chief Justice Warren at the White House.

that music from the Broadway musical "The King and I" not be included in the entertainment at the state dinner at the White House. Apparently, he did not like some of the lyrics. In February 1956, he had successfully negotiated with France for the independence of Morocco, and in 1957 he had taken the title of King. From 1927 to 1953 he had been Sultan of Morocco, and in that role he played host to Allied leaders in a conference that mapped out significant strategy for World War II. In January 1943, United Kingdom Prime Minister Winston Churchill, Roosevelt, and French President Charles de Gaulle met for four days in the Casablanca suburb of Anfa, where they first agreed on the demand for the "unconditional surrender" of the Axis powers. One of the highlights of the conference was a dinner

party hosted by President Roosevelt in honor of Sultan Mohammed V. This recognition of the Moroccan sovereign as host of the conference and as a ruler of importance by President Roosevelt gave credibility to Moroccan aspirations for independence. Mohammed reigned as King of Morocco from 1957 through 1961, when he was succeeded by his son, Moulay Hassan, who became Hassan II.

It should be noted that there were only three state visits to the United States by visiting foreign heads of state in 1957, and two of the three were guests of the Supreme Court. Only King Saud of Saudi Arabia failed to visit the Court during his state visit to Washington from January 30 through February 8.

In the first recorded incidence of one-to-one diplomacy between a Justice and a head

of state at the Court, Robert Menzies, Prime Minister of Australia, met with John M. Harlan for lunch on June 1, 1960.<sup>70</sup> The reason for the meeting is not recorded, but the two shared several common interests. Menzies, who was characterized as an extreme monarchist and "British to his bootstraps," was one of Australia's leading constitutional lawyers and parliamentarians. He also was a Scholar in Law at Cambridge University. Harlan had spent three years as a Rhodes Scholar at Oxford, taking an A.B. with a "first" in jurisprudence in 1923, and was well versed in British and Commonwealth law. He also had a "colonial experience," having been enrolled at an early age in a Canadian boarding school and spent all but the final year of his preparatory education there. Menzies served as Prime Minister from 1939 to 1941 and from 1949 to 1966 and was knighted in 1963. Two years later, he made unpopular decisions to commit Australian troops to the Vietnam War and to reintroduce conscription. In 1966, he retired as Prime Minister and from Parliament.

The final event for a foreign head of state at the Court during the Eisenhower administration occurred on June 29, 1960, when His Majesty King Bhumibol Adulyadej the Great, King Rama IX, and Her Majesty Queen Sirikit of Thailand were honored with a luncheon.<sup>71</sup> All of the Justices and most of their wives and twelve members of the royal party attended, along with the Thai Ambassador to the United States and the State Department's Chief and Deputy Chief of Protocol. The Boston-born King, one of the wealthiest men in the world, had studied political science and law at Lausanne University in Switzerland during his student days. The royal couple had been guests of the Eisenhowers at a state dinner on the previous night. Following the Court luncheon, His Majesty went across the street to address the U.S. Congress. The King immediately told his audience why he had come to America:

When I hear of intolerance and oppression in so many parts of the world,

I want to know how, in this country, millions of people, differing in race, tradition and belief, can live together freely and in happy harmony. How these millions, scattered over a large territory, can agree upon the major issues in the complicated affairs of this world. How, in short, they can tolerate each other at all.<sup>72</sup>

Perhaps, over lunch, the King posed those questions to the Chief Justice and the Court, who might have had intriguing answers in light of their work at the time in civil-rights and civil-liberties cases.

In total, nine foreign heads of state and government had visited the Court during the groundbreaking era of the Eisenhower presidential years, from 1954 through 1960. In contrast, no such visits occurred during the short administration of John F. Kennedy from 1961 to 1963. It should be noted that Prime Minister Nehru returned to the United States for his final official visit in November 1961, but he did not visit the Court on that occasion—nor did he get along well with President Kennedy.<sup>73</sup>

A renowned writer of a modern constitution was the first foreign head of state to visit the Supreme Court during the presidential administration of Lyndon B. Johnson. Eamon de Valera, President of Ireland, came to Washington on May 28, 1964, at the age of eighty-one, on a visit of sentimental value rather than of international importance. At the Supreme Court, he was the guest of Chief Justice Warren at a luncheon.<sup>74</sup> Later that day, de Valera, although almost blind, addressed Congress, speaking for twenty-five minutes without notes. The Irish patriot was born in New York City and taken to Ireland as an infant. The author of Ireland's constitution, "Bunreacht na hÉireann," he was one of the dominant political figures in twentieth-century Ireland. De Valera ended his political career as President of Ireland, serving two terms from 1959 until 1973. As President, he received many distinguished visitors,

including President de Gaulle and President Kennedy (in 1963). De Valera retired from the presidency in June 1973 at the age of ninety-one, the oldest head of state in the world at the time, having served for fourteen years, the longest period allowed under the Irish constitution.

Only five days after the second inauguration of President Johnson on January 20, 1965, the President-elect of Brazil, Arthur da Costa e Silva, arrived in Washington for a three-day informal visit. As part of his tour, Costa e Silva came to the Supreme Court on January 26, 1967.<sup>75</sup> Less than two months later, he was sworn in as President. He then adroitly increased the powers of his office, closed the Brazilian Congress, banned the opposition, and increased media censorship. Costa e Silva suffered a severe stroke in August 1969 and was removed from power by his military ministers.

Prime Minister Mohammad Hashim Maiwandwal of Afghanistan, considered to be one of the main architects of modern Afghanistan, was given a formal welcome with full military honors at the White House on March 28, 1967. The Prime Minister, who vitalized his country's 1964 constitution, which liberalized the political structure and inaugurated a Supreme Court that completed the separation of powers among the executive, the legislature, and the judiciary, was on a three-day official visit. His itinerary included a stop at the Supreme Court, where he was "received on the Plaza by the Chief Justice."<sup>76</sup> Only six months later, Maiwandwal resigned as Prime Minister due to ill health. In 1973, he died in prison under mysterious circumstances following a military coup.

### The Luncheon for Emperor Haile Selassie

One of the best-documented events for a visiting head of state at the Court was the luncheon for Emperor Haile Selassie of Ethiopia on February 14, 1967.<sup>77</sup> The Chief Justice

again was repaying hospitality, for he had been a guest of the Emperor in Addis Ababa in 1963. Selassie, seventy-four years old at the time, was on his third state visit to the United States, the guest of President Johnson from February 13 to 15, 1967. The Emperor afterwards visited New York City and departed the United States on February 17.

The Chief Justice and Mrs. Warren had first met Emperor Selassie on May 26, 1954 during his initial state visit to the United States, when they attended a White House dinner hosted by President Eisenhower. The Chief and the Emperor were almost the same age, and apparently each admired the life and accomplishments of the other.

When the Emperor paid his second state visit to President Kennedy, on October 1, 1963, the Chief Justice, joined by Attorney General Robert Kennedy and others, entertained His Imperial Majesty and some members of his royal entourage aboard the Secretary of the Navy's white yacht, *Sequoia*.<sup>78</sup> The "Rolls Royce of yachts" was a regal setting for a luncheon on the Potomac honoring the Emperor. The Chief Justice sat next to Haile Selassie in the ship's main salon, where five U.S. Presidents had dined and where Roosevelt and Churchill had planned the D-Day invasion of Europe. Later that evening, the Warrens attended the state dinner for the Emperor at the White House.

Although records of the role of the Department of State in helping plan diplomatic proceedings at the Supreme Court are scarce, the documentation of the Court's 1967 luncheon for the Emperor contained in the Earl Warren Papers in the Library of Congress gives details that are probably typical of all such head-of-state events.

In preparation for the luncheon, John Buché, Assistant Ethiopian Desk Officer in the State Department, sent the Chief Justice's secretary details of administrative arrangements.<sup>79</sup> Included were: the Emperor's itinerary; "confidential" biographies of the twelve-member official party (in order of





The Court hosted a luncheon for Emperor Haile Selassie of Ethiopia (center) on February 14, 1967. Chief Justice Earl Warren (right) was again repaying hospitality, for he had been a guest of the Emperor in Addis Ababa in 1963. Selassie, seventy-four years old at the time, was on his third state visit to the United States.

precedence), their titles and manner of address, and a guide to pronouncing their names; a copy of a "secret" memorandum for the President from the Under-Secretary of State summarizing the foreign-policy implications of the visit (for example: the United States could not satisfy the Emperor's demands for more military assistance, but "on the other hand, friendly relations with Ethiopia" were important to American interests in Africa) and suggesting talking points on questions for discussion with the Emperor (for example: "Topics the Emperor will raise: threats to the Red Sea Area and Ethiopia. I recommend that you say: . . . Topics you might raise: The danger of a continued arms race in the Horn of Africa. . ."); a "confidential" country fact sheet including information about governmental structure, natural resources, human resources, economic activity, defense forces, and Americans in Ethiopia; confidential "suggestions on approaching the Ethiopians and topics of conversation" (for example: "Ethiopian court etiquette makes the Hapsburgs look breezy . . . Ethiopians are

generally aware of what is going on in the United States and also follow with some interest developments in Vietnam, China, the Middle East, and Europe . . . Subject to be avoided, if possible . . . Somalia"); and a proposed toast by the Chief Justice. Buché was an excellent choice to write the toast, for he had only recently returned to the United States from a three-year assignment in the U.S. Embassy in Ethiopia, where he was the only Foreign Service Officer fluent in Amharic, the official language of the country. He accompanied the royal party as a translator throughout the state visit.

At 10:30 on the morning of February 14, Haile Selassie met with President Johnson at the White House.<sup>80</sup> The Emperor and the President discussed shared concerns about the United Arab Republic and Soviet advances in the Red Sea basin and the Soviet-sponsored Somali threat to Ethiopian security. Selassie's primary objective was to convince the President of the need for the United States to provide Ethiopia with more arms.

After leaving the White House, the royal entourage drove in a five-limousine convoy from Blair House, where the Emperor was staying, to the Supreme Court, where they were scheduled to arrive at 1:45 p.m. at the 2<sup>nd</sup> Street entrance and park in the underground garage. Security must have been a concern, for accompanying the Emperor in the lead vehicle was Leo E. Crampsey of the State Department's Foreign Dignitary Protective Division. According to Charles "Steve" Gillispie, one of the State Department's translators for the Emperor's visit, the motorcade was thirty minutes late. His Imperial Majesty was met by Chief Justice Warren and T. Perry Lip-pitt, Marshal of the Court, and escorted to the East Conference Room, where a reception line was formed. In hastening the royal party and getting as many as possible into the elevators, uniformed U.S. Security guards apparently shoved people so tightly that the Emperor's black-and-red military hat was knocked askew—a misfortune doubtlessly galling to the ever-meticulous ruler. Although the incident was quickly passed over, some of the Ethiopians interpreted the zealous security arrangements and the actions of the guards as showing a lack of respect for the Emperor and the royal party.<sup>81</sup>

After the forty-five guests had arrived, the party moved to the West Conference room, where lunch was served. Those invited included attorneys working in a variety of federal government positions and "at least some of the important persons who [were] not going to the White House dinner" later that evening.<sup>82</sup> Among the eclectic roster of guests were: Secretary of the Interior Stewart Udall; Senator Frank Lausche (D-OH); Congressman Ross Adair (R-IN), who would later serve as Ambassador to Ethiopia in the 1970s; an admiral and a general; a half dozen State Department officers; representatives of the Peace Corps, the United States Agency for International Development (USAID), and the United States Information Agency (USIA); and *Washington Post* columnist Joseph Kraft. As always at the

Court's functions for visiting heads of state, the State Department's Chief of Protocol—in this instance, James W. Symington—was on hand to ensure that the accepted rules of diplomacy were implemented. Symington was carrying out his duty to "plan and execute detailed programs for foreign leaders visiting the President and accompany them during their official travel in the United States." The Chief Justice was the only Justice present: Tuesday was a working day for the Court, and the Associate Justices were busy at the time of the luncheon, which turned out to be a stag party with no women present.

Ridgewell's Caterers prepared the meal, which featured saddle of veal Orloff and fresh strawberry mousse. At the head table, Haile Selassie was flanked by the Chief Justice and Senator Frank Carlson (R-KS), who, the next morning, hosted a prayer breakfast at the Capitol that the Emperor attended. The Governor of Ethiopia's Shoa Province sat next to Warren and served as interpreter. The Chief Justice was a charming host who, in his remarks, made several comparisons of California to Ethiopia. He and the Emperor competed with bragging rights about their homelands and urged the guests to visit them to see for themselves their natural beauty. Warren wrote by hand several additions and deletions to the proposed toast that Buché had prepared, to make his comments more personal and specific to the Court setting. For example, to the statement "When mention is made of the Emperor of Ethiopia, Americans today recall with pride and affection your many courageous and far-sighted actions," the Chief added, "which have contributed to the freedom of mankind." After "Yet, on this occasion," Warren inserted, "as we are breaking bread at the Supreme Court of the U.S. where all Americans who come here pursue our national ideal of equal justice under law" and then continued from the text, "I think it is more appropriate to salute Your Majesty for your contribution to Ethiopia's legal system." He concluded the page-long statement that

he had made his own with "a toast to Your Majesty—a great statesman, a valued friend, a wise law-giver."<sup>83</sup>

After the luncheon, the Emperor was escorted back to his automobile in the garage by the Chief Justice and Marshal Lippitt. He left at 3:15 p.m. to attend a reception at Howard University, during which His Imperial Majesty was awarded an honorary degree. Later that evening, the Emperor was the guest of the Johnsons at a White House dinner. The Chief Justice and Mrs. Warren were invited to an intimate pre-dinner gathering in the upstairs Yellow Oval Room of the White House for cocktails and the exchange of gifts by the heads of state. Besides the President and First Lady and the Emperor, the Warrens were the only non-diplomats present. Also attending were Acting Secretary of State Nicholas Katzenbach, U.S. Ambassador to Ethiopia Edward Korry, Chief of Protocol Symington, the Ethiopian Minister of Foreign Affairs, and the Ethiopian Ambassador to the United States. Following the presentation of gifts came what Lady Bird Johnson described as "the always thrilling removal of the colors, the forming of the line, and the marching downstairs to the tune of 'Hail to the Chief.'"<sup>84</sup> The party stopped for photographing at the bottom of the stairs before standing in line in the East Room, where about one hundred and fifty guests filed by to shake hands. At state dinners amidst regal furnishings, the Warrens enjoyed executive privileges without many responsibilities other than grasping bejeweled and manicured hands.

So successful were the Chief Justice and his wife in serving as unofficial diplomats that they were frequent guests at White House state dinners and Yellow Oval Room ceremonies throughout Warren's tenure at the Court. Mrs. Johnson noted that at diplomatic receptions, "Chief Justice and Mrs. Warren... were always on hand as helpful standbys and ornaments." And she added, "How easy it is to forget that the Chief Justice is a member of the other political party!"<sup>85</sup> Warren and Mrs. Johnson shared a dubious bond: the John Birch

Society put up billboards in Texas urging the impeachment of Earl Warren and Lady Bird.<sup>86</sup>

In a letter from Symington, the Department of State formally thanked Warren for his "help in entertaining Emperor Haile Selassie of Ethiopia... The luncheon at the Supreme Court was an outstanding success, your toast was much appreciated, and your hospitality contributed significantly to making the visit a memorable occasion for the Emperor and his party."<sup>87</sup> Senator Carlson also sent a letter praising the luncheon to the Chief Justice.<sup>88</sup>

### Later Court Events for Foreign Heads of State

The final foreign head of state to visit the Court during the Johnson administration was President Alfredo Stroessner of Paraguay. On the first day of his three-day official visit, on March 20, 1968, Stroessner "took tea" with the Justices.<sup>89</sup> Tours of the Supreme Court building conducted by a Justice are usually part of such visits. The President ruled Paraguay from 1954 to 1989, coming to power in a military coup and then being re-elected for eight consecutive terms. In many of these elections, either he was the only candidate or the fairness of the election was questioned. He was accused of repression and human-rights violations and of making Paraguay a refuge for some Nazi war criminals after World War II. Stroessner stayed in power for thirty-five years. Among twentieth-century Latin American heads of state, only Fidel Castro had a longer tenure. In 1989, Stroessner was ousted by a coup d'état, and he died in 2006 in exile in Brazil at the age of ninety-three.

In addition to foreign heads of state, the Chief Justice occasionally played host to judges and leaders of the legal profession from foreign countries at the Supreme Court. An example of this was the visit of Ethiopian Attorney General Bereket Habte Selassie in the summer of 1964. Warren had met Bereket during his visit to Ethiopia in 1963. Bereket recalled that "he struck me as a genuine article; no airs



of self importance, no pretensions. Of course, having read *Brown v. Board of Education*, I was biased in his favor from the word go. I considered him a great man, and when I met him in Addis I took to liking him instantly as a human being."<sup>90</sup> Jim Paul, dean of the new law school at Haile Selassie I University, accompanied the Attorney General to Washington, D.C. and telephoned Warren to see if they could meet.<sup>91</sup> The Chief Justice insisted that the two visitors join him for lunch at the Court. When Paul introduced Bereket to Warren, the Chief "exploded into a broad grin and said, 'I remember you, General. And a hearty welcome, Sir!'" Bereket remembered the Chief Justice "as a very kind and jovial man and generous host." Added Bereket, who now lives in the United States,

Men like Earl Warren are rare and when we get them we need to send them abroad as often as possible. They are the surest antidote to the likes of [poor official representatives in recent times]. In the same way the Peace Corps laid to rest the notion of the "Ugly American," good representatives of the institution that checks executive overreaching would help restore America's damaged image and generate good will once more.<sup>92</sup>

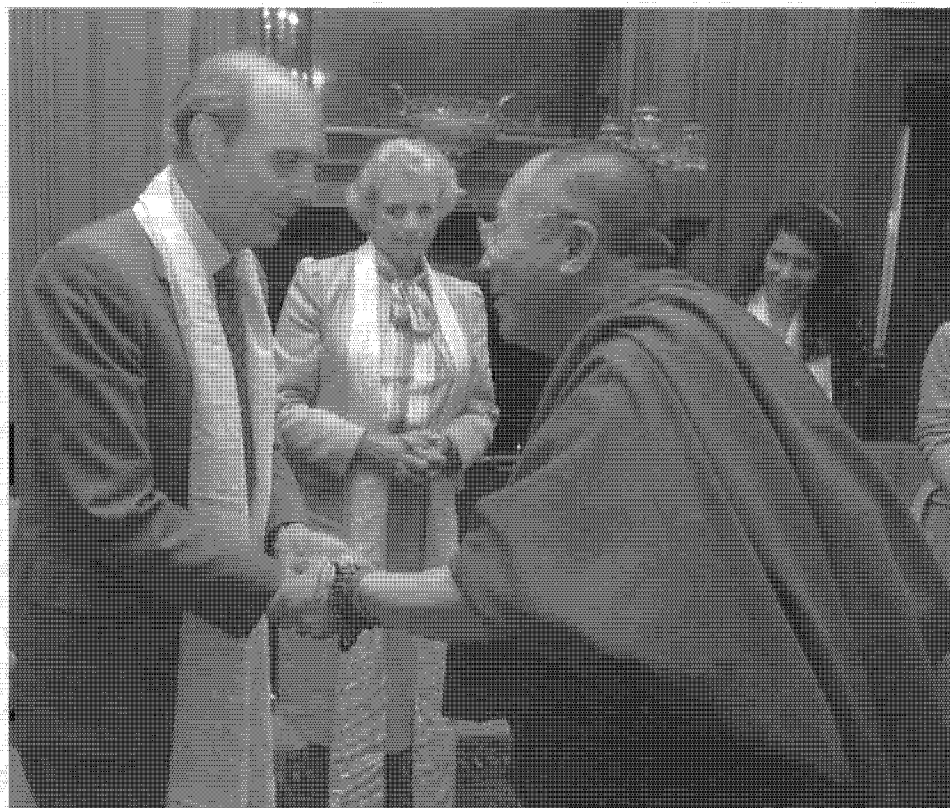
Bereket's holding of Warren in high esteem and fond remembrance may have been typical of those foreign lawyers who met the Chief. Jurists around the world proudly hung photographs of themselves with the Chief Justice on their office walls, noted former president of the American Bar Association Charles Rhyne.<sup>93</sup>

With the retirement of Chief Justice Warren in 1969, the Supreme Court went into dormancy as a site for honoring foreign heads of state. Not until 1996 was the tradition revived. But diplomacy at the Court continued, with a steady stream of state visitors from other levels of foreign governments, especially

the judiciary, touring the Court and meeting the Justices. Several types of "judicial exchanges," wherein Justices and judges from the United States traveled to a foreign country and visited their counterparts, were instigated and continue on a regular basis. Reciprocal visits by foreign judges frequently occur afterwards in the United States.

One of the most colorful visitors to the Court was His Holiness the Dalai Lama, the spiritual leader of most Tibetan Buddhists and the head of the Government of Tibet in Exile. He was the guest of Justice Stephen Breyer, who, along with Justices Harry A. Blackmun and Sandra Day O'Connor, Justice Breyer's wife Dr. Joanna Breyer, and the Breyers' daughter, Chloe, met with him in the Justices' Dining Room on September 13, 1995.<sup>94</sup> His Holiness, clothed in his usual monk's robe of maroon and gold, followed the Tibetan custom of offering a *kata*, or white scarf, in greeting to each of his American hosts. In the Vajrayana Buddhist tradition, the auspicious *kata* signifies the good intentions of the person offering it. Justice O'Connor later commented on the striking charisma of the Dalai Lama on that occasion.<sup>95</sup> On the same day he visited the Court, His Holiness, who was awarded the Nobel Peace Prize in 1989, met with President William J. Clinton and Vice President Albert Gore.

The tradition of honoring a foreign head of state with a luncheon at the Court was revived by Chief Justice William Rehnquist when President Mary Robinson of Ireland was his guest on June 14, 1996.<sup>96</sup> It was a small event, with only two tables in the West Conference Room. The Chief Justice and Justice O'Connor were the only Justices who attended, one at each table with invited guests. Robinson served as the first female President of Ireland from 1990 to 1997 and was the United Nations High Commissioner for Human Rights from 1997 to 2002. She first rose to prominence as an academic, barrister, and member of the Irish senate from 1969 through 1989. The night before her appearance at the Court, Robinson was



His Holiness the Dalai Lama, the spiritual leader of most Tibetan Buddhists and the head of the Government of Tibet in Exile, was invited to visit the Court by Justice Stephen Breyer (left) in 1995. Justices Harry Blackmun and Sandra Day O'Connor (center), Justice Breyer's wife Dr. Joanna Breyer, and the Breyers' daughter, Chloe, met with him in the Justices' Dining Room. His Holiness followed the Tibetan custom of offering a *kata*, or white scarf, in greeting to each of his American hosts.

the guest of the Clintons at a White House dinner as part of her state visit from June 12 to 15, 1996.

President Carlos Saúl Menem of Argentina was honored on January 12, 1999, with a tea at the Court hosted by Justice O'Connor, who had visited Argentina earlier that year.<sup>97</sup> All the Justices except Chief Justice Rehnquist attended. Menem, a lawyer trained at the University of Córdoba and a Peronist, was President of Argentina for ten years. His attempt to run for a third term in 1999 was ruled unconstitutional by Argentine courts. Although there are no photographs of Menem's visit to the Court in the Curator's files, two years afterwards he married Chilean television host and model Cecilia Bolocco, a former Miss Universe, who is thirty-five years younger than

he, and since that time the Menems have been frequent subjects of photo ops by the press.

Perhaps it was fitting that Justice O'Connor, the most recent former elected politician to serve on the Court, would be the successor of Chief Justice Warren as a host to foreign visitors in the conference rooms. Throughout her tenure on the Court, O'Connor attempted to foster collegiality among her colleagues by hosting or organizing lunches and dinners for the Justices. This no doubt reflected her background in Arizona politics, where she was the first female majority leader in any state senate and where she and her husband frequently entertained state legislators and other officials in their home. In 2007, after she had assumed "retired" status on the Court, Justice O'Connor served on the Iraq Study



Commission, a bipartisan group requested by Congress to assess the situation in war-torn Iraq and the surrounding region.

The tradition of foreign heads of state visiting the Court continued during the Chief Justiceship of John Roberts, when Alfred Moisiu, President of Albania, met with the Chief in the Lawyers' Lounge on September 18, 2006.

### The Court as a Site for Public Diplomacy

Under the leadership of Chief Justice Warren, the Supreme Court took up the challenge of exercising "public diplomacy"—interactions other than official ones between national governments. Effective public diplomacy involves dialogue, a two-way exchange of information, and people-to-people contacts are a significant aspect of that effort. From the early 1950s, when the practice of feting high-ranking foreign guests at the Court began, until the present time, U.S. public diplomacy has emphasized the nation's core values and subtly built an image of a benevolent global leader. The Justices have been adroit, upon occasion, in using the magnificent Court building as a place to meet visiting foreign heads of state and to advance the goals of public diplomacy. In contrast to the "hard power" of coercion and threat, and payment or inducement exercised by the executive and legislative branches in rough and tumble diplomacy, the judiciary has been a player in what Joseph Nye calls "soft power," the "ability to get what you want by attraction rather than coercion" in public diplomacy.<sup>98</sup> On view before the world's leaders, the Supreme Court stood four-square for human dignity under the rule of law, and that message was so perceived and admired by the international guests. In extending courtly hospitality to foreign dignitaries, the Justices developed lasting relationships with key individuals over many years, another hallmark of successful public diplomacy.

From all accounts, the Court's move into this previously uncharted area for the judiciary

was a resounding success. And why should it not have been? The Supreme Court is housed in an awe-inspiring temple of justice, one of Washington's—and the world's—great neoclassical buildings. Any occasion honoring a visiting leader in such surroundings was bound to be a memorable event, even as only one aspect of a state visit. And the Justices were among the most intelligent and knowledgeable Americans, who had frequently interpreted the core values of the nation in their work and were well able to represent the country in dialogue with foreign leaders. The visiting dignitaries had an opportunity to interact with the Justices at an institution admired abroad for its independence from other branches of government and for its protection of human rights. The Court's decisions ending racial segregation in public schools were especially lauded by official visitors, many of whom were learned in the law and had an affinity for fellow professionals on the bench.

For visiting foreign heads of state, the Court offered aspirational goals and attractive ideas for emulation. During a time of tense Cold War confrontations, the Supreme Court contributed to public diplomacy that successfully followed the sage advice of George Kennan in his so-called "X article," which appeared in the July 1947 issue of *Foreign Affairs*: "To avoid destruction, the United States need only measure up to its own best traditions and prove itself worthy of preservation as a great nation."<sup>99</sup> In utilizing the Supreme Court building as a welcoming site for foreign leaders to get acquainted with the culture of American law in its most revered institutional setting, the Justices did just that.

### ENDNOTES

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Department of History, St. Andrews University, Scotland, and Jordan Stone, Department of Political Science, Oklahoma State University, while interning in the office of U.S. Senator Don Nichols.

<sup>1</sup>See, e.g., Peter A. Bell, "Extrajudicial Activity of Supreme Court Justices," 22 *Stanford Law Review* 587–617 (1970); Russell R. Wheeler, "Judging What Justices Do Off the Bench," *Supreme Court Historical Society 1990 Yearbook*, available at [http://www.supremecourt.history.org/04\\_library/subs\\_volumes/04\\_c12\\_j.html](http://www.supremecourt.history.org/04_library/subs_volumes/04_c12_j.html) (last visited 1 August 2008); Russell R. Wheeler, "Extrajudicial Activities of the Early Supreme Court," 1973 *The Supreme Court Review* 123–58 (1973).

<sup>2</sup>Biographies of Warren, including his memoirs, are cited throughout this article.

<sup>3</sup>See Harry N. Scheiber, ed., **Earl Warren and the Warren Court: The Legacy in American and Foreign Law** (Lanham, MD: Rowman & Littlefield, 2007), especially the following chapters: Javier A. Couso, "The Seduction of Judicially Triggered Social Transformation: The Impact of the Warren Court in Latin America," pp. 237–63; Thomas Ginsburg, "The Warren Court in East Asia: An Essay in Comparative Law," pp. 265–94; Edward Greenspan, "The Impact of the Warren Court in Canada: A View from the Trenches," pp. 295–307; Eivind Smith, "Political Hero, Legal Dwarf? The Impact of the Warren Court in Europe," pp. 309–32; Kjell Ake Modeer, "An American Dilemma and the Scandinavian Dream: The Citizen Meets Modernity and the Strong Nation-State—A Study in Comparative Legal Cultures," pp. 333–55.

<sup>4</sup>Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court** (New York: Doubleday, 2007), p. 1.

<sup>5</sup>Ferdinand Kuhn, "Capitol Hears Nehru Warn Aggressors," *Washington Post*, 14 Oct 1949, p. 1.

<sup>6</sup>Vice President Radhakrishnan visited the United States in March 1958 and came again as President of the Republic of India in June 1963. Prime Minister Nehru returned to the United States in November 1961.

<sup>7</sup>"This Day That Age," dated June 27, 1956; Talks Postponed, *The Hindu*, Online edition, 27 June 2006, available at <http://www.hindu.com/2006/06/27/stories/2006062703030902.htm>; Edwin L. Dale, Jr., "Eisenhower, Nehru Postpone Parley," *New York Times*, 26 June 1956, p. 1.

<sup>8</sup>Memo, Marshal, SC, U.S. to CJ, 21 Nov 1956, Personal File, Box 115, Dinner for Prime Min. Nehru, Dec. 16, 1956, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter EWPLC).

<sup>9</sup>Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon & Schuster, 1997), p. 322; Box 799, Address, Rebild Festival, Copenhagen[?], Denmark, 4 July 1956, EWPLC.

<sup>10</sup>"Justice Warren in Switzerland," *New York Times*, 10 July 1956, p. 3.

<sup>11</sup>Russell Baker, "Warren Will Make India Goodwill Tour," *New York Times*, 27 July 1956, p. 1.

<sup>12</sup>See **Selected Works of Jawaharlal Nehru**, second series, volume XXXI, H.Y. Sharada Prasad & A.K. Damodaran, eds. (New Delhi: Oxford University Press India, 2004); Inder Malhotra, "A Peep into the Past," *The Hindu*, Online edition, *Literary Review*, 7 Sep 2003, available at <http://www.hindu.com/lr/2003/09/07/stories/2003090700170300.htm>.

<sup>13</sup>Baker.

<sup>14</sup>347 U.S. 483 (1954).

<sup>15</sup>Quoted in Cray, p. 292.

<sup>16</sup>Baker; Leo Katcher, **Earl Warren: A Political Biography** (New York: McGraw Hill, 1967), p. 357.

<sup>17</sup>A.M. Rosenthal, "India Welcomes Warren Politely," *New York Times*, 17 August 1956, p. 5.

<sup>18</sup>Chalmers M. Roberts, "India's Law Impresses Warren," *Washington Post*, 11 September 1956, p. 12.

<sup>19</sup>"Warren Is Hailed in Bombay," *New York Times*, 21 August 1956, p. 5.

<sup>20</sup>Roberts.

<sup>21</sup>The photograph of the Warrens with the Desais was published in the *New York Times*, 26 August 1956, p. 4. Desai later served as Prime Minister from 24 March 1977–15 July 1979. He was the first Prime Minister who did not belong to the Indian Congress Party.

<sup>22</sup>Letter, Warren to Dean Rusk, President Rockefeller Foundation, 20 Nov 1956, Personal File, Box 56, India-1956, EWPLC; "Justice Warren in Madras," *New York Times*, 22 August 1956, p. 20.

<sup>23</sup>"Warren, in Calcutta, Says Law Schools Do Much Better Than 30 Years Ago," *New York Times*, 25 August 1956, p. 17.

<sup>24</sup>A.M. Rosenthal, "New Delhi Greets Warren Warmly," *New York Times*, 29 August 1956, p. 12.

<sup>25</sup>"Indian Paper Hails Warren," *New York Times*, 24 August 1956, p. 5.

<sup>26</sup>Rosenthal, "New Delhi Greets."

<sup>27</sup>Quoted in Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court** (New York: New York University Press, 1983), p. 203; Katcher, p. 356.

<sup>28</sup>Jack H. Pollack, **Earl Warren: The Judge Who Changed America** (Englewood Cliffs, NJ: Prentice-Hall, 1979), p. 304.

<sup>29</sup>Quoted in Katcher, p. 357.

<sup>30</sup>Gerald T. Dunne, **Hugo Black and the Judicial Revolution** (New York: Simon & Schuster, 1977), p. 335.

<sup>31</sup>Earl Warren and Chester Bowles, moderated by William D. Patterson, "Dialogue on India: A Great Friend's Future," *Saturday Review*, 9 January 1957, p. 34.

<sup>32</sup>"Delhi Honors Warren," *New York Times*, 1 September 1956, p. 3; Cray, p. 323.

<sup>33</sup>Clipping, 31 August 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>34</sup>Earl Warren, **The Memoirs of Chief Justice Earl Warren** (Lanham, MD: Madison Books, 1977), p. 263. Warren sat in a choir seat at Westminster Abbey and noticed

Prime Minister Nehru sitting opposite him. A photograph of Warren and Nehru appeared in the *New York Times*, 2 September 1956, p. 20.

<sup>35</sup>Box 799, Address, the All-India Radio network, 30 August 1956, EWPLC; Roberts; Katcher, p. 357.

<sup>36</sup>Roberts; John D. Weaver, *Warren: The Man, the Court, the Era* (Boston: Little Brown, 1967), p. 253.

<sup>37</sup>"Justice Warren Lays Cornerstone," *Washington Post*, 2 September 1956, p. A17.

<sup>38</sup>The Court's copy of the film was sent to Earl Warren, Jr. on 21 June 1957.

<sup>39</sup>Roberts; "Warren Ends India Visit," *New York Times*, 3 September 1956, p. 3; "Warren Stops in Hong Kong," *New York Times*, 4 September 1956, p. 10; "Chief Justice Warren Has Cold," *New York Times*, 9 September 1956, p. 77.

<sup>40</sup>Schwartz, p. 203.

<sup>41</sup>Letter, John M. Harlan to Felix Frankfurter, 28 July 1956, Felix Frankfurter Papers, Harvard Law School, Cambridge, MA (hereafter Felix Frankfurter Papers).

<sup>42</sup>Letter, Frankfurter to Harlan, 31 July 1956, Felix Frankfurter Papers.

<sup>43</sup>Letter, William O. Douglas to Hugo L. Black, 24 August 1956, Hugo L. Black Papers, Library of Congress, Washington, D.C. International travel by Douglas is described in Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003), p. 289.

<sup>44</sup>Letter, Graham R. Hall to Warren, 18 May 1957, and Letter, Henry C. Ramsey, American Consul General, Madras, to Warren, 8 November 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>45</sup>Letter, S.R. Das to Warren, 18 March 1958, Personal File, Box 56, India-1956, EWPLC.

<sup>46</sup>George Sokolsky, "These Days, The Supreme Court's Role," *Washington Post*, 10 September 1956, p. 17.

<sup>47</sup>S. 2646, 85<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1957); H.R. 9207, 85<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1957); see generally C. Herman Pritchett, *Congress Versus the Supreme Court 1957-1960* (Minneapolis: University of Minnesota Press, 1961); Pollack, p. 196; Theodore M. Vestal, *The Eisenhower Court and Civil Liberties* (Westport, CT: Praeger, 2002), pp. 5, 293-94; Sheldon D. Elliott, "Court-Curbing Proposals in Congress," 33 *Notre Dame Law* 597 (1958); Joseph L. Raugh, Jr., "The Truth about Congress and the Court," *The Progressive*, November 1958, p. 30.

<sup>48</sup>Letter, John J. McCloy, Chairman, Council on Foreign Relations, New York City, to Warren, 9 August 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>49</sup>The biography was compiled by D.G. Tendulkar. 2 October 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>50</sup>Letter, Warren to Dean Rusk, 20 November 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>51</sup>Letter, Warren to Nehru, 19 November 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>52</sup>Letter, Nehru to Warren, 6 December 1956, Personal File, Box 56, India-1956, EWPLC.

<sup>53</sup>Memo, Marshal, SC, U.S. to CJ, 21 Nov 1956, Personal File, Box 115, Dinner for Prime Min. Nehru, Dec. 16, 1956, EWPLC.

<sup>54</sup>Personal File, Box 115, Dinner for Prime Min. Nehru, Dec. 16, 1956, EWPLC.

<sup>55</sup>"Warrens Entertain Nehrus," *New York Times*, 17 Dec 1956, p. 10; Dana Adams Schmidt, "President Begins Talks with Nehru to Broaden Amity," *New York Times*, 17 Dec 1956, p. 1.

<sup>56</sup>Note from Frankfurter to CJ, 17 Dec 1956; Note from Burton to CJ, 17 Dec 1956; Letter from Indira Gandhi to Mrs. Warren, 6 Jan 57; and Letter from Mrs. Warren to Indira Gandhi, 22 Jan 57, all in Personal File, Box 115, Dinner for Prime Min. Nehru, Dec. 16, 1956, EWPLC.

<sup>57</sup>"Eisenhower Sees Nehru 14 Hours," *New York Times*, 18 December 1956, p. 1; "Nehru Tells U.S. India is 'Dynamic,'" *New York Times*, 19 December 1956, p. 1.

<sup>58</sup>Nehru met Eisenhower again in New York City while attending the UN General Assembly session on 26 September 1960.

<sup>59</sup>U.S. Supreme Court, Curator Special Events Files.

<sup>60</sup>According to the Official Website of the Royal Monarchy. "Her Majesty the Queen, Education," available at <http://www.royal.gov.uk/output/Page5544.asp>.

<sup>61</sup>U.S. Supreme Court, Marshal Lippitt Papers.

<sup>62</sup>"President of Liberia Due Monday," *Washington Post*, 17 October 1954, p. F11.

<sup>63</sup>Paul Sampson, "Washington Greets Liberia's President," *Washington Post*, 19 October 1954, p. 1.

<sup>64</sup>U.S. Supreme Court, Marshal Lippitt Papers.

<sup>65</sup>U.S. Supreme Court, Marshal Lippitt Papers.

<sup>66</sup>U.S. Supreme Court, Photographs and Curator research files.

<sup>67</sup>U.S. Supreme Court, Curator research files.

<sup>68</sup>Russell Baker, "Diem Lauds U.S. Aid in Talk to Congress," *New York Times*, 10 May 1957, p. 1.

<sup>69</sup>Box 116, File, CJ Luncheon for King of Morocco, 16 November 1957, EWPLC.

<sup>70</sup>Email, Matthew Hofstedt, Associate Curator, U.S. Supreme Court, to author, 8 April 2005.

<sup>71</sup>Box 116, File, Luncheon for King & Queen of Thailand, 29 June 1960, EWPLC.

<sup>72</sup>Speech, 29 June 1960.

<sup>73</sup>"Get Acquainted' Visit," *New York Times*, 7 August 1961, p. 2; "The Nehru Visit," *Time*, 10 November 1961, p. 28; E.W. Kenworthy, "Kennedy Takes Up Snags with Nehru," *New York Times*, 9 November 1961, p. 15.

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<sup>91</sup>James C.N. Paul, telephone interview, 6 September 2006.

<sup>92</sup>Email, Bereket Habte Selassie to author, 8 September 2006.

<sup>93</sup>Cray, p. 293.

<sup>94</sup>U.S. Supreme Court, Photographs and Curator research files.

<sup>95</sup>Public program, "A Life in the Law: A Conversation with the Honorable Sandra Day O'Connor," University of Tulsa, Tulsa, Oklahoma, 1 June 2007.

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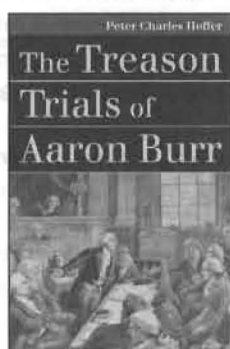
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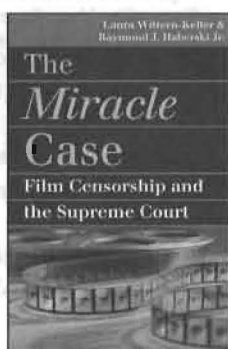


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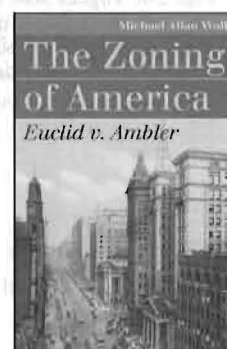
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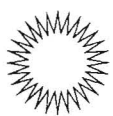
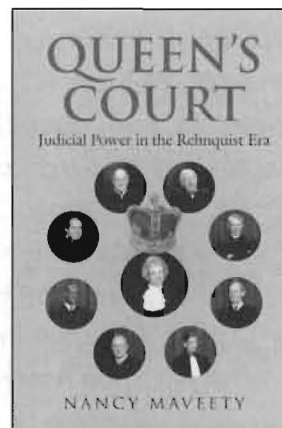
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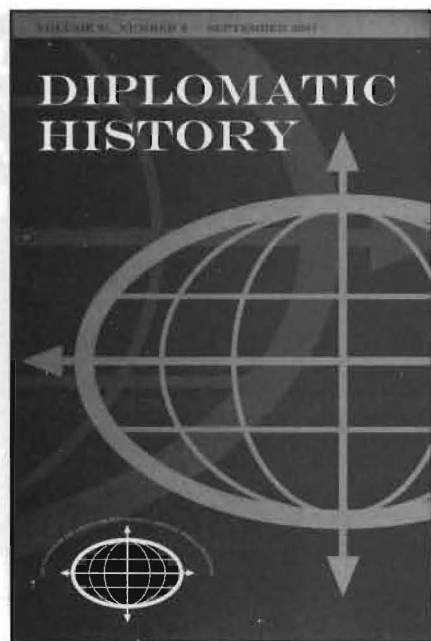
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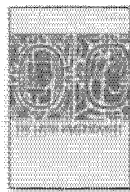
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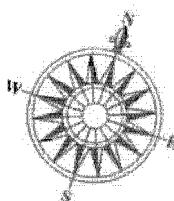


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