Introduction

Melvin I. Urofsky

Various issues of the *Journal* show differing degrees of internal consistency. When we publish the pieces that grow out of our annual lecture series, all or nearly all of the articles in that issue relate to a particular theme, such as the recent issue carrying the lectures on Thomas Jefferson. While there is certainly much interest in looking at an important topic from several angles, I prefer those issues where the articles constitute a potpourri. It is these issues, like the one you now hold in your hands, that in my mind best capture the great richness that characterizes the history of the Supreme Court. Despite the number of years I have studied the Court and edited this journal, I never cease to be pleasantly surprised by new ways scholars keep discovering to inform us about the Court's past.

As Ross Davies notes, we are all so used to the idea of one indivisible Supreme Court that many of us cannot fathom the idea that for nearly four decades the duties of the nation's highest tribunal were carried on by a single member sitting in Washington for the August Term, a condition created by the Jeffersonians as part of their plan to undo the 1800 Judiciary Act. Not only did this "rump" Court sit, but it actually dealt with some cases. One can only feel sympathy for the poor Justice who had to attend to the Court's business in an un–air conditioned federal city, especially when he had already put in hard time riding circuit.

Although we tout the American system of government as a divided or separated one, where the executive, legislative and judicial functions are walled off from one another, historians and political scientists have long known that the lines of demarcation are never sharp, but often fuzzy. John Kaminski, one of the pre-eminent scholars of the Federalist era, and C. Jennifer Lawton explore one of those overlapping areas, the grand jury charges of Chief Justice John Jay. In that era such charges rarely had anything to do with law, and a great deal to do with politics and public policy. In fact, some of the Framers saw such charges as one way to bring the government closer to the people.

All of us who are lawyers (or have law degrees) at one time or another think about the remote (extremely remote) possibility that we would one day be appointed to the high court, to serve in the same body that included

John Marshall, Stephen J. Field, Oliver Wendell Holmes, Jr., Louis D. Brandeis, William J. Brennan, Jr. and the two John Marshall Harlans. While enjoying that fantasy, it would never occur to us to decline such an honor. Yet apparently a number of people have, and Bennett Boskey, a former clerk in the Court, recounts some of those stories.

Mr. Boskey has limited his account to a certain type of declination, but there are a number of urban legends around as to other instances where someone has rejected an offer to become a Justice. Whether it is true or not, for example, I heard many times that John Kennedy wanted to put the noted Harvard Law scholar Paul Freund on the Court, and could not understand why Freund would want to stay in Cambridge.

Speaking of stories, the Society is currently in the process of collecting stories about the Court, the kind that often do not wind up in scholarly publications. Please see the notice that our managing editor, Clare Cushman, has put into this issue, and if any of you know some good tales (preferably true), please share them with us.

Several years ago we began offering a Hughes-Gossett prize to students for papers relating to the Supreme Court, and the high quality of those efforts has confirmed our judgment in creating that award. This year the prize goes to Helen J. Knowles, who while a student at Boston University challenged the accepted wisdom of the Solicitor General as a "tenth member" of the Court. At least for Archibald Cox during the reapportionment cases, the SG's office and the Justices operated on separate wave lengths.

Finally, Grier Stephenson helps us to keep abreast of new books on the Court's history, a job that he has been doing for many years, and doing very well.

So, enjoy the potpourri, and let us hear from you if you have some good stories.

The Other Supreme Court

ROSS E. DAVIES*

> "The judicial Power of the United States, shall be vested in *one* supreme Court."
> —U.S. CONST. art. III, § 1 (emphasis added)

Despite the Constitution's "one supreme Court" language, the Supreme Court came in two flavors for thirty-seven years. From 1802 to 1838, the members of the Court gathered in Washington every winter for a conventional *en banc* February Term,[1] but then in the summer a single Justice would return to the nation's capital to sit alone as a rump Supreme Court for a short August Term.

This odd one-Justice rump Court does not fit the longstanding and widely accepted understanding that the words "one supreme Court" mean "one [indivisible] supreme Court"—a single *en banc* body consisting of all of its available and qualified members to conduct its business. The Framers of the Constitution thought that was what they said when they chose those words, as the records of the constitutional convention of 1787 show.[2] Gouverneur Morris, an influential figure in the drafting of the Constitution, recalled this point on the floor of the Senate in 1802: "The constitution says, the judicial power shall be vested in *one* supreme *court*, and in inferior *courts*. The legislature can therefore only organize *one* supreme court, but they may establish as many inferior courts as they shall think proper."[3] A couple of generations later, Chief Justice Morrison R. Waite was even more emphatic about the indivisibility of the "one" Supreme Court. Addressing a banquet in Philadelphia during a celebration of the centennial of the Constitution, while Congress in Washington debated proposals to enlarge and panelize the Court,[4] he said,

> I beg you to note this language: "ONE SUPREME COURT and such inferior courts as Congress MAY, FROM TIME TO TIME, ordain and establish." Not a Supreme Court or Supreme Courts, but "ONE," and ONLY ONE. This *one* Supreme Court Congress cannot abolish, neither can it create another. Upon this the Constitution has no doubtful meaning. There must be one, and but one. Certainly such a provision, in such pointed language,

Pennsylvania delegate Gouverneur Morris had a great deal of influence on the ultimate formulation of the language of the Constitution. He disagreed with proposed language prohibiting increases in the salaries of Supreme Court Justices on the ground that the other solution to an increasing workload—adding more members—would not reduce the burdens of individual Justices since cases could not be divided among them.

> carries with it the strongest implication that when this court acts, it must act as an entirety, and that its judgments shall be the judgments of the court sitting judicially as one court and not as several courts.[5]

In the same vein, Waite's colleague Justice Stephen J. Field reported that theory and practice were in accord on the Court: "No case in the Supreme Court is ever referred to any one Justice, or to several of the Justices, to decide and report to the others."[6] And Chief Justice Charles Evans Hughes wrote to Congress in 1937, at the height of the controversy over President Franklin Roosevelt's Court-packing plan: "I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested 'in one Supreme Court' . . . . The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts."[7] Finally, retired Chief Justice Earl Warren attacked a proposal for the creation of a National Court of Appeals in part on indivisibility grounds, rhetorically asking, "When the jurisdiction of the Supreme Court is exercised by two courts, have we not created two Supreme Courts in contravention of this constitutional limitation?"[8] Nothing has changed, then, since the Constitution was written and ratified. It is and always has been understood that Congress's implementation of the "one supreme Court" language of Article III has not involved and could not involve a reorganization of the Court under which some Justice or Justices conducted the Court's business while others qualified to serve were compelled to watch from the sidelines.[9]

But this historical belief in perfect congressional perpetuation of the "one [indivisible] supreme Court" is mistaken. Early Congresses did not always treat the constitutional commitment to "one supreme Court" as an absolute bar to all subdivision of the structure and business of the Court. And the Supreme Court itself went along with the legislature in the 1802 creation of the one-Justice rump Supreme Court that sat every year on the first Monday of August until 1839.

From "Midnight Judges" to "Mongrel Court"

The rump Court was a byproduct of what President Thomas Jefferson called "the Revolution of 1800"—that year's presidential and congressional elections in which he and his Republican partisans defeated the Federalists.[10]

President John Adams and the outgoing Federalist Congress took advantage of the subsequent lame-duck legislative session to create several new judgeships in the "Midnight Judges Act" and then fill them with

Federalists.[11] The new denizens of this enlarged judiciary were the "Midnight Judges" whose commissions Adams was diligently signing, and his Secretary of State John Marshall was somewhat ineptly distributing, in the hours before the last Federalist President's term ended.[12] Jefferson and the Republicans were unhappy with this maneuver and set about undoing it shortly after they took office.[13] The result was the Repeal Act of March 8, 1802.[14] It was followed a few weeks later by the "Act to amend the Judicial System of the United States" (the "April Act"), which—in the course of insulating the Repeal Act from effective judicial review by the Supreme Court—created the one-Justice rump Court that was to outlive not only the Midnight Judges controversy, but all of the major participants in it.[15]

Debates on the floors of the House and Senate, and private correspondence among the Justices, highlighted constitutional objections to key provisions in the Repeal Act and the April Act, but the section of the Repeal Act creating the one-Justice rump Court was not one of them. While there were a few objections on policy grounds, it was constitutionally unobjectionable in Congress and the Court. Based on the course of legislation—from the Midnight Judges Act to the Repeal Act to the April Act—the rump Court was, to all appearances, accepted as either a pragmatic (if one was a Republican) or a cosmetic (if one was a Federalist) compromise between abolition and preservation of one of the Court's two annual Terms.

The Midnight Judges Act of 1801 "combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party."[16] It was designed to serve two functions: (1) to repair several defects in the Judiciary Acts of 1789 and 1793,[17] most importantly by relieving members of the Supreme Court of the circuit-riding duties they had borne since 1789[18]; and (2) to embed as many Federalists as possible in the judicial branch as a bulwark against the incoming Republican Congress and President by creating sixteen new circuit court judgeships for the lame-duck Federalists to fill before they left office.[19] As Jefferson not entirely unfairly characterized the intentions of the Federalists, "[T]hey have retired into the Judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased."[20]

The Repeal Act of 1802 was the Republicans' straightforward response: It declared that the Midnight Judges Act "is hereby repealed."[21] Alas, repeal raised troubling constitutional problems, the most significant being the abolition of the sixteen new judgeships, all of which were already occupied.[22] The Constitution provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,"[23] and no one of consequence was claiming that any of the new judges had engaged in impeachably bad behavior. Nor was there any doubt that the Federalists had complied with the constitutional requirements of presidential nomination, senatorial advice and consent, presidential appointment and commissioning, and judicial oath-taking.[24] So there was no way for the Republicans to remove or ignore the new judges on constitutional grounds. Nor was there any sentiment for the delayed gratification of a statute under which the new judgeships would expire with the incumbents.[25]

The Republican revolution required a prompt return to the status quo ante the Midnight Judges Act. Thus, the only acceptable solution was to torpedo the new judgeships with the Midnight Judges still on board, notwithstanding the apparent Article III prohibition on the removal of well-behaved judges. The Republicans justified the judicial abolitions on the ground that the Constitution merely protected a judge's office-holding so long as the office existed, but that nothing prevented Congress and the President from abolishing the office itself, and once the office was gone, the judge no longer had any constitutionally protected right to hold it.[26] The Federalist minority

sensibly pointed out that this would make a nullity of judicial independence under Article III.[27] Both sides invoked the Constitution's "one supreme Court" mandate. The Republicans cited it to contrast Congress's constitutional inability to destroy the Supreme Court with its constitutional authority to destroy inferior courts,[28] while the Federalists used the same language to justify the Midnight Judges Act,[29] suggesting that circuit-riding improperly hampered the capacity of the Justices to sit as a Court.[30] Although the Federalists probably had the better constitutional argument, the Republicans had the votes in Congress and a President who approved.[31]

It was not at all clear, however, that the Republicans had the votes on the Supreme Court to uphold the constitutionality of the Repeal Act. The Court was populated entirely by Federalists, and by judges who hated to ride circuit. In fact, private correspondence among the Justices reveals that Chief Justice John Marshall and Justice Samuel Chase were decidedly for overturning the Repeal Act, while Justices William Cushing, William Paterson, and Bushrod Washington were unwilling to take that step.[32]

Anticipating trouble at the Supreme Court, the Republican Congress passed the April Act—a transparent and ultimately successful attempt to insulate the Repeal Act from review by the Supreme Court until after the Justices had ridden circuit in the upcoming summer and fall of 1802. By then, the operation of the Repeal Act would be well established, and the Justices' circuit riding would displace the Midnight Judges, thus implicitly conceding the force of the Repeal Act. The April Act achieved this end by extending the Republican repeal movement to include a provision of the original Judiciary Act of 1789: "[S]o much of the [1789 Act] as provides for the holding a session of the supreme court of the United States on the first Monday of August, annually, is hereby repealed."[33] As a result, the Supreme Court could not sit to hear a challenge to the Repeal Act until its next sitting, in February 1803.[34] Eventually, after caving in and riding circuit—political reality and the arguments of Cushing, Paterson, and Washington having prevailed over the pique of Marshall and Chase—the Court upheld the constitutionality of some of the Repeal Act's provisions and dodged review of the rest,[35] to the disappointment of Federalist pols.[36]

But the Republicans' hostility toward federal judges in general and the Supreme Court Justices in particular (at least so long as they were Federalists) did not manifest itself in an unrealistic plan to do away with the national judiciary entirely.[37] There were a couple of hotheaded exceptions, but, lacking Jefferson's support, their calls for abolition of the Federalist judiciary went nowhere.[38] The Republicans abolished the August *en banc* sitting of the Court, but they preserved the February sitting.[39] And, in an effort to keep the wheels of justice turning at the Court—and perhaps take the edge off Federalist claims that the abolition of the August Term created by the Judiciary Act of 1789 was a scurrilous ploy to avoid judicial review of the Repeal Act—they created in the second section of the April Act a new kind of Supreme Court session, limited to procedural issues and conducted by one Justice:

> *And be it further enacted*, That it shall be the duty of the associate justice resident in the fourth circuit formed by this act, to attend at the city of Washington on the first Monday of August next, and on the first Monday of August each and every year thereafter, who shall have power to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein, preparatory to the hearing, trial or decision of such action, suit, appeal, writ of error, process, pleadings or proceedings: and that all writs

> and process may be returnable to the said court on the said first Monday in August, in the same manner as to the session of the said court, herein before directed to be holden on the first Monday in February, and may also bear teste on the said first Monday in August, as though a session of the said court was holden on that day, and it shall be the duty of the clerk of the supreme court to attend the said justice on the said first Monday of August, in each and every year, who shall make due entry of all such matters and things as shall or may be ordered as aforesaid by the said justice, and at each and every such August session, all actions, pleas, and other proceedings relative to any cause, civil or criminal, shall be continued over to the ensuing February session.[40]

Federalists in Congress were as outraged in April by the April Act as they had been in March by the Repeal Act, but almost none of their anger—and absolutely none of their constitutional objections—was directed at the new rump Court. They taunted the Republicans about the true purpose of the April Act: "Are the justices of the Supreme Court objects of terror to [Republican] gentlemen? . . . Are they afraid that they will pronounce the repealing law void?"[41] The Republicans replied with the obvious reciprocal: "But we have as good a right to suppose [Federalist] gentlemen on the other side are as anxious for a session in June [or August], that this power may be exercised, as they have to suppose we wish to avoid it, to prevent the exercise."[42] Congressman Lucas Elmendorf of New York even suggested a pecuniary motive for the Federalists' hostility to the Act: "As to the opposition to this bill, do not gentlemen see who oppose it? They are those who reside in or near this place—gentlemen of the bar, who will monopolize the whole business of the courts, and who naturally think the more terms the better for them."[43]

Supplementing such barbs with plausible constitutional objections to the April Act was harder. James Bayard of Delaware, who led the Federalist opposition to the Repeal Act and the April Act in the House of Representatives, was reduced to spluttering, "The effect of the present bill will be[] to have no court for fourteen months. Is this Constitutional?"[44] He had no answer for his own question, and the Republicans felt no need to provide one. Debate on policy grounds continued for a short while, with the Federalists complaining mightily that the abolition of the August sitting by the full Court would prolong litigation and encourage abusive delay tactics by defendants.[45]

Federalists derided the August-Term rump Court as "a certain mongrel court . . . to consist of one justice, vested with power to take preliminary steps without authority to take final ones."[46] But that was as far as it went. The April Act passed without a single objection that the rump Court suffered from any constitutional defect involving the "one supreme Court" requirement, or, for that matter, any other provision of the Constitution.[47]

The rump Court passed muster even more easily at the Supreme Court itself, where it was never questioned by Justices or litigants. The Justices, who were fulminating and debating in their internal correspondence about the constitutionality of the abolition of the circuit courts and the reinstitution of circuit-riding for themselves, were apparently perfectly unconcerned about the new rump August Term. Even Justice Chase, who wrote to Chief Justice Marshall on April 24, 1802 that he was prepared to lose his seat on the Court in the fight against the unconstitutional terms of the Repeal Act, placidly expressed in that same letter his hope for an early conference of the Court to discuss strategy, suggesting "that the Judges could meet me, at Washington, on the first Monday of August next, when I must be there to prepare the Cases for trial."[48] Chase was the "associate justice resident in the fourth circuit formed by [the April] act" who was assigned the "duty of . . . attend[ing] at the city of Washington on

the first Monday of August next . . . to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein."[49]

Chase's uncharacteristic equanimity in the face of the new rump Court assignment may have come as a disappointment to the Republicans. He was the Federalist judge most despised by the Republicans, having been, among other things, the most vigorous in adjudicating cases brought against Republican publishers under the Alien and Sedition Acts.[50] So, there may have been some bear-baiting sentiment behind the selection of Chase to serve on the rump Court—Republicans perhaps hoping that he would refuse to serve in that capacity, thus providing additional fodder for the soon-to-be-commenced impeachment proceedings against him. After all, it would have been just as easy and geographically convenient to assign the rump-Court duties to the congenial and widely respected resident of Virginia in the fifth circuit, Chief Justice John Marshall, instead of Chase, the cantankerous and controversial resident of Maryland in the fourth circuit. Moreover, assigning the rump Court to the Chief Justice—the only member of the Supreme Court explicitly specified by the Constitution[51]—might have added just a bit more constitutional legitimacy to this oddball institution.

In any event, Marshall forwarded Chase's invitation to Justice Paterson with similar complaisance: "[H]e has requested . . . that we should meet in Washington . . . in August next when he is directed to hold a sort of a demi session at that place."[52]

Less than fifteen years after the ratification of the Constitution, with its "one supreme Court" mandate, nobody said "boo" about the constitutionality of the rumping of that Court. There were arguments between the contending political factions about the utility of transforming the Court's August Term from a full-blown, *en banc*, case-or-controversy-deciding session into a purely procedural session, but that was as far as it went. The lack of any constitutional objection to the existence of the rump Court speaks even more loudly in light of the Constitution's repeated invocation in the course of the debates over other provisions of the Repeal Act and the April Act. If there was ever a time when the constitutionality of legislative interference in Court operations was top of mind, it was in the winter and spring of 1802. And yet the rump Court passed through unchallenged.

Thus, at the beginning of the nineteenth century, all three branches of the federal government joined or acquiesced in the creation of the one-Justice rump Supreme Court of 1802, a long-lasting illustration of the flexibility of Article III's "one [indivisible] supreme Court" requirement.

The "Demi Sessions" of 1802 to 1838

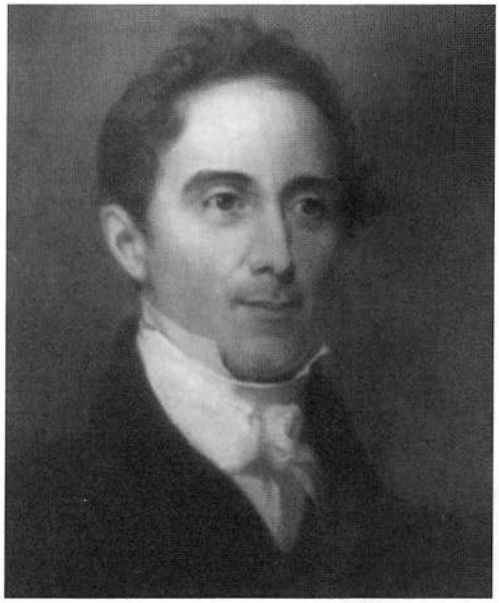
The Supreme Court—either in the form of Justice Chase sitting at the August Term or in the form of the *en banc* Court sitting at the February Term—might have resisted the perpetuation of the August Term as a division of the "one [indivisible] supreme Court," but it did not. Instead the Court chose to treat both of its forms—*en banc* and rump—as versions of the same body, albeit with different ranges of authority depending on whether it was sitting by the authority of the first section of the April Act (*en banc*, with broad authority to decide cases and controversies), or the second (rump, with only limited procedural powers).

The opportunity to stymie the August Term rump Court, at least as an edition of the Supreme Court, arose from the muddy language of the April Act. Its first section repealed the portion of the Judiciary Act of 1789 that "provides for the holding of a session of the supreme court . . . on the first Monday of August," and its second section merely ordered that one Justice "attend at the city of Washington on the first Monday of August . . . to make all necessary orders . . . *as though* a session of the said court was holden on that day."[53] But other language in the April Act made this

less than an easy answer, because the Act was textually of two minds about the status of the August rump Court. The second section of the Act also referred to the rump session as "*such* August session," and made provisions for the attendance of the Clerk of the Court and the treatment of August Term filings and orders that leave little doubt that the proceedings of the rump were to be treated as identical to proceedings of any other session of the Court.[54] In addition, it used exactly the same language to describe the scope of the powers of the Justice from the fourth circuit sitting at the August Term and the scope of the powers of less than a quorum of Justices sitting at the February Term.[55] Furthermore, if the rump Court was not a Supreme Court, what could it be? The Constitution grants Congress wide latitude to vest the "judicial Power . . . in such inferior Courts as [it] may from time to time ordain and establish."[56] Perhaps the rump Court was some sort of one-off inferior court, but if it was, it was an inferior court that performed only functions of the Supreme Court, and the decisions of which were not subject to any sort of review. In other words, it was an inferior national court of last resort conducting only unreviewable business of the Supreme Court and staffed only by a Justice and the Clerk of that Court. This would have been at most a distinction without a difference, and maybe not even that.

The bottom line is that neither the Supreme Court nor anyone else ever treated the August Term as anything other than a session of the Supreme Court. The behavior of the Justices, the Clerk of the Court, and counsel appearing at rump sessions all testify to the recognized legitimacy of the rump Term. None of which is to say that the August Term was of great substantive consequence,[57] at least until near the end of its existence.

At the outset, Samuel Chase, the Justice assigned to serve as the sole member of the rump Court,[58] dutifully came to Washington on the first Monday of August 1802. He met the Clerk of the Court, Elias B. Caldwell,[59]



The routine behavior of Clerk of the Court Elias B. Caldwell during the August rump Court of 1802, and the mundane manner in which business was conducted, support the notion it was a legitimate Term of Court.

and, according to the minutes of the Supreme Court, opened Court as follows:

> At a Session of the Supreme Court of the United States, begun and held at the City of Washington on Monday the 2d day of August in the year of our Lord 1802 agreeably to the Statute in such Case made and provided Samuel Chase one of the Associate Justices of the said Supreme Court and resident of the fourth Circuit was present and the Clerk of the said Supreme Court attending it is ordered by the said Judge that the following entries be made in the following actions to wit . . . .[60]

The first rump Term, like all but one or two of its successors, was short and dull. Chase ordered, and Caldwell recorded, a few routine joinder orders and the continuation (that is, preservation for hearing at the next Term) of all of the cases on the Court's docket.[61] The very routineness with which the records of the first

rump August Term are treated support its status as just another Term of the Supreme Court. The minutes for the Term are just like the minutes for any other Term of the Court. The opening paragraph quoted above follows the well-settled formula used by the Court for all sessions during the preceding years (other than the references to Chase and his residence), and the subsequent running head reads "August Term 1802."[62] The whole business appears in the Court's minute book between the minutes for December Term 1801 and the minutes for February Term 1803. In other words, the only major differences between August Term 1802 and the Terms that occurred immediately before and after it were the date, the attendees, and the scope of the work. Justice Chase and Clerk Caldwell treated it as a Term, and when the Court met *en banc* in 1803, it treated the orders of the August Term as valid exercises of the Court's authority, taking up cases in which Chase had issued orders in August without remark.[63]

The Court's minutes record equally uneventful August Term sittings by Chase from 1803 through 1807.[64] The purely routine nature of the August Term's docket is reflected in the 1807 minutes, which begin with a formulaic session-opening paragraph similar to the one quoted above, and then, without even bothering with the usual list of cases continued, report that "[i]t is ordered by the said Judge (no counsel attending) that the causes on the Docket be continued."[65]

The full Court and counsel appearing before it also occasionally dealt with issues relating to or arising from the August Term Court. In 1806 the full Court issued a new rule governing assignment of errors on appeal, specifying that "[i]n cases not put to issue at the August Term, it shall be the duty of the Plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the Term."[66] In *Blackwell v. Patten*, the full Court refused to quash a writ of error that was challenged on the ground that it had not been properly filed during the preceding August Term.[67] In other cases, the Court heard arguments addressing the August Term or issued orders contemplating service or other performance in conjunction with the August Term.[68] Again, no one ever intimated that there was anything improper or constitutionally questionable about the existence or operation of the rump Court.

Following the August 1807 Term, there is an unexplained gap in entries of minutes for the August Terms, after which the routine picks up with Gabriel Duvall—Chase's successor as Justice resident in the fourth circuit—presiding in 1812.[69] Duvall, perhaps impatient with the mundane routine of the August Term, appears to have neglected his duties.[70] For the 1820 rump sitting, the opening paragraph of the minutes has a blank space before the words "one of the associate Justices of the said Supreme Court and resident of the fourth Circuit in the state of Maryland was present."[71] The same gap appears in the minutes for the 1821 through 1835 August Terms.[72] After Duvall's retirement in 1835, newly commissioned Chief Justice Roger Taney, another resident of the fourth circuit, assumed responsibility for the August Term.[73] By the time Taney took over, a contemporary newspaper could accurately report that "[f]or many years past, the business of this court has been entirely *pro forma*, requiring neither argument by counsel, nor decision by the court; and the attendance of the judge has not always been deemed necessary."[74] At the same time, however, the August Terms—and the rules governing them—were widely recognized by scholars and practitioners as genuine elements of the Court's operations.[75]

Taney was to serve as rump Justice for only three August Terms, from 1836 to 1838.[76] But it was during his relatively brief tenure that the August Term proceedings—two in particular—most clearly demonstrated that the rump Court was a division of the Supreme Court. First, there was Taney's presentation of his own letters patent (his commission) and evidence of oath-taking at the August 1836 Term.

Second, there was his treatment of the case of *Ex parte Hennen* at the August 1838 Term, combined with his second opinion in that case, delivered at the sitting of the full Court in January 1839.

When Taney ordered that the minutes of the August 1836 Term include his presentation to the Court of his letters patent and evidence that he had taken the constitutional and statutory oaths of office,[77] he was following a tradition that had begun on February 2, 1790, with the first member of the Court, Chief Justice John Jay.[78] Before taking a seat on the Court, every Justice was expected to present his paper qualifications to the Court. Every member of the Court had done so (or, in a few cases, was presumed to have done so)[79] for more than forty years. It is difficult to believe that Taney, or the Clerk, could have viewed his presentation of his papers at the August Term as anything other than the traditional presentation of papers to the Court before taking a seat on it, an assumption that is only reinforced by Taney's failure to present his papers at the next sitting of the full Court in January 1837.[80]

Second, and even more telling, was Taney's treatment of Duncan Hennen's request for a mandamus to the federal district judge for the Eastern District of Louisiana, or an order to show cause.[81] Hennen was seeking an order "requiring the said Judge to restore Duncan N. Hennen to the office of Clerk of said District Court."[82] Taney doubted that the April Act empowered the August rump Court to issue either the mandamus or an order to show cause.[83] Nevertheless, Taney took the extraordinary steps of hearing argument in the case at the August Term,[84] and then issuing the requested order to show cause.[85] As he explained in an opinion for the full Court in the same case at the next January Term, Taney had engaged in this maneuver because "the question was an important one, and might again occur; [and] I thought it proper that it should be settled by the judgment of the Court at its regular session, and not by a single judge."[86] He then went on to explain that he "therefore laid the rule [to show cause], because it was the only mode in which I could bring the subject before the Court for decision."[87] There is only one reason why Taney would have seen issuing the order to show cause as the *only* way to bring the issue to the full Supreme Court: if he understood that the rump Court was also the Supreme Court. If the rump Court was an inferior court, Taney could have denied Hennen's petition at the August Term and the *en banc* Court could have heard Hennen's appeal from the denial at its following January Term.[88] But if the rump Court was a Supreme Court, then there could be no appeal from the denial, the Supreme Court being the court of last resort. Therefore, the only way to keep the case alive from the August Term to the January Term for consideration by the full Court was to deny the petition for a mandamus, issue the order to show cause, and make it returnable during the January Term, at which time the full Court would have the opportunity to consider, Taney explained:

> 1. Whether the Supreme Court have the power to issue a writ of mandamus in such a case as that described in the petition. —
> 2. If the Supreme Court have the power is it also given to the Judge of the 4th Circuit, by the act of Congress of 1802 ch. 291 s.2. establishing the August term. — . . .
> . . . [And i]f the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term.[89]

That is precisely what Taney did—issue an order when he was "strongly inclined to the opinion that [he] had no power to [issue], in any case, at the August Term"[90]—because there was no appeal from the August Term, as it was the Supreme Court. Taney would only have approached *Ex parte Hennen* in this manner if he had been "strongly inclined to the

CIRCUIT JUDGES ON THE SUPREME COURT?
A small but significant difference between the reported and original manuscript versions of Roger Taney's January 1839 opinion for the full Court in *Ex parte Hennen*—the word "or" versus the word "as"—suggests a possibility for the August Term even more unorthodox than a rump Court staffed by a single Justice. The reported version of the opinion begins as follows: "At the August term of the Supreme Court, held by the Chief Justice *or* Judge for the fourth circuit, according to the act of Congress of 1802 . . . ." 38 U.S. 225, 228 (1839) (emphasis added). The manuscript version begins: "At the August Term of the Supreme Court, held by the Chief Justice *as* Judge for the 4th circuit, according to the act of Congress of 1802 . . . ." RG 267, Entry 27, *Opinions in Original Jurisdiction Cases, 1835, 1837–1839*, Box 1 (Jan. 26, 1839) (Nat'l Archives & Rec. Admin.) (emphasis added). The "or" in the reported opinion could be read in any number of ways, all consistent with Taney's service as a Justice on the rump Court. But the "as" in the manuscript opinion lends itself to another interpretation as well: that Taney thought he was sitting as a circuit judge—an inferior Article III judge—on the Supreme Court, doing the Court's business. Given the sloppiness of which Reporter of Decisions Richard Peters, Jr., was accused by some Justices and other interested observers, the supposition that Taney's original expression of his belief about his status at the August Term was mangled in reportage is not entirely implausible. *See* G. EDWARD WHITE, *The Marshall Court & Cultural Change* 407–12 (abr. ed. 1991); Craig Joyce, "The Rise of the Supreme Court Reporter," 83 *Mich. L. Rev.* 1291, 1361–62 (1985). If this interpretation is accurate, it lends support to the idea of a congressional power under Article III to designate judges of inferior federal courts to serve on the Supreme Court. Other evidence supporting such a power is very thin, however. And it is also quite possible that either Taney or Peters, with whom Taney was on friendly terms, caught the implications of the manuscript "as" and intentionally changed it to "or" for the reported opinion.

opinion" that the August Term was a Term of the Supreme Court.

The dust-up over *Ex parte Hennen* did generate at least a little bit of attention for the August Term, apparently the only public attention it ever enjoyed.[91] It is possible that Taney, a sophisticated politician as well as a sophisticated lawyer, deliberately made a mountain out of Hennen's molehill in order to raise congressional awareness of the useless relic (and waste of Taney's time for a few days every year) that the August Term had become. If so, it worked. The August Term provision of the April Act was repealed without fanfare in February 1839 on unelaborated grounds of "efficiency" as part of an omnibus act dealing with a variety of judicial business.[92]

Appendix: Chief Justice Roger B. Taney's unreported August Term opinion in *Ex parte Hennen*[93]

August 6, 1838
Supreme Court of the United States Aug. Term 1838 —

Ex parte: In the matter of)
Duncan N. Hennen, on petition)
for a mandamus to the Hon^ble^)
Philip K. Lawrence etc.)

On petition for a mandamus to the Hon^ble^ Philip K. Lawrence Judge of the District Court of the United States for the Eastern District of Louisiana requiring the said Judge to restore Duncan N. Hennen to the office of Clerk of said District Court —

Three questions arise on this motion —

1. Whether the Supreme Court have the power to issue a writ of mandamus in such a case as that described in the petition. —
2. If the Supreme Court have the power is it also given to the Judge of the 4^th^ Circuit, by the act of Congress of 1802. ch. 291. s.2. establishing the August term. —
3. Assuming that the court has the power is the petitioner entitled to the office. —

The public interest requires that the questions in relation to this clerkship should be settled as speedily as possible, and they must be finally

disposed of by the judgment of the Supreme Court. It is therefore my duty to adopt any measure in my power that will enable the parties to bring the question before that tribunal. —

The question whether I have the power sitting alone at this term to lay any rule upon this subject ought in a matter of so much interest to be decided by a full court, and not by a single Judge. I shall therefore grant a rule returnable etc. to show cause why a mandamus should not issue with leave to any person interested to move to discharge the rule on or before the return day, a copy of the rule to be served on the Judges and the adverse claimant of the office, on or before the first of November next. — If the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term. It is nothing more than notice to the parties against whom it issues. It decides nothing and leaves all the questions open for the decision of that tribunal to which they more properly belong. —

ENDNOTES

*This essay is based on one part of a longer article in volume 90 of the *Minnesota Law Review*. Thanks to the editors of the Law Review, especially Deborah Broderson and Aaron Chapin, many of whose improvements to the longer article appear in the essay printed here, and to Vikram Amar, Michelle Boardman, Ofemi Cadmus, Lloyd Cohen, Mike Davies, Susan Davies, Steven Duffield, Robert Ellis, Patricia Evans, Andrew Finch, Curtis Gannon, Gregory Jacob, Bruce Johnsen, Bruce Kobayashi, Eugene Kontorovich, Montgomery Kosma, Michael Krauss, Craig Lerner, Nelson Lund, Ira Brad Matetsky, Stephen McAllister, Suzanna Sherry, Ilya Somin, Amy Steacy, Mark Tushnet, participants in a Robert A. Levy Fellow Workshop, the George Mason Law & Economics Center, and the Critical Infrastructure Protection Program at the George Mason University School of Law. Copyright 2005 Ross E. Davies.

[1]Changed to January beginning in 1826. Act of May 4, 1826, 4 Stat. 160.

[2]1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 95, 104–05, 226, 244 (Max Farrand ed., 1911); 2 *id.* at 38, 44–45, 429–30, 432–33 & n.17; Luther Martin, Md. Att'y Gen., Genuine Information, Address Before the Legislature of the State of Maryland (Nov. 29, 1787), *reprinted in* 3 *id.* at app. A, CLVIII, at 172, 220.

[3]DEBATES IN THE CONGRESS OF THE UNITED STATES, ON THE BILL FOR REPEALING THE LAW "FOR THE MORE CONVENIENT ORGANIZATION OF THE COURT OF THE UNITED STATES" 104 (1802).

[4]CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88, PART TWO 770 (1987).

[5]Morrison R. Waite, Chief Justice, United States Supreme Court, Speech of Chief Justice Waite (Sept. 15, 1887), *in* BREAKFAST TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 18, 19 (1888).

[6]Stephen J. Field, Associate Justice, United States Supreme Court, "The Centenary of the Supreme Court" (Feb. 4, 1890), *in* HAMPTON L. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND ITS CENTENNIAL CELEBRATION 698, 713 (1891).

[7]Letter from Chief Justice Charles E. Hughes to Senator Burton K. Wheeler (Mar. 21, 1937), *in* S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75–711, app. C, at 40 (1937).

[8]"Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal," 59 *A.B.A. J.* 721, 729–30 (1973).

[9]*See, e.g.*, Caleb Cushing, "Analysis of the Existing Constitution of the Judicial System of the United States, and Suggestion of Desirable Modifications Thereof," 6 *U.S. Ops. Att'y Gen.* 271, 277 (1856); "Report of the Study Group on the Caseload of the Supreme Court," 57 F.R.D. 573, 583 (1973); Paul A. Freund, "Why We Need the National Court of Appeals," 59 *A.B.A. J.* 247, 249–50 (1973); Barry Friedman, "A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction," 85 *Nw. U. L. Rev.* 1, 44 n.222 (1990); Daniel J. Meltzer, "The History and Structure of Article III," 138 *U. Pa. L. Rev.* 1569, 1614–19 (1990); Continuity of Gov't Comm'n, "Hearing on Potential Reforms to the Presidential Succession System" 66–67, 70–71 (Oct. 27, 2002), http://www.continuityofgovernment.org/pdfs/1027AEItranscript.pdf. *But see* Tony Mauro, "Profs Pitch Plan for Limits on Supreme Court Service," LEGAL TIMES, Jan. 3, 2005, at 1. Byron R. White and Akhil Amar have suggested that the Court could hear cases in panels, but both leave the door open to review by the *en banc* Court, thus retaining an ultimate presumption of "one [indivisible] supreme Court" of last resort. Byron R. White, "Challenges for the U.S. Supreme Court and the Bar," 51 *Antitrust L.J.* 275 (1982); Akhil Reed Amar, "A Neo-Federalist View of Article III," 65 B.U. L. REV. 205, 268 n.213 (1985); *cf.* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 287–89 (1928); Eugene Gressman, "The National Court of Appeals: A Dissent," 59 *A.B.A. J.* 253, 255 (1973).

[10]Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS

JEFFERSON 140 (Paul Leicester Ford ed., 1899); DANIEL SISSON, THE AMERICAN REVOLUTION OF 1800 (1974).

[11]Act of Feb. 13, 1801, ch. 4, 2 Stat. 89; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 188 (rev. ed. 1926).

[12]*See, e.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803); WILLIAM E. NELSON, *MARBURY v. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 57 (2000).

[13]11 ANNALS OF CONG. 15–16 (1801) (President's Message); *id.* at 23 (repeal bill introduced by Sen. Breckenridge); WILLIAM S. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 55–63 (1918); FRANKFURTER & LANDIS, *supra* note 9, at 26–28.

[14]Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

[15]Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

[16]DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829, at 11–12 (2001); FRANKFURTER & LANDIS, *supra* note 9, at 24–25.

[17]Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

[18]Act of Feb. 13, 1801, ch. 4, § 27, 2 Stat. 89, 98 (repealed 1802).

[19]Act of Feb. 13, 1801 §§ 6–7.

[20]Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 10 WRITINGS OF THOMAS JEFFERSON 301, 302 (Andrew A. Lipscomb ed., 1904).

[21]Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132; *see also* GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER 163–68 (1981); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS 36–68 (1971).

[22]FRANKFURTER & LANDIS, *supra* note 9, at 21 n.56.

[23]U.S. CONST. art. III, § 1.

[24]U.S. CONST. art. II, § 2, cl. 2, art. II, § 3, art. VI, cl. 3; Act of Sept. 24, 1789, ch. 20, § 8, 1 Stat. 73, 76.

[25]*Cf.* S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 12 (1937).

[26]*See, e.g.*, 11 ANNALS OF CONG. 27–30 (1802) (statement of Sen. Breckenridge); *id.* at 59–62 (statement of Sen. Mason). This proposition may seem outrageous today, but it had some legal support at the time. *See, e.g.*, 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 155 (Samuel Rose ed., 4th ed. 1800); 3 WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 165 (1804).

[27]*See, e.g.*, 11 ANNALS OF CONG. 33–34 (1802) (statement of Sen. Mason); *id.* at 56–57 (statement of Sen. Tracy); *id.* at 126–32 (statement of Sen. Chipman).

[28]*See, e.g.*, *id.* at 48 (statement of Sen. Jackson); *id.* at 27–28 (statement of Sen. Breckenridge).

[29]*See, e.g.*, *id.* at 86 (statement of Sen. Morris).

[30]*See, e.g.*, *id.* at 125 (statement of Sen. Chipman); *see also id.* at 53 (statement of Sen. Tracy).

[31]*See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS 75 (1985); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 227–35 (1960).

[32]*See generally* 6 THE PAPERS OF JOHN MARSHALL 104–21 (Charles F. Hobson ed., 1990).

[33]Act of April 29, 1802, ch. 31, §1, 2 Stat. 156, 156.

[34]*See* HAINES, *supra* note 31, at 243.

[35]*Stuart v. Laird*, 5 U.S. 299 (1803); *see also* CARPENTER, *supra* note 13, at 76–78; BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 163–98 (2005).

[36]*See, e.g.*, WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–1807, at 103 (Everett S. Brown ed., 1923).

[37]*See* HAINES, *supra* note 31, at 224.

[38]*See* DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805, at 110–35 (1970).

[39]Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156.

[40]*Id.* § 2.

[41]11 ANNALS OF CONG. 1229 (1802) (statement of Rep. Bayard).

[42]*Id.* at 1229 (statement of Rep. Nicholson).

[43]*Id.* at 1210–11 (statement of Rep. Elmendorf).

[44]*Id.* 11 ANNALS OF CONG. 1229 (statement of Rep. Bayard).

[45]*See, e.g.*, *id.* at 1205, 1210 (statement of Rep. Bayard); *id.* at 1207 (statement of Rep. Griswold); *id.* at 1207–08 (statement of Rep. Dennis).

[46]*Id.* at 1205 (statement of Rep. Bayard).

[47]*See id.* at 1205–11.

[48]Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* THE PAPERS OF JOHN MARSHALL, *supra* note 32 at 109, 110.

[49]Act of Apr. 29, 1802, ch. 31, §2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

[50]*See* JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 216–25 (1980).

[51]U.S. CONST. art. I, § 3, cl. 6.

[52]Letter from John Marshall to William Paterson (May 3, 1802) *in* THE PAPERS OF JOHN MARSHALL, *supra* note 32, at 117, 118.

[53]Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (partially repealed 1839).

[54]*Id.* § 2, 2 Stat. at 156 (emphasis added).

[55]*Compare id.* § 1, *with id.* § 2.

[56]U.S. CONST. art. III, § 1.

[57]*See, e.g.*, ST. GEORGE TUCKER, 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE

COMMONWEALTH OF VIRGINIA 30 (1803), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 181, 187 (Philip B. Kurland & Ralph Lerner eds., 1987).

[58]Act of Apr. 29, 1802, ch. 31, §2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

[59]1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: PART ONE 163–64 (Maeva Marcus & James R. Perry, eds., 1985) [hereinafter DOCUMENTARY HISTORY].

[60]Minutes of the Supreme Court of the United States, Aug. 1802, at 127, *on* Roll 1, Microcopy No. 215 (February 1, 1790–August 4, 1828) (Nat'l Archives & Rec. Admin.) [hereinafter Minutes 1790–1828].

[61]*See id.* at 127–28.

[62]*Id.* at 128.

[63]*See generally* Minutes 1790–1828, Feb. 1803, *supra* note 60, at 128–36.

[64]*See* Minutes 1790–1828, Aug. 1803, Aug. 1804, Aug. 1805, *supra* note 60, at 136–37, 152, 167–68; *id.* Aug. 1806, Aug. 1807, at 29, 61.

[65]Minutes 1790–1828, Aug. 1807, *supra* note 60, at 61; *see generally* Records of the Supreme Court of the United States, Rough Dockets, 1791- (RG267, Box No. 1, Entry 5), Volume 1, 1803, 1806–08, 1810–27 (Nat'l Archives & Rec. Admin.); Records of the Supreme Court of the United States, Rough Dockets, 1803, 1806–08, 1810–1904, 1914–23 (RG267, Box No. 1, Entry 8), Aug. Term 1806, Feb. Terms 1812, 1818, 1819, 1821, 1822, 1826, Jan. Term 1828 (Nat'l Archives & Rec. Admin.).

[66]Minutes 1790–1828, Feb. 1806, *supra* note 60, at 28.

[67]11 U.S. 277, 277–78 (1812).

[68]*See, e.g.*, *Ex parte Hennen*, 38 U.S. 225 (1839); *Rhode Island v. Massachusetts*, 38 U.S. 23, 23–24 (1839); *New Jersey v. New York*, 30 U.S. 284, 291 (1831) (Baldwin, J., concurring in part); *see also Rhode Island v. Massachusetts*, 37 U.S. 657, 676 (1838) (argument of counsel).

[69]LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 335–36 tbl.4-12 (3d ed. 2003).

[70]*See* CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 276 (1974).

[71]Minutes 1790–1828, Aug. 1820, *supra* note 60, at 132.

[72]Minutes 1790–1828, Aug. 1821, Aug. 1822, Aug. 1823, *supra* note 60, at 223, 319, 421; *id.*, Aug. 1824, Aug. 1825, Aug. 1826, Aug. 1827, Aug. 1828, at 531, 627, 735, 889, 1041; Minutes of the Supreme Court of the United States, Aug. 1829, Aug. 1830, Aug. 1831, at 1192, 1396, 1578, *on* Roll 2, Microcopy No. 215 (January 12, 1829–August 7, 1837) (Nat'l Archives & Rec. Admin.) [hereinafter Minutes 1829–1837]; *id.*, Aug. 1832, Aug. 1833, at 1788, 1956; *id.*, Aug. 1834, Aug. 1835, at 3103, 3255. On the other hand, William T. Carroll, the Clerk of the Court from 1827 to 1863, appears to have taken his August Term responsibilities quite seriously. *See, e.g.*, Records of the Supreme Court of the United States, Rough Dockets, 1803, 1806–08, 1810–1904, 1914–23 (RG267, A1, Entry 8), Aug. Terms 1828, 1829, 1830 (Nat'l Archives & Rec. Admin.).

[73]*See* EPSTEIN ET AL., *supra* note 69, at 336 tbl.4-12.

[74]*The Suprmme [sic] Court*, 54 NILES' NAT'L REG. 354 (1838); CARL BRENT SWISHER, ROGER B. TANEY 354 (1935).

[75]*See, e.g.*, ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 342–43 (1831); THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES 150, 152 (1827); THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES AND OF CONSTITUTIONAL POINTS DECIDED 78, 83–84 (1830).

[76]Minutes 1829–1837, Aug. 1836, Aug. 1837, *supra* note 72, at 3421, 3539; Minutes of the Supreme Court of the United States, Aug. 1838, at 3829, *on* Roll 3, Microcopy No. 215 (January 8, 1838–January 24, 1848) (Nat'l Archives & Rec. Admin.) [hereinafter Minutes 1838–1848].

[77]Minutes 1829–1837, Aug. 1836, *supra* note 72, at 3421–35.

[78]*See* DOCUMENTARY HISTORY, *supra* note 59, at 1–7.

[79]*See* Ross E. Davies, "William Cushing, Chief Justice of the United States," 37 U. TOL. L. REV. 597, 610–15 (2006).

[80]*Ex parte Hennen*, 38 U.S. 225, 228 (1839); Minutes 1829–1837, Feb. 1837, *supra* note 72, at 3435–39.

[81]*Ex parte Hennen* (Aug. 6, 1838) (Taney, C.J., unpublished August Term opinion), *reprinted infra* appendix; Minutes 1838–1848, Aug. 1838, *supra* note 76, at 3829–50.

[82]*Ex parte Hennen*, *infra* app.

[83]*Id.*

[84]*The Suprmme [sic] Court*, *supra* note 74, at 354; *see also Supreme Court of the U. States*, 54 NILES' NAT'L REG. 373 (1838).

[85]*Ex parte Hennen*, *infra* app.; *Supreme Court of the U. States*, *supra* note 84, at 373.

[86]*Ex parte Hennen*, 38 U.S. 225, 229 (1839). Taney's use of the word "judge" rather than "Justice" when describing the rump Court is of no moment. During his tenure, the two terms were routinely bandied about as equivalents in arguments before the Court and in published opinions. *See, e.g.*, *United States v. Ferreira*, 54 U.S. 40, 50–51 (1852); *see also, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 565–67 (1842) (argument of counsel); *id.* at 631 (Taney, C.J., concurring and dissenting); *Kendall v. United States*, 37 U.S. 524, 653 (1838) (Taney, C.J., dissenting).

[87]*Ex parte Hennen*, 38 U.S. at 229.

[88]*See, e.g.*, *Decatur v. Paulding*, 39 U.S. 497, 513 (1840) (Taney, C.J.); *Mallard v. United States District Court*, 490 U.S. 296, 308–09 (1989).

[89]*Ex parte Hennen*, *infra* app.

[90]*Ex parte Hennen*, 38 U.S. at 229.

[91]*See The Suprmme [sic] Court*, supra note 74, at 354; *Supreme Court of the U. States*, *supra* note 84, at 373.

[92]Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

[93]RG 267, Entry 27, Opinions in Original Jurisdiction Cases, 1835, 1837–1839, Box 1 (Nat'l Archives & Rec. Admin.).

Duty and Justice at "Every Man's Door": The Grand Jury Charges of Chief Justice John Jay, 1790–1794

JOHN P. KAMINSKI AND C. JENNIFER LAWTON

"It is the Fortune of few to chuse their Situation—it is the Duty & Interest of all to accommodate themselves to the one which Providence chuses for them."[1] So said John Jay, Chief Justice of the United States. Duty was paramount in the lives of Jay and many of his contemporaries of the founding generation.

Jay left America in 1779 to serve as U.S. minister to Spain. In 1782, he became a peace commissioner and was primarily responsible for the hugely successful negotiations that led to the Treaty of Paris ending the Revolutionary War. When he returned to New York in July 1784, Jay wanted to retire from public life, provide for his extended family, and live comfortably with his wife and children. Earlier, he had written his close personal friend and his immediate diplomatic superior, Secretary for Foreign Affairs Robert R. Livingston, that "as my country has obtained her object, my motives for entering into public life are at an end."[2] New York's and the country's needs, however, were still great, and Jay admonished half a dozen political leaders not to abandon government service. Jay himself made it clear that he was willing to continue to serve his country if needed. "If on my return, I find it my duty to devote more of my time to the public, they shall have it, though retirement is what I ardently desire."[3] Upon his return to America, Jay received Congress's invitation to become the new Secretary for Foreign Affairs. He accepted the position when Congress agreed to provide him with a sufficient degree of autonomy. For the next four years, John Jay was the single most important public official in America. He was, in essence, the prime minister of the United States.[4]

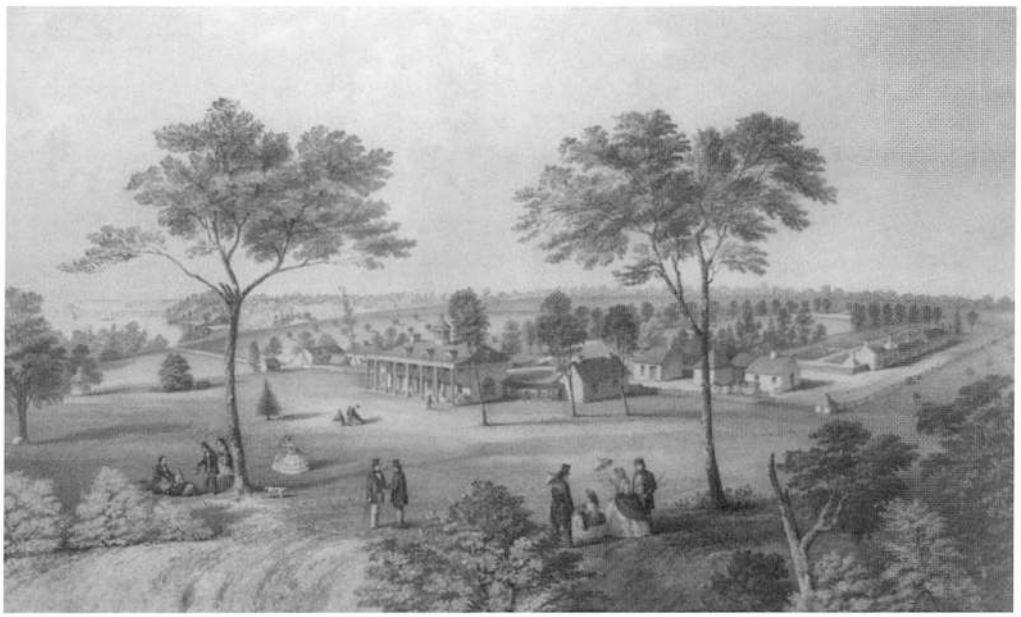
As Secretary for Foreign Affairs, Jay was keenly aware of the shortcomings of the Articles of Confederation. He encouraged the idea of a constitutional convention to drastically revise the very nature of the Articles, not merely to provide a few additional powers for the Confederation Congress. He wholeheartedly

As U.S. minister to Spain, John Jay (left) negotiated the Treaty of Paris, ending the Revolutionary War, under the supervision of his close friend Robert R. Livingston (right). Jay would soon replace Livingston as Secretary for Foreign Affairs, a post he accepted out of patriotism, as he would have preferred to retire and spend time with his family.

endorsed the concept of separation of powers with independent legislative, executive, and judicial departments. When George Washington balked at accepting Virginia's appointment to the Federal Convention, Jay, who had been corresponding with Washington for months about the deficiencies of the Articles, admonished his friend to accept the appointment. Speaking to Washington as no one else dared, Jay told the former Commander-in-Chief that he should not rest on his laurels at Mount Vernon. The crisis required a Washington, who, for the good of his country, according to Jay, had to risk his dearly-won fame again by "favour[ing] your country with your counsels on such an important and signal occasion," instead of viewing the monumental unfolding of events "with the eye of an unconcerned spectator."[5] Feeling the sting of Jay's rhetoric and the pleading of other trusted advisers, Washington accepted the appointment to Philadelphia. The Convention proposed a new Constitution that the American people ratified nine months later. Jay played a pivotal role in the ratification process, serving as the great compromiser in New York. He was the one Federalist leader whom virtually all anti-Federalists trusted, and his pamphlet addressed to the people of the State of New York made many more converts for the Constitution than any other Federalist writing.

As the country's first President, it would be Washington's responsibility to fill many of the positions in the new federal government. Early in his administration, President Washington consulted with Jay about what position he would be willing to accept. Although the President offered Jay either the Department of State or the Department of Treasury, he indicated that he would like Jay to serve as Chief Justice.

The President's primary concern during his term of office would be to convince the American people to accept the legitimacy of the Constitution. The people were



Jay coaxed George Washington out of retirement at Mount Vernon and persuaded the former Commander-in-Chief to serve as one of Virginia's delegates to the Federal Convention.

confident that Washington would not abuse his powers as President. After all, he had already abandoned total power when he surrendered his Commander-in-Chief's commission in December 1783. The people, it was presumed, also would have rapport with their immediate Representatives in Congress, chosen directly by the people themselves, and with Senators chosen indirectly by the people through their state legislatures. The judiciary, however, seemed most likely to be aloof, undemocratic, and perhaps even oppressive—the most likely branch of the new government to be opposed by the people. Judges, to be nominated by the President and confirmed by the Senate, were to be independent of the people and the other branches of government. They were to serve during good behavior, and their salaries could not be diminished. Furthermore, unlike the British judiciary and the judiciaries of several of the American states, the federal judiciary was self-contained and answerable to no higher authority—no individual or public body could review or reverse a decision of the Supreme Court. The new federal Constitution provided no equivalent of the British law lords or legislative bodies or special courts with appellate jurisdiction over the Supreme Court. Americans had despised the vice-admiralty courts created by Parliament a decade before independence. They also despised the British customs service, which cracked down hard on smugglers, who were often viewed by their countrymen as local heroes standing up against imperial oppression. Now America was to have another far-distant Supreme Court with broad jurisdiction, including the trial and punishment of those charged with avoiding the payment of the federal tariff that was expected to provide the bulk of the revenue needed to finance the new government and pay the wartime debt.

President Washington understood the importance of the judiciary to the new government and the possibility that the people might react badly to this potential engine of despotism. When he looked upon the field of candidates for a Chief Justice, he saw only three men lobbying for the position—James Wilson of Pennsylvania, John Rutledge of South Carolina, and Chancellor Robert R.

Livingston of New York. All three were aristocratic, and the first two had potential financial embarrassments ominously hovering about them. Jay, on the other hand, had impeccable credentials: He was an honest and moral person and an experienced statesman, and he had secure finances. It was said he was "known by character throughout the U.S."[6]

In the letter forwarding Jay's commission as Chief Justice, the President expressed his confidence in Jay, as well as the important role that the federal judiciary was expected to play in the new government. The judiciary, Washington wrote, "must be considered as the Keystone of our political fabric."[7] Without the judiciary, the Constitution simply could not perform properly. At the head of the judiciary, Jay was expected to provide the credibility it so desperately needed. The President told Jay that "[i]n nominating you for the important station which you now fill, I not only acted in conformity to my best judgement; but, I trust, I did a grateful thing to the good citizens of these united States: And I have a full confidence that the love which you bear our Country, and a desire to promote general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department."[8] Jay thanked the President for the honor bestowed upon him and promised that he would "never cease to excite my best Endeavours to fulfill the Duties imposed" upon him as Chief Justice.[9] After reading about Jay's appointment, William Short, formerly Jefferson's private secretary and now serving as America's *chargé d'affaires* in Paris, confided in Jay that "I have always thought that in order to reconcile the citizens of the United States to a change in their modes of trial to which men in all countries adhere with obstinacy, it would be necessary only to have at the head of this department a person of great talents and possessing the confidence of all. I have no doubt Sir that that object will be now answered and I most sincerely congratulate my country on the event."[10]

Article III of the Constitution provides only that there must be one supreme court for the United States. Congress, if it so chose, could create inferior federal courts. In the absence of federal courts, state courts would try federal cases—an ominous thought for many of the Framers. In the Judiciary Act of 1789, Congress provided for an elaborate federal judiciary headed by one Supreme Court and branching out to include a federal circuit court in each state. The Supreme Court would consist of one Chief Justice and five Associate Justices. Each state was considered a district and assigned one federal judge with a rather restricted jurisdiction in both civil and criminal matters. The country was divided into three regional circuits—Eastern, Middle, and Southern. The Eastern Circuit stretched from Maine to New York, the Middle from New Jersey to Virginia, and the Southern from North Carolina to Georgia. Each state had its own circuit court made up of that state's district judge and two itinerant justices of the Supreme Court assigned to one of the three regional circuits. The Supreme Court would convene twice annually in the country's capital for sessions beginning in February and August, while each circuit court would sit for spring and fall terms. The first circuit courts would sit in April 1790. For the first ten years of the Supreme Court, most of the time and attention of Justices would concern cases heard in the circuit courts.

About a week before the first circuit courts were to meet, President Washington wrote to the Supreme Court Justices to inspire them as they were about to bring federal justice to the American public for the first time. Washington said that he had always felt "that the stability and success of the National Government, and consequently the happiness of the People of the United States, would depend in a considerable degree on the Interpretation and Execution of its Laws." Thus Washington believed that the judiciary must "not only be independent in its operations, but as perfect as possible in its formation." The President asked the Justices to

report any and all information and remarks as they entered the "unexplored field."[11]

Chief Justice Jay was sounded out by a number of federal district judges to see what formalities he wanted to institute at the first meetings of the circuit courts. Not wanting to offend anyone, Jay thought it "advisable to respect ancient [state] usages in all Cases where Deviations from them are not of essential Importance." As far as parades or opening ceremonies, the circuit courts should have no other special attention than received by the supreme court of each state. "If alterations should be expedient," Jay suggested "they may be better introduced afterwards." Jay told District Judge Richard Law of Connecticut that "[n]o particular Dress has yet been assigned for the Judges on the circuits" and that Jay believed that the New England tradition of having clergymen officiate at the beginning of state court sessions should "be observed and continued at the federal circuit courts." Jay was confident that good public accommodations would be available for the federal judges and court officials, and he confessed that "the Manner in which the Table may be served [is] ... among the least and last of my Cares."[12] Jay anticipated and strove to avoid the anti-Federalist charge that "magnificent circuits of the national judiciary [would be established] to fascinate and dazzle the eye of the people, and to divert them from the republican simplicity of the state courts."[13]

On April 5, 1790, the first circuit court assembled in New York City. Chief Justice Jay and Associate Justice William Cushing of Massachusetts sat with New York District Judge James Duane.[14] After ordering the federal marshal to summon a grand jury, the court recessed for a week. When reconvened, the court swore in the jurors, and Jay, as the senior Supreme Court Justice, addressed them. This kind of an address to grand juries, usually called a charge, had long been an English and American judicial traditional. "Part sermon, part political disquisition, part jurisprudential essay, the charge served to inform jurors about current issues of law and politics."[15]

Jay's charge to the grand juries of the Eastern Circuit in the spring of 1790 was first delivered in New York City on April 12, 1790, then repeated in New Haven, Boston, and Portsmouth, N.H., over the next five weeks. The Chief Justice did not authorize the public printing of his text until the court completed its entire circuit session, when the charge was published as a pamphlet in Portsmouth and in newspapers in Boston, New York City, Portsmouth, and Philadelphia. Reports indicated that the charge was "elegant and nervous,"—that is, vigorous, powerful, and forcible.[16] Benjamin Austin, the foreman of the Massachusetts grand jurors sitting in Boston, replied to the judges of the circuit court that they "may be assured, we shall in our several departments when dismist, exert our Influence to promote Peace, good order, & a strict regard to the Laws of the united States, agreeably to the Constitution so lately adopted." The jurors also hoped that "the Judicial department will ever be filled, as it now is, with Gentlemen of the first Characters for Learning, Integrity and ability."[17]

Chief Justice Jay, in particular, impressed jurors and spectators throughout the circuit, not so much with his physical appearance as with his bearing, his mannerism, and his elegance. Joshua Loring, a Boston merchant, described Jay as "a plain dressing Man & makes but a poor figure, being rather of a small size, remarkably thin & in my opinion looks more like an high Lad, alias a worn out Buck [i.e., a dandy or a fop] than a Judge of the first Court in America. This proves the falsity of judging by appearances as it is allow'd he is a man of superior abilities & understanding."[18] Christopher Gore went further: "The Chief Justice hath delighted the people of Massachusetts—they regret that Boston was not the place of his nativity"—and "his manners, they consider, so perfect as to believe that New York stole him from New England."[19] Jay's close personal friend Gouverneur Morris wrote him from London, saying that he had read the accounts of Jay's appearance at the circuit courts

and hoped that Jay would "continue for it will be productive of many good Consequences both public and private.... The Appearance of your Court also carrying Home to every Man's Bosom a Conviction of the Authority delegated to the Genl. Government and of the prudent Manner in which that Authority is used will go very far towards the firm Establishment of it. For that you know depends always on opinion."[20]

Jay's charge to the grand juries during the spring term of 1790 was masterful.[21] It is, in fact, one of the great historic public papers in American history, yet historians and rhetoricians have paid it little attention. To appreciate the charge's greatness, one must appreciate the setting. The federal court was to appear before the American public in the states for the first time. How would it be received? How would it be perceived? Would it be viewed as a magisterial arm of the powerful and potentially oppressive federal government, or would the circuit courts be embraced as the protector both of the people and the people's government? Jay's charge captured the feeling of the latter without arrogance, undue pomp and magnificence, or aloofness—merely simple references to the uniqueness of the American experiment and to the duty of private citizens to share in the democratic functioning of their new federal government through the judiciary.

Jay began his charge with a general assessment of the science of government. Advocates for free government, Jay said, had long realized the importance "to the Cause of Liberty" of the question of whether people could "long govern themselves in an equal uniform & orderly manner." This question, like all other questions the solutions to which depended upon facts, could only be determined by experience, not by reading or reasoning theoretically. It was a question, Jay said, that many people seriously doubted. Unfortunately, men had had few opportunities to try to answer this question through experience. This was why so little progress had been made in the science of government compared with advances and discoveries in the natural sciences. Most governments that existed at the time or previously had "originated in Force or in Fraud; having been either imposed by improper Exertions of Power, or introduced by the arts of designing Individuals, whose apparent Zeal for Liberty & the public good enabled them to take advantage of the Credulity and misplaced Confidence of their fellow Citizens."

Jay believed that God had given Americans more opportunities of choosing "and more effectual Means of establishing their own Government, than any other Nation has hitherto enjoyed." Americans, he told the jurors, were responsible for how they used these opportunities and these means—responsible to God, to mankind in general, and to our posterity in particular. "Our Deliberations and proceedings, being unawed and uninfluenced by power or corruption, domestic or foreign, are perfectly free." Americans were "generally & greatly enlightened." Demagoguery had little opportunity in a country so large that rarely could one individual gain personal influence nationwide.[22] The creation of federal and state constitutions, with their strengths and weaknesses discovered and—in some cases—corrected, served as experience assisting our understanding of the science of government. The new federal Constitution, in fact, had already demonstrated considerable improvement over the Articles of Confederation. How close to perfection the new Constitution would be, "[t]ime only" would tell. "It is a Consolation to reflect that the good Sense of the People will be enabled by Experience to discover and correct" the Constitution's imperfections. As long as the people were confident in themselves and avoided "Jealousy and Dissensions," they could do just about anything.

Jay then addressed the basic structure of the Constitution. "Wise and virtuous men," he said, have differed respecting government, but they have all now come to the same conclusion: "[t]hat its Powers should be divided into three distinct, independent Departments—The

Executive, legislative and judicial." The question still remained, however, of "how to constitute and balance them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the Constitution from Encroachments." On this problem a great diversity of opinion remained, and "we have all as yet much to learn." Jay told the jurors that the Constitution separated the three branches of government "and much Pains have been taken so to form and define them, as that they may operate as Checks one on the other, and keep each within its proper Limits—it being universally agreed to be of the last Importance to a free People, that they who are vested with executive, legislative & judicial Powers, should rest satisfied with their respective Portions of Power, and neither encroach on the Provinces of each other, nor suffer themselves nor the others, to intermeddle with the Rights reserved by the Constitution to the People."

Jay then advised the jurors, as well as all other Americans, to be patient with the new Constitution. Give it a chance, he pleaded, to demonstrate through experience that it was worthy of a fair trial. If, he said, so much depends on those rare opportunities in which men can choose their own forms of government, and if even "the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by Practice—if on such difficult Questions men may differ in opinion and yet be Patriots—and if the Merits of our opinions can only be ascertained by Experience, let us patiently abide the Tryal, and unite our Endeavours to render it a fair and an impartial one."

Perhaps, Jay suggested, his remarks were thought to be inappropriate "to the present occasion." He disagreed. It was always appropriate to promote compromise and cordiality. "It will be readily admitted, that occasions of promoting good will, and good Temper, and the Progress of useful Truths among our Fellow Citizens should not be omitted."

More directly referring to the judiciary, Jay told the jurors "that a variety of local & other Circumstances" made it difficult for the Constitutional Convention properly to address the judiciary. By adopting the Constitution, Jay said "We had become a Nation." As such, we became responsible for the enforcement of the law of nations in matters concerning other countries and national laws concerning federal matters within our own country. "National tribunals became necessary for the Interpretation & Execution of them both." No such tribunals had previously existed in America. Thus, the Constitutional Convention had no experience to draw upon.[23] American jurisprudence varied state by state "and was accommodated to local not general Convenience; to partial not national Policy." A national judiciary with "general & final" authority was "indispensable." The difficulty lay in determining how such a national judiciary should be established "with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable." According to Jay, the questions involved "no little Intricacy. The Expediency of carrying Justice as it were to every Man's Door, was obvious; but how to do it in an expedient Manner was far from being apparent."

Furthermore, it was necessary to establish a balance between the state and federal judiciaries. "To provide against Discord between national & State Jurisdictions, to render them auxiliary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined, was and will be arduous." In creating the federal judiciary with all these difficulties confronting the Constitutional Convention and the first Congress, it was incumbent that Americans receive the new judiciary "with candor" and allow the experiment to proceed "with Temper and Prudence."

It was under the authority of the Judiciary Act of 1789 that the circuit courts met. According to the act, the courts could exercise civil and criminal jurisdictions. The grand jury was necessary for the latter, and this was the reason for the jurors assembling together.

According to Jay, "the most perfect Constitutions, the best Governments, and the wisest Laws are vain" unless administered well and obeyed. Virtuous citizens obeyed them from a sense of duty, but others could be restrained only by fear of punishment and disgrace. It was therefore "essential to the welfare of Society, and to the Protection of each Member of it in the peaceable Enjoyment of his Rights, that offenders be punished." The aim of punishment was not simply retribution, but rather was "by the Terror of Example to deter Men from the Commission" of crimes. But to be effective, punishment had to be "be proportionate to Guilt," and it had to be realized at all times that the accused or suspected might really be innocent. Hence, the jurors were instructed that "it is proper that dispassionate and careful Inquiry should precede those Rigors which Justice exacts, and which should always be tempered with as much Humanity and Benevolence as the Nature of the Case may admit. Warm partial & precipitate Prosecutions, & cruel and abominable Executions, such as Racks, embowelling, drawing [and] quartering, burning and the like, are no less impolitic than inhuman." Such harsh prosecutions and cruel punishment would arouse disgust for government and sympathy for the criminal. But when offenders were prosecuted with "Temper and Decency," when they received impartial trials, and when they were "punished in a Manner becoming the Dignity of public Justice," the feelings of the public would support the government.

Americans were fortunate that "the Genius of our Laws is mild." Jay praised the grand-jury system as perhaps the greatest institution ever created "for bringing offenders to Justice without endangering the Peace and Security of the innocent." Order and good government were promoted as "the most discreet and respectable Citizens" in any district, bound by oath, "enquire into and present all offences committed against the Laws." The peace and quiet of the community and security of honest citizens were preserved because "no Man can be put in Jeopardy for imputed Crimes without such previous Inquiry and Presentment." The district of the jurors was commensurate with the borders of the state. The public demanded of the jurors "Diligence" and "Circumspection" as they investigated all crimes against the United States within New York or upon the high seas by persons now resident in New York. In addition to violations of federal laws, jurors must search out violations of the law of nations as well as violations of the provisions of treaties. "We are now a Nation," Jay told the jurors, "and it equally becomes us to perform our Duties as to assert our Rights."

The laws of the United States were few, Jay said. They principally concern revenue. The enforcement of these laws was "essential to the Credit, Character and Prosperity of our Country." The burden of supporting the government was placed on all Americans: "whoever therefore fraudulently withdraws his Shoulder from that common Burthen, necessarily leaves his Portion of the weight to be borne by the others." Thus, offenders who illegally avoided taxes did injustice, not only to the government of the United States, but also to their fellow citizens. In essence, the jurors were told to forget the past, when smuggling was not only tolerated but encouraged by the community. Now, smugglers were equated with common thieves robbing from the pockets of their neighbors. The jurors also were admonished to be alert for government officials who might conspire to violate the country's revenue laws.

Finally, Jay reminded the jurors of how connected individual prosperity was with the prosperity of the federal government. In turn, the prosperity of the country was dependent "on a well organized vigorous Government, ruling by wise and equal Laws, faithfully executed." Such a government would not be unfriendly to individual liberty. "On the Contrary, nothing but a strong Government of Laws, irresistibly bearing down arbitrary power & Licentiousness can defend it against those two formidable Enemies." Jay told the jurors "that civil Liberty consists not in a Right to every

Man to do just what he pleases—but it consists in an equal Right to all the Citizens to have, enjoy, and to do, in peace Security and without Molestation, whatever the equal and constitutional Laws of the Country admit to be consistent with the public Good." Consequently it was the duty and interest of all good citizens "to support the Laws and the Government which thus protect their Rights and Liberties." Jay was confident that the grand jury would "chearfully & faithfully perform the Task now assigned You."

No copy of Jay's charge to the grand juries of the Eastern Circuit for the fall 1790 term remains. According to an editorial comment in the *New-Hampshire Gazette*, Jay's "very pertinent Charge, owing to its being extempore," was unavailable for publication.[24] From all accounts, however, the charge was well received. An Albany newspaper reported that Jay, "in few words, addressed the grand jurors very handsomely."[25] The *Connecticut Courant* reported that Jay "delivered the whole with elegant simplicity and precision."[26] The Boston *Independent Chronicle*, referred to Jay's "excellent charge.[27] Boston merchant Henry Jackson reported that "Judge Jay is here. He is much respected & esteemed and is taken very partial notice of—his speech to the Grand Jury was much admired."[28] The *Providence Gazette* reported that Jay's charge was "full of good Sense and Learning, though expressed in the most plain and familiar Style."[29]

Because responses to speeches usually mirrored what was in the speech itself, the best evidence for what Jay said appears in the reply to his charge by the grand jury of the circuit court of New Hampshire sitting in Exeter on November 20, 1790.[30] The jurors "considered the excellent charge given them by the Chief Justice of the U. States with all the attention, which the importance of the sentiments it contains, and the dignity of the authority from whence it proceeds, can inspire." The jurors had long been "convinced of the necessity of a National Government invested with powers sufficient to accomplish the great purposes of a general confederation of the independent American republics." They shared the joy of their countrymen with the ratification of the new Constitution, and thanked God for "the bright dawnings of national splendor" already evident and to be expected in the future.

The jurors understood that no matter how perfect the Constitution and the laws enacted to carry it into effect were, unless the former was wisely administered and the latter were faithfully executed, the new government would not function properly. The jurors felt "strongly impelled by a sense of duty" to watch for violations of the Constitution and federal laws, "[f]ully convinced that the security, the honor, and the happiness of the nation essentially depend on a punctual fulfillment of all public engagements, particularly those of a pecuniary nature." The jurors promised to "pay a pointed attention" to federal laws bringing violators "to exemplary punishment." The jurors concluded by stating that they would live up to the "due sense of the honor of being appointed guardians of laws, which are designed to secure the happiness of a great empire"—that they felt "the importance of the duties devolved on them—and are seriously impressed with the idea that to their country and to their God, as well as to their own consciences, they stand accountable for the manner in which they discharge them."

Chief Justice Jay again rode the Eastern Circuit in the spring of 1791. The Connecticut *General Advertiser* reported that "Judge Jay delivered a very pertinent charge to the Grand Jury, pointing out the duties of their station, and the crimes particularly calling for their attention."[31] Jay's colleague, Justice Cushing, described the charge as "decent & pithy."[32] In Boston, Jay was said to have delivered "a short and elegant extempore Charge." Given the fact that Jay believed that few federal crimes had been violated in Massachusetts, he felt it unnecessary to be "explicit" about any particular law. Nor, because of the enlightened condition of most New Englanders, was it necessary "to enter into an explanation of the general

principles of government." He did stress the importance of the revenue act and praised Massachusetts merchants for "their patriotism, honour and integrity." However, jurors were to be wary of the few who "would endeavour to defraud government of its due." They should also be alerted to the growing, dispassionate crime of counterfeiting the public securities of the United States. As usual, the jurors should keep a vigilant eye on federal officers—especially customs collectors—who might be either oppressive or remiss in performing their duties. The jurors should not be "influenced by fear, affection, or hope of reward." Doing their duty should be their only concern.[33]

Back on the Eastern Circuit in the fall of 1791, Jay gave another "short and elegant charge" to the grand juries. "He congratulated them on the prosperity and tranquility which pervaded the country," and indicated that these good times would continue only as long as the country's laws were faithfully executed. To a great extent, that depended on the grand juries doing their job. Not a believer in the existence of a federal criminal common law, Jay told the jurors that there were few federal laws on the statute books. Congress had enacted the Excise Act during its last session, and the Act deserved their attention. Such laws passed in England were known to be "arbitrary and oppressive" and "repugnant to the rights of a free people." But Congress "had been careful to avoid every thing of the kind, and to remove all cause for just complaint." According to Jay, "the laws of the United States were generally mild, and if we might judge by their effects, were wise.—Those for the collection of the Revenue, raised in an easy manner, the money required by government to discharge those debts which were the price of our liberties and present happiness." The revenue laws had been enforced with few complaints "heard in our streets." However, this complacency ought not "to lull us into fancied security. The condition of the world required vigilance and circumspection. Innocent men ought not, he said, to be vexed with prosecution; nor ought those who were not innocent to escape answering for their faults." Jay was confident that the jurors would discharge their duty "to the satisfaction of their country and their own consciences."[34]

In the spring of 1792, Jay delivered his charge to the grand jury of New York a week after the arrest of New York City financial speculator William Duer, which initiated an economic spiraling that plummeted the country into the Panic of 1792.[35] Stock manipulation and fraud of all kinds contributed not only to Duer's demise, but also to the ruin of hundreds of other speculators, as well as many unwary investors, when the country's fragile, interconnected financial house of cards crumbled. Quickly, the whole country was in the throes of a full-fledged financial panic. Life savings were wiped out and the debtors' prisons filled. Consequently, it was not surprising that Jay's charge at this time concentrated on the enforcement of laws against crimes such as the avoidance of paying taxes, forgery of public and private securities, and perjury.[36] "To dwell upon offences, and to prescribe Punishments," Jay said, "are unpleasing but necessary Tasks—they are imposed by the Nature of civil Society, and by those vices, which too often render Individuals regardless of the Rights of others."

Most men knew that duty and interest were intertwined. Unfortunately, too many ignored their duty and concentrated only on their interest; their passions seduced or impelled them "to do wrong." When governments enacted laws calculated only on the virtues of mankind, those laws ended in "Disorder and Disappointment." When laws focused only on men's vices, they generally were enforced with "oppression & undue Severity." Both the virtues and the vices of human nature should be regarded when passing legislation. Such had been the case in the United States, where laws provided the proper punishment for transgressors, "yet their Mildness indicates much Confidence in the Reason & Virtue of the People." But Jay reminded the jurors that in all societies there were individuals whose actions

were regulated, not by morality, but by convenience. These individuals could only be restrained by the threat of punishments. Thus, the jurors were to see if any laws had been violated, from treason to misdemeanors; all were in the purview of the grand jury. Jay admonished them that "it is important that none of the Laws be violated with Impunity, for being all made for the Good, and by the Authority of the People, it is interesting to the whole Community that they be respected & observed."

Although the enforcement of all laws was necessary, the enforcement of some was, in fact, more important than others. The revenue laws and the excise tax were most critical for America. These laws provided for the collection of funds to support the government that protected our rights and liberties and allowed us to pay the debt contracted to obtain these rights. The government was under the highest moral as well as political obligations to pay these debts "with the utmost Punctuality and good Faith." The Excise Act contributed to the collection of this necessary revenue, not in the oppressive fashion used in Great Britain, but without "those improper Intrusions on our domestic Rights, & all those arbitrary measures which have furnished such abundant Matter for Complaint in other countries and which ought never to be adopted or authorized in any free Country."

The United States, perhaps alone in the world, provided all the revenue necessary without recourse to direct taxation burdening lands and produce. Should fraud be allowed to persist and grow, "the present happy System would cease supply[ing] the Sums necessary for these important purposes, and public Necessity would constrain us to adopt modes of Taxation less consistent with our Feelings, and in a Variety of Respects more inconvenient." "Let it be remembered," Jay said, "that this Revenue is the People's Revenue—that the Government it is to support is the people's Government—that the Debts it is to pay are the people's Debts, and consequently that they who defraud the Revenue defraud the People."

Given the financial panic, Jay thought "it proper to direct your Attention" to two specific crimes in what was "generally called the penal Statute": perjury and forgery. Besides being a "dreadful Insult" to God, there was "no crime more extensively pernicious to Society" than perjury: "it discolours and poisons the Streams of Justice, and by substituting Falsehood for Truth saps the Foundation of personal and public Rights." In any and every community, controversies arose, and to administer proper justice, courts were instituted. Courts relied upon evidence, primarily the testimony of witnesses given under oath. If these "oaths cease to be regarded as sacred, if they cease to operate as they ought on Men's Consciences, our dearest and most valuable Rights become precarious and insecure."

Jay believed that few crimes "involve[d] a higher degree of Turpitude and Guilt than Forgery," and few presented more danger to society. Men who committed crimes in the heat of passion should not be excused, but should be pitied. But the forger committed his crime silently and secretly without passion, "with a heart deeply contaminated with vice." He sought out the most gullible as "the most easy Prey to his Artifices.... The Folly of all bad Men is to be lamented—but the punishment [of] Men so deliberately wicked cannot excite or Merit much Compassion." In a country such as America, where paper securities and currency were so important to the success of the mercantile economy, "[f]orgery is to be vigilently watched and severely punished. When the Authenticity of Paper becomes doubtful, its Credit diminishes, its Currency flags, its utility is destroyed." If this species of fraud became more prevalent, even wills and deeds might become endangered, "especially if Perjury should give to the Works of Forgery the Proof and Stamp of Truth and Authenticity."

Jay again warned the jurors to be wary of government officials. He did not suspect any particular officer, but the faithful performance

Jay refused Secretary of the Treasury Alexander Hamilton's request in 1792 for help in suppressing opposition by farmers in the South and in western Pennsylvania to the recently enacted whiskey tax. He said such lawless behavior was not a matter for him to address in his next grand jury charge, but one that the President would take up with Congress. A mob of irate farmers is shown tarring and feathering a tax collector.

of public duties was so important "that no Instances of corrupt or unlawful Acts or omissions [should] pass unnoticed. See to it," he admonished the jurors, "that there be no Exactions in public offices, nor any of those reprehensible Practices tolerated, which under various Forms and Pretences, enhance the Expence of Business and disgrace both the Officers and the Government."

America's prosperity, Jay told the jurors, "depends on the due observance of their Laws,—and so far as the due observance of the Laws depends on the Detection and punishment of Transgressors, so far Gentlemen you are responsible to the public for the Diligence and Care with which your Duties may be fulfilled." Be vigilant, but at the same time, be temperate. Be cautious, he said, but do not pay too much attention to "slight Circumstances. Offenders know the value of Silence & Secrecy, and Evidence apparently trivial, often leads to Evidence plain & satisfactory—first diligently inquire, and then maturely consider whether your Evidence be such as to justify your making Presentments, or to justify your omitting to make them. Let us strike at the guilty, but be careful not to wound the innocent." Both the jurors' oath and the laws of morality forbade partiality and passion from warping or misleading the jurors' judgment. Governments, Jay said, should sometimes act like individuals—"when our affairs are *out* of order, we should look to them, to put them *in order*—and when our affairs *are* in good order, we should look to them, to *keep them* so." Jay told the jurors that they were "the Eyes of the Public"; as such, they should do their duty.

After the court session in Bennington, Vermont, the Chief Justice was pleased to say that not a single criminal indictment had been presented during the spring term of the Eastern Circuit. The Rutland *Herald of Vermont* reported that "weak minds may form an idea that sitting of courts may be dispensed with, in this case, but the more discerning will perceive that it is in a measure owing to vigilance in the judicial department, that crimes are seldom committed. A great character lately observed in conversation on this point, at Bennington, that courts of justice ought to be like fire engines; always in good order, and used as seldom as possible"[37]

In the fall of 1792, Secretary of the Treasury Alexander Hamilton wrote to Chief Justice Jay asking him for help in suppressing open opposition to the recently enacted whiskey tax by farmers in the South as well as in some western counties of Pennsylvania. Attendees at a public meeting in Pittsburgh on August 21–22, 1792, issued a proclamation

declaring that they would "persist in our remonstrances to Congress, and in every other legal measure that may obstruct the operation of the Law, until we are able to obtain its total repeal." Hamilton could not reconcile such a statement. Legal measures to obstruct a law were contradictory terms. Hamilton felt that "a vigorous exertion of the powers of government [was] indispensable." He hoped that President Washington would issue a proclamation and that at the next circuit court Jay's charge to the grand jury would condemn the lawless activities—especially the proclamation of the Pittsburgh meeting. According to Hamilton, America was in a state of crisis "which demands the most mature consideration of its best and wisest friends."[38]

Within a week, Jay responded to Hamilton by suggesting that neither should the President issue a proclamation nor should his own charge to the grand jury at the next circuit court dwell on the subject. Rather, the President should address both houses of Congress when it came into session and call for appropriate action. In general, Jay believed that government officials should not issue strong declarations "unless there be ability & Disposition to follow them with strong Measures—admitting both these Requisites, it is questionable whether such operations at this Moment would not furnish the antis with Materials for deceiving the uninformed part of the Community, and in some Measure render the operations of administration odious." Yes, Jay said, he, too, perceived symptoms of the crisis to which Hamilton alluded. But Jay believed that if government managed the crisis "with Prudence and Firmness," it would weaken the rebels. If matters could wait until Congress assembled, "I think all will be well. The public will become informed, and the Sense of the Nation become manifest." Congress could then pass the necessary measures to enforce the law. "If in the mean Time such outrages should be committed as to force the Attention of Government to its Dignity, nothing will remain but to obey that necessity in a way, that will leave nothing to Hazard." Overwhelming force would have to be brought to bear to suppress such opposition to law. "Success on such occasions should be certain."[39]

As the next session of the circuit court neared, Jay was forced to return home due to illness. His eyes inflamed and he experienced both fever and a severe case of rheumatism. Treatment failed to alleviate the condition, and he was forced to give up the circuit. He did not resume his judicial duties until the spring of 1793.

As Jay prepared his next charge to a grand jury in the spring of 1793, two subjects demanded his attention: the continuing violation of the Excise Act by farmers in western Pennsylvania; and the outbreak of war in Europe between France and Great Britain, Spain, and the Netherlands.[40] Jay believed that both individuals and nations "injure their essential Interests in proportion as they deviate from order. By Order I mean that rational Regularity which results from Attention and Obedience to those Rules and principles of Conduct which Reason indicates and which Morality and Wisdom prescribe—These Rules and Principles reach every Station and Condition in which Individuals can be placed, and extend to every possible Situation in which Nations can find themselves."

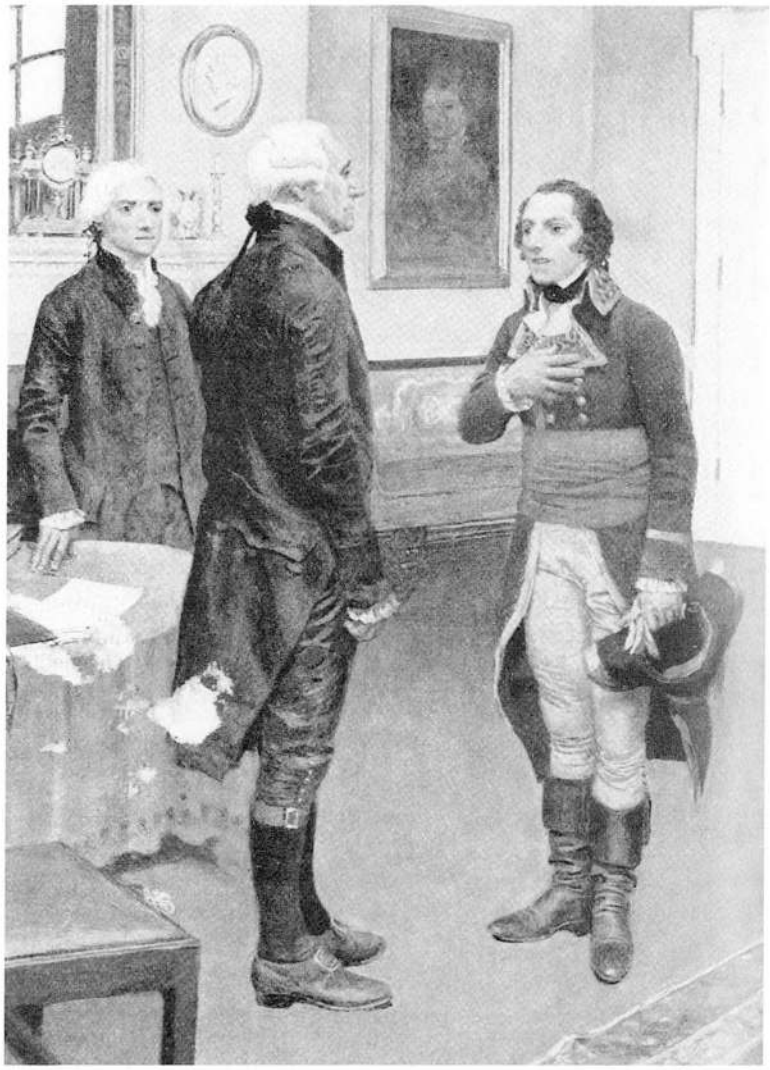
Among the rules were the laws of a country. To make sure that these laws were enforced, courts were established, "whose Business it is to punish Offences, and to render Right to those who suffer wrong." It was the duty of the grand juries to determine whether federal laws had been violated, and, if so, to indict those who had incriminating evidence against them. The grand jurors were to guard the Constitution, laws passed by Congress, the law of nations, and treaties by regulating the conduct of American citizens "relative to our own nation & people and relative to foreign Nations & their Subjects." Included among the first were navigational and finance laws, forgery, counterfeiting, and a host of other offenses enumerated in the penal statutes. As he had done in

previous charges, Jay commented on the importance of a faithful collection of revenue so that the ordinary expenses of government and the public debt could both be paid.

Jay then addressed the issue of foreign affairs in which America would be regulated by the law of nations. This law was drafted by God and was made known to man "by Reason or by Revelation." Nations, Jay wrote, were to each other in the same relationship as were individuals in a state of nature. "Suppose," he said, "twenty families should be cast on an Island and after dividing it between them conclude to remain unconnected with each other by any kind of Government—Would it thence follow that there are no Laws to direct their Conduct towards one another? Certainly not—would not the Laws of Reason and Morality direct them to behave to each other with Respect, with Justice, with Benevolence, with good Faith—Would not those Laws direct them to abstain from violence, to abstain from interfering in their respective domestic Government and arrangements, to abstain from causing Quarrels and Dissentions in each others Families. If they made Treaties would they not be bound to observe them?" The answer was obvious. The nations of the world were like these families placed throughout the world by God. "Between them there is no Judge but the great Judge of all." They had a right to build their own societies as they wished, without outside interference. When two or more countries were at war, other non-interested countries should not interfere except as possible mediators. Third-party nations "ought to observe a strict Impartiality towards both [belligerents], abstaining from affording military aid of any kind or giving just Cause of Offence to either."

The United States found itself in such a situation. Strict impartiality was America's duty. "A just War is an Evil, but it is not the greatest—oppression and Disgrace are greater—War is not to be sought, but it is not to be fled from. Let us do exactly what is just and right." Nations owed each other respect. "Every Man owes it to himself to behave to others with civility and good Manners; and Every Nation in like Manner is obliged by a due Regard to its own Dignity and Character, to behave towards other Nations with Decorum—Insolence and Rudeness will not only *degrade* and *disgrace* nations & Individuals, but also *expose* them to Hostility & Insult—It is the Duty of both to cultivate Peace and good Will, and to this nothing is more conducive than Justice, Benevolence, and good Manners—Indiscretions of this kind have given Occasion to many Wars." Jay instructed the jurors that if they found anyone "engaged in fitting out Privateers or enlisting Men to serve against either of the Belligerent Powers, and in other Respects violating the Laws of Neutrality," they should be indicted. If the jurors were doubtful, they should seek assistance from either the Attorney General or the judges.

It was not only Americans that were required to maintain their neutrality. Belligerent nations had responsibility to neutrals. If foreigners in America tried to seduce Americans to assist in their nation's cause, they should be indicted for high misdemeanors. A new doctrine that allowed Americans to enlist in the service of a belligerent if only they first declared themselves to be expatriates was declared by Jay to be absurd. If the act of a belligerent harmed the interests of an American, the aggrieved party should not and could not legally retaliate. Only Congress should determine the response, declaring war or directing reprisals. But Americans, "as free Citizens," had a right to think and speak their sentiments on these issues. The jurors should not stand in the way of Americans expressing their freedom of speech on "political Questions." These issues were clearly out of the province of grand jurors and judges alike. The grand jurors were to investigate crimes in their district and on the high seas by people residing in the district. Jay had full confidence that the jurors would discharge their duties with "Diligence and Impartiality and without fear, favor, affection, or Respect to persons."



Shortly after Citizen Genet, the new French Minister to America, arrived in South Carolina, George Washington issued his 1793 Proclamation of Neutrality. Washington's views were adopted by Jay, who incorporated them into his charges to grand juries. Genet is shown being formally presented to the President.

A month later, when Jay delivered his charge to the grand jury in Virginia on May 22, 1793,[41] American foreign policy had crystallized. Edmond Charles Genet, the new French minister to America, had landed in Charleston, South Carolina, and had paraded northward to the capital in Philadelphia while continually rallying support for his beleaguered country. On April 22, 1793, President Washington issued his Proclamation of Neutrality. Jay scrapped his draft charge and delivered a different speech that all but ignored the violation of laws while concentrating almost exclusively on violations of the President's proclamation. The Chief Justice repeatedly quoted Emmerich de Vattel's classic **The Law of Nations**,[42] urging the American people "to be particularly exact & circumspect in observing the obligation of Treaties and the Laws of Nations." God, he said, was pleased to place the United States "among the Nations of the Earth, and therefore all those Duties as well as Rights, which spring from the Relation of Nation to Nation, have divolved upon us. We are with other Nations Tenants in Common of the Sea—and it is a Highway for all, and all are bound to exercise that common Right, and that common Highway, in the manner which the Laws of Nations and Treaties require." He quoted the President's Proclamation, saying that it was "exactly

consistent with and declaratory of the Conduct enjoined by the Laws of Nations."

Alluding to Citizen Genet, Jay stated that not only Americans but also foreigners residing in America were required to obey the President's neutrality proclamation. "If they violate the Laws, they are to be punished according to the Laws." America's sovereign rights must be protected from the interference of foreign princes or their subjects.

Jay warned all Americans of the danger of partisanship dividing the country over the war. It was only natural "even for the best men to take Sides"—to wish one belligerent success and the other ill. "Our wishes and Partialities" would become inflamed, and "Indiscretions" often led to hostility. Prudence, Jay said, would not allow such indiscretions to escalate into war. "Union and Harmony" would have to overshadow all sympathetic feelings toward any of the belligerents. We should not divide into fixed political parties—"particularly into Parties in favor of this or that foreign nation." Such a "Situation would be dangerous as well as disgraceful." We should all unite behind President Washington and pursue a policy of neutrality: friendly to all nations, connected or controlled by none.

In concluding, Jay revisited the country's Constitution and statutes. In America, "one great unerring Principle" should always predominate: "the will of the people." The people of the United States "by the Grace & favor of Heaven" had become a sovereign and independent nation. As such, they had a right to choose a form of national government "which they should judge most conducive to their Happiness and Safety." They chose the one "specified in their great and General Compact or Constitution—a Compact deliberately formed, maturely considered, and solemnly adopted and ratified by them. There is not a word in it, but what is employed to express the will of the People; and what Friend of his country & the Liberties of it, will say, that the will of the People is not to be observed, respected and obeyed?" Every citizen, Jay said, was a party to this compact, "and consequently every Citizen is bound by it—To oppose the operation of this Constitution and of the Government established by it, would be to violate the Sovereignty of the People, and would justly merit Reprehension & Punishment." The laws of the land, derived from the same fount, also "must bind accordingly."

"Happy would it be for mankind," Jay declared, "and greatly would it promote the cause of Liberty and the equal Rights of Men, if the free and popular Governments which from Time to Time may take place, should be so constructed, so ballanced, so organized and administered, as to be evidently and eminently productive of a higher and more durable Degree of Happiness than any of the other Forms." Bills of rights alone were insufficient to preserve liberties; governments had to prove to their citizens through actions that those citizens enjoyed equal rights. The freer a people, the stronger their government should be, because it was more difficult for government to "keep up the Fences of Law & Justice about twenty Rights than about five or six; & because it is more difficult to fence against & restrain men who are unfettered, than men who are in Yokes & Chains."

"Being a free People we are governed only by Laws, and those of our own making." These laws regulated the actions of all citizens along guidelines established by the Constitution. He who violated laws was not a good citizen. The execution of the law and the observance of the Constitution promoted "[t]he common good & welfare of the Community . . . to secure to every man what belongs to him as a member of the nation, and by increasing the common Stock of Prosperity, to augment the Value of his Share in it." Thus, it was "the Duty and Interest of us all, that the Laws be observed and irresistably executed." Because the jurors were aware of laws that might have been violated, Jay did not feel it necessary to itemize them. The jurors' oath of office made their duty clear. In this, his last extant charge as Chief Justice, Jay said that "the Experience of Ages" demonstrated the merit of the grand-jury system. He knew that the conduct of the

jurors would "afford new proofs of its utility & Excellence."

ENDNOTES

[1]Jay to Catharine Ridley, Philadelphia, February 1, 1791, *in* Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800** (New York, 1985–) [hereinafter DHSC], II, 126.

[2]Paris, April 22, 1783, *in* Henry P. Johnston, ed., **The Correspondence and Public Papers of John Jay** (New York, 1891) [hereinafter **Jay Correspondence**], III, 44.

[3]Jay to Philip Schuyler, Passy, September 16, 1783, *in* **Jay Correspondence**, III, 81–82.

[4]*See* John P. Kaminski, "Honor and Interest: John Jay's Diplomacy during the Confederation," 83 *New York History* 293 (Summer 2002).

[5]Jay to Washington, March 16, 1786, *in* **Jay Correspondence**, III, 186–87. *See* Douglass Adair, "Fame and the Founding Fathers," *in* Trevor Colbourn, ed., **Fame and the Founding Fathers: Essays by Douglass Adair** (Indianapolis, IN, 1998), 3–36. *Originally published in* Edmund P. Willis, ed., **Fame and the Founding Fathers** (Bethlehem, PA, 1967), 27–52.

[6]James Madison to Thomas Jefferson, New York, May 27, 1789, *in* Julian P. Boyd et al., eds., **The Papers of Thomas Jefferson** (Princeton, 1950–) [hereinafter **Jefferson**], XV, 153.

[7]Washington to Jay, New York, October 5, 1789, *in* DHSC, I, 11.

[8]*Id.*

[9]Jay to Washington, New York, October 6, 1789, *in* DHSC, I, 11–12.

[10]William Short to John Jay, Paris, November 30, 1789, *in* Boyd, **Jefferson**, XVI, 4.

[11]April 3, 1790, *in* DHSC, II, 21.

[12]Jay to Richard Law, New York, March 10, 1790, *in* DHSC, II, 13.

[13]Z, *New York Journal*, May 28, 1790, *in* DHSC, II, 74–75.

[14]Prior to their appointment to the federal judiciary, Cushing had been chief justice of Massachusetts and Duane had been mayor of New York City.

[15]DHSC, II, 5.

[16]Boston *Herald of Freedom*, May 4, 1790, *in* DHSC, II, 60–61.

[17]DHSC, II, 61.

[18]Loring to Jonathan Palfrey, Boston, May 13, 1790, *in* DHSC, II, 67.

[19]Gore to Rufus King, Boston, May 15, 1790, *in* DHSC, II, 67.

[20]Morris to Jay, London, July 7, 1790, *in* DHSC, II, 82–83.

[21]For the text of the charge, see DHSC, II, 25–30. All quotes in the following thirteen paragraphs are taken from these pages.

[22]George Washington and Benjamin Franklin were two obvious and rare exceptions.

[23]Article IX of the Articles of Confederation gave Congress judicial jurisdiction in three distinct areas, and Congress handled each area differently. Congress gave the state courts jurisdiction over piracy and felonies committed upon the high seas. In January 1780, Congress created a Court of Appeals in cases of capture. *See* DHRC, X, 1439, n.2. In 1783, Congress also used an elaborate judicial commission to settle a land dispute between Pennsylvania and Connecticut settlers in the Wyoming Valley of northern Pennsylvania. Although the commission ruled in favor of Pennsylvania in its Trenton Decree of 1783, the Connecticut settlers declared their independence, whereupon the Pennsylvania Assembly called up the militia, which suppressed the rebellion. When another land dispute occurred between Massachusetts and New York, Congress was unable to implement a commission to settle the dispute, and agents of the two states meeting in Hartford settled the dispute between themselves in 1786.

[24]December 11, 1790, *in* DHSC, II, 113.

[25]*Quoted in* DHSC, II, 99.

[26]October 25, 1790, *in* DHSC, II, 102.

[27]November 4, 1790, *in* DHSC, II, 195.

[28]Jackson to Henry Knox, Boston, November 7, 1790, *in* DHSC, II, 106.

[29]December 11, 1790, *in* DHSC, II, 115.

[30]DHSC, II, 113–14. All quotes in the following two paragraphs are taken from these pages.

[31]May 4, 1791, *in* DHSC, II, 160–61.

[32]Cushing to Theodore Sedgwick, New York, February 21, 1791, *in* DHSC, II, 140.

[33]Boston *Columbian Centinel*, May 14, 1791, *in* DHSC, II, 164–65.

[34]The charge was described in the Boston *Columbian Centinel*, November 16, 1791, *in* DHSC, II, 231–32.

[35]The text of Jay's charge to the grand jury of New York is found in DHSC, II, 253–57. The text as given in Bennington, VT, on June 25, 1792, is in DHSC, II, 282–86.

[36]DHSC, II, 253–57. All quotes in this and the following seven paragraphs are taken from these pages.

[37]*Herald of Vermont*, July 9, 1792, *in* DHSC, II, 286.

[38]Hamilton to Jay, Philadelphia, September 3, 1792, *in* DHSC, II, 292–93.

[39]Jay to Hamilton, New York, September 8, 1792, *in* DHSC, II, 294.

[40]For the draft of Jay's charge to the grand jury of Virginia, see DHSC, II, 359–64. All quotes in this and the following four paragraphs are taken from these pages.

[41]DHSC, II, 380–91.

[42]Emmerich de Vattel, **The Law of Nations; or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns** (Northampton, MA, 1820).

Supreme Court Declinations

BENNETT BOSKEY*

Recently the nation has been awash in matters relating to the complex and sometimes mysterious processes governing the nomination and confirmation of Justices of the Supreme Court of the United States. But as our history abundantly shows, by no means every person offered a seat on the Court has decided to accept it.

It occurred to me that there might be some interest in recounting the rather numerous cases where the Justiceship has been declined. I am not referring to situations where an individual lets it be known that he or she does not wish to be "considered" for the vacancy when the President has not yet made up his mind to offer it. Nor am I including instances, like that of Harriet Miers, where an actual nominee has decided not to persevere in the face of strenuous opposition. This account will be limited to cases where it can be substantiated that an offer was genuinely extended and the answer was "no."

Perhaps my interest in this has been stimulated by an anecdotal event that I experienced long ago. After the conclusion of World War II, as a first lieutenant I was one of a small group of lawyers still in uniform assigned to represent the War Department as counsel in an extensive and contentious congressional investigation conducted under the aegis of the Joint Committee Investigating the Attack on Pearl Harbor. Initially—before they resigned midstream because they thought the investigation had turned into a political squabble instead of a fact-finding expedition—the Joint Committee's general counsel was William D. Mitchell and his deputy was Gerhard Gesell. Mitchell had been made Solicitor General of the United States in 1925 and then Attorney General in the Hoover administration (1929–1933), and during the late afternoon pauses after long hours of Joint Committee hearings I became friendly with him. Probably because of the three years I had served as a law clerk at the Supreme Court, our conversations would sometimes veer to the Court and its Justices. On one occasion, Mitchell said to me that he had declined an offer of appointment to the Supreme Court, and that the reason was that back in Minnesota he had been a partner in the same law firm as Pierce Butler and did not wish to spend the rest of his life sitting on the same Court with Butler.[1] Mitchell's statement was such an extraordinary observation that I never forgot it,

William D. Mitchell (above) once confessed to the author that he had turned down an offer of appointment to the Supreme Court because he did not care to share the Bench with Justice Pierce Butler (left), with whom he had been a partner in a Minnesota law firm.

and certainly nobody else of my acquaintance has ever been in a position to tell me of declining an appointment to the Supreme Court. Until now I did not look into which vacancy it must have been, but from the surrounding circumstances it could have been the seat to which Owen J. Roberts was appointed in 1930 or the one to which Benjamin N. Cardozo was appointed in 1932. The painstaking review by Cardozo's biographer of the events during the month between Justice Holmes' resignation and the nomination of Cardozo as successor[2] suggests to me that this must have been the occasion to which Mitchell was referring, and hence that Cardozo owed his appointment to Mitchell's declination. Mitchell was one of the many who urged President Hoover to name Cardozo.

It should come as no surprise that the tale begins where the federal government begins—the administration of President George Washington. In the early days of the Republic, the

Supreme Court's prestige was at a low ebb and almost insignificant in comparison to some positions in the states. Moreover, the necessity of convening where the seat of the federal government was located was of limited attractiveness to many, the nature and volume of the Court's business was still pitifully obscure, and the prospect of riding circuit was formidable and severe. Thus, in the very first group of appointments to the Court in 1789, Robert Hanson Harrison of Maryland was appointed and confirmed. Five days later, however, Harrison was chosen Chancellor of Maryland "and[,] preferring that post to the laborious position on the Federal Court[,] decided to decline the latter, in spite of Washington's urgent request to the contrary, and notwithstanding an urgent letter from his old comrade-in-arms, Alexander Hamilton."[3] Washington then appointed James Iredell in Harrison's place.

Like Harrison, John Rutledge of South Carolina was in the first group appointed by Washington as Associate Justices. While Rutledge was disappointed that he had not been named Chief Justice, he apparently intended to serve as an Associate Justice, yet he was unable to be present at the Court's first sessions in New York in February 1790. Not long afterward, in February 1791, Rutledge was elected Chief Justice of the South Carolina Court of Common Pleas and Sessions. He accepted that post and resigned his seat on the Supreme Court. Washington visited South Carolina in May 1791 and, while there, in a single letter offered the vacant post to either Rutledge's brother Edward Rutledge or to Charles Cotesworth Pinckney. In a joint reply, both declined.[4] I have not delved into early South Carolina history to assess the significance of these offers and declinations.[5] Washington then offered the seat to Thomas Johnson of Maryland, who accepted with considerable reluctance but resigned after two spells of illness. His service of not quite six months has turned out to be the shortest in the Court's history.

A few years later, in June 1795, the first Chief Justice, John Jay, resigned to become governor of New York, and Washington endeavored to obtain acceptance of the position by Alexander Hamilton. "Hamilton, however, declined to accept the appointment, having but recently resigned as Secretary of the Treasury, and being anxious to renew his law practice and political activities in New York."[6] Thus came about the recess appointment as Chief Justice of John Rutledge, the previously resigned Associate Justice, who solicited the Chief Justiceship from Washington but who in due course was rejected for that position by the Senate and then went into a mental and physical decline.

The Senate's rejection of Rutledge had a curious sequel. Washington offered the Chief Justiceship to Patrick Henry, "but old age (and a possible feeling that he ought to have been appointed earlier) led Henry to decline."[7] Then, early in 1796, Washington nominated Associate Justice William Cushing to the vacant Chief Justiceship. Cushing was immediately confirmed, "his commission was made out, which he received the next day, and held for about a week, when, upon the ground of ill-health, he determined to resign it. Washington, for whom he entertained a profound veneration, endeavored to dissuade him from his purpose; but without avail."[8] Cushing's action led to the Chief Justiceship of Oliver Ellsworth; Cushing remained on the Court as an Associate Justice until he died in 1810.

Meanwhile, another Associate Justice vacancy had confronted Washington in the summer of 1795. "Edmund Randolph who appears to have desired the position, and to whom it was apparently offered by the President in July, 1795, had finally decided not to accept, only a few weeks before his forced resignation as Secretary of State owing to the Fauchet letter scandal."[9] This paved the way for the Justiceship of Samuel Chase, the only member of the Court ever to be subject to impeachment proceedings, though fortunately he was not convicted, since the impeachment was in large part a politically motivated attack on the independence of the judiciary.

When Justice James Wilson died under tragic circumstances at a relatively early age in August 1798, President John Adams offered the vacancy to John Marshall, but to Adams' disappointment, Marshall declined, leading to the appointment of Bushrod Washington.[10] In 1800, Chief Justice Ellsworth resigned, at least partly because of ill health. Adams immediately reappointed the former Chief Justice, John Jay, but without consulting Jay, who had already decided that he wished to retire. "Though his appointment was confirmed by the Senate and his commission actually issued, Jay declined the office, basing his refusal largely on the failure of Congress to relieve the Judges from their onerous duty of sitting in the Circuit Courts."[11] Thus was ushered in the tenure of the individual who became the Great Chief Justice, John Marshall.

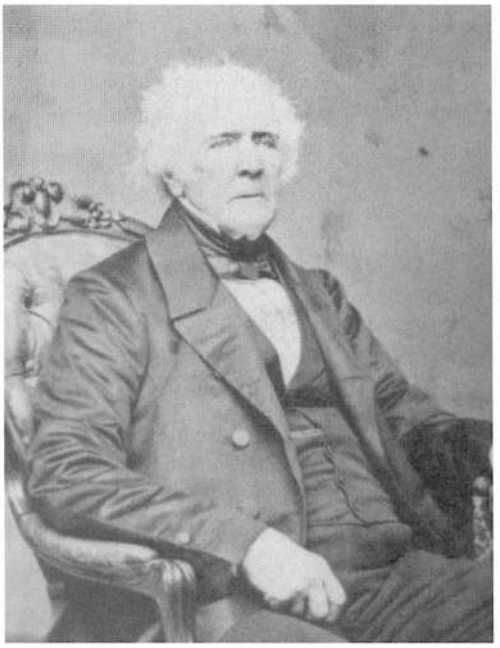
Upon Justice Cushing's death in 1810, President James Madison's first choice to fill the vacancy was Levi Lincoln, who had been the Attorney General under Jefferson and was now being strongly recommended by Jefferson and others. After considering Madison's offer for more than a month, Lincoln "decided that owing to his advanced age and defective eyesight," he must decline, and he wrote to Madison stating his inability to accept. Madison disregarded this declination and sent Lincoln's name to the Senate, where he was promptly confirmed, but Lincoln persisted in his declination. Madison's next nominee, Alexander Wolcott, was overwhelmingly rejected by the Senate, and Madison proceeded to nominate John Quincy Adams, then serving as the U.S. Minister to Russia, who, like Lincoln, was promptly confirmed. Adams firmly and immediately declined the position, "being, as he had written, 'conscious of too little law' and also 'too much of a political partisan.'"[12] This scenario led to nothing less than the eminent Justiceship of Joseph Story.

The death of Justice Robert Trimble in September 1828 was shortly followed by Andrew Jackson's defeat of incumbent John Quincy Adams for the presidency. Instead of acceding to the views of the Democrats that the vacancy should be left unfilled until after Jackson's inauguration, Adams offered the position "to Charles Hammond, the most distinguished lawyer in Ohio[,] and to Henry Clay, both of whom declined."[13] Undeterred, Adams then sent up the name of ex-Senator John J. Crittenden of Kentucky; the nomination died by the inaction of the Senate. This opened the way for Jackson to install on the Court John McLean, whose presidential ambitions ultimately proved him to be a troublemaker.

On March 3, 1837, the day before leaving office, President Jackson filled two newly created vacancies on the Court. One of the nominees was William Smith of Alabama, who had been a Senator from South Carolina. Notwithstanding the fact that his nomination was confirmed on March 8, 1837, Smith declined the position and issued a public statement by way of explanation, basically stating that his declination arose from his desire to retain his freedom to take part in political discussion in support of Jackson's policies and "frankly citing what he regarded as the position's inadequate pay."[14] As a result, President Martin Van Buren filled the vacancy by appointing John McKinley.

Beleaguered President John Tyler had more than his share of declinations.[15] In between his failed nominations in 1847, he made successive offers of a vacancy to John Sergeant and to Horace Binney, both leaders of the Philadelphia and Supreme Court bars, each of whom declined on the ground of being too old. Tyler then twice offered the nomination to the Democratic leader of the Senate, Silas Wright, who declined. And when another vacancy arose, Tyler offered that one to James Buchanan, who likewise declined.[16] Before finally leaving office, however, Tyler did manage to get one of the vacancies filled when his nomination of Samuel Nelson was successful.

James Buchanan—the most ineffectual of Presidents, in contrast to his notable earlier accomplishments as Secretary of State—seems to have harbored a longstanding interest in the

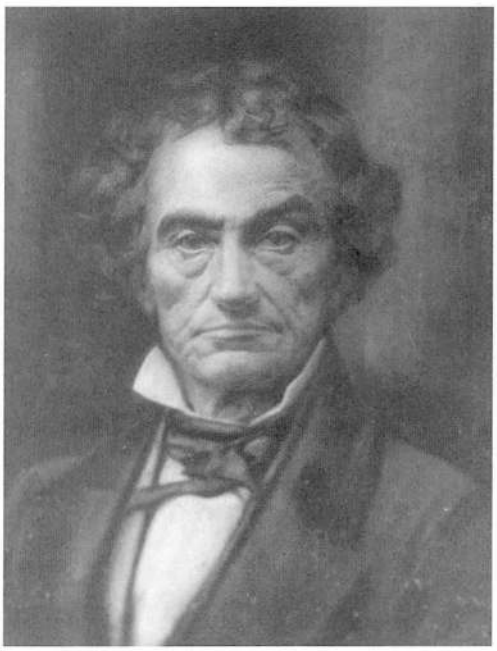


Beleaguered president John Tyler made offers of a Supreme Court seat to many prominent lawyers—including Horace Binney (above left), a leader of the Philadelphia bar, future president James Buchanan (above), and Democratic party leader Silas Wright (left) *twice*—before Samuel Nelson finally accepted the invitation to serve.

possibility of serving on the Supreme Court. While in President James Polk's Cabinet as Secretary of State, Buchanan had at least two more opportunities in 1845–1846 to be placed on the Court. In each instance, however, after initially planning to accept, he changed his mind and remained in the Cabinet.[17] What the Court received instead was Robert Grier.

About five years later, in 1851, President Millard Fillmore offered a vacancy to the distinguished lawyer Rufus Choate, who would not accept.[18] Fillmore then placed Benjamin R. Curtis on the Court. Shortly before the end of his term, Fillmore sought to extricate himself from nominee trouble with the Senate by offering a vacancy on the Court to Judah P. Benjamin, who declined owing to his recent election as Senator from Louisiana.[19] The upshot was that after being inaugurated in March 1853, the new President, Franklin Pierce, was able to use the vacancy to place on the Court John Archibald Campbell of Alabama, a conscientious jurist who felt obliged to resign after the outbreak of the Civil War.

As far as I have been able to ascertain, the next declination came during the administration of President Ulysses S. Grant after



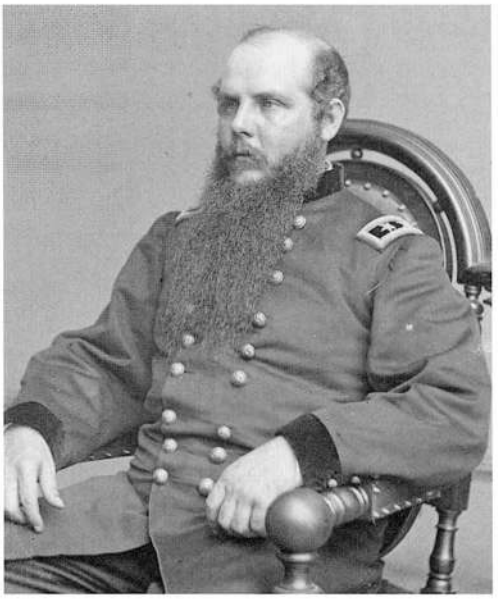
Rufus Choate (left) declined Millard Fillmore's nomination to the Court in 1851 because he did not feel he possessed a judicial temperament. Judah Benjamin (right) turned down Fillmore because he had just been elected Senator from Louisiana. Benjamin would have been the first Jewish Supreme Court Justice.

the death of Chief Justice Chase in May 1873. Grant tendered the position to his politically powerful close associate Senator Roscoe Conkling of New York, whose presidential ambitions were already evident. Conkling declined. Grant next made two successive nominations, each of which was withdrawn because of opposition, and the nation then found that Morrison R. Waite of Ohio—not well known outside Ohio but fortunately highly competent—would be the new Chief Justice.[20]

Conkling had a second opportunity in 1882 when President Arthur nominated him to be an Associate Justice. Despite the understandable hostility of some of his senatorial colleagues, Conkling was confirmed. Although he first expressed acceptance, he then changed his mind and declined the position. Arthur's second choice was Senator George F. Edwards of Vermont, who "declined [the] nomination for personal reasons."[21] This led to the appointment of Samuel Blatchford.

When Chief Justice Waite died in March 1888 during the first Grover Cleveland administration, the President sent an offer of the position to Judge John Schofield of the Supreme Court of Illinois, who was heartily recommended by the President's friend Melville W. Fuller, a leader of the Illinois Bar with some national recognition. Schofield declined, for a strange set of reasons as recounted by Fuller's biographer:

> The published reason for his refusal was that he had a large family of children and that Washington was a bad place to raise children. He told some of his intimates, however, with tears in his eyes, that he would give his good right arm to be Chief Justice of the United States, but that he couldn't



Judge John Schofield of the Supreme Court of Illinois refused Grover Cleveland's nomination for Chief Justice in 1888 with mixed feelings. He badly wanted the appointment, but he feared that his wife, who displayed such frontier habits as running barefoot in the summer, would not adapt well to life in Washington.

> take his wife to Washington. She was a woman of sterling worth but of frontier habits; she went barefoot in the summer. Schofield's friends sympathized but agreed with him.[22]

This cleared the way for Cleveland to insist that Fuller accept the Chief Justiceship, and after momentary hesitation Fuller did so.

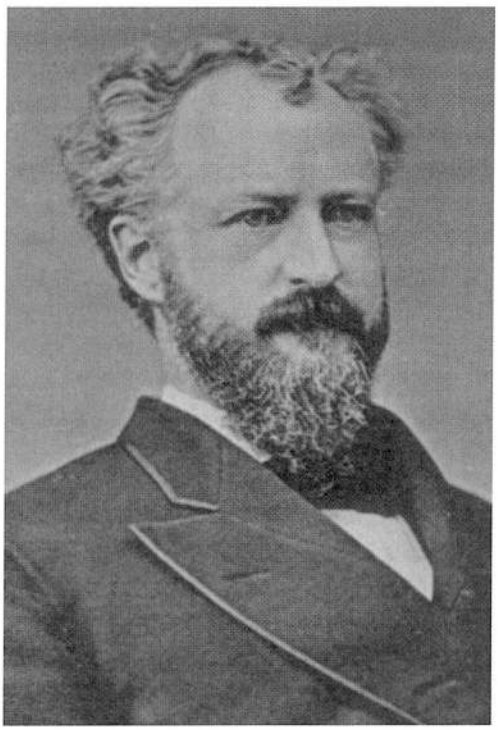
During the second Cleveland administration, after Justice Blatchford's death in 1893, the President offered the vacancy to Frederic Coudert, an eminent New York lawyer, who "declined Cleveland's invitation to serve, allegedly because of his prior commitments to his legal clients." Cleveland then appointed Senator Edward Douglass White of Louisiana, who was later promoted by Taft to the Chief Justiceship.[23] In 1895, after Justice Howell E. Jackson died, Cleveland renominated William B. Hornblower, a controversial New York Democrat whom the Senate had rejected in 1894 for an earlier vacancy; Hornblower "wisely declined the nomination."[24] Rufus W. Peckham became the new Justice.

President Theodore Roosevelt was vexed by declinations. Most notably, William Howard Taft, who succeeded Roosevelt as President and was appointed Chief Justice by President Harding in 1920, had at least two opportunities that he "regretfully" turned down. Late in 1902, when it became known that Justice George Shiras was planning to retire, Roosevelt's first choice was Taft "but he refused because of his work in the Philippines." Similar results followed Roosevelt's continuing offers to Taft when Justices Horace Gray and Henry Billings Brown let their retirement plans be known; Taft expressed "a continual sense of obligation toward the Philippines." Very possibly Taft—or perhaps his wife—had an eye more firmly fixed on the White House prize to be gained from his then-next-friend Roosevelt.[25] In addition to Taft's declinations, Roosevelt received from Philander C. Knox a terse rejection ("no reason given") of an offer of a seat on the Court. Knox had been McKinley's and Roosevelt's Attorney General and had recently been appointed to the Senate[26]; he subsequently became Secretary of State in the Taft administration. Thus, it turned out that Roosevelt did make three appointments to the Court, but they went to Oliver Wendell Holmes, Jr., William R. Day, and William H. Moody.

Apart from the situation of William Mitchell described at the outset, I have found no authentic case of a declination subsequent to the administration of Theodore Roosevelt until we arrive at the Clinton administration. My search has included presidential memoirs, other peoples' memoirs, and a pleasing variety of secondary sources that seemed worth looking at.[27] From Hoover to Clinton was a long hiatus, lasting over half a century. It came to an end in the Clinton administration, for which we have an unassailable source of information—the former president himself. For his initial vacancy, which went to Justice Ruth Bader Ginsburg upon Justice

Byron R. White's retirement, it is clear that Clinton looked first to Governor Mario Cuomo of New York. Speaking of Cuomo, Clinton writes: "I wanted to put him on the Supreme Court but he didn't want that job either. . . . As I said earlier, I first wanted to appoint Governor Mario Cuomo, but he wasn't interested."[28] And when Justice Harry A. Blackmun subsequently retired, Clinton looked to Senator George Mitchell, then the majority leader of the Senate, who likewise declined. As Clinton puts it: "My first choice was Senator George Mitchell, who had announced his retirement from the Senate a month earlier. . . . Mitchell turned me down. He said that if he were to leave the Senate at this time, whatever chance we had to pass health care would evaporate, hurting the American people, the Democrats up for reelection, and my presidency."[29] That vacancy then gravitated to Stephen G. Breyer. With Justice Breyer's addition to the Court, its membership continued unchanged for about eleven years.

From this panorama of the declinations that have punctuated the Court's history might come much thoughtful speculation. How differently would the paths of national development have evolved if the Court instead had been populated by some of those who said "no"? If John Jay had decided to accept President Adams' call to return to the Chief Justiceship, there would have been no Chief Justice Marshall; would the forging of the nation have been severely hampered? Or if the northern radical extremist Roscoe Conkling had accepted President Grant's proffer of the Chief Justiceship, would the Court have been turned into a barrier against efforts at reconciliation between the North and the South? As to the past, such questions—however interesting—are, of course, not really answerable. As to the future, it remains to be seen how often a President's choice to fill a future vacancy on the Court will be an individual who, whether for good reason or otherwise, respectfully declines the honor. And knowing as we must that potential Justices are not fungible and that a single Justice will sometimes make a huge difference, in what manner will such a refusal affect the nation's destiny?



If New York powerhouse Roscoe Conkling had accepted Ulysses S. Grant's proffer of the Chief Justiceship, would he have stymied efforts to reconcile North and South?

ENDNOTES

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[1]Butler, who was an aggressive and not entirely lovable person, served on the Court from December 21, 1922, to his death on November 16, 1939.

[2]Andrew L. Kaufman, **Cardozo** (1998), pp. 456–69.

[3]Charles Warren, **The Supreme Court in United States History** (rev.ed. 1926) [hereafter Warren], vol. I, pp. 42, 90. See also Maeva Marcus, et al., "The Hardships of Supreme Court Service, 1790–1800," in *Yearbook 1984 Supreme Court Historical Society*, p. 118.

[4]Henry Flanders, "Life of John Rutledge," in **The Life and Times of the Chief Justices of the United States** (rev. ed.

1875) [hereafter Flanders], vol. I, p. 622; Clare Cushman (ed.), **The Supreme Court Justices, Illustrated Biographies, 1789–1996** (2nd ed. 1996) [henceforth Cushman], p. 9; Brooks D. Simpson, "President Washington's Appointments to the Supreme Court," 1992 *Journal of Supreme Court History*, p. 67.

[5]For some illumination on this point, see Stanley Elkins and Eric McKitrick, **The Age of Federalism** (1993), pp. 524–28.

[6]Warren, vol. I, p. 125; see also Ron Chernow, **Alexander Hamilton** (2004), p. 486.

[7]Warren, vol. I, p. 139.

[8]Henry Flanders, "Life of William Cushing," in Flanders, vol. II, p. 46. Until recently, Flanders appeared to be almost idiosyncratically unique in including Cushing in a list of the Chief Justices. This year, however, a highly interesting article advanced a definite (though inferred) conclusion that Cushing should be recognized as having actually served as the Chief Justice for at least the two days of February 3–4, 1796. Ross E. Davies, "William Cushing, Chief Justice of the United States," 37 *University of Toledo Law Review* 597 (2006). The conclusion, which relies on a healthy abundance of elderly documents now available, seems to this writer not beyond challenge and well short of passing any beyond-a-reasonable-doubt test.

[9]Warren, vol. I, p. 141.

[10]Warren, vol. I, p. 155; Jean Edward Smith, **John Marshall, Defining a Nation** (1996), p. 245; Albert J. Beveridge, **The Life of John Marshall** (1918), vol. II, p. 347; Henry Flanders, **Life of John Marshall**, in Flanders, vol. II, pp. 384–85.

[11]Warren, vol. I, pp. 172–73; see also George Van Santvoord's 1854 **Sketch of John Jay** (3rd ed. Davies and Kosma 2001), pp. 113–14; Cushman, p. 4; David McCullough, **John Adams** (2001), p. 560; Walter Stahr, **John Jay, Founding Father** (2005), pp. 362–64.

[12]Warren, vol. I, pp. 407–15; see also Cushman, pp. 83, 88–89; Josiah Quincy, **Memoir of the Life of John Quincy Adams** (1858), p. 56; Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** (rev. ed. 1999) [hereafter Abraham], pp. 66–67.

[13]Warren, vol. I, pp. 700–701. As Secretary of State, Clay had been supporting the candidacy of Adams for reelection. The lengthy account of Clay in **Dictionary of American Biography** [hereafter **DAB**], vol. II (1958), p. 177, says: "Clay was temporarily disheartened when he saw the government handed over to a military chieftain. He refused to accept a position on the Supreme Court, and returned wearily over muddy roads to Kentucky, with his simple faith in the good sense of the people much shaken." See also Abraham, p. 70.

[14]Warren, vol. II, pp. 40–41; Abraham, p. 77.

[15]It was Tyler who also managed to "distinguish himself by having more nominees to the Court not confirmed by the Senate than any other President." Cushman, p. 142. For the failure rates of various presidents, see "Subpar Presidents," 6 *Green Bag* 2d 224 (2003).

[16]Warren, vol. II, pp. 113–16; Carl B. Swisher, **The Taney Period, 1836–64,** vol. V, **Holmes Devise, History of the Supreme Court of the United States** (1974), pp. 211–21.

[17]Warren, vol. II, pp. 145–47.

[18]Warren, vol. II, pp. 226–27. Daniel Webster urged Choate to accept, but Choate declined, "feeling that he was not temperamentally fitted to be a judge." Biographical sketch of Rufus Choate, **DAB**, vol. I (1937), p. 87.

[19]Warren, vol. II, p. 245. See also Eli N. Evans, **Judah P. Benjamin: The Jewish Confederate** (1988), pp. 83–84, which says that "Benjamin turned down the offer, preferring the give-and-take of the Senate and looking forward possibly to representing clients before the Supreme Court."

[20]Warren, vol. II, pp. 553–61; Michael A. Kahn and Harry Pohlman, **May It Amuse the Court: Editorial Cartoons of the Supreme Court and Constitution** (2005) [hereafter Kahn and Pohlman], pp. 56–58; William F. Swindler, "Roscoe Conkling and the Fourteenth Amendment," in *Yearbook 1983 Supreme Court Historical Society*, p. 48; Paul A. Freund, "Appointment of Justices: Some Historical Perspectives," 101 *Harvard Law Review* (1988), pp. 1149–50; David M. Jordan, **Roscoe Conkling of New York: Voice in the Senate** (1971) [hereafter Jordan], pp. 199–202.

[21]Warren, vol. II, pp. 623–24. Once again, Conkling was believed to have declined "because he harbored presidential ambitions." Cushman, p. 210; see also Kahn and Pohlman, pp. 59–61. The entry on Conkling in Kermit A. Hall (ed.), **The Oxford Companion to the Supreme Court of the United States** (2nd ed. 2005) [hereafter Hall], p. 206, says that "*The New York Times* suggested that the reason was that the position paid too little money and did not carry any patronage." See also Jordan, p. 418. For the correspondence between President Arthur and Conkling, see 6 *Green Bag* 2d 333 (2003).

[22]Willard L. King, **Melville Weston Fuller, Chief Justice of the United States 1888–1910** (1950), p. 107.

[23]Abraham, p. 108; Allan Nevins, **Grover Cleveland: A Study in Courage** (1933) [hereafter Nevins], p. 571.

[24]Kahn and Pohlman, pp. 62–63; Nevins, p. 572.

[25]Cushman, pp. 294, 343; entry on Taft in **DAB**, vol. 1X (1936), p. 268; Edmund Morris, **Theodore Rex** (2001), pp. 129, 447. Morris suggests that Taft's wife Helen was already mentally redecorating the White House (p. 457). The entry on Taft in Hall, p. 655, notes that "[h]ad Roosevelt been able to offer Taft the position of chief justice, subsequent events might have been very different" and that later, when the death of Chief Justice Fuller led Taft as President to promote Associate Justice Edward Douglass White to the Chief Justiceship, Taft commented that "the one place in the government which I would have liked

to fill myself I am forced to give to another." See also Henry F. Pringle, **The Life and Times of William Howard Taft** (1964), vol. I, pp. 237–51; Abraham, pp. 123, 128.

[26]Edmund Morris, **Theodore Rex** (2001), pp. 441, 714.

[27]I add that, as my endnotes might suggest, I began with Warren and went on to many individual sources that I thought might prove to be helpful. These include an interesting and informative book with a promising title that deals extensively with appointments to the Supreme Court, Abraham's, **Justices, Presidents, and Senators**. This book deals primarily with nominations that were confirmed or rejected, or not voted upon, by the Senate, and only very incidentally does it touch on declinations. Where it does add some information about a particular declination, however, I have cited it.

[28]Bill Clinton, **My Life** (2004), pp. 380, 524.

[29]*Ibid.*, p. 592.

The Conflict between the Chief Justice and the Chief Executive: *Ex parte Merryman*

ARTHUR T. DOWNEY

Rarely does the clash of ideas on the scope of governmental authority get reduced to a direct conflict between leaders of the branches of government. However, early in the Civil War period, the Chief Executive and the Chief Justice confronted each other in a direct fashion. The stakes were high, because the issues related to the conflict between national security and personal liberty.

The Arrest of John Merryman

Late on Saturday, May 25, 1861, a petition for a writ of habeas corpus was presented to Chief Justice Roger Brooke Taney at his home in Washington by Maryland attorneys George M. Gill and George H. Williams. They explained that they were counsel for John Merryman, and that they had just sworn to the petition in front of the U.S. Commissioner in Baltimore. Gill and Williams further explained that at two o'clock that same morning, Merryman had been abducted from his bed in his home outside Cockeysville, north of Baltimore, by a detachment of soldiers led by a Lieutenant Abel, stationed at Relay House on the Northern Central Railroad. Merryman had been taken by train to Baltimore and then by hack to Fort McHenry where, by nine o'clock that morning, he had been locked up.

The lawyers explained that they had visited Merryman at the Fort. The prisoner reported to them that he had been informed that he had been arrested on an order from "one General Keim, of Pennsylvania," whom he did not know. It was alleged that Merryman was the captain of some militia company of Baltimore County, but Merryman said he had never heard of that company. Finally, the person now detaining Merryman "in close custody" was Brevet Brigadier General George Cadwalader. Merryman had signed his petition in front of his lawyers during their interview at Fort McHenry. All access to the prisoner was denied except for his counsel and his brother-in-law.

George Gill was one of two counsels for John Merryman, the Maryland citizen imprisoned without benefit of habeas corpus in 1861.

The lawyers had come to Taney for relief because at that time Supreme Court Justices also sat as federal circuit court judges, and Taney's assigned fourth circuit included Maryland. That was fortuitous, since Taney had deep Maryland roots. It was no small irony that Fort McHenry, in which Merryman was imprisoned, had been the setting during the War of 1812 for the Star-Spangled Banner, based on a poem written by Taney's late brother-in-law, Francis Scott Key, who had been a prominent Washington lawyer.[1] Merryman's lawyers assumed that Taney would order that Merryman be brought before him in Washington.

John Merryman, age 37, was from a distinguished Maryland family that had come to Maryland before 1650. He lived on the 560-acre estate called "Hayfields" near Cockeysville north of Baltimore. It was a cattle farm that raised timothy hay—hence the name "Hayfields."[2] Merryman was long active in the Maryland militia, having been a third lieutenant of the Baltimore County troops in 1847, and by early 1861 he was a first lieutenant of the Baltimore County Horse Guards. Tall and handsome, Merryman was a prominent citizen and president of the Maryland State Agricultural Society.

On Sunday, May 26, the day after Merryman's lawyers met with Taney in Washington, the Chief Justice went to Baltimore, where he could deal more conveniently with the Merryman petition for the writ, since all the potential parties were there.[3] In particular, Taney recognized that it would be awkward to direct General Cadwalader to leave Fort McHenry and come to Washington—beyond the limits of his military command. One of Merryman's lawyers, Williams, presented Taney with a sworn statement explaining that he had gone to Fort McHenry earlier that Sunday and obtained an interview with General Cadwalader. Williams sought permission to see and copy the papers under which the general was detaining Merryman. Cadwalader replied that he would "neither permit the deponent [Williams], though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof."

In response to the petition submitted by Merryman's lawyers, Taney ordered that a writ of habeas corpus be issued, and the clerk of the Circuit Court complied. The writ commanded General Cadwalader to appear at the federal courthouse the following morning, Monday, May 27 at eleven o'clock, and to bring with him the body of John Merryman. At four o'clock that Sunday afternoon, the deputy U.S. Marshal served the writ on General Cadwalader at Fort McHenry.

The writ of habeas corpus was developed early in English common law. By the seventeenth century, "it was recognized as a safeguard of personal liberty. A person arrested was entitled to have a court issue this writ to his custodian, directing the custodian to produce the prisoner in court and explain the reason for his detention."[4] The common-law writ made its way into Article I of the U.S. Constitution,

Merryman was locked up in an airy room on the second floor at Fort McHenry in Baltimore under the detention of Brevet Brigadier General George Cadwalader.

which dealt with the powers of the Congress—the only common-law process mentioned in the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

It was then elaborated in statute form as section 14 of the Judiciary Act of 1789. It was also enshrined in the Constitution of the Confederate States of America (CSA). In 1862, the Confederate Congress empowered President Jefferson Davis to suspend the writ in parts of the Confederacy endangered by enemy attack.[5]

Prior to the Civil War, the writ was also used as a device to free fugitive slaves. While practicing law in Ohio, Salmon P. Chase, Lincoln's Secretary of the Treasury and later the successor to Taney as Chief Justice, used the writ so often in fugitive slave cases that "he came to be known as the 'Attorney General for Runaway Negroes.'"[6] Ironically, in 1847, Lincoln represented a Kentucky slave owner, Robert Matson, who arranged for a writ of habeas corpus to be filed in the free state of Illinois demanding the release of slaves and their return to Kentucky. Thus, in the context of slavery, the writ was a two-edged sword. The conflict between the fugitive-slave provision in the Constitution and the writ of habeas corpus came to a head in March 1859 with the Supreme Court's decision in *Ableman v. Booth*.[7] This decision denied the use of the writ in a state court process to interfere with the enforcement of federal law—specifically, the Fugitive Slave Act. Taney authored that opinion for a unanimous Court.

On the morning of Monday, May 27, 1861, Taney entered the old Masonic Hall on St. Paul Street in Baltimore, leaning on the arm of his grandson. At precisely eleven o'clock, he took his seat at the bench in the courtroom. Word had spread quickly throughout the Baltimore area of the impending controversy, and the courtroom was packed with members of the bar and the public eager to learn of the general's response. Twenty minutes later, an aide-de-camp of General Cadwalader, Colonel Lee, appeared in full military regalia, including red sash and sword, under instructions from the general.

George Cadwalader, age 57, was from a famous Philadelphia family. He practiced law in Philadelphia except for a period during the Mexican War in 1846, when he was commissioned brigadier general of volunteers and received awards for gallantry. After the

war, he returned to his law practice. In 1861, the governor of Pennsylvania appointed him major general of state volunteers, a position he held until May 15, when he assumed command at Fort McHenry.[8] General Cadwalader's brother John, younger by a year, had also been a highly regarded Philadelphia lawyer. During the Buchanan administration, John was appointed to the federal court for the U.S. Eastern District of Pennsylvania.[9] Many years later, Judge Cadwalader's grandson was reported to have said that "if Judge John had issued the writ [in the Merryman case], he would have damn well made his brother obey it."[10]

Colonel Lee read a statement from the general to the Chief Justice. General Cadwalader explained that he had not arrested Merryman. Rather, Merryman's arrest was carried out on the orders of Major General Keim and Colonel Yohe, and Merryman had been brought to Fort McHenry by Lieutenant Abel acting on their orders. He further explained that Merryman was charged with various acts of treason and was ready to cooperate with those engaged in the "present rebellion" against the government of the United States. Finally, Cadwalader stated that he wanted to inform the Chief Justice that he was "duly authorized by the president of the United States ... to suspend the writ of habeas corpus, for the public safety."[11] Cadwalader concluded by requesting that Taney "postpone further action upon this case, until he can receive instructions from the president of the United States."[12]

His task completed, Colonel Lee handed the general's statement to the court clerk and made a move to sit down. But Merryman's lawyer Gill[13] suggested to Taney that Colonel Lee ought to inform them if he had produced the body of John Merryman, as commanded by the writ.[14] Thus, in an almost theatrical step, Taney then asked Colonel Lee whether he had brought with him the body of John Merryman. Lee replied that his only instructions were to deliver the general's statement. Taney responded by inquiring: "The commanding officer declines to obey the writ?"[15] Lee, in effect, threw up his hands and noted that his duties and powers ended after providing the general's statement.

Taney noted that the general had been commanded to produce Merryman before him that morning so that the case might be heard and Merryman might either be remanded to proper custody or be set at liberty. However, said Taney, the general had "acted in disobedience to the writ." Therefore, Taney said, he would order a writ of attachment for contempt according to which General Cadwalader was to appear before Taney at noon the next day, Tuesday, May 27. Colonel Lee retired, and Taney wrote the order for attachment.

Of course, there was little expectation that the general would appear before Taney at noon the next day. But there was speculation that the general might do something to Taney. While in Baltimore, Taney stayed at the Franklin Street home of his eldest daughter, Anne, and her husband J. Mason Campbell, a prominent member of the Baltimore bar. On leaving his daughter's house the next morning, Taney said that it was likely he would be imprisoned in Fort McHenry before the day was over.[16] Taney's anticipation of personal danger was well founded: in the months ahead, the military imprisoned the mayor and chief of police of Baltimore, a member of Congress, thirty-one members of the Maryland legislature, several newspaper publishers and editors, and at least two judges, one of whom—Richard B. Carmichael of Talbot County—was hit on the head with a revolver and dragged from his courtroom.

The Political Context: The Events of April and May

A great deal had happened during the two months before Merryman's arrest. On April 14, Fort Sumter surrendered. The next day, Lincoln issued a proclamation calling for the states to supply 75,000 men and summoned a special session of Congress for July 4.

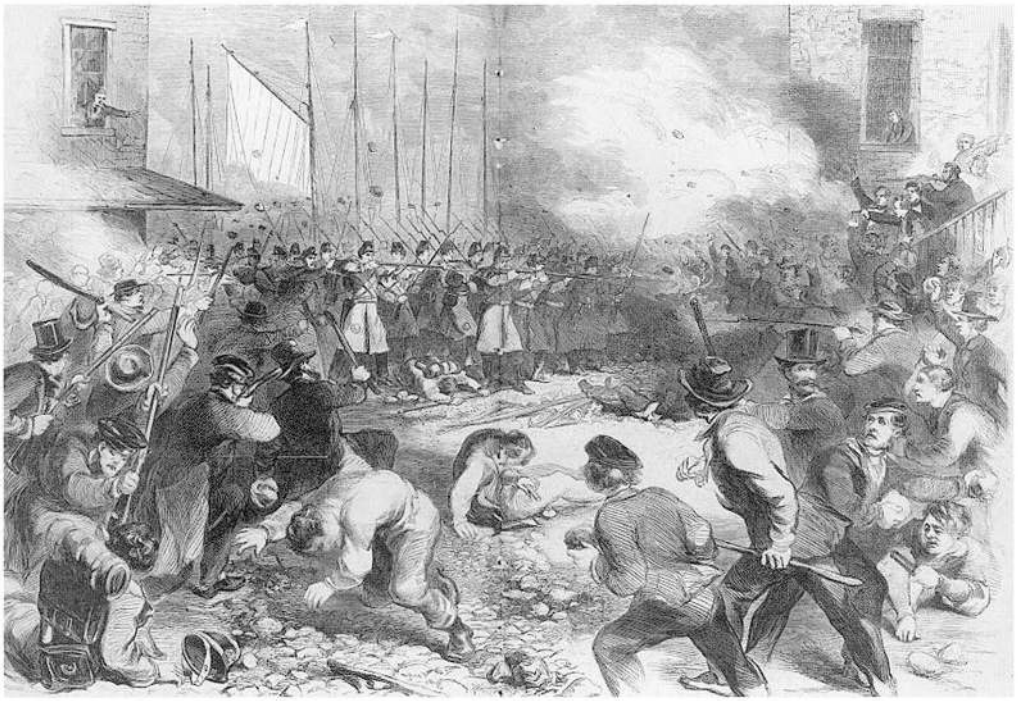
Maryland Governor Thomas Holliday Hicks rushed to Washington to confer with Lincoln, who assured him that Maryland troops would be used exclusively to protect the capital. Marylanders were divided on the slavery issue and on secession, but generally the sentiment was to remain in the Union and to remain a slave state. Marylanders were quite willing to protect the national capital from Southern attack. At the same time, however, there was very little support for the notion of launching attacks against their neighbors in Virginia. In that context, the notion of "permitting" Maryland to be used by troops from the North as a base for an attack on Virginia made them uncomfortable—in part because of the fear that Maryland, in turn, would become a battleground. Only a generation before, in the War of 1812, Maryland had been the scene of brutal attacks by British forces.[17]

Governor Hicks also warned the administration that the people of Baltimore were volatile and issued a reminded that most rail traffic to Washington from the North passed through Baltimore. Baltimore, the third most populated city in America after New York and Philadelphia, had a well-deserved reputation for unruly mobs and violence.[18] Lincoln, of course, understood the "problem" of Baltimore. Just two months earlier, as he was on his way from Illinois to his inauguration in Washington, rumors of an assassination effort in Baltimore caused his security advisers to insist that he pass secretly through Baltimore in the middle of the night. Political cartoonists had a field day. Lincoln was depicted hiding in a rail boxcar dressed in a Scotch plaid cap and a long military coat, being frightened by a cat.[19] His stealthy transit through Baltimore was still personally and politically embarrassing to Lincoln.

A Baltimore ordinance prohibited locomotives from running through the city. Thus, trains going south from Philadelphia to Washington on the Philadelphia, Wilmington & Baltimore line terminated at the President Street Station, where the rail cars were hitched to horses and drawn along tracks through the city, along Pratt Street to Camden Station (now the site of the Baltimore Orioles' stadium), just over a mile away along the harbor. At Camden Station, the cars were then attached to a locomotive to head south to Washington on the Baltimore & Ohio line.

On April 18, a regiment of Pennsylvania troops from Harrisburg changing trains in Baltimore faced hostile crowds. Police marshal George Kane employed 130 policemen to escort the soldiers successfully from the Bolton Station to the B&O station, from which they headed to Washington. The next day, however, things were different. On April 19, the same day that Lincoln issued a proclamation blockading all Confederate ports, the 6th Massachusetts Volunteer Militia—700 armed men—arrived at the President Street Station in Baltimore and began the horse-drawn transit. The first several rail cars successfully made the haul over to the Camden Station, though growing crowds taunted the soldiers in the rail cars as they were towed along the route. Finally, the soldiers were ordered to detrain and to march. Suddenly, all hell broke loose when the soldiers opened fire. George William Brown, mayor of Baltimore and a staunch antislavery advocate, tried to calm the mob and even joined at the head of the soldiers' line; Kane eventually rescued the soldiers. When the day was over, at least sixteen were dead—four soldiers and twelve civilians.[20]

These events became known as the "Pratt Street Riot," a phrase coined in the North. To Southerners, it might have been known as the "Pratt Street Massacre," since most of the deaths were civilians who were killed in their own city by soldiers from Massachusetts. Those civilians were viewed as heroes, having given their lives trying to prevent the state of Maryland from being used as a transit for Northern troops en route to attack the South. The headlines in the *Baltimore Republican* of that day cried: "Our Citizens Shot Down by the Ruffian Black Republicans—Our Streets Drenched with Blood by Lincoln's Hirelings—



Troops from the 6th Massachusetts Infantry Regiment fired on a growing crowd of Confederate sympathizers lined up on Pratt Street in the city of Baltimore. The soldiers were attempting to make their way southward by train.

A Foreign Soldiery Passing Through." [21] Some argued that the event paralleled the Boston Massacre in March 1770, when a civilian mob taunted British soldiers who had been sent to reinforce the local colonial government and thirteen civilians were shot dead and wounded.[22]

In the end, however, the key event was not the "riot" but rather the actions taken by the civic authorities after the shooting. That night, Governor Hicks, Mayor Brown, and others held a mass meeting in the center of Baltimore. Hicks and Brown sent a telegram to Lincoln: "A collision between the citizens and the Northern troops has taken place in Baltimore and excitement is fearful. Send no more troops here."[23] Brown then learned that more troops were en route by train, and he knew that the explosive mix in Baltimore could produce an even greater catastrophe. As a result, Brown and the Board of Police Commissioners met and decided to order the burning of railroad bridges north of the city, to prevent a recurrence of the military transit of Baltimore. Pursuant to these orders, John Merryman participated in the burning of the bridges. Armed Marylanders forced a Pennsylvania regiment to turn back at Cockeysville.

At the same time, the 8th Massachusetts Regiment, under the command of General Benjamin F. Butler, took the water route around Baltimore to Annapolis and then by rail to Washington. Thus, the immediate pressure on Washington was relieved, since troops from the North could get to Washington's defense with relative efficiency.

On April 22, Governor Hicks called a special session of the Maryland legislature, but he scheduled it to meet on the 26th in Frederick, since Butler was occupying the state capital at Annapolis. In Washington, it was feared that the legislature would adopt a secession ordinance, and in Annapolis Butler threatened to arrest any secessionist-minded legislator.

On April 25, Lincoln ordered Commanding General Winfield Scott not to interfere with the Frederick meeting of the Maryland legislature. But, Lincoln added, Scott was to watch whether the legislators decided to arm the state against the Union. In that event, Scott could order "the bombardment of their cities—and in the extremest necessity, the suspension of the writ of habeas corpus." This is the first Lincoln document in which habeas corpus is mentioned. On April 27, Lincoln issued an order to Scott specifically authorizing him to suspend the writ to protect the military line between Philadelphia and Washington. The letter to General Scott was not made public, and no one informed the courts or other civil authorities.[24,25]

On May 10, Lincoln publicly suspended the writ of habeas corpus by proclamation for the first time, but it was confined to an order to the Commander of the Union forces on the Florida coast. Florida had seceded long before. The idea seems to have been that, having seceded, the citizens of Florida no longer had any rights under the Constitution. This first public suspension of the writ, therefore, caused little comment.

On May 13, General Butler, acting on his own authority, occupied the city of Baltimore with men from the Massachusetts 6th, the same regiment involved in the April 19 riot. The following day, General Scott relieved Butler of command, but Baltimore remained under military occupation for the duration of the war.

On May 23, Virginia formally ratified its ordinance of secession. The next day, Lincoln ordered Federal troops to cross the Potomac and to occupy Alexandria.

It was against the background of these events that Merryman's arrest took place early on the morning of May 25.

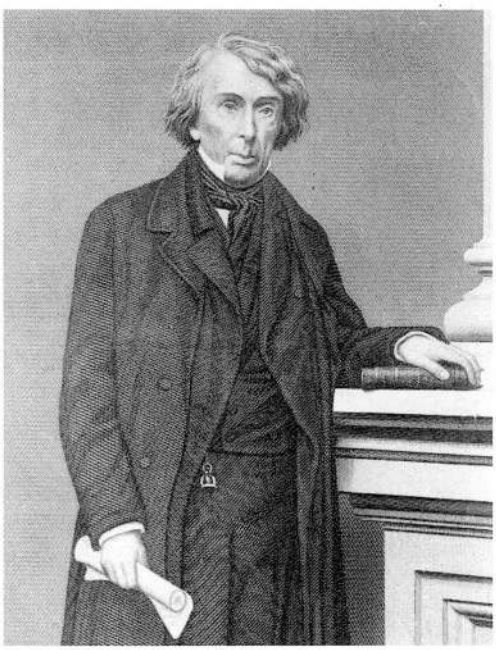
Taney's Decision

During the morning of Tuesday, May 28, "an immense concourse of persons assembled on St Paul Street in the neighborhood of the US Courthouse building, all manifesting the most intense anxiety on the result of the case of habeas corpus for Mr. John Merryman."[26] At the appointed hour of noon, Taney again took his seat in the courtroom and called for the marshal. The marshal reported that he had dutifully gone to Fort McHenry earlier that day, but that he had not been permitted to enter the gate and so could not serve the writ on the general. Taney noted that the marshal had the power to summon a *posse comitatus* to aid him in bringing the general to court, but he excused the marshal, since General Cadwalader clearly had superior power.

Faced with this deadlock, Taney said that he had ordered the writ of attachment the day before because it was the duty of the military officer to turn Merryman over to civil authority, and failing that, it was "very clear that John Merryman ... is entitled to be set at liberty and discharged immediately from imprisonment."[27] Taney explained that he had decided the previous day not to state the full legal reasoning for his position, because he feared that such an oral statement might be misunderstood. He promised to put his opinion in writing and to file it with the Clerk of the Court later in the week. Finally, the Chief Justice said that he would direct "the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[28]

The opinion of the Chief Justice, together with the accompanying petitions and writs, comprised about twenty pages. At times the opinion spoke in the first person; at others, it reviewed English history. Overall, however, it presented an overwhelming case for the proposition that Lincoln had seriously overstepped his bounds. It is an excellent piece of *legal* analysis and writing. It is also an excellent *political* document.

Taney began with the barest statement of the facts—presented, of course, in the way



Chief Justice Roger Taney's decision in the *Merryman* case pointed out that Lincoln had not given notice to the courts or to the public that he had suspended the writ of habeas corpus. Writing for the Fourth Circuit, Taney concluded that the president had exercised "a power which he does not possess under the Constitution."

most favorable to his conclusion—which, he noted, General Cadwalader did not deny:

> [A] military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof . . . [H]is house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry . . . [A]nd when a habeas corpus is served on the commanding officer, . . . the answer . . . is that he is authorized by the president to suspend the writ at his discretion . . . and on that ground refuses obedience to the writ.

Taney then made his statement more personal. As he understood the case, the President not only "claim[ed] the right to suspend the writ of habeas corpus himself, at his discretion," but also claimed the right to delegate that power to a military officer and to leave it to that officer to determine whether he would or would not obey judicial process. Then Taney put his finger on one of the key flaws in Lincoln's action: the President had never given notice to the courts or to the public, by proclamation or otherwise, that he claimed that power. Referring to the statement of General Cadwalader conveyed by Colonel Lee, Taney remarked in a theatrical fashion: "I certainly listened to it with some surprise, for I had supposed . . . to be one of those points of constitutional law upon which there was no difference of opinion" that the writ could be suspended only by an act of Congress. It was as if the general had said the world was flat.

Taney concluded that "the president has exercised a power which he does not possess under the constitution." However, "a proper respect for the high office" of the President made it necessary for the Chief Justice to state fully the ground of his opinion—to demonstrate that he had not ventured to question the legality of Lincoln's action without a careful examination of the whole subject.

The Chief Justice's substantive opinion began with an effort to construe the Constitution regarding where in that document authority is granted. He concluded that the placement of the suspension power in Congress's hands—that is, in Article I—is "expressed in language too clear to be misunderstood by any one [sic]." Then he engaged in a review of English history, quoting Blackstone at length, to explain the Framers' understanding of the relationship between liberty and habeas corpus at the time, when they were still subjects of the Crown.

> If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of

> England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

Turning to American experience, Taney referred to the Aaron Burr conspiracy and to President Thomas Jefferson's deferring to Congress the question of whether or not Congress should suspend the writ of habeas corpus. "And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it." While it is not surprising that Taney had access to law books while writing his opinion in Baltimore, one might ask how it was that Taney was able to point to Jefferson's dialogue with Congress a generation earlier. The answer is that at the time of the Burr conspiracy, when Taney was only 34, he successfully defended a man accused of conspiring with former Vice President Burr to detach the Southern and Western states from the Union.

Taney quoted at length from Justice Joseph Story's definitive **Commentaries on the Constitution**.[29] He accurately described Story as "not only one of the most eminent jurists of the age, but ... one of the brightest ornaments of the supreme court." Turning to Chief Justice John Marshall, Taney quoted from an opinion in which Marshall said the suspension decision is one for Congress, and Taney noted that "I can add nothing to these clear and emphatic words of my great predecessor."

Having established a powerful demonstration of legal authority in support of his position, Taney then broadened his scope and turned somewhat political. He claimed that Merryman's case was not merely a case of an erroneous suspension of the writ, but rather a situation in which the military had thrust aside the judicial authorities "and substituted a military government in its place, to be administrated and executed by military officers." The courts were open in Baltimore and the district attorney of Maryland was available. Nevertheless,

> a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence ... is sufficient to support the accusation ... and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort ...

These actions, Taney pointed out, clearly violated a number of fundamental personal liberty rights protected under the Constitution.[30]

This led Taney to raise the issue of whether a military coup had taken place or whether the President had created a military dictatorship. He concluded that if indeed these fundamental Constitutional rights could be suspended, disregarded, and "usurped" by the military power, "the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."

Having presented both the legal and the political arguments, Taney rested his case. He confronted the hard reality that he had exhausted all his constitutional power, but that resistance had come from "a force too strong for me to overcome." He then quickly offered an escape route, a face-saving way out for the President: "It is possible that the officer ... may have misunderstood his instructions, and exceeded the authority intended to be given him ..." Lincoln merely had to note that General Cadwalader had indeed misunderstood his instructions and the controversy would have disappeared.

Taney explained that he would arrange for the opinion and other documents of the proceedings to be transmitted to the President—from the Chief Justice to the Chief Executive. Then Taney laid the burden squarely on Lincoln "to determine what measures he will take to cause the civil process of the United States to be respected and enforced," because the President has the constitutional obligation to "'take care that the laws be faithfully executed.'"[31] It was a masterful performance by the 84-year-old Chief Justice.

Other Choices?

Did Taney have to confront Lincoln directly by throwing down the gauntlet? Did he have other options?

The most obvious alternative course of action would have been for Taney to suspend further action in the case in order to give Lincoln time to provide proper instructions to General Cadwalader. Indeed, in the general's statement to Taney presented by Colonel Lee on May 27, Cadwalader expressly and respectfully requested exactly that. In Taney's statement of the facts in his written opinion, however, he conveniently neglected to mention the general's request for additional time.

It is likely that Taney chose not to take that temporizing course because he felt it would be pointless. Enough time had already elapsed between the arrest on that Saturday morning and the Court session on Tuesday for Cadwalader to get all the instructions he needed. Moreover, in Taney's view, the clarity and the nature of the wrong—the deprivation of Merryman's liberty, the usurpation of power by the military, and the flaunting of the judicial process—were so overwhelming that the matter simply could not be deferred. Such a wrong had to be stopped dead in its tracks. And as Chief Justice, Taney was the only person who could legitimately put the issue squarely on the President's shoulders. Justice Samuel F. Miller, appointed by Lincoln in 1862, said of Taney, just after the Chief Justice's death in 1864, that "conscience was his guide and a sense of duty was his principle."[32]

Nevertheless, Taney was wrong to act so quickly. Merryman was not in mortal danger. His accommodation at Fort McHenry was not a dank dungeon, but rather an airy room on the second floor. Taney could have waited another week before making his decision. That would have been sufficient time for the general to receive new instructions from Washington and perhaps for the creation of a plausible cover story of misinterpretation of the previous instructions. This would have allowed Lincoln to get off the hook and not to be jammed into a corner. Taney's legitimate worry over the powerful danger to constitutionally protected liberties posed by Lincoln's actions could—and should—have been suspended for a week. If Lincoln continued to stonewall, Taney's position would have been even stronger.

Did Taney have any other options? None that was realistic or safe. For example, he had the authority to order the U.S. marshal to gather a force of men to attempt to storm the gate at Fort McHenry. That would have made for dramatic newspaper copy, but it also might have caused a dangerous mob scene with civilians and soldiers battling each other, as had occurred with lethal horror the previous month in the center of Baltimore. In any event, the Union military forces would have overwhelmed any effort by a marshal. Of course, if Taney had wanted public theater, he could have gone personally to Fort McHenry and nailed the writ of attachment to the gate, as Martin Luther did with his theses. But Taney was not interested in provoking that sort of dramatic confrontation. He did, however, want to make a public statement that would have the effect of not allowing Lincoln to wiggle off the hook.

Lincoln's Response

Lincoln's response to Taney was silence: There was not a word from the Chief Executive until the Fourth of July. On that day, Lincoln sent a detailed written message to Congress,

Lincoln waited several months before responding to Taney's decision, and then did so indirectly and in the passive voice.

convening in the special session that he had called in mid-April. Congress heard the President's message the next day from a clerk, who read it in a dull monotone.[33] The message began with a lengthy review of events since Lincoln's Inaugural—Fort Sumter, the establishment of the Confederate "capital" in Richmond, and Lincoln's call for troops—and then asked Congress for more men and more money. The second half of the message was devoted largely to a detailed political and legal argument against the legitimacy of secession. Here Lincoln employed pithy phrases, accusing the South of "insidious debauching of the public mind," engaging in "ingenious sophism," and "drugging the public mind."[34] One can sense the hand of a confident politician, a master on the stump.

In the middle of the message, Lincoln dealt with the Merryman problem, though he never referred to the case by its name. In contrast to the rest of the message, the tone of this portion is totally different. It is strained and awkward; it does not suggest confidence. Lincoln explained, in the indirect passive form, that "it was considered a duty to authorize the Commanding General . . . to suspend the privilege of the writ of habeas corpus." Even though this authority had been exercised "very sparingly," he argued, the legality and propriety were being "questioned"—never identifying the Chief Justice as the questioner—and the country's attention had been drawn to the proposition that one who is sworn to faithfully execute the laws should not himself violate them. It must have pained Lincoln to acknowledge this charge against him. Lincoln pointed out that there was resistance to the faithful execution of the laws in one-third of the country. Then Lincoln raised some of his famous rhetorical questions, one of which became the title of Chief Justice William H, Rehnquist's 1998 book, **All The Laws But One**:[35]

> [A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?

In a tone that almost pleads for a sympathetic response, Lincoln continued in the passive voice: "But it was not believed that this question was presented. It was not believed that any law was violated." Speaking to the point that it is exclusively Congress—not the President—that has the power to suspend the writ, Lincoln noted disingenuously (though literally correctly) that "the Constitution itself is silent as to which, or who, is to exercise the power," and that, in any event, the Framers would have not have wanted the country to be endangered until Congress could be called together.

That is all there is to Lincoln's public defense of his actions. This was his "response" to Taney. In an odd conclusion to this portion of the message, Lincoln noted his expectation that an opinion "will probably be presented by

the Attorney General." And indeed, the next day Attorney General Edward Bates presented his opinion.[37] The late Chief Justice Renquist thought that it was "not a very good opinion."[36]

From time to time, the Attorney General renders formal legal opinions on matters relating to the function of the federal government. From March 5, 1861, when he was appointed, until the end of that year, Attorney General Bates published forty-one opinions. Most were brief and were directed at other Cabinet members. They ranged from an interpretation of a procurement contract (for the Secretary of War) to whether the Postmaster General had authority to acquire land for a post office.

Just a few weeks before Bates issued his opinion on the suspension of the writ of habeas corpus, he published an opinion on whether the President had the authority to revoke the decree of a general court-martial held in Texas in November 1860 as a result of which a soldier, John Ryan, was imprisoned.[38] Bates opined that Lincoln could take no action: "[I]t is beyond the power of the President to annul or revoke the sentence of a court-martial which has been approved and executed under a former President."[39] Thus, Bates acknowledged that in some areas the President was powerless to act, even in his role as the Commander-in-Chief.

As early as May 20, Lincoln had asked the Attorney General to confer with prominent Maryland constitutional lawyer Reverdy Johnson in order to "prepare the argument for the suspension of the habeas corpus."[40] Bates' twenty-page formal opinion on this subject is a good example of fine lawyering—when your client does not have a solid case. He ignored Taney's citations to the experience of President Jefferson and to Justice Story's **Commentaries on the Constitution**, and he also ignored Taney's textual construction of the suspension power in Article I of the Constitution. While he touched on English history, it was to make the point that it was not particularly relevant, since the U.S. has an entirely different structure of government.

To have taken on Taney directly would have been an uphill battle. Instead, Bates' approach was to work at a high plane of constitutional theory, with a deep focus on the separation of powers and the implied authority that flows from it. His syllogism was this: Only the President has the obligation to "preserve, protect and defend" the Constitution, and so he is duty bound to put down a rebellion (which the courts, Bates noted, cannot do) and, if he locates spies and other supporters of the rebellion, to arrest and confine them. The President is the sole judge "both of the exigency which requires him to act, and the manner in which is most prudent for him to employ the powers entrusted to him."[41]

Having asserted that the President has the power to arrest and detain anyone whom he suspects might be "holding criminal intercourse" with the rebellious forces, Bates confronted the second question: whether the President is justified in refusing to obey a writ of habeas corpus under these circumstances. Once again, drawing on the principle that the three branches of the federal government are fully independent and equal, Bates argued that it was simply unthinkable that a judge could command a President to submit implicitly to the judge's judgment, and could treat the President as a criminal if he disobeys.[42] In any event, Bates argued, the "whole subject-matter is political and not judicial. The insurrection itself is purely political." And, conveniently, the President is "the political chief of the nation."[43]

Then, in a clever tactical step, Bates cited *Luther v. Borden*,[44] a Supreme Court decision written by Taney on the question of whether the President had properly called up the militia. In that case, Taney explained that the President alone has the power to decide whether the exigency exists. Taney's position was that, while it was within the President's responsibility to so decide, it was solely within Congress's power to decide to suspend the writ in light of the situation. In a quite amazing exercise of legal gymnastics, Bates admitted that only Congress has the power to suspend the writ of

habeas corpus to the extent that this is understood to mean a repeal of *all* power to issue the writ. Bates asserted, however, that under the circumstances of a dangerous rebellion, where the public safety requires the confinement of persons implicated in that rebellion, the President has "the lawful power to suspend the privilege of persons arrested under such circumstances."

Bates concluded with the observation that the power of the President to capture insurgents and imprison their accomplices was so obvious that "I never thought of first suspending the writ of habeas corpus, any more than I thought of suspending the writ of replevin, before seizing arms and munitions destined for the enemy." In other words, technical, quaint legal writs have to move aside when the country is confronted with the reality of possible national survival. Bates had conveniently shifted the topic from the imprisonment of persons (such as Merryman) to the confiscation of munitions.

Thus, Attorney General Bates defended the legitimacy of the President's actions. A Missouri native and former slaveholder, Bates had been one of Lincoln's earliest selections for the Cabinet and a rival of Lincoln's—along with William H. Seward, Salmon P. Chase, and Simon Cameron—for the 1860 Republican nomination. At 68, Bates was the oldest member of Lincoln's Cabinet and was viewed highly in political and legal circles as a man who revered the Constitution. Without question, Bates did a fine job in offering a professional legal defense of the President's actions.

But why did he do so, in light of the overwhelming strength of Taney's legal position and the likelihood that Bates was personally uncomfortable with Lincoln's action? He had alternatives: He could have remained silent and simply let Lincoln's message to Congress stand as the definitive statement on the matter ("I can add nothing to what the President has explained in his Message"). That would have had the virtue of allowing him to withhold his personal stamp of approval while at the same time not undercutting the President. At the extreme, of course, Bates could have threatened to resign in protest, but that would have been quite damaging to the new President and would have gained applause from only a handful of constitutional purists. Professor David Herbert Donald, the great Lincoln scholar, has suggested that perhaps Bates was extremely appreciative that Lincoln had selected him for the Cabinet and had done so in an especially gracious manner. More directly, Donald has also posited that Bates passionately wanted to be appointed to the Supreme Court, and that such an aspiration made it difficult to take any action that might diminish Lincoln's interest in him.[45]

Lincoln's written message to Congress on July 4 and Bates' formal opinion of July 5 were the only public responses by the executive branch to the stern judgment of the Chief Justice at the end of May. Why did Lincoln remain silent for more than a month after Taney's decision? Did he have other options?

Lincoln could have taken the escape route offered by Taney: order General Cadwalader to explain to the Chief Justice that he had indeed misunderstood his instructions and that Merryman would be released from Fort McHenry and turned over to Taney's Court. To help Cadwalader save face, the decorous Colonel Lee could have presented this statement. But that course risked being seen as a public defeat for Lincoln—despite the covering excuse of mistake—at a critical time and place. Lincoln needed to be seen, especially in Maryland, as a strong leader focused on protecting the Union at all costs. In addition, Lincoln probably worried that if he yielded to the judiciary, and if civilian juries subsequently were left to decide cases of treason, there was a significant risk—at least in Maryland and the other border states—of jury nullification. Perhaps no jury would convict any Marylander for indirectly helping the Confederates, or at least not helping Union forces move south to attack Virginia.

Another alternative for Lincoln would have been to make no direct response to Taney, but to obtain congressional ratification of his

action. He could easily have taken the opportunity of the July 4 special session of Congress to request that Congress take action to suspend the writ of habeas corpus. There was little doubt that Congress would have been responsive, since Republicans held large majorities in both chambers,[46] and that would have given Lincoln an unassailable legal position. On the other hand, such an action might have suggested that Lincoln had knuckled under to Taney, an unacceptable position.[47]

Central to Lincoln's consideration of his options must have been the raw political fact that Taney was not a formidable political opponent. Taney was widely condemned by the public in much of the North for the *Dred Scott* decision,[48] which had been issued four years earlier at the beginning of the Buchanan administration. Few political figures would want to be seen rallying to Taney's side in a dispute with a wartime President. And the public generally was more concerned about the broad national political/military situation than about a technical legal writ for the detention of a Confederate sympathizer from rural Maryland. In short, Taney was unpopular, action against the Confederacy (and its sympathizers) was popular, and the country was rallying to the President. This situation suggests an interesting parallel to the *Steel Seizure Case* in 1952.[49] That year, President Truman seized certain steel mills by arguing that it was necessary to the Korean War effort. The Supreme Court told Truman that he acted unconstitutionally, since only the Congress had the power to legislate such an action and the fact of the wartime conditions did not alter the relative powers of the legislative and executive branch.[50] This sounds quite like Taney's conclusion that "the president has exercised a power which he does not possess under the constitution."[51]

Another reason that Lincoln decided it was politically possible for him to ignore Taney may have been simply that the Chief Justice was not speaking for the full Supreme Court. Perhaps the situation would have been different if Lincoln had been confronting an opinion of the full Supreme Court, such as 1974's *United States v. Nixon*,[62] rather than merely an opinion by a single Justice.

In sum, it is likely that Lincoln made the political calculation that he had virtually nothing to lose by failing to offer a response to Taney, and that he would risk unacceptable political—and perhaps military—consequences if he yielded to Taney. Neither legally nor politically did Lincoln have to do anything but to let Taney stew.

However, the fact that Lincoln elected to ignore Taney directly and publicly aside from his stilted and awkwardly written message to Congress more than a month after Taney transmitted his opinion does not mean that Lincoln did nothing. In fact, he may well have worked quietly under the table to "fix" the problem of John Merryman. In mid-June, press reports in Baltimore indicated that a grand jury investigation was under way that would probably involve an indictment of Merryman. It was learned that testimony from witnesses indicated that Merryman had burned down the railroad bridges.[53] Press speculation was that, if Merryman was in fact indicted for treason—a capital offense—the District Court would have to remit the case to the Circuit Court, which would not meet again until November.[54]

On July 4—the very day of Lincoln's message to Congress—Secretary of War Cameron interviewed Merryman in Fort McHenry. The *Baltimore Sun* reported merely that Cameron had come to the Fort with his family and that he had reviewed the troops there, leaving by steamer for Virginia.[55] It is more than interesting that General Keim (who issued the order to arrest Merryman at his home), General Cadwalader (who commanded Fort McHenry at the time of Merryman's arrest), and Secretary of War Cameron were all from Pennsylvania and all had an acute understanding of politics. Is it possible that Cameron was sent to Fort McHenry for the purpose of cutting a deal with Merryman—a promise of good behavior[56] in exchange for his release—and that the troop review was merely a convenient "cover" story?

It is not difficult to imagine Lincoln working out a "deal" with Bates and Cameron, with Cameron talking the lead in soothing the ruffled feathers of his two fellow Pennsylvanians.

Eight days later, Attorney General Bates sent the District Attorney for Maryland, William Addison, a letter from Cameron directing that Merryman be released from Fort McHenry in the custody of a U.S. marshal.[57] The Register of Prisoners at Fort McHenry simply notes that Merryman "was transferred to civil authority."[58] Addison was successful in indicting Merryman for treason, but Merryman was permitted to post a $20,000 release bond. He was allowed to return to his home on July 25, almost exactly two months after he was taken from there by the troop of Pennsylvania soldiers. The case never came to trial, and the government eventually dropped the charges.

Thus, the matter of John Merryman was concluded in *exactly* the way that Chief Justice Taney said the Constitution required: Merryman was handed over by the military authorities, and the case was handled within the civil judicial process. All this took place within weeks of the Lincoln/Bates public defense of the arrest and rejection of the Taney writs of habeas corpus and attachment. But this result was virtually unknown by the general public.

Aftermath

Chief Justice Taney died on October 12, 1864, at age 87, at his home in Washington. Attorney General Bates joined President Lincoln at Taney's memorial service early on the morning of October 15, following which Taney's body was transported in a two-car funeral train to Frederick, Maryland, for burial.

Exactly a week before Taney died, Lambdin P. Milligan was arrested in Indiana by U.S. military forces and was tried for treason by military commission. Milligan was one of the ablest and most prosperous lawyers in northern Indiana, and was also a minor politician. The military commission sentenced Milligan to death. Milligan filed a writ of habeas corpus, and the matter eventually reached the Supreme Court which, in 1866, decided *Ex parte Milligan*.[59] This landmark case directed that the writ should issue because the military commission had no jurisdiction over the civilian Milligan.[60] In effect, the Court agreed with Taney's *Ex parte Merryman* decision that took the position that no citizen could be tried by a military "court" as long as the civilian courts were open and available. One of the lawyers representing the government—the losing side—during the argument before the Court was Massachusetts lawyer Benjamin Butler, formerly General Butler, who had occupied Baltimore in May 1861. Counsel for Milligan at the Supreme Court was James A. Garfield of Ohio, arguing his first case before the Supreme Court; he was elected President in 1880.

Who Was Right?

The *Milligan* case suggests that Taney was right with regard to the proper interpretation of the Constitution. On the other hand, Taney was wrong in not giving the President a little more wiggle room, a brief period to allow Lincoln to make a face-saving retreat. It is also a matter of fact that no President since Lincoln has suspended the writ of habeas corpus or otherwise failed to yield to judicial authority, even though there have been wartime emergencies and crises.

It is true that the nation was at war, Maryland's retention in the Union was vital, and the rail link through Baltimore was important. It is also clear that Lincoln was new in his job and not fully secure. In addition, Lincoln knew that the law and the history of fundamental rights centered on the writ of habeas corpus. He believed that the risks to the very existence of the Union were more powerful than the risks to the system of laws and protection of personal liberty by his executive action. Perhaps Lincoln concentrated too much on *his* action—knowing that he was a genuine lover of liberty—rather than the precedent for future Presidents, by which, unchecked, his action could pave the way for dictatorial powers in the wrong hands.

In short, Lincoln decided that the preservation of the Union was more important than personal liberty during the duration of the emergency. That decision was wrong. The protection of personal liberty and the protection of national security need not be mutually exclusive, or a zero-sum game. Lincoln's decision was perfectly understandable. Taney's action was legally correct and personally courageous.

In the end, the nation is very fortunate to have had both men. To have had Lincoln or Taney alone might have resulted in too great a tendency to have either national security or personal liberty dominate at the expense of the other. Together, Lincoln and Taney provided a perfect balance.

Postscript

John Merryman was elected Treasurer of Maryland in 1870 and to the Maryland House of Delegates in 1874. Merryman's wife, Ann Louisa, gave birth to a boy on December 5, 1864, shortly after Taney's death. The child was named Roger Brooke Taney Merryman. The baby died the following July 5, a few months after Lincoln's death.

ENDNOTES

[1]Taney's wife Anne was Key's sister. When Key unexpectedly died in January 1843, the Attorney General of the U.S., as he was about to begin an argument before the Supreme Court, announced the news of Key's death and suggested that the Court immediately adjourn. Mr. Justice Thompson readily agreed and ordered adjournment. Obituary Notice at 42 U.S. [1 How.] xi (1843).

[2]In 1998, the estate became the Hayfields Country Club and golf course.

[3]It is not entirely clear whether Taney went to Baltimore late on Saturday or early on Sunday, but it is clear that the petition was presented to him in Washington on Saturday and that the writ was issued on Sunday in Baltimore.

[4]William H. Rehnquist, **All the Laws but One: Civil Liberties in Wartime** (Knopf, 1998), p. 36. For a recent review of the history of habeas corpus, see Morad Fakhimi, "Terrorism and Habeas Corpus: A Jurisdictional Escape," 30 *J. of Sup. Ct. Hist.* 226 (2006).

[5]William J. Cooper, **Jefferson Davis, American** (Knopf, 2000), 386. See also William C. Davis, **Look Away!** (Free Press, 2002), 175–88.

[6]Mark E. Neely, Jr., **The Fate of Liberty: Abraham Lincoln and Civil Liberties** (Oxford University Press, 1991), xiv.

762 U.S. 506 (1859).

[8]General Cadwalader was replaced on June 11 by General Banks of Massachusetts. In December 1862, General Cadwalader was appointed to a federal board authorized to revise the military laws of the United States.

[9]A year later, Judge John Cadwalader decided the prize case of the vessel Bermuda, a blockade runner. The case was later appealed to the Supreme Court, which affirmed Cadwalader's decision in 1866 in an opinion written by Chief Justice Chase. *The Bermuda*, 70 U.S. (3 Wall.) 514 (1866).

[10]In August 1862, Judge Cadwalader issued a writ of habeas corpus to secure the release of a Philadelphian, Charles Ingersoll, who was arrested after he gave a speech denouncing the Lincoln administration at a Democratic rally. In mid-1863, Judge Cadwalader was renowned for his use of the writ of habeas corpus to release men conscripted under the new draft law; the riots in New York City that summer reflected the tensions over conscription. "*Ex parte Merryman*," 56 *Maryland Historical Magazine* (1961), 386 n.12. See also Neely, **The Fate of Liberty**, 59, 201.

[11]While there is no record of any reaction to that alarming news, one could imagine an audible gasp in the packed courtroom.

[12]*Ex parte Merryman*, 17 Fed. Cas. (No. 9, 487) 144 (1861), at 146.

[13]Present in the courtroom were Merryman's two lawyers, Gill and Williams, along with the U.S. Attorney for Maryland, William Addison.

[14]A good lawyer always wants to ensure that the official record is unambiguous, so that there can be no room for speculation later by opposing parties.

[15]*The Baltimore Sun*, Tuesday, May 28, 1861 p. 1.

[16]"*Ex parte Merryman*," 56 *Maryland Historical Magazine* (1961), 389–90.

[17]Anthony S. Pitch, **The Burning of Washington: The British Invasion of 1814** (Naval Institute Press: 1998). Pitch describes the violent rioting in June 1812, just after the declaration of war against Britain, against the leaders of the anti-war efforts. The sheriff of Baltimore at this time, who tried to put down the rioting, was William Merryman. *Id.* at 6.

[18]See generally David Grimsted, **American Mobbing 1828–1861** (Oxford University Press 1998).

[19]Kristen M. Smith, **The Lines Are Drawn: Political Cartoons of the Civil War** (Hill Street Press, Athens, GA, 1999), 19.

[20]There is a major dispute among historians as to both the exact number of people killed and the size of the crowd. *See, e.g.*, Robert Bailey, "The Pratt Street Riots Revised: A Case of Overstated Significance?," 98 *Maryland Historical Magazine* 153 (2003).

[21]"*Ex parte Merryman*," 56 Maryland Historical Magazine (1961), 388.

[22]The British soldiers were prosecuted for murder, but were acquitted.

[23]Scott Sheads and Daniel Toomey, **Baltimore During the Civil War** (Toomey Press, 1997), 23.

[24] Willian H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Knopf, 1998), p. 24–25.

[25]Professor Daniel Farber states that after the Pratt Street Riot and before the April 27 suspension order, "Lincoln asked his attorney general for advice about his ability to sidestep normal judicial procedures. Bates delegated the question to an assistant, whose answer was not encouraging." Farber provides no citation in support of that statement. Daniel Farber, **Lincoln's Constitution** (University of Chicago Press, 2003), 158.

[26]*The Daily Baltimore Republican*, Tuesday, May 28, 1861, p. 3.

[27]17 F. Cas. 144 (1861).

[28]*Ex parte Merryman*, 17 Fed. Cas. (No. 9, 487) 144 (1861), at 153.

[29]Joseph Story, **Commentaries on the Constitution of the United States** (Little, Brown & Co, 1851), 2 vols.

[30]After Lincoln's suspension of habeas corpus became known, Confederate President Jefferson Davis, a lawyer and former U.S. Senator, "exulted that 'we have forever severed our connection with a government that thus tramples on all principles of constitutionality liberty.'" George C. Rable, **The Confederate Republic** (University of North Carolina Press, 1994), 143. A Richmond newspaper even proposed that the Confederate States of America strike any reference to the ability of the Confederate government to suspend the writ of habeas corpus. *Id.* at 113.

[31]17 F. Cas. at 153, *citing* U.S. Const., Art. II, § 3. It was this phrase that Lincoln would throw back at Taney five weeks later.

[32]"The Supreme Court in the Nineteenth Century," 27 *Journal of Supreme Court History* (2002), at 10.

[33]David Herbert Donald, **Lincoln** (Simon & Schuster, 1995), 304. The Secretary of the Senate who read Lincoln's message was John W. Founey, who was also the publisher of the *Philadelphia Press* at the time. See Ernest B. Furgurson, **Freedom Rising** (Knopf, 2004), 267.

[34]Message to Congress, convened in special session, July 4, 1861.

[35]William H. Rehnquist, **All the Laws but One: Civil Liberties in Wartime** (Knopf, 1998).

[36]Willian H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Knopf, 1998), p. 44.

[37]Professor Mark Neely notes that Bates' opinion was not sent to Congress until after the House passed a resolution on July 12 asking for it. The House seemed not to have known about the suspension of habeas corpus, but the Senate apparently did. Neely, **The Fate of Liberty**, 14.

[38]Ironically, the court martial was ordered by Colonel Robert E. Lee, who also confirmed the sentence.

[39]*Ryan's Case*, 10 Opinions of the Attorneys General 64 (1861).

[40]Neely, **The Fate of Liberty**, 11.

[41]*Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Opinions of the Attorneys General 74, 84 (1861).

[42]Taney, of course, had done no such thing.

[43]*Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Opinions of the Attorneys General (1861).

[44]7 How (48 US) 1 (1844).

[45]Conversation with David Herbert Donald in Washington, November 20, 2003. In October 1864, upon Taney's death, Bates asked Lincoln for the appointment as Chief Justice; Lincoln declined, believing that Bates was too old.

[46]After the withdrawal of the Southerners, the Republicans had 32 out of 48 Senate seats and 106 members of the House out of 176.

[47]In the end, not until March 3, 1863 did Congress authorize the suspension of the writ of habeas corpus, and Lincoln's first proclamation under that authority did not occur until September 15, 1863.

[48]60 U.S. 393 (1856).

[49]*Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

[50]343 U.S. at 587–88.

[51]17 F. Cas. 144, 148 (1861).

[52]418 U.S. 683 (1974).

[53]Merryman, of course, never denied destroying the bridges. Rather, he insisted that he was only doing his duty as an officer of the state militia and following orders from his superiors.

[54]*The Baltimore Sun*, June 21 and 22, 1861.

[55]Scott Sheads and Daniel Toomey, **Baltimore During the Civil War** (Toomey Press, 1997), 38.

[56]Within the notion of "good behavior" might well have been a promise by Merryman that he would not file an action for false imprisonment. Such an action could have caused considerable difficulties for the Lincoln administration.

[57]Thomas F. Cotter, "The Merryman Affair," 24 *The History Trails of the Baltimore County Historical Society* 5 (Winter 1989–90) 7, quoting from the **Attorney General's Letter Books**, Edward Bates to William Addison.

[58]Selected Records of the War Department Relating to Confederate Prisoners of War, 1861–1865, roll 96, vols. 305–310, Registers of Prisoners and Ledger of Prisoners' Accounts, Fort McHenry Military Prison, Fort McHenry, MD.

[59]71 U.S. 2 (1866).

[60]71 U.S. at 62.

May It Please the Court? The Solicitor General's Not-So-"Special" Relationship: Archibald Cox and the 1963–1964 Reapportionment Cases

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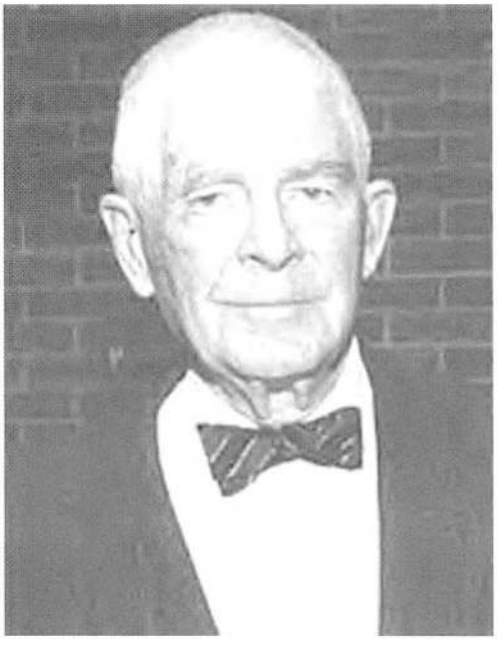
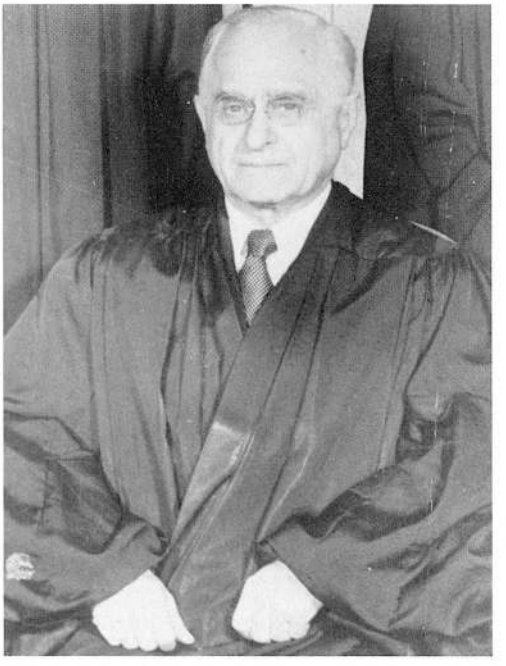
Forty-two years ago, the Warren Court decided the jurisprudential progeny of *Baker v. Carr*.[1] Six cases, headed by *Reynolds v. Sims*,[2] continued to remake the legal landscape of legislative apportionment using the "one person, one vote" principle. For President John F. Kennedy's Solicitor General, Archibald Cox, the *Reynolds* decisions were dangerous. He feared they would precipitate a constitutional crisis that would underscore why Justice Felix Frankfurter, his mentor, had urged his judicial colleagues to avoid entangling their institution in the "political thicket" of legislative apportionment.

In this article, I challenge the conventional wisdom that the Solicitor General is a "Tenth Justice," the leader of an office with which are associated institutional norms and traditions that create a "special relationship" between the Solicitor General and the nine Justices of the Supreme Court of the United States. Analysis is confined to *Lucas v. Colorado General Assembly*, one of the five cases decided with *Reynolds*. *Lucas* was particularly problematic because it involved a constitutional challenge to an apportionment plan that consisted of an amendment to the Colorado State Constitution, adopted through a referendum and supported by a majority of the voters in *every county* in Colorado. Documents relating to the crafting of the government's amicus brief in *Lucas* show that Cox could not rely on his professional status to achieve the goal of keeping the Court out of the reapportionment thicket. First, while the Kennedy administration shared his views, it did so for policy-based rather



Archibald Cox, appointed Solicitor General in 1961 by President Kennedy, once described his office as having "conflicting obligations—to his client and to the Court."



Cox's mentor, Felix Frankfurter, dissented in *Baker v. Carr*, arguing that the Court was rushing into the "political thicket" of legislative malapportionment.

than rule-of-law reasons. Second, the post-1962 Warren Court did not share the Solicitor General's concern for its institutional welfare. In theory, as Solicitor General, Cox enjoyed a special relationship with the Supreme Court. In reality, what this relationship allowed him to accomplish was contingent upon the wider institutional context within which the Solicitor General is situated.

Appointed by President Kennedy in 1961, Archibald Cox became the thirty-first Solicitor General. He is widely acknowledged to have been one of the best Solicitors General, once referred to as "the Willie Mays of Supreme Court lawyers."[3] He came to an office steeped in tradition, where the traditional uniform for participation in oral arguments is the morning suit; it was an office to which mail addressed to "The Celestial General, Washington, D.C." once found its way.[4] Yet, for all the recognition of one's legal talents that selection to the post of official lawyer of the U.S. government bestows, becoming the Solicitor General of the United States carries the baggage of dual loyalty. On the one hand, as Lincoln Caplan's infamous moniker implies, the Solicitor General is a "Tenth Justice" because he enjoys a unique and special relationship with the Justices of the Supreme Court.[5] On the other hand, he serves at the pleasure of the President. The Solicitor General enjoys (or suffers) having his very own political thicket within which to work—one composed of the executive and judicial branches of the American governmental system.

In 1987, in one of the first substantive studies of the Office of the Solicitor General (OSG) offered by someone who was not a former or current employee, Caplan described the Solicitor General as the "Tenth Justice." Reviewing the book, Roger Clegg suggested that one might also view the Solicitor General as the "Thirty-Fifth Law Clerk."[6] Although subsequent studies more frequently invoke Caplan's term, both descriptions portray the Solicitor General as a member of the

staff of the United States Supreme Court. Justice Lewis F. Powell once described the Court as comprising "nine small, independent law firms."[7] Uncritical use of the terms suggested by Clegg and Caplan would require us to expand the membership of the Court so that it comprised ten law firms—the nine Justices' Chambers and the OSG. This is a misleading view of the Solicitor General's work. To be sure, he enjoys a "special relationship" with the Supreme Court. But he is also a presidential appointee serving at the "pleasure" of the President; and as Justice George Sutherland once observed: "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[8] As Cox once described it, "the Solicitor General has conflicting obligations—to his client and to the Court."[9]

Required to be "learned in the law," the Solicitor General is "to assist the Attorney General in the performance of his duties."[10] This is his *legal* obligation, his "duty imposed by law." This "assistance" primarily involves acting as the government's lawyer: defending the federal government before the Supreme Court; choosing which cases to appeal to the Court; and selecting cases in which to file amicus briefs in support of one of the parties. The Solicitor General is considered to have a "special" relationship with the Supreme Court for several reasons.[11] The Court looks upon him as the "gatekeeper" of petitions filed with it. The Solicitor General makes the final determination on government appeals to the Supreme Court. Careful selection of appeals benefits the law and the Court. It allows for development of the law at a speed that is generally consonant with the pace at which the Court's work will be publicly perceived as legitimate. OSG lawyers understand that the Court expects them to maintain a high standard of brief writing. It undermines their relationship with the Court if their work fails to meet the Justices' expectations or exhibits an undesirable degree of ideologically driven argument.

Reflecting the benefits for the Justices of the OSG's "gatekeeper" activities, the Court grants the Solicitor General's requests to participate in oral arguments much more frequently than for any other *amicus curiae*. One of the most important office-specific advantages held by the OSG relates to the filing of amicus briefs. Between 1954 and 1996, an average of 73 percent of the cases in which the Solicitor General filed an amicus brief were decided by the Court in favor of the party supported by the federal government.[12] While one might attribute this success to the OSG's expertise and experience, the office also benefits from provisions in the Supreme Court's rules. The Solicitor General is one of the only persons authorized to submit an amicus brief without obtaining prior written consent from all of the parties involved.[13] And, under the 1954 rules still used in 1963, the Solicitor General was the only lawyer permitted to file an amicus brief without providing an accompanying statement of interest (although he usually did).[14]

In 1974, Marc Galanter differentiated between two categories of parties in legal cases—the "repeat player" and the "one-shotter." The repeat player (RP) is "engaged in many similar litigations over time," whereas the one-shotter (OS) has "only occasional recourse to the courts."[15] The Solicitor General is the quintessential RP. Yet, for all the advantages that RP status gives him, he remains confronted by certain pervasive problems. One, the problem of partiality, reflects a basic aspect of human nature—the influence of self-interest on one's actions.[16] This problem exists in proportion to the size of an individual's jurisdiction. In this respect, the Solicitor General's control over the litigation of the entire federal government might give cause for concern. He is, however, an RP before a small audience the makeup of which is quite consistent. As such, he is the epitome of a profession that Randy E. Barnett argues cannot afford to represent its clients using a tactic of disrepute.[17] The Solicitor General cannot afford to do so, lest he antagonize the Justices

and offend their sense of protecting the legitimacy of *their* institution. Similarly, that the President is hardly the typical client further defends this point. The President is not "exclusively concerned (in [his] capacity as client) with [his] own interest."[18] Whether placating recalcitrant members of Congress or strategizing for upcoming elections, the President is confronted by a myriad of factors when considering the government's involvement in a case. The crafting of the federal government's amicus brief in *Lucas v. Colorado* illustrates the influence of partiality concerns on the work of the Solicitor General. It also provides an opportunity to consider the factors limiting the effectiveness of this particular RP before the Supreme Court of the United States.

In 1962, in *Baker v. Carr*,[19] the Supreme Court ruled that legislative apportionment was a justiciable issue. Overruling *Colegrove v. Green*,[20] decided sixteen years earlier, it held that this subject matter did not constitute a "political question"—a question on whose resolution the judiciary traditionally deferred to the judgment of the "political" branches. For too long, legislators had guarded the territory of their malapportioned districts, refusing to acknowledge that their inaction had negative consequences for a majority of the electorate. The decision in *Baker* clearly distressed the ailing Justice Frankfurter, who dissented, arguing that the majority was eagerly rushing into the "political thicket"[21] of legislative apportionment. Frankfurter saw no more evidence here of abuses in need of judicial intervention than he had done in *Colegrove*. Cox was sympathetic to the concerns of his mentor. However, even he conceded that in Tennessee—the state in question in *Baker*—the malapportionment met the standard he had outlined in the government's amicus brief in *Baker*: "at some point malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment."[22] Cox agreed with Frankfurter's conception of the judicial role that placed significant value on deference to the popularly elected branches of government.[23] The judiciary should not be compelled to intervene when democracy supposedly failed. Yet, he could also see in *Baker* discrimination and legislative *inaction* sufficiently invidious as to warrant judicial *action*. In *Baker*, "Archie stood up and said, 'It is respectable and nothing terrible will happen if you take on reapportionment.'"[24] When confronted with a challenge to the "milder" malapportionment in Colorado (*Lucas*), Cox was immediately inclined to advocate judicial *restraint*.

By the time of the Court's 1963 Term, Cox was also faced with the fact that the Court had significantly expanded judicial involvement in legislative reapportionment. It had ruled on the merits of apportionment plans in 1963 in *Gray v. Sanders*[25] and *Wesberry v. Sanders*.[26] When it granted certiorari in the six cases that were decided in June 1964, the Court entered further into the "political thicket" of apportionment by concerning itself with whether the principles laid out in *Gray* and *Wesberry* applied to cases involving the apportionment of state legislatures. Did the Constitution require states to apportion *both* houses of bicameral legislatures based on population? There is no doubt that Cox answered "no" to this question as vehemently as Frankfurter had objected to the decision in *Baker*. As Solicitor General, he felt that it was his responsibility to protect the Court from what he saw as the dangerous ramifications of issuing such a ruling. À la Frankfurter, he truly believed that the Court should not be exposed to the dangers it would face if it ruled for the petitioners in the state reapportionment cases of the 1963 Term.

Lucas was Cox's "worst legal nightmare" for several reasons.[27] First, it raised fundamental questions about democracy because it challenged an amendment to the Colorado state constitution that had received electoral support from a majority of the voters in every county in the state. Even in the nine counties of the East Slope, comprising the largest urban areas of Colorado, approximately sixty per cent of voters had supported Amendment

7 (providing for per-capita apportionment in the House alone) and rejected Amendment 8 (providing for per-capita apportionment in the House *and* Senate).[28] Furthermore, it was not obvious that the voter discrimination in Colorado was "invidious." Had Cox been asked to rank the fifty states' apportionment plans, placing the most inequitable plan at position one, he would have ranked Colorado somewhere between positions forty-six and fifty.[29]

Of course, Cox represented only one view, and it was a view that met with disagreement both within the OSG and from persons within the larger environment of the Department of Justice and the White House. The question remains, then, how extensive was this disagreement? In his biography of Cox, Ken Gormley argues that it was the White House that relinquished crucial ground in the process of writing the *Lucas* brief. In what he calls "a complicated game of chess, among players theoretically on the same team," he portrays the Solicitor General as the primary force responsible for moving the White House from a desire to have per-capita representation in all state houses to the position that change in this direction should come incrementally and without excessive judicial activism.[30] In *Kennedy Justice*, Victor Navasky acknowledges that the reapportionment cases were the best example of Cox bowing to political pressure, but he still implies that Cox played a primary role in determining the content of the compromises reached in *Lucas*.[31]

I do not dispute that the final position taken was largely Cox's suggestion. The White House-OSG-Office of the Attorney General memoranda on *Lucas* suggest, however, that Gormley and Navasky both underestimate the extent to which Cox's arrival at this position resulted from pressures exerted by the other players in the game. It should be said that Cox's recollections have helped to justify the Gormley-Navasky position. He has written that the reapportionment cases represented the "only instance . . . in which there was frankly political discussion with the White House about the position that the government would take in the Supreme Court."[32] He says that even Lawrence O'Brien, Special Assistant to the President for Congressional Relations and Personnel, put aside the politics when making recommendations about the content of the government's amicus briefs.[33]

From these memoranda, we can identify six significant contributors to the crafting of the government's brief in *Lucas*: Cox; Attorney General Robert Kennedy; Assistant Attorney General (Civil Division) John W. Douglas; Deputy Attorney General Nicholas Katzenbach, Special Counsel to the President Theodore C. Sorensen; and Assistant to the Solicitor General Bruce J. Terris. The memoranda underscore Cox's concern about the potential of the case to provide visible divisions within the federal government. He wrote to Robert Kennedy that he believed it was in the government's interest to participate in the case, lest the Court think that the government endorsed Colorado's apportionment plan, "[a]lthough . . . the depth of our differences and uncertainties may suggest that the United States has no opinion warranting expression."[34] Ultimately the government did express an opinion, but, as Cox's observation suggested, it was a document born out of compromise and accommodation.

Of all the *Lucas* memoranda, the most important was written, not by Cox or Kennedy, but by Terris, an assistant to Cox. On July 3, 1963, Terris, a known civil-rights advocate, wrote a highly influential eleven-page memo that passionately argued for the application of the "one person, one vote" standard to both houses of state legislatures.[35] In his opinion, judicial action was the lifeblood of reapportionment, making the *Reynolds* decisions more significant than the sit-in cases, which were part of a civil-rights movement that had its own momentum regardless of the outcome of judicial action.[36] He felt that the reapportionment cases presented the government with a golden opportunity to take a bold stand in defense

of voting rights, and that the Court would be very receptive to any argument that the OSG made:

> [T]he position taken by the government is probably of considerably greater influence in these cases than in almost any others in which the government appears as an *amicus curiae*. It is generally accepted, and I am sure the Court agrees, that we carried the brunt of persuading the Court to decide *Baker v. Carr* as it did. I think that it is unlikely that the Court will impose a stricter standard on the states than we suggest. However, I think that there is probably a majority for deciding as strict a standard as we are willing to support.[37]

Ironically, the Court did impose a "stricter standard" than that advocated by the government—the stricter standard that Terris recommended.

Although it was unclear just what was protected by the Equal Protection Clause of the Fourteenth Amendment, Terris argued that it was "easier" to interpret equal protection as requiring per-capita apportionment than to read it "expansively," as the Court had done in *Brown v. Board of Education*.[38] Unlike Cox, Terris saw his duty as an OSG attorney dictated by the wishes of the executive branch of the government. And he was perfectly aware of the political ramification of his recommendations. He concluded, however, that the bicameral per-capita approach was sound policy and that the "benefit [to] the country" was widely acknowledged within the executive branch.[39] On this point, Terris clearly was correct. He lobbied hard for acceptance of this position, and was very successful in achieving broad dissemination and acceptance of his views within the Kennedy administration.[40] They were, however, rejected outright by his superior, Solicitor General Cox, who referred to them as "intolerable" and the views of "doctrinnaire liberals."[41]

On August 19, 1963, Cox wrote Robert Kennedy that, as a participant at a state constitutional convention, he might vote for per-capita representation, but that his duty as Solicitor General required a position of discouraging judicial intervention in the matter. He gave several reasons why the government should join the *Reynolds* cases as an amicus, and he echoed Terris's belief that briefs from the OSG had the potential to be very influential. He could not agree with his assistant's recommended course of action, however. He acknowledged that his own view "stems largely from personal conviction," but he emphasized that this personal conviction consisted of concerns about the implications of a per-capita ruling for federalism, and the legitimacy of the law and the judiciary.[42] Concern for "the proper rule of the Supreme Court in our national life, and the obligation of the Solicitor General to the Court" were foremost in his mind, he explained, lest either his office or the administration see recent advancements in civil rights and criminal-procedure litigation jeopardized.[43]

In a "desperate"[44] memo six months later,[45] Cox summarized the options that he saw open to the government in *Lucas* and concluded that the government should advocate dismissal of the case for want of equity, allowing the Court to dispose of the case without ruling on its merits. Prior to *Baker*, the standard argument for dismissal of reapportionment cases had been the "political question" doctrine. In 1964, this was clearly not an option open to Cox. One might argue that dismissal for want of equity was a bizarre suggestion. Certainly it was not recommended by anyone else. In his biography of Cox, Gormley writes that some of the recommendations contained in the memorandum were "almost alarmist." This is a suitable description of Cox's warning that a ruling that the Constitution required both houses to be apportioned based on population would "risk a severe constitutional crisis" and would trigger the states to "defy the Court" in ways the resolution of which would

involve the use of federal troops. Gormley misleads the reader, however, into associating "almost alarmist" with the suggestion to dismiss for want of equity.[46] The Court was no stranger to such requests in reapportionment cases.[47] And dismissing for "want of equity" has been described as "a policy of judicial self-limitation with respect to the entire question of judicial involvement in essentially 'political' questions," a tactic epitomizing the restrained perception of the judicial role held by Cox.[48]

Cox offered four justifications for a dismissal, all of which indicated his concern for the institutional welfare of the Court—a concern sensitive to the sociopolitical environment in which the Court acts, and a concern thereby focused upon justifying and legitimizing that institution's decisions.[49] First, Cox explained that a "court of equity is free to decline to exercise its jurisdiction in cases where its action might be contrary to the public interest," implying that *Lucas* was such a case.[50] Second, he argued that "fair representation" was a "shared" rather than "individual" right. Possession of this right did not guarantee preferential treatment to any one voter in a district. As he later explained in the government's brief, absent any person having more representation than another within a district, "every action to enforce a claimed constitutional right to greater *per capita* representation is a class action necessarily affecting all the voters in the district."[51] Third, there were "wide opportunities for the assertion of majority rule" in Colorado—namely the existence of the initiative and the referendum.[52] This argument was part of Cox's attempt to protect the Court from the "countermajoritarian" charges it would surely face by ruling on the merits of the case; its inclusion in the brief also shows the executive branch's concern with protecting the rights of the states. Finally, Cox argued that this course of action would be in accordance with (a) the arguments made in the government's briefs in the other reapportionment cases of the 1963 Term and (b) the nation's constitutional history. As Burke Marshall and Robert Kennedy rather sarcastically observed, Cox's argument could be summarized as follows: "It didn't fit with history. It didn't fit with the federal structure. It didn't fit with the history of England. It didn't fit with anything."[53]

Given Cox's concern as Solicitor General for the welfare of the Court, it was to be expected that he would also concede the possibility that failure to rule on the merits of *Lucas* might trigger lower court inaction in other instances of legislative malapportionment.[54] After all, one could argue that failure to rule posed the same degree of institutional threat as any decision to rule on the merits, albeit a different kind of threat—the wrong signal to lower courts, rather than the charge of countermajoritarian action. In Cox's opinion, however, these risks were outweighed by the advantages of this course of action:

> No course of action, except the doctrinaire position [advocated by Terris] that I find intolerable, will dispense with a measure of turmoil and uncertainty for a number of years to come. Of all the disadvantages, the risk that some lower courts will decline to exercise a jurisdiction that ought to be exercised, seems least important.[55]

The problem of legislative reapportionment was not about to disappear, but in Cox's view, dismissal for want of equity would reduce the possibility of a political backlash against the Court.

If Rebecca Mae Salokar is right about the influence of personalities on the work of the Solicitor General,[56] then it would be significant if Robert Kennedy's views on *Lucas* were little more than a distillation of Cox's opinions. We know he took a strong personal interest in the reapportionment cases, but how closely did the views expressed in the *Lucas* brief reflect the nature of this interest? If there is little difference in their views, it *might* significantly reduce the argument that Cox faced a dilemma

in balancing the legal and political aspects of legislative reapportionment.

There are two reasons why one might think of Kennedy's views as a composite of Cox's. First, animosity between them existed at the beginning, reflecting their differences in age and legal experience:

> If Robert Kennedy was the Attorney General who had never practiced law, sometimes it seemed to the younger men in the Department that Archibald Cox, by general agreement among the most distinguished Solicitors General in the history of the office, was the Solicitor who couldn't see beyond the law.[57]

The two came to recognize the complementary nature of their relationship, however, as reflected in Burke Marshall's comment that Kennedy

> had problems which he surmounted, by patience namely, in communicating with Archie Cox . . . I think mainly because Archie is always a teacher, and so he had to give you a lecture with whatever advice he gave you. But Bob Kennedy took the lectures and never showed any impatience with him or anything.[58]

One might also see little difference in the views of the two men because, by the time the government's brief was filed in *Lucas* and oral arguments were heard, Robert Kennedy had become increasingly disinterested in Department of Justice work following the death of his brother.[59]

There are, however, two compelling reasons to separate the views of Kennedy and Cox: the nature of the attention that Kennedy paid to the issue while Attorney General, particularly with regard to the electoral effects of legislative reapportionment, and his senatorial interest in the issue. To be sure, Kennedy knew his legal skills paled in comparison to Cox's. He was equally aware, though, that his political knowledge and experience surpassed those

Attorney General Robert Kennedy's views on the reapportionment cases differed from Cox's in that they focused more on the political implications than the legal ones.

of Cox. And he recognized the importance of approaching the reapportionment cases from a political perspective. The Court's decision in *Baker* notwithstanding, the issue was still very much a political question. Consequently, in discussions on *Lucas* and the other reapportionment cases it is fair to say that Cox and Kennedy "started at opposite philosophical poles."[60] Kennedy did not ignore the relevance of the rule of law; his starting point, however, was the politics of the issue. We can see this from the attention paid to the electoral implications of legislative reapportionment. It is clear that Robert Kennedy shared the views of the Kennedy administration, as expressed in the following discussions.

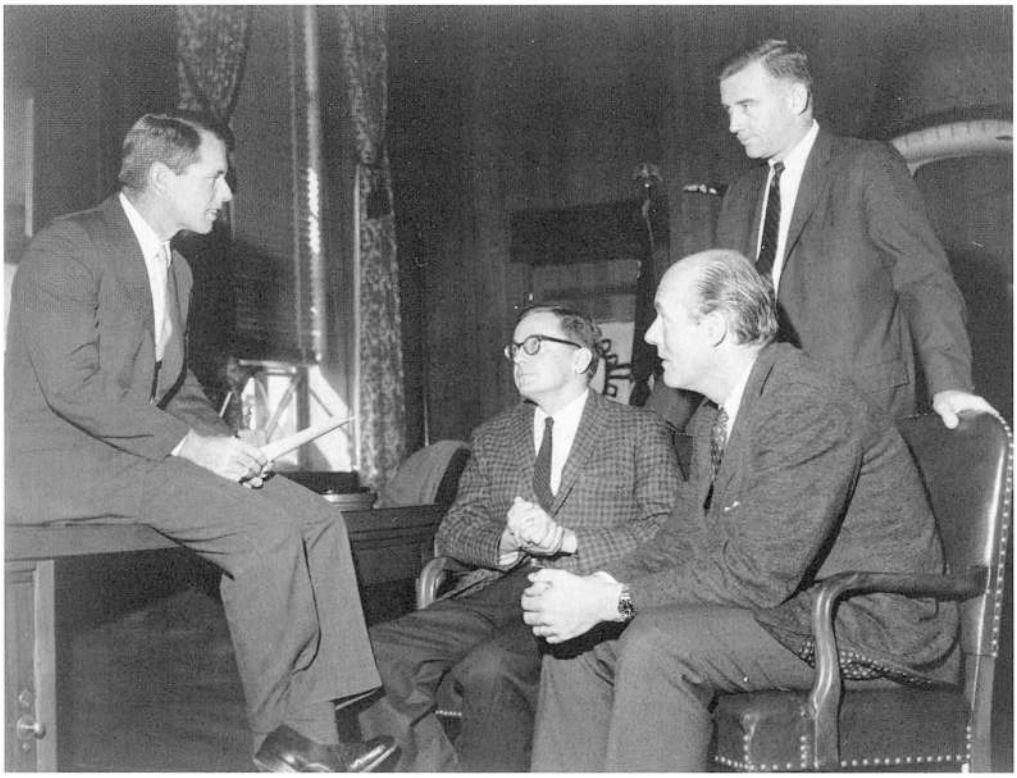
In the spring of 1963, concern arose over the attempts of the Council of State Governments to mobilize the states to amend the Constitution to eradicate federal court jurisdiction over legislative apportionment.[61] Of the thirty-one states for which information was available in May 1963, only one—Wyoming—had actually enacted a resolution approving such an

amendment. However, resolutions had passed the House/Assembly and/or Senate in approximately fifty percent of the remaining states.[62] This effort drew considerable criticism from the White House and from Cox. As the latter pointed out in an address before the Cleveland Bar Association and the City Club, the "lack of debate" on the issues raised by the proposed amendments was "not only surprising but shocking."[63] This reaction echoed the editorial that appeared in the *New York Times* labeling as "incredible and distressing" the absence of substantive scrutiny—legislative, public, and intellectual—of these proposals.[64]

In the wake of *Baker*, Paul T. David and Ralph Eisenberg coauthored an influential paper addressing the reapportionment of state legislatures.[65] In 1962 and 1963, there was considerable correspondence between Professor David and Lee C. White, Assistant Special Counsel to the President, suggesting that the White House paid close attention to the evolution of this issue. This conclusion is also suggested by the administration's replies to letters from the Speaker of the Florida House of Representatives pertaining to that legislature's memorial that expressed the belief that state legislative apportionment was not a federal question. In a September 11, 1962, letter, T. J. Reardon, Jr., Special Assistant to the President, reminded Speaker Chappell of the fundamental nature of the right to vote and equal access to voting.[66] In his October reply, Chappell maintained that the power to apportion state legislatures resided with the states. Although the White House formulated a response, it appears that this was never sent, on the understanding that the administration had made its position on the matter quite clear in Reardon's letter of September 11.[67]

The White House and the Democratic National Committee also expressed considerable interest in the implications of the apportionment cases for the Democratic party's 1964 national convention. Both *Baker* and *Gray* made reforming the method of allocating votes at the convention a pressing issue. It was widely accepted that allocation on the basis of electoral-college votes was no longer acceptable because it failed to reflect party strength in the states. Although favored by some, the practice of offering "bonus" votes to states wherein a majority of the electorate had voted for Kennedy in 1960 was also rejected as "inherently inequitable" and "morally indefensible" in light of the "one person, one vote" doctrine.[68] At all times, discussion of the different reform proposals focused on political feasibility and political gain. The main question asked was, how would any changes benefit President Kennedy when he was re-nominated in the summer of 1964? This was, for all concerned, a distinctly political question.

Once elected to the Senate, Robert Kennedy became an influential opponent of the Dirksen Amendment, an attempt to propose a Constitutional amendment limiting the requirement of population-based apportionment of bicameral state legislatures to house districts, rather than to both chambers.[69] As a high-profile freshman Senator, Kennedy received voluminous correspondence from across the nation, from the general public, politicians (local, state, and national), business leaders, and just about anybody who had an opinion on legislative apportionment.[70] His responses generally conformed to the remarks that he made—in addresses, before Senate committees, and on the floor of the Senate—in defense of the Court's decisions. To be sure, the Senator's speeches emphasized the legal aspects of legislative reapportionment. It is interesting to note, however, that when mention was made of *Lucas* and *Reynolds*, Kennedy used the cases to make a political point. Strip the judiciary of its power to mandate constitutional remedies for malapportionment and you left the people with no fair recourse. Protection of fundamental voting rights would be left to the whim of legislators who, it had to be said, could not be relied on to create plans not in accordance with their own self-interest. Kennedy also repeatedly explained that this was not simply an issue of urban versus rural interests, but



Robert Kennedy debated legislative reapportionment with his advisors while sitting on his desk at the Department of Justice. Nicholas Katzenbach (seated, right) recommended the "narrow ground" argument that was adopted by the government in its brief.

that the proposed amendments also affected the rights of black Americans. In 1965, this was a powerful political statement.

In addition to the memos by Terris and Cox, Robert Kennedy received *Lucas* memoranda from Nicholas Katzenbach, John Douglas, and Theodore Sorensen. Katzenbach and Douglas both expressed concerns that the Court should not address the Fourteenth Amendment question at this point in time. Douglas was clearly worried about the political consequences of a headstrong Court's involvement in the reapportionment cases. He foresaw "widespread hostility" to a ruling that the Constitution required per-capita apportionment in both houses of state legislatures. He favored remanding the case to the lower court, but with the explicit instruction to the court to reconsider the case using permissible criteria.[71] This he preferred to dismissal for want of equity because, echoing the observations that would be made in the government's final brief, he believed the latter would jeopardize the segregation cases.[72]

Katzenbach agreed that it was too soon to ask the Court to risk its legitimacy and the importance of voluntary acceptance to the rule of law by imposing per-capita apportionment upon all the state legislatures. Yet he could not agree with the conclusion that Cox had reached. Instead, he recommended the "narrow ground" argument that Amendment 7 was unconstitutional, but that the Court did not need to address the Fourteenth Amendment requirements. The government ultimately adopted this approach in its brief.

To better understand why Katzenbach and Cox differed on this point, we can compare the speeches they delivered shortly after *Baker* was decided.[73] Cox focused on reaction to the decision, invoking the spirit of Justice Frankfurter's dissenting opinion in that case.

He believed that "the ultimate resolutions of questions fundamental to the whole community must be based on common consensus of opinion." Absent this, he warned his audience, there would be a significant threat to the rule of law that depended on the "voluntary acceptance" of governmental decisions.[74] By contrast, Katzenbach was far more concerned with the political implications of *Baker*. The decision should be welcomed by the states, he said, as a way to "strengthen" and "preserve" federalism; it should be used by state legislators and judges alike to meet the problems of a changing America. Hinting at the views that he would later espouse, Katzenbach commented:

> It is no doubt true . . . that we have not in fact reached the status where representation proportioned to the geographic spread of population is universally accepted as a necessary element of equality between man and man. But as a standard for action and achievement the concept has been part of the American heritage and development from Jefferson to modern times, and the way is now open for obtaining *judicial assistance* in securing that equality in representation.[75]

Cox and Katzenbach both acknowledged the importance of securing rights pertaining to electoral representation. They disagreed, normatively and practically, as to the degree of judicial intervention required to achieve this result.

Of the people from whom Robert Kennedy received *Lucas* memoranda, discussion of Theodore Sorensen's memo has been reserved until last because he was the only person to write from within the White House, rather than the Department of Justice. Sorensen sharply criticized Cox's conclusion that the malapportionment was either comparatively mild or acceptable, normatively or constitutionally.[76] Rather than sharing Cox's concession that dismissal of the case might send the wrong signal to the lower courts, Sorensen was adamant that this was the wrong course of action.[77] Evidencing the primacy of political considerations, however, Sorensen also rejected Terris's recommendation. Now was not the time for the *administration*, he wrote, to advocate per-capita apportionment in "both houses of every state legislature."[78] Instead, Sorensen agreed with Douglas that the case should be remanded for reconsideration using permissible criteria.

Chief Justice Earl Warren chose *Reynolds v. Sims* as the decision that would contain the main holding of the June 1964 reapportionment cases. In light of the standards established by *Wesberry* and *Gray*, the main issue before the Court was "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures."[79] The Court held that the apportionment of both houses of bicameral legislatures must be based on population; some deviations were permissible, but the apportionment had to be substantially based on population. "Legislators represent people, not trees or acres," Warren wrote; "[l]egislators are elected by voters, not farms or cities or economic interests."[80]

One of the most significant aspects of the *Reynolds* opinion was the inclusion of electoral representation rights in the category of "a fundamental matter" that would trigger strict scrutiny.[81] Traditionally, under the Equal Protection Clause of the Fourteenth Amendment, the Court had been reluctant to apply anything but rational-basis review. The very idea of giving strict scrutiny to certain cases because they raised issues involving "fundamental interests" opened the Court up to the charge of "*Lochner*izing" that, at that time, still haunted judges who favored the idea of substantive due process. What gave the Justices the right, so the argument went, to determine that an unenumerated interest was "fundamental" and therefore worthy of a heightened level of judicial review? In the reapportionment cases—explicitly so in the

Reynolds decision—the Warren Court justified using strict scrutiny review for voting rights because of their centrality to democratic theory. It made no sense, Warren argued, to classify suffrage rights as "fundamental" while permitting the votes cast to be "weighted." "To the extent that a citizen's right to vote is debased," he wrote, "he is that much less a citizen."[82]

While "substantive equal protection" might be controversial, subjecting apportionment legislation/plans to a high standard of judicial review is not, as reflected by the acceptance of this standard by subsequent courts.[83] At the time, however, Warren's unequivocal rejection of any notion that there was room for the states to negotiate vis-à-vis the Court's interpretation of the Fourteenth Amendment was one of the main factors behind the Dirksen Amendment. It was an interpretation that went far beyond the recommendations of the government in *Lucas*. In the government's brief, Cox made six main arguments; the Court rejected the three most important.

I. The Case Should Not Be Dismissed for Want of Equity

Of the three points of agreement between the Court and the government, this is the most interesting; it says a great deal about the pressures faced by Cox.[84] The government's amicus brief in *Lucas* began with a rejection of the course of action that the Solicitor General had recommended in his memoranda to the Attorney General. The Court should *not* dismiss the case for want of equity, because this would undermine the value of *Baker*. "[T]he federal courts" the brief observed, "have a clear duty to adjudicate and enforce claims of unconstitutional discrimination resulting from malapportionment."[85] Quoting from *Hall v. St. Helena Parish School Board*,[86] a lower-court school segregation opinion affirmed by the Court in 1962, the brief observed, "No plebiscite can legalize an unjust discrimination."[87] The Court could not have agreed more. "Courts sit to adjudicate controversies involving alleged denials of constitutional rights," wrote Warren.[88]

Clearly this part of the brief ran contrary to Cox's personal beliefs about the judicial role and represented the rejection of the position that he had recommended in his brief to Robert Kennedy on February 4. In a way, Cox must have felt he had achieved a victory by securing the inclusion in the brief of the argument that the voters in Colorado had recourse to a political remedy. But it was only a partial victory.

II. There Is a Political Remedy

Warren's inclusion of the *St. Helena* quote in the *Lucas* opinion[89] might suggest that the government and the Court were in agreement about the value of equal representation of voters. In fact, however, it was included to underscore the majority's conclusion that the voters in Colorado did *not* have recourse to a political remedy. The Court rejected the argument that the existence of the initiative and referendum in Colorado and the proclivity of that state's voters to use these democratic mechanisms enabled the Court to defer to the political branches for a remedy of the malapportionment. In fact, it was in this part of the opinion that Warren included a rationale that both went beyond anything suggested by any of the parties and also gave a good indication of the Chief Justice's appreciation of the political nuances involved in a case of this nature. Warren argued that Amendment 7 and Amendment 8 suffered from the same flaw: both provided that in any county represented by more than one seat, elections would be at-large.

> Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of

> the Senate or House elected specifically to represent them.[90]

Although not expressly stated, the implication was clear: in 1962, the Colorado electorate had been offered a choice between two amendments that were equally intended to preserve the advantage of power then held by the rural and more sparsely populated counties. The choice, Warren concluded, "was hardly as clear-cut as the court below regarded it."[91]

III. The Fourteenth Amendment Question Should Not Currently Be Addressed

Following the recommendations of Sorensen, Marshall, Katzenbach, and Douglas, the government's *Lucas* brief argued that 1963 was the wrong time to decide whether the Fourteenth Amendment required population-based apportionment in both houses of state legislatures. Both Katzenbach and Douglas preferred a course of action that would maintain the involvement of the federal courts—to "keep pressure [on the states] for fair apportionment"—but would not further alienate the nation's elected representatives.[92] The Court should not mandate change in every state legislature, because legislators would see this as a threat to federalism and yet another example of the countermajoritarian problem of the federal judiciary. As Cox explained in a memorandum to Robert Kennedy,

> *[s]uch a position would be contrary to the basic philosophy that ours is a federal system of government in which the people of the States have a large measure of local self-government.* The federal government would be asking the Supreme Court to deny the people of Colorado and other States the right to choose a form of representation adopted by most of the States for all of our history. It would force the rule upon Colorado even though another apportionment, quite reasonable by historic and current standards of practice, has recently been chosen in a specific referendum by majority of the State's people in each and every subdivision. Lower courts, in large numbers, have almost unanimously rejected any such view.[93]

On this final point, Cox's argument was misleading. To be sure, per-capita apportionment was rare in the states. As Anthony Lewis explained in an influential[94] article in the *Harvard Law Review* in 1957, however, in recent years many state courts had begun to act to correct the malapportionment resulting from legislative inaction—without, it should be noted, much concern for the justiciability of the subject matter. By 1957, ten states plus Alaska and Hawaii had enacted constitutional provisions removing responsibility for apportionment from the legislature; eight of these also authorized the judiciary to compel reapportionment on the basis of equality.[95]

Now was the time, the majority in *Lucas* explained, to rule that the Constitution required per-capita apportionment of both houses of state legislatures. Malapportionment because of "prolonged" legislative inaction was not at issue here. The legislature was still to be faulted, because "in spite of the state constitutional mandate for periodic reapportionment," it "has enacted only one effective legislative apportionment measure in the past 50 years."[96] The Court pointed out, however, that to some extent these observations were beside the point: "Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature."[97]

IV. The Main Issue in This Case Is a "Question of Degree"

This was reflected in the Court's rejection of the final point upon which the government's

brief focused—the perception that ultimately, the issue at stake in *Lucas* was really only a "question of degree." Compared to the other reapportionment cases of the 1963 Term, the unique nature of *Lucas* made that case "much closer" than the others.[98] This was the conclusion upon which the rejection of addressing the merits of the Fourteenth Amendment claim largely rested. The Court accepted that *Lucas* was a special case. Again though, this was irrelevant. As explained above, the Court saw no real political remedy existing in Colorado. And the fact that one house of the legislature was apportioned based on population in no way justified leaving the other untouched. The apportionment of the Colorado House and Senate were inextricably intertwined. The Court saw "no indication that the apportionment of the two houses . . . is severable."[99]

In 1962, the makeup of the Supreme Court changed in significant ways. President Kennedy appointed Deputy Attorney General Byron White and Secretary of Labor Arthur Goldberg to replace Justices Charles Evans Whittaker and Frankfurter. These appointments were made after *Baker*, and there was never any doubt that both White and Goldberg could be depended upon to vote with the Warren Court majority in the reapportionment cases. Should Archibald Cox therefore have predicted that the Court would reject the position he advocated in his *Lucas* brief? This is a difficult question to answer. I would argue that the most satisfactory response is that he should have anticipated the Court's expansive ruling, but that his failure to do so is a perfect indication of the conflicting obligations faced by the Solicitor General.

Prior to the emergence of the "real" Warren Court, as David P. Currie has aptly termed the Court as it existed between 1962 and 1969,[100] a strong majority had already formed in support of considering equal access to voting a "fundamental" interest requiring strict scrutiny. By the time the Court granted certiorari in *Reynolds* and the accompanying cases, it had given strong indications in *Wesberry* and *Gray* that it wished to give a very expansive interpretation of this using the "one person, one vote" principle. The Court's decisions were reflecting what Cox has described as the "deep current of essential political egalitarianism [that] ran through the country's political development."[101] This was clear in *Gray* when Justice William O. Douglas wrote that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[102] And in *Wesberry*, Justice Black concluded an opinion heavy on constitutional history with James Madison's observation that "[t]he electors are to be the great body of the people of the United States."[103] The original meaning of the Constitution, Black was certain, reflected the fact that those who read Madison's words in the *Federalist* "surely could have fairly taken this to mean, 'one person, one vote.'"[104] Given the direction the Court took in post-*Baker* reapportionment cases, the holding in *Lucas*, while disappointing, surely cannot have been too surprising for Cox. In his memo to the Attorney General in August 1963, Cox wrote of his belief that his recommended course of action was a view shared by the "center of the Court."[105] Following *Baker* and the appointments of White and Goldberg, it is difficult to understand how Cox could have believed that he could carry the "center" of the Court with him. William Nelson may be correct that the center now consisted of "1960 liberals," rather than a more classic understanding of that term.[106] This was still, however, a center the liberal views of which were the same as those dismissed by Cox as "doctrinaire."

That Cox persisted with a brief that did not advocate per-capita apportionment for both houses of state legislatures is ultimately a strong indication of his conception of the role of the Solicitor General. He could reject the view held by "segregationists" and "Birchers" that "the present Court has already gone too far too fast in imposing its ideals upon the

President and Mrs. Kennedy posed with Chief Justice Earl Warren and Mrs. Warren at a reception for Supreme Court Justices in 1963, when the Court was in the thick of deciding reapportionment issues.

States." As the student of Learned Hand and Felix Frankfurter and as the Solicitor General of the United States, however, Cox would not endorse what he believed "would precipitate a major constitutional crisis causing an enormous drop in public support for the Court."[107]

As Cox later conceded, the constitutional crisis that he expected to result from the Supreme Court's rulings in the *Reynolds* cases never actually materialized.[108] To be sure, when the cases were decided in June 1964, they raised the ire of members of Congress, who responded with repeated calls for the passage of punitive legislation or proposals to amend the Constitution. The reapportionment decisions were not the specific target, however; to the Court's opponents they were just another indication of the Warren Court's "judicial activism," in the pejorative sense of the term.[109] Therefore, the reaction of the Colorado state legislature to the decision in *Lucas* seems less surprising than it might have if the national legislators were specifically aggrieved about the Court's reapportionment decisions. Twice during the spring and summer of 1964 John A. Love, the Governor of Colorado, called his state's general assembly into extraordinary session. Both times he was responding to a Supreme Court decision—first *Wesberry* and then *Lucas*. On both occasions, the assembly swiftly complied with the judiciary. Indeed, of the six states involved in the *Reynolds* cases, Colorado was the first to comply with the Court.[110]

Conclusion

As Solicitor General of the United States, Archibald Cox argued in 1963 and 1964 that the Kennedy administration should encourage the Supreme Court to resist further judicial involvement in the political thicket of

legislative apportionment. This reflected his personal rule-of-law and professional role-of-the-Solicitor-General objections. Had he succeeded, we could indeed refer to him as a "Tenth Justice." However, the final government brief in *Lucas v. Colorado*—perhaps the thorniest of the 1964 reapportionment cases—was not a victory for Cox. Rather, it demonstrated the triumph of compromise. Cox conceded the political importance of the case, as emphasized by the White House and by Attorney General Robert Kennedy. And, when the Court decided the case, the opinion exposed the extent to which a majority of the "real" Warren Court desired to take judicial involvement in these cases to the "next level."

The written and oral arguments offered by Cox represented the conflicting obligations faced by the Solicitor General, who enjoys a "special" relationship with the Court while concurrently serving at the pleasure of the President. The outcome of the case underscored the fact that on this occasion, this relationship was *not* so special. Before the Supreme Court in 1964 in the reapportionment cases, Solicitor General Cox was not a "Tenth Justice." Nine Justices was company; ten would have been a crowd.

ENDNOTES

*This is a revised version of papers presented at the 2004 Annual Meeting of the American Political Science Association, the 2004 Annual Conference of the New York State Political Science Association, and the Boston University Department of Political Science Faculty and Graduate Student Seminar Series. The author wishes to thank Mark Silverstein for reading and commenting on numerous revisions, and for encouraging the pursuit of publication of this former seminar paper. She also wishes to thank Randy Barnett, Wendy Martinek, David Mayers, Chris Rossell, and Adam Silver for their helpful comments on different aspects of this work, and the staff of the John F. Kennedy Library for their excellent research assistance.

[1]369 U.S. 186 (1962).

[2]*Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); and *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).

[3]*Quoted in* Ken Gormley, **Archibald Cox: Conscience of a Nation** (Reading, MA: Addison-Wesley, 1997): 181 (from article in *Cleveland Plain Dealer*, May 19, 1993).

[4]Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** (Indianapolis: Bobbs-Merrill, 1958): 143.

[5]Lincoln Caplan, **The Tenth Justice: The Solicitor General and the Rule of Law** (New York: Alfred A. Knopf, 1987).

[6]At the time Clegg was writing, there were thirty-four law clerks working at the Court. Roger Clegg, "The Thirty-Fifth Law Clerk," review of Caplan, **Tenth Justice**, *Duke Law Journal* 1987 (1987): 964–75.

[7]*Quoted in* Walter F. Murphy, C. Herman Pritchett, and Lee Epstein, **Courts, Judges, & Politics: An Introduction to the Judicial Process**, 5th ed. (Boston: McGraw-Hill, 2002): 618.

[8]*Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

[9]Honorable Archibald Cox, "The Government in the Supreme Court," *Chicago Bar Record* 44 (1963): 222.

[10]28 U.S.C. § 505.

[11]The material for this section is drawn from John M. Harmon, "Memorandum Opinion for the Attorney General: Role of the Solicitor General," *Loyola of Los Angeles Law Review* 21 (1988): 1089–97; Corey A. Ditslear, "Office of the Solicitor General Participation Before the United States Supreme Court: Influences on the Decision-Making Process" (Ph.D. Dissertation: Ohio State University, 2003): 66–72; H. W. Perry, Jr., **Deciding to Decide: Agenda Setting in the United States Supreme Court** (Cambridge, MA: Harvard University Press, 1991): 128–33; Caplan, **Tenth Justice**; and Rebecca Mae Salokar, **The Solicitor General: The Politics of Law** (Philadelphia: Temple University Press, 1992).

[12]Calculated using data from Lee Epstein *et al.*, **The Supreme Court Compendium: Data, Decisions, and Developments**, 3d ed. (Washington, D.C.: CQ Press, 2003): 674.

[13]Supreme Court Rule 37.4.

[14]Under the 1954 Rules, the permission to file an amicus curiae brief had to include this statement. That the Solicitor did not need this permission meant he was also not specifically required to provide a statement of interest. The 1970 rules required the statement of interest to be included in the actual amicus brief, thereby removing this particular Solicitor General advantage. Caplan, **Tenth Justice**: 196, 311 n.41.

[15]Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society* 9 (1974): 95–160, at 97.

[16]Randy E. Barnett, **The Structure of Liberty: Justice and the Rule of Law** (New York: Oxford University Press, 1998): 136–38.

[17]*Ibid.*: 138–42, 145–48.

[18] *ibid.*: 145.

[19]*Baker v. Carr*, 369 U.S. 186, 197–98 (1962).

[20]*Colegrove v. Green*, 328 U.S. 549 (1946).

[21]This phrase was made famous by Justice Frankfurter in *Colegrove*, 328 U.S. at 556.

[22]Brief for the United States as Amicus Curiae, *Baker v. Carr* (No. 60–103): 14–16. *See also* Gormley, **Archibald Cox**, ch. eleven (discussing the acrimony this brought to the previously warm relationship between Cox and Frankfurter).

[23]"In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting, joined by Harlan, J.). *See generally* Mark Silverstein, **Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making** (Ithaca, NY: Cornell University Press, 1984).

[24]Philip Heymann, *quoted in* Caplan, **The Tenth Justice**: 191.

[25]*Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that "political equality" could "mean only one thing—one person, one vote").

[26]*Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that the Constitution required that "as nearly as is practicable," votes in congressional elections were to carry equal weight).

[27]Gormley, **Archibald Cox**: 174; Archibald Cox, **The Court and the Constitution** (Boston: Houghton Mifflin, 1987): 299.

[28]Compiled using data from Brief for the U.S. Government as Amicus Curiae, *Lucas v. Colorado* (No. 63-508): 25 [hereinafter *Lucas* Government Brief].

[29]Gormley, **Archibald Cox**, 174–75; Memorandum from Archibald Cox to Robert F. Kennedy, February 4, 1964, Theodore C. Sorensen Papers, Subject Files 1961–64, Box 35, Folder "Justice Dept. 2/10/64" (Boston: John F. Kennedy Library [hereinafter JFKL]) [hereinafter Cox to RFK 2/4/64].

[30]Gormley, **Archibald Cox**: 173

[31]*See* Victor Navasky, **Kennedy Justice** (New York: Atheneum, 1971): 298.

[32]Cox, **The Court and the Constitution**: 297.

[33]*Ibid.*: 298.

[34]Cox to RFK 2/4/64: 5.

[35]Memorandum from Bruce J. Terris to Archibald Cox, July 3, 1963, Theodore C. Sorensen Papers, Subject Files 1961–64, Box 35, Folder "Justice Dept. 2/10/64" (JFKL) [hereinafter Terris to Cox 7/3/63].

[36]*Ibid.*: 1.

[37]*Ibid.*

[38]*Brown v. Board of Education*, 347 U.S. 483 (1954); Terris to Cox 7/3/63: 8–9.

[39]*Ibid.*: 9–10.

[40]For example, see Memorandum from David Rubin to Harold H. Greene, undated, White House Central Subject Files, Box 189 FG410, Folder "Re: Reapportionment Cases in Supreme Court" (JFKL).

[41]Cox to RFK 2/4/64: 9; Memorandum from Archibald Cox to Robert Kennedy, August 19, 1963, White House Central Subject Files, Box 189 FG410, Folder "Re: Reapportionment Cases in Supreme Court" (JFKL): 14 [hereinafter Cox to RFK 8/19/63].

[42]*Ibid.*: 15–16.

[43]*Ibid.*: 16–19.

[44]Gormley, **Archibald Cox**: 174.

[45]Cox to RFK 2/4/64.

[46]*Ibid.*: 174–75, 499 n.74; *see also* Cox to RFK 2/4/64.

[47]Robert G. Dixon, Jr., **Democratic Representation: Reapportionment in Law and Politics** (New York: Oxford University Press, 1968): 182–83; *see also Colegrove v. Green*, 328 U.S. 549, 564ff (1946) (Rutledge, J., concurring), quoting *Wood v. Broom*, 287 U.S. 1, 8–9 (1932) (opinion of Brandeis, Stone, Roberts, and Cardozo, JJ.).

[48]**Jigsaw Politics: Shaping the House After the 1990 Census** (Washington, D.C.: Congressional Quarterly, 1990): 19.

[49]Cornell Clayton and Howard Gillman, "Introduction," *in* Howard Gillman & Cornell Clayton, eds., **The Supreme Court in American Politics: New Institutionalist Interpretations** (Lawrence, KS: University Press of Kansas, 1999): 1–11.

[50]Cox to RFK 2/4/64: 8.

[51]*Lucas* Government Brief: 27.

[52]Cox to RFK 2/4/64: 8.

[53]Quoted in Gormley, **Archibald Cox**: 171.

[54]Cox to RFK 2/4/64: 9.

[55]*Ibid.*

[56]Salokar, **The Solicitor General**: 104.

[57]Navasky, **Kennedy Justice**: 317.

[58]Burke Marshall, recorded interview by Larry J. Hackman, January 19–20, 1970, 10, RFK OHP Robert F. Kennedy Oral History Project (JFKL) . *See also* Gormley, **Archibald Cox**: 163.

[59]Gormley, **Archibald Cox**: ch. twelve.

[60]*Ibid.*: 164.

[61]See attachment to letter from Lawrence Speiser [Director of the Washington Office of the American Civil Liberties Union] to Lee White, May 2, 1963, White House Staff Files, Lee C. White File, Box 19, Folder "Civil Rights—General 6/18/62-11/16/63 and undated" (JFKL).

[62]Statistics compiled using data from *ibid.* Information in the Senate files of Robert Kennedy indicates that states' action only increased with time. *See particularly* "Constitutional Amendment Action by State Legislatures," Robert F. Kennedy Senate Papers [hereinafter RFK Senate Papers], Senate Legislative Subject File, Box 95, Folder "Reapportionment of State Legislatures, 1/1965–3/1965" (JFKL). *See also* Theodore H. White, **The Making of the President—1964** (New York: Atheneum, 1965): 93–94; and William G. Ross, "Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing

Movements Fail," *Buffalo Law Review* 50 (2002): 483–612 (detailing the nature of some of these attacks).

[63]"Understanding the Supreme Court" address, May 4, 1963, RFK Senate Papers, 1964 Campaign, Background Materials: John Nolan File, Box 7, Folder "Rule of Law" (JFKL): 5.

[64]"Upsetting the Constitution," *New York Times*, April 15 1963; attached to letter from Lawrence Speiser to Lee White, May 8, 1963, White House Staff Files, Lee C. White File, Box 19, Folder "Civil Rights—General 6/18/62–11/16/63 and undated" (JFKL).

[65]Originally prepared for presentation at the annual meeting of the American Political Science Association, September 5, 1962, it was subsequently published by the Public Administration Service. Paul T. David and Ralph Eisenberg, **State Legislative Redistricting: Major Issues in the Wake of Judicial Decision** (Chicago: Public Administration Service, 1962).

[66]Letter from T. J. Reardon, Jr. to William U. Chappell, Jr., and W. Randolph Hodges, September 11, 1962, White House Central Subject Files, Box 929, Folder "ST 2-16-62–" (JFKL).

[67]Memorandum and attached draft letter from Norbert A. Schlei [Assistant Attorney General, Office of Legal Counsel] to T. J. Reardon, Jr., November 20, 1962, White House Central Subject Files, Box 929, Folder "ST 2-16-62 –" (JFKL).

[68]Letter from Paul T. David to Lee C. White, July 15, 1963, Theodore C. Sorensen Papers, Subject Files 1961–64, Box 28, Folder "Apportionment and 1964 Democratic National Convention" (JFKL): 1.

[69]Joseph D. Tydings, recorded interview with Roberta W. Greene, September 29, 1971, 32, RFK OHP, JFKL.

[70]See RFK Senate Papers, Correspondence: Subject Files, 1965, Box 12, Folders "Congress: Reapportionment, 3/1965–7/1965" and "Congress: Reapportionment, 8/1965–12/1965" (JFKL); RFK Senate Papers, Correspondence: Subject Files, 1966, Box 20, Folder "Congress, U.S.: Reapportionment" (JFKL); RFK Senate Papers, Senate Legislative Subject File, Box 95 (JFKL) (containing ten folders pertaining to state legislative reapportionment, January 1964—June 1965); and RFK Senate Papers, Senate Legislative Subject File, Boxes 96 and 97 (JFKL).

[71]By this he meant judging the constitutionality of apportionment in a manner not based on geographical, transportation, and economic factors. He acknowledged the danger of remanding the case without specific instructions: "I don't believe that the case can be sent back to the District Court with directions merely to 'hold,' 'consider,' etc." Memorandum from John W. Douglas to Robert Kennedy, February 11, 1964, "Colorado Apportionment Case—Commerce, Department of" folder, Robert F. Kennedy Papers, Attorney General's General Correspondence, Box 12 (JFKL): 2.

[72]*Ibid.*: 1.

[73]Address by Nicholas deB. Katzenbach at Vanderbilt University, April 27, 1962, RFK Senate Papers, 1964 Campaign, Background Materials: Edwin Guthman File, Folder "*Baker v. Carr*" (JFKL) [hereinafter Katzenbach Address]; "Law and the People" address by Archibald Cox before the Multnomah County Bar Association, Portland, Oregon, May 1, 1962, RFK Senate Papers, 1964 Campaign, Background Materials: John Nolan File, Box 7, Folder "Rule of Law" (JFKL) [hereinafter Cox Speech].

[74]Cox Speech: 12–13.

[75]Katzenbach Address: 16 (emphasis added).

[76]Memorandum from Theodore Sorensen to Robert Kennedy, February 10, 1964, Theodore C. Sorensen Papers, Subject Files 1961-64, Box 35, Folder "Justice Dept. 2/10/64" (JFKL).

[77]*Ibid.*

[78]*Ibid.*

[79]*Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

[80]*Ibid.*, 562.

[81]*Ibid.*, 561–62.

[82]*Ibid.*, 561–64, 567.

[83]Kathleen M. Sullivan and Gerald Gunther, **Constitutional Law**, 14th ed. (New York: Foundation Press, 2001): 794–831.

[84]The government and the Court also agreed upon: (1) rejection of the rational objectives used by the lower court to uphold the constitutionality of Amendment 7 (such as the geography, history, and economics of Colorado; see *Lisco v. Love*, 219 F. Supp. 922 (D.C. Colo. 1963)); and (2) rejection of the relevance of the federal analogy.

[85]*Lucas* Government Brief: 15.

[86]*Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd St. Helena Parish School Board v. Hall*, 368 U.S. 515 (1962).

[87]*Hall*, 197 F. Supp at 659, *quoted in Lucas* Government Brief: 15.

[88]*Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 (1964).

[89]*Ibid.*, 736 n.29.

[90]*Ibid.*, 731 (emphasis omitted).

[91]*Ibid.*

[92]Dougla's to RFK 2/11/64:2.

[93]Cox to RFK 2/4/64: 6.

[94]Gormley, **Archibald Cox**: 497 n.15.

[95]Anthony Lewis, "Legislative Apportionment and the Federal Courts," *Harvard Law Review* 71 (1957): 1067–68, 1089–90.

[96]*Lucas v. Colorado General Assembly*, 377 U.S. 713, 730 (1964).

[97]*Ibid.*, 736.

[98]*Lucas* Government Brief: 57–58.

[99]*Lucas*, 377 U.S. at 735.

[100]David P. Currie, **The Constitution in the Supreme Court: The Second Century, 1888–1986** (Chicago: University of Chicago Press, 1990): 415.

[101]Cox, **The Court and the Constitution**: 303–04.

[102]*Gray v. Sanders*, 372 U.S. 368, 381 (1963).

[103]*Wesberry v. Sanders*, 376 U.S. 1, 18 (1964), quoting *Federalist* No. 57.

[104]*Ibid*., quoting *Gray*, 372 U.S. at 381.

[105]Cox to RFK 8/19/63: 19.

[106]William E. Nelson, "Byron White: A Liberal of 1960," in Mark Tushnet, ed., **The Warren Court in Historical and Political Perspective** (Charlottesville, VA: University Press of Virginia, 1993): 139–54.

[107]Cox to RFK 8/19/63: 19.

[108]Cox, **The Court and the Constitution**: 304.

[109]Randy E. Barnett, "Is the Rehnquist Court an 'Activist' Court? The Commerce Clause Cases," *University of Colorado Law Review* 73 (2002): 1275–90.

[110]Conrad L. McBride, "The 1964 Election in Colorado," *The Western Political Quarterly* 18 (1965): 477. One might argue that this reflected Colorado politics. *Cf*. memorandum from Bruce J. Terris to Robert Kennedy, August 19, 1964, RFK Senate Papers, 1964 Campaign, Staff Files: Milton Gwirtzman/William Vanden Heuval, Box 25, Folder "Apportionment: New York State Legislature" (JFKL) (summarizing the reaction of the New York state legislature to the decision in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

The year 2005 will remain notable in Supreme Court history. A nearly unprecedented period of stability in the Court's membership came to an end. The nation witnessed the appointment of a new Chief Justice, and, for the first time since 1971, a President and the Senate confronted the momentous responsibilities of two simultaneous vacancies to fill.

Events began to unfold on July 1, 2005, when Justice Sandra Day O'Connor notified President George W. Bush of her retirement, which would become "effective upon the nomination and confirmation of my successor."[1] Nominated by President Ronald Reagan on July 7, 1981, and sworn in by Chief Justice Warren Burger on September 26, 1981, Justice O'Connor had served the equivalent of six presidential terms.

On July 19, 2005, President George W. Bush announced his choice of John Glover Roberts, Jr., for the O'Connor seat. A judge on the United States Court of Appeals for the District of Columbia Circuit since May 2003, Roberts had previously distinguished himself as a member of the Supreme Court bar both in and out of government service.[2] On September 3, however, shortly before hearings were to begin in the Senate Judiciary Committee on his nomination, Chief Justice William H. Rehnquist lost his struggle with thyroid cancer. Sworn in as head of the Court on September 26, 1986, Rehnquist was only the third Chief Justice to have been selected from the ranks of the Associate Justices, having initially joined the Bench on January 7, 1972. His tenure of nearly nineteen years as Chief ranked him fourth on the all-time list, behind John Marshall's thirty-four years, Roger B. Taney's twenty-eight, and Melville W. Fuller's twenty-two.[3]

The death of the sixteenth Chief Justice marked the first change in the Court's membership since the retirement of Justice Harry A. Blackmun and the arrival of Justice Stephen G. Breyer on August 3, in 1994. At no other time since Congress last set the roster of the Court at nine, in 1869, had so many years passed without a vacancy. Indeed, the 1994–2005 period came within days of equaling the longest such expanse on record: that between Justice Joseph Story's arrival on February 3, 1812 and Justice Henry Brockholst Livingston's death on March 18, 1823.[4] Thus for many Americans, the process of filling a Supreme Court seat was a dim

memory at best. For others it would be an entirely new experience: Most college freshmen in the fall of 2005 would have been seven years old during Justice Breyer's confirmation proceedings.

As President Bush surely realized, appointment of a Chief Justice is a rare occurrence. There had been forty-three Presidents, but, at the time of Rehnquist's death, only sixteen Chief Justices. Similarly, aside from George Washington, who picked three Chief Justices (John Jay, John Rutledge, and Oliver Ellsworth), no President—not even Franklin D. Roosevelt—has named more than one. The contrast is significant substantively as well as statistically. During the thirty-four years Marshall occupied the center chair, for example, there were six Presidents, and it was Marshall's tenure that perhaps led former President John Quincy Adams to rate the office of Chief Justice as more important than that of President. That was "because the power of constructing the law is almost equivalent to the power of enacting it. The office of Chief Justice of the Supreme Court is held for life, that of the President of the United States only for four, or at most for eight, years. The office of Chief Justice requires a mind of energy sufficient to influence generally the minds of a majority of his associates; to accommodate his judgment to theirs, or theirs to his own; a judgment also capable of biding the test of time and of giving satisfaction to the public."[5] William Howard Taft might have agreed. "Presidents come and go," remarked the former President and future Chief Justice in 1916, "but the Court goes on forever."[6]

Accordingly, President Bush promptly announced on September 5 that he would nominate Roberts for the Chief Justiceship. The decision surprised few. Not only would Roberts, at age fifty, be the youngest Chief Justice since Marshall, who was forty-five when he took his seat, but Roberts had clerked for then Associate Justice Rehnquist during the 1980 Term.[7] Four days of hearings by the Senate Judiciary Committee commenced on September 12, with the committee voting favorably on the nomination 13–5 on September 22. On September 29, the full Senate confirmed Roberts as the seventeenth Chief Justice of the United States by a vote of 78–22,[8] with the swearing in ceremony following hours later at the White House as Justice John Paul Stevens administered the constitutional oath. "What Daniel Webster termed 'the miracle of our Constitution' is not something that happens every generation," observed the new Chief Justice. "But every generation in its turn must accept the responsibility of supporting and defending the Constitution, and bearing true faith and allegiance to it. That is the oath that I just took."[9]

With the Chief Justiceship filled, attention returned to a replacement for Justice O'Connor. The President's announcement on October 3 that her seat should go to White House Counsel Harriet Miers was followed by a formal withdrawal of Miers' nomination on October 27. For the first time since 1987, a President was forced to submit a second name for the same Court position. On October 31, Bush turned to Judge Samuel A. Alito, Jr., who had served on the United States Court of Appeals for the Third Circuit for fifteen years. Five days of hearings before the Judiciary Committee opened on January 9, 2006, with a favorable vote of 10–8 following on January 24. The Senate confirmed Alito 58–42 on January 31, whereupon Chief Justice Roberts administered the constitutional and judicial oaths to the 110th Justice in a private ceremony at the Court about an hour later.[10] The appointment process that Justice O'Connor's letter had set in motion seven months earlier was complete.

Of course, none of these events—or countless others—could have occurred at all, or at least in the way they did, without the Constitution itself. That document not only provides for "one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish"[11] but also provides a blended means for staffing

the Court—nomination by the President and confirmation by the Senate.[12] Under the Articles of Confederation—the national charter that preceded and was superseded by the Constitution—there had been no true national judges and no true national courts. A remarkable development at the Philadelphia Convention in 1787, therefore, was the notion that Article III embodied: a judiciary for the nation. That notion was a leap of faith, because a national judiciary was without precedent. Government under the Articles had been organized around a one-house legislature called Congress, so the Framers were thoroughly familiar with a national legislative power, albeit a far narrower one than that which emerged in the Constitution itself. Even a national executive power was not difficult to fathom, because the Articles Congress had effectively performed certain executive functions in connection with foreign relations and defense.[13] But a broad judicial power for the nation had no such parallels.[14] The only models at hand were the existing state courts that loosely drew on a common legal tradition: English common law.

Understanding the constitutional origins of the federal judiciary, as well as the rest of the national political system in a nation of states, is now immensely aided by publication of **The Constitutional Convention of 1787** by political scientist John R. Vile of Middle Tennessee University.[15] This handsomely appointed and thoroughly accessible two-volume set contains more than 400 entries (counting sidebars), written by the author on as many topics relating to the Convention, its participants, its theories, its work, and more. The emphasis throughout is on the formation of the document itself, rather than on interpretation, application, and evolution of the document in subsequent years. Thus, the volumes are not a study in constitutional law but instead present the individuals, forces, and factors that combined in 1787 to produce a critical "constitutional moment"[16] that "has affected just about everything of political consequence that has followed it."[17]

Among the various categories of entries, probably the most useful is the considerable number of essays on people and constitutional provisions. In the first group, each individual who actually attended the Convention merits separate treatment, even those in Philadelphia who said little or nothing that has survived. For participants whose statements were recorded in the various notes that were made at the time, Vile emphasizes what they said and did, with particular attention to occasions on which they may have altered their positions on the various questions under discussion. Other people deemed worthy of treatment include persons such as John Adams and Thomas Jefferson who did not attend the Convention but whose views undoubtedly influenced those who were present. For similar reasons, there are entries on political philosophers such as John Locke, David Hume, and Louis Montesquieu. Such figures mattered despite the general thrust of John Dickinson's famous admonition: "Experience must be our only guide. Reason may mislead us."[18]

Among the second group are numerous entries related to the judiciary. As with matters relating to the executive and legislative branches, the reader finds that debate, motions, and votes did not move in a straight line. Because the rules of the Convention allowed delegates to reopen subjects on which votes had already been taken, the proceedings often meandered, as it were, as the delegates swerved first one way and then another and then doubled back to retrace ground already covered. One particularly contentious topic was the creation of national tribunals below the Supreme Court. For example, John Rutledge—a future member of the Court—thought that state courts would protect national interests sufficiently as long as there was an appeal in federal matters to the Supreme Court. Creating lower tribunals, he said, would amount to "an unnecessary encroachment" on state court jurisdiction and would be an "unnecessary obstacle[]" to ratification. Taking the opposite position, James Madison insisted that, without lower federal tribunals, problems would arise from

John Vile has written a comprehensive encyclopedia on the Constitutional Convention of 1787. Benjamin Franklin is pictured here representing the Philadelphia delegation.

judgments "obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury." Moreover, cautioned Madison, "[a] Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move." The proposal to empower Congress "to institute inferior tribunals"—a compromise between requiring such courts or leaving federal business to state courts—passed by a vote of 8–2–1. Yet the Convention returned to the same issue some five weeks later and heard further discussion of similar arguments.[19] On a related subject, both the Virginia and New Jersey plans—the two principal governmental frameworks introduced at the Convention—stipulated that federal judges would try federal officials in impeachment proceedings,[20] an idea that was later dropped. Indeed, the only express constitutional duty assigned to the Chief Justice by the document that emerged from the Convention—to preside at Senate impeachment trials of the President[21]—may be the sole surviving element of this proposal.

As for judicial review itself, students of the Supreme Court know that the Constitution lacks direct and express language that authorizes the Justices to invalidate acts of Congress. To be sure, indirect acknowledgment of judicial review may be found in Article III, which, in laying out the jurisdiction of federal courts, refers to cases "arising under this Constitution,"[22] and also in Article VI, which admonishes state judges to hold state laws and constitutional provisions to account under the national Constitution.[23] Yet it remains odd that a power so potentially significant would have been left to inference. Vile insists that the delegates "at the Convention were clearly familiar with the concept of judicial review. Those who expressed themselves on the subject at the Convention overwhelmingly, but not unanimously, supported judicial review.... The issue is complicated by the fact that some might have distinguished between judicial invalidation of national laws and judicial invalidation of state laws.... No delegate extensively discussed whether he thought the judicial should be generally deferential to legislation or fairly active in scrutinizing it."[24] Moreover, some delegates "did indicate that the exercise of judicial review would not necessarily serve as the basis for invalidating unwise legislation."[25] That fact suggests that few delegates, aside from New York's Robert Yates, envisioned judicial review as the powerful political force it would become.[26]

Judicial review fell into the category of provisions such as the presidential veto, the considered but rejected council of revision (on which, in some versions, judges were to sit), staggered terms, contrasting electoral constituencies, and even bicameralism itself that might function as breaks on majority rule without completely frustrating its operation. That the convention would impose limits on majoritarianism was a foregone conclusion, as delegates recalled various and familiar governmental structures in the last third of the eighteenth century. Under the British system, political power was divided three ways. In this balanced or mixed arrangement, as it had evolved, laws were made upon the agreement of the three components of the realm: the monarch, the nobles who sat in the House of Lords, and the elected members of the House of Commons. In most of the colonies, with an appointed governor, a council, and an elected assembly, an analogous balance prevailed. In no sense was the entire administration of a colony's affairs lodged in the hands of delegates elected by "the people," even in the limited colonial meaning of that term. Besides, colonial legislation was subject to review by the King's Privy Council.

After 1776, the American states were part of a system premised upon government by the consent of the governed. The element of popular sovereignty that had been one-third of the balanced structure now seemingly comprised it all. There was no executive appointed from without, and no appointed upper house or council equally unanswerable to the electorate to corral or channel majority sentiment. Suddenly, the balance seemed to have been lost.

Post-1776, political power lay, directly or indirectly, with the electorate. What did this actually mean? "In framing a government which is to be administered by men over men," queried Madison five months after the Constitutional Convention, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[27]

As Vile's comprehensive research demonstrates, the Framers spent much of their time grappling with the implications of this new situation and trying to construct institutions and procedures that would both empower and limit the majority. As Jack N. Rakove explains in the Foreword, "The clauses that collectively comprise the Constitution were something more than the accrued debris of English and American history. They were rather the result of a remarkable exercise in collective deliberation... Reflecting on the various constitutions that had been drafted a decade earlier, the delegates to the Constitutional Convention enjoyed—and seized—a remarkable opportunity to perfect the experiments in self-government that began with the decision for independence."[28]

One of many differences between the Virginia plan and the New Jersey plan related to federal judicial selection: The former provided for legislative selection, and the latter called for selection by the executive.[29] The method eventually chosen by the Convention has remained unaltered. This institutional fixture contrasts with the patterns of judicial selection in the states, which have varied, not only from one state to the next, but within the same state for different levels of judges, as well as over time.[30] Yet alongside the constants of presidential nomination and Senate confirmation have come some striking changes in the way federal judicial selection operates, especially in the case of Supreme Court Justices.

These modifications, with their attendant consequences, are the subject of **Electing Justice** by political scientist Richard Davis of Brigham Young University.[31] Given the recent nomination and confirmation proceedings, publication of Professor Davis's book could hardly be more timely. The volume is one of at least three on the judicial appointment process to appear within the past two years.[32]

In the author's view, judicial selection was marked by insularity for most of American history. Rarely was acceptance or rejection of nominees affected by anyone outside the executive branch, the Senate, and the legal community. Insularity, however, did not mean that the Senate merely rubber-stamped a President's choices. Far from it. Indeed, the rejection rate for nominees was considerably higher in the nineteenth century than in the twentieth. In the first two-thirds of the twentieth century, Judge John J. Parker's nomination to the Supreme Court by President Herbert Hoover in 1930 was the only one to fail. Following Parker's, the only failed nominations in the last third of the century were those of Justice Abe Fortas for Chief Justice in 1968, when the nomination was withdrawn, and of Judges Clement Haynsworth, Harrold Carswell, and Robert Bork in 1969, 1970, and 1987, respectively, when the Senate rejected the nominees in a floor vote.[33] In contrast, some twenty-one nominations in the nineteenth century failed in the Senate for various reasons: postponement, inaction, withdrawal, or outright rejection.[34]

Davis's point is that, whether or not Supreme Court nominations formerly were free of contention, the contending players were usually few in number and the playing field excluded most of the country. Exceptions to the rule numbered no more than a handful, as one thinks of the controversies over nominees such as Stanley Matthews (1881), Louis Brandeis (1916), and John Parker (1930), in which many players did in fact participate. As observers of recent confirmation proceedings know too well, that cozy arrangement has since passed into history. The exceptions of an earlier day have become routine.

Beginning no more than about forty years ago, a new process began to emerge that

George Sutherland was confirmed the very same day he was nominated in 1922, a phenomenon that could never occur today. Richard Davis traces the history of the nomination process in his new book, *Electing Justice: Fixing the Supreme Court Nomination Process*.

involved not only the traditional players (the executive branch, the Senate, and the organized bar), but external ones—the news media, interest groups, and public opinion. These external players have exacerbated partisan tensions in the Senate, as nominees themselves tend now to fall into one of two groups. Some are what Davis terms "constituency" candidates, because the nominees are highly favored by the President's core supporters and the party base.[35] Constituency nominees are those most likely to encounter heavy opposition from the other party's base.[36] Other nominees are what Davis calls "consensual" candidates. They typically appear to be more centrist than constituency candidates and therefore enjoy appeal across party lines, even though their nomination may not spark the ardent enthusiasm among a party's base of a constituency nominee—or the strident opposition to such a nominee from the other party's base.[37]

The impact of the decline of insularity on the appointment process has been significant. For the President and his staff, securing a successful outcome for a Supreme Court nominee now requires the skill ordinarily reserved for shepherding complex legislation through the Congress. For the nominee, the period between nomination and the hoped-for confirmation can be a gauntlet to be run and an ordeal to be endured. Besides the very visible hearings themselves, there are individual meetings with dozens of Senators and countless hours of study and practice grilling—the "murder board"[38]—prior to the hearings. For Senators, the proceedings of the Judiciary Committee have become major public, and often lengthy, events. For example, the Senate Judiciary Committee's public hearings in 1962 on President John Kennedy's nomination of Byron White lasted all of one hour and thirty-five minutes, and the published record filled only twenty-six pages.[39] Those for President Ronald Reagan's nomination of Justice Rehnquist for the Chief Justiceship in 1986 consumed four long days and 1,165 pages,[40] a statistic soon surpassed by marathon committee sessions and multivolume sets for Bork (1987) and Clarence Thomas (1991). Moreover, the period between nomination and confirmation has lengthened substantially. For Warren Burger in 1969, barely nineteen days elapsed between the two events. For someone like Thomas in 1991, whom Davis labels a "constituency" candidate, the gap was 107 days.[41] Even for someone like Stephen Breyer in 1994, whom Davis designates a

"consensual" candidate, the time lag was seventy-seven days.[42] Probably no one will ever again witness lightning-fast confirmations such as that for Oliver Wendell Holmes, Jr., which took place two days after his nomination in 1902, or that for George Sutherland in 1922, which occurred on the very same day as his nomination.

Reasons for this altered state of affairs abound. Technology has revolutionized the news business and made possible cable channels that transmit news seven days a week and twenty-four hours a day. There is thus a nearly insatiable demand for material to fill air time—the more conflict-laden the better. Talk radio dominates the a.m. band and also thrives on controversy. The irony is that while "politicians often succeed by managing conflict and reconciling differences among groups," journalists "succeed by capitalizing on conflict and magnifying those differences."[43] Email and the Internet allow parties and other interested organizations to maintain virtually constant contact with their members, and the same computer advances allow citizens instant and near-effortless access to congressional offices. These realities coexist alongside, and have contributed to, the intense partisan divisions in Congress, which are fed by each party's reliance on and loyalty to its base. Moreover, as anyone knows who has perused a volume of the *United States Reports* from the 1930s and one from today, the range of issues that now occupies the Court's time is unparalleled. The docket reads like a policy agenda for the nation. Thus, few should be surprised that the democratization of other aspects of the political process, such as nomination and election of Presidents, has transformed the selection of Justices into "an election without voters."[44] Indeed, the puzzle is "not why the process has become more open but really why a system dominated by a small set of elites lasted so long."[45] What has at last materialized are the full, if delayed and largely unanticipated, consequences of the Seventeenth Amendment (1913) that popularized the Senate.

What is needed, Davis believes, is a restructuring of selection to "mesh constitutional structure with reality and preserve the trend of democratization"[46] by taking into account the permanent role of external players. "[W]e have transformed the judicial selection process into one with all the trappings of an electoral campaign but without the key players—the electorate. This is an untenable situation—a reality that looks only vaguely familiar to the formal structure designed for it more than 200 years ago and a process that no longer reflects reality."[47]

This goal of matching process with reality can be achieved, Davis contends, through modified behavior of participants and by constitutional amendment. As part of the first approach, Presidents "should avoid articulating public themes for their Supreme Court nominations"[48] that forthcoming nominees will adhere to this or that judicial approach or philosophy. Moreover, Senate confirmation hearings should steer clear of the inquisition and the current charade during which Senators "pretend to ask questions the nominee will actually answer, while nominees pretend to answer the questions the senators actually ask."[49] Even so, when nominees have established views on issues, they should state and explain them. In also suggesting that nominees "should never imply that they would vote a certain way on future cases,"[50] however, Davis seems to expect Senators and the public to grasp a difficult subtlety and therefore may be asking forthcoming nominees to walk the political plank. Nonetheless, implementing such behavioral modifications would entail no formal institutional adjustments, but would be merely a matter of building a consensus among the participants themselves.

The second approach is more ambitious and would require a constitutional amendment. Davis advocates popular nonpartisan plurality election of Justices for eighteen-year, nonrenewable terms, following nomination of several candidates by the President and vetting and publication of recommendations by the

Senate. Every two years, therefore, the electorate would choose a Justice in the general election. A system of staggered terms would mean that voters would only rarely elect more than one Justice at a time, and that would happen only in the event of unplanned vacancies.[51] Current Justices would retain their "good behavior" appointments, but all new Justices would be chosen by ballot. Alternatively, a revised selection process would proceed just as it does now—nomination of one person by the President followed by hearings and a Senate vote on the nominee—except that a favorable Senate vote would be only an intermediate step (a negative vote by the Senate would defeat the nomination). The nominee would then face the voters in a plebiscite. If the candidate lost the plebiscite election, the President would make a recess appointment until the next election, when the process would begin anew to fill the remainder of the eighteen-year term. For Davis, either of these electoral devices would openly acknowledge the Court's political role. A third method, one that would involve the public more minimally, would call for a plebiscite only if a nominee failed to get at least sixty percent of the Senate vote. Under this mechanism, a "controversial [probably constituency-based] nominee would be subject to election while a consensual nominee would not."[52]

According to Davis, selection by the electorate through one of these means or another would promote accountability and, by divorcing the Court from any particular group or institution, would shore up its independence.[53] One suspects, however, that the forces of transformation Davis describes so well that have brought about the current situation would doom the prospects for the changes he deems necessary for a confirmation process worthy of both Court and people.

External players routinely engage the Supreme Court nomination process today, in large part because of the legacy of the Warren Court. The term "Warren Court" has an obvious meaning, in that it refers to a period in Supreme Court history during the years between 1953 and 1969 inclusive, when Earl Warren was Chief Justice. The designation is therefore one of convenience, in the same way that the Fuller Court points to the period 1888–1910, when Melville W. Fuller was Chief Justice, or that the Hughes Court relates to 1930–1941, when Charles Evans Hughes headed the Court. Such designations do not mean that the particular Chief Justice has necessarily been the dominant or even a leading personality on the Bench. He may have been, as was certainly the case with John Marshall (1801–1835), but then again he may not, as with Fred Vinson (1945–1953).[54]

With respect especially to the Warren Court, the term carries with it a second and symbolic meaning as well, of an era in which the Supreme Court provided leadership for the wholesale implementation of programmatic liberalism on a grand scale, with its blend of libertarian and egalitarian objectives. The Warren Court was both busy and consequential, and was one of the most remarkable in judicial history. By one count, in the approximately 150 years before President Dwight Eisenhower's appointment of the fourteenth Chief Justice in 1953, the High Court had overruled seventy-five of its own precedents. During Warren's sixteen years in the center chair, the Court added another fifty-four to the list.[55] Such numbers tell only part of the story. Hardly an aspect of American life went untouched, as landmark rulings on race discrimination, representation, criminal justice, and the freedoms of speech, press, and religion roiled society and the political system.

"Of course, Earl Warren did not do this alone; the seeds were already there," advises Henry Abraham. "But it was he who provided the leadership on the Court; he whose assertive views of the judicial role and vision of constitutional fulfillment made the judicial revolution that he was determined to achieve possible, even if that meant letting a personal sense of right and wrong *determine* the outcome of cases, supporting the result with any convenient—and not necessarily

logically articulated—result; ... results second only to those achieved in different constitutional areas by John Marshall; he whose dedication to the ideals of equal justice under law gave hope to the downtrodden; he [who insisted] that for democratic society to succeed, its people must have ready access to their government, including the judiciary."[56] Among judicially knowledgeable people then and now, therefore, it is difficult to find someone without an opinion about the Warren Court. For Justice William J. Brennan, Jr., Warren was the "Super Chief." For Justice Thurgood Marshall, he was "the greatest chief justice who ever lived."[57] For the John Birch Society, erection of "Impeach Earl Warren—Save the Republic" billboards was in order.[58] For the Conference of State Chief Justices, decisions of the Warren Court "cast doubt as to the validity of [the] boast" that "we have a government of laws and not of men."[59]

The excitement, accomplishments, and controversies of that era are the subject of **The Supreme Court under Earl Warren** by legal scholar and historian Michal R. Belknap of California Western School of Law.[60] The volume is the latest addition to the series entitled *Chief Justiceships of the United States Supreme Court*, under the general editorship of Herbert A. Johnson, emeritus professor at the University of South Carolina School of Law. Previous entries in this series include books on the pre-Marshall, Marshall, Fuller, White, Stone, Vinson, and Burger Courts.[61]

Organization of Belknap's contribution generally proceeds chronologically by major topic. Thus, the school-desegregation cases are treated in chapter two, followed by a chapter on the Cold War and security cases of the late 1950s and the commotion they aroused. Separate chapters on the legislative districting cases (which Warren himself regarded as the most important of his tenure[62]), religious exercises in the public schools, and civil-rights demonstrations are found midway through the book, just before the chapters on privacy and self-expression and on criminal justice. Overall, Belknap's analysis supports the conventional view of two Warren Courts, the first existing from 1953 until the retirement of Justice Felix Frankfurter in 1962, and the second running from that point to Warren's own retirement. It is the latter that Belknap calls "the true Warren Court,"[63] the one that, in Mark Tushnet's assessment, "has entered our culture."[64] Throughout, Belknap's account is enriched by heavy reliance on primary sources, including the fulsome manuscript resources of the Library of Congress, particularly Warren's own papers and the papers of Justice Brennan, who was Warren's colleague for all but three years of his Chief Justiceship.

Along with insightful analysis of the substance of Warren Court decisions themselves, the author offers a look into the Court's internal workings as cases moved from petitions and appeals on the docket to the final published opinions. *United States v. O'Brien*,[65] for example, was a case that fell late in the Warren era and stands at odds with the Warren Court's rights-friendly reputation. The case yielded a precedent that is still often the starting point for any decision having to do with expressive conduct or symbolic speech.

As a protest against the war in Vietnam, David O'Brien and three companions burned their draft cards on the steps of the South Boston Courthouse in front of an angry crowd on March 31, 1966. FBI agents arrested O'Brien for violating the 1965 amendment to the Universal Military Training and Service Act,[66] which provided criminal penalties for anyone who "knowingly destroys [or] knowingly mutilates" a draft card. Following his conviction in the U.S. district court of Massachusetts, the Court of Appeals for the First Circuit reversed, declaring that the 1965 amendment violated the First Amendment. The appeals court nonetheless held that O'Brien could be sentenced because his action violated a regulation of the Selective Service System against nonpossession of one's draft card. Both the government and O'Brien cross-petitioned for review.

At the conference two days after oral arguments, Warren "argued strongly against

O'Brien's position" that burning his draft card was constitutionally protected under the First Amendment's Free Speech Clause. The Brethren supported their Chief, although "Douglas did urge disposing of the case with a short per curiam opinion." Warren, however, took the case for himself and "set out to produce a full-blown defense of the statute's constitutionality." He told the clerk to whom he assigned the case "that he wanted to hold draft-card burning was not speech at all for First Amendment purposes. Since the Court had treated other types of conduct as protected expression, [the clerk] found it necessary to create a very narrow exception for those kinds that had an immediately harmful impact not arising from their communicative effect." The results were not encouraging, with only Justice Hugo Black finding the draft opinion persuasive. Justice John Marshall Harlan noted that the opinion was "'illogical, unsound, and in conflict with prior decisions of this Court.'" Harlan recommended balancing, although Warren had indicated that "he wanted none of that in his opinion." When weeks passed with no one besides Black accepting the decision as Warren wanted it cast, the clerk suggested, at the Chief's invitation, that draft-card burning be recognized as speech but not protected speech in this instance. Brennan agreed, adding that a "compelling governmental interest justified regulating" this speech. So Harlan's initial objection ultimately prevailed.[67]

As published, Warren's opinion spoke of an "important governmental interest"[68] instead of one that was "compelling" and laid out a test with several elements by which government interference with speech-laden conduct would be judged. Not surprisingly, Warren then concluded that the 1965 amendment "meets all of these requirements,"[69] and so O'Brien could be constitutionally punished for violating it. What the opinion failed to show was how preventing the mutilation or destruction of draft cards appreciably aided Congress in raising and supporting armies. Likewise, Warren "refused to consider legislative history, which revealed that the real purpose of those responsible for the law's enactment was to suppress an unpopular form of expression."[70] "Inquiries into congressional motives or purposes," wrote the Chief Justice, "are a hazardous matter.... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[71] This statement was made alongside the same Court's Establishment Clause jurisprudence, which directed judges to inquire into the "purpose" of challenged legislation to assure that it was not the "advancement or inhibition of religion."[72] As for Douglas's initial preference for a short per curiam opinion, he actually wrote a dissent, calling for the case to be reargued on the question of whether Congress should have passed a declaration of war as a basis for American fighting in Vietnam.[73]

Despite some pro-government holdings such as *O'Brien*, the common view is that the Warren Court's rights-friendly decisions greatly affected the way public business in the United States was transacted. Yet Belknap seems to agree with skeptics that the truth falls considerably short of that claim: "[t]he rulings of the Warren Court do not seem to have changed life in America all that much."[74] He agrees with others that, while *Brown v. Board of Education*,[75] for example, "'served both as a catalyst for and as a legitimation of social change,' it rather clearly did not desegregate southern public schools."[76] That had to await enactment of legislation by Congress in the mid-1960s. Neither did the criminal-justice rulings produce "real change."[77] Even the "reapportionment rulings may actually have harmed those whose interests the Warren Court sought to promote."[78] Moreover, "some of what they did bring about was neither intended nor desired by the justices themselves."[79] There is no doubt some truth in these observations, but one is prompted to ask whether the legislation of the mid-1960s, which has had a profound impact on civil rights in this country would have happened as soon—if at all—without *Brown*. Similarly, if many persons

accused of crimes continue to talk during interrogations after *Miranda v. Arizona*,[80] most police departments would probably conclude that *Mapp v. Ohio*,[81] which imposed the Fourth Amendment exclusionary rule on the states (almost half of which had not deployed an exclusionary rule on their own at the time *Mapp* came down[82]), has surely affected the way they conduct searches of persons, homes, and automobiles. Likewise, if the redistricting that followed *Wesberry v. Sanders*[83] and *Reynolds v. Sims*[84] extended greater representation in the U.S. House of Representatives and state legislatures, respectively, to suburbs than to inner cities,[85] that outcome was perfectly predictable on the day those decisions came down in 1964. The 1960 census data spoke for themselves and were available to all.

Rather, Belknap adheres to a more qualified legacy. If, as former Justice Abe Fortas noted, the Court's decisions worked a "profound and pervasive revolution," that revolution, says Belknap, "was largely a legal one."[86] Instead of transforming society, the Warren Court "transform[ed] American legal culture by helping elevate equality to a central position in the law."[87] Moreover, the same Court decisions with questionable policy effects nonetheless stimulated "rights consciousness"[88] and "legitimated resort to the judiciary to accomplish reform."[89] The longstanding conflict between judicial activism and judicial restraint passed into history, but it was replaced by a reenergized debate between believers in Warren-style activism and theorists who sought to limit judicial power by resorting to other reckoning points, such as originalism. Thus, "[f]or those at both ends of the political spectrum, Earl Warren's Court possesses immense symbolic significance."[90]

Justice Hugo L. Black was very much a part of both the substance and symbolism of the Warren years. Well before Warren became Chief Justice, Black had insisted, through his total-incorporation theory, that the Fourteenth Amendment made *all* provisions of the Bill of Rights applicable to the states,[91] a position that a majority of the Bench did not approximate until 1968.[92] Moreover, Black spoke for the Court in some of the key criminal justice, religious freedom, and representation cases of that era.[93] Indeed, about the only notable Warren Court holdings from which Black dissented involved some civil-rights protests[94] and the majority's embrace of a constitutionally protected right of privacy.[95]

For anyone first attracted to the study of the Supreme Court during the years of the Warren and very early Burger Courts, however, it may be difficult to think of Black as a figure from history. He was a fixture on the Bench for so long, from his appointment in 1937 as President Franklin D. Roosevelt's first nominee to the Court to his retirement on September 17 (Constitution Day), 1971, eight days before his death at age eighty-five. Because many issues with which Black engaged still absorb the Court, he seems nearly contemporary. Indeed, his last judicial opinion, in *New York Times v. United States*,[96] concerned freedom of the press and was an appropriate finale to his consequential judicial career. But he can and should now be deemed a figure from history. He was born just twenty-one years after the surrender at Appomattox Courthouse. He served with five Chief Justices, a fact that may have led him to remark on his last birthday that "[c]hief justices come and chief justices go."[97] He left the Bench nearly thirty-five years ago. More than 135 volumes of the *United States Reports* have been issued since he last sat. Twelve new faces—eleven percent of the Court's total membership since 1790—have appeared on the Supreme Court since Black left. Most of the seniors graduating from college in 2006 were born thirteen years *after* Black's death. One wonders if Black has receded in scholarly interest, as well into history, since a full decade has elapsed since the last full-length study of Black was published.[98]

It is therefore both refreshing and gratifying to see publication of **Hugo Black of Alabama** by Steve Suitts,[99] a native Alabaman who is employed by a foundation in Atlanta and

is an adjunct lecturer at the Institute for Liberal Arts of Emory University. Readers should be forewarned that Suitts's book will immerse them in Hugo Black, or at least a part of him. This volume of more than 600 pages concerns only Black's youngest years, prior to his election to the United States Senate in 1926 (he would be re-elected in 1934). That is, the volume encompasses Black's upbringing in Clay County, Alabama, his two-year course of study at the University of Alabama Law School, his career in private law practice, his visibility as a civic leader in Birmingham, his fleeting tenure as a police court judge, his work as a prosecutor, and his military service during World War I. There is even a brief treatment of Black's short career as a medical student at Birmingham Medical College in 1903, in which he "passed the written exams for the first two years of medical study at the end of the first term."[100] His Senate and Court years lie ahead, perhaps as future challenges for Suitts. Only occasionally in this book does the author make fleeting fast-forwards to link later Court opinions with early-life experiences.[101] Collectively this thoroughly researched, fact-heavy, and culture-laden biography might be called the education of a Justice.

Suitts brings together more about pre-Washington Black and his early environment than does any other author. In this respect, Suitts goes well beyond Charlotte Williams's **Hugo L. Black**, published during the first half of Black's Court tenure, and even Virginia Van Der Veer Hamilton's **Hugo Black**, which explored his life before 1937.[102] In his treatment of the early Black, Suitts's account also far surpasses what one finds in the judicial biographies by Roger Newman[103] and Gerald Dunne.[104] Indeed, probably no other study provides such an exhaustive examination of *any* Justice's life before entering federal service. Even Albert Beveridge's monumental biography of John Marshall falls short on this measure.[105] The closest in length to Suitts's in this respect is David Robarge's study of Marshall's life before 1801.[106] Yet Suitts is preeminently conscious of why Black's formative and early professional life merits such lengthy treatment. In the words of the subtitle, the story is about "How His Roots and Early Career Shaped the Great Champion of the Constitution." Thus, it is entirely fitting that Suitts both begins and ends his story with the same event: Black's public remarks in July 1970, his first formal public appearance in Alabama in more than sixteen years—since the decision in *Brown v. Board of Education*.[107]

Much of the length of **Hugo Black of Alabama** derives from the author's emphasis on the benighted milieu in which the young Hugo developed as a person and as a professional. Thus, the book is as much about Suitts's perception of the politics, issues, and culture in the old Alabama—especially north Alabama—as about Black himself.[108] One finds the tensions between Populists and Democrats and notes the minor role that Southern Republicans had come to play by 1900. There is the Prohibition movement that captured Black's support, and there is a picture of "a South held captive by Northern riches and biracial poverty."[109] The picture Suitts paints of life in Alabama in Black's day is not a pretty one. Above all, and pervasive throughout, is the racism that defined life for blacks and whites alike. Black encountered these things as a boy and a young man and in the Alabama courtrooms of his day, and they understandably affected him in ways both uplifting and otherwise. He was both part of his surroundings and separate from them. Thus, even though Black often defended African-American clients and treated them fairly when they faced him in police court, he could resort to the "n–word" as quickly and easily as anyone else. As Suitts illustrates through his account of the Miniard trial in state court in 1919,[110] the word was socially acceptable—at least among whites, "both in and outside the presence of Negroes."[111] The same trial illustrates other truths about Black: he was tenacious; and he assiduously avoided the federal court, seeing that bench populated by Republicans or

Hugo Black's membership in the Ku Klux Klan was the subject of much newsprint at the time of his nomination to the Supreme Court. Steve Suitts's new biography covers Black's early years in Alabama prior to becoming a U.S. Senator.

former corporate lawyers who were inclined, he thought, to "disadvantage poor and working people."[112]

In Suitts's assessment, "Black probably never contemplated fully the ominous consequences of coming of age and influence in a society deeply flawed by oppressive racialism, color-coded democracy, and other damaging human stereotypes. . . . In elections, courtrooms, and even Klan halls, Black learned to make an honest, effective appeal to ordinary whites without abandoning his color-blind notions of justice for all. . . . Within a society controlled by a relatively small number of white men, Black deliberately associated with many men and women across factions, sectors, and the color line. . . . Black became by choice a progressive democrat in a white male society of conservative Democrats. He cultivated his ideals and ideas for a 'bigger vision' often from the seeds of Alabama's poor, working men and women—white men considered 'rednecks' or 'fuzzy necked' and white women not often deemed worthy of being called a 'Southern lady.' These white folk helped Black grow a rooted vision of law, equality, and democracy amid the niggardly soil of Southern parochialism, lingering Old South's racialism, and the New South's anti-democratic tactics."[113] In short, from a culture with few redeeming qualities, an ambitious Black somehow emerged as a mature and extraordinary adult from a flawed and decidedly ordinary people.

At age fifty-one, when he was named to the Court in 1937, Senator Black was almost the same age as Judge Roberts at the time of the latter's appointment.[114] Yet the Court that Justice Black found was vastly different from

the institution that the new Chief Justice inherited in 2005. The sixty-eight years between the arrivals of the two men represent more than the mere passage of time. Few would deny that across that span, both Court and country have changed in many ways. Black was a central—if improbable—contributor to what has transpired.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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ENDNOTES

[1]Letter from Justice Sandra Day O'Connor to President George W. Bush, July 1, 2005. A copy of the letter is available from the Court's Public Information Office. *See* http://www.supremecourtus.gov/publicinfo/press/pr'07—01-05.html (last accessed October 18, 2006).

[2]*See* John G. Roberts, "Oral Advocacy and the Re-emergence of a Supreme Court Bar," 30 *Journal of Supreme Court History* 68 (2005).

[3]*See generally* "Chief Justice Rehnquist: A Remembrance," 37 *The Third Branch* (September 2005), 1–14.

[4]Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1993** (1993), 532.

[5]Charles Francis Adams, ed., **Memoirs of John Quincy Adams** (1876), vol. 9, 250–251.

[6]William Howard Taft, "The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government," 25 *Yale Law Journal* 599, 616 (1916).

[7]The membership of the Supreme Court in 2005 included two other former clerks: Justice John Paul Stevens clerked for Justice Wiley Rutledge in the 1947 Term, and Justice Stephen G. Breyer clerked for Justice Arthur Goldberg in the 1964 Term.

[8]Roberts received the votes of all Republican members of the Senate, the one independent Senator, and exactly half of the 44 Democrat members of the Senate.

[9]Quoted in Sherly Gay Stolberg and Elisabeth Bumiller, "Senate Confirms Roberts as 17th Chief Justice," *New York Times*, September 30, 2005, p. A1.

[10]Alito received the votes of all but one of the Republican members of the Senate plus the votes of four Democrat members of the Senate.

[11]U.S. Constitution, Article III, section 1.

[12]*Id.*, Article II, section 2.

[13]*See, e.g.*, the Articles of Confederation, Article IX, paragraphs 1, 4, 5.

[14]The Articles of Confederation in Article XI, paragraphs 1 and 2, provided for congressional establishment of courts to handle cases involving captures on the seas and, on an ad hoc basis, conflicts between states. The Articles Congress did in fact create a court of appeals for cases in capture. *See* J. Franklin Jameson, "The Predecessor of the Supreme Court," in Jameson, ed., **Essays in the Constitutional History of the United States in the Formative Period 1775–1789** (1889).

[15]John R. Vile, **The Constitutional Convention of 1787** (2005), 2 vols. [hereafter cited as Vile].

[16]*Id.*, vol. 1, xxxi.

[17]*Id.*

[18]Dickinson's remark was made on August 13, 1787, slightly more than a month before the end of the Convention. Max Farrand, **The Records of the Federal Convention of 1787** (rev. ed. 1937), II, 278.

[19]Vile, I, 386–87.

[20]*Id.*, II, 530.

[21]U.S. Constitution, Article I, section 3, paragraph 6.

[22]U.S. Constitution, Article III, section 2, paragraph 1.

[23]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*, Article VI, paragraph 2 (emphasis added). This provision is usually called the Supremacy Clause.

[24]Vile, I, 392–93.

[25]*Id.*, I, 393.

[26]*Id.*, II, 853–54. *See also* Yates's "Letters of Brutus," written in opposition to ratification of the Constitution in New

York State, especially those having to do with the judiciary. They are reprinted in Edward S. Corwin, **Court over Constitution** (1938), 231–62. These same letters are available online at http://wps.prenhall.com/hss'mason'conlaw'14/0,10234,1844890-,00.html (last accessed October 18, 2006).

[27]*The Federalist*, No. 51, February 8, 1788, in Vile, II, 916.

[28]*Id.*, I, xxx.

[29]*Id.*, II, 776.

[30]In Pennsylvania, for example, the state constitution of 1790 placed selection of supreme court justices entirely in the hands of the governor, and its members served during good behavior. The constitution of 1838 instituted a system of fifteen-year terms for justices, and a constitutional amendment in 1850 made all judicial offices elective. With variations introduced by subsequent constitutions, that practice continues. *See* Donald Grier Stephenson, Jr., "John Bannister Gibson," in John H. Vile, ed., **Great American Judges** (2003), I, 289–94.

[31]Richard Davis, **Electing Justice** (2005) [hereafter cited as Davis].

[32]*See* Michael Comiskey, **Seeking Justices** (2004), and Lee Epstein and Jeffrey A. Segal, **Advice and Consent** (2005). The Comiskey volume was reviewed in D. Grier Stephenson, Jr., "The Judicial Bookshelf," 30 *Journal of Supreme Court History* 284, 297–99 (2005). The Comiskey, Davis, and Epstein-Segal studies join a large number of such books, most of which appeared in the 1990s, following the Senate's rejection of Judge Robert Bork's nomination in 1987 and the contentions hearings over Justice Clarence Thomas's nomination in 1991. *See, e.g.*, John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990) [hereafter cited as Massaro]; Ethan Bronner, **Battle for Justice: How the Bork Nomination Shook America** (1990); Stephen L. Carter, **The Confirmation Mess** (1994); John P. Frank, **Clement Haynsworth, the Senate, and the Supreme Court** (1991); Sheldon Goldman, **Picking Federal Judges** (1997); John A. Maltese, **The Selling of Supreme Court Nominees** (1995); Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations** (1994); and David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (1999). An earlier study is Robert Shogan, **A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court** (1972). Spanning nearly three decades have been the several editions of Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court** (1st ed., 1974). Second and third editions of Abraham's book followed in 1985 and 1992, respectively. All three were published by Oxford University Press. Later the book was updated and reissued by Rowman & Littlefield as **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** (2000).

[33]After Senate rejection on October 23, 1987, of Judge Bork's nomination for the seat vacated by retiring Justice Lewis F. Powell, President Ronald Reagan on October 29 announced his intention to nominate Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit. Before the nomination actually became official, however, Judge Ginsburg asked that his name be withdrawn. Thus, according to the Congressional Research Service at the Library of Congress, Ginsburg's name does not technically appear on the list of failed Supreme Court nominations because there was no formal nomination.

[34]Massaro, **Supremely Political**, Appendix 1, 200–202. Massaro's data demonstrate that a nominee was far more likely to fail in the Senate when one party controlled the Senate and the other the White House *and* when the nomination fell late in a President's term. *Id.*, 136. Massaro uses "ideological difference" and "partisan difference" interchangeably in situations of divided government. In the nineteenth century, however, a *partisan* difference between the Senate and the White House did not always reflect an *ideological* difference as the latter term is widely used today.

[35]Davis, 62.

[36]The term "party base" refers to a segment of the electorate strongly identified with one of the two major political parties. Election turnout for a party's base is unusually high, and members of the base are otherwise more politically alert and active than the average citizen. Those in the Democratic base tend to be more liberal than Democratic voters as a whole, while those in the Republican base tend to be more conservative than Republican voters as a whole.

[37]*Id.*, 68.

[38]The term apparently originated in the military as a way to test those who were about to become classroom instructors. The intent was to simulate virtually every conceivable question on a certain topic that an instructor might receive from a skeptical audience. Larry Tracy, "Internet Marketing and Public Speaking: The Murder Board Practice," http://www.marketingsource.com/articles/view/2191 (last accessed on October 18, 2006).

[39]*See* "Nomination of Byron R. White, of Colorado, to Be Associate Justice of the Supreme Court of the United States," Hearing before the Committee on the Judiciary, United States Senate, 87th Congress, 2nd session, April 11, 1962. The hearings were published by the Government Printing Office later in 1962.

[40]*See* "Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States." Hearings before the Committee on the Judiciary, United States Senate, 99th Congress, 2nd session, July 29, 30, 31, and August 1, 1986. The hearings were published in 1987 by the Government Printing Office.

[41]Davis, 68.
[42]*Id.*
[43]Donald Grier Stephenson, Jr., *et al.*, **American Government** (2d ed. 1992), 409.
[44]Davis, 9.
[45]*Id.*, 178.
[46]*Id.*, 13.
[47]*Id.*, 9.
[48]*Id.*, 158.
[49]*Id.*, 160.
[50]*Id.*, 168.
[51]*Id.*, 171.
[52]*Id.*, 172 (bracketing in original).
[53]*Id.*, 176, 178.
[54]*See* James St. Clair and Linda C. Gugin, **Chief Justice Fred M. Vinson of Kentucky: A Political Biography** (2002).
[55]Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium: Data, Decisions, & Developments** (1994), table 2-14, 129–37.
[56]Abraham, **Justices and Presidents** (3d ed.), 259 (emphasis in the original).
[57]Michal R. Belknap, **The Supreme Court under Earl Warren, 1953–1969** (2005), 306, 313 [hereafter cited as Belknap].
[58]Earl Warren, **The Memoirs of Earl Warren** (1977), 303–4.
[59]*See* the text of the Conference's report and resolutions in *U.S. News & World Report* (October 3, 1958), 45. *See also* Charles S. Hyneman, **The Supreme Court on Trial** (1963), 23–24.
[60]*See* note 57.
[61]William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995); Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997); James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995); Walter F. Pratt, Jr., **The Supreme Court under Edward Douglass White, 1910–1921** (1999); Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953** (1997); Earl M. Maltz, **The Chief Justiceship of Warren Burger, 1969–1986** (2000).
[62]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (14th ed. 2005), 185 [hereinafter cited as Mason & Stephenson].
[63]Belknap, 262.
[64]Mark Tushnet, "The Warren Court as History: An Interpretation," in Mark Tushnet, ed., **The Warren Court in Historical and Political Perspective** (1993), 12.
[65]391 U.S. 367 (1968).
[66]50 U.S.C. App. 426(b)(3).
[67]Belknap, 291.
[68]391 U.S. at 376.
[69]*Id.* at 377.
[70]Belknap, 291–92.
[71]391 U.S. at 383–84.
[72]*Abington Township School District v. Schempp*, 374 U.S. 203, 222 (1963).
[73]391 U.S. at 389–91 (Douglas, J., dissenting).
[74]Belknap, 308.
[75]347 U.S. 483 (1954).
[76]Belknap, 308–9.
[77]*Id.*, 309.
[78]*Id.*
[79]*Id.*, 310.
[80]384 U.S. 436 (1966).
[81]367 U.S. 643 (1961).
[82]Mason & Stephenson, 402.
[83]376 U.S. 1 (1964).
[84]377 U.S. 533 (1964).
[85]Belknap, 309.
[86]*Id.*, 308.
[87]*Id.*, 310.
[88]*Id.*
[89]*Id.*, 311.
[90]*Id.*, 313.
[91]*Adamson v. California*, 332 U.S. 46, 69ff (1947) (Black, J., dissenting).
[92]*Duncan v. Louisiana*, 391 U.S. 145 (1968).
[93]Besides *Wesberry v. Sanders*, 376 U.S. 1 (1964), *see Engel v. Vitale*, 370 U.S. 421 (1962), and *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[94]*See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131, 152ff (1966) (Black, J., dissenting).
[95]*Griswold v. Connecticut*, 381 U.S. 478, 508ff (1965) (Black, J., dissenting).
[96]403 U.S. 713 (1971) (Black, J., concurring).
[97]D. Grier Stephenson, Jr., Book Review, 63 *Virginia Law Review* 1087, 1090 n. 18 (1977), *quoting* the *Baltimore Sun*, February 28, 1971, at 1.
[98]Howard Ball, **Hugo L. Black: Cold Steel Warrior** (1996).
[99]Steve Suitts, **Hugo Black of Alabama** (2005) [hereafter cited as Suitts].
[100]*Id.*, 97. As Suitts writes, in language that would challenge the squeamish, "Black needed one-mindedness to endure the distasteful aspects of medical education. Dismembering cadavers and working frequently in blood was very bothersome to a boy who considered himself sickly and for whom blood was a sign of approaching death. His sensitive, roman nose was especially offended. The lab smells often made Black gag for fresher air." *Id.*
[101]*See, e.g.*, the indirect reference to *Engel v. Vitale* in Suitts, 20.
[102]Charlotte Williams, **Hugo L. Black: A Study in the Judicial Process** (1950); Virginia Van Der Veer Hamilton, **Hugo Black: The Alabama Years** (1972).

[103]Roger K. Newman, **Hugo Black** (1994).

[104]Gerald T. Dunne, **Hugo Black and the Judicial Revolution** (1977).

[105]Albert J. Beveridge, **The Life of John Marshall** (1916), 4 vols.

[106]David Robarge, **A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court** (2000). *See* D. Grier Stephenson, Jr., "The Judicial Bookshelf," 26 *Journal of Supreme Court History* 279, 281–83 (2001).

[107]Suitts, 13–15, 549–50.

[108]Black's boyhood home in Clay County was about sixty miles east southeast of Birmingham, where he practiced law.

[109]*Id.*, 242.

[110]*Id. See generally* Suitts, ch. 7, 241–91.

[111]*Id.*, 273.

[112]*Id.*, 244. The Miniard trial was a suit against the Illinois Central Railroad on behalf of a working-class, pregnant white woman who claimed to have been tormented and frightened by an apparently deranged African-American woman in a coach on a train trip from Chicago to Birmingham. The actions of the offending woman allegedly took place before the train reached the Mason-Dixon line. At that point, she and all other black passengers were moved to the Jim Crow car as soon as it was added to the consist at Cairo Junction in extreme southern Illinois. Black asked the jury to award his client the seemingly odd sum of $2,999.99—one penny more and the railroad could have removed the case into federal court under diversity jurisdiction. *Id.* Black's client won, although the verdict was overturned on appeal. *Id.*, 282. Black had the case retried in 1921 and won an award of $2,500 that was again overturned on appeal. A third trial returned yet a third award, and this time apparently the railroad's attorney let it stand. *Id.*, 284. Black was not only ambitious, but persistent. The Supreme Court had upheld the constitutionality of racially segregated rail travel in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[113]Suitts, 553–54.

[114]Roosevelt nominated Black for the Supreme Court on August 12, 1937, and the Senate confirmed him just five days later, on August 17.

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