Introduction

Melvin I. Urofsky

Over the years, I have found that when I am wearing my hat as a constitutional historian, I often have cause to look into the back issues of the *Journal.* Occasionally it is because I am working on a fairly standard item and recall that we have published something in that area. Other times I recall a somewhat idiosyncratic piece that just might have a piece of information that will help illustrate a particular point. This issue carries both types, and each is important in understanding the Court's history.

While there have been more Justices than Presidents, there have been far fewer members of the Court than Senators and especially Representatives. As a result, it is possible to take something like where a particular person is buried and discover a great deal about who he was. George Christensen got interested in where the Justices are buried a number of years back, and he wrote his first article for the Society on that subject in 1983. Since then more Justices have gone to their reward, some have been reinterred, and mistakes about supposed burial sites have been discovered. Christensen has personally visited all but one of the Justices' gravesites, and he now presents an updated version of his research.

Because Justices, unlike members of the executive or legislative branches, are appointed and require Senate confirmation, we have the occasional situation of a President's first choice either not being confirmed or of having the nomination recalled for a variety of reasons. In rare instances, this may happen more than once. Artemus Ward has done some reading on this and has come up with a light-hearted piece on the "Good Old # 3 Club," as Justice Harry Blackmun used to call it. There is also a # 5 Club, and some people believe that Robert Grier is the only member of that "select" body. However, it all depends on how one counts . . .

Readers know that each year we have two competitions for the Hughes-Gossett prizes. One is given to the best article in the *Journal* each year. The other goes to a student essay, with the winning entry published in the *Journal.* This year's student winner is Constance Martin, whose essay is on the jurisprudence of Justice Robert H. Jackson—another reminder, if we needed one, that this

long-neglected and very important figure deserves a top-notch biography.

"The most important thing we sometimes do," Louis Brandeis told Felix Frankfurter, "is deciding not to decide." Brandeis had a highly developed sense of jurisdictional limits, as did Chief Justice William Howard Taft. But where Brandeis would have imposed existing restrictions more tightly, Taft looked to a wholesale revision of the High Court's jurisdictional boundaries. And he succeeded in getting them in the Judiciary Act of 1925, a story told here by Jonathan Sternberg.

All scholars sometimes wish that they could go back and revisit a subject they had written on earlier in their career. They might have changed their minds; more likely, new source material has become available, either to correct earlier interpretations or to provide better substantiation for suppositions. Tony Freyer first wrote about the Little Rock crisis and the resulting 1958 Court case, *Cooper v. Aaron*, in 1984. Recently the University Press of Kansas asked him to contribute a volume on the decision to the "Landmark Cases" series, giving him the chance to look over the field once again. This time, with access to judicial papers not open a quarter-century ago, Freyer is able to give us a more detailed and more nuanced history of that decision.

One of the most controversial parts of the Second Red Scare involved the Attorney General's List of Subversive Organizations. A group could be included on that list with no notice and with no chance to prove that it was not Communist-affiliated or subversive. Robert Goldstein tells us about the case that took the first steps—admittedly small ones—in the Court's recognition that such tactics violated not only the premise of the First Amendment, but the Fifth Amendment's Due Process Clause as well.

So, for light-hearted or for sober reading, enjoy!

Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court

JONATHAN STERNBERG*

Introduction: From Obligation to Discretion

Americans today are accustomed to a Supreme Court that has nearly unfettered power over its appellate jurisdiction to choose which cases it hears and which it discards. Indeed, in 2004, the Supreme Court granted a mere 85 certiorari petitions out of the 8,593 before it.[1] This is a far cry from the early days of the Republic when Chief Justice John Marshall unabashedly declared that the Supreme Court had

> no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[2]

Undeniably, the jurisdictional framework of Marshall's time was considerably different from that of the present day. The law of jurisdiction under which he and his Brethren labored consisted entirely of one piece of legislation: the Judiciary Act of 1789.[3] Besides the limited direction provided in the Constitution itself, for the first century of the Court's existence the 1789 Act defined its entire jurisdictional universe.

By today's standards, Marshall's perceived mandate is striking. Today, the Supreme Court does exactly the opposite of his observation: Given complete discretion over its docket, far more often than not the Court declines to exercise jurisdiction and thus avoids the overwhelming majority of questions put before it. Despite this clear turnaround from the early Republic's jurisprudence, today's Justices routinely extol what they view as the virtues of

the Court's modern discretion versus the earlier system. Justice Arthur Goldberg believed that "the power to decide cases presupposes the power to determine what cases will be decided," as well as "the more subtle power to decide when, how, and under what circumstances an issue should or should not be accepted for review."[4] Justice Thurgood Marshall reasoned that "deciding not to decide is... among the most important things done by the Supreme Court."[5]

That is precisely what the Supreme Court increasingly has done throughout the past eighty years: In the vast majority of cases, it has simply decided not to decide. Since 1925, the proportion of certiorari petitions that the Court has granted out of the number put before it steadily has decreased.[6] This represents a profound turnaround from the days when Chief Justice Marshall could state so emphatically that to decline the exercise of jurisdiction would be tantamount to constitutional treason. After all, under his reasoning, the highest court in the land would have become a den of traitors!

Today, of course, this is hyperbole. How, though, did this sentiment transform from being included in a unanimous opinion two hundred years ago to seeming so bizarre today? The Supreme Court's gradual jurisdictional about-face over the past two centuries is owed largely to the efforts of Chief Justice William Howard Taft, who drafted and lobbied for the instrument that made the Court what it is today: the Judiciary Act of 1925.[7] Taft had had his eye on sweeping Supreme Court reform ever since he began his public life. Upon becoming Chief Justice in 1921, he quickly set about on a campaign to implement those desires, putting forth his arguments for Supreme Court jurisdictional reform, making promises, and declaring purposes. Succinctly put, he convinced Congress to agree "to give the Justices of the Supreme Court what [he] had aggressively sought from the moment he took his seat on the Supreme Court: a far-ranging power to pick and choose which cases to decide."[8] Shortly after the passage of the 1925 Act, Taft remarked, "Easily one-half of certiorari petitions now presented have no justification at all,"[9] reinforcing his belief that the Act met his underlying purpose of making the Supreme Court's caseload "clearer and simpler."[10] Although this post-1925 version of the Court is the only one that any living attorney has known, it was an extreme departure from the prior version of the Court.

This article explores the history of the Supreme Court's appellate jurisdiction, beginning with the Supreme Court's original congressional mandate in the new Republic under the 1789 Act. It introduces the jurisprudence of Chief Justice Taft and explores the reasons and purposes underlying his desire for radical reform and that ultimately lead to the 1925 Act. Having grasped the necessary perspective and context, this work reviews the 1925 Act itself and how precisely it altered previous congressional mandates of Supreme Court jurisdiction so as to give the Court the discretionary appellate jurisdiction that it enjoys today.

Part I: The Road to the 1925 Act

A. Supreme Court Jurisdiction in the Early Republic

The earliest provisions for the Supreme Court's appellate jurisdiction were located, of course, in the Constitution itself. The Constitution grants the Supreme Court appellate jurisdiction in "all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority... both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[11] Although the Supreme Court determined early on that Congress lacked power under the Constitution to add to the Court's original jurisdiction,[12] Section 2 of Article III commanded that Congress make regulations regarding what the Supreme Court's appellate jurisdiction precisely should be.

When William Howard Taft became Chief Justice in 1921, his first priority was giving the Supreme Court better control of its docket. On instigating passage of the Judiciary Act of 1925, he claimed that "[e]asily one-half of certiorari petitions now presented [to the Court] have no justification at all."

Congress did so barely one year after the Constitution was ratified on June 21, 1788.[13] The first task undertaken by the first Senate in the first Congress was to take up its constitutional mandate and create the third branch of government, a federal judiciary.[14] After five months of work, Congress passed the Judiciary Act and it was signed into law by President Washington.[15] This piece of legislation set forth the Supreme Court's jurisdiction that Chief Justice Marshall knew and from which, when asserting the Court's power to review state judgments in criminal law matters, he could declare that a failure to accept jurisdiction amounted to treason. It was the 1789 Act that gave Marshall and his Brethren that jurisdiction.

The 1789 Act—which was drafted by Oliver Ellsworth, a Framer of the Constitution itself[16]—granted the Supreme Court "appellate jurisdiction from the circuit courts and courts of the several states,"[19] as long as a state decision construed the validity, constitutionality, and/or the construction of "a treaty or statute of, or an authority exercised under the United States . . . a statute of, or an authority exercised under any State . . . any clause of the Constitution . . . or commission held under the United States."[18] On its face, this clearly resembles modern federal-question jurisdiction. The key difference between today's Supreme Court and the Court under the 1789 Act, however, is in *how* the Supreme Court could take up its appellate jurisdiction, be it from a state court or federal circuit court. In either case, the appeal was to be "upon a writ of error."[19]

The writ of error, although a common-law writ, was not used widely before the 1789

Act, either in Britain or in Colonial America.[20] It limited the Court—said to be reviewing "in error"—to questions of law in the appeals brought before it, rather than questions of fact.[21] Under the 1789 Act, this procedure allowed a decision below to "be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error,"[22] so long as the party seeking to proceed in error provided "an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by"[23] the applicable judge who had entered the decision below.

It is worth noting that the 1789 Act also empowered the Supreme Court, along with the lower federal courts, "to issue writs of *scire facias,* habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[24] This, of course, included the writ of certiorari, although it was not the certiorari that every American attorney knows today.[25] In Britain, "the writ of certiorari had been used by the King's Bench to assert jurisdictional control over other Courts,"[26] so necessarily the 1789 Act did not allow for such a thing. Rather, the American common law at the time provided certiorari "as an auxiliary process only, to supply imperfections in the record of a case already before it."[27] Thus, certiorari in 1789 and thereafter plainly "did not provide the Supreme Court with discretionary control over its jurisdiction."[28]

The 1789 Act sought to limit the Supreme Court's appellate jurisdiction in error to "final" decisions from the highest court in a state or a circuit court, and sought to limit the Court to issues of law and not of fact.[29] The Act even went so far as to declare that "there shall be no reversal . . . on such writ of error . . . for any error in fact"[30] in either the federal circuits or the state courts.[31] Shortly after the 1789 Act's passage, however, enterprising attorneys began to find loopholes in its many complicated procedural technicalities, especially to defeat the requirement of finality below and the prohibition on hearing issues of fact. Because the Act did not set down any firm procedures for obtaining writs, but rather simply gave the Supreme Court the power to grant them, "[t]he door was left ajar to Supreme Court reexamination of facts"[32] by the Act's wide-ranging writ provision. Both prohibition[33] and mandamus[34] were used to that effect.

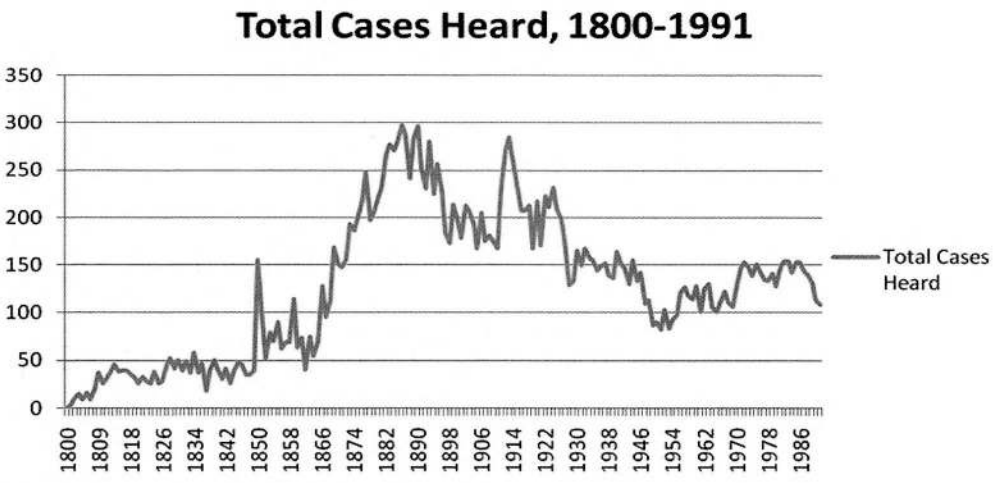
B. Limited Reform Between the Acts of 1789 and 1925

The judiciary set up by the 1789 Act essentially remained untouched by Congress throughout most of the nineteenth century. The Supreme Court's caseload, too, remained fairly static.[35] After the Civil War, however, the number of cases the Court was obligated to decide under the 1789 Act's system "grew dramatically," because of "the array of legal issues multiplied with the growing scale and complexity of federal law in American life."[36]

This resulted both in "a growing number of cases decided each term" and "a growing backlog of delayed cases." For example,

> In 1860, the Court had 310 cases on its docket and decided 91; in 1870, the Court had 636 cases on its docket and decided 280; in 1880, the Court had 1,202 cases on its docket and decided 365; and in 1886, the Court had 1,396 cases on its docket and decided 451. By 1888, the Court was more than three years behind in its work, and when the 1890 Term opened, the Court had "reached the absurd total of 1800" cases on its appellate docket—and was obliged to decide them all.[37]

Congress's initial responses to this problem included increasing the number of Justices from seven to nine and lengthening the Court's annual Term.[38] The Justices themselves responded by limiting the duration of oral argument in most cases to two hours per side[39] and, for the first time, hiring law clerks.[40] Still,



Source: *Extrapolated from* **Congressional Quarterly**

the Court's "incredible" number of decisions remained the "indispensable norm."[41]

Accordingly, in January of 1890, Chief Justice Fuller asked the Senate Judiciary Committee to relieve the Court's growing workload.[42] The Committee sent the Justices several proposals, including "requiring virtually all cases decided in the district court to be appealed to the circuit courts before any review by the Supreme Court,"[43] "authorizing the Supreme Court to sit in panels of three to hear and decide cases that did not present constitutional questions,"[44] increasing the number of Justices to eleven or eighteen,[45] reorganizing the circuit courts,[46] and altering "the allocation of appellate jurisdiction between the circuit courts of appeals and the Supreme Court."[47]

None of Congress's initial proposals mentioned certiorari.[48] When the Senate Judiciary Committee asked the Justices for their views on these proposals, the only one that received unanimous approval was that certain cases were

> not to be brought to the Supreme Court . . . unless the Court of Appeal, or two judges thereof, certify that the question involved is of such novelty, difficulty or importance as to require a final decision by the Supreme Court. But any question shall be so certified, upon which there has been a different decision in another circuit.[49]

Note that this proposal called for "certification," not certiorari. In compromising between Senate and House versions of Supreme Court reform, however, the idea of using writs of certiorari arose in parallel to the above certification scheme.[50]

Thus was produced the Judiciary Act of 1891,[51] which bore the Supreme Court's first discretionary appellate jurisdiction, but only over a large class of decisions from the federal circuits.[52] The 1891 Act limited the Supreme Court to appellate jurisdiction over the circuit courts only if the circuit court certified a question of law to the Supreme Court or if the Supreme Court granted a writ of certiorari to review the circuit court's judgment.[53] The Court still had mandatory appellate jurisdiction through writ of error in many cases, including any that challenged the constitutionality of a statute or in which a capital sentence had been imposed.[54] Jurisdiction over state courts remained the same as it had always been under the 1789 Act.[55]

Under the 1891 Act, then, the Supreme Court was granted discretionary jurisdiction over "the most numerous class of cases," namely "those which depended on the diverse

In 1890, Chief Justice Melville W. Fuller asked the Senate Judiciary Committee to relieve the Court's growing workload. Congress responded by passing legislation giving the Court discretionary review in patent cases, copyright cases, federal trademark cases, admiralty cases, revenue cases, criminal cases, and most bankruptcy cases. Fourteen other categories, however, were exempted from the Justices' discretion, however.

citizenship of the parties as the basis of federal jurisdiction."[56] The discretionary review also included "[p]atent cases, copyright cases, Federal trade-mark cases, admiralty cases, revenue cases, criminal cases, and most bankruptcy cases."[57] In addition to capital cases, however, the 1891 Act still contained fourteen "classes of cases in which a second review as a matter of right could be had in the Supreme Court after prior appeal to the circuit courts," including:

> Civil suits – (1) Brought by the United States, or by any officer thereof authorized by law to sue. (2) Between citizens of the same State claiming lands under grants from different states. (3) Where more than $3,000 is involved and the suit arises under the Constitution or laws or treaties of the United States. (4) Seizures on land or waters not within admiralty or maritime jurisdiction. (5) Cases arising under the postal laws. (6) Suits and proceedings under any law regulating commerce, except such as may be covered in special statutes already mentioned. (7) Civil suits and proceedings for enforcement of penalties and forfeitures and incurred under any law of the United States. (8) Suits for damages by officers and persons for injury done him in protection or collection of United States revenue or to enforce right of citizens to vote. (9) Suits for damages by citizens injured in their Federal constitutional rights. (10) Suits against consuls and vice consuls. (11) Suits under immigration and contract labor laws. (12) Private suits under the antitrust act. (13) Suits by Indians or part blood Indians for allotment under any law or treaty. (14) Suits by tenant in common or joint tenant for partition of land in which the United States is also tenant in common or joint tenant.[58]

Additionally, even after the 1891 Act, the Court "was obligated to review a final judgment rendered by a state court system that denied a federal claim or defense, but had no jurisdiction to review a state court judgment that upheld a federal claim or defense."[59] In 1914, the latter class of cases was opened to discretionary certiorari review.[60] Nonetheless, because of the fourteen mandatory categories and the mandatory review of state court judgments denying a federal claim or defense,[61] by 1916 the Court's workload again had begun to skyrocket.

The class of cases in which a state court had denied a federal claim or defense comprised by far the majority of the Supreme Court's writ of error docket.[62] Of these, the most common were Federal Employers' Liability Act (FELA) cases.[63] In response to this growing writ of error docket, Congress passed another jurisdictional act in 1916 that authorized the Court to decline to review these cases.[64] That statute was fairly ambiguous: The Court's jurisdiction remained by writ of error "(1) where the state court decided against the validity of a treaty, federal statute, or authority exercise under the United States; and (2) where the state court rejected a federal challenge to the validity of a state statute or authority exercised under a state."[65] The 1916 Act provided, however, that where "any right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" that claim, it was placed under the certiorari jurisdiction created by the 1891 Act.[66]

Whatever Congress might have intended in the 1916 Act, the Court understood it to eliminate from its writ of error jurisdiction both FELA cases and those cases that raised "constitutional objections to state executive action."[67] Accordingly, when reviewing the decision of a state court, only challenges to state statutes under the Constitution and/or federal law remained within the Court's writ of error jurisdiction, although it is doubtful if Congress had this in mind.[68] Thus, with the passage of the 1916 Act, the Court's writ of error jurisdiction consisted only of the fourteen classes of federal cases noted above, as well as state court decisions denying a challenge to the validity of a state statute under the Constitution or federal law. The 1916 Act had the effect of alleviating the spike in the total number of cases that the Court heard. Despite the efforts of 1891 and 1916, however, by 1921 approximately seventy-five percent of the Court's cases still fell within its mandatory jurisdiction.[69]

Part II: The 1925 Act

A. Constructing the 1925 Act

This was the Supreme Court as William Howard Taft found it when, in 1921, President Harding appointed him Chief Justice of the United States,[70] a position to which he had aspired since he first became an attorney thirty-five years earlier.[71]

Taft's career was astonishing. Graduating second in his Yale undergraduate class of 1878, he had returned to his native Ohio and attended the Cincinnati Law School.[72] After beginning his legal career as an assistant prosecutor in Cincinnati,[73] he soon soared through the ranks to become an Ohio Superior Court judge in 1887 at the age of twenty-nine,[74] the youngest-ever Solicitor General of the United States in 1890 at the age of thirty-two,[75] a judge on the United States Court of Appeals for the Sixth Circuit in 1892,[76] dean of the Cincinnati Law School in 1896,[77] president of the First American Commission on the Philippine Islands in 1900,[78] Governor General of the Philippines in 1901,[79] and Secretary of War for President Theodore Roosevelt in 1904.[80] In 1908, with Roosevelt's backing, Taft was elected the twenty-seventh President of the United States.[81]

It was then, during his first presidential campaign, that Taft first publicly expressed an interest in reform of the federal judiciary. In June of 1908, while election season was in full

swing, he wrote a short article titled "The Law of the Country" in the *North American Review*, which was essentially "a point-by-point critique of the judicial system."[82] He argued that "our failure to secure expedition and thoroughness in the enforcement of public and private rights in our Courts was the case in which we had fallen farthest short of the ideal conditions in the whole of our Government."[83] Principally, he believed that "the number of allowable appeals, overelaborate codes of procedure, expense of litigation, and dilatory judges" justified reform.[84] Shortly before the November election, Taft flat-out called for Supreme Court "jurisdictional limitations, either in amount in controversy or in the subject matter of suits," or perhaps by "discretionary writ of certiorari."[85]

As President, Taft continued to press for "a change of judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decisions in both civil and criminal cases."[86] Eventually, he publicly began expressing a desire that Congress confine the Supreme Court's jurisdiction "almost wholly to statutory and constitutional questions."[87] In the first decade of the twentieth century, these statements about finality and jurisdictional limitation must have seemed anathema. After all, the basic three-tiered structure of the federal judiciary had not changed since its inception in the 1789 Act. Indeed, during Taft's one-term administration, Congress passed no legislation dealing with the Court's jurisdiction, despite his repeated urging otherwise.

After finishing third in the 1912 presidential election to Woodrow Wilson and Progressive party candidate Theodore Roosevelt,[88] Taft happily accepted an appointment as professor of law and legal history at Yale Law School, where he remained for eight years, continuing to ponder the future of the federal judiciary.[89] In a 1914 commencement address to the Cincinnati Law School, he remarked,

> The Supreme Court has great difficulty in keeping up with its docket. The most important function of the court is the construction and application of the Constitution of the United States. It has other valuable duties to perform in the construction of statutes and in the shaping and declaration of general law, but if its docket is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have, and the litigants of the court will suffer injustice because of delay.[90]

He believed that the only solution was that Congress limit the mandatory jurisdiction of the Court solely to "questions of constitutional construction" and give "an opportunity to litigants in all other cases to apply for a writ of certiorari," so that the Court "may exercise absolute and arbitrary discretion with respect to all business but constitutional business."

During Taft's time at Yale, two major events dramatically increased the number of cases before federal courts: World War I and the dual passage of the Eighteenth Amendment and the Volstead Act,[91] which implemented nationwide Prohibition.[92] "Litigation arising from prohibition alone accounted for an eight percent rise in the number of [federal] cases."[93] As well, World War I brought "civil and criminal cases involving espionage, civil liberties, wartime business contracts," and the like.[94] Still, Chief Justice Edward White, whom Taft had appointed in 1910, was unwilling to press for congressional action, fearing that further limiting the Supreme Court's mandatory jurisdiction could "break down the separation of the political branches of government from the judiciary."[95] White even expressed a great distaste for the jurisdictional limitations in the 1916 Act.[96]

Taft, however, felt otherwise. Congress confirmed Taft as Chief Justice by unanimous voice vote the same day it received his nomination from President Harding.[97] As soon

as Taft's first Court Term as Chief Justice began in October of 1921, he called together a committee composed of Justices William Day, Willis Van Devanter, and James McReynolds to draft a bill for reform of the Supreme Court's jurisdiction.[98] Taft and the other Justices worked on the bill through February of 1922.[99] In the meantime, Taft published two articles in the *ABA Journal* expressing why he thought jurisdictional change was necessary. He blamed the "congestion" in the judiciary on "the gradual enlargement of the jurisdiction of the courts under the enactment by Congress of laws which are the exercise of its heretofore dormant powers... greatly added to by the adoption of the 18th Amendment and the Volstead law."[100] Other examples of this exercise of dormant powers included "the Interstate Commerce Law... the Anti Trust Law, the Railroad Safety Appliance Law, the Adamson Law, the Federal Trade Commission Law, the Clayton Act, the Federal Employers' Liability Law, the Pure Food Law, the Narcotic Law, and the White Slave Law."[101]

As a result, Taft believed that the jurisdiction of the Supreme Court under the 1891 Act and 1916 Act had "really become almost a trap to catch the unwary."[102] Hinting that "[s]ome of us are working on a proposed bill to simplify the statement of the jurisdiction of the Supreme Court," he proposed that there be enacted

> some method... by which the cases brought before [the] Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and the statutes of the United States and on all important questions of general law with respect to which there is a lack of uniformity in the intermediate Federal courts of appeal.[103]

Taft believed that "where there are intermediate courts of appeal," the Supreme Court "is not a tribunal constituted to secure, as its ultimate end, justice to the immediate parties," because the parties "have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy."[104]

Chief Justice Marshall, though, also had a three-tiered judiciary. Marshall's unanimous opinion that a Supreme Court that declines available jurisdiction commits treason on the Constitution ran precisely at odds with Taft's opposite assertion. It also ran counter to Taft's earlier statement that mandatory jurisdiction should remain for questions of constitutional construction. Taft clearly realized the radical nature of what he was suggesting; indeed, no previous, serious legislative proposal had taken the same position.[105] Accordingly, he promised that a completely discretionary Court would give certiorari petitions "the most careful consideration," declining certiorari only for those cases that either were "frivolous" or involved principles that were already "well settled."[106] He believed that such a system was necessary because of the "critical" situation of litigation from the war and from Prohibition, which threatened to "throw" the Supreme Court "hopelessly behind."[107]

With this in mind, Taft appeared before the House Judiciary Committee in March of 1922 to present the bill that he and his committee had written.[108] There, he argued for the expansion of certiorari, explaining how he thought the Justices would work under a discretionary docket.[109] He theorized that the Supreme Court should not exist "to preserve the rights of the litigants," but rather that its purposes were "expounding and stabilizing principles of law" and preserving "uniformity of decision among the intermediate courts of appeal."[110] He promised that "whenever a petition for certiorari presents a question on which one circuit court of appeals differs from another," the Justices would "let the case come into our court as a matter of course."[111]

Taft did, of course, address other potential ideas for reform that his committee had considered and rejected (although they do not appear anywhere in any of this writings), including

Taft (pictured in 1921) promised Congress that a completely discretionary Court would give certiorari petitions "the most careful consideration," declining certiorari only for those cases that either were "frivolous" or involved principles that were already "well settled."

"dividing the court into parts, imposing high costs on litigants, or relying on amount-in controversy requirements," as well as carefully defining "the character of cases which shall come before the court."[112] Instead, he proposed "letting the Supreme Court decide what was important and what was unimportant."[113] Lastly, he explained why he abandoned his 1914 idea of continuing writ of error jurisdiction in constitutional cases: "there could be just as many frivolous cases on constitutional grounds as on other grounds."

With the cat out of Taft's bag, he began lobbying for his bill. He acknowledged that it was radical, but premised his support on the idea that changes in the country had made it necessary. Taft maintained that although "[i]n the old days when business was light in all the federal courts, the appeals and writs of error that were taken to the Supreme Court were not sufficiently numerous to occupy the full time of the Supreme Court," Congress's passage of new laws had created congestion, almost to the level of that in 1891.[114] He insisted that his bill merely followed the lead of the 1891 and 1916 Acts.[115] Dismissing the objection that the bill gave the Court "too wide discretionary power," he promised that every certiorari petition would be "carefully determined by each member of the Court" and "discussed and voted on."[116] In so doing, he contended that "the use of the writ of certiorari seems to be the only practical method" of preserving the rights of the public and other litigants, due to the "frivolous and unnecessary consumption of the time of the Supreme Court," as delay by

When Taft (center) called on President Calvin Coolidge at the White House in 1929, he brought along U.S. circuit court judges (pictured), who were in town for their annual conference. Coolidge had supported passage of the Judiciary Act of 1925, but many circuit judges had opposed it.

means of appeal imposes "an unfair burden on the poor litigant."[117]

As with any other proposal for radical reform, especially one designed to increase the power of a governmental body, many contemporaries expressed an unfavorable view of the 1925 Act. Shortly after Taft made his first appearance before the House Judiciary Committee to announce the bill he and his colleagues had drafted, District Judge Benjamin I. Salinger of Iowa came to Washington and "testified passionately" before the Committee against eliminating any mandatory review of state court judgments.[118] Like many others, he disagreed with Taft's assertion that the Supreme Court's role was not "to secure, as its ultimate end, justice to the immediate parties," stating instead that "the great function of the Supreme Court is to protect rights given by treaty, the Constitution, or other Federal law" and that Congress need not deal with preventing frivolous cases from coming before the Supreme Court because "a frivolous case can be summarily dismissed."[119]

Initially, the American Bar Association (ABA) also was uncomfortable with the 1925 Act, suggesting as an alternative that the best way to deal with an increased Supreme Court workload was to increase the number of Justices to twelve, with six constituting a quorum and the concurrence of five necessary to render a decision.[120] It only dropped this objection when Taft informed the ABA committee studying the bill that all the Justices were opposed to increasing the number of the Court, likening such a proposal to making the Supreme Court into a "town meeting."

Several senators also initially criticized the bill, deprecating the 1916 Act as being bad precedent and reasoning that certiorari gave

the Court "unrestrained discretion."[121] Senator Thomas Walsh predicted that an entirely discretionary Court "would not be inclined to hear intricate cases involving law with which the judges were not already familiar."[122] He found "it difficult to yield to the idea that the Supreme Court of the United States ought to have the right in every case to say whether [its] jurisdiction should be appealed to or not."[123]

Justice Louis Brandeis also disapproved of the 1925 Act, refusing to lend it his support at any time during its drafting or consideration.[124] His experience since the 1916 Act had "raised in [his] mind grave doubt whether the simple expedient of expanding [the Court's] discretionary jurisdiction is the most effective or the safest method of securing the needed relief."[125] Other common complaints were that the bill made "the circuit courts of appeals courts of last resort on constitutional questions"[126] and that it empowered judges "who may be looking for the least work possible and for longer periods of leisure" to "deny humble citizens' right to appeal."[127]

With Taft's promises of speed, low cost, and careful determination, however, the ABA eventually pledged its support for the bill in the fall of 1923.[128] After considerable further lobbying by Taft and the ABA, as well as by Justices Van Devanter, McReynolds, and George Sutherland, the Senate Judiciary Committee approved the bill in October of 1924.[129] During the intervening 1924 presidential election, President Calvin Coolidge voiced his ardent support for the bill, even mentioning as much in his subsequent 1925 State of the Union address.[130] The House Judiciary Committee recommended the bill to the full House in January of 1925.[131] On February 2, 1925, the House passed the bill by voice vote "almost without discussion."[132] One week later, the Senate passed the bill with only one vote in opposition.[133] President Coolidge signed it into law on February 13[134] and it went into effect one month later,[135] completing William Howard Taft's nearly twenty-year crusade to reform the judiciary.

B. Substance, Interpretation, and Subsequent Reform of the 1925 Act

The portions of the 1925 Act dealing with the jurisdiction of the Supreme Court began by repealing and superseding the relevant parts of the 1789, 1891, and 1916 Acts.[136] Under the 1925 Act, the Supreme Court had jurisdiction to review decisions of the United States courts of appeals only by either discretionary writ of certiorari or certified questions.[137] Certiorari jurisdiction also extended to decisions of the highest state court in which a decision could be had that drew into question the validity of a state statute under the Constitution, statutes, or treaties of the United States.[138] Previously, a grant of certiorari brought the entire decision challenged into the Court's review.[139] After the 1925 Act, however, the Court was empowered to pick and choose the federal questions below that it wished to accept.[140]

The 1925 Act did continue writ of error jurisdiction, albeit very limitedly. Under the 1925 Act, writ of error jurisdiction extended to decisions of the courts of appeals denying the validity of a state statute under the Constitution, treaty, or statutes of the United States.[141] It also covered both interlocutory and final orders of the United States district courts: (1) in antitrust and interstate commerce law cases; (2) in criminal cases in which the decision was adverse to the United States, jeopardy had not attached, and the defendant had not been acquitted; (3) in suits to enjoin the enforcement of a state statute administrative action, as long as the case had been heard by a special three-judge panel containing a circuit judge; and (4) in suits to enjoin orders of the Interstate Commerce Commission, also only when heard by the special three-judge panel.[142] The reason for leaving these very limited cases in was that they "raise[d] issues transcending in importance the immediate interests of litigants and involve[d] those national concerns which are in the keeping of the Supreme Court."[143]

Although these lists of discretionary and mandatory subject matters in the 1925 Act

seemed to overlap in several places, it compensated for these inconsistencies by declaring that any lower case could be reviewed by certiorari, even if a writ of error could be taken instead.[144] Taft promised that if a litigant brought a writ of error when he properly should have petitioned for a writ of certiorari, the Court would consider the writ of error as a certiorari petition.[145] He also gave his assurances that any ambiguities would be cleared up when the Supreme Court circulated its Revised Rules of Court to meet the 1925 Act.[146]

Over the next three years, the Court gradually revised its rules.[147] In 1928, it promulgated a new rule, Rule 12, which required all litigants covered in one of the narrow writ of error categories to file a jurisdictional statement within thirty days of docketing their appeal.[148] The Court immediately proceeded to use the rule "to cover matters not merely of jurisdiction in the conventional sense, that is, the appellate authority of the Court," but rather "counsel were obliged to demonstrate that the federal question involved was substantial and (at least) persuade the Court that the record presents an issue that is not frivolous and is not settled by prior decisions."[149] In 1929, the first year Rule 12 was in effect, the Court used it to dismiss thirty-six appeals that otherwise would have been included in the 1925 Act's writ of error jurisdiction.[150] Very quickly, jurisdictional statements and certiorari petitions became practically the same thing, and the prevailing opinion among Supreme Court practitioners was that as all cases became subject to discretionary review, there was no real distinction between a writ of certiorari and a writ of error.[151]

The other avenue in the 1925 Act for placing an issue in front of the Supreme Court was a certified question from one of the United States Courts of Appeals. Taft had lauded this provision when testifying before Congress.[152] Soon, however, the lower courts began to sense the Supreme Court's "hostility" to certified questions.[153] Although in the first decade after passage of the 1925 Act, the circuits issued seventy-two certificates, in the second decade they only issued twenty.[154] Observers noted that the Court "apparently felt that a broad use of certification would frustrate the Court's proper functioning as a policy-determining body by greatly restricting the time available for the discretionary side of its docket."[155]

The 1925 Act remained untouched by Congress for over sixty years, until, on June 27, 1988, Congress passed the Supreme Court Case Selections Act.[156] The 1988 Act was designed to eliminate "virtually all of the remaining elements of the mandatory jurisdiction left in the wake of" the 1925 Act.[157] Under the 1988 Act, which still governs today,[158] the Court retains mandatory appellate jurisdiction only from a three-judge panel of a court of appeals on the issue of a state's federal legislative apportionment.[159]

The role of the 1988 Act in affecting the Supreme Court, however, was no more than "miniscule."[160] Rather than a piece of sweeping legislation, it simply was an amendment of the 1925 Act to meet the Court's existing practice.[161] After all, "the Justices had long . . . employed efficiency devices, such as summary affirmances and dismissals,"[162] to transform the mandatory into the discretionary, as noted above. By the 1980s, the Court simply "was not giving plenary consideration to appeals that did not warrant certiorari review."[163]

Effectively, then, through some innovative Supreme Court procedures and interpretations, the 1925 Act accomplished what Taft had desired upon becoming Chief Justice. It allowed the Supreme Court to decide by unlimited discretionary certiorari review which cases it wished to take and which it did not wish to take, the other theoretical avenues for placing a case before the Court notwithstanding.

Conclusion

The Framers of the Republic would not have recognized the Supreme Court's jurisdiction in the form that it has taken since 1925.

During more than a century under the 1789 Act, massive changes in both federal law and the makeup of the United States during the Industrial Revolution created a crisis, which reached several zeniths between 1891 and 1925. Anticipating and responding to that crisis, William Howard Taft convinced Congress and the American legal establishment to effect the Judiciary Act of 1925—the most sweeping alteration of the Supreme Court's role ever passed in American history. Although the Court today may not be known for its unanimity, the Justices are unanimous in their praise for the virtues of the discretionary court. They owe those virtues to the struggle that Taft and his colleagues endured to give the Court its defining characteristic in the modern era: the power to decide not to decide.

*The author is grateful for the assistance and suggestions of Dean Robert Klonoff of the Lewis & Clark Law School. The author also wishes to thank Professor Robert Gordon of the Yale Law School for giving insight into William Howard Taft.

ENDNOTES

[1]Kenneth W. Starr, "The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft," 90 MINN. L. REV. 1363, 1369 (May 2006).

[2]*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

[3]An Act to establish the Judicial Courts of the United States, 1 Stat. 73 [hereinafter 1789 Act].

[4]William J. Brennan, "The National Court of Appeals: Another Dissent," 40 *U. Chi. L. Rev.* 473, 484 (1973).

[5]Thurgood Marshall, "Remarks at the Second Circuit Judicial Conference" (Sept. 8, 1978), in **Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminisences** 177 (Mark V. Tushnet ed., 2001).

[6]**Congressional Quarterly, The Supreme Court Compendium: Data, Decisions, and Developments** 66–69 (Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, Thomas G. Walker eds., 1994).

[7]Act of February 13, 1925, Pub. L. No. 68–415, 43 Stat. 936 [hereinafter 1925 Act]; *see infra* pp. 12–14.

[8]Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill," 100 *Colum. L. Rev.* 1643, 1644 (Nov. 2000).

[9]William Howard Taft, "The Jurisdiction of the Supreme Court Under the Act of February 13, 1925," 35 *Yale L.J.* 1, 3 (1925).

[10]Hartnett, *supra* note 12.

[11]U.S. Const. art. III § 2.

[12]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[13]Wilfred J. Ritz, **Rewriting the History of the Judiciary Act of 1789** 13 (Wythe Holt, L.H. LaRue eds., 1989).

[14]*Id.*

[15]*Id.* at 14.

[16]Hartnett, *supra* note 12, at 1665.

[17]1789 Act, *supra* note 3, at § 13.

[18]*Id.* at § 25.

[19]*Id.* at §§ 22 (from circuit courts), 25 (from state courts).

[20]Ritz, *supra* note 20, at 7.

[21]*Id.*

[22]1789 Act, *supra* note 3, at § 25.

[23]*Id.* at § 22.

[24]*Id.* at § 14.

[25]Hartnett, *supra* note 12, at 1650.

[26]*Id.*

[27]*American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 380 (1893); *see also* Ritz, *supra* note 20, at 39–40 (discussing the use of certiorari in colonial America and the early Republic).

[28]Hartnett, *supra* note 12, at 1650.

[29]1789 Act, *supra* note 3, at §§ 21–22.

[30]*Id.* at §22.

[31]*Id.* at §25.

[32]Ritz, *supra* note 20, at 70.

[33]*See United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795).

[34]*See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

[35]*See* **Congressional Quarterly**, *supra* note 8, at 66–69.

[36]Margaret Meriwether Cordray and Richard Cordray, "The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection," 82 *Wash. U. L. Q.* 389, 392 (Summer 2004).

[37]Hartnett, *supra* note 12, at 1650–51 (quoting Felix Frankfurter & James M. Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** 86 (1928)).

[38]Margaret Meriwether Cordray and Richard Cordray, "The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking," 36 *Ariz. St. L.J.* 183, 191 (Spring 2004).

[39]*Id.* at 193.

[40]*Id.* at 192.

[41]*Id.*

[42]Hartnett, *supra* note 12, at 1651.

[43]*Id.* at 1652.

[44]*Id.* at 1653–54. Interestingly, the Justices voiced their disapproval at this proposal, reasoning that it likely would be unconstitutional. *Id.* at 1654.

[45]*Id.* at 1654.

[46]*Id.* at 1654.

[47]*Id.* at 1655.
[48]*Id.* at 1652.
[49]*Id.* at 1651–52.
[50]*Id.* at 1656.
[51]Act of March 3, 1891, 26 Stat. 826 [hereinafter 1891 Act].
[52]Taft, *supra* note 13, at 1–2.
[53]1891 Act, *supra* note 59, at § 5.
[54]*Id.*
[55]*Id.*
[56]Taft, *supra* note 13, at 2.
[57]*Id.*
[58]Felix Frankfurter & James M. Landis, "The Business of the Supreme Court," 40 *Harv. L. Rev.* 834, 840 (Apr. 1927).
[59]Hartnett, *supra* note 12, at 1657.
[60]*Id.*
[61]*Id.*
[62]Hartnett, *supra* note 12, at 1658.
[63]*Id.* at 1658–59.
[64]Act of Sept. 6, 1916, Pub. L. No. 258, 39 Stat. 726 [hereinafter 1916 Act]. The 1916 Act was drafted by Justices James McReynolds and William Day, as well as William Howard Taft. Hartnett, *supra* note 12, at 1664. At the time, Taft was the Kent Professor of Law and Legal History at Yale Law School. Henry F. Pringle, **The Life and Times of William Howard Taft** 856 (2d ed. 1964).
[65]Hartnett, *supra* note 12, at 1658.
[66]1916 Act, *supra* note 73, at § 2.
[67]Hartnett, *supra* note 12, at 1658 (*citing Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1, 6 (1920) (holding that "a mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error")).
[68]*Id.* at 1660.
[69]Stephen C. Halpern and Kenneth N. Vines, "Institutional Disunity: The Judges' Bill and the Role of the U.S. Supreme Court," 30 *W. Pol. Q.* 471, 473 (1977).
[70]*Id.*
[71]Pringle, *supra* note 73, at 102.
[72]William H. Rehnquist, "Lecture: Remarks of the Chief Justice: My Life in the Law Series," 52 *Duke L.J.* 787, 798 (Feb. 2003). Today, Cincinnati Law School is the University of Cincinnati College of Law.
[73]Pringle, *supra* note 73, at 47.
[74]*Id.* at 96.
[75]*Id.* at 108.
[76]*Id.* at 122. Congress had created the Sixth Circuit in the 1891 Act. *Id.* at 121.
[77]*Id.* at 125.
[78]Pringle, *supra* note 73, at 159–160. Later, this would commonly be referred to as the "Taft Philippine Commission." *Id.* at 195 n.42.
[79]*Id.* at 199.
[80]Rehnquist, *supra* note 82, at 798.
[81]*Id.*
[82]David H. Burton, **Taft, Holmes, and the 1920s Court: An Appraisal** 116 (1998).
[83]*Id.*
[84]*Id.*
[85]Hartnett, *supra* note 12, at 1661 n.74.
[86]William Howard Taft, "First Annual Message (1909)," *available at* http://www.presidency.ucsb.edu/sou.php (last visited Jan. 1, 2008).
[87]Burton, *supra* note 92, at 716.
[88]Pringle, *supra* note 73, at 840.
[89]*Id.* at 864.
[90]William Howard Taft, "The Attacks on the Courts and Legal Procedure," 5 *Ky. L. J.* 3, 18 (Nov. 1916).
[91]National Prohibition Act, ch. 85, 41 Stat. 305.
[92]Burton, *supra* note 92, at 117.
[93]*Id.*
[94]*Id.*
[95]*Id.*
[96]Hartnett, *supra* note 12, at 1663.
[97]Rehnquist, *supra* note 82, at 798.
[98]Hartnett, *supra* note 12, at 1662.
[99]*Id.* at 1663.
[100]William Howard Taft, "Adequate Machinery for Judicial Business," 7 A.B.A. J. 453, 453–454 (Sept. 1921).
[101]William Howard Taft, "Three Needed Steps of Progress," 8 *A.B.A. J.* 34 (Jan. 1922).
[102]*Id.* at 35.
[103]*Id.*
[104]*Id.*
[105]Hartnett, *supra* note 12, at 1666.
[106]Taft, *supra* note 111, at 36.
[107]*Id.*
[108]Hartnett, *supra* note 12, at 1663.
[109]*Id.* at 1664.
[110]*Id.* at 1664–65.
[111]*Id.* at 1665.
[112]*Id.*
[113]*Id.* at 1665.
[114]William Howard Taft, "Possible and Needed Reforms in the Administration of Justice in Federal Courts," 8 *A.B.A. J.* 601, 602 (Sept. 1922).
[115]*Id.*
[116]*Id.* at 603.
[117]*Id.*
[118]Hartnett, *supra* note 12, at 1667.
[119]*Id.*
[120]*Id.* at 1668.
[121]*Id.* at 1671.
[122]*Id.*
[123]Hartnett, *supra* note 12, at 1694–95.
[124]*Id.* at 1675.
[125]*Id.* at 1675.
[126]*Id.* at 1694.
[127]*Id.* at 1701.

[128]*Id.* at 1674.
[129]*Id.* at 1681.
[130]*Id.* at 1682.
[131]*Id.* at 1691.
[132]*Id.* at 1695.
[133]*Id.* at 1701.
[134]*Id.* at 1704.
[135]Frankfurter & Landis, *supra* note 66, at 859 n.91.
[136]1925 Act, *supra* note 9, at § 1.
[137]*Id.* All territorial courts and the United States Court of Claims were also included in the same certiorari and certification rubric as the circuits of the Court of Appeals. *Id.*
[138]*Id.* This is substantially the same language as remains today in 28 U.S.C. §1257.
[139]Taft, *supra* note 13, at 5.
[140]*Id.*
[141]1925 Act, *supra* note 9, at § 1.
[142]*Id.* at §§ 1, 3.
[143]Frankfurter and Landis, *supra* note 66, at 842.
[144]1925 Act, *supra* note 9, at § 1.
[145]Hartnett, *supra* note 12, at 1693.
[146]Frankfurter and Landis, *supra* note 66, at 866 n.119.
[147]Hartnett, *supra* note 12, at 1708.
[148]*Id.*
[149]*Id.*
[150]*Id.*
[151]*Id.* at 1709.
[152]*Id.* at 1710.
[153]*Id.*
[154]*Id.* at 1710–11.
[155]*Id.* at 1711.
[156]Pub. L. No. 100–352, 102 Stat. 662 [hereinafter 1988 Act].
[157]Starr, *supra* note 1, at 1369.
[158]*Id.* at 1369–70.
[159]Rosemary Krimbel, "Note: Rehearing *Sua Sponte* in the U.S. Supreme Court: A Procedure for Judicial Policy-making," 65 *Chi.-Kent. L. Rev.* 919, 927 n.50 (1989). *See* 28 U.S.C. § 1253, 2284.
[160]Starr, *supra* note 1, at 1370.
[161]Hartnett, *supra* note 12, at 1709–1710.
[162]Starr, *supra* note 1, at 1370.
[163]Margaret Meriwether Cordray & Richard Cordray, "The Supreme Court's Plenary Docket," 58 *Wash. & Lee L. Rev.* 737, 758 (2001).

Here Lies the Supreme Court: Revisited

GEORGE A. CHRISTENSEN

> Show me the manner in which a nation or community cares for its dead and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land, and their loyalty to high ideals.
>
> —William Ewart Gladstone

I have always been more than a bit miffed with most American biographies. They almost universally end, in my experience, with the death of their subject, and, for whatever reason, they almost never address the after-death events in the "life" being studied. I do not here mean any metaphysical considerations of an afterlife, but I have always felt that "after-death" experiences should be addressed as part of a person's true and complete biography. Questions of funeral tributes or the lack thereof, the disposition and location of remains, and the degree of attention and care provided to a gravesite are, I think, indicative of many factors, including the prestige or esteem in which the deceased was/is held by the family, the community and the nation.

I have a modest personal collection of reference and biographical material about the U.S. Supreme Court and its members, including what is, in my opinion, the "gold standard" reference work, **The Congressional Quarterly's Guide to the U.S. Supreme Court**.[1] This "Bible" in the area of Supreme Court studies is loaded with reference data and information about the Court, but makes no mention—at least not in the edition I have at hand—of final resting places for the deceased Justices. Intrigued, I considered this to be a major omission of significant biographical information. In 1981, therefore, I contacted both the Curator and the Marshal of the U.S. Supreme Court in an effort to obtain an accurate, complete, and up-to-date listing of the burial sites of Supreme Court Justices. I was informed by both officers at that time that such a source document of Supreme Court gravesite information did not exist.

Of course, I immediately decided that I would compile, write, and submit for publication just such a Supreme Court gravesite research tool. At the time, I had no idea that I had just found a lifetime's work of "digging" for and sharing such arcane information. And so began what some have considered to be my "obsession" with cemeteries and gravesites of American historical figures.

Over many years and many thousands of miles of travel to collect gravesite information, my primary focus has always been the U.S. Supreme Court. In my travels, however, I have also managed to visit the graves of all U.S. Presidents (except the relatively recent interments of Ronald Reagan and Gerald R. Ford), all U.S. Vice Presidents, and many industrialists, educators, explorers, military heroes, and plenty of notorious folk as well. In 1982, having compiled what seemed to me to be accurate and complete information on all of the Supreme Court gravesites (then ninety-one in number), I wrote and submitted to the Supreme Court Historical Society a proposed article, "Here Lies the Supreme Court: Gravesites of the Justices." My article was accepted and was published in the Society's *Yearbook (1983)*.[2]

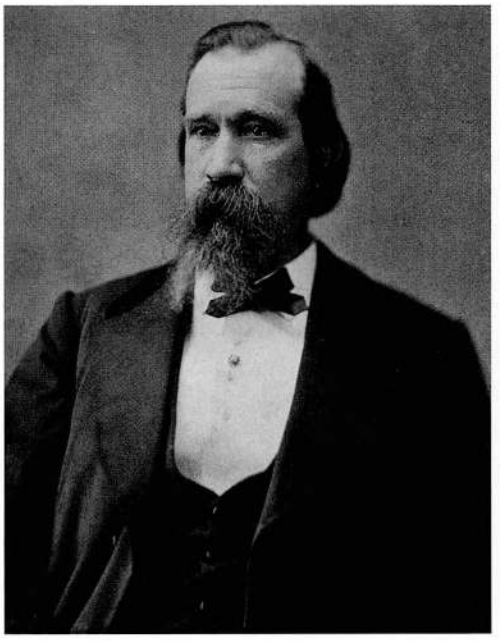
I was naively very pleased with the results of my efforts. I had tried to research, visit and personally verify all the information contained in the table entitled "Gravesites of the Justices" that was part of the 1983 article. However, I did not have the opportunity prior to publication to complete a 100% personal on-site verification visit for every gravesite listed. Post-publication, as I continued to visit and verify Supreme Court gravesites, I was eventually chagrined and forced to conclude that my published article had inadvertently promulgated a few errors of fact. I was further embarrassed to find that a few typographical errors had slipped into the final product.

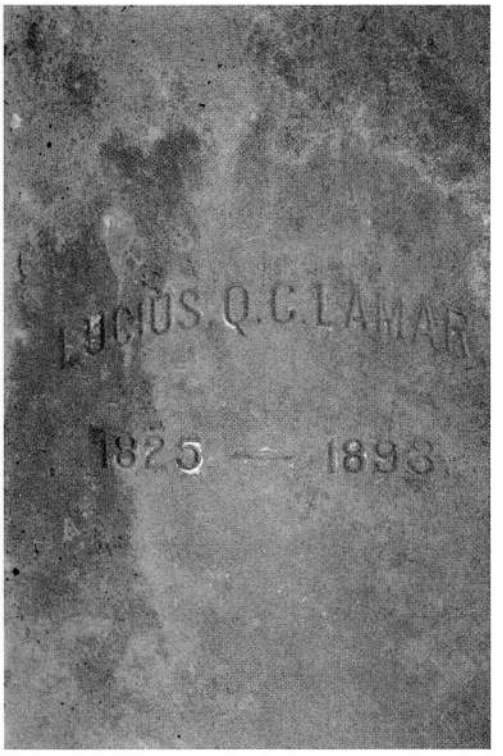
Almost from the very beginning of my research, I had become convinced, in the sense of the Gladstone quotation at the head of this article, that if the United States was to be considered a nation with "respect for the laws of the land"—a country with "loyalty to high ideals"—then my objective of 100% accuracy and completeness in a "Gravesites of the Justices" research paper was a highly positive goal and deserved to be pursued to the absolute best of my ability.

As of this writing in December 2007, I have personally visited 99 (out of now 100) Supreme Court gravesites. I have not yet been able to formulate a sufficiently compelling excuse to travel from my home in Delaware to Colorado for the sole purpose of paying my respects to Justice Byron R. White, but eventually I do intend to visit his interment site on the grounds of the Episcopal Cathedral in Denver. Actuarially, nine deaths have occurred since 1983 that must be added to the Table. And I believe that I now have identified all errors of fact contained in the list published in 1983. Therefore, it now seems to me that an update of the original article is more than a bit overdue.

Further, and even more compelling to me, new volumes concerning the U.S. Supreme Court have begun to appear in the intellectual marketplace. **The Oxford Companion to the Supreme Court of the United States**[3] has integrated burial information into each Justice's biographical sketch entry throughout the book, a development I applaud, though I do disagree in a few cases with the **Oxford Companion**'s data. The **Supreme Court Compendium**[4] reproduces death and burial information in its Table 5–10, with attribution, directly from my *Yearbook 1983* article—thereby also including therein all my originally published inadvertent errors and misstatements. I have also recently encountered David N. Atkinson's **Leaving the Bench: Supreme Court Justices at the End**.[5] Dr. Atkinson's excellent book offers a combination of fine scholarship and fascinating conversational style.[6] He also says some very kind words about me personally in his Appendix C.

The advent of these new publications makes me feel proud and humble—and personally responsible for continuing to do my best to ensure the historical record is kept accurate and





In 1893, Justice Lucius Quintus Cincinnatus Lamar was buried near his relatives in Riverside Cemetery in Macon, Georgia, the town where he had studied law with his uncle. The following year, however, Lamar was moved and reburied in Oxford, Mississippi (above), where he had taught at the university and launched a brilliant career in Mississippi politics.

up to date. To this end, I determined to rewrite and update my 1983 table on "Gravesites of the Justices." This new and up-to-date version is appended to this article.

Initially, while debating with myself whether an updated Table of "Gravesites" would actually be useful, I contacted the Supreme Court Historical Society to determine whether there was any interest in republishing that type of information. Society Executive Director David T. Pride told me, "When you first came into our office twenty-five years ago—has it really been that long?—I admit that I initially considered you, and your proposal, as being rather . . . weird. However, it quite surprised me that, over the years, we have had quite a few inquiries, twenty to thirty inquiries, about that article. You produced an archival piece. Not everyone is *dying* to read it"—David is a very punny man—"but I think there are a good many people out there, *aficionados*, 'denizens of the afterlife,' who would take a great interest [in an updated article]."[7] With that slightly tongue-in-cheek expression of friendly support and encouragement, I commenced the research stage of an updating research project in earnest.

The principal cause of "error" in the information I had gathered in 1983 turned out to be the fact—initially surprising to me—that it is fairly common for dead people to "move." For a little while I considered, as a working title for this paper, "Permanent Addresses (More or Less)." As one example, during a cross-country drive in 1986, I included a major detour in order to visit Macon, Georgia. Upon my arrival, I was utterly dismayed to discover that Justice Lucius Quintus Cincinnatus Lamar, who indeed had been buried in Macon in Riverside Cemetery in January 1893,

had, according to the cemetery's records, subsequently been moved to and reburied in Oxford, Mississippi in the fall of 1894. My level of frustration was greatly increased because, en route to and rushing toward Macon, I had passed within 200 miles of L.Q.C. Lamar's "new" Mississippi gravesite. The staff at Riverside Cemetery could not have been more helpful or encouraging, like almost everyone else I have ever encountered on my cemetery explorations. True scholars and history buffs are, I believe, universally welcomed and appreciated by the people who operate and maintain these sacred precincts.

Also transiently notable is Justice Henry Brockholst Livingston, who died and was buried in Manhattan in 1823 and was then moved to Brooklyn in 1844. Justice Gabriel Duvall, who died in 1844, was moved less than half a mile in 1987. Other members of the Supreme Court who were unable to stay planted in one place include Justices Thomas Todd, George Sutherland, and poor, frazzled James Wilson, who died and was buried in North Carolina in 1798 and then was moved to Philadelphia in 1906.

As my research neared completion, my weekend and vacation driving itinerary became increasingly erratic. A drive from Washington, D.C. to Dayton, Ohio unexpectedly acquired a 330+ mile "detour" in order to visit Harbor Beach, Michigan, where I needed to find the grave of Justice Frank Murphy. And then, when my "collection" was almost complete, it became absolutely necessary (in my mind) to take an eight-day, 4,745 mile solo drive in order to visit both Dallas, Texas (Justice Tom Clark) and St. Paul, Minnesota (Justice Pierce Butler), destinations that I would not otherwise have been likely to visit anytime soon.

Now, some may say that my behavior had gone beyond "reasonableness" at this point, but—in the Gladstone sense—I believed that it was essential that *someone* should do this. At least one citizen needed to visit all Supreme Court gravesites, ensuring that we did in fact know accurate locations, that we did know of the quality of care and upkeep in the surrounding grounds, and—wherever possible—that we should try to gauge the level of community awareness and appreciation of the Court's local "presence." If that one citizen turned out to be me, then I figured that I was on a personal crusade, and "reasonableness" was no longer very significant in my thinking.

Monumental presidential gravesites are fairly common—I am thinking here of Grant's Tomb in Manhattan, Garfield's "castle" in Cleveland, and the huge and self-important Harding Memorial in Marion, Ohio. Also common are relatively modest presidential tombs, such as those of Adams *pere* and *fils* in Quincy, Massachusetts, and the graves of Martin Van Buren in Kinderhook, New York, and Grover Cleveland in Princeton, New Jersey. For the most part, the gravesites of the Justices of the U.S. Supreme Court are much more modest than their presidential counterparts and even sometimes fairly hard to find. William Howard Taft is the exception who possibly proves my point. As both a President and, later, a Chief Justice of the United States, Taft has a grave in Arlington National Cemetery that is tastefully monumental. In comparison, Chief Justice—and Republican presidential nominee and U.S. Secretary of State—Charles Evans Hughes has a relatively small and modest grave in Woodlawn Cemetery in the Bronx. And, back in Arlington National Cemetery, Justice Hugo Black has only a standard government-issue headstone, identical in shape and size to most of the other tens of thousands of veterans' headstones.

As head of the Executive Branch of our Federal Government, our President does occupy a unique and very special place. However, with a tripartite form of government with constitutional checks and balances and with clear separation of powers, our example to the rest of the world should also clearly reflect a high level of devotion to the purpose and functions of the other two branches of our government

For the most part, the gravesites of the Justices of the U. S. Supreme Court are much more modest than their presidential counterparts and even sometimes fairly hard to find. As both President and later Chief Justice of the United States, William Howard Taft has a grave (pictured) in Arlington National Cemetery that is tastefully monumental.

as well. By design and intent, the personnel of the judicial branch are somewhat reclusive and loathe to call attention to themselves. This is appropriate and proper, but it can leave a void in the minds of the citizenry. "Chief Justice who?" is not the type of response that would reflect well on the body politic when talking about Roger B. Taney, Salmon P. Chase, Morrison R. Waite, or even Fred Vinson. Equally unsettling, some of our Presidents also seem to have fallen into some sort of national "Hall of Obscurity"—for example, Millard Fillmore, Franklin Pierce, or Chester Alan Arthur. This may pose problems for the educational system in our country, but my objective here is simpler and broader. Relatively unknown former members of the Supreme Court Bench deserve our continuing honor and respect—if for nothing else, then for maintaining through their service our hallowed belief that "no man is above the Law." And, in most cases, these departed Justices have left a legacy much broader and more pregnant with meaning than just that minimum standard.

In the late 1980s, I visited Louisa, Kentucky, for the first time and, though it took a bit of detective work, I was eventually successful in finding my way to Pine Hill Cemetery. Once there, Chief Justice Fred Vinson's headstone was very easy to find, but as soon as I got out of the car I clearly saw and was deeply shocked to find that Vinson's headstone had been outrageously vandalized, spray-painted with swastikas and racial epithets. I have very seldom in my life felt so much involuntary anger and shame.

William Howard Taft's gravesite at Arlington National Cemetery is more monumental than other Justices buried there—no doubt because he also served as President.

About six years later, with considerable trepidation, I again visited Pine Hill Cemetery. I was greatly relieved and tearfully proud to discover that some civic-minded Louisa person or persons, presumably with big scrub brushes and lots of soap, had cleaned the headstone so well that I could find no remaining traces of the former desecration. In the spirit of Gladstone, I want to suggest that in Louisa, Kentucky, the community's response clearly showed "the tender sympathies of its people, their respect for the laws of the land, and their loyalty to high ideals."

Although Pine Hill Cemetery was somewhat difficult for me to find at first, we do know with certainty exactly where Chief Justice Vinson's body lies. There is still at least a whiff of mystery, however, about the final locations of Justices Henry Baldwin and William Johnson.

I am not aware of any new evidence that would cause me to change my original conclusion regarding Justice Baldwin.[8] There is a paper trail supporting the claim that he is buried—or rather, was moved to and reburied—at Oak Hill Cemetery in the District

Hugo L. Black's standard government-issue headstone is identical in shape and size to most of the other tens of thousands of veterans' headstones in Arlington National Cemetery. Black does, however, have a bench honoring his memory, which links his grave to that of his first wife, Josephine.

of Columbia, notwithstanding unsubstantiated claims that he is buried next to his wife in Meadville, Pennsylvania.

I have, however, reversed my opinion in the case of Justice Johnson.[9] We know that Johnson died in Brooklyn in August 1834, that his body was placed "in temporary storage" in a vault at St. Ann's Church in Brooklyn, and that later transport home to South Carolina was planned to take place "in the winter." We

Taps were played as the casket of Oliver Wendell Holmes was lowered into the ground at Arlington National Cemetery in 1935. Justice George Sutherland stands behind the honor guard holding the flag.

Justice William Johnson's body was removed from St. Ann's Church in Brooklyn and reburied in Charleston, South Carolina, at the graveyard of St. Philip's Church (pictured).

also know that St. Philip's (West) Cemetery in Charleston, South Carolina does contain a large and prominently situated monument, with Justice Johnson's name and dates clearly inscribed thereon, and that several other Johnson family members are known to be buried in that plot. What I do not have currently is an unbroken paper trail that gets Johnson's body from New York to South Carolina. St. Philip's Church volunteer and cemetery authority Kay Bartlett spent a few hours recently on my behalf in the cemetery and in record books in the office, looking for any scrap of information that would nail down the answer to this question dispositively. She was unsuccessful. But all the evidence she has seen, locally and from State Historical Society sources, leads her to declare that "Everything we have here [in Charleston] indicates that *he* is here."[10] My instinct tells me that Kay Bartlett is probably correct. There is nothing on the Johnson monument in St. Philip's or in the church records to indicate that he is *not* there (for example, "In Memoriam"—code for "the body is elsewhere"—or "Lost at Sea," and so on). There seems little more we can learn from currently known resources to prove whether Justice Johnson ever got home. However, law school students and faculty, academic and amateur historians, and other interested folk in both Charleston and in Brooklyn are hereby challenged to take up this "mystery" of "Whatever Happened to Judge William Johnson?" and to search for the missing piece(s) of documentary evidence that prove or disprove the ultimate return of his body to St. Philip's.

We do know what happened to the body of Justice Abe Fortas, but that will not help us to find his gravesite except in the broadest, most

general sense. Fortas, who died in 1982, was cremated as directed by his widow, Carolyn Agger (who died in 1996). According to Tina Hodge, Administrator of Cedar Hill Cemetery in Suitland, Maryland (which did have an operational crematory in 1982), the Justice's ashes were consigned to Cedar Hill Cemetery.[11] What this means, Hodge explained, is that "[t]he widow assigned the ashes to us in 'permanent custody.' We have them. They (the ashes) will eventually be interred in an unmarked, common grave when a sufficient number is obtained." Since the Cedar Hill Cemetery crematory is no longer operational, this suggests to me that it may be a very long time before the remains of Justice Fortas are finally laid to rest below ground, even if only in an unmarked, common grave.

Perhaps the strongest single lesson learned in my experience "collecting" gravesites is that there will probably never be an end to this project. There are the additions that will always be necessary, of course, given our common mortality. But, as I have tried to make clear above, things change. Sometimes individuals are relocated; sometimes entire cemeteries are moved. Cities expand, and former suburbs and even exurbs become incorporated, meaning, at a minimum, that street addresses and zip codes may change over time. And, most deliciously, new information sometimes comes to light that challenges previous orthodoxy.

Only a few months ago, Dr. Atkinson kindly called my attention to John M. Ferren's new biography of Justice Wiley B. Rutledge.[12] There, on page 508, to my utter surprise, I found the following information contained in footnote 4 to chapter 26: "The remains of Justice Rutledge are held at Cedar Hill Cemetery, Suitland, Maryland, near Washington, D.C., pending a family decision on his final resting place. Annabel Rutledge placed a headstone in his memory at Mountain View Cemetery in Boulder, Colorado." Of course, I had previously gone to Boulder—a several-hundred-mile "detour"—and paid my respects at what I now discovered was an empty grave. Another quick telephone call to Tina Hodge in Suitland, Maryland, confirmed that the ashes of both Justice Rutledge and his wife Annabel are still being held at Cedar Hill Cemetery, still awaiting disposition instructions from the family.[13]

The **Oxford Companion to the Supreme Court of the United States** disagrees with me concerning burial locations for, *inter alia*, Justices Henry Baldwin, Philip P. Barbour, Henry B. Livingston, John McKinley, and Potter Stewart.[14] For example, the **Oxford Companion** states that Justice Barbour is buried at the family estate, "Frascati," in Orange County, Virginia. At my request, Mary Wright in the office of the Congressional Cemetery in Washington, D.C. recently spent time in the available cemetery record books and confirmed that Justice Barbour was buried at Congressional Cemetery in 1841. Also, having checked the official "Transfer Book," she reported to me that there was no indication that he had ever been removed and taken back to Virginia, or elsewhere.[15] So I respectfully disagree with **The Oxford Companion** in those cases. But I did feel that it was necessary to double-check. And I would drive down to "Frascati," if I could, to double-check the record from that end. As seekers and finders of facts, we can take very little for granted. Researchers and scholars will not always completely agree with each other, thank heavens. And that is just one more reason why a research project like this one will never be absolutely and completely 100% "finished."

This slightly "weird" hobby of mine, collecting Supreme Court gravesites, did lead to my own personal "fifteen minutes" of celebrity status—well, more like two minutes and fifteen seconds. In May 1998, I was interviewed on the grounds of the U.S. Supreme Court by Stephanie Lambidakis of CBS News. Snippets of our interview were broadcast on the CBS Evening News on Memorial Day, while I was identified to the audience as a "Historian" (CBS's label, not mine!) with supposed

particular expertise on deceased Supreme Court members. Well, that part was maybe sort of true. And friends and family called me from New York and California to say "I saw you on TV!" (It must have been a very "slow" weekend for hard news.)

The time has come to invite my readers to take up this project where I now lay it down. Keep me honest, please, and keep the general public informed if and as things change. And things *will* change.

When new information is discovered or becomes available, I believe that the Supreme Court Historical Society would be an appropriate central resource to be notified and that, in another twenty-four years, or so, perhaps some younger-than-I and equally eager researcher will consider personally revisiting, reverifying, and republishing an updated table of "Gravesites of the Members of the U.S. Supreme Court." I salute this younger version of myself as he or she goes out into the countryside in the year 2031, or thereabouts, and eventually reports back on the state of our country's "tender sympathies," "respect for the laws of the land," and "loyalty to high ideals."

I have come to believe that history is a living discipline, not immutable and "carved in stone." Our knowledge and our understanding of personalities and events change with the passage of time. What must remain unchanging, however, in terms of U.S. Supreme Court studies is our continuing devotion to the basic principles of our common democratic experience, and our qualified respect for all those who have gone before and who tried, according to the lights of their consciences and their times, to do "Justice" and for the basic constitutional precepts of limited government, wherein the judicial branch has, at times, a critical and decisive role.

As the Marshal of the Court says as the Justices take their seats at the beginning of each public session, "All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable Court."[19]

TABLE 1 Gravesites of the Members of the U.S. Supreme Court (Data as of 1 December 2007)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Henry BALDWIN / #22 Pennsylvania / Andrew Jackson (1830–1844)	14 January 1780, New Haven, Connecticut 21 April 1844, Philadelphia, Pennsylvania	Oak Hill Cemetery 30th and R Streets, N.W. Washington, D.C. 20007
Philip Pendleton BARBOUR / #25 Virginia / Andrew Jackson (1836–1841)	25 May 1783, Orange County, Virginia 25 February 1841, Washington, D.C.	Congressional Cemetery 1801 E Street, S.E. Washington, D.C. 20003
Hugo Lafayette BLACK / #76 Alabama / Franklin D. Roosevelt (1937–1971)	27 February 1886, Harlan, Alabama 25 September 1971, Bethesda, Maryland	Arlington National Cemetery Grave # 30–649 Arlington, Virginia 22201
Harry Andrew BLACKMUN / #98 Minnesota / Richard M. Nixon (1970–1994)	12 November 1908, Nashville, Illinois 4 March 1999, Arlington, Virginia	Arlington National Cemetery Grave # 5–40-4 Arlington, Virginia 22201
John BLAIR (Jr.) / #5 Virginia / George Washington (1789–1795)	? 1732, Williamsburg, Virginia 31 August 1800, Williamsburg, Virginia	Bruton Parish churchyard (Colonial Williamsburg Park) P.O. Box 3520 Williamsburg, Virginia 23187
Samuel BLATCHFORD / #48 New York / Chester A. Arthur (1882–1893)	9 March 1820, New York, New York 7 July 1893, Newport, Rhode Island	Green-Wood Cemetery 500 25th Street (at Fifth Avenue) Brooklyn, New York 11232
Joseph P. (Philo) BRADLEY / #41 New Jersey / U.S. Grant (1870–1892)	14 March 1813, Berne, New York 22 January 1892, Washington, D.C.	Mount Pleasant Cemetery 375 Broadway (Belleville Ave.) Newark, New Jersey 07104

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Louis Dembitz BRANDEIS / #67 Massachusetts / Woodrow Wilson (1916–1939)	13 November 1856, Louisville, Kentucky 5 October 1941, Washington, D.C.	Univ. Louisville Law School portico 3rd Street at Eastern Parkway Louisville, Kentucky 40292
William Joseph BRENNAN, Jr. / #90 New Jersey / Dwight D. Eisenhower (1956–1990)	25 April 1906, Newark, New Jersey 24 July 1997, Washington, D.C.	Arlington National Cemetery Grave # 5–40-1 Arlington, Virginia 22201
David Josiah BREWER / #51 Kansas / Benjamin Harrison (1891–1910)	20 January 1837, Smyrna, Asia Minor (now Izmir, Turkey) 28 March 1910, Washington, D.C.	Mount Muncie Cemetery 1500 N. 8th Street Lansing, Kansas 66043
Henry Billings BROWN / #52 Michigan / Benjamin Harrison (1891–1906)	2 March 1836, South Lee, Massachusetts 4 September 1913, Bronxville, New York	Elmwood Cemetery 1200 Elmwood Avenue Detroit, Michigan 48207
Warren Earl BURGER / #97 Virginia / Richard M. Nixon (1969–1986)	17 September 1907, St. Paul, Minnesota 25 June 1995, Washington, D.C.	Arlington National Cemetery Grave # 5-7015–2 Arlington, Virginia 22201
Harold Hitz BURTON / #84 Ohio / Harry S. Truman (1945–1958)	22 June 1888, Jamaica Plain, Massachusetts 28 October 1964, Washington, D.C.	Highland Park Cemetery 21400 Chagrin Boulevard Cleveland, Ohio 44122
Pierce BUTLER / #71 Minnesota / Warren G. Harding (1923–1939)	17 March 1866, Pine Bend, Minnesota 16 November 1939, Washington, D.C.	Calvary Cemetery (Catholic) 753 Front Avenue St. Paul, Minnesota 55103

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
James Francis BYRNES / #81 South Carolina / Franklin Roosevelt (1941–1942)	2 May 1879, Charleston, South Carolina 9 April 1972, Columbia, South Carolina	Trinity Cathedral churchyard 1100 Sumter Street (at Gervais St.) Columbia, South Carolina 29201
John Archibald CAMPBELL / #33 Alabama / Franklin Pierce (1853–1861)	24 June 1811, Washington, Georgia 12 March 1889, Baltimore, Maryland	Green Mount Cemetery 1501 Greenmount Avenue Baltimore, Maryland 21202
Benjamin Nathan CARDOZO / #75 New York / Herbert Hoover (1932–1938)	24 May 1870, New York, New York 9 July 1938, Port Chester, New York	Cypress Hills Cemetery (Shearith Israel Congregation) Jamaica Avenue at Crescent Brooklyn, New York 11208
John CATRON / #26 Tennessee / Jackson & Van Buren (1837–1865)	ca, 1786, Pennsylvania (poss. Virginia) 30 May 1865, Nashville, Tennessee	Mount Olivet Cemetery 1101 Lebanon Road Nashville, Tennessee 37210
Salmon Portland CHASE / #39 Ohio / Abraham Lincoln (1864–1873)	13 January 1808, Cornish, New Hampshire 7 May 1873, New York, New York	Spring Grove Cemetery 4521 Spring Grove Avenue Cincinnati, Ohio 45232
Samuel CHASE / #9 Maryland / George Washington (1796–1811)	17 April 1741, Somerset County, Maryland 19 June 1811, Baltimore, Maryland	Old St. Paul's Cemetery 700 West Lombard Street (entrance on West Redwood St.) Baltimore, Maryland 21201
Tom Campbell CLARK / #86 Texas / Harry S. Truman (1949–1967)	23 September 1899, Dallas, Texas 13 June 1977, New York, New York	Restland Memorial Park 9220 Restland Road Dallas, Texas 75243

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
John Hessin CLARKE / #68 Ohio / Woodrow Wilson (1916–1922)	18 September 1857, Lisbon, Ohio 22 March 1945, San Diego, California	Lisbon Cemetery 1 Elm Street (off Lee Avenue at N. Jefferson) Lisbon, Ohio 44432
Nathan CLIFFORD / #34 Maine / James Buchanan (1858–1881)	18 August 1803, Rumney, New Hampshire 25 July 1881, Cornish, Maine	Evergreen Cemetery 672 Stevens Avenue Portland, Maine 04103
Benjamin Robbins CURTIS / #32 Massachusetts / Millard Fillmore (1851–1857)	4 November 1809, Watertown, Massachusetts 15 September 1874, Newport, Rhode Island	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts 02138
William CUSHING / #3 Massachusetts / George Washington (1789–1810)	1 March 1732, Scituate, Massachusetts 13 September 1810, Scituate, Massachusetts	Cushing Memorial State Park Neal Gate Street (Greenbush) Scituate, Massachusetts 02006
Peter Vivian DANIEL / #28 Virginia / Martin Van Buren (1842–1860)	24 April 1784, Stafford County, Virginia 31 May 1860, Richmond, Virginia	Hollywood Cemetery 412 South Cherry Street Richmond, Virginia 23220
David DAVIS / #37 Illinois / Abraham Lincoln (1862–1877)	9 March 1815, Sassafras Neck, Cecil County, Maryland 26 June 1886, Bloomington, Illinois	Evergreen Memorial Cemetery 302 East Miller Street Bloomington, Illinois 61701

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
William Rufus DAY / #59 Ohio / Theodore Roosevelt (1903–1922)	17 April 1849, Ravenna, Ohio 9 July 1923, Mackinac Island, Michigan	West Lawn Cemetery 1919 7th Street, N.W. Canton, Ohio 44708
William Orville DOUGLAS / #79 Connecticut / Franklin D. Roosevelt (1939–1975)	16 October 1898, Maine, Minnesota 19 January 1980, Washington, D.C.	Arlington National Cemetery Grave # 5-7004-B Arlington, Virginia 22201
Gabriel DUVALL / #17 Maryland / James Madison (1811–1835)	6 December 1752, Prince George's Co., Maryland 6 March 1844, Prince George's Co., Maryland	Marietta House Museum 5626 Bell Station Road Glenn Dale, Maryland 20769
Oliver ELLSWORTH / #10 Connecticut / George Washington (1795–1800)	29 April 1745, Windsor, Connecticut 26 November 1807, Windsor, Connecticut	Palisado Cemetery ("Old Cemetery") 96 Palisado Avenue (Rte. 159) Windsor, Connecticut 06095
Stephen Johnson FIELD / #38 California / Abraham Lincoln (1863–1897)	4 November 1816, Haddam, Connecticut 9 April 1899, Washington, D.C.	Rock Creek Cemetery Rock Creek Church Road & Webster Street, N.W. Washington, D.C. 20011
Abe FORTAS / #95 Tennessee / Lyndon B. Johnson (1965–1969)	19 June 1910, Memphis, Tennessee 5 April 1982, Washington, D.C.	Cedar Hill Cemetery (ashes to be interred in unmarked common grave) 4111 Pennsylvania Avenue Suitland, Maryland 20746

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Felix FRANKFURTER / #78 Massachusetts / Franklin D. Roosevelt (1939–1962)	15 November 1881, Vienna, Austria 22 February 1965, Washington, D.C.	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts 02138
Melville Weston FULLER / #50 Illinois / Grover Cleveland (1888–1910)	11 February 1833, Augusta, Maine 4 July 1910, Sorrento, Maine	Graceland Cemetery 4001 North Clark Street Chicago, Illinois 60613
Arthur Joseph GOLDBERG / #94 Illinois / John F. Kennedy (1962–1965)	8 August 1908, Chicago, Illinois 19 January 1990, Washington, D.C.	Arlington National Cemetery Grave # 21-S-35 Arlington, Virginia 22201
Horace GRAY / # 47 Massachusetts / Chester A. Arthur (1882–1902)	24 March 1828, Boston, Massachusetts 15 September 1902, Nahant, Massachusetts	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts 02138
Robert Cooper GRIER / #31 Pennsylvania / James K. Polk (1846–1870)	5 March 1794, Cumberland County, Pennsylvania 25 September 1870, Philadelphia, Pennsylvania	West Laurel Hill Cemetery 215 Belmont Avenue Bala-Cynwyd, Pennsylvania 19004
John Marshall HARLAN / #44 Kentucky / Rutherford B. Hayes (1877–1911)	1 June 1833, Boyle County, Kentucky 14 October 1911, Washington, D.C.	Rock Creek Cemetery Rock Creek Church Road & Webster Street, N.W. Washington, D.C. 20011
John Marshall HARLAN (II) / #89 New York / Dwight D. Eisenhower (1955–1971)	20 May 1899, Chicago, Illinois 29 December 1971, Washington, D.C.	Emmanuel Church churchyard 285 Lyons Plain Road Weston, Connecticut 06883

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Oliver Wendell HOLMES, Jr. / #58 Massachusetts / Theodore Roosevelt (1901–1932)	8 March 1841, Boston, Massachusetts 6 March 1935, Washington, D.C.	Arlington National Cemetery Grave # 5–7004-A Arlington, Virginia 22201
Charles Evans HUGHES / #62 New York / W. H. Taft (as Associate Justice) New York / Herbert Hoover (Chief Justice) (1910–1916) as Associate Justice (1930–1941) as Chief Justice	11 April 1862, Glens Falls, New York 27 August 1948, Osterville, Massachusetts	The Woodlawn Cemetery 4199 Webster Avenue (at East 233rd Street) Bronx, New York 10467
Ward HUNT / #42 New York / U.S. Grant (1873–1882)	14 June 1810, Utica, New York 24 March 1886, Washington, D.C.	Forest Hill Cemetery 2201 Oneida Street Utica, New York 13501
James IREDELL / #6 North Carolina / George Washington (1790–1799)	5 October 1751, Lewes, England 20 October 1799, Edenton, North Carolina	Hayes Plantation (private cemetery) (access via small creek bridge on Water Street east of town center) Edenton, North Carolina 27932
Howell Edmunds JACKSON / #54 Tennessee / Benjamin Harrison (1893–1895)	8 April 1832, Paris, Tennessee 8 August 1895, "West Meade", Davidson County, (now part of southwest Nashville), Tennessee	Mount Olivet Cemetery 1101 Lebanon Road Nashville, Tennessee 37210
Robert Houghwout JACKSON / #82 New York / Franklin D. Roosevelt (1941–1954)	13 February 1892, Spring Creek, Pennsylvania 9 October 1954, Washington, D.C.	Maple Grove Cemetery Frew Run Street ($\frac{1}{2}$ mile southeast of Frewsburg town center) Frewsburg, New York 14738

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
John JAY / #1 New York / George Washington (1789–1795)	12 December 1745, New York, New York 17 May 1829, Bedford, New York	John Jay Cemetery Boston Post Road (Rte. 1) Rye, New York 10580
Thomas JOHNSON / #7 Maryland / George Washington (1792–1793)	4 November 1732, Calvert County, Maryland 26 October 1819, Frederick, Maryland	Mount Olivet Cemetery 515 South Market Street Frederick, Maryland 21705
William JOHNSON / #14 South Carolina / Thomas Jefferson (1804–1834)	27 December 1771, St. James Goose Creek Parish, (near Charleston), South Carolina 4 August 1834, Brooklyn, New York	St. Philip's (West) Cemetery 142 Church Street Charleston, South Carolina 29401
Joseph Rucker LAMAR / #64 Georgia / William Howard Taft (1911–1916)	14 October 1857, Ruckersville, Georgia 2 January 1916, Washington, D.C.	Summerville Cemetery John's Road at Cumming Street Augusta, Georgia 30903
Lucius Quintus Cincinnatus LAMAR (II) / Mississippi / Grover Cleveland # 49 (1888–1893)	17 September 1825, Eatonton, Georgia 23 January 1893, Vineville (near Macon), Georgia	St. Peter's Cemetery Jefferson Avenue at 16th Street Oxford, Mississippi 38655
Henry Brockholst LIVINGSTON / #15 New York / Thomas Jefferson (1807–1823)	25 November 1757, New York, New York 18 March 1823, Washington, D.C.	Green-Wood Cemetery 500 25th Street (at Fifth Avenue) Brooklyn, New York 11232
Horace Harmon LURTON / #61 Tennessee / William Howard Taft (1910–1914)	26 February 1844, Newport, Kentucky 12 July 1914, Atlantic City, New Jersey	Greenwood Cemetery 976 Greenwood Avenue Clarksville, Tennessee 37040
John MARSHALL / #13 Virginia / John Adams (1801–1835)	24 September 1755, Germantown (now Midland), Virginia 6 July 1835, Philadelphia, Pennsylvania	Shockoe Hill Cemetery 2nd & Hospital Street Richmond, Virginia 23219

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Thurgood MARSHALL / #96 New York / Lyndon B. Johnson (1967–1991)	2 July 1908, Baltimore, Maryland 24 January 1993, Bethesda, Maryland	Arlington National Cemetery Grave # 5–40-3 Arlington, Virginia 22201
(Thomas) Stanley MATTHEWS / #46 Ohio / James A. Garfield (1881–1889)	21 July 1824, Cincinnati, Ohio 22 March 1889, Washington, D.C.	Spring Grove Cemetery 4521 Spring Grove Avenue Cincinnati, Ohio 45232
Joseph McKENNA / #57 California / William McKinley (1898–1925)	10 August 1843, Philadelphia, Pennsylvania 21 November 1926, Washington, D.C.	Mount Olivet Cemetery 1300 Bladensburg Road, N.E. Washington, D.C. 20002
John McKINLEY / #27 Alabama / Martin Van Buren (1838–1852)	1 May 1780, Culpeper County, Virginia 19 July 1852, Louisville, Kentucky	Cave Hill Cemetery 701 Baxter Avenue Louisville, Kentucky 40204
John McLEAN / #21 Ohio / Andrew Jackson (1830–1861)	11 March 1785, Morris County, New Jersey 4 April 1861, Cincinnati, Ohio	Spring Grove Cemetery 4521 Spring Grove Avenue Cincinnati, Ohio 45232
James Clark McREYNOLDS / #66 Tennessee / Woodrow Wilson (1914–1941)	3 February 1862, Elkton, Kentucky 24 August 1946, Washington, D.C.	Glenwood Cemetery U.S. 81 at Pond River Road (1.5 mi. north of town center) Elkton, Kentucky 42220
Samuel Freeman MILLER / #36 Iowa / Abraham Lincoln (1862–1890)	5 April 1816, Richmond, Kentucky 13 October 1890, Washington, D.C.	Oakland Cemetery 1802 Carroll Street Keokuk, Iowa 52632
Sherman MINTON / #87 Indiana / Harry S. Truman (1949–1956)	20 October 1890, Georgetown, Indiana 9 April 1965, New Albany, Indiana	Holy Trinity Catholic Cemetery 2507 Green Valley Road New Albany, Indiana 47150
William Henry MOODY / #60 Massachusetts / Theodore Roosevelt (1906–1910)	23 December 1853, Newbury, Massachusetts 2 July 1917, Haverhill, Massachusetts	Byfield Parish churchyard 132 Jackman Street Georgetown, Massachusetts 01833

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Alfred MOORE / #12 North Carolina / John Adams (1800–1804)	21 May 1755, New Hanover Co., North Carolina 15 October 1810, Bladen County, North Carolina	St. Philip's churchyard Brunswick Town State Historic Site 8884 St. Philip's Road (off Rte 133) Winnabow, North Carolina 28479
Francis William (Frank) MURPHY / #80 Michigan / Franklin D. Roosevelt (1940–1949)	13 April 1890, Harbor Beach, Michigan 19 July 1949, Detroit, Michigan	Our Lady of Lake Huron Cemetery (Rock Falls Cemetery) South Lakeview Road (Rte 25) Harbor Beach, Michigan 48411
Samuel NELSON / #29 New York / John Tyler (1845–1872)	10 November 1792, Hebron, New York 13 December 1873, Cooperstown, New York	Lakewood Cemetery East Lake Road Cooperstown, New York 13326
William PATERSON / #8 New Jersey / George Washington (1793–1806)	24 December 1745, County Antrim, Ireland 9 September 1806, Albany, New York	Albany Rural Cemetery 48 Cemetery Avenue Menands, New York 12204
Rufus Wheeler PECKHAM / #56 New York / Grover Cleveland (1895–1909)	8 November 1838, Albany, New York 24 October 1909, Altamount, New York	Albany Rural Cemetery 48 Cemetery Avenue Menands, New York 12204
Mahlon PITNEY / #65 New Jersey / William Howard Taft (1912–1922)	5 February 1858, Morristown, New Jersey 9 December 1924, Washington, D.C.	Evergreen Cemetery 65 Martin Luther King Avenue Morristown, New Jersey 07960
Lewis Franklin POWELL, Jr. / #99 Virginia / Richard M. Nixon (1972–1987)	19 September 1907, Suffolk, Virginia 25 August 1998, Richmond, Virginia	Hollywood Cemetery 412 South Cherry Street Richmond, Virginia 23220

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Stanley Forman REED / #77 Kentucky / Franklin D. Roosevelt (1938–1957)	31 December 1884, Minerva, Kentucky 2 April 1980, Huntington, New York	Maysville Cemetery Mason-Lewis Rd at Dietrich's Lane Maysville, Kentucky 41056
William Hubbs REHNQUIST / #100 Arizona / Richard M. Nixon (as Associate) Virginia / Ronald Reagan (as Chief Justice) (1972–1986) as Associate Justice (1986–2005) as Chief Justice	1 October 1924, Milwaukee, Wisconsin 3 September 2005, Arlington, Virginia	Arlington National Cemetery Grave # 5–7049-LH Arlington, Virginia 22201
Owen Josephus ROBERTS / #74 Pennsylvania / Herbert Hoover (1930–1945)	2 May 1875, Germantown, Pennsylvania 17 May 1955, West Vincent Township, Chester County, Pennsylvania	St. Andrew's churchyard (1/8 mi. west of Ludwigs Corner, intersection of Rts 401 & 100) West Vincent Township (Glenmoore), Pennsylvania
John RUTLEDGE / #2 South Carolina / George Washington (1789–1791) as Associate Justice (1795) as Chief Justice	? September 1739, Charleston, South Carolina 21 June 1800, Charleston, South Carolina	St. Michael's churchyard 71 Broad Street Charleston, South Carolina 29401
Wiley Blount RUTLEDGE / #83 Iowa / Franklin D. Roosevelt (1943–1949)	20 July 1894, Tar Springs, (Cloverport), Kentucky 10 September 1949, York, Maine	Cedar Hill Cemetery 4111 Pennsylvania Avenue Suitland, Maryland 20746
Edward Terry SANFORD / #72 Tennessee / Warren G. Harding (1923–1930)	23 July 1865, Knoxville, Tennessee 8 March 1930, Washington, D.C.	Greenwood Cemetery 3500 Tazewell Pike Knoxville, Tennessee 37918
George SHIRAS, Jr. / #53 Pennsylvania / Benjamin Harrison (1892–1903)	26 January 1832, Pittsburgh, Pennsylvania 2 August 1924, Pittsburgh, Pennsylvania	Allegheny Cemetery 4734 Butler Street Pittsburgh, Pennsylvania 15201

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Potter STEWART / #92 Ohio / Dwight D. Eisenhower (1958–1981)	23 January 1915, Jackson, Michigan 7 December 1985, Hanover, New Hampshire	Arlington National Cemetery Grave # 5–40-2 Arlington, Virginia 22201
Harlan Fiske STONE / #73 New York / Calvin Coolidge (as Associate) New York / Franklin Roosevelt (as Chief) (1925–1941) as Associate Justice (1941–1946) as Chief Justice	11 October 1872, Chesterfield, New Hampshire 22 April 1946, Washington, D.C.	Rock Creek Cemetery Rock Creek Church Road & Wesbster Street, N.W. Washington, D.C. 20011
Joseph STORY / #18 Massachusetts / James Madison (1812–1845)	18 September 1779, Marblehead, Massachusetts 10 September 1845, Cambridge, Massachusetts	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts 02138
William STRONG / #40 Pennsylvania / U.S. Grant (1870–1880)	6 May 1808, Somers, Connecticut 19 August 1895, Lake Minnewaska, New York	Charles Evans Cemetery 1119 Centre Avenue Reading, Pennsylvania 19601
George SUTHERLAND / #70 Utah / Warren G. Harding (1922–1938)	25 March 1862, Buckinghamshire (Stony Stratford), England 18 July 1942, Stockbridge, Massachusetts	Cedar Hill Cemetery 4111 Pennsylvania Avenue Suitland, Maryland 20746
Noah Haynes SWAYNE / #35 Ohio / Abraham Lincoln (1862–1881)	7 December 1804, Frederick County, Virginia 8 June 1884, New York, New York	Oak Hill Cemetery 30th and "R" Streets, N.W. Washington, D.C. 20007
William Howard TAFT / #69 Connecticut / Warren G. Harding (1921–1930)	15 September 1857, Cincinnati, Ohio 8 March 1930, Washington, D.C.	Arlington National Cemetery Grave # 30-S-14 Arlington, Virginia 22201
Roger Brooke TANEY / #24 Maryland / Andrew Jackson (1836–1864)	17 March 1777, Calvert County, Maryland 12 October 1864, Washington, D.C.	St. John the Evangelist Cemetery 200 Block, East Third Street Frederick, Maryland 21701

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
Smith THOMPSON / #19 New York / James Monroe (1923–1843)	?17 January 1768, Amenia, New York 18 December 1843, Poughkeepsie, New York	Poughkeepsie Rural Cemetery 342 South Avenue Poughkeepsie, New York 12601
Thomas TODD / #16 Kentucky / Thomas Jefferson (1807–1826)	23 January 1765, King and Queen Co., Virginia 7 February 1826, Frankfort, Kentucky	Frankfort Cemetery 215 East Main Street Frankfort, Kentucky 40601
Robert TRIMBLE / #20 Kentucky / John Quincy Adams (1826–1828)	17 November 1776, Berkeley County, Virginia (now West Virginia) 25 August 1828, Paris, Kentucky	Paris Cemetery 1603 Main Street Paris, Kentucky 40361
Willis VAN DEVANTER / #63 Wyoming / William Howard Taft (1910–1937)	17 April 1859, Marion, Indiana 8 February 1941, Washington, D.C.	Rock Creek Cemetery Rock Creek Church Road & Webster Street, N.W. Washington, D.C. 20011
Frederick Moore VINSON / #85 Kentucky / Harry S. Truman (1946–1953)	22 January 1890, Louisa, Kentucky 8 September 1953, Washington, D.C.	Pine Hill Cemetery (Off U.S. 23, top of hill, behind and north of Louisa Plaza) Louisa, Kentucky 41230
Morrison Remick WAITE / #43 Ohio / U.S. Grant (1874–1888)	29 November 1816, Lyme, Connecticut 23 March 1888, Washington, D.C.	Woodlawn Cemetery 1502 West Central Avenue Toledo, Ohio 43606
Earl WARREN / #88 California / Dwight D. Eisenhower (1953–1969)	19 March 1891, Los Angeles, California 9 July 1974, Washington, D.C.	Arlington National Cemetery Grave # 21-S-32 Arlington, Virginia 22201
Bushrod WASHINGTON / #11 Virginia / John Adams (1798–1829)	5 June 1762, Westmoreland County, Virginia 26 November 1829, Philadelphia, Pennsylvania	Mount Vernon Estate family vault 3200 George Washington Parkway Mount Vernon, Virginia 22121

TABLE 1 (Continued)

Name / Sequence # *From / Appointed by* *Supreme Court Service*	*Date and Place of Birth* *Date and Place of Death*	*Interment Location*
James Moore WAYNE / #23 Georgia / Andrew Jackson (1835–1867)	ca. 1790, Savannah, Georgia 5 July 1867, Washington, D.C.	Laurel Grove (North) Cemetery 802 West Anderson Street Savannah, Georgia 31415
Byron Raymond WHITE / #93 Colorado / John F. Kennedy (1962–1993)	8 June 1917, Fort Collins, Colorado 15 April 2002, Denver, Colorado	St. John's Cathedral 1350 Washington Street (ashes interred by All Souls Walk) Denver, Colorado 80203
Edward Douglass WHITE / #55 Louisiana / Grover Cleveland (as Associate) Louisiana/ Wm. H. Taft (as Chief Justice) (1894–1910) as Associate Justice (1910–1921) as Chief Justice	3 November 1845, Lafourche Parish, Louisiana 19 May 1921, Washington, D.C.	Oak Hill Cemetery 30th and R Streets, N.W. Washington, D.C. 20007
Charles Evans WHITTAKER / #91 Missouri / Dwight D. Eisenhower (1957–1962)	22 February 1901, Troy, Kansas 26 November 1973, Kansas City, Missouri	Calvary Cemetery 6901 Troost Street Kansas City, Missouri 64131
James WILSON / #4 Pennsylvania / George Washington (1789–1798)	14 September1742, Carskerdo, Fifeshire, Scotland 21 August 1798, Edenton, North Carolina	Christ Church 2nd Street, above Market Philadelphia, Pennsylvania 19106
Levi WOODBURY / #30 New Hampshire / James K. Polk (1845–1851)	22 December 1789, Francestown, New Hampshire 4 September 1851, Portsmouth, New Hampshire	Harmony Grove Cemetery South & Sagamore Portsmouth, New Hampshire 03802
William Burnham WOODS / # 45 Georgia / Rutherford B. Hayes (1881–1887)	3 August 1824, Newark, Ohio 14 May 1887, Washington, D.C.	Cedar Hill Cemetery 275 North Cedar Street Newark, Ohio 43055

ENDNOTES

[1]Elder Witt, ed., **The Congressional Quarterly's Guide to the U.S. Supreme Court**, Washington, D.C.; Congressional Quarterly, 1979.

[2]George A. Christensen, "Here Lies the Supreme Court: Gravesites of the Justices," *Supreme Court Historical Society Yearbook (1983)*, pp. 17–30.

[3]Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States**, New York: Oxford University Press, 1992.

[4]Lee Epstein, ed., **The Supreme Court Compendium: Data, Decisions, & Developments**, Washington, D.C.: Congressional Quarterly, 1994, pp. 343–53.

[5]David N. Atkinson, **Leaving the Bench: Supreme Court Justices at the End**, Lawrence, KS: University Press of Kansas, 1999.

[6]*Ibid.*, p. 193.

[7]Author's telephone interview with David T. Pride, June 22, 2007.

[8]Christensen, pp 22–23.

[9]*Ibid.*, pp 23–24.

[10]Author's telephone interviews with Kay Bartlett, June 18 and June 21, 2007.

[11]Author's telephone interview with Tina Hodge, June 19, 2007.

[12]John M. Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge**, Chapel Hill, NC: The University of North Carolina Press, 2004.

[13]Author's telephone interview with Tina Hodge, June 21, 2007.

[14]Hall, pp 59, 63, 507, 540, 837.

[15]Author's telephone interviews with Mary Wright, June 25, 2007.

[16]Witt, p. 761.

The Life and Career of Justice Robert H. Jackson

CONSTANCE L. MARTIN*

Introduction

Robert H. Jackson was one of the most influential Justices of the Supreme Court in the twentieth century. His tenure on the Court ran from 1941 to his death in 1954, and during that time he participated in landmark cases involving the programs implemented by Roosevelt's New Deal to rescue the country from Depression, having previously served the administration in other roles. He authored a memorable dissent in *United States v. Korematsu*, the notorious Japanese internment case.[1] He is also remembered for the role he served as the chief American prosecutor before the International Military Tribunal that tried Nazi leaders after World War II. In some ways, Jackson's fierce independence and the lessons he learned growing up in a small town were the ideal training for the demands and competitiveness of the nation's highest Court. That Jackson's words and beliefs still have relevance in the twenty-first century is evidenced by the fact that both recent Supreme Court appointees quoted him during the confirmation hearings.[2] In this essay, I will examine how Jackson's life experiences influenced his legal career and informed his jurisprudence, and to what extent Jackson lived up to his own vision of the role of a Supreme Court Justice.

The Influence of a Small Town

Born near the end of the nineteenth century, Jackson was raised in southwestern New York State in a small town called Frewsburg. It was primarily a farming region, although the family's business activities included horse-breeding, which contributed to Jackson's lifelong love of horses and outdoor sports. Jackson's descriptions of Frewsburg and Jamestown, a city fifteen miles away where Jackson later studied, emphasized the

communities' core values of self-sufficiency and individualism. There was respect for those who worked hard, and distrust of those who did not. Jackson explained, "To an unfortunate individual there was utmost kindness, but if one was a pauper that was probably his own fault. He either drank, or gambled, or was lazy or something evil."[3]

Jackson's own family was thrifty, hard-working, and even more independent than their neighbors: they were "'sturdy and uncompromising Democrats' in an area that was 'overwhelmingly Republican.'"[4] Although Jackson's parents were not religious, they were nominal members of the local church and taught their son "to respect other people's religion and never to start a religious argument."[5] He described his relatives as "practical people who were not carried away by either religious emotions or any other . . . [They were] too busy making a living, to work life's annoyances up into a philosophy."[6] This individualism and regional pride developed Jackson's fundamental belief in persistence and independent thought, and the conviction that hard work is ultimately rewarded. It is likely he was also influenced by the local justices of the peace, whom he saw dispensing justice and whose "decisions represented the community's collective idea of the decent thing."[7] A sense of fairness would characterize Jackson's work in government, advancing and defending New Deal programs.

Jackson's Education

Jackson is a transitional figure between two very different traditions of legal education because he was the last Supreme Court Justice to have received the traditional law-office "apprentice" training rather than a formal law-school curriculum. Jackson's determination to obtain more than the basic education available in Frewsburg sent him north to Jamestown for a post-graduate year of high school. He later spoke often and affectionately of the English teacher, Mary Willard, who befriended him there, encouraged him to read the classics and to debate and "to develop a notable capacity for writing and speaking clear, simple, direct English."[8] She was one of the most important influences of Jackson's life, instilling in him not only a love of books but also legal ambitions.[9]

In 1911, while still attending school, Jackson began clerking part time in the Jamestown law offices of his cousin, Frank Mott, as had been the tradition for aspiring lawyers in the nineteenth century. Mott was a local Democratic leader with statewide connections, and he was the one who made the fateful introduction of Jackson to Franklin D. Roosevelt. Mott and his law partner Benjamin Dean trained Jackson as an apprentice in common law, with steady doses of Blackstone and James Kent[10] so that Jackson would understand "that while the common-law mind strives for continuity . . . it also allows for adaptation of principles to meet particular circumstances."[11] After a year, Jackson decided he "ought to go to a law school, not having had any college."[12] Against the wishes of his father, who did not approve of a legal career, Jackson borrowed money from an uncle to subsidize a year of study at Albany Law School, where, instead of their two-year program, he completed a special one-year course for those with law office experience.[13]

Perhaps surprisingly, Jackson was not enthralled by his legal studies in Albany. He found the classes were intended to prepare students for the bar examination, rather than to inspire discussion or analysis of philosophy or jurisprudence. Seeking intellectual stimulation, he attended arguments before the New York Court of Appeals and sat in on sessions of the New York State legislature, maintaining his family's Democratic leanings and making some useful contacts. He was not sorry to leave Albany after a year, returning to Jamestown with a certificate that would enable him to fulfill the state's bar requirement through

Robert H. Jackson grew up in a farming community in southwestern New York where his family bred horses, among other enterprises. He did not attend college and left Albany Law School after completing a one-year certificate. He learned law through apprenticeships.

additional work for Mott and Dean.[14] However, his one year of study in Albany paid dividends in his exposure to the state legislature and some key contacts, including meeting his future wife through a classmate. Once back in Jamestown, he resumed his apprenticeship and then passed the New York bar at age 21.[15]

Thus, Jackson's legal education was primarily self-taught, but, like other luminaries of the Court, he learned how to use language to advance his cause. His background more resembled the early Justices than those of his twentieth-century colleagues on the Court, although even John Marshall had attended George Wythe's fledgling classes at William and Mary.[16] Most of the Justices with whom Jackson served were the products of prestigious law schools. For example, Felix Frankfurter came from a rarefied academic background and, despite immigrating to the United States as a child speaking no English, had completed high school and college in five years and then graduated first in his class at Harvard Law School.[17] As a member of the faculty at Harvard Law School from 1914 to 1939, Frankfurter maintained close ties to Washington and enjoyed sending his brightest students to clerk on the Court.[18] However, Jackson's innate abilities and love of learning equipped him to take his place with anyone

on the national stage once he left his native New York. In contrast, Jackson's colleague, Justice Frank Murphy, had not maintained a strong relationship with Michigan Law School, where he had been an indifferent student, and as a jurist was considered something of an embarrassment intellectually. Although other law schools proudly sent the best and the brightest young graduates to Washington to clerk for alumni on the Court, Michigan had a tradition of choosing clerks for Justice Murphy "with extraordinary care—for the good of the country."[19]

It seems apparent that Jackson's very practical, on-the-job training affected the way he approached cases, and at times this made him less susceptible to precedent than perhaps some of his colleagues. He placed a high value "on fairness as an overriding principle" and tried to integrate this belief with the "practical consequences of judicial decisions."[20] Dealing with a tax case that became *Dobson v. Commissioner*,[21] he requested a memorandum relating to the standard of review, then read it and said triumphantly to his clerk, "Well, John, that may be the law now but it won't be for long if I can help it."[22] This fierce independence would benefit him later in the high-pressure, competitive atmosphere of the Court, but at times it may have been a liability in personal relationships with the other Justices.

Private Practice

Jackson passed the bar exam in 1913 and hung out his shingle that year in Jamestown. He took great pride in the growth of his solo practice, the variety of the cases he worked on, and his involvement with the state bar association. Representing the interests of the legal community further developed Jackson's pride in his profession. He

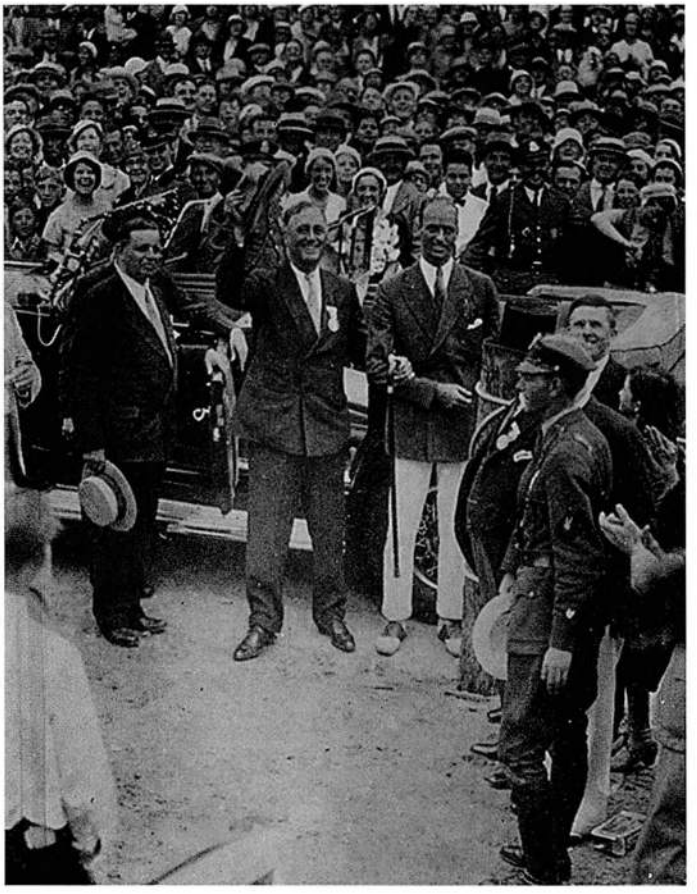
> was the complete small-city lawyer, jury lawyer, appellate lawyer in over fifty appeals, one who could act as counsel for and director of banks, utilities, and other businesses, as well as labor unions, while finding time to win locally famous cases (one in malpractice, the other against the city for causing a typhoid epidemic).[23]

After practicing alone, he joined successful partnerships and was recognized as having "a prosperous litigation practice . . . and was known for his keen analytical abilities and formidable advocacy skills."[24] Moreover, he took pride in being a generalist and "like[d] the contemptuous definition of a specialist as 'one who learns more and more about less and less.'"[25] One biographer states that Jackson's "range of professional work [as a lawyer was] unequaled by any other appointee" during his time on the Court.[26]

Jackson had been only 11 when he accompanied his cousin Mott to Albany for a political meeting and met Franklin Roosevelt for the first time.[27] His involvement with the New York Bar Association led to a friendship with Roosevelt that developed over the years into a mutually beneficial relationship. He also became a key figure in bar circles nationally through legal activities.[28] During the 1920s, Jackson became recognized as the most outstanding lawyer in western New York, and he enjoyed being consulted by Roosevelt on various issues. He was ready for the national stage. The political benevolence of Roosevelt—first as an ambitious New York politician, then as Governor of the state, and finally as President—resulted in great opportunities for Jackson outside New York.

Political Affiliation

Although Republicans had dominated the political climate of western New York, Jackson's involvement in Democratic politics expanded his horizon, not to mention his ambitions, outside Jamestown. He was not the type to advance his career through social interaction per se, but he possessed natural charm and an outgoing personality that were rec-



An outstanding lawyer, Jackson canvassed his part of rural New York during the 1932 presidential campaign, stumping for his friend Franklin D. Roosevelt (pictured). The political benevolence of Roosevelt, first as an ambitious New York politician, then as Governor of the state, and finally as President, played a large role in Jackson's career.

ognized by those he met through civic activities. Jackson was exposed to serious economic and labor concerns as the Depression affected Jamestown, and he started to form opinions about how these issues should be dealt with by the government. Despite his love for his hometown, he began to realize he had outgrown his country practice, and he threw himself into statewide politics as a way to achieve prominence. As he became involved in the bar association of upstate New York and gained recognition for his oratory, he was invited to speak on political issues in other states as well.[29] Jackson was appointed to a Commission to Investigate the Administration of Justice in New York State, and the work he performed brought him into close contact with then–Governor Roosevelt and other prominent Democrats.[30] He was active in Roosevelt's successful 1932 campaign, traveling throughout the state and attacking the Republicans' "record on Prohibition . . . their poor record of economy and their delusive promises of prosperity."[31]

A fiery speech made in 1932 to the New York Democratic Union showed that Jackson did not believe in compromise, at least in the political arena. Full of vigorous campaign rhetoric, he said the country needed a President who "will stand forth as a strong leader with a strength over and above the appeal to his own political partisans."[32] Jackson sought practical solutions to the economic situation, and during the Depression he was concerned about a "litany of fear" and an "attitude of defeatism assumed by many businessmen,"[33] which he feared might be contagious. Jackson's response was characteristically pragmatic as he tried to assist individuals in his part of New York to find jobs. This had be-

Henry Morgenthau (pictured), then Secretary of the Treasury, recruited Jackson to become assistant general counsel for the Bureau of Internal Revenue (a predecessor to the IRS) despite Jackson's lack of tax experience. Jackson performed extremely well, in part because he was not in awe of big business, which enabled him to create aggressive initiatives to combat corporate tax abuse.

gun in 1913, when Roosevelt became Assistant Secretary of the Navy and helped Jackson interact with federal agencies to negotiate employment opportunities for deserving party members from Western New York.[34]

Despite the many years he would spend working for the federal government, Jackson never forgot his roots and always identified with the small-city and country lawyer rather than the Washington elite: "I was never strictly a New Dealer in the sense of belonging to the crowd of young college men that came to Washington and formed a sort of clique . . . I never even went to college."[35] Jackson may have used the device of being an outsider as a way to distinguish himself from those who vied for access to Roosevelt, but friends knew Jackson as "a warm, friendly, eager man of affairs, brimming over with energy and ideas, and with a philosophy of life which was the expression of his character."[36] Jackson was hard-working and ambitious, and had achieved enough on his own to demonstrate that his legal career in New York State was already very successful even had opportunity not called him elsewhere.

Leaving New York for Government Service

Just as John Marshall had hesitated to leave a lucrative private practice, Jackson had similar concerns about entering the public sector. When Roosevelt was Governor, Jackson had

rejected the offer of a position on the New York Public Service Commission. He later asserted, perhaps disingenuously, that he had no expectation of a position in the administration when Roosevelt became President.[37] Moreover, the first federal opportunity that came his way was general counsel of the Works Progress Administration (WPA), the New Deal agency that provided jobs to the unemployed. The agency's purpose offended Jackson's belief, retained from his independent upbringing, that only the industrious merit assistance, and thus was clearly not the right position for him. When Jackson was approached by Henry Morgenthau, then Secretary of the Treasury, about becoming assistant general counsel for the Bureau of Internal Revenue (a predecessor to the IRS), however, he was intrigued enough to accept. He negotiated a four-day work week, which he believed would allow him to maintain his law practice in Jamestown.[38] Morgenthau told Jackson they wanted him because he *did not* have tax experience, saying, "We think there ought to be a fresh viewpoint in the Treasury."[39] This opportunity resulted in positive exposure for Jackson, who was soon recognized as "one of the most gifted attorneys in Roosevelt's arsenal."[40] Jackson was not in awe of big business, which enabled him to create aggressive initiatives to combat corporate tax abuse. One of the ways in which he distinguished himself was by forcing steel millionaire Andrew Mellon to pay over $750,000 in back taxes.[41]

In 1935, Roosevelt announced important changes to the nation's tax structure, based on recommendations from Jackson, influenced by "the broad principle that if a government is to be prudent, its taxes must produce ample revenues without discouraging enterprise; and if it is to be just, it must distribute the burden of taxes equitably."[42] It was critical for the New Deal to encourage corporate growth, but Roosevelt was determined also to increase taxes on large individual incomes. This is one of the reasons that Roosevelt was considered a traitor to his class. It was Jackson who appeared before the Senate Finance Committee to support the President's new tax bill and—among other things—reveal some of the devices used by the most affluent citizens to avoid their fair share of taxes, revenue now so urgently needed by the federal government.[43] For his eloquent assistance, he received an appreciative handwritten note from Roosevelt, calling Jackson's presentation "a grand performance."[44]

Jackson's accomplishments for the Treasury Department resulted in the offer of a position as assistant attorney general for the Tax Division of the Justice Department in 1936.[45] Morgenthau felt this move might help improve relations between the Treasury and Justice departments. Jackson found the opportunity appealing because the tax division functioned as a law office, enabling him to resume his already effective role as an advocate in court. As assistant attorney general, Jackson could select cases from all over the country in which to appear, including some of those in front of the Supreme Court.[46] Later, in a different job in the Justice Department's Antitrust Division, he argued ten cases before the Supreme Court, beginning an association with the nation's highest court that would continue until his death.[47] The cases he argued were not limited to antitrust; they included programs critical to the success of Roosevelt's administration, including "the establishment of the Social Security system and the federal regulation of public utilities."[48] Based on his experience in Treasury, Jackson advocated enforcement of antitrust regulations to strengthen the economy by preventing overconcentration of power and wealth, and he tried to stir up support with speeches.[49]

Jackson's outspoken criticism of monopolies in business earned him some enemies in the corporate world and annoyed some of his superiors, but he was able to maintain Roosevelt's confidence. In fact, Roosevelt valued Jackson's forthrightness. In one instance, when Jackson was asked to testify to the Senate Judiciary Committee about Roosevelt's controversial Court-packing plan, Jackson explained to the President that his opinions did not parallel

those of his boss, the Attorney General. Roosevelt said it "'didn't matter' and told Jackson to 'go ahead and give the plan whatever support [he] could.'"[50] Jackson felt it was crucial that the President convey that his objective in Court reform was to make the Court "a contemporary and non-partisan institution," an issue easier for the public to identify with than crowded dockets and statistics.[51] Fortunately, Roosevelt did not usually object to hearing opposing points of view so long as he felt the speaker was loyal to him.[52]

Despite this success, by the fall of 1937 Jackson had begun to wonder if he should leave Washington and return to his lucrative law practice in Jamestown. He considered resigning as of January 1, 1938 and went to the White House to discuss his plans with the President.[53] At this time, Roosevelt was wrestling with the issue of identifying a strong Democrat who could be groomed for the presidency when his two terms concluded. The current Governor of New York, Herbert Lehman, seemed unlikely to run for a fourth term, and Roosevelt floated the idea of Jackson following in his footsteps as Governor of New York and carrying on his policies on the national stage. "If you were elected governor in 1938, you would be in an excellent position to run for the Presidency in 1940," he told Jackson. "I don't intend to run."[54] However, a Jackson candidacy never took off, and Jackson himself was not committed to the idea, feeling his skills were legal rather than political. Roosevelt had also indicated there would soon be changes in the Justice Department, and that Jackson would be well advised to stay in Washington.[55] Roosevelt already had in mind the elevation of Solicitor General Stanley Reed to the Supreme Court at the first opportunity. When he did so in 1938, Jackson was named as Reed's successor.[56]

Jackson was delighted to be Solicitor General, which he described as "the highest prize that could come to a lawyer."[57] The office of the Solicitor General functions as a small law firm, and the Solicitor General operates as the partisan attorney for the government. This meant that Jackson was essentially practicing law full time, and he gained a national reputation as an appellate advocate.[58] Jackson was admired for his "incomparable legal skills, unparalleled oral advocacy skills, and a mastery of legal prose."[59] He enjoyed getting to know the Justices, becoming particularly close to Frankfurter, who was appointed in January 1939 after the death of Justice Benjamin Cardozo. His work habits continued to be determinedly independent: He worked on appeals by himself and "believed so strongly in his own abilities that he declined to participate in moot court arguments before his appearances in the Supreme Court and did not usually disclose his oral argument strategy to his staff."[60] Justice Louis Brandeis was so impressed by his effectiveness before the Court that at one point he said to Frankfurter, "Robert Jackson should be 'Solicitor General' for life."[61]

Frank Murphy, the liberal former Governor of Michigan, was a longtime Roosevelt supporter and had been named Attorney General in 1939. Some had felt Jackson would be a better choice, but Roosevelt was thus able to please the Catholic constituency as well as to reward Murphy for his loyalty.[62] What Murphy really wanted was to be Secretary of War, and he regarded the Attorney Generalship as a temporary position, part of Roosevelt's intricate long-term plans for his cabinet. However, an indiscreet newspaper interview given by Murphy made that prospect unlikely.[63] The retirement of Justice Brandeis, also in 1939, created another Court vacancy, which was filled by William O. Douglas, a Yale professor who had headed the Securities and Exchange Commission.

As Attorney General, Murphy was a flamboyant figure, infuriating colleagues such as Jackson, who felt Murphy turned ordinary issues into crusades to gain publicity. As well as being a "headline hunter," Murphy replaced many experienced members of the Justice Department with cronies from his Michigan days, regardless of their qualifications.[64] He took

advantage of the platform available to him as Attorney General to articulate personal viewpoints, including his pacifist inclinations and strong support of civil liberties.[65] He declared that civil liberty was "a legal right in time of war as well as in time of peace."[66] While his ideology made Murphy popular with the media, others were concerned that he recklessly disregarded the difficulties of reconciling protection of civil liberties and free speech in a time of war and cared more about his frequent press conferences than about representing the administration.[67] Although there was admiration of Murphy for addressing difficult issues in a world threatened by European war, there was also criticism of his outspoken positions from some members of the President's inner circle, especially once Roosevelt began to voice more support for the Allies, moving away from his prior policy of neutrality.[68] Murphy did not always come across as a team player to his New Deal cohorts, a characteristic valued as much then as now.

Roosevelt had always planned that Attorney General would only be an interim position for Murphy but it is hard to understand why the President continued to believe Murphy merited one of the highly coveted slots on the Supreme Court when Roosevelt had so many worthy allies.[69] The next opening occurred during the fall of 1939 when Justice Pierce Butler died. Because Butler was Catholic, it seemed a foregone conclusion that Murphy was the ideal candidate for the vacancy, but Roosevelt consulted Jackson. Jackson opposed Murphy's ascension to the High Court and did not hesitate to share his opinion, albeit diplomatically: "Mr. President, I don't think that Mr. Murphy's temperament is that of a judge."[70] It is likely he was mollified when Roosevelt replied, "It's the only way I can appoint you Attorney General."[71] Jackson knew he was more qualified to be Attorney General than Murphy had been, but he was also concerned that he was inheriting the job when the country was on the brink of war, with enormous domestic and defense problems, not to mention internal dissension caused by Murphy's flamboyant yet haphazard leadership.[72]

As Attorney General, Jackson was both the primary law-enforcement officer for the United States and the President's legal advisor. Although Jackson was Attorney General for just eighteen months before being nominated to the Supreme Court, he was involved in controversial issues of the day, including conflict with the FBI. Jackson was determined that "the FBI would operate within the law," and he asked Congress to restrict authorization of wire-tapping except for legally recognized purposes.[73] While Attorney General, Jackson argued three important cases before the Supreme Court, which was unusual, winning all three.[74] Overall, however, he found the job less interesting than that of Solicitor General because of the time he was forced to devote to administrative requirements, which he felt interfered with "the Attorney General's opportunity to be a lawyer" rather than "a managing clerk of a law office."[75]

Jackson was more interested in the policy affecting the country than the minutia of office politics, and he embraced his role as advisor to a President about to go to war. One critical role he played during the time before Pearl Harbor involved preparing a legal opinion for Roosevelt that "allowed the President, without Congressional approval, to transfer fifty naval destroyers to England in exchange for military bases in British territories.[76] This enabled Roosevelt to help England combat Germany before the United States had entered the war.[77] More importantly, it established a precedent for executive war powers, or what Jackson euphemistically called "independent executive action."[78]

Roosevelt had personal relationships and political alliances with many New Dealers, but clearly a special bond existed between him and Jackson due to the roots and length of their friendship. There were also social activities in which the Roosevelts included the Jackson family, including boat trips and dinner parties. From all appearances, the Jackson family had

settled well in Washington, and government service and increasing renown do not appear to have changed Jackson's core values. Jackson appreciated his old friends, and, unusually, was conscientious about reminding them of the gratitude he felt for their support and friendship.[79] He placed a premium on time spent with his family and took pride in his children's academic achievements. Jackson's son and daughter attended private schools in Washington before attending Yale and Smith, respectively, taking advantage of educational opportunities unavailable to their father. William Jackson eventually became a respected lawyer, following in his father's footsteps.

Ascension to the Supreme Court

The leadership of the Supreme Court is often characterized by the Chief Justice of that period. During the critical years of the 1940s, however, the Court was dominated by three exceptional Justices: Hugo Black, Felix Frankfurter, and Robert Jackson. All three were brilliant and eloquent jurists, with strong personalities and diverging opinions that at times prevented them from working effectively together.[80] Some historians believe that Roosevelt had definite goals when selecting Justices, seeking: 1) total loyalty to the New Deal, especially support of government regulatory authority; 2) belief in an "egalitarian philosophy of government under law"; and—once it became relevant—3) support of his war plans.[81] Not every appointee met such criteria, but in many days Jackson did. Jackson was Roosevelt's seventh appointment to the Court in a four-year period from August 1937 (Justice Black) to July 1941, perhaps proving that the Court-packing plan had not really been necessary. In contrast to the contentiousness of recent confirmation hearings, Jackson was confirmed with relative ease.[82]

While it may be helpful to serve as a judge prior to joining the nation's highest Court, there are other useful routes. For example, the Solicitor General serves several entities of the government, so this experience was extremely helpful to Jackson. Jackson was equally well-served by his diverse law practice and by the fierce independent spirit he had always cultivated, which helped him focus clearly on issues without distraction. Early in his judicial career, his legal writing won admiration for an eloquence and effectiveness that has been compared to that of Winston Churchill.[83] One of his former clerks described "the extraordinary attractiveness of his prose," observing that Jackson recognized that "he had a gift for graceful and vivid expression and used every opportunity to cultivate it."[84] It is obvious that Jackson had a brilliant mind, despite his lack of traditional education.

As his judicial philosophy evolved, Jackson appears to have been influenced by the way Cardozo advocated instituting social change into a strict reading of the law.[85] His own independent nature and lack of prescribed classroom training made it easier for him than for other Justices to contemplate the issue of justiciability with detachment. Jackson recognized that colleagues such as Frankfurter believed emphatically that the Court should avoid "constitutional controversies when they do not satisfy the doctrines of adverseness, standing, ripeness and nonmootness."[86] Frankfurter felt that "this prolonged uncertainty [was] less harmful than 'the mischief of premature judicial intervention.'"[87] However, Jackson had practical reservations as to whether it was necessary to choose between premature judgment and "technical doctrines for postponing if not avoiding constitutional adjudication."[88] In *The Struggle for Judicial Supremacy*, written while he was Attorney General, he suggested instead that a procedure be established that would determine "substantial constitutional questions" yet "also avoid technical doctrines for postponing inevitable decisions."[89] Of course, the reality of actually being *on* the Supreme Court rather than observing it—even from the vantage point of Attorney General—could have changed Jackson's viewpoint, but throughout his judicial career he tackled tough issues when

he felt it was necessary, whether in the majority or not, as had been his practice before ascending to the Court.

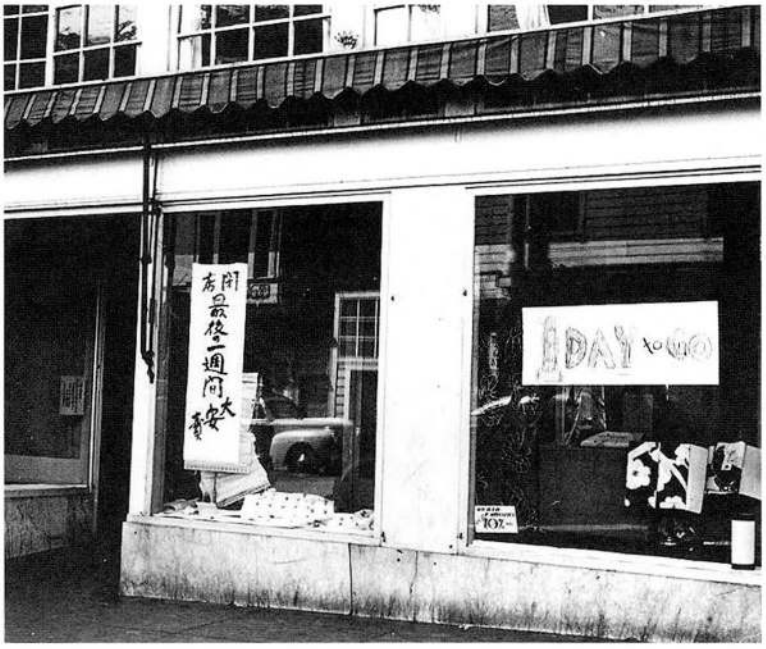
Jackson's associations with the Supreme Court Justices had been strong when he was Solicitor General but antagonistic relationships with several of the other Justices were a negative aspect of his time on the Court. The young lawyer who had rallied his fellow Democrats in 1932, entreating them to put aside internal conflict for the greater purpose of unifying behind Roosevelt to achieve "enlightened leadership,"[90] was not always able to follow his own guidelines when interacting with his judicial colleagues. Although he agreed with Frankfurter on many issues, they clashed on how the Constitution should be interpreted and the extent to which the Framers provided guidance. Jackson believed that "[f]rom the very beginning... the duties of the Court required it... to settle doubts which the framers themselves had been unable to resolve."[91] His philosophy reflected the pragmatic approach of an experienced lawyer with a varied practice: He applied a form of common law to judicial decision-making, adapting legal principles to meet "the endless variation of the facts of cases."[92] Similarly, Cardozo had recommended that when certain rules had "been found to be inconsistent with the sense of justice or social welfare, there should be less hesitation in frank avowal and full abandonment."[93] Jackson's practical personality favored this reasonable approach to precedent: to follow a rule that made sense but be open to situations or conditions that justified a new approach, where there was "a new significance or development over the progress of years."[94]

Jackson also clashed with Hugo Black, to the point that their colleague Justice Harold Burton was surprised they could even exchange polite greetings in the morning.[95] While Jackson and Black shared ideology in some cases, their application of legal doctrine was very different, and Jackson was offended by what he considered "Black's partisan treatment of cases."[96] Jackson did not believe that either Black or Justice Douglas paid enough attention to the background details of cases, and he distanced himself from them by articulating this very pointed conviction in his non-Court writings.[97] In return, Black may have resented the widely held belief that Jackson would eventually replace Chief Justice Harlan Stone.[98] Nor did Jackson respect his colleague Justice Murphy. Jackson's already low opinion of Murphy worsened at the time of Murphy's confirmation to the Court when Murphy tried to delay his departure as Attorney General for a month, implying Jackson would settle rather than prosecute critical cases.[99] The rivalry had intensified during a period when both were mentioned "as possible presidential and/or vice presidential candidates in 1940."[100]

It is hard to understand how a practical individual such as Jackson, beloved by those who came into contact with him in his professional capacity as a lawyer, could fail to see the importance of maintaining cordial relationships with his judicial colleagues, and as will be discussed below, this squabbling probably cost Jackson the Chief Justiceship he craved. Jackson's colleagues back in Jamestown had written to congratulate him on his ascension to the Supreme Court:

> And now that one of us is to sit on the Bench of this highest Court we are a little awed but proud... We don't want to lose you even to the Supreme Court, but knowing you, as we feel we do, our second thoughts are rather reassuring that you will get back to us as the duties of your position and opportunities will permit.[101]

Their affectionate pride and friendship contrasts sharply with Jackson's disagreement with Black. Fortunately, Jackson did have positive relationships with some of his colleagues, particularly with Chief Justice Stone, who was also a liberal New Yorker and had welcomed "Jackson into his circle when [Jackson first] appeared on the Washington scene."[102]



In the 1944 case of *Korematsu v. United States*, the Supreme Court upheld the forcible exclusion of the Japanese during World War II. A majority of the Court agreed with Justice Black that military needs justified the relocation, but Jackson, along with Justices Frank Murphy and Owen J. Roberts, was in an eloquent minority. Their position was later vindicated as being legally and morally correct. Pictured, a Japanese-American business hastily liquidates.

However, Stone did not have the administrative skills to control the dissension on the Court caused by the Jackson-Black squabbles, and this lessened the effectiveness of his tenure.[103]

Korematsu

In *Korematsu v. United States*,[104] the Supreme Court upheld the forcible exclusion of the Japanese during World War II. A majority of the Court agreed with Justice Black that military needs justified the relocation, in a decision later characterized by *Harper's Magazine* as "America's Greatest Wartime Mistake."[105] Along with Murphy and Justice Owen Roberts (the last Hoover holdover), Jackson was in an eloquent minority, ultimately vindicated as being the only legally and morally correct position. Unlike the Warren Court, which came to be known for protecting civil liberties, this Court was reluctant to interfere with what the armed forces and administration considered a necessary war power. *Korematsu* was the second of three cases that tested the constitutionality of exclusion orders. In *Hirabayashi v. United States*,[106] the Court had sustained the legitimacy of a curfew but avoided discussion of the wider implications of relocation. In the third case, Ex parte *Endo*,[107] the Court held that once the loyalty of an internee has been determined, forcible restraint is illegal. In concert, the result of these cases was to send a message that in time of war, certain constitutional principles will be sacrificed for military security.[108]

While Murphy's dissent addressed the racial aspects of the majority's decision, Jackson described "a clear violation of Constitutional rights" but also criticized the judicial analysis upholding the executive order authorizing forcible detention as "a far more subtle blow to liberty than the promulgation of the order itself."[109] By rationalizing the order, "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[110] Jackson's passionate dissent reflected a distrust of excessive government power first articulated by the Framers of the Constitution.

One of his clerks later commented that Jackson "was most eloquent . . . when his prose was put at the service of fundamental values."[111]

Jackson and Murphy had little in common, so it is interesting that they both dissented in this landmark case. However, their opposition to *Korematsu* was based on different arguments. Both attacked Black's majority opinion as officially condoning racism and irrationally punishing an entire group for unproven allegations against a few individuals. Murphy's dissent bluntly dealt with what he termed a "legalization of racism," and attacked the "accumulation of . . . misinformation, half-truths and insinuations that for years have been directed against Japanese-Americans by people with racial and economic prejudices" upon which he believed the military and the majority had overrelied. [112] In *Hirabayashi*, Murphy had reluctantly sided with the majority, holding that there was "substantial basis" to conclude that a mandatory curfew of Japanese Americans and alien Japanese was "a protective measure necessary to meet the threat of sabotage and espionage" of the war.[113] Here, Murphy was determined that his voice would be heard: He would not rubber-stamp *Korematsu*, which he perceived as an inappropriate exercise of war power, unjustified by any documented threat.[114]

Murphy's dissent may have owed something to the fact that he had made a career of supporting the underdog. Yet in contrast to Earl Warren, who as Attorney General of California had grand-mastered the relocation of Japanese Americans on the West Coast, Murphy had reason to see past the shameful belief that Asian culture prevented assimilation and made treason a realistic fear, and instead view the Nisei as unfortunate victims of discrimination. From 1933 to 1935 Murphy had served as Governor General of the Philippines, a nation of thirteen million people that had been under American rule for three decades.[115] Fresh from a term as mayor of Detroit, possessing virtually no knowledge of Asia or the needs of an agrarian society, Murphy nevertheless became very popular in Manila and enjoyed his sojourn in a country virtually untouched by the Depression.[116] Contrary to widespread perception that Japan was not considered a threat to the United States until Pearl Harbor, many in the administration at that time were concerned that the Philippines' drive for independence might result in susceptibility to nearby Japan.[117] Murphy's tenure was not without challenges, but he liked the Filipinos, and his popularity resulted from "an intuitive grasp of Filipino political sensitivity and a . . . personal style that could hardly fail to win positive response."[118] Living among the Filipinos and working closely with them may well have prevented Murphy from falling victim to facile fear of the Japanese.

It was Murphy's phrase, the "legalization of racism," that was remembered,[119] but Jackson's dissent focused on the exercise of military and government power in war time, although he did not ignore the discrimination against "a citizen of the United States by nativity and a citizen of California by residence."[120] Writing for the majority, Justice Black believed the exigencies of war made this decision necessary for the Court to legitimize the military's actions,[121] but Jackson was equally determined not to support an unauthorized exercise of military power. He criticized General J. F. DeWitt, the military's West Coast commander, who had said, "'A Jap's a Jap,' regardless of citizenship," and initiated the relocation through a series of proclamations beginning in March 1942.[122] Jackson pointedly did not recognize the authority of DeWitt's actions, stating that the "'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order."[123] Eschewing Murphy's emotional tone, Jackson wrote with measured force and addressed the substantive issue as to the source from which the authority was derived.

Jackson and Murphy were not alone in their opposition to *Korematsu*. Justice Roberts, a less remembered member of the Court, joined them in dissent, stating that the Government

was discriminating against a citizen based solely on his race, without any constitutional basis for doing so.[124]

Another person appalled by the treatment of Japanese-Americans was Eleanor Roosevelt. She understood that her husband had been under pressure to support the "military necessity" argument and had watched with apprehension the public's growing suspicions of Japanese Americans.[125] Normally, Mrs. Roosevelt did not hesitate to speak candidly to her husband, providing her opinion on national issues but in this instance her efforts were unsuccessful. Roosevelt "gave her a frigid reception and said he did not want her to mention it again."[126] Although Roosevelt revealed much later that he "regretted 'the burdens of evacuation and detention which military necessity had imposed upon these people,'"[127] those close to him said he had made a characteristically pragmatic decision based on what seemed best for the country at that time.[128]

Jackson and Individual Rights

Jackson's best-known opinion was *West Virginia State Board of Education v. Barnette*,[129] where the Court overturned a public-school requirement that students salute the flag or be subject to expulsion and prosecution, thus significantly expanding the scope of free speech set forth in the First Amendment to the Constitution. *Barnette* followed another free-exercise case, *Minersville School District. v. Gobitis*,[130] in which two children who were Jehovah's Witnesses refused to participate in a morning flag salute because they considered it a violation of their religion to worship an icon such as the American flag. Frankfurter had authored a passionate opinion for the majority in which he stated that civic obligations trump the requirements of religious freedom espoused in the Free Exercise Clause of the First Amendment.[131] Frankfurter was angered by the overruling of *Gobitis*. Jackson overruled the case in several ways, and found that the Witnesses' refusal to salute the flag caused no harm, did not violate any other individual's rights, and did not threaten public order.[132] He stated that religious freedom should not be deferential "to legislative policy, even if that policy was founded in reason and was correctable at the polls."[133] Jackson argued that the goal of the Bill of Rights was to guarantee that minority interests were legally enforceable: "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[134] It was not enough to tolerate differing beliefs: Democracy required that those from minority sects be able to practice their faith freely, so long as that form of worship did not interfere with the rights of others. In the most famous part of the opinion, Jackson stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not now occur to us.[135]

Jackson rejected Frankfurter's "promotion of good citizenship"[136] argument in favor of religious liberty during World War II at a time when many condemned the Jehovah's Witnesses' stance as unpatriotic.[137] While Jackson had not been on the Court at the time of *Gobitis*, it was not his influence alone that caused the earlier case to be overturned. Stane (who had been the lone dissenter three years earlier in *Gobitis*) and recently appointed Justice Wiley Rutledge joined the majority, as did Black, Douglas, and Murphy, who switched sides, explaining their changed viewpoints in concurrences.[138] However, it is Jackson's opinion that is remembered for its "ringing endorsement of individual liberty."[139]

In a speech at a ceremony celebrating the 150th anniversary of the Supreme Court in

1940, Jackson, then Attorney General, spoke about the connection between the Court and the American democratic system, concluding:

> The Court is more than an arbiter of cases and controversies. It is the custodian of a culture and is the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity.[140]

Jackson took such responsibilities seriously, lived up to them on the Court, and would certainly take pride in the fact that this case is a significant part of his legacy.

Jackson and Separation of Powers

During the New Deal, there was broad expansion of federal authority based on expanded interpretation of the Commerce Clause, and this was necessary to rescue the nation from the Depression.[141] However, Jackson was sensitive to the need for balance of power between the three branches of government: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[142] He always harbored a suspicion of bureaucracy, whether in the corporations that avoided paying their fair share of taxes, as discussed above, or in any executive that uses power unwisely. The judicial process was not exempt from his criticism: He stated that activism "was no more appropriate on the part of the judiciary in favor of reforms than it was in knocking them down. The initiative should remain with the legislative branch."[143] He advocated a return to pre-Lochner values of judicial restraint:

> With us, what is wanted is not innovation, but a return to the spirit with which our early judges viewed the function of judicial review of legislation—the conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive, and that power so uncontrolled is not to be used save where the occasion is clear beyond fair debate.[144]

In *Youngstown Sheet & Tube Co. v. Sawyer*,[145] as in *Korematsu*, Jackson rejected government authority during a period of international conflict in favor of individual rights, but this time he wrote an influential concurrence instead of a dissent. The case resulted from a labor dispute between American steel companies and their employees that caused President Truman to fear that any cessation in production would impede the success of the Korean War.[146] For that reason, Truman issued an executive order authorizing the Secretary of Commerce to take possession of the steel mills and keep them operating. The Court was asked to review the constitutionality of the Order by the steel company. In what is considered one of the most significant separation-of-powers cases ever decided by the Supreme Court, Jackson identified three possible situations in which a President's actions may be challenged. He stated: 1) "When the President acts pursuant to an express or implied authorization of Congress his authority is at its maximum;" 2) in the absence of a congressional grant of authority, the President's authority is limited to "his own independent powers," although there is a "zone of twilight in which he and Congress may have concurrent authority;" and 3) "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own powers minus any constitutional powers of Congress over the matter."[147] Jackson concluded that seizure of the steel mills fell into this third category, and he added that "[t]he purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[148]

Truman had assumed he had more authority to deal with the emergency than just the Taft-Hartley Act,[149] basing the seizure on

Article II, Sections 1–3, "and whatever inherent, implied or residual power may flow therefrom," his lawyers asserted.[150] The Court rejected this argument, with Black writing the majority opinion: "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control."[151] Thus, the decision demonstrated that the Constitution does not provide the President with authority to take possession of private property, even when the taking is for public use during periods of national emergency, because that authority is vested in the legislative power of Congress.[152]

Rejecting the authority of the President to use his executive power during a national crisis was contradictory to the position Jackson had taken as Attorney General with Roosevelt.[153] However, Jackson asserted that outside the President's enumerated powers, it is Congress that must create policy, and it is the Court's role to "scrutinize[e] challenges to presidential authority in order to preserve the equilibrium of the constitutional system."[154] Truman felt he had been betrayed by a liberal Court which should have been on his side, and he must have wondered if the Justices would have treated Roosevelt the same way. He was particularly infuriated that two of his appointees, Tom Clark and Burton, had voted with the majority, and that it was Clark, in his prior job as Attorney General, who had assured Truman that he did indeed possess the requisite executive power.[155]

Youngstown assumed new relevance as the Bush administration grapples with what limits—if any—exist on its executive powers as it confronts the war on terror. Criticized for the National Security Agency's (NSA) warrantless domestic surveillance, Bush has declared that the decision to conduct warrantless wiretapping is consistent with the inherent power of the President under Article II, Section 2 of the Constitution.[156] It is Jackson's concurrence, rather than Black's majority opinion, that continues to be invoked as a judicial check on the unconstitutional exercise of governmental power. In 2006, the Bush administration's legal team found itself "frenetically parsing each substantive nuance and flowery term to construct arguments that support their initiatives, such as domestic surveillance," and the Justice Department issued a "white paper defending that program that [was] replete with references to *Youngstown*."[157] Jackson's analysis in *Youngstown Sheet* could be influential in the 21st century as the ethics of domestic wiretapping continue to be debated and challenged legally.

Nuremberg

Modern history focuses on the United States' participation in World War II but analysis of its leadership role in rebuilding the countries it had helped destroy, such as Germany and Japan, is less glamorous and can easily be ignored. Thus, it may be difficult for people now to understand how critical it was for the United States to help ensure that the Nuremberg Trials would be conducted according to democratic legal principles. Roosevelt died suddenly in April of 1945, just as victory was within grasp.[158] Truman assumed the presidency, and later that month he asked Jackson to serve as the American Chief of Counsel for the United States responsible for the prosecution of Nazi war criminals. The Allied leaders had decided "an international tribunal constituted by the Americans, English, French, and the Russians" would try the Germans accountable for World War II atrocities.[159] Truman wanted Jackson to go to Europe as America's advocate to ensure a fair trial. Jackson prepared a memo for Judge Samuel Rosenman, who served as Special Counsel first to Roosevelt and then to Truman from 1943 to 1946, accepting the mission and outlining ideas he felt were important, including expediting the trials to discourage people from taking law into their own hands and "a code of procedure" that would "reconcile ideas of different groups accustomed to different systems of law."[160]

President Truman sent Jackson (left) to Nuremberg, Germany as the chief counsel for the United States to negotiate fair trials for the Nazi war criminals. Jackson opposed the summary execution of top Nazi leaders, as he thought it would compromise the Allies' effort in the war.

The challenge for Truman and Jackson was not simply the application of international law. First they had to persuade the countries involved to agree on an approach, since there was no precedent for this type of trial. Churchill, Anthony Eden, and Jackson's old friend Henry Morgenthau, still Secretary of the Treasury, argued for "summary executions of the top Nazis."[161] Cordell Hull, the Secretary of State, favored court-martials that would "convict and execute defendants."[162] Jackson was a much-needed voice of reason, explaining how disastrous it would be to embark on a rule of law that would resemble the Nazis' way of dealing with their enemies—execution without a trial. Following Secretary of War Henry Stimson, Jackson stressed the need for a fair and public trial, despite the difficulties involved.[163] Jackson feared that summary execution, even of war criminals responsible for atrocity, would taint the achievement of the Allies in the war.[164] The British shared this concern to some extent but were also afraid the trial might be denounced as a farce and outrage the British public's sense of fair play.[165] For Jackson, the pressure of balancing these goals—synthesizing international law into a procedure that would provide a fair defense to the accused, while still satisfying the Allied concern that the Nazis be punished for their actions—while the whole world watched was enormous.

On April 13, the day after Roosevelt's death, a sorrowful Jackson was scheduled to speak to the American Society of International Law in Washington. In this speech, Jackson described the "instruments of adjustment, adjudication, and conciliation so reasonable and acceptable to the masses of people [required so] that future governments will have always an honorable alternative to war."[166] He spoke of the need for a "rule of law among the nations" to guarantee "the due process of law" for all citizens.[167] Some believe that coverage of this speech gave Truman or Stimson the idea of asking Jackson to go to Nuremberg.[168] But was it appropriate to ask a sitting Supreme Court Justice to undertake a special and prolonged mission of this nature? It is hard to

imagine President Bush asking Justice Antonin Scalia go to Baghdad to guarantee a fair legal process against former Iraqi president Saddam Hussein.[169] At the time, however, there was precedent for using the Justices as consultants on issues of national importance. Justice Roberts had been appointed by Roosevelt to chair a panel investigating the bombing of Pearl Harbor and had taken a leave of absence from the Court to do so.[170] Nevertheless, Justice Black was among those who disapproved of a Justice being taken away from his obligations to the Court.[171]

Less than twenty years later, President Johnson asked Chief Justice Earl Warren to head an investigation into the assassination of President Kennedy. Warren was reluctant to assume leadership on the commission because he believed activities outside the prescribed roles of the Justices could create separation-of-powers issues, as well as conflict within the Court.[172] However, Warren found it impossible to say no to Johnson, who appealed to his patriotism and made clear his belief (an erroneous one, as it turned out) that only Warren could lead a complete and fair investigation that would quell controversy.[173] It is obvious that Jackson was inspired by similar patriotism, and afterwards saw this service as something that not only had a lasting and positive effect on world order but that would also be his most satisfying achievement. "The hard months at Nuremberg were well spent in the most important, enduring, and constructive work of my life," he later wrote.[174]

Jackson's work "organizing the Nuremberg proceedings established precepts in international law that continue to govern modern international tribunals."[175] There were basic philosophical differences between the delegations. Jackson favored a process based on a presumption of innocence, but the Russians argued for a presumption of guilt that would focus on "the degree of punishment to be meted out."[176] Under Jackson's approach, which ultimately prevailed, Nazis would be set free "if there were insufficient evidence to rebut [a] presumption" of innocence.[177] The Russians refused to give in until Stalin finally intervened after an August 1, 1945 meeting with Truman.[178] In addition to exhibiting patience with representatives of other nations, Jackson's work required endless meetings, poring over legal documents, travel throughout Europe, and separation from his family. Nuremberg was chosen as the most suitable location for the trials,[179] and "on August 8, the Agreement and Charter of the International Tribunal was signed."[180] After months of negotiation under Jackson's leadership, a procedure had been agreed upon that would fairly put individuals on trial "for waging aggressive war and committing crimes against international law."[181] Francis Biddle wrote that "Robert Jackson's tireless energy and skill had finally brought the four nations together—a really extraordinary feat."[182]

The moments that brought lasting recognition were Jackson's opening and closing statements at what the *New York Times* called "the greatest criminal trial in history."[183] As Chief of Counsel for the United States in charge of prosecuting, Jackson opened the trial with a speech that lasted four hours, describing the international law that would frame the trial. He began by declaring to the world "[t]hat four great nations[] stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[184] He "summarized the case against Hitler and co. in such detail that even the defendants . . . shrank and seemed overwhelmed."[185] Jackson spoke evocatively of the legacy that the trial would provide to a worldwide audience, and he cautioned his audience that they "must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."[186] In his closing statement, Jackson attacked the defendants' excuses for their actions, focusing on his familiar theme of individual responsibility and making an argument for the Nazis to be held responsible for the

criminal actions performed as leaders of states. He concluded to the Court, "If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, that there are no slain, there has been no crime."[187]

Chief Justice Stone died during the trial, and the news reached Nuremberg on April 23, 1946.[188] It is possible that being away from Washington at this critical time cost Jackson the longed-for position of Chief Justice. Roosevelt had allegedly promised the appointment to Jackson, first when he persuaded Jackson to become Attorney General and again in 1941 when Roosevelt decided to elevate Justice Stone to replace retiring Chief Justice Hughes.[189] Roosevelt expected he would have another opportunity to influence the leadership of the Court. But by the time Stone died, Truman was President. Not only did Truman have no reason to honor Roosevelt's promise, he apparently became exasperated by the dissention that developed between Jackson and Black and decided not to choose either of them.[190] Friends urged Jackson to return to Washington if he wanted to be appointed Chief Justice, but Jackson refused to leave his responsibilities in Nuremberg. Moreover, he took pride in never having asked for a job, and he refused to begin at that time.[191] As Truman considered candidates, there was a widely publicized rumor that Black told Truman he would resign from the Court if Jackson were appointed Chief Justice.[192] When Jackson heard that he had been blamed for intra-Court tension, he became very upset, and felt Black was responsible and—against Truman's advice—released a statement attacking Black publicly, which in turn caused negative publicity for the Court.[193] These events doubtless spoiled Jackson's triumphant return from Nuremberg.

Liberal or Conservative?

Jackson's achievements at Nuremberg resulted in worldwide renown, but, as one biographer describes it, he returned "a different man: the once libertarian judicial activist . . . had become profoundly cautious, a markedly narrow interpreter of the Bill of Rights."[194] Some attributed his newfound conservatism as a reaction to the atrocities he had spent so much time researching in Europe: "It was his conclusive judgment that one of the major contributory factors was the failure of the Weimar government to crack down on radical dissenters and extremist groups."[195] Jackson's significant opinions supporting free speech came prior to Nuremberg; subsequently, he focused on "the circumstances supposedly justifying legislative abridgments of liberty."[196] His fear was that, if unchecked, force could outweigh law as a vehicle of justice. In *Terminello v. Chicago*, a First Amendment case involving an anticommunist, anti-Semitic speech that disturbed the peace, Jackson dissented, saying, "If the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[197] This was in contrast to his support of individual liberty in *Barnette*, in which he had stated that the Bill of Rights "denies those in power any legal opportunity to coerce" loyalty.[198] Jackson was apparently unwilling to admit that there was any change in his jurisprudence after Nuremburg, but this was a shift from his customary focus on the facts of the case to a larger "context."[199]

No discussion of Jackson would be complete without mentioning his contribution to *Brown v. Board of Education*.[200] Initially, he had several major concerns that initially held back his willingness to overrule *Plessy v. Ferguson*,[201] although he personally supported desegregation.[202] First, because the Court had stated in *Strauder* and *Slaughterhouse* that the purpose of the Fourteenth Amendment was to grant equality, Jackson was not convinced that segregation was a denial of that pledge.[203] Second, Jackson did not believe that the Fourteenth Amendment authorized the Court to overturn segregation laws "in the absence of congressional action on the subject."[204] In addition, Jackson had practical concerns as

Jackson's absence from the Supreme Court made it difficult for Chief Justice Stone to manage the docket effectively, as the Justices were divided 4–4 on many cases and personal animosities were high.

to implementation of desegregation. Jackson wanted "a judicial basis for 'a congenial political conclusion,'" and he wanted a plan for implementation.[205] Jackson's law clerk during that year, E. Barrett Prettyman, Jr., recalled 50 years later that Jackson was most concerned with how the Court would reach its result, not with the ultimate result, and that his unpublished opinion, a concurrence drafted while Chief Justice Fred Vinson was still alive, stated that it was "Congress's task to deal with the school situation now that the Court had ruled.[206]

Jackson may have been convinced by Warren's framing of *Brown* as a case involving the "intuitive justice of equality of opportunity," and he must have been impressed by the way Warren united the Court behind him.[207] Warren felt that even a concurrence would weaken the unanimity of the Court, and he was aided here by the fact that Jackson had a heart attack on March 30 and was prevented from completing the concurrence by his illness.[208] Warren visited Jackson in the hospital with a draft of his opinion, and Jackson made editorial suggestions, promising to join the majority. Jackson came straight from his hospital bed to the Court so that the Supreme Court could show the nation it had unanimously ruled in favor of *Brown*.[209] That demonstrates not only his dedication to the Court but his recognition of the importance of *Brown* to the nation.

Conclusion

Jackson's legal career was dedicated to the proposition that law, rather than force, should govern manmade conflict.[210] He communicated this message not only through his work in private practice and in the public sector, but also in giving his time to the legal community in abundance. Jackson had emphatic opinions about the qualities needed to be successful in life, long before he dreamed of playing a role on the national stage. He modeled these goals on American icons such as Ralph Waldo Emerson, who advocated success through individualism.[211] As Jackson phrased it, "Self reliance, self-help, and independence of other people I believe to be the basis of character and essential to success."[212] Perhaps even before he had ascended to the nation's highest court, Jackson had an equally clear vision of the role of a Justice, which was "[t]o maintain the great system of balances upon which our free government is based."[213] Jackson was sophisticated enough to recognize that government, politics, and the law are intricately connected. During the 1932 presidential campaign, he stated that "[s]ound political strategy, like good preparation of a lawsuit, begins by carefully appraising our weaknesses as we do our strength and avoids underestimating the prospects and resources of an adversary."[214]

Education, whether formal or self-taught, was always important to Jackson. At a commencement address at Randolph-Macon College, he told the graduates that "[t]he true usefulness of the educated man is not in resisting all change, but in controlling and guiding the change itself into channels which benefit society. That takes courage."[215] This was certainly the mantra by which he himself tried to live. A very significant influence in his life was his teacher, Miss Willard, who encouraged him to blossom academically, but most of his professional opportunities resulted from his relationship with Roosevelt. That friendship deeply affected his life. However, it was always Jackson's own skills and industry that enabled him to achieve recognition in every position he held. He was fiercely proud of these achievements and definitely possessed the initiative and skills to have achieved great things even had he never met Roosevelt. One comment Jackson made about Roosevelt shortly after the President's death might also apply to Jackson himself at the end: "Death had been kind. His great work was done. If he was not going to be able to carry on, he would not have desired life."[216]

Jackson understood that the Court as an entity was more powerful than its individual parts. Moreover, Jackson recognized that the Court could and had made mistakes, saying, "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."[217] Similarly, he said in *Barnette*, "We act in these matters not by authority of our competence but by force of our commissions."[218] It is important to remember that Jackson and his cohorts were men with ordinary flaws, despite their legal skill, and were not, in fact, infallible. Jackson, the brilliant writer, was known for drafting his own opinions, partly to organize his own thoughts but partly as a threat to be used for bargaining for certain arguments or language, since some Justices resented concurrences nearly as much as dissents.[219] Whether Jackson recognized that his squabbling with other Justices was something that hurt the Court is something his biographers do not appear to have addressed.

Jackson's independent spirit continues to be relevant today through his writings. As mentioned above, he was cited frequently during both of the recent confirmation hearings.[220] He is certainly remembered as a Justice who wrote eloquent prose that is as readable today as when it was written sixty years ago. I suspect that, as a former trial lawyer who took great pride in his work, he would be equally gratified to know he is remembered "as the judiciary's 'voice of the bar'" for his

commitment to his fellow lawyers.[221] He is also credited, through his legal work in Nuremberg, for significant contribution to the international human-rights movement.[222] Although Jackson did not achieve his ambition to be Chief Justice, both he and his writings—opinions and dissents—are better remembered than the names of Stone and Vinson under whom he served, demonstrating that ideas are more enduring than titles.

Jackson did not fully recover from the heart attack that had hospitalized him during the *Brown* decision making, and he died in October 1954. Despite differences during his life, Jackson's colleagues all paid him tribute by accompanying his body back to Frewsburg, New York, where he was buried next to his parents and grandparents. Frankfurter, his colleague and occasional adversary, summarized Jackson's career in a very apt epitaph: "He had the habit of truth-seeking and faithfully served justice."[223] Speaking for those who had not been privileged to work with Jackson during his lifetime, Justice Potter Stewart offered these words: "Yet I personally know him only as some day all must know him—through the legacy of his written words."[224]

*With thanks to the Hon. Joseph A. Greenaway, Jr. of the United States District Court of New Jersey, who somehow made time to teach a seminar at Rutgers Law School on the Supreme Court and who encouraged me to pursue this topic. I would also like to acknowledge the Hon. Edward F. Harrington of the United States District Court of Massachusetts, for whom I clerked last year and who shares my love of history, as well as my mother, Stephanie L. Martin, who has always been my most valued history teacher. I also appreciate the time that Professor John Q. Barrett of St. John's University Law School took to read this essay.

ENDNOTES

[1]323 U.S. 214 (1944).

[2]Then–Judge Roberts told Senator Patrick Leahy (D-VT) that Robert Jackson was one of the Justices he most admired. *Roberts Reveals Views on Legal Questions*, Sept. 14, 2005, *available at* http://www.cnn.com/2005/POLITICS/09/14/roberts.quotes/ (last visited Dec. 31, 2007). A few months later, then Judge Alito responded to a question on how he would analyze the President's exercise of wartime powers by saying that

> he would first read the statute. He would then consult precedent. He would next proceed if necessary to constitutional interpretation, including separation of powers analysis using the framework of Supreme Court Justice Robert Jackson's concurring opinion in a high-court case that struck down President Harry Truman's seizure of U.S. steel mills during the Korean War.

Carolyn Lochhead, "Democrats Fail to Pin Alito Down in Final Questioning; Nominee Expected to Be Confirmed to Supreme Court," *San Francisco Chronicle*, Jan. 13, 2006, at A7.

[3]Jeffrey D. Hockett, **New Deal Justice: The Constitutional Jurisprudence of Hugh L. Black, Felix Frankfurther, and Robert H. Jackson** 216 (1996).

[4]*Id.* at 217.

[5]Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** 31 (1958). The Jacksons considered religion to be private. Many years later, when Jackson was appointed Attorney General, an associate compiling biographical information asked for his religion. "'Tell them it is none of their business,' [Jackson] answered, with a smile." *Id.* at 185.

[6]Hockett, *supra* note 3, at 218.

[7]Gerhart, *supra* note 5, at 31.

[8]The Hon. Charles S. Desmond, *The Role of the Country Lawyer in the Organized Bar and the Development of the Law*, in **Mr. Justice Jackson: Four Lectures in His Honor** 21 (1969).

[9]Hockett, *supra* note 3, at 218.

[10]Kent, who wrote the influential nineteenth-century **Commentaries on American Law**, was known as the American Blackstone because he "substitut[ed] much Roman law and civil code" instead of relying simply on common law. Greg Bailey, "Blackstone in America: Lectures by an English Lawyer Become the Blueprint for a New Nation's Laws and Leaders," 1 *Early America Review*, *available at* http://www.earlyamerica.com/review/spring97/blackstone.html (last visited Dec. 31, 2007).

[11]Hockett, *supra* note 3, at 219.

[12]*Id.*

[13]John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson," 68 *Alb. L. Rev.* 513, 521–22 (2005). Interestingly, although this expedited version of law school sounds unusual to us now, the same year that Jackson moved to Albany, Earl Warren was matriculating at law school in

Berkeley, where Boalt Hall had a program for Berkeley alumni offering an L.L.B. degree in one year and a J.D. in two. G. Edward White, **Earl Warren: A Public Life** 15–16 (1982). Biographer John C. Jeffries, Jr. comments that "[u]ntil the early decades of [the 20th] century, American law schools did not require applicants to have a college degree and were actually easier to get into that other undergraduate programs." John C. Jeffries, Jr., **Justice Lewis F. Powell, Jr.** 36 (2001).

[14]At that time, New York's bar required three years of "either office work or law school instruction, or any combination thereof." Hockett, *supra* note 3, at 220.

[15]John Q. Barrett, "A Jackson Portrait for Jamestown, 'A Magnet in the Room,'" 50 *Buffalo L. Rev.* 809, 810 (2002).

[16]Aspiring lawyers in colonial America followed the tradition of English apprenticeship until Wythe's law lectures at William & Mary, which began in 1780, demonstrated the value of a structured course of study. Jean Edward Smith, **John Marshall: Definer of a Nation** 75–78 (1996).

[17]Hockett, *supra* note 3, at 142.

[18]White, *supra* note 13, at 175. The young lawyers he sent to the Roosevelt administration were sometimes known as "Felix's Happy Hotdogs" due to the "red smears" that occasionally tainted anyone in that era with liberal leanings. Henry J. Abraham, **Justices & Presidents** 206 (1974).

[19]J. Woodford Howard, Jr., **Mr. Justice Murphy** 470 (1968).

[20]Phil C. Neal, "A Tribute to Justice Robert H. Jackson: Justice Jackson: A Law Clerk's Recollections," 68 *Alb. L. Rev.* 554, 553 (2005).

[21]320 U.S. 489 (1943).

[22]Neal, *supra* note 20, at 554.

[23]Desmond, *supra* note 8, at 24.

[24]The Hon. Victoria A. Graffeo, "A Tribute to Justice Robert H. Jackson: His Years as a Public Servant Learned in the Law," 68 *Alb. L. Rev.* 539, 541 (2005).

[25]Gerhart, *supra* note 5, at 49.

[26]*Id.*

[27]Barrett, *supra* note 13, at 519. "I got to know him when he was just Frank," Jackson recalled of his first encounters with the young politician from Hyde Park, just ten years his senior. Paul Grondahl, "Albany Law to Honor Famous Alumnus", *Times Union* (Albany, NY), Nov. 7, 2004, at D1.

[28]Barrett, *supra* note 15, at 810. Jackson was an early proponent of a statewide bar association for New York, something that did not exist at that time and he felt would benefit the western part of the state and help modernize the New York state court system. Desmond, *supra* note 8, at 26.

[29]Gerhart, *supra* note 5, at 56.

[30]*Id.*

[31]*Id.* at 60.

[32]Robert H. Jackson, "A Lawyer Looks at Politics," *The Jeffersonian* 6, June 1932, *available at* http://www.roberthjackson.org/documents/0632/ (last visited Dec. 31, 2007).

[33]Gerhart, *supra* note 5, at 58.

[34]Graffeo, *supra* note 24, at 541.

[35]Hockett, *supra* note 3, at 227.

[36]Gerhart, *supra* note 5, at vi.

[37]Hockett, *supra* note 3, at 226.

[38]Although Jackson committed to just six months with the Treasury Department, he soon found himself so busy that he had to devote himself to Washington and "let[] things run themselves in Jamestown." *Id.* at 227.

[39]Gerhart, *supra* note 5, at 64.

[40]Graffeo, *supra* note 24, at 541.

[41]Grondahl, *supra* note 27, at D1.

[42]Gerhart, *supra* note 5, at 68.

[43]*Id.* at 69–70.

[44]*Id.* at 71.

[45]Graffeo, *supra* note 24, at 541.

[46]Gerhart, *supra* note 5, at 85.

[47]Graffeo, *supra* note 24, at 541–42.

[48]*Id.* at 542.

[49]Hockett, *supra* note 3, at 228–29.

[50]*Id.* at 230.

[51]*Id.* A detailed analysis of Roosevelt's Court-packing plan is outside the scope of this essay.

[52]Gerhart, *supra* note 5, at 107.

[53]*Id.* at 122.

[54]Joseph P. Lash, **Dealers and Dreamers** 352 (1988).

[55]Gerhart, *supra* note 5, at 123.

[56]Reed, a Kentucky native, was appointed upon Justice Sutherland's retirement to bolster the New Deal presence on the Court to "uphold federal power, whether directed against property or personal rights." Bernard Schwartz, **A History of the Supreme Court** 241 (1993).

[57]Hockett, *supra* note 3, at 231.

[58]Graffeo, *supra* note 24, at 542.

[59]*Id.*

[60]*Id.* at 543.

[61]Gerhart, *supra* note 5, at 191.

[62]*Id.* at 162.

[63]*Id.* at 167–68. Murphy's loose tongue clearly irritated Roosevelt. Later, planning a simultaneous swearing in ceremony for Murphy to the Supreme Court and Jackson as Attorney General, Roosevelt asked Jackson to expedite the event so that Murphy would not be able to hold another press conference in the interim. *Id.* at 190.

[64]*Id.* at 170.

[65]Howard, *supra* note 19, at 206.

[66]*Id.* at 207.

[67]Gerhart, *supra* note 5, at 174.

[68]Howard, *supra* note 19, at 213.

[69]Supposedly, Roosevelt felt extreme loyalty to him both for past support and because, since Murphy had never been in private practice, he had no employment opportunities or political power base to return to in Michigan. Gerhart, *supra* note 5, at 161–62.

[70]David M. O'Brien, **Storm Center: The Supreme Court in American Politics** 62 (1986; 7th ed. 2005).
[71]*Id.*
[72]Even after Murphy had been confirmed, he insisted on being the center of attention, allegedly leaking to the newspapers that he was being "kicked upstairs" to the Supreme Court because he was unwilling to make the kind of deals with the big political organizations that would get Roosevelt a third term. This infuriated both Roosevelt and Jackson. Gerhart, *supra* note 5, at 189. Jackson himself handled a lot of the behind-the-scenes work preparing the way for the third term, in a partisan way that might not now be considered appropriate for a sitting Attorney General.
[73]*Id.* at 198.
[74]Graffeo, *supra* note 24, at 546.
[75]Hockett, *supra* note 3, at 235.
[76]Graffeo, *supra* note 24, at 546–47. *See also* Robert H. Jackson, **That Man: An Insider's Portrait of Franklin Roosevelt** 82–103 (2003).
[77]Graffeo, *supra* note 24, at 547.
[78]Jackson, *supra* note 76, at 82.
[79]John Lord O'Brian, "Introduction," in Desmond, *supra* note 8, at 13.
[80]Earl Warren, often credited with pulling disparate personalities on the Court together, became Chief Justice at the beginning of the 1953 fall Term, overlapping with Jackson by only a year before Jackson's death in October 1954 (although that year included the critical case of *Brown v. Board of Education*, 347 U.S. 483 (1954)). Warren served for significantly longer with Frankfurter, who retired in 1962 after suffering a stroke, and with Black, who resigned in 1971 at age 85 and died several days later.
[81]Abraham, *supra* note 18, at 199.
[82]The only significant opposition came from Senator Millard E. Tydings (D-MD), bitter that Jackson, as Attorney General, had not prosecuted a columnist for publishing libel against Tydings. Gerhart, *supra* note 20, at 232.
[83]Hockett, *supra* note 3, at 241; Neal, *supra* note 20, at 553.
[84]Neal, *supra* note 20, at 553.
[85]*See* Benjamin N. Cardozo, **The Nature of the Judicial Process** 121–123 (Yale University Press 1949) (1921).
[86]Hockett, *supra* note 3, at 243.
[87]*Id.*; Robert H. Jackson, **The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics** 306 (1941).
[88]Jackson, *supra* note 87, at 306.
[89]*Id.* at 306. The book was written at Roosevelt's suggestion to capture the conflict between the courts and the elected branches during the Court-packing controversy. Hockett, *supra* note 3, at 232.
[90]Jackson, *supra* note 32.
[91]Hockett, *supra* note 3, at 245.
[92]*Id.*
[93]Cardozo, *supra* note 85, at 190.
[94]*Id.*
[95]Schwartz, *supra* note 56, at 248.
[96]Hockett, *supra* note 3, at 289.
[97]*Id.*
[98]Gerhart, *supra* note 5, at 242.
[99]*Id.*
[100]Richard D. Lunt, **The High Ministry of Government** 215 (1965).
[101]Gerhart, *supra* note 5, at 234.
[102]*Id.*
[103]Abraham, *supra* note 18, at 218. Nor was Fred Vinson able to quell dissention after he became Chief Justice in 1946. In fact, some felt he exacerbated it. Philip J. Cooper, **Battles on the Bench** 53 (1995).
[104]323 U.S. 214 (1944).
[105]*Quoted in* Schwartz, *supra* note 56, at 250. *Korematsu* has also been bluntly characterized as one of "the Court's Ten Worst Decisions." Lisa Paddock, **Supreme Court for Dummies** 290 (2002).
[106]320 U.S. 81 (1943).
[107]323 U.S. 283 (1944). This case was decided the same day as *Korematsu*.
[108]Alpheus Thomas Mason & William M. Beaney, **The Supreme Court in a Free Society** 296 (1959).
[109]*Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting).
[110]*Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).
[111]Neal, *supra* note 20, at 553.
[112]*Korematsu*, 323 U.S. at 242, 239 (Murphy, J., dissenting).
[113]*Hirabayashi*, 320 U.S. 81, 82. Frankfurter had pressured Murphy not to file a dissent, for the sake of "the great reputation of this Court," so that there would be no suggestion anyone was "out of step." Howard, *supra* note 19, at 307.
[114]Murphy attacked the justification as "questionable" and based on "military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence." *Korematsu*, 323 U.S. at 236–37 (Murphy, J., dissenting).
[115]Howard, *supra* note 19, at 61. Murphy was Governor General from 1933–35, then U.S. High Commissioner for the Philippines from 1935–36 before returning to Michigan and successfully running for Governor.
[116]*Id.* at 60–61, 66.
[117]*See generally id.* at 60.
[118]*Id.* at 69.
[119]*Id.* at 335.
[120]*Korematsu*, 323 U.S. at 214, 242–43; *see also* John Q. Barrett, "A Commander's Power, a Civilian's Reason: Justice Jackson's *Korematsu* Dissent," 68 Law & Contemp. Probs. 57–58 (2005).
[121]*See* the Hon. Joseph A. Greenaway, Jr., "The Weintraub Lecture: Judicial Decision Making and the External Environment," 51 *Rutgers L. Rev.* 181, 188 (1998).
[122]*Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting); Howard, *supra* note 19, at 301.
[123]*Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

[124]*Korematsu*, 323 U.S. at 225–26 (Roberts, J., dissenting).
[125]Doris Kearns Goodwin, **No Ordinary Time** 322–23 (1994).
[126]*Id.* at 323.
[127]*Id.* at 322.
[128]*Id.* at 322. The implication was that he would not hesitate to do so again.
[129]319 U.S. 624 (1943).
[130]310 U.S. 586 (1940).
[131]*Minersville Sch. Dist. v. Gobitis*, 310 U.S. at 596–98.
[132]*Barnette*, 319 U.S. at 630.
[133]Howard, *supra* note 19, at 294.
[134]*Barnette*, 319 U.S. at 637.
[135]*Barnette*, 319 U.S. at 642.
[136]*Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting).
[137]Michael S. Ariens & Robert A. Destro, **Religious Liberty in a Pluralistic Society** 43 (2d ed. 2002).
[138]*Id* at 44.
[139]*Id.*
[140]Gerhart, *supra* note 5, at 197.
[141]The Hon. John M. Harlan, "Introduction" to "Robert H. Jackson's Influence on Federal-State Relations," *in* **Mr. Justice Jackson: Four Lectures in His Honor** 58 (1969).
[142]*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
[143]Graeme A. Barry, "'The Gifted Judge': An Analysis of the Judicial Career of Robert H. Jackson," 38 *Alberta L. Rev.* 880, 888 (2000).
[144]Jackson, *supra* note 87, at 323.
[145]343 U.S. 579 (1952).
[146]O'Brien, *supra* note 70, at 83.
[147]*Youngstown Sheet & Tube Co.*, 343 U.S. at 635–637 (Jackson, J., concurring).
[148]*Id.* at 640 (Jackson, J., concurring).
[149]This was a labor relations act "by which the government could enjoin a strike for eighty days pending an impartial study." David McCullough, **Truman** 898 (1992–1993).
[150]Mason & Beaney, *supra* note 108, at 58.
[151]*Youngstown Sheet & Tube Co.*, 343 U.S. at 588.
[152]Mason & Beaney, *supra* note 108, at 59.
[153]*See supra* notes 76–78 and accompanying text.
[154]Barry, *supra* note 143, at 901.
[155]O'Brien, *supra* note 70, at 83–84. Later, in a conciliatory overture, Justice Black hosted Truman and the Justices at a party in his home. Truman was "testy" until the food and drink were served, then "turned . . . and said, 'Hugo, I don't much care for your law, but, by golly, this bourbon is good.'" McCullough, *supra* note 148, at 901.
[156]On December 19, 2005, Bush defended himself from critics: "As President and Commander-in-Chief, I have the constitutional responsibility and the authority necessary to protect our country . . . Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it." "Warrantless Wiretapping: Shredding the Constitution," The New American, Jan. 9, 2006.
[157]Carl Tobias, "The Long Reach of *Youngstown*," *Providence J.*, Jan. 26, 2006.
[158]Gerhart, *supra* note 5, at 315.
[159]Whitney North Seymour, "Introduction" to "Robert H. Jackson's Contributions During the Nuremberg Trial," *in* **Mr. Justice Jackson: Four Lectures in His Honor** 87 (1969). Before his death, Roosevelt had promised that the United States would "bring the Axis war leaders to the bar of world justice." Gerhart, *supra* note 5, at 312.
[160]Gerhart, *supra* note 5, at 308–10.
[161]Henry T. King, Jr., "Robert Jackson's Transcendent Influence over Today's World," 68 *Alb. L. Rev.* 23, 25 (2004). King served on Jackson's staff as a prosecutor at Nuremberg.
[162]*Id.*
[163]Gerhart, *supra* note 5, at 314.
[164]King, *supra* note 161, at 25.
[165]Gerhart, *supra* note 5, at 314–15.
[166]*Id.* at 316.
[167]*Id.*
[168]*Id.* at 317.
[169]Moreover, Ramsey Clark, former Attorney General under President Johnson and son of former Supreme Court Justice Tom Clark, a Truman appointee, was vilified for his work on Saddam's defense team (for which he did not accept a penny). *See* "All Things Considered, Weekend Edition: Ramsey Clark for Defense" (NPR radio broadcast Dec. 4, 2005). Clark said "that he was there to do what he could to see that there was a fair trial, which he said was necessary for international legitimacy." Doug Struck, "Hussein Is Unruly as Trial Resumes," *Wash. Post*, Nov. 29, 2005, at A16.
[170]Greenaway, *supra* note 121, at 183.
[171]Hugo L. Black & Elizabeth Black, **Mr. Justice and Mrs. Black** 117 (1986). Black was opposed to Jackson's participation in the Nuremberg Trials, and further believed it was unfair to try the war criminals for actions not defined as crimes when they were committed. *Id.* However, the *ex post facto* aspect was also of great concern to Jackson and most members of the Nuremberg delegation. *See* Gerhart, *supra* note 5, at 342–45.
[172]White, *supra* note 13, at 193.
[173]*Id.* at 193.
[174]The Hon. Lord Shawcross, "Robert H. Jackson's Contributions During the Nuremberg Trial," in **Mr. Justice Jackson: Four Lectures in His Honor** 90 (1969).
[175]Graffeo, *supra* note 24, at 546.
[176]King, *supra* note 160, at 25.
[177]*Id.*
[178]Shawcross, *supra* note 174, at 113.
[179]Gerhart, *supra* note 5, at 332.
[180]Shawcross, *supra* note 174, at 114.
[181]Gerhart, *supra* note 5, at 348.
[182]Shawcross, *supra* note 174, at 114. Biddle had succeeded Jackson as Attorney General, but was forced to

resign in 1945 so Truman could appoint Tom Clark, then given the consolation prize of being named a judge at Nuremberg.

183*Quoted in* Gerhart, *supra* note 5, at 364.

184Justice Robert H. Jackson, Chief of Counsel for the United States, Opening Statement to the International Military Tribunal in Case No. 1, The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring, et al., Nov. 21, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm (last visited Dec. 31, 2007).

185Gerhart, *supra* note 5, at 364 (quoting *The Philadelphia Inquirer*, Nov. 22, 1945).

186Jackson, *supra* note 183.

187Gerhart, *supra* note 5, at 424 (quoting Jackson's Closing Statement to the Tribunal on July 26, 1946). It is important to note, however, that three of the defendants were acquitted, demonstrating that the outcome of the trial was in no way predetermined. King, *supra* note 160, at 28–29.

188Gerhart, *supra* note 5, at 403.

189O'Brien, *supra* note 70, at 63.

190*Id.* at 64.

191Gerhart, *supra* note 5, at 278.

192Schwartz, *supra* note 56, at 254.

193Gerhart, *supra* note 5, at 281–2.

194Hockett, *supra* note 3, at 268.

195*Id.*

196*Id.*

197337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

198*Barnette*, 319 U.S. 624, 641.

199Hockett, *supra* note 3, at 271.

200347 U.S. 483 (1952).

201163 U.S. 537 (1896).

202*See* White, *supra* note 13, at 162.

203*See Strauder v. West Virginia*, 100 U.S. 303 (1880), and *Slaughterhouse Cases*, 16 Wallace 36 (1879). *See also* Richard Kluger, **Simple Justice** 669, 681 (1976).

204Kluger, *supra* note 201, at 669.

205*Id.* at 681.

206Gordon B. Davidson, Daniel J. Meador, Earl E. Pollock, E. Barrett Prettyman, Jr., "Supreme Court Law Clerks' Recollections of *Brown v. Board of Education II*," 79 *St. John's L. Rev.* 823, 840, 847 (2006).

207White, *supra* note 13, at 170, 165–167.

208*Id.* at 167.

209Gerhart, *supra* note 5, at 468.

210*Id.* at 455.

211*Id.* at 62.

212*Id.* at 62.

213Hockett, *supra* note 3, at 281.

214Jackson, *supra* note 32.

215Gerhart, *supra* note 5, at 149.

216Jackson, *supra* note 76, at 155.

217Schwartz, *supra* note 56, at 91, 249.

218*Barnette*, 319 U.S. at 640.

219O'Brien, *supra* note 70, at 253.

220*See supra* note 2 and accompanying text.

221Graffeo, *supra* note 24, at 546.

222King, *supra* note 160, at 31.

223Gerhart, *supra* note 5, at 307.

223The Hon. Potter Stewart, "Robert H. Jackson's Influence on Federal-State Relations," in **Mr. Justice Jackson: Four Lectures in His Honor** 63 (1969).

The Grapes of *McGrath*: The Supreme Court and the Attorney General's List of Subversive Organizations in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951)

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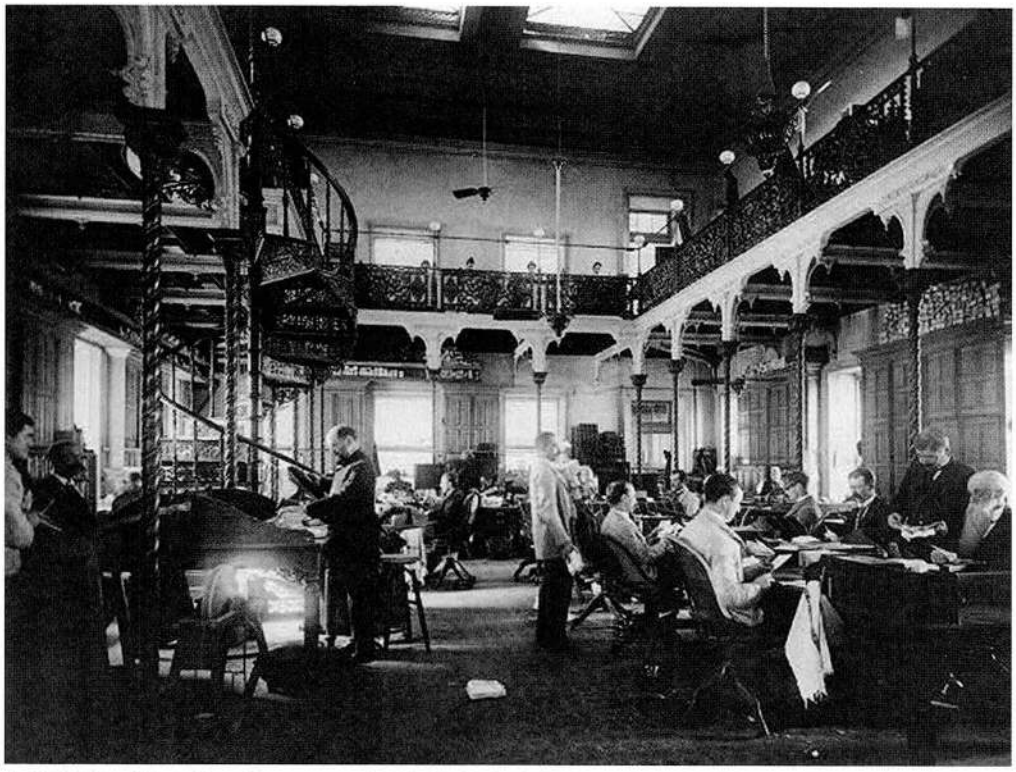
The so-called Attorney General's List of Subversive Organizations (AGLOSO) was one of the most central and widely publicized aspects of the post–World War II Red Scare, which has popularly—if inaccurately—become known as "McCarthyism." Like many other elements of the Red Scare, the AGLOSO in fact predated the emergence of Senator Joseph McCarthy on the national political red-hunting scene. It originated in President Harry Truman's Executive Order 9835 of March 21, 1947, which required all federal civil-service employees to be screened for "loyalty" and specified that one criterion to be used in determinations that "reasonable grounds exist for belief that the person involved is disloyal" would be a finding of "membership in, affiliation with or sympathetic association" with any organization determined by the Attorney General to be "totalitarian, Fascist, Communist, or subversive" or advocating or approving the forceful denial of constitutional rights to other persons or seeking "to alter the form of Government of the United States by unconstitutional means."[1] Beginning in late 1947, the federal government began publishing AGLOSO lists, which ultimately reached almost 300 organizations, without offering the targeted groups either hearings, specific charges, or advance notice. This led *Washington Post* editorial writer Alan Barth to term the Attorney General's AGLOSO mandate "perhaps the most arbitrary and far-reaching power ever exercised by a



In 1947, President Harry Truman mandated that federal civil-service employees be screened for loyalty, with one consideration their membership in, affiliation with or sympathetic association; with organizations determined by the Attorney General to be Communist, Fascist, totalitarian, or subversive. Pictured are government postal workers in the 1940s.

single public official" in American history, effectively allowing that official to "stigmatize" and "in effect, proscribe any organization of which he disapproves."[2] Although the only officially announced purpose of the AGLOSO was to provide guidance in federal civil-service loyalty determinations, it quickly became used by a wide variety of public and private organizations as the basis for discriminating against persons alleged to be affiliated with listed organizations and the groups themselves. Thus, it was utilized by state and local governments, the military, defense contractors, hotels, the Treasury Department (in making determinations regarding tax exemption) and the State Department (in making passport decisions), to cite only a few of many examples.[3] FBI Intelligence Division official A. H. Belmont wrote to Assistant FBI Director D. M. Ladd on March 18, 1952 that AGLOSO listings had been "found from experience to have substantially impeded the effectiveness of the [designated] organization."[4] Both scholars and the general press have clearly agreed with this assessment. Various scholars have written that the AGLOSO, which was massively publicized in the media, became what amounted to "an official black list"[5] and "usually a kiss of death"[6] to listed groups, which came to have in the public mind "authority as the definitive report on subversive organizations," understood as a "proscription of the treasonable activity of the listed organizations"[7] and the "litmus test for distinguishing between loyalty and disloyal organizations and individuals."[8] Thus, an April 28, 1949 *New York Times* story about the listing of additional AGLOSO organizations was headlined "Government Proscribes 36 More Groups as Subversive, 23 of Them 'Communist,'" while a number of files related to the AGLOSO held in the Eisenhower presidential library are marked "blacklisted organizations."[9] In an article entitled "What the Attorney General's List Means,"

the November, 1956 *Elks Magazine* began by accurately noting that "there are few Americans who have not heard of 'the Attorney General's subversive list'" and concluded by summarizing the AGLOSO's clear message: "There is no excuse for any American citizen becoming affiliated with a group on the Attorney General's list today."

In April 1951, in a decision featured in front-page headlines across the country, the U.S. Supreme Court struck the first major blow against the AGLOSO, in a complex and ambiguous decision, *Joint Anti-Fascist Refugee Committee v. [Atorney General Howard] McGrath*,[10] which overruled six lower court decisions and required that three designated organizations be allowed to contest their listings. The High Court ruling concerned the Joint Anti-Refugee Committee (JAFRC), the National Committee on American-Soviet Friendship (NCASF), and the International Workers Order (IWO), three clearly left-wing organizations, which were among the largest and most prominent AGLOSO-designated groups.

The JAFRC had been licensed in 1942 to provide medical aid for Spanish Civil War loyalist refugees in France by President Roosevelt's War Relief Control Board and, like the other organizations, had been granted tax-exempt status by the Treasury Department which had been withdrawn following its AGLOSO designation. The JAFRC included Communists in its leadership, but, like the other two organizations, was never accused of illegal activities. However, early on it attracted the attention of the House of Representatives Committee on Un-American Activities (HUAC), resulting in 1946 contempt-of-court sentences against its entire leadership for failing to supply HUAC with subpoenaed records. The NCASF was organized to promote Soviet-American friendship at a 1942 New York City mass meeting which received greetings from President Roosevelt and Vice President Henry Wallace, was sponsored by three Cabinet members, and was attended by 20,000 people, who heard speeches from New York Governor Herbert Lehman, New York City Mayor Fiorello Laguardia, and conservative American Federation of Labor President William Green. A 1944 NCASF dinner held to celebrate the twenty-sixth anniversary of the Soviet Army received congratulatory messages from five American generals, including Dwight Eisenhower and Douglas MacArthur; its membership included at least three Congressmen and Secretary of the Interior Harold Ickes. During the Cold War, the NCASF became widely viewed as an outlet for Soviet propaganda and its director was found in contempt of Congress in 1946 for failing to provide HUAC with subpoenaed records. The IWO, the largest organization ever AGLOSO-listed while still functioning, was a fraternal insurance benefit society chartered by the state of New York that, although clearly under very substantial Communist Party (CP) influence, enrolled over one million Americans (fewer than five percent of them CP members) between 1939 and 1950. It was praised during World War II by a variety of public officials, including Ickes and Senator Robert Wagner (D-NY), was awarded a Treasury Department certificate of merit for selling almost $300,000 in war bonds, and had repeatedly received high evaluations in regular reviews by New York state and private insurance raters.[11]

Each of the three organizations had originally filed separate suits against the Attorney General and other federal officials in federal district court in Washington, D.C. in 1948 and 1949, maintaining that their listing had unconstitutionally denied them free-speech and due-process rights by damaging their ability to conduct legitimate activities, by impairing their reputations and fostering a wide range of reprisals against them, and by depriving them of any opportunity to contest their designations. For example, with regard to First

The Joint Anti-Fascist Refugee Commission had its tax-exempt status withdrawn once it was placed on the Attorney General's List of Subversive Organizations (AGLOSO). It had been licensed in 1942 to provide medical aid for Spanish Civil War loyalist refugees in France by President Roosevelt's War Relief Control Board. Pictured here, a Spanish Red Cross poster asks for support for imprisoned antifascists and their families in 1936.

Amendment rights, the NCASF maintained that it and its affiliates had been "seriously frustrated and unduly burdened" in exercising its First Amendment rights, as it had "lost numerous members, officers and sponsors; lost public support; lost contributions; lost attendance at meetings; lost circulation of their publications; lost acceptance by colleges, schools and organizations of their exhibits and other material; have been denied meeting places; have been denied radio time;" lost their Federal tax exemption, costing "large sums of money which they would otherwise have received as contributions;" and lost the ability to "get members and support from federal employees," who feared that their "employment would be jeopardized." Beyond the alleged damage to their First Amendment rights, the three organizations maintained that their Fifth Amendment due-process rights had been violated because the government's AGLOSO designations were arbitrary, especially by not

granting them hearings or other procedures allowing contestation of their listings. Thus, the IWO maintained that its listing was "without warrant in law" and "without the slightest basis in truth or in fact and was made without notice or opportunity to be heard, without finding of fact or conclusions of law and without any prior or accompanying statement of explanation." Both the NCASF and the IWO explicitly denied that their activities provided any basis for their AGLOSO designations, while the JAFRC did so implicitly by describing its activities as solely dedicated to aiding Spanish refugees.[12]

The Justice Department filed two-sentence rejoinders to each of the three lawsuits, simply maintaining that the complaints failed to "state a claim" against the government "upon which relief can be granted." In three separate federal district court rulings in 1948 and 1949 judges upheld the government. The JAFRC suit was dismissed without explanation in June 1948. In a February 1949 ruling in the NCASF case, Judge Jennings Bailey declared that there could be no legal remedy for the "indirect effect" of AGLOSO designations upon organizations, which did not "constitute legal damage" or in any way subject them "to any civil or criminal liability" and which were related to a governmental program whose sole purpose was to legitimately facilitate the administration of federal loyalty screenings. In April 1949, Judge Matthew McGuire similarly ruled against the IWO, holding that it lacked standing to sue because it had shown no "unlawful invasion of some legally protected right," as the AGLOSO listing was not a "controlling" government action, but only the equivalent of "advice" to the President which, by implication, governmental agencies and others could utilize or not at their discretion.[13]

Things went little differently in the federal court of appeals for the District of Columbia, although here the Justice Department gave a slightly longer response, which included sweeping claims that the AGLOSO was based on executive powers not subject to judicial review and that, in any case, the AGLOSO inflicted no concrete damage on the complaining organizations that required a legal remedy. In the JAFRC appeal, for example, the Department maintained that the AGLOSO designation imposed "no restrictions whatever" upon the JAFRC, which remained free to conduct its business, raise money, voice its views and publish its beliefs, as the listing issued "no directive to other federal, state, or municipal officials" and did not "command the appellant to do or to refrain from doing anything." Moreover, the Department maintained, the Attorney General was constitutionally authorized to "designate appellant as a communist organization" as an agent of the President in carrying out his responsibilities to regulate admission to the civil service, and "certain executive powers" were "not subject" to court review, "clearly" including the "right to speak forth freely to the nation and inform it of groups deemed to be operating against the best interests of our constitutional government itself." The Department added that it was "untenable" to assert that the Attorney General could "under any circumstances be restrained" from informing the government and the nation about organizations that posed a "threat to our democratic processes," and that although such power "might be subject to abuse," the only remedy was "the elective process," or impeachment of the President. In each case, the appeals court endorsed the government's position. In the JAFRC case, for example, a three-judge appeals panel declared by a 2–1 vote on August 11, 1949 that the organization's complaint failed to "present a justiciable controversy" because the AGLOSO listing and Truman's Loyalty Order "command[ed] nothing of the Committee," denied it "no authority, privilege, immunity or license," subjected it to "no liability, civil or criminal," and "denied no one" any "property rights" or "freedom of speech and assembly." The decision added that, in promulgating the AGLOSO, the Attorney General had merely complied with

presidential directives in providing "information and advice" in pursuit of the government's legitimate interests in protecting the civil service from "disloyal and subversive elements," that the Attorney General had only undertaken "that which the President could have done for himself," in which case "his action would have been within the realm of his executive power, not subject to judicial review," and thus the AGLOSO's "essential character" was that of "acts of the President himself," which could not be "challenged legally." The Court further dismissed all challenges to procedural aspects of the AGLOSO's promulgation and publication, holding, for example, that lack of hearings implied no due-process lapses because the AGLOSO was a "necessary" step in implementing the loyalty program, thus affording "no ground for judicial review" if, as one of its "unavoidable consequences," it happened to "affect adversely" listed organizations "against whom it is not directed." In a vigorous dissent that was twice the length of the majority holding, Judge H. W. Edgerton maintained that the AGLOSO designation of the JAFRC was "contrary to fact, unauthorized and unconstitutional" for numerous reasons. Thus, he argued that "helping former Spanish Republicans is not evidence of disloyalty to the government," that the designation of the JAFRC lacked "basic standards of fairness" by failing to grant notice or hearing, and that the designation was "defamatory" and had unconstitutionally imposed a "substantial clog" on the group's First Amendment rights without any showing of "clear and present danger." The federal appeals court simply cited its JAFRC ruling in rejecting the NCASF appeal in October 1949, and it relied heavily on it in similarly rebuffing the IWO in March 1950.[14]

Following the appeals court rebuffs, the three organizations appealed to the Supreme Court, reiterating their previous arguments, adding that their cases were highly significant given the general context of increasing pressures on civil liberties arising in the Cold War atmosphere, and maintaining that the lower courts had erred in holding that the government bore no responsibility for injuries resulting from their AGLOSO designations. Thus, the NCASF urged the Court to intervene because the issues raised were of "great public importance," since its case presented "another application of the growing tendency of the making of administrative decisions," all "invariably justified by a claim of the needs of 'internal security,'" which "seriously impair individual liberties" without "procedural safeguards" and "on the basis of secret evidence locked in the bosom of the administrator and [therefore] never susceptible of rebuttal by those affected." It maintained that its injuries were caused by governmental officials "stimulating others to take action," and that the Constitution nullified "sophisticated as well as simple-minded encroachments on the freedoms of speech and assembly" and that therefore the contention that the Constitution distinguished between "indirect" and "direct" abridgement of guaranteed rights lacked any legal foundation. Moreover, it maintained, the Attorney General's "unfettered discretion" with regard to making AGLOSO designations meant that he could "list any organization which incurs his displeasure," all while claiming the right to "resist any inquiry into his illegal actions." The NCASF brief concluded by arguing that the Constitution gave "no power to any government official to list organizations as subversive or disloyal" and, citing the 1943 Supreme Court case of *West Virginia Board of Education v. Barnette* (holding that government had no right to demand orthodoxy of the citizenry's political beliefs, such as compelling school children to pledge allegiance to the flag), declared that the AGLOSO effectively allowed the Attorney General "to make himself a judge of political orthodox and loyalty" and to "inform the public that certain ideas are officially discouraged and prohibited," thus violating "the most revered traditions of our Constitution."[15]

In its seventy-eight-page petition for certiorari, the JAFRC maintained that it had

suffered concrete adverse impacts upon its property and constitutional rights. It also argued that because the "executive power is no more immune from judicial review" than any other form of governmental action, it had legal standing and its grievances did present a "justiciable controversy." The JAFRC termed it "immaterial" that the injury it had suffered was "occasioned by publicity and [that] respondents' conduct did not assume the more formal, orthodox, and traditional forms of governmental action," because the "prestige and the power" behind a "label attached and disseminated by an official agency of the government" was especially damaging. The JAFRC urged that "there must be some limits to the use of prestige and power of high public office to stigmatize individuals and organizations," and that a contrary holding could even allow the AGLOSO to list "religions or races as well as organizations" and to permit "the process of judicial review, which in this country is the cornerstone of constitutional government," to be "circumvented upon every occasion when officials conceive some ingenious or novel mode of wielding power." The brief also rejected claims that the AGLOSO only concerned civil-service employees and did not directly threaten First Amendment rights, on the ground that "the purpose of the publication of the list" was to "affect the freedom of thought, expression, and association of every organization labeled or capable of being labeled as 'subversive' by the Attorney General and to every person associated with such an organization."

The Justice Department responded to the briefs with short responses that urged denial of certiorari by reiterating its stance that no grounds existed to consider the lawsuit because "no justiciable controversy" was involved and the organizations had no legal standing because they had suffered no injury at the hands of the government. In its response to the JAFRC brief, for example, the Department maintained that the AGLOSO "in no way" changed the JAFRC's "existing or legal status," imposed "no regulation or directive limiting the operation or conduct of petitioner's affairs," included "no directive to other federal, state, or municipal officers which in any way subjects petitioner to the contingency of future administrative action," and subjected "neither petitioner nor its members to any criminal or civil penalties, either immediate or postponed." Moreover, the government maintained, any damage to the JAFRC's "advantageous relationship with others" alleged to stem from its AGLOSO designation "largely" arose "from the force of public opinion and not from the direct action of respondents." And in any case, it was legally "well settled that public officials are absolutely privileged to publish even false and defamatory matter in the exercise of official duties" and it was "plain that this alleged defamation was an official communication as to matters within the authority of respondents."[16]

The Supreme Court separately granted certiorari in each of the three cases during 1950, leading to another series of exchanges of legal briefs in which the three organizations and the Justice Department reiterated and elaborated upon their prior arguments, often in far sharper terms that reflected the growing Cold War tensions associated with the outbreak of the Korean War in June 1950 and Senator Joseph McCarthy's appearance on the anti-Communist scene in February 1950. Thus, in its September 1950 brief, the NCASF argued that the AGLOSO and the Appeals Court ruling that sustained it were "incompatible with a government of laws and freedom," as "without procedural safeguards, on the basis of secret evidence locked in the bosom of an administrative officer and never susceptible of rebuttal by those affected, and without fulfilling any legitimate governmental purpose" the government had "made an auto-da-fe for the ideas espoused" by the NCASF and the Appeals Court had only "heaped fuel on the flames." Responding to the lower court's ruling that it had no standing to sue because it had suffered no direct injury from the AGLOSO, the brief

characterized such reasoning as effectively holding that First Amendment freedoms required no judicial protection from the government so long as they were abridged by "sophisticated" and "subtle" indirect methods and by "insidious" pressures such as those "here employed," such as an official "blacklist" and "index," rather than "by an outright interdiction." Therefore, the NCASF argued, the appeals court, reflecting a "callous attitude towards the right of political dissent" and mixing "bad logic with misread precedents," had committed the "fundamental constitutional error" of failing to "discharge its primary obligation to give vitality to the Bill of Rights" and translate it into "living law." Thus, upholding its ruling would "imply that the courts have virtually withdrawn from the function of protecting civil liberties."

According to the NCASF brief, the impact of an AGLOSO listing upon an organization could be compared to that of a government "requirement that Jews wear arm-bands," effectively embodying in both cases an official determination that the targeted group or individual "is obnoxious to the government" and an intent to stimulate "the public to shun or harm it," thus presenting as "blatant an instance as ever there was in which governmental authority seeks to censor unpopular ideas by indirect and unhanded efforts." Especially given the real-world impact of the AGLOSO upon groups, the brief maintained that the AGLOSO effectively constituted an official government "regulation" and was thus fatally flawed by its "total disregard of due process" by giving the Attorney General "unfettered discretion," which allowed him to list "any organization which incurs his displeasure," regardless of its aims, activities, or loyalty, and by fostering the "irrational and dangerous" practice of threatening federal employees' jobs for their organizational affiliations rather than their individual performances. Clearly referring to Senator McCarthy, the brief termed the loyalty program's use of associations to judge employees the "stock-in-trade of irresponsible persons who are currently causing the demoralization of the federal service and the blasting of individual reputations and careers."[17]

In its October 1950 brief, the IWO maintained that "in light of the realities of today," it was "the sheerest sophistry for the Government" to maintain that the IWO lacked standing because, for example, AGLOSO designation did not compel anyone to resign from the IWO or to cancel his insurance, as the First Amendment included in its protection of American citizens against government actions those that limited their freedoms by "not only direct restraints but indirect ones as well." In its September 1950 brief, the JAFRC also rejected the claim that the AGLOSO had inflicted no "direct" injury upon it, maintaining that it put "civil service employees and applicants on notice that 'association' with the JAFRC will result in ineligibility," and that in the "political arena," the "intended and actual effect" of being listed was to weaken or destroy "any efficacy among the electorate that such organizations might possess." The brief concluded that even the "most elementary notions of fair play dictates that before a group of Americans may be officially stigmatized as 'disloyal' or 'subversive' they should be heard in their own defense."[18]

Previous government briefs defending the AGLOSO had generally been short and almost casual in tone. However, the Supreme Court's decision to hear the cases apparently came as a considerable shock to the Justice Department, which responded to the JAFRC brief with a fifty-one-page reply, which it incorporated in briefer responses to the NCASF and the IWO. The Department essentially declared that the AGLOSO was a "political" act promulgated by the President in pursuit of his constitutional powers to protect the nation and was therefore completely beyond judicial review and subject to correction only by elections or impeachment. The reply also considerably fleshed out the Department's position that the JAFRC lacked legal standing to challenge the AGLOSO and that "no justiciable controversy"

existed because the "list" allegedly failed to directly impose any concrete penalties on the organization, as it contained no "directive" to "federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action" or any "criminal or civil penalties either immediate or postponed," had no "legally operative effect on First Amendment rights," and did not even require federal employees to "disassociate themselves from petitioner's activities" or "bar other federal employees from becoming members," as it simply indicated that JAFRC affiliations "may or may not be helpful" in making federal loyalty determinations "based on all the evidence." In any case, according to the Department, "well settled" law established that "utterances" made by public officials "are absolutely privileged" against legal assaults "irrespective even of a claim of malicious motivation," and since here the Attorney General was acting "as the agent and alter ego of the President in the exercise of his primary executive power," his act was a "political" one that was "beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment" or via "the elective process." This was especially so at present, the brief argued, since Cold War "tension and danger demands the utmost vigor and vigilance on the part of the President to take action which he deems required in the interest of national safety" and here he sought only to exercise his "constitutional and statutory authority" to regulate the "employment and discharge" of federal employees, which were "internal administrative matters concerning which the United States is free to act as it pleases without judicial compulsion or restraint at the insistence of an outsider such as petitioner." The Department maintained that it was a "complete distortion of the intent and purpose" of the AGLOSO to "conceive of it as a 'blacklist' calculated to injure petitioner by harassment and vilification," and that any "indirect consequences of public disclosure" were beyond "the purview of the First Amendment," which banned interference with free speech but did not state that "Congress or the Executive may not inform the public" or seek to "protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made by or to an investigating body." Essentially, the Department maintained, the JAFRC sought to restrain the Attorney General, who had "been directed by the President to determine and publish" the AGLOSO (in fact Truman's order made no reference to publication), from complying, as was his "clear duty under the Constitution," but "determinations made by the heads of department in the fulfillment of that duty are essentially political, not judicial, in nature" and were "decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review."[19]

The Supreme Court heard consolidated oral argument in the three challenges to the AGLOSO's constitutionality on October 11, 1950, with both the *New York Times* and the *Washington Post*, quite unusually, reporting the developments in lengthy news stories the following day. Only eight Justices appeared at the Bench to hear the cases, as Tom Clark, the former Attorney General who had overseen the AGLOSO, abstained due to conflict-of-interest concerns. Former assistant attorney general O. John Rogge, representing the JAFRC, denounced the "list" as a "star chamber" technique that made the Attorney General's "whims final and correct," while NCASF attorney David Rein termed the AGLOSO a "kind of censorship," currently "in its heyday as a technique for suppressing political dissent," which proclaimed that "certain persons, organizations, literature, or doctrine[s] are heretical, disloyal, subversive, or otherwise officially obnoxious." After IWO attorney Allen H. Rosenberg declared that his organization was the "only fraternal benefit" society in the country that banned segregation and welcomed "the Negro people into membership," Justice Robert H. Jackson inquired who might be excluded from

the organization; when Rosenberg responded, "perhaps professional strikebreakers," Jackson dryly retorted, "They might not be very good insurance risks anyway."

Solicitor General Philip Perlman maintained for the government that careful investigation had preceded the AGLOSO's promulgation, and he denied that any "wholesale blacklisting" of organizations had followed it or that the plaintiff organizations had suffered injury real enough to provide them legal standing to challenge it. Perlman rejected Rogge's contention that AGLOSO's real purpose was to "regiment the American people," instead maintaining that its sole purpose was to "protect and safeguard our form of government" and that it served only as a "guide" and but "one element" in making federal loyalty determinations. When Justice Hugo Black asked Perlman if even the Catholic church could be listed, the Solicitor General said it could. Moreover, under questioning Perlman conceded that since listed organizations had no right to a hearing or appeal, their only remedy was "none" other than to have "the people elect another President who will appoint another Attorney General who will take it off." Justice Felix Frankfurter said the "crux" of the cases was that listed groups were denied a hearing, to which Perlman responded that hearings would "ruin the whole loyalty program," since it would take "years and years" to settle the status of even a single group.

The AGLOSO cases were clearly viewed by the Supreme Court judges and their clerks as simultaneously extremely divisive, important, and politically explosive from the very beginning, according to both the public record of the Court and the files of Supreme Court Justices that became available after their retirement and/or deaths. Two Justices, Frankfurter and Jackson, became so frustrated by the Court's handling of the cases that, as discussed below, they lashed out at their colleagues in extraordinarily harsh terms. Memos to the Justices from their clerks advising them concerning whether to grant "cert," and on the merits of the cases once the Court had decided to consider them, reflect significant division among the clerks and between the clerks and their Justices and, above all, an acute sensitivity to the political ramifications and importance of the issues involved.[20]

In two instances, Justices rejected advice from their clerks that the Court use the recent passage of the 1950 McCarran Act, which provided for hearings before the newly created Subversive Activities Control Board (SACB) and the right to seek subsequent judicial review before the government listed organizations (outside of specific consideration with regard to government employment) as communistic, as an excuse for either indefinitely delaying any ruling on the cases or for backing the government (despite the clerks' conclusions that the AGLOSO organizations had valid cases). Thus, in an undated eight-page memo focused on the NCASF case apparently written immediately before the Court heard oral argument on October 11, 1950, one of Justice Harold Burton's clerks (initials MS) concluded that there was "no doubt" the organization had raised a "justifiable" issue, since its AGLOSO listing was "just about to wreck" its mission, the Attorney General's procedure "did not meet the procedural requirements" of Truman's order calling for "appropriate investigation and determination," and there was "no reason" why "relief cannot or should not be given." However, he recommended that the Court should seek to avoid the "unpleasant chore" of rebuking the executive by seeking governmental assurance at oral argument that, due to the McCarran Act, it would either "rescind the old [AGLOSO] list" and thus moot the existing cases or else "promise" to utilize the Act against the plaintiffs, in which case "these proceedings should be stayed pending" the completion of SACB hearings and the possible judicial review guaranteed under it. The clerk concluded that if the SACB found the JAFRC "subversive and if that finding is upheld by the courts, the merger of the damage from the two lists would make this case moot,"

while if the JAFRC was found "to be lily white, and if the Attorney General persists in leaving the old list stand," then the JAFRC "would still have a cause of action."

A fundamentally similar thirty-three-page October 9, 1950 memo from one of Frankfurter's clerks also evoked the McCarran Act to urge the Court to avoid rejecting the government's arguments (advice that Frankfurter ultimately rejected, just as Burton rejected the above-discussed recommendation of his clerk). Frankfurter's clerk declared that the complaining organizations had "fulfilled the requirements for a justiciable controversy" and had suffered "very real" harm, which had "substantially if indeterminately" reduced the "volume of constitutionally-protected controversial ideas 'competing in the market-place'" and thus raised a "public as well as private interest in allowing the suit." However, he concluded that the Court should "withhold relief on the ground that insufficient justification has been shown for interference with this executive function at this particular time and in these particular instances," above all because "when considerations arising" from the McCarran Act "are placed in the scales, it seems to me tolerably clear that the Court should not now intervene."

Justice Reed also ignored the advice of one of his clerks (initials BAM), although in the reverse direction. While the Court was considering whether to grant "cert" in the JAFRC case, Reed's clerk wrote a memo arguing that the JAFRC had clearly "lost property" interests due to its AGLOSO listing and that the loyalty order had given the Attorney General an "awful power," whose procedures were "squarely at odds with the most rudimentary notions of due process and fair play." Although, he argued, the JAFRC was a "genuinely Communist and 'subversive' outfit" and "there would be no doubt but that after [an administrative or judicial] hearing, its designation would remain as 'subversive,'" the "arbitrary power" granted the Attorney General "to brand with this mark of the pariah is so dangerous" that it was in the "direct tradition of the medieval heresy court—and inconsonant utterly with whole philosophy of Anglo-American law." He concluded that before allowing an official to publish "his black list of heretical organizations, I should require that they at least be given an opportunity to hear the charges and meet them before their reputation is ruined, their property made valueless, and their existence jeopardized." Reed voted not to grant certiorari and, later, against the organizations' claims.

In other instances, the Justices accepted impassioned recommendations from their clerks. Justice William Douglas was advised by a clerk (initials WMC), when the Court was considering hearing the JAFRC's appeal in early 1950, that "it is not necessary to labor the point that this is one of the most important certs of the year," especially because "these days, there are few more serious charges that an organization or person is Communist" and that it appeared that the Attorney General had abused his authority by publishing the AGLOSO and ignoring "rudimentary fairness" by denying the JAFRC "an opportunity to be heard before listing it as subversive or communist." One of Justice Robert Jackson clerk's (initials AYC) similarly advised him to grant cert in the JAFRC case, terming the questions raised therein "of great public importance and significance." According to the clerk, the existing AGLOSO procedure amounted to a "method of prescribing orthodoxy in thought," and what made the Attorney General's powers "so frightening" was the "complete lack of any of the usual trappings of due process." Clearly referring to Jackson's service as a prosecutor of Nazi war criminals at Nuremberg, during which hearings were held before organizations were labeled "Nazi," the clerk added, "I would find it embarrassing, to say the least, to try to explain why the German organizations were given a complete trial" while "American organizations are not entitled to one here."

The Court's records indicate extraordinary, intense, and prolonged divisions once the Justices began to ponder the cases following

the October 11, 1950 oral argument. While sometimes contradictory, these records suggest that, although the Justices discussed the cases on October 14, quite unusually they did not vote until a later meeting on either October 16 or October 21, and that, after first deadlocking 4–4 (effectively upholding the lower court rulings by failing to overturn them), ultimately voted 5–3 against the government when Justice Jackson changed his position. Notes taken by Douglas and Justice Stanley Reed at the October 14 conference indicate that the three dissenting judges—Reed, Chief Justice Fred Vinson, and Justice Sherman Minton—agreed that the three complaining AGLOSO organizations either had "no standing" to sue (Vinson's view) or, if they did, had "nothing to sue for" (in Minton's words) because (in Reed's words) "none" of their constitutional rights had been "violated" and thus there was no "actual controversy."

The opposite position was articulated by Douglas, Burton (who maintained that the Attorney General "cannot without some hearing call them subversive") and Black (who declared that "these organizations have been destroyed" and that no governmental officials could exercise the powers involved in the case "without hearings, evidence, and the right to be heard," since such a proceeding "runs counter to due process and our notion of fairness"). Jackson's comments were highly ambiguous, suggesting that an AGLOSO listing amounted to little more than "abuse piled on to the organization" and "one of the risks" that organizations had to face. His primary concern was that individuals who faced loyalty dismissal proceedings due to AGLOSO ties have the right to "challenge the rating of the organization" and show it was not, in fact, "subversive," and therefore he intended to "wait on these three [organizational] cases until the Court votes on [the case of Dorothy] Bailey," a loyalty dismissal proceeding about which the Court also heard oral argument on October 11, 1950. The tally sheets maintained by several of the Justices strongly suggest that Jackson at first voted against granting relief to the three organizations: Both Vinson's and Reed's records show the vote at 4–4 (with, in Reed's records, a vote for granting relief by Jackson erased and replaced by an opposite vote), while Burton's tally shows a vote by Jackson against relief erased and replaced by a positive vote, with the final vote seemingly dated October 16, 1950 (although Frankfurter's records place the vote on October 21).

On October 23, Burton was assigned to write an opinion for the Court, which rejected the government's position on an extremely narrow basis by giving the complaining organizations the right to further legal proceedings to challenge their AGLOSO listings, while not accepting any general attack on the fundamental constitutionality of the concept of the AGLOSO or the loyalty program. Burton submitted a draft opinion on November 20, which Douglas joined on February 6. Douglas also wrote a separate concurrence, which he circulated on April 11. Separate concurring opinions were circulated by Frankfurter on December 21, Jackson on January 30, and Black on February 9. Between Black's opinion, which created a definitive majority for overturning the lower court rulings and rebuffing the government, and Reed's dissenting opinion of April 6, which was joined by Vinson and Minton, Frankfurter and Jackson both exploded in rage over the Court's proceedings.

Frankfurter's anger centered on what he viewed as the dissenters' unconscionable delay in circulating their views for many weeks after the five majority Justices had submitted their opinions (perhaps fearing that Jackson might switch again or that some other development would affect the vote), which he suggested violated the norms both of the Court and of "decency." In a private letter to Reed on March 19, 1951, Frankfurter fumed that "five months have elapsed since a majority of the Court voted to reverse these cases and nearly six weeks have elapsed since [Black's] last concurring opinion for the judgment of reversal has been circulated," while the dissenters "could

not have been in doubt about your position since October 21st" (possibly the date of the final 5–3 vote in the case). Frankfurter stated that the dissenters' action in "holding up the judgment in the loyalty cases long after a majority has been ready for their disposition" had "no equal since I have been on the court" and "with considerable knowledge of the past doings of the Court, I venture to believe nothing like it has happened for at least 50 years." Noting that Reed had stated "in your engaging way" that he was working on another case, which from the "the point of view of any honest workmanship, could not be possibly be ready for a considerable stretch," Frankfurter thundered that "one of the most unquestioned unwritten laws of the Court is that a man should put aside all to work on a dissent in a case that is ready to go down," a general "obligation," which here carried "special force" because the case involved "interests of great importance, both to the government and citizens." This was especially so, Frankfurter argued, because the majority was calling for "readjustments by the government" that "ought not to be delayed a needless moment" and the "consequences to which the procedure found unauthorized is day to day giving rise are more widely radiating than I think is fully realized," so that "in all decency" the Court's ruling should not "be held up any longer." Although Reed submitted a draft dissent on April 6, he circulated revised versions on April 12, 13 and 21, leading Frankfurter to explode again in an April 27 memorandum to all of the Justices, in which he urged that "these cases come down without further ado," as "the lines have been drawn for more than six months, and the demands of public administration call for adjudication."

While Frankfurter was fuming at his dissenting colleagues, Jackson appears to have remained deeply ambivalent and at times intensely angry about the Court's handling of the AGLOSO cases. His ambivalence apparently largely derived from the collision of his intense detestation of Communism and deep disdain for Douglas, which may have inclined him to originally side with the dissenters, with his strong commitment to due process, which inclined him in the other direction. What outraged him was that he viewed the Court's impending AGLOSO decision, which mandated additional due-process protections for the complaining organizations, as totally contradicting its pending decision to effectively uphold Bailey's federal loyalty firing without providing the right to learn of or cross-examine her accusers. While Jackson focused on the latter issue in his ultimately published, deeply angry concurring opinion, his anger also surfaced in his first draft concurrence, which was circulated in late January 1951, and, above all, in an amazingly bitter, uncirculated draft concurrence that he placed in his files in mid-April.

Jackson's January draft bore only passing resemblance to his final published concurrence; in it he essentially attacked the Court for lacking clarity in its holding and, especially, for allegedly providing AGLOSO organizations more protections than are granted to individuals such as Bailey. Thus, Jackson argued in his draft that "due process requires standards for administrative action," but that the loyalty program provided only "undefined and indefinable generalities" in its use of terms such as "subversiveness, totalitarianism, fascism, or communism" and, indeed, of "loyalty" itself. He termed the AGLOSO listings "administrative finding of a fact" made "without notice to anybody, opportunity for hearing, and standards," which could be "made without anything that a court would recognize as evidence, and so far as the record available to this court shows, it was so made." The draft noted in a footnote that at Nuremberg "every accused organization had opportunity to offer evidence in its defense" and "was confronted with and had a chance to cross-examine all prosecution witnesses," and declared that "lack of notice and lack of right to be heard I think preclude acceptance of the Attorney General's designation as final."

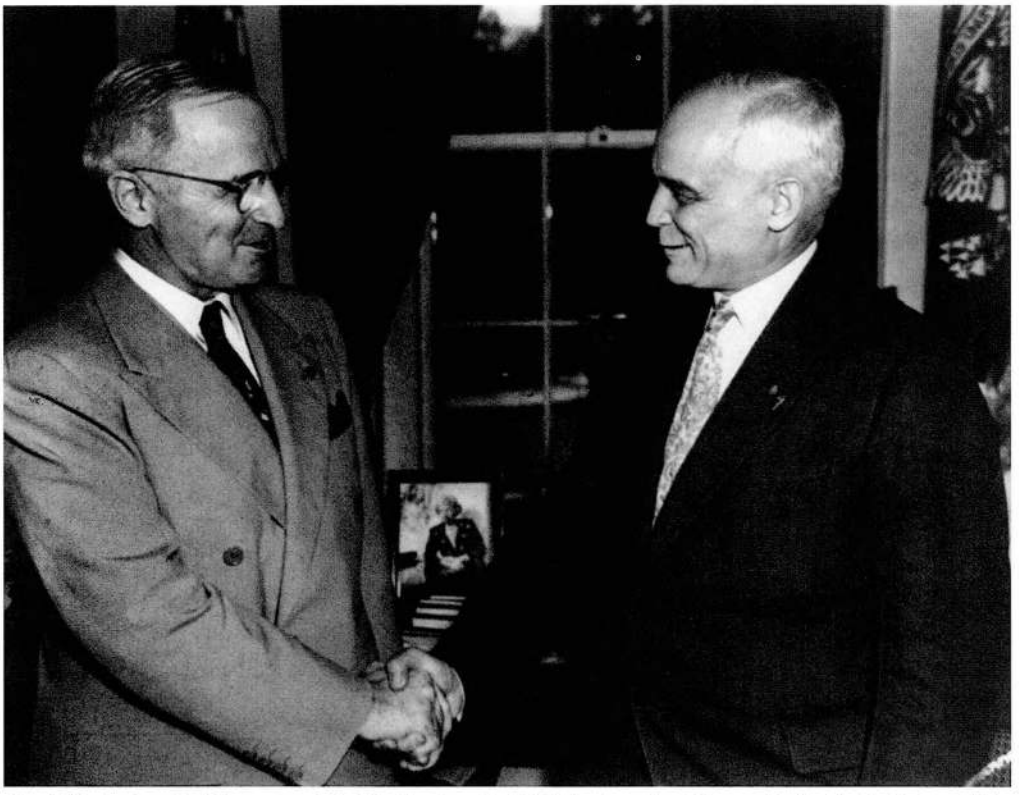
Jackson's anger completely boiled over in the bitter, never-circulated April 12 draft

"addendum" to his concurrence, by then substantially revised from his January draft, which he explained as an attempt "expressly to dissociate myself" from Justice Douglas's April 11 draft concurrence. Jackson's "addendum" essentially accused the Court of having been "soft on communism" in its recent rulings, thereby blocking measures "which if taken in time might well have prevented much of the difficulty [in the loyalty area] that has ensued." Jackson thundered that attempts by the Roosevelt administration to take "some of the 'strong measures' against Communism to which the [Douglas] opinion pays lips service" had been "consistently defeated by this Court" with Douglas's endorsement, with the result that "virtual assurance" had been given to "government employees and others that Communist organizations were quite proper for them to join or affiliate with." Instead of attributing the government's AGLOSO errors to a "good faith mistake in an unsettled and debatable field," Jackson declared that the Court majority was joining the "Communist campaign to smear our own government by accusing [AGLOSO] of being 'totalitarian' in trend, of borrowing 'totalitarian' techniques, of starting down a 'totalitarian path' and of taking a 'leaf from totalitarian jurisprudence.'" In his peroration, Jackson lamented that the government was now finding itself "denounced as 'totalitarians'—by one [i.e. Douglas] who never has been able to see totalitarianism in any Communist case before this Court ... [T]he gratuitous assault upon our own Government from our highest Court ought to be repudiated in the same source if we let truth instead of amiable cowardice be our guide."

On April 30, 1951, the Court made headlines across the country when it finally announced its ruling in *Joint Anti-Fascist Refugee Committee v. McGrath*. In what a United Press dispatch termed a "bombshell" decision, the Court clearly, as the Associated Press lead summarized, "lashed out at the government for branding organizations as Communist without a hearing," yet simultaneously failed to give the plaintiffs anything even approaching a complete victory. Of the eight participating Justices, six of them wrote separate, often-heated, opinions that totaled 40,000 words, or seventy pages in print. As they announced the ruling by reading long excerpts from their written opinions, Jackson commented acidly that hearing them was "likely to make one delirious," while Clark, who had not participated in the case, sat by quietly.[21]

Five Justices—Burton, in a controlling opinion joined only by Douglas, with separate concurring opinions by Douglas, Jackson, Frankfurter, and Black—agreed only that, based on the uncontested factual record before them, since the government had not contested any of the plaintiffs' factual assertions concerning their nature and post-AGLOSO damage to their ability to function, the complaining organizations had standing to sue, that the dispute was justiciable, and that the challenged AGLOSO determinations, in the absence of any process allowing contestation of disputed listings, were so "arbitrary" that their cases should be returned to a federal district court for "determination" as to whether the organizations "are in fact Communistic or whether the Attorney General possesses information from which he could reasonably find them to be so." The Court specifically ordered the cases remanded to district court "with instructions to deny the respondents' [government's] motion that the complaint can be dismissed for failure to state a claim upon which relief can be granted."

In his controlling opinion, Burton held that, in "listing" the three organizations the government had done nothing that "purports to adjudicate the truth of [their] allegations that they are not in fact Communistic." Because the Justice Department had failed to contest their denials and had only moved to dismiss their suits as lacking standing and justiciability, Burton held that, under legal precedent, the government had "therefore admitted" the "facts alleged in the complaint," which must be "taken as true," and the Court therefore



Harold H. Burton (right) was appointed to the Court in 1945 by President Truman (left), the instigator of the AGLOSO. Justice Burton wrote the controlling opinion for the Court in 1951, calling the Attorney General's actions "arbitrary and unauthorized" because Truman's loyalty order had not required that organizations be properly investigated before being placed on the list.

was compelled to find their AGLOSO listings "patently arbitrary," because Truman's order did not authorize the Attorney General to list them "contrary to the alleged and uncontroversial facts constituting the entire record before us." Burton said the situation would be "comparable" if "the Attorney General, under like circumstances, were to designate the American National Red Cross as a communist organization" in the absence of "any contrary claim asserted against" its general reputation as a charitable and loyal organization. Burton's opinion flatly rejected the government's position on standing and justiciability, holding that "the touchstone to justiciability is injury to a legally protected right[,] and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." Brushing aside the government's position that the AGLOSO caused no direct harm to listed organizations, Burton declared that the impact of the AGLOSO listing was to "cripple the functioning and damage the reputation of these organizations." The Attorney General's actions were labeled both "arbitrary and unauthorized," amounting to administrative discretion "run riot," because, according to Burton, Truman's loyalty order had required that listings be preceded by "appropriate investigation and determination," yet the Attorney General's actions had lacked "reliance upon either disclosed or undisclosed facts supplying a reasonable basis for the determination." In the present case, Burton said, Truman's order failed to "authorize, much less direct, the exercise of any such absolute power as would permit the inclusion in the Attorney General's

list of a designation that is patently arbitrary or contrary to fact," but the challenged AGLOSO listings were "unauthorized publications of admittedly unfounded designations of the complaining organizations as 'Communist.'"

Burton added that it would "obviously" be contrary to the intent of the Truman order to "confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so" or to include AGLOSO designations that were "patently arbitrary and contrary to the uncontroversial material facts," and that an "appropriate" governmental "determination" had to be "the result of a process of reasoning" and not "an arbitrary fiat contrary to the known facts." Burton concluded, "Whether the complaining organizations are in fact Communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await determination by the [federal] district court" that had first dismissed the lawsuits. While the only clear mandate of the ruling was to refer the cases back to federal district court, in a footnote Burton seemed to suggest that if the government provided an "administrative hearing" at which organizations proposed for listing were allowed to "present evidence on their own behalf" and to be informed on the "evidence on which the designations rest," that might suffice to make the AGLOSO process constitutional henceforth.

In their concurrences, Black and Douglas both suggested that the entire loyalty program was unconstitutional, and Black characterized the entire concept of an official list of subversive organizations (with or without hearings) as such. However, Burton's controlling opinion was drawn extremely narrowly to focus only on the "outer limit of the authority of the Attorney General" to list organizations without any kind of legal process. Thus, in a footnote, Burton noted that the Court specifically declined to rule on the validity of the government's "acts in furnishing and disseminating a comparable list in any instance where such acts are within the authority purportedly granted by the executive order." The ruling even failed to indicate whether the entire existing "list"—as opposed to the listing of the three challenging organizations—was invalid pending further proceedings, if the three complaining groups were to be "delisted" pending the federal court determination, if all future AGLOSO designations had to be preceded by some kind of "administrative hearing" (as seemed to be suggested in the footnote referenced above), or if the sole future recourse of listed organizations was to challenge their designations in federal court, presumably after considerable damage to their reputations had already occurred. Thus, the immediate result of the ruling was primarily, as the Associated Press reported, to throw a "legal cloud" over the AGLOSO but to clearly establish little beyond that.

Jackson's concurrence, which sometimes read like a dissent, complained about the "extravagance" and "intemperance" of some of the opinions, lamenting that it was "unfortunate that this court should flounder in wordy disagreement over the validity and effect of procedures which have already been pursued for several years," and declaring that the rulings "may create the impression that the decision of the case does not rise above the political controversy that engendered it." Jackson also blasted the Court for its separate ruling issued the same day, upholding by a 4–4 vote (by failing to reverse the lower courts) Dorothy Bailey's loyalty dismissal. Jackson lamented, "This is the first time this court has held rights of individuals subordinate and inferior to those organized groups," terming it an "inverted view of the law" and "justice turned bottom-side up." He added that it was "beyond my understanding how a court whose collective opinion is that the [AGLOSO] designations are subject to judicial inquiry can at the same time say that a discharge based at least in part on them is not." With regard to the AGLOSO itself, Jackson said that "if the only effect of the loyalty order was that suffered by the organizations," he would "think their right to relief very dubious,"

because the designation deprived them of "no legal right or immunity," and they suffered only due to the "sanctions applied by public disapproval, not by law." However, Jackson continued, because of the AGLOSO's impact upon federal employees accused of association with listed groups and their inability to challenge the designations in loyalty proceedings, he would reverse the lower court rulings upholding the AGLOSO "for lack of due process in denying a hearing at any stage," because "unless a hearing is provided in which the organization can present evidence as to its character, a presumption of disloyalty is entered against its every member employee, and because of it, he may be branded disloyal, discharged, and rendered ineligible for government service."

Frankfurter's concurrence, at twenty-five pages by far the longest of the six opinions, declared that the "heart of the matter" was that democratic principles implied "respect for the elementary rights of men, however suspect or unworthy," particularly the practice of "fairness," which could "rarely be obtained by secret, one-sided determination of facts decisive of rights," which served to "maim and decapitate" listed organizations "on the mere say-so of the Attorney General." Even if the designation directly "imposes no legal sanctions on these organizations" and "does not directly deprive anyone of liberty or property," Frankfurter wrote, "it would be blindness" to fail to "recognize that in the conditions of our time such designation," issued by the "highest law officer of the government," in practice "drastically restricts the organizations, if it does not proscribe them." He added that "due process" requirements were "perhaps the most majestic concept in our whole constitutional system," and were not "a fair-weather or timid assurance," but required respect "in periods of calm and in times of trouble" and should be "particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe." Perhaps suggesting that his dissenting colleagues were bending in the political wind, Frankfurter pointedly declared that the nation's Founding Fathers had "put their trust in a judiciary truly independent" by making them "not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences."

In his concurrence, Douglas said that the "paramount issue of the age" was the need to reconcile the need to provide both "security" and "freedom." But he warned that when the country took "shortcuts by borrowing from the totalitarian techniques of our opponents," it opened the way to "a subversive influence of our own that destroys us from within," a trend illustrated by the AGLOSO and Bailey cases. Douglas declared that organizations branded "subversive" by the Attorney General suffered the "real, immediate, and incalculable" injury of being "maimed and crippled," and that, as currently administered, the AGLOSO had "no place in our system of law," but only planted "within the body politic the virus of the totalitarian ideology which we oppose." Given that the "subversive" label "may well destroy the group against whom" it was directed, Douglas wrote, "when the government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests," and to let the government adopt "such lesser ones as suits the convenience of its officers is to start down the totalitarian path." Douglas argued that the "rudiments of justice, as we know it, call for notice and hearing," since the government "cannot by edict condemn or place beyond the pale" and "no more critical governmental ruling can be made against an organization these days" than by branding them "subversive," which, under existing practice, "destroys without opportunity to be heard."

Alone among the Justices, Black's concurrence specifically declared that the government had no authority "with or without a hearing" to "determine, list, and publicize individuals and groups as traitors and public

enemies," a practice he said was "tyrannical" and "smacks of a most evil type of censorship" and one that"effectively punished many organizations and their members merely because of their political beliefs and utterances." Black added that AGLOSO proceedings possessed "almost every quality of bills of attainder," which were specifically forbidden by the Constitution, because they amounted to "executive investigations, condemnations, and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the bill of rights." But, he lamented, "[i]n this day when prejudice, hate, and fear are constantly invoked to justify irresponsible smears and persecutions of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guarantees of individual liberty." Branding the AGLOSO a "much publicized" blacklist, Black said the designations of the three complaining organizations found them "guilty of harboring treasonable opinions and designs" and "officially branded them as communists," labels that "in the present climate of public opinion" and "regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political, or religious prestige and influence."

The single dissenting opinion, written by Reed and joined by Vinson and Minton, endorsed all of the government's key arguments, holding that listed organizations suffered no concrete damage from the AGLOSO, that the AGLOSO's purpose of aiding government personnel loyalty investigations was valid, that listed organizations had no "basis for any court action," and that "in investigations to determine the purposes of suspected organizations, the Government should be free to proceed without notice or hearing" because such loyalty-program-related designations did "not require 'proof' in the sense of a court proceeding" and "to allow petitioners entry into the investigation would amount to interference with the executive's discretion." According to the dissenters, although AGLOSO listings presumably could be "hurtful" to the "prestige, reputation, and earning power" of designated groups, those groups lost no First Amendment or property rights, because they were "not ordered to do anything and are not punished for doing anything" and were not deprived "of liberty of speech or other freedom." According to Reed, AGLOSO listings did not even constitute "guilt by association," because they only amounted to a "warning" to federal officials to "investigate the conduct of the employee and his opportunity for harm." Reed's opinion added that the Attorney General's list sought only to aid loyalty investigations, and was unquestionably "preferable" to investigations of organizations "by each of the more than a hundred" government agencies, while "to require a determination as to each organization for the administrative hearing of each employee investigated for disloyalty would be impossible." The dissenters declared the designations were presumably made after "appropriate investigation and determination" and that, in aid of making loyalty determinations regarding federal personnel, "in investigations to determine the purposes of suspected organizations, the Government should be free to proceed without notice or hearing."

The *McGrath* ruling proved largely a Pyrrhic victory for the organizations that officially "won" their case, but it marked the beginning of a very slow and agonizing end for the AGLOSO, which ultimately took twenty-three years to die. The Justice Department stalled and puzzled over *McGrath* for two years before finally issuing, under the new Eisenhower administration in April 1953, a set of AGLOSO hearing regulations that were grossly biased in favor of the government. Organizations that sought to challenge their designations were given thirty days to act and then required to respond to numerous

The Red Scare blacklisting predated the rise to power of Joseph McCarthy, pictured here in 1954 sharing a laugh with his counsel Roy Cohn at a Senate subcommittee session.

detailed inquiries, which effectively forced them to become police informers on themselves. Moreover, the same Attorney General who originally sought to designate them made the final decision on that designation after obtaining recommendations from hearing officers. The new Attorney General, Herbert Brownell, "relisted" all of the previously designated 192 AGLOSO groups in April 1953, while also proposing sixty-two additions and announcing the new hearing rules. However, the effect of being listed was so devastating, the requirements to obtain a hearing so onerous, and the government so determined to avoid granting hearings that only one such hearing was ever held, involving the miniscule Independent Socialist League (ISL) and two affiliated organizations. In all other cases, the listed groups were already defunct, failed to request hearings, or asked but were denied them on the grounds that their responses to the government's detailed inquiries were inadequate.[22]

The ISL hearing was held in 1955 and 1956. The government delayed issuing a finding thereafter for two years and the new Attorney General, William Rogers, then abandoned the case on June 18, 1958. In the meantime, the Red Scare had markedly diminished, especially with the Korean War armistice of 1953, Democratic victories in the November 1954 congressional elections, the Senate censure of Senator McCarthy the following month, a growing storm of congressional and other criticism of the AGLOSO and other Red Scare excesses after 1954, and an increasing inclination of the Supreme Court to strike down government "anti-subversive" measures after 1956. The government never designated any more AGLOSO organizations after 1954, and in two 1957 cases agreed to "delist" two Lithuanian organizations that challenged their listings in court, for fear that that the Supreme Court would declare the AGLOSO unconstitutional in toto if the cases reached them. Similar concerns led the Justice Department to drop efforts

to list the National Lawyers Guild in 1958, after five years of litigation.[23]

As the AGLOSO gradually diminished in public consciousness and became increasingly moribund in general, Supreme Court rulings in the 1960s effectively dismantled the 1950 McCarran Act, designed to force "Communist" and "Communist front" groups to "register" with the government following hearings before the SACB. After the SACB then increasingly came under attack in the late 1960s as having nothing to do and serving as a political sinecure, President Richard Nixon attempted to revive both the AGLOSO and the SACB by issuing Executive Order 11605 on July 2, 1971, which transferred to the SACB the power to designate AGLOSO organizations following referrals from the Attorney General and hearings, a response both to *McGrath* and to criticism that, under the 1953 Justice Department AGLOSO regulations, the Attorney General acted as both prosecutor and judge. However, as opposition to the Vietnam War and to growing revelations of government spying rose in the 1960s, Nixon was bitterly attacked in Congress for seeking to both foster repression and usurp congressional authority by his executive order, with the legislative opposition lead by Senator Sam Ervin (D-NC) in what amounted to a preview of the Watergate hearings Ervin would lead soon thereafter. In 1972, Congress killed the SACB by defunding it, and in 1974, by then deeply enmeshed in the Watergate scandal, Nixon abolished the AGLOSO via Executive Order 11785, signed on June 4, 1974, two months before his resignation.[24]

The three *McGrath* organizations took their case back to federal district court in late 1951 to determine if the government was justified in its AGLOSO designations—which the government never removed—as provided for by *McGrath*. Before the years of litigation that followed were completed, the IWO was liquidated as an insurance corporation in 1953 as a result of judicial proceedings in New York (the Supreme Court refused to hear the IWO's appeal in this case) and the JAFRC disbanded in early 1955, citing government "harassments, persecutions, and prosecutions" that made it "impossible to carry on" its "good and necessary work." Ten years after it first sued the government over its AGLOSO designation, the NCASF threw in the legal towel in March 1957, following a federal appeals court ruling that, by not seeking an administrative hearing under the 1953 Justice Department regulations, the organization had failed to exhaust its available administrative remedies and therefore was not entitled to relief in the courts. The organization won a small triumph in May 1963, when a federal appeals court held that the SACB's 1956 finding that it was a "communist front" was based on "negligible" evidence and could not be sustained. None of the nation's major newspapers reported the ruling.[25]

ENDNOTES

*This article is drawn from Professor Goldstein's book, scheduled for late 2008 publication by the University Press of Kansas, **American Blacklist: The Attorney General's List of Subversive Organizations.**

[1]Pertinent parts of Truman's loyalty order are reprinted in Ellen Schrecker, **The Age of McCarthyism: A Brief History with Documents** (Boston: Bedford, 2002), p. 175.

[2]Alan Barth, **The Loyalty of Free Men** (New York: Pocket Books, 1952), p. 110.

[3]See "Collateral Consequences of the Attorney General's List," Digest of the Public Record of Communism in the United States (New York: Fund for the Republic, 1955), pp. 77–78. Surprisingly little has been published (aside from some rather technical law review articles) specifically about the Attorney General's List of Subversive Organizations (AGLOSO), but see Eleanor Bontecou, **The Federal Loyalty-Security Program** (Ithaca, N.Y.: Cornell University Press, 1953), pp. 157–204; and Robert Justin Goldstein, "Prelude to McCarthyism: The Making of a Blacklist," *Prologue* (2006), 38, # 3, pp. 22–33. On the Red Scare in general, see Richard Fried, **Nightmare in Red: The McCarthy Era in Perspective** (New York: Oxford University Press, 1990); Ellen Schrecker, **Many Are the Crimes: McCarthyism in America** (Boston: Little, Brown, 1998); and David Caute, **The Great Fear: The Anti-Communist Purge under Truman and Eisenhower** (New York: Simon & Schuster, 1978).

[4]FBI document obtained under the Freedom of Information Act.

[5]Barth, **Loyalty of Free Men**, p. 111.

[6]Schrecker, **The Age of McCarthyism**, p. 40.

[7]Athan Theoharis, **Seeds of Repression: Harry S. Truman and the Origins of McCarthyism** (Chicago: Quadrangle, 1971), pp. 106–7.

[8]Athan Theoharis, "The Escalation of the Loyalty Program," in **Politics and Policies of the Truman Administration**, ed. Barton J. Bernstein (Chicago: Quadrangle, 1970), p. 264.

[9]*See* Eisenhower Presidential Library, Central Files, Office File, 133–E-10, Box 662 for examples of government documents that refer to AGLOSO-listed groups as "blacklisted."

[10]341 U.S. 123 (1951).

[11]For the JAFRC I have relied upon newspaper articles and court rulings. For the NCASF I have used, in addition to such sources, the organization's archival materials in the Tamiment Library at New York University and also Louis Nemzer, "The Soviet Friendship Societies," *Public Opinion Quarterly*, 13 (Summer, 1949), pp. 265–84. The IWO is thoroughly covered in two books: Thomas Walker, **Pluralistic Fraternity: The History of the International Workers Order** (New York: Garland, 1991) and Arthur Sabin, **Red Scare in Court: *New York v. the International Workers Order*** (Philadelphia: University of Pennsylvania Press, 1993).

[12]The district court briefs are included in the organizations' petitions for *certiorari* before the Supreme Court: *NCASF v. McGrath*, petition filed January 23, 1950; *IWO v. McGrath*, filed May 11, 1950; *JAFRC v. McGrath*, filed January 25, 1950. Unless otherwise indicated, all legal materials pertaining to this case were examined in the Supreme Court library.

[13]The district court rulings are included in the briefs referred to *supra* note 12.

[14]*JAFRC v. Clark*, 177 F. 2d 79 (1949), *IWO v. McGrath*, 182 F. 2d 368 (1950). Judge Edgerton dissented again in the latter case. The NCASF case was decided without opinion on October 25, 1949, citing the *JAFRC* ruling (U.S. Court of Appeals for the District of Columbia, No. 10,165). The briefs are included in the petitions to the Supreme Court for *certiorati*, referenced *supra* note 12.

[15]*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Otherwise, see sources cited *supra* note 12 for this and the following paragraph.

[16]Brief for Respondents in opposition, *JAFRC v. McGrath*, March 1950.

[17]Brief for Petitioner, *NCASF v. McGrath*, filed September 20, 1050.

[18]Brief for Petitioner, *IWO v. McGrath*, October 13, 1950; Brief for Petitioner, *JAFRC v. McGrath*, filed September 29, 1950.

[19]Brief for respondents, *JAFRC v. McGrath*, October, 1950.

[20]The following paragraphs are based on the papers of Justices Tom Clark (Tarlton Law Library, the University of Texas at Austin), Stanley Reed (University of Kentucky Library), Harold Burton (Library of Congress), Harold Vinson (University of Kentucky), Robert Jackson (Library of Congress), Hugo Black (Library of Congress), Felix Frankfurter (Library of Congress), and William Douglas (Library of Congress).

[21]*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

[22]*Washington Post* [hereinafter *WP*], *New York Times* [hereinafter *NYT*], *Los Angeles Times* [hereinafter *LAT*], April 30, 1953; *WP*, May 4, 1953. The new regulations and complete listing were published in the May 12, 1953 *Federal Register*.

[23]On the ISL case, see Olive Golden, "Administration of the Attorney-General's List of Subversive Organizations: The Case of the Workers Party—Independent Socialist League," University of Chicago M.A., August, 1962. The dropping of AGLOSO proceedings against the Association of Lithuanian Workers and the American Lithuanian Workers Literary Association received virtually no press coverage, but it is documented in the National Archives, Department of Justice, Record Group 60, file 146-200-2-012; *see especially* the October 4, 1957 file memorandum by Executive Assistant to the Attorney General Harold Healy, Jr. On the National Lawyers Guild's ordeal, see Percival Bailey, "Progressive Lawyers: A History of the National Lawyers Guild, 1936–1958," Ph.D., Rutgers University, 1979. For press coverage, see *WP*, *NYT*, *Chicago Tribune* [hereinafter *CT*], September 13, 1958. On mounting attacks on AGLOSO, see Robert Justin Goldstein, "'Raising Cain': Senator Harry Cain and His Attack on the Attorney General's List of Subversive Organizations," *Pacific Northwest Quarterly*, 98 (2007), pp. 64–77.

[24]On the SACB and its fate, see Ellen Schrecker, "Introduction" to microfilm records of the SACB, 1950–1972 (Frederick, MD: University Publications of America, 1989). Nixon's executive orders were published in the *Federal Register*, July 7, 1971 and June 6, 1974. For samples of the extensive press coverage, see *Washington Star*, July 8, 1971; *NYT*, *CT*, July 16, 1971; *Philadelphia Inquirer*, July 9, 1971; *NYT*, *LAT*, *WP*, June 6, 1974. For the Ervin hearings, see "President Nixon's Executive Order 11605," Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92nd Cong., 1st Sess., October 5, 7, 1971.

[25]The IWO's fate is thoroughly covered in Sabin, **Red Scare**. The dissolution of the JAFRC is reported in *NYT*, February 16, 1955. For developments concerning the NCASF, see the NCASF archives, held at the Tamiment Library, New York University, Collection Number 134. The court ruling setting aside the SACB's finding is *NCASF v. SACB*, 322 F. 2d 375 (D.C.C.A. 1963).

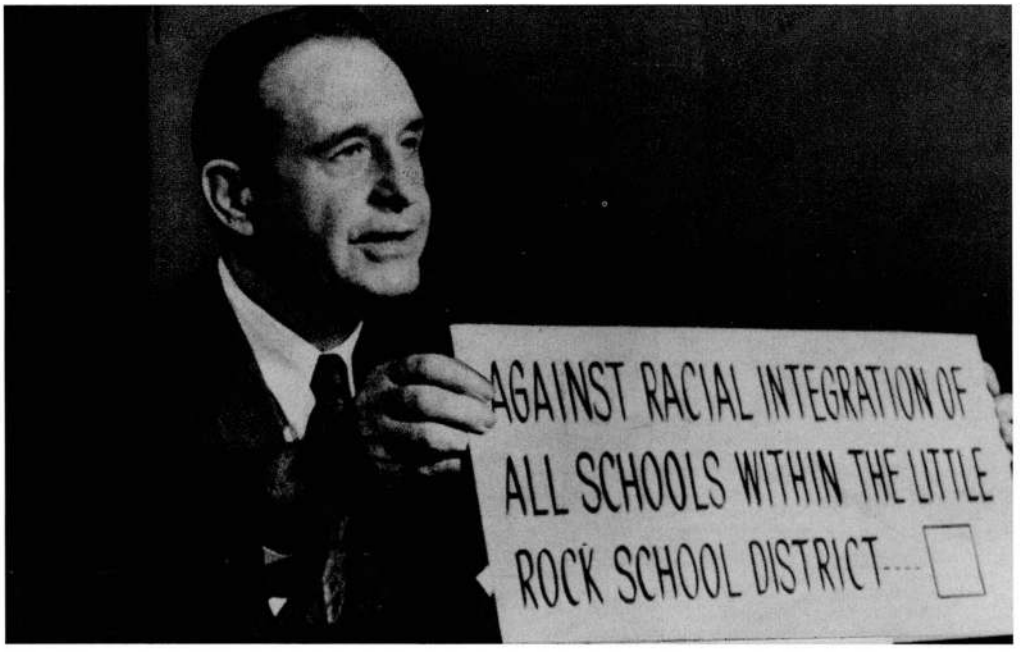
Cooper v. Aaron (1958): A Hidden Story of Unanimity and Division

TONY A. FREYER*

Contemporary and later commentators emphasized the Supreme Court's forceful affirmation of its own authority in *Cooper v. Aaron* (1958). The case was the Court's first significant test of states' rights opposition denying that *Brown v. Board of Education* (1954) (*Brown* I) and the *Brown* II (1955) decree permitting gradual implementation were legitimate constitutional law. Indeed, following the Court's announcement of *Cooper v. Aaron* in September 1958, Arkansas Governor Orval Faubus and his followers closed the very same Little Rock schools the Supreme Court had ordered desegregated. Black students' rights did not prevail until summer 1959. In Arkansas and elsewhere, defiance initially triumphed over the Supreme Court's self-assertive power.[1]

Studies of the Court's decision-making process in *Brown* and *Cooper* also stress the importance of maintaining unanimity. Chief Justice Earl Warren overcame a divided Court to establish unanimous support for overturning racially segregated public schools in *Brown* I. Supported by Felix Frankfurter, Warren maintained unanimity in *Brown* II, despite Justices Hugo Black's and William O. Douglas's belief that Frankfurter's standard of compliance "with all deliberate speed" would encourage delay and opposition throughout the South. Following *Brown* II, the rise of massive Southern resistance—epitomized by the Little Rock crisis and the *Cooper* case—confirmed these doubts.[2]

This article argues that, in *Cooper v. Aaron*, the Court missed an opportunity to strengthen the *Brown* II enforcement standard. When Justice William J. Brennan attempted to draft an opinion limiting the discretion *Brown* II permitted, a consensus emerged within the Court favoring an expansive assertion of judicial supremacy instead. Even so, Frankfurter's break with unanimity in a separate concurring opinion agitated his colleagues.[3] Revealing a hidden story, this essay presents new evidence suggesting that Frankfurter's initial motivation was to protect the "deliberate speed" standard from Brennan's attempt to limit it. Frankfurter benefited from concerns among a majority of the Court's members that Brennan's



When the Supreme Court handed down its 1958 decision in *Cooper v. Aaron* ordering the desegregation of schools in Little Rock, Alabama, Governor Orval Faubus chose instead to close the city's schools.

efforts to curb *Brown* II further implicated congressional and executive enforcement authority. Ultimately, the Court agreed on a unique statement of unanimity affirming expansive judicial supremacy against its critics. Ironically, Frankfurter's *Cooper v. Aaron* concurring opinion reinforced Southern defiance, ensuring that the Court's supremacy in civil rights would emerge some years later from convergence with the nonviolent protest movement identified with Martin Luther King, Jr.[4]

Justice Brennan and "Deliberate Speed"

The Court heard *Cooper v. Aaron* in an unusual August Special Term 1958. The litigation originated in 1956, when the Little Rock National Association for the Advancement of Colored People (NAACP) challenged the school board's minimal desegregation plan. Applying *Brown* II, Arkansas federal district judge John Miller upheld the school board in August 1956. The Eighth Circuit sustained Miller's opinion in spring 1957. The school board's victory became entangled in the historic Little Rock crisis during August and September 1957. Governor Faubus employed National Guard to prevent nine African-American young people—the Little Rock Nine—from entering Little Rock Central High School. Espousing states' rights and police powers, Faubus defied the federal court and the Eisenhower administration from September 2 to September 20. Following federal judge Ronald N. Davies' order against Faubus, the Governor withdrew the guard. A violent mob then blocked the Little Rock Nine from Central until, at President Dwight Eisenhower's command, the 101st Airborne enforced desegregation on September 25. Under armed guard, the Nine achieved academic success during the remaining academic year, despite relentless harassment from a small group of white students identified with the segregationists. Beginning in February 1958, the school board sought a thirty-month delay in

Faubus called in the National Guard to keep the schools closed, citing state's rights and state police powers. Pictured, white girls are educated via television during the brief period that the Little Rock schools were closed to avoid integration.

implementing its desegregation plan, and on June 21 federal judge Harry Lemley ordered the delay. The Legal Defense Fund (LDF)[5] appealed the order; through a complex procedure culminating in the Special Term, the Supreme Court heard arguments on August 28 and September 11, 1958.[6]

On September 12, 1958, the confrontation began anew. At noon, Chief Justice Warren read a three-paragraph per curiam opinion before a full courtroom. The issues having been "fully deliberated upon" in briefs and the oral arguments, the Court had decided "unanimously" to uphold the Court of Appeals' judgment of August 18, 1958. "In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course." The per curiam opinion overturned Lemley's order granting the thirty-month delay, as well as the Court of Appeals' one-month stay of its own order on August 21. The Court held that Judge Miller's original opinion in *Aaron v. Cooper* from August 1956 and Judge Davies' September 1957 order "enforcing the School Board's plan for desegregation in compliance with" *Brown* I and II must "be reinstated." Finally, Warren declared, the "judgment of this Court shall be effective immediately, and shall be communicated forthwith" to the federal district court in Arkansas. Nevertheless, Faubus signed laws authorizing him to hold a special election to close the schools if federal authorities enforced school desegregation; school closure soon followed.[7]

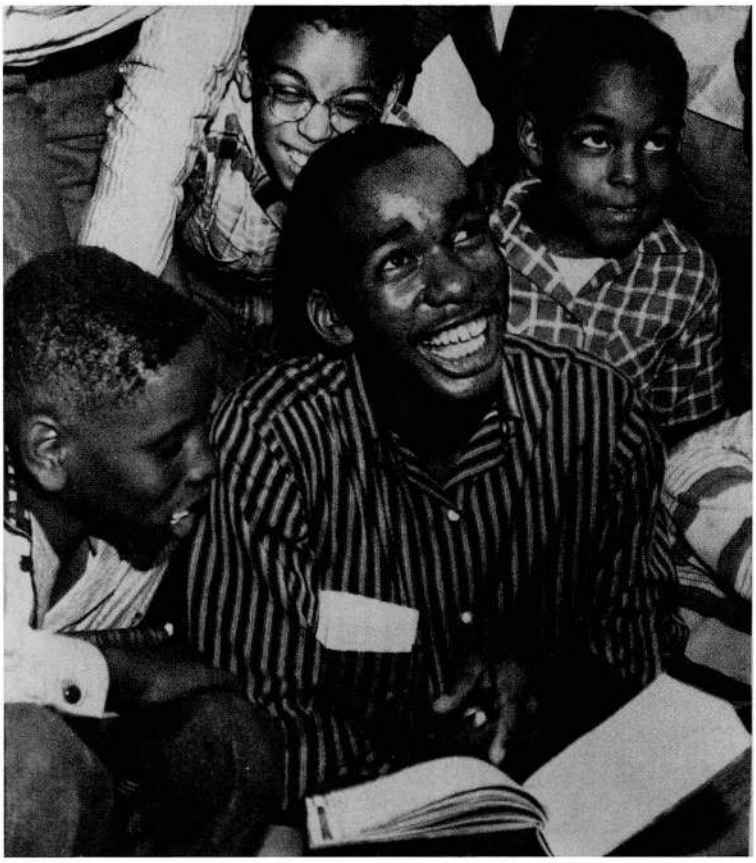
Warren's choice to draft the Court's full opinion in *Cooper v. Aaron* suggested concerns about unanimity. Harold H. Burton had participated in *Brown*, but advanced Parkinson's disease compelled his imminent retirement.

When a judge ordered Little Rock Central High School to admit its nine African-American students, Faubus called off the National Guard, but protests erupted at the state capitol (above and below) condemning integration.

Replacing him raised the question of whether the Court could maintain unanimity in *Cooper v. Aaron*, especially given Eisenhower's appointment of three new Justices since 1955. Undoubtedly, Warren declined to write the opinion himself because he was the focus of enormous criticism from both Northern and Southern conservative critics. Charles E.

Whittaker's opinion-writing was quite slow. William O. Douglas's periodic absence during the Special Term and Tom Clark's brief consideration of a dissent in the Little Rock case removed them from consideration. Warren also declined to consider Black, the vigorous advocate of activism; Frankfurter, who just as vigorously urged self-restraint; and Harlan, often Frankfurter's ally. Justice Brennan, however, was becoming Warren's confidant, and he was Warren's choice.[8]

Media publicity anticipated continued Southern defiance of the *Cooper v. Aaron* decision.[9] Amidst these media images from September 12 to September 26, Brennan wrote and circulated at least six draft opinions. Each recognized that the order granting a thirty-month delay challenged the Court's "fundamental proposition" established in *Brown* I, that "racial segregation" in the states' public schools "is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment." Since school officials argued that Faubus's and Arkansas authorities' actions "spread doubt and confusion as to the significance of this decision under our federal system," Brennan stated, "it may be well to recall some elementary constitutional propositions which are no longer open to question," starting with Chief Justice John Marshall's decision in *Marbury v. Madison* (1803). From Marshall's "basic principle that the federal judiciary is supreme in the exposition of the Constitution," Brennan concluded, "the interpretation of the Constitution enunciated by this Court in the *Brown* case is the supreme law of the land, and is made by Art. VI of the Constitution of binding effect on the States."[10]



A violent mob blocked the Little Rock Nine from entering Central High School until, at President Dwight Eisenhower's command, the 101st Airborne enforced desegregation. Pictured is Ernest Green, showing his textbooks to young African-American children, after completing his first full day at Central High School.

Under armed guard, the Little Rock Nine achieved academic success during the remaining school year, despite relentless harassment from a small group of white students identified with the segregationists. Pictured, the Nine pose with Daisy Bates (standing, second from right), the Arkansas director for the National Association for the Advancement of Colored People, in her living room.

Upon these basic principles, Brennan established the duties state agents owed black students under *Brown* I and II. In addition to Article VI, Brennan cited historic cases holding that state officials were "solemnly bound not to war against the Constitution." A century and a half of "our constitutional history must" overcome any "doubt and confusion" concerning federal supremacy. As a result, "responsible school authorities" not only had an "immediate duty" to make a "prompt start" in segregation plans, as had Little Rock school officials, but in accord with "all deliberate speed," they were permitted no "[d]elay in any guise to avoid discharge of the constitutional duty to desegregate." Brennan thus tied the language of federal supremacy to construing *Brown* II and "deliberate speed." Expanding on that standard, moreover, Brennan affirmed that "a prompt commitment to initiate and complete desegregation at specific times is a necessary requirement for compliance with the constitutional principles expressed in *Brown*." The desegregation plans school boards and the federal courts approved, then, should stipulate and comply with a specified timetable implementing desegregation.[11]

Furthermore, Brennan declared, "it is the duty of the educational authorities to maintain standards in a way consistent with the preservation of constitutional rights, not by foregoing the enforcement of those rights." If "state and local officials cannot or will not control the situation, it becomes the ultimate duty of federal power, ordinarily exercised by the Executive Department, to enforce the decrees of

federal courts." Congressional action also may be "warranted" in order "to secur[e] the constitutional rights of the school children by individual law suits against each school board" under the Fourteenth Amendment. Ultimately, "in a conflict between the Constitution and state recalcitrance, the Constitution must and will prevail. It may be expected that the full force of federal power will be used, if necessary, to achieve this end. Failing this, in Chief Justice Marshall's words, 'the Constitution becomes a solemn mockery.'"[12]

Receiving input from colleagues, Brennan reworked the opinion drafts. He incorporated, for example, Black's revision, stating that funds drawn from the "public purse" in order to support private education, such as those Faubus had called for and the Arkansas legislature had enacted, would be prohibited under the Fourteenth Amendment.[13] Regarding Brennan's treatment of the "questions of prompt and reasonable start and with all deliberate speed," Brennan's conference memorandum asserted, Frankfurter targeted the statement that "every school board must formulate a plan which provides specific dates both for the initiation and completion of the desegregation process. Felix questions whether the principles should be stated in such rigid terms." Frankfurter, Brennan noted further, "would emphasize the obligations to start a process and let the matter of completion alone be developed in local communities as best suited individual local needs and problems" in the application of the "deliberate speed" standard. Like Frankfurter, Harlan, Burton, Whittaker, and probably Clark disapproved of Brennan's effort to provide for timetables within the "deliberate speed" standard. Still, prior to the September 23 conference, Brennan resisted following Frankfurter and the others' lead.[14]

A Unique Affirmation of Unanimity

Prior to the September 23 conference, Justice Harlan prepared an alternative draft opinion addressing Brennan's attempt to alter the "deliberate speed" standard and other points. Unlike Brennan's, Harlan's discussion of "deliberate speed" omitted reference to a possible timetable, including end dates. He also deleted Brennan's citation to *Marbury v. Madison.* Instead, he wrote, the "constitutional oath required by" the Supremacy Clause "of every person holding state or federal executive, legislative or judicial office embraces of course both acts of Congress and the judgments of this Court which under our federal system has the final responsibility for constitutional adjudication."[15]

Harlan's most conspicuous change related the Little Rock case to the Court's unanimity established in *Brown.* That "basic decision," Harlan's typescript concluded, "was unanimously reached by a Court, composed of Justices of diversified geographical and other backgrounds, only after the cases had been briefed and twice argued by lawyers of the highest skill and reputation, and the issues had been under deliberation for... [many] months." *Cooper v. Aaron* provided a new opportunity forcefully to restate the "unanimity" principle. "Since the first [*Brown*] opinion three new Justices have come to the Court," Harlan wrote. "They are at one with the Justices still on the Court who participated in the original decision as to the inescapability of that decision, believing that whatever history may be offered in justification of racial segregation, such discrimination in the public school systems of the States can no longer be squared with the commands of the Fourteenth Amendment that no State shall 'deny any person... the equal protection of the laws.'" Harlan closed by stating that "[t]hese are the reasons for our unanimous affirmance of the judgment of the Court of Appeals" in *Cooper v. Aaron.*[16]

The day before the September 23 conference, in a longhand note on stationary from the Radisson Hotel, Minneapolis, Justice Douglas wrote Brennan. "Please tell the Brethren for me that I think the opinion in this case should

follow the customary format—'Mr. Justice Brennan delivered the opinion of the Court'—and not carry each of our names, as some one suggested," he said. According to Warren's memoir, the Court accepted the "joint opinion" idea, though the Chief Justice did not recall that it had ever been done before. Although Douglas did not know who had proposed the novel idea, it was Frankfurter, who in turn followed the heading from Harlan's full typescript draft of 9/19, which began: "The opinion of the Court, in which (naming each Justice) join, was announced by The Chief Justice." Thus, Frankfurter and Harlan may have sought to reinforce unanimity at the very point Brennan endeavored to alter the "deliberate speed" standard.[17]

At the September 23 conference, Brennan disputed Harlan's removal of the "idea" that the Supremacy Clause "inhibits a State from circumventing [*Brown*] by any method ingenious or ingenuous." He also challenged Harlan's "omit[ed] reference" to *Marbury v. Madison* "and the detailed discussion in my draft of the Court's responsibility for the exposition of the law of the Constitution. That too I think is a very essential part of what I believe our opinion should contain." Instead, Harlan's language "would substitute an emphasis upon the adherence of three new members of the Court to the [*Brown*] principles. I feel any such reference to the three new members would be a grave mistake." The suggested change "lends support to the notion that the Constitution has only the meaning that can command a majority of the Court as that majority may change with shifting membership . . . I think it would be fatal in this fight to provide ammunition from the mouth of this Court in support of it."[18]

Ultimately, the Court endorsed reaffirming "unanimity," accepting the "joint opinion" idea. Compromising Brennan's and Harlan's construction of judicial supremacy, it accepted both Brennan's citation and analysis of *Marbury*, which Harlan had rejected, while incorporating Harlan's language that all government officials were bound by their oath to the Constitution to follow the Court's construction of constitutional provisions in cases such as *Brown*. During September 24 and 25, Brennan's drafts approached a final opinion. Thus, as Harlan wrote at the end of draft three: "Overall this draft shows on the face a patch work job," and "All Justices [accept] 'joining formula.'" Even so, on the fourth draft Brennan's basic approach prevailed on the Supremacy Clause and also on the proposition that state agents could evade *Brown* by neither "ingenious" nor "ingenuous" actions.[19]

Initially, Brennan had attempted to develop a broad opinion limiting the discretion inherent in the "deliberate speed" standard. He had demarcated, too, the shared enforcement responsibilities of federal and state authorities, as well as rejecting the Little Rock school officials' arguments that state and private interference with their desegregation plan justified a thirty-month delay. Nevertheless, Brennan reshaped the opinion along the lines of strongest agreement among the Justices. While he personally agreed with Black that the "deliberate speed" standard effectively invited the very delay and defiance Little Rock and Faubus epitomized, the rest of the Court could not separate the standard from a shared, overriding commitment to maintaining unanimity. Responding to his colleagues' commentary, Brennan narrowed the final draft opinion to focus primarily upon judicial supremacy, reinforced by a unique statement of unanimity—all nine Justices signing the opinion. Even so, Faubus's and Southern public officials' ongoing defiance justified the Court's consensus that its decision should vigorously emphasize a unanimous affirmation of federal judicial supremacy.[20]

The opinion Warren read at noon on Monday, September 29 thus reflected a noteworthy change regarding unanimity. In *Brown*, the Court relied upon unanimity to convey solidarity in the face of anticipated Southern defiance. Arising from the globally reported September 1957 Little Rock crisis, *Cooper v. Aaron* posed the most conspicuous test yet of the unanimity principle's persuasive authority. Brennan's

narrowing of the draft opinions evidenced a consensus among a majority of his colleagues that a strong, precise reaffirmation of unanimity was necessary, especially given the appointment of three new Justices since 1955 and Burton's impending retirement. Thus, despite Douglas's initial objection, the Court accepted the unprecedented "joining formula," thereby supporting both a unique expression of the unanimity principle and Brennan's expansive interpretation of the Supremacy Clause. Yet the opinion Warren read before a full courtroom on September 29 did not suggest the full range of contentious issues arising from *Brown* II and the "deliberate speed" standard, Eisenhower's equivocal approach to enforcement, or congressional measures targeting judicial activism. Instead, the opinion communicated to an international audience a unanimous reaffirmation of the *Brown* decision through the most forceful declaration ever of the Court's own power.[21]

Turning to and naming each of the seven Justices present, Warren declared that all nine members of the Court had authored the opinion. Warren began with its first paragraph, drafted by Black. The case "involves questions of the highest importance to the maintenance of our federal system of government. It squarely presents a claim that there is no duty on state officials to obey federal court orders resting on this Court's deliberate and considered interpretation of the United States Constitution," particularly the "actions" of Arkansas's Governor, legislature, and "other agencies . . . upon the premise that they are not bound by our holding in [*Brown*] that the Fourteenth Amendment forbids states to use governmental powers to bar children from attending schools which are helped to run by public management, funds, or other public property." The Court was "urged to permit continued suspension of the Little Rock School Board's plan to do away with segregated public schools until state laws and efforts to upset and nullify our holding in [*Brown*] have been further challenged and tested in the courts."[22]

Those present in the courtroom and future readers of the opinion in the *U.S. Reports* readily grasped its "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution and that principle [is] a permanent and indispensable feature of our constitutional system." This principle, upheld in *Brown*, was the fundamental law overturning racial segregation. Warren's voice rose, concluding that the principles established in *Brown* "are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." He then said, "The Special Term is now adjourned." Suggesting the press's reception outside the South, the *New York Times* reported upon the opinion's "clear and simple language, understandable even to the most fanatic segregationists." Yet, segregationists in Arkansas, Virginia, and across the South remained defiant. Faubus and his followers in Little Rock closed and privatized the public schools; segregationists prepared slates of candidates for the November elections.[23]

Justice Frankfurter's Concurring Opinion

Notwithstanding the Court's firm commitment to unanimity reflected in the "joining formula," at the September 26 conference finalizing the *Cooper v. Aaron* opinion, Frankfurter announced that he would write a concurrence. "The Conference could not dissuade him from writing separately," Burton's diary recorded, "but he agreed not to file his separate opinion until a week or so after the Court opinion is filed." Years later, Warren's memoir acknowledged that Frankfurter's insistence upon filing the concurring opinion "caused quite a sensation on the Court." More pointedly, Warren, Black, and Brennan were angry, while Harlan, joined by Clark, sought an accommodation. After further fruitless appeals to Frankfurter, Black and Brennan then drafted

their own "separate opinion" affirming that "they stand by" the Court's "opinion as delivered" on September 29. They insisted further that Frankfurter's concurrence "must not be accepted as any dilution or interpretation of the views expressed in the Court's joint opinion."[24]

On a printed copy of the concurrence Frankfurter circulated on October 3, Harlan wrote, "This opinion was the subject of a Special Conf[erence] called by the CJ. (at the instance of W. J. B.) on October 6, 1958." Noting Warren's objections, he wrote at the end, "CJ. says this is the worst thing in the opinion," referring to the last paragraph, which began, "Lincoln's appeal to 'the better angels of our nature' failed to avert a fratricidal war." Measured against the value of unanimity, such lofty sentiments were divisive. Black and Brennan withdrew their own "concurrence" only after Harlan circulated a statement to which Clark acquiesced, questioning Frankfurter's "wisdom" in issuing the concurrence, but leaving the matter to his "good judgment." Harlan "dissented" from Black's and Brennan's "separate opinion, believing that it is always a mistake to make a mountain out of a molehill." Harlan's sensitivity quieted the dispute and Frankfurter got his way.[25]

Both the jointly signed unanimous opinion and Frankfurter's concurrence were reported as *Cooper v. Aaron*. The two opinions were essentially consistent, though Frankfurter's prose was characteristically condescending and verbose. Frankfurter both "unreservedly participate[d] with [his] brethren in [their] joint opinion" and "deem[ed] it appropriate to deal individually with the great issue at stake." Neither the crisis of violence arising from state authorities' efforts to block the Little Rock Nine's admittance to a racially desegregated school—school officials' "undoubted good faith efforts" to the contrary notwithstanding—nor federal "action or nonaction" mitigated the "illegality" of the "interferences with the constitutional right of Negro children qualified to enter the Central High School," Frankfurter declared. The "tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument to thwart law," thereby "disabling" the "Little Rock School Board[] from peacefully carrying out the Board's and the State's constitutional duty."[26]

Like the majority, Frankfurter targeted the claim that disorder justified delaying enforcement of the desegregation order. "No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force," he said. "To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy." The shared supremacy of the Court's decisions and the Constitution were especially binding where such decisions did not result from a divided Court, but were "the unanimous conclusion of a long-matured deliberative process."[27]

Frankfurter's conclusion, however, subtly deviated from the majority opinion. While the concurrence basically endorsed Brennan's construction of the Supremacy Clause, Frankfurter construed it to reinforce the initial federal court decisions in 1956 and 1957 upholding the Little Rock desegregation plan under the *Brown* II "deliberate speed" standard. Addressing the segregationists' assertion that *Brown* was not law, Frankfurter said that the "Constitution is not the formulation of the merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters." Frankfurter then suggested an essential precept of *Brown* II: that by exercising their discretion properly, the federal courts could promote displacement of "[l]ocal customs, however hardened by time," thereby "yield[ing] gradually . . . to law and education."[28]

Frankfurter's final paragraphs explicitly linked the Little Rock case to preserving the "deliberate speed" standard. The Court's holding in *Brown* "that color alone cannot bar a child from a public school . . . has recognized

the diversity of circumstances in local school situations." Indeed, in Little Rock, there was clear "progress . . . made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two lower courts." Should the Court affirm the Little Rock school officials' request for a delay, however, was it not reasonable to conclude that the Court's sanction of "a suspension of the Board's non-segregation plan[] would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the *Brown* case that the Constitution precludes compulsory segregation based on color in state-supported schools?" Federal supremacy answered this question. Many times throughout American history, "[c]ompliance with the decisions of this Court, as the constitutional organ of the supreme Law of the Land . . . depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have . . . cherished it for one hundred and seventy years."[29]

Why was Frankfurter determined to publish the concurring opinion? As recently as June 1958, he had helped to persuade Clark not to dissent by appealing to the value of unanimity in the Alabama-NAACP registration case. Just a few months later, however, he seemed to be rejecting that same advice.[30]

In a November 12, 1958 letter to a friend, C. C. Burlingham, Frankfurter justified his action. "Why did I write and publish the concurring opinion?" He answered his own question, asserting that "anybody reading the two opinions would find the answer." Then, even though in fact he did not mention "the lawyers and the law professors of the South," Frankfurter said that "[m]y opinion, by its content and its atmosphere, was directed" at "a particular audience . . . an audience which I was in a particularly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the Harvard Law School, with a good many Southern lawyers and law professors." Elaborating upon this point, he expressed the "conviction" that "it is to the legal profession of the South on which our greatest reliance must be placed for a gradual thawing of the ice, not because they may not dislike termination of segregation," but most significantly, "because the lawyers of the South will gradually realize that there is a transcending issue, namely, respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States."[31]

Like later commentators, Warren accepted Frankfurter's justification for the separate opinion. Nevertheless, how could Frankfurter believe that the separate opinion did not deny the very unanimity and judicial supremacy it proclaimed? The question suggested, in turn, the contrary reading Brennan gave to Harlan's effort to demonstrate the Court's continuing unanimous support for *Brown* by emphasizing the arrival of three new Justices between 1955 and 1957. Such an assertion, Brennan warned, reinforced the claims of the Court's enemies that its decisions reflected solely the will of the Justices and were not, therefore, binding law. Another unintentional result was that Brennan's drafting process facilitated Frankfurter's decision to issue his separate opinion.[32]

The *Cooper v. Aaron* Opinions: A Hidden Story

The opinion drafting in *Cooper v. Aaron* converged with a public and a hidden story. On September 12, following the Supreme Court's per curiam order upholding the Eighth Circuit's overturning of Judge Lemley's authorized suspension of desegregation in Little Rock, Governor Faubus signed into law legislation calling a special election to vote upon whether the city should close and privatize the schools. On September 27, Little Rock voters endorsed closure and privatiza-

tion, rather than integration, of the school system. In addition, LDF lawyers confronted Judge Miller's resistance in litigation testing these laws. Meanwhile, from September 12 to September 26, Brennan and his colleagues narrowed the initial scope of Brennan's drafts, finally announcing their opinion on September 29. As it grappled with several Cold War confrontations, the Eisenhower administration had already expressed more support than previously for the Supreme Court's desegregation decisions. Thus, Brennan's opinion drafting proceeded amidst both Faubus's ongoing defiance and a new legitimacy the Court received from Eisenhower. Meanwhile, Frankfurter conceived of the separate opinion in order to reassert the unanimity the Court gave the "deliberate speed" standard in *Brown* II.[33]

Brennan's opinion drafts reflected a wider public context. Clark's marginal note on one draft, urging omission of significant congressional references, reflected most Justices' unwillingness to even hint at the struggle over anti-Court legislative proposals introduced by Senators William Jenner, John Marshall Butler, and others from February to August 1958. Similarly, Brennan limited comments on the executive's enforcement role, perhaps because in days preceding the Special Term, Attorney General William P. Rogers publicly defended the Court and the *Brown* decisions amidst criticism from the state chief justices. Solicitor General James Lee Rankin vigorously repeated this defense in his brief and oral arguments of *Cooper v. Aaron* during the Special Term's two hearings.[34]

Eisenhower himself offered a more favorable view of the Court and *Brown*. Questioned about his "personal feeling on the principle of school integration" in an August 20 news conference, Eisenhower responded, "I have always declined to do that for the simple reason that here was something that the Supreme Court says . . . is the instruction of the Constitution. That is, they say this is the meaning of the Constitution." Eisenhower went on to say, "I have an oath; I expect to carry it out. And the mere fact that I could disagree very violently with a decision, and would so express myself, then my duty would be much more difficult to carry out I think." He admitted, too, suggesting a "slower" approach. Still, these words were more positive compared to Eisenhower's problematic public statements following *Brown* I. Indeed, on August 20 Faubus suggested that Eisenhower was saying it was "my duty as Governor to use the military to enforce integration in any school district in this State." Nevertheless, he said, "my position of last fall is unchanged." Eisenhower indirectly offered a rejoinder in a September 5 news conference. The President denied having said he "wishes the Supreme Court had never handed down its [*Brown*] decision," claiming that the August 20 statement correctly expressed his feelings on the matter.[35]

Cold War imperatives influenced Eisenhower's shifting public position toward the desegregation issue. At the very time the domestic and international news media covered the Court's Special Term, Eisenhower dispatched Marines to Lebanon and faced opposition from a new nationalist government in Iraq. A September 5 *U.S. News & World Report* story queried: "If Small War Comes—Is U.S. Ready?" Just days before, Hong Kong's *South China Morning Post* questioned Eisenhower's previous lack of moral support for *Brown* and the Court. The propaganda appeal of justifying presidential action in terms of such constitutional abstractions as "federalism," rather than moral justice, thus linked the President's constitutional obligation to enforce the federal judiciary's racial desegregation orders to his exercise of constitutional powers resisting communism in distant Cold War battlefields such as Lebanon or Iraq.[36]

During the Special Term, the international press publicized the full range of civil rights cases and confrontations. Thus, a September 15 story in the *South China Morning Post* reported on Martin Luther King's protest and arrest. Still, Eisenhower's explaining his

desegregation stance in terms of constitutional duty rather than moral obligation echoed the same paper's story of September 10. It commented on political science professor Donald Flaherty's expressed opinion regarding the Little Rock case that "complete integration would be accomplished gradually. If this could be done peacefully... then the federal system of government would have achieved something of major importance." These were the same sentiments Eisenhower had recently expressed.[37]

This public context suggested the unintended consequences resulting from Brennan narrowing the scope of his opinion drafts. By removing Brennan's initial references asserting a shared constitutional obligation among the federal government's three branches, the Justices emphasized the Court's supremacy in order to refute Faubus's and the segregationists' contrary constitutional claims. At the same time, this affirmation of judicial supremacy reinforced Eisenhower's public statements embracing the constitutional duty to enforce the Supreme Court's decisions; it was consistent, too, with the administration's use of "federalism" as a Cold War propaganda device. Maintaining the unanimity principle, Brennan further narrowed the opinion's scope regarding the "deliberate speed" standard. Brennan's initial drafts attempted to limit the discretion inherent in *Brown* II by suggesting that school desegregation plans should impose timetables, including stipulated beginning and end dates. Since only Black expressly supported this proposition, Brennan removed it.[38]

These disputes over the "deliberate speed" standard and unanimity immediately preceded Frankfurter's decision to issue his separate opinion. At the September 26 conference, the members of the Court first learned that Frankfurter intended to file a separate opinion. Prior to the Special Term, however, Frankfurter prepared two memorandums on the Little Rock case, one of which he circulated among the members of the Court on August 27. Revised and somewhat expanded, this latter memorandum became Frankfurter's concurring opinion, though how that came about was obscure.[39]

Frankfurter's two Little Rock memoranda were consistent with a proposal he had offered the Court the preceding September 1957. By summer of that year, Southern Democratic and conservative Republican U.S. Senators had pushed the Jenner-Butler Bill, seeking to strip away the Court's jurisdiction in controversial national security cases. Senator Lyndon Johnson won a vote narrowly defeating the Jenner-Butler Bill, 49 to 41, in February 1958. During late 1957, Frankfurt attempted to convince his colleagues that a more measured approach to decision-making would result in less politically explosive opinions. On September 30, 1957, he circulated a memorandum suggesting, among other things, "In doubtful, difficult, important cases, would it not on appropriate occasion be desirable that the case be assigned to a Justice for a full report on the issues without taking a vote?" His fellow Justices apparently construed Frankfurter's whole memorandum to mean that he believed the Court was intentionally massing significant opinions until the end of term, resulting in hasty decision-making. Frankfurter felt such heat from his colleagues that on October 7 he circulated a "memorandum in order to dissipate a wrong impression that I have evidently created."[40]

Nonetheless, Frankfurter's Little Rock memoranda conformed to the proposal rebuffed in late 1957. "In a very few cases do we postpone a vote after argument for further study. As illustrated by the course of deliberation in the *Segregation Cases* [*Brown* I and II], resort to such a maturing process, designed for reflection that can only come from an unhurrying atmosphere, emphatically vindicates itself," the 1957 memorandum noted. On June 30, 1958, the Supreme Court issued the per curiam order in *Cooper v. Aaron*, precipitating the Eighth Circuit's own special session of early August, followed by Chief Justice Warren

calling the Supreme Court's August Special Term on the twenty-fifth. Frankfurter's clerk, who drafted this per curiam order, later wrote that, "I had a hand in FF's concurring opinion [*Cooper v. Aaron*]. Since I left Washington on August 1, we must have worked on a draft of the opinion before that date."[41] And the drafts of a memorandum entitled "Facts Pertinent to No. 1 Misc., *Aaron v. Cooper* Prior to Proceedings Before Judge Lemley" conform to the clerk's recollection. This five-page, double-spaced, printed narrative traces the origins and evolution of the litigation preceding and during the Little Rock crisis up to September 21, 1957, when Judge Davies issued the injunction against Faubus's use of National Guard to exclude the Little Rock Nine from Central High. Initialed "F.F.," the copy ended by citing a certiorari petition to the Supreme Court dated July 24, 1958.[42]

Frankfurter circulated a second memorandum on Little Rock dated August 27, 1958. Essentially, this memorandum comported with the process Frankfurter had proposed and the Court rejected in September–October 1957. As noted above, Frankfurter's "Facts" memorandum pertained particularly to Davies' and Lemley's opinions of, respectively, September 21, 1957 and June 20, 1958. It informed the August 27 memorandum's broader emphasis on the issues arising from the appeal of Lemley's order culminating in the Court's historic special hearing on August 28. Prior to that date, Frankfurter prepared a draft, handwritten and then typed, of the August 27 memorandum, to which one of his new clerks added modest edits. The handwritten draft's title was simply "Little Rock," but the printed version addressed to the "Brethren" read "Memorandum by Mr. Justice Frankfurter on Little Rock." The note accompanying the memorandum, also dated August 27, explained that "I have prepared the enclosed memorandum for my own information. It may not be without help or interest to you."[43]

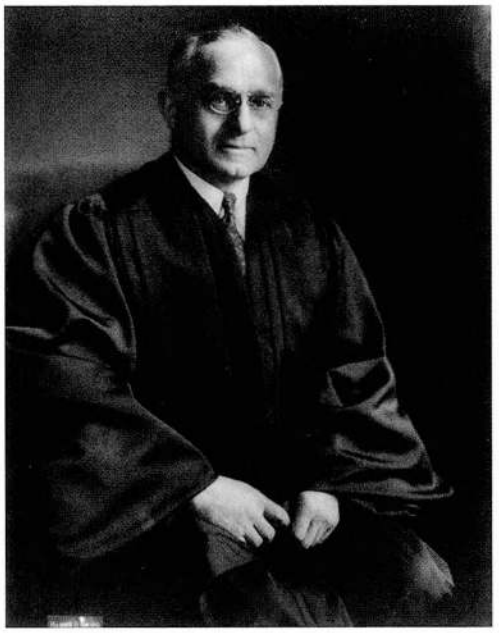
Frankfurter's two Little Rock memoranda shaped the details of the *Cooper v. Aaron* litigation to vindicate the wisdom of *Brown* II. Frankfurter circulated the August 27 memorandum after the Court digested the appellate briefs from the black students and the LDF, the federal government and Solicitor General Rankin, and Richard Butler, representing the Little Rock school board. Styled as a memorandum from Mr. Justice Frankfurter to his Brethren, it presented a consistent argument for reading the issues in the Little Rock case as a test of complying with the "deliberate speed" standard. Many of Frankfurter's handwritten comments on the August 27 draft included virtually the same language as that appearing in the concurring opinion published on October 6. Thus, while Frankfurter expanded upon the memorandum in the following weeks, this initial draft and later additions presented, as noted above, a coherent rational for reading the issues raised and decided in *Cooper v. Aaron* as logically consistent with *Brown* II.[44]

Frankfurter's most significant additions to the revised memorandum appeared in response to Brennan's effort to curb the "flexibility" *Brown* II sanctioned. Brennan delivered his fullest arguments seeking to limit this discretion in his draft opinion circulated among all the Justices on September 22. On the very same day, Frankfurter received a revised and expanded version of the August 27 memorandum. For the first time, the heading read "Mr. Justice Frankfurter, concurring. While unreservedly participating with my brethren in our joint opinion, I deem it appropriate to deal individually with the great issue here at stake." These were the same lines later appearing in the published concurring opinion. The revised August 27 memorandum also included the handwritten note "Sept. 22/58 as received by FF" and the words "our joint" inserted prior to "opinion."[45]

The juxtaposition of these dated drafts strongly suggests that Frankfurter decided to issue the expanded August 27 memorandum as a concurring opinion in response to Brennan's attempt to circumscribe the "deliberate

speed" standard, a position identified with Justice Black, Frankfurter's leading activist opponent within the Court. Dating Frankfurter's decision to issue the separate opinion highlighted his perceptions of unanimity linked to "Southern lawyers." As Brennan's draft opinions revealed, the Justices agreed that *Cooper v. Aaron* should affirm the unanimity principle identified with *Brown*. Nevertheless, Brennan's reformulation of the "deliberate speed" formula aroused dissension among the Justices before their September 23 conference. Harlan, Burton, Clark, and Frankfurter successfully preserved the more flexible remedial standard of *Brown* II. The contentiousness was sufficiently strong, however, that, despite Brennan's objections, the Court accepted Harlan's reference to the unanimous support the three new Justices appointed since 1955 gave *Brown*, as well as the unique "joining formula" that Douglas had resisted.[46]

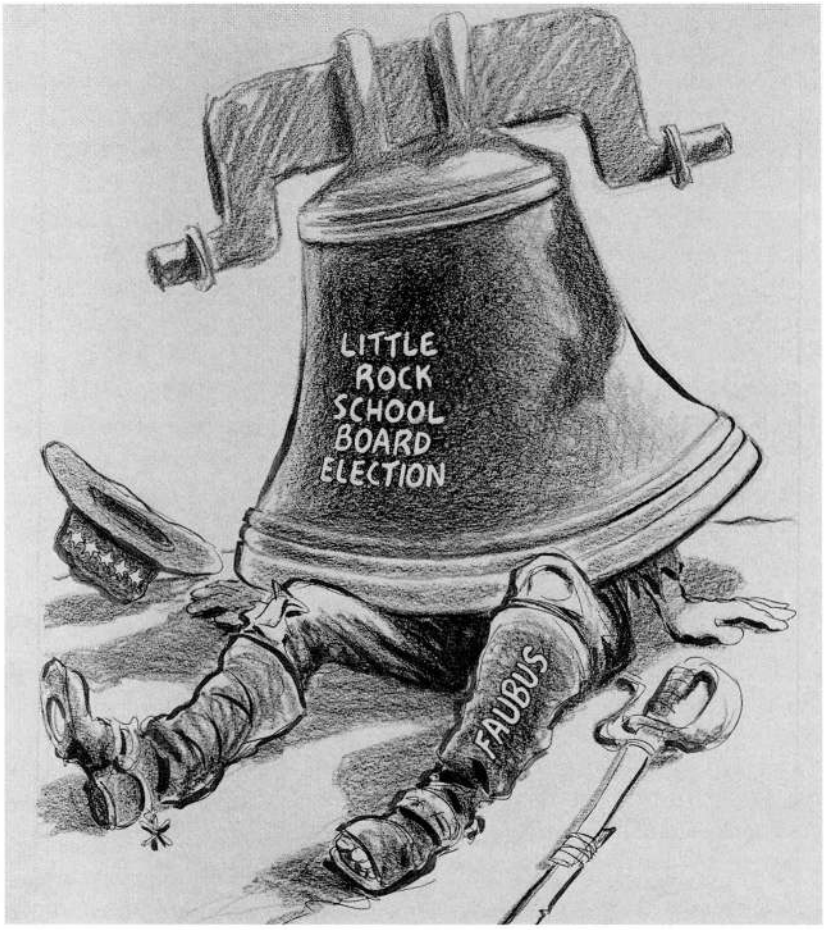
This contention over *Brown* II and unanimity undoubtedly accentuated, for Frankfurter, his own failure to win the Court's support for Warren offering encouraging words to Butler when the Special Term's final oral argument began on September 11. In a letter on that date to Warren justifying the request, Frankfurter admitted Faubus's "trickery" but also said, "My own view has long been that the ultimate hope for the peaceful solution of the basic [desegregation] problem largely depends on winning the support of the lawyers of the South for the overriding issue of obedience to the Court's decision. Therefore I think we should encourage every manifestation of fine conduct by a lawyer like Butler."[47]



Felix Frankfurter's personal connections with moderate Little Rock lawyers who graduated from Harvard Law School probably influenced his decision to write a separate concurrence defending *Brown* II's "deliberate speed" dictum.

Early desegregation in Arkansas seemed to vindicate Frankfurter's faith. His "Facts Pertinent to . . . Proceedings Before Judge Lemley" memorandum emphasized that up to and through the September 1957 crisis, Little Rock school officials' represented by Butler and others developed and implemented their desegregation plan in compliance with *Brown* II. Frankfurter's August 27 memorandum rejected Lemley's affirmation of school officials' request for a delay in part because it departed from those very standards the federal courts had previously affirmed. Frankfurter understood that moderate lawyers such as Butler were not alone in struggling to maintain the *Brown* II standards. Harvard Law School graduate Professor Robert Leflar taught at the University of Arkansas School of Law in Fayetteville. According to Leflar, Frankfurter maintained correspondence with several Harvard Law School graduates in Little Rock whom he believed to be moderates. Frankfurter also felt he had special understanding of Arkansas's racial moderation because early in his career, he had benefited from association with former U.S. Senator and one-time president of the American Bar Association U. M. Rose, founder of Little Rock's leading law firm.[48]

These connections probably influenced Frankfurter's pursuing the separate opinion even after the Court rejected Brennan's limitation of *Brown* II. During September 23–



This May 1959 cartoon shows Governor Faubus pinned under a liberty bell. County voters ousted many segregationists in the May school board elections and replaced them with moderates.

26 Brennan incorporated into the opinion drafts, not his own and Black's construction of the "deliberate speed" standard, but that of his colleagues. To the extent, then, that Brennan's draft of September 22 triggered Frankfurter's decision to transform the August 27 memorandum into a concurring opinion, that rationale soon dissipated.[49] Yet a *Washington Post* headline on September 24 declared, "Faubus Plan Put Up to Court." The LDF filed a case before Judge Miller challenging the constitutionality of the legislation authorizing privatization and closure of the city's public schools. Following problematic procedures, however, Miller stalled the suit. Thus, amidst Brennan's last drafts, Frankfurter reasonably might have concluded that the beleaguered moderate lawyers in Little Rock and elsewhere could benefit from the direct encouragement he had already formulated in the August 27 memorandum-turned-concurring-opinion. Consistent with this interpretation, as Burton's diary confirmed, Frankfurter informed the Court of his decision to issue the separate opinion on September 26, at the same Conference where it approved Brennan's final draft of *Cooper v. Aaron*.[50]

Conclusion

The parallel opinion-drafting process Brennan and Frankfurter pursued within a conflicted public context revealed unintended outcomes. The Court did not accept Brennan's attempt

to craft an opinion firmly suggesting that the President, Congress, and the judiciary possessed shared authority in responding to the Southern states' defiance of *Brown*. Although Brennan did not achieve that more comprehensive mandate, Eisenhower employed the Court's judicial-supremacy rationale to justify his more positive defense of school desegregation, not because racial equality was a moral imperative, but due to his own constitutional duty to enforce the law, in conjunction with Cold War propaganda necessity. Moreover, Brennan could not limit Southern federal judges' and Southern school officials' discretion in implementing *Brown* II. Within the Court, the contentiousness arising from Brennan's efforts nonetheless led Frankfurter to expand his personal Little Rock memoranda into a separate opinion defending the "deliberate speed" standard. Amidst the Court's rejection of Brennan's proposal and Faubus's continuing defiance, Frankfurter finally decided to issue the separate opinion in support of embattled moderate lawyers in Arkansas and across the South. For the first time in a desegregation decision since 1950, the Court failed to maintain unanimity.[51]

This break in unanimity was ironic. In *Cooper v. Aaron*, the Justices resolved the contentiousness over *Brown* II out of deference to unanimity, which they believed conferred legitimacy fostering compliance with school desegregation. R. B. McCulloch, author of Faubus's original states' rights-interposition program, addressed the "deliberate speed" standard in a letter to Judge Lemley on September 5, 1958. "What we want is plenty of elasticity," he declared. "What I *don't* want is for the Supreme Court to fix a definite deadline for the completion of integration in all the schools." Such sentiments vindicated Black's and Brennan's conviction that "deliberate speed" encouraged delay. Yet Frankfurter believed that defending *Brown* II in the separate opinion aided the South's moderate lawyers, including Harvard Law graduates. Coincidently, McCulloch was educated at Harvard Law School.[52] Moreover, Fred N. Fishman, New York attorney, Harvard Law graduate, and Justice Frankfurter's former law clerk, noted in an October 10 letter to Frankfurter that the intimation in the concurring opinion that it was a "unanimous conclusion of a long-matured deliberative process" ignored that "there may well be times when certain elements in the country would want to take advantage of a division in the Court for purposes of evasion, and I wonder whether it is advisable to have in the opinion a statement which might be twisted by such elements to their own ends."[53]

The Court's announcement of its decision on September 29 precipitated further defiance from Faubus and his supporters in Little Rock during 1958 and 1959. Not until August 1959 did a few blacks enter two of the city's high schools. The Court also failed to stem resistance across the South for years to come. These outcomes, as contemporary and later commentators observed, contrasted sharply with the Supreme Court's forceful affirmation in *Cooper v. Aaron* of supreme authority to pronounce the Constitution's meaning. However, emphasizing the gap between the Court's articulation of judicial supremacy and defiance of that same principle neglects the extent to which *Cooper* restricted Faubus's and his counterparts' channels of lawful maneuver. During 1958 and 1959 in Little Rock—and in the civil rights movement's struggle thereafter—civil rights activists combined nonviolent resistance with the judicial supremacy principle, ultimately defeating Jim Crow.[54] Even so, the Supreme Court's decision-making process in *Cooper* revealed a succession of choices narrowing Brennan's and Frankfurter's conflicting views of *Brown* II to the judicial-supremacy principle established by the decision. Brennan's opinion drafts looked to the future, whereas Frankfurter's concurring opinion remained bound by the past.

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ENDNOTES

[1]*Brown v. Bd. of Educ.* 347 U.S. 483 (1954) (*Brown* I); 349 U.S. 294 (1955) (*Brown* II); *Cooper v. Aaron* 358 U.S. 1 (1958); J. W. Peltason, **Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation** (New York, 1961), 179–207; Anthony Lewis, **Portrait of A Decade: The Second American Revolution** (New York, 1964), 46–69; C. Vann Woodward, "The South and the Law of the Land," *Commentary* 26 (November 1958), 370; Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958," 68 *The Georgetown Law Journal*, No. 1 (October 1979), 73–86; Lucas A. Powe, Jr., **The Warren Court and American Politics** (Cambridge, MA, 2000), 157–62; Jack Greenberg, **Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York, 1994), 240–46; Larry D. Kramer, **The People Themselves: Popular Constitutionalism and Judicial Review** (New York, 2004), 221; Michael Meltsner, **The Making of a Civil Rights Lawyer** (Charlottesville, VA, 2006), 34, 43–44; Tony A. Freyer, **Little Rock on Trial: *Cooper v. Aaron* and School Desegregation** (Lawrence, KS, 2007), 135–211; Gary D. Rowe, "Constitutionalism In The Streets," 78 *Southern California Law Review* No. 2 (January 2005), 401–56; Keith E. Whittington, "The Court as the Final Arbiter of the Constitution: *Cooper v. Aaron* (1958)," in Gregg Ivers & Kevin T. McGuire, eds., **Creating Constitutional Change: Clashes Over Power and Liberty in the Supreme Court** (Charlottesville, VA, 2004), 9–20.

[2]The leading work on the "unanimity" issue in *Brown* I and II and their bearing on *Cooper* is Hutchinson, "Unanimity and Desegregation," 14–86; *compare with* Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York, 2004), 290–442. Applying Derrick Bell's "interest convergence" dilemma, "*Brown v. Board of Education* and the Interest-Convergence Dilemma," 93 *Harvard Law Review*, No. 3 (January 1980), 518–33; *see also* Freyer, **Little Rock on Trial**, and the works cited *infra* note 3.

[3]Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (New York, 2006), 292–364; Bernard Schwartz, **Super Chief: Earl Warren And His Supreme Court—A Judicial Biography** (New York, 1983), 72–127, 289–304; Mark V. Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961** (New York, 1994), 216–66; William O. Douglas, **The Court Years, 1939–1975** (New York, 1981), 111–16; Roger K. Newman, **Hugo Black: A Biography** (New York, 1994), 431–44, 474–76; Michael R. Belknap, **The Supreme Court Under Earl Warren, 1953–1969** (Columbia. SC, 2005), 24–50; Craig Alan Smith, **Failing Justice: Charles Evans Whittaker on the Supreme Court** (Jefferson, NC, 2005), 117–25, 151–53, 158, 309 n.55; Tinsley E. Yarbrough, **John Marshall Harlan: Great Dissenter of the Warren Court** (New York, 1992), 168–72; G. Edward White, **Earl Warren: A Public Life** (New York, 1982), 169, 183–84, 343, 353; Tony Freyer, **Hugo L. Black and the Dilemma of American Liberalism** (New York, 1990), 129–32; Freyer, **Little Rock On Trial**, 169–201.

[4]The works cited in notes 2–3 draw upon the papers of some members of the Court who decided *Brown* I and II and/or *Cooper v. Aaron*. Unless otherwise noted, I will cite my own reading of the following: Papers of Justice William J. Brennan, Jr., Part I, Case Files, *Cooper v. Aaron*, August Special Term 1958 No. 58–1, Boxes 14 and 15 (Library of Congress, Manuscripts [hereinafter LC]); Justice John M. Harlan Papers, *Cooper v. Aaron* (1958) Files, Box 57 (Seeley G. Mudd Manuscript Library, Princeton University); Papers of Justice Hugo Black, Case File No. 1, August Special Term, *Aaron v. Cooper*, Container 335 (LC); Papers of Justice Felix Frankfurter, File 4052, Box 220, *Cooper v. Aaron* 1958 (LC); Justice Felix Frankfurter Papers, *Aaron v. Cooper*, Microfilm Reels, 35 and 36 (Harvard Law School Manuscripts [hereinafter HLSM]).

[5]In this article, LDF stands for the NAACP Legal Defense and Education Fund, which was separated from the NAACP in 1957.

[6]Citations in notes 1 and 3 set out the series of events leading to and culminating in the August Special Term. The case files cited in the Justices Brennan, Black, Frankfurter, and Harlan papers set out the procedural and factual story of the Special Term in detail, including the arguments of August 28 and September 11, 1958. Case citations to the *Aaron v. Cooper* litigation are: 143 F. Supp. 855 (E.D. Ark. 1956); 243 F.2d 361 (8th Cir. 1957); 156 F. Supp. 220 (E.D. Ark. 1957); 163 F. Supp.13 (E.D. Ark. 1958); 257 F.2d. 33 (8th Cir. 1958). The events leading up to and constituting the Little Rock crisis in August-September 1957 and its aftermath during the 1957–58 academic year and the summer of 1958 are discussed in a large body of literature, addressed in: Freyer, **Little Rock On Trial**, 1–134; Tony

Freyer, **The Little Rock Crisis** (Westport, CT, 1984); and Elizabeth Jacoway, **Turn Away Thy Son: Little Rock, the Crisis that Shocked the Nation** (New York, 2007).

[7]The quotes are drawn from the *per curiam* order, printed in full, *Cooper v. Aaron* 358 U.S. 1 (1958), at 5; *see also* Justice Harold H. Burton, Diary, Box 4, 1958 (LC). For Faubus's response, as well as that of the LDF, *see* Freyer, **Little Rock Crisis**, 148–158.

[8]The logic of how Warren chose Brennan reflects a process of elimination consistent with the sources cited in note 3; the logic itself was suggested to the author by one of the Justice's clerks, on the understanding that he would remain anonymous.

[9]The media coverage is suggested by: "Mixed Schools: New Crisis in the South," "What the President Said About Little Rock, and Governor Faubus's Reply," and "Court Ruling That Reopened the Little Rock Case," 45 *U.S. News & World Report*, August 29, 1958, at 23–26, 83–86; "Will Ike Use Troops Again?," "On Schools: Eisenhower Calls for 'Reason and Sense,'" and "Pro and Con on Little Rock—Record of Week of Controversy," 45 *U.S. News & World Report*, September 5, 1958, at 27, 92–93, 94–103; "Chief Justice of a Court Under Fire" and "From Virginia: Direct Challenge to the Federal Courts," 45 *U.S. News & World Report*, September 12, 1958, at 38–40, 41; "Integrate Now, Says Court—Close Schools, Say State Laws" and "What South Really Fears About Mixed Schools" [interracial sex], 45 *U.S. News & World Report*, September 19, 1958, at 47–52, 76–90; and "Now the Fight Is 'Private' vs. Public Schools," 45 *U.S. News & World Report*, September 26, 1958, at 48–53. The interpretation of Little Rock's impact—including the August Special Term—on the emergence of civil rights race relations as a national news story is confirmed in Gene Roberts and Hank Klibanoff, **The Race Beat: The Press, the Civil Rights Struggle, and the Awakening of a Nation** (New York, 2007), 143–83.

[10]Quotes from draft, dated September 17 1958, Justice Brennan Papers, *Cooper v. Aaron*, "[Justice Brennan's] Memorandum for the Conference," at 9, 12, 13, Box I:15, Folder 2 (LC). *Compare* some of the same quotes as drawn from the case files for *Cooper v. Aaron* in Justice Harold Burton Papers (LC), *cited in* Schwartz, **Super Chief**, at 296–97.

[11]*Ibid.* The historic cases Brennan cited included: *U.S. v. Peters*, 9 U.S. 115 (1809); *Ableman v. Booth*, 62 U.S. 506 (1859); and *Sterling v. Constantin*, 287 U.S. 378 (1932). For quotations in notes 10–12 of my text, *compare also* Justice Brennan's draft dated 9/17/58 *with* "Memorandum Re Mr. Justice Brennan's Draft Opinion in No. 1. *Cooper v. Aaron*, C.E.W. [Charles Evans Whittaker] 9-18-58," 1–5, especially regarding "definition of 'with all deliberate speed.' I wonder if it wouldn't be best simply to delete it [at p.4]." Whittaker's memorandum is located in Justice Brennan Papers, *Cooper v. Aaron*, Box I:14, Folder 34 (LC).

[12]*Ibid.* In Whittaker, "Memorandum, 9–18-58," he urges Brennan to delete the citation of Chief Justice Marshall's quote ending in "a solemn mockery," in the context of the Eisenhower administration's enforcement responsibilities, because, Whittaker wrote, "it is not for us to say what may be expected of the Executive and the sentence is needlessly inflammatory [at p. 5]."

[13]*Quoted in* Schwartz, **Super Chief**, 207.

[14]Justice Brennan's "Notes for the Conference" and Harold H. Burton to Bill [Brennan], 9/18/18 (concerning "minor suggestions" discussed "yesterday" at lunch), both in Justice Brennan Papers, *Cooper v. Aaron*, Box I:15, Folder 2 (LC); and Whittaker, "Memorandum, 9–18-58," Justice Brennan Papers, *Cooper v. Aaron*, Box I:14, Folder 34 (LC). For Frankfurter's and Harlan's position, see section II of this article. For Black, see *supra* note 13 and accompanying text. Justice Brennan stated that he agreed with Justice Black's dislike of the "deliberate speed" standard. Author's interview with Justice William J. Brennan, March 3, 1980.

[15]"J.M.H. (Draft-9/19/58) No.1 – *Cooper v. Aaron*," at 3, 23, in Justice Harlan Papers, *Cooper v. Aaron* (1958) Files, Box 57 (Seeley G. Mudd Manuscript Library, Princeton University).

[16]*Ibid.*, 24, 25.

[17]W.O.D. to Bill [Justice Brennan], 9/22/58, in Justice Brennan Papers, Box I:15, Folder 2 (LC); Earl Warren, **The Memoirs of Earl Warren** (New York, 1977), 298. On Harlan as the source for the "joint opinion" idea transmitted by Frankfurter, see "J.M.H. (Draft-9/19/58) No.1—*Cooper v. Aaron*," at 1, in Justice Harlan Papers, Box 57 (Seeley G. Mudd Manuscript Library Princeton University), and Schwartz, **Super Chief**, 300.

[18][Untitled, but internal evidence indicates 9/22/58, concerning Draft circulated that date], quotes at 1–2, in Justice Brennan Papers, Box I:15, Folder 2 (LC); Yarbrough, **John Marshall Harlan**, 168–72, particularly 170.

[19]Draft 3, *Cooper v. Aaron*, 9/24/58, at 18, and Draft 4, 9/25/58, both in Justice Harlan Papers, Box 57 (Seeley G. Mudd Manuscript Library Princeton University).

[20]*See supra* notes 10–19 and accompanying text.

[21]*Compare this paragraph with* Schwartz, **Super Chief**, 291–302; and Hutchinson, "Unanimity and Desegregation," 76–83.

[22]Schwartz, **Super Chief**, 301 (notes Douglas "traveling in the West); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

[23]*Cooper*, 358 U.S. at 18, 19; Schwartz, **Super Chief**, 301 (*quoting* the *New York Times*). For Faubus's response, see Freyer, **Little Rock Crisis**, 152–63; for Virginia's response, see Peltason, **Fifty-Eight Lonely Men**, 193–220.

[24]*Quoted in* Schwartz, **Super Chief**, 302.

[25]*Cooper v. Aaron*, concurring opinion of Mr. Justice Frankfurter [Opinion draft, circulated 10/3/58], at 1; *Cooper v. Aaron*, Mr. Justice Harlan, concurring in part, expressing a *dubitante* in part, and dissenting in part, at 1: "Submitted by JMH at Conf. Oct. 6 /58—Clark, J said he would join if Black... Brennan proposal was adopted!," in Justice Harlan Papers, Box 57 (Seeley G. Mudd Manuscript Library Princeton University).

[26]*Cooper*, 358 U.S. at 20, 21–22 (Frankfurter, J., concurring).

[27]*Ibid.*, 22, 24.

[28]*Ibid.*, 24–25.

[29]*Ibid.*, 25–26.

[30]Schwartz, **Super Chief**, 302–3; Hutchinson, "Unanimity and Desegregation," 84–85. Hutchinson notes Frankfurter's role in convincing Clark not to dissent in *NAACP v. Alabama* ex. rel. *Patterson*, 357 U.S. 449 (1958). *Ibid.*, 70.

[31]Justice Frankfurter to C.C. Burlingham, at 2, November 12, 1958, Justice Frankfurter Papers, File 644, Box 37 (LC). *Compare* Hutchinson, "Unanimity and Desegregation," 76–77 n.645 and 646, *and* Freyer, **Little Rock On Trial**, 159–60, 165 for discussion of Frankfurter's earlier letters to, respectively, Harlan (September 2) and Warren (September 11) expressing confidence in moderate Southern lawyers.

[32]Warren, **Memoirs**, 298–99; and *supra* note 30. For Brennan's doubts, see *supra* note 18. Concerning Brennan's unintended influence on Frankfurter's motivation to issue the concurring opinion, see section IV of this article.

[33]*See supra* notes 7, 21–23. For the Eisenhower administration's shifting position, compare Warren, **Memoirs**, 290–91; "On Schools: Eisenhower Calls For 'Reason and Sense,'" 45 *U.S. News & World Report*, September 5, 1958 at 92, 94–95, 97–98; and Mary L. Dudziak, "The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy," 70 *Southern California Law Review*, No. 6 (September 1997), 1641–716. The following discussion presents new evidence linking "unanimity," *Brown* II, and Frankfurter's separate opinion.

[34]Hutchinson, "Unanimity and Desegregation," 79 n.671; Powe, **The Warren Court and American Politics**, 129–32; Freyer, **Little Rock On Trial**, 152.

[35]"What The President Said About Little Rock—And Governor Faubus's Reply," 45 *U.S. News & World Report*, August 29, 1958, at 26; "On Schools: Eisenhower Calls For 'Reason and Sense,'" 45 *U.S. News & World Report*, September 5, 1958, at 92.

[36]45 *U.S. News & World Report*, September 5, 1958, 31–33; "'We Fight Those Who Fight Us': Interview with Leader of Iraq Revolt [Abdul Salam Muhamad Arif]," 45 *U.S. News & World Report*, August 22, 1958, 50–51; Dudziak, "Little Rock Crisis and Foreign Affairs," 1709–10.

[37]*South China Morning Post*, September 15, 1958, at 10. *Quoted in* Dudziak, "Little Rock Crisis and Foreign Affairs," 1710.

[38]*See supra* notes 12, 14, 33, and 35.

[39]*See supra* note 24. Hutchinson suggests a connection between Frankfurter's August 27 memorandum and his concurring opinion. Hutchinson, "Unanimity and Desegregation," 84. My contention that Frankfurter's separate opinion grew out of two memoranda, emphasizing a revised one from August 27, is based on a reading of Justice Felix Frankfurter Papers, *Cooper v. Aaron*, Box 106, Folders 11–13, Microfilm Reel 35, and August Special Term, Box 106, Folders 14–16, and Box 107, Folders 1–8, Microfilm Reel 36 (HLSM).

[40]For the political context of the Jenner-Butler Bill, see Powe, **The Warren Court and American Politics**, 129–32. Regarding the 1957 memorandum, see "Dear Brethren, October Term, 1957, Greetings" [handwritten over, crossed-out] "Memorandum for the Conference From Mr. Justice Frankfurter," [handwritten date] Sept. 30, 1957, signed F.F.; [printed draft] "Dear Brethren: October Term, Greetings," September 30, 1957 [seven pages], at 4; and Frankfurter's regrets, "Memorandum for the Conference, October 7, 1957," October 7, 1957, at 1, all in Justice Frankfurter Papers, FF Part II, US Sup. Ct. Case Files Oct. Term, 1957, Microfilm Reel 35, 0836 Petitions for certiorari, *Aaron v. Cooper* (HLSM).

[41]"Dear Brethren: October Term, Greetings," September 30, 1957, quote at 3, in Justice Frankfurter Papers, FF Part II, US Sup. Ct. Case Files Oct. Term 1957, Microfilm Reel 35, 0836 Petitions for certiorari, *Aaron v. Cooper* (HLSM). The discussion of *Aaron v. Cooper*, 357 U.S. 566 (1957), per curiam order, June 30, 1957, is based on author's interview with Professor John H. Mansfield, May 5, 2006, Harvard Law School, Cambridge MA. As Justice Frankfurter's clerk, he helped draft the per curiam order. He also provided me with the quoted phrase, handwritten, on the margin of the same opinion printed in the "Unpublished Opinions of Mr. Justice Frankfurter," Oct. Term 1957 (copy in Professor Mansfield's possession).

[42]The "Facts... Judge Lemley" memorandum that evolved from handwritten notes to a printed version, as described in the text, may be traced in Justice Frankfurter Papers, *Cooper v. Aaron*, No. 1, Box 106, Folder 11–13, Microfilm Reel 35, and August Special Term, Box 106, Folder 14–16, Microfilm Reel 36 (HLSM). I date the printed draft prior to Mr. Mansfield's departure from Justice Frankfurter's Chambers on August 1, 1958 because the last case cited at the end of the memorandum, at page 5, above the "F.F." signature, is *Faubus v. U.S.*, 254 F. 797 (8th Cir. 1958), *petition for certiorari filed* 27 *United States Law Week* 3028 (U.S. July 24, 1958) (No. 212). The citation to Judge Davies' decision is: *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark., 1957).

[43]The "Memorandum by Mr. Justice Frankfurter on Little Rock" began as four pages, dated August 27, 1958, and signed F.F.; accompanying a note, headed "Dear Brethren," it was circulated on the same date. Justice Frankfurter Papers, August Special Term, Box 107, Folder 1–8 (HLSM).

[44]*Ibid.* An expanded version of this memorandum, with factual material incorporated from the "Facts... Judge Lemely" memorandum described *supra* note 42, evolved into Frankfurter's concurring opinion. *Compare above supra* notes 26–29.

[45]*Ibid.* There are two separate versions of the memorandum dated September 22, followed by "As received by FF," from the law clerk. The first is roughly seven pages long. The second is eight pages long and follows closely Frankfurter's concurring opinion published in the *U.S. Reports.*

[46]*See supra* notes 18–21, 43–44.

[47]Justice Frankfurter to Dear Chief [Justice Warren], September 11, 1958, in Justice Frankfurter Papers, *Cooper v. Aaron*, File 4052, Box 220 (LC).

[48]*Ibid. Compare supra* notes 42–43 to Freyer, **Little Rock Crisis**, 168.

[49]*See supra* note 46.

[50]Schwartz, **Super Chief**, 302–3; Hutchinson, "Unanimity and Desegregation," 80; Freyer, **Little Rock Crisis**, 168.

[51]*See supra* notes 46–50.

[52]R. B. McCulloch to Harry J. Lemley, September 5, 1958, at 2, in Judge Harry J. Lemley Papers, A-10, Box 2, File 4 (University of Arkansas at Little Rock Archives). I thank David Warrington, Head, HLSM, for confirmation that Mr. McCulloch attended Harvard Law School from 1915 to 1917. In another source, I consider McCulloch's contribution to Faubus's states' rights-interposition program. Freyer, **Little Rock Crisis**, 34–35, 77, 80, 89, 128, 129.

[53]Fred N. Fishman to Mr. Justice [Frankfurter], October 10, 1958, in Fred N. Fishman Papers, Box 1, Folder 1–49 (HLSM).

[54]*See supra* notes 1 and 2. For the transition to the era in which Jim Crow was defeated, *see* Klarman, **From Jim Crow**, 399–442; Powe, **Warren Court**, 162–78, 217–38, 255–67; Freyer, **Little Rock on Trial**, 211–38; Meltsner, **Making of a Civil Rights Lawyer**, 80–110.

The "Good Old #3 Club" Gets a New Member

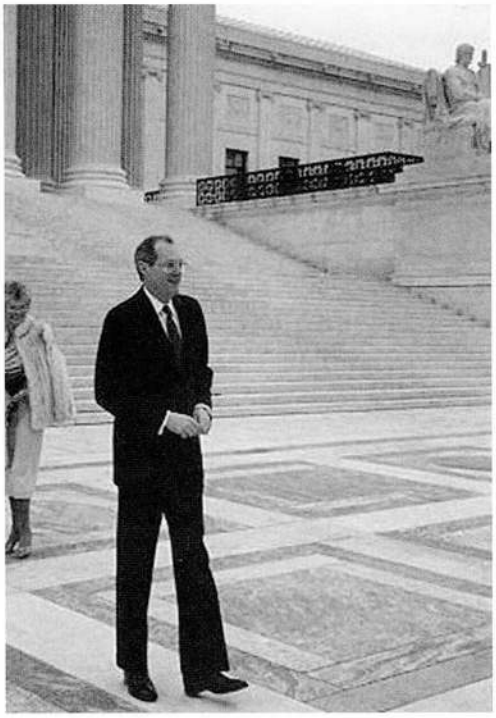
ARTEMUS WARD*

It has been said that serving on the U.S. Supreme Court is like being a member of an exclusive club. Yet within this club, there are even more exclusive clubs that only a small number of Justices are permitted to join. These shadowy associations are unseen by the public, receive no publicity, and are not even known to the Justices who are excluded. The existence of these secretive organizations has recently been revealed through the release of Justice Harry Blackmun's papers at the Library of Congress. This article is the first serious attempt to research the existence, membership, and practices of these clandestine alliances. Ultimately, as with many High Court practices, these newly uncovered connections may be in need of reform, and I offer a number of solutions to define membership criteria and improve their functioning.

Introduction

When Justice Sandra Day O'Connor announced her retirement on July 1, 2005, little did anyone know that one such club—"the good old #3 club"—was about to get a new member. Justice Samuel Alito, who was confirmed 58–42 by the Senate on January 31, 2006, was President George W. Bush's third choice for O'Connor's seat, following the official nominations and withdrawals of U.S. Court of Appeals Judge John G. Roberts, Jr. and White House Counsel Harriet Miers. Of course Roberts was withdrawn so that he could be nominated for the Chief Justiceship. Still, as the President's third choice, Alito joins a rather limited club—one shrouded in mystery, where members ruefully debate membership criteria and remind each other of their rather humble ascension to the nation's highest tribunal.

Like membership on the Court itself, membership in these hidden groups is a product of the appointment process, where nominations and confirmations are subject to political pressure. Successful appointees who follow failed nominees make up these private clubs in which the more failure you follow, the more exclusive club you join. Successful nominees who do not follow failure, such as Chief Justice Roberts, need not apply.



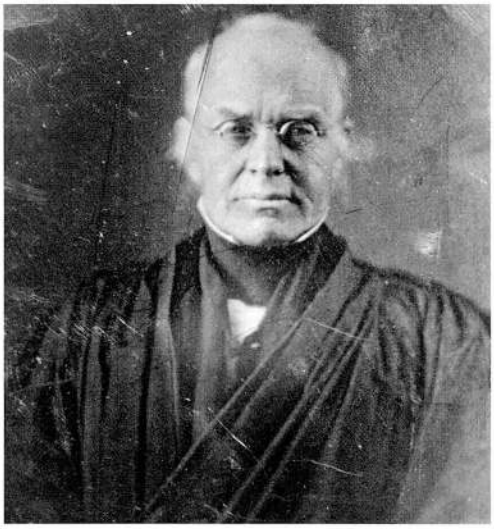
Blackmun may in fact be a member of the #4 Club, not the #3 Club, as he believed. It depends on whether one counts President Lyndon Johnson's attempt to appoint Attorney General Homer Thornberry to Abe Fortas's seat while Fortas was being (unsuccessfully) proposed for Chief Justice. Blackmun (pictured, with #1 Club member Stephen Breyer) was appointed to Fortas's seat after the nominations of Clement Haynsworth, Jr., and G. Harrold Carswell were rejected by the Senate.

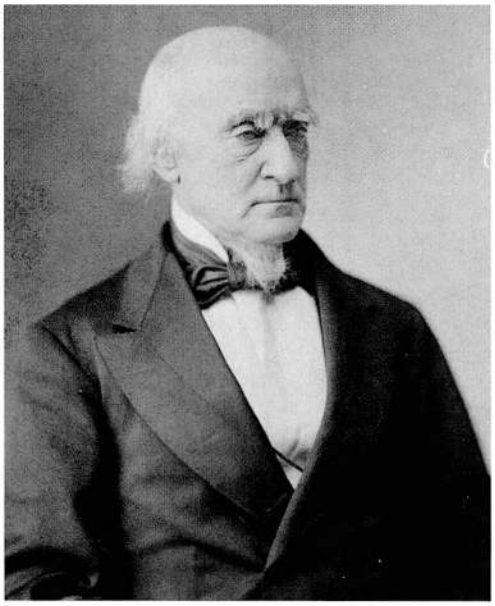
While there have been 152 official nominations to the Supreme Court, Alito is only the 110th person to serve.[1] Nominees have been withdrawn, have been formally rejected or postponed by the Senate, and have even declined the appointment after Senate confirmation. As a result, Presidents have had to resort to their second, third, fourth, and—in one case—fifth choice to fill a single Supreme Court vacancy. These successful nominees have banded together to form four selective groups: the #2, #3, #4, and #5 Clubs.

Good Old #3 and #4 Clubs

Determining who belongs in the #3 Club has proved problematic. Failure to properly consult historical sources and the lack of a clear-cut definition has made even members of the Court mistakenly welcome those that have not merited admission. Take, for example, a 1987 exchange between Justices Blackmun and Anthony Kennedy. Following the Senate's 42–58 rejection of President Ronald Reagan's first nominee, U.S. Court of Appeals Judge Robert Bork, and the withdrawal of his second choice, U.S. Court of Appeals Judge Douglas Ginsburg, Kennedy was the compromise third pick. Before Kennedy's confirmation vote, Justice Blackmun sent him a note. Blackmun had been President Richard Nixon's third choice after the rejections of U.S. Courts of Appeals Judges Clement Haynsworth, Jr., 45–55, and G. Harrold Carswell, 45–51. Blackmun wrote the new nominee:

> Dear Tony: You have my sincere congratulations on your nomination as an Associate Justice of the Supreme Court of the United States. You should, I feel, have comparatively little difficulty on the road to confirmation. I look forward to your being here. Your chambers will be next to mine. Please do not hesitate to let my secretaries or me know if we ever can be of assistance to you. The transition will be a major one, but Dottie and I survived. You will, too. I told Richard that I am a founding member of a very exclusive organization called "the good old #3 club." You now qualify for this unusual but worthy distinction. It happened to me in 1970, and it has served to keep me a little humble whenever Dottie suggests that I might be getting too "judgie." The other characters around here do not qualify. Good luck with the days ahead. You will enjoy being here and will make a worthwhile contribution to what is a common calling for us. Sincerely, Harry[2]





Joseph Story and John Archibald Campbell are both members of the #4 Club because they were nominated after three other candidates declined, withdrew, or were rejected.

TABLE 1 U.S. Supreme Court Good Old Clubs

Club	Year Founded	Total Membership	Active Membership
#5	1846	1	0
#4	1811	2	0
#3	1845	5	1
#2	1790	14	1
Total		**22**	**2**

Kennedy replied, "Dear Mr. Justice Blackmun: You are most gracious to write. Mr. Justice Story was also in the No. 3 club, and I hope to be successful in joining its ranks. When the confirmation process is ended, whatever the result, I look forward to visiting with you. Best personal regards. Yours, Anthony M. Kennedy."[3] In his post-retirement oral history, Blackmun remarked of Kennedy, "[W]e prop each other up every now and then by sympathizing with the other for not being number one."[4]

Despite Kennedy's attempt to place Story in the #3 Club, however, history shows that Story is a member of the slightly more exclusive #4 Club. The death of Justice William Cushing on September 13, 1810 provided President James Madison with his first chance to shape the Court. He first selected President Thomas Jefferson's former Attorney General Levi Lincoln, who was confirmed by the Senate but declined the commission, citing his rapidly failing eyesight and poor health. Madison next turned to Connecticut Republican party leader Alexander Wolcott, who had served as U.S. collector of customs. Wolcott came under immediate criticism for his vigorous enforcement of protectionist trade policies and his relatively slight legal experience. He was rejected by the widest margin in confirmation history: 9–24. Madison's third choice was John Quincy Adams. Son of former President John Adams and Abigail Adams, John Quincy had served in the Senate and was unanimously confirmed by his former

TABLE 2 U.S. Supreme Court Good Old Club Membership List

Member	Nominating President	Seat (Departing Justice)	Prior Nominees & Mode of Failure
		Good Old #5 Club (1846)	
Robert C. Grier	Polk	Henry Baldwin	Edward King (Postponed) Edward King (Withdrawn) John M. Read (No Action) George W. Woodward (Rejected)
		Good Old #4 Club (1811)	
Joseph Story	Madison	William Cushing	Levi Lincoln (Declined) Alexander Wolcott (Rejected) John Quincy Adams (Declined)
John A. Campbell	Pierce	William McKinley	Edward A. Bradford (No Action) George E. Badger (Postponed) William C. Micou (No Action)
		Good Old #3 Club (1845)	
Samuel Nelson	Tyler	Smith Thompson	John C. Spencer (Rejected) Reuben H. Walworth (Withdrawn)
Morrison R. Waite	Grant	Salmon Chase	George H. Williams (Withdrawn) Caleb Cushing (Withdrawn)
Edward D. White	Cleveland	Samuel Blatchford	William B. Hornblower (Rejected) Wheeler H. Peckham (Rejected)
Harry Blackmun	Nixon	Abe Fortas	Clement Haynsworth (Rejected) G. Harrold Carswell (Rejected)
Samuel Alito	G.W. Bush	Sandra Day O'Connor	John Roberts (Withdrawn) Harriet Miers (Withdrawn)
		Good Old #2 Club (1790)	
James Iredell	Washington	Newly Created Seat	Robert Harrison (Declined)
William Paterson	Washington	Thomas Johnson	William Paterson (Withdrawn)
Oliver Ellsworth	Washington	John Jay	William Cushing (Declined)
John Marshall	Adams	Oliver Ellsworth	John Jay (Declined)
John McLean	Jackson	Robert Trimble	John Crittenden (Postponed)[a]
Philip P. Barbour	Jackson	Gabriel Duval	Roger Brooke Taney (Postponed)
John McKinley	Van Buren	Newly Created Seat	William Smith (Declined)
Samuel F. Miller	Lincoln	Peter Daniel	Jeremiah S. Black (Rejected)
Joseph P. Bradley	Grant	Newly Created Seat[b]	Ebenezer R. Hoar (Rejected)
William Strong	Grant	Robert C. Grier	Edwin M. Stanton (Died)[c]
Stanley Matthews	Garfield	Noah Swayne	Stanley Matthews (No Action)
Samuel Blatchford	Arthur	Ward Hunt	Roscoe Conkling (Declined)
Owen J. Roberts	Hoover	Edward T. Sanford	John J. Parker (Rejected)
Anthony Kennedy	Reagan	Lewis Powell	Robert Bork (Rejected)[d]

[a]Though John Quincy Adams nominated Crittenden, Jackson ultimately filled the vacancy.

[b]Though Congress technically created Bradley's seat, it was in effect a reinstatement of the seat abolished when James M. Wayne died.

[c]Stanton was confirmed by the Senate but died before taking office.

[d]Though Douglas Ginsburg was announced by Reagan and began meeting with individual Senators, his nomination was never submitted to the Senate.

TABLE 3 Proposed Good Old Club Membership Rules and Bylaws

1. Membership is limited to Justices of the Supreme Court of the United States.
2. Membership is limited to Justices who were nominated subsequent to formally nominated candidates who failed to serve on the Supreme Court due to withdrawal, Senate rejection or postponement, or declining the appointment.
3. Formal nominations occur when the Senate receives the nomination from the President.
4. Recess appointments count as filling a vacant seat.
5. Nominees who are nominated more than once for the same seat may count prior nominations as failures.
6. Any existing member must formally welcome new members upon their meeting the qualifications for membership in the club. Failure to welcome new members may result in impeachment and removal from the club, upon the concurrence of two-thirds of all living club members.
7. Club membership is nontransferable and ends at death.

colleagues. But the ambitious Adams declined the commission, viewing the position as "taxing and dull," and missed an opportunity to found the good old #3 Club.[5] Instead, Adams had to settle for serving as Secretary of State and President of the United States.

Madison waited seven months to make his fourth selection for Cushing's seat. Though pressed by Jefferson to choose U.S. Postmaster General Gideon Granger of Connecticut, Madison instead infuriated the former President by selecting 32-year-old legal whiz Joseph Story. While serving in the House of Representatives, Story incurred Jefferson's wrath when he voted to repeal the trade embargo. Despite the reservations of Jefferson and a number of Senate Republicans, however, Story was unanimously confirmed by voice vote on November 18, 1811. The agonizingly long process to fill Cushing's seat, which had been vacant for over one year, was finally over. And while Story is still the youngest person ever to sit on the Supreme Court, he is, more importantly, the founding member of the good old #4 Club.

The only other member of the #4 Club is Justice John Archibald Campbell, who succeeded Justice John McKinley. Lame-duck Whig President Millard Fillmore first tried to fill the seat with the nomination of prominent New Orleans lawyer Edward A. Bradford on August 16, 1852, but the Democrat-controlled Senate took no action before the close of the session. On January 10, 1853, he then turned to U.S. Senator and former Navy Secretary George E. Badger of North Carolina, but on February 11 the Senate voted to postpone the nomination of one of their colleagues, 26–25 because Badger resided outside the judicial circuit that included Alabama, Mississippi, and Louisiana—the region that Justice Mckinley was from—and because President-elect Franklin Pierce, a Democrat, was about to take office. Fillmore next offered the nomination to Whig Judah P. Benjamin, newly elected U.S. Senator from Louisiana, but Benjamin declined and instead recommended his law partner, prominent New Orleans attorney William C. Micou. Fillmore nominated Micou on February 24, but once again the Senate took no action, and Fillmore was unable to fill the vacancy. Campbell, a noted advocate before the Supreme Court, was Pierce's only appointment to the Bench after an unprecedented request by the Justices for his selection. Campbell won confirmation by voice vote on March 25, 1853, four days after his

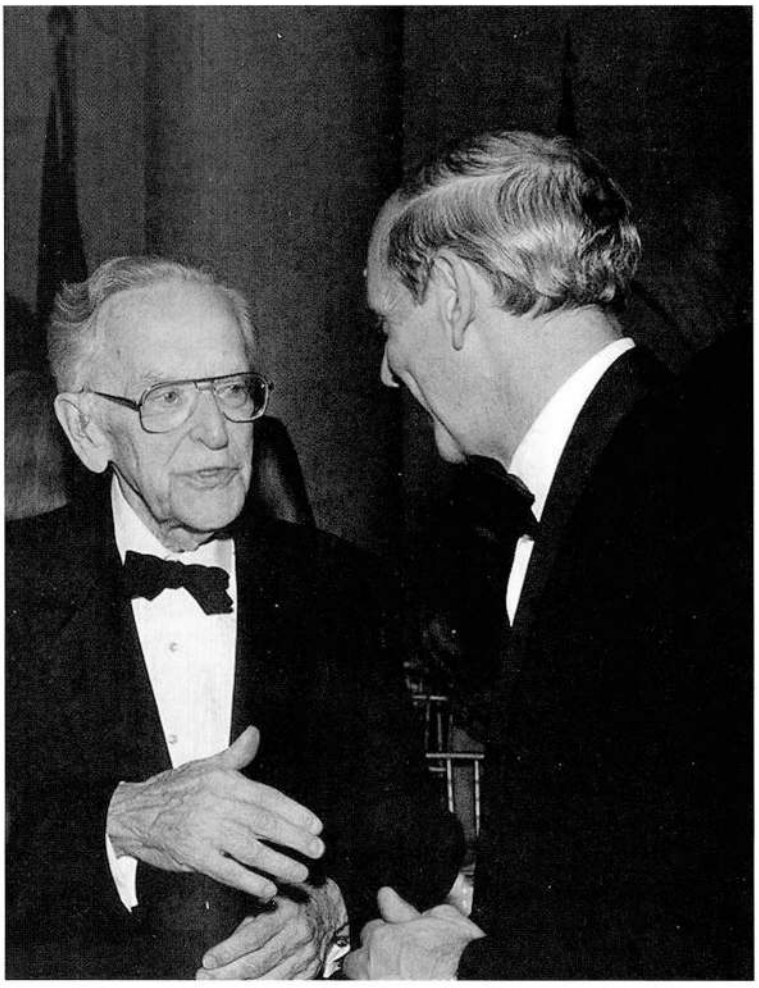
official nomination, joining Story as the only members of the old #4 Club.

Indeed, not only was Kennedy wrong about Story's membership in the #3 Club, Kennedy himself may not truly be a member. It depends on how one defines the terms for membership. Since many candidates have been promoted, floated, and asked to serve without having an official nomination sent by the President to the Senate, it seems reasonable to exclude those who are not officially nominated. And though President Reagan publicly announced the nomination of Douglas Ginsburg, and though Ginsburg began meeting with individual Senators, his nomination was never officially transmitted to the Senate. So under this strict membership criterion, Kennedy can only be a member of the far-less-exclusive #2 Club. Yet because an existing member of the #3 Club, Justice Blackmun, welcomed Kennedy to that Club's membership, Kennedy has a strong claim to belonging—particularly if he has extended the same welcome to Alito. However, should Kennedy fail to recognize Alito's #3 Club membership, Kennedy may be in jeopardy of being stripped of his already tenuous attachment to that group.

Indeed, Blackmun could have made an argument for membership in the more exclusive #4 club, but obviously chose not to. Blackmun filled the seat vacated by Justice Abe Fortas, who resigned on May 5, 1969 amid allegations of financial impropriety. Yet prior to Nixon's nominations of Haynsworth and Carswell to fill the Fortas seat, lame-duck President Lyndon Johnson made an attempt to fill it with U.S. Court of Appeals Judge Homer Thornberry when he tried to elevate Fortas to the Chief Justiceship in the middle of the presidential race on June 26, 1968. Because Fortas's nomination was filibustered and withdrawn no action was taken on Thornberry. Blackmun could have argued that since he was the fourth person officially nominated for the Fortas seat, he should be admitted to the good old #4 Club.

A quick check of the membership lists reveal that Chief Justice Oliver Ellsworth can make a claim to being the founder of the old #3 Club. Ellsworth was confirmed and served after the Senate rejected John Rutledge 10–14 and Justice William Cushing declined the post after his Senate confirmation, citing ill health. If Rutledge's recess appointment and nearly six-month service as Chief are not counted as filling Jay's vacant seat, then Ellsworth can claim to be the originator of the #3 Club. If, however, one considers Ellsworth as filling Rutledge's seat, rather than Jay's, then he is relegated to the #2 Club. That leaves Justice Samuel Nelson, former chief justice of the New York Supreme Court, as the founder of the good old #3 Club. Democrat President John Tyler first nominated a member of his cabinet, John C. Spencer, but the Senate rejected him 21–26. Tyler then turned to New York Chancellor Reuben H. Walworth, but with the 1844 presidential election nearing, Whig Senators voted 20–27 to postpone the nomination. After Democrat James K. Polk won the presidency, Tyler withdrew Walworth's nomination in January 1845 and nominated Nelson. Over one year after Spencer's initial nomination, Nelson was confirmed by voice vote in the Senate on February 14, 1845.

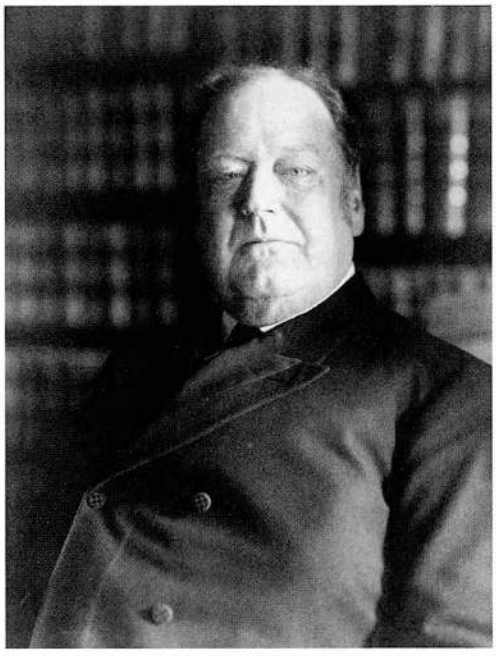
It took nearly thirty years for the old #3 Club to gain its second member. After the death of Chief Justice Salmon P. Chase on May 8, 1873, Grant—now in his second term—first turned to one of his cronies, Roscoe Conkling. But Conkling immediately declined the nomination, and on December 1 Grant chose another of his confidants, former U.S. Senator George H. Williams of Oregon, his Attorney General. Williams was approved by the Judiciary Committee, but due to opposition from the full Senate and sentiment from the organized bar that an attorney from the frontier was ill-suited for the Chief Justiceship, Williams asked that his name be withdrawn, and Grant complied on January 8, 1874. The next day Grant picked another close friend, 74-year-old former diplomat and Attorney General Caleb Cushing, but, like Williams, Cushing asked that his nomination be withdrawn



Ronald Reagan selected Anthony Kennedy (pictured on the day of his investiture) for the Supreme Court in 1987 after his first two nominees—Robert Bork and Douglas Ginsburg—were not confirmed. Harry Blackmun, who had been Richard Nixon's third choice, sent Kennedy a note welcoming him as a member in the "Good Old #3 Club." However, because Ginsburg's commission was never sent to the Senate, an argument can be made that Kennedy belongs to the much larger #2 club.

after opposition in the Senate. Grant complied on January 13 and proceeded to offer the post to three others, without officially nominating any of them: U.S. Senator Timothy P. Howe of Wisconsin, U.S Senator Oliver P. Morton of Indiana, and Secretary of State Hamilton Fish. Morrison R. Waite, who had gained national prominence as one of three United States counsel at the Geneva Arbitration Tribunal, was Grant's official third choice, and he was confirmed 63–0 on January 21, two days after his nomination.

The third member of the old #3 Club was Justice Edward D. White of Louisiana. Following Justice Samuel Blatchford's death on July 7, 1893, President Grover Cleveland first selected William B. Hornblower on September 19, 1893. As a member of the New York City Bar, Hornblower had led an investigation into election irregularities for a seat on the New York Court of Appeals that cost Isaac H. Maynard a judgeship. Maynard's ally, powerful U.S. Senator David B. Hill of New York, led the opposition to Hornblower's High Court nomination, and the Senate rejected him 24–30 on January 15, 1894 after Hill invoked senatorial courtesy. Cleveland next turned to prominent New York attorney Wheeler H. Peckham, nominating him on January 22. As with the previous nominee, Hill also opposed Peckham, who was rejected by the Senate 32–41 on February 16 after Hill invoked senatorial courtesy for the second time. Cleveland then turned to another New Yorker, Frederic

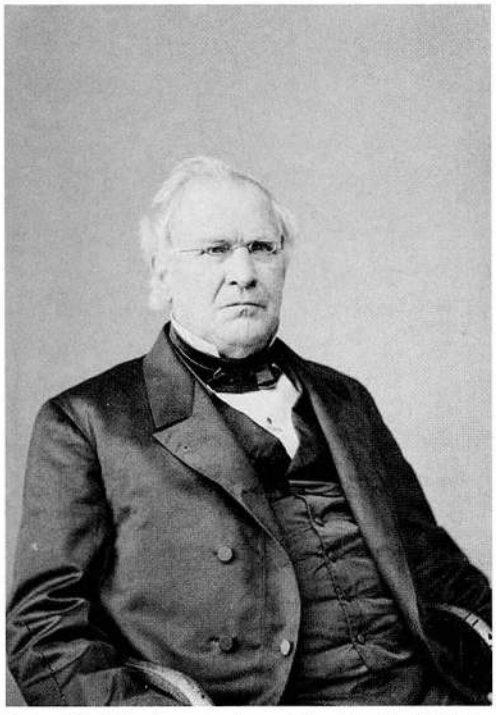


In 1894, Grover Cleveland finally turned to Edward Douglass White (above), the Senate majority leader, after his first two choices were rejected. It would be three-quarters of a century before the next member of the #3 Club would join the Court.

Coudert, but the potential nominee declined. Cleveland finally looked outside New York and nominated White, who was Senate majority leader. His colleagues immediately confirmed him by voice vote the day of his official nomination, February 19, 1894. The old #3 Club did not gain another member for three-quarters of a century, until Justice Blackmun joined their ranks.

The Good Old #5 Club

While Story and Campbell are the only members of the rarified #4 Club, there is an even more elite status. The good old #5 Club is so special that there has been only one member in the 217-year-history of the Supreme Court: Allegheny County district judge Robert C. Grier, who won confirmation by voice vote on August 4, 1846, the day after he was nominated by President Polk. It had been President Tyler who first tried to fill the seat over two years before by turning to James Buchanan, but the future President of the United States declined the nomination. Tyler's first official nomination for the seat came on June 5, 1844, when he selected president judge of the Philadelphia Court of Common Pleas Edward King, but, lacking support from both the Whigs and his own party, the Senate voted to postpone King's nomination 29–18. Tyler renominated King on December 4, and the Senate voted to postpone his nomination again on January 23, 1845. Tyler finally relented and withdrew King's nomination on February 7. Tyler then turned to John M. Read, but the Senate failed to act on Read's nomination by the close of the Twenty-eighth Congress. Tyler's successor in the White House, President Polk, first turned to Buchanan, as Tyler had before him. Buchanan vacillated and eventually declined the nomination for a second time. Instead, Polk



Robert C. Grier is a member of the Court's #5 Club, a category to which he alone belongs. President John Tyler made three attempts to fill the seat before President James Polk appointed Grier as his second choice in 1846.

selected former president judge of Pennsylvania's fourth judicial district and failed U.S. Senate candidate George C. Woodward to fill the vacancy on December 23, 1845, but the Senate rejected Woodward a month later, 20–29. Grier finally filled the seat, becoming the first and only member of the good old #5 Club.

The Good Old #2 Club

The good news for Oliver Ellsworth is that if he is excluded from the #3 Club, he can claim to have founded the #2 Club, though that is debatable as well. James Iredell is the first in line to make the case for originating this group. Iredell was nominated after Robert Harrison, one of Washington's initial six appointments to the High Court who had also been selected as chancellor of New Jersey, became ill, wrote Washington to decline the appointment, and died while en route to the Court's first meeting in New York City. Because he followed Harrison, Iredell has a strong claim to originating the group. But because students of the Court often forget Harrison, and because Iredell was one of the original six Justices, William Paterson can argue that he founded the #2 Club. Paterson's initial nomination to replace Justice Thomas Johnson on February 27, 1793 was withdrawn one day later by President George Washington because Paterson, then the chancellor of New Jersey and a U.S. Senator, had four days remaining in his Senate term. Washington resubmitted Paterson's name on March 4, and he was confirmed by voice vote the same day.

The #2 Club is the least exclusive, with fourteen members. Chief Justice John Marshall joined the #2 club in 1801 after former Chief Justice John Jay, then Governor of New York, declined the appointment. Justice John McLean joined its ranks after lame-duck President John Quincy Adams' nominee, former U.S. Senator John J. Crittenden of Kentucky, permanently stalled when President-elect Andrew Jackson's supporters in the Senate voted 23–17 to postpone the nomination. President Jackson later filled the seat with McLean, who perennially sought the presidency from the Bench. Justice Philip P. Barbour, a former House Speaker, became the next member of the old #2 Club when he followed the unsuccessful nomination of Jackson's controversial former Attorney General and Treasury Secretary Roger Brooke Taney. On the last day of the session, the Senate voted to postpone Taney's nomination, as well as to abolish the vacant seat. But the House failed to join the Senate in doing away with the seat, and Taney went on to be Chief Justice following the death of John Marshall.

Senator John McKinley of Alabama gained admission to the #2 Club after former South Carolina Senator William Smith declined an appointment by Jackson. President Martin Van Buren selected Justice McKinley immediately after taking office, and he won confirmation by voice vote on September 25, 1837. Twenty-five years later, Samuel Freeman Miller joined the club after being nominated by President Abraham Lincoln and winning Senate confirmation by voice vote on the same day, July 16, 1862. A month before Lincoln took office, his predecessor, lame-duck President James Buchanan, tried to fill the seat with the nomination of his Secretary of State and former Attorney General, Jeremiah S. Black, on February 5, 1861. Sixteen days later, however, the Senate rejected Black 25–26.

President Ulysses S. Grant made two appointments to the #2 Club during his tenure in the White House. The first seat was technically a newly created seat. But it was really the seat vacated by the 1867 death of Justice James Wayne. Congress abolished the Wayne seat to prevent President Andrew Johnson from filling it, and re-established it after Grant won the presidency. Justice Robert C. Grier vacated the second seat on his retirement in early 1870. With two seats to fill, Grant selected his controversial Attorney General, Ebenezer R. Hoar, on December 15, 1869, and the popular former

Secretary of War Edwin M. Stanton five days later in an attempt to help with Hoar's nomination, which was running into difficulty in the Senate. Stanton was easily confirmed 46–11 on the same day he was nominated, but he died four days later, before he could take his seat. After the bitter Senate fight, Hoar was rejected on February 3, 1870 by a vote of 24–33. On February 7, Grant made two more nominations, this time with better results. William Strong was confirmed 46–11 on February 18, and Joseph P. Bradley won confirmation 46–9 a month later on March 21, making them the first near-simultaneous members of the #2 Club in Supreme Court history.

A decade later, former U.S. Senator Stanley Matthews of Ohio joined the good old #2 Club after his first nomination by lame-duck President Rutherford B. Hayes on January 26, 1881 died in the Senate Judiciary Committee. Matthews was Hayes's longtime friend and political ally, but the Senate was more concerned about Matthews' cozy relationship with corporate financial and railroad interests, particularly Jay Gould. Matthews was renominated by new President James A. Garfield on March 14 and after two months of heated debate was confirmed by the Senate by the closest vote in history for any successful nominee: 24–23. One year later, U.S. Court of Appeals Judge Samuel Blatchford joined Matthews in the #2 Club. President Chester A. Arthur first selected his political mentor Roscoe Conkling, who had turned down a nomination for Chief Justice from President Grant in 1873. This time, Conkling was confirmed by his Senate colleagues 39–12 on March 2, 1882, but he declined the appointment. Arthur then turned to another member of the Senate George F. Edmunds of Vermont, but Edmunds declined. Blatchford was Arthur's official second choice and was confirmed by voice vote on March 27, 1882.

The final two members of the good old #2 Club, Owen J. Roberts and Anthony Kennedy, both joined during the twentieth century. Roberts was appointed after President Herbert Hoover failed to win confirmation for his first choice, U.S. Court of Appeals Judge John J. Parker of North Carolina. The Senate rejected Parker 39–41 on May 7, 1930 after opposition from the American Federation of Labor and the National Association for the Advancement of Colored People. Roberts, who first gained national prominence as the U.S. attorney in the Teapot Dome Scandals, was selected two days later and confirmed by voice vote a little over a week later. Kennedy joined the club over a half century later, though, as discussed previously, Blackmun welcomed him to the good old #3 club.

ENDNOTES

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[1]Data compiled from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium: Data, Decisions, and Developments**, 2d ed. (Washington, D.C.: Congressional Quarterly Press, 1996), Tables 4–1 and 4–11.

[2]Harry A. Blackmun to Anthony M. Kennedy, November 12, 1987, Blackmun Papers, Box 1405, Manuscript Division, Library of Congress, Washington, D.C.

[3]Anthony M. Kennedy to Harry A. Blackmun, November 16, 1987, Blackmun Papers.

[4]"Justice Harry A. Blackmun Oral History," Blackmun Papers.

[5]Quoted in Henry J. Abraham, **Justices, Presidents, and Senators** (Lanham, MD: Rowman & Littlefield, 1999), 67.

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Errata

In the last issue, Vol. 32, no. 3, there were several errors, which the editors regret.

In the Introduction, it was erroneously stated that Archibald Cox was Robert F. Kennedy's law teacher. Cox taught at Harvard Law School and Kennedy attended University of Virginia's Law School.

On page 286, Tom Clark is the 10th Justice in the photograph. William H. Rehnquist is the Junior Justice.

On page 300, the name of William O. Douglas's second wife was misspelled; it is Mercedes Eicholz.

Two images were incorrectly credited:

On page 240, the photograph of Samuel Williston posing with a high wheel bicycle, 1881, is Courtesy of Special Collections Department, Harvard Law School Library. The photographer is unknown.

On page 243, the photograph of Joseph Warren (no date) is Courtesy of Special Collections Department, Harvard Law School Library. The photographer is Marshall Studio, Cambridge, MA.

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